

1 KESSLER TOPAZ
MELTZER & CHECK, LLP
2 RAMZI ABADOU (222567)
rabadou@ktmc.com
3 ELI R. GREENSTEIN (217945)
egreenstein@ktmc.com
4 STACEY M. KAPLAN (241989)
skaplan@ktmc.com
5 ERIK D. PETERSON (257098)
epeterson@ktmc.com
6 One Sansome Street, Suite 1850
San Francisco, CA 94104
7 Telephone: (415) 400-3000
Facsimile: (415) 400-3001

8 *Lead Counsel for Lead Plaintiff and the Class*
9

10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA
12 WESTERN DIVISION

13 WAYMAN TRIPP and SVEN
14 MOSSBERG, Individually and on Behalf
of all Others Similarly Situated,
15
16 Plaintiffs,
17
18 v.
19 INDYMAC BANCORP, INC. and
MICHAEL W. PERRY,
20 Defendants.

Case No. 2:07-CV-1635-GW (VBK)

**REPLY MEMORANDUM IN
SUPPORT OF (I) CLASS
REPRESENTATIVE'S MOTION FOR
FINAL APPROVAL OF CLASS
ACTION SETTLEMENT AND PLAN
OF ALLOCATION OF
SETTLEMENT PROCEEDS AND (II)
MOTION FOR AN AWARD OF
ATTORNEYS' FEES AND
REIMBURSEMENT OF EXPENSES**

Date: January 28, 2013
Time: 8:30 a.m.
Room: 10
Judge: Hon. George H. Wu

TABLE OF CONTENTS

I. PRELIMINARY STATEMENT 1

II. ARGUMENT 3

 A. The Reaction of the Class Overwhelmingly Supports the Settlement 3

 B. Paul Hastings’ and Corbin Athey’s Letter and the Former IndyMac Officers’ Motion Are Improper 5

 1. The Former IndyMac Officers Lack Standing 5

 2. Paul Hastings’ and Corbin Athey’s Letter is Untimely 11

 3. This is Not the Proper Forum for the Former IndyMac Officers’ Complaints 12

III. FINAL STEPS SHOULD THE COURT APPROVE THE SETTLEMENT 14

IV. CONCLUSION 15

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page(s)

CASES

1
2
3
4 *Ace Marine Rigging & Supply, Inc. v. Va. Harbor Servs.*,
5 2012 U.S. Dist. LEXIS 174117 (C.D. Cal. 2012).....3
6 *Arch Insurance Co., et al. v. Michael W. Perry, et al.*,
7 Case No. 2:12-cv-06290-GW-FFM (C.D. Cal. 2012).....12, 13
8 *Armuth v. Linton*,
9 2012 U.S. Dist. LEXIS 174779 (C.D. Cal. 2012).....15
10 *Class Plaintiffs v. City of Seattle*,
11 955 F.2d 1268 (9th Cir. 1992).....8, 9
12 *Dopp v. HTP Corp.*,
13 947 F.2d 506 (1st Cir. 1991)10, 11
14 *Durham v. Cont'l Cent. Credit, Inc.*,
15 2011 U.S. Dist. LEXIS 2066 (S.D. Cal. 2011).....15
16 *Feder v. Elec. Data Sys. Corp.*,
17 248 Fed. Appx. 579 (5th Cir. 2007)7
18 *Gong-Chun v. Aetna Inc.*,
19 2012 U.S. Dist. LEXIS 96828 (E.D. Cal. 2012).....3, 4
20 *Gould v. Alleco, Inc.*,
21 883 F.2d 281 (4th Cir. 1989).....8
22 *Grannan v. Alliant Law Group, P.C.*,
23 2012 U.S. Dist. LEXIS 8101 (N.D. Cal. 2012).....7
24 *Hal Roach Studios, Inc. v. Richard Feiner & Co.*,
25 896 F.2d 1542 (9th Cir. 1989).....9, 10
26 *HCL Partners Ltd. P'ship v. Leap Wireless Int'l, Inc.*,
27 2010 U.S. Dist. LEXIS 109409 (S.D. Cal. 2010).....1
28 *Heller v. Quovadx, Inc.*,
245 Fed. Appx. 839 (10th Cir. 2007)7

1	<i>Hilao v. Estate of Marcos,</i>	
2	393 F.3d 987 (9th Cir. 2004).....	9, 10
3	<i>Hughes v. Microsoft Corp.,</i>	
4	2001 U.S. Dist. LEXIS 5976 (W.D. Wash. 2001)	5
5	<i>IBEW Local 697 Pension Fund v. Int’l Game Tech., Inc.,</i>	
6	2012 U.S. Dist. LEXIS 150006 (D. Nev. 2012).....	7
7	<i>In re Apollo Group Sec. Litig.,</i>	
8	2012 U.S. Dist. LEXIS 55622 (D. Ariz. 2012)	4, 5
9	<i>In re Apple Inc. Sec. Litig.,</i>	
10	2011 U.S. Dist. LEXIS 52685 (N.D. Cal. 2011).....	8
11	<i>In re McKesson HBOC, Inc. Sec. Litig.,</i>	
12	2006 U.S. Dist. LEXIS 97646 (N.D. Cal. 2006).....	6
13	<i>In re Rambus Inc. Derivative Litig.,</i>	
14	2009 U.S. Dist. LEXIS 131845 (N.D. Cal. 2009).....	2
15	<i>In re Skilled Healthcare Group, Inc.,</i>	
16	2011 U.S. Dist. LEXIS 10139 (C.D. Cal. 2001).....	5
17	<i>In re Washington Public Power Supply System Securities Litigation,</i>	
18	720 F. Supp. 1379 (D. Ariz. 1989).....	8
19	<i>In re: Wachovia Corp. “Pick-A-Payment” Mortg. Mktg. and Sales Practices Litig.,</i>	
20	Case No. M:09-cv-2015-JF, slip. op. (N.D. Cal. 2012)	15
21	<i>Kent v. Hewlett-Packard Co.,</i>	
22	2011 U.S. Dist. LEXIS 106825 (N.D. Cal. 2011).....	7
23	<i>Ko v. Natura Pet Prods., Inc.,</i>	
24	2012 U.S. Dist. LEXIS 128615 (N.D. Cal. 2012).....	7
25	<i>Lee v. West Coast Life Ins. Co.,</i>	
26	688 F.3d 1004 (9th Cir. 2012).....	13
27	<i>Lo v. Oxnard European Motors, LLC,</i>	
28	2012 U.S. Dist. LEXIS 73983 (S.D. Cal. 2012).....	4
	<i>Lymburner v. United States Fin. Funding, Inc.,</i>	
	2012 U.S. Dist. LEXIS 14752 (N.D. Cal. 2012).....	15

1 *McKenzie v. Fed. Express Corp.*,
2 2012 U.S. Dist. LEXIS 103666 (C.D. Cal. 2012)..... 5

3 *McReynolds v. Richards-Cantave*,
4 588 F.3d 790 (2d Cir. 2009) 7

5 *Milano v. Interstate Battery Sys. of Am., Inc.*,
6 2012 U.S. Dist. LEXIS 93201 (N.D. Cal. 2012)..... 7

7 *Morales v. Stevco, Inc.*,
8 2012 U.S. Dist. LEXIS 68640 (E.D. Cal. 2012) 4

9 *Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*,
10 221 F.R.D. 523 (C.D. Cal. 2004)..... 4, 5

11 *Overton v. Hat World, Inc.*,
12 2012 U.S. Dist. LEXIS 144116 (E.D. Cal. 2012) 4

13 *San Francisco NAACP v. San Francisco Unified Sch. Dist.*,
14 2001 U.S. Dist. LEXIS 25904 (N.D. Cal. 2001)..... 7

15 *Schiller v. David’s Bridal, Inc.*,
16 2012 U.S. Dist. LEXIS 80776 (E.D. Cal. 2012) 4, 5

17 *Schwarm v. Craighead*,
18 814 F. Supp. 2d 1025 (E.D. Cal. 2011) 15

19 *Steel Co. v. Citizens for a Better Env’t*,
20 523 U.S. 83, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998) 7

21 *Szyborski v. Ormat Techs., Inc.*,
22 2012 U.S. Dist. LEXIS 148545 (D. Nev. 2012)..... 4

23 *Tenn. Ass’n of Health Maint. Orgs., Inc. v. Grier*,
24 262 F.3d 559 (6th Cir. 2001) 7

25 *Torrise v. Tuscon Elec. Power Co.*,
26 8 F.3d 1370 (9th Cir. 1993) 14

27 *United States Fire Ins. Co. v. Asbestospray, Inc.*,
28 182 F.3d 201 (3d Cir. 1999) 13

Wixon v. Wyndham Resort Dev. Corp.,
2011 U.S. Dist. LEXIS 87249 (N.D. Cal. 2011)..... 7

1 **OTHER AUTHORITIES**

2 4 Newberg on Class Actions §11:55 (4th Ed.) 6
3 Fed. R. Civ. P. 23 6
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **I. PRELIMINARY STATEMENT**

2 Pursuant to the Court's Order Preliminarily Approving Settlement dated
3 August 10, 2012, and as a supplement to the initial filings made by Class
4 Representative Sven Mossberg and his counsel on December 7, 2012, Class
5 Representative respectfully submits the following memorandum in further support of
6 his (i) Motion for Final Approval of Class Action Settlement and Plan of Allocation
7 of Settlement Proceeds, and (ii) the Motion for an Award of Attorneys' Fees and
8 Reimbursement of Expenses.¹ As the deadline for submitting objections and requests
9 for exclusion has now passed, Plaintiffs' Counsel are pleased to inform the Court that
10 ***not a single Class Member*** has objected to any aspect of the Settlement, the Plan of
11 Allocation or the request for an award of attorneys' fees and expenses to Plaintiffs'
12 Counsel.² "The absence of any objections to the settlement creates a strong
13 presumption that the settlement is favorable to the class members." *HCL Partners*
14 *Ltd. P'ship v. Leap Wireless Int'l, Inc.*, 2010 U.S. Dist. LEXIS 109409, at *8 (S.D.
15 Cal. 2010).

16 The Court-authorized claims administrator for the Settlement of the Action,
17 Rust Consulting, Inc. ("Rust"), has undertaken an extensive Court-approved notice
18 campaign in connection with the Settlement. *See* Supplemental Declaration of Eric J.
19 Miller Regarding (A) Mailing of the Notice and Proof of Claim and Release Form;
20 (B) Report on Exclusion Requests Received; and (C) Report on Claims Received to
21 Date (the "Supplemental Mailing Declaration") which provides updated information

22 ¹ Capitalized terms not defined herein shall have those meanings ascribed to
23 them in the Stipulation and Agreement of Settlement dated June 25, 2012 (the
"Stipulation").

24 ² On December 28, 2012, Class Counsel received a letter on behalf of three
25 former officers of IndyMac Bancorp, Inc. ("IndyMac"), Richard Koon, Kenneth
26 Shellem and Scott Van Dellen, objecting to the Settlement (the "Letter"). *See* Dkt.
27 No. 335 at Ex. A. On January 9, 2013, the former IndyMac officers filed a Notice of
28 Motion and Motion to File Objection of Non-Party ("Motion"). *See* Dkt. No. 335.
As discussed below, Class Representative opposes the former IndyMac officer's
motion. Moreover, although Class Counsel does not consider this a valid objection,
as Messrs. Koon, Shellem and Van Dellen are not Class Members, its response to the
Letter is provided below. *See* §II.B., *infra*.

1 regarding the notice mailing and requests for exclusion received, as well as
2 preliminary information regarding the claims submitted to date.³ As set forth in the
3 Supplemental Mailing Declaration, after the dissemination of over 75,500 copies of
4 the Notice of Pendency of Class Action and Proposed Settlement, Motion for
5 Attorneys' Fees and Expenses and Settlement Fairness Hearing ("Notice"), only four
6 additional requests for exclusion have been received since Class Representative's
7 December 7, 2012 submission to the Court, bringing the total number of requests for
8 exclusion from the Class to six – notably, none of which was submitted by an
9 institutional investor.⁴ The reaction of the class to the settlement is a significant
10 factor in assessing its fairness and adequacy. *See In re Rambus Inc. Derivative Litig.*,
11 2009 U.S. Dist. LEXIS 131845, at *10 (N.D. Cal. 2009). Both the Settlement and the
12 requested fees and expenses have received overwhelming support which weighs
13 strongly in favor of approval.

14 For the reasons set forth herein, and in their December 7, 2012 filing, Class
15 Representative and Class Counsel respectfully submit that the proposed \$5,500,000
16 Settlement is a substantial recovery for the Class under all of the circumstances of
17 this case. In particular, the Settlement represents a solid result in light of the risks of
18 continued litigation, including the risk of establishing liability, loss causation and the
19 Class's full amount of damages. In addition, as further demonstrated by the former
20 IndyMac officers' Letter, the significant ability to pay issues confronted in this

21
22 ³ See also Declaration of Eric J. Miller Regarding (A) Mailing of the Notice and
23 Proof of Claim and Release Form, (B) Publication of the Summary Notice, and (C)
24 Report on Exclusion Requests Receive to Date (the "Initial Mailing Declaration")
previously filed with the Court on December 7, 2012 [Dkt. No. 332].

25 ⁴ Copies of the six requests for exclusion are attached as Exhibit A to the
26 Supplemental Mailing Declaration submitted herewith. Only one of the six requests
27 for exclusion received appears to be valid. With respect to the other five requests for
28 exclusion, two of the requests were submitted by individuals who do not appear to be
Class Members, as they purchased their IndyMac common stock (220 shares in the
aggregate) before the start of the Class Period and the other three requests do not
provide the necessary transactional information in order to determine Class
membership as required by the Notice. One of the five requests was also received by
Rust after the December 28, 2012 deadline.

1 Action (e.g., limited insurance proceeds at the center of an interpleader action)
2 support final approval here. The Settlement has the full support of the Class
3 Representative, Plaintiffs' Counsel, Defendant, and the Hon. Daniel Weinstein (Ret.),
4 who oversaw nearly two years of mediation by the Parties and provided the
5 mediator's proposal that resulted in this Settlement. *See Ace Marine Rigging &*
6 *Supply, Inc. v. Va. Harbor Servs.*, 2012 U.S. Dist. LEXIS 174117, at *2-*3 (C.D.
7 Cal. 2012) (Wu, J.) (granting final approval where settlements "were based on
8 vigorous arm's-length negotiations, which were undertaken in good faith by counsel
9 with significant experience"). Additionally, the proposed Plan of Allocation set forth
10 in the Notice is a fair and equitable method for distributing the Net Settlement Fund
11 to eligible Class Members. Finally, in light of the substantial efforts expended by
12 Plaintiffs' Counsel during the course of this Action, and the risks overcome in
13 securing the present Settlement for the Class, the request for attorneys' fees and
14 reimbursement of expenses is fair and reasonable and should be awarded in the
15 amounts sought.

16 **II. ARGUMENT**

17 **A. The Reaction of the Class Overwhelmingly Supports the Settlement**

18 "Where a settlement agreement enjoys overwhelming support from the class,
19 this lends weight to a finding that the settlement agreement is fair, adequate, and
20 reasonable." *Gong-Chun v. Aetna Inc.*, 2012 U.S. Dist. LEXIS 96828, at *43-*44
21 (E.D. Cal. 2012). Here, pursuant to the Court's Preliminary Approval Order, over
22 75,500 copies of the Notice have been mailed to potential members of the Class and
23 nominees, and the summary notice has been published on two separate occasions in
24 *Investor's Business Daily* and over *PR Newswire*.⁵ The Notice contains a detailed
25 description of the Settlement, the Plan of Allocation and the maximum potential fees
26 and expenses sought by Class Counsel. In addition, Plaintiffs' Representative's

27 ⁵ See Supplemental Mailing Declaration at ¶3; Initial Mailing Declaration [Dkt.
28 No. 332], at ¶10.

1 motions for preliminary approval and final approval of the Settlement and Plaintiffs’
2 Counsel’s motion for an award of attorneys’ fees and expenses have all been posted
3 on the settlement website for Class Members’ review.

4 The “Notice included clear instructions about how to object to the Proposed
5 Settlement if the Class Members opposed final approval of the Proposed Settlement.
6 There have been no objections from Class Members or potential class members,
7 which itself is compelling evidence that the Proposed Settlement is fair, just,
8 reasonable, and adequate.” *In re Apollo Group Sec. Litig.*, 2012 U.S. Dist. LEXIS
9 55622, at *11 (D. Ariz. 2012). Indeed, “[t]he complete absence of Class Member
10 objections to the Proposed Settlement speaks volumes with respect to the
11 overwhelming degree of support for the Proposed Settlement among the Class
12 Members.” *Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529
13 (C.D. Cal. 2004). *See also Szymborski v. Ormat Techs., Inc.*, 2012 U.S. Dist. LEXIS
14 148545, at *11 (D. Nev. 2012) (approving settlement and 30% fee award because,
15 among other things, “[n]o objections regarding the settlement or the requested
16 attorneys’ fees have been filed by any class member”); *Overton v. Hat World, Inc.*,
17 2012 U.S. Dist. LEXIS 144116, at *8 (E.D. Cal. 2012) (“Importantly, there were no
18 objections to the requested fee and costs award from any member of the Class.”).⁶

19 Likewise, with over 75,500 Notices mailed, just six requests for exclusion
20 from the Class have been received (only one of which appears to be timely and
21 valid). In other words, “[t]he response of the class was positive, and this weighs in
22 favor of finding that the settlement is favorable to the Class Members.” *Aetna*, 2012
23 U.S. Dist. LEXIS 96828, at *43-*44 (“less than two percent of Class Members opted
24 out of the Settlement” and “no objection to the Settlement Agreement was received”);

25
26 ⁶ *See also Schiller v. David’s Bridal, Inc.*, 2012 U.S. Dist. LEXIS 80776, at *48
27 (E.D. Cal. 2012) (“the Court finds that the results achieved are good, which is
28 highlighted by the fact that there was no objection to the settlement amount or the
attorneys’ fees requested”); *Lo v. Oxnard European Motors, LLC*, 2012 U.S. Dist.
LEXIS 73983, at *7 (S.D. Cal. 2012) (same); *Morales v. Stevco, Inc.*, 2012 U.S. Dist.
LEXIS 68640, at *33-*34 (E.D. Cal. 2012) (same).

1 *McKenzie v. Fed. Express Corp.*, 2012 U.S. Dist. LEXIS 103666, at *18 (C.D. Cal.
2 2012) (“the reaction of the class weighs in favor of granting final approval” where
3 “only four class members requested to be excluded from the settlement, and no
4 objections were received”); *David’s Bridal*, 2012 U.S. Dist. LEXIS 80776, at *39
5 (where “less than two-tenths of one percent of Class Members opted out of the
6 Settlement” the “response of the Settlement Classes was positive, and this weighs in
7 favor of finding that the settlement is favorable to the Class Members”); *Hughes v.*
8 *Microsoft Corp.*, 2001 U.S. Dist. LEXIS 5976, at *24 (W.D. Wash. 2001) (finding
9 nine objections and exclusions submitted by only 1% of class indicated class
10 approval and supported settlement); *In re Skilled Healthcare Group, Inc.*, 2011 U.S.
11 Dist. LEXIS 10139, at *11 (C.D. Cal. 2001) (interpreting “the lack of anything other
12 than a de minimus objection as ratification of the settlement terms by the class”).

13 Additionally, “[i]n assessing whether to grant approval of a settlement, courts
14 consider the reactions of the members of the class, particularly the class
15 representatives. The Class Representatives, who have a substantial understanding
16 and experience with this action and the settlement, have voiced their support for the
17 settlement.” *Apollo Group*, 2012 U.S. Dist. LEXIS 55622, at *10. Class
18 Representative Mossberg, who actively monitored this Action since its onset,
19 including during mediation and settlement negotiations, fully supports the Settlement.
20 See Dkt. No. 305. “[T]he representatives’ views...may be entitled to special weight
21 because the representatives may have a better understanding of the case than most
22 members of the class.” *DIRECTV*, 221 F.R.D. at 528.

23 **B. Paul Hastings’ and Corbin Athey’s Letter and the Former IndyMac**
24 **Officers’ Motion Are Improper**

25 **1. The Former IndyMac Officers Lack Standing**

26 By letter dated December 28, 2012 (the last day to submit an objection in
27 connection with the Settlement), Paul Hasting LLP (“Paul Hastings”) and Corbin,
28 Athey & Martinez LLP (“Corbin Athey”), counsel for three former IndyMac officers,

1 Richard Koon, Kenneth Shellem and Scott Van Dellen (collectively, the “Former
2 IndyMac Officers”),⁷ advised Class Counsel and the Court that they had “objections”
3 to the Settlement. Specifically, Paul Hastings’ and Corbin Athey’s Letter asserts that
4 the 2007-2008 insurance policies (the “Policies”) – the Policies from which the
5 present Settlement has been funded – should be first used to pay their attorneys’ fees
6 before funding any proposed settlements. *See* Dkt. No. 335 at Ex. A (objecting to the
7 Settlement because the Former IndyMac Officers “incurred approximately
8 [\$7,093,000] in defense fees and costs” and “a large portion of [those] costs of
9 defense... remain unpaid”). On January 9, 2013, the Former IndyMac Officers filed
10 a Motion to File Objection of Non-Party, requesting that the Court allow them to file
11 their “objection.”⁸

12 The Former IndyMac Officers are not Class Members – a fact their counsel
13 concedes in their Letter.⁹ Pursuant to the plain language of Rule 23 of the Federal
14 Rules of Civil Procedure, only “class members” may object to a proposed class action
15 settlement. Fed. R. Civ. P. 23(e)(5); *see also* 4 Newberg on Class Actions §11:55

16
17 ⁷ The Former IndyMac Officers are not, nor have they ever been, defendants in
this Action.

18 ⁸ The Former IndyMac Officers’ Motion suffers from various procedural
19 deficiencies. First, the Former IndyMac Officers did not, as required by Local Rule
20 7-3, contact Class Counsel to discuss thoroughly the substance of the contemplated
21 motion and any potential resolution. Second, they failed to properly sign and execute
22 the proof of service for the Motion. Third, as noted by the Court [*see* Dkt. No. 336],
the Motion, though mailed, was not served “not later than 31 days” before the Motion
day as required by Local Rule 6-1. Rather, it was mailed just 19 days before the
scheduled hearing date (*i.e.*, January 28, 2013) and was not received by Class
Counsel until three days ago.

23 ⁹ *See* Dkt. No. 335 at Ex. A, p. 2 (“although Messrs. Koon, Shellem, and Van
24 Dellen are not members of the Settlement Class as defined by the Stipulation and
25 Agreement of Settlement...”). In addition, as set forth at ¶1(d) of the Stipulation:
26 “[e]xcluded from the Class are IndyMac, the Defendant, **the officers and directors of**
27 **the Company, at all relevant times**, members of their immediate families and their
28 legal representatives, heirs, successors or assigns, and any entity in which IndyMac
or the Defendant has or had a controlling interest.” *See generally In re McKesson*
HBOC, Inc. Sec. Litig., 2006 U.S. Dist. LEXIS 97646, at *21-*22 (N.D. Cal. 2006)
 (“Excluding corporate officers from the plaintiff class in a securities fraud case is
reasonable. Otherwise, the defenses atypical of the class members as a whole the
defendant corporation may have against its own officers may defeat class
certification.”).

1 (4th Ed.) (“[A]s a general rule, only class members have standing to object to a
2 proposed settlement.”). “As these statements were not filed by members of the...
3 class[], the Court [should] not consider them.” *San Francisco NAACP v. San*
4 *Francisco Unified Sch. Dist.*, 2001 U.S. Dist. LEXIS 25904, at*24-*26 (N.D. Cal.
5 2001). *See also Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 93-94, 118 S.
6 Ct. 1003, 140 L.Ed.2d 210 (1998) (courts must determine whether there is standing
7 prior to weighing arguments because “[w]ithout jurisdiction the court cannot proceed
8 at all in any cause”).

9 The Letter asserts that the Former IndyMac Officers’ “situation is unique and
10 extraordinary in that their substantial rights are affected by the settlement through the
11 potential loss of available insurance funds currently in dispute in the Interpleader
12 Action.” *See* Dkt. No. 335 at Ex. A, pp. 2-3. Myriad authority in this Circuit,
13 however, makes clear that non-class members do not have standing to object to a
14 class action settlement. *See IBEW Local 697 Pension Fund v. Int’l Game Tech., Inc.*,
15 2012 U.S. Dist. LEXIS 150006, at *3-*5 (D. Nev. 2012) (purported objector “does
16 not claim to be a class member and therefore lacks standing to object to the
17 settlement”); *Ko v. Natura Pet Prods., Inc.*, 2012 U.S. Dist. LEXIS 128615, at *22
18 (N.D. Cal. 2012) (“because Gresham is not a member of the class, he lacks standing
19 to object to the Settlement”); *Milano v. Interstate Battery Sys. of Am., Inc.*, 2012 U.S.
20 Dist. LEXIS 93201, at *6 (N.D. Cal. 2012) (same); *Grannan v. Alliant Law Group,*
21 *P.C.*, 2012 U.S. Dist. LEXIS 8101, at *23-*24 (N.D. Cal. 2012) (same); *Kent v.*
22 *Hewlett-Packard Co.*, 2011 U.S. Dist. LEXIS 106825, at *7 (N.D. Cal. 2011) (same);
23 *Wixon v. Wyndham Resort Dev. Corp.*, 2011 U.S. Dist. LEXIS 87249, at *3-*4 (N.D.
24 Cal. 2011) (same).¹⁰

25 ¹⁰ Other circuits are in accord. *See McReynolds v. Richards-Cantave*, 588 F.3d
26 790, 794 (2d Cir. 2009); *Feder v. Elec. Data Sys. Corp.*, 248 Fed. Appx. 579, 580-
27 581 (5th Cir. 2007) (“only class members have an interest in the settlement funds,
28 and therefore only class members have standing to object to a settlement. Anyone
else lacks the requisite proof of injury necessary to establish the ‘irreducible
minimum’ of standing.”); *Heller v. Quovadx, Inc.*, 245 Fed. Appx. 839, 842 (10th
Cir. 2007) (“non-class members have no standing to object”); *Tenn. Ass’n of Health*

1 Likewise, the Court's Order Preliminarily Approving Settlement makes clear
2 that only *Class Members* may object to the Settlement. *See, e.g.*, Dkt. No. 322 at ¶14
3 ("Any *member of the Class* who timely objects to the Settlement..."). In fact, it
4 specifically states that "no Person other than the parties and their counsel shall be
5 heard, and no papers, briefs, pleadings, or other documents submitted by any Person
6 shall be considered by the Court, unless" that person files with the Court, within 120
7 calendar days of the Notice, "*proof of the Person's membership in the Class*, which
8 proof shall include the Person's purchases and/or acquisitions of IndyMac common
9 stock during the Class Period and any sales thereof, including the dates, the number
10 of shares and price(s) paid and received for each such purchase, acquisition and sale."
11 *Id.* The Former IndyMac Officers, however, as non-Class Members with no
12 standing, do not comply with the terms of the Court's Order. *See In re Apple Inc.*
13 *Sec. Litig.*, 2011 U.S. Dist. LEXIS 52685, at *10, n.4 (N.D. Cal. 2011) ("he lacks
14 standing to object as he did not provide evidence to show that he is a class member as
15 required by this Court's order").

16 Finally, the authority cited by the Former IndyMac Officers does not further
17 their argument. Motion at 1. *In re Washington Public Power Supply System*
18 *Securities Litigation*, 720 F. Supp. 1379 (D. Ariz. 1989), contains absolutely no
19 discussion of the standing of a non-class member to object to a settlement. In fact,
20 the word "standing" does not even appear in the opinion. Nor does the Ninth
21 Circuit's opinion in *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268 (9th Cir. 1992),
22 as the Former IndyMac Officers claim, "affirm[] the [*Washington Public Power*]
23 District Court's decision to allow non-parties to object to the class action settlement."
24 Motion at 1. *Class Plaintiffs* contains no such discussion or holding that the district
25 court's actions were proper, merely noting that the district court "heard objections
26
27 *Maint. Orgs., Inc. v. Grier*, 262 F.3d 559, 566 (6th Cir. 2001) (same); *Gould v.*
28 *Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989), *cert. denied*, 430 U.S. 1058 (1990)
("[t]he plain language of Rule 23(e) clearly contemplates allowing only class
members to object to settlement proposals").

1 from several Bondholders who were not MDL Class Members.” *Class Plaintiffs*, 955
2 F.2d at 1276. Indeed, the only discussion of standing in *Class Plaintiffs* is in the
3 context of standing to appeal. *Id.* at 1276, 1285. In that context, the Ninth Circuit,
4 relying on its earlier opinion in *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896
5 F.2d 1542, 1546-47 (9th Cir. 1989), held that the non-parties had standing to appeal
6 because the settlement directly enjoined them from bringing parallel actions against
7 the settling defendants and, thus, “would serve to bar further prosecution by the [non-
8 parties] of a pending suit.” *Class Plaintiffs*, 955 F.2d at 1276-77.

9 Likewise, the line of authority relied upon in *Class Plaintiffs* all involved
10 appeals by a non-party of an order that either: (1) entered judgment against that non-
11 party; or (2) entered an injunction against that non-party. *See Hal Roach*, 896 F.2d at
12 1546-47 (non-party against whom judgment is entered has standing ... to appeal the
13 district court’s exercise of jurisdiction over him”) (citing *Thompson v. Freeman*, 648
14 F.2d 1144, 1147, n.5 (8th Cir. 1981) (non-party “may bring this appeal to contest the
15 district court’s jurisdiction to bind it to the terms of the court’s injunction”);
16 *Commercial Sec. Bank v. Walker Bank & Trust Co.*, 456 F.2d 1352, 1354 (10th Cir.
17 1972) (allowing enjoined non-party to appeal)).

18 Despite the fact that the [Proposed] Order and Final Judgment here would not
19 enjoin or enter judgment against them, the Former IndyMac Officers, relying on that
20 line of authority, argue that they have standing to object because this Settlement
21 interferes with their efforts to collect insurance funds from other non-parties. Ninth
22 Circuit authority makes clear that the Former IndyMac Officers do not fall within the
23 boundaries of the narrow exception carved out in *Hal Roach*. In *Hilao v. Estate of*
24 *Marcos*, 393 F.3d 987 (9th Cir. 2004), the Ninth Circuit reiterated that “[w]e have
25 consistently held that [a] nonparty has standing to appeal a district court’s decision
26 only in exceptional circumstances.” *Id.* at 992. There, the Ninth Circuit denied a
27 non-party’s attempt to appeal an order reinstating a settlement agreement because the
28 non-party was “not bound by the settlement agreement” and was “required to do

1 nothing under the settlement agreement.” *Id.* at 992-93. As a result, the Ninth
2 Circuit held that “its argument for nonparty appellate standing to challenge that same
3 agreement collapses.” *Id.*¹¹ Similarly, here, because the Former IndyMac Officers
4 are not bound or enjoined by the [Proposed] Order and Final Judgment, nor does the
5 Order require them to do anything, they do not have standing to voice any objection.

6 Finally, and most tellingly, the Ninth Circuit in *Hilao* rejected the non-party’s
7 argument that, despite the fact that it was not bound by the order, it had standing
8 because the order “interfered with its efforts, pursuant to [a court judgment in related
9 litigation], to collect funds” withheld as a result of an interpleader action. 393 F.3d at
10 994. The Ninth Circuit reasoned that “[t]hat inconvenience to the non-party... does
11 not rise to the level of an ‘exceptional circumstance’ justifying nonparty standing
12 to appeal. Were we to hold otherwise, any judgment creditor whose interests may be
13 adversely affected by a district court’s decision in wholly separate litigation, to which
14 the creditor is not a party, would have nonparty standing to appeal. We decline to
15 stretch nonparty standing to appeal that far.” *Id.* Likewise, here, the Former
16 IndyMac Officers’ argument that this Settlement interferes with their efforts to
17 collect funds for related litigation that are being withheld as a result of a wholly
18 separate interpleader action does not meet the Ninth Circuit standard for non-party
19 standing, and should be rejected.

20 Other circuits have come to similar conclusions regarding the narrow scope of
21 the *Hal Roach* exception. In *Dopp v. HTP Corp.*, 947 F.2d 506 (1st Cir. 1991), a
22 former party to the litigation claimed standing on the ground that the judgment, if
23 enforced, would extinguish its contractual rights. *Id.* at 512. The First Circuit noted
24 that a non-party generally does not have standing to appeal, but cited *Hal Roach* for
25 the exception to that general rule. *Id.* at 512. The First Circuit, however, found that

26
27
28 ¹¹ In so holding, the Ninth Circuit distinguished its earlier opinion in the same
litigation, which held that the same non-party did have standing to appeal a
permanent injunction order that did bind the non-party. *Id.* at 994 (citing *Hilao v.*
Estate of Marcos, 94 F.3d 539, 544 (9th Cir. 1996)).

1 the non-party's "effort to take advantage of this isthmian exception is unavailing."
2 *Id.* This was because judgment at issue "contained no order aimed specifically at [the
3 non-party]." *Id.* It reasoned that "the fact that an order has an indirect or incidental
4 effect on a non-party does not confer standing to appeal. If the rule were otherwise,
5 Pandora's jar would be open, *and strangers to a litigated case could pop in and out*
6 *of the proceedings virtually at will.*" *Id.* It thus concluded that the non-party's effort
7 fell "well shy of the exception's narrow confines" and so, "like the storied lady of the
8 evening, [the non-party's] attempt to reenter the fray on appeal ha[d] no visible
9 means of support." *Id.*

10 Because they do not have standing, the Former IndyMac Officers' "objection,"
11 as well as their Motion to file that "objection," should be denied.

12 **2. Paul Hastings' and Corbin Athey's Letter is Untimely**

13 The Former IndyMac Officers assert that Messrs. Koon and Shellem incurred
14 approximately \$5,593,000 and Mr. Van Dellen incurred approximately \$1,500,000 in
15 defense fees and costs between July and December 2012 – *after* the Stipulation was
16 negotiated, executed and filed with the Court on June 25, 2012. Indeed, a settlement-
17 in-principle was reached in the Action over a month earlier, the Parties entered into a
18 Memorandum of Understanding on May 15, 2012 and, shortly thereafter, advised the
19 Court of their agreement on May 24, 2012. *See* Dkt. No. 300. The proposed
20 Settlement appeared on the docket in this Action that same day. *Id.* In addition,
21 Class Representative's motion for preliminary approval was filed on June 26, 2012,
22 attaching the executed Stipulation of Settlement. *See* Dkt. Nos. 303-307.

23 Despite this, neither the Former IndyMac Officers nor their counsel voiced any
24 "objection" at the three preliminary approval hearings in this Action. Indeed, until
25 July 2, 2012, after the Stipulation of Settlement had been reviewed by IndyMac's
26 D&O insurers (the "Insurers") and fully executed, the Former IndyMac Officers did
27 not oppose the funding of this Settlement, even to the Insurers. *See* Memorandum of
28 Points and Authorities in Support of Plaintiffs' Motion for Discharge and Other

1 Relief, Dkt. No. 75-1 at 7, *Arch Insurance Co., et al. v. Michael W. Perry, et al.*, Case
2 No. 2:12-cv-06290-GW-FFM (C.D. Cal. filed July 20, 2012), attached hereto as
3 Exhibit A (“on or about July 2, 2012, XL and the Side A Insurers received
4 correspondence from counsel for defendants Koon, Shellem, and Van Dellen in
5 which counsel stated, *for the first time*, that they opposed the funding of the 07-08
6 Settlements on the basis that their clients are insureds under the 07-08 Side A Policies
7 and, if the amounts were paid, their clients would have no coverage under the 07-08
8 Side A Policies for the FDIC HBD Litigation.”). On August 24, 2012, the Settlement
9 Amount was paid into an interest-bearing escrow account on behalf of the Class.
10 Still, the Former IndyMac Officers failed to even appear in this Action.

11 It was not until December 28, 2012, the very last day that *Class Members* were
12 entitled to object to the Settlement, and after over seven months of labor by the Court
13 and the Parties over the approval of this Settlement, including hundreds of pages of
14 briefing, three hearings, three Court Orders, and a costly campaign to notify Class
15 Members of the proposed Settlement, that the Former IndyMac Officers decided to
16 voice their “objection” to the funding of this Settlement. Moreover, the Former
17 IndyMac Officers’ Letter does not constitute a timely objection because they did not
18 file it with the Court within 120 calendar days of the Notice (December 28, 2012), as
19 required by the Order Preliminarily Approving Settlement (*see* Dkt. No. 322 at ¶14).
20 The Former IndyMac Officers’ eleventh-hour attempt to unravel a Settlement that is
21 the product of over five years of hard work by Class Representative, counsel, the
22 mediator and the Court, because they have come to the conclusion that the benefit
23 provided to the Class is too high, should not be condoned.

24 **3. This is Not the Proper Forum for the Former IndyMac**
25 **Officers’ Complaints**

26 The Former IndyMac Officers’ “objection” should be overruled for the further
27 reason that the issue it raises does not concern the fairness of the Settlement, but
28

1 rather the good faith of the Insurers in funding it. That issue is not properly
2 addressed in this proceeding.

3 As explained elsewhere, the Insurers agreed to fund the Settlement in response
4 to a mediator's proposal by the Hon. Judge Daniel Weinstein (Ret.), with the full
5 knowledge of the claims against the Former IndyMac Officers. The Insurers then
6 proceeded to fund the Settlement by paying \$5.5 million into escrow. Class Counsel
7 believes that the Insurers acted appropriately in agreeing to fund and then funding the
8 Settlement in response to Judge Weinstein's mediator's proposal. If the Former
9 IndyMac Officers believe otherwise, however, their remedy is to pursue a bad-faith
10 claim against the Insurers – not to try to block the Settlement.

11 Indeed, the Former IndyMac Officers have filed precisely such a bad-faith
12 counterclaim against the Insurers in the separate interpleader action pending before
13 this Court, *Arch Insurance Co.*, Case No. 2:12-cv-06290-GW-FFM. The settlement
14 monies themselves are not subject to interpleader because they have already been
15 committed and paid by the Insurers to fund the Settlement. *See, e.g., United States*
16 *Fire Ins. Co. v. Asbestospray, Inc.*, 182 F.3d 201, 211 (3d Cir. 1999) (funds that have
17 been “contractually committed to settle ongoing, pre-interpleader lawsuits” not
18 properly subject to interpleader action). But the Former IndyMac Officers still may
19 recover on their bad-faith counterclaim in that proceeding if they are correct that the
20 Insurers acted in bad faith by funding the Settlement in response to the mediator's
21 proposal. If the Former IndyMac Officers are successful, they will be entitled to
22 recover their defense costs in full as well as any resulting damages, without respect to
23 the limits of the insurance policies. *See, e.g., Lee v. West Coast Life Ins. Co.*, 688
24 F.3d 1004, 1009-10, 1014 (9th Cir. 2012). Approval of the Settlement here will in no
25 way prejudice the Former IndyMac Officers' bad-faith claim or limit their recovery.
26 Accordingly, the Former IndyMac Officers offer no valid ground for derailing the
27 Settlement based on their separate dispute with the Insurers concerning the funding of
28 the Settlement.

1 The Former IndyMac Officers' "objection" serves only to underscore the
2 severity of the ability to pay issues in this Action, and the diligent and aggressive
3 work of Class Counsel in securing the Settlement in the midst of numerous
4 competing claimants, adding further support to the reasonableness of the Settlement.
5 *See Torrissi v. Tuscon Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993).

6 In light of: (i) the overwhelmingly positive reaction of Class Members to the
7 proposed Settlement, the Plan of Allocation, and the fees and expenses requested; (ii)
8 the facts specific to this Action, particularly IndyMac's bankruptcy, the absence of
9 the alleged corporate wrongdoer from the Action and the limited insurance proceeds
10 available to satisfy a future judgment; (iii) the strengths and weaknesses of the
11 Class's claims, and the defenses thereto, based on Class Counsel's extensive
12 litigation and settlement efforts over the pendency of this Action; (iv) the
13 considerable risks and delays associated with continued litigation and trial; and (v)
14 Class Counsel's past experience in similar class actions, Class Representative and
15 Class Counsel firmly believe that the Settlement is eminently fair, reasonable, and
16 adequate and provides a substantial result for the Class and that the fees and expenses
17 requested are reasonable.

18 **III. FINAL STEPS SHOULD THE COURT APPROVE THE SETTLEMENT**

19 Should the Court grant final approval to the Settlement and the Settlement
20 becomes Final (as that term is defined in ¶1(o) of the Stipulation), Rust will continue
21 to process the Proof of Claim and Release Forms ("Claim Forms" or "Claims")
22 submitted in connection with the Settlement and move towards a distribution of the
23 Net Settlement Fund.¹² Among other things, Rust will notify each claimant who has
24 submitted a deficient Claim and work with such claimants to cure these deficiencies

25
26 ¹² As of January 16, 2013, Rust has received a total of 3,798 hard-copy Claims
27 and an additional 10,427 electronic accounts from potential Class Members and
28 nominees. *See* Supplemental Mailing Declaration at ¶7. As set forth in the Notice
and Claim Form, Claims were to be postmarked no later than December 28, 2012.
Given that the deadline is a "postmark" date, Rust expects to continue to receiving
additional Claims in the following weeks. *Id.* at ¶8.

1 so that as many claimants as possible are eligible to receive a distribution from the
2 Net Settlement Fund. Once Rust has fully processed all of the Claims submitted and
3 completed all of its quality assurance reviews to ensure the accuracy of all Claims
4 processed, Rust will provide Class Counsel with a report on the Claims submitted,
5 and Class Counsel will move the Court for distribution of the Net Settlement Fund to
6 eligible Class Members.

7 Pursuant to the Plan of Allocation set forth in the Notice, if there are any funds
8 remaining following distribution of the Net Settlement Fund to eligible Class
9 Members, such that the amount remaining is so small that a re-distribution of this
10 amount would not be economically feasible, Class Counsel will work with the Court
11 in choosing an appropriate 501(c)(3) organization for donation of the remaining
12 balance.¹³

13 IV. CONCLUSION

14 Based on the foregoing and the entire record, Class Representative and
15 Plaintiffs' Counsel respectfully submit that: (i) the proposed Settlement and Plan of
16 Allocation are both fair, reasonable and adequate and warrant the Court's final
17 approval, and (ii) the attorneys' fees and expenses requested by Plaintiffs' Counsel
18 are fully justified and should be granted in full. Accordingly, Class Representative
19

20 ¹³ Class Counsel respectfully submits the National Consumer Law Center
21 ("NCLC") as a 501(c)(3) organization for the Court's consideration. According to its
22 website (www.nclc.org), the NCLC, among other things, "works on behalf of low-
23 income and other vulnerable homeowners to strengthen the mortgage market and our
24 economy." To that end, the NCLC, *inter alia*, investigates mortgage marketplace
25 abuses, including those associated with foreclosures and loan servicing, proposes
26 reforms for these abuses by advocating before myriad federal and state agencies,
27 represents consumers in cutting-edge litigation, and provides a wealth of information
28 on these topics to both advocates and consumers. Additionally, the NCLC has
recently been approved as a cy pres recipient by several courts in the Ninth Circuit.
See, e.g., Armuth v. Linton, 2012 U.S. Dist. LEXIS 174779, at *2 (C.D. Cal. 2012);
In re: Wachovia Corp. "Pick-A-Payment" Mortg. Mktg. and Sales Practices Litig.,
Case No. M:09-cv-2015-JF, slip. op. at 1 (N.D. Cal. June 26, 2012), attached hereto
as Exhibit B; *Lymburner v. United States Fin. Funding, Inc.*, 2012 U.S. Dist. LEXIS
14752, at *12 (N.D. Cal. 2012); *Schwarm v. Craighead*, 814 F. Supp. 2d 1025, 1031
(E.D. Cal. 2011); *Durham v. Cont'l Cent. Credit, Inc.*, 2011 U.S. Dist. LEXIS 2066,
at *4 (S.D. Cal. 2011).

1 respectfully requests that the Court enter the [Proposed] Order and Final Judgment
2 submitted herewith.¹⁴ In addition, because the Former IndyMac Officers do not have
3 standing, their “objection” is untimely, and this Settlement will not prejudice their
4 rights, Class Representative respectfully requests that the Court deny their Motion to
5 File Non-Party Objection.

6 Dated: January 17, 2013

Respectfully submitted,

7
8 **KESSLER TOPAZ
MELTZER & CHECK, LLP**

9 */s/ Stacey M. Kaplan*

10 Ramzi Abadou, Esq.
11 Eli R. Greenstein, Esq.
12 Stacey M. Kaplan, Esq.
13 Erik D. Peterson, Esq.
14 One Sansome Street, Suite 1850
15 San Francisco, CA 94104
16 Tel: (415) 400-3000
17 Fax: (415) 400-3001

18 -and-

19 John J. Gross, Esq.
20 Jennifer L. Enck, Esq.
21 280 King of Prussia Road
22 Radnor, PA 19087
23 Tel: (610) 667-7706
24 Fax: (610) 667-7056

25 *Lead Counsel for Lead Plaintiff
and the Class*

26
27 **GLANCY BINKOW &
GOLDBERG LLP**

28 Lionel Z. Glancy (134180)
Peter A. Binkow (173848)
1925 Century Park East, Suite 2100
Los Angeles, CA 90067
Tel: (310) 201-9150
Fax: (310) 201-9160

Liaison Counsel for Plaintiffs

14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

¹⁴ The [Proposed] Order and Final Judgment submitted herewith is the same order that the Court reviewed in connection with Class Representative’s motion for preliminary approval, with limited edits to reflect current information. For the Court’s convenience, a red-line reflecting those edits is attached hereto as Exhibit C.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**COHEN MILSTEIN SELLERS
& TOLL PLLC**

Steven J. Toll
Andrew N. Friedman
1100 New York Avenue, N.W.
Suite 500, West Tower
Washington, DC 20005
Tel: (202) 408-4600
Fax: (202) 408-4699

Additional Counsel for Plaintiffs

CERTIFICATE OF SERVICE

1
2 I hereby certify that on January 17, 2013, I electronically filed the foregoing
3 with the Clerk of the Court using the CM/ECF system which will send notification of
4 such filing to the e-mail addresses denoted on the attached Electronic Mail Notice
5 List.

6 I certify under penalty of perjury under the laws of the United States of
7 America that the foregoing is true and correct. Executed on January 17, 2013.

8 /s/ Stacey M. Kaplan

9 Stacey M. Kaplan

10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Electronic Mail Notice List

The following are those who are currently on the list to receive e-mail notices for this case.

Ramzi Abadou

rabadou@ktmc.com, arobles@ktmc.com

Tammy Albarran

talbarran@cov.com, eerlich@cov.com

David B Bayless

dbayless@cov.com, eerlich@cov.com

Ian D Berg

iberg@aftlaw.com, tkellar@aftlaw.com

Peter A Binkow

pbinkow@glancylaw.com

Robert L Corbin

sv@corbinathey.com, [sumry](mailto:sumry@corbinathey.com), rcorbin@corbinathey.com

John D Freed

freedjd@cov.com

Andrew N Friedman

afriedman@cohenmilstein.com

Mali B Friedman

mfriedman@cov.com

Lionel Zevi Glancy

lglancy@glancylaw.com

Michael M Goldberg

mmgoldberg@glancylaw.com, dmacdiarmid@glancylaw.com, info@glancylaw.com

John J Gross

jgross@ktmc.com, dmaytorena@ktmc.com

Joshua G Hamilton

lindayoung@paulhastings.com, melmanahan@paulhastings.com, joshuahamilton@paulhastings.com

Matthew B Kaplan

mbkaplan@thekaplanlawfirm.com

Amir Kaltgrad
akaltgrad@corbinathey.com

Stacey M Kaplan
skaplan@ktmc.com, arobles@ktmc.com

Teodora Manolova
tmanolova@goodwinprocter.com

Damian J Martinez
sv@corbinathey.com, dmartinez@corbinathey.com

Christopher L Nelson
cnelson@ktmc.com, dpotts@ktmc.com

Erik David Peterson
epeterson@ktmc.com, knguyen@ktmc.com, arobles@ktmc.com

William F Salle
wflaw@yahoo.com, yessi90042@yahoo.com

Evan Jason Smith
esmith@brodsky-smith.com

Andy Sohrn
asohrn@glancylaw.com

Michael C Tu
mtu@orrick.com

Daniel J Tyukody, Jr
dtyukody@goodwinprocter.com, azunigagarcia@goodwinprocter.com

Edwin V Woodsome, Jr
ed.woodsomes@dechert.com, patty.ruiz@dechert.com

Manual Notice List

The following is the list of attorneys who are **not** on the list to receive e-mail notices for this case (who therefore require manual noticing). You may wish to use your mouse to select and copy this list into your word processing program in order to create notices or labels for these recipients.

Lauren Wagner Pederson

Kessler Topaz Meltzer & Check LLP
280 King of Prussia Road
Radnor, PA 19087

Michael K Yarnoff
Schiffrin & Barroway
280 King of Prussia Road
Radnor, PA 19087

EXHIBIT A

1 KIM W. WEST, State Bar No. 78553
kim.west@clydeco.us
2 ALEC H. BOYD, State Bar No. 161325
alec.boyd@clydeco.us
3 CLYDE & CO US LLP
101 Second Street, 24th Floor
San Francisco, California 94105
4 Telephone: (415) 365-9800
5 Facsimile: (415) 365-9801

6 Attorneys for Plaintiffs/Counterdefendants
ARCH INSURANCE COMPANY and
7 AXIS REINSURANCE COMPANY

8 [Counsel for additional moving parties
on signature block]

9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION
11

12 ARCH INSURANCE COMPANY,
13 ACE AMERICAN INSURANCE
COMPANY, and AXIS
14 REINSURANCE COMPANY

15 Plaintiffs,

16 v.

17 MICHAEL W. PERRY, A. SCOTT
KEYS, LOUIS E. CALDERA, LYLE
18 E. GRAMLEY, HUGH M. GRANT,
PATRICK C. HADEN, TERRANCE G.
19 HODEL, ROBERT L. HUNT II,
LYDIA H. KENNARD, BRUCE G.
20 WILLISON, JOHN OLINSKI, S.
BLAIR ABERNATHY, SAMIR
21 GROVER, SIMON HEYRICK,
VICTOR H. WOODWORTH, SCOTT
22 VAN DELLEN, RICHARD KOON,
KENNETH SHELLEM, WILLIAM
23 ROTHMAN, JILL JACOBSON, and
24 KEVIN CALLAN,

25 Defendants.
26
27
28

Case No. CV12-6290 JFW (FFMx)

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFFS' MOTION FOR
DISCHARGE AND OTHER
RELIEF**

Date: November 26, 2012
Time: 1:30 p.m.
Dept: Room 176

JUDGE: Hon. John F. Walter

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

I. INTRODUCTION..... 1

II. STATEMENT OF FACTS..... 1

 A. Citizenship of the Parties 1

 B. Amount in Controversy 2

 C. The Competing Claims 3

 1. Underlying Claims Asserted Against Defendants..... 3

 2. The Insureds' Pursuit of Insurance Coverage for the
 Underlying Claims..... 5

 3. The Potential Settlement of Four Underlying Claims 5

 4. The Emergence of Competing Claims 6

 5. Judge Klausner Rules that No Coverage is Available
 Under the 08-09 Policies 7

 6. The Impact of Judge Klausner's Ruling 7

 7. The Post-Filing Preliminary Approval of the Tripp and
 Daniels Settlements 8

 8. Defendants Koon and Shellem's Failure to Oppose the
 Preliminary Approval of the Tripp and Daniels
 Settlements..... 9

 9. Arch and ACE's Decision to Preliminary Fund the Tripp
 and Daniels Settlements..... 9

 10. ACE's Decision to Preliminarily Fund the MBS Settlement 11

 11. Defendants Koon, Shellem, Van Dellen and Rothman's
 Assertion of Counter-Claims Herein..... 12

III. LEGAL ARGUMENT 13

 A. Plaintiffs' Burden on Motion for Discharge..... 13

 B. Discharge is Proper 14

 1. Rule 22 Interpleader is Justified if the Stakeholder Has a
 Good Faith Belief There Are or Will Be Competing
 Claims for the Stake 14

 2. Competing Claims for the 07-08 Side A Policies Exist
 Here..... 16

CLYDE & CO US LLP
 101 Second Street, 24th Floor
 San Francisco, California 94105
 Telephone: (415) 365-9800

1 C. This Court Has The Power To Grant Whatever Relief It Deems
Necessary To Adjudicate The Competing Claims..... 17
2 IV. CONCLUSION..... 18
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CLYDE & CO US LLP
101 Second Street, 24th Floor
San Francisco, California 94105
Telephone: (415) 365-9800

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

CASES

Gelfgren v. Republic Nat'l Life Ins. Co.,
680 F.2d 79 (9th Cir. 1982) 13

Lehto v. Allstate Ins. Co.,
31 Cal.App.4th 60 (1994)..... 16

Mack v. Kuckenmeister,
619 F.3d 1010 (9th Cir. 2010)..... 13, 15

Michelman v. Lincoln Nat'l Life Ins. Co.,
685 F.3d 887 (9th Cir. 2012)..... 14, 15, 16, 17

Minn. Mut. Life Ins., 174 F.3d 977, 980 (9th Cir. 1999)..... 15

N.Y. Life Ins. Co. v. Welch,
297 F.2d 787 (D.C. Cir.1961) 15

Salmon Protection and Watershed Network v. County of Marin,
205 Cal.App.4th 195, 201 (Cal. App. Ct. 2012) 17

Strauss v. Farmers Ins. Exchange,
26 Cal.App.4th 1017 (1994)..... 16

United States v. Major Oil Corp.,
583 F.2d 1152 (10th Cir. 1978)..... 14, 17, 18

STATUTES

28 U.S.C. § 1332 1

OTHER AUTHORITIES

Federal Rule of Civil Procedure 22(a)(1)..... 14

Federal Rule of Civil Procedure 22 1, 13, 14, 18

CLYDE & CO US LLP
101 Second Street, 24th Floor
San Francisco, California 94105
Telephone: (415) 365-9800

CLYDE & CO US LLP
101 Second Street, 24th Floor
San Francisco, California 94105
Telephone: (415) 365-9800

1 **I. INTRODUCTION**

2 This is a straightforward Rule 22 interpleader action brought by insurers who
3 provide directors and officers liability coverage to Defendants. The amount of
4 claims – in this case, defense costs and settlements – exceed the limits of insurance
5 available to pay them. There were \$30 million in policy limits at the time of the
6 filing of this action, and there are settlements valued at \$29 million plus past,
7 present and future defense costs that far exceed the remaining limits. The Insureds
8 have made competing claims for those limited insurance proceeds, and several
9 Insureds have objected to payment of any of the remaining limits toward settlement
10 or defense costs of claims against certain other Insureds. Therefore, the Insurers
11 were compelled to file this interpleader to resolve these competing claims. To be
12 clear, the Insurers are not disputing coverage as to the remaining \$30 million in
13 limits. The Insurers simply seek the court’s determination as to which of the
14 competing claims of the Insureds should be paid and in what amounts.

15 It is important to note that the four settlements at issue were negotiated during
16 a mediation before the Hon. Daniel Weinstein, including two settlements that have
17 already been preliminarily approved by Judge Wu of the U.S. District Court for the
18 Central District of California and one that has been preliminarily approved by Judge
19 Kaplan of the U. S. District Court for the Southern District of New York.
20 Surprisingly, the Defendants filed counterclaims in this action asserting that funding
21 those settlement would constitute bad faith by the Insurers. Thus, there can be no
22 reasonable dispute that competing claims exist and interpleader is proper.

23 **II. STATEMENT OF FACTS**

24 **A. Citizenship of the Parties**

25 This action for interpleader arises under Federal Rule of Civil Procedure 22
26 and this Court has diversity jurisdiction pursuant to 28 U.S.C. § 1332.
27

CLYDE & CO US LLP
101 Second Street, 24th Floor
San Francisco, California 94105
Telephone: (415) 365-9800

1 Plaintiff Arch Insurance Company ("Arch") is an insurance company
2 incorporated in the state of Missouri with its principal place of business in the State
3 of New York. [Declaration of Kim W. West in Support of Plaintiffs' Motion for
4 Discharge and Other Relief ("West Declaration"), p. 2:7-8.] Plaintiff ACE
5 American Insurance Company ("ACE") is an insurance company incorporated in the
6 State of Pennsylvania with its principal place of business in the State of
7 Pennsylvania. [Declaration of Victor Corbo in Support of Plaintiffs' Motion for
8 Discharge and Other Relief ("Corbo Declaration"), p. 2:9-11.] Plaintiff AXIS
9 Reinsurance Company ("AXIS") is an insurance company incorporated in the State
10 of New York with its principal place of business in the State of Georgia.
11 [Declaration of Timoth Vazquez in Support of Plaintiffs' Motion for Discharge and
12 Other Relief ("Vazquez Declaration"), p. 2:8-10.] Collectively, Arch, ACE, and
13 AXIS are referred to herein as the "Side A Insurers."

14 All Defendants are citizens of the State of California, except defendants Louis
15 E. Caldera and Lyle E. Gramley, who are citizens of the State of Maryland.
16 [Request for Judicial Notice, p. 2:8-27.]

17 **B. Amount in Controversy**

18 The amount in controversy consists of insurance proceeds of \$30 million.
19 Plaintiff Arch provides coverage to the directors, officers, and members of the
20 Board of Management of IndyMac Bancorp, Inc., and its subsidiaries for the 07-08
21 Policy Period pursuant to the Arch Insurance Company Excess Insurance Policy No.
22 ABX0020231-00 (the "07-08 Arch Side A Policy"). [West Declaration, p. 2:9-12.]
23 Subject to its terms and conditions, the 07-08 Arch Side A Policy provides \$10
24 million in limits excess of \$50 million in underlying limits that have been exhausted
25 by payment of Loss. Arch's policy is excess of \$10 million in limits of an
26 underlying Side A directors and officers policy issued by XL Specialty Insurance
27 Company ("XL") and \$40 million in underlying limits issued by four separate
28

1 insurers who issued four separate Side ABC directors and officers policies. ("ABC
2 insurers"). [West Declaration, p. 2:13-19.] XL and the ABC insurers have paid
3 their full policy limits in Loss and are therefore "exhausted." [West Declaration, p.
4 2:20-21.]

5 ACE likewise provides coverage to the directors, officers, and members of the
6 Board of Management of IndyMac Bancorp, Inc., and its subsidiaries, for the 07-08
7 Policy Period pursuant to the ACE American Insurance Company Policy No. DOX
8 G21681647 002 (the "07-08 ACE Side A Policy"). [Corbo Declaration, p. 2:12-17.]
9 Subject to its terms and conditions, the 07-08 ACE Side A Policy provides \$10
10 million in limits and sits immediately excess of the 07-08 Arch Side A Policy.
11 [Corbo Declaration, p. 2:12-17.]

12 AXIS provides coverage to the directors, officers, and members of the Board
13 of Management of IndyMac Bancorp, Inc., and its subsidiaries, for the 07-08 Policy
14 Period pursuant to the AXIS Policy No. RNN712064/01/2007 (the "07-08 AXIS
15 Side A Policy"). [Vazquez Affidavit, p. 2:11-14.] Subject to its terms and
16 conditions, the 07-08 AXIS Side A Policy provides \$10 million in limits and sits
17 immediately excess of the 07-08 ACE Side A Policy. [Vazquez Affidavit, p. 2:14-
18 16.]¹

19 Hence, the combined remaining Side A limits total \$30 million.

20 **C. The Competing Claims**

21 **1. Underlying Claims Asserted Against Defendants**

22 Various of the Defendants have been sued in the following actions:

- 23 • *Wayman Tripp and Sven Mossberg v. IndyMac Bancorp, Inc. and*
24 *Michael W. Perry*, United States District Court for the Central District

25 _____
26 ¹ The Arch, ACE, and AXIS Side A Policies are referred to herein as the "07-08
27 Side A Policies."
28

CLYDE & CO US LLP
101 Second Street, 24th Floor
San Francisco, California 94105
Telephone: (415) 365-9800

- 1 of California Case No. 2:07-cv-1635-GW-VBK (the “Tripp
2 Litigation”);
- 3 • *Folsom v. IndyMac Bancorp, Inc., Perry and Keys*, Case No. 08-cv-
4 3812 (filed on June 11, 2008);
 - 5 • *Ariel Investments Ltd. v. IndyMac Bancorp, Inc., Perry, and Keys*, Case
6 No. 08-cv-4302 (filed on June 30, 2008);
 - 7 • *Yukelson v. Perry and Keys*, Case No. 08-cv-4591 (filed on July 14,
8 2008);
 - 9 • *Mazal Investment Partners v. IndyMac Bancorp, Inc., Perry, and Keys*,
10 Case No. 08-cv-4923 (filed on July 28, 2008); and
 - 11 • *Daniels v. Perry and Keys*, Case No. 08-cv-5073 (filed on August 1,
12 2008) (collectively the Folsom. Ariel Investments, Yukelson, Mazal
13 and Daniels litigations are referred to herein as the "Daniels
14 Litigation");
 - 15 • *FDIC v. Van Dellen, et al.*, Case No. 2:10-cv-04915-DSF-SH (the
16 “FDIC HBD Litigation”);
 - 17 • *Siegel v. Caldera, et al.*, Case No. 2:09-ap-2645-BB (the "Siegel
18 Litigation");
 - 19 • *In re IndyMac Mortgage-Backed Securities Litigation*, Case No. 09-
20 civ-4583 (the "MBS Litigation");
 - 21 • *MBIA Insurance Corporation v. IndyMac ABS, Inc., et al.*, California
22 Superior Court Los Angeles Case No. BC422358 (the “MBIA
23 Litigation”);
 - 24 • *Assured Guaranty Municipal Corp. v. UBS Securities LLC, et al.*,
25 California Superior Court Los Angeles Case No. BCC445785 (the
26 “Assured Guaranty Litigation”);
 - 27 • *Federal Deposit Insurance Corporation v. Michael Perry*, Case No.
- 28

1 2:11-cv-05561-ODW-MRW (the "FDIC-R Litigation"); and,
2 • *Securities and Exchange Commission v. Michael W. Perry and A. Scott*
3 *Keys*, Case No. CV11-01309-GHK (JCx) (the "SEC v. Perry
4 Litigation").

5 Collectively, the Tripp Litigation, Daniels Litigation, FDIC HBD Litigation, Siegel
6 Litigation, MBS Litigation, Assured Guaranty Litigation, FDIC-R Litigation, and
7 SEC v. Perry Litigation are hereinafter referred to as the "Underlying Claims").
8 [West Declaration, p. 2:22-4:2.]

9 **2. The Insureds' Pursuit of Insurance Coverage for the**
10 **Underlying Claims**

11 The Defendants tendered the Underlying Claims under the ABC and Side A
12 insurance policies in effect for the 07-08 and 08-09 policy periods. [West
13 Declaration, p. 4:3-7.] The 07-08 insurance policies have a combined limit of \$80
14 million. [West Declaration, p. 4:3-7.] The 08-09 policies also have combined limits
15 of \$80 million. [West Declaration, p. 4:3-7.] The 08-09 insurers, however, declined
16 coverage for the Underlying Claims. [West Declaration, p. 4:3-7.]

17 Following the insurers' declination of coverage under the 08-09 policies,
18 coverage litigation ensued with respect to those policies. Ultimately, the various
19 lawsuits regarding coverage under the 08-09 policies were consolidated before the
20 Hon. R. Gary Klausner in *XL Specialty Ins. Co., et al. v. Michael Perry, et al.*,
21 United States District Court for the Central District of California Case No. CV 11-
22 02078-RGK (JCGx) (hereinafter "The 08-09 Coverage Action"). The 08-09
23 Coverage Action was pending during the following material events. [West
24 Declaration, p. 4:8-13]

25 **3. The Potential Settlement of Four Underlying Claims**

26 While the 08-09 Coverage Action was pending, the Underlying Claims
27 asserted against the Defendants were the subject of a long-standing mediation
28

CLYDE & CO US LLP
101 Second Street, 24th Floor
San Francisco, California 94105
Telephone: (415) 365-9800

1 presided over by the Hon. Daniel Weinstein of JAMS. [West Declaration, p. 4:14-
2 23.] On or before April 15, 2012, in response to "mediator's proposals," settlements
3 were reached in the following cases for the following amounts, subject to
4 negotiation of final terms and court approval:

- 5 • Tripp Litigation - \$5.5 million
- 6 • Daniels Litigation - \$6.5 million
- 7 • FDIC-R Litigation - \$11 million
- 8 • MBS Litigation - \$6 million

9 [West Declaration, p. 4:14-23.]

10 As of April 15, 2012, the full \$10 million in limits of the XL Side A Policy
11 were available, such that \$40 million in 07-08 limits remained to fund the 07-08
12 Settlements totaling \$29 million and reimburse any defense costs which might have
13 been incurred as of that date. [West Declaration, p. 4:24-27.]

14 **4. The Emergence of Competing Claims**

15 On May 9, 2012, counsel for defendant William Rothman sent a letter to the
16 Side A Insurers seeking authority in an attempt to settle the FDIC HBD Litigation
17 claim against him (the "Rothman Matter"). [West Declaration, p. 5:1-3.]

18 XL and the Side A Insurers collectively responded to the May 9, 2012
19 Rothman letter on June 21, 2012, by stating, in part, as follows: "... please confirm
20 that Mr. Van Dellen, as well as the other defendants in the HBD action, have no
21 objections to the proposed settlement by Mr. Rothman, particularly given that it will
22 necessitate use of policy proceeds that would otherwise be used in the ongoing
23 defense of the HBD action." [West Declaration, p. 5:4-8.]

24 In the interim, on June 19, 2012, counsel for XL advised the Side A Insurers
25 that XL was in receipt of over \$11 million in defense expenses that various
26 Defendants were requesting to be paid. [West Declaration, p. 5A:9-11.]

27

28

1 Shortly thereafter, on June 25, 2012, counsel for XL advised the Side A
2 Insurers and the Defendants that further additional defense costs had been incurred,
3 such that the total outstanding defense costs and 07-08 Settlements exceeded the
4 combined remaining limits provided by XL and the Plaintiffs. [West Declaration, p.
5 12-15.]

6 **5. Judge Klausner Rules that No Coverage is Available Under**
7 **the 08-09 Policies**

8 On June 26, 2012, the Judge Klausner granted summary judgment in favor of
9 the insurers in the 08-09 Coverage Action, ruling that no coverage was available
10 under the 08-09 policies.² [West Declaration, p. 5:17-19.] This ruling is on appeal
11 to the Ninth Circuit.

12 **6. The Impact of Judge Klausner's Ruling**

13 Within days of Judge Klausner's ruling, the 07-08 Side A Insurers were
14 inundated with more competing claims. First, on or about July 2, 2012, XL and the
15 Side A Insurers received correspondence from counsel for defendants Koon,
16 Shellem, and Van Delle in which counsel stated, for the first time, that they
17 opposed the funding of the 07-08 Settlements on the basis that their clients are
18 insureds under the 07-08 Side A Policies and, if the amounts were paid, their clients
19 would have no coverage under the 07-08 Side A Policies for the FDIC HBD
20 Litigation. [West Declaration, p. 5:20-27.]

21 Then, on or about July 5, 2012, XL and the Side A Insurers received
22 correspondence from counsel for defendant Perry, Jean Veta of Covington &
23 Burling, in which Ms. Veta stated, among other things, that Mr. Perry objected to
24

25 _____
26 ² Hence, as a result, the 07-08 policies became the only source of insurance funding
27 for the Underlying Claims and 07-08 Settlements. [West Declaration, p. __.]
28

1 the Side A Insurers' funding of a settlement between the FDIC and Mr. Rothman.
2 [West Declaration, p. 6:1-4.]

3 Thereafter, on July 11, 2012, counsel for XI advised counsel for defendants
4 Abernathy, Olinski, Heyrick, Grover and Woodworth that the XL Specialty policy
5 would be fully exhausted prior to the funding of the proposed MBS settlement and
6 XL Specialty would not take part in the funding of that settlement. [West
7 Declaration, p. 6:5-8.]

8 The next day, on July 12, 2012, counsel for defendant Perry submitted to
9 counsel for Arch an invoice for payment in the total amount of \$426,799.97. [West
10 Declaration, p. 6:9-10.] This was the first invoice submitted directly to Arch for
11 payment.

12 On the morning of July 13, 2012, counsel for XL advised counsel for
13 defendants Abernathy, Olinski, Heyrick, Grover and Woodworth that XL Specialty
14 already had received defense invoices (including the April/May invoices) that would
15 exhaust its policy, and their June invoice would not be paid with XL Specialty
16 policy proceeds. [West Declaration, p. 6:11-15.]

17 On that afternoon, counsel for the Side A Insurers received an e-mail from
18 counsel for defendants Abernathy, Olinski, Heyrick, Grover and Woodworth which
19 stated that counsel was submitting Fairbank & Vincent's most recent invoice to Arch
20 for processing and payment. [West Declaration, p. 6:16-19.]

21 **7. The Post-Filing Preliminary Approval of the Tripp and**
22 **Daniels Settlements**

23 On or about August 10, 2012, subsequent to the filing of both the Complaint
24 and the First Amended Complaint in the interpleader action, Judge Wu issued orders
25 preliminarily approving the settlements of the Tripp and Daniels matters in the
26 amounts of \$5.5 million and \$6.5 million, respectively. [Request for Judicial
27 Notice, p. 3:1-17, Exhibits A and B.]

28

853135v2

1 Those motions for preliminary approval were not opposed by any insureds.
2 [Request for Judicial Notice, p. 3:18-21.]

3 **8. Defendants Koon and Shellem's Failure to Oppose the**
4 **Preliminary Approval of the Tripp and Daniels Settlements**

5 Defendants Koon and Shellem filed an opposition to a Motion to Stay in the
6 HBD Action on July 16, 2012, in which they confirmed their awareness that the
7 pending 07-08 Settlements in the amount of \$29 million dollars and the outstanding
8 defense expenses would exceed the remaining 07-08 policy limits of \$30 million.
9 [Request for Judicial Notice, p. 3:22-4:6, Exhibit C.] Defendants Shellem and Koon
10 further stated in that filing that they intended to oppose the 07-08 Settlements
11 "through any available avenues." [Request for Judicial Notice, Exhibit C.]

12 Nonetheless, Koon and Shellem did not oppose the preliminary approval of
13 the Tripp and Daniels settlements. [Request for Judicial Notice, p. 4:7-10.]³

14 **9. Arch and ACE's Decision to Preliminary Fund the Tripp and**
15 **Daniels Settlements**

16 On August 13, 2012, Arch was advised by Dennis Auerbach of Covington &
17 Burling, counsel for defendant Perry, that any failure to fund the Tripp and Daniels
18 settlements would be considered a breach of the insurers' funding obligation which
19 could result in the unwinding of those settlements to the prejudice of defendants
20 Perry and Keys. [West Declaration, p. 5:20-26.] Calling the circumstances
21 confronting the parties "uncharted waters," Mr. Auerbach demanded that Arch
22 provide preliminary funding for the settlement or face the consequences. [West

23 _____
24 ³ As to Arch only, if all Insureds, including Koon, Shellem, Van Dellen, and
25 Rothman, agree that it is appropriate for Arch to fund the Tripp and Daniels
26 settlements, then no competing claims as to the Arch limits would exist. Arch
27 invites all of its Insureds, especially Koon and Shellem, to so notify Arch if that is
28 their present position.

CLYDE & CO US LLP
101 Second Street, 24th Floor
San Francisco, California 94105
Telephone: (415) 365-9800

1 Declaration, p. 6:20-26.] The funding date per Judge Wu's order was August 24,
2 2012. [West Declaration, p. 6:27.]

3 Cognizant of their obligations to ensure that they take no actions prejudicial
4 to their Insureds' several interests, Arch and ACE considered Mr. Auerbach's
5 request. In particular, Arch and ACE reviewed the Tripp and Daniels settlement
6 agreements. The relevant settlement documentation provides that the insurers shall
7 fund the settlements, that the insureds have no responsibility to fund the settlements,
8 and that if the settlements are not funded, the settlements shall be null and void.

9 [Request for Judicial Notice, Exhibits A and B.] The settlement agreements further
10 specify that the settlement funds in Tripp and Daniels will be held in escrow, under
11 the jurisdiction of Judge Wu, pending the final approval hearing set for January 28,
12 2013. [Request for Judicial Notice, Exhibits A and B.]

13 Consequently, Arch and ACE determined that if the Tripp and Daniels
14 settlements were preliminarily funded by the insurers, the settlement funds would
15 not be dispersed without the issuance of a final approval order and that, in the
16 interim, any of the Insured-defendants herein could lodge objections to the motion
17 for final approval. [Request for Judicial Notice, Exhibits A and B.]

18 Further, on August 29, 2012, Arch advised its Insureds through email and
19 attached correspondence from its counsel of record that, in pertinent part, (1) Arch
20 and ACE would be proceeding to fund the escrow accounts for Tripp and Daniels in
21 order to preclude the unwinding of those settlements pending final approval or
22 disapproval, and (2) the Insureds should act to protect their perceived interests in the
23 funds before the final approval hearing set for January 28, 2012, in front of Judge
24 Wu. [West Declaration, p. 7:1-8.] No Insured responded to Mr. West's letter by
25 objecting to the funding of the escrow accounts. [West Declaration, p. 7:1-8.]

26 Accordingly, based on their determination that preliminary funding of the
27 Tripp and Daniels settlements would best preserve the status quo and be the least
28

1 likely to prejudice any Insured, Arch deposited \$5.5 million into the escrow account
2 for the Tripp settlement and \$4.5 million into the escrow account for the Daniels
3 settlement, its full \$10 million in policy limits. [West Declaration, p. 7:9-13.] ACE
4 funded the remainder of the Daniels settlement by depositing \$2 million of its policy
5 limit in the escrow account for the Daniels settlement. [Saltzman-Jones Affidavit, p.
6 2:7-12.]

7 Arch and ACE's deposit of funds into the escrow accounts controlled by
8 Judge Wu is, for all intents and purposes, deposit of those funds with this District
9 Court.

10 **10. ACE's Decision to Preliminarily Fund the MBS Settlement**

11 On September 6, 2012, the Side A Insurers were advised by Kimberly West
12 of Fairbank & Vincent, counsel for defendant Abernathy, that Judge Kaplan of the
13 United States District Court for the Southern District of New York had entered in
14 the MBS Litigation an "Order Certifying the Class for Purposes of Partial
15 Settlement" and that any failure to fund the MBS Settlement within ten (10)
16 business days would be considered a breach of the insurers' funding obligation
17 which could result in the unwinding of the settlement to the prejudice of defendants
18 Abernathy, Olinski, Heyrick, Grover and Woodworth [Saltzman-Jones Affidavit, p.
19 2:13-20.] Ms. West demanded that Arch and ACE provide preliminary funding for
20 the settlement. [Saltzman-Jones Affidavit, p. 2:13-20.]

21 Because the Arch policy was exhausted by the funding of the Tripp and
22 Daniels settlements, and cognizant of its obligations to ensure that it take no actions
23 prejudicial to its Insureds' several interests, ACE considered Ms. West's demand. In
24 particular, ACE reviewed the IndyMac MBS partial settlement agreement. The
25 relevant settlement documentation provides that the insurers shall fund the
26 settlements, that the insureds have no responsibility to fund the settlements, and that
27 if the settlements are not funded, the settlements shall be null and void. [Request for
28

CLYDE & CO US LLP
101 Second Street, 24th Floor
San Francisco, California 94105
Telephone: (415) 365-9800

CLYDE & CO US LLP
101 Second Street, 24th Floor
San Francisco, California 94105
Telephone: (415) 365-9800

1 Judicial Notice, p. 4:12-20, Exhibit D.] The settlement agreement further specifies
2 that the settlement funds in MBS will be held in escrow, under the jurisdiction of
3 Judge Kaplan, pending the final approval hearing set for December 11, 2012.
4 [Request for Judicial Notice, Exhibit D.]

5 Consequently, ACE determined that if the MBS settlement was preliminarily
6 funded, the settlement funds would not be dispersed without the issuance of a final
7 approval order and that, in the interim, any of the Insured-defendants could lodge
8 objections to the motion for final approval. [Request for Judicial Notice, Exhibit D.]

9 Accordingly, based on its determination that preliminary funding of the MBS
10 settlement would best preserve the status quo, ACE deposited \$6 million into the
11 escrow account for the MBS settlement. [Saltzman-Jones Affidavit, p. 2:21-24.]

12 Further, on October 9, 2012, ACE advised its Insureds through email and
13 attached correspondence from its counsel of record that, in pertinent part, (1) ACE
14 had agreed to fund the escrow account for the MBS Litigation in order to preclude
15 the unwinding of the settlement pending final approval or disapproval, and (2) the
16 Insureds should act to protect their perceived interests in the funds before the final
17 approval hearing set for December 11, 2012, in front of Judge Kaplan. [Saltzman-
18 Jones Affidavit, p. 2:25-3:3.] No Insured responded to Ms. Saltzman-Jones's letter
19 by objecting to the funding of the escrow accounts. [Saltzman-Jones Affidavit, p.
20 ____.]

21 **11. Defendants Koon, Shellem, Van Dellen and Rothman's**
22 **Assertion of Counter-Claims Herein**

23 Defendants Koon, Shellem, Van Dellen and Rothman have now filed
24 counterclaims in this action, alleging that the insurers have unreasonably refused to
25 pay their legal fees and expenses due to the insurers' alleged "unilateral decision to
26 pay purported settlements" on behalf of other Defendants. [Counterclaims of
27 Defendants/Counter-Claimants Richard Koon and Kenneth Shellem, filed October
28

1 3, 2012; Answer and Counterclaims of Defendants/Counterclaimants Scott Van
2 Dellen and William Rothman, filed October 4, 2012.]

3
4 **III. LEGAL ARGUMENT**

5 **A. Plaintiffs' Burden on Motion for Discharge**

6 An interpleader action is comprised of two stages: In the first stage, the court
7 determines whether the stakeholder has a right to interplead. *Mack v.*
8 *Kuckenmeister*, 619 F.3d 1010, 1023 (9th Cir. 2010). In the second stage, the court
9 adjudicates the merits of the various competing claimants' claims. *Id.*

10 The first stage is resolved by the court's determination of whether the
11 stakeholder has a right to interplead. *See*, Schwarzer, et al., Federal Civil Procedure
12 Before Trial, California and 9th Circuit Edition (2012) §§ 10:181-10:182.

13
14 The usual procedure is for the 'disinterested' stakeholder to
15 bring a motion to discharge it from liability to defendant
16 claimants. Such motion for discharge may be brought
either at the time of filing the complaint or shortly
thereafter.

17 *Id.* (citing *Hudson Sav. Bank v. Austin*, 479 F.3d 102, 107 (1st Cir.2007) (dismissal
18 should take place immediately, without awaiting adjudication of defendants'
19 competing claims)). If the disputed fund or property has not yet been deposited with
20 the court (e.g., in Rule 22 interpleaders), the stakeholder may move for discharge
21 upon depositing the fund or property into the registry of the court. *Id.* at § 10:183.⁴

22 The stakeholder bears the burden of showing that an interpleader is justified.
23 *Id.* at § 10:187 (citing *Interfirst Bank Dallas, N.A. v. Purolator Courier Corp.*, 608
24 F. Supp. 351, 353 (N.D.Tex.1985)). This burden is met by the submission of

25
26 ⁴ Unlike statutory interpleader, Rule 22 does not require that the stake (money or
27 property) be deposited with the court. *Gelfgren v. Republic Nat'l Life Ins. Co.*, 680
F.2d 79 (9th Cir. 1982).

1 affidavits as there is no right to a jury trial at this stage. *Id.* at § 10:188 (citing
2 *Jefferson Standard Ins. Co. v. Craven*, 365 F. Supp. 861 (M.D. Pa.1973)).

3 At the conclusion of the first stage, the court will enter an order allowing the
4 interpleader (if appropriate) to discharge the disinterested stakeholder from the
5 lawsuit, and issue any injunctions if sought and if necessary. *Id.* at § 10:189; *see*
6 *also, United States v. Major Oil Corp.*, 583 F.2d 1152 (10th Cir. 1978) (federal
7 courts have inherent equitable power to enjoin other lawsuits in Rule 22
8 interpleaders).

9 Upon entry of this order, the interpleader defendants can then proceed to the
10 next stage of the litigation: sorting out their competing claims. The interpleader
11 plaintiffs have no interest in the outcome of this dispute.

12 **B. Discharge is Proper**

13 1. **Rule 22 Interpleader is Justified if the Stakeholder Has a**
14 **Good Faith Belief There Are or Will Be Competing Claims**
15 **for the Stake**

16 Federal Rule of Civil Procedure 22 authorizes a stakeholder to join "[p]ersons
17 with claims that may expose [the stakeholder] to double or multiple liability" and
18 requires such persons to interplead. Fed.R.Civ.P. 22(a)(1). As recently explained
19 by the Ninth Circuit:

20 ... in order to avail itself of the interpleader remedy, a
21 stakeholder must have a good faith belief that there are or
22 may be colorable competing claims to the stake. This is
23 not an onerous requirement. *See* 4 James Wm. Moore,
24 *Moore's Federal Practice* § 22.03[1][c] (3d ed. 1997) ("In
25 most cases, it is not difficult for the stakeholder to meet
the requirement of a reasonable or good faith fear of
multiple litigation, and courts appear to require merely that
the stakeholder's concern in this regard be more than
conjectural.").

26 *Michelman v. Lincoln Nat'l Life Ins. Co.*, 685 F.3d 887, 894 (9th Cir. 2012).

CLYDE & CO US LLP
101 Second Street, 24th Floor
San Francisco, California 94105
Telephone: (415) 365-9800

1 The threshold to establish good faith is necessarily low so as not to conflict
2 with interpleader's pragmatic purpose, which is "for the stakeholder to 'protect itself
3 against the problems posed by multiple claimants to a single fund.'" *Mack v.*
4 *Kuckenmeister*, 619 F.3d 1010, 1024 (9th Cir. 2010). These possible problems
5 include the possibility of double liability and the cost of litigation. *Id.* (citing *Trs. of*
6 *Dirs. Guild of Am.-Producer Pension Benefits Plans v. Tise*, 234 F.3d 415, 426 (9th
7 Cir. 2000)); see also *N.Y. Life Ins. Co. v. Welch*, 297 F.2d 787, 790 (D.C. Cir.1961)
8 (A stakeholder, acting in good faith, may maintain a suit in interpleader to avoid the
9 vexation and expense of resisting adverse claims, even though he believes only one
10 of them is meritorious.).

11 An interpleading stakeholder need not sort out the merits of conflicting claims
12 as a prerequisite to interpleader, instead good faith requires a real and reasonable
13 fear of exposure to double liability or the vexation of conflicting claims.
14 *Michelman*, 685 F.3d at 894. A "real and reasonable fear" does not mean that the
15 interpleading party must show that the purported adverse claimant might eventually
16 prevail:

17
18 Of course, the claims of some interpleaded parties will
19 ultimately be determined to be without merit. That,
20 however, is the very purpose of the proceeding and it
21 would make little sense in terms either of protecting the
22 stakeholder or of doing justice expeditiously to dismiss
23 one possible claimant because another possible claimant
24 asserts the claim of the first is without merit.

22 *Id.* at 894-95 (quoting *Aaron v. Mahl*, 550 F.3d 659, 663 (7th Cir. 2008)).

23 Further, interpleader extends to potential, as well as actual, claims. *Minn.*
24 *Mut. Life Ins.*, 174 F.3d 977, 980 (9th Cir. 1999).

25 Thus, the stakeholder is required to demonstrate only that the potential
26 adverse claims have a "minimal threshold level of substantiality." *Id.* (*accord*
27 *Equitable Life Assurance Soc'y of the United States v. PorterEnglehart*, 867 F.2d 79,
28

1 84 (1st Cir.1989) ("[T]o support an interpleader action, the adverse claims need
2 attain only 'a minimal threshold level of substantiality.'" (quoting 7 CHARLES ALAN
3 WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1704 (2d ed.
4 1986)).

5 Here, this burden is not difficult to meet.

6 **2. Competing Claims for the 07-08 Side A Policies Exist Here**

7 The Side A Insurers do not dispute coverage for the Underlying Claims under
8 the 07-08 Side A Policies, and they do not seek to escape their obligation to pay the
9 full remaining limits of the 07-08 Side A Insurance Policies. [West Declaration, p.
10 7:14-16.]

11 The competing demands to the 07-08 Side A Policies exceed the remaining
12 07-08 policy limits of \$30 million, and the Side A Insurers are unable to determine
13 which Defendants should be entitled to the proceeds of the 07-08 Side A Policies.
14 [West Declaration, p. 4:14-7:16.] Furthermore, various of the Defendants have
15 demanded that the Side A Insurers not fund settlements which would inure to the
16 benefit of other Defendants.

17 Therefore, this is a straightforward case where interpleader is necessary and
18 appropriate.

19 Under California law, an insurer owes a duty of good faith and fair dealing to
20 each of its insureds, and cannot favor the interests of one insured over another.
21 *Lehto v. Allstate Ins. Co.*, 31 Cal.App.4th 60, 72 (1994); *Strauss v. Farmers Ins.*
22 *Exchange*, 26 Cal.App.4th 1017, 1021-22 (1994). This doctrine mandates
23 interpleader in the instant matter, where there can be no dispute that competing
24 claims exist. *See, Michelman*, 685 F.3d at 894-95.

25 Accordingly, the Side A Insurers are entitled to their requested relief of
26 discharge and dismissal upon payment of the remaining limits of the 07-08 Side A
27

28

1 Policies into the jurisdiction of the Central District. *Id.* at 899; *see also*, Schwarzer,
2 et al., § 10:189; *Major Oil Corp.*, 583 F.2d at 1157-59.

3 **C. This Court Has The Power To Grant Whatever Relief It Deems**
4 **Necessary To Adjudicate The Competing Claims**

5 Upon Judge Wu's grant of the unopposed motions for preliminary approval of
6 the Tripp and Daniels settlements, Arch deposited its full \$10 million in policy
7 limits into the Tripp and Daniels settlement escrow accounts, and ACE deposited an
8 additional \$2 million of its limit into the Daniels escrow account. [West
9 Declaration, p. 7:9-13.] Thereafter, ACE deposited an additional \$6 million of its
10 limits into the MBS escrow account. [Saltzman-Jones Affidavit, p. _.]

11 These actions were taken to ensure that these settlements did not become void
12 for lack of funding. [Request for Judicial Notice, Exhibits A and B.] The deposit of
13 funds by Arch and ACE has served to maintain the status quo for all of their
14 Insureds, and all Insureds retain the right to oppose the final approval of the
15 settlements and their funding with insurance proceeds.

16 In addition, the preliminary funding of the settlements is consistent with the
17 strong California public policy favoring the settlement of litigation. *Salmon*
18 *Protection and Watershed Network v. County of Marin* 205 Cal.App.4th 195, 201
19 (Cal. App. Ct. 2012) (noting that the California Supreme Court recognized a century
20 ago that settlement agreements "are highly favored as productive of peace and good
21 will in the community," as well as "reducing the expense and persistency of
22 litigation," and that "[t]he need for settlements is greater than ever before" because
23 "[w]ithout them our system of civil adjudication would quickly break down").

24 However, if this Court believes that the deposit by Arch and ACE is
25 inconsistent with the interests of any of the Insureds, the Court possesses various
26 options to address the issues. First, this Court may issue an injunction staying the
27 Tripp, Daniels and MBS actions pending resolution of this interpleader or some

28

1 other interlocutory event. *Major Oil Corp.*, 583 F.2d at 1158. Indeed, one of the
2 most basic equitable 'trailings' attendant upon the vintage interpleader proceeding is
3 that injunctive relief is especially proper where there are numerous claimants and
4 where such relief would prevent a multiplicity of lawsuits. *Id.* at 1157.

5 Second, this Court can set the hearing for the resolution of the priority of the
6 competing claims for a date prior to the December 18, 2012 final approval hearing
7 in MBS.

8 Third, if the Court believes that the preliminary funding of the settlement was
9 improper, the Court can utilize its injunctive power to either direct Judge Wu and
10 Judge Kaplan to freeze the funds in escrow or to transfer those funds into an escrow
11 account under the control of this Court.

12 Other options are available, and Plaintiffs herein invite this Court to take
13 these or any other steps it deems necessary.

14 Finally, approximately \$2 million of the remaining ACE policy limit and the
15 entire \$10 million limit of the AXIS policy remain in control of ACE and AXIS.
16 ACE and AXIS will deposit the remainder of their respective policy limits into the
17 Court registry upon the entry of a Court order directing them to do so to effectuate
18 discharge.

19
20 **IV. CONCLUSION**

21 Because this is a clear case for Rule 22 interpleader, the Side A Insurers
22 respectfully request that the Court execute the proposed Order submitted herewith
23 and (1) discharge Plaintiffs of any further liability to Defendants upon deposit of
24 their remaining policy limits, (2) dismiss Plaintiffs from this lawsuit, (3) enjoin
25 Defendants from pursuing any other actions against Plaintiffs regarding the 07-08
26 Side A Policies, and (4) grant any other relief it deems necessary or expedient to
27 preserve any prejudiced to the Insureds.

EXHIBIT B

E-Filed 6/26/2012

1 Jack R. Nelson (SBN 111863)
jnelson@reedsmith.com
2 David De Jesus (SBN 173263)
ddejesus@reedsmith.com
3 Alicia A. Adornato (SBN 254228)
aadornato@reedsmith.com
4 REED SMITH LLP
101 Second Street, Suite 1800
5 San Francisco, CA 94105
Telephone: +1 415 543 8700
6 Facsimile: +1 415 391 8269

7 T. Thomas Cottingham, III (*admitted pro hac vice*)
tcottingham@winston.com
8 Stacie C. Knight (*admitted pro hac vice*)
sknight@winston.com
9 WINSTON & STRAWN LLP
214 North Tryon Street
10 Charlotte, NC 28202-1078
Telephone: +1 704 350 7700
11 Facsimile: +1 704 350 7800

12 Attorneys for Defendants
WACHOVIA MORTGAGE, FSB, WACHOVIA
13 BANK, FSB, AND GOLDEN WEST
FINANCIAL CORPORATION
14

15
16 **UNITED STATES DISTRICT COURT**
NORTHERN DISTRICT OF CALIFORNIA
17 **SAN JOSE DIVISION**

18 IN RE: WACHOVIA CORP.
"PICK-A-PAYMENT" MORTGAGE
19 MARKETING AND SALES PRACTICES
LITIGATION

Case No. M:09-cv-2015-JF

**[PROPOSED] ORDER GRANTING JOINT
MOTION FOR REIMBURSEMENT OF
EXCESS ADMINISTRATION EXPENSES
AND DISTRIBUTION OF UNCLAIMED
FUNDS**

20 This document relates to:

21
22 *ALL CASES*

Date: TBD
Time: TBD
Courtroom: 3

Honorable Jeremy Fogel

REED SMITH LLP
A limited liability partnership formed in the State of Delaware

23
24
25
26
27
28

1 The Parties' Joint Motion for Reimbursement of Excess Administration Expenses and
2 Distribution of Unclaimed Funds was duly presented to the Court. Having considered all of the
3 parties' arguments, good cause appearing therein, and for the reasons set forth in the Motion, the
4 Court orders that the Joint Motion for Reimbursement of Excess Administration Expenses and
5 Distribution of Unclaimed Funds is hereby GRANTED.

6 Therefore, the Court approves the distribution plan set forth below, and directs that the
7 Settlement Administrator may and shall release the Unclaimed Funds to the Parties, which shall be
8 distributed as set forth below:

9 First, Defendants will be reimbursed for \$1,875,874.24 million in Administration Expenses;

10 Second, Plaintiffs will distribute \$2,560,000 as follows: (a) \$1,250,000 To National
11 Consumer Law Center; (b) \$1,000,000 to Public Justice; and (c) \$310,000 to National Association of
12 Consumer Advocates;

13 Third, the Defendants will distribute the remaining balance to the following non-profit
14 organizations: NeighborWorks America, National Foundation for Credit Counseling, Alliance for
15 Stabilizing Our Communities, Housing Partnership Network, and the NCRC Housing Counseling
16 Network.

17 **IT IS SO ORDERED.**

18
19 DATED: June 26, 2012.

20
21 
22 HONORABLE JEREMY FOGEL
23 UNITED STATES DISTRICT COURT
24
25
26
27
28

EXHIBIT C

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

WAYMAN TRIPP and SVEN
MOSSBERG, Individually and on Behalf
of all Others Similarly Situated,

Plaintiffs,

v.

INDYMAC BANCORP, INC. and
MICHAEL W. PERRY,

Defendants.

Case No. 2:07-CV-1635-GW (VBK)

**[PROPOSED] ORDER AND
FINAL JUDGMENT**

1 WHEREAS, a consolidated class action is pending in this Court captioned *Sven*
2 *Mossberg, et al. v. IndyMac Bancorp, Inc., et al.*, Case No. 2:07-CV-1635-GW
3 (VBK) (the “Action”);

4 WHEREAS, this matter came before the Court for hearing pursuant to the
5 Order Preliminarily Approving Settlement dated _____, August 10, 2012
6 (the “Preliminary Approval Order”), on the application of the parties for approval of
7 the settlement set forth in the Stipulation and Agreement of Settlement dated June 25,
8 2012 (the “Stipulation”) entered into by Sven Mossberg (the “Lead Plaintiff”), on
9 behalf of himself and the certified Class (as defined herein), and defendant Michael
10 W. Perry (the “Defendant”), by and through their respective counsel; and

11 WHEREAS, due and adequate notice having been given to the certified Class,
12 pursuant to the Preliminary Approval Order, and the Court having considered all
13 papers filed and proceedings had herein and otherwise being fully informed in the
14 premises and good cause appearing therefore;

15 IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

16 1. This Order and Final Judgment (the “Judgment”) incorporates by
17 reference the definitions in the Stipulation and all terms used herein shall have the
18 same meanings as set forth in the Stipulation.

19 2. This Court has jurisdiction over the subject matter of the Action, and
20 over all Parties to the Action, including all members of the Class.

21 3. The Notice of Pendency of Class Action and Proposed Settlement,
22 Motion for Attorneys’ Fees and Expenses and Settlement Fairness Hearing (“Notice”)
23 has been given to the Class, pursuant to and in the manner directed by the Preliminary
24 Approval Order, proof of the mailing of the Notice was filed with the Court by Lead
25 Counsel, and a full opportunity to be heard has been offered to all Parties, the Class,
26 and Persons in interest. The form and manner of the Notice is hereby determined to
27 have been the best notice practicable under the circumstances and to have been given
28

1 in full compliance with each of the requirements of Fed. R. Civ. P. 23, and it is
2 further determined that all members of the Class are bound by the Judgment herein.¹

3 4. The Settlement, and all transactions preparatory or incident thereto, is
4 found to be fair, reasonable, adequate, and in the best interests of the Class, and it is
5 hereby approved. The Parties to the Stipulation are hereby authorized and directed to
6 comply with and to consummate the Settlement in accordance with its terms and
7 provisions; and the Clerk of this Court is directed to enter and docket this Judgment in
8 the Action.

9 5. The Action and all claims included therein, as well as all of the Released
10 Claims (defined in the Stipulation and in Paragraph 6(b) below) are dismissed with
11 prejudice as to Lead Plaintiff and the other members of the Class, and as against each
12 and all of the Released Parties (defined in the Stipulation and in Paragraph 6(a)
13 below). The Parties are to bear their own costs, except as otherwise provided in the
14 Stipulation.

15 6. As used in this Judgment, the terms "Released Parties," "Released
16 Claims," "Settled Parties' Claims," and "Unknown Claims" shall have the meanings
17 as provided in the Stipulation, and specified below:

18 (a) "Released Parties" means the Defendant, all former co-defendants,
19 and all of their related parties, including their respective past and present agents,
20 associates, attorneys (including Defendant's Counsel), advisors, spouses, family
21 members, partners, trustees, executors, estates, administrators, subsidiaries, affiliates,
22 predecessors, successors, assigns and insurers.

23 (b) "Released Claims" means any and all claims, causes of action,
24 demands, rights, obligations, duties, damages, losses, costs, expenses, matters and
25 issues of every nature and description whatsoever, whether known or unknown,
26 whether accrued or unaccrued, whether legal or equitable, whether contingent or

27 ¹ Attached hereto as Exhibit A is a list of those Persons who excluded themselves
28 from the Class pursuant to the requirements set forth in the Notice.

1 absolute, whether suspected or unsuspected, whether disclosed or undisclosed,
2 whether liquidated or unliquidated, that arise out of or relate in any way to the subject
3 matter of the Action and/or the purchase or acquisition of IndyMac common stock
4 during the Class Period and shall include (without limitation) (i) all claims or causes
5 of action that have been asserted by or on behalf of Lead Plaintiff or any member of
6 the Class in the Action, or (ii) all claims or causes of action that could have been
7 asserted in any forum by or on behalf of Lead Plaintiff or any member of the Class
8 against any of the Released Parties that arise out of or relate in any way to the
9 allegations, transactions, facts, matters or occurrences, representations or omissions
10 involved, set forth or referred to in the Complaint or any prior complaint in the
11 Action, and that relate to the purchase or acquisition of IndyMac common stock
12 during the Class Period. Notwithstanding the foregoing, "Released Claims" does not
13 include any of the claims asserted in *Daniels v. Perry, et al.*, Case No. 08-cv-3812
14 (C.D. Cal.).

15 (c) "Settled Parties' Claims" means any and all claims, causes of
16 action, demands, rights, obligations, duties, damages, losses, costs, expenses, matters
17 and issues of every nature and description whatsoever, whether known or unknown,
18 whether accrued or unaccrued, whether legal or equitable, whether contingent or
19 absolute, whether suspected or unsuspected, whether disclosed or undisclosed,
20 whether liquidated or unliquidated, that have been or could have been asserted in the
21 Action or any forum by the Released Parties or any of them or the successors and
22 assigns of any of them against Lead Plaintiff, any Class Member or their attorneys,
23 which arise out of or relate in any way to the institution, prosecution, or settlement of
24 the Action (except for claims to enforce the Settlement and claims by the Defendant
25 for insurance coverage).

26 (d) "Unknown Claims" means any and all Released Claims that Lead
27 Plaintiff and/or any Class Member does not know or suspect to exist in his, her or its
28 favor as of the Effective Date and any Settled Parties' Claims that any Released Party

1 does not know or suspect to exist in his, her or its favor as of the Effective Date,
2 which if known by him, her or it might have affected his, her or its decision(s) with
3 respect to the Settlement. With respect to any and all Released Claims and Settled
4 Parties' Claims, the Parties stipulate and agree that upon the Effective Date, Lead
5 Plaintiff and the Defendant shall expressly waive, and each Class Member and
6 Released Party shall be deemed to have waived, and by operation of the Judgment
7 shall expressly have waived, any and all provisions, rights and benefits conferred by
8 any law of any state of the United States, or principle of common law or otherwise,
9 which is similar, comparable, or equivalent to California Civil Code § 1542, which
10 provides:

11 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
12 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
13 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN
14 BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER
15 SETTLEMENT WITH THE DEBTOR.

16 The Parties acknowledge (a) that they may discover facts that are in addition to or
17 different from those which they now believe to be true and have taken that possibility
18 into account in reaching this Settlement; (b) that the releases granted in connection
19 with the Settlement shall remain valid and binding notwithstanding the discovery or
20 existence of any such additional or different facts; (c) that they are relying on their
21 own judgment and not on any representations of an opposing party or opposing
22 counsel in evaluating the released claims; (d) that they have received, and relied
23 upon, independent advice from their advisors regarding the value of the released
24 claims; (e) that the actual value of the Released Claims may be above or below the
25 Settlement Amount; and (f) that the releases granted in the Settlement shall remain
26 valid and binding even if they in the future sustain unanticipated additional damages,
27 losses, costs or expenses arising out of or relating to any claim released as part of the
28 Settlement. The Parties acknowledge, and Class Members and Released Parties by

1 operation of law shall be deemed to have acknowledged, that the inclusion of
2 “Unknown Claims” in the definition of Released Claims and Settled Parties’ Claims
3 was separately bargained for and was a key element of the Settlement.

4 7. Upon the Effective Date of the Settlement, Lead Plaintiff and members
5 of the Class, on behalf of themselves and each of their heirs, executors,
6 administrators, successors, and assigns, shall, with respect to each and every Released
7 Claim, release and forever discharge, and shall forever be enjoined from filing,
8 prosecuting, or otherwise pursuing any Released Claims against any of the Released
9 Parties.

10 8. Upon the Effective Date of the Settlement, each of the Released Parties,
11 on behalf of themselves and each of their heirs, executors, administrators, successors,
12 and assigns, shall, with respect to each and every Settled Parties’ Claim, release and
13 forever discharge, and shall forever be enjoined from filing, prosecuting, or otherwise
14 pursuing any of the Settled Parties’ Claims.

15 9. The Court hereby enters a bar order, pursuant to Section 21D of the
16 Securities Exchange Act of 1934, 15 U.S.C. §78u-4(f)(7)(A), barring and enjoining
17 the prosecution of all claims by any Person against the Defendant, or by the
18 Defendant against any Person, other than a person whose liability has been
19 extinguished by the Settlement, for contribution or indemnification arising from the
20 Action, any claim asserted in the Action, or any claim based, in whole or in part, upon
21 the subject matter of any of the Settled Claims. This provision shall not be construed
22 to bar or enjoin Defendant from obtaining insurance coverage for the Settlement
23 Amount.

24 10. Nothing in the Stipulation, the MOU, or any related negotiations or
25 discussions, shall (a) constitute an admission of liability, fault, or wrongdoing by any
26 Party or an admission concerning the scope of damages sustained by any Party, or (b)
27 be offered or received in evidence or otherwise introduced or invoked in the Action or
28 any other civil, criminal or administrative proceedings for any purpose other than

1 enforcing the terms of the Settlement, defending against claims released by the
2 Settlement, or (in the case of the Stipulation only) litigating any appeal relating to the
3 Court's approval or rejection of the Settlement.

4 11. The Plan of Allocation is approved as fair and reasonable, and Lead
5 Counsel and the Claims Administrator are directed to administer the Settlement in
6 accordance with the terms and provisions of the Stipulation. Neither Defendant nor
7 the Released Parties shall have any responsibility or liability for the Plan of
8 Allocation, the administration of the Settlement, or the distribution of the Settlement
9 Fund.

10 12. The Court finds that all Parties and their counsel have complied with
11 each requirement of the Private Securities Litigation Reform Act of 1995 and Rule 11
12 of the Federal Rules of Civil Procedure as to all proceedings herein.

13 13. Only those Class Members filing valid Proof of Claim and Release forms
14 ("Proofs of Claim") shall be entitled to participate in the Settlement and to receive a
15 distribution from the Settlement Fund. The Proof of Claim to be executed by the
16 Class Members shall further release all Released Claims against the Released Parties.
17 All Class Members shall, as of the Effective Date, be bound by the releases set forth
18 herein whether or not they submit a valid and timely Proof of Claim.

19 14. No Authorized Claimant shall have any claim against Lead Plaintiff,
20 Plaintiffs' Counsel, the Claims Administrator, or any other agent designated by Lead
21 Counsel based on the distributions made substantially in accordance with the
22 Settlement and Plan of Allocation as approved by the Court and further orders of the
23 Court. No Authorized Claimant shall have any claim against the Defendant,
24 Defendant's Counsel, or any of the Released Parties with respect to the investment or
25 distribution of the Net Settlement Fund, the determination, administration, calculation
26 or payment of claims, the administration of the escrow account, or any losses incurred
27 in connection therewith, the Plan of Allocation, or the giving of notice to Class
28 Members.

1 15. Lead Counsel is hereby awarded attorneys' fees in the amount of ____%
2 of the Settlement Fund, which sum the Court finds to be fair and reasonable. Lead
3 Counsel is hereby awarded a total of \$_____ in reimbursement of expenses. The
4 foregoing awards of fees and expenses shall be paid to Lead Counsel from the
5 Settlement Fund, and such payment shall be made at the time and in the manner
6 provided in the Stipulation, with interest from the date the Settlement Amount was
7 funded to the date of payment at the same net rate that interest is earned by the
8 Settlement Fund. The award of attorneys' fees and expenses shall be allocated among
9 Plaintiffs' Counsel in a fashion which, in the opinion of Lead Counsel, fairly
10 compensates Plaintiffs' Counsel for their respective contributions in the prosecution
11 of the Action. Neither the Defendant nor any of the Released Parties shall have any
12 liability or responsibility for the allocation of the award of attorneys' fees and
13 expenses among Plaintiffs' Counsel.

14 16. In making this award of attorneys' fees and reimbursement of expenses
15 to be paid from the Settlement Fund, the Court has considered and found that:

16 (a) the Settlement has created a fund of \$5,500,000 in cash that is
17 already on deposit, plus interest thereon, and that numerous Class Members who
18 submit acceptable Proofs of Claim will benefit from the Settlement;

19 (b) Over 75,500 copies of the Notice were disseminated to
20 putative Class Members indicating that Lead Counsel was moving for attorneys' fees
21 not to exceed 25% of the Settlement Fund and reimbursement of expenses from the
22 Settlement Fund in a total amount not to exceed \$525,000, and [] not one Class
23 Member has filed an objection was filed against the terms of the proposed Settlement
24 or the ceiling on the fees and expenses contained in the Notice;

25 (c) Lead Counsel has conducted the litigation and achieved the
26 Settlement with skill, perseverance and diligent advocacy;

27 (d) The Action involves complex factual and legal issues and was
28 actively prosecuted for several years and, in the absence of a settlement, would

1 involve further lengthy proceedings with uncertain resolution of the complex factual
2 and legal issues;

3 (e) Had Lead Counsel not achieved the Settlement there would remain
4 a significant risk that Lead Plaintiff and the Class may have recovered less or nothing
5 at all from the Defendant;

6 (f) ~~Plaintiffs' Lead Counsel have~~ has devoted over ~~_____~~ 9,363 hours,
7 with a lodestar value of \$ ~~_____~~, \$4,387,416.75, to the prosecution of the
8 Action to achieve the Settlement; and

9 (g) The amount of attorneys' fees awarded and expenses reimbursed
10 from the Settlement Fund are fair and reasonable and consistent with awards in
11 similar cases.

12 ~~17. The Court hereby awards \$ _____ to Lead Plaintiff as~~
13 ~~reimbursement for his reasonable costs and expenses (including lost wages) incurred~~
14 ~~in serving as the class representative and representing the Class during the~~
15 ~~prosecution of this Action.~~

16 ~~18-17.~~ Without affecting the finality of this Judgment in any way, the Court
17 reserves exclusive and continuing jurisdiction over the Action, Lead Plaintiff, the
18 Class, and the Released Parties for the purposes of: (1) supervising the
19 implementation, enforcement, construction, and interpretation of the Stipulation, the
20 Plan of Allocation, and this Judgment;; and (2) supervising the distribution of the
21 Settlement Fund.

22 ~~19-18.~~ In the event that the Settlement does not become effective in accordance
23 with the terms of the Stipulation or in the event that the Settlement Fund, or any
24 portion thereof, is returned to the Defendant, then this Judgment shall be rendered
25 null and void to the extent provided by and in accordance with the Stipulation and
26 shall be vacated and, in such event, all orders entered and releases delivered in
27 connection herewith shall be null and void to the extent provided by and in
28 accordance with the Stipulation.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

~~20~~.19. There is no reason for delay in the entry of this Judgment and immediate entry by the Clerk of the Court is expressly directed pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

Dated: _____

The Honorable George H. Wu
United States District Judge

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT A

List of Persons Excluded from the Class

<u>Name</u>	<u>City/State</u>	<u>Number of Shares</u>
<u>Thomas L. Curth</u>	<u>Indio, CA</u>	<u>140 shares</u>

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

WAYMAN TRIPP and SVEN
MOSSBERG, Individually and on Behalf
of all Others Similarly Situated,

Plaintiffs,

v.

INDYMAC BANCORP, INC. and
MICHAEL W. PERRY,

Defendants.

Case No. 2:07-CV-1635-GW (VBK)

**[PROPOSED] ORDER AND
FINAL JUDGMENT**

1 WHEREAS, a consolidated class action is pending in this Court captioned *Sven*
2 *Mossberg, et al. v. IndyMac Bancorp, Inc., et al.*, Case No. 2:07-CV-1635-GW
3 (VBK) (the “Action”);

4 WHEREAS, this matter came before the Court for hearing pursuant to the
5 Order Preliminarily Approving Settlement dated August 10, 2012 (the “Preliminary
6 Approval Order”), on the application of the parties for approval of the settlement set
7 forth in the Stipulation and Agreement of Settlement dated June 25, 2012 (the
8 “Stipulation”) entered into by Sven Mossberg (the “Lead Plaintiff”), on behalf of
9 himself and the certified Class (as defined herein), and defendant Michael W. Perry
10 (the “Defendant”), by and through their respective counsel; and

11 WHEREAS, due and adequate notice having been given to the certified Class,
12 pursuant to the Preliminary Approval Order, and the Court having considered all
13 papers filed and proceedings had herein and otherwise being fully informed in the
14 premises and good cause appearing therefore;

15 IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

16 1. This Order and Final Judgment (the “Judgment”) incorporates by
17 reference the definitions in the Stipulation and all terms used herein shall have the
18 same meanings as set forth in the Stipulation.

19 2. This Court has jurisdiction over the subject matter of the Action, and
20 over all Parties to the Action, including all members of the Class.

21 3. The Notice of Pendency of Class Action and Proposed Settlement,
22 Motion for Attorneys’ Fees and Expenses and Settlement Fairness Hearing (“Notice”)
23 has been given to the Class, pursuant to and in the manner directed by the Preliminary
24 Approval Order, proof of the mailing of the Notice was filed with the Court by Lead
25 Counsel, and a full opportunity to be heard has been offered to all Parties, the Class,
26 and Persons in interest. The form and manner of the Notice is hereby determined to
27 have been the best notice practicable under the circumstances and to have been given
28

1 in full compliance with each of the requirements of Fed. R. Civ. P. 23, and it is
2 further determined that all members of the Class are bound by the Judgment herein.¹

3 4. The Settlement, and all transactions preparatory or incident thereto, is
4 found to be fair, reasonable, adequate, and in the best interests of the Class, and it is
5 hereby approved. The Parties to the Stipulation are hereby authorized and directed to
6 comply with and to consummate the Settlement in accordance with its terms and
7 provisions; and the Clerk of this Court is directed to enter and docket this Judgment in
8 the Action.

9 5. The Action and all claims included therein, as well as all of the Released
10 Claims (defined in the Stipulation and in Paragraph 6(b) below) are dismissed with
11 prejudice as to Lead Plaintiff and the other members of the Class, and as against each
12 and all of the Released Parties (defined in the Stipulation and in Paragraph 6(a)
13 below). The Parties are to bear their own costs, except as otherwise provided in the
14 Stipulation.

15 6. As used in this Judgment, the terms “Released Parties,” “Released
16 Claims,” “Settled Parties’ Claims,” and “Unknown Claims” shall have the meanings
17 as provided in the Stipulation, and specified below:

18 (a) “Released Parties” means the Defendant, all former co-defendants,
19 and all of their related parties, including their respective past and present agents,
20 associates, attorneys (including Defendant’s Counsel), advisors, spouses, family
21 members, partners, trustees, executors, estates, administrators, subsidiaries, affiliates,
22 predecessors, successors, assigns and insurers.

23 (b) “Released Claims” means any and all claims, causes of action,
24 demands, rights, obligations, duties, damages, losses, costs, expenses, matters and
25 issues of every nature and description whatsoever, whether known or unknown,
26 whether accrued or unaccrued, whether legal or equitable, whether contingent or

27 ¹ Attached hereto as Exhibit A is a list of those Persons who excluded themselves
28 from the Class pursuant to the requirements set forth in the Notice.

1 absolute, whether suspected or unsuspected, whether disclosed or undisclosed,
2 whether liquidated or unliquidated, that arise out of or relate in any way to the subject
3 matter of the Action and/or the purchase or acquisition of IndyMac common stock
4 during the Class Period and shall include (without limitation) (i) all claims or causes
5 of action that have been asserted by or on behalf of Lead Plaintiff or any member of
6 the Class in the Action, or (ii) all claims or causes of action that could have been
7 asserted in any forum by or on behalf of Lead Plaintiff or any member of the Class
8 against any of the Released Parties that arise out of or relate in any way to the
9 allegations, transactions, facts, matters or occurrences, representations or omissions
10 involved, set forth or referred to in the Complaint or any prior complaint in the
11 Action, and that relate to the purchase or acquisition of IndyMac common stock
12 during the Class Period. Notwithstanding the foregoing, "Released Claims" does not
13 include any of the claims asserted in *Daniels v. Perry, et al.*, Case No. 08-cv-3812
14 (C.D. Cal.).

15 (c) "Settled Parties' Claims" means any and all claims, causes of
16 action, demands, rights, obligations, duties, damages, losses, costs, expenses, matters
17 and issues of every nature and description whatsoever, whether known or unknown,
18 whether accrued or unaccrued, whether legal or equitable, whether contingent or
19 absolute, whether suspected or unsuspected, whether disclosed or undisclosed,
20 whether liquidated or unliquidated, that have been or could have been asserted in the
21 Action or any forum by the Released Parties or any of them or the successors and
22 assigns of any of them against Lead Plaintiff, any Class Member or their attorneys,
23 which arise out of or relate in any way to the institution, prosecution, or settlement of
24 the Action (except for claims to enforce the Settlement and claims by the Defendant
25 for insurance coverage).

26 (d) "Unknown Claims" means any and all Released Claims that Lead
27 Plaintiff and/or any Class Member does not know or suspect to exist in his, her or its
28 favor as of the Effective Date and any Settled Parties' Claims that any Released Party

1 does not know or suspect to exist in his, her or its favor as of the Effective Date,
2 which if known by him, her or it might have affected his, her or its decision(s) with
3 respect to the Settlement. With respect to any and all Released Claims and Settled
4 Parties' Claims, the Parties stipulate and agree that upon the Effective Date, Lead
5 Plaintiff and the Defendant shall expressly waive, and each Class Member and
6 Released Party shall be deemed to have waived, and by operation of the Judgment
7 shall expressly have waived, any and all provisions, rights and benefits conferred by
8 any law of any state of the United States, or principle of common law or otherwise,
9 which is similar, comparable, or equivalent to California Civil Code § 1542, which
10 provides:

11 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE
12 CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER
13 FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN
14 BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER
15 SETTLEMENT WITH THE DEBTOR.

16 The Parties acknowledge (a) that they may discover facts that are in addition to or
17 different from those which they now believe to be true and have taken that possibility
18 into account in reaching this Settlement; (b) that the releases granted in connection
19 with the Settlement shall remain valid and binding notwithstanding the discovery or
20 existence of any such additional or different facts; (c) that they are relying on their
21 own judgment and not on any representations of an opposing party or opposing
22 counsel in evaluating the released claims; (d) that they have received, and relied
23 upon, independent advice from their advisors regarding the value of the released
24 claims; (e) that the actual value of the Released Claims may be above or below the
25 Settlement Amount; and (f) that the releases granted in the Settlement shall remain
26 valid and binding even if they in the future sustain unanticipated additional damages,
27 losses, costs or expenses arising out of or relating to any claim released as part of the
28 Settlement. The Parties acknowledge, and Class Members and Released Parties by

1 operation of law shall be deemed to have acknowledged, that the inclusion of
2 “Unknown Claims” in the definition of Released Claims and Settled Parties’ Claims
3 was separately bargained for and was a key element of the Settlement.

4 7. Upon the Effective Date of the Settlement, Lead Plaintiff and members
5 of the Class, on behalf of themselves and each of their heirs, executors,
6 administrators, successors, and assigns, shall, with respect to each and every Released
7 Claim, release and forever discharge, and shall forever be enjoined from filing,
8 prosecuting, or otherwise pursuing any Released Claims against any of the Released
9 Parties.

10 8. Upon the Effective Date of the Settlement, each of the Released Parties,
11 on behalf of themselves and each of their heirs, executors, administrators, successors,
12 and assigns, shall, with respect to each and every Settled Parties’ Claim, release and
13 forever discharge, and shall forever be enjoined from filing, prosecuting, or otherwise
14 pursuing any of the Settled Parties’ Claims.

15 9. The Court hereby enters a bar order, pursuant to Section 21D of the
16 Securities Exchange Act of 1934, 15 U.S.C. §78u-4(f)(7)(A), barring and enjoining
17 the prosecution of all claims by any Person against the Defendant, or by the
18 Defendant against any Person, other than a person whose liability has been
19 extinguished by the Settlement, for contribution or indemnification arising from the
20 Action, any claim asserted in the Action, or any claim based, in whole or in part, upon
21 the subject matter of any of the Settled Claims. This provision shall not be construed
22 to bar or enjoin Defendant from obtaining insurance coverage for the Settlement
23 Amount.

24 10. Nothing in the Stipulation, the MOU, or any related negotiations or
25 discussions, shall (a) constitute an admission of liability, fault, or wrongdoing by any
26 Party or an admission concerning the scope of damages sustained by any Party, or (b)
27 be offered or received in evidence or otherwise introduced or invoked in the Action or
28 any other civil, criminal or administrative proceedings for any purpose other than

1 enforcing the terms of the Settlement, defending against claims released by the
2 Settlement, or (in the case of the Stipulation only) litigating any appeal relating to the
3 Court's approval or rejection of the Settlement.

4 11. The Plan of Allocation is approved as fair and reasonable, and Lead
5 Counsel and the Claims Administrator are directed to administer the Settlement in
6 accordance with the terms and provisions of the Stipulation. Neither Defendant nor
7 the Released Parties shall have any responsibility or liability for the Plan of
8 Allocation, the administration of the Settlement, or the distribution of the Settlement
9 Fund.

10 12. The Court finds that all Parties and their counsel have complied with
11 each requirement of the Private Securities Litigation Reform Act of 1995 and Rule 11
12 of the Federal Rules of Civil Procedure as to all proceedings herein.

13 13. Only those Class Members filing valid Proof of Claim and Release forms
14 ("Proofs of Claim") shall be entitled to participate in the Settlement and to receive a
15 distribution from the Settlement Fund. The Proof of Claim to be executed by the
16 Class Members shall further release all Released Claims against the Released Parties.
17 All Class Members shall, as of the Effective Date, be bound by the releases set forth
18 herein whether or not they submit a valid and timely Proof of Claim.

19 14. No Authorized Claimant shall have any claim against Lead Plaintiff,
20 Plaintiffs' Counsel, the Claims Administrator, or any other agent designated by Lead
21 Counsel based on the distributions made substantially in accordance with the
22 Settlement and Plan of Allocation as approved by the Court and further orders of the
23 Court. No Authorized Claimant shall have any claim against the Defendant,
24 Defendant's Counsel, or any of the Released Parties with respect to the investment or
25 distribution of the Net Settlement Fund, the determination, administration, calculation
26 or payment of claims, the administration of the escrow account, or any losses incurred
27 in connection therewith, the Plan of Allocation, or the giving of notice to Class
28 Members.

1 15. Lead Counsel is hereby awarded attorneys' fees in the amount of ____%
2 of the Settlement Fund, which sum the Court finds to be fair and reasonable. Lead
3 Counsel is hereby awarded a total of \$_____ in reimbursement of expenses. The
4 foregoing awards of fees and expenses shall be paid to Lead Counsel from the
5 Settlement Fund, and such payment shall be made at the time and in the manner
6 provided in the Stipulation, with interest from the date the Settlement Amount was
7 funded to the date of payment at the same net rate that interest is earned by the
8 Settlement Fund. The award of attorneys' fees and expenses shall be allocated among
9 Plaintiffs' Counsel in a fashion which, in the opinion of Lead Counsel, fairly
10 compensates Plaintiffs' Counsel for their respective contributions in the prosecution
11 of the Action. Neither the Defendant nor any of the Released Parties shall have any
12 liability or responsibility for the allocation of the award of attorneys' fees and
13 expenses among Plaintiffs' Counsel.

14 16. In making this award of attorneys' fees and reimbursement of expenses
15 to be paid from the Settlement Fund, the Court has considered and found that:

16 (a) the Settlement has created a fund of \$5,500,000 in cash that is
17 already on deposit, plus interest thereon, and that numerous Class Members who
18 submit acceptable Proofs of Claim will benefit from the Settlement;

19 (b) Over 75,500 copies of the Notice were disseminated to putative
20 Class Members indicating that Lead Counsel was moving for attorneys' fees not to
21 exceed 25% of the Settlement Fund and reimbursement of expenses from the
22 Settlement Fund in a total amount not to exceed \$525,000, and not one Class Member
23 has filed an objection against the terms of the proposed Settlement or the ceiling on
24 the fees and expenses contained in the Notice;

25 (c) Lead Counsel has conducted the litigation and achieved the
26 Settlement with skill, perseverance and diligent advocacy;

27 (d) The Action involves complex factual and legal issues and was
28 actively prosecuted for several years and, in the absence of a settlement, would

1 involve further lengthy proceedings with uncertain resolution of the complex factual
2 and legal issues;

3 (e) Had Lead Counsel not achieved the Settlement there would remain
4 a significant risk that Lead Plaintiff and the Class may have recovered less or nothing
5 at all from the Defendant;

6 (f) Lead Counsel has devoted over 9,363 hours, with a lodestar value
7 of \$4,387,416.75, to the prosecution of the Action to achieve the Settlement; and

8 (g) The amount of attorneys' fees awarded and expenses reimbursed
9 from the Settlement Fund are fair and reasonable and consistent with awards in
10 similar cases.

11 17. Without affecting the finality of this Judgment in any way, the Court
12 reserves exclusive and continuing jurisdiction over the Action, Lead Plaintiff, the
13 Class, and the Released Parties for the purposes of: (1) supervising the
14 implementation, enforcement, construction, and interpretation of the Stipulation, the
15 Plan of Allocation, and this Judgment; and (2) supervising the distribution of the
16 Settlement Fund.

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

24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

19. There is no reason for delay in the entry of this Judgment and immediate entry by the Clerk of the Court is expressly directed pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

IT IS SO ORDERED.

Dated: _____

The Honorable George H. Wu
United States District Judge

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EXHIBIT A

List of Persons Excluded from the Class

<u>Name</u>	<u>City/State</u>	<u>Number of Shares</u>
Thomas L. Curth	Indio, CA	140 shares