No. 09-_____

In the
United States Court of Appeals for the Ninth Circuit

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

v.

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
THE HONORABLE VALERIE BAKER FAIRBANK, JUDGE
CASE NO. CV 07-7587-VBF(JTLX)

AMERICAN HONDA MOTOR CO., INC.'S FED. R. CIV. PROC. 23(F) PETITION FOR PERMISSION TO APPEAL CLASS ACTION CERTIFICATION

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CORPORATE DISCLOSURE STATEMENT

American Honda Motor Co., Inc. is a fully owned subsidiary of Honda Motor Co., Ltd., a publicly held company in Japan that owns 100% of American Honda Motor Co., Inc.'s stock.

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American Honda Motor Co., Inc. ("Honda") respectfully requests permission to appeal the order of the United States District Court, Central District of California, entered on December 17, 2008 ("Order"), certifying a nationwide class on the motion of plaintiffs Michael Mazza, Janet Mazza, and Deep Kalsi ("plaintiffs"). Honda seeks a hearing on the merits and reversal of the Order.

INTRODUCTION

Federal Rule of Procedure 23(f) was designed for cases like this. The district court certified a nationwide class in this misrepresentation action by plaintiffs from Florida and Maryland who seek relief under several sources of *California* law: the Unfair Competition Law, Cal. Bus. & Prof. Code § 17200 *et seq.* ("UCL"); the False Advertising Law, *id.* § 17500 *et seq.* ("FAL"); the Consumers Legal Remedies Act, Cal. Civil Code § 1750 *et seq.* ("CLRA"), and the California common law of unjust enrichment. The Order is manifestly erroneous in its resolution of the predominance inquiry under Rule 23(b)(3)—both as to the elements of California law and in imposing that law on plaintiffs from 44 states—and presents at least one recurrent question of law that is unsettled in this Circuit. *See Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 957 (9th Cir. 2005).

First, the district court concluded that variations in state consumer protection and unjust enrichment laws on outcome-determinative issues did not present "material" conflicts precluding the application of California law

nationwide. Moreover, the court concluded that the non-resident class members' home states have no interest in having their laws apply to the claims of consumers who purchased products and allegedly were deceived there.

Those holdings conflict with decisions of the overwhelming majority of federal courts. The issue is recurrent in this Circuit: in the last six months alone, California district courts have reached diametrically opposite conclusions on whether California's UCL, FAL, CLRA, and unjust enrichment law can be applied to a nationwide class.[1] Although other Rule 23(f) Petitions are pending, only this Petition addresses the "novel or unsettled questions of law" (*Chamberlan*, 402 F.3d at 957) presented by both the statutory and unjust enrichment claims.

Second, the district court disregarded the individualized questions of fact presented by the evidence on the related issues of reliance, materiality and causation. Plaintiffs bore the burden of establishing predominance by a preponderance of the evidence. *See Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). Yet the district court placed the burden on Honda

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[1] *Compare Parkinson v. Hyundai Motor America*, 2008 WL 5233200 (C.D. Cal. Dec. 12, 2008) (Ninth Cir. No. 08-80181 (Rule 23(f) Petition for Review from order certifying nationwide class under California's UCL and CLRA)) *with In re HP Inkjet Printer Litigation*, 2008 WL 2949265 (N.D. Cal. July 25, 2008) (refusing to certify a nationwide class under the UCL, FAL, and CLRA based on state law conflicts) and *Rivera v. Bio Engineered Supplements & Nutrition, Inc.*, 2008 WL 4906433, at *2 (C.D. Cal. Nov. 18, 2008) (certifying some classes but refusing to certify nationwide class under California's unjust enrichment law), Rule 23(f) petition filed, Ninth Cir. No. 08-80193.

to rebut a seemingly conclusive "presumption" that *all* members of the purported class relied on Honda's alleged misrepresentations and omissions. 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 three-plus years at issue here, and that more thorough information was available to consumers pre-sale in various publicly available media, including at Acura dealerships. Thus, the Order does not reflect the "close look" that Rule 23(b)(3) requires. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997). Rather, the Order rests on assumption (as it does in failing to "define the class and the class claims, issues, or defenses" (Fed. R. Civ. P. 23(c)(1)), appoint class counsel, or designate class representatives).

In short, the Order reflects "manifest error" in the context of at least one "novel or unsettled question of law," and is "virtually certain to be reversed on appeal from the final judgment." *Chamberlan*, 402 F.3d at 957. The Petition therefore warrants immediate review. *Id.*

JURISDICTIONAL STATEMENT

The district court has subject matter jurisdiction under 28 U.S.C. § 1332(d)(2)(A) because this is a putative class action placing more than $5 million in controversy, and members of the class are residents of states other than

California, where Honda is incorporated and has its principal place of business. This Court has jurisdiction to review the Order granting class certification under Fed. R. Civ. Proc. 23(f) and 28 U.S.C. § 1292(e). The Petition is timely because it was filed on January 2, 2009, within 10 business days of the entry of the class certification order on December 17, 2008. *See* Fed. R. Civ. Proc. 6 (a)(2) & 23(f).

QUESTIONS PRESENTED

1. Whether California consumer protection 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 jurisdictions implicated.

2. Whether a finding of predominance may rest on a presumption (rather than evidence) that all putative class members 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.

STATEMENT OF FACTS

This action seeks relief under California law for Honda's allegedly deceptive marketing and sale of 2006 through 2009 model year Acura RL vehicles equipped with the optional Collision Mitigation Braking System ("CMBS"). *See* Exhibits to Petition ("Ex.") at 34-35. CMBS helps drivers avoid rear-end collisions by deploying up to three stages of visual, audible and tactile alerts that prompt the driver to take evasive action. (Ex. at 27-28, 34-35.) When a collision is

unavoidable, CMBS automatically applies the brakes. (*Id.*) The Complaint principally asserts that plaintiffs interpreted Honda's advertising to mean that CMBS *always* would proceed sequentially through a three-stage warning system. (Ex. at 28, 74.) Because the system in real-life driving conditions may not always deploy all three stages of alert—i.e., the three stages can "overlap" depending on various factors, including the imminence of the potential rear-end collision threat—plaintiffs claim they were deceived.

On September 24, 2008, the district court denied plaintiffs' initial motion for class certification without prejudice, and invited plaintiffs to file a renewed motion that addressed certain discrete issues. (Ex. at 61-63.) Plaintiffs filed their renewed motion for class certification on October 31, 2008 (Ex. at 64-98), which for the first time raised a new alleged "omission"—that CMBS *may* shut off in bad weather, and thus does not *always* prevent accidents. Plaintiffs, who own 2007 model year Acura RLs, identified the following Honda "advertising" in their renewed motion, which indisputably was not uniform throughout the class period:

> (a) *Point of Sale*. Separate product brochures for the 2006, 2007, 2008 and 2009 model-year Acura RL vehicles. Each brochure was available only during the particular model year and contained different representations and descriptions of the CMBS (Ex. at 77);
>
> (b) *Television*. Two versions of the same commercial, each containing a different voice-over script. The first version aired for about one week in November 2005, while the second version aired for approximately seven months from February 2006 through September 2006 (Ex. at 75-76);

(c) *Magazine*. A single-page advertisement that did not discuss the "three stages" of the CMBS, and that appeared in various magazines from February 2006 through September 2006 (Ex. at 76-77); and

(d) *Internet*. A video that was available on the "Acura.com" website from August 2005 through June 2008, but failed to present any evidence in their renewed motion that any consumer, including plaintiffs, viewed this video before purchasing an Acura RL. (Ex. at 76.)[2]

In opposing the renewed motion for class certification (Ex. at 99-140), Honda identified several materials, available at Acura dealerships and on the Internet, in which Honda disclosed the allegedly concealed information concerning the CMBS to consumers. (Ex. at 110-112.) Honda also provided an appendix of more than 130 pages that detailed the material variations in state consumer protection and unjust enrichment laws of the 44 jurisdictions implicated by plaintiffs' nationwide class claims. (Ex. at 141-279).

On December 17, 2008, the district court entered its Order granting plaintiffs' renewed motion for class certification. (Ex. at 1-25.) The court concluded that California law would apply to the nationwide class, even though it acknowledged that state consumer protection laws conflict on critical issues such as reliance, scienter, standing, and statute of limitations. (Ex. at 13-15, 19.) The

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[2] Plaintiffs also identified certain "press releases" and sales consultant training materials (Ex. at 76-77) that by definition were intended for the press and "sales consultants" and thus were not advertising aimed at consumers. Indeed, other than vague declarations by plaintiffs stating they "considered" unidentified advertising, plaintiffs presented no evidence that any consumer, including plaintiffs, actually viewed these or any other specific materials before purchasing an RL.

court believed it could disregard those conflicts as not "material." (Ex. at 15.) The court also held that a presumption of reliance rendered the reliance issue common to the entire class 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." (Ex. at 22) (emphasis added.)

REASONS FOR GRANTING THE PETITION

A class certification decision should be reviewed under Rule 23(f) when "the district court's class certification decision is manifestly erroneous" ***or*** "turns on a novel or unsettled question of law." *Chamberlan*, 402 F.3d at 957, 959. The Order meets both standards. First, the finding that variations in state consumer protection laws on outcome-determinative issues do not present "material" conflicts is manifestly erroneous, and departs from decisions of numerous federal and state courts—including recent decisions of district courts in this Circuit. Second, as explained above, the choice-of-law analysis for nationwide class claims brought under California's UCL, FAL, CLRA, and unjust enrichment law presents a "novel or unsettled question of law" in this Circuit. Because it involves both statutory and unjust enrichment causes of action, this case presents an ideal vehicle to resolve that question, and foreclose the continuing conflicts among the district courts.

The Order's predominance inquiry went fundamentally awry in another way.

Reliance and materiality are required elements for claims brought under California's consumer protection statutes. No private party can sue under the UCL or FAL without having "lost money or property as a result of" the challenged conduct. Cal. Bus. & Prof. Code §§ 17204 (UCL), 17535 (FAL). No consumer can sue under the CLRA without having "suffer[ed] any damage as a result of the use or employment of a proscribed method, act or practice." Cal. Civ. Code § 1780 (a).[3] And no one can recover for alleged unjust enrichment who was not damaged as a result of the alleged misconduct. *See, e.g., Peterson v. Cellco Partnership*, 164 Cal. App. 4th 1583, 1593-96 (2008).

Yet the district court overlooked the necessarily individualized inquiry into whether consumers saw any particular advertising over a three-year period. Nor did the court consider which consumers (if any) found the alleged omissions from the advertising material to their decision to purchase an Acura RL with CMBS, which consumers made their purchase decision in reliance on the advertising and its omissions, and which consumers in fact received the allegedly concealed information that Honda disclosed in pre-sale materials it made available to consumers. Instead, the district court held that all members of the purported class are presumed to have relied on the alleged representations and omissions, whether

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[3] The California Supreme Court definitively will determine whether reliance is a required element under California's UCL in *In Re Tobacco II Cases* (Case No. S147345). Reliance plainly is a required element for CLRA claims sounding in fraud. *Buckland v. Threshold Enterprises, Ltd.*, 155 Cal. App. 4th 798, 810 (2007).

or not they saw *any* advertising at all. That holding assumed away individual distinctions in critical elements of plaintiffs' claims and misapplied *Massachusetts Mutual Life Insurance Co. v. Superior Court*, 97 Cal. App. 4th 1282 (2002). By raising conflicts with other circuits' class certification decisions on similar reliance issues, the Order underscored the need for this Court to settle this question as well.

More fundamentally, the district court impermissibly shifted the burden away from plaintiffs, who should have had to demonstrate that consumers were exposed to, and acted upon, materially identical advertising and information. Instead, the district court placed the burden on Honda to come forward with evidence that consumers actually viewed the other sources of information available to them that disclosed the allegedly concealed information.

Because these errors are "easily ascertainable from the petition itself," interlocutory review is appropriate. *Chamberlan*, 402 F.3d at 959.

I. THE DISTRICT COURT IMPROPERLY CONCLUDED THAT CALIFORNIA LAW MAY APPLY TO THE NATIONWIDE CLASS.

The district court's finding of predominance rested in large part on its decision to apply California law to the claims of class members from 44 different states. That conclusion is insupportable as a matter of law. The choice-of-law rules of the forum, California, govern this diversity case. *See Zinser*, 253 F.3d at 1187. California applies a three-step "governmental interest analysis" that considers, first, 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.*, 24 Cal. 4th 906, 919 (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 the interests of that state or those of California would be " 'more impaired' if its law were not applied." *Id.* at 920. In conflict with the determinations of other federal courts, including other district courts within this Circuit, the district court erroneously resolved each question. The Seventh Circuit warned against "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, 748 (7th Cir. 2008). That is exactly what happened here.

A. The District Court Erroneously Concluded That The Variations In State Consumer Protection Laws Are Not "Material."

Almost every court to address the issue has concluded that "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) (emphasis added).[4]

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[4] A district court in this Circuit recently reached that conclusion. *See In re HP Inkjet Printer Litigation*, 2008 WL 2949265 (N.D. Cal. July 25, 2008); *see also, e.g., In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1018 (7th Cir. 2002); *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, just to name a few differences"); *Lyon v. Caterpillar, Inc.*, 194 F.R.D. 206, 219 (E.D. Pa. 2000) ("State consumer protection acts vary on a range of ***fundamental issues*** ....") (emphasis added); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 194 F.R.D. 484, 489 (D.N.J. 2000) ("A review of ... state laws

The courts that have addressed unjust enrichment laws have noted similarly material variations.[5] Even cursory review of state consumer protection and unjust enrichment laws reveals the manifest error in the district court's contrary conclusion. (The appendix submitted below set out the outcome-determinative conflicts in greater detail. Ex. at 141-279.)

- **UCL/FAL**: The UCL and FAL conflict with consumer protection statutes in other states on issues that include (1) whether reliance is required, (2) if scienter is required to assert a claim, (3) statute of limitations, (4) available remedies, (5) ability to sue on a class basis, and (6) pre-litigation notice. (Ex. at 120-122; 146-222). Several of these conflicts are not only material, but outcome-determinative. For example, the California Supreme Court soon will decide whether reliance is required for UCL claims. If the court concludes that reliance is a required element for claims under the UCL and FAL, putative class members would have to prove reliance even though they could sue under their home state's consumer protection statute without proof of reliance.[6] Thus, contrary to the

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shows that there exist ***significant*** distinctions between the states' consumer protection statutes") (emphasis added); *Tracker Marine, L.P. v. Ogle,* 108 S.W.3d 349, 352-55 (Tex. App. 2003).

[5] *See, e.g., Rivera*, 2008 WL 4906433 at * 2 (citing "material" differences in state unjust enrichment laws); *In re Prempro,* 230 F.R.D. at 563; *In re Baycol Prods. Litig.*, 218 F.R.D. 197, 215 (D. Minn. 2003).

[6] *Guth v. Allied Home Mtg. Capital Corp.*, 2008 WL 2635521, *6-*7 (Ohio. App. 2008) (Ohio law); *Egwuatu v. South Lubes, Inc.*, 33 Fla. L. Weekly D415, 976 So.2d 50, 53 (Fla. App. 2008) (Florida law); *DaBosh v. Mercedes Benz USA,*

district court's finding, there is a very real likelihood that "prospective class members ... will be less protected under California law than under their own states' consumer protection statutes." (Ex. at 16.) Similarly significant conflicts arise on scienter, statute of limitations, required notice, ability to sue on a class basis, and in the scope of relief available. Thus, on the issue of available relief, if plaintiffs prevail only on their UCL claim, non-resident consumers are limited to restitution and injunctive relief (Cal. Bus. & Prof. Code § 17203), even though they could recover actual damages, treble damages, and punitive damages under their own states' consumer protection statutes.[7]

- **CLRA**: The CLRA similarly conflicts in material respects with other

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Inc., 378 N.J. Super. 105, 874 A.2d 1110, 1121 (N.J. Super. Ct. App. 2005) (New Jersey law); *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) (New York law); *Izzarelli v. R.J. Reynolds Tobacco Co.*, 117 F. Supp. 2d 167, 176 (D. Conn. 2000) (Connecticut law); *S&R Assocs. V. Shell Oil Co.*, 725 A.2d 431, 440 (Del. Super. Ct. 1998) (Delaware law); Ga. Code Ann. § 10-1-372(b) (Georgia law); *Dix v. Am. Bankers Life Assurance Co. of Fla.*, 429 Mich. 410, 418, 415 N.W.2d 206, 209 (Mich. 1987) (Michigan law) (no need to show individual reliance). By contrast, as the appendix submitted below confirmed, even if the California Supreme Court concludes that reliance is not required to state a UCL or FAL claim, California law would conflict with the numerous jurisdictions that require proof of reliance under their consumer protection laws.

[7] ***Actual Damages***: *See, e.g.*, Washington (Wash. Rev. Code Ann. § 19.86.090); Texas (Tex. Bus. & Com. Code § 17.50 (b), (d)); Pennsylvania (73 Pa. Cons. Stat. § 201-9.2(a)); Ohio (Ohio Rev. Code Ann. § 1345.09 (A) & (B)); ***Treble Damages:*** *See, e.g.*, Washington (Wash. Rev. Code Ann. § 19.86.090) (Washington); Ohio (Ohio Rev. Code Ann. § 1345.09(B)); New Jersey (N.J. Stat. Ann. § 56:8-19); ***Punitive Damages:*** *See, e.g.*, Texas (Tex. Bus. & Com. Code § 17.50); Illinois (815 Ill. Comp. Stat. 505/2AA).

states' consumer protection statutes. For example, while the CLRA limits relief to consumers who purchased goods or services for personal, family, or household use (Cal. Civ. Code § 1761(d)), the consumer protection statutes in Maryland, Texas, and New Jersey also allow claims by consumers who purchased goods or products for agricultural, partnership, corporate and other uses.[8] Indeed, there is "little uniformity from state to state" on how "personal, household, or family use" is defined.[9] Thus, corporations could not sue under the CLRA even though they may be entitled to relief under their own state's laws. Moreover, reliance is a required element for any CLRA claim "sounding in fraud." *Buckland*, 155 Cal. App. 4th at 810. Thus, as discussed above (at n.6), consumers in states that have no reliance requirement would have to prove reliance to state a claim under the CLRA, even though they could sue without such proof under their home states' laws.

- **Unjust Enrichment:** Courts routinely refuse to certify nationwide classes under a single state's unjust enrichment law.[10] Indeed, only a few weeks ago another judge in the Central District of California declined to certify a nationwide "unjust enrichment" class under California law because "there are

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[8] *See* Md. Com. Law Code Ann. § 13-101(2)(d); Tex. Bus. & Com. Code Ann. § 17.45(4); N.J. Rev. Stat. Ann. § 56:8-1.

[9] Jonathan Sheldon & Carolyn Carter, *Unfair and Deceptive Acts and Practices* § 2.8.1.1, p.16 (National Consumer Law Center 6th Ed. 2004).

[10] *See, e.g., In re Prempro,* 230 F.R.D. at 563, 565; *In re Baycol Prods. Litig.*, 218 F.R.D. at 215; *Lilly v. Ford Motor Co.*, 2002 WL 507126, at *2 (N.D. Ill. Apr. 2, 2002).

material conflicts between the California law of unjust enrichment ... and the laws of the other states" that "could have a ***significant possible effect on the outcome of the trial.***" *Rivera*, 2008 WL 4906433 at *2 (emphasis added).

B. The District Court Erroneously Concluded That Other States' Interests Will Not Be Impaired If California Law Applies To Their Consumers' Transactions.

The district court likewise erred in disregarding other states' interests in having their laws applied. To determine which state's interest would be " 'more impaired'" if its policy were subordinated to the policy of the other state, courts consider "the relative commitment of the respective states to the laws involved" and "the history and current status of the states' laws" and "the function and purpose of those laws." *Washington Mutual*, 24 Cal. 4th at 920 (quoting *Offshore Rental Co. v. Continental Oil, Co.*, 22 Cal. 3d 157, 164-65 (1978)). Further, courts are cautioned not to focus on "which conflicting law manifest[s] the 'better' or the 'worthier' social policy on the specific issue." *Offshore*, 22 Cal. 3d at 165.

Despite this clear directive not to weigh conflicting state policies, the district court relied on its observation that Honda had "not identified a state with an interest in *denying* its citizens recovery under California's more comprehensive consumer protection laws." (Ex. at 16.) But as Honda pointed out below,

California's laws are not necessarily more comprehensive.[11] Moreover, while California's interest in protecting nonresident consumers is slight, states have significant interests in drawing the proper balance between protecting their own consumers and over deterring the entry of foreign corporations to provide goods and services. That is why courts routinely find that "[e]ach plaintiff's home jurisdiction has a stronger interest in deterring foreign corporations from ... injuring its citizens and ensuring ... its citizens are compensated than [defendant's home state] does in deterring its corporate citizens' wrongdoing." *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 456 (E.D. La. 2006) (citations omitted); *Heindel v. Pfizer, Inc.*, 381 F. Supp. 2d 364, 378 (D.N.J. 2004). Moreover, it is "[a] basic principle of federalism ... that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders." *State Farm Mut. Auto Ins. Co. v. Campbell,* 538 U.S. 408, 422 (2003). This Court and the California courts alike have rejected the extraterritorial application of the UCL to out-of-state plaintiffs challenging out-of-state transactions with California defendants. *Sullivan v. Oracle Corp.*, 547 F.3d 1177, 1187 (9th Cir. 2008)

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[11] For example, Florida consumer laws address all "unconscionable acts or practices" conduct, *Delgado v. J.W. Courtesy Pontiac GMC-Truck, Inc.*, 693 So.2d 602, 606-07 (Fla. App. 1997), but the California Legislature declined to take a similarly broad step, deleting a "catch all" provision in draft versions of the CLRA that declared unlawful conduct that is "oppressive or otherwise unconscionable in any respect." Cal. Assemby Bill No. 292, April 16, 1970. *But see* Cal. Civ. Code § 1770(a)(19) (addressing unconscionable contract provisions).

(quoting *Norwest Mortgage, Inc. v. Superior Court*, 72 Cal. App. 4th 214, 85 Cal. Rptr. 2d 18, 23 (1999)). Similar policies animate the Restatement, which provides that the state where a plaintiff received and relied on an alleged misrepresentation provides the governing law. Restatement (Second) Conflict of Laws § 148 & comment j.[12] Review is warranted here to ensure appropriate consideration of other states' policy preferences before imposing California law on a nationwide basis merely to make a class action possible.

II. THE DISTRICT COURT MANIFESTLY ERRED IN RESTING ON A PRESUMPTION OF RELIANCE TO FIND THAT COMMON QUESTIONS OF FACT PREDOMINATE.

The theory of this case is idiosyncratic on its face. Plaintiffs' *pleaded* claim is that CMBS buyers were materially misled into believing that all three stages of the system deployed every time it was activated, and would not have bought the system had they known that the stages might overlap depending on the circumstances. Only late in the litigation—on the renewed motion for class certification—did plaintiffs even conceive of the notion that Honda should have revealed that the system would not always work in inclement weather, making the significance of that supposed omission still less universally clear.

Moreover, few of the representations challenged here continued for more than a model year, and most for much less. See *supra* pp. 5-6. And the content of

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[12] California courts rely the Restatement (Second) Conflict of Laws for guidance on choice of law issues. *See, e.g.*, *Brack v. Omni Loan Co., Ltd.*, 80 Cal. Rptr. 3d 275, 164 Cal. App. 4th 1312, 1321 (2008).

the descriptions of CMBS changed over time. The scant testimony plaintiffs offered does not show even that the named plaintiffs viewed or relied on the same representations, much less that anyone else did. Indeed, what little evidence there is of the reactions of different CMBS purchasers shows widespread disagreement with plaintiffs over whether Honda's representations of the system were misleading. When plaintiff Michael Mazza posted his concerns about the CMBS on an Internet blog frequented by "car enthusiasts," many other postings disputed his contention that Honda's descriptions of CMBS were misleading. (Ex. at 23, 116.) Unrebutted evidence also showed that other materials available to consumers at Acura dealerships and online—as available to prospective buyers as the brochures on which plaintiffs rely—disclose the very characteristics of the CMBS system that plaintiffs claim were concealed. (Ex. at 20, 110-112.)

The district court swept aside these individualized factual issues in favor of an overarching presumption of reliance, accepting plaintiffs' unsupported assertion that *all* consumers were deceived into buying an Acura RL with CMBS based on alleged omissions in select Honda advertising, even consumers who never saw a *single* CMBS advertisement or were provided additional CMBS information at the dealership, online, or through other available resources. It was plaintiffs' burden to prove that common issues predominated (*Zinser*, 253 F.3d at 1186), but the district court instead reversed the burden by requiring that Honda present affirmative

individualized proof that particular consumers actually saw Honda's pre-sale disclosures of the allegedly concealed information. (Ex. at 22.)

The district court's approach conflicts with holdings of many other circuits, making it imperative for this Court to settle the issue. As the Eleventh Circuit has held, a "factfinder cannot determine whether an advertisement was misleading or fraudulent without knowing its content, and so each plaintiff will have to provide evidence of the particular advertisement(s) that he heard or saw." *Sikes v. Teleline, Inc.*, 281 F.3d 1350, 1364 (11th Cir. 2002). Consumers who did not see the allegedly deceptive advertisements plainly could not have relied on alleged omissions relating to the CMBS. Yet plaintiffs did not present any evidence that any class member (let alone any significant majority) saw the allegedly deceptive advertising before sale. Indeed, that is unlikely: most of the allegedly deceptive advertising was disseminated when the CMBS feature debuted on the 2006 model-year Acura RL, but plaintiffs' class includes consumers who also purchased 2007, 2008 and 2009 model year Acura RLs. Thus, in presuming reliance, the district court necessarily concluded that consumers who purchased vehicles in 2007 and 2008 relied on advertising available only in 2006!

Because plaintiffs' theory of omission rests on an "idiosyncratic" sense of what Honda *did* communicate—that all three stages always deployed, or that the system always prevented accidents—any "presumption of reliance" is especially

far-fetched. *Thorogood*, 547 F.3d at 747, 748. As the Seventh Circuit concluded in another omission case, "the proposition that the other half million buyers, apart from [plaintiff], shared his understanding of [the] representations ... is, to put it mildly, implausible, and so would require individual hearings to verify." *Id.* at 748. The Second Circuit also rejected a similar presumption of reliance for class certification purposes. *McLaughlin v. American Tobacco Co.*, 522 F.3d 215, 224-25 (2d Cir. 2008). And just this week the Third Circuit rejected the evidence-free application of a presumption that an alleged violation had a common impact, recognizing that Rule 23 now requires a "careful, fact-based approach, informed, if necessary, by discovery." *In re Hydrogen Peroxide Antitrust Litig.*, No. 07-1689, slip op. 54 (3d Cir. Dec. 30, 2008); *see id.* slip op. at 42-43.

Moreover, the district court treated its erroneous presumption of reliance as conclusive. When Honda presented evidence that it had in fact disclosed the allegedly concealed information, "the presumption" *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 (N.D. Ill. 2007) (citations omitted). *Massachusetts Mutual*, cited by plaintiffs below, does not support a contrary result because the court itself made clear that *no* inference of reliance would arise if subsequent discovery revealed that plaintiffs were provided with "such a variety of information" as to make "a single determination as to materiality" impossible. 97

Cal. App. 4th at 1294 n.5. Here, there was no evidence that particular communications were seen or heard class-wide, only that they were available. Honda's evidence that pre-sale disclosures of the allegedly concealed information were also available is the type of "evidence negating a plaintiff's direct or circumstantial showing of causation and reliance" that raises a "need for such plaintiff-by-plaintiff determinations ... that common issues will not predominate." *In Re St. Jude Medical*, 522 F.3d at 840. Because the district court misapplied California law and diverged from the predominance analysis of other circuits in similar circumstances, this Court should grant review to settle this important issue in this Circuit.

CONCLUSION

For the foregoing reasons, Honda respectfully requests that its Petition be granted, and that the District Court's Order be vacated.

Dated: January 2, 2009

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PROOF OF SERVICE

Case Name: ***Michael Mazza, Jane Mazza and Deep Kalsi***
v.
American Honda Motor Co., Inc.
Case number: **Ninth Circuit case number 09_____**
United District Court Case No. CV 07-7587-VBF(JTLx)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 221 North Figueroa Street, Suite 1200, Los Angeles, California 90012.

On January 2, 2009, I served the following document described as **AMERICAN HONDA MOTOR CO., INC.'S FED. R. CIV. PROC. 23(F) PETITION FOR PERMISSION TO APPEAL CLASS ACTION CERTIFICATION**, on all interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

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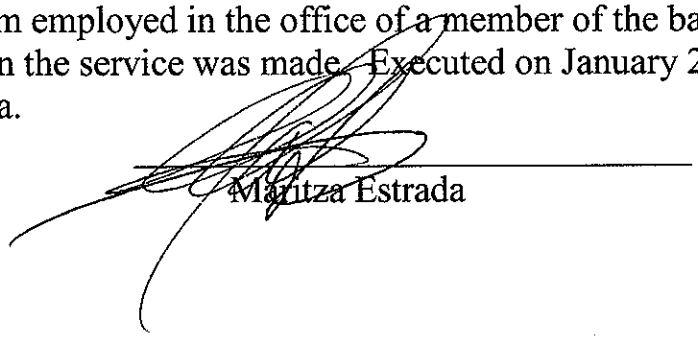
The documents were served by the following means:

[X] (BY E-MAIL OR ELECTRONIC TRANSMISSION) I caused the documents to be sent to the persons at the e-mail addresses listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

[X] (BY MESSENGER SERVICE) I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed above and providing them to a professional messenger service. (A proof of service executed by the messenger will be filed in compliance with the Code of Civil Procedure.)

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. Executed on January 2, 2009, at Los Angeles, California.



Maritza Estrada