Only the Westlaw citation is currently available.

United States District Court,
C.D. California.
Anthony Z. ABERDEEN
v.
TOYOTA MOTOR SALES, U.S.A., et al.

No. CV 08–1690 PSG (VBKx).
June 23, 2009.

H. Scott Leviant, Marc Primo, Mark Yablonovich, Monica Balderrama, Orlando J. Arellano, Payam Shahian, Sang Park, Gregory Yu, Initiative Legal Group LLP, Los Angeles, CA, for Anthony Z. Aberdeen.

Christopher C. Genovese, Steven A. McKelvey, William H. Latham, Nelson, Mullins, Riley and Scarborough, Columbia, SC, Michael L. Mallow, Darlene M. Cho, Loeb and Loeb, LLP, Los Angeles, CA, Uleses Columbus Henderson, Jr., The Eclipse Group LLP, Granada Hills, CA, for Toyota Motor Sales, U.S.A., Inc. and Toyota Motor North America, Inc.

Proceedings: (In Chambers) Order Denying Motion for Class Certification and Dismissing Case (filed 03/20/09)

The Honorable PHILIP S. GUTIERREZ, District Judge.

***1** Wendy K. Hernandez Deputy Clerk

Before the Court is Plaintiff's motion for class certification. After considering the moving and opposing papers, as well as argument at the June 22, 2009 hearing, the Court hereby DENIES the motion.

I. *Background*

On March 13, 2005, Anthony Aberdeen ("Plaintiff") purchased a new 2005 Toyota Prius hybrid automobile. On March 12, 2008, Plaintiff initiated this class action suit against Toyota Motor Sales, U.S.A., Inc. and Toyota Motor North America, Inc. (collectively, "Toyota"), alleging that Toyota engaged in false and deceptive advertising in connection with the sale and lease of Prius automobiles. Plaintiff claims that Toyota touted the Prius's Environmental Protection Agency ("EPA")-estimated fuel economy of a combined 55 miles per gallon ("mpg") in print and television ads, brochures, and other forms of advertising in spite of its awareness that these estimates were grossly inflated. According to Plaintiff, Toyota knew from its internal testing that the Prius did not achieve the EPA-estimated fuel economy under real-world driving conditions, but failed to disclose this information to consumers. Plaintiff has driven his Prius approximately 60,000 miles and has allegedly experienced an average fuel economy of just 35 mpg.

Plaintiff's First Amended Complaint ("FAC") asserts four causes of action: (1) violation of California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof.Code §§ 17200, *et seq.;* (2) violation of California's False Advertising Law ("FAL"), Cal. Bus. & Prof.Code §§ 17500, *et seq.;* (3) unjust enrichment; and (4) violation of the Consumer Legal Remedies Act ("CLRA"), Cal. Civ.Code § § 1750, *et seq.* He seeks to represent a class of all persons residing in the United States who, between January 1, 2000 and December 31, 2007 (the "Class Period"), purchased or leased, not for resale, a new 2001, 2002, 2003, 2004, 2005, 2006 or 2007 Toyota Prius Hybrid (hereinafter referred to as the "Class"). The Class contains a Subclass of all Class members who are "consumers" within the meaning of the CLRA and purchased or leased, not for resale, a new 2001, 2002, 2003, 2004, 2005, 2006 or 2007 Prius. Plaintiff now moves for class certification.

II. *Legal Standard*

A court may certify a class if a plaintiff has met all the prerequisites of Federal Rule of Civil

Procedure 23(a) and at least one of the requirements of Rule 23(b). *See* Fed.R.Civ.P. 23; *Valentino v. Carter–Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir.1996). The burden lies with the plaintiff to establish that the Rule 23(a) and Rule 23(b) requirements have been met. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir.2001). Under Rule 23(a), a plaintiff must demonstrate that: (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 class representatives are typical of the claims or defenses of the class; and (4) the class representatives will fairly and adequately protect the interests of all members of the class. Fed.R.Civ.P. 23(a).

***2** If all four prerequisites of Rule 23(a) are satisfied, a plaintiff must also establish that one or more of the grounds for maintaining the suit under Rule 23(b) are met, including: (1) that there is a risk of substantial prejudice from separate actions; (2) declaratory or injunctive relief benefitting the class as a whole would be appropriate; or (3) common questions of law or fact predominate and the class action is superior to other available methods of adjudication. Fed.R.Civ.P. 23(b).

III. *Discussion*

A. *Standing*

As an initial matter, Toyota contends that Plaintiff lacks standing to bring his UCL, FAL, and CLRA claims on his own or the putative class's behalf. A class may not be certified if the representative plaintiff lacks standing to sue in his or her own name. *See Lee v. Oregon*, 107 F.3d 1382, 1390 (9th Cir.1997) ("If the litigant fails to establish standing, he may not seek relief on behalf of himself or any other member of the class.") (citation omitted).

(i) *Causation/Reliance*

First, Toyota argues that Plaintiff lacks standing under the UCL, CLRA, and FAL because he was not exposed to Toyota's allegedly misleading advertisements before buying his Prius. Therefore, Toyota maintains, Plaintiff cannot show that he relied on those ads in making his purchase decision.

Prior to the passage of Proposition 64, the UCL "authorized any person acting for the general public to sue for relief from unfair competition." *Californians for Disability Rights v. Mervyn's, LLC*, 39 Cal.4th 223, 227, 46 Cal.Rptr.3d 57, 138 P.3d 207 (2006). In 2004, California voters amended the UCL and FAL to limit standing to sue to "any person who has suffered injury in fact and has lost money or property as a result of such unfair competition." Cal. Bus. & Prof.Code §§ 17204 & 17535; *Mervyn's*, 39 Cal.4th at 227, 46 Cal.Rptr.3d 57, 138 P.3d 207. Thus, Proposition 64 "eliminated so-called 'unaffected plaintiff' standing." *Anunziato v. eMachines, Inc.*, 402 F.Supp.2d 1133, 1136 (C.D.Cal.2005). The California Supreme Court recently held that "a plaintiff must plead and prove actual reliance" to establish standing under the UCL. *In re Tobacco II Cases*, 46 Cal.4th 298, 328, 93 Cal.Rptr.3d 559, 207 P.3d 20 (2009).[FN1] Similarly, the CLRA limits standing to "[a]ny consumer who suffers damages *as a result of*" the defendant's unlawful conduct. Cal. Civ.Code § 1780(a) (emphasis added).

FN1. *In re Tobacco II* further held that a plaintiff "is not required to necessarily plead and prove individualized reliance on specific misrepresentations or false statements where, as here, those misrepresentations and false statements were part of an extensive and long-term advertising campaign." *Id.* In contrast to the decades-long advertising tobacco campaign alleged in that case, here, the allegedly misleading advertising materials identified by Plaintiff were in limited circulation for approximately one year prior to Plaintiff's Prius purchase. Accordingly, under *In re Tobacco II*, more

specific allegations of reliance appear to be required in this case.

Of course, a plaintiff cannot show that he relied on a defendant's misrepresentation if he never saw or heard the actionable statement. In the instant case, Plaintiff admitted at his deposition that he never did any online research about the Prius and never visited Toyota's website, where the "Prius Fuel Savings Calculator," which was previously identified by the Court as a potentially actionable misrepresentation, was located. *Dfts' Ex. A* 48:9–11, 173:15–22. Plaintiff further testified that the only Prius advertising materials he recalled seeing were a television advertisement called "Holes" and the 2005 Prius brochure. *Id.* at 138:18–139:4, 93 Cal.Rptr.3d 559, 207 P.3d 20. The "Holes" ad contained the following fuel economy representation:

***3** 55 MPG City/Highway Combined

2004 EPA-estimated 60 city, 51 highway, 55 combined mpg. Actual mileage may vary.

Defendant correctly argues that the "Holes" ad is not actionable under *Paduano v. American Honda Motor Co., Inc.*, 169 Cal.App.4th 1453, 88 Cal.Rptr.3d 90 (2009) because it merely disclosed the Prius's EPA-estimated fuel economy without making any additional representations. Similarly, the 2005 brochure simply stated the EPA estimates; Plaintiff has failed to identify any actionable statements in the pamphlet.

On April 14, 2009—over a month after Plaintiff's deposition and weeks after he filed the instant motion and supporting papers—Plaintiff served Toyota with supplemental interrogatory responses in which he identified two print advertisements that he saw prior to purchasing his Prius. *See Dfts' Ex. C* at 5. The first ad stated: "Start thinking that 55 mpg* is normal." *Id.* The asterisk corresponded to the following text at the bottom of the ad: " *2004 EPA-estimated 60 city/51 highway/55 combined mpg. Actual mileage may vary." *Dfts' Ex. E.* The other print ad Plaintiff claims to have seen was called "Flames" and contained the following statement: "Prius achieves nearly 2.5 times the average fuel efficiency of conventional vehicles and close to 90% fewer smog-forming emissions ...." *Dfts' Ex. C* at 5.

Toyota argues that the Court should disregard Plaintiff's eleventh-hour claim that he saw these ads and relied on them in deciding whether to purchase a Prius. When a declaration is expressly contradicted by deposition testimony without explanation, the deposition testimony will control. *Evans v. IAC/Interactive Corp.*, 244 F.R.D. 568, 571 (C.D.Cal.2007); *see also Kenney v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir.1991) (a party cannot create a triable issue of fact by submitting an affidavit contradicting his prior deposition testimony). Here, Plaintiff stated at his deposition that he could not recall seeing any advertising materials besides the "Holes" ad and the 2005 sales brochure. He also testified that he did not read the magazines in which the "Start thinking" ad ran. *See Dfts' Ex. A* 117:4–119:17; *Ex. B* at 6–7. Further, Plaintiff failed to identify the "Flames" and "Start thinking" ads in his initial response to Toyota's interrogatories. Plaintiff has not attempted to explain this inconsistency. In light of the foregoing, as well as the suspect timing of Plaintiff's sudden "recollection"—which came nearly a month after Plaintiff filed the instant motion, and after the Court ruled on Toyota's motion for judgment on the pleadings—the Court finds that Plaintiff's supplemental response is sham.[FN2] *See Kennedy*, 952 F.2d at 266–67. Accordingly, the Court will disregard it for the purposes of this motion.

FN2. Curiously, Plaintiff himself does not draw attention to his supplemental response in addressing Toyota's reliance argument. Instead, he argues that he need not allege or show that he saw any of the advertisements at issue.

Plaintiff argues that he is not required to plead and establish reliance because his claims are based

on a "pure omission" theory. According to Plaintiff, this class action is not premised on any affirmative misrepresentations, but rather Toyota's failure to disclose the Prius's real-world fuel efficiency as revealed by its internal testing. This theory fails for at least two reasons.

***4** As an initial matter, the Court notes that Plaintiff's argument is premised on a last-minute attempt to reshape his theory of the case. The FAC painted an entirely different picture of this lawsuit:

> This case narrowly focuses on the use of *false and deceptive advertising* by Defendants to sell the [Prius] .... This case challenges the disingenuous way that Toyota *advertises and markets* the [Prius], with *inaccurate representations* of fuel economy that the car simply does not achieve under normal driving conditions ....

FAC ¶ 2 (emphasis added). Apparently realizing that *Paduano* and the Court's order on Toyota's motion for judgment on the pleadings presented serious obstacles to recovery, however, Plaintiff insists that his claims are *not* based on Toyota's affirmative misrepresentations in Prius ads. Instead, he now focuses on Toyota's alleged failure to disclose the results of internal studies which showed that the Prius did not achieve the EPA-estimated fuel economy under realistic driving conditions.

Under Plaintiff's interpretation of the law, Toyota can be liable for failing to disclose *any* information that might be of material interest to the customer. However, it is well-settled that "[a]bsent a duty to disclose, the failure to do so does not support a claim under the fraudulent prong of the UCL." *Buller v. Sutter Health,* 160 Cal.App.4th 981, 987, 74 Cal.Rptr.3d 47 (2008). Plaintiff contends that *Falk v. General Motors Corp.*, 496 F.Supp.2d 1088 (N.D.Cal.2007), stands for the proposition that a defendant has a broad duty to disclose any material facts within its exclusive knowledge, without regard to whether the defendant made any affirmative representations. However, California courts have not adopted as broad a reading of the consumer fraud statutes as Plaintiff would have it.

Falk, adopting the test for the tort of fraud by omission as set forth in *LiMandri v. Judkins*, 52 Cal.App.4th 326, 336, 60 Cal.Rptr.2d 539 (1997), held that a failure to disclose is actionable under the CLRA in four circumstances: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant has exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material fact. 496 F.Supp.2d at 1094–95.

Toyota suggests that the duty to disclose articulated in *Falk* is limited to cases involving a safety-related product defect. This may be correct. *See Daugherty v. Am. Honda Motor Co., Inc.*, 144 Cal.App.4th 824, 836, 51 Cal.Rptr.3d 118 (2006) (finding no duty to disclose product defect in absence of safety concerns); *Oestricher v. Alienware Corp.*, 544 F.Supp.2d 964, 969–73 (N.D.Cal.2008) (discussing cases and rejecting *Falk* 's broad reading of CLRA duty to disclose non-safety related product defect). But another distinction appears in the cases: where there is no fiduciary relationship and the defendant made no affirmative or partial misrepresentations, a plaintiff must show that the public had an expectation or an assumption about the matter in question in order to establish a duty to disclose. *See Daugherty,* 114 Cal.App.4th at 838, 7 Cal.Rptr.3d 905 (failure to disclose an engine problem not actionable under the UCL because "[t]he only expectation buyers could have had about the F22 engine was that it would function properly for the length of Honda's express warranty, and it did"); *Bardin v. DaimerChrysler Corp.*, 136 Cal.App.4th 1255, 1275, 39 Cal.Rptr.3d 634 (2006) (no duty to disclose where plaintiff failed to allege that public had any expectation that

car manufacturer's exhaust manifolds would be made from cast iron, as opposed to tubular steel); *Buller,* 160 Cal.App.4th at 987–89, 74 Cal.Rptr.3d 47 (plaintiff failed to state UCL and CLRA claims based on insurer's failure to disclose prompt-pay discount policy because patients in plaintiff's position were "not likely to be operating under the expectation that they are entitled to a discount"); *Falk,* 496 F.Supp.2d at 1095–96 (duty to disclose existed where a reasonable consumer would expect a speedometer to last for the life of a vehicle).

***5** Here, to the extent that Plaintiff's claims are based on pure omission theory, they must fail because Plaintiff has not identified a source (aside from Toyota's advertising) for the Prius fuel economy expectations that he and members of the putative class allegedly had.[FN3] In the absence of knowledge of the EPA fuel economy estimates, a reasonable consumer would not assume that an automobile would achieve 55 mpg. Accordingly, Plaintiff cannot show that Toyota had a duty to disclose the results of its internal fuel economy testing.

> FN3. As Toyota points out, for this reason, it is clear that although Plaintiff now argues that this is not an advertising case, there can be no question that it is.

Moreover, Plaintiff's theory that Toyota had a duty to disclose its alleged knowledge of the inaccuracy of EPA estimates for the Prius is untenable in light of *Paduano.* As this Court explained in its order on Toyota's motion for judgment on the pleadings:

> Plaintiff argues that under California law, when Toyota disclosed the EPA estimates in its advertising, it assumed a duty to disclose that the estimates were inaccurate or to otherwise provide information about "realistic" fuel efficiency. However, reading such a requirement into the UCL, CLRA, or FAL is foreclosed by *Paduano* 's holding that referring to EPA estimates in advertising is not actionable *unless* the car company makes other misleading representations about achieving those estimates.

Order of April 3, 2009 at 9–10. Paduano held that "[a]s a matter of law, there is nothing false or misleading about Honda's advertising with regard to its statements that identify the EPA fuel economy estimates for the two Civic Hybrid models." 169 Cal.App.4th at 1470, 88 Cal.Rptr.3d 90. In other words, the California Court of Appeals determined that there is no duty to disclose additional facts regarding a car's fuel economy *even when a manufacturer choose to speak* (i.e., by disclosing EPA estimates). In light of this holding, a pure omission regarding fuel economy is not actionable.

In sum, the Court finds that because Plaintiff did not see any actionable advertisements prior to purchasing his Prius, he lacks standing to bring UCL, FAL, or CLRA claims on behalf of himself and the putative class.[FN4] Accordingly, the motion for class certification is DENIED.

> FN4. *Massachusetts Mutual Life Insurance Co. v. Superior Court,* 97 Cal.App.4th 1282, 119 Cal.Rptr.2d 190 (2002), and other cases cited by Plaintiff do not compel a different result. Although *Massachusetts Mutual* held that common reliance by members of class may be inferred when the misrepresentations were material, it also explicitly stated that "such an inference will not arise where the record will not permit it." *Id.* at 1294, 119 Cal.Rptr.2d 190. Here, evidence that Plaintiff did not see any actionable advertisements precludes an inference that he relied on Toyota's alleged misrepresentations. *See also Caro v. Proctor & Gamble Co.,* 18 Cal.App.4th 644, 668–69, 22 Cal.Rptr.2d 419 (1993) (alleged misrepresentation that defendant's reconstituted orange juice was "fresh" was not material as to plaintiff because he did not believe defendant's product to be "fresh"); *Buckland v.*

Threshold Enters., Ltd., 155 Cal.App.4th 798, 809–11, 66 Cal.Rptr.3d 543 (2007) (lack of actual reliance defeats fraud-based CLRA claim).

> Thus, although Plaintiff makes much of the fact that the Court ruled in its order on Toyota's motion to dismiss that reliance could be presumed on a class-wide basis, that reasoning is no longer applicable because the Court now has a fully developed record before it which precludes such an inference.

(ii) *Whether Plaintiff is a "Consumer" under the CLRA*

Toyota also maintains that Plaintiff lacks standing to maintain a CLRA claim because he purchased his Prius for business use. The CLRA prohibits the use of "unfair methods of competition and unfair or deceptive acts or practices" in sale or leases of goods to consumers. Cal. Civ.Code § 1770 (a). The statute defines "consumer" as "an individual who seeks or acquires, by purchase or lease, any goods or services for personal, family, or household purposes." Cal. Civ.Code § 1761(d).

Plaintiff testified in his deposition that the Prius was his "business car, so all mileage would be written off that way" and further admitted that he took a tax deduction for the cost of the Prius as a business car. *Dfts' Ex. A* 19:10–22. Thus, Toyota contends, Plaintiff did not purchase his Prius primarily for personal, family, or household purposes. Plaintiff disagrees, arguing that at the time of his purchase, he checked a box on a dealer form to indicate that he was buying his Prius primarily for "personal, family or household" use (as opposed to "business or commercial" use). *Shahian Decl.*, Ex. 39. And although Plaintiff stated at his deposition that the Prius was "officially" his business car, he also estimated that the split between his business and personal use of the car was "maybe 50/50." *Dfts' Ex. A* 266:14–267:3.

***6** In support of its argument that Plaintiff is not a "consumer" under the CLRA, Toyota relies on *Lazar v. Hertz Corp.*, 143 Cal.App.3d 128, 191 Cal.Rptr. 849 (1983). In *Lazar*, the plaintiff, a self-employed businessman, sued a car rental corporation for overcharging customers for gas used to fill up the tanks of returned rental automobiles. The court held that the plaintiff could not maintain a class action for violation of the CLRA because he admittedly did not rent his car as a "consumer." *Id.* at 142, 191 Cal.Rptr. 849. Plaintiff, on the other hand, cites *Mazza v. American Honda Motor Co.*, 254 F.R.D. 610, 617 (C.D.Cal.2008), in which the court concluded that the CLRA's definition of consumer "was intended solely to exclude dealer/wholesale purchasers." However, *Mazza* did not cite any authority for this proposition or include any analysis; therefore, the Court does not find *Mazza* to be persuasive.

The Court agrees with *Lazar* 's reasoning and finds that Plaintiff did not purchase his Prius as a "consumer" within the meaning of the CLRA. Plaintiff's sworn deposition testimony is that he has taken multiple tax breaks on his Prius as a "business" car. Thus, Plaintiff's supplemental declaration, in which he states that he has driven his Prius "primarily for personal and family use" since purchasing it, appears to be either a sham or an admission of tax fraud. *See Aberdeen Supp. Decl.* ¶¶ 5, 7. Accordingly, Plaintiff lacks standing as a "consumer" under the CLRA.

B. *Rule 23 Requirements*

Although Plaintiff's lack of reliance on any actionable advertisements is sufficient reason to deny the instant motion, the Court will address two additional barriers to class certification.

(i) *Typicality*

Federal Rule of Civil Procedure 23(a)(3) requires a representative plaintiff to establish that his claims are typical of those of the class. The standard is permissive: "representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon v. Chrysler Corp.*,

150 F.3d 1011, 1020 (9th Cir.1998).

Here, Plaintiff's lack of standing to pursue UCL, FAL, and CLRA claims precludes a finding of typicality. *See Prado–Steinman ex rel. Prado v. Bush*, 221 F.3d 1266, 1279 (11 Cir.2000). Because Plaintiff did not view any of Toyota's allegedly deceptive advertisements prior to purchasing his Prius, his claims are clearly not typical of consumers who saw and relied on those ads. Additionally, Plaintiff's CLRA claim is subject to the defense that Plaintiff is not a "consumer" within the meaning of the statute. Class certification is inappropriate where, as here, the representative plaintiff is subject to unique defenses that threaten to preoccupy him. *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir.1992); *Gonzalez v. Proctor & Gamble Co.*, 247 F.R.D. 616, 622 (S.D.Cal.2007). Rather than offering compelling counterarguments on these points, Plaintiff merely insists he is typical because he was subjected to the same omissions regarding real-world Prius fuel economy as the other members of the class. Because Plaintiff has not established that the typicality requirement is met, the motion is also properly DENIED on this basis.

(ii) *Rule 23(b)(3)*

***7** In addition to satisfying all four Rule 23(a) requirements, a plaintiff must also show that the putative class falls within one of the categories enumerated in Rule 23(b). *Lozano v. AT & T Wireless Servs., Inc.*, 504 F.3d 718, 724 (9th Cir.2007). In the instant case, Plaintiff seeks certification under Rule 23(b)(3), which provides that a class may be certified where common questions of law or fact predominate over individual questions and a class action is the superior method for adjudicating the controversy. To determine whether common issues predominate, the court must look to the substantive issues raised by the plaintiff and inquire into the relevant proof for each. *Jimenez v. Domino's Pizza, Inc.*, 238 F.R.D. 241, 251 (C.D.Cal.2006).

Here, Plaintiff has failed to satisfy his burden to show that common questions predominate over individual ones. Whether each class member saw any actionable advertisements and whether he or she relied on Toyota's alleged misrepresentations would require individualized proof. *See Caro*, 18 Cal.App.4th at 668, 22 Cal.Rptr.2d 419 (individual issues predominated on claim that defendant misrepresented that its orange juice was "fresh" because court would need to inquire as to whether each class member read the label and what he or she believed). *In re Tobacco II* and the Court's discussion of standing, *supra*, indicate that reliance may not be presumed on a class-wide basis in this case. Additionally, whether each class member purchased his or her Prius for personal, family, or household use would demand individual inquiries. Other individual questions of fact include (1) what fuel economy each class member achieved; (2) what factors contributed to the driver's fuel economy, such as driving habits, maintenance habits, and driving conditions [FN5]; and (3) whether the purchaser's fuel economy expectations were met. Therefore, class certification must also be DENIED because questions common to all class members do not predominate over questions affecting only individual members.

FN5. For example, Plaintiff has admitted to getting a speeding ticket for driving his Prius in excess of 65 miles per hour. *Dfts' Ex. A* 240:7–241:14. Speed is one of many variables that can impact fuel economy. *See Dfts' Ex.* Q.

C. *Federal Jurisdiction*

Although neither party has contested this Court's jurisdiction, the Court has a responsibility to raise the issue *sua sponte*. *See Morongo Band of Mission Indians v. California State Bd. of Educ.*, 858 F.2d 1376, 1380 (9th Cir.1988). Plaintiff originally asserted that federal jurisdiction over this action existed pursuant to the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d)(2)(A). However, Plaintiff's suit is no longer a class action.

CAFA establishes federal jurisdiction over any

class action if (1) the class has at least 100 members, (2) the aggregate amount in controversy is at least $5 million, and (3) any class member is a citizen of a state different from any defendant. 28 U.S.C. § 1332(d)(2)(A). The statute itself is silent as to whether dismissal or remand is required after denial of class certification, and district courts are split on the issue. *Compare, e.g., Genenbacher v. CenturyTel Fiber Co. II, LLC,* 500 F.Supp.2d 1014, 1017 (C.D.Ill.2007) (retaining jurisdiction following denial of class certification); *Cooper v. R.J. Reynolds Tobacco Co.,* 586 F.Supp.2d 1312, 1319 (M.D.Fla.2008) (citing general rule that post-removal events do not divest federal court of jurisdiction) *with Falcon v. Philips Elecs. N. Am. Corp.,* 489 F.Supp.2d 367 (S.D.N.Y.2007) (dismissing case for lack of jurisdiction after proposed class representative found inadequate); *Arabian v. Sony Elecs. Inc.,* No. 05–1741, 2007 WL 2701340, at *3 (S.D.Cal. Sept.13, 2007) (finding no jurisdiction when there is no "reasonably foreseeable possibility" that class will be certified); *see also Good v. Ameriprise Fin., Inc.,* 248 F.R.D. 560, 574 (D.Minn.2008) (reviewing split of authority). The Ninth Circuit has never addressed this question.

***8** The Court is persuaded by the reasoning of *Arabian*, *Falcon*, and *McGaughey v. Treistman,* No. 05–7069, 2007 WL 24935, at *2–3 (S.D.N.Y. Jan.4, 2007). A determination that class certification is not a "reasonably foreseeable possibility" is not a post-removal change in jurisdictional facts, but rather is equivalent to a finding that jurisdiction never existed under CAFA in the first place. *Arabian,* 2007 WL 2701340, at *5. In the instant case, there is no "reasonably foreseeable possibility" that a class will be certified. Although substitution of a new class representative might cure the problem of standing, the predominance of individual over common questions would continue to preclude class certification. Accordingly, CAFA does not provide a basis for jurisdiction over this action. As no other basis for federal jurisdiction has been alleged, the case must be dismissed.

IV. *Conclusion*

For the foregoing reasons, the motion for class certification is DENIED. The action is DISMISSED for lack of subject matter jurisdiction.

IT IS SO ORDERED.

C.D.Cal.,2009.
Aberdeen v. Toyota Motor Sales, U.S.A.
Not Reported in F.Supp.2d, 2009 WL 7715964 (C.D.Cal.)

END OF DOCUMENT