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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

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9 Mark Schellenbach and William Ryder,

10 Plaintiffs,

11 v.

12 GoDaddy.com, LLC,

13 Defendants.

No. CV-16-00746-PHX-DGC

ORDER

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16 Plaintiffs Mark Schellenbach and William Ryder, on behalf of themselves and a
17 proposed class and subclass, bring this action against Defendant GoDaddy.com, LLC.
18 Docs. 1, 33. Plaintiffs move to certify a class and subclass of persons who purchased a
19 “Dedicated Server” from GoDaddy, alleging that GoDaddy failed to disclose that the
20 server was virtualized and not a free-standing machine. Doc. 127 at 10.¹ The motion is
21 fully briefed (Docs. 127, 128, 129), and the Court heard oral argument on June 14, 2017
22 (Doc. 125). For reasons stated below, the Court will deny class certification.

23 **I. Plaintiffs’ Proposed Class and Sub-Class.**

24 Plaintiffs seek certification of the following class: “All persons who, between
25 October 23, 2014 and March 18, 2017, purchased GoDaddy Dedicated Servers through
26 the GoDaddy.com website or who purchased Dedicated Servers after viewing the
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¹ This order cites to page numbers assigned at the top of each page by the Court’s ECF system, not to original page numbers.

1 GoDaddy.com website. Excluded from the Class are purchasers who purchased via the
2 <https://www.godaddy.com/servers> webpage.” Doc. 127 at 6. Plaintiffs further move to
3 certify a California subclass: “All persons in the state of California who, between
4 October 23, 2014 and March 18, 2017, purchased GoDaddy Dedicated Servers through
5 the GoDaddy.com website or who purchased Dedicated Servers after viewing the
6 GoDaddy.com website. Excluded from the Class are purchasers who purchased via the
7 <https://www.godaddy.com/servers> webpage.” *Id.* The definitions of these two classes
8 are identical, except that the subclass includes only California residents. For the sake of
9 simplicity, the Court will refer to both classes as “the class” throughout this order, except
10 where a distinction between the class and subclass is necessary.

11 **II. Rule 23 Requirements.**

12 Under Rule 23(a), a district court may certify a class only if (1) it is so numerous
13 that joinder of all members is impractical, (2) there are questions of law or fact common
14 to the class, (3) the claims of the representative parties are typical of the claims of the
15 class, and (4) the representatives will fairly and adequately protect the interests of the
16 class. Fed. R. Civ. P. 23(a)(1)-(4). The Court must also find that one of the requirements
17 of Rule 23(b) has been met. Plaintiffs rely primarily on Rule 23(b)(3), which requires
18 that questions of law or fact common to the class predominate over questions affecting
19 only individual class members, and that a class action is superior to other available
20 methods for resolving the controversy. Fed. R. Civ. P. 23(b)(3). Plaintiffs also contend,
21 briefly, that the class can be certified under Rule 23(b)(2). The Court must rigorously
22 analyze the proposed class to ensure it comports with Rule 23. *See Wal-Mart Stores, Inc.*
23 *v. Dukes*, 564 U.S. 338, 351 (2011) (“*Dukes*”).

24 **III. Individual Issues Prevent Certification Under Rule 23(b)(3).**

25 GoDaddy opposes class certification under Rule 23(b)(3) on the grounds that
26 (1) the class does not satisfy the commonality, typicality, or adequacy requirements of
27 Rule 23(a); (2) the class is overbroad and unascertainable, and putative class members
28 lack standing to assert a claim; and (3) the class does not satisfy the predominance

1 requirement of Rule 23(b)(3). Doc. 128. The Court finds that the class does not satisfy
2 the predominance requirement of Rule 23(b)(3), and need not address GoDaddy’s other
3 arguments.

4 A class may be certified under Rule 23(b)(3) only if questions of law or fact
5 common to the class will predominate over questions affecting only individual class
6 members. This predominance inquiry “asks whether proposed classes are sufficiently
7 cohesive to warrant adjudication by representation.” *In re Wells Fargo Home Mortg.*
8 *Overtime Pay Litig.*, 571 F.3d 953, 957 (9th Cir. 2009) (internal quotation marks and
9 citation omitted). “This calls upon courts to give careful scrutiny to the relation between
10 common and individual questions in a case.” *Tyson Foods, Inc. v. Bouaphakeo*, 136
11 S. Ct. 1036, 1045 (2016). “An individual question is one where ‘members of a proposed
12 class will need to present evidence that varies from member to member,’ while a
13 common question is one where ‘the same evidence will suffice for each member to make
14 a prima facie showing [or] the issue is susceptible to generalized, class-wide proof.’” *Id.*
15 (quoting *Newberg on Class Actions*, § 4:50 (5th ed. 2012)). “If the main issues in a case
16 require the separate adjudication of each class member’s individual claim or defense, a
17 Rule 23(b)(3) action would be inappropriate.” *Zinser v. Accufix Research Inst., Inc.*, 253
18 F.3d 1180, 1189 (9th Cir. 2001) (citation omitted).

19 **A. The Nature of Plaintiffs’ Claims.**

20 The predominance inquiry begins with the elements of the underlying cause of
21 action. *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809 (2011). Plaintiffs
22 allege violations of the Arizona Consumer Fraud Act (“ACFA”), California Unfair
23 Competition Law (“CUCL”), and California False Advertising Law (“CFAL”). Doc.
24 127. Because these are all state law claims, the Court must look to state law to determine
25 whether individual issues will predominate over common issues. *See Yokoyama v.*
26 *Midland Nat’l Life Ins. Co.*, 594 F.3d 1087, 1089 (9th Cir. 2010) (holding that the
27 “dispositive issue is thus an issue of Hawaii state law, namely whether Hawaii’s
28 Deceptive Practices Act requires a showing of individualized reliance”).

1 The ACFA prohibits fraudulent, deceptive, or misleading conduct in connection
2 with the sale or advertisement of consumer goods and services. A.R.S. § 44-1522(A).
3 To prevail under the ACFA, a plaintiff must establish that (1) the defendant made a
4 misrepresentation or omission in violation of the Act, and (2) the defendant’s conduct
5 proximately caused the plaintiff to suffer damages. *Parks v. Macro-Dynamics, Inc.*, 591
6 P.2d 1005, 1008 (Ariz. Ct. App. 1979). It is not necessary for the plaintiff to show that
7 the defendant made an affirmative misstatement. Material omissions are actionable under
8 the AFCA. *Maurer v. Cerkenik-Anderson Travel, Inc.*, 890 P.2d 69, 72 (Ariz. Ct. App.
9 1994).

10 The CUCL provides civil remedies for unfair competition, which it defines as
11 “any unlawful, unfair or fraudulent business act or practice.” Cal. Bus. & Prof. Code
12 § 17200. It protects “both consumers and competitors by promoting fair competition in
13 commercial markets for goods and services.” *Kwikset Corp. v. Superior Court*, 51 Cal.
14 4th 310, 320 (2011) (citations omitted). The California legislature framed the CUCL’s
15 provisions in “broad, sweeping language.” *Id.* (citing *Cel-Tech Commc’ns., Inc. v. Los*
16 *Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 181 (1999)). The CFAL “is equally
17 comprehensive within the narrower field of false and misleading advertising.” *Id.*
18 (citations omitted). The CFAL prohibits advertising that “is untrue or misleading, and
19 which is known, or which by the exercise of reasonable care should be known, to be
20 untrue or misleading.” Cal. Bus. & Prof. Code § 17500. A party wishing to bring a
21 claim under the CUCL or CFAL must show: (1) “a loss or deprivation of money or
22 property sufficient to qualify as injury in fact, i.e., economic injury, and (2) [] that
23 economic injury was the result of, i.e., caused by, the unfair business practice or false
24 advertising that is the gravamen of the claim.” *Kwikset*, 51 Cal. 4th at 322.

25 **B. Plaintiffs’ Key Omission and the Need for Individual Inquiries.**

26 Plaintiffs’ case rests on a single omission. Plaintiffs allege that class members
27 were not told that the Dedicated Servers were virtual – that the servers were not stand-
28 alone boxes, but instead were portions of physical servers shared by others and

1 “dedicated” to the class member only through virtualization software. This is the
2 material omission Plaintiffs allege under the ACFA and the unfair practice they allege
3 under the CUCL and CFAL. Plaintiffs do not claim that GoDaddy made any other
4 misrepresentations or omissions. Plaintiffs assert that this omission was highly relevant
5 because, according to their expert, virtualized servers function less effectively than stand-
6 alone servers and Plaintiffs therefore paid too much for their Dedicated Servers.

7 The primary webpage for the Dedicated Servers was [www.godaddy.com/pro](http://www.godaddy.com/pro/dedicated-server)
8 [/dedicated-server](http://www.godaddy.com/pro/dedicated-server). This page will be referred to this order as the “[/pro/dedicated-server](http://www.godaddy.com/pro/dedicated-server)
9 webpage.” GoDaddy concedes that this webpage did not disclose at the beginning of the
10 class period, October 23, 2014, that the Dedicated Servers were virtual. But as of
11 December 15, 2015, it did describe the servers as “Single-Tenant VM.” Doc. 127 at 9.
12 GoDaddy’s Rule 30(b)(6) witness testified that a person with technical knowledge, such
13 as a web designer or web developer, would know that VM stood for “virtual machine.”
14 Doc. 127-1 at 67.

15 Plaintiffs acknowledge that another GoDaddy webpage – [www.godaddy.com](http://www.godaddy.com/servers)
16 [/servers](http://www.godaddy.com/servers) – did disclose throughout the class period that the servers were virtualized. This
17 page will be referred to in this order as the “[/servers](http://www.godaddy.com/servers) webpage.” From the beginning of
18 the class period, it described the Dedicated Server as “Your very own single-tenant
19 *virtual machine*.” Doc. 116-2, ¶ 5 (emphasis added). Paul Bindel, a Senior Director of
20 Web Marketing for GoDaddy, submitted a declaration explaining that this webpage was
21 accessible directly from the main GoDaddy webpage from August 2014 to September
22 2015, and thereafter was accessible through various other GoDaddy webpages, 13 of
23 which are listed in his declaration. *Id.*, ¶ 8. In addition, searches for “GoDaddy” and
24 “server” on widely-used search engines such as Google or Yahoo! would return the
25 [/servers](http://www.godaddy.com/servers) webpage as one of the top two non-paid hits. *Id.*, ¶¶ 7-9.

26 Because the virtual nature of the servers was disclosed on the [/servers](http://www.godaddy.com/servers) webpage,
27 Plaintiffs define the class to exclude all persons “who purchased via” the [/servers](http://www.godaddy.com/servers)
28 webpage. Doc. 127 at 6. Plaintiffs made clear during oral argument that this exclusion

1 applies to persons who actually used the /servers webpage as the method for purchasing
2 the Dedicated Servers. The class does not exclude persons who visited the /servers
3 webpage but purchased their Dedicated Server through another method, such as by phone
4 or through another webpage.

5 Paul Bindel states that the /servers webpage had 373,114 unique visitors between
6 October 1, 2014 and November 4, 2016, a time period that largely overlaps Plaintiffs'
7 proposed class period. Doc. 116-2, ¶ 11; *see also* Doc. 127-8 at 14. The /pro/dedicated-
8 server webpage – from which Plaintiffs allege material information was omitted –
9 received 881,763 unique visitors during the class period. *Id.* at 13. Thus, of the
10 1,254,877 visits to these two webpages during the relevant time frame, 30% visited the
11 page where the virtualized nature of the Dedicate Servers was clearly disclosed. And if
12 most visitors to the /servers webpage also visited the /pro/dedicated-servers webpage, as
13 is likely, then the percentage would be even higher. If the more conservative 30% figure
14 is applied to the proposed class, which Plaintiffs describe as potentially including 10,039
15 purchasers of Dedicated Servers (Doc. 127 at 12), then approximately 3,000 class
16 members visited the webpage where the virtual nature of the servers was disclosed. Such
17 class members would not have been exposed to the omission on which Plaintiffs' case
18 rests. And yet because Plaintiffs' class definition excludes only those who actually made
19 their purchases through the /servers webpage, not those who visited it and purchased
20 through other means, a class-member by class-member inquiry would be required to
21 determine which class members actually were subjected to the key omission.

22 In addition, because the /pro/dedicated server webpage on which Plaintiffs rely
23 included the phrase “Single-Tenant VM” for more than half of the class period, an
24 individualized inquiry would be needed to determine whether class members understood
25 this to mean that they were acquiring a virtualized machine. Plaintiffs argue that the VM
26 acronym was never defined, and note that GoDaddy's Rule 30(b)(6) witness stated that
27 understanding the acronym would require someone with technical knowledge. Doc. 127
28 at 9. But the class almost certainly includes persons with technical knowledge.

1 Dedicated Servers were marketed to persons with web-design expertise. The October 23,
2 2014 press release that launched the Dedicated Server marketing effort (and triggered the
3 start of the class period) referred to the Dedicated Server as an “Advanced Hosting
4 Product[.]” and said it was “designed specifically for Web designers and developers.”
5 Doc. 109-3 at 2. The Dedicated Servers webpages “specifically catered to tech-savvy
6 developers and designers.” *Id.* Given this target market, it is likely that the class
7 includes sophisticated computer users, and an individualized inquiry would be required to
8 determine whether class members had the sophistication to understand that VM meant
9 virtualized machine even if they did not visit the /servers webpage.

10 And these are not the only ways class members could have learned that the servers
11 were virtualized. Prospective purchasers could also talk with a GoDaddy representative
12 by phone or web chat. GoDaddy provided live customer service representatives 24 hours
13 a day, seven days a week. Doc. 128 at 60, ¶ 5. Evidence in the record shows that
14 GoDaddy representatives did disclose in conversations with customers that Dedicated
15 Servers were virtualized. *Id.* at 82, 94. Evidence also shows that GoDaddy fielded more
16 than 31 million phone calls and participated in over 8 million web chat sessions with
17 customers and potential customers during the class period. *Id.* at 60, ¶ 6. This amounts
18 to an average of 35,556 calls and 8,772 web chats per day. *Id.* Thus, even if a class
19 member did not visit the /servers webpage, an individualized inquiry would be required
20 to determine whether she spoke with a GoDaddy representative and learned that the
21 servers were virtualized.

22 A GoDaddy manager, Noah Madieros, explained the ways in which potential
23 customers could use the GoDaddy call-in resources:

24 A large number of GoDaddy customers . . . utilize the customer service line
25 and chat feature to discuss and/or initiate new purchase transactions. In my
26 experience, it is common for GoDaddy customers to call the customer
27 service line or initiate a chat discussion after reviewing GoDaddy’s
28 website, in order to inquire about the specifications of a certain product
prior to purchase. It is also common for GoDaddy customers to call the
customer service line or initiate a chat discussion to request a consultation

1 related to the customer's current needs, without having reviewed a specific
2 product offering on GoDaddy's website. It is also my experience that
3 customers will frequently call GoDaddy's customer service line with
4 questions about our server products but will eventually purchase on their
own through the website at a later time.

5 Doc. 128 at 60.

6 The named Plaintiffs in this case, Mark Schellenbach and William Ryder, provide
7 apt examples of the varied means by which purchasers could acquire Dedicated Servers.
8 Plaintiffs operate SetMySite.com, a business involved in website design and
9 management. *Id.* at 12, 98 (Zechinni Declaration), 170-71 (Schellenbach Declaration);
10 194-95 (Ryder Declaration). Plaintiffs researched dedicated server options using Google
11 and GoDaddy's website. *Id.* at 177-78, 182-83, 199. Although they viewed webpages on
12 GoDaddy's website before making their purchase, they made the purchase over the phone
13 and discussed the Dedicated Server with a GoDaddy agent during that call. *Id.* at 202.

14 In short, GoDaddy customers do not have a uniform buying experience when
15 purchasing Dedicated Servers, and many would have been exposed to information beyond
16 that contained in the /pro/dedicated-servers webpage on which Plaintiffs wish to rely.
17 And this does not even account for other means by which class members could have
18 learned that the servers were virtualized, such as word of mouth or trade publications.

19 Consequently, on the very first element of Plaintiffs' claims – the existence of a
20 material omission – individual issues would predominate if the class were certified. The
21 class therefore cannot be certified under Rule 23(b)(3). *See Berger v. Home Depot USA,*
22 *Inc.*, 741 F.3d 1061, 1069 (9th Cir. 2014), *abrogated on other grounds by Microsoft*
23 *Corp. v. Baker*, 137 S. Ct. 1702 (2017) (finding class certification inappropriate because
24 plaintiff could not show “that all of the members of his proposed class were exposed to
25 Home Depot's alleged deceptive practices”); *McKinnon v. Dollar Thrifty Auto. Grp.,*
26 *Inc.*, No. 12-cv-04457-SC, 2015 WL 4537957, at *9 (N.D. Cal. July 27, 2015) (denying
27 certification because there was no evidence all class members were exposed to deceptive
28 conduct when claims were based upon individual transactions at the rental counter);

1 *Herskowitz v. Apple, Inc.*, 301 F.R.D. 460, 481 (N.D. Cal. 2014) (rejecting class
2 certification in case involving “Apple’s variable conduct in the course of diverse,
3 individualized transactions”); *Mahfood v. QVC, Inc.*, No. SACV 06-0659-AG(ANx),
4 2008 WL 5381088, at *4-5 (C.D. Cal. Sept. 22, 2008) (denying certification because
5 “there exists far too much variation in individual purchasing experiences”).

6 **C. Materiality and Reliance.**

7 In addition to proving that they were exposed to an omission regarding the
8 virtualized nature of the servers, Plaintiffs must prove that the omission was material and
9 that they relied on it when they made their purchases. The parties disagree on whether
10 these elements of Plaintiffs’ claims can be proved class-wide.

11 Plaintiffs claim that they need not *prove* materiality at the class certification stage.
12 Doc. 129 at 16. The Court agrees. Plaintiffs need not prove any element of their case at
13 this stage, but to obtain class certification under Rule 23(b)(3), Plaintiffs must show that
14 their case is susceptible of class-wide proof – that individual issues will not predominate.
15 The cases cited by Plaintiffs make this clear. *See, e.g., Astiana v. Kashi Co.*, 291 F.R.D.
16 493, 505 (S.D. Cal. 2013) (stating that proof of materiality is to be determined by the trier
17 of fact at trial, but that plaintiffs at the class certification stage still must show that
18 materiality is a “common question of fact suitable for treatment in a class action.”)
19 (quotation marks and citation omitted).²

20 Because the requirements of materiality and reliance under California law differ
21 somewhat from Arizona law, the Court will address materiality and reliance separately
22 for the subclass and class.

23 **1. The Subclass.**

24 As mentioned above, the subclass asserts claims under the CUCL and CFAL.
25 Plaintiffs argue that materiality under these statutes asks whether a “reasonable person”

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27 ² Plaintiffs also suggest that this Court already found that the omission was
28 material when it ruled on GoDaddy’s motion to dismiss. Doc. 129 at 16 (citing Doc. 79
at 9). But the question of whether materiality has been adequately alleged (the issue on a
Rule 12(b)(6) motion to dismiss) is different from the question of whether materiality can
be proved on a common basis for purposes of Rule 23(b)(3).

1 would attach importance to the misrepresented or omitted fact, and that such a
2 “reasonable person” determination can be made class-wide. This appears to be correct.
3 *See, e.g., Forcellati v. Hyland’s, Inc.*, No. CV 12-1983-GHK(MRWx), 2014 WL
4 1410264, at *9 (C.D. Cal. Apr. 9, 2014) (CUCL and CFAL permit plaintiffs to show
5 “that Defendants made what a reasonable person would consider a material
6 misrepresentation,” which “is an objective, classwide inquiry”).

7 Plaintiffs also argue that reliance can be proved class-wide because they are
8 entitled to a presumption of reliance. The California Supreme Court has suggested that
9 “a presumption, or at least an inference, of reliance arises whenever there is a showing
10 that a misrepresentation was material.” *In re Tobacco II Cases*, 46 Cal. 4th 298, 327
11 (2009) (quoting *Engalla v. Permanente Medical Group, Inc.*, 15 Cal. 4th 951, 976-77
12 (1997)).³ But “[a]n inference of classwide reliance cannot be made where there is no
13 evidence that the allegedly false representations were uniformly made to all members of
14 the proposed class.” *Davis-Miller v. Auto. Club of S. California*, 201 Cal. App. 4th 106,
15 125 (Cal. Ct. App. 2011); *see also Knapp v. AT & T Wireless Servs., Inc.*, 195 Cal. App.
16 4th 932, 942-43 (Cal. Ct. App. 2011); *Cohen v. DIRECTV, Inc.*, 178 Cal. App. 4th 966,
17 973 (Cal. Ct. App. 2009).

18 As shown above, Plaintiffs cannot show that all subclass members were subjected
19 to a uniform omission. Some visited the /servers webpage where the virtualized nature of
20 the server was clearly disclosed. Others spoke directly with GoDaddy representatives
21 and may have received the same information. Because the nature of the information class
22 members received must be determined on an individual basis, their reliance on that
23 information must also be determined individually. *Mazza v. Am. Honda Motor Co.*, 666
24 F.3d 581, 595 (9th Cir. 2012) (“we agree with Honda’s contention that the

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26 ³ On the basis of this holding, some courts have concluded that reasonable reliance
27 is not an element of claims under the CUCL and CFAL. *See Yumul v. Smart Balance,*
28 *Inc.*, 733 F. Supp. 2d 1117, 1125 (C.D. Cal. 2010). The California Court of Appeals,
however, has concluded that the decision in *Tobacco II* concerned standing, not the
requirements for class certification, and that a class representative’s ability to establish
reliance on a class-wide basis is relevant to the issue of class certification. *Davis-Miller*
v. Auto. Club of S. California, 201 Cal. App. 4th 106, 124 (Cal. Ct. App. 2011).

1 misrepresentations at issue here do not justify a presumption of reliance. This is so
2 primarily because it is likely that many class members were never exposed to the
3 allegedly misleading advertisements, insofar as advertising of the challenged system was
4 very limited.”); *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1022 (9th Cir. 2011),
5 *abrogated on other grounds by Comcast Corp. v. Behrend*, 133 S.Ct. 1426 (2013) (“An
6 inference of class-wide reliance cannot be made where there is no evidence that the
7 allegedly false representations were uniformly made to all members of the proposed
8 class.”); *Davis-Miller*, 201 Cal. App. 4th at 125 (same); *see also Plascencia v. Lending*
9 *1st Mortg.*, No. C 07-4485 CW, 2011 WL 5914278, at *2 (N.D. Cal. Nov. 28, 2011).

10 What is more, California law does not “authorize an award . . . on behalf of a
11 consumer who was never exposed in any way to an allegedly wrongful business
12 practice.” *Cohen*, 178 Cal. App. 4th at 980. Here, many class members will not have
13 been exposed to the material omission, and “if the issue of materiality or reliance is a
14 matter that would vary from consumer to consumer, the issue is not subject to common
15 proof, and the action is properly not certified as a class action.” *In re Vioxx Class Cases*,
16 180 Cal. App. 4th 116, 129 (Cal. Ct. App. 2009) (citing *Caro v. Procter & Gamble Co.*,
17 18 Cal. App. 4th 644, 668 (Cal. App. Ct. 1993)).

18 The Court concludes that proof of reliance by members of the subclass cannot be
19 made on a common basis. This is an additional reason that the subclass cannot be
20 certified under Rule 23(b)(3).

21 **2. The Class.**

22 As noted above, the class asserts claims under the ACFA. Individual issues will
23 predominate in the class for two reasons.

24 First, for an omission to be actionable under the ACFA, it must be of a “material
25 fact.” A.R.S. § 44-1522(A); *Maurer*, 890 P.2d at 72 (ACFA can be violated by
26 “concealment, suppression or omission of any material fact”) (quotation marked omitted).
27 Unlike the CUCL and the CFAL, however, materiality under the ACFA does not look to
28 an objective reasonable person. Instead, an omission is material if it is “logically related

1 to the transaction in which it occurs and rationally significant to the parties in view of the
2 nature and circumstances of the transaction.” *Demaree v. Wal-Mart Stores, Inc.*, 511
3 Fed.Appx. 660, 661 (9th Cir. 2013) (citing *Haisch v. Allstate Ins. Co.*, 5 P.3d 940, 945
4 (Ariz. Ct. App. 2000)). This test requires an examination of the specific purchase
5 transaction, its nature and circumstances.

6 Individual issues will predominate when this transaction-specific materiality test is
7 applied. Each purchase of a Dedicated Server must be considered, including an inquiry
8 into whether the class member was exposed to the alleged omission and what other
9 information the class member received about the Dedicated Server. The class member’s
10 sophistication will be a relevant component of the nature and circumstances of the
11 transaction. As noted, the primary webpage Plaintiffs rely upon included the description
12 of a “Single-Tenant VM” after December 15, 2015. Doc. 127 at 9. Whether a class
13 member understood this to mean a virtual machine will require an inquiry into the class
14 member’s sophistication in computer matters and her familiarity with the acronym VM.
15 In addition, the purpose for which the class member was purchasing the Dedicated Server
16 will be relevant. Some class members may have wanted a virtual machine, or at least not
17 cared whether the server was “dedicated” physically or virtually.

18 Second, a plaintiff suing under the AFCA must prove reliance. *Parks v. Macro-*
19 *Dynamics, Inc.*, 591 P.2d 1005, 1008 (Ariz. Ct. App. 1979) (citing *Peery v. Hansen*, 585
20 P.2d 574, [577-78] (Ariz. Ct. App. 1978)); *see also Cheatham v. ADT Corp.*, 161 F.
21 Supp. 3d 815, 825-26 (D. Ariz. 2016). This reliance need not be reasonable, *id.*, but even
22 unreasonable reliance must be based on the plaintiff’s actual exposure to the omission. If
23 the virtual nature of the servers was not omitted from the information a class member
24 received, then the class member could not have relied on that omission, even
25 unreasonably. *C.f. Peery*, 585 P.2d at 577-78 (in claim under ACFA, “[i]f appellants
26 actually knew that statements in the ad regarding gross sales and net profit were false,
27 then they could not have relied on the truth of the representations and would not have
28 been damaged by them.”). Parties that do not actually rely on a false statement or

1 material omission have no claim under the ACFA. *Kuehn v. Stanley*, 91 P.3d 346, 352
2 (Ariz. Ct. App. 2004) (holding that parties suing on allegedly false appraisal report could
3 not prevail because they “received the appraisal report only after they were already
4 contractually bound to purchase the real estate” and therefore did not rely on the report in
5 purchasing the property). Thus, Plaintiffs must prove reliance by each class member, and
6 that would require proof that each class member was exposed to the alleged omission.

7 The Court concludes that proof of materiality and reliance under the ACFA will
8 require class-member by class-member litigation. Individual issues will predominate,
9 making certification under Rule 23(b)(3) improper.

10 **D. Foreign Class Members.**

11 Of the approximately 10,000 purchasers of Dedicated Servers, about 5,500 are in
12 the United States. Doc. 127 at 12. Plaintiffs’ class definition thus includes
13 approximately 4,500 foreign purchasers, and yet Plaintiffs – who have the burden of
14 showing that individual issues will not predominate – have presented no argument or
15 evidence to show that these foreign class members can assert claims under the Arizona or
16 California statutes or would be bound by the judgment of this Court. Plaintiffs
17 apparently feel a need to define a separate subclass for the approximately 1,700
18 purchasers in California, but they do not explain why the factors requiring this subclass
19 do not also apply to foreign class members. Plaintiffs provide no discussion concerning
20 the location of these foreign class members or whether their countries would honor the
21 judgment in this case. The presence of thousands of foreign class members would likely
22 give rise to numerous individual or small-group issues, defeating class-wide treatment.

23 **E. Plaintiffs’ Arguments.**

24 Plaintiffs make several arguments in support of their claim that the class can be
25 certified under Rule 23(b)(3). The Court does not find the arguments persuasive.

26 **1. Presence of Non-Injured Class members.**

27 Plaintiffs argue that a small number of putative class members who suffered no
28 injury should not prevent the Court from applying a presumption of reliance or defeat

1 class certification. Doc. 129 at 14. Plaintiffs contend that “[w]hile GoDaddy surmises
2 that some of those class members may not have been injured, it ‘has not shown that the
3 class as a whole was exposed to ‘disparate information’ from GoDaddy. . . . [and] ‘[e]ven
4 a well-defined class may inevitably contain some individuals who have suffered no harm
5 as a result of a defendant’s unlawful conduct.’” *Id.* at 14-15 (citing *Torres v. Mercer*
6 *Canyons Inc.*, 835 F.3d 1125, 1136-37 (9th Cir. 2016)).

7 As discussed above, the evidence shows that almost 400,000 visits to GoDaddy’s
8 server-related webpages during the class period included the /servers webpage where the
9 Dedicated Server was described as “Your very own single-tenant virtual machine.”
10 Doc. 116-2, ¶ 5. The class definition excludes persons who purchased their Dedicated
11 Server through this webpage, but not persons who visited the webpage and then
12 purchased the server through other means, such as the phone purchase made by the
13 named Plaintiffs. With at least 30% of the server webpage visits being to the very page
14 where the allegedly omitted fact was clearly disclosed, the Court cannot conclude that
15 only a small number of the class members are affected. It appears that almost one-third
16 of the proposed class members were never subjected to allegedly wrongful conduct at
17 issue in this case. This fact alone makes clear that individual inquiries will be required to
18 show that class members received and relied on the alleged omission.

19 Plaintiff suggested at oral argument that these individual inquiries could be made
20 through a simple two-question questionnaire sent to class members, but the Court is not
21 persuaded that individual issues could be eliminated so easily. The Court could not
22 require GoDaddy to accept a class member’s simple assertion in a questionnaire that she
23 did not visit the /servers webpage or receive information regarding the virtual nature of
24 the server through other means. This issue lies at the heart of Plaintiffs’ liability claim,
25 and GoDaddy certainly would be entitled to test a class member’s assertion on such a
26 central fact, conducting discovery and presenting evidence regarding the webpages
27 visited by the class member and other information the class member received regarding
28 the Dedicated Server before purchase.

1 Plaintiffs rely on *Torres*, 835 F.3d 1136-37, for the proposition that the presence
2 of non-injured individuals will not defeat class certification. True, *Torres* stated that the
3 possible presence of “some” class members who were not injured is not fatal to a class,
4 but *Torres* specifically recognized that “the existence of large numbers of class members
5 who were never exposed to the challenged conduct to begin with” is a “flaw that may
6 defeat predominance.” *Id.* at 1136. That is the situation here. *Torres* cites favorably to
7 the *Berger* and *Mazza* cases cited above, both of which support the decision in this case.
8 *Berger* held that class certification failed because the plaintiffs could not show “that all of
9 the members of his proposed class were exposed to Home Depot’s alleged deceptive
10 practices.” 741 F.3d at 1069. *Mazza* held that a class could not be certified because the
11 plaintiffs could not show that “all class members were exposed to Honda’s misleading
12 statements.” *Id.* The same is true here. Plaintiffs cannot show that all members of the
13 proposed class were exposed the GoDaddy’s alleged omission of the virtual nature of the
14 server, and it appears that a large percentage were not.

15 **2. GoDaddy’s Evidence Regarding Phone Communications.**

16 Plaintiffs dispute GoDaddy’s evidence that potential customers could learn of the
17 virtual nature of the Dedicated Servers through phone conversations or live chats with
18 GoDaddy representatives. The Court does not agree with Plaintiffs’ arguments, but
19 would find that individual issues predominate even if the phone evidence was ignored.
20 The fact that one-third of visits to GoDaddy’s server webpages included a page where the
21 virtual nature of the Dedicated Servers was clearly disclosed is enough to show that class-
22 member by class-member inquiries will be needed if this class is certified.

23 Plaintiffs argue that the Madieros declaration regarding the training of GoDaddy’s
24 customer representatives conflicts with his deposition testimony and is unsupported by
25 documentary evidence. Doc. 129 at 7-8, n.7. In the summary judgment context, “a party
26 cannot create an issue of fact by an affidavit contradicting his prior deposition
27 testimony.” *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991) (citing
28 *Foster v. Arcata Associates*, 772 F.2d 1453, 1462 (9th Cir. 1985), *cert. denied*, 475 U.S.

1 1048 (1986); *Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 543-44 (9th Cir.
2 1975)). “[I]f a party who has been examined at length on deposition could raise an issue
3 of fact simply by submitting an affidavit contradicting his own prior testimony, this
4 would greatly diminish the utility of summary judgment as a procedure for screening out
5 sham issues of fact.” *Id.* But this general rule “does not automatically dispose of every
6 case in which a contradictory affidavit is introduced to explain portions of earlier
7 deposition testimony.” *Id.* Rather, the rule applies only to “‘sham’ testimony that flatly
8 contradicts earlier testimony in an attempt to ‘create’ an issue of fact and avoid summary
9 judgment. Therefore, before applying [this] sanction, the district court must make a
10 factual determination that the contradiction was actually a ‘sham.’” *Id.* at 266-67.

11 In his deposition, Mr. Madieros testified that GoDaddy’s Customer Care Center
12 (“C3”) agents interface with customers, and that anyone wishing to purchase a GoDaddy
13 Dedicated Server would be forwarded to a C3 agent. Doc. 129-2 at 107-08. He further
14 testified that the new hire training manual produced in this litigation was used for all C3
15 agents. *Id.* at 107. Mr. Madieros acknowledged that the manual makes no reference to
16 virtualization, nor does it define the acronym VM. *Id.* at 108-111. He acknowledged that
17 “the average inbound agent getting a job at GoDaddy for the first time would not
18 necessarily [b]e exposed to the term VM.” *Id.* at 112. When asked how many days of
19 training a C3 agent receives, Mr. Madieros responded: “I couldn’t say for a standard
20 inbound agent. Our hosting agents go through two weeks.” *Id.* at 113. When asked
21 about additional training materials for hosting agents, Mr. Madieros answered that “all of
22 the supplementary material around the HSC 100 test are what they have to pass.” *Id.* Mr.
23 Madieros was then asked whether, after completing training, a C3 would immediately
24 begin working as a C3 agent, to which he responded: “As an inbound agent they could.”
25 *Id.* Mr. Madieros then clarified what he meant:

26 Inbound is one of our departments. They are the ones that are least
27 technically skilled. They clearly still have a lot of material to go through
28 before we let them touch a phone call. After that, they would be
specialized in our department, so if they were to apply, either externally or
for an internal job opportunity, they have to apply and pass whatever

1 training documents in their department, and hold the material before they
2 start to enroll.

3 *Id.* at 114.

4 Plaintiffs' counsel asked if "C3 call center agents sell GoDaddy dedicated
5 servers[.]" and Mr. Madieros affirmed that "[y]es, they can." *Id.* Shortly thereafter,
6 Plaintiffs' counsel asked Mr. Madieros "[w]hat training and material used by GoDaddy
7 trains GoDaddy employees on the virtualization of GoDaddy dedicated servers?" *Id.* at
8 115. Mr. Madieros answered that "[t]he training material for our hosting agents, which is
9 all part of the HSC 100 training, spells out that our dedicated servers are Single-Tenant
10 VMs, as opposed to what we would just call a PS" *Id.*

11 GoDaddy provided a sworn declaration from Mr. Madieros in response to
12 Plaintiffs' class certification motion. Doc. 128 at 58-66. This is the declaration Plaintiffs
13 characterize as a sham and ask the Court to disregard. The declaration describes the
14 structure of GoDaddy's C3 agent system and how some agents receive more specialized
15 training than others:

16 8. Customers who call the customers service telephone number identified
17 on GoDaddy's website are connected to a [C3] agent. Depending on the
18 subject matter of each call, a customer's inquiry may be handled by the first
19 C3 agent with whom the customer is connected, or that agent may re-direct
20 the customer to a C3 agent with more particularized training or experience
in dealing with the product or service at issue. Due to the technical nature
of GoDaddy's products and services, and the varying sophistication levels
of GoDaddy customers, specialized teams of C3 agents handle inquiries
and sales related to certain GoDaddy products.

21 9. . . . [I]nquiries and sales related to GoDaddy's Dedicated Server product
22 were generally handled by a specialized team of C3 agents in Hosting
23 Support. It is possible, however, that not every call or chat related to
GoDaddy's Dedicated Server product was forwarded to Hosting Support.

24 10. GoDaddy's Hosting Support agents are specifically trained to, among
25 other things, answer questions about GoDaddy's hosting products,
including its Dedicated Server product. . . .

26 11. In order to become one of GoDaddy's Hosting Support agents, an
27 individual must participate in a multi-day Hosting Support training program
28 . . . [and] must pass a qualifying exam. . . . [T]he agent is [then] designated
as a Tier 1 Hosting Support agent and assigned to the "Inbound"
department. . . .

1 12. At least as early as October 23, 2014, [the beginning of the class
2 period,] the Hosting Support training included a discussion regarding
3 GoDaddy's use of virtualization software in its Dedicated Server Product.
4 Specifically, prospective Hosting Support agents were advised of and
5 expected to know that the Dedicated Server product utilized "Single-Tenant
6 Virtual Machines" or "VMs."

7 * * *

8 18. As with all C3 agents, GoDaddy's Hosting Support agents have
9 varying levels of technical knowledge and sophistication. In order to
10 handle more specialized, technically demanding calls, on subject matters
11 that may exceed the scope of the initial Hosting Support, a Hosting Support
12 agent must pass additional training requirements and then apply for such a
13 position. GoDaddy's higher level Hosting Support agents are referred to as
14 Tier 2 and Tier 3 Hosting Support agents.

15 19. If a Hosting Support agent is unable to answer a customer's question,
16 or needs additional, specialized knowledge to assist a customer, the Hosting
17 Support agent can refer such questions and/or issues to GoDaddy's Tier 2
18 and Tier 3 Hosting Support agents.

19 20. I consider the question of whether GoDaddy's Dedicated Server
20 product utilizes virtualization software to be a straightforward issue within
21 the understanding of GoDaddy's entry level Hosting Support agents. . . .
22 [S]ince at least October 23, 2014, the topic has been discussed during
23 GoDaddy's initial Hosting Support training and is otherwise discussed in
24 regular training refreshers, as well as one-on-one coaching sessions as the
25 need arises. My belief is also based on the performance of Hosting Support
26 agents in responding accurately to questions on the issue, as demonstrated
27 by chat transcripts and email communications . . . produced by the
28 Plaintiffs in this case.

21 21. Specifically, I have reviewed the transcript of the December 10, 2015
22 online chat between someone logged into the GoDaddy account at issue,
23 identified as "Mark Schellenbach," and a GoDaddy agent identified as
24 Charles Taj Jackson ("Tony"). . . .

25 22. . . . Tony was a Tier II Hosting Support agent Tony made the
26 following disclosures:

27 (a) "[A]ll of the resources of the [Dedicated Server] are allocated
28 to you . . . [but] the disk itself would be virtualized."

29 (b) "It is not the same as VPS, in the sense that you would have
30 shared CPU with other users. The build and environment is 'Dedicated' in
31 the resources that you are given. This is done to allow for snapshot
32 backups of the server."

33 Based on my experience in the management and training of Hosting
34 Support agents, these disclosures are consistent with the type of
35 information provided to Hosting Support agents during their training. This
36 information aligns with the type of information I would expect all
37 GoDaddy Hosting Support agents to provide to customers asking a similar
38 question, regardless of whether the customer asks the question prior to or
39 after purchasing a Dedicated Server.

1 * * *

2 24. I have also reviewed certain documents that I understand Plaintiffs
3 produced in this matter, including emails exchanged between an email
4 account for what I understand to be Plaintiffs' business . . . and David
5 Zamora, a GoDaddy small Business consultant, between November 13,
6 2015, and December 11, 2015. . . . I observe that Mr. Zamora, in an email
7 sent on or about November 13, 2015 . . . disclosed to Plaintiffs that he had
8 spoken to colleagues in "server support," and he had been told "Customer
9 has the core(S) and the system is dedicated to themselves that is what
10 makes it a Dedicated Server. [T]he instance is virtualized." Again, based
11 on my experience in the management and training of GoDaddy's Hosting
12 Support agents, this disclosure is consistent with the type of information
13 that I would expect GoDaddy agents to provide to customers inquiring as to
14 whether GoDaddy's Dedicated Server product utilizes virtualization
15 software.

16 Doc. 128 at 60-65.

17 The Madieros deposition testimony states that hosting support agents are C3
18 agents. *See* Doc. 129-2 at 113. For instance, when asked "[h]ow many days of training
19 do GoDaddy C3 call center agents currently go through," Mr. Madieros responded "I
20 couldn't say for a *standard inbound agent*. Our *hosting agents* go through two weeks."
21 *Id.* One question later, Madieros was asked: "once a C3 call center agent has gone
22 through this [new hire] seven day training . . . do they then start working as a call center
23 agent?" He answered: "As an *inbound agent* they could." *Id.*

24 Mr. Madieros's declaration clarifies that the term "inbound" agent refers to a
25 department made up of C3 agents with varying specialties – or presumably no specialty if
26 they are new (i.e. "standard inbound agent") – who are the first point of contact for a
27 customer. *See* Doc. 128 at 60-65. A subset of the "inbound" department is comprised of
28 Tier 1 hosting support agents who have completed specialized hosting training. *See id.* at
29 61, ¶ 11 ("In order to become one of GoDaddy's Hosting Support agents, an individual
30 must participate in a multi-day Hosting Support training program . . . [and] must pass a
31 qualifying exam. . . . [T]he agent is [then] designated as a Tier 1 Hosting Support agent
32 and assigned to the 'Inbound' department").

33 With this clarification, the Court does not find that Mr. Madieros's deposition and
34 declaration are contradictory, and certainly not "flatly" contradictory as required by Ninth

1 Circuit law. *Kennedy*, 952 F.2d at 266. The Court will not disregard the declaration as
2 Plaintiffs request.

3 Plaintiffs also argue that the declaration is untrustworthy because it is unsupported
4 by any documentation produced in this case. Specifically, Plaintiffs assert that GoDaddy
5 has not disclosed a single example of training material that refers to single-tenant virtual
6 machines despite Mr. Madieros’s claim that the training is ongoing. Doc. 129 at 8.
7 Plaintiffs contend that GoDaddy and Mr. Madieros have “change[d] tack” by “now
8 asserting that *some* C3 agents were ‘*advised of*’ [] GoDaddy’s virtualization of its
9 dedicated servers.” Doc. 129 at 8 (emphasis in original). The Court shares Plaintiffs’
10 concern that GoDaddy has produced no document showing how C3 agents are trained on
11 virtualization, but the record does contain evidence supporting Mr. Madieros’s assertion
12 that C3 agents have knowledge that the Dedicated Servers are virtualized and disclose
13 that knowledge to consumers. Plaintiffs themselves were informed on two separate
14 occasions by GoDaddy representatives that their Dedicated Server was virtualized. *See*
15 Doc. 128 at 81-83 (December 10, 2015 live chat with Tier II Hosting Support agent
16 “Tony”), 94 (November 13, 2015 email from GoDaddy Small Business Consultant David
17 Zamora to Plaintiffs). These exchanges occurred after Plaintiffs had purchased their
18 Dedicated Server, but GoDaddy asserts that “Tony” is a C3 agent in the same department
19 as those individuals who would be speaking with potential purchasers of a GoDaddy
20 Dedicated Server. Hearing Transcript at 38:19-21.

21 In short, although Plaintiffs have raised questions about the evidence GoDaddy
22 has presented, Plaintiffs do not dispute that GoDaddy representatives readily disclosed to
23 Plaintiffs that their server was virtualized, that GoDaddy representatives received literally
24 millions of calls and chats during the class period, and that one of GoDaddy’s publicly
25 available server webpages specifically described the Dedicated Server as virtual. Nor
26 have Plaintiffs provided a basis for the Court to ignore the declaration of Mr. Madieros.
27 The Court finds this evidence sufficient to show that an individualized inquiry would be
28 required to determine whether each class member was subjected to the alleged omission,

1 found it material (in the ACFA claim), and relied upon it. Individual issues will
2 predominate if the class and subclass are certified.⁴

3 **IV. The Class Cannot Be Certified Under Rule 23(b)(2).**

4 Rule 23(b)(2) permits certification of a class if the requirements of Rule 23(a) are
5 satisfied and “the party opposing the class has acted or refused to act on grounds that
6 apply generally to the class, so that injunctive relief or corresponding declaratory relief is
7 appropriate respecting the class as a whole.” Fed. R. Civ. P. 23(b)(2). Plaintiffs argue
8 that “certification under Rule 23(b)(2) is appropriate as Plaintiffs seek to enjoin GoDaddy
9 from continuing to omit material information regarding the GoDaddy ‘Dedicated Servers’
10 that it marketed to the public.” Doc. 127 at 14-15. Plaintiffs acknowledge that
11 “GoDaddy currently discloses the use of ‘virtual’ machines in its Dedicated Servers,” but
12 argue that full disclosure “was made only recently and, absent an injunction, GoDaddy
13 could, at any point, revert to its prior descriptions, which omit material information.” *Id.*
14 at 10 n.12.

15 The Court finds a Rule 23(b)(2) class inappropriate. Rule 23(b)(2) authorizes a
16 class in which declaratory or injunctive relief is granted to “the class as a whole,” and
17 courts have made clear that it does not apply when class members’ claims are inherently
18 individual. As the Supreme Court explained:

19 The key to the (b)(2) class is the indivisible nature of the injunctive or
20 declaratory remedy warranted – the notion that the conduct is such that it
21 can be enjoined or declared unlawful only as to all of the class members or
22 as to none of them. In other words, Rule 23(b)(2) applies only when a
23 single injunction or declaratory judgment would provide relief to each
24 member of the class. It does not authorize class certification when each
25 individual class member would be entitled to a different injunction or
26 declaratory judgment against the defendant. Similarly, it does not authorize
27 class certification when each class member would be entitled to an
28 individualized award of monetary damages.

26 ⁴ The Rule 23(b)(3) superiority inquiry asks whether “a class action is superior to
27 other available methods for fairly and efficiently adjudicating the controversy.” Fed. R.
28 Civ. P. 23(b)(3). This requirement must be met in addition to the predominance
requirement. It is not an alternative means for certifying a class. *See id.* (requiring
predominance “and” superiority). Thus, if predominance of common issues is not
present, superiority cannot save the day.


1 *Dukes*, 564 U.S. at 360-61 (quotation marks and citations omitted).

2 Because some class members were not exposed to the alleged omission, they
3 could not seek an injunction against the omission. As a result, an injunction would not
4 provide relief to every class member. Also, because Plaintiffs now know the virtualized
5 nature of the Dedicated Servers, they could not be misled on this fact in the future and
6 therefore cannot show a likelihood of irreparable harm even if GoDaddy were to revert to
7 nondisclosure. Clearly, this case is not suited to injunctive relief.

8 Finally, Rule 23(b)(2) “does not extend to cases in which the appropriate final
9 relief relates exclusively or predominantly to money damages.” *Dukes v. Wal-Mart,*
10 *Inc.*, 509 F.3d 1168, 1186 (9th Cir. 2007), *reversed on other ground*, 564 U.S. 338 (2011)
11 (quoting Fed. R. Civ. P. 23(b)(2), Adv. Comm. Notes to 1966 amend., 39 F.R.D. 69,
12 102). In this case, where Plaintiffs and the class have purchased their Dedicated Servers
13 and seek to recover monetary damages because they allegedly paid too much, there can
14 be no doubt that the appropriate final relief relates exclusively or predominantly to
15 money damages. Certification of the class under Rule 23(b)(2) is not appropriate.

16 **IT IS ORDERED** that Plaintiff’s motion for class certification (Doc. 109) is
17 **denied**. Within 20 days of this order, the parties shall provide the Court with a joint
18 memorandum setting forth the parties’ positions on the future litigation of this action.

19 Dated this 7th day of July, 2017.

20
21 

22
23 _____
24 David G. Campbell
25 United States District Judge
26
27
28