

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

AUG 21 2018

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

MICHAEL COLE, individually and on
behalf of all others similarly situated,

Plaintiff-Appellant,

v.

GENE BY GENE, LTD., DBA Family Tree
DNA, a Texas limited liability company,

Defendant-Appellee.

No. 17-35837

D.C. No. 1:14-cv-00004-SLG

MEMORANDUM*

Appeal from the United States District Court
for the District of Alaska
Sharon L. Gleason, District Judge, Presiding

Submitted August 14, 2018**
Anchorage, Alaska

Before: HAWKINS, McKEOWN, and OWENS, Circuit Judges.

Michael Cole appeals the district court's order denying his Motion for Class Certification in this action alleging that Gene by Gene, Ltd. ("Gene by Gene") disclosed customer DNA results and information without informed, written

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

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

consent in violation of the Alaska Genetic Privacy Act. *See* Alaska Stat. Ann. § 18.13.010(a)(1). We have jurisdiction under Federal Rule of Civil Procedure 23(f). We affirm.

We review the district court’s decision to deny class certification for abuse of discretion, and the findings of fact upon which the court relied for clear error. *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1132 (9th Cir. 2016) (citing *Parsons v. Ryan*, 754 F.3d 657, 673 (9th Cir. 2014)).

The district court did not abuse its discretion by denying class certification on predominance grounds because Cole failed to show that “common questions . . . ‘predominate over any questions affecting only individual members’” of his proposed class and subclass. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1022 (9th Cir. 1998) (quoting Fed. R. Civ. P. 23(b)(3)); *see also* *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016).

Individualized determinations predominate with respect to disclosure, consent, and damages for Cole’s putative class of approximately 900 Alaskans and Gene by Gene customers, as well as for his proposed subclass. *See Comcast Corp. v. Behrend*, 569 U.S. 27, 33–35 (2013); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 622–24 (1997); *Stockwell v. City & County of San Francisco*, 749 F.3d 1107, 1113 (9th Cir. 2014). Whether a particular customer had private information disclosed varies depending on the terms of release signed by the customer, which

of the thousands of Gene by Gene “projects”¹ the customer may have joined, the terms of the specific project a customer joined, and what privacy settings the customer chose.

Likewise, whether a particular customer consented to disclosure of private information varies depending on the particular project the customer joined, the terms of release they signed when they received an at-home testing kit, the terms of release they signed upon joining a project, and any other privacy communications they may have had with Gene by Gene. *See Tyson Foods*, 136 S. Ct. at 1045.

Further, wide variances in individual actual damages, although insufficient standing alone to justify decertification, further support the district court’s conclusion that individual questions predominate over common issues. *See Alaska Stat. Ann. § 18.13.020; Comcast*, 569 U.S. at 33–35; *Just Film, Inc. v. Buono*, 847 F.3d 1108, 1120–21 (9th Cir. 2017).

Finally, the district court did not abuse its discretion by denying class certification on superiority grounds. Cole failed to carry his burden to show that “a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3); *see also Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1190–93 (9th Cir. 2001).

¹ Gene by Gene “projects” are discrete websites or online platforms run by volunteer administrators that allow customers to connect to individuals with similar surnames, genetic characteristics, or shared regional histories.

The damages available to aggrieved Gene by Gene customers under the Alaska Genetic Privacy Act, the difficulties inherent in managing a class action featuring such distinct and individualized issues, the limited resources to be saved by certifying a class, and the absence of other pending or duplicative lawsuits in the Alaskan courts all reflect that individual litigation is a superior mechanism for resolving this appeal. *See* Fed. R. Civ. P. 23(b)(3); Alaska Stat. Ann. § 18.13.020; *see also Amchem*, 521 U.S. at 617 (explaining that the “policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights”) (citation omitted)); *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 515 (9th Cir. 2013).

AFFIRMED.