NO. A10-215

State of Minnesota

In Court of Appeals

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

Plaintiffs-Appellants,

v.

ALTRIA GROUP, INC. and PHILIP MORRIS USA INC.,

Defendants-Respondents / Cross-Appellants.

BRIEF AND ADDENDUM OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street N.W.
Washington, D.C. 20062
(202) 463-5337

Scott A. Smith (#174026)
NILAN JOHNSON LEWIS PA
400 One Financial Plaza
120 South Sixth Street
Minneapolis, MN 55402
(612) 305-7500

John H. Beisner
Jessica Davidson Miller
Geoffrey M. Wyatt
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
1440 New York Avenue N.W.
Washington, D.C. 20005
(202) 371-7000

Attorneys for Amicus Curiae Chamber of Commerce of the United States of America

(Additional Counsel listed on following pages)

2010 – BACHMAN LEGAL PRINTING – FAX (612) 337-8053 – PHONE (612) 339-9518 or 1-800-715-3582

Kay Nord Hunt (#138289)
Ehrich L. Koch (#159670)
Valerie Sims (#30556X)
LOMMEN, ABDO, COLE, KING & STAGEBERG, P.A.
2000 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 339-8131

Stephen A. Sheller
SHELLER, P.C.
1528 Walnut Street
Philadelphia, PA 19102
(215) 790-7300

Martha K. Wivell (#128090)
SHELLER, P.C.
P.O. Box 339
Cook, MN 55723
(218) 666-0250

Esther E. Berezovsky
WILLIAMS CUKER BEREZOFSKY
Woodland Falls Corporate Center
210 Lake Drive East, Suite 101
Cherry Hill, NJ 08002
(856) 667-0500

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

William P. Studer (#106781)
David P. Graham (#185462)
OPPENHEIMER WOLFF & DONNELLY LLP
Plaza VII, Suite 3300
45 South Seventh Street
Minneapolis, MN 55402-1609
(612) 607-7000

Guy Miller Struve
Justin Goodyear
DAVIS POLK & WARDWELL LLP
450 Lexington Avenue
New York, NY 10017-3982
(212) 450-4192

Attorneys for Respondent and Cross-Appellant Altria Group, Inc.

(continued on following page)

George W. Soule (#103664)
Nathan J. Marcusen (#386875)
BOWMAN & BROOKE LLP
150 South Fifth Street, Suite 3000
Minneapolis, MN 55402
(612) 339-8682

Gregory P. Stone
Randall G. Sommer
MUNGER, TOLLES & OLSON, LLP
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560
(213) 683-9100

Mary Vasaly (#152523)
MASLON EDELMAN BORMAN &
BRAND LLP
3300 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-4140
(612) 672-8200

Attorneys for Respondent and Cross-Appellant Philip Morris USA, Inc.

Benjamin J. Velzen (#388344)
LORI SWANSON
MINNESOTA ATTORNEY
GENERAL
445 Minnesota Street, Suite 1400
St. Paul, MN 55101-2130
(651) 757-1235

Attorneys for Amicus Curiae State of Minnesota

Charles A. Bird (#8345)
BIRD, JACOBSEN & STEVENS, P.C.
300 Third Avenue SE, Suite 305
Rochester, MN 55904
(507) 282-1503

Attorneys for Amicus Curiae Minnesota Association for Justice

Prentiss Cox (#218844)
4633 Colfax Avenue South
Minneapolis, MN 55419
(651) 235-1413

Attorneys for Amicus Curiae Tobacco Control Legal Consortium

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

BACKGROUND 3

ARGUMENT 5

I. THE TRIAL COURT MISAPPLIED MINNESOTA LAW IN ORDER TO FACILITATE CLASS CERTIFICATION 5

A. The Trial Court Abused Its Discretion by Inventing a Presumption of Causation 5

B. The Trial Court Further Abused Its Discretion By Barring Defendants From Offering Evidence At The Class Certification Stage To Rebut Its Invented Presumption. 10

II. THE CLASS CERTIFICATION DECISION COULD HAVE DETRIMENTAL CONSEQUENCES FOR BUSINESS AND THE PUBLIC AT LARGE 14

CONCLUSION 16

CERTIFICATE OF COMPLIANCE 18

TABLE OF AUTHORITIES

Page(s)

CASES

American Surety Co. v. Baldwin,
287 U.S. 156 (1932) 13

Aspinall v. Philip Morris Cos.,
442 Mass. 381, 813 N.E.2d 476 (Mass. 2004) 3, 4, 6, 8

Avery v. State Farm Mut. Ins. Co.,
835 N.E.2d 801 (Ill. 2005) 9

Blades v. Monsanto Co.,
400 F.3d 562 (8th Cir. 2005) 10

Curtis v. Altria Group, Inc. and Philip Morris, Inc.,
No. 27-CV-01-18042 (Minn. Dist. Ct. Oct. 21, 2009) 4

Curtis v. Philip Morris Cos. Inc.,
No. PI 01-018042, 2004 WL 2776228 (Minn. Dist. Ct. Nov. 29, 2004) 3, 4, 6, 10

Curtis v. Philip Morris Cos. Inc.,
No. PI 01-018042 (Minn. Dist. Ct. Jan. 16, 2004) 3

De Bouse v. Bayer AG,
922 N.E.2d 309 (Ill. 2009) 9

Eisen v. Carlisle & Jacquelin,
417 U.S. 156 (1974) 10

Group Health Plan, Inc. v. Philip Morris, Inc.,
188 F. Supp. 2d 1122 (D. Minn. 2002) 8

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

Guillory v. Am. Tobacco Co.,
No. 97 C 8641, 2001 WL 290603 (N.D. Ill. Mar. 20, 2001) 13

Hershenow v. Enterprise Rent-A-Car Co.,
840 N.E.2d 526 (Mass. 2006) 8

In re Hydrogen Peroxide Antitrust Litig.,
552 F.3d 305 (3d Cir. 2008)....................11

In re Rhone-Poulenc Rorer, Inc.,
51 F.3d 1293 (7th Cir. 1995)....................14

In re St. Jude Med., Inc.,
522 F.3d 836 (8th Cir. 2008)....................12

Int'l Union of Operating Eng'rs Local No. 68 Welfare Fund v. Merck & Co., Inc.,
929 A.2d 1076 (N.J. 2007)....................9

Kleinman v. Merck & Co., Inc.,
No. ATL-L-3954-04, 2009 WL 699939 (N.J. Super. Ct. Mar. 17, 2009)....................9

Lindsey v. Normet,
405 U.S. 56 (1972)....................13

Peterson v. BASF Corp.,
675 N.W.2d 57 (Minn. 2004)....................6

Rule v. Fort Dodge Animal Health, Inc.,
--- F.3d ---, 2010 WL 2179794 (1st Cir. June 2, 2010)....................8

Schweitzer v. Consol. Rail Corp.,
758 F.2d 936 (3d Cir. 1985)....................15

Shannon v. Boise Cascade Corp.,
805 N.E.2d 213 (Ill. 2004)....................9

Small v. Lorillard Tobacco Co., Inc.,
94 N.Y.2d 43 (N.Y. 1999)....................9

Tuttle v. Lorillard Tobacco Co.,
377 F.3d 917 (8th Cir. 2004)....................9

U-Haul Int'l, Inc. v. Jartran, Inc.,
793 F.2d 1034 (9th Cir. 1986)....................7

Vlandis v. Kline,
412 U.S. 441 (1973)....................13

Whitaker v. 3M Co.,
764 N.W.2d 631 (Minn. Ct. App. 2009)....................10, 11

STATUTES

Minn. Stat. § 325F.68-.70 .... *passim*

Minn. Stat. § 480.051 5

OTHER AUTHORITIES

Bruce Hoffman, Remarks, *Panel 7: Class Actions as an Alternative to Regulation: The Unique Challenges Presented by Multiple Enforcers and Follow-On Lawsuits*, 18 Geo. J. Legal Ethics 1311, 1329 (2005) 15

David L. Wallace, *A Litigator's Guide to the 'Siren Song' of 'Consumer Law' Class Actions* 15

Rule 129.03, Minnesota Rules of Civil Appellate Procedure 1

Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiff(s) to Allege Reliance as an Essential Element*, 43 Harv. J. on Legis. 1, 2 (2006) 16

T. Perrin, 2009 UPDATE ON U.S. TORT COSTS TRENDS 3 (2009), *available at* http://www.towersperrin.com/tp/getwebcachedoc?webc=USA/2009/200912/2009_tort_trend_report_12-8_09.pdf 16

INTRODUCTION

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

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

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

ruling on class certification if it does not uphold the trial court's grant of summary judgment.[2]

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

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

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

---

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

BACKGROUND

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

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

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

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

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

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

ARGUMENT

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

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

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

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

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

plaintiff must show that he or she relied on the allegedly deceptive advertising in buying the product – and that he or she was harmed thereby. *See Group Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2, 13 (Minn. 2001) ("where [] the plaintiffs allege that their damages were caused by deceptive, misleading, or fraudulent statements or conduct in violation of the misrepresentation in sales laws, as a practical matter it is not possible that the damages could be caused by a violation without reliance on the statements or conduct alleged to violate the statutes").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

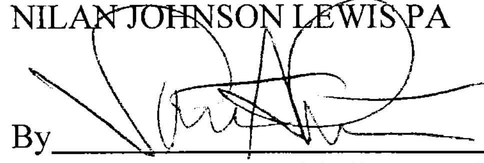
CONCLUSION

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

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

Dated: June 28, 2010

NILAN JOHNSON LEWIS PA



By________________________________

Scott A. Smith (#174026)
400 One Financial Plaza
120 South Sixth Street
Minneapolis, MN 55402
(612) 305-7500

John H. Beisner
Jessica Davidson Miller
Geoffrey M. Wyatt
SKADDEN, ARPS, SLATE, MEAGHER & FLOM, LLP
1440 New York Avenue N.W.
Washington, D.C. 20005

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street N.W.
Washington, D.C. 20062

Attorneys for Amicus Curiae Chamber of Commerce of the United States of America

CERTIFICATE OF COMPLIANCE

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

Dated: June 28, 2010

NILAN JOHNSON LEWIS PA

By
Scott A. Smith (#174026)
400 One Financial Plaza
120 South Sixth Street
Minneapolis, MN 55402
(612) 305-7500

INDEX TO ADDENDUM

January 16, 2004 Order and Memorandum Denying Motion for Class Certification .... (Add. 1)

November 29, 2004 Order and Memorandum Granting Motion for Reconsideration of Denial of Class Certification .... (Add. 12)

STATE OF MINNESOTA | FILED | DISTRICT COURT

COUNTY OF HENNEPIN | 04 JAN 16 AM 10:29 | FOURTH JUDICIAL DISTRICT

DEPUTY
HENN. CO. DISTRICT
COURT ADMINISTRATOR

Gregory Curtis, Joni Kay Hanzal,
Josephine Leonard and Randy Hoskins,
Individually and on Behalf of All Others
Similarly Situated,

Plaintiffs,

vs.

ORDER

File No. PI 01-018042

Philip Morris Companies Inc., and
Philip Morris USA Inc.,

Defendants.

The above-entitled matter came before the undersigned Judge of the District Court, on November 3, 2003, at the Hennepin County Government Center, Minneapolis, Minnesota, on Plaintiff's motion for class certification.

GALE D. PEARSON, Esq. and STEPHEN J. RANDALL, Esq., appeared for and on behalf of Plaintiffs.

EDWARD B. MARGARIAN, Esq., appeared for and on behalf of Defendant.

Based upon all files, records and proceedings herein, together with the arguments of counsel,

IT IS HEREBY ORDERED:

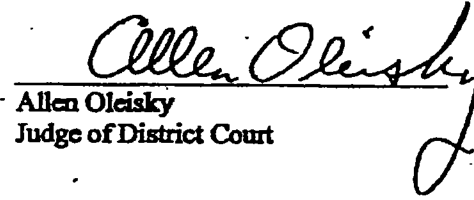
1. That Plaintiffs' motion for class certification is hereby **DENIED.**

2. That the attached Memorandum is hereby incorporated into and made part of this Order.

W0C082896

BY THE COURT:

Dated: January 16, 2004



Allen Oleisky
Judge of District Court

ALLEN OLEISKY
JUDGE OF DISTRICT COURT

W0C082897

MEMORANDUM

FACTS

Plaintiffs seek to represent as a class those persons who purchased Marlboro Lights cigarettes in Minnesota between 1971 and the date of filing of this action. Defendants Philip Morris USA, Inc. and Altria Group, Inc. (collectively "Philip Morris") is the manufacturer and marketer of the Marlboro Lights brand of cigarettes. Plaintiffs claim that Philip Morris marketed Marlboro Lights by claiming that they delivered less tar and nicotine than regular cigarettes when in fact they did not. Plaintiffs contend that any person who purchased Marlboro Lights, therefore, did not get what they thought they were getting as marketed by Philip Morris; a light cigarette that delivered substantially lower amounts of tar and nicotine than a regular cigarette

"Light" cigarettes like Marlboro Lights were originally developed to respond to the health concerns connected with smoking. They purportedly offered a healthier alternative to smokers concerned about their health in the form of a cigarette that delivered less tar and nicotine than regular cigarettes. Marlboro Lights, however, doe not contain less tar and nicotine than regular Marlboros. Instead, it is the physical design of the cigarette itself that provides the method through which the delivery of less tar and nicotine is sought.

The amounts of tar and nicotine delivered by cigarettes was measured by a process known as the Cambridge Filter System ("CFS"). The CFS utilized a smoking machine to determine the amounts of tar and nicotine delivered by different types and brands of cigarettes.

Plaintiffs claim that Philip Morris designed Marlboro Lights such that they would deliver less tar and nicotine when measured by the CFS, but would significantly deliver much higher levels when smoked by actual smokers.

WOC082898

Marlboro Lights were designed with microscopic ventilation holes placed in or around the cigarette filter. When tested in the CFS machines these vent holes are unobstructed and allow outside air to mix with the tobacco smoke thereby diluting the amount of tar and nicotine measured by the machine. These ventilation holes, however, are not marked or readily visible to the naked eye. If a smoker's fingers obstruct these ventilation holes they prevent outside air from mixing with the tobacco air and result in the delivery of higher levels of tar and nicotine. Plaintiffs claim that Philip Morris knew of this but did not inform its consumers that in order to obtain less tar and nicotine that they would have to modify their smoking habits and that the ventilation holes may even have been designed such that smokers would naturally block them when holding the cigarette. Philip Morris therefore knew that because the CFS did not obstruct the ventilation holes that it would register artificially low values for the actual amount of tar and nicotine delivered as compared to smoker that would tend to block those holes.

Plaintiffs also claim that Philip Morris knew that even if smokers did not cover the ventilation holes that they still did not necessarily receive less tar and nicotine due to a phenomenon known as "compensation". Compensation occurs when a smoker changes his or her manner of smoking in order to obtain more tar and nicotine. They accomplish this by increasing their puff frequency and/or puff volume, or in other words, inhaling more often and more deeply than the smoking machine utilized in the CFS.

Plaintiffs contend that Philip Morris marketed Marlboro Lights as delivering less tar and nicotine than regular cigarettes even though it knew that the CFS test results did not give an accurate representation of the actual delivery of tar and nicotine to smokers. Plaintiffs also content that Philip Morris knew, but failed to inform its consumers, that the manner in which

W0C082899

they smoked Marlboro Lights was significant in determining the amount of tar and nicotine they would receive. Essentially, Plaintiffs claim that Philip Morris marketed Marlboro Lights as delivering less tar and less nicotine than regular cigarettes when it knew that those representations were false.

Plaintiffs in this action have brought claims against Philip Morris for common law fraud, unjust enrichment, and violation of Minnesota consumer protection statutes. They now move this Court for an order certifying this action as a class action on behalf of all persons who since 1971 purchased Marlboro Lights in Minnesota. Plaintiffs seek to recover the money that they and the proposed class members spent since 1971 to purchase Marlboro Lights. Plaintiffs in this suit solely seek economic remuneration for the money they spent on Marlboro Lights and do not bring any health related claims from smoking Marlboro Lights.

I. MOTION FOR CLASS CERTIFICATION

A. Plaintiffs' Proposed Class

Plaintiffs' proposed class is described as:

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

Plaintiffs bring claims for common law, unjust enrichment, and violation of Minnesota consumer protection statutes.

B. MINN. R. CIV. P. 23.01 and 23.02

Generally, the issue of class certification is considered before a case is decided on the merits. MINN.R.CIV.P. 23.03(1); Streich v. American Family Mut. Ins. Co., 399 N.W.2d 210, 214

WC082900

(Minn.App. 1987). District courts have considerable discretionary power to determine whether a class action is maintainable. Streich at 213 (citing Forcier v. State Farm Mut. Auto. Ins. Co., 310 N.W.2d 124, 130 (Minn.1981)). MINN. STAT. § 23.01 sets forth a number of prerequisites that must be satisfied before a court can certify a group of plaintiffs for class action status:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if
>
> (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.

In addition to satisfying the prerequisites of Rule 23.01 the purported class action must also fall within one of three categories set forth in MINN. RULE CIV. PROC. 23.02. Streich at 213. A class action may be maintained if the prerequisites of Rule 23.01 are satisfied, and in addition:

> (a) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (1) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (2) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (b) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (c) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class

W0C082901

action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(1) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(4) the difficulties likely to be encountered in the management of a class action.

MINN. R. CIV. P. 23.02. In this motion Plaintiffs contend that they have satisfied all the prerequisites of Rule 23.01 and that this action falls under category (c) of Rule 23.02.

C. Individual Issues of Law and Fact Predominate Over Common Ones

The determination as to whether class certification of this action is appropriate turns upon the issue of whether this action falls within category (c) of Rule 23.02. Plaintiffs contend that it does because common issues of fact and law predominate over questions affecting only individual class members, and because a class action is a superior method of litigating the putative class members' claims. Philip Morris challenges that and instead argues that individual issues of law and fact predominate over common ones in this action. This Court agrees.

1) Misrepresentations

The determination of whether any individual member of the putative class was injured by Philip Morris' alleged misrepresentations is dependent upon a number of issues unique to each individual class member. First and foremost each class member would have to prove that he or she actually suffered an injury due to a misrepresentation made by Philip Morris. Plaintiffs claim that they were injured because they did not receive the "light", i.e. the low tar and nicotine,

WDC082902

cigarettes that they paid for. Whether or not a class member garnered the benefits of low tar and nicotine from Marlboro Lights, however, depends upon the manner in which that class member smoked them. 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.

The issue of whether an individual class member was injured is therefore dependent upon their manner of smoking, which is in turn unique to that class member, Determining the manner in which each class member smoked Marlboro Lights, and hence determining whether they received less tar and nicotine, presents an individual issue unique to each class member. The determination of this issue would necessitate an individual inquiry of each class member as to how they smoked Marlboro Lights.

2) Causation and Reliance

Plaintiffs contend that Philip Morris' misrepresentations caused them to purchase what they thought were cigarettes delivered less tar and nicotine than regular cigarettes, when in fact they did not. In order to recover under any of their claims Plaintiffs and the putative class members must be able to show that some action on the part of Philip Morris caused their alleged damages. In order to show causation Plaintiffs must therefore be able to show that they in some way relied upon the false representations allegedly made by Philip Morris.

Plaintiffs have brought a claim for common law fraud against Philip Morris. The elements of fraud in Minnesota provide that there must be 1) a representation; 2) that

WDC082903

representation is false; 3) it must have to do with a past or present fact; 4) the fact must be material; 5) it must be susceptible of knowledge; 6) the representer must know it to be false, or in the alternative, must assert it as of his own knowledge without knowing whether it is true or false; 7) the representer must intend to have the other person induced to act, or justified in acting upon it; 8) that person must be so induced to act or so justified in acting; 9) that person's action must be in reliance upon the representation; 10) that person must suffer damage; 11) that damage must be attributable to the misrepresentation, that is, the statement must be the proximate cause of the injury. Davis v. Re-Trac Manufacturing Corp., 149 N.W. 2d 37, 38-39 (1967). In other words, Plaintiffs must have been injured through being induced to buy Marlboro Lights through false representations made by Philip Morris.

In regards to Plaintiffs' consumer protection claims, causation is a necessary element of such claims. Group Health Plan, Inc. v. Philip Morris Inc., 621 N.W.2d 2, 13 (Minn. 2001). In order to establish causation Plaintiffs must be able to prove that they relied upon statements or conduct on Philip Morris' part that violated Minnesota's consumer protection statutes.

In order to establish a claim for unjust enrichment, Plaintiffs and the putative class members must show that Philip Morris knowingly received something of value to which it was not entitled, and that the circumstances are such that it would be unjust for it to retain that benefit. Schumacher v. Schumacher, 627 N.W.2d 725, 729 (Minn.App. 2001); ServiceMaster of St. Cloud v. GAB Bus. Servs., Inc., 544 N.W.2d 302, 306 (Minn.1996). Plaintiffs must be able to show that Philip Morris was unjustly enriched in the sense that the term 'unjustly' could mean illegally or unlawfully." First Nat'l Bank v. Ramier, 311 N.W.2d 502 (Minn.1981); ServiceMaster of St. Cloud v. GAB Business Services, Inc. 544 N.W.2d 302, 306 -307 (Minn.

WOC082904

1996). The unlawful or illegal conduct complained of by Plaintiffs is the allegedly false representations made by Philip Morris that Marlboro Lights delivered less tar and nicotine than regular cigarettes. Those allegedly false representations could only have caused Philip Morris to be unjustly enriched if Plaintiffs and the putative class members relied upon them.

Philip Morris raises as a defense its contention that not all class members who smoked Marlboro Lights chose to do so based upon anything that Philip Morris might have said. Instead Philip Morris argues that there exist many reasons as to why a class member may have chosen to smoke Marlboro Lights other than any representations made by Philip Morris as to their ability to deliver lower amounts of tar and nicotine. Indeed evidence has been presented that entities other than Philip Morris, such as health groups and the government, have represented that "light" cigarettes deliver less tar and nicotine. It is possible that some of the class members could have decided to smoke Marlboro Lights based upon these other representations. Philip Morris would at the least be able to raise as a defense a claim that a class member's belief that Marlboro Lights were healthier than regular cigarettes arose out of representations made by one of these other entities.

In addition, class members may have decided to smoke Marlboro Lights for various other reasons including the recommendations of other smokers, taste, and brand recognition. Whether a class member decided to smoke Marlboro Lights because of any representation made to them by Philip Morris, or decided to smoke them due to other reasons, is an individual issue unique to that class member. Determining that issue would require individual inquiries of each class member.

These two issues in and of themselves convince the Court that individual issues

WOC082905

predominate over common ones in this action and consequently render it inappropriate for certification as a class action. In addition this Court notes that Philip Morris contends that proof of damages also raises individual issues. The 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. That amount would differ between each class member depending upon how many cigarettes each purchased and the price the class member paid at the time of their purchases.

CONCLUSION

Individual issues of law and fact predominate over common ones in this action. Class certification is therefore not appropriate in this action. Certifying this as a class action would necessitate individual inquiries into each class member's reasons for smoking Marlboro Lights, as well as an inquiry into whether the manner in which they smoked Marlboro Lights caused them to receive less, the same, or more tar and nicotine than they would have gotten from regular cigarettes.

The predominance of individual issues concerning the reasons why the putative class members began smoking Marlboro Lights, and the manner in which they smoked Marlboro Lights renders this action unsuitable for certification as a class action.

WDC082906

FILED
04 NOV 29 [illegible]
BY DEPUTY
HENN. CO. DISTRICT
COURT ADMINISTRATOR

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

Gregory Curtis, Joni Kay Hanzal, Josephine Leonard and Randy Hoskins, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

vs.

Philip Morris Companies Inc., and Philip Morris USA Inc.,

Defendants.

ORDER

File No. PI 01-018042

The above-entitled matter came before the undersigned Judge of the District Court, on October 1, 2004 at the Hennepin County Government Center, Minneapolis, Minnesota, on Plaintiff's motion for class certification.

GALE D. PEARSON, Esq. and PHILLIP COLE, Esq., appeared for and on behalf of Plaintiffs.

EDWARD B. MARGARIAN, Esq. and WILLIAM STUDER, Esq., appeared for and on behalf of Defendant.

Based upon all files, records and proceedings herein, together with the arguments of counsel,

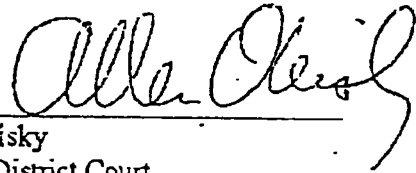
IT IS HEREBY ORDERED:

1. That Plaintiffs' motion for reconsideration of class certification is hereby GRANTED.
2. That the attached Memorandum is hereby incorporated into and made part of this Order.

WCD08716

BY THE COURT:

Dated: Nov 29, 2004



Allen Oleisky
Judge of District Court

ALLEN OLEISKY
JUDGE OF DISTRICT COURT

WCD08717

MEMORANDUM

FACTS

The facts of this case have been fully and completely set forth in this Court's recent Order and Memorandum of January 16, 2004, denying Plaintiffs' motion for class certification. This Court granted Plaintiffs leave to file this motion for reconsideration of this Court's prior denial of class certification.

ANALYSIS

I. MOTION FOR RECONSIDERATION OF CLASS CERTIFICATION

A. Plaintiffs' Proposed Class

As stated in this Court's previous Order Plaintiffs' proposed class is described as:

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

Plaintiffs bring claims for common law fraud, unjust enrichment, and violation of the Minnesota consumer protection statutes.

B. MINN.R.CIV.P. 23.01 and 23.02

In interpreting the Minnesota Rules of Civil Procedure, the Court is mindful of the guidance provided by Minn.R.Civ.P. 1, which provides that these rules "shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."

As previously stated in this Court's Order dated January 16, 2004, the issue of class certification is considered before a case is decided on the merits. MINN.R.CIV.P. 23.03(1); *Streich v. American Family Mut. Ins. Co.*, 399 N.W.2d 210, 214 (Minn.App. 1987). District

WOCD08718

courts have considerable discretionary power to determine whether a class action is maintainable. *Streich* at 213 (*citing Forcier v. State Farm Mut. Auto. Ins. Co.*, 310 N.W.2d 124, 130 (Minn. 1981)). MINN. STAT. § 23.01 sets forth a number of prerequisites that must be satisfied before a court can certify a group of plaintiffs for class action status:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if
>
> (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.

In addition to satisfying the prerequisites of Rule 23.01 the purported class action must also fall within one of three categories set forth in MINN.R.CIV.P. 23.02. *Streich* at 213. A class action may be maintained if the prerequisites of Rule 23.01 are satisfied, and in addition:

> (a) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (1) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (2) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (b) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
>
> (c) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class

WCD08719

action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(1) the interest of members of the class in individually controlling the prosecution or defense of separate actions;

(2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(3) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(4) the difficulties likely to be encountered in the management of a class action.

MINN.R.CIV.P. 23.02.

C. This Court agreed to hear Plaintiff's Motion for Reconsideration of Denial of Class Certification.

Defendant Philip Morris suggests that there are certain parameters/restrictions that are placed on this Court's authority to reconsider its earlier orders denying class certification. Minnesota Rule of Civil Procedure 54.02 specifically entitles this Court to change its decision at any time prior to the entry of final judgment based upon re-examining evidence and/or newly decided caselaw. MINN.R.CIV.P. 54.02.

D. Conduct of the Defendant Philip Morris

The Minnesota Supreme Court has stated that the Consumer Fraud Act reflects the Minnesota Legislature's intent "to make it easier to sue for consumer fraud than it had been to sue for common law fraud." *Wiegand v. Walser Automotive Groups Inc.*, 683 N.W.2d 807 (Minn. 2004) *citing State by Humphrey v. Alpine Air Products, Inc.*, 500 N.W.2d 788, 790 (Minn. 1993).

In this motion for reconsideration the essential question presented by Plaintiffs is whether

W0CD08720

the marketing of Marlboro Lights as a so-called "light" cigarette that allegedly delivers "lowered tar and nicotine" to its users may be challenged in a class action seeking damages, as deceptive conduct in a trade or business in violation of the Minnesota Consumer Fraud Act. Relying on recent Minnesota Supreme Court decisions and the newly returned decision by the Massachusetts Supreme Judicial Court, Plaintiffs contend that a mere causal nexus is required to prove Plaintiffs' reliance and that due to the nature of Defendant's deceptive representations about the Marlboro Lights cigarette products to consumers, it is the conduct of Defendants that is the pivotal point of focus under the Minnesota Consumer Fraud Act, not the conduct of individual consumers *See Wiegand*, 683 N.W.2d 807 (Minn. 2004); *Peterson v. BASF Corp.*, 675 N.W.2d 57 (Minn. 2004); *Aspinall v. Philip Morris Companies Inc.*, 442 Mass. 381, 813 N.E.2d 476 (Mass. 2004). Minnesota case law has failed to provide a clear standard for determining what constitutes a sufficient causal nexus between a defendant's alleged misrepresentations and the damage done to the plaintiffs, however the recent Supreme Judicial Court of Massachusetts's *Aspinall* opinion appears to persuasively shed some light on the facts present in the matter currently before this Court.

In this Court's previous Order it was stated that evidence has been presented that entities other than Philip Morris, such as health groups and other governmental entities, have represented that "light" cigarettes deliver less tar and nicotine and that it is possible that some of the class members could have decided to smoke Marlboro Lights based upon these other representations. That issue is however, a fact issue that Philip Morris would be able to raise as a defense at trial. While this defense remains available for Philip Morris, this Court believes that the lengthy course of intentional misrepresentations concerning "light" cigarettes, which affected a large

WCCD8721

number of Minnesota cigarette consumers, is probative and creates a sufficient causal nexus of reliance.

Plaintiffs here allege that their damages were caused by deceptive, misleading, and fraudulent statements or conduct in violation of the misrepresentations in sales laws, and as a practical matter this Court believes that it would not be possible for these damages to be caused by a violation without reliance on the statements or conduct alleged to violate the statutes. *See Group Health Plan, Inc., v. Philip Morris Inc.*, 621 N.W.2d 2, 13 (Minn. 2001). Therefore a causal nexus between the allegedly wrongful conduct of the defendants and the damages of the plaintiffs must be proved to this Court. However, as set out by the Supreme Court of Minnesota in the *Group Health* case, the showing of reliance that must be made to prove a causal nexus need not include direct evidence of reliance by individual consumers of defendants' products. *Id.* at 14. Here, Plaintiffs contend that the lengthy course of misrepresentations concerning "light" cigarettes, which affected a large number of Minnesota cigarette consumers, is sufficient evidence of reliance at this stage of the proceedings, and this Court agrees.

1. Causal Nexus

Pursuant to *Group Health*, the Minnesota Supreme Court pointed to three examples of a causation nexus under the Federal Lanham Act, 15 U.S.C. § 1125(a), a statute which is similar to the Minnesota Consumer Protection Act in that they both proscribe false or deceptive marketing practices. *Group Health*, 621 N.W.2d at 15 fn. 11. Each of the examples utilizes the deliberately – deceptive conduct of the defendant to establish a sufficient causal nexus. In the *Group Health* case, the Minnesota Supreme Court utilized language that stated:

- Expenditure…of substantial funds in an effort to deceive consumers and influence their purchasing decision justifies a presumption of actual confusion, and the burden shifts to the

WOCD08722

defendant to rebut that presumption. Citing *U-Haul Int'l, Inc. v. Jartran, Inc.*, 793 F.2d 1034, 1041 (9th Cir. 1986).

- Where evidence shows the defendant deliberately engaged in deceptive commercial practice, the burden shifts to the defendant to demonstrate the absence of consumer confusion. Citing *Resource Developers, Inc. v. The Statute of Liberty-Ellis Island Found., Inc.*, 926 F.2d 134, 140 (2d Cir. 1991).

- Egregious deception eliminates need for the plaintiff to prove actual confusion even for damages, citing *PPX Enters., Inc. v. Audiofideliety Enters., Inc.*, 818 F.2d 266, 272 (2d Cir. 1987).

The Minnesota Supreme Court recently stated that a class members' awareness of advertisements may provide a sufficient causal nexus. *See Peterson v. BASF Corp.*, 675 N.W.2d 57, 73 (Minn. 2004). While the Minnesota Supreme Court was applying the New Jersey Consumer Fraud Act's principles of law in the *Peterson* case, there is no reason to believe that those same principles are not applicable to the nearly identical Minnesota Consumer Fraud Act. "An advertisement is deceptive when it has the capacity to mislead consumers, acting reasonably under the circumstances, to act differently form the way they would otherwise would have acted (i.e., to entice a reasonable consumer to purchase the product)." *Aspinall*, 813 N.E.2d at 488.

The Supreme Judicial Court of Massachusetts discusses the issue of deceptive advertising with regard to the influence and misleading impression created by such practices.

> If, as alleged, the defendants intentionally labeled their cigarettes 'Lights' with 'lowered tar and nicotine' in order to establish in the individual and collective consumer consciousness the concept that Marlboro Lights are more healthful (or, at least, less unhealthful) to smoke the regular cigarettes, and thereby increase the defendants' market share of cigarette sales, with full knowledge that most Marlboro Lights smokers would not in fact receive the promised benefits of "lowered tar and nicotine," then there can be no question that the sales of Marlboro Lights occurred in circumstances that make the sales deceptive under G.L. c. 93A.[1] No

[1] Deceptive conduct in a trade or business in violation of Massachusetts General Laws.

WCD08723

> individual inquiries concerning each class member's smoking behavior are required to determine whether the defendants' conduct caused compensable injury to all the 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 defendants' "light" cigarettes.

Id.

Here, Philip Morris has marketed and sold to consumers in Minnesota cigarettes labeled as "lights" and has described them in their marketing campaigns as having "low tar," "low nicotine" and an alternative to "regular" cigarettes. As stated by Plaintiffs, the words "lower tar and nicotine" or "low tar and nicotine" have appeared on every pack of Marlboro Lights sold in Minnesota. While Philip Morris made claims of lower tar and nicotine, information concerning the true delivery of tar and nicotine in the "light" cigarettes in relationship to the Marlboro regular cigarettes was not disclosed.

In this Court's previous Order it was stated that a determination would have to be ascertained as to whether or not an individual class member garnered the benefits of low tar and nicotine from Marlboro Lights and that analysis would depend upon the manner in which that individual class member smoked the "light" cigarette. This Court now agrees with the recent Massachusetts Supreme Judicial Court's decision which states, "So far as we are aware, the actual level of tar and nicotine received by an individual smoker is a factor that cannot be measured by any test." *Aspinall*, 813 N.E.2d at 489. Additionally, the Massachusetts Court goes on to say, "Indeed it may be unlikely that any individual would smoke a cigarette the exact same way twice. Thus, by implication, it is probable that no smoker received the promised benefit of lowered tar and nicotine every time he or she smoked a Marlboro Lights cigarette." *Id.* at fn. 20.

WOCD08724

CONCLUSION

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 Defendants Philip Morris's conduct would become a predominant aspect of each trial. Considerations of delay, and high costs provide additional support for the appropriateness of class certification. This Court concludes 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 Minnesota can seek redress for the alleged deception

WOCD08725