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26 As Chapter 7 Trustee

27 UNITED STATES BANKRUPTCY COURT
28 CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION

19 In re) Case No.: 2:08-21752-BB
20 INDYMAC BANCORP, INC.) Chapter 7
21 a Delaware corporation,)
22 Debtor.)

23 Adversary No. _____
24)
25)
26)
27)

1 Alfred H. Siegel, as Trustee for the
2 Chapter 7 estate of INDYMAC
3 BANCORP, INC.

4 Plaintiff,

5 v.

6 FEDERAL DEPOSIT INSURANCE
7 CORPORATION,

8 Defendant.

} TRUSTEE'S COMPLAINT FOR
DECLARATORY RELIEF,
ENFORCEMENT OF THE
AUTOMATIC STAY,
ACCOUNTING, AND
SEGREGATION AND
SEQUESTRATION OF PROCEEDS
FROM SALE PENDING
DETERMINATION OF
ALLOCATION OF PROCEEDS

9
10 **COMPLAINT¹**

11 Plaintiff Alfred H. Siegel (the "Trustee"), solely in his capacity as
12 Chapter 7 Trustee of the estate of IndyMac Bancorp, Inc. (the "Debtor"), by and
13 through his undersigned attorneys, for this Complaint avers upon knowledge as to
14 himself and his own acts, and upon information and belief as to all other matters as
15 follows:

16 **NATURE OF THE CASE**

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18 ¹ On February 23, 2009, the Bankruptcy Court directed the Trustee to file under
19 seal those textual references within the Trustee's Complaint for Declaratory Relief,
20 Enforcement of the Automatic Stay, Accounting, and Segregation and Sequestration
21 of Proceeds from Sale Pending Determination of Allocation of Proceeds that the
22 Trustee, in good faith, believes are subject to the Stipulated Protective Order Re:
23 Confidentiality and Non-Disclosures entered into by the Parties on January 27, 2009
24 (the "Protective Order"). The Bankruptcy Court further directed the Trustee to
25 redact any text in the Complaint that the Trustee, in good faith, believes is subject to
26 the Protective Order. Accordingly in furtherance of the Bankruptcy Court's directive
27 as well as the Protective Order between the Parties, attached hereto as Exhibit 1,
28 which the Trustee has filed under seal, is a complete and unredacted version of this
Complaint. Attached hereto as Exhibit 2, which the Trustee has filed under seal, is a
document that contains the text that the Trustee has redacted from the Complaint in
the order in which that text would otherwise have appeared in the Complaint (with
references to the relevant paragraphs in the Complaint where the text would
otherwise have appeared). With respect to the remaining exhibits, to the extent the
Trustee believes, in good faith, an exhibit is subject to the Protective Order, it has
filed that exhibit under seal and has noted the same herein.

1 and Statements of Financial Affairs filed by the Debtor were accompanied by broad
2 disclaimers regarding their incompleteness and potential inaccuracies, the Trustee
3 had no means to precisely identify the assets subject to the Transaction or to evaluate
4 the Debtor's interest in them. However, the limited documents that were in the
5 possession of the Trustee raised concerns that the FDIC, as Receiver for the Bank
6 and Conservator for New IndyMac, may possess assets of the Debtor and, therefore,
7 property of the Estate.

8 17. Accordingly, the Trustee filed a Motion for Expedited Issuance of Order
9 Authorizing Production of Documents and Oral Examination Pursuant to F.R.B.P.
10 2004 (the "2004 Motion") on January 12, 2009. A hearing was held on January 15,
11 2009 wherein the Court granted the Motion. The Order granting the Motion was
12 issued on January 21, 2009 (the "Order"), and it required the FDIC: (1) to make
13 available for review and copying the 188 boxes of documents from the Investigations
14 Inventory ("Index") provided by the FDIC that the Trustee identified in the first
15 bullet at 22:9-14 of Exhibit 2 to the 2004 Motion, (2) to make available for review
16 and copying additional boxes of documents from the Index that the Trustee identified
17 and that were reasonably likely to contain information of the kind specified in the
18 second bullet at 22:15-23:3 of Exhibit 2 to the 2004 Motion, (3) to produce to the
19 Trustee documents identified on the 2004 Motion's Exhibit 2 at paragraph 2 and,
20 with respect to paragraph 3 of the 2004 Motion, to produce documents pertaining to
21 the subject matter examination topics 1, 2, and 4 on page 24 of the 2004 Motion's
22 Exhibit 3, and (4) to make available for oral examination concerning the examination
23 topics set forth in the 2004 Motion's Exhibit 3 (with the exception of item 3 thereof)
24 two individuals.

1 18. Despite the Order, the FDIC produced documents subject to production
2 under the Order in an untimely fashion, thereby impeding the review and analysis of
3 them by the Trustee that the 2004 Motion and Order contemplated. Inter alia,

4 a. The FDIC's production of the first and second categories of materials
5 discussed in paragraph 17 was not substantially complete until February
6 10, 2009 (due to an inadvertent error, the production was completed in
7 full and received by the Trustee on February 13, 2009).

8 b. The FDIC waited until February 17, 2009—the evening before the first
9 deposition required by the Order—to produce nearly 15,000 pages of
10 documents responsive to the third category of materials discussed in
11 paragraph 17. This made it virtually impossible for the Trustee's
12 counsel to review such documents prior to the deposition or to question
13 the deponent, David Cooley, about them.

14 c. On February 20, 2009, after the completion of the second deposition
15 required by the Order, the FDIC withdrew claims of privilege as to, and
16 produced for the first time, over 800 documents (totaling nearly 50,000
17 pages). Withdrawing its claim of privilege as to these documents after
18 the second deposition made it impossible for the Trustee's counsel to
19 make use of such documents in connection with either of the ordered
20 depositions.

21 d. Most importantly, as of the date hereof, the FDIC still has not produced
22 any schedules (either in draft or final form) to the various draft purchase
23 and sale agreements it has produced, which would identify the specific
24 assets (including physical assets) that are subject to the Transaction.
25 Such omissions from the FDIC's productions are especially troubling in
26 light of Mr. Cooley's February 18, 2009 examination testimony that the
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1 FDIC had shared with the purchasers some of the schedules of assets as
2 well as some of the schedules of excluded assets to the draft purchase
3 and sale agreements it had produced. (See Ex. 3, Cooley Tr. at 156:16-
4 21.)

5 19. In addition to the deficiencies in the FDIC's document production under
6 the Order, the FDIC failed to produce a witness who could, as required under the
7 Order, address what assets comprise the Transaction, what the FDIC's
8 representations were with respect to such assets, or the specific basis or bases upon
9 which the FDIC believes that such assets are the property of New IndyMac. Indeed,
10 after examining Mr. Cooley, who was not sufficiently knowledgeable or well-
11 informed to fully address these issues, the Trustee requested that the FDIC substitute
12 one of the two individuals Mr. Cooley identified as having personal knowledge of
13 the assets subject to the Transaction or another individual with the knowledge of the
14 same in place of George Alexander, the second of the FDIC's deponents. The FDIC
15 rejected the Trustee's request, indicating that the Trustee could either proceed with
16 the examination of Mr. Alexander or cancel that examination in exchange for being
17 able to pose five interrogatories (including subparts) to the FDIC regarding the
18 physical asset category of furniture, fixtures and equipment only. Lacking any
19 alternatives, the Trustee examined Mr. Alexander on February 20, 2009. Mr.
20 Alexander was unable to speak with any precision on key aspects of the Order's
21 examination topics. (See Ex. 4, February 19, 2009 letter from B. Klubes to A.
22 Ickowitz.)

23 20. Despite the FDIC's approach to its discovery obligations under the Order,
24 the Trustee has managed to gather evidence in the form of documents and certain
25 oral testimony of Messrs. Cooley and Alexander to indicate that the FDIC has
26 possession of a number of assets of the Debtor and, therefore, the Estate, of
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1 substantial value. The FDIC does not dispute the Estate's ownership of these assets,
2 but only represents that those assets are not subject to the Transaction.

3 21. In addition, the Trustee has identified other categories of assets with
4 respect to which, based on documentary and testimonial evidence, it remains unclear
5 as to whether such assets are owned by the Estate or the Bank, and/or whether such
6 assets are subject to the Transaction.

7 **ESTATE ASSETS OR POTENTIAL ASSETS AT ISSUE**

8 22. As described in more detail in the following sections of this Complaint,
9 the Trustee alleges upon knowledge or on information and belief that the FDIC has
10 offered or may be offering for sale as part of the Transaction the following assets
11 comprising property of the Estate:

- 12 a. assets identified on the Debtor's Trial Balance as of July 11, 2008, the
13 date of the bankruptcy filing, as well as securities identified by the
14 FDIC as owned by the Debtor;
- 15 b. certain tangible property that the FDIC's own list of physical assets,
16 which was provided to prospective purchasers of New IndyMac assets,
17 indicates belonged to the Debtor and, thus, is now property of the Estate;
- 18 c. other physical assets (including furniture, fixtures, equipment, and
19 leasehold improvements) that may belong both to the Debtor and to
20 New IndyMac (the "Shared Assets") because (i) such assets are located
21 in facilities that the Debtor and the Bank shared and in which
22 departments and employees that were shared by the Debtor and the
23 Bank operated, (ii) the Expense Allocation Agreement between the
24 Debtor and the Bank as well as corporate policies and practices
25 regarding how to allocate depreciation of these assets, demonstrate that
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1 the Debtor and the Bank shared expense and depreciation attributable to
2 such assets;
3 d. additional tangible assets, including a generator and furniture and
4 cabling at two distinct facilities the Debtor shared with the Bank, which
5 the Debtor appears to have purchased with its own funds; and
6 e. software and applications that appear to have been purchased and used
7 solely by the Debtor or shared by the Debtor and the Bank
8 (collectively, and as described in greater detail below, the "Disputed Property").

9 23. The FDIC succeeds only to the rights held by the Bank prior to
10 receivership and, thus, has no right to sell the above-referenced assets or to deprive
11 the Estate of adequate compensation for the value of such assets. Because these
12 assets are property of the Estate, the Estate's interest in such property extends to the
13 proceeds received from the sale, 11 U.S.C. § 541(a)(6), and such assets must be
14 eliminated from the sale and turned over to the Trustee or, if sold, the proceeds of
15 their sale must be remitted to the Estate promptly following the closing of the
16 transaction.

17 **I. UNDISPUTED ASSETS OF THE DEBTOR IDENTIFIED ON**
18 **THE DEBTOR'S JULY 11, 2008 TRIAL BALANCE AND OTHER**
19 **SECURITIES**

20 24. The July 11, 2008 Trial Balance of the Debtor (the "Trial Balance")
21 identifies numerous assets of the Debtor. (Ex. 5.)

22 25. This paragraph redacted pursuant to the Protective Order and the Court's
23 directive as set forth in footnote 1, supra. (See Ex. 2.)

24 26. This paragraph redacted pursuant to the Protective Order and the Court's
25 directive as set forth in footnote 1, supra. (See Ex. 2.)

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1 27. Because these assets are the undisputed property of the Estate, they
2 cannot be part of the Transaction.

3 **II. TANGIBLE PROPERTY OWNED BY "BUSINESS UNIT 21"**

4 28. This paragraph redacted pursuant to the Protective Order and the
5 Court's directive as set forth in footnote 1, supra. (See Ex. 2.)

6 29. "Business Unit 21" is the accounting designation used by the Debtor and
7 the Bank to signify "IndyMac Bancorp, Inc." (See Ex. 7, IndyMac Bancorp, Inc. &
8 Subs., 2008 Taxable Income—Fed, As of 6/30/2008.)

9 30. This paragraph redacted pursuant to the Protective Order and the Court's
10 directive as set forth in footnote 1, supra. (See Ex. 2.)

11 31. This paragraph redacted pursuant to the Protective Order and the Court's
12 directive as set forth in footnote 1, supra. (See Ex. 2.)

13 32. In light of the above, the Debtor had and the Trustee has the exclusive
14 right to sell or otherwise alienate these assets. The FDIC has no demonstrated basis
15 to assert the Bank's ownership interest in these assets, and thus no corresponding
16 right to sell them.

17 **III. ASSETS SHARED BETWEEN THE DEBTOR AND THE BANK**

18 33. The Debtor, along with its subsidiaries and affiliates, occupied office
19 space in three locations in Pasadena, California (the "Pasadena Facilities"), which
20 served as the corporate headquarters of the Debtor. The three locations that
21 constitute the Pasadena Facilities are:

- 22 a. The "Foothill" facility, located at 3475 Foothill Boulevard, Pasadena,
23 California 91107;
24 b. The "Lake" facility, located at 155 North Lake Avenue, Pasadena,
25 California 91101; and
26 c. The building at 888 East Walnut Street, Pasadena, California, 91101.

1 (Exs. 9, Real Estate Lease Schedule dated February 11, 2009; 10, Cover Page for
2 Form 10-K for fiscal year ending December 31, 2007; 11, CNA Insurance Policy; 12,
3 2008 Notice of Annual Meeting of Shareholders.)

4 34. Certain corporate departments were shared by the Debtor and the Bank.
5 These departments were referred to as "Corporate Shared Services." (Exs. 13,
6 Organizational Chart dated March 23, 2007; 14, Shared Services Expense
7 Management PowerPoint presentation.)

8 35. The Corporate Shared Services included, but may not be limited to, the
9 following departments: Human Resources, Legal, Treasury, Accounting, Investor
10 Relations, Information Technology, and Compliance. (Ex. 13.)

11 36. This paragraph redacted pursuant to the Protective Order and the Court's
12 directive as set forth in footnote 1, supra. (See Ex. 2.)

13 37. This paragraph redacted pursuant to the Protective Order and the Court's
14 directive as set forth in footnote 1, supra. (See Ex. 2.)

15 38. Physical assets affiliated with the Corporate Shared Services
16 departments may be Shared Assets of the Debtor and the Bank.

17 39. This paragraph redacted pursuant to the Protective Order and the Court's
18 directive as set forth in footnote 1, supra. (See Ex. 2.)

19 40. The Debtor and the Bank are signatories to an Expense Allocation
20 Agreement. (Ex. 15.) The Expense Allocation Agreement demonstrates that the
21 Debtor and the Bank intended to compensate one another, under certain
22 circumstances, for services or activities performed by one entity that benefit the other
23 entity. (Ex. 15.)

24 41. The Expense Allocation Agreement provides, in pertinent part:
25 WHEREAS, Bancorp may perform services or engage in activities that benefit
26 Bank or one of its wholly-owned subsidiaries; it being the intention of this
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1 Agreement that Bank be responsible to compensate Bancorp, to the extent
2 deemed appropriate by management of Bank and Bancorp, for any services or
3 activities that benefit such wholly-owned subsidiaries to the same extent as
4 would be applicable if they had been for the direct benefit of Bank
5 (Ex. 15 at 1.)

6 42. Depreciation of physical assets –such as office equipment -- located at
7 the Foothill and Lake facilities was allocated among all business units located within
8 those facilities, including both the Debtor and the Bank business units. (Ex. 16,
9 Expense Allocation Spreadsheet.)

10 43. Thus, based on the shared services and compensation arrangements
11 contemplated by the Expense Allocation Agreement as well as policies and practices
12 governing allocation of depreciation, the Debtor and the Bank shared expenses and
13 depreciation attributable to Corporate Shared Services and office space.

14 44. This paragraph redacted pursuant to the Protective Order and the Court's
15 directive as set forth in footnote 1, supra. (See Ex. 2.)

16 45. This paragraph redacted pursuant to the Protective Order and the Court's
17 directive as set forth in footnote 1, supra. (See Ex. 2.)

18 46. This paragraph redacted pursuant to the Protective Order and the Court's
19 directive as set forth in footnote 1, supra. (See Ex. 2.)

20 47. This paragraph redacted pursuant to the Protective Order and the Court's
21 directive as set forth in footnote 1, supra. (See Ex. 2.)

22 48. This paragraph redacted pursuant to the Protective Order and the Court's
23 directive as set forth in footnote 1, supra. (See Ex. 2.)

24 49. This paragraph redacted pursuant to the Protective Order and the Court's
25 directive as set forth in footnote 1, supra. (See Ex. 2.)

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1 50. This paragraph redacted pursuant to the Protective Order and the Court's
2 directive as set forth in footnote 1, supra. (See Ex. 2.)

3 51. This paragraph redacted pursuant to the Protective Order and the Court's
4 directive as set forth in footnote 1, supra. (See Ex. 2.)

5 52. This paragraph redacted pursuant to the Protective Order and the Court's
6 directive as set forth in footnote 1, supra. (See Ex. 2.)

7 53. This paragraph redacted pursuant to the Protective Order and the
8 Court's directive as set forth in footnote 1, supra. (See Ex. 2.)

9 54. This paragraph redacted pursuant to the Protective Order and the Court's
10 directive as set forth in footnote 1, supra. (See Ex. 2.)

11 55. This paragraph redacted pursuant to the Protective Order and the Court's
12 directive as set forth in footnote 1, supra. (See Ex. 2.)

13 56. The Trustee is unable to verify whether any Shared Assets are subject to
14 the Transaction, as no schedules of physical assets have been produced in connection
15 with the draft Purchase and Sale Agreements. In light of the above, however, the
16 Trustee believes that Shared Assets are likely subject to the sale.

17 **IV. FOOTHILL GENERATOR & "LAKE" FURNITURE AND**
18 **CABLING**

19 *Foothill Generator*

20 57. Upon information and belief, in or around 2006, the Debtor purchased a
21 generator for its Foothill facility ("Foothill generator") then valued at approximately
22 \$1.5 million. (Ex. 19, Compliance and Technology Committee—2006 Capital
23 Expenditures Presentation” dated February 27, 2006 at 6).

24 58. The Foothill facility is one of at least three buildings previously utilized
25 as the joint headquarters of the Debtor and the Bank. (Ex. 12).

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1 59. Upon information and belief, Debtor purchased the Foothill generator
2 using "Corporate" funds, not "Mortgage Bank" or other funds. (Ex.19).

3 60. Upon information and belief, "Corporate" funds are funds belonging to
4 the Debtor.

5 61. As owner of the Foothill generator, the Estate holds the exclusive right
6 to sell or otherwise alienate its asset, and the Bank has no ownership interest or
7 corresponding right to sell it.

8 62. This paragraph redacted pursuant to the Protective Order and the Court's
9 directive as set forth in footnote 1, supra. (See Ex. 2.)

10 63. The Trustee cannot determine whether the Foothill generator is subject
11 to the transaction, as no schedules of assets (including physical assets) have been
12 produced to the Trustee in connection with the draft Purchase and Sale Agreements.
13 In light of the above, however, the Trustee believes that the Foothill generator may
14 be subject to the transaction.

15 Lake Facility Furniture/Cabling

16 64. In or around 2006, the Debtor purchased furniture and cabling for its
17 Lake facility then valued at \$3,762,812.00 ("Lake facility furniture and cabling").
18 (See Ex. 19).

19 65. The Lake facility is one of at least three buildings comprising the
20 Pasadena Facilities, at which the Debtor and the Bank shared office space. See ¶ 33,
21 supra.

22 66. Upon information and belief, the Debtor purchased the Lake facility
23 furniture and cabling using "Corporate" funds, not Mortgage Bank or other funds.
24 (See Ex. 19).

25 67. Upon information and belief, "Corporate funds" are funds belonging to
26 the Debtor.

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1 68. This paragraph redacted pursuant to the Protective Order and the Court's
2 directive as set forth in footnote 1, supra. (See Ex. 2.)

3 69. The Trustee cannot determine whether the furniture and cabling
4 purchased by the Debtor for the Lake facility are subject to the Transaction, as no
5 schedules of assets (including physical assets) have been produced to the Trustee in
6 connection with the various draft Purchase and Sale Agreements. In light of the
7 above, however, the Trustee believes that furniture and cabling owned by the Debtor
8 is likely subject to the sale.

9 **V. PURCHASED SOFTWARE APPLICATIONS AND SYSTEMS**

10 70. Upon information and belief, software was a significant cost to and asset
11 of the Debtor and the Bank.

12 71. This paragraph redacted pursuant to the Protective Order and the Court's
13 directive as set forth in footnote 1, supra. (See Ex. 2.)

14 72. This paragraph redacted pursuant to the Protective Order and the Court's
15 directive as set forth in footnote 1, supra. (See Ex. 2.)

16 73. This paragraph redacted pursuant to the Protective Order and the Court's
17 directive as set forth in footnote 1, supra. (See Ex. 2.)

18 74. This paragraph redacted pursuant to the Protective Order and the Court's
19 directive as set forth in footnote 1, supra. (See Ex. 2.)

20 75. This paragraph redacted pursuant to the Protective Order and the Court's
21 directive as set forth in footnote 1, supra. (See Ex. 2.)

22 76. The Expense Allocation Agreement provides, in pertinent part:
23 WHEREAS, Bancorp may perform services or engage in activities that benefit
24 Bank or one of its wholly-owned subsidiaries; it being the intention of this
25 Agreement that Bank be responsible to compensate Bancorp, to the extent
26 deemed appropriate by management of Bank and Bancorp, for any services or
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1 activities that benefit such wholly-owned subsidiaries to the same extent as
2 would be applicable if they had been for the direct benefit of Bank
3 (Ex. 15).

4 77. Accordingly, upon information and belief, the estate is entitled to a
5 portion of the value of the purchased software listed in the Corporate Unallocated
6 portion of the Bank's Purchased Software Cost Allocation spread sheet.

7 **FIRST CAUSE OF ACTION**

8 **Declaration that the Estate has an**

9 **Ownership Interest in Certain Assets Subject to the Transaction**

10 78. The Trustee repeats and re-alleges paragraphs 1 through 77 as if set
11 forth fully herein.

12 79. Pursuant to 11 U.S.C. § 541(a)(1), property of the Estate includes all
13 legal and equitable interests of the Debtor and property of the Debtor as of the
14 commencement of the case "wherever located and by whomever held."

15 80. Pursuant to 11 U.S.C. § 541(a)(6), property of the estate also includes
16 "proceeds, product, offspring, rents, or profits of or from property of the estate."

17 81. An actual controversy has arisen between Plaintiffs and Defendant
18 regarding the extent to which the Disputed Property is property of the Estate.

19 82. The Trustee is informed and believes and thereupon alleges that the
20 FDIC asserts that the Disputed Property is not Property of the Estate and/or that the
21 proceeds of the Disputed Property will not be Property of the Estate.

22 83. The controversy is definite and concrete.

23 84. The Trustee and the FDIC have adverse interests.

24 85. The controversy between the Trustee and the FDIC is real and
25 immediate. Whether the Disputed Property is property of the Estate is material as it
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1 affects the Trustee's ability to require the FDIC to return such property to the Estate
2 or, if sold, to pay the proceeds of the sale of such property to the Estate.

3 86. Under 11 U.S.C. § 105 and 28 U.S.C. §§ 2201 & 2202, the Trustee is
4 entitled to a declaratory judgment that the Disputed Property and the proceeds of the
5 Disputed Property resulting from the Transaction constitute property of the Estate.

6 **SECOND CAUSE OF ACTION**

7 **Enforcement of 11 U.S.C. §362(a)(3)**

8 87. The Trustee repeats and re-alleges paragraphs 1 through 86 as if set
9 forth fully herein.

10 88. Bankruptcy Code Section 362(a)(3) prohibits "any act to obtain
11 possession of property of the estate or of property from the estate or to exercise
12 control over property of the estate." 11 U.S.C. § 362(a)(3).

13 89. The Bankruptcy Code permits the Court to "issue any order, process, or
14 judgment that is necessary or appropriate to carry out the provisions of this title." 11
15 U.S.C. § 105(a).

16 90. Because there are assets of the Debtor that are subject to the Transaction,
17 putting in place a mechanism that permits the transaction to proceed while ensuring
18 that the Estate's interest in these assets is protected as to the proceeds from sale, and
19 that the proceeds are promptly remitted to the Trustee is necessary to protect the
20 Estate's interest in property of the Estate and to enforce the automatic stay under 11
21 U.S.C. § 362(a)(3).

22 91. Accordingly, the Trustee is entitled to an order directing that the Estate's
23 interest in any property of the Estate that is the subject of the Transaction will extend
24 to the proceeds from the Transaction and that such proceeds shall be promptly
25 remitted to the Trustee following the closing of the Transaction.

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THIRD CAUSE OF ACTION

**Accounting and Sequestration of Certain Funds from
Transaction into Escrow Account Pursuant to 11 U.S.C. § 105(a))**

92. The Trustee repeats and re-alleges paragraphs 1 through 91 as if set forth fully herein.

93. The Bankruptcy Code permits the Court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a).

Accounting

94. The Trustee seeks an order directing the FDIC to conduct an accounting of all assets subject to the Transaction in order to identify any assets owned, in whole or part, by the Estate.

95. An accounting is a just and appropriate remedy to enable the Trustee to determine the nature, amount and extent of the Estate's interest in the assets at issue as well as any amounts the FDIC is required to remit to the Trustee as provided in the Second Cause of Action.

96. The Trustee is entitled to an order directing the FDIC to conduct an accounting of all assets subject to the Transaction in order to identify any assets owned, in whole or part, by the Estate.

Sequestration

97. The Trustee is also entitled to an order requiring the FDIC to segregate and sequester proceeds of the Transaction relating to assets about which the Parties dispute ownership and requiring the FDIC to place such proceeds in an escrow account until the Court is able to determine which Party is entitled to the value of such assets.

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FOURTH CAUSE OF ACTION

Imposition of a Constructive Trust

98. The Debtor repeats and re-alleges paragraphs 1 through 97 as if set forth fully therein.

99. Pursuant to 11 U.S.C. § 105(a), a bankruptcy court may "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." This broad grant of authority vested in the bankruptcy court includes the authority to impose a constructive trust in any case involving the wrongful acquisition or detention of assets to which another has a superior ownership interest.

100. The evidence the Trustee has amassed to date indicates that certain assets made available for sale by the FDIC belong, in fact, to the Estate. The FDIC has refused to cooperate adequately in providing the information necessary to identify the full extent to which the Estate has an ownership interest in the assets subject to the Transaction and has, thus far, even failed to disclose whether certain assets are subject to the Transaction.

101. This paragraph redacted pursuant to the Protective Order and the Court's directive as set forth in footnote 1, supra. (See Ex. 2.)

102. To the extent assets offered by the FDIC for sale in fact belong, in whole or part, to Estate, the FDIC holds these assets in trust for the bankruptcy estate.

103. Accordingly, the Debtor requests that the Court impose a constructive trust on any assets subject to the Transaction identified or that have yet to be identified as owned, in whole or part, by the Estate, entitling the Estate to recover those assets or, if sold, the fair value of those assets upon a judicial determination or negotiated agreement as to the extent of the Estate's interest in them.

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RELIEF REQUESTED

Wherefore, the Debtor respectfully requests that the Court enter judgment as follows:

A. On the First Cause of Action, for declaratory relief that the Disputed Property and the proceeds of the Disputed Property resulting from the Transaction constitute property of the Estate;

B. On the Second Cause of Action, for equitable relief directing that the Estate's interest in any property of the Estate that is the subject of the Transaction will extend to the proceeds from the Transaction and that such proceeds arising out of the sale of property in which the Estate has an interest are promptly remitted to the Trustee following the closing of the Transaction;

C. On the Third Cause of Action, for equitable relief directing the FDIC to segregate and sequester proceeds from the Transaction in an amount representing the fair value of the Disputed Assets, and to place these segregated and sequestered proceeds in an escrow account pending a judicial or mutually agreed upon determination as to the parties' respective rights to these assets;

D. On the Fourth Cause of Action, for equitable relief imposing a constructive trust for the benefit of the Estate on any assets subject to the Transaction that have been identified or have yet to be identified as owned by the Debtor and, thus, the Estate, entitling the Estate to recover the value of these assets from the FDIC; and

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E. For such other and further relief as the Bankruptcy Court deems just and equitable.

Dated: February 23, 2009

KLEE, TUCHIN, BOGDANOFF & STERN
LLP

By: /s/ Matthew C. Heyn

KLEE, TUCHIN, BOGDANOFF & STERN
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ADVERSARY PROCEEDING COVER SHEET (Instructions on Page 2)	ADVERSARY PROCEEDING NUMBER (Court Use Only)
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PLAINTIFFS	DEFENDANTS
ATTORNEYS (Firm Name, Address, and Telephone No.)	ATTORNEYS (If Known)
PARTY (Check One Box Only) <input type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input type="checkbox"/> Creditor <input type="checkbox"/> Other <input type="checkbox"/> Trustee	PARTY (Check One Box Only) <input type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input type="checkbox"/> Creditor <input type="checkbox"/> Other <input type="checkbox"/> Trustee

CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED)

NATURE OF SUIT
 (Number up to five (5) boxes starting with lead cause of action as 1, first alternative cause as 2, second alternative cause as 3, etc.)

<p>FRBP 7001(1) – Recovery of Money/Property</p> <input type="checkbox"/> 11-Recovery of money/property - §542 turnover of property <input type="checkbox"/> 12-Recovery of money/property - §547 preference <input type="checkbox"/> 13-Recovery of money/property - §548 fraudulent transfer <input type="checkbox"/> 14-Recovery of money/property - other	<p>FRBP 7001(6) – Dischargeability (continued)</p> <input type="checkbox"/> 61-Dischargeability - §523(a)(5), domestic support <input type="checkbox"/> 68-Dischargeability - §523(a)(6), willful and malicious injury <input type="checkbox"/> 63-Dischargeability - §523(a)(8), student loan <input type="checkbox"/> 64-Dischargeability - §523(a)(15), divorce or separation obligation (other than domestic support) <input type="checkbox"/> 65-Dischargeability - other
<p>FRBP 7001(2) – Validity, Priority or Extent of Lien</p> <input type="checkbox"/> 21-Validity, priority or extent of lien or other interest in property	<p>FRBP 7001(7) – Injunctive Relief</p> <input type="checkbox"/> 71-Injunctive relief – imposition of stay <input type="checkbox"/> 72-Injunctive relief – other
<p>FRBP 7001(3) – Approval of Sale of Property</p> <input type="checkbox"/> 31-Approval of sale of property of estate and of a co-owner - §363(h)	<p>FRBP 7001(8) Subordination of Claim or Interest</p> <input type="checkbox"/> 81-Subordination of claim or interest
<p>FRBP 7001(4) – Objection/Revocation of Discharge</p> <input type="checkbox"/> 41-Objection / revocation of discharge - §727(c),(d),(e)	<p>FRBP 7001(9) Declaratory Judgment</p> <input type="checkbox"/> 91-Declaratory judgment
<p>FRBP 7001(5) – Revocation of Confirmation</p> <input type="checkbox"/> 51-Revocation of confirmation	<p>FRBP 7001(10) Determination of Removed Action</p> <input type="checkbox"/> 01-Determination of removed claim or cause
<p>FRBP 7001(6) – Dischargeability</p> <input type="checkbox"/> 66-Dischargeability - §523(a)(1),(14),(14A) priority tax claims <input type="checkbox"/> 62-Dischargeability - §523(a)(2), false pretenses, false representation, actual fraud <input type="checkbox"/> 67-Dischargeability - §523(a)(4), fraud as fiduciary, embezzlement, larceny	<p>Other</p> <input type="checkbox"/> SS-SIPA Case – 15 U.S.C. §§78aaa <i>et seq.</i> <input type="checkbox"/> 02-Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)

(continued next column)

<input type="checkbox"/> Check if this case involves a substantive issue of state law	<input type="checkbox"/> Check if this is asserted to be a class action under FRCP 23
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<input type="checkbox"/> Check if a jury trial is demanded in complaint	Demand \$
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Other Relief Sought

BANKRUPTCY CASE IN WHICH THIS ADVERSARY PROCEEDING ARISES			
NAME OF DEBTOR		BANKRUPTCY CASE NO.	
DISTRICT IN WHICH CASE IS PENDING	DIVISIONAL OFFICE		NAME OF JUDGE
RELATED ADVERSARY PROCEEDING (IF ANY)			
PLAINTIFF	DEFENDANT		ADVERSARY PROCEEDING NO.
DISTRICT IN WHICH ADVERSARY IS PENDING	DIVISIONAL OFFICE		NAME OF JUDGE
SIGNATURE OF ATTORNEY (OR PLAINTIFF)			
DATE		PRINT NAME OF ATTORNEY (OR PLAINTIFF)	

INSTRUCTIONS

The filing of a bankruptcy case creates an "estate" under the jurisdiction of the bankruptcy court which consists of all of the property of the debtor, wherever that property is located. Because the bankruptcy estate is so extensive and the jurisdiction of the court so broad, there may be lawsuits over the property or property rights of the estate. There also may be lawsuits concerning the debtor's discharge. If such a lawsuit is filed in a bankruptcy court, it is called an adversary proceeding.

A party filing an adversary proceeding must also must complete and file Form 104, the Adversary Proceeding Cover Sheet, unless the party files the adversary proceeding electronically through the court's Case Management/Electronic Case Filing system (CM/ECF). (CM/ECF captures the information on Form 104 as part of the filing process.) When completed, the cover sheet summarizes basic information on the adversary proceeding. The clerk of court needs the information to process the adversary proceeding and prepare required statistical reports on court activity.

The cover sheet and the information contained on it do not replace or supplement the filing and service of pleadings or other papers as required by law, the Bankruptcy Rules, or the local rules of court. The cover sheet, which is largely self-explanatory, must be completed by the plaintiff's attorney (or by the plaintiff if the plaintiff is not represented by an attorney). A separate cover sheet must be submitted to the clerk for each complaint filed.

Plaintiffs and Defendants. Give the names of the plaintiffs and defendants exactly as they appear on the complaint.

Attorneys. Give the names and addresses of the attorneys, if known.

Party. Check the most appropriate box in the first column for the plaintiffs and the second column for the defendants.

Demand. Enter the dollar amount being demanded in the complaint.

Signature. This cover sheet must be signed by the attorney of record in the box on the second page of the form. If the plaintiff is represented by a law firm, a member of the firm must sign. If the plaintiff is pro se, that is, not presented by an attorney, the plaintiff must sign.

In re (SHORT TITLE) Debtor(s).	CASE NO.:
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NOTE: When using this form to indicate service of a proposed order, **DO NOT** list any person or entity in Category I. Proposed orders do not generate an NEF because only orders that have been entered are placed on a CM/ECF docket.

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:

A true and correct copy of the foregoing document described as _____ will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d), and **(b)** in the manner indicated below:

I. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") - Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s) ("LBR"), the foregoing document will be served by the court via NEF and hyperlink to the document. On _____ I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the email addressed indicated below:

Service information continued on attached page

II. SERVED BY U.S. MAIL OR OVERNIGHT MAIL (indicate method for each person or entity served):

On _____ I served the following person(s) and/or entity(ies) at the last known address(es) in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States Mail, first class, postage prepaid, and/or with an overnight mail service addressed as follow. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Service information continued on attached page

III. SERVED BY PERSONAL DELIVERY, FACSIMILE TRANSMISSION OR EMAIL (indicate method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on _____ I served the following person(s) and/or entity(ies) by personal delivery, or (for those who consented in writing to such service method) by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Service information continued on attached page

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Date	Type Name	Signature
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This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

