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)

SUPPLEMENTAL BRIEF OF AMERICAN HONDA MOTOR CO., INC. REGARDING *WAL-MART STORES, INC. V. DUKES*

(pursuant to Order of June 22, 2011)

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INTRODUCTION

The Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), confirms that the class certification order in this case should be vacated and the case litigated on an individual basis. In response to this Court's June 22, 2011 Order, American Honda Motor Co., Inc. ("Honda") submits this supplemental brief to explain why *Dukes* makes reversal still more clearly warranted.

Dukes persistently and repeatedly rejects the use of analytical and evidentiary shortcuts to smooth the path to class certification. The holdings in *Dukes* that are dispositive here do not, of course, include the examination of particular theories of employment discrimination or the analysis of certification under Federal Rule of Civil Procedure 23(b)(2). The latter provision was not and could not be a basis for the class certification order under review.

Rather, the pertinent holding in *Dukes* articulates what constitutes a "question[] of law or fact common to the class" under Rule 23(a)(2) (and thus under the parallel terms of Rule 23(b)(3) as well). *See* 131 S. Ct. at 2551-52. The definition of commonality in *Dukes* limits common issues to those that permit accurate and reliable resolution of something of significance to each class member's claim in one single adjudication applicable to all. Under that standard, common issues do not predominate in the claims certified below because several

purportedly "common" issues are not common at all within the meaning of the Federal Rules.

Moreover, *Dukes* reiterates (*id.* at 2561) that Rule 23 cannot be used to expand substantive rights in violation of the Rules Enabling Act, 28 U.S.C. § 2072(b). Because the certified class necessarily includes persons who were not and could not have been injured by the allegedly unlawful conduct, the certification order expands substantive rights by permitting litigation to proceed on behalf of persons who lack Article III *standing*. The class should have been defined, if at all, to exclude persons without standing, but here too that crucial issue cannot be determined through common proof.

In short, *Dukes* highlights and confirms many of the reasons why the class certification order is legally unsustainable and should be vacated.

ARGUMENT

A. The Standard Enunciated In *Dukes* For What Constitutes A Common Question Conflicts With The Standard Applied Below.

1. Although *Dukes* also involved some issues specific to classes certified under Rule 23(b)(2) and to the employment discrimination context, the Court explained that "[t]he crux of this case is commonality—the rule requiring a plaintiff to show that 'there are questions of law or fact common to the class.'" 131 S. Ct. at 2550-51 (quoting Fed. R. Civ. P. 23(a)(2)). The controlling question in this appeal is whether the class certified below complied with Rule 23(b)(3),

which requires in pertinent part that "questions of law or fact common to class members predominate over any questions affecting only individual members." In deciding what may qualify as "questions of law or fact common to the class," the *Dukes* Court necessarily decided which issues may weigh on the common side of the balance in a predominance inquiry under Rule 23(b)(3).

The Court in *Dukes* defined a "common issue" under Rule 23(a)(2) as a "common contention" that is "capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." 131 S. Ct. at 2551. That is, the issue must give "cause to believe that all [the class members'] claims can productively be litigated at once." *Id.*

The Court specifically rejected the sufficiency of common-sounding but ultimately abstract issues that can be raised by "[a]ny competently crafted class complaint." 131 S. Ct. at 2551 (quoting Richard Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 131–132 (2009)). Rather, the Court concluded, "What matters to class certification ... is not the raising of common 'questions'—even in droves—but, rather the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id.* (quoting Nagareda, *supra,* at 132) (emphasis in original).

2. By contrast, the district court in the present case relied on a formulation adopted in a superseded *panel* decision in *Dukes*, which held that the "existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." ER11 (quoting *Dukes v. Wal-Mart Inc.,* 474 F.3d 1214, 1225 (9th Cir.), *withdrawn and superseded*, 509 F.3d 1168 (9th Cir. 2007), *reh'g en banc granted*, 556 F.3d 919 (9th Cir. 2009), *on reh'g*, 603 F.3d 571 (9th Cir. 2010) (en banc), *rev'd*, 131 S. Ct. 2541 (2011)). That formulation is incompatible with the Supreme Court's requirement that a "common" issue be capable of final and authoritative *resolution* as to each class member in a single classwide adjudication.

By and large, the district court did not even inquire into whether the "common" issues it found in fact were susceptible to common proof. For example, one question that the district court identified as "common"—"whether Honda had exclusive knowledge of material facts regarding the CMBS System, facts not known to Plaintiffs and the prospective class members before they purchased the RL equipped with the CMBS System" (ER12)—reflects the type of gloss-over that the Supreme Court has rejected. Whether "Plaintiffs and the prospective class members" knew particular "material facts" before purchasing their vehicles is a quintessentially individualized inquiry—especially where, as here, the district court acknowledged that the allegedly concealed information in fact was disclosed

in materials available to consumers pre-purchase. *See* ER25-26. The only way to tell what any individual knew about the CMBS System—including whether that knowledge was affected by any alleged misstatements or omissions by Honda—is to ask that individual. The determination whether Honda's knowledge was "exclusive" cannot possibly be made "at one stroke." 131 S. Ct. at 2551. That is especially so in light of the curative operation of common sense to counteract plaintiffs' professed understanding of the advertisements to mean that cars equipped with CMBS could essentially take over the braking function altogether, and that the system would never deploy brakes immediately in an emergency without methodically progressing through two preliminary warning stages.

B. Under The Standards Enunciated In *Dukes*, Plaintiffs Did Not Establish That The Purportedly Common Issues Are In Fact Amenable To Authoritative Resolution "At One Stroke," And Cannot Be Excused From That Burden By The Improper Application Of Presumptions.

Consistent with arguments made in our briefs (AOB 39, 50-55; Reply Br. 14-16. 26-27), the Court in *Dukes* also confirmed that compliance with the strictures of Rule 23 is a matter of proof, not a matter of pleading or presumption. Rather, "[a] party seeking class certification must *affirmatively demonstrate* his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." 131 S. Ct. at 2551 (first emphasis added; second emphasis in original).

Yet, as we explained in our earlier briefing, rather than seriously consider whether the principal issues in the case were predominantly susceptible to classwide proof, the district court in the present case simply *presumed* class-wide exposure, reliance, causation and injury, based on the most abstract assessment of the plaintiffs' causes of action. The scant evidence provided by plaintiffs consisted entirely of their personal and idiosyncratic interpretations of early CMBS advertising that varied significantly throughout the class period.

The district court declined to address the amenability to authoritative class-wide proof of the critical threshold question in the case: *which* buyers saw or heard *which* advertisements or other communications, and thus to what extent each buyer *could* have been deceived by any false or misleading communications, or by the alleged omissions viewed in context of affirmative communications. Without even common exposure to the allegedly misleading statements (or omissions made misleading by context), no common issues are presented at all. And neither plaintiffs nor the district court ever articulated how "examination of all of the class members' claims for relief" could possibly "produce a common answer to the crucial question" of who saw what, much less how each buyer was affected in her purchasing decision, if at all. 131 S. Ct. at 2552. These are not issues that "can productively be litigated at once" for all class members. *Id.* at 2551.

Materiality also cannot be a common issue when the question extends to whether any individual plaintiff is entitled to relief (and thus the opportunity to prove damages). Both the communications and the allegedly omitted facts varied from buyer to buyer, and materiality also would vary depending on the actual performance of the CMBS System (setting aside plaintiffs' caricature, which assumes unproven and derogatory facts about CMBS in order to make the issues look more common). Moreover, the operation of common sense may be the most telling factor defeating common proof of materiality. Many (one hopes most) prospective automobile buyers would not buy a car or a collision mitigation system based on an assumption that the vehicle would stop itself without driver attention or intervention, or that any aspect of the vehicle would work the same in bad weather as in good. Threading through the matrix between individualized understanding and awareness on one axis, and individualized exposure to a range of both curative and allegedly misleading communications, on the other, produces a sufficiently complex analysis even for a single purchaser. There is no way that analysis could be performed reliably for all buyers, and plaintiffs have suggested none.

The theoretically "greater propensity to purchase" (ER28) that (in various forms) the district court permitted plaintiffs to substitute for actual causation, reliance and injury presents the same type of abstract question of potential

peripheral significance that the Court in *Dukes* held was not common within the meaning of Rule 23. Its resolution, if possible at all "in one stroke," would not "resolve an issue that is central to the validity of each one of the claims." 131 S. Ct. at 2551. Cf. *id.* at 2556 ("Merely showing that Wal–Mart's policy of discretion has produced an overall sex-based disparity does not suffice" to "tie[] all [plaintiffs'] 1.5 million claims together."). A "propensity" is not common just because plaintiffs say so, and they offered no evidence to support their contentions.

And whether a "propensity" actually manifested in a way that caused any plaintiff harm is a quintessentially individualized issue. One can no more assign causation for a purchase based on a mere "greater propensity to purchase" (ER28) or on a determination that "members of the public are likely to be deceived" (ER23-24 (internal quotation marks omitted), any more than the plaintiffs in *Dukes* could reliably assign the motivation behind any individual employment action to stereotyped thinking that could account for 0.5 percent to 95 percent of the employment actions involving class members.[1]

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[1] While *Dukes* does not directly affect the district court's choice-of-law holding, that discussion reflects the same types of analytical shortcomings that invalidate its predominance analysis. For example, the court maintained that differences in the reliance requirement under the various state consumer protection laws were not "material" (ER18), when in fact differences in the legal standards could bar many class members from obtaining relief.

Indeed, one factual similarity between this case and *Dukes* is the sparse distribution of actual anecdotal evidence that the challenged common actions actually harmed all class members. The *Dukes* court rejected the significance in the commonality inquiry of 120 anecdotes accounting for only 1 out of every 12,500 class members, contrasting a prior case where plaintiffs submitted anecdotes of 1 in 8 class members. *See Dukes*. 131 S. Ct. at 2556 (citing *Teamsters v. United States*, 431 U.S. 324 (1977) and *United States v. T.I.M.E.-D.C., Inc.,* 517 F.2d 299, 308 (5th Cir. 1975), overruled on other grounds, *Teamsters,* supra). Plaintiffs' two declarations account for 0.1% of the proposed class, and the record makes clear that they are not the tip of any demonstrated iceberg: Honda received only two additional complaints from consumers about the functioning of CMBS. *See* AOB 12.

C. *Dukes* Reiterates The Impropriety Of Using The Class Device To Expand Substantive Rights, As The Certification Order Did By Encompassing Class Members Who Lack Standing To Sue.

Dukes also supports our contention that a class may not be certified if it is not defined to ensure that its members have Article III standing in common. Among other deficiencies, the uncertainty over which class members were exposed to allegedly misleading statements makes it impossible to establish through common proof which class members, if any, may have been injured by redressable conduct and therefore have standing to seek a determination whether that conduct

is lawful and caused them harm. Article III limits access to the federal courts to those who have standing. A class, therefore, cannot be defined to encompass persons who lack standing because they were never injured by the challenged conduct. And, as the *Dukes* Court confirmed, "the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' 28 U.S.C. § 2072(b) … , a class cannot be certified on the premise that" uninjured parties will be provided some recovery, while Honda "will not be entitled to litigate its … defenses to individual claims." 131 S. Ct. at 2561.

Whatever a court may presume at the class certification stage, it cannot presume that all class members have standing , much less where it identifies no means of proving that fact in single adjudication. Article III does not provide court access to those who are not hurt. Nor can a court, to ease class certification, presume that all class members satisfy causation, reliance, and injury requirements that clearly apply to individual plaintiffs. As we have pointed out before (AOB 55; Reply 28; *see also Amicus* Br. of Product Liability Advisory Council 14-15), the Rules Enabling Act and Article III alike preclude extending standing—and thus a right to recover—to class members who would lack standing to assert individual 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.

Dated: July 22, 2011

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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, Kristine Neale, 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 July 22, 2011, I electronically filed the foregoing **Supplemental Brief of American Honda Motor Co., Inc. Regarding Wal-Mart Stores, Inc. v. Dukes** 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.

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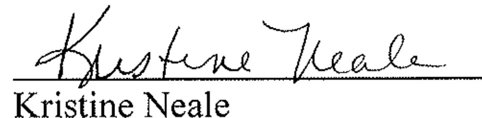

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