UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	5:12-cv-01411-SVW-DTB	Date	September 29, 2015
Title	*Otto v. Abbott Laboratories Inc.*		

Present: The Honorable	STEPHEN V. WILSON, U.S. DISTRICT JUDGE

Paul M. Cruz	N/A
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
N/A	N/A

Proceedings: IN CHAMBERS ORDER DENYING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION [229]

I. Introduction

This is a misleading labeling case in which Plaintiff, Michael Otto, seeks to represent a class of consumers who purchased certain nutrition drinks developed and manufactured by Defendant, Abbott Laboratories. Otto moves to certify a statewide class of consumers under Federal Rule of Civil Procedure 23. For the reasons stated below, the motion is DENIED.

II. Background

Abbott Laboratories develops and manufactures a nutrition shake called Ensure Muscle Health. This shake contains a blend of protein, vitamins, and Revigor. Revigor is an amino acid metabolite, and the Muscle Health shake label suggests that Revigor helps consumers rebuild strength naturally lost over time.

To market Muscle Health, Abbott touted Revigor as a "proven ingredient that helps consumers rebuild muscle and regain strength." (Mark Pifko Decl., Ex. 1). Indeed, Abbott considered Revigor to be "the critical differentiator for the product." (*Id.*, Ex. 3, *see also id.*, Exs. 2, 4, 6).

Although this case began as a referendum on Revigor's overall efficacy, it now concerns a narrower omission theory: whether the label suggesting that Revigor helped rebuild strength was misleading because the ingredient had no benefit for vitamin D deficient people—a sizable subset of Muscle Health's primary elderly audience. Otto points to a few scientific studies and a patent that, he

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contends, prove Revigor's inefficacy for vitamin D deficient individuals. (Mot. for Class Cert., 5:7-11, 6:21-7:1). Abbott, however, calls the study junk science and says that Otto took a portion of the patent out of context. (Opp. to Class Cert., 5:24-28).

After Otto survived summary judgment, Abbott moved to deny certification of Otto's proposed nationwide and statewide class of all purchasers of Abbott's product within the class period. (Dkt. 190). The Court granted that motion, but gave Otto leave to make a bid for certification on a narrower basis. (Dkt. 219). Otto's attempt to seek interlocutory review of that decision was denied. Consequently, Otto moves to certify a class including,

> All residents of California who purchased Ensure Muscle Health during the period of September 16, 2010 through May 31, 2014, and who were (1) 65 years of age or older at the time of purchase; and (2) vitamin D deficient (vitamin D level below 30 ng/mL) at any time within the year prior to purchasing Ensure Muscle Health.

(Mot. for Class Cert., 1:11-13).

III. Legal Standard

"Class actions have two primary purposes: (1) to accomplish judicial economy by avoiding multiple suits; and (2) to protect the rights of persons who might not be able to present claims on an individual basis." *Haley v. Medtronic, Inc.*, 169 F.R.D. 643, 647 (C.D. Cal. 1996) (citing *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983)). To begin, a plaintiff seeking class certification must show that "an identifiable and ascertainable class exists." *Guido v. L'Oreal, USA, Inc.*, 2013 WL 3353857, at *18 (C.D. Cal. July 1, 2013) (quoting *Mazur v. eBay, Inc.*, 257 F.R.D. 563, 567 (N.D. Cal. 2009)). He must then meet two other requirements. *See Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001), *amended by* 273 F.3d 1266 (9th Cir. 2001). First, he must show that the proposed class meets Federal Rule of Civil Procedure 23(a)'s four criteria: (1) the members of the proposed class must be so numerous that joinder of all claims would be impracticable ("numerosity"); (2) there must be questions of law and fact common to the class ("commonality"); (3) the claims or defenses of the representative parties must be typical of the claims or defenses of absent class members ("typicality"); and (4) the representative parties must fairly and adequately protect the interests of the class ("adequacy"). Fed. R. Civ. P. 23(a). Second, he must demonstrate that the class fulfills the conditions of at least one of the three subdivisions of Federal Rule of Civil Procedure 23(b). Otto asserts that the class meets the requirements for Rule 23(b)(3). To qualify for certification under this subsection, a class must satisfy two conditions: (1) common questions of law or fact must "predominate over any questions affecting only individual members," and (2) class resolution must be "superior to other available

methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

IV. Discussion

1. Rule 23(a) Requirements

A. Ascertainability

"As a threshold matter, and apart from the explicit requirements of Rule 23(a), the party seeking class certification must demonstrate that an identifiable and ascertainable class exists." *Mazur*, 257 F.R.D. at 567. A class is ascertainable if it is "administratively feasible for the court to determine whether a particular individual is a member" using objective criteria. *Keegan v. Am. Honda Motor Co., Inc.*, 284 F.R.D. 504, 521 (C.D. Cal. 2012); *Forcellati v. Hyland's, Inc.*, 2014 WL 1410264, at *5 (C.D. Cal. Apr. 9, 2014). The method of identification must use "reliable and manageable means." *Perrine v. Sega of Am., Inc.*, 2015 WL 2227846, at *4 (N.D. Cal. May 12, 2015). And the process must be "reasonably efficient." *Martin v. Pac. Parking Sys. Inc*., 583 F. App'x 803, 804 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 962 (2015). In consumer products cases such as this one, a class is usually ascertainable because putative class members can self-identify based on whether they purchased the product—a simple, objective criterion for identifying class membership. *See, e.g.*, *Forcellati*, 2014 WL 1410264, at *5.

Otto's class definition has three critical identifiers: (1) purchase of Muscle Health between September 16, 2010 and May 31, 2014; (2) age 65 or older at the time; and (3) vitamin D deficiency within a year prior to purchase. Therefore, his identification method must provide for an objective, feasible, and reliable method of identifying individuals with those characteristics.

Otto argues that courts repeatedly permit self-identification in consumer product cases such as this one. Otto contends that purchasers can confirm all of the relevant criteria through questionnaires or similar documents. On the trickiest issue—the vitamin D level—doctors' notes can verify the prerequisite. In support of his argument, Otto relies on the expert testimony of Steven Weisbrot. Weisbrot is a former lawyer who now specializes in class action notice and administration. (Pifko Decl., Ex. 14 ("Weisbrot Decl."), Ex. A). According to his resume, he is a "[n]ationally recognized authority" in the field, and he currently has four years of experience (along with seven years as an attorney in private practice). (Weisbrot Decl., Ex. A). He currently serves as the Executive Vice President for Angeion Group, LLC, a class action claims administration firm. (*Id.* ¶ 2).

Weisbrot opines that properly crafted questionnaires could allow for self-identification in this

case. (Weisbrot Decl., ¶ 6). "The most straightforward method," he suggests, is to permit self-identification on the three critical characteristics. (*Id.* ¶ 9). He then offers a number of features to enhance reliability: purchase information could be verified through receipts, unique codes, stock keeping units, or sworn affidavits including detailed information about the date, location, and amount of purchase; test results, medical records, or doctors' notes could confirm vitamin D levels; and random auditing could confirm the rest. (*Id.* ¶¶ 9-11). Moreover, Weisbrot notes that fraud, to be profitable in this case, would require thousands of claims, which would raise obvious concerns that could be investigated and cured. (*Id.* ¶ 17).

Abbott first offers impeaching evidence. Abbott argues that Weisbrot has never opined that a class was unascertainable. (Brightbill Decl., Ex. 5, § 1). Weisbrot also admitted that this case is a first of sorts: he has never administered a claims process requiring proof of a medical condition. (*Id.* § 4). In addition, he conceded that people rarely retain proof of purchase for this kind of transaction, making it difficult to verify through receipts. (*Id.* § 6).

Next, Abbott argues that Otto's own experience in this case demonstrates that self-identification is infeasible. For example, Otto could recall neither how much Muscle Health he purchased nor the precise time frame during which he purchased it. (Brightbill Decl., Ex. 6, § 1). Moreover, Abbott had to issue subpoenas, depose multiple doctors, and then depose Otto to precisely ascertain the amount of vitamin D in Otto's blood around the time of his purchase. (*See* Dkt. 108, Order; Dkt. 189, Order at 6-10). The Court ultimately found that Otto presented a genuine factual dispute as to whether he was concerned about his vitamin D level at the time he purchased Ensure Muscle Health, which absent proof of his exact vitamin D level at the time of purchase, would be necessary to demonstrate materiality. Therefore, Abbott argues, the process is far too imprecise and individualized to allow self-identification via questionnaire.

To begin, Abbott's attempts to discredit Weisbrot are unpersuasive. Abbott's first argument is general: Weisbrot has never offered expert testimony that a class was not ascertainable. However, this critique, in the absence of evidence that courts found some of those cases not ascertainable, is unconvincing—perhaps every case he has consulted on involved an ascertainable class. Abbott's second argument—that Weisbrot has never offered testimony in a case with these precise features—is similarly inapposite. Each case often involves specific factual permutations that have not been confronted; that, in and of itself, is insufficient to cause a court to disregard an expert's report.[1]

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[1] That being said, the Court harbors its own doubts concerning whether Weisbrot is qualified as an expert in this case. However, this determination is not necessary to resolve the present motion for

Next, the Court addresses Abbott's argument that the class is not ascertainable because determining membership would be too imprecise and require individualized inquiry. A survey of cases within our circuit show that two key factors regarding ascertainability are whether the class (1) requires fact-intensive inquiries to determine class membership, or (2) requires self-identification as to subjective factors, which are prone to subjective memory problems. *Compare Deitz v. Comcast, Corp.*, 2007 WL 2015440, at *8 (N.D. Cal. July 11, 2007) (finding the class not ascertainable because determining whether putative members owned "cable-ready television set(s) would require fact-intensive inquiries); *Bruton v. Gerber Products Co.*, 2014 WL 2860995, at *4 (N.D. Cal. June 23, 2014) (finding the class not ascertainable where the case involved 69 products with changing labeling, making it too difficult for potential members to accurately recall the specific product on a simple form, and too unwieldy to craft a sufficiently specific questionnaire to make it reliable); *Xavier v. Philip Morris USA, Inc.*, 787 F. Supp. 2d 1075, 1089 (N.D. Cal. 2011) (finding the class not ascertainable because it consisted of individuals who smoked a minimum number of cigarettes over "at least twenty pack-years") ("Swearing 'I smoked 146,000 Marlboro cigarettes' is categorically different from swearing 'I have been to Paris, France,' or 'I am Jewish . . .'") with *McCrary v. Elations Co., LLC*, 2014 WL 1779243, at *8 (C.D. Cal. Jan. 13, 2014) ("In this Circuit, it is enough that the class definition describes 'a set of common characteristics sufficient to allow' a prospective plaintiff to 'identify himself or herself as having a right to recover based on the description.'"); *Guido*, 2013 WL 3353857, at *18 ("The requirement of an ascertainable class is met as long as the class can be defined through objective criteria. Here, because the requirement for membership in the class is whether a consumer purchased a particular product after a particular date, the class is easily identifiable."); *Forcellati*, 2014 WL 1410264, at *1 (finding the class ascertainable where putative members had to self-identify as to purchasing a specific product during a specific time frame).

First, there is some merit to Abbott's argument that requiring doctors' notes may make the process of identifying class members too fact-intensive to certify. As other courts have noted, the difficulty in establishing the named plaintiff's relevant characteristic is relevant in determining the ease of ascertaining the full class. *Perrine*, 2015 WL 2227846, at *4. Here, it took significant discovery and the resolution of changing testimony to hone in on Otto's vitamin D level at the time he purchased Muscle Health. And to the extent the class membership inquiry would require a similar case-by-case analysis based on possibly ambiguous or competing evidence, the class fails ascertainability. *See In re WellPoint, Inc. Out-of-Network UCR Rates Litig.*, 2014 WL 6888549, at *16 (C.D. Cal. Sept. 3, 2014). That being said, Abbott's argument is based on the assumption that putative class members would have

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class certification.

to prove either their vitamin D level at the time of purchasing the product, or that they were concerned about their vitamin D level at the time of purchasing the product. To be clear, putative class members would still have to satisfy either of these requirements to qualify as someone to whom the omission could have been material. However, this is more properly addressed under Rule 23(b)(3)'s predominance requirement, discussed *supra*. *See, e.g.*, *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 568 (C.D. Cal. 2014) (finding that the inclusion of uninjured class members is more properly analyzed under Rule 23(a)(2) or 23(b)(3)). On the issue of ascertainability, under Otto's revised class definition, all that is required is for a putative member to submit a doctor's note of his vitamin D level within one year prior to purchasing the product. Therefore, fact-intensive inquiries are not required to determine membership in Otto's class.

Second, although Otto's proposed class definition requires a putative member to do more than simply attest to whether he purchased the product, it still relies only on objective factors. There are three components to Otto's definition: (1) purchase of Muscle Health; (2) age at the time of purchase; and (3) vitamin D level at the time of purchase. As courts in our circuit have repeatedly found, whether or not someone purchased a product at a specific time is an accessible question that can be determined on an objective basis. *See, e.g.*, *In re NJOY, Inc. Consumer Class Action Litigation*, 2015 WL 4881091, at *24 (C.D. Cal. Aug. 14, 2015); *McCrary*, 2014 WL 1779243, at *8; *Guido*, 2013 WL 3353857, at *18. Likewise, age at the time of purchase is an objective criterion: the person was a specific age on a specific date, which cannot be the item of subjective debate. Third, vitamin D level is objective because the plaintiff has identified a particular blood serum level—30 ng/mL—as a cutoff point. A person has either met that threshold or not, provable by a prior blood test and a doctor's note. Thus, every question is an objective one, and no question will induce a subjective estimate.

The Court finds that it would be "administratively feasible . . . to determine whether a particular individual is a member." *Keegan*, 284 F.R.D. at 521; *see also Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (cautioning against denying certification simply due to potential manageability problems). Therefore, the Court finds that the class is ascertainable.

B. Numerosity

Rule 23(a)(1) requires the class to be so numerous that joinder of individual class members is impracticable. Fed. R. Civ. P. 23(a)(1). Although there is no set numerical cutoff used to determine whether a class is sufficiently numerous, courts must examine the specific facts of each case to evaluate whether the requirement as been met. *See Gen. Tele. Co. v. EEOC*, 446 U.S. 318, 329-30 (1980). Here, Otto has introduced evidence that Abbott sold at least 2.1 million units of Ensure Muscle Health in California during the class period, and that at least 32% of the purchasers have low vitamin D levels.

Therefore, the Court finds that the proposed California class is sufficiently numerous.

C. Commonality

Commonality requires that class members have suffered the same injury and that the classwide proceeding can "generate common answers apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011); Fed. R. Civ. P. 23(a)(2). This requirement is construed liberally and the existence of some common legal and factual issues is sufficient. *See Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998) ("The commonality preconditions of Rule 23(a)(2) are less rigorous than the companion requirements of Rule 23(b)(3). Indeed, Rule 23(a)(2) has been construed permissively."). Otto provides several common questions applicable to the class including whether Revigor is able to rebuild strength in vitamin D deficient consumers, and whether the omission that Revigor does not work for those who are vitamin D deficient is likely to deceive a reasonable consumer in Abbott's target audience. As Abbott does not dispute this requirement, the Court finds that commonality is satisfied.

D. Typicality

Typicality requires a determination as to whether the named representative's claims are typical of those of the class members he seeks to represent. Fed. R. Civ. P. 23(a)(3). The named representative's claims must be "reasonably co-extensive with those of absent class members." *Hanlon*, 150 F.3d at 1020. Typicality, like commonality, is a "permissive standard[]." *Id*. Here, as Otto's claim is one of omission, he and all putative class members were injured by the same course of conduct by purchasing the Ensure product without a disclosure that Revigor did not work for people who are vitamin D deficient. Moreover, as Otto's class is defined, all class members were vitamin D deficient at some point within the year prior to purchasing the product. Therefore, the Court finds that typicality is satisfied.

E. Adequacy

Adequacy is satisfied under a two-part inquiry: (1) whether the named representative and his counsel have any conflicts of interest with other class members; and (2) whether the named representative and his counsel will prosecute the action vigorously on behalf of the class. *Hanlon*, 150 F.3d at 1020. Otto contends that he does not have any conflicts of interest with the putative class members, that he has demonstrated his adequacy by being familiar with the present claims and participating in the litigation, and that his counsel has vigorously prosecuted the action. The Court agrees and finds that adequacy is satisfied.

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2. Rule 23(b)(3)

Certifying a class under Rule 23(b)(3) also requires "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

A. Predominance

The predominance requirement is "far more demanding" than the commonality requirement of Rule 23(a). *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997). If common questions "present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication," then "there is clear justification for handling the dispute on a representative rather than on an individual basis," and the predominance test is satisfied. *Hanlon*, 150 F.3d at 1022. However, "if the main issues in a case require the separate adjudication of each class member's individual claim or defense, a Rule 23(b)(3) action would be inappropriate." *Zinser*, 253 F.3d at 1190. This is because, *inter alia*, "the economy and efficiency of class action treatment are lost and the need for judicial supervision and the risk of confusion are magnified." *Id.*

Otto seeks to certify a California class alleging violations of California's UCL, FAL, CLRA, and for negligent misrepresentation.[2] "For purposes of class certification, the UCL, FAL, and CLRA are materially indistinguishable." *Forcellati*, 2014 WL 1410264, at *9. Moreover, the same analysis applies to the negligent misrepresentation claim. *See In re Brazillian Blowout Litig.*, 2011 WL 10962891, at *8 (C.D. Cal. Apr. 12, 2011). Under each statute, a Plaintiff may "establish the required elements of reliance, causation, and damages by proving that Defendant[] made what a reasonable person would consider a material misrepresentation." *Forcellati*, 2014 WL 1410264, at *9. Moreover, materiality is established by "objective criteria that apply to the entire class and do not require individualized determination." *McCrary*, 2014 WL 1779243, at *14.

The parties divide on whether reliance and causation can be proven on a classwide basis. Otto contends that its evidence tends to prove that Abbott's omission was material, thereby raising a presumption of reliance and making the issue susceptible to classwide proof. Abbott argues that

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[2] UCL refers to California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq.*; CLRA refers to California's Consumers legal Remedies Act, Cal. Civ. Code §§ 1750, *et seq.*; FAL refers to California's False Advertising Law, Cal. Bus. & Prof. Code §§ 17500, *et seq.*

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individual questions of reliance and causation predominate because the presumption of reliance is inapplicable or rebutted. The Court finds that the class is not entitled to a presumption of reliance and causation because, as a preliminary matter, the Court would have to engage in fact-intensive inquiries to determine if each class member is one to whom the omission could have been material.

In denying Otto's prior motion for class certification seeking to certify a nationwide and statewide class of all purchasers of Abbott's product, the Court explained that the classes were overbroad because not all purchasers suffered an injury. (Dkt. 219, Order at 3-6). Because Otto's theory was one of omission, the Court found that the omission could only "mislead those with deficient vitamin-D levels, those with a history of low vitamin-D levels, or those who did not know their vitamin-D levels but harbored concern about their vitamin-D sufficiency." (*Id.* at 4-5). As the original class definition included a substantial number of people who had no claim under Otto's theory, the Court noted that the putative class would not be entitled to a classwide presumption of reliance. (*See id.* at 5); *In re ConAgra Foods, Inc.*, 302 F.R.D. at 576 ("[T]he Ninth Circuit has held that if a misrepresentation is not material as to all class members, the issue of reliance 'var[ies] from consumer to consumer,' and no classwide inference arises.").[3] The same concerns persist here.

In the instant motion for class certification, Otto seeks to limit the class to include only those purchasers to whom the omission could have been material. However, Otto has failed to do so. Had Otto defined the class to comply with the Court's previous denial of class certification, putative members who, like Otto, could not prove their vitamin D level at the time of purchase, would have had to submit affidavits that they were concerned about their vitamin D level at the time of purchase. This class definition, however, would have required individualized inquiries and would have been prone to subjective memory, which courts have held fail ascertainability. *See, e.g.*, *Xavier*, 787 F. Supp. 2d at 1089; *Deitz*, 2007 WL 2015440, at *8. Moreover, had Otto defined the class as those purchasers who definitively had less than 30 ng/mL at the time of purchase, the class would have failed typicality because Otto himself could not prove his vitamin D level with certainty. Accordingly, Otto sought to

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[3] The Court also referred to two California Court of Appeals decisions, which continue to be instructive: *Tucker v. Pacific Bell Mobile Services*, 208 Cal. App. 4th 201, 228 (2012) and *Caro v. Procter & Gamble Co.*, 18 Cal. App. 4th 644, 668 (1993). In both cases, the courts could not presume common reliance as can often be done in misrepresentation cases because whether class members relied on the misrepresentation would have been a matter of individual proof. *See also In re Vioxx Class Cases*, 180 Cal. App. 4th 116, 129 (2009) ("[I]f the issue of materiality or reliance is a matter that would vary from consumer to consumer, the issue is not subject to common proof, and the action is not properly certified as a class action.").

avoid these issues and limit the class to purchasers who had less than 30 ng/mL at any point within the year prior to purchasing the product. Although this is an objective factor, it does not serve as an accurate proxy for the subjective concern that could make Abbott's omission material to class members who cannot prove their vitamin D level at the time of purchase. Therefore, at best, Otto's class definition narrows the potential class to include those in the same position as Otto; that is, purchasers who have a history of low vitamin D and create a triable issue of fact as to whether they were actually concerned about their vitamin D level at the time of purchasing the product. Although a purchaser may satisfy the class definition requirements, he has not by virtue of class membership established that he is a person to whom the omission could have been material. Accordingly, just as the Court found that Otto's own concern regarding his vitamin D level at the time of purchasing the product was a triable issue of fact, individualized inquiries would be required for each class member as well. A fact intensive process such as this clearly fails the Rule 23(b)(3) predominance requirement.

B. Superiority

In determining whether superiority is satisfied, courts consider: "(1) the interest of each class member in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against the class; (3) the desirability of concentrating the litigation of the claims in a particular forum; and (4) the difficulties likely to be encountered in the management of a class action." *Edward v. City of Long Beach*, 467 F. Supp. 2d 986, 992 (C.D. Cal. 2006). "Where damages suffered by each putative class member are not large, th[e first] factor weighs in favor of certifying a class action." *Zinser*, 253 F.3d at 1190.

Here, the damages suffered by each putative class member are small, which weighs in favor of class certification. However, as outlined above, prior to establishing a classwide presumption of reliance, the Court would have to undertake extensive individualized inquiries to determine whether each class member was one to whom the omission could have been material. This level of inquiry makes the class unmanageable and undermines the efficiency of classwide adjudication.

Therefore, because issues regarding each individual predominate over issues common to the class and render the class unmanageable, Rule 23(b)(3) has not been satisfied.

V. Conclusion

For the aforementioned reasons, the Court DENIES Plaintiff's motion for class certification.

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