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UNITED STATES DISTRICT COURT
FOR THE 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.: CV-07-1635 GW (VBKx)

**DEFENDANT MICHAEL W.
PERRY'S MOTION TO STAY
PROCEEDINGS**

Date: October 16, 2008

Time: 8:30 a.m.

Ctrm.: Hon. George H. Wu

Courtroom 10

Spring Street Courthouse

1 Defendant Michael W. Perry submits this motion to stay this proceeding.

2 **I. INTRODUCTION**

3 Plaintiffs allege that the two defendants, IndyMac Bancorp, Inc. (“IndyMac”),
4 and Michael Perry, IndyMac’s CEO, committed securities fraud by misrepresenting IndyMac’s
5 compliance with its underwriting guidelines controls and hedging procedures, resulting in
6 IndyMac’s stock declining approximately \$3.00 per share. (Third Amended Complaint
7 (“TAC”) ¶ 18). These allegations are false.

8 On August 2, 2008, IndyMac filed for Chapter 7 bankruptcy protection. Pursuant
9 to section 362(a) of the Bankruptcy Reform Act of 1978, 11 U.S.C. § 101 et seq., all actions,
10 proceedings, and claims against IndyMac were automatically stayed.

11 **II. THE COURT SHOULD STAY THE PENDING CLAIMS AGAINST MICHAEL
12 PERRY.**

13 Under *Landis v. North American Co.*, 299 U.S. 248, 254 (1936), courts have the
14 power to exercise their inherent discretion to stay a case when doing so will promote judicial
15 efficiency and not harm any party. Courts have exercised this discretionary power to enter a
16 case-wide stay where the absent debtor is essential to a just and complete resolution of the case.
17 *See, e.g. Fed. Life Ins. Co. (Mut.) v. First Fin. Group of Texas, Inc.*, 3 B.R. 375, 376 (Bankr.
18 S.D. Tex. 1980); *In re Related Asbestos Cases*, 23 B.R. 523, 530 (Bankr. N.D. Cal. 1982)
19 (“court’s inherent discretion to permit or deny severance of actions in light of considerations of
20 judicial economy and efficiency.”). Whether to exercise its power to stay these proceedings
21 rests within the district court’s discretion. *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978).

22 A trial court may, with propriety, find it is efficient for its own
23 docket and the fairest course for the parties to enter a stay of an
24 action before it, pending resolution of independent proceedings
25 which bear upon the case. This rule applies whether the separate
proceedings are judicial, administrative, or arbitral in character,
and does not require that the issues in such proceedings are
necessarily controlling of the action before the court.

26 *Leyva v. Certified Grocers of Cal. Ltd.*, 593 F.2d 857, 863-64 (9th Cir. 1979); *see also Int’l*
27 *Consumer Prods. of New Jersey, Inc. v. Complete Convenience, LLC*, No. 07-325 (MLC), 2008
28 WL 2185340 at *1 (D.N. J. May 23, 2008) (court stayed the case pending the bankruptcy

1 proceedings under its “inherent power to control the docket” and the “interests of judicial
2 economy”).

3 For the reasons set forth below, this Court should exercise its discretion and stay
4 the district court proceedings as to Mr. Perry.¹

5 **A. A Stay is Warranted as the Claims against IndyMac and Mr. Perry are**
6 **Inextricably Interwoven**

7 District courts have stayed cases against individual senior corporate officers
8 when the corporate defendant has filed for bankruptcy when the claims against the corporate
9 defendant and the individual defendant are “inextricably interwoven” and present “common
10 questions of law and fact, which can be resolved in one proceeding.” *Federal Life*, 3 B.R. at
11 376. In *Federal Life*, the plaintiff alleged that First Financial, through its agent and senior
12 corporate officer, Reynolds, secured monies from plaintiff by fraud. The action against the
13 corporate defendant, First Financial, was stayed when it became subject to an involuntary
14 petition in the bankruptcy court. Plaintiff sought to proceed in the district court against
15 Reynolds.

16 The district court found that plaintiff’s allegations against First Financial and
17 Reynolds were “inextricably interwoven, presenting common questions of law and fact, which
18 can be resolved in one proceeding.” *Id.* Additionally, the *Federal Life* court held that having
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21 ¹ While some courts have extended the bankruptcy court’s automatic stay under 11 U.S.C. § 362
22 to include non-debtors under “unusual circumstances,” the Ninth Circuit has not decided
23 whether or under what circumstances this is permissible. *See, e.g., A.H. Robins Co., Inc. v.*
24 *Piccinin*, 788 F.2d 994, 999 (4th Cir. 1986) (“[T]here are cases . . . where a bankruptcy court
25 may properly stay the proceedings against non-bankrupt co-defendants but . . . there must be
26 unusual circumstances”) (internal citations and quotations omitted); *In re Family Health Servs.,*
27 *Inc. v. Centinela Mammoth Hosp.*, 105 B.R. 937, 942-43 (Bankr. C.D. Cal. 1989) (“the court
28 finds that actions against non-debtor members will result in claims against the debtor for
reimbursement or indemnification such that the debtor is the real party defendant”); *Cf. In re*
Chugach Forest Prods., Inc. v. N. Stevedoring & Handling Corp., 23 F.3d 241, 246-47 (9th Cir.
1994) (questioning vitality of Fourth Circuit’s “unusual circumstances” exception to the rule
that the automatic stay applies only to claims against the debtor). Here, Mr. Perry is not asking
this Court to extend the automatic stay of the bankruptcy court to this proceeding. Rather,
Mr. Perry’s argument focuses on the Court’s inherent power to stay a case on its docket.

1 two proceedings would not promote judicial economy. Accordingly, the court stayed the
2 proceeding against Reynolds:

3 In light of the above, the Court is persuaded that the automatic
4 stay applies to judicial proceedings against a debtor in bankruptcy
5 and its co-defendants, when, as here, the allegations against them
6 arise from the same factual and legal basis. Accordingly, the
7 court is of the opinion that further proceedings in this case are
8 stayed with respect to [the debtor] and [the non-debtor co-
9 defendant] unless the stay is lifted by the Bankruptcy Court.

10 *Id.* at 377.

11 Here, the allegations against IndyMac and Mr. Perry parallel the *First Financial*
12 case. The TAC states that IndyMac and Perry engaged in the same conduct, and the TAC does
13 not differentiate between Mr. Perry and IndyMac. In essence, the TAC treats Mr. Perry and
14 IndyMac as one and the same. For example,

- 15 • “First, during the Class Period, the Company, directed by defendant Perry, engaged
16 in a pattern and practice of overriding and abandoning its own loan underwriting
17 guidelines ...” (TAC ¶ 26).
- 18 • “the Company engaged in these practices at the express behest of defendant Perry
19 (again through Adarkar) so that the Company could make its short term goals ‘at all
20 costs.’” (TAC ¶ 39).
- 21 • “Defendants knew or were deliberately reckless in not knowing about these
22 problems.” (TAC ¶ 66).
- 23 • “Perry orally stated, on behalf of the Company, . . .” (TAC ¶ 111)
- 24 • “Because Perry signed the 2005 10-K, all statements contained therein were made by
25 him and the Company.” (TAC ¶ 115).

26 A separate problem is that in Count II plaintiffs also seek to hold Mr. Perry
27 responsible as a controlling person of IndyMac, under § 20(a) of the Exchange Act. But an
28 individual is liable as a controlling person only if plaintiffs first prove a primary violation of the
federal securities laws by the corporation. *Paracor Fin., Inc. v. Gen. Elec. Capital Corp.* 96
F.3d 1151, 1161 (9th Cir. 1996) (“To establish ‘controlling person’ liability, the plaintiff must
show that a primary violation was committed and that the defendant ‘directly or indirectly’

1 controlled the violator.”); *see also In re Entropin, Inc. Sec. Litig.*, 487 F. Supp. 2d 1141, 1155
2 (C.D. Cal. 2007) (“[S]ince the Court finds material issues of fact regarding defendants’ scienter
3 prevent summary judgment in defendants’ favor on plaintiffs’ Section 10(b) and Rule 10b-5
4 claims, defendants are not entitled to summary judgment on the issue of whether a primary
5 violation occurred.”). Because of the automatic stay as to IndyMac, there can be no
6 adjudication in this court of the federal securities claims against IndyMac. But without an
7 adjudication of the federal securities claims against IndyMac, plaintiffs’ claim against Mr. Perry
8 as a controlling person cannot proceed.²

9 The claims against Mr. Perry and IndyMac are inextricably interwoven and
10 present common questions of law and fact. Thus, the case against Mr. Perry should be stayed.

11 **B. Staying the Case Against Mr. Perry Will Avoid Duplicative, Wasteful, and**
12 **Inefficient Piecemeal Litigation Likely to Produce Conflicting Results**

13 If this matter were to proceed here as to Mr. Perry, and in the bankruptcy court as
14 to IndyMac, duplicative discovery, multiple hearings, and inconsistent results will likely ensue,
15 causing inefficiencies and piecemeal litigation. “Piecemeal litigation occurs when different
16 tribunals consider the same issue, thereby duplicating efforts and possibly reaching different
17 results.” *Am. Int’l Underwriters (Philippines), Inc. v. The Cont’l Ins. Co.*, 843 F.2d 1253, 1258
18 (9th Cir. 1988). Avoiding piecemeal litigation warrants a stay. *Id.* (stay warranted to avoid
19 “duplicative effort and creating a strong possibility of inconsistent results.”).

20 Again, in situations similar to this case, courts have stayed proceedings against
21 the co-defendants of debtors in bankruptcy where the failure to do so would result in piecemeal
22 litigation. *Hemmerle Indus., Inc. v. Kassuba*, 575 F.2d 513 (5th Cir. 1978) (court of appeals
23 permitted an action by a plaintiff against co-defendants of a debtor to be stayed pending

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25 ² Additionally, Mr. Perry may be prejudiced because of his inability to develop an effective
26 defense. The bankruptcy court’s automatic stay precludes seeking any discovery against
27 IndyMac. *See Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 482 F.3d 1091 (9th Cir.
28 2007). To develop its case, both plaintiffs and Mr. Perry will need discovery of IndyMac
documents. Without the benefit of complete discovery in the possession of IndyMac and its
lawyers, Mr. Perry will be unable to mount a full defense and, therefore, will be substantially
prejudiced.

1 dissolution of the bankruptcy court’s injunction because the bankruptcy and district court
2 actions involved common questions). *See also Beardley v. All Am. Heating, Inc.*, No. C05-
3 1962P 2007 WL 1521225 at *3 (W.D. Wash., May 22, 2007) (“Under the circumstances
4 presented here, it would also be more efficient to stay the entire case while claims against [the
5 corporation] are subject to the automatic stay, rather than to proceed with this litigation on a
6 piecemeal basis. Therefore, the Court will invoke its inherent authority to stay this case in its
7 entirety . . .”).

8 Without a stay, the identical claims against IndyMac and Mr. Perry will be
9 adjudicated in two different courts. This duplicative litigation could well result in inconsistent
10 outcomes. For example, the court is currently scheduled to hold a hearing on the Defendants’
11 Motion to Dismiss Plaintiffs’ Third Amended Complaint. Both IndyMac and Mr. Perry filed
12 this motion, and the arguments for IndyMac and Perry are identical. So, in deciding the motion
13 against Mr. Perry, the district court would also, in effect, be deciding the motion against
14 IndyMac. But this is impermissible under the bankruptcy court’s automatic stay. And even if it
15 were permissible, it could well result in inconsistent outcomes (i.e., this court and the
16 bankruptcy court could reach different results on the same motion).

17 The Court should stay the case against Mr. Perry to avoid duplicative, wasteful,
18 and inefficient piecemeal litigation, which could produce conflicting results.

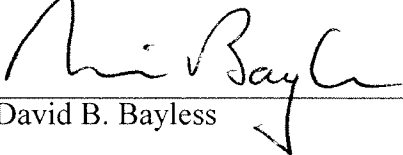
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III. CONCLUSION

Accordingly, the Court should stay this action, pending resolution of the bankruptcy proceeding involving IndyMac. In the alternative, the Court should stay this action but order the parties to return in 120 days to provide the court with a status report of the bankruptcy proceedings, at which time the court can revisit the issue of its stay.³

DATED: 9/22/08

COVINGTON & BURLING LLP

By: 
David B. Bayless

Attorneys for Defendant Michael W. Perry

³ The bankruptcy proceeding is in its early stages. An interim trustee has been appointed but is currently being challenged by a creditor. We anticipate that in the next 120 days, a trustee will be appointed and the case will move forward. See *Beardsley*, 2007 WL 1521225 at *3 (court granted stay and required parties to submit joint status reports every six months).