

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION

SECURITIES AND EXCHANGE )  
COMMISSION, )  
 )  
Plaintiff, ) No. CV 11-1309 R  
 )  
vs. )  
 )  
MICHAEL W. PERRY and A. SCOTT )  
KEYS, )  
 )  
Defendants. )

TRANSCRIPT OF PROCEEDINGS

THE HONORABLE MANUEL L. REAL, U.S. DISTRICT JUDGE PRESIDING

LOS ANGELES, CALIFORNIA

MAY 21, 2012

MOTIONS HEARING

BRIDGET R. MONTERO, CSR 10020, RMR, CRR  
United States Courthouse  
312 North Spring Street, Room 435  
Los Angeles, California 90012  
www.bridgetmontero.com  
Internal File No. 12036

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1 MONDAY, MAY 21, 2012; 10:48 A.M.

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4 THE CLERK: Item No. 10, CV 11-1309, SEC v.  
5 Michael W. Perry, et al.

6 Counsel, your appearances, please.

7 MR. SEARLES: Good morning, Your Honor. Donald  
8 Searles on behalf of the commission. My colleagues, John  
9 Berry and Nick Chung, are with me, as well. Thank you.

10 MS. VETA: Good morning, Your Honor. Jean Veta  
11 here with my colleague, Dennis Auerbach, on behalf of  
12 Defendant Michael Perry. And Mr. Perry is in the courtroom,  
13 as well, sir.

14 MR. BRUCH: Good morning, Your Honor. Greg Bruch  
15 on behalf of Defendant Alan Scott Keys. My colleague, Julie  
16 Smith, is with me, as well.

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

19 MS. VETA: No, Your Honor.

20 MR. SEARLES: Your Honor, I'd like to briefly  
21 address the reply that was filed by Defendants Perry and  
22 Keys.

23 Just briefly, Defendants attempt to characterize  
24 our case as one of a failure to disclose or update  
25 forecasts. That is not what this case is about. Our case

1 is about a 10-K filed in February of 2008. It was  
2 demonstrably false at the time it was filed.

3 By way of background to this case, the capital  
4 position of the bank was absolutely critical. The bank's  
5 capital ratios were absolutely critical. On February 12th,  
6 IndyMac issued a Form 8-K in which it addressed both of  
7 those issues, and reassured the market that it would not be  
8 raising capital in the capital markets because at that time,  
9 the stock price of IndyMac was far below its book value.

10 IndyMac's management, Mr. Perry and Mr. Keys,  
11 appreciated the signals that would be sent to the markets if  
12 IndyMac resumed sales under its direct stock purchase  
13 program and told the market on that date, February 12th,  
14 they would not do so. Two weeks later, in Indymac's  
15 Form 10-K, they have a provision, that we have alleged in  
16 the complaint, that is demonstrably false.

17 In that provision they state that we may be  
18 required to raise the -- of capital. "May" is not the same  
19 as "am." They had a -- at present -- at that time, on  
20 February 29th, they had already resumed the sales of stock  
21 under the DSPP program, so the statement that they may do  
22 so, were disclosing a risk that they may do so, is false.  
23 That risk had already materialized. They had already  
24 started raising --

25 THE COURT: This is all in your papers, Counsel.

1 MR. SEARLES: It is.

2 What I think -- the point that the defendants are  
3 arguing -- or mischaracterizing our case, is the duty to  
4 update forecasts, the duty to update capital ratio  
5 forecasts. That is not what this case is about.

6 And, just briefly, in Mr. Keys's reply to our  
7 opposition, he contends that we have not responded to his  
8 argument regarding disgorgement. We have. Our position  
9 with Mr. Keys is exactly the same as it is with Mr. Perry.  
10 We filed a joint opposition. They joined in their papers.  
11 We submit that our brief, it adequately addresses that  
12 issue. The same factual bases for disgorgement with respect  
13 to salary and the stock proceeds under the DSPP are  
14 appropriate as to both defendants.

15 I'll submit it with that, Your Honor.

16 THE COURT: Counsel?

17 MS. VETA: Your Honor, we agree there was nothing  
18 new here, and we have nothing further to add.

19 Thank you, sir.

20 MR. BRUCH: I concur in that, Your Honor.

21 THE COURT: All right. On February 26th, 2008,  
22 Bancorp began to sell stock pursuant to the DSPP. On  
23 February 29th, 2008, Bancorp filed its 2007 Form 10-K, which  
24 stated that Bancorp, quote, had -- has a direct stock  
25 purchase plan, closed quote, and that Bancorp, quote, may be

1 required to raise capital at terms that are materially  
2 adverse to shareholders, closed quote.

3           It is true that it is a material misstatement to  
4 state that a firm may do something it is already doing. *SEC*  
5 *v. Blavin*, 760 F.2d 706 (6th Cir. 1985). However, this is  
6 inapplicable here because the Form 10-K does not state that  
7 Bancorp may raise capital through the DSPP, but clearly  
8 states that Bancorp already has a DSPP in effect. Indeed,  
9 the Form 10-K states that the DSPP was one of Bancorp's,  
10 quote, principal sources of cash in 2007, raising  
11 \$145.6 million. Therefore, the Form 10-K clearly discloses  
12 that Bancorp was raising capital pursuant to DSPP.

13           The 2007 Form 10-K did not disclose an internal  
14 capital ratio forecast made on February 19th, 2009, which  
15 reflected that the bank's capital ratio might be at or below  
16 10 percent at the end of the quarter, thus jeopardizing  
17 well-capitalized status. Firms are not required to disclose  
18 all internal projections, even if they provide additional  
19 information. *In re Convergent Technologies Securities*  
20 *Litigation*, 948 F.2d 507 (9th Cir. 1991).

21           Failure to disclose existing internal projections  
22 is not an omission of a material fact. *In re Lyondell*  
23 *Petrochemical Co. Securities Litigation*, 984 F.2d 1050 (9th  
24 Cir. 1993). Therefore, Bancorp was not required to disclose  
25 the February 19 capital ratio forecast.

1           The 2007 Form 10-K stated that, quote, we were not  
2 forced to sell assets and liquidation prices and our funding  
3 capacity was not materially impacted, closed quote.  
4 However, the statement was clearly referring to conduct in  
5 2007. The paragraph makes specific reference to, quote, the  
6 year ended on December 31, 2007, closed quote. This  
7 statement was thus true, as stock sales pursuant to the DSPP  
8 did not begin until February 26th of 2008.

9           The bespeaks caution doctrine applies to precise  
10 cautionary language which directly addresses itself to  
11 future projections, estimates, or forecasts. *Miller v.*  
12 *Pezzani*, 35 F.3d 1407 (9th Cir. 1994).

13           Predictive statement are just what the name  
14 implies: Predictions. As such, any optimistic projections  
15 contained in such statements are necessarily contingent.  
16 *Rubinstein v. Collins*, 30 F.3d 160 (5th Cir. 1994). The  
17 2007 Form 10-K also stated, quote, we currently believe our  
18 liquidity level sufficient to satisfy our operating  
19 requirements and meet our obligations and commitments.

20           Cautionary language must precisely address the  
21 substance of the specific statement or omission that is  
22 challenged. *In re Donald J. Trump Casino Securities*  
23 *Litigation*, 7 F.3d (3rd Cir. 1993). Here, Bancorp disclosed  
24 that the market for mortgage-backed and asset-backed  
25 securities had been significantly disrupted; that such

1 disruptions may negatively impact the bank and market  
2 liquidity; that there were material risks to the bank's  
3 well-capitalized status; and that interest rates changes,  
4 real estate value drops, and other economic fluctuations  
5 then occurring could impact capital requirements.

6           The SEC alleges that the defendants are liable on  
7 February 12th, 2008, Form 8-K because it was incorporated by  
8 reference into the DSPP prospectuses and registration  
9 statement. However, the prospectuses and registration  
10 statement specifically state that they do not incorporate  
11 documents or information deemed to have been, quote,  
12 furnished and not filed, closed quote, in accordance with  
13 the SEC rules.

14           Information provided pursuant to items 2.02 and  
15 7.01 are, quote, furnished and not filed, closed quote,  
16 until the filer states otherwise. SEC Form 8-K  
17 section(b)(2). Here, the DSPP prospectuses and registration  
18 statement explicitly state that they do not incorporate any  
19 documents furnished and not filed. Therefore, the  
20 February 12th, 2008, Form 8-K was not incorporated by  
21 reference into the DSPP prospectuses and registration  
22 statement.

23           The requirement that a party be the maker of the  
24 alleged false statements or omissions applies to both Rule  
25 10b-5 and Section 17(a). *SEC v. Dain Rauscher, Inc.*, 254



1 F.3d 852 (9th Cir. 2001). Here, it is undisputed that  
2 defendants did not sign the DSPP prospectuses, nor did they  
3 have any role in preparing or reviewing them. The maker of  
4 a statement is the person or entity that ultimate -- with  
5 ultimate authority over the statement, including its content  
6 and whether and how to communicate it. *Janus Capital Group,  
7 Inc. v. First Derivative Traders*, 131 S.Ct. (2011). Because  
8 Defendants in no way participated in the preparation and  
9 release of the prospectuses, they cannot be held liable for  
10 their content.

11 The S-3 registration statement signed by  
12 Defendants did not incorporate the DSPP prospectuses by  
13 reference because the S-3 registration statement was signed  
14 before the DSPP prospectuses were made.

15 Every registrant subject to section 240.13a-1  
16 shall file a current report on Form 8-K within the period  
17 specified in that form. 17 CFR section 240.13-11(a).  
18 Unless otherwise specified, a report is to be filed or  
19 furnished within four business days after occurrence of the  
20 event. SEC Form 8-K section (b)(1).

21 In this case, on Thursday, May 8th, 2008, the  
22 boards of Bancorp and the bank voted to approve deferral of  
23 dividends on preferred securities. These deferrals were  
24 publicly reported on Monday, May 12th, 2008. It is  
25 undisputed that the deferral was reported within two

1 business days of the vote. While Perry had already told the  
2 board on April 24th that they planned to defer the dividend,  
3 a mere expression of management's opinion is not actionable  
4 if they lack the authority to enforce that opinion. See *In*  
5 *re IBM Corporate Securities Litigation*, 163 F.3d 102 (2nd  
6 Cir. 1998).

7           The SEC's power to obtain injunctive relief has  
8 been broadly read to include disgorgement of profits  
9 realized from violations of the securities laws. *SEC v.*  
10 *Clark*, 915 F.2d 439 (9th Cir. 1999). The amount of  
11 disgorgement includes, quote, all gains, closed quote,  
12 flowing from illegal activities. *SEC v. Platforms Wireless*  
13 *International Corp.*, 617 F.3d 1072 (9th Cir. 2010). Here,  
14 Perry did not sell any Bancorp stock between 2006 and 2008,  
15 received no bonus between 2007 and 2008, and lost almost the  
16 entire value of his Bancorp stock when the company filed for  
17 bankruptcy.

18           Similarly, Keys also sold no Bancorp stock between  
19 2007 and 2008, received no bonus in 2009, and also lost the  
20 full value of his Bancorp stock when the company filed for  
21 bankruptcy. Salary and benefits may be disgorged in some  
22 circumstances. See *SEC v. Global Express Capital Real*  
23 *Estate Investment Fund*, 289 Fed.Appx. 183 (9th Cir. 1998).

24           However, the burden is on the plaintiff to show  
25 that the compensation was not earned from, quote, various

1 functions of value to the company other than the fraudulent  
2 activities, closed quote. *SEC v. Resnick*, 604 F.Supp.2d 773  
3 (D. Md. 2009). The SEC has failed to demonstrate that  
4 Defendants' salaries and benefits would not have been given  
5 but for the illegal conduct.

6 For these reasons, Defendants Perry and Keys's  
7 motion for partial summary judgment are hereby granted.

8 Counsel to prepare the uncontroverted facts and  
9 the judgments for each of the defendants

10 MS. VETA: Thank you, Your Honor.

11 MR. SEARLES: Your Honor, one housekeeping matter.

12 THE COURT: I beg your pardon?

13 MR. SEARLES: We have just one housekeeping matter  
14 to address.

15 THE COURT: All right.

16 MR. SEARLES: The trial is scheduled for June 26.  
17 There are motions in limine the parties are planning on  
18 filing. With the current agreed-upon hearing date of  
19 June 18th, we would like to have the matters heard sooner  
20 than that. I don't know if that's feasible, with the  
21 Court's calendar.

22 THE COURT: I don't have anything here in which I  
23 can make a determination.

24 MR. SEARLES: Okay.

25 THE COURT: All right.

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MS. VETA: Thank you, Your Honor.

(Proceedings concluded at 11:03 a.m.)

C E R T I F I C A T E

I hereby certify that the foregoing is a true and correct transcript from the stenographic record of the proceedings in the foregoing matter.

/s/Bridget R. Montero  
Bridget R. Montero  
Official Court Reporter  
CSR No. 10020

Date: May 22, 2012