IN THE SUPREME COURT OF THE STATE OF OREGON

MARILYN C. PEARSON and LAURA GRANDIN, individually and on behalf of all similarly situated persons,
Plaintiffs-Appellants,
Respondents on Review

v.

PHILIP MORRIS, INC., aka Philip Morris USA, Inc., a foreign corporation,
Defendant-Respondent,
Petitioner on Review

and

PHILIP MORRIS COMPANIES, INC., aka Altria Group, Inc., a foreign corporation,
Defendant.

Multnomah County Circuit Court
Case No. 0211-11819

Court of Appeals
A137297

S061745

RESPONDENTS' BRIEF ON THE MERITS

En Banc Court of Appeals Decision, June 19, 2013
Decision on Reconsideration, August 23, 2013

Opinion by Armstrong, J., joined by Wollheim, Ortega, Sercombe, Nakamoto, and Egan, JJ.

Dissent by Duncan, J., joined by Haselton, CJ, and Schuman and Hadlock, JJ.

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I. INTRODUCTION

For over thirty years, petitioner Philip Morris Inc. ("Philip Morris") made the same misleading half-truth and non-disclosure to every Oregon consumer on every package of Marlboro Lights ("Lights") regarding the cigarette's defining feature and selling point. Philip Morris stated that Lights were "light" and "lowered tar and nicotine" without disclosing that those statements were only true in very limited and particular circumstances. Plaintiffs alleged below that Philip Morris violated the Oregon Unlawful Trade Practices Act (UTPA) (ORS 646.605 et seq) because it falsely represented that Lights had characteristics and features that they did not have.

The statements "light" and "lowered tar and nicotine" are only accurate in very limited circumstances that Philip Morris did not qualify or explain. Lights are only light and lower in tar and nicotine when consumers smoke them in a particular manner, essentially by not covering the nearly invisible holes at the end of the filter, taking shorter puffs, and inhaling less. In truth, the tobacco blend and ingredients in Lights are essentially the same as in regular Marlboro cigarettes (also known as "Marlboro Reds"). Philip Morris knew that smokers generally compensate to obtain more nicotine by covering the Lights' filter holes, puffing more and inhaling longer and deeper (a behavior known as titration or sometimes compensation in the medical literature). Indeed, Philip

Morris marketed Lights to appear as "light" and "lowered tar and nicotine," but designed the cigarettes to take advantage of "elasticity of delivery" so consumers of Lights could pull in as much tar and nicotine as consumers of Marlboro Reds. Philip Morris intentionally made its half-truths to mislead consumers into thinking Lights were somehow safer or better for them when that was only true in limited circumstances that Philip Morris did not disclose.

Based on this overwhelming common core of facts and identical non-disclosures to every Oregon consumer, plaintiffs Marilyn Pearson and Laura Grandin moved for certification of a class of Oregon consumers who purchased Lights.

II. QUESTIONS PRESENTED

Philip Morris's petition for review and plaintiffs' contingent petition for review present the following questions:

> **Question 1:** Is a statement actionable under the UTPA as a half-truth or material omission when the statement – while accurate in limited circumstances – is false because it omits additional or qualifying material facts necessary to make the statement true and complete?
>
> **Proposed Rule of Law:** A statement is actionable as a half-truth or material omission if it omits additional or qualifying material facts necessary to make the statement true and complete.
>
> **Question 2:** Can the element of reliance under the UTPA be litigated on a class-wide basis either when (A) defendant has made statements with material omissions of fact or (B) defendant has made identical affirmative misrepresentations to every purchaser of Lights that

do not disclose the limited conditions under which such cigarettes might be "light" or "lowered tar and nicotine?

Proposed Rule of Law: (A) Proof of reliance is not necessary and may be litigated on a class-wide basis under the UTPA when a defendant has made statements with material omissions of fact to every class member. (B) Reliance also may be litigated as a class-wide issue based on common evidence where a defendant makes identical affirmative misrepresentations in writing to every class member in a manner that would make it unlikely that a substantial number of class members understood that the representations were false.

Question 3: Must an appellate court conclude as a matter of law that the common issues in a class do not predominate over the individual ones merely because the trial court found that it was not "self-evident" that "every" class member was misled?

Proposed Rule of Law: Whether the common issues predominate in a class action is a legal issue from which the appellate court may draw its own conclusions based on its review of the record. In addition, here, the trial court's findings are not inconsistent with the legal conclusion that the common issues predominate.

Question 4: In a proposed UTPA class action, must the lead plaintiff present expert evidence of its damages at the class certification stage?

Proposed Rule of Law: In a UTPA case, a court may draw inferences to support a finding of ascertainable loss and a lead plaintiff in a class case does not have to present expert evidence of damages (or any evidence) at the initial class certification stage.

Question 5: Do issues of class membership, damages, or potential affirmative defenses defeat the predominance of common class issues at the class certification stage?

Proposed Rule of Law: Under Oregon class action law, class membership is determined by the class definition and the filing of class claims. Issues of class membership, individual damage issues, and potential affirmative defenses do not defeat the predominance of class issues.

Question 6: Where a defendant has made the same misleading half-truth with omissions of material fact to every consumer and, at a minimum, there is overwhelming common evidence on the proof of liability, should such common issues, at a minimum, be certified under ORCP 32 and remaining individual issues, if any, be left to proof through separate individual trials?

Proposed Rule of Law: Under ORCP 32 G, a court should certify the common liability issues where they would substantially advance the litigation and leave remaining individual issues, if any, to the individual claim form process or individual trials.

III. STATEMENT OF THE CASE

Plaintiffs filed this action as a putative class action on behalf of purchasers of Lights in Oregon. Plaintiffs claimed that Philip Morris violated the UTPA by making representations with material non-disclosures that failed to disclose that purportedly "light" and "lowered tar and nicotine" cigarettes were only light and lowered tar and nicotine in very limited circumstances, essentially in lab-like conditions that were not explained to consumers. Philip Morris made the same material non-disclosure and half-truth to every member of the class. Based on this common core of facts and identical legal issues, plaintiffs moved to certify a class.

The trial court declined to certify either a damages or even a partial issue class. The trial court held that issues such as proof of reliance and damages created individual issues that predominated over the common issues and, as a

result, a class action was not superior to individual cases under Oregon Rule of Civil Procedure (ORCP) 32.[1]

The court of appeals reversed and remanded for further proceedings because the trial court erred in both holding that the common issues arising from the identical misrepresentations did not predominate and concluding that a class action should not be certified. *Pearson v. Philip Morris, Inc.,* 257 Or App 106, 168, 306 P3d 665 (2013). The court of appeals remanded so that the trial court could reconsider whether, in light of its underlying legal error, the entire class case should be certified or just an issue class under ORCP 32G on solely liability-related issues. *Id*. at 168-69.

Philip Morris petitioned for review and plaintiffs filed a response and contingent request for review. As part of their contingent request for review, plaintiffs asked this Court to review all issues before the Court of Appeals and specifically requested review of that court's conclusion that plaintiff had not presented an omission or half-truth case for which proof of reliance is not

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[1] ER 23, 26.

required.[2] By granting review without limitation, this Court granted review of plaintiffs' contingent petition.[3]

This Court should initially consider whether the Court of Appeals erred in concluding that this was not a half-truth or omission case and that some proof of reliance was required. If reliance is not required, many of Philip Morris's arguments on the purported individual issues presented quickly disappear. Even if this Court ultimately concludes that plaintiffs only may present an affirmative misrepresentation case, the court of appeals was correct that plaintiffs may prove reliance through evidence common to the class as a whole. To the extent there are any remaining individual issues, those may be resolved through the post-trial individual claims process that is a unique feature of Oregon class action law.

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[2] *See* Contingent Request for Review at pp. 15-22 as part of the Response to Petition for Review.

[3] *See* ORAP 9.20(2) (stating that if review is not limited to particular questions, "the questions before the Supreme Court include all questions properly before the Court of Appeals that the petition or response claims were erroneously decided by that court.") (Emphasis added).

IV. SUMMARY OF FACTS

For thirty-two years, each and every package of Marlboro Light cigarettes sold in Oregon prominently stated on the outside of the packaging that the cigarettes were "LIGHT" and "LOWERED TAR AND NICOTINE."[4]

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In fact, those statements contained material non-disclosures of fact and were half-truths. Lights are only "light" and "lowered tar and nicotine" when smoked in a particular manner and under lab-like conditions similar to those provided by the Federal Trade Commission (FTC) testing method, discussed below. Marlboro Reds and Lights have essentially the same tobacco and

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[4] Declaration of David Sugerman in Support of Plaintiffs' Motion for Class Certification ("Sugerman Dec.") (TCF 79), Exh. 1, p, 5, RFA 10.

[5] This sample image appears in the Sugerman Declaration, Exh. 2.

ingredients in the front part of the cigarette, known as the rod.[6] The primary difference between the two is the design and length of the filter and the additional microscopic perforations around the end of the Lights' filter that allow for more ventilated air to be drawn through the cigarette.[7]

Philip Morris placed these additional tiny perforations around the top of the filter (unnoticeable to most consumers) so that extra air is pulled through the cigarette and dilutes the amount of toxic smoke, tar and nicotine that comes through the end of the filter and into the mouth.[8] However, Philip Morris understood that most smokers would subconsciously cover the holes to prevent filtration, draw deeper puffs into their lungs, or hold the smoke in their lungs for longer periods to compensate in order to get more nicotine.[9]

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[6] Declaration of David Sugerman in Support of Reply on Plaintiffs' Motion for Class Certification ("Sugerman Reply Dec.") (TCF 108), Exh. 1, p. 13; Exh. 3, pp. 5-6.

[7] Sugerman Reply Dec., Exh. 1, pp. 13-16; Exh. 3, pp. 5-7. There also was less tobacco packed in a Light cigarette rod. *Id.*

[8] Declaration of Charles S. Tauman ("Tauman Dec."), (TCF 80), Exh. 21, Monograph 13, pp. 17-18, 19-29.

[9] *See* fn 16, below.

In fact, Lights were designed to allow for "elasticity of delivery" so that they could be marketed as "light" and "lowered tar and nicotine," but not actually deliver lower tar and nicotine.[10] From the outset of this critical venture for Philip Morris, which was designed to combat the growing concerns surrounding tobacco and health, Philip Morris wanted a cigarette that *appeared* healthier but delivered the same tar and nicotine to consumers. Philip Morris's internal documents state that "a large proportion of smokers are concerned about the relationship of cigarette smoking to health" and that "*the illusion of filtration is as important as the fact of filtration.* Therefore any [health cigarette] entry should be a radically different method of filtration *but need not be any more effective."* (Emphasis added).[11] Philip Morris also understood that "a cigarette that does not deliver nicotine cannot satisfy the habituated smoker and cannot lead to habituation."[12] In other words, without nicotine, no one gets addicted or continues to buy cigarettes.

Philip Morris understood that if it could develop a "'healthy' cigarette that tasted exactly like a Marlboro, delivered the nicotine of a Marlboro, and

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[10] *See* fn 17, below.

[11] Sugerman Dec., Exh. 6, The Market Potential of a Health Cigarette, pp. 1-2.

[12] *Id*. at p. 5.

was called Marlboro, it would probably become the best-selling brand."[13] Not only was the product misrepresented through a non-disclosure of material facts, this was an intentional and massive fraud on Oregon consumers from the beginning of the development of "light" and "lowered tar and nicotine" cigarettes. Philip Morris's plan, backed by millions in marketing dollars, succeeded *exactly* as it intended. By 1995 light cigarettes (of all brands) were 73% of the cigarette market.[14]

The UTPA claim arises from the half-truth that Philip Morris made to *every* Oregon purchaser of Lights. Philip Morris represented that such cigarettes were "light" and "lowered tar and nicotine" when that statement contains a material non-disclosure of facts. Lights *may* be light under the very specific lab-like conditions set forth under the FTC testing method (also known in the industry as the Cambridge Filter Method). Under the FTC test for determining tar and nicotine content in cigarettes, an approved *machine* draws smoke through cigarettes at precise puff rates, puff volumes and to specified cigarette lengths.[15] However, Philip Morris was aware that *real smokers* cover ventilation holes, puff more, draw in smoke more deeply or hold it in their

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[13] *Id*. at p. 4.

[14] Tauman Dec., Exh. 25, p. 1043.

[15] Tauman Dec, Exh. 21, Monograph 13, p. 13

lungs longer to obtain more nicotine.[16] Philip Morris designed cigarettes that would test low on the FTC machine method, but result in real smokers obtaining more nicotine.[17]

Starting in 2003, after the proposed class period here, Philip Morris expressly and publicly conceded what it had known for years. It added "onserts" to Light packages that acknowledged that the terms "light" and "lowered tar and nicotine" do not mean what any ordinary consumer would understand them to mean. Philip Morris stated that those terms were drawn from "average readings from a standard government test method" and the amount of tar and nicotine will be higher than the standard tar and nicotine

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[16] Sugerman Dec., Exh. 11, p. 3 (stating that "Marlboro85 [Marlboro Red] smokers in this study did not achieve any reduction in smoke intake by smoking a cigarette (Marlboro Lights) normally considered lower in delivery."); Tauman Dec, Exh. 21, Monograph 13, pp. 2, 13-34 (discussing "elasticity of delivery" in design of light cigarettes and industry knowledge and manipulation of how smokers compensate to obtain more nicotine).

[17] *Id*. at p. 32; Tauman Dec., Exh. 27, p. 6 (stating that "[i]nternal corporate documents show this compensatory behavior was well understood by the tobacco companies as early as the 1970s"); Sugerman Dec., Exh. 11, p. 2 (Goodman Study on Marlboro Lights that human smokers "smoked the cigarettes according to their physical properties, i.e., the dilution * * * caused smokers to take larger puffs * * *). Sugerman Dec., Exh. 12, p. 11 (Philip Morris Research Report) (stating that "as [filter] ventilation increases, the deliveries of tar [and] nicotine decrease * * * but puff count and nicotine tar/ratio increase.")

numbers if, for example, you block ventilation holes, inhale more deeply, take more puffs or smoke more cigarettes."[18]

V. SUMMARY OF ARGUMENT

Philip Morris's representations that Lights were "light" and "lowered tar and nicotine" were classic half-truths that omitted material information necessary to make the statements made complete and true in all circumstances. This Court has concluded that a plaintiff does not have to prove that it relied on omitted information to state a UTPA claim. This is also the rule in other similar statutory fraud cases. Indeed, it is impossible to prove reliance on information that was never disclosed. As a result, the Court of Appeals erred in concluding that plaintiffs had to prove reliance by individual class members. If reliance is not an issue in this case, defendants' arguments regarding the purported individual issues raised by the claimed element of reliance are no longer relevant.

Even if this Court concludes reliance is an issue in this case, this Court should follow its recent case law and affirm the Court of Appeals, which required proof of reliance, but held that reliance may be proved based on the common facts. At the class certification stage, plaintiffs do not have to prove

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[18] Sugerman Dec., Exh. 4, p. 1.

whether class members relied or not. The issue is whether such proof may be based on common evidence.

In determining whether the common issues predominate over the individual ones, which is just one "pertinent factor" for class certification among many, this Court simply examines whether a trial court could infer the existence of reliance from the common evidence. This Court recently concluded that a trier of fact may infer reliance where the representations are made without material variation and are of a nature that class members would logically have a common understanding of the terms and would have relied in the same way. Here, the same misrepresentations were made in writing and without variation to every class member regarding the defining feature of the product, "light" and "lowered tar and nicotine" cigarettes. It is reasonable to infer that class members understood those terms as they were stated, and not to mean only "light" or "lowered tar and nicotine" when smoked under very particular and lab-like circumstances.

Philip Morris is also incorrect that the Court of Appeals was bound to follow the trial court's legal conclusions regarding predominance and that any factual findings by the trial court compel different conclusions in this case. This Court has consistently held that a trial court's conclusion regarding the predominance of common issues is a legal conclusion and whether the facts support that conclusion is a question of law. This Court may review the trial

court's legal conclusions and the record based on a legal error standard of review. The Court of Appeals correctly concluded as a legal matter that a class action is superior to individual Light cigarette cases and the common issues predominate over any individual ones.

The Court of Appeals also correctly concluded that issues of damages (or "ascertainable loss" under the UTPA) do not preclude class certification. As an initial matter, plaintiffs do not need to prove class members' damages at the class certification stage. Under Oregon class action law, class members will file individual claim forms that may address individual damage issues. Even assuming plaintiffs have to present a theory of damages *at trial* that is susceptible to class-wide proof, this Court's UTPA case law confirms that a trier of fact may infer "ascertainable loss" under the UTPA in this case based on the common evidence. This Court has permitted an inference of ascertainable loss when a consumer has purchased a product that was represented to have a feature that it did not, in fact, have. Even on this preliminary class-certification record, such an inference may be drawn. Plaintiffs will also present experts at trial to quantify the per-pack damages, which will be proved based solely on common evidence.

Finally, the Court of Appeals correctly concluded that any claimed affirmative defenses, such as statutes of limitation, and class membership issues do not prevent class certification. Where the primary liability issues are based

on common evidence, affirmative defenses and subsequent challenges to individual class membership do not prevent class certification.

VI. ARGUMENT

A. Philip Morris Made A Classic Half-Truth and Non-Disclosure of Fact for Which Proof of Reliance is Not Required.

1. The statements "light" and "lowered tar and nicotine" are misleading half-truths that omit material qualifying information.

Philip Morris made a classic half-truth/partial-lie when it claimed that Lights were "light" and "lowered tar and nicotine." Those statements were only true in very limited circumstances that Philip Morris did not disclose or otherwise qualify. Plaintiffs specifically alleged in their complaint that Philip Morris,

> failed to disclose that in order to receive low tar and nicotine, the smoker would have to smoke the "light" cigarettes in a particular way. This failure to disclose was a misrepresentation within the meaning of ORS 646.608(2).

Fourth Am. Cmplt, ¶ 9 (ER 8-9). Plaintiffs also alleged that Philip Morris knew that whether smokers actually received lower tar and nicotine depended on a number of factors:

> such as whether the smoker covered ventilation holes in the cigarettes, the numbers of puffs taken on each cigarette, and the amount of each cigarette smoked, *none of which defendant disclosed to plaintiff or any class member.*

Id. (emphasis added).[19] As discussed below, this Court has not required affirmative proof of reliance when a UTPA claim arises from a representation that fails to disclose a material fact. *Sanders v. Francis,* 277 Or 593, 598, 561 P2d 1003 (1977).

ORS 646.608(2) provides in relevant part:[20]

> A representation * * * may be any manifestation of any assertion by words or conduct, *including, but not limited to, a failure to disclose a fact.*

(Emphasis added). Neither the statute nor its legislative history sheds light on how to differentiate between a purely affirmative misrepresentation and a representation that fails to disclose a fact. This Court and the Court of Appeals also do not appear to have addressed under what circumstances a statement may be considered a pure affirmative misrepresentation as opposed to a partial truth/misrepresentation that fails to disclose a material fact.

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[19] To the extent Philip Morris cites other allegations of affirmative misrepresentations made by plaintiffs, plaintiffs have the right to allege alternative theories. *See Kashmir Corp. v. Patterson*, 289 Or 589, 592, 616 P2d 468 (1980) (reaffirming the "well established rule" that a plaintiff may present its case in the alternative and is not required to elect upon which theory it will rely). Nonetheless, if this Court concludes that plaintiffs allege a non-disclosure case, plaintiffs are prepared to proceed *solely* under that theory through trial.

[20] The complete text of relevant statutes and rules is set forth in the Appendix.

There is significant guidance provided by the common law of other states as evidenced in the Restatement (Second) of Torts and other states' citation to the rule stated therein.[21] *See e.g., U. S. Nat. Bank of Oregon v. Fought*, 291 Or 201, 206, 630 P2d 337 (1981) ("*Fought*") (relying on Restatement (Second) of Torts as authority) and *Id.* at 226-27 (Linde, J., concurring) (noting that the Oregon Supreme Court frequently cites the Restatement as a valuable and accurate statement or source of law, but does not literally adopt or enact its conclusions).

The Restatement (Second) of Torts defines the following as a misrepresentation based on an omission or lack of qualifying information:

> A representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his failure to state additional or qualifying matter is a fraudulent misrepresentation.

Restatements (Second) of Torts § 529 (1977). The Restatement comments that a half-truth may be as bad as an affirmative fraud:

> A statement containing a half-truth may be as misleading as a statement wholly false. Thus, a statement that contains only favorable matters and omits all reference to unfavorable matters is as much a false representation as if all the facts stated were untrue.

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[21] See footnote 17 of Pearson and Grandin's Response to Petition for Review that notes a significant number of states that rely on Restatement (Second) of Torts Section 529.

Restatement (Second) of Torts § 529, comment a (1977). *See also Krause v. Eugene Dodge, Inc.*, 265 Or 486, 505, 509 P2d 1199 (1973) (internal citations omitted) (stating that "this court has recognized that because 'a half truth is sometimes the worst kind of a lie,' one who makes a representation to the purchaser of a product in the nature of a 'half-truth' thereupon assumes the affirmative obligation to make a 'full and fair disclosure' of the 'whole truth.'"); *Caldwell v. Pop's Homes, Inc.,* 54 Or App 104, 113, 634 P2d 471 (1981) (holding that silence or non-disclosure may be the basis for a fraud action where there was active concealment of the facts).

Philip Morris contends that this case must be an affirmative misrepresentation case because it is based on affirmative statements. It argues that "plaintiffs cannot divorce their misrepresentation allegations from their failure to disclose allegations" and plaintiffs have not presented a "pure 'failure to disclose' case." Petitioner Brief on the Merits, p. 53. Philip Morris further argues that "if cigarette packages did not include the terms 'Lights' and 'lowered tar and nicotine,' there would be no need under plaintiff's theory for PM USA to have disclosed additional information that those cigarettes might not deliver less tar and nicotine if smoked in certain ways." *Id*.

Of course, any UTPA action based on the failure to disclose a fact must be based on *some actual statement made* that contains an omission of fact. The UTPA expressly recognizes this by providing that a "*representation*" includes

the "failure to disclose a fact." ORS 646.608(2). While there can be a "pure affirmative misrepresentation case" where a statement may be proved as wholly true or false based on what is expressly stated, there can be no such thing as "pure failure to disclose case" under the UTPA because an actual "representation" is required. Whether a particular representation is an affirmative misrepresentation or includes the failure to disclose a material fact is the issue in this lawsuit.

Plaintiffs also agree with Philip Morris that if it made *no* representations that Lights were "light" or "lowered tar and nicotine," Philip Morris would have no further duty under the UTPA and would not need to disclose and explain that those statements are only true in limited circumstances. It is the fact that those statements omitted important qualifying information necessary to explain the limited truth of the statements made that makes this fundamentally an omission case based on the failure to disclose.

2. Proof of reliance is not required in material omission cases.

This Court has concluded that proof of reliance is not required in a UTPA case alleging the failure to disclose information. *Sanders,* 277 Or at 598; *State ex rel Redden v. Discount Fabrics, Inc.,* 289 Or 375, 383-84, 615 P2d 1034 (1980); *Wright v. Kia Motors, America, Inc.*, CIV 06-6212-AA, 2007 WL 316351, * 3-4 (D Or Jan 29, 2007) (District of Oregon relied on *Sanders* and

held that where plaintiff alleged that defendant failed to disclose known material defects, plaintiff did not have to allege or prove reliance); s*ee also Affiliated Ute Citizens of Utah v. United States*, 406 US 128, 153-54 (1972) (holding that proof of reliance is not required in federal securities case based on material omissions of fact).[22]

The UTPA has been interpreted liberally to fulfill its remedial purpose of protecting consumers. *Discount Fabrics,* 289 Or at 386, n 8. Thus, a plaintiff suing for a misrepresentation under the UTPA does not have to prove all of the elements of common law fraud. *Id.* at 384.

In *Sanders*, a car dealer offered a car for sale at the lot without disclosing to the consumer, in violation of the UTPA, that it had advertised the same car for sale at a lower price. The car dealer claimed that any damages were not caused "as a result" of the UTPA violation because the consumer was not aware of the undisclosed information, the advertised price. *See* ORS 646.638(1) (providing in relevant part that any person who "suffers an ascertainable loss of money or property, real or personal, as a result of another person's willful use

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[22] Under *Affiliated Ute*, a plaintiff does not have to show reliance on an omitted fact, it only must demonstrate that the omitted fact was material such that a reasonable person would have considered it important in the purchasing decision. 406 US at 153-54. Certainly a reasonable person would have considered it important to know that the terms "Light" and "lowered tar and nicotine" might be accurate in only limited circumstances (and that Philip Morris intended the terms to have far more circumscribed meanings).

or employment of a method, act or practice declared unlawful under ORS 646.608, may bring an individual action"). This Court, however, held that a plaintiff does not have to prove causation/reliance – that the loss was "as a result of" a UTPA violation -- when the UTPA violation arises out of a failure to disclose information:

> In many cases plaintiff's reliance may indeed be a requisite cause of any loss, i.e. when plaintiff claims to have acted upon a seller's express representations. But an examination of the possible forms of unlawful practices shows that this cannot invariably be the case. Especially when the representation takes the form of a 'failure to disclose' under subsection 2 [ORS 646.608(2)], as in this case, it would be artificial to require a pleading that plaintiff had 'relied' on that non-disclosure.

Sanders, 277 Or at 598. Here, plaintiffs do not have to prove reliance or causation based on any non-disclosure of facts and it would be artificial to require reliance on information *not* disclosed by Philip Morris to consumers.

In *Discount Fabrics, Inc*., this Court reaffirmed *Sanders* and concluded that not all the elements of common law fraud, including proof of reliance, are required by the UTPA. 289 Or at 384. *Discount Fabrics* cited and followed *Sanders*:

> This court determined that whether reliance was a necessary element depended on the type of violation alleged and that reliance was not required in nondisclosure cases. Thus, reliance may not be an element of a private cause of suit under ORS 646.638(1) because of the requirement that the loss be the "result of" wilful conduct.

Id. Philip Morris provides no basis for overruling the well-established Oregon Supreme Court case law that holds reliance is not required in cases arising out of representations that fail to disclose material facts.

Philip Morris attempts to distinguish *Sander*s by arguing that it was a "pure non-disclosure" case as if such a case were possible. Clearly *Sanders* was not a "pure non-disclosure case." In *Sanders*, this Court expressly stated that "*when the representation* takes the form of a 'failure to disclose'" under ORS 646.608(2), it would be "artificial" to require proof of reliance on the undisclosed information. 277 Or at 598 (emphasis added). *Sanders*, like all UTPA cases, was based on an actual representation that *also* omitted material information.

Sanders also is not distinguishable based on the fact that there was a separate undisclosed advertised price that gave rise to the UTPA violation. The primary basis of the holding, as quoted above, is that "especially when" the representation at issue is a non-disclosure, proof of reliance is not required. The Court went on to note that plaintiff's damages resulted from defendant's reliance on the consumers' ignorance of the lower advertised price and not from the consumer's reliance on the advertisement. However, that was an *additional* basis for its conclusion that reliance was not required. Moreover, Philip Morris has relied on consumer's ignorance in making the partial disclosure that its

cigarettes were light and lowered tar and nicotine without fully explaining the very limited circumstances when that might be true.

Philip Morris relies on other cases that are neither binding on this Court, nor relevant to a UTPA case, which, as noted, have fewer elements than common law fraud cases. In *Feitler v. Animation Celection, Inc*., 170 Or App 702, 708, 13 P3d 1044 (2000), the Court of Appeals followed *Sanders* and noted there are only three elements to a UTPA claim in an affirmative misrepresentation case and the second element, causation/"reliance-in-fact", was either presumed or not required in a non-disclosure case:

> A plaintiff must prove (1) a violation of ORS 646.608(1); (2) causation ('as a result of'); and (3) damage ('ascertainable loss'). Where, as here, the alleged violations are affirmative misrepresentations, the causal/'as a result of' element requires proof of reliance-in-fact by the consumer. *See Sanders v. Francis*, 277 Or 593, 598, 561 P2d 1003 (1977) (although reliance is not always required to satisfy the 'result of' language in ORS 646.638(1), 'when plaintiff claims to have acted on a seller's express representations' factual reliance is indeed essential).

170 Or App at 708. In *Feitler*, the seller of a rare original Mickey Mouse animation series affirmatively represented that he was selling the "very last of all" of the drawings and the buyer relied on that affirmative representation of completeness. *Id*. at 704-05. The affirmative representation was completely false as stated -- not a partial half-truth which failed to disclose a material fact -- because the collection sold was not complete. *See also Wright*, 2007 WL

316351 at * 3 (noting that *Feitler* required reliance in fact where the violation was "based solely on affirmative misrepresentations.")

Krause discusses the legal principle that a person who speaks a half-truth has a duty to make a full and fair disclosure of the whole truth. *Krause*, 265 Or at 505. However, the jury ultimately concluded that the car dealer represented a car as "new" when it was not. Plaintiff testified that she relied on that affirmative representation and would not have purchased the car if she knew it had 5,000 miles on it. *Krause* is ultimately an affirmative misrepresentation case, which also pre-dates the clear rule for non-disclosure cases announced in *Sanders*.[23]

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[23] Philip Morris's remaining cases are all distinguishable and do not address the issue presented here. *Myer v. E.M. Adams & Co.,* 268 Or 91, 511 P2d 841 (1973) was not a UTPA case, but appears to be a securities case. It also found actual reliance so did not have to address whether proof of reliance was required. *Id*. at 97-98.

Stroup v. Conant, 268 Or 292, 520 P2d 337 (1974) involved an attempted rescission of a contract based on a false representation and did not discuss the UTPA at all, much less the UTPA elements in a failure-to-disclose case.

Beckett v. Computer Career Institute, Inc., 120 Or App 143, 145, 852 P2d 840 (1993) is a Court of Appeals case that is based on a defendant's affirmative misrepresentation that the job placement rate for its graduates was 85-96% when that statement was completely false as stated because defendant represented to its accrediting agency that the graduation rate was 50%. Plaintiff proved reliance in that case.

Terry v. Holden-Dhein Enterprises Ltd., 48 Or App 763, 618 P2d 7 (1980) is a Court of Appeals case that fails to mention *Sanders* or its rule on non-

3. Plaintiffs may need to show that their damages were foreseeable based on the material non-disclosure, but do not have to prove the omission was the cause in fact of their purchase.

Philip Morris is also incorrect that plaintiffs would still need to establish causation based on the "as a result of" language in ORS 646.638. As *Sanders* and *Discount Fabrics* concluded, the "as a result of" element in ORS 646.638 is not necessary in non-disclosure cases.

Assuming that plaintiffs need to prove some form of causation, it could not be that plaintiffs have to prove that the *omission* was the cause in fact of their purchase transaction, which is essentially reliance or transaction causation. The case law has not required such proof and it is impossible to prove causation resulting from reliance on an omitted fact. At most, plaintiffs would have to prove a form of loss causation – that the material omission reasonably led to the type of damages they suffered. A requirement to prove loss, but not transaction, causation or reliance is also supported by the remedy section of the UTPA. *See* ORS 646.638(1) (requiring proof that someone suffers "an ascertainable loss * * * as a result of" an unlawful trade practice and not providing that the transaction was caused by the unlawful trade practice.)

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disclosure. Significantly, the plaintiff in *Terry* admitted that even had all of the facts been fully disclosed to her, she would not have understood them.

In the context of a common law fraud action, this Court has stated that "when an intentional tort is involved, the range of legal causation can be quite broad" and concluded that damages in a fraud case must only be those that "reasonably might be expected" or are foreseeable from the fraud. *Knepper v. Brown*, 345 Or 320, 330-31, 195 P3d 383 (2008). Here, as discussed in section VI, B below, plaintiffs will present *common* evidence that class members paid for a feature in every package of Light Cigarettes that was not evident in the product and their damages reasonably flowed from purchasing a product that was not as it was represented to be.

4. Because proof of reliance is not even required in this case, the trial court erred in holding that individual issues of reliance predominated and that a class action was not superior.

If this Court concludes, as it should, that this case involves a claim of half-truths and non-disclosure of facts, reliance and the "as a result" element of ORS 646.638(1) are not at issue. Therefore, there could be no individual issues about whether Oregon consumers relied on Philip Morris's half-truths because reliance is not an element of the claim. If reliance is not an element of plaintiffs' or the putative class members' claims, the trial court erred in concluding that individual issues of reliance predominate over the common

issues under ORCP 32B(3) and that a class is not a superior method for the fair and efficient adjudication of this controversy under ORCP 32B in general.[24]

B. Even if This Court Concludes That Philip Morris Made Purely *Affirmative* Misrepresentations, the Court of Appeals Correctly Concluded That Reliance May Be Proved Based on Common Evidence.

Even assuming for argument that this Court concludes this is a pure affirmative misrepresentation case for which proof of reliance is required, a jury might reasonably infer based on the common evidence that Oregon consumers relied on Philip Morris's misrepresentations regarding purportedly light and lowered tar and nicotine cigarettes. In this case, a finding of class-wide reliance may be inferred from the facts because the same misrepresentation was made in writing without variation to every class member regarding the defining feature of the product; class members would logically have a common understanding of the misrepresentation; and, class members would naturally have relied on the plain and obvious meaning of the particular terms used. *Strawn v. Farmers Ins. Co. of Oregon*, 350 Or 336, 258 P3d 1199 (2011).

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[24] The trial court also held that individual issues arising out of the ascertainable loss requirement was a separate and independent basis for concluding that the individual issues predominated and a class action was not superior to other methods of adjudication. ER 26. That element is discussed in section VI, D, below.

In *Strawn*, this Court recently examined whether reliance may be proved based on common evidence. *Strawn* was a class action alleging a common law fraud claim. Reviewing its earlier class certification decision in *Newman v. Tualatin Dev. Co. Inc.,* 287 Or 47, 597 P2d 800 (1979), this Court summarized when a class case may be litigated based on common evidence of reliance:

> Direct evidence of reliance by each of the individual class members is not always necessary, however. Rather, reliance can, in an appropriate case, be inferred from circumstantial evidence. For that inference to arise in this context, the same misrepresentation must have been made without material variation to the members of the class. In addition, the misrepresentation must be of a nature that the class members logically would have had a common understanding of the misrepresentation, and naturally would have relied on it to the same degree and in the same way.

Strawn, 350 Or at 358-59. *See also Wieber v. FedEx Ground Package System, Inc.*, 231 Or App 469, 482, 220 P3d 68, 78 (2009) ("Direct evidence of reliance in support of a fraud claim is not required; a plaintiff may prevail on a showing that a reasonable inference of reliance can be drawn from the facts in evidence.")[25]

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[25] Under California law, an inference of reliance is particularly appropriate where the misrepresentation made is material. *In re Tobacco II Cases,* 46 Cal4th 298, 327, 207 P3d 20, 39 (Cal S Ct 2009) ("a presumption, or at least an inference, of reliance arises wherever there is a showing that a misrepresentation was material").

This Court derived this formulation from the rule set forth in its prior authorities and the one "implicitly suggested" in *Newman*. *Strawn*, 350 Or at 358.

To decide whether reliance could be inferred from the evidence, this Court contrasted the misrepresentation in *Strawn* from the one alleged in *Newman*. In *Strawn*, there was a uniform representation in every Farmers insurance contract presented to every consumer regarding a central feature of the insurance, which stated that Farmers would reimburse insureds' "reasonable medical expenses." 350 Or at 359. In contrast, the Oregon Supreme Court in *Newman*, while concluding that reliance may be litigated based on common evidence in appropriate cases, reversed a trial court's certification of a class of townhome purchasers who had sued the developer for misrepresenting in a sales brochure that the homes had only copper pipe when they had galvanized plumbing. *Newman*, 287 Or at 53-54. *Newman* held that evidence of reliance was not common where the misrepresentation was made in a sales brochure that may not have reached or been read by every class member, was one of many representations regarding the townhomes' features, and was made with respect to a relatively minor part of the purchase – the homes' plumbing – so may have had no impact on purchasers.

Plaintiffs can attempt to prove reliance here based on common facts that are far closer to the facts that supported a common inference of reliance in

Strawn than the ones that did not give rise to common issues in *Newman*. The representations here were made in writing without *any* variation to every class member regarding the defining feature of the product. There can be no dispute that every class member received the exact same misrepresentations in written form on the product. Consumers cannot be class members unless they purchased the product, which prominently featured the words "LIGHT" and "LOWERED TAR AND NICOTINE." Thus, a jury could ultimately infer reliance based on the common evidence plaintiffs will present. In any event, plaintiffs do not have to prove reliance at this stage – if they have to prove reliance at all, but only that they may be able to demonstrate reliance through common evidence.

It is also logical and natural to conclude that purchasers would understand the term "light" and "lowered tar and nicotine" to mean precisely what those terms suggest and would not assume the terms were limited by any qualifying information. As the Court of Appeals noted, the product was backed by a targeted multi- million dollar marketing campaigns designed to promote Light cigarettes directly to those concerned about the health risks of smoking. *Pearson*, 257 Or App at 161-62. This was done amid a climate in which even the Surgeon General advised that if smokers were not going to quit smoking, they should move to low tar and low yield cigarettes. *Id*. at 162.

It would be illogical to conclude that *most* consumers would "naturally" understand the terms to mean that the cigarettes were only "light" and "lowered tar and nicotine" when smoked in the way that the FTC machines tested them – without covering filter holes while taking uniform shorts puffs at uniform rates. There was nothing on the packaging or in Philip Morris's marketing that would lead to that inference. As discussed further below, Philip Morris points to pieces of *third party sources* regarding the health and safety of light cigarettes, which often do not say anything about whether smokers understood their Light cigarettes were not lower in tar and nicotine unless smoked in a particular way. Based on this evidence, Philip Morris contends "there can be no reasonable dispute that many smokers read these" third party statements.

However, there truly can be *no* dispute that *every* putative class member purchased a Marlboro Light pack of cigarettes that prominently (and falsely) represented itself as light and lowered tar and nicotine. That fact cannot be disputed and it is certainly reasonable to infer that a reason for purchasing Marlboro Lights at least included the product's central representation and defining feature (even if many addicted consumers also knew that smoking even Light cigarettes was still bad for them). It is also a reasonable inference that consumers would believe the terms "lower tar and nicotine" actually meant that they would receive "lower tar and nicotine" from the cigarettes and not that

they would only ensure they received "lower tar and nicotine" if they smoked the cigarettes as an FTC machine "smoked" them.

The evidence below supports these reasonable inferences:

· A Roper Study in 1976 (cited by the National Cancer Institute) stated that when low tar smokers were asked why they believed low tar cigarettes were better for their health, "answers were overwhelmingly were concerned with lower tar content."[26]

· "The low tar brands have cornered opinion that to the extent any brands are better for your health, they are."[27]

· Philip Morris, itself, understood that when consumers looked at Marlboro Lights packaging, they thought they were getting a lower tar and nicotine cigarette.[28]

· A Philip Morris study concluded that "[i]t is likely, for example, that the popular belief that low-tar cigarettes are "healthier" than full-flavor cigarettes means that people who are concerned about their health will be more likely to switch to low-tar products than people who are not concerned about their health.[29]

· Indeed, Philip Morris targeted the market with a "health" cigarette that they intended to give the impression of law tar and nicotine without delivering low tar and nicotine. Its internal documents reveal that "a large proportion of smokers are concerned about the relationship of cigarette smoking to health" and that "**the illusion of filtration is as important as the fact of filtration. Therefore any entry should be a**

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[26] Monograph 13, Chapter 7, p 221 (Roper Study) (Tauman Dec., Exh. 21).

[27] Monograph 13, Chapter 7, p 221 (Roper Study) (Tauman Dec., Exh. 21).

[28] Testimony of former Philip Morris CEO James Morgan, Depo. pp. 91-92 (Sugerman Dec., Exh. 22).

[29] Exit-Brand Cigarettes: A Study of Ex-Smokers, p. 3 (Sugerman Dec., Exh. 8).

> **radically different method of filtration but need not be any more effective.**" (Emphasis added).[30]

To credit Philip Morris's evidence over plaintiffs', one would have to believe that it was more likely that Light cigarette smokers were ignoring the defining label on the product – and the plain meaning of the terms "light" and "lowered tar and nicotine" – and instead both regularly keeping abreast of and fully believing and crediting sporadic scientific information from third party sources regarding FTC testing and the elasticity of nicotine delivery.

As the court of appeals concluded, the question presented by this Court's class cases is whether it is likely that substantial numbers of class members knew that Philip Morris was trying to defraud them and were aware that Light cigarettes would not be light or lowered tar and nicotine unless smoked within particular parameters. The court concluded:

> Thus, under *Bernard*, *Derenco* and *Guinasso*, whether plaintiffs in this action can prove reliance on a class-wide basis depends on whether it is likely that significant numbers of class members did not rely on defendants' representations.

Pearson, 257 Or App at 156-57. *See Derenco v. Benj. Franklin Fed. Sav. and Loan*, 281 Or 533, 572, 577 P2d 477 (1978), *cert den*, 439 US 1031 (1978) (holding that whether or not the common issues predominated depended in part on whether it was "reasonable to assume" that a "substantial number" of the putative class members were aware of the bank's alleged illegal practice);

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[30] The Market Potential of a Health Cigarette, pp. 1-2 (Sugerman Dec., Exh. 6).

Bernard v. First Nat'l Bank, 275 Or 145, 550 P2d 1203 (1976) (holding that whether or not common issues predominated depended on whether it was "likely" that "numerous" members of the class were aware of the bank's claimed illegal practices); *Guinasso v. Pacific First Federal*, 89 Or App 270, 278, 749 P2d 577, *rev den*, 305 Or 672, 757 P2d 422 (1988) (asking whether there was a likelihood that "significant numbers" of class members knew of the claimed illegal practices).

As the court of appeals stated, the issue is not whether plaintiffs and the class members relied – that issue will be decided by the jury or fact finder as part of the liability question and not as a class certification issue. *Id*. at 156. *See also Newman*, 287 Or at 51 (stating that class certification is "not an appropriate time to determine whether plaintiffs are entitled to prevail" at trial). The issue is whether the plaintiffs can present that issue through evidence common to the class.

As posed by *Derenco* and *Bernard*, whether the common issues arising from illegal conduct predominate depends on whether it is likely that substantial numbers of putative class members were aware that Philip Morris only intended the terms "light" and "lowered tar and nicotine" to be true in very limited circumstances. As discussed in the amicus brief submitted by the Oregon Trial Lawyers Association, ORCP 32 has been significantly amended and broadened since *Derenco* and *Bernard*. The predominance of common issues is now just

one "pertinent factor" in class certification. *See* also ORCP 32B, B(3) (stating same). Nevertheless, plaintiffs presented evidence that it was unlikely that substantial number of consumers understood the terms "light" and "lowered tar and nicotine" to be so limited.

C. The Court of Appeals Correctly Reviewed the Trial Court's Legal Conclusion Regarding Whether Reliance May Be a Common Issue Based on a Legal Error Standard of Review.

The Court of Appeals also correctly concluded that it should review the trial court's legal conclusions regarding class certification and the predominance of common issues based on a "legal error" standard of review.

The trial court made a legal conclusion in determining, incorrectly in the Court of Appeals' view, that the "individual questions predominate over common questions (to a degree that requires denial of class certification)." ER 26. The Oregon Supreme Court has expressly held that this is a legal question reviewed for errors of law, even if there may be some facts found in the process leading to that conclusion:

> The finding that common questions of fact predominate is a conclusion of law despite its being labeled a finding of fact. If, after examination of a scientifically selected cross-section of 'commercial borrowers, the trial court had determined that five percent of the borrowers knew of the banks' method of computing interest at the time that they borrowed, its determination would constitute a finding of fact. However, a deduction therefrom that the common questions predominate over questions affecting only individual members of the proposed class would be a conclusion of law.

Bernard, 275 Or at 153-54; *see also Pearson*, 257 Or App at 157 (stating same). This Court is not bound by a trial court's conclusion regarding predominance because that is a legal conclusion and whether the facts support that conclusion is a question of law. *Bernard*, 275 OR at 154. Thus, whether common questions predominate (or not) and whether they do so in a way that favors class certification is a legal conclusion subject to unfettered review by this Court.[31] Philip Morris tries to restate the trial court's legal conclusion as purported express and implied fact findings.

One arguable factual finding – which was certainly not derived from a "scientifically selected cross-section" of Light cigarette smokers (*Bernard*, 275 Or at 153) – could be the trial court's statement that "it is not as self-evident as plaintiffs contend that every purchaser of Marlboro Lights was motivated substantially by health concerns and acted because he or she was misled" by the representations "Light" and "lowered tar and nicotine." (ER 23). Even assuming that the trial court's statement *regarding plaintiffs' contention* is a factual finding, this presumed finding would not defeat predominance or class certification under any prevailing Oregon legal standard for certifying a class.

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[31] While predominance is one "pertinent" factor for consideration under ORCP 32B (listing factors "pertinent" to class certification), the rule "does not require predominance as a sine qua non of certification of any class." *Shea v. Chicago Pneumatic Tool Co.*, 164 Or App 198, 207, 990 P2d 912 (1999); *Pearson*, 257 Or App at 122 (stating same).

As discussed above, the standard for determining whether individual issues predominate is whether it is "reasonable to assume" that a "substantial number" of the putative class members were aware of Philip Morris's misrepresentations and non-disclosures. *Derenco*, 577 P2d at 572; *see also Bernard,* 275 Or at 157 (asking whether it was "likely" that "numerous" individual adjudications regarding claimant's knowledge of illegal practices was required). The trial court merely disagreed with plaintiffs' contention below that it was "not self-evident" that "*every*" consumer was unaware that the term "light" and "lowered tar and nicotine" did not have their normal and expected meanings. This is far from an ultimate finding of fact that a "substantial number" of class members understood that Philip Morris was lying and not fully disclosing the facts.

The trial court, in reviewing *plaintiff's evidence* of the massive Light cigarette marketing campaign, also noted a level of "irrationality of smoking and cigarette smoking." ER 23. However, such irrationality, deriving in no small part from the hugely addictive nature of nicotine that Philip Morris uses to hook cigarette smokers, does not defeat the common evidence of reliance. As a legal matter, a party relies on a representation if it is a "substantial factor" in their decision to purchase a product even if they may have other irrational bases to purchase or continue to purchase the product, such as addiction. *See Pearson*, 257 Or App at 160 (concluding that the uniform nature of the

representation here, the design and marketing of Lights and studies and surveys that consumers believed lights were safer "convince us that defendant's representations were a substantial factor in the vast majority of the putative class members' purchases.")

Defendants also ask to credit the trial court's supposed "implied" findings that class members had knowledge that the trial court never actually ascribed to them. These claimed implied findings do not flow from the express "finding" that the trial court purportedly made in disagreeing with the contention that "every" class member was misled. They are also not implicit in the trial court's ultimate conclusion that the individual issues predominated in a manner that defeated class certification.

Significantly, ORCP 32(C)(1) expressly directs the court to make special findings of fact. *See* ORCP 32(C)(1) (stating that court "shall determine by order whether" class shall be maintained and "shall find the facts specially and state separately its conclusions thereon"). Philip Morris specifically requested special findings of fact.[32] Philip Morris had the opportunity to object or seek additional special findings if it was not satisfied with the express findings below, but failed to do so. *Cf., Mullennex v. Draper*, 220 Or 1, 2-3, 347 P2d

[32] *See e.g.,* Defendant's Opp. to Plaintiffs' Motion for Class Cert., p. 21 (stating that the trial court had to make special findings of fact in this case) and Class Cert. Hearing, Tr., pp. 68, 70, 136.

990, 991 (1959) ("Because in the trial court plaintiff made no objection to the findings and did not request other or additional findings, this court cannot consider the evidence on which the findings were based.")

As discussed above, this Court can independently analyze the *legal* issue of whether the class is sufficiently cohesive based on its consideration of the record before it. *See Bernard*, 275 Or at 153-54; *see also Pearson*, 257 Or App at 157 (stating same). It also may infer that the representations made were understood based on their common meanings. *Strawn*, 350 Or at 358-59.

Philip Morris relies on criminal and post-conviction cases that conclude an appellate court will construe the facts consistent with the trial court's ultimate conclusions. *See* Pet. Br. at 15, *citing State v. Backstrand*, 354 Or 392, 313 P3d 1084 (2013) and *Ball v. Gladden*, 250 Or 485, 443 P2d 621 (1968). Those cases have limited application to a preliminary class certification decision,[33] but, even so, the court in the post-conviction context in *Ball* went on to conclude that whether the historical facts were sufficient to meet a particular constitutional or legal standard was a legal question "within our proper scope of

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[33] Philip Morris cites the court of appeals class certification decision in *Alsea Veneer, Inc. v. State,* 117 Or App 42, 52, 843 P2d 492 (1992), which merely stated that a court reviews the findings of fact made for substantial evidence. However, as discussed above, to the extent there was any limited "finding" on the extent of reliance by class members, it was merely the observation that plaintiffs' contention regarding one-hundred percent reliance was not "self-evident."

appellate review." *See Ball*, 250 Or at 487-88. The Court concluded that it was *not* bound by a particular finding if it believed that the historical facts were not sufficient to meet the legal standard at issue. *Id*. That is the same conclusion reached by this Court in the class certification context. *Bernard*, 275 Or at 153-54. Indeed, *Bernard* relied on *Ball* and refused to be bound by the trial court's findings or conclusion on predominance because predominance was a legal conclusion "and whether the facts justify such a conclusion is a matter of law." *Id*. at 154.[34]

While Philip Morris cites cases from other jurisdictions refusing to certify Light cigarette consumer classes, several state appellate courts have affirmed decisions certifying such Light cigarette class cases or reversed trial court decisions decertifying them. *See Aspinall v. Philip Morris Cos., Inc.,* 813 NE 2d 476, 492 (Mass S Ct 2004) (affirming decision of trial court to certify statewide class of light cigarette consumers who allege unfair and deceptive conduct in fraudulent marketing of light cigarettes); *In re Tobacco II Cases*, 46 Cal4th 298, 329, 207 P3d 20, 41 (Cal S Ct 2009) (reversing trial court's decertification order and concluding that proof of individualized and specific

[34] At a minimum, and assuming Philip Morris has not waived the issue, to the extent that this Court believes that the issues presented are purely fact and not legal issues, the case should be remanded for further proceedings so that the trial court may actually make clear any special findings of fact on the class members' likely understanding of the terms "light" and "lowered tar and nicotine."

reliance is not required; an inference of reliance is raised when a misrepresentation is material); *Craft v. Philip Morris Cos., Inc.,* 190 SW 3d 368, 388 (Mo Ct App 2005) (affirming trial court's decision to certify class while striking legal conclusions regarding reliance when reliance may not be an element of the claim alleged). Regardless, this Court must follow Oregon consumer and class certification law, which has unique features not incorporated into federal and other states' substantive and procedural laws.

D. A Lead Plaintiff Does Not Have to Prove Class-Wide Damages at the Early Class-Certification Stage, Particularly in a UTPA Case Where Ascertainable Loss May Be Inferred.

Contrary to Philip Morris's contentions, a lead plaintiff does not have to present evidence of damages *at the class certification stage. Alsea Veneer, Inc. v. State,* 117 Or App 42, 843 P3d 492 (1992), *aff'd in part and rev'd in part,* 318 Or 22, 862 P2d 95 (1993). Under Oregon law, proof of damages is not required for class certification. Further, a consumer does not have to present direct evidence of ascertainable loss in a UTPA case such as this where the consumer purchased a product that was represented to have a feature that it did not have. A court may infer ascertainable loss where a represented product lacks a promised feature. *Scott v. Western Int'l Surplus Sales, Inc.,* 267 Or 512, 517 P2d 661 (1973).

1. Proof of damages is not required at the preliminary class certification stage.

In *Alsea Veneer Inc.*, the defendant argued that damage questions, including absence of proof of damages, presented individual issues that prevented class certification. The Court of Appeals rejected that argument:

> Although the damages of the individual plaintiffs will vary, depending on the policy type, loss experience and other factors, the claims of all class members arise from the same transaction and are based on the same contractual theory of liability. The fact that damages may differ among individual plaintiffs or that some plaintiffs may have suffered no damages does not render the claims atypical.

Alsea Veneer, Inc., 117 Or App at 53. The Oregon Supreme Court affirmed and adopted the Court of Appeals' holding and analysis of the class certification issues:

> On the issue whether the Court of Appeals erred in reversing the trial court's denial of plaintiffs' motion to certify the class, we agree with the Court of Appeals' analysis as to that question and see no reason to discuss it further.

Alsea Veneer, Inc. v. State, 318 Or 33, 41, 862 P2d 95 (1993). This Court adopted an analysis and rule that proof of class-wide damages is not required at the class certification stage. Issues relating to damages do not prevent certification. *Id*., *aff'd, by Alsea Veneer, Inc.*, 318 Or at 41. As in *Alsea Veneer*, the liability issues here "arise from the same transaction" (the purchase of identical Light cigarette packages) and are based on the same theory of liability (an identical UTPA claim). *Alsea Veneer, Inc.,* 117 Or App at 53.

Philip Morris attempts to contest plaintiffs' damages theory contending it is "unsupported" by the evidence, but plaintiffs are under no obligation to prove their damages at the preliminary class certification stage. The purpose of class certification is not to test the merits of the claim, but to determine the commonality of key issues, among other things, and the superiority of a class. *See Newman*, 287 Or at 51 (stating that class certification is "not an appropriate time to determine whether plaintiffs are entitled to prevail.") Indeed, former ORCP 32B(3)(f) used to provide that the court should determine at the class certification stage "whether the probability of sustaining the claim or defense is minimal." *See* ORCP 32B(3)(f) (1991). However, that provision was deleted in 1993. *Compare* ORCP 32B(3) (1993).

Other courts addressing this issue in the context of a proposed light cigarette class have reached the same conclusion. In *Aspinall*, the consumers sought recovery of the difference between "the actual value of the [cigarettes] at the time of purchase and what [their] value had been if the representations would have been true." 813 NE2d at 490. The Massachusetts Supreme Court, reaching a result consistent with ORCP 32 and Oregon class action law, concluded, "[w]hether plaintiffs ultimately will be successful in proving actual damages is a matter that need not be resolved at the class certification stage." *Aspinall*, 813 NE2d at 490. *See also, Craft*, 190 SW3d at 385-86 (Mo Ct App 2005).

Philip Morris cites a passage from *Bernard* where the Supreme Court overruled a trial court's conclusion that the class issues were common because the Supreme Court believed that the decision on commonality was based too much on conjecture. 275 Or at 165. That passage of *Bernard* dealt with whether a substantial number of class members were aware of the illegal practice and had individual issues of notice that prevented commonality. Commonality is clearly a class certification issue. *Bernard* did not hold that plaintiffs had to prove damages to obtain certification. *Bernard* also pre-dated *Newman's* holding that the court not consider issues that address the merits.

Philip Morris also relies on *Comcast v. Behrend*, 133 S Ct 1426 (2013), which interprets Federal Rule of Civil Procedure (FRCP) 23. Of course, *Comcast* is neither binding nor persuasive in this instance. *Comcast* analyzed the merits of the damages portion of the case at the class certification stage under FRCP 23. *But see Eisen v. Carlisle and Jacquelin*, 417 US 156, 177 (US 1974) (stating that "We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."). As noted, Oregon law eliminated the provision that previously permitted a trial court's review of the merits as a factor in class certification. *Compare* ORCP 32B(3)(f) (1991) *with* ORCP 32B(3) (1993).

Moreover, under Oregon class action law, individual class members file claim forms very late in the case, *after trial*, in order to assert a claim and be listed individually in the judgment (or else they are not participants in the class). ORCP 32F. Such claim forms may include information regarding the "nature of the loss * * * or damage." ORCP 32F(2)(i). This provision is not in FRCP 23.[35] Thus, Oregon law contemplates a later procedure for individual damage claims that may entirely follow the class trial on liability.

Comcast's requirement for a precise damage theory at the class certification stage is also inconsistent with the Oregon law that permits a court, even at the trial of the class case, to draw conclusions that make "sensible" determinations as to loss. *Derenco*, 281 Or at 562-63.

Comcast is also distinguishable because the plaintiffs' damages theory was not a class-wide damage theory and did not even match their theory of antitrust liability. Here, plaintiffs intend to seek damages on a per-pack and equal basis *across the entire class*. There is only one UTPA claim and theory presented for which the damages will be applied consistently across the class.

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[35] Of course, federal case law construing similar provisions of FRCP 23 may provide helpful guidance, particularly when the provisions in FRCP 23 pre-date the creation of ORCP 32 in 1978. *Newman*, 287 Or at 50. ORCP 32, however, has substantial differences from FRCP 23 that impact issues relating to predominance, damages, and the filing of individual claims post-trial, among others. Cases interpreting those dissimilar provisions in FRCP 23 have no value for this Court.

2. Even assuming class-wide proof of loss is required at the class certification stage, the court may infer ascertainable loss under the UTPA.

Even assuming class-wide proof of loss is required, this Court has held that an "ascertainable loss" may be inferred in a UTPA case where a defendant misrepresents that a product it has sold contains a feature that it does not have.[36] *Scott* , 267 Or at 512.

In *Scott*, the plaintiff purchased a tent whose packaging stated that the tent had eaves and a window flap with a zipper. In fact, the tent was not accurately represented and had no eaves or flap with a zipper. Despite the absence of testimony on the real value of the tent at trial, this Court held that because the tent was not as represented, the court could infer that it had less value than what plaintiff paid. 267 Or at 515-16. "[P]laintiff did not have to prove in what amount the value of the tent was reduced because it was not as represented. He merely had to prove he suffered some loss." *Id*. at 516.

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[36] Under the UTPA, plaintiffs must establish they "suffer[ed] an ascertainable loss of money or property, real or personal, as a result of another person's willful use of or employment of a method, act or practice declared unlawful by ORS 646.608." ORS 646.638(1). "Ascertainable loss" is not defined in the statute, but its meaning is discussed in plaintiffs' briefing in the Court of Appeals (see Opening Br. pp. 29-31) and herein.

This Court later elaborated on *Scott* when observing that the UTPA's overall structure, broad private enforcement rights, and consumer protection purposes support the view that a loss of money "includes the expenditure of funds for goods that are not as desired by the customer and represented by the seller irrespective of their market value to others." *Weigel v. Ron Tonkin Chevrolet Co.,* 298 Or 127, 134, 690 P2d 488 (1984). Loss under the UTPA is viewed broadly and encompasses "losses too small to be cognizable under the common law." *Feitler*, 170 Or App at 708; *Weigel*, 298 Or at 135-136 (*stating same*). *Weigel*, quoting case law interpreting similar state UTPA statutes, stated:

> Whenever a consumer has received something other than what he bargained for, he has suffered a loss of money or property. That loss is ascertainable if it is measurable even though the precise amount of the loss is not known * * *. In one sense the buyer has lost the purchase price of the item because he parted with his money reasonably expecting to receive a particular item or service. When the product fails to measure up, the consumer has been injured; he has suffered a loss. In another sense he has lost the benefits of the product which he was led to believe he had purchased. That the loss does not consist of a diminution in value is immaterial although obviously such diminution would satisfy the statute. To the consumer who wishes to purchase an energy saving subcompact, for example, it is no answer that he should be satisfied with a more valuable gas guzzler.

Weigel, 298 Or 136-37, *quoting Hinchcliffe v. American Motors Corp*., 440 A2d 810 (Conn S Ct 1981). Here, plaintiffs seek recovery because they paid money for a product that was not as it was represented to be. The fact that

Philip Morris chose to charge the same price for Marlboro Lights and Reds is irrelevant. Plaintiffs expected and paid money for a product represented to be Light and lowered tar and nicotine when that was not an inherent feature of the product and was misrepresented.

It is ironic that Philip Morris attempts to distinguish *Scott* and *Weigel* as cases that arose following a trial on the merits. *See* Philip Morris Br. at 40. *Scott* permitted an inference of loss based on the misrepresented and missing feature *even after* complete litigation, evidence on the merits, and a full trial. At the very least, and if necessary, a similar inference may be drawn at this early and preliminary class certification stage, which occurred "as soon as practicable after commencement of an action" (ORCP 32C(1)) and long before trial. The class certification hearing was not even designed to test the merits of the claim.

Regardless of whether there was a record establishing a potential UTPA loss, which there is, there could be no dispute that proof of that loss will be based on a *uniform* per-pack theory of losses. Whether plaintiffs ultimately seek damages through a form of rescissionary loss or based on a lesser per-pack amount based on the misrepresented value, the damages will be uniform throughout the class. On remand, plaintiffs may even later choose to seek leave

to amend to recover statutory damages, as well or instead, pursuant to ORS 646.638 (8).[37]

E. Issues of Class Membership and Affirmative Defenses Do Not Defeat Class Certification.

Philip Morris next contends that issues related to class membership or statute of limitation defenses prevent certifying this case as a class action under ORCP 32. However, such issues, particularly where the key liability questions are common and the remaining factors under ORCP 32B are met, do not defeat class certification.

1. Oregon class action law contemplates individual claim forms that may address individual issues relating to purchase and loss.

Under Oregon class action law, individual class members will ultimately have to file individual claim forms to continue to participate in the class and be listed in the judgment. ORCP 32 expressly requires that those individual claim forms must request affirmative relief and may provide proof of a transaction and damage. As referenced above, ORCP 32F(2)(i) provides in relevant part:

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[37] ORS 646.638(8)(a) provides a mechanism for class plaintiffs to recover statutory damages for "reckless violations" of the UTPA. The statute was not at issue in the initial trial proceeding, but was enacted in 2009 and specifically applied to cases arising *before* or after its effective date that are on-going and have not reached judgment. *See* House Bill 2585, Section 6 (2009). Plaintiffs do not ask this Court to conclude whether statutory damages are part of this case as they are not currently pled. Plaintiffs only alert the Court that they may seek such damages by seeking to amend below.

> Prior to the entry of a judgment against a defendant the court shall request members of the class who may be entitled to individual monetary recovery to submit a statement in a form prescribed by the court requesting affirmative relief which may also, where appropriate, *require information regarding the* nature of the loss, injury*, claim, transactional relationship,* or damage.

(Emphasis added). Thus, Oregon's class action rule contemplates that individuals may need to file claim forms attesting to their claim or transaction. Contrary to Philip Morris's claims, it could not be the case that the requirement of individual proof through a claim form or otherwise is a bar to class certification under ORCP 32 when the rule expressly provides for such proof.

Philip Morris's claimed due process concerns are a red herring *at this stage*. Philip Morris claims a right to test the truth of any statements made by every Light cigarette purchaser/class member regarding their purchases. Of course, it is not a requirement that plaintiffs or any class member retain a receipt of their purchase to pursue a claim under the UTPA. In addition, whether this is litigated as an individual or class case, there likely would be no proof of purchase through receipts so no substantial difference in proof arises between the two methods. Further, the trial court will have substantial discretion under ORCP 32F(2)(i) to address any due process concerns through (a) an assessment of the class-wide proof that is based on the common

evidence[38] and (b) the use of individual claim forms to prove individual claims following litigation of the common issues.

Those claim forms may require attestation under oath or other evidence required by the trial court. The claims process might include the right of Philip Morris to challenge particular claim forms or statements through a separate process. The fact that ORCP 32 expressly contemplates that proof through an individual claim form process, however, demonstrates that such issues do not preclude class certification under Oregon law. Other issues, relating to proof of reliance, if required at all, may be issues addressed by the common evidence or be addressed in the individual claim process with Philip Morris having a right to challenge individual claims. These issues, however, may be addressed by the trial court under ORCP 32.

Despite citations of federal law to the contrary, federal courts have held that individual claim and damage issues do not prevent class certification, particularly where, as here, aggregate damages are susceptible to common proof. *See Blackie v. Barrack,* 524 F2d 891, 905 (9th Cir 1975) (stating that "the amount of damages is invariably an individual question and does not defeat

[38] As to all common issues, Philip Morris's due process rights are clearly protected by its ability to challenge the common issues as to the entire class in the trial on the merits. *See In re Cardizem CD Antitrust Litig.*, 200 FRD 297 (ED Mich 2001) (concluding that the use of aggregate proof does not violate a defendant's due process rights), *citing* , 2 *Newberg on Class Actions*, § 10.05 (3d Ed).

class action treatment."); *Arthur Young & Co. v. U.S. Dist. Court*, 549 F2d 686, 696 (9th Cir 1977) ("We reach this result not because the individual and reserved issues do not appear real as they concern damages suffered by the class members, but because these damage issues do not, as a rule, defeat class certification in cases such as these"); *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F3d 124, 139 (2d Cir 2001) ("Common issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized damage issues.") *See also* 4 *Newberg on Class Actions* § 4.54 (5th Ed) ("Therefore, courts in every circuit have uniformly held that the 23(b)(3) predominance requirement is satisfied despite the need to make individualized damage determinations[.]").

2. Individual Statute of Limitation Defenses Also Do Not Impact Class Certification.

Any statute of limitation defenses also do not defeat the superiority of class certification. To the extent that Philip Morris claims that class members should have been aware of their deception at a certain point – that Light and lowered tar and nicotine cigarettes were misrepresented, that issue will be based on common evidence of what a reasonable person should have known at the time and does not raise individual issues. As the court of appeals also concluded, to the extent that Philip Morris may challenge individual's actual knowledge for statute of limitation purposes, "[a]ny individual questions that

arise will do so only after a jury has determined the central question of a defendant's liability." *Pearson,* 257 Or App at 167. This conclusion is consistent with Oregon Supreme Court case law that individual class member's knowledge of defendant's illegal practices does not defeat certification where it is unlikely that "numerous" or "substantial" class members were aware of the illegal conduct. *Derenco*, 281 Or at 571-572.

Federal case law similarly holds that individual statute of limitation issues do not preclude certification. *Waste Management Holdings, Inc. v. Mowbray*, 208 F3d 288 (1st Cir 2000); *see also Cameron v. E.M. Adams & Co.,* 547 F2d 473 (9th Cir 1976) (stating that the "presence of individual issues of compliance with the statute of limitations here does not defeat the predominance of the common questions."); *In re Monumental Life Ins. Co.,* 365 F3d 408, 421 (5th Cir 2004) ("Though individual class members whose claims are shown to fall outside the relevant statute of limitations are barred from recovery, this does not establish that individual issues predominate, particularly in the face of defendants' common scheme of fraudulent concealment.") Summarizing federal case law, one court concluded:

> Courts have been nearly unanimous, however, in holding that possible differences in the application of a statute of limitations to individual class members, including the named plaintiffs, 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.

In re Energy Systems Equipment Leasing Securities Litigation, 642 F Supp 718, 752-53 (EDNY 1986), citing cases. *See also* 2 *Newberg on Class Actions* § 4:57 (5th Ed) ("Statute of limitations defenses—like damage calculations, affirmative defenses, and counterclaims—rarely defeat class certification.")

The issue presented is whether under ORCP 32A, (1) the class is sufficiently numerous, (2) there are questions of fact and law common to the class, (3) the claims and defenses of the lead plaintiffs are typical, and (4) the lead plaintiffs will adequately protect the class. The next issue is whether, under ORCP 32B, a class action is a superior mechanism for litigating these claims in light of the substantial economic benefits that will accrue from litigating the common liability issues on a class-wide basis. There will be vast benefits from litigating the overwhelming common liability issues regarding defendant's illegal conduct, particularly whether defendant misrepresented Light cigarettes and violated the UTPA as a result. Any individual issues as to particular class members, such as the amount of individual damages or particularized defenses to individual claims, may be litigated, as necessary, through the individual claim form process that ORCP 32F specifically contemplates.

F. At a Minimum, There Is Sufficient Basis to Certify an Issue Class under ORCP 32G on the Common Issue of Liability.

Finally, the trial court erred in failing to certify an issue class on the primary liability issues that arise across all putative class members, including whether the Philip Morris misrepresented that Light cigarettes were "light" and lowered tar and nicotine, among other issues.[39] The trial court's decision to deny alternative certification of an issues class was based on its incorrect legal conclusion that individual issues would still predominate in an issue class. As discussed above, this Court is "not bound by the trial court's conclusion regarding predominance of common questions because whether the facts justify such a conclusion is a matter of law." *Bernard*, 275 Or at 154.

ORCP 32G provides that a class may be certified as to "particular claims or issues." Issue classes may be certified to address all of the common liability issues, leaving any individual defenses to later proceedings. *Shea*, 164 Or App at 207. Philip Morris attempts to distinguish *Shea* by claiming that because *Shea* was a small class with personal injury damages, class members were more likely to take advantage of any findings on the common liability issues.

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[39] Plaintiffs identified over 39 common liability and legal issues and 17 common factual issues in their Memorandum in Support of Class Certification, pp. 21-25 (TCF 73). These include whether Philip Morris should be liable for punitive damages. *Id*. at p. 24.

This argument stands the incentives and realities on their head. An issue class is even more beneficial here because of the huge size of the class. If anything, the most daunting part of this litigation is proving the liability issues against an incredibly well-funded tobacco company. Thousands of class members, who have no ability to fund this litigation individually, would benefit substantially from resolution of the primary liability issues relating to Philip Morris's conduct. Individuals could then decide to litigate issues relating to personal knowledge, reliance (if any is required), and the individual amount of damages in follow-on individual proceedings. At a minimum, there are issues that may be certified that would substantially advance the litigation by resolving the key liability issues through the litigation of common facts.

VII. CONCLUSION

For the reasons stated above, this Court should reverse the trial court and certify the entire class under ORCP 32A and B, or at a minimum, an issues class under ORCP 32G with respect to the liability issues (saving any affirmative defense or damage issue for individual cases). Absent that resolution, this Court should affirm the Court of Appeals and remand to the trial court for further proceedings to determine, in the first instance, whether the entire class case or a liability issue class should be certified.

DATED this 10th day of April, 2014.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 13,625 words.

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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CERTIFICATE OF SERVICE AND FILING

I certify that on April 10, 2014, I filed the foregoing **RESPONDENTS' BRIEF ON THE MERITS** with the Appellate Court Administrator in .PDF, text-searchable format using the Oregon Appellate eCourt filing system in compliance with ORAP 16, as adopted by the Supreme Court.

Participants in this case who are registered eFilers will be served via the electronic mail function of the eFiling system.

I further certify that on April 10, 2014, I served two true and correct copies of said document on the party or parties listed below, via first class mail, postage prepaid, and addressed as follows:

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