IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Docket No. 15-15579

MOHAMMED RAHMAN, individually, and on behalf of other members of the general public similarly situated,
Plaintiff-Appellant,

v.

MOTT'S LLP,
Defendant-Appellee.

APPEAL FROM ORDERS OF THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
HON. SUSAN ILLSTON, PRESIDING
CASE NO. 13-CV-03482-SI

APPELLANT'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

Pursuant to Ninth Circuit Rule 28-2.2, Plaintiff-Appellant Mohammed Rahman submits the following statement of jurisdiction:

a. The United States District Court for the Northern District of California exercised jurisdiction over this action after removal by Defendant-Appellee Mott's LLP on July 26, 2013, pursuant to the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d), 1441(b), 1446, and 1453.

b. On October 15, 2014, the district court granted in part Mott's Motion for Summary Judgment, finding Rahman lacked Article III standing to pursue injunctive relief. (1 Excerpts of Record ["ER"] 18-34.) ("MSJ Ruling"). On December 3, 2014, the district court denied Rahman's Motion for Class Certification, based in part on the prior MSJ Ruling that he lacked standing to seek injunctive relief. (1 ER 11 n.3.) ("Class Certification Order").

c. On December 17, 2014, Rahman timely filed a Petition For Permission to Appeal Order Denying Motion For Class Certification Pursuant to Rule 23(f).[1] The Petition for Permission to Appeal included the October 15, 2014 MSJ Ruling regarding standing, reviewable as part of the

[1] All references to "Rule 23" and its subsections refer to Federal Rule of Civil Procedure Rule 23.

petition because it was expressly incorporated by the district court into its Class Certification Order and was thus inextricably intertwined with the denial of class certification and necessary to ensure meaningful review.

d. On March 26, 2015, this Court granted the Petition for Permission to Appeal. (2 ER 35.)

ISSUES PRESENTED

1. Does a district court abuse its discretion by denying certification of a liability-only class pursuant to Rule 23(c)(4) when it requires the plaintiff to introduce evidence showing predominance as to damages, even though the court had already found that the plaintiff demonstrated predominance on the *liability* issues and despite the fact that under Rule 24(c)(4), the requirements of Rule 23(a) and (b) need only be satisfied with respect to each discrete issue?

2. Did the district court abuse its discretion by refusing to find that bifurcating proceedings under Rule 23(c)(4), with the liability issue to be determined first, followed by a separate trial on damages, would materially advance the case of a consumer alleging unlawful statements on a food product label?

3. Did the district court err by applying an unduly narrow test for Article III standing for injunctive relief claims in which a consumer who

alleges an unlawful or misleading food product label no longer has standing to seek injunctive relief to have that label changed once he or she becomes aware of the unlawful or misleading nature of the label?

STANDARD OF REVIEW

This Court reviews the order denying class certification under the abuse of discretion standard. *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001). "An abuse of discretion occurs when the district court, in making a discretionary ruling, relies upon an improper factor, omits consideration of a factor entitled to substantial weight, or mulls the correct mix of factors but makes a clear error of judgment in assaying them." *Wolin v. Jaguar Land Rover North Am., LLC*, 617 F.3d 1168, 1171 (9th Cir. 2010). (citations omitted); *Jimenez v. Allstate Insurance Co.*, 765 F.3d 1161, 1164 (9th Cir. 2014) ("A class certification order is an abuse of discretion if the district court applied an incorrect legal rule or if its application of the correct legal rule was based on a 'factual finding that was illogical, implausible, or without support in inferences that may be drawn from the facts in the record.'" (citing *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 513 (9th Cir. 2013).

This Court reviews a district court's partial grant of summary judgment de novo. *Suzuki Motor Corp. v. Consumers Union of United*

States, Inc., 330 F.3d 1110, 1131 (9th Cir. 2003). "Summary judgment is appropriate only when 'there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.'" *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1126 (9th Cir. 2008) (citing Fed. R. Civ. P. 56(c)). The court reviews evidence in the light most favorable to the non-moving party, as all justifiable inferences are to be drawn in favor of the non-moving party. *Id.*

STATEMENT OF THE CASE

On June 13, 2013, Rahman filed a class action complaint in San Francisco County Superior Court against Motts and Dr. Pepper Snapple Group alleging violations of the Unfair Competition Law, the False Advertising Law, the Consumer Legal Remedies Act,[2] and negligent misrepresentation and breach of quasi-contract. (1 ER 2.) The complaint alleged that Mott's labeling of a variety of Mott's food products with the statement "No Sugar Added" violated Food and Drug Administration ("FDA") regulations, California's Sherman Food, Drug, and Cosmetic Law ("Sherman Law") (Cal. Health and Safety Code § 109875 *et seq.*), and California consumer protection laws. (2 ER 99; 1 ER 1.) Based on the

[2] Unfair Competition Law ["UCL"] (California Business & Professions Code §§ 17200 *et seq.*), the False Advertising Law ["FAL"] (Cal. Business & Professions Code §§ 17500 *et. seq.*), and the Consumer Legal Remedies Act ["CLRA"] (Cal. Civil Code §§ 1750 *et seq.*).

CAFA, 28 U.S.C. § 1332(d), Mott's removed this action to federal court pursuant to 28 U.S.C. § 1441(b). (1 ER 2.) Rahman voluntarily dismissed without prejudice Dr. Pepper as a defendant on August 30, 2013. (*Id.*) Although Mott's filed a motion to dismiss on various grounds, including failure to meet pertinent pleading requirements, Rahman responded by filing a first amended complaint that mooted the motion to dismiss. (*Id.*) After a second motion to dismiss was granted in part, Rahman filed the operative Second Amended Complaint ("SAC") on February 24, 2014, having been given leave to amend. (*Id.*)

The SAC was based solely on the "No Sugar Added" statement on the label of a single product, Motts' 100% Apple Juice, and alleged violations of the UCL, FAL, CLRA, negligent misrepresentation, and breach of quasi-contract. (1 ER 2; 2 ER 209-210.) Rahman alleged that use of the "No Sugar Added" statement failed to comply with applicable FDA regulations, specifically 21 C.F.R. § 101.60(c)(2). (2 ER 210, 212-214, ¶¶2, 8-11.) This failure to comply with FDA regulations violates the Sherman Law. (2 ER 215-216, ¶¶13-15.) The district court denied Mott's motion to dismiss the SAC. (1 ER 2.)

Rahman moved for class certification on August 1, 2014, pursuant to Federal Rules of Civil Procedure, Rule 23(c)(4), seeking to certify a liability

issue class under Rules 23(b)(2) and 23(b)(3). (2 ER 87.) Rahman argued that certifying a liability issue class would advance the resolution of his claims by "quantum leaps" because if Rahman prevailed, the Court could determine whether injunctive relief (i.e. a label change) is appropriate, while leaving class members to pursue issues of damages.

However, while the class certification motion was pending, Mott's moved for summary judgment on August 12, 2014. (2 ER 170.) On October 15, 2014, the district court granted summary judgment in part, denying summary judgment only as to Rahman's cause of action under the UCL's unlawful prong and for breach of quasi-contract. (1 ER 2.) Within its order, the district court found that Rahman lacked Article III standing to pursue injunctive relief. (1 ER 27.) On December 3, 2014, the district court subsequently denied class certification. (1 ER 16.)

On December 17, 2014, Rahman filed a petition for permission to appeal the order denying the motion for class certification pursuant to Rule 23(f). As a part of his Rule 23(f) petition, Rahman sought review of the district court's summary judgment ruling because it was expressly incorporated by the district court into its class certification analysis and is inextricably intertwined with the denial of class certification. On March 26, 2015, this Court granted the petition for permission to appeal. (2 ER 35.)

STATEMENT OF FACTS

I. RAHMAN PURCHASES MOTT'S 100% APPLE JUICE BASED ON THE "NO SUGAR ADDED" LABEL AND BRINGS A CLASS ACTION SEEKING TO CERTIFY A LIABIITY-ONLY CLASS

To profit from the public's increasing focus on sugar content in food products, Mott's has prominently featured a "No Sugar Added" statement on the label and/or packaging of "Mott's 100% Apple Juice," even though apple juice does not normally contain added sugar. (2 ER 211, ¶ 6.) Before purchasing the apple juice, Rahman read and reasonably relied upon the product packaging, specifically the No Sugar Added label. (2 ER 218, ¶ 31.) He compared Mott's label to that of other competitors such as Treetop and observed that Treetop did not contain a "no sugar added" claim. As a result of the label on Mott's product, Rahman believed that Mott's 100% Apple Juice contained less sugar than, and was healthier than, other 100% apple juices. (*Id.*) Rahman also purchased more Mott's 100% Apple Juice than he otherwise would have given the label. (2 ER 159:22-24 [Rahman: "[A]fter I saw the "No sugar added," I bought more, because I thought with no sugar added, it would be beneficial to me."]; 2 ER 161:21-24.) Specifically, Rahman purchased two to three bottles every two weeks prior to seeing the label, and three to four bottles every two weeks after seeing the label. (2 ER 160-161:18-8.)

Rahman bought Mott's apple juice from 1991 until 2013, when he brought this class action.[3] (2 ER 218, ¶ 30; 2 ER 149:4-6.) Although he stopped purchasing Mott's apple juice after this lawsuit, he would still like to buy it in the future after Mott's changes its label. (2 ER 147:5-12.) In the operative SAC, he alleged that the label on Mott's apple juice misled him and is likely to mislead the consuming public to believe that Mott's apple juice contains less sugar and is healthier than comparable products when it is not. (2 ER 218, ¶ 31.) Rahman alleged that Mott's "No Sugar Added" label fails to comply with FDA regulations specifying the precise nutrient content statements concerning sugar that may be made on a food label. (2 ER 210. ¶ 2; *see also* 21 C.F.R. § 101, Subpart D.) As a result, Mott's violated the Sherman Law and California consumer protection statutes that wholly adopt the federal requirements. (2 ER 210, ¶ 2.) These requirements specifically

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[3] All Mott's 100% Apple Juice sold in California during approximately 2009 to 2011 contained the "No Sugar Added" statement on the label or package. (2 ER 122:3-123:6.) The statement was left off the packaging for a brief period of time in 2011 by "mistake," after the company implemented a change in graphics approved in 2010, and was then placed back on the label in the first quarter of 2012. (2 ER 130-:21-23 [Mott's corporate representative Eric Blackwood: "It was a mistake. They were left off accidentally. As we made a larger graphics change overall, they were simply left off."]; 2 ER 125:14-24.) Mott's marketing research indicated that the "No Sugar Added" statement was a "big selling point for all participants," thus Mott's managers made sure the self-described "mistake" was fixed and the label contains a "No Sugar Added" statement to this day. (2 ER 167; 2 ER 125:14-24.)

provide that the phrase "No Sugar Added" may not be made on a food product if the food it resembles and for which it substitutes normally does not contain added sugars. (2 ER 212-213, ¶ 8.) Due to the substantial inherent sugar content of apple juice, apple juice does not normally contain added sugars. (2 ER 214, ¶¶ 10-11.)

As set forth in the SAC, Rahman sought an injunction requiring Mott's to cease circulation of misbranded Mott's 100% Apple Juice and an award of damages to the class members. (2 ER 216, ¶ 17.) He moved for class certification on August 1, 2014. (*See generally* 2 ER 87.) Pursuant to Rule 23(c)(4), Rahman sought to certify a liability issue class under Rule 23(b)(2) and 23(b)(3). (*Id.*) The class is defined as all California residents who, from June 13, 2009, until the date of the preliminary approval order, purchased Mott's 100% Apple Juice bearing the statement "No Sugar Added" on the label or package. (*Id.*; 2 ER 100.) Rahman contended that the inclusion of the "No Sugar Added" statement on a label for apple juice, which is a food product that does not normally contain added sugar, is both illegal and deceptive. (2 ER 92.) In particular, he argued, *inter alia*, that the label violates the unlawful prong of the UCL because it violates the applicable FDA regulation, 21 C.F.R. section 101.69(c)(2), and thereby the Sherman Law. (*Id.*) He demonstrated that the liability issues are eminently

appropriate for class treatment as they present common questions, such as whether the "no sugar added" statement violates FDA regulations, which can determine on a classwide basis whether Mott's is liable for violating the "unlawful" prong of the UCL. (2 ER 93-94.) Rahman argued that as the underlying liability issues are amenable to common proof, they should be adjudicated prior to any issue relating to remedies, an approach numerous courts have endorsed. (2 ER 94.)

II. THE DISTRICT COURT PARTIALLY GRANTS SUMMARY JUDGMENT FOR MOTT'S AND FINDS RAHMAN LACKS ARTICLE III STANDING TO PURSUE INJUNCTIVE RELIEF BASED ON A STARK SPLIT OF AUTHORITY

After Rahman filed his motion for class certification, Mott's moved for summary judgment on all claims asserted by Rahman on August 12, 2014. (*See generally* 2 ER 170-197.) Mott's argued that its label was not deceptive or misleading, that Rahman did not rely on the label and suffered no damages, and that Rahman lacked standing to seek injunctive relief. (2 ER 176.) Rahman opposed the motion, contending that the reliance arguments failed as a matter law, that Rahman relied on the no sugar added statement and incurred damages when he purchased more product than he would have in reliance on the statement, and that genuine issues of material fact precluded partial summary adjudication of the core issue of whether the statement violates California's consumer protection laws. (*See generally* 2

ER 43-64.) Specifically, Rahman argued that he has standing to seek injunctive relief because he is interested in purchasing the product in the future after Mott's changes its label. (2 ER 58-60.)

On October 15, 2014, the district court granted partial summary judgment in Mott's favor, except as to Rahman's cause of action under the UCL's unlawful prong and for breach of quasi contract. (1 ER 34.) The district court also found that Rahman lacked Article III standing to seek injunctive relief. (1 ER 27.) The district court acknowledged that there is a split of authority among district courts in the Ninth Circuit regarding standing in this context, but adopted the extreme position that a plaintiff's "knowledge" of allegedly unlawful or misleading conduct eliminates that consumer's standing under Article III of the U.S. Constitution to seek injunctive relief against the at-issue practice. (1 ER 26-27.)

III. THE DISTRICT COURT DENIES CLASS CERTIFICATION, BASED IN PART ON ITS MSJ RULING

Although Rahman moved for class certification prior to Mott's motion for summary judgment, the district court issued its MSJ Ruling before its December 3, 2014 Class Certification Order. As a result, the Class Certification Order relies on the MSJ Ruling and expressly references its impact on the class certification issues to be decided. In the Class Certification Order, the district court denied class certification and also

denied a motion that had been brought by Mott's seeking leave to file a motion for reconsideration of the court's MSJ Ruling concerning restitution damages. (*See generally* 1 ER 1-17.)

The district court noted the remaining claims left after its MSJ Ruling, the claim under the UCL's unlawful prong and for breach of quasi-contract, and then applied its class certification analysis. (1 ER 2:23-24.) It found that the requirements for Rule 23(a) were satisfied, including numerosity, ascertainability, commonality, typicality, and adequacy. (1 ER 5-11.) While Rahman moved for certification pursuant to Rule 23(b)(2) and (b)(3), the court found that the MSJ Ruling regarding Rahman's lack of standing for injunctive relief mooted certification under Rule 23(b)(2), which provides that a case may be certified as a class action if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." (1 ER 11 n. 3; Fed. R. Civ. P. 23(b)(2).) The court then only addressed certification under Rule 23(b)(3) and its predominance requirement. (1 ER 11.) The court found that Rahman "has made a prima facie showing that the 'No Sugar Added' statement constitutes a violation of California's Sherman Law, and is thus independently actionable under the unlawful prong of the UCL." (1 ER 11-12:24-2.) As a

result, the court concluded that "Rahman has satisfied the predominance requirement as to issues of liability." (1 ER 12:17-18.)

Although Rahman solely sought to certify a liability-only class pursuant to Rule 23(c)(4), the court nonetheless moved its analysis on to damages and found that "the class could not be certified for purposes of seeking damages." (1 ER 13:23-24.) The court ultimately denied certification finding that certifying a liability only class under Rule 23(c)(4) would not materially advance the resolution of the case, eschewing any notion of bifurcated proceedings because it found that if "Rahman prevail[ed] on the issue of liability, certifying a second class on the issue of damages would in essence amount to prosecuting two trials when one would have done just as well." (1 ER 15:11-13.)

IV. RAHMAN PETITIONS FOR PERMISSION TO APPEAL

Rahman timely petitioned for permission to appeal the Class Certification Order pursuant to Rule 23(f), arguing that the district court interjected an erroneous damages requirement into its predominance analysis and analysis of Rule 23(c)(4), even though for particular issues to be certified using Rule 23(c)(4), the requirements of Rule 23(a) and (b) must be satisfied only with respect to those issues. Rahman argued that the MSJ Ruling was reviewable as part of his Rule 23(f) petition because the district

court rejected a liability-only class under Rule 23(b)(2) based on the MSJ Ruling alone, expressly incorporating it into its analysis. (1 ER 11 n. 3.) The district court further referenced the MSJ Ruling in its Class Certification Order as it analyzed certification issues only based on the "winnow[ing] down" of Rahman's "viable claims and forms of relief" as a result of the MSJ Ruling. (1 ER 15:20-22.) The MSJ Ruling was thus inextricably intertwined with and review of it is necessary to ensure meaningful review of the Class Certification Order. This Court granted the "Petition To Ninth Circuit For Permission To Appeal Order Denying Motion For Class Certification Pursuant To Rule 23(f)" on March 26, 2015.

SUMMARY OF ARGUMENT

Mott's takes advantage of the public's growing focus on sugar content in food by labeling its "100% Apple Juice" products as having "No Sugar Added." This labeling is illegal (and deceptive) because apple juice does not normally contain added sugars. Rahman read and reasonably relied on the no sugar added statement, believing the product contained less sugar and was healthier than similar products. He filed a class action against Mott's alleging that the label was unlawful and misled him and is likely to mislead the consuming public. The label is unlawful because it fails to comply with FDA regulations that prohibit using the "No Sugar Added" statement unless

"[t]he food that it resembles and for which it substitutes normally contains added sugars." 21 C.F.R. § 101.60(c)(2)(iv). Under Rule 23(c)(4), Rahman sought to certify a liability-only class of California residents who purchased the juice, seeking damages but primarily seeking injunctive relief requiring Mott's to change its label to comply with the law. Rahman moved for certification under both Rule 23(b)(2) and Rule 23(b)(3).

The district court denied certification under Rule 23(b)(3). Even though the district court found that Rahman had satisfied the predominance requirement on issues of liability, it nonetheless concluded that he had failed to satisfy the predominance standard as to damages. However, Rahman sought to certify a liability-only class under Rule 23(c)(4), rendering damages irrelevant to the class certification analysis. Because Rahman did not seek to certify a damages class, the district court abused its discretion by denying certification on that basis.

The district court further erred in denying certification under Rule 23(b)(2) on mootness grounds based on its MSJ Ruling regarding Rahman's standing for injunctive relief. Choosing an unduly narrow approach to Article III standing to seek injunctive relief, the district court found that Rahman lacked standing to seek injunctive relief because, at the time of the litigation, he was now aware of the unlawful nature of the statements on

Mott's 100% Apple Juice. The district court reasoned that Rahman could not suffer any future injury given his knowledge. The district court's conclusion was based on an extreme, minority position regarding Article III standing under which a consumer essentially can never seek injunctive relief. This approach to standing is wrong, undermines the consumer protection statutes, and is unnecessary given other less narrow tests that can preserve such objectives while abiding by Article III requirements.

This Court should resolve the split in authority within the Ninth Circuit and adopt a less narrow test for Article III standing that does not guarantee that food labeling cases removed to federal court are rendered dead on arrival due to a rule that consumers who learn they have been deceived and sue cannot pursue their injunctive relief claims. In the alternative, if this Court finds that Rahman lacks standing or the test applied below was appropriate, it should remand with instructions that the injunctive relief claims be remanded to state court given the district court's discretion to remand a removed case to state court upon a determination that retaining jurisdiction would be inappropriate.

LEGAL ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN FINDING A LACK OF PREDOMINANCE AS TO DAMAGES FOR RAHMAN'S LIABILITY-ONLY CLASS

A. Rahman Properly Sought To Certify A Liability-Only Class, Satisfying The Requirements of Rule 23(a) and (b) With Respect To The Particular Issues To Be Certified Under Rule 23(c)(4)

Rule 23(c)(4) provides that "[w]hen appropriate, an action may be maintained as a class action with respect to particular issues." Fed. R. Civ. P. 23(c)(4). Pursuant to Rule 23(c)(4), Rahman sought to certify a liability issue class under Rule 23(b)(2) (seeking injunctive relief)[4] and 23(b)(3) (requiring that common questions of law or fact predominate). Fed. R. Civ. P. 23(b)(2), (b)(3). In order to certify a class, he needed to meet the four requirements of Rule 23(a) which are numerosity, commonality, typicality, and adequacy of representation, as well as one requirement from Rule 23(b). *See Zinser*, 253 F. 3d at 1186. Yet for particular issues to be certified using Rule 23(c)(4), the requirements of Rule 23(a) and (b) need only be satisfied with respect to those issues. *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996); *In re Motor Fuel Temperature Sales Practices Litig.*, 229 F.R.D. 652, 674 (D. Kan. 2013).

[4] Injunctive relief under Rule 23(b)(2) will be discussed, *infra*, Section II.

The particular issues Rahman sought to certify concern a liability-only class. He did not seek to certify a damages class. The district court specifically found that he satisfied the predominance requirement on issues of liability. (1 ER 12:17-18.) His UCL claim does not require individual inquiries on liability, as common issues predominate on whether the juice label is unlawful and violates 21 C.F.R. § 101.60(c)(2). A finding that the label is illegal also supports his quasi-contract claim. Thus, Rule 23(b)(3) was satisfied with respect to the particular issues Rahman sought to certify under Rule 23(c)(4). The district court also found that the requirements of Rule 23(a) were met, with Rahman satisfying numerosity, ascertainability, commonality, typicality, and adequacy. (1 ER 5-10.) As a result, Rahman satisfied the requirements of Rule 23(a) and (b) with respect to the particular issues to be certified under Rule 23(c)(4) and class certification was warranted.

Yet the district court denied certification based on Rahman failing to provide evidence to certify a damages class. (1 ER 13:20-22.) In doing so, it ignored the rule that the requirements of Rule 23(a) and (b) need only be satisfied with respect to the particular issues to be certified under Rule 23(c)(4). *See In re Motor Fuel*, 229 F.R.D. at 674. Indeed, when only particular issues of liability were raised for certification, the district court

should not have added new issues such as certification of a damages class into its analysis. This is because "class certification solely with respect to liability requires that the issues and the class certified meet the requirements of Rule 23; that other non-certified issues or classes would violate Rule 23 is irrelevant." *In re Paxil Litig.*, 212 F.R.D. 539, 543 (C.D. Cal. 2003). Rahman was well within the parameters of Rule 23(c)(4) in seeking to certify a liability-only class. But by interjecting damages into the equation and as discussed more fully below, requiring their predominance here, was an abuse of discretion and in contravention of Rule 23(c)(4)'s mandates.

B. Pursuant to Rule 23(c)(4), A Liability Only Class under Rule 23(b)(3) Requires No Predominance of Damages

Significantly, the district court ruled that "Rahman has satisfied the predominance requirement as to issues of liability." (1 ER 12:17-18.) Yet, disregarding the nature of Rahman's liability issue only class, the district court denied class certification based on its finding that Rahman failed to introduce evidence to show predominance as to damages. (1 ER 13:20-22.) The district court incorrectly focused on the predominance of damages even though it had found that "Rahman seeks to certify a liability-only class under Rule 23(c)(4), which would potentially obviate the need for a damages expert." (1 ER 11: 1-2 & n. 2.) Despite no need for a damages expert, the district court nonetheless ultimately faulted Rahman for choosing not to

certify a damages class: "Plaintiff had ample opportunity to produce evidence necessary to satisfy the requisites of *Comcast [Corp. v. Behrend,* 133 S. Ct. 1426 (2013)] and certify a class as to both liability and damages. He chose not to." (1 ER 15-16:22-1.)

Yet "the rule of *Comcast* is largely irrelevant '[w]here determinations on liability and damages have been bifurcated' in accordance with Rule 23(c)(4)." *In re Deepwater Horizon*, 739 F.3d 790, 817 (5th Cir. 2014). Under Rule 23(c)(4), proceedings may be structured to establish liability on a classwide basis with separate hearings to determine damages. *Butler v. Sears, Roebuck and Co.*, 727 F.3d 796, 800 (7th Cir. 2013). As Rahman does not seek to certify a damages class, there is no need for a damages model, a damages expert, or a damages analysis under Rule 23(c)(4) at the certification stage of his liability-only class. The district court erred by focusing on the ability to prove damages and their predominance for certification of a liability-only class when discussion of damages may be reserved for subsequent proceedings. *See Butler*, 727 F.3d at 800; *Jimenez,* 765 F.3d at 1168 (finding "compelling" such cases from other circuits reserving discussion of damages for subsequent proceedings). The district court's ruling to the contrary was an abuse of discretion, as the "determination of damages may be reserved for individual treatment with

the question of liability tried as a class action." *In re Whirlpool Corp. Front-Loading Washer Products Liab. Litig.*, 722 F.3d 838, 854 (6th Cir. 2013).

Further, *Comcast* itself "did not hold that proponents of class certification must rely upon a classwide damages model to demonstrate predominance." *Roach v. T.L. Cannon Corp.*, 778 F.3d 401, 407 (2d Cir. 2015). *Comcast* does not mandate a formula for classwide measurement of damages in all cases. *See In re Deepwater Horizon*, 739 F.3d at 815, 817 (rejecting the argument post-*Comcast* "that certification under Rule 23(b)(3) requires a reliable, common methodology for measuring classwide damages") (internal quotation marks omitted); *Roach*, 778 F.3d at 407. Indeed, following *Comcast* this Court has reiterated the long-standing rule that individualized "damage calculations alone cannot defeat certification." *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 513 (9th Cir. 2013) (quoting *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010); *see also Jimenez*, 765 F.3d at 1167-1168; *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975) ("The amount of damages is invariably an individual question and does not defeat class action treatment."). Moreover, a "fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it

may remain so despite the need, if liability is found, for *separate determination of damages* suffered by individuals within the class." Advisory Committee's 1966 Notes on Fed. R. Civ. P. 23 (emphasis added).

Thus, while the district court correctly found that Rahman satisfied the predominance requirement as to issues of liability (1 ER 12:17-18), it clearly erred when it continued to find that Rahman failed to show predominance as to damages and the class could not be certified for purposes of seeking damages. (1 ER 13:20-24.) As discussed above, requiring a classwide method of proving damages for this liability-only class is not warranted at this stage and is not required under Rule 23(b)(3). *See Roach*, 778 F.3d at 402 ("We hold that *Comcast* does not mandate that certification pursuant to Rule 23(b)(3) requires a finding that damages are capable of measurement on a classwide basis.")

C. The District Court Abused Its Discretion In Finding That Rahman's Proposed Liability Only Class Would Not Advance The Litigation

Although the district court recognized there was authority sanctioning certification of a liability-only class, with damages to be determined in a subsequent proceeding, the district court nonetheless refused to follow this authority and concluded instead that certifying a liability only class pursuant to Rule 23(c)(4) would not materially advance the resolution of this case. (1

ER 16:2-3.) The court continued to focus on Rahman's ability to prove damages up front in determining whether certifying a liability-only class here would materially advance the litigation. (1 ER 15:7-15.) It failed to explain how addressing damages in a subsequent proceeding would be an inefficient alternative when case law, as discussed above, readily finds this method appropriate and the "sensible approach." *Butler*, 727 F.3d at 800 ("[A] class action limited to determining liability on a class-wide bases, with separate hearings to determine—if liability is established—the damages of individual class members, or homogeneous groups of class members, is permitted by Rule 23(c)(4) and will often be the sensible way to proceed.").

Indeed, when confronted with similar claims, courts have rejected the idea "that certifying Rule 23 (c)(4) classes as to 'liability' would not materially advance the litigation" or that "the remaining individual issues make the case unmanageable." *In re Motor Fuel*, 292 F.R.D. at 667. This is stark contrast to the district court's ruling finding that if "Rahman prevail[s] on the issue of liability, certifying a second class on the issue of damages would in essence amount to prosecuting two trials when one would have done just as well. Alternatively, allowing myriad individual damages claims to go forward hardly seems like a reasonable or efficient alternative." (1 ER 15:11-13.)

Here, the district court rejected application of the very process allowed by case law under Rule 23(c)(4) under the view that it presents a manageability issue despite authority to the contrary. In fact, case law finds that class certification is proper at this point, as "[b]ifurcation enables a court to certify a class action on the issue of liability only, leaving the question of individual class members' damages to be tried separately. Class certification may be proper even though individualized proof of impact or fact of damages is required, particularly where such proof is simple or mechanical." *Jacob v. Duane Reade, Inc.*, 293 F.R.D. 578, 588 (S.D.N.Y. 2013).

Rahman provided supplemental briefing regarding a simple and mechanical approach as to how damages may be resolved and the benefits of proceeding in a bifurcated manner upon the district court's specific request. [5]

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[5] Rahman provided a workable plan for proving damages and established that proceeding with a liability phase first and then addressing damages subsequently in this manner would materially move the case forward to resolution. For example under this plan, if Rahman established the liability issue that the label is unlawful, the class would be notified and then any class member who wished to proceed to prove individual damages would be able to do so. (2 ER 37-38.) Counsel from both parties could together establish a fair and workable procedure for submitting claims, including possible documentation for verification, and would place this in the class notice. (2 ER 38.) "The prove up would be simple and mechanical based on the purchase price and could include a declaration by the claimant that he/she relied on the label and would not have purchased the juice with an unlawful label." (*Id.*) Court have approved such claims procedures for refunds based on claim forms submitted under penalty of perjury, even without any supporting documentation in recent settlements of consumer

(*See* 2 ER 36-40; 2 ER 42.) Yet case law finds that the district court's request regarding how damages may be proven, as well as its subsequent ruling finding that proceeding in this bifurcated manner would not materially advance resolution of the case, were superfluous because "there is no need to decide at this time [of class certification] which avenue to pursue. What is important is that the Court has the tools to handle any management difficulties that may arise at the remedial phase of this litigation." *Houser v. Pritzker*, 28 F. Supp. 3d 222, 254 (S.D.N.Y. 2014) (certifying a liability only class). This is because "[i]f and when the litigation reaches that [remedies] stage, the Court will have a number of management tools at its disposal . . . . the Court could appoint a special master to preside over individual damages proceedings, or could decertify the class after the liability phase and provide notice to plaintiffs as to how to proceed to prove damages." *Id.*[6]

Thus, denying certification at this point was an abuse of discretion

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cases. *See, e.g.*, *Astiana v. Kashi Co.*, 2014 U.S. Dist. LEXIS 127624, *16 (S.D. Cal. Sept. 2, 2014).

[6] Moreover the availability of injunctive relief, which the district court found mooted based on its MSJ Ruling as discussed in the next section, *infra*, would have made it even more clear that Rahman could materially advance the litigation. Courts have found that in cases such as this, where injunctive relief is the "centerpiece" of the matter, certifying a liability class and then having a determination on whether injunctive relief is appropriate is key to advancing the case, as "[b]y quantum leaps, this approach will advance the resolution of plaintiff's core claims on a class-wide basis." *In re Motor Fuel*, 292 F.R.D. at 667.

when Rahman's case may proceed under Rule 23(c)(4) in a bifurcated manner and he provided evidence of how damages would be proven and how proceeding in this manner would move the case forward.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING CERTIFICATION UNDER RULE 23(b)(2) AS MOOT AND FAILING TO ADDRESS RAHMAN'S INJUNCTIVE RELIEF CLAIMS

A. The District Court's Denial of Class Certification Under Rule 23(b)(2) Was Premised On Its Overly Narrow Approach To Article III Standing For Injunctive Relief In Its MSJ Order

Rule 23(b)(2) provides that a case may be certified as a class action if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Although pursuant to Rule 23(c)(4) Rahman moved for class certification under Rule 23(b)(2), the district court denied his motion with respect to Rule 23(b)(2) in a simple footnote, concluding that the issue was moot due to its MSJ Order finding that Rahman lacked Article III standing for injunctive relief. (1 ER 11 n. 3.) Rahman had moved for class certification prior to Motts moving for summary judgment, but the district court ruled on the summary judgment first and then used this ruling as a basis for its decision on the class certification motion, citing to it in its Class

Certification Order. (*See*, *e.g*., 1 ER 11 n.3; 1 ER 15:20-22.)

Necessarily entwined with the Class Certification Order, the MSJ Ruling found no standing for Rahman's injunctive relief claim. In general, for prospective injunctive relief, a plaintiff "must demonstrate that he has suffered or is threatened with a 'concrete and particularized' harm . . . coupled with 'a sufficient likelihood that he will again be wronged in a similar way.'" *Bates v. UPS*, 511 F.3d 974, 985 (9th Cir. 2007) (citations omitted). The district court's ruling was based on application of an unduly narrow test for how to satisfy Article III standing on injunctive relief claims. Noting a three-way split in authority, the district court followed cases that find the plaintiff's knowledge of the allegedly unlawful or misleading conduct bars standing for injunctive relief under Article III. (1 ER 26-27.) *See, e.g.*, *Ham v. Hain Celestial Group, Inc.*, No. 14-cv-02044-WHO, 214 U.S. Dist. LEXIS 141157, *15 (N.D. Cal. Oct. 3, 2014) ("Consumers who were misled by deceptive food labels lack standing for injunctive relief because there is 'no danger that they will be misled in the future.'"); *Morgan v. Wallaby Yogurt Co.*, No. 13-cv-00296-WHO, 2014 U.S. Dist. LEXIS 34548, *21 (N.D. Cal. March 13, 2014) (finding that the court was limited to granting damages because the plaintiffs were now aware of what evaporated cane juice was, unambiguously stated they would not have purchased the

product had they know it contained added sugar, and could not "plausibly allege that they would purchase the challenged products in the future if they were properly labeled").

However, courts in this Circuit have found this approach to be too restrictive, punishing knowing consumers by precluding their standing based on their awareness alone. *See In re Yahoo Mail Litigation*, No. 13-CV-04980-LHK, 2015 U.S. Dist. LEXIS 68585, *22 (N.D. Cal. May 26, 2015) ("Courts have repeatedly rejected this argument as artificially precluding injunctive relief altogether."). In fact, in choosing the most stringent test, the district court below strongly departed from its *own* prior opinions that had adopted a less narrow approach. *See, e.g., Koehler v. Litehouse, Inc.*, No. 12-cv-4055-SI, 2012 U.S. Dist. LEXIS 176971, * 6 (N.D. Cal. Dec. 13, 2012) (Judge Susan Illston); *Larsen v. Trader Joe's Co.*, No. 11-cv-5188-SI, 2012 U.S. Dist. LEXIS 162402, * 4 (N.D. Cal. June 14, 2012) (Judge Susan Illston); *see also* 2 ER 248. The district court's prior rulings exemplify the two other approaches to Article III standing that have been applied by courts in this Circuit within the split of authority.

One approach finds that a plaintiff satisfies Article III standing for injunctive relief without alleging any intent to purchase the mislabelled product in the future. *See, e.g.*, *Henderson v. Gruma Corp.*, No. CV 10-

04173 AHM (AJWx), 2011 U.S. Dist. LEXIS 41077, *18-19 (C.D. Cal. April 11, 2011) (rejecting an argument that the plaintiffs lack standing because they are now aware of the FDA requirements for label disclosures and the ingredients in the defendant's products and alleged they would not purchase the products in the future); *Koehler*, 2012 U.S. Dist LEXIS 176971, at *16 (agreeing with *Henderson*); *Larsen*, 2012 U.S. Dist. LEXIS 162402, at *11 (same). In *Koehler* and *Larsen*, Judge Illston rejected a defendant's argument that the plaintiffs lacked standing to seek injunctive relief because they could not allege a threat of future injury when they would no longer use certain products upon learning that particular statements were a misrepresentation. *See Koehler*, 2012 U.S. Dist LEXIS 176971, at *15-17; *Larsen*, 2012 U.S. Dist. LEXIS 162402, at *9-12. These opinions represent the most broad approach to standing.

Yet Judge Illston later disagreed with her own opinions, *Larsen* and *Koehler*, to find that a plaintiff must demonstrate an intent to purchase the product in the future for Article III standing to seek injunctive relief. (*See* 2 ER 248:18-20 & n.9.) This ruling was made in this case and was part of the district court's order granting in part and denying in part Mott's motion to dismiss the FAC with leave to amend. (*See generally* 2 ER 232-249.) This ruling represents the last approach to standing, a middle ground approach in

which courts have required a plaintiff to allege an intent to purchase the challenged product in the future in order to have standing. *See, e.g.*, *Jou v. Kimberly-Clark Corp.*, No. C-13-03705 JSC, 2013 U.S. Dist. LEXIS 173216, *13 (N.D. Cal. Dec. 10, 2013) (for purposes of Article III standing, the court declined to find it is "unnecessary for [plaintiffs] to maintain any interest in purchasing the products in the future"); *In re Yahoo*, 2015 U.S. Dist. LEXIS 68585, at *23 (finding the future injury requirement for Article III standing is satisfied where the consumer alleges an intent to purchase the product in the future even after discovery of the claimed misrepresentation); *Ries v. Ariz Bevs. USA LLC*, 287 F.R.D 523, 533-534 (N.D. Cal. 2012) (finding standing to pursue injunctive relief where plaintiffs alleged intention to purchase products in the future); *Werdebaugh v. Blue Diamond Growers*, No. 12-CV-2724-LHK, 2014 U.S. Dist. LEXIS 71575, * (N.D. Cal. May 23, 2014) (focusing on intent to purchase product in the future and collecting cases).

The district court therefore has issued prior rulings in favor of all three approaches to standing. Yet the decision below rests on the most narrow approach, without any valid reason to support such a departure from the court's more broad, earlier pronouncements. This Court should determine the proper test for standing, which as discussed more fully below should not

be the harsh and extreme view of the district court's latest ruling.

B. This Court Should Adopt A Less Stringent Test For Injunctive Relief Standing And Reverse The MSJ Order

As this Court has ruled, for plaintiffs to establish Article III standing they must show "a very significant possibility of future harm; it is insufficient for them to demonstrate only a past injury." *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996). But abiding by this requirement does not require adherence to the strictest approach for standing, as the district court found, where "Rahman cannot plausibly prove that he will, in the future, rely on the 'No Sugar Added' statement to his detriment. He therefore lacks standing for injunctive relief." (MSJ Order p. 10:24-25.) A rule such as this would effectively bar any consumer who was misled by an unlawfully or deceptively mislabeled product from seeking injunctive relief.

A better approach is to reason that there is a continuing injury based on the fact that absent any change, consumers cannot rely on the labels whenever they go to the store. *See Ries v. Ariz Bevs. USA LLC*, 287 F.R.D 523, 533 (N.D. Cal. 2012) ("[Inability to rely on label's representation] is the harm California's consumer protection statutes are designed to redress.") In this light, such a harm continues until the labels at issue have changed. *See Lilly v. Jamba Juice Co.*, No. 13-cv-02998-JST, 2015 U.S. Dist. LEXIS

34498, *13-14 (N.D. Cal. March 18, 2015) ("The harms Plaintiffs seek to avoid by bringing this litigation are not just the harms related to purchasing or consuming a mislabeled product, but also the harm of being a consumer in the marketplace who cannot rely on the representations made by Defendants on their product labels. [citation omitted] Without injunctive relief, [plaintiff] could never rely with confidence on product labeling when considering whether to purchase Defendants' product.") This would satisfy the burden placed on a consumer plaintiff such as Rahman to show a possibility of future harm in order to maintain standing given the continuing, present adverse effects of the unlawful label. *See O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974) ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . *if unaccompanied by any continuing, present adverse effects.*") (emphasis added); *Jou*, 2013 U.S. Dist. LEXIS 173216, at *13 (rejecting the defendant's contention that "harm to Plaintiffs cannot continue to the extent they have already discovered the alleged deception"). Indeed, the "No Sugar Added" statements on Mott's 100% Apple Juice will be no less unlawful in the future than they were when Rahman read them. (*See Kumar v. Salov North America Corp.*, No. 14-CV-2411-YGR, 2015 U.S. Dist. LEXIS 12790, *9 (N.D. Cal. Feb. 3, 2015) ("The possibility of future injury is

alleged sufficiently if the plaintiff would encounter the same statements today and could not be any more confident that they were true.”).

As a result, upon a showing that the plaintiff intends to purchase the product in the future if the label is corrected, the standing requirement should be met. *See In re Yahoo*, 2015 U.S. Dist. LEXIS 68585, at *23 (“Rather than applying a rule that would have the functional effect of precluding injunctive relief altogether, courts have held that the ‘likelihood of future injury’ requirement under Article III may be satisfied where a consumer ‘allege[s] that [s]he intends to purchase the products at issue in the future,’ even after a consumer discovers the alleged misrepresentation.”) To be sure, had the district court followed this line of cases requiring an intent to purchase the product in the future, Rahman would have satisfied the standing requirement. He alleged an injury in fact based on purchasing more quantities of the product due to the “No Sugar Added” label, and he testified that he wishes to purchase the product in the future if the challenged statement is removed from the label. (1 ER 2:4; 2 ER 95:17-24; 1 ER 27:4-6; 2 ER 147:6-12.)

The flipside to this, finding that Rahman does not have standing and will not be harmed in the future based on the fact that he *already knows* about the label and the attributes of the product, represents the harsh

approach adopted by the district court. In fact, the district court eschewed any focus on the intent to purchase the product in the future. (1 ER 28 n. 4 ("[T]he court finds that introducing evidence which merely shows an intent to purchase the product in the future, where the product itself remains the same, is not *sufficient* to confer standing for injunctive relief.").) Yet as discussed above, a rule focusing only on awareness of the misleading statements precludes any consumer with knowledge about the misrepresentations from *ever* pursuing injunctive relief. *See Ries*, 287 F.R.D. at 533; *In re Yahoo*, 2015 U.S. Dist. LEXIS 68585, at *23.

This is an unworkable rule that is contrary to the very principles behind consumer protection laws. *See In re Tobacco II* Cases, 46 Cal.4th 298, 320 (2009) ("The purpose of such [injunctive] relief, in the context of a UCL action, is to protect California's consumers against unfair business practices by stopping such practices in their tracks.") The district court below once recognized in a prior opinion, contrary to what it ruled in the current case, that a narrow standing requirement would "eviscerate the intent of the California legislature in creating consumer protection statutes." *Koehler*, 2012 U.S. Dist. LEXIS 176971 at *6; *see also Henderson*, 2011 U.S. Dist. LEXIS 41077, at *20 ("While Plaintiffs may not purchase the same Gruma products as they purchased during the class period, because

they are now aware of the true content of the products, to prevent them from bringing suit on behalf of a class in federal court would surely thwart the objective of California's consumer protection laws.") As courts have recognized:

> If the Court were to construe Article III standing for FAL and UCL claims as narrowly as Defendant advocates, federal courts would be precluded from enjoining false advertising under California consumer protection laws because a plaintiff who had been injured would always be deemed to avoid the cause of the injury thereafter ("once bitten, twice shy") and would never have Article III standing.

Henderson, 2011 U.S. Dist. LEXIS 41077, at *19-20. Moreover, such a harsh standing rule ignores that "the primary form of relief available under the UCL to protect consumers from unfair business practices is an injunction." *In re Tobacco II*, 46 Cal.4th at 319.

While the district court below noted that "the power of federal courts is limited, and that power does not expand to accommodate the policy objectives underlying state law," this does not justify adopting the most stringent Article III standing test ensuring that such state law objectives will necessarily be defeated when there are other sufficient standing tests that can be applied without trampling on consumer protection objectives. (1 ER 27-28:25-2 (citing *Garrison v. Whole Foods Mkt. Grp, Inc.*, No. 13-CV-05222-

VC, 2014 U.S. Dist. LEXIS 75271 (N.D. Cal. June 2, 2014).) The district court gave no valid reason why a less narrow view that preserves state policy goals should not be followed instead. In fact, the district court never explains why it chooses to follow such an extreme approach now, in contrast to its prior opinions in other cases (*see, e.g.*, *Larsen* and *Koehler*) as discussed above, and in contrast to the prior ruling it made in this particular case, when the court reviewed Mott's motion to dismiss the FAC and held "that pleading an intent to purchase the challenged product in the future was *necessary* to confer standing for injunctive relief." (1 ER 28 n. 4 (emphasis in the original).) The district court acknowledged its change of opinion in the MSJ Ruling, but provides no clear reasoning on why it has so starkly departed from this approach to embrace a categorically opposing and limited view on Article III standing. (*See id.*)

There is simply no valid reason to follow such a stringent approach. Many courts have challenged such a near-sighted approach and "rejected the argument that a plaintiff cannot establish standing if he has learned a label is misleading and therefore will not be fooled by it again." *Jones v. Conagra Foods, Inc.*, No. C 12-01633 CRB, 2014 U.S. Dist. LEXIS 81292, *46 (N.D. Cal. June 13, 2014). Contrary to the district court's ruling, consumers such as Rahman possess standing for injunctive relief even if they have

knowledge that a label is deceptive or unlawful when such consumers "would still be interested in purchasing the product if it were labeled properly." *Mason v. Nature's Innovation, Inc.*, No. 12cv3019 BTM (DHB), 2013 U.S. Dist. LEXIS 68072, *13 (S.D. Cal. May 13, 2013).

This Court should adopt a similar test that comports with such reasoning and does not defeat consumer protection objectives at the expense of an unworkable standing requirement. This Court should reverse the MSJ Ruling and be "reluctant to embrace a rule of standing that would allow an alleged wrongdoer to evade the court's jurisdiction so long as he does not injure the same person twice." *Fortyune v. Am. Multi-Cinema, Inc.*, No. CV 10-555, 2002 U.S. Dist. LEXIS 27960, *21 (C.D. Cal. Oct. 22, 2002) (citations omitted).

C. In The Alternative, This Court Should Direct That The Injunctive Relief Claims Be Remanded To State Court Rather Than Uphold The MSJ Ruling On Standing

If this Court finds that the approach applied below for Article III standing is warranted for the injunctive relief claims or that Rahman lacks standing, this Court should nonetheless reverse the MSJ Ruling in order for those claims to be remanded back to state court so that the purpose of California's consumer protection statutes can be accomplished. This has been an alternative approach applied by courts after finding standing

lacking.

For instance, in *Machlan v. Procter & Gamble Co.*, No. 14-cv-01982-JD, 2015 U.S. Dist. LEXIS 1643 (N.D. Cal. Jan. 7, 2015), a case originating in state superior court and removed under CAFA alleging claims under, *inter alia*, the UCL and FAL, the court took the most stringent approach to standing and found it lacking under some theory that the plaintiff, once aware of any misrepresentation, personally could not be harmed in the same way again. *Id.* at *10-11. Rather than dismiss the plaintiff's claims, it found that it had the discretion to order a remand of the injunctive relief portions of the claims. *Id.* at *12. It noted that while the scope of its jurisdiction "begins and ends with Article III," the "result in a California state court would likely be different." *Id.* at 11. This is because "the state courts need not impose the same standing or remedial requirements that govern federal court proceedings." *City of Los Angeles v. Lyons*, 461 U.S. 95, 113 (1983). The court reasoned that while the "UCL permits an injured plaintiff to obtain an injunction from the state court that prevents future harm to other unsuspecting consumers by 'stopping such practices in their tracks,'" the same plaintiff may lack Article III standing. *Machlan*, 2015 U.S. Dist. LEXIS 1643 at *12.

In order to address the fact that "injunctive relief is an important

remedy under California's consumer protection laws," the court found that remand was appropriate. *Machlan*, 2015 U.S. Dist. LEXIS 1643 at *14. Moreover, it concluded that "[a]llowing a defendant to undermine California's consumer protection statutes and defeat injunctive relief simply by removing a case from state court is an unnecessary affront to federal and state comity." *Id.* It retained the authority to remand under *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343 (1988), where the Supreme Court held that district courts have discretion pursuant to the doctrine of pendent jurisdiction to remand a removed case to state court upon a proper determination that retaining jurisdiction would be inappropriate. *Id.* at 353.

Like this case, the case in *Machlan* was originally filed in a California state court, by a California plaintiff, on behalf of a putative class of California residents under California's state laws and was removed under CAFA. *Machlan*, 2015 U.S. Dist. LEXIS 1643 at *14. The court found that remand was warranted, as having the state court determine injunctive relief was appropriate:

> A California state court ought to decide whether injunctive relief is appropriate for plaintiff's claims. Respect for comity and federalism compel that conclusion, and just tossing aside the state's injunction remedy because of this Court's limited jurisdiction is an unwarranted federal intrusion into California's interests and laws.

Id. at *14-15. A similar outcome should happen here, if this Court were to adopt the approach applied below to standing and find standing lacking.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's order denying Rahman's motion for class certification and reverse the MSJ Order to the extent it finds Rahman lacked Article III standing to pursue injunctive relief, and grant Rahman's motion for class certification.

Dated: August 5, 2015

Respectfully submitted,

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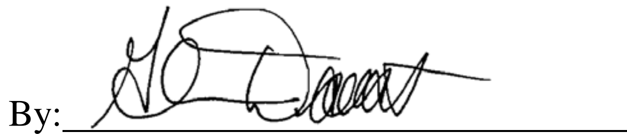
CERTIFICATE OF COMPLIANCE

I certify pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, that the attached Appellant's Opening Brief is proportionally spaced, has a typeface of 14 points, and contains 9,110 words.

Dated: August 5, 2015

Respectfully submitted,

Capstone Law APC



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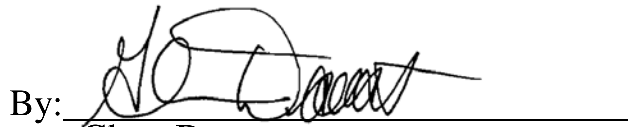
CERTIFICATE OF RELATED CASES

No other cases in this Court are deemed related to this case pursuant to Circuit Rule 28-2.6.

Dated: August 5, 2015

Respectfully submitted,

Capstone Law APC

By: 

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9th Circuit Case Number(s) 15-15579

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