

**IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA, THIRD DISTRICT**

**Case No. 3D03-403**

**ARCHSTONE-SMITH OPERATING TRUST, et al.,**

**Defendants/Appellants.**

**vs.**

**RACHEL J. HENRIQUES, et al.,**

**Plaintiffs/Appellees,**

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**BRIEF OF AMICI CURIAE THE CHAMBER OF COMMERCE OF THE  
UNITED STATES, THE NATIONAL MULTI HOUSING COUNCIL, THE  
NATIONAL APARTMENT ASSOCIATION, THE NATIONAL LEASED  
HOUSING ASSOCIATION, THE BUILDING OWNERS AND MANAGERS  
ASSOCIATION INTERNATIONAL, THE NATIONAL ASSOCIATION OF  
INDUSTRIAL AND OFFICE PROPERTIES, THE FLORIDA  
APARTMENT ASSOCIATION, THE NATIONAL ASSOCIATION OF  
REAL ESTATE INVESTMENT TRUSTS, INC., AND THE REAL ESTATE  
ROUNDTABLE IN SUPPORT OF DEFENDANTS/APPELLANTS**

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**Filed by leave of Court**

**ON APPEAL FROM THE ELEVENTH JUDICIAL CIRCUIT  
IN AND FOR MIAMI-DADE COUNTY, FLORIDA**

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## **IDENTITY AND INTEREST OF AMICI**

Amici submit this brief pursuant to the Court's order of March 11, 2003. Amici are national and state trade organizations representing, among others, developers, financiers, architects, builders, owners, and managers of residential, commercial, and industrial buildings. Amici believe that the certification decision at issue here not only violates the rights of the defendants in this case, but also threatens those of their members who have various interests in multi-occupant buildings located in Florida.

The trial court's order broke legal ground by certifying the first ever single-building/multiple-occupant mold-exposure class action in the country. Unless the class certification is reversed, other Florida courts may do the same, and mold-exposure class action filings will multiply. Accordingly, the amici have a strong interest in explaining to this Court why a single-building/multiple-occupant mold-exposure case cannot be litigated as class action within the boundaries of fairness and due process established by Florida Rule of Civil Procedure 1.220(b)(3) and the Fourteenth Amendment.

## **ARGUMENT**

### **I. CASES INVOLVING ALLEGED HARM FROM INDOOR MOLD ARE PARTICULARLY UNSUITED FOR CLASS ACTION TREATMENT.**

#### **A. The Growth Of Mold Litigation.**

People have lived with mold as long as they have lived indoors. Until the mid-1990's, the close and constant association between people and indoor mold spawned

only a few lawsuits. See John Parker Sweeney & Sheri A. Mullikin, *The 'Mold Monster': Myth or Menace?*, 1 Mealey's Litig. Rep.: Mold 1, 1 & nn.4-5 (2001) (citing 8 cases prior to 1996). In the late 1990's, however, Americans lost their ability to live non-litigiously with this ubiquitous organism. Although there has been neither a demonstrable increase in the quantity of mold, nor any significant change in the scientific evidence related to the health effects of mold, there *has* been an explosion of mold litigation.<sup>1</sup> See, e.g., Dennis Hevesi, *The Turmoil over Mold in Buildings*,

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<sup>1</sup> This explosion was caused by a combination of misleading medical reports, media hype, and the possibility of large verdicts in what promised to be an enormous number of mold cases. "The current concern about toxic mold really started several years ago after federal health officials blamed mold in dilapidated homes in Cleveland for a cluster of 10 cases of *pulmonary hemorrhage* (bleeding in the lungs). But the report was later retracted when outside reviewers found critical mistakes in the investigation." *The Truth About Mold*, 28 Harv. Health Letter 3 (Harv. Med. Sch.), Jan. 2003, at 2; see also United States Centers for Disease Control and Prevention, *Update: Pulmonary Hemorrhage/Hemosiderosis Among Infants - Cleveland, Ohio, 1993-1996*, 49 Morbidity & Mortality Wkly. Rep. 9, 180 (2000) (discussing the retraction of the original report). Although the Cleveland report was retracted, the popular media became infatuated with the possibility that mold, an organism we all live with, might be dangerous or even deadly. See, e.g., 48 Hours: *This Mold House* (CBS television broadcast, Mar. 2, 2000); Michelle Conlin, *Is Your Office Killing You? Sick Buildings Are Seething with Molds, Monoxide — and Worse*, Business Week, June 5, 2000, at 114. This media attention — along with a few large high-profile verdicts — sparked an epidemic of mold-litigation that has swept across the country. See, e.g., Sweeney, *supra*, at 1-2. Today, "it is almost impossible to follow local or national news without learning about new mold claims being made by building occupants including employees, homeowners, apartment tenants, parents, and school children." *Id.* at 1.

This public hysteria also caused insurance claims relating to indoor mold to skyrocket from \$200,000,000 in 2000 to \$2,500,000,000 in 2002. See, Dean Calbreath, *Increasingly Expensive Mold Infestation Claims Wreaking Havoc*, Copley News Service, Feb. 18, 2003. This is "a key reason [that insurers] are charging more

N.Y. Times, Mar. 23, 2003, § 11, at 1 (“about 10,000 mold-related lawsuits have been filed nationwide in the last three years”).

Until now, courts have confined this epidemic of litigation to traditional single-plaintiff lawsuits. Attempts to certify single-building/multiple-occupant classes have been rejected by several courts. For example, a New York trial court refused to certify a class of “[a]ll . . . residents . . . at Phipps Plazas, \* \* \* who have suffered personal injuries and/or emotional distress as a result of exposure to various chemicals, fungi, mycotoxins, bacteria, construction debris and other toxic substances due to the defendants’ negligence.” *Davis v. Henry Phipps Plaza South*, No. 116331/98 (N.Y. Sup. Ct. Aug. 8, 2001) (Order denying class certification at 11) (alteration and first two omissions in original). The court held that “[w]hile some factual issues could perhaps be resolved in a class action format, these issues are thoroughly intertwined with those that must be determined individually,” such as “[t]he specific conditions which subjected individual Plaintiffs to mold exposure,” “[d]efendants’ repair and remediation efforts,” and “causation and \* \* \* comparative negligence.” *Id.* at 12.

The California Court of Appeals has reached the same conclusion. *See Wheeler v. AvalonBay Communities*, No. B 153535, 2002 Cal. App. Unpub. LEXIS 10906

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for insurance policies and halting coverage of homeowners who have filed water damage claims.” *Id.* Indeed, in thirty-five states insurers have successfully lobbied to exclude mold claims from insurance policies unless the damage results from another covered loss. *Id.*

(Cal. App. Nov. 22, 2002). Plaintiffs sought certification of a class of “all persons who were, or are, residents of the apartment units owned by AVALONBAY COMMUNITIES, INC. \* \* \* who have been exposed to toxic materials in the apartments including, without limitation, to bioaerosols emanating from excessive levels of mold, mildew and fungus and/or pesticides and/or other chemicals.” *Id.* at \*3. The appellate court quoted the trial court’s order denying class certification with approval, finding that “each purported class member would have to prove exposure to a particular toxic substance, the timing of such exposure, and the effect of such exposure; Defendants would legitimately seek to present evidence of exposure other than at the apartment complex for each class member.”<sup>2</sup> *Id.* at \*8-9. The reasoning and conclusions of these decisions are clearly correct. Due to the nature of such claims and the characteristics of mold, individual issues must predominate over any potential common issues in a purported single-building/multiple-occupant class action in which plaintiffs seek damages for exposure to mold.

## **B. The Growth Of Mold.**

Molds are naturally occurring members of the fungi kingdom. They reproduce and spread through the distribution of spores. An individual mold spore can enter a

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<sup>2</sup> The appellate court also upheld the trial court’s conclusion that “no amendment will cure the problems [with the complaint] and Plaintiffs can never realistically prove community of interest in law and facts concerning liability and causation, either as to the personal injury cause of actions or the remaining cause of actions [sic].” *Id.* at \*15.

building in many ways, including through open doors or windows or by becoming attached to pets, clothes, or other personal items that enter the building. *See, e.g.,* Centers for Disease Control and Prevention, *Questions and Answers on Stachybotrys Chartarum and Other Molds* (“CDC Q&A”), Q.3, at <http://www.cdc.gov/nceh/airpollution/mold/stachy.htm> (last reviewed Nov. 30, 2002). In order to begin germinating, a mold spore needs only an appropriate nutrient base (*e.g.*, wood, paper, cloth, or dust) and moisture. *Id.* Some species of mold require a constant source of standing water while others can thrive on just the humidity in the air. *See, e.g.,* Stephen J. Henning & Daniel A. Berman, *Mold Contamination: Liability and Coverage Issues: Essential Information You Need to Know for Successfully Handling and Resolving Any Claim Involving Toxic Mold*, 8 *Hastings W.-NW. J. Envtl. L. & Pol’y* 73, 80 (2001). Once they have a nutrient base and water, the spores of some species of mold can produce a mold colony, growing at an exponential rate, within 24 to 48 hours. *See, e.g.,* Envtl. & Occupational Disease Epidemiology, N.Y. City Dept. of Health & Mental Hygiene, *Facts About Mold*, at <http://www.ci.nyc.ny.us/html/doh/html/epi/epimold.html> (Feb. 2001).

Because molds spread so rapidly and require so little to thrive, “[they] are ubiquitous in nature and grow almost anywhere indoors and outdoors.” *State of the Science on Molds and Human Health: Hearing Before the Subcomms. on Oversight and Investigations and Housing and Community Opportunity, House Comm. on*

*Financial Services*, 107th Cong. (July 18, 2002) (statement of Stephen C. Redd, M.D., Chief, Air Pollution and Respiratory Health Branch National Center for Environmental Health, Centers for Disease Control and Prevention) (“Redd Statement”), *available at* 2002 WL 1587891 (F.D.C.H.). “In the natural environment man is exposed to more than 100 species of airborne or dust-bound microfungi. Fungal spore counts frequently exceed pollen counts in the atmosphere by 1000-fold.” Robert K. Bush and John W. Yunginger, *Standardization of Fungal Allergens*, 5 *Clin. Rev. Allergy* 3 (1987). Not only are they ubiquitous in nature generally, but “[m]olds are very common in buildings and homes and will grow anywhere indoors where there is moisture.” CDC Q&A, *supra*, at Q.2.

“Exposure to molds \* \* \* and their spores is unavoidable except when the most stringent of air filtration, isolation, and environmental sanitation measures are observed, eg, [sic] in organ transplant isolation units.” Am. Coll. of Occupational & Env'tl. Med., *Evidence Based Statements: Adverse Human Health Effects Associated with Molds in the Indoor Environment* 1 (Oct. 27, 2002) (“ACOEM”), *available at* <http://www.acoem.org/guidelines/pdf/Mold-10-27-02.pdf>. Exposure to mold can occur either through physical contact with mold growth on a surface, inhalation of mold spores and airborne fragments, or ingestion of mold on food. In addition, some molds produce microbial volatile organic compounds (“MVOCs”), which become airborne and account for the unpleasant odors and tastes associated with some mold.

*Id.* at 4. Under certain conditions, some species of mold will also produce secondary metabolites known as mycotoxins. *Id.* Mycotoxins are large molecules that do not become airborne except when attached to a mold spore or particle that is airborne. *Id.*

Possible health effects associated with mold exposure generally fall into one of three categories: allergic, infectious, or toxic. *See, e.g.,* ACOEM, *supra*, at 1. First, a small but significant percentage of people suffer from mold allergies. *See, e.g., id.* at 2. Second, certain immunocompromised individuals may suffer opportunistic mold infections, usually in their lungs. *See, e.g., id.* at 3. Finally, **ingestion** of certain molds and mycotoxins growing on foods can produce a toxic effect. *See, e.g., id.* at 4. The effect can be quite serious, ranging from headache and nausea to death. *See, e.g.,* Coreen A. Robbins et al., *Health Effects of Mycotoxins in Indoor Air: A Critical Review*, 15 Applied Occupational & Env'tl. Hygiene 773, 775 (2000). Despite media hype, there is no scientific proof that exposure to indoor mold through **physical contact** or **inhalation** produces a similar toxic health effect.<sup>3</sup>

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<sup>3</sup> *See, e.g.,* ACOEM, *supra*, at 4-5; Robbins, *supra*, at 774; Redd Statement, *supra* (“Linkages between indoor airborne exposures to molds and other health effects [beside infections and allergies] have not yet been scientifically substantiated”); Yehudith Assouline-Dayana et al., *Studies of Sick Building Syndrome. IV. Mycotoxicosis*, 39 J. of Asthma 191 (2002) (“there is no evidence in humans that mold exposure leads to nonmucosal pathology”); Texas Medical Association’s Council on Scientific Affairs, *Black Mold and Human Illness*, CSA Report 1-I-02, at 4 (Sept. 2002) (“the proposition that molds in indoor environments may lead to adverse health effects through mechanisms other than infection and allergic/immunologic reactions is an untested impression”), available at [http://www.texmed.org/has/CSA Black Mold.doc](http://www.texmed.org/has/CSA%20Black%20Mold.doc); John Payne et al., *Latest Developments in Mold Exposure Litigation*, 17-

Although mold does cause allergic reactions or infections in some people, “[i]t is not known \* \* \* what quantity of mold is acceptable in indoor environments with respect to health.” Redd Statement, *supra*. “[B]ecause individuals have different sensitivities to molds, setting standards and guidelines for indoor mold exposure levels is difficult and may not be practical.” *Id.*; *see also* CDC Q&A, *supra*, at Q.15 (“Standards for judging what is an acceptable, tolerable, or normal quantity of mold have not been established.”).

**C. The Class Action Is Not An Appropriate Vehicle For Bringing Mold-Exposure Claims Because The Science Of Mold Does Not Permit Class-wide Proof And Individual Issues Will Predominate.**

Proof of a mold exposure claim will necessarily be dominated by individualized inquiries. Even if the plaintiffs were exposed to mold under laboratory-like conditions, the central questions of causation — whether and to what extent a standardized dose of mold affected each of them — would demand a detailed inquiry into each plaintiff’s medical history, lifestyle, and environment. And the individuality of each claim is even greater in real life, where the quantity and type of mold, the

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Fall Nat. Resources & Env’t. 132 (2002) (describing studies conducted by the CDC, California Department of Health Services, California Research Bureau, Washington State Department of Health, and two individual scientists finding no toxic effect).

Some plaintiffs’ experts have argued that certain animal studies establish the toxic effect of low-level chronic inhalation of indoor mold. However, the scientific community has found these studies lacking in scientific merit and the causal connection unproven. *See, e.g.*, Yehudith Assouline-Dayana, *supra* (criticizing studies for various methodological errors and disanalogies to human pathophysiology); Robbins, *supra* (same).

duration and method of exposure, and the cause of the mold growth itself are different in each case. The following sections describe various characteristics of mold and indoor mold exposure that serve to make mold-exposure claims “uniquely individualized” and hence to preclude class-wide proof in any single-building/multiple-occupant class action. *See Liggett Group, Inc. v. Engle*, No. 3D00-3400, slip op. at 11, 14 n.9, 16 (Fla. 3d DCA May 21, 2003) (decertifying class of smokers because, *inter alia*, “specific medical causation is inherently individualized” and “each class member had unique and different experiences that will require the litigation of substantially separate issues”).

1. *The amount and type of mold present in a building unit and the causes of that mold growth vary from unit to unit.*

Although mold is present everywhere, the extent and type of mold growth within a building can vary dramatically between apartments and even from room to room. The species of mold in a unit will depend on which spores entered when a door or window was left open or by becoming attached to clothing or pets. *See, e.g., CDC Q&A, supra*, at Q.3. The *extent* of mold growth will depend on environmental factors such as humidity, temperature, airflow, and nutrient base; whether the mold has been left alone or disturbed; and whether any chemicals such as cleaning agents have been applied to the mold. *See, e.g., Harv. Health Letter, supra*, at 1. Thus, to determine the type and extent of mold growth in a particular apartment requires a first-hand investigation.

Furthermore, many of the factors that affect mold growth in apartments depend on choices made by the occupants: presence and type of carpeting; type and positioning of furniture; presence, type and cleanliness of pets; temperature; use of air conditioning or alternate ventilation systems; whether and how often doors or windows are left open; cleanliness habits of the occupants; and any alteration of the airflow in the unit (caused by, *e.g.*, closed vents or general clutter). *See, e.g., id.* There is no single cause of mold growth in most apartments, but rather a large set of contributing factors. Thus, establishing the causes of mold growth in an apartment requires a detailed individualized investigation.<sup>4</sup>

2. *The existence, amount, and type of mycotoxins produced are idiosyncratic to each instance of mold growth.*

Only a select group of molds produce mycotoxins. Robbins, *supra*, at 774. Moreover, “[m]ycotoxin production for a given species is highly dependent on growth conditions, such as nutrient availability, temperature, and humidity.”<sup>5</sup> *Id.*; *see also*

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<sup>4</sup> Although amici have chosen to focus on the personal injury aspects of plaintiffs’ claims, the necessity for individualized proof of causation with regard to mold in an apartment unit also undermines the ability to determine property damages claims on a class-wide basis. The uniqueness of each individual’s apartment home, as well as other factors related to the effect of mold on physical substances, weigh against any attempt to certify a class limited to property damage claims (in the event plaintiffs were to seek to salvage their class in this way).

<sup>5</sup> For example, “[a]flatoxin production by *Aspergillus* is dependent on concentrations of O<sub>2</sub>, CO<sub>2</sub>, zinc, and copper, as well as physical location.” D.M. Kuhn & M.A. Ghannoum, *Indoor Mold, Toxigenic Fungi, and Stachybotrys Chartarum: Infectious Disease Perspective*, 16 *Clinical Microbiology Reviews* 144, 150 (2003). This toxin is not normally produced by mold growing on building materials. *See, e.g.,*

ACOEM , *supra*, at 4 (“The amount (if any) and type of mycotoxin produced is dependent on a complex and poorly understood interaction of factors that probably include nutrition, growth substrate, moisture, temperature, maturity of the fungal colony, and competition from other microorganisms.”). “Additionally, even under the *same* conditions of growth, the profile and quantity of mycotoxins produced by toxigenic species can vary widely from one isolate to another.” *Id.* at 4 (emphasis added). “[I]t does not necessarily follow from the mere presence of a toxigenic species that mycotoxins are also present.” *Id.*; *see also* Harv. Health Letter, *supra*, at 2; EPA, Indoor Environments Division, *Mold Remediation in Schools and Commercial Buildings* (“EPA, *Remediation*”) (2001), at 42, *available at* <http://www.epa.gov/iaq/molds/graphics/moldremediation.pdf> (last updated June 25, 2001), Kuhn, *supra*, at 147. Because there are no known principles of mycotoxin production (even for individual species), proof of the amount (or even the presence) of mycotoxins in a particular apartment requires a first-hand, particularized, investigation into the actual conditions in that unit.

3. *The exposure of building occupants to mold and/or mycotoxins — even when they are present — depends on the specific environment and activities of the occupants.*

The primary method of exposure to indoor molds and mycotoxins is inhalation.

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Guido Fischer & Wolfgang Dott, *Relevance of Airborne Fungi and Their Secondary Metabolites for Environmental, Occupational and Indoor Hygiene*, 179 *Arch Microbiol* 75, 80 (2003).

See, e.g., California Department of Health Services, *Stachybotrys Chartarum: A Mold That May Be Found in Water-Damaged Homes* (“CDHS, *Stachybotrys*”), at <http://www.dhs.ca.gov/ehib/ehib2/topics/stachygp00.doc> (Nov. 2000). The amount of mold spores and fragments in the air depends on many environmental factors, including the growth substrate, ventilation and general airflow, and physical disturbance. See, e.g., Rafał L. Górny, *Fungal Fragments as Indoor Air Biocontaminants*, 68 *Applied & Env’tl. Microbiology* 3522 (2002). Less obviously, differences in “carpeting type, pets, dust control measures, and humidification” affect airborne spore counts. Kuhn, *supra*, at 146 (citations omitted). Thus, even if an apartment has an elevated level of mold growth, it will not necessarily have an elevated level of airborne spores and fragments. See, e.g., Harriet M. Ammann, Washington State Department of Health, *Is Indoor Mold Contamination a Threat to Health?*, at <http://www.doh.wa.gov/ehp/oehas/mold.html> (last visited May 21, 2003); ACOEM, *supra*, at 6. Also important to apartment residents’ actual exposure levels is the amount of time they spend in their apartment homes. Finally, the timeline of remediation efforts will affect the actual exposure levels of occupants. For all of these reasons, even if two apartments had identical mold growth, the occupants would likely have different exposure levels, and the actual levels would not be ascertainable except by studying the particular conditions of each case.

4. *There is no common effect of mold exposure: some people have no reaction to even elevated levels while others are hypersensitive to small doses.*

“Exposure to mold does not always result in a health problem.” Redd Statement, *supra*; *see also* CDC Q&A, *supra*, at Q.10. Studies indicate that approximately 10% of the population have allergic antibodies to common molds, and that 5% are actually sensitized to mold and thus will suffer allergic symptoms from exposure. ACOEM, *supra*, at 2. Thus, 90-95% of people will not have an allergic response to mold in their apartments. Furthermore, the sensitivity levels of the 5-10% of people who are allergic to mold vary dramatically. *Id.* “What one person can tolerate with little or no effect, may produce symptoms in another similarly exposed individual. In fact, the reaction to both the amount and types of mold varies from one person to the next.” Minnesota Department of Health, *Indoor Mold: Hazard Identification and Control*, at <http://www.health.state.mn.us/divs/eh/indoorair/mold/hazardid.html> (last updated April 14, 2003); *see also* Redd Statement, *supra*. Because each person reacts (or doesn’t react) to mold differently, “[s]tandards for judging what is an acceptable, tolerable, or normal quantity of mold have not been established.” CDC Q&A, *supra*, at Q.15; *see also* Redd Statement, *supra*.

For those who do suffer from mold allergies, the symptoms caused by exposure “are most commonly experienced as allergic asthma or allergic rhinitis (‘hay fever’).” ACOEM, *supra*, at 1. A person with mold-induced “hay fever” may have only a mild

runny nose or may experience itching/watering eyes, general congestion, atopic dermatitis, or asthma symptoms. *See, e.g., id.* at 2. Although some individuals' symptoms get worse if they are exposed to a greater quantity of mold, for others mold-allergy symptoms are not directly correlated with the amount of exposure. *See, e.g., Bush, supra*, at 5-6; Fischer, *supra*, at 77. And “[allergic] reaction is highly specific[;] it is possible that even closely related mold species may cause allergy, yet that allergy may not be detected [upon exposure to another mold].” Ammann, *supra*; *see also* Bush, *supra*, at 14-15. The severity of an individual's allergic reaction to a given species and quantity of mold (and whether there will be one at all) cannot be known without an individualized analysis of her allergic sensitivities.

5. *Symptoms associated with mold allergies are non-specific and may be caused by many environmental and health factors.*

The allergic symptoms commonly caused by mold “are very nonspecific and may be related to exposure to other sources (such as dust mites, animal dander, pollen or other allergens) or to infectious agents such as viruses that cause common colds or flu.” CDHS, *Stachybotrys, supra*. In general, moreover, people who exhibit allergic responses to mold are also allergic to other environmental allergens. ACOEM, *supra*, at 2. The actual cause of an individual's allergic symptoms, therefore, cannot be attributed to mold in her apartment (or to mold at all) without a medical analysis of her allergic sensitivities and other health conditions.

6. *Allergic reactions to mold may be exacerbated by a person's behavior, work, or other factors.*

Sensitivity to mold can be heightened, and symptoms of mold allergies can be exacerbated, by many factors, including other allergies, exposure to certain chemicals or biological agents, and various health-related lifestyle choices. For example, “marijuana smoking may lead to development of fungal hypersensitivity reactions,” and smoking in general will make allergic symptoms worse (especially respiratory symptoms). Bush, *supra*, at 6. A person’s work may also cause or exacerbate allergic symptoms. See, e.g., Fischer, *supra*, at 77 (“professions in the fields of agriculture, forestry \* \* \* food production, \* \* \* [and] [w]aste collectors are at increased risk”). Finally, other general health conditions, including “mental stress,” are correlated with higher levels of allergic symptoms. See, e.g., Assouline-Dayana, *supra*, at 196. Even if an individual is experiencing an allergic reaction to mold in her apartment, an individualized analysis may reveal that other factors are contributing to her symptoms or that she is responsible for exacerbating her condition.

7. *Individuals who suffer from asthma may experience varying responses to mold in the air, but asthmatic symptoms can be caused or exacerbated by many factors.*

“Molds can trigger asthma attacks in persons who are allergic (sensitized) to molds. The irritants produced by molds may also worsen asthma in non-allergic (non-sensitized) people.” EPA, *Remediation*, at 40. However, most individuals will not

have an asthmatic response to inhalant mold because they are not asthmatic.<sup>6</sup> *See, e.g.,* 1 American Academy of Allergy, Asthma, and Immunology, *The Allergy Report* (“AAAAI, *Allergy*”) at 2 (2001), *available at* <http://www.theallergyreport.org/reportindex.html> (approximately 15 million Americans are asthmatic). Among asthmatic individuals, “[t]he types and severity of symptoms depend, in part, on the types of mold present, the extent of an individual’s exposure, the ages of the individuals, and their existing sensitivities or allergies.” EPA, *Remediation, supra*, at 40.

Much like general allergic symptoms, asthma may be caused or exacerbated by many environmental factors. Animal dander, dust mites, pollens, tobacco smoke, air pollution, perfumes, and changes in humidity can all be “triggers” for asthma. *See, e.g.,* 2 AAAAI, *Allergy, supra*, at 51-53. Other individuals may suffer asthma symptoms in response to aspirin, sulfites, or beta-blockers. *See, e.g., id.* And “the most common cause of asthma symptoms” is “viral respiratory infection.” *Id.* at 53. The causes of an individual’s asthma symptoms (and any exacerbating effects) cannot be determined without an individual medical evaluation.

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<sup>6</sup> Molds do not cause asthma to develop. They only exacerbate symptoms in people who already suffer from asthma. *See, e.g.,* Redd Statement, *supra*.

8. *Individual testing is necessary to identify the source of a mold infection.*

Certain species of mold (*e.g.*, *Aspergillus fumigatus*) may infect the lungs or other opportunistic sites within individuals who have weakened immune systems. *See, e.g.*, Fischer, *supra*, at 76; EPA, *Remediation, supra*, at 41. Because a mold infection involves the growth of a particular species of mold in or on the human body, potential sources of the infection can be either confirmed or ruled out through individual testing. *See* ACOEM, *supra*, at 3. Although it may be impossible to determine the actual source of the infection, it is possible to rule out certain potential sources, such as an individual's apartment, if the relevant species is not found there. Therefore, individual testing is required to identify the cause of a mold infection.

9. *Because there is no proven link between indoor mold exposure and health effects other than exacerbation of existing allergies and asthma, to the extent any member of the class seeks to recover for any other health effects, there is no conceivable way in which causation could be established on a class-wide basis.*

Despite widespread media hype over “toxic mold,” scientific study has not established any connection between exposure to indoor mold and any effect other than allergies, asthma, or infections. *See, e.g.*, authorities cited at note 3, *supra*. Amici believe that a toxic effect from inhalation of indoor mold cannot be proved — either in a class action or an individual suit — given the current state of the science. However, any attempt to do so in this case cannot possibly be accomplished on a class-wide basis. Among many potential subjects of individualized proof, there would

have to be evidence that the individual was susceptible to the mycotoxin in question, proof that the mycotoxin was actually present in the apartment and that the individual was exposed to a dose (whether low-level chronic or a single large dose) exceeding her tolerance level, proof that this particular dose of inhaled mycotoxins can cause certain symptoms, proof that the individual suffered those symptoms, and proof that the individual's symptoms do not have another scientifically recognized cause.

\* \* \* \* \*

In sum, these and other individual factual issues would inevitably swamp any common ones in a single-building/multiple-occupant mold-exposure case, making class status improper under Florida Rule of Civil Procedure 1.220(b)(3). *See, e.g., Braun v. Campbell*, 827 So. 2d 261, 267 (Fla. 5th DCA 2002) (“Where both liability and damages depend on individual factual determinations, resolution of these claims can only be decided on an individual basis which is inconsistent with the commonality requirement for class actions.”).

## **II. THIS CASE CANNOT BE TRIED AS A CLASS ACTION WITHOUT VIOLATING THE DEFENDANTS' DUE PROCESS RIGHTS.**

If a single tenant living in defendants' apartment building were to sue for injuries allegedly caused by mold in her apartment, she would have to prove by competent admissible evidence, among other things, that: (i) there was mold growth in her apartment, (ii) the mold growth was caused by the defendants' negligence, (iii) she was exposed to a certain type and amount of mold, (iv) she was biologically

susceptible to that mold exposure, (v) she actually suffered from certain relevant symptoms, and (vi) her symptoms were caused by the mold in her apartment rather than other environmental or health-related factors. She would also have to prove that she suffered damages, and in what amount.

For their part, defendants would have a right to present all of the evidence available to them under Florida law. *See, e.g., Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (“[d]ue process requires that there be an opportunity to present every available defense”) (quotation and citation omitted). Specifically, they would have the right to present rebuttal evidence on each element of the plaintiff’s case, including evidence that: (a) the mold growth was caused or made worse by the plaintiff’s behavior, (b) the specific type and/or quantity of mold in her apartment has not been proven scientifically to cause the symptoms she alleges, (c) she is not biologically susceptible to the mold in her apartment (*e.g.*, she is not allergic to mold or to that species of mold), (d) although there is mold in her apartment, for various reasons she did not receive a significant dose (*e.g.*, she was rarely present in the apartment), (e) any mold in her apartment did not produce mycotoxins (if she is attempting to establish a toxic effect), (f) her symptoms were caused by another source (*e.g.*, exposure to another allergen or a pre-existing health condition), and/or (g) her symptoms were exacerbated by another environmental condition or her own behavior (*e.g.*, smoking).

In the class action setting, too, no claimant’s right to collect damages for mold

exposure could be determined without individualized proof on these issues. *See Engle*, slip op. at 31 (“Specific medical causation and legal causation, along with other elements of liability, must be established on an individualized basis.”); *id.* at 17 (“affirmative defenses and damages must be litigated individually”). Even if the claims of hundreds of tenants were lumped together in a single action, each plaintiff’s burden to make these separate showings, the defendants’ right to investigate and challenge each plaintiff’s evidence and to offer individualized defenses, and the trial court’s duty to make individualized case-by-case findings on these issues would be undiminished. *Id.* at 60-61 n.48 (class action device may not be used to “alter the substantive rights of the parties in [the plaintiffs’] favor”). Thus, if this case is allowed to proceed as a class action, the trial will either be dominated by individual issues for each of hundreds of class members, or it will violate the due process clause by relieving plaintiffs of their obligation to prove each element of their case and depriving defendants of their right to present evidence in their defense.<sup>7</sup> Because neither alternative is permissible, this class should be decertified.

## CONCLUSION

The Court should reverse with instructions to decertify the class.

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<sup>7</sup> The trial court avoided these issues by failing to explain how it intended to manage this case as a class action. Under federal case law, which Florida courts deem “persuasive authority” (*Engle*, slip op. at 11 n.5), that omission alone justifies reversal. *See Castano v. American Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996).

Respectfully submitted this 27th day of May, 2003.

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