

ORIGINAL
FILED

2008 SEP 12 AM 5:00

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

1 Kirk A. Pasich (SBN 94242)
2 PasichK@dicksteinshapiro.com
3 DICKSTEIN SHAPIRO LLP
4 2049 Century Park East, Suite 700
5 Los Angeles, CA 90067-3109
6 Telephone: (310) 772-8300
7 Facsimile: (310) 772-8301

8 James R. Murray (*pro hac vice* application pending)
9 MurrayJ@dicksteinshapiro.com
10 Gina A. Hough (*pro hac vice* application pending)
11 HoughG@dicksteinshapiro.com
12 Avner E. Mizrahi (*pro hac vice* application pending)
13 MizrahiA@dicksteinshapiro.com
14 DICKSTEIN SHAPIRO LLP
15 1825 Eye Street NW
16 Washington, DC 20006-5403
17 Telephone: (202) 420-2200
18 Facsimile: (202) 420-2201

19 Attorneys for Plaintiff

CV 08 4303

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA

16 INDYMAC FEDERAL BANK, F.S.B., by
17 the FEDERAL DEPOSIT INSURANCE
18 CORPORATION as Conservator,

Civil Action No.

19 Plaintiff,

COMPLAINT FOR
DECLARATORY RELIEF;
INJUNCTIVE RELIEF; BREACH
OF CONTRACT; TORTIOUS
BREACH OF THE IMPLIED
COVENANT OF GOOD FAITH
AND FAIR DEALING; AND
REFORMATION

vs.

DEMAND FOR JURY TRIAL

20 PMI MORTGAGE INSURANCE CO., an
21 Arizona corporation,

22 Defendant.

23 Plaintiff INDYMAC FEDERAL BANK, F.S.B., by the FEDERAL DEPOSIT
24 INSURANCE CORPORATION as Conservator, complains of defendant and alleges
25 as follows:

NATURE OF THE ACTION

1. IndyMac Federal Bank, F.S.B. (“IndyMac”), by the Federal Deposit Insurance Corporation (the “FDIC”) as Conservator, seeks a comprehensive declaration of the rights, duties, and liabilities of PMI Mortgage Insurance Co. (“PMI”) under the lender paid mortgage insurance (“LPMI”) coverage program that IndyMac purchased from PMI to insure the risk of borrower defaults on thousands of mortgage loans that IndyMac originated to its residential borrowers or acquired and sold into the secondary mortgage market. Pursuant to the parties’ established practice and course of dealings, PMI has a limited right to “audit” certain loan files. However, pursuant to that practice and course of dealings, PMI is entitled to exercise that right only as to files for delinquent loans or loans as to which IndyMac has made a claim under the LPMI coverage program, and only on a reasonable basis. Contrary to that practice and course of dealings, in July 2008, PMI made an unprecedented demand that IndyMac produce 5,565 insured loan files within 30 days. PMI then unreasonably refused to grant IndyMac a reasonable extension to comply with this unprecedented and unreasonable demand, instead abruptly informing IndyMac that it was rescinding the LPMI coverage on 5,565 loans that together exceed \$1.49 billion in current unpaid principal balance—loans as to which IndyMac paid PMI more than \$13.7 million in premiums to insure. Thus, PMI, without any justification in law or fact, has attempted to shift more than \$1.49 billion of risk exposure to IndyMac. Therefore, IndyMac seeks a declaration that PMI’s attempt to rescind more than \$1.49 billion in insurance coverage for those 5,565 insured loans has no legal effect, is null and void, and is unenforceable.

2. IndyMac also seeks an injunction (a) requiring PMI to withdraw its alleged rescission of coverage for the 5,565 loans, (b) preventing PMI from demanding loan files for loans that are not delinquent or for which IndyMac has not made a claim, and (c) requiring PMI to allow IndyMac a reasonable period of time to furnish PMI with the loan files that PMI is permitted to review—only files for loans

1 that are delinquent or for which IndyMac has made a claim under the LPMI coverage
2 program.

3 3. IndyMac also seeks damages from PMI for its unreasonable and
4 unprecedeted conduct and its violation of the implied covenant of good faith and fair
5 dealing that it owed, and still owes, IndyMac. PMI has tortiously breached this
6 covenant, thus acting in bad faith, and has acted contrary to the customs, practices,
7 and standards in the insurance industry.

8 4. If, for any reason, any language in the policy relied upon by PMI can be
9 reasonably interpreted to mean only what PMI contends in seeking rescission, then
10 that language does not reflect, because of mistake, the mutual understanding and
11 expectation of the parties and should be reformed to do so.

12 THE PARTIES

13 5. The FDIC is a corporation organized under the Federal Deposit Insurance
14 Act, 12 U.S.C. § 1811, *et seq.*, with its principal place of business located in
15 Washington, District of Columbia.

16 6. IndyMac Bank, F.S.B. (“Old Bank”) was a federally chartered FDIC
17 insured savings association. On July 11, 2008, the Office of Thrift Supervision
18 (“OTS”) closed the Old Bank and appointed the FDIC as receiver (the “Receiver”)
19 pursuant to 12 U.S.C. § 1464(d)(2)(A).

20 7. Also on July 11, 2008, pursuant to 12 U.S.C. § 1821(d)(2)(F)(i), the OTS
21 granted the Receiver’s application to organize IndyMac as a new federal savings
22 association. The OTS then appointed the FDIC as conservator. The Receiver
23 transferred most of Old Bank’s insured deposits and substantially all of Old Bank’s
24 assets, including the LPMI insurance coverage program, to IndyMac. As conservator,
25 the FDIC succeeds to the rights, titles, powers, and privileges of the insured
26 depository institution by operation of law. 12 U.S.C. § 1821(d)(2)(A). The
27 conservator may take action “appropriate to carry on the business of the institution
28 and preserve and conserve the assets and property of the institution.” 12 U.S.C.

§ 1821(d)(2)(D)(ii).

8. IndyMac is a federally chartered and FDIC insured savings bank with its principal place of business in Pasadena, County of Los Angeles, California.

9. Upon information and belief, PMI is an Arizona corporation with its principal place of business at 3003 Oak Road, Walnut Creek, California 94597. PMI is licensed to do business and is doing and transacting business in California.

JURISDICTION AND VENUE

10. Under 12 U.S.C. § 1819(b)(2)(A), “all suits of a civil nature at common law or in equity to which the [FDIC], in any capacity, is a party shall be deemed to arise under the laws of the United States.” This Court thus has subject matter jurisdiction over this action under 28 U.S.C. § 1331.

11. This Court has personal jurisdiction over PMI because PMI contractually agreed to submit to the jurisdiction of this Court. This Court also has personal jurisdiction over PMI because PMI was authorized to do, and was doing, business in the State of California within the time period relevant to the claims stated herein.

12. Venue is proper in this District because PMI contractually agreed to venue being in this District. Venue also is proper in this District under 28 U.S.C. § 1391 because a “substantial part of the events or omissions giving rise to the claim occurred” in this District.

INDYMAC'S PURCHASE OF MORTGAGE INSURANCE FROM PMI

13. IndyMac is a federal savings bank that has a substantial business servicing residential mortgage loans. Old Bank had a substantial business originating, acquiring, selling, and servicing residential mortgage loans. As a regular part of its business, Old Bank securitized large pools of the mortgage loans that it originated to borrowers or acquired from other sellers of mortgage loans, transferring those loans to trusts as collateral for the issuance of bonds (known as certificates or notes) to those who invested in the trusts. Old Bank also sold loans to whole loan investors and the government sponsored enterprises (the “GSEs”), primarily the Federal National

1 Mortgage Association (“Fannie Mae”) and the Federal Home Loan Mortgage
2 Corporation (“Freddie Mac”). Old Bank acted as the servicer for the loans transferred
3 to the trusts, whole loan investors, and GSEs (collectively, the “investors”), and
4 assumed contractual responsibility for a wide range of servicing actions essential to
5 the investors, including the responsibility to maintain mortgage insurance on the loans
6 in the trusts. Old Bank’s mortgage loan servicing rights and responsibilities have
7 been transferred to IndyMac.

8 14. To protect itself and the trust investors from the risk of borrower defaults
9 on the mortgage loans that it sells or maintains in its portfolio, Old Bank purchased
10 mortgage insurance from various insurers, including PMI. Old Bank first purchased
11 lender paid mortgage insurance (“LPMI”) coverage from PMI on loans with loan-to-
12 value ratios up to 100% on or about December 11, 1995. On February 8, 2006, Old
13 Bank renewed this coverage, which was provided by a letter agreement (the “2006
14 Letter Agreement”) and the PMI First Lien Master Policy (Form UW 2170.00 (3/94))
15 (the “Policy”), as amended by the Partner Delivered Quality (“PDQ”) Endorsement
16 (Form UW 2170.03 (5/95)).

17 15. On August 7, 2007, Old Bank and PMI entered into a new letter
18 agreement (the “2007 Letter Agreement”), updating some of the terms and conditions
19 contained in the 2006 Letter Agreement, and extending coverage through February 8,
20 2008.

21 16. The LPMI coverage program—consisting of the 2006 Letter Agreement,
22 the 2007 Letter Agreement, the Policy, and the PDQ Endorsement—insured all loans
23 that Old Bank delivered to PMI between February 8, 2006, and February 8, 2008.

24 17. Old Bank purchased LPMI coverage to insure loans that it originated or
25 acquired as loans without mortgage insurance. By buying LPMI coverage for these
26 loans before it sold them into the secondary mortgage market, Old Bank was able to
27 improve the execution of the sale of these loans to investors. The PDQ Endorsement
28 provided the mechanism to facilitate the LPMI coverage for these mortgage loans.

1 After approving a loan, Old Bank would deliver a form to PMI (the “PDQ Transmittal
2 Form”) describing the terms of the loan, the borrower documents relied on by Old
3 Bank in approving the loan, the borrower’s FICO score (a type of credit score that
4 lenders use to assess an applicant’s credit risk), and other factors related to the loan.
5 Within one business day of receiving from Old Bank the PDQ Transmittal Form for a
6 new loan, PMI was required to issue a certificate extending coverage for that loan.
7 Thus, each loan that Old Bank delivered to PMI was automatically insured by the
8 LPMI coverage program, subject to Old Bank’s payment of premium.

9 18. Old Bank paid a different premium for each loan, depending on the
10 individual terms of the loan and, among other things, the borrower documents relied
11 on by Old Bank in approving the loan and the borrower’s FICO score. The 2006
12 Letter Agreement and the 2007 Letter Agreement provide the precise calculation for
13 determining each loan’s premium.

14 19. Old Bank delivered thousands of loans to PMI and paid tens of millions
15 of dollars in premiums for LPMI coverage for those loans.

16 20. The PDQ Endorsement grants PMI the right to review a particular loan’s
17 file record to verify the accuracy of the information that Old Bank provided in the
18 loan’s PDQ Transmittal Form.

19 21. The PDQ Endorsement provides that PMI “reserves the right to rescind
20 coverage with respect to *a* Loan or deny *a* Claim for *a* Loan if *the* Loan file record for
21 *such* Loan *is* not furnished for review or audit within thirty (30) days after [PMI’s]
22 written request for the same, *to the extent that [PMI] is damaged by such delay.*”
23 PDQ Endorsement ¶ 4 (emphasis added).

24 22. The PDQ Endorsement thus contemplates a 30-day delivery time for
25 *each individual loan file.*

26 23. The PDQ Endorsement also requires that PMI be actually damaged by
27 any delay in the delivery time before PMI can even attempt to rescind LPMI coverage
28 for a loan.

**PMI AND OLD BANK'S PRACTICE AND COURSE OF PERFORMANCE
REGARDING LOAN FILE REQUESTS**

24. In the course of PMI and Old Bank's performance under the LPMI coverage program, PMI periodically asked Old Bank to furnish PMI with certain loan files.

25. The particular loan files that PMI requested, in its practice and course of dealings with Old Bank, typically involved a loan where Old Bank had either (a) sent a notice of delinquency about the loan or (b) filed a claim with PMI to recover insurance proceeds for the loan.

26. If PMI did not receive all of the documents that it requested for a particular loan, PMI would reject the loan file and return it to Old Bank.

27. To ensure that PMI received all documents that it requested, Old Bank was required to undertake, among others, the following time-consuming tasks:

- a. gather origination files from off-site storage and other internal Old Bank groups;
- b. review each file, by trained quality control staff, to ensure completeness;
- c. reorganize the files using document level file tabs;
- d. print any missing documentation from Old Bank's imaging system and/or other applications;
- e. deliver the files to the scanning vendor to (i) image the files, (ii) index the specific set of documents required by PMI for each loan, and (iii) create compact disc ("CD") copies of these document sets to send to PMI; and
- f. receive origination files in return and send the CDs to PMI.

Each loan file produced thus requires manual intervention, and, even though Old Bank generally retained (and IndyMac generally still retains) loan files electronically, a significant amount of employee time and vendor time was required to ensure

1 compliance with PMI's requests. PMI knew about this time-consuming process.

2 28. Between August 8, 2007, and May 1, 2008, PMI made 26 separate
3 requests for loan files, requesting a total of 582 loan files. All 582 files were for loans
4 as to which Old Bank either (a) sent PMI a notice of delinquency or (b) filed a claim
5 with PMI to recover insurance proceeds. The largest request was for 140 loan files,
6 and 19 of the requests were for 4 or fewer loan files.

7 29. Because of the time-consuming process to collect and compile each loan
8 file and ensure that no document PMI requested was missing, Old Bank delivered
9 almost all 582 loan files much later than 30 days after PMI's written requests. Not
10 once did PMI rescind, or even threaten to rescind, coverage based on Old Bank's
11 inability to deliver a loan file within 30 days after PMI's request. In fact, Old Bank
12 delivered hundreds of the loan files to PMI more than three months after they were
13 requested, and PMI did not once complain.

14 30. Old Bank and PMI developed a practice and course of performance
15 regarding loan file requests, specifically that (a) PMI would request a loan file only
16 when Old Bank had submitted a notice of delinquency or filed a claim to recover
17 insurance for the loan (but not every loan with a notice of delinquency was subject to
18 a loan file request by PMI), (b) each request would be for a reasonable number of loan
19 files, and (c) PMI would allow Old Bank a reasonable period of time to deliver the
20 loan files to PMI to account for the time-consuming process of compiling the files
21 (a reasonable period for approximately 100 documents often being three months or
22 longer).

23 31. On June 7, 2008, PMI abruptly disregarded the parties' course of
24 performance and requested approximately 511 loan files from Old Bank, almost four
25 times larger than any request PMI previously had made.

26 32. Old Bank promptly began compiling the approximately 511 loan files
27 and delivered them to PMI.

28 **PMI'S UNREASONABLE DEMAND FOR APPROXIMATELY 5,324 LOAN**

FILES TO BE DELIVERED WITHIN 30 DAYS

33. On July 8, 2008, PMI sent Old Bank a letter demanding that Old Bank deliver the loan file for each loan listed on a diskette enclosed with the letter. PMI did not indicate in the letter that the enclosed diskette listed every single loan for which PMI had not previously requested a loan file—approximately 5,324 loans. This was an unprecedented request.

34. Old Bank had not sent a notice of delinquency or filed a claim for the overwhelming majority of the 5,324 loans. In fact, approximately 4,237 of the 5,324 requested loans were not delinquent. Nonetheless, PMI disregarded the established course of the parties' performance under the LPMI coverage program and demanded delivery of every single insured loan file.

35. The July 8, 2008 letter also indicated that PMI had received only 2 of the 511 loan files that it requested on June 7, 2008 and that PMI would rescind coverage for the outstanding 509 loans if the files were not delivered by July 17, 2008. Old Bank, however, had in fact delivered all 511 loan files on July 1, 2008.

36. PMI's July 8, 2008 letter was the first time PMI had ever threatened to rescind coverage for a loan on the ground that Old Bank did not deliver the loan file within 30 days of PMI's written request.

37. On July 9, 2008, after reading PMI's July 8, 2008 letter, Aaron D. Wade, IndyMac's Senior Vice President, Secondary Marketing, telephoned Bill Shirreffs, PMI's Senior Vice President of National Sales, and provided Mr. Shirreffs with evidence that Old Bank had in fact delivered all 511 loan files to PMI on July 1, 2008. PMI subsequently rejected loan files for approximately 223 of those 511 loans; PMI requested additional information on those 223 loans, but made that request directly to Old Bank's repurchase administration division.

38. During the days following his receipt of PMI's July 8, 2008 letter, Mr. Wade had several phone conversations with Mr. Shirreffs regarding the loan file requests.

1 39. Mr. Wade did not realize that the July 8, 2008 letter requested
2 approximately 5,324 loan files because the letter did not say so. Mr. Wade only
3 learned of the enormous volume of the request from one of his conversations with
4 Mr. Shirreffs.

5 40. In their final discussion, Mr. Wade explained to Mr. Shirreffs that
6 because of the unprecedented volume of PMI's request and the time-consuming
7 process required to ensure that PMI received all documents that PMI requested for
8 each loan, it would be physically impossible for IndyMac to deliver the 5,324
9 requested loan files within 30 days. Mr. Wade further noted that the FDIC's recent
10 takeover of Old Bank and the FDIC's appointment as conservator also would slow
11 down IndyMac's ability to deliver the loan files because IndyMac would have to
12 secure the FDIC's approval before delivering the files. Mr. Wade explained that
13 IndyMac would need at least 60 additional days, and possibly longer, to comply with
14 PMI's request.

15 41. Mr. Shirreffs indicated that a 60-day or longer extension was reasonable
16 and that PMI likely would grant it, particularly because IndyMac had taken PMI's
17 request seriously and had contacted PMI about the 511 requested loan files.
18 Mr. Shirreffs promised that he would get back to Mr. Wade quickly about the oral
19 request for an extension. Mr. Wade never heard back from Mr. Shirreffs.

20 42. On August 13, 2008, PMI sent IndyMac a letter acknowledging
21 IndyMac's request for an extension on delivering the 5,324 loan files. PMI wrote that
22 the PDQ Endorsement required delivery within 30 days of a written request and that
23 PMI did not understand why IndyMac was unable to meet that deadline. Disregarding
24 the reasons that Mr. Wade had given to Mr. Shirreff about the basis for IndyMac's
25 reasonable request for an extension, PMI asked IndyMac to explain why it needed an
26 extension.

27 43. On August 27, 2008, Martha M. Belcher, IndyMac's Senior Vice
28 President & Secondary Marketing General Counsel, sent an email to William M.

1 Levinthal, PMI's Vice President and Assistant General Counsel, explaining that
 2 IndyMac was in the process of responding to PMI's August 13, 2008 letter and that if
 3 Mr. Levinthal had any questions he should contact Ms. Belcher.

4 44. Instead of responding to Ms. Belcher's email, the following day,
 5 August 28, 2008, Mr. Levinthal sent a letter to IndyMac stating that PMI was
 6 rescinding LPMI coverage for 5,565 loans—the 5,324 loans that PMI unreasonably
 7 demanded in its July 8, 2008 letter and 241 additional loans that PMI claimed it had
 8 requested files for but not received within 30 days. Approximately 680 of the 5,565
 9 loans were loans for which Old Bank sent PMI files but that PMI rejected and thus
 10 claims are "still outstanding." PMI claimed that it had the right to rescind LPMI
 11 coverage for the 5,565 loans under the PDQ Endorsement because IndyMac had not
 12 delivered the loan files for those 5,565 loans within 30 days of PMI's written requests
 13 and that PMI had allegedly been damaged by the delay.

14 45. Mr. Levinthal explained that the delay allegedly caused PMI damage
 15 because the insured loan pool was exhibiting an exorbitant delinquency rate, IndyMac
 16 had been placed in conservatorship, and PMI allegedly could not protect its rights
 17 without performing an adequate investigation of all of the insured loans. However, it
 18 is unclear if or how PMI sustained any actual damage as a result of any delay.

19 46. In fact, PMI disregarded (a) the language of the PDQ Endorsement,
 20 which contemplated a thirty-day delivery time *per individual loan file*, not for a
 21 massive request of more than 5,000 loan files; (b) IndyMac's reasonable explanation
 22 for the delay; (c) that the delay was in fact caused by PMI's unprecedented
 23 burdensome request, not by IndyMac; and (d) IndyMac and PMI's course of
 24 performance over 26 prior requests under the LPMI coverage program.

25 47. The following day, August 29, 2008, PMI sent IndyMac a letter
 26 enclosing a check returning \$13,713,883.72 in premiums that IndyMac paid to insure
 27 the 5,565 loans for which PMI claims it has rescinded insurance coverage.

28 48. IndyMac has not deposited the check. Instead, IndyMac is returning the

1 check to PMI because IndyMac disputes PMI's attempt to rescind coverage.

2 49. PMI's attempt to rescind more than \$1.49 billion in LPMI coverage for
 3 those 5,565 loans is unprecedented, unenforceable, and a tortious breach of the
 4 implied duty of good faith and fair dealing. PMI's conduct should be deemed null and
 5 void.

6

7 **FIRST CAUSE OF ACTION**

8 **(Declaratory Relief)**

9 50. IndyMac realleges and incorporates by reference herein each allegation
 10 contained in paragraphs 1 through 49 above.

11 51. PMI has contended that it is permitted to rescind more than \$1.49 billion
 12 in LPMI coverage for 5,565 insured loans on the ground that IndyMac did not deliver
 13 loan files to PMI for those 5,565 loans within 30 days of PMI's requests, and that PMI
 14 somehow has actually been damaged by IndyMac's delay. IndyMac disputes PMI's
 15 contentions.

16 52. IndyMac contends that

- 17 a. the parties contemplated—as evidenced by the language in the
 18 PDQ Endorsement—a 30-day delivery time when a request was
 19 made for *an individual loan file*, not for a massive request of more
 20 than 5,000 loan files;
- 21 b. PMI has not, in any way, been actually damaged by the purported
 22 delay, as required by the PDQ Endorsement before PMI can even
 23 attempt to rescind LPMI coverage for a single loan, let alone 5,565
 24 loans;
- 25 c. given the unprecedented nature of PMI's request and the inherent
 26 overbreadth and burden of the request, IndyMac has not delayed,
 27 or any delay is excused;
- 28 d. IndyMac provided PMI with a reasonable explanation for any

delay in delivering the loan files, but PMI unreasonably disregarded that explanation;

e. PMI, not IndyMac, is responsible for the delay. The volume of PMI's request was unprecedented, PMI required a specific set of documents for each loan file, and PMI knew that collecting and organizing all those documents in the proper format was so time-consuming that it would be impossible for IndyMac to comply with the request within 30 days;

f. IndyMac and PMI's course of performance under the LPMI coverage, as evidenced by 26 prior requests and deliveries, demonstrates that the parties did not contemplate a strict 30-day delivery time for loan file requests, particularly not for such an unprecedented, massive request; and

- g. even if the PDQ Endorsement specifies a 30-day delivery deadline regardless of the size of the request, the parties modified any such requirement by their practice and course of performance, and PMI has waived any right it may have had to rescind coverage on the ground of delay because on multiple prior occasions, PMI accepted loan files much later than 30 days after the requests.

IndyMac is informed and believes, and based thereon alleges, that PMI disputes its contentions.

53. An actual and justiciable controversy exists between IndyMac and PMI concerning the matters alleged herein.

54. IndyMac seeks a judicial declaration confirming that PMI's contentions as stated above are wrong and that IndyMac's contentions as stated above are correct; that PMI must honor all duties under the LPMI coverage program, including its duty to provide LPMI coverage for the 5,565 loans for which PMI contends it has rescinded LPMI coverage; that PMI's attempted rescission of the LPMI coverage has

1 no legal effect and is unconscionable, unenforceable, and null and void; and that
 2 because of PMI's conduct, IndyMac is excused from performing or complying with
 3 any conditions and duties otherwise imposed on it by the LPMI coverage program.

4 **SECOND CAUSE OF ACTION**

5 **(Injunctive Relief)**

6 55. IndyMac realleges and incorporates by reference herein each allegation
 7 contained in paragraphs 1 through 49 and 50 through 54 above.

8 56. PMI's alleged rescission of more than \$1.49 billion in LPMI coverage for
 9 the 5,565 loans has already inflicted significant injury on IndyMac by shifting more
 10 than \$1.49 billion of risk exposure onto IndyMac.

11 57. PMI's alleged rescission and refusal to allow IndyMac a reasonable
 12 period of time to comply with PMI's demand for 5,565 loan files will put IndyMac at
 13 significant risk of further irreparable injury because IndyMac is required, under
 14 applicable securitization documents and loan sale agreements, to maintain mortgage
 15 insurance for each loan. Believing that IndyMac no longer maintains such insurance
 16 because of PMI's alleged rescission, the investors likely will demand that IndyMac
 17 repurchase the 5,565 loans. The likelihood of such a demand places IndyMac at
 18 immediate risk of irreparable injury.

19 58. PMI will suffer no, or minimal, injury if it is enjoined from rescinding
 20 coverage for the 5,565 loans and from demanding loan files for loans that are not
 21 delinquent or as to which IndyMac has not made a claim, and compelled to allow
 22 IndyMac a reasonable period of time to deliver the loan files that PMI is permitted to
 23 review. The risk of the irreparable injury to IndyMac far outweighs any harm PMI
 24 might possibly suffer from an injunction.

25 59. To correct the injury that PMI already has caused IndyMac and to
 26 prevent probable irreparable injury that IndyMac likely will suffer in the very near
 27 future, PMI should be (a) compelled to correct the injury it has inflicted by
 28 withdrawing its alleged rescission, (b) prevented from demanding loan files for loans

1 that are not delinquent or as to which IndyMac has not made a claim, and
 2 (c) compelled to allow IndyMac a reasonable period of time to deliver the loan files
 3 that PMI is permitted to review—only files for loans that are delinquent or for which
 4 IndyMac has made a claim under the LPMI coverage program. An injunction will
 5 return the parties to the last peaceable uncontested status that existed before PMI's
 6 unprecedented and unconscionable conduct in allegedly rescinding coverage for the
 7 5,565 loans.

8 60. IndyMac has no adequate remedy at law.

9 **THIRD CAUSE OF ACTION**

10 **(Breach of Contract)**

11 61. IndyMac realleges and incorporates by reference herein each allegation
 12 contained in paragraphs 1 through 49, 50 through 54, and 55 through 60 above.

13 62. Implied in the Policy was a covenant that PMI would act in good faith
 14 and deal fairly with IndyMac, that PMI would do nothing to interfere with the rights
 15 of the Insureds to receive the benefits of the Policy, and that PMI would give at least
 16 the same level of consideration to IndyMac's interests as it gives to its own interests.
 17 PMI breached these duties by, among other things,

- 18 a. wrongfully and unreasonably asserting grounds for rescission that
 19 it knows are not supported by, and in fact are contrary to, the terms
 20 of the Policy, the law, insurance industry custom and practice, its
 21 course of dealings and performance with IndyMac, and the facts;
- 22 b. wrongfully and unreasonably demanding loan files for loans for
 23 which IndyMac has not sent a notice of delinquency or filed a
 24 claim, on grounds that it knows are not supported by, and in fact
 25 are contrary to, the terms of the Policy, the law, insurance industry
 26 custom and practice, its course of dealings and performance with
 27 IndyMac, and the facts;
- 28 c. giving greater consideration to its own interests than it gave to the

interests of the Insureds;

- d. failing to properly investigate before purporting to rescind coverage, and failing to communicate and follow accepted insurance industry custom, practice, and standards in responding to IndyMac's requests for coverage and in purporting to rescind coverage; and
- e. otherwise acting as alleged above.

63. To the extent not waived or otherwise excused, IndyMac has complied with all terms and conditions precedent contained in the Policy.

64. As a direct and proximate result of PMI's acts, IndyMac has been damaged in an amount to be proven at trial.

FOURTH CAUSE OF ACTION

(Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing)

65. IndyMac realleges and incorporates by reference herein each allegation contained in paragraphs 1 through 49, 50 through 54, 55 through 60, and 61 through 64 above.

66. Implied in the Policy was a covenant that PMI would act in good faith and deal fairly with IndyMac, that PMI would do nothing to interfere with the rights of the Insureds to receive the benefits of the Policy, and that PMI would give at least the same level of consideration to IndyMac's interests as it gives to its own interests. Instead of complying with these duties, IndyMac acted in bad faith by, among other things,

- a. wrongfully and unreasonably asserting grounds for rescission that it knows are not supported by, and in fact are contrary to, the terms of the Policy, the law, insurance industry custom and practice, its course of dealings and performance with IndyMac, and the facts;
- b. wrongfully and unreasonably demanding loan files for loans for which IndyMac has not sent a notice of delinquency or filed a

1 claim, on grounds that it knows are not supported by, and in fact
2 are contrary to, the terms of the Policy, the law, insurance industry
3 custom and practice, its course of dealings and performance with
4 IndyMac, and the facts;

5 c. giving greater consideration to its own interests than it gave to the
6 interests of the Insureds;
7 d. failing to properly investigate before purporting to rescind
8 coverage, and failing to communicate and follow accepted
9 insurance industry custom, practice, and standards in responding to
10 IndyMac's requests for coverage and in purporting to rescind
11 coverage; and
12 e. otherwise acting as alleged above.

13 67. In breach of the implied covenant of good faith and fair dealing, PMI did
14 the things and committed the acts alleged above for the purpose of consciously
15 withholding from IndyMac the rights and benefits to which it was entitled under the
16 LPMI coverage program, and without considering the interests of IndyMac and its
17 employees at least to the same extent as it did its own interests.

18 68. PMI's acts are inconsistent with IndyMac's reasonable expectations, are
19 contrary to established practices and legal requirements, are contrary to the express
20 terms of the LPMI coverage program, and constitute bad faith.

21 69. Pursuant to *Brandt v. Superior Court*, 37 Cal. 3d 813, 210 Cal. Rptr. 211
22 (1985), IndyMac is entitled to recover all attorneys' fees and costs that it reasonably
23 has incurred, and continue to incur, in its efforts to protect the benefits of insurance
24 that have been, and continues to be, wrongfully and in bad faith withheld by PMI.

25 70. PMI's conduct is despicable within the meaning of California Civil Code
26 section 3294, and has been done with a willful and conscious disregard of IndyMac's
27 rights, constituting malice, in that PMI engaged in a series of acts designed to deny the
28 benefits due under the LPMI coverage program and to conceal and/or misrepresent

material facts.

71. In light of information, facts, and relevant law to the contrary, PMI, by acting as alleged above, consciously disregarded IndyMac's rights and forced IndyMac to incur substantial financial risk, without any assistance from it, thereby inflicting substantial financial damage on IndyMac. PMI ignored IndyMac's interests and concerns, with the requisite intent to injure within the meaning of California Civil Code section 3294. Therefore, under California Civil Code section 3294, IndyMac is entitled to recover punitive damages from PMI in an amount to be determined at trial for the sake of example and to deter similar conduct in the future.

FIFTH CAUSE OF ACTION

(Reformation of Written Instrument Based on Mistake)

72. IndyMac realleges and incorporates by reference herein each allegation contained in paragraphs 1 through 49, 50 through 54, 55 through 60, 61 through 64, and 65 through 71 above.

73. If, and to the extent that, the PDQ Endorsement permits PMI to rescind coverage for the 5,565 loans under the above alleged circumstances, then the PDQ Endorsement does not reflect the true intent of the parties. This result is from the mutual mistake of the parties. The parties' true agreement is that PMI could rescind coverage for a particular loan if and only if (a) IndyMac unreasonably refused to deliver a loan file within 30 days after a written request from PMI for the file, and (b) IndyMac's refusal caused actual and substantial damage to PMI.

74. Without knowledge of the true facts and in reliance on PMI's representations, IndyMac was deceived and misled into accepting the PDQ Endorsement to the extent that it differs materially from the prior oral and written understanding of the parties. IndyMac's reliance on PMI's representations that the PDQ Endorsement conformed to the parties' intended agreement was reasonable and justified. Therefore, if, and to the extent that, PMI's present contention—that the PDQ Endorsement, as written, permits PMI to rescind coverage for the 5,565 loans

under the above alleged circumstances—is correct, then this result is based on mistake. Therefore, the PDQ Endorsement should be reformed, to the extent necessary, to prohibit PMI from rescinding coverage for any loan unless (a) IndyMac unreasonably refuses to deliver a loan file within 30 days after a written request from PMI for the file, and (b) IndyMac’s refusal causes actual and substantial damage to PMI, and, to the extent necessary, to delete any language in the PDQ Endorsement that PMI contends permits PMI to rescind coverage for the 5,565 loans under the above alleged circumstances.

WHEREFORE, IndyMac prays for judgment as follows:

ON THE FIRST CAUSE OF ACTION

1. For declarations in accord with IndyMac's contentions stated above;

ON THE SECOND CAUSE OF ACTION

2. For an injunction (a) requiring PMI to withdraw its alleged rescission of coverage for the 5,565 loans, (b) preventing PMI from demanding loan files for loans that are not delinquent or for which IndyMac has not made a claim, and (c) requiring PMI to allow IndyMac a reasonable period of time to furnish PMI with the loan files that PMI is permitted to review—only files for loans that are delinquent and for which a claim has been made;

ON THE THIRD CAUSE OF ACTION

3. For damages according to proof at the time of trial, plus interest;

ON THE FOURTH CAUSE OF ACTION

4. For damages according to proof at the time of trial, plus interest;
5. For reasonable attorneys' fees and costs incurred in obtaining the benefits due under the LPMI coverage, according to proof at the time of trial, plus interest;
6. For punitive damages in an amount to be determined at the time of trial;

ON THE FIFTH CAUSE OF ACTION

7. For the reformation of the PDQ Endorsement to the extent necessary to

1 reflect the true intent of the parties as described above;

2 **ON ALL CAUSES OF ACTION**

3 8. For IndyMac's costs of suit incurred herein; and
4 9. For such other, further, and/or different relief as may be deemed just and
5 proper.

6
7 DATED: September 11, 2008 DICKSTEIN SHAPIRO LLP

8
9 By: 
10 Kirk A. Pasich
11 Attorneys for Plaintiff

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

1 **DEMAND FOR JURY TRIAL**

2 IndyMac hereby demands a trial by jury in this action.

3
4 DATED: September 11, 2008 DICKSTEIN SHAPIRO LLP

5
6 By: 
7 Kirk A. Pasich
8 Attorneys for Plaintiff

9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28