

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
TAMPA DIVISION

DALE J. MILLS and C. DIANE MILLS,  
Plaintiffs,

v.

Case No.: 8:06-CV-00986-T-EAK-AEP

FOREMOST INSURANCE COMPANY,  
Defendant.

---

**ORDER ON PLAINTIFFS' MOTION FOR REMAND TO STATE COURT**

THIS CAUSE is before this Court on Plaintiffs', DALE J. MILLS and C. DIANE MILLS (hereinafter "the Millses"), Motion for Remand to State Court (Doc. 211); Defendant's, FOREMOST INSURANCE COMPANY (hereinafter "Foremost"), Memorandum in Opposition to Plaintiffs' Motion for Remand to State Court or in the Alternative Motion for Reconsideration of Denial of Class Certification (Doc. 213); and the Millses Reply Memorandum to Foremost's Opposition to Plaintiff's Motion for Remand (Doc. 217). This Court has previously entered an order denying class certification (Doc. 208) on September 29, 2010, and has subsequently denied the Millses' motion to declare this Court's order denying class certification a nullity (Doc. 216). This Court ordered the Millses to file a response to Foremost's Opposition to Remand to State Court and upon which this Court must now rule. For the reasons set forth below, the Millses' Motion to Remand to State Court is **DENIED**.

*I. CAFA Background*

"A federal court not only has the power but also the obligation at any time to inquire into jurisdiction whenever the possibility that jurisdiction does not exist arises." *Fitzgerald v. Seaboard System R.R., Inc.*, 760 F.2d 1249, 1251 (11th Cir.1985). Foremost submits that this Court should retain jurisdiction over the Millses' individual state law claims citing to *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1268 (11th Cir.2009), in which the action was removed to federal court under the Class Action Fairness Act of 2005

(“CAFA”), 28 U.S.C. §1332(d)(2). The Eleventh Circuit in *Vega* mentions the possibility of non-certification of a class action and its impact on jurisdiction, stating as follows:

We note that the plaintiff’s failure to make a showing of numerosity with respect to the Florida-only class, which gives rise to the possibility that there are fewer than 100 members of the newly-narrowed Florida-only class, does not divest the federal courts of subject matter jurisdiction under the CAFA. *See* 28 U.S.C. § 1332(d)(5)(B). Even if it were later found that the narrowed, Florida-only class numbers fewer than 100, the § 1332(d)(5)(B) limitation applies only to “proposed” plaintiff classes (as opposed to classes actually certified or that go to trial); **jurisdictional facts are assessed at the time of removal; and post-removal events (including non-certification, de-certification, or severance) do not deprive federal courts of subject matter jurisdiction.** *See Cooper v. R.J. Reynolds Tobacco Co.*, 586 F.Supp.2d 1312, 1318-22 (M.D.Fla.2008) (construing mass action provision of the CAFA), *rev. denied*, No. 08-90021 (11th Cir. Oct. 28, 2008); S.Rep. No. 109-14, at 70-71 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 66 (“Current law (that [the CAFA] does not alter) is also clear that, once a complaint is properly removed to federal court, the federal court’s jurisdiction cannot be ‘ousted’ by later events.”); *see also Bullard v. Burlington N. Santa Fe Ry. Co.*, 535 F.3d 759, 762 (7th Cir.2008).

*Id.* at 1268 n. 12 (emphasis added).

Upon examination of the express language contained within CAFA, it becomes clear that the issue of whether retention of the Millses individual claims is proper, given the post-removal decertification order and the current amount in controversy, is one that cannot be resolved by the statute alone. While CAFA does create federal jurisdiction prior to class certification, the statute fails to address whether post-removal denial of a class divests a federal court of jurisdiction. More specifically, §1332(d) does not expressly require class certification for retention of federal jurisdiction, nor does 28 U.S.C. §1453 expressly require remand upon denial of class certification. The statute defines “class action” as “any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action.” *Id.* §1332(d)(1)(B). The statute defines “class certification order” as “an order issued by a court approving the treatment of some or all aspects of a civil action as a class action.” *Id.* §1332(d)(1)(C). Also of relative importance, CAFA states that the statute, “shall apply to any class action before or after the entry of a class certification order by the court with respect to that action.” *Id.* §1332(d)(8). What CAFA does not expressly address are the affects of the denial of class certification in regards to its impact upon

jurisdiction. *See Id.* at §1332(d). If Congress had truly intended that a class action properly removed to federal court was to be remanded upon the decertification of that class, Congress could have expressly stated such. “CAFA’s mass action provisions present an opaque, baroque maze of interlocking cross-references that defy easy interpretation . . . .” *Lowery v. Ala. Power. Co.*, 483 F.3d 1184, 1198 (11th Cir.2007).

## II. Discussion

Given CAFA’s nondescriptive nature on the issue currently before this Court, the determination of whether this Court retains jurisdiction over the Millses’ individual claims is one that must be examined through the context of previously established opinions. As stated above, the Eleventh Circuit in *Vega* stated that jurisdictional facts are assessed at the time of removal and post-removal events, including non-certification, de-certification, or severance do not deprive federal courts of subject matter jurisdiction. *Vega* at. 1268 n. 12. While the Millses argue that this is *obiter dicta* because it is found within a parenthetical, within a footnote, citing to *Allen-Wright v. Allstate Ins. Co.*, No. 07-cv-4087, 2009 WL 1285522, at \*5 (E.D.Pa. May 5, 2009), the Millses fail to mention that the end result in *Allen-Wright* was to deny the motion for remand.

The Court in *Allen-Wright* was faced with a plaintiff’s request for remand in response to the defendant’s motion for summary judgment. *Allen-Wright*, 2009 WL 1285522 at \*1. The *Allen-Wright* court denied certification on December 19, 2008, leaving only the plaintiff’s individual claim against the defendant for underpayment of policy benefits for general contractor’s overhead and profit. *Id.* This Court notes that this is precisely the factual context in which the current action before this Court is now postured. The *Allen-Wright* court framed the central issue as whether, in an action removed pursuant to the jurisdictional grant of CAFA, the denial of class certification deprives a federal court subject matter jurisdiction, noting that CAFA itself does not specifically address the issue. *Id.* The Court held that both the statutory language of CAFA and well-settled law regarding removal actions weigh in favor of

retaining jurisdiction in the matter. *Id.* at 3. The *Allen-Wright* court based such a conclusion upon the plain language of the statute and the United States Supreme Court decision in *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 58 S.Ct. 586, 82 L.Ed. 845 (1938), that “events occurring subsequent to the removal which reduce the amount recoverable, whether beyond the plaintiff’s control of the result of his violation, do not oust the district court’s jurisdiction once it has been attached.” *Id.* No individual in the instant case alleges damages of \$75,000 and this Court notes that the individual damages the Millses are now claiming amount to \$1,864.36, which is based upon Foremost’s failure to pay general contractor overhead and profit in the repair or replacement of the Millses mobile home.

Several district courts around the country that have concluded jurisdiction under CAFA continues often note that jurisdiction is determined at the time a complaint is filed or at the time of removal. *See, e.g., Allen-Wright*, 2009 WL 1285522, at \*3; *In re HP Inkjet Printer Litig.*, No. C 05-3580, 2009 WL 282051, at \*1-2 (N.D.Cal. Feb. 5, 2009); *Brinston v. Koppers Indus., Inc.*, 538 F.Supp.2d 969, 974-75 (W.D.Tex. 2008); *Colomar v. Mercy Hosp., Inc.*, No. 05-22409, 2007 WL 2083562, at \*2-3 (S.D.Fla. July 20, 2007); *Genenbacher v. Centurytel Fiber Co. II, LLC*, 500 F.Supp.2d 1014, 1016 (C.D.Ill. 2007). These courts also treat then treat the denial of class certification as a change in a jurisdictional fact, relying on the general principle that changes in jurisdictional facts do not affect jurisdiction. *See, e.g., Allen-Wright*, 2009 WL 1285522, at \*3; *In re HP Inkjet Printer Litig.*, 2009 WL 282051, at \*2; *Brinston*, 538 F.Supp.2d at 974-75; *Colomar*, 2007 WL 2083562, at \*2-3; *Genenbacher*, 500 F.Supp.2d at 1016-17. However, this Court notes that such a result and analysis has not been uniform throughout all district courts. Other district courts have concluded that the denial of class certification is not a post-filing or post-removal change in jurisdictional facts, but instead a legal determination that the plaintiffs’ claims did not constitute an actual or potential class action. *See, e.g., Muehlbauer v. Gen. Motors Corp.*, No. 05 C 2676, 2009 WL 874511, at \*9 (N.D.Ill. Mar. 31, 2009); *Salazar v. Avis Budget Group, Inc.*, No. 07-cv-0064, 2008 WL 5054108, at \*5-6 (S.D.Cal. Nov. 20, 2008); *Jones v. Jeld-wen, Inc.*, No. 07-22328-CIV, 2008 WL 45411016, at \*3 (S.D.Fla. Oct. 2, 2008); *Clausnitzer v. Fed. Express Corp.*, No. 06-21457-CIV,

2008 WL 4194837, at \*4 (S.D.Fla. June 18, 2008); *Arabian v. Sony Elecs. Inc.*, No. 05cv1741, 2007 WL 2701340, at \*5 (S.D.Cal. Sept. 13, 2007). These courts ultimately conclude that denial of class certification is effectively a determination that there is not and never was CAFA jurisdiction. *See e.g.*, *Muehlbauer*, 2009 WL 874511, at \*9; *M.S. Wholesale Plumbing, Inc. v. Univ. Sports Publ'ns Co.*, No. 4:07CV00730, 2008 WL 5225853, at \*2 (E.D.Ark. Dec. 10, 2008); *Salazar*, 2008 WL 5054108, at \*5-6; *Jones*, 2008 WL 4541016, at \*3; *Clausnitzer*, 2008 WL 4194837, at \*3; *Arabian*, 2007 WL 2701340, at \*5.

The Seventh Circuit, in addition to the Eleventh Circuit, has dealt with the issue presently before this Court. *See e.g.*, *Bullard v. Burlington N. Santa Fe Ry. Co.*, 535 F.3d 759, 761 (7th Cir.2008) (declining, in the context of a mass action, to allow a post-removal filing to affect the court's CAFA jurisdiction because the court "doubt[ed] that anything filed after a notice of removal can affect federal jurisdiction"). This Court notes that the Eleventh Circuit in *Vega* cited to *Bullard* when addressing the impact of post removal events in regards to jurisdiction. The Seventh Circuit more recently addressed the issue in *Cunningham Charter Corp. v. Learjet, Inc.*, 592 F.3d 805 (7th Cir.2010), when presented with the identical issue to the one currently before this Court, and ultimately agreed with the Eleventh Circuit's opinion in *Vega*. In *Cunningham*, the defendant removed the case to federal district court under CAFA and the district judge denied the motion for certification, ultimately ruling that the denial of class certification eliminated subject-matter jurisdiction under CAFA and remanding the case back to state court. *Id.* at 805-806. The Seventh Circuit reasoned in retention of the claims in federal court, "[f]or if a state happened to have different criteria for certifying a class from those of Rule 23, the result of a remand because of the federal court's refusal to certify the class could be that the case would continue as a class action in state court. That result would be contrary to the Act's purpose of relaxing the requirement of complete diversity of citizenship so that class actions involving incomplete diversity can be litigated in federal court." *Id.* at 807. The *Cunningham* Court held that federal jurisdiction under CAFA does not depend on certification, joining with the Eleventh Circuit in *Vega*. *Id.* at 806. "We assumed in *Bullard v.*

*Burlington Northern Santa Fe Ry.*, 535 F.3d 759, 762 (7th Cir.2008), that federal jurisdiction under the Class Action Fairness Act does not depend on certification, and we now join *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1268 n. 12 (11th Cir.2009), in so holding.” *Cunningham* at 806.

The Ninth Circuit has also wrestled with the jurisdictional result following the denial of a class action properly removed under CAFA. In *United Steel v. Shell Oil Co.*, 602 F.3d 1087, 1089 (9th Cir.2010), the Ninth Circuit accepted defendant’s appeal to consider whether the denial of class certification divests federal courts of jurisdiction over cases removed under §1332(d). In addressing the issue of whether the denial of class certification divests a federal court of jurisdiction, the Ninth Circuit stated, “[t]oday we join the Seventh and Eleventh Circuits in holding that it does not. If the putative class action was properly removed to begin with, the subsequent denial of Rule 23 class certification does not divest the district court of jurisdiction.” *Id.*

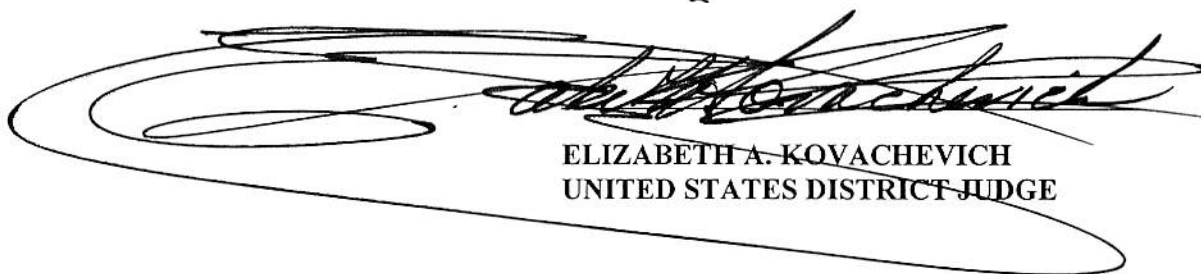
This Court finds that retention of the Millses individual claims to be proper under *Vega*. Furthermore, the Seventh Circuit in *Cunningham* and the Ninth Circuit in *United Steel* provide additional support for such a finding. In their Court ordered response to Foremost’s opposition to remand, the Millses do not contend that based upon the split of opinion among the districts this Court has the discretion to retain and ultimately resolve the Millses’ remaining claims.

### *III. Conclusion*

The textual reading of CAFA, coupled with the previously established law surrounding the precise issue presently before this Court does not support remand. The Eleventh Circuit in *Vega*, in addition to the Seventh and Ninth Circuit Court opinions referenced above, guide this Court in concluding that the Millses individual claims are to remain with this Court. Although the amount in controversy is now minimal compared to that originally plead, this Court does not find that remand of the Millses individual claims is within the text of CAFA or the law as established above. Accordingly, it is:

**ORDERED** that Plaintiffs' Motion for Remand to State Court (Dkt. 211) is **DENIED**. The Millses individual state law claims are hereby retained by this Court. The Court therefore sets the following deadlines for this case: All discovery shall be completed on or before April 3, 2011; dispositive motions shall be filed on or before April 25, 2011; the Court will set a pretrial conference on or after August 1, 2011; and a trial on or after August 15, 2011. The parties shall within five days of this date provide this Court of the estimated hours for trying this jury trial. Furthermore, the parties shall have up to and including February 11, 2011, in which to notify this Court as to the jointly selected mediator, from the list of certified mediators for the Middle District, and as to the desired period of time for scheduling mediation. If the parties fail to agree, this Court will select a mediator and date, but in either instance a separate order of referral to mediation will issue.

**DONE AND ORDERED** in Chambers at Tampa, Florida, this 31st day of January, 2011.



**ELIZABETH A. KOVACHEVICH**  
**UNITED STATES DISTRICT JUDGE**

Copies to: All parties and counsel of record.