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UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA

DEUTSCHE BANK NATIONAL TRUST )  
COMPANY, )

Plaintiff, )

vs. )

FEDERAL DEPOSIT INSURANCE )  
CORPORATION, *as Receiver of IndyMac* )  
*Bank, F.S.B.; Federal Deposit Insurance* )  
*Corporation, as Conservator and Receiver* )  
*of IndyMac Federal Bank F.S.B.; Federal* )  
*Deposit Insurance Corporation, in its* )  
*corporate capacity; and Federal Deposit* )  
*Insurance Corporation, as Government* )  
*Entity,* )

Defendants. )  
\_\_\_\_\_ )

Case No. CV 09-3852 GAF (FFMx)

MEMORANDUM & ORDER RE: MOTIONS  
TO DISMISS BY FDIC AS RECEIVER AND  
FDIC IN ITS CORPORATE CAPACITY

I.

INTRODUCTION

Deutsche Bank brings suit on behalf of itself and as trustee for numerous investors who hold mortgage-backed securities issued by IndyMac Bank, FSB. The suit asserts claims against the Federal Deposit Insurance Corporation (“FDIC”) in various capacities<sup>1</sup> as the successor to IndyMac, which failed in 2008. The FDIC in its capacity

<sup>1</sup> The FDIC is named as a defendant in multiple capacities: (1) as Receiver of IndyMac; (2) as Receiver and Conservator of IndyMac Federal Bank, a “pass through” institution created by the FDIC; (3) in its corporate capacity; and (4) as “government entity.”

1 as receiver (“FDIC-R”) and in its corporate capacity (“FDIC-C”) now bring motions to  
2 dismiss claims arising out of its sale of IndyMac assets to OneWest Bank in 2009.

3 **A. BACKGROUND**

4 Before the recent collapse of the real estate market, IndyMac Bank, FSB,  
5 (“IndyMac”) aggressively marketed mortgage-backed securities that were sold to  
6 investors seeking an income-producing product. These mortgage backed securities  
7 consisted of mortgage pools evidenced by certificates held in a trust managed by  
8 Deutsche Bank National Trust Company (“Deutsche Bank”) as trustee. The securities  
9 were created through complex contracts, so-called “Pooling and Servicing Agreements”  
10 (“PSAs”), that govern the relationship among Deutsche Bank, the trusts it managed, the  
11 investors in the certificates held in those trusts, IndyMac, and certain IndyMac  
12 affiliates. One such agreement was created for each pool of mortgages.

13 For some period of years, the PSAs functioned without any notable difficulty;  
14 the mortgages were serviced in the usual course and investors received their periodic  
15 payments. But then the real estate market collapsed, mortgage loan defaults  
16 skyrocketed, and IndyMac failed. At the direction of the Office of Thrift Supervision  
17 (“OTS”), which declared IndyMac insolvent, the Federal Deposit Insurance  
18 Corporation (“FDIC”) took control of the institution and acted aggressively to wind up  
19 IndyMac’s affairs. Now, in the aftermath of the failure, Deutsche Bank brings this  
20 lawsuit alleging that IndyMac, before it failed, and Defendant FDIC, as the successor to  
21 IndyMac, breached the PSAs, resulting in damage to Deutsche Bank, the trusts, and the  
22 trust’s beneficiaries in a sum between six and eight billion dollars. The issues now  
23 before the Court center around the FDIC’s post-seizure conduct.

24 At the time of the seizure, OTS authorized the creation of a new federally-  
25 chartered savings bank, IndyMac Federal, to which FDIC-R as receiver for IndyMac  
26 transferred substantially all of IndyMac’s assets. FDIC operated the business of  
27 IndyMac for eight months and then sold a substantial portion of IndyMac’s assets,  
28 including the right to service the mortgage loans deposited into the trusts, to a newly

1 formed financial institution, OneWest Bank. OneWest acquired these rights without  
2 being required to assume liabilities that IndyMac had undertaken to maintain the quality  
3 of the mortgage loans that had been deposited into the trusts. Deutsche Bank contends  
4 that, under the terms of its agreements with IndyMac, the FDIC could not sell the  
5 servicing rights without Deutsche Bank's consent, and that the sale of these rights,  
6 particularly without requiring an accompanying assumption of liabilities, constitutes a  
7 breach of the agreement. Deutsche Bank further contends the Financial Institutions  
8 Reform, Recovery and Enforcement Act ("FIRREA") does not preempt contractual  
9 rights of consent and does not authorize FDIC to breach contracts without paying  
10 damages.

11 **B. THE MOTION TO DISMISS AND ISSUES PRESENTED**

12 The FDIC moves to dismiss all claims related to the sale of assets to OneWest  
13 Bank. The FDIC asserts that Deutsche Bank's claims are barred by FIRREA, which it  
14 contends preempts any contractual obligation under the PSAs to obtain Deutsche  
15 Bank's consent to the sale of the servicing rights. The FDIC also contends that  
16 Deutsche Bank, the trusts, and the trust beneficiaries are, at best, third-tier creditors, and  
17 that, given the limited assets available for distribution, the Court should dismiss the case  
18 on prudential mootness grounds because no recovery is possible. FDIC also argues that  
19 FIRREA bars Deutsche Bank from pursuing any equitable claims arising out of its  
20 seizure of IndyMac. Finally, FDIC contends that Deutsche Bank cannot maintain  
21 claims for breach of the covenant of good faith and fair dealing or breach of fiduciary  
22 duty and that FDIC's conduct did not constitute a taking or violate due process under  
23 the Fifth Amendment of the United States Constitution.

24 Deutsche Bank vigorously opposes the motion. Deutsche Bank argues that  
25 FIRREA does not preempt contractual rights of consent, that the FDIC had the option  
26 under FIRREA of performing or repudiating the agreements, and that, having failed to  
27 repudiate, it must answer for its breach. Deutsche Bank also contends that, because the  
28 PSAs constituted so-called "Qualifying Financial Contracts" under FIRREA, the FDIC

1 acted in violation of FIRREA in transferring PSA assets while retaining the liabilities in  
2 an insolvent institution. Deutsche Bank also contends that, because FIRREA does not  
3 give the FDIC the authority to breach a failed institution's contracts without paying  
4 damages, it is entitled to assert remedies, including equitable remedies, that will allow it  
5 to achieve proper compensation for the contract breach.

6 The motion therefore presents the following issues for resolution:

7 (1) Whether FDIC's transfer of servicing rights to One West Bank violated the  
8 terms of the PSAs between IndyMac and Deutsche Bank or the provisions of 12  
9 U.S.C. § 1821(e)(9) relating to Qualified Financial Contracts.<sup>2</sup>

10 (2) Whether FIRREA, through 12 U.S.C. § 1821(d)(2)(G)(i)(II) in particular,  
11 permits FDIC to transfer rights and liabilities of a failed institution without  
12 obtaining consent as required under the terms of a contract between IndyMac  
13 and a third party such as Deutsche Bank.

14 (3) Whether Deutsche Bank's claims should be dismissed under the prudential  
15 mootness doctrine because even if it prevailed, its claim for damages would not  
16 be entitled to priority and thus has no value given IndyMac's insufficient assets.

17 (4) Whether Deutsche Bank can pursue a claim for breach of the implied  
18 covenant of good faith and fair dealing while also pursuing its breach of  
19 contract claim.

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22 <sup>2</sup> This issue arises in part from a statement in the complaint that is ambiguous and probably the result of  
23 a drafting error. The complaint alleges that the PSAs permit succession "only by a person or entity  
24 assuming all of IndyMac's business." (Compl. ¶ 56.) The sample PSA provided, however, indicates that  
25 the Trustee, on an event of default by the Master Servicer (IndyMac Bank), shall assume all of the rights  
26 and obligations of the Master Servicer under this Agreement arising thereafter . . . ." (Docket No. 46,  
27 Opp., Ex. A [PSA] at 60, § 3.05.) Similar language can be found in Section 7.02. (*Id.* at 94.) Thus, while  
28 succession does not require that the successor assume "all of IndyMac's business," it does contemplate  
that the successor will assume rights, duties, liabilities and obligations of the Master Servicer under the  
PSA. However, the agreement also provides that the Trustee, as successor, is exempt from certain  
obligations including the obligation "to effectuate repurchases or substitutions of Mortgage Loans  
hereunder, including repurchases or substitutions pursuant to Section 2.02 or 2.03." (*Id.* at 60, § 3.05.)

1 (5) Whether Deutsche Bank’s request for equitable relief, including its request  
2 for the imposition of a constructive trust, is barred by 12 U.S.C. § 1821(j).

3 (6) Whether the breach of fiduciary duty claim is barred by the Federal Tort  
4 Claims Act (FTCA) and whether Deutsche Bank has a private right of action to  
5 pursue that claim.

6 (7) Whether the alleged breach of contract gives rise to a “takings” claim under  
7 the Fifth Amendment or constitutes a denial of due process.

8 The first issue is the most important, and the Court resolves the question in  
9 favor of Deutsche Bank. The Court concludes that FIRREA Section 1821(d)(2)(G)  
10 does not permit FDIC to circumvent its statutory obligation either to honor a failed  
11 institution’s contracts, or to repudiate them and pay damages. The Court provides a  
12 fuller discussion of this, and of the other claims, below.

## 13 II.

### 14 DISCUSSION

#### 15 A. THE LEGAL STANDARD

16 In considering a Rule 12(b)(6) motion to dismiss, the Court must accept as true  
17 all factual allegations pleaded in the complaint and construe them “in the light most  
18 favorable to the nonmoving party.” Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336,  
19 337–38 (9th Cir. 1996); see also Stoner v. Santa Clara County Office of Educ., 502 F.3d  
20 1116, 1120–21 (9th Cir. 2007). Dismissal under Rule 12(b)(6) may be based on either  
21 (1) a lack of a cognizable legal theory, or (2) insufficient facts under a cognizable legal  
22 theory. SmileCare Dental Grp. v. Delta Dental Plan of Cal., Inc., 88 F.3d 780, 783 (9th  
23 Cir. 1996) (citing Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir.  
24 1984)).

25 To plead sufficient facts to survive a motion to dismiss, a complaint must allege  
26 facts that, “accepted as true, . . . ‘state a claim to relief that is plausible on its face.’”  
27 Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atl. Corp. v. Twombly,  
28 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the plaintiff pleads

1 factual content that allows the court to draw the reasonable inference that the defendant  
2 is liable for the misconduct alleged.” Id. (citing Twombly, 550 U.S. at 556). “[W]here  
3 the well-pleaded facts do not permit the court to infer more than the mere possibility of  
4 misconduct,” the complaint has not sufficiently established that the pleader is entitled to  
5 relief. Id. at 1950. And although the Court’s consideration of the facts is ordinarily  
6 limited to the allegations of the complaint, documents to which a complaint refers and  
7 which are not reasonably contested may be considered in ruling on a 12(b)(6) motion.  
8 Inland Boatmen’s Union, 279 F.3d 1075, 1083 (9th Cir. 2002); Branch v. Tunnell, 14  
9 F.3d 449, 453–54 (9th Cir. 1994), cert. denied, 114 S. Ct. 2704.

## 10 **B. THE CONTRACT CLAIM**

### 11 **1. THE ALLEGATIONS**

12 The present motion focuses on those claims arising out of the sale of IndyMac  
13 assets to OneWest Bank. Although the sale implicates several legal theories, the  
14 arguments center primarily around Deutsche Bank’s assertion that the sale breached the  
15 terms of the PSAs that governed the relations between IndyMac and Deutsche Bank in  
16 regard to the sale and servicing of the mortgage backed securities. Though the terms of  
17 the PSAs are lengthy and complex, the terms at issue here are relatively straightforward.  
18 Deutsche Bank alleges that IndyMac was given the right and obligation to service the  
19 mortgage loan pools for which it received servicing fees (Compl. ¶¶ 35c. & d.; 37–38;  
20 Docket No. 46, Opp., Ex. A at 59–74, Article 3); that IndyMac made certain warranties  
21 and representations regarding the mortgage pools and promised to take curative steps to  
22 maintain the quality of the mortgage pools (Compl. ¶¶ 49–51; Docket No. 46, Opp., Ex.  
23 A at 56–57, § 2.03.); that if IndyMac defaulted on its obligations, only Deutsche Bank  
24 had the power to act as or hire a successor servicer under the terms of the agreement  
25 (Compl. ¶ 56; Docket No. 46, Opp., Ex. A at 60–61, § 3.05); and that, except in limited  
26 circumstances not pertinent to this motion, IndyMac could not assign any of its rights  
27 under the PSAs without the written consent of the trustee and others. (Compl. ¶ 55;  
28 Docket No. 46, Opp., Ex. A at 111, § 10.07.)

1 Deutsche Bank contends that FDIC violated the contract by transferring the  
2 servicing rights to OneWest without transferring IndyMac's liabilities and obligations  
3 to honor the warranties and representations. (Compl. ¶¶ 147, 149.) In addition, they  
4 contend that the PSAs constituted "qualified financial contracts," which § 1821(e)(9) of  
5 FIRREA required to be conveyed in whole or not at all. (Compl. ¶¶ 147–50.)

6 Deutsche Bank also contends that FDIC, in its capacities as receiver and  
7 conservator, became subject to the PSAs and therefore could not transfer the IndyMac  
8 servicing rights without the consent of Deutsche Bank. (Compl. ¶ 148.) FDIC's failure  
9 to obtain consent before transferring the rights to One West, according to Deutsche  
10 Bank, constituted a breach of the PSAs by FDIC in all its capacities. (Compl. ¶ 153.)  
11 Because the FDIC claims that its transfer of assets to OneWest was authorized under  
12 FIRREA, the Court must determine the FDIC's powers under the applicable provisions  
13 of the statute.

14 **2. DEUTSCHE BANK DOES NOT HAVE A CLAIM BASED ON FDIC'S FAILURE**  
15 **TO TRANSFER ALL ASSETS AND LIABILITIES TO ONEWEST**

16 Deutsche Bank contends that in transferring servicing rights to OneWest  
17 without also transferring all of IndyMac's obligations under the PSAs amounted to a  
18 breach of contract both because it violated the terms of the PSAs and because it violated  
19 § 1821(e)(9) of FIRREA. Deutsche Bank cannot prevail under either of these theories.

20 First, although Deutsche Bank's complaint alleges that the PSAs permit  
21 succession "only by a person or entity assuming all of IndyMac's business," no such  
22 provision appears in the sample agreement that Deutsche Bank provided the Court.  
23 (See generally Docket No. 46, Opp., Ex. A.) The Court may properly refer to this  
24 sample PSA in deciding the motion to dismiss. See Branch, 14 F.3d at 453–54. To the  
25 extent that Deutsche Bank suggests that IndyMac made other "representations and  
26 promises" that a single entity would service the loans and bear the curative obligations  
27 (Compl. ¶ 31), it cannot pursue a breach of contract claim on that basis because only  
28

1 written agreements executed by the bank are enforceable against FDIC. 12 U.S.C.  
2 § 1823(e)(1).

3 Second, Deutsche Bank cannot pursue its claim on the theory that the transfer  
4 violated § 1821(e)(9). This provision places special limitations on the FDIC's ability to  
5 transfer certain "qualified financial contracts," or "QFCs." In particular, it provides  
6 that, "[i]n making any transfer of assets or liabilities of a depository institution in  
7 default which includes any qualified financial contract," the FDIC as conservator or  
8 receiver must either:

9 transfer to one financial institution . . . (I) all qualified financial contracts  
10 between any person . . . and the depository institution in default; (II) all claims  
11 of such person or any affiliate of such person against such depository institution  
12 under any such contract . . . ; [and] (III) all claims of such depository institution  
13 against such person or any affiliate of such person under any such contract . . .  
14 or . . . transfer none of the qualified financial contracts [or] claims . . . (with  
15 respect to such person and any affiliate of such person).

16 12 U.S.C. § 1821(e)(9)(A). QFCs include "any securities contract," which includes "a  
17 contract for the purchase, sale, or loan of . . . a mortgage loan [or] any interest in a  
18 mortgage loan." Id. § 1821(e)(8)(D). Such contracts also include:

19 a master agreement that provides for [such a contract], together with all  
20 supplements to any such master agreement, without regard to whether the  
21 master agreement provides for an agreement or transaction that is not a  
22 securities contract under this clause, except that the master agreement shall be  
23 considered to be a securities contract under this clause only with respect to each  
24 agreement or transaction under the master agreement that [qualifies as a  
25 qualified financial contract].

26 Id. § 1821(e)(8)(D)(ii)(XI). Deutsche Bank contends that the PSAs constitute QFCs,  
27 and that FDIC accordingly violated § 1821(e)(9), and thus breached the contract, by  
28 conveying the servicing rights without the related obligations to maintain the quality of  
the mortgage pools.

As an initial matter, Deutsche Bank cites no authority allowing it to pursue a  
breach of contract claim on the ground that FDIC failed to comply with statutory  
restrictions. The Court, however, will consider this claim in substance and analyze it as  
a freestanding claim for violation of the statute. Even assuming that FIRREA's  
provisions on the transfer of QFCs gave rise to a private right of action, Deutsche Bank

1 could not prevail because the Court concludes that FDIC did not breach those  
2 provisions here. Although each PSA is contained in a single document, the document  
3 contains two agreements that IndyMac entered into in two different capacities: as  
4 “Seller” and as “Master Servicer.” (See Docket No. 46, Opp., Ex. A at 14, 25.) In its  
5 capacity as “Seller,” IndyMac received money for selling, transferring, and assigning to  
6 the Deutsche Bank trusts certain mortgage loans. (Compl. ¶ 36; Docket No. 46, Opp.,  
7 Ex. A at 34.) In its capacity as “Seller,” IndyMac also made certain “representations  
8 and warranties,” including that “(2) [a]ll regularly scheduled monthly payments due . . .  
9 have been made”; that “(4) [i]mmediately before the assignment of the Mortgage Loans  
10 to the Depositor, the Seller had good title to . . . each Mortgage Loan”; that “(6) [t]here  
11 is no valid offset, defense or counterclaim to any Mortgage Note or Mortgage”; that  
12 “(9) [e]ach Mortgage Loan at origination complied in all material respects with  
13 applicable local, state and federal laws and regulations”; and that “(11) [a] lender’s  
14 policy of title insurance . . . was effective on the date of the origination of each  
15 Mortgage Loan and each such policy is valid and remains in full force and effect.” (Id.  
16 at 39, S-III-1–2.) The PSAs further provide that if any party discovered a breach of any  
17 of those representations and warranties, IndyMac in its capacity as “Seller” had to cure  
18 the breach or substitute or repurchase the affected mortgage loan or loans. (Id. at 39.)  
19 In its capacity as “Master Servicer,” IndyMac agreed to collect and process mortgage  
20 payments in return for servicing fees and other compensation. (Id. at 44, 55.) The  
21 PSAs do not require IndyMac, in its capacity as Master Servicer, to substitute or  
22 repurchase non-performing mortgages.

23 The agreement under which IndyMac, as Seller, transferred the mortgage loans  
24 to the Deutsche Bank trusts clearly constitutes a QFC. See 12 U.S.C.  
25 § 1821(e)(8)(D)(ii)(I). The agreement under which IndyMac, as Master Servicer,  
26 assumed servicing rights, however, does not. It does not qualify as a sale or transfer of  
27 a mortgage loan, or as any other type of agreement constituting a QFC under FIRREA.  
28 Section 1821(e) provides that a “master agreement shall be deemed to be a qualified

1 financial contract only with respect to those transactions that are themselves qualified  
 2 financial contracts.” *Id.* § 1821(e)(8)(D)(vii). Because the servicing transaction does  
 3 not constitute a QFC, § 1821(e)(9) does not bar FDIC from transferring the servicing  
 4 rights without also transferring the obligations to substitute and repurchase bad  
 5 mortgages, which were part of the QFC transferring the mortgage loans. Deutsche  
 6 Bank therefore cannot succeed on its claim that FDIC’s sale of the servicing rights to  
 7 OneWest, without also transferring the obligations to substitute and repurchase bad  
 8 mortgages, violated § 1821(e)(9). Deutsche Bank’s claim for violation of that provision  
 9 is therefore **DISMISSED with prejudice.**

10 **3. DEUTSCHE BANK DOES HAVE A CLAIM BASED ON FDIC’S FAILURE TO**  
 11 **OBTAIN ITS CONSENT BEFORE TRANSFERRING THE SERVICING RIGHTS**

12 Deutsche Bank also bases its breach of contract claim on FDIC’s failure to  
 13 obtain Deutsche Bank’s consent to the transfer of the servicing rights, in violation of the  
 14 PSAs’ provision barring IndyMac from assigning any of its rights under the PSAs  
 15 without the written consent of the trustee and others. (Complaint ¶ 55; Opp., Ex. A at  
 16 94.) This states a valid claim.

17 ***a. The FIRREA Provisions Do Not Preempt State Contract Law***

18 The FDIC argues that the contract claim, and those causes of action that are  
 19 essentially derivative of the contract claim, fail in their entirety because FIRREA  
 20 preempts any contractual provision that would require it to obtain consent before selling  
 21 a failed institution’s assets. For this proposition, it relies on 12 U.S.C.  
 22 § 1821(d)(2)(G)(i)(II), which provides:

23 The Corporation may, as conservator or receiver--  
 24 (I) merge the insured depository institution with another insured  
 25 depository institution; or  
 26 (II) subject to clause (ii), transfer any asset or liability of the institution in  
 default (including assets and liabilities associated with any trust  
 business) ***without any approval, assignment, or consent with respect to  
 such transfer.***

27 12 U.S.C. § 1821(d)(2)(G)(i)(II) (emphasis added). According to the FDIC, the  
 28 language of this provision of FIRREA conclusively ends Deutsche Bank’s claim for

1 damages arising out of the sale of assets to OneWest without obtaining consent. For  
 2 this proposition, the FDIC relies in significant part on the Ninth Circuit's decision in  
 3 Sahni v. American Diversified Partners, 83 F.3d 1054 (9th Cir. 1996).

4 In Sahni, the FDIC undertook a receivership of a failed bank's assets, which  
 5 included general-partnership interests in certain limited partnerships. Sahni, 83 F.3d at  
 6 1056. The FDIC then transferred the general partnership interests without obtaining the  
 7 consent of the partnerships' limited partner. Id. at 1059. The limited partner cried foul,  
 8 sued the FDIC, and claimed that "the FDIC violated California Corporations Code  
 9 § 15509 by failing to attain [his] consent, as limited partner, to the sale of the . . .  
 10 partnerships." Id. The Circuit held that Corporations Code section 15509 was  
 11 "preempted by federal law" as embodied by section 1821(d)(2)(G)(i)(II), and that the  
 12 FDIC was "exempted . . . from having to obtain any consent." Id. It is clear, however,  
 13 that Sahni's reasoning was directed to the issue of preemption of state partnership  
 14 statutes, not state contract law. While § 1821(d)(2)(G)(i)(II) unmistakably preempts  
 15 state statutory consent requirements, other provisions of FIRREA and later circuit  
 16 decisions treat contracts differently.

17 Section 1821(e) expressly addresses the treatment of contracts made by a failed  
 18 institution prior to its seizure. It provides in pertinent part:

19 (1) Authority to repudiate contracts

20 In addition to any other rights a conservator or receiver may have, the  
 conservator or receiver for any insured depository institution may  
 disaffirm or repudiate any contract or lease--

21 (A) to which such institution is a party;

22 (B) the performance of which the conservator or receiver, in the  
 conservator's or receiver's discretion, determines to be  
 burdensome; and

23 (C) the disaffirmance or repudiation of which the conservator or  
 receiver determines, in the conservator's or receiver's discretion,  
 24 will promote the orderly administration of the institution's affairs.

25 12 U.S.C. § 1821(e). The FDIC must exercise its power to repudiate within "a  
 26 reasonable period following [its appointment]," id. § 1821(e)(2), and where the FDIC  
 27 has exercised its power of repudiation, the injured contracting party has the right to  
 28 recover damages subject to the measure established by FIRREA. Id. § 1821(e)(3).

1 There can be no doubt that those acting on behalf of the FDIC in this case understood  
2 the requirements of § 1821(e) because the FDIC expressly repudiated three PSAs on the  
3 basis that they were “burdensome” and that repudiation would “promote the orderly  
4 administration of the institution’s affairs.” (Compl. ¶ 76.) Having decided not to  
5 repudiate the remaining agreements, FDIC was under an obligation to adhere to their  
6 terms and conditions. The failure to meet that obligation amounts to a breach of those  
7 agreements.

8 The D.C. Circuit came to this conclusion in Waterview Management Co. v.  
9 FDIC, 105 F.3d 696 (D.C. Cir. 1997). In that case, the failed institution had given  
10 Waterview Management Company an “exclusive option to market and purchase”  
11 certain real estate in Maryland. Id. at 697. Subsequently, the Resolution Trust  
12 Corporation (“RTC”) was appointed receiver for the bank, and decided to advertise the  
13 real estate, in violation of the bank’s contractual obligations. Id. at 698. Waterview  
14 sued, and on appeal, the D.C. Circuit held that the RTC had to comply with the  
15 contractual limitations. Noting that the District Court had dismissed on the basis of 12  
16 U.S.C. § 1821(d)(2)(G)(i)(II), the D.C. Circuit noted that “[t]he District Court adopted  
17 the RTC’s argument that this section should be construed to preempt any state law right  
18 that affects the receiver’s ability to sell the property . . . . We reject the District Court’s  
19 view of the statute.” Id. at 699. Rejecting a claim of preemption, the Circuit further  
20 observed:

21 Preemption occurs only where state law conflicts with federal law, and there is  
22 no conflict between the RTC’s ability to transfer the assets held by the failed  
23 financial institution pursuant to 12 U.S.C. § 1821(d)(2)(G)(i)(II) and the  
24 enforcement of valid state law contract rights. Such state law contracts entered  
into pre-receivership serve to define the asset held by the failed financial  
institution.

25 Id. at 699–700 (emphasis added).

26 The Ninth Circuit adopted the reasoning of Waterview in Sharpe v. F.D.I.C.,  
27 126 F.3d 1147 (9th Cir. 1997). In that case, the plaintiffs had entered into a settlement  
28 agreement with Pioneer Bank on July 8, 1994, which at the end of the business day was

1 declared insolvent and seized by regulators who appointed the FDIC as receiver. When  
2 the FDIC failed to honor the settlement agreement, the plaintiffs brought a breach of  
3 contract claim against the FDIC and sought the equitable remedies of declaratory relief  
4 and rescission along with damages. The trial court dismissed the case on the ground  
5 that the claims were precluded by the jurisdictional bar imposed by § 1821(j). Id. at  
6 1151. Plaintiffs appealed.

7 The Ninth Circuit decision expressly rejected the notion that the FDIC may  
8 breach contracts with impunity. “[T]o allow the FDIC to avoid its contractual  
9 obligations by invoking the FIRREA administrative claims process would effectively  
10 preempt state contract law. The statute does not indicate that Congress intended to  
11 preempt state law so broadly.” Id. at 1157. The Court wrote:

12 The District of Columbia Circuit recently held that FIRREA does not  
13 preempt state contract law, both because the language of the statute does  
14 not indicate that Congress intended to preempt such a broad area of state  
15 law and because of the potential constitutional problems with so holding.  
16 Waterview Management Co. v. FDIC, 105 F.3d 696, 699 (D.C. Cir.1997)  
17 (“Indeed, to hold that the federal government could simply vitiate the  
18 terms of existing assets, taking rights of value from private owners with  
19 no compensation in return, would raise serious constitutional issues.”).  
20 We adopt the reasoning of that court.

21 . . . .  
22 Our conclusion is further supported by FIRREA’s provision regarding  
23 the repudiation of contracts. 12 U.S.C. § 1821(e). Section 1821(e) allows  
24 the FDIC to “disaffirm” any contract that it determines to be  
25 burdensome. When the FDIC chooses to repudiate a contract pursuant to  
26 § 1821(e), it must inform the parties to the contract within a reasonable  
27 time and pay compensatory damages.

28 Had the FDIC followed the § 1821(e) procedure in disaffirming the  
settlement agreement with the Sharpes, this would have been a very  
different case. But rather than proceeding pursuant to § 1821(e), the  
FDIC chose to breach the contract by recording the reconveyance  
delivered by the Sharpes without making a wire transfer of funds which  
was its obligation under the settlement agreement. FIRREA does not  
address the consequences of the FDIC’s breach of the Sharpes’  
settlement agreement, but it cannot be the case that the FDIC is in a  
better position when it breaches a contract than when it chooses to  
repudiate.

Id. at 1156-57.

Based on the foregoing authorities, the Court concludes that the FDIC cannot,  
on the basis of federal preemption, avoid the terms and conditions of IndyMac’s

1 agreements with Deutsche Bank. The FDIC had the option of repudiating those  
2 agreements and paying damages under § 1821(e)(3). But the FDIC chose to repudiate  
3 only three of the 240 trust agreements with Deutsche Bank. Accordingly, Deutsche  
4 Bank may proceed with its breach of contract claim arising out of the sale of assets to  
5 OneWest Bank.

6 ***b. FIRREA Does Not Preclude Equitable Relief Relating to the Breach***  
7 ***of Contract***

8 The FDIC also contends that Deutsche Bank cannot seek remedies of rescission,  
9 restitution, or constructive trust because FIRREA bars the Court from granting any  
10 injunction with respect to the actions of the FDIC except as provided in the statute. The  
11 FDIC cites to 12 U.S.C. § 1821(j), which provides:

12 Except as otherwise provided in this section, no court may take any  
13 action except at the request of the Board of Directors by regulation or  
14 order, to restrain or affect the exercise of powers or functions of the  
Corporation as a conservator or a receiver.

15 12 U.S.C. § 1821(j). The FDIC essentially contends that the equitable remedies  
16 sought—namely, a constructive trust on the proceeds of the sale of the servicing rights  
17 to OneWest—amount to injunctive relief that is banned under § 1821(j). However,  
18 Sharpe provides the answer to the FDIC’s argument and allows for the remedies sought  
19 in this case. There, the Circuit held:

20 The damages claim is not affected by the jurisdictional bar imposed by  
21 § 1821(j), but the claims for rescission and declaratory relief must fall  
22 under an exception to § 1821(j) in order to survive. The bar imposed by  
23 § 1821(j) does not extend to situations in which the FDIC as receiver  
24 asserts authority beyond that granted to it as a receiver. Section § 1821(j)  
25 “shields only ‘the exercise of powers or functions’ Congress gave to the  
26 FDIC; the provision does not bar injunctive relief when the FDIC has  
acted beyond, or contrary to, its statutorily prescribed, constitutionally  
permitted, powers or functions.” National Trust for Historic Preservation  
v. FDIC, 995 F.2d 238, 240 (D.C. Cir. 1993), judgment vacated, 5 F.3d  
567 (D.C. Cir.1993), and reinstated in relevant part, 21 F.3d 469 (D.C.  
Cir. 1994).

27 Sharpe, 126 F.3d at 1155. Because FIRREA “does not authorize the breach of  
28 contracts” and “does not preempt state law so as to abrogate state law contract rights,”

1 the FDIC does not act “within its statutorily granted powers in breaching” a valid  
2 contract between the failed institution and a third party. *Id.* In such circumstances,  
3 claims for equitable relief are not barred by § 1821(j). *See id.*

4 Accordingly, the Court concludes that Deutsche Bank may seek equitable  
5 remedies arising out of the FDIC’s breach of the PSAs.

6 ***c. The Claim Should Not Be Dismissed for Prudential Mootness***

7 FDIC argues that any claim that Deutsche Bank may have should be dismissed  
8 under principles of prudential mootness based on several decisions from this district.  
9 E.g., Nasoordeen v. F.D.I.C., No. 08-5631, 2010 WL 1135888 (C.D. Cal. Mar. 17,  
10 2010). In Nasoordeen, Judge Morrow discussed the doctrine in considerable detail:

11 “Under the doctrine of prudential mootness, there are circumstances  
12 under which a controversy, not constitutionally moot, is so ‘attenuated  
13 that considerations of prudence and comity for coordinate branches of  
14 government counsel the court to stay its hand, and to withhold relief it  
15 has the power to grant.’” Fletcher v. United States, 116 F.3d 1315, 1321  
16 (10th Cir. 1997) (quoting Chamber of Commerce, 627 F.2d at 291).  
17 “Where it is so unlikely that the court’s grant of [remedy] will actually  
18 relieve the injury, the doctrine of prudential mootness—a facet of  
19 equity—comes into play. This concept is concerned, not with the court’s  
20 power under Article III to provide relief, but with the court’s discretion  
21 in exercising that power.” Penthouse International, Ltd. v. Meese, 939  
22 F.2d 1011, 1019 (D.C. Cir. 1991).

23 Nasoordeen, 2010 WL 1135888, at \*6. Although the Ninth Circuit has never applied  
24 the doctrine, it has been adopted by the First, Third, Fourth, Fifth, Sixth, Eighth, Tenth,  
25 and D.C. Circuits, and courts within this circuit have consistently applied the doctrine.  
26 *Id.* at \*6 (collecting cases). The doctrine applies when “there are no set of  
27 circumstances under which [plaintiffs] can recover any money or property as a result of  
28 [their] claims,” such as when the amount realized from the liquidation of an insolvent  
bank’s assets is insufficient to meet its liabilities. *Id.* at \*8 (quoting First Ind. Fed. Sav.  
Bank v. F.D.I.C., 964 F.2d 503, 507 (5th Cir. 1992)) (first alteration in original).

FDIC argues that all of Deutsche Bank’s claims are prudentially moot because  
the receiverships of IndyMac and IndyMac Federal have insufficient funds to meet any  
general unsecured claims. (Docket No. 23, Mem. at 3); see also Fed. Deposit Ins.

1 Corp., Notice, Determination of Insufficient Assets to Satisfy Claims Against Financial  
2 Institution in Receivership, 74 Fed. Reg. 59,540 (Nov. 18, 2009). Therefore, FDIC  
3 contends, Deutsche Bank will not be able to recover any money or property, even if it  
4 prevails on its claims. Deutsche Bank, however, maintains that it can recover because  
5 its claims are not general unsecured claims, and that its claims are therefore not  
6 prudentially moot. In particular, Deutsche Bank contends that its claims must be paid  
7 by the FDIC-R either as administrative expenses or from the proceeds of the sale of the  
8 servicing rights and by the FDIC-C from its own funds. (Docket No. 47, Opp. at 14.)

9 FIRREA provides for a priority order in which “amounts realized from the  
10 liquidation or other resolution of any insured depository institution” must be  
11 “distributed to pay claims.” 12 U.S.C. § 1821(d)(11). Under this priority order, FDIC-  
12 R must pay claims in the following order: “(i) [a]dministrative expenses of the  
13 receiver[,] (ii) [a]ny deposit liability of the institution[,] (iii) [a]ny other general or  
14 senior liability of the institution . . . .” *Id.* at § 1821(d)(11)(A). When the FDIC, acting  
15 as receiver, repudiates a contract, it must pay damages as a third-priority general  
16 liability of the institution. *See Battista v. F.D.I.C.*, 195 F.3d 1113, 1120 (9th Cir. 1999)  
17 (holding that claims for damages resulting from repudiation are subject to the  
18 § 1821(d)(11) distribution priority and, unlike administrative expenses, are not entitled  
19 to “super priority”). Thus, here, if FDIC had repudiated the Deutsche Bank contracts, it  
20 would have owed damages as general liabilities. Because of IndyMac’s insufficient  
21 assets, Deutsche Bank would not have actually recovered any amount of these damages.

22 FDIC did not repudiate the contracts, however, but rather breached them. The  
23 statute does not address the consequences of the FDIC’s breach of a failed institution’s  
24 contract. *Sharpe*, 126 F.3d at 1157. The Ninth Circuit’s decision in *Sharpe*, however,  
25 makes clear that damages resulting from the FDIC’s breach of a contract are not subject  
26 to the § 1821(d)(11) distribution priority scheme. In *Sharpe*, the court held that a claim  
27 against the FDIC for breach of a pre-receivership contract did not qualify as a “claim”  
28 for purposes of FIRREA’s administrative exhaustion requirement. *Sharpe*, 126 F.3d at

1 1157. Just as FIRREA’s administrative exhaustion requirement applies only to  
2 “claims,” the § 1821(d)(11) priority scheme applies only to “claims.” See  
3 § 1821(d)(11)(A) (providing that “amounts realized . . . shall be distributed to pay  
4 claims . . .” (emphasis added)). Because Sharpe establishes that a claim against the  
5 FDIC for post-seizure breach of contract does not constitute a “claim” under FIRREA,  
6 that claim is not subject to the § 1821(d)(11) distribution priority. It therefore does not  
7 qualify as a third-priority general liability that will recover nothing because of  
8 insufficient assets.

9 At this juncture, it is enough to conclude that Deutsche Bank’s claim for  
10 damages is not subject to the § 1821(d)(11) distribution priority, and the Court need not  
11 determine at this stage whether damages will ultimately be payable from the  
12 receivership or from FDIC-C’s own funds. Even if the damages will come from the  
13 receivership, Deutsche Bank’s claim will take priority over the categories identified in §  
14 1821(d)(11), and there is accordingly a possibility of recovery. The Court likewise  
15 need not determine the measure of damages at this juncture. No binding authority  
16 identifies the measure of damages, see Sharpe, 126 F.3d at 1157, but the D.C. Circuit  
17 has indicated that a party injured by the FDIC’s breach of a pre-receivership contract is  
18 at least entitled to damages equal to the damages it would have received had FDIC  
19 repudiated the contract. Waterview, 105 F.3d at 702. Such damages are limited to  
20 “actual direct compensatory damages.” Id. at 702 n.4; 12 U.S.C. § 1821(e)(3)(A)(I).  
21 Deutsche Bank might also be entitled to full damages, including consequential  
22 damages, resulting from FDIC’s breach, as FIRREA limits damages only when FDIC  
23 repudiates a contract, and does not address the consequences of a breach by the FDIC.  
24 Regardless, because under Sharpe, Deutsche Bank’s claim for damages is not subject to  
25 the § 1821(d)(11) distribution priority, it can recover damages—whatever their  
26 measure—ahead of the third-priority general creditors who will recover nothing.  
27 Because there is a possibility that they can recover, their claims are not prudentially  
28 moot.

1 For the foregoing reasons, Deutsche Bank may proceed with its breach of  
2 contract claim arising out of the sale of assets to OneWest Bank. FDIC-R's motion to  
3 dismiss this claim is **DENIED**.

4 **4. MOTION TO DISMISS CONTRACT CLAIM AS AGAINST FDIC IN ITS**  
5 **CORPORATE CAPACITY**

6 The FDIC-C also brings a separate motion to dismiss the contract claim as  
7 against the FDIC in its corporate capacity. In its motion, FDIC-C contends (1) that it is  
8 not liable for the actions that FDIC takes in its capacity as receiver, and (2) that it  
9 cannot be liable for breach of a contract to which it was not a party, and Deutsche Bank  
10 fails to adequately allege that FDIC-C was party to the contracts allegedly breached.

11 Deutsche Bank does not dispute that FDIC-C is legally distinct from FDIC-R,  
12 and that actions taken by FDIC-R are not attributable to FDIC-C. See Bullion Servs.,  
13 Inc. v. Valley State Bank, 50 F.3d 705, 709 (9th Cir. 1995) (noting that, “[b]ecause  
14 FDIC Corporate and FDIC Receiver perform two different functions and protect wholly  
15 different interests, courts have been careful to keep the rights and liabilities of these two  
16 entities legally separate”); FDIC v. Roldan Fonseca, 795 F.2d 1102, (1st Cir. 1986)  
17 (“Corporate FDIC is not liable for wrongdoings by Receiver FDIC.”); ABI Inv. Grp. v.  
18 FDIC, 860 F. Supp. 911, 916 (D.N.H. 1994) (“FDIC/Corporate cannot be held liable for  
19 the failure of FDIC/Receiver to disaffirm or repudiate a contract.”). Thus, FDIC-C  
20 cannot be liable for any wrongdoing by FDIC-R.

21 Deutsche Bank contends that FDIC-C is nonetheless liable because it  
22 “participated in and benefited directly from the sale to OneWest, which directly caused  
23 certain of the breaches of the [PSAs] alleged in the Complaint.” (Docket No. 46, Opp.  
24 at 3.) Specifically, Deutsche Bank points to its allegations that FDIC-C entered into the  
25 purchase and assumption agreement under which substantially all of IndyMac's assets  
26 and liabilities were “transferred to and assumed by IndyMac Federal” (Compl. ¶ 23);  
27  
28

1 that “FDIC expressly assumed and assigned to OneWest”<sup>3</sup> parts of the PSAs without  
2 assigning all of the obligations under them (Compl. ¶ 64); that “FDIC acted outside the  
3 scope of its statutorily defined authority” in attempting to sell the PSAs without  
4 assuming and assigning related obligations (Compl. ¶ 65); that “FDIC failed to follow  
5 the procedures provided in the [PSAs] for transferring servicing rights and obligations”  
6 (Compl. ¶ 66); and that “FDIC in its corporate capacity benefit[t]ed from the sale of  
7 IndyMac’s servicing rights to OneWest because it used the profits to pay IndyMac’s  
8 insured depositors and to protect the deposit insurance fund” (Compl. ¶ 151).

9         These allegations do not suffice to state a breach of contract claim against  
10 FDIC-C. Under the applicable New York law<sup>4</sup>, “a non-signatory to a contract cannot be  
11 named as a defendant in a breach of contract action unless it has thereafter assumed or  
12 been assigned the contract.” Crabtree v. Tristar Automotive Grp., 776 F. Supp. 155,  
13 166 (S.D.N.Y. 1991). Deutsche Bank does not allege, nor could it, that FDIC-C is a  
14 signatory to the PSAs, which were executed before FDIC took over IndyMac. It also  
15 does not allege that FDIC-C was assigned the contract. Rather, it appears to suggest  
16 that FDIC-C assumed the contract by entering into the purchase and assumption  
17 agreement, selling parts of the PSAs to OneWest, and benefitting from the sale. These  
18 allegations do not amount to a plausible allegation that FDIC-C assumed the PSAs with  
19 Deutsche Bank sufficient to withstand the pleading standards established by Iqbal, 129  
20 S. Ct. at 1949. First, Deutsche Bank does not explain—and the Court does not  
21 see—how entering into the purchase and assumption agreement in which IndyMac  
22 Federal assumed IndyMac’s assets led FDIC-C to assume the PSAs. Second, even if  
23 FDIC-C did sell, or participate in the sale of, parts of the PSAs to OneWest, it does not  
24 follow that it had assumed the PSAs with Deutsche Bank. Without assuming the PSAs,

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25  
26 <sup>3</sup> In its complaint, Deutsche Bank explains that references to “FDIC” refer to FDIC “in all or any of its  
27 capacities.” (Compl. ¶ 16.)

28 <sup>4</sup> The parties agree that, pursuant to choice-of-law provisions in the PSAs, New York law applies to the  
contract claims in this case.

1 FDIC-C could not be liable for their breach. See Crabtree, 776 F. Supp. at 166.

2 Finally, the allegation that FDIC-C benefitted from the sale to OneWest is not  
3 sufficient to render it liable for the breach of contract resulting from that sale. In  
4 support of its argument to the contrary, Deutsche Bank points to two cases in which  
5 non-signatories to a contract were held susceptible to breach of contract claims. See  
6 Impulse Mktg. Grp. v. Nat'l Small Bus. Alliance, Inc., No. 05-CV-7776, 2007 WL  
7 1701813, at \*6 (S.D.N.Y. June 12, 2007); Dial-A-Mattress Operating Corp. v. Mattress  
8 Madness, Inc., 847 F. Supp. 18, 20 (E.D.N.Y. 1994). In Impulse Marketing, the court  
9 held that allegations that the non-signatory defendant had “played a considerable role in  
10 the management and performance of the contract,” had stated “to the Plaintiff that [it]  
11 was ‘the real party in interest,’” and had made payments to Plaintiff under the contract  
12 indicated that the non-signatory had assumed the role of a party to the contract.  
13 Impulse Mktg., 2007 WL 1701813, at \*6. In Dial-A-Mattress, the court held that it  
14 could pierce the corporate veil to hold the president of a corporation personally liable  
15 for his corporation’s contract where he received payment under the contract. Dial-A-  
16 Mattress, Inc., 847 F. Supp. at 20. In contrast to the situations in these cases, here,  
17 Deutsche Bank has not alleged conduct indicating that FDIC-C was the real party in  
18 interest to the PSAs or that it had assumed the PSAs. Even though FDIC-C ultimately  
19 received the proceeds of the sale to OneWest, Deutsche Bank does not allege that those  
20 proceeds were paid directly to FDIC-C. In any event, Deutsche Bank does not allege  
21 that FDIC-C received benefits from the contract itself, as opposed to the sale of that  
22 contract. And Deutsche Bank cites no authority suggesting that benefitting from the  
23 sale of a contract is evidence that a party assumed that contract.

24 Because Deutsche Bank has alleged insufficient facts under which FDIC-C  
25 could be liable for breach of the PSAs, the breach of contract claim against it is  
26 **DISMISSED**. Deutsche Bank, however, shall be granted leave to amend its complaint  
27 to include further factual allegations establishing FDIC-C’s liability for the breach.  
28

1 **C. CLAIM FOR BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING**

2 FDIC next moves to dismiss Deutsche Bank's claim for breach of the implied  
3 covenant of good faith and fair dealing on the ground that New York law requires such  
4 a claim to be dismissed as duplicative where it is based on the same facts underlying a  
5 breach of contract claim. (Docket No. 23, Mem. at 13); see also Harris v. Provident  
6 Life and Accident Ins. Co., 310 F.3d 73, 81 (2d Cir. 2002) ("New York law . . . does  
7 not recognize a separate cause of action for breach of the implied covenant of good  
8 faith and fair dealing when a breach of contract claim, based upon the same facts, is  
9 also pled."). New York law, however, recognizes an exception to this general rule  
10 when the breach of the implied covenant of good faith and fair dealing and breach of  
11 contract claims are brought in the alternative. Fantozzi v. Axsys Techs., Inc., No. 07  
12 Civ. 02667, 2008 WL 4866054, at \*7 (S.D.N.Y. Nov. 6, 2008). "[W]here there is a  
13 dispute over the existence, scope, or enforceability of the putative contract," a plaintiff  
14 can bring these claims in the alternative. Id. at \*8 (quoting Reilly v. Natwest Markets  
15 Grp., Inc., 181 F.3d 253, 263 (2d Cir. 1999)). A plaintiff can prevail on a claim for  
16 breach of the implied covenant of good faith and fair dealing where it proves that the  
17 defendant "act[ed] in a manner that, although not expressly forbidden by any  
18 contractual provision, . . . deprive[d] the other party of the right to receive the benefits  
19 under their agreement." Id. at \*7 (quoting Aventine Inv. Mgmt, Inc. v. Canadian  
20 Imperial Bank of Commerce, 644 N.Y.S.2d 43, 47 (2nd Dept. 1999)).

21 Here, the parties dispute the enforceability of the contractual provisions  
22 requiring Deutsche Bank's consent for the transfer of the servicing rights and dispute  
23 the existence of any contractual provision barring the transfer of some benefits of the  
24 PSAs without transferring all the obligations imposed by the PSAs. Deutsche Bank  
25 therefore can appropriately plead its breach of contract claim and breach of the  
26 covenant of good faith and fair dealing claim in the alternative. The FDIC contends  
27 that the claim must nonetheless be dismissed because it is not actually pled in the  
28 alternative. (Docket No. 49, Reply at 19.) FDIC, however, does not cite any authority

1 establishing that a plaintiff must use magic words to plead such claims in the  
2 alternative. Finding no such authority, the Court rejects this contention. FDIC's  
3 motion to dismiss Deutsche Bank's claim for breach of the implied covenant of good  
4 faith and fair dealing is therefore **DENIED**.

5 **D. CONSTRUCTIVE TRUST CLAIM**

6 FDIC-R next seeks dismissal of Deutsche Bank's constructive trust claim on the  
7 grounds that (1) § 1821(j) bars such relief, and (2) constructive trust is a remedy, not an  
8 independent claim for relief. (Docket No. 23, Mem. at 28–29.) These arguments fail.

9 First, as explained above, the Ninth Circuit established in Sharpe that “the bar  
10 imposed by § 1821(j) does not extend to situations in which the FDIC as receiver  
11 asserts authority beyond that granted to it as receiver.” Sharpe, 126 F.3d at 1155.  
12 Where, as here, the FDIC breaches, rather than repudiates, a contract, it does not act  
13 within its statutorily granted powers, and § 1821(j) therefore does not apply. Id.  
14 Section 1821(j) therefore does not preclude Deutsche Bank from pursuing its claim for  
15 a constructive trust.

16 Second, FDIC-R is correct that a constructive trust is a remedy, not a  
17 freestanding substantive claim. See Lund v. Albrecht, 936 F.2d 459, 464 (9th Cir.  
18 1991). Nonetheless, “as a matter of practice constructive trust commonly is pleaded as  
19 a separate claim.” Microsoft Corp. v. Suncrest Enter., No. 03-5424, 2006 WL 1329881,  
20 at \*8 (N.D. Cal. May 16, 2006). Because Deutsche Bank's substantive claim for breach  
21 of contract survives the FDIC-R's motion to dismiss, the Court will not dismiss the  
22 claim for constructive trust as a remedy for the breach of contract claim. For these  
23 reasons, the Court **DENIES** FDIC-R's motion to dismiss Deutsche Bank's claim for  
24 imposition of a constructive trust. However, because the Court dismisses the breach of  
25 contract claim against FDIC-C, Deutsche Bank has no substantive claim supporting its  
26 construction trust claim against that entity. The Court therefore **DISMISSES** the  
27 constructive trust claim against FDIC-C.  
28

1 **E. BREACH OF FIDUCIARY DUTY CLAIM**

2 In its complaint, Deutsche Bank also asserts a claim against FDIC-R for breach  
3 of fiduciary duty. (Compl. ¶¶ 166–74.) In particular, Deutsche Bank alleges that  
4 FDIC-R breached its duties “to manage the assets of the receivership in a manner that  
5 ‘maximizes the net present value return from the sale or disposition’ and ‘minimizes the  
6 amount of any loss realized’” (*id.* ¶ 167 (quoting 12 U.S.C. § 1821(d)(13))); to “act for  
7 the benefit of all parties who may establish rights during the administration of the  
8 receivership” (*id.* ¶ 168); and “to act in good faith, to act in accordance with the laws  
9 that establish its authority, to preserve the property in its possession, and to act in a  
10 manner that maximizes potential recovery by those claimants and to allocate the  
11 proceeds of such assets impartially and in accordance with rights established by  
12 claimants, and statutory priorities” (*id.* ¶ 169). Deutsche Bank alleges that FDIC  
13 breached these duties by “furthering its interests in its other capacities . . . at the  
14 expense of the Trusts, the Trustee, and the receivership estate” and by failing “either to  
15 honor in their entirety the Governing Agreements to which IndyMac Federal succeeded,  
16 and to lawfully and properly assign the rights and obligations transferred from  
17 IndyMac, or to repudiate these agreements in their entirety.” (*Id.* ¶¶ 170, 172.) FDIC  
18 moves to dismiss this claim on the grounds that (1) it is barred by the Federal Tort  
19 Claims Act (“FTCA”), and (2) Deutsche Bank has no private right of action under  
20 which it can pursue this claim. The Court addresses each argument in turn.

21 **1. FEDERAL TORT CLAIMS ACT**

22 The FTCA waives sovereign immunity in tort actions brought against any  
23 governmental employee acting within the course and scope of his employment. 28  
24 U.S.C. § 1346(b). The act further provides that no agency can be sued in its own name  
25 for claims cognizable under 28 U.S.C. § 1346(b). 28 U.S.C. § 2679(a). Such claims  
26 must be brought against the United States and include “claims against the United States,  
27 for money damages . . . for injury or loss of property, or personal injury or death caused  
28 by the negligent or wrongful act or omission of any employee of the Government while

1 acting within the scope of his office or employment, under circumstances where the  
2 United States, if a private person, would be liable to the claimant in accordance with the  
3 law of the place where the act or omission occurred.” 28 U.S.C. § 1346(b). Section  
4 1346(b) applies only to claims sounding in tort, not in contract. Davis v. United States,  
5 961 F.2d 53, 56 (5th Cir. 1991). Where the United States, if a private person, would not  
6 be liable to the claimant under analogous state law, § 1346(b) does not apply, and the  
7 agency can be sued in its own name. See FDIC v. Meyer, 510 U.S. 471, 477–78  
8 (1994).

9 Here, Deutsche Bank contends that its claims are not barred by the FTCA  
10 because its claims (1) sound in contract, not tort, and (2) because the United States, if it  
11 were a private person, would not be liable under analogous state law. The Court agrees.

12 First, to the extent that Deutsche Bank alleges that FDIC breached a fiduciary  
13 duty by violating provisions of the PSAs, its claim arises from contract. See Davis, 961  
14 F.2d at (holding that claim for breach of fiduciary duty did not fall within FTCA where  
15 claim was “predicated upon the breach of a condition in the promissory note”).  
16 Because such claims are not cognizable under FTCA’s § 1346(b), they may be brought  
17 against an agency in its own name.

18 Second, to the extent that Deutsche Bank alleges the breach of an independent  
19 fiduciary duty that arises not from its contracts, but from FIRREA, its claim has no  
20 state-law analog applicable to private parties. Deutsche Bank contends that FDIC owed  
21 it a duty under 12 U.S.C. § 1821(d)(13)(E), which requires the FDIC acting as receiver  
22 to “maximize[] the net present value return from the sale or disposition of . . . assets [of  
23 a failed bank]” and to “minimize[] the amount of any loss realized in the resolution of  
24 cases,” among other things. 12 U.S.C. § 1821(d)(13)(E). This provision plainly applies  
25 only to the FDIC-R, and FDIC points to no analogous state law imposing similar duties  
26 on private parties. Because this provision applies only to the FDIC-R, and because  
27 there is no state-law analog, it does not fall within § 1346(b). See FDIC v. Meyer, 510  
28 U.S. at 477–78 (holding that constitutional due process claim did not fall under

1 § 1346(b) because federal law provided the “source of liability for [the] claim”);  
2 Woodbridge Plaza v. Bank of Irvine, 815 F.2d 538, 543 (9th Cir. 1987) (holding that  
3 claim that FDIC violated state banking law regarding the duties of receivers was not  
4 cognizable under § 1346(b) because “[t]here is no persuasive analogy with private  
5 conduct”). Because Deutsche Bank’s claim is not cognizable under § 1346(b), the  
6 FTCA does not bar Deutsche Bank from asserting against FDIC-R a breach of fiduciary  
7 duty claim based on the duties imposed by FIRREA.

8 To the extent that Deutsche Bank bases its breach of fiduciary duty claim on the  
9 “inherent” duties of receivers (see Docket No. 47, Opp. at 20–21), however, the Court  
10 concludes that the FTCA does bar its claim. A common law breach of fiduciary duty  
11 claim sounds in tort. See McNeil v. United States, 78 Fed. Cl. 211, 236 (Fed. Cl. 2007).  
12 In addition, such duties arise from state law and apply to private parties acting as  
13 receiver as well. See Landeen v. Riley Bennet Egloff LLC, No. 1:07-cv-0534, 2008  
14 WL 1766961, at \*1–2 (S.D. Ind. Apr. 11, 2008) (discussing breach of fiduciary duty  
15 claim against private parties acting as receiver for corporation). Thus, the United  
16 States, if a private party, could be liable under state law. Because the FTCA therefore  
17 applies, Deutsche Bank cannot pursue a claim based on the “inherent” duties of  
18 receivers against FDIC-R, but rather must bring it against the United States. If  
19 Deutsche Bank wishes to pursue its breach of fiduciary claim based on the alleged  
20 inherent duties, it must comply with the FTCA.

21 However, because Deutsche Bank asserts theories supporting its breach of  
22 fiduciary duty claim that are not barred by the FTCA, the FTCA does not mandate  
23 dismissal of all theories of relief. The Court must therefore address the question of  
24 whether Deutsche Bank has a private right of action to pursue such claim.

## 25 **2. PRIVATE RIGHT OF ACTION**

26 FDIC further contends that, even if the FTCA does not bar Deutsche Bank’s  
27 breach of fiduciary duty claim, Deutsche Bank has no private right of action allowing it  
28 to pursue that claim. Deutsche Bank counters that a private right of action is both

1 inherent in the FDIC’s role as receiver and implied by § 1821(d)(13)(E) of FIRREA.  
2 (Docket No. 47, Opp. at 20.)

3 First, the Court concludes that Deutsche Bank cannot pursue its claim on the  
4 basis that a private right of action is inherent in the FDIC’s role as receiver. Even if any  
5 such “inherent” private right of action existed, Deutsche Bank could not pursue its  
6 breach of fiduciary duty claim under it because, as explained above, its claims based on  
7 “inherent” duties sound in tort and are barred by the FTCA.

8 Second, the Court concludes that § 1821(d)(13)(E) does not create an implied  
9 private right of action. That section provides:

10 In exercising any right, power, privilege, or authority as conservator or receiver  
11 in connection with any sale or disposition of assets of any insured depository  
12 institution for which the Corporation has been appointed conservator or  
13 receiver, including any sale or disposition of assets acquired by the Corporation  
14 under section 1823(d)(1) of this title, the Corporation shall conduct its  
15 operations in a manner which--

- 16 (i) maximizes the net present value return from the sale or disposition of  
17 such assets;
- 18 (ii) minimizes the amount of any loss realized in the resolution of cases;
- 19 (iii) ensures adequate competition and fair and consistent treatment of  
20 offerors;
- 21 (iv) prohibits discrimination on the basis of race, sex, or ethnic groups in  
22 the solicitation and consideration of offers; and
- 23 (v) maximizes the preservation of the availability and affordability of  
24 residential real property for low- and moderate-income individuals.

25 12 U.S.C. § 1821(d)(13)(E). Although this provision may impose a fiduciary duty on  
26 the FDIC-R, it does not create an implied right of action for breach of that duty.

27 In determining whether a statute gives rise to an implied private right of action,  
28 the Court employs the test set forth in Cort v. Ash, 422 U.S. 66 (1975). Under Cort, the  
Court examines “(1) whether the plaintiff is ‘one of the class for whose especial benefit  
the statute was enacted’; (2) whether there is ‘any indication of legislative intent,  
explicit or implicit, either to create or to deny [a private right of action]’; (3) whether it  
is ‘consistent with the underlying purposes of the legislative scheme to imply’ a private  
right of action; and (4) whether ‘the cause of action [is] one traditionally relegated to  
state law.’” Nisqually Indian Tribe v. Gregoire, 623 F.3d 923, 929 (9th Cir. 2009)  
(quoting Cort, 422 U.S. at 78) (alterations in original). Under this analysis, “the key

1 inquiry is whether Congress intended to provide the plaintiff with a private right of  
2 action.” First Pac. Bancorp, Inc. v. Helfer, 224 F.3d 1117, 1121 (9th Cir. 2000).

3 All courts that have considered whether § 1821(d)(13)(E) gives rise to a private  
4 right of action have concluded it does not. See Hindes v. FDIC, 137 F.3d 148, 170 (3d  
5 Cir. 1998) (holding that § 1821(d)(13)(E) confers no private right of action on  
6 shareholders of a failed bank); Mosseri v. FDIC, No. 95 Civ. 0723, 2001 WL 1478809,  
7 at \*6 (S.D.N.Y. Nov. 20, 2001) (holding that § 1821(d)(13)(E) confers no private right  
8 of action on disappointed bidders for FDIC assets); Pen-Del Mortg. Assocs. v. FDIC,  
9 No. 94-0067, 1994 WL 675502, at \*3 (E.D. Pa. Nov. 23, 1994) (holding that  
10 substantially identical provision applicable to the Resolution Trust Corporation,  
11 § 1441a(b), did not give rise to private cause of action for disappointed bidders); RTC  
12 v. Villa Este Apartments P’ ship, 806 F. Supp. 594, 597–98 (E.D. La. 1992) (holding  
13 that § 1441a(b) did not give a private right of action to party that defaulted on a  
14 mortgage loan held by the failed bank to pursue claim that RTC breached duties by  
15 selling other properties in neighborhood, thereby decreasing property value); Donnelly  
16 Inv. Sec. Corp. v. FDIC, No. 3:96-CV-2730-R, 1998 WL 460289, at \*4 (N.D. Tex.  
17 Aug. 5, 1998) (holding that §§ 1821(d)(13)(E) and 1441a(b) do not create a private  
18 cause of action). To be sure, none of these cases specifically addresses whether  
19 § 1821(d)(13)(E) gives rise to a private cause of action for creditors of a failed  
20 institution. And the cases holding that the provision does not create a private right of  
21 action for, e.g., disappointed bidders are of limited persuasive value. The Third  
22 Circuit’s decision in Hindes v. FDIC, 137 F.3d 148, holding that shareholders of a  
23 failed bank had no private cause of action under § 1821(d)(13)(E) is sufficiently  
24 analogous to the issue presented here, and the Court finds its reasoning particularly  
25 persuasive.

26 In Hindes, the Third Circuit discussed the Cort factors. First, the court held that  
27 the shareholders were not “members of a class for whose special benefit Congress  
28 created section 1821(d)(13)(E).” Hindes, 137 F.3d at 170. Rather, the court explained,

1 “The FDIC’s duty to maximize gain and minimize loss primarily is intended to benefit  
2 the insurance fund by minimizing the claims against it, thereby reducing the cost to the  
3 taxpayers. Thus, the benefits gained by the shareholders and other claimants are  
4 incidental to the primary intended beneficiaries, the insurance fund and the taxpayers.”  
5 Id. Second, the court noted that the statute and its legislative history were silent as to  
6 whether Congress intended to create or deny a private right of action to enforce  
7 § 1821(d)(13)(E). Id. at 171. The court further found no other factors supporting a  
8 private right of action. Because neither of the first two Cort factors suggested that the  
9 court should imply a private right of action, the court did not reach the remaining two  
10 Cort factors.

11 Hinde’s analysis persuades the Court that FIRREA creates no private right of  
12 action in these circumstances. First, creditors like Deutsche Bank are not members of a  
13 class for whose special benefit Congress created § 1821(d)(13)(E). Like the  
14 shareholders in Hindes, creditors stand to benefit from the duties imposed by §  
15 1821(d)(13)(E) because compliance with those duties increases the amount of available  
16 assets from which they can recover. Also as with the shareholders in Hindes, this  
17 benefit is only incidental to the benefits the section intends to confer on the fund and the  
18 taxpayers. See id. at 170. The Ninth Circuit has explained that the first factor of the  
19 Cort test is satisfied “when there is an explicit reference to the individuals for whose  
20 benefit the statute was enacted,” as opposed to a “generic imperative.” Helfer, 224 F.3d  
21 at 1122–23 (recognizing a private right of action for shareholders to enforce §  
22 1821(d)(15), which entitles shareholders to accounting reports). Section  
23 1821(d)(13)(E) does not mention creditors. The subsections requiring FDIC-R to  
24 maximize gains and minimize losses does not identify any beneficiaries at all. See 12  
25 U.S.C. § 1821(d)(13)(E)(i)–(ii).

26 Second, the Court finds no indication of any legislative intent to create a private  
27 right of action under § 1821(d)(13)(E) for creditors. Deutsche Bank is correct that  
28 FIRREA expressly disclaims a private cause of action elsewhere. 12 U.S.C.

1 § 1831g(d). FIRREA, however, also expressly grants private rights of action in other  
2 provisions. See id. §§ 1441a(c)(11)(B), 1441a(q). Because Congress has both  
3 expressly granted and disclaimed private causes of action in other parts of the statute,  
4 the Court cannot infer anything from the statute's silence on the availability of a private  
5 right of action to enforce § 1821(d)(13)(E).

6 Deutsche Bank also contends that provisions setting the FDIC's maximum  
7 liability for claims by creditors, providing claimants with a right to an accounting, and  
8 recognizing the FDIC's duty to receivership claimants are indicia of congressional  
9 intent to create a private right of action here. (Docket No. 47, Opp. at 23); see 12  
10 U.S.C. §§ 1821(i)(2); 1821(d)(15); 1823(d)(3)(C). These provisions, however, do not  
11 actually suggest that Congress intended a private right of action to enforce the duties  
12 imposed by § 1821(d)(13)(E). Although the provision setting FDIC's maximum  
13 liability does contemplate suits against the FDIC, it does not specifically contemplate  
14 suits by creditors to enforce the duties imposed by § 1821(d)(13)(E). Although the  
15 provision requiring FDIC to make accounting reports available to any member of the  
16 public does allow creditors to monitor the FDIC's actions, it does not follow that  
17 creditors therefore have a right to sue for any breaches of § 1821(d)(13)(E) they may  
18 find in the reports. Finally, the provision recognizing that FDIC owes fiduciary duties  
19 to receivership claimants establishes only that FDIC-C retains the same fiduciary duties  
20 as FDIC-R when it acquires assets from the receivership. 12 U.S.C. § 1823(d)(3)(C).  
21 Although this section indicates that FDIC-R does owe fiduciary duties to claimants,  
22 which includes creditors, it does not indicate that FDIC-R owes the § 1821(d)(13)(E)  
23 duties to all claimants, nor does it suggest that those duties are enforceable by creditors  
24 through a private right of action. In sum, the Court finds no indication in the statute  
25 that Congress intended to create a private right of action under § 1821(d)(13)(E).  
26 Moreover, because that section does not name creditors as intended beneficiaries, the  
27 Court concludes that even if a private right of action to enforce that section exists, it  
28 does not lie in creditors.

1 Third, the Court concludes that implying a private right of action would be  
2 inconsistent with the statute's purposes. As the Southern District of New York noted in  
3 Mosseri, FIRREA "repeatedly reaffirm[s] that the FDIC has broad discretion in  
4 discharging its statutory responsibilities." Mosseri, 2001 WL 1478809, at \*5.  
5 Recognizing a private right of action for creditors to enforce § 1821(d)(13)(E) would be  
6 "fundamentally inconsistent with the extensive latitude granted by Congress to the  
7 FDIC in the exercise of its statutory powers." Id. Were the Court to recognize such a  
8 private right of action, every disposition of assets by the FDIC would be subject to  
9 challenge by every party having a potential claim on the assets of the failed bank. This  
10 would impose substantial burdens. In this way, the private right of action that Deutsche  
11 Bank asks the Court to imply here differs from the private right of action under  
12 § 1821(d)(15) that the Ninth Circuit recognized in Helfer, 224 F.3d at 1126–27. In  
13 Helfer, the court noted that implying a private right of action to enforce the provision  
14 requiring the FDIC to provide an annual accounting would not impose any additional  
15 burden. Id. at 1127. Rather, it would require the FDIC only to "provide a copy of the  
16 report it is already obliged to prepare" under the statute. Id. In contrast, implying a  
17 private right of action here could impose substantial new burdens: it would impede the  
18 FDIC's discretion in disposing of assets, and there would be no clear-cut way of  
19 ensuring that parties would deem the statutory obligations satisfied. While whether  
20 FDIC has provided the required report is easy to establish, parties could easily dispute  
21 whether any given transaction maximized gains and minimized losses. The Court is  
22 disinclined to subject the FDIC to the burden of defending against these potentially  
23 numerous claims. Finally, the Court acknowledges that the court in Helfer implied a  
24 private right of action in part because "where no enforcement mechanism is explicitly  
25 provided by Congress or an administrative agency, it is appropriate to infer that  
26 Congress did not intend to enact unenforceable requirements." Id. at 1126. Although  
27 the parties have not identified any mechanism to enforce § 1821(d)(13)(E), the Court  
28 nonetheless concludes that this lack of an enforcement mechanism does not support

1 implying a private right of action here. Because FDIC has an inherent incentive to  
2 maximize gains and minimize losses to ensure adequate compensation for the insurance  
3 funds, the lack of private enforcement is less troubling in the context of §  
4 1821(d)(13)(E). Given this, and in light of the substantial burdens that recognizing a  
5 private right of action could impose, the Court concludes that such a right of action is  
6 inconsistent with FIRREA's purpose.

7 Finally, the fourth Cort factor is satisfied here. Clearly, an action against a  
8 federal entity to enforce a right created by federal law is not "traditionally relegated to  
9 state law." Cort, 422 U.S. at 78. However, this fact does not support implying a private  
10 right of action where the other Cort factors are absent.

11 Because, for the reasons set forth above, the Court concludes that Deutsche  
12 Bank has no private right of action not barred by the FTCA to enforce any fiduciary  
13 duties, the Court **GRANTS** the motion to dismiss the breach of fiduciary duty claim.

#### 14 **F. TAKINGS AND DUE PROCESS CLAIMS**

15 Deutsche Bank also asserts claims against FDIC under the Fifth Amendment for  
16 takings and violations of due process. (Compl. ¶¶ 175–205.) In particular, Deutsche  
17 Bank contends that FDIC effected a taking and violated due process by selling the  
18 servicing rights without also transferring the obligations to replace or repurchase bad  
19 mortgage loans and without obtaining Deutsche Bank's consent. (Id.) FDIC moves to  
20 dismiss these claims.

21 The Court **GRANTS** the motion to dismiss the takings claims against FDIC. In  
22 "a takings case, [the court] assume[s] that the underlying action was lawful." Acadia  
23 Tech., Inc. v. U.S., 458 F.3d 1327, 1331 (Fed. Cir. 2006) (citing Rith Energy, Inc. v.  
24 United States, 270 F.3d 1347, 1352–53 (Fed. Cir. 2001)). Unlawful government action  
25 does not give rise to a takings claim. Id. "[I]f the authority to carry out certain acts  
26 was validly conferred by Congress to an agent, and if those acts are within the  
27 constitutional power of Congress, there is no liability on the part of the agent for  
28 executing its will." Acceptance Ins. Cos. Inc. v. United States, 503 F.3d 1328, 1337

1 (Fed. Cir. 2007). Thus, “[a] takings claim is properly brought against the United States,  
2 not against the agent whose actions give rise to the claim.” *Id.* Deutsche Bank cites no  
3 authority establishing that it can pursue a takings claim against the FDIC, as opposed to  
4 the United States. The Court will therefore dismiss its takings claims.

5 Further, Deutsche Bank cannot amend its complaint in this case to assert its  
6 takings claims against the United States. Under the Tucker Act, 28 U.S.C. §  
7 1491(a)(1), the Court of Federal Claims has exclusive jurisdiction to render judgment  
8 on any takings claim for money damages exceeding \$10,000. *E. Enters. v. Apfel*, 524  
9 U.S. 498, 520 (1998). “Accordingly, a claim for just compensation under the Takings  
10 Clause must be brought to the Court of Federal Claims in the first instance, unless  
11 Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute.”  
12 *Id.* It has not. Because Deutsche Bank must assert its takings claims against the United  
13 States and in the Court of Federal Claims, this Court **DISMISSES** its takings claims  
14 **without leave to amend.**

15 Deutsche Bank also alleges that FDIC violated its due process rights under the  
16 Fifth Amendment by depriving it of its property without due process of law. (Compl.  
17 ¶¶ 198–205.) Deutsche Bank, however, cannot maintain this claim against an agency.  
18 A party can sue for a violation of a constitutional right only if he has a cause of action.  
19 *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388  
20 (1971). *Bivens* created an implied right of action against federal officials for tortious  
21 deprivations of constitutional rights. *Bruns v. Nat’l Credit Union Admin.*, 122 F.3d  
22 1251, 1255 (9th Cir. 1997). However, as the Ninth Circuit has explained, this implied  
23 right of action does not extend to suits directly against a federal agency. *Id.* (holding  
24 that plaintiff could not assert Fifth Amendment due process claim against an agency  
25 because “an individual may not bring a *Bivens* claim for damages directly against a  
26 federal agency”). Deutsche Bank offers no authority to the contrary. The Court  
27 therefore **DISMISSES** Deutsche Bank’s Fifth Amendment due process claims **with**  
28 **prejudice.** Because the Court dismisses the takings and due process claims in their

1 entirety, it need not address FDIC-C's separate arguments that Deutsche Bank has  
2 failed to adequately plead that entity's liability for these alleged violations.

3 **III.**

4 **CONCLUSION**

5 For the foregoing reasons, the Court **DISMISSES with prejudice** the breach of  
6 contract claim to the extent it is based on FDIC-R's sale of the servicing rights without  
7 an accompanying transfer of obligations imposed by the PSAs. The Court, however,  
8 **DENIES** the FDIC-R's motion to dismiss the breach of contract claim to the extent it is  
9 based on FDIC's failure to obtain consent before transferring the servicing rights in the  
10 PSAs. The Court **DISMISSES** the breach of contract claim against FDIC-C **with leave**  
11 **to amend.**

12 The Court also **DENIES** the motion to dismiss the claim for breach of the  
13 covenant of good faith and fair dealing. The Court **DENIES** the FDIC-R's motion to  
14 dismiss the constructive trust claim, but **GRANTS** the FDIC-C's motion to dismiss that  
15 claim. Deutsche Bank, however, shall have the **opportunity to amend** its complaint to  
16 re-assert this claim against FDIC-C.

17 Finally, the Court **DISMISSES** the breach of fiduciary duty, takings, and due  
18 process claims **with prejudice.**

19  
20 **IT IS SO ORDERED.**

21  
22 DATED: January 7, 2011

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Judge Gary Allen Feess  
26 United States District Court  
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