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**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

KEVIN MODA, AKA HOUMAN
MOGHADDAM,

Plaintiff - Appellee,

v.

PRICELINE.COM, INC.,

Defendant - Appellant.

No. 06-56301

D.C. No. CV-06-00474-DOC

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
David O. Carter, District Judge, Presiding

Submitted November 16, 2006**
Pasadena, California

Before: NELSON, T.G. and BYBEE, Circuit Judges, and DUFFY,*** District
Judge.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Kevin T. Duffy, Senior United States District Judge for the Southern District of New York, sitting by designation.

Under 28 U.S.C. § 1453(c), a two-judge panel of this Court granted Priceline’s petition for leave to appeal the district court’s order remanding this action back to state court. We review a district court’s determination of subject matter jurisdiction de novo. *Prize Frize, Inc. v. Matrix (U.S.) Inc.*, 167 F.3d 1261, 1265 (9th Cir. 1999). We hold that the district court has jurisdiction under the Class Actions Fairness Act, *see* 28 U.S.C. § 1332(d)(2)(A),¹ and REVERSE.

Moda accused Priceline of artificially inflating its hotel rankings so that it could advertise that its room prices were *up to* 50 percent lower than its competitors, and he defined the putative class as all consumers from California who, since 1998, booked a room through Priceline. *See Singer v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 376 (9th Cir. 1997) (“The plaintiff, after all, creates the controversy and is the master of the claim.”). In its removal notice, Priceline admitted that it sold 2,092,145 rooms to California consumers during the relevant time period, which amounted to \$310,070,978 in revenue. While the complaint appears to demand a complete refund of the room price, that was not Priceline’s position before the district court. Instead, Priceline asserted that Moda sought to

¹ “The district courts shall have original jurisdiction of any civil action in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs, and is a class action in which . . . any member of a class of plaintiffs is a citizen of a State different from any defendant.”

“restore to California consumers an alleged discount of up to 50%.” At a 50 percent reimbursement rate, Priceline demonstrated, the class stood to recover \$155,035,489.

For whatever reason, Moda embraced the idea of a partial refund, but insists that Priceline had to provide a list of the properties that it rated using its allegedly fraudulent rating system and the corresponding differences between its prices and its competitors’ prices. That is not true. We do not predict what Moda *will* recover, only what he *could* recover. *See Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 405 (9th Cir. 1996) (a defendant’s removal is proper where evidence allows a court to “determine the extent of the loss which it might incur” if plaintiff is successful).² And it is possible that Moda will ultimately prove that, with respect to the properties at which California consumers booked rooms, Priceline owes them a full 50 percent refund. From Priceline’s revenue numbers and the text of the complaint, we conclude that the amount in controversy exceeds \$5 million.

² *See also Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446, 449 (7th Cir. 2005) (where complaint under Telephone Consumer Protection Act did not set cap on recovery and held open possibility of treble damages, “Countrywide did all that was necessary by admitting that one of its employees sent at least 3,800 faxes.” Countrywide “did not have to confess liability in order to show that the controversy exceeds the threshold”; at \$500 in statutory penalties per fax, damages could equal \$5.7 million).

REVERSED. The mandate shall issue immediately.