

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV07-1635-GW(VBKx)

Date October 16, 2008

Title *Waymon Tripp v. Indymac Financial, Inc., et al.*

Present: The Honorable GEORGE H. WU, UNITED STATES DISTRICT JUDGE

Javier Gonzalez

Wil Wilcox

Deputy Clerk

Court Reporter / Recorder

Tape No.

Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Christopher L. Nelson  
John J. Gross

David B. Bayless

**PROCEEDINGS:** DEFENDANTS' MOTION TO STRIKE PARAGRAPHS 73-97 AND 182 AND ALL REFERENCES THERETO FROM PLAINTIFFS' THIRD AMENDED CLASS ACTION COMPLAINT (filed 07/01/08); DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED CLASS ACTION COMPLAINT (filed 07/01/08); DEFENDANT MICHAEL W. PERRY'S MOTION TO STAY PROCEEDINGS (Filed 09/22/08); AND SCHEDULING CONFERENCE

Hearings are held. The Court's tentative rulings are circulated (attached).

For reasons stated on the record, Defendant Michael W. Perry's Motion to Stay Proceedings is **denied**. Defendants' Motion to Strike Paragraphs 73-97 and 182 and All References Thereto from Plaintiffs' Third Amended Class Action Complaint and Defendants' Motion to Dismiss Plaintiffs' Third Amended Class Action Complaint are **taken under submission**. Court to issue order.

The Scheduling Conference is **continued** to **October 31, 2008 at 8:30 a.m.** Parties may appear telephonically, if notice is given to the clerk within two business days of the hearing.

IT IS SO ORDERED.

Initials of Preparer JG

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Tentative Ruling on Motion to Stay Plaintiffs' Third Amended Class Action Complaint

Defendant Michael W. Perry ("Defendant") requests that the Court exercise its discretion and inherent authority to stay this matter for at least 120 days due to IndyMac's bankruptcy. Defendant points out that proceeding with this case while IndyMac is in bankruptcy will potentially lead to duplicative litigation and potentially inconsistent outcomes, and will leave the parties hamstrung in their efforts at discovery relative to the corporate entity. Plaintiffs oppose the request, at least partially because to grant it would, in effect, be the equivalent of extending the automatic stay to individual officer defendants whenever the corporate defendant has declared bankruptcy, contrary to the general rule that the automatic stay extends only to the debtor. *See generally* 3 Collier on Bankruptcy (15th ed. Rev.) ¶ 362.03[3][d], at 362-18; *id.* ¶¶ 362.04[3]-[4], at 362-44 – 45.

Some courts have granted stays in somewhat similar circumstances. *See, e.g., Smith v. Dominion Bridge Corp.*, Civ. Action No. 96-7580, 1999 U.S. Dist. LEXIS 2131, at \*9-16 (E.D. Pa. Mar. 2, 1999) (staying securities matter as to individual defendants under "unusual circumstances" doctrine extending scope of bankruptcy "automatic stay" provision). However, Defendant requests a stay only under the Court's inherent authority pursuant to *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). Under that standard, "'if there is even a fair possibility that the stay...will work damage to someone else,' the stay may be inappropriate absent a showing by the moving party of 'hardship or inequity.'" *Dependable Highway Express, Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007) (quoting *Landis*, 299 U.S. at 255). "Case management standing alone is not necessarily a sufficient ground to stay proceedings." *Dependable Highway*, 498 F.3d at 1066. In addition, "[a] stay should not be granted unless it appears likely the other proceedings will be concluded within a reasonable time." *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863-64 (9th Cir.), *cert. denied*, 444 U.S. 827 (1979).

A stay will require Plaintiffs to delay their efforts to recover compensation for the alleged fraud, with all the attendant delay-associated risks and potential damage to their case. Here, Defendant has not identified any "hardship or inequity" that is peculiar to his

own position. Moreover, Defendant has not demonstrated that it is “likely” IndyMac’s bankruptcy proceedings “will be concluded within a reasonable time.” Instead, he only offers his belief that a trustee will be appointed in the bankruptcy within 120 days from the date he filed his motion.

The Court will deny the motion.

**Tripp, et al. v. IndyMac Bancorp, Inc., et al.**, Case No. CV 07-1635

Tentative Rulings on: 1) Motion to Dismiss Plaintiffs' Third Amended Class Action Complaint ("TAC") and 2) Motion to Strike Paragraphs 73-97 and 182 and all References thereto from Plaintiffs' Third Amended Class Action Complaint<sup>1</sup>

**Motion 1**

The Court must accept all factual allegations in the complaint as true. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S.Ct. 2499, 2509 (2007). The question "is whether *all* of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard." *Id.* (emphasis in original). "The inference that the defendant acted with scienter need not be irrefutable, i.e., of the 'smoking-gun' genre, or even the 'most plausible of competing inferences.'" *Id.* at 2510. But the inference of scienter must be more than merely "reasonable" or "permissible" – "it must be cogent and compelling." *Id.* A complaint survives "only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." *Id.* Ties go to the plaintiff. *See id.*; *ACA Fin. Guar. Corp. v. Advest, Inc.*, 512 F.3d 46, 59 (1st Cir. 2008).

Even before *Tellabs*, in the Ninth Circuit plaintiffs were required to "plead, in great detail, facts that constitute strong circumstantial evidence of deliberately reckless or conscious misconduct." *In re Silicon Graphics Sec. Litig.*, 183 F.3d 970, 974 (9th Cir.) (emphasis added), *reh'g & reh'g en banc denied*, 195 F.3d 521 (1999). Deliberate recklessness means "some degree of intentional or conscious misconduct." *Id.* at 974, 979; *see also SEC v. Rubera*, 350 F.3d 1084, 1094 (9th Cir. 2003) (defining recklessness as "a highly unreasonable omission, involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, and which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it"). Under that standard, it appears

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<sup>1</sup> Although IndyMac Bancorp, Inc. ("IndyMac") and Michael W. Perry are the movants as to both motions, IndyMac has declared bankruptcy. Therefore, Perry is effectively the only moving party in connection with these motions and this Court's rulings herein are only directed to that defendant.

that Plaintiffs' allegations are sufficient to survive the instant motion to dismiss.

The alleged hedging-related false statements are either borderline incomprehensible or pre-date the actual event (the expiration of \$1.5 billion in hedges) that causes the statements to be rendered allegedly false. Without deciding the merits of those allegations, however, what arguably gets Plaintiffs over the hump on the TAC are the allegations related to IndyMac's underwriting guidelines and internal controls. All of the facts, taken collectively, suggest that Perry either was aware or should have been aware that there were serious problems permeating IndyMac's underwriting operations and internal controls, meaning that his statements to the contrary satisfy the scienter standard under a "deliberately reckless or conscious misconduct" standard. In particular, Perry's statements recounted at paragraphs 170, 174 and 199 would appear to be problematic under this standard and consideration of "all of the facts alleged, taken collectively."

The TAC could, undoubtedly, still be improved in certain respects. However, each time the complaint is amended it gets more and more prolix and less and less easily digestible. It is time for the parties to get on with it. The Court's tentative is to deny the motion to dismiss for the above reasons.

## **MOTION 2**

Perry moves pursuant to Federal Rules of Civil Procedure 8 and 12(f) to strike certain paragraphs from the TAC. Perry argues that Plaintiffs lack personal knowledge with respect to the facts alleged in the paragraphs at issue and/or that those paragraphs will bring into play irrelevant, collateral matters, leading to a waste of time and resources.

As noted above in the analysis of Motion 1, the TAC arguably should survive the instant motion to dismiss. *See LeDuc v. Kentucky Cent. Life Ins. Co.*, 814 F.Supp. 820, 830 (N.D. Cal. 1992) ("Motions to strike are generally not granted unless it is clear that the matter to be stricken could have no possible bearing on the subject matter of the litigation."); *cf. PAE Govt. Servs., Inc. v. MPRI, Inc.*, 514 F.3d 856, 858 (9th Cir. 2007) (rejecting striking of allegation as "sham" pleading where ruling "effectively resolved those allegations on the merits," which is inappropriate under Rule 12(f)). To the extent that Perry was aware (or was deliberately reckless in failing to be aware) of the material

covered in these particular paragraphs of the TAC, the allegations may be useful for purposes of showing scienter. There is no prejudice (other than the scope of discovery) to Perry resulting from the presence of the paragraphs in the TAC. The pleadings are not evidence which will be submitted to the jury. To the extent that Plaintiffs attempt to litigate matters which are not within the scope of this claim, the Court can limit those attempts through motions *in limine* (if a motion or motions for summary judgment have not already done so)