IN THE SUPREME COURT OF LOUISIANA

No. 07-C-662

GLORIA SCOTT et al.,

Plaintiffs-Respondents,

v.

THE AMERICAN TOBACCO COMPANY et al.,

Defendants-Petitioners.

On Petition For Review From The Court Of Appeal,
Fourth Circuit, Parish of Orleans
Court of Appeal Docket No. 2004-CA-2095

THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE LOUISIANA ASSOCIATION OF BUSINESS AND INDUSTRY, AND THE LOUISIANA CHEMICAL ASSOCIATION'S MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

NOW INTO COURT, through undersigned counsel, comes the Chamber of Commerce of the United States ("Chamber"), the Louisiana Association of Business And Industry ("LABI"), and the Louisiana Chemical Association ("LCA"), and move this Court for leave to file a brief as *amici curiae* in support of Petitioners. For the following reasons, *amici*'s motion should be granted.

1.

This action addresses the issue of whether the trial court appropriately certified plaintiffs' claims for medical monitoring and cessation damages under Louisiana law.

2.

The Chamber, LABI, and LCA ask that the Court grant them leave to file a brief as *amici curiae* in this case in order to aid the Court's understanding of the serious implications of the class certification decision below.

3.

The Chamber is the nation's largest federation of business companies and associations, with an underlying membership of more than 3,000,000 businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs involving issues of national concern to American business.

4.

The Chamber regularly files *amicus* briefs in significant appeals involving class certification issues, including *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), *State Farm Mutual Auto Insurance Co. v. Speroni*, 525 U.S. 922 (1998), and *Castano v. American Tobacco*, 84 F.3d 734 (5th Cir. 1996).

5.

The LABI represents a wide range of large and small businesses in Louisiana and has approximately 3,200 members throughout the state. The LABI works to foster the interests of the business community through active involvement in the political, legislative, judicial and regulatory processes.

6.

The LCA is a nonprofit Louisiana corporation, composed of 68 member companies located at over 90 chemical manufacturing plant sites in Louisiana. Each LCA company, as does any business in the current legal climate, faces the constant threat of litigation, including class actions, and may be adversely affected by the decision in this litigation.

7.

Amici's motion for leave to file a brief in support of petitioners as *amici curiae* should be granted for two important reasons. ***First***, *amici* have substantial, legitimate business interests that will likely be affected by the outcome of the case. Few issues are of more concern to American business than those pertaining to class certification. The Chamber, LABI, and LCA and their members have a strong interest in reversal of the Fourth Circuit's opinion in this matter because, absent reversal, the court's effective elimination of the reliance requirement would

threaten the ability of businesses in Louisiana to fairly defend themselves against fraud-based class actions.

8.

Second, amici can offer this Court significant guidance on the class certification questions at issue in this appeal that might otherwise escape the Court's attention. Specifically, *amici*'s familiarity with relevant federal class certification precedents and the policy implications of relaxed class certification standards (topics not addressed in petitioners' brief) can be of great assistance to the Court in understanding the broader implications of the Fourth Circuit's ruling.

9.

WHEREFORE, the Chamber of Commerce of the United States, the Louisiana Association of Business And Industry, and the Louisiana Chemical Association respectfully request that this Court grant them leave to file the attached brief as *amici curiae*.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Motion for Leave has been served upon all counsel of record by placing same in the United States mail, postage prepaid and properly addressed, this 2nd day of April, 2007.

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ORDER

Considering the above and foregoing;

IT IS ORDERED that the Chamber of Commerce of the United States, the Louisiana Association of Business and Industry, and the Louisiana Chemical Association's Motion for Leave to File Amicus Brief in Support of Petitioners be and the same hereby is granted, and that their Brief be and hereby is deemed filed with the Court.

New Orleans, Louisiana, this _____ day of _____, 2007.

_____
JUDGE

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE LOUISIANA ASSOCIATION OF BUSINESS AND INDUSTRY, AND THE LOUISIANA CHEMICAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

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Few issues are of more concern to American business than those pertaining to class certification. The Chamber, LABI, and LCA and their members have a strong interest in reversal of the Fourth Circuit's opinion in this matter because, absent reversal, the court's effective elimination of class certification requirements would threaten the ability of businesses in Louisiana to fairly defend themselves against potentially bankrupting class action judgments. *Amici* believe that their perspective can be of assistance to the Court in understanding the broader implications of the Fourth Circuit's ruling.

INTRODUCTION

In upholding the certification of a class of cigarette users asserting claims for medical monitoring and smoking cessation relief against cigarette manufacturers, the Fourth Circuit in this case held that even though plaintiffs' allegations sounded in fraud, they were not required to establish individual reliance in order to prevail on their claims. *Scott v. Am. Tobacco Co.*, 04-

2095, p. 24 (La. App. 4 Cir. 2/7/07); 2007 La. App. LEXIS 258, at *24, *reh'g denied sub nom. Jackson v. Am. Tobacco Co.*, 04-2095 (La. App. 4 Cir. 3/2/07); 2007 La. App. LEXIS 437. Rather, the court found, because plaintiffs seek to recover on behalf of a common fund, "the causal connection" required for a showing of reliance could be established for "the class as a whole" rather than for its individual members. *Id.*

The Fourth Circuit's decision essentially overrides the requirements for asserting a fraud claim under Louisiana law if that claim is pursued as part of a class action rather than individually. Absent reversal, plaintiffs seeking common fund relief under Louisiana law would be allowed to recover for fraud claims without making individualized showings that every class member relied on the defendants' alleged fraud and, as a result of that reliance, suffered a cognizable injury.

Review of this decision is warranted for three important reasons. ***First***, the Fourth Circuit's order is directly contrary to longstanding precedent – both in Louisiana and federal courts – holding that class certification is inappropriate where, as here, plaintiffs' claims require a showing of reliance. While the Fourth Circuit sought to distinguish this case on the basis that plaintiffs seek relief in the form of a single, court-supervised common fund, the court's approach is contrary to volumes of caselaw in that it effectively eliminates the reliance requirement in order to facilitate class certification.

Second, and for similar reasons, the court's "classwide reliance" approach would "cause material injustice" and "significantly affect the public interest." La. Sup. Ct. R. X, § 1(a)(4). If allowed to stand, this ruling would deny future defendants in Louisiana class actions – as it did the defendants in this case – the basic due process right to a fair trial by making it impossible for them to challenge deficiencies in individual class members' claims.

Third, judicial review of the court's decision is also warranted because, if left undisturbed, the court's erroneous conclusions would encourage attorneys to bring to this state the kinds of product liability and fraud class actions routinely rejected by federal courts and other states as uncertifiable on the grounds that they do not meet the fundamental requirements of certification and rob defendants of their Constitutional right to fairly defend themselves. Indeed, the precedent set by the Fourth Circuit's decision threatens to have a far-reaching impact on businesses providing goods and services within the state of Louisiana because it serves as a

strong suggestion to plaintiffs' counsel everywhere that class certification is readily available in Louisiana courts, regardless of how individualized the proposed class members' claims may be.

For these reasons, the Court should grant the Petitioners' writ and reverse the Fourth Circuit's order affirming class certification in this case.

STATEMENT OF FACTS

This appeal arises from a class action in the Civil District Court, Orleans Parish, involving tobacco users seeking the establishment of a court-supervised medical monitoring and/or smoking cessation program fund. The district court certified a class of all Louisiana residents who smoked on or before May 24, 1996 and sought to participate in a smoking cessation program. The district court then conducted a two-phase class trial in which the jury determined that defendant cigarette manufacturers (and a public relations firm) were liable to the class. Defendants appealed to the Court of Appeal for the Fourth Circuit, arguing, *inter alia*, that the district court improperly certified a class in this case because plaintiffs' fraud-based claims required a showing of individual reliance and, as a result, the claims of the class could not be resolved by common proof. The Fourth Circuit rejected this argument, holding that the "certified claim is one for a single, court-supervised fund by the class as a whole" and, therefore, "the only question of reliance pertains to [the class] as a whole." *Scott*, 04-2095, p. 22; 2007 La. App. LEXIS 258, at *22. As a result, the court determined, "individual reliance is not at issue in the instant case," and the verdict was upheld. *Id.*

ARGUMENT

Under Louisiana Supreme Court Rule X, § 1(a), Supreme Court review is appropriate (a) to resolve uncertainty or conflict regarding significant legal issues; and (b) to correct errors that "will cause material injustice or significantly affect the public interest." The Fourth Circuit's ruling in this matter merits Supreme Court review for three important reasons. First, the court's finding that class action plaintiffs seeking medical monitoring or cessation damages to be paid from a common fund need not establish individual reliance to prove their fraud claims is in direct conflict with Louisiana and federal class action law. Second, the court's decision allowing certification of a fraud class on the ground that reliance could be proven for the "class as a whole" violated basic principles of Due Process guaranteed by the Louisiana and United States Constitutions, thereby causing defendants "material injustice." *See* La. Sup. Ct. R. X, § 1(a)(4). And third, the court's ruling will "significantly affect the public interest" because it relaxes the

standard for class certification in Louisiana, thereby potentially opening the door to widespread class action abuse in this state's courts.

I. SUPREME COURT REVIEW IS NECESSARY TO AVOID CONFLICT BETWEEN THE FOURTH CIRCUIT'S DECISION AND SETTLED CLASS ACTION LAW.

The Fourth Circuit's ruling that certification was appropriate because the reliance element of plaintiffs' fraud claims could be proven on behalf of the class as a whole merits review by this Court because it is in direct conflict with this Court's ruling in *Banks v. New York Life Insurance Co.*, 98-0551 (La. 7/2/99); 737 So. 2d 1275, 1279, and with the overwhelming weight of federal authority.[1] While the Fourth Circuit sought to distinguish this case from the long line of cases denying certification of fraud class actions, its efforts were unavailing. This Court should step in to resolve this conflict so as to avoid confusion within Louisiana courts regarding the requirements for certification of class actions alleging fraud or any other causes of action that require proof of reliance.

Prior to the Fourth Circuit's ruling in this case, Louisiana law was clear that claims requiring a showing of reliance are presumptively uncertifiable. In *Banks*, 98-0551, p. 15; 737 So. 2d at 1281, this Court expressly held that a "fraud class action cannot be certified when individual reliance will be an issue." *Id.* By definition, however, reliance is ***always at issue*** in a fraud-based claim that involves individual purchases; in *Banks*, for example, which involved insurance purchases, the court noted: "[i]n determining whether fraudulent or negligent misrepresentations have occurred, the circumstances surrounding each purchase by each policyholder must be examined to determine ***whether the purchaser relied on representations*** made either in written documents or by a particular agent and if so, whether the representations affected the circumstances of each sale." *Id.* (emphasis added); *see also id.* p. 16; 737 So. 2d at 1281-82 (finding that the trial court must "scrutinize each plaintiff's case individually to determine whether," *inter alia*, "plaintiffs relied upon oral statements, written materials or both"). The *Banks* court recognized that even where plaintiffs seek to certify a fraud-based class action on a "core theory" that representations emanating from the "home office" were "unsupported and unsustainable," individualized issues of reliance nevertheless render class certification improper

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[1] The conflict with federal law makes review all the more appropriate because of the clear guidance from the Louisiana legislature and this Court that the Louisiana class action statute is intended to be interpreted consistently with federal class action law. *See Ford v. Murphy Oil U.S.A., Inc.*, 96-2913 (La. 9/2/97); 703 So. 2d 542, 545 n.5 (noting that Act 839 was designed to make the language of Louisiana class action provisions "more closely track the language of Federal Rule of Civil Procedure 23").

because determining which representations actually made their way to prospective consumers ***and influenced their purchases*** requires individualized fact development. *Id.* p. 16; 737 So. 2d at 1282.

This Court's ruling in *Banks* is consistent with the overwhelming weight of federal class action precedent. Almost every federal court to consider the issue has adhered to this guidance, finding that fraud claims are inherently ill-suited for class resolution – ***particularly in cases involving individual consumer decisions*** – because they require each plaintiff to show that he or she relied on the alleged fraud. *See, e.g., Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996); *In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 221 (E.D. La. 1998) (denying class certification; "reliance is an individualized issue"); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360, 374 (E.D. La. 1997) ("under plaintiffs' common law fraud/misrepresentation theory, each class member would have to demonstrate his individual reliance upon the alleged misrepresentations, causing individual, not common, fact issues to predominate").[2]

For example, in *Castano* – the direct precursor of the present action – the U.S. Court of Appeals for the Fifth Circuit concluded that the trial court abused it discretion by certifying a class of smokers seeking compensation "for the injury of nicotine addiction." 84 F.3d at 737. Specifically, plaintiffs in *Castano* alleged that the defendant tobacco companies "fraudulently failed to inform consumers that nicotine is addictive and manipulated the level of nicotine in

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[2] *See also, e.g., Broussard v. Meineke Disc. Muffler Shops*, 155 F.3d 331, 341-42 (4th Cir. 1998) (holding that the "reliance elements of plaintiffs' fraud and negligent misrepresentation claims were not readily susceptible to class-wide proof" because "reliance must be applied with factual precision" and therefore plaintiffs claims "do not provide a suitable basis for class-wide relief") (quotation omitted); *In re Am. Med. Sys.*, 75 F.3d 1069, 1081 (6th Cir. 1996) (vacating order certifying failure-to-warn claims against manufacturer of allegedly defective medical device in part because "each plaintiff's [physician] would also be required to testify . . . as to issues of reliance, causation and damages"); *In re Prempro Prods. Liab. Litig.*, 230 F.R.D. 555, 567-68 (E.D. Ark. 2005) (denying certification of class alleging consumer fraud claims because trial would "requir[e] individualized proof concerning reliance and causation," noting that "[w]hether a plaintiff saw an advertisement; whether the particular advertisement was fraudulent; whether that plaintiff relied on the advertisements; and whether the plaintiff was damaged as a result of the advertisement are all individual questions of fact"); *In re Paxil Litig.*, 212 F.R.D. 539, 548 (C.D. Cal. 2003) (denying class certification of pharmaceutical drug claims, noting that "because the putative plaintiffs all took Paxil at different times, some of those patients may have ingested Paxil and withdrawn from it before the advertisements at issue were aired or may have never seen the advertisements" and therefore "the Court has significant doubts with respect to Plaintiffs' ability to show reliance, other than on a tedious case by case basis"); *Keyes v. Guardian Life Ins. Co.*, 194 F.R.D. 253, 257 (S.D. Miss. 2000) (rejecting class certification because plaintiff's "success or failure will depend on a substantially more individualized inquiry as to the mix of information received by each class member, and how the information affected the class member's decision, i.e., whether there was reliance by that person"); *Sanneman v. Chrysler Corp.*, 191 F.R.D. 441, 453 (E.D. Pa. 2000) ("Common law fraud claims are frequently not certified, as the relevant individual issues would predominate."); *Martin v. Dahlberg, Inc.*, 156 F.R.D. 207, 217 (N.D. Cal. 1994) (class certification denied in fraud case premised on national advertising campaign; "individualized questions of reliance [including whether each individual saw the advertisement, believed the advertisement, would have purchased the product notwithstanding the advertisement and how each individual interpreted the advertisement] . . . preclude certification"); *Kelley v. Mid-America Racing Stables, Inc.*, 139 F.R.D. 405, 411 (W.D. Okla. 1990) (class certification denied where "[e]very member of the proposed class will have to demonstrate his or her reliance to recover under the common law [fraud] theories"); *Gavron v. Blinder Robinson &*

cigarettes to sustain their addictive nature." *Id.* Plaintiffs sought, *inter alia*, "the establishment of a medical monitoring fund." *Id.* at 738. Among the reasons the Fifth Circuit provided for reversing the trial court's certification order was the "error inherent" in its approach to the plaintiffs' fraud claim. Because "a fraud class action cannot be certified when individual reliance will be an issue," the court of appeals found that the trial court had erred by refusing to "consider whether reliance would be an issue in individual trials." *Id.* at 745. The court also observed that attempting to conduct individual trials on reliance subsequent to a class trial on core liability issues, *i.e.*, whether the tobacco companies "knew cigarette smoking was addictive, failed to inform cigarette smokers of such, and took actions to addict cigarette smokers," *id.* at 739, affords no benefit at all because after the class trial the court would be "faced with the difficult choice of decertifying the class after phase 1 and wasting judicial resources, or continuing with a class action that would have failed the predominance requirement of rule 23(b)(3)." *Id.* at 745. In *Banks*, this Court expressly acknowledged that, under the reasoning set forth in *Castano*, fraud claims involving individual reliance are not appropriate for class certification. *Banks*, 98-0551, p. 9; 737 So. 2d at 1281.

The Fourth Circuit's decision here is in direct conflict with these settled principles of class action law. Although the court specifically recognized that proof of plaintiffs' fraud-based claims "requires causation in the form of reliance," *Scott*, 04-2095, p. 22; 2007 La. App. LEXIS 258, at *21, the court sought to distinguish this case from *Banks* and the long line of federal cases similarly acknowledging that reliance cannot be proven on a classwide basis on two grounds. First, the court held that because plaintiffs are seeking to establish a common fund to pay for medical monitoring and/or smoking cessation programs, rather than individual damages to each class member, individual reliance "is not at issue in the instant case." *Id.* at *22. Second, the court found that because plaintiffs here allege that defendants committed "fraud of suppression, concealment, and omission designed to distort the entire body of public knowledge" as opposed to direct, affirmative misrepresentations, there is no need to prove individual reliance. *Id.* The appeals court erred on both counts.

First, the court's finding that individual reliance was "not at issue" in plaintiffs' claims merely because they sought to recover funds for medical monitoring and/or smoking cessation is

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Co., 115 F.R.D. 318, 325 (E.D. Pa. 1987) ("plaintiff's common law Fraud claim in Count III is not suitable to be treated as a class action . . . [because] each plaintiff must demonstrate [his or her] reliance").

contrary to Louisiana substantive law. Medical monitoring and smoking cessation programs are merely forms of relief – not causes of action; thus, they do not diminish the requirement that each plaintiff allege and satisfy every element of his or her underlying claim. *See Bourgeois v. A.P. Green Indus.*, 97-3188, p. 11 (La. 7/2/98); 716 So. 2d 355, 361-62 ("a plaintiff who can demonstrate a need for medical monitoring has suffered damage" which "is compensable ***when the plaintiff establishes liability under traditional tort theories of recovery***") (emphasis added). Put simply, each plaintiff must allege and establish the reliance element of their fraud claims; the mere fact that each seeks medical monitoring and smoking cessation programs as an element of damage does not obviate this basic requirement. Indeed, the Fourth Circuit recognized this very principle in rejecting plaintiffs' contention that equity saved their claims (rejected by the jury) under the Louisiana Products Liability Act. *Scott*, 04-2095, p. 18; 2007 La. App. LEXIS 258, at *17 ("even a monitoring claim requires the establishment of liability 'under traditional tort theories of recovery'") (quoting *Bourgeois*, 97-3188, p. 11; 716 So. 2d at 362).

Second, the Fourth Circuit's theory that plaintiffs alleging fraud arising from a defendant manufacturer's "general" failure to disclose information face a lesser burden in demonstrating reliance is similarly at odds with established law. Louisiana courts have held that reliance is an element of all fraud claims, regardless of whether they are based on a theory of affirmative misrepresentation or omission. *See Edmundson Bros. P'shp v. Montex Drilling Co.*, 98-1564, p. 23 (La. App. 5/5/99); 731 So. 2d 1049, 1062 ("To succeed on their fraud claims, plaintiff must prove a misrepresentation ***or failure to disclose*** by [defendant]; [defendant's] intent to deceive; ***reliance*** by plaintiff on [defendant]; and resulting loss or damage to plaintiff.") (emphasis added). The court's determination that defendants are alleged to have participated in a "lengthy course of prohibited conduct affect[ing] a large number of consumers" using "indirect communications designed to distort the entire body of public knowledge" does not change this. *Scott*, 04-2095, p. 23; 2007 La. App. LEXIS 258, at *22. Notably, no ruling in this state's courts has ever before allowed a plaintiff's assertions of pervasive fraud to supersede that plaintiff's burden to prove that the defendant's statements actually induced his or her action. If this were the law, plaintiffs would merely allege that all frauds "distort[ed] the entire body of public knowledge," rendering causation or reliance a nullity in all class actions.[3]

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[3] By effectively eliminating the requirement that plaintiffs allege and prove individual reliance in a fraud-based class action, the Fourth Circuit has essentially transformed these private class plaintiffs into attorneys general, who need not establish reliance to prevail in consumer fraud actions. Notably, the Louisiana Unfair Trade Practices

For this reason, courts around the country have found that reliance must be proven on an individual basis – thereby precluding class certification – even where plaintiffs have alleged that the defendants engaged in widespread deception by omitting to disclose material facts. *Ford Vehicle Paint*, 182 F.R.D. at 216, 221 (denying class certification because, *inter alia*, "reliance is an individualized issue" where vehicle manufacturer was alleged to have "fraudulently conceal[ed] a paint defect in certain" vehicles "from the consuming public, the Federal Trade Commission, and various states' attorneys general" over the course of several years); *Bronco II*, 177 F.R.D. at 363-64, 374 (denying class certification and observing that "each class member would have to demonstrate his individual reliance upon the alleged misrepresentations, causing individual, not common, fact issues to predominate" where plaintiffs alleged defendant sought to "deceive the public concerning the safety of the Bronco II, a utility vehicle marketed by Ford between the years 1983 and 1990").

In contrast to this well-established approach to evaluating proposed fraud-based class actions, the Fourth Circuit's decision effectively holds that plaintiffs alleging fraud in a class action – unlike individual fraud plaintiffs – may prove reliance on defendants' alleged misconduct through a fraud-on-the-market theory (though the opinion does not use that actual term). According to the court, class action plaintiffs can prove causation on a classwide basis through "direct or other circumstantial evidence that a court determines is relevant and probative as to the relationship between the class claim and the prohibited conduct." *Scott*, 04-2095, p. 24; 2007 La. App. LEXIS 258, at *24. In other words, if the Fourth Circuit's decision is left undisturbed, Louisiana plaintiffs pursuing fraud-based product liability claims will no longer need to show how any single class member reacted to the defendant's assertions about its product – or how they would have reacted to ***different*** information. Rather, it will be assumed that consumers make product purchasing decisions as a class, in a monolithic manner, without regard for personal preferences or priorities.

The fraud-on-the-market theory, widely recognized in the context of securities litigation, allows plaintiffs to dispense with individual proof of reliance by demonstrating that the market

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Act ("LUTPA") specifically confers upon the Attorney General – and only the Attorney General – the ability to seek injunctive relief for alleged consumer fraud without the need to prove reliance. *Louisiana ex rel. Guste v. Fedders Corp.*, 524 F. Supp. 552, 555 (M.D. La. 1981) ("The attorney general may bring an action for injunctive relief in the name of the state against a person to restrain the use of an unfair trade practice . . . the state alone is entitled to injunctive relief."). The Fourth Circuit's decision eviscerates these distinctions, expressly contravening the intent of the legislature in enacting the LUTPA. This anomalous result further confirms the need for review of the lower court's ruling.

incorporated an alleged misrepresentation into the purchase price of a stock. *Kaufman v. i-Stat Corp.*, 754 A.2d 1188, 1189 (N.J. 2000). *See Basic Inc. v. Levinson*, 485 U.S. 224, 247 (1988) ("nearly every court that has considered the proposition has concluded that where materially misleading statements have been disseminated into an impersonal, well-developed market for securities, the reliance of individual plaintiffs on the integrity of the market price may be presumed") (collecting cases from various jurisdictions). Fraud-on-the-market works in the limited context of securities fraud, because there is a "well-developed market in which the price . . . reflects all publicly available information," and because price is generally the sole factor motivating the purchase and sale of stocks. *Appletree Square I Ltd. P'ship v. W.R. Grace & Co.*, 29 F.3d 1283, 1287 (8th Cir. 1994).

Courts around the country have flatly rejected application of the fraud-on-the-market approach to prove reliance in product liability claims, however. *See, e.g., Ford Vehicle Paint*, 182 F.R.D. at 221-22 (acknowledging that the vast majority of states have refused to allow a "fraud on the market" theory of reliance in common law fraud cases) (collecting cases); *Brown ex rel. Estate of Brown v. Philip Morris Inc.*, 228 F. Supp. 2d 506, 519 (D.N.J. 2002) (rejecting plaintiff's attempt to use a "fraud on the market" theory of reliance in action for common law fraud against three tobacco companies for alleged smoking-related death); *Graham v. Am. Cyanamid Co.*, Nos. C-2-94-423, C-2-94-425, 2000 WL 1911431, at *6 (S.D. Ohio Dec. 21, 2000) (dismissing plaintiff's common law fraud claim arising from allegation of permanent disability due to defective vaccine manufactured by defendant because "fraud on the market" theory does not apply to common law fraud claims); *Heindel v. Pfizer, Inc.*, 381 F. Supp. 2d 364, 381 (D.N.J. 2004) (acknowledging impropriety of using "the fraud on the market theory to circumvent the reliance element" of the Pennsylvania consumer fraud statute). As these courts have recognized, product purchases are simply not analogous to purchases of securities. *See Cofield v. Lead Indus. Ass'n*, No. Civ. A. MJG-99-3277, 2000 WL 34292681, at *10 (D. Md. Aug. 17, 2000) (concluding that securities cases do not "provide a useful analogy in the product/fraud context" and noting "that most courts have refused to extend the 'fraud on the market' concept from securities litigation to common law fraud actions"); *N.J. Citizen Action v. Schering-Plough*, 837 A. 2d 174, 178 (N.J. Super. Ct. App. Div. 2003) (fraud on the market and price inflation theories simply "have no place as a part of the proofs required of plaintiffs" in the consumer fraud context). After all, unlike the securities market in which it can be assumed that

individuals purchased a security to make money and were concerned only about its value, consumers obviously have different motivations and take different factors into account in deciding whether or not to purchase a particular product. The Fourth Circuit's refusal to recognize this basic common-sense principle is at odds with this Court's prior rulings and a long line of cases from federal and state courts around the country rejecting the so-called "fraud-on-the-market" approach to demonstrating reliance in products cases.

In short, the Fourth Circuit's determination that reliance need not be proved on an individual basis in "common fund" class actions is in direct conflict with this Court's rulings and a long line of analogous federal cases. Moreover, the court embraced a fraud-on-the-market approach to reliance that has been rejected by courts across the country. Because these conflicts will inevitably create confusion for Louisiana courts and litigants faced with fraud-based class actions in the future, the Court should grant Petitioners' writ and review the Fourth Circuit's decision in this case.

II. THE TRIAL PLAN AFFIRMED BY THE FOURTH CIRCUIT WAS UNCONSTITUTIONAL.

The Fourth Circuit's decision also merits review because the trial court's plan – affirmed on appeal – violated basic principles of due process under the Louisiana and United States Constitutions, which require that defendants have an opportunity to separately defend themselves against each class member's individualized claims if their claims cannot be fairly adjudicated through classwide proof. *See, e.g., Garber v. Randall*, 477 F.2d 711, 716 (2d Cir. 1973) (holding that an overbroad consolidation order may "deny a party his due process right to prosecute his separate and distinct claims or defenses without having them so merged into the claims own defenses of others that irreparable injury will result"); *In re Air Crash Disaster at Stapleton Int'l Airport*, 720 F. Supp. 1505, 1513 (D. Col. 1989) (holding in context of mass consolidation that "[t]he standard of review applied to determine whether trial procedures applied in complex litigation have combined to deny a party's rights to due process and fair trial is one of actual prejudice to the substantial rights of that party"), *rev'd on other grounds, Johnson v. Cont'l Airlines Corp.*, 964 F.2d 1059 (10th Cir. 1992); *see also In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1020 (5th Cir. 1997) (invalidating on due process grounds a trial plan in a mass consolidated proceeding); *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993) (reversing district court's consolidation of 48 asbestos cases and holding that "[t]he benefits of efficiency can never be purchased at the cost of fairness").

The right to due process, set forth in the United States Constitution and the Louisiana Constitution, *see* U.S. Const. amends. 5, 14 (no person shall "be deprived of life, liberty, or property, without due process of law"); La. Const. art. I, § 2 ("No person shall be deprived of life, liberty, or property, except by due process of law"), guarantees every litigant the "opportunity to present his case and have its merits fairly judged." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982); *see also Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.") (internal quotations omitted); *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971) ("[D]ue process requires, at a minimum, that . . . persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."). This guarantee includes the right to present a defense to each and every claim, even in the context of a class action. *See, e.g., Arch v. Am. Tobacco Co.*, 175 F.R.D. 469, 489 n.21 (E.D. Pa. 1997), *aff'd sub nom. Barnes v. Am. Tobacco Co.*, 161 F.3d 127 (3d Cir. 1998).

Moreover, as this Court has recognized, class actions are merely a procedural device and are not intended to alter substantive rights or impair basic fairness to parties. *See Ford v. Murphy Oil U.S.A.*, 96-2913 (La. 9/2/97); 703 So. 2d 542, 547 ("In determining how the legislature intended the courts to define and apply the concept of allowing a class action to enforce rights with a common character, we are mindful of the basic goals or aims of any procedural device: to ***implement the substantive law***, and to implement that law in a manner which will ***provide maximum fairness to all parties*** with a minimum expenditure of judicial effort.") (emphasis added) (quoting *Stevens v. Bd. of Trs.*, 309 So. 2d 144, 151 (La. 1975). *See also State v. 1979 Cadillac Deville*, 627 So. 2d 729, 731 (La. App. 2 Cir. 1993) ("essential elements of procedural due process are notice and an opportunity to be heard and to defend in an orderly proceeding").

The court's decision violates these basic tenets by constraining the ability of class action defendants to present a full and meaningful defense at trial. As noted above, the court's ruling allows for the adjudication of reliance and causation claims on an aggregate basis in certain class actions. However, as court after court has recognized, each class member's ability to establish reliance will vary dramatically based on the individualized facts of his or her case. By allowing a generalized showing of reliance as to all class members as a whole, the court's decision essentially robbed defendants here (and, if left undisturbed, will rob future defendants as well) of

the opportunity to actually contest whether individual class members have any right to recover damages.

Unless the Fourth Circuit's decision is reversed, defendants in Louisiana will be forced to pay damages to class members who have never proven that they have a valid claim, and without having the chance to contest the claims of such class members on the ground that they did not, in fact, rely on any alleged misrepresentations. Such a procedure is clearly not one which affords defendants an "opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews*, 424 U.S. at 333 (internal quotation omitted). For that reason, many courts have found that aggregating claims based on the premise that particular elements of the plaintiffs' claims may be proved through non-specific evidence is unconstitutional. *See Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 311 (5th Cir. 1998) (invalidating phased trial plan in consolidated asbestos cases and acknowledging defendants' argument that the trial failed to "properly try and determine individual causation" and thus violated due process requirements); *Todd-Stenberg v. Dalkon Shield Claimants Trust*, 56 Cal. Rptr. 2d 16, 18 (Ct. App. 1996) (noting that consolidation may violate a party's due process rights and right to jury trial).

The trial in this case was rife with the very violations other courts have cited as reasons why such trials are impermissible, *i.e.*, defendants were denied the right to mount individualized defenses based on the circumstances of each plaintiff's cigarette purchases. Most importantly, defendants were unable to question class members about what information they had regarding the risks of tobacco use; when, where, and from whom they obtained the information; and how much – if at all – they relied on the information in deciding whether to buy defendants' products. As the court itself recognized, "the trial court prevented [defendants] from contesting plaintiffs' claims with specific proof," *Scott*, 04-2095, p. 24; 2007 La. App. LEXIS 258, at * 24; and "defendants were not allowed to question the class representatives as to . . . whether they relied on the alleged misrepresentations." *Id.* at *24-25.

In short, by limiting defendants' ability to challenge individual class members' reliance on their alleged misrepresentations, the lower court robbed the defendants here of the ability to fully and fairly defend themselves against plaintiffs' claims. Moreover, if allowed to stand, that Constitutional violation could well deny future defendants in other industries the "meaningful opportunity to be heard" guaranteed by basic notions of due process. While the lower courts may have been motivated by their own views of the tobacco industry in allowing a class trial to

proceed in this case, acceptance of this approach would lead to the certification of many more class actions against companies in a variety of sectors – automotive, pharmaceutical, technology, insurance – in which class members will be able to prevail on fraud claims regardless of whether they satisfy the fundamental requirements for proving fraud under Louisiana law, and defendants will be denied their due process right to a fair trial. For this reason too, the Court should grant Petitioners' application for review and reverse the Fourth Circuit's decision.

III. SUPREME COURT REVIEW IS NECESSARY TO ENSURE THAT LOUISIANA DOES NOT BECOME A "MAGNET" FOR CLASS ACTIONS.

Supreme Court review is also necessary to ensure that the Fourth Circuit's effective elimination of class certification standards does not cause Louisiana to become the next class action "magnet" jurisdiction.

Over the past decade, plaintiffs' lawyers have moved from jurisdiction to jurisdiction throughout the country in search of courts willing to relax traditional class certification and claims aggregation requirements. Whenever they have found such a court, they have bombarded it with a deluge of massive lawsuits that has usually only ceased when the appellate courts of the jurisdiction in question have stepped in and reasserted their commitment to traditional class action and aggregate litigation principles. For example, when Alabama courts became a haven for abusive class actions in the 1990s, the Alabama Supreme Court stepped in and established bright-line rules for class certification. *See, e.g., Ex parte Citicorp Acceptance Co.*, 715 So. 2d 199, 203 (Ala. 1997) (rejecting "drive by" class certification practice under which some Alabama state trial courts conditionally certified classes before service on defendants). Plaintiffs next found success with "mass actions" in Mississippi – but in due course the Mississippi Supreme Court stepped in to stop the rampant abuses in such cases. *See Janssen Pharmaceutica, Inc. v. Bailey*, 878 So. 2d 31, 47-48 (Miss. 2004) (rejecting mass joinder product liability cases), *modified and reh'g denied*, 2004 Miss. LEXIS 1002 (Aug. 5, 2004). More recently, plaintiffs' efforts focused on Illinois, as certain county courts made known their willingness to rubber stamp class certification proposals and approve abusive settlements. *See, e.g.*, American Tort Reform Foundation, *Judicial Hellholes 2004* 14-15 (2004), *available at* http://www.atra.org/reports (identifying Madison County, Illinois as "Number One Judicial Hellhole" because it has "become a magnet court" for class actions). But, as with Alabama and Mississippi, the Illinois Supreme Court ultimately intervened and ended the abusive rulings in a decision rejecting the trial court's application of Illinois insurance law to a nationwide class of

automobile insurance policy-holders. *See Avery v. State Farm Mut. Auto. Ins. Co.*, 835 N.E.2d 801 (Ill. 2005) (reversing certification of nationwide insurance class action), *cert. denied*, 126 S. Ct. 1420 (2006).

There is no reason to think that the result will be any different if this Court leaves the Fourth Circuit's decision intact. History has shown that every time a jurisdiction has loosened standards for aggregated claims litigation, the result has been the same – an influx of abusive lawsuits against businesses by plaintiffs' lawyers eager to take advantage of the newest mass tort haven. Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 Ariz. L. Rev. 595, 606 (1997) ("Judges who move large numbers of highly elastic mass torts through their litigation process at low transaction costs create the opportunity for new filings. . . . If you build a superhighway, there will be a traffic jam."). In this case, the Fourth Circuit's decision effectively eliminates the fundamental class certification requirement that plaintiffs be able to prove their claims with common proof. Absent that requirement, class certification would become a tool to deprive defendants of their ability to fairly defend lawsuits – rather than a procedural mechanism for the efficient adjudication of common claims. In addition, if the Fourth Circuit's decision is left standing, Louisiana would become one of very few jurisdictions that allow certification of fraud claims. As a result, Louisiana businesses would be unfairly targeted as choice defendants in fraud class actions.

Moreover, it is no answer to suggest that the enactment of the Class Action Fairness Act ("CAFA"), Pub. L. 109-2, 119 Stat. 4, 4-14 (2005), has eliminated any negative consequences caused by the Circuit Court's ruling. Although most nationwide class actions are now removable to federal court under CAFA, plaintiffs will inevitably attempt to expand the import of this decision beyond class action suits in various ways if the Fourth Circuit's decision is left undisturbed. For example, because single-state and certain multi-state class action suits brought against Louisiana companies in Louisiana courts generally cannot be removed to federal court under CAFA, the effects of this ruling will be felt disproportionately by Louisiana-based companies.

As this Court is well aware, such class action abuse will impose tremendous costs on all parties concerned with the litigation process. In *Ford*, this Court observed that class certification "dramatically affects the stakes for defendants," "magnif[ying] and strengthen[ing] the number of unmeritorious claims" and creating "insurmountable pressure on defendants to settle." *Ford*,

96-2913; 703 So. 2d at 550 (quoting *Castano v. Am. Tobacco*, 84 F.3d 734, 746 (5th Cir. 1996)). Many defendants choose to settle in such circumstances, regardless of the merit of the plaintiff's claims, as"[m]any corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation." *Id.*; *see also In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (observing that companies facing millions of dollars of potential liability "may not wish to roll the[ ] dice. That is putting it mildly."). Loosening class certification standards will thus hurt both Louisiana companies and Louisiana consumers, who will pay higher prices for goods and services and see their legitimate lawsuits take a back seat as the Louisiana courts are deluged with meritless class action lawsuits.

This Court should review and reverse the Circuit Court's decision before Louisiana courts become the next haven for class action abuse to the detriment of the state's consumers and businesses and the integrity of the state's legal system.

CONCLUSION

For the reasons set forth above, and those set forth in Petitioners' writ application, the Court should accept the petition for review and reverse the Fourth Circuit's order upholding class certification in this case.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Motion for Admission *Pro Hac Vice* has been served upon all counsel of record by placing same in the United States mail, postage prepaid and properly addressed, this 2nd day of April, 2007.

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