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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

BRAD MAUSS, individually and on behalf of all other persons similarly situated,

Plaintiff,

v.

NUVASIVE, INC.; ALEXIS V. LUKIANOV; KEVIN C. O'BOYLE; and MICHAEL J. LAMBERT,

Defendants.

CASE NO. 13cv2005 JM (JLB)

ORDER GRANTING MOTION FOR CLASS CERTIFICATION; APPOINTING CLASS REPRESENTATIVES; AND APPOINTING CLASS COUNSEL

Pursuant to Fed.R.Civ.P. 23(a), 23(b)(3), and 23(g), Lead Plaintiff Brad Mauss and Plaintiff Daniel Popov move for class certification and appointment of class representatives and class counsel. Defendants NuVasive, Inc. ("NuVasive"), Alexis V. Lukianov, Kevin C. O'Boyle, and Michael J. Lambert (collectively "Defendants") oppose the motion on the ground that named Plaintiffs and their counsel are inadequate to represent the class. Having carefully considered the matters presented, the court record, and the arguments of counsel, the court grants the motion for class certification, appoints Brad Mauss and Daniel Popov as class representatives, and appoints Pomerantz LLP ("Pomerantz") and Glancy Prongay & Murray LLP ("GPM") as class counsel.

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BACKGROUND

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2 On August 28, 2013, Plaintiff commenced this putative securities-fraud class
3 action on behalf of those individuals who purchased NuVasive securities between
4 October 22, 2008, and July 30, 2013. After filing the Sixth Amended Complaint
5 (“6AC”) on October 26, 2016, four rounds of Rule 12(b)(6) motions, and several
6 miscellaneous motions, Plaintiffs, on October 28, 2016, 38 months after
7 commencement of the action, filed their motion for class certification and appointment
8 of class representatives and class counsel. Defendants’ opposition to the motion for
9 class certification focuses on the ability of the class representatives and class counsel
10 to satisfy the adequacy requirement of Fed.R.Civ.P. 23(a)(4).

11 As the merits are not directly at issue in the present motion, the court briefly
12 reviews the nature of this action. NuVasive designs, develops, and markets products
13 for the surgical treatment of spine disorders. NuVasive’s products include Maximum
14 Access Surgery (“MAS”) and Fusion products. On July 30, 2013, NuVasive disclosed
15 in its Form 10-Q for its second quarter in 2013 that it had “received a federal
16 administrative subpoena from the Office of the Inspector General of the U.S.
17 Department of Health and Human Services (OIG) in connection with an investigation
18 into possible false or otherwise improper claims submitted to Medicare and Medicaid.
19 The subpoena seeks discovery of documents for the period January 2007 through April
20 2013.” After releasing this news, NuVasive securities declined \$3.28 per share or over
21 12%, to close at \$22.84 per share on July 31, 2013.

22 Throughout the applicable class period, the complaint alleges Defendants made
23 false and/or misleading statements, as well as failed to disclose material adverse facts
24 about NuVasive's business, operations, and prospects. Specifically, Defendants
25 allegedly made false and/or misleading statements and/or failed to disclose that
26 NuVasive improperly submitted false claims to Medicare and Medicaid in alleged
27 violation of federal and state laws and regulations, made illegal “kickbacks” to doctors,
28 and engaged in off-label promotion of NuVasive products and services. The alleged

1 fraudulent kickback and off-label marketing scheme prompted an investigation by the
2 Office of the Inspector General of the U.S. Department of Health and Human Services.
3 Ultimately, NuVasive paid about \$13.5 million in fines and penalties.

4 The 6AC alleges Plaintiff and other class members have suffered significant
5 losses and damages. Based on these general allegations and more specific allegations
6 provided in the 6AC, the complaint asserts two causes of action: (1) Violations of
7 Section 10(b) and Rule 10b-5 promulgated thereunder against all Defendants; and (2)
8 Violations of Section 20(a) of the Securities Exchange Act against the individual
9 Defendants.

10 DISCUSSION

11 For a class to be certified, Plaintiffs must satisfy the prerequisites of Rule 23(a),
12 and one requirement of Rule 23(b). Under Rule 23(a), the class must satisfy four
13 prerequisites:

14 (1) numerosity of [parties], (2) common questions of law or
15 fact predominate, (3) the named [party's] claims and defenses
16 are typical, and (4) the named [party] can adequately protect
the interests of the class.

17 Hanon v. Dataproducts, 976 F.2d 497, 508 (9th Cir. 1992); Briseno v. ConAgra Foods
18 Inc., 844 F3d. 1121, 1131 (9th Cir. 2017) (“the class representatives bear the burden
19 of demonstrating compliance with Rule 23”). Under Rule 23(b)(3), class certification
20 is appropriate where “questions of law or fact common to the class predominate over
21 any questions affecting only individual members,” and that a “class action is superior
22 to other available methods for fairly and efficiently adjudicating the controversy.”
23 Fed.R.Civ.P. 23(b)(3).

24 Defendants do not dispute Plaintiffs’ showing on the elements of numerosity,
25 commonality, typicality, or the predominance of common factual and legal issues. The
26 only class action requirement challenged by Defendants is Rule 23(a)(4), adequacy of
27 Plaintiffs and their counsel to represent the class.

28 The general test for adequacy involves an analysis of the adequacy of counsel

1 and the class representative’s willingness to “prosecute the action vigorously.” In re
2 Mego Fin’l Corp. Secur. Litig., 213 F.3d 454, 462 (9th Cir. 2000). “The proper
3 resolution of this issue requires that two questions be addressed: (a) do the named
4 plaintiffs and their counsel have any conflicts of interest with other class members and
5 (b) will the named plaintiffs and their counsel prosecute the action vigorously on behalf
6 of the class?” Id. In reliance upon district court cases from around the country,
7 Defendants contend “that where a plaintiff is unfamiliar with the alleged claims or facts
8 of the case, the plaintiff cannot adequately represent a class.” (Oppo. at p.9:24-25).
9 While some circuits require the class representative to have sufficient knowledge about
10 the class claims to provide meaningful guidance to counsel, see Maywalt v. Parker &
11 Parsley Petroleum Co., 67 F.3d 1072, 1077-78 (2nd Cir. 1995), in the Ninth Circuit, as
12 long as the class representative understands his duties and is represented by competent
13 counsel, the class representative and class counsel are considered competent for
14 purposes of Rule 23(a)(4). Local Joint Executive Bd. Of Culinary/Beverage Trust
15 Fund v. Las Vegas Sands, 244 F.3d 1152, 1162 (9th Cir. 2011); Rutter Group,
16 California Practice Guide: Federal Civil Procedure Before Trial, ¶10:343 (2010).

17 Finally, in the case of federal securities actions, the Private Securities Litigation
18 Reform Act of 1995 (“PSLRA”), 15 U.S.C. §78u-4 et seq., sets forth requirements that
19 the lead plaintiff “be capable of adequately representing the interests of class
20 members.” 15 U.S.C. §78u-4(a)(B). On an issue of first impression, the Fifth Circuit
21 has stated, in reference to the PSLRA, “that securities class actions be managed by
22 active, able class representatives who are informed and can demonstrate they are
23 directing the litigation. In this way, the PSLRA raises the standard adequacy threshold
24 [of Rule 23(a)].” Berger v. Compaq Computer Corp., 257 F.3d 475 (5th Cir. 2001).
25 It is unclear whether the Ninth Circuit will follow the Fifth Circuit’s interpretation of
26 the PSLRA as raising the bar for those who seek to serve as class representatives. This
27 is particularly true where the legislative history of the PSLRA indicates that “[t]he
28 provisions of the bill relating to the appointment of a lead plaintiff are not intended to

1 affect current law with regard to challenges to the adequacy of the class representative
2 or typicality of the claims among the class.” H.R. Conf. Rep. No. 104–67, at 34–35
3 (1995). Accordingly, the court declines to impose a higher burden on Plaintiffs beyond
4 that required by Rule 23(a).

5 **Adequacy of Class Counsel**

6 Plaintiffs and the class are represented by Pomerantz and GPM. The firm
7 resumes submitted by counsel demonstrate their adequacy to represent the class. As
8 set forth in those firm resumes, both firms have extensive experience in the prosecution
9 of federal securities class actions. (Carino Decl. Exhs. 2, 3). Both firms are
10 knowledgeable about federal securities laws and have successfully prosecuted hundreds
11 of class actions.

12 Defendants do not raise any specific objection to the competency of Pomerantz
13 and GPM to prosecute this action and to act as class counsel. Rather, Nuvasive
14 contends that counsel have, in essence, treated the class representatives as superfluous
15 stand-ins by not keeping them adequately informed about the status of the case (failed
16 to provide the class representatives with copies of all the amended complaints, orders
17 and other papers issued by the court, or to keep the class representatives adequately
18 informed). (Oppo. at pp.12:23-13:14). The record reveals that Plaintiff Mauss testified
19 that he maintained regular communication with counsel throughout this case, received
20 documents and updates from counsel, and spoke with counsel about 20 times in 36
21 months. (Mauss TR 101:17-24; 147:3-13; 157-157). While Plaintiff Popov did not
22 maintain continuous contact with counsel like Plaintiff Mauss, since resuming a more
23 active role, Plaintiff Popov has regularly communicated with counsel. Based upon the
24 totality of the record, the court finds Pomerantz and GPM adequate to represent the
25 class.

26 In sum, the court appoints Pomerantz and GPM as class counsel.

27 **Adequacy of Brad Mauss and Daniel Popov to Serve as Class Representatives**

28 The identical declarations of Brad Mauss and Daniel Popov, prepared by

1 counsel, establish their competency to serve as class representatives. The declarations
2 establish that they both read the initial complaint and, at least, the 6AC. They both
3 declare their awareness that the federal securities claims arise under §§ 10(b) and 20(a)
4 of the Securities Exchange Act of 1934 and are based upon the alleged materially false
5 and “misleading statements and omissions of material fact concerning, among other
6 things, NuVasive’s fraudulent sales and marketing practices and compliance with
7 healthcare fraud and abuse.” (Popov Decl. ¶4; Mauss Decl. ¶4). Both declarations
8 establish that they “have a fiduciary responsibility to the absent class members to
9 oversee the litigation and ensure that counsel for plaintiffs prosecute the case
10 vigorously and in the interest of all class members equally.” (Popov Decl. ¶13; Mauss
11 Decl. ¶13). The declarations also establish that they will vigorously prosecute this
12 action.

13 In contrast to the competency demonstrated by Mauss and Popov in their
14 declarations, Defendants rely upon their deposition testimony in seeking to establish
15 that the proposed class representatives lack sufficient familiarity with the case such that
16 they are inadequate class representatives.

17 In large part, NuVasive contends that Popov and Mauss have little understanding
18 of the case, are overly reliant on counsel to prosecute the action, and are not informed
19 of the status of the case. NuVasive cites deposition testimony to the effect that Popov
20 and Mauss relied upon counsel to conduct an investigation, failed to show familiarity
21 with the allegations supporting the federal securities claims, failed to maintain regular
22 contact with counsel, and are not sufficiently informed or involved in directing the
23 litigation. The court concludes that the lack of familiarity with certain legal and factual
24 issues demonstrated by Plaintiffs in their depositions is insufficient to disqualify them
25 from serving as class representatives.

26 At the outset the court highlights that federal securities litigation is, by its very
27 nature, attorney-driven litigation. The complexity of the prototypical securities case
28 involves an analysis of allegedly materially misleading statements or omissions made

1 by the company based upon an analysis of SEC filings, wire and press releases,
2 analysts' reports and advisories about the company, and other information. See 6AC
3 at p.1. Such an analysis is beyond the capabilities of most individuals and, in such
4 cases, counsel play a critical role in investigating and prosecuting violations of the
5 federal securities laws. See In re Emulex Corp., 210 F.R.D. 717, 721 (C.D. Cal 2002)
6 ("Plaintiffs' reliance on counsel to file documents and to investigate and litigate the
7 case does not show a failure to supervise or an abdication of their duties as class
8 representatives.").

9 Here, Popov and Mauss are adequate class representatives because (1) they are
10 represented by competent counsel in Pomerantz and GPM who will vigorously
11 prosecute this action;¹ (2) there are no identified conflicts between Plaintiffs, counsel,
12 or the class; (3) they have demonstrated a general familiarity with the allegations in the
13 case;² and (4) they have accepted the responsibilities to serve as class representatives
14 (they have provided responsive documents to counsel, cooperated with counsel,
15 appeared for deposition, kept themselves generally informed about material
16 developments in the case, and represent that they will adequately represent the interests
17 of the class).

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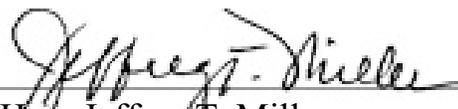
23 ¹ From a practical perspective, at the conclusion of all but the largest of
24 federal securities class actions, counsel are almost always the single largest
25 recipient of funds from any recovery. Counsel are thus incentivized to vigorously
prosecute the action.

26 ² This general familiarity does not require Plaintiffs to understand SEC filings
27 such as Form 10-Ks and Form 10-Qs or to recite the elements of a federal securities
28 claim. Similarly, the representatives are not disqualified from serving as class
representatives because of testimony showing a lack of knowledge concerning the
physical location of the situs of the action, the judge assigned to the case, the
specific alleged misstatements made in the 6AC, or the specific nature of the claims
asserted against the individual defendants.

1 In sum, the court grants the motion for class certification, appoints Brad Mauss
2 and David Popov as class representatives, and appoints Pomerantz and GPM as class
3 counsel.

4 **IT IS SO ORDERED.**

5 DATED: March 22, 2017

6 
7 Hon. Jeffrey T. Miller
United States District Judge

8 cc: All parties

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