No. 96236

IN THE
SUPREME COURT OF ILLINOIS

SHARON PRICE and MICHAEL FRUTH, individually and on behalf of all others similarly situated,	)	On Direct Appeal from the Circuit Court for the Third Judicial Circuit,
Plaintiffs-Appellees,	)	Madison County, Illinois
v.	)	No. 00 L 112
PHILIP MORRIS INCORPORATED,	)	Honorable Nicholas G. Byron, *Judge Presiding.*
Defendant-Appellant.	)	

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ORAL ARGUMENT REQUESTED
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POINTS AND AUTHORITIES

INTRODUCTION

Philip Morris introduced Marlboro Lights – the first so-called "Lights" cigarette – in 1971, with an explicit promise of "lowered tar and nicotine" on every package and an implicit promise of a safer cigarette in the name itself. Internal documents showed, however, that even before 1971, Philip Morris knew that Marlboro Lights were not safer and were not going to deliver any less tar or nicotine to smokers. In fact, Philip Morris' own testing demonstrated that the different design of "Lights" actually created a more toxic form of tar than regular cigarettes.

Plaintiffs not only presented hundreds of internal Philip Morris documents at trial, but testimony of an extraordinary array of experts, including one who has been an author, editor or reviewer of every Surgeon General's Report on smoking since 1975 and three co-authors of the National Cancer Institute's 2001 publication on the risks associated with smoking "low tar" cigarettes. Philip Morris made no serious attempt to refute Plaintiffs' scientific evidence – calling only two career employees as its only scientific experts, neither of whom even refuted the testimony offered by Plaintiffs' experts.

The recent discovery of the facts about "Lights" has led governments around the globe to start banning the use of "Lights" and other "low tar" descriptors in cigarette marketing. Had the trial court found that Philip Morris' use of the "Lights" and "lowered tar and nicotine" descriptors was not deceptive or unfair, ***that*** would have been out of step with the current unanimous consensus of scientific communities and governments around the world.

The propriety of certifying this case as a class action is demonstrated by a single fact which Philip Morris refuses even to acknowledge. As even Philip Morris admits, "Lights" were initially regarded by smokers as "tasteless," and yet, despite objections to their taste, Marlboro Lights went on to eclipse every other brand and become the leading brand of cigarettes sold in the United States; "Light" cigarettes as a class have taken over the market, accounting for 88.7% of all cigarettes sold in the United States according to the Federal Trade Commission's latest report to Congress. Nothing can account for such a colossal shift in consumer preference but one thing: a universal belief that "Lights" are safer.

For more than thirty years, Philip Morris has preyed on and profited from the health concerns of Illinois consumers through an implicit promise of harm reduction and an explicit promise of less of the "bad stuff" in cigarette smoke. For smokers who had trouble quitting, "Lights" were a false promise that they could still do something positive for their health by switching to "Lights." The public health community, unaware of the truth about "Lights," unwittingly reinforced this illusion by recommending that smokers who could not quit should switch to "low tar" cigarettes. However, even before Philip Morris chose to market these cigarettes as safer, it recognized that a promise of reduced tar and nicotine would not only be "misleading, but dangerously so."

If this consumer fraud – uniform misrepresentations made to every single Class member – is not redressable as a class action, then consumer class actions are effectively a dead letter in Illinois. As the Appellate Court observed in *Eshaghi v. Hanley Dawson Cadillac Co*., 214 Ill. App. 3d 995, 1004 (1st Dist. 1991), "[i]n a large and impersonal society, class actions are often the last barricade of consumer protection." That observation was never truer than it is in this case.

COUNTER-STATEMENT OF FACTS

"Light" cigarettes are no safer than other cigarettes. This is not just Plaintiffs' claim. It is Philip Morris' admission and now official corporate position.[1]

The tobacco blend in Marlboro Lights is the same as the tobacco in regular Marlboros. This is not just Plaintiffs' claims. It is Philip Morris' admission. SA 357-358 (Lilly); SA 45 (Burnley); SA 518 (Whidby).

Philip Morris intended the term "Lights" to communicate "lowered tar and nicotine" (a phrase which also appeared prominently on Marlboro Lights packages until Philip Morris removed it after the entry of judgment in this case),[2] and it knew that consumers bought "light" and "low tar" cigarettes because they perceived them to be healthier than other cigarettes. These are not simply Plaintiffs' claims.

[1] *See* testimony of Philip Morris officials excerpted in Plaintiffs' Supplementary Appendix (hereinafter cited as "SA") SA 360 (Lilly); SA 362-363, SA 375 (Lund); SA 380 (Merlo); SA 387-388 (Morgan).

[2] SA 522-523 (April 11, 2003 Report of Proceedings.)

They are the testimony of two former Philip Morris presidents and CEOs. SA 221 (Cullman); SA 393-395, SA 400, SA 401 (Morgan).

"Internal tobacco company documents demonstrate that the cigarette manufacturers recognized the inherent deception of advertising that offered cigarettes as 'Light' or 'Ultra light,' or as having the lowest tar and nicotine yields." These are not merely Plaintiffs' claims. They are the conclusions reported in October 2001 in the National Cancer Institute's *Monograph 13* which is in evidence in this case.[3] Incidentally, Philip Morris now acknowledges that *Monograph 13* is the basis for its new admission that "Lights" are not safer. SA 375 (Lund).

The Canadian government and the European Union have recently banned the use of the terms "light" and "low tar" in cigarette advertising, concluding that such terms "are both false and misleading" because "smokers are being deceived in that they believe these products deliver less tar and nicotine and are less harmful to smokers' health. Allusions to milder taste, as well as actual taste differences, compound this deception." SA 905.[4] *See also* SA 908.

In May 2003, shortly after trial, the World Health Organization completed negotiation of the world's first public health treaty, the Framework Convention on Tobacco Control, which requires signatories to the treaty to enact legislation banning the use of any descriptor "that directly or indirectly creates the false impression that a particular tobacco product is less harmful than other tobacco products. These may include terms such as 'low tar,' 'light,' 'ultra light,' or 'mild[.]'"[5] When it was closed for signing in late June 2004, 168 countries had signed the treaty, including the United States.[6]

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[3] National Cancer Institute. Risks Associated with Smoking Cigarettes with Low Machine-Measured Yields of Tar and Nicotine. Smoking and Tobacco Control Monograph No. 13. Bethesda, MD: U.S. Department of Health and Human Services, National Institutes of Health, National Cancer Institute, NIH Pub. No. 02-5074, October 2001 (reproduced at SA 563-816). Quote in the accompanying text is from *Monograph 13* at SA 810.

[4] For convenience, Plaintiffs will use the same record designations Philip Morris used in its brief. "PX" refers to Plaintiffs' exhibits, "DX" refers to Defendant's exhibits, "Br." refers to Philip Morris' brief, and "A" (followed by a page number) refers to Philip Morris' Separate Appendix.

[5] Convention on Tobacco Control, opened for signature June 16, 2003, 42 I.L.M. 518 (reproduced at SA 1285-1310 and available on Westlaw and at http://www.who.int/gb/ebwha/pdf_files/WHA56/ea56r1.pdf).

[6] Press Release, U.S. Department of Health and Human Services (May 11, 2004) (reproduced at SA 1311-1312 and available at http://www.hhs.gov/news/press/2004pres/20040511.html).

The truth about "Lights" which the rest of the world has only recently begun to discover has been known to Philip Morris from the beginning. The public only discovered the fraud of "Lights" because Philip Morris and the other major cigarette companies were forced to make literally tens of millions of internal documents publicly available starting in 1999 (and continuing today) under the terms of the November 1998 "Master Settlement Agreement" with 46 states, five U.S. territories and the District of Columbia. SA 1313-1323.

The historical background of Philip Morris' development of a "health cigarette"

During the 1950's, highly publicized scientific findings first linking lung cancer to cigarette smoking sparked a national "health scare" that in turn caused "growing concern among the various tobacco companies" "over the potential loss of market … due to the evolving public opinion that smoking is harmful to health … ." SA 567. The tobacco industry collectively launched a public relations campaign designed to cast doubt on scientific studies linking smoking to cancer, while at the same time individual cigarette companies began introducing cigarettes intended to allay the public's health concerns. SA 776. The tobacco companies' research regarding more acceptable cigarettes for an increasingly health conscious market intensified in 1964 when the U.S. Surgeon General released its landmark report confirming the link between smoking and cancer. Soon after, Philip Morris produced a confidential internal report entitled "Market Potential of a Health Cigarette." The Report began with the following assumption:

> [A]ny health cigarette must compromise between health implications on the one hand and flavor and nicotine on the other. ***It seems clear from the performance of existing health cigarette entries that flavor and nicotine are both necessary to sell a cigarette. A cigarette that does not deliver nicotine*** cannot satisfy the habituated smokers and cannot lead to habituation, and ***would therefore almost certainly fail***.

SA 532 (emphases added). Philip Morris' Health Cigarette Report concluded that "[a] large proportion of smokers are concerned about the relationship of cigarette smoking to health" and that for any new "health cigarette," "[***t***]***he illusion of filtration is as important as the fact of filtration***." SA 529 (emphasis added). "Therefore any entry should be by a radically different method of filtration but ***need not be any more effective***." SA 529 (emphasis added).

Philip Morris' Health Cigarette Report laid out the blue-print for the production of a "healthy" cigarette:

> If we could develop a medically and governmentally endorsed "healthy" cigarette that tasted exactly like a Marlboro, delivered the nicotine of a Marlboro, and was called Marlboro, it would probably become the best selling brand.

SA 531. Seven years later, that is precisely how Philip Morris launched the introduction of its new and soon-to-become best selling brand: Marlboro Lights.

Philip Morris' introduction of "Lights"

Marlboro Lights were the first cigarette ever to be sold under the name "Lights." Borne of a corporate culture where "illusion" was "as important" as fact, Marlboro Lights were advertised (consistent with the Health Cigarette Report's recommendations) as delivering "the spirit of Marlboro in a low tar cigarette" and "the new low tar cigarette from America's fastest-growing brand." SA 1324-1325. There was no official definition of the term "Lights," and to this day, the FTC has not adopted any regulation defining "Lights" or any "low tar" descriptors. SA 1326-1331 (Cigarette Testing; Request for Public Comment, 62 Fed. Reg. 48,158, 48,163 (Sept. 12, 1997)) ("There are no official definitions for these terms").

Philip Morris' purported justification for representing "Lights" as delivering "lowered tar and nicotine" was a machine-measured tar and nicotine rating which it and the other tobacco companies had secretly concluded was "misleading and dangerously so."

> [I]f it were assumed that smoking causes disease, any tar and nicotine labeling requirement might be not only ***misleading but dangerously so***. … A smoker would assume … that lower "tar" and nicotine content means "safer" cigarettes. … Accordingly, a smoker could be ***lulled into a false sense of added safety*** by labeling which indicates reduced tar and nicotine content, when "harmful" ingredients have not been reduced at all.
>
> A smoker may compare two packages of cigarettes and choose one on the ground that its tar and nicotine content is less than the other. Presumably, he would be doing so because of his belief that reduced tar and nicotine content makes the cigarette "safer." Here again, he is receiving a possibly ***false assurance of safety***[.]

SA 1058-1059 (1967 Tobacco Institute "Privileged and Confidential" Statement of Position) (emphases added).

Philip Morris never shared those views with the public (or the government). Instead, Philip Morris embraced FTC machine ratings as the coveted "governmental endorsement" dreamed of in the Health Cigarette Report. According to an internal report, Philip Morris concluded that "the FTC standardized test should be retained" for the very reason that "it gives low numbers." SA 534. The FTC has ***never*** suggested that any difference in the ratings of two cigarettes was a reliable predictor of the relative safety of those two cigarettes. Philip Morris, however, purposefully communicated that "Lights" are the safer alternative through the use of the categorical and comparative "Lights" and "lowered tar and nicotine" descriptors. SA 220-221 (Cullman); SA 393-395, SA 397, SA 400-402 (Morgan).

Philip Morris' "Lights" are at least as harmful as regular cigarettes

Despite the fact that Philip Morris was conveying a message which it knew consumers perceived to mean "safer," Philip Morris admitted it never had any scientific evidence to support that claim. SA 360 (Lilly). According to Dr. William Farone (former Director of Applied Research for Philip Morris and peer reviewer of *Monograph 13*),[7] Philip Morris set out "to make a lower tar cigarette that was as close to Marlboro Red the regular cigarette as they could possibly make it." SA 255. Dr. Farone explained that the only difference of any consequence between a Marlboro Lights and a regular Marlboro is the extent to which the filter is "diluted" or "ventilated," laser perforations in the filter that allow more air to come through the filter. SA 252, SA 254, SA 291, SA 289-291.

The reason that filter ventilation results in a slightly lower machine measurement but does not translate into any decrease in tar actually delivered to humans is that humans smoke differently than the machine. The machine "smokes" cigarettes according to established parameters which are identical for every cigarette, every time. People do not smoke like that. SA 590.

[7] SA 571; SA 256. Dr. Farone holds his Ph.D. in physical chemistry and specializes in "colloidal systems," a branch of chemistry dealing with the state of finely divided, suspended matter, such as smoke. SA 241-242. Before joining Philip Morris, Dr. Farone worked as an atmospheric physicist at White Sands Missile Range; taught at Virginia State University where he received a grant from the National Institutes of Health to study atmospheric pollution, including tobacco smoke; and worked for Lever Brothers Company where he was responsible for scientific research relating to the substantiation of advertising claims regarding the company's food and household products. SA 242-248. Philip Morris hired Dr. Farone to work on developing safer cigarettes, where he served as Philip Morris' Director of Applied Research from 1977 through 1984. SA 249-251, SA 288.

At trial, Plaintiffs presented the unrebutted testimony of Dr. Neil Benowitz (widely regarded as the world's leading expert on nicotine pharmacology),[8] who explained that smokers unconsciously smoke cigarettes to obtain a specific level of nicotine, a phenomenon referred to as "titration." SA 19-21. He testified that when smokers switch to a cigarette with lower machine-measured tar and nicotine ratings, they still unconsciously "titrate" to obtain the same, specific level of nicotine they obtained from the higher machine-measured tar cigarette. SA 19-21, SA 33. "Titration" in this context of brand switching is referred to as "compensation." SA 19-21. Similarly, even those smokers who never smoked anything but "Lights" still take in the same amount of tar and nicotine from "Lights" that they would have taken in from a regular cigarette. SA 22-23. S*ee also* SA 34-35.

Dr. Benowitz testified that "virtually all smokers" unconsciously engage in this smoking behavior ***whether they are addicted or not***. SA 22. Dr. Benowitz's testimony was consistent with the conclusions published in *Monograph 13*: "there appears to be complete compensation for nicotine delivery, reflecting more intensive smoking of lower-yield cigarettes." SA 587. Dr. Farone agreed: "I'm sure there's probably one smoker that it doesn't work for, or two, but we're talking about a very, very high level of confidence here, 99.9 percent." SA 259-260. As a result, smokers not only ingest the same amount of nicotine from so-called "Lights," they concomitantly ingest the same amount of tar. SA 252-253, SA 255 (Farone); SA 23-24, SA 27-28 (Benowitz). Philip Morris presented no evidence contradicting Dr. Benowitz.

Internal Philip Morris documents revealed that Philip Morris has long known that virtually all smokers engage in compensatory smoking behavior and that, as a result, "Lights" are just as harmful to

[8] Dr. Benowitz authored the first U.S. study of compensatory smoking published in the *New England Journal of Medicine* in 1983. SA 29-30. In addition to his work as the senior scientific editor of the 1988 Surgeon General's Report and co-editor of *Monograph 13*, Dr. Benowitz has been a contributor to several other Surgeon General's Reports. SA 16-18. Dr. Benowitz is a professor of medicine, psychiatry, and pharmaceutical science, and he is chief of the Clinical Pharmacology Division in the Department of Medicine at the University of California, San Francisco. SA 12-14. He holds board certifications in internal medicine, clinical pharmacology, and medical toxicology. SA 14. He has published more than 350 articles and book chapters in such journals as the *New England Journal of Medicine*, *Journal of the American Medical Association*, and the *American Journal of Public Health and Clinical Pharmacology*. SA 15.

smokers as regular cigarettes. In 1975, a Philip Morris study specific to Marlboros and Marlboro Lights showed the same delivery regardless of the cigarette smoked:

> In effect, the ***Marlboro 85 smokers in this study did not achieve any reduction in smoke intake by smoking a cigarette (Marlboro Lights) normally considered lower in delivery***. Conversely, the Marlboro Light smokers did not increase their smoke intake when they changed to the regular delivery cigarette.

SA 821 (emphasis added). Those results confirmed earlier findings, even dating back to the initial introduction of Marlboro Lights in 1971:

- A 1971 study titled "Tar, Nicotine, and Smoking Behavior": "These findings support the hypothesis that the smoker does have daily intake quotas for tar and/or nicotine, and that he titrates his smoke intake to meet his quotas." SA 1146.

- A 1972 study titled "Tar, Nicotine, and Cigarette Consumption": "This finding supports the notion that smokers develop a daily nicotine intake quota and that when smoking cigarettes differing in nicotine delivery from that to which they are accustomed they tend to modify their consumption rate in order to maintain their normal quota." SA 817.

- A June 1974 report on Human Smoking Habits: "The smoker doses himself with nicotine according to his personal needs … . A controlled experiment with a group of some 150 smokers who were given at random high and low nicotine delivery cigarettes … showed the existence of a definite compensation mechanism …." SA 535-536.

Plaintiffs also presented the unrebutted testimony of Dr. Michael Thun, Vice President of Epidemiology and Surveillance Research at the American Cancer Society and co-author of Chapter 4 of *Monograph 13*.[9] He testified (consistent with the conclusions of *Monograph 13*) that the epidemiological evidence which has accumulated over the last 30 years demonstrate there is no harm reduction when comparing "Lights" to their regular counterparts in terms of disease risk. SA 503-504.

[9] Before joining the American Cancer Society in 1989 as the Director of Analytic Epidemiology, Dr. Thun was an epidemiologist at the Centers for Disease Control. SA 498. Dr. Thun has advised several governmental entities regarding smoking related issues, including OSHA and the Australian Veteran's Administration. SA 499-500. Recently, he was a participant in the World Health Organization's working group relating to cancer. SA 500. Dr. Thun has served on the editorial boards of numerous epidemiology journals, including *Epidemiology*, *Encyclopedia of Public Health*, and *Cancer Epidemiology Biomarkers and Prevention*. SA 500-501. He has also served as a peer reviewer for numerous other journals, including the *New England Journal of Medicine* and the *Journal of the American Medical Association*. SA 501-502.

Philip Morris' "Lights" may be more dangerous than regular cigarettes

Other evidence presented at trial demonstrated that "Lights" may actually be ***more*** harmful than regular cigarettes. Philip Morris has known this, too, from the beginning and presented no evidence to the contrary. Dr. Farone explained that the byproduct of the "Lights" cigarette design (increased filter ventilation) is increased "mutagenicity. It increases the chemical reactions that cause bad chemicals to be formed." SA 292. "[Y]ou get essentially more toxicity from the Marlboro Light than you do from the Marlboro Regular." SA 277.

Philip Morris' internal documents revealed that Philip Morris has consistently and constantly tested the smoke from its cigarettes (including Marlboro Lights and regular Marlboros) for specific mutagenicity (also called biological activity), primarily relying for the past 30 years upon a test called the "Ames Assay." *See* SA 855-857. That testing revealed that the design of "Lights" (filter ventilation/dilution) leads to higher biological activity and thus an increased potential to cause cancer. *See, e.g.*, SA 839-841 ("The take-home-lesson from this experiment is that dilution of a cigarette appears to increase the activity of the WSC [whole smoke condensate] (more dramatically for some cigarettes than for others)."). Dr. Peter Shields, medical doctor and Professor of Oncology and Medicine at the Georgetown University School of Medicine and Lombardi Cancer Center,[10] explained the significance of increased mutagenicity:

> So if you end up with a mutation in the wrong base, you could end up with the wrong amino acid or sometimes you can shut off any production of the proteins so you don't have it at all and ***abnormal functioning will become cancer***.

[10] Dr. Shields is the Director of the Division of Cancer Genetics and Epidemiology at Georgetown University School of Medicine. He is also the Associate Director for Cancer Control and Population Sciences at the Lombardi Cancer Center, one of the leading cancer centers in the world. SA 466-469. Prior to his employment at Georgetown and the Lombardi Cancer Center, Dr. Shields was employed at the National Cancer Institute, eventually becoming the chief of the molecular epidemiology section in the laboratory of human carcinogenesis. SA 470-471. During Dr. Shields' 13-year employment at NCI, he was a member of the faculty at George Washington University Hospital in the Division of Hematology and Oncology. SA 472. As a result of his tenure at NCI, Dr. Shields has developed an expertise in understanding tobacco, tobacco use, and evaluating tobacco products in terms of cancer risk, carcinogenicity, toxicology, and epidemiology. SA 472-473. Dr. Shields has published over 90 peer-reviewed papers. SA 473. Dr. Shields was elected to chair the molecular epidemiology group of the American Cancer Association of Research. SA 474-475. Philip Morris itself has asked Dr. Shields to be a principal investigator for its own studies relating to smoking and disease. SA 475-476.

SA 477 (emphasis added). Dr. Shields explained that a positive Ames test for mutagenicity is "pretty widely accepted" as being "very predictive of what would be an animal carcinogen." SA 482.

Even as far back as 1971, Philip Morris had conducted biological activity testing on human lung cell cultures demonstrating increased biological activity from filter dilution. *See* SA 486-487. As Dr. Shields explained, those early tests revealed that "among all these different products they tested ... the single highest value, which is much higher than all the others, is the one that … [was] mechanically diluted. So the one that has the filtered dilution provides the highest response." SA 487 (discussing SA 1206 at Table I).

The increased cancer-causing potential from "Lights" was also confirmed by the 1977 results of a mouse skin painting experiment from Philip Morris' German laboratory showing increased tumor rates in mice painted with tar from a low tar cigarette compared to mice painted with tar from a regular cigarette. SA 484-485 (Shields discussing PX 94 (SA 1196-1197) (also marked as PX 20-B (SA 830-831)). As Dr. Farone succinctly described these results, "You get more tumors from a diluted cigarette." SA 264 (also discussing SA 830-831, SA 1196-1197). Based on these internal Philip Morris test results, both Drs. Shields and Farone concluded that "Lights" are "a more dangerous product." SA 492-493 (Dr. Shields); SA 287 (Dr. Farone).

Philip Morris nevertheless embraced filter ventilation while at the same time it engaged in "carte blanche avoidance of all biological research" in the United States "in order to plead ignorance about any pathological relationship between smoke and smoker." SA 837. Through a secret arrangement designed to keep test results from being used against it in litigation in the U.S., Philip Morris shipped cigarettes to Germany where they would eventually wind up in a research laboratory known as INBIFO in Cologne. SA 261-262, SA 268-270, SA 274-275 and SA 834. Test results from INBIFO were not sent to Philip Morris' U.S. offices. Instead, they were sent to Dr. Thomas Osdene (a Philip Morris scientist) *at his home*, where he would destroy the results after reading them. SA 271-272; SA 273. *See also* SA 834 (handwritten memo by T.J. Osdene).

Philip Morris also misled the public health community

Philip Morris argued at trial (as it does again on appeal) that its conduct was somehow excused by the fact that since "the 1960s and continuing into the late 1990s, the public health community encouraged manufacturers to reduce tar and nicotine yields and encouraged smokers who would not quit to switch to lower yield cigarettes." Br. at 13. The public health community's recommendations, however, were based upon the mistaken belief that manufacturers were actually reducing the tar and nicotine delivered to the smoker – not just strategically reducing machine measurements. Only after internal tobacco industry documents first started becoming available in 1999 did a consensus among public health authorities about the dangers of "low tar" cigarettes begin to emerge. As explained in *Monograph 13* in October 2001:

> This monograph is unique in another important aspect. For the first time, the authors who prepared the various chapters have had extensive access to the information gleaned from the internal documents of the tobacco companies. The tobacco industry files now open to the public and available on the Internet constitute some 33 million pages of formal and informal memos, meeting notes, research papers, and similar corporate documents. Included are marketing strategies that express the growing concern among the various tobacco companies of the potential loss of new recruits. This concern over the potential loss of market was due to the evolving public opinion that smoking is harmful to health and that it is related to many of the illnesses that smokers experience over the course of their lives.

SA 566-567.

Dr. David Burns, co-author of the 1981 Surgeon General's Report and author and co-editor (with Dr. Benowitz) of *Monograph 13*,[11] testified that if the information available to Philip Morris had "been available to us, the conclusions in 1981 would likely have been different." SA 68. He explained that many people latched on to the 1981 Surgeon General Report's recommendation regarding low tar

[11] Dr. Burns has been an author, editor or senior reviewer of every Surgeon General Report produced since 1975. SA 58. While Medical Staff Director of the National Clearinghouse, an agency of the U. S. Public Health Service, his principal responsibility was to prepare the 1975 Surgeon General's Report. SA 57. He is also a Member of the World Health Organization's Scientific Advisory Committee on Tobacco. SA 54-55. Dr. Burns is a Professor of Medicine at the University of California, San Diego. SA 50-51. Dr. Burns has worked with many medical, governmental and public health agencies, including the Consumer Product Safety Commission, the Environmental Protection Agency, the National Cancer Institute, the American Cancer Society, the Tobacco and Health Committee for the American College of Chest Physicians, and the U. S. Department of Health and Human Services. SA 52-54. He has published many articles on the health consequences of smoking, the effects of smoking cessation, the relationship between media campaigns and tobacco control efforts, and changes in smoking and behavior. SA 56-57.

cigarettes as a reason not to quit smoking and he "felt a deep responsibility to try and correct that recommendation and that misinformation that had been provided by the Surgeon General's Report to the American public." SA 63-64. In Dr. Shields' opinion, Philip Morris' decision to "do nothing" with its test results and to "allow the public health community to make recommendations that Philip Morris clearly had indications were wrong" was "dangerous, reckless, and obviously immoral." SA 491-492.

Philip Morris knew health was "of course" the "principal reason" smokers chose "Lights"

Although challenging Plaintiffs' survey evidence, Philip Morris introduced survey evidence of its own[12] in an attempt to show "that many consumers choose to smoke light cigarettes for reasons such as taste or popularity." Br. at 5. Plaintiffs presented contrary evidence, some of which came directly from the mouths of Philip Morris' top brass. As former Philip Morris CEO James Morgan testified, "[t]he light taste, first of all, is not a positive attribute." SA 396. Philip Morris' Senior Vice President of Marketing agreed that taste "was an obstacle to the success of lights" because "most people did not like the taste of lights cigarettes"; the taste of "Lights" was "not a positive selling point." SA 372 (Lund); SA 399 (Morgan).[13] Nine out of ten people did not like the taste. SA 365 (Lund). Ellen Merlo, Philip Morris' Senior Vice President of Corporate Affairs testified "I think there was a general perception that low-tar cigarettes did not taste as good as full-flavor cigarettes." SA 381.

Philip Morris' research confirms Philip Morris' belief that "[t]he principal reason for switching to a low-tar is, of course, the health concern" – not taste, as Philip Morris now claims. SA 1167. "Those who are currently smoking 'Lights' do so because '…they are better for you …' than full flavor cigarettes" (SA 867); "[t]he appeal of low tars is simple and single – better for you, less harmful …" (SA 885); "The very fact, then, that a smoker has decided to switch from a full-flavor cigarette to a low-delivery cigarette tells us something very important about him: he is concerned about his health, and he is

[12] As discussed below in the text, *infra* at 53-56, Dr. Stanley Presser, a leading survey methodologist, explained in detail why none of the surveys offered by Philip Morris is informative on the issue of whether Class members chose Marlboro Lights or Cambridge Lights cigarettes for health or safety reasons.

[13] SA 885 ("weakness or objection to low tars is also simple – tasteless, lacking in satisfaction"); SA 1161-1165 (confidential under seal) (SA 399 (Morgan) (taste was "a consciously applied negative"). SA 364 (Lund) (agreeing that when "Lights" were introduced, the "big drawback" was that they did not taste good).

willing to do something about it." (SA 861). Hall Adams, a former advertising executive responsible for the Marlboro Lights account, testified that "the whole area of light, lighter cigarettes was being positioned as something that was better for [people]." SA 6-7.

Despite the objectionable taste but consistent with Philip Morris' Health Cigarette Report prediction, Marlboro Lights "took the market" and "became the best selling brand." Since Philip Morris' introduction of Marlboro Lights in 1971, smokers have shifted *en masse* from regular cigarettes to "light" cigarettes, which have captured 88.7% of the market according to the FTC's latest report to Congress. SA 891; FTC Cigarette Report for 2001 at Table 4 (reproduced at SA 1346).

Class certification

Plaintiffs filed this case on February 10, 2000, and the trial court certified it as a class action on February 8, 2001. A 64-67. Because the original class definition was both over-inclusive (it included Illinois residents' purchases made anywhere in the world) and under-inclusive (it excluded purchases made in Illinois by non-Illinois residents), the trial court later modified it. A 68. After trial one year later, the trial court reaffirmed its class certification ruling and entered final judgment for the following Class:

> All persons who purchased Defendant's Cambridge Lights and Marlboro Lights cigarettes in Illinois for personal consumption, between the first date the Defendant placed its Cambridge Lights and Marlboro Lights cigarettes into the stream of commerce through February 8, 2001.

SA 1239, SA 1234.

Plaintiffs' and Class members' testimony

Sharon Price began smoking in 1966 and switched to Cambridge Lights in 1986. SA 450, SA 454. Michael Fruth began smoking in 1973 and switched to Marlboro Lights in 1985. SA 301, SA 304-306. Ms. Price testified that she chose Cambridge Lights because, among other reasons, she believed they contained less harmful substances. SA 451-453. Mr. Fruth testified that he, too, chose a "Light" cigarette because he wanted a healthier cigarette and that he believed Marlboro Lights were healthier. SA 304-305. All 23 testifying Class members testified that they believed "Lights" were safer.[14] Unable to quit

[14] SA 9-10 (Anderson), SA 43 (R. Bohm), SA 39-41 (P. Bohm), SA 217-218 (Crain), SA 302-304, SA 307-308 (Fruth), SA 312-313 (Gaylord), SA 315-316 (G. Gebhart), SA 318 (P. Gebhart), SA 347 (Holak), SA 349-351, SA

smoking after learning the truth about "Lights," Ms. Price and some other Class members have continued smoking "Lights." But as one of Plaintiffs' experts asked at trial, "where are they going to go? What's the alternative that they have? They're going to go back to Reds that they don't like the taste of anymore? No." SA 105-106 (Cialdini).

There is no evidence in the record that any Class member continued smoking "Lights" after learning that "Lights" could be more harmful than regular cigarettes. Philip Morris cites the deposition of Susan Miles (the only "example" for this proposition), who was deposed on October 9, 2000 – more than two years before Plaintiffs' expert disclosures in November 2002 evidencing the potential for increased harm. In fact, Mr. Fruth (the only Plaintiff or Class member who was able to be present during the "more harmful" scientific testimony at trial) immediately switched to a non-Philip Morris regular cigarette after listening to the testimony that Marlboro Lights are actually more harmful than regular cigarettes. SA 309.

The Judgment

The trial court found that Philip Morris' conduct in the marketing of Marlboro Lights and Cambridge Lights was deceptive and unfair in violation of the Consumer Fraud Act and Uniform Deceptive Practices Act. The court held that "[t]he proper measure of damages under the Illinois Consumer Fraud Act is to measure the difference between the value the product would have had at the time of the sale if the representations had been true and the actual value to the consumer of the property sold." SA 1257. Relying on survey evidence, the court found "[t]he aggregate diminution in value … caused by Philip Morris' fraud … to be 92.3%." SA 1260. The court found the total diminution in value for the Class (including a 5 percent non-compounded interest component) to be $7.1005 billion, and finding individual damages of $11,384.77 and $17,811.64 for Plaintiffs Price and Fruth respectively. SA 1261-1263.

The court also concluded that "punitive damages are appropriate in this case" after finding that Philip Morris' conduct was "outrageous" and that "Philip Morris' motive was evil and the acts showed a

352-353 (Izzi), SA 355-356 (Kezios), SA 377-378 (McHatton), SA 383 (Miles), SA 405 (J. Norton), SA 407-408 (M. Norton), SA 453 (Price), SA 457-458 (Larry Reynolds), SA 460-461 (Linda Reynolds), SA 465 (Seitzinger), SA 495 (Smith), SA 512 (Walker), SA 514 (Webb), SA 520-521 (Whitt).

reckless disregard for the consumers' rights." SA 1275. Finding Philip Morris' "true value or worth to be between $25 billion and $50 billion," the court awarded another $3 billion in punitive damages – less than half the compensatory damage award. SA 1277.

ARGUMENT

Standard of Review

Throughout its brief, Philip Morris either ignores the applicable standard of review or claims that issues are subject to de novo review when they are not. "The manifestly erroneous standard represents the typical appellate standard of review for findings of fact made by a trial judge" because the "trial judge is able to observe and hear the witnesses at the evidentiary hearing and, therefore, occupies a 'position of advantage in a search for the truth' which 'is infinitely superior to that of a tribunal where the sole guide is the printed record.'" *People v. Coleman*, 183 Ill. 2d 366, 384-85 (1998). When mixed questions of law and fact are presented, the trial court's findings of fact are not reviewed under a de novo standard whenever the trial court answers the question of law incorrectly. Rather, the trial court's resolution of the question of law is reviewed de novo, but the trial court's findings of fact are still reviewed for abuse of discretion or manifest error. *People v. Gherna*, 203 Ill. 2d 165, 175 (2003).[15]

"An abuse of discretion occurs where no reasonable person would agree with the position adopted by the trial court." *Schwartz v. Cortelloni*, 177 Ill. 2d 166, 176 (1997). It is "'the most deferential standard of review available with the exception of no review at all.'" *People v. Coleman*, 183 Ill. 2d 366, 387 (1998). "The hallmark of deferential review is that although the reviewing court might have viewed the matter differently, it lacks the authority to change the result on appeal." *Id*. at 388. That is the standard which applies to the overwhelming majority of the issues Philip Morris has raised in this appeal.

[15] Philip Morris' reliance on *Beehn v. Eppard*, 321 Ill. App. 3d 677, 680-81 (1st Dist. 2001), for its contention that this Court should apply a de novo standard of review is misplaced. The issue in *Beehn* involved the review of a trial court's *in limine* ruling (normally reviewed for abuse of discretion) to exclude evidence based solely upon the trial court's resolution of a legal issue (specifically, whether recovery by either a bailor or a bailee for damage to bailed property bars a subsequent recovery by the other). *Id*. Because the trial court had excluded evidence based upon its erroneous resolution of that purely legal question, the Appellate Court held that the trial court had erroneously excluded the evidence. *Id*.

I. PHILIP MORRIS HAS WAIVED ANY CHALLENGE TO THE CLASS CERTIFICATION OF PLAINTIFFS' UNFAIRNESS CLAIM AND TO THE SUFFICIENCY OF THE EVIDENCE SUPPORTING THE TRIAL COURT'S FINDING THAT PHILIP MORRIS ENGAGED IN "UNFAIR" PRACTICES.

Philip Morris has waived any appeal from the trial court's class certification of Plaintiffs' unfairness claim and from the trial court's finding that Philip Morris engaged in "unfair" practices – one of the two theories Plaintiffs pled, tried and proved based on the CFA's independent prohibition of "unfair" conduct. *Robinson v. Toyota Motor Credit Corp*., 201 Ill. 2d 403, 417 (2002) (CFA permits recovery "for unfair as well as deceptive conduct"). With the exception of four fleeting sentences, the otherwise exclusive focus of Philip Morris' entire brief is Plaintiffs' distinct "deception" theory of liability.

"When there is a general verdict and more than one theory is presented, the verdict will be upheld if there was sufficient evidence to sustain either theory." *Dillon v. Evanston Hosp.*, 199 Ill. 2d 483, 492 (2002). Here, there was not only a general judgment, but explicit findings of liability on ***both*** of Plaintiffs' theories. In its only challenge to class certification (Br. at Section I), Philip Morris argues that "[i]n determining whether common issues predominate, courts look to the elements of the claim asserted," but Philip Morris goes on to examine only the elements of a CFA deception claim. Br. at 18. Philip Morris' discussion of the elements of a deception claim cannot substitute for a discussion of the elements of an unfairness claim because the elements are very different. The elements of an unfairness claim are: "(1) whether the practice offends public policy; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers." *Robinson*, 201 Ill. 2d at 417-18. Having ignored Plaintiffs' unfairness theory, Philip Morris has waived any challenge to the class certification of that claim.[16]

Similarly, Philip Morris' ***entire*** challenge to the trial court's "unfairness" finding on the merits consists of four conclusory sentences. Br. at 55. Supreme Court Rule 341(e)(7) requires the argument

[16] Philip Morris should not be permitted to attempt to raise this issue for the first time in its reply brief either. *See* Rule 341(e)(7) ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.").

section of a brief to "contain the contentions of the appellant and ***the reasons therefor***, with citation of the authorities and the pages of the record relied on." "A court of review is entitled to have the issues clearly defined and to be cited pertinent authority. A point not argued or supported by citation to relevant authority fails to satisfy the requirements of Rule 341(e)(7)." *Dillon*, 199 Ill. 2d at 493. Where an argument lacks supporting authority in violation of Rule 341(e)(7), this Court may "consider th[e] matter waived." *Id*.

Philip Morris fails to explain how Plaintiffs' evidence fails to support a factual finding that Philip Morris' conduct with respect to Marlboro Lights or Cambridge Lights "offends public policy," "is immoral, unethical, oppressive, or unscrupulous" or "causes substantial injury to consumers" – the three "unfairness" factors. The single-sentence, conclusory allegation that the trial court "failed to provide any basis for its conclusion" (in its 51-page final order containing numerous detailed findings of fact) provides this Court no basis by which it could possibly "discern the question sought to be resolved." *Dillon*, 199 Ill. 2d at 493.

Philip Morris next makes the confusing assertion that "such a 'bare assertion of unfairness … is insufficient' to state a claim," apparently mingling two distinct issues: the bases for the trial court's finding of unfairness and the adequacy of Plaintiffs' unfairness allegations in the Complaint.[17] Similarly, in support of its statement that "a conclusory finding of 'unfairness' is also unconstitutionally vague and violates due process," Philip Morris cites without explanation a Supreme Court decision which stands for the unremarkable proposition that "an enactment" – ***not*** a trial court's allegedly "conclusory finding" of fact – "is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Perhaps Philip Morris means that the statute itself is unconstitutional – a claim that Philip Morris fails to articulate anywhere in its brief. In any event, these confused statements do not come close to complying with Rule 341(e)(7) and make it impossible for Plaintiffs to respond or for this Court to "discern the question sought to be resolved."

[17] Plaintiffs pled and proved and the trial court found that Philip Morris engaged in "one or more of the following unfair and/or deceptive acts and/or practices" which Plaintiffs then set out in detail in subparagraphs. SA 1358-1360 (Second Amended Complaint ¶¶ 29(a), (b), (e), (f) & (h); ¶¶ 33, 34) and SA 1274-1275 (trial court findings).

This Court should not and cannot afford to turn a blind eye to such a flagrant disregard of Rule 341's requirements. As this Court has admonished litigants, "[t]he rules of court we have promulgated are not aspirational. They are not suggestions. They have the force of law, and the presumption must be that they will be obeyed and enforced as written." *Bright v. Dicke*, 166 Ill. 2d 204, 210 (1995).

II. THE TRIAL COURT'S FINDING THAT COMMON QUESTIONS OF FACT AND LAW PREDOMINATED IS SUPPORTED BY THE EVIDENCE, AND PLAINTIFFS PROVED THE ELEMENTS OF THEIR CLAIMS.

A trial court "has a broad discretion in determining whether the action may be maintained as a class action and its determination should be given great respect by a reviewing court." *McCabe v. Burgess*, 75 Ill. 2d 457, 464 (1979). "The scope of appellate review is limited to an assessment of the trial court's exercise of discretion and does not extend to an independent, *de novo* evaluation of the facts alleged to justify litigation of the case as a class action." *Clark v. TAP Pharm. Prods., Inc.*, 343 Ill. App. 3d 538, 545 (5th Dist. 2003), *appeal allowed*, 201 Ill. 2d 560 (2002) (quoting *Avery v. State Farm Mut. Auto. Ins. Co*., 321 Ill. App. 3d 269, 279 (5th Dist. 2001)); *Carrao v. Health Care Serv. Corp.*, 118 Ill. App. 3d 417, 427 (1st Dist. 1983) (citing *McCabe*).

The sole class certification finding Philip Morris has challenged is whether common questions of law and fact predominated over individual issues. Philip Morris does not challenge the trial court's findings of numerosity or of the adequacy of the Class representatives[18] or Class counsel. Philip Morris does not even challenge the trial court's finding of the *existence* of common questions of law and fact. Rather, Philip Morris challenges only the trial court's finding that those common issues *predominated* over individual issues. Although it does take issue with the fourth requirement for class certification – that it "is an appropriate method for the fair and efficient adjudication of the controversy" – Philip Morris' actual objection is nothing more than a reiteration of its insistence that individual issues predominate: "certification of the class would not be fair to PM USA [because of] the sheer number and

[18] Philip Morris does in one sentence say that ***other*** courts have found ***other*** plaintiffs to be inadequate in ***other*** cases because they were held to have impermissibly split consumer claims from personal injury claims. Br. at 41. Philip Morris has not, however, challenged the adequacy of either Plaintiff Price or Fruth in ***this*** case. The permissibility of claim-splitting is discussed below in text, *supra* at 60.

complexity of ***individual fact issues***" depriving Philip Morris of any "meaningful opportunity ***to contest individual class members' claims***." Br. at 35. Thus, but for its contention that individual issues predominated, Philip Morris has really raised no independent objection to the fairness and efficiency of the class action adjudication of this case.

"[C]ourts frequently find allegations that the defendant engaged in a common course of conduct to satisfy the commonality and predominance requirements." *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 511 (D.N.J. 1997) (finding predominance based upon standardized representations and omissions). *See also* Fed. R. Civ. P. 23 advisory committee notes to 1966 amendments, subsection (b)(3) ("a fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action").

Illinois courts have applied the same rule, repeatedly holding that "[w]here a defendant is alleged to have acted wrongfully in the same basic manner as to an entire class, ***common class questions dominate the case.***" *Martin v. Heinold Commodities, Inc.*, 139 Ill. App. 3d 1049, 1060 (1st Dist. 1985) (emphasis added), *aff'd in part and rev'd in part*, 117 Ill. 2d 67, 82 (1987) ("We agree with the court that there is a common issue of fact in this case."); *McCarthy v. LaSalle Nat'l Bank & Trust Co.*, 230 Ill. App. 3d 628, 634 (1st Dist. 1992) (common questions predominated because class members were "harmed in the same manner in a series of similar transactions based on similar documents").[19]

"[A] claim will meet the predominance requirement when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position." *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 693 (D. Minn. 1995). *Accord Allapattah Serv., Inc. v. Exxon Corp.*, 333 F.3d 1248, 1260-61 (11th Cir. 2003); *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 136 (2d Cir. 2001); *In re Vitamins Antitrust Litig*., 209 F.R.D. 251, 262 (D.D.C. 2002). Here, the predominance requirement under the

[19] *See also Gordon v. Boden*, 224 Ill. App. 3d 195, 200-02 (1st Dist. 1991); *Gutansky v. Advance Mortgage Corp.*, 102 Ill. App. 3d 496, 500 (1st Dist. 1981); *Gowdey v. Commonwealth Edison Co.*, 37 Ill. App. 3d 140, 151 n.7 (1st Dist. 1976); *Brooks v. Midas-International Corp.*, 47 Ill. App. 3d 266, 273 (1st Dist. 1977) (superceded on other grounds); *P.J.'s Concrete Pumping Serv., Inc. v. Nextel West Corp.*, 345 Ill. App. 3d 992, 1003 (2d Dist. 2004); *Clark*, 343 Ill. App. 3d at 545-50.

Illinois CFA is "easily met" because it is "predicated upon a series of essentially identical transactions by thousands of purchasers, including Illinois residents, which were founded upon and arose out of identical language in the promotional offer prepared by defendant." *Miner v. Gillette Co.*, 87 Ill. 2d 7, 19 (1981). Philip Morris represented every pack of Marlboro Lights cigarettes to be "light" and to deliver "lowered tar and nicotine" when Philip Morris knew these representations to be false. Plaintiffs presented "generalized evidence" to prove Philip Morris' common course of unlawful conduct, Philip Morris' intent that consumers rely on its "Lights" and "lowered tar and nicotine" representations, and the injury Philip Morris' unlawful conduct caused to Class members. "Once this basic determination has been made, the fact that there may be individual questions, as proposed by defendant, will not defeat the predominating common question." *Id*. *Accord Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 625 (1997) ("Predominance is a test ***readily met*** in certain cases alleging ***consumer or securities fraud*** or violations of antitrust laws.") (emphases added).

A. Philip Morris' factual arguments are directly contrary to the trial court's factual findings which Philip Morris has not challenged as being against the manifest weight of the evidence.

Philip Morris focuses entirely on what *Philip Morris* claims were individual issues and ignores those issues which the trial court identified as both common and predominating at trial.[20] First, the trial court found, as this Court did in *Miner*, that "common issues of law predominate[d] because the Illinois Consumer Fraud Act applie[d] to the claims of all Class members." SA 1237. The court also identified common issues of fact including: whether Philip Morris intended Class members to rely upon its "Lights" and "lowered tar and nicotine" representations; whether Philip Morris' conduct violated the CFA; and whether that violation was willful and wanton. SA1237-1238. Other common issues included whether Philip Morris designed "Lights" to deliver the same levels of tar and nicotine as regular cigarettes and

[20] At several points in its brief, Philip Morris alludes to arguments Plaintiffs' counsel made at the class certification hearing more than two years prior to trial. However, the class certification order in the final judgment is the only one at issue on appeal; it represents the trial court's final view on the class certification issue and is based upon a fully developed factual record. *See Purcell & Wardrope Chartered v. Hertz Corp.*, 175 Ill. App. 3d 1069, 1076 n.2 (1st Dist. 1988) (pre-trial class certification order is interlocutory in nature "and may be adjusted or modified by the trial court at a later point in the litigation to accommodate any changes or newly discovered facts as they arise").

whether Philip Morris represented to Class members that "Lights" were safer or delivered lowered levels of tar and nicotine than regular cigarettes. By their very nature, these issues could not have been addressed through individualized evidence from Class members, and as even a cursory review of the transcript reveals, these were the dominant, pervasive themes at trial.

Of the common issues the trial court identified, Philip Morris only argues that one (whether each consumer received less tar and nicotine) raises individual issues. Br. at 19. The trial court, however, made an explicit factual finding that consumers did not receive less tar and nicotine from "Lights." It is therefore insufficient for Philip Morris simply to advance its own view of the evidence on appeal in support of its argument that Plaintiffs were required to present individual evidence on this issue. Rather, Philip Morris must first demonstrate that the trial court's finding that Class members did not receive less tar and nicotine from "Lights" was "contrary to the manifest weight of the evidence." *Ceres Ill., Inc. v. Illinois Scrap Processing, Inc.*, 114 Ill. 2d 133, 142 (1986). Philip Morris simply discusses the evidence which supports *Philip Morris*' arguments and views the evidence in the light most favorable to *Philip Morris*. That is the wrong analysis.

> A reviewing court should not overturn a trial court's findings merely because it does not agree with the lower court or because it might have reached a different conclusion had it been the fact finder. The trial judge, as the trier of fact, is in a position superior to a reviewing court to observe witnesses while testifying, to judge their credibility, and to determine the weight their testimony should receive. Consequently, where the testimony is conflicting in a bench trial, the trial court's findings will not be disturbed unless they are against the manifest weight of the evidence.

Bazydlo v. Volant, 164 Ill. 2d 207, 214-15 (1995). "A judgment is against the manifest weight of the evidence only when an opposite conclusion is apparent or when findings appear to be unreasonable, arbitrary, or not based on evidence." *Id*. at 215. This Court must "view[] the evidence in the aspect most favorable to the prevailing party below." *Ceres*, 114 Ill. 2d at 142. "[I]t is not enough to show that there is sufficient evidence to support a contrary judgment." *Id.*

All of Philip Morris' challenges to the trial court's class certification order are infected by Philip Morris' systemic failure to acknowledge its burden of overcoming those findings of fact which are inextricably intertwined with the trial court's class certification findings of predominance. Although

Philip Morris later concedes that the trial court's findings are subject to a manifest error standard of review[21] (Br. at 63), Philip Morris largely ignores the trial court's findings of fact (and the evidence supporting them) while arguing against the existence of predominating questions. By simply citing to the evidence most favorable to itself, Philip Morris has failed to meet its burden on appeal. *See Ceres*, 114 Ill. 2d at 142.

Philip Morris also argues that the trial court "applied the preponderance of the evidence standard instead of the clear and convincing standard" without any citation to the record. Br. at 63. However, Philip Morris has failed to show that the trial court applied the wrong burden of proof. Thus, not only has Philip Morris waived the issue by failing to provide "the pages of the record relied on," (*see* Rule 341(e)(7)), but the trial court must be presumed to have applied the correct standard. *See Foutch v. O'Bryant*, 99 Ill. 2d 389 (1984).[22]

In any event, Philip Morris should lose on the merits of this issue. Philip Morris first cites a 1909 decision of this Court which is inapplicable because it is a common law fraud case which predates the enactment of the CFA by more than 50 years. Philip Morris also cites two Appellate Court decisions, one of which simply assumes without discussion that the clear and convincing standard applies. *Munjal v.*

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[21] Citing federal cases, Philip Morris then immediately argues that "because the court adopted plaintiffs' proposed findings of fact *verbatim*, this Court should" employ some unidentified heightened level of review. Br. at 63. First of all, Philip Morris and Plaintiffs both submitted proposed final orders to the trial court. Contrary to Philip Morris' suggestion, the trial court did ***not*** adopt Plaintiffs' proposed order entirely without change. The court changed the proposed amount of the judgment by more than $11 billion, changed the proposed amount of punitive damages, changed the proposed percentage recovery for attorneys' fees, and imposed its own *cy pres* award. *Compare* SA 1277-1284 and C43365–70. In any event, whatever the law may be elsewhere, Illinois does not require heightened scrutiny of factual findings when a trial court adopts a party's proposed findings. *Shapiro v. Regional Bd. of Sch. Trustees*, 116 Ill. App. 3d 397, 404 (1st Dist. 1995) (observing that adopting without change a parties proposed findings has been found "a common and useful practice in complicated cases" and concluding that "the practice does not necessitate imposing a stricter standard of review"). Even the federal cases Philip Morris cites do not purport to alter the standard of review for findings proposed by a party and adopted verbatim by the trial court. *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1267 n.4 (7th Cir. 1995) (noting that it is acceptable for courts to adopt "many or most" of a parties' proposed findings and that doing so "does not alter our basic standard or review" which "remains deferential").

[22] Philip Morris failed to obtain a ruling from the trial court and cannot now complain of any error on this issue on appeal. *Feldscher v. E&B, Inc.*, 95 Ill. 2d 360, 365-66 (1983) (where party objected to the admission of testimony "but did not obtain a ruling on the question from the trial court," it waived the objection). Even in its post-trial motion, Philip Morris made absolutely no mention of the trial court's failure to apply the correct burden of proof. *See* C43454-55 (post-trial motion). The ***only*** mention Philip Morris ever made of this issue at trial was buried at page 105 of its proposed findings of fact and conclusions of law submitted to the court after trial. C43262.

Baird & Warner, Inc., 138 Ill. App. 3d 172, 183 (2d Dist. 1985) (noting that on one issue the plaintiffs failed to establish by clear and convincing evidence that the defendants were guilty of fraud). The other case is a First District case which is no longer followed in that district. *Cintuc, Inc. v. Kozubowski*, 230 Ill. App. 3d 969 (1st Dist. 1992). *But see Cuculich v. Thomson Consumer Elecs., Inc.*, 317 Ill. App. 3d 709, 717-18 (1st Dist. 2000) (adopting preponderance standard). "Based on the liberal intent of the legislature in enacting the Consumer Fraud Act," (*i.e.*, to afford a broader range of protection than the common law) the First, Third and Fifth Districts of the Appellate Court have held that the burden of proof under the CFA is the preponderance of the evidence standard. *Cuculich*, 317 Ill. App. 3d at 718; *Avery*, 321 Ill. App. 3d at 291; *Malooley v. Alice*, 251 Ill. App. 3d 51, 56 (3d Dist. 1993). Those decisions are well-reasoned, and this Court should adopt them. In any event, the trial court's findings (supported by substantial evidence) can withstand review under any standard of review.

B. Whether Philip Morris' conduct was unfair or deceptive in violation of the CFA and UDTPA were predominating common questions, Plaintiffs' generalized evidence supports the trial court's finding that Philip Morris violated both statutes, and Philip Morris has waived any challenge to this finding.

Philip Morris argues (without citation of any authority) that whether its "Lights" and "lowered tar and nicotine" representations were deceptive – and thus violated the CFA – depends on individualized proof regarding how Class members smoked the cigarettes. Br. at 19-20. That argument is wrong as a matter of law. Whether Philip Morris violated the CFA or UDTPA is not subject to determination on an "individual" basis. The legality of Philip Morris' conduct is judged by objective standards. Under the CFA, a deceptive act is one which creates the likelihood of deception or has the capacity to deceive. *People ex rel. Hartigan v. Knecht Servs., Inc.*, 216 Ill. App. 3d 843, 857 (2d Dist. 1991) ("An advertisement has been held to be deceptive on its face if it creates the likelihood of deception or has the capacity to deceive."); *Williams v. Bruno Appliance & Furniture Mart, Inc.*, 62 Ill. App. 3d 219, 222 (1st Dist. 1978) (same). Section 2 of the CFA prohibits "unfair or deceptive acts or practices . . . ***whether any person has in fact been misled, deceived or damaged thereby***." 815 ILCS § 505/2 (emphasis added). *See* UDTPA, 815 ILCS § 510/2(a)(5), (7) and (12). Individualized proof is therefore not even germane to

the issue of whether Philip Morris violated the CFA or UDTPA.[23] The legality of Philip Morris' conduct under the unfairness provision of the CFA is judged by a similarly objective standard. *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 417-18 (2002) (unfairness elements are: "(1) whether the practice offends public policy; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers").

On the merits, Philip Morris did not dispute at trial and does not now dispute that Marlboro Lights and Cambridge Lights are not "lighter" and do not deliver "lowered tar and nicotine" ***to every consumer***. In fact, at trial and now in its brief, Philip Morris admits that Marlboro Lights and Cambridge Lights do not "deliver[] less tar to all smokers"; according to Philip Morris, such a cigarette is a "fictional cigarette," "a hypothetical product." Br. at 30, 73. Philip Morris also admits that if smokers "were given the option to purchase … a hypothetical truly safer cigarette," "***any reasonable person would be less inclined to purchase the real-world Lights***." Br. at 73 (emphasis added). These admissions coupled with the substantial evidence introduced at trial clearly established Philip Morris' violations of the CFA and UDTPA not just by a preponderance of the evidence but beyond all doubt. The trial court thus acted well within its discretion in finding that Philip Morris' marketing of Marlboro Lights and Cambridge Lights as "light" and delivering "lowered tar and nicotine" was "deceptive" (*i.e.*, had the "capacity to deceive") and "unfair" in violation of the CFA and the UDTPA.

C. Whether Philip Morris intended Class members to rely on its "Lights" and "lowered tar and nicotine" representations was a predominating, common question of fact, and Plaintiffs proved through generalized evidence that Philip Morris intended for Class members to rely.

Although reliance is itself not an element of a CFA cause of action, a defendant's intent that class members rely on its representations ***is*** an element of the cause of action. *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 501 (1996). Obviously, the issue of *Philip Morris*' intent was a common question, a central theme of the trial, and it was subject to generalized proof. As discussed (*supra* at 19-20), Illinois

[23] Whether Philip Morris' violations ***caused harm*** to Plaintiffs or Class members is an analytically distinct question which Philip Morris attempts to sidestep by jumping immediately to a discussion regarding whether Class members "failed to receive less tar and nicotine." Br. at 19. Plaintiffs discuss that issue below at 25-31, 32-36.

courts have held time and again that a common scheme to defraud consumers constitutes not merely a common question of fact but a singularly important common question of fact that satisfies the predominance requirement and invariably trumps any individual questions. Philip Morris has not challenged the trial court's finding that "whether Defendant Philip Morris intended for the Class to rely upon these representations" was a predominating, common question of fact, a finding that was more than amply supported by the evidence. SA 1237-1238. Philip Morris has also failed to challenge the court's finding that Philip Morris did indeed intend for Class members to rely upon those representations, another finding that was also fully supported by the record. SA 1274. Both of the trial court's unchallenged findings should be affirmed.

D. Whether "Lights" are potentially more harmful than regular cigarettes was a predominating, common question of fact, and Plaintiffs proved through generalized evidence that "Lights" are potentially more harmful.

In addition to their two distinct legal theories (deception and unfairness), Plaintiffs also presented two distinct *factual* theories. First, Plaintiffs alleged that the representation of "lower tar" explicitly contained within the "lowered tar and nicotine" representation (and implicitly communicated by the descriptor "Lights") was misleading and unfair because Class members did not take in any less tar and nicotine from "Lights." Second, even if there were some *de minimis* number of Class members who took in slightly less tar, Philip Morris' "Lights" and "lowered tar and nicotine" representations were ***still*** misleading and unfair to all Class members because those representations are at best deceptive, unfair half-truths. The "tar" from "Lights" has an increased potential to cause harm because it is more mutagenic and contains substantially higher levels of 22 of the 25 most toxic constituents of cigarette smoke. Therefore, even if it were possible that the representation of "lowered tar" was true for some small segment of the Class, Philip Morris' "Lights" and "lowered tar and nicotine" representations were deceptive and unfair because "Lights" delivered more toxic tar. Philip Morris makes no argument that this issue required "individualized" proof from Class members.

1. Increased mutagenicity demonstrates that "Lights" increase the potential for harm as compared to regulars.

The undisputed evidence in this case is that each milligram of "Lights" tar is more mutagenic and more toxic than each milligram of tar from a regular cigarette. Dr. William Farone, former Director of Applied Research at Philip Morris in the 1970's and 80's, explained that the only difference of any consequence between "Lights" and regular cigarettes is the extent to which the filter is "ventilated." SA 252-254. The byproduct of this design change is increased "mutagenicity. It increases the chemical reactions that cause bad chemicals to be formed." SA 292. When ventilation is increased, "[t]he amount of mutagenicity per milligram of tar, per milligram of tar [sic], increases"; "you get essentially more toxicity from the Marlboro Light than you do from the [Marlboro] Regular." SA 277. *See also* SA 491 (Dr. Shields testifying that "in fact, when you smoke light cigarettes in a compensating way which means you're inhaling tar and other parts of composition, you actually also change the smoke chemistry"). As a consequence, the design change utilized by Philip Morris to reduce "machine" measurements of tar and nicotine for light cigarettes actually ***increases both*** their toxicity and mutagenicity (also called "biological activity," *see* SA 46).

Philip Morris' testing over the past 30 years has consistently revealed that the design distinction between Marlboro Lights and regular Marlboros leads to higher biological activity and increased potential to cause cancer.[24] Dr. Harold Burnley, Philip Morris' Vice President of Operations Planning, testified that Philip Morris has been conducting mutagenicity testing for as long as he could remember. SA 46. Similarly, Dr. Farone testified that during his tenure "other tests were abandoned in favor of [the Ames

[24] *See* SA 857 ("The assay [Ames] is sensitive for detection of mutagenicity of cigarette smoke condensate, robust, widely used, and accepted. It is routinely used at INBIFO [Philip Morris' German testing laboratory] for the reproducible discrimination of different cigarette types."); SA 840 ("The take-home-lesson from this experiment is that dilution of a cigarette appears to increase the activity of the WSC [whole smoke condensate] (more dramatically for some cigarettes than for others)"); SA 844 ("This result strengthened our conclusion that filter dilution acts to increase WSC [whole smoke condensate] activity."). Thus, Philip Morris was not only aware that Marlboro Lights were more mutagenic than Marlboros Reds, but it also understood that increased filter ventilation/dilution was the cause. *See* SA 848 ("Increased porosity and ventilation will lower the air flow through the cone and increase the specific mutagenicity."); SA 846 ("From these studies, filter ventilation appears to be the outstanding cigarette parameter which effects CSC S/M [cigarette smoke condensate Salmonella/microsome] activity the most."); SA 854 ("Mutagenicity of mainstream smoke condensate is influenced by … filter ventilation").

test] because of its higher correlation with tumorigenicity tests[.]" SA 297. Indeed, he testified that "the mutagenicity studies that we did at Philip Morris were used as an indicator for not only just mutagenicity, but also for carcinogenicity." SA 263.

When Philip Morris' expert witness and long-time employee, Dr. Richard Carchman, was asked on cross-examination if he agreed with Dr. Shields "that the Ames study data was important information, was a major red flag in the context of Philip Morris's product design testing," he testified, "Yes. I totally agree." SA 72-73.

> Q. [Dr. Shields] has stated that to do nothing with the positive Ames results in terms of publishing them for the public health community was dangerous, reckless and immoral. Do you agree with that?
> A. I believe if you have positive Ames results on cigarettes that was not available, not published, then it is wrong not to publish them if the information was available.

SA 73. Philip Morris documents leave no doubt that Philip Morris also understood that increased mutagenicity was predictive of increased carcinogenicity. *See* SA 1211 ("There appeared to be a correlation between the level of response in the Ames/Salmonella assay and the pattern of positive carcinogenicity findings."); SA 833 ("Salmonella typhimurium – Generally good correlation with skin painting results.").

Another Philip Morris expert witness, Dr. Jerry Whidby, a retired Philip Morris scientist of 26 years and current litigation consultant exclusively for Philip Morris, testified that if increased ventilation increased biological activity, "***using ventilation, increased ventilation, would be under question***." SA 515-516 (emphasis added). Similarly, Dr. Burnley explained that "biological testing is used to determine the suitability of a product change," and he agreed that more biological activity per milligram of tar (*i.e.*, specific mutagenicity) is worse rather than better. SA 47-48. He further agreed that "if a biological testing score went up, more investigation would be needed." SA 48.

Based upon Philip Morris' own test results, both Drs. Shields and Farone concluded that Philip Morris' design of Marlboro Lights and Cambridge Lights resulted in "***a more dangerous product***" by increasing the cancer-causing potential of the smoke. SA 492-493 (Dr. Shields). Dr. Farone testified:

Q. Do you have an opinion to a reasonable degree of certainty as to whether or not Marlboro Lights and Cambridge Lights cigarettes are ***a more harmful product*** than their regular counterpart?
A. I do.
Q. And what's your opinion?
A. I believe they are. I conclude that they are.

SA 287.[25]

Philip Morris argues that "because Dr. Shields' testimony failed to link mutagenicity to disease risk, his testimony was … irrelevant and provided no support for the court's 'more harmful' finding." Br. at 67. That is wrong. Dr. Shields testified that "Lights" are "***a more dangerous product***," and he based that opinion on the standard used widely in government and industry alike for assessing the relative safety of consumer products: mutagenicity testing. SA 478-479, SA 481, SA 482-483. Specifically, Dr. Shields testified that the Ames test for mutagenicity (the test Philip Morris used to test "Lights") is widely used by industry (the pharmaceutical industry, for example) and by governmental agencies to test the safety of consumer goods. SA 480-481. The Food and Drug Administration also uses mutagenicity testing for judging the safety of food additives and drugs, and the Environmental Protection Agency uses it to evaluate and treat water chemicals and air pollution. SA 480-481. He also testified that the government bases its determination of "possible human carcinogens … upon just laboratory data, animal data, and that stuff gets regulated so we don't get exposed." SA 483. Thus, Dr. Shields' testimony ***did*** link mutagenicity to ***product safety*** – the issue on which he offered his opinion.

Philip Morris also challenges Dr. Farone's conclusion that Marlboro Lights and Cambridge Lights are "***a more harmful product***" than regular cigarettes. Br. at 67. Philip Morris goes even further in its challenge to Dr. Farone's testimony, arguing that his testimony "should have been excluded under the *Donaldson* test." *Id*. Under *Donaldson v. Central Illinois Public Service Co*., 199 Ill. 2d 63, 77 (2002), "[i]f the underlying method[s] used to generate an expert's opinion are reasonably relied upon by the experts in the field, the fact finder may consider the opinion – despite the novelty of the conclusion

[25] *See also* SA 255 (Dr. Farone: "a milligram of tar from the Marlboro Light is actually more toxic in its chemical composition than the regular."); SA 488 (Dr. Shields: Philip Morris had test results indicating "that [its] product design change could make it more dangerous in people" and that it was not an acceptable choice "to just keep doing the same testing over and over again and making a harmful product potentially more harmful.").

rendered by the expert." Philip Morris does not challenge Dr. Farone's qualifications as an expert on the subject of product safety. Philip Morris itself hired Dr. Farone to "evaluate and help them improve their development of safer cigarette products," and he served as Philip Morris' Director of Applied Research from 1977 through 1984. SA 255-256, SA 251, SA 288. Like Dr. Shields, Dr. Farone testified that the Ames test for mutagenicity is used by other industries for "product testing." SA 276, SA 265. "And it's required actually in some EPA submissions now and FDA submissions …. [T]he Ames test dose responses are required submission for most chemicals." SA 276. "[T]he mutagenicity studies we did at Philip Morris were used as an indicator for not only just mutagenicity, but also for carcinogenicity." SA 263. "[I]t's a predictor of skin painting results, which were considered a predictor of carcinogenicity. So, in a way it's a predictor of one level removed of carcinogenicity." SA 276. Thus, just as with Dr. Shields, Dr. Farone's testimony ***did*** link mutagenicity (as measured by Philip Morris' own product testing for the past 30 years) to ***product safety.*** Even Philip Morris' expert, Dr. Carchman, agreed that for certain classes of compounds, there is a very good correlation between mutagenicity and carcinogenicity. SA 70-71.[26]

Philip Morris' concession that Plaintiffs' evidence established that tar from a "Light" cigarette "was more 'mutagenic'" and "contained higher levels of certain harmful constituents" (Br. at 65) – clearly the type of information upon which a buyer would be expected to rely in making a purchasing decision – is, for all practical purposes, a concession that Plaintiffs proved that light cigarettes are "more harmful" for consumer fraud purposes. The trial court's finding that this was a predominating, common issue and its finding that Philip Morris violated the CFA and UDTPA by representing more mutagenic and more toxic cigarettes as "light" delivering "lowered tar and nicotine" are supported by the record and should be affirmed.

[26] See SA 1211 ("appeared to be a correlation"); SA 833 ("Generally good correlation").

2. The Massachusetts Benchmark Study: "Lights" are more toxic.

In 2000, Philip Morris released the results of a cigarette toxicity study which it (along with other cigarette manufacturers) conducted, known as the "Massachusetts Benchmark Study." The study measured the yields of tar and the various constituent toxins found in the smoke of certain commercial cigarette brands including both Marlboro and Marlboro Lights.[27] Jeffrey Harris,[28] M.D., Ph.D., performed a mathematical evaluation of the Massachusetts Benchmark data and concluded that in comparison to a regular Marlboro, each unit of tar from a Marlboro Lights cigarette delivers ***significantly higher*** levels of 22 of the 25 most toxic substances in cigarette smoke. *See* SA 1192 (graphical chart); SA 328-329. Based in part on his analysis of the Massachusetts Benchmark data, Dr. Harris testified that "there is reliable scientific evidence that would be accepted, to a reasonable degree of scientific certainty, supporting the proposition that Marlboro Lights is more harmful than Marlboro Reds to the human smoker[.]" SA 333; SA 330-332.

Philip Morris presented no testimony or other evidence to rebut Dr. Harris' analysis of the Benchmark data, data collected in tests that Philip Morris performed in its own laboratory. Instead, Philip Morris argues that because "[t]his evidence … made the comparison solely *on a per milligram basis* … [it] did not account for the fact that class members who did not fully compensate received fewer milligrams of tar from Lights" than from regular cigarettes. Br. at 65. Thus, Philip Morris concludes, Plaintiffs presented no proof "that they were exposed to any higher risk." *Id*. In other words, without

[27] The Massachusetts Benchmark Study was conducted by the cigarette industry as a voluntary response to proposed regulations issued by the Massachusetts Department of Public Health. SA 1172-1191.

[28] Dr. Harris is a full time Professor of Economics at MIT with a joint appointment in a program at Harvard Medical School. SA 321-322. He is also a full time practicing primary care physician at Massachusetts General Hospital. SA 321. During his career, Dr. Harris has served as a consultant to the National Cancer Institute; his 1994 presentation at an NCI conference ultimately became a published chapter in the NCI's *Monograph 7*. SA 323. He has been a consultant to the Massachusetts Department of Health, and has also served in an advisory capacity to the Centers for Disease Control, the Veteran's Administration, and the Consumer Products Safety Commission. SA 324-326. He has authored and served as an editor for several chapters in various Surgeon General's reports. SA 324-325. Dr. Harris has also testified by invitation before various Congressional committees, including the House Ways and Means Committee regarding a proposal to raise the federal cigarette tax; the Senate Judiciary Committee regarding economic issues in smoking, and the Senate Democratic Task Force on Tobacco. SA 326-327. Dr. Harris has written a number of articles relating to economics and tobacco. SA 337-338.

disputing that it exposed every single Class member to more toxic tar,[29] Philip Morris seeks to excuse its unfair and deceptive conduct by arguing that some Class members may have at least received less of the more toxic tar, completely ignoring the fact that Philip Morris promised "lowered tar" – not less of a more toxic tar. Philip Morris' promise of "lowered tar" but delivery of a more toxic tar – even if it were less for some Class members – was deceptive and unfair in violation of the CFA and UDTPA.

Next Philip Morris argues that Dr. Harris' "testimony was irrelevant and provided no support for the circuit court's finding that Lights were 'more harmful.'" Br. at 66. As Philip Morris notes, during cross-examination Dr. Harris did agree that "statistically significant changes in the composition of tobacco smoke" "do not necessarily translate into disease" and that it has not been "scientifically established using the standards that scientists would use" that smoking Marlboro Lights is more dangerous than smoking Marlboros. That, however, is the wrong standard for judging whether "Lights" are "more harmful." It does not matter in the context of this consumer fraud case whether the increased mutagenicity or the higher levels of toxins actually "translated into disease." Whether "Lights" are "more harmful" is a question which, in a consumer fraud case, must be judged from the *consumer's* perspective. The proper question is whether the increased mutagenicity and substantially higher levels of toxins was information of "the type … upon which a buyer would be expected to rely in making a decision whether to purchase" a cigarette represented as "Light" and "lowered tar and nicotine." *Connick*, 174 Ill. 2d at 505. The more toxic nature of "Lights" tar is clearly the kind of information upon which a buyer would be expected to rely in deciding whether "Lights" were safer or "more harmful" when making a cigarette purchasing decision. The trial court's conclusion that a consumer would be expected to rely on this information and would likely conclude that "Lights" are "more harmful" was well within the court's discretion.

[29] In fact, Philip Morris' concedes that "Plaintiffs' evidence established at most that the tar from Lights" "was more 'mutagenic'" and "contained higher levels of certain harmful constituents." Br. at 65.

E. Whether Marlboro Lights and Cambridge Lights are at least as harmful as regular cigarettes was a predominating, common question of fact, and Plaintiffs proved through generalized evidence that those cigarettes are at least as harmful.

The trial court also found that "Marlboro Lights and Cambridge Lights are just as harmful as regular Marlboro and regular Cambridge for all Class members in this case." SA 1252-1253. Philip Morris challenges this finding arguing that "it was undisputed at trial" that "at least some smokers did in fact receive less tar and nicotine from smoking Lights." Br. at 22. Philip Morris also argues that Plaintiffs Sharon Price and Michael Fruth failed to prove that they received less tar and nicotine because no "biomarker test"[30] was performed on them. Br. at 64.

Although Philip Morris argues that Plaintiffs' expert, Dr. Benowitz, "conceded[] the only way to determine whether an individual failed to receive lower tar and nicotine was to conduct a 'biomarker' test measuring nicotine levels in blood," (Br. at 64) Philip Morris fails to note that although biomarker tests could be performed on anyone, the results would be meaningless for purposes of this case. As Dr. Benowitz further explained, "the only way to do a compensation study in an individual would be to have measured cotinine before they switched and then measured cotinine after they switched. ***So, at this point in time there is no way to do a biomarker study for compensation***." SA 36. By definition, Class members either switched to "Lights" or initially chose "Lights" before this litigation began, and it is therefore impossible to measure their "pre-switch" cotinine levels which is a necessary part of a biomarker study. Philip Morris' biomarker argument is thus a complete red herring. In any event, the evidence presented at trial was more than sufficient to prove that Plaintiffs and Class members received the same levels of tar and nicotine from Marlboro Lights and Cambridge Lights as they would from Marlboro Reds or Cambridge.

Dr. Neil Benowitz testified that through unconscious smoking behaviors, Class members receive the same amount of tar and nicotine from "Lights" as from their regular counterparts. SA 19-21; SA 33.

[30]A biomarker test is a test of human blood, saliva or urine used to estimate a smoker's intake of tobacco toxins.

Q: Do you have an opinion to a reasonable degree of medical or scientific certainty as to the ***percentage of smokers who smoke in such a way to achieve their own desired level of nicotine*** from smoking on either a daily basis or on a per cigarette basis?
A: ***I think virtually all smokers do***.
Q: And when you will say virtually all, ***does that apply*** to addicted smokers as well as ***to those who may not be addicted***?
A: ***Yes***.
Q: Is that true whether you smoke a regular cigarette or a light cigarette?
A: Yes.

SA 22 (emphases added) (objection omitted). *See also* SA 587 ("there appears to be complete compensation for nicotine delivery, reflecting more intensive smoking of lower-yield cigarettes."). Dr. Benowitz's testimony refutes Philip Morris' claim that Plaintiffs' theory "is predicated on addiction," "that addiction is a highly individual issue," and that for this reason "the circuit court should have, but refused to, decertify the class." Br. at 21-22.

Dr. Benowitz based his conclusions on his review of published studies of compensatory smoking behavior during his work for *Monograph 13* – many of which Dr. Benowitz has performed himself. SA 25-26. Philip Morris argues "it was undisputed at trial that not every smoker compensates and not every smoker who compensates does so completely." What was actually undisputed, however, was Dr. Benowitz's testimony that there is no difference in human tar and nicotine exposure when comparing cigarettes in the machine-measured tar range of Marlboro Lights and Marlboro or Cambridge Lights and Cambridge. SA 27-28. This is true regardless of whether a smoker switched to "Lights" or smoked only "Lights" all along. SA 22-23. Dr. Benowitz's findings are also confirmed by Philip Morris' own internal testing from 30 years ago.

> Marlboro 85 smokers in this study did not achieve any reduction in smoke intake by smoking a cigarette (Marlboro Lights) normally considered lower in delivery. Conversely, the Marlboro Lights smokers did not increase their smoke intake when they changed to the regular delivery cigarette.

SA 821.

Dr. Farone also testified – based upon his own experience at Philip Morris – that Philip Morris set out "to make a 'low tar' cigarette that was as close to Marlboro Red the regular cigarette as they could possibly make it." SA 255; SA 258 ("it was designed to be as similar to Marlboro Regulars as possible").

> Q. [I]f people smoke a Marlboro Light, are they designed to get the same amount of nicotine as a Marlboro Red?
> A. Yes, they were designed, and I interpret all to mean to a reasonable degree of scientific certainty statistically valid. I'm sure there's probably one smoker that it doesn't work for, or two, but we're talking about a very, very high level of confidence here, 99.9 percent.

SA 259-260.

> Q. [D]o you have an opinion as to whether throughout the class period, Marlboro Lights and Cambridge Lights have been designed to allow them – to allow the smokers of them to extract the same nicotine and, thereby, because of the relationship with tar, the same tar from the cigarettes as they would from a regular counter-part?
> A. Yes, I do.
> Q. What's your opinion?
> A. They were designed to essentially be the same.

SA 293-294.

Both Dr. Benowitz and Dr. Farone were also careful to point out that the machine-measured tar and nicotine differences between a Marlboro Red and a Marlboro Light (or a Cambridge and Cambridge Light) are relatively small.[31] SA 298-299 (Farone); SA 37 (Benowitz). "[T]here isn't any difference between a ten milligram product, for the most part, of tar and a fifteen milligram product. That difference is so small in that [machine] test that it's easy for people to overcome that difference when they smoke." SA 257 (Farone). When Dr. Benowitz specifically examined cigarettes with machine-measured nicotine yields which correspond to the "Light" and regular brands, he found "the same exposure from all the cigarettes, including the cigarettes that are like Marlboro and Marlboro Lights." SA 27. "[T]here is no difference in the exposures when you look at the popular light category and full flavor category." SA 27-28.

Recent epidemiological studies – studies of disease rates in populations – corroborate Dr. Benowitz's and Dr. Farone's testimony that "Lights" cigarettes are just as harmful as their regular counterparts. In this regard, Plaintiffs presented the testimony of Dr. Michael Thun, Vice President of Epidemiology and Surveillance Research at the American Cancer Society and co-author of Chapter 4 of

[31] By contrast, *Monograph 13* includes comparisons of the relative risks of smoking cigarettes with machine measured tar yields from 37 mg to less than 1 mg. The purpose of *Monograph 13* was to assess all design changes in cigarettes over the past 50 years. SA 642. In stark contrast, the comparison relevant to this case only involves Marlboro Lights, Cambridge Lights and their regular, counterpart brands (machine tar yields of 10-11 mg compared to 15-16 mg).

Monograph 13. SA 497. Dr. Thun testified that there is no evidence that the machine-measured tar difference between "Lights" and regular cigarettes leads to any disease reduction when comparing "Lights" smokers to regular cigarette smokers. SA 503-504. *See also* SA 1420, Harris, Thun, et al., *Cigarette Tar Yields In Relation to Mortality from Lung Cancer in the Cancer Prevention Study II Prospective Cohort, 1982-8*, BRITISH MEDICAL JOURNAL 328:72 (2004) ("There was no difference in risk among men who smoked brands rated as very low tar (1.17, 0.95 to 1.45) or low tar (1.02, 0.90 to 1.16) compared to those who smoked medium tar brands."). Philip Morris offered no expert to contradict Dr. Thun.

The testimony of Drs. Benowitz, Farone and Thun, along with Philip Morris' internal studies and documents, amply support the trial court's conclusion that "Lights" are not any safer than regular cigarettes. Philip Morris' admissions that "Lights" are not safer permits no other conclusion. The evidence at a bare minimum supports the conclusion that, more likely than not (the preponderance standard), Plaintiffs and Class members did not receive lower tar and nicotine from their Marlboro Lights and Cambridge Lights. With respect to this issue, the trial court did not abuse its discretion and this predominating common question further supports the trial court's class certification.

Philip Morris seems to concede the certifiability of "a class action involving a representation by the defendant that its orange juice was 100% pure." Br. at 20. Philip Morris then attempts to distinguish that case, *Gordon v. Boden*, 224 Ill. App. 3d 195 (1st Dist. 1991), by arguing that "[w]hether or not the juice really was 100% pure can be answered by a single test[.]" Br. at 20. Although there is no comparable test which can be applied here, the substantial scientific and medical proof that ***is*** available has caused eminent scientists and medical doctors to conclude to a reasonable degree of scientific and medical certainty that all smokers receive the same tar and nicotine from Marlboro Lights and Cambridge Lights as they would receive from a regular Marlboro or Cambridge.

Philip Morris insists this case is instead more like *Kelly v. Sears Roebuck & Co.*, 308 Ill. App. 3d 633 (1st Dist. 1999), where Sears was accused of selling old car batteries as new, although the plaintiff was unsure whether he personally received one of the old batteries or a new one. In this case, however,

all Class members received the same product, a product which Plaintiffs proved Philip Morris designed to deliver to smokers the same levels of tar and nicotine they would inhale from the regular brand and which, in fact, delivered to smokers the same levels of tar and nicotine. The trial court's finding that this was a predominating issue and its finding that "Lights" are just as harmful should be affirmed.

F. Whether Class members' claims are barred by the statute of limitations defense was an easily resolved, predominating common question because no one could reasonably be expected to have discovered prior to 1999 that Marlboro Lights and Cambridge Lights do not deliver lower tar and nicotine.

"[C]ourts have been nearly unanimous ... in holding that possible differences in the application of a statute of limitations to individual class members ... does not preclude certification of a class action so long as the necessary commonality and, in a 23(b)(3) class action, predominance, are otherwise present." *Mowbray v. Waste Mgmt. Holdings, Inc.*, 189 F.R.D. 194, 199 (D. Mass. 1999) (citing cases). That is particularly true in this case where the evidence conclusively established that there is no "possible difference" in the application of the statute of limitations to the Class members in this case because no Class member could have discovered either the fact of his injury or that the injury was "wrongfully caused" prior to 1999.

"The statute starts to run when a person knows or reasonably should know of his injury and also knows or reasonably should know that it was wrongfully caused. At that point the burden is upon the injured person to inquire further as to the existence of a cause of action." *Witherell v. Weimer*, 85 Ill. 2d 146, 156 (1981). "The time at which a party has or should have the requisite knowledge under the discovery rule to maintain a cause of action is ordinarily a question of fact." *Jackson Jordan, Inc. v. Leydig, Voit & Mayer*, 158 Ill. 2d 240, 250 (1994). The evidence supports the trial court's conclusion that the statute of limitations defense did not present individual issues or bar Plaintiffs' or the Class' claims.

The "injury" in this case was the receipt of cigarettes which were more harmful than (or at least as harmful as) regular cigarettes. Until the publication of *Monograph 13* in October 2001, even members of the public health community – including the U. S. Surgeon General – were still recommending that smokers switch to "lower tar" cigarettes if they were unable to quit smoking altogether. SA 31-32. Dr.

Benowitz, the top U.S. expert on smoking compensation, testified that he "and other public health people felt that there was a benefit in reducing the yields of cigarettes." SA 32. *Monograph 13* represented a new consensus on the dangers of "low tar" cigarettes. SA 31 (Benowitz). In a November 27, 2001, press release, the American Medical Association described *Monograph 13*'s findings "that today's 'light' cigarettes have not brought about any reductions in the health risks of tobacco use" as "stunning." SA 889. Indeed, Philip Morris itself conceded that *Monograph 13* represents a "fundamental departure" from previous views of the public health community. SA 1392.

The reason that the public health community had not reached a consensus on the dangers of low tar cigarettes before 2001 is that prior to 1999, they had no access to the evidence which forged that consensus. As Philip Morris itself explains, it and other tobacco companies settled litigation with 46 states by entering into the Master Settlement Agreement in November 1998. The MSA "mandate[d] that vast numbers of internal industry documents be made easily available to the public." SA 1401. "The tobacco industry files now open to the public and available on the Internet constitute some 33 million pages of formal and informal memos, meeting notes, research papers, and similar corporate documents." SA 566-567. Plaintiffs' expert Dr. Burns (who has been an author, editor or reviewer of every Surgeon General's Report on smoking since 1975) testified that access to those internal documents "filled in the missing link" regarding the harm of "light" cigarettes. SA 59-60, SA 60-61. As Dr. Burns explained:

> The premise on to which [sic] low tar and nicotine cigarettes reduce disease risk is that the smoker will actually get less tar when they use those products. That had been what the expectation was. When we looked at the internal tobacco industry documents, we were able to understand that these cigarettes had been designed specifically to produce a low level when measured by machine but to have an elasticity of delivery when they were smoked by individual smokers.

SA 59. The information gleaned from those documents "allowed [public health] to bridge what had been a confusing conflict in the scientific evidence, that some of the epidemiologic studies showed a reduction in disease risk whereas we didn't see that when we looked at populations." SA 60-61.

Thus, though Philip Morris bore the burden of proving this affirmative defense, it presented no credible evidence that Plaintiffs or Class members could have learned of their injury prior to February 10,

1997 or any other time prior to 1999. Philip Morris merely cites in scattershot fashion mostly obscure references to the phenomenon of compensation – knowledge of which would not have apprised any Class member of his injury, much less that it was "wrongfully caused."

Philip Morris also cites the testimony of Susan Miles that "in 1995 or 1996, she saw a television program discussing the same limitations of the FTC method at issue here." Br. at 35. The experts have known of those "limitations" for three decades, but they still did not know what Plaintiffs needed to know to pursue their claims: that "Lights" deliver the same levels of tar and nicotine as regular cigarettes. There is nothing in the record which suggests that Susan Miles was somehow more informed than all of those experts.

"[A]n injured person is not held to a standard of knowing the inherently unknowable[.]" *Nolan v. Johns-Manville Asbestos*, 85 Ill. 2d 161, 171 (1981). Class members could not reasonably be expected to have discovered what the nation's leading scientists and doctors did not know. The trial court's conclusion that Class members could not have discovered their injuries and could not have discovered that those injuries were "wrongfully caused" before February 10, 1997, is a finding with which no "reasonable person" could disagree. *Schwartz v. Cortelloni*, 177 Ill. 2d 166, 176 (1997). Accordingly, the trial court did not abuse its discretion in concluding that the statute of limitations issue did not present individual issues that would predominate over common issues or that Plaintiffs' or the Class' claims are not time-barred.

III. PLAINTIFFS PROVED THAT PHILIP MORRIS' "LIGHTS" MISREPRESENTATIONS WERE MATERIAL AND THAT ITS CFA AND UDTPA VIOLATIONS CAUSED HARM TO THE CLASS.

A. Whether Philip Morris' misrepresentations were material was a predominating, common question, and the evidence overwhelmingly proves that they were material.

Under the CFA and UDTPA, information is "material" if it is "the type … upon which a buyer would be expected to rely in making a decision whether to purchase." *Connick v. Suzuki Motor Co.*, 174 Ill. 2d 482, 505 (1996). That is an objective standard which required no proof from individual Class members. Indeed, it is well established that when the FTC finds a claim to be deceptive, it may *infer* that

the deception is a material factor in the purchaser's decision. *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965). *See* 815 ILCS § 505/2 ("In construing this section consideration shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to Section 5(a) of the Federal Trade Commission Act."). Moreover, the FTC "considers certain categories of information presumptively material. First, the Commission presumes that express claims are material.… The Commission also considers claims or omissions are material if they significantly involve health, safety, or other areas with which the reasonable consumer would be concerned." SA 1410 (*FTC Policy Statement on Deception* (Oct. 14, 1983)). *See also In re Firestone Tire & Rubber Co*., 81 F.T.C. 398, 1972 WL 127476 (1972) ("We note at the outset that both alleged misrepresentations go to the issue of the safety of respondent's product, an issue of great significance to consumers."). In addition, Plaintiffs proved that Philip Morris' misrepresentations were material through the expert testimony of two nationally-recognized consumer behavior experts, both of whom opined that the false health reassurances inherent in the "Lights" and "lowered tar and nicotine" descriptors were important factors in Class members' decisions to purchase "Lights." *See* SA 100-101 (Cialdini); SA 208-210 (Cohen).

Instead, it argues that Plaintiffs failed to prove the "materiality" of Philip Morris' misrepresentations because Plaintiff Price (and some Class members) continued to purchase "Lights" even after learning of Philip Morris' fraud. According to Philip Morris, this makes the present case analogous to *Bass v. Prime Cable of Chicago, Inc.*, 284 Ill. App. 3d 116 (1st Dist. 1996). In *Bass*, cable customers had been induced to subscribe to cable service in part by a promise of a free cable guide. After initially providing the cable guide at no charge, the cable company later notified its cable subscribers that it would begin charging a fee for the cable guide. The plaintiff nevertheless continued to use the cable service and even subsequently ordered and paid for the guide. *Id*. at 127. The court held that the cable company's later termination of the free guide was not a material inducement as evidenced by the plaintiff's continued use of the cable service and purchase cable guide. The present case is distinguishable from *Bass* in a very fundamental respect.

Unlike the Plaintiffs in the present case, Plaintiff Bass was never promised a product with a particular attribute but surreptitiously provided a product lacking that attribute. Nor was Bass seeking recovery for amounts he paid for a misrepresented product. Rather, the cable company told Bass he would get a free cable guide with his subscription, and that was exactly what he received; the cable company never secretly charged him for the guide. When the cable company decided to terminate the free guide, it ***notified*** Bass first. Thus, it is clear that the court's conclusion about the materiality of the original promise of a free guide was assessed with respect to the relief the plaintiff was seeking on a going-forward basis: on that going-forward basis, the cable company's prior representation was obviously no longer material to plaintiff (if it ever had been), as evidenced by his continued subscription to both the cable service and the guide itself. *Id*. at 127. Significantly, the court never had occasion to address and did not address the historical materiality of the cable company's promise of a free guide when the plaintiff ***initially*** decided to subscribe to cable services. That critical fact distinguishes *Bass* from the present case.

Philip Morris promised Plaintiffs a product which for more than 30 years it never delivered – a product which Philip Morris now even concedes was a "hypothetical," "fictional" product. Br. at 30, 73. The fact that some consumers may now settle for real-world, "just as harmful" "Lights" after they learn the promised product was a complete sham does not mean that the false representation was not historically material to their original purchase decision to smoke "Lights." If Plaintiffs were seeking recovery for amounts they paid to Philip Morris ***after*** they learned of the fraud, the case could then be legitimately compared to *Bass*. Because Plaintiffs in this case seek recovery for amounts they paid to Philip Morris in the past under false pretenses, the case is very different from *Bass*.

Moreover, as Dr. Cialdini (*see infra* note 41) explained, there are perfectly valid reasons Class members might not stop smoking "Lights" after learning of the fraud, neither of which have to do with the materiality of Philip Morris' misrepresentations.

> [T]hey have come to prefer that taste by virtue of its repeated association with health. It has acquired the positivity that it didn't have before, all right? So, now you're asking them to move away from a taste that they now prefer, not the one that got them to switch, not the factor that got them to switch. Secondly, where are they going to go? What's the alternative that they have? They're going to go back to Reds that they don't like the taste of any more? No. They're going

> to stay with what they have made, which has been associated with health in the past and become positive and which they've made an active public commitment to many times.

SA 105-106.

Moreover, unlike cable service and as Philip Morris finally now admits (after more than 50 years of denial) cigarette smoking is addictive. SA 544 ("We agree with the overwhelming medical and scientific consensus that cigarette smoking is addictive."). Given the undisputed addictive nature of cigarettes which prevents many smokers quitting despite dozens of attempts, the fact that smokers continue smoking "Lights" even after learning of the fraud does little to undermine the common sense conclusion that health representations about cigarettes are material.[32]

Finally, the continued use of "Lights" by some Class members does not defeat the materiality of the fraud in their purchasing decision because there is no demonstrably safer or "lighter" cigarette available in the marketplace that would be an adequate substitute for the fraudulent, addictive product currently marketed. *See also* SA 455 (Susan Price testifying that she has no reason to change since "knowing what I know now" no other brand would be any safer). Undoubtedly, some Class members have grown accustomed to, and now prefer, the taste of "Lights." Philip Morris should not now be allowed to escape liability because its customers continue to consume its products, when it cannot identify a product for which its descriptors are true.

The materiality of Philip Morris' implicit health claim about a consumer product which kills 400,000 Americans every year is patently obvious. If a safer cigarette actually existed, that would clearly constitute information of a kind that would be important to a smoker and the kind upon which he would be expected to rely in making his cigarette purchase decision. Philip Morris does not really disagree: "[g]iven that choice [of a genuine Lights], any reasonable person would be less inclined to purchase the real-world Lights." Br. at 73. The trial court's findings that "materiality" was a predominating, common

[32] Recognition of the difficulty many smokers face in quitting smoking does not defeat the predominance of the common question of materiality which, to reiterate, is judged by an objective standard, as discussed above in the text, *supra* at 38.

issue and that Plaintiffs' proved the materiality of Philip Morris misrepresentations are thus supported by the record and should be affirmed.

B. Whether Philip Morris' "Lights" and "lowered tar" misrepresentations proximately caused Plaintiffs' and Class members' purchases of Marlboro Lights and Cambridge Lights was a predominating, common question, and Plaintiffs proved that proximate cause.

Philip Morris contends that Plaintiffs were required to prove that they and Class members were deceived by Philip Morris' misrepresentations ***and*** that Philip Morris' "deception caused each class member to purchase each pack of Lights during the 30-year class period." Br. at 18, 24-25, 26. Those are misstatements of the law. As a threshold matter, reliance is ***not*** an element of a CFA cause of action. *Connick*, 174 Ill. 2d at 501. Rather, to establish proximate causation in a "deceptive advertising [case] brought under the Act" a plaintiff must establish "that he was, ***in some manner***, deceived." *Oliveira v. Amoco Oil Co*., 201 Ill. 2d 134, 155 (2002) (emphasis added). As the Court reiterated earlier this year, "[t]he teaching of *Oliveira* and *Zekman* is that deceptive advertising cannot be the proximate cause of damages under the Act unless it actually deceives the plaintiff." *Shannon v. Boise Cascade Corp.*, 208 Ill. 2d 517, 525 (2004) (discussing *Oliveira* and *Zekman v. Direct Am. Marketers, Inc.*, 182 Ill. 2d 359 (1998)).

In both *Oliveira* and *Shannon*, the representative plaintiffs had never seen the false advertisements at issue and thus could not allege that they were "in some manner deceived," a fatal omission which required their cases to be dismissed. In the present case, it is undisputed that Philip Morris made the "Lights" misrepresentation to every single Class member every single time they purchased a pack of "Lights" because that explicit misrepresentation appeared on every single pack of "Lights" that Philip Morris ever sold. It is similarly undisputed that Philip Morris made the "lowered tar and nicotine" misrepresentation ***to every single Class member*** who purchased Marlboro Lights because that additional misrepresentation was also stamped on every single pack of Marlboro Lights Philip Morris ever sold between 1971 and March 2003. Indeed, it would be impossible for anyone to purchase those

cigarettes without explicitly asking for "Lights" or looking for the "Lights" name. Thus, the trial court's conclusion that *Oliveira* did not require decertification of the Class was unassailably correct.

Moreover, Plaintiffs were not required to prove that Philip Morris' misrepresentations were the sole, predominant or decisive factor in their decision to purchase "Lights." On the contrary, Illinois law is clear that proximate cause "need not be the sole cause." *Oliveira*, 201 Ill. 2d at 150 ("The requirement of reliance in fact is a requirement that the defendant's representation is one of the causes in fact of the plaintiff's harm, although it need not be the sole cause.") (quoting 2 D. Dobbs, LAW OF TORTS § 474 at 1358 (2001)). As explained in the RESTATEMENT (SECOND) OF TORTS, even in common law fraud actions:

> It is not, however, necessary that [a plaintiff's] reliance upon the truth of the fraudulent misrepresentation be the sole or even the predominant or decisive factor in influencing his conduct. ***It is not even necessary that he would not have acted or refrained from acting as he did unless he had relied on the misrepresentation***. It is enough that the representation has played a substantial part, and so has been a substantial factor, influencing his decision.

RESTATEMENT (SECOND) OF TORTS § 546 (1977) cmt. b (emphasis added). *See Oliveira*, 201 Ill. 2d at 150 (citing RESTATEMENT § 546 with approval). Rather, "any cause which, in natural or probable sequence, produced the injury complained of" is sufficient. *Capiccioni v. Brennan Naperville, Inc.*, 339 Ill. App. 3d 927, 937 (2d Dist. 2003). And as this Court has held, that is a factual issue whose "determination is best left to the trier of fact." *Connick*, 174 Ill. 2d at 504.

Philip Morris also argues that *Zekman* and *Oliveira* require that in class actions, every single class member must establish proximate causation through individual evidence. Nothing in *Zekman* or *Oliveira* (or now *Shannon*) supports Philip Morris' contention that Illinois law requires that there be myriad individual mini-trials in order to prove proximate causation in a CFA class action. This Court did not eliminate *sub silentio* the procedural devices afforded to class action plaintiffs in Illinois for decades. The undisputed facts that (1) Philip Morris made its misrepresentations to every single Class member with

every single purchase of "Lights,"[33] and (2) these representations were material (see Section III(A) at 38-42 above), entitled Plaintiffs to a presumption of causation for purposes of the CFA and the UDTPA. Even in the much more demanding context of common law fraud, this Court has approved the use of "various procedures … 'rules, mechanisms or presumptions … for mitigating the problem of showing reliance'" in class actions. *Steinberg v. Chicago Med. Sch.*, 69 Ill. 2d 320, 341 (1977). Those "procedures" include "inferring from the materiality of the misstatement that a reasonable investor would have relied; stressing general reliance on a common course of conduct over a period of time; dispensing with or minimizing the need to prove individual reliance in cases of nondisclosure." *Id*.

As courts have long recognized in common law fraud actions, the element of reliance need not be proven by direct testimony of reliance.[34] The evidence Plaintiffs presented supports the trial court's finding of causation in this case. First of all, outside the context of litigation, Philip Morris itself has never questioned that smokers universally understood "Lights" to mean "safer" until it was sued for its "Lights" fraud. Internal documents make abundantly clear that Philip Morris understood that the "principal reason" consumers began smoking "Lights" (and low tar cigarettes) was health concerns. *See, e.g*., SA 1167 ("The principal reason for switching to a low-tar is, of course, the health concern"); SA 885 ("[t]he appeal of low tars is simple and single – better for you, less harmful"); SA 861 ("The very fact, then, that a smoker has decided to switch from a full-flavor cigarette to a low-delivery cigarette tells us something very important about him: he is concerned about his health, and he is willing to do something about it.").

For more than thirty years, Philip Morris has recognized, has relied upon and has taken advantage of the fact that smokers do, indeed, understand the health implications of Philip Morris' "Lights"

[33] Philip Morris argues that, in a case involving repeated purchases of the same article, a consumer must prove that he or she re-visited his or her initial purchase decision and was "re-deceived" with each and every subsequent purchase. Philip Morris cites no authority for that proposition, and there is none.

[34] *See, e.g*., *State v. First Nat'l Bank of Anchorage*, 660 P.2d 406, 422 n.26 (Alaska 1982); *Frontier Exploration, Inc. v. American Nat'l Fire Ins. Co.*, 849 P.2d 887, 891 (Colo. Ct. App. 1992); *Sriver v. Maley*, 151 N.E.2d 518, 521 (Ind. Ct. App. 1958); *Wilden Clinic, Inc. v. City of Des Moines*, 229 N.W.2d 286, 292 (Iowa 1975); *Poulsen v. Treasure State Indus., Inc.*, 626 P.2d 822, 827 (Mont. 1981); *Owens-Corning Fiberglas Corp. v. American Centennial Ins. Co.*, 660 N.E.2d 770, 779 (Ohio Ct. Com. Pl. 1995); *East Providence Loan Co. v. Ernest*, 236 A.2d 639, 642 (R.I. 1968).

descriptor – not to mention the plain English meaning of Philip Morris' explicit "lowered tar and nicotine" claim. Philip Morris offers no good reason that the trial court should not have come to precisely the same conclusion in this case. If Philip Morris' arguments are accepted, consumer fraud class actions will largely be eradicated in Illinois, with defendants demanding individualized proof of the meaning of straightforward representations like "Lights," "lowered tar and nicotine," "free lighter," "100% natural orange juice" or "roast beef" – never before required under Illinois law. *See, e.g.*, *Miner v. Gillette Co.*, 87 Ill. 2d 7 (1981) (free lighter); *Gordon v. Boden*, 224 Ill. App. 3d 195 (1st Dist. 1991) (100% natural orange juice); *Hayna v. Arby's, Inc.*, 99 Ill. App. 3d 700 (1st Dist. 1981) (roast beef). However, it is deceptive and unfair business practices – not consumer class actions – which this Court has a "clear mandate from the Illinois legislature" to eradicate in all their forms. *Gordon*, 224 Ill. App. 3d at 206. The Court should reject Philip Morris' arguments.

C. The testimony of Drs. Cohen and Cialdini was grounded in scientific theory, based upon other evidence in the case including internal Philip Morris documents, and was therefore admissible.

Plaintiffs also presented the testimony of two nationally recognized social scientists and one of the nation's leading public health experts[35] all of whom testified that in their professional opinions, every Class member would have relied in some degree upon Philip Morris' "Lights" and "lowered tar and nicotine" misrepresentations. Philip Morris, however, challenges the foundation and thus admissibility of their testimony in implicit recognition that their testimony established proximate causation for the Class. Notably, Philip Morris does ***not*** challenge the sufficiency of their testimony to support the trial court's

[35] Philip Morris also challenges certain testimony from Dr. Michael Cummings. The trial court did not even mention the testimony of Dr. Cummings in its final judgment. Thus, even if Philip Morris had demonstrated some error in the admission of Dr. Cummings' opinion regarding smokers' perceptions about Lights, a subject addressed by two other plaintiff experts, that cannot possibly justify the reversal of the judgment. Dr. Michael Cummings holds a Ph.D. in Public Health and works in the field of cancer prevention and public health, and he has worked for over 20 years at the Roswell Park Cancer Institute where he is the Chairman of the Department of Health Behavior within the Division of Cancer Prevention and Population Sciences and the Director of the Smoking Control Program. SA 224-225. He has conducted research on smoking cessation for more than twenty years. SA 227. Significantly, Philip Morris has not challenged the admissibility of the majority of Dr. Cummings' testimony. Instead, Philip Morris takes issue only with his testimony relating to the reasons smokers smoke "Lights" and his conclusion that "there would be no other reason to smoke Marlboro Lights unless you thought you were getting less tar and that it would be better for you." SA 232. Dr. Cummings' extensive work with thousands of smokers clearly qualified him to render that opinion. SA 228-229, SA 230-231. Philip Morris' challenge to Dr. Cummings' testimony should accordingly be rejected.

finding of causation. Instead, Philip Morris challenges ***only*** the admissibility of their testimony. "The decision of whether to admit expert testimony is within the sound discretion of the trial court, and a ruling will not be reversed absent an abuse of that discretion." *Snelson v. Kamm*, 204 Ill. 2d 1, 24 (2003). *See* discussion *supra* at 28 (regarding admissibility of expert testimony).

1. Dr. Cohen's testimony was based on well-established scientific theory and substantial record evidence and was therefore admissible.

Dr. Cohen was a contributing author for *Monograph 7* and a peer reviewer of both *Monograph 13* and the 1989 Surgeon General's Report. SA 119-121. Dr. Cohen, Distinguished Service Professor of Marketing at the University of Florida, is an expert in the field of consumer psychology, consumer behavior and marketing, and survey research, with a career-long emphasis on consumer decision-making.[36] SA 115-116, SA 198, SA 120-121. Dr. Cohen has worked extensively on tobacco-related consumer psychology and consumer behavior issues, including a 1980 evaluation of the Surgeon General's cigarette warning, after which he issued a report advocating a rotational system of four different warnings, a system Congress later adopted. SA 119. He has also provided the very kind of expert advice and consultation to the FTC as he offered in this case. *See* note 36.

Philip Morris challenges the foundation and thus admissibility of Dr. Cohen's opinion that virtually ever Class member "believed that the words 'light' and 'lowered tar and nicotine' meant 'safer.'" Br. at 28. Dr. Cohen explained in detail the bases for his opinion. First, he described at length

[36] In 1972, the Federal Trade Commission asked Dr. Cohen to design research to examine the likelihood of consumer deception for consumer products. SA 116. Dr. Cohen has worked extensively with the FTC designing studies and evaluating studies and surveys on a wide range of issues involving motor vehicles, over-the-counter drugs, nutritional advertising for food products, cellular telephones, product labeling, consumer rights and consumer credit contracts. SA 116-117. When the FTC launched an investigation into R.J. Reynolds' "Joe Camel" youth advertising campaign, the Commission hired Dr. Cohen as its chief consultant on consumer behavior. SA 117-118. He has been reviewing tobacco industry documents produced in litigation since the early 1980's. SA 118. He has also worked with the Canadian government in litigation against the tobacco industry. SA 118. Dr. Cohen, who holds his Ph.D. in marketing, with an emphasis in consumer psychology and consumer behavior, from UCLA, spent six years as a professor at the University of Illinois, before joining the University of Florida as chairman of the marketing department in 1974. SA 117-118. Since 1975 he has also served as director of the University's Center for Consumer Research. SA 118. Dr. Cohen has published extensively in the fields of consumer behavior, marketing and social psychology in peer reviewed literature, such as the *Annual Review of Psychology*. SA 111-115. In addition, he has served on editorial boards of preeminent journals in the field of consumer behavior and marketing, including the *Journal of Consumer Research*, *Journal of Public Policy in Marketing* and *Journal of Marketing*. SA 113-114. Dr. Cohen's expertise in surveys and survey techniques includes, in addition to his doctoral training, his position as Director of Social and Behavioral Science Research at National Analysts, a leading survey research organization, where he was in charge of all government related surveys. SA 121.

what he called the "information environment" at the time Philip Morris introduced Marlboro Lights in 1971. SA 122-181. Based upon his years of studying the tobacco industry, Dr. Cohen traced the historical origins of the discovery of the connection between smoking and disease in the 1950's and how popular media reports of these findings created significant health concerns for smokers – "they are being told in the popular press that the real problem is tar[.]" SA 122-123. *See also* SA 776-810 (historical background). Dr. Cohen explained that for the next twenty years, "the information environment [was] inundated with information that tar was bad stuff and so [there] was a race among cigarette companies to prove to consumers that by smoking their brand of cigarettes, it would have less of this bad stuff, this tar." SA 181.

Dr. Cohen described how this widespread health anxiety for smokers can "be thought about in terms of the very important psychological concept called cognitive dissonance." SA 131-132.

> The individual will seek to reduce the tension. One way to do it is to stop smoking. Then smoking can kill me, I quit. Fine, no more dissonance. But as we have subsequently learned it's pretty difficult for many people to quit smoking. Many people tried repeatedly. With each failure there is an added conviction that I am unable to stop. Now consider the dissonance. I smoke, can't quit, smoking is harmful to me.

SA 131-132.

Philip Morris' own behavioral scientists examined the attitudes and behavior of smokers, finding the principle of cognitive dissonance useful "in making predictions about the strategies smokers use in responding to any information concerning smoking and health because once they are dissonant, then the theory makes predictions about how they will respond." SA 136. *See* also SA 131-144, SA 916, SA 918. Philip Morris attempted to address the dissonance created by the health consequences of smoking in two distinct (yet related) ways. First, they embarked on a disinformation campaign designed to cast doubt on every study published that was indicative of a relationship between smoking and disease as one strategy for "reducing dissonance for smokers thus leading them to continue smoking, especially for those who found it difficult to quit." SA 130-133, SA 146. *See also* SA 922 (Tobacco industry employed a "holding strategy, consisting of – creating doubt about the health charge without actually denying it"); SA 926-955; PX 67 (group of over 300 documents); SA 1000-1020.

Second, Dr. Cohen testified that Philip Morris "capitalized" on the information environment in the marketing of "light" cigarettes.

> What they had to do was connect a cigarette to low tar. In other words, the public had been led to believe and the information environment was abundant in the information that low tar meant healthier.
>
> So what a cigarette company had to do, including Philip Morris, was to connect a brand to less tar because then consumers would be led to conclude that that cigarette is healthier. In fact Philip Morris wouldn't even have had to say the cigarette is safer or healthier. People could connect the dots themselves.
>
> All people had to do was to say this cigarette Marlboro Lights, say, has lower tar and hence it's got less of the bad stuff that can kill you. It's safer. Philip Morris didn't have to say we have a safer cigarette.

SA 183-184. Philip Morris "could then link [its] cigarette to the reduction in tar, by simply saying, as it did on every package, lowered tar and nicotine, once it did that [sic], then ***the cigarette inescapably***, using the words from this paragraph, ***inescapably lea[d]s to the conclusion that the cigarette is safer***." SA 194-195 (emphases added).

Philip Morris' own documents reveal this two-pronged strategy to challenge the conclusion that cigarettes cause disease yet provide an implicitly safer alternative in the form of "Lights" for smokers concerned about their health. "In this way, we have protected our bridges behind us because we have not admitted there is a direct relation between smoking and health, and we are building new bridges ahead which we will need if there is a flood, but which we will not need if there is no flood." SA 1022. *See also* SA 956-957, SA 969-984, SA 999 (questioning link between smoking and disease). Marlboro Lights, a "health reassurance" cigarette, gave smokers a cigarette they perceived as having "less of the bad stuff," allowing them to reduce dissonance without quitting. SA 182-184. *See* SA 921 ("switching to low tar brands offers an alternative means of reducing their concern about their smoking").

Dr. Cohen explained his conclusions in terms of a "field of forces" theory of decision-making imported from physics to psychology and now widely used in other disciplines. SA 185-187. "[I]t's unchallenged modern economic theory" and "a fundamental model in all the social sciences." SA 189-190. As Dr. Cohen explained, cigarettes have a number of attributes, including image, price, flavor and the social acceptability of smoking. SA 187. Such attributes "do[n't] necessarily have to be a positive

attribute," but "there is only one attribute of cigarettes which is uniformly positive": health reassurance. SA 187-188.

> I think it is absolutely fair to assume that every single person would like to live longer, live healthier. And so a cigarette that said explicitly that this cigarette has lowered tar and nicotine directly implies improved health. It has to be a positive attribute, it can have no other function, other than to lead people to be more inclined to purchase the product.

SA 192-193. As Philip Morris itself recognized, "the largest group of all are people who are convinced that smoking is dangerous to their health, and they are torn between a conscience that urges them to quit, and a hedonistic desire to continue doing something they enjoy." SA 191 (discussing PX 32).

In all, Plaintiffs introduced close to 40 qualitative and other marketing studies (*see* PX 74, 75 Group) specifically designed to examine in-depth "what people think and how they think and why they think." SA 205. Dr. Cohen relied on much of that marketing research data which Philip Morris generated or commissioned specifically to determine why consumers were buying a particular product.[37] Those and other documents support Dr. Cohen's conclusion that Philip Morris unquestionably believed that ***the*** primary factor influencing smokers' decisions to buy "Lights" was the health reassurance associated with those products, which is precisely the pitch Philip Morris made to smokers. SA 195 (Cohen). *See* SA 873 (also marked as SA 871) ("implicit in the tobacco industry's promotion of the low delivery cigarettes is the assumption that less tar and less nicotine represent a 'safer' cigarette"); SA 531; SA 1022. *See also* SA 1215 ("a real marketing advantage is gained by calling attention to the delivery values … of low delivery cigarettes").[38] Thus there was both "generally accepted" theory and a substantial factual

[37] This marketing research data showed that: "a smoker would assume … that lower 'tar' and nicotine content means 'safer cigarettes'" (SA 1058); "[t]hose who are currently smoking 'Lights' do so because '…they are better for you …' than full flavor cigarettes" (SA 867); "[t]he appeal of low tars is simple and single – better for you, less harmful…" (SA 885); "[t]he principal reason for switching to a low-tar is, of course, the health concern …" (SA 1167); "The very fact, then, that a smoker has decided to switch from a full-flavor cigarette to a low-delivery cigarette tells us something very important about him: he is concerned about his health, and he is willing to do something about it." (SA 861); "Marlboro Lights – Core Image Associations: … Lower delivery/healthy. Marlboro Lights – Rational assets: …Healthy/low tar" (SA 1140-1141). *See also* SA 1147 ("Smoking of hi-fi's (rather than full flavor brands) is a result of a psychological need – for safety, at the expense of good taste.").

[38] *See also* testimony of Philip Morris CEO Morgan and Cullman, SA 393-395, SA 400, SA 401 and SA 221 (testifying that Philip Morris intended "Lights" to convey reduced tar and nicotine).

foundation for Dr. Cohen's opinion that Class members universally understood that "Lights" and "lowered tar and nicotine" meant exactly what Philip Morris intended it to mean: "safer." SA 208.

Neither Dr. Cohen nor Plaintiffs ever disputed that there are a number of variables, including taste,[39] relevant to consumers' cigarette brand choices. Contrary to Philip Morris' intimations, Dr. Cohen forthrightly acknowledged that Class members may smoke "Lights" for a variety of reasons "***in addition to***" (not "other than") health reasons. SA 212. Dr. Cohen explained that for his purposes, it was unnecessary to distinguish between these different influences or attributes in order to determine why Class members smoke their particular brand of "Lights," which corresponds with Illinois law that the misrepresentation must be a "substantial factor" – not a sole or determinative factor – in the purchase decision. SA 211. *See* text *supra* at 43. Dr. Cohen's testimony that health considerations had a "directional influence" on that decision may be "jargonistic," but it is not "a hedge that fails to meet the proximate causation test." Br. at 29. Dr. Cohen's bottom line opinion is unmistakable: Philip Morris' "Lights" and "lowered tar and nicotine" misrepresentations definitely contributed to Class members' decisions to smoke "Lights." SA 210. *See also* SA 94 (Cialdini) (the concept of improved health "is so universally positive that it would be a determining factor" in Class members' decisions to purchase "Lights").

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[39] Philip Morris' argument that smokers chose "Lights" primarily because they preferred the taste is disingenuous at best. The evidence at trial makes abundantly clear that taste was ***an obstacle*** to the marketing of "Lights." *See* SA 885, SA 1167, SA 1216, SA-894 (also marked as SA 898 and SA 902), SA 1147-1148. Moreover, Philip Morris has always known that after switching, smokers' taste preferences migrate to "Lights" because of the associated health benefit. SA 1152. Consumers' "taste preferences migrate adaptively" to the cigarettes they choose "[f]or reasons other than taste." The following illustrative example is taken directly from Philip Morris' own research:

> A woman smoker who participated in our recent Virginia State Fair smoking tests related that she had been an inveterate Camel smoker. Her husband persuaded her to shift to Philip Morris Multi-Filter. The first few packs she found not at all satisfying but with continued smoking she began to enjoy her smokes. When she had finished the carton, she bought a pack of Camels and found them much too strong. She has continued to smoke the Multi-Filter.
>
> ***The instance is cited because it is not singular***. In fact, it is typical of what seems to be happening in the market place … . ***For reasons other than taste satisfaction, smokers change over to high efficiency filter cigarettes, and with time, taste preferences migrate adaptively. It appears that mildness, initially tolerated, becomes preferred***.

SA 1152-1153 (emphases added). S*ee also* PX 75-FF (SA 1160) (also marked as PX 78 (SA 1165)) ("The consumer's 'ideal point' in terms of taste migrates rapidly to whatever he/she is currently smoking."); SA 894 (also marked as SA 898 and SA 902) ("In all cases, apparently the consumer comes to like or get used to the product and may find it somewhat unappetizing to switch back.").

Philip Morris also argues that Dr. Cohen's testimony relevant to causation was based on a "legally meaningless hypothetical": "type of Marlboro Lights class members would choose if presented with (1) 'the Marlboro Lights which Philip Morris actually sold,' and (2) 'a Marlboro Lights cigarette that really did deliver meaningfully less tar to all smokers [and] is identical to the Marlboro Lights [that] Philip Morris actually sold … in every non-health respect, including taste and price.'" Br. at 29-30. Philip Morris' only challenge to that hypothetical as being factually baseless is itself an astonishing admission to say the least: "this fictional cigarette – one that delivered less tar to *all* smokers irrespective of smoking behavior … never existed" "[i]n the real world." Br. at 30. The indisputable fact that Philip Morris categorically represented its cigarettes as "Lights" delivering "lowered tar and nicotine" to ***all*** smokers irrespective of smoking behavior was a more than sufficient factual basis for the question put to Dr. Cohen.

Moreover, the question was far from "legally meaningless." Philip Morris has cited no authority for the proposition that when a fraudfeasor promises its victim something that is non-existent in "the real world," the victim's preference for the promised product somehow becomes irrelevant. To the contrary, whether consumers would have chosen the promised "Lights" product (albeit "fictional") over the real-world "Lights" goes directly to the very heart of the materiality of Philip Morris' misrepresentation. In fact, Philip Morris essentially acknowledges this materiality when it admits that: "Given that non-existent 'choice,' any reasonable person would be less inclined to purchase the real-world Lights." Br. at 73.

Finally, Philip Morris challenges Dr. Cohen's testimony as mere "assumption" because it was not based upon any survey showing that 100% of "Lights" smokers believed "Lights" are safer. First of all, as noted, Dr. Cohen testified that among published surveys "there is substantial consistency among all reliable surveys that … consumers understand that lower tar cigarettes [are] safer." SA 198-199. Second, Dr. Cohen explained why survey evidence is only one part of the picture: the published surveys "have very, very different approaches." SA 213. For instance, his own survey "asked only about the numbers," "the tar numbers that appear in advertising. It has got nothing to do with the issues I was testifying about today." SA 213-214.

Moreover, Philip Morris cites no authority for the proposition that opinions like Dr. Cohen's are admissible only if based upon survey evidence yielding 100% uniform responses. The reason surveys should not be the *sine qua non* for determining Class members' beliefs has to do with various shortcomings and limitations of surveys. To begin with, unlike qualitative studies (such as focus groups), surveys do not permit any in-depth exploration of "what people think and how they think and why they think." SA 205. In addition, surveys suffer from problems of both "underreporting" and "overreporting."

Dr. Cohen explained why surveys which ask "belief" questions, such as those at issue in this case, "underreport" smokers' true beliefs. Dr. Cohen explained why in smoking surveys people underreport health reasons for choosing a low tar cigarette:

> [I]t is basically unpleasant to think about doing something very stupid, especially if that thing can injure your health. So people don't like to think about those things. And they don't like to admit to others that they do stupid things.
>
> So when asked questions in a survey about why you started smoking a light cigarette, or a low tar cigarette, people may not want to say it was health, and they may not even want to think about it. Because if you bring up health, you basically renew dissonance, you basically increase the level of anxiety about, what have I been doing all these years, have I been harming my health? And so some people would just rather not think about it. Just rather avoid it and not talk about it.

SA 206-207. That "would lead people, at least some people, to stay away from health as an answer, because they just don't want to talk about smoking cigarettes in relation to health." SA 207.

Dr. Cohen explained that many surveys fail to distinguish between the reasons a smoker chooses his *brand* of "Lights" and the reasons a smoker chose *any* "Lights" in the first place. For example, although a smoker initially chooses "Lights" for reasons relating to health risk reduction, she may have later switched to another brand of "Lights" for some other reason, such as taste. "Now, survey researcher comes along, and says, why did you start smoking your current brand?" SA 202. "[I]t presents a terrible problem for the survey researcher. If the survey researcher asks a straightforward question, why are you smoking the brand you are now smoking, in this case I guess Marlboro Lights, the person will honestly answer, taste." SA 203. "As a further problem, cognitive psychologists have established convincingly that the last decision you make is the more memorable one, in memory, for these kind of routine decisions. That is the more accessible piece of information." SA 204. To further complicate the analysis

of survey results regarding preferences for taste of "Light" cigarettes, Philip Morris' own research demonstrates that "Lights" smokers associate the "taste," "flavor," and "impact" with the health reassurance. *See* SA 1137 ("Lighter taste provides 'better for you' reassurance"); SA 1155 ("It may even be suggested that a cigarette will be acceptable to many current low delivery smokers only if it has the taste characteristics that they associate with a 'healthy cigarette' e.g. low in flavor, strength and impact").

During the rebuttal phase of trial, Plaintiffs further demonstrated why the surveys upon which Philip Morris so heavily relied were an unreliable measure of the critical issue posed by this case. Dr. Stanley Presser,[40] one of the nation's leading survey methodologists, testified for Plaintiffs, and Philip Morris does not challenge his testimony. Dr. Presser, like Dr. Cohen, testified that none of the surveys Philip Morris relied upon provides reliable data on the critical issue in this case: whether Class members chose "Lights" for health reasons. Dr. Presser examined in detail each survey Philip Morris presented and concluded that each survey was fatally flawed. According to Dr. Presser, every one of the surveys Philip Morris presented either utilized improperly framed questions or surveyed the wrong population.

Dr. Presser testified that many of the surveys Philip Morris presented were not relevant to the issue of whether consumers chose "Lights" for health reasons because they failed to survey an appropriate population. A 1984 Roper survey (DX 4423) was based upon a percentage of a sample of *all* adults, including both nonsmokers and smokers of non-light cigarettes – the wrong population. SA 439-441. A 2000 article (DX 4089) Philip Morris relied upon drew respondents from a population of *all* smokers – again, the wrong population. SA 444-446. A 2001 study (DX 4178) was also based on a question asked of *all* smokers, not just "Lights" smokers – yet again the wrong population. SA 446. (Dr. Presser

[40] Dr. Presser Ph.D., a Professor in the Sociology Department and in a Joint Program in Survey Methodology at the University of Maryland, and former Director of the Survey Research Center at the University, has served on the Board of Overseers of the General Social Survey at the University of Chicago Survey Center. SA 416; SA 419. Dr. Presser is also a former editor of *Public Opinion Quarterly* (the preeminent publication for survey research), and has served on numerous other editorial boards. SA 417, SA 420-421. He is the former President of the American Association for Public Opinion Research, the preeminent organization for survey researchers. SA 417-418. Dr. Presser has written extensively on the subject of survey methods, including a textbook frequently used in survey research courses, and he has drafted numerous surveys. SA 421-424. Dr. Presser has served as an expert survey consultant for the Attorney General of the State of Alaska, the Antitrust Division of the Justice Department and the National Oceanic and Atmospheric Administration. SA 422-423.

explained that this study was problematic also because respondents may have assumed they were asked whether "Lights" lower their risk compared to not smoking at all, due to the sequence in which certain questions were asked. SA 446-447.). The abstract of a 2001 study (DX 3412) makes clear that the results refer to *all* smokers, not just "Lights" smokers – the wrong population one more time. SA 448.

Dr. Presser also analyzed a 1999 article (DX 4493) based on a survey which asked respondents, "In the 12 months prior to Basic Military Training have you ever switched to a low tar/nicotine cigarette just to reduce your health risk?" Dr. Presser explained that the percentage of people who said "yes" to this question does not indicate how many "low tar" smokers believe that "low tar" cigarettes are safer. First, the survey was not limited to smokers of "low tar" cigarettes. Thus, respondents who answered "no" would have included smokers of regular cigarettes. SA 443-444. Second, for any smoker who had smoked "low tars" for more than twelve months, "no" would have been an appropriate response even if the respondent had indeed switched to "low tars" ***exclusively*** for health reasons. SA 443-444. Accordingly, in Dr. Presser's opinion, the survey results reported in the article provide no reliable information regarding the percentage of Lights smokers who purchased Lights for health reasons. SA 444. Thus, because these surveys surveyed the wrong populations, they provided no reliable answer to the relevant issue in this case: whether "Lights" smokers choose "Lights" for health-related reasons.

The rest of the surveys cited by Philip Morris were similarly unreliable because of the questions asked or the way the questions were asked. For example, a 1998 Gallup Survey (DX 3824) asked respondents, "Why do you smoke nonregular cigarettes?" Dr. Presser explained that the problem with this question is that it was an "open" question for respondents (allowing them to respond in their own words) but a "closed" question for the interviewers (requiring them to "fit" responses into several categories). SA 425. The format of the question generated a significant portion (30%) of unusable information from respondents and introduced significant "measurement variations." SA 426-428. To compound these problems, because respondents were allowed to give multiple answers and interviewers were only to record two of them, Dr. Presser explained that it is "impossible" to determine whether a respondent who preferred "taste" also provided a health-related response. SA 428-430. Moreover, many

of the recorded responses are meaningless for purposes of this case. SA 431-432. These limitations led Dr. Presser to conclude that the 1998 Gallup Survey is not informative about the percentages of "Lights" smokers who chose "Lights" for health-related reasons. SA 433.

Similarly, Dr. Presser explained that the data from the 1976 Roper study (DX 4402) does not provide any reliable indication of how many "Lights" smokers purchased "Lights" for health reasons because the survey questions required respondents to compare brands of cigarettes. Thus, respondents may have compared their brand of "Lights" to another brand of "Lights." SA 436-438. As a result, Dr. Presser concluded that the data derived from the survey was "not informative on the issue of what proportion of light cigarette smokers believe that light cigarettes are safer than regular cigarettes." SA 438.

Dr. Presser explained that a 2001 survey discussed in an article Philip Morris relied upon (DX 4432) was flawed because it was not possible to determine whether respondents who stated that they smoked "Lights" because they "prefer[red] the taste compared to Regular cigarettes" also responded that they smoked "Lights" "as a step toward quitting smoking completely," "to reduce the risks of smoking without having to give up smoking," "to reduce tar [they] get from smoking," and/or "to reduce the nicotine [they] get from smoking." SA 434. Dr. Presser therefore expressly disagreed with Philip Morris' expert's conclusion that the data cited in this article indicated that the predominant reason people smoke "Lights" was because they preferred the taste. SA 434-435.

Dr. Presser testified (as did Dr. Cohen) that Dr. Cohen's 1994 survey (DX 3004) was designed to measure the extent to which people understand tar and nicotine ratings. Dr. Presser testified that this survey was therefore not informative about the number of "Lights" smokers who chose "Lights" for health reasons. SA 441-442.

It was for these kinds of reasons that Dr. Cohen testified that the surveys upon which Philip Morris so heavily relied compared "apples and oranges and pineapple, it is a fruit salad." SA 213. The record thus clearly supports the trial court's factual conclusion that the surveys Philip Morris relied upon did not warrant the exclusion of Dr. Cohen's testimony and did not compel the conclusion that substantial

numbers of Class members were not misled and confused by Philip Morris' misleading and unfair use of the "Lights" and "lowered tar and nicotine" descriptors. The trial court did not abuse its discretion in admitting or relying upon Dr. Cohen's testimony, and it should therefore be affirmed.

2. Dr. Cialdini's testimony was based on well-established scientific theory and substantial record evidence and was therefore admissible.

Using four psychological principles of persuasion and influence – association, consistency, authority, and social proof – Dr. Robert Cialdini[41] analyzed the expected consumer impact of the language appearing on packs of Marlboro Lights and Cambridge Light cigarettes. SA 85-86, SA 90. These principles are widely accepted in the field of social psychology and are taught (from Dr. Cialdini's text) at every major university in the country. SA 78-79. *See also Davis v. Southern Bell Tel. & Tel. Co.*, 1994 WL 912242 at *3-4 (S.D. Fla. 1994) (finding that Dr. Cialdini relied on principles that met the validity standard imposed by Rule 702 and noting that he applied well-established general principles in his field). Dr. Cialdini testified that every Class member would associate the terms "Lights" and "lowered tar and nicotine" with the concept of health, and that Class members would have relied on that association *as one determining factor* in his or her purchase decisions of "Lights."[42] SA 93-94 ("light" "refers to healthier, less hazardous" and the concept of improved health and "is so universally positive that it would be a determining factor" for Class members); SA 95-96 ("lower tar and nicotine is once again associated with health" and "strengthened the association between light and health"); SA 99.

[41] Dr. Robert Cialdini is the Regents' Professor of Psychology at Arizona State University and past president of the Personality and Social Psychology Division of the American Psychological Association, whose focus is "the study of persuasion and social influence, especially … as they reflect on consumer persuasion and influence decisions." SA 74-77. His textbook *Influence: Science and Practice*, is a teaching text and required reading at the Stanford Business School, Harvard Law School and the Stanford Law School, and in psychology, communications, business, and law courses at more than 300 other universities. SA 78-79. Dr. Cialdini is also the author of a number of textbooks, including *Social Psychology, Unraveling the Mysteries*, an undergraduate social psychology textbook. In recognition of his lifelong contributions to the discipline of consumer psychology, Dr. Cialdini received the Distinguished Scientific Achievement Award of the Society of Consumer Psychology. SA 77. He has published extensively in the field of social psychology, particularly consumer influence and authored "numerous articles on the subject of influence and persuasion." SA 78-85. His book, *Influence: The Psychology of Persuasion*, is now in its third edition since its original publication in 1984. SA 82.

[42] Philip Morris argues that Dr. Cialdini "admitted" he could not conclude that 100 percent of the Class purchased Lights because they were deceived into believing they were safer. However, as Dr. Cialdini explained on re-direct, he has never been able to quantify the small percentage of people who do not value the health attribute as positive. SA 102.

Dr. Cialdini further testified that the principle of "consistency" forces people to reduce "cognitive dissonance." Because people desire to be "consistent" with the notion that they are personally prudent and health conscious, "Lights" provide smokers the ability to continue smoking and, simultaneously, to do something they believe is positive for their health. SA 97-98. Dr. Cialdini testified that Philip Morris' documents outlining its strategy for marketing "Lights" confirmed the relevance of these principles and corroborated his conclusions. SA 85-92. *See, e.g.*, SA 1167 ("The principal reason for switching to a low-tar is, of course, the health concern…").

The surveys upon which Philip Morris relies to attack Dr. Cialdini's testimony are the very same surveys discussed in the preceding section. For the same reasons those surveys did not require the exclusion or rejection of Dr. Cohen's testimony, they also did not require the exclusion or rejection of Dr. Cialdini's testimony. Accordingly, the trial court did not abuse its discretion in admitting or relying upon Dr. Cialdini's testimony, and it should be affirmed.

IV. PHILIP MORRIS HAS WAIVED MOST OF ITS DUE PROCESS ARGUMENTS, IT WAS NOT DEPRIVED OF DUE PROCESS IN ANY EVENT, AND THE CLASS NOTICE DID NOT VIOLATE DUE PROCESS.

A. Philip Morris' right to defend itself was not infringed.

While complaining about the introduction of general, class-wide proof against it, Philip Morris for the most part argues generally about the evidence admitted without ever identifying the specific evidence or testimony whose admission supposedly constituted a denial of due process. As discussed in Section I above, Rule 341(e)(7) requires the argument section of a brief to "contain the contentions of the appellant and ***the reasons therefor***, with citation of the authorities and the pages of the record relied on." In its drawn out discussion, Philip Morris attempts to raise at least ten unrelated issues, none of which are "clearly defined" or supported by citations to "pertinent authority." *Dillon v. Evanston Hosp.,* 199 Ill. 2d 483, 493 (2002). Philip Morris should be deemed to have waived all of them.

Even should the Court decide to address the issues Philip Morris attempts to raise, they have no merit. For instance, Philip Morris intimates without directly arguing that it is entitled to have only individualized evidence introduced against it. That argument has been roundly and soundly rejected, and

this Court should reject it too. In a recent consumer fraud cigarette class action, the court considered and rejected Philip Morris' "individualized proof" argument, concluding that "State legislatures, courts, and commentators have recognized that tools for aggregation are especially helpful in the context of consumer fraud, when the relatively low value of specific claims or the litigation advantages of a well-financed defendant can discourage individuals from pressing their claims in court." *In re Simon II Litig.*, 211 F.R.D. 86, 151 (E.D.N.Y. 2002).[43] The court specifically rejected Philip Morris' constitutional argument, noting that "[r]equiring such a horse and buggy interpretation for trials in a computer-guided-rocket age seems somewhat far-fetched." *Id*. at 154-55.

Philip Morris also complains about the testimony of Drs. Cohen, Cialdini and Cummings in the most general of terms (Br. at 36), although Philip Morris does not explain how the admission of their testimony violated any principle of due process. Rather, Philip Morris argues that it "could not directly rebut this testimony with evidence of what real class members believed because it had been precluded from taking discovery of even a representative sample of absent class members." Br. at 36. As a threshold matter, Philip Morris has not appealed ***any*** of the trial court's discovery rulings; not a single point Philip Morris has raised on appeal so much as mentions a discovery ruling, and none of the trial court's discovery orders are included in the "Orders Appealed From" section of Philip Morris' Separate Appendix. *See* PM Appendix Vol. 1 at i. Moreover, Philip Morris never sought discovery from a "representative sample" of Class members. Rather, less than four months before trial it requested for the first time discovery from ***all Class members***, a request it renewed just eight weeks before trial. C17566-581; C20566-578; C26557-558.

Philip Morris fails to acknowledge (much less discuss) the established balancing test for analyzing due process claims in this context. Philip Morris therefore predictably fails to demonstrate that it was denied due process. Whether a procedural device utilized where a private party invokes state

[43] *See also In re Antibiotics Antitrust Actions*, 333 F. Supp. 278, 289 (S.D.N.Y.), *mandamus denied*, 449 F.2d 119 (2d Cir. 1971) ("The court is confident that [statistical techniques] can be successfully utilized in the courtroom and that their application will allow the consumers to protect their rights while freeing the court and the defendants of the specter of unmanageability. In these circumstances the court cannot conclude that the defendants are constitutionally entitled to compel a parade of individual plaintiffs to establish damages.").

authority to deprive another person or entity of property comports with due process is determined by a balancing of interests:

> [F]irst, consideration of the private interest that will be affected by the [procedure]; second, an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and third, . . . principal attention to the interest of the party seeking the [procedure], with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections.

Hilao v. Estate of Marcos, 103 F.3d 767, 786 (9th Cir. 1996) (alterations in original) (quoting *Connecticut v Doehr*, 501 U.S. 1, 11 (1991)). *See also In re Simon II Litig.*, 211 F.R.D. 86, 152-53 (E.D.N.Y. 2002) (same).

Instead, Philip Morris cites an amalgam of inapposite cases in an attempt to cobble together a due process argument which dispenses with the required analysis. For instance, in *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970), the Court held that the plaintiffs had a due process right to an evidentiary hearing at which they are allowed to appear, present evidence and cross-examine adverse witnesses in connection with termination of their welfare benefits. As noted, the only witnesses to whom Philip Morris even refers are Drs. Cialdini, Cohen and Cummings. Br. at 36. Philip Morris deposed each of those witnesses at length, presented trial experts to rebut their testimony, cross-examined these witnesses at trial and even presented its own survey and statistical evidence in rebuttal.

Philip Morris also cites *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998), a case in which the plaintiffs' fraud claims were based on "the most dramatic" ***oral*** misrepresentations Meineke made to ***some*** absent class members with no proof that the named plaintiffs, much less the entire class, had ever heard those misrepresentations. *Id*. at 344. Likewise, the plaintiffs in *Broussard* "stitch[ed] together the strongest contract case based on language from various" franchise agreements that had no connection to the plaintiffs' contracts. *Id*. Nothing even remotely similar occurred in this case. Philip Morris made exactly the same written misrepresentation to every single plaintiff and every single Class member every single time they bought every single pack of "Lights." Moreover, Plaintiffs created no "composite" plaintiff in this case, and even Philip Morris makes no

serious argument that Plaintiffs did so. None of the problems present in *Goldberg* or *Broussard* exist in this case.

Philip Morris also claims unfairness and due process violations which ***may*** (according to Philip Morris) "extend even beyond this case" because the trial court preserved Class members' personal injury claims. Claim preservation is consistent with both the Restatement and this Court's prior decisions. The RESTATEMENT (SECOND) OF JUDGMENTS § 26(1)(b) (1982) provides that the doctrine of *res judicata* does not bar the prosecution of split claims that would otherwise normally have been barred under claim splitting rules if "[t]he court in the first action has expressly reserved the plaintiff's right to maintain the second action." The Appellate Court adopted this section of the Restatement in *Airtite v. DPR Ltd. Partnership*, 265 Ill. App. 3d 214, 219-20 (4th Dist. 1994), and this Court has on several occasions cited § 26(1) with approval. *See, e.g.*, *Nowak v. St. Rita High Sch.*, 197 Ill. 2d 381, 393 (2001). Philip Morris' claim splitting arguments are therefore completely meritless. Further, Philip Morris' vague reference to the "claim splitting rules in numerous other jurisdictions" are inapplicable since courts in every other jurisdiction will be bound to give Full Faith and Credit to the judgment in ***this*** case. *See Miner v. Gillette Co.*, 87 Ill. 2d 7, 15-16 (1981).

B. The trial court did not err in approving the pre-trial notice sent to the Class, and even if there was some deficiency in the notice, it can be readily cured in the post-trial notice which the Class must receive.

Philip Morris misstates the standard of review and ignores the evidence in the record supporting the adequacy of the notice provided. Philip Morris is wrong when it contends that the trial court's rulings concerning Class Notice are reviewed entirely de novo. The class action statute expressly authorizes "the court ***in its discretion*** [to] order such notice that it deems necessary to protect the interests of the class and the parties." 735 ILCS § 5/2-803 (emphasis added). Plaintiffs agree that any ***legal*** issues relating to the notice should be reviewed de novo. However, just like any other findings of fact, the trial court's findings relating to the notice are reviewed for abuse of discretion. *See, e.g.*, *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 168 (2d Cir. 1987) (with respect to class notice, "our standard of review is 'the

familiar one of whether the District Court was "clearly erroneous" in its factual findings and whether it "abused" its traditional discretion'").

The three alleged deficiencies argued by Philip Morris are: (1) the failure to provide individual notice to people listed on a database maintained by Philip Morris; (2) inadequate dissemination of the published notice; and (3) the failure to provide a separate notice before ruling on Class counsel's application for fees and expenses. As discussed below, the trial court acted well within its discretion in resolving each of these issues.

First, the trial court properly refused to order individual notice to the fraction of Class members whose names may have appeared on a Philip Morris database, "given the uncertainties regarding the completeness and accuracy of the list of its customers' names and addresses submitted by defendant Philip Morris Incorporated[.]" SA 1433. Courts have "not required notice by mail [where] the only lists of potential class members available were both over- and under-inclusive, causing the courts to conclude that notice by mail was unreasonable under the circumstances." *Macarz v. Transworld Sys., Inc.*, 201 F.R.D. 54, 60 (D. Conn. 2001) (citing *In re Domestic Air Transp. Antitrust Litig.*, 141 F.R.D. 534, 546 (N.D. Ga. 1992) and *Carlough v. Amchem Prods., Inc.*, 158 F.R.D. 314, 328 (E.D. Pa. 1993)). The effort to disseminate notice to absent class members must simply be "reasonable" in relation to "anticipated results, costs and amount involved." *Macarz*, 201 F.R.D. at 59. Plaintiffs presented expert testimony that the addresses in the database were "approximately 50% valid for mailing purposes[,]" based upon "a random sampling of the database" which was compared to "a nationwide [credit research] database of names, addresses, telephone numbers and social security numbers."[44] SA 1446. Philip Morris' own manager stated that "Philip Morris already has excluded from the available group tens of thousands of Illinois residents, who are smokers of Marlboro Lights and Cambridge Lights, because of

[44] As Philip Morris notes, the trial court indicated at one point that this testimony ***alone*** did not prove the database was unreliable. SA 1-2. However, Philip Morris neglects to mention that the trial court ***later*** concluded that, taking all the evidence into consideration, there was sufficient reason to doubt the reliability of the database. SA 1433.

'undeliverable' addresses." SA 1229-1230 (emphasis in original). The trial court did not abuse its discretion by refusing to order costly, individual notices based upon such an unreliable database.

Second, the notice approved by the trial court was reasonably calculated to reach most Class members. Plaintiffs' expert estimated notice "to have reached 86.39 percent of potential class members." SA 1434-1440. As Philip Morris concedes, the notice included publication in 18 regional newspapers throughout Illinois, two notices in the *Chicago Tribune* and *St. Louis Post Dispatch*, publication in *USA Today*, a press release to a newswire service which reaches 92 countries and approximately 8,300 media points throughout the world, and a website accessible throughout the world. SA 1438-1440, SA 1451-1454. The mere fact that Philip Morris presented conflicting testimony does not mean that the trial court abused its discretion by rejecting that testimony and approving Plaintiffs' proposed notice. Plaintiffs' expert testified that the Notice was "reasonably formulated to reach the target audience." SA 1440. Another factor upon which the trial court expressly and appropriately relied was the fact that there were two separate rounds of notice, one in 2001 and another in 2002. SA 1433. Philip Morris also argues that the class definition of persons who purchased Marlboro Lights and Cambridge Lights in Illinois[45] required a notice program which saturated global media. Philip Morris cites no authority for this extreme position, and Plaintiffs are not aware of any. The possibility that some Class members may reside in remote parts of the world exists in virtually any class action.

Third, no additional notice was necessary prior to the attorneys' fee award. As an initial matter, Philip Morris did not ask the trial court to order additional notice to the Class concerning Class counsel's petition for fees and expenses. "Issues raised for the first time on appeal are waived." *Jones v. Chicago HMO Ltd. of Ill.*, 191 Ill. 2d 278, 306 (2000). However, even if Philip Morris had preserved the issue of whether additional notice was required concerning Class counsel's fee application, there is no authority

[45] Plaintiffs' amendment of the class definition did not make the Class nation- or world-wide in the general sense of those terms. Throughout the case, the focus was on Illinois, not the rest of the world. Plaintiffs' motivation for amending the class definition was simply to conform the class definition to available proof of Philip Morris' light cigarette sales in Illinois and avoid the complication of trying to determine how many Illinois sales were to Illinois residents.

requiring such additional notice in the context of a case where a class received adequate pre-trial notice and the case proceeded to judgment on the merits.

Two of Philip Morris' three cases on this point concerned settlements, rather than trials, of class actions. *In re US Bancorp Litig.*, 291 F.3d 1035 (8th Cir. 2002); *In re Fine Paper Antitrust Litig.*, 751 F.2d 562 (3d Cir. 1984). In both cases, the court made the uncontested point that class members were entitled to receive notice of the settlement and an opportunity to participate in a fairness hearing relating to all aspects of the settlement, including the award of fees. *US Bancorp Litig.*, 291 F.3d at 1038; *Fine Paper*, 751 F.2d at 584. In *Client Follow-Up Co. v. Hynes*, 105 Ill. App. 3d 619, 626 (1st Dist. 1982), the Appellate Court held that there should have been an additional notice because there had been no court approved "notice" whatsoever; the only "notice" consisted of two newspaper articles about the case and "[n]either article was prepared at the direction of any court."[46]

Class notice serves two purposes. It "protects a defendant's interest in finality and the avoidance of multiple suits, while protecting absent class members' interests in not being bound by an action to which they did not consent." Br. at 42. Although unnecessary, both objectives could be reinforced with a post-trial notice in this case. The notice could provide Class members another opportunity to opt out and such additional notice would eliminate the risk that Philip Morris could be subject to successive suits by Class members who choose not to opt out. Plaintiffs are ***not*** advocating the adoption of any general rule dispensing with pre-trial notice in class actions. However, it would be an enormously wasteful and a monumental elevation of form over substance to reverse the judgment and require a third pre-trial notice based on an increasingly stale Philip Morris database of addresses, all in the name of protecting Class members' rights. The trial court's approval of the notice was well within its discretion and should be affirmed.

[46] The only other authority Philip Morris cites is Fed. R. Civ. P. 23(h)(1). However, that rule of federal procedure is not binding on Illinois courts and was not even required in federal courts prior to the adoption of subsection (h) on December 1, 2003, nearly six months after the conclusion of trial in the present case.

V. THE CIRCUIT COURT PROPERLY REJECTED PHILIP MORRIS' EXEMPTION AND PREEMPTION DEFENSES BASED UPON THE FEDERAL SCHEME GOVERNING CIGARETTE LABELING AND ADVERTISING BECAUSE NO GOVERNMENTAL AUTHORITY EVER APPROVED, AUTHORIZED OR REQUIRED PHILIP MORRIS' USE OF "LIGHTS" OR "LOW TAR" DESCRIPTORS.

A. The CFA does not immunize Philip Morris from liability because the FTC has never "specifically authorized" use of the phrase "Lights" or "lowered tar and nicotine."

The FTC has never "specifically authorized" the fraudulent use of ***any*** descriptor, and it would lack the legal authority to do so in any event. Faced with the stark reality that the FTC has never "specifically authorized" Philip Morris' use of any descriptor whatsoever, Philip Morris is forced to resort to an argument that the "specifically authorized" language of section 10b(1) of the CFA means something other than "specifically authorized": that it means nothing more than "compliance with federal law." Br. at 52. That argument is as groundless as a claim that the FTC "specifically authorized" Philip Morris' conduct.

As even Philip Morris' own expert agreed, the FTC is primarily a law enforcement agency charged with enforcing antitrust and consumer protection laws. SA 410. Philip Morris' expert also conceded that the FTC does not adopt trade regulation rules that "approve something" (such as "low tar" or "Lights" descriptors), and he agreed that the FTC has never adopted a regulation which approved the use of "Lights" or "low tar" descriptors. SA 411, SA 415. Moreover, Philip Morris has not – and cannot – point to a single FTC statement or document which ever held that any tobacco company has ever "substantiated" the use of such descriptors. (As part of its investigative and enforcement powers under the FTC Act, the FTC may require advertisers to "substantiate" – *i.e.*, support by "competent scientific and medical tests and studies" – claims they make in their ads. *See American Home Prods. Corp. v. FTC*, 695 F.2d 681, 692-93 & n.20 (3d Cir. 1982) (collecting cases).) And as Philip Morris' own corporate officials testified at trial, Philip Morris has never had any proof that its "Lights" are any safer than regular cigarettes. SA 359-360 (Lilly); SA 463 (Sanders).

The FTC has explicitly disavowed any "official" definitions of "light or "low tar":

> Cigarette manufacturers use a number of descriptive terms (such as "low tar," "light," "medium," "extra light," "ultra light," "ultra low," and "ultima") in advertising and labeling information

> about their cigarettes. … ***There are no official definitions for these terms*** but they appear to be used by the industry to reflect ranges of FTC tar ratings.

SA 1331 (Cigarette Testing; Request for Public Comment, 62 Fed. Reg. 48,158, 48,163 (Sept. 12, 1997)) (emphasis added). With no FTC regulation and no FTC "official definition" to rely upon, Philip Morris points to two FTC consent orders in proceedings against other cigarette companies as somehow constituting "specific authorization" of Philip Morris' use of "Lights" and "lowered tar and nicotine" descriptors, even though neither order involved any use of a "Lights" descriptor. A consent order entered in 1971 required American Tobacco Company (not Philip Morris) to "cease and desist from" advertising that its cigarettes were "low or lower in tar by use of the words 'low', 'lower', or 'reduced' or like qualifying terms unless the statement is accompanied by a clear and conspicuous disclosure of" the per milligram tar and nicotine content of the cigarettes and the cigarette to which it is compared as well as the per milligram tar and nicotine content "of the lowest yield domestic cigarette." DX Group 14(3).

The 1971 consent order did not mention "Lights," it did not define "low tar," and it did not establish a numerical standard for "low tar." Far from giving blanket approval to descriptive terms, if anything, the order was a clear indication that the FTC would consider comparative claims suspect. Moreover, the conditions the consent order imposed on American for using the words "low," "lower" or "reduced" are conditions with which Philip Morris has never complied in its use of the term "Lights" or "lowered tar and nicotine." Thus, Philip Morris' citation to the 1971 order for the proposition that "the FTC deemed descriptive statements based on FTC Method results to be *per se* substantiated" borders on frivolous. Br. at 47 (citing DX Group 14(3)).

Similarly, in 1995, the FTC again instituted enforcement proceedings against American Tobacco Company and the litigation was settled through a consent order and, once again, that consent order said nothing about "Lights," it did not define "low tar," and it did not establish a numerical standard for "low tar." DX 16(9). The order did not license American Tobacco (or any other tobacco company) to freely use descriptors such as "light" or "lowered tar and nicotine." Thus, the FTC never "specifically

authorized" Philip Morris' use of "Lights" or "low tar" descriptors by consent order, by rule, regulation or definition. Philip Morris' section 10b(1) defense should therefore be rejected.

Philip Morris' reliance on *Lanier v. Associates Finance, Inc.*, 114 Ill. 2d 1 (1986), is fundamentally flawed for one very simple reason: this case involves Philip Morris' active and direct misrepresentations that its cigarettes were "light" and delivered "lowered tar and nicotine." And as this Court explicitly held in *Jackson*:

> *Lanier* … does not confer a blanket immunization of assignees from liability under the Consumer Fraud Act. A plaintiff would be entitled to maintain a cause of action under the Consumer Fraud Act where the assignee's fraud is active and direct.

Jackson v. South Holland Dodge, Inc., 197 Ill. 2d 39, 51-52 (2001). In addition, as the court in *Jenkins v. Mercantile Mortgage Co.*, 231 F. Supp. 2d 737 (N.D. Ill. 2002), explained:

> *Lanier* involved the question of whether ICFA imposed higher disclosure requirements than TILA. The Illinois Supreme Court in *Lanier* held only that, where TILA was implicated and the defendant was in compliance, Illinois law does not impose greater disclosure requirements than those mandated by federal law. The *Lanier* court did not hold, as CST seems to contend, that merely because a party does not violate a federal law, it does not violate ICFA.

Id. at 752 (citation omitted).

This Court held in *Martin v. Heinold Commodities, Inc*., 163 Ill. 2d 33, 50 (1994) that defendant's "deception was neither specifically authorized by the [Securities and Exchange] Commission, nor in compliance with the Commission's regulations." Moreover, "literal compliance with disclosure regulations will not necessarily ensure that a violation of [federal] regulations has not occurred" because "[i]n certain circumstances, 'a customer may be deceived about [material facts] despite receipt of the information" required by federal law. *Id.* The same conclusions are true here. To reiterate, there are not even any FTC regulations with which Philip Morris has arguably complied. This Court should affirm the trial court's rejection of Philip Morris' section 10b(1) affirmative defense, and, for the same reasons, Philip Morris' section 4(1) defense on Plaintiffs' UDTPA claim.

B. The Cigarette Labeling and Advertising Act does not expressly preempt Plaintiffs' CFA and UDTPA claims.

In *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), the Supreme Court examined the preemptive scope of the Federal Cigarette Labeling and Advertising Act and held that the Act does not preempt fraud actions against cigarette companies.

> The central inquiry in each case is straightforward: we ask whether ***the legal duty*** that is the predicate of the common-law damages action constitutes a "requirement or prohibition based on smoking and health … imposed under State law with respect to … advertising or promotion," giving that clause a fair but narrow reading. As discussed below, each phrase within that clause limits the universe of common-law claims pre-empted by the statute.

Id. at 523-24 (ellipses in original) (emphasis added).

The Court held that "fraudulent-misrepresentation claims that do arise with respect to advertising and promotions (most notably claims based on allegedly false statements of material fact made in advertisements) are not pre-empted by § 5(b)." *Id.* at 528. Plaintiff Cipollone had also "allege[d] intentional fraud and misrepresentation both by 'false representation of a material fact [and by] conceal[ment of] a material fact.'" *Id.* These claims were not preempted because "[s]uch claims are predicated not on a duty 'based on smoking and health' but rather on a more general obligation – the duty not to deceive." *Id*. at 528-29.

> This understanding of fraud by intentional misstatement is appropriate for several reasons. First, in the 1969 Act, ***Congress offered no sign that it wished to insulate cigarette manufacturers from longstanding rules governing fraud***. To the contrary, both the 1965 and the 1969 Acts explicitly reserved the FTC's authority to identify and punish deceptive advertising practices–an authority that the FTC had long exercised and continues to exercise. This indicates that Congress intended the phrase "relating to smoking and health" (which was essentially unchanged by the 1969 Act) to be construed narrowly, ***so as not to proscribe the regulation of deceptive advertising***.

Id. at 529 (emphases added) (citations omitted). "It is inconceivable that placing warning labels on cigarette packages, in compliance with FCLAA, would give a cigarette manufacturer license to commit fraud." *Stationary Eng'rs Local 39 Health & Welfare Trust Fund v. Philip Morris, Inc.*, 1998 WL 476265 at *20 (N.D. Cal. 1998).

Thus, even if a claim implicates cigarette advertising and promotion, if that claim is based on a requirement or prohibition which is generally applicable and does not target "smoking and health," then

the claim is not preempted. *Cipollone*, 505 U.S. at 523 n.22. *See also Medtronic, Inc. v. Lohr*, 518 U.S. 470, 488 (1996) (noting that the preemption "statute in *Cipollone* was targeted at a limited set of state requirements – those 'based on smoking and health'").[47]

The CFA and UDTPA do not target "smoking and health." "The Consumer Fraud Act … is a general prohibition of fraud and misrepresentation." *Jackson*, 197 Ill. 2d at 46-47. Accordingly, Plaintiffs' claims are not preempted. The fact that some of Plaintiffs' allegations relate to smoking and health is irrelevant; the proper analysis is whether ***the state law duty*** at issue is based on smoking and health. *See Penn Adver. of Baltimore, Inc. v. Mayor and City Council of Baltimore*, 63 F.3d 1318, 1324 (4th Cir. 1995) (noting that if the preemption provision were "to be interpreted so broadly, the Supreme Court in *Cipollone* could not have allowed the continued prosecution of common law claims for breach of express warranty, misrepresentation, intentional fraud, and conspiracy – all of which relate generally to the effects on health of promoting the sale of cigarettes"). Even in *Lorillard v. Reilly*, 533 U.S. 525, 551-52 (2001), relied upon by Philip Morris, the Court emphasized that generally applicable laws were not preempted: "[r]estrictions on the location and size of advertisements that apply to cigarettes on equal terms with other products appear to be outside the ambit of the pre-emption provision. Such restrictions are not 'based on smoking and health.'"

Plaintiffs' claims are not the kind of "failure to warn" claims held preempted in *Cipollone*. In *Cipollone*, the Court held plaintiffs' claim that respondents failed to provide adequate warnings of the health consequences of cigarette smoking was preempted to the extent that Plaintiffs' "theory [would] require a showing that respondents' post-1969 advertising or promotions should have included additional,

[47] *See also Miele v. American Tobacco Co.*, 770 N.Y.S.2d 386, 391 (N.Y. App. Div. 2003) (finding the duty underlying plaintiff's fraudulent concealment claims is a state-law duty not to deceive); *In re Simon II Litig.*, 211 F.R.D. 86, 143 (E.D.N.Y. 2002) ("Manufacturers are subject to state laws prohibiting fraud and conspiracy. Such a cause of action – one based on the duty not to deceive – is permitted by *Cipollone*."); *Castano v. American Tobacco Co.*, 870 F. Supp. 1425, 1432-33 (E.D. La. 1994) (holding that "claims based on affirmative misrepresentations are not preempted"); *Burton v. R.J. Reynolds Tobacco Co.*, 884 F. Supp. 1515, 1521 (D. Kan. 1995) (holding that plaintiff's misrepresentation and fraudulent concealment claims were not preempted under *Cipollone*); *Filkin v. Brown & Williamson Tobacco Corp.*, 1999 WL 617841 at *2 (N.D. Ill. 1999) (finding plaintiff's fraudulent concealment claim was not preempted because it "does not derive from a 'duty based on smoking and health' but rather on a more general obligation – the duty not to deceive").

or more clearly stated, warnings.'" *Id.* at 524-25. However, Plaintiffs in the present case have not claimed that Philip Morris was under a legal duty to warn anyone of anything. Rather, Plaintiffs have claimed that it was unfair and deceptive for Philip Morris to make specific claims about its products – that they were "light" and delivered "lowered tar and nicotine." No one forced Philip Morris to use the terms, but having chosen to "speak," it has an un-preempted duty under state law to speak truthfully. As the Appellate Court has held:

> It is well established that a statement which is technically true as far as it goes may nevertheless be fraudulent, where it is misleading because it does not state matters which materially qualify the statement as made. In other words, a half-truth is sometimes more misleading than an outright lie.

St. Joseph Hosp. v. Corbetta Const. Co., 21 Ill. App. 3d 925, 952-53 (1st Dist. 1974).

Similarly, Plaintiffs' claims in this case are ***not*** "claims that the descriptors 'neutralized' the mandated warnings" as Philip Morris contends in its brief. Br. at 56, 58. This argument ignores the law, defies common sense, and disregards the evidence. Plaintiffs' claim is that Philip Morris' "Lights" and "lowered tar and nicotine" representations were false. *See Forster v. R.J. Reynolds Tobacco Co.*, 437 N.W.2d 655, 662 (Minn. 1989) ("[T]he cause of action [for intentional misrepresentation], in a preemption sense, does not lie in challenging the adequacy of the federal warning nor in claiming a dilution of that warning, but only in asserting the falsity of what the cigarette manufacturer has chosen to say."). Philip Morris made specific representations about its products: that they were ***lighter*** and delivered ***lowered tar and nicotine*** than their regular counterparts. A consumer can accept as true every word on the federally-mandated warning label and still be misled by Philip Morris' deceptive descriptors. As the tobacco companies themselves concluded in their confidential 1967 "Statement of Position": "The suggestion that less nicotine is 'safer' is not avoided by the warning now on cigarette packages. The warning would only remind the smoker that the lower nicotine cigarette is not necessarily completely safe. ***Obviously, the warning would not stop him from concluding that it is 'safer.***'" SA 1050 (emphasis added).

Philip Morris also argues that "the court admitted testimony that before 2002, Philip Morris had not disclosed information about compensation and actual tar and nicotine yields" and that "[t]he Court based its judgment on this failure to disclose, stating that 'it was not until the fall of 2002 that [PM USA] disseminated this knowledge.'" Br. at 57. That is a blatant misrepresentation of the record. The trial court did not cite that evidence in support of some failure to disclose theory of liability, but rather in response to Philip Morris' statute of limitations defense and Philip Morris' attempt to shift blame to the public health community for misperceptions about "Lights." SA 1257. Plaintiffs have not asserted a preempted failure-to-warn claim, and the trial court did not find Philip Morris liable on any such claim. Philip Morris' arguments to the contrary should be rejected.

C. FTC policies do not impliedly preempt Plaintiffs' claims.

To prevail on a claim of implied conflict preemption, Philip Morris needed to show: (1) it would be "impossible" for Philip Morris to comply with both Illinois and FTC requirements; or (2) Illinois law requirements stand as an obstacle to the accomplishment and execution of the FTC's purposes and objectives. *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995). Notably, Philip Morris cannot (and does not) claim that Plaintiffs' claims are impliedly preempted by Congress because the Supreme Court has already rejected a claim of implied conflict preemption based on the Labeling Act. "[I]n *Cipollone*, we engaged in a conflict pre-emption analysis of the Federal Cigarette Labeling and Advertising Act, and found 'no general, inherent conflict between federal preemption of state warning requirements and the continued vitality of state common-law damages actions.'" *Id*. at 288-89. Philip Morris instead argues that Plaintiffs' claims are impliedly preempted by FTC "policies." However, because there are no FTC regulations or orders governing the use of "Lights" or "low tar" descriptors, there can be no FTC regulations or orders with which this lawsuit could conceivably conflict.[48]

It is "not impossible" for Philip Morris to comply with both Illinois law and existing FTC "policy" regarding tar and nicotine machine ratings. Philip Morris can manufacture cigarettes with any

[48] Philip Morris' contention that this lawsuit somehow conflicts with some disembodied FTC "policy" is wholly unsupported because the only policies Philip Morris identifies are those relating to the "disclosure of tar and nicotine yields" in advertising. Br. at 60.

FTC machine tar and nicotine rating it chooses, and it can publish the FTC machine ratings of those cigarettes consistent with FTC "policy." What Philip Morris cannot do is claim that a cigarette has attributes it does not have. Holding Philip Morris liable for making false claims about its cigarettes will in no way interfere with the FTC policy regarding machine-measured tar and nicotine ratings. Indeed, in this case, Philip Morris' expert admitted that he could not point to any document that suggested the FTC intended to prevent states from regulating low-tar descriptors and that he was offering no opinion that it was FTC policy to prohibit state regulation of the term "Lights" on cigarettes. SA 412-414.

Finally, unable to point to any FTC decision or policy with which Plaintiffs' fraud claim conflicts, Philip Morris argues that "even an agency's decision not to adopt a regulation may suffice." Br. at 60. However, as a unanimous Supreme Court held in *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002), a "decision not to regulate … is fully consistent with an intent to preserve state regulatory authority pending the adoption of specific federal standards."

Philip Morris recently lost this same conflict preemption argument in a RICO case brought by the federal government, where the Department of Justice has alleged that Philip Morris "knowingly misled consumers with advertisements that suggested, for example, that 'light' cigarettes were less hazardous."

> State prohibitions of unfair or deceptive trade practices are not preempted *unless* they conflict with an express FTC rule. *American Financial Services Ass'n v. FTC*, 767 F.2d 957, 989-990 (D.C. Cir. 1985). Indeed, the Agency has long *encouraged* use of overlapping state deceptive practices statutes because problems in the marketplace exceed the Agency's enforcement capabilities. *Kellog Co. v. Mattox*, 763 F. Supp. 1369, 1380 (N.D. Tex. 1991).
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> * * *
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> In sum, the history of co-existence between the FTC Act and other statutes, both state and federal, directed at fraudulent and deceptive advertising, marketing and promotion demonstrates that the statute is not in conflict with the Government's RICO claims in this case.

United States v. Philip Morris Inc., 263 F. Supp. 2d 72, 78-79 (D.D.C. 2003). This Court should reject Philip Morris' argument, too.

VI. THE TRIAL COURT CORRECTLY REJECTED PHILIP MORRIS' FIRST AMENDMENT CLAIM.

Philip Morris has no viable First Amendment defense to Plaintiffs' deception claim as a matter of law because if the commercial speech at issue is misleading, "the speech is not protected by the first

amendment." *Vuagniaux v. Department of Prof'l Regulation,* 208 Ill. 2d 173, 190 (2003). *See Scott v. Association for Childbirth at Home, Int'l*, 88 Ill. 2d 279, 287 (1981) ("Since the Act prohibits only such speech as amounts to a fraudulent or deceptive practice, i.e., false or misleading advertising, it can affect only speech that is by definition outside the ambit of first amendment protection, and within the scope of permissible State regulation."). The trial court explicitly found that the evidence "establish[es] that Philip Morris recognized the ***inherent deception*** of offering cigarettes as 'Light' and 'Lowered Tar and Nicotine'" and found that Philip Morris' use of the terms "Lights" and "lowered tar and nicotine" was "false, misleading, deceptive and untrue." SA 1256, SA 1270. The trial court's rejection of Philip Morris' First Amendment defense should be affirmed.

VII. THE ISSUE OF DAMAGES WAS A PREDOMINATING, COMMON ISSUE, AND THE TRIAL COURT'S AWARD IS SUPPORTED BY THE EVIDENCE AND THE LAW.

A. The trial court's damages findings are subject to the deferential "manifest error" standard of review.

Philip Morris has not challenged the legal standard the trial court applied to determine damages under the CFA or UDTPA in this case. The parties agree that the applicable legal standard is supplied by this Court's decision in *Gerill Corp. v. Jack L. Hargrove Builders, Inc.*, 128 Ill. 2d 179, 196 (1989): "Under the benefit-of-the-bargain rule, which governs the damage computations in fraudulent misrepresentation cases, damages are determined by assessing the difference between the actual value of the property sold and the value the property would have had if the representations had been true." *See also* Br. at 70 (quoting *Gerill*). *See also Kinsey v Scott*, 124 Ill. App. 3d 329, 341 (2d Dist. 1984) ("damages in cases of fraudulent misrepresentation or concealment [are measured by] the value the property would have had at the time of the sale if the defects did not exist, minus the value the property actually had at the time of the sale due to the defects") (*cited in Gerill*). This is precisely the measure of damages Plaintiffs advocated and the trial court adopted. Thus, because the legal standard for the award of damages is not in dispute, the trial court's findings that the Class sustained damages and the amount of those damages are subject to review for manifest error. *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 543 (1996).

B. The proper measure of damages is the difference between the price paid by Class members for "Lights" and the value to Class members of the misrepresented "Lights" cigarette.

Dr. Jeffrey Harris M.D., Ph.D., (the MIT economics professor who is also a full time practicing primary care physician at Massachusetts General Hospital and who analyzed the Massachusetts Benchmark Study data, *see* note 28, *supra* at 30) testified for Plaintiffs. Dr. Kip Viscusi, a Harvard professor, testified for Philip Morris. At a general level, Drs. Harris and Viscusi essentially agreed that the correct economic model for measuring damages in this case is the difference between the price Class members paid for "Lights" and the value to the Class member of the "misrepresented" cigarette they actually received. In fact, Dr. Viscusi testified that the appropriate measure of damages for purposes of this case is precisely the measure of damages Plaintiffs used.

> Q. Alright. Now the damages done would be the difference between the price they paid and their willingness to pay for fake Lights?
> A. That's right.
> Q. O.K. And willingness to pay, you told us yesterday, is what? What is willingness to pay?
> A. It is the maximum amount that the consumer would be willing to pay for that particular product.

SA 506-507.

In addition, Dr. Viscusi acknowledged that all Class members would prefer to buy the genuine product promised (*i.e.*, genuine Marlboro Lights and Cambridge Lights) rather than the misrepresented or "fake" version of these cigarettes at the same price. SA 508 ("Q. As a matter of basic economics, wouldn't you agree that all Class Members would prefer to buy the genuine Marlboro Lights rather than the fake versions of those cigarettes at the same price? A. Sure, that is a basic rationality test."). Philip Morris acknowledged as much in its opening Brief on this Appeal. Br. at 73 ("any reasonable person would be less inclined to purchase the real-world Lights"). Thus, there can be no dispute that damages *existed* for the Class because every Class member would be willing to pay less for "fake" "Lights" than a "genuine" "Lights."

Dr. Michael Dennis of Knowledge Networks performed a valuation survey specifically designed to be consistent with the *Gerill* standard. First, the population surveyed was current and recently former

Marlboro Lights smokers. SA 236. The survey asked respondents questions regarding how much they would be willing to pay for Marlboro Lights if they had known the truth about them (*i.e.*, they delivered the same tar and were "just as harmful" as regular Marlboros). *See* SA 1088-1134 (Knowledge Network survey).

Respondents were asked questions about how much they would be willing to pay for the "just as harmful" Marlboro Lights if the "promised" Marlboro Lights (*i.e.*, the ones they thought they were getting) had also been available. The aggregate average amount that the respondents would have been willing to pay for the "just as harmful" Marlboro Lights if a genuine Marlboro Lights were available was 22.3% of the actual price of a pack of Marlboro Lights – a 77.7% diminution in value. Next, respondents were asked how much they would be willing to pay for the "could be more harmful" Marlboro Lights if the "promised" Marlboro Lights were available. The aggregate average amount that the respondents would have been willing to pay for the "could be more harmful" Marlboro Lights if a genuine Marlboro Lights were available was 7.7% of the actual price of a pack of Marlboro Lights – a 92.3% diminution in value.[49]

Dr. Harris calculated Class members' total expenditure for Marlboro Lights and Cambridge Lights for the relevant portion of the Class period[50] to be $7.6928 billion. SA 335-336. Philip Morris presented no evidence of a different amount and has not challenged the calculation of total consumer expenditure. Next, using the data generated by the Knowledge Networks survey, Dr. Harris calculated

[49] The issue of damages was a predominating, common issue, and even if it had not been, the law is clear that the individual damages issues do not preclude class certification. "It is, of course, well established that the elemental determination that some members of a class are not entitled to relief because of some particular factor will not bar the class action." *Steinberg v. Chicago Med. Sch.,* 69 Ill. 2d 320, 388 (1977). Individual issues of damages ordinarily will not preclude class certification if there are other predominating, common questions of fact or law. *See, e.g*., *Purcell & Wardrope Chartered v. Hertz Corp.*, 175 Ill. App. 3d 1069, 1074 (1st Dist. 1988); *Haywood v. Superior Bank FSB*, 244 Ill. App. 3d 326, 330 (5th Dist. 1993); 5 *Moore's Federal Practice* § 23.23[2] (1997) ("the necessity of making an individualized determination of damages for each class member generally does not defeat commonality"). "The *Gillette* court noted that the existence of individual issues, a separate determination of individual damages, multiple theories of recovery, or even the inability of some class members to obtain relief because of a particular individual factor will not, standing alone, defeat a class certification if the common questions of fact or law are otherwise predominant." *Purcell*, 175 Ill. App. 3d at 1074.

[50] Because a private cause of action under Section 2 of the Illinois Consumer Fraud Act did not become effective until October 1973, the court held that the appropriate period for damages calculation in this case to be from October 1973 through February 8, 2001. SA 1261.

Class members' aggregate, compensatory damages to be $5.9773 billion on the "just as harmful" claim and $7.1005 billion for the "could be more harmful" claim. SA 1218. Dr. Harris arrived at the "just as harmful" figures by multiplying the total Class expenditure of $7.6928 billion by the survey-measured 77.7% "just as harmful" diminution in value. He arrived at the "could be more harmful" figure the same way. SA 1218; SA 335-336.[51] The trial court adopted Dr. Harris' calculations for its award of compensatory damages. SA 1259-1261.

Philip Morris argues that "the real-world evidence of value precluded any claim of 'economic loss' as a matter of law." Philip Morris insists that the Consumer Fraud Act "requires a straightforward comparison of (1) ***the market's valuation*** of Lights before the discovery of the supposed deception and (2) ***the market's valuation*** of Lights after such discovery." Br. at 70. That argument is fatally flawed in at least two distinct respects. First, Philip Morris simply *assumes* that "the market" has both the knowledge and efficiency to incorporate the "Lights" fraud into the retail market price of cigarettes. Philip Morris argues that "[h]ere, there was no evidence – absolutely none – that the price of Lights decreased after the alleged deception was discovered." Br. at 71. That, however, is because there was no evidence – absolutely none – that "the market" ever knew about Philip Morris' deception. Without proof that "the market" has discovered Philip Morris' fraud, it is impossible to make the "straightforward comparison" Philip Morris insists upon.

Second, Philip Morris' "market valuation" argument "is nothing more than the market theory this court specifically rejected in *Oliveira*." *Shannon v. Boise Cascade Corp.*, 208 Ill. 2d 517, 528 (2004). Market theory, applied in federal securities litigation, is based on the assumption "that in an efficient market the price of a stock will reflect all information available to the public[.]" *Levinson v. Basic Inc.*, 786 F.2d 741, 750 (6th Cir. 1986), *vacated on other grounds*, 485 U.S. 224 (1988).[52] Thus, when the

[51] Dr. Harris calculated the damages without prejudgment interest to be $4.9868 billion for the "could be more harmful" scenario and $4.1980 billion for the "just as harmful" scenario. SA 335-336.

[52] No state has accepted the "efficient market" theory since the U.S. Supreme Court adopted it in securities litigation sixteen years ago, and it has come under widespread criticism. *See Kaufman v. i-State Corp.*, 754 A.2d 1188, 1198-1200 (N.J. 2000) (*cited in Oliveira v. Amoco Oil Co.*, 201 Ill. 2d 134, 140 n.l (2002)). Just this year, this Court again reiterated its rejection of market theory causation in CFA cases. *Shannon*, 208 Ill. 2d at 528.

truth is revealed to the market, it should adjust to reflect the real value of the stock. Whatever justification there may be for such an "efficient market" theory in capital markets, there is absolutely no basis for its import into the cigarette market. Cigarette prices are not established by market forces the way that they are in capital markets. Cigarette prices are established by cigarette manufacturers, (in this case Philip Morris), and there is no dispute that "Lights have always cost the same" as regular cigarettes. Br. at 71. If the law of damages were what Philip Morris proposes, the ability to manipulate (or eliminate) damages in a case like this would rest in the exclusive control of the defendant who determines the prices of its products. In any case, Philip Morris produced absolutely no evidence that the cigarette market is an "efficient market." Thus, "[t]he fact that Lights have always cost the same" as regular cigarettes does not "establish[] that the alleged deception did not cause any diminution in the value of Lights," as Philip Morris argues. Br. at 71. Rather, the fact that "Lights" have always cost the same is simply further confirmation that the cigarette market is not an efficient, information-driven market – and that Philip Morris' "market valuation" argument has no more basis in fact (or in the evidence in this case) than it does in theory.

C. The trial court utilized the correct comparison to measure of damages.

The only accurate method available to measure damages is the method that Plaintiffs' experts used in this case: consumers must be given the choice between the real-world, "just as harmful" or "could be more harmful" cigarette and a cigarette which has the promised attributes but is in every other respect the same. It is this exact comparison which accurately measures the *Gerill* difference between "the actual value of the property sold and the value the property would have had if the representations had been true."

Philip Morris cites *In re Busse*, 124 Ill. App. 3d 433, 440 (1st Dist. 1984), where the court held that in determining the "value" of real estate, "a recent sale of the subject property is the best evidence of value" and that "a contemporaneous sale … is practically conclusive on the issue of value." "The price actually paid at a bona fide sale" is what is relevant to the issue of the property's value. *Id.* However, the cigarette market cannot be compared to the real estate market just as it cannot be compared to capital

markets. Philip Morris sets the prices of Marlboro Lights, not "efficient" market forces. Moreover, there is no reason to believe – and there is certainly no evidence in the record to support a finding – that 30 years of "Lights" and "lowered tar and nicotine" marketing has been undone and that smokers are now generally aware that "Lights" are at least as harmful as regular cigarettes. Thus, the sales to which Philip Morris points as establishing "actual value" are not "bona fide, recent sales" as referred to in *Busse*.

As Dr. Harris testified, if the promised, truly safer cigarette is not included in the comparative valuation, the value of the promise (*i.e.*, the reduced harm promise of Marlboro Lights and Cambridge Lights) cannot be measured. Dr. Viscusi testified, however, that because the promised product does not exist in the "real world," it should not exist in the valuation measure for this case. Thus, the disputed question boils down to whether it is proper to take into consideration a genuine "Light" when determining the difference in value to the consumers between "genuine" "Lights" and "misrepresented" "Lights" – a tautological question which answers itself. While the Viscusi model does not comport with the law, Dr. Harris' model was based directly on the *Gerill* measure of damages. Thus, the trial court properly rejected Dr. Viscusi's damages model.

Moreover, as the court noted, "[t]he reason the promised product (*i.e*., a 'real' light cigarette that actually reduces the harm from cigarettes and delivers lowered tar and nicotine) does not exist in the 'real world' is that Philip Morris never offered a 'real' Marlboro Light or Cambridge Light cigarette to the Class."[53] SA 1258-1259. If defendants were permitted to frustrate the application of the benefit-of-the-bargain rule by knocking the falsely promised product out of the equation because that product never existed, then to paraphrase this Court, the CFA "could be violated with impunity." *Schatz v. Abbott Labs., Inc.*, 51 Ill. 2d 143, 148 (1972). In fact, under Philip Morris' theory, damages would be unavailable to Plaintiffs no matter what the misrepresentation might have been.

[53] Philip Morris now acknowledges that it has never sold or marketed any "safer" cigarettes. *See* SA 548 (PM USA "insert") ("Smokers should not assume that lower yielding brands are 'safe' or 'safer' than full-flavor brands."); SA 560 (PM USA "onsert") ("There is no such thing as a safe cigarette. … You should not assume that cigarette brands using descriptors like … "Light" … are less harmful than full flavor cigarette brands or that smoking such cigarette brands will help you quit smoking."). "This disclosure certainly cannot serve to avoid liability made, as it was, long after this case was filed. However, these disclosures do establish that even Philip Morris agrees that Marlboro Lights and Cambridge Lights are not any safer than their regular counterparts." SA 1259.

The decision of some Class members to continue purchasing "Lights" after learning of the fraud should not impact the result because the option of switching to a safer cigarette simply does not exist. *See* text *supra* at 40-41. The value of the misrepresented "Lights" cigarette to the consumer thus changes when the smoker is faced with a much different bargain than the one Philip Morris presented to consumers during the Class period. If the consumer is left with only the option of purchasing a "Light" cigarette that does ***not*** reduce harm and does not deliver "lowered tar and nicotine," the fact that the consumer may now settle for this product or "make do" does not answer the *Gerill* inquiry: what is the difference between the value of the promised "Lights" and misrepresented "Lights." *See* SA 339-340 (Harris) ("You've got to put the two cigarettes on the same shelf for the consumer in order to assess the valuation to the consumer of the harm reduction. If you take one of them away, you're going to get the consumer's reaction to a different bargain in which the consumer had to make do with what was left.").

The measure of damages which Plaintiffs presented and the trial court adopted were thus based on the law and common sense and should be affirmed.

D. The Knowledge Networks survey methodology is generally accepted within the field of survey research – including by Philip Morris' own experts.

The trial court made the factual finding that the Knowledge Networks survey was accurate and reliable. SA 1260 ("the survey conducted by Knowledge Networks did provide an accurate measure of damage suffered by the Class members in this case"). Although Philip Morris agrees that this finding and the admissibility of the survey and the surveyor's testimony is reviewed for an abuse of discretion, Philip Morris completely fails to demonstrate that "no reasonable person would agree with the position adopted by the trial court" in admitting or relying upon Dr. Dennis' testimony or the survey results. The trial court was well within its discretion in admitting and relying upon Dr. Dennis' testimony and the results of the Knowledge Networks survey.[54]

[54] "The weight to be afforded a witness's testimony is a matter for the trier of fact based on the assessments made at trial, and this assessment is not to be disturbed on appeal absent an abuse of discretion." *Temesvary v. Houdek*, 103 Ill. App. 3d 560, 568 (2d Dist. 1998).

Notwithstanding Philip Morris' protestations to the contrary, Dr. Dennis testified unequivocally that the Knowledge Networks survey accurately measured respondents' beliefs and valuations and produced reliable results.

> Q. Does this survey ***accurately*** measure the respondent's reported beliefs and evaluations?
> A. Yes, I believe so.

SA 239 (emphasis added). Similarly, Dr. Cohen, a survey expert, reviewed the Knowledge Networks survey which he found "proper" and represented "appropriate ways of gathering information from smokers via survey method." SA 199-200.

Philip Morris has not challenged on appeal the trial court's recognition of Dr. Dennis as a qualified and experienced expert in survey research nor could it legitimately question his qualifications. Dr. Dennis has conducted over 40 substantive survey research projects for federal agencies and academic clients throughout the country. SA 234-235. At the time of trial, Philip Morris' own damages expert, Dr. Viscusi, was personally working with Dr. Dennis and Knowledge Networks on a government-funded and academic survey research project utilizing the Knowledge Networks survey methodology. SA 509-510 (Viscusi). Philip Morris' own ***survey*** expert, Nancy Mathiowetz, has not only hired Dr. Dennis to conduct survey research on her behalf, but has also co-authored an article with Dr. Dennis that appeared in the proceedings in the section on survey research methods in the American Statistical Association. SA 1455-1477 (Dennis et al., *Analysis of Call Patterns in a Large Random-Digit Dialing Survey: The National Immunization Survey,* Nov. 28, 1999).

Philip Morris also has mounted no legitimate challenge to Dr. Dennis' methodologies. To make that challenge successfully, Philip Morris would have to demonstrate that Dr. Dennis' methodologies are not reasonably relied upon by experts in the field. "If the underlying method[s] used to generate an expert's opinion are reasonably relied upon by the experts in the field, the fact finder may consider the opinion – despite the novelty of the conclusion rendered by the expert." *Donaldson v. Central Ill. Pub. Serv. Co.*, 199 Ill. 2d 63, 77 (2002). Survey methodology has not only "gained general acceptance in the particular field in which it belongs," it has rightfully gained acceptance among the courts. *Id*.

Instead, Philip Morris attempts to portray the interaction between Plaintiffs' counsel and Dr. Dennis at the time of the survey as somehow improper. The interaction between Plaintiffs' counsel and Dr. Dennis was not only proper, the very authority Philip Morris cites recognizes such interaction as "necessary" to proper survey design for surveys conducted in the context of litigation:

> [A]ttorney involvement in the survey design is necessary to ensure that relevant questions are directed to a relevant population. The trier of fact evaluates the objectivity and relevance of the questions on the survey and the appropriateness of the definition of the population used to guide sample selection. These aspects of the survey are visible to the trier of fact and can be judged on their quality, irrespective of who suggested them.

SA 1489-1490 (REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 237-38 (2d ed. 2000)). In any event, Dr. Dennis (not Plaintiffs' attorneys) drafted each and every question in the Knowledge Network survey. SA 237.

Philip Morris also criticizes Dr. Dennis because "after seeing respondents' answers in an initial test-run, *Plaintiffs' counsel* changed the survey." Br. at 76-77. That claim is an outright (and outrageous) misrepresentation of the record. As Dr. Dennis testified, ***he*** – not Plaintiffs' counsel – made changes to the pre-test questionnaire in accordance with thoroughly sound principles of survey technique. *See* SA 238-239 (Dennis testimony that "a pretest [was] performed for this survey" in order "to check all phases of the questionnaire [and] to make sure that the respondent understands all the questions" and that "absolutely no[ne] of the changes from the pretest to the main interview [were] made to influence the direction of the results").

> Texts on survey research generally recommend pretests as a way to increase the likelihood that questions are clear and unambiguous,[*] and some courts have recognized the value of pretests. … Attorneys who commission surveys for litigation sometimes are reluctant to approve pilot work or to reveal that pilot work has taken place because they are concerned that if a pretest leads to revised wording of the questions, the trier of fact may believe that the survey has been manipulated and is biased or unfair. A more appropriate reaction is to recognize that pilot work can improve the quality of a survey and to anticipate that it often results in work changes that increase clarity and correct misunderstandings. ***Thus, changes may indicate informed survey construction rather than flawed survey design***.

[*] For a thorough treatment of pretesting methods, *See* Gene M. Converse, Empers and Stanley Presser, *Survey Questions: Handcrafting the Standardized Questionnaire* 51(1986) [footnote in original].

SA 1500-1501. (REFERENCE MANUAL ON SCIENTIFIC EVIDENCE, *supra*) (emphasis added). Philip Morris' attack on Dr. Dennis' changes to the pre-test is nothing but a cynical attempt to goad this Court down the very path the Reference Manual on Scientific Evidence cautions against. The reality is that pre-tests, like the one performed by Dr. Dennis, actually increase the quality of a survey. The survey's results were objective and reliable and obtained through generally accepted survey techniques.

E. The award of prejudgment interest was appropriate.

The trial court found that under the circumstances of this case an award of pre-judgment interest was appropriate. SA 1262. Although pre-judgment interest is not generally recoverable absent a statute or agreement providing for it, the CFA is such a statute. It authorizes an award of prejudgment interest. *Kleczek v. Jorgeneen*, 328 Ill. App. 3d 1012, 1025 (4th Dist. 2002); *Transport Leasing/Contract, Inc. v. Methvin*, 1992 WL 67846 (N.D. Ill. 1992). Awards of prejudgment interest under the CFA further the "clear mandate from the Illinois legislature," a "mandate [that] necessarily includes policies of deterrence, disgorgement, and compensation." *Gordon v. Boden*, 224 Ill. App. 3d 195, 206 (1st Dist. 1991). Thus, the trial court's award of prejudgment interest was a permissible exercise of its discretion and should be affirmed.

F. The *cy pres* award was appropriate.

Philip Morris has not cited a single case in which a trial court has been found to have abused its discretion by granting *cy pres* or "fluid recovery" relief. The fact that an award of "leftover funds to non-parties would not further the interests of class members" is not reason for ***denying*** a fluid recovery; it is the very purpose of fluid recovery which serves important policies of deterrence and disgorgement when making an award to Class members is impractical. *Gordon*, 224 Ill. App. 3d at 206. Allowing an unclaimed judgment to revert to a wrongdoer like Philip Morris would also fail to further class member interests, and such a reversion would undermine the legislative policies underlying the CFA and UDTPA of deterrence and disgorgement. The Appellate Court has approved the use of fluid recovery in Illinois as "a procedural device used to avoid manageability problems in the calculation and distribution of damages

in large class actions" for claims brought under the CFA. *Gordon*, 224 Ill. App. 3d at 204. *Cf. Boyle v. Giral*, 820 A.2d 561, 569 (D.C. 2003).

There is nothing punitive about forbidding a fraudfeasor from retaining the fruits of his fraud which is all that a *cy pres* award does. Philip Morris has provided this Court with no basis for concluding that the trial court in this case abused its discretion by granting such relief. Unlike the defendant in *Simer v. Rios*, 661 F.2d 655, 676-77 (7th Cir. 1981), Philip Morris ***has*** "intentionally violated a statute which was intended to regulate socially opprobrious conduct" and the use of fluid recovery will serve the statutory objectives of deterrence and disgorgement. The trial court's *cy pres* award should be affirmed.

G. The award of punitive damages is lawful and amply supported by the record.

The very authority Philip Morris cites for de novo review makes clear that just as with any other factual issue, a reviewing court "will not disturb" the award "unless it is against the manifest weight of the evidence." *O'Neill v. Gallant Ins. Co.*, 329 Ill. App. 3d 1166, 1179 (5th Dist. 2002). *See Canel & Hale, Ltd. v. Tobin*, 304 Ill. App. 3d 906, 920 (1st Dist. 1999) (applying abuse of discretion standard). Only purely legal issues, such as the award's constitutionality, are reviewed de novo. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc*., 532 U.S. 424, 435 (2001) ("factual findings made by the district courts in conducting the excessiveness inquiry, of course, must be accepted unless clearly erroneous").

1. The punitive award is not excessive.

When reviewing a claim of unconstitutional excessiveness of a punitive award, a court must consider three factors which Philip Morris largely ignores: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff[s] and the punitive damages award; and (3) the difference between the punitive damages awarded … and the civil penalties authorized or imposed in comparable cases." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003). The trial court's award easily passes constitutional muster under this analysis.

a. Philip Morris' conduct was reprehensible and there is no disparity between the award and the actual harm suffered by the Class.

"Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996). This record brims with damning evidence of Philip Morris' outrageously unlawful conduct. While the only injury sought to be redressed in this case was an economic one, it bears reiterating that Philip Morris' deliberate fraud was one that preyed on consumers' health concerns. Precisely because it knew at the time it first marketed Marlboro Lights that consumers perceived "lower tar" as being "less hazardous," Philip Morris launched the so-called "light" version of its Marlboro cigarette to give smokers a "psychological crutch" in hopes of preventing smokers from quitting smoking altogether. SA 385-386 (Morgan); SA 222 (Cullman). *See also* SA 876 ("we must in the near future provide some answers which will give smokers a psychological crutch and a self-rationale to continue smoking"). Philip Morris has admitted in this case that it has ***never*** had any evidence that "Lights" are safer, there is no such thing as a safer cigarette and that "Lights" have ***always*** had essentially the same tobacco blend as regular cigarettes. *See* SA 357-360 (Lilly); SA 463 (Sanders); SA 518 (Whidby); SA 45 (Burnley). Philip Morris has always known that smokers compensate when smoking "low tar" cigarettes, thereby negating any alleged potential benefit of "lower tar" products. *See, e.g.*, SA 1146, SA 817.

Philip Morris also knew that "Lights" not only fail to deliver "lowered tar and nicotine," but that each milligram of "Lights" tar is ***more*** mutagenic and toxic. *See, e.g.*, SA 255 (Farone). Philip Morris went to great lengths to avoid discovery of damaging research, taking "great pains to eliminate any written contact" between itself and its foreign testing labs such as INBIFO as part of its effort to avoid the existence of any evidence which might be used against it in U.S. litigation. SA 266-267, SA 295-296, SA 274-275 (Farone); SA 835.

Philip Morris claims its recent admissions about low tar cigarettes somehow mitigate the outrageousness of 30 years of shocking conduct. Throughout the Class period Philip Morris never made such admissions, but instead denied that smoking causes disease, denied that nicotine is addictive, tried to

confound the public health community's message, and belittled anyone – particularly the public health community – who suggested otherwise.[55] Philip Morris' recent actions in response to the recent world-wide furor over "Lights" and "low tar" is further justification for punishing Philip Morris, not rewarding it. Philip Morris claims that it was the public health community which is to blame for consumer perception that "Lights" and "low tar" cigarettes are safer. That claim itself is outrageous. The ***only*** reason the public health community sent such a message was because tobacco companies like Philip Morris deceived them – along with consumers – into believing that such cigarettes actually deliver lower tar. Of course, the public health community was not privy to the "powerfully significant" research which Philip Morris has had for thirty years. If they had been, their recommendations to smokers would have been quite different. *See, e.g.*, SA 65-68 (Burns).

Although Philip Morris now vows to follow the "guidance" of public health on the issue of "Lights" and "low tar" cigarettes, it engages in the same kind of semantic games which typify Philip Morris' duplicitous conduct throughout the Class period, incredibly claiming under oath that "the public health community has not yet told us to change our guidance relative to low tar cigarettes." SA 366-368 (Lund). Despite what Philip Morris admits in this appeal is the new scientific consensus about "Lights" and "low tar" cigarettes (Br. at 14), Philip Morris' latest excuse for not taking heed is that the U.S. Surgeon General and FTC have not provided Philip Morris any "guidance" on the use of "Lights" and "low tar" descriptors – ignoring the fact that the National Cancer Institute, the European Union, the Canadian Government and 168 signatory countries to the Framework Convention on Tobacco Control which now includes the U.S. have provided "guidance" to which Philip Morris turns a deaf ear and continues to use the misleading "Lights" descriptor. Indeed, it took the entry of the multi-billion dollar judgment ***in this case*** for Philip Morris to remove the explicitly false "lowered tar and nicotine" representation from packages of Marlboro Lights. SA 1748.

[55] *See e.g.*, SA 1219; SA 874; SA 951; SA 958; SA 960; SA 962; SA 964; SA 967; SA 956; SA 999; SA 374 (Lund).

Philip Morris' recent "onsert," newspaper inserts, and website regarding the dangers of "Lights" are not mitigating factors either. Like most of Philip Morris' "open" and "honest" communications about cigarettes, these too came only after Philip Morris was faced with litigation. SA 370-371, SA 373. Indeed, the timing of the insert/onsert event – just two months before trial – strongly suggests that it was not just pending "Lights" litigation but the inescapable fact that ***this case*** was really going to trial that prompted Philip Morris' action. And this was no "campaign" to correct 30 years of false "Lights" advertising – it was an ephemerally brief "incident": the newspaper inserts were inserted just the one time, and the onsert was included in a one-week supply of cigarettes. SA 369. Viewing the evidence in the light most favorable to the judgment, it was a cynical media stunt designed to provide Philip Morris with the very mitigation argument it now makes and that Philip Morris anticipated it would need.[56] Philip Morris' "mitigating" conduct is far too little and comes way too late. The overwhelming evidence of Philip Morris' three-decade long, intentional and repeated fraud perpetrated on more than one million consumers in Illinois more than amply justifies the trial court's punitive award.

b. The punitive award is less than half actual damages.

The U.S. Supreme Court has provided a simple rule of thumb which, although not alone conclusive, simplifies the analysis of the reasonable relationship between the punitive award and the harm: "[s]ingle digit multipliers are more likely to comport with due process, while still achieving the State's goal of deterrence and retribution." *State Farm*, 538 U.S. at 425. The award in this case is ***less than half*** the compensatory award.[57] The third factor to consider is the civil penalties authorized in comparable cases. Had the Attorney General brought this suit, Philip Morris could have faced potential

[56] Philip Morris also claims that it should not be subject to punitive damages because it has "complied with" FTC policy. That too is another Philip Morris obfuscation, as discussed above at 64-72. The FTC has never required Philip Morris' use of "Lights" and "lowered tar and nicotine" and never immunized Philip Morris (or any other company) for their false use.

[57] Philip Morris also argues that punishment is not needed because the compensatory award allegedly "is many times more than the amount of profits" Philip Morris earned from selling Lights in Illinois. First, the compensatory award does nothing more than return to Class members the amount that was wrongfully taken from them and not a penny more. Given both the magnitude and the morally repugnant nature of Philip Morris' violation, the trial court was well within its discretion in concluding that the compensatory award alone was insufficient to punish Philip Morris adequately.

penalties of $50,000 per violation – which means per victim.[58] 815 ILCS § 505/7(b). Having defrauded over one million consumers in Illinois, the penalty could have been over $50 billion.

c. Philip Morris has the ability to pay the award.

Philip Morris can pay the entire judgment entered in this case. [REDACTED]

SA 344-345 and SA 1529-1557 (2002 Consolidated Financial Statement of Philip Morris at 4 (under seal)). Philip Morris' ***exclusive*** challenge to the evidence upon which the trial court relied in making the factual assessment of Philip Morris' actual value and ability to pay is the patently false insinuation that Plaintiffs presented evidence of the financial capacity of Altria, Philip Morris' parent company. Br. at 86-87. To be sure, Dr. Harris did indeed refer to Altria's market capitalization, but he did so as a means to determine ***Philip Morris***' true value, not Altria's. Philip Morris is not a publicly traded company. It is a wholly owned subsidiary of Altria which *is* a publicly company. By determining the percentage of operating income that Philip Morris contributed to Altria,[59] Dr. Harris was able to calculate the percentage of the parent's market capitalization which is attributable to its ownership of Philip Morris. SA 341-342. As Dr. Harris explained, ***Altria's*** market capitalization was approximately $80 billion. *See* SA 341 and SA 1220. Dr. Harris' analysis showed and he testified that "an accurate and valid estimate[] of the true value" of Philip Morris is approximately $25 billion. SA 343.

The evidence leaves no room for debate that Philip Morris' true value far exceeds its "book value" of $6.462 billion, which is precisely why Philip Morris clings to the untenable position that only a

[58] Other courts, interpreting similar consumer protection statutes, have consistently interpreted the same or similar language to mean per victim and have upheld damages awards of multiple times the statutory fine where numerous individuals were injured. *See e.g.*, *Arizona ex rel. Corbin v. United Energy Corp. of Am.*, 725 P.2d 752 (Az. Ct. App. 1986); *Missouri ex rel. Nixon v. Consumer Auto. Resources*, 882 S.W.2d 717 (Mo. Ct. App. 1994); *Nebraska ex rel. Stenberg v. American Midlands*, *Inc.*, 509 N.W.2d 633 (Neb. 1994); *People v. Superior Court*, 507 P.2d 1400 (Cal. 1973).

[59] As demonstrated by evidence which Philip Morris withheld until post-trial bond hearings, [REDACTED] SA 343-344.

defendant's "book value" may be considered for purposes of a punitive award.[60] As the Appellate Court has recognized, a company's book value net worth is not necessarily a reliable indicator of a defendant's ability to pay a damage award. *Cox v. Doctors' Assocs., Inc.*, 245 Ill. App. 3d 186, 208 (5th Dist. 1993) (allowing evidence of net earnings because in a "closely held business[] … the shareholders are free to take out whatever salary they choose, leaving whatever net worth in the corporation that they desire"). As other courts have explained, "'[n]et worth' is subject to easy manipulation and, in our view, it should not be the only permissible standard. Indeed, it is likely that blind adherence to any one standard could sometimes result in awards which neither deter nor punish or which deter or punish too much." *Lara v. Cadag*, 16 Cal. Rptr. 2d 811, 813 n.3 (Ct. App. 1993). "'Net worth' … can be an elusive concept, a potentially-puzzling indicator of current value, and of questionable utility." *Herman v. Sunshine Chem. Specialties, Inc.*, 627 A.2d 1081, 1089-90 (N.J. 1993) (noting that "a defendant's income might be a better indicator of the ability to pay"). The court's consideration of Philip Morris' true value as opposed to "book value net worth" was thus legally permissible, and its factual conclusion that a $3 billion punitive award was within Philip Morris' capacity to pay is not only not against the manifest weight of the evidence, it is *supported* by the manifest weight of the evidence and should not be disturbed.

2. The Master Settlement Agreement does not bar the punitive award.

Philip Morris' previous settlement of other litigation with the State of Illinois does not bar the court's award of punitive damages in this case. To establish its affirmative defense of *res judicata*, Philip Morris needed to prove two things which it did not prove: identity of the parties or their privies and identity of causes of action. *Robinson v. Toyota Motor Credit Corp.*, 201 Ill. 2d 403, 411 (2002). Philip Morris proved neither.

[60] Philip Morris insists that *Fopay v. Noveroske*, 31 Ill. App. 3d 182, 201 (5th Dist. 1975), does not permit consideration of any financial data other than a defendant's book value net worth when determining the amount of a punitive award, a position to which even the Fifth District no longer adheres, assuming it ever did. *See Central Bank Granite City v. Ziaee*, 188 Ill. App. 3d 936, 945-46 (5th Dist. 1989) (approving evidence of net earnings). *See also Johnson v. Smith*, 890 F. Supp. 726, 731 (N.D. Ill. 1995) (noting that since *Fopay* the Fifth District "has approved the consideration of earning capacity as well as net worth in setting punitive damages"). Significantly, Philip Morris offers no explanation for why book value net worth should be the only admissible evidence on the issue, and as the authorities discussed in the text hold, there is none. The trial court was therefore well within its discretion in admitting and relying upon other evidence of Philip Morris' actual ability to pay a punitive award.

There can be no identity of causes of action unless the same "core of operative facts" gives rise to the right to relief in both actions. *See River Park, Inc. v. City of Highland Park*, 184 Ill. 2d 290, 302-03 (1998). Philip Morris' entire argument on this point is a single sentence in which it claims that there is a "common nexus of operative facts underlying both causes." Br. at 82. If that is not a Rule 341(e)(7) waiver of the point, nothing is, and that should be the end of this entire argument. In any event, the State sued Philip Morris and others for damages ***the State sustained*** as a result of the tobacco industry's denials of disease causation, denials of the addictive nature of nicotine, nicotine manipulation, and youth targeting. Nowhere in the State's complaint is there any mention of Philip Morris' fraudulent use of "Lights" and "lowered tar and nicotine," that "Lights" are designed not to deliver "lowered tar and nicotine" to smokers, or that "Lights" are more mutagenic and toxic than regular cigarettes. DX 4802. Philip Morris failed to prove an identity of actions.

Moreover, this Class is not in privity with the State for purposes of res judicata. Privity exists between parties who adequately represent the same legal interests. *Diversified Fin. Sys., Inc. v. Boyd*, 286 Ill. App. 3d 911, 916 (4th Dist. 1997). Here, there is no privity because Plaintiffs' interests vis-à-vis ***this*** fraud were not even contemplated by the State's suit, much less adequately represented by it; the MSA represented only those claims which belonged ***exclusively*** to the State. *Skillings v. Illinois*, 121 F. Supp. 2d 1235, 1238 (C.D. Ill. 2000). The fact that the trial court has assigned ***the Class'*** punitive award to the State is authorized by statute and does not change the analysis. 735 ILCS § 5/2-1207. *See In re The Exxon Valdez*, 270 F.3d 1215 (9th Cir. 2001) (rejecting similar privity and res judicata arguments); *Satsky v. Paramount Communications, Inc.*, 7 F.3d 1464 (10th Cir. 1993) (same).

VIII. THE CIRCUIT COURT CORRECTLY FOUND THAT PHILIP MORRIS WAIVED PRIVILEGE CLAIMS TO DOCUMENTS PRODUCED IN OTHER LITIGATION AND PRODUCED TO A CONGRESSIONAL COMMITTEE ONLY "UNDER THREAT OF CONTEMPT" WHICH IS INSUFFICIENT TO PRESERVE THE CLAIM AS A MATTER OF WELL-ESTABLISHED LAW.

Philip Morris does not argue that the entire judgment should be reversed because of the trial court's admission of ***one*** of these 39,000 de-privileged documents; rather, it seeks reversal of the trial court's ruling as to these documents, presumably to shield the documents in future litigation against

Philip Morris in Illinois and so the order will not be added to the already-lengthy list of more than 15 other courts in other jurisdictions that have declared these documents are not privileged. Those decisions are part of this record. SA 1558-1747. Because Philip Morris has repeatedly raised and lost the same argument time and again, it has had a full and fair opportunity to litigate the issue and is therefore collaterally estopped from raising it yet again here. *See generally Du Page Forklift Serv., Inc. v. Material Handling Serv.*, 195 Ill. 2d 71 (2001) (discussing collateral estoppel).

On the merits, the reason other courts have rejected Philip Morris' claims of privilege and the reason this Court should affirm the trial court's rejection of those claims appears in the very first sentence of the one-half page of argument Philip Morris devotes to this issue: those documents "were produced ***under threat of criminal contempt*** in response to a subpoena by a congressional committee." Br. at 86 (emphasis added). The law is clear that producing documents under threat of contempt is insufficient. "[A] party seeking to preserve a claimed privilege, despite Congressional subpoena, ***must*** challenge such a subpoena ***by standing in contempt of Congress***." *Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris, Inc.*, 35 F. Supp. 2d 582, 594 (N.D. Ohio 1999) (emphases added); *United States v. Fleischman*, 339 U.S. 349 (1949).

Moreover, as Plaintiffs demonstrated in the trial court, Philip Morris Incorporated (the defendant here) produced the documents pursuant to a Congressional subpoena issued to Philip Morris' then-parent company, Philip Morris Companies, Inc. Thus, Philip Morris did not even produce the documents under "threat of criminal contempt," as Philip Morris alleges, but rather ***voluntarily***. C20201-04, 20250-52. Second, the documents at issue were actually first produced in litigation in Minnesota after Philip Morris unsuccessfully asserted the privileges, and the Minnesota courts found them not to be privileged. *Minnesota ex rel. Humphrey v. Philip Morris Inc.*, 606 N.W.2d 676, 692-95 (Minn. Ct. App. 2000). Third, Philip Morris waived its claims of privilege when, in settling the Minnesota litigation, it agreed "[f]or documents upon which a privilege was claimed and found not to exist … Plaintiffs may seek Court approval to make such documents available to the public." C20265-70. Last, the documents are now

available on the Internet[61] (C20298-99), and their widespread disclosure in the public domain extinguished any alleged privilege. *See, e.g.*, *Underwater Storage, Inc. v. United States Rubber Co.*, 314 F. Supp. 546, 549 (D.D.C. 1970) (once document entered the public domain, "[i]ts confidentiality was breached thereby destroying the basis for the continued existence of the privilege"). The trial court's rejection of Philip Morris' claims of privilege was correct and should not be reversed.

CONCLUSION

For all of the foregoing reasons, the trial court's judgment should be affirmed.

Respectfully submitted,

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[61] *See* http://www.house.gov/commerce/TobaccoDocs/documents.html.

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The undersigned hereby certifies that he is one of the attorneys for Plaintiffs-Appellees, SHARON PRICE AND MICHAEL FRUTH, and that he served the foregoing Appellees' Brief and the seven volume Supplementary Appendix on all counsel of record by causing three copies of said Brief and Supplementary Appendix to be delivered via First Class U.S. Mail, with postage fully prepaid on July 12, 2004, addressed to:

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