STATE OF MISSOURI)
)
CITY OF ST. LOUIS)

MISSOURI CIRCUIT COURT
TWENTY-SECOND JUDICIAL CIRCUIT
(City of St. Louis)

ENTERED

SEP 13 2004

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SEP 13 2004

MARIANO V. RAZZA
CLERK, CIRCUIT COURT
BY _____ DEPUTY

DAYNA CRAFT, Individually and on Behalf of All Others Similarly Situated,	)	Cause No. 002-00406A
Plaintiff,	)	Division No. 1
v.	)	
PHILIP MORRIS COMPANIES, INC., and PHILIP MORRIS INCORPORATED,	)	
Defendants.	)	

ORDER

This matter comes before the Court on "DEFENDANTS' MOTION FOR RECONSIDERATION OF CLASS CERTIFICATION." Having considered the parties' written and oral arguments and the supplemental materials filed in support of their respective positions, the Court now rules as follows.

I. Background

Plaintiff brings this consumer fraud action on behalf of herself and a class of Marlboro Lights smokers, who claim they were defrauded by Defendants' false representations that Marlboro "Lights" cigarettes deliver less tar and nicotine than regular cigarettes. On December 31, 2003, the Court entered its original order granting class certification in the case. On the same date, the Court also entered its related order denying Defendants' motion for summary judgment (which had argued that Plaintiff could not possibly prove any economic harm). The Court

found that Plaintiff could conceivably prove such harm under the benefit-of-the-bargain rule of damages applicable in Missouri. Defendants thereafter moved for reconsideration of the order granting class certification, which was heard on the record on April 28, 2004.

Defendants argue in their motion for reconsideration, inter alia, that (1) there have been several significant case law developments from other states since the time of the 12/21/03 order which merit the Court's attention[1]; (2) there is insufficient evidence in the record to support the Court's finding that "compensation" is virtually universal among Lights smokers; and (3) that the benefit-of-the-bargain theory of damages which the Court adopted in its certification and summary judgment orders is flawed in at least two fundamental respects. Defendants argue that as applied by the Court the benefit of the bargain theory improperly allows class members to avoid individual proof of both causation and damages. Additionally, though less heavily emphasized, Defendants' motion also raises several other concerns relating to class certification, including among others statute of limitations concerns.

The Court believes that by far the most difficult and vexing issue, of the ones that Defendants have raised, is the issue of causation/reliance. The Court will therefore address the other questions first.

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[1] There indeed have been such case law developments--developments which the Court frankly acknowledges largely lend support to the view that class certification is not appropriate in a "Lights" cigarette case. (But see Aspinall v. Phillip Morris Companies, Inc., No. SJC-09143, 2004 Mass. LEXIS 501 (Supreme Court of Massachusetts, August 13, 2004)). The Court will address those case law developments in its discussion of the issue of reliance and causation.

II. Statute of Limitations

Plaintiffs' MPA claims are governed by Missouri's five-year statute of limitations for statutory actions under § 516.120 RSMo, and are subject to the "capable of ascertainment" test for accrual. See Carr v. Anding, 793 S.W.2d 148, 150 (Mo. App. E.D. 1990); see also generally 18 A.L.R.4th 1340. Defendants have requested in the alternative, if the Court does not vacate its prior order granting class certification, that it "at least amend the class definition to limit the claims to purchases made within five years of the filing of the Petition."

Plaintiff and her attorneys have had two opportunities now to address, in any substantive fashion, the class certification concerns Defendants have raised relative to the statute of limitations problem. At each opportunity, they have declined to do so.

In view of the Court's comments on this issue in its 12/31/03 certification memorandum order (at 29-30), and in view of the further arguments which Defendants have now presented to the Court, the Court concludes that it would be inconsistent with the requirements of a class action to involve potential issues of when each individual class member either ascertained or met the "capable of ascertainment" test for statute of limitations purposes. The Court agrees with Defendants that the only alternative to holding mini-trials on this issue for essentially every class member is to limit the class definition to purchases made within five years preceding the filing of the Petition. The Court further agrees with Defendants that this particular issue will never be any riper for decision than it is now, and that

deferring a ruling until a later date would only serve to needlessly waste resources on some matters contingent upon the scope of the class, such as class notice.

Accordingly, as reflected in the part of this order setting forth the specifics of what is ordered, the class definition will be amended to limit the class and its claims to those purchases going back in time no further than five years immediately preceding the filing of the Petition.

III. "Compensation"

The Court rejects Defendants' rehashed arguments concerning the smoking-related phenomenon known as "compensation." This issue was properly addressed in the Court's original certification order of December 31, 2003. The Court continues to believe the record contains sufficient indications of a realistic possibility that virtually all Lights smokers "compensate," as to justify permitting the case to proceed on a class action basis.[2]

IV. Benefit of the Bargain Theory as it Affects Proof of Injury

The Court has carefully reviewed Defendants' 29-page Memorandum in support of their motion to reconsider class certification, as well as Defendants' Reply Memorandum in support thereof (filed on April 26, 2004), and too their "Supplemental Submission Relating to Class Certification" filed on or about

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[2] Other courts, as well, have rejected Defendants' arguments regarding compensation. See Aspinall v. Philip Morris Companies, Inc., 2004 Mass. LEXIS 501, at * 28-31, No. SJC-09143 (Supreme Court of Massachusetts, August 13, 2004). Additionally, assuming *arguendo* that the record previously contained insufficient evidence that virtually all Lights smokers compensate and that only a *de minimis* number do not, the Court has concluded from its review of the four boxes of materials filed by Plaintiffs on or about May 17, 2004, (consisting of their Supplement to the Record with regard to class certification, which was expressly allowed by the Court at the hearing of April 28, 2004), that these materials contain further evidence supporting a finding that compensation is virtually universal.

June 7, 2004. It would be fair to say that the largest part of these memoranda focuses on criticism of the benefit-of-the-bargain theory of damages that the Court adopted in its orders of December 31, 2003, especially insofar as Defendants maintain that such theory improperly allows Plaintiffs to "bypass" individual proof of (a) causation and (b) damages in the case of each class member.

To a limited extent (but only a limited extent), Defendants are correct that the benefit of the bargain rule on damages does indeed affect the causation analysis in this case; and the Court will discuss that aspect of it in the separate section of this memorandum dealing with the issue of causation/reliance. This section, however, will briefly address the benefit of the bargain rule more generally, and especially with reference to the concerns Defendants have raised regarding proof of economic loss or injury.

For the reasons set forth in both the Court's 12/31/03 order denying Defendants' motion for summary judgment and to a lesser extent in its order of the same date granting class certification, the Court is very confident that benefit of the bargain is the measure of damages that applies in Missouri, in either common law or statutory claims of consumer fraud other than rescission. See Kendrick v. Ryus, 123 S.W. 937, 939 (Mo. 1909); Sunset Pools of St. Louis, Inc. v. Schaefer, 869 S.W.2d 883, 886 (Mo. App. E.D. 1994).

As discussed by the Court in those two earlier orders, many states follow the "out-of-pocket" damages rule in such cases but Missouri does not; Missouri follows the more liberal "benefit-of-

the-bargain" rule, which can lead to far different results in a given case. (See generally discussion in Court's order of 12/31/03 denying Defendants' motion for summary judgment.) The benefit of the bargain rule allows a plaintiff who has been harmed by a misrepresentation of the item he purchased to recover the difference between the actual value of the item at the time it was purchased and the value it would have had if it had been in the state or condition as it was falsely represented to be---i.e., "if the representations had been true." Kendrick, 123 S.W. at 939; 37 Am Jur 2d *Fraud and Deceit*, §§ 385 and 416 (2001).

Although Defendants' attacks on the benefit-of-the-bargain rule as applied by the Court to this case appear in some ways to have been more narrowly tailored in their oral argument at the 4/28/04 hearing than in some of the language to be found in their written memorandum[3], both arguments nonetheless make the contention that there is no evidentiary support for the Court's determination that there are sufficient grounds to believe Plaintiffs would be able to prove class-wide damages because it is entirely possible Plaintiffs could establish, through expert

[3] In their memorandum at 22, Defendants assert that "nothing in Missouri law suggests that benefit of the bargain damages are appropriate" in a case such as this one. Defendants contend the notion that a truly safer, less toxic cigarette might have more economic value is pure "speculation," and that all of the Missouri cases which have employed the benefit of the bargain rule have applied it only where there was "real world evidence" of the value the goods would have had if they had truly been as represented. However, none of those cases required Plaintiffs to prove their damages before trial; and all of them involved evidence that in a sense was speculative until and unless it was proven at trial, including the Sunset Pools case, whose theory of lost economic benefit under the benefit of the bargain rule---that a home spa which was delivered would have been more valuable if it had not been a floor model--is certainly no more "speculative" or far-fetched than the notion that so-called "Light" cigarettes would have been worth more if they had truly been as represented.

testimony at trial, that each pack of Marlboro Lights purchased would have had greater economic value if in fact it had truly been as represented--i.e., if it had truly been a lower-tar, lower-nicotine cigarette. See class certification order, at 19-21. See also the last page of the Court's 12/31/03 order denying summary judgment (finding both logic and common sense "suggest that a true low-tar, low-nicotine cigarette very probably would have had an economic worth and value greater... than a comparable non-low tar, low nicotine cigarette, due to... the added value that would be inherent in a less toxic, less harmful, 'safer' cigarette.")

Defendants argue that there is simply no evidentiary support for this conclusion, on which class certification is in part based. They further contend that such conclusion improperly allows the class members to avoid what would otherwise be a requirement that they must individually prove that each class member suffered economic injury. (See generally, Defendants' Memorandum, at 20-23.)

Crucial to this line of argument is Defendants' contention that the only evidence in the record shows that the "free market" set a price and a value for Marlboro Lights that was always, in essence, the same as that for Marlboro regulars.[4] (See Defendants' Memorandum, at 21) As stated by Defendants therein: "In the absence of proper evidence of a premium or a price differential, supposition about a non-existent potential

[4] As noted by the Court in its 12/31/03 summary judgment denial, the record does indeed tend to reflect that the price of Marlboro Lights--whether or not it was set solely by the "free market"--has, at all relevant times, been essentially the same as the price for Marlboro regulars.

'objective market' differential amounts to counterfactual speculation, and is an inappropriate underpinning for class certification." (Id. at 22) Or, as stated more plainly by Defendants' counsel at oral argument, "Where are the affidavits on this . . . mythical higher economic value, that is contradicted by what the market set for the price that is in the record?" (Transcript of hearing, at 23)

First, the Court rejects the assumption that a truly "free market," wholly uninfluenced and unaffected by the alleged fraud and deception here, and/or by the addictive nature of nicotine, was necessarily the sole determinant of the price of Marlboro Lights. The "market price" of Marlboro Lights was at least in part a result of a corporate pricing decision made by Defendants; and that pricing decision in turn quite possibly may have been part and parcel of the alleged deception that lies at the very heart of this case---a deliberate effort to deceive many people into choosing to smoke and/or choosing to *continue* to smoke, by falsely representing and holding out to them the promise of something very alluring: namely, that they could smoke or continue to smoke, and at no greater price, but with a cigarette that was healthier and safer because it was significantly lower in tar and nicotine. In short, the so-called "market price" in this case may have been inextricably intertwined with the alleged fraud and manipulation. This possibility cannot be discounted, especially in view of internal tobacco industry documents from other cases that have already become public record. For example, as noted in one scholarly article:

> The [tobacco] industry also created what it cynically called "reassurance products," including low tar cigarettes. Indeed, the filtered and low tar cigarette was viewed by Philip Morris as "our traditional response to anti-smoking publicity . . ." [footnote omitted] Evidence from the cigarette industry's files shows that this strategy was successful. Smokers relied upon the industry's representations and believed low tar cigarettes were safer. For example, a Lorillard research report shows that "those who smoke low tar and nicotine cigarettes generally do so because they believe such cigarettes are 'better for you.'" [footnote omitted] The presence of what was perceived, in reliance on industry action, to be a safer cigarette was a substantial cause of continued smoking. * * * * Moreover, according to documents discovered in the Minnesota case, the industry was well aware that smokers of lower delivery products tended to "compensate" by smoking harder or blocking ventilation holes in order to maintain a "preferred intake level of nicotine," thus defeating any reductions in delivery. [footnote omitted]

Wilson & Gillmer, *Minnesota's Tobacco Case: Recovering Damages Without Individual Proof of Reliance Under Minnesota's Consumer Protection Statutes*, 25 Wm. Mitchell L. Rev. 567, 618 (1999).

Second, while the Court agrees with Defendants that Plaintiff has submitted no formal "evidence" as such to support the premise the Court relied upon with regard to its conclusion that Plaintiffs may quite possibly be able to prove class-wide damages[5] (namely, the premise that Plaintiffs would be able to provide expert testimony to support that every pack of Marlboro Lights would have had a higher monetary value than the purchase price if in fact it had truly been, as represented, a cigarette

[5] Of course, as Defendants correctly note (Defendants' Memorandum, at 22), the Plaintiffs submitted no evidence to support this theory because, quite simply, it was not originally their theory. However, the Court cannot help the fact that both parties initially failed to realize that the benefit of the bargain rule is the applicable measure of damages for fraud cases in Missouri, or the crucial implications that the rule could have for this case. By the same token, the Court cannot then just shut its eyes to the very real possibility that the Plaintiff class might be able to prove such damages.

that actually delivered significantly lower tar and nicotine), the Court believes that common sense and logic so strongly support this notion that no formal evidence is needed to make it a proper and reasonable basis for allowing class certification.

If the Court were to hold otherwise, it would be tantamount to finding class certification improper in a case where it was alleged that a company had widely bottled and distributed untreated water of doubtful potability, and falsely marketed it as "pure spring water," simply because the Plaintiffs had offered no expert evidence in advance of trial that actual pure spring water might be worth more than untreated and potentially contaminated water. Is there any real doubt that expert testimony could be found to support such a common sense proposition?

The Court thinks not. Indeed, as was aptly noted by Judge Bork in an FTC case involving false and deceptive tobacco advertising, some deceptions may be so self-evident that at times a court may properly "rely on its own experience and understanding of human nature in drawing reasonable inferences about the reactions of consumers to the challenged advertising." Federal Trade Commission v. Brown & Williamson Tobacco Corporation, 778 F.2d 35, 41 (D.C. Cir. 1985). Likewise, the Court believes, it is equally obvious that Plaintiffs here will be able to obtain expert testimony to support at trial the common sense theory that Marlboro Lights would have been worth more if they had truly been the low-tar/low-nicotine product they were represented to be. It thus would be a pointless exercise for

this Court to deny or temporarily withdraw class certification simply because Plaintiffs have not yet done so.

The Court likewise rejects Defendants' related argument that such testimony, as to an alleged higher "as represented" economic value of the product, would be unduly speculative if it were offered. As the Court indicated in its summary judgment order, such criticism of the benefit-of-the-bargain rule has historically been a mainstay of those who believe the rule is too generous; but this alleged difficulty of proof is no greater than in warranty cases where essentially the same rule applies, and in any event the criticism has been rejected by Missouri courts:

> The fact that the property sold was of such a character as to make it difficult to ascertain with exactness what its value would have been if it had [been as represented] affords no reason for exempting the defendant from any part of the direct consequences of his fraud.

Kendrick v. Ryus, 123 S.W. at 940.

Similarly, the Court rejects Defendants' closely related argument that allowing the case to proceed as a class action on such a basis somehow presumes that damages have already been established or will be. On the contrary, the Court believes its certification order made clear that Plaintiffs are free to seek to prove such damages at trial, **if they can prove it.** Defendants, of course, will be free not only to cross-examine, but also put on the full array of evidence and argument available to them that Marlboro Lights would have been worth the same even if they had been as represented, and hence that Plaintiffs simply suffered no economic loss at all. If such proof is found convincing, then Defendants will presumably prevail at trial.

Finally, with regard to the Defendants' criticism of the Court's application of the benefit of the bargain rule as a potential basis for recoverable economic damages in this case, the Court makes the general observation that Defendants seem to have shifted their position, somewhat, on just what might constitute compensable damages in this case, once the benefit of the bargain rule entered into the picture. It was the Court's distinct impression, when the original class certification motion was pending, that Defendants argued that Plaintiff Craft had no claim for monetary damages of any sort, precisely because she was only seeking to recover for her "subjective feelings" of loss over what the product might have been worth to her individually if it had truly delivered lower tar and nicotine. Defendants belittled that notion, and contended instead that she would have a real economic loss only if she could somehow show that the alleged deception had resulted in an inflated price, and/or had caused her to smoke when she otherwise would not have.

Now, however, when the benefit of the bargain rule has come into the case, thus presenting a potentially viable theory of class-wide economic damages, Defendants appear to have shifted gears considerably. They now apparently argue (1) that price inflation could **not** be a valid damages theory, because it is tantamount to the much-maligned "fraud on the market theory;" (2) that the benefit of the bargain theory of damages as applied in this case is the same as a fraud on the market theory; and (3) that plaintiff class members can have a valid claim for monetary loss only if they **do** prove "the subjective value to each

individual of obtaining the expected decrease in tar and nicotine."[6]

Evidently, then, Defendants have never seen a damages theory that they like or think would be compatible with class action status in this case---at least, not one that appears to have any chance of viability at the time it is being discussed. (The Court of course can appreciate the fact that Defendants, like most litigants, certainly have no interest taking a position that might in any way help their opponents.)

For the reasons cited above, the Court finds that the fact of damages--as opposed to the amount of damages for each class member[7]--will likely not require individualized proof, as would result in individual questions predominating over common issues. There are sufficient grounds to believe class-wide damages can be proved, under the benefit of the bargain damages rule which governs in Missouri, so as to justify class certification.

V. Reliance and Causation

As modified, and explained more fully in this order, the Court stands by its original holding in the class certification order that class members are not required to prove individual

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[6] As stated by Defendants: "Finally, and critically, even for those who bought for lower tar and nicotine and did not get it, valuation of the 'benefit lost' is itself an individual issue---**because it is based on the subjective value to each individual of obtaining the expected decrease in tar and nicotine.**" ("Memorandum of Law in Support of Defendants' Motion for Reconsideration of Class Certification Order," at 23-24). (emphasis added)

[7] As the Court acknowledged in its certification order, apportionment of any class-wide damages award in this case likely will require at least some degree of individualized proof, but the Court believes that issue could likely be handled largely through a streamlined administrative process. And, consistent with what the Missouri Supreme Court has stated, the mere fact that such individual damage apportionment issues would remain in a case after liability has been determined does not make class certification inappropriate. State ex rel. American Family Mutual Ins. Company v. Clark, 106 S.W.3d 483, 488 (Mo. banc 2003).