IN THE SUPREME COURT OF THE STATE OF OREGON

MARILYN C. PEARSON and LAURA GRANDIN, individually and on behalf of all similarly situated person,

Plaintiffs-Appellants,
Respondents on Review,

vs.

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

CA A137297

SC S061745

MERITS BRIEF OF PETITIONER PHILIP MORRIS USA, INC.

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. QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

Question 1: In reviewing a decision not to certify a class, is the appellate court bound by the trial court's findings of fact when they are supported by substantial evidence?

Proposed Rule: In reviewing a class certification order, the appellate court is bound by the trial court's factual findings so long as they are supported by substantial evidence. The court may not disregard those findings in favor of its own findings of fact based on *de novo* review of the evidence.

Question 2: Can the element of reliance under the Unlawful Trade Practices Act, ORS 646.605 *et seq.*, be litigated on a class-wide basis when undisputed evidence establishes—and the trial court found—that a substantial number of putative class members did not purchase Marlboro Lights in reliance on the alleged misrepresentations?

Proposed Rule: Reliance cannot be litigated on a class-wide basis when undisputed evidence establishes—and the trial court found—that many class members did not purchase Marlboro Lights in reliance on the alleged misrepresentations.

Question 3: At the certification stage, must plaintiffs do more than merely represent through counsel that an element of their claims, such as ascertainable loss, can be proved on a class-wide basis?

Proposed Rule: At the certification stage, plaintiffs must do more than merely represent through counsel that an element of their claims, such as ascertainable loss, can be proved on a class-wide basis. Plaintiffs must present sufficient evidence establishing how plaintiffs will prove the elements of their claims using common proof.

Question 4: Is plaintiffs' theory of class-wide ascertainable loss—that an "inherently light" cigarette is worth more than a "possibly light" cigarette—viable in the face of undisputed evidence that Marlboro Lights sold for the same price as Marlboro Reds?

Proposed Rule: Plaintiffs' class-wide theory of ascertainable loss is not viable. The undisputed evidence that Marlboro Lights sold for the same price as Marlboro Reds and the price of Marlboro Lights did not decline after the alleged "truth" was disclosed demonstrates that plaintiffs cannot prove through common evidence that an "inherently light" cigarette would be worth more than a "possibly light" cigarette.

Question 5: Do common issues predominate under ORCP 32 where numerous individual issues would need to be adjudicated separately by the trier-of-fact for each class member?

Proposed Rule: Even if some aspects of plaintiffs' claims are amenable to class-wide proof, common issues do not predominate where plaintiffs' claims present numerous individual issues, including class membership, whether each

purchase was made in reliance on the alleged fraud, and affirmative defenses such as the statute of limitations.

Question 6: Is certification of specific issues appropriate under ORCP 32 G where numerous individual issues would need to be resolved on behalf of each class member?

Proposed Rule: Even if some aspects of plaintiffs' claims are amenable to class-wide proof, certification of an issue class under ORCP 32 G is inappropriate where resolution of each class member's claims would require adjudication of numerous individual issues, such that resolving common issues would not materially advance the litigation and improve efficiency.

II. NATURE OF THE ACTION AND RELIEF SOUGHT

Plaintiffs filed this class action seeking relief under the Unlawful Trade Practices Act, ORS 646.605 *et seq.* ("UTPA"). Plaintiffs alleged that PM USA violated the UTPA by misrepresenting that Marlboro Lights ("Lights")[1] would deliver less tar and nicotine than Marlboro Reds ("Reds") and that, as a result of the alleged misrepresentation, plaintiffs suffered economic losses. Plaintiffs moved to certify a world-wide class consisting of everyone who purchased at least one pack of Lights in Oregon between 1971 and 2001. *Pearson v. Philip Morris Inc.*, 257 Or App 106, 108, 306 P3d 665 (2013).

[1] As of June 22, 2010, the federal Family Smoking Prevention and Tobacco Control Act prohibits the use of "light," "mild," "low," or similar descriptors. All references to products with such descriptors are for historical purposes only.

The trial court denied class certification, concluding that the individual issues presented by the elements of reliance and ascertainable loss "vastly predominate over the common issues" and precluded any superiority finding. ER 11. The court explained that the individual issues presented by either of these elements standing alone would be sufficient to defeat certification, and thus it "would reach the conclusion that individual questions predominate over common questions (to a degree that requires denial of class certification) even if [its] finding on one of those issues were found on appeal to be wrong." ER 26. The court further declined to certify an issue class. ER 25. The court subsequently granted PM USA's motion for summary judgment on preemption grounds and entered judgment of dismissal.

Plaintiffs appealed and assigned error to the summary judgment and class certification decisions. PM USA conceded error on summary judgment based on the U.S. Supreme Court's intervening decision in *Altria Group, Inc. v. Good*, 555 US 70, 129 S Ct 538 (2008), and the Court of Appeals reversed that judgment. In a 6-4 decision, the Court of Appeals then reversed the trial court's conclusion that individual issues predominated over common issues and remanded for the trial court to determine whether certification would be superior in view of the Court of Appeals' decision, and, if not, whether an issue class would be appropriate. 257 Or App at 172.

III. SUMMARY OF FACTS

A. *The "Lights" and "lowered tar and nicotine" descriptors on packs of Lights accurately reflect results obtained by the FTC Method.*

In 1967, the Federal Trade Commission ("FTC") adopted a standardized method for measuring tar and nicotine, which became known as the FTC Method. Under the FTC Method, a machine smokes each cigarette using a standardized set of conditions. Declaration of Peter English ¶¶ 30 ("English Decl.") (Tr. Ct. Dkt. No. 102, Exhibit A).

A smoker does not necessarily smoke in the same manner as the FTC's machine or in the same manner as other smokers. ER 12; English Decl. ¶ 30. If a smoker changes the way he or she smokes when switching to a cigarette with lower FTC yields—by (1) smoking each cigarette more intensely (such as taking larger or more frequent puffs or blocking ventilation holes used to dilute the smoke with air), or (2) smoking more cigarettes—he or she might not receive less tar and nicotine, notwithstanding the lower FTC measurements. Declaration of Peter A. Valberg, ¶¶ 19-22 (SER 60-63); ER 13 (trial court finding same). Changing how one smokes when switching to a lower-tar cigarette is referred to as "compensation." SER 63 ¶ 22; ER 13 (trial court discussing compensation). If a smoker compensates to such an extent that he or she receives the same amount of tar and nicotine from a lower-yield cigarette as he or she would receive from a higher-yield cigarette, the smoker is

compensating "completely." SER 67 ¶ 29. To the extent a smoker engages in "incomplete" compensation, the smoker is still receiving less tar and nicotine from the lower-yield cigarette. *Id*.

Before the FTC adopted its method, PM USA expressly advised the FTC that because there was considerable variability in smoking behavior, smokers might not receive the amount of tar and nicotine indicated by the FTC's measurements. English Decl. ¶ 31. The FTC repeated PM USA's warnings nearly verbatim in a press release when it adopted the FTC Method but explained that it was adopting its method as a "reasonable standardized method" that was "capable of being presented to the public in a manner that is readily understandable." 8/1/1967 FTC Press Release, 1-2 (Attachment 114 to the Affidavit of James C. Miller III) (Tr. Ct. Dkt. No. 152).

In 1971, four years after adoption of the FTC Method, PM USA introduced Lights. It is undisputed that Lights always measured lower in tar and nicotine under the FTC Method than Reds, which means that a smoker who smokes Lights and Reds in the same manner will receive less tar and nicotine from Lights. Lights and Reds were always priced the same, notwithstanding their difference in FTC-measured yields. ER 17; Declaration of Bruce Neidle, ¶¶ 10-11 (SER 27).

B. *Many smokers received less tar and nicotine when smoking Lights.*

Lights not only measured lower in tar and nicotine under the FTC Method, the trial court found based upon undisputed evidence that many smokers actually received less tar and nicotine from Lights. For example, PM USA offered deposition testimony taken in another Lights case from Dr. Neal Benowitz, an expert who has frequently testified against PM USA. As noted by the trial court, Dr. Benowitz conceded that the extent of compensation "depends" on the smoker's behavior and that Lights smokers "on average" obtain less tar and nicotine on a "per cigarette basis"—i.e., they receive less tar and nicotine from a single Lights as compared to what they would have received from a single Reds. ER 18-19, SER 86-87.

Dr. Benowitz's testimony was confirmed by the unrefuted testimony of defense expert Dr. Peter Valberg, a former Professor at Harvard University's School of Public Health. SER 59, ¶ 3. Dr. Valberg concluded, based on an analysis of sixteen studies examining the extent to which smokers compensate, that the "overwhelming majority of smokers exhibit less than complete compensation" and "[m]ore than half of all the results showed less than 50% compensation." SER 69-71, ¶¶ 41-42. Dr. Valberg further explained that among smokers who compensate, some do so by smoking more Lights cigarettes and that those individuals smoke more cigarettes precisely because they receive less tar and nicotine from each Lights. SER 67, ¶ 29.

Plaintiffs did not dispute that many Lights smokers in fact received less tar and nicotine. Instead, when faced with this evidence, plaintiffs shifted from their theory that Lights consumers did not receive less tar and nicotine when smoking Lights, to a new theory that Lights smokers were injured because they received a cigarette that was not "inherently lower in tar and nicotine" than Reds "no matter how they were smoked." ER 7, ¶ 23; 257 Or App at 119-20 (recognizing that plaintiffs had shifted to this second theory).

C. *Many class members did not believe Lights were "inherently lighter" than Reds and purchased Lights for reasons unrelated to tar and nicotine levels or health.*

The trial court recognized that public health authorities disseminated information to the public through the lay press "that discussed the very misrepresentations plaintiffs allege in this case." ER 23. The record likewise established that information that light cigarettes might not deliver less tar and nicotine and might not be any safer for smokers who compensate was repeatedly communicated throughout the class period through media such as the *Oregon Statesman*, *The Oregonian*, *Newsweek*, and *Consumer Reports*. SER 33-39, ¶¶ 69-80; SER 44, ¶ 103; *see also infra* at 18-19.

The public health community's concern about light cigarettes ultimately culminated in the 2001 publication of Monograph 13. Monograph 13 concluded that there is "no convincing evidence" that reductions in FTC-measured tar and nicotine yields "have resulted in an important decrease in the

disease burden caused by cigarette use either for smokers as a group or for the whole population." SER 43, ¶ 101. That conclusion was widely reported in the lay media. SER 44, ¶ 103; *see also infra* at 20.

Also in 2001, even before Monograph 13, PM USA began including a statement on every advertisement that "the amount of tar and nicotine you inhale will vary depending on how you smoke the cigarette." *See* 2001 Marlboro Lights Advertisement (Ex. 11 to Def.'s Mot. to Dismiss the Second Am. Compl.) (SER 1). PM USA continued to inform customers that Lights might not deliver less tar and nicotine or be safer than regular cigarettes after Monograph 13. For example, beginning in 2002, PM USA included periodic "onserts" on all Lights packages advising that (1) FTC-measured yields "are not meant to communicate the amount of tar and nicotine actually inhaled by any smoker"; (2) smokers of Lights "may not inhale less tar and nicotine"; and (3) smokers "should not assume" that Lights "are less harmful." *See* SER 29-30 (example of an onsert). Notwithstanding these and other disclosures, there was no decline either in the relative market share or price of Lights after Monograph 13 was released or after PM USA placed onserts on packages of Lights. SER 28, ¶¶ 13-14.

Consistent with the information repeatedly made available to smokers during the class period, the trial court found that it was not credible to conclude that "every purchaser of Marlboro Lights was motivated substantially by health

concerns and acted because he or she was misled by the name 'Lights' or the statement 'lowered tar and nicotine.'" ER 23. This finding is confirmed by voluminous survey data, discussed in detail below, finding that a substantial percentage of light and low-tar smokers do *not* believe that their cigarettes are safer and/or purchased their cigarettes for reasons unrelated to health, such as taste. *See infra* at 17-18. It also is confirmed by the testimony of class representative Ms. Pearson, who testified that she was aware that tar and nicotine deliveries were influenced by smoking behavior when she switched to Lights and that she continued to purchase Lights even after participating in this lawsuit and learning of the alleged fraud. *See infra* at 19-20.

IV. SUMMARY OF ARGUMENT

After conducting the rigorous review of the record required by this court's precedents, the trial court correctly recognized that "not only do the individual issues predominate over the common ones, they do so overwhelmingly." ER 26. There is simply no way to try the claims of the estimated 100,000 putative class members spread around the world without examining (among other things) each individual's beliefs, purchasing motivations, and smoking behavior. As a result, instead of promoting judicial efficiency, certifying the class proposed here would necessitate thousands of individual mini-trials that would bog down the trial court for many years. Indeed, the trial court's holding is consistent with the overwhelming weight of

authority in similar Lights cases—including in 14 out of 16 cases to address that question since the trial court's decision below—in which certification has been denied based on the inherently individual issues raised by these claims.[2]

In overturning the trial court's determination, the Court of Appeals misinterpreted this court's decisions and ignored the facts found by the trial court. *First*, in casting aside the trial court's factual findings and conducting its own *de novo* review of the evidence, the Court of Appeals disregarded binding authority from this court. The trial court found a substantial number of class

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[2] *See In re: Light Cigarettes Mktg. Sales Prac. Litig.*, 271 FRD 402 (D Me 2010) (denying certification in four consolidated cases), *rev. denied*, Order, No. 10-8042 (1st Cir Feb. 22, 2011); *Cabbat v. Philip Morris USA Inc.*, 2014 WL 32172 (D Haw 2014) (pet. for rev. pending); *Wyatt v. Philip Morris USA Inc.*, 2013 WL 4046334 (ED Wis 2013), *rev. denied*, Order, No. 13-8021 (7th Cir. Sept. 6, 2013); *Cleary v. Philip Morris USA Inc.*, 265 FRD 289 (ND Ill 2010), *aff'd*, 656 F3d 511, 520 n6 (7th Cir 2011); *McLaughlin v. Am. Tobacco Co.*, 522 F3d 215 (2d Cir 2008); *Benedict v. Altria Grp., Inc.*, 241 FRD 668 (D Kan 2007); *Mulford v. Altria Grp., Inc.*, 242 FRD 615 (DNM 2007); *Lawrence v. Philip Morris USA Inc.*, 53 A3d 525 (NH 2012); *Stern v. Philip Morris USA Inc.*, 2007 WL 4841057, slip op. (NJ Super Ct 2007); *Davies v. Philip Morris USA Inc.*, 2006 WL 1600067 (Wash Super Ct 2006); *Huntsberry v. R.J. Reynolds Tobacco Co.*, slip op. (Wash Super Ct 2006); *but see* Order, *Miner v. Philip Morris Cos. Inc.*, No. 60CV03-4461 (Ark Cir Ct Nov. 8, 2013) (review pending); *Curtis v. Altria Group, Inc.*, 792 NW2d 836 (Minn Ct App 2010), *rev'd on other grounds*, 813 NW2d 891 (Minn 2012). In *Miner*, the court applied a certification standard far more lenient than the standard applicable here. Hr'g Tr at 68-69, *Miner v. Philip Morris Companies Inc.*, No. CV 2003-4661 (Ark Cir Ct Oct. 22, 2013) ("Arkansas is probably, from a class certification [perspective], a much easier state to certify a class regardless of what happens in the merits than many of our sister states . . ."). In *Curtis*, the Minnesota Supreme Court subsequently entered judgment in favor of PM USA and thus had no reason to reach the question of certification. 813 NW2d 891.

Several courts also denied class certification in Lights cases before the trial court's decision below. *See Philip Morris USA Inc. v. Hines*, 883 So 2d 292 (Fla 4th DCA 2003); *Cocca v. Philip Morris Inc.*, 2001 WL 34090200 (Ariz Super Ct 2001); *Oliver v. R.J. Reynolds Tobacco Co.*, 2000 WL 33598654 (Pa Ct Com Pl 2000); *but see Craft v. Philip Morris Cos.*, 190 SW3d 368 (Mo Ct App 2005); *Aspinall v. Philip Morris Cos.*, 813 NE2d 476 (Mass 2004); *In re Tobacco Cases II*, slip op. (Cal Super Ct 2001).

members did not rely on the misrepresentation alleged by plaintiffs. As the trial court explained, based on a record demonstrating that smokers had different beliefs about and reasons for purchasing Lights, it is not "self-evident" that "every purchaser of Marlboro Lights was motivated substantially by health concerns and acted because he or she was misled by [the] name 'Lights' or the statement 'lowered tar and nicotine.'" ER 23. The trial court further found no factual support for plaintiffs' theory of class-wide ascertainable loss: "there is no evidence that cigarettes that cannot be made to deliver more tar and nicotine than Marlboro Regulars by compensatory smoking behavior sell for a higher price (and, inferentially, are worth more)." ER 17-18. The trial court's findings were supported by substantial evidence and thus, under Oregon law, are binding on appeal. The Court of Appeals, however, ignored those findings and instead conducted a *de novo* review that produced contrary findings that are unsupported by the record. That was error.

Second, the Court of Appeals erred by concluding that individual issues concerning each class member's reliance on the alleged fraud did not support the trial court's conclusion that individual issues predominated over common issues. This court has consistently held that plaintiffs' claims cannot be adjudicated on a class-wide basis where individual knowledge and motivations are at issue. *See, e.g.*, *Newman v. Tualatin Dev. Co.*, 287 Or 47, 54, 597 P2d 800 (1979); *Bernard v. First Nat'l Bank*, 275 Or 145, 162, 550 P2d 1203

(1976). The Court of Appeals failed to follow these precedents, even though it expressly recognized that whether each purchase was made in reliance on the alleged misrepresentation would need to be adjudicated individually. 257 Or App at 167-68 (to resolve reliance, "a fact finder must ascertain the number of packs that each class member purchased before he or she learned that Marlboro Lights are not inherently light"). The Court of Appeals concluded that the trier of fact could determine whether each class member relied when making *at least one purchase* of Lights using class-wide evidence. *Id*. at 160. This conclusion turns a blind eye to the individual issues raised by each class member's motivations and beliefs.

Third, the Court of Appeals erred by failing to require any evidence that ascertainable loss could be adjudicated on a class-wide basis and instead accepting plaintiffs' bare representations that they would come forward with such evidence later. As the trial court recognized, consistent with this court's decision in *Bernard*, "when plaintiffs seek class certification and assert that something can be proved on a class-wide basis, they have the burden in the certification proceeding to present evidence in support of that proposition." ER 23. The need for such evidence was particularly important here, given that the undisputed evidence demonstrates, and the trial court found, that "inherently lighter" cigarettes were not worth more than "potentially lighter" cigarettes.

Fourth, the Court of Appeals erroneously disregarded other individual issues that make plaintiffs' claims unsuited for class-wide treatment. The court recognized that individual inquiries for each of the estimated 100,000 or more class members would be necessary to determine whether the class member actually purchased Lights and was therefore a member of the class, whether the class member relied on the alleged misrepresentation when making each purchase, and whether the class member is barred by PM USA's statute of limitations defense. *See* 257 Or App at 166-68. Yet the court incorrectly concluded that the need for these thousands of mini-trials did not defeat predominance.

Fifth, the Court of Appeals erred by remanding the question of whether an issue class was appropriate. The extensive individual issues raised by plaintiffs' claims confirm that an issue class would not materially advance the litigation and thus the trial court correctly refused to certify an issue class.

Finally, all eleven judges to have considered the issue—ten judges on the Court of Appeals and the trial court judge—correctly recognized that plaintiffs' UTPA claims require proof of reliance. *Pearson*, 257 Or App at 139-46; *id.* at 173 (Duncan, J., concurring in part, dissenting in part); ER 16. The court should either decline to take up the "contingent question" raised by plaintiffs or affirm the Court of Appeals decision on this limited point.

V. ARGUMENT

A. *The Court of Appeals erred in failing to apply the facts found by the trial court.*

This court has made clear that "an appellate court cannot reject the findings of fact of the trial court unless the appellate court can say affirmatively that there is *no evidence* to support the fact found by the trial court." *Illingworth v. Bushong*, 297 Or 675, 694, 688 P2d 379 (1984) (emphasis added), *overruled in part on other grounds*, *Ditommaso Realty, Inc. v. Moak Motorcycles, Inc.*, 309 Or 190, 785 P2d 343 (1990); *see also*, *e.g.*, *Marsh v. Am. Family Mut. Ins. Co.*, 231 Or App 332, 338, 218 P3d 573 (2009) ("On appeal, we accept a trial court's findings of fact if they are supported by any evidence."). Indeed, this court has repeatedly explained that this deference applies even to findings that are *implied* by the trial court's decision:

> "[I]f the trial court does not make express findings on all pertinent issues, the appellate court will view the record in a light most favorable to the trial court's ruling and presume that the facts were decided in a manner consistent with the trial court's ultimate conclusion."

State v. Backstrand, 354 Or 392, 405 n12, 313 P3d 1084 (2013); *see also*, *e.g.*, *Ball v. Gladden*, 250 Or 485, 487, 443 P2d 621 (1968) (relied upon by this court in *Bernard* when discussing the "scope of review" of certification decisions and concluding that "[i]f findings are not made on all such facts, and there is evidence from which such facts could be decided more than one way,

we will presume that the facts were decided in a manner consistent with the ultimate conclusion").

Accordingly, appellate courts are bound by both express and implicit findings of fact made by the trial court when deciding class certification so long as they are supported by record evidence. *See, e.g., Alsea Veneer, Inc. v. State*, 117 Or App 42, 52, 843 P2d 492 (1992) (in appeal from class certification, "[w]e review the trial court's factual determinations for substantial evidence"), *rev'd on other grounds*, 318 Or 33, 862 P2d 95 (1993). Such deference makes particular sense in the class certification context because it is the trial court's responsibility to manage a class action. As this court explained,

> "In reviewing the trial court's determination that a proceeding shall or shall not be conducted as a class action, it must be remembered that this is largely a decision of judicial administration; that is, how the trial shall proceed. In making such decisions the trial court is customarily granted wide latitude."

Newman, 287 Or at 51. The Court of Appeals violated this principle.

1. *The trial court made findings of fact that were supported by substantial evidence and those findings are binding on the appellate court.*

The trial court found that it was not "self-evident" that "every purchaser of Marlboro Lights was motivated substantially by health concerns and acted because he or she was misled by [the] name 'Lights' or the statement 'lowered tar and nicotine.'" ER 23. The court observed that "there were articles in the

lay press more than a year before the filing of this action that discussed the very misrepresentations plaintiffs allege in this case," *id.*, and further found that plaintiffs' evidence "show[ed] the irrationality of smoking and cigarette purchasing." *Id.* Based on these findings, the court concluded that whether each class member relied on the alleged misrepresentations is a question requiring individual rather than common proof, thereby defeating predominance and superiority. *Id*. Both explicit and necessarily implicit in that holding are factual findings that smokers have different beliefs about and reasons for purchasing Lights, and that at least some smokers purchase Lights for reasons other than tar and nicotine deliveries or health.

These findings are supported by substantial evidence. *First*, survey data from the Centers for Disease Control ("CDC") and other third parties demonstrated that many Lights smokers did not believe that Lights were inherently lighter or safer and purchased Lights for reasons unrelated to the alleged misrepresentations, such as taste. Declaration of Ralph L. Keeney (Apr. 4, 2005) (SER 76-79) (compiling surveys) For instance:

- A 1986 CDC survey found that only 26% of light smokers think their brand is "less hazardous." SER 76.
- A 1993 CDC survey found that the most cited reason for smoking light cigarettes was taste. Only 21% reported smoking those cigarettes because they were more healthful than other brands. SER 78.

- A 1998 Gallup Poll similarly found that taste was the most cited reason (33%) for smoking light cigarettes. SER 79. Only 11% reported smoking their brand to improve health, only 10% to reduce tar exposure, and only 9% to reduce nicotine exposure. *Id*.
- A 1999 survey of light smokers found that only 31% believed that light cigarettes reduced the risk of having health problems as compared to regular cigarettes. SER 77.

Second, PM USA's expert historian, Dr. Peter English, compiled an uncontroverted record of repeated public warnings about compensation and the potential that low yield cigarettes might not be less hazardous that appeared in the public media throughout the class period. SER 33-39. For example:

- A 1976 article in *Consumer Reports* entitled "Less Tar, Less Nicotine: Is That Good?" advised that "[w]hen cigarette smoke contains less nicotine than such smokers are accustomed to, their bodies simply contrive ways to get more smoke." SER 52-54; *see also* SER 33-34, ¶¶ 69-71.
- A 1978 *Oregon Statesman* column warned of a study showing that smokers who use cigarettes lower in tar and nicotine than their usual brand "hold the smoke in their lungs longer, thus making the 'safer' cigarette just as dangerous." SER 55; *see also* SER 38-39, ¶ 80.

- A 1982 article in the *Oregonian* reported that "smokers who have switched to brands with low tar and nicotine content to protect their health are wasting their money and continue to endanger their health" because they "may unconsciously change how they smoke to maintain their intake of nicotine." SER 36, ¶ 77.
- A 1983 *Newsweek* article reported on research concluding that "smokers who switch to 'light' cigarettes absorb as much nicotine as before." SER 35, ¶ 74.

There can be no reasonable dispute that many smokers read these and other similar articles and formed a belief that Lights might not deliver less tar and nicotine depending on how they are smoked.

Third, the testimony of one of plaintiffs' hand-picked class representatives establishes that smokers may be aware of the impact of their smoking behavior on tar and nicotine deliveries and yet still purchase Lights for reasons unrelated to the alleged deception. Ms. Pearson testified that when she switched to Lights she began taking deeper puffs from the cigarette, smoking further down the rod of the cigarette, and smoking more cigarettes and understood at that time that such changes would increase the amount of tar and nicotine she received. SER 7 at 119-21. Moreover, Ms. Pearson continued to purchase Lights *even after participating in this lawsuit* and alleging that Lights do not deliver less tar and nicotine. SER 3, 8, 10 at 74, 124, 133. She conceded

that she has no interest in "changing brands" because she "like[s] Marlboro Lights" and would not be in favor of Lights being taken off the market. SER 8, 10-11 at 125, 133-34. And these continued purchases cannot be ignored simply because some smokers might be addicted, since those smokers are addicted to *nicotine* and not to any particular cigarette brand.[3]

Finally, unrefuted market evidence demonstrates that many class members did not believe Lights were inherently lighter or safer and did not purchase for that reason. It is undisputed that there was no decline in either the price or relative market share of Lights even after the publication of Monograph 13 and PM USA's communications (and the communications of others) that the amount of tar and nicotine smokers receive depends on smoking behavior and that smokers should not assume Lights are safer than other cigarettes. SER 28 ¶ 14; Declaration of W. Kip Viscusi ¶¶ 22, 33-37 (SER 81-84). As the Second Circuit observed in evaluating this evidence, "that the market did not shift away from light cigarettes after the publication of Monograph 13 is compelling evidence that plaintiffs had other, non-health-related reasons for purchasing Lights." *McLaughlin*, 522 F3d at 226; *see also* SER 81-84 (Viscusi Decl. ¶ 22, 33-37).

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[3] Even if some continued purchases could be explained away by addiction, this would only introduce additional individual issues that would further defeat certification. *Barnes v. Am. Tobacco Co.*, 161 F3d 127, 134 (3d Cir 1998) (addiction is a "highly individualistic inquiry"); *Philip Morris Inc. v. Angeletti*, 752 A2d 200, 236 (Md 2000).

The trial court's findings are not only supported by the evidence, they are consistent with the findings of courts around the country. Courts repeatedly have considered similar records and concluded that "many smokers did not believe the Defendants' claims that lights had lower tar and nicotine and smoked lights for reasons unrelated to the alleged health benefits." *Light Cigarettes*, 271 FRD at 416; *see also, e.g.*, *McLaughlin*, 522 F3d at 223 ("Individualized proof is needed to overcome the possibility that a member of the purported class purchased Marlboro Lights for some reason other than the belief that Marlboro Lights were a healthier alternative . . . ."); *Cabbat* , 2014 WL 32172, at *9 (similar); *Wyatt*, 2013 WL 4046334, at *2-3 (similar); *Lawrence*, 53 A3d at 532 (similar); *Hines*, 883 So 2d at 293 (similar); *Stern*, 2007 WL 4841057, slip op. at 14 (similar); *Cocca*, 2001 WL 34090200, at *1 (similar); *Oliver*, 2000 WL 33598654, at *5 (similar).

In addition to its findings related to smokers' beliefs and purchasing motivations, the trial court also made findings when rejecting plaintiffs' contention that "a UTPA claim arose at the moment of purchase because the cigarette was not *inherently* lower in tar and nicotine than a Marlboro Red." ER 16 (emphasis in original). The court found that "[t]he only evidence in the record is that Philip Morris always set the same price for Marlboro Lights and Marlboro Reds" and that "there is no evidence that cigarettes that cannot be made to deliver more tar and nicotine than Marlboro Regulars by compensatory

smoking behavior sell for a higher price (and, inferentially, are worth more)." ER 17-18 (citations excluded). The trial court's finding was not simply supported by record evidence; it was undisputed the price for Lights and Reds was always the same. ER 17; SER 27 ¶¶ 10-11.

2. *The Court of Appeals erred by ignoring the trial court's findings of fact, engaging in de novo review and making findings that were unsupported by the record.*

Given the substantial evidence supporting the trial court's factual findings, the Court of Appeals was obliged to accept them. *See supra* at 14-16. The court, however, ignored those findings and instead conducted a *de novo* review of the evidence. 257 Or App at 161-65. Despite plaintiffs' failure to offer *any* evidence that all, or even some, class members understood "Lights" or "lowered tar and nicotine" to mean "inherently lighter regardless of how they are smoked," the Court of Appeals speculated "that it is unlikely that there are numerous putative class members who did not actually rely on the representations" for at least some of their purchases. *Id.* at 163. In addition, notwithstanding the trial court's finding that "there is no evidence" that an inherently light cigarette would "sell for a higher price (and, inferentially, are worth more)," the Court of Appeals concluded that a "jury could infer that an inherently light cigarette would be more valuable than a potentially light cigarette." *Id.* at 138. This disregard of the trial court's findings is an independent basis for reversing the Court of Appeals decision.

Not only did the Court of Appeals err by ignoring the trial court's findings, it compounded that error by making findings that were *contrary* to the record evidence. For example, the very Roper survey relied upon by the court when concluding "that it is unlikely that there are numerous putative class members who did not actually rely on the representations," *id.* at 164, actually found exactly the opposite. That study concluded that in 1976—25 years before the end of the class period—*less than half* of low-tar smokers (47%) thought that some cigarette brands were safer than others. A Study of Smokers' Habits and Attitudes With Special Emphasis on Low Tar Cigarettes, Exhibit 24 to Declaration of David Sugerman in Support of Pls. Mot. for Class Certification (Tr. Ct. Dkt. No. 79). The same study also found that when low-tar smokers were asked why they liked their brand, the reasons given most were "mild" (59%), "good flavor" (34%), and "satisfying" (33%)—all of which were given more frequently than "better for your health" (30%). *Id.*

The Court of Appeals ignored those results and instead sought to discredit the entirety of PM USA's survey evidence by asserting without any evidentiary support that (1) some surveys "do not necessarily capture the information relevant to causation" because "*one survey* asked respondents for the 'main reason' they smoked lower-yield cigarettes," and (2) the survey results "are extremely likely to have been affected by cigarette marketing." 257 Or App at 163 (emphasis added). Even if the Court of Appeals' *de novo* review

of this evidence were proper (it was not), neither of these arguments can withstand scrutiny.

The Court of Appeals' focus on one survey asking respondents for their "main reason" for smoking low-tar cigarettes ignores that many other surveys did *not* ask smokers for a single, "main reason" for smoking those cigarettes. *Id.* For example, a 1993 Gallup poll, cited elsewhere by the Court of Appeals, asked smokers if they "strongly disagreed," "disagreed," "agreed," or "strongly agreed" "that smoking low-tar cigarettes was safer than smoking high-tar cigarettes." *Id*. at 125. Contrary to the court's conclusion that nearly all class members believed the alleged fraud, 42% of the respondents to that survey "disagree[d]" or "strongly disagree[d]" that low-tar cigarettes were safer. SER 76. Likewise, the 1976 Roper survey discussed above and a 1993 CDC survey cited by the Court of Appeals allowed respondents to give *multiple* reasons why they preferred light and low-tar cigarettes and still found many smokers did not identify concerns about health or beliefs about tar and nicotine deliveries as even one reason for purchasing those cigarettes. *See supra* at 17, 22-23.

Nor is there any basis for the Court of Appeals' speculation that the survey evidence could be disregarded entirely as "likely to have been affected by cigarette marketing" because some respondents "may parrot back advertising claims." *Id.* at 163. As an initial matter, the court's reasoning is contrary to plaintiffs' allegations that PM USA represented Lights as healthier. If those

allegations were true, one would expect respondents to say Lights were *healthier* if they were "parroting back" advertisements, and not saying they were no safer. The court also cites no evidence to support its reasoning. Instead, the Court of Appeals cites only to a portion of Monograph 13 that on its face does not discuss or interpret surveys, but rather comments on why it believes manufacturers did not expressly advertise light cigarettes as safer. *Id*. at 164. And other portions of Monograph 13 relied on survey results—such as surveys finding *less than half* of the low-tar smokers "said some brands were better for health than others"—without suggesting that those results are somehow tainted by marketing. Risks Associated with Smoking Cigarettes with Low Yields of Tar and Nicotine, Exhibit 21 to Declaration of David Sugerman in Support of Pls. Mot. for Class Certification (Tr. Ct. Dkt. No. 79).

The Court of Appeals also erred by not giving any weight to articles warning about compensation and low-tar cigarettes. The court summarily claimed that the message in those articles was inconsistent with PM USA's advertising. 257 Or App at 164-65. Plaintiffs, however, did not offer, and the court did not cite, any evidence that PM USA's advertising nullified the message in these numerous articles or that no one believed them. Nor could they—the assumption that no class members read and believed articles published in prominent Oregon and national news sources strains credulity and defies common sense.

In addition, the Court of Appeals mistakenly dismissed the import of Ms. Pearson's testimony by reasoning that her continued purchases of Lights with knowledge of the alleged fraud "do[] not retroactively change her initial reliance on defendant's representation." 257 Or App at 165. That misses the point. As other courts have recognized, the fact that a hand-picked class representative continues to purchase the product even with knowledge of the alleged truth confirms that there are reasons for individuals to purchase the product other than the alleged fraud. *See, e.g.*, *McLaughlin*, 522 F3d at 226 ("Three of the six named plaintiffs even continued to purchase Lights after filing the complaint in this case, suggesting the influence of some other motivation."); *Stern*, 2007 WL 4841057, slip op. at 15 (similar). This testimony thus distinguishes this case from those, discussed in Part II below, in which there is only one reason why a consumer would purchase the product and reliance may be sometimes inferred or presumed. Even if Ms. Pearson might have testified that she initially purchased Lights with a belief they might deliver less tar and nicotine, there unquestionably are other class members who were aware of the alleged fraud before they ever purchased Lights.

* * *

The Court of Appeals' failure to accept the trial court's findings, its *de novo* review, and its factual conclusions that are unsupported by the evidence were wholly improper under Oregon law. These errors were critical to the

Court of Appeals decision. As discussed below in Sections V.B and C, the trial court's findings and the evidence supporting them demonstrate that reliance and ascertainable loss each raise individual issues that independently predominate over common issues and warrant reinstatement of the trial court's decision denying class certification. Indeed, if the court concludes that *either* reliance *or* ascertainable loss cannot be adjudicated on a class-wide basis, the court should affirm the trial court's exercise of discretion when denying class certification. ER 26 ("I would reach the conclusion that individual questions predominate over common questions (to a degree that requires denial of class certification) even if my finding on one of those issues were found on appeal to be wrong.").

B. *The Court of Appeals erred by reversing the trial court's conclusion that reliance cannot be tried on a class-wide basis.*

1. *Plaintiffs cannot prove reliance by each class member without individual inquiries concerning that class member's beliefs and motivations when purchasing each Lights pack.*

The trial court correctly found that the reliance requirement in this case raises individual issues that preclude certification. ER 23.[4] As discussed above, the trial court found—and substantial evidence overwhelmingly confirms—that Lights smokers had varying beliefs about and reasons for smoking Lights over the 30-year class period. *See supra* at 16-21.

[4] As discussed in Section V.D.1 below, the Court of Appeals and the trial court correctly concluded that plaintiffs' UTPA claims require proof of reliance. *See infra* at 50-54.

Indeed, even the Court of Appeals recognized that there are reasons for smokers to purchase Lights other than the alleged fraud. The court specifically contemplated that there would be smokers whose "reliance ended" because they "understood that Marlboro Lights were not inherently light" yet continued to purchase Lights. 257 Or App at 168. The court thus acknowledged that "a fact finder must ascertain the number of packs that each class member purchased before he or she learned that Marlboro Lights are not inherently light." *Id*.

In light of this undisputed evidence that many smokers purchased Lights for reasons other than the alleged fraud, the trial court properly applied this court's precedent in holding that the individual inquiries that would be required to resolve reliance defeat class certification. In *Bernard*, this court reversed certification of a class of bank customers who alleged that the banks overcharged certain interest after noting that any customer with actual knowledge of the banks' interest practices "would not be entitled to recover." 275 Or at 157. The court observed that "a legitimate issue exists concerning the knowledge of the [interest] method of many" borrowers and that, even though "the banks did not discuss their method of computing interest with their borrowers," it did "not follow that regular borrowers for business purposes would not be on notice of it." *Id*. at 162. The court explained: "[p]laintiffs have introduced no evidence from which we can conclude, in view of the realities of commercial borrowing, that the number of borrowers who would be

legitimately subject to challenge on the issue of knowledge is less than 'numerous.'" *Id*. Rather, "[f]rom the record it appears probable that many claimants' knowledge will legitimately be in issue and that separate adjudications of the claims of numerous members of the class will be required to dispose of the question of defendants' liability." *Id*. Thus, the court concluded that "common questions do not predominate and that the case is not a proper one for a class action." *Id*.

This court revisited the question of how variability in class member knowledge impacts class certification in *Derenco, Inc. v. Benjamin Franklin Federal Savings & Loan Association*, 281 Or 533, 577 P2d 477 (1978). As in *Bernard*, the ability of a class member to recover in *Derenco* depended in part on whether that class member had knowledge of certain alleged banking practices. *Id.* at 570. The court thus reviewed the record to determine whether plaintiffs had "demonstrate[d] that it is not 'likely' that separate adjudications will be required to resolve this issue in 'numerous' instances." *Id*. Comparing "the evidence" with the facts in *Bernard*, the *Derenco* court concluded that "the contrary is true concerning the knowledge of members of the class . . . . [I]t is probable that few borrowers ever thought of the matter at all." *Id*. at 572. Accordingly, in contrast to *Bernard*, the court concluded that it is "proper that this proceeding continue as a class action." *Id*.

The lesson of these two cases is straightforward: where the knowledge of class members and their reasons for entering into a transaction are at issue and vary among individual class members, a class cannot be certified. This rule makes sense. If the fact finder must examine the knowledge and beliefs of thousands upon thousands of class members, those individual inquiries will predominate and defeat any efficiencies of class treatment.

This court confirmed that principle in *Newman*, 287 Or 47. Plaintiffs there alleged that the defendant expressly warranted that townhouses would have only copper plumbing when in fact they also included galvanized plumbing. *Id.* at 52. The court explained that "[e]ven if plaintiffs can prove the brochure [that warranted copper plumbing] was given to all members of the class in this case, that would not establish that every member of the class read, was aware of, and relied upon each of the representations in the brochure." *Id.* at 54. The court thus ruled that "[i]nasmuch as reliance in this case would have to be individually determined, the trial court was correct in ruling a class action could not be brought." *Id*. *Newman* is directly on point and makes clear that where, as here, plaintiffs' claims raise individual issues of reliance because class members hold different beliefs and purchasing motivations, class certification should be denied.

2. *The Court of Appeals erred by concluding plaintiffs could satisfy their class certification burden with an inference of one-time reliance unsupported by the record.*

The Court of Appeals cited this court's ruling in *Newman* but concluded it did not control. Instead, the court held that whether each class member relied when making *at least one purchase* could be resolved with class-wide proof. 257 Or App at 160. At the same time, however, the court recognized that class members did not uniformly rely on the alleged misrepresentations throughout the class period and thus the fact finder would need to make individual determinations as to the number of packs that each class member purchased in reliance on the alleged fraud. *Id.* at 167-68. This recognition that many purchases were *not* made in reliance on the alleged fraud demonstrates that reliance is inherently individual. *See supra* at 16-21. For this reason alone, the Court of Appeals erred when concluding that "one-time" reliance could be resolved on a class-wide basis.

Moreover, the Court of Appeals reached its "one-time" reliance conclusion by misreading this court's decision in *Strawn v. Farmers Insurance Co.*, 350 Or 336, 258 P3d 1199 (2011), *cert. denied*, __ US __, 132 S Ct 1142 (2012). As an initial matter, *Strawn* did not review a class certification decision, but instead addressed the denial of defendant's motion for a directed verdict after a class-wide trial. *See id.* at 339. The burden in *Strawn* was therefore on the defendant to show that the evidence, viewed most favorably to

the plaintiff, would not permit a reasonable jury to find that everyone who bought defendant's insurance relied on its provisions. *Id.* at 353 & n.12. By contrast, at the certification stage, it is plaintiffs who bear the burden of showing that reliance *can* be proved on a class-wide basis. *See, e.g.*, *Bernard*, 275 Or at 154 ("unquestioned rule" is that plaintiffs bear the burden).

In addition, the facts concerning class-wide reliance in *Strawn* were fundamentally different than those presented here. In *Strawn*, the court reasoned that a jury could infer that all class members relied on a representation that their car insurance policies would include certain coverage, because the policies at issue were legally required to include that coverage and thus the circumstances showed that no consumer would knowingly purchase a policy without that coverage:

> "[A] person who purchases a motor vehicle policy to meet the financial responsibility requirements of Oregon law . . . has no choice to buy a policy without PIP coverage. The insurer issuing the policy has no choice to issue it without PIP coverage. The entire scheme is structured to permit the purchasers of such insurance, as well as the state in its regulatory role, to have confidence that the policy provides all coverage, including PIP benefits, that is required to meet the financial responsibility laws."

Id. at 361. The *Strawn* court found "particularly instructive" *Klay v. Humana, Inc.*, 382 F3d 1241 (11th Cir 2004), which also addressed a situation where there was only one reason that plaintiffs entered into the contract—because they

were promised to be reimbursed for medical services they provided. 350 Or at 357.

Here, by contrast, the record shows—and even the Court of Appeals agreed—that there are reasons to purchase Lights other than the alleged fraud. This case therefore is fundamentally different than both *Strawn* and *Klay*: there is no basis to assume or infer that all class members shared the same beliefs about Lights or the same motivations for purchasing them, even when making their first purchase. Although "reasonable inferences are permissible[,] speculation and guesswork are not." *State v. Bivins*, 191 Or App 460, 467, 83 P3d 379 (2004) (quotation omitted).

Indeed, the Second Circuit specifically distinguished *Klay* on this basis in rejecting a class-wide inference or presumption of reliance in a similar Lights case. *McLaughlin*, 522 F3d at 223, 225 n.7. After concluding that "each plaintiff in this case could have elected to purchase light cigarettes for any number of reasons, including a preference for the taste and a feeling that smoking Lights was 'cool,'" *id*. at 225, the court explained that this variability put Lights purchases on a "very different" footing from the transactions at issue in *Klay*:

> "[A]ssuming that most individuals are led to believe that they will get paid when they sign a contract calling for payment is very different from assuming that most individuals purchase a consumer good in reliance upon an inference that they draw from its

> marketing and branding rather than for some other reason."

Id. at 225 n.7; *see also, e.g., Davies*, 2006 WL 1600067, ¶ 21 (rejecting presumption of reliance in light of the "numerous non-health-related reasons that people buy light cigarettes" and noting defendant's right "to rebut the presumption of reliance"); *Poulos v. Caesars World Inc.*, 379 F3d 654, 667-68 (9th Cir 2004) (rejecting presumption of reliance where "there may be no single, logical explanation" for plaintiffs' conduct).

The Court of Appeals further misread *Strawn* as supporting an inference or presumption of class-wide reliance for at least one purchase simply from the fact that the alleged misrepresentations were on all Lights packages. 257 Or App at 160. To the contrary, *Strawn* held only that a uniform misrepresentation is a *consideration* in determining whether there can be class-wide reliance. 350 Or at 356-57. At the same time, *Strawn* made clear that courts must *also* consider "how likely it is that class members would have uniformly relied on [the alleged misrepresentation] and, conversely, *the likelihood that their reliance would vary significantly from one class member to the next*." *Id.* at 357 (emphasis added). And in *Newman*, this court rejected certification even assuming that the alleged misrepresentation "was given to *all* members of the class in this case" because the evidence showed, as it does here, that individual inquiries would still have been necessary to determine if the common

representation was the reason why a consumer purchased the product. 287 Or at 54 (emphasis added).

Because class members held different beliefs about Lights and had different motivations for purchasing them, *see supra* at 16-21, it is likely "that their reliance would vary significantly from one member to the next," *Strawn*, 350 Or at 357, and thus even one-time reliance cannot be resolved on a class-wide basis. As the four-judge dissent in this case concluded, reliance is not amenable to common proof given "the likely variations in both how putative class members understood defendant's representations and, relatedly, whether the representations played a substantial role in their decisions to purchase Marlboro Lights." 257 Or App at 175-78 (Duncan, J., concurring in part, dissenting in part).

C. *The Court of Appeals erred by reversing the trial court's conclusion that ascertainable loss cannot be proven on a class-wide basis.*

The Court of Appeals also erred when concluding that ascertainable loss could be litigated using class-wide proof despite plaintiffs' failure to make *any* showing that such proof was even possible. This court has made clear that, at the certification stage, plaintiffs must present sufficient evidence to show their claims are susceptible to common, class-wide proof, and certification should not be granted based on the mere "hope" that "something would 'turn up' to

prevent the inquiry from being unduly burdensome." *Bernard*, 257 Or at 166. Accordingly, in *Bernard*, the court reversed certification in part because:

> "the [trial court's] opinion contains no support, factual or otherwise, for the court's conclusion that the number of borrowers with notice [and therefore excluded from the class] "would appear to be small." The evidence in the case before us does not so prove and *we refuse to base a decision on conjecture*."

Id. at 165 (emphasis added); *see also Derenco*, 281 Or at 569-73 (engaging in lengthy examination of record evidence to determine whether plaintiff proffered sufficient evidence to demonstrate class certification would be appropriate). This holding is consistent with the Oregon Rules of Civil Procedure, which specifically contemplate that the trial court should undertake a close examination of the record at the class certification stage by requiring the court to "*find the facts specially* and state separately its conclusions thereon" in its certification decision. ORCP 32 C(1) (emphasis added).

That aspect of *Bernard* is also consistent with the approach taken under Federal Rule of Civil Procedure 23, which the U.S. Supreme Court recently applied in *Comcast Corp. v. Behrend*, __ US __, 133 S Ct 1426 (2013). In *Comcast*, the Court held that certification must be denied where plaintiffs fail to provide "evidentiary proof" of a class-wide method for determining each class member's loss. *Id.* at 1432. In contrast to plaintiffs here, the *Comcast* plaintiffs submitted a statistical model in support of certification. *Id*. Yet after closely

examining the model, the Court held that certification was inappropriate because the model could not "establish[] that damages are capable of measurement on a classwide basis." *Id*. at 1433; *see also, e.g.*, *In re Rail Freight Fuel Surcharge Antitrust Litig. MDL-No. 1869*, 725 F3d 244, 253 (DC Cir 2013) ("No damages model, no predominance, no class certification."); *McLaughlin*, 522 F3d at 227-30 (rejecting certification in lights case after concluding plaintiffs' injury and damages theory were not "plausible as a matter of law" because they were based on models that were "pure speculation").

Plaintiffs moved for class certification based on their second theory that class members suffered an "ascertainable loss" because PM USA allegedly misrepresented that Lights would deliver less tar and nicotine no matter how the cigarettes were smoked. *See supra* at 7-8. The Court of Appeals concluded that this theory would require proof that an "inherently light cigarette" is more valuable and would sell for more than a cigarette whose tar and nicotine delivery depends on how it is smoked. 257 Or App at 138. Plaintiffs, however, did not offer any evidence of how they would prove this difference in value.

Despite plaintiffs' failure to offer any evidence to support their theory, the Court of Appeals concluded it was amenable to class-wide resolution based on bare promises from plaintiffs' counsel to provide that evidence at some later date. *See* 257 Or App at 127 ("Plaintiffs *told the trial court* that they *would* present experts who could testify to the value of [the inherent lightness]

feature") (emphases added); *id.* at 138 ("[P]laintiffs *told the court* that they *would* present evidence that the feature of inherent lightness had value. Specifically, *they told the court* that they *would* present experts who could testify about the difference in value between an inherently light cigarette and a potentially light cigarette.") (emphases added). Furthermore, the court relied upon inferences that had no support in the record:

> "[A] jury could infer that an inherently light cigarette would be more valuable than a potentially light cigarette; it could infer that the inherently light cigarette would be more protective than the potentially light cigarette and that the difference in protection has value. From there, a jury could find that a person who had purchased what was represented to be an inherently light cigarette but was actually only a potentially light cigarette had suffered an ascertainable loss because the person overpaid."

Id. at 138.

Bernard makes clear that this approach to class certification is improper. *See supra* at 35. Furthermore, a jury can draw inferences only from evidence. *See*, *e.g.*, *Stites v. Morgan*, 229 Or 116, 119-20, 366 P2d 324 (1961) (requiring "sufficient evidence" before an inference can be drawn); *Woodtek, Inc. v. Musulin*, 263 Or 644, 653, 503 P2d 677 (1972) ("A finding of fact on a material issue must be based on some substantial evidence, and not mere speculation."); *Ehler v. Portland Gas & Coke Co.*, 223 Or 28, 38, 352 P2d 1102 (1960)

(similar). The representations and inferences relied upon by the Court of Appeals, however, had no evidentiary support.

To the contrary, not only is plaintiffs' theory unsupported, it is flatly contradicted by the only relevant evidence in the record. As the Court of Appeals itself recognized, "[d]efendant has always sold Marlboro Lights for the same price as Marlboro Regulars." 257 Or App at 113; *see also* ER 17, SER 27. As a result, even if Lights were represented to be inherently lower in tar and nicotine no matter how smoked, as plaintiffs claim, no smoker ever paid a premium for that feature. Moreover, as discussed above, there was no decline in the market share or price of Lights after the alleged "truth" was disclosed, *see supra* at 20, which confirms that "[d]efendants' misrepresentation could in no way have reduced the value of the cigarettes that plaintiffs actually purchased," *McLaughlin*, 522 F3d at 229. Thus, as the trial court concluded, "there is no evidence that cigarettes that cannot be made to deliver more tar and nicotine than Marlboro Regulars by compensatory smoking behavior sell for a higher price (and, inferentially, are worth more)." ER 17-18 (citations excluded).

This lack of evidence also distinguishes this case from the two decisions relied upon by the Court of Appeals when concluding ascertainable loss was amenable to common proof: *Weigel v. Ron Tonkin Chevrolet Co.*, 298 Or 127, 690 P2d 488 (1984), and *Scott v. Western International Surplus Sales, Inc.*, 267 Or 512, 517 P2d 661 (1973). In those cases, which, unlike this case, considered

individual claims after a full trial on the merits, there was evidence that the misrepresented "feature" at issue had actual value to the plaintiff. In *Weigel*, in which plaintiff claimed an ascertainable loss after purchasing a car misrepresented as "new," the court relied upon "the salesman's testimony . . . that the required disclosure of the prior use would have depreciated its value to some extent" and the "plaintiff's own testimony that the automobile would have suffered a reduction in value if its prior 'use' by a hopeful but unsuccessful customer had been disclosed." 298 Or at 137; *see also Scott*, 267 Or at 514 (finding ascertainable loss where plaintiff "wanted a [tent with a] window with a closing flap that could be secured and eaves," which the tent he purchased did not have).

Given plaintiffs' failure to offer any evidence demonstrating ascertainable loss could be adjudicated on a class-wide basis, the decision below is inconsistent with this court's precedent. The Court of Appeals' willingness to overlook this failure of proof was critical to its conclusion that ascertainable loss was amenable to class-wide treatment. Indeed, without any proof of a common, class-wide ascertainable loss, the only way any individual class member could possibly establish an ascertainable loss is by demonstrating that he or she would have spent less on cigarettes absent the alleged fraud by either quitting smoking or smoking less. Plaintiffs have not offered this as their theory of ascertainable loss and with good reason. Determining "what [class

members] would have opted to do, but for the defendants' misrepresentation" would raise quintessential individual issues. *McLaughlin*, 522 F3d at 228.

D. *The multitude of individual issues confirms the trial court's conclusion that a class action would not be superior to individual actions.*

The Court of Appeals correctly recognized that the trier of fact would need to conduct mini-trials to resolve class membership, the extent of reliance, and the statute of limitations for each of the estimated 100,000 class members before that class member could recover damages. 257 Or App at 167-68. The court erred, however, in disregarding the need for these individual inquiries in its certification analysis. The inevitable thousands of mini-trials that even the Court of Appeals' decision contemplates would bog down the trial court for years and defeat any efficiencies gained by class certification.

1. *The Court of Appeals correctly recognized that class membership, the extent of reliance, and affirmative defenses would require individual adjudications.*

Class membership. Each claimant would need to prove that he or she purchased Lights in Oregon during the class period to demonstrate that he or she is a class member. 257 Or App at 167-68. The Court of Appeals "agree[ed] with defendant that [adjudication of class membership] will require individual inquiries of class members" because "consumers are unlikely to maintain receipts from their purchases of cigarettes," and "claims of class membership would often be made based on little more than self-serving

assertions by class members themselves." *Id.* at 166; *see also Light Cigarettes*, 271 FRD at 422 ("Because cigarettes are inexpensive and purchased frequently, it is unlikely that smokers will have receipts or other ways of objectively proving purchase history."); *Ludke v. Philip Morris Cos.*, 2001 WL 1673791, at *3 (Minn Dist Ct 2001) (smokers "do not generally keep receipts or any other proof of purchase").

The Court of Appeals was correct. As the Third Circuit recently explained, "[a] defendant has a similar, if not the same, due process right to challenge the proof used to demonstrate class membership as it does to challenge the elements of a plaintiff's claim." *Carrera v. Bayer Corp.*, 727 F3d 300, 305-06 (3d Cir 2013). Thus, "a defendant must be able to challenge class membership. This is especially true where the named plaintiff's deposition testimony suggested that individuals will have difficulty accurately recalling their purchases . . . ." *Id.*; *see also, e.g., Perez v. Metabolife Int'l, Inc.*, 218 FRD 262, 269 (SD Fla 2003) (anything less than "an opportunity to challenge the memory or credibility of the individual making that averment would provide inadequate procedural protection to the Defendant"); *Grimes v. Rave Motion Pictures Birmingham, L.L.C.*, 264 FRD 659, 665 (ND Ala 2010) (similar). Moreover, in addition to class membership, the trier of fact would need to determine how many packs of Lights each class member purchased in Oregon

during the class period to determine the amount of any damages, which raises additional individual inquiries for the same reasons.

Reliance when making each purchase. As discussed above, the Court of Appeals contemplated that the fact finder would have to "ascertain the number of packs that each class member purchased before he or she learned that Marlboro Lights are not inherently light" in order to determine the extent of each class member's reliance, because class members are only "entitled to damages for each pack of Marlboro Lights that he or she bought in reliance on defendant's representations." 257 Or App at 167.

This aspect of the court's decision is also correct. As discussed below, the UTPA requires proof of reliance upon the alleged misrepresentation. *See infra* at 50-54. Under both Oregon law and due process, this requirement cannot be avoided simply because this is a class action. *See*, *e.g.*, ORS 1.735(1) (procedural rules "shall not abridge, enlarge or modify the substantive rights of any litigant"); *Hoyt v. Paulos*, 310 Or 196, 200, 796 P2d 355 (1990) (class action device is procedural and, other than express exceptions set forth by the legislature, does not change the substantive elements of a claim or shift the burden of proof); *Carrera*, 727 F3d at 305-06 ("A defendant in a class action has a due process right to raise individual challenges and defenses to claims, and a class action cannot be certified in a way that eviscerates this right or masks individual issues.") (petition for rehearing pending); *Sacred Heart*

Health Sys. v. Humana Military Healthcare Servs., 601 F3d 1159, 1176 (11th Cir 2010) (similar).

Statute of limitations. The Court of Appeals also correctly held that the trier of fact would need to consider individual proof from each class member to resolve PM USA's statute of limitations defense. 257 Or App at 167-68. Under ORS 646.638(6), a plaintiff must file UTPA claims "within one year from the discovery of the unlawful method, act or practice." Because the statute expressly ties the limitations period to the plaintiff's "discovery," the Court of Appeals has held that the period begins to run once the claim has accrued and the plaintiff knows or should have known of the "alleged unlawful act." *Saenz v. Pittenger*, 78 Or App 207, 211-12, 715 P2d 1126 (1986); *see also, e.g.*, *F.D.I.C. v. Smith*, 328 Or 420, 428, 980 P2d 141 (1999) ("In general terms, a cause of action does not accrue under the discovery rule until the claim has been discovered or, in the exercise of reasonable care, should have been discovered."). Furthermore, for the limitations period to begin running, the class member need not have actual or constructive knowledge of every single fact of his or her claim; rather, the class member must merely have facts sufficient to "excite attention and put a party upon his guard or call for an inquiry." *McCulloch v. Price Waterhouse LLP*, 157 Or App 237, 247-48, 971 P2d 414 (1998) (quoting *Mathies v. Hoeck*, 284 Or 539, 542-43, 588 P2d 1 (1978)); *see also, e.g.*, *Duyck v. Tualatin Valley Irr. Dist.*, 304 Or 151, 159 n4,

742 P2d 1176 (1987) ("We have stated that in fraud or deceit actions, the statute of limitations does not begin to run until the plaintiff should have known, in the exercise of reasonable diligence, that the defendant's conduct was tortious.").

Here, each class member's claim accrued when he or she began purchasing Lights with actual or constructive knowledge of the alleged fraud. The relevant question for statute of limitations purposes, therefore, is whether each class member *knew or should have known* of his or her potential claim before July 2001 (one year before this lawsuit was filed), which depends upon the specific circumstances of that individual class member. For example, based on a similar record to that here, the New Hampshire Supreme Court recognized that "hundreds of publications and television news reports between 1976 and 1995 informed consumers that light cigarettes were no less harmful than regular cigarettes." *Lawrence*, 53 A3d at 530; *see also McLaughlin*, 522 F3d at 233 ("some members of the class almost certainly were aware long before 2000 that 'light' cigarettes were not appreciably safer for them than regular cigarettes") (citations omitted). Class members who read such news reports were on notice of their claims for purposes of triggering the limitations period, and there is no way to determine which class members fall into this category except by individual inquiry.

2. *The individual issues raised by class membership, reliance, and affirmative defenses defeat predominance and superiority and preclude certification.*

Although the Court of Appeals recognized that these issues would require individualized proof, it went astray in concluding that the need for thousands of individual adjudications on these issues "does not affect" predominance and superiority. 257 Or App at 167. The Court of Appeals reasoned that these issues do not defeat predominance because "[a]ny individual questions that arise will do so only after a jury has determined the central question of defendant's liability to the class." *Id.* at 166-67. This reasoning is flawed for two independent reasons.

First, class membership, whether each class member relied with regard to each purchase of Lights and the statute of limitations *are* relevant to liability. The question of liability turns on whether PM USA owes any money to a person for their purchase of Lights. Each of the individual issues that the Court of Appeals recognized goes to that very issue. For example, if the claimant did not purchase a pack of Lights in reliance on the alleged misrepresentation, then—even under the court's analysis, 257 Or App at 144, 167—that claimant has failed to establish an element of liability as to that purchase. Likewise, PM USA would not owe any money to any individual who did not actually purchase Lights in Oregon and thus is not a class member, or to any class member whose claim is barred by the statute of limitations. These questions go directly to

liability, and raise additional individual issues defeating certification, as numerous courts have held. *See, e.g.*, *Light Cigarettes*, 271 FRD at 421-22 (individual issues raised by statute of limitations, "who qualifies as a class member and the damages each member is owed" further defeat class certification); *Benedict*, 241 FRD at 680 (identifying purchasers of low-tar cigarettes in a particular state and time period "would be a *very* difficult task") (emphasis in original); *Oliver*, 2000 WL 33598654, at *7 (similar); *Cocca*, 2001 WL 34090200, at *1 (similar); *Mulford*, 242 FRD at 630 ("highly individualized affirmative defense[]" of statute of limitations "weighs heavily against class certification" given the need for defendant to "develop evidence regarding each person's knowledge of the issues surrounding lights cigarettes"); *Benedict*, 241 FRD at 680 (similar).

Second, even if these issues were somehow labeled as addressing issues other than liability, they cannot simply be ignored for purposes of class certification. To the contrary, this court made clear in *Bernard* that "the court, in ruling whether it is proper to proceed with any class action, has the obligation" to determine if "a defendant is pressing an *issue* or a *defense*" that would defeat certification. *Id.* at 158 (emphases added); *see also, e.g.*, *Derenco*, 281 Or at 569-70 (considering whether "proffered *defenses* of laches and waiver present individual questions preventing certification of the class") (emphasis added); *Wal-Mart Stores Inc. v. Dukes*, __ US __, 131 S Ct 2541, 2561 (2011)

(holding under federal analog to ORS 1.735(1) that "a class cannot be certified on the premise that [defendant] will not be entitled to litigate its statutory defenses to individual claims").

Regardless of how they are labeled, the individual inquiries necessary to resolve class membership, whether each class member relied with regard to each purchase of Lights, and the statute of limitations would require adversarial, in-person procedures in order to protect PM USA's substantive and procedural rights. Accordingly, even if these issues did not relate to "liability" *per se* (they do, *see supra* at 45-46), they would still require individual inquiries that predominate over any common issues and defeat certification. As this court explained in *Bernard*:

> "To hold that a case may proceed as a class action when there appears to be a legitimate issue or defense which will require an individual inquiry of a considerable number of the claimants would attribute to the legislature an intention either to overload the courts with an unmanageable proceeding or to deprive the defendants of valuable procedural and substantive rights by preventing them from asserting what appears to be a bona fide defense. One or the other would be the inevitable result. We attribute to the legislature neither intention in the absence of a specific indication that it so desires."

275 Or at 159.

The problems contemplated in *Bernard* are precisely what will result here if this case proceeds as a class action. Either the individual inquiries raised by

plaintiffs' claims would "overload the courts" with an unmanageable number of extensive mini-trials, or PM USA will be "deprive[d]" of "valuable procedural and substantive rights."

E. *The trial court correctly held that the need for numerous individual inquiries for each class member defeats certification of an issue class under ORCP 32 G*

The trial court ruled that an issue class "do[es] not eliminate the main obstacle to certification of the whole case as a class action: the overwhelming predominance of individual issues." ER 25. The Court of Appeals reversed that holding and remanded the question of an issue class to the trial court. Because individual issues pervade virtually all aspects of each class member's claims as well as PM USA's defenses, an issue class would only waste the resources of the parties and the court. The trial court's conclusion should be reinstated.

Even if some issues were decided on a class-wide basis, each class member would still have to prove individually reliance, injury, damages and class membership, and respond to PM USA's defenses such as statute of limitations, before establishing liability and recovering any money. Plaintiffs' proposal would thus compound, rather than avoid, a judicial nightmare. As the Second Circuit held in rejecting a similar proposal for issue certification in a lights case:

> "[G]iven the number of questions that would remain for individual adjudication, issue certification would not 'reduce the range of issues in dispute and promote the judicial economy.' Certifying, for example, the issue of defendants' scheme to defraud, would not materially advance the litigation because it would not dispose of larger issues such as reliance, injury, and damages.

McLaughlin, 522 F3d at 234 (citations omitted); *see also*, *e.g.*, *In re St. Jude Med., Inc.*, 522 F3d 836, 841 (8th Cir 2008) ("Even courts that have approved 'issue certification' have declined to certify classes where the predominance of individual issues is such that limited class certification would do little to increase the efficiency of the litigation.").

Moreover, given plaintiffs' failure to demonstrate that class members suffered any palpable injury, *see supra* at 35-40, few (if any) would likely bring suit to take advantage of any "common findings" that an issue class action might generate. In this respect, this case is fundamentally different from *Shea v. Chicago Pneumatic Tool Co.*, 164 Or App 198, 990 P2d 912 (1999), where the court found an issue class to be appropriate. The class there was much smaller—estimated to be only "in excess of 125"—and each class member claimed substantial damages for personal injuries. Thus, it was much more likely that class members would take advantage of any common findings. *See id*. at 202. That is not the case here.

In short, an issue class would not materially advance the litigation here, because numerous issues require adjudication on an individual basis. The court should therefore reinstate the trial court's denial of issue certification.

F. *The Court of Appeals correctly determined that reliance is an element of plaintiffs' claim.*

Plaintiffs have presented "contingent questions" as to whether reliance is an element of their claims. The court should either decline to take up those questions or affirm the Court of Appeals decision on this limited point. All eleven judges to address this issue—the Court of Appeals majority and dissent and the trial court—agreed that plaintiffs' UTPA claims require proof of reliance. 257 Or App at 139-46; *id.* at 173 (Duncan, J., concurring in part, dissenting in part); ER 16. That conclusion is unquestionably correct.

The UTPA provides that a plaintiff may recover damages only for an "ascertainable loss" that was suffered "*as a result of*" a violation of the statute. ORS 646.638(1) (emphasis added). In *Sanders v. Francis*, this court held that, in cases involving a misrepresentation, the plaintiff must prove that he or she relied on the misrepresentation to establish this causal element and recover damages under the UTPA. 277 Or 593, 597-98, 561 P2d 1003 (1977); *see also Redden v. Disc. Fabrics Inc.*, 289 Or 375, 384, 615 P2d 1034 (1980) (following *Sanders*); *Searcy v. Bend Garage Co.*, 286 Or 11, 15-16, 592 P2d 558 (1979) (same); *Feitler v. Animation Celection, Inc.*, 170 Or App 702, 708, 13 P3d 1044

(2000) (considering claims under ORS 646.608(e) and explaining that "[w]here, as here, the alleged violations are affirmative misrepresentations, the causal/'as a result of' element requires proof of reliance in fact by the consumer"); *Terry v. Holden-Dhein Enters., Ltd.*, 48 Or App 763, 766, 618 P2d 7 (1980) (plaintiff whose conduct would be unaffected by knowledge of the "true facts" does not have a claim under the UTPA).

The reliance requirement set forth in *Sanders* is consistent with the intent of the drafters of the UTPA. In *Weigel*, this court traced the origin of the UTPA's "private enforcement section" to the landmark article by David Rice, *Consumer Transaction Problems*, 48 BU L Rev 559 (1968). 298 Or at 135 n5. In his article, Professor Rice expressly noted that a "false advertisement, standing alone is not wrongful *as to the individual purchaser who does not actually rely*." 48 BU L Rev at 562 (emphasis added). He explained further that, even if a consumer was deceived initially, "after discovery of the wrong," the consumer "will be on the alert to avoid future injury at the hands of the same merchant." *Id.* at 577. Accordingly, once "aware of the particular deception," the consumer "*can no longer be victimized by the offending practice*." *Id.* (emphasis added).

Plaintiffs cannot deny that their lawsuit involves allegations of affirmative misrepresentations. Plaintiffs' claims are based on allegations that the statements "Lights" and "lowered tar and nicotine" on packages of Lights

were untrue because Lights were not "inherently light." 257 Or App at 128. In their complaint, plaintiffs claim that "defendants *falsely represented* that Marlboro Lights delivered lower tar and nicotine in comparison to regular cigarettes." ER 3 ¶ 8 (emphasis added). Plaintiffs allege that these representations "violated ORS 646.608(1)(e)," *id*., which prohibits a defendant from "*represent[ing]* that . . . goods . . . have sponsorship, approval, characteristics, ingredients, uses, benefits, quantities, or qualities that they do not have." ORS 646.608(1)(e) (emphasis added). Given that plaintiffs' claim clearly alleges misrepresentations, reliance is an element of their claim.

Plaintiffs, however, assert that they need not prove reliance because they *also* allege that PM USA should have provided additional information about Lights. Resp. to Pet. Rev. at 15. To be sure, in *Sanders*, the court noted that strict reliance was not required in a pure "failure to disclose" case because there is no statement upon which to rely. 277 Or at 598. But plaintiffs cannot divorce their misrepresentation allegations from their failure-to-disclose allegations: if cigarette packages did not include the terms "Lights" and "lowered tar and nicotine," there would be no need under plaintiffs' theory for PM USA to have disclosed additional information that those cigarettes might not deliver less tar and nicotine if smoked in certain ways. Nor can plaintiffs cite any case that holds that a plaintiff is relieved of the burden of proving

reliance on a misrepresentation simply because the plaintiff *also* includes a failure to disclose allegation.

To the contrary, courts routinely require reliance in cases involving a violation of ORS 646.608(1)(e) even if plaintiffs also allege that the defendant should have provided additional information. *See, e.g.*, *Feitler*, 170 Or App at 708 (plaintiff alleged that defendant misrepresented that he had sold all of a certain product and also failed to disclose that he had purchased four additional items); *Beckett v. Computer Career Institute, Inc.*, 120 Or App 143, 145, 852 P2d 840 (1993) (defendant both misrepresented that its placement rate for graduates was 85% and failed to disclose that its placement rate, as reported to its accrediting agency, was 50%). Indeed, in the very "half truth" case cited by plaintiffs, this court required the plaintiff to prove reliance. *Kraus v. Eugene Dodge, Inc.*, 265 Or 486, 506, 509 P2d 1199 (1973); *see also, e.g.*, *Stroup v. Conant*, 268 Or 292, 296-97, 520 P2d 337 (1974) (relief available where plaintiff showed reliance on "misrepresentation by half-truths") (quotations omitted); *Myer v. E.M. Adams & Co.*, 268 Or 91, 97-98, 519 P2d 375 (1974), *withdrawn in part on reh'g*, 519 P2d 375 (1974) (same). This result makes sense: if the mere inclusion of a non-disclosure allegation eliminated the element of reliance, then virtually every plaintiff could circumvent the reliance requirement simply by including an allegation that the defendant should have disclosed the very information that made the representation false.

Finally, even if plaintiffs were correct that this case should be viewed solely as an omission case, plaintiffs ignore that they would still need to establish causation: i.e., that plaintiffs suffered an ascertainable loss "as a result of" the alleged unfair trade practice. ORS 646.638(1). Thus, even under their own theory, plaintiffs would have to demonstrate that their decision to purchase the product was "as a result of" the nondisclosure—i.e., that they would not have purchased Lights had they known the information that was allegedly suppressed. *See, e.g.*, *Terry*, 48 Or App at 766 (plaintiff failed to prove causation under the UTPA because she would have purchased the defendant's services even without the alleged failure to disclose and thus "her loss in this case did not result 'as a result of' the defendants' failure to disclose a fact"). This inquiry would require the same individualized determinations concerning each class member's beliefs about and reasons for purchasing Lights as the reliance inquiry.

VI. CONCLUSION

The court should vacate the Court of Appeals decision, affirm the trial court's order denying class certification, and remand plaintiffs' individual claims for further proceedings. Indeed, if the court concludes that *either* reliance *or* ascertainable loss cannot be adjudicated on a class-wide basis, the court should affirm the trial court's exercise of discretion when denying class certification. ER 26.

Respectfully submitted this 27th day of February, 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 13,491 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 February 27, 2014, I filed the foregoing **MERITS BRIEF OF PETITIONER PHILIP MORRIS USA, INC.** with the Appellate Court Administrator by using the eFiling system.

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