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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. S. BLAIR ABERNATHY, Defendant.	Case No. CV11-01308 JFW(SSx) **COMPLAINT**

Plaintiff Securities and Exchange Commission (the "Commission") alleges as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction over this action pursuant to Sections 20(b), 20(d)(1), and 22(a) of the Securities Act of 1933 ("Securities Act"), 15 U.S.C. §§ 77t(b), 77t(d)(1), and 77v(a). Defendant has directly or indirectly made use of the means or instruments of transportation or communication in interstate commerce, or of the mails, to engage in the transactions, practices, and courses of business alleged in this Complaint.

2. Venue is proper in this district pursuant to Section 22(a) of the Securities Act, 15 U.S.C. § 77v(a), because Defendant resides and transacts business within this district and certain of the transactions, acts, practices and courses of conduct constituting violations of the federal securities laws alleged in this Complaint occurred within this district.

SUMMARY

3. This action involves securities law violations committed by S. Blair Abernathy ("Abernathy"), the former Executive Vice President and Chief Financial Officer of IndyMac Bancorp, Inc. ("IndyMac").

4. IndyMac through its main subsidiary – IndyMac Bank, F.S.B. ("IndyMac Bank" or "the Bank") – primarily made, purchased, and sold residential mortgage loans. In July 2008, IndyMac Bank was placed under Federal Deposit Insurance Corporation ("FDIC") receivership and IndyMac filed for bankruptcy protection.

A. False and Misleading Statements in the Offer and Sale of IndyMac's Residential Mortgage-Backed Securities in 2007

5. In 2007, IndyMac Bank conducted six offerings totaling $2.5 billion of residential mortgage-backed securities ("RMBS"). RMBS are securitizations of pools of loans, and RMBS investors receive payments out of the principal and

interest that residential loan borrowers pay on the underlying loans. Each of those six offerings, however, misrepresented the quality of the loans underlying each offering. Prior to and during the RMBS offering period, Abernathy received internal monthly reports showing that 12% to 18% of a random sample of IndyMac Bank's loans contained misrepresentations regarding important information about the loans' characteristics (such as a loan's status as an owner-occupied loan or its loan-to-value ("LTV") ratio) and/or the borrowers' creditworthiness (such as a borrower's identity, income, or debt load). Despite receiving those monthly reports showing that a significant percentage of loans contained misrepresentations, Abernathy negligently failed to take reasonable or responsible steps to ensure that the RMBS offering documents, which had been prepared by inside and outside counsel, included accurate disclosures concerning the loans in the RMBS or notified investors that the presented information was materially misleading in light of IndyMac Bank's monthly reports. Abernathy authorized and/or signed Commission filings relating to these offerings. These six offerings have experienced substantial loan delinquencies and ratings downgrades.

B. <u>False and Misleading Statements Regarding IndyMac's Deteriorating Financial Condition in 2008 Stock Sales</u>

6. In 2008, Abernathy was negligent in not knowing that IndyMac's offering documents for stock sales through the Direct Stock Purchase Program ("DSPP") contained false and misleading disclosures concerning IndyMac's financial condition. Although Abernathy regularly received information regarding IndyMac's deteriorating financial condition, Abernathy negligently failed to take steps to disclose this information to investors. Instead, he authorized IndyMac's common stock offering materials that made false and misleading statements regarding IndyMac's liquidity position and IndyMac's need to raise capital to keep IndyMac Bank "well capitalized." IndyMac disclosed its liquidity problems in its

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Q1 2008 Form 10-Q, filed on May 12, 2008. In July 2008, IndyMac Bank was put into FDIC receivership and IndyMac declared bankruptcy.

7. Based on his conduct, Defendant violated Sections 17(a)(2) and 17(a)(3) of the Securities Act of 1933, 15 U.S.C. §§ 77q(a)(2) and 77q(a)(3). The Commission seeks an order enjoining Defendant from future violations of these provisions, ordering Defendant to pay a civil monetary penalty, requiring Defendant to disgorge his ill-gotten gains with prejudgment interest, and providing other appropriate relief.

THE DEFENDANT

8. S. Blair Abernathy is a resident of La Verne, California. He began working for IndyMac Bank in 1994 and was its Executive Vice President in charge of four groups: Secondary Marketing (1994-2004); Investment Portfolio Group (2004-March 2007); Specialty Lending (March 2007 to November 2007); and Capital Markets (November 2007-April 25, 2008). Abernathy became IndyMac's Chief Financial Officer on April 25, 2008 and held that position until July 2008. Abernathy was licensed as a CPA in California until his license was cancelled in 2003, due to non-renewal by Abernathy. Abernathy was also Executive Vice President and a member of the Board of Directors of IndyMac MBS, Inc., the depositor for the relevant RMBS offerings.

RELATED PARTIES

9. IndyMac was a Delaware corporation with principal executive offices in Pasadena, California. Its common stock was registered with the Commission pursuant to Section 12(b) of the Exchange Act and traded on the NYSE until August 18, 2008, when it was delisted and withdrawn from registration pursuant to Rule 12d2-2(b) of the Exchange Act. Its common stock is currently quoted on the Pink Sheets operated by OTC Markets Group, Inc. IndyMac filed for Chapter 7 bankruptcy on July 31, 2008.

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10. IndyMac Bank was a federally-chartered thrift institution regulated by the Office of Thrift Supervision ("OTS") and headquartered in Pasadena, California. The OTS closed IndyMac Bank on July 11, 2008, and it was placed under FDIC receivership.

11. IndyMac MBS, Inc. was a Delaware corporation that was a limited purpose finance subsidiary of Bank. IndyMac MBS was the depositor for the relevant RMBS offerings, which totaled approximately $2.5 billion.

FACTS

A. Background

12. At the end of 2007, IndyMac was a publicly traded company with two primary operating segments: mortgage banking, which originated, purchased, traded and serviced mortgage loans; and thrift, which invested in residential loans and RMBS.

13. IndyMac Bank acquired most of its loans through relationships with mortgage brokers or other financial institutions and sold most of them to third parties, primarily through RMBS offerings and whole loan sales. IndyMac Bank conducted RMBS offerings under IndyMac MBS's shelf registration statements and through Government Sponsored Enterprises ("GSE") such as Fannie Mae and Freddie Mac.

B. False and Misleading Statements in IndyMac Bank's RMBS Offerings

1. IndyMac Bank's Securitization of Conduit Loans

14. IndyMac Bank's Conduit Division accounted for 20% of IndyMac's $78 billion loan production in 2007 by purchasing loans in bulk from third-party originators. Abernathy was involved with the Conduit Division until August 2007 when it was shut down. He was also an Executive Vice President and a member of the board of directors of IndyMac MBS, the IndyMac Bank subsidiary that conducted the Bank's RMBS offerings.

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15. From May to December 2007, IndyMac Bank sold about $13.9 billion in RMBS through offering documents, that is, shelf registration statements on Form S-3, a prospectus, and a prospectus supplement. From May through August 2007, IndyMac Bank conducted six RMBS offerings totaling $2.5 billion securitizing Conduit Division loans. As alleged below, the offering documents for these six offerings contained materially false and misleading information regarding the quality of the loans underlying the RMBS.

2. <u>IndyMac's False and Misleading RMBS Disclosures</u>

a) <u>Loan Quality: IndyMac's PPQC Reports</u>

16. From 1994 to August 2007, IndyMac Bank's Post Production Quality Control ("PPQC") unit performed monthly quality control audits of the Bank's loan production. Each month, PPQC selected a statistically valid random sample of the Bank's total loan production and assessed each loan to determine whether the borrower or a third party, such as the mortgage broker or appraiser, misrepresented information in obtaining the loan. The misrepresentation categories identified by PPQC were:

a. *Occupancy*—the loan documents stated that the home was the borrower's primary residence when it actually was a second home or investment property. Borrowers are more likely to repay a loan if they live in the home.

b. *Appraisal*—the appraisal stated an inflated home value. An inflated appraisal lowers the loan-to-value ("LTV") ratio of a loan, so it appears to carry less risk.

c. *Income*—the borrower's income was overstated to show more cash flow to make loan payments (*e.g.*, a flooring installer with a stated income of $13,500 per month). The more a borrower's income is overstated, the greater the risk of default.

d. *Employment*—the borrower's work status was inaccurate (*e.g.*, the borrower claimed that he worked for trucking company but had quit nine months earlier). If a borrower's employment (and hence, income) is misstated, the greater the risk of default.

e. *Assets*—the borrower's assets were overstated to show greater resources to make loan payments (*e.g.*, borrower claimed $29,000 in saving account when there was $0). The more a borrower's assets are overstated, the greater the risk of default.

f. *Credit (undisclosed liabilities)*—the loan application did not disclose the borrower's existing or in-process debts, which reduced the borrower's debt load (*e.g.,* the borrower obtained loans on two properties from different banks). The greater a borrower's debts, the greater the risk of default.

g. *Transaction ("straw buyer")*—a borrower with good credit obtained a loan for a relative with poor credit. Again, to the extent the true identity, employment and credit history of a borrower is concealed, the greater the risk of default.

17. Before making a misrepresentation finding, PPQC developed actual proof that information on the loan application was false. For example, PPQC did not make an employment misrepresentation finding unless the borrower admitted that the information was false or the employer confirmed that the borrower did not work there. An appraisal misrepresentation was the only category that might involve judgment rather than definitive proof. PPQC, however, gave each mortgage production unit, including Conduit, the opportunity to dispute any finding before it became final. Conduit disagreed with PPQC's findings, including appraisals, approximately 2% of the time.

18. If PPQC identified a loan misrepresentation, it recalculated the loan's estimated lifetime loan loss using the corrected information. PPQC then

determined the increase in the loss estimate between the loan as underwritten and as corrected. PPQC rated the estimated loan loss as "severe" if it had a misrepresentation finding and the loss estimate increased by more than 50 basis points. PPQC also rated a loan "severe" if it had an underwriting error and an increase in the loss estimate greater than both 100% and 100 basis points. PPQC rated loans as "moderate" if the loss estimate increased by up to 50 basis points and was based on a loan misrepresentation, or increased by both 50% to 100% and 50 to 100 basis points and was based on an underwriting error. In addition to the severe and moderate rates, PPQC reported the "defect" rate, which were the "severe" and "moderate" rates combined.

19. PPQC prepared monthly audit reports and distributed them approximately three to four months after the audited month. The reports:

a. *First*, had an "Executive Summary" that:

i. Stated the sample's defect rate—which ranged from 10% to 22% from September 2005 through August 2007;

ii. Compared the stated defect rate to prior periods; and

iii. Stated the percentage of loans that contained misrepresentations – which ranged from 12% to 18% from January 2007 (when reporting of that statistic began) through August 2007.

b. *Second*, presented a chart that broke down the findings by business unit, including Conduit, which had a defect rate of up to 30% from April 2005 through August 2007.

c. *Third*, attached spreadsheets that provided loan-by-loan detail of PPQC's findings with supporting reasons and the response of the business unit responsible for the loan.

20. PPQC distributed the monthly reports by e-mail and posted them on IndyMac's intranet site. Abernathy received hardcopy and/or electronic copies of

the reports and was also aware that the reports were available on IndyMac's intranet.

b) IndyMac Bank's False and Misleading Statements Regarding Loan Quality

21. In mid 2007, IndyMac conducted six RMBS offerings through IndyMac IMSC Mortgage Loan Trust ("IMSC") securitizing only Conduit loans:

RMBS Offering	Settlement Date	Amount Offered
IMSC 2007-F1	5/29/2007	$274 million
IMSC 2007-AR1	6/28/2007	$675 million
IMSC 2007-F2	6/28/2007	$330 million
IMSC 2007-HOA1	6/29/2007	$425 million
IMSC 2007-AR2	7/30/2007	$307 million
IMSC 2007-F3	8/30/2007	$531 million

22. The registration statements for these RMBS offerings contained blank tables for the securitized loans to be summarized in the prospectus supplements. The loan information included the LTV, occupancy, borrower credit score, mortgage rate, loan type (*e.g.*, full, limited, or no documentation), loan purpose (*e.g.*, purchase or refinance), and original and outstanding principal balance, all of which was material information to a reasonable investor. The prospectus supplements then populated these tables with information on the securitized loans. IndyMac Bank, however, populated the tables with the original information that it had on the loans. From January to August 2007, however, the random samples of IndyMac loans as set forth in the PPQC reports showed that, in 12% to 18% of its

loans, the original information (such as that summarized in the tables) contained misrepresentations. As such, the information provided in the Bank's prospectus supplements was false and misleading.

23. The offering documents for each RMBS offering also stated that IndyMac Bank would not include any loan in the offering if anything came to its attention causing it to believe that the loan contained a misrepresentation. That statement was false and misleading because the PPQC reports provided IndyMac Bank reason to believe that 12% to 18% of its loans, including loans underlying the six offerings, contained misrepresentations.

24. The loan information was material. The quality of the loans and the characteristics of the borrowers were key bases for determining whether a loan would be repaid, whether a foreclosure would yield sufficient funds if the borrower defaulted on the loan, and, thus, whether RMBS investors would receive their principal and interest payments. Loan quality and borrower characteristics, therefore, had a significant bearing upon the risk of owning, and the value of, an RMBS.

25. Abernathy had significant responsibilities in connection with the six RMBS offerings at issue, including signing the Forms S-3; reviewing, discussing, and participating in the structuring of each transaction; participating in setting the price for a proposed offering; and directly authorizing four of the six transactions. Despite receiving monthly PPQC reports showing that a significant percentage of loans contained misrepresentations, Abernathy negligently failed to take reasonable or responsible steps to ensure that the RMBS offering documents, which had been prepared by inside and outside counsel, included accurate disclosures concerning the loans in the RMBS or to notify investors that the presented information was materially misleading in light of IndyMac Bank's PPQC audit results.

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C. IndyMac's False and Misleading 2008 Stock Sales

26. On April 25, 2008, Abernathy became IndyMac's CFO after the previous CFO left IndyMac on medical leave. As CFO, Abernathy supervised IndyMac's investor relations department, which managed IndyMac's Direct Stock Purchase Plan ("DSPP"). Under the DSPP, investors could purchase $10,000 or more of IndyMac's common stock at a 1% to 2.5% discount to market price.

27. From April 25 through May 9, 2008, IndyMac raised approximately $22.2 million through the DSPP pursuant to a June 30, 2006 Form S-3 automatic shelf registration statement and April 3 and May 2, 2008 prospectuses, which offering documents incorporated by reference periodic filings with the Commission.

1. IndyMac's Prior Commission Filings

28. On February 12, 2008, IndyMac reported its 2007 results of operations and financial condition in a Form 8-K ("2007 Earnings 8-K"), which included as exhibits an earnings press release (the "Press Release"), a shareholder letter (the "Shareholder Letter"), and a presentation entitled "IndyMac Bancorp, Inc. Fourth Quarter Review" (the "Presentation"). Although IndyMac acknowledged in those filings that it had a "terrible" 2007 and had lost $509 million in the quarter just ended and $615 million during fiscal 2007, its Press Release informed investors that it had finished the quarter in a "solid overall financial position" and had a "game plan" that gave it a "realistic shot" at a $13 million profit in 2008. IndyMac further stated that even if its 2008 forecast was wrong, "we have the capital ... to absorb nearly triple our presently forecasted 2008 credit costs and fight our way through until the housing and mortgage markets do stabilize."

29. The 2007 Earnings 8-K also had positive forecasts for a metric critical to banks – the total risk-based capital ratio (the "capital ratio") – which is a measure of a bank's safety and soundness and is calculated by dividing a bank's

total risk-based capital (*e.g.*, shareholder equity) by total risk-weighted assets (*i.e.*, the greater the presumed risk of an asset, the greater the risk weighting and the reserved capital needed to support the asset).

30. Under the OTS's regulations and 2000 order approving IndyMac's acquisition of IndyMac Bank, IndyMac Bank was required to maintain a capital ratio of 10% or more to be considered "well-capitalized." IndyMac Bank would suffer significant regulatory consequences if its capital ratio fell below the 10% well-capitalized threshold, including:

a. An inability to accept (without a waiver from the FDIC) brokered deposits (*i.e.*, funds deposited by brokers for third parties that receive higher interest rates), which would likely curtail IndyMac Bank's lending business;

b. Potentially increased costs, including borrowing costs from the Federal Home Loan Bank, insurance premiums to the FDIC, and payments to the OTS; and

c. The OTS and FDIC could impose various restrictions or remedial requirements.

31. In the 2007 Earnings 8-K, IndyMac stated that IndyMac Bank's capital ratio was 10.50% at the end of 2007, and was thus above the 10% well-capitalized threshold. IndyMac went on to state that "[w]e believe that, under current regulations, the bank will continue to meet its 'well-capitalized' minimum capital requirements in the foreseeable future," and that "[w]e are currently forecasting that our balance sheet size will decline and our capital ratios will increase over the course of 2008 as we execute our revised business model of primarily GSE lending."

32. Indeed, the Shareholder Letter stated that the "only good news" was that, even with its significant annual and quarterly losses, IndyMac remained in a "fundamentally sound financial position" and that IndyMac Bank's "capital levels

continue to exceed the levels defined as 'well capitalized' by our regulators." The letter informed IndyMac's investors that "based on our new business model ... we are forecasting a small profit in 2008 ... as we believe we can maintain our 'well-capitalized' capital ratios even under worsening industry conditions."

33. The Presentation included in the 2007 Earnings 8-K projected that IndyMac Bank would have a capital ratio of 10.59% at March 31, 2008. With regard to raising capital, the Shareholder Letter stated, "[W]e want to try and avoid raising capital externally right now given our current stock price relative to book value per share, as any capital raised would be highly dilutive to existing shareholders." Similarly, the Presentation stated that "due to our low stock price to book value per share, our 2008 plan does not rely on the capital markets for raising capital; instead we plan to eliminate the dividend [on common shares] and shrink the balance sheet," thereby improving IndyMac's capital position by $318 million.

34. The 2007 Earnings 8-K also discussed IndyMac's liquidity, including its cash position, stating that it had:

a. $64 million in cash at year end 2007 to pay future preferred dividends of $7.3 million per quarter;

b. "enough cash to pay [preferred dividends] for over 2 years without any dividends from the Bank or additional debt or equity raised"; and

c. "the right to defer dividend payments on [preferred securities] for up to five years; [but it did] not expect to have to exercise this right."

35. IndyMac's capital and liquidity levels and its "realistic" plan to return to profitability in 2008 began to change just one week after it filed its 2007 Earnings 8-K. There was significant interest rate volatility in February 2008 which in turn adversely affected IndyMac Bank's capital ratio on those days when interest rates rose. On or about February 19, 2008, IndyMac learned that a

significant one-day rise in interest rates caused IndyMac Bank's forecasted capital ratio at March 31 to be right at or slightly under 10%. That same day, on February 19, IndyMac began to raise up to $50 million through new stock sales through the DSPP. IndyMac planned to use DSPP sales proceeds to keep the Bank's capital ratio above 10% by contributing $25 to $50 million to IndyMac Bank and to pay future preferred dividends. All of the DSPP sales at issue in this Complaint were made to institutional investors who were seeking to arbitrage the difference between the discounted price and the market price by selling their DSPP shares into the public securities markets to capture the price difference.

36. On February 29, 2008, IndyMac filed its 2007 Form 10-K. Although IndyMac's 2007 Form 10-K included many negative statements and acknowledged that "2007 was a terrible year for our industry, for IndyMac, and for you, our owners," it also repeated many of the positive statements in its 2007 Earnings 8-K, including: "We have a solid and a realistic plan that we believe will return IndyMac to profitability in 2008." The 2007 Form 10-K also made positive disclosures regarding IndyMac's current liquidity and capital needs:

a. "We currently believe our liquidity level is sufficient to satisfy our operating requirements and meet our obligations and commitments in a timely and cost effective manner";

b. "As a result of our ... strong capital and liquidity positions, we were not forced to sell assets at liquidation prices and our [loan] funding capacity was not materially impacted"; and

c. While Bank "currently [has] regulatory capital ratios in excess of the 'well capitalized' requirement and [has] implemented a plan to ... increase our capital ratios, there can be no assurance that [Bank] will not suffer material losses or that [IndyMac's] plans ... will succeed. In those circumstances, [IndyMac] may be required to seek additional regulatory capital to maintain our capital ratios at the 'well capitalized' level."

37. These statements were false and misleading when IndyMac filed its 2007 Form 10-K. IndyMac's capital position was not "strong" because IndyMac Bank's capital ratio was projected to be right at or slightly below 10%. Furthermore, IndyMac's liquidity position was weakening and it needed to raise new capital to protect its well-capitalized regulatory status and to pay preferred dividends in future quarters.

38. On March 31, 2008, IndyMac made a $70 million capital contribution to IndyMac Bank for the principal purpose of protecting the Bank's capital ratio. After the $70 million capital contribution on March 31, 2008, IndyMac was left with about $21 million in cash, which was enough to pay three quarters of preferred dividends without raising additional capital or receiving dividends from IndyMac Bank.

39. On April 3, 2008, IndyMac filed a prospectus registering the offer of an additional ten million common shares through the DSPP. The prospectus stated that IndyMac "intend[ed] to use the net proceeds from [the offering] for general corporate purposes, including investment in our subsidiaries" and incorporated disclosures in IndyMac's 2007 Earnings 8-K and 2007 Form 10-K regarding IndyMac's strong capital and liquidity positions.

40. IndyMac's capital and liquidity positions deteriorated even further in late April 2008, when Moody's Investors Service downgraded 165 MBS bonds sponsored by IndyMac Bank on April 23, and Standard & Poor's downgraded 251 IndyMac Bank-sponsored MBS bonds on April 28. IndyMac Bank held on its balance sheet $160 million in downgraded bonds as of March 31, 2008 and recorded a $9.5 million write-down expense during the quarter ended March 31, thereby lowering IndyMac Bank's first quarter 2008 capital ratio. In addition, the bond rating downgrades also negatively impacted IndyMac Bank's capital ratio in

future quarters because additional capital was required to support the downgraded, and hence riskier, bonds.

41. On April 25, 2008, shortly after the first bond downgrade, Abernathy became IndyMac's CFO after the previous CFO left IndyMac on medical leave.

42. After the bond downgrades, IndyMac had no choice but to suspend preferred dividends as a way to conserve cash. It was also clear that the downgrades could drive IndyMac Bank's capital ratio below 10% at March 31, and that IndyMac would not have sufficient cash to both keep IndyMac Bank's capital ratio above 10% and pay future preferred dividends.

43. Abernathy negligently failed to disclose (either through a new prospectus, an amendment to the April 3, 2008 prospectus, or a Form 8-K) that IndyMac planned to use the DSPP net offering proceeds for a capital contribution to IndyMac Bank and to pay future preferred dividends, see Item 504 of Regulation S-K of the Securities Act, 17 C.F.R. § 229.504 (prospectus required to disclose "the principal purposes for which the net proceeds to the registrant from the securities to be offered are intended to be used and the approximate amount intended to be used for each such purpose."), and that the April bond rating downgrades jeopardized IndyMac Bank's "well-capitalized" status such that IndyMac would need to conserve cash by suspending future preferred dividends. The impact of the bond ratings downgrades to IndyMac's capital and liquidity would have been material information to reasonable investors' assessment of their risk of loss and their valuation of IndyMac stock offered through the DSPP.

44. From April 25 through May 2, 2008, when it filed a new DSPP prospectus, IndyMac raised approximately $12.8 million through the DSPP.

2. IndyMac's False and Misleading May 2, 2008 Prospectus

45. By May 2, 2008, it was clear that IndyMac would have to suspend future preferred dividend payments as a result of the continuing decline in IndyMac's liquidity and capital positions.

46. On May 2, 2008, IndyMac filed with the Commission a new prospectus registering the offer of another ten million common shares. Abernathy authorized the filing of the May 2 prospectus. This prospectus again stated that IndyMac "intend[ed] to use the net proceeds from [the offering] for general corporate purposes, including investment in our subsidiaries." By incorporating by reference the 2007 Earnings 8-K and 2007 Form 10-K, the May 2 prospectus repeated those earlier filings' statements regarding IndyMac's strong capital and liquidity positions, its cash holdings being sufficient to pay future preferred dividends for over two years, and its positive forecasts for the Bank's capital ratio.

47. From May 3 through May 9, 2008, IndyMac raised $9.4 million through the DSPP. May 9 was the last trading day before May 12, when IndyMac filed its Form 10-Q for the quarter ended March 31, 2008 and all DSPP sales ended.

48. The DSPP offering's specific purpose was to raise capital to protect IndyMac Bank's capital ratio. In addition, contrary to the disclosures in the 2007 Earnings 8-K and 2007 Form 10-K, IndyMac's liquidity position had deteriorated as a result of IndyMac's $70 million cash contribution to the Bank on March 31 such that IndyMac would have to suspend future preferred dividend payments, and IndyMac Bank's capital ratio was close to the 10% "well-capitalized" threshold as a result of the bond downgrades in April. Abernathy negligently failed to take steps to disclose this information to investors until May 12, 2008, when IndyMac filed its Forms 10-Q and 8-K, which disclosed, among other things, the suspension of future preferred dividends and that IndyMac Bank's capital ratio would have been 9.27% if the risk-weighting impact of the April bond downgrades had been required to have been recorded as of March 31. Such information would have been material to investors, as they would have viewed the true reasons for IndyMac's stock sales and its declining capital and liquidity levels as important to their assessment of their risk of loss and the price for IndyMac's common stock. On

May 12, 2008, IndyMac's common stock price closed at $3.06, an 11% drop from its prior close of $3.43, on volume of 4.8 million shares. On May 13, IndyMac's stock price fell an additional 24%, closing at $2.32 on volume of 14.9 million shares.

CLAIM FOR RELIEF

MISREPRESENTATION IN THE OFFER OR SALE OF SECURITIES

Violations of Sections 17(a)(2) and 17(a)(3) of the Securities Act

49. The Commission realleges and incorporates by reference ¶¶ 1 through 48 above.

50. Defendant, in the offer and sale of securities, by the use of the means or instruments of transportation or communication in interstate commerce or by use of the mails, directly or indirectly, (a) obtained money or property by means of untrue statements of a material fact or by omitting to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; and (b) engaged in transactions, practices, or courses of business which operated or would operate as a fraud or deceit upon the purchaser.

51. By engaging in the conduct described above, Defendant violated, and unless restrained and enjoined will continue to violate, Sections 17(a)(2) and 17(a)(3) of the Securities Act, 15 U.S.C. §§ 77q(a)(2) and 77q(a)(3).

PRAYER FOR RELIEF

WHEREFORE, the Commission respectfully requests that the Court:

I.

Issue findings of fact and conclusions of law that Defendant committed the alleged violations.

II.

Issue a judgment, in a form consistent with Fed. R. Civ. P. 65(d), permanently enjoining defendant Abernathy and his agents, servants, employees, attorneys, and those persons in active concert or participation with any of them, who receive actual notice of the order by personal service or otherwise, from violating Sections 17(a)(2) and 17(a)(3) of the Securities Act, 15 U.S.C. §§ 77q(a)(2) and 77q(a)(3).

III.

Order Abernathy to disgorge all ill-gotten gains from his unlawful conduct, together with prejudgment interest thereon.

IV.

Order Defendant to pay a civil penalty under Section 20(d)(1) of the Securities Act, 15 U.S.C. § 77t(d)(1).

V.

Retain jurisdiction of this action in accordance with the principles of equity and the Federal Rules of Civil Procedure in order to implement and carry out the terms of all orders and decrees that may be entered, or to entertain any suitable application or motion for additional relief within the jurisdiction of this Court.

VI.

Grant such other and further relief as this Court may determine to be just and necessary.

DATED: February 11, 2011

Respectfully submitted,

Roberto A. Tercero

Roberto A. Tercero
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Securities and Exchange Commission