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NO. A10-0215

State of Minnesota
In Court of Appeals

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

Appellants,

vs.

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

Respondents.

REPLY BRIEF OF RESPONDENT AND CROSS-APPELLANT PHILIP MORRIS USA INC.

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INTRODUCTION

The class certified here has hundreds of thousands of members, spans decades, and covers millions of transactions. In each of those transactions, a class member made an individual decision to purchase Lights. The undisputed evidence showed, and the trial court found, that those individual decisions were made for many different reasons. (R. Add. 10.) Many purchased Lights because they preferred the taste. Others did so because friends or family smoked Lights. Some did so because they wanted a cigarette with lowered tar and nicotine. And so on. Indeed, many purchased Lights knowing about the allegations here – such as the three class representatives who continued to purchase Lights even after filing this complaint. (R.A. 386-87, 425, 540.)

In addition, each class member smoked Lights in a unique way, and as a result, obtained a unique amount of tar and nicotine, as the undisputed evidence showed, and the trial court found (R. Add. 8). Many individual smokers who switched from Reds to Lights received less tar and nicotine after switching to Lights.

Each class member purchased different amounts of Lights, for different prices, over different periods of time stretching as far back as 1971, as the trial court observed. (R. Add. 11.)

One thing remained constant, however. Notwithstanding Plaintiffs' contention that class members suffered an economic loss by purchasing a light

cigarette that was allegedly no different than Reds, the price of Lights was always the same as the price of Reds during the entire thirty-three year class period.

Plaintiffs do not dispute these points or the trial court's factual findings in its initial order denying certification. Yet these undisputed facts demonstrate that individual issues predominate – including as to whether an individual received lowered tar (in which case the individual could not have been subjected to a misrepresentation or have suffered an injury), whether the individual believed and relied upon the purported misrepresentation, whether the individual suffered an economic loss as a result, and the amount of damages, if any, suffered by that class member.

As PMUSA described in its opening brief, courts across the country have declined to certify purported Lights class actions for these precise reasons, finding that individual issues overwhelmingly predominate over common ones. (RB 38-40 & nn.16-17.)[1] Plaintiffs make no attempt to distinguish those cases, or to explain why the result here should differ – particularly when every federal court has ruled that Lights classes cannot be certified and when Minnesota's Rule 23 is "intended to produce consistent results" with Federal Rule 23. *Whitaker v. 3M Co.*, 764 N.W.2d 631, 635 (Minn. Ct. App. 2009).

The same result should obtain here. The trial court reached the correct conclusion in its initial order. Its subsequent grant of certification, based not on

[1] New abbreviated record citations in this brief are as follows. RB = Respondent PMUSA's Opening Brief. AR = Appellants' Response and Reply Brief.

considered changes of its prior factual findings but rather on misreadings of *Group Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2 (Minn. 2001), *Peterson v. BASF Corp.*, 675 N.W.2d 57 (Minn. 2004), *cert. granted, vacated*, 544 U.S. 1012 (2005), *aff'd on remand*, 711 N.W.2d 470 (Minn. 2006), and one inapposite out-of-state case, was clear legal error, and, as such, an abuse of discretion.

In attempting to defend the certification order, Plaintiffs seek to minimize the significance of these myriad individual issues by making irrelevant merits-based conduct allegations, and misstating the standard of review and the elements of consumer protection claims brought under Minn. Stat. § 8.31, the "Private AG Statute." Should this Court reinstate any of Plaintiffs' claims, it should remand with instructions to decertify the class, and to limit the individual plaintiffs' statutory claims to transactions within the six-year statute of limitations.

ARGUMENT

I. THE TRIAL COURT ERRED IN CERTIFYING THE CLASS

A. Plaintiffs Misstate The Standard Of Review

While the parties agree that the standard of review is abuse of discretion, Plaintiffs misconstrue how that standard applies here. Plaintiffs contend that "[t]he facts regarding class certification are to be viewed in a light most favorable to the trial court's ruling," suggesting that this Court must accept as true Plaintiffs' "factual outline" of alleged misconduct provided at pages two through seven of their brief. (AR 2.) But Plaintiffs' supporting authority, *Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. Ct. App. 2000), is irrelevant. *Vangsness* involved a custody battle, not a class action, and the portion of the decision Plaintiffs cite concerns the standard of review of a trial court's decision on a new trial motion, not on class certification. *Id.* at 471-72.

Contrary to Plaintiffs' suggestion, this Court reviews the trial court's certification decision to determine whether the trial court "address[ed] and resolve[d] factual disputes relevant to class-certification requirements," and whether the trial court applied the correct standard and found that plaintiffs met the Rule 23 certification standards by a preponderance of the evidence. *Whitaker*, 764 N.W.2d at 640. The trial court here, based on the submitted evidence, addressed and resolved factual disputes, making specific factual findings in its initial order denying certification. (R. Add. 8-11.) All of those factual findings demonstrated that individual issues predominated such that certification under

Rule 23 was inappropriate. (*Id.* at 11.) The court's order granting Plaintiffs' motion for reconsideration, by contrast, did not make different factual findings based on the evidence before it. (R. Add. 16-20.) Indeed, to the extent the court addressed its prior findings at all, it *confirmed* that the evidence showed individuals decided to smoke Lights for reasons other than PMUSA's alleged misrepresentations. (R. Add. 17.) Plaintiffs' lengthy and irrelevant discussion of alleged misconduct has no connection to Rule 23 requirements or the trial court's rulings on certification. *See In re Initial Public Offering Securities Litig.*, 471 F.3d 24, 41 (2d Cir. 2006) (cited with approval in *Whitaker*, 764 N.W.2d at 636) (in determining class certification, the court "should not assess any aspect of the merits unrelated to a Rule 23 requirement"). The trial court's factual findings of variability among class members unequivocally support reversal of the certification order.[2]

B. Individual Issues Overwhelmingly Predominate, Mandating Reversal Of The Trial Court's Class Certification Order

1. The Trial Court Erred In Concluding That Reliance Could Be Presumed

As *Whitaker* instructs, "courts must analyze rule 23 certification requirements with specific reference to the cause of action asserted in a particular

[2] Plaintiffs understate their burden to establish predominance by conflating Rule 23.01's commonality and typicality requirements with 23.02(c)'s predominance requirement. (AR 20 n.9.) While the presence of a single common question may suffice to establish commonality under Rule 23.01, predominance is an exacting standard that requires far more than establishing commonality and typicality. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997) ("predominance criterion is far more demanding" than commonality requirement).

case." 764 N.W. at 638. Here, the cause of action is a Private Attorney General suit for consumer fraud. A plaintiff using the Private AG Statute to pursue a claim for statutory fraud must prove causation. *Group Health*, 621 N.W.2d at 13. Where, as here, plaintiffs allege fraudulent statements, causation requires proof of "*reliance* on those statements" because "it is not possible that the damages could be caused by a violation *without reliance*" – *i.e.*, without proof that plaintiffs believed the statements and bought the product as a result of that belief. *Id.* (emphasis added).

The trial court made the specific factual finding, based on the undisputed record evidence, that class members decided to smoke Lights for various reasons. (R. Add. 10.) The trial court thus concluded that "[w]hether a class member decided to smoke Marlboro Lights because of any representation made to them by Philip Morris, or decided to smoke them due to other reasons, is an individual issue unique to that class member. Determining that issue would require individual inquiries of each class member." (*Id.*)

In reversing itself, the trial court did not reassess the evidence or change its prior factual findings. Rather, its reversal was based on the erroneous legal conclusion that, under *Group Health*, *Peterson*, and *Aspinall v. Philip Morris*

Cos., 813 N.E.2d 476 (Mass. 2004), reliance may be presumed based solely on Plaintiffs' allegations of misrepresentations. (R. Add. 18-19.)[3]

Plaintiffs do not dispute the trial court's factual finding in its initial order or the supporting evidence. (RB 45-46 (summarizing record evidence).) Instead, Plaintiffs essentially argue – under the guise of "relax[ing]" the elements for consumer fraud – that they need not prove causation or reliance at all. (AR 22.) Plaintiffs claim that PMUSA's advertisement of Lights as "light" and containing "lowered tar" suffices to show that each of the estimated hundreds of thousands of class members believed Lights were safer and purchased Lights in reliance on those statements – in other words, that causation and reliance may be presumed without any supporting evidence. Plaintiffs' erroneous argument rests on misreadings of *Group Health* and *Peterson.*[4]

Group Health - As PMUSA explained (RB 48), *Group Health* merely noted that, in some circumstances, plaintiffs may rely on "other direct or circumstantial evidence" to satisfy their *prima facie* showing of reliance. 621 N.W.2d at 14. *Group Health* did not establish that a court can certify a class in the

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[3] This point, which PMUSA articulated in its opening brief (RB 47), is but one example demonstrating why Plaintiffs' claim that "PM does not point to improper application of the law" (AR 19) is flatly incorrect.

[4] Plaintiffs do not cite *Aspinall* in their reliance argument (AR 22-23), apparently recognizing that because the Massachusetts statute, unlike Minnesota's, lacks a reliance requirement, 813 N.E.2d at 486, *Aspinall* cannot support a conclusion that causation and reliance do not present predominating individual issues in this case. The trial court's reliance on *Aspinall* to support its conclusions on causation and reliance, as PMUSA explained (RB 48 n.22), was clear error.

face of unchallenged contradictory evidence showing a diversity of consumer purchasing motivations, or foreclose defendants' ability to defend themselves by demonstrating that a plaintiff did not rely, or permit a plaintiff who could not show reliance through any means to obtain recovery. To the contrary, *Group Health* was unequivocal that plaintiffs "could not have relied on the misconduct" – and thus are not entitled to any relief – "if they were not misled or deceived." *Id.* at 12; *accord Weigand v. Walser Auto. Groups, Inc.*, 683 N.W.2d 807, 812 (Minn. 2004) ("reliance is a component of the causal nexus requirement for a private consumer fraud class action").

Peterson - Similarly, *Peterson* did not hold that reliance may be presumed, for purposes of a § 8.31 claim, based solely on allegations of misrepresentations.[5] As an initial matter, *Peterson* concerned alleged violations arising under the New Jersey Consumer Fraud Act, not the Minnesota statutes at issue here. 675 N.W.2d at 60-61. *Peterson* interpreted the New Jersey statute as "not requir[ing] a showing of reliance." *Id.* at 72. By contrast, as noted above, the Minnesota

[5] Plaintiffs erroneously state that this Court, in denying Plaintiffs' petition for discretionary review of the initial decision denying certification, directed the trial court to reconsider its denial in light of *Peterson.* (AR 16.) Rather, the Court's Order merely noted that one reason why interlocutory review was inappropriate was that the trial court had not had the opportunity to address Plaintiffs' arguments about *Peterson.* (Supp. Add. 2.) The Order did not suggest that those arguments were correct. (*Id.*) In a similar misreading of the record, Plaintiffs imply that the trial court in 2009 denied a motion by PMUSA for reconsideration of class certification. (AR 17.) No motion was filed or ruled upon; the trial court simply declined to permit filing a motion to decertify at that point in the proceedings. (R.A. 54-58.)

Supreme Court has unequivocally held that the Minnesota statute requires a showing of reliance. *Group Health*, 621 N.W.2d at 13. The Supreme Court reaffirmed its holding in *Weigand*, a case it decided *after Peterson*. *Weigand*, 683 N.W.2d at 812.

The procedural posture of *Peterson* was also different. *Peterson*'s opinion concerning the causal nexus requirements under New Jersey law was not expressed in the context of class certification and did not involve the *Whitaker* class certification standard. (The court held the defendant waived its class certification arguments. (*Id.* at 68.)) Rather, the court was reviewing the denial of a JNOV motion to determine whether "there is any competent evidence reasonably tending to sustain the verdict" viewed "in the light most favorable to the nonmoving party." *Id.* at 71.

Furthermore, the facts in *Peterson* were radically different from those here. Those facts, viewed in light of *Peterson's* procedural posture, demonstrate that *Peterson* actually supports decertification in this case. *Peterson* involved a class of farmers who grew specialty crops such as sugar beets. *Id.* at 60-61. The defendant BASF sold two pesticides, Poast and Poast Plus, which were both EPA-approved for use on 60 crops, including major crops and specialty crops. *Id.* at 62. But BASF marketed Poast (which sold for $4 more per acre) for use on all 60 crops, and marketed Poast Plus for use on only four major crops. *Id.* Plaintiffs claimed BASF deceived them into purchasing the more expensive Poast for their specialty crops instead of the cheaper and equally effective Poast Plus. *Id.* at 60-

61. After BASF's actions were exposed, the price and volume of sales of Poast declined. *Id.* at 73. The court, reviewing this evidence in the light most favorable to the plaintiffs, held that BASF's failure to inform farmers that Poast Plus could be used on specialty crops, and that the price and sales of Poast declined after BASF's deception was publicized, was sufficient to sustain the jury's verdict as to causation. *Id.* at 73-74.

In sum, in *Peterson*, the trial evidence – viewed in the light most favorable to the plaintiffs – was sufficient for the court to infer that no farmer would have purchased Poast if he had known he could have obtained the same product for $4 less per acre by purchasing Poast Plus, and therefore that all the farmers relied on BASF's concealment of that fact.[6]

Here, by contrast, the evidence on certification showed that a substantial percentage of individual smokers chose to purchase Lights for various reasons having nothing to do with representations of lowered tar. In addition, unlike *Peterson*, the price of Lights has always been the same as Reds, and the price of Lights did not decline – and its market share *grew* – after plaintiffs' allegations were made public. (RB 45-46; R. Add. 10.) That evidence demonstrated the

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[6] *Peterson* thus belongs to a category of cases where courts conclude that causation and reliance are satisfied because the record demonstrates no person would engage in the transaction with knowledge of the truth. *See, e.g.*, *Klay v. Humana, Inc.*, 382 F.3d 1241 (11th Cir. 2004) (affirming certification notwithstanding reliance requirement because no doctor would work for free). Reversal of the trial court's certification decision here will have no bearing on the certification of those types of consumer fraud cases or others where, unlike here, the proofs are common and classwide.

impossibility here of classwide reliance, unlike *Peterson*. Far from aiding Plaintiffs' position, *Peterson* provides additional grounds why the class here was improperly certified.

That *Peterson* does not support certification here is reinforced by *Stern v. Philip Morris USA, Inc.*, 2007 WL 4841057 (N.J. Super. Ct. 2007), in which a New Jersey court, considering the same statute at issue in *Peterson*, concluded that individual questions of reliance precluded certification of a Lights class action:

> Whether a class member decided to smoke Marlboro Lights due to a representation made to them by defendant, or decided to smoke them due to other reasons, is an individual issue unique to that class member. Determining that issue would require individual inquiries of each class member. Plaintiffs must prove a causal nexus between defendant's alleged misrepresentation and any ascertainable loss. Since there are many non-health related reasons why people purchased light cigarettes, defendant shall be permitted to individually inquire why that class member chose Marlboro Lights, i.e., was the reason motivated by taste, habit, personal preference, peer influence or health related reasons?

2007 WL 4841057, at 9.

Moreover, *Peterson*'s discussion of the evidence of classwide reliance relied heavily on *Varacallo v. Massachusetts Mutual Life Insurance Co.*, 752 A.2d 807, 817-19 (N.J. Super. A.D. 2000). *See Peterson*, 675 N.W.2d at 73. *Stern* expressly distinguished *Varacallo* from the facts in Lights cases:

> The court in *Varacallo* did in fact apply a presumption of causation and reliance; however, in doing so the court found that it was inconceivable that more than a very small number of class members would have purchased defendant's insurance policy rather than a competitor's policy if they had known the truth underlying defendant's alleged deception.

> The *Varacallo* case differs from the situation involving consumers' reasons for purchasing Marlboro Lights. The evidence in this case has shown that many smokers choose light cigarettes, including Marlboro Lights, for reasons unrelated to any deception about comparative safety or tar and nicotine deliveries.

2007 WL 4841057, at 10.

As countless courts have recognized, in Lights and other cases, where, as here, there are many reasons for consumer purchasing decisions, presumptions cannot be invoked for class certification, and reliance cannot be proved on a common basis. *See, e.g., McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 223, 225 & n.7 (2d Cir. 2008); *Stern*, 2007 WL 4841057; *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 658, 666-67 (9th Cir. 2003); *Unger v. Amedisys, Inc.*, 401 F.3d 316, 321 (5th Cir. 2005); *In re Ford Motor Vehicle Paint Litig.*, 182 F.R.D. 214, 220-22 (E.D. La. 1998); *Anderberg v. Masonite Corp.*, 176 F.R.D. 682, 685 (N.D. Ga. 1997).

Indeed, Plaintiffs' argument would lead to absurd results. Under their view of the law, class members who bought Lights for reasons other than PMUSA's alleged misrepresentations, or who did not believe Lights delivered lowered tar and nicotine, would nonetheless recover money from PMUSA. There are countless thousands of such individuals – including three of the named plaintiffs, who continued to purchase Lights after filing this case.[7]

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[7] Courts across the country have repeatedly rejected statutory fraud and other deception claims asserted by plaintiffs who continued to purchase the defendant's products or services even after learning of the defendant's allegedly fraudulent

Finally, Plaintiffs and the trial court also ignored that, even if (contrary to the legal standard) Plaintiffs themselves were not required to show reliance, PMUSA has a due process right to defend itself by introducing evidence of individual non-reliance. The trial court recognized that PMUSA had this right (R.Add. 17-19), but committed legal error by failing to conclude that exercise of this right necessarily meant reliance could not be adjudicated on a class-wide basis. *See In re St. Jude Med., Inc.*, 522 F.3d 836, 840 (8th Cir. 2009); *Buetow v. A.L.S. Enters., Inc.*, 259 F.R.D. 187, 191 (D. Minn. 2009); *In re Zurn Pex Plumbing Prods. Liab. Litig.*, 267 F.R.D. 549, 561-62 (D. Minn. 2010).

2. Whether Class Members Received Less Tar And Nicotine Presents Individual Issues

Based on the undisputed record evidence, the trial court made the finding of fact that "[w]hether or not a class member garnered the benefits of low tar and nicotine from Marlboro Lights . . . depends upon the manner in which that class member smoked them." (R. Add. 8.) Consequently, the trial court concluded that Plaintiffs could not establish the existence of a misrepresentation or injury without an individual inquiry to determine "the manner in which each class member

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conduct. *Siegel v. Shell Oil Co.*, __ F.3d __, 2010 WL 2977315, at *4 (7th Cir. 2010); *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 903 F.2d 176, 179 (2d Cir. 1990); *Bass v. Prime Cable of Chi., Inc.*, 674 N.E.2d 43, 51-52 (Ill. App. 1996); *Solomon v. Bell Atl. Corp.*, 9 A.D.3d 49, 52, 55 (N.Y. App. 2004). Continued purchase of the product after learning of the alleged deception also prevents plaintiffs from proving reliance on any alleged misrepresentations. *See, e.g.*, *Allgood v. R.J. Reynolds Tobacco Co.*, 80 F.3d 168, 171-72 (5th Cir. 1996); *In re Ford Motor Vehicle Paint Litig.*, 182 F.R.D. at 221.

smoked Marlboro Lights" in order to establish "whether they received less tar and nicotine." (*Id.*)

In reversing itself, the trial court did not alter these factual findings. Instead, it simply stated that it "agree[d] with the [*Aspinall*] decision" in which the Massachusetts court speculated that it was unaware of a test that could measure actual tar and nicotine levels received by a smoker. (R. Add. 20.)

As PMUSA explained, this was legal error. (RB 53-54.) The trial court was required to make its own factual findings as to whether individual issues predominated based on the evidence before it. It was not free to cast aside its own findings based on the unsupported speculation of the Massachusetts court. *Whitaker*, 764 N.W.2d at 638 (plaintiffs must establish all Rule 23 elements "by a preponderance of the evidence"; this standard "requires the district court to resolve factual disputes relevant to rule 23 certification requirements"). Nor was it free simply to eliminate a critical element of Plaintiffs' proof based on *Aspinall's* speculation that Plaintiffs would not be able to prove that element, particularly where the evidence showed that, on average, Lights smokers receive less tar and nicotine. (RB 52.)[8] Plaintiffs' opposition quotes *Aspinall* but fails to address any

[8] Plaintiffs erroneously claim that PMUSA did not identify "any unresolved factual disputes," and that PMUSA listed "factual disputes it believes the trial court erroneously resolved." (AR 19.) To the contrary, PMUSA pointed out that the trial court *correctly* resolved factual questions in its initial order, then improperly cast those findings aside in its second order based upon its misreading of foreign decisions and Minnesota law. The court did not go back and make contrary findings based on a reinterpretation of the evidence before it (nor could it have done so based on that evidence).

of the arguments PMUSA raised as to why it was improper for the trial court to rely on *Aspinall.*[9]

Many smokers receive less tar and nicotine when smoking Lights. Those smokers receive what was allegedly promised – lower tar and nicotine – and therefore cannot have received a misrepresentation or suffered injury.[10] Yet Plaintiffs argue that it is "irrelevant" whether any class member actually received lower tar and nicotine "because [PMUSA] promised smokers lower tar and nicotine from Marlboro Lights and under the [Minnesota Consumer Fraud Act] the tort is complete when the misrepresentation is made." (AR 23.)

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[9] As PMUSA noted (RB 40 n.18), Massachusetts did not subscribe at the time of the *Aspinall* decision to the predominance standard imposed by *Whitaker*, *see Aspinall*, 813 N.E.2d at 484-85, nor did the *Aspinall* court have a record comparable to the one presently before this Court, *see id.* at 494-95 (noting absence of record evidence) (dissenting opinion).

[10] Plaintiffs' brief distorts and miscites the record evidence in attempting to demonstrate that PMUSA concluded that Lights delivered as much tar and nicotine as Reds. (*E.g.*, AR at 3-4.) For example, Plaintiffs cherry-pick a single 1975 memorandum from PMUSA's Human Smoking Simulator ("HSS") studies, which spanned from the mid-1970s into the 1980s. (AR at 3.) That memorandum reported on a study of five smokers who switched from Reds to Lights, measuring only nine cigarettes they smoked of each brand over a four-week span. The study found that 40% (two of five) received less tar and nicotine after switching to Lights. (*See* June 9, 2009 PMUSA Letter Brief to Hon. Richard Solum, Exh. D at 1000735513.) Moreover, while that particular study is far too limited to permit the broad generalizations that Plaintiffs seek to draw from it, Plaintiffs neglect to mention that the multitude and variety of studies conducted during the course of PMUSA's HSS program strongly support the conclusion that Marlboro Lights smokers receive less tar and nicotine than smokers of full-flavored cigarettes. *See, e.g.*, *id.* Exh. E; *Mulford v. Altria Group, Inc.*, 242 F.R.D. 615, 626 n.7 (D.N.M. 2007).

Plaintiffs' argument makes no sense, and flatly misstates the relevant legal standard. If a class member actually received lower tar and nicotine, he or she received what was allegedly promised, no misrepresentation occurred and that class member has no claim. In any event, Plaintiffs do not and cannot bring claims under the Minnesota Consumer Fraud Act, which itself does not provide a private right of action; Plaintiffs bring claims under the Private AG Statute, under which Plaintiffs must prove not only that a misrepresentation was made but that the misrepresentation caused injury to Plaintiffs. *Group Health*, 621 N.W.2d at 13; Minn. Stat. § 8.31, subd. 3a (only persons "injured by a violation" are entitled to recover). A class member who received what was promised – lowered tar and nicotine – cannot have suffered an injury. *See Stern*, 2007 WL 4841057, at 11 ("If any [class] member did in fact get less tar and nicotine from Marlboro Lights, then that person suffered no injury. Consequently, defendant's alleged misrepresentations would not have been false as to that person; thus the person could not have been deceived by defendant's alleged misrepresentation. Such a member would have received precisely what they bargained for at the agreed upon price.").

Plaintiffs also cite the inapposite *Craft* decisions from Missouri, which were not a basis for the trial court's decision. In *Craft*, the court of appeals held that the plaintiffs' claims *as alleged* were not based on whether they failed to receive lowered tar and nicotine, so the issue of tar and nicotine delivery was treated as irrelevant in the court of appeals' class certification analysis. *Craft v.*

Philip Morris Cos., 190 S.W.3d 368, 382 (Mo. Ct. App. 2005). This is because the Missouri court of appeals followed the principle that in determining whether a case should be certified as a class action, the court only considers the allegations of the complaint, and does not consider whether those allegations state a cause of action. *Id.* Here, by contrast, Minnesota law, like federal law, requires inquiry at the class certification stage into the proof necessary to prove a cause of action at trial in order to determine whether that proof is individualized. *Whitaker*, 764 N.W.2d at 637-38. Whether Plaintiffs received lowered tar and nicotine is a critical element of their claims. Moreover, the evidence here was undisputed that some class members do not receive as much tar and nicotine from Lights as they would from full-flavor cigarettes. This evidence has been noted by numerous courts that have declined to certify Lights claims. *See, e.g., Mulford v. Altria Group, Inc.*, 242 F.R.D. 615, 627 (D.N.M. 2007) ("[A] significant number of persons in the purported class received the promised lower tar and nicotine from Marlboro Lights cigarettes," and thus "evidence regarding each purported class member's smoking habits must be submitted in order to demonstrate causation and loss."); *Pearson v. Philip Morris, Inc.*, 2006 WL 663004, at *7 (Or. Cir. Ct. 2006) ("on average," Lights smokers receive less tar and nicotine); *Philip Morris USA Inc. v. Hines*, 883 So. 2d 292, 294-95 (Fla. Ct. App. 2003) ("whether or not a smoker reaped the benefits of a lower tar and nicotine cigarette depended upon how the cigarettes were smoked"). Plaintiffs' bald, unsupported claims that

"PM's misrepresentation injured all class members the same way" (AR at 24) have no support in the record.[11]

3. Individual Issues Predominate Concerning Proof Of Injury

As PMUSA explained in its opening brief, because the only possible common loss that could be tried on a class-wide basis 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. (RB 55-57.) *Plaintiffs do not address this point at all – they make no attempt to explain how they could establish injury on a common basis with no price differential.* (This is another reason *Peterson* does not support certification here; in *Peterson*, there was a $4 price differential, which decreased after the farmers learned of the deception. 675 N.W.2d at 73-74.) Plaintiffs instead focus only on whether individual proof of *damages* can defeat class certification. However, proof of the existence of injury and proof of the amount of damages are

[11] Plaintiffs also cite in support *Price v. Philip Morris Inc.*, 2003 WL 22597608 (Ill. Cir. 2003), *rev'd*, 848 N.E.2d 1 (Ill. 2005). Plaintiffs neglect to mention, however, that in *Price*, after the trial court certified a class, held a bench trial, and entered judgment in favor of the plaintiffs, the Illinois Supreme Court ordered that judgment be entered in favor of PMUSA, rendering the trial court decision a nullity. *In re K.S.*, 850 N.E.2d 335, 345 (Ill. App. Ct. 2006). In any event, although the Supreme Court did not need to reach the question of class certification, it nevertheless expressed "reservations about the existence of individual issues that might make class certification inappropriate," including whether all class members relied on the alleged misrepresentations and whether they failed to receive less tar and nicotine. *Price v. Philip Morris, Inc*, 848 N.E.2d 1, 53 (Ill. 2005). Moreover, an Illinois federal court recently ruled that a purported Lights class in Illinois could not be certified. *Cleary v. Philip Morris USA, Inc.*, 265 F.R.D. 289 (N.D. Ill. 2010).

two distinct elements of Plaintiffs' claim, as countless cases – including *In re New Motor Vehicles Canadian Export Antitrust Litig.*, 522 F.3d 6, 28 (1st Cir. 2008), a case on which Plaintiffs themselves rely – make clear. *See, e.g., id.* at 28 (to obtain certification, plaintiffs "must include some means of determining that each member of the class was in fact injured, even if the amount of each individual injury could be determined in a separate proceeding"); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 187-88 (3d Cir. 2001) (affirming denial of class status where plaintiffs had not only provided no model formula for measuring damages, but more fundamentally had also not demonstrated the *fact* of damages); *Lester v. Percudani*, 217 F.R.D. 345, 352 (M.D. Pa. 2003). The trial court's failure to recognize Plaintiffs' complete failure of proof on this element constituted an abuse of discretion.[12]

4. Individual Issues Predominate Concerning Class Membership And Damages

The individualized proof required to determine class membership and damages – to determine whether a particular class member purchased Lights in Minnesota during the class period, and, if so, the amount of money spent by that

[12] Plaintiffs' proposed intention to seek restitution (AR 26-27) has no bearing on this analysis. Restitution, even if it were available here (which it is not), is a form of relief that is only available if the plaintiff has established all of 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 – unless they *first* establish that they suffered an 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.").

class member on those purchases – would overwhelm the court with hundreds of thousands of mini-trials and be an "invitation for fraud." *Ludke v. Philip Morris Cos., Inc.*, 2001 WL 1673791, at *3 (Minn. Dist. Ct. 2001). Under these circumstances, class certification would be improper even if common claims otherwise predominated (which they do not). The trial court found in its initial order (R. Add. 10-11) that damages issues were individualized, yet ignored that finding in its subsequent order.

Plaintiffs have no response to the point that the hundreds of thousands of individualized proofs required to establish class membership in this case are unmanageable and alone suffice to defeat certification. *See Perez v. Metabolife Intern., Inc.*, 218 F.R.D. 262, 269 (S.D. Fla. 2003) (class actions are not manageable where "individualized mini-trials would be required even on the limited issue of class membership"); *see also, e.g.*, *Crosby v. Soc. Sec. Admin.*, 796 F.2d 576, 579-80 (1st Cir. 1986); *In re Phenylpropanolamine Prods. Liab. Litig.*, 214 F.R.D. 614, 619-20 (W.D. Wash. 2003) ("Because the vast majority of putative class members are unlikely to possess proof of purchase . . . the individualized inquiries surrounding class identification . . . would defy the court's ability to effectively and efficiently manage the litigation."); *Weiner v. Snapple Beverage Corp.*, 2010 WL 3119452, at *12-13 (S.D.N.Y. 2010) (denying certification of class of Snapple purchasers because, *inter alia*, absence of receipts made class unmanageable).

And while Plaintiffs claim that individualized proof of the amount of damages can never defeat certification, this Court and others have held to the contrary in class actions based on cigarette purchases. *See, e.g.*, *Keating v. Phillip Morris, Inc.*, 417 N.W.2d 132, 137 (Minn. Ct. App. 1987) (upholding trial court's denial of certification of class of cigarette purchasers where "proof of damages would result in thousands of mini-trials") (citing multiple cases in which courts declined to certify classes for the same reason); *Ludke*, 2001 WL 1673791, at *2-3 (declining to certify class of cigarette purchasers where proof of damages based on cigarette purchases in Minnesota would have to be established on an individual basis, "an unmanageable, if not impossible, task").

Nor does plaintiffs' purported seeking of restitution (AR 26-27) alter this analysis. The "restitution" Plaintiffs seek is a refund to each class member of the money the class member paid for Lights from 1971 through 2004, or of PMUSA's profits – Plaintiffs are not clear which. (AB 6 (refund); AR 26 (profits).) Either way, it would be impossible to determine how to compensate an individual class member without holding a mini-trial to determine how many packs of Lights that class member purchased in Minnesota during the relevant period, and what price the class member paid for those purchases.

Plaintiffs' citation to *State of Minn. v. U.S. Steel Corp.*, 44 F.R.D. 559, 569 (D. Minn. 1968), is entirely inapposite; while proving individual damages for a class of 500 purchasers of steel may not be an insurmountable barrier to certification, it is another matter entirely for a class of hundreds of thousands of

individual consumers who repeatedly purchased a relatively inexpensive consumer product and kept no records – including the named Plaintiffs here, who had no receipts and no idea how much they spent on cigarettes. (R.A. 376, 460, 509, 563.) Plaintiffs have never even attempted to suggest how damages might be proved in this case or ultimately distributed to individual class members. This problem is critical; it further confirms that this class action is fundamentally unmanageable and cannot be certified. *Keating,* 417 N.W.2d at 137 (before certifying under Rule 23.02(c), the court also must find that a class action will be superior, which requires that a class trial be manageable).

Plaintiffs also cannot overcome the barriers to certification by arguing that the dollar value of some class members' claims may be relatively small. As this Court recognized in denying discretionary review of the trial court's initial decision denying certification, "Petitioners speculate that others may have insufficient individual damages to pursue their claims individually. But they do not assert that their own damages are so modest as to preclude continued prosecution of their claims, in the absence of class certification." (Supp. Add. 1.) More fundamentally, that some class members' 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.*, *In re Hotel Tel. Charges*, 500 F.2d 86, 90 (9th Cir. 1974) ("[T]he desirability of allowing small claimants a forum to recover for large-scale antitrust violations does not eclipse the problem of unmanageability.").

Moreover, Plaintiffs seek to recover attorneys' fees and costs (A. 19), and the Private AG Statute provides such relief under appropriate circumstances. Minn. Stat. § 8.31, subd. 3a. The availability of such recovery "provides substantial incentives to bring meritorious individual suits." *Hamilton v. O'Connor Chevrolet, Inc.*, 2006 WL 1697171, at *11 (N.D. Ill. 2006); *see also Castano v. Am. Tobacco Co.*, 84 F.3d 734, 748 (5th Cir. 1996) ("The expense of litigation does not necessarily turn this case into a negative value suit, in part because the prevailing party may recover attorneys' fees under many consumer protection statutes.").

5. The Statute of Limitations Presents Additional Individual Issues

Finally, Plaintiffs have no response to the argument that individual questions overwhelmingly predominate concerning the statute of limitations. Plaintiffs' argument that proof of fraudulent concealment proves the primary claim (AR 27-28) misses the point. Even if Plaintiffs were correct that the doctrine applied at all (and they are not, *see infra* Section II), because actual knowledge defeats concealment for statute of limitations purposes, *Hydra-Mac, Inc. v. Onan Corp.*, 450 N.W.2d 913, 918-19 (Minn. 1990), and because actual knowledge is an individual question, it cannot be litigated on a class-wide basis. *See, e.g.*, *McLaughlin*, 522 F.3d at 233; *Mulford*, 242 F.R.D. at 630; *Benedict v. Altria Group, Inc.*, 241 F.R.D. 668, 680 (D. Kan. 2007). As described in PMUSA's

opening brief, the record evidence demonstrated that many class members had actual notice of their claims prior to 1995. (RB 11-12, 61; R.A. 976-77, 979-83.)

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

Plaintiffs' complaint seeks damages for Lights purchases dating back to 1971, based on violations of consumer protection laws for which the statute of limitations is six years. The trial court committed legal error by allowing plaintiffs to pursue claims past the six-year period based on plaintiffs' allegations of fraudulent concealment-based tolling. As PMUSA explained (RB 62-63), because the discovery rule does not apply to consumer protection claims, and because the discovery rule and the fraudulent concealment doctrine achieve the same result, the fraudulent concealment doctrine should not apply as a matter of law to consumer protection claims. *See In re Lutheran Bhd. Variable Ins. Prods. Co. Sales Practices Litig.*, 2002 WL 1023150, at *3 (D. Minn. 2002).

Plaintiffs offer no response to this argument beyond citation of inapposite cases in which application of the fraudulent concealment doctrine to statutory consumer protection claims was either not at issue or not challenged. (AR at 29 n.10.) *Buller v. A.O. Smith Harvestore Prods., Inc.*, 518 N.W.2d 537 (Minn. 1994), for example, involved claims for common law fraud, not statutory fraud. *See id.* at 540. In *Appletree Square I Ltd. P'ship v. Investmark, Inc.*, 494 N.W.2d 889 (Minn. Ct. App. 1993), no argument was raised (and thus the court did not

decide) whether fraudulent concealment could be applied to toll the statute of limitations on a deceptive trade practices claim. In *Veldhuizen v. A.O. Smith Corp.*, 839 F. Supp. 669 (D. Minn. 1993), the court expressly "assum[ed] without deciding that the limitations period" for the statutory fraud claim could be tolled under the fraudulent concealment doctrine, and ruled that the claim was time-barred. *Id.* at 676-77 & n.7.

Even if Plaintiffs could avail themselves of the fraudulent concealment doctrine to avoid tolling, the trial court erred because Plaintiffs submitted no evidence in opposition to PMUSA's motion for partial summary judgment to create a material factual dispute on the issue. Plaintiffs argue that PMUSA's motion was properly denied because PMUSA did not submit supporting evidence. (AR 28-29.) But Plaintiffs themselves admitted their claims accrued when they purchased cigarettes. (*See* Pls.' Mem. Of Law In Opp. To Defs.' Mot. For Partial Summ. J. Against Pls.' Consumer Protection Claims On Statute Of Limitations Grounds (June 13, 2003) at 6). Consequently, their complaint on its face, which alleged that class members purchased Lights beginning in 1971, established all that was necessary to shift the burden of proof to Plaintiffs, on summary judgment, to establish material facts in dispute such that summary judgment would not be appropriate. *See Hydra-Mac*, 450 N.W.2d at 918 (to meet initial burden, defendants need only establish date on which claims accrued). Because Plaintiffs submitted no evidence to establish a material factual dispute, relying instead solely on the complaint's allegations of fraudulent concealment, summary judgment

should have been granted. *See Haefele v. Franson*, 2007 WL 1815859, at *3-*4 (Minn. Ct. App. 2007) (upholding grant of summary judgment where plaintiff alleged fraudulent concealment but presented no admissible evidence of concealment); *Yonak v. Severson*, 2005 WL 3291817, at *3-*4 (Minn. Ct. App. 2005) (same); *Reid Enters., Inc. v. Deloitte & Touche, L.L.P.*, 2000 WL 665684, at *4 (Minn. Ct. App. 2000) (same). Plaintiffs' opposition fails to address any of these cases.

Plaintiffs claim their allegations are supported by the National Cancer Institute's 2001 report, Monograph 13 (AR 30), yet Monograph 13 does not, in light of the named Plaintiffs' own testimony and other evidence demonstrating awareness, prior to 1995, of the allegedly concealed facts (*see, e.g.,* Defs.' Reply Memo In Support Of Defs.' Mot. For Partial Summ. J. Against Pls.' Consumer Protection Claims On Statute Of Limitations Grounds (July 14, 2003) at 8-9 n.5; RB 11-12 (citing evidence)) "show a fact issue as to [Plaintiffs'] inability with reasonable diligence to have discovered the alleged[ ] [misrepresentations]." *Haefele*, 2007 WL 1815859, at *4. Plaintiffs submitted no declarations or other evidence to make that showing. Accordingly, summary judgment should have been granted.

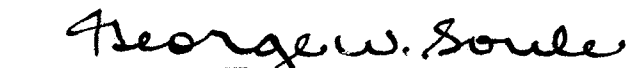
CONCLUSION

For the reasons set forth in PMUSA's opening brief, the Court should affirm the judgment below. If the Court reinstates any of Plaintiffs' claims, PMUSA respectfully requests that the Court remand the action with instructions to

decertify the class, and limit each individual plaintiff's consumer protection claims to those purchases arising after November 28, 1995 on statute of limitations grounds.

DATED: August 16, 2010

Respectfully submitted,



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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 6,922 words. This brief was prepared using Microsoft Word 2003.

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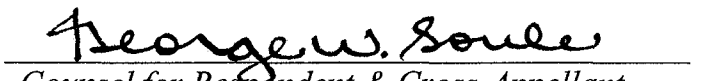

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