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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ROBERT ADAM KENNEDY, an individual, on behalf of himself, and on behalf of all persons similarly situated, Plaintiff, vs. NATURAL BALANCE PET FOODS, INC., a California corporation; and DOES 1 through 100, inclusive, Defendant.
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CASE NO. 07-CV-1082 H (RBB)

**ORDER DENYING
PLAINTIFF’S MOTION FOR
CLASS CERTIFICATION AND
ISSUING ORDER TO SHOW
CAUSE REGARDING
JURISDICTION**

On May 14, 2008, plaintiff Robert Adam Kennedy (“Plaintiff”) filed a motion to certify a class. (Doc. No. 50.) Defendant filed a response in opposition on June 2, 2008. (Doc. No. 55.) Plaintiff has filed a reply. (Doc. No.57.) The Court has taken judicial notice of several documents as requested by both parties. (See Doc. Nos. 55-2, 57-1.) Additionally, Plaintiff filed objections to several of Defendant’s submissions. (Doc. No. 58.) Defendant filed a response to those objections. (Doc. No. 59.) In ruling on this motion, the Court has considered only such evidence as is proper.

The Court exercises its discretion pursuant to Local Civil Rule 7.1(d)(1) to decide this matter without oral argument and therefore vacates the hearing scheduled for June 16, 2008. For the reasons set forth below, the Court denies Plaintiff’s motion.

1 **Background**

2 Numerous lawsuits have been filed arising out of the sale of allegedly contaminated
3 pet food and, on June 19, 2007, the Judicial Panel on Multi-District Litigation consolidated
4 those actions and transferred them to the United States District Court for the District of
5 New Jersey (“the MDL court”). (MDL Docket No. 1850, Case No. 07-2867 (NLH).) On
6 May 30, 2008, the MDL court issued an order granting preliminary certification of a
7 settlement class and preliminary approval of a proposed settlement. (Notice of Entry of
8 Order, Doc. No. 53.)

9 The MDL settlement agreement defines “Recalled Pet Food Product(s)” as any pet
10 food product or any ingredient thereof that was recalled by any released entity (a group that
11 includes defendant Natural Balance Pet Foods, Inc.). The four products specified in
12 Plaintiff’s complaint here are among the Recalled Pet Food Products. The MDL court
13 granted preliminary approval to a settlement class defined as “all persons and entities who
14 purchased, used or obtained, or whose pets used or consumed Recalled Pet Food
15 Product(s).” (See Doc. No. 53.) The MDL court’s preliminary approval order states:
16 “[t]his order bars and enjoins all Settlement Class members from commencing or
17 prosecuting any action asserting any Released Claims and stays any actions or proceedings
18 brought by any member of the Class asserting any Released Claims as of fifteen (15) days
19 after the date of this Order.” (Id.) Additionally, the MDL court ordered that “[p]ending
20 Final Approval, no Settlement Class Member, either directly, representatively, or in any
21 other capacity, shall file, commence, prosecute or continue against any or all of the
22 Released Parties, any action or proceeding in any court or tribunal asserting any of the
23 matters, claims or causes of action that are to be released upon Final Approval pursuant to
24 the Settlement Agreement, and are hereby enjoined from so proceeding.” (Id.)

25 Although Plaintiff apparently is included in the settlement class identified by the
26 plain language of the MDL court’s preliminary approval order, Plaintiff wishes to continue
27 this action independently. Plaintiff asserts that Defendant misrepresented the origin of
28 certain pet food products by labeling them as “Made in the U.S.A.” when those products in

1 fact contained foreign-sourced components and ingredients. (First Am. Compl. (“FAC”)
2 ¶¶ 2, 5.) Plaintiff’s first amended complaint alleges that this designation violated the
3 Consumer Legal Remedies Act, Cal. Civ. Code § 1170 et seq. and/or similar laws in other
4 states; and California’s Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 et seq.
5 (FAC ¶¶ 23, 36.) Plaintiff asserts these claims on his own behalf as well as all similarly
6 situated consumers.

7 In the present motion, Plaintiff requests certification of a class defined as: “[a]ll
8 individuals in the United States who purchased one or more of the following Natural
9 Balance brand pet food products labeled as ‘Made in the USA’ since May 3, 2003: Venison
10 and Brown Rice Dry Dog Formula, Venison and Brown Rice Canned Dog Food, Venison
11 and Brown Rice Formula Dog Treats, and/or Venison and Green Pea Dry Cat Formula.”
12 (Doc. No. 50.) Each of the four products named in Plaintiff’s complaint was recalled by
13 Defendant in April of 2007 and have not been offered for retail sale since that time.
14 Consumers who received a full refund for specific purchases of Natural Balance products
15 would be excluded from the class proposed by Plaintiff. (Id.)

16 Defendant opposes class certification. (Doc. No. 55.) Defendant contends that
17 Plaintiff’s motion fails to demonstrate that this case is appropriate for class litigation under
18 Rule 23 of the Federal Rules of Civil Procedure. Defendant also contends that the claims
19 asserted by Plaintiff in this case are encompassed in the MDL settlement agreement and
20 therefore barred from proceeding by the MDL court’s preliminary approval order. (Id.)

21 Discussion

22 **I. Effect Of the MDL Court’s Preliminary Approval Order**

23 Before reaching the merits of Plaintiff’s motion for class certification, the Court
24 must determine whether Plaintiff may maintain this action in light of the MDL court’s
25 preliminary approval order. Defendant contends that Plaintiff and the putative class
26 members in this case are members of the Settlement Class preliminarily approved by the
27 MDL court and, therefore, that the MDL court’s preliminary approval order bars Plaintiff
28 from proceeding with this action, at least until the MDL court adjudicates the validity of

1 Plaintiff's purported opt-out from the proposed MDL settlement. Plaintiff responds that he
2 timely filed written notice of his election to opt out of the MDL settlement and be excluded
3 from the MDL settlement class in accordance with the MDL court's preliminary approval
4 order. (See Doc. No. 54.) Plaintiff also disputes whether he is a member of the MDL
5 settlement class, since Plaintiff contends that the MDL action is products liability litigation
6 focused on allegedly contaminated pet food products, while this case involves the "Made in
7 the U.S.A." designation used on some of Defendant's products.

8 For purposes of the present motion for class certification, the Court concludes that
9 the MDL court's preliminary approval order does not enjoin Plaintiff from maintaining or
10 continuing this action, since Plaintiff provides evidence that he has opted out of the MDL
11 settlement class. Although Defendant contends that Plaintiff's purported opt-out is not
12 effective until adjudicated by the MDL court as part of the final approval, the Court
13 concludes that, for purposes of whether to enjoin Plaintiff from proceeding with this action,
14 Plaintiff's evidence of a timely opt-out is sufficient. Cf. Phillips Petroleum Co. v. Shutts,
15 472 U.S. 797, 812 (1985) ("we hold that due process requires at a minimum that an absent
16 plaintiff be provided with an opportunity to remove himself from the class by executing
17 and returning an 'opt out' or 'request for exclusion' form"). However, Plaintiff seeks to
18 prosecute this action on behalf of a putative class, and it is Plaintiff's burden to demonstrate
19 that class certification is warranted. In part because every member of Plaintiff's putative
20 class appears to be subject to the MDL court's preliminary approval order enjoining other
21 actions related to the recalled products, the Court concludes that Plaintiff's motion fails to
22 satisfy that burden.

23 **II. Class Certification – Legal Standard**

24 When a person sues as a class representative, Rule 23 requires the court to "determine
25 by order whether to certify the action as a class action." Fed. R. Civ. P. 23(c)(1)(A). If the
26 Court's order certifies a class, it must: define the class; define the class claims, issues, or
27 defenses; and appoint class counsel according to Rule 23(g). Fed. R. Civ. P. 23(c)(1)(B),
28 23(g). To certify a class, the Court must determine that the class meets all the prerequisites of

1 Rule 23(a) and that the action fits under at least one of the types of class actions described in
2 Rule 23(b). Fed. R. Civ. P. 23(a)-(b). Here, the Court concludes that Plaintiff’s motion fails
3 to establish that the proposed class meets the prerequisites of Rule 23(a).

4 **A. Rule 23(a)**

5 The Court’s “threshold task is to ascertain whether the proposed settlement class
6 satisfies the requirements of Rule 23(a) of the Federal Rules of Civil Procedure applicable
7 to all class actions, namely: (1) numerosity, (2) commonality, (3) typicality, and
8 (4) adequacy of representation.” Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir.
9 1998). “The prerequisite of numerosity is discharged if the class is so large that joinder of
10 all members is impracticable.” Id. Sufficient commonality exists “if there are questions of
11 fact and law which are common to the class.” Fed. R. Civ. P. 23(a)(2); see Hanlon, 150
12 F.3d at 1019. “The typicality prerequisite of Rule 23(a) is fulfilled if the claims or defenses
13 of the representative parties are typical of the claims or defenses of the class.” Hanlon, 150
14 F.3d at 1020 (internal quotations omitted); see id. (representative’s claims “need not be
15 substantially identical” to all class members’s claims). Finally, Rule 23(a) requires that all
16 class members’ interests be adequately represented. Fed. R. Civ. P. 23(a)(4). “Resolution
17 of two questions determines legal adequacy: (1) do the named plaintiffs and their counsel
18 have any conflicts of interest with other class members and (2) will the named plaintiffs
19 and their counsel prosecute the action vigorously on behalf of the class?” Hanlon, 150 F.3d
20 at 1020.

21 The Court concludes that Plaintiff’s motion fails to establish that the proposed class
22 satisfies the requirements of Rule 23(a). First, Plaintiff fails to demonstrate that the
23 proposed class “is so large that joinder of all members is impracticable.” Hanlon, 150 F.3d
24 at 1019. Based on the terms of MDL court’s preliminary approval order, the only
25 individuals who would be able to join a class in this action appear to be individuals who
26 choose to opt out of the MDL settlement. Although the evidence indicates that Plaintiff has
27 done so, Plaintiff provides no evidence that any other putative class members have decided
28 to opt out of the MDL class and settlement. Plaintiff asserts that the proposed class in this

1 case is “obviously so numerous” that joinder is impracticable, see Motion at 7, but does not
2 provide any basis for the Court to determine the size of the proposed class. Although
3 courts do not interpret Rule 23 as requiring a particular number of class members, courts
4 consistently require that the class be sufficiently definite and readily ascertainable. See
5 William W. Schwarzer, A. Wallace Tashima, & James M. Wagstaffe, Federal Civil
6 Procedure Before Trial ¶ 10:263 (citing DeBremaecker v. Short, 433 F.2d 733, 734 (5th
7 Cir. 1970)). In the absence of any evidence regarding the size of the proposed class, the
8 Court concludes that Plaintiff fails to satisfy his obligation to establish the existence of a
9 class so numerous that joinder would be impracticable. Hanlon, 150 F.3d at 1019.

10 Second, the Court concludes that Plaintiff’s motion fails to demonstrate that the
11 proposed class meets Rule 23’s requirements of “commonality” and “typicality.” Id.
12 Those two requirements “tend to merge.” Gen. Tel. Co. of Southwest v. Falcon, 457 U.S.
13 147, 158 n. 13 (1982). Plaintiff must show both that “there are questions of law or fact
14 common to the class,” and that “the claims or defenses of the [representative] are typical of
15 the claims or defenses of the class.” Fed. R. Civ. P. 23(a)(2)-(3). A proposed class may
16 meet the commonality requirement either with shared legal issues involving different
17 factual predicates or a common nucleus of facts with different legal remedies. See Staton
18 v. Boeing Co., 327 F.3d 938, 953 (9th Cir. 2003). A Court may not simply presume that
19 one plaintiff’s claim is typical of others. General Tel. Co. of Southwest, 457 U.S. at 157-59
20 (holding that it was improper for trial court to infer commonality of discriminatory
21 treatment based only on treatment of one employee). Generally, the class representative
22 must be part of the class, possess the same interest as the class members, and suffer the
23 same injury as the class members. Id. at 156. The representative’s injury may differ to
24 some extent in nature and degree, however. See Dukes v. Wal-Mart, Inc., 509 F.3d 1168,
25 1184-85 (9th Cir. 2007); Hanlon v. Chrysler Corp., 150 F.3d at 1020.

26 Here, Plaintiff seeks to certify a nationwide class. While one of Plaintiff’s claims is
27 based on California law, Plaintiff’s second claim is asserted under California’s Consumer
28 Legal Remedies Act and/or “the laws of every other state,” which Plaintiff asserts “are

1 identical to and/or substantively similar to California consumer fraud laws.” (FAC ¶ 23.)
2 The Ninth Circuit has stated that a plaintiff seeking class certification in a situation where
3 different states’ laws would apply to the claims has a duty to provide a thorough analysis of
4 the applicable state laws in order to allow the district court to determine whether
5 differences in the laws would preclude class certification. Zinser v. Accufix Research
6 Institute, Inc., 253 F.3d 1180, 1189-90 (9th Cir. 2001); id. at 1189 (“Where the applicable
7 law derives from the law of the 50 states, as opposed to a unitary federal cause of action,
8 differences in state law will compound the disparities among class members from the
9 different states.”). The Court concludes that Plaintiff’s motion fails to satisfy this duty.
10 Plaintiff relies on the bare assertion that common questions of law and fact exist. (Motion
11 at 8-10.) The Court concludes that this is insufficient under the law, particularly when
12 Defendant has pointed out numerous potential legal and factual differences within the class
13 proposed by Plaintiff. For instance, Plaintiff seeks to assert a claim under the CLRA
14 (and/or the analogous laws of other states) on behalf of anyone who purchased certain of
15 Defendant’s pet food products, despite the fact that the purpose for which the purchase was
16 made affects whether the purchaser is a “consumer” who may assert a claim under the
17 CLRA. See Cal. Civ. Code §1761(d).

18 In light of the foregoing, the Court concludes that Plaintiff’s motion fails to establish
19 either that the putative class members’ claims possess sufficient commonality, or that the
20 named plaintiff’s claims are “typical” of class members’ claims. Hanlon, 150 F.3d at 1019.
21 In sum, independent of the effect of the MDL court’s preliminary approval order, the Court
22 concludes that Plaintiff’s motion fails in several respects to demonstrate that the proposed
23 class satisfies the prerequisites of Rule 23(a).

24 **B. Rule 23(b)**

25 In addition to the prerequisites of Rule 23(a), a party seeking class certification must
26 show that the action is maintainable under Rule 23(b)(1), (2) or (3). Amchem Products,
27 Inc. v. Windsor, 521 U.S. 591, 614 (1997); Hanlon, 150 F.3d at 1022. A class meets the
28 requirements of Rule 23(b)(3) whenever it is in the parties’ best interests to settle their

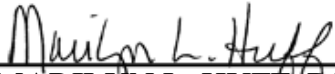
1 differences in a single action. Hanlon, 150 F.3d at 1022. Since the Court concludes that
2 Plaintiff's motion fails to satisfy the prerequisites of Rule 23(a), the Court need not decide
3 whether the requirements of Rule 23(b) are met.

4 **Conclusion**

5 For the reasons set forth above, the Court denies Plaintiff's motion for class
6 certification. In light of that ruling, the Court orders Plaintiff to show cause why this case
7 should not be dismissed for lack of subject matter jurisdiction. No later than July 11, 2008,
8 Plaintiff shall file a brief indicating the basis for continuing federal jurisdiction. Defendant
9 shall file a response in opposition on or before July 25, 2008. Plaintiff may file a reply on
10 or before August 1, 2008. After reviewing the parties' submissions, the Court if necessary
11 will schedule a hearing.

12 IT IS SO ORDERED.

13 DATED: June 12, 2008

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16 MARILYN L. HUFF, District Judge
17 UNITED STATES DISTRICT COURT
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