

**UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA**

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**SECURITIES AND EXCHANGE  
COMMISSION,**

**Plaintiff,**

**vs.**

**Case No. CV 11-1309 R**

**MICHAEL W. PERRY and A. SCOTT  
KEYS,**

**Defendants.**

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**EXPERT REPORT OF ANGELO A. VIGNA**

**I. Qualifications**

1. I am a former Regional Director of the Office of Thrift Supervision (OTS), a former Executive Vice President/Director of Agency Functions of the Federal Home Loan Bank of New York (FHLB), and have more than 30 years of experience as a senior banking/thrift regulator. At the OTS, I was the Senior Federal Officer in charge of examination, supervisory, and regulatory oversight of more than 400 savings institutions in the Northeast with total assets of approximately \$200 billion; and served as the primary regulator and chief regional liaison with representatives of the Resolution Trust Company for the resolution of approximately 100 thrifts. I also contributed to the development of OTS regulatory policies and procedures. At the FHLB, I provided regulatory oversight for more than 300 federally insured thrift institutions in New York, New Jersey, and Puerto Rico with total assets of approximately \$120 billion. In this

role, I oversaw the resolution of hundreds of financially distressed thrift institutions through mergers and other means. In addition, for more than a decade, I was a Managing Director at Sandler O'Neill & Partners, an investment bank that specializes in the financial services industry. My CV is attached as Exhibit 1. A list of cases in which I have testified as an expert at trial or by deposition during the past four years is attached as Exhibit 2.

## **II. Assignment**

2. I have been retained by counsel for Michael W. Perry and A. Scott Keys to opine on various regulatory issues involving IndyMac Bank, F.S.B. (“the Bank”) and its holding company, IndyMac Bancorp, Inc. (“Bancorp” or “IMB”), as they relate to the claims asserted by the SEC against Messrs. Perry and Keys.

3. In preparing this report, I relied upon my experience in the financial services industry and, in particular, my experience as a regulator for the OTS and FHLB. In addition, as part of this assignment, I have reviewed and relied on documents related to the issues in this case. These documents are listed in Exhibit 3 to this report.

4. I am being compensated at my usual rate of \$600 per hour. My compensation is not dependent on the outcome of this matter.

5. My work in this matter is ongoing. I reserve the right to revise my opinions in light of any additional materials including data, documents, expert reports, and deposition or other testimony that may subsequently come to light, or if I am asked to perform further research or analysis.

## **III. Summary of Opinions**


6. Based on my review of the materials and my knowledge and experience as a banking regulator, I conclude the following:

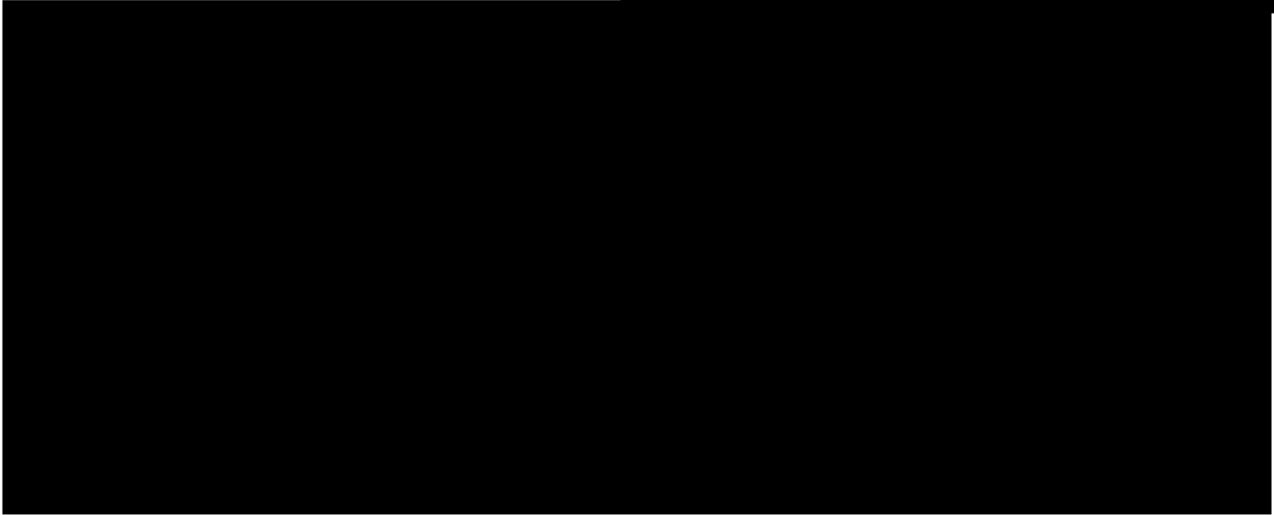
- It was appropriate for the Bank to calculate and report its regulatory capital ratios at March 31, 2008 in accordance with criteria approved by the OTS, the Bank's primary federal regulator.
- It is a common regulatory practice for regulators to require institutions under their supervision to submit non-public specialized reports covering areas of concern or interest to the regulator.
- The Bank was prohibited by OTS regulation from publicly disclosing its CAMELS rating or any potential changes to its CAMELS rating.
- It has been the OTS's longstanding policy and practice to look to thrift holding companies as sources of strength for their thrift subsidiaries. In this regard, it is common and customary for holding companies to maintain sufficient capital at their thrift subsidiaries through capital market transactions.

#### **IV. Discussion**

7. In July 2000, IndyMac Mortgage Holdings, Inc., a real estate investment trust, acquired SGV Bancorp and its thrift subsidiary, First Federal Savings and Loan Association of San Gabriel Valley ("FFSGV"). IndyMac Mortgage changed its name to IndyMac Bancorp, Inc. and FFSGV changed its name to IndyMac Bank, F.S.B. The transaction was approved by the OTS, the thrift's primary federal regulator, in Order No. 2000-55, dated June 20, 2000 ("2000 Order"). Among the conditions imposed by the OTS in approving the application was a requirement that in calculating its risk-based capital requirement IndyMac Bank must double risk weight all subprime loans whether held for investment or held for sale. The 2000 Order provided that all the conditions set forth therein, including the one regarding the double risk-

weighting of subprime loans, were to be satisfied “in a manner satisfactory to the West Regional Director [of the OTS] or his designee.” 2000 Order ¶ 2.

8. Beginning in July 2000, the Bank calculated its risk-based capital ratios in compliance with this OTS regulatory standard. 



9. Based on my years as an OTS Regional Director and federal bank regulator, it is not unusual for an OTS regional director to modify the supervisory requirements imposed on an institution as regulatory requirements and the institution’s financial condition change.

Depending on the specific circumstances, an OTS regional director may decide to impose additional requirements on an institution, loosen or eliminate certain supervisory requirements, or change the type of supervisory requirements altogether. As a practical matter, it is not uncommon for OTS modifications to supervisory requirements to be informal.

10. I further understand that the OTS approved the Bank’s request to accrue an \$18 million intercompany receivable from Bancorp to the Bank as of March 31, 2008, and include that \$18 million as part of the Bank’s regulatory capital as of March 31, 2008 in its first quarter 2008 Thrift Financial Report (“TFR”), based on a cash transfer to the Bank that occurred on May 9, 2008. I understand that Bancorp had this \$18 million cash on hand on March 31, had a policy

of contributing capital to the Bank as needed to keep the Bank well capitalized, and, like many other thrift holding companies, routinely contributed capital to the Bank to keep the Bank well capitalized. Moreover, it has been the long-standing policy of the OTS to look to thrift holding companies to act as sources of strength for their subsidiary thrifts and to contribute capital as needed to keep the institutions well capitalized and safe and sound.

11. Because the Bank's primary federal regulator, the OTS, approved the transaction and did not raise any safety and soundness concerns, it is my opinion that the Bank acted appropriately by calculating its capital ratios as of March 31, 2008 in accordance with the criteria approved by the OTS.

12. The Bank was well capitalized (i.e., total risk-based capital ratio exceeded the 10 percent minimum threshold for a well-capitalized institution) according to criteria approved by the OTS as of March 31, 2008. Accordingly, Bancorp's disclosures in its 2007 10-K and first quarter 2008 10-Q that the Bank was well capitalized were entirely accurate.

13. Even if the Bank's total risk-based capital ratio had been slightly below 10 percent as of March 31, 2008, the Bank still would have been an "adequately-capitalized" institution under OTS regulations. As an adequately-capitalized institution, the Bank might have been subject to restrictions on the use of brokered deposits, but it was fairly common during that period for the FDIC to grant waivers from such restrictions. The fact that Bancorp made an additional contribution to the Bank on May 9, 2008 to bolster the Bank's capital ratios would have increased the likelihood of such a waiver.

14. In any event, as noted, the Bank was a well-capitalized institution as of March 31, 2008 according to OTS-approved criteria for calculating the Bank's capital ratios. It is virtually unprecedented for a well-capitalized institution to fail as quickly as the Bank did. As the OTS

recognized after the Bank's seizure in July 2008, the failure of the Bank was precipitated by a unique event: a bank run caused by the public release on June 26, 2008 of a letter from Senator Charles Schumer questioning the Bank's long-term viability. An OTS fact sheet released after the FDIC's seizure states that, in the three days *before* June 27, the Bank had a net deposit *inflow* totaling \$31.2 million. But from June 27 to July 10 (the day before the Bank's seizure), it suffered a net deposit *outflow* of 1.3 billion. *See* Exhibit 4. Consequently, the OTS concluded that the Bank was in an unsafe and unsound condition due to its inability to meet its obligations to depositors and creditors -- not insufficient capital -- and was placed in receivership.

15. It is common for regulated financial institutions to provide information to their regulator that goes beyond the information that the institution publicly discloses. Institutions do this to keep their regulator fully apprised about company operations. Such information might include such items as results of stress tests, internal forecasts, analyses of the ALLL methodology under different scenarios, progress in resolving problem assets, and analyses of what the institution's capital ratios would be under hypothetical scenarios. [REDACTED]

16. [REDACTED]

17.

CAMELS is the uniform evaluation system used by federal financial institution regulators to evaluate the soundness of a bank measured on a scale of 1 (strongest) to 5 (weakest). These ratings are awarded on the basis of the adequacy and quality of a bank's Capital, Assets (loans and investments), Management, Earnings, Liquidity and Sensitivity to Market Risk (to systemic risk). Banks with a rating of 1 are considered most stable; banks with a rating of 2 or 3 are considered of average risk; and those with a 4 or 5 are considered below average and closely monitored to ensure their viability. Federal law, however, precluded the Bank from publicly disclosing information about the CAMELS rating assigned to it by the OTS, or from disclosing possible changes to the CAMELS rating assigned to it by the OTS. Indeed, any public disclosure of such information by IndyMac management could have resulted in regulatory and/or criminal sanctions.<sup>1</sup> In this regard, the four banking regulatory agencies in February 2005 issued an Interagency Advisory on the Confidentiality of the Supervisory Rating and Other Non-Public Supervisory Information.

18. IndyMac would have been required to disclose a formal enforcement action by the OTS resulting from any CAMELS downgrade, but no such formal enforcement action had been taken by the OTS when the SEC filings at issue in this case were made. Accordingly, there was nothing for IndyMac to disclose with respect to its CAMELS rating, or the effects thereof, in the relevant SEC filings.

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<sup>1</sup> See 18 U.S.C. § 1906; 12 C.F.R. § 510.5.

19. The SEC's contemporaneous guidance on the disclosure of regulatory actions supports my conclusion. In December 2009, after dozens of bank failures, the SEC published its annual "Areas of Frequent Staff Comment – Financial Institutions." The publication states that only formal enforcement agreements and informal enforcement agreements that have a "material impact on future operations" need to be disclosed. The SEC therefore does not require disclosure of the possible consequences of a potential formal enforcement order. Nor should informal enforcement documents automatically be disclosed, particularly because federal bank regulators treat these as non-public documents. *See* Exhibit 5 (p. 48–49).

20. It should also be noted that the OTS is not *required* to take formal enforcement action against a CAMELS [REDACTED] institution. Indeed, the OTS took only informal enforcement action against IndyMac through late June 2008. Such informal action consisted of requiring the Bank to agree to a Memorandum of Understanding ("MOU") that became effective on June 20, 2008, the same day IndyMac was downgraded from a CAMELS [REDACTED]. Only after the public release of Senator Charles Schumer's June 26, 2008 letter did the OTS seek to impose a formal enforcement action, presenting a Cease and Desist ("C&D") Order to the company on July 3, 2008. I understand the FDIC put the Bank into receivership before the C&D Order was executed.

21. In my experience, the core purpose of a thrift holding company is to serve as a source of financial and managerial strength to its subsidiary bank and to ensure that the subsidiary does not conduct its operations in an unsafe or unsound manner. It is standard practice for holding companies to maintain sufficient capital at their thrift subsidiaries by raising capital from investors. This is especially true for unitary thrift holding companies, which control only a single thrift. Unlike other thrift holding companies, Bancorp was a unitary thrift holding

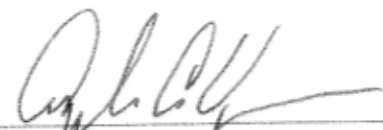


company with no operations or significant assets of its own. Investors in a holding company like Bancorp would well understand that capital raised through a direct stock purchase plan or otherwise would have been used to maintain the subsidiary bank's capital ratios and otherwise support its operations.

22. Additionally, as noted above, it was longstanding OTS policy and practice to look to holding companies under its jurisdiction as sources of financial strength for their federally-insured subsidiaries by raising and contributing capital. Further to this policy and practice, the Government Accountability Office explained in 2005 that the OTS had "instituted standards designed to ensure that the holding company serves as a source of strength for its insured depository institution subsidiaries." *See* Exhibit 6 (p. 31). For this further reason, investors would well understand that Bancorp would likely have contributed capital to the Bank to support its capital ratios and otherwise maintain the Bank's financial strength.

DATED:

4/6/12

  
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Angelo A. Vigna