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.

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

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

Respectfully submitted,

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### NCL'S STATEMENT OF THE CASE AND FACTS CITES TO NON-RECORD EVIDENCE AND CONTAINS LEGAL ARGUMENTS

The Statement of the Case and Facts ("Statement") contained in Defendant/Respondent's ("NCL") Amended Brief on the Merits (hereinafter cited to as AB ____.) is replete with references to and discussion about non-record evidence. The Statement also contains improper legal arguments. For instance, NCL alleges that the Amended Complaint alleged a series of legal conclusions with little to no supporting factual allegations. (AB.7) This is legal argument. It is also false. The Amended Complaint sets out numerous factual allegations (Pet.App. 35-37). NCL claims that the trial court somehow reversed Plaintiff's burden of proving why the class should be certified to why it should **not** be certified. (AB.10, 11) NCL even states that the trial court went on to argue the Plaintiffs' case. (AB. 12) Neither assertion is proper or even true.

NCL claims in its Statement that in Pollack v. Norwegian Cruise Lines Ltd., 98-621-CIV-Lenard (S.D.Fla.) the court decertified that class action because of inadequate numerosity and because individual issues predominated over common issues. (AB. 17) The proposed class in Pollack consisted of passengers on the March 25th cruise only, the last of the three consecutive cruises Plaintiffs in the present case seek class status for. However, NCL's assertion is misleading. The parties in the

Pollack class action filed an **agreed** motion to decertify the class as part of a settlement involving an individual plaintiff. *See* NCL App. to Reply Brief in the Third District. Most likely, NCL prepared said order and inserted what it wanted. The Court in Pollack had initially provisionally certified the class pending discovery (A.PL.App.40). NCL fails to advise this Court of that fact.

NCL cites and quotes from medical literature/articles/journals in its Statement. (AB.5-7) Such documents are not part of the record on appeal and cannot be properly be considered by this Court. [1]

Another example of NCL's improper attempt to discuss non-record evidence in this appeal is its argument that Plaintiff has not sought to obtain third party discovery, mainly records from the CDC that NCL has had difficulty obtaining. (AB. 8 fn. 3) The status of non-record discovery has nothing to do with whether the trial court abused its discretion in certifying the class, whether the decision below should

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[1] Pedroni v. Pedroni, 788 So.2d 1138, 1139, fn. 1 (Fla.5th DCA 2001) (documents which are not part of the record on appeal cannot properly be considered by the court: "That an appellate court may not consider matters outside the record is so elemental that there is no excuse for any attorney to bring such matter before the court")(citations omitted); *see also* Bailey v. State, 173 So.2d 708, 709 (Fla. 1st DCA 1965)("While the appellant in his brief made certain statements of fact which might, had they been properly alleged in a pleading and established in the record, have raised a justiciable issue, such facts are not so alleged or proved. Hence, since a brief is in no legal sense a pleading, it would be highly improper for us to consider such an issue based solely upon statements and arguments contained in the brief.")

be reversed, nor whether McFadden v. Staley, 687 So.2d 357 (Fla. 4th DCA 1997) should be approved.[2]

NCL states that the Plaintiffs, "recognizing the errors committed below," have argued that the trial court took extensive evidence over three separate hearings. (AB 8 fn. 4) Incredulously, NCL argues that because the trial court's order granting class certification merely states that the cause was heard on one date - January 14, 2000 (the final hearing) that there was no evidence presented prior to that. Not only did the trial court hold three hearings on the issue of class certification, but it also reviewed numerous motions, memorandums and evidentiary filings (See fn. 3,4 of Initial Brief of Petitioners, NCL A.CT. 106,117,120; Pl.App. 24,69; NCL A.TR., 34,42).

NCL's attack on the form of the trial court's order contains improper non-record evidence and legal arguments as well. (AB 15 fn. 7) NCL implies that just because the actual trial order does not specifically address every single aspect of superiority and manageability that it should be reversed. Fla.R.Civ.P. 1.220(d)(1) states that an order on class action may be altered or amended before entry of judgment on the merits of the action. Therefore, assuming arguendo, that there were any actual defects in the order, they could easily be cured by amendment. This does

[2]Anyway, Plaintiff cannot obtain medical records from the CDC without a release from each putative class member, something counsel can't do until the class is certified.

not change the fact that the trial court in this case carefully reviewed numerous pleadings and evidentiary submissions before making its ruling.

NCL further interjects non-record evidence into its brief by arguing numerosity was not met because NCL settled individual claims with passengers. (AB 36,37) This evidence was not filed in the trial court, raised as an affirmative defense, nor properly raised in Third District (Pet.App. 47). It should be not be considered now. *See* Pedroni, *supra.*

**NCL HAS NOT SHOWN THAT THE TRIAL COURT ABUSED ITS DISCRETION BY RULING THAT THE COMMONALITY REQUIREMENT WAS MET BY PLAINTIFFS NOR SHOWN WHY MCFADDEN SHOULD NOT BE APPROVED AND THE THIRD DISTRICT DECISION REVERSED**

The Third District's decision in this case reversed the trial court's order granting class certification based on one factor only: "insufficient commonality" (Pet.App. 25). NCL gives short thrift to the commonality requirement. Instead NCL mainly argues the **other** requirements for class certification. For example, the Third District cited to Ulysses Cruises, Inc. v. Calves, 728 So.2d 363 (Fla. 3d DCA 1999) as authority for its holding that commonality was not met. NCL does not even discuss Ulysses, which actually dealt with the predominance issue. NCL also ignores the cases cited in Ulysses, all of which are easily distinguishable from the present case. NCL does not even attempt to distinguish the McFadden case or even argue that

McFadden was wrongly decided. Instead, NCL merely argues that Plaintiffs have not met **any** of the requirements for class certification.

NCL incorrectly states that the only issue common to the class is that the CDC conducted an investigation of the March 4th and 25th cruises for a suspected outbreak of gastrointestinal illness (AB. 29). While the facts concerning the CDC investigation are indeed common to all class members, there are other common questions presented by Plaintiff and found to exist by the trial court such as whether NCL impliedly warranted that its food products and/or water served class members was fit for human consumption; whether NCL breached its implied warranty of fitness; whether such breach of warranty was a proximate cause of damage to the members of the class; whether NCL was negligent in the serving of adulterated food products and/or water to members of the class. (Pet.App. 28,38-41).

Rule 1.220(a)(2) requires merely that the class share questions of law or fact in common arising out of the same course of conduct by a defendant presenting a question of common interest. McFadden, 687 So.2d at 359; Broin v. Philip Morris Companies, Inc., 641 So.2d 888 (Fla. 3d DCA 1994) *rev. denied*, 654 So.2d 919 (Fla. 1995). NCL completely ignores the decision in McFadden dealing with the issue of commonality. McFadden found commonality was met based on very similar circumstances to those that exist in the present case, *i.e.*, where a number of people got

sick from the same food poisoning/virus at the same time based upon the same conduct. All that is required for commonality is a showing of either common questions of law, or common questions of fact. Cox v. American Cast Iron Pipe Company, 784 F.2d 1546, 1557 (2d Cir. 1986) Despite NCL's contentions to the contrary, the commonality requirement does not require that **all** questions of law or fact raised in the litigation be common; to the contrary, **just one** common question will suffice Stewart v. Winter, 669 F.2d 328, 335 (5th Cir. 1982)(emphasis supplied). The Plaintiffs in the present case have shown both common questions of fact with record evidence as well as common questions of law. The trial court did not abuse its discretion in ruling that the commonality requirement had been met based on record evidence including the CDC report confirming that NCL ignored the CDC's warnings that ill crew members be taken off duty (Pet.App. 7).

## NCL HAS NOT SHOWN THAT THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT PLAINTIFFS MET THE PREDOMINANCE REQUIREMENT

Fla.R.Civ.P. 1.220(b)(3) requires that the questions of law or fact common to the claim or defense of each class member predominate over questions of law or fact affecting only individual members of the class. While the Third District's opinion states that its reversal was based on insufficient commonality, the case cited in its

decision dealt with the predominance requirement. *See* Ullyses. Indeed, even Ullyses did not discuss predominance. It merely cited to other cases. Therefore, predominance was addressed by Plaintiffs.

The present case involves allegations and record evidence of one single happening: the outbreak of a virus on three consecutive cruises which record evidence indicates most likely was caused by NCL's negligence in inspecting its water system and food handling practices even after warnings from the CDC. (Pet.App. 4-24, 38-42). In the present case, Plaintiffs have demonstrated a methodology of generalized proof for determining the issue of causation and negligence including, but not limited to, the CDC reports and surveys of medical records. (NCL.A.CT. 158-161)

Furthermore, Plaintiffs have shown that proof of damages is no obstacle to certification in this case. The focus of predominance is on liability, not damages, which always involve individual issues; the fact that damages may vary is not a bar to certification.[3] Liability in this case is easily capable of generalized proof. Plaintiffs have shown that generalized proof can be provided by proving through the CDC report and medical records that everybody got sick from the same bad

[3]*See* Lifanda v. Elmhurst Dodge, 2001 WL 744189 (NM.D. Ill. 2001); Davis v. Southern Bell Tel. & Tel. Co., 1993 WL 593999 *9-11 (S.D. Fla. 1994); Frankel v. City of Miami Beach, 340 So.2d 463, 465 (Fla. 1976); *see generally* I.H. Newburg, Newburg on Class Actions, sections 4.21 and 4.25 (1992).

water/food. Plaintiffs' submitted interrogatories to the trial court which are very specific, showing that the Plaintiffs would be able to use the CDC's reports, client passenger surveys, statistical data as to length and type of illness, medical records and costs of medical treatment to prove damages. (PL.App. A. 70) The cost of medical treatment for class members is easily proven from existing records, the CDC and NCL. The cost of each voyage, other out-of-pocket expenses, contracts of passage, notice of claims, NCL's documents concerning the inspection of the vessel, passenger manifests, and reports to governmental agencies could all be used. The trial court fully addressed the predominance issue and correctly determined it was not a bar to class certification. (NCL.A.Tr. 38-40).

For the first time, NCL argues in its Answer Brief that there is a constitutional impropriety of having a trial on liability and separate trials on proximate cause, damages and comparative negligence. (AB 46) NCL claims that this would be inconsistent with the Seventh Amendment. First of all, the Seventh Amendment does not apply to the states. *See*, Minneapolis and St. Louis R.R. Co. v. Bombolis, 241 U.S. 211, 217 (1916). Furthermore, there would be no need to re-examine factual

issues by subsequent juries. In any event, NCL has not properly raised this issue by burying it on page 47 of this Answer Brief.[4]

**PLAINTIFFS HAVE EASILY MET THE LOW NUMEROSITY THRESHOLD**

Even though the Third District reversed on the issue of commonality only, NCL argues numerosity was not met. NCL argues that Plaintiffs made conclusory legal statements in the trial court and in its briefs unsupported in the record. (AB 25) NCL argues that this is legally insufficient to meet the requirements of numerosity. (AB. 25) Once again, NCL misstates the facts. The Plaintiffs filed in the trial court a certified copy of the Center for Disease Control investigation which contains precise figures with regard to the putative class member passengers who got sick on the class cruises. The CDC determined that 303 passengers and 85 crew members on the March 4th cruise; at least 53 passengers and 28 crew members on the March 14th

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[4] *See* Singer v. Borbua, 497 So.2d 279, 281 (Fla. 3rd DCA 1986); Lester v. Arb, 658 So.2d 583, 584 - 85 (Fla. 3rd DCA 1995)(issue not presented for review when not listed in table of contents); Vaughn v. Vaughn, 714 So.2d 632, (fn.1)(Fla. 1st DCA 1998)(strongly criticizing appellant arguing additional and distinct issues within the argument and footnote of brief: "argument with addresses a point not set out in the issue on appeal will not be considered."); F.M.W. Properties, Inc. v. Peoples First Financial Sav. & Assoc., 606 So.2d 372, 375-76 (Fla. 1st DCA 1992)(failure to organize appellate arguments under cogent and distinct issue headings on appeal presents sufficient reason for appellate court to decline consideration of the matter); Florida Emergency Physicians - Kang & Associates, M.D., 800 So.2d 631, 636 (Fla. 5th DCA 2001)(matters not presented to the trial court by the pleadings and evidence will not be considered by appellate court;... alleged errors relied on for reversal must be raised clearly, concisely and separately as points on appeal).

cruise; and 302 passengers and 52 crew members on the March 25th cruise developed gastroenteritis (Pet.App. 7). The fact that no questionnaires were filled out does not effect the numerosity requirement at all. Even without the questionnaires from one cruise period, over 700 passengers and crew class members would remain.

"Although mere allegations of numerosity are insufficient to meet this prerequisite, a Plaintiff need not show the precise number of members in the class" Evans v. U.S. Pipe & Foundry Company, 696 F.2d 925 (11th Circuit 1983). The numerosity requirement is that class members are so numerous that joinder is impracticable–not impossible. *See* Fabricant v. Sears Roebuck, 202 F.R.D. 310, 313 (S.D. Fla. 2001). There is no exact number required for class treatment – a Plaintiff's estimate need only be reasonable. *Id.* (*citing* Kilgo v. Bowman Tranp., Inc., 780 F.2d 859, 878 (11th Ci. 1986), *accord* Walco Investments, Inc. v. Thenen, 168 F.R.D. 315, 324 (S.D. Fla. 1996). In fact, classes with as few as 25 members have been Vaughn v. Vaughn, 714 So.2d 632, fn. 1.1 (Fla. 1st DCA 1998) certified. Fabricant, 202 F.R.D. at 313 (*citing* Kreuzfeld, A.G. v. Carnehammar, 138 F.R.D. 594, 599 (S.D. Fla. 1991)(class of 130 certified)).[5]

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[5]*See, e.g.*, Smith v. Atlantic Boat Builder Co., 356 So.2d 359 (Fla. 1st DCA 1978)(class of 100 members certified). *See also* Walco, 168 F.R.D. at 324 (courts also consider geographic diversity of class members, nature of action, size of each member's claim, judicial resources and inconvenience of trying individual suits and ability of class members to prosecute individual actions). These factors all weigh in

**NCL HAS NOT DEMONSTRATED THAT THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING TYPICALITY**

NCL has not shown how the trial court abused it discretion in determining that the named class representatives claims in this case are typical of the other class members. Nor have they shown why, if the named representative's claims in the McFadden case were typical, they should not be typical in this case:

> typicality requires a nexus between the class representative's claims or defenses and the common questions of fact or law which unite the class... The class representative's claims are typical if her claim and those of the class arise from the same event or pattern or practice and are based on the same legal theory...typicality is established if the named Plaintiffs claims arose from the same practice or course of conduct by the same defendant and are based on the same legal theory.

Fabricant v. Sears Roebuck, 202 F.R.D. 310, 313 (S.D. Fla. 2001).(citations omitted).

The named Plaintiffs in this case have alleged and shown record evidence that there is a nexus between their claims and NCL's defenses and common questions or fact or law which unite the class arising from the same pattern or practice and based on the same legal theory; mainly whether the class members got sick as a result of NCL's negligent practices and procedures and food/water handling including as shown in the CDC reports.

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favor of numerosity having been met in this case. Furthermore, NCL injects non-record evidence of releases. Plaintiffs will contest many of those releases. However, assuming arguendo, that the releases are valid, the class should still be well over 100.

NCL argues that because the named Plaintiffs in this case did not sign releases their claims are somehow not typical of the other class members who did. (AB 36,37) However, in Florida, typicality is not defeated by specific defenses or counterclaims to the named Plaintiff's claim. Fabricant 202 F.R.D. at 314. Fabricant held that a named Plaintiff was typical although she may not have been entitled to receive actual damages for her own claim and that even if she might have been precluded from recovering actual damages such preclusion did not render her claim atypical, *citing to* Brink v. First Credit Resources, 185 F.R.D. 567 (D. Ariz. 1999)(where class representative had no actual damages, claim not a typical where claim based on same course of conduct and required proof of same elements).

Regardless of whether the named Plaintiffs in this case signed releases, their claims arose out of the same course of negligent conduct by NCL as that for any passengers who did sign releases. Furthermore, the class can be re-defined later on if NCL were to prevail on summary judgment on that issue. Plaintiffs can seek leave of court to amend the class, including leave to add named class members who signed the releases. At this stage in the pleadings, based on the allegations and evidence which the trial court reviewed for class certification, the Plaintiffs claims are typical, especially as to the class members who did not sign releases. Furthermore, Plaintiffs

fully intend on fully litigating the issue of the validity and propriety of the non-record releases.

**NCL HAS NOT SHOWN THAT THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT CLASS REPRESENTATION IS SUPERIOR AND MANAGEABLE**

NCL also argues that superiority and manageability were not met. (AB 38) 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 (or even less than 100) 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 treatment should be used in this case to save on duplicity of suits to reduce expenses of litigation. (NCL A.T. 35)[6]

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[6]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).

Despite NCL's assertion to the contrary, the trial court addressed the issue of manageability under Rule 1.220(b)(3)(D). (Pet.App. 29; NCL A.T. 35-40). 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). NCL has shown no reason why this class action cannot be properly managed; and there is none.

Interestingly, as Plaintiffs pointed out in Appellee's Brief in the Third District (pages 30, 49) NCL has already argued that this case **is manageable as a class** action. In the Pollack case, NCL argued in its Motion to Dismiss the federal action that:

> The Rose class action is before a well-respected jurist, Judge Norman Gersten, who has proven countless times that he is more than qualified to handle the class action pending before him...The state action is on its way to being certified as a class and will almost certainly go to judgment first...
>
> The state forum is more than adequate to protect the rights of all class members. Dade County state courts handle hundreds of class actions each year including several which have recently had all eyes focused on Dade County: the tobacco class actions. Additionally, these personal injury plaintiffs will benefit from a jury trial in state court... (PL. App. 43, 44)

NCL has clearly asserted inconsistent positions in another forum.[7]

## CONCLUSION

The Third District's decision is in direct conflict with McFadden, which was decided correctly. NCL has failed to show that the trial court abused its discretion in finding that the commonality and predominance requirements were met by Plaintiffs. NCL has not shown why McFadden should not be approved instead of the decision below. For the reasons set forth above and in Petitioner's Initial Brief, Plaintiffs request this Honorable Court to reverse the Third District's decision and remand to the trial court.

[7] *See* Kellogg v. Fowler White, 807 So.2d 669 (Fla. 4th DCA 2001); Dubois v. Osborne, 745 So.2d 479, 581 (Fla. 1st DCA 1999); City of Gainesville v. State Dept. of Transp., 778 So.2d 519, 531 (Fla. 1st DCA 2001); Broudy v. Broudy, 423 So.2d. 504, 506 (Fla. 3rd DCA 1982).

## CERTIFICATE OF SERVICE

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

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## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief, was generated in a Times New Roman, 14 point font, pursuant to Fla. R. App. P. 9.210.

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