No. 17-15088

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CIRCLE CLICK MEDIA LLC, CTNY INSURANCE GROUP LLC, *et al*.,

Plaintiffs-Appellants,

v.

REGUS MANAGEMENT GROUP, LLC, REGUS BUSINESS CENTRE LLC, REGUS PLC, HQ GLOBAL WORKPLACES LLC, and DOES 1-50,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
District Court Case No. 3:12-cv-04000-EMC
The Honorable Edward M. Chen, District Court Judge

OPENING BRIEF OF PLAINTIFFS-APPELLANTS

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Plaintiff-Petitioner Circle Click Media LLC hereby states that it has no parent corporations and there is no publicly held corporation that owns ten percent (10%) or more of its stock.

Plaintiff-Petitioner CTNY Insurance Group LLC hereby states that it has no parent corporations and there is no publicly held corporation that owns ten percent (10%) or more of its stock.

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I. STATEMENT OF JURISDICTION

This matter was removed from the California Superior Court pursuant to 28 U.S.C. § 1441 and the procedures set forth in 28 U.S.C. § 1446 based on 28 U.S.C. § 1332(d)(2). The statutory basis for this Court's jurisdiction is 28 U.S.C. § 1291. Plaintiffs appeal from (1) the order denying plaintiffs' motion for class certification (6ER1143 – 1171), entered March 11, 2016), (2) the order denying plaintiffs motion for leave to file motion for class certification reconsideration (3ER0426-29), entered May 5, 2016), (3) the order granting defendant's motion for partial summary judgment (1ER10-22), entered July 18, 2016), and (4) the final judgment (1ER1-2), entered December 16, 2016. The plaintiffs filed their timely Notice of Appeal on January 11, 2017. The appeal is from a final order disposing of all parties' claims.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Was it error for the district court to deny class certification on the ground that individual issues predominate over common issues?

Was it error for the district court to dismiss plaintiff Circle Click's claim for a public injunction on the ground that it did not have Article III standing?

If the district court did not have subject matter jurisdiction to issue a public injunction, was it error for the district court not to remand the unfair business practices causes of action to the state court?

If the district court does have Article III jurisdiction for a public injunction, may such an injunction be issued even if no class is certified?

Pertinent constitutional provisions, statutes, and rules are contained in a separate addendum.

III. STATEMENT OF THE CASE

A. BACKGROUND

1. The Parties

Appellants are a class of small businesses, who rented office space in California and New York from defendants (herein collectively "Regus"). 5ER957:10. Regus, is the largest provider of office space in the world. 2ER306, 322:19-323:7. Regus provides furnished and serviced office space to small businesses, most with fewer than 10 employees, Lease terms are typically six months or less. 2ER300, 351-52; 6ER1343.

2. The OSA Form Contract.

Each Regus client in the proposed class enters into a nearly identical form contract, known as the Office Service Agreement ("OSA")[1], which in printed form consists of a single sheet of paper printed on both sides.[2] 4ER738-762, 865, 1582-88. On the front of the OSA there is information identifying the client and the office, together with a "Total Monthly Payment" for the office, due each month during the term of the agreement. *Id.*; 5ER963, 933-34, 933, 963:14-964:3. Appellant Circle Click's monthly price, and the term, as stated on the face of the OSA, was as follows:

[1] "OSA" was used to describe both paper and online versions, but the "O" in the online version stands for "Online" rather than "Office."

[2] Online and paper versions of the form contract were in use during the class period, with the Terms and Conditions in the same small font. In the online version, the Terms and Conditions are not shown unless a hyperlink is clicked. Regus does not require the client to actually look at the Terms and Conditions before accepting them.

Office Number	Number of people
1611	1
Initial Payment:	
First month's fee:	$0.00
Service Retainer:	$1,368.00
Total Initial Payment:	$1,368.00
Monthly Payment:	
Total Monthly Payment thereafter:	$1,368.00
Length of Agreement:	
Start Date Friday, October 01, 2010	End Date Thursday, March 31, 2011

3ER410-12.

The form contracts for all class members remained essentially the same from 2006 until 2014. 4ER738-62; 6ER1145, 1212-23; 7ER1393-1548, 1641-47.

3. The Terms and Conditions.

Printed on the back of the OSA in the paper version of the rental contract, and incorporated by reference into the OSA, are the Terms and Conditions, (5ER931), which the client accepts by checking a box on the front of the OSA. 5ER963:14-964:3. The Terms and Conditions are printed in smaller than five-point font; if printed in 12-point Tahoma font, they would expand to eight pages. Id. The District Court found that the Terms and Conditions was "exceedingly difficult to read." 4ER880.

The Terms and Conditions were essentially the same for every member of the class until early 2014, when its font was enlarged somewhat. 4ER695-737;

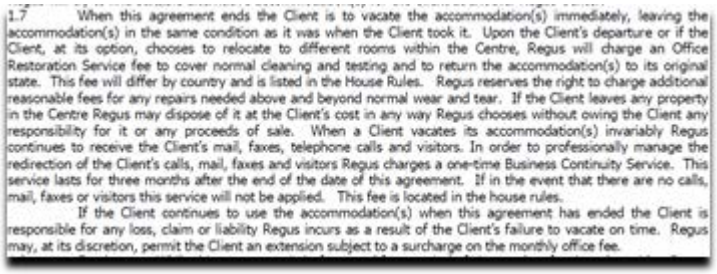
7ER1590. Regus knew that its customers tend not to read the Terms and Conditions. 2ER290-91.

4. OSA Price Misrepresents Actual Cost; Hidden Fees are Significant

Buried in the fine print of the Terms and Conditions, are references to two service fees. 2ER695-737. One of the fees, called the Office Restoration Service ("ORS") fee, ends up costing several hundred additional dollars, to pay for normal wear and tear to the office.[3] 2ER353. The second charge, called the "Business Continuance Service" ("BCS") fee, pays for a recorded message on the client's phone line, and mail forwarding (postage extra) for three months after the client leaves. 2ER353-54. Circle Click was charged a $483.99 ORS fee and a $1,047 BCS fee, for a total of $1,530.99, which increased the monthly cost during the six month lease term by more than 18%. 3ER593-94, 575-77, 582. Regus billed and collected the same charges from CTNY. 3ER395, 507-510.

[3] Under California and New York state law, normal wear and tear is by default the obligation of the landlord, not the tenant.

It is no wonder that few clients see the references to the ORS and BCS in the Terms and Conditions, as they are printed in a paragraph, in the size font Regus used, which looks like this:



1.7 When this agreement ends the Client is to vacate the accommodation(s) immediately, leaving the accommodation(s) in the same condition as it was when the Client took it. Upon the Client's departure or if the Client, at its option, chooses to relocate to different rooms within the Centre, Regus will charge an Office Restoration Service fee to cover normal cleaning and testing and to return the accommodation(s) to its original state. This fee will differ by country and is listed in the House Rules. Regus reserves the right to charge additional reasonable fees for any repairs needed above and beyond normal wear and tear. If the Client leaves any property in the Centre Regus may dispose of it at the Client's cost in any way Regus chooses without owing the Client any responsibility for it or any proceeds of sale. When a Client vacates its accommodation(s) invariably Regus continues to receive the Client's mail, faxes, telephone calls and visitors. In order to professionally manage the redirection of the Client's calls, mail, faxes and visitors Regus charges a one-time Business Continuity Service. This service lasts for three months after the end of the date of this agreement. If in the event that there are no calls, mail, faxes or visitors this service will not be applied. This fee is located in the house rules.

If the Client continues to use the accommodation(s) when this agreement has ended the Client is responsible for any loss, claim or liability Regus incurs as a result of the Client's failure to vacate on time. Regus may, at its discretion, permit the Client an extension subject to a surcharge on the monthly office fee.

4ER695-737. The tenant's security deposit or "retainer," according to Regus policy, may be withheld and applied to pay the ORS and BCS fees. 2ER321; 6ER1345. When Circle Click complained about its bill, Regus threatened to withhold BCS and other fees from Circle Click's security deposit. 3ER422. Circle Click filed a complaint in San Francisco Superior Court, seeking, *inter alia*, an injunction under the California Unfair Business Practices Act ("CUBPA"),[4] Cal. Bus. & Prof. Code § 17200 et seq. 5ER1058-71. The case was removed to federal court by Regus based on the Class Action Fairness Act ("CAFA") codified at 28 U.S.C. §§ 1332(d) and 1453(b). 5ER1048-54.

[4] This statute does not have an official name. In recent times California courts have taken to referring to it as the Unfair Competition Law ("UCL"). For consistency, references to "UCL" in quoted materials have been changed to CUBPA.

B. THE SECOND AMENDED CLASS ACTION COMPLAINT

The operative complaint is the Second Amended Complaint ("SAC"), filed on February 11, 2013 (5ER956-1014), which alleges that Regus routinely imposes on its client's unfair charges that cause the office cost to exceed the amount stated on the front of the OSA. 5ER932-55 at ¶¶ 23-26, 52a, 52h, 52i, 73, 76a, 81a-c, 111-113, 142, 143. The complaint alleges Count I for Violation of Cal. Bus. & Prof. Code section 17200, (2) Count II for Violation of Cal. Bus. & Prof Code section 17500, (3) Count III for Intentional Misrepresentation, (4) Counts IV for Unjust Enrichment under California law, (5) Count V for Unjust enrichment under New York law. The SAC did not allege, nor did the pleading contain, any claims for relief based on oral representations or sales presentations made by Regus sales agents. 5ER956-1014.

The false and misleading price printed on the OSAs is alleged by the class to be material because a reasonable person would attach importance to the OSA price when agreeing to take the space, would not have expected the hidden ORS and BCS fees, and would have altered his or her choice of entering into the OSA with Regus, had he or she known the truth. *Id.* at ¶117; 3ER393:27-28, 419:8-10; 2ER293, 331:4-8, 350:16-17; 6ER1288-1307; 7ER1601.

C. DEFENDANTS' 12(b)(6) MOTION TO DISMISS SECOND AMENDED COMPLAINT

Defendants filed a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. Pro. 12(b)(6). 5ER933. The Honorable Samuel Conti granted in part and denied in part Respondents' motion to dismiss, but as relevant to this appeal, the court held that "Plaintiffs' claims for unfair and fraudulent practices under the [CUBPA] remain undisturbed." 5ER942-43.

D. THE COUNTERCLAIMS AGAINST THE CLASS

At the time of answering the second amended complaint, Regus filed counterclaims against the absent class members, and the named plaintiffs, for breach of contract, quantum meruit, and unjust enrichment. 5ER905. Plaintiffs filed motion to dismiss the counterclaims, which Judge Conti granted as to the counterclaims against the absent class members, and for breach of contract against Circle Click, with prejudice. 5ER905-928; 4ER894-904; 4ER900:28; 5ER928. The remaining counterclaim, for breach of contract against CTNY, and alternative counterclaims for unjust enrichment and quantum meruit, were dismissed to allow this appeal. 4ER897; 5ER928, 1141.

E. CLASS CERTIFICATION BRIEFING AND RULINGS

Plaintiffs filed their first motion for class certification on June 1, 2015. 7ER1608-1635. In opposition, Regus contended its sales process and sales collateral changed over time, sales presentations to individual class members were

different and, thus, Rule 23(b) predominance could not be satisfied. 6ER1244-1287. Judge Conti found that common issues predominated, noting that "Regus's argument that common questions do not predominate because at least some class members read the Terms and Conditions is unavailing because *whether printing the Terms and Conditions in small font is likely to deceive the public* is a question common to the class even if certain class members successfully read the Terms and Conditions notwithstanding their small font." 3ER463:11-19 (italics added).

Plaintiffs presented evidence showing that the lack of disclosure of hidden fees was consistent over time. 6ER1229-32, 1212-23, 1342-43, 1345, 1389, 1392; 7ER1394-1484, 1486-87, 1492-1593, 1601, 1639, 1642-51; 4ER696-737, 739-762, 770:19, 774:24-25, 777:11-14, 780:17-19, 781:3-6, 783:8-12, 786:11-13, 790:13-28, 793:10-13, 796:10-13, 846:13-22, 854, 865:12-25, 874:11-25, 880:6-14; 2ER323:16-324:1-2, 249:8-28, 304:9-10, 307:1-308:14, 309:2, 313:12-17, 322:28-324:3, 334:16-335:10, 374:1-19; 3:439; 3ER463:13, 469:12-16. In some OSA's there was a reference to one or more of the hidden fees in the "comments" section or in an addendum, although the evidence was that this was the case for only a small percentage of the OSAs. 6ER1212-36; 7ER1601. Respondents did not identify any customers who were actually able to rent a Regus office for the amount promised on the OSA, and there was significant proof that class members' invoices routinely exceeded the price printed on the OSA's. 5ER907:19-908:2,

970:1-6; 3ER522-583, 508-510; 2ER321:8-12; 4ER827-851; 2ER303 Although Judge Conti held "that a class action is superior to other available methods for fairly and effectively adjudicating this controversy," (3ER468:14-469:19), he found that inclusion in the class definition of persons whose OSA showed knowledge of the fees made the class definition overbroad, (2ER354-55.) Judge Conti denied class certification without prejudice, which allowed plaintiffs to amend the class definition. 3ER473

After Judge Conti retired, plaintiffs filed a renewed class certification motion on December 17, 2015. 2ER339-65. In plaintiffs' second motion to certify the class plaintiffs narrowed the class definition to include only forms of contract generally used with small businesses, and to exclude class members with knowledge of the hidden fees as evidenced by language added to the OSA which mentioned them. 2ER354-55. Plaintiffs' revised California class definition was as follows:

> All persons who, on account of an office located in California, either (1) entered into an office accommodation agreement (OSA) using one of the Regus standard physical office space forms of agreement (which are the same or substantially similar to one of the forms identified as REGUS00657 - 00664, 00680 - 00686, 02093, 11477, 11478 - 11480 or 20199) did not have a corporate account, and paid or were charged for, on or after May 8, 2008, one or more of the Identified Charges which was not disclosed in the "comments" section of the OSA or in an addendum to the OSA; or (2) entered into an office accommodation agreement with an entity later acquired by

> Regus,* did not have a corporate account, and paid to or were charged by Regus on or after May 8, 2008 one or more of the Identified Charges.

2ER355-56. The first common question listed in the revised motion for class certification under the CUBPA unfair and fraudulent causes of action, was "Does the failure to include required service fees in the office price stated in the OSA make the OSA price misleading?" (2ER358 (emphasis added). A hearing was held before the Honorable Edward M. Chen, on February 24, 2016. 1ER56.

On March 25, 2016, plaintiffs filed a motion for leave to file motion for reconsideration of the order denying the motion for class certification. 2ER366-86. The district court denied the request on May 5, 2016, finding that "Plaintiff cannot simply ignore the oral representations made by Regus, such as when a salesperson *affirmatively informed* a customer of the disputed fees. . . . Thus, even if plaintiffs were to rely solely on the documents, which does not prevent Regus from arguing that whether a class member had a claim based on the lack of adequate disclosure of the ORS and BCS fees is an individualized issue that depends in part on whether a salesperson did in fact disclose the fees." 1ER51:1-10.

In a footnote, the district court held that because "there is no persuasive evidence of a uniform or consistent pattern of oral statements, certification is not appropriate." 1ER52-53. The district court stated that "there was an individualized

issue of what people were exposed to – for example, if they were exposed only to the OSA, or if they received the OSA and were orally informed by a Regus salesperson that they would be charged a ORS or BCS separate from the price listed in the OSA. Thus, there are individualized issues of what mix of information Regus presented each class member with." 1ER54:18-23.

F. DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND RULINGS

On April 28, 2016, defendants filed a motion for partial summary judgment, asking for dismissal of Circle Click's request for a public injunction as permitted by Cal. Bus. & Prof. Code section 17203, based on a claimed lack of standing to seek such relief. 2ER192-209. Plaintiffs filed an opposition to the motion on May 12, 2016, (2ER174-91), defendants thereafter filed a reply to the opposition, (2ER163-73), and a hearing was held, on June 30, 2016. 1ER23-46.

At the time the original complaint was filed, on May 8, 2012, Circle Click was still in contract with Regus and Regus was demanding that Circle Click pay for disputed service fees and penalties, including the ORS and BCS fees. 2ER180, 182-83; 3ER575-77, 82, 593-94, 602-605.

Plaintiffs contended in the opposition to the motion to dismiss for lack of standing that, the "unfair practices complained of are clearly ongoing." 2ER180-82. However, on July 18, 2016, the Court concluded that Circle Click "lacks Article III standing to seek injunctive relief under the [CUBPA] because it has not

shown any threat of future injury." 1ER16-17. The district court also held that a CUBPA public injunction could only be issued if a class was certified. 1ER18-21.

G. FINAL JUDGMENT AND APPEAL TO THE 9TH CIRCUIT

On December 16, 2016, the District Court entered final judgment. 1ER1-2. On January 12, 2017, Plaintiffs-Appellants filed timely notice of this appeal. 2ER124-126.

IV. SUMMARY OF THE ARGUMENT

The district court committed two serious errors.

First, the Court ruled that individual issues predominate over common issues, because oral sales presentations to various customers might have varied. But the common question that Plaintiffs presented for class resolution did not involve any oral presentations. The common question was based solely on the documents that Regus presented to every customer: "Does the failure to include required service fees in the office *price stated in the OSA make the OSA price* misleading?" As it was undisputed that virtually the same OSA was presented to every member of the class, this question clearly predominates over any individual questions.

Second, the district court did not properly handle the claim for a public injunction. If the district court correctly determined that it did not have jurisdiction to grant the primary relief available under the CUBPA cause of action, injunctive

relief, then it improperly failed to remand plaintiffs' CUBPA cause of action back to state court. Plaintiffs filed this case in California state court, not federal court. Under California law, plaintiffs clearly had standing to seek a public injunction. Defendant had the case removed to federal court – and then claimed that plaintiffs had thereby lost their right to seek a public injunction. The district court agreed. Even if the district court was correct that it did not have jurisdiction to issue a public injunction, it was unfair and improper to simply dismiss this claim, depriving plaintiffs of the right to pursue a public injunction in *any* court. The district court should have remanded this claim back to the California state court where Plaintiffs had brought it in the first place, and where Plaintiffs unquestionably had standing.

Plaintiffs argue that there is federal jurisdiction over the public injunction claim because private parties may enforce the public interest embodied in California law and existing Ninth Circuit precedent does not prohibit jurisdiction. Furthermore, the public injunction issue is separate from the class certification issue because California law allows the court to issue a public injunction without a class action. The district court's determination that a class action was required for public injunctive relief has definitely been rejected by the California Supreme Court

V. ARGUMENT

A. STANDARD OF REVIEW

In general, an appellate court reviews a district court's order denying a motion for class certification for abuse of discretion. *Parra v. Bashas', Inc.*, 536 F.3d 975, 977–978 (9th Cir. 2008). Abuse exists in three circumstances: (1) reliance on an improper factor, (2) omission of a substantial factor, or (3) a clear error of judgment in weighting the correct mix of information. *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708 (9th Cir. 2010). However, "[t]o the extent that the ruling on a Rule 23 requirement . . . involves an issue of law, review is *de novo*." *Yokoyama v. Midland Nat. Life Ins. Co.*, 594 F.3d 1087, 1091 – 92 (9th Cir. 2010). Whether plaintiffs have to prove at trial which class members did not have knowledge of the hidden fees hidden is a matter of law, which this court may review *de novo*.

The district court's ruling on defendants' motion for partial summary judgment also presents a pure question of law, so review is also *de novo*. *Beaver v. Tarsadia Hotels,* 816 F.3d 1170, 1177 (9th Cir. 2016).

B. COMMON ISSUES PREDOMINATE ON THE CLAIMS BASED ON ORS AND BCS FEES; THE CLASS SHOULD HAVE BEEN CERTIFIED

1. The Predominance Inquiry Requires Consideration of What Individual Issues Plaintiffs Must Prove at Trial

The determination of whether "questions of law or fact common to class members predominate begins, of course, with the elements of the underlying cause of action." *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804 (2011). "In determining whether common questions predominate, the Court identifies the substantive issues related to plaintiff's claims (both the causes of action and affirmative defenses); then considers the proof necessary to establish each element of the claim or defense; and considers how these issues would be tried." *Ellsworth v. U.S. Bank, N.A.*, No. C 12-02506 LB, 2014 WL 2734953, at *19 N.D. Cal. June 13, 2014. At trial, an "individual question is one where 'members of a proposed class will need to present evidence that varies from member to member.'" *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016).

Plaintiffs claim the contract documents may have misled class members to believe that that the monthly price stated in the OSA was the actual price of the office. 2ER358. Plaintiffs argue that, at the class certification stage, their burden is to show universal distribution of allegedly misleading documents. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S. Ct. 2541, 2554-2557 (2011). Plaintiffs met this requirement by showing the universal distribution of the misleading OSA.

4ER738-62; 6ER1145, 1212-23; 7ER1393-1548. Plaintiffs do not need to show that what the class members were "told" was "universally uniform;" as such a showing is necessary only if plaintiffs are relying on the oral sales presentation as the basis for their claim. 2ER255:5-7.

The district court held that showing that each member of the class was exposed to the misleading documents was not enough, stating that if "there is no persuasive evidence of a uniform or consistent pattern of oral statements, certification is not appropriate," presumably because in the absent such evidence of uniformity, the question of what each class member was orally told would be an individual issue. 1ER52-53, fn.3.

Plaintiffs' first common question presented to the district court under the unfair and fraudulent CUBPA causes of action was, "Does the failure to include required service fees in the office price stated in the OSA make the OSA price misleading?" 2ER358 (emphasis added). In analyzing predominance, however, the district court did not begin its analysis with the elements of the underlying causes of action. Rather than looking first at what individual issues would be required to be proven at trial, the district court decided that "it must first be determined what the customer saw and/or heard." 6ER1160 (emphasis added). The district court applied an incorrect legal standard, beginning its analysis with "what a customer saw and/or heard" and requiring it to be "universally uniform,"

holding that since there were some class members who learned of the hidden fees before signing the OSA, there is "probative evidence that there was *not* a universally uniform practice of not disclosing the disputed fees." 6ER1166 (emphasis in original).

At the hearing on class certification plaintiffs argued that "The theory, your Honor, is basically, predominately based on the documents." 1ER60:16-17. Plaintiffs' counsel stated, "the documents themselves are inherently misleading" and, when asked by the district court if plaintiffs would be willing to try the cased based only on the documents, responded "Yes." 1ER66. The district court quotes from the oral argument record to support its claim that "Plaintiffs acknowledge that their claim is also based on the documents (*sic*) the *way* the documents are *presented*, which includes the salesperson's pitch to the individual customer." 6ER1159:17:27-1160:6. The hearing transcript does not support the district court's claim that plaintiffs rely on the sales presentation for their CUBPA claim. "THE COURT: My first – the threshold question – I think you answered that, is when you say…the way the OSA was presented includes the way the salespeople sort of pitched and presented… MR. VISHER: **I didn't**…**We're not saying you said this and that** – if you are presented these documents, you just look at the documents. The documents, themselves, have a price on there which – which you

think is the price you -- THE COURT: So you are not relying on anything they said. MR. VISHER: No…" 2ER64:22-65:14 (emphasis added).

It is undisputed that the class "saw" the same OSA, and the Terms and Conditions were essentially the same during the 2006 – 2014 period. 6ER1229-32, 1212-23, 1342-43, 1345, 1389, 1392; 7ER1394-1484, 1486-87, 1492-1593, 1601, 1639, 1642-51; 4ER696-737, 739-762, 770:19, 774:24-25, 777:11-14, 780:17-19, 781:3-6, 783:8-12, 786:11-13, 790:13-28, 793:10-13, 796:10-13, 846:13-22, 854, 865:12-25, 874:11-25, 880:6-14; 2ER323:16-324:1-2, 249:8-28, 304:9-10, 307:1-308:14, 309:2, 313:12-17, 322:28-324:3, 334:16-335:10, 374:1-19; 3:439; 3ER463:13, 469:12-16. A review of the applicable law shows that the district court's conclusions of law, first requiring that what class members saw and heard had to be universally uniform and, second, that defendant could create predominance problems merely by showing some class members were not misled, were both clear error requiring reversal.

2. "Who Knew" is Not Relevant to Proof of the CUBPA Claim

"In order to state a cause of action under the fraud prong of the UCL a plaintiff need not show that he or others were actually deceived or confused by the conduct or business practice in question. 'The "fraud" prong of [the CUBPA] is unlike common law fraud or deception. A violation can be shown even if no one was actually deceived, relied upon the fraudulent practice, or sustained any

damage. Instead, it is only necessary to show that members of the public are likely to be deceived." [Citations.]" (*Schnall v. Hertz Corp.*, 78 Cal. App. 4th 1144, 1167 (2000).

Plaintiffs at trial need to prove that persons receiving the Regus contract were "likely to be deceived" about the price stated on the face of the OSA, not because of anything defendants said, but solely because the price stated on the OSA did not include, and the OSA did not mention, the required ORS and BCS fees. *See Prata v. Superior Court*, 91 Cal. App. 4th 1128, 1146 (2001). Plaintiffs do not have to prove that unnamed class members were in fact misled due to a uniform practice of failing to disclose the fees. In fact, in a class unfair business practice action, only the named plaintiffs need to show damage by the unfair conduct, for "to hold that the absent class members on whose behalf a private [CUBPA] action is prosecuted must show on an individualized basis that they have 'lost money or property as a result of the unfair competition' (§ 17204) would conflict with the language in section 17203 authorizing broader relief—the 'may have been acquired' language—and implicitly overrule a fundamental holding in our previous decisions, including *Fletcher* [*v. Security Nat'l Bank,* 23 Cal.3d 442 (1979)]*, Bank of the West* [*v. Superior Court* (1992) 2 Cal.4th 1254] and *Committee on Children's Television*[, *Inc. v. General Foods Corp*, 35 Cal.3d 197 (1983)]." *In re Tobacco II Cases*, 46 Cal. 4th 298, 320 (2009). In sum "individual

matters of proof [are] irrelevant to liability under the [CUBPA]." *Prata*, 91 Cal. App. 4th at 1146.

The district court, by holding that there was an individual issue requiring proof of lack of knowledge, took a position on the proof requirements of a CUBPA action that was explicitly rejected by the California Supreme Court in *Fletcher*, 23 Cal. 3d 442. In *Fletcher,* the defendant argued that "plaintiff must present individual proof that each allegedly defrauded consumer seeking restitution did not *know* of the fraud, and that this requirement destroys the basis for a class suit." *Id.* at 449 – 450. *Fletcher* interpreted language also found in the CUBPA and found it "unquestionably broad enough to authorize a trial court to order restitution without requiring the often impossible showing of the individual's lack of knowledge of the fraudulent practice in each transaction. Hence defendant's argument clearly fails to defeat the class action." *Fletcher*, 23 Cal. 3d at 451.

The plaintiffs' lack of reliance on oral statements means proof of what class members may have heard is not important. In this respect, our facts are similar to those in *Kingsbury v. U.S. Greenfiber*, LLC, CV 08-00151, 2011 WL 2619231 at *6 (C.D. Cal. May 23, 2011)[5], where "Plaintiff and putative class members were

[5] The class was later decertified based on classwide damage problems unrelated to the points relevant here. *Kingsbury v. U.S. Greenfiber, LLC*, No. CV0800151DSFAGRX, 2013 WL 12114077 (C.D. Cal. Nov. 5, 2013).

given standard written purchase agreements which they all signed. Plaintiff does not rely on oral representations made by various individuals to establish fraud and false advertising. Rather, class members were presented with one document, a standard document, on which they relied. Plaintiff has therefore satisfied the predominance requirement of Fed. R. Civ. Pro. 23(b).” The Ninth Circuit made the same point in *Yokoyama*, 594 F.3d 1087, where it reversed the denial of class certification where there was failure to disclose material information in uniformly provided brochures. In neither case was there any indication that class certification should be denied if some of the class were not deceived. *See also, Plascencia v. Lending 1st Mortg.*, No. C 07-4485 CW, 2011 WL 5914278, at *2 (N.D. Cal. Nov. 28, 2011).

Allowing knowledge by some in the class of the deception to defeat an unfair business practice claim is, in fact, contrary to the basic concept of California unfair business practice law, a point explained in *Ewert v. eBay, Inc.*, No. C-07-02198 RMW, 2010 WL 4269259 (N.D. Cal. Oct. 25, 2010). In *Ewert,* plaintiff claimed that the eBay listing contract failed to disclose the existence of certain delays the seller might face, which would shorten the expected time during which an item would be listed. On the predominance issue, Judge Whyte first noted that the claims were based on “eBay's uniform conduct toward all class members” so “there is no question that there are many common questions of law and fact.” *Id.*

at *6. The eBay contract in *Ewert* and the Regus contract are similar in that, both cases, the contract was given to all class members and the disclosures in it are claimed to be inadequate. *See also Ellsworth v. U.S. Bank, N.A.*, No. C 12-02506 LB, 2014 WL 2734953 (N.D. Cal. June 13, 2014); *Vaccarino v. Midland Nat'l Life Ins. Co.*, 2013 U.S. Dist. LEXIS 88612, *57-58, 2013 WL 3200500 (C.D. Cal. June 17, 2013); *Vedachalam v. Tata Consultancy Services, Ltd.* (No. C 06-0963 CW) 2012 WL 1110004, at *9 (N.D. Cal., Apr. 2, 2012) (form contract interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing).

Just as Regus claims that the knowledge of the hidden fees by some class members causes individual issues to predominate, in *Ewert* eBay argued that "individualized inquiry is needed to determine which class members knew about the potential for delays." *Ewert*, 2010 WL 4269259, at *7. Judge Whyte's explanation of the reason why no showing of lack of knowledge is required under California law is applicable to our facts: "The problem with eBay's argument is it rests upon a faulty premise — that individual proof of reliance is required to recover under the [CUBPA] and under the FAL. Faced with virtually the same argument raised by eBay, the California Supreme Court expressly rejected the idea that 'plaintiff must present individual proof that each allegedly defrauded consumer seeking restitution did not know of the fraud, and that this requirement

destroys the basis for a class suit. *Fletcher v. Security Pacific Nat'l Bank*, 23 Cal. 3d 442, 449-50, 153 Cal. Rptr. 28, 591 P.2d 51 (1979)." *Ewert*, 2010 WL 4269259, at *7. Judge Whyte concluded that "plaintiffs need not establish lack of knowledge by individual class members to recover under either the [CUBPA] or the FAL." *Id.*

A good discussion of why individual class member knowledge is unimportant in a CUBPA action is found in *Waller v. Hewlett-Packard Co.*, 295 F.R.D. 472 (S.D. Cal. 2013). Plaintiffs argued that the packaging on certain Hewlett-Packard ("HP") computers misrepresented the "actual functionality" of a software feature known as "SimpleSave." Some language on the box and the user manual explained how the SimpleSave feature worked, and HP argued that individual issues predominated "because of purchasers' different understanding of how the SimpleSave operates; some may have read the representations on the box carefully, some may have read the user manual." *Waller*, 295 F.R.D. at 484– 485. In rejecting HP's position, the court noted that it was necessary to have "a fundamental understanding of what a [CUBPA] and FAL claim require, which is very little." *Waller*, 295 F.R.D. at 485.

The *Waller* opinion notes that for liability to attach under the unfair business practices statutes, "it is necessary to show only that members of the public are likely to be deceived," for which purpose California uses "a hypothetical

reasonable person standard." *Id.* Because only the named plaintiffs must show "deception, reliance, or damages," once they have met this burden "'no further individualized proof of injury or causation is required to impose restitution liability against the defendant in favor of absent class members.'" *Id.* quoting *In re Steroid Hormone Product Cases*, 181 Cal.App.4th 145, 154 (2010). "This being the law of [CUBPA] claims, HP is simply mistaken to say that individual questions both matter and predominate. If a product is advertised with a misrepresentation, that is more or less the end of it." *Waller*, 295 F.R.D. at 485. As in *Waller,* the fact some Regus class members may have learned of the hidden fees does not cause individual issues to predominate.

A case explaining how unimportant it is in certification of an unfair business practice case whether class members have knowledge of the misleading facts is *Tucker v. Pac. Bell Mobile Servs.*, 208 Cal. App. 4th 201 (2012). *Tucker* notes that the "question here is whether Plaintiffs' complaint adequately presents predominant common questions of law or fact." *Tucker*, 208 Cal. App. 4th at 216. Plaintiffs claimed that defendants "published common misrepresentations in their contract documents.'" *Id.* at 218. Defendants countered that "subscriber rate plan information was communicated to class members through a variety of written materials, including 'a "terms and conditions" booklet, the rate plan brochure and

the features brochure'; through the mail; and via 'the internet at the website.'" *Id.* at 220.

The *Tucker* court found that the phone company's evidence, which showed that the variety of information given to the class members would have given them an understanding of the actual charging practices, was enough to show that the class could not prove "actual reliance" by the entire class, and so affirmed the trial court's dismissal of the common law fraud claims. *Tucker*, 208 Cal. App. 4th at 221 – 225. However, the court found that "[s]omewhat different considerations apply" in an unfair business practice cause of action, where relief is available "without individualized proof of deception, reliance and injury." *Tucker*, 208 Cal. App. 4th at 225. The court reversed the dismissal of the unfair business practice class claim, finding that "the adequacy of Defendants' disclosures of the contested billing practice, and whether at least some members of the public are likely to be deceived" allowed the trial court at the class certification stage to consider the unfair business practice causes of action for class treatment. *Tucker* thus held that knowledge by some of the class could defeat a common law fraud or CLRA claim, but not a CUBPA claim. *Id.* at 230.

3. *Defendants' Proof That Some Class Members had Knowledge, and thus Lacked Injury, Does Not Defeat Class Certification*

In the district court's view of predominance in a CUBPA case, if Regus disputed whether "a class member had a claim based on the lack of adequate disclosure of the ORS and BCS fees" it would present "an individualized issue that depends in part on whether a salesperson did in fact disclose the fees." 1ER51:8 – 10. This is directly at odds with the holding in *Fletcher* that "a class action may proceed, in the absence of individualized proof of lack of knowledge of the fraud." *Fletcher*, 23 Cal. 3d at 451.

It is true that Regus could claim that some class members were not entitled to restitution because they had knowledge of the ORS and BCS fees, but this does not defeat certification. *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 233 (2d Cir. 2008) ("the presence of individual defenses does not by its terms preclude class certification"); *Ellsworth v. U.S. Bank, N.A.*, No. C 12-02506 LB, 2014 WL 2734953, at *29 (N.D. Cal. June 13, 2014); *Fletcher*, 23 Cal. 3d at 454 ("fact that *some* members of the class may have been informed of the alleged fraud should not in itself preclude the trial court from affording a remedy for recovery of those who had no such information"); See in *Villalpando v. Exel Direct Inc.* (No. 12-CV-04137-JCS) 2016 WL 1598663, at *14 (N.D. Cal. Apr. 21, 2016) (discussing Justice Werdeger's concurring opinion in *Brinker Rest. Corp. v. Superior Court*, 53 Cal. 4th 1004, 1040 - 41 (2012)).

The above discussion makes it clear that the district court's view that "even if Plaintiffs were to rely solely on the documents," Regus could show individual issues predominate, by proving some class members had knowledge, is wrong.

4. *Cases Relied on By District Court Only Require Uniformity of Misleading Materials on Which Plaintiff Relies, Not of Defendant's Entire Conduct*

The district court apparently derived its view that both the documents and the sales presentation had to be uniform, and supported its analysis of the "degree of uniformity by which class members were exposed to the alleged deceptive conduct" needed for predominance, by comparing and contrasting two cases: *Kaldenbach v. Mutual of Omaha Life Insurance Co.,* 178 Cal. App. 4th 830 (2009), a CUBPA case based on oral representations and; *Vaccarino v. Midland Nat. Life Ins. Co.*, No. CV 11-5858 CAS MANX, 2013 WL 3200500 (C.D. Cal. June 17, 2013), a common law fraud case based on uniform documents. 6ER1161:1-1162:24.

In *Kaldenbach* and *Vaccarino*, the plaintiffs relied on a uniform sales process as the basis for their unfair business practice claims, so the question relevant here, whether sales practices, on which plaintiffs do not rely, need, nevertheless, to be shown to be uniform, was not discussed. 2ER257:3-9. These cases, which the district described as "focused on the uniformity of the sales experience for all purchasers," may be relevant to the degree of uniformity that has

to exist as to the matters on which plaintiffs base their claim, but they are not relevant to whether the sales presentation needs to be uniform in cases where plaintiffs base their claim, not the sales presentation, but on the misleading documents. The misleading OSA price was clearly the predominate issue, while the fact that some class members were not misled does not even rise to the level of being an individual issue.

C. DISTRICT COURTS MAY ENJOIN UNFAIR PRACTICES EVEN IF THE NAMED PLAINTIFF CAN NOT BE INJURED A SECOND TIME

City of Los Angeles v. Lyons, 461 U.S. 95 (1983), requires plaintiffs seeking injunctive relief to show they are likely future victims of the practice sought to be enjoined. Persons complaining of misleading statements, but whose knowledge of the misleading nature of the statements means they may not be misled by them again, are not able to meet the Lyons test. These unfair practices, with no possible repeat victims, and thus no possibility of meeting the Lyons test, are referred to here as "No Knowledge Victim," or "NKV," unfair practices.

1. *California Law Requires Neither Repeat Injury Nor a Class Action for Public Injunction*

The district court not only found that plaintiffs must meet the *Lyons* test to obtain a public injunction, it held that class certification was required before a public injunction could issue under California law. Although the holding that a

public injunction required a class action was clearly erroneous at the time it was made, that view has since been specifically rejected by the California Supreme Court. *McGill v. Citibank, N.A.*, 2 Cal. 5th 945, 959 (2017) ("a private individual who has 'suffered injury in fact and has lost money or property as a result of' a violation . . . has standing to file a private action . . . requesting public injunctive relief"). Neither future injury nor class certification are requirements for a public injunction under California law.

2. *The Named Plaintiff Repeat Injury Requirement Was Not Developed to Address NKV Cases*

When a case brought under state law in state court is removed to federal court on diversity grounds, the district court ideally adjudicates the case under state law in the same way as a state court judge would, if Article III permits that result. *In re Cty. of Orange*, 784 F.3d 520, 531 (9th Cir. 2015). Both the CUBPA and Article III require that the plaintiff have suffered an injury from the complained of practice. However, *Lyons* adds an additional requirement for injunctions, that the named plaintiff be a likely repeat victim of the practice sought to be enjoined for the federal courts to have Article III "case or controversy" jurisdiction.

Lyons held that the plaintiff's inability to show he was likely to be choked by the police in the future deprived him of standing to obtain injunctive relief. In *Lyons,* and in most other appellate cases applying it, there is no discussion of whether the nature of the complained of practice makes it inherently impossible to

meet the *Lyons* test. The *Lyons* test has been applied, by some district courts, in removed NKV CUBPA cases, to deny injunctive relief, but all of these cases simply assume *Lyons* must be applied, and so all fail to discuss whether *Lyons* should be applied. *Cabral v. Supple, LLC*, No. EDCV-12-00085-MWF-OP, 2016 WL 1180143, at *6 (C.D. Cal. Mar. 24, 2016), *appeal dismissed sub nom. Arleen Cabral v. Supple LLC* (Apr. 21, 2016) (denying plaintiff's request for partial remand of the injunctive relief portions of her FAL, [CUBPA], and CLRA claims where "undisputed that this Court's subject matter jurisdiction was proper under CAFA"); *Mezzadri v. Med. Depot, Inc.*, 113 F. Supp. 3d 1061, 1065 (S.D. Cal. 2015) ("no dispute that this action was properly removed under CAFA and that this Court has subject matter jurisdiction over the causes of action alleged"; request to remand injunction remedy denied); *Burns v. Tristar Prod., Inc.*, No. 14-CV-749-BAS DHB, 2014 WL 3728115, at *4 (S.D. Cal. July 25, 2014) (no discussion of whether removal proper, injunction claim dismissed with note that plaintiff may "commence a separate action for injunctive relief in state court"); *Davidson v. Kimberly-Clark Corporation* (No. C 14-1783 PJH) 2015 WL 2357088, at *4 (N.D. Cal. May 15, 2015) (no claim that removal improper; court rejects plaintiff's proposal to "sever a remedy" in CUBPA cause of action and "then remand that remedy"; case dismissed); *Machlan v. Procter & Gamble Co.*, 77 F. Supp. 3d 954, 958 (N.D. Cal. 2015) ("Plaintiff did not contest the removal"; injunction remedy

remanded); *Maraventano v. Nordstrom, Inc.*, No. 10-CV-02671 JM WMC, 2013 WL 5936183, at *15 (S.D. Cal. Nov. 1, 2013) (no indication removal contested; court finds no injunction standing); *Jones v. Nutiva, Inc.,* No. 16-cv-00711, 2016 WL 5210935, at *10 (N.D. Cal. Sept. 22, 2016) (injunction claim dismissed; motion remand injunction remedy denied; no indication plaintiff contested defendant's assertion of proper CAFA jurisdiction); *Rahman v. Mott's LLP*, No. CV 13-3482 SI, 2014 WL 5282106, at *6 (N.D. Cal. Oct. 15, 2014) (plaintiff did not contest removal jurisdiction; summary judgment granted, finding no standing for injunctive relief; affirmed on appeal without reaching injunction standing issue); *Price v. Synapse Group, Inc., et al*., 2017 WL 3131700, at *13 - 15 (S.D. Cal. July 24, 2017) (injunctive relief remedy dismissed; refused to remand); *Gomez v. Jelly Belly Candy Company*, No. EDCV1700575, 2017 WL 2598551, at *2, n.2(C.D. Cal. June 8, 2017) (no injunction standing; refused to remand injunctive relief claims).

Other district court opinions, notably *Henderson v. Gruma Corp.*, No. CV 10-04173 AHM AJWX, 2011 WL 1362188 (C.D. Cal. Apr. 11, 2011), on which Judge Conti relied in this matter before it was reassigned (3ER449), have refused to apply *Lyons* on the grounds that if the repeat injury test were applied, "federal courts would be precluded from enjoining false advertising under California consumer laws because a plaintiff who had been injured would always be deemed

to avoid the cause of the injury thereafter ... and would never have Article III standing," thus thwarting the purposes of the CUBPA. *Henderson v. Gruma Corp.*, 2011 WL 1362188, at *7. This approach, however, aside from allowing California public policy to directly confer Article III standing, something that would be impermissible under *Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998 (9th Cir. 2004), does not explain how Article III is satisfied without satisfying the *Lyons* test.

The result is that, while there are cases which have refused to apply *Lyons,* there are no cases which discuss how Article III can be satisfied in an NKV CUBPA case without satisfying the *Lyons* requirement of repeat injury.

3. The Case Against Regus Clearly Presents a Case or Controversy

Regus states a rental price on the face of its office rental contract, but has large additional mandatory fees unfairly hidden in the fine print. Regus clients are NKV victims because only a person who does not know about the hidden fees can be misled by the rental price on the front of the contract, but only a person who has been victimized by the hidden fees, and thus knows of them, can be a plaintiff. NKV cases have caused Article III difficulties for two related reasons. First, when plaintiff chooses to file a CUBPA case in federal court, plaintiff accepts whatever jurisdiction the district court has. As standing must be shown for each form of relief requested, standing for a public injunction must be shown separately from

standing for restitution. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000).[6] If there is no federal jurisdiction of the injunction remedy, the plaintiff effectively waives any right to that remedy and it must be dismissed.

Second, if the CUBPA complaint is originally filed in state court, the case may not be properly removed unless the district court has jurisdiction over the CUBPA cause of action. If Article III requires that no public injunction be issued, then the federal court is powerless to use the CUBPA to stop the NKV unfair practice, and if such a remedy is important to the case, the case must be remanded. These problems, however, only arise in an NKV case if *Lyons* must be applied.

The *Lyons* "named plaintiff repeat victim" test has never been used by the Ninth Circuit in an NKV unfair practice case, and should never be used in such cases. The district courts which have applied *Lyons* to NKV cases have (1) failed to recognize that the named plaintiff repeat injury test was not developed for NKV cases; (2) failed to realize that, in cases where it is impossible for the plaintiff to meet the *Lyons* test, other standing tests have been used; (3) not given consideration to the fact that the CUBPA permits the court to act to protect the

[6] However, as explained in the next section, in a removed case, the test may work differently if it is applied to the question of whether removal was proper as opposed to being applied on the assumption that the federal court has jurisdiction over the whole case.

public interest, which permits a lower test of redressability as to the named plaintiff, and allows consideration of the public good of stopping the practice to influence the standing question and; (4) not appreciated that Ninth Circuit law does not require the *Lyon* test be applied to NKV cases.

Although Article III does impose personal standing requirements, it should be kept in mind that "the law of Article III standing is built on a single basic idea—the idea of separation of powers." *Allen v. Wright* (1984) 468 U.S. 737, 752. "[T]o satisfy Article III's standing requirements, a plaintiff must show 'injury in fact,' causation, and redressability. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–561 (1992)." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 168 – 169 (2000). "Thus, in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Flast v. Cohen*, 392 U.S. 83, 101 (1968). The plaintiff is required to have a "personal stake" in the case "to assure that the case is in a form capable of judicial resolution," which requires "sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions . . ." but the rules are "riddled with exceptions." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 403 (1980). From these statements of the law it is possible to conclude that Article III requires an

adversarial dispute for which the courts can provide relief; but nothing inherent in Article III prevents a federal court from stopping an illegal practice just because the plaintiff could not be subjected to the practices twice.

The record in this case over the past five years, consisting of over four hundred docket entries, including dozens of motions and other contested matters with thousands of pages of legal arguments, demonstrates the case has "sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions." 3ER469:17-19; 5ER1084-1142. Clearly, plaintiffs have a stake in this matter and have spent a great deal of time and energy trying to prove that they have been the victims of Regus unfair business practices, that Regus continues to engage in those same practices, and that the court should stop Regus from continuing to engage in such practices. The CUBPA allows the court, if it finds that Regus has been engaged, and continues to engage, in unfair business practices, to stop Regus from engaging in those unfair practices in the future. If the court may only stop the Regus unfair practices if there are repeat victims who can meet the *Lyons* test, the NKV nature of the Regus unfair practices creates a dilemma, preventing the court from stopping ongoing unfair practices.

Lyons was a 42 U.S.C. § 1983 action seeking to enjoin the use of chokeholds by the Los Angeles police department. The *Lyons* court concluded that "Lyons' standing to seek the injunction requested depended on whether he was likely to

suffer future injury from the use of the chokeholds by police officers" but that the fact that plaintiff had been choked "does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would illegally choke him into unconsciousness without any provocation or resistance on his part." *Lyons,* 461 U.S. at 105. The *Lyons* test has been adopted by the Ninth Circuit. *Gest v. Bradbury*, 443 F.3d 1177, 1181 (9th Cir. 2006).

However, neither *Lyons* nor *Gest* involved an effort to stop a private party from committing unfair business practices. Whereas "a federal injunction dealing with state law enforcement," as was the case in *Lyons,* "is an extraordinary remedy," an injunction stopping private party unfair practices is more routine. *Koen v. Long*, 302 F. Supp. 1383, 1389 (E.D. Mo. 1969), *aff'd,* 428 F.2d 876 (8th Cir. 1970). The fact that an NKV unfair practice victim never can meet the *Lyons* test requires the Court to either consider alternatives to *Lyons,* or resign itself to accepting that NKV unfair practices simply cannot be stopped by the federal courts.

4. *Alternatives to "Named Plaintiff Repeat Injury" Have Been Employed in Cases Where Lyons Can Not Be Satisfied*

There is no reason to think that the Supreme Court intended that the *Lyons* test be applied in cases, such as those involving NKV unfair practices, where it is inherently impossible for the plaintiff to meet it. In fact, the Supreme Court itself

has found ways to allow plaintiffs to show injunction standing, other than by showing they would personally be subject to an illegal practice in the future, where the practice is ongoing, deserves judicial action to stop it, but the circumstances do not allow plaintiff to meet the *Lyons* test.

County. of Riverside v. McLaughlin, 500 U.S. 44, 51 (1991) was a case brought by prisoners who were held more than 36 hours after arrest before having a probable cause determination. The defendant county argued, as to plaintiffs, that "under *Lyons*, they cannot show that they are likely to be subjected again to the unconstitutional conduct." *County of Riverside*, 500 U.S. at 51. *County of Riverside* held that plaintiffs did not have to show that they would be subject to the alleged illegal conduct in the future because that conduct was ongoing at the time the complaint was filed and so was redressable by injunctive relief. *County of Riverside*, 500 U.S. at 51. The *County. of Riverside* plaintiffs did not have to meet the *Lyons* named plaintiff repeat injury test, even though, unlike an NKV plaintiff, the *County. of Riverside* plaintiffs could theoretically have been faced with arrest and an illegal hold time in the future.

The Supreme Court recently noted that the *County. of Riverside* "inherently transitory" line of cases was developed to deal with injunction claims where "the challenged conduct was effectively unreviewable, because no plaintiff possessed a personal stake in the suit long enough for litigation to run its course" and so "the

transitory nature of the conduct giving rise to the suit would effectively insulate defendants' conduct from review." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 133 S. Ct. 1523, 1531 (2013). Just as with the "inherently transitory" cases, with an NKV case the "nature of the conduct giving rise to the suit would effectively insulate defendants' conduct from review" if plaintiff was required to show a likely repeat injury. The point is not that *County. of Riverside* is directly applicable to our facts, but that it shows that a plaintiff may have Article III injunction standing without meeting the *Lyons* test. Furthermore, although the "transitory" concept was not developed for NKV cases, it may properly be applied to them. A cause of action is "transitory" when "the trial court will not have even enough time to rule on a motion . . . before the proposed representative's individual interest expires." *U.S. Parole Commission*, 445 U.S. at 399. An NKV plaintiff's ability to meet the *Lyons* test is clearly "transitory" in the sense that as soon as the fraud is discovered the ability to meet *Lyons* expired.

5. *In Public Interest Cases an Ongoing Illegal Practice May be Enjoined; Emphasis is on Defendant's Conduct, Not Plaintiff's Possible Future Injury*

In actions enforcing the public interest as expressed by statute, and where standing extends "to the full limits of Article III," "traditional 'prudential' considerations regarding standing—for instance, that a litigant must assert an injury peculiar to himself" may be waived. *Midpeninsula Citizens for Fair*

Housing v. Westwood Investors 221 Cal.App.3d 1377, 1385–86 (1990), *reh'g denied and opinion modified* (July 31, 1990) (citing *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 372 (1982). Similarly, the government does not have to meet the "named plaintiff repeat injury" test. "In a Government case the proof of the violation of law may itself establish sufficient public injury to warrant relief." *California v. Am. Stores Co.*, 495 U.S. 271, 295–96 (1990).

Injunctive relief is equitable in nature and "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937). The CUBPA expresses the public interest in stopping unfair business practices. If plaintiffs prove that the Regus unfair practices are ongoing, only a blind application of *Lyons* would lead to a finding that the United States Constitution prohibits a federal court from exercising its discretion to enforce the CUBPA to stop those unfair practices.

a) The United States *Constitution Does Not Prevent an Injured Private Party from Enforcing Public Interest*

Where injured private plaintiffs seek to enforce the public interest, injunctive relief is available if the illegal practice was ongoing when the complaint was filed. In *Friends of the Earth, Inc.*, 528 U.S. 167, the environmental group's standing

was supported by the fact that it was "undisputed that Laidlaw's unlawful conduct—discharging pollutants in excess of permit limits—was occurring at the time the complaint was filed." 528 U.S. at 184. Regus' unfair practices were ongoing at the time the complaint was filed, and are still ongoing.

In *Friends of the Earth,* the Court not only allowed the plaintiff to seek a public injunction stopping the polluting, but also allowed the private plaintiff to seek penalties that were payable to the government. Justice Rehnquist dissented from the grant of standing in *Friends of the Earth*, arguing that the majority was improperly "permitting law enforcement to be placed in the hands of private individuals." 528 U.S. at 198. The *Friends of the Earth* majority did authorize private individuals to enforce public rights, as Justice Rehnquist had feared, and it is now clear that Congress may authorize "plaintiffs to enforce public rights in their own names." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1553 (2016), *as revised* (May 24, 2016) (Justice Thomas, concurring). However, the private party enforcing public rights must, unlike the government, make a "further showing of injury." *Spokeo, Inc.*, 136 S. Ct. at 1551 (Justice Thomas, concurring). In other words, the government may stop illegal practices merely by showing that they are ongoing; the court may enjoin defendant's conduct on behalf of an injured private plaintiff, but only if plaintiff makes the additional showing of injury from that practice.

In *Flast*, 392 U.S. 83, the plaintiff sought to enjoin spending of federal taxpayer money in support of religious organizations. The Court held that "in terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Flast*, 392 U.S. at 101. In *Flast,* Justice Douglas' understanding of the law was that taxpayers have standing to "be vigilant private attorneys general" even though their "stake in the outcome of litigation may be de minimis by financial standards." *Flast*, 392 U.S. at 109 (Justice Douglas, concurring). Even Justice Harlan, who dissented from the Court's finding of standing in *Flast*, conceded that plaintiffs representing the public interest, rather than their own interest, "are not constitutionally excluded from the federal courts." *Flast*, 392 U.S. at 120 (Justice Harlan, dissenting). NKV plaintiffs have suffered injury in fact and have lost money or property at the hands of defendants, and so have more personal interest than the private plaintiffs which Harlan had in mind, whose only interest was the public interest. If Congress can give standing to even pure public interest plaintiffs with no personal stake, then, there can be no Article III prohibition against standing of an injured NKV plaintiff. Justice Harlan's view is consistent with the rule that "Article III poses no obstacle to the legislative extension of federal jurisdiction, founded on diversity, so long as any two adverse

parties are not co-citizens." *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 531 (1967).

6. *Article III Does Not Prohibit the Court from Honoring the CUBPA Grant of Power to the Court to Stop Unfair Practices*

The CUBPA allows an injured plaintiff to bring an action to stop the unfair practices which caused it injury, and endows the court with right to act in the public interest to stop the practice. The Ninth Circuit has shown great respect for state law, finding that "the violation of a state-created legal right can, in itself, satisfy the injury in fact requirement for standing under Article III" and that "state law can create interests that support standing in federal courts" because state "statutes constitute state law that can create such interests." *Cantrell v. City of Long Beach*, 241 F.3d 674, 684 (9th Cir. 2001). Furthermore, once plaintiff has shown an Article III injury based on a statutory interest "causation and redressability requirements are relaxed." *Id.* at 682. As with *Cty. of Riverside*, the point is not that *Cantrell* is directly applicable to our facts, but that it California law shows a public interest in stopping unfair practice on behalf of injured parties, which, although it may not directly confer federal standing, is a factor which the court may consider in the assessing Article III jurisdiction.

7. *Existing 9th Circuit Authority Does Not Prohibit a CUBPA Injunction to Stop "No-Knowledge" Unfair Practices*

Two Ninth Circuit cases which apply the *Lyons* named plaintiff repeat injury test, *Gest*, 443 F.3d 1177, and *Hangarter*, 373 F.3d 998, have been the basis for many of the district court rulings refusing to give CUBPA plaintiffs public injunction standing. Neither of these cases involved an NKV unfair practices and neither provides a rationale for using the named plaintiff repeat injury standing test in NKV cases. These Ninth Circuit cases, and their district court progeny, all simply assumed that the *Lyons* named plaintiff repeat injury test applies to all injunction cases, regardless of whether it is even possible for the named plaintiff to be a repeat victim.

Hangarter was an individual action by an insured against the insurance company for cutting off her disability payments on the basis that she was not disabled, in which she obtained a jury verdict for more than $7 million, including $5 million in punitive damages, which award was upheld on appeal. The district court's injunction in *Hangarter*, which was of the general "obey the law" variety, appears to have been of little interest to the plaintiff, and the opinion's discussion gives the injunctive relief issue short shrift.

The *Hangarter* court's refusal to grant standing was based on pre-2005 law, which did not require that the CUBPA plaintiff have been injured by the illegal practice, and it was CUBPA's lack of an injury requirement, not the repeat injury

issue, which was the standing defect on which the Court focused. *Hangarter*, 373 F.3d at 1022, citing *Lee v. Am. Nat. Ins. Co.*, 260 F.3d 997, 1001–02 (9th Cir. 2001) (plaintiff has no Article III standing, "if he cannot demonstrate the requisite injury"). A post-2005 CUBPA plaintiff does not suffer from the *Lee* "no injury" standing problem because a CUBPA must now have Article III injury in fact.

Hangarter does cite *Clark v. City of Lakewood,* 259 F.3d 996, 1007 (9th Cir. 2001), in which the Ninth Circuit applied the named plaintiff repeat injury test to an action against a city, but gave no consideration to the question of whether the *Lyons* test should be applied in a CUBPA case between private parties. However, an injunction against a private party involves none of the Article III prudential deference to state authority considerations which are important in cases against public entities such as *Lyons* and *City of Lakewood.*

Gest is neither a CUBPA nor an NKV case, and was, like *Lyons* and *Clark*, an action against a public entity. Plaintiffs in *Gest* were Oregon signature collectors for three state law petitions. The Oregon Secretary of State rejected some of the signatures because of failure to meet its unwritten guidelines. The Secretary of State put the existing informal rules into administrative law, causing the district court to note "that the signature collectors were unlikely to face an injury related to circulator certifications in the future because the Elections Division had communicated its procedures." *Gest*, 443 F.3d at 1180.

Gest stated the rule that if plaintiffs "seek declaratory and injunctive relief, they must demonstrate that they are 'realistically threatened by a *repetition* of the violation.' *Armstrong* [*v. Davis*, 275 F.3d 849 (9th Cir. 2001)], at 860–61 (emphasis in original); see *City of Los Angeles v. Lyons*, 461 U.S. 95, 109, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983)." *Gest*, 443 F.3d at 1181. Although nominally requiring repeat injury to the named plaintiffs, *Gest* appears to suggest that if the plaintiffs had been able to show "*repetition* of the violation" by proving that "the Secretary will apply unwritten rules for circulator certifications in the future," regardless of its future application to the named plaintiffs, the court's attitude towards injunctive relief standing would have been different.

There is nothing in *Gest* that suggests the named plaintiff repeat injury test should be applied to bar an injunction under the CUBPA for an NKV case. First, the plaintiffs in *Gest* were petition signature collectors who, presumably, potentially could meet the repeat injury test. Second, the *Gest* case was one against a public entity, and so like the situations where the *Lyons* test was traditionally applied, rather than one against a private party by a plaintiff endowed with the public interest by CUBPA. Finally, there is no discussion in *Gest* of when the named plaintiff repeat injury test should be applied, and the facts of the case suggest the named plaintiff repeat injury test would be appropriate, so the question of whether that test should be applied to an NKV case was not considered. The

G*est* case is not, then, authority for application of the named plaintiff repeat injury test to CUBPA cases involving NKV unfair practices.

Although present authority does not prohibit a finding of public injunction jurisdiction in this case, plaintiffs concede that it also does not necessarily compel a finding that there is federal jurisdiction. But a finding favoring federal jurisdiction to stop the Regus unfair practices on behalf of its victims does not run afoul of any of the traditional separation of powers Article III concerns, and the public interest and the transitory nature of the offense, coupled with the clear showing of a hard fought adversary dispute, militate in favor of jurisdiction. Only by turning a blind eye to the realities of this litigation's history could one say that it did not involve "sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions . . . ." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. at 403.

D. If the District Court Did Not Have Jurisdiction to Issue a Public Injunction, the CUBPA Cause of Action Should Have Been Remanded

1. Introduction to Remand for Lack of Subject Matter Jurisdiction

For the purposes of the discussion in this section, plaintiffs assume that the district court correctly determined that plaintiff Circle Click did not have Article III standing to request a CUBPA injunction. "[S]ubject-matter jurisdiction" is "the courts' statutory or constitutional *power* to adjudicate the case." *Steel Co. v.*

Citizens for a Better Env't, 523 U.S. 83, 89 (1998). This section argues that if the federal courts do not have the power to adjudicate the plaintiffs' CUBPA cause of action, that cause of action must be remanded to state court. The primary function of a CUBPA cause of action is to stop defendant from continuing to engage in an unlawful business practice. If the federal court cannot stop the unfair practice, then it does not have the "*power* to adjudicate the case" and does not have subject matter jurisdiction.

"A suit brought by a plaintiff without Article III standing is not a 'case or controversy,' and an Article III federal court therefore lacks subject matter jurisdiction over the suit." *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004). "'[T]he standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication *of the particular claims asserted.*" *Allen v. Wright,* 468 U.S. 737, 752, 104 S.Ct. 3315, 3325, 82 L.Ed.2d 556 (1984) (emphasis added)." *Int'l Primate Prot. League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991). In our case, the objective of the "particular claims asserted" in the CUBPA cause of action is to stop the unfair business practices. Ancillary to that objective is the restitution of monies Regus received from those unfair practice. If plaintiffs have no standing to stop the unfair practices, the court's alternatives are either to allow defendant to use removal to strip the CUBPA cause of action of its primary

injunctive goal, or to remand the matter to state court where that goal may be achieved.

Standing is examined as of the time the case is filed in state court, and the removal statutes, including CAFA, do not give the federal court subject matter jurisdiction it would not otherwise have. *Polo v. Innoventions Int'l, LLC*, 833 F.3d 1193, 1197 (9th Cir. 2016) ("when federal jurisdiction is absent from the commencement of a case, [a case] is not 'properly removed'—and therefore need not 'stay [ ] removed'"). In a removed case, if plaintiff does not have federal standing at the time of filing to obtain the most important relief related to a CUBPA action – a public injunction – then a CUBPA cause of action seeking such an injunction was not properly removed, the case is not properly in federal court, and must be remanded to state court.

2. There is No Subject Matter Jurisdiction Without Standing

"Courts lack subject matter jurisdiction over actions in which the plaintiff lacks Article III standing. *See Bernhardt v. Cty. of Los Angeles*, 279 F.3d 862, 868 (9th Cir. 2002)." *Terrell v. Costco Wholesale Corporation*, No. C16-1415JLR 2017 WL 2169805, at *1 (W.D. Wash. May 16, 2017). "'The rule' in the Ninth Circuit is 'that a removed case in which the plaintiff lacks Article III [*i.e.*, constitutional] standing must be remanded to state court under § 1447(c) ....' *Polo*

v. Innoventions Int'l, LLC, 833 F.3d 1193, 1196 (9th Cir. 2016)." *King v. King*, No. 3:16-CV-630-PK, 2016 WL 4940317, at *7 (D. Or. Sept. 14, 2016). "No motion, timely or otherwise, is necessary: ultimate responsibility to ensure jurisdiction lies with the district court. *Kelton Arms* [*Condominium Owners Ass'n v. Homestead Ins. Co.*, 346 F.3d 1190 (9th Cir. 2003)], 346 F.3d at 1192. Moreover, the district court generally must remand the case to state court, rather than dismiss it. *Bruns v. Nat'l Credit Union Admin.*, 122 F.3d 1251, 1257 (9th Cir. 1997). Remand is the correct remedy because a failure of federal subject-matter jurisdiction means only that the federal courts have no power to adjudicate the matter." *Polo*, 833 F.3d at1196.

3. *CAFA Does Not Allow Removal of Cause of Action for which Plaintiff Lacks Article III Standing*

The district court removal cases cited above, which held that there was no federal jurisdiction to grant a CUBPA injunction, assumed that CAFA gave them jurisdiction over the CUBPA equivalent to what they would have if the plaintiff had filed the case in federal court. The rule that "a removed case in which the plaintiff lacks Article III standing must be remanded to state court under § 1447(c) applies as well to a case removed pursuant to CAFA as to any other type of removed case. § 1453(c)(1) ('Section 1447 shall apply to any removal of a case under [CAFA], except ... section 1447(d).'" *Polo*, 833 F.3d at 1196.

Only after the district court determines that the case is properly removed may it consider the standing of plaintiff for each form of relief requested. The district court below apparently assumed, as have other district courts, that it had subject matter jurisdiction over the entire CUBPA cause of action, i.e., that removal was proper, and so its jurisdiction was the same as if plaintiffs had filed it in district court originally. Had this assumption been correct, the district court could then delete from the CUBPA cause of action the injunction remedy over which it did not have subject matter jurisdiction due to a lack of standing by the plaintiff to obtain that relief. The district court made no analysis of whether its assumption of jurisdiction over the whole cause of action was justified, apparently assuming that CAFA gave it that jurisdiction.

4. *The Importance of a CUBPA Injunction Makes Splitting it from Restitution by Removal Improper*

In most cases between private parties, there is no public interest issue involved and plaintiff's only interest in obtaining an injunction is to protect itself from defendant's conduct. In contrast, the whole purpose of CUBPA is '"to provide a streamlined procedure for the prevention of ongoing or threatened acts of unfair competition.' [Citation.]" *Yanting Zhang v. Superior Court*, 57 Cal. 4th 364, 371 (2013). Thus, in a CUBPA cause of action, the whole purpose of the action centers around a public injunction that stops the unfair practice from continuing, even if the plaintiff does not directly benefit from that injunction. If the federal

court lacks subject matter jurisdiction to issue a public injunction, and thus honor this basic "prevention" purpose of the CUBPA, then the federal court lacks jurisdiction of the CUBPA cause of action and must remand that cause of action.

The history of the CUBPA demonstrates the central role the public injunction plays. The CUBPA now gives the court the explicit power to order restitution, but until a 1976 statutory amendment, the courts only had the statutory power to enjoin unfair practices. *Kraus v. Trinity Mgmt. Servs., Inc.*, 23 Cal. 4th 116, 130 (2000). This statutory change adding restitution, however, did not give the court any new authority, but merely confirmed the court's inherent equitable power to order restitution because "a trial court has the inherent power to order, as a form of ancillary relief, that the defendants make or offer to make restitution to the customers found to have been defrauded. (For analogous federal cases, see *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960); *Porter v. Warner Holding Co.*, 328 U.S. 395 (1946); *Sec. & Exch. Comm'n v. Texas Gulf Sulphur Co.*, 446 F.2d 1301 (2d Cir. 1971); *McComb v. Frank-Scerbo & Sons*, 177 F.2d 137 (2d Cir. 1949); *Walling v. O'Grady*, 146 F.2d 422 (2d Cir. 1944)." *People v. Superior Court*, 9 Cal. 3d 283, 286–87 (1973).

The power to issue a public injunction, this history shows, is the only power the CUBPA gives the court which it would not otherwise have. And, despite the addition of a statutory right to restitution, "injunctive relief [is] 'the primary form

of relief available under the [CUBPA],' while restitution is merely 'ancillary.' (*In re Tobacco II Cases* (2009) 46 Cal.4th 298, 319, 93 Cal.Rptr.3d 559, 207 P.3d 20.)" *Clayworth v. Pfizer, Inc.*, 49 Cal. 4th 758, 790 (2010).

If removal takes away the power of the public injunction, then, it essentially strips the CUBPA of its primary purpose. To say that the district court has jurisdiction over the removed CUBPA that was filed in state court, but does not have the power to adjudicate the case and stop the unfair practice makes no sense.

a) Removal of Only Part of a Cause of Action is Not Allowed

The basic concept of diversity jurisdiction is that the district court adjudicates the case under state law in the same way as a state court judge would. *In re County of Orange*, 784 F.3d at 531. The federal court clearly may not adjudicate a CUBPA case in the same way as a state court if it is unable to grant a public injunction. Removal of only the restitution remedy of a CUBPA action is, then, contrary to the basic concept of diversity jurisdiction.

Although the language of the removal statute, 28 U.S.C. § 1441, which allows removal of a "civil action," and the remand statute, 28 U.S.C. § 1447, which allows remand of "the case," appear to contemplate either removal or remand of all the causes of action, case law has established that causes of action may be treated separately, so those causes of action without subject matter

jurisdiction in federal court may be separately remanded. "To the extent a partial remand of standing deficient claims will result in duplicative litigation, such result is preferable to a federal court enabling defendants to prevent plaintiffs from seeking relief for claims for which they have standing in state court, but not under Article III, by removing the entire case." *Reyes v. Checksmart Fin., LLC*, No. 15-16459, 2017 WL 3142486, at *4 (9th Cir. July 25, 2017) (unpublished).

Allowing remand of only some causes of action serves an important public policy purpose, because "[in]n some cases, a plaintiff might forfeit an otherwise viable state-law claim because that claim was part of a removed diversity case which was subsequently determined to be beyond the federal court's power to decide, a result which might militate in favor of remanding, rather than dismissing, nonjusticiable state-law claims." *Lee v. Am. Nat. Ins. Co.*, 260 F.3d 997, 1006–07 (9th Cir. 2001).[7] Treating an NKV CUBPA claim for injunctive relief as not properly removed serves this same public purpose, as splitting off and dismissing the public injunctive relief would also "forfeit an otherwise viable state-law claim

[7] Note that "[a] 'claim' is a cause of action." *Rundgren v. Washington Mut. Bank, FA*, 760 F.3d 1056, 1061 (9th Cir. 2014). For removal purposes, the Supreme Court also uses "claim" as the same as "cause of action." *Wisconsin Dep't of Corr. v. Schacht*, 524 U.S. 381, 388 (1998).

because that claim was part of a removed diversity case which was subsequently determined to be beyond the federal court's power to decide." *Id.* at 1006–07.

VI. CONCLUSION

This appeal involves two distinctly different questions: (1) whether the class should have been certified based on the predominance of the common misleading contract documents and; (2) whether the public injunction remedy of the CUBPA cause of action was properly dismissed. On the first issue, plaintiffs have shown that their CUBPA cause of action relies on the uniformly distributed OSA with its misleading monthly price. Evidence of Regus sales practices only served to show that the sales talk rarely included disclosure of the ORS and BCS fees.

The district court mistakenly held that plaintiffs needed to show both that the contract documents were misleading, and that the fees hidden in the Terms and Conditions were uniformly not disclosed during the sales presentation process. Plaintiffs do not claim that the sales process uniformly failed to disclose the fees, only that plaintiffs do not have to present any evidence of such disclosures at trial, so they are not individual issues.

On the public injunction standing issue, plaintiffs argue in the alternative. Either the district court has jurisdiction to issue a public injunction or, if it does not, the CUBPA public injunction cause of action should have been remanded to the state court. Federal courts lack jurisdiction to stop NKV unfair practices only

if the *Lyons* repeat injury test must be applied to NKV cases. The reality is that this heavily litigated case could only be said not to present a case or controversy if a narrow rule such as the test in *Lyons* is applied. Looking at the traditional requirements for, and purposes of, the case or controversy requirement of Article III shows that the court has jurisdiction to grant the full relief available under the CUBPA. Furthermore, a public injunction may be issued whether or not a class is certified.

If the federal court does not have subject matter jurisdiction to issue a public injunction, the federal court should let the state court handle the CUBPA cause of action by remanding it to the California Superior Court, the forum originally chosen by plaintiffs. The main purpose of CUBPA is to stop businesses from continuing to engage in unfair business practices; defendant should not be permitted to thwart that purpose merely by removal.

For all of the reasons stated above, the case should be remanded to the district court with instructions either to accept jurisdiction to issue a public injunction or to remand the CUBPA cause of action to the state court. If the district court does have jurisdiction to issue a public injunction, the district court's holding that individual issues predominate should be reversed and the matter remanded to the district court to reconsider class certification and with instructions that it may issue a public injunction regardless of whether a class is certified.

Plaintiffs-Appellants request they be granted fees and costs on appeal, determined by the district court.

Dated: September 8, 2017 Respectfully submitted,

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By: /s/ S. Chandler Visher
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STATEMENT OF RELATED CASES PURSUANT TO CIRCUIT RULE 28-2.6

Case No. 17-15088

There are no related cases as defined in subparagraphs (a), (b) and (d) pending in this Court. *Davidson v. Kimberly-Clark Corp.,* No. 15-16173, is a related case to the extent that it raises a public injunction standing issue similar that involved here. Because the public injunction and the CUBPA has been raised in a number of district court cases, it is entirely possible that issue's present in conjunction and plaintiffs are unaware.

Dated: September 8, 2017 /s/ S. Chandler Visher
Attorney for Plaintiffs-Appellants

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 8th day of September 2017 a copy of Appellants' Opening Brief, was sent via electronic delivery addressed to the following:

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I further certify that on this 8th[h] day of September 2017 the Appellants' Opening Brief, was electronically filed through CM/ECF, United States Court of Appeals for the Ninth Circuit.

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Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-15088

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Date: Sept. 11, 2017

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