

No. A10-0215

STATE OF MINNESOTA
IN THE COURT OF APPEALS

Gregory Curtis, et al., individually and on behalf of all others similarly situated,

Appellants,

vs.

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

Respondents.

BRIEF AND ADDENDUM OF RESPONDENT ALTRIA GROUP, INC.

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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 LEGAL ISSUES

ON RESPONDENTS' CROSS-APPEAL:

Respondent Altria Group, Inc. (“Altria”) joins in the positions of Respondent Philip Morris USA Inc. (“PM USA”) on the cross-appeal.¹ In addition, Altria presents the following issues relating to the denial of Altria’s motion to dismiss for lack of personal jurisdiction:

- I. Did the district court, in denying Altria’s motion to dismiss for lack of personal jurisdiction pursuant to Minn. R. Civ. P. 12.02, improperly accept the allegations in Plaintiffs’ Complaint as true despite Altria’s contrary evidence?**

The district court answered in the negative. This issue was raised and preserved in Altria’s Memorandum of Law in Support of Its Motion to Dismiss the Complaint. (Altria App. 47A-49A.)²

Sausser v. Republic Mortgage Investors, 269 N.W.2d 758 (Minn. 1978)

Lyons v. Philip Morris, Inc., 225 F.3d 909 (8th Cir. 2000)

¹ Before January 2003, Altria was named Philip Morris Companies Inc., and Philip Morris USA Inc. was named Philip Morris Incorporated. This brief uses the current names throughout. Plaintiffs erroneously refer to Respondents as Altria Group, Inc. and Philip Morris Companies. (Pl. Br. 3.)

² “Altria App.” citations are to the Appendix to Brief of Respondent Altria Group, Inc.

II. Are the facts cited by the district court (exclusive of Plaintiffs' unsupported allegations) insufficient as a matter of law to support a finding of personal jurisdiction as to Altria?

The district court held that it could assert personal jurisdiction over Altria based upon facts, such as overlapping directors and the inherent supervisory power of a parent corporation over a subsidiary, that have been rejected by the courts as bases for the assertion of personal jurisdiction. This issue was raised and preserved in Altria's Reply Memorandum of Law in Further Support of Its Motion to Dismiss for Lack of Personal Jurisdiction. (Altria App. 240A-249A.)

QAI Precision Prods., Inc. v. Impro Indus. USA, Inc., No. 04-23 (DWF/SRN), 2005 U.S. Dist. LEXIS 16323 (D. Minn. Aug. 4, 2005)

Conwed Corp. v. R.J. Reynolds Tobacco Co., Civ. File No. 98-1412 (PAM/JGL), 1999 U.S. Dist. LEXIS 9641 (D. Minn. Apr. 1, 1999)

U.S. Const. amend. XIV, § 1

Minn. Stat. § 543.19(1)

III. Where Altria is a separate entity from PM USA, has never designed, manufactured, marketed, distributed, or sold any product, including cigarettes, has not conducted any business within Minnesota, has never owned, rented, used, or possessed any real or personal property in Minnesota, has not paid taxes in Minnesota, has not engaged in solicitation or service activities within Minnesota, and has never been qualified to do business in Minnesota, does Altria lack the necessary minimum contacts with Minnesota to support the court's exercise of personal jurisdiction over it?

The district court held that it could assert personal jurisdiction over Altria.

This issue was raised and preserved in Altria's Memorandum of Law in Support of Its Motion to Dismiss the Complaint. (Altria App. 49A-51A.)

Juelich v. Yamazaki Mazak Optonics Corp., 682 N.W.2d 565 (Minn. 2004)

Busch v. Mann, 397 N.W.2d 391 (Minn. Ct. App. 1986)

Wines v. Lake Havasu Boat Mfg., Inc., 846 F.2d 40 (8th Cir. 1988)

Conwed Corp. v. R.J. Reynolds Tobacco Co., *supra*

U.S. Const. amend. XIV, § 1

Minn. Stat. § 543.19(1)

ON PLAINTIFFS' APPEAL:

Altria joins in the positions of PM USA on the issues presented by Plaintiffs' appeal. In addition, the following issues specific to Altria are also presented in response to Plaintiffs' appeal:

- IV. The findings which were the basis for the judgment against Altria in the DOJ matter bore no relation to the alleged fraudulent marketing of light cigarettes. In view of this fact, are there additional reasons specific to Altria for denying Plaintiffs' motion to apply the doctrine of collateral estoppel?**

The district court did not reach this issue, because it held the doctrine of collateral estoppel to be inapplicable on other grounds. This issue was raised and preserved in Altria's Brief in Opposition to Plaintiffs' Motion for Partial Summary Judgment Based on Collateral Estoppel. (Altria App. 409A-410A.)

United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1 (D.D.C. 2006), aff'd in part, vacated in part, 566 F.3d 1095 (D.C. Cir. 2009)

United States v. Young, 804 F.2d 116 (8th Cir. 1986)

V. The Minnesota consumer fraud statutes impose liability only where a defendant engages in conduct in connection with the sale or distribution of goods or services. Inasmuch as Plaintiffs failed to make such a showing as to Altria, was their motion for partial summary judgment on liability against Altria properly denied?

The district court did not reach this issue, because it held that the doctrine of collateral estoppel was inapplicable. This issue was raised and preserved in Altria's Brief in Opposition to Plaintiffs' Motion for Partial Summary Judgment Based on Collateral Estoppel. (Altria App. 410A-412A.)

Avery v. Solargizer International, Inc., 427 N.W.2d 675 (Minn. Ct. App. 1988)

STATEMENT OF THE CASE

Altria joins in the Statement of the Case in PM USA's brief on appeal.

Altria filed a notice of related appeal, which joined in PM USA's appeal from orders of the district court (Oleisky, J.) filed on January 29, 2004 and November 29, 2004, denying partial summary judgment and granting class certification, and which also appealed from the October 16, 2002 order of the district court (Oleisky, J.) denying Altria's motion to dismiss for lack of personal jurisdiction. (Altria App. 443A-446A.)

Altria joins in PM USA's arguments in opposition to Plaintiffs' appeal and in support of PM USA's cross-appeal, which apply equally to Altria. In addition, Altria submits this brief in support of its cross-appeal from the denial of its motion to dismiss for lack of personal jurisdiction, and in further support of the denial of Plaintiffs' collateral estoppel motion.

STATEMENT OF FACTS

A. Altria Is a Holding Company

Altria was incorporated in Virginia on March 1, 1985. (Affidavit of Kathleen S. Lampe (“Lampe Aff.”) ¶ 2, Add. 6.)³ Altria is a holding company, not an operating company, and owns a number of operating companies, which at the time of suit included PM USA, Kraft Foods Inc., Miller Brewing Company, and Philip Morris International Inc. (Id. ¶ 3, Add. 6-7.) Altria and PM USA are separate and distinct legal entities. (Id. ¶¶ 4-5, Add. 7.) Altria has no more than 35 employees. (Id. ¶ 7, Add. 7.)

Altria has never designed, manufactured, marketed, distributed, or sold any product, including cigarettes. (Lampe Aff. ¶ 12, Add. 9.) It has not conducted any business within the State of Minnesota and lacks business contacts in the State. (Id. ¶¶ 8-13, Add. 8-9.) Altria has never owned, rented, used, or possessed any real or personal property in Minnesota; has not filed any state income tax returns or paid state taxes in Minnesota; has not engaged in solicitation or service activities within Minnesota; has never been qualified to do business in Minnesota; and has never authorized any agents to manufacture, market, or sell any products in Minnesota, or anywhere else. (Id. ¶¶ 8-11, Add. 8.)

From October 1999 until December 2001, Altria aired nationwide radio, television, and print advertisements regarding public service efforts by the people and

³ “Add.” cites are to the Addendum attached to this brief.

companies that are part of the Altria family of companies. (Id. ¶ 14, Add. 9.) None of these placements included any product advertisements. (Id.) Although Altria maintains a public website, that website does not advertise products made and distributed by its operating subsidiaries and does not solicit business of any kind. (Id. ¶ 15, Add. 9.)

B. The Complaint

The Complaint alleges that, beginning when Marlboro Lights were first sold in Minnesota in 1971 (more than 13 years before Altria was incorporated), PM USA and Altria made fraudulent statements to Minnesota consumers about tar and nicotine levels in Marlboro Lights cigarettes. (Am. Compl. ¶¶ 3-8, Altria App. 2A-4A.)⁴ The Complaint additionally alleges that PM USA and Altria failed to make disclosures about certain design features of Marlboro Lights cigarettes that allegedly affect a smoker's ability to "achieve the claimed lower tar." (Id. ¶ 8, Altria App. 4A.)

The Complaint alleges, in conclusory fashion, that Altria, through its "wholly owned subsidiary" PM USA, "engaged in the business of manufacturing, promoting, marketing, distributing, and selling Marlboro Lights brand light cigarettes." (Am. Compl. ¶ 16, Altria App. 6A.) It also alleges that Altria "conducts business in

⁴The initial Complaint was filed on November 28, 2001. The Amended Complaint was filed on May 15, 2002 and the Second Amended Complaint was filed on November 1, 2002. The allegations relating to personal jurisdiction are substantially the same in all three complaints. "Am. Compl." citations are to the Amended Complaint, which was in effect at the time of the Order from which this cross-appeal is taken.

Minnesota, and at all relevant times manufactured, promoted, marketed, distributed, and sold cigarettes in interstate commerce and in Minnesota.” (Id.)

C. Altria’s Motion to Dismiss for Lack of Personal Jurisdiction

On March 12, 2002, Altria filed a motion to dismiss Plaintiffs’ claims for lack of personal jurisdiction pursuant to Minn. R. Civ. P. 12.02. Altria filed two supporting affidavits. The first, from Kathleen S. Lampe, contained factual statements that directly controverted the Complaint’s allegations about the nature of Altria’s business and its activities in Minnesota. (Lampe Aff. ¶¶ 1-15, Add. 6-9.) The second, from David P. Graham, included as attachments several decisions from other jurisdictions dismissing Altria for lack of personal jurisdiction, as well as Altria’s 2000 annual report. (Altria App. 54A-148A.)

D. Plaintiffs’ Response to Altria’s Motion to Dismiss

Plaintiffs filed a memorandum in opposition to Altria’s motion to dismiss on May 29, 2002. (Altria App. 156A-171A.) Plaintiffs did not dispute any of the facts in the Lampe Affidavit. They relied upon the allegations in their Amended Complaint,⁵ as well as the discovery that had occurred up to that point.⁶ (Altria App. 157A-160A.)

⁵ Notably, Part II of the Argument section in plaintiffs’ brief was entitled “Plaintiffs Have Presented Sufficient Averments and Facts to Defeat a Motion to Dismiss.” (Altria App. 161A (emphasis supplied).)

⁶ As shown in Point I below, the district court erred by considering the factually unsupported allegations of Plaintiffs’ Amended Complaint. As demonstrated in Point II below, the facts adduced by Plaintiffs and relied upon by the district court were insufficient as a matter of law to establish personal jurisdiction over Altria.

Plaintiffs also cited 1998 testimony given by former Altria CEO Geoffrey Bible in a separate lawsuit, as well as Altria's 2000 Annual Report. (Altria App. 158A, 160A, 165A-168A.)⁷ Plaintiffs did not argue that they had met the legal standard required to pierce the corporate veil between PM USA and Altria.

E. The District Court's Decision Denying Altria's Motion to Dismiss

The district court (Oleisky, J.) denied Altria's motion to dismiss on personal jurisdiction grounds on October 16, 2002. (Add. 1.) The district court initially stated that it was required to "accept as true the plaintiffs' well pleaded factual allegations." (Add. 3.) The district court said that in Altria's 2000 Annual Report it "represented itself as the leading consumer products company in the world," which the court deemed "evidence of continuous and systematic contacts in Minnesota." (Add. 3-4.) The court said that Altria's CEO had testified that he had the power to change PM USA policies (although it did not find that this power had been exercised). (Add. 4.)

The district court further stated that Altria was "one and the same" as PM USA from 1971 to 1985 (a period during which Altria did not even exist), that there was some overlap among directors of PM USA and Altria from 1985 to 1991, and that the

⁷ Plaintiffs filed a supplementary opposition memorandum on June 20, 2002, attaching several additional documents, none of which were cited by the district court. (App. 304A-359A.) These included a government publication discussing smoking risks, a memorandum describing Altria's charitable giving policy, two documents relating to Minnesota lobbyists hired by PM USA (not Altria), a 2001 confidentiality order from an Illinois case, a 1995 Altria public relations memorandum, a PM USA policy memorandum, and a 1991 Altria letter to a law professor relating to warning labels and advertising policy in various countries. (*Id.*)

Plaintiffs alleged that these facts demonstrated “that [Altria] was, and is, aware of and participated in the alleged fraudulent activities of [PM USA]” (Add. 4.) The court concluded that “plaintiffs’ allegations, therefore, establish a nexus between [Altria] and Minnesota such that Minnesota’s exercise of personal jurisdiction over [Altria] satisfies the Due Process requirements.” (Add. 4-5 (emphasis supplied).)

ARGUMENT

ON ALTRIA’S CROSS-APPEAL

I. Because Altria Has Insufficient Minimum Contacts With Minnesota to Satisfy the Due Process Clause, the District Court’s Finding of Personal Jurisdiction Over Altria Should Be Reversed

Minnesota’s long-arm statute, Minn. Stat. § 543.19(1), “extend[s] the personal jurisdiction of Minnesota courts as far as the Due Process Clause of the federal constitution allows.” Valspar Corp. v. Lukken Color Corp., 495 N.W.2d 408, 410 (Minn. 1992). Consequently, “[i]f the personal jurisdiction requirements of the federal constitution are met, the requirements of the long-arm statute will necessarily be met also,” so that “when analyzing most personal jurisdiction questions, Minnesota courts may simply apply the federal case law.”⁸ Id. at 411.

Under federal due process law, “the defendant must have ‘certain minimum contacts’ with the forum state” and the exercise of jurisdiction must “not offend

⁸ Personal jurisdiction may be of two kinds: general, where the defendant is subject to suit in the state for any purpose, and specific, where the cause of action arises out of the defendant’s contacts with the forum. Valspar, 495 N.W.2d at 411. The district court did not specify which type of jurisdiction it found to exist. As shown below, neither type of jurisdiction is supported by the record here.

‘traditional notions of fair play and substantial justice.’” Juelich v. Yamazaki Mazak Optonics Corp., 682 N.W.2d 565, 570 (Minn. 2004) (quoting Burnham v. Superior Ct., 495 U.S. 604, 618 (1990)). Minnesota courts analyze these questions using a five-factor test that evaluates: (1) the quantity of contacts with the forum state; (2) the nature and quality of those contacts; (3) the connection of the cause of action with these contacts; (4) the interest of the state providing a forum; and (5) the convenience of the parties. Juelich, 682 N.W.2d at 570.

The first three factors are the “most important.” Juelich v. Yamazaki Mazak Optonics Corp., 670 N.W.2d 11, 17 (Minn. Ct. App. 2003), aff’d, 682 N.W.2d 565 (Minn. 2004). Here they weigh decisively against any finding of personal jurisdiction. The uncontroverted facts in the Lampe Affidavit establish that Altria does not do business or own property in Minnesota, nor does it engage in any of the business activities – cigarette manufacturing, distribution, marketing, and sales – that Plaintiffs claim caused injury in Minnesota. (Lampe Aff. ¶¶ 8-13, Add. 8-9.)

Whether personal jurisdiction exists is a question of law which this Court reviews de novo. Juelich, 682 N.W.2d at 569-70.

A. In Finding Personal Jurisdiction, the District Court Improperly Accepted the Allegations in Plaintiffs’ Complaint As True Despite Altria’s Contrary Affidavits

The district court erred when it premised its denial of Altria’s motion to dismiss in part on Plaintiffs’ unsupported factual allegations, because Altria submitted uncontroverted contrary evidence that it lacked Minnesota contacts. As shown below, Minnesota law requires the court to base its findings on the actual evidence.

In meeting its burden to establish personal jurisdiction, a party opposing a motion to dismiss supported by affidavits “cannot rely on general statements in his pleading and therefore the allegations contained in plaintiffs’ complaint cannot be used to sustain their burden of proof.” Sausser v. Republic Mortgage Investors, 269 N.W.2d 758, 761 (Minn. 1978); see also, e.g., Hoff v. Kempton, 317 N.W.2d 361, 363 n.2 (Minn. 1982) (same). Rather, when a defendant submits affidavits in support of a motion to dismiss, a plaintiff’s unsupported jurisdictional allegations do not carry the plaintiff’s burden. Cf. In re Minnesota Asbestos Litig., 552 N.W.2d 242, 246 (Minn. 1996) (“[W]here one party attempts to prove that the statutory and constitutional requisites for jurisdiction are present based upon wholly unverified and unattested evidence, it cannot be said that only insubstantial rights of the opposing party are affected.”) (quoting Sausser, 269 N.W.2d at 761).

Indeed, Lyons v. Philip Morris, Inc., 225 F.3d 909 (8th Cir. 2000), the case the district court cited in concluding that it was bound to accept the Plaintiffs’ allegations, stands for the opposite principle. In Lyons – which involved a holding company that owned tobacco-company subsidiaries – the defendant had submitted “lengthy affidavits and supporting documents.” Id. at 915. The Eighth Circuit affirmed a dismissal for lack of personal jurisdiction while faulting plaintiffs for offering “conclusory assertions” without any “factual materials supporting their position.” Id.⁹

⁹ In contrast, where the defendant does not submit any affidavits in support of its motion to dismiss for lack of personal jurisdiction, the allegations of the complaint (...continued)

The Lampe Affidavit that Altria submitted in support of its motion to dismiss directly contradicted the Amended Complaint's factual allegations concerning personal jurisdiction. In denying Altria's motion, however, the district court ignored the Lampe Affidavit, and instead relied, in large part, on Plaintiffs' unsupported allegations. This was improper. Because Altria submitted affidavit evidence that it lacked Minnesota contacts, Plaintiffs' bare allegations to the contrary were inadequate to establish personal jurisdiction over Altria.

B. As a Matter of Law, the Facts Cited by the District Court Do Not Support a Finding of Personal Jurisdiction as to Altria

Stripped of the conclusory allegations in Plaintiffs' Amended Complaint, the facts relied upon in the district court's decision are insufficient as a matter of law to support personal jurisdiction over Altria.

1. Since Altria Was Not Formed Until 1985, It Was Impossible for Altria and Its Subsidiary to Be "One and the Same" Before That Date

The district court was mistaken as a matter of law in its assertion that Altria and PM USA were "one and the same" before 1985. (Add. 4.) As the uncontested facts laid out in the Lampe Affidavit make clear, Altria came into existence for the first time in 1985, as a holding company owning PM USA and other companies. (Lampe Aff. ¶¶ 2-3, Add. 6-7.) Altria was not a successor to PM USA, which continued to exist as a separate and distinct operating company and did not transfer

(continued...)

will be taken as true. E.g., Hardrives, Inc. v. City of La Crosse, 307 Minn. 290, 293, 240 N.W.2d 814, 816 (Minn. 1976).

any assets to Altria. (Altria App. 233A, 280A, 282A.) Indeed, Plaintiffs acknowledged to the court below that “[Altria] was formed in 1985 to be a company which owns 100% of the stock of [PM USA].” (Altria App. 157A.)

2. The Statements in Altria’s 2000 Annual Report to Shareholders Do Not Furnish a Basis for Personal Jurisdiction

The district court was also wrong as a matter of law in premising its finding of personal jurisdiction upon Altria’s statement in its 2000 Annual Report that it was “the leading consumer products company in the world.” (Add. 3-4.) The Annual Report made clear that Altria was a holding company whose subsidiaries, including PM USA, were engaged in various businesses. (Altria App. 105A.) The Annual Report expressly stated that the words “[w]e,’ ‘us,’ and ‘our’ refer, as appropriate in the context, to [Altria], one or more of its subsidiaries, or both.” (Altria App. 146A.) This included the very statement relied upon by the district court in its opinion – that Altria was “Delivering on Our Promise . . . to Be the Most Successful Consumer Products Company in the World.” (Altria App. 86A-87A.)

As a matter of law, summary statements of this kind in annual reports do not furnish a basis for personal jurisdiction.¹⁰ For example, in Conwed Corp. v. R.J. Reynolds Tobacco Co., Civ. File No. 98-1412 (PAM/JGL), 1999 U.S. Dist. LEXIS

¹⁰ The annual report of a publicly traded company is required to be prepared on an annual basis and distributed to the shareholders of the company. 17 C.F.R. § 240.14c-3. It provides a consolidated overview of the financial health and operations of the company, including its subsidiaries, for the benefit of investors. 17 C.F.R. § 240.14a-3(b).

9641, at *10-*13 (D. Minn. Apr. 1, 1999), the U.S. District Court for Minnesota found no basis for personal jurisdiction over a holding company despite a statement in the holding company's annual report that it was "the world's most international cigarette manufacturer." See also, e.g., Doe v. Unocal Corp., 248 F.3d 915, 928 (9th Cir. 2001) ("[R]eferences in the parent's annual report to subsidiaries or chains of subsidiaries as divisions of the parent company do not establish the existence of an alter ego relationship."); Fletcher v. Atex, Inc., 68 F.3d 1451, 1459-60 (2d Cir. 1995) (references in Kodak's annual report to subsidiary as a "division" are not evidence that companies were a "single economic entity"); Insolia v. Philip Morris Inc., 31 F. Supp. 2d 660, 663 (W.D. Wis. 1998) ("References to tobacco products produced by 'BAT' and 'the Group' in documents created by defendant BAT are not concessions that BAT manufactures cigarettes.").

3. The Existence of a Limited Number of Overlapping Directors Does Not Support Personal Jurisdiction

The district court also erred in its reliance on the existence of limited overlap between the Boards of Directors of Altria and PM USA during the first six years of Altria's existence (and well before this action was brought).¹¹ (Add. 4.) As the United States Supreme Court has noted, "it is entirely appropriate for directors of a parent corporation to serve as directors of its subsidiary, and that fact alone may not

¹¹ The overlap was never more than one-fourth of PM USA's board. One individual served on the boards of both companies from 1985 to 1991, and four other individuals served on both boards for periods of one to three years during the same six-year period. (See App. 188A-196A.)

serve to expose the parent corporation to liability for its subsidiary's acts.” United States v. Bestfoods, 524 U.S. 51, 69 (1998) (quoting American Protein Corp. v. AB Volvo, 844 F.2d 56, 57 (2d Cir. 1988)). See also, e.g., QAI Precision Prods., Inc. v. Impro Indus. USA, Inc., No. 04-23 (DWF/SRN), 2005 U.S. Dist. LEXIS 16323, at *13 (D. Minn. Aug. 4, 2005) (“[S]hared corporate officers among [entities] are not, by themselves, a sufficient basis upon which to find alter ego liability.”); In re Ski Train Fire in Kaprun, Austria, 230 F. Supp. 2d 403, 412 (S.D.N.Y. 2002) (holding that personal jurisdiction did not exist over defendant despite director overlap with corporation doing business in forum state); Patent Incentives, Inc. v. Seiko Epson Corp., Civil Action No. 88-1407 (AMW), 1988 U.S. Dist. LEXIS 9933, at *3 n.1, *29 (D.N.J. Sept. 6, 1988) (finding lack of personal jurisdiction over parent where 77% of subsidiary directors were alleged to be parent directors because “[p]laintiffs have simply failed to come forward with any evidence to suggest that the relationship . . . is anything other than a bona fide parent/subsidiary business”).

4. The Inherent Supervisory Relationship Between a Parent and Its Subsidiary Does Not Furnish a Basis for Personal Jurisdiction

Finally, the district court improperly based its finding of personal jurisdiction on former Altria CEO Geoffrey Bible's testimony that, as CEO of the parent company, he had the power to make changes to policies of Altria's subsidiaries. (Altria App.

221A-227A.)¹² However, the ordinary general oversight of subsidiary policies is not a basis for imposing jurisdiction upon a parent corporation. “Parents of wholly owned subsidiaries necessarily control, direct, and supervise the subsidiaries to some extent, but unless there is a basis for piercing the corporate veil and thus attributing the subsidiaries’ torts to the parent, the parent is not liable for those torts.” IDS Life Ins. Co. v. SunAmerica Life Ins. Co., 136 F.3d 537, 540 (7th Cir. 1998); see also Seltzer v. I.C. Optics, Ltd., 339 F. Supp. 2d 601, 611 (D.N.J. 2004) (finding lack of personal jurisdiction over parent despite allegations “that [parent personnel] did exert a considerable amount of influence and control over [the subsidiary],” because the parent’s “activities did not deviate from the normal amount of control a parent has over its subsidiary”).

Plaintiffs did not argue below that the court should pierce the corporate veil between PM USA and Altria. Not having relied upon this theory below, the Plaintiffs may not rely upon it here. Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. 1988). In any event, there is no factual basis in the record for piercing the corporate veil. In Victoria Elevator Co. v. Meriden Grain Co., 283 N.W.2d 509 (Minn. 1979), the Supreme Court listed factors relevant to the determination whether or not to pierce the corporate veil:

¹² Mr. Bible also testified that the Board of Directors of Altria is the ultimate authority in the company, with the power to hire and fire him, and that PM USA formulated its own practice and policies on issues of smoking and health. (Altria App. 221A-225A.)

Factors considered significant in the determination include: insufficient capitalization for purposes of corporate undertaking, failure to observe corporate formalities, nonpayment of dividends, insolvency of debtor corporation at time of transaction in question, siphoning of funds by dominant shareholder, nonfunctioning of other officers and directors, absence of corporate records, and existence of corporation as merely facade for individual dealings.

283 N.W.2d at 512 (citation omitted). Disregard of the corporate entity requires that a number of these factors be present. Id.

Thus, “[a] subsidiary’s activities may subject the parent company to jurisdiction only if the companies are so organized that one is an instrumentality or adjunct of the other.” Busch v. Mann, 397 N.W.2d 391, 395 (Minn. Ct. App. 1986); see also, e.g., Steinbuch v. Cutler, 518 F.3d 580, 589-90 (8th Cir. 2008); Behm v. Nuveen & Co., 555 N.W.2d 301, 308 (Minn. Ct. App. 1996) (a “parent must ‘dominate’ a subsidiary before jurisdiction will be extended to the parent based on the subsidiary’s contacts”); In re Hibbing Taconite Co., 431 N.W.2d 885, 893 (Minn. Ct. App. 1988). Where “there is no indication that [the parent] controlled the day-to-day operations of its tobacco subsidiaries,” the parent’s “general policies and procedures regarding its subsidiaries do not amount to daily control” sufficient to pierce the corporate veil. Conwed Corp., 1999 U.S. Dist. LEXIS 9641, at *19.¹³

In the present case, none of the factors required to pierce the corporate veil is present. (See, e.g., Lampe Aff. ¶¶ 5-8, Add. 7-8.) Notwithstanding the absence of

¹³ Indeed, the Conwed court flatly concluded that such pervasive control could not “occur when [the parent] has under 200 employees.” Id. In this case, the parent had no more than 35 employees. Lampe Aff. ¶ 7, Add. 8.

these relevant factors, the district court stated that Mr. Bible's testimony that he had the power to make policy changes, "viewed in the light most favorable to the plaintiff, is evidence of total control and day-to-day interference, to the extent that practice and policy decisions affect daily activities and operations." (Add. 4.) This statement reveals that the court improperly conflated the normal policy oversight responsibility of a parent company with the complete domination of the day-to-day operations of the subsidiary by the parent which is necessary in order to pierce the corporate veil. The court apparently equated having the "power" with exercising that "power." Plaintiffs simply presented no evidence of the domination that veil-piercing requires: the actual exercise of power by Altria to control the day-to-day operations of PM USA.

The facts relied upon by the district court in its decision were thus insufficient as a matter of law to support personal jurisdiction over Altria. Accordingly, the court's order should be reversed and Altria dismissed from the case.

C. Altria's Actual Contacts With Minnesota – Which Were Not Mentioned by the District Court – Are Insufficient to Support Personal Jurisdiction

Altria's limited contacts with Minnesota – viewed apart from Plaintiffs' unsupported allegations – are insufficient as a matter of law to support personal jurisdiction over Altria. This is so clear that the district court did not rely upon any of these factors in asserting jurisdiction over Altria.

1. Altria's Nationwide Public Service Advertising Does Not Support Personal Jurisdiction

Altria's advertisements are not a sufficient basis to establish minimum contacts with Minnesota. Generally, national advertising is insufficient to establish personal jurisdiction in Minnesota, particularly where (as here) it was public service rather than product advertising. See Wines v. Lake Havasu Boat Mfg., Inc., 846 F.2d 40, 43 (8th Cir. 1988) ("Minnesota can not constitutionally assert jurisdiction on the basis of this [national] advertising."); Ductcap Prods. v. J & S Fabrication, Inc., Civil No. 09-1179 (ADM/FLN), 2009 U.S. Dist. LEXIS 92038, at *10 (D. Minn. Oct. 2, 2009) ("Courts have consistently held that advertising in a national trade journal is insufficient to confer personal jurisdiction."); Now Foods Corp. v. Madison Equipment Co., 386 N.W.2d 363, 367 (Minn. Ct. App. 1986).

In this case, Altria's national advertisements, which ran from October 1999 until December 2001, cannot establish Minnesota contacts. These advertisements contained information about the public service efforts of Altria's people and companies. (Lampe Aff. ¶ 14, Add. 9.) The advertisements did not include any product advertisements. (Id.) These advertisements are simply irrelevant for jurisdictional purposes.

2. Altria's Passive Website Is Not a Basis for Personal Jurisdiction

The Minnesota courts also cannot exercise personal jurisdiction over Altria on the basis of its passive website, which did not advertise any of its subsidiaries' products or solicit any business. (Lampe Aff. ¶ 15, Add. 9.) Such a passive website

is insufficient to support personal jurisdiction as a matter of law. E.g., Juelich, 682 N.W.2d at 574 (“Because [the company’s] website merely provides general corporate information and does not include an order-taking function, it is properly categorized as a ‘passive’ website. Maintenance of a passive website generally does not support the exercise of jurisdiction.”); see also Toro Co. v. Advanced Sensor Tech., Inc., Civil No. 08-248 (DSD/SRN), 2008 U.S. Dist. LEXIS 49458, at *8 (D. Minn. June 25, 2008) (“[A] website that allows visitors to send email and view press releases and videos but does not offer products for sale or the ability to enter into contracts via the site is a passive site, and its accessibility does not serve as grounds for personal jurisdiction.”) (citations and internal quotation marks omitted); Greenbelt Res. Corp. v. Redwood Consultants, L.L.C., 627 F. Supp. 2d 1018, 1027 (D. Minn. 2008) (“Passive websites are those upon which a defendant has posted information accessible to interested users in foreign jurisdictions and are not grounds for the exercise of personal jurisdiction.”).

3. Altria’s Charitable Contributions in Minnesota Do Not Support Personal Jurisdiction

Altria made charitable donations in Minnesota (Altria App. 228A-231A), but this too does not support personal jurisdiction. See, e.g., In re Ski Train Fire In Kaprun, Austria, 343 F. Supp. 2d 208, 216 (S.D.N.Y. 2004) (providing funding to large universities in the forum is insufficient to support personal jurisdiction); Steege Corp. v. Ravenal, 830 F. Supp. 42, 51 (D. Mass. 1993) (foundation’s donation practice does not support personal jurisdiction); see also, e.g., Gianna Enters. v. Miss

World (Jersey) Ltd., 551 F. Supp. 1348, 1356-57 (S.D.N.Y. 1982) (defendant's affiliation with a New York charity did not support personal jurisdiction). Indeed, exercising personal jurisdiction based on charitable donations would have the unfortunate effect of discouraging charity by nonresidents.

For all of the foregoing reasons, no basis exists for imposing personal jurisdiction on Altria. The October 16, 2002 order of the district court (Oleisky, J.), denying Altria's motion to dismiss for lack of personal jurisdiction, should be reversed, and Altria should be dismissed from the case.

ON PLAINTIFFS' APPEAL:

II. Plaintiffs Are Not Entitled to Invoke Offensive Collateral Estoppel Against Altria

The district court was correct to deny Plaintiffs' motion for partial summary judgment based on collateral estoppel not only because prior inconsistent verdicts and the lack of a jury trial in DOJ render preclusion inappropriate here (as the district court held), but also because Plaintiffs cannot – and did not attempt to – establish the essential elements of collateral estoppel as to Altria. See, e.g., In re Light Cigarettes Marketing Sales Practices Litig., 691 F. Supp. 2d 239 (D. Me. 2010) (refusing to apply collateral estoppel against Altria and PM USA based on DOJ findings).

This Court reviews the decision to grant or deny summary judgment de novo. Sentinel Mgmt. Co. v. Aetna Cas. & Sur. Co., 615 N.W.2d 819, 827 (Minn. 2000).

Although Plaintiffs attempt to elide the differences between PM USA and Altria by referring to them jointly as “Philip Morris” (Pl. Br. at 3 n.1), they must

establish the elements of collateral estoppel separately as to PM USA and as to Altria. Moreover, it is black-letter law that in order for collateral estoppel to apply, the issue previously litigated must have been necessary to the final judgment and identical to the issue in the current proceeding. See, e.g., United States v. Young, 804 F.2d 116, 117 (8th Cir. 1986). The application of collateral estoppel to Altria here would fail these basic tests.

Plaintiffs do not identify any particular finding or conclusion against Altria in the DOJ case for which they seek preclusive effect. Plaintiffs cite 30 findings of fact made by the DOJ trial court to show that “Philip Morris” committed fraud in connection with light cigarettes. See Pl. Br. at 49-50. None of these 30 findings mentions Altria, and many of them predate Altria’s creation in 1985. On this basis alone, collateral estoppel is inappropriate as to Altria.

In any event, the only finding from the DOJ matter that could conceivably be argued to be “necessary” to the judgment against Altria for purposes of collateral estoppel would be the finding that Altria engaged in the “predicate acts” of mail fraud that formed the basis for the “pattern of racketeering activity” necessary to sustain liability under RICO, 18 U.S.C. § 1962(c). This finding, however, is not identical to any issue presented here.

Of the 148 RICO predicate acts alleged by the DOJ in the DOJ case, only nine were alleged against Altria. United States v. Philip Morris USA, Inc., 449 F. Supp. 2d 1, 973-78 (D.D.C. 2006), aff’d in part, vacated in part, 566 F.3d 1095 (D.C. Cir. 2009). On appeal, the D.C. Circuit Court of Appeals affirmed with respect to only

four of these nine predicate acts, 566 F.3d at 1129, which are therefore the only predicate acts relevant to the issue of collateral estoppel. See Fairbrook Leasing, Inc. v. Mesaba Aviation, Inc., 519 F.3d 421, 428 (8th Cir. 2008) (“[B]asic principles of issue preclusion bar [petitioner] from relying on the district court’s alternative ruling . . . because that ruling was not upheld on appeal.”). None of these four predicate acts related to the issue as to which Plaintiffs seek collateral estoppel: whether Altria committed fraud in the advertising and marketing of light cigarettes. (See Pl. Br. at 49-50.) Rather, they related to letters from an in-house employment lawyer seeking compliance with confidentiality agreements. 566 F.3d at 1129. Therefore, these predicate acts are not “identical” to any issue in this case.¹⁴

Moreover, there is no basis for applying the DOJ trial court’s findings regarding PM USA to Altria by means of veil-piercing based on collateral estoppel, even if it were open to Plaintiffs to argue such a theory in this Court when they did not do so in the court below. The Government did not argue a veil-piercing theory in the DOJ case, and the DOJ trial court specifically stated that it was not adopting such a theory. 449 F. Supp. 2d at 878 n.58. Moreover, the D.C. Circuit Court of Appeals

¹⁴ The D.C. Circuit affirmed the finding of RICO conspiracy against Altria as a “circumstantial inference” based on a wide variety of unspecified findings. See 566 F.3d at 1129-30. This does not permit the identification of any specific finding (let alone any finding relating to lights or low tar cigarettes) as having been necessary to the judgment against Altria, and thus, collateral estoppel based on this finding would be inappropriate. See, e.g., Zohlman v. Zoldan, 226 B.R. 767, 772 (S.D.N.Y. 1998) (explaining that “collateral estoppel should not apply” where “the prior decision amounts to a mere recitation of result, with no specific statement of findings” (quoting Citibank v. Hyland (In re Hyland), 213 B.R. 631, 633 (Bankr. W.D.N.Y. 1997))).

expressly declined to reach the issue of Altria's challenge to the trial court's finding of Altria's alleged "control" over PM USA. 566 F.3d at 1129. It is clear that when an appellate court declines to rule upon a finding of a lower court, that finding cannot be given collateral estoppel effect. See, e.g., In re Microsoft Corp. Antitrust Litig., 355 F.3d 322, 328-39 (4th Cir. 2004); In re Baylis, 217 F.3d 66, 71 (1st Cir. 2000); Fairbrook Leasing, 519 F.3d at 428.

For these reasons, in addition to those set forth by PM USA, the district court was correct in denying Plaintiffs' collateral estoppel motion as to Altria.

III. Plaintiffs' Motion for Partial Summary Judgment Against Altria Was Properly Denied, Among Other Reasons, Because the DOJ Findings Fail to Satisfy the Elements of the Minnesota Consumer Fraud Statutes

Plaintiffs' failure to establish a basis for applying the doctrine of collateral estoppel defeats their corollary motion for partial summary judgment on liability against Altria. However, there are additional reasons why Plaintiffs' consumer fraud claim against Altria fails.

The Minnesota consumer fraud statutes impose liability only upon persons or entities who violate their terms in connection with the sale of goods or services. See Minn. Stat. § 325F.69 (1) (prohibiting fraud, misrepresentation, and deceptive practices "in connection with the sale of any merchandise" under the Minnesota Prevention of Consumer Fraud Act); Minn. Stat. § 325D.13 (prohibiting misrepresentation "in connection with the sale of merchandise" under the Unlawful Trade Practices Act); Minn. Stat. § 325D.44 (listing thirteen affirmative acts constituting deceptive trade practices "in the course of [a person's] business, vocation,

or occupation” under the Deceptive Trade Practices Act); Minn. Stat. § 325F.67 (prohibiting false advertising in connection with the “intent to sell” merchandise under the False Statement in Advertising Act).

Minnesota courts confirm the importance of direct action by the parent in order to establish liability for consumer fraud. See, e.g., Avery v. Solargizer Int’l, Inc., 427 N.W.2d 675, 683-84 (Minn. Ct. App. 1988) (affirming trial court decision that there were not sufficient facts to demonstrate respondents made false advertising statements and noting that False Statement in Advertising Act “does not provide for vicarious liability of controlling persons”).

As already noted, Altria does not manufacture, sell, or distribute cigarettes. Consequently, the district court’s denial of Plaintiffs’ motion for partial summary judgment against Altria should be affirmed.

CONCLUSION

On Plaintiffs' appeal, Altria respectfully requests that this Court affirm the district court's orders dated October 4, 2009, October 21, 2009, and December 4, 2009. On Defendants' cross-appeal, Altria respectfully requests that the Court reverse the district court's January 29, 2004 and November 29, 2004 orders, and that the Court reverse the district court's October 16, 2002 order denying Altria's motion to dismiss for lack of personal jurisdiction, and remand the cause with instructions to dismiss Altria from the case with prejudice.

Dated: June 21, 2010

Respectfully submitted,



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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, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 6,580 words. This brief was prepared using Microsoft Office Word 2003 (Professional Edition).

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