

361 Fed.Appx. 785, 2010 WL 55554 (C.A.9 (Cal.))
(Not Selected for publication in the Federal Reporter)
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This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Ninth Circuit Rule 36-3. (Find CTA9 Rule 36-3)

United States Court of Appeals,
 Ninth Circuit.

Robert Adam KENNEDY, an individual on behalf of himself, and on behalf of all persons similarly situated, Plaintiff-Appellant,

v.

NATURAL BALANCE PET FOODS, INC., a California corporation, Defendant-Appellee.

No. 08-56378.

Argued and Submitted Dec. 10, 2009.

Filed Jan. 6, 2010.

Background: Named plaintiff filed proposed class action in state court on behalf of himself and all individuals who purchased mislabeled pet food products sold by defendant. Action was removed to federal court. The United States District Court for the Southern District of California, [Marilyn L. Huff](#), J., denied motion to certify nationwide class and subsequently dismissed action for lack of subject matter jurisdiction. Named plaintiff appealed.

Holdings: The Court of Appeals held that:

- (1) denial of motion for class certification was proper, but
- (2) district court erred in dismissing case, rather than remanding to state court.

Affirmed in part and vacated and remanded in part.

West Headnotes

[1] Federal Civil Procedure 170A 171

170A Federal Civil Procedure

170AII Parties

170AII(D) Class Actions

170AII(D)2 Proceedings

170Ak171 k. In general; certification in general. [Most Cited Cases](#)

Federal Civil Procedure 170A 172

170A Federal Civil Procedure

170AII Parties

170AII(D) Class Actions

170AII(D)2 Proceedings

170Ak172 k. Evidence; pleadings and supplementary material. [Most Cited Cases](#)

Party seeking class certification must demonstrate that certification is warranted, and court must conduct a rigorous analysis to determine that prerequisites of class action rule have been met. [Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.](#)

[2] Federal Civil Procedure 170A 182.5

170A Federal Civil Procedure

170AII Parties

170AII(D) Class Actions

170AII(D)3 Particular Classes Represented

170Ak182.5 k. Consumers, purchasers, borrowers, and debtors. [Most Cited Cases](#)

Predominance requirement for maintaining class action was not satisfied with respect to claim under California's Consumer Legal Remedies Act (CLRA). [Fed.Rules Civ.Proc.Rule 23\(b\)\(3\), 28 U.S.C.A.](#); [West's Ann.Cal.Civ.Code § 1770.](#)

[3] Removal of Cases 334 2

334 Removal of Cases

334I Power to Remove and Right of Removal in General

334k2 k. Constitutional and statutory provisions. [Most Cited Cases](#)

Removal of Cases 334 102

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334 Removal of Cases

334VII Remand or Dismissal of Case

334k101 Grounds for Remand

334k102 k. Want of jurisdiction or of cause for removal. [Most Cited Cases](#)

Removal of Cases [334](#) [108](#)

334 Removal of Cases

334VII Remand or Dismissal of Case

334k108 k. Dismissal of case. [Most Cited Cases](#)

District court erred in dismissing removed action rather than remanding to state court, where it no longer had subject matter jurisdiction over action following denial of class certification. [28 U.S.C.A. § 1447\(c\)](#).

***786** [Norman B. Blumenthal](#), Blumenthal, Nordrehaug & Bhowmik, La Jolla, CA, for Plaintiff-Appellant.

[Kyle Kveton](#), Esquire, [James Raymond Robie](#), Esquire, Robie & Matthai, Los Angeles, CA, for Defendant-Appellee.

Appeal from the United States District Court for the Southern District of California, [Marilyn L. Huff](#), District Judge, Presiding. D.C. No. 3:07-cv-01082-H-RBB.

Before: [PREGERSON](#), [NOONAN](#) and [PAEZ](#), Circuit Judges.

MEMORANDUM ^{FN*}

FN* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

****1** Appellant Robert Kennedy filed this proposed class action in San Diego Superior Court on behalf of himself and all individuals in the United States who purchased allegedly mislabeled pet food products sold by Natural Balance Pet Foods, Inc. The action was removed to federal

court pursuant to [28 U.S.C. § 1441\(a\)](#) and the Class Action Fairness Act, codified at [28 U.S.C. § 1332\(d\)](#). The district court denied Kennedy's motion to certify a nationwide class and subsequently dismissed the action for lack of subject-matter jurisdiction. Kennedy appeals both orders. We affirm the denial but vacate the dismissal with instructions to remand the action to San Diego Superior Court.

[1] [Rule 23 of the Federal Rules of Civil Procedure](#) governs when a federal court may certify a class. A class must satisfy the four prerequisites of [Rule 23\(a\)](#) and fall into one of the three categories of class actions defined in [Rule 23\(b\)](#). [Fed.R.Civ.P. 23](#); [Parra v. Bashas', Inc.](#), [536 F.3d 975, 978 \(9th Cir.2008\)](#). The party seeking class certification must demonstrate that certification is warranted, and the court must conduct a “rigorous analysis” to determine that the prerequisites of [Rule 23](#) have been met. [Zinser v. Accufix Research Inst., Inc.](#), [253 F.3d 1180, 1186 \(9th Cir.2001\)](#). In reviewing a denial of class certification, the standard of review is for abuse of discretion. [Parra](#), [536 F.3d at 977](#).

[2] We affirm the denial of Kennedy's class certification motion. Kennedy alleged violations of California's Unfair Competition Law (“UCL”), [Cal. Bus. & Prof.Code § 17200](#), and California's Consumer Legal Remedies Act (“CLRA”), [Cal. Civ.Code § 1770](#). In his CLRA claim, Kennedy also alleged violations of “parallel sister state statutes,” asserting that “all other states have consumer fraud statutes which are substantially similar” to the ***787** CLRA. The district court denied class certification in part because Kennedy failed to show that the proposed class satisfied the commonality and typicality requirements of [Rule 23\(a\)\(2\) and \(3\)](#). In so doing, the court noted [Zinser's](#) requirement that the class plaintiff provide a “thorough analysis of the applicable state laws” in a situation where “different states' laws would apply to the claims.” [253 F.3d at 1188-89](#). Kennedy now concedes that the CLRA claim should be limited to a California

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class. In addition, as the district court noted, the CLRA applies only to “consumers,” but the proposed class consists of all “individuals” who purchased the challenged products, regardless of the purpose for which the products were purchased.

The district court's analysis under [Rule 23](#) conflates the permissive commonality and typicality requirements of [Rule 23\(a\)\(2\) and \(3\)](#) with the more rigorous predominance requirement of [Rule 23\(b\)\(3\)](#). Nonetheless, we affirm the court's ultimate determination not to certify the class under [Rule 23](#), because Kennedy failed to satisfy the predominance requirement of [Rule 23\(b\)\(3\)](#) with respect to the CLRA claim. *See Zinser, 253 F.3d at 1189* (“Understanding which law will apply before making a predominance determination is important when there are variations in applicable state law.”). While Kennedy contends that the district court should have certified a nationwide class for the UCL claim, failure to certify a subclass or certify a class with respect to particular issues is not an abuse of discretion. *See Vinole v. Countrywide Home Loans, Inc., 571 F.3d 935, 947 (9th Cir.2009)*; *Zinser, 253 F.3d at 1189-90*. Accordingly, pursuant to [Rule 23\(b\)\(3\)](#), we affirm the denial of Kennedy's motion for certification of the proposed nationwide class.

****2 [3]** The parties do not dispute that once the district court denied class certification, it no longer had subject-matter jurisdiction over the action. The district court erred in dismissing the case rather than remanding the action to state court. [Section 1447\(c\) of Title 28](#), which applies to cases removed from state court, provides that “[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.” This provision is mandatory. *See Bruns v. Nat'l Credit Union Admin., 122 F.3d 1251, 1257-58 (9th Cir.1997)*.

For the reasons above, the denial of Kennedy's motion for class certification is AFFIRMED. The order dismissing the action for lack of subject-matter jurisdiction is VACATED and REMANDED

with instructions to remand the action to San Diego Superior Court.

C.A.9 (Cal.),2010.
Kennedy v. Natural Balance Pet Foods, Inc.
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