

A10-215

**State of Minnesota  
In Supreme Court**

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Gregory Curtis, Joni Kay Hanzal, Josephine Leonard and  
Randy Hoskins, individually and on behalf of all others  
similarly situated,

Respondents,

v.

Altria Group, Inc.,

Defendant,

and

Philip Morris, Inc.,

Petitioner.

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**BRIEF AND ADDENDUM OF RESPONDENTS**

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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).

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## STATEMENT OF THE ISSUES

- I. ARE RESPONDENT PLAINTIFF CLASS' MINN. STAT. § 8.31, SUBD. 3a CLAIMS ENTITLED TO PROCEED BECAUSE THEY DO CONFER A PUBLIC BENEFIT?

The trial court held in the negative and the Court of Appeals reversed. This issue was raised in Petitioner Philip Morris' motion for partial summary judgment. (Add.1).

Collins v. Minnesota School of Business, Inc., 655 N.W.2d 320 (Minn. 2003).

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

Minn. Stat. § 8.31, subd. 3a.

- II. RESPONDENT PLAINTIFF CLASS WAS NOT A PARTY TO EITHER STATE v. PHILIP MORRIS OR TO ITS SETTLEMENT, WHICH AGREEMENT SPECIFICALLY STATES IT DOES NOT DETERMINE, LIMIT OR PREJUDICE THE RIGHTS OF ANY NON-PARTY. ARE PLAINTIFF CLASS' CLAIMS BARRED BY THAT SETTLEMENT AGREEMENT AND RESULTING CONSENT JUDGMENT?

The trial court held in the affirmative and the Court of Appeals reversed. This issue was raised in Petitioner Philip Morris' motion for partial summary judgment and judgment on the pleadings. (Add.1; Add.22).

Dykes v. Sukup Mfg. Co., 2010 WL 1904538 (Minn. 2010).

Henschel v. Smith, 278 Minn. 86, 153 N.W.2d 199 (1967).

- III. DID THE TRIAL COURT ABUSE ITS DISCRETION IN GRANTING CLASS CERTIFICATION?

Pursuant to Respondent Plaintiff Class' motion, class certification was granted. The Court of Appeals affirmed.

Peterson v. BASF Corp., 675 N.W.2d 57 (Minn. 2004), *cert. granted, vacated*, 544 U.S. 1012 (2005), *aff'd on remand*, 711 N.W.2d 470 (Minn. 2006).

Streich v. Am. Fam. Mut. Ins. Co., 399 N.W.2d 210 (Minn. App. 1987).

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

## STATEMENT OF THE CASE AND FACTS

The trial court, the Honorable Gary Larson, dismissed Respondent Curtis et al.'s (Plaintiff Class) consumer protection Minn. Stat. § 8.31, subd. 3a causes of action for failure to confer a public benefit and alternatively as barred by the release in State by Humphrey v. Philip Morris USA, Inc. (State Tobacco Case). (Add.46). The Court of Appeals reversed and reinstated Plaintiff Class' consumer protection claims. (Add.1). Because this case comes before the Court on a grant of summary judgment to Petitioner Philip Morris, Inc. (PM), the facts on appeal are to be viewed in a light most favorable to Plaintiff Class. Isles Wellness, Inc. v. Progressive N. Ins. Co., 703 N.W.2d 513, 516 (Minn. 2005).

The Court of Appeals also affirmed the class certification order. (Add.1). That ruling is viewed on an abuse of discretion standard, with the facts viewed most favorable to the certification ruling. Forcier v. State Farm Mut. Auto. Ins. Co., 310 N.W.2d 124, 130 (Minn. 1981); Electro Nuclear Sys. Corp. v. Telex Corp., 295 Minn. 576, 205 N.W.2d 127, 128 (1973) (“A reviewing court is charged with the duty to view the record most favorably to sustain an order involving the exercise of discretionary authority by a trial court.”). Plaintiff Class offers this outline to provide a more accurate factual and historical perspective and in accord with the standard of review.

### **A. PM Misrepresented Its Marlboro Light Product.**

The gravamen of this action is PM represented its Marlboro Lights cigarettes as “light”—having “lowered tar and nicotine”—in relation to Marlboro Red cigarettes (PM's

regular Marlboro brand), while knowing those statements were misleading and not true. (A10-11; RA741). PM misled Minnesota consumers by marketing and selling “light” cigarettes as containing less tar and nicotine than its standard brand, despite knowing that actual exposure levels were essentially the same. (See RA232, RA257).

Plaintiff Class alleges PM sells and markets Marlboro Lights cigarettes in violation of the Minnesota Consumer Fraud Act (CFA), Minn. Stat. §§ 325F.68-.70; Unlawful Trade Practices Act (UTPA), Minn. Stat. §§ 325D.09-.16; and False Statement in Advertisement Act (FSAA), Minn. Stat. § 325F.67. (A9-15). All of these statutes impose a prohibition against misleading and deceiving the purchasing public.

The CFA broadly declares the “act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement, or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise” is an unlawful practice. Minn. Stat. § 325F.69, subd. 1. (R.Add.5).

Likewise, PM violated UTPA, Minn. Stat. § 325D.13 (R.Add.9), which states:

No person shall, in connection with the sale of merchandise, knowingly misrepresent, directly or indirectly, the true quality, ingredients or origin of such merchandise.

And the FSAA, Minn. Stat. § 325F.67, prohibits a representation in advertising that is untrue, deceptive or misleading. (R.Add.10).

Plaintiff Class asserts that under Minnesota’s consumer protection statutes, these purchasing consumers are entitled, pursuant to Minn. Stat. § 8.31, subd. 3a, to recover as restitution from PM the amounts they paid to purchase this product sold under false and

misleading pretenses. Plaintiff Class does not assert any smoking-related damages for personal or health injuries.

**B. PM Marketed Marlboro Lights as a Health Reassurance Cigarette.**

Light cigarettes came into being because PM recognized smokers had become increasingly concerned about health issues related to smoking. (RA326). People who smoked wanted to quit because of these concerns, and PM accurately perceived a desire to quit was a significant threat to its economic welfare. (RA522-25). January 1964 marked the release of the first Surgeon General's report on smoking and reawakened public concerns about the potential health consequences of smoking. (RA272). Tobacco manufacturers needed to reduce consumer concerns and a lower tar and nicotine yield cigarette was viewed as an attractive alternative for many smokers once smokers were convinced by advertising that this would be a meaningful step toward health and away from risk. (RA273-74; RA329-36).

Marlboro Lights packages containing the words "lights" and "lowered tar and nicotine" were introduced in 1971. (RA190). PM intentionally marketed Marlboro Lights with the descriptor "lights" and the representation "lowered tar and nicotine" on every package of Marlboro Lights with the intention of communicating to consumers that Marlboro Lights cigarettes were less harmful or safer than regular Marlboro cigarettes. (See RA568, RA598). Every consumer purchasing this product had to seek out or ask for these "Light" cigarettes by name.

PM internally described Marlboro Lights as “health reassurance cigarettes.” (See RA329; RA377). A 1978 PM internal document states:

The very fact, then, that a smoker has decided to switch from a full flavor cigarette to a low delivery cigarette tells us something very important about him: he is concerned about his health and he is willing to do something about it.

(RA569).

The March 20, 1984 edition of PM’s The Cigarette Consumer states:

- Historically, motivation has come from health issues.
- People willing to stick with lower tar because they feel they are doing themselves a favor.
- Most successful new brands have had low tar/health motivation . . . .

(RA598).

PM’s assessment of its ability to lure consumers to “light” cigarettes proved true; light cigarettes rapidly came to dominate the U.S. cigarette market, representing over 72% of the total cigarettes sold by 1995. (RA723). Since PM introduced Marlboro Lights, it has aggressively advertised the brand nationally and in Minnesota. In 1974, PM spent \$2,433,477 nationally on the advertisement of light cigarettes. (RA111). By 1984, its advertising budget was \$42 million. (RA117). By 1989, its combined budget for Marlboro Lights and Reds had ballooned to \$107.2 million. (RA132).

**C. PM Knew It Was Misleading the Consumer in Its Sale of Marlboro Lights.**

In its brief PM argues, as it has elsewhere, the public health community, and not PM, was the reason some consumers believed these light products to be safer. But PM had specific scientific and cigarette design knowledge the public health community did not possess related to light cigarettes generally as well as Marlboro Lights specifically. (RA741-43). The fact is PM took advantage of the public health community's concerns in selling its cigarettes which deliver neither lowered tar nor nicotine to Minnesota consumers. (RA267-303).

PM has known for decades that most smokers are likely to receive as much or more tar and nicotine from Marlboro Lights as they would receive from regular Marlboros. (RA611, 614, 618, 621, 631, 633). PM knew its advertising claims for "lights" were false and misleading. PM was aware because of nicotine addiction smokers would not smoke "health reassurance" cigarettes if they failed to supply enough nicotine to sustain their addiction. PM designed its light cigarette to create the illusion that there would be less nicotine and tar but at the same time would facilitate a smoker's ability to compensate for the reduced nicotine yield. Compensation occurs by the smoker inhaling more often and more deeply than the smoking machine used to measure the amounts of tar and nicotine delivered by cigarettes. As a result, smokers inhale the same amount of nicotine (and with it, tar) from "lights" as regular cigarettes. (RA624-25). A 1975 PM

internal report comparing tar and nicotine intake in Marlboro Light smokers with regular “Marlboro 85” cigarette smokers concluded:

[S]moker data collected in this study are in agreement with the results found in other project studies. The panelists smoked the cigarettes according to physical properties; i.e., the dilution of the lower RTD [resistance to draw] of Marlboro Lights caused the smokers to take larger puffs on the cigarette than on Marlboro 85's. The larger puffs, in turn, increased the delivery of the Marlboro Light proportionally. [T]he Marlboro 85 smokers in the study did not achieve any reduction in smoke intake by smoking a cigarette (Marlboro Lights) normally considered lower in delivery.

(RA742-43).

Any contention by PM that the Federal Trade Commission (FTC) “blessed [PM’s] use of labels like ‘light’ and ‘low tar’ [was] foreclosed by Altria v. Good, 555 U.S. 70 (2008), concluding the FTC has never . . . entirely condoned the use of ‘light’ or ‘low tar’ descriptors.” U.S. v. Philip Morris USA, Inc., 566 F.3d 1095, 1124-25 (D.C. Cir. 2009), *cert. denied* 130 S.Ct. 3502 (2010). PM has long known that the FTC machine-measured test does not measure the amount of tar and nicotine inhaled by the actual smoker.

(RA618, 621). PM’s knowledge and suppression is demonstrated in its formerly confidential 1974 internal document:

Generally people smoke in such a way that they get much more than predicted by machine. This is especially true for dilution cigarettes [i.e. low tar, low nicotine]. . . . The FTC standardized test . . . gives low numbers.

(RA621-22).

Not only did PM exploit the limits of the machine test to market its cigarettes as “lowered tar and nicotine,” it also deliberately designed “lights” to fool the machine into producing results that would enable PM to characterize Marlboro Lights as “lowered tar and nicotine” while ensuring “lights” smokers obtained much higher levels. (See RA211-35). Specifically, light cigarettes are designed with microscopic ventilation holes in and near the filter. When tested by machine, these vent holes are unobstructed and allow air to mix thereby diluting the amount of tar and nicotine measured by the machine. A smoker’s fingers, however, obstruct these holes and thereby the smoker is delivered higher levels of tar and nicotine. (RA215, RA219). PM did not inform consumers about the vent holes. (See RA219).

Again, the purpose was to ensure Marlboro Lights smokers received acceptable, addictive levels of tar and nicotine, as determined by PM’s internal research. (RA372-400; RA741-42). In short, PM has known for decades that light cigarettes do not offer a meaningful reduction of risk, and its marketing, which emphasizes reduction in tar and nicotine, was deceptive.

PM advertised and sold Marlboro Lights as “lowered tar and nicotine” to Minnesota consumers unimpeded before and after the State’s 1998 Tobacco settlement. In October 2001, the National Cancer Institute (NCI) released Monograph 13: “Risks Associated With Smoking Cigarettes With Low Machine Measured Yields of Tar and Nicotine” (Monograph 13). (RA205). Plaintiff Class directs the Court’s attention to its preface. (RA206). Monograph 13 came about because internal tobacco documents now

available revealed what tobacco companies long knew but the public did not regarding the industry's manipulation and deception in the manufacture and sale of "light cigarettes." (RA206-07). Monograph 13 states:

- Low tar cigarette advertisements were intended to reassure smokers worried about smoking health risks and prevent quitting.
- Advertising successfully got smokers to use light cigarettes.
- Formerly secret tobacco documents now available to health professionals and the public demonstrate manufacturers recognized their advertisements' inherent deception offering "light" cigarettes or having the lowest tar and nicotine yields.

(RA301).

This lawsuit was filed in November 2001. (A19). PM admits that only after this lawsuit and after spending millions promoting its light cigarettes did PM place a folded leaflet inside selected brands of its cigarettes for "a period of each year." (A749). No insert was included in every pack and one had to purchase the product to receive the information. PM asserts it enclosed a booklet in certain select newspapers, but not the Minneapolis StarTribune or the St. Paul Pioneer Press. (A748). PM quotes the NCI Press Release that Monograph 13 "clearly demonstrates" that people who smoke light cigarettes are "likely to inhale the same amount of cancer-causing toxins" as those who smoke regular cigarettes. (A766). PM continued selling Marlboro Lights with no such statement on its light packs.

This class action was certified in 2004. (Add.78). PM, and its amici, would have this Court believe PM did nothing which injured the class. (See Product Liability

Counsel Brief at 16; Chamber Brief at 14-15). But during the pendency of this action, the Federal District Court in U.S. v. Philip Morris USA, Inc., 449 F.Supp.2d 1 (D.D.C. 2006), *aff'd in part, vacated in part and remanded*, 566 F.3d 1095 (D.C. Cir. 2009) (DOJ Case), ruled PM and others violated the Racketeer Influenced Corrupt Organizations Act. The DOJ's detailed findings that PM schemed to defraud light smokers and its affirmation on appeal demonstrates the merit in this lawsuit.<sup>1</sup> DOJ, 566 F.3d at 1124-26. "As their internal documents reveal, Defendants engaged in massive, sustained and highly sophisticated marketing and promotional campaigns to portray their light brands as less harmful than regular cigarettes." DOJ at 1124, quoting Philip Morris, 449 F.Supp.2d at 860. "Defendants have known for decades that . . . low tar cigarettes do not offer a meaningful reduction of risk, and that their marketing which emphasized reductions in tar and nicotine was false and misleading." Id.

Also affirmed were the DOJ court's findings that PM's public statements about "lights" were "blatantly false," that PM "withheld and suppressed [its] extensive knowledge and understanding of nicotine-driven smoker compensation" and that PM intentionally designed its light cigarettes to facilitate smokers' compensation, thereby

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<sup>1</sup> In its Brief, PM cites to documents (see Brief, pp. 6, 28, 42-43) in purported support of decertification which were not presented to the trial court at the time this case was certified. Specifically, those documents, located at A747 through A875, were submitted by PM in a later attempt to contradict the DOJ court's extensive findings of fact regarding PM's fraud which findings Plaintiff Class submitted collaterally estopped PM from contesting its fraud. Plaintiff Class submits this Court should also look at the DOJ findings, specifically findings of fact 2400-2483. Philip Morris, 449 F.Supp.2d at 513-29.

ensuring they obtain their required dosage of nicotine. DOJ at 1125. The findings describe PM’s efforts to “design commercial cigarettes . . . capable of delivering nicotine across a range of doses that would keep smokers addicted” through filter design, the placement of ventilation holes, paper poracity and alterations to the chemical form of the nicotine delivered to smokers’ brains.” 449 F.Supp.2d at 339.

After the DOJ decision, Congress enacted the Family Smoking Prevention and Tobacco Control Act of 2009 (Tobacco Control Act), Pub. L. No. 111-31, 123 Stat. 1776 (2009). In so enacting, in its legislative findings, Congress cited the DOJ findings. Id. at 1781. Congress was fully aware of litigation against tobacco companies pending across the country and made clear this legislation was not to disturb pending litigation. The statute explicitly provides “[n]othing” in its provisions “shall be construed to . . . affect any action pending in Federal, State or tribal court.” Tobacco Control Act § 4(a), 123 Stat. 1776, 1782, codified at 21 U.S.C. § 387 Note.

## ARGUMENT

### **I. THE COURT OF APPEALS’ REINSTATEMENT OF PLAINTIFF CLASS’ CONSUMER PROTECTION CLAIMS SHOULD BE AFFIRMED.**

#### **A. This Court Has De Novo Review.**

This case comes before the Court on a grant to PM of summary judgment dismissing Plaintiff Class’ action under Minn. Stat. § 8.31, subd. 3a, for failure to confer a public benefit and alternatively as barred by release. On review, this Court determines, based on the summary judgment record, if there are genuine issues of material fact and

whether the district court committed error in its application of Minnesota law. The evidence is viewed most favorable to Plaintiff Class. Isles Wellness, Inc., 703 N.W.2d at 516.

This case also involves the interpretation of Minn. Stat. § 8.31 which presents a question of law. Lee v. Fresenius Med. Care, Inc., 741 N.W.2d 117, 122 (Minn. 2007).

**B. Plaintiff Class' Claims Satisfy Minnesota's Public Benefit Requirement as Enunciated by This Court.**

The harm the consumer protection statutes seek to avoid and to remedy occurs when consumers are misled into buying products that are not what they are represented to be. Minn. Stat. § 8.31, subd. 3a, entitled "private remedies," provides a cause of action and sets out the remedies available to those injured by violation of the CFA and other Minnesota consumer protection statutes. (R.Add.2). It states in pertinent part:

Subdivision 3a. Private remedies. In addition to the remedies otherwise provided by law, any person injured by a violation of any of the laws referred to in subdivision 1 may bring a civil action and recover damages, together with costs and disbursements, including costs of investigation and reasonable attorney's fees, and receive other equitable relief as determined by the court. . . .

The provision includes no mention of public benefit. It certainly has no requirement that a private remedies action must include a prayer for a certain type of relief.

Although not tied to any express statutory language, this Court in Ly v. Nystrom, 615 N.W.2d 302, 314 (Minn. 2000), held Minn. Stat. § 8.31, subd. 3a "applies only to those claimants who demonstrate that their cause of action benefits the public." In Ly, the

purchaser of a restaurant brought a CFA action against the seller. Thus, there was only one transaction in the matter. No advertisements were made. No representations were made to the public at large. This Court dismissed the appellant's claim because the matter involved a single buyer in a single transaction with a single seller. Neither the transaction nor the alleged misrepresentation affected the public at large. This fact was determinative. "Appellant was defrauded in a single one-on-one transaction in which fraudulent misrepresentation, while evincing reprehensible conduct, was made only to appellant." Id. at 314. It was based upon this fact the Court concluded a successful prosecution of the fraud claim would have no public benefit.

In so holding, the Court echoed the earlier dissent authored by Justice Simonett in Church of the Nativity of Our Lord v. WatPro, Inc., 491 N.W.2d 1, 10 (Minn. 1992) (Simonett, J, concurring and dissenting in part) that consumer protection laws are aimed at practices—a term that denotes fraud victimizing more than one plaintiff. The dissent in WatPro, 491 N.W.2d at 9-10, and the Court in Ly, 615 N.W.2d at 311 n.16, ultimately agreed on this purpose requiring the fraud "to have the potential to deceive and ensnare members of the consumer public other than just the plaintiff." Id.

It is true that this Court in Ly quoted Representative Sieben's statements as to the purpose of § 8.31, subd. 3a, but PM in its brief to this Court does not do so completely or accurately. As stated by this Court:

Representative Sieben stated that the purpose of the Private AG Statute is to stop the "unscrupulous . . . businessman who makes . . . false and deceptive ads," and with its adoption "a private

citizen may take the person to court . . . when the citizen has been defrauded and he may recover damages plus reasonable attorney's fees or injunctive relief.”

Id. at 311.

The Court continued:

Representative Sieben also referred to the importance of providing an incentive to consumers to privately enforce the fraudulent business practices laws: “An operator who can . . . rip off a large number of citizens, and cease operating . . . may likely to be able to do so with little threat of legal action. More stringent remedies are therefore needed . . . [This bill] provides a route for private recovery for the victims of consumer fraud.

Id.

There is nothing in Representative Sieben's statements that remotely implies that the rationale of the private remedy statute is anything but the creation of a statutory right for consumers to recover money from the unscrupulous business that engages in misleading business practices. And the ability to recover certainly continues even though that offender ceases operating. Id. PM argues a suit that seeks only to compensate private individuals—even a large class of private individuals—who are victims of consumer fraud does not meet the purpose of § 8.31. But that is exactly what Representative Sieben said the purpose was in its enactment.

This Court's decision in Ly was followed by its decision Group Health Plan, Inc. v. Philip Morris, Inc., 621 N.W.2d 2 (Minn. 2001), in which this Court rejected PM's efforts to place further restrictions on the CFA unsupported by the statute's express

language. This Court states it is not this Court's role to "narrow the [statute's] reach where the legislature has spoken in unequivocally broad terms." Id. at 11.

There is only one post-Ly decision by this Court applying the public benefit requirement—Collins v. Minnesota School of Business, Inc., 655 N.W.2d 320 (Minn. 2003). In Collins, a group of students enrolled in the Minnesota School of Business (MSB) after viewing a television advertisement about the school's sports medicine technician program and reviewing the school's literature. The students brought suit, alleging a number of MSB's representations in the advertisement's informational presentations and literature were false. In discussing the § 8.31 requirement, the Court elaborated on the facts the Court had found determinative in Ly:

The defendant [in Ly] made numerous fraudulent representations concerning its restaurant business, but only made the representations directly to the plaintiff. Emphasizing that the misrepresentations were made to only one person and that the fraudulent transaction was completed on a one-on-one basis, we concluded that the plaintiff did not demonstrate that his claim was in the public interest.

Id. at 330.

Based upon its holding in Ly, this Court held the plaintiffs in Collins had satisfied the public benefit requirement and noted the determinative facts:

When [MSB] launched its program, it made misrepresentations to the public at large by airing a television advertisement. MSB also made numerous sales and information presentations and provided students with a "Career Opportunities" sheet, which students interpreted as a list of jobs for which they might qualify after completing the program. All of these factors indicate that MSB presented its program to the public at large. We hold that

respondents' successful prosecution of their claims benefited the public and therefore respondents are entitled to reasonable attorney fees.

Id.<sup>2</sup> This Court made clear in both Ly and Collins that the public benefit requirement is satisfied where the defendant “made misrepresentations to the public at large” and engaged in transactions with a broad section of the public, as opposed to a single transaction “completed on a one-on-one basis.” Id.

Plaintiff Class' claims in this matter satisfy the conditions set forth in Ly and Collins.<sup>3</sup> First, unlike the one-on-one transaction at issue in Ly, PM sold 23,179,206,000 Marlboro Light cigarettes in Minnesota between 1974 and 2001. (RA192-93). The named plaintiffs do not seek to benefit just themselves, but also the class, which includes thousands of defrauded Minnesotans who bought cigarettes misrepresented in ads and on cigarette packs as “light.” If recovery on behalf of a substantially smaller number of students, as was the case in Collins, is sufficient to confer a benefit upon the public, there can be no denying Plaintiff Class' action reaches the same threshold.

Second, PM presented its misrepresentations to the public at large in advertisements and on its packaging for 37 years. (RA105-70; RA267-303). This Court

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<sup>2</sup> Inexplicably, PM quotes to the Court of Appeals' rationale in Collins for concluding there was a public benefit, which rationale is not the stated rationale of this Court. (See PM Brief at p. 15).

<sup>3</sup> Before the lower courts, Plaintiff Class asserted it met the public benefit requirement as enunciated by this Court. Plaintiff Class also made clear it did not waive any argument to this Court that it should reconsider and eliminate this requirement.

in Collins held the MSB's airing of advertisements regarding one program to the public at large was sufficient to satisfy the second factor. PM's advertising and sales of Marlboro Lights in Minnesota dwarf the single advertisement at issue in Collins, which supported the school's liability.

Conduct exhibiting the capacity to deceive a substantial portion of the consuming public necessarily subsumes the public interest requirement because the conduct entails en-masse repetition of unfair or deceptive acts; a court therefore acts in the public interest when it accords restitution as a result of that conduct.

**C. The Trial Court Improperly Engrafted New Limitations onto Minn. Stat. § 8.31, subd. 3a, Contrary to the Language and Intent of the Statute, Which the Court of Appeals Appropriately Rejected.**

Disregarding the nature of PM's fraud which ensnared Minnesota consumers, the trial court focused only on the relief requested by Plaintiff Class—restitution—stating “even if Plaintiffs were successful, they would only receive monetary recovery for a large number of private individuals, which is not enough to establish a public benefit.”

(Add.62). Accordingly, the district court engrafted a new requirement onto Minn. Stat. § 8.31, subd. 3a. To the contrary, and as the Court of Appeals ruled, Minn. Stat. § 8.31, subd. 3a broadly states “any person injured . . . may bring a civil action to recover damages . . . and receive other equitable relief as determined by the court.” (Add.22).

A statute's “words and phrases are construed according to the rules of grammar” and according to their plain and common meaning, unless they embody some special significance. Minn. Stat. § 645.08(1). The object of statutory interpretation is “to

ascertain and effectuate the intention of the legislature.” Minn. Stat. § 645.16. This Court must give effect to all of a statute’s provisions so that “no word, phrase or sentence should be deemed superfluous, void, or insignificant.” Am. Family Ins. Group v. Schroedl, 616 N.W.2d 273, 277 (Minn. 2000). If the text is clear, “statutory construction is neither necessary nor permitted.” Am. Tower, L.P. v. City of Grant, 636 N.W.2d 309, 312 (Minn. 2001). If ambiguous, this Court applies canons of construction to discern legislative intent. Minn. Stat. § 645.16.<sup>4</sup>

Here, Plaintiff Class seeks restitution due to PM’s deceit. A restitutionary award focuses on the defendant’s wrongfully obtained gain. Kerr v. Charles F. Vatterott & Co., 184 F.3d 938, 944 (8th Cir. 1999). It punishes the wrongdoer by taking his ill-gotten gains, thus removing his incentive to perform such wrongful acts again. Id., citing Dan B. Dobbs, Law of Remedies § 4.1(1) at 369-71 (Abr. 2d ed. 1993). It also serves as a lesson to others to dissuade similar, future conduct. Restitution is as much a public benefit as, for example, the grant of injunctive relief. “Future violations may be best deterred by seeking victim-specific monetary relief, rather than non-victim-specific injunctive relief.” State by Hatch v. Cross Country Bank, 703 N.W.2d 562, 570 (Minn. App. 2005).

PM is not entitled to keep the ill-gotten fruits of its unfair, deceptive and unlawful conduct, but this is what PM requests. After all, the laws against unfair business

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<sup>4</sup> And if the Court chooses to look at legislative intent, as the statements of Representative Sieben, quoted in Ly, make clear, the Legislature did not intend the statute to be construed as PM urges and some federal courts have ruled.

practices, and specifically § 8.31, subd. 3a, were drafted to prevent a wrongdoer from retaining the benefits of its wrongful act. A suit for restitution enforces the laws of Minnesota by restoring the status quo. The recovery of that which has been wrongfully acquired is in the public interest. It furthers the remedial purpose of the CFA. Wiegand v. Walser Auto. Groups, Inc., 683 N.W.2d 807, 812 (Minn. 2004). The purpose of Minnesota's consumer protection statute is to protect the public from unlawful business practices and to provide those harmed with a remedy. This lawsuit does exactly that and the Court of Appeals appropriately ordered it reinstated.

## **II. THIS CASE IS NOT BARRED BY THE STATE TOBACCO SETTLEMENT.**

The trial court also ruled Plaintiff Class cannot recover as a matter of law on its consumer protection claims based on the settlement and resulting Consent Judgment in the State Tobacco case ignoring the fact Plaintiff Class members are not parties to that settlement and the settlement release specifically states it does not “bind any non-party or determine, limit or prejudice the rights of such persons or entity.” (RA96). The Tobacco Settlement does not provide any remedy for individual consumers injured by PM's violation of Minnesota's consumer protection statutes. And Minnesota's Attorney General states this action does provide a benefit to the public regardless of the Attorney General's earlier tobacco lawsuit. (Add.21). The Court of Appeals correctly reinstated Plaintiff Class' claims. (Add.25).

**A. State Tobacco Case Was Brought in 1994.**

The State Tobacco case was brought in 1994 by the Attorney General, on behalf of the State, and Blue Cross and Blue Shield of Minnesota (BCBS) on its own behalf.

(RA1). The State/BCBS did not bring their actions as subrogated parties to any underlying tort/statutory protection claims that cigarette purchasers may have against the cigarette industry. Instead, State/BCBS sued in their own right for injunctive relief and to recover the money they spent to pay for health care for smoking-attributable diseases.

(RA54). State by Humphrey v. Philip Morris, Inc., 551 N.W.2d 490, 495-498 (Minn. 1996).<sup>5</sup>

Paragraph 4 of the State's Second Amended Complaint (State Complaint) explains the "premise" of the State's case was the tobacco industry "and not the State of Minnesota, or its citizens . . . should pay for the staggering health care cost caused by its actions in violation of the laws of the state." (RA3). Cigarette sales "have resulted in increased health care costs directly attributable to cigarette smoking." (RA51). The State's complaint sought damages to protect the public health of its citizens and also "to vindicate the State's proprietary interests in enforcing the State's rights to damages for economic injuries to the State" caused by the industry's unlawful actions including increased expenditures for Minnesota's Medicaid plan, Medical Assistance; General

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<sup>5</sup> Specifically, the Attorney General acted on behalf of the State pursuant to its "authority under the common law, as well as Minn. Stat. §§ 8.01, 8.31, 325D.09-15, 325D.43-45, 325D.49-66 and 325F.67-70" to protect the "citizens and the public health." (RA3).

Assistance Medical Care; Minnesota Care and the State Employee Group Insurance program. (RA3-6). The words “light,” “low tar” or “lower tar” do not appear anywhere in the State’s Amended Complaint.

As to Count Four (consumer fraud), Count Five (unlawful trade practices) and Count Six (deceptive trade practices), the State sought injunctive relief. (RA45-48). As to Count Eight (restitution) and Count Nine (unjust enrichment), the State sought to recoup from defendants the medical costs borne by the State stemming from defendants’ unlawful conduct. (RA50-51).

**B. The Settlement Agreement and Consent Judgment Do Not Bind Non-Parties.**

The Settlement Agreement, by its terms, bound only the State itself and not any private individuals. The Agreement purported “to settle and resolve with finality all claims of the State of Minnesota relating to the subject matter of this action which have been or could have been asserted by the State of Minnesota.” (RA72-73). Its second paragraph recites the State commenced its action “asserting various claims for monetary, equitable and injunctive relief on behalf of the State of Minnesota . . . .” (RA73). Consideration for the payments which were to be made by the Settling Defendants required “the dismissal and release of claims by the State of Minnesota” and were “to be made . . . in satisfaction of all of the State of Minnesota’s claims for damages . . . .” (RA74; RA78-79).

PM, at page 9 of its brief, quotes a portion of the Settlement Agreement's Paragraph III(B). What PM does not say is "State of Minnesota," for purposes of the Release, includes the following: "any of its past, present or future administrators, representatives, employees, officers, attorneys, agents, representatives, officials acting in their official capacities, agencies, departments, commissions, and whether or not any such person or entity participates in the settlement." (RA83-84).

Nor does PM quote that part of the Settlement Agreement that specifically states it does not "determine, limit or prejudice the rights" of any non-party.

Except as expressly provided in the Settlement Agreement, no portion of the Settlement Agreement shall bind any non-party or determine, limit or prejudice the rights of any such persons or entity. None of the rights granted or obligations assumed under the Settlement Agreement by the parties hereto may be assigned or otherwise conveyed without the express prior written consent of all of the parties hereto.

(RA96). Plaintiff Class and its members were not parties to the Settlement Agreement.

Plaintiff Class and its members cannot enforce its terms.

Pursuant to the tobacco parties' agreement, Ramsey County entered a Consent Judgment which "resolves all claims set forth in the State's Second Amended Complaint." (RA69). None of the Consent Judgment's provisions concern the rights of individual Minnesota consumers. Section IV of the Consent Judgment states it is not intended to and does not vest standing in any third parties with respect to its terms nor can anyone other than the parties enforce it. (RA64). Section V(M) of the Stipulation for Entry of Consent Judgment entitled "Intended Beneficiaries" states:

This action was brought by the State of Minnesota, through its Attorney General, and by Blue Cross to recover certain monies and to promote the health and welfare of the people of Minnesota. No portion of this Settlement Agreement shall provide any rights to, or be enforceable by, any person or entity that is neither a party hereto nor a person encompassed by the releases provided in paragraphs III.B. and C. of the Settlement Agreement.

(RA96).

**C. Based on the Unambiguous Terms of the Settlement Agreement and Consent Judgment, This Case Is Not Barred.**

**1. Unambiguous Release language does not bar Plaintiff Class' claims.**

A settlement agreement is a contract. State by Humphrey v. Philip Morris USA, Inc., 713 N.W.2d 350, 355 (Minn. 2006). Since settlement agreements are merely private contracts, one cannot prejudice the rights of non-parties. See Pacific Indem. Co. v. Thompson-Yaeger, Inc., 260 N.W.2d 548, 558 (Minn. 1977). And “settlements ordinarily occasion no *issue preclusion* (sometimes called collateral estoppel), unless it is clear . . . that the parties intended their agreement to have such an effect.” Arizona v. California, 530 U.S. 392, 414 (2000).

The court reviews the language of the contract to determine the parties' intent. Dykes v. Sukup Mfg. Co., 781 N.W.2d 578, 581 (Minn. 2010). The cardinal purpose of construing a contract is to give effect to the intention of the parties as expressed in the language they used. Employers Liab. Assur. Corp. v. Morse, 261 Minn. 259, 111 N.W.2d 620, 624 (1961). Construction is a question of law unless there is ambiguity. Art Goebel, Inc. v. N. Suburban Agencies, Inc., 567 N.W.2d 511, 515 (Minn. 1997). The court is not

to go beyond the language of an unambiguous contract in interpreting the document.

Telex Corp. v. Data Prods. Corp., 271 Minn. 288, 135 N.W.2d 681, 686-87 (1965).

Unambiguous words in a contract are not to be read in isolation, but rather “in accordance with the obvious purpose of the contract . . . as a whole.” Motorsports Racing Plus, Inc.

v. Arctic Cat Sales, Inc., 666 N.W.2d 320, 324 (Minn. 2003) (quotation omitted). There

is a presumption the parties intended the language used to have effect. “[W]e will attempt to avoid an interpretation of the contract that would render a provision meaningless.”

Chergosky v. Crosstown Bell, Inc., 463 N.W.2d 522, 526 (Minn. 1990); Martin v. Setter,

184 Minn. 457, 239 N.W. 219, 221-22 (1931).

The trial court improperly looked beyond the four corners of the Settlement Agreement in determining it precludes Plaintiff Class’ claims.<sup>6</sup> (Add.63-65). The Settlement Agreement precludes only the claims specifically referred to, those brought by the State and listed in the release, not the claims of persons not parties in the case nor claims not listed in the release. To interpret the release otherwise renders meaningless the provision which explicitly states that it does not “bind any non-party or determine, limit or prejudice the rights of any such persons or entity.” (RA96).

The trial court acted directly contrary to that language in dismissing this action, thus limiting and prejudicing class members’ rights. The 1994 state case did not provide

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<sup>6</sup> Rather than focusing on the unambiguous language of the actual Release and Consent Judgment, PM now wants this Court to take judicial notice of proposed findings of fact submitted in State by Humphrey. The Court of Appeals denied PM’s motion to take judicial notice of these proposed findings after full briefing of the issue. (RA806).

Plaintiff Class any remedy under Minn. Stat. § 8.31, subd. 3a. Based on the unambiguous language of the Settlement Agreement, Plaintiff Class' action is entitled to proceed. (RA96).

**2. Unambiguous language of Consent Judgment does not bar Plaintiff Class' claims.**

The Consent Judgment states it resolves only the claims set out in the State's Complaint and even as to the State, the remedies are "cumulative" and nothing prevents even the State from "bringing any action for conduct not released hereunder, even though the conduct may also violate the Consent Judgment." (RA71). The Consent Judgment declares it "is not intended to and does not vest standing in any third party with respect to the terms thereof or create for any person other than the parties hereto a right to enforce the terms hereof." (RA64). Again, Plaintiff Class' members were not parties to the State's suit.

A consent judgment, likewise, is based solely on the agreement and consent of the parties. Hollenkamp v. Peters, 410 N.W.2d 427, 429 (Minn. App. 1987). While a consent decree is accorded the weight of a final judgment, it "is to be construed . . . basically as a contract." U.S. v. ITT Cont'l Baking Co., 420 U.S. 223, 238 (1975). A consent decree binds the signatories, but cannot be used as a shield against all future suits by non-parties seeking to challenge conduct that may or may not be governed by the decree. Austin v. Alabama Check Cashers Ass'n, 936 So.2d 1014, 1040-41 (Ala. 2005),

citing Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 529 (1986).

This Court has held when parties enter into a consent judgment, an intention to bind others is never to be inferred from the circumstances. “[A] consent judgment implies no determination by the court of any issues in the case.” Hentschel v. Smith, 278 Minn. 86, 153 N.W.2d 199, 205 (1967). Consent judgments also do not support issue preclusion (collateral estoppel). Hollenkamp, 410 N.W.2d at 432. The rationale behind this general rule is that issues underlying a consent judgment are not actually litigated. Id. Moreover, such a judgment is not to be given preclusive effect if to do so violates important public policy. Hentschel, 153 N.W.2d at 203.

Even if a consent decree purports to affect the rights of third parties, those parties are not bound unless their interests were adequately represented by a party to the decree. In re Birmingham Reverse Discrimination Employment Litig., 833 F.2d 1492 (11th Cir. 1987), *aff'd* 490 U.S. 755 (1989). The opportunity to be heard is an essential requirement of due process of law in all judicial proceedings. Windsor v. McVeigh, 93 U.S. 274, 277 (1876). The question here is does government action preclude a citizen’s suit under § 8.31, subd. 3a, where the citizen’s interests asserted were not adequately represented in the government’s lawsuit. Other courts have ruled that such actions are entitled to proceed.

In Victa v. Merle Norman Cosmetics, Inc., 24 Cal.Rptr.2d 117 (Cal. Ct. App. 1993), the question was whether an injunctive consent judgment in a federal age

discrimination and employment case brought by the EEOC operates to bar the complaining employee's original action for damages under California law. The court concluded there was insufficient privity to bar the latter action. Id. at 126. An individual's subsequent suit for restitutionary relief may be brought after other, more general injunctive relief has been issued in favor of a public entity plaintiff, because the individual was not fully represented on a particular claim by the public entity, which was seeking broad relief.

Likewise, in In re Exxon Valdez, 270 F.3d 1215, 1227-1228 (9th Cir. 2001), the Ninth Circuit addressed whether the consent decree entered into after Alaska and the United States sued Exxon under the provisions of the Clean Water Act precluded a punitive damage award in a subsequent suit to redress private economic loss. The Ninth Circuit looked to the consent decree and recognized "[t]hrough the government signatories released all government claims, the consent decree provides explicitly that 'nothing in this Agreement, however, is intended to affect legally the claims, if any, of any person or entity not a Party to this Agreement.'" Id. at 1227. Exxon's argument was the government released plaintiffs' private claims, even though plaintiffs did not consent to any such release, because the government was acting as *parens patrie* for the private claimants. The Ninth Circuit, however, held the parties must have intended to preserve private claims by their language expressly excluding them from the settlement.

The estoppel effect of a settlement agreement and a consent judgment cannot be extended beyond the scope of the agreements and cannot be used for purposes different

than contemplated by the parties. Here, Plaintiff Class was not a party to the State's prior lawsuit, nor is there support for the proposition that Plaintiff Class was somehow in privity with the Attorney General. A party is not in privity unless it had "controlling participation and active self-interest" in the prior litigation. Crossman v. Lockwood, 713 N.W.2d 58, 62 (Minn. App. 2006).

By the terms of its settlement, it is clear the State was enforcing its own legal claims and seeking redress for its own injuries, not that of an individual citizen or consumer class. Anchor Glass Container Corp. v. Buschmeier, 426 F.3d 872, 879 (7th Cir. 2005). The State made clear it intended to preserve private § 8.31, subd. 3a remedies by language in the Settlement Agreement by expressly excluding non-parties from the settlement. See Dykes, 781 N.W.2d at 581.

Here, the trial court dismissed Plaintiff Class' lawsuit on the pretense that the settlement of the State Tobacco suit somehow implies the interests of the citizens have been adequately represented, their rights protected and their injuries redressed, and therefore, this lawsuit offers no "public benefit." There is no support under the law or facts for such ruling. And the fact PM continued its sale of Marlboro Lights after settlement shows the State Tobacco lawsuit did not end PM's deceit.

**D. The Unambiguous Language of § 8.31, subd. 3(a) Does Not Bar This Case.**

The district court also relied on the common reference to Minn. Stat. § 8.31, subd. 3a, as the "private attorney general statute" and two federal district court decisions

that adopted the notion that an individual who pursues a claim as a private attorney general assumes the role and duties of the Attorney General and acts in its stead.

(Add.55). The Court of Appeals properly rejected this notion. (Add.24-25).

Statutory construction is neither necessary nor permitted when the statute's text is clear and unambiguous. Am. Tower, L.P., 636 N.W.2d at 312. There is no legal basis requiring conversion of an action by private individuals into a state action. Minn. Stat. § 8.31, subd. 3a., plainly provides “[i]n addition to the remedies otherwise provided by law, any person injured by a violation” of the listed consumer protection statutes “may bring a civil action” for such injuries. Such actions are not limited to situations where the state has failed to enforce consumer protection laws. The statute does not provide that a person pursuing such an action becomes a representative of the State or is deputized a legal “representative” of the State.

Minn. Stat. § 8.31, subd. 3a's “private remedies,” do not allow a private litigant to stand in the shoes of the Attorney General. Instead, subdivision 3a authorizes private causes of action—not causes of action brought on behalf of the State of Minnesota. As noted in Group Health Plan Inc., 621 N.W.2d at 6-7, subdivision 3a creates private remedies for violations of the statutes enumerated in subdivision 1.

On the other hand, Minn. Stat. § 8.31 authorizes the Attorney General to investigate violations of state consumer protection laws, issue pre-suit civil investigative demands, enter into pre-suit settlements, sue wrongdoers for injunctive relief and civil penalties and distribute any monetary relief obtained to injured consumers. Minn. Stat.

§ 8.31, subs. 1-3. Subdivision 3a only authorizes private actions. Private litigants cannot seek civil penalties or obtain pre-suit investigations. The Attorney General and private parties are not interchangeable under the statute.

The trial court's conclusion would produce absurd results. Only the Attorney General can decide what legal actions are brought on behalf of the State. See Minn. Stat. § 8.01 (2008); State by Humphrey v. McLaren, 402 N.W.2d 535, 539 (Minn. 1987); State by Spannaus v. Nw. Bell Tel. Co., 304 N.W.2d 872, 877 (Minn. 1981); State by Peterson v. City of Fraser, 191 Minn. 427, 254 N.W. 776, 778-79 (Minn. 1934). Private litigants such as Plaintiff Class cannot step into the shoes of the Attorney General and bind the State through claim preclusion to judgments, settlements and court orders over which it had no control.

**E. Philip Morris's Own Actions on Enforcement of Settlement Terms Support Conclusion that State Settlement Does Not Bar Plaintiff Class' Claims.**

The Settlement Agreement mandates that jurisdiction over any claims for breach or enforcement of the Agreement continue to reside with Ramsey County. (RA74). See Philip Morris USA, 713 N.W.2d at 354. Had PM truly believed Plaintiff Class' action was in violation of the State Tobacco settlement, its obligation was to so assert in Ramsey County. It did not. Hennepin County District Court did not have jurisdiction to dismiss

Plaintiff Class' case based on the construction and claimed enforcement of the Release and Consent Judgment as urged by PM.<sup>7</sup>

**F. Philip Morris' Ongoing Actions Regarding the Sale of Light Cigarettes After Settlement Also Support Position that State Settlement Does Not Bar Claims.**

Following the settlement, PM, who had sold "light" cigarettes before the State Tobacco case commenced, continued to do so. (RA193). Such lack of change provides additional support for the conclusion that the Release and Consent Judgment do not bar the Plaintiff Class' claims.

**III. DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN CERTIFYING AND REFUSING TO DECERTIFY PLAINTIFF CLASS.**

PM's challenge to class certification rests upon its improper classification of Plaintiff Class' claims and its improper construction of the plain language of the Minnesota Consumer Protection Statutes. The issue on appeal is not the number of courts around the country which have come down on one side or the other of light cigarette class action decisions; the issue is whether the Minnesota trial courts in this instance abused their discretion in certifying and refusing to decertify the class, not once, but twice. They did not.

The district court initially concluded individual issues (the reasons class members began smoking Marlboro Lights and how they smoked Marlboro Lights) predominated

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<sup>7</sup> Although the issue of subject matter jurisdiction was not raised in the district court, subject matter jurisdiction cannot be waived. Marzitelli v. City of Little Canada, 582 N.W.2d 904, 907 (Minn. 1998).

and denied class certification. But it reconsidered and certified the class following this Court's decision in Peterson v. BASF Corp., 675 N.W.2d 57, 73 (Minn. 2004), *cert. granted, vacated*, 544 U.S. 1012 (2005), *aff'd on remand*, 711 N.W.2d 470 (Minn. 2006). (R.Add.11-21).<sup>8</sup> Relying on Peterson's examination of the causal nexus evidence needed to recover under Minnesota's consumer protection laws, as well as the logic of Aspinall v. Philip Morris Co., 813 N.E.2d 476, 485-86 (Mass. 2004), the district court concluded:

The Plaintiffs are similarly situated to other consumers of Marlboro Lights, and because the injury claimed is economic, and not a personal injury, all have been similarly injured. Were there to be individual trials, the common aspects of [PM's] conduct would become a predominant aspect of each trial. Considerations of delay, high costs, and arbitrary results provide further support for the appropriateness of class certification. We conclude that a class action is not only an appropriate method to resolve the plaintiffs' allegations, but, pragmatically, the only method whereby purchasers of Marlboro Lights in Massachusetts can seek redress for the alleged deception.

(R.Add.21). It examined the Lanham Act examples set out by this Court in Group Health, 621 N.W.2d at 15 n.11, utilizing the deliberately deceptive conduct of the defendant to establish a sufficient causal nexus. (Add.84-85).

It also considered PM's claim that lower tar and nicotine may have been received; but also found "information concerning the true delivery of tar and nicotine in the 'light'

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<sup>8</sup> Peterson is instructive here. Although it interpreted New Jersey's Consumer Fraud Act, that statute utilizes the same language as Minnesota's CFA. (RA873). Like Minnesota's CFA, consumer fraud in New Jersey, in contrast with common law fraud, does not require a showing of reliance, merely a causal relationship. Gennari v. Weichert Co. Realtors, 691 A.2d 350, 366 (N.J. 1997).

cigarettes in relationship to the Marlboro regular cigarettes was not disclosed.” (Add.86.) In granting class certification based on Peterson and other cases by this Court, the district court concluded all consumers of Marlboro Lights have been injured similarly by PM’s deceit and seek restitution. (Add.87).

**A. The Lower Courts Correctly Applied Minnesota Law.**

“The class action serves to conserve the resources of the court and the parties by permitting an issue that may affect every class member to be litigated in an economical fashion.” Burch v. Qwest Comm. Int’l, Inc., 677 F.Supp.2d 1101, 1123 (D. Minn. 2009), citing Gen. Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 155 (1982). Rule 23 has generally been accorded a liberal interpretation. See Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 563 (2nd Cir. 1968). The question on class certification is not whether the proposed class will prevail on the merits, but rather whether the requirements of Rule 23 have been met. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178 (1974).

Class certification is a two-step process: a court may exercise its discretion to certify a class if all requirements of Rule 23.01 are met, plus at least one of the requirements of Rule 23.02. See Rathbun v. W.T. Grant Co., 300 Minn. 223, 239-40, 219 N.W.2d 641, 652 (1974).

Members of a proposed class must first show in step one:

- (a) the class is so numerous that joinder of all members is impracticable;
- (b) there are questions of law or fact common to the class;

- (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
- (d) the representative parties will fairly and adequately protect the interests of the class.

Minn. R. Civ. P. 23.01.

In step two, Plaintiff Class' claims were certified as a class under 23.02(c), which provides:

questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. . . .

Minn. R. Civ. P. 23.02(c). Rule 23.02 is intended to provide a practical analysis about whether proceeding as a class leads to a more efficient resolution of the dispute. David F. Herr & Roger S. Haydock, 1 Minn. Prac. § 23.02 at 23.8 (5th ed.).

The district court found Plaintiff Class met the requirements of Rule 23.01. (Add.67; Add.78). The record overwhelmingly supports this conclusion. PM asserts the trial courts made "a clear error of judgment in assaying" Rule 23.02(c)'s facts, citing Whitaker v. 3M Co., 764 N.W.2d 631, 636 (Minn. App. 2009). PM appears to assert two alleged errors: 1) the district court's failure to require proof of individual reliance by class members to recover under the consumer fraud statutes and 2) the district courts' determination that common questions of law or fact predominate over individual questions. PM's arguments are not in accord with Minnesota law as applied to the facts and the grant of certification should be affirmed.

**B. There Was No Abuse of Discretion in Finding There Were Common Questions of Law and Fact.**

PM incorrectly argues that the Court of Appeals eliminated “the reliance requirement” in claims arising from Minnesota’s consumer protection statutes and, if “the reliance requirement” is in place, there can be no common questions of law and fact for this class. (PM Brief at pp. 26-38). PM and its amici also mis-characterize the Plaintiff Class’ claims and assert individual proof of reliance is needed here, precluding class certification.<sup>9</sup> PM’s assertions are wrong.

PM erroneously assumes other courts’ holdings supply authority to decertify the Plaintiff Class. Opinions from foreign jurisdictions are not binding on this court. Mahowald v. Minn. Gas Co., 344 N.W.2d 856, 861 (Minn. 1984). Different states have different statutes addressing consumer fraud and this Court is the ultimate authority on interpretation of Minnesota law. See Anderson-Johanningmeier v. Mid-Minnesota Women’s Ctr., Inc., 637 N.W.2d 270, 276 (Minn. 2002).

**1. District Court applied elements of CFA as set out by this Court and found common questions of fact and law apply to all.**

PM argued to the Court of Appeals the district court failed to conduct an inquiry into whether the required causation in this case is capable of proof at trial through

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<sup>9</sup> Amicus Product Liability Council urges that Group Health adopted an “indirect aggregate causation analysis.” Whatever that term means, it is not a term used by this Court in Group Health nor is it a term ever used by any Minnesota court.

evidence that is common to the class rather than individual members. The Court of Appeals disagreed, stating

The district court’s analysis is not extensive, but it found that all members of the class have been similarly injured by Philip Morris’s alleged lengthy course of prohibited conduct. And the record supports this finding.

(Add.35). It went on to note documents in the record obtained from PM itself “demonstrate Philip Morris’s early and continuing awareness of smokers’ attitudes toward health issues, recognition of the market potential of a cigarette perceived by consumers to be healthier than regular cigarettes, and recognition that the reason smokers accept low-tar cigarettes is due to the health reassurance they seem to offer.” (Add.36).

PM contends the reliance of each individual class member is a critical element to the Plaintiff Class’ claims. However, this Court has stated reliance is not a required element. In Group Health, 621 N.W.2d at 12, this Court held “[t]he limited references in the statutes to the victim/plaintiff indicate that reliance is not an element of a violation . . . .” of the Minnesota consumer protection statutes under which Plaintiff Class seeks recovery.

In Group Health, this Court rejected the same reliance argument PM makes here. PM offers no reasons for this Court to retreat from its answer to the second certified question in Group Health, which was:

whether a plaintiff<sup>10</sup> must plead and prove reliance on the defendant's alleged misrepresentation in order to recover damages under Minn. Stat. § 8.31, subd. 3a, for violation of Minn. Stat. §§ 325F.67, 325F.69, subd.1, or 325D.13.

Id. at 9. This Court responded in the negative:

The language of the statutes therefore establishes that, to state a claim that any of the substantive statutes have been violated, the plaintiff need only plead that the defendant engaged in conduct prohibited by the statutes and that the plaintiff was damaged thereby. Allegations that the plaintiff relied on the defendant's conduct are not required to plead a violation.

Id. at 10. Neither the question nor this Court's answer was limited to just the plaintiffs before it. Relevant portions of the statutes remain as they were when this Court decided Group Health.<sup>11</sup>

That this Court intended Group Health's holdings to apply to class actions involving CFA claims is illustrated by the Sutton line of cases. In 2000, the Court of Appeals addressed a class action including a CFA claim. Sutton v. Viking Oldsmobile Nissan, Inc., 611 N.W.2d 60 (Minn. App. 2000). This Court stayed further review pending disposition in Group Health. Sutton v. Viking Oldsmobile Nissan, Inc., 623 N.W.2d 247 (Minn. 2001). This Court then remanded Sutton for consideration in light of

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<sup>10</sup> Earlier in its opinion, this Court framed the second certified question slightly differently. 621 N.W.2d at 4. Neither time did the Court indicate it intended the answer to apply only to the plaintiffs before it.

<sup>11</sup> PM also argues the Court of Appeals erred in accepting an "inference" of reliance on behalf of the Plaintiff Class. (PM Brief at pp. 33-36). This is just another way of stating that it is PM's belief that individual reliance is required before causation can be found, a position rejected by in Group Health.

Group Health. Id. Relying on Group Health, the Court of Appeals concluded the CFA required the class prove “a lesser standard of a legal nexus between the injury and wrongful conduct.” Sutton, 2001 WL 856250 at \*2 (Minn. App. 2001) (RA809).

Since Group Health, a less stringent proof of causation is required in consumer-protection actions than in actions for common-law fraud. This Court recognized this relaxed measure of proof was purposely chosen by the legislature to make it easier for plaintiffs to recover. Wiegand, 683 N.W.2d at 811. The required evidence does not require proof of individual reliance, but merely a causal relationship between the seller/advertiser’s actions and the alleged injury. Id. at 811-12; Peterson, 675 N.W.2d at 73 (a theory of liability based on the causal relationship between the advertiser’s actions that resulted in plaintiffs suffering a loss was an appropriate inference by the jury). A causal nexus is established when there is something to connect “the claimed damages and the alleged prohibited conduct.” Group Health, 621 N.W.2d at 14. In Peterson, 675 N.W.2d at 73, it was enough that class members showed defendant corporation’s advertising was misleading and “farmers in general” were likely to be misled. Peterson held “class members’ awareness of advertisements may provide a sufficient causal nexus.” Id.

Plaintiff Class submitted nexus evidence to the trial court, including PM’s decades-long course of light cigarette advertising, showing how PM purposely misled the public about Marlboro Lights. Until 2009, the word “lights” appeared on every package of Marlboro Lights purchased in Minnesota, and the descriptor “lower tar and nicotine”

appeared until 2003. No class member could buy them without explicitly asking for or looking for the “light” name. PM used the terms “lights” and “lower tar and nicotine” to keep people smoking and maintain corporate revenue. PM’s representation to Minnesota consumers that Marlboro Lights were “light” and reliably delivered less tar and nicotine is false. Coupled with the fact PM never shared on its cigarette package relevant information about its microscopic holes and compensation, the requirement for a “causal nexus” is met. (See R.Add.18-20).<sup>12</sup> This Court in Peterson stated, based on the evidence in the record, “[t]he jury could infer from the advertisements and other evidence that but for BASF’s *unconscionable conduct*,” farmers in general would not have been induced to buy the product advertised as the superior product and that “class members’ awareness of advertisements may provide a sufficient causal nexus.” Id. (emphasis added). The same is true here.

As the Court of Appeals states, the district court appropriately relied on the cases from this Court that issued after its initial denial of class certification, citing Wiegand and Peterson to certify the class. (Add.38). The Court of Appeals recognized it can certainly be inferred from PM’s extensive marketing of Marlboro Lights as a healthier alternative to traditional cigarettes that PM intended to convince consumers that its product was

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<sup>12</sup> PM in its brief at page 46 states: “The undisputed evidence in the record here, however, is that most Light smokers do receive less tar and nicotine.” This is not true and is contrary to PM’s own statement on its website quoting the NCI release that Monograph 13 clearly demonstrates that people who smoke light cigarettes are likely to inhale the same amount of toxins as regular cigarettes. (A766). More important to this lawsuit is PM’s admission that not all smokers in this class action did receive less tar and nicotine.

something other than PM allegedly knew it to be. PM had not—and in all practicality, cannot—negate the commonsense inference that its massive advertising campaign was successful in persuading consumers that Lights were healthier than regular cigarettes. Because PM did not present sufficient evidence to negate an inference that “its massive advertising campaign was successful in persuading consumers that Lights were healthier than regular cigarettes,” the Court of Appeals concluded that the district courts were within their discretion to certify the class. (Add.38-39). As the Court of Appeals succinctly stated:

Here, as in Peterson, appellants allege that the impact of the manufacturer’s conduct on consumers was designed by the manufacturer to be the same for all members of the class: instilling a belief about the nature of a product. Therefore, the causal nexus is a question common to all class members.

(Add.37).

PM argues, if smoked in a particular manner, Lights may have delivered what was advertised, which makes the inquiry into falseness of its claim an individual inquiry. But as the Court of Appeals states, it is the claim of Plaintiff Class that PM “purposefully withheld this important information about smoking methods from consumers and expended enormous sums in deceptive advertising (the prohibited conduct) to influence consumers to pay money (the damages claimed) for a misrepresented product.” (Add.37). The required causal nexus may be established when there is something to connect the claimed damages and the alleged prohibited conduct. Group Health, 621 N.W.2d at 14. Here, the very name on every product purchased—Lights—demonstrates the ongoing

thread of deceptive advertising and all sums from purchases of this product must be returned.

**C. Under Step Two, the District Court's Determination That Common Questions of Law or Fact Predominate Over Any Individual Questions Was Not an Abuse of Discretion.**

PM alleges the lower courts erred by failing to place the proper weight on issues unique to each individual member of the Plaintiff Class and by holding common issues predominate. (PM Brief at pp. 39-40). PM ignores under the CFA it is PM's intent to deceive that is the focus, and that reliance on part of the consumer is not required. The district court found that common questions predominate regarding statutory violations, and the Court of Appeals states "from our extensive review of the record, we conclude that finding is amply supported by evidence in the record." (Add.34). Many of the same arguments apply to resolving whether the 23.01(b) common questions of fact and law and 23.02(c) common issues predominate have been met.

Commonality exists when behavior causing a common effect is at issue. Gilchrist v. Perl, 387 N.W.2d 412, 417-18 (Minn. 1986) (class action ideal where "[a]ll plaintiffs have precisely the same claim against defendants" arising out of defendant's false statements and only amount of damages remains). The predominance inquiry for class certification "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997). A claim will satisfy the predominance requirement "when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide

basis, since such proof obviates the need to examine each class member's individual position." In re Potash Antitrust Litig., 159 F.R.D. 682, 693 (D. Minn. 1995). The common question need not be dispositive of the entire action because "predominance" as used in the rule is not automatically equated with "determinative." Amchem, 521 U.S. at 624. "A single common issue may be the overriding one in the litigation, despite the fact that the suit also entails numerous remaining individual questions." William B. Rubenstein, et al., 2 Newberg on Class Actions § 4:25 at 172 (4th ed.).

The nature of the evidence that will suffice to resolve a question determines whether the question is common or individual. See In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 136-40 (2nd Cir. 2001), *overruled on other grounds*. If, to make a prima facie showing on a given question, members of a proposed class will need to present evidence that varies from member to member, then it is an individual question. If the same evidence will suffice for each member to make a prima facie showing, then it becomes a common question. Blades v. Monsanto Co., 400 F.3d 562, 566 (8th Cir. 2005).

Whether common issues predominate under Rule 23.02(c) involves examining liability, not damages. In re Select Comfort Corp. Sec. Litig., 202 F.R.D. 598, 610 (D. Minn. 2001). The first step in this analysis is to look at the elements necessary to recover on Plaintiff Class' claims against PM. Streich v. Am. Fam. Mut. Ins. Co., 399 N.W.2d 210, 217 (Minn. App. 1987); Lewy 1990 Trust by Lewy v. Investment Advisors, Inc., 650 N.W.2d 445, 456 (Minn. App. 2002). If just one of these elements is common

to the class and predominates, certification is appropriate. See Lockwood Motors, Inc. v. Gen. Motors Corp., 162 F.R.D. 569, 575 (D. Minn. 1995).

Plaintiff Class seeks recovery under three substantive statutes that implicate PM's conduct in advertising "Lights": CFA, UTPA and FSAA. PM's intent to deceive light cigarette consumers in violation of these statutes involves questions common to the entire class. This element relates solely to PM's conduct, and as such, proof for these issues will not vary among class members. See, e.g., In re Catfish Antitrust Litig., 826 F.Supp. 1039, 1042 (N.D. Miss. 1993) ("[e]vidence of a national conspiracy to fix the price of catfish products and processed catfish would revolve around what the defendants did, and said, if anything, in pursuit of a price fixing scheme").

When common misrepresentations are made to many consumers, a class is appropriate even if individual issues also need resolution. See Jenson v. Cont'l Fin. Corp., 404 F.Supp. 806, 813 (D. Minn. 1975). In fact, courts frequently grant certification despite differences in class members' damages. Lewy, 650 N.W.2d at 456-57. If defendant's conduct affects all class members, "calculating the damages for all the affected [class members] in one action makes more sense than forcing each [member] to bring a separate action just to split the damage-calculation time." Id. at 457.

**1. No individual defenses preclude class certification.**

PM asserts it has it has the right to rebut any "inference or presumption of class-wide reliance," and that this would result in individual issues predominating at trial. (PM

Brief at pp. 33-36). Since “causation” rather than “reliance” is the standard for recovery, this argument is misdirected.

No defenses specific to individual class members predominate over common issues here. PM relies heavily on In re St. Jude Medical, Inc., 522 F.3d 836 (8th Cir. 2008), in which a proposed class of plaintiff patients sought recovery for misrepresented prosthetic heart valves. There were a number of ways in which the proposed class members were exposed to the misrepresentations and some of them were not exposed to any misrepresentations at all. Id. at 838-39. The case before this Court is significantly different. Here, each class member was exposed to the word “Lights” through the very purchase of the product and a presumption of exposure to PM’s extensive advertising campaign is also well-supported by the record.

The St. Jude decertification arguments were rejected in a class action involving the fraudulent marketing of annuities in Mooney v. Allianz Life Ins. Co. of N. Am., 2009 WL 511572 (D. Minn. 2009) (RA812), for many reasons which are also applicable here:

Additionally, the court in St. Jude II determined that the misrepresentations alleged against the defendant “undoubtedly will vary by individual physician.” . . . By contrast, the vast majority of class members here will have relied on a standard set of alleged misrepresentations printed in the brochure. Third, the nature of the misrepresentation in St. Jude II involved a complex medical device as opposed to a misrepresentation involving a relatively straight-forward statement. . . . Fourth, St. Jude II included evidence that almost all of the named plaintiffs were exposed to the misrepresentation in different ways and through different language. Even Allianz’s strongest evidence suggests that a majority, if not a vast majority, of the class was exposed to and relied on the alleged misrepresentations. Fifth, individual

issues were expected to predominate during the remedial phase of the proposed action in St. Jude II because it required medical monitoring. The remedial phase in this action is not so individualized. . . . Finally, the court in St. Jude II held that “[w]hether a certain published representation by [the defendant] was materially false may be amenable to common resolution.” . . . The situation the St. Jude II court anticipated as an exception is the factual context of this case.

Id. at \*6 (citations omitted). Even more so than in Mooney, the Plaintiff Class here was exposed to PM’s misleading marketing that Marlboro Lights were safer than regular cigarettes with every package they purchased. This is a straight-forward claim susceptible to proof on a class-wide basis because of the scope of PM’s misleading advertising. And while there may be some individual issues in determining the proper amount of recovery for each class member, recovery does not require individual monitoring. The situation in St. Jude is entirely distinguishable. It is appropriate to proceed as a class here.

## **2. Individual smoking habits are irrelevant.**

PM asserts Plaintiff Class must prove each member failed to receive lower tar and nicotine from Marlboro Lights. (PM Brief at p. 41). Class members’ personal tar and nicotine intake levels are irrelevant. PM promised all smokers lower tar and nicotine from Marlboro Lights, knowing it was unlikely that the Plaintiff Class would actually receive lower tar and nicotine because of smoker compensation and product design. PM chose not to share such pertinent information with consumers on its packaging. Under Minnesota’s consumer protection laws, the tort is complete when the misrepresentation or

misleading statement is made. The actual tar and nicotine levels members received are irrelevant to maintaining the class.

The economic harm plaintiffs incurred was incurred by each member of the class when they purchased the misrepresented product. Minnesota's consumer protection statutes do not focus at all on the behavior of the deceived party and none of the statutes contain any language which refers in any way to the deceived persons' conduct. The language of each of the statutes defines the elements of its cause of action. See Group Health, 621 N.W.2d at 4; Minn. Stat. § 645.16.

Decertifying the class based on consumers' tar and nicotine impacts would shift the inquiry from defendants' actions to the consumer's use of the product which is contrary to the legislature's focus when it enacted Minnesota's consumer protection statutes based on the statutory language utilized. The plain language of the statutes put the defendant's actions on inquiry.

In that regard, Plaintiff Class' claims are similar to State by Humphrey v. Alpine Air Prods., Inc., 490 N.W.2d 888 (Minn. App. 1992), *aff'd* 500 N.W.2d 788 (Minn. 1993). Alpine Air involved consumer protection claims against the manufacturer of an air purifier which was sold as providing health benefits but which could produce unhealthy amounts of ozone. 500 N.W.2d. There was no means to determine the amount of ozone produced and the manufacturer did not warn consumers that the machines could produce harmful amounts of ozone. Id. at 789-90. These actions violated the consumer protection laws. Id. at 789. Likewise, PM failed to instruct consumers that the amount of

tar and nicotine produced by smoking Marlboro Lights could vary significantly from the advertised amount and could be harmful. Under Minnesota's consumer protection statutes, recovery on these claims depends on the conduct of the defendant. In Aspinall, 813 N.E.2d at 489, the court rejected PM's attempt to defeat class certification, holding: "it may be unlikely that any individual would smoke a cigarette the exact same way twice. Thus . . . it is probable that no smoker received the promised benefit of lower tar and nicotine every time he or she smoked a Marlboro Lights cigarette."

Focus on the consumer protection violations during the class certification inquiry rather than the conduct of the end consumer is proper. The court in Aspinall held that "[n]either an individual's smoking habits nor his or her subjective motivation in purchasing Marlboro Lights bears on the issue whether the advertising was deceptive." 813 N.E.2d at 489. Individual inquiries concerning class members' smoking behavior are not required to determine whether PM's

conduct caused compensable injury to all members of the class—consumers of Marlboro Lights were injured when they purchased a product that, when used as directed, exposed them to substantial and inherent health risks that were not (as a reasonable consumer likely could have been misled into believing) minimized by their choice of the defendant's "light" cigarettes.

Id. at 488.

Analyzing the identical issue in a "lights" case against PM, a Missouri court held: "individual differences in smoking behavior would have no effect in terms of requiring individual mini-trials for each class member, because despite any such differences, each

class member would still have received a product that in fact did not deliver, to him or her, lower yields of tar and nicotine.” Craft v. Philip Morris Cos., Inc., 2003 WL 23355745 at \*4 (Mo. Cir. Ct. 2003) (RA840). Missouri’s appellate court affirmed, recognizing

Plaintiff’s allegations go to the condition and labeling of the product at the time it was sold; they do not make defendant’s liability dependent on each consumer’s individual smoking behavior.

Craft v. Philip Morris Cos., Inc., 190 S.W.3d 368, 388 (Mo. Ct. App. 2005).

PM also asserts that if a consumer purchased Lights for reasons unrelated to tar and nicotine, the consumers got what they paid for and were not deceived or damaged. The district court did not accept PM’s position on damages.

Under that reasoning a defendant could, arguably, intentionally misrepresent that its product possessed certain qualities or features and yet not face a potential damages claim so long as it did not charge more for the product than it would have for a product without those qualities and features. The Court is mindful that in Minnesota consumer protection statutes are remedial in nature and are to be liberally construed in favor of protecting consumers. [Cites omitted]. Applying Philip Morris’s interpretation to the class representatives’ damages claims would seem to contradict that principle.

(Add.98).

PM also argues knowledge is a defense under Minnesota’s consumer protection statutes that would defeat Plaintiff Class’ claims or cut them off at a certain time and that each consumer’s knowledge presents an individual question. However, as stated previously, reliance is not a required element of any of Minnesota’s consumer protection

statute claims. The reasons for individuals' purchases are not issues and cannot predominate over the common questions of law or fact. Even if a class member had knowledge, knowing that PM violated the statute does not relieve PM from liability for its deceit.

In summary, the overwhelming evidence shows common issues are at the heart of this case—specifically PM's massive advertising campaign to sell "light" cigarettes and its knowledge of what a consumer would receive from the product compared to the way in which it was advertised. PM knew that test results showed artificially low levels of tar and nicotine compared to what a consumer would likely receive. PM knew that consumers would compensate to receive additional nicotine because the substance is addictive. PM failed to give consumers material information about how to get less tar and nicotine and provided no mechanism to regulate it.

The required legal nexus is proven with every purchase of Marlboro Lights. No class member could buy Marlboro Lights without explicitly asking for them or looking for the "lights" name. Those acts alone provide sufficient legal nexus, even without considering the Marlboro Lights Minnesota print ads or the enormous sums PM paid for Marlboro Lights advertising. As the Court of Appeals correctly held, the district courts did not clearly err in concluding that common issues predominate and certifying the class.

### 3. Restitution is amenable to class determination.

Plaintiffs seek restitution. Minn. Stat. § 8.31, subd. 3a (providing for “other equitable relief”). Restitution is appropriate when the defendant’s “fraud infected every single sale” of the product. Alpine Air, 490 N.W.2d at 896. Plaintiff Class’ claims focus on PM’s gain from its fraudulent conduct, an amount which can be determined from Marlboro Lights sales information during the period at issue as provided by PM or through sales tax records from the State of Minnesota. The restitution sought by Plaintiff Class is the return of money received by PM through its deceitful sales of Marlboro Lights. Contrary to PM’s assertion that it might be defrauded of money by unscrupulous class members, PM’s sales of light cigarettes in Minnesota during the class period is a finite number readily determined for the period at issue. The calculation of individual sums paid by class members is capable of determination and distribution in the administration of the class recovery.

PM suggests that differences in calculating the amount of individual money to be returned to class members prevent certification.<sup>13</sup> However, courts routinely find Rule 23(b)(3)’s predominance requirement satisfied despite the need for individualized damage determinations when the “fact” of injury is common. See, e.g., Potash, 159 F.R.D. at 692; Catfish, 826 F.Supp. at 1042; 2 Newberg on Class Actions § 4.26 at n.76 (citing cases).

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<sup>13</sup> Unlike cases to which PM refers at pages 48 and 49 of its brief, Plaintiff Class is not seeking damages on a benefit-of-the bargain theory. For example, the Price class sought recovery for loss of benefit of the bargain. Price v. Philip Morris, Inc., 2003 WL 22597608 at \*3 (Ill. Cir. Ct. 2003), *rev’d on other grounds* 848 N.E.2d 1 (Ill. 2005) (RA818).

Difficult issues with respect to determining the appropriate amount of actual or statutory recovery to be awarded in a class action, or potential difficulties with the distribution of the aggregate monetary awards, do not preclude class certification when all other requirements are met. See, e.g., Weld v. Glaxo Wellcome Inc., 746 N.E.2d 522 (Mass. 2001).

“It is very common for Rule 23(b)(3) class actions to involve differing damage awards for different class members.” De La Fuente v. Stokely-Van Camp, Inc., 713 F.2d 225, 233 (7th Cir. 1983). The existence of administrative issues in managing the distribution of monetary awards to a class does not suggest that a trial court abuses its discretion in finding a class manageable. Id. The fact that the district court may institute follow-up “mini trials” or administrative procedures such as claims resolution facilities which are now commonly used to address class recovery does not by itself make a class unmanageable.<sup>14</sup>

Rule 23(a)(3) does not require that all members of a proposed class pay the same amount, use similar purchase methods, or use the product the same way in order to pursue their common claims. A wealth of authority supports this position. 1 Newberg on Class Actions, § 3.15 at n.2 (explaining that “differences in the methods of purchase or kinds of products purchased among class members have been held not to bar a finding of typical

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<sup>14</sup> Any funds that remain unclaimed after the class members are compensated could be placed into a cy pres fund to be used to promote the goal of the litigation or may escheat to the state. See Powell v. Georgia-Pacific Corp., 119 F.3d 703 (8th Cir. 1997); Fogie v. Thorn Americas, Inc., 2001 WL 1617964 (D. Minn. 2001) (RA870).

claims”); see In re Brand Name Prescription Drugs Antitrust Litig., 1994 WL 663590 (N.D. Ill. 1994) (RA855); In re Domestic Air Transp. Antitrust Litig., 137 F.R.D. 677, 699 (N.D. Ga. 1991); In re Wirebound Boxes Antitrust Litig., 128 F.R.D. 270, 272 (D.Minn. 1989); Minnesota v. U.S. Steel Corp., 44 F.R.D. 559, 566 (D. Minn. 1968).

PM’s aggregate liability can be determined in a single, class-wide adjudication and paid into a class fund. Procedures will be fashioned to distribute it equitably and prevent PM from keeping its “ill-gotten gains.” Olson v. Energy North, Inc., 1999 WL 1332362, at \*6 (Mass. Super. Ct. 1999).<sup>15</sup> (RA865). Even if multiple proceedings are needed to determine the amount of recovery for individual class members, the predominance of a common issue of liability is reason to certify a class. Rathbun, 219 N.W.2d at 652.

**D. Class Action Here Is Superior Method of Adjudication.**

The trial court stated “[c]onsiderations of delay, and high costs provide additional support for the appropriateness of class certification” and concluded “a class is not only an appropriate method to resolve the plaintiffs’ allegations, but pragmatically, the only

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<sup>15</sup> The Olson court stated, “I am mindful that it will be difficult to identify most of the members of the class . . . . [W]ith respect to those than can be identified and located, it will be difficult to determine how much gasoline they purchased during the class period and how much they lost as a result of the alleged scheme to defraud, especially if they did not purchase all of their gasoline with a credit card. Yet, the difficulty in identifying and locating the members of the class and ascertaining the amount of damages should not defeat class certification where the alternative is to leave those aggrieved without a remedy and to permit those who allegedly perpetrated the fraud to keep the ill-gotten gains.” 1999 WL 1332362 at \*6.

method whereby purchasers of Marlboro Lights in Minnesota can seek redress for the alleged deception.” (Add.87).

This matter presents a similar scenario to this Court’s decision in Perl, 387 N.W.2d 412. There, where it was determined that forfeiture of fees from a certain class of prior clients was the proper recovery, this Court stated that the class action was ideally suited to the situation. Id. at 417-418. All plaintiffs had precisely the same claim against the defendants as in Perl. This Court determined that there was no need for separate trials on what should be returned to each member of the class. Id. at 418. The trier of fact could consider Plaintiff Class’ claims in the aggregate and then at that point individual claims can be determined—either by formula as in Perl or by a claims administration process.

The district court properly reviewed the evidence submitted, applied the law, and exercised its discretion in granting class certification. The grant of class certification should be affirmed.

**E. PM Did Not Preserve Its Statute of Limitations Argument.**

PM argues that the Court of Appeals erred when it tolled the statute of limitations based on fraudulent concealment. (PM Brief at pp. 55-56). This issue was not included in PM’s petition for review, which is required for a legal issue to be reviewed. Minn. R. Civ. App. P. 117, subd. 3(a). This Court will not address issues not raised in the petition for review. George v. Estate of Baker, 724 N.W.2d 1, 7 (Minn. 2006); Nw. Racquet Swim & Health Clubs, Inc. v. Deloitte & Touche, 535 N.W.2d 612, 613 n.1 (Minn. 1995). In the event that this Court chooses to allow PM to advance this argument,

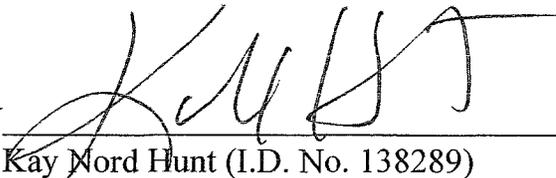
Plaintiff Class asserts that the Court of Appeals correctly found that the evidence amply supports a finding that PM intentionally withheld information from consumers and their claims are not time barred. (Add.37-38).

**CONCLUSION**

Respondent Plaintiff Class requests the Court of Appeals' decision reinstating its consumer protection claims and affirming the grant of class certification be affirmed.

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Dated: May 17, 2011

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**CERTIFICATION OF BRIEF LENGTH**

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 1 and 3, for a brief produced with a proportional font. The length of this brief is 13,992 words. This brief was prepared using Word Perfect 12.

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