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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DOUGLAS J. CAMPION,
Plaintiff,
v.
OLD REPUBLIC HOME PROTECTION
COMPANY, INC.,
Defendant.

Case No. 09-CV-748-JMA(NLS)

**ORDER DENYING PLAINTIFF'S
MOTION FOR RECONSIDERATION
OR, IN THE ALTERNATIVE,
REQUEST FOR CLARIFICATION
(DOC. NO. 58)**

On February 3, 2011, Plaintiff Douglas J. Campion filed a Motion for Reconsideration or, in the Alternative, Request for Clarification of the Court's denial of Plaintiff's earlier motion for class certification. (Doc. No. 58.) Defendant Old Republic Home Protection Company, Inc. has filed a brief in opposition and Plaintiff has also filed a reply in support of his motion. (Doc. No. 61 and 62.) Pursuant to CivLR 7.1.d.1, the motion is suitable for disposition without oral argument.¹ After due consideration of the

¹ In his motion for reconsideration, Plaintiff requests he be permitted oral argument on the motion for class certification because he believed oral argument would be held and was surprised when it was not. *Memorandum of Points & Authorities in Support of Motion for Reconsideration*, p. 12. Plaintiff's statements in this regard, and their implication that oral argument on the class certification issues was previously requested, necessitate clarification of the record.

Pursuant to CivLR 7.1.d.1, oral argument is held at the Court's discretion. The Court will consider a number of factors in determining whether oral argument should be held,

1 parties' briefs, the Court DENIES Plaintiff's motion.

2 **I. LEGAL STANDARD**

3 Plaintiff's motion is brought under CivLR 7.1.i.1 and the Court's "inherent power
4 to reconsider and modify its interlocutory orders...." CivLR 7.1.i.1 allows a party to apply
5 for reconsideration "[w]henver any motion or any application or petition for any order or
6 other relief has been made to any judge and has been refused in whole or in part." The
7 rule requires a party to show "what new or different facts and circumstances are claimed
8 to exist which did not exist, or were not shown, upon such prior application." CivLR
9 7.1.i.1.² Although Plaintiff's request invokes CivLR 7.1.i.1 and the Court's inherent
10 authority to modify prior orders, the parties agree reconsideration may be granted under
11 standards applicable to a Fed. R. Civ. P. 59(e) post-judgment motion for reconsidera-
12 tion, which allows for reconsideration when "the district court (1) is presented with newly
13 discovered evidence, (2) committed clear error or the initial decision was manifestly
14 unjust, or (3) if there is an intervening change in controlling law," citing *School Dist. No.*
15 *1J, Multnomah County, Or. v. AC and S, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). A

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17 including whether the factual and legal issues raised in the briefing might require further
18 development and whether oral argument has been requested. As part of the briefing schedule,
19 the motion for class certification was set for a hearing date on October 1, 2010. Due to
20 calendaring conflicts of counsel, the Court vacated that date and instructed counsel to jointly
21 call chambers regarding rescheduling. (Doc. No. 52). When the Court's staff spoke with
22 counsel, they were informed the Court was inclined to hold oral argument and, therefore, it
23 wished to select an alternate date that was convenient for counsel. Counsel expressed
24 surprise oral argument might be held and indicated they were willing to have the matter
25 decided on the briefing, but agreed that if a hearing was to be held, a date should be chosen
26 that was mutually convenient. After counsel consulted their calendars, the Court was informed
27 that all concerned could be present, if the Court decided it needed oral argument, on
28 December 17, 2011. However, after familiarizing itself more thoroughly with the parties'
extensive briefs and supporting declarations and exhibits, and learning that neither party felt
oral argument was necessary, the Court determined the motion was suitable for disposition
without argument and did not reset the hearing.

Plaintiff now requests he be permitted to argue the motion for class certification. The
request is not only untimely, but is also beyond the scope of the motion for reconsideration.
After reviewing the briefing on this motion, the Court finds the matter suitable for disposition
without oral argument.

² Defendant correctly maintains that Plaintiff failed to comply with CivLR 7.1.i.1's
affidavit requirement. Although Plaintiff's motion is defective in this regard, the Court is not
inclined to deny the motion solely on the basis of a procedural deficiency and will exercise its
inherent authority to consider the merits of the arguments for reconsideration.

1 motion for reconsideration may not be used to get a second bite at the apple. It is not a
2 method by which to raise arguments or present evidence for the first time when they
3 could reasonably have been raised earlier [*Id.*; see also *Kona Enterprises, Inc. v. Estate*
4 *of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000)] or to reargue an issue [*Am. Ironworks &*
5 *Erectors, Inc. v. N. Am. Constr. Corp.*, 248 F.3d 892, 899 (9th Cir. 2001)].

6 Here, Plaintiff only invokes “clear error” as a basis for reconsideration, arguing
7 the Court’s prior decision was clearly erroneous on five counts. The Ninth Circuit has
8 not defined a standard for “clear error,” although it has been discussed by other circuits.
9 As the Fifth Circuit Court of Appeals has observed, “[i]n the context of the law of the
10 case doctrine, “clearly erroneous” is a very exacting standard. ‘Mere doubts or dis-
11 agreement about the wisdom of a prior decision of this or a lower court will not suffice
12 for this exception. To be clearly erroneous, a decision must strike us as more than just
13 maybe or probably wrong; it must be dead wrong.’” *Hopwood v. Texas*, 236 F3d 256,
14 273 (5th Cir. 2000) (citation omitted). The Seventh Circuit has also set a high standard
15 for a party filing a motion for reconsideration on the basis of error, finding the movant
16 must demonstrate a “wholesale disregard, misapplication, or failure to recognize
17 controlling precedent.” *Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000).

18 II. DISCUSSION

19 A. The Court Did Not Misapply *Dukes*, Ignore Plaintiff’s Evidence, or Rely 20 Exclusively on Evidence Submitted by Defendant

21 In his first argument, Plaintiff contends the Court ignored his evidence that
22 Defendant financially incentivizes its contractors to deprive class members of the
23 benefits of their home warranty plans and instead relied exclusively on statistical
24 evidence submitted by Defendant. *Memorandum of Points & Authorities in Support of*
25 *Motion for Reconsideration*, p. 3. In doing so, Plaintiff submits the Court misinterpreted
26 and misapplied *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010) and
27 essentially conducted a mini-trial on Plaintiff’s claims. The Court was, Plaintiff argues,

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1 “bound to take the substantive allegations of the complaint as true,” pursuant to *Blackie*
2 *v. Barrack*, 524 F.2d 891 (9th Cir. 1975). *Id.*

3 Plaintiff’s argument the Court misinterpreted and misapplied *Dukes* rehashes his
4 argument from the motion for class certification about the appropriate legal standard
5 and is not a proper basis for reconsideration. *Am. Ironworks & Erectors, Inc.*, 248 F.3d
6 at 899. Furthermore, the Court did not, as Plaintiff posits, “ignore all of Plaintiff’s
7 evidence.” To the contrary, the Court accepted Plaintiff’s substantive allegations as true
8 but determined that the claims were not capable of proof without examining class
9 members’ claims on an individualized basis. The order denying class certification is
10 replete with citations and references to the Complaint, Plaintiff’s arguments, and
11 Plaintiff’s evidence. *See e.g., Order Denying Plaintiff’s Motion for Class Certification*
12 *and Defendant’s Motion to Strike*, p. 2, ln. 6-18; pp. 2-3, ln. 25-9; p. 6, ln. 22-26; p. 8, ln.
13 7-16; p. 9, ln. 7-14; pp. 10-11, ln. 28-7; pp. 13-14, ln. 13-12; pp. 15-16, ln. 25-3; p. 18,
14 ln. 13-20; pp. 19-20, ln. 21-5; pp. 21-22, ln. 10-11; p. 25, ln. 14-19; pp. 26, ln. 21-27; p.
15 27, ln. 17-25; p. 28, ln. 11-15; p. 29, ln.11-12; p. 30, ln. 17-23; and pp. 31-32, ln. 23-3.

16 As the Court previously observed, although a court should not conduct a
17 preliminary inquiry into the merits of a plaintiff’s case when considering a motion for
18 class certification, the Court *must* conduct a “rigorous analysis” to ensure the prerequi-
19 sites of Rule 23(b) are actually satisfied, not just presumed from the pleadings. *Dukes*,
20 603 F.3d at 581. The “rigorous analysis” requirement is not, as Plaintiff posits, simply
21 an interpretation of the *Dukes* case, but rather is derived from long-standing legal
22 precedent. *See Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982).

23 In some instances, the pleadings will be sufficient to demonstrate whether a
24 class should be certified, but often courts are required to look “behind the pleadings”
25 even to issues overlapping with the merits of the underlying claims. *Dukes*, 603 F.3d at
26 581; *See also Falcon*, 457 U.S. 160 (“[s]ometimes the issues are plain enough from the
27 pleadings to determine whether the interests of the absent parties are fairly encom-
28 passed within the named plaintiff's claim, and sometimes it may be necessary for the

1 court to probe behind the pleadings before coming to rest on the certification question.”)
2 The Court is not required to “unquestioningly accept a plaintiff’s arguments as to the
3 necessary Rule 23 determinations” and may consider facts that are relevant to the Rule
4 23 determination, even though the facts may also relate to the underlying merits of the
5 case. *Dukes*, 603 F.3d at 586, 589.

6 In this case, it was necessary for the Court to probe behind the pleadings to
7 make findings on the Rule 23 certification decision. Although the Court cited multiple
8 reasons why individual issues overwhelmed issues that are common to the class,
9 Plaintiff takes exception to the Court’s consideration of statistical evidence proffered by
10 Defendant regarding the handling of service claims. *Memorandum of Points & Authori-*
11 *ties in Support of Motion for Reconsideration*, p. 5. This evidence, however, which was
12 not disputed or challenged by Plaintiff at the time, was not used to evaluate or make a
13 determination on the merits of Plaintiff’s claims. The Court accepted Plaintiff’s substan-
14 tive allegations, but determined due to multiple factors that individual issues predomi-
15 nated in this case and, therefore, class certification was not appropriate.³ *Order*
16 *Denying Plaintiff’s Motion for Class Certification and Defendant’s Motion to Strike*, pp.
17 16, 19, 20, 26-27, 28-29. The fact that the Court considered uncontroverted evidence
18 submitted by Defendant, which also overlaps with issues pertaining to the merits of the
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21 ³ For example, in considering Plaintiff’s cause of action for Breach of Contract it was
22 necessary to analyze some aspects of the merits of the claim to the extent they overlapped
23 with class certification requirements. The theory espoused by Plaintiff in support of class
24 certification, that Defendant breached the class member’s home warranty plans before a claim
25 was ever made, is untenable under fundamental principles of contract law. *Order Denying*
26 *Plaintiff’s Motion for Class Certification and Defendant’s Motion to Strike*, p. 14. The Court
27 then examined class certification of the cause of action from the point in time at which
28 Defendant’s duty to perform arose, i.e., when class members made a claim for benefits. *Id.*
pp. 14-15. Observing that Plaintiff and his expert conceded some of the claims were
appropriately administered by Defendant, the Court found this theory required an individualized
inquiry to determine whether claims were wrongfully denied or inappropriately handled. *Id.* p.
15. The Court also found Plaintiff’s demand for restitution required individualized examination.
Id. p. 16. At this point, the Court also considered Defendant’s uncontroverted evidence that
85.8% of the service requests made were covered, and concluded, based on the entire record
and applicable legal principles, that individual issues predominated over common issues
because an inquiry “would need to be made into the claims of such a large portion of the
class....” *Id.*

1 claim, in determining whether Plaintiff satisfied the requirements of Rule 23 is neither
2 improper nor a basis for reconsideration.

3 **B. The Court Did Not Ignore Plaintiff's Theory of the Case**

4 Plaintiff's second argument is the Court committed clear error by focusing on
5 Defendant's denial of claims and ignoring Plaintiff's theory of the case, which also
6 consists of allegations that Defendant's wrongful business practices include:

- 7 1) contractors performing band-aid fixes rather than necessary but expensive
8 repairs;
- 9 2) contractors gouging customers for non-covered portions of the claim and
10 upselling them unnecessary and uncovered upgrades; and
- 11 3) contractors refusing to work on expensive jobs, requiring customers to
12 resubmit claims and, often times, pay a second service call fee.

12 *Memorandum of Points & Authorities in Support of Motion for Reconsideration*, p. 6.

13 Plaintiff claims the Court improperly accepted Defendant's argument that the case is
14 about improper denial of claims when, in fact, he also claims that due to Defendant's
15 wrongful business practices, the overwhelming majority of the putative class members
16 were substantially worse off even when a claim was covered. *Id.* p. 7.

17 Contrary to Plaintiff's assertion, these allegations were not ignored and were, in
18 fact, addressed in the underlying order. *Order Denying Mot. For Class Certification*, p.
19 8, In. 7-16; p. 13, In. 16-25, pp. 19-20, In. 20-5. Plaintiff's argument for class certifica-
20 tion essentially sought to have the Court presume Defendant's alleged unfair practices
21 caused the class members harm.⁴ As the Court explained, the mere existence of the
22 system Plaintiff contends Defendant created "would not prove on a class-wide basis
23 that claims were wrongfully denied or *inappropriately handled*." *Id.* p. 15, In. 16-19,
24 *emphasis added*.

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26 ⁴ Plaintiff previously posited that each class member was harmed because, by virtue of
27 these practices, each of them "faced the risk that [Defendant's] contractor would deny
28 legitimate claims, perform cheap repairs, punt on expensive jobs or upsell the customer on
"non-covered charges." *Memorandum of Points & Authorities in Support of Motion for Class
Certification*, pp. 16 and 24-25. As discussed in the order denying class certification, this
"diminished value" theory is too speculative to establish the necessary causal link. *Order
Denying Mot. For Class Certification*, p. 20.

1 As previously explained, under the class definition espoused by Plaintiff, individ-
2 ual inquiries and proof would be required to determine whether the alleged “unfair”
3 conduct actually caused injury to each class member, as well as to determine appropri-
4 ate restitution. *Id.* p. 20. Class members’ individual claims for benefits would need to
5 be examined to determine how they were administered, whether the class members
6 were harmed as a result of Defendant’s claims handling practices and, if so, how they
7 were harmed. A class member’s claim would need to be reviewed to determine
8 whether it was honored or denied. If the claim was denied, further inquiry would need to
9 be made as to whether the denial was legitimate, as Plaintiff concedes many were. On
10 the other hand, even if the claim was honored, individualized inquiries would be
11 necessary. Honored claims would need to be examined to determine whether a class
12 member was in fact “substantially worse off even when a claim [wa]s ‘covered.’”
13 *Memorandum of Points & Authorities in Support of Motion for Reconsideration*, p. 7, In.
14 6. Plaintiff’s own experience demonstrates the need for individualized inquiries. He
15 made two claims for benefits under his home warranty plan, the first of which – concern-
16 ing his garbage disposal – was the impetus for this suit. He testified, however, that
17 when he made a second claim (for problems with his electric range/oven) he received
18 the benefit owed to him, and admitted he would not have sued Defendant had that been
19 his only claim. *Declaration of Tammy Boggs in Support of Opposition to Motion for*
20 *Class Certification (“Boggs Dec.”)*, Ex. B (Transcript of Deposition of Douglas J.
21 Campion (“Campion Depo.”) pp. 28-30; In. 7-7). The inquiry into honored claims is
22 further complicated, moreover, because Plaintiff alleges these class members may have
23 been harmed in a variety of ways – some through an inadequate band-aid fix, others
24 through price gouging, and others by a contractor’s unjustified refusal to perform
25 expensive repairs. The circumstances of individual class member’s claims would,
26 therefore, need to be examined in order to prove Plaintiff’s argument that class mem-
27 bers were harmed by defendant’s practices even when claims were covered.

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1 **C. Plaintiff Has Not Established a Basis to Reconsider Denial of Certification**
2 **of the Breach of Contract Cause of Action**

3 Plaintiff's third argument is that the Court committed clear error in concluding his
4 proposed remedy for the Breach of Contract cause of action would require examination
5 of too many individualized issues. *Memorandum of Points & Authorities in Support of*
6 *Motion for Class Certification*, pp. 7-9. Plaintiff contends the amount of restitution to
7 which each class member is entitled can be calculated by a claims administrator with a
8 uniform measure of restitution. *Id.* p. 8. The formula he proposes was not advanced in
9 his motion for class certification and, thus, is not an appropriate basis for reconsidera-
10 tion.⁵ Furthermore, the Court's ruling on the contract-based causes of action was not
11 only limited to the need for individualized inquiries in calculating the amount of restitu-
12 tion to which class members might be entitled. The Court also found individual issues
13 predominated with regard to establishing whether a breach occurred. *Order Denying*
14 *Mot. For Class Certification*, pp. 14-15. Although Plaintiff argues the Court committed
15 clear error with regard to its analysis of the Breach of Implied Covenant of Good Faith
16 and Fair Dealing cause of action, he does not challenge the Court's conclusion with
17 regard to the Breach of Contract claim. There is, therefore, no basis to revisit the
18 Court's denial of class certification for this cause of action.

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22 ⁵ The formula now advanced by Plaintiff further illustrates the leap in logic (from
23 Defendant's alleged wrongful business practices to class members' presumed damages) that
24 pervades Plaintiff's arguments and exemplifies why proof of the class members' claims
25 requires individualized scrutiny. Plaintiff states "there are essentially three different scenarios
26 that would entitle class members to restitution: [1] Where Defendant denied the class
27 member's claim outright...[;] [2] Where Defendant handled the claim...[; and] [3] Where
28 Defendant handled some claims and denied others. *Memorandum of Points & Authorities in*
Support of Motion for Reconsideration, p. 8. With regard to claims falling in the first category,
for example, Plaintiff proposes the measure of restitution for these class members be
determined by the amount the class member paid [the policy premium plus the service call
fee(s)] less the amount he or she received (in these cases, nothing). This formula assumes
that every claim denied by Defendant was done so wrongfully and, therefore, every class
member whose claim was denied is entitled to restitution, even though Plaintiff concedes some
claims were legitimately denied.

1 **D. Individualized Inquiries Are Necessary With Respect To Plaintiff's Claim**
2 **For Breach Of The Implied Covenant**

3 Plaintiff's fourth argument challenges the Court's denial of class certification of
4 the cause of action for Breach of Implied Covenant of Good Faith and Fair Dealing.
5 *Memorandum of Points & Authorities in Support of Motion for Class Certification*, pp. 9-
6 11. Plaintiff argues the Court "conflated" the breach of contract claim with the breach of
7 implied covenant claim, when in fact these are two distinct and separate causes of
8 action that required separate analysis. *Id.* p. 9. Citing *Schwartz v. State Farm Fire and*
9 *Casualty Co.* 88 Cal.App.4th 1329, 1399 (2001) and *Carma Developers (Cal.), Inc. v.*
10 *Marathon Development Cal. Inc.*, 2 Cal. 4th 342, 373 (1992), Plaintiff contends a claim
11 for breach of the implied covenant of good faith and fair dealing does not require the
12 breach of a specific contractual provision. *Id.* Thus, Plaintiff argues, even if individual-
13 ized inquiries are necessary for Plaintiff's breach of contract claim, they are not neces-
14 sary for the implied covenant claim because Defendant's policies "breached the implied
15 covenant with respect to every class member who made a claim, regardless of whether
16 Defendant ultimately covered the claim or not." *Id.* p. 9, ln. 18-24.

17 The failure of an insurer to deal fairly and in good faith with its insured by
18 refusing, without proper cause, to compensate its insured for a loss covered by the
19 policy may give rise to a cause of action for breach of the implied covenant of good faith
20 and fair dealing. *Fleming v. Safeco Ins. Co.*, 160 Cal. App. 3d 31, 38 (1984); *Neal v.*
21 *Farmers Ins. Exchange*, 21 Cal. 3d 310 (1978). The covenant is implied as a supple-
22 ment to the express contractual covenants, to prevent a contracting party from engaging
23 in conduct that frustrates the other party's rights to the benefits of the agreement. *Love*
24 *v. Fire Ins. Exchange*, 221 Cal.App.3d 1136, 1153 (1990). In the context of insurance
25 contracts, a cause of action may be sustained based on any number of practices such
26 as such as delayed payment based on inadequate or tardy investigations or oppressive
27 conduct by claims adjusters seeking to reduce the amounts legitimately payable. *Id.*

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1 Such conduct, which may not necessarily constitute a breach of a specific contractual
2 provision, frustrates the insured's right to receive the benefits of the contract. *Id.*

3 Plaintiff's claim that Defendant "breached the implied covenant with respect to
4 every class member who made a claim, regardless of whether Defendant ultimately
5 covered the claim or not," however, again glosses over the required element of causa-
6 tion. In order to prevail on a cause of action for breach of the implied covenant of good
7 faith and fair dealing, an insured must establish its injury was proximately caused by the
8 insurer's breach. See *PPG Industries v. Transamerica Ins. Co.*, 20 Cal. 4th 310, 315
9 (1999); See also *Neal*, 21 Cal.3d at 925 (insurance company may be liable for "any
10 damages which are the proximate result of that breach"); *Brandt v. Superior Court*, 37
11 Cal.3d 813, 817 (1985). As previously discussed herein and in the order denying
12 Plaintiff's motion for certification, individualized inquiries and proof would be required to
13 determine whether the alleged wrongful business practices actually caused injury to the
14 class members.

15 **E. The Court Did Not Commit Clear Error in Determining Proof of Class Mem-**
16 **bers' Reliance on Defendant's False Advertising Requires Individualized**
17 **Inquiries**

18 Plaintiff's final argument is the Court committed clear error in concluding Plain-
19 tiff's false advertising claims required individualized inquiries into each class member's
20 reliance on Defendant's representations because the Court considered evidence
21 submitted by Defendant that most home warranty plans were purchased by someone
22 other than the class member. *Memorandum of Points & Authorities in Support of*
23 *Motion for Reconsideration*, p. 11. The Court did not, however, use this evidence to
24 determine "Plaintiff could not prove that all class members received th[e] written materi-
25 als," as Plaintiff claims. *Id.* The Court's inquiry was limited to determining whether
26 Plaintiff had established a framework for proving reliance on a class-wide basis.
27 Plaintiff claims the common framework for class-wide reliance was established by
28 demonstrating that Defendant made false representations in uniform written materials.
As explained in the order denying certification, this analysis does not hold up.

1 The fact that class members may have seen some, all or none of the alleged
2 misrepresentations due to the varying ways in which they acquired their plans has never
3 been in dispute. The Court was not required to turn a blind eye to this. *Dukes*, 603
4 F.3d at 581, 589. The key to establishing a framework for proving class-wide reliance
5 with respect to Plaintiff's false advertising claim is not whether all class members
6 ultimately received written materials, but whether they were exposed to the alleged
7 misrepresentations *prior* to obtaining their plans. Plaintiff did not establish such a
8 framework.

9 Plaintiff also argues that even if reliance can not be properly presumed for class
10 members who received their warranty plan as part of a real estate transaction, the Court
11 should have certified a subclass or new class consisting of all persons who purchased a
12 plan directly from Defendant. *Id.* p. 12. This alternate class definition was not proposed
13 by Plaintiff and he does not show how the Court committed clear error by not *sua*
14 *sponte* crafting this alternate class definition.

15 **F. The Order Denying Certification Does Not Preclude Plaintiff from Attempt-**
16 **ing to Modify the Proposed Class**

17 Lastly, Plaintiff requests clarification that the order denying class certification is
18 without prejudice "so that he can modify and renew his motion for class certification at a
19 later date if circumstances warrant doing so." *Id.* p. 13. It is unclear as to whether
20 Plaintiff, who states "it can sometimes take plaintiffs two, three, or even four bites at the
21 class-certification apple to propose a class that meets Rule 23's requirements" intends
22 to re-seek certification as to the previously proposed class or to modify his proposed
23 class definition and then seek certification as to a new proposed class. The deficiencies
24 as to the previously proposed class are such that they can not be cured by another
25 motion under Fed. R. Civ. P. 23. The order is not, however, intended to preclude

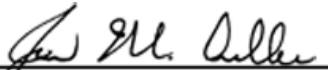
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1 Plaintiff from seeking to modify the class definition and attempting to certify an alternate
2 proposed class.

3 DATED: May 20, 2011

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5 Jan M. Adler
6 U.S. Magistrate Judge

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