No. 96236

IN THE
SUPREME COURT OF ILLINOIS

SHARON PRICE and MICHAEL FRUTH, *et al.*,	)	
	)	On Direct Appeal from the
Plaintiffs-Appellees,	)	Circuit Court of the
	)	Third Judicial Circuit,
v.	)	Madison County, Illinois
	)	
PHILIP MORRIS INCORPORATED,	)	No. 00 L 112
	)	
Defendant-Appellant.	)	Nicholas G. Byron,
	)	*Judge Presiding*.

REPLY BRIEF OF APPELLANT PHILIP MORRIS USA INC.

James R. Thompson
George C. Lombardi
Jeffrey M. Wagner
Julie A. Bauer
Stuart Altschuler
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, IL 60601-9703
312-558-5600

Michele Odorizzi
Joel D. Bertocchi
Michael K. Forde
MAYER, BROWN, ROWE & MAW LLP
190 South LaSalle Street
Chicago, IL 60603-3441
312-782-0600

Larry Hepler
Beth A. Bauer
BURROUGHS, HEPLER, BROOM,
MacDONALD, HEBRANK & TRUE, LLP
103 West Vandalia Street, Suite 300
Post Office Box 510
Edwardsville, IL 62025-0510
618-656-0184

Kevin M. Forde
KEVIN M. FORDE, Ltd.
111 West Washington Street
Suite 1100
Chicago, IL 60602
312-641-1441

Attorneys for Defendant-Appellant Philip Morris USA Inc.

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ORAL ARGUMENT REQUESTED

INTRODUCTION

Plaintiffs do not dispute that, to prevail on behalf of the entire class, they had to prove that everyone who purchased Marlboro Lights and Cambridge Lights (together, "Lights") in Illinois over a 30-year period was deceived into believing that Lights delivered less tar and nicotine and were safer than full-flavor cigarettes, that the alleged deception was a substantial factor in everyone's decision to buy Lights, and that no one actually got less tar and nicotine.[1] Common sense suggests that plaintiffs could not possibly prove all of these elements in a single trial for the entire class – and they did not. Although the circuit court made findings on these issues – findings copied verbatim (including typographical errors) from plaintiffs' proposed order – those findings misconstrued both the law and the factual record, were against the manifest weight of the evidence, and were the product of a proceeding so unfair that it denied Philip Morris USA ("PMUSA") due process.

The circuit court never should have certified this class because resolving the claims of the class representatives could not – and did not – "establish a right of recovery" in all other class members. *Hagerty v. Gen'l Motors Corp.*, 59 Ill. 2d 52, 59 (1974). The evidence makes clear that each class member's claim depends on highly individualized facts. For example, most testifying class members (17 out of 23) chose to continue purchasing light cigarettes even after learning of the alleged deception. *See* Opening Brief of Appellant Philip Morris USA Inc. ("Def. Br.") at 10 & n.3. Indeed, notwithstanding plaintiffs' assertions to the contrary (Appellees' Brief ("Pl. Br.") at 14), the record establishes that class members continued smoking Lights even after learning that they might be "more harmful." *See, e.g.*, R. 10984, 11020 (Whitt); C. 43106 (Miles); *see generally infra* at 13-14. The record also demonstrates that the class includes

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[1] *See Shannon v. Boise Cascade Corp.*, 208 Ill. 2d 517 (2004); *Oliveira v. Amoco Oil Co.*, 201 Ill. 2d 134 (2002); *Zekman v. Direct Am. Marketers, Inc.*, 182 Ill. 2d 359 (1998) (together, "*Shannon-Oliveira-Zekman*").

smokers who purchased Lights for reasons other than health or whose testimony indicates that they received exactly what was allegedly promised – less tar and nicotine. *See infra* at 6-18; Def. Br. at 19-27. The simple, dispositive fact is that plaintiffs did not prove deception, causation, and injury for all class members. In reaching the contrary conclusion, the circuit court ignored the class members' own testimony and misread both the law and the evidence. For example:

- **Tar and Nicotine Delivery**. In finding that no class member got less tar and nicotine, the court relied on Dr. Benowitz. But Dr. Benowitz testified that compensation was complete only on "average" and that "some people take in less [tar and nicotine] and some people take in more." R. 3103. The court made a fundamental error in concluding that what was asserted to be true "on average" was true for every class member. *Infra* at 6-10.

- **Deception**. In finding that every class member was deceived, the court improperly relied on plaintiffs' experts' assumption that all class members believed Lights were safer than their full-flavor counterparts. This assumption lacked any evidentiary support and was contradicted by plaintiffs' own survey and all other surveys in evidence. *Infra* at 10-12.

- **Proximate Causation**. In finding that every Lights purchase was caused by the alleged deception, the court failed to apply the proper legal standard (the "substantial factor" test) and found causation even though plaintiffs' own experts could not say what role the alleged deception played in any class member's purchasing decision. *Infra* at 12-18.

- **"More Dangerous"**. In finding that Lights were "more dangerous" than full-flavor cigarettes, the court ignored the testimony of plaintiffs' own experts that Lights could *not* be considered "more dangerous" based upon "the standards that scientists would use." *See, e.g.*, R. 5193 (Harris); *infra* at 26-29.

- **Statute of Limitations**. In concluding that PMUSA had no limitations defense against any class member, the court disregarded the undisputed facts and denied PMUSA the opportunity to demonstrate that any class member had sufficient notice to trigger the running of the statute. This ruling thus violated state law and due process. *Infra* at 20-23.

The result of these and other errors was a $10.1 billion Judgment that violated controlling law and was "unreasonable, arbitrary, [and] not based on evidence." *Bazydlo v. Volant*, 164 Ill. 2d 207, 215 (1995). If upheld, the Judgment would allow individuals to recover merely because they are part of a class, not because plaintiffs proved their claims.

In urging affirmance, plaintiffs (and their amici) contend that PMUSA exposed smokers to a greater risk of personal injury than the smokers expected. But plaintiffs themselves argued

that this case was not about personal injuries. *See, e.g.*, R. 174.[2] Rather, to pursue this case on behalf of a mammoth class, plaintiffs limited their claims to supposed "economic injuries." These "economic injuries," however, are illusory; as plaintiffs concede, they did not even attempt to prove that Lights would have cost less in the real world had the "truth" been known. Pl. Br. at 75-76. Instead, to manufacture billions of dollars in damages when none actually exists, plaintiffs used a "contingent valuation" survey in which a handful of consumers speculated about how much they personally would have been willing to pay for Lights under hypothetical market conditions that never existed. Plaintiffs' damages theory has never been accepted in any court in Illinois or elsewhere; if accepted, it would radically expand class action liability in Illinois and allow astronomical windfall damages (and fee awards) without any real-world injury. *Infra* at 41-46.

Finally, plaintiffs defend the Judgment as wise regulatory policy, supposedly consistent with regulatory decisions made by some foreign countries. *See* Pl. Br. at 3-4. However, Congress and the Federal Trade Commission ("FTC") – not the circuit court – have the responsibility to determine U.S. policy in this area. In exercising that responsibility, the FTC made a deliberate decision to allow PMUSA to use terms such as "lowered tar and nicotine" and "lights" as long as they were substantiated by the FTC Method. *See infra* at 34-37; Def. Br. at 44-49. The circuit court's finding that PMUSA's use of those terms nonetheless violated state law (giving rise to massive liability) collides with the regulatory regime established by Congress and the FTC. Accordingly, plaintiffs' claims are barred by § 10b of the CFA, 815 ILCS 510/4 (hereinafter, § 4(1)) of the UDTPA, and federal preemption. *Infra* at 33-41.

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[2] Personal injury actions based on the same allegations as those here are currently pending in Illinois and will proceed irrespective of this Court's ruling on class certification. *See* Def. Br. at 39 n.19 (collecting cases).

STANDARD OF REVIEW

There is no dispute that the circuit court's legal errors are reviewed de novo. *See, e.g.*, *Allen v. Woodfield Chevrolet, Inc.*, 208 Ill. 2d 12, 21 (2003). De novo review applies even where the legal error is wrapped up in an issue (such as a question of fact) that is within the circuit court's discretion. *Beehn v. Eppard*, 321 Ill. App. 3d 677, 680-81 (1st Dist. 2001). Therefore, to the extent that class certification or the Judgment is predicated on legal error, review is de novo.

Nor is there a dispute that the circuit court's factual errors ordinarily are reviewed on a "manifest weight of the evidence" standard. *Kalata v. Anheuser-Busch Cos.*, 144 Ill. 2d 425, 433 (1991). Although deferential, this standard is not toothless. A reviewing court "should not focus on isolated instances of testimony but must instead examine the evidence as a whole." *People v. Fabian*, 42 Ill. App. 3d 934, 937 (1st Dist. 1976). Findings of fact must also be consistent with "simple common sense." *In re Beatriz S.*, 267 Ill. App. 3d 496, 526 (1st Dist. 1994). Here, the court's verbatim adoption of plaintiffs' proposed findings requires an even more probing review of the record and Judgment. As even the case that plaintiffs cite recognizes, where a circuit court adopts proposed findings verbatim, the reviewing court should "scrutinize the record with greater care in determining that the findings are supported." *Shapiro v. Reg'l Bd. of Sch. Trs.*, 116 Ill. App. 3d 397, 404 (5th Dist. 1983) (Pl. Br. at 22 n.21); *see also* 5 Am. Jur. 2d *Appellate Review* § 682 (2004) (collecting cases). As demonstrated below, the Judgment here is unsupported by record evidence and thus cannot survive scrutiny under this or any other standard.

ARGUMENT

I. PMUSA DID NOT WAIVE ITS ARGUMENTS REGARDING UNFAIRNESS

Plaintiffs' threshold argument is the assertion that PMUSA waived all challenges to the circuit court's finding that PMUSA's conduct was "unfair" in addition to being "deceptive." Pl. Br. at 16-18. However, PMUSA challenged the unfairness finding by arguing that its conduct complied with FTC guidelines and therefore could not be deemed unfair. Def. Br. at 55. PMUSA also argued that, even if plaintiffs could show unfair conduct, whether anyone had a

right to damages because of that conduct required the same individualized inquiry as plaintiffs' "deception" claim under the CFA. *Id*. The UDTPA (which prohibits "unfair" practices) provides solely for injunctive relief; a plaintiff may recover damages for unfairness only by suing under the CFA's private cause of action provision. *See, e.g., Dorr-Oliver Inc. v. Fluid-Quip, Inc.*, 834 F. Supp. 1008, 1014-15 (N.D. Ill. 1993). Thus, as PMUSA expressly argued, irrespective of whether plaintiffs rely on the CFA or the UDTPA, plaintiffs must satisfy the causation and injury requirements of the CFA to recover damages suffered as a result of unfair business practices. *See* Def. Br. at 55 ("a violation of the UDTPA can serve as a basis for damages only if a plaintiff also satisfies the causation and injury requirements of the CFA – requirements that plaintiffs failed to meet"). PMUSA properly framed its class certification and failure-of-proof challenges to both theories by reference to the CFA's requirement that each class member prove causation and injury. *See, e.g.*, Def. Br. at 19-33, 64, 68-69. PMUSA was required to do no more. *Dep't of Conservation v. First Nat'l Bank of Lake Forest*, 36 Ill. App. 3d 495, 505 (2d Dist. 1976) (an argument contained in the brief is preserved for appellate review).

II. THE CIRCUIT COURT ERRED IN CERTIFYING THE CLASS

A. The Court Erred In Certifying The Class Because The Requirements Of 735 ILCS 5/2-801(2) Were Not Satisfied

Plaintiffs argue that the "sole" basis for PMUSA's challenge to class certification is the predominance requirement of 735 ILCS 5/2-801(2). Pl. Br. at 18. Plaintiffs simply ignore PMUSA's other challenges. *See* Def. Br. at 35 (class treatment not "fair and efficient"); Def. Br. at 41 (class representatives inadequate because split claims). In any event, predominance is the keystone requirement. Only when common issues predominate can a class action be tried efficiently and in a manner consistent with due process. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997) (rigorous adherence to predominance ensures that a class is "sufficiently cohesive" to warrant mass adjudication); *Southwestern Refining Co. v. Bernal*, 22

S.W.3d 425, 434 (Tex. 2000) (where common questions do not predominate, class certification can "severely compromise a party's ability to present viable claims or defenses").

Contrary to plaintiffs' suggestion, *see* Pl. Br. at 20-36, the predominance test is not whether common issues outnumber individual issues. Rather, the test is whether adjudication of the class representatives' claims will effectively establish "a right of recovery" for all other class members without the need to inquire into each individual's circumstances. *See, e.g.*, *Hagerty*, 59 Ill. 2d at 59; *AG Farms, Inc. v. Am. Premier Underwriters, Inc.*, 296 Ill. App. 3d 684, 696 (4th Dist. 1998). A class action fails as a matter of law – and certification is therefore an abuse of discretion – if recovery depends on factual determinations unique to each class member. *See McCabe v. Burgess*, 75 Ill. 2d 457, 468-69 (1979); *Magro v. Cont'l Toyota, Inc.*, 67 Ill. 2d 157, 161-64 (1977). Even where the defendant allegedly engaged in a common course of conduct with respect to the entire class, issues such as deception, causation, and injury defeat predominance if they require an examination of each class member's particular facts.[3]

1. Whether Class Members Failed To Receive What Was Promised Is An Individual Issue

Nowhere have plaintiffs distorted the record more than on the threshold question of whether all class members failed to receive what PMUSA allegedly promised. To have a valid claim, each class member had to show that he or she did not receive what was allegedly promised – here, less tar and nicotine. If a class member received less tar and nicotine, he or she received what was promised and therefore was not deceived or injured. *See, e.g.*, *Kelly v. Sears Roebuck & Co.*, 308 Ill. App. 3d 633, 644 (1st Dist. 1999).

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[3] *See, e.g.*, *Mele v. Howmedica, Inc.*, 348 Ill. App. 3d 1, 24 (1st Dist. 2004); *Rodmaker v. Johns Holding Co.*, 205 Ill. App. 3d 520, 526 (4th Dist. 1990); *see also Amchem Prods.*, 521 U.S. at 623-25 ("shared experience of asbestos exposure" was insufficient to satisfy predominance requirement where causation could only be established via multiple individualized inquiries). This is not a case, such as *In re Potash Antitrust Litig.*, 159 F.R.D. 682 (D. Minn. 1995), cited by plaintiffs (Pl. Br. at 19), a price-fixing case, in which the court noted that predominance is satisfied only if plaintiffs' "proof obviates the need to examine each class member's unique position." 159 F.R.D. at 693.

This case is no different from *Kelly*. There, a plaintiff who was promised a "new" battery could not recover simply because others had received "used" batteries. Instead, the plaintiff was required to show that he personally did not receive a new battery. *Id*. Plaintiffs attempt to distinguish *Kelly* on the ground that here "all class members received the same product." Pl. Br. at 36 (emphasis omitted). However, the alleged promise here was less tar and nicotine. As shown below, the undisputed record establishes that at least some class members received less tar and nicotine even if others did not. *Kelly* holds that in these circumstances those who received what was promised cannot recover. 308 Ill. App. 3d at 644; *see also, e.g.*, *Rivera v. Wyeth-Ayerst Labs.*, 283 F.3d 315, 319-20 (5th Cir. 2002); *Williams v. Purdue Pharma Co.*, 297 F. Supp. 2d 171, 175-76 (D.D.C. 2003); *New Jersey Citizen Action v. Schering-Plough Corp.*, 842 A.2d 174, 178-79 (N.J. App. Div. 2003).

To support recovery on a class-wide basis, the circuit court found that, throughout the 30-year class period, *every* class member smoked Lights in such a way that he or she failed to receive less tar and nicotine. *See* C. 43395. This "finding" is utterly unsupported by the record. The court relied upon a single expert, Dr. Benowitz. C. 43395. But Dr. Benowitz never testified that *all* class members compensated completely and thereby received the same amount of tar and nicotine from each Lights cigarette as they would have from a full-flavor cigarette. He said only that compensation was complete on "*average*." *See* R. 3103 (emphasis added). "Average" does not mean "all." Dr. Benowitz explained that, for any particular person, compensation may be incomplete or non-existent: "*some people take in less* and some people take in more" tar and nicotine. R. 3103 (emphasis added). He even acknowledged the possibility that "some" class members "don't compensate at all." R. 3104. *The court made the fundamental error of assuming that what was asserted to be true "on average" was in fact true for every class member at all times.* As a result, those class members who actually received less tar and nicotine, and therefore had no valid claim, were nonetheless allowed recovery.

This is not a case where plaintiffs proved that only a "de minimis" number of class members got what was allegedly promised. As plaintiffs note, Dr. Benowitz testified that "virtually all smokers" smoke to achieve their particular levels of nicotine. Pl. Br. at 33; *see also id*. at 7. However, this testimony responded to a question asking whether smokers achieve their own desired level of nicotine "on either a daily basis or on a per cigarette basis." *Id*. at 33 (quoting SA 22). As Dr. Benowitz subsequently explained, smokers who achieve their desired levels of nicotine on "*a daily basis*" – and not on a "per cigarette basis" – do so by smoking *more cigarettes*. R. 3057-60 (emphasis added). They smoke more cigarettes precisely because they receive less tar and nicotine *from each Lights cigarette*. *Id*.; *see also* R. 3006-07 (Farone) (smokers increase cigarettes per day when receiving less nicotine per cigarette). Smokers who received less tar and nicotine per cigarette but smoked more cigarettes were not deceived and do not have a claim. They are akin to beer drinkers who switched from regular to light beer and complain that they did not get fewer calories after drinking greater quantities of beer than they did before.[4] *See In re Tobacco Cases II*, slip op. at 31 (Cal. Super. Ct. 2004) ("no reasonable smoker (even if addicted and therefore vulnerable) can believe that the amount of tar and nicotine consumed by smoking does not depend on the actual number of cigarettes smoked") (SSA-91).[5]

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[4] In support of their theory of universality of compensation, plaintiffs also cite a single PMUSA study that they say found no difference in *average* tar deliveries between smokers of Marlboro and Marlboro Lights. Pl. Br. at 33; PX 17-K. However, the study found that 40% of the individuals who switched from Marlboro to Marlboro Lights received *less* tar and nicotine. R. 7372-76 (Goodman); Group 28(4) at 2-3. If anything, the study confirms the individual nature of this issue because it found that the amount of tar and nicotine received varied dramatically among smokers. Beyond that, plaintiffs ignore the undisputed testimony of Dr. Benowitz, who explained that the study was "flaw[ed]," "problematic," and could not provide a "definitive answer" on compensation. R. 3087-89. Finally, all other similar studies by PMUSA discussed at trial found that compensation was incomplete and thus, even on an average basis, smokers of lower yield cigarettes received *less* tar and nicotine. R. 7359-62, 7446-47 (Goodman); R. 2721 (Farone); Group 29(5).

[5] PMUSA has filed a Motion for Leave to File a Second Supplementary Appendix (cited herein as "SSA-__"), attaching the new unpublished decisions cited in this reply brief.

Plaintiffs try to salvage the circuit court's finding by pointing to Dr. Farone's testimony (Pl. Br. at 33-34), but that testimony – not cited by the circuit court in support of its compensation finding – provides no support. Dr. Farone never testified that all Lights smokers received the same amount of tar and nicotine they would have received from full-flavor cigarettes. Instead, he was asked to opine only about the "design" of Lights: "if people smoke a Marlboro Light, are they *designed* to get the same amount of nicotine as a Marlboro Red?" R. 2440 (emphasis added). He responded that Lights were "*designed*" so that "99.9 percent" of smokers *could* get the same amount of tar and nicotine. R. 2441 (emphasis added); *see also* Def. Br. at 23. Dr. Farone did not go beyond the alleged *design capacity* of Lights to testify about whether class members in fact compensated completely. *See* Def. Br. at 23 & n.13. Dr. Farone's testimony therefore cannot be used to buttress the circuit court's erroneous finding of universal compensation.

The circuit court also ignored the class members' testimony. Several class members admitted that they did not compensate when smoking Lights. *See* Def. Br. at 23; *see also, e.g.*, R. 7322 (Webb) (answering "no" when asked if he compensated). In addition, several class members admitted that they smoked more cigarettes after switching to Lights – indicating that they were receiving less tar and nicotine from Lights on a per cigarette basis. *See, e.g.*, R. 2908, 2918, 2951-52 (Gaylord); R. 10876 (G. Gebhart); R. 10354 (Seitzinger); R. 10447-48 (Reynolds); R. 11487-88 (Walker); R. 10277, 10285 (R. Bohm). Plaintiffs do not even attempt to explain how these class members (and others like them), who clearly received less tar and nicotine from each Lights cigarette they smoked, could claim to have been deceived or injured.

Finally, in an attempt to justify their failure to prove that all class members compensated, plaintiffs argue that it would have been impossible to use a "biomarker" test to measure tar and nicotine deliveries once class members had already switched to Lights. Pl. Br. at 32. However, at trial plaintiffs never asserted, let alone proved, that it is impossible to determine whether or the extent to which a class member compensated. To the contrary, plaintiffs relied on PMUSA's own

previous studies attempting to measure the extent to which smokers compensate. *See supra* at n. 4. In any event, plaintiffs' experts did not even attempt to interview class members about their smoking habits when switching to Lights, such as whether they took more puffs, covered vent holes, or increased the number of cigarettes smoked per day. *See, e.g.*, R. 3097-99 (Benowitz). The failure of plaintiffs and the circuit court to consider class members' actual smoking behavior – as well as Dr. Benowitz' concessions that the class included smokers who received less tar and nicotine – require reversal of the Judgment.

2. Whether Each Consumer Was Deceived And Whether The Alleged Deception Caused Actual Injury Are Individual Issues

In addition to demonstrating that no class member received what was promised, under *Shannon-Oliveira-Zekman*, plaintiffs had to prove (1) that each class member was deceived into believing that Lights delivered less tar and nicotine and were therefore less hazardous, and (2) that this deception proximately caused the class member to purchase Lights, resulting in actual economic loss. The elements of deception, causation, and injury raised additional individual issues that, as a matter of law, precluded any finding that common issues predominated.

a. The Circuit Court's Finding That Every Class Member Was Deceived Is Legally And Factually Unsupportable

Plaintiffs acknowledge that they had to prove that all class members were deceived. Pl. Br. at 42 (deceptive advertising "'cannot be the proximate cause of damages under the [CFA] unless it actually deceives the plaintiff'") (quoting *Shannon*). Plaintiffs contend that they proved class-wide deception by showing that everyone who bought Lights saw the words "lights" and (in the case of Marlboro Lights) "lowered tar and nicotine" on the package. Pl. Br. at 42-43.[6] But,

[6] Plaintiffs err in asserting that PMUSA has conceded that the term "lights" is misleading because Lights "are no safer than other cigarettes." Pl. Br. at 2. On its website, PMUSA has merely stated, consistent with the public health position, that "smokers should not assume" that Lights are "safe" or "safer." DX 4801. Scientific investigation into low yield cigarettes (defined in this brief as measured by the FTC method) is continuing, R. 4128-30 (Thun), and PMUSA has petitioned the FTC to issue rules as to how PMUSA should proceed in the future with respect to FTC testing and descriptors. DX 7543.

as this Court explained in *Oliveira*, a consumer who saw deceptive advertisements "but never believed them" lacks a valid claim. 201 Ill. 2d at 155. In *Zekman*, this Court rejected a CFA claim because the plaintiff, after having read the advertisements, was not deceived. 182 Ill. 2d at 375-76; *see also Shannon*, 208 Ill. 2d at 525; *County of Cook v. Philip Morris, Inc.*, 2004 WL 2186536 (1st Dist. 2004). So too, consumers who bought Lights but did not believe that they delivered less tar and nicotine or were safer were not deceived by the descriptors and do not have a valid claim for damages.

Plaintiffs failed to introduce any admissible evidence of class-wide deception. Plaintiffs cannot claim that they proved class-wide deception because a few hand-picked class members testified that they believed at one time that Lights were safer. Even if that testimony proved that *those* particular class members were deceived, it would not prove that anyone else (let alone a million class members) was deceived. *See Hagerty*, 59 Ill. 2d at 59.

Nor did plaintiffs attempt to prove class-wide deception through surveys or studies of consumer beliefs. In fact, *every survey* in evidence showed that substantial percentages of consumers did not believe that Lights delivered less tar and nicotine or were safer. *See* R. 4830 (plaintiffs' expert Cohen); R 5059-60 (plaintiffs' expert Cialdini). Even in plaintiffs' own survey, 23% of respondents did not interpret Lights as referring to the delivery of lower tar and nicotine, and 32% did not interpret "lowered tar and nicotine" as meaning less hazardous than full-flavor cigarettes. PX 74-A at 27, 29. Plaintiffs rely on their experts' criticisms of these surveys' findings (including their own) (Pl. Br. at 52-56), but the fact remains that plaintiffs, who had the burden of proof, failed to offer even a single survey that supported their claim of class-wide deception.[7]

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[7] The court found that none of the surveys specifically addressed the beliefs of Lights smokers. C. 43392. The record does not support this finding. *See* DX 4402 at 95 (only 3% of the low-tar smokers surveyed by the Roper Organization identified Marlboro Lights as "better for your health"); Group 21(9) at 39 (only 27.6% of low-tar smokers believed their brands were

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Finally, even plaintiffs' experts (Drs. Cohen and Cialdini) did not opine that the entire class was deceived; they simply *assumed* that everyone believed the words "lights" and "lowered tar and nicotine" meant safer. *See* Def. Br. at 28-31. Neither spoke to a single class member. *Id*. Neither cited any survey showing class-wide deception (because there was none). *Id*. Where, as here, an expert makes an assumption with no factual support, the opinion is inadmissible and cannot serve as a basis for a court's finding. *Leonardi v. Loyola Univ. of Chicago*, 168 Ill. 2d 83, 96 (1995); *see also Donaldson v. Cent. Ill. Pub. Serv. Co.*, 199 Ill. 2d 63 (2002).[8]

b. The Circuit Court's Finding That The Alleged Deception Caused Every Class Member To Sustain Actual Injury Is Legally And Factually Unsupportable

Plaintiffs were also required to prove proximate causation – *i.e.*, that each class member "would not have engaged in the transaction had the other party made truthful statements." *Martin v. Heinold Commodities, Inc.*, 163 Ill. 2d 33, 60 (1994) (quotation omitted); *see also Shannon*, 208 Ill. 2d at 525-26 (requiring proximate cause). Although the alleged deceptive or unfair conduct need not be the sole cause, plaintiffs concede that such conduct at least must have "played a substantial part, and so has been a substantial factor" in causing each purchase. Pl. Br. at 43 (quotations omitted).

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safer); DX 4191 at 3 (of survey respondents who switched to lights, only 25% said they were "safer" or "healthier"); DX 4432 at i13 (40% of lights smokers indicated they smoked lights "to reduce the risks of smoking"; 80% of lights smokers indicated they preferred the taste).

[8] Indeed, when confronted with the unanimous body of survey evidence contradicting his hypothesis of universal safety beliefs, Dr. Cohen declared that the data should be ignored because "[m]y opinion is based on extremely well-grounded theory." R. 4882. That turns the scientific method on its head. Where the data contradict the hypothesis, the scientific method requires that the hypothesis be rejected – not that the data be ignored in favor of theory. *See United States v. Bynum*, 3 F.3d 769, 773 (4th Cir. 1993) ("'Scientific' knowledge is generated through the scientific method – subjecting testable hypotheses to the crucible of experiment in an effort to disprove them. An opinion that defies testing, however defensible or deeply held, is not scientific."); R. 11164-69 (Viscusi).

The circuit court did not find that the alleged deception was a "substantial factor" in each class member's decision to purchase Lights throughout the 30-year class period. Indeed, the court did not cite the "substantial factor" test in its Judgment at all. Instead, it found that causation was satisfied for all class members even though they "may have relied to different degrees or in different ways upon" the alleged deception. C. 43388; *see also* Pl. Br. at 45 (experts testified only that class members "relied in some degree"). Such a finding does not come close to a determination that the alleged deception was a "substantial factor" in every class member's purchasing decision. The court's finding of causation cannot stand because it was predicated on the wrong legal standard.

Nor is there record evidence to support a finding that the substantial factor test was met with respect to all class members. As noted above, most class members who testified at trial (17 out of 23) continued smoking light cigarettes even after participating in this lawsuit and learning about plaintiffs' allegations. *See* Def. Br. at 10 & n.3. Plaintiffs concede that some class members continued smoking Lights even after they learned Lights were not safer; they argue, however, that there is "no evidence" that "any" class member continued smoking Lights after learning that Lights "could be more harmful." Pl. Br. at 14. But that is simply not true. Ms. Whitt, for example, conceded that she continued smoking Lights even after learning that "they could be more harmful." R. 10984, R. 11020. Similarly, Mr. Norton and Ms. Price continued smoking Lights even after reading the complaint, which alleged that Lights were "more dangerous." *See* C. 15811; R. 11618-21, 11623 (J. Norton); R. 5718-20 (Price).[9] Plaintiffs assert

[9] Indeed, class action plaintiffs are presumed to be aware of the fraud alleged in their complaint. *See Marks v. Simulation Sciences*, 2000 WL 33115589, at *5 (C.D. Cal. 2000). In addition, before they testified, at least 12 of the class members who continued to smoke light cigarettes had watched a *60 Minutes II* program in which plaintiffs' experts asserted that the descriptors were lies and that light cigarettes may be more dangerous. R. 10059-60 (Smith); R. 10362, 10380 (Seitzinger); R. 10879 (G. Gebhart); R. 3274 (Kezios); R. 4513 (Izzi); R. 7227 (Anderson); R. 7322 (Webb); R. 10092-94, 10127, 10133, 10139, 10143, 10148 (M. Norton); R. 10176, 10181, 10183 (P. Gebhart); R. 10264-67 (Bohm); R. 10923, 10961 (Holak); R. 11620-21, 11623 (J. Norton).

that Ms. Miles' deposition testimony that she continued to smoke Lights should be discounted because the deposition occurred before the submission of plaintiffs' experts' reports. *See* Pl. Br. at 14. But it is beyond dispute that Ms. Miles continued to smoke Lights *even after hearing the evidence at trial* because she liked the lighter taste. *See* C. 43106.

That class members continued to buy Lights after learning that they were not safer – and could be more dangerous – demonstrates that the alleged deception was not a substantial factor in these class members' purchasing decisions. *See Bass v. Prime Cable of Chicago, Inc.*, 284 Ill. App. 3d 116, 127 (1st Dist. 1996). Plaintiffs' attempt to distinguish *Bass* is meritless. *See* Pl. Br. at 39-40. As in *Bass* – and as other courts have recognized – consumers who continue buying a product after the alleged deception has been revealed cannot plausibly claim that the deception was a substantial factor in their original purchasing decision. *See Lehrman v. South Chicago Cable, Inc.*, 210 Ill. App. 3d 346, 352 (1991); *Kellerman v. Mar-rue Reality & Builders*, 132 Ill. App. 3d 300 (1985); *Perrin v. Pioneer National Title Ins. Co.*, 83 Ill. App. 3d 664 (1980); *see also Solomon v. Bell Atlantic*, 777 N.Y.S.2d 50, 56 (App. Div. 2004). At the very least, the evidence that some class members continued to buy Lights even after no longer believing Lights to be safer establishes that causation is a highly individualized inquiry.[10]

Furthermore, other evidence confirms the differences among class members relating to causation. For example, one of the two class representatives – Ms. Price – testified that she chose Cambridge Lights based on the FTC Method tar and nicotine numbers themselves. R. 5714. Thus, if anything, the legally required disclosure of the FTC Method results (*see* Def. Br. at 46-

[10] Plaintiffs assert that certain class members continued purchasing Lights because of "addiction." Pl. Br. at 41. However, addiction itself is an individual issue because plaintiffs' experts conceded that not all smokers are addicted. R. 3240 (Benowitz); Def. Br. at 21-22. In any event, smokers do not become addicted to specific brands. R. 12338 (Harris). Thus, addiction cannot explain class members' continued purchases of Lights. Nor can plaintiffs explain away continued Lights purchases by arguing that there was no safer cigarette on the market. Pl. Br. at 41. Plaintiffs' experts testified that ultra-light cigarettes were safer. R. 3079 (Benowitz).

48) – and not PMUSA's descriptors – caused her purchase. *See also* R. 2934-36, R. 2939-43 (Gaylord) (chose Lights after looking at FTC Method numbers). Where, as here, the evidence shows that class members "do not share a common universe of knowledge and expectations," class certification is improper. *Poulos v. Caesar's World, Inc.*, 379 F.3d 654, 665 (9th Cir. 2004) (reversing class certification where causation depends on such "individualized" issues as class members' knowledge, motivations, and expectations); *see also Young v. Ray Brandt Dodge, Inc.*, 176 F.R.D. 230, 234 (E.D. La. 1997) (class certification inappropriate where court must inquire "into the subjective circumstances about each plaintiff's decision to purchase").

Ultimately, plaintiffs rely on the unsupported assumptions and abstract theories of their experts to establish causation on a class-wide basis. But again, these assumptions and theories cannot satisfy the "substantial factor" test. As noted above, Drs. Cohen and Cialdini started from the *assumption* that consumers believed that Lights were safer than full-flavor cigarettes. R. 4723-24 (Cohen), R. 4921 (Cialdini). They then theorized that lower tar was a "health attribute" and that, *assuming taste and other factors were the same for all brands*, the "health attribute" must have increased the likelihood that a consumer would buy the product. *See, e.g.*, R. 4645-46 (Cohen); R. 4941-42 (Cialdini). Based on these assumptions, Drs. Cohen and Cialdini concluded that descriptors such as "lights" must have had some positive "directional influence" on every class member's purchasing decision. R. 4855 (Cohen); R. 4952-55 (Cialdini).

This testimony was inadmissible and insufficient to satisfy the "substantial factor" test. *First*, for all of the reasons outlined above, there was no basis for assuming that all class members believed that Lights were safer than full-flavor cigarettes. *See supra* at 10-12.; Def. Br. at 28-31. *Second*, plaintiffs never proved that all other attributes were the same for all cigarette brands or that the "health attribute" was a *substantial* factor in the decisions of all class members to buy Lights. To the contrary, Drs. Cohen and Cialdini conceded that there were numerous reasons for choosing Lights other than the "health attribute" and that they did not know "what weight any individual class member assigned to the health attribute." *See, e.g.*, R. 4718 (Cohen); R. 5032

(Cialdini). Dr. Cohen explained that people who were "preoccupied with health" could attach a higher weight to the supposed safety benefits of Lights; by contrast, others "not much concerned with health" could place a "much lower weight" on it. R. 4704. "Each person has his own weights." R. 4757. Significantly, Dr. Cohen refused to testify that such beliefs "caused" people to purchase Lights because he did not have "the necessary evidence." R. 4853. Similarly, Dr. Cialdini agreed that people can have "multiple reasons" for choosing Lights, including taste, and people "don't all share the same weighting of those reasons." R. 5032. Dr. Cialdini further admitted that he did not know whether smokers' beliefs as to whether Lights are safer have changed over time. R. 5036. Such expert opinions are insufficient as a matter of law to satisfy the requirements of *Shannon-Oliveira-Zekman* and the "substantial factor" test.

Finally, plaintiffs assert that class members overwhelmingly disliked Lights' taste and therefore must have purchased Lights for health reasons. Pl. Br. at 12-14. In so arguing, plaintiffs ignore the testimony of their own expert, Dr. Cohen, who admitted that "it is more likely than not that some class members assigned relatively high weight to taste." R. 4781-82; *see also* Pl. Br. at 40. Dr. Cohen also admitted that smokers do not smoke cigarettes whose taste they do not like. For example, even though – according to plaintiffs' experts (R. 3079 (Benowitz)) – "ultra low tar" cigarettes are safer, they have not captured a significant market share because "people report disliking the taste enormously" – *i.e.*, health often is not a determining factor in consumers' choice of cigarettes. R. 4875 (Cohen); *see also, e.g.*, R. 7927-28 (Miles) (did not switch to ultra lights even though she believed they were safer because she "didn't like the taste").

Furthermore, plaintiffs grossly mischaracterize PMUSA's employee testimony and internal documents, which reflect nothing more than the belief that *some* smokers chose Lights for health while others chose Lights for other reasons, such as taste. For example, plaintiffs cite former PMUSA CEO James Morgan's testimony for the proposition that the taste of Lights is not a "positive attribute." Pl. Br. at 14. But Mr. Morgan also testified that some people "*switched*

because they in fact liked a less harsh taste." R. 3439; *see also* R. 10000 (Lund) ("there were people who liked Marlboro Lights when it first came out"). Mr. Morgan further testified that only "*some* percent of the low-tar smokers" thought that Lights were safer. R. 6861 (emphasis added). Ellen Merlo, a PMUSA Senior Vice President, confirmed that only "*some* people were smoking low-tar" because of health concerns. R. 4178 (emphasis added). Furthermore, plaintiffs ignore the undisputed market history of Marlboro Lights, which demonstrates that taste was a primary reason for the brand's ultimate success. Mr. Morgan explained that, although Marlboro Lights was not successful when first introduced in the early 1970's, the brand started growing during the 1980s when "there was a general trend in the country towards milder tasting products." R. 6812-16.[11] This evidence corroborates the testimony of many class members that they chose Lights because they preferred the taste. *See, e.g.*, R. 7916-17 (Miles) ("preferred the flavor" of Lights; full-flavor cigarettes were "too strong"); R. 7169 (McHatton) (Marlboro Lights had "lighter taste" and "was a smoother cigarette").[12]

In short, there was no basis for a finding that Lights' perceived "health attribute" was a substantial factor in every class member's purchasing decisions – and the court did not even

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[11] Citing the testimony of two former PMUSA executives (Morgan and Cullman), plaintiffs contend that PMUSA "purposefully communicated that 'Lights' are the safer alternative." Pl. Br. at 6. However, at no time did Morgan or Cullman so testify. *See* SA 220-21, 393-95, 400-02. Indeed, plaintiffs' expert conceded that PMUSA never made an express representation of safety about Lights. *See, e.g.*, R. 4626-27 (Cohen).

[12] The documents cited by plaintiffs also do not establish that *all* Lights smokers choose low-yield cigarettes for health reasons. *See, e.g.*, PX 35 at 8 (excerpts marked as SA 870-73) (concern about health "may be a major factor motivating *some* people" to purchase Lights) (emphasis added); SA 1216 ("a taste satisfaction far outweighs specific tar content as a determination of success"); SA 1154-55 (discussing taste characteristics acceptable to "many" smokers); PX75-C at 17-18 (excerpts marked as SA 1135-39) (reporting that two-thirds of the sample preferred taste of low-tar Merit); SA 886 (reporting that nearly all Lights smokers come to prefer the taste of Lights over time); SA 1167 (surprising number of Lights smokers switched for reasons of convenience associated with lifestyle changes such as marriage); SA 861 (recognizing need to make good tasting low-tar cigarettes for people to switch). Some documents cited by plaintiffs were nothing more than mere hypothetical discussions that took place years before Lights were developed and marketed. *See, e.g.*, SA 1021-22 (1958); SA 1149-1153 (1964).

purport to make such a finding. C. 43388. By failing to apply the required standard of causation, the court committed legal error – both in certifying the class and in entering the Judgment.

c. This Court Cannot Presume Deception And Proximate Cause Contrary To *Shannon-Oliveira-Zekman*

To plug the gaping holes in their class-wide proof, plaintiffs ask this Court to *presume* that all class members were deceived and that such deception caused all class members to sustain injury. Pl. Br. at 39, 44. A court, however, may not remove obstacles to certification simply by creating presumptions that resolve individual issues against the defendant. If a court did so, a class action would allow recovery by class members who could not prove their claims if they sued individually, contrary to law and due process. *See Ortiz v. Fibreboard*, 527 U.S. 815, 845 (1999) (class actions may not modify any substantive right).

Although plaintiffs ask this Court to presume deception and causation, the circuit court did not purport to adopt any such "presumption"; nor did plaintiffs request one in their proposed findings of fact. *See* C. 43322-70. Plaintiffs' request is therefore waived. *See, e.g., Home Ins. Co. v. Liberty Mut. Ins. Co.*, 266 Ill. App. 3d 1049, 1053 (1st Dist. 1994). Further, any such presumption would be improper as a matter of law. A presumption cannot be manufactured out of whole cloth; it must be based on an inference supported by common sense and on a reasonable probability based on established facts. *See, e.g., Bullard v. Barnes*, 102 Ill. 2d 505, 517 (1984) (rejecting presumption where it did not reflect common experience); *see also Village of Lake in the Hills v. Lloyd*, 227 Ill. App. 3d 351, 353 (2d Dist. 1992); *United States Dept. of Justice v. Landano*, 508 U.S. 165, 175 (1993). Here, neither common sense nor record evidence would allow a presumption that every class member purchased every pack of Lights over a 30-year period because of the alleged deception. Such a presumption would conflict with the testimony

of the class members themselves and all surveys in evidence – including plaintiffs' own survey. *See supra* at 10-18.; PX 74-A.[13]

This case is a far cry from *Steinberg v. Chicago Med. Sch.*, 69 Ill. 2d 320 (1977), cited by plaintiffs. Pl. Br. at 44. There, the Court was willing to infer causation because applicants would have had no reason to apply to the medical school if they had known that the school was not following its own published criteria for admission. More importantly, the Court stated that it was unwilling to block the class action when equity imposed an independent obligation on the school to refund the application fee. 69 Ill. 2d at 340. In the 37 years since *Steinberg*, no Illinois appellate court has upheld a presumption of deception or causation in the class action context.[14]

Here, a class-wide presumption of deception and causation would defy common sense, reasonable probability, and the undisputed record. The record reveals that:

- For decades, smokers have been aware – indeed, every cigarette pack has explicitly warned them – that all cigarettes are inherently dangerous. As class members' testimony confirms (*see supra* at 13-14, 17), many smokers decided whether to smoke and chose what brands to smoke for reasons other than health;
- Every survey admitted into evidence confirmed that consumers have differing views as to whether Lights deliver less tar and nicotine or are safer, *see supra* at 11;
- Plaintiffs' own experts were unwilling to testify that the alleged deception "caused" all class members to purchase Lights because of the absence of "the necessary evidence," *see* R. 4853 (Cohen); *see supra* at 15-16.

Furthermore, given the court's refusal to permit discovery of absent class members, PMUSA could not contact class members to conduct its own survey or otherwise seek to rebut the

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[13] Courts have uniformly refused to adopt such presumptions in aggregate smoking and health litigation. *See, e.g., Group Health Plan, Inc. v. Philip Morris, Inc.*, 188 F. Supp. 2d 1122, 1126-27 (D. Minn. 2002) (rejecting causation presumption because it would result in a "radical sea change" in the law), *aff'd in relevant part*, 344 F.3d 753 (8th Cir. 2003); *see also Philip Morris Inc. v. Angeletti*, 752 A.2d 200, 236 (Md. 2000) (refusing to create presumption); *Small v. Lorillard Tobacco Co.*, 720 N.E.2d 892 (N.Y. 1999) (same).

[14] Nor can plaintiffs use cy pres to circumvent individual issues. *See* Def. Br. at 79-80.

presumption. *See infra* at 30-32. As a result, any presumption of deception or causation would be effectively irrebutable, denying PMUSA due process. *See id.*

Plaintiffs absurdly assert that, unless a presumption of deception and causation is applied, "consumer fraud class actions will largely be eradicated in Illinois." Pl. Br. at 45. But consumer class actions have managed to proceed for decades in Illinois without presumptions that contradict the record and violate common sense and due process. Although there may be consumer fraud cases where a presumption would be appropriate, this case is not one of them given the clear differences among class members with respect to deception, causation, and injury. Indeed, a presumption here would alter the substantive requirements of the CFA and write the predominance requirement out of the class action statute. If this Judgment were upheld based on presumptions contrary to the factual record, class actions would become a tool not to compensate injured consumers, but rather to give "each plaintiff a windfall unrelated to its own damage." *Group Health*, 188 F. Supp. 2d at 1127 n.4 (citations omitted).

3. Statute Of Limitations Is An Individual Issue

Yet another individual issue precluding class certification is the statute of limitations. The circuit court did not merely disregard the limitations defense in certifying the class; the court eliminated the defense entirely – for every class member – based on its *assumption* that no class member could possibly have known before February 10, 1997 that Lights were more harmful than full-flavor cigarettes. *See* C. 43409. The court's conclusion was based on an erroneous view of the "discovery rule" (subject to de novo review) and violated PMUSA's constitutional rights by denying PMUSA the opportunity to conduct discovery to prove when individual class members learned or should have learned of their claims.

Contrary to plaintiffs' suggestion, Pl. Br. at 36, a court *must* take a statute of limitations defense into account in determining whether individual issues predominate. *See, e.g., Mele v. Howmedica, Inc.*, 348 Ill. App. 3d 1, 24 (1st Dist. 2004); *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 149 (3d Cir. 1998); *O'Connor v. Boeing N. Am., Inc.*, 197 F.R.D. 404, 410-11, 413-14 (C.D.

Cal. 2000). The case relied upon by plaintiffs – *Mowbray v. Waste Mgt. Holdings, Inc.*, 189 F.R.D. 194 (D. Mass. 1999) – merely noted that individual issues raised by a limitations defense do not *per se* defeat certification where the court finds that common issues predominate. *Id*. at 199. On appeal, the First Circuit in *Mowbray* made clear that the law is "settled" that affirmative defenses such as statute of limitations "*should be considered in making class certification decisions*." 208 F.3d 288, 295 (1st Cir. 2000) (emphasis added). Indeed, to strip a defendant of a defense like statute of limitations in order to certify a class would violate due process. *See, e.g.*, *In re Detention of Allen*, 331 Ill. App. 3d 996, 1003 (2d Dist. 2002) ("Procedural due process guarantees that a defendant has the right to present relevant, competent evidence in his defense"); *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (same); *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 344 (4th Cir. 1998) (due process is violated if certification and trial plan do not permit the defendant to assert individual limitations defenses).

Here, invoking the discovery rule, plaintiffs included $4.9 billion in damages for Lights purchases made before the three-year limitations period. In so doing, *plaintiffs* chose to add another individual issue: whether each class member's *subjective* knowledge put him or her on notice of the claim before February 10, 1997. *See Hermitage Corp. v. Contractors Adj. Co.*, 166 Ill. 2d 72, 84 (1995). Illinois law is clear that plaintiffs – not PMUSA – had the burden of establishing the requirements of the discovery rule for each class member. *Id.* at 84. And it is also clear that – contrary to the circuit court's suggestion otherwise – a class member need not be aware of the entirety of the alleged misconduct to trigger the statute. *See id.* at 77, 85-86; *Knox College v. Celotex Corp*., 88 Ill. 2d 407, 415 (1981). Here, it was not necessary for a class member to be on notice that Lights might be more dangerous than full-flavor cigarettes for the limitations period to run. Rather, as even plaintiffs concede, under the discovery rule, all that was required was that class members either knew or should have known that "Marlboro Lights and Cambridge Lights do not deliver lower tar and nicotine." Pl. Br. at 36; *see also* Pl. Br. at 38.

Plaintiffs did not even attempt to prove that no one in the class could have known, before February 10, 1997, that Lights did not deliver less tar and nicotine. Nor could they have met this burden. Although the public health community generally encouraged the development of lower yield cigarettes, *see* Def. Br. at 13-14, the record is replete with evidence of public allegations – well before 1997 – that some smokers in fact received the same amounts of tar and nicotine from Lights as they would have from full-flavor cigarettes. *See* Def. Br. at 34-35 & nn. 16-17. Dr. Benowitz testified that in 1983 he published his compensation theory "that smokers of low yield cigarettes do not take in less nicotine." R. 3090-91. By his own admission, his views received "a lot of newspaper press" and "some t.v. press." *Id*. Similarly, Dr. Farone conceded that *Consumer Reports* included warnings as early as 1976 that compensation could cause light cigarettes to deliver the same amount of tar and nicotine as full-flavor cigarettes. R. 2664-66; Group 39(2).[15] In fact, some class members expressly testified that they were exposed to this information and therefore had notice of their claims before the limitations period. *See, e.g.*, R. 7931-32 (Miles) (saw television program on limitations of FTC method in 1995 or 1996). In rejecting the limitations defense for every class member, the court ignored these facts, which were more than sufficient to put class members on notice of their claims. *See, e.g.*, *In re Burbank Envtl. Litig.*, 42 F. Supp. 2d 976, 981-82 (C.D. Cal. 1998) (limitations defense applied where facts underlying allegations were discussed in "newspaper articles" and "newscasts"). And by rejecting the defense while denying PMUSA discovery to determine what absent class members

[15] *See also* DX 7078 at v-vi, 5-15, 48-49, 52, 80, 86-87, 97-98, 180-81, 185; DX 7079 at 216-17; DX 7081 at 12-13, 341-54; DX 3964; DX 6915; DX 6917; DX 6914; Group 11(65); DX 6919; Group 3(2); Group 19(19) at 4-5; Group 19(30) at 2; DX 6900; DX 4625; DX 3643; DX 6920; DX 4612; DX 3972; DX 3982. Notably, although unnecessary to trigger the statute of limitations, there have also been public claims since the 1970s that light cigarettes may be more dangerous to the extent smokers overcompensate. *See, e.g.*, DX 7076 at xiv (1979 Surgeon General's report that smokers "may in fact increase their hazard if they begin smoking more cigarettes or inhaling more deeply"); DX 7078 at v-vi; Group 3(3) at 47; DX 6915; DX 6919.

knew – and when – the court effectively deprived PMUSA of its rights under Illinois law and due process. *See infra* at 30-32.

Plaintiffs have no response except to argue that these public warnings are irrelevant because they were disseminated before Monograph 13 announced a "new consensus" on low-yield cigarettes. Pl. Br. at 37. But plaintiffs cite no authority requiring a government consensus before the limitations period is triggered. In a recent individual lawsuit, the Seventh Circuit rejected this argument, affirming summary judgment on limitations grounds because the plaintiff had notice of his "lights" fraud claim well before Monograph 13 was published. *Howard v. Philip Morris USA, Inc.*, 98 Fed. Appx. 535, 539 (7th Cir. 2004). Indeed, plaintiffs here clearly did not need Monograph 13 for notice of their claims since they filed their lawsuit in February 2000, over a year and a half *before* Monograph 13 was published. *See* C. 3-16. The court's categorical rejection of the statute of limitations defense on behalf of every member of the class was wrong as a matter of law, requiring reversal of both the Judgment and the class certification ruling. *See, e.g.*, *O'Connor*, 197 F.R.D. at 413-14 (discovery rule created individual issue defeating certification); *Hurd v. Monsanto Co.*, 164 F.R.D. 234, 240 (S.D. Ind. 1995) (same).[16]

4. Recent Cases From Other States Do Not Support Certification Of This Case As A Class Action

Three appellate courts in other states have addressed on interlocutory appeal the certification of a class similar to the class proposed here, reaching opposite conclusions. *Compare Philip Morris USA Inc. v. Hines*, -- So. 2d -- , 2003 WL 23094834 (Fla. Ct. App. 2003) (reh'g pet. pending) (reversing certification as an abuse of discretion) *with Aspinall v. Philip*

[16] Notably, three trial courts that have certified "lights" class actions implicitly recognized that the application of the discovery rule to the statute of limitations defense would raise individual issues that preclude class certification. To remove this obstacle, the courts limited the classes to the applicable limitations period, without application of the discovery rule. *Aspinall v. Philip Morris Cos.*, slip op. at 16 (Mass. Super. Ct. 2001) (A. 430); *Craft v. Philip Morris Cos.*, slip op. at 3-4 (Mo. Cir. Ct. 2004) (pet. for appeal pending) (SSA-14-15); *Marrone v. Philip Morris USA, Inc.*, slip op. at 2 (Ohio Ct. Comm. Pleas 2003) (A. 460).

Morris Cos., 813 N.E.2d 476 (Mass. 2004) (upholding trial court's certification); *Marrone v. Philip Morris USA, Inc.*, 2004 WL 2050485 (Ohio Ct. App. 2004) (petition for reconsideration and certification of conflict pending) (same).

In *Aspinall*, the court reinstated certification of a lights class action, but did so only by applying principles squarely contrary to *Shannon-Oliveira-Zekman* – and even then only by a narrow 4-to-3 majority over a vigorous dissent.[17] The majority held that a class could be certified on the theory that a class member could have a legally cognizable claim based on deceptive conduct even if (1) he or she was *not* deceived, (2) the purchase was *not* caused by the alleged deception, and (3) the class member *got* what was allegedly promised (less tar and nicotine). 813 N.E.2d at 486. Only by relying on these extreme rulings – based on a Massachusetts statute that has no application here – could the majority conclude that issues such as "an individual's smoking habits" and an individual's "subjective motivation[s]" in purchasing Lights were irrelevant and did not defeat certification. *Id*. at 489.[18]

Aspinall directly conflicts with *Shannon-Oliveira-Zekman*, which – as even plaintiffs acknowledge – requires a plaintiff to show that he or she was actually deceived and injured by the deception. *See* Pl. Br. at 42. Indeed, in *Oliveira*, this Court specifically rejected the precise theory adopted by *Aspinall* – that consumers who were not actually deceived by the advertisements could nonetheless recover if they paid a higher price for the product than they

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[17] The court's ruling upholding class certification was based on a special class action provision of the Massachusetts statute (Mass. G.L. c. 93A) that "differs in significant respects from" Rule 23, *see* 813 N.E.2d at 484, and omits any express predominance requirement.

[18] *Aspinall* was also predicated on the assumption that the members of the class who actually received less tar and nicotine were "very few in number and impossible to identify." 813 N.E.2d at 489 n.21. Here, the factual record refutes such an assumption. *See supra* at 6-10. Thus, even under the *Aspinall* standard, certification cannot stand here because plaintiffs failed to introduce evidence that no more than a "very few" class members received less tar and nicotine. *See McCabe*, 75 Ill. 2d at 464 (plaintiffs have the burden of satisfying requirements for class certification). Similarly, as discussed above, plaintiffs here introduced no evidence that it was "impossible" to identify class members who failed to receive less tar and nicotine. *See supra* at 9-10; Def. Br. at 11 n.8.

would have but for the alleged deceptive conduct. *Compare Oliveira*, 201 Ill. 2d at 140-41, 155 *with Aspinall*, 813 N.E.2d at 489-90. *Aspinall* therefore provides this Court with no guidance on the issue of class certification.[19]

Similarly, in *Marrone*, the court affirmed certification of a lights class action – with little analysis – based on a summary conclusion that Ohio law permitted a presumption of causation. *See* 2004 WL 2050485, at *7-9. As discussed above, given the existing trial record here, such a presumption would violate Illinois law and due process. *See supra* at 18-20. Moreover, the *Marrone* court simply ignored the other individual issues that defeat certification, such as whether class members received less tar and nicotine, whether they were deceived, and whether they sustained injury. *See supra* at 6-12.

By contrast, in *Hines*, the court reversed certification as an abuse of discretion because class members' claims raised the same individual issues relating to deception, causation, and injury that should preclude class certification here:

> Here, the record supports Philip Morris' contention that the manner in which the cigarettes were smoked and the smoker's reasons for choosing to smoke "light" cigarettes could preclude an individual smoker's entitlement to damages and, thus, would be legitimate issues raised in defense. . . . In the instant case, an individual's smoking behavior will be relevant, and the common questions of law and fact in this case will not predominate over the individual issues.

2003 WL 23094834, at *3. *Hines* confirms that the certification here should be reversed.

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[19] For this reason, a trial court's recent certification of a lights class action in *Craft* is irrelevant as well. There the court based certification on a determination that – under its reading of Missouri law – a plaintiff need not prove that he or she was deceived or that he or she purchased the product because of the deception. *See* slip op. at 32, 34 (SSA-43, 45). As the *Craft* court itself recognized, its ruling was contrary to *Oliveira*. *See id*. at 29-30, 32 (SSA-40-41, 43). By contrast, other trial courts have rejected certification of lights class actions because individual issues predominated. *See Cocca v. Philip Morris Inc.*, 2001 WL 34090200 (Ariz. Super. Ct. 2001); *Oliver v. R..J. Reynolds Tobacco*, 2000 WL 33598654 (Pa. Ct. Com. Pl. 2000); *Curtis v. Philip Morris Cos.*, slip op. (Minn. Dist. Ct. 2004) (reconsideration motion pending) (SSA-1-11).

B. Plaintiffs' Allegations That The Tar Of Lights Is More Harmful Cannot Convert The Predominating Individual Issues Into Common Issues

Plaintiffs also assert that the tar from Lights "has an increased potential to cause harm" because each unit of tar (expressed in milligrams) is more mutagenic and has higher levels of certain constituents than a unit of tar from full-flavor cigarettes. Pl. Br. at 25. Plaintiffs contend – and the circuit court found – that because PMUSA did not make public disclosures about mutagenicity or constituent levels, all class members would be entitled to recover damages even if some class members received less tar and nicotine. *Id*.; *see also* C. 43383-84.

As an initial matter, this "more harmful" theory did not relieve plaintiffs of the burden of proving deception, causation, and injury, as required by *Shannon-Oliveira-Zekman*. Plaintiffs' claim was that, in failing to make disclosures about mutagenicity and constituent levels, PMUSA affirmatively misrepresented that Lights were safer. Pl. Br. at 25, 29. To establish such a claim, plaintiffs had to prove that all class members were deceived into believing that Lights were safer and that this belief was a substantial factor in each purchasing decision. As demonstrated above, these are inherently individual issues. *See supra* at 10-18.

Furthermore, plaintiffs' "more dangerous" theory does not dispense with the need for individual inquiry into each class member's smoking behavior. As plaintiffs' experts conceded, even if the tar of Lights were more mutagenic or had higher constituent levels on a *per milligram basis*, smokers would still receive *less* harmful substances *per cigarette* if they inhaled less tar. R. 5220-25 (Harris); R. 2756 (Farone); *see also* Def. Br. at 65. Thus, even if a milligram of Lights tar were "more harmful" than a milligram of full-flavor tar, individual examination into each class member's smoking behavior would be required to determine whether Lights were "more harmful" for that particular class member on a per cigarette basis.

In any event, the circuit court's finding that Lights "are actually more harmful," C. 43397, is not supported by *any* record evidence. Rather, plaintiffs' witnesses on this issue all testified that they could not say that Lights increased the risk of disease. Dr. Harris testified:

> Q. . . . [Y]our calculations don't prove that Marlboro Lights are more harmful to human health than Marlboro Reds; correct?
>
> A. Based on the standards of evidence scientists would use to apply to the word prove, no, they don't show that.
>
> Q. . . . . You do not believe that it has been scientifically established that smoking Marlboro Lights is more dangerous than smoking Marlboros, do you?
>
> A. *Not scientifically established using the standards that scientists would use.*

R. 5192-93 (emphasis added). Similarly, Dr. Farone admitted that an increase in mutagenicity "does not necessarily translate into a measurable increase in risk" and that the relationship between mutagenicity and an increased risk of disease "has not been established." R. 12099. He explained:

> If you have a mutation, you have an increase in mutations, but that doesn't mean there's an increase in measurable disease, and *so that's where the thing falls apart in terms of knowing*, and I think we discussed that before. *You know you have a mutagen, but you don't know whether it's going to cause cancer.*

R. 12121-22 (emphases added).[20] As plaintiffs point out, during direct examination, Dr. Farone testified that Lights were "more dangerous" than their full-flavor counterparts. Pl. Br. at 28. However, Dr. Farone clarified that he believes that Lights are "more dangerous" because "they lead people to a false sense of security." R. 2777. He expressed concern that the reduction in tar from full-flavor Marlboros to Marlboro Lights was not substantial enough to justify the use of the words "lights" or "lowered tar and nicotine":

> The point is that it is a reduction, but my testimony consistently, from the very beginning, has been that the reduction needs to be large and significant. So in my opinion, I have never used the words Marlboro Lights and Marlboro Regulars before, I will give you that, but my opinion is a slight reduction in tar can be misleading.

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[20] To the extent any expert's testimony can somehow be interpreted as supporting the court's findings, it should have been excluded under *Donaldson*, 199 Ill. 2d at 76-77, because the findings were not based on any principle generally accepted in the scientific community. *See also* Br. of *Amicus Curiae* PLAC at 39-42.

R. 2778.[21] No witness opined – let alone with a reasonable degree of scientific certainty – that Lights are more dangerous because of increased mutagenicity or constituent levels. *See, e.g.*, *Wojcik v. City of Chicago*, 299 Ill. App. 3d 964, 978 (1st Dept. 1998) (reasonable degree of certainty required).[22] In short, there is a complete absence of evidence, even from plaintiffs' own experts, for the finding that the tar in Lights makes them more dangerous than full-flavor cigarettes.

On appeal, plaintiffs reverse course, abandon the Judgment that adopted their own proposed findings, and assert a theory that was never raised at trial and that is unsupported by the evidence or the law. Plaintiffs now argue that "it does not matter" whether Lights in fact are more harmful; what "matters" is that information about mutagenicity and constituents is "clearly" of the type "upon which a buyer would be expected to rely in making a purchasing decision." Pl. Br. at 31. This theory was never tried and is now waived. *See, e.g., Boub v. Township of Wayne,*

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[21] Dr. Shields similarly testified only that mutagenicity tests are used to predict *animal* carcinogens, not human disease risk. R. 5276-81, 5288-89. Notably, Monograph 13 – upon which plaintiffs and their experts relied throughout trial – does not even suggest that the tar from lower yield cigarettes is more harmful than the tar from other cigarettes. R. 2783 (Farone); PX 14 (Monograph 13). Further, the recent 2004 Report of the International Agency for Research on Cancer has confirmed that "[r]elative potency in tests for mutagenicity and related effects *is not a reliable indicator of carcinogenic potency*." IARC Monograph Vol. 83, "Tobacco Smoke and Involuntary Smoking" at 21 (emphasis added). In an attempt to cloud the issue, plaintiffs point to testimony by Drs. Farone and Shields that mutagenicity testing is used in the course of product safety testing. Pl. Br. at 28-29. But just because mutagenicity may be used as one of a battery of product safety tests does not establish that mutagenicity itself is predictive of human disease risk. Plaintiffs do not even address the cases holding that in vitro testing (such as mutagenicity) alone cannot establish disease causation in humans. *See* Def. Br. at 66 & n.33 (collecting cases).

[22] Nor do any of the PMUSA documents cited by plaintiffs support a finding that Lights increase the risk of disease. *See* Pl. Br. at 9-10, 26-27 (citing SA 855-57, 839-41, 1196-97, 844, 848, 846, 854, 1211, 833). To the contrary, as Dr. Carchman testified, PMUSA relied on the undisputed epidemiologic evidence, which consistently showed throughout the 30-year class period that smokers of lower yield cigarettes (per FTC Method) had a reduced risk of lung cancer. R. 10643-46; *see also* R. 4076-77 (Thun). These findings were deemed reliable because the epidemiology inherently considered any differences in the mutagenicity of the tar. R. 10519-21 (Carchman). It was further undisputed that scientists believed that these studies also inherently considered compensation because the studies were based on disease rates actually experienced by smokers grouped by FTC cigarette yield. R. 3189 (Benowitz); R. 8028-29 (English); Group 22(12) at 79-80; Group 21(9) at 2, 29-30.

183 Ill. 2d 520, 536 (1998); *Shannon*, 208 Ill. 2d at 527. Moreover, the only evidence in the record that arguably refers to this theory is Dr. Harris' testimony, which refutes it. Dr. Harris testified that, in 1994, the Ad Hoc Committee of the President's Cancer Panel considered whether the mutagenicity of tar and other smoke constituents should be measured and publicly disclosed. As Dr. Harris conceded, the committee decided against disclosure "*to avoid confusing smokers*." R. 5215-16 (emphasis added); *see also* Group 22(11) at 2. As a matter of common sense, if this information both is "confusing" to smokers and does not "translate into a measurable increase in risk," such information is not "material" and cannot give rise to a CFA claim. *See* 815 ILCS 505/2 (only "material" deceptions actionable); *Ryan v. Wersi Electronic & Co.*, 59 F.3d 52, 53 (7th Cir. 1995) (materiality is an element of a CFA claim).

Further, it is undisputed that class members are generally aware that *all* cigarettes, including Lights, pose health risks. *See, e.g.*, R. 7184 (McHatton); R. 4394, 5018 (Cialdini) (smokers generally). Plaintiffs offered no evidence that all or even most class members would base their brand selections on mutagenicity or constituent findings, especially if they were informed that such findings do "not necessarily translate into a measurable increase in risk." R. 12099 (Farone); *see also supra* at 12-18. (discussing variability of consumer purchasing decisions). Indeed, as noted above, class members such as Ms. Whitt and Ms. Miles continued purchasing Lights even after becoming aware of the allegations about mutagenicity and constituent levels – allegations that went *beyond* what was proven at trial. *See supra* at 13-14.

The only case cited by plaintiffs on this point, *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill. 2d 482 (1997), is inapposite. At issue there was the failure to disclose a defect that posed indisputable risks to health – the tendency of an automobile *to roll over*. *Id*. at 503-04. By contrast, here, plaintiffs' experts admitted that there is no accepted scientific basis to conclude that the increases in mutagenicity or constituent levels resulted in any increased risk of disease.

C. The Certification And Judgment Violated 735 ILCS 5/2-801(4) And Due Process

Plaintiffs failed to satisfy another certification prerequisite – that the class action must be "an appropriate method for the fair and efficient adjudication of the controversy." 735 ILCS 5/2-801(4). The cumulative impact of the circuit court's rulings resulted in proceedings so unfair as to violate § 801(4) and due process.[23]

First, the circuit court erred in treating highly individual issues such as deception, causation, damages, and statute of limitations as "common." The inevitable result was that these individual issues were improperly subsumed or eliminated entirely from the litigation. For example, instead of talking about real class members, plaintiffs' experts talked about the hypothetical "average" smoker. Dr. Benowitz opined that compensation "on average" was complete. R. 3103. Dr. Cohen opined that "the average person" would assume that Lights are safer. R. 4671. And Dr. Harris calculated "the average damage" award for class members. R. 6172. The "average" class member, however, never appeared in the courtroom and was never subject to cross examination. Any class member different from the hypothetical "average" was simply ignored. Relying on such "generalized evidence," absent class members obtained a judgment without proving the individual elements of their claims in violation of Illinois law and due process. *See Broussard*, 155 F.3d at 343-45.[24]

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[23] Plaintiffs assert that this argument was not preserved because no discovery ruling was included in the "Orders Appealed From" section of PMUSA's Separate Appendix. Pl. Br. at 58. However, the "order appealed from" is the Judgment. This is not an appeal from the court's discovery rulings. The argument is that the discovery rulings produced a trial and a Judgment that violated due process. In any event, the notice of appeal stated that PMUSA was appealing all interlocutory orders, which includes discovery orders. *See* C. 46144. Such references are sufficient and plaintiffs' waiver argument has no merit. *See Kuzmanich v. Cobb*, 276 Ill. App. 3d 634, 636 (1st Dist. 1995) (declining to find waiver based on failure to include materials in appendix where arguments are "in a clear and orderly fashion so that the court may properly ascertain and dispose of the issues").

[24] Plaintiffs argue that *Broussard* is distinguishable because PMUSA made identical representations to every member of the class. Pl. Br. at 59. But this is a distinction without a difference. With respect to the critical issues here – deception, causation, and damages – the

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Second, the circuit court compounded its error by barring discovery of any class member other than the few handpicked by plaintiffs. R. 1215; C. 26616. Class certification forced PMUSA to defend claims raising highly individualized issues on an aggregate basis, depriving it of the ability to present individualized defenses based on each class member's circumstances – again in violation of § 801(4) and due process. *See* Def. Br. at 19-35; *Sandwich Chef of Texas, Inc., v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 220 (5th Cir. 2003) (reversing class certification because defendants were denied an opportunity to dispute individual issues on an individual basis); *Agency for Health Care Admin. v. Assoc. Indus. of Florida*, 678 So. 2d 1239, 1254 (Fla. 1996) (due process is violated by allowing aggregate procedures without giving the defendant the right to dispute individual issues on an individual basis).[25]

Finally, even PMUSA's attempt to use aggregate evidence to defend itself was improperly blocked. Plaintiffs argue that PMUSA never sought discovery "from a 'representative sample' of Class Members" in order to conduct a survey or study. Pl. Br. at 58. *PMUSA, however, repeatedly sought absent class member discovery and expressly asked for leave to take discovery from "a statistically significant and randomly determined sample.*" *See* C. 20571; *see*

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class certification and Judgment do not rest on facts concerning real people, but rather on expert testimony about an "average" smoker who never existed. If anything, certification in this case is even more egregious than certification in *Broussard* because here the composite plaintiff was entirely theoretical, built from expert testimony, rather than based on testimony from real people.

[25] Plaintiffs ignore case law cited in PMUSA's opening brief in which courts rejected procedures similar to those at issue here as fundamentally unfair and violative of due process. *See* Def. Br. at 36-37 (discussing *In re Fibreboard Corp.*, 893 F.2d 706 (5th Cir. 1990), and other cases). Instead, plaintiffs cite three cases in support of the procedures used, which are either distinguishable or wrongly decided (and on appeal). In *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996), the defendant at least had an opportunity to depose a random sample of 137 class members, whose claims were then tried. *Id*. at 782. In *In re Antibiotics Antitrust Actions*, 333 F. Supp. 278 (S.D.N.Y. 1971), which involved price-fixing overcharges for drugs, the only individual issue was the calculation of the damages of class members. *Id*. at 289. Finally, *In re Simon II Litig.*, 211 F.R.D. 86 (E.D.N.Y. 2002) (appeal pending), is riddled with multiple errors, not the least of which was that the court certified a "(b)(1) limited fund" class action in violation of settled class-action law under *Ortiz*, 527 U.S. 815; there has been no trial or merits discovery and certification is on interlocutory appeal.

also C. 17569-650; R. 1213-15; R. 1563-64; R. 1694; Group 43(1)-(5) at No. 12. These requests were all denied. *See, e.g.*, R. 1215, C. 26616. And when PMUSA sought to rely on existing published studies and surveys – each of which contradicted the "findings" of class-wide deception and causation – the court (copying plaintiffs' proposed order verbatim) found each study and survey "neither credible nor persuasive." C. 43392; *see supra* at n.7. Without absent class member discovery or the opportunity to conduct its own survey of the class, PMUSA was effectively left without any aggregate evidence with which to defend itself in violation of state law and federal and state guarantees of due process.

III. PLAINTIFFS FAILED TO PROVE THEIR CLAIMS

The very reason this case should not have been certified in the first place – the predominance of individual issues – is also the reason why plaintiffs failed to prove their CFA and UDTPA claims. As discussed in Section II and in PMUSA's opening brief, plaintiffs' generalized, aggregate testimony was incapable of proving deception, causation, and injury for any class member, much less the class as a whole. *See* Def. Br. at 65. Indeed, plaintiffs did not even prove the claims of their two class representatives – claims they continue to ignore on appeal (devoting only two paragraphs and a footnote in their brief to the testimony of the class representatives). Given this failure of proof, the Judgment cannot stand.

Furthermore, the court improperly failed to apply the "clear and convincing" burden of proof in its Judgment. Contrary to plaintiffs' claims, Pl. Br. at 22, this issue was not waived. PMUSA specifically requested that the circuit court apply the clear and convincing standard. *See* C. 43262; *see generally People v. Carson*, 79 Ill. 2d 564, 577 (1980) (no waiver if party gave court opportunity to correct error before final judgment).[26]

[26] Presumably the court applied the preponderance of the evidence standard under Fifth District precedent. *See, e.g.*, *Avery v. State Farm Mut. Auto. Ins. Co.*, 321 Ill. App. 3d 269, 291 (5th Dist. 2001) (requiring preponderance standard), *appeal allowed*, 201 Ill. 2d 560 (2002).

IV. THE CIRCUIT COURT ERRONEOUSLY REJECTED PMUSA'S DEFENSES BASED ON THE FEDERAL GOVERNMENT'S REGULATION OF TAR AND NICOTINE DISCLOSURES IN CIGARETTE ADVERTISING

As demonstrated in PMUSA's opening brief at 44-49, Congress and the FTC have established – and PMUSA has followed – comprehensive policies and programs regarding tar and nicotine disclosures and cigarette advertising. The circuit court committed legal error in failing to recognize that this comprehensive scheme bars this suit.[27]

A. Plaintiffs' Claims Are Barred By The Policies And Express Terms Of The CFA And The UDTPA

1. Plaintiffs' Claims Are Barred Under § 2 Of The CFA

As an initial matter, plaintiffs fail to address, much less dispute, PMUSA's argument based on § 2 of the CFA, which required the circuit court to take account of the FTC's interpretation of the FTC Act in deciding whether a practice is "deceptive" or "unfair." *See Robinson v. Toyota Motor Credit Corp.* 201 Ill. 2d 403, 417 (2002). As demonstrated in PMUSA's opening brief at 44-49, the FTC for decades has concluded that PMUSA's use of the terms "lights" and "lowered tar and nicotine" is not "unfair" or "deceptive" under the FTC Act as long as those terms are supported by FTC Method results. The circuit court not only failed to take into account the FTC's positions, C. 43414, it expressly flouted them: "I am not bound by the FTC" (R. 3249); the court "totally erases from its consideration any reference to the FTC . . . We're not going to use in this case the FTC to hide behind the basic issues" (R. 4973). The court's findings that PMUSA's conduct was deceptive and unfair conflicted with the FTC's own

[27] In response to PMUSA's argument that their claims are barred by the First Amendment, Def. Br. at 62-63, plaintiffs assert that PMUSA's descriptors are false and therefore not constitutionally protected. *See* Pl. Br. at 71. Plaintiffs do not dispute, however, that PMUSA's descriptors have always accurately reflected FTC Method results; further, the record establishes that at least some class members received less tar and nicotine while others purchased with the understanding that "lights" referred to FTC measurements. *See supra* at 6-18; R. 11019 (Whitt); R. 11509 (Walker). PMUSA's descriptors therefore are not *inherently* false, and the balancing test of *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New* York, 447 U.S. 557 (1980), bars plaintiffs' claims. *See* Def. Br. at 62.

determinations on this issue and thus violated § 2. Accordingly, this Court should reverse the Judgment and conclude that PMUSA's conduct did not violate the CFA or the UDTPA.

2. CFA § 10b And UDTPA § 4(1) Bar Plaintiffs' Claims

CFA § 10b exempts from liability any conduct that is "specifically authorized" by a federal regulatory scheme. Similarly, UDTPA § 4(1) exempts from liability any conduct that is in "compliance with the orders or rules of or a statute administered by a Federal, state or local governmental agency." *See also* Def. Br. at 49. In its opening brief, PMUSA showed that these provisions barred plaintiffs' claims on two independent grounds.

1. PMUSA argued that any alleged failure to disclose smoking and health information about Lights beyond the congressional mandated warning – such as providing information about mutagenicity or constituent levels – was "specifically authorized" by, and complied with, the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331 *et seq.* ("Labeling Act"). *See* Def. Br. at 54-55. Therefore, such a failure was exempt from liability under CFA § 10(b) and UDTPA § 4(1). Plaintiffs do not even address this argument, which alone warrants reversal.

2. PMUSA also argued that the affirmative use of the term "lowered tar and nicotine" and like qualifying terms such as "lights" was "specifically authorized" by, and complied with, the FTC's regulatory program for tar and nicotine disclosures and therefore was exempt from liability. *See* Def. Br. at 51-54. Plaintiffs' response to this argument is flawed in a number of respects.

First, plaintiffs assert that §§ 10b and 4(1) do not apply to the FTC's program because that program is not based on formal regulations. Pl. Br. at 64. However, agencies like the FTC often announce and implement federal policies through means other than formal rules, such as consent orders, advisory opinions, and agency reports. *See* Def. Br. at 53 (citing authorities); *see also Dowhal v. SmithKline Beecham Consumer Healthcare*, 12 Cal. Rptr. 3d 262, 272-73 (Cal. 2004) (industry-wide FDA policy established through informal advisory letter to individual

company). In *Holloway v. Bristol-Myers Corp.*, 485 F.2d 986 (D.C. Cir. 1973), the court explained that the FTC has a long history of using informal means to secure adherence to its policies. *Id*. at 997-99; *see also Watson v. Philip Morris Cos.*, 2003 WL 23272484, at *16-19 (E.D. Ark. 2003) (appeal pending); R. 6329-35 (Peterman).[28] Here, the FTC has used a variety of regulatory tools to create the comprehensive program that authorized PMUSA's use of descriptors. *See* Def. Br. at 53; *Watson*, 2003 WL 23272484, at *1-9, 13-20. Under these circumstances, neither §§ 10b nor 4(1) is limited to formal regulations. *See, e.g., Lanier v. Assoc. Fin., Inc.*, 114 Ill. 2d 1, 12-14 (1986) (agency staff interpretation sufficient for § 10b defense).

Second, plaintiffs erroneously claim that the FTC never "officially defined" low tar descriptors. *See* Pl. Br. at 5, 65. To the contrary, years before Lights were introduced, the FTC itself began using the term "low tar" in its official annual reports to Congress to refer to cigarettes measuring 15 milligrams of tar or less. *See* Group 2(4) at 18-19. Subsequently, the FTC "formally define[d] a 'low tar' cigarette as one that has 15.0 or less milligrams of 'tar'" in its official annual reports to Congress and staff reports. *See* Group 20(11) at 1-50; Group 19(17) at 11; Group 19(18) at 16; R. 6456-61 (Peterman); *see also* Group 22(2) at 3-4.[29]

Third, plaintiffs assert that the FTC's consent orders do not apply to the descriptor "lights." *See* Pl. Br. at 65. The plain language of the *American Brands* order, however, expressly permits labeling and advertising cigarettes as "low or lower in 'tar' by use of the words 'low,'

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[28] *See also, e.g., FTC v. Mandel Bros.*, 359 U.S. 385, 391 & n.6 (1959) (FTC's policy can be inferred from complaints, cease and desist orders, and negotiated settlements, and is entitled to "great weight"); *Alaska v. O'Neill Investigations, Inc.*, 609 P.2d 520, 529 (Alaska 1980) (FTC consent decrees constitute "administrative interpretation[s]" with "precedential value"); *Schuback v. Household Fin. Corp.*, 376 N.E.2d 140, 141 (Mass. 1978) (FTC's policy inferred from complaints and cease and desist orders).

[29] Plaintiffs cite a 1997 FTC notice in the Federal Register suggesting that there are no definitions for a variety of descriptors. *See* Pl. Br. at 5, 64-65; Group 23(5) at 48,163. This lone comment, however, is an aberration contrary to numerous other FTC documents spanning almost 40 years that *expressly* define the term "low tar" as "15 mg. tar or less." *See* R. 6756-58 (Peterman).

'lower,' or 'reduced' or *like qualifying terms*," as long as those terms are based on, and accompanied by, FTC Method results. Group 14(3) at 2 (emphasis added). Plaintiffs' suggestion that "like qualifying terms" does not include the word "lights" is wrong. The FTC has repeatedly recognized that the term "lights" refers to "low tar" cigarettes, and the FTC itself uses the terms "low tar" and "light" interchangeably. *See, e.g.*, Group 19(6) at 10, 12; Group 23(2) at 2; Group 23(25); R. 6494-96 (Peterman). Indeed, plaintiffs' case is based on the premise that "lights" is a qualifying term that means "lower tar and nicotine." Plaintiffs alternatively accuse PMUSA of failing to abide by *American Brands*. *See* Pl. Br. at 65. However, *American Brands* requires only that PMUSA include a legend with FTC Method results in its Lights advertising – and it is undisputed that PMUSA complied with this requirement. *See* Group 14(3) at 2-3; *see also* R. 6539 (Peterman).[30]

Finally, plaintiffs misread the case law, especially *Lanier*. They argue that *Lanier* is inapplicable because they have alleged affirmative misrepresentations. Pl. Br. at 66. But *Lanier* did not hold that affirmative misrepresentations somehow fall outside the protections of §§ 10b and 4(1). The issue in *Lanier* was simply whether the defendant had violated the CFA by failing to provide additional information when a federal agency expressly permitted silence. *See* 114 Ill. 2d at 12-18. This Court held that the defendant had not violated the CFA because the conduct in question – nondisclosure – was specifically authorized by federal policy. *Id*. at 16-18.[31]

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[30] Plaintiffs also focus only on this consent decree and ignore the repeated occasions in which the FTC specifically investigated low tar and lights advertising, concluding on each occasion that the descriptors were substantiated by the FTC method, and thus no action was warranted. *See, e.g.*, Def. Br. at 48; Group 20(1)-(13); R. 6460-64, 6495-521, 6700-02, 6744 (Peterman); Group 21(1)-(12).

[31] Plaintiffs' reliance on *Martin*, 163 Ill. 2d 33, fails on this basis. Although the defendant commodities brokers in *Martin* met their minimum federal disclosure requirements, liability was based on additional affirmative misstatements suggesting that broker's commissions were actually "fees" – statements that were not required, permitted, or exempted from liability by federal policy. *Id*. at 38-42, 49-52; *see also Weatherman v. Gary-Wheaton Bank of Fox Valley, N.A.*, 186 Ill. 2d 472, 487-88 (1999) (distinguishing *Martin* on these grounds).

This Court subsequently applied the same principle in *Jackson v. South Holland Dodge, Inc.*, 197 Ill. 2d 39 (2001). There, this Court held that, because federal law did not impose liability on the defendant for the conduct challenged by the plaintiff, the defendant's conduct was in compliance with federal law and not actionable under the CFA. *Id.* at 49-50. As *Jackson* and *Lanier* make clear, the critical question is whether the allegedly deceptive conduct is in compliance with or "specifically authorized" by federal law and not whether the conduct is based on a failure to disclose rather than an affirmative misrepresentation.

Here, as in *Jackson* and *Lanier*, PMUSA's use of descriptors was always specifically authorized by, and complied with, federal law. The FTC required FTC Method testing and reporting and authorized PMUSA to describe certain cigarettes as "low tar" or "light" based on those results. The terms about which plaintiffs complain are the very disclosures expressly authorized by the federal government. Accordingly, the conduct here was "specifically authorized" within the meaning of § 10b and in "compliance" with federal policy within the meaning of § 4(1).

B. Plaintiffs' Failure To Warn And "Neutralization" Claims Are Expressly Preempted By The Labeling Act

The federal Labeling Act expressly preempts state law claims that impose requirements or prohibitions based on smoking and health with respect to cigarette advertising or promotion. 15 U.S.C. § 1334(b); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 520-28 (1992). Thus, the Labeling Act bars claims that PMUSA should have provided additional information about Lights. 505 U.S. at 524. It also precludes claims alleging that Lights advertising "minimize[d] the health hazards" or "downplayed the dangers" of smoking, thereby neutralizing the effectiveness of the federally mandated warnings that appeared on every Lights pack. *See id.* at 527-28.

Plaintiffs misconceive both the scope and application of the Labeling Act. *First*, plaintiffs argue erroneously that their claims are not preempted because generally applicable consumer protection statutes such as the CFA and UDTPA are not "based on smoking and

health." *See* Pl. Br. at 68. To determine if a claim is "based on smoking and health," courts examine whether plaintiffs' attempt to impose a requirement or prohibition is "motivated by" or "intertwined with" concerns about smoking and health. *See Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 548 (2001). Accordingly, courts have found preempted state-law claims asserted under a variety of generally applicable state statutes because the suit was motivated by or intertwined with concerns about smoking and health. *See, e.g.*, *Small v. Lorillard Tobacco Co.*, 679 N.Y.S.2d 593, 597-98, 602-03 (App. Div. 1998) (consumer protection act preempted); *Huddleston v. R.J. Reynolds Tobacco Co.*, 66 F. Supp. 2d 1370, 1377-81 (N.D. Ga. 1999) (state RICO act preempted); *Griesenbeck v. Am. Tobacco Co.*, 897 F. Supp. 815, 818-19, 821-24 (D.N.J. 1995) (products liability act preempted). Under plaintiffs' theory, some states might use the consumer protection statute to prohibit descriptors such as "lights" (as the circuit court effectively did here); others might follow the FTC's lead and permit such descriptors. This result would subject PMUSA to inconsistent state rules as to the labeling of its products – the very problem that the preemption provision was intended to avoid. *Cipollone*, 505 U.S. at 514.[32]

Second, plaintiffs attempt to avoid express preemption by denying that the Judgment was based on a "failure to warn" theory. *See* Pl. Br. at 69-70. However, the circuit court *repeatedly* relied upon failure-to-warn evidence throughout its Judgment. *See, e.g.*, C. 43383-84 (PMUSA did "not state" that Lights tar is "higher in toxic substances and more mutagenic"); C. 43393

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[32] Amici urge this Court to apply a "presumption against preemption." Public Citizen Br. at 6-10. Any such presumption, however, must give way in favor of the enforcement of the Act's express preemption provision. *See Reilly*, 533 U.S. at 548-549. Amici also claim that the Labeling Act does not apply because cigarette pack statements are not "advertising and promotion." *See* Public Citizen Br. at 11 & n.1. However, as courts have recognized, "advertising and promotion" encompasses any attempt by a company "to notify its mass market of anything." *Griesenbeck*, 897 F. Supp. at 823; *see also Jones v. Vilsack*, 272 F.3d 1030, 1034-37 (8th Cir. 2001); *Huddleston*, 66 F. Supp. 2d. at 1381 & n.1; *Sonnenreich v. Philip Morris Inc.*, 929 F. Supp. 416, 419 (S.D. Fla. 1996); *Cantley v. Lorillard Tobacco Co., Inc.*, 681 So. 2d 1057, 1061 (Ala. 1996). "Advertising and promotion" includes words and phrases on packs of cigarettes. *See DeLuca v. Liggett & Myers, Inc.*, 2003 WL 1798940, at *3-4 (N.D. Ill. 2003); *see also* R. 9889 (Lund).

(PMUSA had scientific knowledge that it did not share); C. 43397-99 (PMUSA failed to conduct and publicize research); C. 43403 (PMUSA should have disclosed information earlier). Indeed, even in their brief, plaintiffs cannot articulate their claims without running afoul of preemption. For example, plaintiffs allege that PMUSA failed to disclose the results of mutagenicity research. *See* Pl. Br. at 9-10, 26-28. They further claim that, because of PMUSA's alleged failure to disclose such information, the public health community recommended low-yield cigarettes. *See* Pl. Br. at 11-12. Finally, plaintiffs contend that, if PMUSA had disclosed this information, it would have affected class members' purchasing decisions. *See* Pl. Br. at 29, 31. Irrespective of what plaintiffs' claims are called, their underlying allegations sought to impose liability on the ground that PMUSA *should have said more* about the health risks of Lights – a claim that is preempted. *See, e.g.*, *Glassner v. R.J. Reynolds Tobacco Co.*, 223 F.3d 343, 347 (6th Cir. 2000) (under *Cipollone*, it is "necessary to look beyond the labels" of plaintiffs' claims and "evaluate each claim to determine whether it was in fact preempted by the [Labeling] Act").

Plaintiffs cannot save their claims by calling their non-disclosure allegations an affirmative fraud through "half-truths." *See* Pl. Br. at 69. Plaintiffs' argument that the Lights label was misleading because it failed to disclose information about mutagenicity and constituent levels fails as a matter of state law, *see supra* at 26-29., but in any event it is a preempted "neutralization" claim. Plaintiffs allege that the terms "lights" and "lowered tar and nicotine" in ordinary advertising and promotional materials conveyed to smokers that Lights were safer than full-flavor cigarettes. At bottom, therefore, plaintiffs are challenging PMUSA's advertising and promotional materials as implicitly inducing smokers to dismiss or minimize the federally mandated warning. Such a claim is a neutralization claim preempted by the Labeling Act's express preemption provision. *See Newton v. R.J. Reynolds Tobacco Co.*, No. C 02-1415, slip op. at 12-13 (N.D. Cal. 2003) (A. 463); *In re Tobacco Cases II*, slip op. at 30-34 (identical lights allegations are a "preempted, neutralization, failure-to-warn claim") (SSA-90-94). Plaintiffs argue that this is not a "neutralization of the federal warning" claim because class members

allegedly did not believe Light cigarettes were *safe* – only that they were *safer*. *See* Pl. Br. at 69. Plaintiffs' position is directly contradicted by *Cipollone*, which holds that the preemption of "neutralization" claims extends to allegations that ordinary cigarette advertising or promotion "minimize" or "downplay[]" the health risks of smoking. 505 U.S. at 527-28. Here, plaintiffs contend that PMUSA's advertising and promotion of Lights led class members to believe that smoking certain cigarettes "minimize[d]" the risks of smoking. *See, e.g.*, C. 42433, 37-39; R. 4665-67, 4860-61, 4876-77 (Cohen); *see also, e.g.*, C. 43386-87. That is a "neutralization" claim, preempted under *Cipollone*. *See* 505 U.S. at 527.

C. Plaintiffs' Claims Conflict With The FTC's Comprehensive Regulatory Scheme

Conflict preemption bars state-law claims that conflict with or stand as an obstacle to a federal policy or regulatory scheme. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000); *Orman v. Charles Schwab & Co.*, 179 Ill. 2d 282 (1997). By imposing liability for actions taken in compliance with the FTC's regulatory program, the Judgment conflicts with the same FTC policies that give rise to PMUSA's §§ 10b and 4(1) defenses and is barred by conflict preemption. *See supra* at 34-37.; Def. Br. at 58-62; *see also Johnson v. Philip Morris*, 159 F. Supp. 2d 950, 952-53 (S.D. Tex. 2001) (state law claim based on FTC Method flaws dismissed).

Plaintiffs' reliance on *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), is misplaced. *See* Pl. Br. at 71. As explained in PM USA's opening brief, *Sprietsma* merely held that a decision not to regulate will not have a preemptive effect if the decision was based on an intent to leave existing divergent state regulations in place. *See* Def. Br. at 60-61; 537 U.S. at 64-68. Here, the FTC intended its decisions to bar state law claims. *See* Def. Br. at 48, 60; Group 3(6) at 8. Plaintiffs also cite *United States v. Philip Morris Inc.*, 263 F. Supp. 2d 72 (D.D.C. 2003), which is irrelevant. That decision did not involve state-law claims at all. Instead, the issue was whether federal regulation precluded the *federal* government from bringing *federal* claims. The court

never addressed the issue of whether federal regulation precluded a state court, applying *state* law to claims brought by *private* parties, from interfering with federal policies and goals.

V. THE CIRCUIT COURT'S DAMAGE AWARD IS LEGALLY AND FACTUALLY UNSUPPORTABLE

A. Under Well-Established Standards, The Class As A Whole Sustained No Damage

In an attempt to prove damages on a class-wide basis, plaintiffs disclaimed personal injuries and claimed solely economic loss – that all class members paid too much for Lights. To demonstrate damages under this theory, plaintiffs had to prove that Lights would have cost less in the real world had the "truth" been known. *See Gerill Corp. v. Jack L. Hargrove Builders, Inc.*, 128 Ill. 2d 179, 196 (1989); *Munjal v. Baird & Warner, Inc.*, 138 Ill. App. 3d 172, 186-87 (2d Dist. 1985); *In re Busse*, 124 Ill. App. 3d 433, 438-39 (1st Dist. 1984). Plaintiffs agree that this is the correct measure of damages, Pl. Br. at 73, but they did not even attempt to prove such an economic loss. Indeed, plaintiffs concede that they did not and could not prove that the market price of Lights would have been lower if the alleged "truth" had been known. *Id*. at 75-76. Plaintiffs further concede that Lights "have always cost the same" as their full-flavor counterparts and thus class members spent the same amount for Lights that they would have spent for full-flavor cigarettes. *Id*. at 76. Because plaintiffs failed to show either that class members paid "extra" for the alleged safety benefit of Lights or that the market price of Lights was otherwise inflated, they proved no economic loss compensable under the CFA. *See Munjal*, 138 Ill. App. 3d at 186-87; *see also Small*, 698 N.Y.S.2d at 621 (dismissing claim for refund of cigarettes' price because plaintiffs suffered no pecuniary or physical harm).[33]

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[33] Plaintiffs' concessions that market price is not dependent on the level of tar and nicotine delivered to the smoker further distinguish this case from *Aspinall*. There, the court upheld certification based in part on the *theoretical possibility* that plaintiffs could prove at trial an economic loss based on "*market* value." *See* 813 N.E.2d at 490 (referring to the difference "between the price paid by the consumers and the true *market* value of the 'misrepresent[ed]' cigarettes they actually received") (emphasis added). Here, plaintiffs had an opportunity to present such proofs, but failed to do so. Furthermore, in *Aspinall*, the court upheld certification

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Plaintiffs attempt to excuse this utter failure of proof by suggesting that *Oliveira* precluded them from relying on market data as a matter of law. Pl. Br. at 75. But the issue in *Oliveira* was deception and causation, not damages. This Court rejected the argument that a plaintiff could recover under the CFA simply by proving that the market price of the product at issue was inflated, even though he was not deceived by the allegedly deceptive advertising. 201 Ill. 2d at 155. Neither *Oliveira* nor any other Illinois case has ever suggested that, once a plaintiff proves deception and the other CFA elements, market data should be ignored in determining whether and the extent to which the consumer suffered actual economic injury. Indeed, where, as here, the damage theory is that class members were overcharged for a product because it was misrepresented, such a determination *must* rely on market analysis. *See, e.g., In re Busse*, 124 Ill. App. 3d at 440.

Nor can plaintiffs justify their disregard for the market by asserting that it is not "efficient" based on unsupported allegations that cigarette prices are established by the tobacco companies. Pl. Br. at 75-76. As an initial matter, Illinois courts consistently apply real-world market values when determining the existence and extent of economic loss, without any reference to the "efficiency" of the market. *See, e.g., Gerill Corp.*, 128 Ill. 2d at 196. In any event, to the extent the "efficiency" of the cigarette market even matters, plaintiffs – not PMUSA – had the burden of proof on this issue. *See, e.g., Martin*, 163 Ill. 2d at 58-59 (plaintiffs have burden to prove actual damages). Plaintiffs failed to offer a shred of evidence that the market is not a reliable measure and reflection of economic value. In fact, plaintiffs did not even assert such a

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notwithstanding the speculative nature of the damages because plaintiffs (under Massachusetts law) alternatively had a right to statutory damages if they could not prove actual injury. 813 N.E.2d at 490. Here, plaintiffs have no such right.

theory at trial and therefore have waived it. *See, e.g.*, *Boub*, 183 Ill. 2d at 536; *Shannon*, 208 Ill. 2d at 527.[34]

Instead of relying on market data, plaintiffs attempted to prove damages by relying on a "contingent valuation" Internet survey that asked a sample of 275 non-class members subjectively to value "Lights" independent of any market information. No Illinois court has ever upheld a damage award based on a methodology even remotely similar to this one. As courts have held, a damages methodology that is not tethered to the market is inherently speculative and therefore fails as a matter of law. *See* Def. Br. at 74-75 (collecting cases); *see also Tietsworth v. Harley-Davidson*, 677 N.W.2d 233, 240 (Wis. 2004). In *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360 (E.D. La. 1997), the court rejected the same kind of theory advanced here because it was speculative: "[a]ccording to plaintiff's economic expert . . . a survey will provide a basis for determining a single figure that represents an average of the amount by which Bronco II owners think their vehicles have diminished in value. Plaintiffs cite no authority for such a method of measuring damages, and I consider it speculative." *Id*. at 374. In fact, neither plaintiffs nor their amici have cited any case *anywhere* in which a court has approved a contingent valuation methodology like that used here. *See generally* Br. of *Amicus Curiae*, PLAC at 23.[35]

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[34] Notably, plaintiffs' expert Dr. Harris conceded that the cigarette market is characterized by normal consumer economic behavior. R. 6135-36, 12328-32.

[35] Two economists filed an amicus brief that does little more than simply vouch for Dr. Harris' damage methodology. *See* Br. of Economists Robert Solow and George Akerlof. This is an improper attempt to add unsworn, expert testimony after the trial. In any event, amici are wrong in asserting that PMUSA's theory of damages would lead to no damages, irrespective of the promise made, leaving a manufacturer "without fear of liability for damages." *Id* at 4. *First*, amici overlook the authority of the Attorney General to sue under the CFA, regardless of whether economic loss has been shown. The Attorney General, in fact, has already sued PMUSA, and in November 1998, the suit was settled by the Master Settlement Agreement, under which PMUSA is obligated to pay the State an estimated $9.1 billion through the year 2025 and is subject to numerous restrictions relating to advertising, marketing, and promotion. *See* C. 43594; *see also* Def. Br. at 81-82, 85; DX 4391 at §§ III, VII. *Second*, if PMUSA promised some attribute that was valued in the marketplace – or if the plaintiffs could show that they would not have

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Plaintiffs' methodology, if upheld, would radically change the scope of product liability in Illinois by allowing recovery for massive "economic" damages without any evidence that consumers would have paid less had the "truth" been known. Plaintiffs' theory would result in limitless liability for manufacturers and allow speculative damages never previously permitted in Illinois. *See Munjal*, 138 Ill. App. 3d at 186-87. Instead, the law looks to the market to determine if the plaintiff suffered any "diminution in value" or other "economic loss." Here, as plaintiffs and their experts conceded, there was no such market loss.

Similarly, plaintiffs cannot salvage their "diminished value" theory by relying on their allegations that Lights posed greater risks than class members expected. In the personal injury context, this Court has refused to allow claims for increased risk without a showing of present physical injury and some quantification of the probability of the increased risk. *Dillon v. Evanston Hosp.*, 199 Ill. 2d 483, 506 (2002). The methodology used here, however, would allow a plaintiff to evade *Dillon* by converting any claim for increased risk – *without* present physical injury and *without* any quantification of the risk – into a multi-billion dollar consumer fraud suit for economic injuries. Plaintiffs could simply declare that they would have assigned less value to the product if they had known about a hypothetical increase in risk – without showing that they would have paid any less. To allow recovery under these circumstances would eviscerate the policies underlying *Dillon*.[36]

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purchased the product but for that promise – then any failure to comply with that promise would have resulted in economic loss. *Third*, PMUSA still remains subject to personal injury suits (each of which seeks substantial compensatory and punitive damages) based on the same misconduct at issue here – and these suits provide ample disincentive against deception. Amici overlook the fact that plaintiffs' theory of damages is completely unprecedented in Illinois – indeed, it has never even been suggested in any case – yet no court or any other legal authority has ever agreed with the absurd assertion that, up to now, manufacturers have been "without fear of liability for damages."

[36] *See generally* Henderson & Twerksi, "Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring," 53 *S.C. L. Rev.* 815, 850 (2002) (arguing against recovery for increased risk because "as the massive number of uninjured

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B. Plaintiffs' Damage Model Is Factually Flawed And Masks Critical Individual Differences Among Class Members

Even if a properly designed and executed contingent valuation survey could theoretically be used to calculate damages, plaintiffs' survey here was fundamentally flawed. As plaintiffs acknowledge, Illinois law requires a comparison between (1) the purchase price – which reflects the market value of Lights as represented – and (2) the true market value of Lights as they were when sold – *i.e.*, what their market value would have been if the public believed that Lights were not safer and "could be more harmful" than full-flavor cigarettes. *See Gerrill*, 128 Ill. 2d at 196; R. 6000-02 (Harris) (agreeing with the standard). To determine the true value of Lights absent the alleged deception, one would have to ask Lights smokers how much they would have been willing to pay for Lights if they had known the alleged truth. Plaintiffs now claim that they asked their survey respondents this precise question (Pl. Br. at 74), but they did not. *See* R. 5593-94 (Dennis). Instead, plaintiffs asked this fundamentally different and legally improper question:

> What is the highest price you would pay for a Marlboro Lights cigarette that could be more harmful than Marlboro Reds *if a Marlboro Lights that delivers less tar and is less harmful or safer than a Marlboro Reds was available at the price you usually pay for Marlboro Lights*? (Remember that both Marlboro Lights cigarettes taste exactly the same.)?

PX 74-A at 39 (emphasis added). This question went far beyond simply asking what the cigarettes would have been worth if class members had known the alleged truth. The question improperly asked respondents to imagine a fundamentally different marketplace – a marketplace where not only the "truth" was known, but where there was the hypothetical option of purchasing a "less harmful" cigarette that costs and tastes exactly the same as Marlboro Lights. Plaintiffs'

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claimants presenting anticipatory claims devours the defendants' resources, those defendants are forced into bankruptcy, leaving nothing for those whose ills, whe[n] they eventually manifest themselves, are not the least bit speculative").

damages expert admitted that including this non-real world alternative product caused respondents to give a *larger* damages estimate than they otherwise would. R. 6112-13 (Harris).[37]

In addition, plaintiffs never proved the assumption underlying the question – that Lights in fact are "more harmful" than full-flavor cigarettes. *See supra* at 26-29. The question therefore is improper because it assumes facts not proven. *Leonardi*, 168 Ill. 2d at 96 (expert must have a factual basis for assumptions). Finally, plaintiffs did not provide respondents with any information on the *magnitude* of the difference in risk between the two cigarettes. As a result, respondents had no basis for speculating to what extent they would be willing to purchase the less-safe "Lights." Respondents were left to guess how much "more harmful" Lights were in this scenario, invalidating the survey. *See* R. 11207-12 (Viscusi). For these reasons, even if this Court were prepared to depart from established legal standards to adopt plaintiffs' "contingent valuation" approach, the particular survey employed here was flawed as a matter of law and cannot support the damage award.

C. Plaintiffs' Internet Survey Was Scientifically Invalid And Inadmissible And Therefore Cannot Support Any Award Of Damages

Plaintiffs do not dispute that their damage calculation was based on Dr. Dennis' Internet survey. Thus, if the survey is inadmissible, plaintiffs' damages claim fails for that reason alone. *See* R. 6126-27 (Harris). Plaintiffs had the burden to come forward with evidence that their

[37] Plaintiffs' description of Dr. Harris' credentials, *see* Pl. Br. at 30 n.28, is notable for its lack of completeness. Plaintiffs omit to mention that Dr. Harris' testimony has been precluded in other cases involving similar allegations. In *Group Health*, 344 F.3d 753, the Eighth Circuit upheld the exclusion of Dr. Harris' testimony as inconsistent with plaintiffs' theory of the case. According to Dr. Harris in *Group Health*, the tobacco companies could have produced low-yield cigarettes earlier and, if they had done so, smoking would have become safer because low-yield cigarettes are safer than full flavor cigarettes. *Id.* at 760-61. Dr. Harris reversed his testimony for purposes of this case. *See also RJR-MacDonald Inc. v. Canada*, [1991] 82 D.L.R.4th 449, 513-14 (describing Dr. Harris' testimony as designed to lead "necessarily to the desired result" and lacking in "the scientific objectivity that [a] court is entitled to expect from an expert witness"), *rev'd* [1993] 102 D.L.R.4th 289, *rev'd* [1995] 3 S.C.R. 1999.

survey was based on scientifically accepted methodology and yielded valid results. *See Donaldson*, 199 Ill. 2d at 76-77. Plaintiffs failed to carry this burden.

Plaintiffs cannot point to a single witness who testified that the Internet survey was scientifically valid and accurately measured smokers' valuations of Lights. Instead, plaintiffs misleadingly assert that Dr. Dennis testified that the "survey accurately measure[d] the respondent's beliefs and evaluations." Pl. Br. at 79 (emphasis omitted). But Dr. Dennis actually said something quite different – that the survey accurately measured respondents' "*reported* beliefs" – a carefully crafted way of saying merely that his survey accurately recorded the subjects' answers. R. 5573 (emphasis added).[38] When asked directly about his survey's foundation, Dr. Dennis conceded that it was "unable to measure" the "true beliefs that people have." R. 5591. Indeed, plaintiffs' counsel acknowledged at trial that Dr. Dennis "didn't have an opinion as to the true validity of the answers." R. 5581. The survey could not measure true beliefs because, among other reasons, it suffered from non-response bias, acquiescence bias, miscomprehension error, and was not adequately pretested. R. 10710-91 (Mathiowetz); *see also* Br. of *Amicus Curiae* PLAC at 23-34.

Plaintiffs also cite Dr. Cohen's testimony that the survey was "an appropriate way[] of gathering this information." Pl. Br. at 79; R. 4681. However, Dr. Cohen was expressly addressing *only the survey's first ten questions*, which showed that many smokers believed that Lights were not safer. *See supra* at 11. These questions were not part of the damages calculation. R. 4834. Dr. Cohen made clear that he was *not* opining on the survey's "willingness to pay" questions that formed the basis of the damages award. R. 4844. Accordingly, because the survey

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[38] Plaintiffs also dispute that Dr. Dennis changed the survey questions after an initial test-run in response to plaintiffs' counsel's suggestions. Pl. Br. at 80. To the contrary and as stated in PMUSA's opening brief, Dr. Dennis testified that he had conversations with plaintiffs' counsel about the pretest and made changes to the survey in response to counsel's suggestions. R. 5626-44; *see* Def. Br. at 76-77.

lacked foundation, it failed to satisfy *Donaldson*, was inadmissible, and cannot support the Judgment.

D. The Prejudgment Interest Award Was Improper

In its opening brief, PMUSA established that the $2.1137 billion prejudgment interest award was improper because (1) the CFA does not provide for prejudgment interest, (2) none of the provisions of the Illinois Interest Act applies, and (3) prejudgment interest is appropriate only where the amount in controversy is fixed. *See* Def. Br. at 78-79. Instead of addressing these arguments, plaintiffs cite three non-binding decisions that they contend vest the court with discretion to award prejudgment interest. *See* Pl. Br. at 81. Only one, *Transport Leasing/Contract, Inc. v. Methvin*, 1992 WL 67846 (N.D. Ill. 1992), actually authorized such an award.[39] Even if *Transport Leasing* accurately reflected Illinois law, it authorized prejudgment interest only where the amount in controversy is fixed and undisputed and the defendant has not "denied the elements of the charges." 1992 WL 67846, at *2-3. Here, by contrast, the amount of damages was not subject to precise computation and was vigorously disputed. Plaintiffs cite no authority for awarding prejudgment interest in these circumstances. Accordingly, the prejudgment interest award should be overturned. *See, e.g.*, *Alguire v. Walker*, 154 Ill. App. 3d 438, 448 (1st Dist. 1987) (prejudgment interest is improper where damages are "disputed").

E. The Punitive Damages Award Was Excessive

Contrary to plaintiffs' suggestions, only the threshold finding of punitive liability is reviewed under the manifest weight of the evidence standard; whether the amount awarded is excessive is reviewed de novo. *O'Neill v. Gallant Ins. Co.*, 329 Ill. App. 3d 1166, 1181 (5th Dist. 2002); *Cooper Indus., Inc. v. Leatherman Tool Group Inc.*, 532 U.S. 424, 436 (2001). Plaintiffs'

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[39] Plaintiffs also cite to *Gorden v. Boden*, 224 Ill. App. 3d 195 (1st Dist. 1991), but that decision did not address prejudgment interest. As noted in PMUSA's opening brief, the third decision merely affirmed the circuit court's denial of prejudgment interest without addressing whether the CFA permits such an award in the first place. *Kleczek v. Jorgenson*, 328 Ill. App. 3d 1012, 1025 (4th Dist. 2002).

arguments regarding the excessiveness factors of *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), are largely addressed by PMUSA's opening brief. *See* Def. Br. at 83-85. Plaintiffs ignore the extraordinary deterrent effect of the compensatory award. In cases involving large compensatory damages, the compensatory award itself serves the purposes of punitive damages. *See, e.g.*, *State Farm*, 538 U.S. at 425; *Waits v. City of Chicago*, 2003 WL 21310277, *6 (N.D. Ill. 2003). Here, the compensatory award is so large – over $7.1 *billion* – that *any* additional punitive award would be wholly unnecessary and constitutionally excessive.

Nor can plaintiffs refute that the punitive award (particularly when combined with the compensatory award) improperly exceeds PMUSA's ability to pay. Plaintiffs claim that PMUSA actually has a "true value" and ability to pay of "approximately $25 billion." Pl. Br. at 86. But plaintiffs admit that this figure is based on market capitalization. *Id.* Market capitalization is irrelevant because it is simply the "value of shares owned by shareholders," R. 12324-25 (Harris), shares that PMUSA does not own and cannot sell to satisfy a judgment.

Plaintiffs do not dispute that the punitive award would be excessive in light of PMUSA's net worth – the "traditional[]" measure of ability to pay. *Fopay v. Noveroske*, 31 Ill. App. 3d 182, 200 (5th Dist. 1975). Instead, plaintiffs contend that courts have recently rejected consideration of net worth. Pl. Br. at 87. To the contrary, the two Illinois decisions upon which plaintiffs rely make clear that "*evidence of net worth is still the preferred method*." *Central Bank-Granite City v. Ziaee*, 188 Ill. App. 3d 936, 946 (5th Dist. 1989) (emphasis added); *Cox v. Doctor's Assocs., Inc.*, 245 Ill. App. 3d 186, 208 (5th Dist. 1993) (same). Those courts merely recognized that net worth may be insufficient where "defendants' assets are in some way indeterminable or concealed." *Central Bank*, 188 Ill. App. 3d at 946 (quotation omitted). Plaintiffs have introduced no such evidence here.[40] Accordingly, to go beyond net worth would create "a real possibility" of

[40] Plaintiffs' allegations about PMUSA's cash management practices, Pl. Br. at 86 n.59, are not supported by the evidence they cite (SA 343-44) or anywhere else in the record. PMUSA explained its cash management practices to this Court in its Explanatory Suggestions Of Philip

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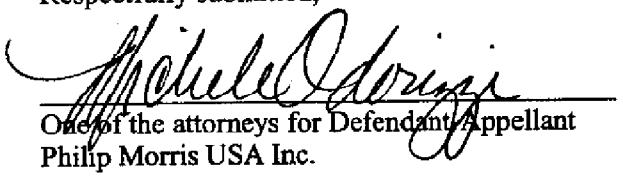
providing "a deceptively high ability to pay," given that a "defendant's past earnings are necessarily and inextricably intertwined with his net worth." *Fopay*, 31 Ill. App. 3d at 200. The punitive award was excessive in light of the only reliable measure of ability to pay in the record, and the award must be reversed. *See also* Def. Br. at 83-86 (referring to other reasons for reversal).

CONCLUSION

For the reasons stated above and in PMUSA's opening brief,[41] the judgment below should be reversed, and the circuit court should be directed to decertify the class and enter judgment in favor of PMUSA.

Respectfully submitted,



Dated: October 4, 2004

One of the attorneys for Defendant/Appellant
Philip Morris USA Inc.

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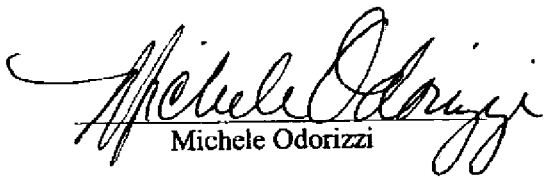
Morris USA Inc. In Support Of Its Renewed Motion For A Supervisory Order at 15 n.11 (Sept. 5, 2003).

[41] PMUSA relies on its arguments in its opening brief with respect to the deficiencies of the class notices (Def. Br. at 41-44), the res judicata effect on the punitive damages claim of the settlement with the State (*id.* at 81-83), cy pres (*id.* at 79-81), and the privilege claim (*id.* at 86-87).

CERTIFICATE OF MAILING

The undersigned hereby certifies that she is one of the attorneys for Defendant-Appellant Philip Morris USA Inc. and that she caused 20 copies of the foregoing Reply Brief of Appellant Philip Morris USA Inc. to be mailed to the Clerk of the Court on October 4, 2004, by depositing said copies, postage prepaid, in the United States mail at 190 South LaSalle Street, Chicago, Illinois, addressed to:

Juleann Hornyak
Clerk of the Court
Illinois Supreme Court
Supreme Court Building
Springfield, Illinois 62706



Michele Odorizzi

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is one of the attorneys for Defendant-Appellant Philip Morris USA Inc. and that she served the foregoing Reply Brief of Appellant Philip Morris USA Inc. on all counsel of record by causing three copies of said Reply Brief to be deposited in the United States at 190 South LaSalle Street, Chicago, Illinois, postage prepaid, on October 4, 2004, addressed to each of the counsel on the attached service list, except as noted on the service list, where copies were hand delivered on October 4, 2004 or placed with a courier on October 4, 2004 for overnight delivery.

Michele Odorizzi

SERVICE LIST

Stephen M. Tillery
George A. Zelcs
Korein Tillery
Gateway One on the Mall
701 Market Street, Suite 300
St. Louis, MO 63101
(Overnight Next Day Delivery)

Joseph A. Power, Jr.
Larry R. Rogers, Sr.
Devon C. Bruce
Power Rogers & Smith
Three First National Plaza
70 West Madison Street, 55th Floor
Chicago, IL 60602
(Hand Delivery)

Edward J. Kionka
Attorney at Law
26 East Washington St.
2d Floor
Belleville, IL 62220-2101

Jay H. Tressler
Dion J. Sartorio
Tressler, Soderstrom, Maloney & Priess
233 South Wacker Drive
Sears Tower, 22nd Floor
Chicago, IL 60606

David E. Bennett
James A. Spizzo
Vedder, Price, Kaufman
& Kammholz, PC
222 North LaSalle Street, Suite 2400
Chicago, IL 60601

Robert N. Hochman
Sidley Austin Brown & Wood LLP
Bank One Plaza
10 S. Dearborn Street
55th Floor
Chicago, IL 60603

Stephen A. Swedlow
Robert L. King
Swedlow & King, LLC
Three First National Plaza
70 West Madison Street, Suite 660
Chicago, IL 60603
(Hand Delivery)

Michael J. Brickman
Jerry Hudson Evans
Nina H. Fields
Richardson, Patrick, Wistbrook &
Brickman, LLC
174 East Bay Street
Charleston, SC 29401
(Overnight Next Day Delivery)

Michael A. Pope
Aron J. Frakes
McDermott, Will & Emery
227 West Monroe Street
Chicago, IL 60606

Gene C. Schaerr
Stephen B. Kinnard
Sidley Austin Brown & Wood, LLP
150 K. Street, N.W.
Washington, DC 20005

John B. Kralovec
Kralovec, Jambois & Schwartz
Goodman Theatre Building
60 W. Randolph Street, 4th Floor
Chicago, IL 60601

Joel J. Africk
Chief Executive Officer
American Lung Association of
Metropolitan Chicago
1440 W. Washington Blvd.
Chicago, IL 60607

Megan E. Annitto
Citizens' Commission to Protect the Truth
633 Third Avenue
Floor 19
New York, NY 10017

Stephen Gardner
Law Office of Stephen Gardner, PC
6060 North Central Expressway
Suite 560
Dallas, TX 75206

Eugene I. Pavalon
Pavalon, Gifford, Laatsch & Marino
2 North LaSalle Street
Suite 1600
Chicago, IL 60602

Allison M. Zieve
Brian Wolfman
Public Citizen Litigation Group
1600 20th Street, NW
Washington, DC 20009

Leslie A. Brueckner
F. Paul Bland, Jr.
Arthur H. Bryant
Trial Lawyers for Public Justice
1717 Massachusetts Ave., N.W.
Suite 800
Washington, DC 20036

Donald J. Russell
Alan E. Untereiner
Robbins, Russell, Englert, Orseck &
Untereiner LLP
1801 K Street, N.W., Suite 411
Washington, DC 20006

Michael W. Coffield
Michael W. Coffield & Assoc.
77 West Wacker Dr., Suite 4800
Chicago, IL 60601

Thomas R. Meites
Paul W. Mollica
Meites, Mulder, Burger & Mollica
208 S. LaSalle St., Suite 1410
Chicago, IL 60604-1102

Thomas G. Griffin
Griffin Law Offices LLC
656 West Randolph Street
Suite 500W
Chicago, IL 60661

Professor Andrew I. Gavil
Howard University School of Law
2900 Van Ness Street N.W.
Washington, DC 20008

Robin S. Conrad
National Chamber Litigation Center, Inc.
1615 H Street, N.W.
Washington, DC 20062

J. Timothy Eaton
Kathleen Holper Champagne
Ungaretti & Harris LLP
3500 Three First National Plaza
Chicago, IL 60602-4283
(Hand Delivery)