IN THE SUPREME COURT
STATE OF FLORIDA

Supreme Court No.: SC01-1316
Third DCA No.: 3D00-1012
L.T. CASE NO. 98-01648

JUDITH ROSE and CHARLES R. AULT,
on behalf of themselves and others
similarly situated,

Plaintiffs/Petitioners.

v.

NORWEGIAN CRUISE LINES LIMITED
d/b/a NORWEGIAN CRUISE LINES,

Defendant/Respondent.
_____/

On Review of a Decision by the
Third District Court of Appeal

INITIAL BRIEF OF PETITIONERS,
JUDITH ROSE and CHARLES R. AULT,
on behalf of themselves and others similarly situated

Respectfully submitted,

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STATEMENT OF THE CASE AND OF THE FACTS

This is a class action on behalf of all paying passengers ("Class Members" or "Plaintiffs")who consumed water and/or food unfit for human consumption and were thus made ill on the Norwegian Cruse Lines Limited ("NCL") cruise ship M/S Royal Odyssey ("Royal Odyssey") during three consecutive voyages which departed from the Port of Miami, Dade County, Florida on March 4, 1997, March 14, 1997 and March 25, 1997. The Amended Complaint ("Complaint") alleges that due to actions and omissions of NCL, its agents, employees and/or operators, the Class Members were made ill.[1] This resulted in symptoms such as vomiting, diarrhea and other physical ailments caused by the food and/or water served by NCL. (Pet. App. 35,36) The food and/or water was unfit for human consumption and believed to be contaminated with a Norwalk or Norwalk-like virus[2]. (Pet.App. 35,36)

The class action was brought pursuant to Fla.R.Civ.P., 1.220(a); 1.220(b)(1) and/or Rule 1.220(b)(3).The Complaint alleges that the members of the class are so numerous(approximately 700

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[1](Pet. App. 35)(References are to Petitioners' Appendix which accompanies this brief, or to the appendixes in the Third District Court below: NCL's Appendix to Appellants Initial Brief Containing Court Documents shall be referred as NCL A. CT.; NCL's Appendix to Appellants initial Brief Containing Transcripts shall be referred to as NCL A.TR.; Appendix to Appellees' Answer Brief shall be referred to as "PL.App.___".

[2] The Norwalk virus is know called a small round-structured virus (SRSV). (Pet.App. 4,16)

persons) that joinder of all members is impracticable (Pet.App. 37);that the claims of the named Plaintiffs are typical of the claims of each member of the Class (Pet.App. 37); that Plaintiffs will fairly and adequately protect the interests of the members of the Class (Pet.App. 37); that questions of law and fact exist that are common to the class (such as whether NCL impliedly warranted that its food and/or water was fit for human consumption, whether NCL breached its implied warranty of fitness, whether NCL was negligent in the serving of adulterated food products and/or water to members of the class, and whether this breach/negligence was a proximate cause of damage to members of the class); and that such common questions predominate over questions affecting individual Class Members (Pet.App. 38,39,40); and that a class action is the superior method of determining this case.(Pet.App. 37)

The trial court held off on ruling on Plaintiffs' Verified Motion for Class Certification ("Motion")(NCL A.Ct. 38) until NCL had the opportunity to obtain discovery and the trial court had the opportunity to review the relevant pleadings and evidentiary submissions to assure that the case met the requirements for class certification.[3]

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[3]Filings with the trial court prior to its ruling on class certification included the following discovery answering questions related to the appropriateness of class certification: Affidavit of Dr. Parker filed by NCL on September 24, 1998 (NCL A. Ct. 121); Plaintiffs' Answers to Class Certification Interrogatories to Judith Rose served on July 1, 1999 (PL.App.70); Plaintiff's Answers to Class Certification

The trial court held three hearings on Plaintiffs' Motion and reviewed numerous pleadings, memorandums and evidence[4]. At the September 28, 1998 hearing on Plaintiffs' Motion, the trial court deferred ruling based on NCL's objection to Plaintiffs' prior co-counsel having a possible conflict with a named class member. (NCL A. Ct. 106) Co-counsel, Grossman & Goldman, P.A., was thereafter substituted as counsel. (NCL A. Ct. 106)

On April 14, 1999, the trial court held another hearing on Plaintiffs' Motion, and again deferred ruling on class certification. This time, deferral was based primarily upon the fact that the now former named class representative, Norman Rose, might not have been an adequate representative, and due to the fact that the United States District Court for the Southern District of Florida had provisionally certified as a class the passengers on the March 25, 1997 cruise in Pollack v. Norwegian Cruise Lines Ltd., Case Number 98-621-CIV-Lenard(S.D.Fla.)[5]. (A.PL.App. 40)

Interrogatories to Charles Ault served on October 19, 1999 (NCL A. Ct. 154); Deposition transcript of Judith Rose filed by NCL on July 7, 1999 (NCL A. Tr. 161); Deposition transcript of Charles Ault filed by NCL on January 13, 2000 (NCL A. Tr. 73); Affidavit of Plaintiffs' Counsel in Support of Class Certification (NCL A. Ct. 94); and, copy of certified copy of the CDC report filed at hearing on January 14, 2000. (Pet.App. 1)

[4]The only hearing in the trial court for which a court reporter was present was the final hearing on class certification held in January, 2000.

[5]The parties in the Pollack class action case subsequently filed an agreed motion to decertify the class as part of a settlement involving the individual Plaintiffs.(NCL's App. to

There was no order entered at the April 14, 1999 hearing. Charles Ault was substituted as a named class member on August 4, 1999. (PL.App. 24)On September 21, 1999, the trial court granted NCL's motion to continue Plaintiffs' hearing on class certification, ruling that Charles Ault's deposition was to take place at least two days prior to any hearing on the Motion and the deposition was later taken on October 22, 1999 . (NCL A. Ct. 117,120) (PL. App. 69)

After numerous attempts to schedule the Motion *See*, e.g.,Plaintiffs' Emergency Motion for Ruling on Class Certification (PL. App. 47), on January 14, 2000, the trial court finally held a hearing on the merits of Plaintiffs' Motion. (NCL A.T. 1) At the hearing, the trial court stated that it would not make a ruling until it reviewed, digested and understood NCL's Response and Memorandum in Opposition to Class Certification. (NCL A.T. 34,42) Part of the evidence submitted to and reviewed by the trial court are reports and documents from the United States Public Health Service, Department of Health and Human Services, the Center for Disease Control and Prevention ("CDC"). The reports confirm that Plaintiffs' claims are proper for class certification. (Pet. App. 1-23).

Reply Brief in the Third District)

As a result of passenger illness during the subject cruise periods, the CDC conducted an investigation into passenger illnesses on the Royal Odyssey. (Pet.App. 41) The CDC determined that 303 passengers (41%) and 85 crew members on the March 4 through March 14, 1997 voyage; at least 53 passengers and 28 crew members on the March 14 through 25 voyage ;[6]; and 302 passengers (40%) and 52 crew on the March 25 through April 4 voyage, developed gastroenteritis (Pet.App. 4-7, 10, 12-15, 18, 19).

The CDC identified "a small round-structural virus (RSV) as a the cause of this outbreak" and concluded:

> The outbreak of gastroenteritis which affected 31% of passengers and crew during the March 25-April 4 cruise of MS Royal Odyssey was probably caused by SRSVs. This was the last of three outbreaks of gastroenteritis occurring on three consecutive cruises and was the second epidemiologic investigation performed. **We suspect that this was one continuous outbreak rather than three separate outbreaks based on the following evidence:**
>
> 1) Epidemiologic Investigation: Two cohort analysis of questionnaire data collected from passengers on the March 4-14 and March 25-April 4 cruises each found an increased risk of illness among those who reported drinking the ship's potable water. Unlike the analysis of the questionnaire data collected on the first cruise, though, this investigation failed to find either a dose-response relationship for tap water consumption or a

[6] No questionnaires were filled out by passengers on the March 14 through March 25 cruise. Plaintiffs are claiming that approximately 40% (300) of the passengers would have become sick as approximately 40% became sick on the other two cruises. The 53 passengers identified were merely those who went to the ship's doctor. Most passengers did not report to the ship's doctor.

decreased risk of illness among those who reported drinking only bottled water.

2) Environmental Investigation: A possible breach of the integrity of the potable water system was identified. Also, one potable water tank had no free chlorine residual which suggests that organic material had consumed the chlorine added to potable water at bunkering. Since there was no change made to the potable water system, any possible cross-connection and/or high organic burden **could have persisted through the three affected cruises.**

3) Laboratory Investigation: Identical RSV genomic sequences were determined in the RNA polymerase and capsid regions among ill passengers and crew of the March 25-April 4 cruise. **These sequences were the same as those seen in the March 4-14 cruise.** (*Emphasis supplied.*) (Pet.App. 7)

On April 4, 1997, the CDC issued a "Recommendation Not to Sail" and the Royal Odyssey was placed in wet dock. (Pet.App. 22) The CDC determined that the most likely cause and/or source of SRSVs was the drinking water on board the Royal Odyssey. (Pet.App. 4)

According to the CDC, passenger symptoms included gastroenteritis, diarrhea, vomiting, loose stools, abdominal cramps, headaches and muscle aches. (Pet.App. 4,5) The median duration of illness was several days. (Pet.App. 5) The CDC reports confirm that the CDC was notified of the outbreak of gastroenteritis on **March 13, 1997, during the first cruise period for class members.** (Pet.App. 4)

After each of the first two class cruise periods, the CDC recommended that: NCL sanitize handrails, door knobs and toilet areas with ammonia; change air filters and use only fresh (rather than re-circulated air conditioning); food handlers with gastroenteritis be excluded from duty; good hand washing practices be stressed to all crew members; potable water be tested for bacterial coliforms prior to bunkering (taking potable water on board);and that NCL continue to investigate sources of contamination for the outbreak (Pet.App. 4, 16).

The CDC confirmed that NCL **ignored** the CDC's recommendations:

> Following the first outbreak and pursuant to recommendations made by CDC, ill crew with food preparation or service duties were to have been taken off duty for 48 hours following cessation of symptoms. Notwithstanding this recommendation, only 5 ill crew members reported to ship's doctor and were taken off duty while questionnaire data identified 16 ill crew who reported working in a food preparation or service capacity. (Pet.App. 7)

Plaintiffs' Complaint and Motion contain numerous factual, specific allegations as to NCL's negligence causing the outbreak of gastroenteritis affecting Class Members with illnesses such as vomiting and diarrhea. *See,* Paragraphs 1, 6, 9, 14 and 15 of Plaintiffs' Complaint (Pet.App. 35-43) and Plaintiffs' Motion. (NCL A. Ct. 38).[7] Moreover, the transcript of the January 14, 2000

[7] The current Complaint states counts for breach of warranty and negligence. Counts for *res ipsa loquitur* and negligent infliction of emotional distress were stricken. (PL.App. 83)

hearing on class certification confirms that the trial court had carefully considered the class action requirements and that Plaintiffs had met them.(NCL A. Tr. 1-211)

On March 21, 2000, the trial court entered its Order Granting Plaintiff's Verified Motion for Class Certification. (Pet.App. 27) The trial court's order contained findings of fact and conclusions of law which included a detailed analysis confirming that Plaintiffs had met the commonality and predominance requirements for class certification:

> The facts and evidence, including the CDC reports and deposition transcripts of the named class representatives indicate that common questions of law and fact exist as to all members of the class and that these common questions predominate over any questions affecting individual members of the class, including but not limited to: whether Defendant impliedly warranted that its food products and/or water served class members was fit for human consumption; whether Defendant breach its implied warranty of fitness; whether such breach of warranty was a proximate cause of damage as suffered by members of the class; whether Defendant was negligent in the serving of adulterated food products and/or water to members of the class.[8] (Pet.App. 28)

On April 11, 2000, NCL served its Notice of Appeal of said order. After briefs were filed and oral argument was heard, on May 16, 2001, the Third District Court of Appeal filed its per curiam opinion stating:

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[8] The trial court also found the remaining requirements for class certification of numerosity, typicality, adequacy of representation, superiority and manageability were also met. (Pet.App. 28,29)

> Norwegian Cruise Lines, Limited, has appealed an order by the trial court, which order grants class certification. The class thus created consists of all paying passengers who consumed water and/or food unfit for human consumption and were thus made ill on the M/S Royal Odyssey during their voyages.
>
> We conclude that the class certification is improper because of insufficient **commonality**. See Ulysses Cruises, Inc. v. Calves, 728 So.2d 363 (Fla. 3d DCA 1999). The case is remanded to the Trial Court with instructions to enter its order decertifying the class. Reversed and remanded." SCHWARTZ, C.J. and FLETCHER, J., concur (emphasis supplied)(Pet.App. 24)

Judge Goderich filed a dissenting opinion citing Broin v. Philip Morris Companies, Inc.,641 So.2d 888 (Fla. 3d DCA 1994), review denied, 654 So.2d 919 (Fla. 1995). (Pet.App. 24)

On June 8, 2001, Plaintiffs served their Notice to Invoke Discretionary Jurisdiction pursuant to Fla.R.App.P. 9.030(a)(2)(A)(iv) arguing that the Third District's opinion in this case is in express and direct conflict with the Fourth District Court of Appeal decision in McFadden v. Staley, 687 So.2d 357 (Fla. 4th DCA 1997). This Court accepted jurisdiction on January 16, 2002, and this appeal followed.

SUMMARY OF THE ARGUMENT

Quite simply, the present case involves the exact type of scenario for which class action treatment is appropriate. Courts have held that food poisoning and cruise ship cases present the types of issues, especially relating to liability, for which class actions are best suited.

Plaintiffs seek to certify a class of specifically defined, easily identifiable persons: passengers aboard NCL's cruise ship during three consecutive cruises on the same ship who became sick as a result of one common operative set of facts: NCL's negligence in using contaminated water/food despite warnings from the CDC.

The Class Members' claims are based on the same legal theories of negligence and breach of warranty arising from the same practices and course of conduct of NCL: mainly NCL's negligence in allowing, using and serving adulterated or contaminated water or food on three straight cruises on the same ship despite warnings from the CDC. As in McFadden, these common issues are dispositive of the case.

This case involves three consecutive cruises on the same ship with the same water tanks, pipes and systems. It involves the same crew members. It is alleged, and the record evidence, including CDC reports, confirms, the probability that there was one continuous, identifiable outbreak of gastroenteritis. Each Class Member suffered nearly identical symptoms such as nausea and vomiting.

It is puzzling why the Third District Court reversed class certification in this case based on insufficient commonality. Under either the commonality requirement, or the predominance requirement, the trial court was correct in finding that the

Plaintiffs have met the class action standard for both, with record evidence including the CDC reports. The Third District's opinion not only is in conflict with the Fourth District in McFadden, but also with its own decision in Broin. Those two cases correctly ruled that class certification was proper.

The trial court correctly found that common questions predominate. The claims of the representative parties in this regard arise from the same event and course of conduct that give rise to the claims of the other class members and are based on the same legal theories.

Class action is not only the superior method of litigation in this case, but essentially, the only available method for the class members. There is no realistic alternative to a class action in the present case, as hundreds of passengers throughout the country would be forced to file suit individually for damages.

The pleadings and evidence provided to the trial court prove that Plaintiffs met the requirements for class certification under Fla.R.Civ.P. 1.220, McFadden and Broin. There was no abuse of discretion by the trial court. The Third District's decision should be reversed.

STANDARD FOR CLASS ACTIONS AND STANDARD OF REVIEW

Fla.R.Civ.P. 1.220 is based on Fed.R.Civ.P. 23. Federal decisions are persuasive authority on the interpretation of Florida's rule. In re Rules of Civil Procedure, 391 So.2d 165, 170 (Fla.1980) (Committee Note to the 1980 amendment to Rule 1.220); Broin v. Philip Morris Companies, Inc., 641 So.2d 888, 889 n.1 (Fla. 3rd DCA 1994).

The trial court's decision on class certification in this case must be upheld unless it constituted an abuse of discretion. Jenne v. Solomos, 707 So.2d 1203 (Fla. 4th DCA 1998). An abuse of discretion cannot be found unless no reasonable person could agree with the trial court's ruling. Canakaris v. Canakaris, 382 So.2d 1197 (Fla. 1980).

In this case the trial court considered both the allegations of the Complaint and the evidence obtained in discovery pertinent to certification.

The trial court must resolve any doubt in favor of class certification. Neumont v. Monroe County, 198 F.R.D. 554,557 citing In re: Carbon Dioxide Antitrust Litigation, 149 F.R.D. 229, 232 (M.D. Fla. 1993). Class certification is strictly a procedural matter and the merits of the claim are not to be considered when determining the propriety of a class action. Singer v. AT&T Corp., 185 F.R.D. 681, 685 (S.D.Fla. 1998)(citing

Eisen); Hively v. Northlake Foods, Inc., 191 F.R.D. 661, 665-666 (M.D. Fla. 2000).

ARGUMENT

I. THE THIRD DISTRICT'S MAJORITY OPINION ERRONEOUSLY CONCLUDED THAT THE COMMONALITY REQUIREMENT WAS NOT MET

Fla.R.Civ.P. 1.220(a) provides that a class action may be maintained if the court concludes that:

> (1) The members of the class are so numerous that separate joinder of each member is impracticable;
>
> (2) The claim or defense of the representative party raises questions of law or fact common to the question of law or fact raised by the claim or defense of each member of the class;
>
> (3) The claim or defense of the representative party is typical of the claim or defense of each member of the class; and,
>
> (4) The representative party can fairly and adequately protect and represent the interests of each member of the class.

Once a court finds that the requirements of Rule 1.220(a) have been satisfied, it must then determine whether class action is appropriate under Rule 1.220(b)(1) or (b)(3). Rule 1.220(b) states that the class action may be maintained if the court concludes that the prerequisites of subsection (a) are satisfied and that:

> (1) The prosecution of separate claims or defenses by or against individual members of the class would create a risk of either:
>
> A. inconsistent or varying adjudications concerning individual members of the class which would establish incompatible standards of conduct for the party opposing the class; or

B. adjudications concerning individual members of the class which would, as a practical matter, be dispositive of the interests of other members of the class who are not parties to the adjudications, or substantially impair or impede the ability of other members of the class who are not parties to the adjudications to protect their interests; or ...

(3) The claim or defense is not maintainable under either subsection (b)(1) or (b)(2), but the **questions of law or fact common** to the claim or defense of the representative party and the claim or defense of each member of the class **predominate** over any question of law or fact affecting only individual members of the class, and **class representation is superior** to other available methods for the fair and efficient adjudication of the controversy...The conclusions shall be derived from consideration of all relevant facts and circumstances, including and the... difficulties likely to be encountered in the **management** of the claim or defense on behalf of a class. (e*mphasis supplied*)

The courts refer to the essential requirements of Rule 1.220 as numerosity, "commonality, predominance, superiority, typicality, and adequacy of representation." McFadden v. Staley, 687 So.2d 357, 358 (Fla. 4th DCA 1997) (emphasis added); see also, Broin v. Philip Morris Companies, Inc., 641 So.2d 88 (Fla. 3rd DCA 1994).

A. THE COMMONALITY REQUIREMENT OF RULE 1.220(a) WAS ESTABLISHED IN THIS CASE.

The Third District court majority used the term "commonality", which is a requirement of Rule 1.220**(a)**. However, the court's opinion did not discuss the facts, claims or issues involved. Instead, the court merely cited to Ulysses. Ulysses was a brief

one paragraph opinion similar to the one in this case. It did not discuss the facts, claims or issues involved.

Ulysses reversed a class certification because the record disclosed no **predominance** of common questions over questions affecting only individual members in that case. Apparently, the Ulysses court was more concerned with the "predominance" requirement of class certification which falls under Rule 1,220**(b)** and is different than the "commonality" requirement under Rule 1.220**(a)**, which was cited as the basis for reversal in this case. Whether analyzed under either the commonality, or the predominance requirement, or both, the Third District's conclusion in this case was incorrect.

Rule 1.220(a)(2) requires that the class share questions of law or fact in common. This merely requires that claims "...arise out of the same course of conduct by a Defendant and that they present a question of common interest." McFadden v. Staley, 687 So.2d 357,359 (Fla. 4th DCA 1997). See also, Broin, 641 So.2d at 890, 891. The federal courts have observed that this requirement is expressed in the disjunctive and is satisfied by a showing **either** of common questions of law, **or** of common questions of fact. See, e.g., Cox v. American Cast Iron Pipe Co., 784 F.2d 1546, 1557 (2d Cir. 1986).(emphasis supplied) The commonality requirement does **not** require that **all** questions of law or fact raised in the

litigation be common.[9] There simply must be "at least **one issue** the resolution of which would affect all or a significant number of the putative class members," Stewart v. Winter, 669 F.2d 328, 335 (5th Cir. 1982)(emphasis supplied), such that "there is a need for combined treatment and a benefit to be derived therefrom." In re Asbestos School Litigation, 104 F.R.D.422, 428 (E.D. Pa. 1984).

The present case easily satisfies the commonality requirement. The Class Members' claims "arise from the same practice or course of conduct" and are "based on the same legal theory." See, McFadden, 687 So.2d at 354; See also Broin, 641 So.2d at 890, 891. All members of the class became sick due to one single event: an outbreak of a virus alleged to be caused by the same NCL course of conduct. Nearly all questions of fact and law requiring resolution in this matter are the same. The facts surrounding the claims for negligence and breach of warranty will be essentially exactly the same for each Class Member. So will the determination of proximate cause.

NCL also has raised affirmative defenses that are common to all Class Members. See NCL's Answer. (Pet.App. 47) Assertions of such common defenses, "bolsters class action treatment." Broin,

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[9] Powell,522 so.2d at 70; Port Authority Police Benevolent Ass'n v. Port Authority, 698 F.2d 150 (2d Cir. 1983); Like v. Carter, 448 F.2d 798, 802 (8th Cir. 1971), *cert. denied*, 405 U.S. 1045 (1972); American Financial System, Inc. v. Harlow, 65 F.R.D. 94 (D. Md. 1974).

641 So.2d at 891; Mathieson v. General Motors Corp., 529 So.2d 761, 762 (Fla. 3d DCA 1988). Thus, Plaintiffs' not only have claims common to all Class Member claims, but also commonality as to NCL's corresponding defenses.

An excellent analysis of the commonality requirement is contained in the Fourth District Court of Appeal case McFadden v. Staley, 687 So. 2d 357 (Fla. 4th DCA 1997). McFadden is in direct conflict with the present case. The striking factual similarities between McFadden and the present case cannot be denied. McFadden found class certification appropriate for restaurant patrons who became ill with symptoms essentially exactly the same as those suffered by the Plaintiffs in the present case:

> The class members are restaurant patrons who allegedly became ill from eating adulterated food at appellant's restaurant over a four day period. **The complaint alleges that several hundred class members contracted salmonella poisoning, or were afflicted with various gastrointestinal ailments, as a direct result of unsanitary, unsafe and unhealthy food handling practices at the restaurant. 687 So.2d at 358** (emphasis supplied)

McFadden held that the threshold for class certification under commonality is not a high one. 687 So.2d at 359. It is aimed at determining whether there is need for combined treatment and a benefit to be derived therefrom. *Id.* This requires only that resolution of common questions affect all or a substantial number of the class members. *Id.* The court in McFadden ruled that the

complaint in that case sufficiently alleged common questions of law and fact. In affirming class certification, the court stated:

> The (trial) court found that the issue of liability would be the same for all class members. The court also found that the issue of damages was the same, not withstanding that the extent of individual damages may differ...
>
> Claims which arise out of the same course of conduct by a defendant but in differing factual contexts may be pled as a class action if they present a **question of common interest** (citations omitted)... the primary concern in considering commonality of claims should be...whether the claims are based in the **same legal theory** (citations omitted)...
>
> The class members share a common interest in obtaining the relief sought. The common issues raised by the causes of action alleged include breach of implied warranty of fitness,...negligence...All members of the class ate at the restaurant within the same period and each became ill. The allegations also indicate that the Defendant acted toward each of them in a similar manner by serving food adulterated by using unsanitary and unhealthy food handling practices. 687 So.2d at 359. (emphasis supplied)

See also, Broin, 641 So.2d at 890. Just as in McFadden, Plaintiffs in the present case base their claims on conduct which raise common factual and legal issues as to all Class Members and NCL. Under the standard laid out in McFadden, the Plaintiffs clearly provided the trial court with sufficient allegations and evidence to meet the low commonality threshold.

The Class Members' claims are based on the same legal theories of negligence and breach of warranty arising from the same practices and course of conduct of NCL: mainly NCL's negligence in allowing, using and serving adulterated or contaminated water or

food on three straight cruises on the same ship despite warnings from the CDC. As in McFadden, these common issues are dispositive of the case.

The common questions in the present case are essentially exactly the same as those in McFadden. In the present case the class members are cruise passengers who allegedly became ill from consuming adulterated food or being supplied food/water unfit for human consumption over three consecutive cruise periods on the exact same ship. The complaint alleges that hundreds of class members contracted a virus and were afflicted with various gastrointestinal ailments due to NCL's unsafe and unhealthy practices on this one ship. See also Broin, 641 So.2d at 890, 891.

In Broin the class members were 60,000 flight attendants, working for different airlines on different planes who were exposed to second hand smoke for varying amounts of time. The claims were against different cigarette manufacturers located throughout the country. The symptoms would include such things as emphysema, chronic obstructural pulmonary disease, cancer and other types of illnesses. Obviously, the common questions in the present case are far more similar and way less varied than those in Broin.

Furthermore, each Class Member's claim need not be completely identical. See Broin, 641 So.2d at 891. Rule 1.220 does not require denial of class certification merely because the claims of

each class member varies somewhat from that of the others. McFadden, 687 So.2d at 359. See also Broin, 641 So.2d at 890.

In the present case, only the matter of compensatory damages may possibly demand individualized treatment. This feature does not defeat the commonality threshold for class certification. *Id.*; *See*, *also* Sterling v. Velsicol Chemical Corp., 855 F.2d 1188, 1197 (6th Cir. 1988). In any event, the damages for each class member in the present case will be very similar and easily ascertainable. See McFadden, 687 So.2d at 359 ("the (trial) court also found that the issue of damages was the same, notwithstanding that the extent of individual damages may differ"). Ticket prices, hotel expenses and travel expenses will be nearly identical for each Class Member. Even medical expenses will be similar. Most Class Members suffered similar symptoms such as nausea and vomiting for a few days. See CDC Report.

The present case comes just about as close as humanly possible to a class of persons having common identical claims.

B. AS THE TRIAL COURT CORRECTLY FOUND, THE PREDOMINANCE REQUIREMENT OF RULE 1.220(b) WAS ALSO MET BY PLAINTIFFS

The present case falls squarely within the parameters of subsection 1.220(b).[10] The common questions alleged by Plaintiffs

[10] While Plaintiffs have alleged and satisfied the requirements of, and the literal terms of Rule 1.220(b)(1), judicial precedent suggests that subsection (b)(3) treatment is most appropriate for this case. Generally, subsection (b)(1) and (b)(2) are applied when injunctive or declaratory relief is

predominate over any individual questions that might be presented. No questions of fact or law that effecting only an individual class member predominate over the common questions in this matter.

Plaintiffs have alleged that all Class Members became ill as a result of the negligence and breach of warranty of NCL. As previously cited, even if Plaintiffs' individual damages may vary somewhat in degree and severity, this does not foreclose class representation. McFadden, 687 So.2d at 359.

As previously noted, the Third District's opinion in this case cites to Ulysses, which reversed class certification "...because the record discloses no predominance of common questions..." In the present case, the trial court found that the record evidence confirmed that the predominance requirement had been met, stating that the facts and evidence indicated:

> Common questions predominate over any questions affecting individual members of the class, including but not limited to: whether Defendant impliedly warranted that its food products and/or water served class members was fit for human consumption; whether Defendant breached it implied warranty of fitness; whether such breach of warranty was a proximate cause of damage as suffered by members of the class; whether Defendant was negligent in the serving of adulterated food products and/or water to members of the class. (Pet.App. 28)

Ulysses cites to three other cases. However, none of them dealt with class actions in cases involving cruise ships or food poisoning. Each can be easily distinguished from the present case.

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primary. Here, subsection (b)(3) is most applicable as Plaintiffs seek money damages rather than injunctive relief.

Mathieson v. General Motors Corp., 529 So.2d 761, (Fla. 3d DCA 1988) held that a suit was not maintainable as a class action on a claim for economic loss caused by a product defect because the Plaintiffs response to a statute of limitations defense was that the unnamed Plaintiffs were unaware of the defect within the time permitted for filing: "Plaintiffs who propose to represent a class are required to show that they truly represent the purported class (citations omitted)...a claim is not representative where the defense of each Plaintiff would be dependent on different facts and circumstances." (citation omitted) 529 So.2d at 762. In the present case, the defenses of each class member will be dependant on the exact same facts and circumstances.

In Maner Properties, Inc. v. Siksay, 489 So.2d 842 (Fla. 4th DCA 1986) the court held that class action was not appropriate for mobile home park owners' claims on misrepresentations and nondisclosure of material facts by Defendants to those members of the class who took title pursuant to agreements for deed. The court stated that the claim by resident lot owners of the park was essentially an action for fraud based upon different circumstances surrounding separate contracts alleging damage for negligent placement and installation of certain mobile homes that was applicable to only a portion of members. In the present case all claims are applicable to all class members, not just a portion.

In Costin v. Hargraves, 283 So.2d 375 (Fla.1st DCA 1973) the court held that an action seeking declaratory judgment was not appropriate for class action status where each class property owner acquired an interest under a separate contract of conveyance, there was no showing of cooperative enterprise among the Plaintiffs, none of the Plaintiffs had a pecuniary interest in land other than that covered by his own separate contract claims; and issues and defenses were not common to all members of the class. Again, in the present case, all issues and defenses are common to all Class Members.

As the federal cases have shown, predominance is determined by reference to **liability** issues, not damages, which always involve individual issues. Lifanda v. Elmhurst Dodge, 2001 WL 755189 (N.D. Ill. 2001); Williams v. Rizza Chevrolet-Geo, Inc, 2000 WL 263731 (N.D. Ill. 2000); Blackie v. Barrack, 524 F.2d 891, 905 (9th Cir. 1975); Davis v. Southern Bell Tel. and Tel. Co., 1993 WL 593999 *9-11 (S.D. Fla. 1994); see generally I.H. Newburg, Newburg on Class Actions, section 4.21 and 4.25 (1992).

The Plaintiffs in this case have pled numerous common issues of fact and law relating to liability. (PetApp. 35-45) The four common issues of fact and law found by the trial court to both exist, and to predominate, all relate to liability:

> ...common questions predominate over any questions affecting individual members of the class, including but not limited to: whether Defendant impliedly warranted that its food products and/or water served class members was fit for human

> consumption; whether Defendant breached its employed warranty of fitness; whether such breach of warranty was a proximate cause of damage as suffered by members of the class; whether Defendant was negligent in the serving of adulterated food products and/or water to members of the class. (Pet.App. 28)

Furthermore, the Plaintiffs' damages in the present case will not vary much at all, as all class members suffered the same symptoms for a short period of time, several days. Individual differences as far as class members' damages do not predominate over the common questions concerning liability. Frankel v. City of Miami Beach, 340 So.2d 463, 465 (Fla.1976); Bentkowski v. Marfuerza Compania Maritima, S.A., 70 F.R.D. 401, 404-5 (E.D. Pa. 1976) (Rule 23 (b)(3) satisfied in cruise ship food poisoning case); Calderon v. Presidio Valley Farmers Ass'n., 863 F.2d 384, 389 (5th Cir. 1989)

C. **OTHER COURTS HAVE CORRECTLY HELD THAT CRUISE SHIP AND FOOD POISONING CASES ARE PARTICULARLY APPROPRIATE FOR CLASS TREATMENT**

Commonality and predominance have been found in other class actions instituted on behalf of cruise ship passengers or food poisoning victims. See, e.g. Bentkowski v. Marfuerza Compania Maritima, S.A., 70 F.R.D. 401 (E.D., Pa.(1976)(food and/or water poisoning of cruise passengers); Hernandez v. Motor Vessel Skyward, 61 F.R.D. 558,(S.D. Fl. 1974)(same factual predicate as Bentkowski); Farrenholz v. Mad Crab, Inc., 2000 WL 1433956 (Ohio App. 8 Dist. 2000)(common questions predominate for class of restaurant patrons who suffered food poisoning at one restaurant over a four day period due to an outbreak of a virus); Kornberg v.

Carnival Cruise Lines, Inc., 741 F.2d 1332, (11th Cir.1984)(common factual questions presented by toilet malfunction); Cada v. Costa Lines, Inc., 547 F.Supp.85 (N.D. Ill.1982)(fire on ship); Simon v. Cunard Line, Ltd., 75 A.D.2d 283, 428 N.Y.S.2d 952 (1980)(inadequate air conditioning, lack of fresh water and change in itinerary).

In Bentkowski v. Marfuerza Compania Maritima, S.A., 70 F.R.D. 401 (E.D. Pa. 1976), a class action was brought by passengers aboard a cruise ship for damages because of alleged food and/or water poisoning while on the cruise. The district court held that class certification was proper on behalf of approximately two hundred passengers who suffered injuries or illness as a result of contaminated food and/or water.

Hernandez v. Motor Vessel Skyward, 661 F.R.D. 558 (S.D.Fla. 1973) affirmed 507 F.2d 847 (5th Cir. 1975), was a class action with six hundred fifty-five passengers aboard a seven day cruise who became ill, allegedly because of their exposure to contaminated food or water on the ship with symptoms such as severe vomiting and diarrhea. Like in this case, claims included negligence and breach of implied warranty. In Hernandez, the court ruled that whether the defendants were negligent in preparing either the drinking water or food that was available for consumption by the passengers was subject to uniform determination. 61 F.R.D. at 651. The court granted class certification on the issue of the negligence of the

defendants in preparing or allowing contaminated food and/or water on the ship.

In Farrenholz v. Mad Crab, Inc., 2000 WL 1433956 (Ohio App. 8 Dist. 2000) the court found that class action was appropriate because the class claims revolved around whether food consumed by patrons of the Mad Crab Restaurant for three days caused the class members to become ill from food poisoning. The class supported their claim with a report from the health department tracing the outbreak to a certain virus transmitted to people dining at the Mad Crab on the days in question:

> The common question to be resolved for each of the proposed claimants would be proximate cause. In the absence of a class action case, each would have to prove that the cause of their illness was food poisoning traceable to the Mad Crab. The common question here is causation, which has to be proved on a class-wide basis. Whether damages may differ among the claimants is not a reason to deny class certification. (citation omitted) therefore the element of predominance under Civ.R. 23(B)(C)has been met in the instant case. Id. at *8.

If the predominance requirement was met in Mad Crab, it surely is met in the present case as well. In Kornberg v. Carnival Cruise Lines, Inc., 741 F.2d 1332 (11th Cir. 1984), plaintiffs filed a class action suit against Carnival seeking damages allegedly caused by the failure of the sanitary system of a ship during a one week cruise in the Caribbean. The Eleventh Circuit vacated the denial of class certification and remanded for further consideration. 741 F.2d at 1332. The court in Kornberg ruled that there need only be

a nexus between the class representative's claims or defenses and the common questions of fact of law which unite the class.

Class action has not been limited to cruise/food poisoning cases. Courts have held that mass tort cases involving a single catastrophic event are amendable to class certification because similar types of physical harm or property damage is caused. See Valentino v. Carter-Wallace, Inc., 97 F.3d 1227 (9th Cir.1996). Also, proximate cause can be determined on a class-wide basis because it is the same for each of the plaintiffs. Georgine v. Amchem Products, Inc., 83 F.3d 610 (3rd Cir. 1996). A class action may be the best vehicle to resolve a defendant's liability when the alleged cause is a single course of conduct. See Lowe v. Sun Refining & Marketing Co., 73 Ohio App.3d 563, 597 N.E.2d 1189 (1992).

Courts recognize that applying the class action mechanism to mass tort accidents avoids needless repetitive presentation of the same evidence in litigation of the same legal issues. Sterling v. Velsicol Chemical Corp., 855 F.2d 1188, 1197 (6TH Cir. 1988). See also Brown v. New Orleans Pub. Serv., Inc., 506 So.2d 621 (La. App. 1987) (recognizing that a class action may be appropriate for a mass tort such as a food poisoning, where the causative link between the defendant's conduct and the plaintiff's injuries is the same for all plaintiffs and the only issue that varies is the extent of damages for each individual member of that class.).

II. ALL OTHER REQUIREMENTS FOR CLASS CERTIFICATION HAVE ALSO BEEN MET

While the Third District's ruling was based only on insufficient commonality, it is clear from the record that all the requirements of Rule 1.220 have been met as the trial stated in its order granting class status. (Pet.App. 27-29) The numerosity requirement was not contested with over 700 class members. The trial court also found that the typicality and adequacy requirements were met. (Pet.App. 28,29)

Class representation in the present case would clearly be superior to other available methods of litigation. Conducting this case as a class action would be far less burdensome than prosecuting over 700 separate actions. Voluminous cases could result in such problems as duplicative discovery procedures, disputes amongst groups of counsel, repeated adjudication of controversies and excess costs. In fact, the trial court noted that class action should be used to save on duplicity of suits to reduce expenses of litigation. (NCL A.T. 35)

Furthermore, the relatively small amount of each individual class members' damage claim would make it cost prohibitive for individual members to pursue their claims if a class action were not certified. *See*, Frankel v. City of Miami Beach, 340 So.2d 463 (Fla. 1976); Colonial Penn Ins. Co. v. Magnetic Imaging Systems I Ltd., 694 So.2d 852 (Fla. 3rd DCA 1997). As the courts have recognized, "to require a multiplicity of suits by similarly

situated small claimants would run counter to one of the prime purposes of a class action." Swanson v. American Consumer Industries, Inc., 415 F.2d 1326, 1333 (7th Cir. 1969); *See also* Eisen v. Carlisle & Jacqueline, 417 U.S. 156, 158 (1974) (economic reality dictates class treatment where individual claims are only $70.00 each.) Class certification is appropriate in such circumstances as a means of assuring access to the courts and legal assistance in the vindication of small claims. Philips Petroleum Corp. v. Shutts, 472 U.S. 797 (1985).

The trial court's order also addressed the issue of manageability under Rule 1.220(b)(3)(D). (Pet.App. 29) Plaintiffs have alleged and demonstrated, and the trial court found, that the names and addressees of class members are determinable from NCL's own records and from health/CDC records. (Pet.App. 29) Furthermore, as evidenced by the proposed notice of pendency of class action, notice in this case can easily be provided such persons via first class mail in the form of a notice similar to those customarily used in class actions and attached to the trial court's Order. (Pet.App. 31-34)

There is simply no reason why this class action cannot be properly managed. See R.J. Reynolds Tobacco Co. v. Engle, 672 So.2d 39 (Fla. 3d DCA 1996) rev. denied, 682 So.2d 1100 (Fla. 1996) (class action for **all** residents of Florida who got sick from cigarettes).

The trial court in the present case took a long, arduous journey before determining that class certification was proper. A review of the pleadings, documentary evidence, deposition transcripts of Ms. Rose and Mr. Ault, and the hearing transcripts, make it abundantly clear that the trial court's granting of class certification was made carefully and on the basis of more than sufficient information submitted by both parties. NCL filed numerous memorandums and motions before class certification. (Pet.App. 97, 107, 117, 120, 129)

While a court may look beyond the pleadings to determine whether class action is appropriate, a determination of class certification does not focus on whether a plaintiff will ultimately prevail on the merits. Neumont, FRD. at 557. All that is necessary for class certification is that the trial court understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of certification issues. *Id.* The record and hearing transcript confirm that the trial court had a clear understanding of the facts and applicable law, and required Plaintiffs to establish the necessary prerequisites for class certification before certifying the class. It did not abuse its discretion.

CONCLUSION

The Third District's reversal of the trial court's order is erroneous and is in direct conflict with McFadden, which was decided correctly.

For the reasons set forth above, Plaintiffs' request this Honorable Court to reverse the Third District's's decision and remand to the trial court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on this 26 th day of February, 2002.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief, was generated in a Courier New, 12 point font, pursuant to Fla. R. App. P. 9.210.

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