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UNITED STATES OF AMERICA  
UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

- - -  
HONORABLE MANUEL L. REAL  
UNITED STATES DISTRICT JUDGE PRESIDING  
- - -

SECURITY AND EXCHANGE )  
COMMISSION, ) CERTIFIED COPY  
)  
PLAINTIFF, )  
) CV 11-1309 R  
VS. )  
)  
MICHAEL W. PERRY, et al., )  
)  
DEFENDANTS. )  
-----)

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
MONDAY, SEPTEMBER 10, 2012  
A.M. SESSION  
LOS ANGELES, CALIFORNIA

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APPEARANCES OF COUNSEL:

ON BEHALF OF PLAINTIFF:

DONALD SEARLES, ESQUIRE  
NICHOLAS CHUNG, ESQUIRE  
JOHN BERRY, ESQUIRE

ON BEHALF OF DEFENDANT:

D. JEAN VETA, ATTORNEY AT LAW

1 LOS ANGELES, CALIFORNIA; MONDAY, SEPTEMBER 10, 2012

2 A.M. SESSION

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7 THE CLERK: Calling Item No. 3, CV-11-1309:  
8 SEC versus Michael W. Perry, et al.

9 Counsel, please state your appearances.

10 MR. SEARLES: Good morning, Your Honor.  
11 Donald Searles, John Berry and Nicholas Chung on behalf  
12 of the Commission.

13 MS. VETA: Good morning, Your Honor. Jean  
14 Veta on behalf of defendant Michael Perry.

15 Mr. Perry is in the courtroom with me today,  
16 sir.

17 THE COURT: All right. Counsel, anything to  
18 add to the documents with have been filed?

19 MR. SEARLES: No, Your Honor.

20 MS. VETA: No, Your Honor.

21 THE COURT: All right. Defendant moves for  
22 summary judgment on the SEC's risk-weighting and  
23 17(a)(2) claims.

24 Concerning the risk-weighting claim, between  
25 June 20, 2000 and May 12, 2008, the Office of Thrift

1 Supervision required IndyMac to double risk weight its  
2 prime assets when calculating whether the bank was well  
3 capitalized.

4 Defendant contends that on February 26,  
5 2008, the OTS director waived the double risk-weighting  
6 requirement, though the director does not recall doing  
7 so.

8 IndyMac utilized the waiver in its 2008  
9 Form 10-Q contained an accurate table comparing the  
10 bank's non-double risk weighted capital ratio as of  
11 March 31, 2008, when the non-double risk weight ratios  
12 for prior quarters. However, it did not disclose the  
13 OTS's waiver or that the bank had transitioned away from  
14 double risk-weighting prime assets -- subprime assets.  
15 The bank did not qualify as a well capitalized without  
16 the OTS waiver.

17 The SEC contends there was no OTS waiver,  
18 and even if there was, failing to disclose the waiver  
19 and that the bank had transitioned away from double  
20 risk-weighting subprime assets were material omissions.

21 Defendant contends it is entitled to summary  
22 judgment on the SEC's risk-weighting claim because as  
23 reported, it was well capitalized under the operative  
24 capital ratio, and it was not required to disclose the  
25 OTS waiver or that it had transitioned away from double

1 risk-weighting subprime assets.

2 First, there is no genuine issue of material  
3 fact that IndyMac received a waiver.

4 Defendant provided evidence indicative of  
5 the waiver such as Mr. Key's recollection of the waiver  
6 and follow-up communications relaying the waiver.

7 While OTS director does not recall granting  
8 the waiver, a witness' lack of recollection does not  
9 create a genuine issue of material fact sufficient to  
10 defeat summary judgment.

11 Federal Election Commission versus Toledano,  
12 317 F.3d 939 (Ninth Circuit 2002).

13 Second, failing to disclose the waiver and  
14 that the bank had transitioned away from double  
15 risk-weighting subprime assets were not material  
16 omissions.

17 To fulfill the materiality requirement,  
18 there must be substantial likelihood that the disclosure  
19 of the omitted facts would have been viewed by the  
20 reasonable investor as having significantly altered the  
21 total mix of information made available.

22 Basic, Inc. versus Levinson, 485 U.S. 224  
23 (1988).

24 The bank provided accurate charts that  
25 showed it was well capitalized under the operative

1 capital ratio. A capitalized status under a  
2 hypothetical inapplicable capital ratio does not alter  
3 this information in any way.

4 Moreover, the bank is not required to  
5 disclose hypothetical information. See Hanon versus  
6 Dataproducts Corporation, 976 F.2nd (Ninth Circuit  
7 1992). Therefore, defendant's motion for summary  
8 judgment as to the risk weighting claim is hereby granted.

9 Concerning the SEC's Section 17(a)(2)  
10 claims, Section 17(a)(2) states that it shall be  
11 unlawful for any person in the offer or sale of any  
12 securities to obtain money or property by means of any  
13 untrue statement of a material fact. 15 U.S.C. Section  
14 77(a)2).

15 Defendant seeks summary judgment with  
16 respect to both the risk-weighting and capital  
17 contribution issues on the ground that he did not obtain  
18 any money or property after the alleged material  
19 misrepresentation.

20 The SEC contends IndyMac obtained money  
21 through the offer or sale of securities through its use  
22 of the direct stock purchase plan.

23 However, those sales ended on May 9, 2008,  
24 prior to the May 12, 2008, securities filings, and  
25 IndyMac did not raise additional capital after that

1 time.

2           IndyMac's direct stock purchase plan  
3 administrator, Mellon Bank, received money from bidders  
4 on shares, but the money was refunded after the minimum  
5 threshold trading price was not met.

6           The SEC has not alleged a separate basis for  
7 Mr. Perry himself having obtained money or property.  
8 Defendant's status as a salaried employee and  
9 shareholder without more is insufficient, because he did  
10 not sell any stock during the relevant period and his  
11 compensation was not earned as a result of the fraud.

12           SEC versus Hopper, 2006 U.S. District LEXIS  
13 17772, (Southern District of Texas, March 24, 2006).

14           Therefore, defendant's motion for partial  
15 summary judgment as to the Section 17(a)(2) claims is  
16 hereby granted.

17           Counsel to prepare the order, to prepare the  
18 non-controverted facts and the judgement.

19           MS. VETA: Thank you, Your Honor.

20           MR. SEARLES: Your Honor, will you be  
21 setting a trial date in this matter? It was vacated the  
22 last time we were before you.

23           THE COURT: We probably will be. I will  
24 have to look at my calendar.

25           All right. We will be in recess.

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MR. SEARLES: Thank you, Your Honor.  
(PROCEEDINGS CONCLUDED.)



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CERTIFICATE OF REPORTER

COUNTY OF LOS ANGELES )  
 ) SS  
STATE OF CALIFORNIA )

I, SHERI S. KLEEGER, OFFICIAL COURT REPORTER, IN AND FOR  
THE UNITED STATES DISTRICT COURT FOR THE CENTRAL  
DISTRICT OF CALIFORNIA, DO HEREBY CERTIFY THAT PURSUANT  
TO SECTION 753, TITLE 28, UNITED STATES CODE, THE  
FOREGOING IS A TRUE AND CORRECT TRANSCRIPT OF THE  
STENOGRAPHICALLY REPORTED PROCEEDINGS HELD IN THE  
ABOVE-ENTITLED MATTER AND THAT THE TRANSCRIPT PAGE  
FORMAT IS IN CONFORMANCE WITH THE REGULATIONS OF THE  
JUDICIAL CONFERENCE OF THE UNITED STATES.

DATE: FEBRUARY 9, 2010

/s/ \_\_\_\_\_

SHERI S. KLEEGER, CSR  
FEDERAL OFFICIAL COURT REPORTER