MINNESOTA STATE LAW LIBRARY

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.

BRIEF OF APPELLANT PHILIP MORRIS USA INC.

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

STATEMENT OF THE ISSUES

1. **Do private plaintiffs provide the required public benefit to sue as private attorneys general when (1) the attorney general already sued on the public's behalf for the same conduct and obtained billions of dollars and a permanent injunction in settlement, (2) legislation prohibits any repetition of the challenged conduct, and (3) plaintiffs seek only additional damages?**

This issue was raised in Philip Morris USA Inc.'s ("PMUSA") partial summary judgment motion. (A.36-37.) The court of appeals reversed the district court's dismissal of plaintiffs' statutory claims for failure to provide a public benefit. (Add.2, 19-22.) PMUSA timely sought review. (A.94.)

Apposite Authority:

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

Collins v. Minn. Sch. of Bus., Inc., 655 N.W.2d 320 (Minn. 2003)

Behrens v. United Vaccines, Inc., 228 F. Supp. 2d 965 (D. Minn. 2002)

2. **If plaintiffs are suing as private attorneys general seeking a public benefit, are their claims barred by the release in *State v. Philip Morris* because (1) plaintiffs stand in the shoes of the Attorney General, and (2) the settlement released all claims the State could have brought on behalf of the public, "whether directly or indirectly, representatively, derivatively or in any other capacity"?**

This issue was raised in PMUSA's partial summary judgment motion. (A.36.) The court of appeals reversed the district court's alternative ruling that, if plaintiffs' statutory claims provided a public benefit, they would be barred by the

release in *State v. Philip Morris.* (Add.23-25.) PMUSA timely sought review. (A.94.)

Apposite Authority:

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

3. Can a consumer protection class action be certified where individual adjudication would be required to determine whether each class member relied on the alleged misrepresentations, failed to receive what was allegedly promised, suffered a resulting injury, and qualifies as a class member, and to determine the amount of damages?

This issue was raised in plaintiffs' motions for class certification and reconsideration. (A.22-25.) The district court initially denied certification (Add.67, 73-77) but later certified a class on reconsideration. (Add.78.) The court of appeals upheld certification. (Add.39.) PMUSA timely sought review. (A.94.)

Apposite Authority:

Group Health Plan, Inc. v. Philip Morris Inc., 621 N.W.2d 2 (Minn. 2001)

McLaughlin v. Am. Tobacco Co., 522 F.3d 215 (2d Cir. 2008)

In re Light Cigarettes Mktg. Sales Practices Litig., 271 F.R.D. 402 (D. Me. 2010), *pet. for interlocutory rev. denied*, No. 10-8042 (1st Cir. 2011)

STATEMENT OF THE CASE

Plaintiffs brought this class action in District Court, Hennepin County, against PMUSA on behalf of everyone worldwide who purchased Marlboro Lights

("Lights")[1] in Minnesota from 1971 to 2004. (A.6); *see infra* at 24 (precise class definition). Plaintiffs contend that by using the descriptor "Lights" and, through 2003, the phrase "lowered tar and nicotine" on Lights packages, PMUSA misrepresented that Lights would deliver less tar and nicotine (and thus be safer) than higher-tar cigarettes such as Marlboro Reds ("Reds"). Although Lights always measured lower in tar and nicotine according to the Federal Trade Commission ("FTC") test in place during the class period, plaintiffs contend that smokers change their behavior after switching to Lights—for example, taking deeper or more frequent puffs or smoking more cigarettes (known as "compensation")—to such an extent that they failed to receive less tar and nicotine. (A.3-5.)

Plaintiffs do not seek recovery for illnesses resulting from smoking Lights. (Add.87.) Instead, they claim economic injuries because they failed to receive what they say was promised: less tar and nicotine. (A.3-5, 10-14.) Plaintiffs make this claim of economic injury notwithstanding that Lights have always sold at the same price as Reds and even though both class representatives continued purchasing Lights after learning the alleged "truth" and bringing this lawsuit. *See infra* at 27.

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[1] As of June 22, 2010, the federal Family Smoking Prevention and Tobacco Control Act prohibits the use of "light," "mild," "low," or similar descriptors. All references to products with such descriptors are for historical purposes only.

Plaintiffs initially sued for common-law fraud and unjust enrichment and under Minn. Stat. § 8.31, subd. 3a (the "Private AG Statute") for alleged consumer protection violations (Minn. Stat. §§ 325F.68-.70, §§ 325D.09-.16, §§ 325D.43-.48, and § 325F.67). (A.9-18.)

In January 2004, the district court (then Judge Allen Oleisky) denied class certification, holding that individual issues predominated. (Add.67, 73-77.) The court, however, granted reconsideration in November 2004 and certified the class. (Add.78-79.)

After various stays pending appeals in other cases, PMUSA in January 2009 informally requested leave of the district court (by then Judge Gary Larson) to file a motion to decertify, on the basis of changes in the law and the factual record, including that six courts (now eight) had rejected certification of similar Lights classes since the certification order. (A.27-30.) The court denied leave to file a decertification motion. (A.31.)

In May 2009, plaintiffs voluntarily dismissed with prejudice their common-law fraud claims and prayer for injunctive relief. (A.32-35.)

In August 2009, PMUSA moved for partial summary judgment to dismiss the Private AG claims for lack of public benefit, or, alternatively, because they were released. (A.36-37.) The district court granted the motion in October 2009 on both grounds. (Add.46-66.)

PMUSA then successfully moved for judgment on the pleadings on the remaining unjust enrichment count. (A.38-43.) Final judgment was entered on December 8, 2009. (A.44-49.)

The court of appeals, in its opinion of December 28, 2010, reversed the dismissal on summary judgment of the Private AG claims and upheld class certification. (Add.2-3, 32-39.) The court affirmed dismissal of the unjust enrichment count and certain other rulings (Add.26), which plaintiffs chose not to appeal, and thus only the Private AG claims remain.[2]

This Court granted review by Order dated March 15, 2011.

STATEMENT OF THE FACTS

A. History Of Lights

The public health community began recommending lower-tar cigarettes in the 1950s due to the link between tar in cigarette smoke and disease. (A.437-38, 492-93, 535-36.) In response, the FTC in 1967 developed a standardized method (then known as the "FTC Test") for measuring tar and nicotine yields. (A.310-11, 341.)[3]

To measure tar and nicotine, the FTC Test uses a machine that "smokes" every cigarette the same way—*e.g.*, same puff intensity, puff duration, and time

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[2] The court of appeals also held that the district court lacked personal jurisdiction over co-defendant Altria Group, Inc. (Add.16-17.) Plaintiffs have not appealed this ruling, and Altria therefore is not a party to this appeal.

[3] In 2008, after the class period, the FTC withdrew its support of this test. *See* 73 Fed. Reg. 74,500, 74,503-04 (Nov. 26, 2008). References to "low" and "high" tar in this brief refer to FTC measurements.

between puffs. (A.301-03, 310-11.) Smokers, however, do not smoke every cigarette in identical fashion. (A.301-03, 310-11, 809-10.) Smokers who switch to lower-tar cigarettes can "compensate" to inhale more tar and nicotine by smoking each cigarette more intensely or by smoking more cigarettes. (A.405, 809-10.)

Before the FTC began its testing program, PMUSA advised that the FTC Test could not measure actual smoking behavior, and the FTC acknowledged this limitation. (A.301-03, 310-11.) Indeed, for decades the public record has been filled with information that FTC measurements do not reflect actual deliveries and that smokers who compensate may not receive less tar and nicotine. (A.310-11, 356, 405, 435, 495-96, 535-36, 549, 553, 555.) For example, the Minneapolis *Star Tribune* and other papers reported in 1983 on a study finding that low-tar smokers may receive as much tar and nicotine as high-tar smokers. (A.553, 555.) In addition, all cigarettes, regardless of tar and nicotine yields, have always borne the same federally required health warnings. *See* 15 U.S.C. § 1333(a).

Notwithstanding concerns about compensation, the public health community encouraged low-tar cigarettes from the 1960s through the 1990s (A.438, 492-93, 535-36), based on epidemiology showing that lower FTC measurements were associated with reduced lung cancer risk notwithstanding compensation. (A.445, 454, 528-30, 535-36.) For example, a 1976 American Cancer Society study found that low-tar smokers were 26% less likely to die from lung cancer than high-tar smokers. (A.514-25.)

In November 2001, the National Cancer Institute issued Monograph 13, which reinterpreted these studies. (A.528.) On the basis of this re-analysis, Monograph 13 concluded there was "no convincing evidence" that low-tar cigarettes had resulted "in an important decrease" in disease. (A.531.)

PMUSA began manufacturing Lights in 1971. (A.304.) Lights always measured lower in tar and nicotine than Reds under the FTC Test. Thus a Lights cigarette, smoked the same way as a Red, will deliver lower tar and nicotine to the smoker.

In 2002, following publication of Monograph 13, and again every year through 2008, PMUSA included periodic "onserts" on Lights packages advising of the possibility of compensation, that the "lights" descriptor was not intended as a representation of how much tar and nicotine smokers would inhale, and that consumers should not assume that light cigarettes are safer. (A.749-50, 776-77.) PMUSA provided similar information in newspaper, television, and radio advertisements, and on its website. (A.748-49, 756-75.) PMUSA also removed the phrase "lowered tar and nicotine" from Lights packages in 2003.[4]

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[4] From 1970 through the end of the class period, PMUSA, pursuant to a FTC-compelled industry agreement, included a legend in all cigarette advertising disclosing the brand's tar and nicotine yields and stating that those measurements were on "av[erage]" per the "FTC" Test. (A.568-69); *see also* (A.779 (sample advertisement with legend).) Since 2001, the words "[t]he amount of tar and nicotine you inhale will vary depending on how you smoke" also appeared in Lights advertisements. (A.750.)

In June 2009, Congress enacted legislation prohibiting "lights" and "low tar" descriptors absent government approval. 21 U.S.C. § 387k. No cigarettes now manufactured use "lights" descriptors.

B. Prior Attorney General Lawsuit

In August 1994, the State of Minnesota sued PMUSA and other tobacco companies, asserting claims for injunctive and other equitable relief, civil penalties, and damages under the same statutes on which plaintiffs here sue. (A.621-26.) Like these plaintiffs, the State asserted that Lights could deliver as much tar and nicotine as high-tar cigarettes because of smoker compensation. (A.637, 640-69.)

In May 1998, defendants there, including PMUSA, settled with the State. (A.671-701.) The Settlement requires defendants to pay over a hundred million dollars to the State each year into perpetuity (A.677-82), and imposes numerous restrictions on the defendants' conduct, including advertising restrictions. (A.688-92.) In addition, the Consent Judgment permanently enjoins "any material misrepresentation of fact regarding the health consequence of using any tobacco product." (A.707.) The Attorney General retains authority to enforce these restrictions in court. (A.712-13.) As the Settlement Agreement states, these terms "will achieve for the State of Minnesota (and thus for the people of the State of Minnesota) significant funding for the advancement of public health, the implementation of important tobacco-related public health measures in Minnesota,

as well as funding for national research dedicated to studying and significantly reducing the use of Tobacco Products by youth." (A.672.)

In exchange, the State agreed that it

> shall release and forever discharge all Defendants . . . from any and all manner of civil claims, demands, actions suits and causes of action, damages whenever incurred, liabilities of any nature whatsoever, including civil penalties, as well as costs, expenses and attorneys' fees, known or unknown, suspected or unsuspected, accrued or unaccrued, whether legal, equitable or statutory ("Claims") that the State of Minnesota (including any of its past, present or future administrators, representatives, employees, officers, attorneys, agents, representatives, officials acting in their official capacities, agencies, departments, commissions, and divisions, and whether or not any such person or entity participates in the settlement), whether directly or indirectly, representatively, derivatively or in any other capacity, ever had, now has or hereafter can, shall or may have, as follows:
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> a. for past conduct, as to any Claims relating to the subject matter of this action which have been asserted or could be asserted now or in the future in this action or a comparable Federal action by the State; and
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> b. for future conduct, only as to monetary Claims directly or indirectly based on, arising out of or in any way related to, in whole or in part, the use of or exposure to Tobacco Products manufactured in the ordinary course of business, including without limitation any future claims for reimbursement for health care costs allegedly associated with use of or exposure to Tobacco Products.

(A.682-83.)

SUMMARY OF THE ARGUMENT

This appeal presents three issues.

First, as the district court properly held, plaintiffs cannot bring these claims under the Private AG Statute because they seek to vindicate only their own private interests. Under *Ly v. Nystrom*, 615 N.W.2d 302 (Minn. 2000), private plaintiffs suing as private attorneys general must demonstrate that their lawsuit serves a "public benefit." The court of appeals erroneously concluded that this standard is met so long as the alleged misrepresentations were "made to the public at large." (Add.19.)

As this Court explained in *Ly*, a suit that will exclusively result in private monetary recovery—and no benefit to the public at large—cannot be brought as a Private AG action. Plaintiffs' lawsuit exclusively seeks monetary recovery for individuals. It does not seek to uncover or alter PMUSA's conduct in any way or otherwise benefit the public; nor could it, as Congress prohibits use of the allegedly misleading descriptors absent prior government approval and PMUSA no longer manufactures cigarettes labeled as "lights."

Moreover, over three years before plaintiffs sued, the Attorney General already obtained a consent judgment against PMUSA based on the same alleged wrongdoing under the same consumer protection statutes. In exchange for a broad release of claims, PMUSA submitted to a permanent injunction against deceptive advertising and agreed to pay billions of dollars—including payments of over a hundred million dollars per year forever—revenue that pays for smoking

education and cessation programs for the benefit of the class (and others). Thus, the Attorney General already obtained the public benefit from pursuing these claims. For these reasons, plaintiffs' claims may be within the proper scope of a common-law fraud action (abandoned here), but not one as a private attorney general for the "public benefit."

Second, as the district court correctly concluded in the alternative, if plaintiffs were properly suing as private attorneys general, their lawsuit is barred by the release the Attorney General provided PMUSA as part of the settlement. That release prohibits claims brought "indirectly," "representatively," or "derivatively" on behalf of the State. The court of appeals erroneously reversed without even addressing these plain terms of the release. To the extent plaintiffs sue as "private attorneys general," they are acting on behalf of the State and thus their claims were released.

Third, putting aside these substantive deficiencies with plaintiffs' claims, the case should never have been certified as a class action. Courts across the country—twelve in all—have rejected certification of similar lawsuits, recognizing that resolving Lights claims would depend on so many individual inquiries that any class-wide trial would inevitably break down into millions of mini-trials, defeating any efficiencies of class treatment. Individual factual inquiries are necessary here to establish critical elements of plaintiffs' claims: whether each class member believed Lights were safer and relied on this belief in making each purchase, whether each class member failed to receive the allegedly

promised less tar and nicotine, whether each class member was financially worse off because of his or her purchases, whether each class member purchased Lights in Minnesota during the class period and qualifies as a class member, and the number of packs purchased and amount of damages (if any) owed to each class member.

Consistent with the overwhelming majority of courts, the district court initially rejected certification. Based on an undisputed factual record, the court found that smokers varied in their beliefs about and reasons for purchasing Lights and that many received less tar and nicotine. In reversing itself on reconsideration, the court did not disturb these factual findings, but rather redefined the elements of plaintiffs' claims such that these individualized issues could be ignored. The court erred when interpreting *Group Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2, 13 (Minn. 2001), as permitting class-wide "presumptions" of reliance under the circumstances here. And it unlawfully excused plaintiffs from proving that they actually failed to receive less tar and nicotine based on speculation that it would be difficult for them to offer this proof.

The court of appeals perpetuated this legal error, concluding that all class members were entitled to an "inference" of reliance simply because PMUSA "extensive[ly] market[ed]" Lights. (Add.38.) But no decision of this Court supports a presumption or inference of class-wide reliance where, as here, the undisputed record and factual findings demonstrate that many class members over the three decades at issue did not believe Lights were safer and purchased Lights

for reasons other than health. Moreover, the court of appeals ignored that PMUSA would be permitted as a matter of Minnesota law and state and federal due process to rebut any presumption with evidence that class members did not rely on the alleged misrepresentation—evidence that is inherently individual. And beyond that core error, the court improperly turned a blind eye to many other individual issues that numerous courts have relied on in rejecting class certification of nearly identical claims.

This Court should reverse the court of appeals' decision and reinstate the judgment in favor of PMUSA. Alternatively, the Court should remand with instructions to decertify the class.

ARGUMENT

I. SUMMARY JUDGMENT ON PLAINTIFFS' PRIVATE ATTORNEY GENERAL CLAIMS WAS APPROPRIATE BECAUSE THOSE CLAIMS PROVIDE NO PUBLIC BENEFIT

A. Standard Of Review

The standard of review for a grant of summary judgment is *de novo*. *Day Masonry v. Indep. Sch. Dist. 347*, 781 N.W.2d 321, 325 (Minn. 2010).

B. Plaintiffs' Claims Provide No Public Benefit

In *Ly v. Nystrom*, 615 N.W.2d 302, this Court found it "clear that the sweep of the [Private AG Statute] can be no broader than the source of its authority—that of the attorney general—whose duties are to protect *public* rights in the interest of the state." *Id.* at 313 (emphasis in original). Thus, the statute "applies only to

those claimants who demonstrate that their cause of action benefits the public." *Id.* at 314.

Ly's reasoning was grounded in the Private AG Statute's rationale: to provide "a reward to private parties for uncovering and bringing to a halt unfair, deceptive and fraudulent business practices, functions that, to that point, had been the responsibility of the attorney general." *Id.* at 313; *see also id.* at 311 (purpose of statute is "to stop the unscrupulous businessman who makes false and deceptive ads") (quoting Hearing on H.F. 733, H. Comm. Commerce & Econ. Dev., 68th Minn. Leg. Mar. 30, 1973 (audio tape) (comments of Rep. Sieben)). Accordingly, "[i]f the attorney general is not authorized to commence a proceeding because it would not result in a public benefit, then a claimant under the Private AG Statute is similarly constrained." *Id.* at 314 n.22 (internal citation omitted).

Following this reasoning, *Ly* determined that a restaurant purchaser's suit seeking only damages from the seller provided no public benefit. *Id.* at 314. Although the defendant violated the Consumer Fraud Act, and although the Private AG Statute permits a private plaintiff to recover damages for such a violation, the Court held that something more was needed—some benefit to the public at large—when a private plaintiff seeks to act as a substitute for the attorney general. *Id.* The private recovery of damages alone is insufficient. *See id.* ("A successful prosecution of [purchaser's] fraud claim does not advance state interests and enforcement has no public benefit, and is not a claim that could be

considered to be within the duties and responsibilities of the attorney general to investigate and enjoin.").

This Court explained further the public benefit requirement in *Collins v. Minnesota School of Business, Inc.*, 655 N.W.2d 320 (Minn. 2003). Students there filed suit against the Minnesota School of Business ("MSB") for misleadingly advertising the school's "sports medicine technician" program and representing the program would lead to non-existent jobs. *Id.* at 322-23. A few months after the students uncovered the wrongful conduct and sued, MSB revised its curriculum and changed its program's name to "Health and Exercise Sciences" to "more closely reflect[ ] the content of the revised curriculum." *Id.* at 322. The court of appeals held that the suit provided a public benefit because the representations were made to the public at large, and "*[a]s a result of appellants' lawsuit, respondent stopped its television advertisements and changed the program's curriculum.*" *Collins v. Minn. Sch. of Bus., Inc.*, 636 N.W.2d 816, 820-21 (Minn. Ct. App. 2001) (emphasis added). The court explained that "[b]ut for appellants' lawsuit, an indefinite class of potential consumers might have been injured in the same manner as were appellants." *Id.* at 821. This Court affirmed. *Collins*, 655 N.W.2d at 330.

Many courts have followed *Ly* and *Collins* by recognizing that "[t]o determine whether a claim is brought for the public benefit, the Court should examine not only the form of the alleged misrepresentation, but also the relief sought by the plaintiff." *Zutz v. Case Corp.*, 2003 WL 22848943, at *4 (D. Minn.

2003). If a successful suit will only result in monetary payments to private individuals and there is no *public* benefit, a Private AG suit cannot be maintained. *Id.*; *see also, e.g.*, *Schaff v. Residential Funding Corp.*, 2006 WL 2506974, at *16 (D. Minn. 2006); *Beck v. Sunrise Senior Living Mgmt.*, 2008 WL 3412096 at *2 (D. Minn. 2008); *Kalmes Farms, Inc. v. J-Star Indus., Inc.*, 2004 WL 114976, at *6 (D. Minn. 2004); *Wehner v. Linvatech Corp.*, 2008 WL 495525, at *3 (D. Minn. 2008); *Behrens v. United Vaccines, Inc.*, 228 F. Supp. 2d 965, 970-72 (D. Minn. 2002); *Evangelical Lutheran Church in Am. Bd. of Pensions v. Spherion Pac. Workforce LLC*, 2005 WL 1041487, at *4 (D. Minn. 2005); *PCS Prof'l Claim Serv., LLC v. Brambilla's Inc.*, 2007 WL 3313661, at *6-7 (D. Minn. 2007).

Applying *Ly*, the district court correctly determined that plaintiffs' claims do not provide a public benefit under the unique combination of undisputed facts here. As an initial matter, plaintiffs' lawsuit mirrored the 1994 Attorney General action that already raised the same allegations and obtained extensive public benefits, including payment of billions of dollars to the State for smoking-related programs and broad injunctive relief. *See supra* at 8-9 (describing public benefits resulting from settlement). Where an Attorney General has already sued and obtained relief, a subsequent private lawsuit "can confer only a negligible additional public benefit." *Simonson v. Ameriquest Mortg. Co.*, 2006 WL 3463000, at *4 (D. Minn. 2006); *see also, e.g.*, *Weigand v. Walser Auto. Grp.*, 2006 WL 1529511, at *3 (Minn. Ct. App. 2006) ("A plaintiff 'cannot use the private-attorney-general statute to bring a cause of action based on business

practices that the attorney general has already addressed.'") (citations omitted); *Ly*, 615 N.W.2d at 313 (Private AG Statute enacted to provide incentive for private parties to "uncover[ ]" wrongful business practices). This result reflects appropriate judicial concern about unnecessary and duplicative litigation and subjecting defendants to repeated litigation of the same claims.

Moreover, federal law now bans without prior government approval "precisely the representations on which plaintiffs base their claims." (Add.62-63.) No packs of PMUSA cigarettes currently being manufactured contain "lights" descriptors. Plaintiffs' suit thus cannot have any effect on PMUSA's practices, in contrast to the *Collins* suit, which motivated MSB to change its advertising. Hence, as the district court recognized, it is "*impossible* for Plaintiffs' suit to have any public benefit." (Add.63 (emphasis added)); *see also Behrens*, 228 F. Supp. 2d at 972 (no public benefit because government had removed offending product from the market); *Kalmes Farms*, 2004 WL 114976, at *6 (no public benefit because "[w]hile the allegedly false advertising was presented to the public at large, the advertising and the product it sought to promote are no longer in production"); *Scally v. Norwest Mortg., Inc.*, 2003 WL 22039526, at *7 (Minn. Ct. App. 2003) (no public benefit because, *inter alia*, employee who made misrepresentations had "been terminated and he is no longer in any position to harm the public").

Furthermore, while courts have recognized that injunctive relief can provide a benefit to the general public (for example, by preventing ongoing

misleading advertising that could deceive members of the public in the future), *see, e.g.*, *Behrens*, 228 F. Supp. 2d at 972 (recognizing that future injunction on advertising would provide public benefit), plaintiffs here abandoned their request for an injunction and seek only money damages. (A.32-35.)

C. <u>The Court Of Appeals Erroneously Reversed The District Court</u>

Notwithstanding this unique combination of undisputed facts, the court of appeals erroneously concluded that plaintiffs satisfied the public benefit requirement merely because they presented "evidence that misrepresentations alleged to have violated the law were made to the public at large." (Add.2.) In so ruling, the court improperly cabined *Ly* to its facts and applied the decision too narrowly. This ruling ignored both *Ly*'s broader holding and its reasoning why a private plaintiff must provide a public benefit to proceed under the Private AG Statute—a rationale grounded in the legislative history of the Statute—as well as common sense and the common law. *See Ly*, 615 N.W.2d at 311 (discussing legislative history). And it belied numerous decisions holding that where the exclusive benefit of an action is monetary recovery for private plaintiffs, there is no public benefit and plaintiffs cannot sue as private attorneys general. *See, e.g.*, *Schaff*, 2006 WL 2506974, at *16 (no public benefit where putative class of securities purchasers sought only compensatory damages); *Kalmes Farms*, 2004 WL 114976, at *6 (similar); *Wehner*, 2008 WL 495525, at *3 (similar); *Beck*, 2008 WL 3412096, at *2 (similar); *PCS Prof'l Claim Serv.*, 2007 WL 3313661, at

*6-7 (similar); *Zutz*, 2003 WL 22848943, at *4 (similar); *Weigand*, 2006 WL 1529511, at *3 (similar); *Simonson*, 2006 WL 3463000 (similar).

The court of appeals also misconstrued *Collins*. (Add.19, 22.) As described above, the *Collins* suit provided a public benefit because it uncovered wrongful conduct and led MSB to revise its public advertisements. Nowhere does *Collins* state that an allegation of misrepresentations in advertising to the public, *by itself*, will suffice to provide a public benefit, as the court of appeals here incorrectly concluded.

Behrens, a widely followed decision, thus rejected the precise reading of *Collins* reached by the court of appeals. Plaintiffs in *Behrens* sought monetary compensation for purchasing a vaccine in reliance on misrepresentations made to the public. 228 F. Supp. 2d at 966-67. Plaintiffs argued that their case was similar to *Collins*, "because they were induced into purchasing the Defendant's product by the representations of the Defendant's agent which, they allege, were false and misleading to the public at large." *Id.* at 970. They further claimed that "just as in *Collins*, their lawsuit will aid an 'indefinite class of potential consumers,' who might otherwise be 'injured in the same manner' as they were." *Id.* (citation omitted). The court rejected these arguments, holding that because plaintiffs sought "to redress only their own personal, business damages" and did not seek to alter the misleading advertising, their suit provided no public benefit. *Id.* at 972. Moreover, the allegedly misleading product had been removed from the market by the government "and not as a result of the Plaintiffs' suit." *Id.* The court

accordingly agreed with defendants that "Plaintiffs cannot responsibly contend, as did the plaintiffs in *Collins*, that, 'but for' their lawsuit, the Defendant would have continued to make false representations about that product to the public's disadvantage." *Id.* at 970.

Finally, the court of appeals also erroneously relied on *Group Health*, 621 N.W.2d 2, as "instructive." (Add.21-22.) That decision did not address the public benefit requirement; the quote relied upon by the court of appeals merely examined whether the Private AG Statute was limited to purchasers. 621 N.W.2d at 9. If anything, *Group Health* confirms the district court's reading of *Ly*: this Court was explicit there that "the overall tenor" of the consumer protection statutes is "to maximize the tools available *to stop the prohibited conduct*," *id.* (emphasis added)—precisely what this lawsuit does not even attempt to achieve.

The notion that a suit provides a public benefit merely because it concerns allegations of misrepresentations made to the public makes little sense. A "benefit" is "something that promotes well-being." Merriam-Webster's Collegiate Dictionary at 106 (10th ed. 1999). "Public" means "of or relating to people in general." *Id.* at 944; *cf.* Minn. Stat. § 103D.011 (defining, in Watershed Law, "'public benefit' [to] mean an act or thing that tends to improve, benefit, or contribute to the safety or well-being of the general public, or benefit the inhabitants of the watershed district"). A suit that seeks only to compensate private individuals—even a large class of private individuals—who allege they relied, in the past, on misrepresentations in public advertising and suffered harm

thereby, does not promote the well-being of the general public.[5] The court of appeals' approach would mean that all consumer fraud actions based on public advertisement *per se* create a public benefit. That cannot be squared with *Ly*.

In sum, plaintiffs cannot satisfy the public benefit requirement merely based on claims of alleged misrepresentations made to the public at large. The material facts are undisputed: the Attorney General already sued for the same conduct and obtained extensive public benefits, federal law bars the allegedly offending descriptors absent prior approval, and plaintiffs dismissed with prejudice their claims for injunctive relief. Under the correct legal standard—the requirement that the suit provide a benefit to the public in addition to private monetary recovery—this unique set of facts establishes that plaintiffs' claims cannot proceed under the Private AG Statute. The court of appeals' decision should be overturned, and the district court's grant of summary judgment should be reinstated.

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[5] The court of appeals also erroneously relied on *In re National Arbitration Forum Trade Practices Litigation*, 704 F. Supp. 2d 832 (D. Minn. 2010). (Add.21.) That decision unequivocally stated that a prior Attorney General action concerning the same conduct "*means that there is no public benefit to Plaintiffs' claims*." *Id.* at 838 (emphasis added). Nevertheless, the court went on to permit claims after concluding that monetary damages may provide a public benefit. *Id.* at 839. The decision is thus internally inconsistent and fails to follow *Ly*. The case also is distinguishable from the unique factual circumstances present here, where the Attorney General already has obtained broad injunctive relief and recovered billions of dollars for the public's benefit, and where legislation bars the alleged misconduct.

II. IF PLAINTIFFS WERE SUING AS PRIVATE ATTORNEYS GENERAL, THEIR CLAIMS WOULD BE BARRED BY THE ATTORNEY GENERAL'S SETTLEMENT

The district court alternatively held that, if plaintiffs are suing as private attorneys general because their claims provide a public benefit, such claims necessarily would be barred by the Release in the settlement of the Attorney General action. (Add.63-65.) The court of appeals erred in reversing that ruling.

It is undisputed that the Release bars the State, "whether directly or indirectly, representatively, derivatively or in any other capacity," from bringing the claims asserted here. *See supra* at 9. The sole question is whether a suit brought by private attorneys general purportedly seeking to benefit the public is one brought "indirectly, representatively, [or] derivatively" on behalf of the State. That is self-evident.

Just as the Attorney General is authorized to bring suit on behalf of the State to enforce the consumer fraud laws for the benefit of the public, private plaintiffs, as described above, *see supra* at 13-16, are authorized to bring such suits to enforce the consumer fraud laws for the benefit of the public. *Ly*, 615 N.W.2d at 313 ("the role and duties of the attorney general with respect to enforcing the fraudulent business practices laws must define the limits of the private claimant under the statute"); Minn. Stat. § 8.31. By suing as a private attorney general to serve the public benefit, a plaintiff "act[s] in the Attorney General's stead" and therefore is acting indirectly, representatively, or derivatively on behalf of the State. *Behrens*, 228 F. Supp. 2d at 969 (citing *Ly*, 621 N.W.2d at

311); *see also Kalmes Farms*, 2004 WL 114976, at *6 ("An individual that pursues a claim as a 'private' attorney general must assume the role and duties of the attorney general position as it relates to the enforcement of the law.") (citing *Ly*, 621 N.W.2d at 313).

The court of appeals failed to address this reasoning. Instead, the court based its decision on the fact that the Private AG Statute does not expressly state that a private plaintiff bringing a claim thereunder becomes a representative of the State. (Add.25.) In so doing, the court ignored *Ly* and the other decisions holding that the private plaintiff must be suing to serve the public interest just as the Attorney General would.

The court of appeals also refused to consider the Attorney General's own position in *State ex rel. Humphrey v. Philip Morris*, No. C1-94-8565, a case litigating the scope of the Settlement's release. There, in its [Proposed] Findings of Fact, the State explained that the Settlement's "release provisions" were intended "to encompass suits or causes of action that might be asserted *by any parties—including private litigants*—in adjudicatory proceedings, along with the damages, liabilities and costs that can arise in relation to such proceedings." (A.78 (emphasis added).)[6] The court of appeals denied PMUSA's request for judicial

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[6] Indeed, the Settlement provides generally that it does not "bind any non-party," "*[e]xcept as expressly provided in this Settlement Agreement*" (A.695 (emphasis added)), thus contemplating that individuals who were not explicitly named as parties to that action may be bound to the extent they are acting on behalf of the State.

notice of this significant fact (A.91-93), which is consistent with the Release and case law interpreting the statute and bars plaintiffs' claims here, and which wholly contradicts the Attorney General's position in its amicus brief filed before the court of appeals.

The Release thus provides independent grounds to reverse and reinstate the judgment in favor of PMUSA.

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

The court of appeals further erred in upholding certification of what likely is the largest class ever certified in Minnesota:

> All persons, who purchased Defendants' Marlboro Lights cigarettes in Minnesota for personal consumption from the first date Defendants sold Marlboro Lights in Minnesota [1971] through the date of the certification of the class [2004].

(Add.78, 80.) The class spans over three decades, has an estimated hundreds of thousands of members worldwide, and encompasses billions of transactions. (Add.80; A.6.)

The ruling conflicts with twelve decisions holding that similar Lights claims cannot be certified as class actions.[7] Indeed, certification has been rejected

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[7] *In re Light Cigarettes Mktg. Sales Practices Litig.*, 271 F.R.D. 402 (D. Me. 2010), *petition for interlocutory review denied*, No. 10-8042 (1st Cir. 2011) (concluding the "certification analysis is not sufficiently questionable to warrant interlocutory review"); *Cleary v. Philip Morris USA Inc.*, 265 F.R.D. 289 (N.D. Ill. 2010) (appeal pending); *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008); *Stern v. Philip Morris USA Inc.*, slip op., 2007 WL 4841057 (N.J. Super. Ct. 2007) (A.1065); *Benedict v. Altria Group, Inc.*, 241 F.R.D. 668 (D.

by *every* federal court to consider the issue,[8] which is significant because Minnesota's certification rule "closely tracks" and is intended to "produce consistent results" with its federal counterpart. *Whitaker v. 3M Co.*, 764 N.W.2d 631, 635 (Minn. Ct. App. 2009); *see also* Minn. R. Civ. P. 23 advisory committee notes 1968 & 2006; 1 Minn. Prac. R. 23, § 23:1 (4th ed. 2010) ("cases and authorities dealing with the federal rule should be viewed as particularly persuasive authority").

The court of appeals reached this result only by erroneously eliminating the reliance requirement for consumer protection class actions and by disregarding numerous other individual issues that courts repeatedly have held preclude certification in Lights cases. The court in fact acknowledged that certification of this sprawling class was based on "implicit" findings (Add.34), "not extensive" analysis (Add.35), and multiple "inference[s]." (Add.38.) The decision below is

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Kan. 2007); *Mulford v. Altria Group, Inc.*, 242 F.R.D. 615 (D.N.M. 2007); *Davies v. Philip Morris USA Inc.*, 2006 WL 1600067 (Wash. Super. Ct. 2006); *Huntsberry v. R.J. Reynolds Tobacco Co.*, No. 2:04CV01266, slip op. (Wash. Super. Ct. 2006) (A.894); *Pearson v. Philip Morris, Inc.*, 2006 WL 663004 (Or. Cir. Ct. 2006) (appeal pending); *Philip Morris USA Inc. v. Hines*, 883 So. 2d 292 (Fla. Ct. App. 2003); *Cocca v. Philip Morris Inc.*, 2001 WL 34090200 (Ariz. Sup. Ct. 2001); *Oliver v. R.J. Reynolds Tobacco Co.*, 2000 WL 33598654 (Pa. Ct. Com. Pl. 2000). As discussed below, there are only three other certified Lights actions and in each the courts relied on unique features of state law that are inapplicable here. *See Lawrence v. Philip Morris USA Inc.*, No. 09-CV-518, slip op. (N.H. Super. Ct. 2010) (A.981) (motion for interlocutory review pending); *Craft v. Philip Morris Inc.*, 190 S.W.3d 368 (Mo. Ct. App. E.D. 2005); *Aspinall v. Philip Morris Cos.*, 813 N.E.2d 476 (Mass. 2004).

[8] *Light Cigarettes*, 271 F.R.D. 402; *Cleary*, 265 F.R.D. 289; *McLaughlin*, 522 F.3d 215; *Stern*, 2007 WL 4841057; *Benedict*, 241 F.R.D. 668; *Mulford*, 242 F.R.D. 615.

out-of-step with modern class action law and the requirement that courts rigorously analyze class certification to protect defendants from "judicial blackmail" to settle large, but non-meritorious, class actions. If upheld, the certification bar will fall so low that Minnesota may become a magnet for misbegotten consumer protection class actions.

A. Standard Of Review

A decision granting or denying class certification is reviewed for abuse of discretion. *Whitaker*, 764 N.W.2d at 635. An abuse of discretion occurs when a court "relies upon an improper factor, omits consideration of a factor entitled to substantial weight, or mulls the correct mix of factors but makes a clear error of judgment in assaying them." *Id.* (citations omitted). Similar to a *de novo* standard, "[a]n abuse of discretion also occurs if the court adopts an incorrect legal rule." *Id.*

B. The Court Of Appeals Erroneously Eliminated The Reliance Requirement For Consumer Fraud Class Actions

In *Group Health*, this Court held that plaintiffs suing under the Private AG Statute must establish reliance because "it is not possible that the damages could be caused by a violation without reliance"—*i.e.*, without proof that plaintiffs believed the misrepresentations and bought the product as a result of that belief. 621 N.W.2d at 13; *see also Weigand v. Walser Auto. Grp.*, 683 N.W.2d 807, 812 (Minn. 2004) ("reliance is a component of the causal nexus requirement for a private consumer fraud class action").

As numerous other courts have recognized, proof of reliance under circumstances like those here precludes certification because "many smokers did not believe the misrepresentations and bought light cigarettes without relying on them." *Light Cigarettes*, 271 F.R.D. at 417; *see also, e.g.*, *Stern*, 2007 WL 4841057, at *9 ("consumers have reasons other than the alleged deception or misrepresentation to choose Marlboro Lights"). As a result, any class trial would inevitably break down into countless mini-trials to determine which class members could satisfy reliance and which could not. *See, e.g.*, *McLaughlin*, 522 F.3d at 223 ("Individualized proof is needed to overcome the possibility that a member of the purported class purchased Lights for some reason other than the belief that Lights were a healthier alternative.").

The undisputed record here confirms that whether each class member believed Lights were safer and purchased because of this belief can be determined only through individual inquiries. Three of the original four class representatives (and both remaining representatives), for example, continued to smoke Lights *even after suing* (A.157-58, 177, 264), notwithstanding their allegations that Lights did not deliver less tar and nicotine and were not safer. These continued purchases alone demonstrate that there are reasons to purchase Lights other than the alleged misrepresentations. *McLaughlin*, 522 F.3d at 226 ("Three of the six named plaintiffs even continued to purchase Lights after filing the complaint in this case, suggesting the influence of some other motivation."). Indeed, several admitted preferring the taste of Lights to higher-tar cigarettes. (A.193-94, 229-30.)

PMUSA also submitted unrefuted expert testimony of a consumer behavior expert that "[d]ifferent people understand the word 'light' to mean different things, and people smoke light cigarettes for many different reasons." (A.482.) This conclusion was based on empirical evidence, such as a 1998 Gallup study finding that the majority of low-tar smokers chose their brand for reasons other than "perceived health benefits" and a 1987 survey where a significant percentage did not believe low-tar cigarettes were safer. (A.487-89.) Plaintiffs did not contend (or submit any expert or other evidence demonstrating) that all class members believed and relied on the alleged misrepresentations. Instead, in admitting below that their common-law fraud claims could not be certified because of reliance (A.58-59), they tacitly conceded that not all class members relied.

Moreover, although the record at the time of certification was sufficient to establish this variability, additional evidence developed below confirmed that many class members could not establish reliance on the alleged misrepresentations. For example, since the most recent public disclosure of the alleged "truth" about Lights, including through periodic "onserts" PMUSA placed on Lights packages advising about the possibility that smokers will not receive less tar and nicotine, *see supra* at 7, the relative market share and price of Lights both nationally and in Minnesota *increased.* (A.799-806.) As the Second Circuit explained in considering similar evidence, "that the market did not shift away from light cigarettes" after these disclosures "is compelling evidence that plaintiffs

had other, non-health-related reasons for purchasing Lights." *McLaughlin*, 522 F.3d at 226.[9]

Faced with an undisputed record, the district court initially denied certification because reliance presented "individual inquiries." (Add.76.) The court found that "class members may have decided to smoke Marlboro Lights for various other reasons including the recommendations of other smokers, taste, and brand recognition" and 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." (*Id.*)[10]

Nevertheless, the district court reversed itself on reconsideration. The court did not overturn its earlier factual findings that class members' beliefs and purchasing motivations varied. Rather, the court concluded that "Minnesota case law has failed to provide a clear standard for determining what constitutes a

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

[10] The court also recognized that reliance presented individual issues when it denied a summary judgment motion directed to the lack of reliance by three class representatives on the ground that whether they "decided to purchase Marlboro Lights based upon their reliance on false statements made by Philip Morris *presents questions of fact*" to be decided by the jury. (Add.95 (emphasis added).)

sufficient causal nexus" (Add.83), and then made a *legal* determination that—under *Group Health* and *Peterson v. BASF Corp.*, 675 N.W.2d 57 (Minn. 2004)—plaintiffs' "showing of reliance . . . need not include direct evidence of reliance by individual consumers of defendants' products." (Add.84.) Instead, the court determined that allegations of a "lengthy course of misrepresentations" are sufficient to create a "presumption" of reliance. (Add.83-85.)

The court of appeals affirmed, concluding that although "the district court's analysis is not extensive," the court "appropriately relied on" *Group Health* and *Peterson* as permitting an "inference" that "all consumers of Lights were led by false advertising to believe that Lights were healthier than regular cigarettes." (Add.35-38.) The court concluded that this inference was triggered by "extensive marketing of Lights as a healthier alternative to traditional cigarettes." (Add.38.)

The creation of a class-wide presumption or inference to bypass the undisputed individual issues presented by the reliance requirement was based on a misreading of *Group Health* and *Peterson* and thus is a *per se* abuse of discretion.

1. *Group Health*'s Approval Of Indirect Reliance Has No Application To This Case

As an initial matter, the district court and court of appeals erroneously assumed that *Group Health*'s indirect reliance standard applied to class actions such as this one. *Group Health* suggested that indirect evidence of reliance may be appropriate proof in some circumstances in "*the type of case before the court.*" 621 N.W.2d at 15 (emphasis added). This Court went out of its way to emphasize,

however, that it was not pronouncing a blanket rule, but that the "reliance factor may be different in a case of different scope." *Id.* at 15 n.10.

Group Health was not a class action aggregating the claims of thousands of individuals. Rather, it was a "direct" third-party payer action brought by insurance companies to recoup healthcare expenditures. The insurance companies alleged they had incurred higher expenditures either because (1) they had been deceived into failing to implement "tobacco education programs" that would have led to less smoking by their subscribers (and thus less disease), or (2) their subscribers had been deceived, smoked as a result, and became ill. *See id.* at 4-5. Since *Group Health*, courts have distinguished "direct" third-party payer actions from class actions, concluding that "aggregated evidence of causation" may be appropriate for third-party payers in circumstances in which it would not be permitted in class actions. *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc.*, 344 F.3d 211, 226 (2d Cir. 2003). *Blue Cross* reasoned that, unlike class actions, a direct action by a third-party payer involves only a single plaintiff. *Id.* Because only the third-party payer would recover money if it were to prevail, there is no need to determine which specific subscribers would have smoked absent the alleged misconduct and could recover if they sued individually. *See also Republic Servs., Inc. v. Liberty Mut. Ins. Co.*, 2006 WL 2844122, at *3 (E.D. Ky. 2006) (permitting use of "statistical sampling" because "case before the court .

. . is not a class action but rather a single plaintiff with multiple claims against a small group of defendants").[11]

By contrast, a class action is a procedural device that, as a matter of Minnesota law and state and federal due process, aggregates the separate claims of many individuals and "cannot abridge, enlarge, or modify the substantive rights of any litigant." Minn. Stat. § 480.051; *see also DeGrande v. Demby*, 529 N.W.2d 340, 342 (Minn. Ct. App. 1995) (same). Even where the claims of thousands of individuals may be tried together in a class action, "the parties' legal rights and duties . . . and the rules of decision" remain "intact" and "unchanged." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (plurality opinion). In other words, individuals may not recover money simply because they are members of a class, but instead may recover only if they could establish the elements of their claims had they sued individually. And this Court was unequivocal in *Group Health* 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.

The district court and court of appeals ignored this distinction and assumed that the kind of indirect reliance proof contemplated in *Group Health* for third-

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[11] This is confirmed further by the *Group Health* Court's look to Lanham Act decisions for "guidance." 621 N.W.2d at 15 n.11. Like third-party payer actions, Lanham Act cases are brought by a *single plaintiff* claiming damages resulting from the deception of its potential customers. *See, e.g., United Indus. Corp. v. Clorox Co.*, 140 F.3d 1175, 1180 (8th Cir. 1998).

party payer actions would be available in any type of Private AG action, and thus class members would not have to establish that they actually relied on the alleged misrepresentations. In purporting to apply *Group Health*, the courts erroneously disregarded the substantially different context of this case and that their approach would effectively eliminate reliance as a requirement in *all* consumer class actions.

2. Creation Of An Inference Of Reliance Was Error Even If *Group Health*'s Indirect Standard Applied To Class Actions

Even if this Court were to extend *Group Health* to class actions, it would not justify the inference or presumption of class-wide reliance invoked here for two reasons.

First, nothing in *Group Health* authorizes an inference that *every* individual who purchased a Light cigarette over three decades relied on an alleged misrepresentation simply because the product was "extensive[ly] marketed." (Add.38.) Presumptions and inferences cannot defy "common sense and probability." *U.S. Dep't of Justice v. Landano*, 508 U.S. 165, 175 (1993) (citation omitted); *see also, e.g.*, 2 *McLaughlin on Class Actions*, § 8:11 (6th ed. 2010) ("any presumption or inference must be supported by record evidence or at least common sense"). That a product was "extensively marketed" does not necessarily mean that everyone who purchased the product shared the same beliefs and purchasing motivations. Indeed, the district court expressly found that class members' beliefs and purchasing motivations varied. (Add.76). In circumstances

like these, courts in Lights cases and other types of consumer fraud actions have recognized that a class-wide presumption of reliance would be inappropriate, notwithstanding extensive marketing, where it is not supported by the record. *See, e.g.*, *McLaughlin*, 522 F.3d at 225-26 (rejecting "a presumption of reliance" in Lights case because of "differences in plaintiffs' knowledge and levels of awareness"); *Light Cigarettes*, 271 F.R.D. at 417-18 (same); *Davies*, 2006 WL 1600067, at *3 (same); *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 665-67 (9th Cir. 2003) (because "[g]amblers do not share a common universe of knowledge and expectations," case did not present "a context in which we can assume that potential class members are always similarly situated").

Second, even if plaintiffs were entitled to invoke a presumption or inference, the district court and court of appeals committed legal error (and thus abused their discretion) in failing to consider the consequences of PMUSA's right of rebuttal. *Group Health* did not foreclose a defendant's ability to defend itself by demonstrating that a plaintiff did not rely. Rather, this Court merely contemplated that, in some circumstances, plaintiffs may rely on "other direct or circumstantial evidence" to satisfy their *prima facie* reliance showing. 621 N.W.2d at 14.

This recognition is consistent with settled law that presumptions are not irrebuttable, but merely shift the burden of coming forward with evidence to the defendant. *See* Minn. R. Evid. 301. Once the party offers contrary evidence, the presumption is "burst" and the case is tried as if the presumption never existed.

Itron, Inc. v. Benghiat, 2003 WL 21402608, at *3 (Minn. Ct. App. 2003); *see also Ogren v. City of Duluth*, 18 N.W.2d 535, 540 (Minn. 1945). The district court in fact acknowledged that PMUSA "would be able to raise as a defense at trial" that "some of the class members could have decided to smoke Marlboro Lights" for reasons other than the alleged misrepresentations (Add.83), and that PMUSA would be entitled to "rebut" any "presumption" of reliance. (Add.83-85). Yet neither the district court nor the court of appeals fulfilled its obligation to analyze the impact on class certification of PMUSA's right to rebut with evidence of non-reliance. *See Whitaker*, 764 N.W.2d at 638-39 (requiring rigorous analysis).

This right of rebuttal has led courts to deny certification even where plaintiffs might have been able to use indirect evidence of reliance under *Group Health*. In *In re St. Jude Medical, Inc.*, 522 F.3d 836 (8th Cir. 2008), for instance, the Eighth Circuit questioned whether *Group Health*'s indirect reliance standard applied to a class action alleging consumer protection violations in connection with heart valve sales. But even assuming *Group Health* applied, the court held that defendants' right to rebut with individual evidence of non-reliance defeated certification:

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

> evidence negating a plaintiff's direct or circumstantial showing of causation and reliance.

Id. at 840 (emphases in original); *see also In re Zurn Pex Plumbing Prods. Liab. Litig.*, 267 F.R.D. 549, 561-62 (D. Minn. 2010) (same); *Buetow v. A.L.S. Enters., Inc.*, 259 F.R.D. 187, 191 (D. Minn. 2009) (same).

The same reasoning applies here. PMUSA has a right under Minnesota law and state and federal due process to rebut the claims of individual class members with evidence of non-reliance—for example, by showing that an individual never believed Lights were safer or that an individual (like both class representatives) *continued to purchase Lights* even after learning of the alleged truth. The undisputed record and undisturbed factual findings of the district court demonstrate that PMUSA could make this showing as to many class members, and thus any class claims would require thousands of mini-trials. *See Davies*, 2006 WL 1600067, at *3 (concluding in Lights case that even a presumption would create individual issues because of PMUSA's right "to rebut the presumption of reliance" and "to challenge each and every class member" as to causation).

3. *Peterson* Does Not Permit An Inference Of Class-Wide Reliance

Nor does *Peterson*, 675 N.W.2d 57, support application of an inference or presumption to circumvent the individual issues presented by the reliance requirement. Indeed, this Court in *Peterson* was not addressing Minnesota law, but rather claims brought under the New Jersey Consumer Fraud Act, which this Court interpreted as "not requir[ing] a showing of reliance." *Id.* at 72.

The facts there, moreover, differed dramatically from this case, and support decertification here. The defendant in *Peterson* marketed one pesticide for use on all crops, and sold it for $4 more per acre than another pesticide, which it marketed for use on only four crops. *Id.* at 62. Plaintiffs claimed that the less expensive pesticide was approved for use on all crops (not just four), yet defendant's marketing caused them to purchase the more expensive pesticide. *Id.* at 60-62. After defendant's actions were exposed, the sales and price of the more expensive pesticide declined. *Id.* at 73. This Court, in reviewing the jury verdict and denial of a JNOV motion, held that this evidence—viewed in the light most favorable to plaintiffs—was sufficient to infer that no farmer would have purchased the more expensive pesticide knowing that the cheaper version provided the same benefits, and therefore all farmers relied on the concealment of that fact. *Id.* at 73-74. *Peterson* thus belongs to a category of cases where the record and common sense demonstrate that no person would engage in the transaction knowing the truth.[12]

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[12] Reversal of this certification order will have no bearing on the continued certification of those types of cases and others where reliance can be proven on a class-wide basis. *See, e.g., Klay v. Humana, Inc.*, 382 F.3d 1241, 1259 (11th Cir. 2004) (affirming certification notwithstanding reliance requirement because "jury could quite reasonably infer" that no physician would agree to a contract without payment for services); *In re Retek Inc. Secs. Litig.*, 236 F.R.D. 431, 436-37 (D. Minn. 2006) (permitting fraud-on-the-market presumption of reliance in securities fraud class action). As the Second Circuit explained when distinguishing *Klay* from Lights cases, "a financial transaction does not usually implicate the same type or degree of personal idiosyncratic choice as does a consumer purchase." *McLaughlin*, 522 F.3d at 225 n.7.

Here, by contrast, not only did the district court find substantial variability among class members' beliefs and purchasing motivations, there also was no impact on the market for Lights after the alleged truth was revealed as there had been for the more expensive pesticide. *See supra* at 28. Far from aiding plaintiffs' position, *Peterson* provides additional support for the conclusion that the class should not have been certified.

That conclusion is further confirmed by *Peterson*'s heavy reliance on *Varacallo v. Massachusetts Mutual Life Insurance Co.*, 752 A.2d 807, 817-19 (N.J. Super. App. Div. 2000). *See Peterson*, 675 N.W.2d at 73. A New Jersey court later distinguished the facts in *Varacallo* in refusing to certify a Lights action:

> 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.

Stern, 2007 WL 4841057, slip op. at 10.[13]

C. The Court Of Appeals Disregarded Other Predominating Individual Issues That Should Have Precluded Certification

The district court and court of appeals ignored other issues that would require individual proof and thereby independently erred in assessing whether plaintiffs carried their burden of demonstrating that common issues predominated. The district court certified the class under Rule 23.02(c), which requires a finding that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members." The court was required to analyze this and all certification requirements "with specific reference to the cause of action asserted in a particular case," *Whitaker*, 764 N.W.2d at 638, as well as the defenses that the defendants will raise, *In re Baycol Prods. Liab. Litig.*, 218 F.R.D. 197, 211 (D. Minn. 2003). The predominance question therefore "necessarily requires an examination of the underlying elements necessary to establish liability for plaintiffs' claims." *Blades v. Monsanto Co.*, 400 F.3d 562, 569 (8th Cir. 2005); *see also, e.g.*, *In re Hartford Sales Practices Litig.*, 192 F.R.D. 592, 604 (D. Minn. 1999) ("[P]redominance will be found where generalized evidence may prove or disprove elements of a claim.") (citation and

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[13] The district court further erred in looking to *Aspinall*, 813 N.E.2d 476, as somehow providing guidance on what constitutes "a sufficient causal nexus" in Minnesota. (Add.85-86). The Massachusetts law at issue there is fundamentally different from Minnesota law; in direct contrast to this Court's rulings in *Group Health* and *Weigand*, *Aspinall* held that the Massachusetts statute did *not* require reliance. 813 N.E.2d at 489. Notably, the court of appeals did not rely on *Aspinall* in affirming the certification order.

quotation omitted). To determine whether common or individual issues predominate, courts "must take two steps. [The court's] first focus must be on the substantive elements of plaintiff's cause of action and inquire into the proof necessary for the various elements. Second, after examining the proof necessary [the court] must inquire into the form that trial on these issues would take." *Simer v. Rios*, 661 F.2d 655, 672 (7th Cir. 1981).

The district court and court of appeals departed from this well-settled standard by ignoring both steps and failing even to consider numerous issues that could only be resolved on an individual basis. This too was error. *See, e.g.*, *Whitaker*, 764 N.W.2d at 635 (court abuses discretion when granting certification if it "relies upon an improper factor, *omits consideration of a factor entitled to substantial weight,* or mulls the correct mix of factors but makes a clear error of judgment in assaying them") (citations omitted) (emphasis added); *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 320 (3d Cir. 2008) ("because each requirement of Rule 23 must be met, a district court errs as a matter of law when it fails to resolve a genuine legal or factual dispute relevant to determining the requirements").[14]

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[14] Plaintiffs relied on *Craft*, 190 S.W.3d 368, but that court was able to affirm certification only by determining that it had to accept the allegations of the complaint as true and could not resolve factual disputes. *Id.* at 384; *see also Lawrence*, slip op. at 8 (following *Craft* and focusing on what plaintiff "alleges in her writ"). *Craft* stands in direct contrast with Minnesota (and federal) law, which requires the court to make factual determinations as necessary to resolve certification. *See Whitaker*, 764 N.W.2d at 638 (plaintiffs must establish certification requirement "by preponderance of the evidence" and this standard

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

The court of appeals erred by disregarding the predominating individual inquiries necessary to prove that each class member failed to receive what allegedly was promised: less tar and nicotine. (A.3-5, 10-13.) It is undisputed that Lights produce less tar and nicotine according to the former FTC Test, and thus a class member who smokes Lights and Reds the same way receives less tar and nicotine from Lights. Accordingly, a core issue in any trial would be whether each smoker compensated "completely"—*i.e.*, changed his or her behavior after switching to Lights such that he or she failed to receive less tar and nicotine. *See, e.g.*, *Pearson*, 2006 WL 663004, at *2 ("The tar and nicotine yield of a cigarette . . . depends not upon what is contained in the unlit tobacco in the column, *but upon the way the cigarette is smoked.*") (emphasis added). That *other* smokers may have failed to receive less tar and nicotine is irrelevant; to establish liability and obtain relief, each plaintiff must demonstrate that he or she *personally* failed to receive what was promised. *See, e.g.*, *O'Neil v. Simplicity, Inc.*, 574 F.3d 501, 503 (8th Cir. 2009) (under Minnesota law, each plaintiff personally must fail to receive what was promised).

"requires the district court to resolve factual disputes relevant to rule 23 certification requirements"); Richard A. Nagareda, *Common Answers for Class Certification*, 63 Vand. L. Rev. En Banc 149, 149-50 (2010) ("Gone are earlier suppositions that the court must accept as true the allegations contained in the class complaint—a view that would lead to class certification in virtually every proposed instance by turning the question into an exercise in pleading rather than a matter of affirmative proof.") (collecting citations).

Courts repeatedly have found that "many light cigarettes smokers do not fully compensate when they smoke" and receive less tar and nicotine and "the extent of their compensation can only be predicted by assessing their individual smoking habits." *Light Cigarettes*, 271 F.R.D. at 416; *see also, e.g.*, *Mulford*, 242 F.R.D. at 627 ("[A] significant number of persons in the purported class received the promised lower tar and nicotine from Marlboro Lights cigarettes," and "evidence regarding each purported class member's smoking habits must be submitted in order to demonstrate causation and loss."); *Hines*, 883 So. 2d at 294-95 ("whether or not a smoker reaped the benefits of a lower tar and nicotine cigarette depended upon how the cigarettes were smoked"); *Pearson*, 2006 WL 663004, at *7 (Lights smokers "on average" receive less tar and nicotine and whether any individual failed to receive less tar and nicotine "depends, some do and some don't").

The undisputed record in this case compels the same conclusion. (A.809-36.) Plaintiffs presented no expert or other proof even purporting to establish that all Lights smokers failed to receive less tar and nicotine; nor did they attempt to explain how this issue could be resolved on a class-wide basis. By contrast, PMUSA submitted expert testimony in opposition to certification demonstrating that the amount of tar and nicotine an individual smoker receives depends upon how a person smokes. (A.302-03.)

In addition, after certification, Dr. Benowitz—an editor and author of Monograph 13, upon which plaintiffs base their claims (A.104-05), and a frequent

plaintiffs' expert in Lights cases—conceded that the extent of compensation "depends" and that, "on average," smokers receive less tar and nicotine from each Lights cigarette. (A.831-32, 839); *see also Pearson*, 2006 WL 663004, at *7 (relying on this testimony in denying certification). Dr. Benowitz's concession was confirmed by the unrefuted affidavit of Dr. Valberg, a former Harvard School of Public Health professor, who concluded that the majority of Lights smokers receive less tar and nicotine. (A.834.) Among other things, Dr. Valberg conducted an analysis of a nationally-representative U.S. government study finding that low-tar smokers on average received *less* nicotine than high-tar smokers. (A.818-24.)[15]

The district court originally found that determining which class members failed to receive less tar and nicotine would require predominating individualized inquiries:

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[15] In addition, under plaintiffs' theory, smokers who switch to Lights compensate because they are addicted to nicotine and require a set amount of nicotine each day. (A.809, 832-33.) By definition, therefore, smokers who began smoking Lights or who are not addicted would have no need to compensate because they would not have to maintain a set amount of nicotine developed smoking a higher-tar brand. (A.809, 753-54.) It is undisputed that many smokers initiated with Lights or are not addicted, which would create additional individual issues. (*Id.*); *see also, e.g.*, *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 144-46 (3d Cir. 1998) (whether a smoker is addicted requires a "highly individualistic inquiry"); *Thompson v. Am. Tobacco Co.*, 189 F.R.D. 544, 554 (D. Minn. 1999) ("individual proof of addiction would predominate over questions common to the class and thereby preclude class certification"); *Price v. Philip Morris Inc.*, 848 N.E.2d 1, 53 (Ill. 2005) (questioning certification and stating, "we question whether the members of the class who never smoked prior to smoking Marlboro Lights would have felt the need to compensate when they lacked a prior habit to compensate for").

> Depending upon how a class member smoked, he or she may have received less, the same, or even more tar and nicotine in smoking Marlboro Lights than they would have in smoking a regular cigarette. The amount of tar and nicotine a class member received would also be dependent upon the amount of compensation, if any, that a class member may have engaged in while smoking Marlboro Lights.

(Add.74.)

Again, in reversing itself the district court did not alter these factual findings. Instead, relying on an application of Massachusetts law by the bare four-to-three majority in *Aspinall*, 813 N.E.2d 476, the district court determined that, as a legal matter, plaintiffs would not need to prove that they compensated completely to establish liability based on speculation that it would be difficult for plaintiffs to prove whether they failed to receive less tar and nicotine. (Add.86.)

This determination constituted reversible legal error. *First*, it is legally improper to eliminate a critical element of plaintiffs' proof merely to make plaintiffs' case easier to prove. "The plaintiff has the burden of proving every essential element of his case." *Wick v. Widdell*, 149 N.W.2d 20, 22 (Minn. 1967); *see also Muller v. Rogers*, 534 N.W.2d 724, 726 (Minn. Ct. App. 1995) (same). Under the district court's approach, PMUSA could be liable even to individuals who received what was allegedly promised, simply because the court concluded that class-wide proof on this issue would be difficult. Eliminating elements of plaintiffs' claims in order to facilitate class-wide treatment violates state and federal due process and the well-established principle that class actions are

procedural devices that do not alter substantive rights. Minn. Stat. § 480.051; *see also supra* at 32.

Second, the district court erroneously relied on the *speculations* of the *Aspinall* majority ("So far as we are aware," "it may be unlikely," "it is probable"),[16] rather than assessing the record evidence *in this case*. This speculation was contrary to the record here, including smoker testimony that they were capable of addressing the extent to which they compensated. For example, some class members testified that they increased the number of cigarettes they smoked after switching to Lights. (A.273.) This form of compensation is particularly significant because, under plaintiffs' theory, plaintiffs who compensated by smoking more cigarettes did so because they were receiving less tar and nicotine from *each cigarette*. Such individuals cannot recover. *See, e.g.*, *Pearson*, 2006 WL 663004, at *7 (class member must prove he or she received "as much tar and nicotine from [Lights] as he or she would have received from *the same number of* [Reds]") (emphasis added); *In re Tobacco Cases II*, 2004 WL 2445337, at *20 (Cal. Super. Ct. 2004) (same). Other Lights smokers testified that they did not change the way they smoked at all, and thus believe they received less tar and nicotine. (A.847-78.)

Finally, even *Aspinall* recognized that "a class action consisting of all purchasers would obviously not be appropriate" where "most consumers actually

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[16] The *Aspinall* dissent expressly criticized this conclusion as speculation. 813 N.E.2d at 494-95 (Cordy, J., dissenting).

receive the promised benefit, as may be ascertained by objective tests." 813 N.E.2d at 489 n.21. The undisputed evidence in the record here, however, is that most Lights smokers do *receive less tar and nicotine*. *See supra* at 42-43. As a result, it was doubly inappropriate to eliminate an element of plaintiffs' claims based on speculation that it would be difficult for plaintiffs to offer proof on the issue. *See Mulford*, 242 F.R.D. at 628 (rejecting *Aspinall* because "[t]he undisputed evidence is that a significant number of smokers received the promised lower tar and nicotine").

Notwithstanding the record and the district court's erroneous elimination of an element of plaintiffs' claim through its improper reliance on Massachusetts law, the court of appeals *sub silentio* affirmed. The court acknowledged in passing the argument that "if smoked in a particular manner, Lights may have delivered what was advertised, which makes the inquiry into the falseness of its claims an individual inquiry." (Add.37.) The court did not take issue with the undisputed record that some class members received less tar and nicotine, but rather simply cast this issue aside in a single sentence:

> But appellants counter that Philip Morris purposefully withheld this important information about smoking methods from all consumers and expended enormous sums in deceptive advertising (the prohibited conduct) to influence consumers to pay money (the damages claimed) for a misrepresented product.

(*Id.*)

The court of appeals improperly conflated the issue of causation—what "influence[d] consumers" to purchase Lights—with the separate issue of whether consumers failed to receive what was promised. Regardless of *why* a class member purchased Lights, the "defendant's alleged misrepresentations would not have been false" as to "any member [who] did in fact get less tar and nicotine from Marlboro Lights." *Stern*, 2007 WL 4841057, slip op. at 16. And individualized inquiries would therefore be required because "[p]laintiffs must show that Marlboro Lights cigarettes did not deliver the promised lower tar and nicotine." *Mulford*, 242 F.R.D. at 626.

2. Proof Of The Existence Of An Injury Is A Predominating Individualized Issue

Courts routinely reject certification where there are individual issues relating to whether each class member suffered *any* cognizable injury—an issue distinct from the *amount* of damages owed to each class member. *See, e.g.*, *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 28 (1st Cir. 2008) (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"). The courts below erred in failing to acknowledge—much less consider—the individualized issues concerning proof that each class member suffered injury.

The district court correctly recognized in a summary judgment ruling that to establish a cognizable injury, plaintiffs would have to prove that they "suffered

an out-of-pocket loss." (Add.98); *see also, e.g.*, *Strouth v. Wilkison*, 224 N.W.2d 511, 514 (Minn. 1974) ("limit[ing]" misrepresentation claims to "actual out-of-pocket loss"); *Northstar Indus., Inc. v. Merrill Lynch & Co.*, 576 F.3d 827, 832-33 (8th Cir. 2009) ("Minnesota uses the 'out-of-pocket' approach"). In the context of plaintiffs' Lights claims, there are two ways that class members could establish an out-of-pocket loss: (1) showing that Lights are worth less than their purchase price (and thus they paid too much); or (2) showing that they would have quit or purchased fewer cigarettes in the absence of the alleged misconduct (and thus would have spent less money).

The first approach requires proof that plaintiffs received Lights that were worth less than their purchase price. (Add.97-98); *see also JEM Acres, LLC v. Bruno*, 764 N.W.2d 77, 85 (Minn. Ct. App. 2009) (out-of-pocket loss is measured by the difference in "the amount paid for the property minus its fair market value"). Under plaintiffs' theory, they paid for a Lights but received a cigarette that was not substantially different from Reds. (A.10-14.) Plaintiffs' showing of "loss," then would require a price difference between Lights (what they paid for) and Reds (what they received)—just as there was a price difference between the pesticides in *Peterson*, *see supra* at 37. But it was undisputed that *Reds have always cost the same as Lights*. Thus, class members received a product equal in value to their out-of-pocket expenditures. Accordingly, the only "class" determination on the issue of injury based on this approach would be that the class suffered *no* out-of-pocket loss. *Bryan v. Kissoon*, 767 N.W.2d 491, 496 (Minn.

Ct. App. 2009) ("if the property is worth what a party paid for it, then that party has suffered no damages"); *Price*, 848 N.E.2d at 56 (Lights smokers suffered no injury because "[t]here was no price disparity between light cigarettes and their full-flavored counterparts") (Karmeier, J., concurring).[17]

Because plaintiffs did not—and cannot—offer any means of proving that they overpaid for Lights, the only way any class member could have suffered an injury is if that individual could demonstrate that, absent the alleged fraud, he or she would have spent less on cigarettes. But this necessarily would require individual inquiries regarding whether each class member would have quit or smoked less had he or she learned the "truth."

For these reasons, the Second Circuit held that proof of injury in a Lights trial would require individual inquiries defeating certification:

> [O]ut-of-pocket losses cannot be shown by common evidence because they constitute an inherently individual inquiry: individual smokers would have incurred different losses depending on what they would have opted to do, but for defendants' misrepresentation. For example, smokers who would have purchased full-flavored cigarettes instead of Marlboro Lights had they known that Marlboro Lights were not healthier would have suffered no injury because Marlboro Lights have always been priced the same as full-flavored cigarettes. By contrast, those who would have quit smoking altogether could recover their expenses in purchasing Marlboro Lights. And those who would have continued to smoke, but in

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[17] That class members did not pay too much for Lights is confirmed further by the fact that the price of Lights has not declined after the most recent disclosures. *See supra* at 28.

> greater moderation, could recover something in between. Thus, on the issue of out-of-pocket loss, individual questions predominate; plaintiffs cannot meet their burden of showing that injury is amenable to common proof.

McLaughlin, 522 F.3d at 228; *see also Benedict*, 241 F.R.D. at 680 ("establishing whether each class member suffered economic injury injects individual issues").

3. Proof Of The Amount Of Damages And Class Membership Are Predominating Individualized Issues

Although the "mere fact that there are differences . . . [in] individual amounts of damages does not preclude class certification," *New Motor Vehicles*, 522 F.3d at 23, courts deny certification "where 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, Keating v. Philip Morris Inc.*, 417 N.W.2d 132, 137 (Minn. Ct. App. 1987) (courts refuse to certify where "proof of damages would result in thousands of mini-trials").

Relatedly, courts deny certification where defining who is in a class of product purchasers requires inquiries into whether, when, and/or where each claimant bought the product. *See, e.g., Stephens v. Gen. Nutrition Co.*, 2010 WL 4930335, at *2 (N.D. Ill. 2010) ("because there is no reliable way to determine class membership without holding individualized hearings, class certification must be denied"); *Grimes v. Rave Motion Pictures Birmingham, L.L.C.*, 264 F.R.D.

659, 665 (N.D. Ala. 2010) (same); *Perez v. Metabolife Int'l, Inc.*, 218 F.R.D. 262, 269 (S.D. Fla. 2003) (same).

Determining both the amount of damages and class membership would require individualized inquiries into whether, when, and how many packs of Lights each claimant purchased in Minnesota. But "[b]ecause cigarettes are inexpensive and purchased frequently, it is unlikely that class members will have receipts or other ways of objectively proving purchase history." *Light Cigarettes*, 271 F.R.D. at 422. Indeed, none of the representatives here retained any receipts or could identify the amount spent on cigarettes. (A.147, 212, 245, 287.) Accordingly, there would be no objective, class-wide means of determining who purchased Lights in Minnesota (necessary to determine class membership) and, if so, the amount of those purchases (necessary to determine the damages owed to each class member). Instead, individual mini-trials would be required in which each claimant would testify as to his or her smoking history in Minnesota, subject to cross-examination and rebuttal proofs.

Other Lights courts have found that these inquiries present predominating individual issues defeating certification. *See, e.g.*, *Light Cigarettes*, 271 F.R.D. at 422 (because there is no objective proof of purchasing history, damages and class membership present individual issues); *Benedict*, 241 F.R.D. at 680 (verifying class membership would be "a *very* difficult task") (emphasis in original); *Davies*, 2006 WL 1600067, at *5 ("Defendant should have the opportunity and be entitled to challenge each and every individual as to his or her

claimed damages. This also renders a determination of damages an unmanageable task."); *Cocca*, 2001 WL 34090200, at *1 (same); *Oliver*, 2000 WL 33598654, at *7 (same).

Those decisions are consistent with Minnesota certification law. A Minnesota court in fact previously rejected certification of an antitrust class of cigarette purchasers for just those reasons:

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

Ludke v. Philip Morris Cos., 2001 WL 1673791, at *3 (Minn. Dist. Ct. 2001).

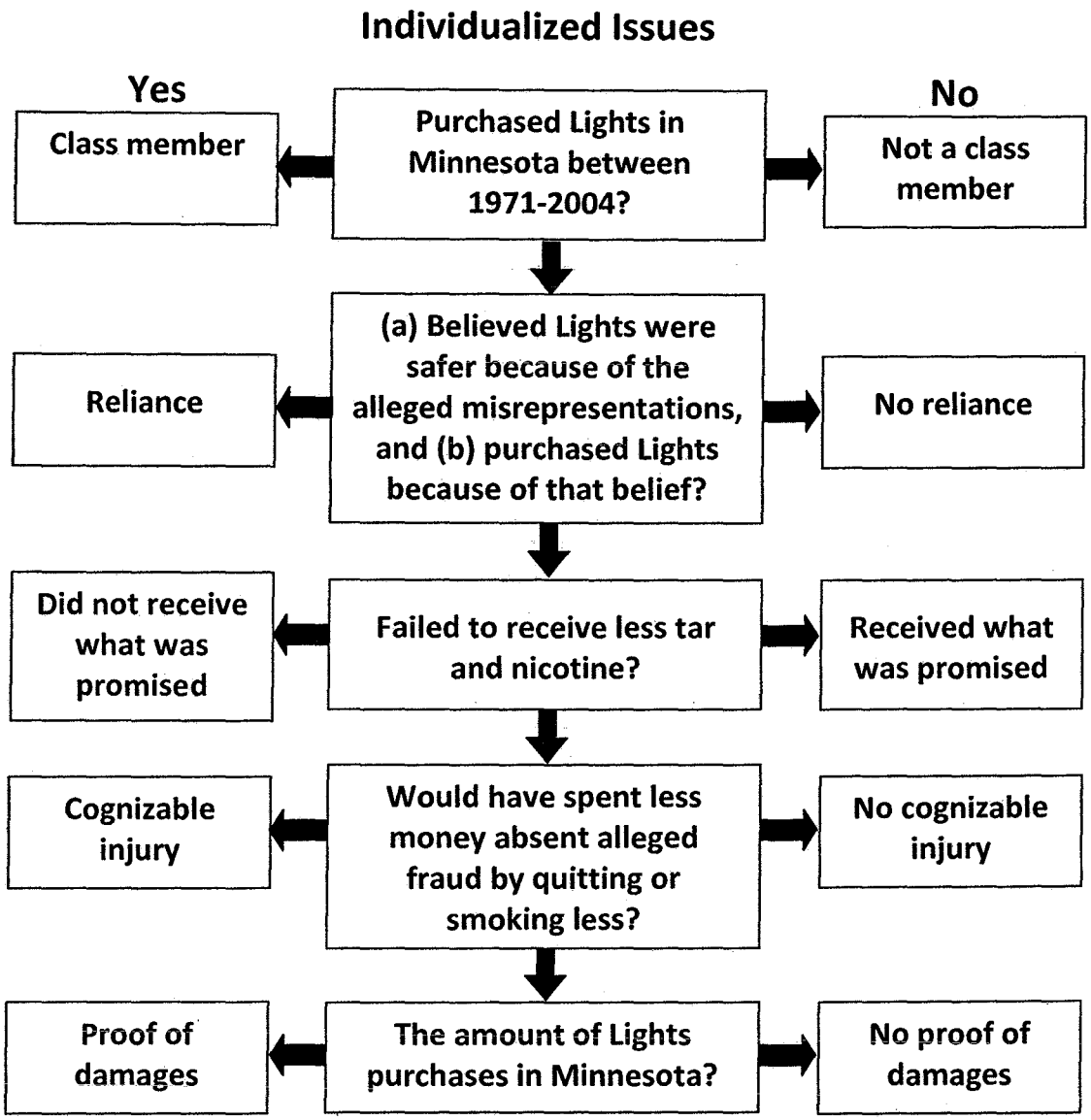
Here, as in those cases, a class action of cigarette purchasers—especially a worldwide class spanning over 30 years—would be an "invitation for fraud." *Id.* PMUSA has the state and federal due process right to demonstrate that individual plaintiffs did not purchase Lights in Minnesota (and are not class members) or are overstating the extent of their purchases (and are inflating damages). *See, e.g.*, *McLaughlin*, 522 F.3d at 231-32 (aggregate proof of damages in Lights case would impermissibly deny the defendant's due process right to challenge allegations of individual plaintiffs); *Perez*, 218 F.R.D. at 269 (refusing to identify class members "through affidavits and fact sheets" because "any written submissions that do not give the Defendant an opportunity to challenge the

memory or credibility of the individual making that averment would provide inadequate procedural protection").

The district court initially acknowledged some of these difficulties in rejecting certification, noting that "[t]he amount of damages each class member suffered would be dependent upon the total amount that class member spent on Marlboro Lights during the class period," which "would differ between each class member depending upon how many cigarettes each purchased." (Add.77.) In reversing itself on reconsideration, however, the court failed rigorously to analyze the impact of these proofs on whether these claims could be tried on a class-wide basis. This presented another reason to reverse the certification order—a reason not even considered by the court of appeals. These failures provide independent bases for reversal now.

* * *

In sum, resolution of each class member's claims would turn on numerous issues—any one of which alone is dispositive on a class member's recovery—that could only be resolved by examining each class member's individual circumstances, as illustrated below:



The court of appeals' elimination of the reliance requirement and failure to consider how the other elements of plaintiffs' claims could be tried on a class-wide basis was error. The relaxation of the burden of proof and class certification standard implicit in this approach would expose sellers of any consumer product to the enormous burdens and pressures of defending class actions in Minnesota predicated on unsupported pleadings and unwarranted inferences. Minnesota law

and state and federal due process require that courts discharge their certification gate-keeping functions more rigorously than by resort to supposed "commonsense inference[s]" (Add.38) that the actual evidence and factual findings below categorically debunk. Such principles are important not only to PMUSA, but to every company that sells products in Minnesota. This Court should apply the certification rule as it was intended, and reverse and remand with instructions to decertify the class.

D. Even If Class Certification Were Proper, Failure To Limit The Class Period To The Limitations Period Was Error

Plaintiffs seek to recover for Lights purchases dating back to 1971, well before the beginning of the limitations period (November 28, 1995, or six years before the complaint was filed). The district court and court of appeals ruled that class members could seek to recover for purchases before the limitations period based on allegations that the limitations period was tolled by fraudulent concealment. (Add.41, 92-93.)

The courts erred in failing to consider how fraudulent concealment tolling would affect the scope of any plaintiff's claims that could be adjudicated on a class-wide basis. To establish tolling, this Court has held that "the claimant must establish that it was *actually unaware* that the defect existed before a finding of fraudulent concealment can be sustained." *Hydra-Mac, Inc. v. Onan Corp.*, 450 N.W.2d 913, 918-19 (Minn. 1990) (emphasis added); *see also Dakota County v. BWBR Architects, Inc.*, 645 N.W.2d 487, 494 (Minn. Ct. App. 2002) (same). The

court of appeals itself recognized that this tolling inquiry would require determinations for each class member regarding "whether, and for what period, the statute of limitations may have been tolled." (Add.43.) Because individual inquiries would be required to determine which claimants were "actually unaware" for purposes of fraudulent concealment-based tolling such that they could sue for purchases prior to the limitations period, at a minimum the class period should have been limited to purchases after November 28, 1995.[18]

CONCLUSION

For the reasons set forth above, this Court should reverse the court of appeals' decision and reinstate the judgment in favor of PMUSA. Alternatively, the Court should remand with instructions to decertify the class.

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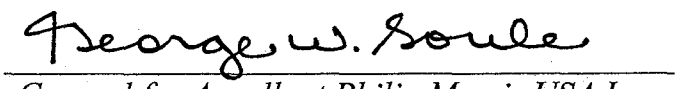
[18] Indeed, in the rare instances where courts have certified Lights claims, the courts have recognized that the individual issues presented by the statute of limitations meant that the class periods must be limited to the applicable limitations periods. *Aspinall*, 813 N.E.2d at 485, 492; *Craft*, 190 S.W.3d at 375-76.

Dated: April 14, 2011.

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. 131.01, subd. 5, for a brief produced with a proportional font. The length of this brief is 13,995 words. This brief was prepared using Microsoft Word 2003.

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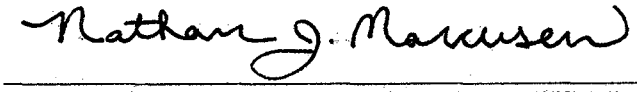

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