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11
12 **UNITED STATES DISTRICT COURT**
13 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
14 **WESTERN DIVISION**

15 **IN RE INDYMAC ERISA**
16 **LITIGATION**

17 **Master File No.: 08-04579 DDP (VBKx)**

18 **CLASS ACTION**

19 **PLAINTIFFS' NOTICE OF MOTION**
20 **AND MOTION FOR FINAL**
21 **APPROVAL OF CLASS ACTION**
22 **SETTLEMENT, CERTIFICATION OF**
23 **SETTLEMENT CLASS, AND**
24 **APPROVAL OF PLAN OF**
25 **ALLOCATION**

26 **Date: Monday, January 10, 2011**

27 **Time: 11:00 a.m.**

28 **Courtroom: 3, 2nd Floor**

Before the Hon. Dean D. Pregerson

1 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that on Monday, January 10, 2011, at 11:00 a.m.,
3 or as soon thereafter as the matter may be heard, in Courtroom 3 of the United
4 States District Court, located on the 2nd Floor at 312 N. Spring Street, Los Angeles,
5 California 90012, before the honorable Dean D. Pregerson, United States District
6 Judge, Interim Co-Lead Plaintiffs Sam Zhong Wong and Jeffrey Washington will
7 and hereby do move the Court as follows:

8 1. to finally approve the Stipulation and Agreement of Settlement of
9 Class Action – ERISA (“Settlement Agreement”) as fair, reasonable, and adequate,
10 and to direct the consummation of the Settlement Agreement in accordance with its
11 terms and provisions;

12 2. to confirm the certification of the Class for settlement purposes, and to
13 find that the requirements of Rule 23(a) and 23(b)(2) of the Federal Rules of Civil
14 Procedure have been met;

15 3. to find that the dissemination of the Notice in the form and manner
16 ordered by the Court was accomplished as directed, satisfied the requirements of
17 Rule 23 of the Federal Rules of Civil Procedure and due process and was the best
18 notice practicable under the circumstances, and constituted due and sufficient notice
19 to all persons entitled thereto;

20 4. to approve the proposed Plan of Allocation of the Settlement Fund;
21 and

22 5. to enter the proposed Final Order and Judgment in substantially the
23 form filed concurrently herewith, as provided by the Settlement Agreement.

24 This motion is supported by the Memorandum of Points and Authorities
25 attached hereto, the Joint Declaration of Margaret E. Hasselman and Derek W.
26 Loeser in Support of Renewed Motion for Preliminary Approval, Plaintiffs’
27 concurrently filed motion and supporting papers for Attorneys’ Fees, Expenses, and
28 Case Contribution Awards, and the entire Court file in this action.

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Respectfully submitted December 6, 2010.

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18 **CLASS ACTION**

19 **PLAINTIFFS' MEMORANDUM OF**
20 **POINTS AND AUTHORITIES IN**
21 **SUPPORT OF MOTION FOR FINAL**
22 **APPROVAL OF CLASS ACTION**
23 **SETTLEMENT, CERTIFICATION OF**
24 **SETTLEMENT CLASS, AND**
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1 **I. INTRODUCTION**

2 Interim Lead Plaintiffs Sam Zhong Wang and Jeffrey Washington
3 (“Plaintiffs”), on behalf of themselves and the proposed Class, hereby move for
4 final approval of the proposed Settlement of this action, which asserts claims for
5 breaches of fiduciary duty under the Employee Retirement Income Security Act of
6 1974, as amended, (“ERISA”), 29 U.S.C. § 1001 *et seq.* The proposed Stipulation
7 and Agreement of Settlement of Class Action – ERISA (the “Settlement
8 Agreement” or “Settlement”)¹ resolves Plaintiffs’ and Class Members’ stated
9 claims for breaches of fiduciary duty against all Defendants.

10 The proposed Settlement, which the Court preliminarily approved on
11 September 16, 2010 (the “Preliminary Approval Order”), consisting of a cash
12 payment of \$7 million, is an excellent recovery that provides substantial benefit to
13 the Class Members and is fair, reasonable, and adequate under the governing
14 standards for evaluating class action settlements in this circuit. *See, e.g., Hanlon v.*
15 *Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998); *Rodriguez v. West Publ’g*
16 *Corp.*, No. 05-3222, 2007 WL 2827379, at *7 (C.D. Cal. Sept. 10, 2007), *rev’d on*
17 *other grounds*, 563 F.3d 948 (9th Cir. 2009). Since the Court preliminarily
18 approved the Settlement, notice of the Settlement has been issued to Class
19 Members pursuant to the terms of the Preliminary Approval Order, and as of this
20 filing, none of the 2,862 Class Members has objected to the Settlement.² For the
21 reasons discussed below and in Plaintiffs’ Memorandum of Points and Authorities
22 in Support of Renewed Motion for Preliminary Approval (Dkt. 110-1)
23 (“Preliminary Approval Memo”), Plaintiffs respectfully request that the Court

24 ¹ A copy of the fully executed Settlement Agreement, including exhibits, is attached hereto as Exhibit 1.

25 ² Because Plaintiffs’ motion for attorneys’ fees and case contribution awards is being filed
26 concurrently, Class Members have been given until December 13, 2010, to submit objections to
27 the Settlement. *See In re Mercury Interactive Corp. Securities Litigation*, 618 F.3d 988, 995 (9th
28 Cir. 2010) (holding that Rule 23 requires that class members have an opportunity to review and
prepare objections to class counsel’s fee motion before final approval of a class action fee award
is granted). Pursuant to the Preliminary Approval Order, Plaintiffs’ will respond to objections (if
any) on or before December 20, 2010.

1 enter an Order (1) granting final approval of the Settlement; (2) confirming
2 certification of the Class for settlement purposes; (3) determining that the forms
3 and methods of Notice to the Class were appropriate and sufficient; and (4)
4 approving the proposed Plan of Allocation of the Settlement Fund.

5 II. BACKGROUND

6 The facts of this case and the details of the Settlement Agreement are
7 discussed at length in the Preliminary Approval Memo at pages 2-13 and,
8 accordingly, are only briefly summarized here.³

9 A. Case History

10 This case stems from the mortgage crisis of 2007 and 2008 and the
11 consequent collapse of the secondary market for mortgage-backed securities, which
12 led to the failure of IndyMac Bank, F.S.B. (the “Bank”). The Federal Deposit
13 Insurance Corporation (“FDIC”) seized the Bank’s assets on July 11, 2008, and
14 forced the Bank’s parent company, IndyMac Bancorp, Inc. (“Bancorp” and together
15 with the Bank, “IndyMac”), to file for Chapter 7 bankruptcy on July 31, 2008.
16 Plaintiffs and the Class are participants in and beneficiaries of the IndyMac Bank,
17 F.S.B. 401(k) Plan (the “Plan”) within the meaning of ERISA § 3(7), 29 U.S.C. §
18 1002(7), who had a portion of their Plan accounts invested in IndyMac common
19 stock.

20 Plaintiffs and their counsel conducted a thorough investigation and analysis
21 of the claims alleged in this case with an eye toward preserving the pool of assets

22 ³ Because several documents contain detailed discussions of this litigation’s progress, risks, and
23 ultimate success, Plaintiffs ask the Court to consider these documents in connection with this
24 motion and memorandum, and Plaintiffs incorporate by reference those documents herein. *See*
25 Preliminary Approval Memo; the Joint Declaration of Margaret E. Hassleman and Derek W.
26 Loeser in Support of Plaintiffs’ Renewed Motion for Preliminary Approval, attached hereto as
27 Exhibit 2 (“Joint Dec.”); and the concurrently-filed Motion and Memorandum of Points and
28 Authorities in Support of Motion for Award of Attorneys’ Fees, Reimbursement of Expenses, and
Case Contribution Awards and Joint Declaration of Jeffrey G. Lewis and Derek W. Loeser in
Support of (1) Plaintiffs’ Motion for Final Approval of Class Action Settlement, Certification of
Settlement Class, and Approval of Plan of Allocation, and (2) Plaintiffs’ Motion for Award of
Attorneys’ Fees, Reimbursement of Expenses, and Award of Case Contribution Awards to
Named Plaintiffs (“Lewis/Loeser Dec.”).

1 available to satisfy a judgment, which were quite limited. To mitigate the depletion
2 of the fiduciary liability policy, the parties discussed the possibility of an early
3 mediation. Joint Dec. at ¶¶ 38-46. The parties agreed to exchange information
4 informally so that Plaintiffs' counsel could investigate the claims thoroughly while
5 minimizing depletion of the fiduciary policy, which is a wasting policy, rather than
6 proceeding with formal discovery right away. *Id.* at ¶¶ 14-18, 48-50. Plaintiffs also
7 served subpoenas on the FDIC as Receiver for the Bank and Principal Financial
8 Group, the record-keeper for the Plan, to obtain additional documents. *Id.* at ¶ 13,
9 19-20.

10 The documents produced were core to the claims and defenses in this case
11 and included, among other things, the following: governing Plan instruments;
12 documents (including meeting minutes, internal communications, and internal
13 memoranda) evidencing actions taken by the fiduciaries responsible for
14 administering the Plan and monitoring its investments; documents that Defendants
15 contended supported their various defenses; documents evidencing the insurance
16 coverage that was potentially available to satisfy a judgment in the case; and
17 information necessary to perform an expert analysis of the Plan's potential
18 damages. *Id.* at ¶¶ 12-29.

19 After review of this information, the parties agreed to forestall costly
20 discovery and preliminary litigation matters in order to pursue an early mediation
21 and attempt to resolve the case efficiently and at minimal cost to the proposed
22 Class. On August 25, 2009, the parties' counsel and Defendants' insurer
23 participated in an arms-length mediation session with the Honorable Daniel
24 Weinstein (Ret.), a well respected mediator of complex disputes. *See id.* at ¶¶ 47-
25 51; Declaration of Hon. Daniel H. Weinstein (Ret.), attached hereto as Exhibit 3
26 ("Weinstein Dec.") at ¶¶ 7-21. In advance of the mediation, the parties exchanged
27 detailed mediation statements and expert reports in which they debated the merits
28 of the claims, assessed damages, and evaluated potential insurance coverage. The

1 mediation resulted in a tentative agreement regarding the core settlement amount,
2 and after several months of additional negotiations, the final terms of the Settlement
3 were reached as set forth in the Settlement Agreement.

4 **B. Factual and Legal Bases of Plaintiffs' Claims**

5 The claims in this lawsuit arise under the fiduciary duty provisions of
6 ERISA, which require the fiduciaries of employee benefit plans to, among other
7 things, prudently and loyally manage the assets of the plans they oversee. 29 U.S.C.
8 §§ 1104(a), 1132(a)(2)-(3). Plaintiffs allege that Defendants breached their
9 fiduciary duties to the Plan and its participants by imprudently allowing Plan assets
10 to be invested in IndyMac common stock, by failing to take reasonable steps to
11 ensure that the Plan's investment in IndyMac common stock was a prudent choice,
12 by failing to adequately monitor and communicate with their co-fiduciaries
13 regarding the Plan's investment in IndyMac common stock, and by making
14 misrepresentations to participants about the soundness of IndyMac common stock
15 as a Plan investment. Defendants deny and dispute all of these allegations. Plaintiffs
16 allege that these breaches resulted in millions of dollars of losses to the Plan when
17 IndyMac common stock became virtually worthless following the Bank's failure in
18 2008.

19 **C. Plaintiffs' Estimated Losses**

20 Plaintiffs' Counsel retained the services of UHY Advisors Forensic,
21 Litigation & Valuation Services, Inc. ("UHY"), a firm experienced in financial
22 analysis and damages calculations in ERISA breach of fiduciary duty cases such as
23 this one. Joint Dec. at ¶¶ 23-29. Based on the Plan's transactional data and the
24 factual history of the Bank's failure, Class Counsel and UHY estimated that the
25 principal loss incurred by the Plan would range from \$5.27 million to \$22.1 million.
26 *Id.* at ¶ 32. As discussed in detail in the Preliminary Approval Memo at pages 8-9,
27 there are several disputed factors at play in this calculation, including the date of the
28 breach and which losses should be included in the damages calculation (i.e.,

1 purchaser losses only or both purchaser and holder losses). *See* Joint Dec. at ¶ 30-
2 35. This range does not take into account any discount for the risk of not
3 establishing liability.

4 Furthermore, the method of calculating damages is in contention.
5 Defendants' expert—Cornerstone Research—used a different calculation method
6 and estimated that the potential damages in this case were, at the most, \$3 million.
7 *Id.* at ¶ 35. A key difference between Plaintiffs' and Defendants' calculations was
8 the question of how the Plan's assets invested in IndyMac stock would have
9 performed in an alternative investment. Defendants argued that the most
10 appropriate comparator investments all lost value during the relevant time period,
11 reducing the potential recovery, whereas Plaintiffs' estimates assume a better
12 performance by the Plan's alternative investments. *Id.* at ¶ 35. Given that
13 Defendants' outside estimate of potential damages was \$3 million (compared to
14 Plaintiffs' outside estimate of over \$22 million), resolution of this issue would have
15 significantly affected the Class's potential recovery.

16 Of course, it was also possible that Defendants would prevail on one or
17 more of their affirmative defenses if the case was pursued to judgment, in which
18 case the Class would have recovered nothing. Further, as discussed in detail in the
19 Preliminary Approval Memo at pages 10-11, the pool of assets available to satisfy
20 a judgment in the Plan's favor was extremely limited as a result of the Bank's
21 failure and the Bancorp's bankruptcy. Accordingly, the \$7 million Settlement
22 represents an excellent recovery, avoids the risks of protracted litigation, and
23 provides the Class with certain, immediate relief.

24 **D. Preliminary Approval**

25 On the basis of the foregoing facts and those described in Plaintiffs'
26 preliminary approval papers, the Court granted preliminary approval of the
27 Settlement and preliminarily certified the Class for settlement purposes. In so
28 doing, the Court found that the Settlement was the result of serious, arm's-length,

1 and non-collusive negotiations, that it is a fair, reasonable, and adequate
2 Settlement under the circumstances of this case, and that the Settlement does not
3 have any obvious deficiencies or give any improper preferential treatment to the
4 Named Plaintiffs or any segment of the Class. Preliminary Approval Order at ¶ 5.
5 The Court also ordered that the Class be given notice of the Settlement and an
6 opportunity to object according to a set schedule and scheduled a fairness hearing
7 for the Settlement on January 10, 2011.

8 **E. Notice**

9 Class Counsel and the Settlement Administrator have timely complied with
10 the notice provisions of the Court’s preliminary approval order. Affidavit of
11 Jennifer M. Keough (Exh. 4) (“Keogh Dec.”) at ¶¶ 1-9; Lewis/Loeser Dec. at ¶ 3-
12 6. The parties’ notice plan, as approved by the Court and implemented by Class
13 Counsel, consisted of the following: (1) retaining the Settlement Administrator by
14 October 15, 2010; (2) causing the Notice (a copy of which is attached as Exhibit A
15 to the Settlement Agreement) to be mailed to each person within the Class at the
16 last known address of each person (which information was obtained from the Plan
17 Administrator and the FDIC pursuant to a protective order) no later than
18 November 4, 2010; (3) causing the Notice, the Settlement Agreement and other
19 documents to be posted to a website established specifically for this Settlement at
20 <http://www.gcginc.com/cases/idm>; and (4) causing a short form of the Notice
21 (attached as Exhibit B to the Settlement Agreement) to be electronically published
22 with nationwide distribution on Business Wire. Only 25 of the 2,862 Notices—
23 representing less than 1% of the Class—have been undeliverable by mail after
24 reasonable efforts to find updated addresses. Class Counsel is continuing to seek
25 correct address information for these Class Members for purposes of distributing
26 Settlement payments.

27 ///

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1 **F. Plan of Allocation**

2 The Plan of Allocation (attached hereto as Exhibit 5) provides for a pro-rata
3 distribution of the Net Settlement Fund to all eligible Class Members based on
4 their losses. *See* Lewis/Loeser Dec. at ¶ 7-12. Under the Plan of Allocation, each
5 Class Member’s net loss is calculated by subtracting the total dollar amount each
6 Class Member received from dispositions of IndyMac stock during the Class
7 Period from the total dollar amount each Class Member invested in IndyMac stock
8 during the Class Period. The net loss of each Class Member will be aggregated to
9 determine the total net loss for all Class Members. Each Class Member then will
10 be assigned a net loss percentage based on their individual net loss compared to the
11 aggregate net loss, and that percentage will correspond to the Class Member’s
12 share of the Settlement Fund, net of fees and expenses approved by the Court.
13 Because some Class Members will have net losses so small that their dollar
14 recoveries will be less than the costs of distributing the payments, the Plan of
15 Allocation also contains procedures for efficiently reallocating *de minimis*
16 recoveries amongst the rest of the Class Members. If there are any funds remaining
17 in the Settlement Fund one year after the initial payments are made, the Plan of
18 Allocation requires Class Counsel to present the Court with a plan for distributing
19 these funds in a fair and lawful manner.

20 **III. LEGAL STANDARD**

21 The law favors settlement, particularly in class actions and other complex
22 cases where substantial resources can be conserved by avoiding the time, cost, and
23 rigors of formal litigation. *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th
24 Cir. 1976). Final approval of a proposed class action settlement will be granted
25 where it is established that the proposed settlement is “fair, reasonable, and
26 adequate.” Fed. R. Civ. P. 23(e)(1)(C). In determining whether to grant final
27 approval, the Court does not “reach any ultimate conclusions on the contested
28 issues of fact and law which underlie the merits of the dispute, for it is the very

1 uncertainty of outcome in litigation and avoidance of wasteful and expensive
2 litigation that induce consensual settlements.” *Class Plaintiffs v. City of Seattle*,
3 955 F.2d 1268, 1291 (quoting *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d
4 615, 625 (9th Cir. 1982)); *Nat’l Rural Telecomm.*, 221 F.R.D. at 526 (quoting
5 same).

6 In evaluating whether a settlement is fair, reasonable, and adequate, courts
7 are guided by the eight factors set forth in *Hanlon v. Chrysler Corp.*:

- 8 (1) strength of the plaintiffs’ case;
- 9 (2) risk, expense, complexity and likely duration of further
10 litigation;
- 11 (3) risk of maintaining class action status throughout the trial;
- 12 (4) amount offered in settlement;
- 13 (5) extent of discovery completed and the stage of the proceedings;
- 14 (6) experience and views of counsel;
- 15 (7) presence of a governmental participant (which is not relevant to
16 this case); and
- 17 (8) reaction of the Class Members to the proposed settlement.

18 150 F.3d 1011, 1026 (9th Cir. 1998).

19 For the reasons discussed in detail in the Preliminary Approval Memo at
20 pages 15-19 and summarized below, the Settlement satisfies all of the *Hanlon*
21 factors and should be finally approved as a fair, reasonable, and adequate
22 settlement.

23 **A. The Settlement Merits Final Approval.**

24 The Settlement is the product of serious arm’s-length, informed negotiations
25 and represents an excellent, and certain, recovery for the Class. Notice of the
26 Settlement, its terms, and the procedures for objecting has been timely distributed
27 to the Class in the manner ordered by the Court and, as of this filing, no Class
28 Member has objected to the Settlement.

1 **1. Strength of Plaintiffs’ Case**

2 Class Counsel believes that the Plaintiffs’ case is strong on the merits. The
3 information obtained through public sources and formal and informal discovery
4 demonstrates, in Plaintiffs’ view, that Defendants knew or should have known that
5 the Plan’s investment in IndyMac stock was an imprudent retirement investment
6 because of the Bank’s extremely risky business practices. Plaintiffs also believe
7 that the evidence demonstrates that Defendants failed to act in a procedurally
8 prudent manner by failing to take reasonable steps to evaluate the prudence of the
9 Plan’s investment in IndyMac stock.

10 Nonetheless, Plaintiffs recognize that continued litigation entails significant
11 risk of an adverse outcome for the Class. As described at length in the Preliminary
12 Approval Memo, there are significant disputes about the amount of damages the
13 Class could expect to recover if this case were litigated to judgment. Assuming
14 that Defendants’ liability could be established, the \$7,000,000 settlement amount
15 reflects a recovery that is anywhere from approximately 33% to over 200% of the
16 Class’s total damages. This is well within the range of similar ERISA class action
17 settlements that received final approval. Joint Dec. at ¶ 35-36.

18 Of course, Defendants’ do not concede liability in this case, and have
19 asserted affirmative defenses that, if successful, would defeat Plaintiffs’ claims in
20 their entirety. The settlement amount reflects Plaintiffs’ and Class Counsel’s
21 consideration of this risk.

22 **2. Risk, Expense, Complexity and Likely Length of Further**
23 **Litigation**

24 The risk and expense of future litigation counsels heavily in favor of
25 approving the Settlement. As detailed in the Preliminary Approval Memo at pages
26 10-11, the assets available to satisfy a potential judgment in this case are very
27 limited. The Bank was seized by the federal government and all of its assets were
28 placed under the control of the FDIC as receiver. The FDIC ultimately determined

1 that the Bank's unsecured creditors (which the Class would have been in the event
2 of a judgment) would recover nothing of value from the receivership.
3 Determination of Insufficient Assets to Satisfy Claims Against Financial
4 Institution in Receivership, 74 Fed. Reg. 221, Notices 59541 (Nov. 18, 2009).
5 Additionally, Bancorp, the holding company of the Bank, had itself filed for
6 bankruptcy protection, further reducing the pool of potential assets to satisfy a
7 judgment in this case.

8 Consequently, Class Counsel determined that the only assets reasonably
9 available to satisfy a judgment or settlement were from wasting insurance policies
10 and Defendants' personal holdings. Under these circumstances, the risk that
11 continued litigation would deplete most if not all of the assets available to satisfy a
12 judgment was significant, particularly in light of the need for numerous
13 depositions, lengthy document review, and expert testimony on complex financial
14 matters. The Settlement ensures the Class a reasonable recovery for their losses
15 and avoids the risk that pursuing the case to judgment might ultimately deplete the
16 assets below the \$7,000,000 settlement amount. Therefore, this factor weighs
17 strongly in favor of approving the settlement.

18 **3. The Risk of Maintaining Class Action Status through Trial**

19 As explained in more detail in the Preliminary Approval Memo at 19-28,
20 this case is a paradigmatic example of a case best handled through class action
21 treatment. Accordingly, although Defendants were expected to resist class
22 certification, Plaintiffs' do not consider the risk of losing class action status before
23 or during trial to be very significant.

24 **4. Amount Offered in Settlement**

25 The amount offered in the Settlement—\$7,000,000—is, as explained above
26 and in the Preliminary Approval Memo, an excellent recovery for the Class that
27 represents between 33% and over 200% of the potential recovery in this case. This
28 range is towards the high-end of recoveries compared to other complex ERISA

1 class actions involving employer stock. Joint Dec. at ¶ 36. Furthermore, the
2 Settlement is a sum certain in the face of significant risks that further litigation
3 would deplete the assets available to satisfy a potential judgment. *See In re Enron*
4 *Corp. Securities, Derivative & ERISA Litigation*, 228 F.R.D. 541, 556 (S.D. Tex.
5 2005) (noting that the class’s “bird in hand” strongly supported settlement
6 approval). Therefore, the amount offered strongly supports final approval of the
7 Settlement.

8 **5. The Extent of Discovery and the Stage of the Proceedings.**

9 Both the formal and informal discovery conducted in this case was adequate
10 to evaluate the Class’s claims on the merits and the potential damages that the
11 Class might recover. As set forth in detail in the Preliminary Approval Memo at
12 pages 4-6, the publicly available information, subpoena responses, and documents
13 produced during the parties’ informal exchanges were extensive and included
14 documents and information that would have been sought in discovery if the case
15 had not been successfully settled at an early mediation. Although the case has
16 settled fairly early in the proceedings, this result is very good for the Class and
17 supports approval of the Settlement because of the significant risk that proceeding
18 with the litigation would dramatically increase the costs to the Class while
19 depleting most or all of the assets available to satisfy a judgment.

20 **6. The Experience and Views of Counsel.**

21 Class Counsel are very experienced in ERISA class action litigation and
22 have been involved in many of the most significant cases in the field, including
23 numerous cases alleging breaches of fiduciary duty with respect to employer stock.
24 Joint Dec. at ¶¶ 59-91. Based on this broad experience, as well as the specific
25 considerations presented under the facts and circumstances of this case, Class
26 Counsel have concluded that the Settlement is fair, reasonable, and adequate and
27 should be presented to the Court for approval. Class Counsel’s opinion factors
28 heavily in favor of approving the Settlement. *In re Pacific Enter. Sec. Litigation*,

1 47 F.3d 373, 378 (9th Cir. 1995) (“Parties represented by competent counsel are
2 better positioned than courts to produce a settlement that fairly reflects the each
3 party’s expected outcome in litigation.”); *Rodriguez*, 2007 WL 2827379 at *9 (“In
4 assessing the adequacy of the terms of a settlement, the trial court is entitled to,
5 and should, rely upon the judgment of experienced counsel for the parties.”); *Nat’l*
6 *Rural Telecmms. Coop.*, 221 F.R.D. at 528 (“‘Great weight’ is accorded to the
7 recommendation of counsel, who are most closely acquainted with the facts of the
8 underlying litigation.”); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 622 (N.D. Cal.
9 1979) (“The recommendations of plaintiffs’ counsel should be given a
10 presumption of reasonableness.”).

11 **7. The Presence of a Governmental Participant**

12 No government entity is a party to or formal participant in this litigation.
13 Therefore, this factor is inapplicable.

14 **8. The Reaction of Class Members to the Settlement.**

15 Class Notice was accomplished by all three means set forth in the
16 Preliminary Approval Order on November 4, 2010. Keough Dec. at ¶¶ 4-9;
17 Lewis/Loeser Dec. at ¶¶ 3-6. The deadline for a Class Member to file an objection
18 is December 13, 2010. As of December 6, 2010, no Class Member has objected to
19 the Settlement. If any objections are submitted between this filing and the
20 deadline, Plaintiffs’ will respond to those in a reply brief. The absence of any
21 objections to date demonstrates that the Class Members support the Settlement.
22 *Nat’l Rural Telecomm.*, 221 F.R.D. at 528 (“‘The reactions of the members of a
23 class to a proposed settlement is a proper consideration for the trial court.’”
24 quoting 5 Moore’s Federal Practice § 23.85[2][d]). Here, the fairness,
25 reasonableness, and adequacy of the settlement are well supported by the absence
26 of any objections to the Settlement, as well as the factors discussed above.

27 ///

28 ///

1 **V. CLASS CERTIFICATION SHOULD BE CONFIRMED**

2 The Court preliminary certified the following class for settlement purposes
3 in its preliminary approval order:

4 All persons other than Defendants and Defendants’ spouses, parents,
5 or children who were participants in or beneficiaries of the IndyMac
6 Bank, F.S.B. 401(k) Plan at any time between July 1, 2006, and June
7 1, 2010, and whose accounts included investments in the IndyMac
8 Bancorp stock fund.

9 Nothing has changed about the Class since the preliminary certification was
10 granted, and to date, no Class Member has objected to the certification.
11 Accordingly, class certification should be confirmed for purposes of finally
12 approving the Settlement. As described in detail in the Preliminary Approval
13 Memo, the proposed Class meets all four prerequisites of Rule 23(a) necessary to
14 class certification: numerosity, commonality, typicality, and adequacy of
15 representation. Rule 23(b)(1) is also satisfied, making this Class appropriate for
16 class certification. Preliminary Approval Memo at 19-28.

17 **VI. THE PLAN OF ALLOCATION SHOULD BE APPROVED**

18 The Plan of Allocation, as described above, is an efficient means of fairly
19 distributing the Settlement Fund among the Class Members in proportion with
20 their losses while minimizing costs to the Class. *See* Lewis/Loeser Dec. at ¶¶ 7-12.
21 Further, by settlement payments will be treated, to the maximum extent
22 permissible by law, as qualified retirement plan distributions and Class Members
23 will be provided with instructions on how to handle the payments. This Plan of
24 Allocation is substantially similar to plans approved in other ERISA employer
25 stock class actions. *See e.g., In re Polaroid ERISA Litigation*, No. 03-8335 (Order
26 and Final Judgment) (S.D.N.Y. June 25, 2007); *In re Dynegy, Inc. ERISA*
27 *Litigation*, No. H-02-3076 (Order Approving Plan of Allocation) (S.D. Tex. Dec.
28 10, 2004). For these reasons, the Plan of Allocation should be approved.

///

VII. CONCLUSION

1
2 The Settlement is an excellent and certain recovery for the Class that is fair,
3 reasonable, and adequate and will bring finality to this litigation. It is well within
4 the range of similar ERISA class actions that have received final approval.
5 Accordingly, Plaintiffs respectfully request that the Court enter an Order (1)
6 granting final approval of the Settlement; (2) certifying the Class for settlement
7 purposes; (3) determining that the forms and methods of Notice to the Class were
8 appropriate and sufficient; and (4) approving the proposed Plan of Allocation of
9 the Settlement Fund.

10 DATED this December 6, 2010.

11 Respectfully Submitted,

12
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EXHIBIT 1

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18 *Attorneys for Defendants Louis E. Caldera, Hugh M.*
19 *Grant, and John F. Seymour*

20 **Additional counsel listed on signature page*

21 IN THE UNITED STATES DISTRICT COURT
22 FOR THE CENTRAL DISTRICT OF CALIFORNIA
23 WESTERN DIVISION

24 **IN RE INDYMAC ERISA**
25 **LITIGATION**

Master File No.: 08-04579 DDP(VBKx)

STIPULATION AND AGREEMENT
OF SETTLEMENT OF CLASS
ACTION – ERISA

Judge: HON. DEAN D. PREGERSON

26
27 **STIP. AND AGREEMENT OF SETTLEMENT OF CLASS ACTION [MASTER FILE No.: 08-04579-DDP]**
28

1 Subject to the approval of the *Court* pursuant to Rule 23(e) of the Federal
2 Rules of Civil Procedure, Named Plaintiffs Sam Zhong Wang and Jeffrey
3 Washington (“*Named Plaintiffs*”), individually and on behalf of themselves and the
4 below-defined Class, enter into this Stipulation and Agreement (“*Stipulation*”) with
5 Jim Barbour, Louis E. Caldera, Kevin Cochrane, Hugh M. Grant, Ken Horner, A.
6 Scott Keys, Rayman Mathoda, Michael W. Perry, Jennifer Pikoos, and John F.
7 Seymour (“*Defendants*”) to settle this *Action* on, and subject to, the terms and
8 conditions below.

9 RECITALS

10 WHEREAS, *Named Plaintiffs* commenced independent actions against
11 *Defendants* and others¹, asserting various claims for relief under the Employee
12 Retirement Income Security Act of 1974, as amended (“ERISA”), all of which
13 claims are disputed by all those named;

14 WHEREAS, the *Court* consolidated the *Named Plaintiffs’* actions and all
15 other actions asserting claims for relief under ERISA into the above-captioned
16 *Action* on October 7, 2008;

17 WHEREAS, the *Named Plaintiffs* filed the Consolidated Complaint for
18 Breaches of Fiduciary Duty under the Employee Retirement Income Security Act
19 (the “*Complaint*”) in the *Action* on January 5, 2009;

20
21
22 ¹ Lyle E. Gramley, Patrick C. Haden, Terrance G. Hodel, Robert L. Hunt, Lydia H.
23 Kennard, and Bruce G. Willison were dismissed without prejudice with a tolling
24 agreement on March 13, 2009; Richard H. Wohl was dismissed without prejudice
25 on February 19, 2009 (“Dismissed Defendants”). In his initial complaint, Plaintiff
26 Washington named IndyMac Bank, F.S.B., which was closed by the Office of
27 Thrift Supervision on July 11, 2008, and IndyMac Bancorp, Inc., which filed for
28 bankruptcy protection under Chapter 7 of the United States Bankruptcy Code on
July 31, 2008, as defendants. Plaintiff Wang named IndyMac Bank, F.S.B. as a
defendant in his initial complaint.

1 WHEREAS, the *Named Plaintiffs* and *Defendants* (the “*Parties*”) and
2 *Underwriter*, at their own expense, have engaged in a mediation process before The
3 Honorable Daniel Weinstein (ret.) of JAMS, which efforts included a day-long, in-
4 person mediation on August 25, 2009, at the conclusion of which an agreement in
5 principle between the *Parties* was reached on certain settlement terms, and
6 *Defendants’* deadline to respond to *Named Plaintiffs’* Consolidated Complaint was
7 extended until June 2, 2010, by the *Court’s* order of May 24, 2010;

8 WHEREAS, the *Parties* have engaged in extensive, further arm’s-length
9 negotiation following the August 25, 2009 mediation;

10 WHEREAS, these discussions and negotiations resulted in the execution of a
11 Settlement Term Sheet in February 2010 (the “*Term Sheet*”), which set forth the
12 principal terms of the settlement of this *Action*;

13 WHEREAS, the *Parties* desire to promptly and fully resolve and settle with
14 finality all of the *Released Claims* asserted by *Named Plaintiffs* on behalf of
15 themselves and the *Class Members* against all of the *Released Parties*;

16 WHEREAS, the *Underwriter* has agreed to provide the funds for this
17 *Settlement* under the applicable fiduciary insurance policy;

18 NOW, THEREFORE, the *Parties*, in consideration of the promises,
19 covenants, and agreements herein described, and for other good and valuable
20 consideration, acknowledged by each of them to be satisfactory and adequate, and
21 intending to be legally bound, do hereby mutually agree as follows:

22 **1. DEFINITIONS**

23 1.1. As used in this *Settlement*, italicized and capitalized terms and phrases
24 not otherwise defined herein have the meanings provided below:

25 1.2. “*Action*” means Master File No. 08-4579-DDP-(VBKx) (C.D. Cal.),
26 including all actions consolidated therewith.

27 1.3. “*Bancorp*” means IndyMac Bancorp, Inc.

28 1.4. “*Bank*” means IndyMac Bank, F.S.B.

1 1.5. “*Bankruptcy Court*” means the bankruptcy court presiding over
2 *Bancorp*’s bankruptcy proceedings.

3 1.6. “*Class*” means, for the purposes of this *Settlement* only, a non-opt-out
4 class of all persons, other than *Defendants* and *Defendants*’ spouses, parents, or
5 children, who were participants in or beneficiaries of the IndyMac Bank, F.S.B.
6 401(k) Plan at any time between July 1, 2006, and the date of execution of the
7 *Stipulation* and whose accounts included investments in the IndyMac Stock Fund.

8 1.7. “*Class Counsel*” means Co-Lead Counsel, Keller Rohrback, LLP and
9 Lewis, Feinberg, Lee, Renaker & Jackson, P.C., and Liaison Counsel, The Braun
10 Law Group, P.C.

11 1.8. “*Class Member(s)*” means the member(s) of the *Class*, individually or
12 collectively.

13 1.9. “*Class Notice*” means the forms of notice appended as Exhibits 1 and
14 2 to the *Order for Notice and Hearing*, attached hereto as Exhibit A.

15 1.10. “*Court*” means the United States District Court for the Central District
16 of California.

17 1.11. “*Custodian*” means a federally-insured financial institution proposed
18 by *Class Counsel* and acceptable to *Defendants*.

19 1.12. “*Daniels Action*” means *John Folsom v. Indymac Bancorp, Inc. et al.*,
20 2:08-cv-03812-GW-VBK (C.D. Cal.), a Securities Exchange Act of 1934 case
21 pending against Ernst and Young, LLP., A. Scott Keys, and Michael W. Perry, and
22 cases consolidated therein.

23 1.13. “*Defendants*” means Jim Barbour, Louis E. Caldera, Kevin Cochrane,
24 Hugh M. Grant, Ken Horner, A. Scott Keys, Rayman Mathoda, Michael W. Perry,
25 Jennifer Pikoos, and John F. Seymour.

26 1.14. “*Defendants’ Counsel*” means (i) Munger, Tolles & Olson, LLP for
27 Defendants Louis E. Caldera, Hugh M. Grant, and John F. Seymour; (ii)
28 Covington & Burling, LLP for Defendant Michael W. Perry; (iii) Willkie Farr &

1 Gallagher LLP for Defendant A. Scott Keys; and (iv) Corbin, Fitzgerald & Athey
2 LLP for Defendants Jim Barbour, Kevin Cochrane, Ken Horner, Rayman
3 Mathoda, and Jennifer Pikoos.

4 1.15. “*Effective Date*” means the date on which all the conditions set out in
5 Paragraph 8.1 of this *Settlement* have been satisfied.

6 1.16. “*ERISA*” means the Employee Retirement Income Security Act of
7 1974, as amended, 29 U.S.C. §§ 1001 *et seq.*

8 1.17. “*Gross Settlement Fund*” shall have the meaning set forth in
9 Paragraph 3.3.

10 1.18. “*Final Approval and Fairness Hearing*” and “*Fairness Hearing*”
11 have the meaning that is set forth in Paragraph 9.2.

12 1.19. “*Final Order and Judgment*” and “*Judgment*” have the meaning that
13 is set forth in Paragraph 9.2 and refer to the document attached hereto as Exhibit
14 B.

15 1.20. “*Independent Fiduciary*” means a *Person* who may, at the election of
16 *Defendants*, be appointed to consider whether to approve and authorize in writing
17 the *Stipulation*. The *Independent Fiduciary* shall have all of the rights and
18 responsibilities contemplated by Prohibited Transaction Class Exemption 2003-39,
19 including any amendments or successors thereto.

20 1.21. “*Net Settlement Fund*” is defined by Paragraph 3.4.

21 1.22. “*Named Plaintiffs*” means Sam Zhong Wang and Jeffrey Washington.

22 1.23. “*Notice*” means the “Notice of Proposed Settlement With Defendants,
23 Motions for Attorneys’ Fees and Reimbursement of Expenses with Fairness
24 Hearing,” which is to be sent to members of the *Class* substantially in the form
25 attached hereto as Exhibit 1 to Exhibit A.

26 1.24. “*Order for Notice and Hearing*” means the order granting preliminary
27 approval of the *Settlement* and directing notice thereof to the *Class* substantially in
28 the form attached hereto as Exhibit A.

1 1.25. “*Party*” or “*Parties*” means *Named Plaintiffs* and *Defendants*,
2 individually and collectively.

3 1.26. “*Person*” means an individual, partnership, corporation, government
4 entity or any other form of entity or organization.

5 1.27. “*Plaintiffs’ Counsel*” means *Class Counsel* and any other counsel
6 representing any *Class Member* in any action consolidated into this *Action*.

7 1.28. “*Plan of Allocation*” means a plan of allocation of the *Net Settlement*
8 *Fund* as proposed by *Class Counsel* and approved by the *Court*.

9 1.29. “*Plan of Allocation Implementation Expenses*” means all reasonable
10 expenses incurred in implementing the *Plan of Allocation*, including the costs of
11 gathering required data and performing required calculations.

12 1.30. “*Plan*” means the IndyMac Bank, F.S.B. 401(k) Plan.

13 1.31. “*Released Claims*” means any and all claims whether known or
14 unknown, (1) that were asserted in the *Action* or that could have been asserted in
15 this *Action*; (2) that would have been barred by res judicata had the *Action* been
16 fully litigated to a final judgment; or (3) that relate to any investment in *Bancorp*
17 stock or the IndyMac Stock Fund by the *Plan* or any such investment by any *Plan*
18 participant through the *Plan*. *Released Claims* shall extend to all *Released*
19 *Parties*. Provided, however, that *Released Claims* shall not extend to any claims
20 asserted by or on behalf of the plaintiffs in (1) the *Tripp Action* or (2) the *Daniels*
21 *Action*. Further, *Released Claims* shall not extend to claims (1) related to
22 enforcement of the *Settlement Stipulation*; (2) for individual or vested benefits
23 separate and distinct from the claims asserted in the *Action*; or (3) against the
24 *Independent Fiduciary*.

25 1.32. “*Released Parties*” means any and all of the *Defendants*, *Bancorp*, the
26 *Bank*, the *Plan*, and every *Person* who was a director, officer, governor,
27 management committee member, in-house counsel, employee, or agent of
28 *Bancorp* or the *Bank*, or a trustee or fiduciary (including de facto fiduciaries) for

1 the *Plan*, together with, for each of the foregoing, any present or former
2 representatives, insurers, reinsurers, attorneys, consultants, administrators,
3 employee benefit plans, investment advisors, investment underwriters, spouses,
4 and successors, including without limitation, the *Bancorp* bankruptcy estate and
5 Trustee Alfred H. Siegel.

6 1.33. “*Settlement*” means the settlement of the *Action* contemplated by this
7 *Stipulation*.

8 1.34. “*Settlement Fund*” means the interest-bearing escrow account
9 established to hold the funds contributed by the *Underwriter* pursuant to Paragraph
10 3.1 of the *Settlement Stipulation*.

11 1.35. “*Settlement Stipulation*” and “*Stipulation*” refer to this Stipulation and
12 Agreement and Settlement of the *Action*.

13 1.36. “*Settlement Administrator*” means the person or firm hired, at *Class*
14 *Counsel*’s discretion, to administer the provision of *Class Notice* provided for in
15 Paragraph 4.2.

16 1.37. “*Settlement Amount*” means the \$7,000,000.00 to be paid by the
17 *Underwriter* on behalf of *Defendants* in consideration for the release and discharge
18 provided for in Paragraphs 2.2 and 2.4.

19 1.38. “*Summary Notice*” means the summary notice of proposed *Settlement*
20 and hearing for publication substantially in the form attached as Exhibit 2 to
21 Exhibit A.

22 1.39. “*Taxes*” means (i) any and all applicable taxes, duties, and similar
23 charges imposed by a government authority (including any estimated taxes,
24 interest or penalties) arising in any jurisdiction, (A) with respect to the income or
25 gains earned by or in respect of the *Gross Settlement Fund*, including, without
26 limitation any taxes that may be imposed upon *Defendants* or their counsel with
27 respect to any income or gains earned by or in respect of the *Gross Settlement*
28 *Fund* for any period during which it does not qualify as a qualified settlement fund

1 for federal or state income tax purposes; or (B) by way of withholding as required
2 by applicable law on any distribution by the *Custodian* of any portion of the *Gross*
3 *Settlement Fund* to any persons entitled thereto pursuant to this *Stipulation*; and
4 (ii) any and all expenses, liabilities, and costs incurred in connection with the
5 taxation of the *Gross Settlement Fund* (including without limitation, expenses of
6 tax attorneys and accountants). For the purposes of clause (i)(A) of this paragraph,
7 taxes imposed on *Defendants* shall include amounts equivalent to taxes that would
8 be payable by *Defendants* but for the existence of relief from taxes by virtue of
9 loss carryforwards or other tax attributes, determined by *Defendants*, acting
10 reasonably, and accepted by the *Custodian*, acting reasonably.

11 1.40. “*Tripp Action*” means *Claude A. Reese v. Indymac Financial Inc et*
12 *al.*, 2:07-cv-01635-GW-VBK (C.D. Cal.), a Securities Exchange Act of 1934 case
13 pending against Michael W. Perry, and cases consolidated therein.

14 1.41. “*Underwriter*” means the insurer that provided a primary fiduciary
15 policy for *Bancorp* for the claims at issue in this *Action* for the period 2007-2008.

16 2. SCOPE AND EFFECT OF SETTLEMENT

17 2.1. The obligations incurred pursuant to this *Settlement* shall be in full and
18 final disposition of the *Action* and shall release and discharge all *Released Parties*
19 from all *Released Claims*.

20 2.2. Upon the *Effective Date* of the *Settlement*, *Named Plaintiffs* and all
21 *Class Members*, on behalf of themselves, their personal representatives, heirs,
22 executors, administrators, trustees, successors, and assigns will completely and
23 finally settle, release, and discharge the *Released Claims*. Upon the *Effective Date*
24 of the *Settlement*, *Named Plaintiffs* and all *Class Members* shall be bound by this
25 *Settlement*, and shall, regarding the *Released Claims*, have exclusive recourse to
26 the benefits, rights, and remedies provided by this *Settlement* and shall be
27 precluded from pursuing any other action, demand, suit, or other claim, in any
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1 judicial or administrative forum of any kind, against the *Released Parties* with
2 respect to the *Released Claims*.

3 2.3. Upon the *Effective Date* of the *Settlement*, *Bancorp*, the *Bank*,
4 Dismissed Defendants, and each *Defendant*, on behalf of each of them and of their
5 respective predecessors and successors in interest, release and forever discharge
6 each and every one of the *Named Plaintiffs*, all *Class Members*, and *Class Counsel*
7 with respect to the *Released Claims*.

8 2.4. It is understood by the *Named Plaintiffs* and *Class Members* that a risk
9 exists that, following the *Effective Date* of this *Settlement*, they may incur or suffer
10 losses, damages, or injuries which are related to the *Released Claims*, but which
11 they do not know about or anticipate on or before the *Effective Date*. Further a
12 risk exists that any loss or damage *Named Plaintiffs* and *Class Members* presently
13 associate with the *Released Claims* may be or become greater than currently
14 estimated. The *Named Plaintiffs* and *Class Members* assume these risks, and
15 agree to be bound by this *Settlement*, including the releases of claims contemplated
16 by the *Settlement*, even if such unknown or unanticipated results later become
17 known or anticipated. To this end, the *Named Plaintiffs* and *Class Members*
18 acknowledge that this *Settlement* will waive and relinquish all rights under Section
19 1542 of the California Civil Code, which provides that “[a] general release does
20 not extend to claims which the creditor does not know or suspect to exist in his or
21 her favor at the time of executing the release, which, if known by him or her must
22 have materially affected his or her settlement with the debtor,” as well as under
23 any statutes or common law principles of similar effect in any jurisdiction, to the
24 fullest extent they may lawfully do so.

25 2.5. The *Settlement* shall not bar, waive, or release any claims asserted in
26 any related securities, derivative, or other related actions pending against
27 *Defendants*, *Bancorp*, or *Bank*, including the *Tripp* and *Daniels* actions; provided,
28 however, that the *Parties* agree that the question of the extent, if any, to which the

1 amount paid in settlement of this matter may constitute an offset or credit against,
2 or a reduction in the gross amount of any claim asserted in any securities,
3 derivative, or other related actions pending against *Defendants, Bancorp, or Bank,*
4 is to be determined in such other action, and the *Parties* reserve all rights with
5 respect to the position they may take on that question in those actions. Provided,
6 however, that nothing herein shall permit *Named Plaintiffs* and *Class Members* to
7 recover more than 100% of their losses.

8 **3. CONSIDERATION FOR SETTLEMENT**

9 3.1. In consideration for the release and discharge provided for in
10 Paragraphs 2.2 and 2.4, on or before the tenth (10th) day following the later of
11 (1) preliminary approval of this *Settlement Stipulation* by the *Court* or (2) the entry
12 of a final order by the *Bankruptcy Court* providing that the use of insurance policy
13 proceeds to pay the *Settlement Amount* does not violate the automatic stay or that
14 the automatic stay, to the extent, if any, it applies, is lifted for purposes of
15 authorizing such payment and does not constitute a preference, voidable transfer,
16 fraudulent transfer, or similar transaction, the *Underwriter* shall deliver by wire
17 transfer \$7,000,000.00 (the "*Settlement Amount*") into an interest-bearing escrow
18 account established by *Class Counsel* (the "*Settlement Fund*").

19 3.2. *Defendants* agree to take reasonable and necessary steps to cause the
20 *Underwriter* to make the payment called for in Paragraph 3.1.

21 3.3. The *Settlement Fund*, together with all interest earned from the date of
22 deposit of the *Settlement Amount*, shall constitute the *Gross Settlement Fund*.

23 3.4. The *Gross Settlement Fund* shall be used to pay (i) all costs of *Notice,*
24 *Summary Notice,* and administration costs referred to in Paragraph 4.2; and (ii) the
25 attorneys' fee and expense award referred to in Paragraph 5.1, and the *Named*
26 *Plaintiff* case contribution awards, if any, referred to in Paragraph 5.1. The
27 balance of the *Gross Settlement Fund* (inclusive of interest earned) after the
28

1 matters described in clauses (i) and (ii) of this Paragraph, and after the payment of
2 any *Taxes* shall be the *Net Settlement Fund*.

3 3.5. All *Taxes* shall be paid out of the *Gross Settlement Fund*, shall be
4 considered to be a cost of administration of the *Settlement*, and shall be timely paid
5 by the *Custodian* without prior order of the *Court*. The *Custodian* shall, to the
6 extent required by law, be obligated to withhold from any distributions to any
7 person entitled thereto pursuant to this *Stipulation* any funds necessary to pay
8 *Taxes* including the establishment of adequate reserves for *Taxes* as well as any
9 amount that may be required to be withheld under Treasury Reg. 1.468B-(1)(2) or
10 otherwise under applicable law in respect of such distributions. *Class Counsel*
11 shall provide to *Defendants' Counsel* copies of all tax returns filed with respect to
12 the *Gross Settlement Fund* promptly upon the filing thereof, and evidence of the
13 payment of *Taxes* as and when all such payments are made. Further, the *Gross*
14 *Settlement Fund* shall hold harmless and indemnify the *Defendants* and their
15 counsel for any liability for *Taxes* (including, without limitation, taxes payable by
16 reason of any such indemnification payments).

17 3.6. No later than seven (7) business days after the *Effective Date*, the *Net*
18 *Settlement Fund* shall be transferred by the *Custodian* pursuant to a *Plan of*
19 *Allocation* to be proposed by *Class Counsel* and approved by the *Court*. All funds
20 held by the *Custodian* shall be deemed to be in the custody of the *Court* held
21 exclusively for the purposes described in Paragraphs 3.4 and 3.5 of this *Settlement*
22 until such time as the funds shall be disbursed pursuant to this *Settlement* and/or
23 further order of the *Court*. The *Custodian* shall invest any funds in excess of
24 \$250,000 in U.S. Treasury securities, securities issued by United States agencies
25 or fully insured by the Federal Deposit Insurance Corporation (“FDIC”), deposits
26 and certificates of deposit fully insured by the FDIC and backed by the full faith
27 and credit of the U.S. Treasury, and/or short term debt or commercial paper fully
28 guaranteed by the FDIC under the Temporary Liquidity Guarantee Program and

1 backed by the full faith and credit of the U.S. Treasury, and shall collect and
2 reinvest in the *Net Settlement Fund* all earnings accrued thereon.

3 3.7. Any funds held by the *Custodian* in an amount of less than \$250,000
4 may be held in a bank account or Certificates of Deposit insured by the FDIC or
5 may be invested as funds in excess of \$250,000 are invested. The *Parties* agree
6 that the *Gross Settlement Fund* is intended to be a Qualified Settlement Fund
7 within the meaning of Treasury Regulation § 1.468B-1, and that the *Custodian* as
8 administrator of the *Gross Settlement Fund* within the meaning of Treasury
9 Regulation § 1.468B-2(k)(3), shall be responsible for filing tax returns and any
10 other tax reporting for or with respect to the *Gross Settlement Fund* and paying
11 from the *Gross Settlement Fund* any *Taxes* owed with respect to the *Gross*
12 *Settlement Fund*. The *Parties* agree that the *Gross Settlement Fund* shall be
13 treated as a Qualified Settlement Fund from the earliest date possible, and agree to
14 any relation-back election required to treat the *Gross Settlement Fund* as a
15 Qualified Settlement Fund from the earliest date possible. *Defendants* agree to
16 timely provide to the *Custodian* the statement described in Treasury Regulation
17 § 1.468B-3(e).

18 3.8. None of the *Defendants*, the *Released Parties*, the *Underwriter*, or
19 their respective counsel shall have any responsibility for or liability whatsoever
20 with respect to (i) any act, omission or determination of *Class Counsel* or the
21 *Custodian*, or any of their respective designees or agents, in connection with the
22 administration of the *Settlement* or otherwise; (ii) the management, investment, or
23 distribution of the *Gross Settlement Fund*; (iii) the formulation, design, or terms of
24 the *Plan of Allocation*; (iv) the determination, administration, calculation, or
25 payment of any claims asserted against the *Gross Settlement Fund*; (v) any losses
26 suffered by, or fluctuations in the value of, the *Gross Settlement Fund*; or (vi) the
27 payment or withholding of any *Taxes*, expenses, and/or costs incurred in
28

1 connection with the taxation of the *Gross Settlement Fund* or the filing of any
2 returns.

3 **4. ADMINISTRATION**

4 4.1. The *Custodian*, acting solely in its capacity as *Custodian*, shall be
5 subject to the jurisdiction of the *Court*.

6 4.2. Following entry of the *Order for Notice and Hearing*, the *Custodian*
7 may pay from the *Gross Settlement Fund*, without further approval from the *Court*
8 or *Defendants*, all reasonable costs and expenses up to the amount of \$75,000
9 associated with identifying and notifying the *Class Members* and effecting mailing
10 of the *Notice* and publication of the *Summary Notice* as ordered by the *Court*, and
11 the administration of the *Settlement*, including without limitation, the actual costs
12 of printing and mailing the *Notice* and electronic publication of the *Summary*
13 *Notice* on the Business Wire. Notwithstanding the foregoing, the *Custodian* shall
14 not make any payment pursuant to this paragraph that would cause the aggregate
15 payments made under this paragraph to exceed \$75,000 without first obtaining
16 further approval from the *Court*. In the event that the *Settlement* is terminated as
17 provided for herein, the amounts expended pursuant to the first two sentences of
18 this Paragraph shall not be returned to the *Underwriter*. Neither the *Defendants*
19 nor the *Underwriter* shall have any responsibility for the costs and expenses
20 described in this paragraph.

21 4.3. Following entry of the *Order for Notice and Hearing*, the *Custodian*
22 may pay any required *Taxes* from the *Gross Settlement Fund*, without further
23 approval from the *Court* or *Defendants*.

24 4.4. *Defendants* shall cooperate with *Class Counsel* and the *Settlement*
25 *Administrator* to accomplish the *Notice* in accordance with the *Order for Notice*
26 *and Hearing*, including by authorizing the provision to and/or release by the
27 *Settlement Administrator* of participant names, addresses, social security numbers,
28 and contact information in electronic spreadsheet format.

1 4.5. The *Custodian* may rely upon any notice, certificate, instrument,
2 request, paper, or other document reasonably believed by it to be genuine and to
3 have been made, sent, or signed by an authorized signatory in accordance with this
4 *Settlement*, and shall not be liable for (and will be indemnified from the *Gross*
5 *Settlement Fund* and held harmless from and against) any and all claims, actions,
6 damages, costs (including reasonable attorneys' fees) and expenses claimed
7 against or incurred by the *Custodian* for any action taken or omitted by it,
8 consistent with the terms hereof concerning the *Gross Settlement Amount*, in
9 connection with the performance by it of its duties pursuant to the provisions of
10 this *Settlement* or order of the courts, except for its gross negligence or willful
11 misconduct. If the *Custodian* is uncertain as to its duties hereunder, the *Custodian*
12 may request that *Named Plaintiffs* (and, prior to the *Effective Date*, *Defendants*)
13 sign a document clarifying the action or non-action to be taken by the *Custodian*.
14 In the event the *Settlement* is terminated, as provided for herein, the *Gross*
15 *Settlement Fund* shall be returned to the *Underwriter*, except for indemnified
16 amounts and expenses incurred by the *Custodian* in connection with this
17 paragraph.

18 4.6. *Plan of Allocation Implementation Expenses* will be paid by (or
19 reimbursed from) the *Gross Settlement Fund* to the extent of the first \$100,000
20 thereof, with any excess above such amount paid promptly by the *Gross*
21 *Settlement Fund* if such payment is approved by the *Court*. Neither *Defendants*
22 nor the *Underwriter* shall have any responsibility for the *Plan of Allocation*
23 *Implementation Expenses* other than the *Underwriter's* contribution to the *Gross*
24 *Settlement Fund*.

25 **5. ATTORNEYS' FEES AND EXPENSES**

26 5.1. *Class Counsel* will apply to the *Court* for an award of attorneys' fees
27 not to exceed 30% of the *Gross Settlement Fund*, and reimbursement of expenses
28 payable from the *Gross Settlement Fund*, and shall further provide to the *Court*, as

1 part of the motion for approval of the *Settlement*, all necessary information
2 required by the *Court* concerning the total award of attorneys' fees and
3 reimbursement of expenses to be payable from the *Gross Settlement Fund*. Such
4 application shall be made in accordance with such schedule as the *Court* may
5 establish, and the proposed *Order for Notice and Hearing* shall provide that such
6 application shall be made no later than seven days prior to the *Fairness Hearing*.
7 *Class Counsel* may also apply to the *Court* for case contribution awards to *Named*
8 *Plaintiffs* in an amount not to exceed \$5,000 per *Named Plaintiff*. *Defendants* will
9 take no position with respect to any such applications for attorneys' fees or
10 expenses, or *Named Plaintiffs'* case contributions awards. Such amounts are
11 awarded by the *Court* from the *Gross Settlement Fund* and shall be payable by the
12 *Custodian* within fourteen (14) calendar days of the *Effective Date*. *Defendants*
13 shall have no obligations whatsoever with respect to any attorneys' fees or
14 expenses incurred by *Plaintiffs' Counsel*.

15 **6. TERMS OF ORDER FOR NOTICE AND HEARING**

16 6.1. Promptly after this *Stipulation* has been fully executed, *Class Counsel*
17 shall apply to the *Court* for entry of the *Order for Notice and Hearing*,
18 substantially in the form attached hereto as Exhibit A, which Order shall, among
19 other provisions, certify the *Class* as a non-opt-out class for settlement purposes
20 only.

21 6.2. The mailing or publication of the *Notice* and *Summary Notice* shall not
22 occur until the *Order for Notice and Hearing* has been entered by the *Court*.

23 **7. TERMS OF ORDER AND FINAL JUDGMENT**

24 7.1. If the *Settlement* contemplated by this *Stipulation* is approved by the
25 *Court*, *Class Counsel* and *Defendants' Counsel* shall request that a *Judgment* be
26 entered substantially in the form attached hereto as Exhibit B.

1 **8. EFFECTIVE DATE**

2 8.1. The *Effective Date* of the *Settlement* shall be the date when all of the
3 following conditions have been met:

4 8.1.1. the *Gross Settlement Amount* has been deposited into the
5 *Settlement Fund* in accordance with the provisions of Paragraph 3.1;

6 8.1.2. *Class Notice* has been sent to *Class Members* in accordance with
7 the provisions of Paragraph 4.2;

8 8.1.3. the *Court* has entered the *Order and Final Judgment* in all
9 material respects in the form set forth in Exhibit B, following the *Final Approval*
10 *and Fairness Hearing*; and

11 8.1.4. the *Final Order and Judgment* has become final and, in the
12 event that the *Court* modifies the *Final Order and Judgment*, neither the *Named*
13 *Plaintiffs* or *Defendants* have elected to terminate this *Settlement* pursuant to the
14 provisions in Paragraph 10.2.

15 **9. PROCEDURES AND TIMING FOR APPROVAL OF SETTLEMENT**

16 9.1. Notice to Class Members:

17 9.1.1. The mailing or publication of the *Class Notice* shall not occur
18 until the *Order for Notice and Hearing* has been entered by the *Court*.

19 9.1.2. Within thirty (30) days of the date the *Court* enters the *Order for*
20 *Notice and Hearing*, *Class Counsel* shall retain the *Settlement Administrator* to
21 facilitate *Class Notice* as provided herein and in the *Order for Notice and Hearing*.

22 9.1.3. By no later than sixty (60) days before the *Final Approval and*
23 *Fairness Hearing*, the *Settlement Administrator* shall cause the *Class Notice*,
24 together with such non-substantive modifications thereto as may be agreed upon by
25 the *Parties* and presented to the *Court* to be mailed, by first-class mail, postage
26 prepaid, to the last known address of each *Class Member* who can be identified by
27 reasonable effort.
28

1 9.1.4. By no later than sixty (60) days before the *Final Approval and*
2 *Fairness Hearing*, the *Settlement Administrator* shall cause the *Summary Notice*,
3 together with such non-substantive modifications thereto as may be agreed upon by
4 the *Parties*, to be published electronically on the Business Wire.

5 9.1.5. By no later than sixty (60) days before the *Final Approval and*
6 *Fairness Hearing*, *Class Counsel* shall cause the *Class Notice* to be published on
7 each website identified within the *Class Notice*.

8 9.1.6. The last day for *Class Members* to file objections to the
9 *Settlement* shall be no more than fifteen (15) days before the *Final Approval and*
10 *Fairness Hearing*.

11 9.1.7. No later than seven (7) days before the *Final Approval and*
12 *Fairness Hearing*, the *Settlement Administrator* and *Class Counsel* shall file with
13 the *Court* (a) a motion for entry of the *Final Order and Judgment* and approval of
14 the *Plan of Allocation*; (b) proofs of timely compliance with the foregoing mailing
15 and publication requirements; (c) the application for award of attorneys' fees and
16 costs referenced in Paragraph 5.1.

17 **9.2. Final Approval and Fairness Hearing:** The *Court* will, in its
18 discretion, conduct a hearing at which it will consider whether the *Settlement* is
19 fair, reasonable, and adequate (the "*Final Approval and Fairness Hearing*"). The
20 proposed Order for Notice and Hearing shall provide that the Final Approval and
21 Fairness hearing will be scheduled no earlier than 100 days after the filing of the
22 motion for preliminary approval. At or after the *Final Approval and Fairness*
23 *Hearing*, the *Court* will determine: (i) whether to enter judgment approving the
24 *Settlement* and dismissing the *Action* (which judgment is referred to herein as the
25 "*Final Order and Judgment*"); (ii) whether the distribution of the *Settlement*
26 *Amount* as provided in the proposed *Plan of Allocation* should be approved; and
27 (iii) what legal fees, case contribution awards, and costs and expenses should be
28 awarded to *Class Counsel* and to *Named Plaintiffs* as contemplated by Paragraph

1 5.1 of this *Settlement*. The *Parties* agree to support entry of the *Final Order and*
2 *Judgment* as contemplated by clause (i) of this Paragraph; however, pursuant to
3 the provisions in Paragraph 5.1, *Defendants* agree not to take any position, and are
4 not required to take any position, with respect to the matters described in clauses
5 (ii) or (iii) of this Paragraph (provided that nothing contained herein shall prohibit
6 the *Independent Fiduciary* from taking a position with respect to such matters),
7 nor will any of *Defendants* enter into any agreement that restricts the application
8 or disposition of the *Settlement Amount*. The *Parties* covenant and agree that they
9 will reasonably cooperate with one another in obtaining the *Final Order and*
10 *Judgment* as contemplated hereby at the *Fairness Hearing* and will not do
11 anything inconsistent with obtaining the *Final Order and Judgment*.

12 **10. TERMINATION OF SETTLEMENT**

13 10.1. *Defendants'* obligation to respond to the *Complaint* is suspended upon
14 filing of this *Settlement Stipulation* with the *Court*. This *Settlement* shall be
15 voidable pursuant to the procedures set forth in paragraph 10.2 and under the
16 circumstances listed in paragraph 10.2. If this *Settlement* is terminated or not
17 consummated for any reason, this *Settlement* shall be deemed null and void and
18 shall have no further force and effect, and neither this *Settlement* nor the
19 negotiations leading up to it shall be used or referred to by any *Party* in this *Action*
20 or in any other action or proceeding for any purpose. The *Parties* shall then be
21 restored to their respective positions in the *Action* as of August 25, 2009, except
22 that *Defendants* shall have thirty days from the date of termination of the
23 *Settlement* to respond to the operative complaint. In such event, any judgment or
24 order entered by the *Court* in accordance with the terms of this *Settlement* shall be
25 treated as vacated *nunc pro tunc*. Nothing in this Paragraph gives any *Party* any
26 right to unilaterally terminate or not to consummate the *Settlement*.

27 10.2. *Named Plaintiffs* and *Defendants* shall each have the right to terminate
28 this *Settlement* as provided in Paragraph 10.3.2 or by providing written notice of

1 their election to do so to one another within thirty (30) days of any of the
2 following: (a) the *Court* declining to enter the *Order for Notice and Hearing* in
3 any material respect; (b) the *Court* refusing to approve this *Settlement* as set forth
4 in this *Stipulation*; (c) the *Court* declining to enter the *Order and Final Judgment*;
5 or (d) the date upon which the *Judgment* is modified or reversed in any material
6 respect by any level of appellate court.

7 **10.3. Independent Fiduciary:**

8 10.3.1. Within thirty (30) days of the date the *Court* grants
9 preliminary approval to the *Settlement*, *Defendants* shall either cause an
10 *Independent Fiduciary* to be appointed or shall notify *Class Counsel* in writing that
11 *Defendants* have waived their right to terminate the *Settlement* pursuant to this
12 paragraph 10.3.

13 10.3.2. If, as of the date that is thirty (30) days prior to the
14 *Fairness Hearing*, the *Independent Fiduciary* has not approved the *Settlement*,
15 authorized settlement of the *Action* consistent with the terms of this *Settlement*
16 *Stipulation*, and approved the release of the *Released Claims* in its capacity as
17 fiduciary of the Plan as contemplated by Department of Labor Prohibited
18 Transaction Class Exemption 2003-39; *Defendants* each shall have the right to
19 terminate this *Settlement* by providing written notice of their election to do so
20 within twenty (20) days of the *Fairness Hearing*.

21 10.3.3. The *Parties* shall promptly provide to the *Independent*
22 *Fiduciary* such non-privileged information, documents, and other materials (and
23 shall make available for interview by the *Independent Fiduciary* such persons) as
24 the *Independent Fiduciary* reasonably requests. All fees and expenses (including
25 the cost of counsel and other advisors) of the *Independent Fiduciary* shall be paid
26 by the *Underwriter*, and *Defendants* shall cause the *Underwriter* to make such
27 payments if *Defendants* have not waived their right to terminate the *Settlement*
28 pursuant to this paragraph 10.3.

1 **11. MISCELLANEOUS PROVISIONS**

2 11.1. **No Admission of Liability:** Each *Party* understands and agrees that
3 the agreement embodied in this *Settlement* is a compromise and settlement of
4 disputed claims, and that this *Settlement* is not and shall not be construed as an
5 admission or evidence of liability by any of the *Defendants* regarding any of the
6 claims made in the *Action* or otherwise.

7 11.2. **Cooperation:** The *Parties* agree to cooperate fully with one another
8 in seeking *Court* approval of this *Settlement* and to use their best efforts to effect
9 its consummation. Such efforts include, without limitation, the execution of any
10 documents reasonably necessary to implement the provisions of this *Settlement*,
11 and cooperation seeking appropriate orders from the *Court*. Neither *Named*
12 *Plaintiffs* nor *Defendants* shall evade their good faith obligation to seek approval
13 of this *Settlement* by virtue of any rulings, orders, governmental reports, or any
14 other developments in any action that might occur after the *Parties* execute this
15 *Settlement* that might be deemed to alter the relative strength of the *Parties*'
16 positions with respect to any claim or defense in this *Action*.

17 11.3. **Amendment of Settlement:** This *Settlement* may be amended or
18 modified only by a written instrument signed by the *Parties* or their respective
19 successors-in-interest or their respective counsel and approved by the *Court*.

20 11.4. **Waiver:** No waiver of any breach of any term or provision of this
21 *Settlement* shall be construed to be, or shall be, a waiver of any other breach of this
22 *Settlement*. No waiver shall be binding unless in writing and signed by the *Party*
23 waiving the breach.

24 11.5. **Successors and Assigns:** This *Settlement* shall be binding upon, and
25 inure to the benefit of, the successors and assigns of the *Parties*.

26 11.6. **Counterparts:** This *Settlement* may be executed in one or more
27 counterparts, all and each of which shall be deemed one and the same instrument.
28

1 Signatures transmitted via facsimile or email shall have the same force and effect
2 as the originals.

3 **11.7. Construction:** Each *Party* represents that he, she, or it has cooperated
4 in the drafting and preparation of this *Settlement*. The *Parties* additionally agree
5 that in any construction of this *Settlement*, this *Settlement* shall not be construed
6 against any *Party* on the basis that the *Party* might have had a greater hand in
7 drafting this *Settlement*. The *Parties* also agree that the terms of this *Settlement*
8 shall be interpreted according to their fair meaning. The headings of sections and
9 paragraphs herein are for convenience of reference only and shall not affect the
10 meaning or interpretation of this *Settlement*.

11 **11.8. Entire Agreement:** This *Settlement* and its accompanying exhibits set
12 forth the entire agreement and understanding of the *Parties* concerning the subject
13 matter hereof, and supersede and replace all prior negotiations, proposed
14 agreements, and any other agreements, written or verbal. Each of the *Parties* to
15 this *Settlement* acknowledges that no other *Party* to this *Settlement*, nor any
16 attorney of any such *Party*, has made any promise, statement, representation, or
17 warranty whatsoever, express or implied, not contained in this *Settlement*, to
18 induce either *Party* to execute this *Settlement*. The *Parties* further acknowledge
19 that they are not executing this *Settlement* in reliance on any promise,
20 representation, or warranty by any *Party* not contained in this *Settlement*.

21 **11.9. Governing Law:** To the extent not governed by federal law, the
22 rights and obligations of the *Parties* and the *Class Members* shall be construed and
23 enforced in accordance with, and governed by, the laws of the State of California,
24 without giving effect to choice of law principles.

25 **11.10. Advice of Counsel:** In entering into this *Settlement*, the *Parties*
26 represent that they have relied upon the advice of their attorneys, who are the
27 attorneys of their own choice, that the terms of this *Settlement* have been read
28

1 completely and explained to them by their attorneys, and that those terms are fully
2 understood and voluntarily accepted by them.

3 11.11. **Severability:** In the event any of the provisions of this
4 *Settlement* are deemed to be invalid and unenforceable, except for any of the
5 releases contained in Paragraphs 2.1 through 2.4, such provision shall be severed
6 from the remainder of this *Settlement* and the invalidity of any severed provision
7 shall not affect any other provision of this *Settlement* that can be given effect
8 unless either the *Named Plaintiffs* or *Defendants* invoke their right to terminate the
9 *Settlement* pursuant to Paragraph 10.2.

10 11.12. **Authority:** Each person, including counsel, executing this
11 *Settlement* on behalf of any *Party* hereby warrants and represents that he or she
12 has the full authority to do so. Each *Party* further warrants and represents that he,
13 she or it has not assigned or transferred to any person not a *Party* to this *Settlement*
14 any *Released Claim*, in whole or in part, and that each *Party* shall hold harmless
15 the other *Parties* from and against any claim based on or in connection with any
16 such assignment or transfer made, or claimed to have been made, by him, her or it.

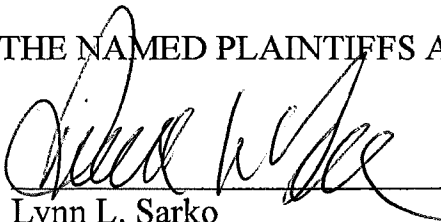
17 11.13. **Continuing Jurisdiction:** The administration, effectuation, and
18 enforcement of the *Stipulation* as provided for herein will be under the authority of
19 the *Court*. The *Court* will retain continuing and exclusive jurisdiction over the
20 *Parties* and *Class Members*, and over the administration, effectuation, and
21 enforcement of the terms of the *Stipulation* and the benefits to *Class Members*
22 hereunder, and for such other matters that may properly come before the *Court*,
23 including any dispute or controversy arising with respect to the interpretation,
24 enforcement, or implementation of the *Stipulation* or any of its terms. Any such
25 dispute or controversy must be brought to the attention of the *Court* by written
26 motion. The *Parties* and each of the *Class Members* consent to the jurisdiction of
27 the *Court* with respect to any proceedings brought to enforce or interpret this
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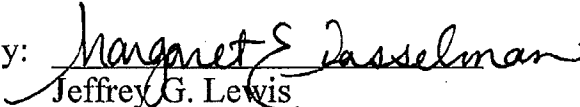
1 *Settlement* and hereby waive all objections to venue and personal and subject
2 matter jurisdiction in that regard.

3 11.14. **Calculation of Time Periods:** The computation of any date or
4 period of time prescribed by the *Stipulation* shall be governed by Rule 6(a) of the
5 Federal Rules of Civil Procedure.

6
7 IN WITNESS WHEREOF, the *Parties* have executed this *Stipulation* on the
8 dates set forth below.

9 FOR THE NAMED PLAINTIFFS AND CLASS MEMBERS:

10
11 By:  Dated: 5/28/10
12 Lynn L. Sarko
13 Derek W. Loeser
14 Erin M. Riley
15 Sarah H. Kimberly
16 KELLER ROHRBACK L.L.P.
17 1201 Third Avenue, Suite 3200
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Telephone: (206) 623-1900
Facsimile: (206) 623-3384

18 By:  Dated: 5-28-10
19 Jeffrey G. Lewis
20 Margaret E. Hasselman
21 James P. Keenley
22 LEWIS, FEINBERG, LEE,
23 RENAHER & JACKSON, P.C.
24 1330 Broadway, Suite 1800
Oakland, CA 94612
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25
26 Michael D. Braun
27 BRAUN LAW GROUP, P.C.
28 10680 West Pico Boulevard, Suite 280
Los Angeles, California 90064
Telephone: (310) 836-6000

1 Facsimile: (310) 836-6010

2
3 *Class Counsel and Attorneys for Named Plaintiffs*

4
5
6
7
8 FOR THE DEFENDANTS:

9
10 By: *Kathleen M. McDowell* Dated: *28-May-2010*
11 John W. Spiegel
12 Kathleen M. McDowell
13 MUNGER, TOLLES & OLSON LLP
14 355 South Grande Ave., 35th Floor
15 Los Angeles, CA 90071-1560
16 Telephone: (213) 683-9100
17 Facsimile: (213) 687-3702

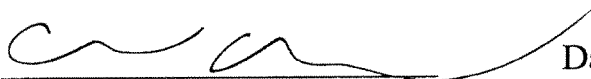
18 *Counsel for Defendants Louis E. Caldera, Hugh M. Grant, and John F. Seymour*

19 By: _____ Dated: _____
20 Tammy Albarran
21 Kelly P. Finley
22 COVINGTON & BURLING LLP
23 One Front Street, 35th Floor
24 San Francisco, CA 94111
25 Telephone: (415) 591-6000
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27
28

1
2 FOR THE DEFENDANTS:

3
4 By: _____ Dated: _____
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12 *Counsel for Defendants Louis E. Caldera, Hugh M. Grant, and John F. Seymour*

13 By:  Dated: June 1, 2010
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28 *Counsel for Defendant Michael W. Perry*

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By: Gregory S. Bruch / JSM
Gregory S. Bruch
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Dated: June 1, 2010

Counsel for Defendant A. Scott Keys

By: _____
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Telephone (213) 612-0001
Facsimile (213) 612-0061

Dated: _____

Counsel for Defendants Jim Barbour, Kevin Cochrane, Ken Horner, Rayman Mathoda, and Jennifer Pikoos

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By: _____ Dated: _____
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Julie A. Smith
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Telephone (202) 303-1000

Counsel for Defendant A. Scott Keys

By: Joel M. Athey Dated: 5/26/10
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Michael W. Fitzgerald
Joel M. Athey
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Telephone (213) 612-0001
Facsimile (213) 612-0061

Counsel for Defendants Jim Barbour, Kevin Cochran, Ken Horner, Rayman Mathoda, and Jennifer Pikoos

EXHIBIT 1

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**UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

**IN RE INDYMAC ERISA
LITIGATION**

Master File No.: 08-04579 DDP(VBKx)

**[PROPOSED] FINDINGS AND
ORDER PRELIMINARILY
APPROVING PROPOSED CLASS
ACTION SETTLEMENT,
PRELIMINARILY CERTIFYING
SETTLEMENT CLASS, APPROVING
NOTICE PLAN, AND SETTING TIME
FOR FAIRNESS HEARING**

JUDGE: DEAN D. PREGERSON

1 This matter comes to the Court for hearing on Plaintiffs’ Motion for
2 Preliminary Approval of Proposed Class Action Settlement, Preliminary
3 Certification of Settlement Class, Approval of Notice Plan, and Time for Fairness
4 Hearing. Presented to the Court for preliminary approval is a settlement of this
5 litigation as against all *Defendants*.¹ The terms of the *Settlement* are set out in the
6 Stipulation and Agreement of Settlement of Class Action – ERISA (“Settlement
7 Agreement”) executed by counsel for the *Parties* on June 1, 2010. The Court,
8 having considered the Settlement Agreement, motion and supporting materials,
9 hereby finds and orders as follows:

10 1. Jurisdiction: The Court has jurisdiction over the subject matter of this
11 *Action* and over the *Parties*.

12 2. Class Certification: The Court preliminarily certifies the *Class* for
13 settlement purposes only. The *Class* means, for purposes of this *Settlement* only, a
14 non-opt-out class of all persons other than *Defendants* and *Defendants*’ spouses,
15 parents, or children who were participants in or beneficiaries of the IndyMac Bank,
16 F.S.B. 401(k) Plan at any time between July 1, 2006, and the date of execution of
17 the *Settlement* and whose accounts included investments in the IndyMac Stock
18 Fund.

19 3. The Court preliminarily appoints *Named Plaintiffs* Sam Zhong Wang
20 and Jeffrey Washington as the *Class* Representatives.

21 4. The Court preliminarily appoints Co-Lead Counsel, Lewis, Feinberg,
22 Lee, Renaker & Jackson, P.C. and Keller Rohrback, L.L.P., and Liaison Counsel,
23 Braun Law Group, P.C., as Class Counsel to represent the proposed Class.

24 5. Preliminary Findings Concerning Proposed Settlement. The Court
25 preliminarily finds that the proposed *Settlement* should be approved as: (i) the

26
27 ¹ Terms capitalized and italicized in this order shall have the meaning ascribed to
28 them in the Settlement Agreement.

1 result of serious, extensive, arm's-length, and non-collusive negotiations; (ii) fair,
2 reasonable, and adequate; (iii) having no obvious deficiencies; (iv) not improperly
3 granting preferential treatment to the *Named Plaintiffs* or segments of the *Class*;
4 (v) falling within the range of possible approval; and (vi) warranting notice of the
5 *Settlement* to the *Class* of a formal fairness hearing, at which evidence may be
6 presented in support of and in opposition to the proposed *Settlement*.

7 6. Fairness Hearing. A hearing is scheduled for _____ (the "Fairness
8 Hearing") to determine, among other things:

9 • Whether the *Settlement* should be approved as fair, reasonable, and
10 adequate;

11 • Whether this *Action* should be dismissed with prejudice pursuant to
12 the terms of the *Settlement*;

13 • Whether the *Notice* and *Summary Notice* and the means of
14 dissemination provided for by the Settlement Agreement: (i) constituted the best
15 practicable notice; (ii) constituted notice that was reasonably calculated, under the
16 circumstances, to apprise members of the *Class* of the pendency of the litigation,
17 their right to object to the *Settlement*, and their right to appear at the Fairness
18 Hearing; (iii) was reasonable and constituted due, adequate, and sufficient notice to
19 all *Persons* entitled to notice; and (iv) met all applicable requirements of the
20 Federal Rules of Civil Procedure, and any other applicable law;

21 • Whether *Class Counsel* adequately represented the *Class* for purposes
22 of entering into and implementing the Settlement Agreement;

23 • Whether the *Plan of Allocation* should be approved;

24 • Whether the application for attorneys' fees and expenses filed by
25 *Class Counsel* should be approved; and

26 • Whether the application for compensation for the *Named Plaintiffs*
27 should be approved.

28

1 7. Notice. A proposed form of *Notice* is attached hereto as Exhibit 1.
2 With respect to such form of *Notice*, the Court finds that such form fairly and
3 adequately: (i) describes the terms and effect of the Settlement Agreement and of
4 the *Settlement*; (ii) notifies the *Class* concerning the proposed *Plan of Allocation*;
5 (iii) notifies the *Class* that *Class Counsel* will seek a case contribution award from
6 the *Settlement Fund* for the *Named Plaintiffs* in an amount not to exceed \$5,000 for
7 each *Named Plaintiff*, for attorneys' fees not to exceed 25% of the *Settlement*
8 *Fund*, and reimbursement of out-of-pocket expenses; (iv) gives notice to the *Class*
9 of the time and place of the Fairness Hearing; and (v) describes how the recipients
10 of the *Notice* may object to any of the relief requested. The Court directs that
11 *Class Counsel* shall:

12 • By no later than _____, 2010, retain the *Settlement Administrator* to
13 facilitate notice of the *Settlement* to the *Class* as provided for herein and in the
14 Settlement Agreement.

15 • By no later than _____, 2010, cause the *Notice*, with blanks completed
16 and such non-substantive modifications thereto as may be agreed upon by the
17 *Parties*, to be sent to each *Person* within the *Class* who can be identified by
18 reasonable effort. Such *Notice* shall be sent by first-class mail, postage prepaid, to
19 the *Person's* last known address. The *Defendants* shall cooperate with Class
20 Counsel to accomplish Notice provided for in this paragraph, including by
21 providing *Class Counsel*, in accordance with Section 9 of the Settlement
22 Agreement, with the names and last known addresses of the members of the *Class*
23 to the extent such information is within *Defendants'* custody or control.

24 • By no later than _____, 2010, cause the Settlement Agreement with
25 all of its exhibits and the *Notice* to be posted on a website Class counsel establishes
26 for this purpose.

1 • By no later than _____, 2010, cause a *Summary Notice* in the form
2 attached hereto as Exhibit 2, with blanks completed and such non-substantive
3 modifications thereto as may be agreed upon by the *Parties*, to be electronically
4 published on at least one occasion for nationwide distribution on Business Wire
5 and/or such other publications as the Court may authorize.

6 • By no later than _____, 2010, file with the Court a proof of timely
7 compliance with the foregoing mailing and publication requirements.

8 8. Objections to Settlement. Any member of the *Class* who wishes to
9 object to the fairness, reasonableness, or adequacy of the *Settlement*, to the *Plan of*
10 *Allocation*, to any term of the Settlement Agreement, to the proposed award of
11 attorneys' fees and expenses, or to any request for compensation for the *Named*
12 *Plaintiffs*, may file an objection. An objector must send to the Settlement
13 Administrator a letter or other written filing with a statement of his, her or its
14 objection(s), specifying the reason(s), if any, for each such objection made,
15 including any legal support and/or evidence that such objector wishes to bring to
16 the Court's attention or introduce in support of such objection, as well as the
17 objector's full name, address, telephone number, and signature, and the name,
18 address, and telephone number of any counsel representing the objector. The
19 objector or his, her or its counsel (if any) must effect service of the objection on the
20 *Settlement Administrator* at the address provided in the *Notice* so that it is received
21 by no later than _____, 2010. Any member of the *Class* or other *Person* who does
22 not timely serve a written objection complying with the terms of this paragraph
23 shall be deemed to have waived, and shall be foreclosed from raising, any
24 objection to the *Settlement*, and any untimely objection shall be barred.

25 9. Appearance at Fairness Hearing. Any objector who serves a timely,
26 written objection in accordance with the instructions above and herein, may also
27 appear at the Fairness Hearing either in person or through counsel retained at the
28

1 objector's expense. Objectors or their attorneys intending to appear at the Fairness
2 Hearing must effect service of a notice of intention to appear setting forth, among
3 other things, the name, address, and telephone number of the objector (and, if
4 applicable, the name, address, and telephone number of the objector's attorney) on
5 the *Settlement Administrator* (at the addresses set out in the Notice) no later than
6 _____, 2010. Any objector who does not timely serve a notice of intention to
7 appear in accordance with this paragraph shall not be permitted to appear at the
8 Fairness Hearing, except for good cause shown.

9 10. Service of Papers. The *Settlement Administrator* shall promptly
10 furnish *Defendants' Counsel* and *Class Counsel* with copies of any and all
11 objections that come into its possession, and *Defendants' Counsel* and *Class*
12 *Counsel* shall promptly furnish each other with copies of any and all objections
13 that come into their possession.

14 11. Notice Expenses. The expenses of printing and mailing all notices
15 required hereby to the extent of the first \$75,000 shall be paid from the *Settlement*
16 *Fund* as provided in Section 4.2 of the Settlement Agreement.

17 12. Motion for Final Approval of Settlement, Plan of Allocation, and Fee
18 Petition. No later than _____, 2010, the *Settlement Administrator* and *Class*
19 *Counsel* shall file with the Court (a) a motion for entry of the *Final Order and*
20 *Judgment* and approval of the *Plan of Allocation*; (b) proofs of timely compliance
21 with the foregoing mailing and publication requirements; (c) the application for
22 award of attorneys' fees and costs referenced in Paragraph 5.1 of the Settlement
23 Agreement.

24 13. Termination of Settlement. This Order shall become null and void,
25 and shall be without prejudice to the rights of the *Parties*, all of whom shall be
26 restored to their respective positions existing immediately before this Court entered
27 this Order, if the *Settlement* is terminated in accordance with the Settlement
28

1 Agreement. In such event, Section 10 of the Settlement Agreement shall govern
2 the rights of the *Parties*.

3 14. Use of Order. This Order shall not be construed or used as an
4 admission, concession, or declaration by or against *Defendants* of any fault,
5 wrongdoing, breach, or liability or as a waiver by any *Party* of any arguments,
6 defenses, or claims he, she, or it may have, including, but not limited to, any
7 objections by *Defendants* to class certification in the event that the Settlement
8 Agreement is terminated. In the event this Order becomes of no force or effect, it
9 shall not be construed or used as an admission, concession, or declaration by or
10 against *Defendants*, *Named Plaintiffs*, or the *Class*.

11 15. Continuance of Hearing. The Court reserves the right to continue the
12 Fairness Hearing without further written notice.

13 16. Response to Consolidated Complaint. *Defendants'* obligation to
14 respond to the *Complaint* is suspended as provided in Section 10 of the Settlement
15 Agreement.

16 IT IS SO ORDERED.

17 Date:

18 _____
19 Dean D. Pregerson
20 United States District Court Judge
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EXHIBIT A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

**IN RE INDYMAC ERISA
LITIGATION**

Master File No.: 08-04579 DDP (VBKx)
CLASS ACTION

**NOTICE OF PROPOSED CLASS ACTION SETTLEMENT, SETTLEMENT FAIRNESS
HEARING, AND MOTION FOR ATTORNEYS' FEES AND REIMBURSEMENT OF
EXPENSES AND NAMED PLAINTIFFS' COMPENSATION**

You have received this notice because records show that you, or someone who designated you as their retirement plan beneficiary, participated in the IndyMac Bank, F.S.B. 401(k) Plan (the "Plan") and had a portion of your account invested in the fund containing IndyMac Bancorp common stock anytime between July 1, 2006 and June 1, 2010 ("Class Period"). As a result of class action litigation over the propriety of this investment, you may be eligible to receive money in the proposed settlement (the "Settlement").

Please read this notice carefully.

This Notice has been ordered by the Court overseeing the case.

This is not a solicitation or advertisement from an attorney.

You have not been sued.

- This notice advises you of the settlement of a consolidated class action lawsuit brought by Plaintiffs Sam Zhong Wang and Jeffrey Washington on behalf of themselves, the Plan, and as representatives of a class described herein (the "Class") against the Defendants (persons named personally as defendants in the lawsuit).
- This class action lawsuit involves claims that the fiduciaries responsible for overseeing the Plan breached their fiduciary duties to the Plan and its participants by allowing the Plan and its participants to maintain and continue investments in IndyMac Bancorp common stock after July 1, 2006. The fiduciaries deny that they breached any fiduciary duties.
- The United States District Court for the Central District of California (the "Court") has preliminarily approved the Settlement and has scheduled a hearing to evaluate the fairness and adequacy of the Settlement and consider the Plaintiffs' motion for final approval of the Settlement and for class certification, motion for approval of a proposed plan of allocation, and motion for an award of attorneys' fees and costs and for case contributions awards to the Plaintiffs. That hearing, before the Hon. Dean D. Pregerson, has been scheduled for _____, 2010, at ____m. in Courtroom 3, Second Floor, of the United States District Court for the Central District of California, 312 N. Spring St., Los Angeles, California.
- If the Settlement is approved and you are a member of the Class, you will receive money in exchange for releasing the Defendants from legal claims that were or could have been brought in the lawsuit.
- The terms of the Settlement are contained in a Stipulation and Agreement of Settlement – ERISA Action (the "Settlement Agreement"), a copy of which is available at www._____.com or by contacting Plaintiffs' Counsel as described below. Capitalized terms used in this notice and not defined herein have the meanings assigned to them in the Settlement Agreement. The Settlement is summarized below.

- **Your legal rights will be affected whether or not you take any action. Read this notice carefully.**

YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT

No Action is Necessary to Receive Payment

If you do nothing in response to this notice, and the proposed Settlement is approved by the Court, you will receive a monetary payment and release certain legal claims.

Object (no later than _____)

If you wish to object to any part of the Settlement, you can write to the Court and counsel and explain why.

Appear at a Hearing on _____

If you have submitted a written objection to the Court and Plaintiffs' Counsel, as explained below, you can ask to speak in Court about the fairness of the Settlement.

These rights and options – ***and the deadlines to exercise them*** – are explained in this notice.

The Court in charge of this case has given preliminary approval to the Settlement but will be conducting a hearing on _____, 2010, to evaluate whether to give final approval to the Settlement. Your benefits under the Settlement will be provided if the Court gives its final approval to the Settlement and after any appeals are resolved. Thank you for your patience.

WHY DID I RECEIVE THIS NOTICE?

You have received this notice because you or someone in your family are or may have been a participant in, beneficiary of, or alternate payee of the Plan during the Class Period.

The Court caused this notice to be sent to you because you have a right to know about the Settlement and all of the options available to you regarding the Settlement before the Court decides whether to approve the Settlement. This notice describes the litigation, the Settlement, your legal rights, what benefits are available, and who is eligible for them.

The Court in charge of this case is the United States District Court for the Central District of California. The people who brought this suit are called the "Plaintiffs," and the people they sued are called the "Defendants." The Plaintiffs in this case are Sam Zhong Wang and Jeffrey Washington. The Defendants are Jim Barbour, Louis E. Caldera, Kevin Cochrane, Hugh M. Grant, Ken Horner, A. Scott Keys, Rayman Mathoda, Michael W. Perry, Jennifer Pikoos, and John F. Seymour.

The legal action that is the subject of this notice and the Settlement is titled *In re IndyMac ERISA Litigation*, Case No. 2:08-cv-04579-DDP-(VBK).

WHAT IS THIS CASE ABOUT?

This case stems from the mortgage crisis of 2007 and 2008 and the resulting failure of IndyMac Bank, F.S.B. (the “Bank”). The Bank was taken over by federal government regulators on July 11, 2008, and shortly thereafter the Bank’s holding company, IndyMac Bancorp, Inc. (“Bancorp”), filed for bankruptcy protection in the United States Bankruptcy Court for the Central District of California. As a result of the Bank’s failure, Bancorp’s publicly traded stock became virtually worthless.

The Plaintiffs who brought this case and the class of people they are seeking to represent are former participants in the Plan who had a portion of their Plan accounts invested in IndyMac Bancorp, Inc. common stock (“IndyMac stock”). Between July 14, 2008, and August 13, 2008, eight lawsuits were filed to recover damages on behalf of participants in the Plan for the losses they suffered as a result of the Plan’s investments in IndyMac stock. On October 7, 2008, the Court ordered that all these cases be consolidated into a single lawsuit, and it appointed lead plaintiffs and lead attorneys to prosecute the claims. On January 5, 2009, the Plaintiffs filed a consolidated complaint for all the actions. This lawsuit is brought on behalf of the Plan and its participants, and the Plan participants will recover money if this Settlement is given final approval. The settlement proceeds will be allocated among Class Members who lost money in their Plan accounts during the Class Period due to investment in IndyMac stock.

The consolidated lawsuit alleges that the Defendants breached fiduciary duties they owed to the Plan and its participants under a federal law called the Employee Retirement Income Security Act (“ERISA”). ERISA is a comprehensive statute that regulates the operations of most private-sector employee benefit plans, including the retirement plan at issue in this case. Under ERISA, the people and entities responsible for overseeing the Plan’s investment owe the Plan itself, and the current and former employees who participate in it, fiduciary duties to loyally and prudently manage the Plan’s assets. This lawsuit alleges that the Plan’s fiduciaries breached these duties by allowing the Plan and its participants to make and maintain investments in IndyMac stock after July 1, 2006. The Defendants have vigorously denied that they breached any legal duties and strongly contest their liability for the Plan’s losses.

WHY AND HOW DID THE PARTIES REACH THIS SETTLEMENT?

This litigation is strongly contested by both the Defendants and the Plaintiffs, and both parties bear the risk that they will not prevail on key legal and factual issues if the case proceeds all the way to a judgment. The Plaintiffs and their counsel believe the Class’s legal claims are strong, and the Defendants and their counsel believe their defenses are strong. This litigation is further complicated for the Plaintiffs because there are limited assets available to satisfy a judgment in favor of the Plan and its participants due to the federal takeover of the Bank and the bankruptcy of its holding company, and because there are numerous other legal claims on the remaining assets of the Bank. The primary source of assets available to satisfy a judgment in this case is from insurance policies, which are also used to cover the ongoing costs of litigation.

Counsel for the Plaintiffs and Defendants exchanged relevant documents and retained financial experts to analyze the potential damages in the case. After this information was exchanged and discussed between the parties, they agreed to participate in a mediation session to attempt to resolve the case at an early stage of the litigation, before assets available to pay a judgment were further depleted by litigation costs. On August 25, 2009, the parties met with the Honorable Daniel Weinstein (Ret.), a

retired judge and highly experienced mediator. As a result of this meeting and subsequent negotiations between the parties' counsel and Judge Weinstein, the parties reached this Settlement on behalf of the Plan and all of its participants.

The Settlement calls for the payment of \$7,000,000 in cash by the Defendants' fiduciary insurance carrier, which will be allocated to Class Members based on how much each lost due to investments in Bancorp stock during the Class Period. In exchange for the cash payment, the Class Members agree to release the Defendants from any liability related to the claims that have been asserted in this lawsuit. The Settlement payment is a compromise that reflects extensive investigation, hard-fought negotiations, and the risks faced by both the Plan participants and the Defendants if the litigation were pursued to judgment. It is the considered opinion of the Plaintiffs and their attorneys, who have substantial experience in this type of litigation, that the Settlement is an excellent recovery for the Plan's participants.

WHY IS THIS CASE A CLASS ACTION?

This case is a class action because the legal and factual issues that pertain to each member of the Class are very similar or identical. In a class action, one or more plaintiffs, called "named plaintiffs," sue on behalf of people who have similar claims. The Court resolves the issues for all members of the Class. United States District Judge Dean D. Pregerson is presiding over this case and must approve this Settlement before it can become final.

HOW DO I KNOW IF I AM A MEMBER OF THE CLASS?

The Class of Plan participants in this Settlement is defined as follows:

All persons other than Defendants and Defendants' spouses, parents, or children who were participants in or beneficiaries of the IndyMac Bank, F.S.B. 401(k) Plan at any time between July 1, 2006, and June 1, 2010, and whose accounts included investments in the IndyMac Bancorp stock fund.

You have received this notice because the Plan's records show that you, or someone who designated you as a beneficiary of his or her retirement account, had such investments. If you have any questions about whether you are a member of the Class, you can contact Plaintiffs' counsel, whose information is listed in the section titled "Contact Information for Plaintiffs' Counsel."

WHAT DOES THE SETTLEMENT PROVIDE?

The Settlement provides that the Defendants' fiduciary insurance carrier will pay \$7,000,000, which will be deposited into an interest bearing account called the "Gross Settlement Fund." The amount remaining in the Gross Settlement Fund (including interest, but after accounting for taxes and Court-approved expenses and attorneys fees) will be allocated among and paid to members of the Class according to a Plan of Allocation to be approved by the Court. Disbursement of the Settlement Fund to the Class will occur once the Settlement has become final – after all appeals relating to the Settlement are favorably decided and all appeal periods have expired.

In exchange for the Settlement payment, Class Members will release all claims that were or could have been asserted in this Action against the Defendants, Bank, Bancorp, the fiduciaries of the Plan, and

their successors. The release does not include claims asserted in unrelated lawsuits pertaining to Bancorp stock¹ or individual claims that you may have separate and apart from the claims asserted in this lawsuit. For more information about the scope of the release, please see the section of this notice titled “How Do I Get More Information?”

WHAT WILL BE MY SHARE OF THE SETTLEMENT FUND?

You will receive a pro rata share of the \$7,000,000 Settlement Fund after costs and fees have been deducted. The Settlement payment is a compromise; accordingly, it does not compensate Plan participants for 100% of their losses.

By _____, 2010, Plaintiffs’ Counsel will file a detailed Plan of Allocation for Court approval at or after the Fairness Hearing. The Plan of Allocation, which may be obtained at www._____.com or by contacting Plaintiffs’ Counsel after it is filed, will describe the manner in which the Settlement proceeds (the “Net Settlement Fund”) will be distributed to Class Members. In general terms, the Plan of Allocation will provide that each Class Member’s share of the Net Settlement Fund will be calculated as follows:

Each member of the Class will be assigned an “Alleged Net Loss Percentage,” showing the percentage of his or her alleged net loss in relation to all other Class members’ alleged net losses. Each member of the Class’s share of the Net Settlement Fund will be equal to the Net Settlement Fund, less the Plan expenses associated with implementing the Plan of Allocation, multiplied by his or her Alleged Net Loss Percentage.

The Settlement Administrator will perform all calculations for you and determine your pro rata amount. The Settlement Administrator will have access to all available records, so you do not need to be concerned if you no longer have your Plan account statements. The Court will be asked to approve a more detailed statement of the Plan of Allocation, a copy of which will be available along with other settlement documents at www._____.com.

HOW DO I GET A PAYMENT?

If the Settlement is given final approval, you will not have to do anything to get a payment from the Settlement. You will receive a check for your pro rata share of the Settlement along with general information about what to do with those funds in order to maintain their tax-protected status as retirement savings. Because each individual’s financial situation is unique, we cannot give specific tax advice. ***You should consult with your own tax advisor about what to do with your payment prior to depositing the check.***

WHEN WOULD I RECEIVE MY PAYMENT?

¹ Such unrelated lawsuits include, but are not limited to, *Daniels v. Indymac Bancorp, Inc.*, Case No. 2:08-cv-03812-GW-VBK (C.D. Cal.), and *Tripp v. Indymac Financial Inc.*, Case No. 2:07-cv-01635-GW-VBK (C.D. Cal.).

Payment is conditioned on several matters, including the Court's approval of the Settlement and that approval becoming final and no longer subject to any appeals. Upon satisfaction of various conditions, the Net Settlement Fund will be distributed pursuant to the Plan of Allocation described above. The Settlement Agreement may be terminated on several grounds, including if the Court does not approve or otherwise modifies the terms of the Settlement. If the Settlement Agreement is terminated, the Settlement will also be terminated, and the Action will proceed as if the Settlement had not been reached.

CAN I OPT OUT OF THE SETTLEMENT?

No. Because of the legal issues involved, the class of Plan participants affected by this Settlement has been preliminarily certified as a mandatory class. If final approval is granted by the Court, it will remain a mandatory class. This means that you cannot opt out of the benefits of the Settlement in order to pursue your own claims or for any other reason. You can, however, object to the Settlement and try to convince the Court not to approve the Settlement for any reasons that you see fit to present. For information on how to file an objection with the Court and/or attend the Settlement Fairness Hearing, see the sections below titled "How Do I Object to the Settlement?" and "How Can I Attend the Settlement Fairness Hearing?"

WHO ARE THE PLAINTIFFS' ATTORNEYS? DO THEY REPRESENT ME?

The Court has appointed Plaintiffs' Counsel to represent the Class of Plan participants in this case. Plaintiffs' Counsel are: Lewis, Feinberg, Lee, Renaker & Jackson, P.C., in Oakland, California; and Keller Rohrback, L.L.P., in Seattle, Washington (referred to herein as "Plaintiffs' Counsel" or "Class Counsel"). These firms have extensive experience representing employees in complex ERISA litigation. If you are a member of the Class, these law firms represent your interests in this lawsuit.

If you wish, you can retain your own lawyer at your own expense to represent you in connection with the Settlement. If you do hire your own attorney, he or she must send a Notice of Intent to Appear to the Settlement Administrator by _____, 2010.

HOW WILL THE PLAINTIFFS' ATTORNEYS BE COMPENSATED?

Class Counsel has spent hundreds of hours working on this case, and tens of thousands of dollars on the costs and expenses of the investigation and prosecution of the lawsuit. The terms of the Settlement call for Class Counsel's fees and expenses to be paid out of the Settlement Fund. Class Counsel will apply to the Court for no more than 25% of the Settlement Fund in fees, plus out-of-pocket costs.

The individual Plaintiffs who brought this case will also request a case contribution award from the Settlement Fund to compensate them for the time and effort they spent assisting with the investigation and prosecution of the case. Class Counsel will request that the Court approve case contribution awards of \$5,000 for each of the two Plaintiffs.

You have the right to object to this aspect of the Settlement even if you approve of the other aspects of the Settlement.

HOW DO I OBJECT TO THE SETTLEMENT?

If you are a member of the Class, you can object to the Settlement if you disagree with any part of it. You can give reasons why you think the Court should not approve the Settlement, and the Court will consider your views prior to giving the Settlement final approval. Because the Settlement is a private agreement, the Court does not have the power to modify terms of the Settlement without the consent of the parties. Therefore, even if you only object to part of the Settlement, your objection, if successful, might result in a rejection of the entire Settlement.

To object, you must send a letter or other written filing stating that you object to the Settlement in *In re IndyMac ERISA Litigation*, Case No. 2:08-cv-04579-DDP-(VBK). You must also include your full name, address, telephone number, signature, and a full explanation of all reasons you object to the Settlement, as well as the name, address, and telephone number of any counsel representing you. Your written objection must be received by the Settlement Administrator by _____, 2010. The Settlement Administrator's address is _____.

If your written objection is not received by _____, 2010, you will lose your opportunity to have your objection considered by the Court, to attempt to prevent the Settlement from being approved, or to appeal from any orders or judgments by the Court in connection with the proposed Settlement.

HOW DO I ATTEND THE FAIRNESS HEARING?

The Court will hold a Fairness Hearing before the Honorable Dean. D. Pregerson to evaluate the fairness of the Settlement at _____ on _____, 2010, in the United States District Court for the Central District of California, located at 312 N. Spring St., Los Angeles, California 90012, Courtroom 3, Second Floor.

At this hearing, the Court will consider whether the Settlement is fair, reasonable, and adequate. If there are objections, the Court will consider them. The Court will listen to people who have asked to speak at the hearing. The Court may also decide how much Class Counsel and the Plaintiffs will be compensated for their efforts to secure the Settlement. After the hearing, the Court will decide whether to approve the Settlement. We do not know how long these decisions will take.

You do not have to attend the hearing. The attorneys representing the Plaintiffs and the Class will present the Settlement to the Court and answer any questions the Court may have. If you file a written objection, you do *not* have to attend the hearing in order for it to be considered by the Court.

You are welcome to come to the hearing at your own expense. You may also arrange for your own counsel to attend on your behalf. You may also ask the Court for permission to speak at the hearing. To do so, you must send a letter or other paper called a "Notice of Intention to Appear at Fairness Hearing in *In re IndyMac ERISA Litigation*, Case No. 2:08-cv-04579-DDP-(VBK)" to the Settlement Administrator. Be sure to include your name, address, telephone number, and signature. Your Notice of Intention to Appear must be sent to the Settlement Administrator at the address listed above in the answer to the question "How Do I Object to the Settlement?" and must be received by no later than _____, 2010.

WHAT HAPPENS IF I DO NOTHING AT ALL?

If you do nothing at all, you will remain a part of the Class, and if the Court approves the Settlement you will receive the payment described in this notice and release your claims against the Defendants as described in this notice.

HOW DO I GET MORE INFORMATION?

Please do not contact the Court, the Bank, or Bancorp. They are not in a position to provide you with information about the Settlement.

This notice is a summary of the Settlement. The complete Settlement is set forth in the Settlement Agreement. You can get a copy of the Settlement Agreement at www._____.com, by calling (800) ____ - ____, or by emailing Class Counsel at _____.

You may also review the case file in the United States District Court, located at 312 N. Spring St., Los Angeles, California, 90012. Or you can review the case file online through the PACER system at <http://pacer.psc.uscourts.gov/>. Please note that users must pay fees to access court files through PACER.

EXHIBIT B

Keller Rohrback L.L.P. and Lewis, Feinberg, Lee, Renaker & Jackson, P.C. are Issuing the Following Statement Regarding the IndyMac ERISA Litigation

LOS ANGELES—(BUSINESS WIRE)—Keller Rohrback L.L.P. and Lewis, Feinberg, Lee, Renaker & Jackson, P.C.:

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

**IN RE INDYMAC ERISA
LITIGATION**

**Master File No.: 08-04579 DDP (VBKx)
CLASS ACTION**

TO ALL MEMBERS OF THE FOLLOWING CLASS:

All persons who were participants in or beneficiaries of the IndyMac Bank, F.S.B. 401(k) Plan (the “Plan”) at any time between July 1, 2006, and June 1, 2010 (the “Class Period”), and whose accounts included investments in the IndyMac Bancorp, Inc. stock fund.

**PLEASE READ THIS NOTICE CAREFULLY.
THIS IS A COURT-ORDERED LEGAL NOTICE.
THIS IS NOT A SOLICITATION.**

A proposed settlement (the “Settlement”) has been preliminarily approved by a federal court in the above-captioned class action lawsuit alleging breaches of fiduciary duties under the Employee Retirement Income Security Act (“ERISA”) in connection with the Plan. The terms of the Settlement are contained in a Stipulation and Agreement of Settlement – ERISA Action (“Settlement

Agreement”), which was executed on June 1, 2010. A copy of the Settlement Agreement is available at www._____.com. Capitalized terms used in this Summary Notice and not defined herein have the same meaning assigned to them in the Settlement Agreement.

The proposed Settlement provides for a payment of \$7 million to settle all claims against all Defendants. Under the Settlement, the proceeds, net of expenses described in the Settlement Agreement (which include notice and administrative expenses, Court-approved attorneys’ fees and expenses and Plaintiff case contribution awards, taxes, and other costs related to the Settlement Fund administration) will be allocated to members of the Class whose Plan account(s) suffered losses as a result of investing in IndyMac Bancorp, Inc. stock during the Class Period. Settlement proceeds will be allocated in accordance with a Plan of Allocation approved by the Court.

If you qualify, you will receive such an allocation. You do not need to submit a claim or take any other action unless you wish to object to the Settlement. The United States District Court for the Central District of California (the “Court”) authorized this Notice.

THE COURT WILL HOLD A HEARING AT __:__.M. ON _____, 2010 TO DECIDE WHETHER TO APPROVE THE SETTLEMENT.

Additional information about the proposed Settlement, including the Notice of Proposed Class Action Settlement that has been mailed to Class Members and explains how Class Members can object to the Settlement and the Settlement Agreement is available at www._____.com. In addition, Plaintiffs' Counsel have established a toll-free number, _____, to assist in answering questions regarding the Settlement.

PLEASE DO NOT CONTACT THE COURT.

DATED: _____, 2010.

By Order of the Court

The Hon. Dean D. Pregerson, United States District Court Judge

EXHIBIT 2

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**UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

**IN RE INDYMAC ERISA
LITIGATION**

Master File No.: 08-04579 DDP(VBKx)

**[PROPOSED] FINAL ORDER
AND JUDGMENT**

JUDGE: DEAN D. PREGERSON

This *Action* involves claims for alleged violations of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§ 1001, *et seq.* (“*ERISA*”), with respect to the IndyMac Bank, F.S.B. 401(k) Plan (the “*Plan*”).¹

This matter came before the Court for a hearing pursuant to the order of this Court entered on _____, 2010, on the application of the *Parties* for approval of the *Settlement* set forth in the Stipulation and Agreement of Settlement of Class Action – ERISA (the “*Settlement Agreement*”), executed on June 1, 2010, and filed with the Court on June 2, 2010.

Before the Court are: (1) *Named Plaintiffs’* Motion for Final Approval of Settlement and for Settlement Class Action Certification (“*Final Approval Motion*”); (2) *Named Plaintiffs’* Motion and Memorandum for Approval of Plan of

¹ Terms capitalized and italicized in this order shall have the meaning ascribed to them in the *Settlement Agreement*.

1 Allocation (“Plan of Allocation Motion”); and (3) *Class Counsel’s* Motion for
2 Award of Attorneys’ Fees and Expenses and Named Plaintiffs’ Case Contribution
3 Awards (collectively, the “Fees and Expenses Motion”).

4 The Court has received declarations attesting to the mailing of the *Notice*
5 and publication of the *Summary Notice* in accordance with the Court’s Findings
6 and Order Preliminarily Approving Proposed Settlement, Preliminarily Certifying
7 Settlement Class, Approving Notice Plan, and Setting Time and Fairness Hearing
8 (“Order for Notice and Hearing”).

9 A hearing was held on _____, 2010 (the “Final Approval Hearing”), to:
10 (1) determine whether to grant the Final Approval Motion; (2) determine whether
11 to grant the Plan of Allocation Motion; (3) determine whether to grant the Fees and
12 Expenses Motion; and (4) rule upon such other matters as the Court might deem
13 appropriate.

14 Due and adequate notice having been given to the *Class* as required, and the
15 Court having considered all papers filed and all related proceedings, hereby finds
16 and orders as follows:

17 1. This Court has jurisdiction over the subject matter of this *Action* and
18 over all *Parties* to the *Action*, including all members of the *Class*.

19 2. On _____, 2010, _____ copies of the *Notice* were mailed to
20 *Class Members*.

21 3. On _____, 2010, a copy of the *Summary Notice* was
22 electronically published on the Business Wire in accordance with the Settlement
23 Agreement and the Court’s Order for Notice and Hearing.

24 4. In accordance with the Court’s Order for Notice and Hearing, the
25 *Notice* and Settlement Agreement were posted on www._____.com.

26 5. The *Notice* and the *Summary Notice* fully informed *Class Members* of
27 their rights with respect to the *Settlement*, including the right to object to the
28 *Settlement* or the application for an award of attorneys’ fees and reimbursement of

1 expenses.

2 6. The *Notice* and *Summary Notice* collectively met the statutory
3 requirements of notice under the circumstances, including the individual notice to
4 all members of the *Class* who could be identified through reasonable effort, and
5 fully satisfied the requirements of Federal Rule of Civil Procedure 23 and the
6 requirements of due process.

7 7. The *Action* and all claims contained therein, as well as all of the
8 *Released Claims*, are dismissed with prejudice as to the *Named Plaintiffs*, the *Class*
9 *Members*, and the *Plan*, and as against the *Released Parties*. The *Parties* are to
10 bear their own costs, except as otherwise provided in the Settlement Agreement.

11 8. The Final Approval Motion is GRANTED, and the *Settlement* is
12 hereby APPROVED as fair, just, reasonable, and adequate as to each member of
13 the *Class*, and in the public interest. The *Parties* are hereby directed to implement
14 the *Settlement* in accordance with its terms and conditions.

15 9. The *Named Plaintiffs*, on behalf of themselves, the *Plan*, and the
16 *Class*, are deemed to have, and by operation of this Order and Judgment shall have,
17 absolutely and unconditionally released and forever discharged the *Released*
18 *Parties* from the *Released Claims*.

19 10. All members of the *Class* are hereby forever barred and enjoined from
20 prosecuting the *Released Claims* against the *Released Parties*. As set forth in
21 Paragraph 1.31 of the Settlement Agreement, the *Released Claims* shall be: any
22 and all claims whether known or unknown, (i) that were asserted in the *Action* or
23 that could have been asserted in this *Action*; (ii) that would have been barred by *res*
24 *judicata* had the *Action* been fully litigated to a final judgment; or (iii) that relate to
25 any investment in *Bancorp* stock or the IndyMac Stock Fund by the *Plan* or any
26 such investment by any *Plan* participant through the *Plan*. *Released Claims* shall
27 extend to all *Released Parties*. The *Released Claims* shall not extend to any claims
28 asserted by or on behalf of the plaintiffs in (i) the *Tripp Action* or (ii) the *Daniels*

1 *Action*. Further, *Released Claims* shall not extend to claims (i) related to
2 enforcement of the Settlement Agreement; (ii) for individual or vested benefits
3 separate and distinct from the claims asserted in the *Action*; or (iii) against the
4 *Independent Fiduciary*.

5 11. Each of the *Defendants*, by operation of this Order and Judgment,
6 absolutely and unconditionally releases and forever discharges the *Named*
7 *Plaintiffs*, the *Class*, and *Class Counsel* from any and all claims relating to, or in
8 connection with the institution or prosecution of this *Action* or the *Settlement* of
9 any *Released Claim*.

10 12. The *Plan of Allocation* is hereby APPROVED as fair and reasonable.
11 *Class Counsel* are directed to administer the *Settlement* in accordance with its
12 terms and provisions. Any modification or change in the *Plan of Allocation* that
13 may hereafter be approved shall in no way disturb or affect this Judgment and shall
14 be considered separate from this Judgment.

15 13. *Class Counsel* is hereby awarded attorneys' fees in the amount of
16 _____% of the *Settlement Fund*, which the Court finds to be fair and reasonable, and
17 \$_____ in reimbursement of *Class Counsel's* reasonable expenses incurred in
18 prosecuting the *Action*. The attorneys' fees and expenses so awarded shall be paid
19 from the *Gross Settlement Fund* pursuant to the terms of the Settlement
20 Agreement, as provided in the Settlement Agreement, with interest on such
21 amounts from the date the *Settlement Fund* was funded to the date of payment at
22 the same net rate that the *Gross Settlement Fund* earns. All fees and expenses paid
23 to *Class Counsel* shall be paid pursuant to the timing requirements described in the
24 Settlement Agreement.

25 14. The *Named Plaintiffs* are hereby awarded case contribution awards in
26 the amount of \$5,000 each and shall be paid pursuant to the timing requirements
27 described in the Settlement Agreement.

28 15. In making this award of attorneys' fees and reimbursement of

1 expenses to be paid from the *Settlement Fund*, and the compensation awards to the
2 *Named Plaintiffs*, the Court has considered and found that:

3 a) The *Settlement* achieved as a result of the efforts of *Class*
4 *Counsel* has created a fund of \$7,000,000 in cash that is already on
5 deposit, plus interest thereon, and will benefit thousands of *Class*
6 *Members*;

7 b) *Class Counsel* have conducted the litigation and achieved the
8 *Settlement* with skill, perseverance, and diligent advocacy;

9 c) The *Action* involves complex factual and legal issues
10 prosecuted over several years and, in the absence of a settlement,
11 would involve further lengthy proceedings with uncertain resolution of
12 the complex factual and legal issues;

13 d) Had *Class Counsel* not achieved the *Settlement*, there would
14 remain a significant risk that the *Named Plaintiffs* and the *Class* may
15 have recovered less or nothing from the *Defendants*;

16 e) The amount of attorneys' fees awarded and expenses
17 reimbursed from the *Settlement Fund* are consistent with awards in
18 similar cases; and

19 f) The *Named Plaintiffs* rendered valuable service to the *Plan* and
20 to all *Plan Participants*. Without this participation, there would have
21 been no case and no settlement.

22 16. Neither the Settlement Agreement nor the terms of the Settlement
23 Agreement shall be offered or received into any action or proceeding for any
24 purposes, except (i) in an action or proceeding arising under the Settlement
25 Agreement or arising out of or relating to the Preliminary Approval Order or the
26 this Final Order and Judgment, (ii) in any action or proceeding where the releases
27 provided pursuant to this Settlement Agreement may serve as a bar to recovery, or
28 (iii) in any action or proceeding to determine the availability, scope, or extent of

1 insurance coverage (or reinsurance related to such coverage) for the sums
2 expended for the *Settlement* and defense of the *Action*.

3 17. Without affecting the finality of this Judgment in any way, this Court
4 hereby retains continuing jurisdiction over: (a) implementation of the *Settlement*
5 and any award or distribution of the *Settlement Fund*, including interest earned
6 thereon; (b) disposition of the *Settlement Fund*; (c) hearing and determining
7 applications for attorneys' fees, costs, interest, and reimbursement of expenses in
8 the *Action*; and (d) all *Parties* hereto for the purpose of construing, enforcing, and
9 administering the *Settlement*.

10 18. The Court finds that during the course of the litigation, the *Named*
11 *Plaintiffs* and the *Defendants* and their respective counsel at all times complied
12 with the requirements of Federal Rule of Civil Procedure 11.

13 19. This Order and Judgment shall not be considered or used as an
14 admission, concession, or declaration by or against *Defendants* of any fault,
15 wrongdoing, breach, or liability.

16 20. In the event that the *Settlement* does not become effective in
17 accordance with the terms of the Settlement Agreement or in the event that the
18 *Gross Settlement Fund*, or any portion thereof, is returned to the *Defendants* or
19 their insurers, then this Judgment shall be rendered null and void to the extent
20 provided by and in accordance with the Settlement Agreement and shall be
21 vacated, and in such event, all orders entered and releases delivered in connection
22 herewith shall be null and void to the extent provided by and in accordance with
23 the Settlement Agreement.

24 21. Final Judgment shall be entered herein.

25 IT IS SO ORDERED.

26 Date:

27 _____
28 Dean D. Pregerson
United States District Court Judge

EXHIBIT 2

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**UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

**IN RE INDYMAC ERISA
LITIGATION**

Master File No.: 08-04579 DDP(VBKx)

CLASS ACTION

**JOINT DECLARATION OF
MARGARET E. HASSELMAN AND
DEREK W. LOESER IN SUPPORT OF
RENEWED MOTION FOR
PRELIMINARY APPROVAL OF
PROPOSED CLASS ACTION
SETTLEMENT, PRELIMINARY
CERTIFICATION OF SETTLEMENT
CLASS, APPROVAL OF NOTICE
PLAN, AND TIME FOR FAIRNESS
HEARING**

Date: Monday, September 13, 2010

Time: 10:00 a.m.

Courtroom: 3, 2nd Floor

Before the Hon. Dean D. Pregerson

Margaret E. Hasselman and Derek W. Loeser declare as follows:

1. Margaret E. Hasselman is a shareholder of Lewis, Feinberg, Lee, Renaker & Jackson, P.C. and a member in good standing of the State Bar of California. Derek W. Loeser is a partner in Keller Rohrback L.L.P. and a member

1 in good standing of the State Bar of Washington. On October 7, 2008, the Court
2 appointed our firms Interim Co-Lead Counsel for Named Plaintiffs Sam Zhong
3 Wang and Jeffrey Washington (“Plaintiffs”). We have been personally involved in
4 the litigation of this matter and are responsible for the prosecution of this action.

5 2. We submit this declaration in support of Plaintiffs’ Renewed Motion
6 for Preliminary Approval of Proposed Class Action Settlement, Preliminary
7 Certification of Settlement Class, Approval of Notice Plan, and Time for Fairness
8 Hearing. We have personal knowledge of the matters stated herein and, if called
9 upon, we could and would competently testify thereto.

10 I. PROCEDURAL AND FACTUAL BACKGROUND

11 A. Proceedings Leading to the Proposed Settlement

12 3. On July 14, 2008, the first ERISA action challenging Defendants’
13 conduct in relation to the investment in the common stock of IndyMac Bancorp,
14 Inc. (“Bancorp” and together with IndyMac Bank, F.S.B., “IndyMac”) by the
15 IndyMac Bank, F.S.B. 401(k) Plan (the “Plan”) was filed. Plaintiffs Wang and
16 Washington filed their initial complaints on August 1, 2008, and August 8, 2008,
17 respectively. In total, eight similar complaints were filed between July 2008 and
18 August 2008.

19 4. On October 7, 2008, the Court entered an order (Dkt. No. 54)
20 consolidating the ERISA actions against IndyMac, appointing Sam Zhong Wang
21 and Jeffrey Washington Interim Lead Plaintiffs, and appointing Keller Rohrback
22 L.L.P. and Lewis, Feinberg, Lee, Renaker & Jackson, P.C. (together, “Plaintiffs’
23 Counsel”) as Interim Co-Lead Counsel with responsibility to, among other things,
24 lead and coordinate the prosecution of this case.

25 5. On January 5, 2009, Plaintiffs filed their Consolidated Complaint for
26 Violations of the Employee Retirement Income Security Act (the “Complaint”)
27

1 (Dkt. No. 67). In the Complaint, Plaintiffs alleged that Defendants violated their
2 fiduciary and co-fiduciary duties under the Employee Retirement Income Security
3 Act of 1974, 29 U.S.C. § 1001, *et seq.* (“ERISA”) by, inter alia: (a) failing to
4 prudently and loyally manage the Plan and the Plan’s assets; (b) failing to properly
5 monitor the performance of their fiduciary appointees and remove and replace
6 those whose performance was inadequate; (c) failing to disclose necessary
7 information to co-fiduciaries; (d) failing to provide participants with complete and
8 accurate information regarding the soundness of IndyMac stock sufficient to advise
9 participants of the true risks of investing their retirement savings in IndyMac
10 equity; and (e) breaching their co-fiduciary obligations.

11 6. Plaintiffs sought relief for Defendants’ fiduciary breaches on behalf of
12 a Class consisting of all participants or beneficiaries of the Plan whose individual
13 accounts made or maintained investments in IndyMac stock during the Class
14 Period, which the Settlement Agreement defines as July 1, 2006, through June 1,
15 2010.

16 7. Plaintiffs allege that Defendants knew or should have known that
17 IndyMac stock was an imprudent retirement investment during the Class Period
18 and that Defendants acted imprudently by allowing further Plan investment in
19 IndyMac stock and by not liquidating the Plan’s holdings of IndyMac stock. The
20 Complaint seeks to recover losses suffered by the Plan as a result of Defendants’
21 alleged breaches of fiduciary duty.

22 8. The initial and subsequent complaints were the product of Plaintiffs’
23 Counsel’s extensive efforts to investigate and analyze factual materials related to
24 the mortgage industry generally and IndyMac specifically. The investigation
25 allowed Plaintiffs to include more than 200 paragraphs in the Complaint containing
26 facts bearing on the parties, the Plan, and Defendants’ alleged fiduciary breaches.
27 These paragraphs addressed, among other things, the design and operation of the
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1 Plan, Defendants' fiduciary status, and the prudence of the fiduciary decision to
2 permit the Plan to invest and maintain existing investments in IndyMac stock in the
3 face of information suggesting both that Company stock was inflated due to
4 undisclosed information and that the stock investment became increasingly and
5 unacceptably risky. *See* Complaint ¶¶ 31-201. The Complaint contains allegations
6 that Plan fiduciaries failed in their duty to properly disclose to Plan participants
7 material information bearing on the value of IndyMac stock, including facts
8 regarding the risks posed by exposure to subprime mortgages, continued
9 securitization of mortgage-backed securities after demand had sharply fallen,
10 retention of illiquid mortgage-backed security tranches, and inadequate reserves
11 for loan losses. *Id.* ¶¶ 202-211. These allegations, in turn, supported Plaintiffs'
12 detailed causation and charging allegations. *See id.* ¶¶ 244-311.

13 **B. Factual and Legal Basis for Plaintiffs' Claims**

14 9. Plaintiffs' claims raise a host of contested legal and factual issues
15 under ERISA, which would require extensive expert discovery and testimony to
16 resolve. Underlying the ERISA issues are the extraordinarily complicated issues
17 surrounding IndyMac's underwriting and securitization practices and alleged
18 accounting improprieties, which Plaintiffs allege rendered IndyMac's reported
19 financial results inaccurate and misleading during the Class Period. The issues
20 contributing to the complexity of the case include the following:

21 • **Complex and innovative legal theories.** ERISA is a highly-
22 specialized and complex area of the law, and the type of claims brought here—
23 involving alleged breaches of duty by the Plan's fiduciaries—are especially so.
24 The law is developing, there are significant conflicts between the approaches
25 adopted by different trial and appellate courts, and new law developed in this area
26 after this case was filed. Plaintiffs' Counsel believe the claims in this case are
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1 solidly grounded in ERISA law, but it is beyond debate that the issues are
2 complex.

3 • **Complexity of establishing liability and losses.** A finding of liability
4 would require careful presentation and analysis of lengthy and detailed Plan
5 documents, complex corporate financial and accounting matters, and sophisticated
6 judgments about the investment decisions Defendants had made, or not made, as
7 much as four years ago. In addition, damage assessments by the finder of fact often
8 result in a battle of experts. In this case, Defendants likely would have argued that
9 even if the imprudence of IndyMac stock as a Plan investment could be
10 established, it did not become imprudent until so late in the Class Period that
11 Plaintiffs' damages would be minimal. One of the principal challenges Plaintiffs'
12 Counsel faced was showing that IndyMac was an imprudent Plan investment early
13 in the Class Period, before the stock lost much of its value.

14 • **Risk of an unforeseen change in the law.** ERISA jurisprudence
15 presents an ever-changing legal landscape, and there is a constant risk that the law
16 will change before judgment. While many recent decisions have upheld claims
17 similar to those asserted here, others have not, and there was no assurance a change
18 in the law would not have affected, or negated, the claims in this lawsuit. The
19 possibility that the law might materially and adversely change during the course of
20 the litigation meant that Plaintiffs needed to structure their arguments and proofs to
21 present multiple avenues to recovery. The necessity of avoiding an approach that
22 placed all of Plaintiffs' "eggs in one basket" greatly magnified the complexity of
23 Plaintiffs' task.

24 • **Decision tree.** Applying a standard "decision tree" analysis to this
25 case only underscores its magnitude and complexity. Defendants likely would have
26 asserted numerous factual and legal defenses to this suit, any one of which, if
27 successful, could have resulted either in a judgment in Defendants' favor, or a very
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1 small recovery for the Class. The innumerable forks-in-the-road leading to liability
2 and damage findings all had to be considered by Plaintiffs' Counsel and factored
3 into their overall litigation strategy. The possibility of a loss at any of these forks in
4 the road—from the motion to dismiss, through summary judgment, trial and
5 appeal—had to be factored into Plaintiffs' analysis, and consequently bears on the
6 Court's evaluation of the Settlement.

7 10. In light of the above, further litigation presents a significant risk to
8 both sides. If the parties were to continue litigating this case, both sides would
9 need to spend hundreds of thousands of dollars on briefing of motions to dismiss,
10 witness depositions, expert depositions, summary judgment briefing, and
11 additional pre-trial preparation. The trial itself—which Plaintiffs' Counsel
12 estimates would take approximately three weeks—and the likely subsequent
13 appeals would also require a significant undertaking by both parties.

14 11. While Plaintiffs believe that they ultimately would have been able to
15 prove the claims asserted at least for some part of the Class Period, the risk of
16 assets available for recovery being depleted as well as the risks of the case being
17 lost, delayed, or its value diminished compel the conclusion that the Settlement—
18 which provides a substantial immediate benefit—is in the best interest of the Class.

19 **C. Discovery Conducted**

20 12. Plaintiff began document discovery at the outset of the case with
21 statutory and informal requests for a variety of ERISA-related materials. In
22 response to these requests, Defendants and the FDIC as Receiver for IndyMac
23 Bank, F.S.B. produced governing Plan documents, the summary plan description,
24 and summary annual report.
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1 13. Plaintiff subpoenaed the FDIC as Receiver for IndyMac Bank, F.S.B.
2 for additional Plan documents. In response, the FDIC produced, among other
3 things:

- 4 • Plan documents;
- 5 • trust agreements and material modifications;
- 6 • summary plan descriptions;
- 7 • the Employee Benefits Fiduciary Committee Charter;
- 8 • the service agreement, including amendments, for the record keeper of
9 the Plan;
- 10 • minutes of the Employee Benefits Fiduciary Committee;
- 11 • presentations provided to the members of the Employee Benefits
12 Fiduciary Committee; and
- 13 • minutes of the Management and Development and Compensation
14 Committee.

15 14. In compliance with the Court's October 7, 2008 order consolidating
16 the ERISA cases (Dkt. No. 54) and the December 4, 2008, Order re Joint
17 Stipulation Regarding Preliminary Scheduling (Dkt. No. 60), the individual
18 Defendants produced the following:

- 19 • minutes of the Management and Development and Compensation
20 Committee;
- 21 • the bylaws and policies of the Board of Directors, including updates
22 and additions;
- 23 • Board of Director Governance Documents, including Board of
24 Director Committee Charters and Policies; and
- 25 • the charter for the Management and Development and Compensation
26 Committee.

1 15. Plaintiff Wang also provided Plaintiffs' Counsel with hundreds of
2 pages of emails that Defendant Perry sent to IndyMac employees about the health
3 of the company and the stock price.

4 16. In preparation for drafting the consolidated complaint, Plaintiffs
5 reviewed and analyzed all of these documents as well as publicly available
6 information, including but not limited to:

7 • complaints filed in other cases that were based on allegations similar
8 to this case;

9 • numerous articles detailing the housing crisis, subprime melt-down,
10 and IndyMac;

11 • Form 8-Ks filed with the SEC detailing IndyMac's earnings and
12 operations;

13 • Annual Reports;

14 • reports issued by various governmental and non-governmental
15 agencies related to IndyMac and the housing crisis;

16 • congressional testimony on the mortgage crisis; and

17 • transcripts from interviews with industry experts and banking insiders.

18 17. To determine whether early settlement negotiations would be fruitful
19 and to help the parties assess the merits of Plaintiffs' claims and Defendants'
20 defenses, Defendants produced documents relevant to the litigation, including,
21 among other things:

22 • the fiduciary liability policy;

23 • the "Classic Side A" policies;

24 • documents related to policies and procedures of the Board of
25 Directors;

26 • documents related to the policies and procedures of the Management
27 Development and Compensation Committee;

1 • emails to and from Defendant Michael Perry discussing the Plan,
2 IndyMac stock, and the health of the company;

3 • emails from Grove Nichols, Executive Vice President, Corporate
4 Communications discussing the Plan and the financial results and future of
5 IndyMac;

6 • additional emails to and from other Defendants and executives
7 discussing the Plan, investment in the Plan, and Plan administration;

8 • additional minutes of the Management and Development and
9 Compensation Committee; and

10 • additional Form 11-Ks IndyMac filed with the SEC.

11 18. On May 13, 2009, the Parties met to discuss the possibility of an early
12 mediation. During this meeting, Defendants produced additional documents to
13 assist in mediation, including:

14 • Management and Development and Compensation Committee
15 meeting packages;

16 • Board of Director meeting packages;

17 • additional Plan documents;

18 • the Fiduciary Committee Charter;

19 • additional emails to and from Defendant Michael Perry and others
20 discussing Plan administration;

21 • Form 8-Ks IndyMac filed with the SEC; and

22 • capital markets research reports.

23 19. In advance of the mediation held on August 25, 2009, the parties
24 issued joint subpoenas to the FDIC as Receiver for IndyMac Bank, F.S.B. and
25 Principal Financial Group.

1 20. In response, the FDIC produced Plan amendments and documents and
2 reports related to the Plan’s auditor, Ernst & Young. Principal produced, among
3 other things:

- 4 • Plan documents, including summary plan descriptions, Plan
5 amendments, and trust agreements;
- 6 • documents detailing the performance of the Plan’s investment options;
- 7 • Plan communications, including enrollment education materials,
8 descriptions of investment strategies, reports on diversification, investment option
9 fact sheets, and newsflashes of Plan changes;
- 10 • Plan transactional data through December 31, 2008; and
- 11 • emails between Principal and IndyMac.

12 21. Plaintiffs’ Counsel carefully reviewed the information and materials
13 produced by Defendants, IndyMac, Principal, and the FDIC, as well as the
14 materials obtained from public sources.

15 **D. Plaintiffs’ Estimated Losses**

16 22. According to the 2006 Form 5500 filed by the Plan with the
17 Department of Labor, the value of IndyMac stock in the Plan at year-end 2006 was
18 approximately \$16.7 million. At year-end 2007, it was \$3.8 million. By the end of
19 the Class Period—June 1, 2010—IndyMac stock was essentially worthless, trading
20 on the Pink Sheets at four cents a share. Thus, the IndyMac stock fund lost
21 virtually all of its value during the Class Period.

22 23. To calculate the Plan’s losses in this case, Plaintiffs retained a well-
23 regarded expert, Saul Solomon from UHY Advisors Forensic, Litigation &
24 Valuation Services, Inc. (“UHY”).

25 24. Mr. Solomon is a managing partner of UHY and has calculated losses
26 for retirement plans in numerous ERISA breach of fiduciary duty cases, including
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1 *In re WorldCom Inc. ERISA Litigation, In re Williams Cos. ERISA Litigation, In re*
2 *Enron Corp. Securities Derivate and “ERISA” Litigation, Alvidres v. Countrywide*
3 *Financial Corp.,* and others.

4 25. Mr. Solomon and UHY calculated the range of potential damages in
5 this case by determining the capital loss of the IndyMac stock fund. Capital loss
6 was ascertained by adding holder damages to purchaser damages and, as an
7 alternative, by calculating purchaser damages only.

8 26. As noted above, the parties received Plan transactional data from
9 Principal Financial Group to analyze the damages in this case. Principal was only
10 able to provide data through December 31, 2008. Therefore, the relevant time
11 period for purposes of calculating damages was the breach date—when Defendants
12 knew or should have known IndyMac stock was an imprudent investment for
13 participants’ retirement assets—through December 31, 2008.

14 27. UHY calculated capital loss based on different breach dates. This is a
15 common approach in ERISA breach of fiduciary duty cases, because in order to
16 have a realistic assessment of provable losses in a case of this type, Plaintiffs must
17 consider the possibility that they would not be able to establish a breach of
18 fiduciary duty at the outset of the proposed Class Period (when damages are
19 larger), but instead, would only be able to prove a breach later in the Class Period
20 after IndyMac’s financial condition had further deteriorated, lowering the stock
21 price and Plaintiffs’ recoverable losses. With a later breach date, the evidence that
22 Defendants knew or should have known IndyMac stock had become an imprudent
23 investment would be stronger, but the amount of the losses would be smaller since
24 the value of the Plan’s investment in the stock decreased over the course of the
25 Class Period.

26 28. Thus, UHY used three different breach dates for purposes of its
27 analysis: the proposed Class Period start date (July 1, 2006), and two alternate
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1 dates, February 8, 2007, and August 1, 2007. UHY also calculate damages based
2 on two distinct measures of loss – the first comprised both “holder” losses and
3 “purchaser losses,” and the second just “purchaser losses.” This is a common
4 approach because the parties disagree on which measure of loss is appropriate, and
5 the issue has not been resolved by the courts. Holder losses are losses that result
6 from IndyMac stock purchased by the Plan *before* the beginning of the Class
7 Period but held (imprudently) after the point at which IndyMac stock became an
8 imprudent investment. Purchaser losses are losses that result from stock purchased
9 after the established breach date.

10 29. Based on UHY’s calculations, Plaintiffs determined that if they
11 prevailed on all counts and the Court were to accept Plaintiffs’ proposed breach
12 date of July 1, 2006, and Plaintiffs’ method for calculating damages—thus giving
13 Plaintiffs a total victory—the capital loss would be \$22,110,342, including both
14 holder and purchaser damages. If, on the other hand, a later breach date were
15 established—a more probable outcome given that most of IndyMac’s serious
16 problems came to light later in the Class Period—the total potential recovery
17 would be substantially smaller. For instance, if the breach date were February 8,
18 2007, or August 2, 2007, the capital loss, including holder and purchaser damages,
19 would be \$19,853,757 or \$13,333,492, respectively.

20 30. However, these estimates are uncertain, because while Plaintiffs
21 believe that including both holder and purchaser damages is appropriate,
22 Defendants would likely argue that only purchaser losses are recoverable.
23 Furthermore, Defendants would likely argue that to sell the stock in the Plan,
24 Defendants would have to make corrective disclosures, and these disclosures
25 would cause the value of the stock to drop, creating a no-win situation for the Plan.
26 Plaintiffs dispute this argument as it presumes that a later disclosure would have
27 the same impact as an earlier one, and that the Plan (and its participants) should
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1 suffer the consequence of Defendants' imprudent actions, instead of Defendants
2 themselves. Nonetheless, the case law is unsettled in this area and neither party can
3 be certain whether holder losses would be recoverable in this case.

4 31. If Defendants were to persuade the Court that only purchaser losses
5 were available, Plaintiffs' recoverable losses would decline significantly. For
6 instance, given the same potential breach dates, capital loss based on purchaser
7 damages only would be \$11,196,597 for the July 1, 2006 breach date, \$8,946,490
8 for the February 8, 2007 breach date, and \$5,272,932 for the August 1, 2007
9 breach date.

10 32. Thus, in the event Plaintiffs were to prevail on liability, the potential
11 range of damages based on the three different breach dates identified above is
12 approximately \$5.3 million to \$22.1 million. Therefore, the Settlement represents a
13 recovery of between 32% to 132% *without a discount for the risk of not prevailing*.

14 33. This range differs from the initial range provided in Plaintiffs'
15 Memorandum of Points and Authorities in Support of Motion for Preliminary
16 Approval (Dkt. No. 105-1 at 20). The initial range of \$11.2 million to \$22.1
17 million represents the potential purchaser and combined purchaser/holder damages,
18 respectively, if liability were established at the outset of the Class Period (July 1,
19 2006). When negotiating the settlement, Plaintiffs also took into account the
20 possibility of smaller damage figures in the event that a later breach date were
21 established in the case. In order to provide the Court with additional context in
22 which to evaluate the settlement amount, we are providing these additional
23 calculations for the Court's review.

24 34. While the likelihood of Plaintiffs being able to carry their burden to
25 show that holding and allowing purchases of IndyMac stock was imprudent gets
26 stronger as the Class Period progresses, establishing liability at any point in the
27 Class Period was by no means guaranteed in this case. In addition to Defendants'
28

1 affirmative defenses, trial would have been a risky undertaking, and Plaintiffs
2 recognize that they may have failed to establish a breach of fiduciary duty under
3 ERISA. Indeed, the case law on breach of fiduciary duty claims of this type is
4 mixed, and while many cases have settled, the few cases that have been tried have
5 so far resulted in defense verdicts. *See, e.g., Brieger v. Tellabs, Inc.*, 629 F. Supp.
6 2d 848 (N.D. Ill. June 26, 2009); *Nelson v. IPALCO*, 480 F. Supp. 2d 1061 (S.D.
7 Ind. 2007), *aff'd*, 512 F.3d 347 (7th Cir. 2008); *DiFelice v. U.S. Airways, Inc.*, 436
8 F. Supp. 2d 756 (E.D. Va. 2006), *aff'd*, 497 F.3d 410 (4th Cir. 2007).

9 35. Further, Defendants would likely argue that a different method for
10 calculating damages should be used, which would result in an even lower range of
11 estimated damages. Indeed, in advance of mediation, the parties exchanged
12 damages reports, and Defendants' expert—Cornerstone Research—determined that
13 the likely damages in this case ranged from \$2.6 million to \$3 million, on the
14 theory that had the assets in IndyMac stock been invested in one of the Plan's other
15 investments instead, they would have lost some value, and that such loss of value
16 should be subtracted from Plaintiffs' recovery. Under Defendants' damages
17 analysis, the Settlement represents a recovery of 233% to 269% of the Plan's total
18 recoverable losses.

19 36. Thus, whatever the breach date ultimately proved (if any), and the
20 measure of damages adopted, the Settlement provides a substantial recovery well
21 in excess of the range that courts traditionally have found to be fair and adequate
22 under the law. *See, e.g., In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th
23 Cir. 2000) (approving settlement that comprised one sixth of plaintiffs' potential
24 recovery). Below is a chart detailing plaintiffs' estimated damages relative to the
25 settlement in other ERISA breach of fiduciary duty cases based on the best
26 possible recovery scenarios (outset of class period, and holder and purchaser
27 damages):

	Plaintiffs' Estimated Damages	Settlement Amount	Settlement as % of Damages
<i>In re Global Crossing ERISA Litig.</i>	\$358,000,000	\$79,000,000	22.1%
<i>In re Enron Corp. Sec., Derivative & ERISA Litig.</i>	\$1,200,000,000	\$264,764,999	22.1%
<i>In re CMS Energy ERISA Litig.</i>	\$165,000,000	\$28,000,000	17%
<i>In re AIG ERISA Litig.</i>	\$206,000,000	\$24,200,000	11.7%
<i>In re AOL Time Warner, Inc. ERISA Litig.</i>	\$1,500,000,000	\$100,000,000	6.7%
<i>Alvidres v. Countrywide Fin. Corp.</i>	\$257,000,000	\$55,000,000	21.4%
<i>In re Merrill Lynch & Co., Inc. Sec., Derivative and ERISA Litig.</i>	\$3,000,000,000	\$75,000,000	2.5%
<i>In re Goodyear Tire & Rubber Co. ERISA Litig.</i>	\$340,000,000	\$8,375,000	2.5%
<i>In re Polaroid ERISA Litig.</i>	\$36,000,000	\$15,000,000	41.7%
<i>In re Syncor ERISA Litig.</i>	\$45,000,000	\$4,000,000	8.9%

37. As this chart shows, the Settlement in this case—which represents a recovery of 32% of the Plan’s losses based on the best possible recovery scenario (outset of Class Period and both purchaser and holder losses)—compares favorably to other ERISA settlements involving claims of this type.

E. Assets Available to Satisfy a Potential Judgment

38. Plaintiffs filed claims on behalf of individual plaintiffs as well as on behalf of the Plan and the proposed Class against the receivership for IndyMac Bank, F.S.B. based on the allegations contained in the Complaint. However, on

1 March 22, 2009, the FDIC as Receiver for IndyMac Bank, F.S.B. disallowed the
2 claims. Even if the FDIC had allowed the claim, Plaintiffs and the Plan would have
3 been unsecured creditors and recovered nothing of value, due to the FDIC's
4 determination that insufficient assets were available to satisfy any unsecured
5 creditor claims against the Bank. Determination of Insufficient Assets to Satisfy
6 Claims Against Institution in Receivership, 74 Fed. Reg. 221, Notices 59541 (Nov.
7 18, 2009). Thus, the receivership was not a source of assets to satisfy a potential
8 judgment in this case.

9 39. Plaintiffs also conducted an asset search for each Defendant to
10 determine whether it would be beneficial to pursue those assets to satisfy a
11 potential judgment. Plaintiffs determined that the risk of further depleting the
12 fiduciary liability policy by pursuing Defendants' personal assets outweighed the
13 potential benefit of obtaining the assets. There was no guarantee that liability
14 would be established against the individual Defendants, that they would have
15 sufficient assets to pay a large judgment, or, most importantly, that a judgment
16 would be obtained that was greater than the Settlement Amount. Taking all of
17 these risks into account, Plaintiffs determined that the most prudent course of
18 action under the circumstances was to settle the claim for \$7,000,000 before the
19 insurance proceeds were further depleted.

20 40. As detailed in the Declaration of Kathleen M. McDowell, the primary
21 insurance policy applicable to Plaintiffs' claims is the fiduciary liability policy,
22 which provides \$10 million limits in the aggregate. The policy is a "wasting"
23 policy, meaning that defense fees and costs incurred by Defendants in this case
24 deplete the available policy limit.

25 41. IndyMac also purchased Side A policies, which incept for purposes of
26 fiduciary liability coverage above \$10 million. The Side A policies provide a total
27

1 of \$40 million in policy limits, which is shared by the fiduciary liability policy and
2 all director and officer (“D&O”) policies.

3 42. Defense counsel informed Plaintiffs that there were a number of other
4 actions and investigations—many of which involved at least some of the
5 Defendants in this action—that had potential claims on the Side A policies.
6 Accordingly, it would have been difficult to fund a settlement in this case that
7 required payment from any Side A policy without first resolving the competing
8 claims. However, it was unclear when these other actions and investigations would
9 be resolved. Indeed, several are still ongoing, and resolution may take several more
10 years.

11 43. The D&O policies contain provisions that expressly exclude coverage
12 for ERISA claims such as the ones asserted in this case. Therefore, they were not
13 applicable to this case.

14 44. There are no other insurance policies available that would apply to
15 Plaintiffs’ claims.

16 45. Finally, Defense Counsel informed Plaintiffs’ Counsel that the
17 insurance carriers with policies implicated in other actions related to IndyMac’s
18 business practices and failure were seeking to have the fiduciary liability policy
19 contribute to cover part of the costs of discovery in those other actions. These
20 carriers felt that the discovery conducted in the ERISA case would overlap with the
21 discovery conducted in many of these other cases regarding IndyMac’s failure.
22 Accordingly, there was a danger that the fiduciary liability policy would be further
23 depleted to cover discovery costs in other cases.

24 46. Consequently, Plaintiffs determined that the fiduciary liability policy
25 would likely be substantially if not entirely depleted if the case were litigated
26 through trial.

1 **F. Settlement Negotiations**

2 47. After Plaintiffs filed their consolidated complaint on January 5, 2009,
3 Defense Counsel informed Plaintiffs' Counsel that there were limited assets
4 available to fund a recovery in this case. Defense Counsel mentioned the fiduciary
5 liability policy as the primary—and perhaps only—source of funding.

6 48. Plaintiffs' Counsel carefully analyzed the Class' potential recovery in
7 this case if successful on the merits and determined that the best interests of the
8 Class would be served by attempting to resolve the case before the primary
9 fiduciary liability policy was depleted.

10 49. The parties met on May 13, 2009, to discuss the parties' positions,
11 assess the documents produced, and determine whether a formal mediation would
12 be appropriate.

13 50. In advance of the meeting, Defendants provided their damages
14 analysis and a detailed memorandum with supporting exhibits explaining what
15 they perceived to be the strengths of their defenses. The parties conferred in person
16 at the offices of Lewis Feinberg and engaged in a detailed discussion of the merits
17 of the case, the potential damages, the assets available to satisfy a judgment,
18 logistical concerns, and the likely cost and scope of discovery. Although the parties
19 disagreed on numerous issues, there was sufficient common ground that at the
20 conclusion of the meeting, the parties agreed to schedule a formal mediation and to
21 postpone formal discovery. If the mediation did not produce a settlement, the
22 parties agreed that motions practice and formal discovery would proceed promptly.

23 51. The parties retained the Hon. Daniel Weinstein as a mediator and
24 conducted a full-day mediation on August 25, 2009. With Judge Weinstein's
25 guidance, the parties engaged in arm's-length negotiations. In advance of the
26 mediation, the parties exchanged detailed mediation statements and prepared
27 responsive statements. At the mediation, the parties engaged in a joint session in

1 which they debated their views of the law and facts of the case and thereafter
2 separated for a series of individual meetings with Judge Weinstein. At the end of
3 the day the parties had yet to come to terms; instead, Judge Weinstein made a
4 mediator proposal. The parties accepted the proposal. Thereafter, the parties
5 engaged in extensive negotiations regarding the settlement terms and conditions.
6 These negotiations involved numerous telephone conferences with Defense
7 Counsel, carriers' counsel, and Judge Weinstein.

8 9 **II. SUMMARY OF THE SETTLEMENT**

10 52. Based on the Form 5500s filed by the Plan with the Department of
11 Labor in 2006 and 2007,¹ Plaintiffs estimated that there were approximately 6,000
12 potential Class Members.

13 53. While the Settlement Agreement was being drafted, the parties
14 contacted Principal Financial Group to obtain Class Member information in order
15 to issue notice. Because the FDIC is the Receiver for IndyMac Bank, F.S.B.,
16 Principal first needed to gain permission from the FDIC before producing detailed
17 Class Member information. Plaintiffs are still working with the FDIC to comply
18 with the Privacy Act and obtain permission. In the interim, Principal was able to
19 estimate that there are 2,863 potential Class Members. Because the settlement
20 amount has been fixed, a smaller class size means a higher recovery per class
21 member.

22 **III. THE PROPOSED SETTLEMENT MERITS PRELIMINARY** 23 **APPROVAL**

24 54. The Settlement is fair, reasonable, and adequate and is the result of
25 arm's-length negotiations and sufficient discovery. Indeed, it is Plaintiffs' position

26
27 ¹ The Plan did not file a Form 5500 in 2008 because of the failure of IndyMac
28 Bank, F.S.B. and Bancorp's bankruptcy filing in July 2008.

1 that both the discovery conducted and the ample public information—including
2 media reports, congressional hearings, and both state and federal investigations and
3 lawsuits—support Plaintiffs’ core allegation that IndyMac stock became an
4 imprudent investment for the Plan during the Class Period.

5 55. Furthermore, Plaintiffs believe the evidence would show that each
6 Defendant was a Plan fiduciary and failed to take any action to protect the Plan and
7 serve Plan participants’ best interests as required by ERISA.

8 56. Nonetheless, Plaintiffs also recognize the risks of continued litigation
9 and an adverse outcome. Plaintiffs readily acknowledge that many of the complex
10 factual and legal issues involved in this action are contested, and both parties have
11 proffered evidence to support their competing views of the case. Thus, while
12 Plaintiffs and Plaintiffs’ Counsel believe this is a strong case for Plaintiffs, the
13 outcome of continued litigation remains uncertain.

14 57. The Settlement was reached by experienced, fully-informed counsel
15 after protracted and intense arm’s-length negotiations with the assistance of a
16 skilled mediator.

17 58. Plaintiffs’ Counsel are highly experienced in litigating and settling
18 ERISA breach of fiduciary duty claims in cases similar to this one. Based on this
19 broad experience, as well as the specific considerations presented under the facts
20 and circumstances of this particular case, Plaintiffs’ Counsel have concluded that
21 the Settlement is fair, reasonable, and adequate, and should be presented to the
22 Court for approval.

23 **IV. QUALIFICATIONS OF PROPOSED CLASS COUNSEL**

24 **A. Lewis, Feinberg, Lee, Renaker & Jackson, P.C.**

25 59. Lewis Feinberg serves or has served as class counsel in numerous
26 ERISA class actions in districts throughout the country, including, but not limited
27

1 to, the following class or multi-plaintiff actions, several of which are being or have
2 been successfully litigated with Keller Rohrback:

3 • ***In re J.P. Jeanneret Associates, Inc.***, No. 09-3907 (S.D.N.Y.). Lewis
4 Feinberg and Keller Rohrback jointly represent several union employee benefit
5 plans seeking to recover losses sustained by the plans through investment in
6 entities associated with Bernard L. Madoff from various individuals and entities
7 that managed assets for and/or gave investment advice to the plans.

8 • ***In re Worldcom, Inc. ERISA Litigation***, No. 02-4816 (S.D.N.Y). In
9 2004, the United States District Court for the Southern District of New York
10 approved a \$47 million partial settlement of a nationwide class action lawsuit on
11 behalf of participants in WorldCom's 401(k) plan. In November 2002, following
12 consolidation of several related lawsuits, Keller Rohrback was appointed lead
13 counsel, and Jeffrey Lewis of Lewis Feinberg was appointed by the court to advise
14 lead counsel for the plan participants with regard to ERISA issues. In March 2002,
15 even before the bankruptcy of WorldCom, Lewis Feinberg, along with co counsel,
16 filed the first ERISA lawsuit against fiduciaries of the plan, and then obtained a
17 significant decision from the United States District Court for the Northern District
18 of California rejecting a motion to dismiss the case. *See Vivien v. WorldCom, Inc.*
19 No. 02-1329, 2002 WL 31640557 (N.D. Cal. July 26, 2002).

20 • ***Taylor v. ANB Bancshares, Inc.***, No. 08 5170 (W.D. Ark.). Lewis
21 Feinberg is currently litigating this putative class action regarding pension plans
22 sponsored by Arkansas National Bank. Arkansas National Bank recently was taken
23 into federal receivership. The complaint asserts breaches of fiduciary duty arising
24 out of the defendant bank's failure to act prudently with regard to plan investments
25 in company stock even while those fiduciaries knew or should have known that the
26 stock was significantly overvalued due to the bank's dire financial situation.

1 • ***Neil v. Zell***, No. 08-6833 (N.D. Ill.). Lewis Feinberg, along with co-
2 counsel, represents a putative class of employees and former employees of the
3 Tribune Co. alleging breached of fiduciary duty and violations of ERISA’s
4 prohibited transaction provisions in connection with the 2007 leveraged buyout of
5 the Tribune Co. by the company’s Employee Stock Ownership Plan.

6 • ***Tatum v. R.J. Reynolds Tobacco Co.***, No. 04-1082 (M.D.N.C.). The
7 firm, along with co-counsel, is currently awaiting decision following a month-long
8 trial in this class action that alleges breaches of fiduciary duty arising out of R.J.
9 Reynolds plan fiduciaries forced liquidation of 401(k) plan investments in Nabisco,
10 Inc. stock following the separation of Nabisco and R.J. Reynolds, causing losses to
11 the plan. The firm has already achieved a significant Fourth Circuit Court of
12 Appeals decision overturning the district court’s dismissal of the claims.

13 • ***Fernandez v. K M Industries Holding Co.***, No. 06 07339 (N.D. Cal.).
14 The firm represents a class of employees and former employees of the family of
15 Kelly Moore companies who allege that the fiduciaries of the company’s
16 Employee Stock Ownership Plan breached their fiduciary duties by serving as both
17 the buyers and sellers in transactions in which company stock was sold to the plan
18 at significantly overvalued prices because of the company’s looming asbestos
19 liabilities, which were never disclosed to the actuarial and accounting firms
20 responsible for valuing the stock. The firm achieved a settlement of \$55 million, of
21 which the initial \$40 million settlement with certain defendants was approved in
22 May 2009, and the remaining \$15 million settlement with the last defendant was
23 approved in April 2010.

24 • ***Lively v. Dynegy, Inc.***, No. 05-0063 (S.D. Ill.). The firm represented a
25 class of 401(k) plan participants who experienced significant losses after plan
26 fiduciaries encouraged continued and increased investment of employee retirement
27 savings in company stock while those fiduciaries knew or should have known that
28

1 the company's stock was significantly overvalued because of fraudulent financial
2 reporting and accounting practices. The firm's work resulted in a \$17.9 million
3 settlement.

4 • ***Hurlic v. Southern California Gas Co.***, No. 05-5027 (C.D. Cal.). The
5 firm represented a class of employees and former employees of Southern
6 California Gas Co. who alleged several violations of ERISA and age
7 discrimination law in connection with the conversion of the employer's traditional
8 defined benefit pension plan to a "cash balance" plan. After an appeal to the Ninth
9 Circuit, a claim that the amendment was invalid due to insufficient notice settled,
10 and the settlement was approved in May 2009.

11 • ***Gottlieb v. SBC Communications, Inc.***, No. 00 4139 (C.D. Cal.). The
12 firm, along with co counsel, was Class Counsel in an ERISA action on behalf of
13 employees of what was formerly known as Pacific Telesis Group. That action
14 alleged that plan fiduciaries breached their fiduciary duty by eliminating one of the
15 investment funds in its 401(k) plan – stock of a former subsidiary. The case settled,
16 resulting in the payment of over \$7 million in additional benefits to class members.

17 • ***Anthony v. Koch Industries, Inc.***, No. 05-00806 (M.D.N.C.). On
18 September 7, 2007, a U.S. district court granted final approval to a multi-million-
19 dollar settlement in an ERISA class action arising out of reductions in retiree
20 health benefits. Lewis Feinberg served as co class counsel.

21 • ***In re Masters, Mates & Pilots Pension Plan & IRAP Litigation***, No.
22 85-9545 (S.D.N.Y.). The firm served as one of plaintiffs' counsel in two certified
23 class actions arising out of two employee benefit plans' losses of tens of millions
24 of dollars in investments. Lewis Feinberg achieved settlements of the clients'
25 fiduciary breach claims against the plans' trustees and former investment manager,
26 and of malpractice claims against former plan counsel. Together with settlements
27 of consolidated cases (involving a former bank trustee for the plans and a former
28

1 plan auditor), this resulted in the restoration of over \$20 million to the plans. One
2 portion of the case was reported sub nom *Beck v. Levering*, 947 F.2d 639 (2d Cir.
3 1991), cert. denied, 112 S. Ct. 1037 (1992).

4 • ***Kayes v. Pacific Lumber Co.***, No. 93-16271 (N.D. Cal.). The firm
5 served as counsel for a class of retirees and employees of Pacific Lumber Co. The
6 complaint alleged that defendants' selection of Executive Life Insurance Company
7 to provide annuities to pension plan participants (upon termination of the plan)
8 violated ERISA's fiduciary standards. The Ninth Circuit decision upheld plaintiffs'
9 standing to pursue the claims, affirmed the lower court finding that defendant
10 corporate officers were fiduciaries, and broadly defined term "plan asset" for
11 purposes of ERISA's prohibited transaction provisions. The Ninth Circuit also
12 upheld plaintiffs' rights to pursue class actions in ERISA breach of fiduciary duty
13 cases. *See* 51 F.3d 1449, 1462 1463 (9th Cir. 1995). On remand, the case settled,
14 resulting in the payment of millions of dollars to the class members.

15 • ***Horn v. McQueen***, No. 98-591 (W.D. Ky.). The firm represented as
16 co counsel a group of employees of the U.S. Corrections Corp. of America. After
17 trial, the Court held that defendants had breached their fiduciary responsibilities
18 under ERISA by causing the pension plan to purchase sponsoring employer stock
19 at an inflated price. Class wide settlements resulted in the payment of over \$13
20 million.

21 • ***Gerlib v. R.R. Donnelley & Sons Co.***, No. 95-7401 (N.D. Ill.) and
22 *Jefferson v. R.R. Donnelley & Sons Co.*, No. 00-8609 (N.D. Ill). The firm
23 represented classes totaling more than 600 plan participants seeking benefits under
24 pension and severance plans sponsored by R.R. Donnelley & Sons Co. The ERISA
25 action settled for \$15 million after summary judgment was granted for plaintiffs on
26 two out of three pension claims and one out of two severance claims.

1 • ***In re: Capital Consultants, LLC Litigation***, No. 00 1290 (D. Or.).

2 The firm served as lead counsel in four related ERISA breach of fiduciary duty
3 class actions arising out of the largest pension investment fraud in U.S. history.
4 Settlements with plan trustees and service providers resulted in the restoration of
5 over \$12 million to the plans.

6 • ***Bell v. Executive Committee of UFCW Pension Plan for Employees***,

7 No. 01-236 (D.D.C.). The firm served as lead counsel in an ERISA breach
8 fiduciary duty class action arising out of pension fund investments in hedge funds.
9 Settlements with plan trustees and the plan's investment manager and investment
10 advisor resulted in the restoration of \$10 million to the plan.

11 • ***Dodson v. Lone Star Technologies, Inc.***, No. 91-2574 (N.D. Tex.).

12 The firm served as counsel for a certified class of retirees and employees of Lone
13 Star Technologies. The complaint alleged that the defendants' selection of
14 Executive Life Insurance Company to provide annuities to pension plan
15 participants (upon termination of the plan) violated ERISA's fiduciary standards.
16 The case settled, resulting in the payment of more than a million dollars in
17 additional pension benefits to the class members.

18 • ***Patelski v. Boeing Corp.***, No. 01-7159 (S.D.N.Y.). The firm served as

19 one of plaintiff's counsel in a certified class action seeking to force defendants to
20 fully or partially terminate a VEBA Trust established to pay retiree medical
21 premiums and to distribute funds to retirees and their surviving spouses. Pursuant
22 to a settlement in 2003, the Trust was terminated and tens of millions of dollars
23 were paid out to the Class.

24 • ***Felts v. Masonry Welfare Trust Fund***, No. 80 746 (D. Or.). The class

25 action complaint alleged that trustees of a pension plan and a health and welfare
26 plan breached their fiduciary duties by engaging in self-dealing and other
27 prohibited transactions and mismanaging plan assets in violation of ERISA's
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1 fiduciary standards. The settlement required that defendants reimburse trusts and
2 amend the governing plan instruments to provide future safeguards.

3 • ***Gomez v. Local Union No. 85***, No. 79 1877 (N.D. Cal.). The firm
4 served as class counsel in a certified class action brought on behalf of several
5 thousand truck drivers against the fiduciaries of two pension plans, alleging
6 breaches of fiduciary duty and other violations of ERISA and the Taft Hartley Act
7 for failure of the trustees to effectuate merger, reciprocity or another mechanism to
8 address the adverse consequences to plan participants of dual pension coverage.
9 The court approved settlement provided for merger of the two plans, retroactive
10 application of that merger, and a reciprocity agreement, resulting in new or higher
11 pensions for individuals who had been denied benefits because their participation
12 had been divided between the two plans.

13 • ***Canseco v. Construction Laborers Pension Trust***, No. 95-55011
14 (C.D. Cal.). The firm served as co-counsel for a class of pension plan retirees. The
15 circuit court opinion reversed the district court's judgment for defendants and
16 resulted in the payment of millions of dollars in retroactive benefits to class
17 members.

18 • ***Trotter v. Perdue Farms, Inc.***, No. 99-893 (D. Del.). The firm was
19 certified as co-counsel for a ten-state class of chicken processing workers in an
20 action under the Fair Labor Standards Act, various states' wage and hour laws, and
21 ERISA. A \$10 million settlement was approved by the court. As a result, millions
22 of dollars were paid to the class members and they will receive additional pension
23 credit and benefits. The ERISA preemption aspect of the case is reported at 168 F.
24 Supp. 2d 277 (D. Del. 2001).

25 • ***Turpin v. Consolidated Coal Co.***, No. 99 1886 (W.D. Pa.). In 2005,
26 the court certified an ERISA class action in which plaintiffs challenged the use of
27 standardized "Explanation of Benefits" forms by a major insurer and administrator

1 of ERISA covered health insurance plans. The court previously ruled that the
2 defendant's use of such computerized forms sent to plaintiffs violated ERISA
3 regulations. Subsequently, the Court approved a settlement whereby the insurer
4 agreed to wide ranging injunctive relief, including changes to its forms and
5 practices, affecting hundreds of thousands of health plan participants and
6 beneficiaries.

7
8 **B. Keller Rohrback L.L.P.**

9 60. In addition to the cases Keller Rohrback has litigated with Lewis
10 Feinberg, as noted above, the firm serves or has served as class counsel in
11 numerous ERISA class actions in districts throughout the country, including, but
12 not limited to, the following:

13 • *Whetman v. IKON Office Solutions, Inc.*, MDL No. 10-01318 (E.D.
14 Pa.). This case resulted in ground-breaking opinions in the ERISA 401(k) area of
15 law on motions to dismiss, class certification, approval of securities settlements
16 with a carve-out for ERISA claims, and approval of ERISA settlements.

17 • *In re Enron Corp. ERISA Litigation*, MDL No. 1446 (S.D. Tex.).
18 Keller Rohrback served as Co-Lead Counsel in this class action filed on behalf of
19 participants and beneficiaries of the Enron Corporation Savings Plan, a 401(k) plan
20 and ESOP plan. Plaintiffs have achieved settlements totaling more than \$264
21 million in cash for the Enron plan participants.

22 • *Alvidres v. Countrywide Financial Corp.*, No. 07-05810 (C.D. Cal.).
23 Keller Rohrback served as class counsel in this ERISA class action alleging
24 mismanagement of retirement plan investments in Countrywide Financial Corp.
25 stock. On November 16, 2009, Judge John F. Walter granted final approved of the
26 \$55 million settlement.

1 • ***In re Syncor ERISA Litigation***, No. 03-02446 (C.D. Cal.). On
2 October 22, 2008, Judge R. Gary Klausner granted final approval of the settlement,
3 which included a payment of \$4 million in cash to the plan for losses suffered by
4 the certified class.

5 • ***In re Fremont General Corporation Litigation***, No. 07-02693 (C.D.
6 Cal.). In this ERISA class action, Keller Rohrback serves as Lead Counsel. On
7 May 29, 2008, the court denied defendants' motion to dismiss, and on April 15,
8 2010, the court certified a class of plan participants whose individual retirement
9 plan accounts were invested in Fremont General Corp. common stock during the
10 class period.

11 • ***In re Merrill Lynch & Co., Inc. Securities, Derivative & ERISA***
12 ***Litigation***, No. 07-10268 (S.D.N.Y.). On August 21, 2009, Judge Jed S. Rakoff
13 granted final approval of the \$75 million settlement in the ERISA action.

14 • ***Braden v. Wal-Mart Stores, Inc.***, No. 08-3798 (W.D. Mo.). Keller
15 Rohrback serves as Lead Counsel in this case regarding excessive fees associated
16 with the Wal-Mart Profit Sharing and 401(k) Plan's mutual funds. On November
17 25, 2009, the Eighth Circuit Court of Appeals reversed and remanded a decision by
18 the district court for the Western District of Missouri that had dismissed the
19 complaint in October of 2008. The Eighth Circuit opinion reinstates all five of
20 Plaintiff's claims.

21 • ***In re Washington Mutual, Inc. ERISA Litigation***, No. 07-01874
22 (W.D. Wash.). Judge Marsha J. Pechman consolidated the various pending ERISA
23 cases and appointed Keller Rohrback Interim Co-Lead Counsel on May 20, 2008.
24 On October 5, 2009, Judge Pechman issued an order granting in part and denying
25 in part defendants' motions to dismiss the consolidated second amended complaint.
26 [fill in details on preliminary approval]

1 • ***In re Colonial BancGroup, Inc. ERISA Litigation***, No. 09-00792
2 (M.D. Ala.). Keller Rohrback was appointed Co-Lead Counsel in this consolidated
3 class action that alleges that Colonial BancGroup, Inc. stock became an imprudent
4 investment for retirement plan savings due to the company's improper business
5 practices related to its overexposure to the housing and subprime markets.

6 • ***In re Wachovia Corp. ERISA Litigation***, No. 09-00262 (W.D.N.C.).
7 Keller Rohrback was appointed Interim Lead Counsel in this ERISA fiduciary
8 breach class action currently pending in the United States District Court for the
9 Western District of North Carolina.

10 • ***In re Regions Morgan Keegan ERISA Litigation***, No. 08-2192
11 (W.D. Tenn.). Keller Rohrback serves as Interim Co-Lead Counsel representing a
12 proposed class of participants and beneficiaries of the Regions Financial Corp.
13 401(k) Plan, the AmSouth Bancorp Thrift Plan, and the Legacy Regions Plan. On
14 March 9, 2010, the court denied defendants' motion to dismiss on all disputed
15 counts of plaintiffs' consolidated complaint.

16 • ***In re American International Group, Inc. ERISA Litigation II***, No.
17 08-05722 (S.D.N.Y.). On March 19, 2009, Keller Rohrback was appointed Interim
18 Co-Lead Counsel to represent the proposed class of participants and beneficiaries
19 of the AIG Incentive Savings Plan. On June 26, 2009, plaintiffs filed a
20 consolidated amended complaint.

21 • ***In re Bear Stearns Cos., Inc. ERISA Litigation***, No. 08-02804
22 (S.D.N.Y.). On December 29, 2008, Keller Rohrback was appointed Interim Co-
23 Lead Counsel to represent the proposed class of participants and beneficiaries of
24 The Bear Stearns Cos. Inc. Employee Stock Ownership Plan. On April 20, 2009,
25 Co-Lead Counsel filed an amended consolidated complaint.

26 • ***In re Beazer Homes USA, Inc. ERISA Litigation***, No. 07-00952
27 (N.D. Ga.). On October 11, 2007, Keller Rohrback was appointed Interim Co-Lead
28

1 Counsel, and on April 2, 2010, the Honorable Richard W. Story issued an order
2 granting in part and denying in part defendants' motion to dismiss plaintiffs'
3 consolidated amended complaint. [fillin details on settlement which is pending
4 approval]

5 • ***In re State Street Bank and Trust Co. ERISA Litigation***, No. 07-
6 08488 (S.D.N.Y.). On February 19, 2010, Judge Richard J. Holwell granted final
7 approval of the \$89.75 million settlement in the ERISA action.

8 • ***In re Marsh ERISA Litigation***, No. 04-8157 (S.D.N.Y.). The court
9 approved a settlement in the amount of \$35 million on January 29, 2010.

10 • ***Ingram v. Health Management Associates, Inc.***, No. 07-00529 (M.D.
11 Fla.). The court consolidated the related ERISA actions and on June 10, 2009,
12 Keller Rohrback was appointed as a member of the Interim Lead Counsel
13 Committee. On July 27, 2009, plaintiffs filed their consolidated complaint.

14 • ***In re Constellation Energy, Inc. ERISA Litigation***, No. 08-02662 (D.
15 Md.). On January 27, 2009, Keller Rohrback was appointed Interim Co-Lead Class
16 Counsel to represent the proposed class of participants and beneficiaries of the
17 Constellation Energy Group, Inc. Employee Savings Plan and the Represented
18 Employee Savings Plan for Nine Mile Point. On May 18, 2009, plaintiffs filed a
19 consolidated amended class action complaint.

20 • ***In re Xerox Corporation ERISA Litigation***, No. 02-01138 (D.
21 Conn.). On April 14, 2009, Judge Thompson approved the \$51 million settlement
22 negotiated by the parties.

23 • ***In re Pfizer ERISA Litigation***, MDL No. 1688 (S.D.N.Y.). On
24 October 21, 2005, the Court appointed Keller Rohrback as sole Interim Lead
25 Counsel. A consolidated class action complaint was filed on June 5, 2006. On
26 March 20, 2009, the Honorable Laura T. Swain issued an order in which she
27 denied in large part defendants' motion to dismiss.

1 • ***In re Merck & Co., Inc. "ERISA" Litigation***, MDL No. 1658
2 (D.N.J.). On July 11, 2006, Judge Stanley R. Chesler granted in part and denied in
3 part defendants' motions to dismiss. On February 9, 2009, Judge Chesler granted
4 in part and denied in part plaintiffs' motion for class certification.

5 • ***In re Ford Motor Company ERISA Litigation***, No. 06-11718 (E.D.
6 Mich.) On December 22, 2006, the Court appointed Keller Rohrback Interim Co-
7 Lead Counsel. On December 22, 2008, Judge Stephen J. Murphy III issued an
8 order denying defendants' motion to dismiss.

9 • ***In re The Goodyear Tire & Rubber Company ERISA Litigation***, No.
10 03-02180 (N.D. Ohio). On July 6, 2006, Judge John R. Adams denied defendants'
11 motions to dismiss. On October 22, 2008, the Court issued final approval of the
12 \$8.375 million settlement.

13 • ***In re AIG ERISA Litigation***, No. 04-09387 (S.D.N.Y.). On
14 December 12, 2006, the late Judge John E. Sprizzo denied defendants' motion to
15 dismiss. On October 8, 2008, Judge Kevin T. Duffy, for Judge Sprizzo, issued final
16 approval of the \$25 million settlement negotiated by the parties.

17 • ***Lilly v. Oneida Ltd. Employee Benefits Admin. Committee***, No. 07-
18 00340 (N.D.N.Y.). On May 8, 2008, Judge Neal P. McCurn issued an order in
19 which he denied defendants' motion to dismiss. The order allows plaintiffs to
20 pursue their claims against defendants.

21 • ***In re Polaroid ERISA Litigation***, No. 03-08335 (S.D.N.Y.). On
22 March 31, 2005, Judge William H. Pauley III granted in part and denied in part
23 defendants' motion to dismiss. On September 29, 2006, Judge Pauley granted
24 plaintiffs' motion for class certification. The parties subsequently reached a
25 settlement in the amount of \$15 million, which was approved by the Court on June
26 25, 2007.

1 • ***In re Visteon Corporation ERISA Litigation***, No. 05-71205 (E.D.
2 Mich.). On March 9, 2007, Judge Avern Cohn approved a settlement in the amount
3 of \$7.6 million.

4 • ***Smith v. Krispy Kreme Doughnut Corporation***, No. 05-06187
5 (M.D.N.C.). On January 10, 2007, Judge William L. Osteen approved the proposed
6 settlement, which provided for structural changes to the plan, as well as the
7 payment of \$4.75 million in cash.

8 • ***In re HealthSouth Corp. ERISA Litigation***, No. 03-01700 (N.D.
9 Ala.). On June 28, 2006, Judge Karon Bowdre approved a settlement in the amount
10 of \$28.875 million, with a possible additional \$1 million from any HealthSouth
11 recovery in the derivative action.

12 • ***In re BellSouth Corporation ERISA Litigation***, No. 02-02440 (N.D.
13 Ga.). On December 5, 2006, Judge Forrester approved a settlement that provided
14 structural relief for the plans valued at up to \$90 million, plus attorneys fees and
15 costs.

16 • ***In re Mirant Corporation ERISA Litigation***, No. 03-01027 (N.D.
17 Ga.). On November 16, 2006, the Court approved the settlement, including a
18 payment of \$9.7 million in cash to the plan for losses suffered by the certified
19 settlement class.

20 • ***In re Williams Companies ERISA Litigation***, No. 02-00153 (N.D.
21 Okla.). On November 16, 2005, the Court approved the settlement for \$55 million
22 in cash, plus equitable relief in the form of a covenant that Williams will not take
23 any action to amend the plan to (i) reduce the employer match thereunder below
24 four percent prior to January 1, 2011, or (ii) require that the employer match be
25 restricted to company stock prior to January 1, 2011.

1 • ***In re CMS Energy ERISA Litigation***, No. 02-72834 (E.D. Mich.). On
2 December 27, 2004, Judge Steeh granted plaintiffs' motion for class certification
3 and subsequently approved the \$28 million settlement negotiated by the parties.

4 • ***Cokenour v. Household International, Inc.***, No. 02-07921 (N.D. Ill.).
5 On November 22, 2004, the court approved the settlement for \$46.5 million in cash
6 to the plan.

7 • ***In re Global Crossing Ltd. ERISA Litigation***, No. 02-07453
8 (S.D.N.Y.). Judge Gerard Lynch approved the settlement on November 10, 2004,
9 which provided for, among other relief, the payment of \$79 million to the plan.

10 • ***In re Lucent Technologies, Inc. ERISA Litigation***, No. 01-03491
11 (D.N.J.). Keller Rohrback was appointed Co-Lead Counsel in this class action
12 brought on behalf of participants and beneficiaries of the Lucent defined
13 contribution plans that invested in Lucent stock. The settlement provided for,
14 among other relief, the payment of \$69 million in cash and stock to the plan. Judge
15 Joel Pisano approved the settlement on December 12, 2003.

16 • ***In re Providian Financial Corp. ERISA Litigation***, No. 01-05027
17 (N.D. Cal.). The Providian ERISA Litigation settlement provided for structural
18 changes to the plan, as well as the payment of \$8.6 million in cash to the plan. The
19 Court approved the settlement on June 30, 2003.

20 **C. Counsel Is Knowledgeable in the Applicable Law.**

21 **1. Lewis, Feinberg, Lee, Renaker & Jackson, P.C.**

22 61. In addition to the class actions listed previously, Lewis Feinberg
23 serves or has served as counsel in the following successful reported ERISA cases,
24 among others:

25 • ***Saffon v. Wells Fargo & Co. Long Term Disability Plan***, 511 F.3d
26 1206 (9th Cir. 2008);
27

- 1 • *Abatie v. Alta Health & Life Ins. Co.*, 458 F.3d 955 (9th Cir. 2006);
- 2 • *Burrey v. Pac. Gas & Elec. Co.*, 159 F.3d 388 (9th Cir. 1998);
- 3 • *Clayton v. KPMG Peat Marwick*, 18 EBC 2200 (C.D. Cal. 1994);
- 4 • *Dobson v. Hartford Fin. Servs.*, 389 F.3d 386 (2d Cir. 2004);
- 5 • *Lee v. California Butchers' Pension Trust Fund*, 154 F.3d 1075 (9th
- 6 Cir. 1998);
- 7 • *Mongeluzo v. Baxter Travenol Long Term Disability Plan*, 46 F.3d.
- 8 938 (9th Cir. 1995);
- 9 • *Mertens v. Kaiser Steel Retirement Plan*, 829 F. Supp. 1158 (N.D.
- 10 Cal. 1992);
- 11 • *Mertens v. Black*, 948 F.2d 1105 (9th Cir. 1991); and
- 12 • *McMunn v. Pirelli Tire, LLC*, 161 F. Supp. 2d 97 (D. Conn. 2001).

13 62. As illustrated by the above, Lewis Feinberg and its predecessors have
14 litigated cases under ERISA since 1976. The firm has engaged in litigation and
15 consulting work throughout the United States on behalf of ERISA plan
16 participants.

17 63. The Lewis Feinberg attorneys working on this action are experienced
18 and knowledgeable in ERISA and complex class actions.

19 **a. Margaret E. Hasselman**

20 64. Margaret E. Hasselman is the shareholder with primary responsibility
21 for this case at Lewis Feinberg. Ms. Hasselman received her B.A. from University
22 of North Carolina at Chapel Hill in 1998 and her J.D. from Boalt Hall School of
23 Law, University of California at Berkeley, in 2003. She served as Articles Editor
24 for Ecology Law Quarterly from 2002 to 2003. In 2003, she was awarded the
25 Alvin and Sadie Landis Prize in Local Government Law and was admitted to the
26 Order of the Coif.
27

1 65. Ms. Hasselman joined Lewis Feinberg in 2003 as an associate
2 attorney and became a shareholder of the firm on January 1, 2009. She was
3 selected as a Northern California Rising Star for 2009 and 2010 by Law & Politics.
4 Ms. Hasselman is admitted to practice in California, in each of the four federal
5 district courts in California, and in the Ninth Circuit and the Seventh Circuit.

6 66. Since 2003, Ms. Hasselman has practiced in the area of employee
7 benefits. Significant ERISA cases in which she has played or is playing a primary
8 role, in addition to this one, include:

- 9 • In re J.P. Jeanneret Associates, Inc.;
- 10 • Hurlic v. S. California Gas Co.;
- 11 • Anthony v. Koch Indus., Inc.;
- 12 • Lively v. Dynegy, Inc.; and
- 13 • Fernandez v. K M Indus. Holding Co.

14 67. Ms. Hasselman also speaks and writes frequently on employee
15 benefits issues. She is a co-editor of the American Bar Association (“ABA”) Labor
16 and Employment Section Employee Benefits Committee quarterly newsletter and
17 is a Contributing Author to Sacher, et al., Employee Benefits Law (BNA Books),
18 Chapter 11, “ERISA Preemption and Effect on Other Laws” (2008 Supplement).
19 She has spoken at the ABA’s ERISA Basics Institute on “Fiduciary Standards,” at
20 the Western Pension and Benefits Conference on “401(k) and Other Fiduciary
21 Litigation,” the Nationwide Teleconference sponsored by Strafford Publications on
22 “Reducing Retiree Benefits: Employer’s Legal Risks and Responsibilities,” and the
23 ABA’s Labor and Employment Section Annual CLE Conference on “What Labor
24 and Employment Lawyers Need to Know About ERISA.” She spoke at the
25 National Employment Lawyers Association 2009 Annual Convention on
26 “Attacking Mass Layoffs” with respect to ERISA. She has also written and
27

1 contributed to articles regarding aspects of employee benefits law and contributed
2 to an amicus curiae brief submitted to the Supreme Court of the United States.

3 68. Ms. Hasselman has played a major role in complex class actions
4 outside the ERISA area as well. These cases include:

- 5 • *Giannetto v. Computer Sciences Corp.*, No. 03-CV-8201 (C.D. Cal.).

6 In 2005, the United States District Court for the Central District of California
7 granted final approval for a settlement of \$24 million for a class of technology
8 workers claiming that they had been improperly classified as exempt under the
9 FLSA and state overtime laws of 13 states.

- 10 • *Darensburg v. Metro. Transp. Comm'n*, No. 05-1597 (N.D. Cal.). The
11 firm, as part of a legal team, represents a coalition including bus riders, labor, and
12 civil rights advocates in a federal class action lawsuit against the Bay Area's
13 Metropolitan Transportation Commission on behalf of AC Transit bus riders of
14 color. The suit alleges that MTC violates federal and state civil rights laws by
15 channeling funds in favor of BART and Caltrain commuters while denying
16 equitable funding to AC Transit bus riders of color. The firm and the rest of
17 Plaintiffs' counsel tried the case before the court in October 2008 and are currently
18 appealing an adverse judgment.

19 **b. Jeffrey G. Lewis**

20 69. Jeffrey G. Lewis, a shareholder of Lewis Feinberg, also worked on
21 this case. Mr. Lewis graduated from Yale University in 1970 with a B.A. degree
22 and from Boalt Hall Law School (University of California at Berkeley) in 1975
23 with a J.D. degree. He was admitted to practice in California in December 1975. In
24 addition to his California State Bar membership, he is admitted to practice before
25 the U.S. District Courts for the Northern District of California, Eastern District of
26 California, Central District of California, and Southern District of California, as
27

1 well as the Second, Third, Fourth, Ninth, and Tenth Circuit Courts of Appeal and
2 the U.S. Supreme Court.

3 70. Since 1975, Mr. Lewis has specialized in pension and employee
4 benefit litigation and consultation under the Employee Retirement Income Security
5 Act (“ERISA”). Initially, he did so as an attorney at the Senior Citizens’ Law
6 Center, a legal services program specializing in the legal problems of the elderly,
7 and, since 1978, he has done so in private practice. He has done this work in many
8 states, including, but not limited to, California, Oregon, Washington, Utah, North
9 Carolina, Kentucky, Illinois, Texas, New York, West Virginia, Delaware,
10 Connecticut, and Georgia. Many of these cases have been class actions. His legal
11 work in the pension and employee benefit plan area has included the litigation of a
12 broad spectrum of employee benefit and ERISA issues. This has included litigation
13 regarding benefit claims, breaches of fiduciary duty, and the scope of relief
14 available under the different subsections of ERISA §502(a), 29 U.S.C. §1132(a).
15 At present, virtually all of his work is in the employee benefit plan area. He is
16 frequently asked to and does mediate complex ERISA cases.

17 71. From 1998 to 2001, Mr. Lewis served as the Plaintiff’s Co Chair of
18 the American Bar Association’s Employee Benefits Committee of the Labor and
19 Employment Section. He is presently one of the co chairs of the Board of Senior
20 Editors, Employee Benefits Law (BNA), a publication of the ABA. As a Senior
21 Editor, he has had joint responsibility for the publication and has served as co
22 senior editor for various chapters of the Second Edition and the supplements
23 thereto, including the chapter on Fiduciary Responsibility. He also previously
24 served as the editor of the ERISA chapter in Employee Rights Litigation: Pleading
25 and Practice (Matthew Bender), and was a contributing editor on employee
26 benefits for a legal reference book published by Little, Brown & Company.

1 72. In 1998, Mr. Lewis was named by the National Law Journal as one of
2 the top 40 employee benefits attorneys in the nation. Fewer than a handful of the
3 40 were plaintiffs’ attorneys. He also was selected as a Charter Fellow of the
4 American College of Employee Benefits Counsel and is a member of its Board of
5 Governors. For the past four years he has been named a “Northern California
6 Super Lawyer,” and he was named as the top plaintiff’s side ERISA attorney in the
7 San Francisco Bay Area by the legal newspaper The Recorder. In addition to
8 maintaining a full time practice as described above, Mr. Lewis has lectured and
9 taught on the subject of pension law and employee benefits for more than 25 years.
10 He has served as an adjunct professor at Hastings College of Law (U. of
11 California), where he taught a course entitled “Pension/Employee Benefit Law” in
12 1997, 1998 and 1999. He previously taught courses on employee benefit law and
13 ERISA at the University of San Francisco School of Law and Golden Gate
14 University Law School. In addition, he has lectured and given training programs in
15 pension law throughout California and the United States. For many years, he was a
16 regular speaker at the American Bar Association’s Annual “ERISA Litigation:
17 Tactics and Strategy” seminars, where he spoke on a broad range of ERISA topics,
18 including, on numerous occasions, on one or more topics related to litigating
19 ERISA breach of fiduciary duty claims.

20 73. In the past, Mr. Lewis has served as co chair of the Fiduciary
21 Responsibility Subcommittee of the American Bar Association Labor and
22 Employment Section’s Employee Benefits Committee and as co chair of the
23 Pension Committee of the National Employment Lawyers’ Association. He is a
24 member of the Lawyers Advisory Committee of the National Pension Assistance
25 Project.

1 **c. James P. Keenley**

2 74. James Keenley, an associate attorney at Lewis Feinberg, also worked
3 on this case. Mr. Keenley is a graduate of the University of California, Berkeley
4 School of Law (Boalt Hall), where he served as the Co-Editor-in-Chief of the
5 Berkeley Journal of International Law and as a member of the California Law
6 Review. Since joining the firm in 2007, Mr. Keenley has worked on numerous
7 types of ERISA cases, including individual benefit claims, complex breach of
8 fiduciary duty class actions, professional negligence claims against ERISA plan
9 advisors, prohibited transaction litigation, and cases presenting ERISA preemption
10 issues. Mr. Keenley has also worked extensively on complex wage-and-hour class
11 actions involving a mixture of state and federal claims. Mr. Keenley is the author
12 of *How Many Injuries Does it Take? Article III Standing in the Class Action*
13 *Context*, 95 Cal. L. Rev. 849 (2007), and is a frequent speaker on ERISA litigation
14 issues.

15 **2. Keller Rohrback L.L.P.**

16 75. In addition to the class actions listed previously, Keller Rohrback
17 serves or has served as counsel in the following successful reported ERISA cases,
18 among others: [you listed many of these already up above]

- 19
- 20 • *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009);
 - 21 • *In re Syncor ERISA Litig.*, 516 F.3d 1095 (9th Cir. 2008);
 - 22 • *In re Xerox Corp. ERISA Litig.*, 483 F. Supp. 2d 206 (D. Conn. 2007);
 - 23 • *In re Polaroid ERISA Litig.*, 240 F.R.D. 65 (S.D.N.Y. 2006);
 - 24 • *In re Polaroid ERISA Litig.*, 362 F. Supp. 2d 461 (S.D.N.Y. 2005);
 - 25 • *In re Syncor ERISA Litig.*, 227 F.R.D. 338 (C.D. Cal. 2005);
 - 26 • *In re Williams Cos. ERISA Litig.*, 231 F.R.D.416 (N.D. Okla. 2005);
 - 27 • *In re CMS ERISA Litig.*, 225 F.R.D. 539 (E.D. Mich. 2004);

- 1 • *Hill v. BellSouth Corp.*, 313 F. Supp. 2d 1361 (N.D. Ga. 2004);
- 2 • *In re CMS ERISA Litig.*, 312 F. Supp. 2d 898 (E.D. Mich. 2004);
- 3 • *In re WorldCom ERISA Litig.*, 263 F. Supp. 2d 745 (S.D.N.Y. 2003);
- 4 • *In re Williams Cos. ERISA Litig.*, 271 F. Supp. 2d 1328 (N. D. Okla.
- 5 2003); and
- 6 • *Tittle v. Enron Corp.*, 284 F. Supp. 2d 511 (S.D. Tex. 2003).

7 76. Keller Rohrback has extensive experience in handling ERISA class
8 action cases and other complex litigation and is a national leader in this area of
9 litigation.

10 77. The Keller Rohrback attorneys assigned to this case are experienced
11 and knowledgeable in ERISA and complex class actions.

12
13 **a. Lynn L. Sarko**

14 78. Lynn L. Sarko is Keller Rohrback's Managing Partner and leads the
15 firm's Complex Litigation Group and ERISA team. Mr. Sarko received both his
16 M.B.A. degree in accounting and law degree from the University of Wisconsin,
17 where he served as Editor-in-Chief of the Wisconsin Law Review and was selected
18 by faculty as the outstanding graduate of his class. He is a former Assistant United
19 States Attorney and Ninth Circuit judicial law clerk (Hon. Jerome Farris). He has
20 actively engaged in the prosecution of complex litigation for two decades. Mr.
21 Sarko has served as lead or co-lead counsel in several leading ERISA cases,
22 including the largest and most complex – the *Enron*, *WorldCom*, and *Global*
23 *Crossing* cases – and numerous other cases. In these ERISA cases, Mr. Sarko has
24 worked closely with the U.S. Department of Labor (“DOL”) on numerous issues,
25 has established relationships with many of the key experts in the field, has worked
26 extensively with counsel in parallel securities and derivative cases, and has
27 developed systems for effectively coordinating the discovery in the parallel cases.

1 79. In addition to his work as lead or co-lead counsel in these prominent
2 ERISA cases, Mr. Sarko has prosecuted a variety of class actions involving high
3 profile matters including the Exxon Valdez Oil Spill, the Microsoft civil antitrust
4 case, the Vitamins price-fixing cases, the MDL Fen/Phen Diet Drug Litigation, as
5 well as notable public service lawsuits such as *Erickson v. Bartell Drug Co.*,
6 establishing a woman's right to prescription contraceptive health coverage. Aided
7 in part by his M.B.A. in accounting, Mr. Sarko has also litigated numerous
8 complex cases involving financial and accounting fraud, including actions against
9 several of the nation's largest accounting and investment firms.

10 80. Mr. Sarko is a recipient of Trial Lawyer of the Year by the Trial
11 Lawyers for Public Justice Foundation and for the last seven years was named
12 "Super Lawyer" among civil litigators by *Washington Law and Politics* magazine
13 in its annual review of the State's legal profession. Mr. Sarko is a frequent
14 commentator on ERISA litigation. He regularly speaks at national ERISA
15 conferences. Most recently, Mr. Sarko spoke at the DOL Speaks: 2008 Los
16 Angeles Benefits Conference, the 2008 Western Benefits Conference, as well as
17 the Employee Benefits Conference, the American Bar Association's Employee
18 Benefits Committee Meeting and the Glasser Annual ERISA Litigation
19 Conference. Mr. Sarko is considered one of the leading experts on ERISA class
20 action cases.

21 **b. Derek W. Loeser**

22 81. Derek W. Loeser is a partner at Keller Rohrback and a member of the
23 firm's ERISA team. He is one of the chief plaintiffs' counsel in numerous ERISA
24 breach of fiduciary duty cases, including, among others:

- 25 • *In re Polaroid ERISA Litig.*, No. 03-8335 (S.D.N.Y.);
- 26 • *In re AIG ERISA Litig.*, No. 04-8141 (S.D.N.Y.); and
- 27

- 1 • *In re Ford ERISA Litig.*, No. 06-11718 (E.D. Mich.).

2 82. Mr. Loeser also played a lead role in the prosecution of many of the
3 firm's groundbreaking ERISA cases, including:

- 4 • *In re Enron Corp. ERISA Litig.*, No. 01-3913 (S.D. Tex.);
5 • *In re HealthSouth Corp. ERISA Litig.*, No. 03-784 (N.D. Ala.); and
6 • *In re CMS Energy ERISA Litig.*, No. 02-72834 (E.D. Mich.).

7 83. Mr. Loeser has extensively researched, briefed and argued a multitude
8 of legal issues arising in ERISA class action cases, including on motions to
9 dismiss, class certification, and summary judgment, and has conducted extensive
10 document, deposition, and expert discovery in these cases. He has played a lead
11 role in successful settlement negotiations in several of the firm's ERISA cases.

12 84. Mr. Loeser is a member of the American Bar Association's Section of
13 Labor & Employment Law and the Employee Benefits Committee as a plaintiff's
14 attorney, and is a frequent speaker at national ERISA conferences. For example,
15 Mr. Loeser recently spoke at the West Legalworks 20th Annual ERISA Litigation
16 Conference.

17 85. Before joining Keller Rohrback in 2002, he clerked for the Hon.
18 Michael R. Hogan, United States District Court, District of Oregon, and was a trial
19 attorney in the Employment Litigation Section of the Civil Rights Division of the
20 United States Department of Justice in Washington, D.C. Mr. Loeser obtained his
21 B.A. from Middlebury College, where he graduated summa cum laude, with
22 highest departmental honors, and as a member of Phi Beta Kappa. He graduated
23 with honors from the University of Washington School of Law. Mr. Loeser was
24 named in 2007, 2008, 2009, and 2010 as a "Super Lawyer" among civil litigators
25 and recognized in 2005 and 2006 as a "Rising Star" by *Washington Law and*
26 *Politics* magazine in its annual review of the State's legal profession.

1 **c. Erin M. Riley**

2 86. Erin M. Riley is a partner at Keller Rohrback and a member of the
3 firm’s ERISA team. Ms. Riley’s practice focuses on ERISA breach of fiduciary
4 duty litigation. In addition to this case, she has successfully litigated several class
5 actions, including, among others:

6 • In re Merrill Lynch & Co., Inc. ERISA Litig., No. 07-10268
7 (S.D.N.Y.);

8 • *In re AIG ERISA Litig.*, No. 04- 8141 (S.D.N.Y.);

9 87. Ms. Riley is also actively involved in the following ERISA cases:

10 • In re Wachovia Corp. ERISA Litig., No. 09-00262 (W.D.N.C.);

11 • In re Beazer Homes USA, Inc. ERISA Litig., No. 07-00952 (N.D.
12 Ga.);

13 • In re American International Group, Inc. ERISA Litig.II, No. 08-5722
14 (S.D.N.Y.);

15 • In re Bear Stearns Cos., Inc. ERISA Litig., No. 08-02804 (S.D.N.Y.);

16 and

17 • In re Washington Mutual, Inc., ERISA Litig., No. 07-01874 (W.D.
18 Wash.).

19 88. Ms. Riley graduated cum laude from the University of Wisconsin
20 School of Law and was a managing editor of the Wisconsin Law Review. She
21 received her B.A. in French and History from Gonzaga University, where she
22 graduated cum laude. Ms. Riley is licensed to practice in both Washington and
23 Wisconsin and is a member of the American Bar Association’s Section of Labor &
24 Employment Law and the Employee Benefits Committee as a plaintiff’s attorney.
25 She was recognized in 2009 as a “Rising Star” by *Washington Law and Politics* in
26 its annual review of the State’s legal professionals.

1 **d. Sarah H. Kimberly**

2 89. Sarah H. Kimberly is an associate in Keller Rohrback's Complex
3 Litigation Group. Her practice focuses on complex ERISA breach of fiduciary duty
4 litigation. She has successfully litigated several class actions, including:

- 5 • Alvidres v. Countrywide Fin. Corp., No. 07-05810 (C.D. Cal.); and
6 • *In re Marsh ERISA Litig.*, No. 04-8157 (S.D.N.Y.).

7 90. Ms. Kimberly is also actively involved in the following ERISA cases:

- 8 • *In re Fremont Gen. Corp. Litig.*, No. 07-02693 (C.D. Cal.);
9 • *In re Wachovia Corp. ERISA Litig.*, No. 09-00262 (W.D.N.C.);
10 • *In re Beazer Homes USA, Inc. ERISA Litig.*, No. 07-00952 (N.D.

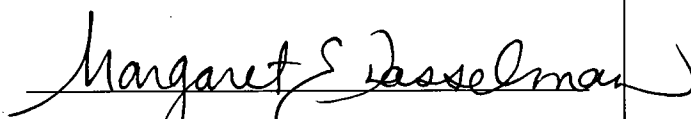
11 Ga.); and

- 12 • *In re Colonial BancGroup, Inc. ERISA Litig.*, No. 09-00792 (M.D.
13 Ala.).

14 91. Ms. Kimberly graduated from The George Washington University
15 Law School. She is admitted to practice in Washington State and before the
16 Western District of Washington and the Ninth Circuit Court of Appeal. Ms.
17 Kimberly is also a member of the Washington State, King County, and American
18 Bar Associations. She was recognized in 2010 as a "Rising Star" by *Washington*
19 *Law and Politics* in its annual review of the State's legal professionals.

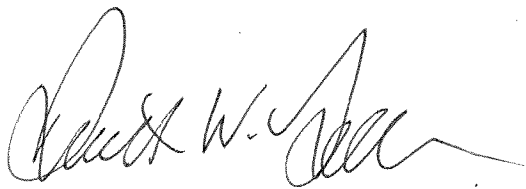
20 We declare under penalty of perjury that the foregoing is true and correct.

21
22 Executed in Oakland, California, on August 6, 2010.

23
24
25 
26 Margaret E. Hasselman

1 Executed in Seattle, Washington, on August 6, 2010.

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Derek W. Loeser

EXHIBIT 3

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6
7 **UNITED STATES DISTRICT COURT**
8 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**
9 **WESTERN DIVISION**

10 **IN RE INDYMAC ERISA**
11 **LITIGATION**

Master File No.: 08-04579 DDP(VBKx)

CLASS ACTION

12
13 **DECLARATION OF HON. DANIEL H.**
14 **WEINSTEIN (RET.) IN SUPPORT OF**
15 **RENEWED MOTION FOR**
16 **PRELIMINARY APPROVAL OF**
17 **PROPOSED CLASS ACTION**
18 **SETTLEMENT, PRELIMINARY**
19 **CERTIFICATION OF SETTLEMENT**
20 **CLASS, APPROVAL OF NOTICE**
21 **PLAN, AND TIME FOR FAIRNESS**
22 **HEARING**

Date: Monday, September 13, 2010

Time: 10:00 a.m.

Courtroom: 3, 2nd Floor

Before the Hon. Dean D. Pregerson

23
24 I, Hon. Daniel H. Weinstein (Ret.), hereby declare as follows:

25 1. From July 2009 through February 2010, I served as the mediator for
26 the parties in the case captioned *In re IndyMac ERISA Litigation*. I submit this
27 Declaration in connection with Plaintiffs' Renewed Motion for Preliminary
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1 Approval of Proposed Class Action Settlement, Preliminary Certification of
2 Settlement Class, Approval of Notice Plan, and Time for Fairness Hearing.

3 2. From 1982 through 1988, I served as a Judge of the Superior Court of
4 the State of California, County of San Francisco. I also served as an Associate
5 Justice Pro Tem of the California Supreme Court and of the First District Court of
6 Appeal.

7 3. Since retiring from the bench, I have been a full-time mediator. For
8 the past twenty years, I have presided over the mediation of countless disputes,
9 including many of the most complex multi-party disputes throughout the United
10 States. For example, I have mediated dozens of federal securities class actions
11 involving public companies such as Enron, Homestore, Qwest, Adelphia, Dynegy,
12 Providian, Clarent, and other major New York Stock Exchange and NASDAQ
13 corporations. I have also mediated a host of other types of class actions, including
14 ERISA actions, product liability actions, toxic tort cases, environmental litigation,
15 and litigation brought by borrowers, credit card customers, insurance purchasers,
16 and air crash victims. Many of these cases involve complex fact patterns and legal
17 issues and hundreds of millions (or billions) of dollars in claimed damages. They
18 often include numerous plaintiffs and plaintiffs' counsel, as well as numerous
19 defendants (issuers, directors, officers, insurance carriers, professional firms, et
20 cet.) and defense counsel. For each of the last ten years, I have assisted parties in
21 forging settlements of complex disputes involving more than one billion dollars in
22 the aggregate.

23 4. My experience includes the mediation of many cases such as this one,
24 i.e., breach of ERISA fiduciary duty class actions involving company stock in
25 defined contribution retirement plans. All cases involve complexities, but ERISA
26 breach of fiduciary duty cases involve three particularly difficult issues for the
27 mediator.
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1 5. First, the law is unsettled. Case law consists overwhelmingly of
2 recent district court decisions on motions to dismiss and for class certification.
3 New opinions are issued monthly. There are very few opinions on the merits, and
4 the few appellate cases are inconsistent.

5 6. Second, the cases often involve overlapping, concurrent litigation
6 based on similar factual allegations. Here, there are at least two securities cases
7 against at least some of the defendants in this case. Therefore, the settlement of
8 one case raises issues of different insurance coverage, different defendants, and so
9 on. Sometimes it is possible to settle both cases at the same time, but often, as is
10 the case here, it is not.

11 7. Third, the measurement of the loss to the plan is hotly disputed,
12 because there is deep disagreement on the appropriate methodology for measuring
13 the loss to the plan in a defined contribution case involving company stock. No
14 case has spoken directly to this issue. Therefore, the parties' expert reports are
15 difficult to rely on because they are based on assumptions that are widely variable.
16 Notwithstanding these and other idiosyncrasies of company stock litigation, I
17 believe I have mediated enough of these cases to develop a sense of appropriate
18 ranges of settlement for them.

19 8. I set forth my background as a mediator above to provide context for
20 the comments that follow and to demonstrate that my perspective on the settlement
21 of this action is rooted in significant experience in the resolution of complex
22 litigation generally and company stock litigation in particular. As described below,
23 this action presented complicated legal, factual, and practical issues as complicated
24 as any that I have ever encountered. The parties were represented during the
25 mediation process through zealous and able counsel, who negotiated aggressively
26 and at arm's length. I am very strongly of the view that the settlement of this
27 action reached at the end of the mediation process represents a reasonable and
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1 practical resolution of highly uncertain litigation. The Court, of course, will make
2 determinations as to the “fairness” of the settlement under applicable legal
3 standards. From a mediator’s perspective, however, I can say that I unreservedly
4 recommend the settlement that has been reached as reasonable, hard-fought, arm’s
5 length, and accurately reflective of the risks and potential rewards of the claims
6 being settled.

7 9. All of the parties, entities, and individuals who were represented at the
8 mediation sessions or who participated in the negotiations executed a
9 Confidentiality Agreement indicating that the mediation process was to be
10 considered settlement negotiations for the purpose of all state and federal rules
11 protecting disclosures made during such process from later discovery and/or use in
12 evidence. The parties further agreed that the Confidentiality Agreement extends to
13 all present and future civil, judicial, quasi-judicial, arbitral, administrative or other
14 proceedings. Nothing in my declaration divulges any privileged information.
15 Further, the parties agree that the filing of this declaration does not constitute the
16 waiver of any such confidentiality privilege.

17 10. The parties retained me as a mediator in July 2009. The parties
18 prepared detailed mediation submissions that included thorough analyses of the
19 claims, defenses, and the current status of the litigation, as well as the available
20 insurance coverage and the competing demands on a number of the policies.

21 11. On August 25, 2009, I held a joint settlement conference for the
22 parties. The mediation was attended by counsel for Defendants and Plaintiffs as
23 well as the insurance carrier. The parties conducted a plenary session in which
24 counsel for both sides presented their factual and legal positions ably and
25 zealously. Early settlement positions reflected highly disparate views about the
26 claims asserted against the defendants, and thereto. I stressed to each party the
27 significant risks of going forward. The plaintiffs might recover very little or have
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1 their damages capped drastically. The Defendants, too, faced significant risks if a
2 court ultimately disagreed with its legal and / or factual analysis of the claims
3 against them. Both sides faced years of uncertainties and legal expenses if the
4 litigation did not settle, but instead went forward in the Courts.

5 12. In connection with each of the above-described aspects of the
6 negotiations, I mediated other issues between and among the parties including,
7 among many others: (1) Management's duty to prudently manage the Plan's
8 investment in IndyMac stock; and (2) the effect of the scope information conveyed
9 to Plan Participants regarding the soundness of IndyMac stock.

10 13. In addition to these sophisticated and strongly disputed legal claims,
11 defenses and damages issues, there were challenging and complicated financial
12 issues due to the amount of damages being sought for settlement an the available
13 potential resources for satisfaction of any judgments which might be obtained. The
14 parties' early settlement demands and offers reflected vastly different views about
15 the merits, damages, and available financial resources to resolve the concerns.
16 There were also strong positions taken by the former Officers that would have
17 taken years to litigate, with uncertain results, and extraordinary fiscal costs to all of
18 the parties.

19 14. Additionally, the amount of available insurance was being eroded at a
20 fast pace by the sheer expense of the litigation landscape and the significant
21 defense costs being incurred. Failure to reach a global settlement posed the
22 legitimate concern that significant resources would be consumed in the expense of
23 the ongoing litigation when the Company also had a number of separate
24 governmental regulatory investigations pending. Thus, there were some common
25 sense, practical considerations of resources and collection that had to be factored in
26 along with the plethora of daunting legal and factual issues in the mediated case.

1 15. The conference culminated in a Mediator's Proposal of \$7 million. I
2 provided the parties with my reasoning as to why I believed the proposed
3 settlement to be fair, reasonable, and deserving of their earnest consideration. The
4 Mediator's Proposal was in a range that I believed reasonably reflected the parties'
5 factual, legal, and financial positions, and also took into consideration the risks and
6 costs of litigation, and the extent to which insurance coverage would be depleted
7 should this matter not settle.

8 16. Following some very strong advocacy on behalf of each group, the
9 Mediator's Proposal of \$7 million was accepted by the parties.

10 17. After the settlement conference, I mediated a dispute between the
11 parties concerning certain terms of the term sheet. With my assistance, this dispute
12 was eventually resolved, and the parties signed the term sheet in February 2010.

13 18. I believe that the parties' advocacy and ultimate compromise of the
14 formidable disputed issues were the result of reasonable, arm's-length bargaining
15 and represent reasonable settlement terms in light of the strengths and weaknesses
16 of the parties' factual and legal positions.

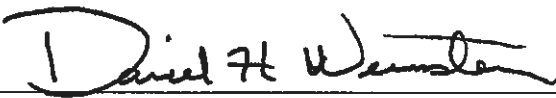
17 19. In light of the formidable and sophisticated factual, legal, damages,
18 and financial issues involved and the significant time to litigate and negotiate this
19 resolution, I view the total settlement in large part as a testament to the abilities
20 and efforts of a highly talented and committed group of counsel and dedicated
21 principals on both sides. I can state that each settlement term represents a heavily-
22 negotiated and arm's-length compromise of disputed claims among experienced
23 and able counsel.

24 20. Based on, and as a result of the foregoing, I state to the Court that I
25 am satisfied that the proposed settlement is fair, reasonable, and adequate. There is
26 substantial monetary consideration flowing to the Class, with due recognition to
27 the complexity of the facts and legal contentions at issue, and a real threat of years
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1 of litigation and appeals. I believe that the settlement was the highest settlement
2 amount that the plaintiffs could have achieved at this time.

3 21. Therefore, based on my knowledge of this action, all of the materials
4 provided to me, the efforts of counsel, the intensity of the negotiations, the
5 litigation risks, and the benefits reached in the proposed settlement, I believe that
6 this is a fair, reasonable, and adequate settlement of all claims against the
7 defendants, and I respectfully recommend that it be approved by the District Court.

8 Respectfully submitted this 2nd day of August, 2010.

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Hon. Daniel H. Weinstein (Ret.)

EXHIBIT 4

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**UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

**IN RE INDYMAC ERISA
LITIGATION**

Master File No:

CV 08-04579 DDP(VBKx)

**AFFIDAVIT OF JENNIFER M.
KEOUGH REGARDING NOTICE
DISSEMINATION**

JENNIFER M. KEOUGH, being duly sworn, deposes and says:

1. I am Executive Vice President, Operations, of The Garden City Group, Inc. (“GCG”). The following statements are based on my personal knowledge and information provided by other GCG employees working under my supervision, and if called on to do so, I could and would testify competently thereto. GCG has been providing comprehensive legal administrative services for over 25 years. Our team has served as administrator for well over 1,000 cases. In the course of our history, we have mailed over 227 million notices, handled over 3 million calls, processed over 41 million claims, and distributed over \$22 billion.

1 database¹. Where a more current address was obtained, GCG updated the address
2 accordingly.

3 6. Pursuant to Paragraph 7 of the Preliminary Approval Order and Section 9.1.3
4 of the Settlement Agreement, GCG formatted the Notice and caused it to be printed. The
5 Notices were posted for first-class mail, postage pre-paid, and delivered on November 4, 2010
6 (the "Notice Date") to a U.S. Post Office to be mailed to each person on the Class List. A
7 total of 2,862 Notices were mailed. A copy of the Notice is attached hereto as Exhibit A.
8

9 7. As of December 1, 2010, of the 2,862 Notices mailed, 178 were returned to
10 GCG as undeliverable with forwarding address and promptly remailed to the new addresses as
11 provided by USPS; 115 Notices were returned to GCG as undeliverable without forwarding
12 address information. GCG promptly researched the addresses for these 115 records using an
13 advance address level search database.² Through these efforts, GCG obtained 90 updated
14 addresses and promptly remailed Notices; 25 Notices remain ultimately undeliverable.
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16 **PRESS RELEASE**

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18 8. Pursuant to Paragraph 7 of the Preliminary Approval Order and Section 9.1.4
19 of the Settlement Agreement, GCG caused the Summary Notice to be electronically published
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21 ¹ The NCOA database is the official United States Postal Service database product, which makes change
22 of address information available to mailers to help reduce undeliverable mail pieces before mail enters the
23 mailstream. This product is an effective tool to update address changes when a person has completed a change
24 of address form provided by the Post Office. The address information is maintained on the database for four
25 (4) years and is then purged. As such, NCOA is a cost effective tool to update addresses for a four (4) year
26 period.

27 ² GCG utilized AccurInt to perform advanced level address searches using the name, address and Social
28 Security Number information, where available, that was provided by Counsel to GCG. This company searches
personal data sourced from multiple public and private databases to provide GCG with the most current and
accurate addresses available.

1 for nationwide distribution on *Business Wire*. A copy of the Summary Notice and
2 confirmation of its publication is attached hereto as Exhibit B.

3 **WEBSITE**

4 9. Pursuant to Paragraph 7 of the Preliminary Approval Order and Section 9.1.5
5 of the Settlement Agreement, beginning on November 4, 2010, GCG established a website,
6 <http://www.GCGInc.com/cases/IDM>, where Class Members can view the Settlement
7 Agreement with all of its exhibits, the Notice, Summary Notice, and the Preliminary Approval
8 Order.
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13 I declare under penalty of perjury, pursuant to the laws of the State of California, that
14 the foregoing is true and correct to the best of my knowledge and that this Affidavit was
15 executed on this 3rd day of December, 2010 at Seattle, Washington.

16 By: 
17 Jennifer M. Keough

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21 Sworn to before me in Seattle, Washington this 3rd day of December, 2010.
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24 
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26 BROOK LYN BOWER
27 Notary Public in and for the State of Washington
28 Residing in Seattle
My Commission Expires: July 26, 2012.
License No. 99205



EXHIBIT A

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IN RE INDYMAC ERISA
LITIGATION

Master File No.: 08-04579 DDP (VBKx)
CLASS ACTION

NOTICE OF PROPOSED CLASS ACTION SETTLEMENT, SETTLEMENT FAIRNESS HEARING, AND MOTION FOR ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES AND NAMED PLAINTIFFS' COMPENSATION

You have received this Notice because records show that you, or someone who designated you as their retirement plan beneficiary, participated in the IndyMac Bank, F.S.B. 401(k) Plan (the "Plan") and had a portion of your account invested in the fund containing IndyMac Bancorp common stock anytime between July 1, 2006 and June 1, 2010 ("Class Period"). As a result of class action litigation over the propriety of this investment, you may be eligible to receive money in the proposed settlement (the "Settlement").

**Please read this Notice carefully.
This Notice has been ordered by the Court overseeing the case.
This is not a solicitation or advertisement from an attorney.
You have not been sued.**

- This Notice advises you of the Settlement of a consolidated class action lawsuit brought by Plaintiffs Sam Zhong Wang and Jeffrey Washington on behalf of themselves, the Plan, and as representatives of a class described herein (the "Class") against the Defendants (persons named personally as defendants in the lawsuit).
- This class action lawsuit involves claims that the fiduciaries responsible for overseeing the Plan breached their fiduciary duties to the Plan and its participants by allowing the Plan and its participants to maintain and continue investments in IndyMac Bancorp common stock after July 1, 2006. The fiduciaries deny that they breached any fiduciary duties.
- The United States District Court for the Central District of California (the "Court") has preliminarily approved the Settlement and has scheduled a hearing to evaluate the fairness and adequacy of the Settlement and consider the Plaintiffs' motion for final approval of the Settlement and for class certification, motion for approval of a proposed plan of allocation, and motion for an award of attorneys' fees and costs and for case contributions awards to the Plaintiffs. That hearing, before the Hon. Dean D. Pregerson, has been scheduled for January 10, 2011, at 11:00 a.m. in Courtroom 3, Second Floor, of the United States District Court for the Central District of California, 312 N. Spring St., Los Angeles, California.
- If the Settlement is approved and you are a member of the Class, you will receive money in exchange for releasing the Defendants from legal claims that were or could have been brought in the lawsuit.

The terms of the Settlement are contained in a Stipulation and Agreement of Settlement – ERISA Action (the "Settlement Agreement"), a copy of which is available at <http://www.gcginc.com/cases/idm> or by contacting Plaintiffs' Counsel as described below. Capitalized terms used in this Notice and not defined herein have the meanings assigned to them in the Settlement Agreement. The Settlement is summarized below.

- **Your legal rights will be affected whether or not you take any action. Read this Notice carefully.**

YOUR LEGAL RIGHTS AND OPTIONS IN THIS SETTLEMENT

No Action is Necessary to Receive Payment

If you do nothing in response to this Notice, and the proposed Settlement is approved by the Court, you will receive a monetary payment and release certain legal claims.

Object (no later than December 13, 2010)

If you wish to object to any part of the Settlement, you can write to the Court and counsel and explain why.

Appear at a Hearing on January 10, 2011 at 11:00 a.m.

If you have submitted a written objection to the Court and Plaintiffs' Counsel, as explained below, you can ask to speak in Court about the fairness of the Settlement.

These rights and options – and the deadlines to exercise them – are explained in this Notice.

The Court in charge of this case has given preliminary approval to the Settlement but will be conducting a hearing on January 10, 2011, to evaluate whether to give final approval to the Settlement. Your benefits under the Settlement will be provided if the Court gives its final approval to the Settlement and after any appeals are resolved. Thank you for your patience.

WHY DID I RECEIVE THIS NOTICE?

You have received this Notice because you or someone in your family are or may have been a participant in, beneficiary of, or alternate payee of the Plan during the Class Period.

The Court caused this Notice to be sent to you because you have a right to know about the Settlement and all of the options available to you regarding the Settlement before the Court decides whether to approve the Settlement. This Notice describes the litigation, the Settlement, your legal rights, what benefits are available, and who is eligible for them.

The Court in charge of this case is the United States District Court for the Central District of California. The people who brought this suit are called the "Plaintiffs," and the people they sued are called the "Defendants." The Plaintiffs in this case are Sam Zhong Wang and Jeffrey Washington. The Defendants are Jim Barbour, Louis E. Caldera, Kevin Cochrane, Hugh M. Grant, Ken Horner, A. Scott Keys, Rayman Mathoda, Michael W. Perry, Jennifer Pikoos, and John F. Seymour.

The legal action that is the subject of this Notice and the Settlement is titled *In re IndyMac ERISA Litigation*, Case No. 2:08-cv-04579-DDP-(VBK).

WHAT IS THIS CASE ABOUT?

This case stems from the mortgage crisis of 2007 and 2008 and the resulting failure of IndyMac Bank, F.S.B. (the "Bank"). The Bank was taken over by federal government regulators on July 11, 2008, and shortly thereafter the Bank's holding company, IndyMac Bancorp, Inc. ("Bancorp"), filed for bankruptcy protection in the United States Bankruptcy Court for the Central District of California. As a result of the Bank's failure, Bancorp's publicly traded stock became virtually worthless.

The Plaintiffs who brought this case and the class of people they are seeking to represent are former participants in the Plan who had a portion of their Plan accounts invested in IndyMac Bancorp, Inc. common stock ("IndyMac stock"). Between July 14, 2008, and August 13, 2008, eight lawsuits were filed to recover damages on behalf of participants in the Plan for the losses they suffered as a result of the Plan's investments in IndyMac stock. On October 7, 2008, the Court ordered that all these cases be consolidated into a single lawsuit, and it appointed lead plaintiffs and lead attorneys to prosecute the claims. On January 5, 2009, the Plaintiffs filed a consolidated complaint for all the actions.

QUESTIONS? CALL TOLL-FREE 1 (888) 404-8013 OR VISIT [HTTP://WWW.GCGINC.COM/CASES/IDM](http://www.GCGINC.COM/CASES/IDM)

This lawsuit is brought on behalf of the Plan and its participants, and the Plan participants will recover money if this Settlement is given final approval. The Settlement proceeds will be allocated among Class Members who lost money in their Plan accounts during the Class Period due to investment in IndyMac stock.

The consolidated lawsuit alleges that the Defendants breached fiduciary duties they owed to the Plan and its participants under a federal law called the Employee Retirement Income Security Act ("ERISA"). ERISA is a comprehensive statute that regulates the operations of most private-sector employee benefit plans, including the retirement plan at issue in this case. Under ERISA, the people and entities responsible for overseeing the Plan's investment owe the Plan itself, and the current and former employees who participate in it, fiduciary duties to loyally and prudently manage the Plan's assets. This lawsuit alleges that the Plan's fiduciaries breached these duties by allowing the Plan and its participants to make and maintain investments in IndyMac stock after July 1, 2006. The Defendants have vigorously denied that they breached any legal duties and strongly contest their liability for the Plan's losses.

WHY AND HOW DID THE PARTIES REACH THIS SETTLEMENT?

This litigation is strongly contested by both the Defendants and the Plaintiffs, and both parties bear the risk that they will not prevail on key legal and factual issues if the case proceeds all the way to a judgment. The Plaintiffs and their counsel believe the Class's legal claims are strong, and the Defendants and their counsel believe their defenses are strong. This litigation is further complicated for the Plaintiffs because there are limited assets available to satisfy a judgment in favor of the Plan and its participants due to the federal takeover of the Bank and the bankruptcy of its holding company, and because there are numerous other legal claims on the remaining assets of the Bank. The primary source of assets available to satisfy a judgment in this case is from insurance policies, which are also used to cover the ongoing costs of litigation.

Counsel for the Plaintiffs and Defendants exchanged relevant documents and retained financial experts to analyze the potential damages in the case. After this information was exchanged and discussed between the parties, they agreed to participate in a mediation session to attempt to resolve the case at an early stage of the litigation, before assets available to pay a judgment were further depleted by litigation costs. On August 25, 2009, the parties met with the Honorable Daniel Weinstein (Ret.), a retired judge and highly experienced mediator. As a result of this meeting and subsequent negotiations between the parties' counsel and Judge Weinstein, the parties reached this Settlement on behalf of the Plan and all of its participants.

The Settlement calls for the payment of \$7,000,000 in cash by the Defendants' fiduciary insurance carrier, which will be allocated to Class Members based on how much each lost due to investments in Bancorp stock during the Class Period. In exchange for the cash payment, the Class Members agree to release the Defendants from any liability related to the claims that have been asserted in this lawsuit. The Settlement payment is a compromise that reflects extensive investigation, hard-fought negotiations, and the risks faced by both the Plan participants and the Defendants if the litigation were pursued to judgment. It is the considered opinion of the Plaintiffs and their attorneys, who have substantial experience in this type of litigation, that the Settlement is an excellent recovery for the Plan's participants.

WHY IS THIS CASE A CLASS ACTION?

This case is a class action because the legal and factual issues that pertain to each member of the Class are very similar or identical. In a class action, one or more plaintiffs, called "named plaintiffs," sue on behalf of people who have similar claims. The Court resolves the issues for all members of the Class. United States District Judge Dean D. Pregerson is presiding over this case and must approve this Settlement before it can become final.

HOW DO I KNOW IF I AM A MEMBER OF THE CLASS?

The Class of Plan participants in this Settlement is defined as follows:

All persons other than Defendants and Defendants' spouses, parents, or children who were participants in or beneficiaries of the IndyMac Bank, F.S.B. 401(k) Plan at any time between July 1, 2006, and June 1, 2010, and whose accounts included investments in the IndyMac Bancorp stock fund.

QUESTIONS? CALL TOLL-FREE 1 (888) 404-8013 OR VISIT [HTTP://WWW.GCGINC.COM/CASES/IDM](http://www.gcginc.com/cases/idm)

You have received this Notice because the Plan's records show that you, or someone who designated you as a beneficiary of his or her retirement account, had such investments. If you have any questions about whether you are a member of the Class, you can contact Plaintiffs' counsel, whose information is listed in the section titled "Contact Information for Plaintiffs' Counsel."

WHAT DOES THE SETTLEMENT PROVIDE?

The Settlement provides that the Defendants' fiduciary insurance carrier will pay \$7,000,000, which will be deposited into an interest bearing account called the "Gross Settlement Fund." The amount remaining in the Gross Settlement Fund (including interest, but after accounting for taxes and Court-approved expenses and attorneys fees) will be allocated among and paid to members of the Class according to a Plan of Allocation to be approved by the Court. Disbursement of the Settlement Fund to the Class will occur once the Settlement has become final – after all appeals relating to the Settlement are favorably decided and all appeal periods have expired.

In exchange for the Settlement payment, Class Members will release all claims that were or could have been asserted in this Action against the Defendants, Bank, Bancorp, the fiduciaries of the Plan, and their successors. The release does not include claims asserted in unrelated lawsuits pertaining to Bancorp stock¹ or individual claims that you may have separate and apart from the claims asserted in this lawsuit. For more information about the scope of the release, please see the section of this Notice titled "How Do I Get More Information?"

WHAT WILL BE MY SHARE OF THE SETTLEMENT FUND?

You will receive a pro rata share of the \$7,000,000 Settlement Fund after costs and fees have been deducted. The Settlement payment is a compromise; accordingly, it does not compensate Plan participants for 100% of their losses.

By December 6, 2010, Plaintiffs' Counsel will file a detailed Plan of Allocation for Court approval at or after the Fairness Hearing. The Plan of Allocation, which may be obtained at <http://www.gcginc.com/cases/idm> or by contacting Plaintiffs' Counsel after it is filed, will describe the manner in which the Settlement proceeds (the "Net Settlement Fund") will be distributed to Class Members. In general terms, the Plan of Allocation will provide that each Class Member's share of the Net Settlement Fund will be calculated as follows:

Each member of the Class will be assigned an "Alleged Net Loss Percentage," showing the percentage of his or her alleged net loss in relation to all other Class members' alleged net losses. Each member of the Class's share of the Net Settlement Fund will be equal to the Net Settlement Fund, less the Plan expenses associated with implementing the Plan of Allocation, multiplied by his or her Alleged Net Loss Percentage.

The Settlement Administrator will perform all calculations for you and determine your pro rata amount. The Settlement Administrator will have access to all available records, so you do not need to be concerned if you no longer have your Plan account statements. The Court will be asked to approve a more detailed statement of the Plan of Allocation, a copy of which will be available along with other Settlement documents at <http://www.gcginc.com/cases/idm>.

HOW DO I GET A PAYMENT?

If the Settlement is given final approval, you will not have to do anything to get a payment from the Settlement. You will receive a check for your pro rata share of the Settlement along with general information about what to do with those funds in order to maintain their tax-protected status as retirement savings. Because each individual's financial situation is unique, we cannot give specific tax advice. ***You should consult with your own tax advisor about what to do with your payment prior to depositing the check.***

¹ Such unrelated lawsuits include, but are not limited to, *Daniels v. Indymac Bancorp, Inc.*, Case No. 2:08-cv-03812-GW-VBK (C.D. Cal.), and *Tripp v. Indymac Financial Inc.*, Case No. 2:07-cv-01635-GW-VBK (C.D. Cal.).

WHEN WOULD I RECEIVE MY PAYMENT?

Payment is conditioned on several matters, including the Court's approval of the Settlement and that approval becoming final and no longer subject to any appeals. Upon satisfaction of various conditions, the Net Settlement Fund will be distributed pursuant to the Plan of Allocation described above. The Settlement Agreement may be terminated on several grounds, including if the Court does not approve or otherwise modifies the terms of the Settlement. If the Settlement Agreement is terminated, the Settlement will also be terminated, and the Action will proceed as if the Settlement had not been reached.

CAN I OPT OUT OF THE SETTLEMENT?

No. Because of the legal issues involved, the Class of Plan participants affected by this Settlement has been preliminarily certified as a mandatory class. If final approval is granted by the Court, it will remain a mandatory class. This means that you cannot opt out of the benefits of the Settlement in order to pursue your own claims or for any other reason. You can, however, object to the Settlement and try to convince the Court not to approve the Settlement for any reasons that you see fit to present. For information on how to file an objection with the Court and/or attend the Settlement Fairness Hearing, see the sections below titled "How Do I Object to the Settlement?" and "How Can I Attend the Settlement Fairness Hearing?"

WHO ARE THE PLAINTIFFS' ATTORNEYS? DO THEY REPRESENT ME?

The Court has appointed Plaintiffs' Counsel to represent the Class of Plan participants in this case. Plaintiffs' Counsel are: Lewis, Feinberg, Lee, Renaker & Jackson, P.C., in Oakland, California; and Keller Rohrback, L.L.P., in Seattle, Washington (referred to herein as "Plaintiffs' Counsel" or "Class Counsel"). These firms have extensive experience representing employees in complex ERISA litigation. If you are a member of the Class, these law firms represent your interests in this lawsuit.

If you wish, you can retain your own lawyer at your own expense to represent you in connection with the Settlement. If you do hire your own attorney, he or she must send a Notice of Intent to Appear to the Settlement Administrator by December 13, 2010.

HOW WILL THE PLAINTIFFS' ATTORNEYS BE COMPENSATED?

Class Counsel has spent hundreds of hours working on this case, and tens of thousands of dollars on the costs and expenses of the investigation and prosecution of the lawsuit. The terms of the Settlement call for Class Counsel's fees and expenses to be paid out of the Settlement Fund. Class Counsel will apply to the Court for no more than 25% of the Settlement Fund in fees, plus out-of-pocket costs.

The individual Plaintiffs who brought this case will also request a case contribution award from the Settlement Fund to compensate them for the time and effort they spent assisting with the investigation and prosecution of the case. Class Counsel will request that the Court approve case contribution awards of \$5,000 for each of the two Plaintiffs.

You have the right to object to this aspect of the Settlement even if you approve of the other aspects of the Settlement.

HOW DO I OBJECT TO THE SETTLEMENT?

If you are a member of the Class, you can object to the Settlement if you disagree with any part of it. You can give reasons why you think the Court should not approve the Settlement, and the Court will consider your views prior to giving the Settlement final approval. Because the Settlement is a private agreement, the Court does not have the power to modify terms of the Settlement without the consent of the parties. Therefore, even if you only object to part of the Settlement, your objection, if successful, might result in a rejection of the entire Settlement.

To object, you must send a letter or other written filing stating that you object to the Settlement in *In re IndyMac ERISA Litigation*, Case No. 2:08-cv-04579-DDP-(VBK). You must also include your full name, address, telephone number, signature, and a full explanation of all reasons you object to the Settlement, as well as the name, address, and

telephone number of any counsel representing you. Your written objection must be received by the Settlement Administrator by December 13, 2010. The Settlement Administrator's address is *In re IndyMac ERISA Litigation*, c/o The Garden City Group, Inc., P.O. Box 91207, Seattle, WA 98111-9307.

If your written objection is not received by December 13, 2010, you will lose your opportunity to have your objection considered by the Court, to attempt to prevent the Settlement from being approved, or to appeal from any orders or judgments by the Court in connection with the proposed Settlement.

HOW DO I ATTEND THE FAIRNESS HEARING?

The Court will hold a Fairness Hearing before the Honorable Dean. D. Pregerson to evaluate the fairness of the Settlement at 11:00 a.m. on January 10, 2011, in the United States District Court for the Central District of California, located at 312 N. Spring St., Los Angeles, California 90012, Courtroom 3, Second Floor.

At this hearing, the Court will consider whether the Settlement is fair, reasonable, and adequate. If there are objections, the Court will consider them. The Court will listen to people who have asked to speak at the hearing. The Court may also decide how much Class Counsel and the Plaintiffs will be compensated for their efforts to secure the Settlement. After the hearing, the Court will decide whether to approve the Settlement. We do not know how long these decisions will take.

You do not have to attend the hearing. The attorneys representing the Plaintiffs and the Class will present the Settlement to the Court and answer any questions the Court may have. If you file a written objection, you do *not* have to attend the hearing in order for it to be considered by the Court.

You are welcome to come to the hearing at your own expense. You may also arrange for your own counsel to attend on your behalf. You may also ask the Court for permission to speak at the hearing. To do so, you must send a letter or other paper called a "Notice of Intention to Appear at Fairness Hearing in *In re IndyMac ERISA Litigation*, Case No. 2:08-cv-04579-DDP-(VBK)" to the Settlement Administrator. Be sure to include your name, address, telephone number, and signature. Your Notice of Intention to Appear must be sent to the Settlement Administrator at the address listed above in the answer to the question "How Do I Object to the Settlement?" and must be received by no later than December 13, 2010.

WHAT HAPPENS IF I DO NOTHING AT ALL?

If you do nothing at all, you will remain a part of the Class, and if the Court approves the Settlement you will receive the payment described in this Notice and release your claims against the Defendants as described in this Notice.

HOW DO I GET MORE INFORMATION?

Please do not contact the Court, the Bank, or Bancorp. They are not in a position to provide you with information about the Settlement.

This Notice is a summary of the Settlement. The complete Settlement is set forth in the Settlement Agreement. You can get a copy of the Settlement Agreement at <http://www.gcginc.com/cases/idm>, by calling (888) 404-8013, or by emailing Class Counsel at indymacsettlement@kellerrohrback.com.

You may also review the case file in the United States District Court, located at 312 N. Spring St., Los Angeles, California, 90012. Or you can review the case file online through the PACER system at <http://pacer.psc.uscourts.gov/>. Please note that users must pay fees to access court files through PACER.

EXHIBIT B



2300 Clarendon Blvd., Suite 1002
Arlington, VA 22201
www.businesswire.com
703.243.0400 tel
703.243.1480 fax

November 4, 2010

Ms. Katie Sparks
Media Buyer
GCG Communications
5335 SW Meadows Rd., Ste. 365
Lake Oswego, OR 97035

Dear Katie:

This letter confirms that the press release entitled "Legal Notice of Class Action Lawsuit for Certain Participants in the IndyMac Bank, F.S.B. 401(k) Plan" was issued over Business Wire's National Circuit on November 4, 2010.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Toner".

Michael Toner
Senior Account Executive
Business Wire



November 04, 2010 09:00 AM Eastern Daylight Time

Legal Notice of Class Action Lawsuit for Certain Participants in the IndyMac Bank, F.S.B. 401(k) Plan

LOS ANGELES--(BUSINESS WIRE)--Keller Rohrback L.L.P. and Lewis, Feinberg, Lee, Renaker & Jackson, P.C. are Issuing the Following Statement Regarding the IndyMac ERISA Litigation.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

**IN RE INDMAC ERISA
LITIGATION**

**Master File No.: 08-04579 DDP (VBKx)
CLASS ACTION**

TO ALL MEMBERS OF THE FOLLOWING CLASS:

All persons who were participants in or beneficiaries of the IndyMac Bank, F.S.B. 401(k) Plan (the "Plan") at any time between July 1, 2006, and June 1, 2010 (the "Class Period"), and whose accounts included investments in the IndyMac Bancorp, Inc. stock fund.

**PLEASE READ THIS NOTICE CAREFULLY.
THIS IS A COURT-ORDERED LEGAL NOTICE.
THIS IS NOT A SOLICITATION.**

A proposed settlement (the "Settlement") has been preliminarily approved by a federal court in the above-captioned class action lawsuit alleging breaches of fiduciary duties under the Employee Retirement Income Security Act ("ERISA") in connection with the Plan. The terms of the Settlement are contained in a Stipulation and Agreement of Settlement – ERISA Action ("Settlement Agreement"), which was executed on June 1, 2010. A copy of the Settlement Agreement is available at <http://www.gcginc.com/cases/idm>. Capitalized terms used in this Summary Notice and not defined herein have the same meaning assigned to them in the Settlement Agreement.

The proposed Settlement provides for a payment of \$7 million to settle all claims against all Defendants. Under the Settlement, the proceeds, net of expenses described in the Settlement Agreement (which include notice and administrative expenses, Court-approved attorneys' fees and expenses and Plaintiff case contribution awards, taxes, and other costs related to the Settlement Fund administration) will be allocated to members of the Class whose Plan account(s) suffered losses as a result of investing in IndyMac Bancorp, Inc. stock during the Class Period. Settlement proceeds will be allocated in accordance with a Plan of Allocation approved by the Court.

If you qualify, you will receive such an allocation. You do not need to submit a claim or take any other action unless you wish to object to the Settlement. The United States District Court for the Central District of California (the "Court") authorized this Notice.

THE COURT WILL HOLD A HEARING AT 11:00 A.M. ON JANUARY 10, 2011 TO DECIDE WHETHER TO APPROVE THE SETTLEMENT.

Additional information about the proposed Settlement, including the Notice of Proposed Class Action Settlement that has been

mailed to Class Members and explains how Class Members can object to the Settlement and the Settlement Agreement is available at <http://www.gcginc.com/cases/idm>. In addition, Plaintiffs' Counsel have established a toll-free number, 1 (888) 404-8013, to assist in answering questions regarding the Settlement.

PLEASE DO NOT CONTACT THE COURT.

DATED: NOVEMBER 4, 2010.

By Order of the Court

The Hon. Dean D. Pregerson, United States District Court Judge

Contacts

Keller Rohrback LLP

Erin Riley, 206-623-1900

or

Lewis, Feinberg, Lee, Renaker & Jackson, P.C.

Jim Keenley, 510-839-6824

Permalink: <http://www.businesswire.com/news/home/20101104005365/en/Legal-Notice-Class-Action-Lawsuit-Participants-IndyMac>



EXHIBIT 5

In re IndyMac ERISA Litigation
PLAN OF ALLOCATION OF CLASS ACTION SETTLEMENT FUND

1. Capitalized terms used herein have the meanings ascribed to them in the Stipulation and Agreement of Settlement of Class Action (Dkt. 110-2) (the “Settlement”) or in this Plan of Allocation.
2. “Allocation Administrator” means Garden City Group, Inc. (“GCG”), the Settlement Administrator and the entity implementing the Plan of Allocation.
3. The “Plan” is the IndyMac Bank, FSB 401(k) Profit Sharing Plan.

A. Amount to Be Distributed

The Net Settlement Fund, which is described in paragraph 3.4 of the Settlement, will be allocated among all eligible Class Members pursuant to the method described below. The Net Settlement fund is derived by deducting from the Gross Settlement Fund (described in paragraph 3.3 of the Settlement) the disbursements described in the Settlement at paragraphs 3.5, 4.2, and 5.1 as approved by the Court. Those disbursements include (a) the costs of administering the Settlement including the costs of the Notice and Summary Notice, (b) attorneys’ fees and case contribution awards, (c) taxes that the Gross Settlement Fund may be subject to.

B. Calculation of Each Class Members’ Share of the Net Settlement Fund

Each Class Member’s share of the Net Settlement Fund will be calculated as follows:

- (i) Each Class Member’s “Net Loss” due to Plan investments in Company Stock will be calculated according to the formula $A + B - C - D$ where:
 A = the dollar amount of each Class Member’s Plan account balance invested in Company Stock at the beginning of the Class Period;

B = the dollar amount added to each Class Member's Plan account balance invested in Company Stock during the Class Period

C = the dollar amount credited to the Class Member's Plan account balance resulting from dispositions of Company Stock during the Class Period;

D = the dollar amount of each Class Member's Plan account balance invested in Company Stock immediately after the end of the Class Period.

- (ii) If $A + B - C - D$ is less than zero for a given Class Member, such Class Member's Net Loss will be zero.
- (iii) If data is not available to determine the account balances of Class Members at the beginning or end of the Class Period, then data from the nearest available date will be used.
- (iv) The Net Losses of the Class Members will be aggregated. Each Class Member will be assigned a Net Loss Percentage, reflecting the percentage of the Class Member's loss in relation to the aggregate losses. Each Class Member's share of the Net Settlement Fund will be equal to the Net Settlement Fund multiplied by the Class Member's Net Loss Percentage. This calculation will be called for each Class Member the "Preliminary Dollar Recovery."
- (v) The Allocation Administrator shall identify all Class Members whose Preliminary Dollar Recovery is less than twenty-five dollars (\$25.00), called the "De Minimis Amount." All such Class Members, if any, shall receive an allocation of zero from the Net Settlement Fund and the Preliminary Dollar Recovery otherwise attributable to such Class Members shall be reallocated among the other Class Members

proportionately in accordance with their Net Losses (the “Reallocation”).

- (vi) The Allocation Administrator shall then, taking into account the Reallocation (if applicable), recalculate the Final Dollar Recovery for each Class Member. If there is no Reallocation, the Preliminary Dollar Recovery for each Class Member shall also be their Final Dollar Recovery. The sum of the Final Dollar Recoveries must equal the Net Settlement Fund.
- (vii) To the maximum extent allowable by law, each Class Member’s Final Dollar Recovery is intended to be treated as a qualified retirement tax distribution pursuant to ERISA and the Internal Revenue Code.

C. Distribution of the Final Dollar Recoveries

1. Payments to Class Members: The Gross Settlement Fund is currently held in an interest bearing account with Wells Fargo Bank, N.A. (the “Settlement Account”). As soon as practicable after calculating the Final Dollar Recoveries, the Allocation Administrator shall cause the mailing of a check from the Settlement Account, in the amount of each Class Member’s Final Dollar Recovery, to each Class Member using address data obtained for purposes of administering the Notice.

2. Undeliverable and Unclaimed Amounts: In the event a Class Member’s Final Dollar Recovery cannot be delivered because the identity or location of the Class Member or his or her beneficiary cannot be determined after reasonable efforts, or the amount of the Final Dollar Recovery remains unclaimed after one year, then the amount of such undeliverable or unclaimed Final Dollar Recovery shall be returned to the Settlement Account. After the passage of one full calendar year from the distribution of the initial payments pursuant to this Plan of Allocation, Class Counsel shall determine the aggregate value, if any, or

forfeited distributions under this Plan of Allocation, and shall, within sixty (60) days thereafter, make a motion to the Court for approval for final distribution of any such forfeited amount. Such a proposal would include a redistribution to Class Members if economically practicable, escheat of the forfeited funds to the state, or any other means approved by the Court.

D. Continuing Jurisdiction

The Court will retain jurisdiction over the Plan of Allocation to the extent necessary to ensure that it is fully and fairly implemented.