No. 09-55376

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Michael Mazza, Janet Mazza and Deep Kalsi,
Plaintiffs-Appellees,

v.

American Honda Motor Co., Inc.,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
THE HONORABLE VALERIE BAKER FAIRBANK, JUDGE
CASE NO. 2:07-CV-07-7857-VBF (JTLX)

OPENING BRIEF OF AMERICAN HONDA MOTOR CO., INC.

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CORPORATE DISCLOSURE STATEMENT

American Honda Motor Co., Inc. is a wholly owned subsidiary of Honda Motor Co., Ltd., a publicly held company in Japan.

TABLE OF CONTENTS

Page

TABLE OF CONTENTS - Continued

Page

TABLE OF CONTENTS - Continued

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

TABLE OF AUTHORITIES - Continued

Cases **Page(s)**

TABLE OF AUTHORITIES - Continued

Cases **Page(s)**

TABLE OF AUTHORITIES - Continued

Cases **Page(s)**

TABLE OF AUTHORITIES - Continued

Cases **Page(s)**

TABLE OF AUTHORITIES - Continued

Cases **Page(s)**

TABLE OF AUTHORITIES - Continued

Cases **Page(s)**

Statutes and Rules **Page(s)**

TABLE OF AUTHORITIES - Continued

Statutes and Rules **Page(s)**

TABLE OF AUTHORITIES - Continued

Statutes and Rules **Page(s)**

TABLE OF AUTHORITIES - Continued

Statutes and Rules **Page(s)**

TABLE OF AUTHORITIES - Continued

Statutes and Rules **Page(s)**

Other Authorities **Page(s)**

JURISDICTIONAL STATEMENT

The district court has subject matter jurisdiction under 28 U.S.C. § 1332(d)(2)(A). The diversity of citizenship requirement is satisfied because plaintiffs Michael Mazza and Janet Mazza are Florida residents, plaintiff Deep Kalsi is a Maryland resident, and defendant American Honda Motor Co., Inc. ("Honda") is a California corporation with its principal place of business in Torrance, California. The amount-in-controversy requirement is satisfied because plaintiffs allege that the value of the aggregate claims of putative class members exceed $5 million, exclusive of interests and costs. Less than one-third of the putative class members are citizens of California, the state in which the action originally was filed.

This Court has jurisdiction under Fed. R. Civ. P. 23(f) and 28 U.S.C § 1282. Honda filed its petition for permission to appeal on January 2, 2009, within 10 court days from the December 17, 2008 entry of the order granting plaintiffs' renewed motion for class certification. This Court granted Honda's petition on March 12, 2009.

STATEMENT OF ISSUES

1. Whether California consumer protection statutes and unjust enrichment law may be applied to the claims of a purported nationwide class notwithstanding the widely recognized material variations in the laws of the 44 states implicated by plaintiffs' claims, and other states' recognized interests in having their laws apply to the claims of their residents.

2. Whether a finding that common issues predominate may rest on a presumption (rather than evidence) that all putative class members were exposed to, found material, and relied on particular alleged representations and omissions in advertising that changed over time and was supplemented by substantial and varying point-of-sale and online communications, in claims

a. under the California Consumers Legal Remedies Act, notwithstanding the requirement of proof of causation and actual damage as result of the challenged practice;

b. under the California Unfair Competition Law and False Advertising Law notwithstanding the requirement, for restitutionary relief, for proof that money or property was lost as a result of the challenged practice;

c. under California unjust enrichment law notwithstanding the need to determine whether Honda's retention of benefits would be "unjust" in light of the equities in each particular case.

STATEMENT OF THE CASE

Florida residents Michael and Janet Mazza and Maryland resident Deep Kalsi filed this action in the United States District Court for the Central District of California on behalf of a putative nationwide class of consumers who purchased or leased vehicles equipped with the Collision Mitigation Braking System ("CMBS"). (ER448.) Asserting that Honda misrepresented the capabilities and limitations of the CMBS, the complaint sought recovery under the California Unfair Competition Law (Cal. Bus. & Prof. Code § 17200 *et seq.* ("UCL")), False Advertising Law (*id.* § 17500 *et seq.* ("FAL"), and Consumers Legal Remedies Act (Cal. Civil Code § 1750 *et seq.* ("CLRA")), and for unjust enrichment.

After denying without prejudice plaintiffs' initial motion to certify a nationwide class under the three statutes (ER30-32), the district court granted plaintiffs' renewed motion for a nationwide class to press claims under those statutes and the California law of unjust enrichment. (ER5-29.) In an order entered December 17, 2008, the district court certified the following class:

> All persons in the United States, who between August 17, 2005 and class certification, purchased or lease, not for resale, Acura RL vehicles equipped with the Collision Mitigation Braking System.

(ER2-10.)[1] The order did not designate class representatives or appoint class counsel.

Honda petitioned this Court for permission to appeal that order on January 2, 2009. While the petition was pending, on January 8, 2009, the district court issued a revised order that, among other things, appointed plaintiffs as class representatives and designated their attorneys as class counsel. (ER2.)

STATEMENT OF FACTS

A. The Features of the CMBS System.

Honda introduced the CMBS in the fall of 2005 as part of the optional "Technology Package" for the 2006 model year Acura RL. (ER261.) CMBS uses a millimeter-wave radar unit mounted on the RL's front grille to monitor for potential rear-end collisions. (ER258, 280-81, 285.) The system measures the distance and closing rate between the Acura RL and the vehicle or object directly in front of it. (*Id*.) When triggered, the CMBS responds with any or all of the following (ER300):

- A "Stage 1" alert, which sounds a tone and flashes a visual "BRAKE" warning on the dashboard display;
- A "Stage 2" alert, which includes the Stage 1 warnings but also brakes lightly and tugs on the driver's seat belt; and

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[1] The CLRA class "applied only to vehicles purchased for 'personal, family or household purposes.'" (ER2, 10.)

- A "Stage 3" alert—issued if an accident is unavoidable—which includes the Stage 1 warnings but brakes hard and retracts the seat belts of the driver and front passenger to secure them for impact.

The timing for the deployment of the CMBS stages varies depending on factors that include the speed of the vehicle and the relative speed of the vehicle ahead. (ER282.) As the owner's manual explained, the CMBS might shut off temporarily under conditions including "[a]n abnormal tire condition," "[e]xtended off-road or mountainous driving," or "[d]riving … in bad weather[,]" but the "CMBS indicator in the instrument panel" will alert the driver to the temporary shut-off. (ER442, 444, 446.)

Honda included the CMBS in the "Technology Package" for the 2006 RL, and in the "CMBS/ACC Package" in subsequent model years. (ER261, 267, 271.) These packages included Adaptive Cruise Control and Michelin PAX "run flat" tires (except that the run-flat tires were not offered in the 2009 model year), and added approximately $4000 to the list price. (ER261, 267, 271.)

B. Honda Unveils the Acura RL with CMBS for the Media And Discloses That The System's Alert Stages May "Overlap" And That It May Temporarily Disengage In "Inclement Weather."

On August 17, 2005, just before the vehicle went on sale, Honda introduced the 2006 Acura RL with CMBS at a Rose Bowl event where media representatives were invited to experience all three stages of the CMBS first-hand in test drives.

(ER315-17.) At that event, Honda distributed the press release for the 2006 RL.[2] (ER315, 420-22.) Honda also provided a PowerPoint presentation explaining that the system may temporarily disengage in "inclement weather" and a video explaining that the alert stages may "overlap depending on the rate of the closure of [the RL] and the vehicle ahead." (ER316-19, 344.)

C. Honda Provides Varying Marketing and Informational Materials for the 2006-2009 Model Years.

Honda's promotional materials for the CMBS have varied significantly. Some promotional materials did not discuss any CMBS "stages," while others specifically disclosed that the system's alert stages may "overlap" or provided more detail on alerts issued in each alert stage. The Mazzas and Kalsi each bought a 2007 Acura RL in April and May 2007 respectively. (ER450.) Most of Honda's CMBS promotion occurred during the prior model year.

1. *Promotional Materials for the 2006 Acura RL*

a. The *2006 Acura RL product brochure* stated that CMBS "is designed to help alert the driver of a pending collision or—if it's unavoidable—to reduce the severity of impact by automatically applying the brakes if an impending collision is detected." (ER258.) The brochure described the CMBS in these terms:

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[2] Honda issued a press release for each model year Acura RL and posted the releases on Honda's media websites, "Hondanews.com" and "Acuranews.com." (ER323-33, 396-98.)

> If the system senses a vehicle, it determines the distance and closing speed. If the closing speed goes above a programmed threshold, the system will immediately alert the driver with an audible alarm and a flashing indicator on the instrument panel. If the driver takes no action to reduce speed, the system will automatically tug at the driver's seat belt and lightly apply the brakes. When the system senses that a frontal collision is unavoidable and the driver still takes no action, the front seat belts are retracted tightly and strong braking is applied automatically to lower impact speed and help reduce damage and the severity of the injury.

(ER258.) The brochure also described the system's response during each of the three warning stages. (ER259.) An image of an RL following a large truck had this text between the vehicles: "CMBS evaluates a possible collision. It will first provide audio and visual alert and then apply the brakes automatically if a collision seems imminent." (ER259.)

b. *"The Distance" television commercial*, the only CMBS television commercial, had two versions. The first aired only for one week in early November 2005 (ER398-99) with this voice-over:

> So much can happen in the space of a few seconds. The Acura Collision Mitigation Braking System detects an object ahead. The driver is warned, and warned again. If necessary, the system even applies the brakes to lessen the potential impact. The Acura RL, it gives your reflexes a head start.

(ER360.) Honda modified the commercial and re-aired it from February 2006 through September 2006 (ER363-65) with this voice-over:

> So much can happen in the space of a few seconds. The Acura Collision Mitigation Braking System detects a potential hazard

> ahead. The driver is warned so he can react. If necessary, the system would have even applied the brakes to lessen a potential impact. The Acura RL, it gives your reflexes a head start.

(ER361.) Plaintiff Michael Mazza testified that he saw the first version of the commercial, which stopped airing 17 months before he bought his RL; Kalsi did not recall whether he saw the first version, the second version, or both. (ER288, 352.)

c. *The "What Might Happen" print advertisement* promoted the CMBS in various magazines from March through September 2006. (ER438-39.) The ad explained:

> CMBS uses a radar signal to help detect potential hazards ahead. Then, after a series of instantaneous calculations, including distance and closing speed, they system *can* react. It *can* give you auditory and visual warnings, a tug on the seat belt, and *when necessary*, even initiate strong braking in order to lessen the severity of an inevitable impact.

(ER434) (emphasis added).

d. *The Customer Information Center ("CIC")* is an intranet-based "interactive sales tool" on kiosks at Acura dealerships "to assist sales consultants and customers at every stage of the sales process." (ER292.) The CIC was available without a password to all dealership customers once the kiosk was activated at the start of each business day. (ER96.)

From the launch of the Acura RL with CMBS until March 2008—when Honda discontinued use of the kiosks because the same information was available to consumers online (ER94)—the CIC had two videos that explained how CMBS works. (ER111, 298.) The second CMBS video specifically disclosed that:

> - …various alert stages [in the CMBS system] can overlap depending on the rate of closure of your vehicle and the vehicle ahead.
>
> - …[CMBS] is not a substitute for attentive, defensive driving. The system does have limitations, and will not detect all possible accident causing situations….

(ER360.)

e. *The Owner Link website*, now known as "MyAcura.com," was linked to Acura.com throughout the class period. (ER101-10, 310-11.) Consumers could log on to Owner Link without entering a vehicle identification number. (*Id*.) There, they could view video clips that disclosed the "overlap" between various stages of the CMBS System, and review the RL's owner's manual, which disclosed that CMBS may disengage temporarily during inclement weather. (ER101-06.)

f. *The Acura.com website* included an RL section with written and video content about the CMBS. (ER417.)

2. *Promotional Materials for 2007-2009 Model Year Acura RL*

Honda had no CMBS-specific television commercials or magazine advertisements after the end of the 2006 model year. While the CIC and the Acura.com and Owner Link websites continued to be available, Honda's other promotional materials for CMBS were less extensive.

a. *The 2007 Acura RL product brochure*, available at dealerships, described the CMBS in these terms (ER264-65):

> 1. *Recognition of possible collision*
>
> CMBS has a radar system with a transmitter mounted behind the RL's grille. When CMBS first determines that a collision is possible, it warns the driver with audio and visual alerts.
>
> 2. *Belts tighten and light braking*
>
> If the driver takes no action to reduce speed, the system will automatically tug at the driver's seat belt to increase the level of warning. The system will also begin light braking.
>
> 3. *Strong braking*
>
> When the system determines an impact is unavoidable, the front belts tighten and strong braking is automatically applied to reduce impact velocity and collision forces.

b. *The Acura Style magazine* is sent to all Acura dealerships, subscribing Acura owners, and interested consumers twice each year. (ER101.) An article in the Summer 2007 edition described the CMBS and explained that it "responds" to a potential collision "with *any or all three* increasingly dramatic imperatives."

(ER300 (emphasis added).) Every Acura dealership received ten copies of this magazine in July 2007 for use and display. (ER101, 301-06, 308-09.)

c. The *2008 Acura RL product brochure* explained the CMBS in these terms (ER270):

> Collision Mitigation Braking System™ (CMBS) on CMBS/PAX models uses radar to detect objects in front of the RL. If it determines that a collision is possible, it warns the driver by displaying the word "BRAKE" and sounding a tone. If the system senses that a collision is probable, it tugs the driver's seatbelt and begins light braking. If the impact is imminent, the system tightens the front belts and automatically applies hard braking to help reduce impact velocity and collision force.

d. A new *CMBS video on Acura.com for the 2009 Acura RL* explained that:

> …if CMBS determines that a collision is likely, a series of beeps sound, and the word "BRAKE" flashes on the RL's multi-informational display. If the driver responds appropriately by turning the wheel and/or braking to avoid the collision, CMBS will disengage. If the driver does not respond sufficiently, the CMBS system will trigger a brake actuator to apply light brake force, and will produce a slight tug on the driver's seatbelt. The system will disengage again if the driver undertakes sufficient evasive action. However, *if at any point* CMBS determines that a collision is unavoidable, the system *immediately enters* its third stage. It will apply stronger brake force to mitigate the force of impact, and apply stronger seatbelt retraction for the driver and if present, for the front passenger, to better position them prior to the collision….

(ER419) (emphasis added).

D. Four of 2,000 CMBS Purchasers—Including Two Named Plaintiffs—Complain to Honda That the System Did Not Operate As Advertised.

Honda sold approximately 2,000 Acura RL vehicles equipped with CMBS through authorized Acura dealerships during the class period. (ER366-67.) Only four purchasers—*including* plaintiffs Kalsi and Michael Mazza—called Honda to complain that CMBS does not function as Honda advertised. (ER376-77.) Mazza also posted his CMBS concerns on an Internet blog, but several consumers disagreed with his contention that Honda misrepresented the CMBS. (ER353.) One commenter even attributed Mazza's complaints to his idiosyncratic understanding of how the system should work:

> Although I have not used your car, I really think your problem is a misunderstanding of the system. The system does not have to go through the stages. Depending on the situation it can instantly go to any stage depending on the situation.

(ER116, 354.) There is no dispute that CMBS works; it helped the named plaintiffs avoid as many as five potential collisions. (ER289.)

E. Plaintiffs Bring This Action and The District Court Certifies A Nationwide Class.

Plaintiffs allege that they interpreted Honda's marketing materials for the CMBS to mean that the system *always* would proceed through a sequential three-stage warning system, no matter how imminent the potential collision. (ER448-49.) Because in real-world driving conditions Stage Three may deploy without

progressing through Stage One and Stage Two, plaintiffs claim they were deceived. (ER456.) In particular, plaintiffs allege that Honda misrepresented the operation of CMBS and failed to disclose that it:

- "and its three separate stages of alert and mitigation may deploy late and fail to timely alert the driver to avoid a collision";
- "may fail to deploy and alert the driver with any or all three separate stages of alert and mitigation before a collision"; and
- "will not deploy in response to some obstacles on the road ahead."

(ER449.) In their renewed certification motion, plaintiffs also contended for the first time that Honda failed to disclose that CMBS may temporarily disengage in inclement weather. This theory is not in the complaint or plaintiffs' interrogatory responses. (ER274-75, 277-78.)

As noted above, the district court certified a nationwide class under the UCL, FAL, CLRA, and California's unjust enrichment law; the class encompassed all persons who bought or leased a new or used Acura RL with CMBS between August 17, 2005 and December 17, 2008. (ER1-29.) First, the district court held that California law applied to all claims of the entire nationwide class. Although the California statutes differed from the consumer protection statutes of other states on reliance, scienter, statute of limitations, standing, and available remedies, the district court—which addressed only the differences in remedies—concluded that

the conflicts were not "material." (ER18.) In any event, the court held, because Honda is headquartered in California, the non-resident class members' home states do not "have any interest in applying *their* laws in this case" (ER19-21), and any interest those states might have is not "more impaired" than California's interest because other states' interests are not "implicated *in this litigation.*" (ER23.)

Second, the district court held that common issues predominated over individualized issues. The court rested on presumptions of reliance and materiality. The court found a presumption of reliance permissible because, "[a]lthough the information about the limitations of the CMBS system may have been available in some media, there is little-to-no evidence that this information was made available or *reached* consumers prior to their purchase of the RL with CMBS System." (ER26.) In a related finding under the UCL, the court held that Honda's alleged representations and omissions about CMBS in various promotional materials were "material" to all class members even though evidence Honda presented showed that "a number of consumers disagreed with [the named plaintiffs'] conclusion that Honda had misrepresented the CMBS." (ER27.) And the court concluded that the unjust enrichment claims could be tried on a class basis because Honda's promotional materials induced a "greater propensity" to purchase the CMBS. (ER28.)

SUMMARY OF ARGUMENT

To certify the nationwide class here, the district court presumed away the individualized inquiries required under the varying laws of 44 jurisdictions. At the behest of plaintiffs from Florida and Maryland—plaintiffs who account for half of the four buyers who complained to Honda about CMBS—the district court certified a nationwide class under *California* law: the UCL, the FAL, the CLRA, and the California common law of unjust enrichment. That did away with the diversity of law that otherwise applied to the claims of residents of 44 states. And the court then used broad presumptions to submerge the necessarily individual inquiries under each cause of action. That resolution of the predominance inquiry under Rule 23(b)(3) was a clear abuse of discretion.

First, contrary to the great weight of federal authority, the district court concluded that outcome-determinative variations in state consumer protection and unjust enrichment laws did not present "material" conflicts that might preclude the nationwide application of California law. Moreover, the court concluded that the nonresident class members' home states have no interest in having their laws applied to the claims of in-state consumers. Those legally erroneous assessments reflect the cavalier state-court approach toward nationwide classes that prompted Congress to enact the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2)(A), and bring Rule 23 to bear. The class certification process should not override other

states' policy decisions by extending California law nationwide—particularly in the absence of a single Californian who claims to have been deceived in the way plaintiffs allege.

Second, the district court disregarded the individualized questions of fact on the related issues of reliance, materiality and causation. Plaintiffs bore the burden of establishing predominance by a preponderance of the evidence. Yet the district court placed the burden on Honda to rebut a seemingly conclusive presumption that all members of the purported class found Honda's alleged misrepresentations and omissions material and relied on them. The district court did so even though plaintiffs provided no evidence of exposure to the challenged advertising, or reliance on it, that pertained to anyone besides the named plaintiffs themselves. To the contrary, unrebutted evidence showed both that Honda's advertisements varied widely over the years at issue, and that more thorough information was available to consumers at dealerships and in publicly available media. Indeed, only 4 persons—0.2% of the putative class—complained to Honda about any supposed misrepresentations about CMBS, and many buyers took issue with plaintiffs' theory of deception when one plaintiff aired it on the Internet. Nor is the result affected by the California Supreme Court's recent decision in the *Tobacco II Cases*, 207 P.3d 20 (Cal. 2009). That decision applied unique California state-law class certification principles that conflict with Rule 23 and Article III. In federal

class actions, not only the class representative, but class members as well must be injured and have standing. Finding predominance under the unjust enrichment claim required a further stretch because the equitable considerations important to that claim are especially individualized. The "close look" that Rule 23(b)(3) requires, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997), would have precluded certification because there was no evidence of predominance. Because it rests on improper factual and legal shortcuts, the certification should be vacated.

STANDARD OF REVIEW

A district court's decision to certify a class is reviewed for abuse of discretion. *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1237 (9th Cir. 2001). A court abuses its discretion if it applies an impermissible legal criterion or relies on clearly erroneous finding of fact. *See Molski v. Gleich*, 318 F.3d 937, 946 (9th Cir. 2003). The district court's choice-of-law determination is reviewed *de novo*. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1187, *amended*, 273 F.3d 1266 (9th Cir. 2001).

ARGUMENT

I. THE DISTRICT COURT IMPROPERLY CURTAILED THE PREDOMINANCE ANALYSIS UNDER RULE 23 BY APPLYING CALIFORNIA LAW TO THE CLAIMS OF A NATIONWIDE CLASS.

An action may be certified for class treatment under Rule 23 only if the individual claims of each plaintiff involve questions of law or fact common to

every plaintiff's claim (Fed. R. Civ. P. 23(a)) and those common questions predominate over individual issues (*id*. 23(b)). The approximately 2,000 members of the nationwide class assert claims for recovery under three California statutes—the UCL, FAL, and CLRA—and the California law of unjust enrichment. All of the named plaintiffs and the vast majority of class members live outside California; they encountered the alleged misrepresentations, and bought their vehicles, in other states. The analysis of commonality and predominance must begin by determining which law governs each class member's claims. *See Zinser*, 253 F.3d at 1189.

Most federal courts have refused to certify nationwide classes under a single state's consumer protection and unjust enrichment laws. Indeed, "[a] principal purpose of the Class Action Fairness Act is to correct what former Acting Solicitor General Walter Dellinger has labeled a wave of 'false federalism[,]" in which "state courts faced with interstate class actions have undertaken to dictate the substantive laws of other states by applying their own laws to ... other states." S. Rep. No. 109–14, at 61 (2005); *see id.* at 23-27. Congress understood and intended that federal courts would not follow this course. *Id.* at 63-64. The district court here went its own way in holding that all claims against Honda could be governed

by California law, shortcutting the predominance analysis and easing the path to certification.[3]

The Seventh Circuit recently warned of "the tendency, when the claims in a federal class action are based on state law, to undermine federalism." *Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742, 745 (7th Cir. 2008). The certification in this case sacrificed federalism for expedience.

A. California's Choice-of-Law Rules Preclude Nationwide Application of California Law Here.

The district court's finding of predominance rested in large part on its decision to apply California law to the claims of the out-of-state plaintiffs and putative class members from 43 jurisdictions. Although it properly "look[ed] to the forum state's choice of law rules to determine the controlling substantive law," *Zinser*, 253 F.3d at 1187, the court misapplied California's choice-of-law analysis.

That three-step "governmental interest analysis" first considers whether "the applicable rule of law in each potentially concerned state … materially differs from the law of California." *Washington Mut. Bank, NA v. Sup. Ct.*, 15 P.3d 1071, 1080 (Cal. 2001). If there are material differences, the court must determine whether each other state "has an interest in having its own law applied," and, if so, whether

[3] Some courts have certified nationwide *settlement* classes under a single state's law. Those decisions should be disregarded in deciding whether to certify a litigation class because "a district court need not inquire whether the case, if tried,

the interests of that state or those of California would be "'more impaired' if its law were not applied." *Id.* at 1081.

1. *The Substantial and Outcome-Determinative Variations Among State Consumer Protection And Unjust Enrichment Laws Are "Material."*

Unless "the relevant laws of each state are identical," the court must determine whether the laws of the other implicated states "materially differ[] from the law of California." *Washington Mutual*, 15 P.3d at 1080. No binding California precedent defines "material" for this purpose, but courts applying similar analyses have found material those differences that "have a significant *possible* effect on the outcome of the trial." *Fin. One Pub. Co. v. Lehman Bros. Special Fin., Inc*., 414 F.3d 325, 331 (2d Cir. 2005) (emphasis in original) (internal quotation marks omitted); *In re Bankers Trust Co.*, 752 F.2d 874, 882 (3d Cir. 1984) ("significant effect on the outcome of the trial"). *Cf. Stonewall Surplus Lines Ins. Co. v. Johnson Controls, Inc.*, 17 Cal. Rptr. 2d 713, 718 (Cal. App. 1993) (engaging in full choice-of-law analysis because the "substantive law of California leads to a different result than the substantive law of Wisconsin"). *See also Rivera v. Bio Engineered Supplements & Nutrition, Inc.*, 2008 WL 4906433, at *2 (C.D. Cal. Nov. 13, 2008).

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would present intractable management problems, ... for the proposal is that there be no trial." *Amchem*, 521 U.S. at 620.

a. *State Consumer Protection Laws Vary Materially.*

As court after court has held in declining to certify similar nationwide classes, state consumer laws "vary considerably." *In re Bridgestone/Firestone*, 288 F.3d 1012, 1018 (7th Cir. 2002). Indeed, "the different states have material variances between their consumer protection laws …." *In re St. Jude Medical, Inc.*, 425 F.3d 1116, 1120 (8th Cir. 2005).[4]

In reaching the contrary conclusion, the district court ignored numerous potentially outcome-determinative variations notwithstanding the comprehensive explication of the divergences in Honda's comprehensive appendix of state law variations. (ER117-256.) Almost every element of every claim reflects substantial variation among jurisdictions.

For example, reliance is required for CLRA claims "sounding in fraud." *Buckland v. Threshold Enterprises, Ltd.*, 66 Cal. Rptr. 3d 543, 551 (Cal. App. 2007). Under the UCL, named plaintiffs in class actions must plead and prove "actual reliance" to have standing to press a UCL claim (*Tobacco II*, 207 P.3d at

[4] Many district courts have reached the same conclusion. *See In re Grand Theft Auto Video Game Consumer Litig.*, 251 F.R.D. 139, 147 (S.D.N.Y. 2008) (some "differences" in state consumer-fraud law "are outcome determinative"); *In re Prempro*, 230 F.R.D. 555, 564 (E.D. Ark. 2005) ("consumer fraud and unfair competition laws of the states differ with regard to the defendant's state of mind, type of prohibited conduct, proof of injury-in-fact, available remedies, and reliance"); *Lyon v. Caterpillar, Inc.*, 194 F.R.D. 206, 219 (E.D. Pa. 2000); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 194 F.R.D. 484, 489 (D.N.J. 2000).

39), although under the unique California representative action they need not demonstrate that absent class members also have standing (*id.* at 34).[5] Yet this reliance requirement materially conflicts with the consumer protection statutes of Ohio, Florida, New Jersey, and Massachusetts, and New York, among others, which do not require reliance.[6] Given the significant questions regarding which class members saw or cared about which advertisements, distinctions in the reliance standard could be dispositive.

The district court did not address these outcome-determinative variations or those in other claim elements. For example, although scienter is not required for a UCL, FAL, or CLRA claim, the consumer protection statutes of many states do require some form of scienter, whether knowledge, intent, or willfulness.[7]

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[5] For most purposes we treat questions under the UCL and the FAL together.

[6] *See Guth v. Allied Home Mtg. Capital Corp.*, 2008 WL 2635521, at *6-*7 (Ohio. App. 2008); *Egwuatu v. South Lubes, Inc.*, 976 So.2d 50, 53 (Fla. App. 2008); *DaBosh v. Mercedes Benz USA, Inc.*, 874 A.2d 1110, 1121 (N.J. Super. App. 2005); *Sebago, Inc. v. Beazer East, Inc.*, 18 F. Supp. 2d 70, 103 (D. Mass. 1998) (Massachusetts law); *Stutman v. Chem. Bank*, 95 N.Y.2d 24, 731 N.E.2d 608, 611-12 (N.Y. 2000).

[7] *See, e.g.*, Colo. Rev. Stat. 6-1-105(1)(e), (g), (u) (knowingly); Idaho Code § 48-603 (knowledge) ; 815 Ill. Comp. Stat. 505/2 (construed in *Siegel v. Levy Org. Dev. Co.*, 607 N.E.2d 194, 198 (Ill. 1992) (intent to induce reliance)); Kan. Stat. Ann. §§ 50-626(a), (b)(2)-(4) (willful, knowing, or with reason to konw); Mich. Comp. Laws Ann. § 445.911(6) (intent to deceive); Nev. Rev. Stat. Ann. 598.0915 (knowingly); N.J. Stat. Ann. § 56:8-2 (knowledge and intent for omissions); Or. Rev. Stat. § 646.638(1) (willful for damages); Utah Code §§ 13-11-4(2), 13-11-5(3) (knowing or intentional); W. Va. Code § 46A-6-102(M) (intent to induce reliance). *See also Thompson v. Am. Tobacco Co.*, 189 F.R.D. 544, 553 (D. Minn.

Differing mental states, of course, require differing proof. Many more states do not permit class actions under their consumer protection statutes.[8] And the statutes of limitations for the UCL (4 years, Cal. Bus. & Prof. Code § 17208) and the CLRA (3 years, Cal. Civ. Code § 1783) conflict with the 1- to 6-year limitations periods of similar statutes in other states, which may bar some class members' claims.[9]

There also are material variations in the remedies available under different state consumer protection laws. Restitution and injunctive relief are the only remedies available under the UCL. Cal. Bus. & Prof. Code § 17203; *Korea Supply v. Lockheed Martin Corp.*, 63 P.3d 937, 943 (Cal. 2003). Yet other states'

1999) (intent to induce reliance) (Minnesota law); *Debbs v. Chrysler Corp.*, 810 A.2d 137, 155 (Pa. Super. 2002) (knowledge or reckless disregard); *Cooper v. GGGR Invest., LLC*, 334 B.R. 179, 188 (E.D. Va. 2005) (Virginia law) (intent).

[8] *See* Ala. Code § 8-19-10(f); Ga. Code Ann. § 10-1-399 (a); *Arnold v. Microsoft Corp.*, 2001 WL 193765, at * 6 (Ky. Cir. Ct. July 21, 2000); La. Rev. Stat. Ann. § 51:1409(A); Miss. Code Ann. § 75-24-15(4); Va. Code Ann. § 59.1-204, -204.1 ("individual action"); *Am. Online v. Sup. Ct.*, 108 Cal. Rptr. 2d 699, 712 (Cal. App. 2001) (noting "absence of any provision" permitting class actions under Virginia Act).

[9] Fla. Stat Ann. § 95.11(3)(f) (4 years); 815 Ill. Comp. Stat. 505/10a(e) (3 years); Md. Code Ann. Cts. & Jud. Proc. § 5-101 (3 years); Mass. Gen. Law ch. 260, § 5(A) (4 years); N.J. Stat. Ann. § 2A:14-1 (6 years); *Galden v. Guardian Life Ins. Co. of Am.*, 750 N.E.2d 1078, 1082 (N.Y. 2001) (3 years); Ohio Rev. Code § 1345.10(c) (2 years); Or. Rev. Stat. § 646.638(6) (1 year from deceptive practice); 42 Pa. Cons. Stat. § 5525(8) (4 years); Tex. Bus. & Com. Code § 17.565 (2 years); Va. Code Ann. § 59.1-204.1(A) (2 years); Wash. Rev. Code § 19.86.120 (4 years).

consumer protection statutes permit actual damages,[10] treble damages,[11] punitive damages,[12] and attorney's fees.[13]

The district court disregarded the variations in remedies on the ground that "a CLRA violation, which serves as a predicate UCL violation under the UCL's 'unlawful' prong, provides for each of the remedies [Honda] contends would be unavailable with the application of California law to a nationwide class." (ER19.) That effort to mix and match causes of action to gloss over material differences was improper: the "conflicts test must be applied to *each* claim upon which certification is sought." *Zinser*, 253 F.3d at 1188 (emphasis in original). And plaintiffs also seek UCL relief for conduct that allegedly is "fraudulent" or "unfair" rather than "unlawful" (Cal. Bus. & Prof. Code § 17200). *See* ER 465-69.

More fundamentally, even if plaintiffs recovered punitive damages under the

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[10] Fla. Stat. Ann. § 501.211; 815 Ill. Comp. Stat. 505/10a(a); Md. Code Ann., Com. Law § 13-408(a); Mass. Gen. Laws ch. 93A § 9(3); N.J. Stat. Ann. § 56:8-19; *Super Glue Corp. v. Avis Rent A Car Sys., Inc.*, 517 N.Y.S.2d 764, 767 (N.Y. App. Div. 1987); Ohio Rev. Code Ann. § 1345.09(A) & (B); 73 Pa. Cons. Stat. § 201-9.2(a); Tex. Bus. & Com. Code § 17.50(b), (d); Wash. Rev. Code Ann. § 19.86.090.

[11] N.J. Stat. Ann. § 56:8-19; Ohio Rev. Code Ann. § 1345.09(B); 73 Pa. Cons. Stat. § 201-9.2(a); Wash. Rev. Code Ann. § 19.86.090.

[12] 815 Ill. Comp. Stat. 505/2AA; Tex. Bus. & Com. Code § 17.50.

[13] Fla. Stat. Ann. § 501.211; 815 Ill. Comp. Stat. 505/10a(c); Md. Code Ann., Com. Law § 13-408(b); Mass. Gen. Laws ch. 93A § 9(4); N.J. Stat. Ann. § 56:8-19; Ohio Rev. Code Ann. § 1345.09(F); 73 Pa. Cons. Stat. § 201-9.2(a); Tex. Bus. & Com. Code § 17.50; Wash. Rev. Code Ann. § 19.86.090.

CLRA, extending them to a nationwide class would violate the Due Process Clause because "[a] State cannot punish a defendant for conduct that may have been lawful where it occurred. … Nor, as a general rule, does a State have a legitimate interest in imposing punitive damages for unlawful acts committed outside of the State's jurisdiction." *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 421 (2003) (citations omitted). Thus, punitive damages could not be imposed based on a violation of one of the CLRA's substantive proscriptions if the conduct was lawful where it occurred.

b. *State Unjust Enrichment Jurisprudence Varies Materially.*

As most courts to address the matter have found, unjust enrichment jurisprudence varies materially from state to state. *See Rivera*, 2008 WL 4906433 at *2 (declining to certify nationwide class under California law for this reason). In California, a plaintiff must show (1) that the defendant was enriched at the plaintiff's expense, and (2) under the circumstances between the parties, it is unjust for the defendant to retain the benefit. *See McBride v. Boughton*, 20 Cal. Rptr. 3d 115, 122 (Cal. App. 2004). That is far from a universal standard; state courts "do not articulate a single set of elements by which they may obtain consistent results." Candace S. Kovacic, *A Proposal to Simplify Quantum Meruit Litigation*, 35 Am. U. L. Rev. 547, 559 (1986). For example,

> Some states do not specify the misconduct necessary to proceed, while others require that the misconduct include dishonesty or fraud. Other states only allow a claim of unjust enrichment when no adequate legal remedy exists. Many states, but not all, permit an equitable defense of unclean hands. Those states that permit a defense of unclean hands vary significantly in the requirements necessary to establish the defense.

Thompson v. Bayer Corp., 2009 WL 362982, at *5 (E.D. Ark. Feb. 12, 2009) (quoting *Clay v. American Tobacco Co.*, 188 F.R.D. 483, 501 (S.D. Ill. 1999)).[14]

There is no uniform definition of "unjust." Minnesota defines unjust to "mean illegally or unlawfully." *Servicemaster of St. Cloud v. GAB Bus. Servs., Inc.*, 544 N.W.2d 302, 306 (Minn. 1996) (internal quotations omitted). Yet neither Illinois nor New York requires fault to prove unjust enrichment. *Firemen's Annuity & Benefit Fund v. Municipal Employees' Annuity & Benefit Fund*, 579 N.E.2d 1003, 1007 (Ill. App. 1991); *Mayer v. Bishop*, 551 N.Y.S.2d 673 (N.Y. App. Div. 1990). And New Hampshire allows unjust enrichment claims against a defendant who "innocently receive[d] a benefit and passively accept[ed] it." *Petrie-Clemons v. Butterfield*, 441 A.2d 1167, 1172 (N.H. 1982).

Other elements of unjust enrichment claims also vary. In Georgia, for example, unjust enrichment is proven when "the party sought to be charged has been conferred a benefit by the party contending an unjust enrichment which the

[14] *See* also. *e.g..*, *In re ConAgra Peanut Butter Prods. Liab. Litig*., 251 F.R.D. 689, 695-96 (N.D. Ga. 2008) (highlighting several material differences in state

benefited party equitably ought to return or compensate for." *Georgia Title Distribs., Inc. v. Zumpano Enters., Inc.*, 422 S.E.2d 906, 908 (Ga. App. 1992). In Massachusetts, "the plaintiff" must "demonstrate[] that [the] defendant was enriched under circumstances which make retention of money unjust." *Maruho Co. v. Miles, Inc.*, 1993 WL 81453, at *6 (D. Mass. March 8, 1993).

The states that have articulated more precise elements differ markedly in their unjust enrichment standards. For example:

- Texas and Washington require that (1) valuable services were rendered or materials furnished; (2) for the person sought to be charged; (3) who accepted, used and enjoyed them; and (4) under circumstances that provided reasonable notice that the plaintiff expected to be paid.[15]
- By contrast, Arizona, Delaware, and Louisiana require (1) an enrichment; (2) an impoverishment; (3) a connection between the enrichment and the impoverishment; (4) an absence of "justification" or "cause" for the

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unjust enrichment laws); *Prempro*, 230 F.R.D. at 563; *In re Baycol Prods. Litig.*, 218 F.R.D. 197, 214 (D. Minn. 2003).

[15] *See Bashara v. Baptist Mem. Hosp.*, 685 S.W.2d 307, 310 (Tex. 1985); *Bailie Communications, Ltd. v. Trend Bus. Sys., Inc.*, 810 P.2d 12, 17 (Wash. App. 1991).

enrichment and impoverishment; and (5) the absence of a remedy provided by law.[16]

- Idaho, Kentucky, Rhode Island, and Tennessee use these terms: (1) A benefit conferred upon the defendant by the plaintiff; (2) the defendant's appreciation of the benefit; and (3) the defendant's acceptance of the benefit under circumstances that make it inequitable for him to retain it without paying its value.[17] Florida, Missouri, Nevada, and Pennsylvania additionally require proof that the defendant ***retained*** the benefit under circumstances that make it inequitable for him not to pay its value.[18]

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[16] *See Community Guardian Bank v. Hamlin*, 898 P.2d 1005, 1008 (Ariz.. 1995); *Jackson Nat'l Life Ins. Co. v. Kennedy*, 741 A.2d 377, 393-94 (Del. Ch. 1999); *Minyard v. Curtis Prods., Inc.*, 205 So.2d 422, 432 (La. 1967).

[17] *See Aberdeen-Springfield Canal Co. v. Peiper*, 982 P.2d 917, 923 (Idaho 1999); *Guarantee Elec. Co. v. Big Rivers Elec. Corp.*, 669 F. Supp. 1371, 1380-81 (W.D. Ky. 1987) (Kentucky law); *Anthony Corrado, Inc. v. Menard & Co. Bldg. Contractors*, 589 A.2d 1201, 1201-02 (R.I. 1991); *Paschall's, Inc. v. Dozier*, 407 S.W.2d 150, 155 (Tenn. 1966).

[18] *See Swindell v. Crowson*, 712 So.2d 1162, 1163 (Fla. App. 1998) (per curiam); *Ernst v. Ford Motor Co*., 813 S.W.2d 910, 918 (Mo. App. 1991); *Topaz Mut. Co. v. Marsh*, 839 P.2d 606, 613 (Nev. 1992); *Styer v. Hugo*, 619 A.2d 347, 350 (Pa. Super. 1993).

- Kansas, Maryland, and Wisconsin permit proof that the defendant either appreciated or merely knew of the benefit and either accepted or retained it under circumstances making it inequitable for him not to pay for it.[19]

These divergences create the potential for inconsistent and unpredictable outcomes across jurisdictions.

The variations identified above are "material" under any reasonable choice-of-law analysis. *See In re Grand Theft Auto Video Game Consumer Litig.*, 251 F.R.D. 139, 147, 150 (S.D.N.Y. 2008) (finding a "true conflict" between state consumer protection and unjust enrichment laws under California's choice-of-law analysis). The district court's contrary holding was erroneous.

B. The District Court Compounded Its Error By Concluding That No State Other Than California Has An Interest In This Litigation.

When the relevant state laws materially differ, the trial court must "determine what interest, if any, each state has in having its own law applied to the case." *Washington Mutual*, 15 P.3d at 1080. The district court held that no state other than California has an interest in this litigation. This Court has held, to the contrary, that "every state has an interest in having its law applied to its resident claimants." *Zinser*, 253 F.3d at 1187. And class members' home states have an

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[19] *See J.W. Thompson Co. v. Welles Prods. Corp.*, 758 P.2d 738, 745 (Kan. 1988); *County Comm'rs of Caroline County v. J. Roland Dashiell & Sons, Inc.*, 747 A.2d 600, 607 n.7 (Md. 2000); *Watts v. Watts*, 405 N.W.2d 303, 313 (Wis. 1987).

interest not only in protecting consumers from in-state injuries caused by foreign corporations but also in delineating the scope of recovery under their laws, according to their often "different conceptions of what adequate compensation is." *Spence v. Glock, Ges.m.b.H.*, 227 F.3d 308, 314 (5th Cir. 2000).

The California courts seek guidance from "the modern, mainstream approach adopted in the Restatement [(Second) of Conflict of Laws]." *Nedlloyd Lines, B.V. v. Superior Court*, 824 P.2d 1148, 1151 (Cal. 1992). The Restatement analysis of comparative state interests considers "(a) the place ... where the plaintiff acted in reliance upon the defendant's representations, (b) the place where the plaintiff received the representations, (c) the place where the defendant made the representations, (d) the ... place of incorporation and place of business of the parties." Restatement (Second) of Conflict of Laws § 148.

In addition, whenever "any two of the above-mentioned contacts, *apart* from the defendant's domicile, state of incorporation or place of business, are located wholly in a single state, this will usually be the state of the applicable law with respect to most issues." *Id.*, Com. j. The district court summarily dismissed the interests of the class members' home jurisdictions even though in almost every instance each class member's home state—and not California—would be both "the place ... where the plaintiff acted in reliance upon the defendant's representations" and "the place where the plaintiff received the representations." *Id.* § 148. There

was no evidence that the named plaintiffs (or absent class members outside California) received the alleged representations or acted on them in California. Rather, those events—and any deception, reliance or injury—occurred at the time of purchase in other states. *See Grand Theft Auto*, 251 F.R.D. at 149. As this Court has recognized, "[a]lthough the situs of the injury is no longer the sole consideration in California choice-of-law analysis, California courts have held that, 'with respect to regulating or affecting conduct within its borders, the place of the wrong has the predominant interest.'" *Abogados v. AT&T, Inc.*, 223 F.3d 932, 935 (9th Cir. 2000) (quoting *Hernandez v. Burger*, 162 Cal. Rptr. 564, 568 (Cal. App. 1980)).

The Restatement analysis and *Abogados* lead to a straightforward result reinforced by constitutional considerations. The Supreme Court has recognized that, as a "basic principle of federalism[,] each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders." *State Farm*, 538 U.S. at 422. Most of the states have acted to protect their own citizens by prohibiting deceptive trade practices, but they "need not, and in fact do not, provide such protection in a uniform manner." *BMW of North Am. v. Gore*, 517 U.S. 559, 569 (1996). To the contrary, each state has made judgments about laws that will best protect its residents while balancing other state interests, resulting in

"a patchwork of rules representing the diverse policy judgments of lawmakers in 50 States." *Id.* at 570.

For example, New Jersey intended its Consumer Fraud Act "to be 'one of the strongest consumer protection laws in the nation.'" *New Mea Constr. Corp. v. Harper*, 497 A.2d 534, 543 (N.J. Super. 1985). Similarly, in 1993 Florida added language to its Deceptive and Unfair Trade Practice Act to protect "the 'consuming public' from those who engage in '*unconscionable' acts or practices*," *Delgado v. J.W. Courtesy Pontiac GMC-Truck, Inc.*, 693 So.2d 602, 606-06 (Fla. App. 1997)—a breadth deleted from early drafts of the CLRA by the California Legislature (ER369-74), which instead chose to "define [unlawful] practices in a fair and specific manner." (ER374.) Massachusetts likewise broadened its Consumer Protection Act to cover, not only individuals who suffer a "loss of *money or property* … as a result of … an unfair or deceptive practice," but also those who show any form of "injury" due to an "act or practice declared to be unlawful" by the statute. *Leardi v. Brown*, 474 N.E.2d 1094, 1101 (Mass. 1985). This amendment "substantially broadened the class of persons who could maintain actions." *Id.* (citations omitted). In stark contrast, California citizens approved Proposition 64 and inserted the same language that Massachusetts deleted. *See* Cal. Bus. & Prof. Code § 17204.

Against these state interests, plaintiffs contended that only California's interests are implicated because the allegedly deceptive advertising "emanated from" California. That one-factor test has attracted little judicial support.[20] That is because the primary focus of state consumer protection laws is to protect consumers in each state. The contrary view would allow California to supplant its sister states' regulation of the sale and marketing of products, and the protection of consumers, within their borders so long as a California company was involved.

Even if the alleged deceptive conduct "emanated from" California, that fact does not displace others states' interest in this litigation. There is no harm, and no cause of action, unless the alleged misrepresentation is communicated and has an effect. "Fraud in the air, so to speak, is not actionable. It is the operative effect of the fraud that gives rise to the cause of action and conditions the extent of recovery." *Chisholm v. House*, 183 F.2d 698, 703 (10th Cir. 1950). No consumer harm could occur until someone heard and acted upon the allegedly deceptive representations by buying a product that (plaintiffs claim) had been

[20] *See Lyon*, 194 F.R.D. at 217 (rejecting plaintiffs' claim that Illinois law should apply because the common misrepresentations all originated from defendant's management in Illinois); *see also In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 348-49 (D.N.J. 1997) (laws of plaintiffs' home states applied even though plaintiffs alleged that Ford's headquarters are located in Michigan, where any relevant decisions were made and any misrepresentations originated).

misrepresented. *See Grand Theft Auto*, 251 F.R.D. at 149. Yet those acts occurred in other states, and (plaintiffs claim) injured other states' citizens.

Finally, California has no legitimate interest in imposing its own sense of justice nationwide. There is a strong presumption *against* the extraterritorial application of state statutes. That presumption is grounded in the constitutional limitations on a state's power to regulate activities occurring outside its borders. *BMW*, 517 U.S. at 568-73. Under the logic of the decision below, California law applies nationwide to virtually any consumer action against a California corporation. But other states have greater interests in protecting their own citizens, and regulating commerce within their borders, than does California in extending its legal rules throughout the nation. The district court was wrong to conclude otherwise.

C. Other States' Interests Would Be "More Impaired" If California Law Applied Nationwide.

The final step of the choice-of-law analysis requires a determination of "which state's interest would be more impaired if its policy were subordinated to the policy of the other state." *Offshore Rental Co. v. Continental Oil, Co.*, 583 P.2d 721, 726 (Cal. 1978); *Washington Mutual*, 15 P.3d at 1081. This "comparative impairment" analysis "does not involve the court in 'weighing' the conflicting governmental interests 'in the sense of determining which conflicting law manifest[s] the 'better' or the 'worthier' social policy on the specific issue"

because "'[a]n attempted balancing of conflicting state policies in that sense ... [would be] difficult to justify in the context of a federal system in which, within constitutional limits, states are empowered to mold their policies as they wish.'" *Offshore Rental*, 583 P.2d at 726 (citations omitted).

In concluding that "no state has an interest in *denying* its citizens recovery under California's potentially more comprehensive consumer protection laws" (ER20), however, the district court necessarily concluded that California law is better. Yet different states' consumer fraud statutes differ precisely because each state has chosen a different balance between protecting its residents and maintaining economic growth and business development, and each state, no doubt, views its statute as the best. *See* pp. 31-32, *supra*. *See also Tucci v. Club Mediterranee, S.A.*, 107 Cal. Rptr. 2d 401, 408-409, 411 (Cal. App. 2001) (noting that interests served by workers compensation laws include "fostering business investment and development" and "defining and limiting liability").

The comparative impairment inquiry allocates respective spheres of influence to achieve "the maximum attainment of underlying purpose by *all* governmental entities." *Kearney v. Salomon Smith Barney, Inc.*, 137 P.3d 914, 918 (Cal. 2006) (internal quotations omitted; emphasis retained). Just as a corporation's home state "has no legitimate interest in protecting nonresident shareholders" as opposed to "local investors" (*Edgar v. MITE Corp.*, 457 U.S. 624, 644

(1982)), "California has no greater interest in protecting other states' consumers than other states have in protecting California's." *Discover Bank v. Sup. Ct.*, 36 Cal. Rptr. 3d 456, 462 (Cal. App. 2005). California's interest in regulating unlawful conduct within its borders is fully served by allowing California residents to sue a California-based corporation under California law. Yet applying California law to the entire nationwide class asserted here would severely undermine the varying and equally considered policy judgments of 43 other jurisdictions.

In this regard, the governmental interest analysis requires that courts consider "the relative commitment of the respective states to the laws involved," "the history and current status of the states' laws," and "the function and purpose of those laws." *Washington Mutual*, 15 P.3d at 1081. This analysis reinforces the need to apply the law of each class member's state of purchase.

For example, the Pennsylvania legislature in December 1996 expanded the state's consumer protection law to include "any other fraudulent *or deceptive* conduct which creates a likelihood of confusion or misunderstanding," removing earlier requirements to satisfy the elements of common-law fraud. *Commonwealth v. Percudani*, 825 A.2d 743, 746-47 (Pa. Commw. 2003). The Ohio Consumer Sales Practices Act permits recovery for "any damages," and including actual damages, treble damages, and attorney's fees. *Einhorn v. Ford Motor Co*, 548

N.E.2d 933, 936 (Ohio 1990) (emphasis added). Similarly, the New York Consumer Protection Act provides "a mechanism to protect the public from 'all' deceptive acts and practices." *N.Y. Public Int. Research Group, Inc. v. Insurance Inf. Institute*, 531 N.Y.S.2d 1002, 1006 (N.Y. Sup. 1988). Consistent with this objective, the Act has relaxed standing requirements which require that plaintiffs prove actual injury, but not necessarily pecuniary harm. *Stutman v. Chem. Bank*, 731 N.E.2d 608, 612 (N.Y. 2000). The interests of these states will be "more impaired" if California's more restrictive consumer protection statutes are applied nationwide. Conversely, the interests in fostering business activity promoted by the states that limit liability to acts undertaken with scienter (*see* p. 22 & n.7, *supra*) would be more impaired by the imposition of California's looser liability standards.

Other states have made similar policy decisions on the amount and types of damages that will be available under their state consumer protection laws, who may sue, and whether a class action device is available. The states where class members saw or heard the alleged misrepresentations and made purchases as a result have the greater interest in enforcing their laws. *See Grand Theft Auto*, 251 F.R.D. at 150 ("the interests of the state of purchase would be most impaired if its consumer-fraud laws were not applied"). The district court's conclusion that "no state has an interest in denying its residents recovery under California law" asks

the wrong question and resulted in the court's application of the wrong substantive law to the varying claims of the out-of-state plaintiffs.

D. The Need to Apply The Laws Of Multiple Jurisdictions Precludes Predominance Of Any Common Legal Issues.

As this Court has recognized, the "'proliferation of disparate factual and legal issues is compounded exponentially' when [the] law[s] of multiple jurisdictions apply." *Zinser*, 253 F.3d at 1190 (quoting *Castano v. American Tobacco Co.*, 84 F.3d 734, 741 (5th Cir. 1996)). Because the law of multiple jurisdictions must apply here, the variances in state law will overwhelm any common issues and preclude a finding of predominance.[21] Here, plaintiffs' claims would involve hundreds of issues and sub-issues, requiring the Court to examine, state by state, each issue on which there was a conflict. Indeed, plaintiffs did not even attempt, much less carry out, the "thorough analysis of the applicable state laws" that might have provided support for a conclusion "that state law variations will not swamp common issues and defeat predominance." *Washington Mutual*, 15 P.3d at 1085. The district court cannot sidestep this significant predominance hurdle by certifying a nationwide class under California laws that materially conflict with those of other interested states.

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[21] *See Zinser*, 253 F.3d at 1189 ("[W]here the applicable law derives from the law of the 50 states, . . . differences in state law will compound the disparities among class members from the different states") (internal quotation marks omitted); *see also Washington Mutual*, 15 P.3d at 1083.

II. THE CLASS CERTIFICATION RESTS ON UNSOUND PRESUMPTIONS THAT EACH CLASS MEMBER WAS EXPOSED TO THE SAME REPRESENTATIONS ABOUT THE CMBS, ARRIVED AT THE SAME MISUNDERSTANDING AS THE NAMED PLAINTIFFS, FOUND THAT MISUNDERSTANDING EQUALLY MATERIAL, AND RELIED ON IT IN THE SAME WAY.

Rule 23 requires a "definitive assessment" of predominance. *In re Salomon Analyst Metromedia Litig.*, 544 F.3d 474, 485 (2d Cir 2008). The district court's finding that common issues predominated over individualized ones imposed a legally unwarranted presumption that excused plaintiffs' complete failure to establish that factor with evidence. This Court should vacate the class certification based on what effectively was a presumption of predominance.

A. The District Court Improperly Presumed Reliance To Find That Common Questions Of Fact Predominate Under The CLRA.

Class certification analysis under Rule 23 requires a "careful, fact-based approach." *In re Hydrogen Peroxide Antitrust Litig*., 552 F.3d 305, 326 (3d Cir. 2008). The district court failed to conduct that rigorous factual analysis, relying instead on the evidence-free application of a presumption of reliance to find that common issues both existed and predominated in plaintiffs' CLRA claims. That legal error invalidates the certification of the class.

"[A]ctual reliance is an element of a CLRA claim sounding in fraud." *Buckland*, 66 Cal. Rptr. 3d at 552; *see* Cal. Civ. Code § 1780 (a) (CLRA claimants must have sustained damage "as a result of the use or employment of a proscribed

method, act or practice"). Thus, "a plaintiff suing under the CLRA for misrepresentations in connection with a sale [must] plead and prove she relied on a material misrepresentation." *Cattie v. Wal-Mart Stores, Inc.*, 504 F. Supp. 2d 939, 946 (S.D. Cal. 2007) (citing *Caro v. Procter & Gamble Co*., 22 Cal. Rptr. 2d 419, 433 (Cal. App. 1993)).

In certifying a class, however, the district court entirely overlooked the necessarily individualized inquiry into whether consumers were even *exposed* to any particular advertising over a three-year period. Much less did the court consider which consumers (if any) found the alleged misrepresentations and omissions in certain advertising material to their decision to purchase the package including CMBS, or which consumers in fact relied on the advertising, and which consumers instead were aware of the allegedly concealed information because of Honda's disclosures in other pre-sale materials—yet proceeded with a purchase fully aware of the how CMBS works.

The district court avoided those factual inquiries by simply presuming that each of the nearly 2,000 putative class members received and relied on Honda's alleged representations and omissions while remaining unaware of Honda's pre-sale materials disclosing the allegedly concealed information. This assumed away individual distinctions in critical elements of plaintiffs' claims, and misapplied both California law and the federal law of class certification. "[A]ctual, not

presumed, conformance with the Rule 23 requirements is essential." *Hydrogen Peroxide*, 552 F.3d at 326 (internal quotation marks omitted). The certification decision here falls short of established Rule 23 standards.

1. *No Presumption of Reliance Is Available Under California Law.*

The district court concluded that plaintiffs are "entitled to an inference of reliance" and that "common issues of fact predominated as to the question of materiality" even though it acknowledged that "information about the limitations of the CMBS system may have been available in some media" Honda made available to consumers pre-sale. (ER26.)

To presume away the individual communications and experiences, the district court relied primarily on *Massachusetts Mutual Life Insurance Co. v. Superior Court*, 119 Cal. Rptr. 2d 190 (Cal. App. 2002)—a decision that itself rested on a mistaken assumption that the CLRA applies to insurance contracts. *See Fairbanks v. Sup. Ct.*, 205 P.3d 201, 205 (Cal. 2009). The putative class members in *Massachusetts Mutual* purchased defendant's "vanishing premium" policies after they all heard the same scripted "sales presentation" through defendant's agents—a presentation that did not disclose the company's alleged intent not to provide sufficient dividends to cover premium payments, removing the reason for the purchase. 119 Cal. Rptr. 2d at 192. Although the *Massachusetts Mutual* court held that an "inference of reliance" was appropriate on those facts (*id.* at 198-99),

it also noted that no such inference could arise if subsequent discovery revealed that policy holders were provided with "such a variety of information" as to make "a single determination as to materiality" impossible. *Id.* at 198 n.5. Thus, rather than making class certification under the CLRA a matter of presumption rather than proof, the *Massachusetts Mutual* court found unusually strong and uniform facts establishing that reliance, materiality, causation, and damages could be satisfied on a class-wide basis. No such facts or findings are evident here.

The district court's far broader and more general presumption of reliance finds no more support in *Vasquez v. Superior Court*, 484 P.2d 964 (Cal. 1971) or *Occidental Land, Inc. v. Superior Court*, 556 P.2d 750 (Cal. 1976). Like *Massachusetts Mutual*, *Vasquez* involved an *identical* oral misrepresentation that was "recited by rote to every member of the class." 484 P.2d at 971. The court held that, in light of the allegations that identical misrepresentations were made to each class member, the plaintiffs could establish a false representation and justifiable reliance without individual testimony. *Id*. at 972-73.

In *Occidental*, the California Supreme Court emphasized that *Vasquez* permits a class-wide inference of reliance only when each class member heard an identical misrepresentation. The misrepresentation appeared in a public report that "[e]ach purchaser was *obligated to read* … and *state in writing* that he had done so." *Occidental*, 556 P.2d at 751 (emphasis added).

By contrast, in *Mirkin v. Wasserman*, 858 P.2d 568 (Cal. 1993), the California Supreme Court refused to extend a presumption of reliance to cases based on omissions. *Id.* at 574. The court also reiterated that a class-wide inference of reliance may arise, if at all, only "*when the same material misrepresentations have actually been communicated to each member of a class*." *Id.* at 575 (emphasis in original). Here, however, there is no evidence as to how many of the absent class members saw any of the varying communications about the CMBS, much less which they remembered at the time of purchase.

As authoritatively construed, the CLRA does not permit any presumption of reliance (and thus of causation and injury), much less a class-wide one. The California Supreme Court recently held that "in order to bring a CLRA action, not only must a consumer be exposed to an unlawful practice, but some kind of damage must result." *Meyer v. Sprint Spectrum L.P.*, 200 P.3d 295, 299 (Cal. 2009). The court observed that the CLRA's standing provision requires a "causal link between 'any damage' and the unlawful practice." *Id*. And the court further held that the CLRA does not provide a remedy for "situations in which an allegedly unlawful practice under the CLRA has not resulted in some kind of tangible increased cost or burden to the consumer." *Id.* at 301. *Meyer* makes clear that the CLRA encompasses only cases where actual damage was actually caused by the challenged business practice; causation and injury cannot be presumed.

Any contrary suggestion in *Massachusetts Mutual* is no longer valid as a matter of California law.

Plaintiffs' scant evidence fell far short of supporting a presumption of reliance even if one were available. They presented no evidence that a single other buyer of an Acura RL with CMBS actually saw *any* of the communications alleged to be misleading, much less that they all viewed the *same* communications. Plaintiffs also presented no evidence that a single other buyer understood the communications to mean that the CMBS system would always deploy all three possible stages in sequence and would never fail. Plaintiffs made no effort to prove that any absent class members, let alone most buyers, found the alleged omissions material, or would have altered their behavior had they known how the CMBS actually performed. And plaintiffs presented no evidence that the purchasers of *used* vehicles—many of whom had no transaction or communication with Honda at all—viewed, interpreted, or relied on the challenged communications.

Yet, as explained above (at 6-11), several sources of information about the CMBS were available during each model year. There was no standard script or formulation; rather, each source communicated something different. Even within the same model year, some promotional materials did not discuss the CMBS "stages," while others disclosed the very information plaintiffs claim was

concealed. (ER298, 438-39.) Indeed, the district court recognized that such disclosures were made in pre-purchase materials available at Acura dealerships on the CIC, online on OwnerLink, and in publications like "Acura Style" magazine (ER25-26.) That "variety of information" makes "a single determination as to materiality" impossible, and precludes the use of a class-wide inference of reliance even under *Massachusetts Mutual*. 119 Cal. Rptr. 2d at 198 n.5. More important, under Rule 23(b)(3), "a fraud case" of this kind is "unsuited for treatment as a class action" because "there was material variation in the representations made" and, so far as the evidence shows, equal variation likely "in the kinds or degrees of reliance by the persons to whom they were addressed." Fed. R. Civ. P. 23(b)(3), 1966 Adv. Comm. Notes. Consumers who reviewed the disclosures could not have been misled in the way plaintiffs allege, yet the district court assumed away the individualized inquiry necessary to resolve the materiality of Honda's alleged misrepresentations and omissions under those circumstances.

2. *The District Court Improperly Allocated To Honda The Burden of Rebutting Improperly Presumed Predominance.*

The district court's certification of CLRA claims also rested on an erroneous reversal of the burden of proof. Plaintiffs bore the burden of establishing each element required for class certification by a preponderance of the evidence. *Zinser*, 253 F.3d at 1186. Yet the district court instead placed the burden on Honda to rebut a presumption that *all* members of the purported class relied on

Honda's alleged misrepresentations and omissions notwithstanding the variety of communications and the lack of evidence as to the absent class members' exposure to them. Having held plaintiffs to no evidentiary burden at all, the district court required Honda to rebut plaintiffs' showing—which rested entirely on the availability of certain varying communications—with a specific showing that particular consumers had viewed equally available information that disclosed what was allegedly concealed. Once Honda presented evidence that it had in fact disclosed the allegedly concealed information, it is "the presumption" that should have been "destroyed, creating a myriad of issues of individual reliance." *In re GMC Dex-Cool Prods. Liab. Litig.*, 241 F.R.D. 305, 320-21 (S.D. Ill. 2007) (citations omitted).

Honda's rebuttal cannot be held to a higher standard of specific proof than plaintiffs' assumption-laden contention of predominance. Plaintiffs did not carry their burden, and the district court court's certification should be vacated.

3. *Rule 23 Bars The Application Of A Presumption Of Reliance To Find Predominance.*

The district court's use of a presumption of reliance to support its predominance finding sharply contrasts with the federal "courts' general unwillingness to permit a presumption of reliance/causation" to support class certification "in consumer fraud cases." *In re Neurontin Marketing, Sales Practices and Products Liability Litig.*, 257 F.R.D. 315, 2009 WL 1323835, at *13

(D. Mass. May 13, 2009). For example, the Second Circuit recently refused to apply a "presumption of reliance" in a purported class action where defendants had conducted a "national marketing campaign" that "represented that Light[] [cigarettes] were healthier than full-flavored cigarettes in a 'consistent, singular, uniform' fashion." *McLaughlin v. American Tobacco Co.*, 522 F.3d 215, 223 (2d Cir. 2008). As that court observed, even proof of "widespread and uniform misrepresentation … only satisfies half of the equation" because reliance on the misrepresentation requires individual proof "to overcome the possibility that a member of the purported class purchased Lights for some reason other than the belief that Lights were a healthier alternative." *Id.* In particular, the Second Circuit was "not blind to the indeterminate likelihood" that several class members "were *aware* that Lights are not, in fact, healthier than full-flavored cigarettes, and they therefore could not have relied on defendants' marketing materials in deciding to purchase Lights." *Id.* at 226.

Unlike the district court in the present case, the Second Circuit did not shift the burden to the defendant to show that particular class members had received corrective disclosures. Rather, the availability of accurate information, and the "indeterminate likelihood" that some absent class members knew of it, established sufficient differences "in plaintiffs' knowledge and levels of awareness [to] defeat the presumption of reliance." *Id.*

By contrast, the district court here did disregard "the indeterminate likelihood" that absent class members were aware of the actual functioning of the CMBS before making their purchases. And the court certified a class notwithstanding the specific availability of that information online and at the point of sale, and the lack of evidence about what, if any, allegedly misleading communications the absent class members had received.

The Seventh Circuit has also rejected the use of a "presumption of reliance" as a shortcut to a finding of predominance in a consumer deception case. The plaintiff in *Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742 (7th Cir. 2008), contended that Sears misrepresented that the drum in its Kenmore drier was made of "Stainless Steel." The plaintiffs alleged he had understood the words "stainless steel" imprinted on the dryer and in point of sale advertising materials to mean that all of the steel in the drum was stainless. In reversing the district court's certification order, the court of appeals stated that "the proposition that [other dryer purchasers] shared [the plaintiff's] understanding of Sears' representation … is, to put it mildly, implausible, and so would require individual hearings to verify." *Id.* at 748.

The certification in this case rested on an assumption of common understanding that was at least as unfounded as that rejected in *Thorogood*. In presuming reliance on widely varying promotional materials by all class members,

the district court assumed not only that all class members were exposed to the same materials, but also that they shared a common interpretation of Honda's advertising. The only evidence, however, was contrary: one of the plaintiffs had to admit that, when he posted a complaint about the advertising on a website, other buyers commented that they had not misunderstood the operation of the CMBS. (ER175.) And only two persons apart from the named plaintiffs ever complained on that score to Honda. (ER376-77.)

The district court further departed from federal class certification law in applying a presumption of reliance to "mixed claims" that are premised on both affirmative misrepresentations and omissions. *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 666 (9th Cir. 2004). This Court has explained that "[t]he shortcut of a presumption of reliance typically has been applied in cases involving securities fraud and, even then, … only in cases primarily involving 'a failure to disclose'—that is, cases based on omissions as opposed to affirmative misrepresentations." *Id*. But cases that "are best characterized as either affirmative misrepresentation or 'mixed claims' … would not be entitled to the presumption" even if any presumption were available outside the special context of the securities markets. *Id.*

This is at best a "mixed claims" case. Plaintiffs alleged that Honda "made" both "misrepresentations and material omissions about the CMBS' collision

avoidance assist system which Honda alleges to be comprised of three separate stages of alert and mitigation." (ER448.) Thus, plaintiffs alleged that Honda "consistently" had both "misrepresented and concealed material facts" about the deployment of CMBS. (ER454.) This is precisely the type of "mixed claim" case that "would not be entitled to the presumption" of reliance if this were a federal securities case. *See Poulos*, 379 F.3d at 666. And under state law, reliance cannot be presumed in an omissions case, either. *Mirkin*, 858 P.2d at 573-74.

Moreover, plaintiffs presented no evidence that any class member (let alone any significant majority) saw Honda's allegedly deceptive advertising before their purchases. Indeed, that is unlikely because most of that advertising was disseminated during the 2006 model year and did not continue afterward. But in presuming reliance, the district court necessarily concluded that consumers who purchased vehicles in 2007, 2008, or 2009—even consumers who purchased used vehicles—viewed and relied on advertising that was not available after 2006. That presumption was insupportable.

B. The Predominance Finding For Plaintiffs' UCL And FAL Claims Also Rested On Legally Invalid Presumptions.

The district court also abused its discretion in holding that common issues of fact predominate over individual issues with respect to plaintiffs' UCL and FAL claims. As it did with plaintiffs' CLRA claim, the court concluded that "the question of materiality is a common one that could be determined on a class-wide

basis" because Honda did not present evidence that consumers actually viewed its pre-sale disclosures of the CMBS system's limitations. (ER27.) But as discussed above, the court's substitution of unfounded presumptions for evidence in the predominance inquiry under Rule 23 conflicts with federal law, which requires "[a]ctual, not presumed, conformance" with Rule 23 standards. *Hydrogen Peroxide*, 552 F.3d at 326 (internal quotation marks omitted).

There is no basis to presume that absent class members were exposed to the same communications, or were misled by them, much less that the communications bore a causal connection to the loss of any money or property that could be restored to them under the UCL. The California Supreme Court's recent decision in the *Tobacco II Cases*, 207 P.3d 20 (2009), does not relax Rule 23's requirements but rather reflects an aberration of California procedural law that cannot reach into the federal courts. In *Tobacco II*, the court addressed the standing requirements for bringing private class actions under the UCL. Before Proposition 64, the UCL and the FAL permitted anyone in California, even a person with no exposure to the alleged wrongful practice, to seek injunctive and restitutionary relief on behalf of the general public. Proposition 64 limits private party standing to "any person who has suffered an injury in fact and has lost money or property as a result of such unfair competition" (Cal. Bus. & Prof. Code § 17204) and requires compliance with class certification procedures whenever a private seeks to pursue

representative claims on behalf of others (*id.* § 17203).

In *Tobacco II*, the court held that the injury–in-fact and causation requirements for standing apply only to the individual class representatives, not to the unnamed class members. 207 P.3d at 38-39. That is, under California law, a named plaintiff who has suffered injury in fact and loss of property has standing to seek restitutionary relief on behalf of members of the public to whom the unfair practice may have caused no actual harm. That holding retained as much as possible of the former nonclass "representative" action under UCL.

The court also addressed the causation requirements for a plaintiff seeking to establish standing to pursue a UCL class action. The court refused to adopt a presumption of reliance. Rather, a representative plaintiff "must demonstrate actual reliance on the allegedly deceptive or misleading statements, in accordance with well-settled principles regarding the element of reliance in ordinary fraud actions." 207 P.3d at 25-26. The court concluded that named plaintiffs need not necessarily establish individual reliance on specific representations, but limited that holding to the setting of an extensive and long-term advertising campaign—one that lasted over decades—that would make identifying particular communications "unrealistic." *Id.* at 26, 40. No such decades-long campaign is at issue in this case, which involves a small set of identified communications.

Tobacco II does not excuse the plaintiffs here from establishing that the

dispositive issues of exposure, materiality, reliance and causation are predominantly common. Rule 23—and the case-or-controversy requirement Article III of the Constitution—do not permit class actions on behalf of uninjured persons. *See Amchem*, 521 U.S. at 613 ("Rule 23's requirements must be interpreted in keeping with Article III constraints ... .").

Under *Tobacco II*, a class can include members who suffered no injury in fact. But to have Article III standing, a plaintiff must show an injury in fact, a causal connection between the harm and a defendant's complained-of-conduct, and a likelihood that requested relief will redress the harm. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000). And "no class may be certified that contains members lacking Article III standing." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006). The courts of appeals have uniformly rejected the notion that a federal class action may be brought against persons who lack standing in their own right. *See id.*; *Oshana v. Coca-Cola Co.* 472 F.3d 506, 514 (7th Cir. 2006) (affirming denial of class certification because "[c]ountless members of Oshana's putative class" lacked standing because they "could not show any damage, let alone damage proximately caused by Coke's alleged deception"); *Adashunas v. Negley*, 626 F.2d 600, 604 (7th Cir. 1980) (class certification properly denied where it was not clear "that the proposed class members have all suffered a constitutional or statutory violation warranting some

relief"). *See also Vuyanich v. Republic Nat'l Bank of Dallas*, 723 F.2d 1195, 1199 (5th Cir. 1984) ("a class representative must possess the same interest and suffer the same injury as the class members" (quoting *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 216 (1974)). Likewise, the district courts have repeatedly recognized that only "those ascertainable individuals who have standing to bring the action" may be part of a class. *Zelman v. JDS Uniphase Corp.*, 376 F. Supp. 2d 956, 966 (N.D. Cal. 2005).[22]

Accordingly, *Tobacco II* cannot rescue the UCL class action here. Not only do the district court's presumptions of common exposure, materiality, and reliance go beyond the scope of *Tobacco II*, but a presumption that permits a class to include those without actual injury (and therefore standing) would violate Article III.

But the certification was not supported by evidence that absent class

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[22] *See also In re TJX Cos. Retail Security Breach Litig.* 246 F.R.D. 389, 392 (D. Mass. 2007) ("It is well-established that members of a plaintiff class must all have the legal right to bring suit against the defendant on their own … ."); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F.Supp.2d 289, 334 (S.D.N.Y. 2003) ("each member of the class must have standing with respect to injuries suffered as a result of defendants' actions"); *O'Neill v. Gourmet Sys. of Minn. Inc.*, 219 F.R.D. 445, 453 (W.D. Wis. 2002) ("the proposed class lacks standing"); *In re Copper Antitrust Litig.*, 196 F.R.D. 348, 353 (W.D. Wis. 2000) ("requirement that the plaintiffs and the class they seek to represent have standing"); *Clay*, 188 F.R.D. at 490 ("[t]he definition of a class should not be so broad . . . as to include individuals who are without standing to maintain the action on their own behalf"); *McElhaney v. Eli Lilly & Co.*, 93 F.R.D. 875, 878 (D.S.D. 1982) ("Each class member must have standing to bring the suit in his own right.").

members were exposed to the same representations as the class representatives, shared the same understanding of these communications, or acted upon that understanding to their detriment—in terms of the UCL remedial scheme, by delivering "money or property" that could be "restore[d]." *See* Cal. Bus. & Prof. Code § 17203; *see also id.* § 17535 (FAL). Indeed, there was no evidence that more than two additional buyers believed they had not been adequately informed about the CMBS. Class members who neither saw the communications nor found them misleading cannot have been injured by them. Because these persons have no standing to pursue a claim in federal court in their own right, allowing them to pursue claims through the class action device would impermissibly enlarge their substantive rights through procedural rules. *See Amchem*, 521 U.S. at 613 (noting that "Rule 23's requirements must be interpreted in keeping with ... the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right'") (quoting 28 U.S.C. § 2072(b)).

The district court's application of presumptions of reliance and materiality departs from "[p]roper analysis under Rule 23," which "requires rigorous consideration of all the evidence." *Hydrogen Peroxide*, 552 F.3d at 321. The two proposed class representatives presented no evidence that anyone other than themselves was exposed to, found material, and relied upon any particular alleged misrepresentations and omission. "[R]igorous consideration" of that evidentiary

gap requires a denial of certification, not a presumption to accomplish what the evidence did not.

C. The Unjust Enrichment Claims Are Not Susceptible To Class-wide Proof.

Rule 23(b)(3) requires "a close look at the case before it is accepted as a class action" (*Amchem*, 521 U.S. at 515), yet the district court barely acknowledged the individualized inquiries necessary to resolve plaintiffs' unjust enrichment claims. The same variations in exposure, understanding, and reliance that make individual issues predominant in the statutory claims preclude certification of the unjust enrichment claims as well. Unjust enrichment claims by their nature are exceptionally difficult to adjudicate on a collective basis; each claim requires consideration whether the totality of the circumstances between the plaintiff and the defendant makes it unjust to permit the defendant to retain a benefit even though no legal cause of action exists. *McBride*, 20 Cal. Rptr. 3d at 122. Thus, unjust enrichment claims are fundamentally context-specific and require an individualized examination and balancing of the equities.

As the Eleventh Circuit recently observed, "common questions will rarely, if ever, predominate an unjust enrichment claim, the resolution of which turns on individualized facts." *Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1274 (11th Cir. 2009). To adjudicate an unjust enrichment claim, a trial "court must examine the particular circumstances of an individual case and assure itself that, without a

remedy, inequity would result or persist. Due to the necessity of this inquiry into the individualized equities attendant to each class member, courts … have found unjust enrichment claims inappropriate for class action treatment." *Id.* (collecting cases).

It is rare, if not impossible, that one person's unjust enrichment claim is capable of serving as a proxy for another person's claim, much less as a proxy for the claims of an entire class. Whether it is unjust for one party to retain a purchase price depends on the benefits to the individual purchaser. That is why court after court has declined to certify classes for this purpose. *See id.*[23]

As in *Vega*, the equities surrounding each unjust enrichment claim here turn on "what each [class member] was told and understood." *Id.* at 1275. There is nothing unjust about an RL purchase by one who knew how the CMBS operates,

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[23] *See also, e.g., In re Rezulin Prods. Liab. Litig*., 210 F.R.D. 61, 69 (S.D.N.Y. 2002) ("[T]he question whether an individual class member got his or her money's worth is inherently individual.... Would the defendants' retention of the price paid by class member X be 'unjust'? It depends on whether [the product] benefited that individual and whether the benefits sufficiently outweigh any harm, even in the form of enhanced risk, that the individual sustained."); *Clay*, 188 F.R.D. at 501 ("Thus, the defendants' liability for unjust enrichment to a particular plaintiff depends on the factual circumstances of the particular purchase at issue ... [T]he claim of unjust enrichment is packed with individual issues … ."); *In re Phenyl-propanolamine (PPA) Prods. Liab. Litig.*, 214 F.R.D. 614, 620 n.8 (W.D. Wash. 2003) (unjust enrichment claims "could require individualized factual inquiries into issues such as causation, materiality, notice, and/or breach"); *Lilly v. Ford Motor Co*., 2002 WL 507126, at *2 (N.D. Ill. Apr. 3, 2002) ("Unjust enrichment is an equitable doctrine. There would be individual questions as to whether a particular class member is subject to equitable defenses.")

or who was indifferent to the supposed misrepresentations and omissions that form the basis of the lawsuit. Honda "cannot have been unjustly enriched without proof of deception," *Oshana*, 472 F.3d at 515, but plaintiffs provided no evidence that common issues predominated as to deception, instead hiding behind invalid presumptions.

Plaintiffs also cannot prevail without showing that it would be unjust for them not to recover a certain portion of their vehicles' purchase price from Honda. But whether equity requires that plaintiffs or any class member obtain this result cannot be determined without examining the circumstances surrounding each class member's acquisition of his or her RL. For example, equity may require different results (*a*) for a class member who purchased the CMBS option because he wanted a "three-stage warning" system in response to every threat and (*b*) for a class member who did not care how CMBS worked so long as it reduces the likelihood of rear-end collisions. Whether the operation of the CMBS in fact prevented potentially injurious collisions—as plaintiff Kalsi's system did (ER289)—also would affect the equities. As a further complication, consumers who purchased the safety package because they wanted the ACC or run-flat tire feature, and were indifferent to the CMBS, also would not have an unjust enrichment claim because they got exactly what they wanted.

The district court's abbreviated analysis dispensed with these necessarily individualized inquiries in favor of an evidence-free presumption that all 2,000-plus members of the class shared plaintiffs' concerns about the CMBS, relied on a common interpretation of varying marketing materials, purchased the safety package primarily for the CMBS feature, and were uniformly ignorant of Honda's disclosures concerning the system's capabilities and limitations. Indeed, the court conducted no analysis of these issues, instead simply quoting plaintiffs' assertion that the predominance inquiry was met because "Honda's [alleged] failure to reveal that the CMBS System does not perform reliably 'induces reliance on the part of consumers, which results in consumers' greater propensity to purchase the Acura RL with the $4,000 CMBS option." (ER28.) That variable "propensity" creates individualized issues under all plaintiffs' claims, and underscores plaintiffs' failure—indeed, their inability as a matter of law—to show that common issues predominate in the context-specific adjudication of unjust enrichment claims.

CONCLUSION

The order of the district court certifying nationwide classes should be vacated and the case remanded for further proceedings on the plaintiffs' individual claims.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

1. Pursuant to Fed. R. App. P. 29(d) and 9th Cir. R. 32-1, the undersigned hereby certifies that the attached brief is proportionally spaced, has a typeface of 14 points or more, and contains 13,929 words, exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B).

2. The brief has been prepared in proportionally-spaced typeface using Microsoft Word 2002 in 14-point Times New Roman font. As permitted by Fed. R. App. P. 32(a)(7)(C), the undersigned has relied upon the word-count feature of this word-processing system in preparing this certificate.

July 29, 2009

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STATEMENT OF RELATED CASES

Counsel for American Honda Motor Co., Inc., is not aware of any related cases pending in this Court. *See* Ninth Cir. R. 28–2.6.