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NO. A10-215

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State of Minnesota  
**In Court of Appeals**

GREGORY CURTIS, JONI KAY HANZAL,  
 JOSEPHINE LEONARD and RANDY HOSKINS,  
 individually and on behalf of all others similarly situated,  
*Plaintiffs-Appellants,*

v.

ALTRIA GROUP, INC. and PHILIP MORRIS USA INC.,  
*Defendants-Respondents/ Cross-Appellants.*

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**BRIEF AND ADDENDUM OF AMICUS CURIAE  
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## INTRODUCTION

The Chamber of Commerce of the United States of America (“the Chamber”) is the world’s largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector and from every region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national concern to American business.<sup>1</sup>

The trial court’s interpretation of Minnesota’s class certification requirements threatens the ability of Minnesota businesses to fairly defend themselves against consumer fraud allegations that are often asserted in class action cases. In particular, the trial court’s class certification order erroneously diluted the elements of the Minnesota Consumer Fraud Act (“CFA”), Minn. Stat. § 325F.68-.70, in order to facilitate class certification. In so doing, the trial court violated the fundamental principle that procedural devices cannot affect substantive laws. If left undisturbed, its ruling will encourage the filing of abusive class actions against Minnesota businesses. For these reasons and those set forth in defendants’ briefs, this Court should reverse the trial court’s

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<sup>1</sup> In conformity with Rule 129.03 of the Minnesota Rules of Civil Appellate Procedure, counsel for *amicus* state that they are not counsel in this case for any party; that they authored this brief in whole; and, that no person or entity, other than *amicus*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

ruling on class certification if it does not uphold the trial court's grant of summary judgment.<sup>2</sup>

*First*, the trial court erred by holding that allegations in a class action that the defendants engaged in a "lengthy course" of misconduct justify the adoption of a presumption of causation. Minnesota law does not recognize such a presumption, and several other courts have rejected the existence and wisdom of such a presumption as well. The trial court then compounded this error by refusing to entertain evidence capable of rebutting a presumption of causation at the class certification stage, essentially guaranteeing class certification to any plaintiff willing to allege a "lengthy course" of misconduct.

*Second*, the trial court's decision poses a significant threat to Minnesota businesses and consumers – and to the integrity of the state's judicial system. By excusing plaintiffs from having to demonstrate that causation is a common issue in order to satisfy the class certification requirements, the trial court's ruling will promote abuse of the class action device and increase the cost of doing business in Minnesota to manufacturers and consumers alike.

For these reasons, if the Court reinstates any of plaintiffs' claims, it should reverse the trial court's class certification decision and remand with instructions to decertify the plaintiff class.

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<sup>2</sup> *Amicus* believes the trial court decided the summary judgment issue correctly and that this Court should affirm that ruling. If it does not, however, *amicus* respectfully submits that the class certification ruling was erroneous and should be reversed.

## BACKGROUND

Plaintiffs brought a class action suit against defendants pursuant to the CFA. The action was predicated on defendants' alleged deception in the sale of cigarettes to Minnesota consumers over the course of more than thirty years. Plaintiffs claimed that defendants' advertisements misrepresented Marlboro Lights by implying that they were safer than full-flavored cigarettes because they delivered less tar and nicotine to smokers. According to plaintiffs, smokers of Marlboro Lights in fact received the same amount of tar and nicotine as they would have received if they had smoked full-flavored cigarettes.

The trial court initially denied certification of plaintiffs' proposed class on the ground that adjudication of any class member's claim would necessarily require an individual inquiry into at least four issues: (1) whether the class member received what was allegedly promised – i.e., less tar and nicotine; (2) whether the class member was deceived – i.e., believed that Marlboro Lights would deliver less tar and nicotine and were safer; (3) whether this alleged “deception” caused the class member to purchase Marlboro Lights; and (4) whether the class member sustained any injury from his purchase of Lights. *Curtis v. Philip Morris Cos. Inc.*, No. PI 01-018042, at 8, 10-11 (Minn. Dist. Ct. Jan. 16, 2004) (Addendum (“Add.”) 8, 10-11).

The trial court reversed its ruling on rehearing and certified a class, relying primarily on a decision of the Massachusetts Supreme Court. *See generally Curtis v. Philip Morris Cos. Inc.*, No. PI 01-018042, 2004 WL 2776228, at \*2-3 (Minn. Dist. Ct. Nov. 29, 2004) (Add. 12-21) (citing *Aspinall v. Philip Morris Cos.*, 442 Mass. 381, 813 N.E.2d 476 (Mass. 2004)). In so doing, the trial court announced that it no longer

believed that the causation element of plaintiffs' claims would be subject to individual proof, agreeing with plaintiffs that "the lengthy course of misrepresentations concerning 'light' cigarettes, which affected a large number of Minnesota cigarette consumers, is sufficient evidence of reliance at this stage of the proceedings . . . ." *Id.* at \*3; Add. 18. The court determined that this "lengthy course" of conduct allowed it to presume causation on a classwide basis. *Id.* at \*4; Add. 20 (concluding that "it is probable that no smoker received the promised benefit of lowered tar and nicotine every time he or she smoked a Marlboro Lights cigarette") (quoting *Aspinall*, 813 N.E.2d at 489 n.20); *see also id.* at \*3; Add. 18 ("Expenditure . . . of substantial funds in an effort to deceive consumers and influence their purchasing decision justifies a presumption of actual confusion"). According to the trial court, the effect of this presumption was to make "the conduct of Defendants . . . the pivotal point of focus under the Minnesota Consumer Fraud Act, not the conduct of individual consumers." *Id.* at \*2; Add. 17.

Although the court expressly acknowledged that the presumption should be rebuttable, it nonetheless refused to consider defendants' evidence that "entities other than Philip Morris, such as health groups and other governmental entities, have represented that 'light' cigarettes deliver less tar and nicotine and that it is possible that some of the class members could have decided to smoke Marlboro Lights based upon these other representations." *Id.* at \*3. According to the trial court, defendants' argument was merely "a fact issue that Philip Morris would be able to raise as a defense at trial."

*Id.*

The trial court subsequently granted summary judgment to defendants. *Curtis v. Altria Group, Inc. and Philip Morris, Inc.*, No. 27-CV-01-18042 (Minn. Dist. Ct. Oct. 21, 2009). Plaintiffs filed an appeal challenging the grant of summary judgment, and defendants filed a cross-appeal challenging the class certification decision.

## ARGUMENT

### **I. THE TRIAL COURT MISAPPLIED MINNESOTA LAW IN ORDER TO FACILITATE CLASS CERTIFICATION.**

The trial court improperly altered the fundamental substantive elements of a CFA claim in order to facilitate class certification. Specifically, the trial court: (1) invented a presumption of causation that apparently applies in any class action alleging a “lengthy course” of conduct; and (2) denied defendants the right to rebut the presumption at the class certification stage. The net effect of these two steps – neither of which has any basis in Minnesota law – was to eviscerate the causation element of the CFA for purposes of deciding class certification. As such, the trial court’s order breached the fundamental tenet that procedural “rules shall not abridge, enlarge, or modify the substantive rights of any litigant.” Minn. Stat. § 480.051.

#### **A. The Trial Court Abused Its Discretion By Inventing A Presumption Of Causation.**

The trial court first erred by displacing obviously individualized issues of causation with an across-the-board presumption.

The CFA requires a plaintiff to demonstrate a “causal nexus” between a defendant’s allegedly deceptive advertising of a consumer product and the plaintiff’s alleged injury. As the Minnesota Supreme Court has recognized, this means that a

plaintiff must show that he or she relied on the allegedly deceptive advertising in buying the product – and that he or she was harmed thereby. See *Group Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2, 13 (Minn. 2001) (“where [] the plaintiffs allege that their damages were caused by deceptive, misleading, or fraudulent statements or conduct in violation of the misrepresentation in sales laws, 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”).

The trial court acknowledged this essential element, but it held that causation could be presumed on a classwide basis in light of an alleged “lengthy course of misrepresentations concerning ‘light’ cigarettes, which affected a large number of Minnesota cigarette consumers.” *Curtis*, 2004 WL 2776228, at \*3; Add. 18. The trial court relied chiefly on two authorities to justify its adoption of a novel presumption of causation: (1) a case description in a string citation in a footnote in the Supreme Court’s decision in *Group Health*; and (2) a decision of the Massachusetts Supreme Court in *Aspinall*, another light cigarettes case. *Id.* at \*3-4; Add. 18-19. Neither of these authorities remotely justifies the trial court’s ruling.<sup>3</sup>

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<sup>3</sup> The trial court also relied on *Peterson v. BASF Corp.*, 675 N.W.2d 57 (Minn. 2004) for the propositions that: (1) “it is the conduct of Defendants that is the pivotal point of focus under the Minnesota Consumer Fraud Act, not the conduct of individual consumers,” and (2) “a class member[’s] awareness of advertisements may provide a sufficient causal nexus.” *Id.* at \*2, \*3; Add. 17, 19. This reliance was misplaced, most fundamentally because *Peterson* involved the *New Jersey* Consumer Fraud Act, not the *Minnesota* Consumer Fraud Act. Moreover, *Peterson* did not address the propriety of class certification; nor was the question of factual predominance challenged on appeal by the defendant in that case. Thus, *Peterson* could not support the trial court’s ruling either.

*Group Health* did not even consider (much less authorize) the application of a presumption of causation in CFA class actions. That case involved a suit by health maintenance organizations (“HMOs”) alleging that they had sustained higher costs as a result of their beneficiaries’ use of tobacco products. The Supreme Court was asked to consider two narrow questions certified to it by the U.S. District Court for the District of Minnesota: (1) whether the HMOs had to be purchasers to sue under the CFA; and (2) whether the HMOs had to prove causation by “direct” reliance. After reaching the limited holding that proof of causation under the CFA need not be “direct,” *Group Health* expressly cautioned that it “decline[d] to answer in any greater detail based solely on the pleadings what manner of proof will be necessary” to prove causal nexus. 621 N.W.2d at 15. The question whether the HMOs were entitled to a presumption of causation was neither raised nor decided.

The trial court ignored this warning, seizing on a footnote in *Group Health* that contained a string of parenthetical descriptions of federal cases that had applied the Lanham Act, including one description of a case that held that “expenditure by a competitor of substantial funds in an effort to deceive consumers and influence their purchasing decisions justifies a presumption of actual confusion, and the burden shifts to the defendant to rebut that presumption.” *Group Health*, 621 N.W.2d at 15 n.11 (citing *U-Haul Int’l, Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1041 (9th Cir. 1986)). As other courts have recognized, the trial court’s reading of *Group Health* is simply wrong. Indeed, after the *Group Health* case returned to federal court, the U.S. District Court for the District of Minnesota rejected this reading of the Supreme Court’s ruling, holding that it “would

amount to a radical sea change in Minnesota consumer protection law” that could not possibly be justified by the “dubious proposition that footnote 11 in *Group Health*,” which merely listed “examples of a ‘variety of approaches’ which this Court might consider when assessing whether causation exists, somehow shifts the burden of proof on causation from Plaintiffs to Defendants.” *Group Health Plan, Inc. v. Philip Morris, Inc.*, 188 F. Supp. 2d 1122, 1126 (D. Minn. 2002) (rejecting plaintiffs’ reliance on the Supreme Court’s citation of *U-Haul International*).

The trial court’s reliance on foreign authority was likewise misplaced. While the *Aspinall* case considered similar allegations about light cigarettes and decided to apply the same presumption of causation adopted by the trial court in this case, *Aspinall* is not persuasive for a number of reasons. Most obviously, *Aspinall* is a Massachusetts case interpreting the Massachusetts consumer fraud statute, not the Minnesota statute. In any event, other courts have recognized that the vitality of *Aspinall* is open to serious question even under Massachusetts law. See, e.g., *Rule v. Fort Dodge Animal Health, Inc.*, --- F.3d ---, 2010 WL 2179794, at \*4 & n.5 (1st Cir. June 2, 2010) (noting that Massachusetts has moved away from its prior reasoning that deceptive advertising effects a per se injury on consumers); *Hershenow v. Enterprise Rent-A-Car Co.*, 840 N.E.2d 526, 535 (Mass. 2006) (effectively setting aside *Aspinall*).

Moreover, the weight of foreign authority is decidedly against the adoption of artificial presumptions of causation in cases like this one. Many jurisdictions have likened such presumptions to a theory that a “lengthy course” of conduct like the one alleged in this case produces a “fraud on the market” – a theory of causation that has been

rejected outside the securities context. In Illinois, for instance, courts have held that allegations of general deception of consumers based on the “market theory,” without more, are insufficient where plaintiffs were not directly deceived by the defendant’s advertisements or statements. *See, e.g., De Bouse v. Bayer AG*, 922 N.E.2d 309, 318-19 (Ill. 2009); *Avery v. State Farm Mut. Auto Ins. Co.*, 835 N.E.2d 801, 846 (Ill. 2005); *Shannon v. Boise Cascade Corp.*, 805 N.E.2d 213, 217 (Ill. 2004) (holding that “deceptive advertising cannot be the proximate cause of damages under [the consumer fraud statute] unless it actually deceives the plaintiff”). Similarly, courts in New Jersey have declined to accept “fraud on the market” theories as a causal nexus within the context of consumer fraud claims. *See, e.g., Int’l Union of Operating Eng’rs Local No. 68 Welfare Fund v. Merck & Co., Inc.*, 929 A.2d 1076, 1087-88 (N.J. 2007); *Kleinman v. Merck & Co., Inc.*, No. ATL-L-3954-04, 2009 WL 699939 (N.J. Super. Ct. Mar. 17, 2009). And New York courts have likewise agreed that market theories do not establish a “connection between the misrepresentation and any harm from, or failure of, the product.” *See, e.g., Small v. Lorillard Tobacco Co., Inc.*, 94 N.Y.2d 43, 56 (N.Y. 1999).

Here, it was similarly illogical for the trial court to conclude that plaintiffs’ allegations of a “lengthy course” of conduct justified a presumption of classwide causation. The mere existence of an advertising campaign – even a long-running and far-reaching one – does not justify the assumption that every purchase of the advertised product resulted from the campaign. Other courts applying the CFA have agreed. *See, e.g., Tuttle v. Lorillard Tobacco Co.*, 377 F.3d 917, 923, 926-27 (8th Cir. 2004) (holding that plaintiff failed to prove reliance and “reliance cannot be presumed in this case”

despite citation of widely published representation allegedly made by defendant because there was no evidence plaintiff's decedent had seen the representation) (citing, *inter alia*, *Group Health*, 621 N.W.2d at 11). Because the trial court's finding of predominance was premised on its erroneous presumption that defendants' alleged conduct uniformly affected the class, that finding was in error, and the trial court's class certification decision should be reversed.

**B. The Trial Court Further Abused Its Discretion By Barring Defendants From Offering Evidence At The Class Certification Stage To Rebut Its Invented Presumption.**

Although defendants attempted to rebut the trial court's presumption of uniform causation by offering evidence that some class members relied on statements by nonparties (such as health groups and governmental entities) in deciding to purchase light cigarettes – and *not* on statements by defendants – the trial court refused to consider such evidence at class certification, calling it “a fact issue” for trial. *Curtis*, 2004 WL 2776228, at \*2, Add. 17. This too was error.

The trial court's holding appears to reflect an overly wooden application of the rule that a court should not decide merits issues in determining whether a class should be certified. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). Contrary to the trial court's apparent assumption that it had to remain blind to all “fact” issues until trial, the vast majority of courts – including this one – have recognized that some inquiry into the merits of a case is appropriate at the class certification stage. *See Blades v. Monsanto Co.*, 400 F.3d 562, 569 (8th Cir. 2005) (class certification inquiry “necessarily requires an examination of the underlying elements necessary to establish liability for plaintiffs’

claims”). Indeed, this Court has held that a trial court is “require[d]” to “resolve factual disputes relevant to rule 23” at the class certification stage. *Whitaker v. 3M Co.*, 764 N.W.2d 631, 638 (Minn. Ct. App. 2009) (emphasis added). As the U.S. Court of Appeals for the Third Circuit has recognized, such an inquiry is particularly important in determining whether common factual issues predominate because a trial court must “formulate some prediction as to how specific issues will play out” at trial “in order to determine whether common or individual issues predominate in a given case.” *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3d Cir. 2008) (citations and internal quotation marks omitted). Thus, “[a]n overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met.” *Id.* at 316.

In *Whitaker*, for example, the plaintiffs sought to represent a class of Minnesota employees of 3M in a case alleging a pattern and practice of age discrimination. *Id.* at 633. In arguing that common issues predominated, plaintiffs relied largely on analyses by their experts that purported to find “statistically significant disparities in the treatment of 3M employees under the age of 46 versus those 46 and older.” *Id.* at 634. 3M opposed certification, arguing that the statistical analyses were flawed for a variety of reasons and that proper analyses showed no disparity in treatment and no pattern of discrimination. *Id.* The trial court “declined to resolve the dispute,” explaining that while “3M disputes the analysis conducted by [respondents’] expert, the court finds that sufficient statistical evidence has been presented to suggest that the data presents

common questions for a class-wide pattern or practice trial.” *Id.* at 634-35. This Court reversed, holding that the trial court abused its discretion by refusing to consider 3M’s evidence that the issues were individualized. Following the majority of federal decisions on the issue, the Court explained “that the prohibition against merits-related inquiries does not apply when class-certification issues overlap with the merits.” *Id.* at 636. Accordingly, the trial court erred “both by failing to require proof of rule 23 certification requirements by a preponderance of the evidence and by failing to resolve factual disputes relevant to class-certification requirements.” *Id.* at 639.

For these reasons, it was not only proper, but also necessary, for the trial court to consider evidence at the class certification stage that individual plaintiffs did not, in fact, rely on defendants’ advertisements. The U.S. Court of Appeals for the Eighth Circuit made precisely this point in applying the *Group Health* ruling to a putative class action alleging CFA claims concerning medical devices manufactured by St. Jude Medical. *See In re St. Jude Med., Inc.*, 522 F.3d 836 (8th Cir. 2008). There, the court explained that, even if *Group Health* “does not require the plaintiffs to present direct proof of individual reliance, *Group Health* surely does not prohibit [the defendant] from presenting direct evidence that an individual plaintiff (or his or her physician) did not rely on representations from [the defendant].” *Id.* at 840. In light of the evidence proffered by the defendant in opposition to class certification, the *St. Jude* court found it “clear that resolution of [the defendant’s] potential liability to each plaintiff under the consumer fraud statutes will be dominated by individual issues of causation and reliance” and denied certification. *Id.*

Here, the record before the trial court established that consumers held a variety of beliefs concerning Marlboro Lights cigarettes and that advertising was not the sole reason that consumers chose to smoke Marlboro Lights. (*See, e.g.*, Br. & Addendum Of Resp. & Cross-Appellant Philip Morris USA Inc. at 44-46.) Indeed, defendants had evidence that *three out of four class representatives continued to smoke Marlboro lights even after filing their lawsuit*. The trial court's refusal to consider this evidence made its "presumption" of causation irrebuttable at the class certification stage. This was an error of constitutional dimension. *Cf., e.g., Vlandis v. Kline*, 412 U.S. 441, 446 (1973) (holding that statutes "creating permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments" of the U.S. Constitution because it is "arbitrary and unreasonable" to presume something is true when there is evidence that it is not); *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) ("Due process requires that there be an opportunity to present every available defense.") (quoting *American Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932)).<sup>4</sup>

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<sup>4</sup> One court, denying class certification in a tobacco consumer fraud class action, aptly explained the problem as follows: "[s]ome plaintiffs may have been bombarded by tobacco propaganda while others may have never seen a cigarette ad or paid little or no attention to such ads. Additionally, each member's reliance on those purported misstatements varies. Each class member began smoking for different reasons. Some may have been influenced by peer pressured individual interests. Even if they began smoking due to deceptive advertising, more than likely not all of the members were subject to the same advertising, were exposed to it for the same amounts of time, and were influenced by it in the same manner." *Guillory v. Am. Tobacco Co.*, No. 97 C 8641, 2001 WL 290603, at \*8 (N.D. Ill. Mar. 20, 2001).

For these reasons, the trial court abused its discretion in certifying a class, and this Court should reverse the trial court's class certification order if summary judgment is not upheld.

**II. THE CLASS CERTIFICATION DECISION COULD HAVE DETRIMENTAL CONSEQUENCES FOR BUSINESS AND THE PUBLIC AT LARGE.**

The trial court's class certification decision also has troubling policy implications. Specifically, the decision threatens to: (1) promote abuse of the class action device, thereby eroding the efficiency of the judicial system; and (2) disrupt business and the free flow of commerce.

*First*, the trial court's ruling invites abuse of the class action device, to the detriment of both litigants and Minnesota courts. By granting a presumption of causation to any CFA plaintiff who is willing to claim a "lengthy course" of alleged misconduct, the trial court's ruling will encourage the filing of baseless class actions on behalf of large groups of product purchasers who never, in fact, relied on a defendant's advertisements.

Such lawsuits have no social value. For one thing, they create tremendous settlement pressure on defendants, regardless of the merits of a case, simply because an unfavorable ruling – no matter how misguided – could translate into substantial liability. *See, e.g., In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (stating that defendants in a class action lawsuit "may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle."). Of course, not every defendant will have to settle; some – like defendants here – may choose to defend a class suit on the

merits. But not every defendant will be able to afford such a path. “Following certification, class actions often head straight down the settlement path because of the very high cost for everybody concerned, courts, defendants, plaintiffs of litigating a class action . . . .” Bruce Hoffman, Remarks, *Panel 7: Class Actions as an Alternative to Regulation: The Unique Challenges Presented by Multiple Enforcers and Follow-On Lawsuits*, 18 Geo. J. Legal Ethics 1311, 1329 (2005) (panel discussion statement of Bruce Hoffman, then Deputy Director of the Federal Trade Commission’s Bureau of Competition). As a result, “certification is the whole shooting match,” David L. Wallace, *A Litigator’s Guide to the ‘Siren Song’ of ‘Consumer Law’ Class Actions*, LJM’s Product Liability Law & Strategy (Feb. 2009), and defendants faced with improvidently certified, meritless lawsuits often are forced to settle before trial. The effect of the trial court’s decision would thus be to impose a penalty on any defendant that is alleged to have engaged in a lengthy course of conduct – a policy decision of dubious constitutionality that in any event could only belong to the Legislature.

The courts, too, will pay a price. By eliminating causation as an element to be considered in deciding class certification, the trial court’s ruling could turn Minnesota into a magnet jurisdiction for plaintiffs’ lawyers seeking to file large, frivolous class actions. These unmanageable and meritless suits would crowd out legitimate legal grievances, raising the overall costs of litigation and jeopardizing the fairness of the legal system. See *Schweitzer v. Consol. Rail Corp.*, 758 F.2d 936, 942 (3d Cir. 1985) (noting that “windfalls” awarded to plaintiffs bringing frivolous claims may cause those who actually suffered injury to receive “insufficient compensation”).

*Second*, by promoting frivolous consumer fraud class actions, the trial court's class certification decision threatens to drive up the costs of business and disrupt the free flow of commerce. In this respect, consumers – the ostensible beneficiaries of consumer fraud lawsuits – would, in fact, be the losers. After all, they are the ones who would be forced to pay higher prices at the grocery store and the shopping mall in order to cover the costs incurred by companies in defending themselves against baseless claims. See T. Perrin, 2009 UPDATE ON U.S. TORT COSTS TRENDS 3 (2009), available at [http://www.towersperrin.com/tp/getwebcachedoc?webc=USA/2009/200912/2009\\_tort\\_trend\\_report\\_12-8\\_09.pdf](http://www.towersperrin.com/tp/getwebcachedoc?webc=USA/2009/200912/2009_tort_trend_report_12-8_09.pdf) (reporting that the tort-lawsuit industry cost Americans \$254.7 billion in 2008).

For these reasons, lawsuits proceeding on artificially constructed theories of causation ultimately serve one constituency only – the plaintiffs' bar. As one commentator has warned, “[W]hen the consumers themselves have never relied on a manufacturer's misrepresentation, have never independently sought redress, and likely will never receive meaningful benefit from a suit (although their lawyers stand to make millions of dollars), these class actions become more akin to corporate blackmail than consumer protection.” Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiff(s) to Allege Reliance as an Essential Element*, 43 Harv. J. on Legis. 1, 2 (2006).

### **CONCLUSION**

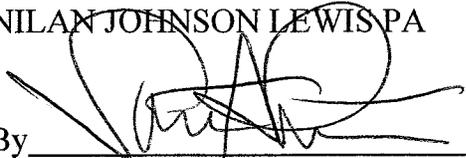
For the foregoing reasons, and the reasons stated by the defendants, the trial court erred in certifying the plaintiff class. Accordingly, if the Court reinstates any of

plaintiffs' claims, it should reverse the trial court's class certification decision and remand with instructions to decertify the class.

Dated: June 28, 2010

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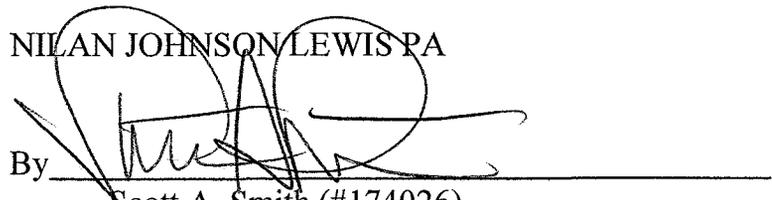
**CERTIFICATE OF COMPLIANCE**

The undersigned counsel certifies that this brief complies with the requirements of Minn. R. Civ. P. 132.01, subd. 3(c) in that it is printed in a 13 point, proportionately spaced typeface, and contains 4,483 words, excluding the Table of Contents and Table of Authorities. The brief was prepared using Microsoft Word 2003.

Dated: June 28, 2010

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A handwritten signature in black ink, appearing to read "Scott A. Smith", is written over a horizontal line. The signature is somewhat stylized and overlaps the text "NILAN JOHNSON LEWIS PA" above it.

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