In the Court of Appeal of the State of California

First Appellate District

Division Two

BELINDA VAN TONDER, et al., Plaintiffs/Appellants, v. CHEVRON CORPORATION, at al., Defendants/Respondents.	No. A104870 (Judicial Council Coordination Proceeding No. 4103)

Appeal from Order Denying Class Certification, San Francisco County Superior Court, Judge Carlos Bea

BRIEF OF RESPONDENTS

CRAIG E. STEWART #129530
JONES DAY
555 California Street, 26th Floor
San Francisco, CA 94104-1500
Tel.: 415-626-3939
Fax: 415-875-5700

GENNARO A. FILICE III #06112
RICHARD V. NORMINGTON #130228
FILICE BROWN EASSA & MCLEOD LLP
1999 Harrison Street, 18th Floor
Oakland, CA 94612
Tel.: 510-444-3131
Fax: 510-839-7940

Attorneys for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes and Codes

Rules

Other Authorities

INTRODUCTION

"[A] class action cannot be maintained where each member's right to recover depends on facts peculiar to his case." *City of San Jose v. Superior Court,* 12 Cal. 3d 447, 459 (1974). This case falls squarely within that rule. Plaintiffs assert that class certification is proper because class members were "required to shelter-in-place" (Br. 1) and were deprived of their "ability to go about their daily business." Br. 57. But plaintiffs' own pleadings and evidence show that these allegations cannot be established by common proof (assuming they state a viable claim at all). Instead, they depend on each class member's individual circumstances and on the credibility of each class member's individual testimony. The undisputed facts are that:

- A large portion of the class was not required to stay indoors at all, because they lived miles away from the refinery and far outside any zone to which any community notification applied.

- Regardless of where they lived, many plaintiffs did not stay indoors. One plaintiff, for example, who claimed on her questionnaire that she stayed indoors the day of the fire, admitted at her deposition that in fact she did not stay indoors but went on a shopping trip to Oakland as she had previously planned. Plaintiffs admit that this is a "crucial individualized inquiry." Br. 18.

- Even among those who were indoors, many would have been indoors even absent the fire and suffered no disruption of their "daily business." Among these is the plaintiff who admitted at her deposition that, while the shelter notification was in effect, she continued her normal indoor activities in the same manner as she would have on any other day.

- Of those plaintiffs who stayed indoors when they otherwise would not have, a jury properly instructed on the elements of plaintiffs' theories would be entitled to conclude that many did

> not suffer any harm of the kind that would entitle them to any recovery.

The predominance of these and other individual issues precludes class certification, as the trial court found. Under the substantive law governing plaintiffs' claims, plaintiffs who had no reason to shelter, who did not shelter, who would have remained indoors anyway, or who suffered no cognizable harm from remaining indoors have no right to recover. Contrary to plaintiffs' argument, the question is not merely the "measure of damages for each member" (Br. 2)—although the individual amount-of-damages issues here weigh heavily against certification. The issues go directly to liability itself—whether particular class members suffered any injury at all. They are precisely the kinds of issues that the California Supreme Court and other courts have repeatedly held preclude class certification. Indeed, plaintiffs' claims are even less susceptible to class treatment than other claims, because they involve entirely subjective assertions of harm that turn uniquely on the jury's assessment of each plaintiff's individual testimony.

Faced with these irrefutable facts, plaintiffs devote their brief to a series of erroneous diversionary arguments. They first assert that the trial court applied the "wrong criteria" and denied class certification solely because of individual issues over the "amount of damages." Br. 16. In fact, the court's express ruling was that individual issues of *both* "causation and damages" predominated and precluded class certification, which was the same basis upon which *Lockheed Martin Corp. v. Superior Court*, 29 Cal. 4th 1096, 1111 (2003), and numerous other cases have denied class

certification. The court did precisely what this Court in the previous appeal directed it to do—it carefully reviewed the particular facts and issues in this case, weighed the common and individual issues, and ruled on the basis of the record here rather than any categorical rules. Plaintiffs do not, and cannot, contend that the trial court's predominance determination is not supported by substantial evidence. It clearly is, which requires that the court's order be affirmed.

Plaintiffs next argue that the trial court should have permitted them to prove the amount of damages through "inferential statistics." Br. 21-32. But they again ignore that the issue is not merely the amount of damages but whether particular class members were harmed at all. Alleged class members cannot make up for their own lack of injury by "extrapolating" from the alleged injuries of others. Even if the issue were limited to the amount of damages, plaintiffs cite no authority holding that the trial court was required to exercise its discretion to accept statistical proof in the circumstances here. The trial court's ruling is also supported by plaintiffs' failure to submit any admissible evidence showing the feasibility of statistical proof here.

Similarly meritless is plaintiffs' assertion that the individual fact-of-injury issues may be resolved simply by a plaintiffs' assertion on a questionnaire that he or she sheltered and was harmed. Such questionnaire responses do not eliminate individual issues because the defendant has the right to challenge the responses and demonstrate their invalidity. The importance of this right here has already been demonstrated. When

deposed, plaintiffs have repeatedly contradicted their questionnaire responses and revealed that their claims of harm are unfounded.

Plaintiffs' arguments prove only that class treatment is not proper. If it were true that every alleged class member was "simultaneously subject to the same impact" (Br. 18) and each was asserting the "identical claim" (Br. 51), there would be no need to resort to "extrapolating" from "inferential statistics" or to rely on individual questionnaire responses to prove the basic elements of liability. This is not a case in which "the defendant's liability to the class could be determined by facts common to all." *City of San Jose*, 12 Cal. 3d at 460. Instead, to the extent there is any liability here, it depends on facts individual to each class member.

Ultimately, plaintiffs' argument is that a class should be certified because Chevron has caused widespread harm and a class action is the only way to "efficiently" address it. But plaintiffs' premises and their conclusion are both wrong. The available evidence does not show widespread harm. Instead, it shows a wide variety of differing circumstances and a lack of cognizable harm. To the extent any harm occurred, the claims can be effectively addressed through the exemplar trial process under way in the trial court—the same process that plaintiffs admit is the proper way to address the thousands of bodily injury and property damage claims that plaintiffs concede cannot be certified. To the extent this process is not as "efficient" as lumping together all of these disparate claims and resolving them in an aggregate fashion that denies Chevron the

right to defend each on its merits, such purported inefficiency has never been a proper basis for granting class certification.

STATEMENT OF THE CASE

A. The March 25, 1999 fire and resulting lawsuits.

In the afternoon of March 25, 1999, a fire occurred at the Chevron Richmond refinery's Isomax unit, a facility located well inside the refinery. JA 336. Smoke rose in a column high into the air and was visible for a few hours while the fire was brought under control. Area-wide monitoring failed to detect any significant increase in toxic materials in any of the Richmond neighborhoods. JA 337.

The incident was widely publicized in the local news media. JA 11, 406-08. As a precautionary measure, the Contra Costa County Health Department activated its community notification network, advising nearby residents to stay indoors. Such notifications do not require that any actual danger exist. The network may be activated "when a visible incident occurs, such as an explosion, which does not pose a health hazard." JA 401. The notification here was lifted after less than three hours. JA 408.

Chevron maintains that most, if not all, plaintiffs have no compensable injuries. Although smoke from the fire was visible over the

refinery for a few hours, it is unlikely that the fire caused any harm, especially to people located miles away.[1]

Following the fire and attendant publicity, more than 50 separate actions were filed, on behalf of more than 50,000 individual, named plaintiffs. JA 520. The first action, *Wesley VanTonder, et al. v. Chevron U.S.A., Inc.* (C99-01103), was filed on March 26, 1999 at 8:41 a.m., less than eighteen hours after the fire started. All actions have been coordinated in San Francisco. JA 41.

---

[1] Plaintiffs relied below on a chronology attributed to the Contra Costa County Health Services Department. The following are excerpts from that chronology:

2:40 Smoke straight up – Chevron Jeff Craig

3:05 No odors in community; No injuries

3:34 Chevron update: No odor

3:46 Eric J – Goodrick – doesn't smell anything but smoke overhead

3:56 Maria – smoke high – heading south

3:56 Eric @ 31 gate – people outside watching – no ash, no odor

4:08 Maria – smoke is high not at street level

4:32 Smoke plume decreased; No measurable Hydrocarbon readings

4:43 Chevron update: Fire reduced; Plume depleted; No contaminants detected by monitors

5:31 Shelter-in-place lifted

6:20 Chevron update: Bag samples clean; No detectable substances outside Refinery

JA 406-08, 501.

B. Plaintiffs' claims.

Plaintiffs' complaint alleges a wide variety of personal and property injury claims. Thirteen individuals are named as plaintiffs. JA 5-9. Seven are adults, including one who was 93 years old at the time. The rest are minor children, including a six-month-old baby.

Most allege that they suffered personal injuries of some kind, although the specific ailments varied significantly from individual to individual. Some allege that they sought medical attention; some do not. Some allege that they sheltered in their homes; others were away from their homes. Some allege that they were required to miss work as a result of sheltering, while others make no such allegation and still others (such as the children and the 6-month-old baby) obviously could not have suffered any such "inconvenience." Some allege that they had to cancel social plans or shopping trips; others do not. In at least some of the cases, it is obvious that they would have remained in their homes in any event, or that at most they were prevented from playing outside when they might otherwise have done so.

C. Plaintiffs' initial request for class certification.

No doubt recognizing that California courts have repeatedly rejected class certification for the personal injury and property damage claims they assert (*see infra,* pp. 13-14), plaintiffs do not seek class certification for those claims. Instead, without abandoning any of their physical personal injury or property damage claims, plaintiffs propose an alleged "shelter in place" class. SJA 1367. This alleged class consists of persons:

(1) who "were present within Zones 1, 2 and/or 5 and thus subject to the Shelter-in-Place warning and who sheltered in place as a result of the explosion, fire, and toxic release"; and

(2) "who were in the vicinity of Chevron's Richmond Refinery within the cities of Richmond, North Richmond, El Cerrito, San Pablo, El Sobrante, and Pinole" and who "sheltered in place are a result of the explosion, fire and toxic release." SJA 1367.

As thus defined, the alleged class is not limited to persons subject to the county warning, or even to people immediately surrounding the refinery. Instead, it extends to people who lived as much as eight or nine miles away and far beyond the warning area.

Plaintiffs also sought certification of an even larger "punitive damages" class. That class consisted not only of those who sheltered-in-place, but anyone who "suffered any harm" from the fire. SJA 1368. The punitive damages class is not limited to persons within any geographical boundary. *Id.*

Plaintiffs also conceded that, even if their motion were granted, a large number of individual trials would still be required. According to plaintiffs, class members asserting physical personal injury claims are reserving those claims "for later individualized determinations." RT (8/1/01) 11:15-17. While plaintiffs asserted that the number of such individualized trials would be "small," they admitted that 5,000 plaintiffs had not waived their personal injury claims. *Id.* at 12:7-13. Similarly, the supposed "class" determination would not resolve the shelter-in-place

claims of plaintiffs who sheltered in locations outside the geographical boundaries of the proposed class definition.

D. The individuality of even plaintiffs' narrowed claims.

Chevron opposed plaintiffs' motion on the ground, among other things, that plaintiffs' alleged "annoyance, inconvenience, and loss of enjoyment of legal rights" injury presents the same kinds of individual issues precluding class treatment as plaintiffs' other personal injury claims. JA 876, 892.

The diversity of circumstances among the alleged class members is evident in the questionnaire responses of individual claimants. The questionnaires show that—like the named plaintiffs—the alleged class is a diverse group.

The locations at which the claimants say they sheltered vary widely. They are spread all over the West Contra Costa County and beyond. They run the entire gamut of places people might be on a given afternoon (home, someone else's home, school, work, jail, store, bank, bus, BART train, park, sleeping). JA 801 (¶ 8), 838-47. It is apparent from the responses that many plaintiffs who claimed to have "sheltered" did not stay indoors at all, but instead "sheltered" at such places as their backyard, "in the field," "at the beach," on a "football field" or in other outdoor locations. JA 839-47.

For those who sheltered in place, the time they say they spent indoors likewise varied tremendously. It ran from as little as five minutes to as much as two weeks, with virtually every interval in between. JA 800

(¶ 7), 827-37. Some plaintiffs say they sheltered in place early (*e.g.*, from 2:30 to 3:00 p.m.) while others say they came indoors later (*e.g.*, from 5:00 to 9:00 p.m.), including some after the county's warning had already been lifted. For many, their sheltering in place apparently included time during which they would normally be asleep. *E.g.*, JA 832 ("4 pm to 7 am next day"). Some apparently did not start sheltering until the following morning. *E.g.*, JA 830. On the other hand, some reported that they began sheltering even before the fire started at 2:30 p.m. *E.g.*, JA 830, 836. Some were not sure. JA 835 ("Not sure"; "I can't remember"; "Long time").

The reported impact of sheltering in place was also varied, reflecting nearly as many different responses as there are claimants. The responses included: "can't remember," "ended up eating can goods," "all the barbecue food was ruined," "could not go in and out as we pleased," "had to cancel my routine walks," "unable to go to library to do a class assignment," "could not complete yard work," "had to cancel church meeting that evening," "couldn't finish cleaning my car," "had to cancel some important business meeting," "day was ruined," and "stayed at liquor store 3 hours." JA 848-61.

E. Trial court's earlier class certification ruling and appellate proceedings.

On August 30, 2001, the trial court denied plaintiffs' motion. Citing to *Fuhrman v. California Satellite Systems*, 179 Cal. App. 3d 408 (1986), the court held that plaintiffs' claims were not appropriate for class treatment because they depended on each class member's individual emotional reaction to the events at issue. JA 1170. The court thereafter

denied plaintiffs' motion for reconsideration, holding that individual issues would predominate even if plaintiffs styled their claim as seeking compensation for inconvenience and annoyance rather than emotional distress. JA 1304.

This Court reversed these rulings on the ground that it appeared from the trial court's order that the court was applying a categorical rule that emotional distress claims could never be certified. SJA 1442. The Court remanded the matter for the trial court to consider, in accord with *Lockheed*, whether "the issues which may jointly tried, when compared with those requiring separate adjudication, are so numerous and substantial that the maintenance of a class action would be . . . advantageous to the judicial process and to the litigants." *Id.*

F. Proceedings on remand.

On remand, plaintiffs renewed their class certification motion, seeking certification of the same classes requested in their initial motion. In accord with this Court's mandate, the superior court examined the particular facts and circumstances of this case under the governing standards announced in *Lockheed* and other cases. On the basis of this review, it found class certification to be improper because "individual issues of causation and damages predominate over the common issues of fact and law." SJA 1693. Noting that Chevron had submitted evidence showing that there was a "wide disparity as to what each [plaintiff] would have done different, if anything," as a result of the fire and explosion, the court ruled that whether any class member suffered any injury, and if so, the degree of any such injury depends on the "individual lives and

circumstances of each of the plaintiffs." SJA 1687. Among other things, the court noted that some class members would not have suffered any compensable anxiety, fear or emotional distress from the incident. SJA 1688. Based on this review of the nature of plaintiffs' claims and the record, the court concluded that plaintiffs made "no evidentiary showing that such shelter caused any . . . common damage which requires . . . common compensation." SJA 1690.

The court rejected plaintiffs' assertion that these individual differences could be glossed over by having an expert witness testify to the "average" injury supposedly suffered by the class members. The court ruled that the plaintiffs' proposed expert testimony did not show that plaintiffs' claims of "psychological impact" resulting from "annoyance and restraint of freedom" could be proved on any common basis. SJA 1692-93.

ARGUMENT

I. THE TRIAL COURT'S RULING IS ENTITLED TO GREAT DEFERENCE.

A "trial court is vested with broad discretion to determine whether a class should be certified." *Block v. Major League Baseball,* 65 Cal. App. 4th 538, 543 (1998); *accord Reese v. Wal-Mart Stores, Inc.,* 73 Cal. App. 4th 1225, 1233 (1999) ("[t]rial courts have great discretion with regard to class certification").

On appeal, the reviewing court's task "is not to determine in the first instance whether the requested class is appropriate but rather whether the trial court has abused its discretion in denying certification." *Block,* 65 Cal. App. 4th at 543 (quoting *Osborne v. Subaru of America, Inc.*, 198 Cal. App.

3d 646, 654 (1988)). "So long as [the trial] court applies proper criteria and its action is founded on a rational basis, its ruling must be upheld." *Caro v. Procter & Gamble Co.*, 18 Cal. App. 4th 644, 655 (1993) (internal quotations omitted).

Plaintiffs have the burden to show that class certification is appropriate. They must present substantial evidence that the required community of interest is present. *Lockheed*, 29 Cal. 4th at 1108. Class actions are appropriate—and superior to other means of resolving disputes—only if the class members have a "sufficient community of interest" in "common questions of law and fact." *City of San Jose*, 12 Cal. 3d at 459. A "community of interest" does not exist if each class member will be "required to litigate numerous and substantial questions determining his individual right to recover following the 'class judgment' determining issues common to the purported class." *Id.*

II. THE TRIAL COURT CORRECTLY DENIED CLASS CERTIFICATION.

A. The trial court properly relied on the existence of individual issues of causation and damages in finding class certification inappropriate.

The courts have repeatedly denied class certification where the plaintiffs' claims, although involving common questions of breach of duty or the like, require individual proof as to which class members suffered any injury. In *Lockheed*, for example, the Court noted that the plaintiffs' groundwater contamination claims presented "significant common issues" regarding such key issues as the fact of contamination, the defendant's fault, and the toxicity of the chemicals at issue and risks of disease that they

posed. 29 Cal. 4th at 1107. Despite these common issues, however, the Court held that class certification was improper "as a matter of law" because individual proof would be required on the issues of "causation and damages." *Id.* at 1111. *Lockheed* is one of a long line of California decisions that have rejected class certification for personal injury and property damage claims such as those here because of individual injury and damages questions.[2]

Significantly, plaintiffs do not dispute that their claims for personal physical injury and property damages are unsuitable for class treatment. Their argument is therefore that claims of emotional injury (such the "annoyance" and "inconvenience" they assertedly suffered) are better candidates for class treatment than bodily injury claims. This argument finds no support in the law, which holds the opposite—that emotional injury claims are peculiarly *unsuited* for class treatment. *See Altman v. Manhattan Savings Bank,* 83 Cal. App. 3d 761, 767 (1978) (denying class certification of a claim of emotional distress because any recovery

---

[2] *Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1125 (1988) ("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"); *Kennedy v. Baxter Healthcare Corp.*, 43 Cal. App. 4th 799, 811 (1996) ("Perhaps the most obvious impediment to class treatment of plaintiffs' complaint is the enormous number of individual questions that will inevitably arise on the question of causation."); *Rose v. Medtronics, Inc.*, 107 Cal. App. 3d 150, 155 (1980) ("[i]n general, mass tort actions for personal injuries are not appropriate for class-action treatment"); *Brown v. Regents of the University of California*, 151 Cal. App. 3d 982 (1984) (class certification denied of claim that hospital had violated government and industry standards related to provision of coronary care).

"necessarily would involve evidence of the mental and subjective state of each plaintiff"); *Fuhrman v. California Satellite Systems,* 179 Cal. App. 3d 408, 425 (1986) (recognizing that "perhaps no cause of action is less susceptible to a class action than one for infliction of emotional distress" and denying class certification): *D'Amico v. Sitmar Cruises, Inc.*, 109 Cal. App. 3d 323, 325 (1980) (class certification properly denied of a claim that the defendant caused passengers to be subjected to an "unenjoyable travel atmosphere"); *Stilson v. Reader's Digest Association, Inc.*, 28 Cal. App. 3d 270, 273 (1972) (denying class certification of claim for "mental anguish" because the "gist of the cause of action here asserted is a wrong 'resulting in injury to the feelings'; it 'concerns one's own peace of mind'; and the injury is 'mental and subjective'").

Plaintiffs' argument is also contrary to the factual record in this case, which establishes that plaintiffs' claims present at least the same number of individual fact-of-injury, causation and damages issues as any other personal injury claim. Among other things, the following questions will have to be determined for each individual class member:

Fact of sheltering: The first issue is whether a particular claimant did in fact "shelter." The mere fact that a person resided in one of the communities plaintiffs specify in their class definition does not establish that the person "sheltered." Similarly, evidence that one plaintiff stayed indoors would not show that any other plaintiff sheltered—let alone that all 50,000 plaintiffs did so. Nor can this question be determined by any mechanical, readily verifiable means of proof. Instead, it will require

individual-by-individual evidence as to where each person was on March 25 and what he or she did upon learning of the fire. As noted above (at 9), the discovery responses already in the record demonstrate that many alleged class members will not be able establish that they "sheltered." When asked where they sheltered, the alleged class members gave such responses as "Back yard," "at garden outside," "at the playground," "barbecue outside," "didn't seek shelter," "does not remember," "don't know," "fishing, Keller Beach in Pt. Richmond," "I stay outdoor at Coronado school," "outside playing," and "I was with my video camera taking video." JA 838-47. To the extent that these or any other alleged class members did not actually shelter, they could not have suffered the alleged inconvenience of having been forced to do something they did not in fact do.

Significantly, plaintiffs themselves describe determining who sheltered as a "crucial individualized inquiry." Br. 18. Their argument is that this crucial individual issue has already been resolved by the alleged class members' responses to the discovery questionnaires. The courts, however, have consistently held that such questionnaires do not avoid the need for individual proof. In *In re Phenylpropanolamine Products Liability Litig.*, 214 F.R.D. 614 (W.D. Wash. 2003), for example, the plaintiffs asserted that injured class members could be identified through sworn oaths or affidvaits. *Id.* at 619. The court rejected this proposal, holding that it would not "avoid individualized inquiry" because the defendant would be entitled to challenge the affidavits. The court observed that the alleged

injury did not turn on facts that could be objectively verified through documentary evidence (such as medical or pharmacy records of purchases made), but instead turned on the subjective assertions of the alleged class members. *Id*.[3]

The same is true here. The mere fact that someone states in a questionnaire that he or she sheltered does not establish that fact as true. Chevron is entitled to challenge that assertion by cross-examination and other evidence—just as it would in an individual action. For example, one plaintiff stated in her questionnaire that she stayed indoors at her home until the day after the fire and was unable to attend to "personal necessities." SJA 1598. At her deposition, however, she admitted that on the afternoon of the fire, after coming inside from watering the garden, she went with her husband to Oakland as previously planned, where they visited a supply store, a leather goods store, Jack London Square, and a barbecue restaurant. SJA 1550-51 (50:21-51:24), 1554 (56:13-20). The jury would be entitled to conclude from this testimony that this plaintiff did not shelter and was not injured. Plaintiffs' questionnaire approach would impermissibly deny Chevron the right to present such evidence.

---

[3] *Accord Barnes v. American Tobacco Co.,* 161 F.3d 127, 145-46 (3d Cir. 1998) (rejecting reliance on questionnaires because "defendants would be permitted to cross-examine each individual about his specific choices, decisions and behavior"); *Thompson v. American Tobacco Co., Inc.*, 189 F.R.D. 544, 554 (D. Minn. 1999) (holding that submission of affidavits would not avoid individual issues because they would not constitute "conclusive proof of injury" and could not defeat the defendants' right to "cross-examine each class member regarding that alleged injury").

For the same reason, plaintiffs' argument that individual issues are avoided by defining the class as those who sheltered (Br. 5) is without merit. The very process of determining who sheltered requires individualized treatment. As the court explained in *Insolia v. Philip Morris Inc.*, 186 F.R.D. 535 (W.D. Wis. 1998):

> It makes no difference whether these issues are part of the definition of a proposed class or part of the merits of the claims raised in a complaint. . . . Plaintiffs cannot shortcut [this process] by using otherwise legitimate characteristics to identify class members and then asserting that all such individuals, by virtue of possessing these characteristics, are relieved from offering any specific proof on matters critical to the disposition of their claims.

Id. at 547.[4]

Causation: Damages may not be awarded for alleged "inconvenience" that was not caused by the fire. As plaintiffs admit, to the extent mere inconvenience or annoyance from sheltering is compensable at all, the claimant must show that he or she was "restrained *by* the events of March 25, 1999" and sheltered "*because* of the explosion and fire." RT (10/10/01) 4:15-17 (emphasis added). A person who "sheltered" in a

---

[4] Plaintiffs assert that the trial court "in essence" found that the fact of sheltering "could be established as to the class" when it found plaintiffs' proposed class to be "ascertainable." Br. 40. But ascertainability means only that class members can be identified, not that they suffered injury or have a valid claim. Plaintiffs' proposed class was all persons in the specified area who completed a questionnaire stating that they had sheltered. SJA 1685 n.2; *see also* Br. 4-5. That was the definition the trial court concluded is ascertainable. But the question still remains whether any member of that class was injured, including whether their claim of having sheltered is true.

location at which he or she would have remained even absent the fire has no valid claim for recovery. A person cannot claim to have been inconvenienced by doing the same thing he or she would have done anyway.

Again, the discovery responses to date demonstrate the individuality of this issue. Many claimants said that they sheltered in place at work. Given that the fire occurred at 2:30 p.m., that the shelter-in-place warning was given at 2:46 p.m. and that it was lifted at 5:31 p.m. (JA 406-08), it is highly likely that for a large number of the claimants who were at work, the warning did not require that they alter their behavior at all. To the extent any claimant who stayed indoors at work seeks recovery on the ground that he or she was somehow nonetheless "inconvenienced," that will present an individual issue. The same is true of persons who allegedly sheltered in their homes, at the shopping mall, at someone else's home, at a hotel, at school, in a restaurant, at the "West County Jail in Richmond, CA" (JA 846), or any of the other myriad places claimants allegedly stayed indoors. If they would have remained at the location anyway, they do not have a valid claim. And there is no way to establish this fact except through individual proof.

One of the plaintiffs stated in her questionnaire that she sheltered at her home and that her inconvenience was "having to stay indoors." SJA 1586. At her deposition, however, she admitted that she was worked as a medical aid at her grandfather's house that afternoon and that she attended to her normal duties that day just as she did on any other day.

SJA 1523 (47:4-11). Her only alleged inconvenience occurred later that evening (after she left her grandfather's home) when she says she stayed at her friend's house about an hour longer than she normally would have between the hours of 7:00 and 9:00. SJA 1527 (58:12-17). This testimony presents obvious individual issues—did she in fact stay at her friend's house longer than normal, was that because of the fire, was it reasonable for her to be "sheltering" so many hours after any warning was lifted (and after she had already left her grandfather's house to travel to her friend's house), and did this alleged sheltering actually cause her any compensable inconvenience? A jury evaluating her testimony would be fully justified in concluding that she suffered no compensable injury. And even if the jury concluded otherwise, that would do nothing to establish the claim of any other alleged class member, each of whom was in a different circumstance that afternoon.

The individuality of this issue is compounded by the breadth of plaintiffs' class definition. As noted above (at 7-8), the alleged class is not limited to those subject to the county warning (which was limited to an area within a mile or two immediately north and east of the refinery). Instead, the class extends to persons located as far as 8-9 miles and several cities away from the refinery. Thus, it is not true that every proposed class member was "required" or "forced" to stay indoors, or that they were in the "identical shelter-in-place situation," as plaintiffs assert. Br. 1, 20 n.5, 21. In addition to the individual proof that those persons outside the reach of the shelter-in-place warning actually sheltered, individual evidence will be

required as to why they sheltered and whether any sheltering was reasonable and can fairly be attributed to anything Chevron did.

Fact of Inconvenience: Even if a person reasonably stayed indoors when he or she might not otherwise have done so, that would not establish any actual harm. A child, for example, who might otherwise have gone outside to play would likely not have been "inconvenienced" by instead playing games or watching television inside. Similarly, it is hard to conceive how a 6-month-old baby could have been "inconvenienced" or "annoyed" at all. A jury would likewise be entitled to conclude that persons who stayed indoors "at the casino, on San Pablo Ave" (JA 844), or who "went to Contra Costa College Library and stayed here" (JA 846), were not harmed in any manner entitling them to recovery.

These fact of inconvenience issues take on added complexity given plaintiffs' reliance on nuisance theories. Nuisance requires proof of "disturbance of rights in land." *Venuto v. Owens-Corning Fiberglass Corp.,* 22 Cal. App. 3d 116, 123 (1971); *Koll-Irvine Center Property Owners Assn. v. County of Orange,* 24 Cal. App. 4th 1036, 1041 (1994) ("to proceed on a private nuisance theory the plaintiff must prove an injury specifically referable to the use and enjoyment of his or her land"). To prevail on a nuisance theory, therefore, it is not enough for a plaintiff to show that he or she sheltered somewhere. The plaintiff must additionally show that the plaintiff's use of the plaintiff's own land was interfered with.[5]

---

[5] A "public nuisance" claim does not require interference with the plaintiff's rights in land. But a private person may not bring a public

(continued . . .)

This is an individual issue. As noted above (at 9), the evidence shows that class members were at a wide variety of locations other than their own homes. One of the plaintiffs testified that she was at the Hilltop Mall when the fire occurred and did not learn of the fire until she returned home shortly before the shelter-in-place warning was lifted. SJA 1499 (41:10-20). Her alleged inconvenience was staying home the rest of the evening (even after the warning was lifted), and postponing until the next day a trip to the store. SJA 1502 (51:10-21). A jury would be entitled to conclude that someone who was at the mall and then postponed a trip to the store suffered no interference with the use of her property.

Moreover, "the law of torts does not attempt to impose liability or shift the loss in every case in which one person's conduct has some detrimental effect on another." *San Diego Gas & Electric Co. v. Superior Court,* 13 Cal. 4th 893, 937-38 (1996). Thus, recovery of damages for nuisance requires proof that defendant caused the plaintiff to suffer "substantial actual damage." *Id.* To the extent that any plaintiff can make this showing at all given the brief period and limited area to which the shelter-in-place warning applied, that showing would not establish the claim of other persons even in the same neighborhood, let alone for the

---

nuisance suit unless he shows "special injury" to himself that is "different *in kind* from that suffered by the general public." *Venuto,* 22 Cal. App. 3d at 124 (emphasis in original). Plaintiffs' claim does not assert any "special" injury to class members, different from that of the general public. To the contrary, the premise of plaintiffs' class certification motion is that all class members suffered a "uniform" injury that is "similar in nature" to that allegedly suffered by ten of thousands of residents in the vicinity of the refinery.

entire alleged class spread over six different cities. The courts have routinely denied class certification of nuisance claims precisely because of these kinds of individual issues. *City of San Jose*, 12 Cal. 3d at 461-62 (ruling that class certification was improper because whether particular class members were affected by the alleged nuisance "depends on a myriad of individualized factors"); *Frieman v. San Rafael Rock Quarry, Inc.*, 116 Cal. App. 4th 29, 42 (2004) (upholding denial of class certification because "[e]ach resident would have to prove interference with the comfortable enjoyment of life or property and that interference was substantial and unreasonable") (internal quotations omitted).[6]

Duration of inconvenience: As noted above (at 9-10), the discovery questionnaires show that alleged class members claim to have sheltered for wildly varying lengths of time—before, during, and well after the shelter-in-place warning was given (and, in some cases, before the fire even occurred). Not only would proof be required from each claimant as to the length of his or her alleged sheltering, but Chevron would be entitled to prove that the claimants did not shelter for that long, that the length of their

---

[6] Plaintiffs assert that *City of San Jose* is limited to claims for "diminution of property value." Br. 20 n.5. But plaintiffs' assertion that their enjoyment of their property was substantially and unreasonably interfered with raises at least as many individual issues as the diminution of value claim in *City of San Jose.* Just as each parcel had to be examined in *City of San Jose,* each parcel must be examined here to determine "the impact of certain activities on a particular piece of land" (12 Cal. 3d at 462)—*i.e.*, whether the residents in fact sheltered, whether they would have sheltered anyway, and whether the sheltering substantially and unreasonably interfered with their enjoyment of their property.

sheltering was unreasonable, or that they were not "inconvenienced" during the entire period of their alleged sheltering (because, for example, it occurred during their normal sleeping hours and they were asleep).

Degree/value of inconvenience: The questionnaire responses also demonstrate that the alleged degrees of "inconvenience" or "annoyance" varied widely by individual. A claimant who "could not leave my home to enjoy outside" (JA 852) has not been inconvenienced to the same degree as a claimant who "missed a very important wedding rehearsal" (JA 850). Nor was the person who "was separated from my wife and our wedding anniversary" (JA 859) inconvenienced to the same degree as the person who was "not able to dump my trash" (*id.).* And none of these people suffered the same inconvenience as the person who "can't remember" (JA 851) how he or she was inconvenienced.

B. The individual issues, and the trial court's ruling, go to issues of liability, not merely the amount of damages.

Plaintiffs try to dismiss the foregoing individual differences in circumstances as supposedly going only to the amount of individual damages. In the same vein, they assert that the superior court applied the "wrong criteria" in supposedly holding that "individualized calculation of damages prevented certification." Br. 12. Neither assertion is correct.

The individual issues discussed above go primarily to liability itself, not merely the amount of damages. Whether an alleged class member sheltered, whether he or she would have sheltered anyway, and whether any such sheltering caused any harm (or interfered with any plaintiff's

possessory interests in land) are all liability issues. Just as in *Lockheed*, these questions go to whether the plaintiff suffered any injury at all and thus whether the plaintiff has any "right to recover." 29 Cal. 4th at 1111.

In upholding the denial of class certification in *Frieman*, the court noted that whether particular plaintiffs suffered "substantial and unreasonable" discomfort or annoyance from an alleged nuisance is not merely a damages issue: "Rather than mere variations in the measure of damages, these factors are the keys to defendant Quarry's liability." 116 Cal. App. 4th at 42;[7] *see also City of San Jose*, 12 Cal. 3d at 463 (existence of injury goes to "the basic issue of defendant's liability"); *Jordan v. City of Santa Barbara*, 46 Cal. App. 4th 1245, 1257 (1996) ("[d]amage or injury has long been considered an essential element of a cause of action for nuisance"); 6 B.E. Witkin, *Summary of California Law*, Torts, § 1316, p. 775 (9th ed. 1988) ("[i]t is a fundamental principle that a negligent act does not give rise to liability without damage").

Similarly, the trial court's ruling was not based merely, or even primarily, on individual issues surrounding the "measure of damages," as plaintiffs erroneously assert. Br. 2. When the court referred to "damages," the court's order makes clear that it was referring to the entire range of

---

[7] *Frieman* also rejected the argument, advanced by plaintiffs in the previous appeal of this case, that the existence of injury in a nuisance case "is an objective standard, capable of common proof." 116 Cal. App. 4th at 41. The court held that the "reasonable person" standard is a means of excluding unreasonable claims based on a "particular person's own sensibilities" but does not resolve the question whether a particular class member in fact suffered any actionable discomfort or annoyance. *Id.*

issues surrounding plaintiffs' claims of injury. Thus, the court began its discussion by reviewing the evidence regarding "causation and damages." SJA 1687-88. It explicitly noted proof of "wide disparity" in how class members may have responded to the fire and community warning, including the fact that many may not have done "anything" differently. SJA 1687. It likewise observed that the evidence showed that the "damage suffered, *if any*" depends on the "individual lives and circumstances of each of the plaintiffs." SJA 1687 (emphasis added). And it expressly observed that there was no evidence of "common damage." SJA 1690. "Damage" in this tort context is a synonym for "injury." *E.g.*, *Jordan*, 46 Cal. App. 4th at 1257 (referring to "[d]amage or injury" as an essential element of a nuisance claim). Indeed, throughout its opinion, the court uses "causation and damages," "damages," and "damage" interchangeably when discussing facts bearing on whether any legally compensable harm was suffered, as opposed merely to the amount of monetary recovery to be awarded.[8] When the court referred specifically to the amount of damages, it used the phrase "common compensation," which it expressly distinguished from the lack of evidence of "common damage." SJA 1690.

The court's ultimate conclusion was that "individual issues of causation and damages predominate over the common issues of fact and law" (SJA 1693), which mirrors the Supreme Court's conclusion in

---

[8] *See also* SJA 1689 ("elements of causation and damages"), 1691 ("nature and extent of damages"; "variable elements of damage"), 1692 ("fewer individual damage variables").

Lockheed when it similarly used the phrase "causation and damages" to refer to "questions respecting each individual class member's right to recover." 29 Cal. 4th at 1111; *cf. Jolly*, 44 Cal. 3d at 1123 (identifying individual "causation, and damages" issues as generally precluding class certification in mass tort cases); *Hicks v. Kaufman & Broad Home Corp.*, 89 Cal. App. 4th 908, 926 (2001) (holding class certification improper because of "individual factual questions as to causation and damages").

Moreover, plaintiffs are incorrect in suggesting that damages issues are irrelevant to class certification. The courts have recognized that "the difficulty in litigating individual damage claims remains a relevant consideration in class action certification." *Osborne*, 198 Cal. App. 3d at 657; *see also Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 713 (1967) (the need for class members to prove the amount of their damages is a "factor to be considered in determining whether a class action is proper").

Accordingly, courts have frequently relied upon the presence of individual damages issues in finding class certification to be improper. *See, e.g., Lockheed*, 29 Cal. 4th at 1111 (citing the need for individual proof of "causation and damages" as "fatally undermining" the trial court's predominance finding); *Brown*, 151 Cal. App. 3d at 990 (relying upon the "complexity of the damage question" in affirming denial of class certification); *Block*, 65 Cal. App. 4th at 545 (affirming denial of class certification in part on the ground that "difficulties in awarding damages weighed against certification").

Nor are plaintiffs correct in asserting that the superior court relied on *Lockheed* as supposedly holding that individual causation and damages issues always preclude class certification. Br. 15. As noted above (at 11-12), the court did not deny class certification merely because it determined causation and damages required individual proof. Instead, after outlining the issues it found were susceptible of common proof and those requiring individual proof (SJA 1686-88), and after concluding that the individual causation and damages issues could not be eliminated through plaintiffs' proposed expert testimony (SJA 1688-93), the court expressly ruled that class certification is improper because those individual issues "predominate over the common issues of fact and law" that the court had earlier reviewed in its order. SJA 1693. If plaintiffs were correct that the trial court believed that individual causation and damages issues were by themselves sufficient to preclude class certification, the court would have ended its ruling simply by finding that causation and damages were not subject to common proof and would not have gone on to make its express predominance finding.[9]

---

[9] The trial court's reference to *Lockheed*'s "requirement" of substantial evidence that causation and damages be shown by common proof (SJA 1692) must be read in the context of plaintiffs' argument below that class certification is proper because of the alleged "uniformity" of injury and damages suffered by all class members. SJA 1373. Under *Lockheed*, for plaintiffs to obtain class certification on that basis, they were required to "place[] in the record sufficient evidence to warrant the trial court's concluding that they are likely to be able to make that demonstration with common proof." 29 Cal. 4th at 1109. The trial court here was addressing that requirement and it properly concluded that plaintiffs failed to make that showing.

The trial court's predominance finding is precisely the determination plaintiffs assert the court was required to make and precisely the determination the Supreme Court made in *Lockheed*. *See* 29 Cal. 4th at 1111; *see also Frieman*, 116 Cal. App. 4th at 42 (affirming finding of lack of predominance where, as here, "[p]laintiffs produced no evidence that these [fact-of-injury] issues do not vary significantly as to each individual"). It is a "valid, pertinent reason" for denying class certification that is supported by substantial evidence and it requires that the order be affirmed. *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 436 (2000).

C. The trial court's finding that individual issues predominate is supported by substantial evidence.

In addition to erroneously arguing that the superior court applied the "wrong criteria," plaintiffs challenge the superior court's factual determination that common issues do not predominate. Br. 37. But their argument consists of little more than reciting the alleged common facts that plaintiffs believe exist and asserting that other cases have certified classes in so-called "single incident mass tort cases." Br. 38-41. Such arguments do not satisfy the substantial evidence standard or overcome the great deference owed to the trial court's ruling.

As discussed above (at 15-24), the individual issues here are numerous and substantial. According to plaintiffs' own evidence (RT (9/12/03) at 21), the alleged class consists of at least 27,000 people. The enormous time and effort that would be involved in trying to resolve which of those persons sheltered, whether they would have sheltered anyway, and whether their sheltering caused them any cognizable injury is

indisputable. This case thus falls squarely within the rule that "the community of interest requirement is not satisfied if every member of the alleged class would be required to litigate numerous and substantial questions following the 'class judgment' determining issues common to the purported class." *City of San Jose*, 12 Cal. 3d at 459.

Plaintiffs also overstate the significance of their alleged common issues. As Chevron acknowledged below (and as the superior court recognized (SJA 1686 n.2)), there is no dispute that the fire and explosion occurred on Chevron's property and involved Chevron's equipment. Thus, the key issue here will not be Chevron's responsibility for the fire, but whether that event caused any compensable injury to class members. *Cf. Altman*, 83 Cal. App. 3d at 766-67 (denying class certification of an emotional distress claim where the critical issue was whether defendants' conduct resulted in any actual, compensable harm).

The cases plaintiffs cite in which classes have been certified in various "mass disaster" cases (Br. 40-41) do not help them. To the extent any of those cases would certify the kind of claim at issue here, they would be inconsistent with governing California law. In fact, however, none of plaintiffs' cases have certified a claim like the one here. Indeed, in plaintiffs' first cited case, *In re Three Mile Island Litigation*, 87 F.R.D. 433, 441-42 (M.D. Pa. 1980), the court *denied* certification of a class for "emotional distress and resulting physical injury." The court found that the claims were "diverse and personal," and will "require individual proof" that

would cause the purported class action to "break up into separate suits." *Id.* at 441-42.[10]

D. Plaintiffs' "superiority" argument is misguided.

Plaintiffs assert that a class action is the "superior method" for resolving their claims because, they assert, the individual claims of each plaintiff will otherwise have to be tried "ad infinitum." Br. 43. But such alleged "superiority" has never been a proper basis for certifying claims that do not meet the community of interest and other settled requirements for class certification. It could have equally been said in *Lockheed* that a class action there would be "superior" to each of the 50,000 to 100,000 allegedly affected individuals separately litigating his or her claim. But the Supreme Court nonetheless rejected class treatment because the lack of predominant common issues precluded it. This enforcement of the basic prerequisites to class certification recognizes that, where certification is improperly granted, a class action may "preclude a defendant from defending each individual claim to its fullest, and even deprive a litigant of a constitutional right." *City of San Jose,* 12 Cal. 3d at 458. The California Supreme Court has thus recognized the "dangers of injustice" in certifying class actions and "the limited scope within which these suits serve beneficial purposes." *Id.* at 459.

---

[10] Several of plaintiffs' cases are "evacuation" cases. Such cases do not present the same individual issues as the present inconvenience-from-sheltering-in-place claim. Because everyone has been forced to actually move to another location, the alleged injury in such cases is more concrete and objectively verifiable and causation and fact of injury are less likely to be individual.

Plaintiff's class certification arguments present precisely this danger of injustice from lumping together disparate claims of injury that turn on individual proof. As discussed above (at 15-24), the discovery record thus far demonstrates that plaintiffs' claims of widespread, blanket injury are unfounded. Even as to those plaintiffs who stated on their questionnaires that they sheltered, individual questioning has frequently revealed that they did not in fact shelter or that their sheltering did not result in any cognizable harm. If these persons sued Chevron individually, Chevron would have the right to conduct such individual examination and the jury would be entitled to deny compensation. Class certification would impermissibly deny Chevron these rights. It would allow plaintiffs to create a "composite case" that would unfairly portray the class as having "suffered a uniform, collective injury" while denying Chevron the "benefit of deposing or cross-examining the disparate individuals behind the composite creation." *Broussard v. Meineke Discount Muffler Shops, Inc.,* 155 F.3d 331, 345 (4th Cir. 1998). The result would be the very kind of "superficial adjudications" that the Supreme Court has condemned as violating "[r]eason and the constitutional mandates of due process." *City of San Jose,* 12 Cal. 3d at 462.

Plaintiffs' "superiority" argument is also erroneous because it exaggerates both the consequence of denying class certification and the alleged benefit of granting it. The claims of the allegedly affected plaintiffs in this case are before the superior court in the coordinated cases below, which is exercising its broad authority under the coordination statutes to

manage them through structured discovery and exemplar trials. This process facilitates a negotiated resolution of the claims without the need for the "innumerable trials" and "innumerable appeals" plaintiffs claim they fear. Br. 45. This is precisely the means by which the Supreme Court has stated claims like these should be resolved. *See Jolly,* 44 Cal. 3d at 1125.

By contrast, if any attempt at all is made to protect Chevron's right to defend itself based on the individuality of the claims, class certification will not result in the simple, expeditious resolution that plaintiffs envision. Instead, by attempting to resolve the individual injury claims of thousands of plaintiffs in a single massive trial with potentially huge consequences riding on the outcome, class certification will likely result in a greater number of procedural battles and a trial that will mire the jury in complex expert and other testimony over the validity of plaintiffs' efforts to account for the individual circumstances here. Moreover, even that trial will leave unresolved the large number of other substantial claims that plaintiffs would exclude entirely from the class action. These include (1) the thousands of physical personal injury and property damage claims that have already been filed, and (2) the shelter-in-place claims of the persons who live outside the geographic boundaries of plaintiffs' proposed class. *See supra,* pp. 8-9. The only proper way to achieve the kind of expeditious resolution of all the pending claims—both those that plaintiffs would include in the proposed class and those that plaintiffs admit cannot properly be tried on a class basis— in the "fair and efficient" (Br. 43) manner that

plaintiffs say they want is through the exemplar trial process underway in the trial court.

III. THE TRIAL COURT CORRECTLY HELD THAT PLAINTIFFS' PROPOSED "STREAM-LINED" DAMAGES APPROACH IS UNFOUNDED AND INADEQUATE IN ANY EVENT TO SUPPORT CLASS CERTIFICATION.

Plaintiffs' lengthy digression into the use of "inferential statistics" to prove damages (Br. 21-32) is likewise unfounded, for several reasons.

A. Class certification here is precluded by individual injury issues, not just amount of damages.

First, as noted above (at 24-28), the issue here is not simply proving the amount of damages, but establishing whether particular class members suffered any injury and thus have any claim at all. This fundamental requirement of injury cannot be established through "inferential statistics." If that were the law, class certification would never be denied on the basis of individual fact-of-injury questions, because in every case a random sample could be taken of some larger group and an "average" injured person developed. Under this theory, a class could have been certified in *Lockheed* and damages awarded based on an "aggregate liability determination" that "factored in the presence" (Br. 30) of both injured and non-injured claimants. Similarly, a class could have been certified in *City of San Jose* by using statistics to "infer" the average damage that each class member suffered from the nuisance. Nothing in those cases suggests that such an approach would be permissible. To the contrary, *City of San Jose* explicitly rejected the plaintiffs' suggestion that, with certain

subclassifications, the injury to the class members could be calculated "as a group." 12 Cal. 3d at 461. The Court held that doing so would impermissibly "[a]lter[] the substantive law" and result in "superficial adjudications" that would deny a fair trial "to either the defendant or the members of the class—or both." *Id.* at 462.

Bell v. Farmers Ins. Exch., 115 Cal. App. 4th 715 (2004), does not depart from this law. The court's ruling there was based on its conclusion that the "case called for individual adjudications only of the damages resulting from unpaid overtime." *Id.* at 743. Moreover, the statistical proof there went only to one aspect of the damages computation—the number of overtime hours worked by the class members. Here, the issue is not merely damages, nor is it only the number of hours a class member sheltered. Instead, the issues are whether the class member sheltered at all, whether they would have been sheltering in any event, whether any sheltering caused any compensable harm, and, if so, the degree of such harm. Each of these but the last is a liability issue—and the last is a subjective damages question that is fundamentally more complex and individual than the overtime issue in *Bell*. There, the rate of compensation was a mechanical determination based on the defendants' records of the actual hourly wage rate for each employee. *Id.* at 724. No such objective measure of the degree of any purported harm exists here.

Nor are plaintiffs helped by *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996). The Ninth Circuit described the methodology used there as "unorthodox" and justified only by the "extraordinarily unusual nature" of

that case—a claim under the Alien Tort Claims Act and the Torture Victims Protection Act for torture, summary execution and "disappearance." *Id.* at 786. The court's use of "federal common law" to create a remedy in that case (*In re Estate of Marcos Human Rights Litigation*, 910 F.Supp. 1460, 1469 (D. Hawai'i 1995)), is not relevant to this case governed by California nuisance and negligence law. Courts have declined to apply *Hilao* outside of its unique context. *See, e.g., Cimino v. Raymark Industries, Inc.*, 151 F.3d 297, 319 (5th Cir. 1998) (noting that *Hilao* was a suit under the Alien Tort Claims Act, where the court applied substantive principles of federal or international "common law").

B. Plaintiffs' proof was in any event insufficient.

Even if the amount of damage were the only individual issue here, or "inferential statistics" could be used to prove fact of injury, plaintiffs' argument would still fail. As the parties seeking class certification, plaintiffs had the burden to "place substantial evidence into the record" establishing the propriety of class certification. *Lockheed*, 29 Cal. 4th at 1096. Plaintiffs, however, produced no evidence to support using statistical proof. They did not submit any declaration or other evidence from their purported expert, James Dannemiller, describing the methodology he would follow or even stating that a statistical approach would be valid in a case like this. Instead, plaintiffs submitted (with their reply brief) only their counsel's declaration, who said only that Mr. Dannemiller stated that he would be "willing and available" to serve as a "court-appointed statistical expert" in this case. SJA 1626-27.

The superior court was entitled to reject this offer as insufficient. As the court noted, the Supreme Court rejected the proffered expert testimony in *Lockheed* as "too qualified, tentative and conclusionary to constitute substantial evidence." 29 Cal. 4th at 1111. Here, plaintiffs do not rise even to that level. The expert testimony here is not merely too qualified or tentative. It is non-existent.

Trying to avoid their failure of proof, plaintiffs accuse the superior court of having ruled that statistical proof of damages is never appropriate. The court made no such ruling. All that it had before it was plaintiffs' belated and inadequate offer of proof, which it rejected as insufficient. *See, e.g.*, SJA 1692 (noting that "'substantial evidence' must at least consist of straightforward, competent, non-conclusory expert opinion by qualified witnesses" and finding insufficient the "assumptive and conclusory" nature of the "second hand relation of Mr. Dannemiller's evidence by Mr. Tindall").

Moreover, plaintiffs are incorrect in suggesting that the use of statistical evidence is a matter of right in every case. In affirming the result in *Bell*, the court emphasized that "claims for unpaid overtime compensation present certain *unique and distinguishing characteristics*"—including the employer's obligation to maintain employee work records and the consequent shift in the burden of proof to the employer to establish the amount of any unpaid overtime. 115 Cal. App. 4th at 748-49 (emphasis added). The court recognized that whether to permit statistical evidence of damages is a discretionary matter for the trial court, which is in a "much

better position than an appellate court to formulate an appropriate methodology for a trial." 115 Cal. App. 4th at 751 (internal quotation omitted). The court also relied on the fact that the defendant had "acquiesced to statistical proof of damages" and elected to "rely on its own statistical evidence as a matter of trial tactics." *Id.* at 758. The defendant in *Hilao* had likewise "waived any challenge to the computation of damages." 103 F.3d at 784 n.11, 785 n.12.[11]

Here, Chevron has not acquiesced to extrapolating or inferring any class member's injury or damages from that of other class members. Nor does this case involve any "extraordinary" or "unique" statutory scheme that permits a relaxed standard of proof "imperfectly tailored to the facts of particular employees" so as to "vindicate an important statutory policy." *Bell,* 115 Cal. App. 4th at 751. It is a claim of alleged negligence or nuisance, in which individual injury is a fundamental prerequisite to liability. The trial court was fully justified in exercising its discretion to reject plaintiffs' proposal for "statistical" proof in these circumstances. *See, e.g., Cimino,* 151 F.3d at 319 (rejecting statistical proof because causation must be determined as to "individuals, not groups"); *Arch v. American Tobacco Co., Inc.*, 175 F.R.D. 469, 493 (E.D. Pa. 1997) ("Unlike *Hilao,* defendants in this case do not waive any challenge to the computation of damages"); *Zapata v. IBP, Inc.*, 175 F.R.D. 578, 581

---

[11] Similarly, in the *Pleasant Hill Cremation* case (Br. 20 n.6, 26), the defendants had agreed to statistical sampling and did not appeal. RT (9/12/03) at 46.

(D. Kan. 1997) ("we find the *Marcos* decision of little authority, given its factual differences"; "the defendant had waived questions concerning the propriety of the methodology employed"); *Estate of Mahoney v. R.J. Reynolds Tobacco Co.*, 204 F.R.D. 150, 160 (S.D. Iowa 2001) ("absent mutual agreement of the parties, damages must be determined from the facts of each case").

IV. PLAINTIFFS' COMPLAINTS ABOUT THE EXEMPLAR PROCESS ARE NOT PROPERLY BEFORE THE COURT AND ARE IN ANY EVENT ERRONEOUS.

Plaintiffs include in their brief a challenge to the trial court's Case Management Order No. 4, which describes the trial court's plan for selecting plaintiffs for an exemplar trial. Br. 32-37. Not only is this challenge not properly before the Court and erroneous in any event, it only further demonstrates why class certification is not proper.

A. The case management order is not reviewable on this appeal.

The trial court's discretionary case management plan is not appealable under Code of Civil Procedure section 904.1. Nor it is reviewable under section 906, which permits review of certain "intermediate rulings" on appeal of a judgment or order. Section 906 requires that the ruling be one that "involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party." These requirements are not met here.

The trial court's case management plan does not involve the merits or affect the propriety of the court's class certification order. Although the

trial court stated its intent to proceed with exemplar trials, class certification is improper without regard to that process because the required community of interest and other prerequisites to class certification are absent here. If plaintiffs were correct that the trial court plan is legally flawed (and if they could show any such flaws caused them prejudice), they could raise that issue on appeal when their claims are resolved and judgment is entered. But that would not affect the validity of the denial of class certification. For the same reason, the plan for the exemplar trial does not substantially affect any party's rights. *See Muao v. Grosvenor Properties, Ltd.*, 99 Cal. App. 4th 1085, 1089 (2002) (holding that party's rights were not substantially affected for purposes of section 906 by an order compelling arbitration because the party would have the right to challenge the order on appeal from any judgment confirming any adverse arbitration award).

B. Plaintiffs' challenge to the order is both waived and groundless.

Even if the order were reviewable, plaintiffs' challenge is meritless. First, plaintiffs did not present to the court below the arguments they are now making. In fact, plaintiffs took essentially the opposite approach. When the trial court asked for the parties' proposal for handling an exemplar trial, plaintiffs suggested that each side select its "best" cases or that plaintiffs themselves would select a group of twenty to be subject to discovery. Supp. Appx. 13-14, 18.[12] Later, they asserted that the first

---

[12] Plaintiffs do not provide this Court with any portion of the record that led to the trial court's adoption of the order. The relevant materials, however, are contained in the appendices filed with plaintiffs' writ petition

(continued . . .)

exemplar trial should consist of persons entitled to a preference under Code of Civil Procedure section 36, and that a "second wave" of individual trials should consist of ten personal injury claimants (five picked by each side) and ten randomly selected "shelter-in-place" claimants. Appx. 205-06. At no time did plaintiffs request that a statistically significant, random sample group be selected.

When the trial court rejected plaintiffs' proposed approach as not likely to be helpful in facilitating settlement and adopted instead an approach in which the exemplar plaintiffs would be randomly selected from certain categories (Appx. 306-19; SJA 1347-52), plaintiffs sought an extraordinary writ from this Court, But, again, they made no claim that the court's order was erroneous because it did not include a statistically valid sample. Instead, they argued that the preference statute mandated that preference plaintiffs' cases be tried first. On March 14, 2002, this Court denied the writ.

Having not presented their argument to the trial court—and, indeed, having essentially argued to the contrary—plaintiffs have waived the right to assert it here. *Jones v. Dutra Construction Co.*, 57 Cal. App. 4th 871, 876-77 (1997).

Besides being waived, the argument is groundless. Plaintiffs' objection assumes that the purpose of the exemplar trial is to conclusively

---

in *De Pew v. Superior Court*, No. A097729. Should the Court elect to consider the issue, Chevron requests that the Court take judicial notice of those appendices. References in this brief to "Appx." and "Supp. Appx." are to those appendices.

resolve the claims (or aspects of the claims) of the class as a whole. That was the basis for the objection in *In re Chevron U.S.A. Inc.*, 109 F.3d 1016 (5th Cir. 1997). The court there expressly distinguished between use of the "bellwether trial" for purpose of "issue or claim preclusion" and use of the trial for resolving the cases of the particular plaintiffs whose claims would be tried. *Id.* at 1017. The Court granted mandamus only as to the former, and expressly denied it as to the latter. *Id.* at 1017, 1021. The Court made clear that its due process concern was the prospect that the outcome of the trial might be used as "the basis for a judgment affecting cases other than the thirty." *Id.* at 1020. No such concern is implicated here, because the court's order does not mandate that the exemplar trial outcome will be binding on the claims of other plaintiffs.

Instead, the purpose of the trial is to provide a potential basis for a negotiated settlement. Plaintiffs do not cite any authority holding that a trial court may not structure an exemplar trial for such purposes in the manner the trial court has here. Plaintiffs suggest that test cases with statistically selected plaintiffs are more likely to provide meaningful settlement guidance. But there is no reason to believe the various categories of randomly selected plaintiffs contemplated by the trial court's order will not serve that purpose. Indeed, as noted, the court's order allows for a considerably broader number of plaintiffs representing a larger cross-section than what plaintiffs were proposing.

In any event such matters are entrusted to the discretion of the trial court. *See Bell*, 115 Cal. App. 4th at 751. The need for such deference is

particularly acute here given that the trial court was exercising the broad powers invested in him as a coordination judge. *McGhan Medical Corp. v. Superior Court*, 11 Cal. App. 4th 804, 812 (1992) (describing the "great breadth of discretion" given to coordination judges). This Court should reject plaintiffs' request that it micro-manage the trial court's discretionary case management.

Finally, far from undermining the trial court's denial of class certification, plaintiffs' argument only confirms that class certification is improper. Plaintiffs assert that the proposed exemplar group is not sufficiently "representative" because it "over-represents" certain plaintiffs while "under-representing" others. Br. 34. The premise of a class action, however, is that the plaintiffs themselves are representative of the class as a whole, such that proof of one plaintiffs' claim proves the claim of the class as a whole. *See City of San Jose*, 12 Cal. 3d at 460. Plaintiffs' argument that the alleged class is so diverse that even a group of twenty-one plaintiffs would not be representative of the whole demonstrates that this case turns on differing individual circumstances that preclude class certification. *See Broussard*, 155 F.3d at 341 (finding that the "sheer number of separate statements that were put before the jury to prove a 'common' message" demonstrated that the class did not meet the requirements for certification); *Sprague v. General Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998) ("The district court took testimony from more than three hundred class members in an effort to obtain a purportedly representative sample of the representations and communications made by [the defendant]. That it was

necessary to do so strongly suggests to us that class-wide relief was improper.").

V. THE TRIAL COURT CORRECTLY REJECTED PLAINTIFF'S REQUEST FOR A "LIABILITY" ONLY CLASS.

Relying on California Rule of Court 1855(b), plaintiffs argue that the trial court should have at least certified a class as to "liability issues." Br. 45-47. This argument fails for the same reasons as plaintiffs' other arguments.[13]

First, as discussed above, the individual issues here go not merely to damages, but to the existence of liability itself. Thus, even if a "liability only" class would be proper when liability turns on facts common to the entire class, that is not the case here.

Second, Rule 1855(b) cannot be used to create single issue classes without regard to the required community of interest and other prerequisites to class certification. Rule 1855(b) mirrors Federal Rule of Civil Procedure 23(c)(4). The courts interpreting that provision have uniformly held that it does not override the other requirements for class certification. As the Fifth

---

[13] Plaintiffs' motion in the court below did not refer to Rule 1855(b) or otherwise request that the trial court certify a class as to limited issues. Thus, even if it were true that the trial court "failed to consider" certifying a limited class, that would not help plaintiffs because plaintiffs failed to raise the issue. However, at the hearing the trial court did raise sua sponte the possibility of certifying certain questions, while leaving the remainder for resolution in a small claims procedure. RT (9/12/03) at 6-11. The court ultimately concluded, however, that such a procedure was unworkable and would violate defendants' jury trial rights. SJA 1693-94. Plaintiffs do not challenge that ruling.

Circuit observed in *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996):

> [a] district court cannot manufacture predominance through the nimble use of subdivision (c)(4). . . . [A]llowing a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of rule 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended.

Id. at 745 n.21. Thus, the court held that the rule permits severance of a common issue only when a given cause of action, as a whole, satisfies the predominance requirement. *Id.; accord Gunnells v. Healthplan Services Inc.*, 348 F.3d 417, 440 (4th Cir. 2003); *Arch*, 175 F.R.D at 496; *In re Telectronics Pacing Sys., Inc.*, 168 F.R.D. 203, 220 (S.D. Ohio 1996); *In re Jackson National Life Insurance Co.*, 183 F.R.D. 217, 224-25 (W.D. Mich. 1998).[14]

---

[14] Some federal courts have suggested that Rule 23(c)(4) might permit the predominance inquiry to be satisfied on some basis less than an entire cause of action. But even these courts have recognized that class certification is improper on manageability or other grounds when the issues singled out for common treatment will still leave numerous and substantial issues to be resolved individually. *E.g., In re Baycol Products*, 218 F.R.D. 197, 209 (D. Minn. 2003) ("[C]ertification under (c)(4) will not make the case more manageable . . . individual trials will still be required to determine issues of causation, damages, and applicable defenses. As a result, a class trial will not materially advance this litigation."); *Emig v. Am. Tobacco Co.*, 184 F.R.D. 379, 394-395 (D. Kan. 1998) (rejecting reliance on Rule 23(c)(4) because of the intertwining of the issues and because resolution of alleged common issue alone would not materially advance the litigation).

California courts have similarly recognized that class treatment of particular issues is improper when, following resolution of those issues, significant individual proof will still be required. *See City of San Jose*, 12 Cal. 3d at 459 (class certification improper if "numerous and substantial" individual question will remain after class judgment); *accord Lockheed*, 29 Cal. 4th at 1110-11.

That is the situation here. For the reasons discussed above, a trial on the purported common issues will still leave for individual resolution the critical disputed injury, causation and damages in the case. Just as was true of the claims in *City of San Jose, Lockheed* and numerous other cases denying class certification because of individual fact-of-injury and damages questions, this claim as a matter of law may not be certified for class treatment.

VI. THE COURT PROPERLY DENIED CERTIFICATION OF A PUNITIVE DAMAGES CLASS.

The trial court's ruling that class treatment of plaintiffs' claims for compensatory damages is not proper also establishes that class certification is impermissible for plaintiffs' punitive damages claim. As the court found, a separate punitive damages class would violate the requirement that punitive damages have a nexus with, and be proportional to, the plaintiffs' actual damages. SJA 1695 (citing SJA 1469:17-21).

Plaintiffs do not appear to contest that a punitive damages class is improper if their shelter-in-place claims are not certified. Instead, their argument assumes that their shelter-in-place class is certified. Citing to their proposed trial plan for class-wide treatment of liability and

compensatory damages, they argue that a punitive damages class is proper because punitive damages would be decided only "after compensatory damages have been determined at trial." Br. 48.[15] The cases they cite as "approving class treatment of punitive damages claims" were similarly each cases in which the court had found the underlying liability and compensatory damage claims to be proper for class treatment.[16] Because class treatment of the underlying liability and compensatory damage claims here is not proper, class certification of the punitive damages claim is likewise improper.

To the extent that plaintiffs are contending that a separate punitive damages class would be proper even absent certification of the underlying compensatory damage claims, that argument is unfounded. California law is clear that a punitive damages must "bear a reasonable relation" to the plaintiffs' actual damages. *Neal v. Farmers Ins. Exch.*, 21 Cal. 3d 910, 928 (1978); *Liodas v. Sahadi,*, 19 Cal. 3d 278, 284 (1977) ("'exemplary damages must bear a reasonable relation to actual damages'"). Moreover,

---

[15] Plaintiff state this would be true "whether or not the shelter-in-place damages are tried on an individual or classwide basis." Br. 48. But it is clear from the rest of their discussion that they are envisioning these "individual" damages determinations as occurring within the context of certified class action on the liability (including injury and causation) issues.

[16] *See* Br. 48 & n. 12, 54 (citing *In re The Exxon Valdez,* 296 F. Supp. 2d 1071 (D. Alaska 2004); *In re Agent Orange Prods. Liab. Litig.*, 100 F.R.D. 718 (E.D.N.Y. 1983); *In re Federal Skywalk Cases,* 93 F.R.D. 415 (W.D. Mo. 1982); *Izzi v. Mesquite Country Club*, 186 Cal. App. 3d 1309 (1986)).

the same jury that determines the amount of punitive damages must decide the predicate punitive damage liability issues. Civil Code § 3295.

The principle that "exemplary damages must bear a 'reasonable relationship' to compensatory damages" is also a requirement of federal due process. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 580 (1996). As the Supreme Court recently made clear, "the precise award [of punitive damages] in any case . . . must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1524 (2003). "Courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *Id.*[17]

These principles preclude certifying a class for the purpose of determining punitive damages in a case such as this, where the underlying claims of individual injury are not susceptible of class treatment. A jury asked to assess punitive damages before determining the extent of actual injury suffered by individual class members will not be able to reasonably relate the award to any determination of the extent of actual damages. Rather, the jury will be required to speculate, based on absent or incomplete

---

[17] Plaintiffs assert that courts are also permitted to consider the "potential harm that the defendant's conduct would have caused its intended victim if the wrongful plan had succeeded." Br. 53 (quoting *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993)). But here there were no "intended victims" of any "wrongful plan." Moreover, plaintiffs do not identify any basis for concluding that any "potential harm" from the alleged conduct was greater than the harm, if any, that actually occurred.

proof, as to whether and to what extent the class members actually suffered any injury. As the court held in refusing to certify a punitive damages class in *Philip Morris Inc. v. Angeletti*, 752 A.2d 200 (Md. App. 2000):

> Allowing a single jury to set irrevocably the amount of punitive damages to be imposed relative to and on behalf of several, let alone thousands of individuals, whose actual damages are themselves determined separately from each other, does not enable the jury to properly assess the amount of punitive damages that are appropriate in specific relation to different amounts of—and reasons for—actual damages. Mere widespread, identical proportionality between actual damages and punitive damages for such a multitude of plaintiffs would not necessarily encapsulate the relation between the two types of damages deemed requisite under this State's common law.

Id. at 777-78; *accord Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425, 433 (Tex. 2000) (rejecting the use of a multiplier for a punitive damages award before resolving the actual compensatory damages for individual class members); *Liggett Group Inc. v. Engle*, 853 So. 2d 434, 453 (Fla. App. 2003) (relying on *State Farm* to reject a punitive damages class; "The defendants are entitled to a jury determination, on an individualized basis, as to whether and to what extent each particular class member is entitled to receive punitive damages. One class member's circumstances cannot serve as a proxy for another's."); *In re Baycol Products*, 218 F.R.D. 197, 215 (D. Minn. 2003) (relying on *State Farm* to reject a separate punitive damages class "because the conduct upon which Plaintiffs would base their punitive damages claim is not specific to a particular plaintiffs' claims").[18]

---

[18] These principles likewise preclude awarding punitive damages based on awards of compensatory damages derived from "inferential statistics" or (continued . . .)

Plaintiffs assert that *State Farm* "weigh[s] in favor" of certifying a punitive damages class here because it recognized that punitive damages should not be based on injuries suffered by non-parties. Br. 49. According to plaintiffs, class certification would permit the "inclusion" of these other claims. Br. 50. But nothing in *State Farm* suggests that it was doing away with the settled requirements for certification and adopting instead a new standard that permits individual injury claims to be "included" together whenever multiple plaintiffs seek punitive damages based on the same alleged conduct. When the underlying claim of injury upon which the prayer for punitive damages depends is an individual one not susceptible of class treatment, class treatment of the derivative punitive damages claim is improper for the same reason.[19]

Plaintiffs' related assertion that a punitive damages class should be certified to resolve the problem in a "mass disaster" case of ensuring that

---

"extrapolation." Such extrapolated awards (even if they were otherwise permissible) do not establish the "harm to the plaintiff" (*State Farm*, 123 S. Ct. at 1524) required to support a punitive damages recovery. Moreover, plaintiffs have not identified any other feasible way for a single jury to determine the actual harm to individual plaintiffs in a manner sufficient to satisfy *State Farm.* Thus, even if a class were certified for compensatory damages on the basis requested by plaintiffs, a punitive damages class would still be improper.

[19] In addition, plaintiffs' suggestion that their proposal would permit all claims arising from the fire to be resolved in single proceeding before a single jury (Br. 50) is unfounded. As noted above (at 8-9), plaintiffs' proposed class does *not* include all persons who have asserted claims arising from the fire. It is simply not feasible to expect a single jury to sit for the months or years required to resolve all of these claims for purposes of an overall punitive damages determination that is properly tailored to the actual harm to the plaintiffs.

the amount of the punitive damage award does not result in "under-deterrence" or "over-deterrence" (Br. 52) is likewise unfounded. Far from suggesting aggregate treatment as the means for ensuring against the risk of awards not commensurate with the harm done, *State Farm* addressed the issue in an entirely different way—by requiring that any award of punitive damages be "proportionate to the amount of harm to the plaintiff and to the general damages recovered." 123 S. Ct. at 1524. This requirement that any plaintiffs' punitive damages be closely tethered to the injury proved by that plaintiff avoids the problem plaintiffs say they fear. To the extent that particular plaintiffs prove they were injured (and prove the requirements for punitive damages), those plaintiffs will be entitled to a proportional recovery of punitive damages. But to the extent that particular plaintiffs were not injured, those plaintiffs are not entitled to recover punitive damages. And where, as here, the claims of injury turn on facts that require individual proof, class certification is not proper.

Plaintiffs try to avoid this conclusion by asserting that *State Farm* "directs constitutional scrutiny away from the recovery of particular plaintiffs" and instead toward the "overall offending conduct of the defendant." Br. 51. That assertion stands *State Farm* on its head. The whole point of *State Farm* was to reject such arguments that punitive damages may be assessed based on a defendant's "overall offending conduct." Even in its discussion of the reprehensibility prong on which plaintiffs rely, *State Farm* made clear that a defendant may be punished only for "the conduct that harmed the plaintiff, not for being an unsavory

individual or business." 123 S. Ct. at 1523. Similarly, the Court held that any evidence of the defendant's conduct "must have a nexus to the specific harm suffered by the plaintiff." *Id.* More fundamentally, in its discussion of the proportionality prong, the Court held that any punitive damages award must be based not only "upon the facts and circumstances of the defendant's conduct" but on the "harm to plaintiff." *Id.* at 1522. Far from indicating lack of concern "with the recovery of any particular plaintiff" (Br. 50), the Supreme Court held that punitive damages must be tailored to "amount of harm to the plaintiff and to the general damages recovered." 123 S. Ct. at 1524.

In short, the "serious institutional problem" (Br. 51) plaintiffs say they fear is entirely of their own making. By seeking to certify a class that disregards or glosses over the lack of harm to particular class members, plaintiffs are inviting the very kind of disproportionate awards the Supreme Court has condemned. The superior court properly rejected that request.

CONCLUSION

For the foregoing reasons, the superior court's order denying class certification should be affirmed.

Dated: May 27, 2004.

JONES DAY
CRAIG E. STEWART #129530

GENNARO A. FILICE III #06112
RICHARD V. NORMINGTON #130228
FILICE, BROWN EASSA & MCLEOD LLP

By _____

Attorneys for Respondents