UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV07-1635-GW(VBKx)	Date	November 15, 2011
Title	*Sven Mossberg, et al. v. Indymac Financial, Inc., et al.*		

Present: The Honorable	GEORGE H. WU, UNITED STATES DISTRICT JUDGE	
Javier Gonzalez	None Present	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None Present	None Present

PROCEEDINGS: (IN CHAMBERS): COURT ORDER

The tentative issued on November 14, 2011, is adopted as the Court's final ruling. Lead Plaintiff's Motion for Class Certification is **GRANTED.** Plaintiffs' counsel is reminded of the Court's position regarding his adequacy to represent the class.

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Initials of Preparer JG

Tripp, et al. v. IndyMac Bancorp, Inc., et al., Case No. CV-07-1635
Tentative Ruling on Motion for Class Certification

Plaintiff Sven Mossberg[1] moves for class certification in this securities fraud action. The proponent of class treatment bears the burden of demonstrating that class certification is appropriate. *See In re Northern Dist. of California, Dalkon Shield IUD Prod. Liab. Litig.*, 693 F.2d 847, 854 (9th Cir. 1982). Before certifying a class, the trial court must conduct a "rigorous analysis" to determine whether the party seeking certification has met the prerequisites of Rule 23 of the Federal Rules of Civil Procedure. *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1233 (9th Cir. 1996). Rule 23 requires the party seeking certification to satisfy all four requirements of Rule 23(a)[2] and at least one of the subparagraphs of Rule 23(b). *See id.* at 1234. The Court is permitted to consider any material necessary to its determination, though it should not engage in a trial of the merits. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551-52 (2011) (noting that the "rigorous analysis" required at class certification will "[f]requently . . . entail some overlap with the merits of the plaintiff's underlying claim"); *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 981 (9th Cir. 2011); *Marlo v. United Parcel Serv., Inc.*, 639 F.3d 942, 949 (9th Cir. 2011); *Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 947 n.15 (9th Cir. 2009).

Defendant Michael W. Perry challenges Mossberg's ability to satisfy the typicality and adequacy of representation requirements of Fed. R. Civ. P. 23(a) and the predominance requirement of Fed. R. Civ. P. 23(b)(3). Of principal concern here is Mossberg's ability to satisfy Rule 23(a)(4)'s adequacy requirement. It is therefore to that

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[1] Mossberg has informed the Court that co-named plaintiff, Wayman Tripp, will be unable to continue to serve as a representative of the class due to illness.

[2] Rule 23(a) requires that the party/parties seeking certification show:

(1) the class is so numerous that joinder of all members is impracticable;
(2) there are questions of law or fact common to the class;
(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
(4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a).

question that this analysis first turns.

A. Adequacy

Citing *In re Cooper Companies Inc. Securities Litigation*, 254 F.R.D. 628, 636 (C.D. Cal. 2009), and *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001), Mossberg argues that Rule 23's adequacy requirement looks only to whether the representative's interests are antagonistic to the interests of the purported class and to ensure that plaintiffs are represented by counsel of sufficient diligence and competence to fully litigate the claims. It is certainly true that various characterizations of Rule 23(a)(4)'s adequacy requirement have been announced, some of which make no mention of any consideration of how interested and engaged the proposed class representative is in the litigation. *See, e.g.*, *Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010) ("Whether the class representatives satisfy the adequacy requirement depends on the qualifications of counsel for the representatives, an absence of antagonism, a sharing of interests between representatives and absentees, and the unlikelihood that the suit is collusive.") (omitting internal quotation marks) (quoting *Walters v. Reno*, 145 F.3d 1032, 1046 (9th Cir. 1998) and *Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir. 1994)).[3]

Of course, that does not change the fact that Rule 23(b)(4) itself requires that the class representative "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(b)(4). This entails some measure of involvement or vigor on the class representative's part, perhaps especially in the securities litigation arena[4]. The Ninth

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[3] The Court has no concern with Mossberg's counsel's adequacy. *See* Docket No. 273-9; *see also generally* Schwarzer, Tashima, et al., California Practice Guide: Federal Civil Procedure at Trial (2010) §§ 10:320-324, at 10-55 – 56; *id.* §§ 10:586-586.5, at 10-108.8.

[4] There is reason to conclude that in securities litigation there is a particular reason to examine adequacy issues closely. Under the Private Securities Litigation Reform Act of 1995 ("PSLRA") a plaintiff must proffer a sworn certification indicating, among other things, that he, she or it is not acting at the behest of counsel and has reviewed the complaint and authorized its filing. *See* 15 U.S.C. § 78u-4(a)(2)(A). Although Mossberg was not alone when he was appointed lead plaintiff in this action, finding him an adequate class representative in the face of the information the Court now has before it would render the PSLRA's protections and Rule 23's requirements somewhat toothless (although Mossberg is undoubtedly correct that the "lead plaintiff" designation under the PSLRA is water-under-the-bridge at this point in the case). *See In re Cendant Corp. Litig.*, 264 F.3d 201, 263-65 (3d Cir. 2001) (indicating that Rule 23's typicality and adequacy concerns come into play in designating lead plaintiff under PSLRA and that adequacy analysis requires consideration of whether the lead plaintiff applicant "has the ability and incentive to represent the claims of the class vigorously," among other questions) (quoting *Hassine v.*

Circuit recognizes this aspect of the adequacy inquiry. *See Staton v. Boeing Co.*, 327 F.3d 938, 957 (9th Cir. 2003) (recognizing "will the representative plaintiffs and their counsel prosecute the action vigorously on behalf of the class?" as one of the "two questions" the court asks in determining "whether the representation meets [the Rule 23(a)(4)] standard"); *see also Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1021 (9th Cir. 1998) (indicating that "there are no fixed standards by which 'vigor' can be assayed" in assessing adequacy). Even in *Cooper* (one of the two cases Plaintiff relies upon for a limited "adequacy" scope), the district court commented as follows:

> The class representatives are familiar with the facts and theories of this case. Each of the class representatives has declared to the Court that they have supervised and monitored the progress of the litigation, including reviewing quarterly updates from the class counsel and supervising subordinates who collected discovery materials. The class representatives have also given depositions in this case demonstrating their knowledge of the issues involved in the case . . . . Give the extensive holdings of the class representatives, and the importance of the funds under their management, the class representatives are extremely likely to pursue this suit with vigor.

254 F.R.D. at 636. It then rejected an argument that the class representatives were inadequate because they had insufficient involvement in the litigation and had "effectively abdicat[ed] control of the suit to class counsel," concluding that "[t]he class representatives in this case do not have the troubling traits that suggest this is lawyer-

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Jeffes, 846 F.2d 169, 177 (3d Cir. 1988)); *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 483 (5th Cir. 2001) ("Any lingering uncertainty, with respect to the adequacy standard in securities fraud class actions, has been conclusively resolved by the PSLRA's requirement that securities class actions be managed by active, able class representatives who are informed and can demonstrate they are directing the litigation. In this way, the PSLRA raises the standard adequacy threshold.").

This is of course not to say that the PSLRA standards would be read into the Rule 23 analysis so as to create an additional requirement under Rule 23. *See Berger v. Compaq Computer Corp.*, 279 F.3d 313, 313-14 (5th Cir. 2002); *see also In re BankAmerica Corp. Secs. Litig.*, 263 F.3d 795, 801 (8th Cir. 2001) ("It is therefore not quite accurate to characterize § 77z-1(a)(3)(B) as a mere extension of Federal Rule of Civil Procedure 23(a)(4) . . . ."). Indeed, as Mossberg points out, the Ninth Circuit has rejected such a contention, effectively distancing itself from the Fifth Circuit's analysis in the *Berger* litigation, in *Cavanaugh v. United States District Court for the N. Dist. of Cal. (Barton) (In re Cavanaugh)*, 306 F.3d 726, 732-39 (9th Cir. 2002), though the *Cavanaugh* decision did not consider anything akin to the concerns this order raises about Mossberg.

In any event, this discussion is effectively beside the point here, as the general or standard Rule 23 analysis is enough to raise an eyebrow at the proposition that Mossberg should be named class representative in this action.

driven litigation by a manufactured plaintiff out to make a quick buck." *Id.* at 636-37. The *Cooper* court offered no suggestion that these were inappropriate considerations, notwithstanding its earlier limited description of what an adequacy analysis entails.

To be sure, other Circuits have addressed the issue more directly, and in more detail. For instance, in *Monroe v. City of Charlottesville*, 579 F.3d 380 (4th Cir. 2009), *cert. denied*, 130 S.Ct. 1740 (2010), the Fourth Circuit opined as follows:

> To satisfy Rule 23(a)(4), a class representative must, among other factors, be of a character to vigorously pursue the case. Findings that a representative lacks sufficient interest, credibility, or either knowledge or an understanding of the case – although a knowledge or understanding of all the intricacies of the litigation is not required – are grounds for denying class certification. The analysis is intended "to ensure that the parties are not simply lending their names to a suit controlled entirely by the class attorney."

Id. at 385 (quoting 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 1766 (3d ed. 2005)). The Second and Fifth Circuits have taken a similar approach. *See Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1077-78 (2d Cir. 1995) ("[C]lass certification may properly be denied where the class representatives ha[ve] so little knowledge of and involvement in the class action that they would be unable or unwilling to protect the interests of the class against the possibly competing interests of the attorneys."); *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 484 (5th Cir. 1982) ("The adequacy requirement mandates an inquiry into the zeal and competence of the representative's counsel and into the willingness and ability of the representative to take an active role in and control the litigation and to protect the interests of absentees."); *see also Valley Drug Co. v. Geneva Pharms., Inc.*, 350 F.3d 1181, 1189 (11th Cir. 2003) ("Th[e] 'adequacy of representation' analysis 'encompasses two separate inquiries: (1) whether any substantial conflicts of interest exist between the representatives and the class; and (2) whether the representatives will adequately prosecute the action.'") (quoting *In re HealthSouth Corp. Secs. Litig.*, 213 F.R.D. 447, 460-61 (N.D. Ala. 2003)).

Certainly the proposed class representative's level of familiarity with the issues in the lawsuit and involvement in the prosecution of the lawsuit plays a role in this type of analysis. *See* Manual For Complex Litigation (4th ed. 2004), § 21.26, at 276-77 ("The

Private Securities Litigation Reform Act...requires that a class representative act independently of counsel, be familiar with the subject matter of the complaint, and authorize initiation of the action. In other kinds of class actions as well, courts have required that representatives be knowledgeable about the issues in the case."). The Fifth Circuit has perhaps tread that path the most (and, in particular, in the context of the Private Securities Litigation Reform Act):

> We have identified a "generic standard" for the adequacy requirement, noting that "the class representatives [must] possess a sufficient level of knowledge and understanding to be capable of 'controlling' or 'prosecuting' the litigation." We have also noted that "the PSLRA raises the standard adequacy threshold" with its "requirement that securities class actions be managed by active, able class representatives who are informed and can demonstrate they are directing the litigation." Although we noted that the PSLRA raises the adequacy threshold, we have "not, however, created an additional requirement under rule 23(a)(4) that ... the putative class representative possess[ ] a certain level of experience, expertise, wealth or intellect, or a level of knowledge and understanding of the issues, beyond that required by our long-established standards for rule 23 adequacy of class representatives." The "long-established standard" for the adequacy determination on which we principally relied in *Berger* [*v. Compaq Computer Corp.*, 257 F.3d 475, 483 (5th Cir. 2001)] requires "'an inquiry into [1] the zeal and competence of the representative[s'] counsel and ... [2] the willingness and ability of the representative[s] to take an active role in and control the litigation and to protect the interests of absentees[.]'" In addition to determining the proposed class counsel's zeal and competence and the proposed class representative's willingness and ability, the district court's "adequacy inquiry also 'serves to uncover conflicts of interest between the named plaintiffs and the class they seek to represent.'"

Feder v. Elec. Data Sys. Corp., 429 F.3d 125, 129-30 (5th Cir. 2005) (omitting internal quotations and citations) (quoting *Berger v. Compaq Computer Corp.*, 257 F.3d 475 (5th Cir. 2001) and *Berger v. Compaq Computer Corp.*, 279 F.3d 313 (5th Cir. 2002)). At the same time, other courts have recognized that the division of labor between a class representative and his/her/its legal representative must mean something, such that any resulting inability of a proposed class representative to demonstrate absolute familiarity and understanding of the complexities of litigation should not act as a disqualifying factor.

Thus, even that same Fifth Circuit has opined that "class representatives are

entitled to rely to some extent on counsel, although they should know more than that they were 'involved in a bad business deal.'" *Feder*, 429 F.3d at 131 (quoting *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 483 (5th Cir. 2001)) (omitting internal quotation marks). Indeed, notwithstanding its earlier decision in *Maywalt*, the Second Circuit has a "general disfavor of 'attacks on the adequacy of a class representative based on the representative's ignorance.'" *In re Flag Telecom Holdings, Ltd. Secs. Litig.*, 574 F.3d 29, 42 (2d Cir. 2009) (quoting *Baffa v. Donaldson, Lufkin & Jenrette Sec. Corp.*, 222 F.3d 52, 61 (2d Cir. 2000)); *see also Baffa*, 222 F.3d at 61 & n.5 (suggesting that defects in knowledge about case are more appropriately assessed under the "typicality" requirement); *cf. Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 370-74 (1966).

Here, Perry argues that Mossberg is both disengaged and lacks sufficient familiarity with and knowledge about this lawsuit and its proceedings. Mossberg spends a substantial portion of his Reply pointing out why he feels that Perry has misrepresented or distorted the evidentiary record on that subject. In the end, Mossberg has the better argument on this point. He: relatively accurately summarized the allegations of the lawsuit, *see* Mossberg Depo. at 25:24-26:14; knows the name of the judge handling this case, *see id.* at 26:23-27:1; knows that the Ninth Circuit had been asked to review one of the Court's decisions thus far, *see id.* at 29:4-21; knows there have been mediation/ settlement efforts, *see id.* at 29:22-30:1; has met with his attorneys in person twice, spoken with them on the phone numerous times, and has received materials from and sent materials to his attorneys, by way of mail, on at least several occasions, *see id.* at 40:10-41:7, 41:14-42:4; has an at-least-somewhat-reasonable explanation of "what it means to be a class representative"[5]; he believes he can fulfill those duties and that he has done so to this point, *see id.* at 46:10-21; is familiar with the course of the pleading versions filed in this case; is familiar with at least some of the key documents filed in this case; and has, on occasion when necessary, asked his attorneys questions about some of those

[5] "It means that I should review any documents, pleadings, et cetera, sent to me by my attorney, and reviewing them to see if I saw any problem with them. And if I did, to call it to the attention of the attorney, and also to what extent I can to protect the interests of all of the other members of the class." In addition, "to follow up in [*sic*] the decision by the court to see that that is complied with." Mossberg Depo. at 45:16-46:6.

documents, *see id.* at 62:22-65:5, 77:12-18, 78:4-21.[6]

Can Perry make out a case that Mossberg could have been, or even should have been, more engaged and/or knowledgeable as a class representative? Of course he can. Mossberg: did not know the name of this Court, and thought that it sat in San Francisco, *see id.* at 27:2-12; did not know what the Ninth Circuit (which *does* have its central offices in San Francisco) had been asked to review in this case, *see id.* at 29:4-21; indicated that he saw no real need to attend any of the hearings held thus far in the matter because he could "get the full report from my attorney" and was not present at any of the mediation sessions and does not think his presence was even discussed, "[a]pparently, [because] there was no need for it," *see id.* at 28:10-20, 30:12-19; did not have any desire to attend the mediation sessions, *see id.* at 30:20-22; indicated that he got involved in the lawsuit after it was already underway, when his attorneys contacted him, and he got involved not due to any "particular motivation," but because he was asked to serve and has "a problem not saying no too often," *see id.* at 30:23-32:1; never discussed the lawsuit with Tripp, nor met Tripp, despite the fact that they were joined together for purposes of obtaining PSLRA "lead plaintiff" status based, at least in part, on the indication that they would work together, *see id.* at 43:16-20; was unfamiliar with several of the materials relating to him that were filed and/or served on his behalf, *see id.* at 56:13-57:1, 75:17-76:5; did not receive or review, pre-filing, any of the versions of the complaint filed in this action, *see id.* at 63:21-64:16, 65:9-66:10, 77:12-18, any of the oppositions his attorneys had filed in connection with motions the defendants have filed in this case, *see id.* at 77:19-78:17, or Perry's First Set of Requests for Production that were directed to him, *see id.* at 80:17-81:7, 84:6-85:10; could not remember whether he had reviewed any documents filed by either defendant or by his attorneys, other than the few documents (5, at that point in time in the deposition) that were introduced as exhibits at his deposition, *see id.* at 77:3-10; does not know the identity of any confidential witness referenced in the Sixth Amended Complaint, *see id.* at 67:13-24, 68:20-69:3, 70:1-8, 71:17-24, 73:2-9, 73:24-74:7, 74:23-75:6; has no specific recollection of having

[6] The Court relies on Mossberg's deposition testimony in connection with this analysis because his declaration (see Docket No. 273-1) is, while consistent with this account (at least in most key respects), much less detailed.

received any of the orders this Court has issued in this case, *see id.* at 78:22-79:7; could not identify the reason for why the class period had changed between the Third Amended and Fourth Amended Complaints, and again by the time the Sixth Amended Complaint had been filed, *see id.* at 85:20-88:7, 90:5-15; and intends to attend the trial personally "[i]f [he is] physically able," but would "try to avoid it" if he could, *see id.* at 129:2-11, 129:15-20. There is no question that an ideal class representative would be much more engaged than Mossberg has been here. In fact, one might call this a borderline call.

Several considerations suggest, however, that his engagement may just be on the side of the border rendering him satisfactory for Rule 23 purposes (at least in this respect). First, Rule 23 does not call for the "best" representative; it calls for an "adequate" representative. Second, especially considering the factors affecting this issue as set forth in such cases as *Flag Telecom* and *Feder*, it would be too harsh an assessment to take Mossberg to task for not having the kinds of hands-on role that one might expect of, for example, his counsel. *See* Manual For Complex Litigation (4th ed. 2004), § 21.26, at 277 (indicating that requirement that representatives be "knowledgeable about the issues in the case . . . does not necessarily require legal experience or expertise on the part of the representative, who is usually a layperson"). Some of the evidence recited in the previous paragraph is more troubling than others, but that portion (a substantial portion) that recounts his unfamiliarity with pleadings, filings, the location of this Court, the reasons behind certain of the changes in the operative pleadings, the identity of confidential witnesses, and other similar facts, would be surprising if Mossberg were one of the attorneys prosecuting this action. But he is not. Short of actually being one of the attorneys working on the case, it is hard to imagine any class representative who would be fully familiar with, and fully enmeshed in, every detail in a class action, especially one involving the complexity (perhaps most notably at the pleading stage) of a securities fraud class action.

While he may not have taken a hands-on role in connection with the strategy underlying this case or the formulation of his attorneys' filings, he indicates that he is familiar with the issues involved in the lawsuit and the course of this litigation and has both kept abreast of developments and discussed the case with his counsel when there has been a need for such discussion. This Court cannot expect Mossberg (or, frankly, any

class representative) to sit at home typing up pleadings, briefs and other relevant documents, asking only that his lawyers sign them as officers of the Court. Lawyers are trained in the law to provide laymen with legal help. Mossberg's deposition indicates that is what has occurred here.

However the Court comes out on that question, there is one other consideration that seemingly must factor into the Court's assessment of Mossberg's adequacy – he is 88 years old, lives in New Jersey and, due to health conditions, would have to travel by land to attend any proceedings in this matter and would have difficulty sitting through long proceedings in this matter. *See id.* at 6:19-23, 13:11-13, 49:1-12, 50:19-51:3, 129:2-11, 129:15-20.[7] While he may have been sufficiently vigorous and engaged up to this point in time in the litigation (over four years into the case), his appointment as class representative does not end the case (though, practically speaking, it might). If this matter proceeds to trial, which this Court must assume that it would, Mossberg would have to remain engaged and vigorous, representing the class members' interests. His lawyers may not do that alone because courts do not appoint engaged legal counsel as class representatives.

The Court has been able to unearth only one decision from within this Circuit considering whether an advanced age and associated health factors make one unsuitable to perform as a class representative. *See In re Convergent Techs. Secs. Litig.*, No. 84-20749, 1985 WL 5812 (N.D. Cal. Sept. 2, 1985). In that case, however, there was no discussion of just what age the individual was or what health issues he faced. *See id.* at *2. In addition, there were numerous other class representatives. *See id.*

Mossberg takes issue with the idea that age and health (and the possibility that the two considerations will collide in an unfortunate ending) should be considerations in assessing Rule 23 adequacy, pointing out that, in the end, all of us are terminal patients

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[7] The Court does not discount Mossberg's testimony indicating that, for all but the last few years, he has been something of a world traveler. *See* Mossberg Depo. at 47:3-16, 47:20-48:8, 49:1-12. However, he admittedly does it less so now because of his medical problems. *See id.* Mossberg also continues to work to some degree, despite his retirement: he translates documents between English and Swedish and Norwegian. *See id.* at 13:16-14:9, 16:22-17:4. The Court also does not disagree with Mossberg's assessment that "[t]hings could change between now and next October." *See id.* at 129:22-23. As to that last point, however, the Court would note that it is not only somewhat speculative, but does not account for the fact that "things" can "change" in either direction.

and there is no telling when an end might come (referring to life, not securities litigation). Obviously he is correct. Moreover, there are, of course, numerous examples of the aged in our society (not to mention human history) serving productive and laudable roles. In fact, the judiciary is a prime example. But, to use a concept that is not unfamiliar in the law, if our lives can be seen as sliding scales, the ends of that scale become more precipitous the farther we advance along it. Ask any actuary: the chances that an 88-year-old man will continue to be able to vigorously represent a class of persons into the undefined future are markedly less than the chances that – to pick a number – a 55-year-old person will be able to do the same.

Mossberg no longer has any companions in the journey this suit has taken; Tripp has already dropped out, apparently due to his own health and/or medical reasons. *See* Mossberg Depo. at 25:18-23, 43:12-15. Were that not true, this Court could afford to be less concerned that the class would continue to be adequately represented on into the future. *See, e.g.*, *Convergent Techs.*, 1985 WL 5812, at *2.

Rule 23(a)(4) demands that a class representative protect the interests of the class. In the absence of any higher authority holding (or even suggesting) that age, health and associated travel-related restrictions are, as a matter of law, *in*appropriate factors to take into consideration in determining whether a class representative will be able to shoulder that responsibility, the Court may not find Mossberg to be an adequate representative on his own. In the end, however, a rejection of Mossberg as class representative would not necessarily mean the end of this case. The Court would allow Mossberg's counsel to look for other suitable representatives or co-representatives (perhaps even Claude Reese, the only applicant to become lead plaintiff at the beginning of this action other than Tripp and Mossberg). *See CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 728 (7th Cir. 2011) (indicating that if trial court, upon remand, determines that class representative is improper, the representative's law firm still might be able to find an adequate substitute representative); *see also* Manual For Complex Litigation (4th ed. 2004), § 21.26, at 277 (indicating that, where replacement of a representative is appropriate, "courts generally allow class counsel time to make reasonable efforts to recruit and identify a new representative who meets the Rule 23(a) requirements"). In fact, it indicated as much in a telephonic conference held November 3, 2011. Whether

most-capable adequate representative of class interests.

Mossberg's counsel wishes to follow that course is entirely up to them.[8]

Aside from the question of Mossberg's adequacy, the Court would find no other reason to deny class certification.

B. Numerosity

Numerosity is keyed to the impracticability of joinder. *See Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-14 (9th Cir. 1964). Mossberg indicates that there were, at a minimum, "thousands" of purchasers of IndyMac shares during the class period, *see* Docket No. 272 at 10:1-4 and Docket No. 273-6 (Nye Declaration) ¶¶ 15, 56, and Perry does not contest the numerosity issue. This is clearly sufficient to satisfy the numerosity requirement. Joinder of all such individuals would clearly be impractical, if not impossible.

C. Commonality

Rule 23(a)(2) requires that there be "questions of law or fact [which are] common to the class." This commonality requirement has been permissively construed.[9] *See Hanlon*, 150 F.3d at 1019. Although there must be common questions of law or fact, it is not necessary that all questions of law or fact be common. *See id.* ("The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class."); *see also Staton*, 327 F.3d at 953-57. The Ninth Circuit has made clear that Rule 23(a)(2) is more lenient than the related requirement in Rule 23(b)(3) that common questions of fact or law predominate. *See Hanlon*, 150 F.3d at 1019; *see also Perry v. U.S. Bank*, No. C-00-

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[8] The Court would never suggest that any attorney should not appeal one of its decisions or orders. *See* Fed. R. Civ. P. 23(f) (providing for appeal by permission from an order denying class certification); *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 662 (9th Cir. 2004). However, where the Court already has concerns about a proposed class representative's age and health, such a course would certainly not halt the march of time. On the other hand, even if Mossberg's counsel affirmatively elected not to take advantage of the opportunity the Court now presents it with to procure another representative or co-representative, it would not be an extraordinary surprise to learn that the Ninth Circuit gave them yet another opportunity, if it saw fit to disagree with this Court's adequacy analysis.

[9] This was true at least up until the Supreme Court's recent decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011). However, notwithstanding the Supreme Court's protestation to the contrary, *see id.* at 2556-57, it is somewhat difficult to understand *Dukes* as doing something other than melding the commonality requirement with the predominance requirement of Rule 23(b)(3) (the latter of which was not at issue in *Dukes*, which was a Rule 23(b)(2) class). In any event, even if that analysis is accurate, the rigidity now injected into the commonality analysis would not appear to have much effect in the context of securities litigation class actions in particular, for the reasons addressed herein.

1799-PJH, 2001 U.S. Dist. LEXIS 25050, at *20 (N.D. Cal. Oct. 17, 2001) (finding that Rule 23(a)(2) was satisfied but Rule 23(b)(3) was not). *But see* Footnote 9, *supra*. Under that approach, for purposes of Rule 23(a)(2), the common questions need only exist, even if they are not the predominant questions in the case.

However, in *Dukes*, the Supreme Court indicated that in order to satisfy the commonality requirement, the putative class members'

> claims must depend upon a common contention – for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

131 S.Ct. at 2551. It then quoted a commentator for the notion that

> "[w]hat matters to class certification...is not the raising of common 'questions' – even in droves – but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers."

Id. (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.L. Rev. 97, 132 (2009)) (italics in *Dukes*; underline added); *see also Ellis*, 657 F.3d 970, 981 (9th Cir. 2011) at 981. The Supreme Court determined the "central" commonality was lacking in *Dukes*. *See Dukes*, 131 S.Ct. at 2552 ("Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored.*"); *id.* at 2554 ("[D]emonstrating the invalidity of one manager's use of discretion will do nothing to demonstrate the invalidity of another's.").

Here, the crucial questions will wind up being the truth or falsity of Perry's representations. *See Pub. Emps. Ret. Sys. of Miss. v. Merrill Lynch & Co., Inc.*, No. 08 Civ. 10841 (JSR), 2011 U.S. Dist. LEXIS 93222, *26-27 (S.D.N.Y. Aug. 22, 2011). Commonality is satisfied.

D. Typicality

Rule 23(a)(3) requires that the claims or defenses of the representative parties are typical of the claims or defenses of the class. "The purpose of the typicality requirement

is to assure that the interest of the named representative aligns with the interests of the class." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). "Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose . . . ." *Id.* (citation and internal quotation marks omitted). "The test of typicality is whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Id.* (citation and internal quotation marks omitted). The representative plaintiffs' claims need not be identical to those of the class, but rather need only be "reasonably co-extensive with those of absent class members . . . . " *Hanlon*, 150 F.3d at 1020. In practice, "[t]he commonality and typicality requirements of Rule 23(a) tend to merge." *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 157 n.13 (1982).

At the same time, "class certification is inappropriate where a putative class representative is subject to unique defenses which threaten to become the focus of the litigation." *Hanon*, 976 F.2d at 508 (citations and internal quotation marks omitted). Perry argues Mossberg cannot satisfy typicality because he bought shares in IndyMac *after* the alleged revelation of the truth and because he (according to Perry) did not rely on the integrity of the market in making his purchases. As to the latter argument, the Ninth Circuit has made clear that "the defense of non-reliance is not a basis for denial of class certification." *Id.* at 509.

With respect to Mossberg's post-revelation purchases, even if that would be a defense "unique" to him (and it almost certainly would not be "unique" to him), it would not "threaten" to become a "major focus" of the litigation. *Id.* at 508-09. Moreover, as one court within this District has recently concluded, such purchases would not preclude certification unless they were part of an "unusual post-disclosure trading pattern[]." *In re Countrywide Fin. Corp. Secs. Litig.*, 273 F.R.D. 586, 602-03 & n.36 (C.D. Cal. 2009). Here, Mossberg has accounted for his December 2007 purchase as part of an "averaging-down" strategy (though the Court might note that he has not done so unequivocally[10]). *See id.* This Court follows that approach.

[10] Mossberg testified that his purchase at that time "could have been – in retrospect, could be considered as one bringing down the average basis for the securities." Mossberg Depo. at 119:1-9, 126:16-127:1.

E. Predominance & Superiority

A class may be certified under Rule 23(b)(3) where questions of law or fact common to members of the class predominate over questions affecting only individual members and a class action is superior to other available methods. *See* Fed. R. Civ. P. 23(b)(3). The predominance analysis focuses on "the legal or factual questions that qualify each class member's case as a genuine controversy" and is "much more rigorous" than commonality. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997). It does not involve counting the number of common issues, but weighing their significance. *See, e.g., Local Joint Executive*, 244 F.3d at 1163 (contrasting the "number and importance" of common issues with the "few" and "relatively easy" individualized issues); *see also Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 593 (9th Cir. 2010), overruled in other respects by Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct. 2541 (2011) (noting that Rule 23(b)(3) "requires a district court to formulate 'some predictions as to how specific issues will play out in order to determine whether common or individual issues predominate in a given case," meaning that it would be "[no surprise] that a district court will have to make more precise factual determinations under Rule 23(b)(3) than under Rule 23(a)(2)").

The predominance analysis looks, at least in part, to whether there are common issues the adjudication of which "will help achieve judicial economy," further the goal of efficiency and "diminish the need for individual inquiry." *See Vinole v. Countrywide Home Loans, Inc.*, 571 F.3d 935, 939, 944 (9th Cir. 2009) (quoting and citing *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir. 2001)). Here, the same issues Perry identifies as harming Mossberg's typicality showing take central stage in his predominance challenge as well. It is true that "[w]hether common questions of law or fact predominate in a securities fraud action often turns on the element of reliance," *Erica P. John Fund, Inc. v. Halliburton Co.*, 131 S.Ct. 2179, 2184 (2011), and that Perry has identified what he believes are problems with Mossberg's reliance showing. Nevertheless, with or without Mossberg, the fraud on the market theory will play a big role in this suit. *See generally Conn. Ret. Plans & Trust Funds v. Amgen Inc.*, 2011 U.S. App. LEXIS 22540 at *2-8 (9th Cir. Nov. 8, 2011). It may be that Perry is able to rebut it as to Mossberg (and others in a situation similar to him), but that does not mean that

common issues will not predominate. Issues of reliance will take up a relatively minor part of the stage set for this litigation. The lion's share of any trial in this matter will no doubt center on the questions – the *common* questions – of the truth or falsity of Perry's and IndyMac's statements, scienter and loss causation.

Beyond predominance, Perry does not appear to argue here that a class action would not be superior to other methods, the other requirement of Rule 23(b)(3). The matters that are to be taken into consideration in making all of the necessary findings under Rule 23(b)(3) include the following:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
>
> (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3)(A)-(D). All of these factors point to a class action being the superior method for fairly and efficiently adjudicating the instant controversy(ies). There is no indication (other than Reese's participation in the lead plaintiff "competition") that other individuals are seeking to advance the rights Mossberg assert are at stake here. No party has suggested any particular difficulties in managing this particular class action. Finally, where, as here, "recovery on an individual basis would be dwarfed by the cost of litigating on an individual basis, this factor weighs in favor of class certification." *Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010).

Rule 23(b)(3) is satisfied here.

F. Conclusion

In sum, but for the above-described concerns about Mossberg's adequacy, this matter would be suitable for class certification.