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State of Minnesota
In 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 AND CROSS-APPELLANT PHILIP MORRIS USA INC.

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INTRODUCTION

Sixteen years ago, the Minnesota Attorney General sued Respondent Philip Morris USA Inc. ("PMUSA")[1] for alleged violations of Minnesota's consumer protection statutes. The State sought declaratory, equitable, injunctive, and monetary relief, including restitution and disgorgement of all profits from cigarette sales in Minnesota. At trial, the AG argued that PMUSA misrepresented that Marlboro Lights ("Lights") have lowered tar and nicotine. The case settled in 1998. In exchange for a broad release of claims, PMUSA submitted to broad injunctive provisions against deceptive advertising, and agreed to pay billions of dollars – including payments of over a hundred million dollars a year forever – funds which help pay for public education and smoking cessation programs.

Appellants' ("Plaintiffs") suit, filed over three years after that settlement, is based on the same consumer protection statutes and the same alleged misconduct. Plaintiffs, however, do not seek advertising injunctions or other relief to halt the alleged misconduct – nor could they, as Congress has banned, and PMUSA no longer manufactures, cigarettes that are marketed using the representations of which Plaintiffs complain. Rather, Plaintiffs ask that PMUSA refund to smokers all the money they spent purchasing Lights in Minnesota from 1971 to 2004.

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[1] Plaintiffs refer erroneously to Respondents as Altria Group, Inc. and Philip Morris Companies. (AB 3.) Philip Morris Companies is the former name of Altria Group, Inc. PMUSA was formerly known as Philip Morris Incorporated.

The trial court found that, on these unique facts, Plaintiffs could not bring consumer protection claims as Private Attorneys General because their claims would only potentially benefit them – through monetary awards – and would not benefit the public at large. That decision is the primary focus of Plaintiffs' appeal.

The primary focus of PMUSA's cross-appeal – which the Court need not reach if it affirms the trial court's entry of judgment for PMUSA – is whether the trial court improperly certified a class to pursue the consumer protection claims. The question hinges primarily on whether individual issues predominate over common ones – they do – and whether it would be possible to try this case, which Plaintiffs themselves admit arises from "millions of transactions on behalf of hundreds of thousands of Minnesotans who bought billions of cigarettes" (AB 22-23), without overwhelming the judiciary. To establish liability, each class member must show, among other things, that each time he (or she) purchased Lights, he did so because of the descriptors "lights" or "lowered tar and nicotine" (and not for some other reason, such as taste). He must also show that he did not receive lowered tar and nicotine (by altering the way he smoked each cigarette – and no two smokers smoke the same way and no smoker smokes every cigarette the same way). And he must show that he suffered a economic loss that is common to the class (notwithstanding that Lights have always cost the same as Marlboro Reds), and the extent of that economic loss (which would differ for each of the hundreds of thousands of class members, necessitating separate mini-trials on damages alone). Eleven courts, including the last seven since the filing of this action, have

denied certification in similar Lights class actions, and this Court should do the same.

COUNTER-STATEMENT OF THE ISSUES

I. WHETHER PRIVATE PLAINTIFFS CONFER A PUBLIC BENEFIT AND MAY PROCEED UNDER SECTION 8.31 WHEN (1) THE ATTORNEY GENERAL HAS SUED FOR THE SAME ALLEGED CONDUCT AND OBTAINED A CONSENT JUDGMENT; (2) LEGISLATION BANS AND HAS TERMINATED THE ALLEGED MISREPRESENTATIONS; AND (3) PLAINTIFFS SEEK ONLY MONEY.

The issue was raised in PMUSA's partial summary judgment motion. (A. 173.)[2] The trial court dismissed Plaintiffs' statutory consumer protection claims because they provided no public benefit. (Add. 1-2.)

Authority: *Ly v. Nystrom*, 615 N.W.2d 302 (Minn. 2000); *Collins v. Minnesota School of Business, Inc.*, 655 N.W.2d 320 (Minn. 2003); *Weigand v. Walser Automotive Group, Inc.*, 2006 WL 1529511 (Minn. Ct. App. 2006); *Schaaf v. Residential Funding Corp.*, 2006 WL 2506974 (D. Minn. 2006); Minn. Stat. § 8.31, subd. 3a.

II. WHETHER, IF PLAINTIFFS' STATUTORY CLAIMS PROVIDE A PUBLIC BENEFIT, THEY ARE BARRED BY THE RELEASE IN THE SETTLEMENT AGREEMENT IN *STATE V. PHILIP MORRIS*.

The issue was raised in PMUSA's partial summary judgment motion. (A. 173.) The trial court held that, if Plaintiffs' statutory claims provided a public benefit, they would be barred by the release in *State v. Philip Morris* because (1) the claims necessarily would be brought on the public's behalf by private plaintiffs

[2] Record citations here are abbreviated as follows. AB = Appellants' Brief. Add. = Plaintiffs' Addendum. A. = Plaintiffs' Appendix. R.Add. = Respondent PMUSA's Addendum. R.A. = Respondent PMUSA's Appendix. AG = Attorney General *amicus* brief. MAJ = Minnesota Association for Justice *amicus* brief.

standing in the shoes of the Attorney General; and (2) the settlement released all claims that the State could have brought, "whether directly or indirectly, representatively, derivatively or in any other capacity." (Add. 18-20.)

Authority: *Ly v. Nystrom*, 615 N.W.2d 302 (Minn. 2000).

III. WHETHER PLAINTIFFS' UNJUST ENRICHMENT CLAIM WAS BARRED BECAUSE THEY HAD ADEQUATE LEGAL REMEDIES IN THE FORM OF COMMON LAW FRAUD AND CONSUMER PROTECTION CLAIMS.

The issue was raised in PMUSA's motion for judgment on the pleadings. (R.A. 11-15.) The trial court held that Plaintiffs had adequate legal remedies and could not pursue unjust enrichment. (Add. 22-23.)

Authority: *Southtown Plumbing, Inc. v. Har-Ned Lumber Co., Inc.*, 493 N.W.2d 137 (Minn. Ct. App. 1992); *In re Silicone Implant Ins. Coverage Litig.*, 652 N.W.2d 46 (Minn. Ct. App. 2002), *aff'd in part, rev'd in part on other grounds*, 667 N.W.2d 405 (Minn. 2003).

IV. WHETHER FINDINGS OF A SINGLE JUDGE IN A FEDERAL RICO ACTION SHOULD BE APPLIED UNDER PRINCIPLES OF NON-MUTUAL OFFENSIVE COLLATERAL ESTOPPEL TO CONCLUSIVELY ESTABLISH PMUSA'S LIABILITY.

The issue was raised in Plaintiffs' partial summary judgment motion. (A. 381.) The trial court held that collateral estoppel did not apply due to inconsistent prior verdicts, non-identicality of issues, and unfairness, including that the federal RICO action was tried to a single judge and this case will be tried to a jury. (Add. 32.)

Authority: *Jack Faucett Assocs. v. AT&T*, 744 F.2d 118 (D.C. Cir. 1984); *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979); *Schwab v. Philip Morris USA Inc.*, 449 F. Supp. 2d 992, 1079 (E.D.N.Y. 2006), *rev'd on other grounds sub nom. McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008); *In re Light Cigarettes Marketing Sales Practices Litig.*, 691 F. Supp. 2d 239 (D. Maine 2010); *City of St. Louis v. American Tobacco Co.*, No. 22982-09652-01, slip op. (Mo. Cir. Ct. 2010) (R.A. 120).

V. WHETHER CLASS CERTIFICATION SHOULD BE REVERSED.

The issue was raised in Plaintiffs' motion for class certification and motion for reconsideration. (R.A. 17, 19.) The trial court certified a class on reconsideration. (R.Add. 12.)

Authority: *Whitaker v. 3M Co.*, 764 N.W.2d 631 (Minn. Ct. App. 2009); *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008); *Stern v. Philip Morris USA Inc.*, 2007 WL 4841057 (N.J. Super. Ct. 2007); *In re St. Jude Med., Inc.*, 522 F.3d 836 (8th Cir. 2009).

VI. WHETHER THE TRIAL COURT ERRED IN DENYING PARTIAL SUMMARY JUDGMENT ON STATUTE OF LIMITATIONS GROUNDS.

The issue was raised in PMUSA's motion for partial summary judgment. (R.A. 22.) The trial court denied the motion. (R.Add. 22.)

Authority: Minn. Stat. § 541.05, subd. 1(2); *Klehr v. A.O. Smith Corp.*, 875 F. Supp. 1342 (D. Minn. 1995); *Kopperud v. Agers*, 312 N.W.2d 443 (Minn.

1981); *Buller v. A.O. Smith Harvestore Prods., Inc.*, 518 N.W.2d 537 (Minn. 1994).

STATEMENT OF THE CASE

Plaintiffs sued on behalf of everyone who bought Lights in Minnesota from 1971 through 2004 – likely the largest class in Minnesota history – claiming PMUSA misrepresented that Lights deliver less tar and nicotine. (A. 3-4.) Plaintiffs brought claims for common law fraud, unjust enrichment, and under Minn. Stat. § 8.31, subd. 3a (the "Private AG Statute"), for alleged violations of Minnesota's consumer protection statutes (Minn. Stat. §§ 325F.68-.70, §§ 325D.09-.16, §§ 325D.43-.48, and § 325F.67). (A. 9-18.) Plaintiffs do not seek recovery for illnesses. Claiming they suffered an economic loss because Lights were allegedly misrepresented, Plaintiffs seek a refund of the total amount the class paid for Lights for 33 years. (AB 6.)

In January 2003, PMUSA moved for partial summary judgment on statute of limitations grounds. (R.A. 22.) The trial court (then Judge Allen Oleisky) denied this motion on January 29, 2004. (R.Add. 22-23.)

Plaintiffs moved for class certification in January 2003. (R.A. 17-18.) On January 16, 2004, the trial court denied the motion, holding that individual issues concerning injury, causation, reliance, and damages, predominated. (R.Add. 1, 7-11.) The court, however, granted Plaintiffs' reconsideration motion on November 29, 2004. (R.Add. 12-13.)[3]

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[3] Plaintiffs' request for interlocutory review of the initial order denying certification, and PMUSA's request for interlocutory review of the reconsideration order, were denied by this Court. (R.A. 25, 37.)

After various stays pending appeals in other related cases expired, PMUSA requested leave of the trial court (now Judge Gary Larson) in January 2009 to file a motion to decertify the class, on the basis of changes in the law and the factual record, including that six courts had rejected certification of similar "lights" classes since the certification order in this case. (R.A. 54-57.) The court denied the request. (R.A. 58.)

In February 2009, Plaintiffs moved for partial summary judgment, arguing that the judgment in *United States v. Philip Morris USA Inc.*, 449 F. Supp. 2d 1 (D.C. Cir. 2006), *aff'd in part, vacated in part*, 566 F.3d 1095 (D.C. Cir. 2009), petition for *certiorari* filed Feb. 19, 2010, has preclusive effect, which Plaintiffs asserted would establish liability. (A. 381-82.) The trial court denied the motion on October 4, 2009. (Add. 32.)

On May 15, 2009, Plaintiffs voluntarily dismissed with prejudice their common law fraud claim and their prayer for injunctive relief. (R.A. 59-60.)

In August 2009, PMUSA moved for partial summary judgment to dismiss the statutory claims because they did not provide a public benefit, or, alternatively, because they were released in the settlement of a prior Attorney General action. (A. 173-74.) The trial court granted the motion on October 21, 2009. (Add. 1-2.)

PMUSA then moved for judgment on the pleadings on the remaining unjust enrichment count. (R.A. 11.) The trial court granted the motion, and final judgment was entered on December 8, 2009. (Add. 22-23.)

On February 3, 2010, Plaintiffs filed their appeal. On February 19, 2010, PMUSA filed its notice of related appeal of the orders granting class certification and denying partial summary judgment on statute of limitations grounds. (R.A. 1.)

STATEMENT OF THE FACTS

In the 1950s and 1960s, the public health community began recommending the use of lower-tar cigarettes due to the link between tar and disease. (R.A. 806-07, 865, 979, 1022.) In response, the Federal Trade Commission ("FTC") in 1967 developed a standardized method ("the FTC Test") for measuring tar and nicotine yields. (R.A. 642.)

The FTC Test machine "smokes" every cigarette the same way – *e.g.*, the same puff intensity, duration, and interval between puffs. (R.A. 595, 602-03.) Smokers, however, do not smoke every cigarette in identical fashion. (R.A. 595, 602-03, 1748-49.) Smokers who switch from higher-tar to lower-tar cigarettes can compensate by smoking each cigarette more intensely (*e.g.*, taking deeper or longer puffs, or covering cigarette vent holes), or by smoking more cigarettes. (R.A. 1748-49.) Before the FTC began its testing program, PMUSA advised the FTC that the FTC Test did not reflect actual smoking behavior, and the FTC acknowledged this limitation. (R.A. 595, 602-03.)

PMUSA began manufacturing Lights in 1971. (R.A. 596.) As measured by the FTC Test, Lights have always delivered lower tar and nicotine than Reds. This means that a Lights cigarette, smoked the same way as a Reds, will deliver lower tar and nicotine to the smoker.

But smokers may not always smoke different cigarettes the same way, and the public record has been filled for decades with information that the FTC ratings

do not reflect actual deliveries and that, if smokers compensate, they may not receive less tar and nicotine from low-tar cigarettes and thus not receive any reduction in risk. (R.A. 657, 741, 771, 979-83, 1022-23, 1051, 1055, 1057.) For example, the Minneapolis Star Tribune and other papers reported in 1983 on a study finding that smokers of light cigarettes may receive as much tar and nicotine as smokers of full-flavor cigarettes. (R.A. 1055, 1057.) Moreover, packs of Lights and Reds carried the same warnings, and Congress consistently rejected mandating warnings or other packaging disclosures regarding compensation or tar and nicotine deliveries. (R.A. 707-08).

Notwithstanding concerns about compensation, the public health community encouraged use of low-yield cigarettes through the 1990s. (R.A. 807, 822-23, 873, 949.) This recommendation was based on epidemiology showing lower tar cigarettes as measured by the FTC Method reduce smokers' lung cancer risk. (R.A. 1015-17, 1022.) For example, a 1976 American Cancer Society study found that low tar smokers were 26% less likely to die from lung cancer than high tar smokers. (R.A. 1001-12.)

In November 2001, the National Cancer Institute issued Monograph 13, which reinterpreted studies that scientists had previously relied upon in recommending tar yield reductions. (R.A. 1015.) On the basis of this re-analysis, Monograph 13 concluded, for the first time, that there was "no convincing evidence" that reduced yield cigarettes had resulted "in an important decrease" in disease rates. (R.A. 1018.)

In 2002, following publication of Monograph 13, and again every year through 2008, PMUSA provided warnings on selected packages of all of its low tar cigarettes advising consumers of the possibility of compensation, that the "lights" descriptor was not intended as a representation of how much tar and nicotine any smoker would inhale, and that they should not assume that light cigarettes are safer than other cigarettes. (R.A. 1550-51, 1577-78.) PMUSA provided similar information in advertisements in major newspapers, on television and radio programs, and on its website. (R.A. 1549-50, 1557-76.) In 2003, the phrase "lowered tar and nicotine" was removed from all packs of Lights. In 2009, the tear tape on Lights packages included a message stating "'Lights' does NOT mean safer. It refers to taste. 'Lights' won't help you quit smoking." (R.A. 1551, 1579.)

In June 2009, Congress enacted the Family Smoking Prevention and Tobacco Control Act (the "FSPTCA"), Pub. L. No. 111-31, 123 Stat. 1776. The Act bans the use of the descriptors "lowered tar" and "light" unless expressly authorized by the Secretary of Health and Human Services. FSPTCA § 101(b)(3). No packs of PMUSA cigarettes are now manufactured with the "light" descriptor.

ARGUMENT

I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT ON PLAINTIFFS' CONSUMER PROTECTION CLAIMS

A. Plaintiffs' Statutory Claims Provide No Public Benefit And Hence Were Properly Dismissed

To sue under the Private AG Statute for violations of Minnesota's consumer protection statutes, plaintiffs must "demonstrate that their cause of action benefits the public." *Ly v. Nystrom*, 615 N.W.2d 302, 314 (Minn. 2000). A cause of action provides a public benefit by "uncovering and bringing to a halt unfair, deceptive and fraudulent business practices, functions that, [prior to the enactment of the Private AG Statute], had been [exclusively] the responsibility of the attorney general." *Id.* at 313. The trial court determined that Plaintiffs' claims provide no public benefit because of the unique facts present here: (1) The Attorney General sued PMUSA in 1994, alleging the same wrongdoing that Plaintiffs assert underlies their claims, resulting in a settlement in which PMUSA submitted to broad injunctive provisions against deceptive advertising and agreed to pay billions of dollars; (2) 2009 federal legislation bans without prior FDA approval the very representations – "lights" and "lowered tar and nicotine" – that Plaintiffs claim were misleading; and (3) Plaintiffs seek only money, and do not seek injunctive relief. The purported concern of Plaintiffs and their *amici* that affirmance of the trial court's decision will eviscerate the Private AG Statute is

entirely unwarranted. No cases concerning the Private AG Statute have involved, or are ever likely to involve, these unique facts. The decision should be affirmed.[4]

Although Plaintiffs repeatedly attack the *Ly* decision (*e.g.*, AB 19-20 & n.5), they cannot dispute that *Ly* – and the public benefit requirement – is binding. (AB 20 n.5.) Moreover, the legislature has repeatedly declined to enact legislation to eliminate the public benefit requirement – evidence that the decisions of the Supreme Court and the trial courts that Plaintiffs so heavily criticize are, in fact, in accord with the legislature's view of the scope and purpose of the Private AG Statute.[5]

Forced to acknowledge *Ly's* binding authority, Plaintiffs then argue it should be limited to its facts – a one-on-one transaction – claiming that if a case concerns representations made to the public at large and seeks a large financial recovery for a class, a public benefit necessarily exists. (AB 22.) That reading ignores *Ly's* plain language and its reasoning that the Private AG Statute rewards private parties "*for uncovering and bringing to a halt* unfair, deceptive and fraudulent business practices." 615 N.W.2d at 313 (emphasis added). *Ly's* reasoning is grounded in the legislative history of the Private AG Statute, the

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[4] Plaintiffs correctly state the standard of review. (AB 18.)

[5] *See, e.g.*, H.F. 84, 86th Legis. Sess. (2009-10), available at https://www.revisor.mn.gov/bin/bldbill.php?bill=H0084.0.html&session=ls86; S.F. 140, 86th Legis. Sess. (2009-10), available at https://www.revisor.mn.gov/bin/bldbill.php?bill=S0140.0.html&session=ls86; H.F. 2787, 85th Legis. Sess. (2007-08), available at https://www.revisor.mn.gov/bin/bldbill.php?bill=H2787.1.html&session=ls85.

purpose of which was "to *stop* the unscrupulous businessman who makes false and deceptive ads." *Id.* at 311 (quoting Hearing on H.F. 733, H. Comm. Commerce & Econ. Dev., 68th Minn. Leg. Mar. 30, 1973 (audio tape) (comments of Rep. Sieben)) (emphasis added). Plaintiffs' construction is likewise at odds with *Collins v. Minnesota School of Business*, 655 N.W.2d 320, 330 (Minn. 2003), which affirmed this Court's holding that a public benefit existed where private plaintiffs uncovered and halted false advertising about the defendant's sports medicine technician program. 636 N.W.2d 816, 820 (Minn. Ct. App. 2001). Indeed, this Court in *Collins* expressly rejected Plaintiffs' position, stating that "Our conclusion [as to whether there is a public benefit] does not, therefore, turn on the number of plaintiffs in this action." *Id.* at 821.

Plaintiffs here did not uncover the alleged wrongful conduct of which they complain. Rather, their suit piggybacks on the 1994 AG suit that already addressed the conduct at issue. In that suit, the AG contended at trial – as Plaintiffs do here – that PMUSA misrepresented Lights as being "light" and containing "lowered tar and nicotine." (A. 177-78, 181-217.) The case settled in May 1998, resulting in a consent judgment. (A. 117.) The State obtained billions of dollars, including payments for tobacco research and smoking cessation programs, future payments into perpetuity exceeding a hundred million dollars per year, and broad injunctive relief, including specific advertising restrictions and a blanket injunction prohibiting material misrepresentations about tobacco products. (A. 119-26, 133-36; AG 3-4.) Because the AG had already uncovered and

addressed PMUSA's practices as it deemed appropriate, *see Ly*, 615 N.W.2d at 313, the trial court correctly held that Plaintiffs' subsequent private claims do not provide a public benefit. (Add. 14 (quoting *Weigand v. Walser Auto. Group, Inc.*, 2006 WL 1529511, at *3 (Minn. Ct. App. 2006) ("[a] plaintiff 'cannot use the private-attorney-general statute to bring a cause of action based on business practices that the attorney general has already addressed.'") and *Simonson v. Ameriquest Mortgage Co.*, 2006 WL 3463000 (D. Minn. 2006) ("'the fact that state attorneys general, who are responsible for protecting the public interest, reached a settlement with Ameriquest suggests that Plaintiff's lawsuit can confer only a negligible additional public benefit'")).

Plaintiffs seek to distinguish *Weigand* because the AG settlement in that case, in addition to the *public* benefit of injunctive relief against the defendant, provided a *private* benefit: consumers were given the option to arbitrate their claims. That fact, however, is not central to *Weigand's* holding that "[o]nce the attorney general *took action against respondent*, the need for a private citizen to act 'in lieu of the attorney general' *ceased to exist*." 2006 WL 1529511, at *3 (emphasis added). Here, the AG took extensive action leading to massive ongoing payments and injunctive relief directly benefiting the public, as the AG's *amicus* brief itself describes. (AG 3-5.) Indeed, in a prior *amicus* brief filed by the AG with other state AGs in a lights case in Illinois, the AG stated that the AGs' settlements "included an unprecedented array of restrictions on advertising, promotion and marketing of cigarettes. The settlements also provided for

payments to the States in compensation for alleged violations of state health and welfare and consumer protection laws and policies." (PMUSA's June 21, 2010 Motion to Supplement the Record and Request for Judicial Notice ("RJN"), Exh. 2, at 3.) Plaintiffs cannot claim to meet the public benefit requirement by second-guessing the actions of the AG or contending they were insufficient. Because "the attorney general has already acted to protect the public, appellant has not established that his suit benefits the public," and the claims were properly dismissed. *Weigand*, 2006 WL 1529511, at *4.[6]

Plaintiffs' citations to excerpts of the Minnesota Attorney General's *amicus curiae* brief opposing preemption in *Dahl v. R.J. Reynolds Tobacco Co.* have no relevance here. (AB 13-14, 31-32.) That brief concerned whether the plaintiffs' claims in *Dahl* were preempted by federal law. The brief had nothing to do with whether the consumer protection claims in *Dahl* met the public benefit requirement articulated in *Ly* and its progeny; the issue was never raised.

Plaintiffs' further argument that the AG settlement did not stop the use of lights descriptors is irrelevant. It was within the AG's prosecutorial discretion to decide that the broad injunctive relief it obtained prohibiting any material misrepresentations about tobacco products was not violated by the use of lights descriptors. In any event, as the trial court recognized, the 2009 FSPTCA bans

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[6] Plaintiffs seek to distinguish *Simonson* because it involved a one-on-one transaction (AB 36), but *Simonson*'s reasoning that the prior AG actions obviated the public benefit of the subsequent private suit applies equally to a class action. 2006 WL 3463000, at *4.

without prior FDA approval "precisely the representations on which Plaintiffs base their claims," – *i.e.*, "lights" and "lowered tar and nicotine." (Add. 18-20.)[7] Hence, it is "*impossible* for Plaintiffs' suit to have any public benefit." (*Id.* (emphasis added)); *c.f. Scally v. Norwest Mortgage, Inc.*, 2003 WL 22039526, at *7 (Minn. Ct. App. 2003) (no public benefit because, *inter alia*, employee who made alleged misrepresentations had "been terminated and he is no longer in any position to harm the public"). In fact, no packs of PMUSA cigarettes currently being manufactured contain the terms "lights" or "lowered tar and nicotine." Because there is no wrongful conduct to halt, the claims cannot provide a public benefit. *Ly*, 615 N.W.2d at 313; *Kalmes Farms, Inc. v. J-Star Indus., Inc.*, 2004 WL 114976, at *6 (D. Minn. 2004) (dismissing Private AG claim for lack of public benefit because "[w]hile the allegedly false advertising was presented to the public at large, the advertising and the product it sought to promote are no longer in production").

Indeed, Plaintiffs' suit implicitly acknowledges it cannot provide a public benefit, because Plaintiffs seek only money for the individual class members. As the trial court held, consistent with the overwhelming weight of the case law, monetary payments to individuals are the quintessential form of *private* relief and

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[7] Plaintiffs implicitly suggest that PMUSA sought to prevent the FSPTCA ban on lights descriptors in *Commonwealth Brands, Inc. v. U.S.*, 2009 WL 3754273, (W.D. Ky 2009). (AB 30.) In fact, PMUSA was not a plaintiff in the *Commonwealth Brands* suit and did not seek to overturn the ban. Moreover, the court upheld the ban. 2009 WL 3754273 at *9.

do not provide a benefit to the *public*. (Add. 17.) *See, e.g., Schaff v. Residential Funding Corp.*, 2006 WL 2506974, at *16 (D. Minn. 2006) (no public benefit where putative class of securities purchasers sought compensatory damages for class members for losses due to misrepresentations); *Beck v. Sunrise Senior Living Mgmt.*, 2008 WL 3412096, at *2 (D. Minn. 2008) (no public benefit because, *inter alia*, plaintiff did not seek injunctive relief, but only monetary recovery for private injury); *Kalmes Farms*, 2004 WL 114976, at *6 (same); *Wehner v. Linvatech Corp.*, 2008 WL 495525, at *3 (D. Minn. 2008) (same); *PCS Prof'l Claim Serv., LLC v. Brambilla's Inc.*, 2007 WL 3313661, at *6-7 (D. Minn. 2007) (no public benefit because plaintiffs did not seek "the type of equitable relief that would support a finding that their cause of action benefits the public"); *Zutz v. Case Corp.*, 2003 WL 22848943, at *4 (D. Minn. 2003) (no public benefit; recovery sought was "for the exclusive benefit of the plaintiff"); *Behrens v. United Vaccines, Inc.*, 228 F. Supp. 2d 965, 970-72 (D. Minn. 2002) (no public benefit because plaintiffs did not seek a "future injunction on the Defendant's advertising, nor any injunction on the Defendant's marketing"). As these decisions and others explain, if a plaintiff's suit seeks only money for the plaintiff, and does not halt ongoing wrongful conduct towards the public, there is no public benefit and the plaintiff cannot bring claims under the Private AG Statute (although the plaintiff can, of course, bring a claim for common law fraud). Indeed, Plaintiffs' *amicus* Minnesota Association for Justice ("MAJ") frankly acknowledges that the Private AG Statute "provide[s] incentive for lawyers to take such cases *in order to stop*

the wrongful conduct and permit recovery of all wrongfully gotten gains," and concedes that the overwhelming weight of federal authority supports the trial court's holding. (MAJ 5-9 (emphasis added).)[8]

Schaff is instructive. In *Schaff*, as here, plaintiffs argued their claims provided a public benefit because they sought monetary relief for an entire class of people allegedly defrauded by misrepresentations. The court rejected the argument, holding there was no public benefit because "ultimately, the benefit that will result, if [plaintiffs] succeed, will accrue to the exclusive benefit of those individual investors because the redress sought is to compensate Plaintiffs for their injuries." *Id.* at *16 (citation omitted). Indeed, *Schaff* is particularly notable

[8] Plaintiffs and *amici* inaptly claim the reasoning of the cases is not grounded in binding authority; in fact, the cases all expressly cite and rely upon *Ly*. The two errant outlying decisions cited by Plaintiffs and *amici*, *In re National Arbitration Forum Trade Practices Litig.*, – F. Supp. 2d –, 2010 WL 605710 (D. Minn. Feb. 22, 2010), and *Kinetic Co. v. Medtronic, Inc.*, 672 F. Supp. 2d 933 (D. Minn. 2009), which concerned motions to dismiss at the outset of the case, do not warrant serious consideration. Indeed, *National Arbitration Forum* conceded that a prior action by the Attorney General concerning the same conduct "means that there is no public benefit to Plaintiffs' claims," but nevertheless permitted the claims to stand "at this stage of the litigation" because the allegations suggested the pursuit of monetary damages for the class may provide a public benefit. 2010 WL 605710 at *4-5. The court's inconsistent reasoning makes no sense, and does not take into account the holding in *Ly*, confirmed in *Collins* and subsequent case law, that a public benefit will not be found unless future wrongful conduct is prevented. Nor did either decision involve the unique circumstances present in this case, where the AG has obtained broad injunctive relief and recovered billions of dollars for the benefit of the public, and where legislation has barred the alleged wrongful conduct.

because the judge in that case was Joan Ericksen, a former Supreme Court Justice who was part of the majority in *Ly*.[9]

Because the AG has acted and there is no wrongful conduct to stop, Plaintiffs are left to argue that monetary payments to a large class will provide some sort of vague benefit of "dissuad[ing] similar, future conduct." (AB 25.) But courts have flatly rejected the notion that a metaphysical future deterrent effect satisfies the public benefit requirement. *See Behrens*, 228 F. Supp. 2d at 970-72 (claims seeking only monetary compensation provided only "metaphysical potential" for future deterrence insufficient to confer a public benefit); *PCS Prof'l Claim Serv.*, 2007 WL 3313661, at *5-7 (rejecting argument that monetary relief provides public benefit by allegedly discouraging defendant from making future misstatements).[10]

B. <u>If Plaintiffs' Claims Provided A Public Benefit, They Would Be Barred By The Express Terms Of The AG Settlement</u>

The trial court correctly held that, even if Plaintiffs' claims somehow provided a public benefit, then the claims necessarily would be barred by the Release in the settlement of the AG action. (Add. 18-20.) The court followed the

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[9] Plaintiffs misstate *Schaff* as holding there was no public benefit because misrepresentations were not made to the public at large. (AB 27-28.) *Schaff's* express holding was that there was no public benefit because plaintiffs only sought monetary relief for the class. 2006 WL 2506974, at *16. The portion of *Schaff* concerning the absence of representations made to the public was *dicta*; the court did not need to decide that issue in order to dismiss the claims.

[10] Plaintiffs' unsupported notion that "[r]estitution is as much a public benefit as, for example, the grant of injunctive relief" (AB 25) makes no sense. The "restitution" Plaintiffs seek is monetary relief to private individuals.

Supreme Court's instruction in *Ly* that a private plaintiff suing under the Private AG Statute stands in the shoes of the Attorney General. (Add. 18 (quoting *Ly*, 615 N.W.2d at 313).)

As an initial matter, the arguments of Plaintiffs and their *amici* as to why the Settlement does not bar Plaintiffs' claims are fundamentally predicated on the fact that Plaintiffs' claims are *private* claims seeking only *private* relief – a stark admission that Plaintiffs' claims depend on eliminating the public benefit requirement at the core of the Private AG Statute.

If Plaintiffs' claims were, however, to provide a public benefit, they would be barred by the Release, which bars the State, "whether directly or indirectly, representatively, derivatively or in any other capacity," from bringing the claims asserted here. Plaintiffs here – to the extent they assert claims as Private AGs who must act for the public's benefit – necessarily bring their claims "indirectly, representatively, [or] derivatively" on behalf of the State and fall within the bar of the Release. (Add. 19 (quoting Release) (A. 138-39).)

Plaintiffs and their *amici* argue that the language in the case law describing plaintiffs in Private AG actions as stepping into the shoes of the AG is only a metaphor, and does not mean that Plaintiffs' claims are brought "directly or indirectly, representatively, derivatively or in any other capacity" on behalf of the State. But *Ly's* instruction is not a metaphor; a plaintiff seeking to proceed under Section 8.31 *must* act for the benefit of the public, and thus the plaintiff must be

acting, at least in an indirect, representative, or derivative way, on behalf of the State. Such a plaintiff would thus be bound by the Settlement's bar. (A. 138-39.)

Significantly, the interpretation of the release urged by Plaintiffs and *amici directly contradicts* the AG's position in *State ex. rel. Humphrey v. Philip Morris*, No. C1-94-8565, a case litigating the scope of the Settlement's release. There, in its [Proposed] Findings of Fact, the State explained that the Settlement's "release provisions" were intended "to encompass suits or causes of action that might be asserted *by any parties – including private litigants* – in adjudicatory proceedings, along with the damages, liabilities and costs that can arise in relation to such proceedings." (RJN Exh. 1, ¶ 35 (emphasis added).) This explanation is exactly consistent with the language of the Release and case law interpreting the statute and applies to bar Plaintiffs' private claims here.

The cases Plaintiffs and *amici* cite (*e.g.*, AG 8-9) are inapposite. Those cases do not arise under consumer protection statutes that impose a public benefit requirement, and accordingly say nothing about whether a plaintiff suing for alleged misrepresentations under a statute requiring a public benefit is bound by the state's release of claims arising from a suit involving the same alleged misrepresentations. Rather, those cases concern the irrelevant issue of whether plaintiffs were in *privity* with the state for res judicata purposes. PMUSA did not argue, and the trial court did not determine, that Plaintiffs here are in privity with the AG; the court determined that, *if* the claims were to provide a public benefit, Plaintiffs would be acting *as representatives of the state*. For this same reason, the

language in the Settlement that it does not "bind any non-party or determine, limit or prejudice the rights of any such person or entity" has no bearing here. As the AG's proposed findings of fact confirm, Plaintiffs are *not* non-parties; to the extent they bring claims on behalf of the public, they are indirect representatives of the State bound by the Settlement. By contrast, the settlement agreement does not bar Plaintiffs from bringing *private* claims for common-law fraud.

Plaintiffs and *amici* err in arguing the AG has no authority to release private claims. The AG plainly thought it had such authority when it submitted its Proposed Findings that the release encompassed suits brought by private litigants. In any event, the AG certainly has authority to release claims that private litigants could bring *on behalf of the public*, or pursuant to a public benefit requirement, as their own, and other, cases confirm. *See, e.g., Satsky v. Paramount Commc'ns, Inc.*, 7 F.3d 1464, 1470 (10th Cir. 1993) ("[w]hen a state litigates common public rights, the citizens of that state are represented in such litigation by the state *and are bound by the judgment*") (emphasis added); *State by Humphrey v. Ri-Mel, Inc.*, 417 N.W.2d 102, 112 (Minn. Ct. App. 1987) (AG had authority to sue on behalf of health club members to protect State's quasi-sovereign interest in protecting economic health of its citizens); *Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769 (9th Cir. 1994) (state's prior release of claims for oil spill damages barred private plaintiffs' claim for lost recreational use).

Similarly, the AG's concern that the trial court's ruling will permit private parties to bind the AG is misplaced. Private parties litigating public rights cannot

bind the government – just as the doctrine of offensive collateral estoppel, for sound public policy reasons, cannot be applied against the government. *See United States v. Mendoza*, 464 U.S. 154, 159-63 (1984).[11]

II. THE TRIAL COURT PROPERLY GRANTED JUDGMENT ON PLAINTIFFS' UNJUST ENRICHMENT CLAIM

As the trial court observed, "'It is well settled in Minnesota that one may not seek a remedy in equity when there is an adequate remedy at law.'" (Add. 25 (quoting *Southtown Plumbing, Inc. v. Har-Ned Lumber Co., Inc.*, 493 N.W.2d 137, 140 (Minn. Ct. App. 1992)).) Because unjust enrichment is an equitable remedy, "[r]elief under the theory of unjust enrichment is not available where there is an adequate legal remedy or where statutory standards for recovery are set by the legislature." 493 N.W.2d at 138-40. The trial court correctly found that Plaintiffs' voluntarily abandoned common-law fraud claim, as well as their statutory claims, compelled dismissal of the unjust enrichment claim. (Add. 25-26.)

Plaintiffs argue the common-law fraud claim was inadequate because it "would not be pursued on a class-wide basis." (AB 46-47.) Plaintiffs did not make this argument below, and hence waive it here. *Thiele v. Stich*, 425 N.W.2d

[11] Plaintiffs also briefly argue, without authority, that PMUSA was required to seek an injunction in Ramsey County to raise its defense. (AB 44.) Plaintiffs voluntarily filed this action in Hennepin County, however, and nothing in the settlement bars PMUSA from raising the release as a defense in the court in which Plaintiffs sued. That settlements routinely include forum provisions vesting jurisdiction in the trial court to enforce the settlement does not mean the release is only enforceable in that court.

580, 582 (Minn. 1988); *In re Welfare of P.R.S., Jr.*, 2009 WL 4574063, at *10 (Minn. Ct. App. 2009). In any event, Plaintiffs are wrong. Whether a claim is certifiable has no bearing on whether it is "adequate"; it is undisputed that each individual plaintiff has an adequate legal remedy through pursuit of a fraud claim. *See, e.g., Stratton v. American Med. Sec., Inc.*, 266 F.R.D. 340, 354 (D. Ariz. 2009) (declining to certify unjust enrichment claim because plaintiffs' fraud claim provided an adequate remedy at law, even though court declined to certify fraud claim because of predominance of individual issues).[12]

Plaintiffs also contend the trial court's dismissal of the statutory claims demonstrated those claims were inadequate. As this Court has held, however, whether a legal remedy is "adequate" depends on whether the remedy was available, not on whether it was pursued successfully. *See In re Silicone Implant,* 652 N.W.2d at 76 (inability to prove element of claim for breach does not mean party had no adequate legal remedy); *see also ServiceMaster of St. Cloud v. GAB Business Services, Inc.*, 544 N.W.2d 302, 305-07 (Minn. 1996). Plaintiffs here, like those in *Silicone Implant*, could not prove an element of their statutory claims (a public benefit). Plaintiffs' failure of proof does not render the claims inadequate. Moreover, Plaintiffs conceded that while the statutory claims were pending, their unjust enrichment claim was not viable because they had an

[12] The unjust enrichment claim, which is "simply a recharacterization of appellants' fraudulent misrepresentation claims," *Dahl v. R.J. Reynolds Tobacco Co.*, 742 N.W.2d 186, 195 (Minn. Ct. App. 2007), was never certified. *See infra note* 20.

adequate remedy at law. (Nov. 10, 2009 Letter from Plaintiffs' Counsel to Judge Larson, at 1-2.) It would make little sense logically, or as a matter of public policy, if a non-viable equitable remedy became viable upon dismissal of legal or statutory claims – the result would arbitrarily depend merely on which motion was filed first. As *Silicone Implant* makes clear, however, this irrational approach is not the law.

III. THE TRIAL COURT PROPERLY DENIED PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON COLLATERAL ESTOPPEL GROUNDS

Plaintiffs moved for partial summary judgment on the grounds that, under principles of offensive non-mutual collateral estoppel, findings in *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), petition for *certiorari* filed Feb. 19, 2010 ("*DOJ*"), established defendants' liability to the hundreds of thousands of class members in this case as a matter of law.

The *DOJ* lawsuit, filed in 1999, two years before this suit, alleged multiple schemes to defraud by the major U.S. tobacco companies, involving numerous alleged "pillars" of misconduct, only one of which related to low tar cigarettes. 449 F. Supp. 2d at 27, 31-32. The government did not litigate the claims of any smoker or class of smokers, but sought only equitable relief to "prevent and restrain" future RICO violations. *Id.* After a bench trial, the court found that defendants had violated RICO, 449 F. Supp. 2d at 27-28, and granted certain equitable relief, *id.* at 938-45. The D.C. Circuit "affirm[ed] the district court's

judgment of liability" as to the tobacco company defendants and "largely affirm[ed] the remedial order." 566 F.3d at 1150. However, the court acknowledged that it "may not have reached all the same conclusions as the district court," if it were reviewing the evidence independently. *Id.* at 1134.

Like *every* other court to address this issue, the trial court here properly declined to apply preclusion to the *DOJ* findings. *See Schwab,* 449 F. Supp. 2d at 1079 (E.D.N.Y. 2006); *Grisham v. Philip Morris, Inc.*, 670 F. Supp. 2d 1014, 1031-32, 1035-37 (C.D. Cal. 2009); *In re Light Cigarettes*, 691 F. Supp. 2d at 251 (D. Maine 2010); *City of St. Louis v. American Tobacco Co.*, No. 22982-09652-01 (Mo. Cir. Ct., 2010) (R.A. 120).

A. Legal Standard

Non-mutual offensive collateral estoppel is the most "detailed, difficult, and potentially dangerous" form of estoppel. *Jack Faucett*, 744 F.2d at 124-25.[13] It "presents a unique potential for unfairness." *Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244, 248 (3d Cir. 2006). As a threshold matter, it should not apply where "the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant." *Parklane Hosiery*, 439 U.S. at 329-30; *Jack Faucett*, 744 F.2d at 125-26.

[13] Federal law governs the preclusive effect of a federal judgment grounded in federal law. *See, e.g., In re Light Cigarettes,* 691 F. Supp. 2d 239. In Minnesota, however, "[t]he federal and state standards on the collateral estoppel effect of a prior judgment are essentially the same." *Trebesch v. Astra Pharm. Prods., Inc.*, 503 F.Supp. 79, 82 n.5 (D. Minn. 1980).

Even if there are no inconsistent verdicts, a plaintiff still must prove that: (1) the issues in both proceedings are identical; (2) the issues in the prior proceeding were litigated and actually decided; (3) there was a full and fair opportunity for litigation in the prior proceeding; and (4) the issues previously litigated were necessary to support a valid and final judgment on the merits. *See, e.g., Otherson v. Dep't of Justice, Immigration & Naturalization Serv.*, 711 F.2d 267, 273 (D.C. Cir. 1983). Even if plaintiffs can establish all of these elements, the trial court may still in its discretion decline to apply the doctrine. *Parklane Hosiery*, 439 U.S. at 331.

This Court reviews de novo whether collateral estoppel is available. *Matter of Trusts Created by Hormel*, 504 N.W.2d 505, 509 (Minn. Ct. App. 1993). "Once it is determined that collateral estoppel is available, the decision to apply the doctrine is left to the trial court's discretion." *Id.*

B. <u>The Trial Court Properly Held That Prior Inconsistent Verdicts Required Denial Of Summary Judgment</u>

Based upon a massive record, the trial court determined that the *DOJ* decision cannot have preclusive effect here because it "'is itself inconsistent with one or more previous judgments in favor of the defendant.'" (Add. 40 (quoting *Parklane Hosiery*, 439 U.S. at 330).)

In its decision, the trial court extensively discussed *Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris, Inc.*, No. 98-CV-3287 (E.D.N.Y.) ("*BCBS*") and *Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris, Inc.*,

No. 1:97-CV-1422 (N.D. Ohio). In *BCBS*, a health insurer brought federal RICO claims, alleging (as in *DOJ*) that light cigarettes, due to compensation, were not healthier than full-flavor cigarettes. (March 10, 2009 Affidavit of Nathan Marcusen in Opposition to Plaintiffs' Motion for Partial Summary Judgment Based on Collateral Estoppel ("March 10, 2009 Marcusen Aff.") ¶ 19 & Exh. 18, at 39.) The *BCBS* plaintiff called many of the same expert witnesses to testify in support of its allegations that the government called in *DOJ*. (March 26, 2009 Supplemental Affidavit of Nathan Marcusen in Opposition to Plaintiffs' Motion for Partial Summary Judgment Based on Collateral Estoppel ("March 26, 2009 Marcusen Aff.") Exh. A.) In direct contrast to *DOJ*, however, the *BCBS* jury returned a verdict in favor of PMUSA on the RICO claims. (*Id.* ¶ 22 & Exh. 21.)[14]

Plaintiffs state that the *BCBS* jury found against PMUSA on the New York consumer fraud claim. (AB 52.) Plaintiffs fail to disclose, however, that the consumer fraud verdict was overturned on appeal, and judgment was entered for defendants on all claims. *See Empire Healthchoice, Inc. v. Philip Morris USA, Inc.*, 393 F.3d 312 (2d Cir. 2004). Accordingly, the jury's decision on the state law claim is a nullity for purposes of analyzing collateral estoppel. *See, e.g., Erebia v. Chrysler Plastic Prods. Corp.*, 891 F.2d 1212, 1215 (6th Cir. 1989).

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[14] Additional inconsistent prior verdicts are described in PMUSA's March 26, 2010 Supplemental Brief in Opposition to Plaintiffs' Motion for Partial Summary Judgment Based on Collateral Estoppel, in Exhibits 25, 27, 28, 30, and 32 of the March 10, 2009 Marcusen Aff., and in Exhibits A-S of the March 26, 2010 Marcusen Aff.

Moreover, as the trial court recognized here, regardless of the initial verdict on the state law claim, *BCBS* is an inconsistent verdict for collateral estoppel purposes because the jury there rejected the same claim brought under the same statute (RICO) that was the basis of liability in *DOJ.* (Add. 10.)

Notably, the *BCBS* trial judge – Judge Weinstein – subsequently declined to give preclusive effect to *DOJ* in *Schwab* because "'defendants have won so many of the tobacco cases,'" such as *BCBS*. *Schwab*, 449 F.Supp. 2d at 1079. As the presiding judge in *BCBS*, Judge Weinstein was uniquely situated to determine whether it is inconsistent with *DOJ*. *See Oldham v. Pritchett*, 599 F.2d 274, 281 (8th Cir. 1979) (where judge who presided over earlier action makes a "determination of its collateral estoppel effect" in a subsequent action, that determination "is entitled to great weight" given that he "was in a particularly good position to determine what was actually litigated" in the prior proceeding); *see also City of St. Louis*, slip op. at 17 & n.12 ("application of offensive collateral estoppel in this case would be glaringly inconsistent with a large number of prior jury verdicts"; expressly finding *BCBS* and *Iron Workers* "resulted in jury verdict outcomes that are directly opposite of the outcome in the court-tried *DOJ* case") (R.A. 136).

Similarly, in *Iron Workers*, plaintiffs brought state-law RICO claims alleging that Lights yielded the same amount of tar and nicotine as full-flavor Marlboros. (March 10, 2009 Marcusen Aff. Exh. 22; March 26, 2009 Marcusen

Aff. Exhs. D-E.) Again, however, the jury rejected plaintiffs' RICO claims, returning a verdict for PMUSA. (March 26, 2009 Marcusen Aff. Exh. C.)

Plaintiffs urge rejection of *Iron Workers* on the ground that supposedly significant evidence relied upon by the *DOJ* court did not exist at the time *Iron Workers* was decided. (AB 52-53.) But Plaintiffs cite no authority that a prior *inconsistent* verdict should not bar application of collateral estoppel because of changing evidence. The case Plaintiffs cite, *Montana v. United States*, 440 U.S. 147 (1979), held that a prior *consistent* verdict will not *create* collateral estoppel when there is a significant change in the evidence. *Id.* at 159. Because application of collateral estoppel "presents a unique potential for unfairness," *Jean Alexander Cosmetics,* 458 F.3d at 248, changing evidence should be reason to bar prior *consistent* judgments from having preclusive effect, but not the converse. *See also City of St. Louis*, slip op. at 17 & n.12 (rejecting argument that *DOJ* was entitled to greater weight because it was more recently decided).

The *Grisham* court, although denying collateral estoppel on other grounds applicable here, disagreed with Judge Weinstein in *Schwab* and other courts concerning the inconsistency of prior verdicts. *Grisham's* reasoning on this point was erroneous in at least two fundamental respects. *First*, *Grisham* incorrectly concluded that "many of the prior cases were litigated before plaintiffs had access to the full panoply of evidence of tobacco companies' bad acts." 670 F. Supp. 2d at 1035. In fact, long before the U.S. government sued, the AG here and in 39 other states filed suits resulting in millions of documents from Philip Morris and

other tobacco companies being made publicly available on the internet in 1998. *See, e.g.,* Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 Utah L. Rev. 863, 896 (2005); RJN Exh. 2. All of the lights verdicts inconsistent with *DOJ* came after the publication of these documents. *Second*, the *Grisham* court declined to treat prior general verdicts as inconsistent, improperly shifting the burden to PMUSA to prove that each jury specifically rejected the precise findings of fraud made in *DOJ*. 670 F. Supp. 2d at 1034-35. Plaintiffs, however, bear the burden – which they did not meet here – to prove that the prior judgments are not inconsistent. *Jack Faucett*, 744 F.2d at 130 ("It is enough if that inconsistent determination undermines the court's confidence in the earlier decision."); *see State Farm Fire & Cas. Co. v. Century Home Components, Inc.*, 550 P.2d 1185, 1192 (Or. 1976) (bench finding could not be given preclusive effect in light of inconsistent jury verdict, notwithstanding "general" nature of verdict) (cited with approval in Reporter's Note to Restatement (Second) of Judgments § 29 cmt. f (1982)); *see also City of St. Louis*, slip op. at 17 n.11 (expressly rejecting *Grisham's* conclusion that prior inconsistent verdicts can be discounted) (R.A. 136).

Moreover, Plaintiffs' argument concedes that scientific evidence is evolving. As described below, recent scientific evidence casts doubt on the *DOJ* findings. (R.A. 1746-75, 1779-1805.) Because Plaintiffs bear the burden of proof, and given the potential unfairness of applying offensive collateral estoppel, changes in the state of scientific knowledge must be viewed in the light most

favorable to PMUSA. Thus, if *Iron Workers* is to be disregarded for collateral estoppel purposes, so must *DOJ*.

C. The Trial Court Correctly Held That Plaintiffs Did Not Establish That The Issues In *DOJ* Were Identical To The Issues Necessary To Establish Liability Here

The trial court also correctly held that collateral estoppel was not available because *DOJ* did not raise identical issues. (Add. 38.) Identicality requires that "the legal matter raised in a second or subsequent suit is identical in all respects to the issue decided in the first proceeding and [that] the controlling facts and applicable legal principles remain the same." *Sydnes v. C.I.R.*, 647 F.2d 813, 814-15 (8th Cir. 1981). The trial court observed that the government in *DOJ* "was not required to demonstrate the differing elements of the state law claims at issue here, including whether any individual smoker was actually defrauded or injured by the alleged misconduct or free of Defendants' affirmative defenses." (Add. 39.) Those differences preclude a finding of identicality.

Plaintiffs incorrectly assert, without discussion or analysis, that "the elements of Minnesota's CFA are satisfied by the findings of fact and conclusions of law in the RICO case [*DOJ*]." (AB 50.) As the trial court recognized, however, Plaintiffs seek monetary relief under the Private AG Statute. Each plaintiff must therefore prove not only that the defendants violated the consumer protection statutes, but that he or she suffered a cognizable injury caused by the defendants' violation. *Group Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2, 13 (Minn. 2001); *see also Weigand*, 683 N.W.2d at 812 (reaffirming that

"reliance is a component of the causal nexus requirement for a private consumer fraud class action"). *DOJ*, by contrast, concerned a federal RICO claim seeking prospective equitable relief. The central issues in this case – including whether any class member can prove that the alleged misrepresentations caused that class member to purchase Lights, whether that class member was injured thereby, and the amount of the injury – were absent from *DOJ*. Indeed, the *DOJ* court repeatedly found that numerous consumers did not believe that light cigarettes are safer and that numerous consumers purchased light or low tar cigarettes for reasons other than tar and nicotine deliveries or health – findings that are consistent with the conclusions of courts in lights cases across the country and with the record developed in this case to date. *See, e.g.*, *DOJ*, 449 F. Supp. 2d at 476 (relying on study finding that only "21% of light or ultra light cigarette smokers chose those brands because they perceived them to be healthier"). Given these findings by the *DOJ* court itself, and the requirements in this case of causation, reliance, and injury, application of collateral estoppel would be improper. *See, e.g., Schwab*, 449 F. Supp. 2d at 1079 (noting that the *DOJ* findings do not provide "proof of reliance" in declining to give preclusive effect to the findings); *Grisham*, 670 F. Supp. 2d at 1031 (no identicality because issues of "causation, reliance, and damages" were not litigated in *DOJ*).

D. <u>Collateral Estoppel Is Unavailable For Additional Reasons</u>

There are additional grounds for denying collateral estoppel that the trial court did not reach.

1. Plaintiffs Did Not Establish That The Findings On Which They Rely Were Necessary To The *DOJ* Judgment

Collateral estoppel is also improper because Plaintiffs cannot establish that the *DOJ* findings were "*necessary* to [the] court's judgment." *United States v. Alaska*, 521 U.S. 1, 13 (1997) (emphasis in original). "A determination ranks as necessary or essential only when the final outcome hinges on it." *Bobby v. Bies*, 129 S. Ct. 2145, 2152 (2009). Because *DOJ* was not limited to an alleged low tar scheme, one cannot discern whether the low tar findings were necessary to the court's determination that the defendants violated RICO – and Plaintiffs here did not show otherwise. *See In re Light Cigarettes*, 691 F. Supp. 2d at 250; *Grisham*, 670 F. Supp. 2d at 1031-32.

2. New Scientific Evidence Makes Collateral Estoppel Inapplicable

Collateral estoppel is also improper because emerging scientific evidence casts doubt on the *DOJ* findings. (R.A. 1746-75, 1779-1805.) "[C]hanges in fact essential to a judgment will render collateral estoppel inapplicable in a subsequent action raising the same issues." *Montana v. United States*, 440 U.S. 147, 159 (1979); *see Zweig v. E.R. Squibb & Sons, Inc.*, 536 A.2d 1280, 1283 (N.J. Super. Ct. App. Div. 1988) (declining to apply collateral estoppel to finding that drug was defective where "[l]ater scientific discoveries" that "cast doubt on prior findings").

Recent evidence has emerged since the *DOJ* trial confirming that, on average, compensation is incomplete – *i.e.*, smokers generally receive less tar and nicotine from low tar cigarettes both on a daily basis (the question addressed by

the *DOJ* court) and on a per cigarette basis (the question at issue here). (R.A. 1748-49.) Obviously, any Lights smoker who receives less tar and nicotine has no case. Application of collateral estoppel in light of this emerging evidence would be grossly unfair.

E. Even If Collateral Estoppel Were Available, The Trial Court's Denial Of Summary Judgment Constituted A Proper Exercise Of The Court's Discretion

Finally, even were this Court to determine that collateral estoppel was available, the trial court was well within its discretion to decline to apply it. In addition to the reasons set forth above, this case, as the trial court observed, will be tried to a jury, whereas *DOJ* was tried to the court. (A. 42.) Defendants should not be deprived of the right to have a jury determine the issues in this case. *See* 18A *Federal Practice & Procedure* § 4465.2 (2009) ("a state court . . . may properly protect state jury-trial rights by denying nonmutual preclusion [*i.e.*, offensive collateral estoppel]"). Plaintiffs claim "[n]o court has precluded collateral estoppel based on who will be the trier of fact." (AB 53.) This is simply incorrect. *See Grisham*, 670 F. Supp. 2d at 1036 (given "Defendants' interest in having a jury decide the case," and "the clear Constitutional interest supporting civil jury trials," the "absence of a jury trial" in *DOJ* was one of several fairness factors considered "when balancing the equities of issue preclusion"); *In re Light Cigarettes,* 691 F. Supp. 2d at 251 ("follow[ing] the lead of other courts that have given weight to the deprivation of a jury trial" in declining to apply collateral

estoppel to *DOJ*) (citing *Grisham* and *Whelan v. Abell,* 953 F.2d 663, 669 (D.C.Cir.1992)); *City of St. Louis*, slip op. at 19-21 (same) (R.A. 138-40).[15]

IV. THE TRIAL COURT ERRED IN CERTIFYING THE CLASS

The trial court certified what is likely the largest class ever certified in this state:

> All persons, who purchased Defendants' Marlboro Lights cigarettes in Minnesota for personal consumption from the first date Defendants sold Marlboro Lights in Minnesota through the date of the certification of the class.

(R.Add. 12, 14.) It spans thirty-three years, has hundreds of thousands of members spread across the country and abroad, and encompasses billions of transactions. (AB 22-23.)

Across the country, courts have overwhelmingly rejected certification of virtually identical lights claims. In the nearly six years since the trial court granted certification, courts in Illinois, Kansas, New York, New Jersey, New Mexico, Oregon, and Washington have found that classes like the one here are ill-suited for class-wide treatment – and *not a single court* has certified a lights class that has

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[15] Plaintiffs assert that their request for restitution should be tried to the court (AB 53), but (1) Plaintiffs themselves demanded a jury trial (A. 1); and (2) Plaintiffs' Complaint seeks *damages* for violations of the Minnesota consumer protection statutes. (A. 11-15.) In any event, calling the relief they seek "restitution" does not render it equitable in nature. Where, as here, plaintiffs want their money back, the claim sounds in law, not equity. *See Kerr v. Charles F. Vatterott & Co.*, 184 F.3d 938, 944 (8th Cir. 1999) (holding plaintiff's claim for restitution was a claim for damages, not equitable relief, explaining restitution is a form of compensatory damages when the "focus[ ] [is] on the plaintiff's losses and seek[s] to recover in money the value of the harm done to him").

survived appeal.[16] Certification has also been rejected by *every* federal court that has ever considered the issue,[17] which is significant because Minnesota's certification rule is "intended to produce consistent results" with its federal counterpart. *Whitaker v. 3M Co.*, 764 N.W.2d 631, 635 (Minn. Ct. App. 2009). And in the two certified lights actions considered by the trial court, the courts relied on unique certification rules that materially depart from Minnesota and federal requirements.[18]

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[16] *Cleary v. Philip Morris USA Inc.*, 265 F.R.D. 289 (N.D. Ill. 2010); *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008); *Stern v. Philip Morris USA, Inc.*, 2007 WL 4841057 (N.J. Super. Ct. 2007); *Benedict v. Altria Group, Inc.*, 241 F.R.D. 668 (D. Kan. 2007); *Mulford v. Altria Group, Inc.*, 242 F.R.D. 615 (D.N.M. 2007) (plaintiffs subsequently granted leave to re-seek certification); *Davies v. Philip Morris USA, Inc.*, 2006 WL 1600067 (Wash. Super. Ct. 2006); *Huntsberry v. R.J. Reynolds Tobacco Co.*, slip op. (Wash. Super. Ct. 2006) (R.A. 158); *Pearson v. Philip Morris, Inc.*, 2006 WL 663004 (Or. Cir. Ct. 2006) (appeal pending); *see also Philip Morris USA Inc. v. Hines*, 883 So. 2d 292 (Fla. Ct. App. 2003); *Cocca v. Philip Morris Inc.*, 2001 WL 34090200 (Ariz. Sup. Ct. 2001); *Oliver v. R.J. Reynolds Tobacco Co.*, 2000 WL 33598654 (Pa. Ct. Com. Pl. 2000). Moreover, in the only lights case tried – upon which plaintiffs relied heavily below (*see* Plaintiffs' Memorandum In Support of Motion for Class Certification, at 1-2) – the Illinois Supreme Court, in ordering judgment entered for PMUSA on other grounds, expressed "reservations about the existence of individual issues that might make class certification inappropriate." *Price v. Philip Morris, Inc*, 848 N.E.2d 1, 53 (Ill. 2005).

[17] *Cleary*, 2010 WL 680957; *McLaughlin*, 522 F.3d 215; *Stern*, 2007 WL 4841057; *Benedict*, 241 F.R.D. 668; *Mulford*, 242 F.R.D. 615.

[18] In *Aspinall v. Philip Morris Cos., Inc.*, 813 N.E.2d 476 (Mass. 2004), the Massachusetts certification rules, unlike Minnesota's rule, do not even require predominance. *See id.* at 484-85. The consumer protection statute at issue in *Aspinall* was also fundamentally different from the statutes at issue here, as discussed below. In *Craft v. Philip Morris Cos., Inc.*, 190 S.W.3d 368 (Mo. Ct. App. 2005), the court was able to affirm certification only by determining that it had to accept the allegations of the complaint as true and need not resolve factual disputes for purposes of its decision. *Id.* at 384. That ruling stands in direct

Consistent with these decisions, the reconsideration order granting certification should be reversed. The trial court correctly recognized in its initial order denying certification that Plaintiffs' claims raise individual issues that overwhelmingly predominate. Moreover, because any trial of these claims would inevitably require thousands of mini-trials, Plaintiffs cannot meet their burden of establishing that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Minn. R. Civ. P. 23.02. If the Court were to reverse the final judgment, it should remand with instructions to decertify the class.[19]

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contrast with Minnesota (and federal) law, which, as discussed below, requires the court to make factual determinations as necessary to resolve certification. *See infra* Section IV.A.

[19] The trial court's initial order denied certification of Plaintiffs' consumer protection and unjust enrichment claims. (R.Add. 9-11.) The parties' briefs on reconsideration and the order granting reconsideration did not address the unjust enrichment claim. (R.Add. 16-21.) Indeed, the reconsideration order relied heavily on *Aspinall*, in which the court there, while certifying the consumer protection claim for reasons inapplicable here, held that the unjust enrichment claim could not be certified. 2001 WL 35913233 (Mass. Super. Ct. 2001). For these reasons, PMUSA believes the court did not certify an unjust enrichment class and Plaintiffs have not appealed the original order denying certification of that claim. (A. 164, 169.) In any event, because Plaintiffs' unjust enrichment theory is identical to their consumer fraud theory – *i.e.*, defendants were allegedly unjustly enriched by making misrepresentations on which plaintiffs relied, causing them harm (A. 16-18) – the reasons why certification was improper as to consumer fraud apply equally to unjust enrichment. *See Cleary*, 2010 WL 680957 (rejecting certification of unjust enrichment-based lights claim).

A. Plaintiffs Must Satisfy Every Element Of Rule 23 By A Preponderance Of The Evidence

Plaintiffs bear the burden of establishing "all the elements of rule 23.01 – numerosity, commonality, typicality, and adequacy of representation – and one of the sections of Rule 23.02." *Whitaker*, 764 N.W.2d at 635 (citation omitted). The trial court certified the class under Rule 23.02(c), which also requires a finding that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." Before certifying under Rule 23.02(c), the court also must find that a class action will be superior, Minn. R. Civ. P. 23.02, which requires that a class trial be manageable. *Keating v. Philip Morris, Inc.*, 417 N.W.2d 132, 137 (Minn. Ct. App. 1987).

This Court reviews the certification decision for abuse of discretion. *Whitaker*, 764 N.W.2d at 635. An abuse of discretion occurs:

> when a court, in making a discretionary ruling, relies upon an improper factor, omits consideration of a factor entitled to substantial weight, or mulls the correct mix of factors but makes a clear error of judgment in assaying them. An abuse of discretion also occurs if the court adopts an incorrect legal rule.

Id. (citations omitted).

At the time of the certification order, there was confusion as to the trial court's obligations in resolving certification. *See Whitaker*, 764 N.W.2d at 637. Minnesota courts had not clearly addressed whether courts should make factual determinations – including on certification issues overlapping with the merits of the claims – in resolving certification.

More than four years *after* the certification order, this Court in *Whitaker* resolved that issue. Following the federal trend, *Whitaker* held that plaintiffs must establish all of the elements "by a preponderance of the evidence" and that this standard "*requires* the district court to resolve factual disputes relevant to rule 23 certification requirements, including relevant expert disputes." *Id.* at 638 (emphasis added); *see generally* BNA's Class Action Litigation Report, Evidentiary and Burden of Proof Standards for Class Certification Rulings, (Jun. 11, 2010) (available on Westlaw at 11 BNACLASSLR 536). In particular, in assessing predominance, courts should look down the road and consider whether the elements of plaintiffs' claims are "capable of proof at trial through evidence that is common to the class rather than individual to its members." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311-12 (3d Cir. 2008) (cited with approval in *Whitaker*, 764 N.W.2d at 637). "[C]ourts must analyze rule 23 certification requirements with specific reference to the cause of action asserted in a particular case," *Whitaker*, 764 N.W. at 638, as well as the defenses that the defendants will raise, *In re Baycol Prods. Liab. Litig.*, 218 F.R.D. 197 (D. Minn. 2003). If trial of these issues would "degenerate into thousands and thousands of individual trials" for each class member, individual issues predominate and a class action would be unmanageable. *Keating*, 417 N.W.2d at 137.

As discussed below, the trial court failed to conduct the inquiry required by *Whitaker*. Indeed, Plaintiffs offered no experts or evidence to support their theories of common class-wide proof. On reconsideration, the court simply

accepted Plaintiffs' allegations as true, without considering the expert affidavits and other evidence submitted by PMUSA demonstrating that individual issues predominated. Thus, the court did not and could not determine that Plaintiffs established all of the Rule 23 elements by a preponderance of the evidence. This alone is reason to reverse the certification order.

B. The Trial Court Erred In Failing To Recognize That Causation Presents A Predominating Individual Issue

To obtain relief in a private consumer protection action, plaintiffs must establish causation. *Group Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2, 13 (Minn. 2001). Where, as here, plaintiffs allege fraudulent statements, causation requires proof of "*reliance* on those statements" because "it is not possible that the damages could be caused by a violation *without reliance*" – *i.e.*, without proof that plaintiffs believed the statements and bought the product as a result of that belief. *Id.* (emphases added).

As other lights courts have recognized, this proof presents highly individualized issues precluding certification. *See, e.g.*, *McLaughlin*, 522 F.3d at 223 ("Individualized proof is needed to overcome the possibility that a member of the purported class purchased Lights for some reason other than the belief that Lights were a healthier alternative – for example, if a Lights smoker was unaware of that representation, preferred the taste of Lights, or chose Lights as an expression of personal style."); *Stern*, 2007 WL 4841057 ("consumers have reasons other than the alleged deception or misrepresentation to choose Marlboro

Lights"); *see generally Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996) ("[A] fraud class action cannot be certified when individual reliance will be an issue.").

These conclusions are reflected in the undisputed record below. Three of the original representatives were smoking Lights when they filed this suit and continued to do so (R.A. 386-87, 425, 540), notwithstanding their filing of a complaint alleging that Lights did not deliver less tar and nicotine and were not safer. These continued purchases demonstrate that there are reasons to purchase Lights other than the alleged misrepresentations. *McLaughlin*, 522 F.3d at 226 ("Three of the six named plaintiffs even continued to purchase Lights after filing the complaint in this case, suggesting the influence of some other motivation."). Indeed, several representatives admitted they preferred the taste of Lights to full-flavored cigarettes. (R.A. 441-42, 493-94.)

PMUSA also submitted the affidavit of consumer behavior expert Dr. Meyer, who explained that "[d]ifferent people understand the word 'light' to mean different things, and people smoke light cigarettes for many different reasons." (R.A. 969.) This conclusion was based on empirical evidence, such as a Gallup study finding that the majority of low tar smokers chose their brand for reasons other than "perceived health benefits." (R.A. 968-78.) In contrast, Plaintiffs submitted no expert or other evidence as to beliefs and purchasing motivations of the class. Nor did they even contend that all class members believed and relied on the alleged misrepresentations – to the contrary, in acknowledging that their

common law fraud claim could not have been certified because of the reliance requirement, they tacitly concede individual reliance will vary. (AB 46-47.)

Moreover, although the record at the time of the certification order was sufficient to establish this variability, additional evidence has since emerged confirming that many smokers did not rely on the alleged misrepresentations. For example, since the alleged "truth" about light cigarettes was publicly disclosed, including through periodic onserts PMUSA placed on Lights packages, the relative market share of Lights both nationally and in Minnesota has *increased.* (R.A. 1600-07.) As the Second Circuit explained when considering this evidence, "that the market did not shift away from light cigarettes" after these disclosures "is compelling evidence that plaintiffs had other, non-health-related reasons for purchasing Lights." *McLaughlin*, 522 F.3d at 226.[20]

Not surprisingly, the court, in its initial order rejecting certification, recognized that causation presented individual issues incapable of class-wide resolution:

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[20] In light of the continuing obligation to consider the propriety of certification and the inefficiencies of remanding for further consideration where it would be futile, the Court may consider this evidence in reviewing the certification order. *See, e.g.*, *Grein v. Grein*, 364 N.W.2d 383, 387 (Minn. 1985) (declining to remand when district court would reach the same result); *Gardner v. First Am. Title Ins. Co.*, 218 F.R.D. 216, 217 (D. Minn. 2003) (court is "charged with the duty of monitoring its class decisions in light of the evidentiary development of the case") (citations omitted); *Hartman v. Duffey*, 158 F.R.D. 525, 538 (D.D.C. 1994) (considering "additional evidence" beyond original certification record on remand).

> class members may have decided to smoke Marlboro Lights for various other reasons including the recommendations of other smokers, taste, and brand recognition. Whether a class member decided to smoke Marlboro Lights because of any representation made to them by Philip Morris, or decided to smoke them due to other reasons, is an individual issue unique to that class member. Determining that issue would require individual inquiries of each class member.

(R.Add. 10.)

Notwithstanding this conclusion and the undisputed record, the court reversed itself on reconsideration based on a legal determination that, under *Group Health*, plaintiffs' "showing of reliance . . . need not include direct evidence of reliance by individual consumers of defendants' products," but that plaintiffs' allegations of a "lengthy course of misrepresentations" created a "presumption" of reliance. (R.Add. 18-19.)

This is error. First, the court could not have concluded there was a presumption of reliance based on the evidence, as Plaintiffs did not offer evidence that would establish any such presumption. *See McLaughlin*, 522 F.3d at 225 & n.7 (rejecting notion that plaintiffs were entitled to presumption of reliance given multiple reasons why consumers purchase Lights). Second, PMUSA's evidence of non-reliance was unchallenged by Plaintiffs; the court's conclusion improperly ignored that evidence, which negates any presumption of reliance.[21] Third, even if

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[21] Under Minnesota law, a presumption does not relieve plaintiff of the burden of proof; it merely shifts the burden of coming forward with evidence to the defendant. Minn. R. Evid. 301. Once the party against whom the presumption

a presumption were proper, the court committed legal error by ignoring the effect of PMUSA's due process right to rebut that presumption, which would still result in predominating individualized issues and a lack of manageability. *Group Health* merely noted that, in some circumstances, plaintiffs may rely on "other direct or circumstantial evidence" to satisfy their *prima facie* showing of reliance. 621 N.W.2d at 14. *Group Health* certainly did not foreclose *defendants'* ability to defend themselves by demonstrating that a plaintiff did not rely. To the contrary, the Court was unequivocal that plaintiffs "could not have relied on the misconduct" – and thus are not entitled to any relief – "if they were not misled or deceived." *Id.* at 12; *accord Weigand*, 683 N.W.2d at 812 (Minn. 2004) ("reliance is a component of the causal nexus requirement for a private consumer fraud class action").[22]

The trial court recognized that PMUSA "would be able to raise as a defense at trial" that "some of the class members could have decided to smoke" Lights for

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operates offers evidence contrary to the presumption, the presumption is "burst" and the case is tried as if the presumption never existed. *Itron, Inc. v. Benghiat*, 2003 WL 21402608, at *3 (Minn. Ct. App. 2003); *see also Ogren v. City of Duluth*, 18 N.W.2d 535, 540 (Minn. 1945).

[22] The trial court also cited two inapposite decisions interpreting other states' consumer protection statutes. (R.Add. 17.) *Aspinall* certified a lights claim only after concluding – in stark contrast to *Group Health* – that the Massachusetts statute did not require reliance. 813 N.E.2d at 486. Similarly, *Peterson v. BASF Corp.*, 675 N.W.2d 57 (Minn. 2004), interpreted the New Jersey statute not to require reliance. *Id.* at 72. Since *Peterson*, however, a New Jersey court itself rejected certification of a lights claim under that statute, determining that reliance was required and created predominating individual issues. *Stern*, 2007 WL 4841057.

reasons other than the alleged misrepresentations, and that PMUSA would be entitled to "rebut" any "presumption" of reliance. (R.Add. 17-19.) Yet the court never considered the impact these rebuttal proofs would have on whether reliance could be adjudicated on a class-wide basis. As a result, the court failed its obligation to look down the road to consider whether plaintiffs' claims are "capable of proof at trial through evidence that is common to the class rather than individual to its members." *Hydrogen Peroxide*, 552 F.3d at 311-12.

Since the certification order, courts repeatedly have rejected certification of Minnesota consumer protection claims in circumstances like those here, even though the plaintiffs may have been entitled to use indirect proof of reliance under *Group Health*, recognizing that the defendants' right to rebut reliance on an individual basis creates predominating individual issues. In *In re St. Jude*, 522 F.3d 836, the Eighth Circuit decertified a class alleging consumer protection violations in connection with the sale of heart valves, explaining:

> But assuming this case fits within the *Group Health* category, and thus does not *require* the *plaintiffs* to present direct proof of reliance, ***Group Health* surely does not *prohibit* [defendant] from presenting direct evidence that an individual plaintiff . . . did not rely on representations from [defendant].** . . . Whatever *Group Health* means about the need for these plaintiffs to present direct evidence of individual reliance, **it does not eliminate the right of a defendant to present evidence negating a plaintiff's direct or circumstantial showing of causation and reliance.**

Id. at 840 (italicized emphases in original, bold emphases added), *see also Buetow v. A.L.S. Enters., Inc.*, 259 F.R.D. 187, 191 (D. Minn. 2009) (same); *In re Zurn*

Pex Plumbing Prods. Liab. Litig., – F.R.D. –, 2010 WL 1839278, at *9-10 (D. Minn. 2010) (same).

The same reasoning applies here. As the trial court found, many class members could not establish reliance because they did not believe the alleged misrepresentations or would have purchased Lights for reasons other than the alleged misrepresentations. It would be unlawful and unconstitutional to use the class action device to deny PMUSA of its right to demonstrate that these class members did not rely and cannot obtain relief. *See, e.g.*, Minn. Stat. § 480.051 (procedural devices may not change substantive rights); *see also DeGrande v. Demby*, 529 N.W.2d 340, 342 (Minn. Ct. App. 1995) (same). This error is also reason to reverse the certification order.

C. The Trial Court Erred Because Whether Class Members Received Less Tar And Nicotine Presents Individual Issues

The certification order must also be reversed because individual issues predominate on the question whether each of the class members actually received what they were allegedly promised. A consumer fraud plaintiff who received what was allegedly promised cannot recover because the plaintiff was not deceived and has not suffered any injury as a result of the deception. Plaintiffs here allege PMUSA promised they would receive less tar and nicotine from Lights. It is undisputed, however, that Lights measure less tar and nicotine according to the FTC's method, and that a smoker who smokes Lights and Reds in the same fashion will receive less tar and nicotine from Lights. Accordingly,

Plaintiffs must show that they changed their smoking behavior after switching to Lights such that they failed to receive less tar and nicotine from a Lights cigarette than they would have if they had smoked a full-flavored cigarette, a phenomenon known as "complete compensation." That other smokers may have compensated completely is irrelevant; to establish liability and obtain relief, each plaintiff must demonstrate that he or she *personally* failed to receive less tar and nicotine. *See, e.g.*, *O'Neil v. Simplicity, Inc.,* 574 F.3d 501, 503 (8th Cir. 2009) (under Minnesota law, each plaintiff personally must fail to receive what was promised); *Carey v. Select Comfort Corp.*, 2006 WL 871619, at *2 (Minn. Dist. Ct. 2006) (plaintiff could not recover based on representations that a mattress trapped moisture where his mattress had not suffered any harm from moisture).

As with reliance, courts have repeatedly found that many lights smokers receive less tar and nicotine, demonstrating that whether each plaintiff failed to receive what was allegedly promised would require individual determinations. *See, e.g., Mulford*, 242 F.R.D. at 627 ("[A] significant number of persons in the purported class received the promised lower tar and nicotine from Marlboro Lights cigarettes," and thus "evidence regarding each purported class member's smoking habits must be submitted in order to demonstrate causation and loss."); *Pearson*, 2006 WL 663004, at *7 ("on average," smokers receive less tar and nicotine); *Hines*, 883 So. 2d at 294-95 ("whether or not a smoker reaped the benefits of a lower tar and nicotine cigarette depended upon how the cigarettes were smoked").

The same conclusion is amply supported by the undisputed record here, both at the time of, and in the proceedings since, certification. (R.A. 1748-49.) Plaintiffs presented no expert or other proof even purporting to establish that all lights smokers compensated completely; nor did they even attempt to explain how this issue could be resolved on a class-wide basis. By contrast, PMUSA submitted expert testimony in opposition to certification demonstrating that the amount of tar and nicotine an individual smoker receives depends upon how a person smokes. (R.A. 594-95.)

In addition, after certification, Dr. Benowitz – an editor and author of Monograph 13, upon which Plaintiffs base their claims (AB 53), and a frequent plaintiffs' expert in lights cases – conceded that "on average," smokers receive less tar and nicotine from each Lights. (R.A. 1770-71, 1778.); *see also Pearson*, 2006 WL 663004, at *7 (relying on Dr. Benowitz's testimony in denying certification). Dr. Benowitz's concession was confirmed by the unrefuted affidavit of Dr. Valberg, a former Harvard School of Public Health professor. (R.A. 1770-71.) Among other things, Dr. Valberg conducted an analysis of a nationally-representative U.S. government study finding that smokers of light cigarettes on average received 11% *less* nicotine than smokers of high tar cigarettes. (R.A. 1758-59.)[23]

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[23] In addition, under Plaintiffs' theory, smokers compensate because they are addicted to nicotine and require a set amount of nicotine each day. By definition, therefore, smokers who are not addicted would have no need to compensate because they would not have to maintain a set amount of nicotine. (R.A. 1748.) It

Based on the evidence before it, the trial court originally held that the extent of compensation varies and would require individualized inquiries rendering certification improper:

> Whether or not a class member garnered the benefits of low tar and nicotine from Marlboro Lights, however, depends on the manner in which that class member smoked them. Depending upon how a class member smoked, he or she may have received less, the same, or even more tar and nicotine in smoking Marlboro Lights than they would have in smoking a regular cigarette. The amount of tar and nicotine a class member received would also be dependent upon the amount of compensation, if any, that a class member may have engaged in while smoking Marlboro Lights.

(R.Add. 8.)

Nevertheless, on reconsideration, the court reversed itself. As with its approach to reliance, the court did not withdraw its conclusion that the extent to which smokers compensated completely varies. Instead, relying on *Aspinall*, the court determined that Plaintiffs would not need to prove that they compensated completely to establish liability based on speculation that it would be impossible for plaintiffs to prove whether they failed to receive less tar and nicotine. (R.Add. 20.)

This was error. First, the court's order reflects that it relied exclusively on the *speculations* of the Massachusetts court ("So far as we are aware," "it may be

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is undisputed that many smokers are not addicted, which would create additional individual issues. (R.A. 1748.); *see also, e.g.*, *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 142-43 (3d Cir. 1998); *Thompson v. Am. Tobacco Co.,* 189 F.R.D. 544, 554 (D. Minn. 1999).

unlikely," "it is probable"), and the court did not itself possess or weigh the evidence in the record before it *in this case*. Under *Whitaker*, that failure alone was error. 764 N.W.2d at 638 (requiring court to "resolve factual disputes relevant to rule 23 certification requirements, including relevant expert disputes").

Second, the decision to eliminate a critical element of Plaintiffs' proof based on speculation that it would be impossible for Plaintiffs to prove that element is legally improper. Plaintiffs bear the burden to prove all of the elements of their claim. *Muller v. Rogers*, 534 N.W.2d 724, 726 (Minn. Ct. App. 1995). Yet under the court's approach, PMUSA could be held liable to an individual who received what was allegedly promised, simply because it would be difficult for smokers generally to offer proof on this issue. By eliminating elements of Plaintiffs' proofs to facilitate class-wide treatment, the court again violated due process and the well-established principle that class actions are procedural devices that shall not alter substantive rights. Minn. Stat. § 480.051.

Third, this speculation also lacked any record support. The testimony of smokers in the record demonstrated that they were capable of addressing the extent to which they compensated. For example, some testified that they increased the number of cigarettes they smoked after switching to Lights. (R.A. 549.) This form of compensation is particularly significant because, under Plaintiffs' theory, Plaintiffs who compensated by smoking more cigarettes have not established that they failed to receive what was promised. Why? Because the act of smoking more cigarettes establishes that a single Lights delivered less tar and nicotine; that

is why the smoker smoked more cigarettes. *See, e.g.*, *Pearson*, 2006 WL 663004, at *7 (light smoker must show complete compensation on a "per cigarette" basis); *In re Tobacco Cases II*, 2004 WL 2445337, at *20 (Cal. Super. Ct. 2004) (same). Other smokers have testified that they did not change the way they smoked at all, and thus believe they received less tar and nicotine. (R.A. 1706, 1709-12, 1715-16, 1719-21, 1724-28, 1731-33, 1736-37.)

Finally, even the *Aspinall* court recognized that "a class action consisting of all purchasers would obviously not be appropriate" where "most consumers actually receive the promised benefit, as may be ascertained by objective tests." 813 N.E.2d at 489 n.21. The evidence in the record here, however, is that "on average," Lights smokers *receive less tar and nicotine*. *See supra* at pp. 54-55. As a result, it was doubly inappropriate to eliminate an element of Plaintiffs' claims based on speculation that it would be difficult for Plaintiffs to offer proof on the issue. *See Mulford*, 242 F.R.D. at 628 (rejecting *Aspinall* because "[t]he undisputed evidence is that a significant number of smokers received the promised lower tar and nicotine").

D. <u>The Trial Court Erred Because Proof Of Injury Raises Individual Issues</u>

Courts have recognized that where a plaintiff has failed to set forth a viable means of establishing the *existence* of an injury for the entire class, certification is improper. *See, e.g.*, *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 28 (1st Cir. 2008). Applying this doctrine, courts have rejected

certification of lights claims in part because plaintiffs failed to offer a means of proving class-wide injury. *McLaughlin*, 522 F.3d at 228; *Benedict*, 241 F.R.D. at 680. The court correctly recognized that to establish a cognizable injury and obtain relief, Plaintiffs would have to prove that they "suffered an out-of-pocket loss." (R.Add. 32); *see also, e.g.*, *Strouth v. Wilkison*, 224 N.W.2d 511, 514 (Minn. 1974); *Northstar Indus., Inc. v. Merrill Lynch & Co., Inc.*, 576 F.3d 827, 832-33 (8th Cir. 2009). This requires proof that plaintiffs received Lights that were worth less than their purchase price. (R.Add. 31-33); *see also JEM Acres, LLC v. Bruno*, 764 N.W.2d 77, 85 (Minn. Ct. App. 2009) (out-of-pocket loss is measured by the difference in "the amount paid for the property minus its fair market value.").

The undisputed record evidence here confirmed that Plaintiffs could not make that showing. Under Plaintiffs' theory, they paid for a Marlboro Light but received a cigarette that was not substantially different from full-flavored Marlboros. (A. 4.) Plaintiffs' "loss," then, would be the price difference between Lights (what they paid for) and full-flavored Marlboros (what they received). But it was undisputed that *full-flavored Marlboros have always cost the same as Lights*. Thus, class members received a product equal in value to their out-of-pocket expenditures. Accordingly, the only permissible "class" determination on the issue of damages would be that the class suffered *no* out-of-pocket loss at all. *Bryan v. Kissoon*, 767 N.W. 2d 491, 496 (Minn. Ct. App. 2009) ("if the property is worth what a party paid for it, then that party has suffered no damages"); *Price*,

848 N.E.2d at 56-57 (Lights smokers suffered no damages because, *inter alia*, "[t]here was no price disparity between light cigarettes and their full-flavored counterparts") (Karmeier, J., concurring).

Certifying a class in such circumstances was erroneous. Faced with the fact that Lights and Reds cost the same, Plaintiffs did not even attempt to show that any "proposed model will be able to establish, without need for individual determinations for the many millions of potential class members," the existence of an injury for the class. *New Motor Vehicles*, 522 F.3d at 26-27. As the First Circuit held in *New Motor Vehicles* – cited by this Court with approval in *Whitaker*, 764 N.W. 2d at 636, 638 – when the theory of certification "relies on a novel or complex theory as to injury . . . the district court must engage in a searching inquiry into the viability of that theory and the existence of the facts necessary for the theory to succeed." 522 F.3d at 26. The *New Motor Vehicles* court reversed a certification order based on concerns about the viability of the injury model offered by Plaintiffs. *Id.* at 28-29. Plaintiffs' failing here is even more extreme – Plaintiffs did not and could not offer *any* model or expert proof that purported to determine that Lights were worth less than their purchase price.

E. <u>The Trial Court Erred Because Determining Class Membership And The Money Spent On Cigarettes For Damages Present Predominating Individual Issues</u>

To qualify as a class member, each plaintiff would need to prove that he or she purchased Lights in Minnesota. (R.Add. 3.) In addition, because the amount of damages (if any) owed to each plaintiff would depend on how much

the plaintiff spent on cigarettes, each plaintiff would also need to establish the number of purchases made in Minnesota and the price of those purchases.

Numerous courts – including this Court – have recognized that these types of proofs for purposes of establishing class membership or damages can create predominating individual issues. *See, e.g.*, *Keating*, 417 N.W.2d at 137 (courts refuse to certify a class where "proof of damages would result in thousands of mini-trials"); *Perez v. Metabolife Int'l, Inc.*, 218 F.R.D. 262, 269 (S.D. Fla. 2003) ("individualized mini-trials would be required even on the limited issue of class membership").

This is true here. As *Ludke v. Philip Morris Cos., Inc.*, 2001 WL 1673791 (Minn. Dist. Ct. 2001), recognized in rejecting certification of an antitrust class of cigarette purchasers in the State:

> People who purchase cigarettes do so frequently and as a matter of course. They purchase them in various places. They buy cartons and single packages. They do not generally keep receipts or any other proof of purchase. They may well not know how many cigarettes they consume.

Id. at *3. Indeed, none of the representatives here had any receipts for their purchases, and none could identify the amount spent on cigarettes. (R.A. 376, 460, 509, 563.)

As a result, a class action of cigarette purchasers – especially one spanning 33 years – would be an "invitation for fraud." *Ludke*, 2001 WL 1673791, at *3. PMUSA has the due process right to demonstrate that individual plaintiffs did not

purchase Lights in Minnesota (and thus are not class members) or are overstating the extent or price of their purchases (and thus are inflating damages). *See, e.g.*, *Perez*, 218 F.R.D. at 267-69 (refusing to identify class members "through affidavits and fact sheets" because "any written submissions that do not give the Defendant an opportunity to challenge the memory or credibility of the individual making that averment would provide inadequate procedural protection"). As courts have found in rejecting certification of lights cases, these inquiries would require thousands of mini-trials, defeating any efficiencies of class-wide treatment. *See Davies*, 2006 WL 1600067, at *5 ("[W]here it is unlikely consumers will have receipts or any method of proving prior purchases, Defendant should have the opportunity and be entitled to challenge each and every individual as to his or her claimed damages. This also renders a determination of damages an unmanageable task."); *Benedict*, 241 F.R.D. at 680 (verifying class membership would be "a *very* difficult task") (emphasis in original); *Oliver*, 2000 WL 33598654, at *7 ("there can be no class-wide method of determining damages that does not require individual proofs"); *Cocca*, 2001 WL 34090200, at *1 (same); *Rave Motion Pictures Birmingham, L.L.C.*, 264 F.R.D. 659, 665 (N.D. Ala. 2010) ("Without a receipt, no plaintiff would have proof of a claim, the *sine qua non* of class membership.").

The trial court initially acknowledged some of these difficulties in rejecting certification:

> The amount of damages each class member suffered would be dependent upon the total amount that class member spent on Marlboro Lights during the class period. That amount would differ between each class member depending upon how many cigarettes each purchased and the price the class member paid at the time of their purchases.

(R.Add. 10-11.) In reversing itself on reconsideration, however, the court failed even to consider the impact of these proofs on whether these claims could be tried on a class-wide basis or the constitutional infirmities of doing so. *See McLaughlin*, 522 F.3d at 231-32 (aggregate proof of damages would impermissibly deny defendant due process right to challenge allegations of individual plaintiffs). This presents yet another reason to reverse the certification order. *See Hydrogen Peroxide*, 552 F.3d at 320 ("because each requirement of Rule 23 must be met, a district court errs as a matter of law when it fails to resolve a genuine legal or factual dispute relevant to determining the requirements").

F. <u>The Trial Court Erred By Failing To Consider The Impact Of The Statute Of Limitations</u>

Plaintiffs' consumer protection claims are subject to a six-year limitations period under Minn. Stat. § 541.05, subd. 1(2). The court permitted Plaintiffs' claims outside the limitations period to survive summary judgment on the ground that there were factual issues as to whether the fraudulent concealment doctrine would the toll the statute of limitations. (R.Add. 5-6.) But even if that doctrine were applicable here (it is not, *see infra* Section V), fraudulent concealment is

individual and does not toll the limitations period where a plaintiff has *actual* notice of his or her potential claims. *See, e.g.*, *Hydra-Mac, Inc. v. Onan Corp.*, 450 N.W.2d 913, 918-19 (Minn. 1990) ("[T]he claimant must establish that it was *actually unaware* that the defect existed before a finding of fraudulent concealment can be sustained.") (emphasis added); *Dakota County v. BWBR Architects, Inc.*, 645 N.W.2d 487, 494 (Minn. Ct. App. 2002) (same).

As numerous lights courts have recognized, determining whether each plaintiff had actual knowledge for statute of limitations purposes depends on the unique knowledge and circumstances of each plaintiff and cannot be litigated on a class-wide basis. *See, e.g.*, *McLaughlin*, 522 F.3d at 233; *Mulford*, 242 F.R.D. at 630; *Benedict*, 241 F.R.D. at 680. This is particularly true here, where the evidence in the record – unrefuted by Plaintiffs – demonstrated that many class members had actual notice of their claims prior to 1995. (R.A. 976-77, 979-83.) Indeed, even the two courts that have certified lights claims have recognized that the individual issues presented by the statute of limitations meant that the class periods in those cases must be limited to the applicable limitations periods. *See Aspinall*, 813 N.E.2d at 485, 492; *Craft*, 190 S.W.3d at 375-76. Yet the trial court did not even consider the statute of limitations defense on class certification. This too was error, and at a minimum, the Court should restrict the class period to the limitations period (November 28, 1995 to November 28, 2001).

V. THE TRIAL COURT ERRED IN DENYING PARTIAL SUMMARY JUDGMENT ON STATUTE OF LIMITATIONS GROUNDS

Plaintiffs do not dispute that their claims accrue, at the latest, on the date of each Lights purchase. (Plaintiffs' Memorandum In Opposition to Defendants' Motion for Partial Summary Judgment Against Plaintiffs' Consumer Protection Claims On Statute of Limitations Grounds ("Plaintiffs' SOL Memo"), at 6.) As a result, claims for purchases between 1971 and November 28, 1995 (six years before the filing of the complaint) are presumptively time-barred.[24] The trial court, however, denied PMUSA's motion for partial summary judgment, holding that "an issue of fact remains as to whether Philip Morris fraudulently concealed facts which would have established their cause of action." (R.Add. 27.) The court's ruling was erroneous for two reasons.

First, the court erroneously assumed that the fraudulent concealment doctrine applies here. The Minnesota legislature has determined, and Plaintiffs concede, that the discovery rule does not apply here. *See Klehr*, 875 F. Supp. at 1352; (Plaintiffs' SOL Memo, at 6). Because the discovery rule and the fraudulent concealment doctrine "achieve the same result" – preventing the statute of limitations from running until the plaintiff learns, or should learn, of his cause of

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[24] At the time of defendants' summary judgment motion, Plaintiffs' complaint sought damages. (A. 11, 13, 15, 19.) Plaintiffs subsequently suggested that they intend to seek only restitution or disgorgement. PMUSA does not believe Plaintiffs can obtain such relief. If Plaintiffs are allowed to seek such relief in lieu of damages, their claims should be governed by the two-year limitations period under Minn. Stat. § 541.07(2). *See Freeman v. Q Petroleum Corp.*, 417 N.W.2d 617, 618-19 (Minn. 1988).

action – where the discovery rule does not apply, neither does fraudulent concealment. *Kopperud*, 312 N.W.2d at 446-47 (securities fraud statute). For this reason, the court in *In re Lutheran Bhd. Variable Ins. Prod. Co. Sales Practices Litig.*, 2002 WL 1023150, at *3 (D. Minn. 2002), declined to apply the doctrine to consumer protection claims.

Second, even if fraudulent concealment-based tolling were available, Plaintiffs submitted no evidence in opposition to PMUSA's summary judgment motion, so there was no basis for denying the motion. Because Plaintiffs' pre-November 1995 claims were presumptively time-barred, Plaintiffs were required to demonstrate a material fact issue as to whether PMUSA fraudulently concealed the alleged misrepresentations during that time period *and* whether "the concealment could not have been discovered sooner by reasonable diligence on [plaintiffs'] part and that their failure to discover it was not the result of their own negligence." *Buller*, 518 N.W.2d at 542-43; *see also Gradjelick v. Hance*, 646 N.W.2d 225, 230-31 (Minn. 2002); Minn. R. Civ. P. 56.05.

Plaintiffs instead relied solely on the SAC's allegations (Plaintiffs' SOL Memo, at 2-4, 6-10), thereby failing to satisfy their burden. *See Haefele v. Franson*, 2007 WL 1815859, at *3-*4 (Minn. Ct. App. 2007) (upholding grant of summary judgment where plaintiff alleged fraudulent concealment but presented no admissible evidence of concealment); *Yonak v. Severson*, 2005 WL 3291817, at *3-*4 (Minn. Ct. App. 2005) (same); *Reid Enters., Inc. v. Deloitte & Touche, L.L.P.*, 2000 WL 665684, at *4 (Minn. Ct. App. 2000) (same).

CONCLUSION

For the foregoing reasons, PMUSA respectfully requests that the judgment of dismissal should be affirmed. Alternatively, should the Court reinstate any of Plaintiffs' claims, PMUSA respectfully requests that the Court affirm the trial court's rejection of Plaintiffs' motion on collateral estoppel, remand the action with instructions to decertify the class, and limit each individual plaintiff's consumer protection claims to those purchases arising after November 28, 1995 on statute of limitations grounds.

DATED:
June 21, 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. 131.01, subd. 5, for a brief produced with a proportional font. The length of this brief is 15,920 words. This brief was prepared using Microsoft Word 2003.

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