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6 UNITED STATES DISTRICT COURT
7 SOUTHERN DISTRICT OF CALIFORNIA
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9 ALBERT CALDERON, an individual on
10 behalf of himself and all others similarly
11 situated, et al.,

Plaintiffs,

12 v.

13 TOTAL WEALTH MANAGEMENT,
14 INC., et al.

Defendants.
15

Case No.: 15CV1632 BEN (NLS)

**ORDER DENYING MOTION TO
REMAND**

[Docket No. 14]

16 This case was removed by Defendant First Trust Company of Onaga (“FTCO”)
17 based on jurisdiction under the Class Action Fairness Act. (Docket No. 1.) Plaintiffs
18 move to remand the case to state court based on two exceptions to CAFA. (Docket No.
19 14.) Because Plaintiffs have failed to establish that either exception applies, the Court
20 **DENIES** the Motion to Remand. However, the Court grants Plaintiffs’ request for leave
21 to conduct limited jurisdictional discovery and file a renewed motion to remand if it can
22 be supported by evidence.

23 **BACKGROUND¹**

24 Plaintiffs allege that the numerous individual Defendants, operating under the
25 brand name Total Wealth Management and a number of affiliated companies presented
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27 ¹ The Court only notes the allegations as relevant to the Motion to Remand.

1 themselves to the public as an investment advisory business that would help investors
2 organize a safe portfolio of investments. Defendants allegedly falsely represented the
3 portfolios would provide low risk investments using risk management tools and take into
4 account tax implications. However, unbeknownst to Plaintiffs, Defendants were actually
5 routing Plaintiffs' funds to investment companies that were paying Defendants a
6 percentage of the money they generated from Plaintiffs. Plaintiffs allege more than
7 \$100,000,000 was raised through the scheme and damages are in excess of \$50,000,000.
8 Plaintiffs also allege that Defendants generated client investors through a weekly local
9 radio show called Uncommon Wealth. Plaintiffs assert fourteen state-law claims.

10 The proposed class is "TWM's investment advisory clients whose funds were
11 placed in or passed through TWM, ACOF, or the series of unregistered fund of funds
12 referred to as the 'Atlas Portfolio Series' who suffered damages." (Second Amended
13 Complaint ("SAC") ¶ 149.) FTCO's Notice of Removal provides evidence that
14 Defendants had between 400 and 800 clients when they were engaging in this scheme.
15 Plaintiffs allege that all 27 named Plaintiffs are residents of San Diego.

16 DISCUSSION

17 "[N]o antiremoval presumption attends cases invoking CAFA, which Congress
18 enacted to facilitate adjudication of certain class actions in federal court." Dart Cherokee
19 Basin Operating Co., LLC v. Owens, 135 S. Ct. 547, 554 (2014). "CAFA gives federal
20 courts jurisdiction over certain class actions, defined in § 1332(d)(1), if the class has
21 more than 100 members, the parties are minimally diverse, and the amount in controversy
22 exceeds \$ 5 million." Dart, 135 S. Ct. at 552 (citing 28 U.S.C. § 1332(d)(2), (5)(B) and
23 Standard Fire Ins. Co. v. Knowles, 133 S. Ct. 1345, 1348 (2013)). These requirements
24 are met.²

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27 ² Plaintiff does not assert that any of these requirements are not met.

1 **I. CAFA Exceptions**

2 Plaintiffs assert that two exceptions to CAFA jurisdiction— the local controversy
3 and home-state controversy exceptions—apply and require remand. When either
4 exception applies, the Court “shall decline to exercise jurisdiction.” § 1332(d)(4). As
5 “the party seeking remand,” Plaintiffs “bear[] the burden to prove an exception to
6 CAFA’s jurisdiction.” *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1022 (9th Cir. 2007)
7 (discussing local controversy exception, § 1332(d)(4)(A), and home-state controversy
8 exception, § 1332(d)(4)(B)); see also *Benko v. Quality Loan Serv. Corp.*, 789 F.3d 1111,
9 1116 (9th Cir. 2015) (“plaintiff bears burden of showing that this provision, known as the
10 ‘local controversy exception,’ applies to the facts of a given case.”).

11 The local controversy exception is intended to keep “class actions with a truly
12 local focus” before the state courts. *Bridewell-Sledge v. Blue Cross of Cal.*, 798 F.3d
13 923, 2015 WL 4939641, at *4 (9th Cir. 2015) (quoting S.Rep. No. 109-14, at 39 (2005)).
14 Although it is a narrow exception, when the requirements are met, “a district court is
15 required to remand the class action back to the originating state court.” *Id.* at *4-5 (citing
16 *Benko*, 789 F.3d at 1116 and *Serrano*, 478 F.3d at 1022). The first element of the local
17 controversy exception—that more than two-thirds of the proposed class are citizens of
18 California—is at issue here. § 1332(d)(4)(A)(i)(I).³ The home-state controversy

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20 ³ The full exception provides as follows:

21 A district court shall decline to exercise jurisdiction under [CAFA]

22 (A)(i) over a class action in which—

23 (I) greater than two-thirds of the members of all proposed plaintiff classes in the
24 aggregate are citizens of the State in which the action was originally filed;

25 (II) at least 1 defendant is a defendant—

26 (aa) from whom significant relief is sought by members of the plaintiff class;

27 (bb) whose alleged conduct forms a significant basis for the claims asserted
by the proposed plaintiff class; and

(cc) who is a citizen of the State in which the action was originally filed; and
(III) principal injuries resulting from the alleged conduct or any related conduct
of each defendant were incurred in the State in which the action was originally
filed; and

1 exception also requires that “two-thirds or more of the members of all proposed plaintiff
2 classes in the aggregate . . . are citizens of the state in which the action was originally
3 filed.” § 1332(d)(4)(B).⁴

4 “[T]here must ordinarily be at least some facts in evidence from which the district
5 court may make findings regarding class members’ citizenship for purposes of CAFA’s
6 local controversy exception.” *Mondragon v. Capital One Auto Finance*, 736 F.3d 880,
7 884 (9th Cir. 2013) (joining three other circuits). “A district court makes factual findings
8 regarding jurisdiction under a preponderance of the evidence standard.” *Id.* (citing
9 *Valdez v. All State Ins. Co.*, 372 F.3d 1115, 1117 (9th Cir. 2004)).

10 In *Mondragon*, the Ninth Circuit disagreed with a district court inferring that the
11 proposed classes were at least two-thirds California citizens when each was defined as
12 persons that purchased and registered a car in California during the class period.⁵ *Id.* at
13 881-83. The Ninth Circuit found the inference understandable, but concluded that
14 evidence was required. *Id.* at 884 (“we would guess more than two-thirds” of the
15 prospective class were California citizens, “[b]ut it is also likely that some of them were
16 not.”).

17 There are two key points in *Mondragon* that are relevant here. First, “[a] complete
18 lack of evidence does not satisfy [the preponderance of the evidence] standard.” *Id.* at
19 884. Plaintiffs have provided a complete lack of evidence as to the citizenship of the
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22 (ii) during the 3-year period preceding the filing of that class action, no other class
23 action has been filed asserting the same or similar factual allegations against any of
24 the defendants on behalf of the same or other persons[.]

24 ⁴ The full exception provides “(B) two-thirds or more of the members of all proposed plaintiff classes in
25 the aggregate, and the primary defendants, are citizens of the State in which the action was originally
26 filed.” § 1332(d)(4)(B).

26 ⁵ The *Mondragon* decision notes that “a pure inference regarding the citizenship of prospective class
27 members may be sufficient if the class is defined as limited to citizens of the state in question, but
otherwise such a finding should not be based on guesswork.” *Mondragon*, 736 F.3d at 881-82. Here,
the proposed class is not limited to citizens of California.

1 class. The only evidence submitted by Plaintiffs is a declaration that asserts that
2 Plaintiffs' Counsel has "received inquiries about the case by other plaintiffs that would fit
3 into the class of those damaged by defendants. Every potential class member with whom
4 I spoke was a California resident and whose investment funds were solicited in
5 California." (Decl. of Maria C. Severson in Supp. of Pls.' Mot. to Remand ¶ 7 (emphasis
6 added).) The declaration only addresses residency, not citizenship, and provides no
7 evidence indicating how many potential class members—estimated from evidence
8 submitted by FTCO on removal to exceed at least 400—are California citizens.⁶
9 Although the Court is "permitted to make reasonable inferences from facts in evidence"
10 when evaluating the applicability of the exception, concluding more than two-thirds of a
11 class of hundreds are California citizens based on the assertion that inquiries have been
12 received and some unknown number of people calling are California residents is not a
13 reasonable inference.

14 This is particularly true in light of the second key point from Mondragon.
15 "[J]urisdictional findings of fact should be based on more than guesswork." *Id.* at 884.
16 There is some appeal to deducing that more than two-thirds of the proposed class are
17 California citizens. Defendants are California entities that allegedly operated out of San
18 Diego and generated clients from a local radio broadcast. It appears to be the kind of
19 local controversy the CAFA exceptions seek to keep in state court. However, this
20 deduction is no different than concluding that two-thirds of the class are California
21 citizens because the class was limited to those that purchased and registered their cars in
22 California. The Ninth Circuit rejected this as "sensible guesswork, based on a sense of
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24 ⁶ The Court acknowledges a connection between residency and citizenship. In Mondragon, the panel
25 observes "that a party with the burden of proving citizenship may rely on the presumption of continuing
26 domicile" and notes that some courts "treat a person's residence as prima facie evidence of the person's
27 domicile," although the panel declines to adopt that presumption. 736 F.3d at 885-86. However, the
court also found that a "residential address in California does not mean that person is a citizen of
California." *Id.* at 884 (citing *Kanter v. Warner-Lamber*, 265 F.3d 853, 857 (9th Cir. 2001)).

1 how the world works, but guesswork nonetheless.” Id. at 884 (quoting *In re Sprint Nextel*
2 Corp., 593 F.3d 669, 674 (7th Cir. 2010). Additionally, the court noted the likelihood
3 that “some automobiles were purchased and registered in California by members of the
4 military, by out-of-state students, by owners of second homes, by other temporary
5 residents who maintained legal citizenship in other states, and by person who live in
6 California but are not U.S. citizens.” Id. 884. Similar circumstances and others might
7 apply to the proposed class here. The class proposed here also lacks the California-
8 specific class limitations that were themselves insufficient in *Mondragon*.

9 However reasonable it might be, the Court cannot infer the class is more than two-
10 thirds California citizens based solely on the allegations of the SAC and the single piece
11 of evidence submitted addressing only residency of an unknown number of potential
12 members. Plaintiffs have not met their burden.

13 Based on the foregoing, the Motion to Remand is **DENIED**.

14 **II. Jurisdictional Discovery**

15 Plaintiffs seek leave to file a renewed motion to remand. As in *Mondragon*
16 Plaintiffs will have an opportunity to obtain jurisdictional discovery and renew the
17 motion to remand. Id. at 885 (“We instruct the district court to allow *Mondragon* an
18 opportunity, if he chooses to do so, to renew his motion to remand and to take
19 jurisdictional discovery tailored to proving that more than two-thirds of the putative class
20 are citizens of California.”). Although the court’s conclusion was based, in part, on the
21 absence of prior guidance from the Ninth Circuit at the time plaintiff filed his motion to
22 remand, this Court still finds it most efficient to allow Plaintiffs to conduct limited and
23 expedient jurisdictional discovery tailored to the two-thirds issue and file a renewed
24 motion to remand. See *Benko*, 789 F.3d at 1117 (allowing amendment of state court
25 complaint to allow plaintiffs to “provide a federal court with the information required to
26 determine whether a suit is within the court’s jurisdiction under CAFA.”).

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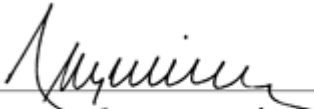
1 Jurisdictional discovery shall be completed within 60 days. Any renewed motion
2 to remand must be filed within 90 days. Discovery disputes shall be resolved by the
3 Magistrate Judge.

4 **CONCLUSION**

5 Plaintiffs’ Motion to Remand is **DENIED** with leave to file a renewed motion to
6 remand after conducting limited jurisdictional discovery.

7 **IT IS SO ORDERED.**

8 Dated: October 8, 2015

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11 Hon. Roger T. Benitez
12 United States District Judge

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