DAVID B. BAYLESS (SBN 189235)
E-mail: dbayless@cov.com
TAMMY ALBARRAN (SBN 215605)
E-mail: talbarran@cov.com
STEVEN D. SASSAMAN (SBN 258021)
E-mail: ssassaman@cov.com
COVINGTON & BURLING LLP
One Front Street
San Francisco, CA 94111
Telephone: 415-591-6000
Facsimile: 415-591-6091

Attorneys for Defendant Michael W. Perry

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

WAYMAN TRIPP and SVEN MOSSBERG, Individually and On Behalf of All Others Similarly Situated,

Plaintiff,

v.

INDYMAC BANCORP, INC., and MICHAEL W. PERRY,

Defendants.

Case No.: 2:07-cv-1635-GW (VBK)

DEFENDANT MICHAEL W. PERRY'S MEMORANDUM IN OPPOSITION TO LEAD PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Date: November 14, 2011
Time: 8:30 a.m.
Ctrm.: 10
Judge: Hon. George H. Wu

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I. INTRODUCTION

Defendant Michael W. Perry opposes Lead Plaintiff's Motion for Class Certification (Dkt. No. 272) ("Motion"). Rule 23(a) of the Federal Rules of Civil Procedure establishes the four prerequisites for class certification—numerosity, commonality, typicality, and adequacy of representation. Here, Lead Plaintiff, Sven Mossberg, has failed to meet three of the four prerequisites.

While Lead Plaintiff's allegations raise issues that are common to the class, proof of certain elements of Mossberg's claim (*e.g.*, reliance) is not susceptible to class-wide resolution based on common evidence. As shown below, Mossberg's claims are not typical, and he has not, and cannot, adequately protect the interests of the proposed class. In addition, Mossberg has not demonstrated that common questions of law and fact predominate in his proposed class, as required by Rule 23(b)(3).

Accordingly, the Court should deny Mossberg's motion for class certification.

II. PROCEDURAL HISTORY

This case has been through numerous rounds of pleading. On March 12, 2007, Claude A. Reese filed the initial complaint. (Dkt. No. 1.) ***No other investor*** filed a lawsuit against Mr. Perry making similar allegations at that time. On May 16, 2007, Wayman Tripp and Sven Mossberg ("Tripp Group") moved to intervene in Mr. Reese's lawsuit (Dkt. No. 12), and on June 18, 2007, the Court appointed the Tripp Group and its counsel as Lead Plaintiffs and Lead Counsel (Dkt. No. 16).

To win the Lead Plaintiff appointment, the Tripp Group argued they were adequate representatives because *together* they had "the largest known financial interest in the relief sought by the action." (Mot. for Lead Plaintiff, Dkt. No. 12, at 5.) The Tripp Group represented their combined losses were $36,480.40, but only $9,961.10 of this figure is attributed to losses allegedly suffered by Sven

Mossberg. (*Id.* at 1; Decl. of Evan J. Smith ("Smith Decl.") Ex. C, Dkt. No. 13.) They also represented to the Court that "Wayman Tripp and Sven Mossberg are committed to working together in the joint prosecution of this action." (Mot. for Lead Plaintiff at 7-8, n.3.) As shown below, this could not be farther from the truth.

The Tripp Group filed their First Amended Class Action Complaint on September 7, 2007 ("1AC"). (Dkt. No. 35.) Four-and-a-half years later, after numerous amended complaints—Second Amended Class Action Complaint (Dkt. No. 54) ("2AC"); Third Amended Class Action Complaint (Dkt. No. 81) ("3AC"); Fourth Amended Class Action Complaint (Dkt. No. 165) ("4AC"); and Fifth Amended Class Action Complaint (Dkt. No. 195) ("5AC")—and a corresponding number of successful motions to dismiss, the Tripp Group barely got past the pleading stage with its Sixth Amended Class Action Complaint For Violations of Section 10(b) and 20(a) of the Securities Exchange Act of 1934 ("6AC").

Through this process, the allegations against Mr. Perry have been significantly narrowed. Initially, the Tripp Group claimed that Mr. Perry primarily and secondarily violated the federal securities laws during a class period from January 26, 2006 through January 25, 2007. (*See* 1AC ¶ 1.) Early iterations of their Complaint alleged, among other things, no fewer than 30 untrue and misleading statements regarding (1) IndyMac's underwriting practices and controls; (2) IndyMac's earnings projections; (3) IndyMac's hedging activity; and (4) IndyMac's internal controls over financial reporting, including Sarbanes-Oxley certifications. But the Tripp Group was forced to drop the last three categories of statements because the Court found, as a matter of law, that they were *not* actionable. (*See* Minutes of April 20, 2009 Motion Hearing, Dkt. No. 159.) Thus, the *only* category of claims remaining relates to statements about IndyMac's underwriting practices and controls. (*See* 6AC ¶¶ 29-115.)

Moreover, the Tripp Group significantly altered their proposed class period. In their initial submission to this Court, the Tripp Group moved to be lead plaintiffs on behalf of a class that purchased common stock from May 4, 2006 to March 1, 2007. (Mot. for Lead Plaintiff at 1.) They next proposed a class period from January 26, 2006 through January 25, 2007. (*See* 1AC ¶ 1; 2AC ¶ 1; 3AC ¶ 1.) The 4AC then alleged a class period of March 1, 2006 through January 25, 2007. (4AC ¶ 1.) So, for over three years the Tripp Group claimed that the "truth" about Mr. Perry's purported fraud was "revealed" to the market on January 25, 2007.

But the Court found no such revelation on that date. (Tr. of Sept. 24, 2009 Oral Argument, Dkt No. 192, at 23:11-24:16.) So the Tripp Group changed their story yet again. The 5AC and 6AC allege a class period from March 1, 2006 to March 1, 2007. (5AC ¶ 1; 6AC ¶ 1.) On March 1, 2007, however, IndyMac's stock price declined only 6%.

While the 6AC survived the pleading stage, the Court certified for interlocutory appeal its order denying the motion to dismiss the 6AC on loss causation grounds—a required element of a securities fraud claim. In certifying its order for immediate appeal, the Court emphasized that its conclusion that loss causation had been adequately pled was "by no means assured or obvious. It was a *close call*." (February 1, 2010 Tentative Ruling on Certification, Dkt. No. 224, at 4 (emphasis added) (adopted as final ruling on March 22, 2010, Dkt. No. 242).) It also stated that, "in light of [its] other rulings on the various motions to dismiss . . . the *loss causation element is perilously close to being entirely absent from this case*." (*Id*. at 5 (emphasis added).) Mr. Perry's petition to the Ninth Circuit for permission to file an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) was not accepted, but without discussion of the merits.

III. THE TRIPP GROUP DISBANDS

In late August, we contacted the Tripp Group's counsel to discuss dates for the depositions of Lead Plaintiffs Tripp and Mossberg. On August 25, 2011, we were informed that Mr. Tripp would be unable to serve as a class representative due to an illness and, thus, a deposition was not necessary. (Declaration of Steven D. Sassaman ("Sassaman Decl.") ¶ 2.) (*See also* Mot. at 1 n.1)

On September 9, 2011, the parties stipulated to the withdrawal of Mr. Tripp as a lead plaintiff in this case, which this court approved on September 15, 2011. (Stipulation Regarding Withdrawal of Lead Plaintiff Wayman Tripp, Dkt. No. 274; Order Granting Stipulation Regarding Withdrawal of Lead Plaintiff Wayman Trip, Dkt. No. 277, at 1.) As a result, Sven Mossberg ("Mossberg") is now the only remaining member of the Tripp Group seeking appointment as the sole class representative.

IV. LEAD PLAINTIFF SVEN MOSSBERG

Lead Plaintiff Sven Mossberg now asks the Court to certify a class pursuant to Fed. R. Civ. P. 23(a) "on behalf of all persons or entities who purchased or otherwise acquired IndyMac Bancorp, Inc. ("IndyMac" or the "Company") common stock from March 1, 2006 through March 1, 2007 (the "Class Period"), inclusive (the "Class")." (Mot. at 1.)

Mr. Mossberg is 88 years old, resides in New Jersey, and has been investing in the stock market for approximately 35 years. (*See* Mot. for Lead Plaintiff at 7-8 n.3.; Sassaman Decl. Ex. 1 at 4:11-13.) During discussions to schedule Mossberg's deposition, his counsel informed us that Mossberg could not travel long distances due to a health issue. Thus, as an accommodation, Mossberg was deposed in Philadelphia on September 22, 2011. (Sassaman Decl. ¶ 3.) Mossberg was questioned about his personal involvement in this action, for which he seeks to be appointed as class representative.

His testimony revealed a profound detachment from the case and demonstrated that he has had, at best, a passive involvement in these proceedings—rubber-stamping documents his attorneys send him to sign. Mossberg was unable to correctly identify the court before which this suit is pending (Sassaman Decl. Ex 1 at 5:2-11); he has not attended any mediation sessions (and was disinclined to do so), despite being given the opportunity to be present at these proceedings (*Id.* at 6:10-20; 7:22-8:22); he has only passing familiarity with any of the counsel representing him in this action (*Id.* at 11:7-18:9); he has had limited contact with the two attorneys with whom he has had communication; and he has only met his counsel in person once prior to the deposition over the past four years. (*Id.* at 13:17-17:21; 18:10-23.)

Although his attorneys have filed numerous documents with this Court, Mossberg *has not reviewed any of these before filing* or provided his counsel with guidance, being content to simply receive copies of documents after they were already presented to the Court in final form. (*Id.* at 23:1:-25:18; 34:18-37:17; 38:8-39:16.) He has no familiarity with any orders this Court has issued (*Id.* at 37:22-38:7) or the circumstances surrounding Mr. Perry's attempt to obtain Ninth Circuit interlocutory review. (*Id.* at 7:4-21.) And Mossberg never met or even discussed this case with his former co-lead plaintiff Wayman Tripp, despite his counsel's representation to this Court that he would do so. (*Id.* at 19:8-24.)

Mossberg was unfamiliar with Mr. Perry's First Set of Requests for Production of Documents or his counsel's response to this document, having apparently relied on second-hand knowledge of the requests in his search for responsive documents. (*Id.* at 39:17-44:19.) He was equally unable to explain why the putative class period had changed over the course of the various complaints filed in his name (*Id.* at 44:20-49:15) or demonstrate any knowledge of the identities of the seven Confidential Witnesses cited in the 6AC, despite the centrality of their alleged statements to his case. (*Id.* at 26:4-34:16.)

Mossberg's health prevents him from traveling by air and would interfere with his ability to sit through lengthy proceedings. (*Id.* at 20:4-22:3.) If this case proceeds to trial, he would have to travel from his home in New Jersey (*Id.* at 3:19-23) to Los Angeles by ground transportation; he is reluctant to attend a trial, testifying that "if [he] could avoid it, [he] would try to avoid it." (*Id.* at 61:2-20.)

Finally, Mossberg admitted that he relied *exclusively* on the recommendation of investment analyst John Dessauer to purchase his IndyMac common stock during the purported class period. (*Id*. at 50:7-11.) He also continued to purchase IndyMac common stock *after* he claims the "truth" about Mr. Perry's fraud was revealed. (*Id.* at 51:2-53:24). Specifically, on December 19, 2007, long after March 1, 2007, when he alleges that the "truth" about IndyMac had been revealed to the market, Mossberg purchased 1,000 additional IndyMac shares. (*Id.* at 54:3-59:15.) Indeed, he still owns all IndyMac securities he purchased. (*Id.* at 60:5-10.)

V. LEGAL ARGUMENT

Mossberg states that class certification in securities class actions is "routine." (Mot. at 8). To the contrary, Mossberg bears the burden of establishing compliance with all four requirements set out in Rule 23(a)—numerosity, commonality, typicality and adequacy of representation—as well as the requirements of Rule 23(b)(3). *See, e.g., Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508-09 (9th Cir. 1992). Here, Mossberg has failed to establish the requirements of commonality, typicality and adequacy of representation.

Mossberg also must show that one of the requirements of Rule 23(b) is met. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614-15 (1997). In this case, Mossberg asserts he has met Rule 23(b)(3)'s requirement that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3).

These requirements are satisfied only if a "rigorous analysis" confirms they have been met. *Zinser v. AccufixResearch Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001); *Hanon*, 976 F.2d at 509. Here, Rule 23(b)(3) has not been met.

A. Mossberg Does Not Satisfy Rule 26(a)(3) Because His Claims Are Atypical of Other Members of the Proposed Class.

Rule 23(a)(3) requires that the claims or defenses of a named plaintiff be "typical" of the claims and defenses of the other class members. "A named plaintiff's motion for class certification should ***not*** be granted if 'there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it.'" *Hanon*, 976 F.2d at 508 (emphasis added). Named plaintiffs in securities class actions who purchase additional shares after the alleged fraud has been revealed are ***not typical*** of the purported class they seek to represent. *See Rocco v. Nam Tai Elecs., Inc.*, 245 F.R.D. 131, 136 (S.D.N.Y. 2007) (finding plaintiff who made purchases "strategically" after close of class period atypical of the proposed class); *In re Valence Tech. Sec. Litig.*, No. C 95-20459, 1996 WL 119468, at *5 (N.D. Cal. Mar. 14, 1996) (denying certification where named plaintiffs bought additional shares one day and two months, respectively, after curative disclosures were made) (emphasis added).

Continuing stock purchases after the truth is purportedly revealed, "acts to rebut the presumption that [plaintiff] relied on the alleged misrepresentations in making his purchases." *Rolex Employees Ret. Trust v. Mentor Graphics Corp.*, 136 F.R.D. 658, 664 (D. Ore. 1991) (cited with approval, *Hanon*, 976 F.2d at 508). This unique defense is "likely to become a focus of the litigation, preventing [the named plaintiff] from adequately representing the other class members." *Valence Tech.*, 1996 WL 119468, at *4.

Here, Mossberg purchased an additional 1,000 shares of IndyMac stock on December 19, 2007, increasing his IndyMac holdings by 50%. (Sassaman Decl. Ex. 1 at 52:1-14). This is nearly nine months after the day the 6AC claims that the

market "learn[ed] the truth" about IndyMac's alleged underwriting irregularities. (6AC at 66.)[1]

Thus, Mossberg will be subject to "unique defenses at trial." This makes him atypical of the putative class, precluding him to serve as a class representative. *See Rocco,* 245 F.R.D. at 136 (denying certification for this reason); *see also Mateo v. V.F. Corp.*, No. C 08-05313, 2009 WL 3561539, at *5 (N.D. Cal. Oct. 27, 2009) (even an "arguable defense peculiar to the named plaintiff" destroys typicality and brings adequacy into question as well).

B. Mossberg Does Not Satisfy Rule 23(a)(4) As He Has Not and Cannot Adequately Protect the Interests of the Class.

Rule 23(a)(4) requires a court to "scrutinize the ability of the named representatives to represent the interests of the class fairly and adequately." *In re United Energy Corp. Solar Power Modules Tax Shelter Sec. Litig.*, 122 F.R.D. 251, 257 (C.D. Cal. 1988). To be found adequate under Rule 23(a)(4), a plaintiff must demonstrate "the requisite level of knowledge and control of the litigation to ensure that he will vigorously prosecute" the suit. *Shiring v. Tier Techs., Inc.*, 244 F.R.D. 307, 315 (E.D. Va. 2007). This control is particularly critical in cases governed by the Private Securities Litigation Reform Act of 1995 ("PSLRA"), where the evaluation of a plaintiff's adequacy must reflect "Congress's emphatic command that competent plaintiffs, ***rather than lawyers***" direct class actions. *Berger v. Compaq Computer Corp.*, 257 F.3d 475, 484 (5th Cir. 2001) (emphasis added). Mossberg bears the burden of establishing his adequacy. *See Zinser*, 253 F.3d at 1186; *Berger.*, 257 F.3d at 481.

Here, Mossberg has admitted that he is an inadequate class representative.

[1] This purchase was also made almost a year after the date Lead Plaintiff originally claimed that this "truth" became known.

1. Mossberg Is Not a "Presumptively Most Adequate Plaintiff" Under the Standard of the PSLRA.

In cases subject to the PSLRA, the statute requires courts to identify the "presumptively most adequate plaintiff," in part based on an assessment of which putative lead plaintiff has the greatest financial interest in the relief sought by the purported class. *In re Cavanaugh*, 306 F.3d 726, 729-30 (9th Cir. 2002). This is a finding closely related to the Rule 23(a)(4) analysis and is likewise a determination of who is "most capable of adequately representing the interests of class members." *Id.* at 730 n.3.

The Tripp Group represented to this Court that it satisfied this requirement for appointment as lead plaintiff by pointing to its $36,380.40 cumulative losses. (*See* Mot. for Lead Plaintiff at 4-5; Decl. of Michael Goldberg Ex. C., Dkt. No. 10.) Yet Mossberg's loss of $9,961.10 constituted barely a quarter of the combined Tripp Group's loss. (*See* Smith Decl. Ex. C.) As he is now the sole lead plaintiff following Wayman Tripp's withdrawal from the case, Mossberg is no longer entitled to a presumption of adequacy, given his markedly diminished financial stake and the reality that it is significantly smaller than those of other possible class representatives.

2. Mossberg Has Not Been in Control of This Litigation.

In deciding whether a potential class representative is adequate, a court must determine whether the plaintiff is "simply lending [his] name[ ] to a suit controlled entirely by the class attorney." 7A Charles A. Wright, et. al., *Federal Practice and Procedure* § 1766 (3d Ed. 2005). Where named plaintiffs have "abdicated their role in the case beyond that of furnishing their names as plaintiffs," their counsel has essentially usurped their representative roles. *See Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 727 (11th Cir. 1987). A plaintiff "who is unfamiliar with the case will not serve the necessary role of

checking the otherwise unfettered discretion of counsel in prosecuting the suit." *Welling v. Alexy*, 155 F.R.D. 654, 659 (N.D. Cal. 1994).

Here, Mossberg did not even decide on his own to intervene in the lawsuit against Mr. Perry. Rather, Mossberg was contacted by Schiffrin Barroway Topaz & Kessler, LLP (predecessor to Mossberg's current counsel Kessler Topaz Meltzer & Check, LLP) and was asked to join *their* case. (Sassaman Decl. Ex. 1 at 8:23-9:19, 10:16-11:1.) Prior to this solicitation, Mossberg had not even considered suing over his IndyMac investment. (*Id*. at 10:11-15.)

Moreover, Mossberg's lack of familiarity with and control over this case is alarming. He has not read any of the complaints or other documents filed by his attorneys or offered any comments or corrections prior to their filing. (Sassaman Decl. Ex. 1 at 23:1:-25:18; 34:18-37:17; 38:8-39:16.); *see Shiring*, 244 F.R.D. at 316 (plaintiff inadequate for failure to participate in drafting amended complaint). He has not read any of this Court's orders, nor did he know about the petition made to the Ninth Circuit to appeal a critical ruling in this case. (Sassaman Decl. Ex. 1 at 7:4-21; 37:22-38:7.) He cannot explain why the class period has been altered as many times as it has, with its attendant shift of the date on which the alleged "truth" was revealed. (*Id.* at 44:20-49:15); *see Shiring*, 244 F.R.D. at 316 (plaintiff deemed inadequate because he did not know the reason the class period was reduced in amended complaint).

Mossberg does not know who the seven Confidential Witnesses are (Sassaman Decl. Ex. 1 at 26:4-34:16), even though their statements form a key part of each of his amended complaints and underpin many of his central allegations. Indeed, he could not recall having encountered *any* of the statements attributed to these individuals outside of the complaints themselves. (*Id.*)

Given that Mossberg is almost entirely unacquainted with the names of the firms and attorneys representing him (*Id.* at 11:14-18:9), it is difficult to see how his control over them is anything but illusory. His failure to attend even one of the

mediation sessions (of which there have been many) (*Id.* at 6:10-20; 7:22-8:22), paired with health concerns that would make it difficult to travel cross-country for a trial and burdensome for him to sit through the lengthy proceedings that this case would necessitate—not to mention his stated reluctance to even attend a trial—have limited, and will continue to limit, his opportunity to exercise effective control over the litigation. (*Id.* at 61:2-20.) His "apparently superfluous role in this litigation to date" clearly demonstrates his inadequacy as a class representative under Rule 23(a)(4). *See Greenspan v. Brassler,* 78 F.R.D. 130, 133 (S.D.N.Y. 1978).

Mossberg's conduct and contradictory sworn testimony also calls into question his credibility, which further undermines his adequacy as a class representative. *See Harris v. Vector Mktg. Corp.*, 753 F. Supp. 2d 996, 1015 (N.D. Cal. 2010) (lead plaintiff's credibility a "relevant consideration with respect to the adequacy analysis."). Contrary to express representations made to this Court, Mossberg has been completely detached from this litigation and has demonstrated abdication of true control to his counsel. For example, Mossberg represented his commitment to "work[ ] together in the joint prosecution of this action" with former co-plaintiff Wayman Tripp. (Mot. for Lead Plaintiff at 7-8 n.3.) Yet, in reality, he and Wayman Tripp never met and never discussed any aspect of the litigation conducted in their names for the over four years this case has been pending. (*See* Sassaman Decl. Ex. 1 at 19:8-24.)

And Mossberg continues to misrepresent to this Court his involvement in this case. For example, in his sworn declaration, he states that he has "responded to . . . draft documents [his counsel] have sent" him. (Decl. of Sven Mossberg In Support of Mot. for Class Cert., Dkt. No. 273-1, at 1.). This is flatly contradicted by his sworn deposition testimony that he *did not receive*, let alone review, drafts of papers filed by his attorneys until after such documents had been filed. (*See* Sassaman Decl. Ex. 1 at 23:1-25:18; 34:18-37:17; 38:8-39:16.)

This fatal lack of credibility, and his willingness to permit his counsel unfettered control over the litigation, belies Lead Plaintiff's claims that he has served or can serve as an adequate representative of the purported class.

C. Mossberg's Atypical Claims Also Defeat a Showing of Predominance of Common Questions of Law or Fact Under Rule 23(b)(3).

In addition to meeting the four prerequisites of Rule 23(a), Mossberg must also meet the requirement of Rule 23(b)(3). Rule 23(b)(3) requires two separate inquiries: (1) do issues of fact or law common to the class "predominate" over issues unique to individual class members; and (2) is the proposed class action "superior" to other methods available for adjudicating the controversy. Rule 23(b)(3)'s predominance inquiry is "rigorous"; it "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc.*, 521 U.S. at 623-24. The predominance requirement is "far more demanding" than Rule 23(a)(2)'s "commonality" requirement.[2] *Id*.

While Mossberg alleges a fraud-on-the-market theory in this action and asserts that his claims are entitled to a presumption of reliance (Mot. at 17), reliance is a rebuttable presumption. *Basic Inc. v. Levinson*, 485 U.S. 224, 247-48 (1988) (while fraud on the market plaintiff is entitled to the presumption that he relied on market information in deciding to trade in stock, "[a]ny showing that severs the link between the alleged misrepresentation and either price received (or paid) by the plaintiff, ***or his decision to trade*** at fair market price, will be sufficient to rebut the presumption of reliance") (emphasis added). If there is "any

[2] For the same reasons discussed in this section, Mossberg has not established the existence of "questions of law or fact common to the class," as required by Rule 23(a)(2). What matters is not the raising of common questions, but "rather the capacity of a classwide proceeding to generate common *answers* apt to driving the resolution of the litigation. Dissimilarities within the proposed class are what have the potential to impede the generation of common answers." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (internal citation omitted).

material variation . . . in the degrees of reliance" upon alleged fraudulent representations, class cohesion is lacking and certification is unwarranted. *See Simon v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 482 F.2d 880, 882 (5th Cir. 1973).

Mossberg's sworn testimony confirms that, unlike other class members, he did not rely upon the integrity of the market in purchasing IndyMac stock. Instead, Mossberg testified that he relied exclusively on the recommendations of John Dessauer, the author of an investing newsletter, to purchase IndyMac common stock during and after the end of the class period. *See In re Countrywide Fin. Corp. Mortgage Mktg. & Sales Practices Litig.*, No. 3:08-cv-01888-DMS (WMC), slip op., Dkt. No. 109, at 24-27 (S.D. Cal. Oct. 11, 2011) (denying certification where class members lacked common reasons for taking out loans and rejecting plaintiffs' argument they were entitled to an inference of reliance); *Rocco*, 245 F.R.D. at 136 (denying certification where lead plaintiff would be subject to "unique defenses" at trial). Mossberg admitted that other than Dessauer's newsletter, he relied on no other sources in deciding to purchase IndyMac shares. (Sassaman Decl. Ex. 1 at 50:7-11.)

In addition, as noted above, Mossberg continued to purchase IndyMac shares months after the date he alleges Mr. Perry's purported fraud was revealed, further suggesting that he did not purchase IndyMac shares relying on the integrity of the market. Thus, Mossberg is not similarly situated to those who might have purchased shares relying on the integrity of the market price.

Not only does this contradict the argument that common facts predominate for the proposed class, but it also highlights the separate and unique defenses that Mr. Perry can and will assert against Mossberg. These issues establish that individual questions will predominate in this litigation, creating "difficulties . . . in the management of a class action" that are inconsistent with certification under Rule 26(b)(3). *See Amchem Prods. Inc.*, 521 U.S. at 615. Having failed to satisfy

this necessary prerequisite for certification, Lead Plaintiff's Motion must also fail. *See Zinser*, 253 F.3d at 1186.

VI. CONCLUSION

In sum, Lead Plaintiff Mossberg has failed to meet his burden of establishing commonality, typicality, and adequacy under Rule 23(a) and predominance under Rule 23(b)(3). Thus, his Motion for Class Certification must be denied.

DATED: October 13, 2011

Respectfully submitted,

COVINGTON & BURLING LLP

By: */s/ Tammy Albarrán*
Tammy Albarrán

Attorneys for Defendant Michael W. Perry