UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. MICHAEL W. PERRY and A. SCOTT KEYS, Defendants.	Case No. CV-11-1309-R

Rebuttal Report
of Linda MacDonald

Senior Managing Director
FTI Consulting, Inc.

April 23, 2012

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I. INTRODUCTION

1. FTI Consulting, Inc. ("FTI") has been retained by Covington & Burling LLP, counsel for Defendant Michael W. Perry, the former Chairman and Chief Executive Officer (CEO) of IndyMac Bancorp, Inc. ("Bancorp") and its wholly-owned subsidiary, IndyMac Bank, F.S.B. ("Bank"), in connection with the above-referenced matter. On behalf of FTI, I have been asked to respond to the opinions reached by Professor Anthony Saunders in his April 6, 2012 Report submitted on behalf of Plaintiff U.S. Securities and Exchange Commission ("SEC") (here and after, the "Saunders Report") to the extent they relate to the $18 million capital contribution recorded as an intercompany payable/receivable at March 31, 2008.

2. FTI was engaged in this matter at the hourly billing rates of the individuals assigned, plus expenses. My billing rate in this matter is $600 per hour. My fees are not contingent on the opinions expressed herein or on the outcome of these proceedings.

3. In performing this engagement, I and/or staff working under my direction have reviewed various materials, including the Saunders Report. A listing of relevant materials I reviewed and considered in preparing this report is attached as Exhibit A. As of the date of this report my work on this matter is ongoing and I may amend this report based on new information that comes to my attention during such review.

II. PROFESSIONAL BACKGROUND

4. I am a senior managing director in the forensic and litigation consulting practice of FTI, based in New York. I have over 25 years of professional experience in financial accounting and reporting. At FTI, I have served as a testifying and consulting expert in various litigation matters, including those involving the application of generally accepted accounting principles ("GAAP") in financial accounting and reporting and many involving financial institutions.

5. I joined FTI in 2008 after nearly 12 years at the Financial Accounting Standards Board ("FASB"), where I was a director. While at the FASB as a director and before that as a project manager, I was involved in establishing U.S. accounting standards, and managed the projects that established the FASB's accounting standards on fair value measurements ("FAS 157"), restructuring obligations ("FAS 146"), and asset impairments and disposals, including discontinued operations ("FAS 144"). I coordinated with the International Accounting Standards Board (IASB) on convergence with international accounting standards ("IFRS") and advised on implementation of the standards after they were issued. I also was involved in various initiatives to address complexity in financial reporting, including the FASB's initiative on principles-based standards.

6. I began my career as an auditor for a national public accounting firm (now Deloitte & Touche, LLP). I was with Deloitte & Touche, LLP from 1983-1986. I was a member of the staff of the Division of Enforcement of the U.S. Securities and Exchange Commission ("SEC") in Washington, DC from 1987-1990. While at the SEC, I worked on enforcement investigations into possible fraud and violations of GAAP and generally

accepted auditing standards ("GAAS") associated with the financial statements of public companies. After leaving the SEC in 1990, I held positions with national public accounting firms (Deloitte & Touche, LLP and Eisner & Co, both in New York) where I provided expert consulting services in litigation matters, including those involving the application of GAAP in financial accounting and reporting. I joined the FASB in 1996.

7. I hold an M.B.A. in finance from American University and a B.A. in economics and management from Albion College. I am a certified public accountant and a former member of the Technical Standards Subcommittee of the AICPA Ethics Committee (1995-1996) and of the AICPA Not-For-Profit Fair Value Task Force (2009-2011).

8. I have been a frequent speaker on accounting topics at national industry and professional conferences, and other events. My publications in the past ten years are "Fair Value Changes Ahead," *The CPA Journal* (January 2010) and "Don't Bury Fair-Value Accounting Just Yet," *Conde Nast Portfolio.com* (October 7, 2008). I also contributed to FASB publications, including, "Some Facts about Fair Value," (May 2008).

9. A list of matters in which I have provided expert testimony in the past four years is attached as Exhibit B.

III. OPINION

10. Based on my review of the materials listed in Exhibit A and my knowledge, training, and professional experience, it is my opinion that the $18 million capital contribution was not "backdated" to March 31, 2008 in the Bank's Q1 2008 regulatory filings, as Professor Saunders asserts. Rather, the $18 million capital contribution was appropriately recorded as an intercompany payable/receivable at March 31, 2008 under GAAP, which forms the basis for the Bank's reporting in the regulatory filings. Accordingly, there was no act of "backdating" to be disclosed in Bancorp's Q1 2008 SEC filings.

IV. BACKGROUND

11. At a time of unprecedented market disruption caused by the global financial crisis that was then unfolding, Bancorp determined that a capital contribution of $70 million was needed to maintain the Bank's well-capitalized status at March 31, 2008. Bancorp made the $70 million capital contribution to the Bank on March 31, 2008. [SEC Ex-614; EY-IMB-WP-08-000585-587] In the Bank's Q1 2008 Thrift Financial Report ("TFR") issued on April 30, 2008, the total risk-based capital ratio ("capital ratio") at March 31, 2008 was 10.15%, above the 10% well-capitalized threshold established by the Office of Thrift Supervision ("OTS"), the Bank's primary federal regulator. [Q1 2008 TFR]

12. After the Bank issued its Q1 2008 TFR, Bancorp became aware that its outside auditors, Ernst & Young ("E&Y"), had proposed adjustments in connection with their quarterly review. [SEC Ex-731; EY-IMB-WP-08-000447-448] At that time, Bancorp understood that the adjustments could cause the Bank's capital ratio at March 31, 2008 to fall below the 10% well-capitalized threshold.[1] [2/21/12 deposition of Gregory Stephen Sosnovich at 60, 224-225; 12/17/09 testimony of Michael W. Perry at 427] A May 9, 2008 memorandum prepared by E&Y explains:

> In the course of our review of the interim financial statements of IndyMac, we identified several review differences. In combination with the turnaround effects of the differences from our 2007 audit, these review differences had an adverse impact on the Company's total risk-based capital ratio as of March 31, 2008 in that the ratio fell below 10% "well-capitalized" minimum threshold if the differences were to be recorded. [EY-IMB-WP-08-000158-163 at 162]

13. To maintain the Bank's well-capitalized status at March 31, 2008, Bancorp recorded an additional $18 million capital contribution to the Bank in the form of an intercompany payable/receivable at March 31, 2008 and amended the Bank's Q1 2008 TFR. [Sec Ex-529; SEC Ex-531] The $18 million intercompany payable/receivable was paid (by Bancorp) and received (by the Bank) as part of a $50 million capital contribution made to the Bank on May 9, 2008, before Bancorp issued its Q1 2008 Form 10-Q. [SEC Ex-621; EY-IMB-WP-08-000655, EY-IMB-WP-08-000651] As Mr. Perry testified, the "$50 million was in two parts, it was an $18 million payback of the receivable and a $32 million capital contribution, additional capital contribution" in Q2 2008. [12/17/09 testimony of Michael W. Perry at 457:3-6]

14. In Bancorp's Q1 2008 Form 10-Q issued on May 12, 2008, the $18 million intercompany payable/receivable eliminated in consolidation. It had no effect on the capital reported at the consolidated level. In the Bank's Q1 2008 TFR as amended on May 12, 2008, the $18 million intercompany receivable was classified within assets,

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[1] I understand that as it turned out, the proposed E&Y adjustments would not have caused the Bank's capital ratio at March 31, 2008 to fall below the 10% well-capitalized threshold. [2/21/12 deposition of Gregory Stephen Sosnovich at 238-241]

increasing the capital reported by the Bank. The capital ratio at March 31, 2008 was 10.26%.[2] [Q1 2008 TFR as amended (page 31)]

15. Bancorp's Q1 2008 Form 10-Q disclosed:

> Our capital levels continue to exceed the levels defined as "well capitalized" by our regulators. At March 31, 2008 Indymac Bank's Tier 1 "core" capital ratio was 5.74%, our Tier 1 risk-based capital ratio was 9.00%, and our total risk-based capital ratio was 10.26%, each above the "well-capitalized" regulatory levels of 5.00%, 6.00%, and 10.00%, respectively." [Q1 2008 Form 10-Q (page 4, footnote reference omitted)]

This same disclosure was made in the presentation used for the May 12, 2008 Q1 2008 earnings call, which added, "[t]he Bancorp contributed $88 million to the Bank during Q1 08." [May 12, 2008 Form 8-K (Exhibit 99.2)]

V. <u>THE ALLEGED BACKDATING</u>

16. Relying on the SEC Complaint in this matter, Professor Saunders asserts that the capital ratio disclosed in Bancorp's Q1 2008 SEC filings (10.26%) was false and misleading because the $18 million capital contribution was "backdated" to March 31, 2008 in the Bank's Q1 2008 regulatory filings.[3] In that regard, Professor Saunders refers to the fact that for purposes of the Bank's regulatory reporting in the Q1 2008 TFR as amended, the $18 million capital contribution was recorded as an intercompany receivable in a period other than the period in which it was paid (by Bancorp) and received (by the Bank). Clearly, the underlying presumption is that this timing of recognition (at March 31, 2008) somehow violated GAAP, which forms the basis for the Bank's reporting in the regulatory filings.[4]

17. Recognition is a key concept underlying GAAP and its application. FASB Concepts Statement No. 5, *Recognition and Measurement in Financial Statements of Business Enterprises*, ("CON 5") explains, "Recognition is the process of formally recording or incorporating an item" in GAAP financial statements (for example, as a liability or asset). [¶6] Yet the issue of recognition in GAAP is not addressed or otherwise referred to by Professor Saunders (or the SEC).

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[2] The capital ratio reported in the Q1 2008 TFR as amended (10.26%) did not include the effect of the proposed E&Y adjustments. [Perry 11/22/11 response to SEC Interrogatory No. 1] At the May 10, 2008 Bancorp Audit Committee meeting, Mr. Abernathy explained, "none of the adjustments were deemed material individually or in the aggregate to the financial statements." [SEC Ex-661]

[3] Professor Saunders states, "For purposes of preparing this report and developing the opinions expressed herein, I assume that the facts alleged in the SEC's Complaint in this case are true." [Saunders Report ¶8]

[4] "OTS guidance requires thrifts to follow GAAP for all regulatory reports. The regulatory reporting requirements at 12 CFR Section 562.2(b)(i) require thrifts to incorporate GAAP whenever GAAP is the referenced accounting instruction." [May 21, 2009 "Audit Report: Safety and Soundness: OTS Involvement with Backdated Capital Contributions by Thrifts," issued by the Office of Inspector General, (page 7)]

18. As a basis for addressing issues like this one under GAAP the primary focus must be on recognition. That is the essential starting point. The related issues that then follow are measurement and classification. Measurement refers to the amount at which an item is recognized in GAAP financial statements. Classification refers to where in GAAP financial statements the item is shown (for example, within assets, liabilities, or equity). I address those issues below.

A. Recognition in GAAP Financial Statements

19. The threshold issue relates to the timing of recognition, specifically, whether it was appropriate under GAAP to give accounting recognition to the $18 million capital contribution as an intercompany payable/receivable at March 31, 2008.

20. GAAP financial statements are prepared on an accrual basis, not on a cash basis.[5] This means that payables/receivables are regularly recorded in GAAP financial statements. Thus, whether and/or when the $18 million capital contribution was paid (by Bancorp) and received (by the Bank) is not relevant here. What is relevant is whether the $18 million intercompany payable (a liability) and the corresponding $18 million intercompany receivable (an asset) arose from an obligation by Bancorp to maintain the Bank's well-capitalized status at March 31, 2008 that qualified for recognition under the definition of liabilities used for GAAP purposes.

21. FASB Concepts Statement No. 6, *Elements of Financial Statements*, ("CON 6") defines liabilities (and assets) for GAAP purposes. Liabilities are present obligations requiring a future sacrifice of economic benefits.[6] Present obligations are not limited to legal obligations; they also include equitable and constructive obligations. [CON 6, ¶35 F/N 22] CON 6 clarifies, "although most liabilities rest generally on a foundation of legal rights and duties, existence of a legally enforceable claim is not a prerequisite for an obligation to qualify as a liability if for other reasons the entity has the duty or responsibility to pay cash, to transfer other assets, or to provide services to another entity." [¶36] In turn, assets represent economic benefits that are obtained or controlled by an entity.[7] CON 6 clarifies, "although the ability of an entity to obtain benefit from an asset and to control others' access to it generally rests on a foundation of legal rights, legal enforceability of a claim to the benefit is not a prerequisite for a benefit to qualify as an asset if the entity has the ability to obtain and control the benefit in other ways." [¶26]

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[5] FASB Concepts Statement No. 1, *Objectives of Financial Reporting by Business Enterprises*, ("CON 1") explains, "Information about enterprise earnings and its components measured by accrual accounting generally provides a better indication of enterprise performance than information about current cash receipts and payments. Accrual accounting attempts to record the financial effects on an enterprise of transactions and other events and circumstances that have cash consequences for an enterprise in the periods in which those transactions, events, and circumstances occur rather than only in the periods in which cash is received or paid by the enterprise." [¶44]

[6] CON 6 defines liabilities as, "probable future sacrifices of economic benefits arising from present obligations of a particular entity to transfer assets or provide services to other entities in the future as a result of past transactions or events." [¶35, F/N references omitted]

[7] CON 6 defines assets as, "probable future economic benefits obtained or controlled by a particular entity as a result of past transactions or events." [¶25, F/N reference omitted]

22. The record indicates that as a thrift holding company subject to regulation by the OTS, Bancorp had an obligation to maintain the Bank's well-capitalized status at March 31, 2008 that qualified for recognition under the definition of liabilities used for GAAP purposes. Further, Bancorp was committed to fulfilling its obligation at March 31, 2008. Thus, it was appropriate under GAAP to give accounting recognition to the $18 million capital contribution as an intercompany payable/receivable at March 31, 2008.

1. Bancorp had an obligation to maintain the Bank's well-capitalized status at March 31, 2008

23. OTS practice was to look to thrift holding companies to serve as sources of strength to their subsidiary banks.[8] For example:

- In the 1/30/09 letter from John Reich, OTS Director, to Timothy Geithner, Secretary of the Treasury, John Reich states, "It is important to note that ensuring strong capital is a key to maintaining a safe and sound institution—the goal of prudential bank supervision. The OTS has a longstanding practice of looking to the holding company as a source of strength for maintaining strong capital in the thrift." [page 1]
- In the 5/18/09 letter from John Bowman, OTS Acting Director, to Susan Barron, OIG Audit Director, John Bowman states, "The contributions [made by Bancorp and other similarly situated thrifts] were consistent with OTS's primary safety and soundness mission and longstanding practice of requiring holding companies to serve as sources of financial support for their FDIC-insured subsidiary thrifts to help prevent or reduce potential losses to the deposit insurance fund." [page 2]
- The OTS Directors' Responsibilities Guide (April 2008), official guidance to directors of thrifts and thrift holding companies, established that in the event of a conflict between the interests of Bancorp and the interests of the Bank, the interests of the Bank were "paramount." [page 16]

24. Bancorp's own Enterprise Risk Management ("ERM") policy encompassed the source of strength practice of its banking regulator. Through Bancorp's ERM policy, the Boards directed Mr. Perry, as Bancorp's CEO, to "maintain capital ratios at the Bank" that at all times met the minimum criteria for a well-capitalized thrift established by the OTS, including a "Total Risk-based Capital Ratio of no less than 10%." [ERM Policy – "Capital Adequacy," approved 12/10/07 (page 4 of 49)]

2. Bancorp was committed to fulfilling its obligation

25. Bancorp's SEC filings from Q1 2006 up through Q1 2008 indicate that in keeping with its ERM policy, Bancorp's practice was to raise capital as necessary to maintain the Bank's well-capitalized status:

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[8] In the April 6, 2012 Expert Report submitted by Angelo A. Vigna on behalf of Defendants Michael W. Perry and A. Scott Keys ("Vigna Report"), Mr. Vigna states, "It has been the OTS's longstanding policy and practice to look to thrift holding companies as sources of strength for their thrift subsidiaries." [¶6]

- In 2006 Bancorp raised $148.5 million in common equity and $188 million in trust preferred securities, and contributed $354.1 million to the Bank. [2006 Form 10-K (page F-6, F-7, F-31); 2007 Form 10-K (page F-6, F-7, F-37)]
- In 2007 Bancorp raised $145.6 million in common equity and $30 million in trust preferred securities, and contributed $260 million to the Bank. [2007 Form 10-K (page 59, F-6, F-7, F-37)] In addition, the Bank raised $491 million in Series A Preferred Stock. [2007 Form 10-K (page F-7, F-51, F-58)]
- Up through March 31, 2008, Bancorp raised $39 million in common equity and contributed $88 million to the Bank. [Q1 2008 Form 10-Q (page 4, 48, 74, 75), May 12, 2008 Form 8-K (Ex 99.2)]
- The capital contributions made by Bancorp maintained the Bank's well-capitalized status at each reporting date within the period above, including at March 31, 2008.

26. Mr. Keys testified, "Again, we had frequent discussions about raising as much money as we could through the DSPP with the goal of contributing as much as needed to maintain well capitalized status at March 31." [11/19/09 testimony of Allen Scott Keys at 162:23-25, 163:1] Similarly, Mr. Perry testified that there was "a heavy focus on keeping IndyMac safe and [s]ound" up through issuance of the Q1 2008 Form 10-Q. [12/16/09 testimony of Michael W. Perry at 121:2] "[O]ur goal was to contribute – to raise as much capital and contribute as much capital as we could to keep IndyMac well capitalized in the first quarter." [12/17/09 testimony of Michael W. Perry at 257:14-16]

3. A written note is merely a promise to pay

27. The May 21, 2009 "Audit Report: Safety and Soundness: OTS Involvement with Backdated Capital Contributions by Thrifts," issued by the Office of Inspector General ("OIG"), which Professor Saunders includes in the listing of materials reviewed and considered in Appendix 2 to his Report, states that the OIG concluded that the $18 million capital contribution was "backdated" to March 31, 2008 in violation of GAAP (page 6) because the Bank "had not recorded a note receivable from the holding company before the quarter ended" (page 16, 29). The Bank did not record a note receivable from the holding company before quarter end. However, that is not relevant here.

28. In substance, a written note is merely a promise to pay. FASB Statement No. 146, *Accounting for Costs Associated with Exit or Disposal Activities*, ("FAS 146") clarifies, "In general, an obligation is created by an entity's promise, on which others are justified in relying, to take a particular course of action (perform) that will entail the future transfer or use of assets." [¶B19] The entity's promise may be "(2) stated in words, either oral or written, or (3) inferred from the entity's past practice, which, absent evidence to the contrary, others can presume that the entity will continue." [¶B19(a)]

29. Bancorp clearly had a past practice of making capital contributions as necessary to maintain the Bank's well-capitalized status evidencing an obligation at March 31, 2008. Further, the record indicates that these capital contributions were made without having had a written note in place. Mr. Perry testified, "Well, we wouldn't have done this as a note, it's an intercompany transaction between a wholly-owned subsidiary." [12/17/09 testimony of Michael W. Perry at 442:5-6] An emphasis on a written note subordinates substance to form. FASB Concepts Statement No. 2, *Qualitative Characteristics of Accounting Information,* ("CON 2") explains, "The quality of reliability and, in particular, of representational faithfulness leaves no room for accounting representations that subordinate substance to form."[9] [¶160]

30. Even if there had been a written note from Bancorp evidencing its obligation at March 31, 2008, the timing of its recording in the books and records used for GAAP reporting (at or after March 31, 2008) would not be relevant. Amounts reported in GAAP financial statements are often recorded after the balance sheet date. The closing process necessarily results in administrative delays. As Mr. Perry testified, this was the case here. "Lots of entries were booked after 3/31 that applied to 3/31, probably hundreds of entries. That's what accrual accounting is all about." [12/17/09 testimony of Michael W. Perry at 442:15-18] Mr. Perry explained that at the time he asked the OTS for approval to amend the Q1 2008 TFR to record the $18 million capital contribution at March 31, 2008, "we had not closed our books, it was – I knew that it was accrual accounting. We were using accrual accounting, and so we were, you know, I was proposing to accrue for the capital that was at the holding company, the $18 million, in the form of a receivable and book that as capital, as an accrual. We were doing lots of other accruals subsequent to quarter end." [12/17/09 testimony of Michael W. Perry at 439:5-11]

B. Measurement in GAAP Financial Statements

31. The issue that then follows relates to measurement of the intercompany payable/receivable at March 31, 2008, specifically, whether it was appropriate under GAAP to measure the intercompany payable/receivable based on the additional $18 million capital contribution Bancorp subsequently determined was needed to maintain the Bank's well-capitalized status at March 31, 2008.

32. AU Section 560, *Subsequent Events*, the relevant guidance in effect at the time (included within GAAS), requires companies to revise the estimates recorded in GAAP financial statements for information that becomes available after the balance sheet date but before issuance of the financial statements if that information provides additional

[9] CON 2 defines representational faithfulness as "Correspondence or agreement between a measure or description and the phenomenon that it purports to represent (sometimes called validity)." [Glossary] CON 2 clarifies, "In accounting, the phenomena to be represented are economic resources and obligations and the transactions and events that change those resources and obligations." [¶63]

evidence about conditions existing at the balance sheet date.[10] The record indicates that this was the case here.

33. Against the backdrop of the unprecedented market disruption caused by the global financial crisis that was then unfolding, Bancorp initially estimated that a $70 million capital contribution was needed to maintain the Bank's well-capitalized status at March 31, 2008. (Because the $70 million capital contribution was paid to the Bank at March 31, 2008, the intercompany obligation was initially measured at zero.) However, at that time, the estimates inherent in the process of preparing the Q1 2008 GAAP financial statements were subject to change, having potential implications for the Bank's well-capitalized status at March 31, 2008.[11]

34. Mr. Perry was aware of this. In his communications to the OTS regarding the Bank's initial Q1 2008 TFR filing on April 30, 2008 (which included the $70 million capital contribution made to the Bank on March 31, 2008), Mr. Perry explained:

> The above numbers will still not be final until our SOX procedures are fully complete and the audit committee and E&Y complete their procedures and in times like these, with significantly more judgment applied given the illiquid markets (especially for securities), these processes take more time and there could be material changes to the above that would later cause us to amend the Thrift Report. With that said, I am hopeful that will not be the case. [SEC Ex-516]

35. As it turned out, the numbers changed. Bancorp subsequently determined that its initial estimate ($70 million) fell short, and that an additional $18 million capital contribution was needed to maintain the Bank's well-capitalized status at March 31, 2008. The additional $18 million capital contribution, determined after March 31, 2008 but before issuance of Bancorp's Q1 2008 Form 10-Q, was based on information that provided additional evidence about conditions existing at March 31, 2008, including numerous forecast updates.[12] [11/19/09 testimony of Allen Scott Keys at 80-81; 12/16/09 and 12/17/09 testimony of Michael W. Perry at 122-123, 256-257]

36. Thus, it was appropriate under GAAP to measure the intercompany payable/receivable based on the additional $18 million capital contribution Bancorp determined was needed to maintain the Bank's well-capitalized status at March 31, 2008. The $18 million intercompany payable/receivable at March 31, 2008 provided a better measure of Bancorp's obligation to make the capital contribution (and the Bank's

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[10] AU 560 states, "All information that becomes available prior to the issuance of the financial statements should be used by management in its evaluation of the conditions on which the estimates were based." [¶.03]

[11] As the SEC itself acknowledges, there were a "number of unsolved regulatory, accounting, and auditor issues" at (and after) March 31, 2008. [SEC Complaint ¶57(b), SEC Ex-600]

[12] I understand that there were changes to other estimates at March 31, 2008 as well, some of which caused the capital reported by the Bank at March 31, 2008 to decrease (for example, asset write downs relating to the bond downgrades after March 31, 2008 but before issuance of the Q1 2008 Form 10-Q).

corresponding right to receive the capital contribution) at March 31, 2008.[13] Capital contributions to the Bank during Q1 2008 were $88 million, not $70 million as the SEC asserts.

C. Classification in GAAP Financial Statements

37. The remaining issue is one of classification, and is specific to the $18 million intercompany receivable recorded in the Bank's Q1 2008 TFR as amended. Receivables are assets. However, receivables resulting from capital transactions are not always classified within assets in GAAP financial statements (with a corresponding increase to capital). More often, these receivables are classified within equity (and offset against the related capital account with no net effect on capital). In that case, a capital contribution receivable would not increase the capital reported even if the receivable is appropriately recorded under GAAP. Thus, the issue is whether it was appropriate under GAAP to classify the $18 million intercompany receivable within assets in the Bank's Q1 2008 TFR as amended.

38. In EITF Issue No. 85-1, "Classifying Notes Received for Capital Stock," the EITF reached a consensus that such receivables may be classified within assets if "there is substantial evidence of ability and intent to pay within a reasonably short period of time."[14] EITF Issue 85-1 does not specify when this condition is met. However, the EITF Issue 85-1 Abstract states, "The SEC requires that public companies report notes received in payment for the enterprise's stock as a deduction from shareholders' equity. Task Force members confirmed that the predominant practice is to offset the notes and stock in the equity section. However, such notes may be recorded as an asset if collected in cash prior to issuance of the financial statements." The record indicates that this was the case here.

39. The $18 million intercompany receivable was collected in cash on May 9, 2008, before issuance of Bancorp's Q1 2008 Form 10-Q, evidencing Bancorp's affirmative intent and ability to timely pay. Thus, it was appropriate under GAAP to classify the $18 million intercompany receivable within assets (with a corresponding increase to the capital reported by the Bank) in the Bank's Q1 2008 TFR as amended.

40. The SEC alleges that, "the financial statements of IndyMac Bank were not in accordance with GAAP because the $18 million contribution was recorded as an increase to the Bank's cash balance as of March 31, 2008 when, in fact, the Bank did not have the $18 million in cash as of that date." [SEC 3/26/12 response to Perry's Interrogatory No. 26] The $18 million intercompany receivable was included in cash in the Bank's Q1 2008 TFR as amended, and not separately shown as an intercompany receivable, as the SEC notes. However, that appears to result from a mistake and, in any event, is not relevant here.

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[13] The Bank's "Holding Company Docket Print" from the OTS website separately shows Bancorp's obligation at March 31, 2008 as a payable to thrift subsidiaries of $18 million. [9/17/08 Holding Company TFR (from OIG's 2/03/12 "first production")]

[14] By way of example, the EITF Issues Summary refers to the situation in which "a parent corporation may desire to increase the equity of the wholly-owned subsidiary by issuing a note to that subsidiary as a contribution to paid-in capital."

41. As previously stated, the $18 million intercompany receivable was appropriately classified within assets. Assets include both cash and intercompany receivables. For purposes of calculating the Bank's regulatory capital ratio, cash and intercompany receivables are similarly risk-weighted—both are assigned a risk-weighting of 0%. Thus, the Bank's regulatory capital ratio disclosed in Bancorp's Q1 2008 Form 10-Q would have been the same, regardless of whether the $18 million intercompany receivable was designated within assets as cash or as an intercompany receivable in the Bank's Q1 2008 TFR as amended.[15]

VI. THE ALLEGED FAILURE TO DISCLOSE

42. Professor Saunders asserts that the alleged "backdating" in the Bank's Q1 2008 regulatory filings should have been disclosed in Bancorp's Q1 2008 SEC filings. [Saunders Report p. 6(c)]. I disagree. The $18 million capital contribution was not "backdated" to March 31, 2008 in the Bank's Q1 2008 regulatory filings. Accordingly, there was no act of "backdating" to disclose in Bancorp's Q1 2008 SEC filings.

Linda MacDonald

Dated: April 23, 2012

[15] A May 13, 2008 email from Mr. Luttenberger to Mr. Sosnovich explains that what was actually recorded as an intercompany receivable was reported in the Q1 2008 TFR as amended as cash with 0% risk-weighting on Schedule CCR. Mr. Sosnovich responded, "the issue was more to treat the item as a zero risk-weight than cash v interco." [SEC Ex-530]

Exhibit A

Materials Reviewed and Considered

Pleadings

Complaint, *Securities and Exchange Commission v. Michael W. Perry and A. Scott Keys*, 2/11/11

Plaintiff Securities and Exchange Commission's Responses to Defendant Michael W. Perry's First Set of Interrogatories, 10/31/11

Plaintiff Securities and Exchange Commission's Amended Responses to Defendant Michael W. Perry's First Set of Interrogatories, 4/02/12

Plaintiff Securities and Exchange Commission's Responses to Defendant Michael W. Perry's Second Set of Interrogatories, 3/26/12

Plaintiff Securities and Exchange Commission's Responses to Defendant Michael W. Perry's Third Set of Interrogatories, 4/16/12

Michael W. Perry's Objections and Responses to Plaintiff Securities and Exchange Commission's First Set of Interrogatories, 11/22/11

Defendant Michael W. Perry's Second Set of Requests for Production to Plaintiff Securities and Exchange Commission, 2/14/12

Defendant Michael W. Perry's Second Set of Interrogatories to Plaintiff Securities and Exchange Commission, 2/14/12

Notice of Motion and Michael W. Perry's Motion for Partial Summary Judgment Pursuant to Rule 56 of The Federal Rules of Civil Procedure, 4/06/12

SEC Investigative Testimony

Gregory Sosnovich, 11/12/09

Allen Scott Keys, 11/19/09, 11/20/09

Sterling Blair Abernathy, 12/10/09, 12/11/09

Michael W. Perry, 12/16/09, 12/17/09, 12/18/09

Deposition Testimony

Gregory Sosnovich, 2/21/12

Francisco Nebot, 2/23/12

Pamela Marsh, 2/28/12

Brian Carter, 3/01/12

Christina Hunt-Fuhr, 3/08/12

Christina Ching, 3/13/12

Blair Abernathy, 3/14/12

A. Scott Keys, 4/04/12, 4/05/12

SEC Filings

IndyMac Bancorp, Inc. 10-Q for the period ended 3/31/06

IndyMac Bancorp, Inc. 10-Q for the period ended 6/30/06

IndyMac Bancorp, Inc. 10-Q for the period ended 9/30/06

IndyMac Bancorp, Inc. 10-K for the period ended 12/31/06

IndyMac Bancorp, Inc. 10-Q for the period ended 3/31/07

IndyMac Bancorp, Inc. 10-Q for the period ended 6/30/07

IndyMac Bancorp, Inc. 10-Q for the period ended 9/30/07

IndyMac Bancorp, Inc. 10-K for the period ended 12/31/07

IndyMac Bancorp, Inc. 8-K filed 2/12/08

IndyMac Bancorp, Inc. 8-K filed 3/11/08

IndyMac Bancorp, Inc. 10-Q for the period ended 3/31/08

IndyMac Bancorp, Inc. 8-K filed 5/01/08

IndyMac Bancorp, Inc. 8-K filed 5/12/08

Exhibits

[redacted]

[redacted]

Bates Stamped Documents

[redacted]

Accounting Literature and Related Guidance

FASB Statement No. 95, *Statement of Cash Flows*

FASB Statement No. 146, *Accounting for Costs Associated with Exit or Disposal Activities*

FASB Concepts Statement No. 1, *Objectives of Financial Reporting by Business Enterprises*

FASB Concepts Statement No. 2, *Qualitative Characteristics of Accounting Information*

FASB Concepts Statement No. 5, *Recognition and Measurement in Financial Statements of Business Enterprises*

FASB Concepts Statement No. 6, *Elements of Financial Statements*

EITF Issue No. 85-1, "Classifying Notes Received for Capital Stock"

AU Section 560, *Subsequent Events*

Staff Accounting Bulletin Topic 4.E, "Receivables from Sale of Stock"

AICPA Audit and Accounting Guide, *Depository and Lending Institutions: Banks and Savings Institutions, Credit Unions, Finance Companies and Mortgage Companies*, updated as of 5/01/07

New Directions Bulletin 09-04, Recognition of Capital Contributions in the Form of Cash or Notes (January 23, 2009)

Regulatory Filings

IndyMac Bank, F.S.B Thrift Financial Report as of 3/31/06

IndyMac Bank, F.S.B Thrift Financial Report as of 6/30/06

IndyMac Bank, F.S.B Thrift Financial Report as of 9/30/06

IndyMac Bank, F.S.B Thrift Financial Report as of 12/31/06

IndyMac Bank, F.S.B Thrift Financial Report as of 3/31/07

IndyMac Bank, F.S.B Thrift Financial Report as of 6/30/07

IndyMac Bank, F.S.B Thrift Financial Report as of 9/30/07

IndyMac Bank, F.S.B Thrift Financial Report as of 12/31/07

IndyMac Bank, F.S.B Thrift Financial Report as of 3/31/08 (Original)

IndyMac Bank, F.S.B Thrift Financial Report as of 3/31/08 (Amended)

Holding Company TFR as of 3/31/08 dated 9/17/08 (from OIG's 2/03/12 "first production")

OIG Production

[redacted]

[redacted]

Other

[redacted]

Expert Reports

Report of Professor Anthony Saunders, 4/06/12

Expert Report of Kenneth M. Lehn, 4/05/12

Report of Edward H. Fleischman, 4/06/12

Expert Report of Angelo A. Vigna, 4/06/12

Exhibit B

Expert Testimony

In re: Federal National Mortgage Association Securities, Derivative, and "ERISA" Litigation. United States District Court, District of Columbia. MDL No. 1668. Consolidated Civil Action No. 1:04-cv-1639 (RLJ). Testified on behalf of defendant. Financial accounting and reporting. Expert report November 15, 2010. Deposition testimony May 12, 2011.

Aris Multi-Strategy Fund, L.P., v. Quantek Opportunity Fund, L.P., Quantek Asset Management LLC, and Javier Guerra. American Arbitration Association in New York, NY. Case No. 13-148-Y-00060-10. Testified on behalf of respondent. Forensic accounting. Expert report February 15, 2011. Arbitration testimony April 11-12, 2011.

Corporate Property Associates 14, Inc. v. CHR Holding Corp., et al. The Court of Chancery of the State of Delaware. Civil Action No. 3231-VCS. Testified on behalf of defendant. Financial accounting and reporting. Expert report February 23, 2011. Deposition testimony March 11, 2011.