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,

vs.

PHILIP MORRIS, INC., nka 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

CA A137297

SC S061745

PETITIONER PHILIP MORRIS USA INC.'S REPLY 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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INTRODUCTION

Philip Morris USA Inc. ("PM USA") submits this reply brief to address several significant mischaracterizations by plaintiffs concerning the evidence in the record, governing law and PM USA's arguments, and to respond to plaintiffs' argument concerning the contingent question raised in their Response to the Petition for Review.

ARGUMENT

I. PLAINTIFFS MISCHARACTERIZE THE RECORD, DISREGARD THE TRIAL COURT'S FINDINGS AND MISAPPLY OREGON LAW

A. Plaintiffs mischaracterize the trial court's findings and ignore the record and controlling authority when arguing reliance is amenable to class-wide proof.

The record in this case, including survey evidence, information available in the media, market data, and the class representatives' testimony, overwhelmingly supports the trial court's determination that smokers have differing beliefs about and reasons for purchasing Marlboro Lights ("Lights"). *See* PM USA Br. at 17-20. Plaintiffs seek to cast aside both that record and the trial court's findings by characterizing those findings as "legal conclusions" that are not entitled to deference. Resp. Br. at 35-37. To the contrary, unlike the ultimate question of whether common or individual issues predominate, the underlying question of whether the record evidence establishes individual variability *is* a question of fact that is entitled to deference on appeal. This court reached that exact conclusion in

Bernard when explaining that "[i]f, after an examination of a scientifically selected cross-section of 'commercial' borrowers, the trial court had determined that five per cent of the borrowers knew of the banks' method of computing interest at the time they borrowed, *its determination would constitute a finding of fact*." *Bernard v. First Nat'l Bank*, 275 Or 145, 153-54, 550 P2d 1203, 1209 (1976) (emphasis added). The same is true here: The trial court's "determinations" concerning Lights smokers' beliefs and motivations after an examination of the record are "finding[s] of fact" that are entitled to deference on appeal. *See id.*

Nor can plaintiffs plausibly excuse the Court of Appeals' improper *de novo* review of that record by claiming the trial court made no findings on the issue. Resp. Br. at 36. The trial court necessarily found that smokers have differing beliefs and motivations when it concluded that reliance would require individual examinations and that finding is overwhelmingly supported by the evidence. ER 23. And even if those implicit findings were not entitled to deference (they are, *see* PM USA Br. at 15-16), the trial court also *expressly* found that smokers' beliefs and motivations were "irrational," and *expressly* rejected as not "self-evident" the proposition "that every purchaser of Marlboro Lights was motivated substantially by health concerns and acted because he or she was misled." ER 23.

This variability in beliefs and motivations defeats certification even if plaintiffs' claims are based on uniform misrepresentations. *See, e.g.*, *Newman v.*

Tualatin Dev. Co., 287 Or 47, 597 P2d 800 (1979) (rejecting certification despite uniform misrepresentations). Plaintiffs themselves concede that a uniform misrepresentation does not permit an inference of class-wide reliance unless "class members . . . naturally would have relied on it *to the same degree and in the same way*." Resp. Br. at 28 (quoting *Strawn v. Farmers Ins. Co.*, 359 Or 336, 358-59, 258 P3d 1199 (2011), *cert. denied*, __ US __, 132 S Ct 1142 (2012)) (emphasis added). That is not true here, as established by the evidence and trial court findings. Indeed, the Court of Appeals majority concluded that individual inquiries would be necessary to determine whether Lights smokers relied when making each purchase, *Pearson v. Philip Morris, Inc*., 257 Or App 106, 160, 306 P3d 665 (2013)—a conclusion that plaintiffs ignore.

B. Plaintiffs misrepresent the extent to which Lights smokers received less tar and nicotine.

Throughout their response brief, plaintiffs repeatedly make the unsupported assertion that few, if any, Lights smokers actually received lower tar and nicotine. *See, e.g.*, Resp. Br. at 1 ("only accurate in very limited and particular circumstances"); *id*. at 4 (Lights were "only light and lowered tar and nicotine in very limited circumstances, essentially in lab-like conditions"); *id*. at 10 ("under the very specific lab-like conditions set forth under the FTC testing method"); *id.* at 13 (similar); *id.* at 15 (similar). *All* of the evidence in this case is to the contrary. PM USA Br. at 7-8 & evidence cited therein. The uncontradicted evidence

establishes that the "overwhelming majority of smokers" receive less tar and nicotine from light cigarettes and "more than half of all the results showed less than 50% compensation." *Id.* Based on that evidence, the trial court found that smokers "on average" receive less tar and nicotine from each Lights cigarette as compared to a Reds cigarette, ER 18-19, another factual finding entitled to deference on appeal. Plaintiffs cannot change this critical fact. To the contrary, when faced with this evidence, plaintiffs below abandoned their First Claim for Relief: that Lights smokers failed to receive less tar and nicotine. ER 7. Instead they shifted the focus to their Second Claim for Relief: that PM USA represented that Lights were "inherently lighter" regardless of how they were smoked. *Id*. at 8. That was the only claim the Court of Appeals even considered. *Pearson*, 257 Or App at 119-20.

C. Plaintiffs erroneously conflate ascertainable loss with the amount of damages.

Plaintiffs contend that they need not show that there is a common means of establishing an ascertainable loss for the entire class because, "[u]nder Oregon law, proof of damages is not required for class certification." Resp. Br. at 41. Plaintiffs conflate the *amount* of damages with the *fact* of injury (*i.e.*, ascertainable loss). The plain language of the Unlawful Trade Practices Act ("UTPA") requires that plaintiffs prove that they suffered "an ascertainable loss of money or property, real or personal, as a result of" an unlawful trade practice. ORS 646.638 (1). Unless

the fact of that "ascertainable loss" can be proved on a class-wide basis, plaintiffs cannot prove *liability* on a class-wide basis. Regardless of whether individual issues relating to the amount of damages owed to each putative class member are sufficient to defeat certification under Oregon law, class certification is not appropriate where there are individual issues relating to whether the unlawful trade practice caused any injury at all.

The undisputed record in this case demonstrates that plaintiffs suffered no class-wide ascertainable loss. Lights were always priced the same as Reds and thus Lights smokers did not pay any premium for the alleged "inherently light" feature of Lights. PM USA Br. at 21-22. Consequently, in order to demonstrate an ascertainable loss, each putative class member would need to show that they continued to smoke Lights when they otherwise would have quit or smoked less. That proof necessarily involves individual inquiries. *See* PM USA Br. at 39-41. Plaintiffs' answer that they will tell the court at some later date how they intend to prove ascertainable loss with class-wide evidence is insufficient. *See Bernard*, 275 Or at 165-66.

D. Plaintiffs ignore the individual inquiries that would be necessary to resolve the statute of limitations issues.

Plaintiffs rely on outdated federal authority to suggest that individual issues created by the statute of limitations defense are irrelevant to class certification. Resp. Br. at 53-54. More recently, the U.S. Supreme Court has made clear that

defenses should be considered in assessing certification: "a class cannot be certified on the premise that [defendant] will not be entitled to litigate its statutory defenses to individual claims." *Wal-Mart Stores, Inc. v. Dukes*, 131 S Ct 2541, 2561 (2011). PM USA does not argue that the individual issues raised by affirmative defenses always defeat class certification, but it makes no sense simply to turn a blind eye to defenses that would require extensive individual inquiries in evaluating whether plaintiffs have carried their burden of establishing that a class action would be superior. For this reason, this court has rejected certification based upon individual defenses in other cases. *Bernard*, 275 Or at 158. And one of the very cases cited by plaintiffs, *Waste Management Holdings, Inc. v. Mowbray*, 208 F3d 288, 297-99 (1st Cir. 2000), held that "affirmative defenses should be considered in making class certification decisions."

Nor is there any merit to plaintiffs' alternate contention—which the Court of Appeals rejected, *Pearson*, 257 Or App at 166—that the statute of limitations defense involves only a common question because it depends on whether "class members *should have been aware* of their deception at a certain point," which "will be based on common evidence of what a reasonable person should have known at the time." Resp. Br. at 52 (emphasis added). That argument assumes that every putative class member had access to the same information about Lights at the same time, a fact that is not established by the record in this case and which

is implausible on its face. In any event, the question of whether putative class members "should have been aware" does not alone resolve the statute of limitations defense. Rather, as the Court of Appeals concluded, 257 Or App at 166, the court also must consider whether and when each putative class member had *actual* notice to decide if an individual's claim is barred by the statute of limitations. *See, e.g.*, *Saenz v. Pittenger*, 78 Or App 207, 212, 715 P2d 1126 (1986). That is an individual inquiry. *Pearson*, 257 Or App at 166.

II. PLAINTIFFS CANNOT ELIMINATE THE REQUIREMENT THAT PUTATIVE CLASS MEMBERS MUST PROVE THEY RELIED UPON EXPRESS MISREPRESENTATIONS BY RECASTING THEIR ALLEGATIONS AS A "FAILURE TO DISCLOSE"

Plaintiffs spend much of their merits brief disputing the conclusion reached by *every* judge on the Court of Appeals and by the trial court that plaintiffs seek to recover based on affirmative misrepresentations and must therefore prove that they relied on those misrepresentations.

Plaintiffs cannot dispute that their claims are based on allegations that PM USA expressly misrepresented Lights as "light" and "lowered tar and nicotine." *See, e.g.*, Resp. Br. at 31 (arguing 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*" and "it is certainly reasonable to infer that a reason for purchasing Marlboro Lights at least included *the product's central representation* . . ."") (emphases added); *id.* at 1 ("Plaintiffs alleged below that

Philip Morris . . . *falsely represented that Lights had characteristics and features* that they did not have.") (emphasis added). Indeed, plaintiffs concede that any allegations of a failure to disclose arise exclusively from PM USA's alleged express misrepresentations: "[I]f [PM USA] made *no* representations that Lights were 'light' or 'lowered tar and nicotine,' [PM USA] would have no further duty under the UTPA and would not need to disclose [additional information]." Resp. Br. at 19 (emphasis in original).

Plaintiffs also cannot dispute that this court has held that "plaintiff's reliance may indeed be a requisite cause of any loss . . . when plaintiff claims to have *acted upon* a seller's express representations." *Sanders v Francis*, 277 Or 593, 598, 561 P2d 1003, 1006 (1977) (emphasis in original). This describes plaintiffs' claims to a tee: plaintiffs allege that putative class members "acted upon" PM USA's "express representations" that Lights were "light" and delivered "lowered tar and nicotine."

Plaintiffs attempt to sidestep this reliance requirement by characterizing their claims as alleging that PM USA's express representations were deceptive because PM USA did not provide *additional* information that would have cured the misleading nature of what it said. Resp. Br. at 15-19. But plaintiffs cannot cite any authority that allows a party to avoid proving reliance upon affirmative

misrepresentations simply because defendant could have cured the deception by saying more.

Plaintiffs point to *Sanders*, but there this court observed that reliance upon an alleged failure to disclose would not be required because "it would be *artificial* to require [reliance] on that non-disclosure." 277 Or at 598 (emphasis added). Here, however, where the alleged duty to disclose additional information derives entirely from the alleged express misrepresentations, a plaintiff must have relied on the affirmative misrepresentations for the related omissions to have made a difference. Simply put, those omissions would have no impact on the plaintiffs' actions unless they first relied on the initial misrepresentations. For example, it would make *no difference* to a putative class member who did not rely on the statements "Lights" and "lowered tar and nicotine" whether those alleged representations meant "inherently lighter," "potentially lighter" or something else.[1]

In the end, plaintiffs' argument that proof of reliance upon express representations is not required for "half-truth" claims proves too much: their interpretation would eliminate the reliance requirement from *all* UTPA claims. The Court of Appeals observed that "[e]very fraud case based on [a] material misrepresentation [can] be turned facilely into a material omissions case[.]" 257

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1 Plaintiffs also cite *State ex rel Redden v. Discount Fabrics Inc*., 289 Or 375, 615 P2d 1034 (1980) (Resp. Br. at 25-26). But that case, which was brought by the Attorney General and did not arise under ORS 646.638 (1), merely repeats the *Sanders* holding in *dicta*.

Or App at 143 (citation and internal quotations omitted). This observation is correct, as plaintiffs themselves concede. Resp. Br. at 22 ("like all UTPA cases, [*Sanders*] was based on an actual representation that *also* omitted material information") (emphasis in original). And although plaintiffs attempt to distinguish cases like *Feitler v. Animation Celection*, 170 Or App 702, 13 P3d 1044 (2000) and *Krause v. Eugene Dodge*, 265 Or 486, 509 P2d 1199 (1973) as involving "pure misrepresentation" claims, *Feitler* and *Krause* easily could be framed as "half-truth" claims that allege both express misrepresentations and partial omissions.[2] Such maneuvering should not eliminate the need for proof of reliance on the express misrepresentations.

Nor can plaintiffs avoid the reliance requirement by now arguing that this is "fundamentally an omission case based on the failure to disclose." Resp. Br. at 19. As an initial matter, this new argument is belied by plaintiffs' own concession that PM USA "would have no further duty" to disclose had it "made *no* representation," Resp. Br. at 19 (emphasis in original), and by plaintiffs' failure even to plead stand-alone failure to disclose claims. Furthermore, allowing plaintiffs to pursue stand-alone concealment claims would implicate the lower

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2 For example, in *Feitler*, the alleged fraud could have included the seller's failure to disclose that he had additional "plane crazy" drawings. In *Krause*, the alleged fraud could have been based in part on plaintiff's failure to disclose "that the same car had previously been sold for $3,575 to another purchaser in return for a bad check."

courts' rulings on federal preemption. Indeed, when plaintiffs sought to have the Court of Appeals vacate the trial court's summary judgment ruling, they argued that their claims were based on alleged half-truths that included express misrepresentations and thus were not preempted. *See* Appellants' Opening Br. at 16 (Or Ct App Mar. 2, 2009). How plaintiffs characterized their claims was critical: although federal law might not preempt claims based on *express* misrepresentations, claims based solely upon failure to disclose allegations are preempted by federal law. *Cipollone v. Liggett Grp., Inc.*, 505 US 504, 524-25 (1992) (Federal Cigarette Labeling and Advertising Act preempts state law claims that would require different or additional health information beyond Labeling Act's warnings); *Altria Grp., Inc. v. Good*, 129 S Ct 538, 547-48 (2008) (reaffirming *Cipollone* analysis). Thus, notwithstanding the Court of Appeals' conclusion on preemption, any failure to disclose claims necessarily would be preempted.

Finally, even if plaintiffs were somehow correct that their claims should be viewed as omission claims in which reliance is not required, plaintiffs are incorrect that this characterization would relieve them from proving that the alleged misconduct caused their purchases. Resp. Br. at 25. Neither *Sanders* nor *Discount Fabrics*, upon which plaintiffs rely for this assertion, purports to eliminate the statutorily required proof of causation where omissions alone are alleged. The

plain language of the UTPA requires proof of causation in *all* cases, without distinguishing between claims based on misrepresentations and those based on omissions. ORS § 646.638(1) (requiring the plaintiff to suffer an ascertainable loss "as a result of" the wrongful conduct). Applied here, had plaintiffs made only concealment allegations, they could demonstrate ascertainable loss "as a result of" those allegations by proving they would not have purchased Lights if they had known the facts that allegedly were concealed. By contrast, putative class members who purchased Lights with knowledge of the allegedly concealed information (like class representative Ms. Pearson, SER 3, 8, 10 at 74, 124, 133) would not have suffered an ascertainable loss "as a result of" that concealment.

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Plaintiffs are therefore wrong when claiming that "it could not be that plaintiffs have to prove that the *omission* was the cause in fact of their purchase transaction" because such proof would be "impossible." Resp. Br. at 25 (emphasis in original). Such proof is entirely possible here but, like proof of reliance, can only be offered on an individual basis.

DATED this 1st day of May, 2014.

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CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

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 2,822 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 FILING AND SERVICE

I certify that on May 1, 2014, I filed the foregoing **PETITIONER PHILIP MORRIS USA INC.'S REPLY BRIEF ON THE MERITS** with the Appellate Court Administrator by using the eFiling system.

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