H037888

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

PROMETHEUS REAL ESTATE GROUP, INC. and LICK MILL CREEK, A CALIFORNIA LIMITED PARTNERSHIP,
Petitioners,

v.

THE SUPERIOR COURT FOR THE STATE OF CALIFORNIA, COUNTY OF SANTA CLARA,
Respondent.

VANDANA UPADHYAY, *et al.*, each individually and on behalf of all others similarly situated,
Real Parties in Interest.

Petition for Writ of Mandate or Other Appropriate Relief from Order Denying Motion for Class Decertification Entered Dec. 6, 2011 Superior Court of Santa Clara County (1-08-CV-118002) The Honorable Kevin McKenney, Dep't 20, 408-882-2320

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Dated: February 14, 2012

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State of California
Court of Appeal
Sixth Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Prometheus Real Estate Group, Inc. v. Superior Court for the State of California, County of Santa Clara, No. H037888

Pursuant to Rule 8.208, *amici curiae* Washington Legal Foundation (WLF) and Allied Educational Foundation (AEF) state as follows:

(1) WLF and AEF are both § 501(c)(3) nonprofit corporations. Neither WLF nor AEF has a parent corporation, and no entity or person has any ownership interest in either corporation.

(2) Neither WLF nor AEF has a financial or other interest in the outcome of this proceeding, nor are they aware of anyone other than the parties who possesses such an interest.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Page(s)

Statutes and Constitutional Provisions:

Miscellaneous:

ISSUES PRESENTED FOR REVIEW

Whether the trial court abused its discretion in denying Petitioners' motion to decertify class claims. A trial court abuses its discretion if it bases its decision on improper legal standards. *Amici* address the following question: did the trial court apply improper legal standards in determining that common issues of fact and law predominated over individual issues?

INTERESTS OF *AMICI CURIAE*

The interests of *amici curiae* Washington Legal Foundation (WLF) and Allied Educational Foundation (AEF) are set out more fully in the attached motion for leave to file this brief. In brief, WLF is a public-interest law and policy center located in Washington, D.C. with supporters in all 50 States, including many in California. WLF devotes a significant portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. WLF regularly appears before California courts and other State and federal courts in cases raising issues regarding certification of class actions. (*See,.e.g., Alcoser v. Thomas*, 2011 WL 537855 (Cal. App. 2011), *cert. denied*, 132 S. Ct. 518 (2012); *Conn. Retirement Plans & Trust Funds v. Amgen, Inc.* (9th Cir. 2011) 660 F.3d 1170; *Wal-Mart Stores, Inc. v. Dukes* (2011) 131 S. Ct. 2541; *Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429.)

AEF is a nonprofit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

WLF is concerned by the proliferation of class action lawsuits being filed in federal and state courts and the inhibiting effect that such suits can have on the development and expansion of business. WLF believes that the Superior Court's certification decision (and its denial of the decertification motion), if allowed to stand, will exacerbate that trend by encouraging

efforts to certify inappropriate, unwieldy classes. A decision to certify such a class is often outcome determinative, because it creates enormous pressure on defendants to settle the suit without regard to the underlying merits. *Amici* take no position regarding whether any class members possess meritorious claims against Petitioners; *amici* are insufficiently familiar with the factual record in this case to take such a position. Rather, their sole purpose in filing is to point out to the Court a variety of legal errors committed by the trial court in the course of certifying a plaintiff class and then refusing to decertify the class.

Amici are filing this brief to promote the interests of the business community and the public at large; they have no direct interest, financial or otherwise, in the outcome of this lawsuit. Because of their lack of direct interest, *amici* believe that they can assist the Court by providing a perspective distinct from that of any party.

STATEMENT OF FACTS

Petitioner Prometheus Real Estate Group, Inc. and Lick Mill Creek Apartments (collectively, "Prometheus") are entities within a California real estate group that owns and manages the Mansion Grove Apartments in Santa Clara, California. Mansion Grove is an apartment complex consisting of numerous buildings that house nearly 1,000 rental units spread out widely over more than 20 acres. In the spring of 2008, the City of Santa Clara granted Prometheus approval to add seven new buildings (containing 125 new rental units) to the apartment complex. Construction on the new units began in mid-2008 and continued until early 2010.

The Real Parties in Interest – nine tenants of Mansion Grove at the time that construction began (referred to herein as "Plaintiffs") – thereafter filed suit against Prometheus based on issues arising from the construction

activity. In February 2010, they filed a motion seeking to certify a plaintiff class consisting of "all persons who entered into a lease agreement for a fixed term tenancy" at Mansion Grove "on or after June 27, 2007." In March 2010, the Superior Court certified the requested class, except that it limited class membership to those who "who remained as tenants following the building of new construction in 2008."

Prometheus thereafter engaged in extensive discovery from both the nine named plaintiffs and absent class members (who are purported to number more than 1300 individuals who reside or resided in a total of 781 apartments at Mansion Grove). Based on information gleaned from that discovery, Prometheus in October 2011 filed a motion to decertify class claims. Prometheus's principal claim was that the class lacked a well-defined community of interest because factual questions that will need to be resolved on a plaintiff-by-plaintiff basis predominate over common questions of fact. The Superior Court denied the motion for decertification (with respect to each of the seven causes of action set forth in the complaint) by means of an oral ruling at the conclusion of a December 6, 2011 hearing on the motion. In support of its ruling, the trial court stated no more than that "[t]here's a commonality of the claims." (*See* Prometheus Pet. at 7.) The trial court also acknowledged that "it would seem reasonable that different people are going to be affected differently . . . there is a whole range of damages or effects that this would have on them." (*Id.*) But the trial court did not address how the existence of that "whole range" affected the question of whether common issues of fact predominate – and thus whether this suit can properly be tried on a class-wide basis.

Prometheus thereafter filed this petition for a writ of mandate. Prometheus asks the Court to direct the Superior Court to decertify the

class. Alternatively, Prometheus asks the Court to direct the Superior Court to show cause why it should not decertify the class – *i.e.*, to provide some explanation for its cryptic December 6 order denying the motion to decertify.

SUMMARY OF ARGUMENT

In support of its motion to decertify, Prometheus provided substantial evidence – evidence that it did not obtain until after the class was initially certified – indicating that the ability of many or most of the class members to recover on any of the seven causes of action will turn on resolution of factual issues unique to individual class members. Such evidence provides strong support for Prometheus's argument that individual factual issues predominate over common issues – in which event this case cannot appropriately be tried as a class action.

The Superior Court did not attempt to provide a reasoned explanation regarding why it concluded that class treatment was appropriate with respect to any or all of the seven causes of action; it simply stated that "there's a commonality of claims." In the absence of any explanation of the legal standards the Superior Court applied in arriving at its legal conclusion, it is impossible to know whether the court applied the correct legal standards. It would be inappropriate simply to *presume* that the court applied the correct legal standards. Appellate courts generally "review only the reasons given by the trial court" for its class certification ruling and "ignore any other grounds that might support" the ruling. (*Barthold v. Glendale Federal Bank* (2000) 81 Cal.App.4th 816, 829.) At the very least, therefore, the trial court should be required to explain why the evidence produced by Prometheus does not require a conclusion that individual issues of fact predominate.

Moreover the evidence supplied by Prometheus strongly suggests that individual issues of fact predominate and thus that the Plaintiffs have failed to demonstrate the necessary "well-defined community of interest among class members." The arguments raised by Plaintiffs in the trial court (in response to the new evidence) were based on a misunderstanding of relevant case law and failed to explain how any of their seven causes of action could be tried on a class-wide basis.

With respect to the claims based on nuisance and breach of the covenant of quiet enjoyment (Counts 1 through 3), Prometheus's evidence demonstrated that the degree to which class members were affected by the 2008-2010 construction varied considerably. Such variations affect not only the damages to which a class member may be entitled but also whether there is any liability at all – because an interference with real property interests cannot constitute a nuisance or a breach of the covenant unless it is *substantial* – and the evidence indicates that some class members faced substantially less interference than did others.

With respect to the claims based on fraud and negligent misrepresentation (Counts 4 and 5), there is no means by which the claims could be proven through common evidence. Prometheus has demonstrated that some class members received significantly more information about upcoming construction than did others. In order to prove their claims, Plaintiffs will need to show on a plaintiff-by-plaintiff basis that they were provided misleading information and reasonably relied on the information. Proof cannot be undertaken on a classwide basis when class members received different information. Indeed, even the central piece of evidence on which Plaintiffs rely, the "Addendum to Rental Agreement," cannot be proven on a classwide basis, because it will be incumbent on Plaintiffs to demonstrate

that each class member actually read the Addendum. There is no basis for presuming that Prometheus's tenants actually read a document that most people do not bother to read.

The same rationale requires decertification with respect to the § 17200 cause of action (Count 7). That cause of action is based on claimed misrepresentations and concealment of information. Because individual class members received different amounts of information about construction plans, their claims cannot be tried on a classwide basis.

A decision handed down last week by the Court of Appeal for the First District demonstrates the impropriety of trying claims of this sort on a classwide basis. The appeals court concluded that a trial court had abused its discretion by failing to decertify a class of bank employees who claimed that they had improperly been classified as exempt from California's overtime laws. (*Duran v. U.S. Bank Nat'l Assoc.* (Cal. App. Feb. 6, 2012) 2012 WL 366590 at *37-*41.) The court held that even though the bank had placed *every* employee who worked with small businesses (the class of employees at issue) into the "exempt" category, the propriety of each placement depended on the work actually performed by the bank employee in question. The court determined that such plaintiff-to-plaintiff factual variations required decertification, and that the trial court abused its discretion in failing to grant it. (*Id.*). Similarly, because the ability of individual Plaintiffs to recover on each of their seven claims against Prometheus varies considerably based on factual differences in the situations they each faced, this case does not qualify for class action status.

ARGUMENT

I. CLASS CERTIFICATION IS INAPPROPRIATE WHERE, AS HERE, INDIVIDUAL ISSUES OF FACT PREDOMINATE OVER COMMON ISSUES OF FACT

Class actions are authorized when there is a question of "common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court"; under those circumstances, "one or more may sue or defend for the benefit of all." (Code Civ. Proc., § 382.) While class actions "offer a means of avoiding repetitious litigation and a multiplicity of legal actions dealing with identical basic issues by greatly expediting the resolution of claims" (Duran, at *37), they can create possibilities for injustice in an individual case. (*See, e.g., City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 458 ("[C]lass actions may create injustice. The class action may deprive an absent class member of the opportunity to independently press his claim, preclude a defendant from defending each individual claim to its fullest, and even deprive a litigant of a constitutional right.")).

Class certification is appropriate where there is (1) a sufficiently numerous, ascertainable class; (2) a well-defined community of interest; and (3) proof that certification will provide substantial benefit to litigants and the courts, *i.e.*, proof that proceeding as a class is superior to other methods. (*Fireside Bank v. Superior Court* (2007) 40 Cal.4th 1069, 1089.) In order to demonstrate "a well-defined community of interest," a party must show (1) common questions of law or fact predominate over individual questions of law or fact; (2) the class representatives have claims or defenses that are typical of the class; and (3) the class representatives can adequately represent the class. (*Id.*) It is the first of the three community-of-interest factors (predominant common questions of fact) that is at issue

here.

The evidence presented by Prometheus in connection with its motion to decertify the class – the accuracy of which is largely undisputed – demonstrates that this lawsuit cannot proceed as a class action because individual issues of fact predominate over common issues of fact. The Superior Court apparently concluded that class certification was appropriate simply because the putative class members share some common traits – they all resided in the same apartment complex, they all experienced life at the complex during significant construction activity, and they all signed leases with Prometheus that contained very similar lease terms. But as *Doran* demonstrates, that sort of commonality has very little to do with whether the factual issues whose resolution are critical to specific causes of action being asserted by Plaintiffs, can be tried on a class-wide basis. The Superior Court failed to identify a single relevant factual issue that can be resolved on a classwide basis, and *amici*'s review of the causes of action being asserted suggests there are none.

Certainly, the brief filed by Plaintiffs in the Superior Court failed to identify any such issue. Plaintiffs' efforts in that brief to identify issues that were susceptible to classwide proof fell short – in large measure because Plaintiffs misunderstood the elements of the various causes of action they are asserting.

A. Individual Issues of Fact Predominate with Respect to Plaintiffs' Claims Alleging Nuisance and Breach of the Covenant of Quiet Enjoyment

With respect to the claims based on nuisance and breach of the covenant of quiet enjoyment (Counts 1 through 3), Prometheus's evidence demonstrated that the degree to which class members were affected by the 2008-2010 construction varied considerably. Such variations affect not

only the damages to which a class member may be entitled but also whether there is any liability at all – because an interference with real property interests cannot constitute a nuisance or a breach of the covenant unless it is *substantial*. (*Andrews v. Mobile Aire Estates* (2005) 125 Cal.App.4th 578, 589 (a landlord does not breach the implied covenant of quiet enjoyment unless his action "substantially interfere[s]" with the tenant's use and enjoyment of the leased premises); *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 938 (a nuisance cause of action requires a showing that interference with the plaintiff's use of his property was both substantial *and* unreasonable).)

The evidence indicates that some class members faced substantially less inconvenience during the construction period than did others. That wide variation is hardly unexpected in a case of this sort. Mansion Grove is a large apartment complex; it is spread out over more than 20 acres. Some tenants had construction going on right in front of their windows. Other tenants lived in units that were considerably farther from the construction. Some tenants temporarily lost parking spots; others did not. Because construction of the seven new buildings was staggered throughout the construction period, an individual tenant would have suffered lesser degrees of inconvenience when construction was occurring on new buildings that were more distant from his apartment, and greater degrees of inconvenience when construction began on nearby buildings (assuming that he was a tenant during that portion of the construction period). Accordingly, it would be impossible to determine on a classwide basis that all Plaintiffs either did or did not suffer a "substantial" interference with the enjoyment of their property rights. In light of the significant variation in the conditions experienced by Manor Grove tenants, some tenants may have suffered a

"substantial" interference while others did not (and thus cannot establish liability under Counts 1 through 3). The only way for the Superior Court to make that determination is to consider the claims for nuisance and breach of the covenant of quiet enjoyment on a Plaintiff-by-Plaintiff basis. Under those circumstances, individual issues of fact predominate over common issue of fact, thereby rendering inappropriate a classwide trial of Counts 1 through 3.

In their Superior Court brief opposing decertification, Plaintiffs argued that individualized determinations regarding the degree of interference were unnecessary because the "substantial interference" standard is to be judged by an objective standard rather than a subjective standard. (Pl. Br. 9.) Quoting from a Supreme Court decision that discussed the elements of a damages claim based on nuisance, Plaintiffs argued:

> "The degree of harm is to be judged by an objective standard, *i.e.*, what effect would the invasion have on persons of normal health and sensibilities living in the same community? If normal persons in that locality would not be substantially annoyed or disturbed by the situation, then the invasion is not a significant one, even though the idiosyncrasies of the particular plaintiff might make it unendurable to him. This is, of course, a question of fact that turns on the circumstances of each case." . . . . To establish liability, this Court need only determine whether a reasonable person, looking at the whole situation impartially and objectively, would consider the interference from [Prometheus's] construction project substantial. Even though damages may in fact be different for some class members, individualized recovery does not preclude class treatment.

(*Id.* (quoting *San Diego Gas & Electric Co.*, 13 Cal.4th at 938-39).)

Plaintiffs' argument is based on a misunderstanding of the subjective-versus-objective distinction. *San Diego Gas & Electric* did, indeed, hold that the claims of any one plaintiff were to be judged on an objective basis – would a reasonable person in the situation faced by that

individual plaintiff have deemed the interference with his real property interests to be "substantial?" But by referring to an "objective" standard, the Supreme Court did not endorse Plaintiffs' position – that when a defendant's actions inconvenience a large group of people, whether those actions constitute a "substantial" invasion of all those people's interests should be determined based on how a hypothetical person would have reacted had he been faced with an average amount of the inconvenience faced by the group as a whole. The Court was merely indicating that the "subjective" feelings of an individual plaintiff (who may be either more or less sensitive than average) are not determinative. Nothing in California case law suggests that Prometheus's liability to the class as a whole can be determined based on how an objective observer might view Prometheus's overall treatment of its tenants. Rather, any Plaintiff who seeks to recover under a nuisance or breach-of-the-covenant-of-quiet-enjoyment theory must demonstrate that the conditions that *he actually experienced* constituted a substantial interference (and, in the case of nuisance, also an unreasonable interference) with his property interests. In light of evidence that different Plaintiffs experienced substantially different conditions during the construction period, a class-wide trial of these claims is unwarranted – because individual issues of fact predominate.

Last week's *Dolan* decision made clear that a trial judge may not overcome the deficiencies described above by resorting to sampling. *Dolan* involved a putative class of bank employees who claimed that they had improperly been classified as exempt from California's overtime laws. The trial judge certified the plaintiff class, even though the classification determination turned on an issue that varied from plaintiff to plaintiff – if the employee spent a majority of his working hours outside the office, he

was exempt from overtime laws, and if he spent a majority of his working hours inside the office, he was not exempt. The trial judge sought to overcome that problem (*i.e.*, the problem that individual issues of fact appeared to predominate) by adopting a trial plan that called for a trial of the claims of 20 randomly selected plaintiffs. After making post-trial findings that all 20 of those employees were not exempt from overtime laws, the trial court entered a classwide factual finding that *every* class member was not exempt – and refused to permit the defendant to introduce evidence that individual class members spent most of their time outside the office and thus were, in fact, exempt employees. (*Duran*, 20212 WL 3665590, at *14.) The appeals court disapproved that sampling technique and held – in light of evidence that the relevant facts varied significantly from plaintiff to plaintiff – that the trial court abused its discretion in denying a motion to decertify the class. (*Id.* at *37-*41.) The court explained that entry of class-wide findings based on findings derived from a small sample of plaintiffs is only permissible when calculating damages, not when determining liability. (*Id.* at *25.) The court determined that denying the defendant the right to introduce evidence that it was not liable to individual class members would violate its due process rights under the U.S. and California Constitutions. (*Id.* at *30-*31.)[1]

In sum, the predominance problems created by the wide variation in inconvenience suffered by Mansion Grove tenants cannot be overcome by a

[1] In support of its conclusion, the court cited the U.S. Supreme Court's recent decision regarding federal court class actions, *Wal-Mart Stores, Inc. v. Dukes* (2011) 131 S. Ct. 2544, which "disapprove[d]" of efforts by class counsel to overcome deficiencies in commonality and predominance by applying on a classwide basis factual findings derived from a small sample of class members. (*Id.* at *29.)

trial plan that focuses on the conditions faced by a small sampling of tenants. At trial, the Superior Court will be required to examine the evidence regarding each tenant to determine whether that tenant's use and enjoyment of his apartment was "substantially" interfered with. A classwide trial of Counts 1 through 3 is thus unwarranted because individual issues of fact would predominate. As the Supreme Court has explained, "[T]he 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." (*City of San Jose*, 12 Cal.3d at 459.)

B. Individual Issues of Fact Predominate with Respect to the Claims Based on Fraud and Negligent Misrepresentation

With respect to the claims based on fraud and negligent misrepresentation (Counts 4 and 5), there is a similar predominance of individual issues of fact. There is no means by which the claims could be proven through common evidence.

Plaintiffs contend that Prometheus misrepresented its future construction plans. But in order to recover on that claim, they will need to show that: (1) Prometheus made false representations; (2) they heard or read the misrepresentations; and (3) they reasonably relied on the misrepresentations to their detriment. (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 811.) None of those elements can be demonstrated on a classwide basis, particularly in light of Prometheus's new evidence that Mansion Grove tenants had widely varying levels of information regarding construction plans.

As the Supreme Court has repeatedly stated, "There is no doubt that reliance is the causal mechanism of fraud." (*In re Tobacco II Cases* (2009) 46 Cal. 4th 298, 326.) Demonstrating reliance requires a plaintiff to show

that, in the absence of the defendant's misrepresentation, "the plaintiff in all probability would not have engaged in the injury-producing conduct." (*Id.*) While a plaintiff need not show that the defendant's misrepresentation was the "only cause" of his own injury-producing conduct, establishing reliance requires a plaintiff to establish at a minimum that the misrepresentation was *a* cause. (*Id.* at 326-27.) A misrepresentation cannot, of course, have caused a plaintiff to act in an injury-inducing manner if the plaintiff never heard or read the misrepresentation.

The principal piece of evidence to which Plaintiffs point in support of their misrepresentation claim is a lease addendum (entitled, "Addendum to Rental Agreement – Future Renovations"), which Plaintiffs allege was attached to the lease agreement signed by every class member. The addendum stated, "[T]his property may be undergoing a major renovation." Plaintiffs allege that the addendum was misleading because: (1) the construction involved new units, and thus could not accurately be termed a "renovation"; and (2) Prometheus knew by at least June 17, 2007 that it planned to go forward with major construction. But unless Plaintiffs are far more conscientious than most tenants, many of them never read the addendum. Those who did not read it cannot claim to have been misled thereby and certainly cannot claim to have detrimentally relied on information contained in it.

The California Supreme Court has held that reliance by absent class members can be inferred from circumstantial evidence under limited circumstances, even in the absence of direct testimony from those absent class members. (*See, e.g., Vasquez v. Superior Court*, 4 Cal. 3d at 814-15.) But the facts in this case do not remotely resemble *Vasquez*. In *Vasquez*, the plaintiffs alleged that it was the defendant's *unvarying* practice, when

attempting to sell freezers and food to consumers, to orally convey to those customers the same fraudulent statements. (*Id.*) Thus, the plaintiffs alleged, every single class member (both the named plaintiffs and the absent class members) actually heard the defendant's misrepresentations. The Court held that that allegation was sufficient to withstand a demurrer because if at trial the plaintiffs could demonstrate the existence of the alleged unvarying practice, then one could reasonably infer (pursuant to that practice) that absent class members actually heard and relied on the misrepresentation. (*Id.*) There is no similar evidence in this case. The complaint does not allege that every tenant had the addendum called to his attention at the time of lease signing. Accordingly, to the extent that Plaintiffs base their misrepresentation claims on the addendum, they will be required at trial to prove on a plaintiff-by-plaintiff basis that the addendum was actually read.[2]

Amici also note that the class includes every tenant who resided at Mansion Grove during the 2008-2010 construction period, even those who signed leases after construction had begun. Because the nature of the construction likely would have been apparent to all such Plaintiffs, it is difficult to discern how their reliance on alleged misrepresentations could be proven on a classwide basis.

Even if Plaintiffs could demonstrate that each class member read the addendum, there is little case law support for their assertion that detrimental reliance on the addendum can be presumed. That assertion is based on a

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[2] Moreover, Prometheus has introduced considerable evidence that many tenants were provided much more detailed information regarding construction plans. Thus, even if each such tenant read the addendum, whether he relied on it and was actually misled will require a detailed examination of his state of mind in light of all the information he received.

misreading of the Supreme Court's *Tobacco II* decision. The Supreme Court stated, "Individualized reliance on specific misrepresentations [is not required] where . . . those misrepresentations and false statements were part of an extensive campaign." (*Tobacco II*, 46 Cal. 4th at 328.) But *Tobacco II* involved allegations that individual plaintiffs had heard numerous statements from cigarette manufacturers over a period of many years that falsely claimed that cigarette smoking was not addictive. The Court explained that "where, as here, a plaintiff alleges exposure to a long-term advertising campaign, the plaintiff is not required to plead with an unrealistic degree of specificity that the plaintiff relied on particular advertisements or statements." (*Id.*) Thus, the plaintiffs were not required to specify which of the many false statements they had heard was the one which actually caused them to smoke. (*Id.*) That is a far cry from Plaintiffs' assertion that they need not provide evidence that each class member read the addendum and relied thereon simply because the addendum was included in every lease.

C. Individual Issues of Fact Predominate with Respect to Plaintiffs' § 17200 Cause of Action

The same rationale requires decertification with respect to Plaintiffs' cause of action under Bus. & Prof. Code § 17200. That cause of action is based on claimed misrepresentations and concealment of information. Because individual class members received different amounts of information about construction plans, their claims cannot be tried on a classwide basis.

A recent appeals court decision, *Davis-Miller v. Automobile Club of Southern California* (2011) 201 Cal. App. 4th 106, is instructive in this regard. It held that a suit alleging § 17200 violations could not be

maintained as a class action because common issues of fact did not predominate over individual issues of fact. Although the plaintiffs alleged that the defendant had falsely advertized the nature of its program for servicing car batteries, there was a serious question regarding whether all class members had actually seen the advertising. (*Id*. at 117.) Under those circumstances, the court held that the alleged misrepresentations could not be proven on a classwide basis, explaining, "[W] do not understand the UCL to authorize an award for injunctive relief and/or restitution on behalf of a consumer who was not exposed in any way to the allegedly wrongful business practice." *Id.* at 121. It concluded, "A class action cannot proceed for a fraudulent business practice under the UCL when it cannot be established that the defendant engaged in uniform conduct likely to mislead the entire class. . . . Specifically, when the class action is based on alleged misrepresentations, a class certification denial will be upheld when individual evidence will be require to determine whether the representations were actually made to each member of the class." (*Id.*)

In sum, the motion to decertify should be granted with respect to Count 7, given the need to determine whether individual tenants read the lease addendum on which Plaintiffs rely and the substantial evidence that many Mansion Grove tenants received significant information regarding construction plans from a variety of sources.

II. CERTIFICATION OF A CLASS ACTION PLACES ENORMOUS FINANCIAL PRESSURE ON DEFENDANTS AND THUS IS NEVER APPROPRIATE UNLESS THE PLAINTIFFS HAVE DEMONSTRATED THAT THEY HAVE MET ALL PREREQUISITES

Amici were persuaded to file a brief in this case because we view it as a particularly egregious example of certification of a class in the absence of any clear showing that the class action prerequisites have been met. A writ of mandate is warranted in this case to send a clear signal to trial courts that they should not certify classes as a matter of course but rather should engage in a detailed analysis of each and every claim raised by the plaintiff to determine whether it can appropriately and efficiently tried on a classwide basis.

As numerous courts have recognized, companies that face a large certified class and hence enormous potential damages are "under intense pressure to settle." (*Matter of Rhone-Poulenc Rorer, Inc.* (7th Cir. 1995) 51 F.3d 1293, 1298, *cert. denied* (1995) 516 U.S. 867.) If not wanting to "roll these dice," they settle; "the class certification - the ruling that will have forced them to settle - will never be reviewed." (*Id.*) Such settlements can in many instances legitimately be deemed "blackmail settlements." (H. Friendly, *Federal Jurisdiction: A General View* 120 (1973). *See also Castano v. American Tobacco Co.* (5th Cir. 1996) 84 F.3d 734, 746 (pressure emanating from certification of big classes amounts to "judicial blackmail," creating "insurmountable pressure on defendants to settle"; "[t]he risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low").)

When the plaintiffs have met all of the requirements for maintaining a class action, these "insurmountable pressure[s]" are tolerable; the

distortions they impose on the litigation process are outweighed by the efficiencies inherent in the class action system. But there can be no justification for coercing defendants into settling claims by certifying classes where those requirements have not been met; indeed, certifying such classes will simply provide claimants with even stronger incentive to seek class certification for their claims, even when they realize that their proposed class is too unwieldy ever to go to trial.

Amici take no position on Plaintiffs' claims that Prometheus is liable to them for injuries they suffered as a result of the construction activity at Mansion Grove; we are not sufficiently familiar with the record to take a position. But whether Prometheus acted wrongfully toward some or all of the Plaintiffs is not the point of this Petition. Rather, the issue before the Court is whether the Plaintiffs should be permitted to make inappropriate use of the class action device in order to gain a tactical advantage in this litigation. *Amici* ask that the Court respond with an emphatic "no." Plaintiffs assert that unless a class is certified, many tenants may not receive the compensation to which they feel entitled. But the Supreme Court has repeatedly rejected equity-based arguments for excusing class action plaintiffs from demonstrating that they have met each of the prerequisites for certification and for excusing them from proving every element of their claims. "Class actions are provided only as a means of enforcing substantive law. Altering the substantive law to accommodate procedure would be to confuse the means with the ends – to sacrifice the goal for the going." (*Washington Mutual Bank v. Superior Court* (2001) 24 Cal. 4th 906, 918 (quoting *City of San Jose v. Superior Court* (1974) 12 Cal. 3d 447, 462).)

CONCLUSION

The Washington Legal Foundation and the Allied Educational Foundation respectfully request that the Court grant the petition for writ of mandate.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

The text of this brief consists of 5533 words, as counted by the WordPerfect X5 word processing program used to generate this brief.

Dated: February 14, 2012

/s/ Richard A. Samp
Richard A. Samp

PROOF OF SERVICE

WASHINGTON, DISTRICT OF COLUMBIA

I, RICHARD A. SAMP, declare:

That I am over the age of eighteen (18) years, and not a party to the within cause. My business address is 2009 Massachusetts Avenue, N.W., Washington, DC 20036.

On February 14, 2012, I served the below-listed document titled as:

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

BY MAIL, by placing a true copy thereof in a sealed envelope. I am readily familiar with the firm's practice of collection and processing of documents for mailing. Under that practice, it would have been deposited with the United States Postal Service on that same day with postage thereon fully prepaid at Washington, D.C. in the ordinary course of business.

I declare under penalty of perjury under the laws of the District of Columbia that the above is true and correct.

Executed on February 14, 2012, at Washington, District of Columbia.

/s/ Richard A. Samp
Richard A. Samp

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