IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Docket No. 09-55376

MICHAEL MAZZA, JANET MAZZA, DEEP KALSI,
Plaintiffs-Appellees,

v.

AMERICAN HONDA MOTORS, INC.,
Defendant-Appellant.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
THE HONORABLE VALERIE BAKER FAIRBANK, JUDGE PRESIDING
COURTROOM 9
CASE NO. 2:07-CV-7857-VBF (JTLX)

APPELLEES' SUPPLEMENTAL BRIEF ADDRESSING THE IMPACT OF *WAL-MART STORES, INC. V. DUKES*

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INTRODUCTION

Wal-Mart Stores, Inc. v. Dukes, No. 10-277, 2011 U.S. LEXIS 4567 (June 20, 2011) ("*Dukes*"), did not alter the law in any way that affects class certification in this case. In *Dukes*, the plaintiffs sought to certify an injunctive relief class of 1.5 million women with Title VII discrimination claims under Fed. R. Civ. P. 23(b)(2). The discrimination allegedly arose from discretionary employment decisions made by thousands of separate managers spread across the country. Here, the district court certified a class under Fed. R. Civ. P. 23(b)(3) for material omissions in Honda's advertising. The instant class comprises approximately 1,958 consumers who paid a premium for Honda's Collision Mitigation Braking System ("CMBS") due to allegedly material facts Honda omitted from advertising and other marketing materials issued from its corporate headquarters in Torrance, California.

Under the facts of this case, the standards articulated by the Supreme Court in *Dukes* are satisfied. The *Dukes* decision clarified two provisions of the Federal Rules of Civil Procedure: Rule 23(b)(2) and Rule 23(a)(2). Rule 23(b)(2) has no relevance to this case, which the trial court certified under Rule 23(b)(3). As for Rule 23(a)(2), the

Dukes court held that "for purposes of Rule 23(a)(2) '[e]ven a single [common] question' will do." *Id*. at *36. Here the district court found four common questions. *See Mazza v. Am. Honda Motor Co.*, 254 F.R.D. 610, 618 (C.D. Cal. Dec. 16, 2008) (finding four common questions).[1] At a minimum, the objective question of whether Honda's omissions are material to a reasonable consumer is common to every class member, thus satisfying the commonality requirement of *Dukes*. Therefore, since the district court here certified the claims under Rule 23(b)(3) and identified one or more common questions, *Dukes* confirms the appropriateness of class treatment.

FACTS AND PROCEDURE

On June 9, 2010, this Court heard oral argument concerning the district court's class certification order. On December 7, 2010, this Court issued an order deferring submission of this case pending the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 603 F.3d 571 (9th Cir. 2010) (en banc), *cert. granted*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 795 (2010). On June 20, 2011, the Supreme Court issued its decision in *Wal-Mart Stores, Inc. v. Dukes*, 2011 U.S.

[1] *Clarified in Mazza v. Am. Honda Motor Co.*, No. CV 07-7858 VBF(JTLx), 2009 U.S. Dist. LEXIS 125691 (C.D. Cal. Jan. 8, 2009).

LEXIS 4567 (June 20, 2011). On June 22, 2011, this Court instructed the parties to file briefs articulating their positions on the application of *Wal-Mart Stores, Inc. v. Dukes* to this case.

ARGUMENT

I. *DUKES* DOES NOT IMPACT THE APPLICATION OF CALIFORNIA LAW TO THE ENTIRE CLASS

The *Dukes* decision has no impact on the district court's decision to apply California law to a nationwide class. *Dukes* did not involve Rule 23(b)(3), under which the district court determined that common issues of law predominate. In fact, *Dukes* did not involve choice of law issues at all. In any event, the district court correctly applied California's choice of law test (the three step "governmental interest" analysis), and concluded that California law properly applied to the claims of the entire class. *See Mazza*, 254 F.R.D. at 624 (citing *Clothesrigger, Inc. v. GTE Corp.*, 191 Cal. App. 3d 605, 613 (1987)); *see also id.* at 623 (citing *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 241-42 (2001)). Given its conclusion regarding the choice of law analysis, the district court held that common legal issues predominate for the nationwide class. *Mazza*, 254 F.R.D. at 624.

The district court's reasoning is consistent with other case law applying California law extraterritorially to claims arising out of

conduct emanating from California. *See Sound Appraisal v. Wells Fargo Bank*, 717 F. Supp. 2d 940, 944-45 (N.D. Cal. 2010); *Norwest Mortg., Inc. v. Super. Ct.*, 85 Cal. Rptr. 2d 18, 24-25 (1999); *cf. Diamond Multimedia Sys. v. Super. Ct.*, 19 Cal. 4th 1036, 1064 (1999) ("California . . . has a legitimate and compelling interest in preserving a business climate free of fraud and deceptive practices[ ]" and in "'extending state created remedies to out-of-state parties harmed by wrongful conduct occurring in California. . . .").

Most recently, in *Sullivan v. Oracle Corp.*, S170577, 2011 Cal. LEXIS 6537, __ Cal. 4th __ (June 30, 2011), the California Supreme Court again upheld the unremarkable principle that California law may apply to claims of class members situated outside of California, so long as there is a sufficient connection to California. Indeed, the *Sullivan* Court specifically reaffirmed prior decisions approving nationwide class actions for UCL violations where the unlawful conduct forming the basis for the out-of-state plaintiffs' claims emanated from California. *See id.* at n.10 (citing *Wershba*, 91 Cal. App. 4th 241-42, and *Clothesrigger, Inc.*, 191 Cal. App. 3d 613). Notably, these are the same authorities relied upon by the district court here.

Thus, the application of California law to the class's claims nationwide is proper, as long as Honda's at-issue conduct emanated from California. Based on the district court's fact findings, there is no doubt that this is the case. *Mazza*, 254 F.R.D. at 620 ("Here, Defendant's allegedly deceptive practices originate in, and emanate from California.") The district court specifically found that "virtually every event connected with the CMBS System—notably its design and marketing—happened in California." *Id.* Even the advertising agencies that had been retained to do all of the print, radio, television, and Internet-based advertising for the CMBS System were based in the Los Angeles area. *Id.*

In short, *Sullivan*, *Wershba* and *Clothesrigger*, along with an unbroken line of California authority, supports the application of California law to the nationwide class's claims. *Dukes*, which involved neither choice of law issues nor a predominance inquiry, does nothing to disturb this established case law and the district court's order applying it.

II. THE FACTS OF *DUKES* ARE MATERIALLY DIFFERENT FROM THE FACTS OF THIS CASE

A. Where *Dukes* Involved An Unwieldy 1.5 Million Employees Subjected To Discretionary Decisions By Thousands Of Managers Across The Country, This Case Involves 1,958 Consumers Subjected To Common Omissions From Honda's Torrance, California Headquarters

The Supreme Court's denial of class certification in *Dukes* must be understood in the light of the unique facts of that case. *Dukes*, "one of the most expansive class actions ever," involved a class of 1.5 million women attempting to certify claims for Title VII discrimination arising out of discretionary employment decisions made by thousands of different Wal-Mart managers located at various stores throughout the country. *Dukes*, 2011 U.S. LEXIS 4567 at *7-8. Those unusual facts created a morass of certifiability issues under Rule 23(a)(2) that have no relevance here. In addition, the *Dukes* class was certified under Rule 23(b)(2), without the predominance and superiority inquiries that Congress built into Rule 23(b)(3) for monetary claims. *Id*. at *38-39. Here the district court certified the class under Rule 23(b)(3)—a provision the interpretation of which was not at issue in *Dukes* and that provides Defendant with all the necessary constitutional protections that were lacking under 23(b)(2)

for the defendant in *Dukes*.

In *Dukes*, the Court observed that it was being asked to certify a class of unprecedented size and complexity. *Dukes*, 2011 U.S. LEXIS 4567 at *7 ("We are presented with one of the most expansive class actions ever. . . . [O]ne and a half million plaintiffs, current and former female employees of petitioner Wal-Mart . . . allege that the discretion exercised by their local supervisors over pay and promotion matters violates Title VII by discriminating against women."). The size of the class and, more importantly, the diffuse nature of the subjective decision-making made it unusually difficult for the plaintiffs to demonstrate "the capacity of a classwide proceeding to generate common *answers* apt to drive the resolution of the litigation." *Id*. at *20 (emphasis in original).

In contrast, here the class is comprised of approximately 1,958 purchasers of Honda's CMBS who were subject to common material omissions. Unlike the decentralized and geographically dispersed promotion decisions in *Dukes*, the district court found that Honda's omissions emanated from its California headquarters and occurred uniformly, affecting virtually all CMBS purchasers. *Mazza*, 254 F.R.D. at 626 ("[T]here is little-to-no evidence that [the information

about CMBS's limitations] was available or reached consumers prior to their purchase of the [Acura] RL with CMBS System."); *see also id.* at 620 (noting that all CMBS dissemination of information, or lack thereof, originated in California). The obstacles to class certification are therefore incomparably fewer and less significant here than in *Dukes*.

B. Whereas The Alleged Discrimination In *Dukes* Arose From The Diffuse, Discretionary Behavior Of Managers Scattered Across America, The Material Omissions Here Were Directed By Honda From Its California Headquarters

The Title VII claims in *Dukes* were based on alleged discriminatory behavior by thousands of Wal-Mart managers at stores scattered across the country. *See Dukes*, 2011 U.S. LEXIS 4567 at *35. The plaintiffs could not prove commonality under Rule 23(a)(2) because there was no central policy linking the discretionary behavior of these thousands of managers—other than it was discretionary. *See id*. ("Even if every single one of [the plaintiffs'] accounts is true, that would not demonstrate that the entire company 'operate[d] under a general policy of discrimination,' which is what respondents must show to certify a company-wide class."). In fact, Wal-Mart's corporate policy prohibited sex discrimination, but granted autonomy

and discretion to managers. *See id.* at *3 ("Wal-Mart's announced policy forbids sex discrimination."); *see also id.* at *4 ("Wal-Mart's 'policy' [is] giving local supervisors discretion over employment matters.").

Here, the district court found that Plaintiffs were injured not by the discretion of disparate individuals, but by common omissions directed from Honda's Torrance, California headquarters. *See Mazza*, 254 F.R.D. at 620; *see also id.* at 626. The Plaintiffs were harmed by Honda's uniform suppression of material information related to the CMBS in its marketing, not by discretionary actions of thousands of managers operating outside of Honda's central control.

III. CLASS CERTIFICATION SHOULD BE AFFIRMED UNDER THE RULE 23(a)(2) COMMONALITY STANDARD ARTICULATED IN *DUKES*

A. Consistent With *Dukes*, Class Members Have Identified One Or More Common Questions

The Supreme Court held in *Dukes* that "for purposes of Rule 23(a)(2), '[e]ven a single common question' will do . . . ." *Dukes*, 2011 U.S. LEXIS 4567 at *36 (June 20, 2011). The *Dukes* plaintiffs were unable to articulate a single question common to all the class members in the light of the huge size of the class (1.5 million people), and the discretionary nature of thousands of Wal-Mart managers'

employment decisions. *See id*. at *19.

By contrast, the materiality of Honda's classwide failure to disclose, among other things, that the CMBS shuts off in adverse weather—where one would want it most—is exactly the kind of common contention that *Dukes* requires:

> [Class members'] claims must depend upon a common contention -- for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it 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.

Dukes, 2011 U.S. LEXIS 4567 at *19-20.

The contention that Honda's omissions were material to a reasonable consumer goes to the heart of every class member's claim in this case. Thus, the class that the district court here certified, which involves approximately 1,958 CMBS purchasers, brings omissions causes of action that are—unlike Title VII claims based on thousands of disparate discretionary decisions—susceptible to common inquiry.

In *Ramos v. SimplexGrinnell*, the Southern District of New York held that *Dukes*' Rule 23(a)(2) analysis did not apply where the alleged violation was rooted in companywide objective facts, rather

than disparate discretionary decisions:

> The relevant facts and circumstances in [*Dukes*] have little bearing here . . . . [P]laintiffs have come forward with significant proof that defendant routinely failed to account for labor performed on public works projects and pay prevailing wages for covered work. Moreover, there is little discretion or subjective judgment in determining an employee's right to be paid prevailing wages; the right arises automatically, by operation of law . . . . In addition, whereas in [*Dukes*] defendant had an 'announced policy' prohibiting discrimination, defendant here has not come forward with evidence of an expressed uniform policy that ensured the payment of prevailing wages to its employees when due.

Ramos v. SimplexGrinnell, 07-CV-981 (SMG), 2011 U.S. Dist. LEXIS 65593 at *16 (S.D.N.Y. June 21, 2011).

Here, a consumer's right to information material to a purchase, like a worker's right to prevailing wages in *Ramos*, arises automatically. Under the Consumers Legal Remedies Act ("CLRA") and Unfair Competition Law ("UCL"), materiality is determined by a "reasonable consumer" standard. *Williams v. Gerber Prods. Co.*, 523 F.3d 934, 938 (9th Cir. 2008). Therefore, the Court need not inquire into the particular circumstances of each class member. Plaintiffs allege that Honda failed, on a companywide basis, to communicate

objectively material information about the CMBS to its customers. *Mazza*, 254 F.R.D. at 627 ("[B]ased on the evidence regarding the pre-purchase availability of the material disclosing the CMBS System's limitations, the Court . . . concludes that the question of materiality is a common one that could be determined on a class-wide basis."). The class therefore satisfies Rule 23(a)(2) commonality in the light of the *Dukes* decision.

B. Class Members Point To A Common Wrong

Dukes makes it plain that the Rule 23(a) commonality requirement is satisfied where, as here, centralized corporate action has directly harmed all members of a class. *See Dukes*, 2011 U.S. LEXIS 4567 at *25-26 (explaining that class members must produce "a common answer to the crucial question why was I [harmed]."). They may produce such a common answer even if differently-situated class members suffered varying effects from the same corporate action. The *Dukes* decision explains: "[I]f [an] employer 'used a biased testing procedure to evaluate both applicants for employment and incumbent employees, a class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule

23(a).'" *Dukes*, 2011 U.S. LEXIS 4567 at *25-26 (quoting *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 159 (1982)). In that example, a biased test would have different consequences for an applicant and an incumbent employee. However, since the corporate action that caused the harms—the biased test—is the same, the differing claims would satisfy commonality.

Here, all class members have a common answer to the question of why they were harmed: Honda uniformly omitted information that a hypothetical reasonable consumer would find to be material. The materiality of Honda's omissions is a single objective inquiry that goes to the heart of each class member's claims. As the district court found, "the question of materiality is a common one that [can] be determined on a class-wide basis . . . . The standard is that of the 'reasonable consumer.'" *Mazza*, 254 F.R.D. at 626. Had the information been disclosed, the market price that all consumers paid for the CMBS would have been less.

Finally, commonality under *Dukes* is further confirmed by the district court's conclusion that essentially *all* of Honda's representations to class members, prior to their CMBS purchases, failed to disclose the limitations of CMBS. *Mazza*, 254 F.R.D. at 626

("[T]here is little-to-no evidence that [information about the limitations of the CMBS] was available or reached consumers prior to their purchase of the RL with CMBS."). This information was not omitted haphazardly, or due to scattered discretionary decisions. *Cf. Dukes*, 2011 U.S. LEXIS 4567 at *25-26. Rather, it was uniformly omitted from advertisements and pre-purchase materials available to the class members. Thus, Honda injured the class via uniform omissions communicated from its headquarters in Torrance, California.

C. This Case Turns On Common Questions That Can Be Resolved For The Entire Class

Dukes focuses the class certification inquiry on "the capacity of a classwide proceeding to generate common answers apt to drive the resolution of the litigation." *See Dukes*, 2011 U.S. LEXIS 4567 at *20 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009)). In *Dukes*, discerning the reasons behind disparate, discretionary managerial decisions precluded certification.

Here, in stark contrast to *Dukes*, each cause of action turns on questions that can be resolved, with *common answers*, on a classwide basis. The district court identified the following four questions of law

and fact as common to the class:

> (1) whether Honda had a duty to Plaintiffs and the prospective class members to disclose that: the three stages of the CMBS System overlap; the CMBS will not warn drivers in time to avoid an accident; and that the CMBS shuts off in bad weather; (2) 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; (3) whether a reasonable consumer would find the omitted facts material; and (4) whether Honda's omissions were likely to deceive the public.

Mazza, 254 F.R.D. at 618.

The Plaintiffs' causes of action depend upon the trier of fact's answers to these questions. These questions, furthermore, go deeper than the kind of cursory common questions the *Dukes* decision indicates cannot suffice. *See Dukes*, 2011 U.S. LEXIS 4567 at *18-19 ("For example: Do all of us plaintiffs indeed work for Wal-Mart?"). The common questions here speak to the actual elements of the claims being brought under the CLRA, UCL, False Advertising Law ("FAL"), and for unjust enrichment.

In fact, the district court found not merely that common questions *exist*, satisfying Rule 23(a)(2), but that common questions

predominate for each cause of action. *See Mazza*, 254 F.R.D. at 625-27. In finding the predominance of common questions, the district court applied the higher standard of Rule 23(b)(3), which is unmodified by *Dukes*. Therefore, a holding in this case that any of the Plaintiffs' causes of action fail to satisfy Rule 23(a)(2) commonality in the light of *Dukes* would imply that *Dukes* raised the bar for "commonality" under 23(a)(2) *above the previous 23(b)(3) predominance test*. Such a holding would create doubt as to whether there is any difference between commonality and predominance—an outcome the Supreme Court did not intend. *Dukes*, 2011 LEXIS 4567 at *36 (rejecting the dissent's characterization that the majority blended 23(a)(2)'s commonality requirement with 23(b)(3)'s predominance requirement).

In short, the legal and factual questions at the center of this case are precisely the kind of questions that enable "a classwide proceeding to generate common answers apt to drive the resolution of the litigation," *Dukes*, 2011 U.S. LEXIS 4567 at *20. *Dukes* does not impugn the Rule 23(a)(2) certifiability of classes with common questions such as those presented here, where the class contends that the hypothetical reasonable consumer would have found Honda's

omissions to be material.

IV. CERTIFYING THIS RULE 23(b)(3) CLASS DOES NOT IMPLICATE ANY RIGHTS DEFENDANTS MAY HAVE TO RAISE STATUTORY DEFENSES

During its discussion of Rule 23(b)(2), the Court in *Dukes* observed that a class action may not deny a defendant the right to litigate statutory defenses to individual claims:

> Because the Rules Enabling Act forbids interpreting Rule 23 to 'abridge, enlarge or modify any substantive right,' 28 U.S.C. § 2072(b); see *Ortiz*, 527 U.S. at 845, a class cannot be certified on the premise that Wal-Mart will not be entitled to litigate its statutory defenses to individual claims. And because the necessity of that litigation will prevent backpay from being 'incidental' to the classwide injunction, respondents' class could not be certified even assuming, *arguendo*, that 'incidental' monetary relief can be awarded to a 23(b)(2) class.

Id. at *50-51. This observation does not bear upon class certification in the instant case for five reasons.

First, and most crucially, the *Dukes* Court did *not* ground its "individual defenses" analysis in the Due Process clause or any principle of general application. Rather, the Court's reasoning was specifically in the context of the "detailed remedial scheme" of Title VII:

> When the plaintiff seeks *individual* relief

> such as reinstatement or backpay after establishing a pattern or practice of discrimination . . . the burden of proof will shift to the company, but it will have the right to raise any affirmative defenses it may have, and to "demonstrate that the *individual* applicant was denied an employment opportunity for lawful reasons."

See Dukes, 2011 LEXIS 4567 at *49 (emphasis added). In the context of a Title VII case like *Dukes* in which the plaintiffs allege a "pattern or practice of discrimination," the defendant's right to present individual defenses inheres from the process set out in *Teamsters v. United States*, 431 U.S. 324, 358 (1977), in which the defendant tries to rebut the plaintiffs' inference of discrimination in mini-trials. *Dukes*, 2011 LEXIS 4567 at n.7. The Court's statement that the Rules Enabling Act cannot allow Rule 23 to "abridge, enlarge, or modify any substantive right," *id.* at *50, can thus only be read vis-à-vis the defendant's substantive right, as created by Title VII, to present individual defenses in response to individual claims for reinstatement or backpay. Sampling and extrapolation as to liability and damages therefore remain viable in contexts *other* than Title VII. *See, e.g.*, *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996). Unlike the Title VII litigation in *Dukes*, the statutory rights at issue here—the CLRA, UCL and FAL—provide Honda with no analogous right to

present "individual defenses."

Second, certification in *Dukes*, according to the Court, would have improperly abridged Wal-Mart's right to litigate individual defenses because the plaintiffs attempted to certify individual monetary damages under Rule 23(b)(2). *Dukes*, 2011 U.S. LEXIS 4567 at *50-51. In pursuing certification under Rule 23(b)(2), the plaintiffs avoided the predominance and superiority inquiries set forth in Rule 23(b)(3), which are designed to afford defendants greater procedural protections. *See id*. at *42 ("The procedural protections attending the (b)(3) class--predominance, superiority, mandatory notice, and the right to opt out--are missing from (b)(2) not because the Rule considers them unnecessary, but because it considers them unnecessary *to a (b)(2) class*.") (emphasis in original). Rule 23(b)(3), under which the class was certified here, "allows class certification in a much wider set of circumstances *but with greater procedural protections*." *Id.* at *40 (emphasis added).

Third, Honda's key statutory defenses—those surrounding the materiality of the omissions—are not susceptible to individual resolution in any event. Plaintiffs' UCL and FAL claims hinge entirely upon the objective, common inquiry of whether Honda's

conduct was "likely to deceive . . . a reasonable consumer." *Mazza*, 254 F.R.D. at 626-27. The CLRA claim depends upon that same common inquiry:

> Plaintiffs contend Mass Mutual failed to disclose [information that] would have been material to any reasonable person contemplating the purchase of an N-Pay premium payment plan. If plaintiffs are successful in proving these facts, the purchases common to each class member would in turn be sufficient to give rise to the inference of common reliance on representations which were materially deficient.

Mass. Mut. Life Ins. Co. v. Super. Ct., 97 Cal. App. 4th 1282, 1293 (2002). With respect to the unjust enrichment claims, the district court emphasized that Honda must defend itself against factual contentions common to the class instead of hiding behind the bald assertion that some individuals might have purchased CMBS at the exact same price in the absence of the material omissions. *See Mazza*, 254 F.R.D. at 627 ("For the same reasons discussed [in the CLRA, UCL and false advertising claims], the Court finds that common issues of fact predominate as to Plaintiffs' Unjust Enrichment claims."). The district court's holding acknowledged that prices for the CMBS were set by the market and uniformly charged, so liability

and damages will be the same for every class member.

Fourth, the Supreme Court reasoned that class certification under Rule 23(b)(2) would have been unfair to Wal-Mart because of the extreme and unique facts of that case. *Dukes* involved 1.5 million class members, each bringing discrimination claims to which Wal-Mart might have raised a range of plausible, individualized statutory defenses based on the thousands of managers involved. No such unfairness exists in the instant case. Here, the class size is 1,958 members, or approximately .13% of the putative class size in *Dukes*. Moreover, the predominant factual issue—whether Honda's omissions would have been material to a reasonable consumer—is a unitary inquiry, by reference to a hypothetical, objective standard. In other words, here, unlike in *Dukes*, Honda has no "individualized defenses" arising from millions of separate, unique factual circumstances and managerial decisions.

Fifth, unlike in *Dukes*, certifying this class would not abridge Honda's right to bring individualized defenses because Honda may still attempt at trial to rebut the presumption of reliance with reference to individual customers' CLRA and unjust enrichment claims. This does not counsel against certification because "'[t]he fact a defendant

may be able to defeat the showing of causation as to a few individual class members does not transform the common question into a multitude of individual ones; plaintiffs satisfy their burden of showing causation as to each by showing materiality as to all.'" *See Mass. Mut.*, 97 Cal. App. 4th at 1292 (quoting *Blackie v. Barrack*, 524 F. 2d 891, 907, n.22 (9th Cir. 1975).

CONCLUSION

The *Dukes* decision confirms that the district court appropriately certified a Rule 23(b)(3) class here. The plaintiffs in *Dukes* attempted to certify claims for monetary damages under Rule 23(b)(2), not Rule 23(b)(3), and otherwise presented the Supreme Court with an extreme set of facts thoroughly distinguishable from the facts before this Court.

Under the commonality standard of Rule 23(a)(2), articulated in *Dukes*, and in the light of the common questions found here and enumerated by the district court, this Court should affirm the district court's class certification order.

Dated: July 22, 2011

Respectfully submitted,

Initiative Legal Group APC

By: /s/ Glenn A. Danas
Marc Primo
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Attorneys for
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I hereby certify that the attached reply brief is proportionately spaced, has a 14-point typeface and contains 4332 words.

Dated: July 22, 2011

Respectfully submitted,

Initiative Legal Group APC

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9th Circuit Case Number(s) 09-55376

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