

No. A10-0215

**STATE OF MINNESOTA  
IN THE COURT OF APPEALS**

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

*Appellants,*

vs.

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

*Respondents.*

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**REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT  
ALTRIA GROUP, INC.**

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Guy Miller Struve  
Justin Goodyear  
DAVIS POLK & WARDWELL LLP  
450 Lexington Avenue  
New York, New York 10017  
(212) 450-4192

William P. Studer (#106781)  
David P. Graham (#185462)  
OPPENHEIMER WOLFF & DONNELLY  
LLP  
Plaza VII, Suite 3300  
45 South Seventh Street  
Minneapolis, Minnesota 55402-1609  
(612) 607-7000

*Attorneys for Respondent  
Altria Group, Inc.*

[continued on reverse]

Kay Nord Hunt (#138289)  
Ehrich L. Koch (#159670)  
Valerie Sims (#30556X)  
LOMMEN, ABDO, COLE, KING  
& STAGEBERG, P.A.  
2000 IDS Center  
80 South Eighth Street  
Minneapolis, MN 55402  
(612) 339-8131

Stephen A. Sheller  
SHELLER, P.C.  
1528 Walnut Street  
Philadelphia, PA 19102  
(215) 790-7300

Martha K. Wivell (#128090)  
SHELLER, P.C.  
P.O. Box 339  
Cook, MN 55723  
(218) 666-0250

Esther E. Berezofsky  
WILLIAMS CUKER BEREZOFSKY  
Woodland Falls Corporate Center  
210 Lake Drive East, Suite 101  
Cherry Hill, NJ 08002  
(856) 667-0500

*Attorneys for Appellants*

George W. Soule (#103664)  
Nathan J. Marcusen (#386875)  
Jennifer K. Huelskoetter (#288883)  
BOWMAN AND BROOKE LLP  
150 South Fifth Street, Suite 3000  
Minneapolis, MN 55402  
(612) 339-8682

Gregory P. Stone  
Sean Eskovitz  
Randall G. Sommer  
MUNGER, TOLLES & OLSON, LLP  
355 South Grand Avenue, 35<sup>th</sup> Floor  
Los Angeles, CA 90071-1560  
(213) 683-9100

Mary Vasaly (#152523)  
MASLON EDELMAN BORMAN  
& BRAND LLP  
3300 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, MN 55402-4140  
(612) 672-8200

*Attorneys for Respondent  
Philip Morris USA Inc.*

[continued on next page]

Benjamin J. Velzen (#388344)  
LORI SWANSON  
ATTORNEY GENERAL,  
STATE OF MINNESOTA  
445 Minnesota Street, Suite 1400  
St. Paul, MN 55101-2130  
(651) 757-1235

*Attorneys for Amicus Curiae  
State of Minnesota*

Prentiss Cox (#218844)  
4633 Colfax Avenue South  
Minneapolis, MN 55419  
(651) 235-1413

*Attorney for Amicus Curiae  
Tobacco Control Legal Consortium*

Charles A. Bird (#8345)  
BIRD, JACOBSEN & STEVENS, P.C.  
300 Third Avenue SE, Suite 305  
Rochester, MN 55904  
(507) 282-1503

*Attorneys for Amicus Curiae  
Minnesota Association for Justice*

Scott A. Smith (#174026)  
NILAN JOHNSON LEWIS PA  
400 One Financial Plaza  
120 South Sixth Street  
Minneapolis, MN 55402  
(612) 305-7500

John H. Beisner  
Jessica D. Miller  
SKADDEN, ARPS, SLATE,  
MEAGHER & FLOM LLP  
1440 New York Avenue, N.W.  
Washington, DC 20005

Robin S. Conrad  
Amar D. Sarwal  
NATIONAL CHAMBER  
LITIGATION CENTER, INC.  
1615 H Street, N.W.  
Washington, DC 20062

*Attorneys for Amicus Curiae  
Chamber of Commerce of  
the United States of America*

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Plaintiffs, in their Response and Reply Brief (“Pl. Resp. Br.”), do not deny that Respondent Altria Group, Inc. (“Altria”)<sup>1</sup> is a holding company which is distinct from its subsidiary, Respondent Philip Morris USA Inc. (“PM USA”). Indeed, Plaintiffs admit that they never attempted to make the showing required to pierce the corporate veil between PM USA and Altria. Plaintiffs likewise do not dispute that Altria has no property or presence in Minnesota, and that Altria has never manufactured, sold, or distributed any product, in Minnesota or elsewhere.

Plaintiffs try to avoid the obvious conclusion – that Altria is not subject to personal jurisdiction in this case – by repeating the flawed grounds relied upon by the district court, and by advancing arguments that were not relied upon by the district court, including four new legal theories that Plaintiffs did not even raise below. As shown below, Plaintiffs’ arguments are legally unsound, and are based upon factual assertions that are simply not supported by the record.

Because Plaintiffs have failed to support the assertion of personal jurisdiction over Altria, the October 16, 2002 order of the district court (Oleisky, J.), denying Altria’s motion to dismiss for lack of personal jurisdiction, should be reversed, and Altria should be dismissed from the case.<sup>2</sup>

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<sup>1</sup> Plaintiffs’ brief refers to Altria by its former name, Philip Morris Companies Inc. (“PMC”). Like Altria’s opening brief, this brief uses the current name throughout. See Altria Br. 1 n.1.

<sup>2</sup> Altria also joins in the reply brief submitted by PM USA, which deals with issues that apply to Altria as well as PM USA.

## ARGUMENT

### **I. Because Plaintiffs Concede That They Never Attempted to Make the Showing Required to Pierce the Corporate Veil, Personal Jurisdiction Over Altria Must be Assessed on the Basis of Altria's Own Contacts with Minnesota.**

By their own admission, Plaintiffs did not attempt to make the showing required to pierce the corporate veil. (See Pl. Resp. Br. at 30 (“Plaintiffs opposed [Altria’s personal jurisdiction motion], not on a piercing the corporate veil theory but because [Altria] itself is a tortfeasor subject to Minnesota jurisdiction.”).) This admission is highly significant, because it means that personal jurisdiction over Altria cannot be based upon the contacts of PM USA, but instead must be based upon a showing of Altria’s own contacts with Minnesota. (See Altria Br. at 16-17 and cases cited, including Behm v. John Nuveen & Co., 555 N.W.2d 301, 308 (Minn. Ct. App. 1996), and Busch v. Mann, 397 N.W.2d 391, 395-96 (Minn. Ct. App. 1986).) This is at variance with the approach adopted by the court below, which focused upon Altria’s relationship with PM USA. (See Point II infra.)

Plaintiffs appear to recognize their burden to make a showing of Altria’s own contacts with Minnesota, alleging (as quoted above) that Altria “itself is a tortfeasor subject to Minnesota jurisdiction.” (Pl. Resp. Br. at 30.) But, as shown below, Plaintiffs have failed to support this allegation with any evidence or with any legal foundation. And, at times, Plaintiffs revert back to arguments based on Altria’s relationship with PM USA, even though such arguments are inconsistent with their recognition that the issue is Altria’s own contacts with Minnesota.

Regardless of which of the Plaintiffs' ever-changing theories is considered, there is no basis to assert personal jurisdiction over Altria.

**II. The Grounds Cited by the District Court Do Not Support a Finding of Personal Jurisdiction Over Altria.**

In its initial brief, Altria showed that Altria has no contacts with Minnesota, and that the grounds relied upon by the court below do not support its finding of personal jurisdiction over Altria. (Altria Br. at 10-18.) Plaintiffs try to defend the reasoning of the court below, but their attempts are without merit.

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

As shown in Altria's initial brief (Altria Br. at 10-12), the district court's reliance upon the allegations of Plaintiffs' complaint violated the teaching of the Minnesota Supreme Court that a party opposing a motion to dismiss supported by affidavits "cannot rely on general statements in his pleading and therefore the allegations contained in plaintiffs' complaint cannot be used to sustain their burden of proof." Sausser v. Republic Mortgage Investors, 269 N.W.2d 758, 761 (Minn. 1978).

Without mentioning the Sausser case, Plaintiffs assert that their complaint and supporting evidence "are taken as true." (Pl. Resp. Br. at 32.) But, as pointed out in Altria's initial brief (Altria Br. at 11-12 n.9), the case that Plaintiffs cite for this proposition, Hardrives, Inc. v. City of La Crosse, 307 Minn. 290, 240 N.W.2d 814 (Minn. 1976), is not on point, because in that case no affidavits were filed in

support of the motion to dismiss for lack of personal jurisdiction. Where (as here) such affidavits have been filed, Sausser controls, and “the allegations contained in plaintiffs’ complaint cannot be used to sustain their burden of proof.” 269 N.W.2d at 761.

**B. Since Altria Was Not Formed Until 1985, It Was Impossible for Altria and Its Subsidiary to Be “One and the Same” Before That Date.**

Plaintiffs try to defend the mistaken statement of the district court (Add. 4) that Altria and PM USA “were one and the same” before 1985. (Pl. Resp. Br. at 34.) But the record is undisputed that Altria did not exist before 1985, as it was first formed on March 1, 1985. (Altria App. 233A.) Following its formation, the stock of Altria was distributed to PM USA’s stockholders in exchange for their PM USA stock, leaving Altria as a holding company owning PM USA’s stock. (Altria App. 233A, 282A.) No assets of PM USA were sold or transferred to Altria. (Altria App. 233A, 280A.) Thus Plaintiffs are simply wrong in saying that “two [companies] were created out of the one” and that “[r]eorganization put [Altria] in place of [PM USA] in 1985.” (Pl. Resp. Br. at 34.)<sup>3</sup> Rather, an entirely new holding company was created for the first time in 1985, and its separate corporate entity is entitled to recognition unless a showing is made that justifies

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<sup>3</sup> Plaintiffs rely on the fact that, after the exchange, the financial results of Altria were restated for accounting purposes to include the financial results of PM USA for the period before the exchange. (Pl. Resp. Br. at 34.) But this was done for purposes of comparable financial disclosure to shareholders, and does not mean that Altria existed before 1985. (See Altria App. 233A.)

piercing the corporate veil – a showing that Plaintiffs have admittedly failed to make. (See Point I supra.)

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

The district court was wrong as a matter of law in relying upon the statement in Altria’s 2000 Annual Report that it was “the leading consumer products company in the world.” (Add. 3.) Altria’s initial brief cited numerous cases for the proposition that such summary statements in annual reports to shareholders do not support personal jurisdiction over a holding company. (See Altria Br. at 13-14 and cases cited, including Conwed Corp. v. R.J. Reynolds Tobacco Co., Civ. File No. 98-1412 (PAM/JGL), 1999 U.S. Dist. LEXIS 9641, at \*10-\*13 (D. Minn. Apr. 1, 1999).)

Plaintiffs do not cite any cases to the contrary. Instead, they simply rely upon their own ipse dixit that every statement about manufacturing and marketing in Altria’s 2000 Annual Report must be read as referring to Altria itself (Pl. Resp. Br. at 34-35), despite the clear explanation in the Annual Report that the words “[w]e,” “us,” and “our” refer, as appropriate in the context, to [Altria], one or more of its subsidiaries, or both.” (Altria App. 146A.) Plaintiffs’ argument is unfounded.

Aware that the district court’s reliance upon Altria’s 2000 Annual Report was untenable, Plaintiffs point to two other documents that were not relied upon by the district court, but which Plaintiffs argue show that Altria “was actively

involved in advertising and marketing Marlboro Lights.” (Pl. Resp. Br. at 36.)

Neither document shows anything of the sort. The first document is a 1986 report of the Altria Corporate Affairs function, describing its activities as “a service and support group for the operating companies” in the areas of corporate affairs and government relations, but not in the areas of advertising and marketing of Marlboro Lights or any other product. (See Altria App. at 319A-323A.) The second document is a 1991 letter to a law professor describing Altria’s general policies regarding product advertising by its subsidiaries. (Altria App. at 355A-359A.) The letter does not say that Altria itself (as opposed to its subsidiaries) carried out product advertising of any products, let alone of Marlboro Lights. The record is uncontradicted that it did not. (Lampe Aff. ¶¶ 12, 14, Add. 9.)

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

As a matter of law, overlapping directors and officers do not support the exercise of personal jurisdiction. (See Altria Br. at 14-15 and cases cited, including United States v. Bestfoods, 524 U.S. 51, 69 (1998).) Again, Plaintiffs cite no cases to the contrary. (See Pl. Resp. Br. at 36.)

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

Plaintiffs admit that former Altria CEO Geoffrey Bible testified that he had the power to make changes to the policies of Altria’s subsidiaries – not that he had actually exercised such power. (See Pl. Resp. Br. at 37.) From this, Plaintiffs leap to the assertion that “the [Altria/PM USA] relationship resulted in [PM USA’s]

false Marlboro Lights advertising and marketing in Minnesota.” (Id.) Plaintiffs cite no evidence whatever for this assertion, which is an obvious non sequitur.

Like the court below, the Plaintiffs are confusing a parent company’s power to set the policies of its subsidiary with the actual exercise of domination and control by the parent company over the day-to-day activities of the subsidiary. Every parent company has the power to set its subsidiary’s policies, but this does not mean that the parent company is subject to personal jurisdiction based on the activities of the subsidiary, unless the parent company dominates and controls the day-to-day activities of the subsidiary to a degree that warrants piercing the corporate veil. (See Altria Br. at 16-17 and cases cited, including Behm v. John Nuveen & Co., 555 N.W.2d 301, 308 (Minn. Ct. App. 1996), and Busch v. Mann, 397 N.W.2d 391, 395-96 (Minn. Ct. App. 1986).) In the present case, Plaintiffs have admittedly presented no basis for piercing the corporate veil. (See Point I supra.) In particular, Plaintiffs cite no evidence that Mr. Bible or anyone else at Altria dominated and controlled the day-to-day activities of PM USA, or that Altria determined PM USA’s policy on Marlboro Lights.

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

**III. The Arguments Made by Plaintiffs That Were Not Relied Upon by the District Court Likewise Do Not Justify a Finding of Personal Jurisdiction Over Altria.**

In an effort to support the district court's exercise of personal jurisdiction over Altria, the Plaintiffs have advanced a plethora of arguments that were not relied upon by the district court. None of these arguments has merit.

**A. Plaintiffs' Criticisms of the Lampe Affidavit Lack Merit.**

Plaintiffs argue that the Lampe Affidavit "lacked credibility." (Pl. Resp. Br. at 33.) The district court made no such finding. It simply (and improperly) ignored the Lampe Affidavit, even though it was uncontradicted.

Although Plaintiffs launch two attacks on the Lampe Affidavit, both criticisms are unfounded and fail to justify the district court's disregard of the uncontroverted facts in the Lampe Affidavit.

First, the Lampe Affidavit states that "[t]here is no common ownership or commingling of assets between [Altria] and [PM USA]." (Lampe Aff. ¶ 5, Add. 7.) Plaintiffs argue that this is wrong because all PM USA shareholders became Altria shareholders in the 1985 plan of exchange. (Pl. Resp. Br. at 33.) But this exchange took place at the shareholder level, and does not alter the fact that there is no common ownership or commingling of assets between the two companies.

Second, Plaintiffs say that the statement in the 2002 Lampe Affidavit that Altria and PM USA "do not have any common officers and directors" (Lampe Aff. ¶ 5, Add. 7) was incorrect because there were some common officers and directors between 1985 and 1995, long before the present action was brought (which is the

relevant time for assessing personal jurisdiction<sup>4</sup>). (Pl. Resp. Br. at 33-34.) There is simply no contradiction here, because the statement in the Lampe Affidavit related to 2002, not to the period from 1985 to 1995.

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

As a matter of law, national advertising is insufficient to establish personal jurisdiction in Minnesota. (See Altria Br. at 19 and cases cited, including Wines v. Lake Havasu Boat Mfg., Inc., 846 F.2d 40, 43 (8th Cir. 1988).) Plaintiffs cite no cases to the contrary. (See Pl. Resp. Br. at 37.) Moreover, Plaintiffs presented no evidence that any of Altria's public service advertising was tortious or had anything to do with Marlboro Lights.

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

Passive websites are insufficient to support personal jurisdiction as a matter of law. (See Altria Br. at 19-20 and cases cited, including Juelich v. Yamazaki Mazak Optonics Corp., 682 N.W.2d 565, 574 (Minn. 2004).) Plaintiffs do not dispute this, and cite no cases to the contrary. (See Pl. Resp. Br. at 37.)

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<sup>4</sup> It is well settled that "the jurisdiction of the Court depends upon the state of things at the time of the action brought." Keene Corp. v. United States, 508 U.S. 200, 207 (1993), quoting Mollan v. Torrance, 22 U.S. (9 Wheat.) 537, 539 (1824).

**D. Altria's Charitable Contributions in Minnesota Do Not Support Personal Jurisdiction.**

As a matter of law, charitable contributions do not support the exercise of personal jurisdiction. (See Altria Br. at 20-21 and cases cited, including In re Ski Train Fire in Kaprun, Austria, 343 F. Supp. 2d 208, 216 (S.D.N.Y. 2004).) Plaintiffs cite no cases to the contrary. (See Pl. Resp. Br. at 37.)

**E. The DOJ Decision Does Not Support Personal Jurisdiction Over Altria.**

Plaintiffs argue that the DOJ decision “adds credence” to the district court’s finding of personal jurisdiction over Altria. (Pl. Resp. Br. at 38.) This is incorrect, for several reasons. First, the DOJ decision is not entitled to collateral estoppel effect against Altria. (See PM USA Br. at 28-39; Altria Br. at 21-24.) Second, the DOJ decision contains no finding that Altria is subject to personal jurisdiction in Minnesota. Third, the U.S. Court of Appeals in DOJ declined to reach the issue of Altria’s alleged “control” over PM USA, thereby depriving that issue of any potential collateral estoppel effect. (See Altria Br. at 23-24.) Fourth, the only four predicate acts affirmed by the U.S. Court of Appeals against Altria in the DOJ case had nothing to do with Marlboro Lights cigarettes, the subject matter of this action. (See Altria Br. at 22-23.) For all these reasons, the DOJ decision lends no support to personal jurisdiction here.<sup>5</sup>

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<sup>5</sup> In a cryptic footnote, Plaintiffs note that they sought additional discovery on the personal jurisdiction issue in 2002. (Pl. Resp. Br. at 38 n.12.) This footnote is without significance here, because Plaintiffs have had almost a decade (...continued)

**IV. The Legal Theories Advanced by Plaintiffs for the First Time on This Appeal Do Not Support Personal Jurisdiction.**

In an effort to shore up the decision under review, Plaintiffs advance four new legal theories for the first time on this appeal. (See Resp. Br. at 38-41.) Not having advanced these theories in the court below, Plaintiffs may not rely upon them here. Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. 1988). In addition, as shown below, each of Plaintiffs' new legal theories is both legally and factually lacking in merit.

**A. Effects Test**

Plaintiffs first rely upon the "effects test" of Calder v. Jones, 465 U.S. 783, 789-90 (1984). (Pl. Resp. Br. at 38-39.) But the "effects test" is inapplicable here, because Plaintiffs have failed to "point to specific activity indicating that [Altria] expressly aimed its tortious conduct at" Minnesota such that "the brunt of the harm" occurred in Minnesota. Griffis v. Luban, 646 N.W.2d 527, 534-35 (Minn. 2002) (quoting Calder, 465 U.S. at 266); see also Johnson v. Arden, No. 09-2601, \_\_\_ F.3d \_\_\_, 2010 WL 3023660, at \*11 (8th Cir. Aug. 4, 2010) ("mere effects in the forum state are insufficient to confer personal jurisdiction").

Plaintiffs cannot rely upon the conclusory assertion that Altria's acts "were aimed at Minnesota" (Pl. Resp. Br. at 39) without identifying evidence of specific

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(continued...)

since 2002 in which to take additional personal jurisdiction discovery if they so desired. Cf., e.g., Lewis v. St. Cloud State Univ., 693 N.W.2d 466, 473 (Minn. Ct. App. 2005).

tortious acts intentionally directed at Minnesota. See, e.g., Coen v. Coen, 509 F.3d 900, 906 (8th Cir. 2007); Lyons v. Philip Morris Inc., 225 F.3d 909, 915 (8th Cir. 2000); Griffis, 646 N.W.2d at 534-35. Plaintiffs have not done this and cannot do it, not least because Altria does not manufacture, sell or distribute cigarettes or any other product in Minnesota or anywhere else, and was not even in existence at the time of the introduction of Marlboro Lights in 1971. (Lampe Aff. ¶¶ 2, 4, 12, Add. 6, 7, 9.)

#### **B. Stream of Commerce Doctrine**

The stream of commerce doctrine (Pl. Resp. Br. at 39-40) is likewise inapposite. That doctrine permits the exercise of personal jurisdiction over a manufacturer or distributor that places its products into the stream of commerce with the expectation that the products will be purchased by Minnesota consumers. Juelich v. Yamazaki Mazak Optonics Corp., 682 N.W.2d 565, 571 (Minn. 2004). The doctrine has no application to Altria, which is a holding company, not a manufacturer or distributor. (Lampe Aff. ¶ 12, Add. 7.) See, e.g., Holland Am. Line Inc. v. Wärtsilä N. Am., Inc., 485 F.3d 450, 459 (9th Cir. 2007) (The parent holding company “has not put any products into the stream of commerce that might have ended up in the forum . . . . That alone ends the inquiry.” (emphasis in original)); Wicken v. Morris, 510 N.W.2d 246, 250 (Minn. Ct. App. 1994) (“There are, however, no facts to support a claim that [parent] was a manufacturer or primary distributor generally marketing a product in Minnesota, and the stream-of-

commerce analysis does not apply.”), rev'd on other grounds, 527 N.W.2d 95 (Minn. 1995).

In an effort to bring this case within the stream of commerce doctrine, Plaintiffs state that Altria “participated in disseminating public statements in Minnesota about Marlboro Lights . . .” (Pl. Resp. Br. at 40.) This statement is made up out of whole cloth. There is no factual basis for it in the record, and Plaintiffs cite none. “It is well settled that an appellate court may not base its decision on matters outside the record on appeal, and that matters not produced and received in evidence below may not be considered.” Plowman v. Copeland, Buhl & Co., 261 N.W.2d 581, 583 (Minn. 1977).

### C. “Parent-Subsidiary Analysis”

Plaintiffs next appeal to what they call “parent-subsidiary analysis,” arguing that “a parent’s contacts with its subsidiaries on matters relating to the product or conduct at issue are relevant to the determination of personal jurisdiction.” (Pl. Resp. Br. at 40.)

This argument fails, among other reasons, because Plaintiffs have concededly failed to meet the legal standard required for veil-piercing, so that personal jurisdiction over Altria must be assessed on the basis of Altria’s own acts, not those of its subsidiaries. (See Point I supra.) Plaintiffs simply have no factual or legal basis for establishing jurisdiction over Altria based on the actions of PM USA, its subsidiary. See, e.g., Steinbuch v. Cutler, 518 F.3d 580, 589 (8th Cir.

2008) (“Whether a subsidiary is subject to personal jurisdiction in the state has no effect on the jurisdictional inquiry regarding its parent.”).

The three cases cited by Plaintiffs under this heading (Pl. Resp. Br. at 40) were all cases in which, unlike this case, personal jurisdiction was based upon evidence of the defendant company’s own acts, not upon its relationships with affiliated companies.<sup>6</sup> Thus Plaintiffs’ appeal to “parent-subsidary analysis” does not advance their case.

#### **D. Agency Doctrine**

Finally, Plaintiffs argue that Altria is subject to personal jurisdiction because PM USA was its agent. (Pl. Resp. Br. at 40-41.) But Plaintiffs have failed to point to any evidence that PM USA had the power to bind Altria to contracts with third persons, which is essential to a finding of agency. See Cardiac Pacemakers, Inc. v. Aspen II Holding Co., 413 F. Supp. 2d 1016, 1025 (D. Minn.

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<sup>6</sup> See Wicken v. Morris, 510 N.W.2d 246 (Minn. Ct. App. 1994), subsequent appeal at C7-94-1219, 1994 WL 664944, at \*4 (Minn. Ct. App. Nov. 29, 1994) (“[T]his is not a case in which an injured Minnesota resident seeks to assert personal jurisdiction over a parent corporation through a subsidiary. Instead, jurisdiction over [the parent] is based on [the parent’s] own activities in Minnesota.” (emphasis in original)), rev’d on another issue, 527 N.W.2d 95 (Minn. 1995); Daher v. G.D. Searle & Co., 695 F. Supp. 436, 438-39 (D. Minn. 1988) (plaintiff established personal jurisdiction by submitting numerous exhibits which demonstrated that the parent independently committed the tortious acts “at the heart of Plaintiff’s Complaint” by misrepresenting the safety of its subsidiaries’ product); Warren v. Honda Motor Co., 669 F. Supp. 365, 369 (D. Utah 1987) (upholding jurisdiction over a subsidiary based on the subsidiary’s “own actions in the forum” because the subsidiary designed the product and knew that by dealing exclusively with its parent, the product would be used in the forum).

2006) (collecting Minnesota cases holding that “an agent must have authority to bind the principal when acting on the principal’s behalf”). This failure of proof is fatal to Plaintiffs’ theory of agency. See, e.g., Jurek v. Thompson, 308 Minn. 191, 200-01, 241 N.W.2d 788, 793 (Minn. 1976) (“In the absence of any persuasive evidence of manifestation of consent, right of control, and fiduciary relationship, there is no agency as a matter of law.”).

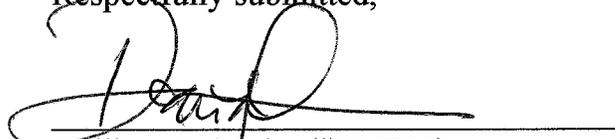
For all of the foregoing reasons, no basis exists for the district court’s imposition of personal jurisdiction over Altria. The district court’s order should be reversed.

**CONCLUSION**

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

Dated: August 16, 2010

Respectfully submitted,



William P. Studer (#106781)  
David P. Graham (#185462)  
OPPENHEIMER WOLFF & DONNELLY LLP  
Plaza VII, Suite 3300  
45 South Seventh Street  
Minneapolis, Minnesota 55402-1609  
(612) 607-7000

Guy Miller Struve  
Justin Goodyear  
DAVIS POLK & WARDWELL LLP  
450 Lexington Avenue  
New York, New York 10017  
(212) 450-4192

*Attorneys for Respondent/Cross-Appellant  
Altria Group, Inc.*

## CERTIFICATION OF BRIEF LENGTH

I hereby certify that this reply brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 3,924 words. This brief was prepared using Microsoft Office Word 2003 (Professional Edition).

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William P. Studer (#106781)  
David P. Graham (#185462)  
OPPENHEIMER WOLFF & DONNELLY LLP  
Plaza VII, Suite 3300  
45 South Seventh Street  
Minneapolis, Minnesota 55402-1609  
(612) 607-7000

Guy Miller Struve  
Justin Goodyear  
DAVIS POLK & WARDWELL LLP  
450 Lexington Avenue  
New York, New York 10017  
(212) 450-4192

*Attorneys for Respondent/Cross-Appellant  
Altria Group, Inc.*