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)

REPLY BRIEF OF AMERICAN HONDA MOTOR CO., INC.

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INTRODUCTION

In trying to defend the compound, impermissible shortcuts that led to class certification here, plaintiffs and their amici ask this Court to make two remarkable holdings. First, this Court would have to hold that every California company's nationwide consumer interactions are governed by California law rather than the law where the relevant interactions took place—even where, as here, not a single Californian could be found to represent a purported class. Second, the Court would have to interpret California law—and disregard established contrary federal law—to permit certification of a class that is defined without regard to whether class members were exposed to (much less injured by) the communications at the core of the case. Neither premise is sustainable; together, they make the certified class conspicuously improper.

Nothing justifies the nationwide application of California consumer protection statutes and common law to consumers who—like the named plaintiffs and most of the putative class—have no connection to California. Plaintiffs contend that variations in scienter, reliance, causation, remedies and limitations are all immaterial—as they must to endorse the district court's departure from the contrary assessment of the other Circuits. But once that threshold error is apparent, plaintiffs and their amici are left to argue that other states have no interest in

applying local law to their own citizens' in-state transactions, or that those interests must yield before California's supposed interest in subjecting all conduct by California companies to California local law. This is not a one-state Union, however, but one of 50 states in a federal system.

Likewise, the necessity for individualized proof cannot be swept under a series of dispositive presumptions. California state law does not stretch so far, and even if it did, federal law does not countenance the certification of a class that does not distinguish between the injured and the unaffected. Were the class confined to those exposed to and influenced by particular communications regarding CMBS—or ignorance of its supposed imperfections—the class might not be ascertainable. But that is no reason to treat all those who purchased vehicles with CMBS as if they were exposed to the same communications and confused by them the same way plaintiffs claim to have been.

This action is not amenable to class treatment, much less nationwide class treatment. The order certifying the class should be reversed.

ARGUMENT

I. THE PREDOMINANCE FINDING RESTS ON THE IMPROPER NATIONWIDE APPLICATION OF CALIFORNIA LAW.

The district court's decision to extend California's consumer protection and unjust enrichment law nationwide rested on its erroneous threshold finding that outcome-determinative variations in state consumer protection and unjust

enrichment laws are not material. And its California-centric conclusion that no other state has any interest in this litigation recalled decisions that preceded (and prompted) the enactment of the Class Action Fairness Act of 2005 ("CAFA"). Yet those are the cases plaintiffs and amici cite in support. *See, e.g.*, Appellee's Br. ("AB") 37-38 & Public Citizen Br. ("PCB") 13 (citing *Clothesrigger, Inc. v. GTE Corp.*, 236 Cal. Rptr. 605 (Cal. App. 1987); *Wershba v. Apple Computer, Inc.*, 110 Cal. Rptr. 2d 145 (Cal. App. 2001)).

Congress enacted CAFA to fix "a system that allow[ed] state court judges to dictate national policy … from the local courthouse steps … contrary to the intent of the Framers when they crafted our system of federalism." S. Rep. No. 109-14, at 24 (2005). In particular, CAFA was intended to constrain "the tendency of some state courts to be less than respectful of the laws of other jurisdictions, applying the law of one state to an entire nationwide controversy and thereby ignoring the distinct, varying state laws that should apply to various claims" in a multi-state class action. *Id.* at 37.

But in dismissing outcome-determinative variations in state law as immaterial, the district court did exactly that. And in concluding that California law and policy were superior to those of other states, the court "embrac[ed] the view that other states should abide by a deciding court's law [because California's]

laws are preferable to other states' contrary policy choices." *Id.* at 26. That is impermissible.

A. The Outcome-Determinative Differences In State Consumer Protection And Unjust Enrichment Laws Are Material.

Plaintiffs and their amici try to defend the district court's failure to perceive material variations in state consumer protection laws—in conflict with holdings of at least four other Circuits and most other courts to consider the issue. *See* Opening Br. ("OB") 21 (citing *In re St. Jude Medical, Inc.*, 425 F.3d 1116, 1120 (8th Cir. 2005); *In re Bridgestone/Firestone*, 288 F.3d 1012, 1018 (7th Cir. 2002)); *Spence v. Glock, GES.m.b.H.*, 227 F.3d 308, 313 n.8 (5th Cir. 2000) (recognizing "multitude of different standards and burdens of proof" for "consumer protection claims"); *Nafar v. Hollywood Tanning Sys.*, 2009 WL 2386666, at *4 (3d Cir. 2009) (noting "actual conflicts" among various states' "consumer protection laws").[1]

Although plaintiffs chide Honda for relying on decisions "outside the Ninth Circuit" (AB34), they present no contrary authority from this or any other court of appeals. They cite *Hanlon v. Chrysler*, 150 F.3d 1011 (9th Cir. 1998), for the

[1] Even the district court in the *Mercedes-Benz Tele Aid Contract Litigation*, 257 F.R.D. 46 (D.N.J. 2009)—on which plaintiffs and their amici heavily rely—recognized that "significant conflicts" and "wide variation" exist among state consumer protection laws and among the "policies those laws are meant to effectuate." *Id.* at 63 (citing *Fink v. Ricoh Corp.*, 839 A.2d 942, 974-82 (N.J.

proposition that "idiosyncratic differences between state consumer protection laws are not sufficiently substantive to predominate over the shared claims" (AB34), but *Hanlon* (like *Wershba*, *supra*) involved a settlement class; this Court did not evaluate whether state consumer protection laws conflict, focusing instead on the "procedural and substantive objections to the settlement." *Id.* at 1017. Settlement class decisions provide little guidance in cases seeking certification of a litigation class: because "the same concerns with regards to case manageability that arise with litigation classes are not present with settlement classes," "variations in state laws … are irrelevant to certification of a settlement class." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 529 (3d Cir. 2004); *see Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997). The only "heightened scrutiny" of settlement classes focuses on Rule 23 factors "designed to protect absentees" (*id.*) and "potential conflicts of interest" between class representatives and members of the putative class (*Hanlon*, 150 F.3d at 1020)—not conflicts among state laws.

Plaintiffs and their amici leave undisputed the outcome-determinative effect of differing scienter requirements and statutes of limitations, not to mention the unavailability of class actions under several state statutes. *See* OB22-23. Indeed, a decision cited by plaintiffs specifically distinguished out-of-state decisions denying

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Super. 2003) (extensively discussing the "numerous actual conflicts on various issues" among various states' consumer fraud statutes).

class certification on similar facts because those cases did not "involve the UCL and its unique" amenability to class certification. *Mass. Mut. Life Ins. Co. v. Super. Ct.*, 119 Cal. Rptr. 2d 190, 196 (Cal. App. 2002).[2]

And plaintiffs' efforts to paper over conflicting standards for reliance and relief rely on the faulty premise that differences in state laws can be eliminated by considering California's consumer protection statutes cumulatively. AB34-39; PCB 9. But "a *separate* conflict of laws inquiry must be made with respect to *each issue* in the case"—a separate analysis of each cause of action, not a cumulation of the issues presented in the litigation. *Wash. Mut. Bank v. Sup. Ct.*, 15 P.3d 1071, 1081 (Cal. 2001) (emphasis added); *accord J.P. Morgan & Co. v. Sup. Ct.*, 6 Cal. Rptr. 3d 214, 225 (Cal. App. 2003) (each choice of law issue warrants separate consideration). The Due Process Clause also requires application of an "individualized choice of law analysis to each plaintiff's claims." *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 627 (3d Cir. 1996) (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 823 (1985)), *aff'd sub nom. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *see Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1188 (9th Cir. 2001). That precludes the mix-and-match approach advocated by plaintiffs and adopted by the district court.

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[2] On limitations, plaintiffs simply assume the conclusion that California's statutes apply to all out-of-state plaintiffs. AB37.

Plaintiffs and their amici do not address how the limitations in UCL remedies will be reconciled if plaintiffs prevail only on their UCL claim. To the contrary, by relying on the CLRA to fill in the UCL's gaps, they effectively concede that UCL remedies are materially different from the relief available under other states' laws. Yet because a CLRA violation can serve as a predicate for liability only under the "unlawful" prong of the UCL, it cannot fill in the remedial gaps if plaintiffs prevail under the UCL's "fraudulent" or "unfair" prongs alone. *See*, *e.g.*, *Daugherty v. Am. Honda Motor Co., Inc.*, 51 Cal. Rptr. 3d 118, 128 (Cal. App. 2006); Cal. Bus. & Prof. Code § 17200.

Nor do plaintiffs achieve anything by contending (erroneously) that the UCL's reliance requirement "only applies to the named plaintiff," or that the CLRA's reliance requirement in limited circumstances may be overcome by a presumption. AB10. Whatever idiosyncrasies attend California's treatment of reliance under those statutes intensifies rather than alleviates the conflict with state laws that impose no reliance requirement (*see* OB22 & n.6) or impose stricter standards of reliance or proximate causation.[3]

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[3] *See*, *e.g.*, *Kuehn v. Stanley,* 91 P.3d 346, 351 (Ariz. App. 2004); *Oliveira v. Amoco Oil Co.,* 776 N.E.2d 151, 164 (Ill. 2002); *Captain & Co. v. Steinberg,* 505 N.E.2d 88, 98-99 (Ind. App. 1987); *Feitler v. Animation Celection, Inc.,* 13 P.3d 1044, 1050 (Or. App. 2000); *Weinberg v. Sun Co., Inc.*, 777 A.2d 442, 446 (Pa. 2001); Tex. Bus. & Com. Code § 17.50(a).

Plaintiffs also assert—in the face of contrary conclusions of courts and scholars (*see* OB25-26)—that state unjust enrichment laws are essentially the same. But plaintiffs do not meaningfully rebut the conflicts we set out (OB26-29).[4] Court after court has recognized these "troublesome differences" that include "the disparity in proof required to prove an enrichment was 'unjust or wrongful' and the requirement by some states that there be no adequate remedy at law." *Thompson v. Bayer Corp.*, 2009 WL 362982, at *4 (E.D. Ark. Feb. 12, 2009); *see id.* at *4-*6 (cataloguing differences); *Vulcan Golf, LLC v. Google, Inc.*, 254 F.R.D. 521 (N.D. Ill. 2008); *Clay v. Am. Tobacco Co.*, 188 F.R.D. 483 (S.D. Ill. 1999). *Mercedes-Benz* is the outlier, and that decision relied heavily (257 F.R.D. at 58) on a class certification decision that the Third Circuit reversed because its "choice-of-law exploration was insufficient." *Powers v. Lycoming Engines*, 328 Fed. Appx. 121, 128, 2009 WL 826842 (3d Cir. 2009), *rev'g* 245 F.R.D. 226, 231 (E.D. Pa. 2007). The district court in the present case similarly overlooked material variations in the amorphous unjust enrichment action.

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[4] Indeed, the California courts cannot agree on whether there is even a stand-alone "cause of action in California for unjust enrichment," or whether instead "[u]njust enrichment is a general principle, underlying various legal doctrines and remedies, rather than a remedy itself." *Melchior v. New Line Prods., Inc.*, 131 Cal. Rptr. 2d 347, 357 (Cal. App. 2003). In addition, some states permit unjust enrichment claims only where there is a direct commercial relationship between the plaintiff and the defendant, one not present between Honda and the used vehicle purchasers in the class. *Fasching v. Kallinger*, 510 A.2d 694, 699 (N.J. Super. 1986); *Scott v. Mamari Corp.*, 530 S.E.2d 208, 212 (Ga. App. 2000).

B. Plaintiffs' Home States Have An Interest In This Litigation.

In disavowing the governmental interests of their home states, plaintiffs (with their amici) effectively assert that consumer protection laws are not designed to protect in-state consumers and regulate their transactions, so that California alone has a cognizable interest in applying its law to advertisements viewed and purchases made in Maryland, Florida, and other states. To obscure their reliance on that notion, plaintiffs and their amici concentrate most of their fire on a straw man. They insist that, in fleshing out one element of the governmental interest test, we abandoned the test altogether. That is not so. As we pointed out (OB30), California has long incorporated considerations borrowed from the Restatement.

Indeed, it is widely acknowledged that the "governmental interest test is substantially similar to the most-significant relationship test adopted by the … Restatement." *P.V. ex rel. T.V. v. Camp Jaycee*, 962 A.2d 453, 460 (N.J. 2008). While the two standards vary in some respects, both consider the place of the wrong, residency of both plaintiff and defendant, and the place of injury in evaluating states' interests in a lawsuit. In focusing on labels, plaintiffs and their amici largely overlook the substance of our analysis, and that of the authorities they cite.

For example, the court in *Hurtado v. Superior Court*, 522 P.2d 666 (1974), applied California law to wrongful death claims brought by Mexican citizens

against California defendants based on an automobile accident in California with California-registered vehicles. *See id.* at 669 (California was "the place of the wrong"). But when the conduct and injury occur elsewhere, the interests of other jurisdictions are far more pronounced. As this Court recognized in distinguishing *Hurtado*, it is "nonsensical to suggest Mexico has no interest" in a case involving decisions made in the United States but conduct and injury in Mexico. *Abogados v. AT&T, Inc.*, 223 F.3d 932, 935 (9th Cir. 2000).

Thus, in *Reich v. Purcell*, 432 P.2d 727 (Cal. 1967), a wrongful death action following an accident in Missouri involving Ohio and California citizens, the California Supreme Court recognized that "[i]n a complex situation involving multi-state contacts … no single state alone can be deemed to create exclusively governing rights." *Id.* at 729. The court therefore considered the residence of the parties, the place of the wrong, and the place of injury in identifying each state's respective interests. *Id.* at 730.

Public Citizen's reliance on *Diamond Multimedia Systems v. Superior Court*, 968 P.2d 539 (Cal. 1999), is equally misplaced. At issue there was a narrow question of statutory interpretation: whether California Corporations Code § 25400, regulating conduct "in this state," supported claims by out-of-state residents against a California corporation for issuing false press releases and manipulating its stock. *See* 968 P.2d at 544. The court nowhere maintained that

California's interests override all other states' interests whenever a California-based company is a defendant, or that California law might displace other states' laws as applied to nationwide consumer transactions. Indeed, such a legislative effort would not pass constitutional muster. While there is no "doubt that Congress has ample authority to enact" nationwide consumer protection standards for automobile sales, "it is clear that no single State could do so." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1996).

Even if Honda's conduct "emanated" from its California headquarters (AB3; PCB2), that does not eliminate the long-recognized interests of other states in regulating the advertising and sale of products within their borders to their residents. California courts find California's interest in protecting in-state consumers in in-state transactions materially greater than another state's interest in policing the conduct of a resident corporation. *See Klussman v. Cross Country Bank*, 36 Cal. Rptr. 3d 728, 740-41 (Cal. App. 2005).

Mercedes-Benz again is the outlier, even in its own district. *See Chin v. Chrysler Corp.*, 182 F.R.D. 448, 457 (D.N.J. 1998); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 348 (D.N.J. 1997); *see also In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 458 (E.D. La. 2006); *Lyon v. Caterpillar, Inc.*, 194 F.R.D. 206, 217 (E.D. Pa. 2000). Simply put, "States have a strong interest in

applying their own consumer protection laws to their citizens." *Baker v. Fam. Credit Counseling Corp*., 440 F. Supp. 2d 392, 414 (E.D. Pa. 2006).

Finally, this Court previously has recognized that even laws that *limit* liability for non-resident defendants advance a legitimate state interest. *Abogados*, 223 F.3d at 936; *see* OB29-32, 35. Thus, even if California law provided putative class members the "full panoply" of remedies (PCB19), other states' interests are not diminished simply because their laws limit liability. This is no idle concern. "A national company sometimes limits its sales according to variations in risk, as when liability insurers pull out of high-verdict states or mail-order companies refuse orders from some states." *White v. Ford Motor Co.*, 312 F.3d 998, 1017-18 (9th Cir. 2002). Thus, the contention that California's laws are the most protective of consumers is irrelevant. *See Offshore Rental Company v. Continental Oil, Company*, 583 P.2d 721, 726 (Cal. 1978).

C. The "Comparative Impairment" Analysis Does Not Favor The Application of California Law.

Rather than address the factors required to evaluate the "comparative impairment" of state interests, plaintiffs and their amici ask this Court to treat Honda's principal place of business as the single, dispositive consideration. To the contrary, the comparative impairment inquiry considers the "relative commitment of the respective states to the laws involved" in light of the "history and current status of the states' laws." *Offshore Rental*, 583 P.2d at 726. Several states

recently have modified their consumer protection laws to provide expanded remedies while relaxing standing requirements. *See* OB36-37. California has gone in the opposite direction with recent statutory amendments that make it more difficult to assert a consumer protection claim. *See* OB22-24. This factor favors applying the laws of each class member's home state, as do other states' efforts to restrict liability.

CAOC suggests (Br. 7) that courts may decide to apply what they view as California's "more favorable" laws notwithstanding other states' contrary policies. But that is precisely the type of determination of "the better or the worthier social policy" that the California Supreme Court rejected as "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 (internal quotation marks omitted).

Applying California law nationwide also does not achieve the "maximum attainment of underlying purpose by *all* governmental entities." *Kearney v. Solomon Smith Barney, Inc.*, 137 P.3d 914, 918 (Cal. 2006) (internal quotations omitted; emphasis retained). California has some interest in regulating corporations headquartered in the state. But that interest is not compromised if California consumer law applies only to California residents. Yet the nationwide application of California law would severely compromise the interests and policies of all other

states in providing the appropriate standard of conduct for consumer advertising, marketing, and sales within their jurisdictions. Because "[s]tate consumer-protection laws vary considerably, … courts must respect these differences rather than apply one state's law to sales in other states with different rules." *Bridgestone/Firestone*, 288 F.3d at 1018. As this Court has observed, while states may take different regulatory approaches, whether to product safety or consumer protection generally, "[n]either state is entitled, in our federal republic, to impose its policy on the other." *White*, 312 F.3d at 1018. California choice-of-law principles do not permit, much less require, that result.

II. THE PREDOMINANCE FINDING RESTS ON LEGALLY INSUPPORTABLE PRESUMPTIONS.

A. The Lack Of Uniformity In Honda's CMBS Disclosures Precludes Class-Wide Proof Of Plaintiffs' CLRA Claims.

Our opening brief explained (at 39-50) that neither California law nor Rule 23 permits the presumptions that the district court applied to smooth the way to class certification. The district court presumed class-wide exposure, reliance, causation and injury to find that common issues predominated in plaintiffs' CLRA claims. It did so even though plaintiffs provided no evidence that Honda's CMBS promotions were uniform in the same model year (much less throughout the class period), or that any absent class members were even exposed to the advertising alleged to be misleading (much less relied on it). *See* OB40, 44.

Plaintiffs concede that CLRA claimants must not only "be exposed to an unlawful practice, but some kind of damage must result." AB23 (quoting *Meyer v. Sprint Spectrum*, 200 P3d 295, 299 (Cal. 2009)). And they cannot reasonably dispute that the district court improperly presumed class members' exposure to the challenged communications (*see* OB44) because plaintiffs presented no evidence that a single other ***buyer*** of an Acura RL with CMBS actually saw ***any*** of the challenged promotional materials, much less that they all viewed the ***same*** materials. Nor did plaintiffs offer any collective method to determine who saw what.

To the contrary, the undisputed evidence showed that Honda provided marketing and informational materials to consumers that varied widely over time and across geographical markets. *See* OB6-11.[5] Plaintiffs' failure to demonstrate that any absent class members were even exposed to the communications claimed to be misleading precludes any possible presumption of class-wide reliance even under the broadest application of state law. *See Osborne v. Subaru of Am.*, 243 Cal. Rptr. 815, 824 (Cal. App. 1988).

[5] Indeed, the record reflects no mass-media advertisements for the CMBS after the 2006 model year. *See* OB10-11. And as the district court recognized, Honda disclosed the information plaintiffs alleged was omitted—in pre-purchase materials available to consumers at dealerships, online, and in publications. ER25-26; *see* OB6-11.

Plaintiffs' reliance on *Massachusetts Mutual* is misplaced. There, the court applied a presumption of reliance because the plaintiffs had established that uniform disclosures were made to the entire class.[6] 119 Cal. Rptr. 2d at 192. The court also explained that no such inference could arise if subsequent discovery revealed that class members were provided with "such a variety of information" as to preclude "a single determination as to the materiality" of the information allegedly concealed. *Id.* at 198 n.5.

Plaintiffs do not dispute that Honda provided a variety of CMBS promotional materials to consumers. Plaintiffs claim instead that class-wide presumptions are warranted here because "no matter how many different affirmative representations Honda made to class members, Honda's marketing and advertising was identical" because "at no time were the CMBS's limitations disclosed to potential buyers." AB21-22.

Yet it is not true that Honda "*never* … revealed [the CMBS's alleged limitations] . . . in any of the resources that potential RL/CMBS buyers consulted *pre-purchase*" (AB19 n.41). Plaintiffs conceded below that Honda disclosed this

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[6] Other California courts that have applied a presumption of reliance did so because the plaintiffs had established that the same communications were made to the entire class. *See Occidental Land, Inc. v. Sup. Ct.*, 556 P.2d 750 (Cal. 1976) ("[e]ach purchaser was obligated to read" same document); *Vasquez v. Sup. Ct.*, 484 P.2d 964 (Cal. 1971) (identical misrepresentation was "recited by rote to every member of the class"); *Stern v. AT&T Mobility Corp.*, 2008 WL 4382796 (C.D. Cal. Aug. 22, 2008) (descriptions of charges on customers' bills were the same).

information but argued that "any pre-purchase references to the omissions were far ***less prominent*** than" the materials disclosing the omissions Honda provided post-purchase. *See* ER25–26 (emphasis added). That concession underscores the individualized issues. Indeed, the district court found that "the omitted information may have been available to some consumers, pre-purchase" (*id.*). Yet the court disregarded those disclosures because Honda did not present individualized affirmative evidence that consumers viewed it (while excusing plaintiffs' failure to supply evidence that all buyers viewed the challenged communications).

In doing so, the district court improperly reversed the applicable burdens (*see* OB45-46): ***plaintiffs*** had to provide evidence establishing that Honda made uniform representations received by all class members—and that the representations were material in a uniform way—before Honda had any burden of rebuttal, much less with individualized evidence.

Even setting aside Honda's disclosures of CMBS's limitations, no single determination of materiality or reliance is possible. Plaintiffs contend that "Honda's marketing and advertising w[ere] 'identical'" merely because the alleged omissions were "uniform." AB21–22. But it is precisely because of the lack of uniformity in Honda's ***affirmative*** representations that the materiality and reliance determinations are highly individualized. Under California law, class-wide reliance may arise, if at all, "when the same material misrepresentations have

actually been communicated to each member of a class." *Mirkin v. Wasserman*, 858 P.2d 568, 575 (Cal. 1993).[7] No such presumption extends to omissions. *Id.* Plaintiffs contend that *Mirkin* does not apply because they are not advancing a "fraud-on-the-market" theory. AB21. But that is precisely what they are doing by asking for a presumption that the safety package price would have been less absent Honda's alleged misrepresentations and omissions (*see* AB25 n.47). *Mirkin*'s reasoning has even more force here because Honda's representations were not uniform or subject to one interpretation.

By contrast with mixed-claim theory pleaded in their complaint (ER448-473), plaintiffs recharacterize this case as strictly about omissions and "*not* a case about affirmative misrepresentation and concealment (so called "mixed" claims)" (AB23). But that semantic sleight-of-hand cannot obscure the fact that their claims all rest on the notion that Honda's allegedly misleading advertising induced consumers to purchase vehicles equipped with the CMBS. Plaintiffs' theory is not that Honda said nothing about CMBS, but that what it said was allegedly misleading in the absence of additional information. As a consequence, the materiality of the purported omissions is inextricably intertwined with Honda's

[7] Plaintiffs mistakenly cite this Court's decision in *Binder v. Gillespie*, 184 F.3d 1059 (9th Cir. 1999), a federal securities-fraud case, for the proposition that California state law recognizes a presumption of reliance in cases involving a mix of misstatements and omissions.

varying affirmative representations. For this reason, plaintiffs' effort to invoke a duty to disclose (AB17-19) cannot obviate individualized examinations of Honda's representations and their effects on a reasonable consumer's expectations.

The materiality of the alleged omission about the three stages necessarily depends upon Honda's affirmative representations and how they were interpreted by class members. Notably, the only evidence showed that class members did not share a common interpretation of Honda's advertising: one plaintiff admitted that when he posted a complaint about the advertising on a website, other buyers commented that they had not similarly misunderstood the operation of the CMBS. ER353-54 (miscited as "ER175" at OB49).[8]

Similarly, the materiality of the second alleged (though unpleaded) omission—that the CMBS may temporarily disengage in "inclement weather," albeit only after the driver has been alerted by a dashboard signal (ER442, ER444, ER446)—turns on class members' interpretation of the two television commercials in which fog is present. *See* AB6. Yet that assumes that all buyers through 2009 saw and remembered commercials that aired for only seven months in the 2006 model year. And the materiality of the third alleged omission—that the CMBS will not always "warn drivers in time to ***avoid*** an accident" (AB8) (emphasis

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[8] Plaintiffs speculate (AB15 n.37) that one of these commenters was a Honda or dealership employee. The cited evidence provides no support. *See* ER116.

added)—depends on class members' interpretation of "Collision ***Mitigation*** Braking System," and of the promotional materials that always disclosed that the CMBS was designed to alert the driver of pending collisions and automatically apply the brakes to lessen the severity of unavoidable impacts. *See* OB6-8. Nothing in the record suggests how a court could commonly determine the materiality of an omission to state that a safety ***mitigation*** system did not prevent all collisions. Rather, the materiality of that purported omission would be highly context-specific.

Moreover, even if all of Honda's representations about the CMBS ***could*** be subject to one common interpretation, individual issues remain regarding whether class members relied on the representations in deciding to purchase the optional package that included the CMBS. *See* ER261, 267, 271. Far more likely, some class members may have purchased the bundled package primarily for the adaptive cruise control or run-flat tires, and others would not have cared about the supposedly concealed limitations so long as the CMBS achieved its stated purpose of mitigating the impact of a potential accident (as it did in helping plaintiffs alone avoid at least five potential collisions (ER289)). *See McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 223 (2d Cir. 2008) (observing need for individual proof "to overcome the possibility that a member of the purported class purchased" a product for a reason other than the allegedly misrepresented fact).

Plaintiffs respond that "if materiality is shown, … reliance and causation may be inferred as to the entire class." AB15. Class-wide materiality would require common proof that the class as a whole would have "behaved differently"—and uniformly—had it possessed the relevant information. *Mirkin*, 858 P.2d at 574. Yet plaintiffs' own characterization of their supposed change in behavior belies its susceptibility to common proof: "each plaintiff would have bought their Acura RL with the CMBS at another price, or not at all, had the truth about the CMBS been known" (AB25 n.47). What plaintiffs are saying is that some of them might not have bought the safety package and others might have tried to bargain down its price with various different dealers. But which are which—and what lower price, if any, they might have obtained—are quintessentially individualized questions. Nor is there any evidentiary basis for a common expectation that CMBS would operate with equal efficiency regardless of the weather; brakes and tires, for example, generally do not. Without individualized inquiries, it would be impossible to gauge the causal effect of the alleged omissions and the extent of their influence on purchasing decisions so as to enable class-wide determination of damages or restitution. *See Frieman v. San Rafael Rock Quarry, Inc.*, 10 Cal. Rptr. 3d 82, 92-93 (Cal. App. 2004).

In any event, even assuming that the alleged omissions were material to the class members who actually saw the same television commercials, it does not

follow that class members who saw different (or no) promotional materials would have found them or the alleged omissions material. Plaintiffs' failure to provide any evidence that a single other buyer actually saw any of the materials alleged to be misleading—much less that they all viewed the same materials—precludes any presumption of class-wide exposure and reliance.

B. The Variety of Honda's Representations Precludes Class-Wide Proof Of Plaintiffs' UCL and FAL Claims.

For similar reasons, plaintiffs cannot overcome the predominance of individualized issues in their UCL and FAL claims. *See* OB50-55.

1. *Actual reliance is an element of UCL and FAL claims.*

Plaintiffs contend that "reliance is irrelevant in the predominance analysis" under Rule 23 because "[u]nnamed class members need not establish reliance at any time, including at trial for liability purposes." AB24-25. According to plaintiffs, "*Tobacco II* makes clear that 'reliance' is not even an element of a UCL 'fraudulent' prong claim and the UCL's 'likely to deceive' standard remains in full effect" even after Proposition 64. AB24 (citing *Tobacco II*, 207 P.3d 20, 35 (Cal. 2009)).[9] Yet *Tobacco II* holds that a plaintiff "proceeding on a claim of

[9] Amicus Consumer Attorneys of California ("CAOC") contends (Br. 21-22) that a "likely to deceived" standard applies. But even if this standard applied to the predominance inquiry, class certification still would not be appropriate because Honda's varied representations about the CMBS preclude a single determination as whether its communications were misleading. That is why the California Court of Appeal recently affirmed a refusal to certify a UCL class because "what materials,

misrepresentation as the basis of his or her UCL claim 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." *Id.* at 26. *See also Princess Cruise Lines, Ltd. v. Sup. Ct.*, 101 Cal. Rptr. 3d 323, 328 (Cal. App. 2009), pet. for review filed, No. S178842 (Dec. 18, 2009) ("it is very clear that reliance is required in a UCL action").

After it addressed the standing requirements for UCL class action, the *Tobacco II* court addressed "the meaning of the phrase 'as a result of.'" 207 P.3d at 38. Although the court recognized that "***before*** Proposition 64, 'California courts have repeatedly held that relief under the UCL is available without individualized proof of deception, reliance, and injury,'" *id.* at 39 (emphasis added) (citing *Massachusetts Mutual*), it emphasized that "because it is clear that the overriding purpose of Proposition 64 was to impose limits on private enforcement actions under the UCL, we must construe the phrase 'as a result of' in light of this intention to limit such actions." *Id.* (citations omitted). Because "there is no doubt that reliance is the causal mechanism of fraud," the court concluded that the phrase

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disclosures, representations, and explanations were given to any given purchaser" could not be proven on a class-wide basis. *Kaldenbach v. Mutual of Omaha Life Ins. Co.*, 100 Cal. Rptr. 3d 637, 651 (Cal. App. 2009). In such circumstances, "there was no showing of uniform conduct likely to mislead the entire class." *Id.* at 652. By contrast, the *Kaldenbach* court observed, *Tobacco II* and *Massachusetts Mutual* involved "identical misrepresentations and/or nondisclosures by the defendants made to the entire class." *Id.*

"as a result of" thus "imposes an actual reliance requirement on plaintiffs prosecuting a private enforcement action under the UCL's fraud prong." *Id*.

Because a plaintiff bringing an individual claim under the UCL must show actual reliance, it necessarily follows that members of a UCL class action must also demonstrate reliance to prove liability and entitlement to restitution. Where reliance and causation are subject to common proof, a class may be certified. Where common proof is impractical or unmanageable, however, the action must proceed on an individual basis.

In arguing that class members "need not establish reliance … at trial for liability purposes," plaintiffs rely instead on the portion of *Tobacco II* addressing standing. AB24-25. That discussion held that Proposition 64 requires only the class representative to demonstrate standing. 207 P.3d at 34. But establishing standing does not resolve the question whether common issues predominate, much less in federal court where (1) Article III precludes persons without actual injury from bringing an action whether collectively or individually, and (2) the federal standards of Rule 23, not amorphous state standards, govern class certification.

In the wake of *Tobacco II*, the California Court of Appeal has recognized that standing and predominance are not the same thing. "Standing, generally speaking, is a matter addressed to the trial court's jurisdiction because a plaintiff who lacks standing cannot state a valid cause of action." *Cohen v. DIRECTV, Inc.*,

101 Cal. Rptr. 3d 37, 49 (Cal. App. 2009), pet. for rev. filed, No. S177734 (Dec. 1, 2009). Commonality and predominance, on the other hand, address the utilities of litigating a class action. *See id*. Indeed, the *Tobacco II* court confirmed that its holding on standing applies only "where class requirements have otherwise been found to exist." 207 P.3d at 38.

The *Cohen* court further confirmed that *Tobacco II* does not permit UCL plaintiffs to presume away the predominance factor in class certification analysis. The court rejected a contention that the UCL could "authorize an award for injunctive relief and/or restitution on behalf of a consumer who was never exposed in any way to an allegedly wrongful business practice." 101 Cal. Rptr. 3d at 48. Even if a class proponent need not demonstrate the standing of all absent class members, the court still must determine whether individualized issues of exposure or reliance would preclude a finding of predominance sufficient to support class certification.

Plaintiffs gain little support from *Morgan v. AT&T Wireless Services, Inc.*, 99 Cal. Rptr. 3d 768 (Cal. App. 2009), and *Plascencia v. Lending 1st Mortgage*, 259 F.R.D. 437 (N.D. Cal. 2009). *Morgan* involved a demurrer and did not address class certification, and also overlooks *Tobacco II*'s interpretation of Proposition 64's "as a result of" language. 99 Cal. Rptr. 3d at 773. The district court in *Plascencia* addressed uniform loan documents that consequently did not

raise individualized issues of exposure or reliance. *See* 259 F.R.D. at 446. In addition, the court in that case construed *Tobacco II* to effectively remove the reliance element in UCL claims from a predominance inquiry, by contrast with *Cohen*. As explained below, however, whatever the California law of collective actions under the UCL may permit in the way of relief for uninjured persons, a federal court cannot entertain an action on behalf of such persons.

2. ***Rule 23 and Article III do not permit certification of a class of uninjured persons.***

The class should be decertified for the additional reason that neither Rule 23 nor Article III permits the use of presumptions of common exposure, materiality, and reliance to certify a class to include persons without regard to actual injury. *See* OB53-54. Even if *Tobacco II* could be interpreted to permit a class that includes members who have suffered no injury in fact, a holding on California procedural law cannot alter federal law. Neither Rule 23—whose "requirements must be interpreted in keeping with Article III constraints" (*Amchem*, 521 U.S. at 613)—nor Article III's case-or-controversy requirement permits class actions on behalf of uninjured persons.

The courts of appeals have uniformly rejected the notion that a federal class action may include class members who lack actual injury and therefore Article III standing in their own right. *See Denney v. Deutsche Bank AG*, 443 F.3d 253, 264 (2d Cir. 2006) ("no class may be certified that contains members lacking Article III

standing"); *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 514 (7th Cir. 2006) (class certification denied because "[c]ountless members" of putative class "could not show any damage, let alone damage proximately caused by … alleged deception"); *Adashunas v. Negley*, 626 F.2d 600, 604 (7th Cir. 1980); *Romberio v. Unumprovident Corp.,* 2009 WL 87510, at *8 (6th Cir. Jan.12, 2009).

Chief Judge Collins of the Central District of California recently reached the same conclusion. In refusing to certify a purported UCL class, she noted that most "courts have found that class definitions should be tailored to exclude putative class members who lack standing." *Burdick v. Union Security Insurance Co.*, 2009 WL 4798873, at *3-*4 (C.D. Cal. Dec. 9, 2009). Thus, "regardless of whether Plaintiffs state a claim under the UCL or FAL, they must still establish the Article III standing requirements … ." *Id.* at *4 n.6 (citing *Lee v. American Nat'l Ins. Co.,* 260 F.3d 997, 1001-02 (9th Cir. 2001)). That precludes reliance on the "may have been acquired" language (Cal. Bus. & Prof. Code § 17203) to the extent it suggests that persons may recover without actual injury.

Plaintiffs nonetheless argue that "it is broadly recognized that absent class members 'need not make any individual showing of standing… .'" AB26 (quoting NEWBERG ON CLASS ACTIONS § 2:7, at 88 (4th ed. 2002)).[10] But that again

[10] CAOC (at Br. 14) cites *Bates v. UPS*, 511 F.3d 974, 983 (9th Cir 2007), to this effect, but that case involved a Rule 23(b)(2) class.

confuses the threshold showing of standing with the availability and scope of certification under Rule 23—in particular, whether basic questions of causation and injury can be resolved on a common basis. That question cannot be resolved in favor of certification merely because one person has demonstrated injury. Indeed, in a decision cited by plaintiffs (AB26), the Seventh Circuit noted that, even if the named plaintiff has standing, a class that is defined "so broad[ly] that it sweeps within it persons who could not have been injured by the defendant's conduct" cannot be certified. *Kohen v. Pac. Inv. Mgmt Co.*, 571 F.3d 672, 677 (7th Cir. 2009).

Because persons "who could not have been injured"—like buyers who were not exposed to Honda's challenged advertising—cannot pursue a claim in federal court in their own right, allowing them to pursue claims though the class action device would impermissibly enlarge their substantive rights through procedural rules, contrary to the Rules Enabling Act, 28 U.S.C. § 2072(b). *See Amchem*, 521 U.S. at 613. And it would be unconstitutional for a federal court to conduct an adjudication on behalf of persons who were not injured in fact. Because the issues of exposure, reliance, and injury that are constitutionally necessary to separate the injured from the uninjured require intensely individualized inquiries, no class can be certified here.

C. Individual Issues Predominate In Plaintiffs' Unjust Enrichment Claims.

Plaintiffs have no coherent response to our demonstration (OB56-59) that the variations in class members' exposure, interpretation, and reliance preclude class certification of plaintiffs' unjust enrichment claims, nor can plaintiffs distinguish the many cases refusing to certify unjust enrichment classes (OB57 n.23). As the Eleventh Circuit recently explained, "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). The equities surrounding each unjust enrichment claim turn on "what each [class member] was told and understood" and a trial "court must examine the particular circumstances of an individual case." *Id.* at 1275.

Plaintiffs and their amici provide no principled basis for this Court to depart from that holding. They do not show that the circumstances of each buyer's exposure, interpretation and reliance are conducive to evaluation *en masse* of the relative justice of Honda's sale of options packages containing CMBS. The injustice of any enrichment depends on the plaintiff's circumstances as well as the defendant's, and contains a significant (and highly individualized) causal element.

Plaintiffs unsurprisingly lack support for their argument that common issues predominate under these circumstances.[11]

[11] CAOC contends (Br. 24) that the unjust enrichment claim "is ideally suited for class wide treatment because it, like the UCL [claim], is focused on the defendant's conduct and not on any supposed individual issues," but cannot identify a single decision certifying unjust enrichment claims for class-wide adjudication. Plaintiffs note (AB29) that the district court in *Rivera v. Bio-Engineered Supplements & Nutrition*, 2008 WL 4906433 (C.D. Cal. Nov. 13, 2008), certified a nationwide class under Rule 23(b)(2), but that provision does not require predominance.

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.

Dated: December 31, 2009

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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 6,994 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 2007 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.

December 31, 2009

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CERTIFICATE OF SERVICE

I, Cindy Pohorski, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is Two Palo Alto Square, Suite 300, Palo Alto, CA 94306.

I hereby certify that on December 31, 2009, I electronically filed the foregoing **Reply Brief of American Honda Motor Co., Inc.** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Executed on December 31, 2009, at Palo Alto, California.

/s/ Cindy Pohorski
Cindy Pohorski