IN THE SUPREME COURT
STATE OF FLORIDA

SUPREME COURT CASE NO. SC 01-1316
THIRD DCA CASE NO. 3D00-1012
L.T. CASE NO. 98-01648

JUDITH ROSE and CHARLES 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

DEFENDANT/RESPONDENT=S BRIEF ON THE MERITS

Respectfully submitted,
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STATEMENT OF THE CASE AND FACTS

A. The CDC reports

On March 4, 1997, the M/S Royal Odyssey set sail for a ten day cruise. On March, 13 1997, NCL voluntarily notified the Vessel Sanitation Program (AVSP@), the National Center for Environmental Health and the Centers for Disease Control (ACDC@), that passengers and crew members aboard the M/S Royal Odyssey had reported gastrointestinal[1] symptoms. (A 172). During the cruise, 33 (4.4%) of 755 passengers and 8 (2.1%) of 375 crew members had reported various gastrointestinal symptoms to the ship=s doctor. (A 172).

The CDC undertook a field investigation and discovered ***some*** evidence of a small round structured virus (ASRSV@) as the ***probable*** cause of the outbreak. (A172-179). After conducting a laboratory, environmental and epidemiologic investigation of the March 4 cruise, the CDC reported that:

> A large outbreak of gastroenteritis [sic] caused by a small round structured virus (SRSV) occurred among the passengers and crew on the cruise ship Royal Odyssey during the Eastern Caribbean cruise, March 4 through 14, 1997. SRSV, formally (sic) called ANorwalk@ or ANorwalk-like@ virus, causes an acute, usually self-limited gastroenteritis, characterized by nausea, vomiting, diarrhea, and abdominal pain lasting 24-48 hours. The epidemic curve for this outbreak supports a point source for exposure. The questionnaire distributed to passengers and crew revealed a statistical association between consumption of the ship=s tap water and illness, ***but no deficiencies were noted by the VSP in the ship=s potable water system. The source of this outbreak is still being investigated.***

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(A 175). ***Significantly, the CDC=s investigation and inspection of the galleys also revealed Agood food handling and storage practices@ and that the potable water system fully complied with VSP regulations.*** (A 175). The CDC=s laboratory investigation included polymerase chain reaction (APCR@) analysis. (A 174). The CDC identified a SRSV in the stool of passengers using PCR analysis, but found ***no SRSV in ill crew members= stool samples***. (A 174). As a result of its investigation, the CDC made recommendations to NCL. (A 175).

During the following cruise on March 14-25, 1997, 53 (6.9%) of 769 passengers and 28 (7.1%) of 389 crew reported gastrointestinal symptoms to the ship=s doctor. (A 183). ***No CDC questionnaires were submitted to the passengers and crew on the second cruise***. The CDC thus conducted ***no successive investigation*** and therefore reviewed ***no data or other evidence collected from the passengers and crew on this second cruise*** except, presumably, an analysis of complaints made to the ship=s doctor, i.e., there was no epidemiologic nor any laboratory investigation. (A 183). The VSP, however, conducted an environmental ***inspection*** on March 25, 1997, and recommended sanitizing handrails, door knobs and toilet areas with quaternary ammonia, to change filters and use only fresh air (rather than recirculated air) in the air conditioning system, and to continue to report the daily number of diarrhea cases to the VSP during the next cruise. (A 183).

On March 25, 1997, the M/S Royal Odyssey departed Miami for an eleven (11) day cruise. (A 183). According to the CDC, as of April 3, 1997, A61 (7.8%) of 781 passengers and 14 (3.6%) of 386 crew [members] on board [the] M/S Royal Odyssey had reported an illness with diarrhea and/or vomiting to the ship=s doctor.@ (A 183). Unlike the second cruise, the CDC had passengers fill out questionnaires for this third cruise upon which the CDC premised its data. (A 183, 184). According to information summarized in the CDC report from these questionnaires, 302 (40%) passengers and 52 (13%) crew members reported gastrointestinal symptoms. (A 184). The investigators reported that the potable water had been chlorinated as it was bunkered. (A 185). Moreover, food protection, temperatures, preparation facilities and equipment and hygienic practices were ***within recommended guidelines.*** (A 185). The CDC=s laboratory investigation included reverse transcripterase-polymerase chain reaction (ART-PCR@). (A 184). Nucleotide sequences of RT-PCR products in the ribonucleic acid polymerase and capsid regions were analyzed to determine relatedness of the Aviruses@ detected on the first cruise with Aviruses@ detected on the third cruise. (A 184). Out of 23 samples collected, only 3 (13%) stool specimens from passengers and crew members were identified as identical genomic sequences of the SRSV identified from the first cruise. (A 185).

The final CDC report was at least as inconclusive as the first CDC Report, if not

more so. The findings stated that the outbreak of gastrointestinal problems on the March 25 cruise ***Awas probably caused by SRSVs.@*** (A 186). Significantly, the report states that:

> [s]everal limitations to this investigation should be considered. ***The observed relationship between reported consumption of tap water and increased risk of illness may have been confounded since those developing gastroenteritis could have increased their consumption of tap water. The reported exposure to consumption of tap water was not sufficient to account for all cases of illness and some who developed illness reported no exposure to tap water. It is likely that some illness was contracted due to close-contact person-to-person spread or fomite transmission though this investigation was unable to test these specific hypotheses.***

(A 186). The CDC further stated that A[u]nlike 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 decreased risk of illness among those who reported drinking only bottled water.***@ (A 186). Moreover, the CDC stated that A[w]e ***suspect*** that this was one continuous outbreak rather than three separate outbreaks.@ (A 186). There was never a definitive finding or conclusion. (A 186). On April 4, 1997, the VSP issued a ARecommendation Not to Sail.@ (A 187). NCL voluntarily kept the ship in dry dock and undertook a series of additional corrective actions. (A 187-188).

B. SRSV is a highly contagious, minor, common illness that readily spreads from person to person in close quarters

Acute gastroenteritis is one of the most common illnesses in the United States second only to upper respiratory infections. Roger I. Glass *et al., The Epidemiology of Enteric Calciviruses: A Reassessment Using New Diagnostics,* 181 J. Infectious Diseases S254 (2000). According to the medical literature, a causal relationship has not been easy to establish:

> ...several serial outbreaks on cruise ships, in a school system, and from oysters that were attributed to a single contaminated source were found to be caused by viruses with different sequences, suggesting multiple etiologic agents and possibly different modes of spread.

Id. Dr. Cynthia Sears, Associate Professor in the Division of Infectious Diseases and Gastroenterology at Johns Hopkins recently commented that outbreaks of viral gastroenteritis on cruise ships are not extraordinary due to close quarters and because of the highly contagious nature of the virus: AIf you touch a surface smeared with the virus, Sears says, >even wiping your hands across your face is enough to transmit it.=@ Bill Brewster, V*irus Takes a Cruise* (July 13, 2000), http:www.abcnews.go.com/sections/travel/DailyNews/bbprincesss.html.

Epidemic gastroenteritis is characterized by large numbers of secondary cases due to person-to-person spread. *Food Poisoning Virus found to be Transmitted by Contact on Football Field* (October 25, 2000), <http:www.cnn. com/2000/health/10/25/football.virus.ap/index.html> (AThe virus is hardy enough to survive on unbleached surfaces and carpet for months@). SRSVs were found to be a major cause

of outbreaks and sporadic cases of acute gastroenteritis among crowded United States ground forces deployed to Saudi Arabia during the War with Iraq in 1991. Debra E. Berg, *et al., Multi-State Outbreaks of Acute Gastroenteritis Traced to Fecal-Contaminated Oysters Harvested in Louisiana*, 181 J. Infectious Diseases S388 (2000). A study of an outbreak aboard an aircraft carrier in 1997 revealed that 44% of the 4200-member crew may have been effected. Michael McCarthy et al., *Norwalk-like Virus Infection in Military Forces: Epidemic Potential, Sporadic Disease, and the Future Direction of Prevention and Control Efforts*, 181 J. Infectious Diseases S307. As here, a likely source of for the SRSV was ***never*** found:

> Adequate chlorination was present in potable water supplies, and all shipboard food was obtained from previously inspected and approved sources. It was concluded at the end of these outbreaks that >1 crew members ***probably*** had acquired the infection during shore leave and then returned to the ship where crowding facilitated transmission.

Id. (Emphasis added). In fact, the same study came to the conclusion that the major risk factor for SRSV outbreaks in contained areas such as military ships is crowding, Awhich limits the options that can be taken to control transmission@:

> Besides alleviating crowding, there are few alternatives for controlling [SRSV] transmission. Sending sick troops home during garrison duty may be helpful, ***although removing symptomatic workers and food handlers has not consistently ended outbreaks. Stringent clean-up of toilets, food preparation facilities, and living quarters also is important but has not reliably controlled transmission. Increased chlorination and heating food may be of limited benefit.***

Id.

C. The Plaintiffs= class action complaint and motion for class certification

The Plaintiffs, Mr. & Mrs. Rose,[2] filed a class action lawsuit on behalf of all paying passengers who purportedly consumed Awater and/or food unfit for human consumption and [were] thus made ill on the [M/S] Royal Odyssey@ during the March 4, 14 and 25, 1997, [v]oyages. (A 12-24). The amended complaint alleged the Rule 1.220 requirements as a series of legal conclusions with little to no supporting factual allegations. (A 27-31). There were no allegations as to subsections (b)(1) or (b)(3). (A 27-31).

The Plaintiffs subsequently filed a verified motion for class certification and an accompanying Amemorandum of law.@ The Plaintiffs again recited a series of legal conclusions. (A 38-41). For example, the Plaintiffs asserted that A[s]ince the expense and burden of individual litigation makes it virtually impossible for individual class members to seek redress for the wrongs alleged herein [this] class action is ***superior*** to other available methods for the fair and efficient adjudication of this controversy.@ (A 39). There were no allegations regarding Subsection (b)(1) or manageability whatsoever. (A 38-41). Moreover, the Plaintiffs alleged that the identities of putative class members were identifiable from NCL=s records and from

AHealth Department@ records.[1] (A 40). The Plaintiffs attached to the motion the Fourth District Court of Appeal Opinion in *McFadden v. Staley,* 687 So. 2d 357 (Fla. 4th DCA 1997), the order granting class certification in *McFadden*, and two reports from the CDC, among other things. (A 41).

[1] Assuming AHealth Department@ records mean the CDC, the Plaintiffs have never sought to obtain such third party discovery, although NCL has. Obtaining these records, if they still exist, has proven very difficult and the CDC has refused to allow investigators to be deposed. *See* 45 C.F.R. ' 2.1 *et. seq*.

D. The class certification hearing

At the hearing on the Plaintiffs= motion for class certification, the Plaintiffs= counsel, Mr. Julien, reminded the trial court that there had been a previous hearing on class certification, at which time the trial court found the class representative, Mr. Rose, inadequate.[3] (T 4). Mr. Julien asked the trial court, A[if] it=s still beneficial[,] I will go through the requirements [of Rule 1.220] which I think we met for class certification.@ (T 4). The trial court replied, AYou need to go through the requirements.@ (T 4).

Mr. Julien first argued that the Plaintiffs had met the Anumerosity@ requirement of Rule 1.220 because the Plaintiffs had alleged that there were 700 or more class members who had purportedly contracted a gastrointestinal virus on the three cruises at issue. (T 5). However, Mr. Julien conceded that not every passenger had become ill. (T 5). The Plaintiffs offered nothing more than counsel=s beliefs as to the size of the class: AI believe there=s approximately 900, 1,000 passengers that were sick we=re claiming due to this virus. This is proven through the CDC Report where all of the passengers filled out questionnaires how they became sick.@[2] (T 5-6). Based solely upon his assertion that numerosity was proven by the CDC report, Mr.

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[2] Contrary to Mr. Julien=s representations, as referenced s*upra*, the plain language of the CDC reports show that the passengers on the second cruise never filled out questionnaires. (A 183).

Julien advised: AWe met the numerosity [requirement]. No question there, Your Honor.@ (T 6).

The trial court next asked Mr. Julien, ACommonality, you=re claiming it=s the same illness?@ (T 6). Mr. Julien advised that the trial court was correct and that the threshold for demonstrating commonality is not high. (T 6). He argued that denial of class certification is not required because the claims of one or more class members Aarises in a factual context that varies somewhat from that of the other plaintiffs.@ (T 6). He urged the trial court to reject NCL=s argument that there were persons who drank water off ship during shore excursions because it was not enough to deny class certification and stated that instead:

> Mr. Julien: ...the main thing that the Court has to focus on in a class action is whether it presents common or general interest [questions of] all members of a class [with] similar interest[s] in obtain[ing] the relief sought. Clearly had the same interest obtaining relief sought damages under negligence claim and breach of warranty claim in this present case.
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> * * *

> [The *Broin* case][3] goes on to say plaintiffs must merely establish a common claim arising from the same practice or course of conduct that gave rise to the remaining claims and based upon same legal theory[.] [A]gain[,] we have the same legal theory in this case and the *Broin* case claims that arise from different factual context if they present a question of common interest.

(T 6-8).

Just as Mr. Julien offered to go through the Plaintiffs= depositions to demonstrate the Acommon interest,@ the trial court interrupted, and questioned NCL=s counsel, as follows: ***AWhat area is the defense saying it shouldn=t be certified?@*** thus reversing the burden of proving why the class should be certified to why it should ***not*** be certified. (T 8). NCL=s counsel, Mr. Farkas, attempted to respond that the Plaintiffs had not demonstrated typicality, predominance, superiority and manageability, but the trial court interjected that A[the Plaintiffs= counsel is] claiming the CDC says they all got sick from the Norwalk virus.@ (T 8). NCL=s counsel countered that the CDC report was inconclusive and that the CDC had

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[3] The Plaintiffs= reliance upon *Broin v. Philip Morris Co., Inc.*, 641 So. 2d 888, 890 (Fla. 3d DCA 1994) is misplaced. In *Broin*, the Third District reviewed an order granting a motion to dismiss a class certification where all of the allegations must be taken as true. *Id.* The trial court was ***clearly*** under the impression that *Broin* involved a ruling on class certification rather than a motion to dismiss: AThe Court: Remember I have a class certification case from the 3rd from 1994 Y.@ (T 4-5, 14). Finally, in *Broin*, unlike the instant case, the manufacture of cigarettes, which allegedly caused the injuries to the Plaintiffs, was directly linked to the defendant company. There is no such direct link in this case.

surmised that the illness was Aprobably@ caused by a SRSV. (T 8). The trial court asked, ADoes the CDC suggest it all appears to be the same virus?@ (T 8). Mr. Julien responded in the affirmative. The trial court next stated: AJust give me the CDC report and if you all are going to disagree I=ll take a look at it and put on the record. ***They don=t have to prove it now.*** They just have to ***suggest*** that there is this common element that runs through it.@ (T 8-9).

The following exchange occurred wherein the trial court ***continued*** to thrust the burden on NCL=s counsel to demonstrate why the class should ***not*** be certified without requiring the Plaintiffs= counsel to demonstrate that each of the requisite elements of Rule 1.220 had been met:

> The Court: This was one continuous outbreak rather than three outbreaks based on the following. So they think it=s one long outbreak.
> Mr. Julien: My argument is, Your Honor, we=re not here to try the case.
> The Court: I understand.
> Mr. Julien: This is a matter for trial. That just goes to prove we have this same interest to argue about the same legal theories.
> The Court: Counsel, they think it=s one particular viral thing that affected everyone at one continuous outbreak so that=s the CDC=s position.
> Mr. Farkas: That is the CDC=s position. That is their inconclusive position.
> The Court: We=re not here to prove it. Doesn=t automatically meet the test of commonality. It=s one thing that lasted the whole time which is affecting everyone in the class.
> Mr. Farkas: That=s the claim, Your Honor.
> The Court: That=s all we=re here for is to see if the claim B
> Mr. Farkas: Is common[,] but we are also here to see if defenses too are common as well and that is not the case. Just because the CDC says that

perhaps or probably it was caused by a [SRSV]. [W]e filed an affidavit of Dr. [Latinae] Parker when the first hearing was heard - first class certification and he states that Norwalk like viruses can [cause] all the symptoms claimed however so can the Rotavirus, and so can Shighella, Salmonella and other parasites which are found in the Caribbean islands. The testimony is that all the passengers went [to Caribbean islands,] including the two [class] representatives.

The Court: Do you have a case that says I=m supposed to weigh the competing affidavit in class certification?

Mr. Farkas: [An] affidavit to compete this against?

The Court: There=s CDC. Affidavit which identifies the CDC report so I=m asking you because you have a contrasting affidavit[,] does that mean I=m supposed to weigh them in class certification?

Mr. Farkas: Your Honor, what it is you must also take into account the defenses which are presented and whether they are common. I do not have a case with me on point. I can supplement the record if the Court does wish.

Mr. Julien: I would offer to the Court [that it is] [a]xiomatic in a class certification you=re not here to weigh the requirements. Just see if you can apply the elements. I can provide authority on that as well, Your Honor.

I think his point lays the exact point that they have a common defense. Whether or not it was the Norwalk virus or couple other viruses in the CDC report. Those are all matters certainly for trial.

The Court: It would be helpful and quicker if the defense tells me what it is - which pieces that they feel don=t meet the requirements of -

(T 9-12). The trial court then went on to further argue the Plaintiffs= case and continued to reverse the burden on NCL to demonstrate why the class should ***not*** be certified notwithstanding the fact that Mr. Julien had advised the trial court that he had not finished going through the requirements of Rule 1.220:

The Court: Y typicality is the plaintiff representative is claiming the same problem that the class is claiming so typicality is met. They=re claiming they got sick from a virus so the number it=s 700 plus. That

> meets the requirement. Seven hundred plus so I'm just asking you specifically ***what is it that you feel does not meet the requirement of class certification?***

(T 13).

NCL=s counsel again tried to advise the trial court that merely because the Plaintiff=s counsel had presented the trial court with the CDC reports, the reports alone were not enough to certify the class because the Plaintiffs had not, and could not, meet their burden of proof to demonstrate anything other than the allegation that the CDC surmised that there was a viral outbreak on the ship as the Acommon thread@ among the passengers on those three cruises. (T 13-14, 15-18, 20, 32, 36-38, 41-42). The Plaintiff, Mr. Ault, was a passenger on the first cruise and the Plaintiff, Mrs. Rose, was a passenger on the third cruise. (A 18). There was no passenger from the second cruise to serve as class representative. (T 18, 23). Moreover, the defenses as to each passenger are highly individualized since their susceptibility to any viral gastroenteritis would necessarily depend upon whether they went ashore in the Caribbean and ate or drank anything while there, among other things. (T 10, 11, 15, 16-17). NCL=s counsel argued that a class action could not be maintained because the inquiry into each passenger=s specific activities and medical condition would be so highly individualized as to devolve into a series of mini-trials. (T 14-15, 17, 36-37). There was also no means of generalized proof of NCL=s alleged negligence. (T 37-

38, 39-40). Moreover, the very reports upon which the Plaintiffs so heavily relied failed to support the representations made to the trial court at the hearing. (T 8, 9, 10, 16-17).

However, the trial court was focused almost exclusively on the fact that the CDC report surmised that there was one continuous outbreak as sufficient for granting class certification:

> The Court: [The CDC says] it=s one continuous sequence start to finish. That they claim it=s the same virus. That it=s common among all the people whether they have some differing problems or not or whether one got it from the water or one got it from food all coming from the ship all with the same virus. That would not - that would not defeat class certification.

(T 19-20). The trial court then read the Plaintiffs= Amended complaint and advised NCL=s counsel that the allegations regarding the common issues of law or fact were sufficient, ***if taken as true***, to certify the class:

> The Court: Remember, usually on motions to dismiss or other motions the complaint=s ***taken as true***. You don=t get a chance to undercut it just because you don=t agree with it.
> Mr. Julien: These are issues for trial, Your Honor.

(T 20).

NCL further attempted to argue that the Plaintiffs had failed to present the trial court with a methodology by which the Plaintiffs would demonstrate that each alleged member of the class was individually effected by the alleged virus. (T 37-39). Due

to the diverse ways in which a person could become ill on a ship and because an individualized medical analysis would be required as to each passenger to even attempt to determine the method of contracting illness, the inquiry was far too individualized to certify the class. (T 37-39). However, the trial court continued to reiterate that because the CDC report surmised that there was one continuous outbreak, the fact that some passengers were ill is sufficient to demonstrate that the class should be certified. (T 39-40).

The trial court never ruled or made findings at the time of the hearing. (T 42). Instead, the trial court stated that it would read NCL=s opposing memorandum. (T 42). Mr. Julien presented a proposed order to the trial court, but the trial court requested NCL to review it. (T 51). Mr. Julien stated that it A[p]robably would be better if [the trial court made] your ruling and we=ll work up a proposed order.@ (T 51).

E. Order granting class certification

Several weeks after the hearing, the trial court=s judicial assistant telephoned NCL=s counsel and announced that the trial court had determined to certify the class and that the parties were to agree on the form of a proposed order.[4] Based upon the trial court having reversed the burden of proof and consequent failure to require the Plaintiffs to meet their burden of proof and the lack of findings to support the trial

court=s ruling, NCL was obviously unable to agree to the form of the proposed order and objected by letter. (A 11). The Plaintiffs= counsel prepared a proposed order that parroted some provisions of Rule 1.220 and made a series of legal conclusions without factual support, among other things, and submitted it to the trial court. (A 3-10). The trial court subsequently entered the order prepared by the Plaintiffs. [4]

(A 3-10). A timely interlocutory appeal ensued (A 1-2).

NCL urged the Third District to reverse on a number of grounds. (IB , RB). The Plaintiffs= Answer Brief ***confessed error*** as to the trial court=s ***Afindings@*** that the class was appropriate for certification under Rule 1.220(b)(1). (AB 23 fn 8). However, the Plaintiffs claimed that the trial court=s Afindings@ otherwise justified certification particularly where the District Judge in the Southern District of Florida had provisionally certified a class consisting of passengers from the third cruise pending discovery. (AB). In fact, after discovery had taken place, the District Court ***decertified*** the class based upon inadequate evidence of numerosity and because individual issues predominated over common issues. (RA Tab 2). The Third District reversed the trial court=s order granting class certification with instructions

[4] The trial court provisionally certified the March 25, 1997, cruise that had been provisionally certified in federal court, pending discovery, without a hearing or motion for certification ever having been filed (when the federal judge denied NCL=s motion to dismiss in federal court). (A 3-4). The District Court has since decertified the class. (RA Tab 2).

to decertify on remand because of insufficient commonality. (PMA 24-25). The proceedings in this Court ensued.

SUMMARY OF THE ARGUMENT

The trial court committed patent error in certifying the class where the Plaintiffs failed to meet their strict burden to demonstrate that all of the requirements for Rule 1.220(a), (b)(1) and (b)(3) were met. The Plaintiffs relied completely upon two reports from the CDC as the sole basis to certify this class and the trial court accepted the Plaintiffs= counsel=s representations that the CDC reports demonstrated that the passengers on the three cruises at issue had all contracted an identical strain of a SRSV. However, the CDC=s investigation never concluded that the SRSV originated or spread due to NCL=s food or water, as alleged by the Plaintiffs. After accepting the Plaintiffs= counsel=s argument concerning the CDC reports, the trial court focused almost exclusively on the alleged identical SRSV on all three cruises as the basis to certify the class, notwithstanding the fact that the evidence adduced at the hearing fails to support that conclusion, and erroneously reversed the burden upon NCL to demonstrate why the class should ***not*** be certified. Moreover, the trial court further erred in refusing to probe beyond the pleadings to examine whether, in fact, the elements of the alleged common legal claims could be tried and proven as to all class members and instead accepted the allegations of the amended class action

complaint as true.

The order granting class certification should have been denied where the Plaintiffs claims are not common, not typical, do not predominate, are not superior to other methods of adjudication nor are they manageable as a class action. The CDC only investigated the first and third cruise at issue and therefore it will be nearly impossible to determine whether passengers from the second cruise have claims and defenses that are common to the remainder of the class. Moreover, the CDC reports clearly demonstrate that a significant amount of ill passengers suffered from Aviruses@ other than the SRSV identified on the first cruise. Thus, an individual inquiry ***must*** be undertaken to determine whether each passenger suffered from the identical strain of SRSV identified from the first cruise or any of the other numerous viruses present in the Caribbean. Proofs as to negligence, causation, failure to warn, breach of warranty, reliance and damages will vary from passenger to passenger. The defenses will also vary from passenger to passenger since a determination of what each passenger ate or drank, their self-medication and their failure or refusal to seek medical help while ill will be different for each passenger.

The class action should not have been certified because there is no generalized method of proof as to the entire class to demonstrate that each passenger suffered an injury, the cause of the injury, warnings received by each passenger, each passenger=s

reliance upon representations made by NCL or its agents and employees and damages. Statistical extrapolation and representative trials deny due process and NCL=s seventh amendment right to jury trials. Moreover, statistical extrapolation and representative trials can only generally demonstrate causation. Individual mini-trials would nevertheless be necessary as to causation and damages. This class action is thus not superior to other methods of adjudication nor is it manageable due to the highly individualized inquiry necessary to prosecute the case. Moreover, the class action should never have been certified under 1.220 (b)(1) because there is no factual or legal basis to certify the class under that subsection of the rule pursuant to the very cases cited in the trial court=s order.

The class representatives do not meet the typicality requirement because there is no class representative for the second cruise. Additionally, Mr. Ault=s alleged permanent injuries are atypical of the injuries allegedly sustained by the remainder of the proposed class. Mrs. Rose=s inability to remember ports of call or what she ate or drank at those ports render her inadequate since those issues directly relate to NCL=s defenses to the class action. The Plaintiffs are also atypical of most of the putative class members since they never settled claims with NCL. Finally, the Plaintiffs failed to meet their burden of demonstrating numerosity where the number of passengers who have settled claims with NCL exceeds the number of potential

putative class members who would be eligible to participate.

STANDARD OF REVIEW

Where, as here, a trial court applies facts based solely upon documentary evidence, the deference usually given to the trial court=s findings is inapplicable because the appellate court is in the same position as the trial court and, therefore, *de novo* review is appropriate. *Redondo v. Jessup*, 426 So. 2d 1146, 1147 (Fla. 3d DCA 1983); *see also* Childress and Davis, *Federal Standards of Review,* '2.14 Vol. I, p. 276 (2d ed. 1991).

ARGUMENT

THE TRIAL COURT COMMITTED PATENT ERROR BY DISREGARDING THE STANDARDS FOR CLASS CERTIFICATION AND CERTIFIED THE CLASS DESPITE THE PLAINTIFFS= FAILURE TO ESTABLISH EACH ELEMENT OF FLORIDA RULE OF CIVIL PROCEDURE 1.220

The United States Supreme Court has ruled that a trial court must conduct a Arigorous analysis@ into whether the prerequisites of the federal equivalent of Florida Rule of Civil Procedure 1.220 have been met.[5] *General Tel. Co. v. Falcon,* 457 U.S. 147, 161, 72 L. Ed. 2d 740, 102 S. Ct. 2364 (1982); *Baptist Hospital of Miami, Inc. v. DeMario,* 661 So. 2d 319, 321 (Fla. 3d DCA 1995). While a trial court has discretion in deciding whether to certify a class, that discretion must be exercised within the framework of Rule 1.220. *Southern Bell Tel. & Tel. Co. v. Wilson,* 305 So.

2d 302 (Fla. 3d DCA 1974); *Execu-Tech Business Systems, Inc. v. Appleton Papers, Inc.,* 743 So. 2d 19, 21 (Fla. 4th DCA 1999) (a party seeking class certification has the burden of pleading and proving each and every element required under rule 1.220); *Gulf Oil Co. v. Bernard,* 452 U.S. 89, 100, 68 L. Ed. 2d 693, 101 S. Ct. 2193 (1981); *Kirkpatrick v. J.C. Bradford & Co.,* 827 F.2d 718, 721 n. 2 (11th Cir. 1987); *Gilchrist v. Bolger,* 733 F.2d 1551, 1555 (11th Cir. 1984); *Ezell v. Mobile Housing Bd.,* 709 F.2d 1376, 1380 (11th Cir. 1983); *Cross v. National Trust Life Ins. Co.,* 553 F.2d 1026, 1029 (6th Cir. 1977)(Adistrict court has broad discretion in determining whether a particular case may proceed as a class action so long as it applies the criteria of Rule 23 correctly@).

A class action is not maintainable by virtue of its designation as such in the pleadings. *Cash v. Swifton Land Corp.,* 434 F.2d 569, 571 (6th Cir. 1970). The trial court must ensure that the Plaintiffs have met the burden of demonstrating that the requirements of the rule have been established. *Falcon,* 457 U.S. at 161. Subsection (a) of Rule 1.220 contains four prerequisites, all of which must be met before a class can be certified. Fla.R.Civ.P. 1.220(a). Once those conditions are satisfied, the party seeking certification must also demonstrate that it falls within at least one of the subcategories of Rule 1.220(b). The Plaintiffs failed to meet this Astrict@ burden by relying upon conclusory allegations. *Brooks v. Southern Bell Tel. & Tel. Co.*, 133

F.R.D. 54, 56 (S.D. Fla. 1990); *Sandlin v. Shapiro & Fishman*, 168 F.R.D. 662 (M.D. Fla. 1996). Here, the trial court failed to conduct a rigorous analysis that all of the prerequisites of the Florida equivalent of Rule 23 were satisfied. *Falcon*, 457 U.S. at 161; *Kaser v. Swann*, 141 F.R.D. 337, 339 (M.D. Fla. 1991).

Contrary to the trial court=s assertion that the pleadings must be accepted as true for purposes of ruling on the motion, the United States Supreme Court has ruled that it is necessary for the court to probe ***beyond the pleadings*** before ruling on class certification. *Falcon,* 457 U.S. at 160. Federal courts have held that:

> Mere repetition of the language of Rule 23(a) is not sufficient. There must be an adequate statement of the basic facts to indicate that each requirement of the rule is fulfilled. Maintainability may be determined by the court on the basis of the pleadings, if sufficient facts are set forth, but ***ordinarily the determination should be predicated on more information than the pleadings will provide . . . . The parties should be afforded an opportunity to present evidence on the maintainability of the class action.***

Weathers v. Peters Realty Corp., 499 F.2d 1197, 1200 (6th Cir. 1974)(citation omitted); *Rutstein v. Avis Rent-A-Car Systems, Inc.*, 211 F.3d 1228, 1233-35 (11th Cir. 2000). The Eleventh Circuit has held that Awhile it is true that a trial court may not properly reach the merits of a claim when determining whether class certification is warrantedYthis principle should not be talismanically invoked to artificially limit a trial court=s examination of the factors necessary to a reasoned determination of whether a plaintiff has met [the] burden of establishing each of the rule 23 class action

requirements.@ *Love v. Turlington*, 733 F. 2d 1562, 1564 (11th Cir. 1984) citing *Huff v. N.D. Cass Company of Alabama*, 485 F. 2d 710, 713 (5th Cir. 1973).[5] The Court refused to Aaccept the idea that to avoid infringing the plaintiff=s in the class= right to a jury trial, district judges must be barred from making any evidentiary inquiry,@ and further ArejectedYthe argument that the judge is inextricably bound by the face of the pleadings@); *see also* Rutstein, 211 F.3d at 1233-35. The trial court therefore was required to consider both the allegations of the amended class action complaint and the supplemental evidentiary submissions of ***both*** parties in ruling upon this motion. *Blackie v. Barrack*, 524 F. 2d 891, 901 n. 17 (9th Cir. 1975).

The trial court=s reversal of the burden of proof from the Plaintiffs to NCL contradicted the unequivocal pronouncements by the United States Supreme Court that the burden of establishing the elements of a class action rest solely upon the parties seeking certification. *See Falcon,* 457 U.S. at 161. While it certainly may be argued that the trial court=s directions were no more than an attempt to focus the argument on the most troublesome points, this Court should nevertheless reject that argument because the trial court=s order contains little to no factual findings based upon evidence submitted by the Plaintiffs in support of class certification. (A 3-10).

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[5] Under *Bonner v. City of Prichard*, 661 F. 2d 1206, 1207 (11th Cir. 1981)(*en banc*), cases decided by the former Fifth Circuit before October 1, 1981 are binding on the Eleventh Circuit.

See In Re: American Medical Systems, Inc., 75 F. 3d 1069, 1086 (6th Cir. 1996). Consequently, the trial court=s findings merely parrot the language of Rule 1.220 and are not findings in any true sense. There are absolutely no findings whatsoever relating to predominance, superiority and manageability or any factual or legal basis to certify the class under subsection (b)(1). This Court should therefore conclude that the practical effect of the proceeding below was to place the burden on NCL to disprove the Plaintiffs= Aentitlement@ to class certification in derogation of the language of Florida Rule of Civil Procedure 1.220 and *Falcon.*[6] 457 U.S. at 161; *In Re: American Medical Systems, Inc.*, 75 F. 3d at 1086. The Plaintiffs= cannot meet the mandatory elements of rule 1.220(a), or subsection (b)(1) and (b)(3).

A. The Plaintiffs failed to establish numerosity

The first subdivision of Rule 1.220(a) requires that the class be Aso numerous that joinder of all members is impracticable.@ Fla.R.Civ.P. 1.220(a)(1). The Plaintiffs= conclusory legal statements at the trial court and in their briefs that Aseparate joinder of 900 potential class members from all over the United States would be impractical@ is unsupported in the record and is legally insufficient to meet

[6] *As set forth supra,* the trial court abdicated its obligation as a finder of fact by delegating its decision making authority to the Plaintiffs= attorney such that the order at issue is the equivalent of a legal argument written by an attorney and signed by a circuit judge.

the requirements of Rule 1.220(a). (AB 12, MB 1-2)(the Plaintiffs= alleged 700 in their brief on the merits).

In *Faraci v. Regal Cruise Line, Inc.,* 1994 U.S. Dist. Lexis 14817 (S.D.N.Y. October 3, 1994),[7] the District Court was presented with a motion for class certification where there was an outbreak of gastrointestinal illness aboard a cruise ship. However, unlike the instant case, the United States Public Health Service discovered sanitation deficiencies on board the ship that Acould contribute to an outbreak of gastrointestinal illness.@ *Id.* at *1. The *Faraci* plaintiffs alleged that approximately 5,500 passengers embarked on the defendants= cruises between April and June 1993 and estimated that twenty-five (25%) of them sustained personal injuries as a result of unsanitary conditions. *Id.* at *5. The Court denied certification because the plaintiffs failed to meet their burden of demonstrating the size of the class and the impracticability of joinder; a plaintiff seeking class certification must demonstrate numerosity through something more than a good faith Aestimate." *Id.* at *4. (plaintiffs are required to Aproduce proof that there are a large number of class members@); *see also Makuc v. American Honda Motor Co.,* 835 F.2d 389, 394 (1st

[7] Unlike *Faraci*, the CDC never determined the source of the exposure for the suspected virus and therefore, it is just as likely that a passenger brought it on board the ship and it spread via person to person, particularly where the CDC found that NCL=s food and water handling met with all applicable guidelines. (A 175).

Cir. 1987); *Fleming v. Travenol Lab, Inc.,* 707 F.2d 829, 833 (5th Cir. 1983); *Marcial v. Coronet Ins. Co.,* 880 F.2d 954, 957 (7th Cir. 1989). Here, the record unequivocally established that the Plaintiffs estimated the size of the class. (AB 3).

In their Answer Brief filed in the Third District, the Plaintiffs relied heavily upon the federal class action proceeding, *Pollack v. Norwegian Cruise Line,* Case No. 98-621, formerly pending in the Southern District of Florida, where District Judge Joan Lenard *sua sponte* provisionally certified the March 25-April 4 voyage as a class action pending discovery.[8] (RA Tab 1, p.1). Discovery in that case unequivocally established that there was ***no numerosity*** as to the third voyage:

> The CDC report indicates that 302 passengers filled out questionnaires reporting symptoms with the CDC definition of gastroenteritis. Following the cruise, more than 430 passengers individually settled claims with [NCL] and executed releases.[9] Thus, 128 more passengers executed releases than filled out questionnaires. Moreover, only 17 passengers executed releases after the filing of the class action. Even if the class were limited to those individuals and the Plaintiff (who would not be typical of the class because she has not executed a release), the Court finds that a potential class of eighteen passengers is not a legally adequate number to constitute a class in this case. Accordingly, the

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[8] Here, the trial court provisionally certified the March 25 B April 4 voyage pending the outcome of the federal case because the same voyage had been provisionally certified by the federal court. (A 3). Since the federal class action has been decertified and dismissed with prejudice, and where all of the class issues were resolved in the federal action, no issue remains to be resolved at the state court level. *See Pollak v. Courshon,* 768 So.2d 2 (Fla. 3d DCA 2000).

[9] 252 Passengers on the March 4-14 voyage and 259 passengers form the March 14-25 voyage executed releases which have been provided to the Plaintiffs.

Court finds that the numerosity requirement has not been met.

(RA Tab 1, pp. 2-3). NCL settled 941 individual claims with passengers for the three cruises, which is 41% of the total number of passengers and exceeds the Plaintiffs' Aguesstimate@ of the size of the class (out of 2,305 total passengers, 941 settled claims (41%) as opposed to the 605 (26%) that may be extrapolated from CDC documents for the first and third cruise, since there are no documents for the second cruise). The actual estimate should be much lower given the fact that the CDC found the identical strain of SRSV in only 3 out of 23 cases (13%). The Plaintiffs have failed to demonstrate numerosity because it is entirely unclear whether a class even exists.

B. The class claims are not common

Rule 1.220(a)(2) requires that there must be Aquestions of law or fact common to the class@ before the class may be certified. Fla.R.Civ.P. 1.220(a)(2). This is the subsection of the rule upon which the trial court almost exclusively focused as a basis to certify the class. (T 6, 8, 9-12, 13-14, 15-18, 20, 32, 36-38, 41-42). In doing so, the trial court erroneously refused to consider NCL=s affidavit filed in opposition and erroneously insisted that the pleadings must be taken as true, as in a motion to dismiss. *See supra*. (T 20-21). In order to certify the class, the second requirement of Rule 1.220(a) must also be met, i.e., Athe claim or defense of the representative party

raises questions of law or fact common to the questions of law or fact raised by the claim or defense of each member of the class.@ Fla.R.Civ.P. 1.220(a)(2). As the United States Supreme Court noted in *Falcon*:

> The class action was designed as >an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.= *Califano v. Yamaski,* 442 U.S. 682, 700-01, 99 S.Ct. 2545, 2557-2558, 61 L. Ed. 2d 176 (1985). Class relief >is Apeculiarly appropriate Awhen the@ issues involved are common to the class as a whole= and when they >turn on questions of law applicable in the same manner to each member of the class.= *Id.* at 701, 99 S. Ct. at 2257. For in such cases, >the class-action device saves the resources of both the courts and the parties by permitting an issue potentially affecting every [class member] to be litigated in an economical fashion under Rule 23. *Ibid.*

Falcon, 457 U.S. at 155. The only issue common to this proposed class is that the CDC conducted an investigation of the March 4 and 25 cruises for a suspected outbreak of a gastrointestinal illness and that is not at issue. Where, as here, a single issue that is common to the proposed class is far less significant than the individualized inquiry necessary for all of the other issues, class certification should be ***denied.*** *See Moore v. American Federation of Television and Radio Artists,* 216 F.3d 1236, 1242-43 (11th Cir. 2000)(when only two issues are common to the class, it requires no Aextensive analysis to conclude that this is not enough to satisfy the requirements of Rule 23(a)(2)); *In re: Temple,* 851 F.2d 1269, 1273 (11th Cir. 1988); *Hudson v. Delta Air Lines,* 90 F.3d 451, 456-58 (11th Cir. 1996)(denial of class certification affirmed as to lack of commonality where individual issues outweighed

common ones); *see also Amchem Products, Inc. v. Windsor,* 521 U.S. 591, 610-11 (1997); *Murray v. Auslander,* 244 F.3d 807, 812 (11th Cir. 2001)(pain and suffering, mental anguish and humiliation are inherently individual injuries compelling an inquiry into each individual=s circumstances).

As in their pleadings and class certification motion, on appeal before the Third District, the Plaintiffs asserted in a conclusory manner that they demonstrated commonality below: AThe named Plaintiffs and class members= claims arise 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 cruises.@ (AB 13, MB 16). Their Answer Brief also listed purported Acommon@ issues among class members, including whether NCL=s breach of warranty and negligence proximately caused class members to suffer damages, among other things. (AB 14). The Plaintiffs= amended class action complaint and class certification motion simply allege in general terms that there are Acommon issues@ without identifying any facts supporting NCL=s alleged failure to provide water or food fit for human consumption or any practice by which NCL failed to follow public health guidelines that were Acommon@ to all plaintiffs. (A 25-36, 38-42).

In order to determine whether the Plaintiffs= claims are indeed common, the trial court should not have accepted all of the allegations as true, particularly where

they presuppose liability based upon CDC reports that do not support those allegations, and should have looked beyond the pleadings to determine if the class claims are in fact common. *See Rutstein*, 211 F.3d at 1233-35. For example, in order to prosecute this case, the Plaintiffs will have to prove the elements of negligence: duty, breach, cause in fact, proximate cause and damages. *Moransais v. Heathman,* 744 So. 2d 973, 975 fn 3 (Fla. 1999). As for breach of warranty, they need to prove: a sale of a product, a defect that existed before it left the defendant=s control, such a defect caused the Plaintiffs= injuries and the Plaintiffs= were forseeable users of the product. *See McCarthy v. Florida Ladder, Co.,* 295 So. 2d 707, 709 (Fla. 2d DCA 1974). NCL also has a due process right to defend by refuting the Plaintiffs= evidence.

Here, there is no commonality as to any of the negligence elements and in particular causation, damages and the defenses to negligence. Even breach of a duty will be exceedingly individual given the fact that the very reports upon which the Plaintiffs have relied show that there was more than one virus. Moreover, SRSV is a very common, highly contagious virus that likely spreads from person to person contact in close quarters on the ship and this virus was similar in only 3 of 23 people tested! There are similar problems in a breach of warranty case where the Plaintiffs would necessarily have to demonstrate consumption of a defective product and that

such product caused the injuries allegedly sustained by the passengers. Moreover, the damages that the Plaintiffs seek amply demonstrate a lack of commonality since obviously some passengers never suffered an illness, others would have pre-existing conditions, others no-pre-existing conditions, and where pain and suffering and discomfort would vary greatly from individual to individual. (AB 18). Moreover, NCL is entitled to defend on the basis that the varying symptoms reported to the CDC on the questionnaires are so common that they may have resulted from a number of different illnesses. (RA Tab 1, p. 4).

NCL attempted to introduce the affidavit of Dr. Latinae Parker, who opined that:

> [t]o confirm that [the Plaintiffs and their] fellow passengers were suffering from symptoms brought on by the Norwalk virus, stool samples and other highly sophisticated testing must be performed. It *cannot* be assumed that simply because one passenger is infected with the virus that all are suffering the same illness.
>
> Though diarrhea, nausea and vomiting can be caused by the Norwalk virus, *the exact same* symptoms can be brought on by common seasickness as well as Shigella, Salmonella, and parasites which can be found on Caribbean Islands. Passengers who disembark the vessel to explore these islands are easily susceptible to contracting these illnesses. Those who contract these illnesses will suffer diarrhea, nausea, and vomiting.
>
> Moreover, similar symptoms can be caused by other viruses[,] including Rotavirus, Enteric Adenovirus, Cacivirous, and Astrovirus, which can also be found in the Caribbean.

(A 123-125). The trial court, however, erroneously refused to consider the affidavit. (T 9-12). S*ee supra*. The Plaintiffs cannot demonstrate commonality based on the facts and circumstances present here. The Plaintiffs= claims of negligence and breach of warranty will differ based upon the individual diagnosis of the physical ailment and whether that was due to passenger transmission, contracting a virus or parasite on a Caribbean island or whether the passenger suffered from seasickness, among a number of other things. (A 123-125). Because little to no laboratory testing was completed, there is no way for the Plaintiffs to show that any given passenger was suffering from a SRSV as opposed to any of the above-referenced illnesses or parasites. (A 172-191). The CDC report unequivocally demonstrates that not ***all*** passengers on the third cruise suffered from the same strain of SRSV identified by laboratory testing on the first cruise. (A 184-185). The CDC conducted RT-PCR testing to analyze and determine the relatedness of the A***viruses detected.@*** (A 184). The CDC RT-PCR testing showed that out of 23 stool specimens collected from passengers and crew, Aidentical genomic sequences@ were found in only 3 of 23 stool specimens that were the same strain of SRSV as that found on the initial cruise. (A 185). The CDC report itself, therefore, ***proves*** the existence of other Aviruses@ and therefore fails to support the Plaintiffs= basis for class certification.

Proofs as to negligence, failure to warn and breach of warranty will also vary

from plaintiff to plaintiff because each person=s illness may have been complicated by transmission or re-transmission of any of the aforementioned illnesses or parasites from passenger to passenger, as well as failing to seek medical assistance. Furthermore, each plaintiff=s doctor would have to testify as to whether the passenger contracted an SRSV and the Plaintiffs= and each class members= prior medical history. Additional witnesses would be necessary to determine what oral or written representations or warnings were made to each passenger[6] and what NCL employees did or did not tell each passenger, as well as issues relating to each passengers= reliance on such statements. Further, witnesses and experts would be required to prove causation and damages for each passenger. *See generally In re: Northern District of Calif., Dalkon Shield IUD Prods. Liab. Litig.,* 693 F. 2d 847, 854-55 (9th Cir. 1982) *cert. denied, A.H. Robins Co. v. Abed*, 459 U.S. 1171, 74 L. Ed. 2d 1015, 103 S. Ct. 817 (1983) (on issues of negligence, strict products liability, adequacy of warnings, fraud and conspiracy, Acommonality begins to be obscured by individual case histories@). In fact, most mass tort actions are ultimately rejected because of the highly individualized inquiry necessary to prosecute them which makes them unmanageable and ***not*** superior to other means of adjudication. See e.g., *Castano v. American Tobacco Co.*, 84 F. 3d 734 (5th Cir. 1996); *In re: Rhone-Poulenc Rorer, Inc.*, 51 F. 3d 1293 (7th Cir. 1995). *See also,* John C. Coffee Jr*., Class Wars: The*

Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. 1343, 1345 n.2 (1995) (AFederal courts remain largely unreceptive to mass tort actions and regularly deny certification@).

The complete failure of proof, other than offering the CDC reports, which fail to support the general and conclusory allegations of the Plaintiffs= amended complaint and motion for class certification, highlights the trial court=s error in certifying this class. The Plaintiffs presented no proof because there is no such proof available as best evidenced by the CDC reports and the affidavit of Dr. Latinae Parker. Dr. Parker opined that there is no Acommon cause@ of diarrhea and vomiting on a pleasure cruise in the Caribbean. *See supra*. By accepting the conclusory allegations of the party with the burden of proof on certification, the trial court erroneously accepted the CDC reports as Aproving@ commonality, which they do not. The Plaintiffs simply cannot meet their burden of proof as to Rule 1.220(a)(2).

C. The Plaintiffs cannot demonstrate typicality

Rule 1.220(a)(3) requires that Athe claim or defense of the representative party is typical of the claim or defense of each member of the class.@ Fla.R.Civ.P. 1.220(a)(3). Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class. The Plaintiffs must show that their injuries arise from or are directly related to a wrong to a class,

and that wrong includes the wrong to the Plaintiffs. Thus, the Plaintiffs= claims are typical if they arise from the event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory. 1 Newberg, *supra,* ' 3.13, at 3-76. (footnote omitted). *See also General Tel. Co. v. EEOC,* 446 U.S. 318, 330, 64 L. Ed. 2d 319, 100 S. Ct. 1698 (1980) (Atypicality requirement is said to limit the class claims to those fairly encompassed by the named plaintiffs= claims@). A necessary consequence of the typicality requirement is that the representative=s interests will be aligned with those of the represented group, and in pursuing his own claims, the named plaintiff will also advance the interests of the class members. 1 Newberg, *supra,* ' 3.13, at 3-75.

Neither of the class representatives were on the cruise commencing March 14, 1997. Since the CDC undertook no successive investigation of the second cruise and since the passengers filled out no questionnaires, it will be practically impossible to determine which passengers were purportedly sick and which passengers were not. (A 183). Even if they were sick, it will be nearly impossible to determine which passengers suffered from the alleged SRSV infection identified by the CDC rather than any number of traveler's illnesses passengers can contract in the Caribbean during shore excursions or by person to person contact. (A 123-125). Symptoms will vary among passengers. (A 123-125, 184). For example, Mr. Ault claims to be suffering

from bloating well over two years after the cruise despite the fact that the CDC defined the SRSV as a common infection lasting for only 2-3 days. (A 175, T 92-93). Mr. Ault=s claims of permanent injuries are therefore atypical of the rest of the class.

The Aclaims or defenses@ of the named Plaintiffs are ***not*** typical of the Aclaims or defenses@ of the proposed class. The Plaintiffs have not signed releases of their claims against NCL. Those persons who executed releases will necessarily have to litigate the validity of the releases while the named Plaintiffs will not. Indeed, the Plaintiffs have adduced no evidence that a class of persons exist who have not executed releases. *Melong v. Micronesian Claims Comm=n,* 643 F.2d 10, 15 (D.C. Cir. 1980)(AWhen the purported class representative has not executed a release and need not establish that the release is defective in his individual case, serious questions are raised concerning the typicality of the class representative=s claims and the adequacy of his representation of other class members@); *Thonen v. McNeil-Akron, Inc.,* 661 F.Supp. 1271, 1274 (N.D. Oh. 1986)(holding that named plaintiffs who did not sign accord and satisfaction agreements, unlike other class members, Acannot prove commonality and typicality@).

The trial court should have probed beyond the legal conclusions asserted in the pleadings before concluding that typicality was met. (T 12)(AThey=re claiming they got sick from a virus so the number it=s 700 plus. That meets the requirement@).

Instead, the trial court took the legal conclusions alleged in the amended class action complaint as true and determined that because the Plaintiffs alleged there were 700 plus people affected by a virus, the Plaintiffs= claims were Atypical.@ (T 12). The trial court clearly gave no serious consideration to the typicality requirement and entered the order prepared by the Plaintiffs= counsel which merely regurgitated the language of the rule. This was erroneous. *See Falcon*, 457 U.S. at 158-159 (reversing certification for failure of proof on typicality element, holding that it was error for district court to presume that respondent=s claim was typical of other claims against petitioner). Even if the trial court had probed beyond the pleadings, there is no basis to determine typicality.

D. There is no factual or legal basis to certify the class under subsection (b)(1)

The order granting class certification states that A[t]he Court finds that the pleadings, facts and evidence submitted by the plaintiffs have satisfied the requirements of Fla.R.Civ.P. 1.220(a); 1.220(b)(1) and (b)(3).@ (A 4). While the Plaintiffs ultimately confessed error on this issue in their Answer Brief, this Afinding@ underscores the quantum lack of evidence before the trial court which further illustrates the problem in delegating the fact finding to the party drafting the order. (AB fn 8, BM fn 10).

The trial court=s findings as to predominance were insufficient and unsupported by any proffer made by the Plaintiffs and the order is devoid of *any*

findings as to superiority and manageability

The trial court also certified the class under Florida Rule of Civil Procedure 1.220(b)(3).[7] Significantly, the order fails to set forth all of the requirements to maintain an action under subsection (b)(3) of Rule 1.220. Subsection (b)(3) requires that Athe questions of law or fact common to the claim or defense of the representative party and the claim or defense of each class member 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.@ Fla.R.Civ.P. 1.220(b)(3). Additionally, the trial court must consider the Adifficulties likely to be encountered in the management of the claim or defense on behalf of the class,@ among other things. Fla.R.Civ.P. 1.220(b)(3)(D).

None of the cases cited by the trial court support certification as to causation and damages, which are the most significant issues. The trial court=s order cited *Hernandez v. Motor Vessel Skyward,* 61 F.R.D. 558 (S.D. Fla. 1973), as support for its decision to grant certification in this case. In *Hernandez* the United States District Court for the Southern District of Florida certified the class under Rule 23(b)(1)(A) as to the issue of negligence only. *Hernandez,* 61 F.R.D. at 561. Significantly, the *Hernandez* court conceded that individual issues predominated as to every other

aspect of the case:

> In the instant case, only one issue is available for class treatment. Whether the defendants were negligent in preparing either the drinking water or food that was available for consumption by the passengers is subject to a uniform determination. A ruling on this issue would be applicable to any prospective claimant. ***The issues of the proximate cause of each passenger=s illness . . . and damages are individual in nature. The likelihood of individual defenses on these issues is at least recognizable. For example, the symptoms manifested by some of the passengers may be related to seasickness or some other illness unrelated to exposure to contaminated food or water.***

Id., at 561. *Hernandez* therefore not only fails to support certification under subsection (b)(3), it is distinguishable because the district judge certified the class under subsection (b)(1)(A) on the ground that the doctrine of collateral estoppel might bind the defendant on issues of liability if any plaintiff were liable to win against it. *Id.* at 561. This concern has since been eliminated by the United States Supreme Court decision in *Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979); *see also Bentkowski v. Marfuerza Compania, S.A.*, 70 F.R.D. 401, 402 (E.D. Pa. 1976); (which rejected the Hernandez court=s decision to certify under subsection (b)(1)(A) because mass torts are not, as a rule, subject to certification under (b)(1)(A), (b)(1)(B) or (b)(2)). The *Bentkowski* opinion certified as to liability only with no real (b)(3) analysis. *Bentkowski,* 70 F.R.D. at 402 (relying upon *Hernandez*, the class was certified as to liability only with no real (b)(3) analysis).

The trial court also cited *McFadden v. Staley,* 687 So. 2d 357 (Fla. 4th DCA

1997) as support for its ruling. However, *McFadden* fails to provide such support. First, *McFadden* was erroneously predicated upon the Third District=s decision in *Broin v. Philip Morris Co., Inc.,* 641 So. 2d at 890. *Broin* involved an appeal of an order granting a motion to dismiss where all of the allegations must be taken as true. There is also ***no real*** discussion of predominance, superiority or manageability in the Fourth District=s opinion. *See McFadden,* 687 So. 2d at 358-59. Further, unlike the instant case where the CDC reports indicate that the water on the ship and the food met with all public health guidelines, the Public Health Unit in *McFadden* Aconfirmed Salmonella@ for all patrons of the restaurant. *Id.* Here, there has been no such direct link between the water and food and the Aviruses@ found on the ship. The Plaintiffs cannot demonstrate that a class action is superior to other methods of adjudication and that a class action would be manageable. Finally, the order cited *Kornberg v. Carnival Cruise Lines,* 741 F. 2d 1332 (11th Cir. 1984) as additional support for its ruling. In *Kornberg v. Carnival Cruise Lines, Inc.*, 1986 A.M.C. 854 (S.D. Fla. 1985), on remand after the Eleventh Circuit reversed decertification and directed the court to make a determination as to whether the plaintiffs met rule 23 requirements, Judge King ruled that the action was not superior to other available methods of adjudication. *Kornberg*, 1986 A.M.C. at 854. *Kornberg* thus fails to support the order granting class certification. The highly individual inquiry required

in this case, as set forth *supra*, also defeats superiority.

Individual issues predominate. Subdivision (b)(3) parallels subdivision (a)(2) in that both require that common questions exist, but subdivision (b)(3) contains the far more stringent requirement that common issues predominate over individual issues. 1 Newberg, *supra,* '3.10 at 3-56. As referenced above, the trial court was obligated to look beyond the pleadings to determine whether questions of law or fact predominate over questions affecting only individual members; the trial court refused to do so because the trial court accepted the allegations as true, disallowing any discussion or argument as to the proofs required or elements of the claims or defenses. However, the court must investigate beyond the allegations of the complaint in order to determine if common questions predominate. *Rutstein,* 211 F. 3d at 1233-34. The Rule 23(b)(3) inquiry, upon which rule 1.220(b)(3) is predicated, tests whether proposed classes are sufficiently cohesive to warrant adjudication by class representation. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). Questions of law or fact are deemed Acommon@ Awhen there exists generalized evidence that proves or disproves the element on a simultaneous, class-wide basis. Such proof obviates the need to examine each class member=s individual position.@ *Dahlgren=s Nursery, Inc. v. E.I. du Pont de Nemours & Co.*, 1994 U.S. Dist. Lexis 17918 at *27 (S.D. Fla. June 9, 1994)*, citing In re: Industrial Gas Anti-Trust Litigation,* 100 F.R.D.

280, 288 (N.D. Ill. 1983). The Eleventh Circuit recently ruled that:

> In order to determine whether common questions predominate, AWe are called upon to examine the cause [] of action asserted in the complaint on behalf of the putative class.@ []. Whether an issue predominates can only be determined after considering what value the resolution of the class-wide issues will have in each class member=s underlying cause of action. []

Rutstein, 211 F. 3d at *1234 (citations omitted). The trial court erroneously failed to conduct this inquiry, despite NCL=s repeated requests, because the Plaintiffs= counsel urged that such inquiry should be Areserved for trial.@ (A T 9-12, 20-21).

The burden was clearly on the Plaintiffs to Atender some credible basis for claiming that the questions susceptible to generalized proof on the class-wide basis - the common questions - predominate over questions subject to only individualized proof.@ *Dahlgren=s Nursery, Inc.*, 1994 U.S. Dist. Lexis 17918 at *29 (citations omitted). If the effect of class certification is to bring in hundreds of possible claimants Awhose presence will in actuality require a multitude of mini-trials (a procedure which will be tremendously time consuming and costly), then the justification for class certification is absent.@ *Dahlgren=s Nursery, Inc.*, 1994 U.S. Dist. LEXIS 17918 at *28-29, citing *Alabama v. Blue Bird Body Co.,* 573 F. 2d 309, 328 (5th Cir. 1978). Thus, even if certified as to a particular issue, e.g., was the food or water on the three cruises adulterated as in *Hernandez*, the daunting prospect of hundreds, if not thousands, of mini-trials as to all of the other remaining issues fails

to support a basis for class certification because each class member would nevertheless have to try an individual case.

Here, the Plaintiffs failed to propose any methodology for demonstrating, using generalized proof, that each and every member of the proposed class has sustained an injury. *Rutstein,* 211 F. 3d at 1233-34. The issue of causation, as well as that of negligence, must be subject to a Aclear cut determination@ with generalized proof before common questions can be found to predominate. *Dahlgren=s Nursery, Inc.*, 1994 U.S. Dist. LEXIS 17918 at *34-35, *citing Hernandez*, 61 F.R.D. at 560. *See also Execu-Tech Business Systems, Inc.,* 743 So. 2d at 20-22 (affirming the trial court=s decision denying class certification because there was no reasonable methodology proffered by the plaintiff using generalized proof of class-wide impact and damages); *Rutstein* 211 F. 3d at *17-19. Although generalized proof may well be suited for those cases in which the cause of the damages is a single tragic happening, it is not well suited for those cases where, as here, no one set of operative facts establishes liability and no single proximate cause equally applies to each potential class member. *Dahlgren=s Nursery, Inc.*, 1994 U.S. Dist. LEXIS 17918 at *35. AGeneralized proof is also inapposite where the damages do not lend themselves to mechanical calculation but instead depend on the facts peculiar to each class member.@ *Dahlgren=s Nursery, Inc.*, 1994 U.S. Dist. Lexis 17918 at *35.

In the instant case, the Plaintiff, Mr. Ault, answered an interrogatory stating that the methodology to be used to demonstrate damages ***may*** be statistical surveys, on a representative basis, utilizing expert testimony and statistical data. (A160-161). Even if the Plaintiffs had elaborated as to how these cases might be tried using statistics and experts, representative or statistical methods for causation and damages calculations are highly controversial and are often rejected by the federal courts and have been characterized as a Aradical solution@ that deny due process rights to a one-on-one jury trial. *See e.g., In re: Fibreboard Corp.*, 893 F. 2d 706, 710 (5th Cir. 1990).

It is completely unclear what type of Astatistical data@ can Aeasily@ be extrapolated from records that the Plaintiffs= have ***never*** sought to obtain, i.e., the CDC questionnaires or other CDC documents. Further, it is uncertain that such records will be made Aeasily@ available since they were never requested by the Plaintiffs. *See* 45 C.F.R. ' 2.1 et seq. It is even more unclear how pain and suffering can be demonstrated on a Arepresentative basis@ utilizing expert testimony and statistical data since the Plaintiffs failed or refused to elaborate on that issue. Contrary to the Plaintiffs= intent to show common damages through statistical analysis, a detailed analysis of whether each class member suffered from viral gastroenteritis is absolutely necessary, including the extent of the illness, and a detailed analysis of the

class member=s medical history, to demonstrate whether ***any*** member of the class, including the Plaintiffs/Class Representatives, contracted the identical strain of SRSV identified in only 3 of 23 specimens collected by the CDC. (A 185). The order granting class certification referenced the answers to interrogatories to buttress the determination that the class should be certified. Instead, they clearly demonstrate all of the reasons that certification should have been denied. Individual questions will thus predominate as to negligence, proximate cause, damages and comparative negligence thus precluding certification of this class action.

As the court noted in *Mertens v. Abbot Laboratories*, 99 F.R.D. 38, 42 (D.N.H. 1983), A[w]hat has already been said about the individual nature of proof in the context predominance applies with equal force to superiority.@ 99 F.R.D. at 42. *See supra.* In fact, many courts have determined that a superiority analysis cannot be commenced absent some type of proposed structure in which the case will be tried. *In re: Telectronics Pacing Systems, Inc.*, 168 F.R.D. 203, 221 (S.D. Ohio 1996). The Plaintiffs have repeatedly failed to propose any structure whatsoever, claiming that such a proposal was a matter for Atrial.@ Instead, the Plaintiffs have reiterated a series of legal conclusions relating solely to predominance and have completely ignored the superiority requirement of Rule 1.220(b)(3). Fla.R.Civ.P. 1.220(b)(3). Since the Plaintiffs failed to meet the strict burden of proof to demonstrate that this

class action is superior to other methods of adjudicating the claim, the trial court should have denied class certification.

The defendants in *Hernandez* and *Bentkowski* never raised the constitutional impropriety of having a trial on liability and separate trials on proximate cause, damages and comparative negligence issues. *Hernandez*, 61 F.R.D. at 561; *Bentkowski*, 70 F.R.D. at 406. If this case were certified as to liability only, as in *Hernandez* and *Bentkowski*, *supra*, as a means to handle the highly individual inquiry necessary in this litigation, such plainly would be inconsistent with the Seventh Amendment right to have juriable issues determined by the first jury impaneled to hear them and not re-examined by another finder of fact.[10] *See In re: Rhone-Poulenc Rorer, Inc.*, 51 F. 3d at 1303 (AThis would be obvious if the second finder of fact were a judge@); *Castano,* 84 F. 3d at 750-51. Issues of negligence, proximate causation, damages and comparative negligence overlap and must therefore be tried by the same jury. *Id.* (Proximate causation is found by determining whether the harm to the plaintiff followed in some sense naturally, uninterruptedly and with reasonable probability from the negligent act of the defendant and therefore overlaps the issue of

[10] While this issue was not specifically raised below, error amounting to a constitutional violation is fundamental error and therefore the lack of contemporaneous objection to preserve the issue does not prevent appellate review. *Scoggins v. State*, 726 So. 2d 762, *17 (Fla. 1999).

defendant=s negligence). Such a rule is dictated for the very practical reason that if separate juries are allowed to pass on issues involving overlapping legal and factual questions, the verdicts rendered by each jury could be inconsistent. *Castano,* 84 F. 3d at 750-51. Having failed to proffer some evidence that a class action is a superior method to other means of litigation and manageable, the trial court=s certification should never have been entered.

The Plaintiffs claim that they Ahave indeed proposed a generalized method of proof for determining the issue of causation and negligence including, but not limited to, the CDC reports and surveys of medical records.@ (AB 25, 26). Respectfully, such an argument demonstrates a fundamental misunderstanding of the burden of proof, prerequisites and the trial court=s responsibilities in ruling on a motion for class certification. The Plaintiffs, not NCL, carry the burden of proving ***all*** of the class action requirements at all times. *See Baptist Hospital of Miami, Inc. v. Demario,* 661 So. 2d 319, 321 (Fla. 3d DCA 1995).

Here, the Plaintiffs have only generally mentioned that they would attempt to demonstrate the elements of negligence and breach of warranty through CDC records, statistical surveys and representative trials. (AB 25, 26). There is insufficient evidence to show by generalized proof that each passenger contracted viral gastroenteritis as a result of food and/or water aboard the ship based upon the statistics

set forth in the CDC reports. (IB 3-5). Surveys of medical records are also insufficient to demonstrate on a class-wide basis duty, breach, causation and damages because such surveys ***may*** only demonstrate ***general*** causation at best. *Sterling v. Velisicol Chemical Corp.*, 855 F.2d 1188, 1200 (6th Cir. 1988). Proof by statistics and representative trials would also infringe upon NCL=s due process rights because NCL is entitled to its day in Court. *See Richards v. Jefferson County*, 517 U.S. 793, 798 (1996). The due process provisions of the Fifth and Fourteenth Amendments are not Atechnical conceptions.@ *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). The use of statistics and/or representative trials implicates NCL=s due process rights. The promulgation of the rules of court allowing class certification were not intended to allow courts to legislate or make substantial amendments to NCL=s substantive due process rights or to the Plaintiffs= evidentiary burden to show duty, breach, cause in fact, proximate cause and damages. *See* Article V, ' 2(a), Fla. Const.; *Langstrom v. Lyon,* 86 So. 2d 771 (Fla. 1956) (by reason of constitutional provision relating to separation of powers, rules of court should not abridge, enlarge or modify the substantive rights of any litigant).

A class action is simply not a superior means to try each passenger=s case because of the individual differences which require individual determinations as to each claim. *See Georgine v. Amchem Prods.,* 83 F.3d 610, 627 (3d Cir. 1996); *In re:*

American Medical Systems, Inc., 169 F.R.D. 643, 654 (C.D. Cal. 1996). Judge Lenard agreed in the federal class action:

> The use of a class action in this case raises fairness concerns. Although statistical estimation is useful for demonstrating general causation, it does not demonstrate individual causation. The use of statistical estimation to show individual causation changes the burden of proof and raises concerns that Defendant=s substantive rights may be violated. Federal statute prohibits the Federal Rules of Civil Procedure from abridging, enlarging or modifying any substantive right. *See* 28 U.S.C. ' 2072; *see also Cimino v. Raymark Indus.,* 151 F.3d 297, 312 (5th Cir. 1998). As a result, given the individualized inquiry necessary to try the case as a class action, the Court finds that this action is not superior to other available methods for a fair adjudication of the controversy.

(RA Tab 2, p. 4). Each passenger must prove, and NCL must have the opportunity to disprove, that a particular individual contracted gastroenteritis as a result of NCL=s negligence and that NCL breached its warranty as to each passenger.

The few courts that have allowed class certification for personal injury mass torts have ***not*** allowed matters of individual causation to be determined on a representative basis. *See Sterling v. Velisicol Corp.,* 855 F.2d at 1200-01 (the court allowed representative plaintiffs to prove general causation, but the individual class members nevertheless had to demonstrate that his or her specific injuries or damages were proximately caused by the ingestion or use of contaminated water). The class should not have been certified because the Plaintiffs failed to demonstrate the requirements of subsection (b)(3). *In re: Fibreboard Corp.*, 893 F.2d at 711-12;

Cimino, 151 F.3d at 312; *Jackson v. Johns-Manville Sales Corp.*, 781 F.2d 394, 415 (5th Cir. 1986).

CONCLUSION

Based upon the foregoing facts and authorities, Respondent, Norwegian Cruise Line Limited, respectfully submits that this Court should uphold the Third District=s opinion reversing the order granting class certification and remanding with directions to vacate the order granting class certification and to enter an order denying class certification.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY, that a copy hereof has been furnished by U.S. Mail on this ___ day of March, 2002, to: William Julien, Esq., Grossman and Goldman, Attorneys for Appellees, 1098 NW Boca Raton Blvd., Boca Raton, Florida 33432, and to Keith E. Hope, Esq., Crabtree & Hope, P.A., Attorneys for Amicus Curiae, Academy of Florida Trial Lawyers, 240 Crandon Boulevard, Suite 279, Key Biscayne, Florida 33149.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing Amended Brief on the Merits, was generated in Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.2100.

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[1] Gastroenteritis means inflammation and/or infection of the gastrointestinal tract. Viral gastroenteritis is an infection caused by a variety of viruses that results in vomiting or diarrhea with symptoms generally lasting 1-2 days following infection. (A 124, 175).

[2] Mr. Ault was subsequently substituted as a Plaintiff/Class Representative. (A 106).

[3] Recognizing the errors committed below, the Plaintiffs have argued that the trial court took extensive evidence over three separate hearings. (AB 2, 9, 33). That contention is controverted by the very order under review which the Plaintiffs= counsel drafted: ATHIS CAUSE having come before the Court on January 14, 2000 for evidentiary ***hearing*** on Plaintiffs= Verified Motion for Class Certification....@ (A 3). Nowhere does the order state that there were ***three*** evidentiary hearings upon which the trial court relied in ruling upon class certification. (A 3-6).

[4] The trial court deferred to counsel in deciding class certification, a practice that has been criticized and resulted in reversals in other cases. See *Goosby v. Lawrence*, 711 So. 2d 577, 580 (Fla. 3d DCA 1998); *Polizzi v. Polizzi*, 600 So. 2d 490, 491 (Fla. 5th DCA 1992) (trial court=s overloaded dockets do not justify the court, in effect, delegating its decision making authority (obligation) to one of the attorneys of record. It is one thing to direct one of the attorneys, as an officer of the court, to prepare a judgment in accordance with specific directions by the trial judge after the evidence is in and his decision is made; it is quite another to permit (order) the attorneys to prepare a judgment in accordance with their view of what the evidence shows Y [this] procedure can lead to a situation in which an attorney decides certain issues not even contemplated by the judge@).

[5] Because rule 1.220 is patterned after Federal Rule of Civil Procedure 23, federal cases construing rule 23 are persuasive authority as to the interpretation of rule 1.220. *Broin v. Philip Morris Co., Inc.,* 641 So. 2d at n1.

[6] The Plaintiffs alleged failure to warn.

[7] Certification under subsection (b)(3) requires the court to find that the claim or defense is *not* maintainable under (b)(1) or (b)(2). Instead, the trial court certified under subsections (b)(1), *see supra,* and (b)(3) without any explanation whatsoever as to the viability of the class action under subsection (b)(1). (A 4). The order is, therefore, at a minimum, internally inconsistent.