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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

IN RE INDYMAC ERISA LITIGATION	**Master File No.:** 08-04579 DDP (VBKx) **<u>CLASS ACTION</u>** **CONSOLIDATED COMPLAINT FOR BREACHES OF FIDUCIARY DUTY UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT**

I. PREFATORY NOTES

- On July 11, 2008, the Office of Thrift Supervision closed IndyMac Bank, F.S.B. ("IndyMac Bank" or the "Bank"), naming the Federal Deposit Insurance Corporation ("FDIC") receiver and conservator. On October 13, 2008, Plaintiffs filed proofs of claim with the FDIC in accordance with 12 U.S.C. § 1821(d).

- If the FDIC disallows Plaintiffs' claims, Plaintiffs will notify the Court and seek to name IndyMac Bank as a defendant in this action pursuant to 12 U.S.C. § 1821(d)(6).

- On or about July 31, 2008, IndyMac Bank's parent company, IndyMac Bancorp, Inc. ("IndyMac Bancorp"), filed for bankruptcy protection under Chapter 7 of the United States Bankruptcy Code. As such, this action is stayed as to IndyMac Bancorp unless and until such time as the stay is lifted or relief from the stay is granted by the bankruptcy court. Currently, Plaintiffs are not prosecuting this action against IndyMac Bancorp.

- If the bankruptcy stay is modified or lifted to permit further prosecution of this action against IndyMac Bancorp, Plaintiffs will notify the Court and seek to name IndyMac Bancorp as a defendant in this action.

- Collectively, IndyMac Bank and IndyMac Bancorp are referred to as "IndyMac" or the "Company."

II. INTRODUCTION

1. Plaintiffs Sam Zhong Wang and Jeffrey Washington allege the following based upon their personal knowledge and the investigation of Plaintiffs' counsel, which included a review of U.S. Securities and Exchange Commission ("SEC") filings by IndyMac, including the Company's proxy statements (Form DEF14A), annual reports (Form 10-K), quarterly reports (Form 10-Q), current reports (Form 8-K), and the annual reports (Form 11-K) filed on behalf of the IndyMac Bank, F.S.B. 401(K) Plan (the "Plan"); a review of the Forms 5500 filed by the Plan with the U.S. Department of Labor ("DOL"); interviews with participants of the Plan; and a review of available documents governing the operations of the Plan, including the IndyMac Bank, F.S.B. 401(k) Plan Summary Plan Description and Prospectus, revised February 8, 2008 ("SPD"), and the limited selection of documents produced by Defendants pursuant to the Court's Order re Joint Stipulation Regarding Preliminary Scheduling (Dkt No. 60), and by the FDIC pursuant to subpoena and written requests for information under ERISA § 104(b). Plaintiffs believe that substantial additional evidentiary support will exist for the allegations set forth herein after a reasonable opportunity for discovery.

III. NATURE OF THE ACTION

2. This is a class action brought on behalf of the Plan, pursuant to §§ 502(a)(2) and (a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1132(a)(2) and (a)(3), against the fiduciaries of the Plan for violations of ERISA.

3. The Plan is a retirement plan sponsored by IndyMac Bank, which was a wholly owned subsidiary of IndyMac Bancorp prior to its collapse.

4. Plaintiffs' claims arise from the failure of Defendants, who are fiduciaries of the Plan, to act solely in the interest of the participants and beneficiaries of the Plan, and to exercise the required skill, care, prudence, and diligence in administering the Plan and the Plan's assets during the period July 1, 2006 to present (the "Class Period").

5. Defendants allowed the imprudent investment of the Plan's assets in IndyMac common stock throughout the Class Period, even though they knew or should have known that such investment was unduly risky and imprudent. The Company's serious mismanagement and improper business practices—including fraudulent and high-risk lending and investment practices, inadequate internal controls over these practices, and misleading statements and misrepresentations regarding the Company's net income and financial results—led to the artificial inflation of IndyMac stock, even as mortgage default rates and foreclosures in the Bank's portfolio of loans rose, creating dire financial circumstances for the Company. As a result, IndyMac stock was an unduly risky and inappropriate investment option for Plan participants' retirement savings during the Class Period.

6. Therefore, Plaintiffs allege in Count I that Defendants who were responsible for the investment of Plan assets breached their fiduciary duties to the Plan's participants in violation of ERISA by failing to prudently and loyally manage the Plan's investment in IndyMac stock. In Count II, Plaintiffs allege that Defendants who were responsible for the selection, monitoring, and removal of the Plan's other fiduciaries failed to properly monitor the performance of their fiduciary appointees and remove and replace those whose performance was inadequate, as well as provide them with the necessary information to fulfill their fiduciary duties. In Count III, Plaintiffs allege that Defendants with knowledge of the risks associated with IndyMac stock breached their duty to disclose necessary information to co-fiduciaries. In Count IV, Plaintiffs allege that Defendants

breached their duty to inform the Plan's participants by failing to provide complete and accurate information regarding the soundness of IndyMac stock and the prudence of investing and holding retirement contributions in IndyMac equity. Finally, in Count V, Plaintiffs allege that Defendants breached their duties and responsibilities as co-fiduciaries by failing to prevent breaches by other fiduciaries of their duties of prudent and loyal management, adequate monitoring, and complete and accurate communications to co-fiduciaries and Plan participants and beneficiaries.

7. As is more fully explained below, during the Class Period, Defendants with responsibility for the Plan's investments imprudently permitted the Plan to hold and acquire IndyMac stock despite the Company's serious mismanagement, improper business practices, and dire financial circumstances. Based on publicly available information for the Plan, Defendants' breaches have caused an estimated principal loss of over ***$24 million of retirement savings.***

8. This action is brought on behalf of the Plan and seeks to recover losses to the Plan for which Defendants are personally liable pursuant to ERISA §§ 409 and 502(a)(2), 29 U.S.C. §§ 1109, and 1132(a)(2). In addition, under § 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), Plaintiffs seek other equitable relief from Defendants, including, without limitation, injunctive relief and, as available under applicable law, constructive trust, restitution, equitable tracing, and other monetary relief.

9. ERISA §§ 409(a) and 502(a)(2) authorize participants such as Plaintiffs to sue in a representative capacity for losses suffered by the Plan as a result of breaches of fiduciary duty. Pursuant to that authority, Plaintiffs bring this action as a class action under Fed. R. Civ. P. 23 on behalf of all participants and beneficiaries of the Plan whose Plan accounts were invested in IndyMac stock during the Class Period.

10. In addition, because the information and documents on which Plaintiffs' claims are based are, for the most part, solely in Defendants' possession, certain of Plaintiffs' allegations are made by necessity on information and belief. At such time as Plaintiffs have had the opportunity to conduct discovery, Plaintiffs will, to the extent necessary and appropriate, amend this Complaint or, if required, will seek leave to amend to add additional facts that further support Plaintiffs' claims.

IV. JURISDICTION AND VENUE

11. **Subject Matter Jurisdiction.** This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1).

12. **Personal Jurisdiction.** ERISA provides for nationwide service of process. ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2). All Defendants are either residents of the United States or subject to service in the United States. Therefore, this Court has personal jurisdiction over them. This Court also has personal jurisdiction over Defendants pursuant to Fed. R. Civ. P. 4(k)(1)(A) because they would all be subject to the jurisdiction of a court of general jurisdiction in the State of California.

13. **Venue.** Venue is proper in this district pursuant to ERISA § 502(e)(2), 29 U.S.C. § 1132(e)(2), because the Plan is administered in this district, some or all of the fiduciary breaches for which relief is sought occurred in this district, and IndyMac has its principal place of business in this district.

V. PARTIES

A. Plaintiffs

14. **Plaintiff Sam Zhong Wang** is currently a resident of Alhambra, California, and has worked for IndyMac Bank since December 1999. He is, and at all relevant times has been, a participant in the Plan within the meaning of ERISA

§ 3(7), 29 U.S.C. § 1002(7), and held IndyMac shares in the Plan during the Class Period. At all relevant times, a portion of his retirement account was and has been invested in one or more of the sub-funds of the Plan that held IndyMac common stock.

15. **Plaintiff Jeffrey Washington** is currently a resident of Orange County, California. He is, and at all relevant times has been, a participant in the Plan within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7). At all relevant times, a portion of his retirement account was and has been invested in one or more of the sub-funds of the Plan that held IndyMac common stock.

B. IndyMac Bank, F.S.B. and IndyMac Bancorp

16. **IndyMac Bank, F.S.B.** was an indirect, wholly-owned subsidiary of **IndyMac Bancorp** prior to the Bank's collapse. The Bank operated as a hybrid/thrift company with its principal place of business is located in Pasadena, California. In 2007, IndyMac Bank was the seventh largest savings and loan bank, second largest independent mortgage lender, ninth largest residential mortgage originator, and eighth largest mortgage servicer nationwide. IndyMac Annual Report at 3, Form 10-K, Dec. 31, 2007. Its business model focused on mortgage banking—originating, trading, and servicing mortgage loans—and thrift investing—investing in single-family residential mortgage assets, which it holds on its balance sheet. *Id.* at 4. Specifically, the Bank specialized in Alternative-A, or "Alt-A," mortgages, which fall between prime and subprime loans. Generally, when properly originated, Alt-A loans are not considered as risky as subprime loans but, nonetheless, fall below the underwriting standards of Fannie Mae and Freddie Mac.

17. On information and belief, Plaintiffs allege that at all relevant times, IndyMac Bancorp and the Bank had virtually identical Boards of Directors.

18. Currently, as described in the Prefatory Notes, Plaintiffs are not asserting claims against or seeking relief from the Bank or IndyMac Bancorp through this action.

C. Defendants

19. The Defendants are identified below. All of the Defendants were fiduciaries of the Plan within the meaning of ERISA, as is explained below in Section VI ("Defendants' Fiduciary Status"), and all of them breached their fiduciary duties in various ways as is explained in Section XII ("Causes of Action").

20. **Defendant Bancorp Management Development and Compensation Committee ("Bancorp MD&C Committee")** is a committee consisting of a minimum of three "non-employee directors" of IndyMac Bancorp within the meaning of Rule 16b-3 promulgated under the Securities Exchange Act of 1934, and "outside directors" within the meaning of Section 162(m) of the Internal Revenue Code of 1986, as amended.

21. **Defendant Bank Management Development & Compensation Committee ("Bank MD&C Committee")** was at all relevant times a committee of the Board of Directors of IndyMac Bank, F.S.B., responsible for establishing, reviewing and monitoring the compensation practices of the Bank. On information and belief, all members of the Bank MD&C Committee were at all relevant times also members of the Bancorp MD&C Committee

22. The Bancorp MD&C Committee and the Bank MD&C Committee are collectively referred to herein as the "MD&C Committees."

23. **Management Development and Compensation Committee Defendants.** On information and belief, the members of the MD&C Committees during the Class Period were:

a. **Defendant Louis E. Caldera**, who served as a member of the MD&C Committees during the Class Period;

b. **Defendant Hugh M. Grant**, who served as a member of the MD&C Committees during the Class Period;

c. **Defendant John F. Seymour**, who served as member and Chairman of the MD&C Committees during the Class Period;

d. **MD&C Committee John and Jane Does**. After reasonable inquiry, Plaintiffs do not currently know the identity of all the MD&C Committees' members during the Class Period. Therefore, additional members of the MED&C Committees are named fictitiously, as MD&C Committee John and Jane Does 1-10. Once their true identities are ascertained, Plaintiffs will seek leave to join them under their true names.

24. The MD&C Committees and its members listed above are collectively referred to herein as the "MD&C Committee Defendants."

25. **Employee Benefits Fiduciary Committee.** Plaintiffs are informed and believe, and based thereon allege, that the IndyMac Bank, F.S.B. Employee Benefits Fiduciary Committee ("Fiduciary Committee"), as described below, was at all relevant times the Plan Administrator of the Plan within the meaning of ERISA § 3(16)(A), 29 U.S.C. § 1002(16)(A), and the named fiduciary of the Plan within the meaning of ERISA § 402(a), 29 U.S.C. § 1102(a). On information and belief, the Fiduciary Committee had the authority to select and eliminate the investment options offered to participants under the Plan, including options that included IndyMac common stock.

26. **Fiduciary Committee Defendants.** Plaintiffs are informed and believe, and based thereon allege, that the following individuals were members of the Fiduciary Committee at all or some relevant times:

a. **Defendant Kevin Cochrane** served as a member of the Fiduciary Committee during the relevant time period, and was at some or all relevant times the Chief People Office and Director of Human Resources for the Bank;

b. **Defendant Ken Horner** served as a member of the Fiduciary Committee during the relevant time period, and was at some or all relevant times an Executive Vice President and Chief Resource Officer for the Bank;

c. **Defendant Jim Barbour** served as a member of the Fiduciary Committee during the relevant time period, and was at some or all relevant times a Second Vice President and Chief Compensation Officer for the Bank;

d. **Defendant Jennifer Pikoos** served as a member of the Fiduciary Committee during the relevant time period, and was at some or all relevant times First Vice President of Compensation and Benefits for the Bank;

e. **Defendant A. Scott Keys** served as a member of the Fiduciary Committee during the relevant time period, and was at some or all relevant times Executive Vice President and Chief Financial Officer of IndyMac Bancorp;

f. **Defendant Rayman Mathoda** served as a member of the Fiduciary Committee during the relevant time period, and was at some or all relevant times an Executive Vice President and Chief People and Efficiency Officer for the Bank.

g. **Fiduciary Committee John and Jane Does 1-10.** Plaintiffs do not currently know the identity of all the Fiduciary Committee members during the Class Period. Therefore, additional members of the

Fiduciary Committee are named fictitiously, as Fiduciary Committee John and Jane Does 1-10. Once their true identities are ascertained, Plaintiffs will seek leave to join them under their true names.

27. The Fiduciary Committee and its members are collectively referred to herein as the "Fiduciary Committee Defendants."

28. **Defendant Michael W. Perry** served as the Chief Executive Officer and Chairman of the Board of IndyMac Bancorp and IndyMac Bank during the Class Period. As described below, as a member of the Boards, Defendant Perry exercised oversight responsibilities and discretionary authority over the composition of the MD&C Committees. As Chief Executive Officer, Defendant Perry had, at some or all relevant times pursuant to the Fiduciary Committee Charter and on other information and belief, the authority to select and remove members of the Fiduciary Committee subject to the ratification of the MD&C Committee.

29. **Defendant Richard H. Wohl** served as the President of IndyMac Bank and as a member of the Board of IndyMac Bank during the Class Period. As described below, on information and belief, Defendant Wohl has certain appointment and oversight responsibilities with respect to the Plan.

30. **Director Defendants.** Members of the Boards of Directors for IndyMac Bancorp and the Bank who were not also members of the MD&C Committees are collectively referred to herein as the "Director Defendants." The Director Defendants include:

a. **Defendant Lyle E. Gramley** was at some or all relevant times a director of IndyMac Bancorp and the Bank;

b. **Defendant Patrick C. Haden** was at some or all relevant times a director of IndyMac Bancorp and the Bank;

c. **Defendant Terrance G. Hodel** was at some or all relevant times a director of IndyMac Bancorp and the Bank;

d. **Defendant Robert L. Hunt** was at some or all relevant times a director of IndyMac Bancorp and the Bank;

e. **Defendant Lydia H. Kennard** was at some or all relevant times a director of IndyMac Bancorp and the Bank; and

f. **Defendant Bruce G. Willison** was at some or all relevant times a director of IndyMac Bancorp and the Bank.

VI. DEFENDANTS' FIDUCIARY STATUS

A. Types of ERISA Fiduciary Status

31. **Named Fiduciaries.** ERISA requires every plan to have one or more "named fiduciaries." ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1). The person named as the "administrator" in the plan instrument is automatically a named fiduciary, and in the absence of such a designation, the sponsor is the administrator. ERISA § 3(16)(A), 29 U.S.C. § 1002(16)(A).

32. ***De Facto* or Functional Fiduciaries.** ERISA treats as fiduciaries not only persons explicitly named as fiduciaries under § 402(a)(1), but also any other persons who in fact perform fiduciary functions. *See* ERISA § 3(21)(A)(i), 29 U.S.C. § 1002(21)(A)(i). Such fiduciaries are referred to herein as "*de facto*" or "functional" fiduciaries. Thus, a person is a fiduciary to the extent "(i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." *Id.*

33. Each of the Defendants was a fiduciary with respect to the Plan and owed fiduciary duties to the Plan and the participants in the manner and to the extent set forth in the Plan's governing instruments, under ERISA, and through their conduct.

34. As fiduciaries, Defendants were required by ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), to manage and administer the Plan and the Plan's investments solely in the interest of the Plan's participants and beneficiaries and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

35. Plaintiffs do not allege that each Defendant was a fiduciary with respect to all aspects of the Plan's management and administration. Rather, as set forth below, Defendants were fiduciaries to the extent of the fiduciary discretion and authority assigned to and/or exercised by each of them, and the claims against each Defendant are based on such specific discretion and authority.

36. Instead of delegating all fiduciary responsibility for the Plan to external service providers, on information and belief, IndyMac chose to delegate its responsibility regarding the administration of the Plan to the Fiduciary Committee. Additionally, on information and belief, IndyMac chose to assign the appointment and removal of fiduciaries to the MD&C Committees, which, in turn delegated the responsibility to appoint members of the Fiduciary Committee to Defendant Perry as the Company's Chief Executive Officer, subject to the MD&C Committees' ratification.

37. ERISA permits fiduciary functions to be delegated to insiders without an automatic violation of the rules against prohibited transactions. ERISA § 408(c)(3), 29 U.S.C. § 1108(c)(3). However, insider fiduciaries, like external

fiduciaries, must act solely in the interest of participants and beneficiaries, not in the interest of the Plan sponsor.

B. The MD&C Committee Defendants' Fiduciary Status Under the Plan.

38. During the Class Period, the Boards relied on the MD&C Committees to carry out their fiduciary responsibilities under the Plan and ERISA.

39. Per the MD&C Committee charters and on information and belief, the MD&C Committee Defendants were, at some or all relevant times, responsible for establishing, reviewing, and monitoring the compensation philosophy and practices of IndyMac Bancorp and the Bank, including reviewing the performance of the Fiduciary Committee Defendants and rendering reports to the Boards about that performance.

40. According to the Fiduciary Committee Charter, the MD&C Committee Defendants had the duty to ratify the CEO's appointments to the Fiduciary Committee, as well as remove members of the Fiduciary Committee. Fiduciary Committee Charter at 5. According to minutes of the Bank MD&C Committee, the Bank MD&C Committee exercised such authority by ratifying such appointments during the Class Period.

41. Consequently, in light of the foregoing duties, responsibilities, and actions, the MD&C Committee Defendants were *de facto* fiduciaries of the Plan within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), during the Class Period in that they exercised discretionary authority or discretionary control respecting management of the Plan, exercised authority or control respecting management or disposition of the Plan's assets, and/or had discretionary authority or discretionary responsibility in the administration of the Plan.

C. The Fiduciary Committee Defendants' Fiduciary Status Under the Plan.

42. The Fiduciary Committee is the Plan Administrator and Named Fiduciary under the Plan. *See* Plan Document at 55; *See* Employee Benefits

Fiduciary Committee Charter at 2; *See* SPD at 17. Per the SPD, the Committee "is responsible for the administration of the Plan and the management of the Plan's assets. The Committee has the power and discretion to interpret the Plan." *Id.*

43. The Fiduciary Committee Defendants had the responsibility of selecting the investments in the Plan and monitoring the performance of the investment funds, including the IndyMac Stock Fund in the Plan. *See* Investment Policy Statement of IndyMac Bank, F.S.B. 401(k) Plan (hereinafter "Investment Policy Statement") at 2-4.

44. According to the Fiduciary Committee Charter at 4, the Fiduciary Committee was to "diversify the 401(k) Plan...investments so as to minimize the risk of large losses, unless, under the circumstances, it is clearly prudent not to do so." *See also* Plan Document at 56.

45. Additionally, the Fiduciary Committee had the duty to: appoint investment managers; review and monitor the Plan in support of compliance with applicable laws and regulations; direct the Trustee of the Plan with respect to all investments of the principal or income of the trust and policies and with respect to other matters concerning the Plan's assets; adopt, amend and interpret rules for the administration or regulation of the Plan; amend the Plan; establish and review a funding policy for the Plan; determine all questions relating to the eligibility of employees to participate in the Plan; and oversee the Human Resources management staff's following duties: determining, computing and certifying to the Trustee and amount and kind of benefits payable; authorizing disbursement by the Trustee; and, maintaining the necessary records for the administration of the Plan. Fiduciary Committee Charter at 2-3. See also Plan Document at 55-56.

46. Moreover, on information and belief, the Company and the Fiduciary Committee exercised responsibility for communicating with participants regarding the Plan, and providing participants with information and materials required by

ERISA. In this regard, the Company and the Fiduciary Committee disseminated the Plan documents and materials which, among other things, incorporated by reference IndyMac's misleading SEC filings, thus converting such materials into fiduciary communications.

47. According to the Fiduciary Committee Charter and ERISA, the members of the Fiduciary Committee were to "discharge their duties solely in the interest of the Plans' participants and their beneficiaries and for the exclusive purpose of providing benefits to the participants and their beneficiaries." *Id.* at 4.

48. Consequently, in light of the foregoing duties, responsibilities, and actions, the Fiduciary Committee Defendants were both named fiduciaries of the Plan pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), and *de facto* fiduciaries of the Plan within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), during the Class Period in that they exercised discretionary authority or discretionary control respecting management of the Plan, exercised authority or control respecting management or disposition of the Plan's assets, and/or had discretionary authority or discretionary responsibility in the administration of the Plan.

D. Michael W. Perry's Fiduciary Status.

49. On information and belief, IndyMac was a *de facto* fiduciary of the Plan during the Class Period because it had the responsibility to establish, review, and monitor the compensation practices of the Company; appoint and remove members of the MD&C and Fiduciary Committees, the Bank's Human Resources Department, and the Trustee; and was responsible for the activities of its employees through traditional principles of agency and *respondeat superior* liability. Moreover, on information and belief, the Company and the Fiduciary Committee exercised responsibility for communicating with participants regarding the Plan, and providing participants with information and materials required by

ERISA. However, IndyMac, as a business entity, cannot act on its own without a human counterpart. In this regard, during the Class Period, on information and belief, IndyMac relied on Defendant Perry to carry out certain of its fiduciary responsibilities under the Plan and ERISA. Therefore, the Defendant Perry is a functional fiduciary under ERISA.

50. In addition, as an executive officer of IndyMac Bancorp and IndyMac Bank, Defendant Perry was directly aware of the day to day management of IndyMac and, on information and belief, was required to approve and sign off on statements and operational procedures for the Company and the Plan.

51. Additionally, according to the Fiduciary Committee Charter, Defendant Perry, and the Company's CEO, had the authority to select members of the Fiduciary Committee, subject to the ratification by the MD&C Committee. Fiduciary Committee Charter at 5. According to minutes of the MD&C Committee, Defendant Perry exercised such authority by appointing members to the Fiduciary Committee during the Class Period.

52. In addition, throughout the Class Period, Defendant Perry made numerous statements, many of which were incomplete and inaccurate, to employees, and thus to Plan participants, regarding the Company, and future prospects of the Company specifically with regard to the risk, or purported lack of risk, faced by the Company as a result of its Alternative-A and subprime loan exposure and its exposure related to mortgage-back securities. These statements, which were made in, among other places, Company emails sent to all employees, were made in an ERISA fiduciary capacity because they contained information about the likely future of the Plan's benefits, in particular the value and prudence of the Plan's largest single investment, IndyMac stock, and, thus were acts of Plan administration under controlling legal precedent.

53. Consequently, in light of the foregoing duties, responsibilities, and actions, Defendant Perry was a *de facto* fiduciary of the Plan within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), during the Class Period in that he exercised discretionary authority or discretionary control respecting management of the Plan, exercised authority or control respecting management or disposition of the Plan's assets, and/or had discretionary authority or discretionary responsibility in the administration of the Plan.

E. Richard H. Wohl's Fiduciary Status.

54. On information and belief, IndyMac was a *de facto* fiduciary of the Plan during the Class Period because it had the responsibility to establish, review, and monitor the compensation practices of the Company; appoint and remove members of the MD&C and Fiduciary Committees, the Bank's Human Resources Department, and the Trustee; and was responsible for the activities of its employees through traditional principles of agency and *respondeat superior* liability. Moreover, on information and belief, the Company and the Fiduciary Committee exercised responsibility for communicating with participants regarding the Plan, and providing participants with information and materials required by ERISA. However, IndyMac Bank, as a business entity, cannot act on its own without a human counterpart. In this regard, during the Class Period, on information and belief, IndyMac Bank relied on Defendant Wohl to carry out certain of its fiduciary responsibilities under the Plan and ERISA. Therefore, the Defendant Wohl is a functional fiduciary under ERISA.

55. In addition, as an executive officer of IndyMac Bank, Defendant Wohl was directly aware of the day to day management of IndyMac Bank and, on information and belief, was required to approve and sign off on statements and operational procedures for IndyMac Bank and the Plan.

56. Consequently, in light of the foregoing duties, responsibilities, and actions, Defendant Wohl was a *de facto* fiduciary of the Plan within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), during the Class Period in that he exercised discretionary authority or discretionary control respecting management of the Plan, exercised authority or control respecting management or disposition of the Plan's assets, and/or had discretionary authority or discretionary responsibility in the administration of the Plan.

F. The Director Defendants' Fiduciary Status.

57. Pursuant to the Plan Document, the Director Defendants had the authority to appoint and remove members of the Fiduciary Committee. These duties were delegated to the MD&C Committee, which delegated the appointment of the Fiduciary Committee members to the Company's CEO.

58. Plaintiffs are informed and believe and based thereon allege that the Director Defendants exercised discretionary authority with respect to the appointment, removal and monitoring of the members and chairmen of the MD&C Committees.

59. Plaintiff is informed and believes and based thereon alleges that the Director Defendants delegated authority to establish, review and monitor the compensation practices of the Company, including the Company's employee pension plans, to the MD&C Committee in order that the MD&C Committee could assist the Boards in relation to their responsibilities for the Company's employee pension plans.

60. Consequently, in light of the foregoing duties, responsibilities, and actions, the Director Defendants were *de facto* fiduciaries of the Plan within the meaning of ERISA § 3(21), 29 U.S.C. § 1002(21), during the Class Period in that they exercised discretionary authority or discretionary control respecting management of the Plan, exercised authority or control respecting management or

disposition of the Plan's assets, and/or had discretionary authority or discretionary responsibility in the administration of the Plan.

VII. THE PLAN

A. The Purpose and Operation of the Plan

61. The Plan, sponsored by IndyMac Bank, is a defined contribution plan. The Plan is a legal entity that can sue and be sued. ERISA § 502(d)(1), 29 U.S.C. § 1132(d)(1). However, in a breach of fiduciary duty action such as this, the Plan is neither a defendant nor a plaintiff. Rather, pursuant to ERISA § 409, 29 U.S.C. § 1109, and the law interpreting it, the relief requested in this action is for the benefit of the Plan and its participants and beneficiaries.

62. The Plan, established effective July 1, 1997, provides retirement benefits for nearly all of IndyMac's employees, barring some limited exclusions. *See* SPD at 1. An employee becomes eligible to participate in the Plan on the first day of the month following the completion of 30 days of "eligibility service." *Id.*

63. The assets of an employee benefit plan, such as the Plan here, must be "held in trust by one or more trustees." ERISA § 403(a), 29 U.S.C. § 1103(a). During the Class Period, the assets of the Plan were held in trust by Principal Trust Co., except for assets invested in IndyMac and Countrywide Financial Corp. common stock, which were held in trust by Bankers Trust Co., N.A. IndyMac Bank, F.S.B. 401(k) Plan, Annual Report at 11, Form 11-K, Dec. 21, 2007 ("2007 Form 11-K"). Principal Trust was also the recordkeeper of the Plan during the Class Period. *Id.* at 7.

B. Participant and Employer Contributions to the Plan

64. Under the Plan, an account is maintained for each participant, reflecting all contributions and the participant's share of earnings, losses or administrative expenses of the Plan. *Id.*

65. Participants can elect to contribute up to 40% of their annual eligible compensation on a pre-tax basis, up to a maximum of $15,500, or $20,500 for participants age 50 years or older. *Id.*

66. The Company's matching contributions are discretionary. *Id.* During the years ended December 31, 2006 and 2007, the Company made matching contributions equal to 75% of the first 3% of eligible pay that participants contributed, and 25% of the second 3% of eligible pay contributed. *Id.* On March 1, 2008, the Company suspended employer matching contributions. *Id.*

67. Participants become vested in the Company matching and discretionary contributions according to the following schedule:

Years of Service	Vested Percentage
Less than 1 year	0%
1 but less than 2	20%
2 but less than 3	40%
3 but less than 4	60%
4 but less than 5	80%
5 years or more	100%

SPD at 8; 2007 Form 11-K at 7. Participants' salary deferrals are fully vested and non-forfeitable at all times. 2007 Form 11-K at 7.

68. According to the 2007 Form 11-K, a participant has discretion to direct the investment of his or her account to the various investment options offered by the Plan. *Id.* at 8.

C. Investment options in the Plan, including IndyMac Stock Fund

69. Throughout the Class Period, the Fiduciary Committee Defendants selected the investment options made available to participants of the Plan. *See* Plan Document effective January 1, 2006, (referred to herein as the "Plan

Document") at 28 (the Fiduciary Committee was responsible for authorizing and designating investment options under the Plan, including investments in Qualified Employer Securities).

70. While certain provisions of the Plan document purport to limit the right of the Plan fiduciaries to remove the IndyMac Stock Fund as an investment alternative by means other than a formal Plan amendment, the Plan's Investment Policy Statement gives the Fiduciary Committee discretionary authority over the IndyMac Stock Fund. *See, e.g.*, Investment Policy Statement at 2, 4 ("the Named Fiduciary may select employer stock as an investment option" and "the Named Fiduciary shall evaluate the suitability of existing investment options under the Plan approximately once each year").

71. Additionally, to the extent Defendants intended to insulate themselves from liability through this Plan language, it is ineffective. Regardless of the language in the Plan document, the document cannot be relied on to the extent it contravenes the fiduciaries' obligations under ERISA to prudently manage the Plan's investments. ERISA mandates that plan fiduciaries follow plan documents only to the extent they are consistent with ERISA's requirements.

72. Accordingly, the Fiduciary Committee had the authority and responsibility to require that Plan participants transfer their investments in the IndyMac Stock Fund to another Plan investment option, and the authority and responsibility to liquidate those investments, once it became imprudent to remain invested in IndyMac stock or in the IndyMac Stock Fund to the extent that it was comprised of IndyMac stock.

D. Losses to the Plan.

73. During the Class Period, IndyMac stock represented a significant portion of the Plan's net assets. As a result, the Plan incurred substantial losses when the stock plummeted. On July 3, 2006, IndyMac stock opened at $46 per

share, and the value of the Company stock held in the Plan as of that date was valued at approximately $16.7 million. 2007 Form 11-K at 11. As of January 2, 2009—following the collapse of IndyMac due to revelations that the Company engaged in, among other things, fraudulent loan origination and risky investment practices—IndyMac stock is trading on the Pink Sheets (under ticker IDMCQ.PK) at approximately $0.14 per share, representing a decline of nearly 99.7% since the beginning of the Class Period, and signifying huge Plan losses. On information and belief, the value of IndyMac stock in the Plan is now only worth approximately $158,000.

74. Despite the Plan's substantial investment in IndyMac stock, Defendants failed to protect the Plan from the risks that the Company's reckless and improper conduct created. Defendants continued to hold the Plan's shares of IndyMac stock and compounded the problem (and the losses) by allowing participants to purchase additional shares during the Class Period. Plaintiffs estimate a principal Plan loss of over ***$24 million***.

VIII. FACTS BEARING ON FIDUCIARY BREACH

A. IndyMac Stock was an Imprudent Investment for the Plan during the Class Period Because of Improper Business Practices and Risk Mismanagement that Resulted in the Precipitous Decline in the Company's Stock Price.

75. During the Class Period, IndyMac stock became an imprudent investment for Plan participants' retirement savings. IndyMac Bank was financially mismanaged, and it engaged in highly risky and inappropriate loan origination practices, creating dire financial circumstances that exposed the Plan to the risk of huge losses.

76. A fiduciary may not ignore circumstances, such as those here, that increase the risk of loss to participants and beneficiaries to an imprudent and unacceptable level.

77. IndyMac's false and misleading statements contributed to the artificial inflation of the value of the Company stock, increasing the risk of loss. As the DOL, the agency charged with responsibility for enforcing ERISA, has stated, it is never prudent for a retirement plan fiduciary to purchase company stock that he knows or should know is artificially inflated. Brief of the Secretary of Labor as Amicus Curie Supporting Appellants and Requesting Reversal at 15-16, *In re Calpine Corp. ERISA Litig.*, No. 06-15013 (9th Cir. Nov. 16, 2006).

78. A variety of circumstances contributed to the unacceptable level of risk borne by Plan participants as a result of the Plan's investment in IndyMac stock, including, but not limited to:

(1) the Company's fraudulent and high-risk loan origination and investment practices;

(2) the lack of adequate internal controls over its improper loan origination and investment practices;

(3) the Company's mismanagement of risk and liquidity;

(4) the Company's failure to acknowledge, manage, and accurately disclose the risks associated with its mortgage loan origination and investment practices;

(5) the false, misleading, and incomplete statements regarding the Company's net income and financial results;

(6) the artificial inflation of IndyMac stock caused by these circumstances; and

(7) the dire financial circumstances created by IndyMac's improper business and accounting practices.

79. Given the purpose of the Plan—to allow employees to save for retirement—the Plan's fiduciaries did not undertake any meaningful action to protect the Plan from the losses caused by the Plan holding a significant amount of

IndyMac stock during the Class Period. The Plan's fiduciaries continued to offer IndyMac stock as an investment option and maintain IndyMac shares in the Plan even as the stock was plunging in value. A prudent fiduciary facing similar circumstances would not have stood idly by as the Plan lost millions of dollars.

1. Background

80. During the recent housing boom, interest rates were low, leading to reduced mortgage rates, which attracted more first-time home buyers and persuaded many to refinance their existing loans. Lenders took advantage of this growing market by originating more loans and introducing "exotic" and nontraditional loan products to appeal to a wider customer base. Lenders also lowered their underwriting standards to capture more market share.

81. The overheated housing market was unsustainable, however, and when it burst in 2006, lenders found themselves burdened with vast portfolios of loans made to under-qualified borrowers with little ability to repay.

82. As default rates rose and foreclosures became inevitable, the credit markets froze in the fall of 2007, resulting in a financial crisis and nationwide recession.

83. The mortgage and credit crises are rooted in the lax underwriting standards and improper lending practices that were the basis of the subprime and Alternative-A ("Alt-A") lending industries.

84. Subprime loans are mortgages extended to borrowers who have a heightened risk of default because they have, among other things, a history of loan delinquency or default, a recorded bankruptcy, and/or limited debt experience.

85. Although subprime mortgages are associated with the highest level of risk and, therefore, the highest risk of default, Alt-A loans have proven to be similarly problematic.

86. Like subprime loans, Alt-A mortgages are nontraditional or "exotic" loans. Generally, Alt-A borrowers have higher credit scores than subprime borrowers. Nonetheless, Alt-A loans are laden with risk: borrowers either "provide little documentation of their income or assets, or . . . make smaller than usual down payments or purchase loans that have unusual terms, like interest-only payments for an initial period." Stephen Labaton, *Lenders Fight Stricter Rules on Mortgages*, N.Y. Times, April 28, 2008, at A1. Thus, they are not considered prime, and borrowers are often able to receive Alt-A loans without providing any evidence of their ability to repay.

87. Subprime and Alt-A loans extended to borrowers based on no documentation of assets or income are often referred to as "liar" loans, due to the propensity of borrowers to overstate income and assets in order to meet already lax lending standards.

88. Other popular loan products in both subprime and Alt-A lending included the adjustable rate mortgage ("ARM") and pay-option ARM. An ARM is a mortgage with a variable interest rate: it contains an initial "teaser rate" that balloons to a much higher rate after a set period of time (anywhere from a few months to a few years).

89. A pay-option ARM is a type of adjustable rate mortgage that allows borrowers to choose one of four payment options each month. These loans were especially risky because most borrowers chose the least costly payment option—negative amortization—which permitted the borrower to make an artificially low payment that was less than the amount of interest for that month. This created new debt as the remaining interest was capitalized.

90. A considerable percentage of IndyMac's Alt-A loans were pay-option ARMs, and IndyMac often locked borrowers into these loans by imposing a loan prepayment penalty for a set period.

91. Finally, IndyMac also offered another high-risk loan product: home equity lines of credit (HELOCs), which are second mortgages that provide a line of credit from which a borrower can draw over a period of time. HELOCs were often offered as "piggyback" loans with first mortgages for those borrowers who were unable to put down 20% of the home value as a downpayment. These piggyback HELOCs increased the borrower's cumulative loan-to-value up to 90% and sometimes 100%. Furthermore, as second lien mortgages, HELOCSs are subordinate to first mortgages. They are also ARMs that are immediately subject to fluctuating interest rates.

92. Not surprisingly, a higher percentage of all of these types of loans have recently gone into default and foreclosure as borrowers are unable to make their payments.

2. IndyMac Becomes Overexposed to the Overheated Housing Market.

93. There was tremendous financial incentive to enter the subprime and Alt-A markets. Origination fees on many of these types of loans are significantly higher than on prime loans because they carry higher interest rates based on the higher risk of default. Additionally, these higher interest rates result in higher potential returns, and allowed lenders to sell these higher-yielding mortgages on the secondary market for a higher price. During the housing boom, IndyMac took advantage of these financial benefits and became a leader in Alt-A lending.

94. IndyMac pushed its underwriters to originate more and more of these loans in its quest to garner the large fees associated with them. The Company also purchased a substantial number of loans from brokers, ignoring repeated reports of predatory lending and improper origination practices.

95. Though it exposed the Company, and, thus, the Plan to massively more risk, targeting the Alt-A and subprime markets offered IndyMac benefits

beyond larger fees: (1) the Alt-A and subprime markets represented a new population of borrowers, because they likely did not qualify for prime mortgages; (2) Alt-A and subprime borrowers tended to be inexperienced and unsophisticated and far more likely to sign up for the complex and problematic mortgage products IndyMac originated; and (3) IndyMac was able to sell the majority of its Alt-A and subprime mortgages to the secondary market, thereby offloading the risk and removing the toxic loans from its books.

96. However, while this drive for market share yielded high short-term returns, it also created a ticking time bomb: the risk of high default rates and foreclosures grew as the housing market cooled and the reset dates for pay option ARMs drew near.

97. Even as housing prices declined and the housing bubble burst, IndyMac focused on loan production and continued to engage in the business practices described above.

98. Fueling this focus on subprime and Alt-A lending was a cadre of investors on the secondary market.

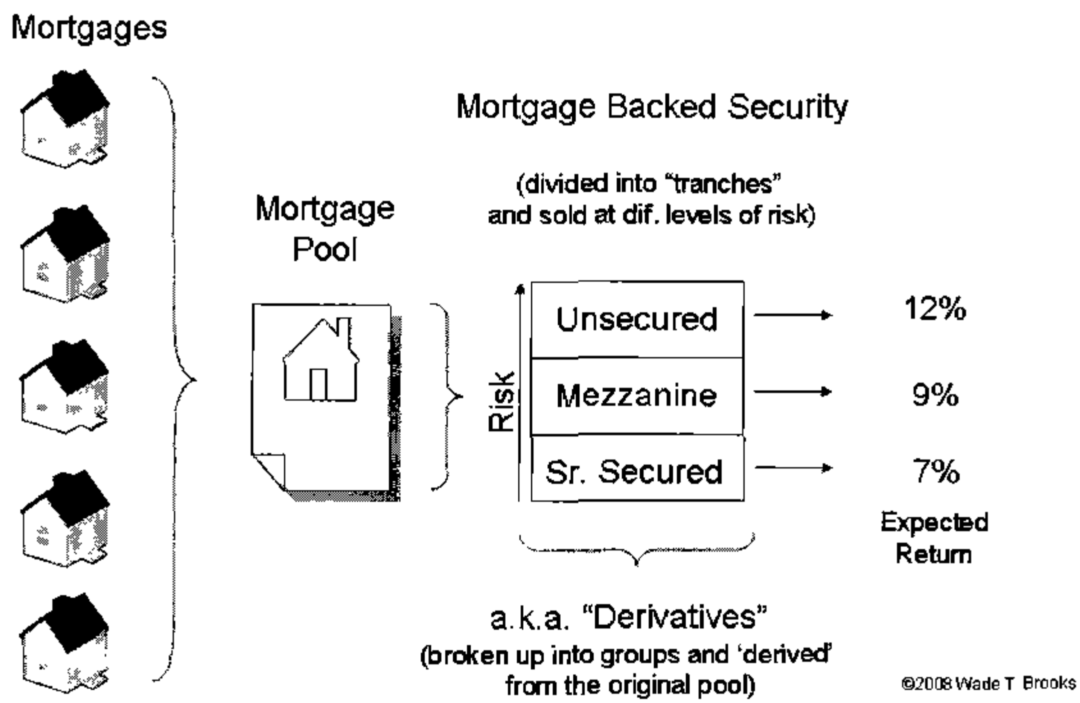
3. The Secondary Market Fueled the Mortgage Market.

99. In the early 2000s, interest rates were low, making traditional investments in treasury bonds less attractive due to their lower rate of return. Hungry for higher-yielding investments, investors turned to collateralized debt obligations ("CDOs"): a Wall Street invention that offered a higher rate of return but entailed a higher degree of risk.

100. Wall Street created these CDOs by pooling together asset-backed securities derived from debt obligations—credit card debt, car loan debt, mortgage debt—and dividing the pool into layers called "tranches," which contained varying levels of risk and, therefore, varying rates of return: the higher the level of risk, the higher the rate of return.

101. The rise in the housing market and resultant explosion in home-loan lending created more mortgage-backed securities ("MBS"), which helped create more CDOs, and thus more investment vehicles for hungry investors.

102. MBS are created in a similar fashion as CDOs: a lender pools together mortgages it has originated and bought from other lenders into an MBS, divides the MBS into tranches, and then sells the tranches on the secondary market, as demonstrated below:



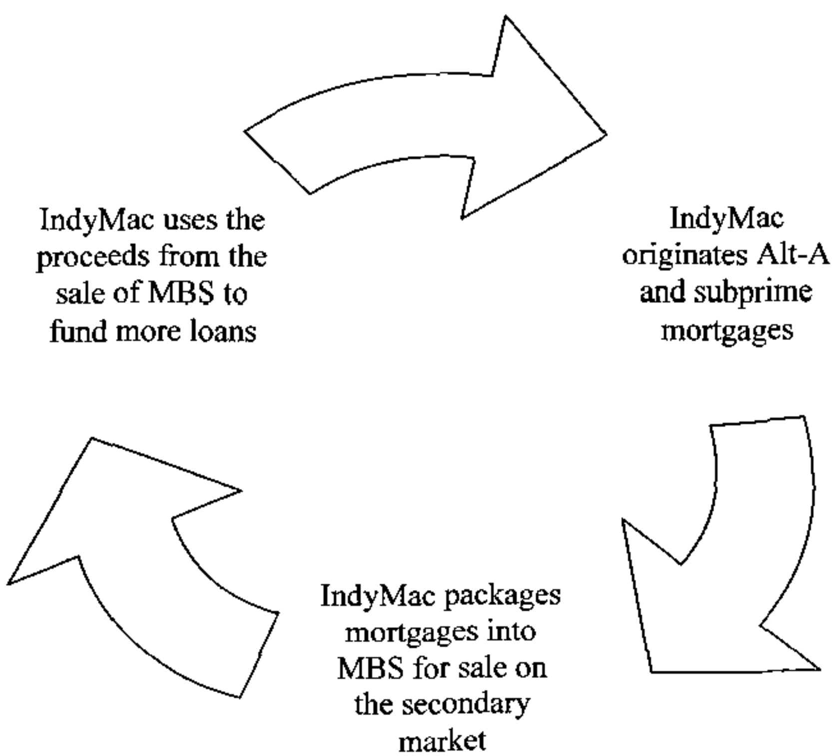
103. These MBS tranches are eventually pooled into CDOs and sold to investors. Consequently, CDOs paid investors from the stream of mortgage payments generated by the underlying mortgages. By 2005 and 2006, Wall Street's appetite for MBS was insatiable as it rushed to generate more and more CDOs.

104. IndyMac earned fees on the MBS it sold on the secondary market. The Company also retained mortgage servicing rights in most of the mortgages it

sold, which provided another source of revenue. In general, IndyMac securitized roughly 87% of the loans it originated and retained servicing rights to the majority of these loans. *See* IndyMac Current Report, Form 8-K, April 25, 2006, at Ex. 99.1.

105. To generate more and more fees, the Company required a steady source of capital to originate more and more loans. Sales of MBS on the secondary market provided this much-needed stream of dollars. However, if anything were to disrupt this closed circle, the whole business model would crash, and IndyMac would be starved for funds to make new loans and maintain capital.

106. Treasury Secretary Henry Paulson described this business model as the "originate-to-distribute securitization model," which allowed IndyMac to make large sums of money by engaging in effectively a Ponzi scheme, as illustrated below:



4. The Secondary Market Evaporates, Creating a Financial Crisis.

107. Because many CDOs contained predominantly MBS, if the underlying mortgages defaulted at higher rates than expected, the CDO investors' income stream would be impaired and the riskier tranches would default. This is exactly what happened in the first half of 2007.

108. IndyMac's Alt-A and subprime borrowers began defaulting in increasing numbers, well beyond what the risk models employed to determine default rates had predicted. The increased defaults and mounting foreclosures caused the CDOs that contained these toxic mortgages to default as well.

109. As a result, in early 2007, Wall Street's interest in MBS began to wane, and by the end of the summer, the CDO and MBS markets had evaporated. By September 2007, the mortgage crisis was well underway, triggering the freezing of the credit markets and leaving IndyMac with a huge inventory of loans and no buyers.

110. The circle was broken and IndyMac was left without a source of funds to maintain capital or make new loans. With no buyers in sight, the Company was forced to move $10.7 billion in loans held for sale to its "held for investment" portfolio in the fourth quarter of 2007. Clough, *supra*.

5. IndyMac's Improper Business Practices Render the Company's Stock Imprudent and Cause the Company to Collapse.

111. IndyMac's single-minded drive for market share and short-term securitization windfalls left the Company ill-prepared to weather the mortgage crisis and subsequent freezing of the credit markets. The Company's highly risky and imprudent business practices created dire financial circumstances that rendered Company stock imprudent and led to IndyMac's collapse. On July 11, 2008, the FDIC took over the Bank, and less than three weeks later, on July 31, 2008, IndyMac Bancorp filed for Chapter 7 bankruptcy.

112. While the Company's failure was the result of a number of factors, its deliberate decision to continuously decrease lending standards, engage in predatory lending, and improperly manage risk placed the Company on a path that was doomed to fail.

113. As David Balsam, former chief financial officer of IndyMac's mortgage bank, observed: "The seeds were planted long ago. What happened in the industry, while significant and dramatic, should not have bankrupted a well-run institution." Richard Clough, *Special Report: IndyMac's Last Gasps*, L.A. Bus. J., Sept. 15, 2008.

114. Throughout the Class Period, IndyMac focused on loan quantity rather than loan quality. In order to increase loan volume, the Company continually decreased its lending standards to qualify more borrowers and accept more loan applications. However, the Company did not account for the additional risk these unsound practices created. IndyMac's growth strategy resulted in short-term profits but was unsustainable in the long-term.

(a) The Company Employed Lax Underwriting Standards that Were Often Ignored.

115. Numerous reports describe a culture at IndyMac that pressured underwriters to book more and more loans without regard for borrowers' ability to repay.

116. The *Los Angeles Business Journal* interviewed current and former IndyMac employees who "painted a detailed picture of a company colored by an aggressive and sometimes boorish chief executive who created a corporate culture that gave the company little chance of surviving a major market downturn." Clough, *supra*.

117. The Center for Responsible Lending ("CRL") released a report entitled, *IndyMac: What Went Wrong? How an "Alt-A" Leader Fueled its Growth*

with Unsound and Abusive Mortgage Lending, shortly before the Bank failed.[1] The report contains interviews with current and former IndyMac employees and IndyMac borrowers that describe the Company's drive for market share and lax lending standards.

118. Wesley E. Miller, an underwriter for IndyMac from 2005 to 2007, explained to the CRL that "when he rejected a loan, sales managers screamed at him and then went up the line to a senior vice president and got it okayed." CRL Report at 9.

119. Other IndyMac underwriters the CRL interviewed and IndyMac executives cited as confidential witnesses in the Securities Complaint,[2] describe the drive to "push loans through," regardless of whether the loans contained accurate information or met the Company's underwriting guidelines. CRL Report at 9-10; Securities Compl. at ¶¶ 34-36.

120. According to a confidential witness cited by the Securities Complaint, starting in 2006, "the quality of loans originated became a running joke within the Company. In particular, certain loans with deficient documentation or that were issued to borrowers unable to pay them back became known as 'Disneyland Loans.' These loans . . . referr[ed] to a loan issued to a Disneyland *cashier* who claimed in his/her application that he/she earned $90,000 per year." Securities Compl. at ¶ 55 (emphasis in original).

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[1] *See* Mike Hudson, *IndyMac: What Went Wrong? How an "Alt-A" Leader Fueled its Growth with Unsound and Abusive Mortgage Lending*, June 30, 2008, http://www.responsiblelending.org/pdfs/indymac_what_went_wrong.pdf ("CRL Report").

[2] Third Amended Class Action Complaint for Violations of Sections 10(b) and 20(a) of the Securities Exchange Act of 1934, *Tripp v. IndyMac Bancorp, Inc.*, No. 07-1635 (C.D. Cal. June 6, 2008) ("Securities Complaint" or "Securities Compl.").

121. Numerous other lawsuits detail IndyMac's practice of fraudulently inflating appraisals[3] and falsifying borrowers' documents:[4] all in the interest of increased loan production.

122. In fact, soon after the Bank failed, it was revealed that the FBI was investigating IndyMac Bancorp "for possible fraud in connection with home loans made to risky borrowers." Lara Jakes Jordan, *FBI Looking Into IndyMac Bancorp*, Associated Press, July 16, 2008.

(b) IndyMac Knowingly Purchased Loans from Mortgage Professionals Who Engaged in Predatory Lending.

123. The majority of IndyMac's loans were derived from mortgage professionals, such as mortgage brokers, mortgage bankers, financial institutions, and homebuilders. *See* IndyMac Annual Report at 7, Form 10-K, Mar. 1, 2007. In 2006, these types of loans accounted for 86% of IndyMac's loans overall. *Id.*

124. Although IndyMac stated it reviewed loans it bought from mortgage professionals to ensure their compliance with the Company's origination standards, many of these loans were the product of predatory lending and improper origination practices. A careful review of loan applications would have revealed these improper and potentially unlawful practices.

125. Numerous complaints have been filed against IndyMac in California, Maine, New Jersey, Virginia and other states.[5] These suits allege that the

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[3] *See, e.g.*, *Cedeno v. IndyMac*, No. 06-6438 (S.D.N.Y. Aug. 25, 2006) (complaint filed).

[4] *See, e.g.*, *George v. IndyMac Bank*, No. 08-2732 (C.D. Cal. Apr. 25, 2008) (complaint filed); *Ware v. IndyMac Bank*, No. 07-1982 (N.D. Ill. Apr. 10, 2007) (complaint filed).

[5] *See, e.g.*, *George v. IndyMac Bank*, No. 08-2732; *Darling v. IndyMac Bancorp, Inc.*, No. 06-123 (D. Me. Oct. 3, 2006) (complaint filed); *Zurawski v. Mortgage*

Company worked with mortgage brokers who pushed borrowers into IndyMac's pay-option ARMs by misrepresenting the terms of loans and falsely promising low interest rates and payments.

126. Additionally, IndyMac has filed lawsuits against a number of mortgage brokers, alleging breach of warranties and obligations based on almost complete default rates in certain loan pools sold to IndyMac from 2003 through 2006.[6] These actions suggest that IndyMac was well aware that brokers were engaging in predatory lending and improper origination practices throughout the Class Period. Nonetheless, IndyMac continued to purchase loans from these brokers, even after it initiated legal actions against them in 2007.

(c) The Company Did Not Properly Manage Risk.

127. Throughout the Class Period, IndyMac did not adequately manage risk. It used ineffective systems and risk models to predict default rates and risk exposure, and it did not properly reserve for loan losses, hedge against loss, or manage liquidity.

128. IndyMac relied on a program called "e-MITS" (electronic Mortgage Information and Transaction System)—which computes interest rates based on information entered into the system—to process loans.

129. IndyMac also used credit risk models to determine a potential borrower's risk of default. These risk models assisted the Company in determining whether to extend a loan to a customer, how likely the loan was to be repaid, and the value of the loan for sale on the secondary market.

Funding Corp., No. 08-794 (D.N.J. Feb. 13, 2008) (complaint filed); *Mitchell v. IndyMac Bank*, No. 08-146 (D. Va. Feb. 19, 2008) (complaint filed).

[6] *See, e.g., IndyMac Bank, F.S.B. v. Silver State Mortgage*, No. 07-405 (D. Nev. Mar. 29, 2007) (complaint filed); *IndyMac Bank, F.S.B. v. Geneva Mortgage Corp.*, No. 07-1914 (C.D. Cal. Mar. 22, 2007) (complaint filed).

130. Risk models and e-MITS, however, were only as effective as the information entered. If the information was inaccurate, the related systems reports and determinations would also be inaccurate. This was often referred to as: "garbage in, garbage out."

131. Furthermore, risk models are based on empirical data: although prospective in nature, they rely on retrospective information. Therefore, IndyMac's deteriorating origination standards are especially significant. Although the Company assured investors and the Class that it used well tested credit risk and loan quality models to determine borrower qualification and loan value, what the Company did not reveal is that these models were created using empirical data that no longer applied. Foundational information was based on IndyMac's historical origination standards that were significantly stricter than the standards (or lack of standards) used during the Class Period. Additionally, predicted default rates were predicated on loan performance during the housing boom.

132. Therefore, these models based on empirical data—which was necessarily retrospective—could not accurately predict the default risk of loans originated under entirely different circumstances. This difference helped create a grave disconnect between the actual and stated quality of IndyMac's loans—a disconnect that was never disclosed to investors or the Class.

133. Additionally, these risk models did not account for the increased risk exposure related to the Company's MBS business practices. IndyMac retained certain interests in the MBS it sold on the secondary market—thereby exposing itself to risky tranches—and also attached representations and warranties to its MBS that obligated the Company to buyback underperforming loans.

134. According to the Securities Complaint, these buybacks were known as "kickbacks," and they "increased drastically" during the Class Period, swelling

from $108 million in 2005 to $194 million in 2006 and finally ballooning to $613 million in 2007. Securities Compl. at ¶¶ 62, 63, 66.

135. Further exacerbating the Company's risk exposure was the Company's failure to properly reserve for loan losses and hedge against loss.

136. Many businesses hedge in order to mitigate risk, and it is standard practice among mortgage banks to hedge against credit loss. However, in early 2007, Defendant Perry admitted that the Company had misrepresented its hedging practices, explaining that "we don't hedge as we talk many times." IndyMac Earnings Webcast & Teleconference Call for Fourth Quarter 2006 Financial Results, Jan. 25, 2007. He further disclosed that the Company had allowed hedges on $1.5 billion worth of liabilities to expire. *Id.*

137. Finally, IndyMac did not properly manage liquidity. The Company relied heavily on brokered deposits—high-yielding certificates of deposit arranged by brokers and sold to thrifts. Although these deposits provided considerable initial liquidity, they were not as reliable as core deposits, which are "from steady customers who tend to leave their money where it is." Clough, *supra*. Thus, "[f]or many banks, core deposits can account for more than 50 percent of a deposit base." *Id.* By the first quarter of 2008, only $3 billion of IndyMac's $19 billion in deposits was in core deposits. *Id.*

138. As one bank consultant noted: "The more you have in core deposits the better grounded the institution is. . . . Anytime you see an institution that is growing through noncore deposits, it is one of the big red flags that should alert either the regulators or the public that the institution may be engaged in some kind of higher-risk, higher-reward activity." *Id.*

139. Indeed, IndyMac was so dependent on brokered deposits that it asked the Office of Thrift Supervision—the Bank's federal regulator—to allow it to backdate an $18 million infusion from IndyMac Bancorp to the Bank so that it

could maintain its status as well-capitalized in the first quarter of 2008. Had the Bank lost this status, it would not have been allowed to accept brokered deposits. The OTS permitted the Bank to backdate the infusion from May 9, 2008 to March 31, 2008. Two months later, the Bank collapsed.

140. It is clear that IndyMac was not a hapless victim of the mortgage and credit crisis. Instead, it helped create the crisis and engaged in improper business practices and lax internal controls that intensified the effects of the crisis and led to the Company's demise. IndyMac's insatiable appetite for loan origination drove underwriting standards down, spawned ever more risky mortgage products, and encouraged predatory lending practices, all designed to maximize loan volume for securitization into MBS.

141. As Secretary Paulson noted, "[The] potential market failure arose from the emergence of the complex originate-to-distribute securitization model where mortgages had been sliced and diced then packaged and sold to investors around the world." Remarks by Secretary Henry M. Paulson, Jr. on U.S. Housing Market before FDIC's Forum on Mortgage Lending to Low and Moderate Income Households, July 8, 2008 (http://www.ustreas.gov/press/releases/ hp1070.htm).

142. It was IndyMac's single-minded focus on its originate-to-distribute securitization model that led to the complete collapse of the Company: forcing IndyMac Bancorp to file for Chapter 7 bankruptcy and the FDIC to take over the Bank, at a cost of $8.9 billion to taxpayers and over $24 million to Plan participants.

B. Defendants Knew or Should Have Known that IndyMac Stock Was an Imprudent Investment.

143. Given the facts described above, it is clear that since the beginning of the Class Period, the Company's stock was an imprudent investment for the Plan because of, among other things, the Company's: (1) fraudulent and high-risk loan

origination and investment practices; (2) lack of adequate internal controls over its improper loan origination and investment practices; (3) mismanagement of risk and liquidity; (4) failure to acknowledge, manage, and accurately disclose the risks associated with its mortgage loan origination and investment practices; (5) false, misleading, and incomplete statements regarding the Company's net income and financial results; (6) artificial inflation of IndyMac stock caused by these circumstances; and (7) dire financial circumstances created by IndyMac's improper business and accounting practices.

144. Defendants had substantial warnings of the cooling housing market, lax underwriting, and impending mortgage crisis. Because IndyMac's earnings were completely dependent on its mortgage-related business, these warnings should have triggered an investigation into the prudence of Plan investment in Company stock.

1. Published Warnings Place Plan Fiduciaries on Notice of the Need to Investigate Risks at IndyMac.

145. In late 2004 and early 2005, industry watchdogs began expressing growing fears that relaxed lending practices had increased "risks for borrowers and lenders in the overheated housing markets." Ruth Simon, *Mortgage Lenders Loosen Standards – Despite Growing Concerns, Banks Keep Relaxing Credit-Score, Income and Debt-Load Rules*, Wall St. J., July 26, 2005, at D1.

146. Indeed, trouble in the housing market emerged in 2005 when home values began to decline and the Federal Reserve instituted a series of interest rate hikes that caused interest rates on variable rate loans, including mortgage loans, to rise. In response, "bank regulators issued their first-ever guidelines for credit-risk management for home-equity lending" in May 2005. *Id.*

147. On July 26, 2005, the *Wall Street Journal* warned that "[m]ortgage lenders are continuing to loosen their standards, despite growing fears that relaxed

lending practices could increase risks for borrowers and lenders in overheated housing markets." *Id.*

148. In 2006, the media reported that nontraditional mortgages were growing even riskier as lenders originated a large number of "liar" loans. *See, e.g.*, Gretchen Morgenson, *Crisis Looms In Market for Mortgages*, N.Y. Times, Mar. 11, 2007, at 1.

149. In response to the increasing risks inherent in nontraditional lending, the Federal Reserve and the other banking agencies issued the "Interagency Guidance on Nontraditional Mortgage Product Risks," which sent a warning to the marketplace that bank regulators were concerned about the lessened underwriting standards and general lax risk management practices of some mortgage lenders. *See* Office of the Comptroller of the Currency Board of Governors of the Federal Reserve System, Interagency Guidance on Nontraditional Mortgage Product Risks, Sept. 29, 2006, http://www.federalreserve.gov/BoardDocs/SRLetters/2006/SR0615a2.pdf.

150. On December 20, 2006, the Center for Responsible Lending issued a report predicting the worst foreclosure crisis in the modern mortgage market. Ron Nixon, *Study Predicts Foreclosure for 1 In 5 Subprime Loans*, N.Y. Times, Dec. 20, 2006, at C1. Shortly thereafter, several major mortgage lenders disclosed extraordinary rates of loan defaults, triggering inquiries from the SEC and FDIC, and resulting in several bankruptcy filings. *Id.*

151. In early 2007, investment banks began to pull back from MBS in response to increased delinquencies.

152. On August 31, 2007, President Bush announced a limited bailout of U.S. homeowners unable to pay the rising costs of their debts. Steven R. Weisman, *Bush Plans a Limited Intervention on Mortgages*, N.Y. Times, Sept. 1, 2007, at C1.

153. In September of that year, the market for MBS evaporated and credit markets froze.

154. Additionally, the credit crisis is not without precedent. An overheated housing market and imprudent lending in the 1980s and 1990s caused the Savings and Loan Crisis, which resulted in hundreds of bank failures and helped lead the country into a recession. In 1998, the collapse of a single hedge fund, Long-Term Capital Management, temporarily froze credit markets around the world, foreshadowing the current credit market paralysis. Finally, in the late 1990s, the dot-com bubble burst, wiping out trillions of dollars in market value of technology companies and triggering another recession.

155. As early as 2002, the pattern began to emerge again: interest rates were dropping and home prices were rising. The country was in the midst of another housing bubble. And by the fall of 2005, housing prices were falling. Nonetheless, IndyMac continued its quest for market share throughout the Class Period, continually assuring investors and the Class that the Company was well positioned to capitalize on the housing market downturn even as foreclosure rates doubled.

156. IndyMac was playing a game of Russian roulette: the Company was banking on the market rebounding before it was forced to recognize the inevitable losses from its overexposure to toxic loans.

2. Defendants Knew that the Company was at Risk and Company Stock was Imprudent Because of the Company's Improper Business Practices.

157. Due to their positions within the Company, Defendants knew or should have known that IndyMac stock was an unduly risky investment option. They knew or should have known that the Company was at risk because it was extending below-standard mortgages that were at high risk of default, the

Company lacked adequate internal controls, and statements regarding the Company's net income and financial results were misleading and inaccurate.

158. In light of the published warnings described above, Defendants also knew that the housing market was cooling and the mortgage markets were unstable due to decreased demand and increased rates of default.

159. In his 2007 annual letter to shareholders, Defendant Perry admitted that "like many innovations (e.g., the Internet, railroads, etc.), innovative home lending went too far." Business Wire, *IndyMac Issues 2007 Annual Shareholder Letter*, Feb. 12, 2008, http://findarticles.com/p/articles/mi_m0EIN/is_2008_Feb_12/ai_n24257707. Indeed, "innovative home lending" led to the mortgage crisis and resultant credit crunch.

160. Perry acknowledged that IndyMac had contributed to the mortgage crisis, stating that the Company and other lenders "were part of the problem, and, as IndyMac's CEO, I take full responsibility for the mistakes that we made." *Id.* Nonetheless, Perry was careful to place considerable blame elsewhere and bemoan that the collapse of the mortgage and secondary markets was unforeseeable. However, this is not the case.

161. IndyMac's own improper business practices should have warned of the imprudence of Company stock and the Company's impending collapse.

162. Indeed, as early as July 2006—the beginning of the Class Period—it was clear the Company was overexposed to risk and in danger of facing dire financial circumstances.

163. Although Defendant Perry touted IndyMac's growth in the second quarter of 2006,[7] the Company instituted a hiring freeze in July: a clear sign that trouble was lurking at IndyMac.

[7] *See* IndyMac Current Report, Form 8-K, July 27, 2006, at Ex. 99.1.

164. Furthermore, Perry admitted during a conference call discussing the second quarter earnings that the Company had recorded a \$9.7 million loss in the first half of 2006 due to a fraud scheme that was the result of "massive collusion" between a mortgage broker and a developer in Michigan and Florida. . IndyMac Earnings Webcast & Teleconference Call for Second Quarter 2006 Financial Results, July 27, 2006. Perry admitted IndyMac had "gotten a little bit laxed," and that the Company "didn't have the focus on fraud that we should have in this area." *Id.*

165. And beginning in mid-2006, delinquency rates increased sharply and continued to rise throughout the Class Period.

166. Defendants should have been well aware of these developments.

167. Considering that 99% of IndyMac's earnings were derived from its mortgage-related businesses, any instability in the housing market or indication of improper mortgage-related practices should have put Defendants on notice that there was greater risk inherent in Plan investment in Company stock.

168. The published warnings detailed above began appearing in the popular press as early as 2005, and IndyMac's improper business practices were continuously brought to the attention of Defendants throughout the Class Period through numerous lawsuits and reports, as described previously.

169. As ERISA fiduciaries charged with the highest duty known to law, Defendants were required to investigate the merits of the Plan's huge investment in IndyMac stock and take prompt and effective action to protect the Plan from unnecessary losses. *See, e.g., Donovan v. Mazzola*, 716 F.2d 1226, 1232 (9th Cir. 1983). Defendants failed to do so.

170. To the extent that some Defendants did not have actual knowledge of the degree to which IndyMac stock was inflated due to the Company's undisclosed Alt-A and subprime exposure, those Defendants were on notice by virtue of the red

flags described above that should have caused them to investigate the risks posed by IndyMac stock. However, they conducted no such investigation.

171. Defendants had available to them several options for satisfying their fiduciary duties, including: (1) making appropriate public disclosures, as necessary; (2) divesting the Plan of IndyMac stock; (3) discontinuing further investment in IndyMac stock under the Plan; (4) consulting independent fiduciaries regarding appropriate measures to take in order to prudently and loyally serve the participants of the Plan; and/or (5) resigning as fiduciaries of the Plan to the extent that as a result of their employment by or association with IndyMac they were unable to loyally serve the Plan and its participants in connection with the Plan's acquisition and holding of IndyMac stock.

172. In the end, when the severity of the circumstances came to light, the Plan suffered significant losses, all or some of which could have been avoided had the Plan's fiduciaries acted prudently and loyally to protect the interests of Plan participants, as required by ERISA.

C. Despite Knowledge of IndyMac's Improper Business Practices and Inadequately Disclosed Stock Risk, Defendants Permit the Purchase of IndyMac Stock as Defendant Perry Touts IndyMac's Financial Health.

173. IndyMac's seemingly strong financial picture in recent years was based on its strategy to sell MBS on the secondary market and use that money to originate Alt-A and subprime loans, the majority of which were no-documentation or low-documentation loans and pay-option ARMs. As the housing market faltered, so too did the Company.

174. To assuage fears of the growing problems in the housing market, IndyMac repeatedly made false statements regarding its financial condition and false assurances to Plan participants and the public regarding the sufficiency of its risk-management processes and reserves for losses. These false statements caused the price of IndyMac stock to be artificially inflated during the Class Period.

175. The Company necessarily knew of its own financial condition, and Defendant Perry's position as CEO, Defendant Keys' position as CFO, and Defendant Wohl's position as President of the Bank indicate that they had access to adverse undisclosed information about the Company's business, operations, products, operational trends, financial statements, markets, and present and future business prospects via access to internal corporate documents (including the Company's operating plan, budgets and forecasts, and reports of actual operations compared thereto), conversations and connections with other corporate officers and employees, attendance at management and Board meetings, and receipt of reports and other information provided in connection with these meetings. Because of their access to this information, Defendants Perry, Keys, and Wohl knew or should have known that IndyMac's common stock was an imprudent investment for the Plan's assets during the Class Period.

176. In light of the steady drumbeat of published warnings of the risks inherent in nontraditional lending, as well as their own knowledge of the Company's financial condition, the remaining Defendants should have conducted an independent investigation of the risks posed by IndyMac stock during the Class Period. No prudent fiduciary would allow employees to invest in a company facing (and hiding) the tremendous risks IndyMac took on during the Class Period.

177. Nonetheless, the Plan's fiduciaries continued to offer IndyMac stock as an investment option and maintained IndyMac stock in the Plan. A prudent fiduciary facing similar circumstances would not have stood idly by as the Plan's assets inevitably decreased in value.

178. Despite Defendants' knowledge or what should have been their knowledge of IndyMac's risky business practices during the Class Period, the Company presented a positive outlook regarding IndyMac stock as an investment

for the Plan's assets. Management, including Defendant Perry, publicized strong Company performance and stock benefits.

179. IndyMac publicly and repeatedly highlighted favorable operating results and revenue growth trends, as well as other positive financial indicators even as the Company experienced financial trouble and the housing and secondary markets cooled.

180. Even when the Company was forced to institute a hiring freeze in July 2006, Defendants Perry and Keys highlighted IndyMac's "record results" and "strong performance." IndyMac Current Report, Form 8-K, July 27, 2006, at Ex. 99.1.

181. Reporting on the third quarter of 2006, Defendant Wohl recognized that "mortgage industry volumes continued to decline." IndyMac Current Report, Form 8-K, Nov. 2, 2006, at Ex. 99.1. Nonetheless, the Company's "mortgage production hit a record level for the eleventh consecutive quarter, growing 19 percent over the prior quarter." *Id.* Even though the country was experiencing a housing downturn, the Company continued its high loan production as Wohl touted that the Company's "market share nearly doubled over last year to an estimated 3.87 percent, an all-time high for Indymac, demonstrating strong progress in our core strategy of leveraging our mortgage banking infrastructure." *Id.*

182. Defendant Perry acknowledged the difficulties in the housing and mortgage markets but nevertheless predicted that IndyMac would "again achieve record EPS [earnings per share] in 2007." *Id.*

183. Not surprisingly, fourth quarter earnings fell short. Even still, Perry assured shareholders and the Class: "[W]e are redoubling our efforts to both improve our earnings and tighten up our forecasting processes." IndyMac Current Report, Form 8-K, Jan. 25, 2007, at Ex. 99.1.

184. Perry also noted that "[n]otwithstanding our earnings shortfall for the fourth quarter . . . for the full year 2006, we achieved record mortgage loan production. . . . Tough times, like what we are now facing, are when companies like IndyMac can gain ground on the competition – and this is exactly what we are doing." *Id.*

185. Even after the housing bubble had burst and the Company had experienced increased delinquencies and greater than forecasted losses, Perry put a positive spin on the Company's focus on increasing loan volume.

186. However, contrary to Perry's assertion, IndyMac was not gaining ground on the competition. Instead, the competition was relinquishing ground to IndyMac: banks such as Wells Fargo were decreasing their loan volume to minimize their exposure to the perceived risks associated with continued growth in the mortgage market.

187. During this period, as IndyMac was filing and facing lawsuits related to improper origination practices, Defendant Perry assured investors and the Class: "[W]e maintained reasonable and prudent credit quality in our mortgage loan production." *Id.*

188. Two months later, Perry reassured shareholders that IndyMac's heavy exposure to and investment in Alt-A loans was not subject to the same risks as subprime loans.

> I think the facts, as we've outlined them, speak for themselves in terms of the credit quality of Alt-A production versus subprime – and, in particular, how Indymac's credit quality shines in relation to the industry, validating our lending standards and practices. . . . Alt-A is not "slightly" less risky than subprime, it is a lot less risky. While Indymac does not have industry cumulative loss data for conforming loans for this time period, I find it inconceivable that conforming loan losses could be much lower than Indymac's Alt-A cumulative losses of less than 1/100th of one percent, or 0.81 basis points, at this time.

IndyMac Current Report, Form 8-K, Mar. 29, 2007, at Ex. 99.1.

189. On April 26, 2007, IndyMac announced its first quarter 2007 earnings, reporting net earnings of $52.4 million, down from $79.8 million in the first quarter 2006. Current Report, Form 8-K, April 26, 2007, at Ex. 99.1. Perry commented:

> While we are disappointed with these results because they are considerably below our historical levels, . . . our earnings must be considered solid in light of the challenging conditions we faced this quarter, particularly with respect to significant and unusual spread widening for private mortgage backed securities (i.e., pricing erosion with respect to loan sales into the secondary market) and increased credit costs. Very few mortgage companies earned a profit during the quarter, and many, in fact, failed.
>
> * * *
>
> This quarter was a serious test of our hybrid thrift/mortgage banking business model. . . . With our strong liquidity and stable funding base and the diversification of our earnings within home lending activities, we met this challenge very well, particularly in comparison to how we were able to perform during the global liquidity crisis of 1998.

Id.

190. The following quarter also experienced a decline in net earnings from the prior year. *See* IndyMac Current Report, Form 8-K, July 31, 2007, at Ex. 99.1. Nonetheless, Perry remained optimistic, explaining that the Company's performance "must be considered solid given current conditions in the mortgage and housing markets. Once again, the balance provided by our hybrid thrift/mortgage banking business model protected us in this environment." *Id.*

191. However, on August 22, in response to the declining interest in the secondary market, IndyMac announced it would re-enter the prime jumbo home

loan market. Scott Reckard, *IndyMac Overhauls Lending Strategy*, L.A. Times, Aug. 29, 2007, at C1. Perry predicted: "I think we've weathered the worst of the storm. You can see rays of hope coming through the clouds here." *Id.*

192. The Company also announced that it would hire approximately 800 new employees. *Id.* Perry again touted the Company's financial health, stating: "While we project that our overall mortgage volumes will be down substantially in the fourth quarter as we and all lenders have tightened guidelines, ***our fourth quarter mortgage banking revenue margins are presently forecasted to increase.***" *Id.* (emphasis added).

193. However, roughly one month later, the secondary market collapsed, and the Company could no longer securitize and sell its Alt-A and subprime loans. Consequently, IndyMac was forced to move a $10.7 billion portfolio of loans that it could no longer sell to the category of "held for investment."

194. In an effort to bolster its financial position and respond to concerns voiced by the Office of Thrift Supervision, IndyMac changed its business plan in November 2007 and moved away from nontraditional loans to focus entirely on originating mortgages that met the underwriting standards of government sponsored enterprises, and, therefore, could be purchased by Fannie Mae and Freddie Mac. *See* IndyMac Current Report, Form 8-K, Nov. 6, 2007, at Ex. 99.1.

195. In spite of these volatile circumstances, Defendant Perry continued to remain optimistic and as late as February 2008 was predicting that IndyMac would weather the downturn in the housing market and turn a profit. Vikas Bajaj, *Lax Lending Standards Led to IndyMac's Downfall*, N.Y. Times, July 29, 2008.

196. Then on April 30, 2008, Perry sent an email to Company employees informing them that "[g]iven the decline in our stock price, some people have questioned IndyMac's survivability in the current environment. I am here to tell you that I believe we have turned a corner and that our business is improving."

197. Nevertheless, two weeks later, the Company reported a loss of $184.2 million in the first quarter 2008, compared to net earnings of $52.4 million in the first quarter 2007. IndyMac Current Report, Form 8-K, May 12, 2008, at Ex. 99.1. Perry admitted that the Company "did not at this time forecast a return to overall profitability in 2008 given current market conditions, but we do forecast significantly declining losses each quarter for the balance of the year." *Id.*

198. Throughout the spring, IndyMac worked "feverishly to raise money, find an acquirer or sell parts of the company, an effort known inside the bank as 'Project Iron Man.'" Bajaj, *supra.*

199. However, by the end of June, IndyMac was unable to raise capital, prompting the Office of Thrift Supervision to finally determine that the Company was no longer "well capitalized"—less than two months after it allowed IndyMac Bank to backdate a much-needed infusion of capital.

200. The next month, on July 11, 2008, the OTS closed IndyMac and named the FDIC receiver and conservator. The OTS found that "[w]ith insufficient liquidity to meet its obligations, and no viable alternative to return to profitability and restore capital adequacy, IndyMac was in an unsafe and unsound condition to transact business." Office of Thrift Supervision, *OTS Fact Sheet on IndyMac Bank*, July 11, 2008, http://www.ots.treas.gov/docs/7/73001.pdf.

201. Throughout this period, Defendants continued to offer IndyMac stock as an investment option for Plan assets and maintained Company stock in the Plan. Over the course of the Class Period, IndyMac stock dropped 99.7% in value. Despite this precipitous decline and the serious mismanagement and dire financial circumstances that caused the decline, Defendants failed to take any action to protect the Plan from huge losses.

D. Defendants Failed to Provide the Plan's Participants, Beneficiaries, and their Co-Fiduciaries with Complete and Accurate Information about the True Risks of Investment in IndyMac Stock in the Plan.

202. ERISA mandates that plan fiduciaries have a duty of loyalty to the plan, its participants, and co-fiduciaries, which includes the duty to speak truthfully to the plan, its participants, and co-fiduciaries when communicating with them. A fiduciary's duty of loyalty under ERISA includes an obligation not to materially mislead or knowingly allow others to materially mislead plan participants, beneficiaries, or co-fiduciaries. *Hill v. BellSouth Corp.*, 313 F. Supp. 2d 1361, 1369 (N.D. Ga. 2004) (citing *Varity Corp. v. Howe*, 516 U.S. 489, 506 (1996)).

203. During the Class Period, on information and belief, Defendants made direct and indirect communications to Plan participants regarding the financial health of the Company. These communications also included, but were not limited to, SEC filings, annual reports, press releases, and Plan documents, in which Defendants failed to disclose that Company stock was an imprudent retirement investment, and which were incorporated by reference in Plan-related documents.

204. Defendant Perry regularly communicated with employees, including participants in the Plan, about the performance, future financial and business prospects of the Company (e.g., employee emails discussed *supra*) and about Company stock.

205. The Company regularly communicated with employees, including participants in the Plan, about the performance, future financial and business prospects of the Company, and Company stock.

206. Against the background of these misleading communications from the Company and Defendant Perry, the Fiduciary Committee Defendants, which had assigned responsibility for communicating with the Plan's participants (who had the ability to reduce their own exposure to Company stock through the Plan) and the remaining fiduciaries, failed to disclose facts that would have apprised the

Plan's participants of the risks presented by Company stock that, in turn, would have allowed them to conclude that their exposure to Company stock through the Plan should be reduced, or that Company stock was not a prudent retirement investment.

207. Further, Defendants, as the Plan's fiduciaries, knew or should have known certain basic facts about the characteristics and behavior of the Plan's participants—well-recognized in the 401(k) literature and the trade press—concerning investment in company stock, including that:

(1) employees tend to interpret a match in company stock as an endorsement of the company and its stock;

(2) out of loyalty, employees tend to invest in company stock;

(3) employees tend to over-extrapolate from recent returns, expecting high returns to continue or increase going forward;

(4) employees tend not to change their investment option allocations in the plan once made;

(5) lower income employees tend to invest more heavily in company stock than more affluent workers, though they are at greater risk; and

(6) even for risk-tolerant investors, the risks inherent in company stock are not commensurate with it rewards.

Bridgitte C. Mandrian and Dennis F. Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, 116 Q. J. Econ. 4, 1149 (2001), http://mitpress.mit.edu/journals/pdf/qjec_116_04_1149_0.pdf; *see also* Nellie Liang & Scott Weisbenner, *Investor Behavior and the Purchase Of Company Stock in 401(k) Plans the Importance of Plan Design*, Board of Governors for the Federal Reserve System Finance and Economics Discussion Series, No. 2002 36 (2002), http://www.federalreserve.gov/pubs/feds/ 2002/200236/200236pap.pdf.

208. Even though Defendants knew or should have known these facts, and even though Defendants knew of the high concentration of the Plan's funds in Company stock during the Class Period, Defendants failed to take any meaningful ameliorative action to protect the Plan and its participants from the heavy investment in IndyMac stock.

209. In particular, Defendants failed to provide participants, and the market as a whole, with complete and accurate information regarding the true financial condition of the Company, which was affected by, among other things, the Company's: (1) fraudulent and high-risk loan origination and investment practices; (2) lack of adequate internal controls over its improper loan origination and investment practices; (3) mismanagement of risk and liquidity; (4) failure to acknowledge, manage, and accurately disclose the risks associated with its mortgage loan origination and investment practices; (5) false, misleading, and incomplete statements regarding the Company's net income and financial results; (6) artificial inflation of IndyMac stock caused by these circumstances; and (7) dire financial circumstances created by IndyMac's improper business and accounting practices.

210. As a result, participants in the Plan could not appreciate the true risks presented by investments in Company stock and, therefore, could not make informed decisions regarding their Plan investments in Company stock.

211. Additionally, Defendants Perry, Keys, and Wohl knew all or a portion of the truth about the Company's financial condition and in particular about the risks posed to the Company by its exposure to the Alt-A, subprime, and MBS markets, as detailed previously. On information and belief, these Defendants with knowledge of some or all of the risks posed by the Plan's investment in Company stock failed to disclose this information to their co-fiduciaries who served on the MD&C Committee and the Fiduciary Committee, and were empowered by the

documents governing the Plans and ERISA to protect the Plan and its participants and beneficiaries by eliminating or limiting investment in Company stock, selling Company stock, and making appropriate disclosures to the Plan's participants and beneficiaries.

E. Defendants Suffered from Conflicts of Interest.

212. As ERISA fiduciaries, Defendants were required to manage the Plan's investments, including the investment in IndyMac stock, solely in the interest of the participants and beneficiaries, and for the exclusive purpose of providing benefits to participants and their beneficiaries. This duty of loyalty requires fiduciaries to avoid conflicts of interest and to resolve them promptly when they occur.

213. Conflicts of interest arise when a company that invests plan assets in company stock founders. As the situation deteriorates, plan fiduciaries are torn between their duties as officers and directors for the company on the one hand, and to the plan and plan participants on the other. As courts have made clear, "[w]hen a fiduciary has dual loyalties, the prudent person standard requires that he make a careful and impartial investigation of all investment decisions." *Martin v. Feilen*, 965 F.2d 660, 670 (8th Cir.1992) (citation omitted). Fiduciaries must avoid "placing themselves in a position where their acts as officers or directors of the corporation will prevent their functioning with the complete loyalty to participants demanded of them as trustees of a pension plan." *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982).

214. Because the compensation of several Defendants was significantly tied to the price of IndyMac stock, Defendants had an incentive to keep the Plan's assets invested in IndyMac stock on a regular, ongoing basis. Elimination of Company stock as an investment option for the Plan would have reduced the overall market demand for IndyMac stock and sent a negative signal to Wall Street

analysts and the market overall. Both results would have adversely affected the price of IndyMac stock, resulting in lower compensation for the Defendants.

215. Some Defendants may have had no choice in tying their compensation to IndyMac stock (because compensation decisions were out of their hands), but Defendants did have the choice of whether to keep the Plan's participants' and beneficiaries' retirement savings invested in IndyMac stock or whether to properly inform participants of material negative information concerning the above-outlined Company problems.

216. Finally, any signal to the market that the Company was not a sound, long term investment, such as the Plan's divestiture of IndyMac stock, would have called into question the Defendants' job performance as corporate officers. Rather than have anyone question their soundness as leaders of IndyMac, Defendants chose to remain silent and let the Plan continue to hold and acquire IndyMac stock.

217. These conflicts of interest put the Defendants in the position of having to choose between their own interests as directors, executives, and stockholders, and the interests of the Plan's participants and beneficiaries, in whose interests the Defendants were obligated to loyally serve with an "eye single."

218. Yet, Defendants did nothing to protect the Plan and the Plan's participants from the inevitable losses the Plan would suffer.

219. While the above Defendants protected themselves, they stood idly by as the Plan lost millions of dollars because of its investment in IndyMac stock.

IX. THE RELEVANT LAW

220. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), provides, in pertinent part, that a civil action may be brought by a participant for relief under ERISA § 409, 29 U.S.C. § 1109.

221. An individual may be a fiduciary for ERISA purposes either because the plan documents explicitly describe fiduciary responsibilities or because that

person functions as a fiduciary. *See* U.S.C. § 1002(21)(A); *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 262 (1993); *Concha v. London*, 62 F.3d 1493 (9th Cir. 1995).

222. When fiduciaries put the interests of the company or their own interests ahead of the interests of plan participants, they violate ERISA. A fiduciary may, therefore, be personally liable to plan participants for breaching the responsibilities, obligations, or duties imposed under the plan and must restore any losses to the plan with any profits the fiduciary made through use of plan assets. ERISA § 409(a), 29 U.S.C. § 1109(a).

223. ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), authorizes individual participants to seek equitable relief from fiduciaries, including, without limitation, injunctive relief and, as available under applicable law, constructive trust, restitution, and other monetary relief.

224. ERISA §§ 404(a)(1)(A) and (B), 29 U.S.C. §§ 1104(a)(1)(A) & (B), provide, in pertinent part:

> A fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries, for the exclusive purpose of providing benefits to participants and their beneficiaries, and with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims.

225. These fiduciary duties under ERISA §§ 404(a)(1)(A) and (B) are referred to as the duties of loyalty, exclusive purpose, and prudence and are the "highest known to the law." *Donovan v. Bierwirth*, 680 F.2d 263, 272 n.8 (2d Cir. 1982).

226. A fiduciary breaches the duty of loyalty when the fiduciary withholds information that the fiduciary knows or should know a participant would need to make an informed decision. Therefore, the duty of loyalty includes: (1) a negative

duty not to misinform; (2) an affirmative duty to inform when the fiduciary knows or should know that silence might be harmful; and (3) a duty to convey complete and accurate information material to the circumstances of participants and beneficiaries.

227. A fiduciary must avoid conflicts of interest and resolve them promptly when they do occur. As such, a plan fiduciary must always administer a plan with an exclusive purpose or "eye single" to the interests of the participants and beneficiaries, regardless of the interests of the fiduciaries themselves or the plan sponsor. *Bierwirth*, 680 F.2d at 271.

228. A plan fiduciary is also responsible for the investment and monitoring of plan investments, ensuring that only prudent investments are offered as plan options, and monitoring such investments to ensure that they *remain* prudent and suitable for the plan. *In re ADC Telecomm, ERISA Litig.,* No. 03-2989, 2004 U.S. Dist. LEXIS 14383 (D. Minn. July 26, 2004). This includes the duty to conduct an independent and thorough investigation into, and to continually monitor, the merits of all the investment alternatives of a plan to ensure that each investment is a suitable option for the plan.

229. ERISA § 405(a), 29 U.S.C. § 1105(a), "Liability for Breach by Co-Fiduciary," provides, in pertinent part:

> In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

> (1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;
>
> (2) if, by his failure to comply with section 404(a)(1), 29 U.S.C. § 1104(a)(1), in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or
>
> (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

230. Co-fiduciary liability is an important part of ERISA's regulation of fiduciary responsibility. Because ERISA permits the fractionalization of a fiduciary duty, there may be, as in this case, several ERISA fiduciaries involved in a given decision, such as the role of company stock in a plan. In the absence of co-fiduciary liability, fiduciaries would be incentivized to limit their responsibilities as much as possible and to ignore the conduct of other fiduciaries. The result would be a setting in which a major fiduciary breach could occur, but the responsible party could not easily be identified. Co-fiduciary liability obviates this. Even if a fiduciary did not participate in a breach, if he knows of a breach, he must take steps to remedy it.

> [I]f a fiduciary knows that another fiduciary of the plan has committed a breach, and the first fiduciary knows that this is a breach, the first fiduciary must take reasonable steps under the circumstances to remedy the breach. . . . [T]he most

> appropriate steps in the circumstances may be to notify the plan sponsor of the breach, or to proceed to an appropriate Federal court for instructions, or bring the matter to the attention of the Secretary of Labor. The proper remedy is to be determined by the facts and circumstances of the particular case, and it may be affected by the relationship of the fiduciary to the plan and to the co-fiduciary, the duties and responsibilities of the fiduciary in question, and the nature of the breach.

1974 U.S.C.C.A.N. 5038, 1974 WL 11542, at 5080.

231. Plaintiffs bring this action under the authority of ERISA § 502(a)(2) for relief under ERISA § 409(a) to recover losses sustained by the Plan arising out of the breaches of fiduciary duties by the Defendants for violations under ERISA § 404(a)(1) and ERISA § 405(a).

X. ERISA § 404(C) DEFENSE INAPPLICABLE

232. ERISA § 404(c), 29 U.S.C. § 1104(c), is an affirmative defense that provides a limited exception to fiduciary liability for losses that result from participants' exercise of control over investment decisions. In order for § 404(c) to apply, participants must in fact exercise "independent control" over investment decisions, and the fiduciaries must otherwise satisfy the numerous procedural and substantive requirements of § 404(c) and the regulations promulgated under it.

233. Here, ERISA § 404(c) does not apply for several reasons.

234. First, ERISA § 404(c) does not and cannot provide any defense to the fiduciaries' imprudent decision to select and continue offering IndyMac stock as an investment option in the Plan during the Class Period, because participants neither made this decision nor had control over it. *See* Final Reg. Regarding Participant Directed Individual Account Plan (ERISA Section 404(c) Plan) ("Final 404(c) Reg."), 57 Fed. Reg. 46906-01, 1992 WL 277875, at *46924 n.27 (Oct. 13, 1992)

(codified at 29 C.F.R. pt. 2550) (noting that "the act of limiting or designating investment options which are intended to constitute all or part of the investment universe of an ERISA § 404(c) plan is a fiduciary function which, whether achieved through fiduciary designation or express plan language, is not a direct or necessary result of any participant direction of such plan").

235. Second, ERISA § 404(c) does not apply to any Company stock in the Plan over which the participants had no control. On information and belief, at times during the Class Period, participants' ability to divest their Plan investments in IndyMac stock was restricted, which prevents true participant control over their Plan investment in IndyMac stock.

236. Third, ERISA § 404(c) does not apply to participant directed investment in IndyMac stock, because Defendants failed to ensure effective participant control by providing complete and accurate material information to participants regarding IndyMac stock. *See* 29 C.F.R. § 2550.404c-1(b)(2)(i)(B) (stating that the participant must be provided with "sufficient information to make informed decisions"). Indeed, pursuant to the DOL's regulation, a participant's "exercise of control is not independent in fact if . . . (ii) A plan fiduciary has concealed material non-public facts regarding the investment from the participant or beneficiary, unless the disclosure of such information . . . would violate [applicable law]." § 2550.404c-1(c)(2). Here at least the Company and Defendants Perry and Wohl have concealed such facts, as detailed previously. As a consequence, participants in the Plan did not have informed control over the portion of the Plan's assets invested in IndyMac stock, and the Defendants remain entirely responsible for losses that resulted from such investment.

237. Fourth, in order to be a § 404(c) plan that provides a participant or beneficiary with an opportunity to exercise control over the assets in his account, an identified plan fiduciary (or a person or persons designated by the plan fiduciary

to act on his behalf) must provide participants and beneficiaries with "a description of the procedures established to provide for the confidentiality of information relating to the purchase, holding and sale of employer securities, and the exercise of voting, tender and similar rights by participants and beneficiaries, and the name, address and phone number of the plan fiduciary responsible." 29 C.F.R. § 2550.404c-1(b)(2)(B)(1)(vii). On information and belief, no such information was provided to Plan participants.

238. Because ERISA § 404(c) does not apply here, the Defendants' liability to the Plan, Plaintiffs, and the Class for losses caused by the Plan's investment in IndyMac stock is established upon proof that such investment was or became imprudent and resulted in losses to the Plan during the Class Period.

XI. DEFENDANTS' INVESTMENT IN INDYMAC STOCK IS NOT ENTITLED TO A PRESUMPTION OF PRUDENCE

239. Some courts have applied a presumption of prudence to decisions by plan fiduciaries to invest plan assets in company stock in plans that qualify as Employee Stock Ownership Plans ("ESOPs") under the Internal Revenue Code and rules of the Department of the Treasury promulgated thereunder. The presumption is based on the ESOP's dual purpose of allowing employee stock ownership on the one hand and providing retirement savings on the other. *Moench v. Robertson*, 62 F.3d 553, 569, 571 (3d Cir. 1995) (explaining dual purpose of ESOPs and adopting presumption of prudence to balance these concerns). "A plaintiff may then rebut this presumption of reasonableness by showing that a prudent fiduciary acting under similar circumstances would have made a different investment decision." *Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995). The Ninth Circuit has twice declined to adopt the presumption of prudence. *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1102 (9th Cir. 2008).

240. Here, even if, contrary to Ninth Circuit precedent, the presumption were applied, the presumption is overcome by the facts alleged here, including, among other averments:

- a precipitous stock price decline from over $45 to under $0.14 per share during the Class Period;
- risk of imminent further collapse of the Company's stock price based on the Company's risky business practices;
- the Company's deteriorating financial condition as well as Defendants' conflicted status;
- serious mismanagement prompting governmental investigations and evidenced by, among other things, inappropriate and potentially unlawful loan origination practices;
- imprudent management of operational and financial risk;
- misrepresentations regarding IndyMac's financial condition;
- the consequential artificial inflation of IndyMac's stock; and
- dire financial circumstances causing IndyMac to be on the brink of collapse.

241. In light of these circumstances, Plaintiffs overcome the presumption of prudence regarding investment in IndyMac stock during the Class Period to the extent that the presumption applies at all.

242. The imprudence of continued investment by Defendants in IndyMac stock during the Class Period under the circumstances present here is recognized in DOL regulations.

> [B]ecause every investment necessarily causes a plan to forego other investment opportunities, an investment will not be prudent if it would be expected to provide a plan with a lower rate of return than available alternative investments with commensurate degrees of risk or is riskier than alternative available investments with commensurate rates of return.

29 C.F.R. 2509.94-1.

243. Defendants had available to them investment alternatives to IndyMac stock that had either a higher rate of return with risk commensurate to IndyMac stock or an expected rate of return commensurate to IndyMac stock but with less risk. *See In re Enron Corp. Sec., Derivative & ERISA Litig.*, 284 F. Supp. 2d 511, 547 (S.D. Tex. 2003). Based on these circumstances, and the others alleged herein, it was imprudent and an abuse of discretion for Defendants to continue to make and maintain investment in IndyMac stock, and, effectively, to do nothing to protect the Plan from significant losses as a result of such investment during the Class Period.

XII. CAUSES OF ACTION

A. Count I: Failure to Prudently and Loyally Manage the Plan and Assets of the Plan.

244. Plaintiffs incorporate by this reference the paragraphs above.

245. This Count alleges fiduciary breach against the following Defendants: the Fiduciary Committee Defendants (the "Prudence Defendants").

246. The Plan is governed by the provisions of ERISA, 29 U.S.C. §§ 1001, *et. seq.*, and Plaintiffs are participants of the Plan.

247. Each of the Prudence Defendants, on information and belief, were named fiduciaries pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), or *de facto* fiduciaries within the meaning of § 3(21)(A), 29 U.S.C. § 1002(21)(A), or

both. Thus, they were bound by the duties of loyalty, exclusive purpose, and prudence.

248. Each of the Prudence Defendants was also a co-fiduciary of the other Defendants, under ERISA § 405, 29 U.S.C. § 1105, with respect to the Plan and its participants. As co-fiduciaries, each of the Defendants is liable for the others' conduct under the terms of ERISA § 405(a), 29 U.S.C. § 1005(a).

249. As alleged above, the scope of the fiduciary duties and responsibilities of the Prudence Defendants included managing the assets of the Plan for the sole and exclusive benefit of Plan participants and beneficiaries, and with the care, skill, diligence, and prudence required by ERISA. On information and belief, the Prudence Defendants were directly responsible for, among other things, selecting prudent investment options, eliminating imprudent options, determining how to invest employer contributions to the Plan and directing the Trustee regarding the same, evaluating the merits of the Plan's investments on an ongoing basis, and taking all necessary steps to ensure that the Plan's assets were invested prudently.

250. Yet, contrary to their duties and obligations under the Plan's documents and ERISA, the Prudence Defendants failed to loyally and prudently manage the assets of the Plan. Specifically, during the Class Period, the Prudence Defendants knew or should have known that IndyMac stock no longer was a suitable and appropriate investment for the Plan, but was, instead, a highly speculative and risky investment in light of the Company's fundamental weaknesses. Nonetheless, during the Class Period, the Prudence Defendants continued to offer IndyMac stock as an investment option for participant contributions. They did so despite evidence that the Company was engaged in a fraudulent and highly risky business plan including rife predatory lending and had ignored industry regulations and warnings, as well as sound business practice in order to extend mortgages which were at high risk of default.

251. The Prudence Defendants were obliged to prudently and loyally manage all of the Plan's assets. However, their duties of prudence and loyalty were especially significant with respect to Company stock because: (1) company stock is a particularly risky and volatile investment, even in the absence of company misconduct; and (2) participants tend to underestimate the likely risk and overestimate the likely return of investment in company stock. In view of this, the Defendants were obliged to have in place a regular, systematic procedure for evaluating the prudence of investment in Company stock.

252. The Prudence Defendants had no such procedure. Moreover, they failed to conduct an appropriate investigation of the merits of continued investment in IndyMac stock even in light of the losses, the Company's highly risky and inappropriate practices, and the particular dangers that these practices posed to the Plan. Such an investigation would have revealed to a reasonably prudent fiduciary the imprudence of continuing to make and maintain investment in IndyMac stock under these circumstances.

253. The Prudence Defendants' decisions respecting the Plan's investment in IndyMac stock described above, under the circumstances alleged herein, abused their discretion as ERISA fiduciaries in that a prudent fiduciary acting under similar circumstances would have made different investment decisions. Specifically, based on the above, a prudent fiduciary could not have reasonably believed that further and continued investment of the Plan's contributions and assets in IndyMac stock was in keeping with the Plan settlor's expectations of how a prudent fiduciary would operate.

254. The Prudence Defendants were obligated to discharge their duties with respect to the Plan with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and

familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B).

255. According to DOL regulations and case law interpreting this statutory provision, a fiduciary's investment or investment course of action is prudent if: (1) he has given appropriate consideration to those facts and circumstances that, given the scope of such fiduciary's investment duties, the fiduciary knows or should know are relevant to the particular investment or investment course of action involved, including the role the investment or investment course of action plays in that portion of the plan's investment portfolio with respect to which the fiduciary has investment duties; and (2) he has acted accordingly.

256. Again, according to DOL regulations, "appropriate consideration" in this context includes, but is not necessarily limited to:

> (1) a determination by the fiduciary that the particular investment or investment course of action is reasonably designed, as part of the portfolio (or, where applicable, that portion of the plan portfolio with respect to which the fiduciary has investment duties), to further the purposes of the plan, taking into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action; and
>
> (2) consideration of the following factors as they relate to such portion of the portfolio:
>
> b. the composition of the portfolio with regard to diversification;

c. the liquidity and current return of the portfolio relative to the anticipated cash flow requirements of the plan; and

d. the projected return of the portfolio relative to the funding objectives of the plan.

257. Given the conduct of the Company as described above, the Prudence Defendants could not possibly have acted prudently when they continued to invest the Plan's assets in IndyMac stock because, among other reasons, the Prudence Defendants knew of and/or failed to investigate the failures of the Company, which included: (1) fraudulent and high-risk loan origination and investment practices; (2) lack of adequate internal controls over its improper loan origination and investment practices; (3) mismanagement of risk and liquidity; (4) failure to acknowledge, manage, and accurately disclose the risks associated with its mortgage loan origination and investment practices; (5) false, misleading, and incomplete statements regarding the Company's net income and financial results; (6) artificial inflation of IndyMac stock caused by these circumstances; and (7) dire financial circumstances created by IndyMac's improper business and accounting practices.

258. As such, the risk associated with the investment in IndyMac stock during the Class Period was far above the normal, acceptable risk associated with investment in company stock. Yet, Plan participants were unaware of this risk. The Prudence Defendants knew participants were unaware of the risk – as was the market generally – because the Prudence Defendants never disclosed it.

259. Thus, given this inequity, the Prudence Defendants had a duty to avoid permitting the Plan or any participant to invest Plan assets in IndyMac stock.

260. Further, knowing that the IndyMac common stock investment in the Plan was not a diversified portfolio, the Prudence Defendants had a heightened

responsibility to divest the Plan of Company stock if it became or remained imprudent.

261. The fiduciary duty of loyalty entails, among other things, a duty to avoid conflicts of interest and to resolve them promptly when they occur. A fiduciary must always administer a plan with single-minded devotion to the interests of the participants and beneficiaries, regardless of the interests of the fiduciaries themselves or the plan sponsor. On information and belief, at least some of the Prudence Defendants acted in their own self-interest in benefiting from selling huge amounts of Company stock at fraudulently inflated values. Fiduciaries laboring under such conflicts, must, in order to comply with the duty of loyalty, make special efforts to assure that their decision making process is untainted by the conflict and made in a disinterested fashion, typically by seeking independent financial and legal advice obtained only on behalf of the plan.

262. The Prudence Defendants breached their duty to avoid conflicts of interest and to promptly resolve them by: (1) failing to engage independent advisors who could make independent judgments concerning the Plan's investment in IndyMac stock; (2) failing to notify appropriate federal agencies, including the DOL, of the facts and circumstances that made IndyMac stock an unsuitable investment for the Plan; (3) failing to take such other steps as were necessary to ensure that participants' interests were loyally and prudently served; (4) failing to disregard the impact of their duty to avoid conflicts of interest on their own compensation; and (5) placing their own and IndyMac's improper interests above the interests of the participants with respect to the Plan's investment in IndyMac stock.

263. Moreover, a fiduciary's duties of loyalty and prudence require it to disregard plan documents or directives that it knows or reasonably should know would lead to an imprudent result or would otherwise harm plan participants or

beneficiaries. ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). Thus, a fiduciary may not blindly follow plan documents or directives that would lead to an imprudent result or that would harm plan participants or beneficiaries, nor allow others, including those whom they direct or who are directed by the plan, to do so.

264. The Prudence Defendants breached this duty by: (1) continuing to offer IndyMac stock as an investment option for participants of the Plan; (2) allowing participants to invest Plan assets in IndyMac stock rather than in cash or other short-term investment options; and (3) engaging in this course of conduct when the Prudence Defendants knew or should have known that IndyMac stock no longer was a prudent investment for participants' retirement savings.

265. As a consequence of the Prudence Defendants' breaches of fiduciary duty alleged in this Count, the Plan suffered tremendous losses. If the Prudence Defendants had discharged their fiduciary duties to prudently invest the Plan's assets, the losses suffered by the Plan would have been minimized or avoided. Therefore, as a direct and proximate result of the breaches of fiduciary duty alleged herein, the Plan, and indirectly Plaintiffs and the other Class members, lost millions of dollars of retirement savings.

266. Pursuant to ERISA §§ 409, 502(a)(2) and (a)(3), 29 U.S.C. §§ 1109(a), 1132(a)(2) and (a)(3), the Prudence Defendants are liable to restore the losses to the Plan caused by their breaches of fiduciary duties alleged in this Count and to provide other equitable relief as appropriate.

B. Count II: Failure to Monitor Fiduciaries.

267. Plaintiffs incorporate by this reference the allegations above.

268. This Count alleges fiduciary breach against the following Defendants: the MD&C Committee Defendants, Defendant Perry, and the Director Defendants (the "Monitoring Defendants").

269. As alleged above, during the Class Period the Monitoring Defendants were named fiduciaries pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), or *de facto* fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), or both. Thus, they were bound by the duties of loyalty, exclusive purpose, and prudence.

270. As alleged above, the scope of the fiduciary responsibilities of the Monitoring Defendants included the responsibility to appoint, and remove, and thus, monitor the performance of other fiduciaries, including (1) monitoring the Fiduciary Committee Defendants by the MD&C Committee and Defendant Perry, and (2) monitoring the MD&C Committee Defendants by the Director Defendants.

271. Under ERISA, a monitoring fiduciary must ensure that the monitored fiduciaries are performing their fiduciary obligations, including those with respect to the investment and holding of plan assets, and must take prompt and effective action to protect the plan and participants when they are not.

272. The monitoring duty further requires that appointing fiduciaries have procedures in place so that on an ongoing basis they may review and evaluate whether the "hands-on" fiduciaries are doing an adequate job (for example, by requiring periodic reports on their work and the plan's performance, and by ensuring that they have a prudent process for obtaining the information and resources they need). In the absence of a sensible process for monitoring their appointees, the appointing fiduciaries would have no basis for prudently concluding that their appointees were faithfully and effectively performing their obligations to plan participants or for deciding whether to retain or remove them.

273. Furthermore, a monitoring fiduciary must provide the monitored fiduciaries with complete and accurate information in their possession that they know or reasonably should know that the monitored fiduciaries must have in order

to prudently manage the plan and the plan assets, or that may have an extreme impact on the plan and the fiduciaries' investment decisions regarding the plan.

274. On information and belief, the Monitoring Defendants breached their fiduciary monitoring duties by, among other things: (1) failing, at least with respect to the Plan's investment in Company stock, to monitor their appointees, to evaluate their performance, or to have any system in place for doing so, and standing idly by as the Plan suffered enormous losses as a result of their appointees' imprudent actions and inaction with respect to Company stock; (2) failing to ensure that the monitored fiduciaries appreciated the true extent of IndyMac's highly risky and inappropriate business and accounting practices, and the likely impact of such practices on the value of the Plan's investment in IndyMac stock; (3) to the extent any appointee lacked such information, failing to provide complete and accurate information to all of their appointees such that they could make sufficiently informed fiduciary decisions with respect to the Plan's assets; and (4) failing to remove appointees whose performance was inadequate in that they continued to make and maintain investments in IndyMac stock despite their knowledge of practices that rendered IndyMac stock an imprudent investment during the Class Period for participants' retirement savings in the Plan, and who breached their fiduciary duties under ERISA.

275. As a consequence of the Monitoring Defendants' breaches of fiduciary duty, the Plan suffered tremendous losses. If the Monitoring Defendants had discharged their fiduciary monitoring duties as described above, the losses suffered by the Plan would have been minimized or avoided. Therefore, as a direct and proximate result of the breaches of fiduciary duty alleged herein, the Plan, and indirectly Plaintiffs and the other Class members, lost millions of dollars of retirement savings.

276. Pursuant to ERISA §§ 409, 502(a)(2) and (a)(3), 29 U.S.C. §§ 1109(a), 1132(a)(2) and (a)(3), the Monitoring Defendants are liable to restore the losses to the Plan caused by their breaches of fiduciary duties alleged in this Count and to provide other equitable relief as appropriate.

C. Count III: Failure to Disclose Necessary Information to Co-Fiduciaries.

277. Plaintiffs incorporate by this reference the allegations above.

278. This Count alleges fiduciary breach against the following Defendants: Defendant Perry, Defendant Keys, and Defendant Wohl (collectively, the "Disclosure Defendants").

279. As previously alleged, the Disclosure Defendants were fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), during the Class Period. Thus, they were bound by the duties of loyalty, exclusive purpose, and prudence.

280. Pursuant to the duties of prudence and loyalty, fiduciaries are required to disclose to their co-fiduciaries information that they know is unavailable to their co-fiduciaries, but that such co-fiduciaries need to protect the interests of the plan. *See Glaziers and Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Securities*, 93 F.3d 1171 (3rd Cir. 1996).

281. The Disclosure Defendants were fiduciaries of the Plan who possessed non-public information during the Class Period about the risks posed by IndyMac stock, which they knew could be used by other fiduciaries of the Plan to protect the Plan and its participants and beneficiaries.

282. While the MD&C Committee Defendants and the Fiduciary Committee Defendants should have sought sufficient information concerning the risks posed by investment in Company stock, those fiduciaries in possession of such knowledge should have supplied that information to them voluntarily in the fulfillment of the fiduciary duties they owed to the Plan. To the extent disclosure

of such information was necessary before taking action to protect the Plan, such disclosure should have been made.

283. The Disclosure Defendants profited from their breach of this duty.

284. Pursuant to ERISA §§ 409, 502(a)(2) and (a)(3), 29 U.S.C. §§ 1109(a), 1132(a)(2) and (a)(3), the Disclosure Defendants are liable to restore the losses to the Plan caused by their breaches of fiduciary duties alleged in this Count, to disgorge any profits made through their breach and to provide other equitable relief as appropriate.

D. Count IV: Failure to Provide Complete and Accurate Information to the Plan's Participants and Beneficiaries.

285. Plaintiffs incorporate by this reference the allegations above.

286. This Count alleges fiduciary breach against the following Defendants: Defendant Perry and the Fiduciary Committee Defendants (collectively, the "Communications Defendants").

287. As previously alleged, the Communications Defendants were named fiduciaries pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), or *de facto* fiduciaries within the meaning of § 3(21)(A), 29 U.S.C. § 1002(21)(A), or both. Thus, they were bound by the duties of loyalty, exclusive purpose, and prudence.

288. At all relevant times, the scope of the fiduciary responsibility of the Fiduciary Committee Defendants included the communications and material disclosures to the Plan participants and beneficiaries. In addition, Defendant Perry acted as a *de facto* communicating fiduciary as a result of his extensive communications directly with employees/Plan participants regarding the Company and its likely future prospects. Defendant Perry knew that the employees' retirement savings were invested significantly in IndyMac stock in the Plan, that his communications concerned this investment, and, thus, concerned Plan benefits, and constituted acts of Plan administration under ERISA.

289. The duty of loyalty under ERISA requires fiduciaries to speak truthfully to participants, not to mislead them regarding the plan or plan assets, and to disclose information that participants need in order to exercise their rights and interests under the plan. This duty to inform participants includes an obligation to provide participants and beneficiaries of the plan with complete and accurate information, and to refrain from providing false information or concealing material information, regarding plan investment options such that participants can make informed decisions with regard to the prudence of investing in such options made available under the plan. This duty applies to all of the Plan's investment options, including investment in IndyMac stock.

290. Because investments in the Plan were not diversified (i.e. Defendants chose to or allow Plan assets to be invested so heavily in IndyMac stock), such investment carried with it an inherently high degree of risk. This inherent risk made the Communications Defendants' duty to provide complete and accurate information particularly important with respect to IndyMac stock.

291. The Communications Defendants breached their duty to inform participants by failing to provide complete and accurate information regarding IndyMac's serious mismanagement and improper business practices and public misrepresentations, and the consequential artificial inflation of the value of IndyMac stock, and, generally, by conveying incomplete information regarding the soundness of IndyMac stock and the prudence of investing and holding retirement contributions in IndyMac equity. These failures were particularly devastating to the Plan and its participants because Plan assets were invested in IndyMac stock during the Class Period, and when the value of IndyMac stock collapsed, the Plan participants' retirement savings plummeted.

292. Defendants' omissions clearly were material to participants' ability to exercise informed control over their Plan accounts, as in the absence of the

information, participants did not know the true risks presented by the Plan's investment in IndyMac stock.

293. Defendants' omissions and incomplete statements alleged herein were Plan-wide and uniform in that Defendants failed to provide complete and accurate information to any of the Plan's participants.

294. Defendants in this Count were unjustly enriched by the fiduciary breaches described in this Count.

295. As a direct and proximate result of the breaches of fiduciary duties alleged herein, the Plan, and indirectly Plaintiffs and the Plan's other participants and beneficiaries, lost a significant portion of their retirement investment.

296. Pursuant to ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) and ERISA § 409(a), 29 U.S.C. § 1109(a), Defendants in this Count are liable to restore the losses to the Plan caused by their breaches of fiduciary duties alleged in this Count.

E. Count V: Co-Fiduciary Liability.

297. Plaintiffs incorporate by this reference the allegations above.

298. This Count alleges co-fiduciary liability against all Defendants.

299. As alleged above, during the Class Period Defendants were named fiduciaries pursuant to ERISA § 402(a)(1), 29 U.S.C. § 1102(a)(1), or *de facto* fiduciaries within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), or both. Thus, they were bound by the duties of loyalty, exclusive purpose, and prudence.

300. As alleged above, ERISA § 405(a), 29 U.S.C. § 1105, imposes liability on a fiduciary, in addition to any liability which he may have under any other provision, for a breach of fiduciary responsibility of another fiduciary with respect to the same plan if knows of a breach and fails to remedy it, knowingly participates in a breach, or enables a breach. Defendants breached all three provisions.

301. **Knowledge of a Breach and Failure to Remedy.** ERISA § 405(a)(3), 29 U.S.C. § 1105, imposes co-fiduciary liability on a fiduciary for a fiduciary breach by another fiduciary if, he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach. Each Defendant knew of the breaches by the other fiduciaries and made no efforts, much less reasonable ones, to remedy those breaches. In particular, they did not communicate their knowledge of the Company's illegal activity to the other fiduciaries.

302. IndyMac, through its officers and employees, was unable to meet its business goals, engaged in highly risky and inappropriate business practices, withheld material information from the market, and profited from such practices, and, thus, knowledge of such practices is imputed to IndyMac as a matter of law.

303. Because Defendants knew of the Company's failures and inappropriate business practices, they also knew that Defendants were breaching their duties by continuing to invest in Company stock. Yet, they failed to undertake any effort to remedy these breaches. Instead, they compounded them by downplaying the significance of IndyMac's failed and inappropriate business practices, and obfuscating the risk that the practices posed to the Company, and, thus, to the Plan.

304. **Knowing Participation in a Breach.** ERISA § 405(a)(1), 29 U.S.C. § 1105(1), imposes liability on a fiduciary for a breach of fiduciary responsibility of another fiduciary with respect to the same plan if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach. IndyMac knowingly participated in the fiduciary breaches of Defendants in that it benefited from the sale or contribution of its stock at prices that were disproportionate to the risks for Plan participants. Likewise, Monitoring Defendants knowingly participated in the breaches of

Defendants because, as alleged above, they had actual knowledge of the facts that rendered IndyMac stock an imprudent retirement investment and yet, ignoring their oversight responsibilities, permitted Defendants to breach their duties.

305. **Enabling a Breach.** ERISA § 405(a)(2), 29 U.S.C. § 1105(2), imposes liability on a fiduciary if by failing to comply with ERISA § 404(a)(1), 29 U.S.C. §1104(a)(1), in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled another fiduciary to commit a breach.

306. The Monitoring Defendants' failure to monitor Defendants, particularly the Fiduciary Committee Defendants and the MD&C Defendants, enabled those Defendants to breach their duties.

307. As a direct and proximate result of the breaches of fiduciary duties alleged herein, the Plan, and indirectly Plaintiffs and the Plan's other participants and beneficiaries, lost millions of dollars of retirement savings.

308. Pursuant to ERISA §§ 409, 502(a)(2) and (a)(3), 29 U.S.C. §§ 1109(a), 1132(a)(2) and (a)(3), Defendants are liable to restore the losses to the Plan caused by their breaches of fiduciary duties alleged in this Count and to provide other equitable relief as appropriate.

XIII. CAUSATION

309. The Plan suffered millions of dollars in losses because substantial assets of the Plan were imprudently invested or allowed to be invested by Defendants in IndyMac stock during the Class Period, in breach of Defendants' fiduciary duties.

310. Defendants are liable for the Plan's losses in this case because the Plan's investment in IndyMac stock was the result of Defendants' decision to imprudently maintain the assets of the Plan in IndyMac stock. Thus, Defendants are liable for these losses because they failed to take the necessary and required

steps to ensure effective and informed independent participant control over the investment decision-making process, as required by ERISA § 404(c), 29 U.S.C. § 1104(c), and the regulations promulgated thereunder.

311. Had the Defendants properly discharged their fiduciary and co-fiduciary duties, including the monitoring and removal of fiduciaries who failed to satisfy their ERISA-mandated duties of prudence and loyalty, eliminating IndyMac stock as an investment alternative when it became imprudent, and divesting the Plan of IndyMac stock when maintaining such an investment became imprudent, the Plan would have avoided some or all of the losses that they, and indirectly, the participants suffered.

XIV. REMEDY FOR BREACHES OF FIDUCIARY DUTY

312. The Defendants breached their fiduciary duties in that they knew or should have known the facts as alleged above, and therefore knew or should have known that the Plan's assets should not have been invested in IndyMac stock during the Class Period.

313. As a consequence of the Defendants' breaches, the Plan suffered significant losses.

314. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2) authorizes a plan participant to bring a civil action for appropriate relief under ERISA § 409, 29 U.S.C. § 1109. Section 409 requires "any person who is a fiduciary . . . who breaches any of the . . . duties imposed upon fiduciaries . . . to make good to such plan any losses to the plan." Section 409 also authorizes "such other equitable or remedial relief as the court may deem appropriate."

315. With respect to calculation of the losses to the Plan, breaches of fiduciary duty result in a presumption that, but for the breaches of fiduciary duty, the Plan would not have made or maintained their investments in the challenged investment and, instead, prudent fiduciaries would have invested the Plan's assets

in the most profitable alternative investment available to them. Alternatively, losses may be measured not only with reference to the decline in stock price relative to alternative investments, but also by calculating the additional shares of IndyMac stock that the Plan would have acquired had the Plan fiduciaries taken appropriate steps to protect the Plan. The Court should adopt the measure of loss most advantageous to the Plan. In this way, the remedy restores the Plan's lost value and puts the participants in the position they would have been in if the Plan had been properly administered.

316. Plaintiffs and the Class are therefore entitled to relief from the Defendants in the form of: (1) a monetary payment to the Plan to make good to the Plan the losses to the Plan resulting from the breaches of fiduciary duties alleged above in an amount to be proven at trial based on the principles described above, as provided by ERISA § 409(a), 29 U.S.C. § 1109(a); (2) injunctive and other appropriate equitable relief to remedy the breaches alleged above, as provided by ERISA §§ 409(a), 502(a)(2) and (3), 29 U.S.C. §§ 1109(a), 1132(a)(2) and (3); (3) injunctive and other appropriate equitable relief pursuant to ERISA § 502(a)(3), 29 U.S.C. 1132(a)(3), for knowing participation by a non-fiduciary in a fiduciary breach; (4) reasonable attorney fees and expenses, as provided by ERISA § 502(g), 29 U.S.C. § 1132(g), the common fund doctrine, and other applicable law; (5) taxable costs and interest on these amounts, as provided by law; and (6) such other legal or equitable relief as may be just and proper.

317. Under ERISA, each Defendant is jointly and severally liable for the losses suffered by the Plan in this case.

XV. CLASS ACTION ALLEGATIONS

318. **Class Definition.** Plaintiffs bring this action as a class action pursuant to Rules 23(a), (b)(1), (b)(2) and (b)(3) of the Federal Rules of Civil

Procedure on behalf of Plaintiffs and the following class of persons similarly situated (the "Class"):

319. All persons, other than Defendants, who were participants in or beneficiaries of the Plan at any time between July 1, 2006 and the present, and whose accounts included investments in IndyMac stock.

320. **Class Period.** The fiduciaries of the Plan knew or should have known at least by July 1, 2006 and through the present that the Company's material weaknesses were so pervasive that IndyMac stock could no longer be offered as a prudent investment for retirement Plan.

321. **Numerosity.** The members of the Class are so numerous that joinder of all members is impracticable. While the exact number of Class members is unknown to Plaintiffs at this time, and can only be ascertained through appropriate discovery, Plaintiffs believe there are, based on the Plan's Form 5500 for Plan year 2006, approximately 8,900 members of the Class who participated in, or were beneficiaries of, the Plan during the Class Period.

322. **Commonality.** Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting solely individual members of the Class. Among the questions of law and fact common to the Class are:

(1) whether Defendants each owed a fiduciary duty to Plaintiffs and members of the Class;

(2) whether Defendants breached their fiduciary duties to Plaintiffs and members of the Class by failing to act prudently and solely in the interests of the Plan's participants and beneficiaries;

(3) whether Defendants violated ERISA; andwhether the Plan has suffered losses and, if so, what is the proper measure of damages.

323. **Typicality.** Plaintiffs' claims are typical of the claims of the members of the Class because: (1) to the extent Plaintiffs seek relief on behalf of the Plan pursuant to ERISA § 502(a)(2), his claim on behalf of the Plan is not only typical to, but identical to a claim under this section brought by any Class member; and (2) to the extent Plaintiffs seek relief under ERISA § 502(a)(3) on behalf of himself for equitable relief, that relief would affect all Class members equally.

324. **Adequacy.** Plaintiffs will fairly and adequately protect the interests of the members of the Class and has retained counsel competent and experienced in class action, complex, and ERISA litigation. Plaintiffs have no interests antagonistic to or in conflict with those of the Class.

325. **Rule 23(b)(1)(B) Requirements.** Class action status in this ERISA action is warranted under Rule 23(b)(1)(B) because prosecution of separate actions by the members of the Class would create a risk of adjudications with respect to individual members of the Class which would, as a practical matter, be dispositive of the interests of the other members not parties to the actions, or substantially impair or impede their ability to protect their interests.

326. **Other Rule 23(b) Requirements.** Class action status is also warranted under the other subsections of Rule 23(b) because: (1) prosecution of separate actions by the members of the Class would create a risk of establishing incompatible standards of conduct for Defendants; (2) Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive, declaratory, or other appropriate equitable relief with respect to the Class as a whole; and (3) questions of law or fact common to

members of the Class predominate over any questions affecting only individual members and a class action is superior to the other available methods for the fair and efficient adjudication of this controversy.

XVI. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for:

A. A Declaration that the Defendants, and each of them, have breached their ERISA fiduciary duties to the participants;

B. A Declaration that the Defendants, and each of them, are not entitled to the protection of ERISA § 404(c)(1)(B), 29 U.S.C. § 1104(c)(1)(B);

C. An Order compelling the Defendants to make good to the Plan all losses to the Plan resulting from Defendants' breaches of their fiduciary duties, including losses to the Plan resulting from imprudent investment of the Plan's assets, and to restore to the Plan all profits the Defendants made through use of the Plan's assets, and to restore to the Plan all profits which the participants would have made if the Defendants had fulfilled their fiduciary obligations;

D. Imposition of a Constructive Trust on any amounts by which any Defendant was unjustly enriched at the expense of the Plan as the result of breaches of fiduciary duty;

E. An Order requiring Defendants to appoint one or more independent fiduciaries to participate in the management of the Plan's investment in IndyMac stock;

F. Actual damages in the amount of any losses the Plan suffered, to be allocated among the participants' individual accounts in proportion to the accounts' losses;

G. An Order awarding costs pursuant to 29 U.S.C. § 1132(g);

H. An Order awarding attorneys' fees pursuant to the common fund doctrine, 29 U.S.C. § 1132(g), and other applicable law; and

I. An Order for equitable restitution and other appropriate equitable and injunctive relief against the Defendants.

DATED January 5, 2009.

BRAUN LAW GROUP, P.C.

By ______________________

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

In re: IndyMac ERISA Litigation PLAINTIFF(S) v. DEFENDANT(S).	CASE NUMBER 08-04579 DDP (VBKx) **SUMMONS**

TO: DEFENDANT(S): INDYMAC BANK, F.S.B., et al. (see Attachment A)

A lawsuit has been filed against you.

Within 20 days after service of this summons on you (not counting the day you received it), you must serve on the plaintiff an answer to the attached ☐ complaint ☑ Consolidated ~~amended~~ complaint ☐ counterclaim ☐ cross-claim or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff's attorney, Michael D. Braun, whose address is 12304 Santa Monica Blvd., Suite 109 Los Angeles, CA 90025. If you fail to do so, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Clerk, U.S. District Court

Dated: 5 JAN 2009

By: MARILYN DAVIS
Deputy Clerk

(Seal of the Court)

SEAL

[Use 60 days if the defendant is the United States or a United States agency, or is an officer or employee of the United States. Allowed 60 days by Rule 12(a)(3)].

ATTACHMENT A to SUMMONS

Additional Defendants:

Bancorp Management Development and Compensation Committee
Bank Management Development & Compensation Committee
Bruce G. Willison
Hugh M. Grant
Jennifer Pikoos
Jim Barbour
John F. Seymour
Ken Horner
Kevin Cochrane
Louis E. Caldera
Lydia H. Kennard
Lyle E. Gramley
Michael W. Perry
Patrick C. Haden
Rayman Mathoda
Richard H. Wohl
Robert L. Hunt
Robert L. Hunt, II
Scott Keys
Terrance G. Hodel