NO. S088458
4 CIVIL NOS. E025064, E025263, E025181

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

Lockheed Martin Corporation, *et al.*
Petitioners and Defendants
v.
Superior Court of the State of California, For the County of San Bernardino
West District – Rancho Cucamonga
Respondent

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

On Appeal from The Superior Court of San Bernardino County
The Honorable Ben T. Kayashima
Case No. RCV 31496

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS LOCKHEED MARTIN CORPORATION, *ET AL.*

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I. ISSUES ADDRESSED BY *AMICUS CURIAE*

Did the Court of Appeal correctly vacate the certification of the proposed class of medical monitoring claimants on the ground that it failed to meet the established requirements for class certification under California law?

Should this Court create lower class certification requirements for medical monitoring claimants?

II. INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") respectfully submits this brief supporting the position of Defendants Lockheed Martin Corporation, *et al.*

The Chamber is the largest federation of business organizations and individuals in the United States and regularly seeks to participate in court proceedings where issues of importance to the business community are at stake. The membership of the Chamber reflects the diversity of American industry and includes nearly three million businesses and organizations, with 140 direct members of every size, in every business sector, from every geographic region of the country. The Chamber has more than 13,000 members in California, and an even larger number of the Chamber's members conduct substantial business in California. For that reason, the Chamber's members have a significant stake in the just and evenhanded administration of justice in the California courts that have jurisdiction over them.

Two litigation developments of great concern to the Chamber's membership intersect in this case. The first involves the efforts of litigants to push class action litigation beyond the judicious boundaries of the

mechanism's design, as evidenced in this case by plaintiffs' exhortation to this Court to "apply" class certification requirements to allow the certification of greater numbers of mass tort actions. *See, e.g.*, Plaintiffs' Br. 49 (urging this Court to "seize the opportunity to further advance the utility of class actions to meet the needs of modern society"). Whatever the legitimate benefits of a properly certified class action, this Court has made clear that adjudication by class action absent adherence to established procedural safeguards threatens the constitutional rights of all litigants. For defendants, a class action can impose enormous pressures to settle contested or even meritless claims rather than risk the litigation exposure that a class action can entail. As a consequence, the interest of the Chamber lies in ensuring that class actions are reserved for contexts appropriate under existing rules.

The second litigation development of concern to the Chamber's members is the implementation of the still-novel medical monitoring damage theory under which individuals exposed to chemicals at uncertain and extremely low levels seek damages for the costs of ongoing medical screening for exposure-related diseases that may (but likely will not) develop in the future. A handful of courts – including this Court in *Potter v. Firestone Tire & Rubber Co.*, 6 Cal. 4th 965 (1993) – have sanctioned recovery for these "medical monitoring" damages even when the alleged wrongful exposure has caused no "injury" under traditional tort law standards. The sobering reality is that most people in modern day society are exposed on a daily basis to low levels of myriad substances currently believed to be hazardous. Unless appropriately delimited, medical monitoring claims thus present the potential for a staggering judicially-

created liability for most businesses, without benefits that many falsely assume medical monitoring will produce. *See infra* at Section V.A.

Concerns about unbridled liability for medical monitoring claims multiply exponentially in the class action context. In the case currently before the Court, for example, the proposed class includes most individuals who resided in the City of Redlands for more than six months over a forty-year period and who may have been exposed (at levels that would obviously vary widely for each putative class member based on personal habits with regard to drinking and bathing) to various chemicals in the city's water supply – a class plaintiffs estimate could include as many as 100,000 claimants. In the Chamber's view, the trial court's certification of a class as inclusive and amorphous as this one – not confined by manifestation of actual injury – raises serious due process concerns that the Court of Appeal appropriately avoided through adherence to existing class certification requirements. A contrary ruling would contravene established principles of California law and present substantial risks to legitimate business interests of the Chamber's members. For that reason, the Chamber submits this brief.

III. INTRODUCTION

Although plaintiffs' brief frames the issue before this Court as if the viability of *any* future proposed medical monitoring class hinges upon the outcome of this case, the only question on appeal is whether the Court of Appeal correctly held that the medical monitoring class proposed *in this case* fails to clear the threshold requirements for class treatment under existing California law. The Chamber respectfully believes the answer to that question is yes, as the Court of Appeal correctly determined.

Faced with the obvious misfit between group-oriented class action procedures and medical monitoring claims dependent by law upon individual proof, plaintiffs assert that allowing recovery for medical monitoring damages is "meaningless" absent class treatment, thereby in effect inviting the Court to lower the threshold for certification of proposed medical monitoring classes. Plaintiffs' Br. 1. The Chamber respectfully urges the Court to reject that invitation. No basis exists in California law to adopt such an approach, and none of the public policy considerations recognized by this Court as supporting the recovery of medical monitoring expenses by asymptomatic plaintiffs justifies relaxing class certification requirements as a means to encourage the filing of such claims. Further, ignoring the very real difficulties posed by class certification of medical monitoring claims will bypass legitimate systemic restraints on litigation and liability. The fact that nearly *any* individual could state a colorably viable claim for medical monitoring based on nothing more than the exposures that attend every day living demands – as a matter of law, policy and practicality – retention of legitimate limitations on litigation exposure, including the existing standards for class certification under attack here.

IV. THE PROPOSED MEDICAL MONITORING CLASS CAN BE CERTIFIED ONLY BY LOWERING THE LEGAL STANDARD FOR CLASS CERTIFICATION UNDER CALIFORNIA LAW.

California law measures the suitability of medical monitoring claims for class action treatment by principles developed under the general class action statutes, California Code of Civil Procedure § 382.[1] These principles

[1] Section 382 of the Code of Civil Procedure authorizes class suits in California when "the question is one of common or general interest, of many

mandate that a class not be certified unless the trial court first determines: that there is an ascertainable class of individuals with factually plausible claims; that common issues predominate; and, upon a careful weighing of the burdens and benefits, that substantial benefits will accrue to both the litigants and the courts from class treatment. *Kennedy v. Baxter Healthcare Corp.*, 43 Cal. App. 4th 799, 809 (1996). Class actions are impermissible "where there are diverse factual issues to be resolved, even though there may be many common questions of law." *Osborne v. Subaru of America, Inc.*, 198 Cal. App. 3d 646, 653-54 (1988) (citations omitted).

Plaintiffs' claims can be certified only by casting aside these well-established requirements of California law. As explained below, applying these well-established standards to the required elements of a medical monitoring claim under California law, the Court of Appeal correctly recognized that individual issues determinative of each plaintiff's entitlement to medical monitoring would overwhelm the common question of law presented, such that class treatment would not yield "substantial benefits" to the court or to the litigants.

A. *Potter* Requires Individualized Proof To Support Any Award Of Medical Monitoring Damages.

In *Potter*, this Court approved the novel tort theory that an asymptomatic plaintiff may recover for medical monitoring damages in certain specific circumstances.[2] Sanctioning the recovery of medical

(continued)

persons, or when the parties are numerous, and it is impracticable to bring them all before the court."

[2] That result is at odds with decisions of other courts – including the United States Supreme Court – that have declined to sanction recovery of

monitoring damages required the Court to balance the public policy benefits of allowing asymptomatic individuals to recover medical monitoring damages against the mischief that loomed from abandoning tangible injury as the long-standing touchstone for tort liability. *See, e.g.*, 1 Thomas Atkins Street, *The Foundations of Legal Liability* 493 (1906) ("injury is always a prerequisite condition of liability and without injury no cause of action can exist"). Even so, this Court expressed confidence that allowing recovery without injury would not open the "floodgates of litigation" because recovery could not be had simply by showing exposure to an assertedly hazardous chemical, or even increased risk of future disease from that exposure, but rather only by showing individual entitlement to damages based on specific factors enumerated by the Court. *Potter*, 6 Cal. 4th at 971.

A reading of *Potter* confirms that the Court had in mind that entitlement to medical monitoring damages would be decided only upon individualized inquiry. Thus, the Court limited availability of medical monitoring damages to *particular* plaintiffs who could establish "the necessity, as a direct consequence of the exposure in issue, for specific monitoring beyond that which an individual should pursue as a matter of general good sense and foresight." *Potter*, 6 Cal. 4th at 1009 (citations omitted). Moreover, the Court identified five factors to guide the consideration of whether a "*particular* plaintiff's exposure in a given situation justifies future periodic medical monitoring":

(1) the significance and extent of the plaintiff's exposure to chemicals;

(2) the toxicity of the chemicals;

(continued)

medical monitoring damages absent a physical injury. *See Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424 (1997).

(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 chances 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.

Id. at 1009 (emphasis added). Of these elements, only the second can be established without plaintiff-specific inquiry and proof. The Court also emphasized that "there is no question that a defendant ought not to be liable for medical monitoring of a plaintiff's preexisting condition that is unaffected by a subsequent toxic exposure" even if a defendant negligently caused that exposure. *Id.* at 1009 n.27. In sum, this Court conditioned a plaintiff's recovery of non-traditional tort damages on the ability to satisfy "substantial evidentiary burdens" related to the unique circumstances of each individual claim. *Id.*

B. Well-Established Principles of California Law – Mirrored In That Of Other Jurisdictions – Preclude Certification Of The Proposed Class.

In light of *Potter's* clear holding, the Court of Appeal concluded that a class action would not be a superior vehicle for litigation of plaintiffs' claims because the individual determinations indispensable to an imposition of liability dwarf any common issues. This conclusion was well founded in bedrock principles of California law. "A class action is appropriate only when there exists a 'sufficient community of interest' in 'common questions of law and fact' so that proceeding in the class action form will result in 'substantial benefits both to the litigants and to the court.'" *Hamwi v. Citinational-Buckeye Inv. Co.*, 72 Cal. App. 3d 462, 471 (1977) (citation

omitted); *see also Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429 (2000). In making this determination, a trial court must conclude that the "issues which may be jointly tried, when compared with those requiring separate adjudication, [are] sufficiently numerous and substantial to make the class action advantageous." *Hamwi*, 72 Cal. App. 3d at 471 (citation omitted).

Consistent with this Court's holding in *Potter*, the Court of Appeal properly held that "determining the right to medical monitoring is not a simple matter of showing that a certain number of people were exposed to toxic chemicals over a certain amount of time." *Lockheed Martin Corp. v. Superior Court*, 94 Cal. Rptr. 2d 652, 658 (2000). The Court of Appeal aptly summarized the difficulty of class treatment of medical monitoring claims such as those presented here:

> The requirement that each class member demonstrate the need for medical monitoring precludes certification. In order to state a claim for medical monitoring, each class member must prove that the monitoring program he requires is "different from that normally recommended in the absence of exposure." [Citation.] To satisfy this requirement, each plaintiff must prove the monitoring program that is prescribed for the general public and the monitoring program that would be prescribed for him. Although the general public's monitoring program can be proved on a classwide basis, an individual's monitoring program by definition cannot. In order to prove the program he requires, a plaintiff must present evidence about his individual smoking history and subject himself to cross-examination by the defendant about that history. This element of the medical monitoring claim therefore raises many individual issues.

Lockheed Martin Corp., 94 Cal. Rptr. at 660 (quoting *Barnes v. American Tobacco Co.*, 161 F.3d 127, 146 (3d Cir. 1998)). Based on these considerations, the Court of Appeal concluded that the numerous individual issues raised by plaintiffs' claims – including variations in exposure levels,

exposure to different chemicals, and distinctive individual risk factors such as smoking history, weight, pre-existing illness or pre-disposition to illness – presented a "multitude of factual questions which can only be resolved by individual proof . . . making class certification inappropriate." *Lockheed Martin Corp.*, 94 Cal. Rptr. 2d at 658. In sum, denying class certification of this medical monitoring class did not render this Court's decision in *Potter* "meaningless," as plaintiffs argue, but rather correctly implemented *Potter's* mandate that individual proof of injury come before any determination of liability.

The correctness of the Court of Appeal's decision is evidenced by the hesitance of most courts (California and elsewhere) to certify mass-tort claims in general for class treatment and the near-uniform refusal to do so with respect to medical monitoring claims. This Court has long recognized that "personal-injury mass-tort class-action claims can rarely meet the community of interest requirement in that each member's right to recover depends on facts peculiar to each particular case." *Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1125 (1988); *see also Kennedy v. Baxter Healthcare Corp.*, 43 Cal. App. 4th 799 (1996).[3] That is equally so with respect to medical

[3] The view that mass torts present considerable obstacles to class treatment is reflected as well in the revision notes to Rule 23(b)(3) of the Federal Rules of Civil Procedure:

> 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 of liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

monitoring claims, and for that reason most courts have denied certification of proposed medical monitoring classes.[4]

(continued)

Fed. R. Civ. P. 23(b)(3) (advisory committee note to 1966 Amendment). Courts continue to deny certification of mass tort class actions based on this same rationale. *See, e.g., Philip Morris Inc. v. Angeletti*, 752 A.2d 200 (Md. 2000); *Geiger v. American Tobacco Co.*, 696 N.Y.S.2d 345 (N.Y. 1999).

[4] *See, e.g., Thompson v. American Tobacco Co.*, 189 F.R.D. 544, 554-56 (D. Minn. 1999) (tobacco); *Smith v. Brown & Williamson Tobacco Corp.*, 174 F.R.D. 90 (W.D. Mo. 1997) (tobacco); *Arch v. American Tobacco Co., Inc.*, 984 F. Supp. 830 (E.D. Pa. 1997) (tobacco); *Reilly v. Gould, Inc.*, 965 F. Supp. 588, 598 (M.D. Pa. 1997) (lead); *Harding v. Tambrands Inc.*, 165 F.R.D. 623 (D. Kan. 1996) (tampons allegedly causing toxic shock syndrome); *Kennedy v. Baxter Healthcare Corp.*, 43 Cal. App. 4th 799 (1996) (latex gloves); *Blaz v. Galen Hosp. Ill., Inc.*, 168 F.R.D. 621 (N.D. Ill. 1996) (radiation treatments); *Hurd v. Monsanto Co.*, 164 F.R.D. 234, 241 (S.D. Inc. 1995) (PCBs); *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 1995 WL 273597 (E.D. Pa. Feb. 22, 1995) (spinal fixation devices); *Newton v. Southern Wood Piedmont Co.*, 163 F.R.D. 625 (S.D. Ga. 1995), *aff'd*, 95 F.3d 59 (11th Cir. 1996) (residents' exposure to chemicals from nearby wood treatment plant); *Boughton v. Cotter Corp.*, 65 F.3d 823, 827 (10th Cir. 1995) (mill emissions); *Thomas v. FAG Bearings Corp.*, 846 F. Supp. 1400, 1410 (W.D. Mo. 1994) (trichloroethylene); *Daigle v. Shell Oil Co.*, 133 F.R.D. 600, 604 (D. Colo. 1990), *aff'd*, 972 F.2d 1527 (10th Cir. 1992) (exposure to toxic waste disposal pond); *Blake v. Chemlawn Servs. Corp.*, 1988 WL 6151 (E.D. Pa. Jan. 26, 1988) (lawn pesticides); *Brown v. Southeastern Pa. Transp. Auth.*, 1987 WL 9273 (E.D. Pa. Apr. 9, 1987) (PCBs); *Linkous v. Medtronic, Inc.*, 1985 WL 2602 (E.D. Pa. Sept. 4, 1985) (cardiac pacemakers); *Caruso v. Celsius Insulation Resources, Inc.*, 101 F.R.D. 530 (M.D. Pa. 1984) (formaldehyde foam insulation); *Askey v. Occidental Chem. Corp.*, 477 N.Y.S.2d 242 (N.Y. App. Div. 1984) (toxic waste); *Mertens v. Abbott Labs.*, 99 F.R.D. 38 (D.N.H. 1983) (DES); *Ryan v. Eli Lilly & Co.*, 84 F.R.D. 230 (D.S.C. 1979) (DES); *see also Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997) (Medical monitoring claimants will "incur different medical expenses because their monitoring and treatment will depend on singular circumstances and individual medical histories.")

Tellingly, *O'Connor v. Boeing N. Am., Inc.*, 184 F.R.D. 311 (C.D. Cal. 1998) – a case plaintiffs describe as having facts "practically identical" to this one (Plaintiffs' Br. at 6) and upon which plaintiffs relied heavily below and in their opening brief in this Court to support their argument for class treatment – demonstrates the wisdom of the majority view. Just two months ago, the *O'Connor* trial court joined the majority of courts in concluding that medical monitoring claims are ill-suited to class certification. Although the trial court in *O'Connor* initially granted certification of a medical monitoring class, it reversed course and decertified the class on its own motion after two years of trying to manage the unwieldy case. In its order decertifying the class, the district court stated that:

> The rigor and difficulty of the Court's individualized analysis in its summary judgment order and its review of *Gutierrez v. Cassiar Mining Corp.* . . . and *Lockheed Martin Corp. v. Superior Court* . . . have also persuaded the Court that it underestimated the difficulty of applying the individualized factors required by *Potter v. Firestone Tire and Rubber Co.* . . . to the Class I medical monitoring claim in its July 1998 certification order.

O'Connor v. Boeing N. Am., Inc., 2000 WL 1682973, No. CV 97-1554, at 43 n.6 (C.D. Cal. Oct. 10, 2000). The *O'Connor* trial court's ultimate realization that the court could not effectively manage a class of individuals seeking medical monitoring for exposure to an allegedly contaminated water supply confirms the correctness of the Court of Appeal's conclusion that class treatment of the medical monitoring class proposed here would not provide substantial benefit to the court or to the litigants.

V. THIS COURT SHOULD NOT LOWER THRESHOLD CLASS CERTIFICATION REQUIREMENTS TO ACCOMMODATE CLASS TREATMENT OF THE PROPOSED MEDICAL MONITORING CLASS.

Although plaintiffs argue that the proposed class here meets the existing requirements for class certification under California law, at its core their argument (stated on page 1 of their brief and reiterated throughout) is something altogether different: that "[t]his Court's decision in *Potter* is meaningless if a remedy [for medical monitoring damages] is not available on a class-wide basis." Plaintiffs' Br. 1. To be sure, the individual orientation of medical monitoring claims (reflected in this Court's decision in *Potter*) does not fit easily with group-oriented class action procedures. But *Potter* (which was not a class action) demonstrates that the medical monitoring remedy *does* have viability outside the class action context.[5]

To the extent plaintiffs ask this Court to modify class certification requirements for medical monitoring claims, no legitimate basis exists upon which to do so. The individual inquiries necessary to show entitlement to medical monitoring damages demonstrate that medical monitoring claims are generally not good candidates for class treatment, not that the class certification requirements should be relaxed to allow certification to proceed. As this Court has mandated, "the same procedures facilitating proper class actions [should] be used to prevent class suits where they prove

[5] The approximately 800 individual personal injury actions now pending before the trial court in which individual plaintiffs seek medical monitoring damages for chemical exposure also refute any claim that the availability of medical monitoring damages means nothing absent class certification. *See also* fn.9, *infra.*

nonbeneficial." *City of San Jose v. Superior Court*, 12 Cal. 3d 447, 458 (1974).

At bottom, plaintiffs suggest that the justifications for judicial recognition of medical monitoring damages also warrant across-the-board class certification of medical monitoring claims. The notion that particular claims should automatically qualify for class treatment is a premise so radical that plaintiffs can cite no case (from *any* jurisdiction or indeed for *any* type of damage claim) in support of it. Although this Court stated in *Potter* that "recovery for medical monitoring costs is supported by a number of sound public policy considerations," the Court implied neither that these public policy benefits could be effectuated only through the class action device nor that these benefits justified any relaxation in the standards for class certification of medical monitoring claims. *Potter*, 6 Cal. 4th at 1008.

Because individuals in modern society are exposed to assertedly hazardous substances every day, allowing asymptomatic plaintiffs to recover for medical monitoring raises the specter of limitless, crippling liabilities for defendants. The dangers for American businesses multiply exponentially to the extent medical monitoring claimants are permitted to seek damages *en masse* through the class action device. *See Redland Soccer Club, Inc. v. Department of the Army of the United States*, 55 F.3d 827, 846 n.8 (3d Cir. 1995), *cert. denied*, 516 U.S. 1071 (1996) (Without limitations on the availability of medical monitoring damages, virtually every industrial citizen would "become a health care insurer of medical procedures routinely needed to guard persons against some of the ordinary vicissitudes of life.") Requiring defendants to fund the costs of medical monitoring for "exposure-only" plaintiffs jeopardizes the efficient functioning of the tort system. *See Metro-North*, 521 U.S. at 424 (rejecting lump sum damage award for

medical monitoring based in part on concerns that such awards for asymptomatic plaintiffs would undermine the continuing viability of the tort system). This concern looms even larger in the context of class treatment for medical monitoring claims and counsels in favor of continued adherence to California's established class certification requirements.

A. Medical Experts Agree That Decisions About The "Clinical Value" Of Medical Monitoring Must Be Based Upon Factors Unique To Each Individual.

In *Potter*, this Court sanctioned the recovery of medical monitoring damages in large part based upon the "important public health interest in fostering access to medical testing" that has the potential to mitigate, or even to prevent, future illnesses. *Potter*, 6 Cal. 4th at 1008. But while *Potter* acknowledged the potential value of medical monitoring to facilitate the early detection of disease, this Court rejected the premise that even wrongful exposure to hazardous substances by itself entitles a plaintiff to recover damages for medical monitoring. Instead, the Court properly limited the availability of such damages to circumstances in which, *inter alia*, "the clinical value of early detection and diagnosis" suggests the reasonableness and necessity of medical monitoring for a *particular* plaintiff. *Id*. at 1006. In so doing, this Court recognized that undifferentiated assumptions about the value of medical monitoring to a wide spectrum of plaintiffs with varying exposure levels and health profiles cannot be made reliably.

The wisdom of the Court's caution in this regard is reaffirmed by the evolving scientific consensus that medical monitoring of asymptomatic individuals is of marginal "clinical value" in most cases. In recent years, the medical community has come to an agreement that diagnostic medical screening of asymptomatic persons for future injuries is appropriate only in

limited and well-defined situations. *See, e.g.*, U.S. Preventive Services Task Force, *Guide to Clinical Preventive Services*, at xliv-xlvi, 6, 10, 98, 138, 171, 178, 184 (2nd ed. 1996) ("*Task Force Guide*") (concluding that medical monitoring is not prudent with respect to all but a handful of specific procedures, and further that screening decisions must be made on an individual basis); Thomas M. Gill & Ralph I. Horowitz, *Evaluating the Efficacy of Cancer Screening*, 48 J. Clinical Epidemiology 281, 290 (1995) ("the benefits of screening for most cancers has not been conclusively demonstrated").[6]

Ironically, while the medical community rejects the notion that subjecting healthy people to medical testing can facilitate the early detection

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[6] The United States Public Health Service commissioned the U.S. Preventive Services Task Force ("Task Force") in 1984, and again in 1990, to "develop[] recommendations for clinicians on the appropriate use of preventive interventions, based on a systematic review of evidence of clinical effectiveness." *Task Force Guide*, xxviii. The Task Force focused on the effectiveness of what physicians refer to as "screening tests" – various tests and procedures that can be administered to asymptomatic persons in an effort to identify those with diseases requiring special intervention. The recommendations of the Task Force were formulated in cooperation with a number of esteemed health-care organizations, including the American Academy of Family Physicians, the American Academy of Pediatrics, the American College of Physicians, the Centers for Disease Control, and the National Institutes of Health. *Id.* at 1iii. Prior to publication, more than 700 experts reviewed the Task Force's recommendations, recommendations that built upon the organizing principle that a "screening test must satisfy two major requirements to be considered effective: [1] The test must be able to detect the target condition earlier than without screening and with sufficient accuracy to avoid producing large numbers of false-positive and false-negative results . . . [2] Screening for and treating persons with early disease should improve the likelihood of favorable health outcomes . . . compared to treating patients when they present with signs or symptoms of disease." *Id.* at liv, xlii.

of latent diseases and cancers or enhance treatment options and health outcomes, some courts have simply assumed that benefits of medical monitoring are so self-evident as to require no explanation. *See, e.g., Ayers v. Township of Jackson*, 525 A.2d 287, 311 (N.J. 1987) (citing only the opinion of a fellow judge for the proposition that the "value of early diagnosis and treatment for cancer patients is well-documented"). In fact, only a small number of screening procedures have proven effective at diagnosing illness for asymptomatic individuals, and nearly all of these tests are recommended as a matter of routine medical care for the general public. *See Task Force Guide*, lxii-lxviv.

Contrary to the core assumption motivating judicial recognition of medical monitoring claims, even if a particular test diagnoses latent disease with reasonable accuracy, the early detection of a great many diseases, including cancers, does not improve clinical outcomes. *See, e.g.*, Philip Cole & Alan S. Morrison, *Basic Issues in Population Screening For Cancer*, 64 J. Nat'l Cancer Inst. 1263 (1980) (despite the "compelling intuitive idea" that early detection of cancer is beneficial, "the difficulty of trying to improve a population's health by screening is immense"); *Task Force Guide, supra*.

Science thus confirms this Court's judgment that liability for medical monitoring cannot be fairly imposed absent a determination that "the clinical value of early detection and diagnosis" warrants recovery in a particular case. Contrary to the platitude that "[w]ithholding [medical monitoring] relief . . . is dangerous, for lives will be lost when grave disease is diagnosed too late" (Plaintiffs' Br. 49, quoting *Metro North*, 521 U.S. at 454 (Ginsburg, J., concurring and dissenting)), whether medical monitoring has *any value at all* is highly dependent on individual circumstances. This fact

alone confirms that medical monitoring claims like those proposed for class treatment here are ill-suited to class treatment because the clinical value of medical screening – and thus the availability of recovery for such damages – depends on plaintiff-specific factual issues.

B. Claimed Financial Hurdles To Litigation Of Individual Medical Monitoring Claims Do Not Justify Lowering The Bar For Class Certification.

It is sometimes suggested, as plaintiffs do here, that medical monitoring claims should be certified for class treatment whenever the litigation of individual medical monitoring claims is not financially attractive. *See* Plaintiffs' Br. 1 (arguing medical monitoring claims are suitable candidates for class certification because "[i]t is cost prohibitive for an exposure-only individual to pursue a claim for the relatively modest expense of medical monitoring").[7] But that argument proves too much. It is axiomatic that the decision to pursue or to forgo litigation involves an analysis of whether the goal of litigation and the likelihood of success outweigh the required expenditure of time, resources, and money. Plaintiffs suggest that individuals who seek medical monitoring following exposure to a hazardous substance should not have to face this calculus, but there is no reason that should be uniquely so for "medical monitoring plaintiffs" and not for other plaintiffs.[8]

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[7] As a threshold matter, the suggestion that plaintiffs' medical monitoring claims are not cost-effective to pursue absent class treatment in this case rings hollow, given the range of costly medical tests sought by plaintiffs and the fact that "monitoring" by definition entails repetitive testing over a period of some duration.

[8] Our legal system does not strive to provide a forum for risk-free litigation. Indeed, many procedural aspects of our judicial system serve to

Nothing in California law excuses – or should excuse – the failure to meet the established prerequisites for class certification simply because the claims of the proposed plaintiff class are small or because class certification would encourage litigation. To be sure, the class action mechanism can "overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997). Further, no dispute exists that, for better or worse, "[t]he use of the class-action procedure for litigation of individual claims may . . . motivate [plaintiffs] to bring cases that for economic reasons might not be brought otherwise." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338 (1980).

Even so, the efficiencies of scale plaintiffs obtain via the class action device constitute a benefit of a properly certified class, not a basis for disregarding class certification requirements. If financial considerations render a class action the only viable litigation vehicle for a certain group of claims, that fact alone is insufficient reason to "headlong plunge into an unmanageable and interminable litigation process." *Thompson,* 189 F.R.D. at 556 (citation omitted).[9]

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discourage the filing of certain claims. For example, the well-known "American Rule" on attorneys' fees – which requires (absent a contrary statutory directive) that each party to a litigation bear his or her own legal fees regardless of the outcome – demonstrates that the American legal system does not encourage resort to the courts to seek redress of all wrongs, particularly those that fall below a certain threshold.

[9] As this Court has recognized, even if a case is not certifiable as a class action, California law offers other means for litigants to use consolidation procedures to pool and maximize resources, as well as to promote judicial economy. *See Jolly*, 44 Cal. 3d at 1125 n.19. In coordinated proceedings conducted pursuant to Section 404 of the California Rules of Civil

C. Improper Class Certification Jeopardizes Constitutional Guarantees And The Legitimacy Of The Class Action Device.

In *Potter*, this Court sanctioned the recovery of damages for medical monitoring in part based on the perceived inequity of requiring "an individual wrongfully exposed to dangerous toxins . . . to pay the expense of medical monitoring." *Potter*, 6 Cal. 4th at 1008. Whatever can be said for the notion that the law should favor wrongfully exposed plaintiffs over defendants who allegedly caused the exposure, this principle of wealth transfer takes on troubling dimensions in the mass litigation context.[10] Moreover, the sentiment that it is somehow more fair to place the financial burden of medical monitoring on business interests rather than individuals cannot be squared with basic constitutional guarantees accorded *all* litigants in our legal system, irrespective of pretrial conceptions of innocence or blameworthiness. Fundamental notions of fairness and due process require application of procedural rules in a uniform manner blind to the kinds of

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Procedure, for example, "common issues can be determined, yet each particular plaintiff is responsible for the proof of particular facts applicable to that particular plaintiff." *Id.*; *see also* Cal. Code Civ. P. § 404.1 (providing for coordination of civil actions to promote the ends of justice where cases share common questions of fact or law).

[10] Several years after this Court decided *Potter*, the United States Supreme Court considered the notion that medical monitoring damages can be justified by the alleged inequity of "plac[ing] the burden of such care on the negligently exposed plaintiff rather than on the negligent defendant," but nevertheless determined that countervailing policy considerations and systemic concerns counseled against allowing asymptomatic individuals to recover medical monitoring damages as a matter of federal common law. *Metro-North*, 521 U.S. 424 (1997).

value-laden judgments about the respective blameworthiness of the parties that plaintiffs would insert into the process here.

Similarly, although this Court has acknowledged that properly-certified class actions can serve to deter wrongdoing, *see, e.g.*, *Linder*, 23 Cal. 4th at 435, attempting to deter allegedly wrongful conduct by permitting claims to proceed that do not meet established standards subverts the legitimate role of the justice system. The class action device sometimes facilitates litigation without regard to the legitimate deterrence or punishment function such litigation can arguably serve. The reason is simple: As the Supreme Court has noted, "[f]or better or for worse, the financial incentive that class actions offer to the legal profession is a natural outgrowth of the increasing reliance on the 'private attorney general' for the vindication of legal rights." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338 (1980). The resulting dynamic raises systemic policy concerns:

> Damage class actions have significant capacity to achieve public goals: to compensate those who have been wrongfully injured, to deter wrongful behavior, and to provide individuals with a sense that justice has prevailed. But what drives damage class actions is private gain: the opportunity they offer lawyers to secure large fees by identifying, litigating, and resolving claims on behalf of large numbers of individuals, many of whom were not previously aware that they might have a legal claim and most of whom play little or no role in the litigation process. These financial incentives produce significant opportunities for lawyers to make mischief, and to misuse public and private resources for litigation that does not serve a useful social purpose. How to respond to this dilemma is the central question for public policy.

Class Action Dilemmas: Pursuing Public Goals for Private Gain, 6-7 (Rand Institute for Civil Justice 2000); *see also cf. Blue Chip Stamps v. Superior Court of Los Angeles County*, 18 Cal. 3d 381, 386 (1976) ("[W]hen the

individual's interests are no longer served by group action, the principal – if not the sole – beneficiary then becomes the class action attorney. To allow this is to sacrifice the goal for the going, burdening if not abusing our crowded courts with actions lacking proper purpose.") (internal citations and quotations omitted).

No doubt, class actions can serve legitimate societal objectives. But to justify private class action litigation solely on a deterrence or punishment rationale where plaintiffs' lawyers wield the power of selecting targets of litigation efforts undermines the legitimacy of the class action procedure and threatens damage to the constitutional rights of defendants. Stretching the class action device beyond its legitimate sphere of operation does not serve a legitimate deterrent function, but rather bestows on private parties (and their attorneys with profit motives) the power to engage in a form of "legalized blackmail" against defendants who have not been proven blameworthy. *See, e.g., In re Rhone-Poulenc, Inc.*, 51 F.3d 1293 (7th Cir. 1995), *cert. denied sub-nom, Grady v. Rhone-Poulenc Inc.*, 516 U.S. 867 (1995).[11] Given the

[11] Although plaintiffs posit that "only class certification can redress . . . wrongdoing and thereby deter" the conduct alleged to have occurred here (Plaintiffs' Br. 11), the legal system already provides ample avenues to deter the kinds of wrongful conduct alleged to have occurred in this case. If a defendant's conduct is legally blameworthy, criminal law provides the most obvious ruler to measure whether the defendant's conduct is worthy of punishment. Regulatory agencies play an important role in setting standards and deterring unlawful conduct through administrative, civil and criminal proceedings. In the civil arena, myriad legal organizations exist specifically for the purpose of providing lawyers to act as "private attorneys general" to deter conduct in a range of circumstances deemed "socially beneficial" by the membership of those organizations. Finally, where state and federal governments desire to deter conduct deemed socially undesirable, legislative bodies often pass legislation that awards attorneys fees to plaintiffs who successfully pursue such litigation.

reality that the "grant of class status can put considerable pressure on the defendant to settle, even when plaintiff's probability of success on the merits is slight," *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832 (7th Cir. 1999), the failure to adhere to class certification requirements illegitimately encourages litigation settlements that do not in any way reflect the merits of underlying claims.

Finally, although neither the federal nor state constitution confers any right to prosecute a claim by a class action vehicle, s*ee People v. Kelii*, 21 Cal. 4th 452, 459 (1999), a plaintiff's "right to medical monitoring . . . raises issues of fact which defendants have a due process right to litigate." *Lockheed Martin Corp.*, 94 Cal. Rptr. 2d at 658; *accord Potter*, 6 Cal. 4th at 1009; *Gutierrez v. Cassiar Mining Corp.*, 64 Cal. App. 4th 148, 153, 156 (1998). Under this Court's decision in *Potter*, a defendant's liability to pay for an individual's medical monitoring depends on individual issues relating to exposure, personal characteristics, pre-existing conditions and lifestyle factors – each of which, as the Court of Appeals recognized, presents an issue a defendant is constitutionally entitled to litigate fully. *Lockheed Martin Corp.*, 94 Cal. Rptr. at 657-58. For this reason, to allow factual determinations concerning a particular individual's entitlement to medical monitoring to be addressed during the medical monitoring process itself, *after* the defendant has already been held liable to pay for the program (*see* Plaintiffs' Br. 21-22), would violate a defendant's constitutional rights.[12] As

[12] The argument that individual issues concerning liability can be determined as part of the administration of a medical monitoring program was properly rejected in *Thompson v. American Tobacco Co.*, 189 F.R.D. 544 (D. Minn. 1999). The plaintiffs in *Thompson* contended that the individualized inquiry regarding each plaintiff's injury and the nature and extent of the medical monitoring required by each class member could be

this Court has observed, "[o]nly in an extraordinary situation would a class action be justified where, subsequent to the class judgment, the members would be required to individually prove not only damages but also liability." *City of San Jose v. Superior Court*, 12 Cal. 3d at 463.

Similar reasons dictate rejection of the suggestion, also made by plaintiffs below, that "individual factors are not important in determining the suitability of a class action because they are seeking a court-supervised fund and not payment of monetary damages to individual class members." *Lockheed Martin Corp.*, 94 Cal. Rptr. 2d at 659. The mere fact that plaintiffs seek a single remedy in the form of medical monitoring damages does not eliminate any of the elements necessary to prove each individual's entitlement to medical monitoring. *See City of S. Pasadena v. Department of Transp.*, 29 Cal. App. 4th 1280, 1293 (1994) (finding that an injunction is a remedy, and may only be issued if the underlying cause of action is established). As the Court of Appeal determined, the "remedy [plaintiffs] seek does not avoid the reality that entitlement to that remedy depends upon factors unique to each individual class member." *Lockheed Martin Corp.*, 94 Cal. Rptr. 2d at 659.

To hold otherwise would be to rewrite the substantive law of California to allow imposition of medical monitoring liability based upon nothing more than exposure and to ignore this Court's directive that individual exposure, personal characteristics and pre-existing conditions are

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determined by the administrators of a court-supervised medical monitoring fund after the court determined the defendant's general liability for medical monitoring damages. *Thompson*, 189 F.R.D. at 555. The trial court, however, properly rejected plaintiffs' attempt to establish injury by use of the medical monitoring remedy. *Id.*

components of *every* medical monitoring claim. *Id.* at 657; *Potter*, 6 Cal. 4th at 1009 (medical monitoring damages may not be based solely "upon a showing of an increased but unquantified risk resulting from exposure to toxic chemicals") (citation omitted).

California law properly does not allow courts to ignore substantive law simply to permit class treatment:

> We decline to alter . . . rule[s] of substantive law to make class actions more available. Class actions are provided only as a means to enforce 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.

City of San Jose, 12 Cal. 3d at 462; *see also Granberry v. Islay Invs.*, 9 Cal. 4th 738, 749 (1995); *Mirkin v. Wasserman*, 5 Cal. 4th 1082, 1103 (1993). Because plaintiffs cannot demonstrate "that the individual questions [in any class action here] will not overwhelm the common questions, unless some of the required elements or allowed defenses [in] respect to the alleged claims are eliminated or impaired," *In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir. 1974), the Court of Appeal appropriately denied class certification in this case.

VI. PREFERENTIAL TREATMENT OF CERTAIN CLASSES OF LITIGANTS SHOULD BE ACCORDED – IF AT ALL – BY THE LEGISLATURE, NOT THE COURTS.

The legislature has the power, within constitutional limits, to provide incentives to plaintiffs to pursue claims for medical monitoring if the legislature determines that public policy favors increased litigation of such claims. "In categories of cases where the [l]egislature wants to encourage litigation it can intervene to alter the decision-making equation[,]" where

plaintiffs otherwise might find litigation cost-prohibitive. *Covenant Mutual Ins. Co. v. Young*, 179 Cal. App. 3d 318, 325 (1986).[13]

When (as here) a proposed class falls outside the parameters of established class action procedure, however, a court's inquiry should be at an end. "Sweeping modifications of tort liability law fall more suitably within the domain of the [l]egislature, before which all the affected interests can be heard and which can enact statutes providing uniform standards and guidelines for the future." *Dumas v. Cooney*, 235 Cal. App. 3d 1593, (1991) *review denied* (Mar. 12, 1992) (quotations omitted). Legislatures have tools – unavailable to the courts – that make them uniquely well-situated to reach fully informed decisions about the need for broad public policy changes in the law.[14] Whether the machinery of the State of California should depart from existing law to facilitate the litigation of medical monitoring claims

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[13] For example, fee-shifting statutes make "it economical to seek redress not just in aggravated cases where the potential economic recovery is huge but in modest cases as well" because "the injured person knows he will not have to absorb his own lawyer's legal fees, at least if he wins." *Covenant Mutual Ins.*, 179 Cal. App. 3d at 325. When the legislature deems it appropriate to provide a statutory incentive in particular cases, "injured parties [are] able to file more lawsuits and the public policy behind the substantive statute – whatever it may be – [is] enforced more broadly and more effectively." *Id.*

[14] *Mirkin*, 5 Cal. at 1104 ("[W]e have emphasized in recent decisions that courts should be hesitant to 'impose [new tort duties] when to do so would involve complex policy decisions' [citation] especially when such decisions are more appropriately the subject of legislative deliberation and resolution.'"); *Wasylow v. Glock, Inc.*, 975 F. Supp. 370, 381 (D. Mass. 1996) ("Frustration at the failure of legislatures to enact laws sufficient to curb handgun injuries is not adequate reason to engage the judicial forum in efforts to implement a broad policy change.").

implicates policy issues that should be weighed and determined by the California legislature, not this Court.

Allowing the legislature to make this choice in the first instance also makes sense because any relaxation in the standard for class certification for medical monitoring claims promises to flood California with class action litigation. California courts already handle more class action litigation than almost any other state. *See Class Action Dilemmas* at 62-63 (identifying California as a "hot state" for class action litigation based on case filing data). To the extent California applies a more permissive standard for class certification of medical monitoring claims than federal courts or other state courts, California will become the forum of choice for nationwide medical monitoring litigation. *See* Georgene Vairo, *Judicial v. Congressional Federalism: The Implications of the New Federalism Decisions on Mass Tort Cases and Other Complex Litigation,* 33 Loy. L.A. L. Rev. 1559, 1597-99 & n.204 (2000) (describing "flight to state courts" for class action litigation triggered by the restrictive stance toward class certification in the mass tort context taken by federal courts). The decision to accept that consequence is not one that should be made lightly, if at all, and should properly be left to the elected branch of government.

VII. CONCLUSION

For all the reasons stated above, the Chamber respectfully submits that this Court should confirm that California law requires proposed medical monitoring classes to meet the same certification standards as other proposed classes and, accordingly, affirm the unanimous decision of the Fourth District Court of Appeal below.

Dated: December 27, 2000

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CERTIFICATE OF SERVICE BY MAIL

I, Rebecca A. Womeldorf, declare as follows:

I am over the age of eighteen years and am not a party to this action; my business address is 1350 I Street, N.W., Washington, D.C., 20005; I am an attorney with the law firm of Spriggs & Hollingsworth and am currently working with Marc S. Mayerson, a member of the bar of this Court, and at his direction, on June 11, 2015, I served the within:

BRIEF OF CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS LOCKHEED MARTIN CORPORATION, *ET AL*.

by forwarding a true copy thereof by overnight courier to each of the persons named below at the address shown:

SEE ATTACHED SERVICE LIST

I certify under penalty of perjury that the foregoing is true and correct, that the foregoing document was printed on recycled paper, and that this Certificate of Service was executed by me on December 27, 2000, in the District of Columbia.

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