

A10-215

**State of Minnesota  
In Court of Appeals**

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Gregory Curtis, Joni Kay Hanzal, Josephine Leonard and  
Randy Hoskins, individually and on behalf of all others  
similarly situated,

Appellants,

v.

Altria Group, Inc. and Philip Morris, Inc.,

Respondents.

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**APPELLANTS/CROSS-RESPONDENTS'  
RESPONSE AND REPLY BRIEF AND ADDENDUM**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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**STATEMENT OF THE ISSUES AS RAISED IN  
RESPONDENTS/CROSS-APPELLANTS' BRIEFS**

I. DID THE TRIAL COURT ABUSE ITS DISCRETION IN GRANTING CLASS CERTIFICATION?

Pursuant to Appellants' motion, class certification was granted. (R.Add. 12).

Peterson v. BASF Corp., 675 N.W.2d 57 (Minn. 2004), *cert. granted, vacated*, 544 U.S. 1012 (2005), *aff'd on remand*, 711 N.W.2d 470 (Minn. 2006).

Streich v. Am. Fam. Mut. Ins. Co., 399 N.W.2d 210 (Minn. Ct. App. 1987).

Group Health Plan, Inc. v. Philip Morris, Inc., 621 N.W.2d 2 (Minn. 2001).

II. DID THE TRIAL COURT COMMIT ERROR IN DENYING PHILIP MORRIS PARTIAL SUMMARY JUDGMENT ON STATUTE OF LIMITATIONS GROUNDS?

Cross-Appellant Philip Morris sought partial summary judgment, which was denied. (R.Add. 22).

Cattnach v. State Farm Ins. Co., 577 N.W.2d 251 (Minn. Ct. App. 1998).

Wild v. Rarig, 302 Minn. 419, 234 N.W.2d 775 (1975), *cert. denied*, 424 U.S. 902 (1976).

III. DID THE TRIAL COURT COMMIT ERROR IN DENYING ALTRIA'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION?

Cross-Appellant Altria (then Philip Morris Companies) sought dismissal pursuant to Minn. R. Civ. P. 12.02, which was denied. (A.Add. 1).

Hardrives, Inc. v. City of La Crosse, 240 N.W.2d 814 (Minn. 1976).

Rostad v. On-Deck, Inc., 372 N.W.2d 717 (Minn. 1985).

## RESPONSE TO PHILIP MORRIS' STATEMENT OF THE FACTS

In asserting no “public benefit,” Respondent PM USA, Inc. (PM)<sup>1</sup> relies on the allegations of Plaintiff Class’ Second Amended Complaint and on self-selected portions of the State of Minnesota v. Philip Morris record. (A. 176). PM also referenced the 2009 Family Smoking Prevention and Tobacco Control Act (FSPTCA), 21 U.S.C. § 387, *et seq.*, but did not inform the court that Congress instructed the FSPTCA was to have no effect on any pending state court actions. To the grant of summary judgment/judgment on the pleadings, Plaintiff Class is entitled to have the material facts viewed in a light most favorable to them.

PM’s purported facts, Brief pages 11-13, are primarily references to its 2003 opposition to class certification (R.A. 00325) and its 2009 opposition to Plaintiff Class’ motion to review discovery from absent class members (R.A. 001556), which 2009 opposition was not of record when class certification was granted in 2004. The facts regarding class certification are to be viewed in a light most favorable to the trial court’s ruling. Plaintiff Class offers this factual outline to provide accurate historical perspective.

Marlboro Lights packs containing the words “lights” and “lowered tar and nicotine” were introduced in 1971. (A. 366). Any contention that the Federal Trade Commission (FTC) “blessed [PM’s] use of labels like ‘light’ and ‘low tar’ was foreclosed by Altria v. Good, \_\_\_ U.S. \_\_\_, 129 S. Ct. 538 (2008), concluding FTC has never

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<sup>1</sup> Respondent Altria joins in PM USA, Inc.’s arguments in opposition to Plaintiff Class’ appeal. (Altria Brief, p. 4). Accordingly, arguments as to PM also apply to Altria in this regard.

condoned “light” or “low tar” descriptors.” U.S. v. Philip Morris USA, Inc. (DOJ), 566 F.3d 1095, 1124-25 (D.C. Cir. 2009), *cert. denied* \_\_\_ U.S. \_\_\_, 2010 WL 604180 (2010).

PM has known but did not inform smokers they would likely receive as much or more tar from Marlboro Lights as they would smoking regular Marlboros. PM intended consumers to associate “lights” with healthier products. (SA 528, 558). PM designed its Marlboro Lights so they did not provide consumers lower tar, yet it marketed, promoted and sold “lights” as if they did. PM’s knowledge and suppression is demonstrated in a formerly confidential 1974 internal document, “Some Unexpected Observations on Tar and Nicotine and Smoker Behavior”:

Generally people smoke in such a way that they get much more than predicted by machine. This is especially true for dilution cigarettes [i.e. low tar, low nicotine]. . . . The FTC standardized test . . . gives low numbers.

(SA 600-601).

A 1975 internal PM document reveals PM knew there was no “delivery” difference between “light” and regular Marlboros. (SA 728). PM conducted research to assure the composition of its “light” cigarettes would not make it easier for “light” smokers to quit than if they smoked regular cigarettes. (SA 527). Not only did PM exploit the limits of FTC’s tests to market its cigarettes as “lowered tar and nicotine,” it also deliberately designed “lights” to fool FTC’s tests into producing results enabling it to characterize Marlboro Lights as “lowered tar and nicotine” while ensuring “lights” smokers obtained much higher levels of them. PM’s design and processing innovations

generated reduced tar and nicotine yields on FTC's tests, but produced significantly higher levels when actually smoked. (See Monograph 13 – Chapter 1: Public Health Implications of Changes in Cigarette Design and Marketing – and Chapter 2: Cigarette Design).<sup>2</sup> The purpose of its deceptive design was to ensure Marlboro Lights smokers received acceptable, addictive levels of tar and nicotine, as determined by PM's internal research. (See SA 599-601, 608, 612, 626; see generally Monograph 13 — SA 268).

In 1998, the Consent Judgment was entered in State v. Philip Morris. (A. 117). With the approval of Philip Morris Company<sup>3</sup> (PMC), PM advertised and sold Marlboro Lights as “lowered tar and nicotine” unimpeded to Minnesota consumers before and after that settlement. (A. 366; R.A. 001600; 224A).

In October 2001, the National Cancer Institute released Monograph 13, concluding:

- Low tar cigarette advertisements were intended to reassure smokers worried about the health risks of smoking and prevent quitting.
- Advertising and promotional offers successfully got smokers to use light cigarettes.
- Formerly secret tobacco documents available to health professionals and the public demonstrate manufacturers recognized the advertisements' inherent deception offering “light” cigarettes or having the lowest tar and nicotine yields.

(SA 261).

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<sup>2</sup> The October 2001 NH Pub. No. 02-5074, National Cancer Institute's publication entitled Monograph 13: Risks Associated With Smoking Cigarettes With Low Machine-Measured Yields of Tar and Nicotine—which is referred to as Monograph 13—is of record but has not been included in its entirety in the appendix.

<sup>3</sup> Claims against PMC, which later changed its name to “Altria,” were released by the Settlement and Consent Judgment. (A. 138).

This lawsuit was filed November 2001 and Plaintiffs sought leave to proceed as a class.<sup>4</sup> Plaintiff Class asserts PM misrepresented Marlboros as “light” and, as purchasing consumers, are entitled to restitution under Minn. Stat. § 325F.69 and § 8.31, subd. 3a.

PM admits that not until after this lawsuit commenced did it provide any “warnings” and then only on “selected packages” of its cigarettes. (R.A. 001550). PM asserts it enclosed a booklet in certain newspapers, but not including the Minneapolis StarTribune or St. Paul Pioneer Press. (R.A. 001549). PM continued selling Marlboro Lights. PM did not remove express references to tar and nicotine on those packages until early 2003. In re Light Cigarettes Marketing Sales Practices Litigation, \_\_\_ F. Supp. 2d \_\_\_, 2010 WL 2160331 at \*4 (D. Me. 2010). (SA 840).

No PM “warning” informed consumers that light smokers compensate subconsciously, that light cigarette design results in more mutagenic smoke than regular cigarette smoke, or that additives alter pH levels, affecting nicotine delivery. Id. (R.A. 1578). PM failed to disclose the “ultimate fact”—no increased health benefits result from smoking “lights”; instead, PM’s explanation effectively reopened the possibility “lights” might be healthier. Id.

This class action was certified in 2004. (R.Add. 12). In 2006, following a nine-month bench trial and a record including nearly 14,000 exhibits and testimony of nearly 250 witnesses, the court in U.S. v. Philip Morris USA, 449 F. Supp. 2d 1 (D.D.C. 2006)

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<sup>4</sup> There is no evidence this lawsuit “piggybacked” the 1994 AG suit.

(DOJ), issued a ruling including 4,088 separate factual findings.<sup>5</sup> (SA 1). The fraud liability findings against PM and Altria were affirmed in all significant respects in the DOJ case. 566 F.3d 1095.

Affirmed are DOJ's findings that PM and Altria schemed to defraud smokers. "As their internal documents reveal, Defendants engaged in massive, sustained, and highly sophisticated marketing and promotional campaigns to portray their light brands as less harmful than regular cigarettes." *Id.* at 1124, quoting Philip Morris, 449 F. Supp. 2d at 860 (SA 195). "Defendants have known for decades that . . . low tar cigarettes do not offer a meaningful reduction of risk . . . and that their marketing which emphasized reductions in tar and nicotine was false and misleading." *Id.* (SA 196).

Also affirmed were the DOJ court's findings that defendants's public statements about "lights" were "blatantly false"; that PM "withheld and suppressed [its] extensive knowledge and understanding of nicotine-driven smoker compensation" and that PM intentionally designed its light cigarettes to facilitate smokers' compensation, thereby ensuring they obtained their required dosage of nicotine. (SA 196-198). The findings describe defendants' efforts to "design commercial cigarettes . . . capable of delivering nicotine across a range of doses that would keep smokers addicted" through filter design, the placement of ventilation holes, paper porosity and alterations to the chemical form of the nicotine delivered to smokers' brains. (SA 45; DOJ Finding of Fact 1368).

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<sup>5</sup> For the Court's benefits, Plaintiff Class has placed pertinent findings and conclusions of law in its Supplemental Appendix.

Shortly after the D.C. Circuit's decision, Congress enacted the FSPTCA, 123 Stat. 1776 (2009). In so enacting, in its legislative findings, Congress cited the district court's U.S. v. Philip Morris findings. Id. at 1781. It also instructed "nothing in the new Act 'shall be construed to . . . affect any action pending in Federal, State or tribal court.'" Section 4(a), 123 Stat. 1782. Hunter v. Philip Morris USA, 582 F.3d 1039, 1043, n.1 (9th Cir. 2009).

PM sought rehearing en banc in U.S. v. Philip Morris, arguing the FSPTCA rendered moot certain aspects of that decision. When rehearing was denied, PM repeated that claim in its United States Supreme Court's certiorari petition, which petition was denied. Id. at 2010 WL 604180.

**I. PLAINTIFF CLASS IS ENTITLED TO REINSTATEMENT OF ITS CASE.**

PM's contention that this action provides no "public benefit" bears no relationship to the foundation for or language of Minn. Stat. § 325F.69 and Minn. Stat. § 8.31, subd. 3a. Minnesota's Consumer Fraud Act (CFA) "broadens the common law to counteract the seller's disproportionate marketing power present in consumer transactions." D.A.B. v. Brown, 570 N.W.2d 168, 172 (Minn. Ct. App. 1997). The CFA is remedial in nature and to be liberally construed to protect consumers. State by Humphrey v. Alpine Air Prods., Inc., 490 N.W.2d 888, 892 (Minn. Ct. App. 1992), *aff'd* 500 N.W.2d 788 (Minn. 1993).

Minn. Stat. § 325F.69, subd. 1 applies to sales accompanied by misrepresentations. Minn. Stat. § 8.31, subd. 3a provides “any person injured” by a § 325F.69 violation “may bring a civil action to recover damages . . . and receive other equitable relief . . . .” PM fails to address this statutory language. Instead, it boldly asserts that because Plaintiff Class seeks disgorgement of class members’ payments to purchase Marlboro Lights sold under false pretenses, this action must be dismissed. Minnesota law does not so support.

In Collins v. Minnesota School of Business, Inc., 655 N.W.2d 320, 330 (Minn. 2003), Minnesota’s Supreme Court reiterated its holding in Ly v. Nystrom, 615 N.W.2d 302 (Minn. 2002), that the touchstone of the judicially-created public benefit limit on consumer fraud actions are broad dissemination of misrepresentations. In Ly, 615 N.W.2d at 311, the Court quoted Representative Sieben that the statute’s purpose was to stop an “unscrupulous . . . businessman who makes . . . false and deceptive ads” and with § 8.31, subd. 3a’s adoption “a private citizen may take the person to court . . . when the citizen has been defrauded and he may recover damages . . . .” In Collins, 655 N.W.2d at 330, the Supreme Court chastised the trial court for its failure to focus on whether misrepresentations were made to “the public at large.”

Collins follows Minnesota’s Supreme Court decision in Group Health Plan, Inc. v. Philip Morris, Inc., 621 N.W.2d 2 (Minn. 2001), rejecting PM’s efforts to place further restrictions on the CFA unsupported by the statute’s express language. It further states it is not the court’s role to “narrow the [statute’s] reach where the Legislature has spoken in unequivocally broad terms.” Id. at 11.

Likewise, it is not this Court's role to impose further limitations on the CFA on PM's urging. Plaintiff Class's members were injured by PM's § 325F.69 deceit and are entitled to "recover damages . . . and receive other equitable relief as determined by the court." Minn. Stat. § 8.31, subd. 3(a). Plaintiff Class is entitled to pursue its legislatively-created private remedy.

PM's further assertion that there can be no "public benefit" because of the 1998 Consent Judgment in State v. Philip Morris is specifically rejected by the Attorney General itself. (Amicus Brief of State of Minnesota, p. 5, n.2). The record stands undisputed that the State's 1994 action and settlement did not keep Respondents from their continued fraud in selling Marlboro Lights, which misrepresentations continued unabated until after this lawsuit was filed. (A. 366).

PM admits Plaintiff Class is not in privity with the State so as to be bound by the Consent Judgment under a res judicata analysis. The State v. Philip Morris settlement document itself unequivocally states "no portion of this Settlement Agreement shall bind any non-party or determine, limit or prejudice the rights of any such person or entity." (A. 151). Neither Plaintiff Class nor its members were party to that action. Yet the trial court acted directly contrary to that language in dismissing this action, thus limiting and prejudicing class members' rights. The 1998 state case did not provide Plaintiff Class any remedy under Minn. Stat. § 8.31, subd. 3a.

## **II. PLAINTIFF CLASS IS ENTITLED TO PARTIAL SUMMARY JUDGMENT ON COLLATERAL ESTOPPEL GROUNDS.**

The first element of a claim under the CFA is a false promise or misrepresentation. Alsides v. Brown Institute, Ltd., 592 N.W.2d 468, 474 (Minn. Ct. App. 1999). The DOJ final judgment establishes PM explicitly represented, through advertising and other marketing techniques, that “light” and “low tar” cigarettes are less risky and healthier than “full flavored” cigarettes. PM was aware those representations were false.

The DOJ findings quote a March 1, 1977 memo from tobacco-funded scientist Schacter to PM Director of Research Osdene warning, in light of evidence that carbon monoxide, hydrogen cyanide and nitrogen oxide delivery is “considerably greater” in PM’s “light” cigarettes than in its regular cigarettes, the “campaign for low nicotine cigarettes is misguided” and rests on “fallacious promises.” (SA 99). Dr. Farone, PM Director of Applied Research, explained PM’s testing, conducted over 25 years, revealed Marlboro Lights are more mutagenic (i.e., cancer-causing) than regular Marlboros. (SA 100). A 1982 PM document shows PM’s Swiss research center found its “light” cigarettes were “more likely to cause cancer” than regular cigarettes. (SA 101). It received similar reports from research facilities in 1994 and 2001. (SA 101-102). A 2001 document from its German laboratory demonstrated “in every case, the mutagenicity of Marlboro Lights is higher than the mutagenicity of Marlboro full-flavor.” (SA 102).

PM was also aware “lights” present an increased danger to smokers due to “compensation.” While developing “lights,” PM learned light smokers inhale more deeply than regular cigarettes and consume more cigarettes to obtain their daily nicotine

quota. (SA 104-105). PM's internal research shows it was aware its lights posed a greater health risk than its regular cigarettes, but continued to market "lights" as a safer alternative. (SA 99-128, 148-187).

The next element necessary to prove CFA consumer fraud is "the intent that others rely thereon regardless of whether any person has, in fact, been misled, deceived or damaged." Alsides, 592 N.W.2d at 474. As the DOJ detailed, Respondents learned consumers concerned about mounting reports of smoking's health risks were more likely to smoke "light" cigarettes. PM targeted those consumers expressly to dissuade them from quitting. (SA 44-46, 129-136, 195-198). PM knew its "light" and "low tar" cigarettes were more dangerous than regular cigarettes, and also knew smokers interpreted those brand descriptors to mean "light" cigarettes offered a safer alternative. (SA 159, 178-179). PM's formerly confidential internal document establish PM

has long known and intended that its advertisements and marketing for low tar cigarettes, featuring claims of lowered tar and nicotine and "light" . . . descriptors, contributed to and reinforced consumers' mistaken belief that low tar cigarettes are better for their health, and encouraged consumers to smoke them for this reason.

(SA 178). Studies prepared for PM in 1976 and 1979 concluded smokers switched to "lights" because of its advertising calling low tar levels to their attention and consumers' perception that "lights" are healthier. (SA 179-180).

For the CFA's purposes, Plaintiff Class is able to conclusively demonstrate the legal nexus between Respondents' fraudulent conduct and Plaintiff Class' damages, i.e., funds expended by class members to purchase Marlboro Lights. Contrary to PM's

contention, Plaintiff Class need not prove its individual members relied on PM's conduct to establish a CFA violation. Group Health, 621 N.W.2d at 12. Instead, Plaintiff Class must and has shown a "legal nexus" between its injury and Respondents' wrongful conduct. Id. at 13-14. As Minnesota's Supreme Court stated, "where the plaintiff's damages are alleged to be caused by a lengthy course of prohibited conduct that affected a large number of consumers, the showing of reliance that must be made to prove a causal nexus [under the CFA] need not include direct evidence of reliance by individual consumers of [PM's] products." Id. at 14.

Like Group Health, this matter alleges damages caused by PM's lengthy course of prohibited conduct affecting large numbers of consumers. The legal nexus requirement may be satisfied by direct or circumstantial evidence "probative as to the relationship between the claimed damages and the alleged prohibited conduct." Id. at 14.

The required legal nexus is proven with every purchase of PM's Marlboro Lights. No class member could buy Marlboro Lights without explicitly asking for them or looking for the "lights" name. Every sale depended on a Plaintiff Class member actually requesting a pack or carton of "Marlboro Lights" or seeking out PM's "light" Marlboros. Those acts alone provide sufficient legal nexus, even without considering the packs of Marlboro Lights appearing in Minnesota print ads or the enormous sums PM paid for nationwide Marlboro Lights advertising.

The Findings of Fact and Conclusions of Law from the DOJ case establish a causal nexus between the restitution Plaintiff Class seeks and Respondents' wrongful conduct. They establish Respondents' use of "lights" and "low tar" were designed to keep people smoking in order to maintain corporate revenues. The DOJ court capsulized the causal reliance, nexus connection:

[O]ne can only wonder just why defendants were spending millions upon millions of dollars in advertising every year if they thought no one—smoker, potential smoker, or member of the public—was going to believe it and rely on it. The question answers itself. Moreover, Defendants knew, as their many internal documents reveal, just how badly ordinary smokers addicted to nicotine did not want to believe . . . that smoking was disastrous for their health and then as the evidence mounted, wanted to believe that they could smoke low tar light cigarettes and not sacrifice their health. For Defendants to now deny that the "disinformation" they were spending millions on to deceive the public would not have been of import to a reasonable person in determining his or her choice of action is the height of disingenuousness.

(SA 205-206).

The DOJ Finding of Fact and Conclusions of Law demonstrate Respondents' fraud was intended to keep smokers smoking and create purchasers—to increase revenue. Based on the DOJ case's final judgment, no genuine issue of material fact as to any element of CFA consumer fraud remains.

In denying Plaintiff Class' collateral estoppel motion, the trial court did not reach the issue of PM's purportedly "new evidence." (Add. 42). Respondents contend they can undo the DOJ findings—and their 1971-2004 CFA violations—by contradicting four

decades of PM's own internal research with "new" studies. None of PM's "new" evidence changes what PM knew and did from 1971 to 2004, as addressed in DOJ's findings. All events giving rise to PM's liability, its knowledge and actions from the initial Marlboro Lights sale in Minnesota to 2004, occurred before the DOJ bench trial started September 2004 and ended with a judgment August 1, 2006. Where the first and second actions are based on the same historical facts, a litigant may not avoid the first decision's preclusive effect by offering cumulative evidence of new studies or additional opinions offered after the first trial. See Liberty Mut. Ins. Co. v. Fag Bearings Corp., 335 F.3d 752, 761 (8th Cir. 2003), *reh'g denied*. PM cannot now change the historical facts forming the basis of the DOJ's findings establishing their false marketing/promotion to maintain revenue streams.

To preclude collateral estoppel, PM must show all responsible scientific thought has gelled into a general consensus contrary to the scientific view prevailing at the DOJ trial. As noted in Scooper Dooper, Inc. v. Kraftco Corp., 494 F.2d 840, 846 (3d Cir. 1974), "[c]arried to its extreme, the concept of changed factual circumstances would totally undermine the application of collateral estoppel. Rare would be the case in which counsel could not conjure up some factual element that has changed between adjudications." Here PM's purportedly "new" evidence has not become the basis of new scientific consensus, is based on PM sponsored research, and is proffered in the form of unpublished opinion of one without experience in smoking epidemiology.

Minnesota courts have not addressed the effect of purportedly new scientific evidence upon collateral estoppel's "full and fair opportunity" prong. However, where new scientific evidence has rendered collateral estoppel inapplicable, the new evidence clearly showed previous judgments were in error. Zweig v. E.R. Squibb & Sons, Inc., 536 A.2d 1280, 1283 (N.J. Super. Ct. App. Div. 1988). The Zweig evidence was breakthrough evidence—a sea change causing the scientific community to arrive at a new consensus and a complete reversal of scientific understanding. No sea change occurred here.

PM discusses the "evolving nature of the complex scientific issues." Ultimately, it cannot defeat collateral estoppel by presenting studies "inconsistent with the DOJ court's conclusions" but having more recent publication dates. It spent months presenting evidence in the DOJ case contradicting the court's findings. In fact, Drs. Zeiger and Valberg's affidavits regurgitate arguments PM presented in the DOJ. (R.A. 001746, 001779). Zeiger and Valberg simply discuss newly published studies standing for conclusions the DOJ court heard and rejected. The new studies do not change what Respondents knew and said about "lights" from 1971 to 2004—the heart of this case. PM's "new" evidence is simply cumulative and cannot defeat application of collateral estoppel.

### III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN CERTIFYING THE CLASS.

#### A. Certification Followed This Court's Order.

As Minnesota's Supreme Court has long held, class actions are most often needed in consumer suits like this where individual claims are small. Rathbun v. W.T. Grant Co., 300 Minn. 223, 219 N.W.2d 641, 653 (1974). Plaintiffs' claims could not be better suited for class treatment. This case satisfies all class certification requirements under Minn. R. Civ. P. 23. Respondents' illegal conduct in deceptively promoting, marketing and selling Marlboro Lights is common to each of the thousands of Minnesota consumers comprising the class. Other consumer class actions have been certified against Respondents arising from their Marlboro Lights marketing and sale. See Aspinall v. Philip Morris Companies, Inc., 813 N.E.2d 476 (Mass. 2004); Craft v. Philip Morris Cos., 190 S.W.3d 368 (Mo. Ct. App. 2005); Price v. Philip Morris, Inc., 2003 WL 22597608 (Ill. Cir. 2003), *rev'd on other grounds*, 848 N.E.2d 1 (Ill. 2005) (SA 810) (granting certification of ICFA Unfair Practices Claim and entering \$10 billion judgment for class after 2½ month bench trial).<sup>6</sup>

The trial court initially denied class certification. At this Court's direction, the trial court reconsidered and certified the class in light of Peterson v. BASF Corp., 675 N.W.2d 57, 73 (Minn. 2004), *cert. granted, vacated*, 544 U.S. 1012 (2005), *aff'd on remand*, 711 N.W.2d 470 (Minn. 2006). (R.Add. 11-21; Supplemental Addendum [S.Add.] 1). Relying on the Peterson court's examination of the causal nexus requirement

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<sup>6</sup> But see Good, 129 S. Ct. 538 (2008).

under consumer fraud laws, as well as the Aspinall<sup>7</sup> court's logic, the trial court concluded:

Plaintiffs are similarly situated to other consumers of Marlboro Lights, and because the injury claimed is economic and not a personal injury, all have been similarly injured. Were there to be individual trials, the common aspects of Defendants [*sic*]. Philip Morris's conduct would become a predominant aspect of each trial. Considerations of delay, and high costs provide additional support for the appropriateness of class certification. . . . [A] class action is not only an appropriate method to resolve the plaintiffs' allegations, but pragmatically, the only method whereby purchasers of Marlboro Lights in Minnesota can seek redress for the alleged deception.

(R.Add. 21). PM sought discretionary review, and in early 2009 sought reconsideration of class certification before the trial court. (S.Add. 3; R.A. 000058). Its requests were denied. (Id.)

**B. Class Certification Is Within the Trial Court's Discretion.**

The trial court has "considerable discretionary power to determine whether class actions may be maintained." Streich v. Am. Fam. Mut. Ins. Co., 399 N.W.2d 210, 213 (Minn. Ct. App. 1987). A court's class certification can be reversed only by showing an abuse of discretion. Whitaker v. 3M Co., 764 N.W.2d 631, 635 (Minn. Ct. App. 2009).

On abuse of discretion, this Court defers to the district court's credibility determinations, and views the evidence in the light most favorable to the district court's findings. Vangness v. Vangness, 607 N.W.2d 468, 472 (Minn. Ct. App. 2000). The district court is charged with reconciling conflicting evidence, so while "the record might

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<sup>7</sup> The court did not rely on Aspinall's class action analysis, only its discussion of how Plaintiffs were harmed by PM's conduct. (R.Add. 19-20).

support findings other than those made by the [district] court, [that] does not show that the court's findings are defective." Id. at 474.

While Respondents may wish for a "partial trial of the merits" before this Court, see Whitaker, 764 N.W.2d at 640, the question here is simply: did the trial court abuse its discretion? It did not.

**C. Plaintiffs Meet All Class Certification Requirements.**

**1. Whitaker does not invalidate the trial court's order.**

PM alleges the trial court erred by failing to conduct a factual inquiry to determine whether Plaintiffs met the "preponderance of evidence" standard, and by not "resolving factual disputes relevant to rule 23 certification requirements, including relevant expert disputes." Resp. Br. at 43, quoting Whitaker, 764 N.W.2d at 638. But what Whitaker requires is "that district courts . . . address and resolve factual disputes relevant to class-certification requirements." Id. at 640. Factual disputes need only be resolved to the extent necessary to determine whether plaintiffs have made out a prima facie claim for the class. Blades v. Monsanto Co., 400 F.3d 562, 567 (8th Cir. 2005).

Whitaker's factual disputes involving 3M's employment discrimination were addressed by statistical analysis from competing experts addressing plaintiffs' "pattern-or-practice" and disparate-impact claims. Whitaker, 764 N.W.2d at 628-29. Because the district court failed to weigh the plaintiffs' evidence in light of 3M's objections and alternative expert reports, this Court held the lower court failed to determine whether the plaintiffs had met the preponderance threshold. Id. at 639.

The situation here is markedly different. Consumer fraud statutes require different elements of proof than employment discrimination actions. PM's conduct in falsely representing Marlboro Lights affects the entire class equally and is the "heart of the claim," unlike the numerous employment decisions 3M made which could only be presented class-wide statistically. Plaintiffs here submitted evidence proving Respondents' actions and motives which is unchallenged on appeal and meets the preponderance test.<sup>8</sup>

PM alleges, but does not provide evidence, that the trial court failed to weigh the certification decision in light of its objections or evidence. Nor has PM identified any unresolved factual disputes. Rather, it lists factual disputes it believes the trial court erroneously resolved, and argues these issues predominate. But that is not the proper standard of review.

Here the trial court examined and weighed the evidence and, where the parties disagreed, made factual determinations based on appropriate, applicable standards of proof. Its decision complies with Whitaker.

**2. Common issues predominate and a class action is a superior method of adjudication.**

PM does not point to improper application of the law, or dispute that Plaintiff Class meets Rule 23.01. PM does not challenge the trial court's assessment of its own

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<sup>8</sup> See Affidavits and supporting documents of Gale D. Pearson, submitted as part of the class certification record 1/22/2003, 7/14/2003, 10/7/2003 and 9/17/2004 ("Class Certification Record") (a portion of this record is reprinted in the Supplemental Appendix, SA 214-793).

conduct, but rather urges that the individual elements of the Plaintiff Class' claims prevail over PM's 40 years of public deceit. See Boeken v. Phillip Morris, Inc., 26 Cal. Rptr. 3d 638, 684 (Cal. App. 2009). Plaintiffs therefore assume PM believes the trial court made "a clear error of judgment in assaying" Rule 23.02(c)'s factors.<sup>9</sup> See Whitaker, 764 N.W.2d at 636; Respondents' Brief at 42.

Class actions remain "the poor man's keys to the courthouse," allowing those with small claims to band together to seek a remedy which would elude single plaintiffs. Muehler v. Land O'Lakes, Inc., 617 F. Supp. 1370, 1375 (D. Minn. 1985). All that is needed is a predominant common question, and no better alternative. Minn. R. Civ. P. 23.02(c).

Class actions are superior to other methods of adjudication when each class member's claim is too small to justify costs of litigation. Lewy 1990 Trust ex rel. Lewy v. Investment Advisors, Inc., 650 N.W.2d 445, 457 (Minn. Ct. App. 2002). In fact, this is the purpose of the class action—to take care of the "smaller guy." Streich, 399 N.W.2d at 218. The trial court recognized class certification should be construed in light of class actions' underlying objectives. See Smilow v. SW Bell Mobile Sys., Inc., 323 F.3d 32, 41 (1st Cir. 2003). As it realized, a class is the only efficient, realistic means for class members to pursue this litigation. See Kristian v. Comcast Corp., 446 F.3d 25, 54 (1st

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<sup>9</sup> PM's allegation that individual differences predominate implicates Rule 23.01 elements of commonality and typicality. But the burden for finding commonality and typicality is "very light," and satisfied when class claims are linked by a common question of law and class members possess similar claims to the named plaintiffs. Mund v. EMCC, Inc., 259 F.R.D. 180, 183-84 (D. Minn. 2009).

Cir. 2006) (The more claimants, the more likely a class is to yield substantial economies in litigation. The *realistic* alternative to a class is not 17 million individual suits, but zero individual suits, as “only a lunatic or a fanatic sues for \$30.”); Amchen Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (class action’s core policy is to overcome the problem that small recoveries provide no incentive for individuals to bring solo actions prosecuting their rights). The trial court found that Rule 23.02(c)’s superiority prong was met, and that a class action was, “pragmatically, the only method whereby purchasers of Marlboro Lights in Minnesota can seek redress for the alleged deception.” (R.Add. 21.)

The predominance requirement “tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.” Amchen, 521 U.S. at 594. The court looks beyond the pleading to determine “whether, given the factual setting . . . the plaintiff’s general allegations are true, common evidence could suffice to make out a prima facie case for the class.” Blades, 400 F.3d at 566. Predominance is satisfied if liability “can be proven on a systematic, class-wide basis.” Id. at 569. See also In Re New Motor Vehicles Canadian Export Antitrust Litigation, 522 F.3d 6, 28 (1st Cir. 2008) (class proper where common questions regarding liability predominate). Class certification is proper where, as here, Respondents “committed the same unlawful acts in the same method against an entire class.” Kennedy v. Tallant, 710 F.2d 711, 717 (11th Cir. 1983). The trial court properly determined Plaintiffs met the predominance requirement, since common aspects of Respondents’ conduct” are “a predominant aspect” of each Plaintiff’s claim. (R.Add. 21).

**3. The reliance requirement is met and supports predominance.**

To recover, Plaintiff Class must show members' damages were caused by Respondents' conduct, but are not required to plead or prove individual reliance. Group Health Plan, Inc., 621 N.W.2d at 13.

[I]n cases such as this, where the plaintiffs' damages are alleged to be caused by a lengthy course of prohibited conduct that affected a large number of consumers, the showing of reliance that must be made to prove a causal nexus need not include direct evidence of reliance by individual consumers of defendants' products. Rather, the causal nexus and its reliance component may be established by other direct or circumstantial evidence that the district court determines is relevant and probative as to the relationship between the claimed damages and the alleged prohibited conduct.

Id. at 14. Thus, "reliance" in a CFA action is a requirement much less burdensome than for common law fraud—a relaxed measure of proof the legislature purposely chose to ease plaintiffs' recoveries. Wiegand v. Walser Automotive Groups, Inc., 683 N.W.2d 807, 811 (Minn. 2004).

A causal nexus is established when there is something to connect "the claimed damages and the alleged prohibited conduct." Group Health, 621 N.W.2d at 14. This is not a high threshold. In Peterson, it was enough that class members showed defendant corporation's advertising was misleading and that "farmers in general" were likely to be misled. 675 N.W.2d at 73. Peterson held "class members' awareness of advertisements may provide a sufficient causal nexus." Id.

Plaintiffs submitted nexus evidence, including PM's light cigarette advertising to the trial court, showing how PM purposely misled the public about Marlboro Lights. PM used the terms "lights" and "low tar" to keep people smoking and maintain corporate revenue. PM's representation to Minnesota consumers that Marlboros were "light" and reliably delivered less tar is false. Peterson's requirement for a "causal nexus" is met. (See R.Add. 18-20).

Until this year, the word "lights" appeared on every package of Marlboro Lights purchased in Minnesota, and the descriptors "lower tar and nicotine" appeared until 2003. The named Plaintiffs purchased believing the cigarettes were light and thus less harmful. (R.Add. 20; SA 275, 277, 279, 281). No class member could buy them without explicitly asking for or looking for the "lights" name. A causal nexus exists for class certification.

**4. Individual issues do not warrant decertification.**

**a. Smoking habits.**

PM asserts Plaintiff Class must prove each member failed to receive lower tar and nicotine from Marlboro Lights. Resp.Br. at 50-51. Such individualized issues are irrelevant because Respondents promised smokers lower tar and nicotine from Marlboro Lights and under the CFA the tort is complete when the misrepresentation is made. In Aspinall, the court rejected PM's attempt to defeat class certification on this basis, holding: "[I]t may be unlikely that any individual would smoke a cigarette the exact same way twice. Thus, . . . it is probable that no smoker received the promised benefit of lower

tar and nicotine every time he or she smoked a Marlboro Light cigarette.” 813 N.E.2d at 489.

Analyzing the identical issue in a “lights” case against PM and PMC, the Missouri court held: “Individual difference in smoking behavior would have no effect in terms of requiring individual mini-trials for each class member, because despite any such differences, each class member would still have received a product that in fact did not deliver, to him or her, lower yields of tar and nicotine.” Craft v. Philip Morris Cos., 2003 WL 23355745 at \*4 (Mo. Cir. 2003) (SA 793).

Missouri’s appellate court reaffirmed the trial court’s certification decision, recognizing

Plaintiff’s claim . . . is that she purchased a product designed and manufactured to manipulate test results, resulting in a misrepresented and mislabeled product. Plaintiff’s allegations go to the condition and labeling of the product at the time it was sold; they do not make defendant’s liability dependent on each consumer’s individual smoking behavior.

Craft, 190 S.W.3d at 382.

There are no individualized issues with respect to liability because PM’s misrepresentation injured all class members the same way. PM publicly represented Marlboro Lights reliably delivered less tar and nicotine. This is false, particularly since PM withheld information about compensation and ventilation holes.

Plaintiff Class is not required to prove actual tar and nicotine levels members received in order to maintain the class. The CFA prohibits false statements to consumers. “Neither an individual’s smoking habits nor his or her subjective motivation in

purchasing Marlboro Lights bears on the issue whether the advertising was deceptive.”

Aspinall, 813 N.E.2d at 489. Individual inquiries concerning class members’ smoking behavior are not required to determine whether Respondents’

conduct caused compensable injury to all members of the class—consumers of Marlboro Lights were injured when they purchased a product that, when used as directed, exposed them to substantial and inherent health risks that were not (as a reasonable consumer likely could have been misled into believing) minimized by their choice of the defendant’s “light” cigarettes.

Id. at 488. Price, 2003 WL 22597608 at \*3 (SA 811) (predominance satisfied because Illinois consumer statute applied to all class members’ claims).

The predominance requirement demands common questions, not exclusivity or unanimity of them. Smilow, 323 F.3d at 39; In re Visa Check/Master Money Antitrust Litig., 280 F.3d 124, 140 (2d Cir. 2001). “Predominance is not defeated by individual damages questions as long as liability is still subject to common proof.” New Motor Vehicles, 522 F.3d at 28. If common questions predominate regarding liability, courts generally find the requirement satisfied even if individual issues remain. Id. at 23. Necessity for calculation of individual damages should not preclude class determination when common liability issues predominate. Gogasian v. Gulf Oil Corp., 561 F.2d 434, 456 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978). Whether common issues predominate under Rule 23.02(c) involves examining liability, not damages. Nerland v. Caribou Coffee Co., Inc., 564 F. Supp. 2d 1010, 1035 (D. Minn. 2007). It is enough that plaintiffs provide “generalized evidence” of a common scheme affecting the entire class.

Id. The trial court properly focused on PM's conduct to conclude Plaintiffs submitted sufficient evidence to establish predominance and certify the class. (R.Add. 20-21).

**b. Plaintiff Class seeks restitution.**

This is not a personal injury case. Rather, Plaintiffs seek economic damages, which are more capable of formulaic calculations. Plaintiffs seek restitution, which is authorized in a consumer fraud action. Minn. Stat. § 8.31, subd. 3a (providing for "other equitable relief"); Alpine Air, 490 N.W.2d at 895. Because Plaintiffs' claims focus on Respondents' gain from their fraudulent conduct, the calculation of individual sums paid by class members is not definitive.

Even were this not true, individualized damages proof would not defeat class certification. Alpern v. UtiliCorp United, Inc., 84 F.3d 1525, 1540 (8th Cir. 1996). When common misrepresentations are made to many consumers, a class is appropriate even if individual issues also need resolution. See Jenson v. Continental Financial Corp., 404 F. Supp. 806, 813 (D. Minn. 1975). In a class, individual issues usually remain after common issues are adjudicated and courts frequently grant certification despite difference in class members' damages. Lewy, 650 N.W.2d at 456-57. Where common questions of law and fact predominate, "the amount of damages may vary, and thus require more or less time to calculate, does not defeat certification." Id. If defendants' conduct affects all class members, "calculating the damages for all the affected [class members] in one action makes more sense than forcing each [member] to bring a separate action just to split the damage-calculation time." Id. at 457. See also Cohen v. Chilcott Public Ltd.

Co., 522 F. Supp. 2d 105, 116 (D.C.C. 2007) (certifying unjust enrichment claims of nationwide class).

PM's argument that this case would degenerate into thousands of damage mini-trials which predominates over proof of its own misconduct should be rejected:

It seems specious and begging the question to say that if these 500 lawsuits were brought into a class so that proof on the issue of conspiracy need be adduced only once and the result then becomes binding on all 500, that thereby the common issue of conspiracy no longer predominates because from a total time standpoint, cumulatively individual damage proof will take longer.

State of Minnesota v. United States Steel Corp., 44 F.R.D. 559, 569 (D. Minn. 1968).

The trial court has the authority to appropriately manage this litigation in the interests of judicial expediency.

Certifying this class is a superior method by which to proceed because otherwise Minnesota Marlboro Lights purchasers will have no remedy as such pursuit would not be economically feasible. In Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980), the Supreme Court noted "[w]here it is not economically feasible to obtain relief [from] . . . a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they may employ the class-action device."

**c. Fraudulent concealment does not affect class certification.**

Tolling the statute of limitations based on defendants' fraudulent concealment applies to class actions. See In re Monosodium Glutamate Antitrust Litigation, 2003 WL 297287 at \*2 (D. Minn. 2003) (S.A. 835). When proof of fraudulent concealment also

proves the primary claim—here, Respondents’ misrepresentation of Marlboro Lights—the common liability questions prevail over individual questions involving when each plaintiff should have learned of the misconduct. United States Steel, 44 F.R.D. at 568-69, n.19.

#### **IV. PM’S FRAUDULENT CONCEALMENT TOLLS THE STATUTE OF LIMITATIONS.**

##### **A. PM’s “Summary Judgment” Motion Was Unsupported.**

PM made a “Partial Summary Judgment” motion on statute of limitations grounds. However, it more properly would be captioned as a request for a partial declaratory judgment, since it relied solely on legal arguments, produced no evidence supporting its motion, and failed to list any supporting undisputed material facts. See Minn. R. Civ. P. 56.03; Minn. Gen. R. Prac. 115.03 (requiring statement identifying evidence in support of motion).

When a party fails to support its summary judgment motion without supporting evidence tending to disprove the complaint’s allegations, the motion must be denied. Bixler by Bixler v. J.C. Penney Co., Inc., 376 N.W.2d 209, 215 (Minn. 1985). A party asserting a statute of limitations defense has the burden of proving all the defense’s elements. Golden v. Lerch Bros., 203 Minn. 211, 220, 281 N.W. 249, 253 (1938). The non-moving party “need not put forth undisputed evidence or conclusively establish favorable facts” but need only show there is a genuine issue of material fact. Southcross Commerce Center, LLP v. Tupy Proprs., LLC, 766 N.W.2d 704, 709 (Minn. Ct. App. 2009) (citation omitted).

PM represented Marlboro Lights delivered lower tar and nicotine, knowing they did not and having evidence to the contrary. (A. 4-5). Plaintiffs' allegations are supported by the evidence submitted to the trial court. (R.Add. 27). PM offers no undisputed evidence in opposition, and its summary judgment motion was properly denied on this ground alone.

**B. Fraudulent Concealment Tolls the Statute of Limitations.**

Plaintiffs provided material facts proving PM's fraudulent concealment. Whether a plaintiff exercised reasonable diligence investigating potential concealments is a factual matter ill suited for summary judgment. Cattnach v. State Farm Ins. Co., 577 N.W.2d 251, 254 (Minn. Ct. App. 1998); Appletree Square I Ltd. P'shp v. Investmark, Inc., 494 N.W.2d 889, 894 (Minn. Ct. App. 1993), *rev. denied*.

This action was filed November 28, 2001, and involves claims dating back to 1971. (A. 2-3, 364, 366). Consumer protection claims are subject to a six-year statute of limitations.<sup>10</sup> Minn. Stat. § 541.05, subd. 1(2). But fraudulent concealment tolls the statute of limitations until misrepresentation can be discovered. See Wild v. Rarig, 302 Minn. 419, 450, 234 N.W.2d 775, 795 (1975), *cert. denied*, 424 U.S. 902 (1976). The concealment must be affirmative, including any actions or statements suppressing the

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<sup>10</sup> Minnesota appellate courts have never ruled that fraudulent concealment does not apply to consumer fraud claims. See Buller v. A.O. Smith Harvestore Products, Inc., 518 N.W.2d 537, 542 (Minn. 1994), *reh'g denied* (fraudulent concealment applied to consumer fraud); Appletree Square, 494 N.W.2d at 894 (applying fraudulent concealment in a Deceptive Trade Practices Act claim), *rev. denied*. See also Veldhuizen v. A.O. Smith Corp., 839 F. Supp. 669, 679 n.7 (D. Minn. 1993) (fraudulent concealment applies to consumer fraud claim). Fraudulent concealment has also been applied to actions which, like the statutes invoked here, lack statutory discovery provisions. See Minn. Stat. § 541.07(1).

truth. Id., 234 N.W.2d at 795. It must be “the facts which establish the cause of action which are fraudulently concealed.” Hydra-Mac, Inc. v. Onan Corp., 450 N.W.2d 913, 918 (Minn. 1990), *as amended on denial of rehearing*.

Since their 1971 introduction, PM fraudulently concealed, suppressed and failed to disclose to the public material facts concerning Marlboro Lights. (A. 3, 5). The suppressed information that light cigarettes do not deliver less tar or nicotine is the “very existence of the facts which establish [this] cause of action.” Hydra-Mac, 450 N.W.2d at 918. The class certification and summary judgment records provide ample evidence that the true facts about light cigarettes were not publicly known until late 1999. (See Monograph 13 – Preface, pages i-ii, and Chapter 4, pages 69-71; A. 121-123). For example, one month before this case was filed, NCI published Monograph 13, which represented a consensus on the dangers of “light” cigarettes impossible before 1999 because neither scientists nor consumers had access to the formerly confidential industry documents containing the evidence on which the consensus was formed. (SA 84-85, 90; Monograph 13 – Preface, pages i-ii). Viewing the summary judgment record in the light most favorable to Plaintiffs, the trial court should be affirmed.

#### **V. THE COURT HAS PERSONAL JURISDICTION OVER PMC/ALTRIA.**

In 2002, Altria, then “Phillip Morris Companies” (PMC), moved to dismiss for lack of personal jurisdiction. Plaintiffs opposed, not on a piercing the corporate veil theory but because PMC itself is a tortfeasor subject to Minnesota jurisdiction.

In determining whether the exercise of jurisdiction would offend due process, the trial court analyzed the issue on the quantity of contacts, nature of the contacts, the connection between the defendant, the contacts and the cause of action; Minnesota's interest in providing a forum; and the parties' convenience. Nat'l City Bank of Minneapolis v. Ceresota Mill Ltd. Partnership, 488 N.W.2d 248, 252-253 (Minn. 1992).

The trial court denied PMC's motion, explaining PMC and PM were the same company until 1985, with overlap of directors afterward. (A.Add. 4; A178A- A179A). It also based its decision on PMC's own representations, including those in its 2000 Annual Report, representing itself as a consumer product manufacturer and marketer and identifying Marlboro as key to its corporate success. (Id.)

The trial court noted PMC's entanglement with PM, including the testimony of PMC's CEO that he had the power to change PM's policies and practices and the right to make the ultimate decisions in smoking and health-related matters, including advertising and public statements. The trial court concluded the evidence was "of total control and day-to-day interference." (A.Add. 4). It acknowledged Plaintiff's claim was that PMC was aware of and participated in PM's fraudulent activities. The court concluded, viewed in a light most favorable to Plaintiffs, the record supports asserting personal jurisdiction over PMC.

**A. Due Process Is Satisfied.**

The existence of personal jurisdiction is a question of law, reviewed de novo. N.W. Airlines, Inc. v. Friday, 617 N.W.2d 590, 592 (Minn. Ct. App. 2000). It is

plaintiffs' burden to prove the minimum contacts necessary to satisfy due process. At the pretrial stage, however, plaintiffs need only make a prima facie showing of Minnesota-related activities through the complaint and supporting evidence, which are taken as true. Hardrives, Inc. v. City of La Crosse, Wisconsin, 240 N.W.2d 814, 816 (Minn. 1976). Contrary to PMC's assertions, the allegations in Plaintiffs' Complaint and supporting affidavits are taken as true. Id. In a close case, "doubts should be resolved in favor of retention of jurisdiction." Valspar Corp. v. Lukken Color Corp., 495 N.W.2d 408, 411-12 (Minn. 1992).

Under Minnesota's long-arm statute, jurisdiction is proper when one corporation commits any act causing injury in Minnesota, provided the burden placed on the defendant does not violate fairness or substantial justice. Minn. Stat. § 543.19, subd. 1. Minnesota's long-arm statute is intended to "have the maximum extraterritorial effect allowed" under the federal constitution's due process clause. Rostad v. On-Deck, Inc., 372 N.W.2d 717, 719 (Minn. 1985). If due process is satisfied, Minnesota's long-arm statute is satisfied. Domtar, Inc. v. Niagara Fire Ins. Co., 533 N.W.2d 25, 29 (Minn. 1995).

Due process requires defendant have minimum contacts with the forum state such that maintenance of the suit does not offend "traditional notions of fair play and substantial justice." Larson v. Dunn, 460 N.W.2d 39, 43 (Minn. 1990). Minimum contacts exist where a nonresident defendant "purposefully avail[s] itself of the privilege of conducting activities within the jurisdiction." Rostad, 372 N.W.2d at 719. The

purposeful availment requirement ensures a defendant “will not be haled into a jurisdiction solely as a result of ‘random’, ‘fortuitous’, or ‘attenuated contacts’ or the unilateral activity of another party.” Leach v. Curtis of Iowa, Inc., 399 N.W.2d 656, 659 (Minn. Ct. App. 1987).

Actual physical presence in Minnesota is not required; defendant’s indirect contacts can establish jurisdiction. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985). “[W]hen a nonresident’s contacts are directed at attaining a commercial benefit within Minnesota jurisdiction may be proper.” Jenson v. R.L.K. & Co., 534 N.W.2d 719, 723 (Minn. Ct. App. 1995). The court’s ruling that PMC was subject to personal jurisdiction is well-founded and should be affirmed.

**1. Lampe affidavit lacked credibility.**

PMC complains the trial court ignored the Lampe Affidavit. (149A). Lampe’s Affidavit directly contradicts other PMC documents in the record and lacks credibility. Lampe claims “there is no common ownership or commingling of assets between Philip Morris Companies Inc. and Philip Morris Incorporated.” (150A). However, the 1985 SEC 10-K Annual Report shows, in the Plan of Exchange (Plan), PM’s stockholders all became PMC stockholders. (282A). Further, Lampe carefully worded her 2002 Affidavit claiming “[t]he two companies do not have any common officers and directors.” (150A). However, the Plan stated that on the effective date, PM’s directors all became PMC directors. (282A). Additionally, PMC’s interrogatory answers identify five people who overlapped as directors on both companies’ boards from 1985 to 1991. (178A-179A).

Sixteen people overlapped as officers during a 10-year period. (378A-379A). The trial court did not err by giving the Lampe Affidavit little weight.

**2. Reorganization put PMC in place of PM in 1985.**

PMC contends the court erred in asserting PMC and PM were one and the same before 1985. Yet PMC told the SEC the reorganization was similar to a pooling of interests “and the consolidated results of [PMC] for periods prior to July 1, 1985 reflected the consolidated results of [PM].” (233A). Additionally, the PMC/PM Plan, effective July 1, 1985, established that the corporate framework through which PM’s operations were conducted was restructured and PMC became PM’s publicly-held parent. It also established that holders of PM stock became PMC stockholders. (282A). PM’s directors became PMC’s directors. (282A). PMC held itself out as producing cigarettes, engaging in national advertising and identified Marlboro as its “primary engine of growth.” (90A). The trial court accurately stated there was only one company before 1985, when two were created out of the one.

**3. Annual report and other documents support trial court’s decision.**

PMC contends the court could not use general statements in its 2000 Annual Report (Annual Report) to determine if it is subject to Minnesota’s jurisdiction. PMC tries to back away from what it told shareholders and the public in 2000: it would deliver on its promise to be the most successful consumer products company in the world and grow its tobacco business. (86A-87A). PMC stated it would conduct business as a responsible “manufacturer and marketer of consumer products.” (87A). PMC’s Annual

Report discusses its desire to focus on the development and marketing of potentially less risky products, including research to develop and launch a cigarette that significantly reduces smoke constituents identified as harmful to smokers. (90A). PMC's Annual Report also included a lengthy discussion of its significant progress "toward our goal of successfully defending the company's interests in litigation," listing highlights of tobacco litigation. (91A).

On a back page, under "Company Structure," PMC's Annual Report notes the parent/subsidiary interplay and states "[w]e,' 'us' and 'our' refer, as appropriate in the context, to Philip Morris Companies Inc., one or more of our subsidiaries, or both." (146A). Contrary to PM's assertion, this endnote does not establish that PMC disavowed any statements in its report nor does it establish they came from PM.

Further, PMC's Annual Report was one of many documents in the record evidencing that PMC is subject to personal jurisdiction in Minnesota. (322A). Correspondence to PMC's Board on PMC's letterhead recognizes "As a service and support group for the operating companies, helping to protect and promote their products, we have been challenged as never before." (319A). The board memo continues that in its first full year of operation, PMC's Corporate Issues Management Committed "focused primarily on product liability and on the identification of other issues on which the corporation needs to develop an informed position or action plans." (Id.) Among those

issues was to “continue testing the focus of corporate advertising campaigns.” (320A).

Regarding corporate communications, it stated:

As the voice of the parent company, Corporate Communications works to create a favorable climate for Philip Morris Companies Inc., . . . to help the operating companies offset the challenges to their products.

(321A).

In 1991, Murray Bring, PMC Senior V.P./General Counsel, on PMC letterhead, provided information “relating to our advertising policy.” (355A). Bring acknowledged that PMC’s cigarette advertising was designed to affect brand choice. (357A). PMC’s Annual Report and numerous other documents support the trial court’s conclusion PMC was actively involved in advertising and marketing Marlboro Lights.

**4. Overlapping directors adds to basis for personal jurisdiction.**

PMC also complains the existence of overlapping directors alone does not support personal jurisdiction. The overlap between the two boards, 100% at the time of the reorganization, continued on a lesser degree for the first six years of PMC’s existence. (179A). The trial court correctly noted that overlap in articulating reasons why PMC was subject to Minnesota jurisdiction. In addition to Board overlap, 16 individuals were PMC officers while simultaneously serving as PMC officers from 1985 to 1995. (378A-379A). The overlap was significant.

**5. Trial court properly considered “entanglement” between parent/subsidiary.**

The interrelationship between parent and subsidiary provided yet another basis for finding personal jurisdiction exists. The court noted that PMC CEO Geoffrey Bible<sup>11</sup> testified that if he disagreed with PM decisions on issues of smoking and health, he had the power to change them. (166A, 224A). He had the power to decide what PM would say regarding smoking and health. (224A). Bible admitted the buck stopped in his office for PM decisions and he had the power to make ultimate decisions for PM. (222A). The trial court concluded such dominance, viewed in the light most favorable to the Plaintiffs, evidenced control and day-to-day interference. (A.Add. 4). Rather than the merely supervisory relationship PMC claimed, the PMC/PM relationship resulted in PM’s false Marlboro Lights advertising and marketing in Minnesota.

**6. PMC’s additional contacts support personal jurisdiction.**

PMC’s additional Minnesota contacts are not as easily dismissed as it suggests. PMC promoted its public image by national advertising, including advertising in Minnesota. Those efforts were not public service announcements. Charitable contributions in Minnesota, too, provide jurisdictional support. PMC gave donations to 88 Minnesota entities. (228A-231A). PMC undertook these actions to build goodwill and create positive contacts with Minnesota.

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<sup>11</sup> Bible testified in State v. Phillip Morris, March 2, 1998. (SA 40).

**B. The Trial Court’s Conclusions Are Echoed by the DOJ Decision.**

The DOJ’s findings add credence to the finding that Minnesota has personal jurisdiction over PMC. (SA 40, 200-202). The trial court’s decision here was well supported by the Amended Complaint submitted evidence<sup>12</sup> and was reaffirmed by the DOJ Findings.

**C. Jurisdiction Is Supported on Several Theories.**

Courts have endorsed several approaches to determine whether a defendant has sufficient contacts with a forum state to support jurisdiction. Each supports a determination of personal jurisdiction here.

**1. “Effects test”**

In cases involving intentional misconduct, Minnesota’s Supreme Court has approved a broad exercise of personal jurisdiction where defendant’s wrongful acts have an “effect” in the forum. Here—the decades-long pattern of intentional and willful misconduct caused thousands of Minnesota purchasers to buy Marlboro Lights—the “effects test” supports the assertion of personal jurisdiction. Calder v. Jones, 465 U.S. 783, 789-90 (1984).

Minnesota embraced Calder in Larson v. Dunn, 460 N.W.2d 39 (Minn. 1990). In Kopperud v. Agers, 312 N.W.2d 443, 445 (Minn. 1981), Minnesota’s Supreme Court found jurisdiction despite defendant’s Arizona residence where his relevant actions took

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<sup>12</sup> When PMC brought this motion, Plaintiffs noted discovery was incomplete and asked for additional discovery before the motion’s determination. The court ruled without addressing Plaintiffs’ discovery issues.

place because, although the direct contacts with Minnesota were limited, the defendant was instrumental in setting the fraudulent scheme in motion and sustaining it. Minnesota had an obvious interest in providing a forum since Minnesotans were defrauded. Id. at 445. Jurisdiction under the “effects test” is proper since PMCs’ acts were intentional, were aimed at Minnesota, and PMC knew that harm was likely to be suffered here. Zumbro, Inc. v. California Natural Prods., 861 F. Supp. 773, 782-83 (D. Minn. 1994).

That PMC’s’ intentional wrongdoing encompasses literally the entire country cannot—in logic or law— preclude jurisdiction in Minnesota. See Minnesota Mining & Mfg. Co. v. Rauh Rubber, Inc., 943 F. Supp. 1117, 1124 n.2 (D. Minn. 1996) (cannot avoid jurisdiction by targeting all America rather than individual states). PMC enjoyed commercial benefit from PM’s profits based in part upon Minnesota Marlboro Lights sales. Exercising personal jurisdiction over PMC is not only consistent with—but mandated by—concepts of fair play and substantial justice.

## **2. Stream of commerce doctrine**

Under a stream-of-commerce doctrine, personal jurisdiction exists when a corporation participates in research, design, manufacture, distribution, or marketing with the expectation its product will be purchased in the forum. See Rostad, 372 N.W.2d at 718-20. “A manufacturer who places its product in the stream of commerce in an effort to serve, directly or indirectly, markets in a jurisdiction is subject to suit in that jurisdiction under World-Wide Volkswagen.” Id. at 721. Where a product arrives in Minnesota by defendant’s purposeful marketing efforts, jurisdiction is appropriate. Id.

Since PMC participated in disseminating public statements in Minnesota about Marlboro Lights, the stream-of-commerce doctrine support personal jurisdiction.

### **3. Parent-subsidiary analysis**

Numerous decisions recognize a parent's contacts with its subsidiaries on matters relating to the product or conduct at issue are relevant to the determination of personal jurisdiction. See Wicken v. Morris, 510 N.W.2d 246, 250 (Minn. Ct. App. 1994), *rev'd on other grounds*, 527 N.W.2d 95 (Minn. 1995) (to ignore the parent-subsidiary relationship "would thwart an appropriate jurisdictional analysis in light of . . . International Shoe."); Daher v. G.D. Searle & Co., 695 F. Supp. 436, 438-39 (D. Minn. 1988) (jurisdiction under Minnesota's long-arm statute appropriate based on the parent company's tortious acts—"independent[] but in concert" with its subsidiary—in misrepresenting the safety of a medical device); Warren v. Honda Motor Co., Ltd., 669 F. Supp. 365, 369 (D. Minn. 1987) (parent-subsidiary relationship itself was a "minimum contact" for purposes of personal jurisdiction). Plaintiff Class has demonstrated significant contacts between PMC and PM regarding issues at the core of this litigation. Minimum contacts exist by virtue of PMC's relationship with its operating company.

### **4. Agency doctrine**

PMC directed and had control over PM's tortious conduct in Minnesota. Minn. Stat. § 543.19, subd. 1 applies to acts committed "in person or through an agent." As the principal, PMC is subject to personal jurisdiction wherever its agent PM acted. That

PMC is also PM's parent makes no difference. NFD, Inc. v. Stratford Leasing Co., 433 N.W.2d 905 (Minn. Ct. App. 1988).

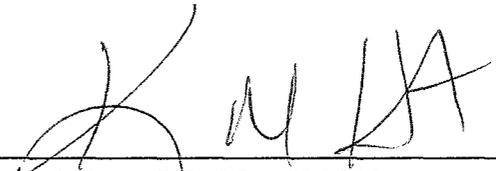
Establishing agency may be easier in the parent-subsiary context. Wells Fargo & Co. v. Wells Fargo Exp. Co., 556 F.2d 406, 419 (9th Cir. 1977). Plaintiff Class must establish that (1) the parent manifested that the subsidiary act for it, (2) the subsidiary accepted, and (3) there was an understanding between parent and subsidiary that the parent controlled the activity. NFD, 433 N.W.2d at 910. All are established here. PMC chose to exercise control over PM's cigarette-related decision-making. It chose to subject itself to Minnesota's jurisdiction.

### CONCLUSION

Appellant/Plaintiff Class respectfully requests that the trial court's dismissal of this case be reversed. And as to issues raised by Respondents as Cross-Appellants, Plaintiff Class requests that the trial court be affirmed.

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Dated: August 4, 2010

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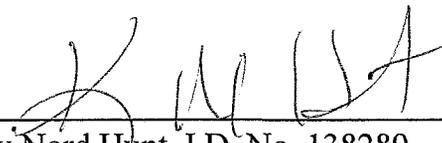
**CERTIFICATION OF BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 1 and 3, for a brief produced with a proportional font. The length of this brief is 9,992 words. This brief was prepared using Word Perfect 12.

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