
NO. A10-0215

State of Minnesota
 In Supreme Court

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

Respondents,

vs.

Altria Group, Inc.,

Dismissed Defendant,

and

Philip Morris, Inc.,

Appellant.

REPLY BRIEF OF
 APPELLANT PHILIP MORRIS USA INC.

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INTRODUCTION

Plaintiffs' brief boils down to a request that this Court rewrite its precedents to allow this massive class action to go forward. Plaintiffs' arguments are contrary to Minnesota law for several reasons.

First, under the unique facts presented here, plaintiffs' claims provide no public benefit. Before this lawsuit was filed, the Attorney General brought consumer protection claims based on the same alleged misconduct and obtained a consent judgment in which Philip Morris USA Inc. ("PMUSA") submitted to a permanent injunction against deceptive advertising and agreed to pay billions of dollars that would directly benefit the State and its citizens. Moreover, plaintiffs do not seek to halt the alleged misrepresentations; nor could they, because Congress has prohibited "lights" descriptors absent prior governmental approval, and no cigarette today is sold with such descriptors. Plaintiffs do not dispute these facts. Instead, plaintiffs and their *amici* seek to rewrite the public benefit requirement to foreclose only lawsuits based on one-on-one consumer transactions. This limitation finds no support in the rulings of this Court or numerous other courts.

Second, if plaintiffs were proceeding as private attorneys general, their claims would be barred by the Release in the Attorney General settlement. Plaintiffs' contention that the settlement could never apply to third-party claims is refuted by the plain language of the Release itself, which expressly applies to third

parties acting “indirectly,” “representatively,” or “derivatively” on behalf of the State.

Finally, in defending class certification, plaintiffs do not contest the substantial individual variability among class members that compelled the rejection of certification in twelve similar cases. (*See* PMUSA.Br.24-25 & n.7(collecting citations).)¹ Plaintiffs instead ask the Court to ignore this variability by claiming that it has no bearing on whether class members can establish liability and recover money. Under plaintiffs’ theory, individuals could recover money even when they (1) did not believe the alleged misrepresentations and/or purchased Lights for reasons unrelated to the alleged misrepresentations, (2) received the lower tar and nicotine that plaintiffs contend was promised, and/or (3) are not financially worse off because they would have continued to purchase Lights and/or spend the same money on cigarettes regardless of the alleged misrepresentations. This argument flies in the face of the plain language of Minn. Stat. § 8.31, subd. 3a (the “Private AG Statute”) and this Court’s rulings, which make clear that plaintiffs are not entitled to relief if they were not deceived, did not rely, or were not injured (among other things).

This Court should reinstate judgment in favor of PMUSA or, alternatively, remand with instructions to decertify the class.

¹ New abbreviated citations in this brief are: PMUSA.Br.=PMUSA’s Opening Brief. Resp.Br.=Brief of Respondents. A.G.Br.=Brief of Attorney General. MAJ.Br.=Brief of Minnesota Association for Justice. NACA.Br.=Brief of National Association of Consumer Advocates.

ARGUMENT

I. JUDGMENT SHOULD BE REINSTATED IN FAVOR OF PMUSA BECAUSE PLAINTIFFS’ PRIVATE AG CLAIMS PROVIDE NO PUBLIC BENEFIT

Plaintiffs turn a blind eye to the unique combination of facts that the district court found establishes no public benefit. Plaintiffs profess that the only basis for the district court’s ruling was that plaintiffs’ lawsuit “seeks only to compensate private individuals.” (Resp.Br.14 (emphasis in original).) Not so. Nowhere in their eight-page public benefit argument do plaintiffs acknowledge—let alone address—that the Attorney General has already sued for the same conduct and obtained a consent judgment and that no cigarette is sold today with “lights” descriptors because Congress has banned them absent government approval.

Plaintiffs then seek to twist the public benefit requirement beyond recognition, contending it applies only to foreclose lawsuits based on one-on-one transactions. According to plaintiffs, merely seeking money on behalf of a class satisfies the requirement.

Plaintiffs ignore *Ly v. Nystrom*’s broader holding and reasoning that although the Private AG Statute allows for the recovery of damages, it is intended to reward private parties “*for uncovering and bringing to a halt* unfair, deceptive and fraudulent business practices.” 615 N.W.2d 302, 313 (Minn. 2000) (emphasis added). Plaintiffs’ selective quotation of *Ly*’s discussion of legislative history disregards *Ly*’s conclusion that this history “reveals the statutory purpose in providing incentives to injured private parties to *enforce the unlawful business*

practices statutes as a substitute for the attorney general.” *Id.* at 311 (emphasis added). Those statutes (the CFA, DTPA and FSAA) are geared towards halting conduct, as Representative Sieben recognized by stating—as *Ly* quotes—that the purpose of the Private AG Statute was to “stop” wrongful conduct. *Id.*² The primary intent of these statutes is to empower the Attorney General to act on behalf of the public to stop deceptive business practices. Plaintiffs seeking to proceed under the Private AG Statute—with its special benefits (such as attorneys fees)—must do the same.

Plaintiffs also misconstrue *Collins v. Minnesota School of Business, Inc.*, 655 N.W.2d 320 (Minn. 2003). Plaintiffs there provided a public benefit because their successful prosecution caused defendant to halt misleading advertisements and change its curriculum. *Id.* at 322, 330. Plaintiffs minimize that fact by arguing that this Court’s decision did not focus on the lawsuit’s effect on defendant’s conduct. To the contrary, this Court affirmed the opinion of the court of appeals, holding that the plaintiffs there met the public benefit requirement as a consequence of their “successful prosecution of their claims.” *Id.* at 330. That successful prosecution, as the court of appeals noted, caused the School of

² To no avail, plaintiffs quote Justice Simonett’s dissent in *Church of the Nativity of Our Lord v. WatPro, Inc.*, 491 N.W.2d 1, 10 (Minn. 1992). Justice Simonett focused not only on whether the transaction involved a single plaintiff, but on whether the misrepresentations have “*the potential* to deceive and ensnare members of the consumer public other than just the plaintiff.” *Ly*, 615 N.W.2d at 311 n.16 (quoting *WatPro*, 491 N.W.2d at 10-11) (emphasis added). Only ongoing misrepresentations have the potential to deceive, and a lawsuit that can halt those misrepresentations may benefit the public.

Business to *change its practices*. *Collins v. Minnesota Sch. of Bus., Inc.*, 636 N.W.2d 816, 820 (Minn. Ct. App. 2001) (“As a result of appellants’ lawsuit, respondent stopped its television advertisements and changed the program’s name and curriculum.”). *Collins* thus implicitly affirmed the court of appeals’ determination that there was a public benefit because the successful prosecution of the suit changed defendant’s conduct. Notably, the court of appeals had expressly rejected the argument advanced here that plaintiffs served a public benefit by suing on behalf of many people: “Our conclusion [as to whether there is a public benefit] does not, therefore, turn on the number of plaintiffs in this action.” 636 N.W.2d at 821.³

Plaintiffs also disregard the numerous decisions of the Minnesota Court of Appeals and federal district courts supporting the district court’s finding of no public benefit. These decisions, while not binding, reflect a consensus of considered views on the scope of Private AG claims in light of *Ly*.⁴

These decisions have rejected plaintiffs’ assertion that simply suing on behalf of many consumers confers a public benefit. *Evangelical Lutheran Church in Am. Bd. of Pensions v. Spherion Pac. Workforce LLC*, 2005 WL 1041487, at *4 (D. Minn. 2005) (A.890) (one should not “confuse[] large numbers with the

³ Contrary to plaintiffs’ contention that PMUSA’s citation to the court of appeals opinion in *Collins* is “inexplicable” (Resp.Br.16), it is necessary to consider the opinions of this Court and the court of appeals in *Collins* to understand the factual framework of the decisions and their relevance here.

⁴ Notably, *Ly* cited both Minnesota Court of Appeals and federal decisions in support of its holding. 615 N.W.2d at 312 & n.18.

public benefit”); *Weigand v. Walser Auto. Grp., Inc.*, 2006 WL 1529511, at *3 (Minn. Ct. App. 2006) (A.1104); *Schaaf v. Residential Funding Corp.*, 2006 WL 2506974, at *16 (D. Minn. 2006) (A.1043). Instead, these decisions have held that there is no public benefit where, as here, parties seek only private monetary recovery and do not seek to or could not halt the misconduct. (See PMUSA.Br.16 (collecting authorities).)⁵ And these authorities have further recognized that where the Attorney General already sued and obtained relief—like here—subsequent private lawsuits “can confer only a negligible additional public benefit.”

Simonson v. Ameriquest Mortg. Co., 2006 WL 3463000, at *4 (D. Minn. 2006) (A.1059); see also *Weigand*, 2006 WL 1529511, at *3 (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”); *Behrens v. United Vaccines, Inc.*, 228 F. Supp. 2d 965, 972 (D. Minn. 2002) (no public benefit because government had removed offending product from the market).

⁵ The State’s citation (A.G.Br.16) to *In re Levaquin Products Liability Litigation*, 752 F. Supp. 2d 1071 (D. Minn. 2010), is not to the contrary. *Levaquin* recognized that the scope of the conduct *as well as* the remedy sought were factors in the public benefit analysis. *Id.* at 1078. Likewise, *Burtch v. Oakland Park, Inc.*, 2006 WL 1806196 (Minn. Ct. App. 2006) (Supp.A.13) (cited by MAJ.Br.13-14), upheld a finding of public benefit there *not* because plaintiffs were awarded damages, but because “*future residents* of the Oakland Park community . . . are benefited by this case’s establishment of reasonable rules [and] elimination of unlawful, unreasonable lease provisions.” *Burtch*, 2005 WL 5010659 (Minn. Dist. Ct. 2005) (Supp.A.25) (emphasis added). MAJ’s citation to a few outlier federal decisions (MAJ.Br.21-22), including *National Arbitration Practices* (addressed in PMUSA.Br.21n.5), only underscores that the great majority of the decisions consistently apply the public benefit requirement as intended by *Ly*.

Plaintiffs' *amici* acknowledge the federal decisions but contend those cases' reasoning is not grounded in this Court's decisions. To the contrary, all the decisions cite and rely upon *Ly*, and several, contrary to MAJ's contention (MAJ.Br.21), cite *Collins* as well (*e.g.*, *Zutz v. Case Corp.*, 2003 WL 22848943, at *3-4 (D. Minn. 2003) (A.1109)).

Moreover, the Legislature repeatedly has declined to enact legislation eliminating the public benefit requirement.⁶ Indeed, it has recognized the requirement by enacting specific consumer protection statutes that expressly state that bringing suit under the statute provides a public benefit. Minn. Stat. § 325N.06 (action "by a foreclosed homeowner [for violations of certain mortgage foreclosure statutes] is in the public interest," "and all remedies of section 8.31 are available for such an action"); *id.* § 325N.18 (same); *id.* § 58.18 (same) (residential mortgages); *id.* § 82B.24 (same) (real estate appraisers); *id.* § 270C.445 (same) (tax preparation services); *id.* § 327B.12 (same) (manufactured home sales); *id.* § 332A.18 (same) (debt management services); *id.* § 332B.13 (same) (debt settlement services). In the wake of *Ly*, *Collins*, and other related decisions, these actions by the Legislature demonstrate that it has endorsed the courts' interpretation of the Private AG Statute, including that the suit must also

⁶ 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>.

provide a public benefit notwithstanding that the text of the Statute authorizes private suits seeking damages. *D.W.H. Through Mitchell v. Steele*, 494 N.W.2d 513, 516 (Minn. Ct. App. 1993) (failure to amend statute after courts' rulings interpreting statute indicates Legislature's adoption of courts' interpretation).⁷

Finally, that plaintiffs label the recovery they seek "restitution" makes no difference; it is still money for private plaintiffs for alleged past wrongs. As explained above and in PMUSA's opening brief, courts repeatedly have rejected the notion that monetary recoveries alone provide a public benefit. (PMUSA.Br.16, 18-19.) Plaintiffs have no response to those cases, and their citation to authorities suggesting monetary awards provide a deterrent effect are inapposite; none of those authorities concerned the public benefit requirement at issue here. *Behrens*, 228 F. Supp. 2d at 970-71 (rejecting notion that damages award provides a deterrent effect sufficient for the public benefit requirement; claims that merely provide a "metaphysical potential" for a public benefit are not "sufficient to satisfy the public benefit requirement").

⁷ The Legislature's conduct is reason alone to decline NACA's invitation (not made by plaintiffs or other *amici*) to reverse *Ly* outright. Furthermore, this Court is "extremely reluctant to overrule [its] precedent under principles of *stare decisis*" and will not do so absent "compelling reason." *State v. Lee*, 706 N.W.2d 491, 494 (Minn. 2005).

II. IF PLAINTIFFS WERE SUING AS PRIVATE ATTORNEYS GENERAL, THE ATTORNEY GENERAL SETTLEMENT WOULD BAR THEIR CLAIMS

As a threshold matter, plaintiffs’ opposition to the settlement bar depends on the argument that plaintiffs’ claims are *private* claims seeking only *private* relief—a stark admission that those claims provide no public benefit.⁸

In any event, plaintiffs err in contending that the settlement cannot bind private individuals. The very provision on which they rely states the contrary: “*Except as expressly provided in the Settlement Agreement, no portion of the Settlement Agreement shall bind any non-party or determine, limit or prejudice the rights of any such persons or entity.*” (A.695 (emphasis added).) The italicized portion of the sentence, which contemplates that the settlement can bind non-parties, cannot be disregarded. “A contract must be interpreted in a way that gives all of its provisions meaning.” *Current Tech. Concepts, Inc. v. Irie Enters., Inc.*, 530 N.W.2d 539, 543 (Minn. 1995). The settlement *expressly provides* that persons acting on behalf of the State, “indirectly, representatively, derivatively or in any other capacity” are barred from bringing the claims asserted here (A.682-83)—a group that inherently includes plaintiffs, to the extent they assert claims as private attorneys general for the public’s benefit.⁹

⁸ Plaintiffs quibble that the Attorney General’s complaint did not mention “Lights” or “low tar” (Resp.Br.21), but do not dispute (as the State concedes, A.G.Br.17) that, at trial, the State’s case included the allegations at issue here. (See PMUSA.Br.8.)

⁹ Contrary to plaintiffs’ contentions (Resp.Br.22), PMUSA quoted in its opening brief the definition of “State of Minnesota” and the provision of the

Plaintiffs' argument is further belied by the State's [Proposed] Findings of Fact in *State ex rel. Humphrey v. Philip Morris*, No. C1-94-8565, which states that the "release provisions" were intended "to encompass suits or causes of action that might be asserted *by any parties—including private litigants*—in adjudicatory proceedings." (A.78 (emphasis added).)¹⁰ Notably, nothing in the Release prohibits plaintiffs from bringing common law fraud claims; the bar only extends to Private AG claims that plaintiffs seek to bring on behalf of the State.

Plaintiffs and the State also manufacture a strawman argument that the Private AG Statute does not "deputize" plaintiffs as the Attorney General's agents. (A.G.Br.7-11.) PMUSA does not argue that plaintiffs who proceed under the Private AG Statute are so deputized; rather, because such plaintiffs must act for the public's benefit, they thereby act, indirectly or representatively, on behalf of the State.

Similarly, the State argues that case descriptions of plaintiffs in Private AG actions stepping into the Attorney General's shoes are only metaphorical. (A.G.Br.12-13.) But *Ly*'s instruction that plaintiffs seeking to proceed under the Private AG Statute *must* act for the benefit of the public is not mere symbolism.

settlement stating that it does not bind non-parties "except as expressly provided." (PMUSA.Br.9, 23n.6.)

¹⁰ The State raises technical arguments concerning the Proposed Findings but does not attempt to reconcile its prior position with its position here. (A.G.Br.6n.2.)

Such plaintiffs *must* act, at least in an indirect, representative, or derivative way, on behalf of the State, and would thus fall within the Release.

Likewise, reinstatement of the district court's ruling will not permit private parties to bind the Attorney General. (Resp.Br.30.) Private parties litigating public rights cannot bind the government—just as offensive collateral estoppel, for public policy reasons, cannot be applied against the government. *United States v. Mendoza*, 464 U.S. 154, 159-63 (1984).

Finally, contrary to plaintiffs' and the State's implications, the Attorney General has authority to release claims that private litigants could bring *on behalf of the public*, or pursuant to a public benefit requirement, as numerous cases confirm. *See, e.g., Satsky v. Paramount Commc'ns, Inc.*, 7 F.3d 1464, 1470 (10th Cir. 1993) (“When 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.”); *State by Humphrey v. Ri-Mel, Inc.*, 417 N.W.2d 102, 112 (Minn. Ct. App. 1987) (attorney general 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, 773-74 (9th Cir. 1994) (state's release of claims for oil spill damages barred private plaintiffs' claim for lost recreational use). None of plaintiffs' or *amicus*'s inapposite citations (Resp.Br.26-27; A.G.Br.9-12) concern application of the public benefit requirement under Minnesota law.

III. THE CLASS CERTIFICATION DECISION IS LEGALLY ERRONEOUS AND SHOULD BE REVERSED

A. Whether Each Class Member Relied Is A Predominating Individualized Issue

Plaintiffs do not dispute that many class members did not believe that Lights delivered less tar and nicotine or were healthier over the three-decade class period.¹¹ Nor do they challenge the district court's undisturbed findings that "class members may have decided to smoke Marlboro Lights for various other reasons including the recommendations of other smokers, taste, and brand recognition." (Add.76.)¹² Rather, plaintiffs seek to make class members' beliefs and purchasing

¹¹ Plaintiffs note that portions of the record further confirming the individual variability among class members were offered after the initial certification order. (Resp.Br.10n.1.) Plaintiffs do not—and cannot (PMUSA.Br.29n.9)—ask the Court to disregard the evidence. Plaintiffs instead claim that consideration of this evidence somehow allows plaintiffs to rely on findings from *United States v. Philip Morris USA Inc.*, 449 F. Supp. 2d 1 (D.D.C. 2006) (“*DOJ*”), even though the court of appeals and district court refused to apply collateral estoppel to these findings (Add.31-32), which plaintiffs failed to appeal. Unlike the properly admitted evidence PMUSA cites, reliance on the *DOJ* findings would be impermissible hearsay. *Regents of the Univ. of Minn. v. Med. Inc.*, 382 N.W.2d 201, 208 (Minn. Ct. App. 1986) (“If neither collateral estoppel nor res judicata applies, previous judgments are regarded as hearsay.”). In any event, *DOJ* was not a class action, involved different claims, and its findings actually demonstrate further why certification would be improper because the court there found considerable variability among smokers. *See, e.g.*, 449 F. Supp. 2d at 476 (only “21% of light or ultra light cigarette smokers chose those brands because they perceived them to be healthier”).

¹² Plaintiffs state that, because the certification determination is reviewed for abuse of discretion, “the facts” must be “viewed most favorable to the class certification ruling,” and then provide a lengthy recitation of their allegations. (Resp.Br.2-9.) None of these allegations, however, were found to be true by the district court in deciding certification. As a result, these allegations are irrelevant and not entitled to deference. Courts have repeatedly held that it is error merely to

motivations irrelevant by asserting that “reliance is not a required element.”

(Resp.Br.36.) This is wrong and distorts this Court’s rulings.

Plaintiffs selectively quote *Group Health Plan, Inc. v. Philip Morris Inc.*’s statement that “[a]llegations that the plaintiff relied on the defendant’s conduct are not required to plead *a violation*.” 621 N.W.2d 2, 12 (Minn. 2001) (emphasis added). This statement merely reflects that deceptive conduct is a consumer protection violation regardless of whether anyone relied—triggering, for example, the Attorney General’s right to sue to enjoin such conduct going forward. It does not resolve the critical question here: what must plaintiffs prove to establish liability and recover money?

Plaintiffs ignore the remainder of *Group Health*, in which the Court went on to address “whether a plaintiff must *prove* reliance in order to recover damages under [section 8.31].” *Id.* at 13 (emphasis in original). This Court held that section 8.31’s plain language requires proof of reliance on the violation to establish causation:

as a practical matter it is not possible that the damages could be caused by a violation without reliance on the statements or conduct alleged to violate the statutes. Therefore, in a case such as this, it will be necessary to prove reliance on those statements or conduct to satisfy the causation requirement.

Id. This Court reaffirmed this ruling in *Weigand v. Walser Automotive Group, Inc.*, unequivocally stating that “reliance is a component of the causal nexus

accept plaintiffs’ allegations as true in resolving certification. *See, e.g., Whitaker v. 3M Co.*, 764 N.W.2d 631, 63-38 (Minn. Ct. App. 2009).

requirement for a private consumer fraud class action.” 683 N.W.2d 807, 812 (Minn. 2004). Thus, applying *Group Health*, courts have rejected Private AG claims for lack of reliance. *Flynn v. Am. Home Prods. Corp.*, 627 N.W.2d 342, 351-52 (Minn. Ct. App. 2001):

Plaintiffs acknowledge they must establish “causation,” but strip that requirement of meaning, contending that mere evidence that class members were “exposed to” the alleged misrepresentations is sufficient. (Resp.Br.38-39, 45.) But nothing in *Group Health* allows a plaintiff who did not believe the misrepresentation or would have purchased the product regardless of the misrepresentation to recover money simply because he or she saw the misrepresentation or the product was widely advertised. That is precisely the legal error of the court of appeals’ ruling. *Group Health* was explicit that plaintiffs “could not have relied on the misconduct”—and thus are not entitled to any relief—“*if they were not misled or deceived.*” 621 N.W.2d at 12 (emphasis added).¹³

Nor can plaintiffs defend certification based on *Group Health*’s conclusion that, in certain circumstances, plaintiffs may be able to use indirect proof of

¹³ Indeed, courts repeatedly have recognized that certification is not proper even where all class members were exposed to a uniform representation if the evidence shows, as here, that not all class members relied on the representation. *See, e.g., McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 223 (2d Cir. 2008) (rejecting certification in lights case because “proof of misrepresentation—even widespread and uniform misrepresentation—only satisfies half of the equation; the other half, reliance on the misrepresentation, cannot be the subject of general proof”); (*see also* PMUSA.Br.27-29, 34).

reliance to satisfy their *prima facie* burden. 621 N.W.2d at 13-14. *First*, as noted in PMUSA's opening brief, *Group Health* was explicit that it was not adopting a blanket rule applicable to all cases and that the "reliance factor may be different in a case of different scope." 621 N.W.2d at 15 n.10; (*see also* PMUSA.Br.30-32). Plaintiffs do not address the critical distinctions between the direct action by a third-party payer in *Group Health* and the class action here. Instead, their sole response is that *Group Health* must have meant for its indirect reliance standard to apply to all cases because it stayed and remanded a putative class action (*Sutton*) for reconsideration in light of *Group Health*. (Resp.Br.37-38.) But a remand to allow an appellate court the benefit of a previously unavailable opinion says nothing about the merits or the decision's applicability to the remanded case. *See Peterson v. BASF Corp.*, 711 N.W.2d 470, 474 n.5 (Minn. 2006) (explaining that similar U.S. Supreme Court "GVR" remands say nothing about the merits and lack precedential value).

Second, even if *Group Health*'s indirect reliance proof standard applied to a class action, at most that would allow some class action plaintiffs to attempt to invoke a presumption or inference of reliance, which, in any event, *could be rebutted by PMUSA*. (*See* PMUSA.Br.33-36.) As the Eighth Circuit held in *In re St. Jude Medical, Inc.*, where the right to rebut such a presumption or inference with evidence of non-reliance will require individualized proofs, class certification is improper. 522 F.3d 836, 840 (8th Cir. 2008). Plaintiffs try to distinguish *St. Jude* as limited to cases where not all class members were exposed to the

misrepresentations. (Resp.Br.44.) *St. Jude*'s reasoning was not so limited. Rather, the court concluded that because some physicians who had seen the representations "did not rely on" them, the defendant was entitled to "present[] direct evidence that an individual plaintiff (or his or her physician) did not rely on representations." 522 F.3d at 839-40.

Plaintiffs contend further that *St. Jude* was somehow "rejected" by a federal district court in *Mooney v. Allianz Life Insurance Co.*, 2009 WL 511572 (D. Minn. 2009) (Supp.A.49). (Resp.Br.44.) But *Mooney* contradicts plaintiffs' arguments; the court there recognized that "it is not possible that the damages could be caused by a violation without reliance on the statements or conduct." 2009 WL 511572, at *6. *Mooney* simply falls into the category of cases—like *Peterson v. BASF Corp.*, 675 N.W.2d 57 (Minn. 2004), upon which plaintiffs also rely—in which the record demonstrates that virtually no one would have engaged in the transaction had they known the truth. *Mooney*, 2009 WL 511572, at *6 (even defendant's "strongest evidence" shows that the "vast majority . . . relied"); (PMUSA.Br.36-38) (discussing *Peterson*). These cases have no application here, where plaintiffs presented no expert proofs of universal reliance and the district court found based on PMUSA's unchallenged experts—as have numerous other courts (PMUSA.Br.33-34)—that many Lights smokers over the three-decade class period purchased their cigarettes for reasons unrelated to the alleged misrepresentations.¹⁴

¹⁴ Contrary to *amicus*'s fears (NACA.Br.22-26), reaffirming this Court's holdings that reliance is required would not mean the end of consumer class

B. Whether Each Class Member Received Less Tar And Nicotine Is A Predominating Individualized Issue

Plaintiffs concede—as the district court found (Add.74)—that some class members received the allegedly promised lower tar and nicotine. (Resp.Br.6 (alleging only that “most” failed to receive less tar and nicotine).) As numerous courts have held in similar lights cases, because individual inquiries would be required to determine which class members received lower tar and nicotine and which did not, there is no manageable way to try these claims on a class-wide basis. (See PMUSA.Br.42 (collecting authorities).)¹⁵

Unable to deny this variability, plaintiffs take the same approach as they do with reliance: they contend that how much tar and nicotine any class member received is legally “irrelevant.” (Resp.Br.45-46.) Plaintiffs assert that all class members—including those who received what was allegedly promised—can

actions, because it would have no impact on cases where the record shows (unlike here) that “[t]he only logical explanation” for the decision to purchase the product “is that the class members relied on the” alleged misrepresentation. *Peterson v. H & R Block Tax Servs., Inc.*, 174 F.R.D. 78, 85 (N.D. Ill. 1997); (see also PMUSA.Br.37n.12).

¹⁵ Plaintiffs cite a 1975 PMUSA study supposedly finding that Lights smokers “inhale the same amount of nicotine (and with it, tar)” (Resp.Br.6-7), but that study does not erase their concession or the district court’s finding. That study examined only five smokers who switched from Reds to Lights, measuring only nine cigarettes smoked of each brand over four weeks. (RA741.) The study found that 40% (two of five) received less tar and nicotine after switching to Lights. (Supp.A.2-3, 8.) Thus, if anything, the study confirms that determining whether a Lights smoker failed to receive less tar and nicotine requires individual inquiries. Similarly, none of the other PMUSA documents plaintiffs cite reflects that that all smokers failed to receive less tar and nicotine or believed Lights were safer and purchased Lights for that reason. In fact, many show just the opposite. (See, e.g., RA417, 486, 611.)

recover simply because *some* smokers did not receive less tar and nicotine.

(Resp.Br.45.) This too is wrong.

As plaintiffs confirm, the violation alleged here is that PMUSA represented Lights as delivering “lowered tar and nicotine” “in relation to Marlboro Red,” which supposedly was “not true.” (Resp.Br.2-3.) For those class members who received less tar and nicotine, there is no consumer protection violation, because any representation of lower tar and nicotine was true. *See, e.g., Mulford v. Altria Grp., Inc.*, 242 F.R.D. 615, 628-29 (D.N.M. 2007) (“whether Defendants’ representation that a pack of Marlboro Lights would deliver lower tar and nicotine than Marlboro Regulars is false . . . requires each class member to prove that the person who smoked the cigarettes actually received something other than ‘lowered tar and nicotine’”). Nor would those class members have suffered any injury, because they would have received what they supposedly paid for—a cigarette delivering less tar and nicotine. *See, e.g., Stern v. Philip Morris USA Inc.*, 2007 WL 4841057, slip op. at 16 (N.J. Super. Ct. 2007) (A.1068) (“Such a member would have received precisely what they bargained for at the agreed upon price.”).¹⁶

¹⁶ Plaintiffs say without citation that “the tort is complete when the misrepresentation or misleading statement is made.” (Resp.Br.45-46.) But tar is in the smoke and not the tobacco, and therefore whether a smoker failed to receive less tar and nicotine (thus received a misrepresentation) depends on how they smoke. *See Pearson v. Philip Morris, Inc.*, 2006 WL 663004, at *2 (Or. Cir. Ct. 2006) (A.1020) (appeal pending). Moreover, the Private AG Statute is explicit that only *injured* plaintiffs may sue. Minn. Stat. § 8.31, subd. 3a; *see also infra* at 21-22.

The Eighth Circuit thus rejected a similar argument under Minnesota law in *O’Neil v. Simplicity, Inc.*, 574 F.3d 501, 503 (8th Cir. 2009). Plaintiffs there brought a putative class action seeking recovery for economic losses suffered because cribs malfunctioned for some consumers but had not yet malfunctioned for plaintiffs. The court held that a plaintiff cannot recover because the manufacturer failed to deliver on its promises for *other* consumers:

the plaintiffs must allege that their product actually exhibited the alleged defect. . . .

[B]ecause [plaintiffs’] crib has not exhibited the alleged defect, they have necessarily received the benefit of their bargain. [Plaintiffs] purchased a crib with a functioning drop-side and that crib continues to have a functioning drop-side. *Their bargain with [defendants] did not contemplate the performance of cribs purchased by other consumers.*

Id. at 503-04 (emphasis added); *see also, e.g., In re Baycol Prods. Litig.*, 218 F.R.D. 197, 213-14 (D. Minn. 2003) (denying certification where some individuals received the benefit of the drug and therefore “received their money’s worth”).

Ignoring these decisions, plaintiffs rely on *State by Humphrey v. Alpine Air Products, Inc.*, 490 N.W.2d 888 (Minn. Ct. App. 1992). (Resp.Br.46-47.) But that decision does not allow a plaintiff who received what was promised to recover money. In contrast to this case, whether the air purifiers at issue in *Alpine Air* delivered the promised health benefits did not depend on how they were used. Rather, the court found that—for *all* consumers—“no positive health benefits are obtained by using the purifier.” 490 N.W.2d at 895. Moreover, *Alpine Air* did not

involve private class action claims, but instead an action by the Attorney General, *id.* at 890, 895, who, in contrast to private plaintiffs, does not have to show any injury (or reliance) resulting from the alleged violation. Minn. Stat. § 8.31, subd. 3.

Disregarding the numerous courts requiring plaintiffs to prove that they personally failed to receive what was allegedly promised, plaintiffs point to *Aspinall v. Philip Morris Cos.*, 813 N.E.2d 476 (Mass. 2004). They fail, however, to address the reasons articulated in PMUSA's opening brief as to why that outlier decision is inapposite here (and wrong in PMUSA's opinion) and ignore the fact that the trial court abused its discretion by adopting this Massachusetts decision as Minnesota law. (PMUSA.Br.39n.13, 44-45.) Plaintiffs similarly rely on *Craft v. Philip Morris Inc.*, 190 S.W.3d 368 (Mo. Ct. App. E.D. 2005), but that decision did not conclude that a plaintiff could recover even if he or she received less tar and nicotine. The court held only that under Missouri law—unlike here (PMUSA.Br.24-25)—it could not decide at the certification stage what proofs were required but rather had to accept the allegations as pled by plaintiffs, which the court viewed as not depending on whether they failed to receive less tar and nicotine. *Id.* at 382, 384.

C. Whether Each Class Member Suffered An Injury Is A Predominating Individualized Issue

As PMUSA explained in its opening brief, because the only possible common injury that could be tried class-wide is a price difference between what

plaintiffs paid for (Lights) and what they allegedly received (Reds), and because Lights and Reds have always cost the same, plaintiffs have suffered no common loss. (PMUSA.Br.47-49.) Plaintiffs ignore this point; they make no attempt to explain how they could establish a common injury with no price differential. *See, e.g., Weiner v. Snapple Beverage Corp.*, 2010 WL 3119452, at *6 (S.D.N.Y. 2010) (Supp.A.56) (rejecting certification where “plaintiffs have not shown that they could prove at trial using common evidence that the putative class members in fact paid a premium for Snapple beverages as a result of the ‘All Natural’ labeling”). Plaintiffs instead focus on whether individual proof of *the amount of damages* can defeat class certification. Proof of the existence of injury and proof of the amount of damages, however, are two distinct elements. *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 28 (1st Cir. 2008) (distinguishing whether “each member of the class was in fact injured” from the “amount of each individual injury”).

Plaintiffs’ only substantive response is that they need not prove that they paid too much for Lights or suffered other economic injury because they are supposedly seeking restitution. (Resp.Br.50&n.13.) Not so. Even if restitution were available, it is a *form of relief* available only if the plaintiff has established all the elements of liability, including injury. Minn. Stat. § 8.31, subd. 3a (only persons “*injured* by a violation” are entitled to “recover damages” or “*receive other equitable relief*”) (emphases added). Plaintiffs are not entitled to recover *any relief*—legal or equitable—without *first* establishing a cognizable injury. *See,*

e.g., *K.A.C. v. Benson*, 527 N.W.2d 553, 562 (Minn. 1995) (“Unable to establish an ‘injury,’ plaintiff has no basis for recovery under the Consumer Fraud Act.”) (citation omitted).

D. Proof Of Class Membership, Purchases, And The Amount Of Damages Are Predominating Individualized Issues

Plaintiffs do not contest that determining who purchased Lights in Minnesota during the class period (thus qualifying as a class member) or the amount of those purchases (necessary to determine the amount of damages or restitution owed each class member) would require individualized determinations examining each class member’s smoking history. (PMUSA.Br.51-53.) Plaintiffs respond that the fact that different class members may be owed different amounts of money cannot defeat certification. (Resp.Br.51.) Plaintiffs ignore, however, the numerous decisions that certification is improper where (as is true here, given the need for inquiring into each class member’s purchasing history and possible failure to mitigate damages), “the calculation of damages is not susceptible to a mathematical or formulaic calculation” that would avoid the need for individual inquiries in determining how much is owed to each class member. *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 307 (5th Cir. 2003); *see also, e.g., Aiello v. Providian Fin. Corp.*, 239 F.3d 876, 881 (7th Cir. 2001) (same). Nor do plaintiffs address the authority denying certification where individual inquires are required to determine who qualifies as a class member. (PMUSA.Br.50-53 (collecting authorities).)

Alternatively, plaintiffs ask this Court to disregard these issues by adopting a “fluid recovery” scheme in which “aggregate liability can be determined in a single, class-wide adjudication and paid into a class fund,” and any funds not distributed to class members “could be placed into a cy pres fund . . . or may escheat to the state.” (Resp.Br.51-52&n.14.) No Minnesota decision has permitted fluid recovery in a contested class action, and for good reason. Plaintiffs’ proposal—which neither the district court nor the court of appeals relied on as a basis for certification—would be unlawful and unconstitutional and cannot justify certification.

As an initial matter, plaintiffs’ premise that the amount supposedly owed to the class as a whole may be determined simply “from Marlboro Lights sales information” (Resp.Br.50), incorrectly presupposes that PMUSA is liable for every single purchase over more than thirty years, including by individuals who did not rely, received less tar and nicotine, or did not suffer an economic loss. *See supra* at 12-22. As discussed above, there is no way to determine the amount owed to the class without undertaking individual inquiries into each of these issues to determine which purchases are actionable. *In re Phenylpropanolamine Prods. Liab. Litig.*, 214 F.R.D. 614, 620 (W.D. Wash. 2003) (where “court faces the daunting task of determining who could claim those damages in the first place . . .

the adoption of a fluid recovery procedure would not serve to lessen the manageability problems plaguing the proposed class”).¹⁷

Moreover, although fluid recovery is used in settlements, courts have rejected its use in contested class actions as a violation of due process and the Rules Enabling Act (adopted by Minnesota at Minn. Stat. § 480.051) where invoked to excuse satisfaction of class action requirements. For example, the Second Circuit rejected the application of fluid recovery in a lights case similar to that proposed here:

Roughly estimating the gross damages to the class as a whole and only subsequently allowing for the processing of individual claims would inevitably alter defendants’ substantive right to pay damages reflective of their actual liability. . . . When fluid recovery is used to permit the mass aggregation of claims, the right of defendants to challenge the allegations of individual plaintiffs is lost, resulting in a due process violation.

McLaughlin, 522 F.3d at 231-32; see also, e.g., *In re “Agent Orange” Prod. Liab. Litig.*, 818 F.2d 179, 185 (2d Cir. 1987) (rejecting fluid recovery to “allow[] plaintiffs to satisfy the manageability requirements of Rule 23 where they otherwise could not”); *Nelson v. Greater Gadsden Hous. Auth.*, 802 F.2d 405, 409

¹⁷ This point illustrates the distinction between this case and *Gilchrist v. Perl*, 387 N.W.2d 412 (Minn. 1986), which plaintiffs erroneously claim “presents a similar scenario.” (Resp.Br. 53.) *Perl* found certification proper only because “[t]he particular breach of fiduciary duty involved is the same for all members of the class.” 387 N.W.2d at 417. The only question there was the amount of fees that should be returned, and for that issue it was possible to apply “a single percentage figure [to] govern[] all the claims.” *Id.* at 418. By contrast, whether each class member can recover here (and if so, how much) depends on the individual issues outlined above.

(11th Cir. 1986) (aggregate damages award cannot “relieve plaintiff classes of the burden of proving individual damages or to avoid the dismissal of unmanageable class actions”); *Windham v. Am. Brands, Inc.*, 565 F.2d 59, 72 (4th Cir. 1977) (rejecting fluid recovery where “there is no ‘easy formula’ by which individual proof of damages may be avoided”); *In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir. 1974) (“allowing gross damages by treating unsubstantiated claims of class members collectively significantly alters substantive rights” and would violate Rules Enabling Act).¹⁸

E. At A Minimum, Any Certified Class Should Have Been Limited To The Limitations Period

Finally, plaintiffs mischaracterize PMUSA’s position in contending that PMUSA waived its statute of limitations argument. PMUSA is *not* appealing the application of fraudulent-concealment tolling to consumer protection claims. *See* 792 N.W.2d 836, 860 (Minn. Ct. App. 2010). Instead, PMUSA’s argument is that the district court and court of appeals erred in failing to consider such tolling’s

¹⁸ Plaintiffs cannot overcome the barriers to certification by characterizing this lawsuit as involving small claims. (Resp.Br.53.) That some claims may be small does not mean the Court may disregard the individual issues presented by those claims and the insurmountable hurdles they present for any manageable class-wide trial. *See, e.g., Hotel Tel. Charges*, 500 F.2d at 90 (“the desirability of allowing small claimants a forum to recover for largescale antitrust violations does not eclipse the problem of unmanageability”). Moreover, courts have rejected such arguments where there is the possibility of recovery of attorneys’ fees and costs (as plaintiffs seek here under the Private AG Statute (A.19)), because this potential recovery “provides substantial incentives to bring meritorious individual suits.” *Hamilton v. O’Connor Chevrolet, Inc.*, 2006 WL 1697171, at *11 (N.D. Ill. 2006) (Supp.A.33); *see also Castano v. Am. Tobacco Co.*, 84 F.3d 734, 748 (5th Cir. 1996).

impact on *class certification*. (See PMUSA.Br.55-56.) PMUSA preserved this issue by challenging the certification order in its Petition for Review and specifically identifying the statute of limitations as presenting individual issues. Petition for Review at 2.

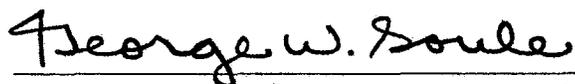
Notably, plaintiffs do not attempt to explain how tolling could be determined on a class-wide basis, because it cannot. Tolling would not apply to individuals with knowledge of their claims; therefore, any certified class must be restricted to the limitations period to avoid the individual inquiries necessary to determine which class members had such knowledge prior to the limitations period. (PMUSA.Br.55-56.)

CONCLUSION

For these reasons, this Court should reinstate the judgment in favor of PMUSA. Alternatively, the Court should remand with instructions to decertify the class.

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Respectfully submitted,



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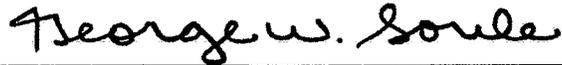
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CERTIFICATION OF BRIEF LENGTH

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 6,789 words. This brief was prepared using Microsoft Word 2003.

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