No. S088458

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Lockheed Martin Corporation, et al.,

Petitioners and Defendants,

vs.

Superior Court of the State of California for the County of San Bernardino, Rancho Cucamonga District,

Respondent.

Roslyn Carrillo, individually and on behalf of all others similarly situated, et al.,
Plaintiffs and Real Parties in Interest.

APPLICATION AND PROPOSED AMICUS BRIEF OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF LOCKHEED MARTIN CORPORATION AND HIGHLAND SUPPLY CORPORATION

From a Decision of the California Court of Appeal
Fourth Appellate District, Division Two, Nos. E025064, E025163, E025181

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APPLICATION TO FILE BRIEF OF AMICUS CURIAE AND STATEMENT OF INTEREST OF AMICUS CURIAE

Pursuant to California Rule of Court 14, the Washington Legal Foundation (WLF) hereby requests that it be permitted to file the accompanying amicus curiae brief in this matter.

A. Description Of Amicus Curiae

WLF is a non-profit, public interest law and policy center based in Washington, D.C., with supporters nationwide, including many in California. WLF regularly appears as amicus curiae in cases raising important questions on causation, admissibility of evidence, damages, products liability and other substantive tort law issues. *See, e.g., Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993); *BMW v. Gore,* 517 U.S. 559 (1996); *Artigilio v. Corning Inc.,* 18 Cal. 4th 604 (1998); *Judicial Council Coordination Proceeding No. JCCP 2967 "Lockheed Litigation Cases" (Plaintiffs Group 2),* Cal. Supreme Ct. No. S072213 (1998) (letter brief in support of petition for review).

WLF's Legal Studies Division also publishes critical analyses by leading experts on important issues in the development of the law, including articles dealing with toxic torts, medical monitoring, punitive damages, and class actions. *See, e.g,* Martin, *Coming to Terms on Settlement Class Actions after Ortiz and Amchem* (WLF Working Paper) (March 2000); Anderson, *Courts Should Deny Class*

Action Status for Allegations of Future Injury (WLF Legal Backgrounder) (May 28, 1999); Antonucci, *Medical Monitoring Claims: Paying Today's Real Dollars for Tomorrow's Illusory Injuries* (WLF Legal Backgrounder) (Sept. 10, 1993); Margulies, *Restraining Private Enforcement of California's Proposition 65* (WLF Working Paper) (June 1995).

As its appearances and legal publications reflect, WLF is vitally interested in the application and development of the statutory and common law on significant tort law issues. It is particularly concerned with the expansion of existing procedural or substantive law principles where such expansion will adversely affect the orderly disposition of cases or the economic well-being of its supporters.

WLF has reviewed the principal briefs of the parties in this matter in this Court and the Court of Appeal. It believes that its participation in this case can assist the Court by bringing an additional perspective to the issues before it. WLF will focus its brief on the propriety of a medical monitoring class action in the context of: (1) developing class action law; and (2) existing principles of California tort law.

B. Interest Of Amicus Curiae

In denying class certification, the Court of Appeal followed a roadmap that has been adhered to with near unanimity in this state and elsewhere. For a number of reasons developed more

fully in the accompanying brief, WLF believes the Court of Appeal reached the correct result.

First, class actions should not, as a matter of law or public policy, be stretched to cover factually diverse personal injury claims where there is a need for individualized proof. The medical monitoring claims made here raise multiple individualized issues that cannot fairly or realistically be tried on a classwide basis. As a result, they are unsuitable for class treatment.

Second, any attempt to try these myriad individualized issues on a classwide basis improperly sacrifices pivotal elements of a medical monitoring cause of action, compromises basic principles of tort law, and irretrievably prejudices the legitimate interests of the target defendants. None of these developments are a proper function of a class action. None are supported by the sound and orderly development of common law.

Third, the practical impact of stretching class action principles to reach these medical monitoring claims is to make this state a less desirable place in which to do business and to place California companies at a distinct competitive disadvantage. For companies who have extensive sales or operations in this state, the consequences of expansive class action liability necessarily will have to be evaluated as future business growth and development plans are made. As the Fifth Circuit has noted in a similar context:

> Certification dramatically affects the stakes for defendants. Class certification magnifies and strengthens the number of unmeritorious claims. Aggregation of claims also makes it more likely that a defendant will be found liable and results in significantly higher damage awards.

Castano v. American Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996) (citations omitted); *see also In Re General Motors Corp. Pick-Up Truck Fuel Tank,* 55 F.3d 768, 784-85 (3d Cir.), *cert. denied sub nom.*, 516 U.S. 824 (1995) (certification of mass tort class action creates "the opportunity for a kind of legalized blackmail" to extract settlements far in excess of the individual claims' worth); *In Re Rhone-Poulenc Rorer, Inc.,* 51 F.3d 1293, 1300 (7th Cir.), *cert. denied*, 516 U.S. 867 (1995) (documenting how personal injury class actions threaten substantial economic risks that create intense pressure to settle claims that might otherwise be defended).

Given these deleterious consequences, there is reason for pause when considering whether to extend the reach of class actions to the thousands of personal injury claims represented in this medical monitoring lawsuit. In fact, when considering whether substantive tort liability principles should be expanded, this Court frequently has examined the consequences of such an expansion on the consumers in this state and on those companies that do business here.[1]

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[1] *See, e.g., Erlich v. Menezes, 21 Cal. 4th 543, 560 (1999)* (rejecting recovery of emotional distress damages in housing construction defect cases because it could increase housing costs, affect availability of insurance, and diminish housing supply); *Freeman*

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To be sure, the public policy issues in this case are raised by a procedural doctrine that does not involve a substantive liability theory. But the societal, jurisprudential, and economic implications of procedural doctrines can be just as profound as a proposed expansion of the substantive law. Procedural rules often entail risks and benefits to society, business, and the courts because

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& Mills, Inc. v. Belcher Oil Co., 11 Cal. 4th 85, 102-03 (1995) (limiting recovery for allegedly tortious breach of contract based on the need for stability and predictability in commercial affairs and because of potential for excessive tort damage recoveries); *Applied Equip. Corp. v. Litton Saudi Arabia, Ltd.,* 7 Cal. 4th 503, 520 (1994) (rejecting tort liability against a contracting party for inducing breach of contract in part because the imposition of such liability could deprive businesses of the opportunity to respond to changing economic conditions or make them reluctant to enter contracts); *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965, 991-92 (1993) (noting that proliferation of "fear of cancer" claims could result in scarcity of insurance and that burdens of that scarcity fall on the public); *Huggins v. Longs Drug Stores Cal., Inc.,* 6 Cal. 4th 124, 133 (1993) (expansion of potential liability to pharmacists rejected because the extension of liability not only would increase medical malpractice insurance costs, but would also tend to "inject undesirable self-protective reservations" impairing optimal patient care); *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1106 (1993) ("fraud on the market" theory rejected in part because it is "important that businesses be freed from potential liabilities of infinite duration in order that corporations may determine with some reasonable certainty what their financial situation is as of any given point of time."); *Moore v. Regents of Univ. of Cal.*, 51 Cal. 3d 120, 146 (1990) ("In deciding whether to create new tort duties we have in the past considered the impact that expanded liability would have on activities that are important to society, such as research."); *Brown v. Superior Court*, 44 Cal. 3d 1049, 1063-65 (1988) (courts must consider "the public interest in the development and availability of important products"); *Thing v. La Chusa,* 48 Cal. 3d 644 664 (1989) (courts must consider the potential that expanded liability may impose "unacceptable costs on those among whom the risk is spread"); *Foley v. Interactive Data Corp.*, 47 Cal. 3d 654, 696 & n. 33, 699 (1988) (in considering expansive tort law concepts courts must consider "consequences for the stability of the business community").

they determine who can be sued, where, and under what circumstances.

If California's class action principles are extended to encompass factually diverse personal injury claims, then companies doing business in this state will be placed on an unequal footing with companies doing business in the vast majority of jurisdictions where class actions cannot be pursued in these circumstances. The serious financial and practical burdens associated with defending class lawsuits will become a common cost of doing business in California, but not elsewhere. Companies must then decide whether it is wiser to relocate rather than to continue doing business here.

Even if they stay, these companies must then decide whether to expand and develop their business in California or in a less litigation-attractive jurisdiction. Companies that are newly formed or are currently located elsewhere also must decide whether it makes sense to move to a state that, unlike virtually any other, invites class actions in any circumstances where a series of common issues allegedly exist.

WLF does not contend that the scope of California's class action law will be the dispositive, or even the most important, factor in making such decisions. But in conjunction with other developments, its liability-expanding potential will undoubtedly have an effect. California businesses already face skyrocketing real estate

prices, stringent environmental regulations, rising utility and labor costs, as well as antigrowth measures.[2] To the extent that our substantive or procedural law fosters a climate of expansive liability – along with the higher insurance premiums and increased manufacturing and product costs that are its inevitable byproducts – it adds another reason for companies to reconsider whether to locate or pursue further growth or expansion opportunities here.[3]

There are no substantial benefits to be had in real parties' pursuit of a class action. Class certification will not materially

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[2] *See* Editorial, *Sobering Outlook,* The Orange Country Register, pg. B06 (July 17, 2000) (California's personal income tax, capital gains tax, and corporate income tax hinders economic climate and entrepreneurship); Lepage, *Business Gears Up To Battle New Bills,* Sacramento Bee, pg. E1 (Dec. 29, 1999) (detailing businesses' efforts to resist legislation that would drive up costs by raising workers' compensation premiums and the minimum wage); Editorial, *California's Business Chill*, The Orange County Register, pg. B06 (June 16, 1999) (California ranks 41st of 50 states and District of Columbia on major governmental costs imposed on investment, entrepreneurship and business; western neighbors – all competitors for California's businesses – rank much higher); *The Economy Perspective: Crossing Borders,* Investors Business Daily, pg. B1 (July 21, 1997) (highlighting mobility of businesses in today's economy and explaining why California's high cost of doing business is a threat to its economic future); Oliver, *Dulling Golden State's Glitter?*, Investor's Business Daily, pg. A1 (April 8, 1997) (explaining businesses' fears about how regulatory and tax proposals stifle economic recovery).

[3] *See* Zaremberg, *Punitive Damage Awards from the Twilight Zone*, San Diego Business Journal, No. 11, Vol. 21, pg. 51 (March 13, 2000) (business leaders in California see "the state civil justice system as having a worse effect on business than public infrastructure, health care costs and even taxes."); Rojas, *Business Climate Survey: Education, Tort Reform Are Top Concerns*, Inland Empire Business Journal, Vol. II, No. 2, pg. 21 (Feb. 1999) (pointing out business leaders' views on why liability and civil lawsuits are major impediments for the development of California business).

advance the resolution of these claims. It will simply generate added cost, complexity, and, inevitably, prejudicial error flowing from any attempt at a classwide trial. In an era when California businesses already are facing major economic challenges that hinder their business development efforts, this state does not need to depart from settled law and open up new venues to pursue costly class actions. *See Blue Chip Stamps v. Superior Court*, 18 Cal. 3d 381, 385 (1976) ("because group action is also capable of injustice, the representative plaintiff must show substantial benefit will result to both the litigants and to the court"); *see also Linder v. Thrifty Oil Co.,* 23 Cal. 4th 429, 435 (2000) (quoting *Blue Chip Stamps*); *City of San Jose v. Superior Court*, 12 Cal. 3d 447, 459 (1974) ("despite this court's general support of class actions, it has not been unmindful of the accompanying dangers of injustice or of the limited scope within which these suits serve beneficial purposes").

Rejection of class certification does not, as real parties would have it, leave the putative class members without a remedy. They can pursue their own individual actions, just like any other personal injury claimant. There is every reason to assume, based on the record here, that they will do so. The briefing reflects that more than 800 personal injury claims already are pending against the defendants over the same toxic exposures.[4] "Where class members

[4] *Potter* itself is also illustrative of why individual claims can be pursued. There, the four plaintiffs recovered substantial damages for medical monitoring, psychiatric illness and general disruption of their

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are willing and able to litigate their own cases, as they have shown a willingness to here, a class action is unnecessary." *Mertens v. Abbott Labs., Inc.,* 99 F.R.D. 38, 42-43 (D.N.H. 1983); *accord In Re Arthur Treacher's Franchise Litig.*, 93 F.R.D. 590, 594-95 (E.D. Pa. 1982); *Causey v. Pan Am. World Airways, Inc*., 66 F.R.D. 392, 399 (E.D. Va. 1975).

WLF accordingly urges (1) the rejection of class certification in these medical monitoring cases and (2) the adoption of the reasoning and result reached by the Court of Appeal below.

Dated: December 27, 2000.

Respectfully submitted,

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lives as a result of their toxic exposure. The trial court also awarded another $2.6 million in punitive damages. *Potter*, 6 Cal. 4th at 978.

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I

INTRODUCTION

Real parties in interest assert that their medical monitoring claims fit comfortably within California's class action rubric. No published California case law, involving medical monitoring or any other personal injury claim, is cited in support of this allegedly well-settled result. No such case exists. Real parties are in fact asking this Court to take an unprecedented step.

They want it to certify for trial a class of some 50,000 to 100,000 personal injury claimants, each of whom has a unique claim for medical monitoring occurring over some 40 years. No California appellate court has ever affirmed certification of a class action with — as is the case here — thousands of claimants asserting highly individualized tort claims spanning several decades. Instead, every court to consider the question of certification in such circumstances has rejected classwide litigation as unworkable, unduly burdensome, and outside the range of cases appropriate for class action treatment.

This consensus is not borne of some ingrained hostility to class actions. On the contrary, it follows from a candid appraisal that class actions work well in certain types of cases, but manifestly not in others. This Court put the matter directly in *Jolly v. Eli Lilly and Company*, 44 Cal. 3d 1103, 1123 (1988):

> As the trial court in the present case correctly observed, mass-tort actions for personal injury most often are not appropriate for class action certification. (Citation.) The major elements in tort actions for personal injury – liability, causation, and damages – may vary widely from claim to claim, creating a wide disparity in claimants' damages and issues of defendant liability, proximate cause, liability of skilled intermediaries, comparative fault, informed consent, assumption of the risk and periods of limitation. (Citations omitted).

By the time of this Court's 1988 pronouncement, the views it expressed on the lack of suitability of class actions in resolving mass-tort personal injury lawsuits were neither new nor entirely novel. Five years earlier, in looking at a proposed class action involving liability and punitive damage claims related to the Dalkon Shield, the Ninth Circuit made the same observations about product liability claims generally:

> In product liability actions . . . [n]o single happening or accident occurs to cause similar types of physical harm . . . No one set of operative facts establishes liability. No single proximate cause applies equally to each potential class member and each defendant. Furthermore, the alleged tortfeasor's affirmative defenses (such as failure to follow directions, assumption of the risk, contributory negligence, and the statute of limitations) may depend on facts peculiar to each plaintiff's case. *In Re Northern District of California Dalkon Shield IUD Prods. Liab. Litig.,* 693 F.2d 847, 853 (9th Cir. 1982), *cert. denied*, 459 U.S. 1171 (1983).

In fact, more than 17 years before the Ninth Circuit's analysis, the drafters of the 1966 revisions to Rule 23 explicitly stated

that class certification was not meant for mass accident lawsuits precisely because such lawsuits are a collection of individualized personal injury claims:

> A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an actin conducted nominally as class action would degenerate in practice into multiple lawsuits separately tried. 39 F.R.D. 69, 103 (1966).[5]

With this backdrop in mind, there is no getting around that real parties' toxic exposure cases are the prototypical mass-tort personal injury action. As recognized in *Potter v. Firestone Tire & Rubber Co.,* 6 Cal. 4th 965 (1993), medical monitoring is a tort cause of action just like any other negligence or product liability claim. There are, moreover, thousands of such claims encompassed in the class description here. And, the facts allegedly supporting the pivotal elements of a medical monitoring cause of action will vary widely from claimant-to-claimant – thereby creating disparities in issues of liability, causation, damages, and periods of limitation.

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[5] *Accord Broughton v. Cotter Corp.*, 65 F.3d 823, 826-27 (10th Cir. 1995) (affirming refusal to certify medical monitoring class, citing Advisory Committee Note, and noting that predominance of common issues is needed to achieve economies of class action and that mass accidents generally are not appropriate for class treatment because of significant individual questions on damages, liability, and defenses).

Real parties want this Court to overlook these recognized impediments to class litigation in the interest of making it easier for innocent consumers to recover. From their perspective, unless all these medical monitoring claims are aggregated, the target defendants will escape the level of punishment commensurate with their wrongdoing. But real parties again do not cite any authority suggesting, much less compelling, that professed concerns about the need for a remedy or for some appropriate measure of deterrence can trump an analysis of the factors that must be present *before* a class action can be pursued. No such case exists.

Nor is there any case suggesting that there is a right to proceed with a class action simply because the class involves allegedly injured consumers, an allegedly toxic exposure, a purportedly malfeasing defendant, or some combination of all three. The recognized prerequisites for classwide litigation *still must be met.* Thus, as many courts in this state and elsewhere have held, where class litigation inevitably would degenerate into a series individual of mini-trials that is not an occasion for an exercise of discretion to proceed with a class action. Rather, it is a time to declare, as the Court of Appeal did here, that class litigation should not proceed.

II

CALIFORNIA LAW ESTABLISHES THAT PERSONAL INJURY CASES INVOLVING MULTIPLE INDIVIDUAL FACTUAL ISSUES ARE NOT SUITABLE FOR CLASS ACTION TREATMENT

Before a class can be certified, California law requires an ascertainable class and a well-defined community of interest in questions of law and fact affecting the parties to be represented. Cal. Code Civ. Proc. § 382; *Bozaich v. State of Cal.*, 32 Cal. App. 3d 688, 694 (1973). In addition to these generalized criteria, there must also be: "(1) predominant common questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class." *Silva v. Block*, 49 Cal. App. 4th 345, 351 (1996).

As these various requirements reflect, for a class action to achieve its intended purpose, there must be a showing that common questions of law and fact predominate with respect to each potential class member's claim. On the one hand, the "issues which may be jointly tried, when compared with those requiring separate adjudication, must be sufficiently numerous and substantial to make the class action advantageous to the judicial process and the litigants. [Citation.]" *City of San Jose v. Superior Court*, 12 Cal. 3d 447, 460 (1974). On the other, the "community of interest requirement is not satisfied if every member of the alleged class would be required to litigate numerous and substantial questions determining his individual

right to recover following the 'class judgment' determining issues common to the purported class. [Citation.]" *Id*. at 459.

Accordingly, if too many individualized inquiries inevitably must be made, the class action device loses its paramount utility and any attempt at classwide litigation must be abandoned because the community of interest requirement cannot be met. As the court put it in *Brown v. Regents of University of California*, 151 Cal. App. 3d 982, 989 (1984): "If the ability of each member of the class to recover clearly depends on a separate set of facts applicable only to him, then all the policy considerations which justify class actions equally compel the dismissal of such inappropriate actions at the pleading stage."

Perhaps not surprisingly, attempts to certify broad and diverse classes of personal injury, contract, or product liability claimants inevitably fail to meet the community of interest requirement. As this Court explained in *Jolly,* 44 Cal. 3d 1103, such claims are "most often not appropriate for class certification" because the pivotal facts underlying the key elements of the liability, causation and damages vary widely from claim-to-claim. *Id.* at 1123.

Kennedy v. Baxter Healthcare Corp., 43 Cal. App. 4th 799 (1996), is typical of those cases heeding this Court's admonishment in *Jolly*. There, plaintiffs sought to bring a class action on behalf of health care workers in California for personal injury claims

relating to latex gloves. The first amended complaint alleged various products liability causes of action including negligence, strict liability, failure to warn, negligent misrepresentation, breach of warranty, and sought medical monitoring.

Although plaintiffs urged that there were many issues common to all class members raised by the defendant's conduct, this alone did not establish the requisite community of interest. Rather, the number of individual issues still had to be examined. In that regard, the court of appeal pointed to potential damage recoveries as an area where individual inquiries necessarily would arise. *Kennedy,* 43 Cal. App. 4th at 810-11. Other individual issues included privity, the determination of the limitations period, causation (due to presence of latex in other products) and the Identity of the manufacturer. *Id.* Thus, in keeping with *Jolly* and other cases, the court reasoned that any attempt to certify a class of personal injury claimants foundered because of the numerous individual issues that needed to be resolved before a particular class member could recover. *Id.* at 810-13.

Kennedy shows the caution exercised by California courts in approaching class actions posing numerous separate questions of fact. If discretion must be exercised in that setting, it does not tilt in favor of proceeding with a class action. Just the opposite is true as case-after-case so provides:

- *Fuhrman v. California Satellite Systems*, 179 Cal. App. 3d 408 (1986) (class action rejected for recipients of threatening anti-piracy letters even though class members similarly situated because recovery depended on facts peculiar to each individual case);

- *Baltimore Football Club, Inc. v. Superior Court*, 171 Cal. App. 3d 352 (1985) (class action rejected for nationwide class of NFL season ticket holders because court would have to determine right to recover under law of each state and make diverse legal rulings involving a multitude of jurisdictions);

- *Block v. Major League Baseball*, 65 Cal. App. 4th 538 (1998) (rejecting 800 member class of pre-1947 baseball players suing for misappropriation of name and likeness because of differences in fact patterns, damages and affirmative defenses);

- *Caro v. Procter & Gamble Co.*, 18 Cal. App. 4th 644 (1993) (consumer class rejected against orange juice processor even though common misrepresentation because factual disputes existed over whether class members believed the misrepresentation and class

action would not be the superior method to adjudicate that issue); and

- *City of San Jose*, 12 Cal. 3d 447 (class action rejected for landowners alleging nuisance and inverse condemnation from airport overflights because recovery predicated on facts peculiar to each plaintiff).[6]

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[6] These cases are only a random sampling. There are many more. *See Silva*, 49 Cal. App. 4th 345 (class treatment rejected for victims of police dog bites because even if excessive force used, each plaintiff would still have to show he or she suffered constitutional injury); *Clausing v. San Francisco Unified Sch. Dist.*, 221 Cal. App. 3d 1224 (1990) (class treatment rejected for students allegedly abused by school district because the ability of each class member to recover depended on a separate set of facts); *Dean Witter Reynolds Inc. v. Superior Court*, 211 Cal. App. 3d 758 (1989) (class action rejected for consumers challenging certain IRA fees where individual lawsuits would give plaintiffs a better opportunity to protect their interests); *Osborne v. Subaru of Am.,* 198 Cal. App. 3d 646 (1988) class action rejected for purchasers of allegedly defective 1973, 1974 and 1976 Subaru automobiles in part because proximate causation and damages would be individual issues and class action would not be superior method for handling claims); *Collins v. Safeway Stores, Inc.* 187 Cal. App. 3d 62 (1986) (class action rejected for purchasers of allegedly contaminated eggs because not all eggs sold were contaminated and each individual class member would be forced to prove his or her right to recover); *Brown*, 151 Cal. App. 3d 982 (class treatment rejected for concealment and misrepresentation claims of coronary care recipients because of individual issues related to representations, reliance, informed consent, causation and damages); *D'Amico v. Sitmar Cruises, Inc.*, 109 Cal. App. 3d 323 (1980) (class treatment rejected for cruise ship passengers complaining of unenjoyable cruise atmosphere since proof of damages would be diverse and depend on unique showing by each individual); *Rose v. Medtronic, Inc.*, 107 Cal. App. 3d 150 (1980) (class action rejected for plaintiffs injured by allegedly defective pacemaker in part because of individualized inquiries on damages); *Altman v. Manhattan Sav. Bank,* 83 Cal. App. 3d 761 (1978) (no class treatment for claims of homeowners for breach of fiduciary duty because individual testimony from 458

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Federal cases construing Federal Rule of Civil Procedure 23 are in accord. Notably, the Supreme Court's reasoning in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 117 S. Ct. 2231 (1997), identifies similar concerns in rejecting an attempt to certify a settlement class involving alleged exposure to asbestos. The district court had concluded that the individual class members' shared interest in receiving "prompt and fair compensation" and their common exposure to asbestos were sufficient to justify certification of a global settlement class under Rule 23(a) and (b)(3). *Amchem*, 117 S. Ct. at 2242 (quoting *Carlough v. Amchem Prods., Inc.*, 158 F.R.D. 314, 316 (E.D. Pa. 1993) (district court order certifying class)). The Third Circuit reversed the certification order, finding that the disparities in the interests of the class members, as well as the significant number of highly individualized legal and factual issues relevant to each claimant, rendered class certification improper. *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 625-35 (3d Cir. 1996) (intermediate appellate court opinion reversing class certification).

In the briefing before the Supreme Court, the petitioners emphasized the global settlement's case management benefits (resolution of thousands of claims at once), at the expense of a rigorous analysis of Rule 23's express requirements. *Amchem*, 117 S. Ct. at 2248-49. While not blind to the petitioners' entreaties, the

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plaintiffs would be required in order for each class member to establish the right to remocer emotional distress and other damages).

Supreme Court made it clear that the desire to manage complex litigation could not trump the specific requirements of Rule 23. *See id.*; *accord In Re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 799-800 (3d Cir.), *cert. denied sub nom.*, 516 U.S. 824 (1995).

With these parameters in mind, the Supreme Court held that plaintiffs failed to satisfy the predominance requirement where they merely asserted that all class members might have been exposed to a similar product supplied by the defendants.

As the Court initially noted, the predominance inquiry requires examination of a variety of particularized factors, including: (a) the number of individual questions raised by the claims of each class member; (b) the significance of the uncommon questions; (c) any overarching disputes about the health consequences of exposure; (d) the varying degrees of exposure; (e) the different ways in which the claimants were exposed (and over what periods of time); (f) any differences in injuries, as well as (g) any differences in controlling state law. *Amchem*, 117 S. Ct. at 2249-50.

And when the Court examined these factors with respect to the asbestos cases, the substantial differences among the claims of the potential class members on each of these factors stood as an insurmountable barrier to class certification — even though the settlement would have relieved the judicial system of thousands of

potential claims. *Id.* at 2250; *see also In Re American Med. Sys.,* 75 F.3d 1069, 1084-85 (6th Cir. 1996) (pointing to unavoidable factual and legal diversity in rejecting class certification in mass tort case); *In Re Northern Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.,* 693 F.2d at 853-56 (noting impropriety of class actions in mass tort lawsuits because no one set of operative facts typically establishes liability, proximate causation or damages); *Reilly v. Gould, Inc.*, 965 F. Supp. 588, 601-06 (M.D. Pa. 1977) (where one set of operative facts does not establish liability or proximate cause, individual issues inevitably will out number common issues and make class certification inappropriate).[7]

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[7] Just as in California, there are countless other federal cases conclusively refuting any suggestion that class treatment is possible in mass-tort personal injury lawsuits, precisely because the requisite community of interest is lacking. *See Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (cigarettes); *In Re Rhone-Poulenc Rorer, Inc.,* 51 F.3d 1293 (7th Cir.), *cert. denied,* 116 S. Ct. 184 (1995) (blood derivatives); *In Re Fibreboard Corp*., 893 F.2d 706 (5th Cir. 1990) (asbestos); *In Re Bendectin Prod. Liab. Litig*., 749 F.2d 300 (6th Cir. 1984); *Kurczi v. Eli Lilly & Co.,* 160 F.R.D. 667 (N.D. Ohio 1995) (DES); *Bethards v. Bard Access Sys., Inc.,* 1995 WL 75356 (N.D. Ill. 1995) (catheters); *In Re Orthopedic Bone Screw Prod. Liab. Litig*., 1995 WL 273597 (E.D. Pa. 1995) (spinal fixation devices); *Mehornay v. Pfizer, Inc.*, 1991 WL 540731 (C.D. Cal. 1991) (heart valves); *Davenport v. Gerber Prod. Co.*, 125 F.R.D. 116 (E.D. Pa. 1989) (baby bottles); *Raye v. Medtronic Corp.,* 696 F. Supp. 1273 (D. Minn. 1988) (pacemakers); *Ikonen v. Hartz Mountain Corp.,* 122 F.R.D. 258 (S.D. Cal. 1988) (flea and tick spray); *Linkous v. Medtronic, Inc.*, 1985 WL 2602 (E.D. Pa. 1985) (pacemakers); *In Re Tetracycline Cases*, 107 F.R.D. 719 (W.D. Mo. 1985); *Caruso v. Celsius Insulation Resources, Inc.,* 101 F.R.D. 530 (M.D. Pa. 1984) (urea formaldehyde insulation); *Payton v. Abbott Labs.*, 100 F.R.D. 336 (D. Mass. 1983) (DES); *Sanders v. Tailored Chem. Corp.,* 570 F. Supp. 1543 (E.D. Pa. 1983) (urea formaldehyde insulation); *Mertens v. Abbott Labs., Inc.*, 99 F.R.D. 38 (D.N.H. 1983) (DES); *McElhaney v. Eli Lilly & Co*., 93 F.R.D. 875 (D.S.D. 1982) (DES);

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Like real parties here, the plaintiffs in these cases were able to point to several issues common to each class member's case and argue that those issues could be litigated on behalf of the class. But as the reasoning in the above cases reflects, one must dig deeper than assembling some list of common questions that allegedly apply to each class member.

Most personal injury, product liability, or wronged consumer cases present the same issues (i.e., was the defendant negligent, did a misrepresentation occur, was the plaintiff injured, what was the cause of injury). If the pivotal inquiry simply revolved around whether similar-type questions would have to be asked, then personal injury cases routinely could be pursued as class lawsuits. What matters, however, is not whether the questions must be asked, but rather how those common questions will be answered. Where the answers necessarily will differ depending on fact patterns peculiar to the claimants, California case law, like the overwhelming majority of federal cases construing Rule 23, provides that a class action is not a superior means of adjudicating such a dispute.[8]

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Thompson v. Procter & Gamble Co., 1982 WL 114 (N.D. Cal. 1982) (tampons).

[8] Real parties downplay this fundamental distinction in reliance on this Court's opinions in *Vasquez v. Superior Court*, 4 Cal. 3d 800 (1971), and *Richmond v. Dart Industries, Inc.*, 29 Cal. 3d 462 (1981). But these cases bear no resemblance to the personal injury context. *Vasquez* involved a class of meat and freezer purchasers each of whom purchased the product because of the same canned misleading

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III

A CLASS ACTION CANNOT AND SHOULD NOT BE USED TO RESOLVE THE FACTUALLY DIVERSE CLAIMS MADE IN A MEDICAL MONITORING LAWSUIT

There are no reported decisions certifying a medical monitoring class action under California law. The reason is not surprising. The prerequisites to a medical monitoring claim that this Court enumerated in *Potter,* 6 Cal. 4th 965, raise a host of individual fact inquiries that, as the foregoing case law reflects, do not provide an appropriate backdrop for classwide relief. *Potter,* for example,

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sales pitch. And in *Richmond*, the class consisted of disaffected owners of recreational homesites purchased from a developer, all of whom again received the same written misrepresentation regarding the adequacy of the water supply and other necessities. Thus, in neither were there meaningful factual distinctions among the various class members with respect to the causation of the alleged damages or even to the determination of the damages themselves. What these cases have in common is, however, exactly what is lacking in the lawsuits before this Court.

While there are no California medical monitoring cases highlighting this fundamental distinction, federal cases construing the predominance requirement under Rule 23 expose it. After looking at medical monitoring claims with substantive elements like those required by *Potter*, the courts in *Barnes v. The American Tobacco Co.,* 161 F.3d 127, 138-40, 143-50 (3d Cir. 1998), and *Reilly,* 965 F. Supp. at 601-06, each found too much factual diversity to support class action treatment. *Accord Dhamer v. Bristol-Myers Squibb Co.*, 183 F.R.D. 520, 529 (N.D. Ill. 1998) (rejecting medical monitoring class in part because of predominance of individual issues); *see Thompson v. American Tobacco Co.*, 189 F.R.D. 544, 551-52 (D. Minn. 1999) (same); *Smith v. Brown & Williamson Tobacco Corp.,* 174 F.R.D. 90, 97 & 100 (W.D. Mo. 1997) (same).

highlights five factors that must be examined before the elements of a medical monitoring cause of action are satisfied:

> (1) the significance and extent of the plaintiff's exposure to chemicals; (2) the toxicity of the chemicals; (3) the relative increase in the chance of onset of disease in the exposed plaintiff as a result of the exposure, when compared to (a) the plaintiff's chance of developing the disease had he or she not been exposed, and (b) the chances of the members of the public at large of developing the disease; (4) the seriousness of the disease for which the plaintiff is at risk; and (5) the clinical value of early detection and diagnosis. *Potter*, 6 Cal. 4th at 1009.

These five discrete issues cannot, as a matter of sound medical science, be resolved on a classwide basis. The diseases for which plaintiffs seek monitoring and treatment implicate a wide variety of risk factors. An examination of the risk factors requires a personalized inquiry extending to the individual's medical history, eating habits, lifestyle, work history, and family history. Indeed, the specific attributes of any medical monitoring claim shows just how involved – and individualized – the relevant inquiries can become.

Factor (1): The significance and extent of the plaintiff's exposure to chemicals. As *Potter* itself makes clear, mere exposure to the allegedly toxic substances is not enough to support a medical monitoring cause of action. *E.g., Potter*, 6 Cal. 4th at 1009; *see Miranda v. Shell Oil Co.*, 17 Cal. App. 4th 1651, 1657 (1993). Further the need for medical monitoring must arise as direct consequence of the specific exposure. *Potter*, 6 Cal. 4th at 1006,

1009 & n.27. In order to meet this element, therefore, the precise exposure of each plaintiff must be examined. That sort of class member-by-class member inquiry – over thousands of plaintiffs and many years – is antithetical to class action treatment.

Factor (2): The toxicity of the chemicals. The purported toxicity of the chemicals in the abstract or in particular doses likewise is irrelevant to a medical monitoring claim. What is important is the duration, amount, and route of exposure to each chemical for each prospective plaintiff. Only that sort of individualized query will determine whether the actual exposure justifies a need for medical monitoring. The need for the discrete examination, in turn, undermines class treatment.

Factor (3): The relative increase in the chance of the exposure. In order to support a recovery, the need for medical monitoring must arise, as noted, as a direct consequence of the toxic exposure – a need that extends beyond what a person would otherwise do as a matter of common sense or because of a preexisting risk. *Potter*, 6 Cal. 4th at 1005-06, 1009 & n.27. This element also cannot be proven in the abstract or according to some generic formula. Rather, it requires a look at an individual's health history, work history, nutrition, lifestyle, age, gender, genetics, other toxic exposures and anything else necessary to divine the risk factors in a particular individual. This element is singularly unsuited to classwide determination.

Factor (4): The seriousness of the disease for which the plaintiff is at risk. This element too cannot be answered in the abstract or by formula. While toxic exposures might give rise to range of serious diseases, such a truism does not say anything about any particular individual. And there is no way to generalize on such an issue where – as here – there are different chemical exposures involving thousands of different people, some of whom allegedly were exposed for 6 months and some of whom may have been exposed for 10, 20, 30 or even 40 years. The uniqueness of this element too does not lend itself to classwide treatment.

Factor (5): The clinical value of early detection and diagnosis. There generally is value, as *Potter* recognizes, in the early detection and diagnosis of serious disease. But once again, that truism does not have much meaning outside an individual case. As noted with respect to Factor 4, given the diversity surrounding the nature, duration, and amount of exposure regarding this class, the value of early detection will vary from claimant-to-claimant. While it is difficult to predict in advance how the question will be answered, the fact that it must be asked undermines class treatment.

The individual inquiries in this case will not stop, however, with the factors outlined in *Potter*. The defendants' limitations defense raises individual issues as well. Here, with a class spanning a 40-year period and with public disclosures about the condition of the water having been made over a substantial portion of

that period, when a particular claimant's medical monitoring cause of action might have accrued, will be an individualized issue under the proper application of our discovery rule. *See Jolly*, 44 Cal. 3d at 1109-14. What each person knew or should have known about the condition of the water, and when they knew or should have known it, will be the arbiter of the running of the relevant limitations period. *Id.* Thus, proof of the elements of this affirmative defense too will be an individualized issue. Without regard to the merits of the defense, the need for these inquiries also must be taken into account when determining whether a class action is appropriate. *See, e.g., Davenport,* 125 F.R.D at 120; *Ikonen,* 122 F.R.D. at 264; *In Re Tetracycline Cases*, 107 F.R.D. at 734; *In Re Transit Co. Tire Antitrust Litig.,* 67 F.R.D. 59, 73 (W.D. Mo. 1975).

The fact of the matter is that in these cases — just as in any other toxic exposure personal injury case — each class member will be required to prove the merits of his or her medical monitoring claim and be required to litigate defendants' limitations defense. Each prospective plaintiff will need to hire a lawyer, retain expert witnesses, call treating physicians, and conduct a full trial to resolve his or her affirmative claims and defendants' defense. Simply put, for reasons discussed above, any effort to invoke class action procedures stalls right there. *See supra* pp. 5-14 (and cases cited).[9]

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[9] And, even ignoring these independent factual and legal inquires, each class member's particularized medical monitoring costs still will

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Apart from their inability to satisfy the predominance requirement, real parties offer no concrete explanation as to how a court could manageably try the claims of a class that they contend consists of more than 40,000 residents on issues encompassing the seriousness of the alleged injury, the necessity for increased medical monitoring, and the statute of limitations. But real parties must demonstrate that the case can be tried on a classwide basis. If they cannot do so, class certification should be rejected. *See Valentino v. Carter-Wallace, Inc.,* 97 F.3d 1227, 1234 (9th Cir. 1996) (reversing class certification order in part because predominance analysis did not include consideration of how trial court would conduct a classwide trial); *Castano,* 84 F.3d at 744 (same); *Georgine,* 83 F.3d at 632 (same).

Not only do real parties fail to offer any concrete solution to the manageability problem, the only method to which they allude to solve it cannot survive scrutiny either. According to real parties, any perceived complexities in the claims of the medical monitoring

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have to be determined individually, once the elements of the cause of action are satisfied. This reality too defeats class treatment because of the number of individual inquiries that still inevitably must be made. *See Fuhrman*, 179 Cal. App. 3d at 425 (class treatment rejected where recovery depended on facts peculiar to individual's own case); *D'Amico,* 109 Cal. App. 3d at 325-27 (class treatment for cruise passengers made ill was inappropriate since proof of damages would be totally diverse and dependent upon the showing of particular individuals); *see also Altman,* 83 Cal. App. 3d at 767-68 (no class treatment for claims involving injury to peace of mind because testimony would be required from each class member in order to establish the right to recover).

claimants will be eliminated because the trial court can presume – based on generic expert testimony – that the exposure levels are sufficiently toxic and, thereafter, deal with *Potter's* various elements through the medical screening process itself.

To begin with, this approach puts the proverbial cart before the horse by substituting the medical screening process for proof of the elements of the medical monitoring cause of action. But a class action is a procedural device, not a means to alter the substantive elements of a claim. *See State of Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 328 (5th Cir. 1978) (Rule 23 does not eliminate elements of plaintiffs' cause of action which require individualized proof); *City of San Jose,* 12 Cal. 3d at 462 & n.9 ("Altering the substantive law to accommodate procedure would be to confuse the means with the ends – the goal for the going."); *see also In Re Fibreboard Corp.,* 893 F.2d at 712 (use of illustrative evidence as to individual issues to arrive at a lump sum verdict for the 3,000 member class unlawfully "submerged the discrete components of the class members' claims and the asbestos manufacturers' defenses").

In addition, real parties approach strips away the very safeguards this Court injected into *Potter* to forestall a flood of unwarranted medical monitoring claims and control the excessive costs that would result. *Potter,* 6 Cal. 4th at 1009-10. In keeping with this Court's directive, there must be individualized proof before

there can be any recovery. *Id.; see Miranda,* 17 Cal. App. 4th at 1660.

Moreover, California law also makes it clear that the defendants are entitled to a jury trial on the elements of the medical monitoring claim. Any attempt to push these elements to some out-of-court screening panel would be reversible error. *See Gutierrez v. Cassiar Mining Corp.*, 64 Cal. App. 4th 148, 153-56 (1998) (emphasizing nature of jury issues); *see also* B.A.J.I. 14.10.1 (revised in light of *Gutierrez* to ensure that *Potter's* various factors are submitted to the jury).

Here, no matter how many common issues real parties might identify, there will be a need for individualized resolution of the essential elements of the medical monitoring claims, as well as the limitations defense. A determination of any so-called common issues therefore would neither significantly advance the litigation, nor reduce the multiple individual issues that still must be determined. No time savings are achieved by an attempt at classwide litigation in these circumstances; the only by products of such an attempt are duplication of effort, added complexity, and an extraordinary investment of judicial resources. That is why those courts that have looked at the feasibility of these thousand-plus plaintiff mini-trials have stated the obvious: they will not work and they cannot work. *E.g.*, *In Re Ford Motor Co. Vehicle Paint Litig.,* 182 F.R.D. 214, 221-25 (E.D. La. 1998) (where trial would be fragmented and court left

with mini-trials on causation, damages and affirmative defenses, justification for class certification is absent).[10]

IV

REAL PARTIES SHOULD NOT BE ABLE TO FACILITATE CLASS TREATMENT BASED ON AN UNRECOGNIZED PRESUMPTION OF CAUSATION

In the end, real parties classwide approach to resolving these medical monitoring claims subtly, but no less effectively, does away with each individual plaintiff's burden of proof. The five factors set forth in *Potter* describe the plaintiff's burden of proof on the causation of their medical monitoring injuries. To meet this burden with respect to the medical monitoring claims, real parties would have the court rely on their experts generic evidence of toxic exposure. The need for individualized proof is replaced by "plausible assumptions" about causation in order to get these cases off the

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[10] *See In Re Masonite Hardboard Siding Prods. Liab. Litig*., 170 F.R.D. 417, 426 (E.D. La. 1997) (fragmenting issues for class certification defeats the economy of the class action); *Haley v. Medtronic*, 169 F.R.D. 643, 653-54 (C.D. Cal. 1996) (certification of class of pacemaker users is unmanageable due to individual causation issues); *Harding v. Tambrands*, 165 F.R.D. 623, 632 (D. Kan 1996) (potential for multitude of subclasses counsels against finding of predominance in tampon case); *Davenport,* 125 F.R.D. at 120 (too many individual issues would remain unresolved after common issues trial); *Ikonen*, 122 F.R.D. at 265 (any savings of time and costs would be "insignificant" since individual issues would still have to be adjudicated).

ground. Yet, this approach is at odds with well-settled principles of California's common law.

"As a general rule, tort liability is dependent upon the plaintiff's ability to demonstrate that his or her damages were caused by the defendant, and this rule applies in strict liability, as well as negligence cases. (Citation.)" *Edwards v. A. L. Lease & Co.,* 46 Cal. App. 4th 1029, 1034 (1996). It is this element of actual causation "which links the wrongful act with the damages suffered." *Youst v. Longo*, 43 Cal. 3d 64, 74 (1987).

In Smith v. ACandS, Inc., 31 Cal. App. 4th 77 (1994), for example, the plaintiff alleged that he had been exposed to an asbestos product made by the defendant, but his proof showed only that it was possible that he had been so exposed. Specifically, although there was evidence that the plaintiff may have worked at a refinery during periods when the defendant was installing asbestos insulation, the plaintiff failed to prove – other than through "rank speculation" – that their work actually overlapped and, even if it had, that he and the defendant had worked in the same areas of a "sprawling complex." Under these circumstances, plaintiff failed to offer sufficient proof of causation, and his tort claim was subject to dismissal. *Id.* at 88-89; *accord Hunter v. Pacific Mechanical Corp.,* 37 Cal. App. 4th 1282, 1289-90 (1995) (where evidence established only that plaintiff might have been exposed to defendant's asbestos products during various timeframes, evidence of actual causation

impermissibly rested on speculation and conjecture); *Dumin v. Owens-Corning Fiberglass Corp.,* 28 Cal. App. 4th 650, 655-57 (1994) (claim that defendant's asbestos product was used on plaintiff's ship "would require a stream of conjecture and surmise," and "only speculation could produce the conclusion" that the plaintiff was exposed to asbestos dust from other ships undergoing repairs in same large shipyard).

Leslie G. v. Perry & Associates, 43 Cal. App. 4th 472 (1996), is also instructive. There, the plaintiff was raped in the garage of her apartment building and claimed that the building owner's failure to repair a broken security gate was a cause of the assault. *Id.* at 476. Plaintiff's expert in fact opined that plaintiff's assailant had selected plaintiff's apartment building for his attack in part because the broken gate provided easy access. *Id.* at 479. At the same time, however, the expert conceded that he did not know, and could not prove, whether the rapist had entered the garage through the broken gate or some other way. Affirming summary judgment for the defendants, the court of appeal explained why the expert's opinions did not create an issue of fact:

> Since there is no direct evidence that the rapist entered or departed through the broken gate (or even that the broken gate was the only way he could have entered or departed), [plaintiff] cannot survive summary judgment simply because it is *possible* that he *might* have entered through the broken gate. [Citations.] 43 Cal. App. 4th at 483 (italics in original).

As these cases illustrate, California law requires specific factual proof to substantiate injury causation claims – not speculation, assumptions, and conjecture. *See Cottle v. Superior Court,* 3 Cal. App. 4th 1367, 1384 (1992) (mere possibility that injury was caused by exposure to chemicals was insufficient basis for submission of issue to jury); *Visueta v. General Motors Corp.,* 234 Cal. App. 3d 1609, 1616-17 (1991) (liability for defectively manufactured products is premised on proof of a casual relationship of injury); *Jones v. Ortho Pharm. Corp.,* 163 Cal. App. 3d 396, 402-03 (1985) (possibility that ingestion of drug may have had some effect on development of progressive disease insufficient to prove proximate causation); *Endicott v. Nissan Motor Corp.,* 73 Cal. App. 3d 917, 926-27 (1977) (general probability of enhanced injury insufficient to prove causation of injuries in vehicle accident).

Real parties would, however, dispense with this burden in favor of "plausible assumptions" about causation, based on an expert's statistical generalities that may prove meaningless in individual cases. But the acknowledged inability of generic statistical evidence to show what happened in a particular case already has led California courts to reject efforts to substitute mathematical odds for proof of facts. *See People v. Collins*, 68 Cal. 2d 319, 329-32 (1968) (rejecting prosecution's "engaging but logically irrelevant" attempt to prove identification based on purported odds that there was only a one in 12 million chance that another couple with same characteristics as defendants would have been present at time robbery committed);

McKeon v. Hastings College of the Law, 185 Cal. App. 3d 877, 898 (1986) (The "abstract value" of a "[mathematical] formulation . . . is not proof derived from admissible evidence. . . Mathematical formulae cannot be manipulated to substitute for hard evidence."); *People v. Cella*, 139 Cal. App. 3d 391, 404-05 (1983) (rejecting proof that there was only a "2 or 3 in 100,000" statistical probability that a list of ten names would appear in the same order twice); *People v. Louie,* 158 Cal. App. 3d Supp. 28, 45-49 (1984) (holding that prosecution improperly used statistical comparisons to prove that physician was falsifying disability claim forms).

Real parties offer no sound reason to depart from these governing rules in this case. Indeed, their request to have this Court require only a "plausible assumption of causation" should be seen for what it is: A request to establish an irrebutable presumption of actual causation that is unrecognized under California law. Yet, as noted above, a class action is a procedural vehicle intended only to permit the joinder of claims. Those claims still must be proven under established substantive law principles. *See supra* p. 20 (and cases cited). Real parties accordingly should not be permitted to proceed with a class action built on a rejection of established causation principles.

V

CONCLUSION

Real parties' efforts to certify thousands of medical monitoring claims as a class action are not legally supportable nor procedurally manageable. This Court therefore should embrace the reasoning and result reached by the court of appeal below and refuse to certify these factually diverse personal injury claims as a class action.

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