

# 06-4666-cv

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IN THE  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

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KAREN McLAUGHLIN, JANE AMODEO, DAVID TUTTLEMAN, SUSAN BAILEY,  
BARBARA BISHOP, TREVOR CAMPBELL, FERGAL FURLONG, DAVID ROGERS,  
BARBARA SCHWAB, PATRICIA SCOCOZZA and JIM SHERMAN,

*Plaintiffs-Appellees,*

—against—

AMERICAN TOBACCO COMPANY, ALTRIA GROUP, INC.,  
PHILIP MORRIS USA INC., LORILLARD TOBACCO CO,  
BRITISH AMERICAN TOBACCO LIMITED, LIGGETT GROUP, INC.,  
B.A.T. INDUSTRIES P.L.C. and R.J. REYNOLDS TOBACCO CO.,

*Defendants-Appellants.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK,  
JUDGE JACK B. WEINSTEIN

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## **APPELLANTS' BRIEF**

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## **CORPORATE DISCLOSURE STATEMENTS**

Pursuant to Federal Rule of Appellate Procedure 26.1, defendants-appellants make the following disclosures:

### **Philip Morris USA Inc.**

Appellant Philip Morris USA Inc. is a wholly-owned subsidiary of Altria Group, Inc. Altria Group, Inc. is the only publicly held company that owns 10% or more of Philip Morris USA Inc.'s stock.

### **Altria Group, Inc.**

Appellant Altria Group, Inc. has no parent company. No publicly held company owns 10% or more of Altria Group, Inc.'s stock.

### **R. J. Reynolds Tobacco Company**

Appellant R. J. Reynolds Tobacco Company, a North Carolina corporation, is the successor by merger to R. J. Reynolds Tobacco Company, a New Jersey corporation. The existing R. J. Reynolds Tobacco Company is a wholly owned, indirect subsidiary of Reynolds American Inc., which is a North Carolina corporation. Appellant Brown & Williamson Tobacco Corporation (now known as Brown & Williamson Holdings, Inc.) holds more than 10% of the stock of Reynolds American Inc.

## **Lorillard Tobacco Company**

Appellant Lorillard Tobacco Company is wholly owned by Lorillard, Inc., which is wholly owned by Loews Corporation. Shares of Loews Corporation are publicly traded. Other subsidiaries of Loews Corporation that are not wholly owned by Loews Corporation but have some securities in the hands of the public are CNA Financial Corporation and Diamond Offshore Drilling, Inc. In addition, Loews Corporation indirectly owns 100% of the general partner of Boardwalk Pipeline Partners, LP, whose subsidiaries Boardwalk Pipelines, LP and Texas Gas Transmission, L.L.C. have issued bonds that are publicly owned. Loews Corporation has also issued Carolina Group stock, a publicly traded tracking stock.

## **British American Tobacco (Investments) Limited**

The following are parent companies and publicly held companies that have a 10% or greater ownership interest in British American Tobacco (Investments) Limited:

British American Tobacco p.l.c., British American Tobacco (1998) Limited, B.A.T Industries p.l.c., and British-American Tobacco (Holdings) Limited.

## **B.A.T Industries p.l.c.**

B.A.T Industries p.l.c. reserves all rights and defenses, including but not limited to the defense of lack of personal jurisdiction, and nothing in this brief shall constitute a waiver of any of these rights and defenses or a voluntary submission to

the jurisdiction of the Court. The following are parent companies and publicly held companies that have a 10% or greater ownership interest in B.A.T Industries p.l.c.: British American Tobacco p.l.c. and British American Tobacco (1998) Limited.

### **Liggett Group LLC**

Defendant Liggett Group LLC (“Liggett,” formerly known as and sued herein as Liggett Group Inc.), is a 100% indirect subsidiary of Vector Group Ltd. whose stock is publicly traded on the New York Stock Exchange.

# TABLE OF CONTENTS

	<b>Page</b>
CORPORATE DISCLOSURE STATEMENTS .....	i
TABLE OF AUTHORITIES .....	vii
PRELIMINARY STATEMENT .....	1
JURISDICTIONAL STATEMENT .....	1
QUESTION PRESENTED .....	1
STATEMENT OF THE CASE.....	1
STATEMENT OF THE FACTS .....	5
A.    Development Of Lights .....	5
1.    The FTC’s Regulatory Program .....	5
2.    Awareness Of Compensation .....	7
3.    Emerging Concerns About Low-Yield Cigarettes .....	8
B.    Proceedings Below .....	9
1.    Plaintiffs’ Complaint .....	9
2.    Plaintiffs’ First Certification Motion.....	11
3.    Plaintiffs’ Second Certification Attempt.....	12
4.    The District Court’s Opinion.....	14
SUMMARY OF THE ARGUMENT .....	15
STANDARD OF REVIEW .....	17
ARGUMENT .....	18
I.    THE DISTRICT COURT ERRONEOUSLY DETERMINED THAT COMMON ISSUES PREDOMINATE .....	18
A.    Reliance Is An Individual Issue Defeating Class Certification .....	19
1.    Reliance May Not Be Deemed A Common Issue By Invoking A Fraud-On-The-Market Presumption.....	23

**TABLE OF CONTENTS**  
(continued)

	<b>Page</b>
2.    The District Court’s Alternative Approach Of Resolving Reliance With Statistical Proof Is Improper And, In Any Event, Not Supported By The Record.....	28
B.    Loss Causation Is An Individual Issue Defeating Class Certification .....	30
1.    Whether A Class Member Received Less Tar And Nicotine Is Inherently Individual.....	31
2.    The District Court Erroneously Eliminated The Loss Causation Requirement .....	34
C.    The Statute Of Limitations Defense Is An Individual Issue Defeating Class Certification .....	34
1.    At Least A Significant, But Unknown, Number Of Class Members’ Claims Are Time-Barred.....	35
2.    The District Court Erred By Trying To Ignore The Individual Issues Presented By The Statute Of Limitations .....	36
D.    Proof Of Injury Is Another Individual Issue Defeating Certification .....	39
1.    Plaintiffs’ “Loss Of Value” Model Does Not Measure RICO Injury .....	42
2.    Plaintiffs’ Price Impact Model Does Not Measure RICO Injury .....	42
II.    THE DISTRICT COURT ERRED IN ADOPTING AN AGGREGATE, STATISTICAL APPROACH BASED ON FLUID RECOVERY .....	45
A.    The District Court’s Approach Violates Rule 23, The Rules Enabling Act, and RICO.....	45
B.    The Use Of Fluid Recovery Is Unlawful.....	48

**TABLE OF CONTENTS**  
(continued)

	<b>Page</b>
C.    The District Court’s Aggregate Approach Violates Defendants’ Constitutional Rights.....	51
III.    PLAINTIFFS HAVE NOT SATISFIED OTHER REQUIREMENTS FOR CERTIFICATION.....	54
A.    A Class Action Is Not A Superior Method Of Adjudicating Plaintiffs’ Claims .....	54
B.    The Class Representatives Fail The Typicality Requirement.....	58
CONCLUSION.....	59
CERTIFICATE OF COMPLIANCE.....	61

## TABLE OF AUTHORITIES

Page

### CASES

<i>Abrams v. Interco Inc.</i> , 719 F.2d 23 (2d Cir. 1983) .....	50, 55
<i>Academic Indus., Inc. v. Untermeyer Mace Partners, Ltd.</i> , No. 90 Civ. 1052 (LBS), 1992 WL 73473 (S.D.N.Y. Apr. 1, 1992) .....	40
<i>In re "Agent Orange" Prod. Liab. Litig.</i> , 818 F.2d 179 (2d Cir. 1987) .....	49, 50, 51
<i>Andrews v. A T &amp; T Co.</i> , 95 F.3d 1014 (11th Cir. 1996) .....	19, 55, 56
<i>Anza v. Ideal Steel Supply Corp.</i> , 126 S. Ct. 1991 (2006).....	43, 44, 45
<i>Armstrong v. Guccione</i> , __ F.3d __, 2006 WL 3404803 (2d Cir. 2006) .....	59
<i>Aspinall v. Philip Morris Cos.</i> , 813 N.E.2d 476 (Mass. 2004).....	22
<i>Bank of China v. NBM LLC</i> , 359 F.3d 171 (2d Cir. 2004), <i>cert. dismissed</i> , 126 S. Ct. 695 (2005) .....	19
<i>Barnes v. Am. Tobacco Co.</i> , 161 F.3d 127 (3d Cir. 1988) .....	33, 38
<i>Basic Inc. v. Levinson</i> , 485 U.S. 224 (1988).....	26
<i>Bingham v. Zolt</i> , 823 F. Supp. 1126 (S.D.N.Y. 1993), <i>aff'd</i> , 66 F.3d 553 (2d Cir. 1995).....	51

<i>Blue Cross &amp; Blue Shield of N.J., Inc. v. Philip Morris USA Inc.</i> , 344 F.3d 211 (2d Cir. 2003) .....	53, 54
<i>Blyden v. Mancusi</i> , 186 F.3d 252 (2d Cir. 1999) .....	53
<i>In re Bridgestone/Firestone, Inc.</i> , 288 F.3d 1012 (7th Cir. 2002) .....	47, 57
<i>In re Brooklyn Navy Yard Asbestos Litig.</i> , 971 F.2d 831 (2d Cir. 1992) .....	1
<i>Broussard v. Meineke Discount Muffler Shops, Inc.</i> , 155 F.3d 331 (4th Cir. 1998) .....	30, 38
<i>Castano v. Am. Tobacco Corp.</i> , 84 F.3d 734 (5th Cir. 1996) .....	20, 46, 56
<i>Chiang v. Veneman</i> , 385 F.3d 256 (3d Cir. 2004) .....	39
<i>Cimino v. Raymark Indus., Inc.</i> , 151 F.3d 297 (5th Cir. 1998) .....	52-53
<i>City Bank &amp; Trust Co. v. Vann (In re Vann)</i> , 67 F.3d 277 (11th Cir. 1995) .....	21
<i>Clay v. Am. Tobacco Corp.</i> , 188 F.R.D. 483 (S.D. Ill. 1999) .....	26
<i>Cocca v. Philip Morris Inc.</i> , No. CV 1999-008532, 2001 WL 34090200 (Ariz. Super. Ct. July 24, 2001) .....	22, 26, 31, 58
<i>Commercial Union Assurance Co. v. Milken</i> , 17 F.3d 608 (2d Cir. 1994) .....	39, 40, 42
<i>Corley v. Entergy Corp.</i> , 220 F.R.D. 478 (E.D. Tex. 2004), <i>aff'd</i> , 152 F. App'x 350 (5th Cir. 2005) .....	47

<i>Davies v. Philip Morris USA, Inc.</i> , No. 04-2-08174-2, 2006 WL 1600067 (Wash. Super. Ct. May 26, 2006) .....	22
<i>Denney v. Deutsche Bank AG</i> , 443 F.3d 253 (2d Cir. 2006) .....	48
<i>Dura Pharms., Inc. v. Broudo</i> , 544 U.S. 336 (2005).....	30
<i>Eisen v. Carlisle &amp; Jacquelin</i> , 479 F.2d 1005 (2d Cir. 1973), <i>rev'd</i> , 417 U.S. 156 (1974).....	4, 48, 49, 50, 51, 52
<i>Emig v. Am. Tobacco Co.</i> , 184 F.R.D. 379 (D. Kan. 1998) .....	33
<i>Falise v. Am. Tobacco Co.</i> , 94 F. Supp. 2d 316 (E.D.N.Y. 2000).....	24
<i>In re Fibreboard Corp.</i> , 893 F.2d 706 (5th Cir. 1990) .....	46, 52
<i>First Nationwide Bank v. Gelt Funding Corp.</i> , 27 F.3d 763 (2d Cir. 1994) .....	20, 24, 40
<i>Galerie Furstenberg v. Coffaro</i> , 697 F. Supp. 1282 (S.D.N.Y. 1988) .....	51
<i>Hamilton v. O'Connor Chevrolet, Inc.</i> , No. 02-C-1897, 2006 WL 1697171 (N.D. Ill. June 12, 2006) .....	56
<i>Heinold v. Perlstein</i> , 651 F. Supp. 1410 (E.D. Pa. 1987).....	40
<i>Henkind v. Brauser</i> , No. 87 CIV 4072 (MGC), 1989 WL 54109 (S.D.N.Y. May 17, 1989) .....	40

<i>Holmes v. Sec. Investor Prot. Corp.</i> , 503 U.S. 258 (1992).....	43-44
<i>In re Hotel Tel. Charges</i> , 500 F.2d 86 (9th Cir. 1974).....	47, 55, 56
<i>In re Initial Pub. Offerings Sec. Litig.</i> , __F.3d__, 2006 WL 3499937 (2d Cir. 2006).....	<i>passim</i>
<i>Kamm v. Cal. City Dev. Co.</i> , 509 F.2d 205 (9th Cir. 1975).....	57
<i>LaBauve v. Olin Corp.</i> , 231 F.R.D. 632 (S.D. Ala. 2005).....	39
<i>Line v. Astro Mfg. Co.</i> , 993 F. Supp. 1033 (E.D. Ky. 1998).....	40
<i>Lorillard Tobacco Co. v. Reilly</i> , 533 U.S. 525 (2001).....	57
<i>Ludke v. Philip Morris Cos.</i> , No. MC 00-1954, 2001 WL 1673791 (Minn. Dist. Ct. Nov. 21, 2001) .....	55
<i>Marisol A. v. Giuliani</i> , 126 F.3d 372 (2d Cir. 1997) .....	58
<i>In re Merrill Lynch Ltd. P'ships Litig.</i> , 154 F.3d 56 (2d Cir. 1998) .....	34
<i>Metromedia Co. v. Fugazy</i> , 983 F.2d 350 (2d Cir. 1992) .....	19
<i>Molski v. Gleich</i> , 318 F.3d 937 (9th Cir. 2003) .....	47
<i>In re Monumental Life Ins. Co.</i> , 365 F.3d 408 (5th Cir. 2004) .....	39

<i>Moore v. Am. Fed'n of Television &amp; Radio Artists</i> , 216 F.3d 1236 (11th Cir. 2000) .....	20
<i>Moore v. PaineWebber, Inc.</i> , 189 F.3d 165 (2d Cir. 1999) .....	20, 30
<i>Moore v. PaineWebber Inc.</i> , 306 F.3d 1247 (2d Cir. 2002) .....	19, 34
<i>Newton v. Merrill Lynch, Pierce, Fenner &amp; Smith, Inc.</i> , 259 F.3d 154 (3d Cir. 2001) .....	52
<i>Oliver v. R.J. Reynolds Tobacco Co.</i> , No. 9803-0268, 2000 WL 33598654 (Pa. Ct. Com. Pl. Dec. 19, 2000).....	22, 31
<i>Ortiz v. Fibreboard Corp.</i> , 527 U.S. 815 (1999).....	24, 46
<i>Parker v. Time Warner Entertainment Co., L.P.</i> , 331 F.3d 13 (2d Cir. 2003) .....	54
<i>Patterson v. Mobil Oil Corp.</i> , 241 F.3d 417 (5th Cir. 2001) .....	20
<i>Pearson v. Philip Morris, Inc.</i> , No. 0211-11819, 2006 WL 663004 (Or. Cir. Ct. Feb. 23, 2006).....	22, 31
<i>In re Peterson</i> , 253 U.S. 300 (1920).....	53
<i>Philip Morris Inc. v. Angeletti</i> , 752 A.2d 200 (Md. 2000) .....	19
<i>Philip Morris USA, Inc. v. Hines</i> , 883 So. 2d 292 (Fla. Dist. Ct. App. 2003).....	22, 31
<i>Poulos v. Caesars World, Inc.</i> , 379 F.3d 654 (9th Cir. 2004) .....	20, 27, 47

<i>Powers v. British Vita, P.L.C.</i> , 57 F.3d 176 (2d Cir. 1995) .....	30
<i>Price v. Philip Morris, Inc.</i> , 848 N.E.2d 1 (Ill. 2005), <i>cert. denied</i> , 75 U.S.L.W. 3281 (No. 06-465, Nov. 27, 2006) .....	6, 7, 22, 40
<i>Provost v. City of Newburgh</i> , 262 F.3d 146 (2d Cir. 2001) .....	29
<i>In re Repetitive Stress Injury Litig.</i> , 11 F.3d 368 (2d Cir. 1993) .....	1, 52
<i>Rodriguez v. McKinney</i> , 156 F.R.D. 112 (E.D. Pa. 1994) .....	27
<i>Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.</i> , 319 F.3d 205 (5th Cir. 2003) .....	20, 47
<i>Sanneman v. Chrysler Corp.</i> , 191 F.R.D. 441 (E.D. Pa. 2000) .....	56
<i>Schwab v. Philip Morris USA Inc.</i> , 449 F. Supp. 2d 992 (E.D.N.Y 2006) .....	1
<i>Scivally v. Graney</i> , 21 F.3d 420 (table), 1994 WL 140413 (1st Cir. 1994).....	40
<i>Sedima, S.P.L.R. v. Imrex Co.</i> , 741 F.2d 482 (2d Cir. 1984), <i>rev'd on other grounds</i> , 473 U.S. 479 (1985).....	51
<i>Semerenko v. Cendant Corp.</i> , 223 F.3d 165 (3d Cir. 2000) .....	26
<i>Sikes v. Teleline, Inc.</i> , 281 F.3d 1350 (11th Cir. 2002) .....	20, 27, 47
<i>In re Simon II Litig.</i> , 407 F.3d 125 (2d Cir. 2005) .....	9, 51

<i>Small v. Lorillard Tobacco Co.</i> , 94 N.Y.2d 43, 698 N.Y.S.2d 615 (1999).....	33
<i>Sprague v. Gen. Motors Corp.</i> , 133 F.3d 388 (6th Cir. 1998) .....	18
<i>State Farm Mut. Auto. Ins. Co. v. Campbell</i> , 538 U.S. 408 (2003).....	51
<i>Thompson v. Am. Tobacco Co.</i> , 189 F.R.D. 544 (D. Minn. 1999) .....	33
<i>In re Tobacco Cases II</i> , No. JCCP 4042, 2004 WL 2445337 (Cal. Super. Ct. Aug. 4, 2004), <i>aff'd</i> , 47 Cal. Rptr. 3d 917 (Ct. App.), <i>review granted on other</i> <i>grounds</i> , 2006 WL 3628022 (Cal. Nov. 1, 2006).....	32
<i>Trane v. O'Connor Sec.</i> , 718 F.2d 26 (2d Cir. 1983) .....	51
<i>United States v. Nelson</i> , 277 F.3d 164 (2d Cir. 2002) .....	29
<i>Van Gemert v. Boeing Co.</i> , 553 F.2d 812 (2d Cir. 1977) .....	49, 50
<i>W. Elec. Co. v. Stern</i> , 544 F.2d 1196 (3d Cir. 1976) .....	52
<i>Waste Mgmt. Holdings, Inc. v. Mowbray</i> , 208 F.3d 288 (1st Cir. 2000).....	38
<i>Watson v. Philip Morris Cos.</i> , No. 4:03-CV-519 GTE, 2003 WL 23272484 (E.D. Ark. 2003), <i>aff'd</i> , 420 F.3d 852 (8th Cir. 2005), <i>petition for cert. filed</i> (No. 05-1284, Apr. 7, 2006).....	6
<i>Windham v. Am. Brands, Inc.</i> , 565 F.2d 59 (4th Cir. 1977) .....	55

**FEDERAL CONSTITUTION, STATUTES & RULES**

U.S. CONST. amend. VII .....53

15 U.S.C. § 45(a)(1), (b) .....57

15 U.S.C. § 57b(a)(2), (b) .....57

15 U.S.C. § 1333 .....7

18 U.S.C. § 1964.....1, 39, 56

28 U.S.C. § 1331 .....1

28 U.S.C. § 2072(b) .....46

Fed. R. Civ. P. 23..... *passim*

## **PRELIMINARY STATEMENT**

Defendants appeal from an Order (Weinstein, J.) certifying a class of U.S. residents who have purchased one of 65 cigarette brands labeled as “Lights.” *Schwab v. Philip Morris USA Inc.*, 449 F. Supp. 2d 992 (E.D.N.Y 2006).

## **JURISDICTIONAL STATEMENT**

Plaintiffs asserted subject matter jurisdiction under 28 U.S.C. § 1331 and 18 U.S.C. § 1964. A177. This Court has jurisdiction pursuant to Federal Rule of Civil Procedure 23(f).

## **QUESTION PRESENTED**

Did the district court err in certifying the class?

## **STATEMENT OF THE CASE**

This is an unlawful class certification order, exemplifying the “systemic urge to aggregate litigation” that this Court has repeatedly condemned. *In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 373 (2d Cir. 1993) (quoting *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir. 1992)). The district court certified a nationwide class of U.S. residents who purchased even one pack of any one of 65 brands of “Lights.” The class is massive: comprising *tens of millions* of people, spanning *35 years*, and seeking *\$800 billion*.

Plaintiffs assert claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), alleging economic losses resulting from defendants’ use of the term “Lights.” According to plaintiffs, defendants’ use of this descriptor

constitutes mail and wire fraud because Lights smokers did not receive less tar and nicotine than they would have from smoking “full-flavored” cigarettes and thus have not received a safer cigarette. The district court did not accept plaintiffs’ assertions that all consumers had the same reasons for choosing Lights or the same beliefs as to Lights’ risks. To the contrary, the court rejected plaintiffs’ argument of “universal reliance” on the alleged fraud as “absurd.” And for good reason: even plaintiffs’ own surveys show that the vast majority of Lights smokers prefer the taste of Lights to full-flavored cigarettes and would have purchased Lights regardless of whether they offered lower risk. The court also acknowledged that many Lights purchasers had heard reports and believed for decades that Lights are no less dangerous than full-flavored cigarettes; indeed, the court recognized that many Lights purchasers would be barred from recovery in individual litigation by the statute of limitations or for failure to prove reliance. *See, e.g.*, SPA23, 117. Still, the court certified the class.

This lawsuit should not have been certified. The class members’ disparate knowledge, beliefs, and reasons for choosing Lights preclude class treatment. *See In re Initial Public Offerings Secs. Litig.*, \_\_F.3d\_\_, 2006 WL 3499937, at \*19 (2d Cir. 2006) (“*IPO*”) (reversing class certification on similar grounds). But the district court nevertheless concluded that this litigation, despite “somewhat dubious arguments and questionable proofs,” must proceed as a class action

because it “has so many important public social overtones.” SPA25. In its zeal to certify, the court ignored settled law under RICO and Rule 23.

*First*, Rule 23 is a procedural device, not an invitation to make radical revisions in substantive law. Yet, the district court improperly tried to rewrite the elements of plaintiffs’ claims to make the individual issues in this case amenable to “common” proof. For example, the court eliminated the requirement of a but-for link between the misrepresentation and the purchase (*i.e.*, reliance), adopting instead an unprecedented test for putative “mass market” fraud that depends on whether defendants “distort[ed]” the “body of public knowledge.” SPA223. The court also eliminated the requirement that RICO plaintiffs show “loss causation,” *i.e.*, that they failed to receive what was allegedly promised (less tar and nicotine), by simply dismissing this element as “nonsensical” in consumer fraud cases. SPA70. And, contrary to controlling precedent, the court permitted plaintiffs to pursue a theory of “benefit-of-the-bargain” damages, instead of requiring plaintiffs to show that they suffered out-of-pocket losses tied directly to the RICO violation—a determination that, in this case, turns on individual issues such as whether a smoker would have quit or would not have started smoking absent the use of the descriptor “Lights.” SPA93-96.

*Second*, to avoid the need for individualized proof (and to obviate the predominance requirement), the district court adopted a radical theory of trial by

statistics in which the jury would determine the percentage of class members with valid claims. SPA170-266, 466-535. Under a “fluid recovery” procedure, the jury would use this percentage estimate to make an aggregate damages award, which would be distributed to class members based on claims forms submitted in an ill-defined administrative proceeding. SPA522.

The district court’s theory, if accepted, would eviscerate Rule 23’s predominance requirement and violate defendants’ constitutional rights. It would expand exponentially the category of cases eligible for class treatment. Furthermore, the court’s approach flouts this Court’s ruling that fluid recovery is “illegal,” “wholly improper,” and “inadmissible as a solution of the manageability problems of class actions.” *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1018 (2d Cir. 1973), *rev’d on other grounds*, 417 U.S. 156 (1974). The district court cast this precedent aside on the ground that *Eisen* is “not in the highest intellectual tradition of the Second Circuit Court of Appeals.” SPA513.

*Third*, plaintiffs failed to meet their burden even under the district court’s invalid approach to aggregate litigation. As the district court recognized, plaintiffs’ experts were unable to develop any statistical means of determining the percentage of class members with valid RICO claims. SPA246. Notwithstanding this failing, the court certified the class, reasoning that the jury could derive its own estimate. SPA246-47. It is fundamentally improper to permit the jury to

speculate about what plaintiffs' own experts could not determine. In deferring to the jury, the court also improperly allowed its certification analysis to be shaped by its view of the importance and merits of this case, SPA15-26, and abdicated its responsibility to determine whether Rule 23 was satisfied. *IPO*, 2006 WL 3499937, at \*15.

The certification order is erroneous and should be reversed.

### **STATEMENT OF THE FACTS**

Below is a brief history of Lights and a summary of the proceedings below.

#### **A. Development Of Lights**

##### **1. The FTC's Regulatory Program**

In 1971, defendant Philip Morris USA introduced the first "Lights" cigarette: Marlboro Lights. A4957. Defendants subsequently introduced other "Lights" brands at different times throughout the 35-year class period.

Lights were developed against the backdrop of the FTC's fifty-year history of regulating tar and nicotine measurements, disclosures, and marketing. The purpose of the FTC's regulatory program was to encourage consumers to rely on tar and nicotine measurements in making their brand choices and to encourage

“competition among the cigarette companies” to promote “those varieties which rank low in tar and nicotine.” A1159; A1198; A4891.<sup>1</sup>

To achieve these goals, the FTC’s program had three components. *First*, the FTC developed its own method for measuring tar and nicotine yields—the “FTC Method”—and began using it in 1967. The FTC declared that its method was to be the exclusive method for measuring yields and that it is “deceptive to advertise a tar figure which is higher than the latest applicable FTC tar figure,” because “consumer confusion might be generated.” A1225; A1161.

*Second*, the FTC directed that manufacturers disclose tar and nicotine yields. In 1970, a year before the first “Lights” brand, the FTC extracted an industry-wide agreement—still operative today—requiring that FTC-measured yields be disclosed in all advertisements using the legend “\_\_ mg. tar, \_\_ mg. nicotine av. per cigarette by FTC method.” A1159-61; A2822-25 (sample advertisement with legend).

*Third*, the FTC authorized manufacturers to use “descriptors” but only if based on FTC results—in other words, only if they function as shorthand, consumer-friendly references to the FTC’s measurements. A1158; A1194. “Low

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<sup>1</sup> The FTC’s regulatory history is discussed in *Price v. Philip Morris, Inc.*, 848 N.E.2d 1, 6-19 (Ill. 2005), *cert. denied*, 2006 WL 2843774 (2006), and *Watson v. Philip Morris Cos.*, 2003 WL 23272484, at \*3-9 (E.D. Ark. 2003), *aff’d*, 420 F.3d 852 (8th Cir. 2005), *petition for cert. filed* (No. 05-1284, Apr. 7, 2006).

tar” cigarettes—including “reduced tar,” “lower tar,” or “Lights”—must be 15 mg. of tar or less, as measured by the FTC Method. A1162.

Today, the vast majority of cigarettes sold in the U.S. are in the FTC-defined “low tar” category, and, as plaintiffs’ experts concede, smokers prefer such cigarettes regardless of whether they are labeled “Lights.” A3778-79; A3801; A1638. And all cigarettes—regardless of their tar and nicotine yields—have carried identical government-mandated health warnings during the entire class period. 15 U.S.C. § 1333; *see also* A1152.

## **2. Awareness Of Compensation**

The FTC has long been aware of allegations that the FTC Method does not measure tar and nicotine deliveries to actual smokers.

Smokers who change the way they smoke when switching from higher-yield to lower-yield cigarettes (like Lights)—either by (1) smoking more cigarettes, or (2) smoking each cigarette more intensely—might not receive less tar and nicotine. A4846-47; A1254-55. This is “compensation.” A4846.<sup>2</sup> If a smoker compensates sufficiently to receive the same or a greater amount of tar and nicotine as from a

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<sup>2</sup> Compensation refers to a smoker’s change in behavior when *switching* from a full-flavored cigarette to a low-yield cigarette, A1806, and does not apply to smokers who started with Lights or those who switched from a lower-yield cigarette (such as an “Ultra-Light”) to a Light and therefore do not need to compensate when smoking Lights. A1261; *see also Price*, 848 N.E.2d at 53.

higher yield cigarette, compensation is “complete.” A1762-63; A4879; A1255. A smoker who engages in only “partial” compensation when smoking Lights receives less tar and nicotine. A1807-09; A4879; A1255. Whether and how much any particular smoker compensates may also vary over time—over years or even within the same day. A1255.

As plaintiffs’ expert conceded, “[i]t was known that compensation existed” when the first “Lights” brand was introduced in 1971. A1864. Indeed, before the FTC began measuring yields in 1967, the tobacco industry warned that there was considerable variability in smoking behavior and that the FTC’s measurements would not reflect these individual differences. A4840; A1133-34; A1176. The FTC acknowledged this limitation, issuing a press release repeating the industry’s warnings verbatim. A4839-40; A1134-35; A1190-91. Since adopting its measurement program, the FTC has repeatedly considered whether it should abandon or modify its method in response to the very theories and allegations asserted by plaintiffs here. A4851-52; A4890; A1162-65. The FTC has retained its method, however.

### **3. Emerging Concerns About Low-Yield Cigarettes**

Since the beginning of the FTC’s measurement program, there have been reports in medical and lay publications that compensation may defeat any benefits of smoking low-yield cigarettes. A1517-32. In 2001, the National Cancer Institute

published Monograph 13, which reinterpreted the same studies that scientists had relied upon in recommending yield reductions. A1166; A1168. On the basis of this re-analysis of the same data, Monograph 13 concluded that there was “no convincing evidence that changes in cigarette design between 1950 and the mid 1980s 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.” A992.

The FTC is considering whether to change its measurement program in response to Monograph 13, but has not done so. A1942. Public health authorities have also reached varying conclusions about yield reductions. A1168-74. In 2004, for example, the World Health Organization concluded that “changes in cigarettes since the 1950s have probably tended to reduce the risk for lung cancer associated with the smoking of particular numbers of cigarettes at particular ages.” A1240; A1173.

## **B. Proceedings Below**

### **1. Plaintiffs’ Complaint**

Plaintiffs filed this lawsuit in May 2004 on behalf of a nationwide class of Lights purchasers. A169. It was assigned to Judge Weinstein on the basis of plaintiffs’ representation that it is a “related case” to *In re Simon II*, where this Court reversed another order by the district court certifying a nationwide class of smokers. *See In re Simon II*, 407 F.3d 125 (2d Cir. 2005).

Plaintiffs allege that defendants sought “to market, advertise, promote, distribute and/or sell light cigarettes as purportedly lower in tar and/or nicotine, despite knowledge that light cigarettes do not actually deliver lower amounts of tar and/or nicotine when smoked.” A170. According to plaintiffs, the common descriptor “Lights”—as defined by the FTC pursuant to its policies and directions—justifies aggregating the claims of tens of millions of consumers who smoked 65 different brands over the past 35 years into one massive class action. A263; A268. The class does not seek recovery on the basis of cigarettes that are in the low-tar category but are not described as “Lights.” A3138. Nor does the class include individuals who chose to smoke “Ultra Lights” cigarettes, which yield even less tar and nicotine (7 mg. or less) under the FTC Method than Lights. A3138.

Plaintiffs disclaim recovery for smoking-related illnesses. A227; A232. Instead, they seek \$800 billion or more in alleged economic damages (trebled) stemming from their purchases. A3520. They claim that, due to “compensation,” Lights smokers did not receive the “promised” benefit of less tar and nicotine. A193; A195. Notably, however, three of the six named plaintiffs continued to purchase Lights after filing the complaint—without requiring any price reduction—notwithstanding their awareness of a purported “fraud.” A2004; A2006; A2089; A2091; A2111; A1990-91.

## 2. Plaintiffs' First Certification Motion

Plaintiffs first moved for class certification in February 2005. A248. Their theory was that *all* Lights smokers since 1971 believed that Lights were safer, would not have purchased but for that belief, and failed to receive less tar and nicotine. *See, e.g.*, A271-80. The district court repudiated this “universality” theory, explaining that it “would be absurd” to presume “every purchaser ... of light cigarettes purchased in reliance on a purported fraud.” A3114; *see also, e.g.*, A3242. Indeed, many peer-reviewed surveys in the record—including some by plaintiffs’ own experts—reflect that the majority of the proposed class (1) smoke Lights because they prefer the taste, and (2) do not believe Lights are less hazardous. A1668-69; A1671-75; A1677-78; A1320; A1339-40.

Instead of denying plaintiffs’ motion, however, the district court proposed a different certification theory: an aggregate, statistical approach relying on a “fluid recovery” procedure. A3314; *see also* A3256; A3279. The court explained that without such an approach, plaintiffs would be “out of the court.” A3285; A3288. The district court suggested that plaintiffs should develop statistical estimates of the percentage of class members who have valid claims and are entitled to recovery. A3345. Then, in an administrative proceeding in which defendants would not participate, the “class” damages would be distributed based on claims

forms submitted by individual plaintiffs, with unclaimed amounts distributed for supposed public purposes. A3256; A3318.

The court deferred ruling on the certification motion, A3285, giving plaintiffs nearly a year to develop new proofs consistent with its aggregate approach. A3267.

### **3. Plaintiffs' Second Certification Attempt**

Plaintiffs renewed their motion in June 2006. A3638. They submitted ten new expert reports that they claimed would meet the district court's aggregate proof requirements. *See generally* A3638. But none of these experts, separately or in combination, estimated the percentage of class members with valid claims.

On reliance, for example, plaintiffs initially promised the district court that one of their experts, Dr. Hauser, had "a means available to identify a percentage of light smokers who did rely on the fraud absent universality. Dr. Hauser does just that." A3111. Dr. Hauser later admitted, however, that he has "not done a survey to determine the impact of the word 'light,'" and that he is "not providing an expert opinion as to whether or not light is the driver of health risk" perceptions. A3980. Plaintiffs ultimately conceded that Dr. Hauser did *not* measure reliance: he "does not opine specifically that a certain percentage of the class did or did not 'rely' on Defendants' fraud in making their purchase of Defendants' 'light' cigarettes." A5307.

Likewise, on the statute of limitations, plaintiffs failed to adduce any “statistical analysis to estimate how many smokers knew what and when” as the district court requested. A3279. Dr. Hauser conducted a “Time Study” in response to the district court’s request, A3483-84, but the results were inimical to plaintiffs’ case. The survey found that fewer than 15% of respondents currently believe Lights are safer than “regular” cigarettes, and the majority have *never* believed Lights were safer. A3499-500. Further, among those who once believed Lights were less dangerous but changed their minds, the great majority did so before the four-year statute of limitations period (May 2000). A3507.

After meeting with plaintiffs’ counsel to discuss the results of the Time Study, Dr. Hauser revamped his expert report. Before the meeting, Dr. Hauser’s draft report stated that the Time Study was “sound, reliable, and valid” and included a lengthy discussion of the study’s design and implementation and an analysis of its results. A3507. In the report that Dr. Hauser ultimately submitted one business day after meeting with counsel, however, he referred to the Time Study as an “attempt[ed]” survey and stated that he “would have little confidence” in its results and will “not rely on any such survey.” A3423 n.2.

#### 4. The District Court's Opinion

On September 25, 2006, the district court certified the class.<sup>3</sup> The court based its order on its theory of fluid recovery and conducting class action litigation with statistics. SPA466-536. The district court acknowledged that— notwithstanding previous admonitions that it “can’t allow the jury to grab a number out of thin air” (A6198)—plaintiffs had failed to offer “a decisive” expert “on the critical reliance and damages questions.” SPA246. In fact, the court determined that “evidence of the percentage of the class which was defrauded and the amount of economic damages it suffered appears to be quite weak—and plaintiffs have been less than candid in failing to acknowledge that deficiency in their proof.” SPA22.

Despite plaintiffs’ failings, the district court concluded that the jury should be permitted to “come up with ‘a number’” of the percentage of class members with valid claims. SPA246. The court explained that “[p]laintiffs’ proof is akin to a pointillist painting by Georges Seurat,” and hoped that “[w]hen a juror stands

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<sup>3</sup> Although the district court’s opinion is 540 pages, much of it addresses rulings that are not pertinent to this appeal. The topics that are most pertinent to class certification are found at pages 16-30 (background, burden), 57-61, 89-111, 249-71, and 300-07 (injury), 63-78 (reliance), 111-27 (statute of limitations), 170-236 (class certification motion), and 466-529 (“management” issues).

back from the canvas and looks at the big picture,” the juror may be able to “discern” what plaintiffs’ own experts could not. SPA247.

Although the district court had earlier stated it would stay proceedings and certify any class certification order for interlocutory review (A3230), the court denied interlocutory review, denied a stay, and set trial for January 2007. SPA537-39. This Court granted defendants permission to appeal under Rule 23(f) and stayed all proceedings below. A6199.

### **SUMMARY OF THE ARGUMENT**

Plaintiffs failed to establish that common issues predominate. In this fraud-based RICO action, each class member must show, *inter alia*, that he or she believed Lights were less hazardous than full-flavored cigarettes, purchased Lights due to this belief, did not receive what was allegedly promised (less tar and nicotine), and suffered actual, out-of-pocket losses. Each class member must also overcome the statute of limitations defense, which raises additional individual issues of whether and when each plaintiff was on notice of his or her alleged “injury.” The district court acknowledged that these inquiries would vary among class members, but was nevertheless determined to certify the class and, in doing so, made three broad categories of legal errors.

*First*, the district court eliminated the well-settled requirements that a RICO plaintiff must show that he or she (i) relied on the alleged fraud (“but for,” or

transaction, causation), and (ii) did not receive what was allegedly promised (“loss causation”). The court also eliminated the requirement that a RICO plaintiff must show out-of-pocket losses and instead permitted plaintiffs to recover on a theory that they did not receive the “benefit-of-the-bargain” in purchasing Lights. A district court may not contort the elements of a RICO claim in this manner so that plaintiffs’ claims can be made to fit the mold of a class action.

*Second*, to obviate the predominance requirement, the district court adopted a radical theory of statistical aggregation and “fluid recovery.” The court declared that the jury could use statistics and other aggregate proof to estimate what percentage of the multi-million person class could establish individual issues such as reliance and the statute of limitations. The jury would then use these estimates to determine the percentage of class members with valid claims and make an aggregate “damages” determination. This is flatly inconsistent with Second Circuit precedent. The use of statistics to resolve individual issues with purportedly “common” proof also violates Rule 23’s predominance requirement, the Rules Enabling Act, and defendants’ constitutional rights.

*Third*, even under the district court’s unlawful theory, this case should not have been certified. Plaintiffs failed to provide a statistical means of resolving *any* of the individual issues in this case. None of plaintiffs’ experts estimated the percentage of class members who: relied on the alleged fraud; did not receive

what was allegedly promised; suffered out-of-pocket losses; or survived the statute of limitations. Nor did any expert come forward with a means of determining the percentage of the class that satisfied *all* of these requirements. Nonetheless, the court improperly ruled that the jury should be permitted to decide for itself the percentage of class members with valid claims—the very determination that plaintiffs’ own experts could not make. In so doing, the court breached its duty to determine whether Rule 23’s requirements were satisfied.

Finally, the district court erred in ruling that plaintiffs had shown that a class action is a “superior” method of adjudication and that the named plaintiffs are asserting “typical” claims. There is no way that the tens of millions of claims aggregated in this lawsuit could be properly resolved in a class action. Nor, due to the wide variability in class members’ beliefs about Lights, reasons for smoking Lights, smoking behavior, and smoking histories can there be any “typical” plaintiff to assert these fraud claims. Any class proceeding that properly accounted for defendants’ rights would devolve into a morass of millions of individual mini-trials, defeating any efficiencies of class treatment.

### **STANDARD OF REVIEW**

As the Court summarized in *IPO*:

[T]he standard for appellate review is whether discretion has been exceeded (or abused) ... . To the extent that the ruling on a Rule 23 requirement is supported by a finding of fact, that finding, like any other finding of fact, is

reviewed under the “clearly erroneous” standard. And to the extent that the ruling involves an issue of law, review is *de novo*.

2006 WL 3499937, at \*14. The district court must conduct a “rigorous analysis” to evaluate whether plaintiffs have satisfied their burden, and “a district judge may not certify a class without making a ruling that each Rule 23 requirement is met.” *Id.* at \*7, \*15. “[A] lesser standard such as ‘some showing’ for satisfying each requirement will not suffice.” *Id.* at \*7. And, as part of the requisite rigorous analysis, a court must resolve any “factual disputes relevant to each Rule 23 requirement,” even if those disputes overlap with a “merits issue.” *Id.* at \*15.

## **ARGUMENT**

### **I. THE DISTRICT COURT ERRONEOUSLY DETERMINED THAT COMMON ISSUES PREDOMINATE**

Under Rule 23(b)(3), a party seeking class certification must establish, among other things, that “questions of law or fact common to the members of the class predominate over any questions affecting only individual members.” An issue is “common” only if proving it for a single class member would necessarily prove it for every member of the class. *Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 399 (6th Cir. 1998) (an issue is individual when a “named plaintiff who proved his own claim would not necessarily have proved anybody else’s claim”).

The mere fact that the defendant may have engaged in a common course of conduct is “not enough to show predominance” because individual inquiries may

be needed to determine how the common course of conduct affected each plaintiff. *Moore v. PaineWebber, Inc.*, 306 F.3d 1247, 1255 (2d Cir. 2002); *see also, e.g., Andrews v. AT&T Co.*, 95 F.3d 1014, 1025 (11th Cir. 1996) (“Even if it could be shown that the appellants were engaged in a scheme to defraud ... plaintiffs would still have to show, on an individual basis, that they relied on the misrepresentations, suffered injury as a result, and incurred a demonstrable amount of damages.”).

Appellate courts across the country have consistently rejected attempts to certify smoking and health class actions because they inevitably depend on individual issues.<sup>4</sup> This case is no different.

**A. Reliance Is An Individual Issue Defeating Class Certification**

“[T]o prevail in a civil RICO action predicated on any type of fraud ... the plaintiff must establish ‘reasonable reliance’ on the defendants’ purported misrepresentations or omissions.” *Bank of China v. NBM LLC*, 359 F.3d 171, 178 (2d Cir. 2004), *cert. dismissed*, 126 S. Ct. 675 (2005); *see also, e.g., Metromedia Co. v. Fugazy*, 983 F.2d 350, 368 (2d Cir. 1992). This element requires proof “that the defendant’s alleged RICO violation was the ‘but-for’ or cause-in-fact of his

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<sup>4</sup> *Philip Morris Inc. v. Angeletti*, 752 A.2d 200, 222-23 (Md. 2000) (collecting decisions); SPA24 (“Candor impels recognition of the fact that the Courts of Appeals have not been kind to massive claims against tobacco companies.”).

injury,” which means that “but for the defendant’s misrepresentations the transaction would not have come about.” *First Nationwide Bank v. Gelt Funding Corp.*, 27 F.3d 763, 769 (2d Cir. 1994); *see also Moore v. PaineWebber, Inc.*, 189 F.3d 165 (2d Cir. 1999).

Under this Court’s precedent, “establishing reliance individually by members of the class would defeat the requirement of Rule 23 that common questions of law or fact predominate over questions affecting only individual members.” *IPO*, 2006 WL 3499937, at \*16. Other federal courts of appeals have similarly held that “a fraud class action cannot be certified when individual reliance will be an issue,” *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996), and therefore apply “a working presumption against class certification” in “RICO fraud actions.” *Sandwich Chef of Tex., Inc. v. Reliance Nat’l Indem. Ins. Co.*, 319 F.3d 205, 219 (5th Cir. 2003); *see also* Fed. R. Civ. P. 23 Advisory Committee’s Note (“a fraud case may be unsuited for treatment as a class action if there was material variation ... in the kinds or degrees of reliance”). Consistent with this authority, courts of appeals routinely decline to certify fraud-based RICO claims due to individualized reliance issues. *See, e.g., Poulos v. Caesars World, Inc.*, 379 F.3d 654 (9th Cir. 2004); *Sikes v. Teleline, Inc.*, 281 F.3d 1350 (11th Cir. 2002); *Patterson v. Mobil Oil Corp.*, 241 F.3d 417, 419 (5th Cir. 2001); *Moore v. Am. Fed’n of Television & Radio Artists*, 216 F.3d 1236, 1242-43 (11th Cir. 2000).

Here, to establish reliance, plaintiffs must show that they (1) believed Lights delivered less tar and nicotine and thus were safer because of defendants' alleged misrepresentations (as opposed to statements from some other source), and (2) purchased those cigarettes because of that belief, as opposed to other reasons (such as taste preferences or image). These issues are inherently individual. The only way to determine a person's beliefs about and reasons for purchasing Lights is to examine him or her. Indeed, the record shows that individual Lights smokers chose their cigarettes for myriad reasons and have different beliefs about the relative health hazards of Lights. And surveys conducted by plaintiffs' own experts show that, when smokers are polled on their individual beliefs, the overwhelming majority prefer the taste of Lights over full-flavored cigarettes and would purchase Lights *even if* they believed the cigarettes to be just as dangerous as full-flavored cigarettes. A4100; A1674-75; A1677. There is no conceivable way that reliance can be proved for the entire class in one mass trial.<sup>5</sup>

This alone defeats certification. Indeed, this is not a novel case, and courts have repeatedly rejected certification of similar "Lights" claims on the ground,

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<sup>5</sup> The requirement that reliance be reasonable also creates individual issues, because "[j]ustifiable reliance is gauged by 'an *individual standard* of the plaintiff's own capacity and the knowledge which he has.'" *City Bank & Trust Co. v. Vann (In re Vann)*, 67 F.3d 277, 283 (11th Cir. 1995) (quoting *Prosser & Keeton on Torts* § 108, at 751 (5th ed. 1984)) (emphasis in original).

among others, that plaintiffs cannot prove either but-for causation or reliance on the descriptor “Lights” on a class-wide basis. *Philip Morris USA, Inc. v. Hines*, 883 So. 2d 292, 294 (Fla. Dist. Ct. App. 2003) (review pending); *Davies v. Philip Morris USA, Inc.*, 2006 WL 1600067, at \*3 (Wash. Super. Ct. 2006) (review denied, application for review from denial pending); *Pearson v. Philip Morris, Inc.*, 2006 WL 663004, at \*10 (Or. Cir. Ct. 2006) (review denied); *Cocca v. Philip Morris Inc.*, 2001 WL 34090200, at \*3 (Ariz. Super. Ct. 2001); *Oliver v. R.J. Reynolds Tobacco Co.*, 2000 WL 33598654, at \*5 (Pa. Ct. Com. Pl. 2000).<sup>6</sup>

The district court, however, changed the law to make reliance susceptible to class-wide adjudication by (1) suggesting that reliance can simply be presumed, and (2) ruling that plaintiffs may prove reliance for the entire class with statistical evidence or other “aggregate” proof. The court undertook this effort to “satisfy[] the community’s basic sense of fairness,” SPA227, in violation of both the Rules Enabling Act and this Court’s admonition that “[a] district judge should not assess

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<sup>6</sup> See also *Price*, 848 N.E.2d at 52 (dismissing lawsuit on other grounds but expressing skepticism as to “whether it can reasonably be said that deception created by the words ‘Lights’ and ‘lowered tar and nicotine’ ... was the ‘but for’ cause of millions of purchasing decisions made over a period of some 30 years by the 1.14 million members of the plaintiff class”). Those few state courts that have permitted certification of lights cases have generally done so by interpreting their own state’s law not to require reliance or but-for causation, which is directly contrary to this Court’s interpretation of RICO. See, e.g., *Aspinall v. Philip Morris Cos.*, 813 N.E.2d 476, 489 (Mass. 2004).

any aspect of the merits unrelated to a Rule 23 requirement.” *IPO*, 2006 WL 3499937, at \*15. Neither of the court’s approaches provides a basis for ignoring the individual reliance issues in this case.

**1. Reliance May Not Be Deemed A Common Issue By Invoking A Fraud-On-The-Market Presumption**

The district court recognized that reliance varies among class members, and, before its certification decision, repeatedly rejected any presumption of reliance as “absurd”:

- “If the plaintiff[s]’ position is that everybody who smoked a light cigarette had the same reasons, of course, that’s not going to be a valid conclusion.” A1089.
- “I am not going to make any such presumption [that ‘every purchaser ... of light cigarettes purchased in reliance on a purported fraud.’] That would be absurd. ... To have this Court presume that millions of people react in the same way like Pavlov’s dogs is not something that this Court has ever considered doing.” A3114.
- “[P]reposterous” is “not an inadequate representation of how [the court] feel[s]” about plaintiffs’ notion of “universality of reliance.” A3242.

In its certification order, the court similarly acknowledged that “[t]here is considerable merit to defendants’ experts’ position that many, if not all, [of] the plaintiffs would have bought these light cigarettes even if they knew they provided no health advantage over regular cigarettes.” SPA23. Indeed, as noted, three of the six class representatives continued smoking Lights even after filing this lawsuit. *See supra* at 10.

Nevertheless, after repeatedly recognizing that many class members could *not* establish reliance, the district court endeavored to bypass this individual issue by suggesting that a fraud-on-the-market “presumption may be appropriate in the present case.” SPA208. In a similar vein, the court invoked the “less demanding” standard for proving reliance that it had invented in *Falise v. American Tobacco Co.*, 94 F. Supp. 2d 316 (E.D.N.Y. 2000). SPA72-76. Under this approach, the critical inquiry would be whether defendants “distort[ed] the entire body of public knowledge.” SPA223, 227.

As an initial matter, this “reliance” standard does not require reliance at all. The district court’s “public knowledge distortion” test is wholly unprecedented. As this Court has made clear, to satisfy the reliance requirement, a RICO plaintiff must establish a *but-for link* between the alleged misrepresentation and the decision to purchase the product. *First Nationwide Bank*, 27 F.3d at 769. By changing the substantive elements of a RICO claim to facilitate certification, the district court committed reversible error and violated the Rules Enabling Act. *See, e.g., Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999).

Moreover, any suggestion that certification may be based on a fraud-on-the-market presumption of reliance is wrong. The record emphatically underscores that there is no basis for such a presumption here. To the contrary, the vast majority of class members *cannot* be deemed to have relied on any purported

health assurance that plaintiffs allege is implicit in the word “Lights.” For example:

- **Surveys.** Overwhelming survey data show that at least a majority of Lights smokers (1) did *not* believe Lights are safer, and (2) purchased Lights for reasons entirely unrelated to tar and nicotine yields. A1312-14; A1320-21; A1339-40 (collecting surveys). In fact, plaintiffs’ expert Dr. Cummings conceded that his own studies show there was no predominant view on “whether cigarettes are equally hazardous or whether some kinds of cigarettes are more hazardous,” “a majority of smokers did not believe that light cigarettes are less harmful,” and “a majority of American smokers did not believe that light cigarettes give less tar.” A1677.
- **Public dissemination of information.** For decades, the public has been exposed to repeated, explicit warnings about compensation and the health risks of Lights. A1518-32. For example, plaintiffs’ expert Dr. Benowitz agreed that his 1983 study (in the NEW ENGLAND JOURNAL OF MEDICINE) concluding that “smokers of lower-yield cigarettes do not receive any less nicotine than smokers of regular cigarettes” was “well publicized” in the media, including on ABC, CBS, and NBC news. A1820; A1527.<sup>7</sup> More generally, as the district court acknowledged, the health hazards of low-yield cigarettes had been publicized “in newspapers, popular magazines, textbooks, government pamphlets, television news programs and public service announcements from the late 1950s to the present.” SPA122.

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<sup>7</sup> This is consistent with testimony from absent class members in other cases. For example, one testified that he never believed “light cigarettes are safer than full-flavored cigarettes” and “laugh[ed]” at the idea “[b]ecause that’s insane to me.” A4344; A4363. He saw a news report on compensation in the mid-1990s that “basically confirmed” what he already believed. A4342. Another testified that he believed all cigarettes are “equally dangerous” and that his parents warned him about the limitations of the FTC Method: “Don’t believe everything the government tells you because their machine pulls constant smoke.” A4378; A4382; A4388; *see also* A4242-4811 (depositions of absent class members reflecting disparity of views about Lights).

- **Market evidence.** If smokers were relying on the “Lights” descriptor as a representation of lower tar and nicotine, there should have been a decline in sales or price after the alleged “truth” was revealed. *Semerenko v. Cendant Corp.*, 223 F.3d 165, 178-79 (3d Cir. 2000). But that never happened. To the contrary, since Monograph 13’s conclusions were widely publicized,<sup>8</sup> there has been no decline either in the sales or price of Lights. A1367-68; A1371.
- **Variability in marketing and length of class period.** That the tens of millions of class members have varying beliefs about and reasons for purchasing Lights is consistent with the 35-year length of the class period and 65 different brands at issue. As plaintiffs’ expert admitted, “people’s beliefs about lights can change over time.” A1705; *see also* A1362-63. Defendants have also marketed their Lights brands differently. A1633; *see also* A1581; A1609. And, even within brands, the advertising campaigns have *changed over time*. A1581.<sup>9</sup> *See Clay v. Am. Tobacco Co.*, 188 F.R.D. 483, 492 (S.D. Ill. 1999) (rejecting certification due to variation in advertising); *Cocca*, 2001 WL 34090200, at \*1 (same in Lights case).

There is, thus, no basis for applying a fraud-on-the-market presumption of the sort used in securities fraud cases under *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). And, as this Court has made clear, in a fraud case “[w]ithout the *Basic* presumption, individual questions of reliance would predominate over common questions.” *IPO*, 2006 WL 3499937, at \*17. Under *IPO*, a reliance presumption

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<sup>8</sup> Plaintiffs’ expert admitted that the information in Monograph 13 was disseminated “widely” and “has had an [e]ffect on the understanding of the people who use the product.” A1906; *see also* A1532-34; A2282.

<sup>9</sup> The district court made general statements about defendants’ marketing and their internal documents in support of its reliance rulings, SPA71-73, 226-28, but none of this material—or any evidence proffered by plaintiffs—purports to quantify the extent of consumer reliance.

can apply *only* where plaintiffs show “the existence of an efficient market.” *Id.* at \*16. This Court noted that “it is also doubtful whether the ... presumption can be extended[] beyond its original context,” *i.e.*, a claim that a stock issuer makes “misrepresentations [that] affect the price of securities traded in the open market.” *Id.* at \*16-17. Indeed, the Court ruled there that a presumption was not appropriate even in a securities fraud case because the alleged fraud concerned initial public offerings, not shares sold in an aftermarket, and “the market for IPO shares is not efficient.” *Id.* at \*16.

Here, plaintiffs did not even try to show that the Lights market is efficient. Moreover, as courts have consistently held, a fraud-on-the-market presumption does not apply outside the context of a securities fraud case because there is generally no basis for assuming that all purchasers have the same beliefs and act for the same reasons. For example, in *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 665 (9th Cir. 2004), the court rejected a class-wide presumption of reliance for RICO claims based on misrepresentations regarding video poker because “gambling is not a context in which we can assume that potential class members are always similarly situated.” *See also, e.g., Sikes*, 281 F.3d at 1361-64 (reversing certification where there was no basis for presumption of reliance); *Rodriguez v. McKinney*, 156 F.R.D. 112, 116 (E.D. Pa. 1994) (reliance should not be presumed where there are “various factors” involved in plaintiff’s decision).

This is not a securities fraud case and, as shown above, is *not* a situation where the record and logic indicate that all class members bought Lights for the same reason, thus justifying a presumption. As noted, the district court recognized that it would be “preposterous” and “absurd” to presume that every purchaser of Lights in this country for the past thirty years had the same beliefs and reasons for purchasing Lights.

**2. The District Court’s Alternative Approach Of Resolving Reliance With Statistical Proof Is Improper And, In Any Event, Not Supported By The Record**

The district court alternatively indicated that it would permit reliance to be resolved on an aggregate basis by allowing the jury to make a “finding on the percentage of the class that relied on the alleged fraud.” SPA307. As discussed below, the district court may not convert this individual issue into a common one by simply declaring it to be amenable to statistical or other aggregate proof. *See infra* at Part II. But the Court need not even reach this issue because, notwithstanding the district court’s unlawful aggregate approach, *plaintiffs did not provide any statistical means of proving the percentage of class members who could establish reliance.*

Plaintiffs initially promised that their expert Dr. Hauser had conducted a survey to determine the percentage of the class who relied. A3646; A3111. But Dr. Hauser himself acknowledged that he had not established “the percentage of

light smokers who relied on cigarette companies' allegedly false representations in deciding to purchase light cigarettes." A4151-52. And even plaintiffs were ultimately forced to concede that Dr. Hauser "does not opine specifically that a certain percentage of the class did or did not 'rely' on Defendants' fraud in making their purchase of 'light' cigarettes." A5307.

The district court noted that plaintiffs failed to show reliance could be adjudicated with statistical evidence, but nonetheless concluded that the jury should be permitted to arrive at its own estimate of the percentage of the class that purportedly relied. SPA246-47. In so holding, the court abdicated its responsibility to determine that the requirements for class certification had been satisfied (even under the district court's improper notion that individual issues can be resolved with statistics). *IPO*, 2006 WL 3499937, at \*15. The jury also may not be permitted to decide this case by simply picking a number out of thin air—when plaintiffs' own experts have conceded that they do not have an evidentiary basis to provide a statistical estimate of reliance. *See, e.g., United States v. Nelson*, 277 F.3d 164, 217 (2d Cir. 2002) (“[W]e do not permit juries to speculate in order to draw their conclusions.”); *Provost v. City of Newburgh*, 262 F.3d 146, 156 (2d Cir. 2001).

Finally, plaintiffs' failure goes beyond their inability to provide a means of adjudicating reliance with statistical proof. They made no effort to identify which

of those class members who allegedly relied on the alleged fraud can also satisfy the other elements of their claims, such as loss causation, and show that they are not barred by the statute of limitations. Without such evidence connecting the elements of class members' claims, plaintiffs would be seeking to impose liability based on a "fictional composite," not real people. Such a result is contrary to the Rules Enabling Act, RICO, Rule 23, and due process. *See Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 342 (4th Cir. 1998) (reversing class certification where "plaintiffs portrayed the class at trial as a large, unified group that suffered a uniform, collective injury" and defendant was "forced to defend against a fictional composite").

**B. Loss Causation Is An Individual Issue Defeating Class Certification**

"[I]n RICO-fraud cases the plaintiff must prove ... loss causation." *Moore*, 189 F.3d at 172; *see also Powers v. British Vita, P.L.C.*, 57 F.3d 176, 189 (2d Cir. 1995). Plaintiffs must demonstrate for each class member "that the defendant's fraud caused an economic loss"—*i.e.*, that their loss was caused by the failure to receive what was allegedly promised. *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 344 (2005). Here, whether a class member failed to receive what was allegedly promised—less tar and nicotine from each Lights cigarette—is another individual issue precluding certification.

## 1. Whether A Class Member Received Less Tar And Nicotine Is Inherently Individual

It is undisputed that Lights deliver less tar and nicotine if an individual smokes a Light in the same manner as a full-flavored cigarette. Therefore, whether plaintiffs received what was allegedly promised “depends on how they smoke the cigarette.” A1703.

Class members did not receive what was allegedly promised only if they smoked each Light in such a way that they obtained the same or greater amount of tar and nicotine than they would have from smoking a full-flavored cigarette—*i.e.*, that they compensated “completely.” The only way to determine this is to examine an individual’s own smoking behavior. Thus here, unlike in most consumer class actions, the purchasers’ behavior—not the product’s content—determines if plaintiffs received what was allegedly promised. *Pearson*, 2006 WL 663004, at \*2 (“A cup of milk contains a certain amount of fat regardless of whether it is sipped or gulped... . The tar and nicotine yield of a cigarette, however, depends not only upon what is contained in the unlit tobacco in the column, but upon the way the cigarette is smoked.”); *see also Hines*, 883 So. 2d at 294; *Cocca*, 2001 WL 34090200, at \*3; *Oliver*, 2000 WL 33598654, at \*6. It is therefore not surprising that plaintiffs’ own experts conceded that compensation “*would vary across smokers*” and that “among smokers in general, *not everybody compensates completely.*” A1762-63 (emphases added); *see also* A2367 (“there will be some

people who undercompensate”); A1808 (compensation “depends, some do and some don’t” and some “under-compensate”).<sup>10</sup>

In particular, plaintiffs’ expert Dr. Benowitz explained that, even among smokers who compensate, many compensate by increasing their cigarettes smoked per day. A1809. This is significant because smokers who compensate in that manner “[w]ould be getting less nicotine on a per-cigarette basis.” A1809. Under plaintiffs’ theory, smokers compensate to maintain a set amount of nicotine each day. *See, e.g.*, A195. Accordingly, to the extent class members compensate by smoking more cigarettes, they are receiving less tar and nicotine *from each cigarette*. Like a dieter who eats more low-fat cookies, people who smoked more cigarettes received what allegedly was represented—less tar and nicotine with each Light—and do not have a claim. *In re Tobacco Cases II*, 2004 WL 2445337, at \*20 (Cal. Super. Ct. 2004) (“no reasonable smoker (even if addicted and therefore vulnerable) can believe that the amount of tar and nicotine consumed by smoking does not depend on the actual number of cigarettes smoked”), *aff’d*, 47 Cal. Rptr. 3d 917 (Cal. Ct. App.), *review granted on other grounds*, 2006 WL 3628022 (Cal. Nov. 1, 2006). Indeed, Dr. Benowitz conceded that “on average,” smokers do *not*

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<sup>10</sup> These concessions are consistent with defendants’ expert’s testimony. A1255; A1261.

compensate completely on a per-cigarette basis and therefore receive less tar and nicotine with each cigarette. A1808.

Plaintiffs' theory of compensation is also predicated on addiction, which is yet another individual issue. *Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43, 53-54, 698 N.Y.S.2d 615, 619 (1999) (addiction is individual issue defeating certification); *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 145 (3d Cir. 1988); *Thompson v. Am. Tobacco Co.*, 189 F.R.D. 544, 554 (D. Minn. 1999); *Emig v. Am. Tobacco Co.*, 184 F.R.D. 379, 389 (D. Kan. 1998). Addiction is the *sine qua non* of plaintiffs' compensation theory: under plaintiffs' theory, smokers compensate to maintain a set amount of nicotine each day "[b]ecause they're addicted." A2367; *see also* A3419 ("[c]ompensation has to be understood in the context of addictive behavior"); A333 (smokers compensate "to sustain their addiction"). Those smokers who are not addicted do not compensate—let alone completely—because they are not seeking to maintain a set amount of nicotine. A1833. As plaintiffs' expert Dr. Benowitz confirmed, not all smokers are addicted to nicotine, and thus individual inquiries would be required to determine who is addicted. A1845; *see also* A1261-62.<sup>11</sup>

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<sup>11</sup> For example, studies find that approximately 24% of current smokers are "chippers"—*i.e.*, smokers who smoke only occasionally and are not addicted. A1261-62; A1909.

## **2. The District Court Erroneously Eliminated The Loss Causation Requirement**

The district court recognized that whether each class member received less tar and nicotine is an individual issue: “[i]t doesn’t make any sense to say there is 100 percent compensation.” A3191. To certify the class, however, the court simply eliminated the requirement. Without citation to authority, the court concluded summarily that the loss causation requirement should be limited to “commercial finance” cases and that it is “inapplicable” and “nonsensical” in the “consumer fraud context.” SPA69-70. This Court has never held, however, that the applicability of the loss causation requirement depends on the subject matter of the alleged fraud. *See generally Moore*, 306 F.3d at 1253 (“[T]o recover for a defendant’s fraudulent conduct ..., each plaintiff must prove that ... his or her reliance on this misrepresentation was the proximate cause of his or her loss.”). Nor would such a distinction make sense. Loss causation has a clear application in consumer fraud cases. Eliminating it alters substantive RICO law and would permit plaintiffs to recover even if they received what was allegedly promised.

### **C. The Statute Of Limitations Defense Is An Individual Issue Defeating Class Certification**

Plaintiffs’ claims are subject to a four-year statute of limitations that begins “on the date that plaintiff discovers or should have discovered th[e] injury.” *In re Merrill Lynch Ltd. P’ships Litig.*, 154 F.3d 56, 60 (2d Cir. 1998). Here, class

members who discovered or should have discovered their alleged injuries before May 11, 2000—four years before this action was filed—are time-barred.

**1. At Least A Significant, But Unknown, Number Of Class Members' Claims Are Time-Barred**

The district court recognized that, due to sustained, nationwide media reports from the 1970s through the year 2000 and the wide availability to the public of appellants' internal documents, some class members “undoubtedly” had actual knowledge of their alleged “injury” “before May 11, 2000 (four years before the complaint was filed).” SPA117. Indeed, the court ruled that “[u]ntenable is plaintiffs' extreme position that *no member of the class discovered the injury ... before May 11, 2000.*” SPA117 (emphasis in original).

The record plainly demonstrates that an unknown, but significant, number of class members were on notice of their claims before May 2000. Other plaintiffs filed lawsuits raising “lights-fraud” allegations long before May 2000. *No less than six Lights class actions*—raising virtually identical allegations—had been filed *before* the year 2000, including some filed by the same plaintiffs' counsel here.<sup>12</sup> As early as 1994, plaintiffs had filed RICO actions alleging “fraud” in

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<sup>12</sup> See A2406; A2433 (same plaintiffs' counsel); A2461; A2489 (same plaintiffs' counsel); A2507; A2529; *see also* SPA118-19 (“It is not denied that plaintiffs' counsel has had knowledge of the RICO injury alleged in this matter since at least July 1998...”).

connection with Lights due to the phenomenon of compensation. A2553. Judge Weinstein even presided over one such case (filed in 1998). A2632.

As the district court also recognized, “[a] number of reports appeared in newspapers, popular magazines, textbooks, government pamphlets, television news programs and public service announcements from the late 1950s to the present indicating that ‘light’ cigarettes were not as safe as portrayed by defendants.” SPA122. This is reflected in the survey data (discussed above), which demonstrate that many class members were on notice of their potential claims well before May 2000. *See supra* at 11, 25.<sup>13</sup> A significant number of class members, if not the entire class, are thus barred from bringing the claims asserted in this action.

## **2. The District Court Erred By Trying To Ignore The Individual Issues Presented By The Statute Of Limitations**

The district court acknowledged that the statute of limitations is a “troubling critical problem for plaintiffs” because:

some members of the class almost certainly were aware long before 2000 that “light” cigarettes were not

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<sup>13</sup> Even some of the named plaintiffs’ experiences indicate that they were on notice of their claims prior to May 2000. Mr. Rogers testified that in the 1990s he “intentionally” compensated by covering ventilation holes and that he believed at the time he would receive more tar and nicotine by doing so. A2262-63. And, well before 2000, Ms. Scocozza believed she took more and deeper puffs when smoking Lights, and she believed at the time she was receiving more tar and nicotine as a result. A2203-04. For similar examples from absent class members, *see* A4476; A4381-82; A4789.

appreciably safer for them than regular cigarettes. The statute would bar their claims.

SPA114.

In an attempt to resolve this problem and certify the class, the district court again relied upon its theory that individual issues could be subsumed by “aggregate,” statistical proof. The court suggested that “[b]ased on surveys, other evidence and extrapolation, plaintiffs’ experts might develop a model showing how many smokers of ‘light’ cigarettes were ignorant of the alleged fraud in each relevant year.” SPA114; *see also* A3279. In response, one of plaintiffs’ experts conducted and was prepared to rely upon a survey to estimate the percentage of the class that is not time-barred. After months of work and preparing drafts stating that the survey’s results were “reliable,” the survey was shared with plaintiffs’ counsel. Just one business day before his report was due, however, the expert reversed course, stating that he had “little confidence” in the study and would not rely on it. A3423 n.2. As a result, even under the court’s improper approach to class actions, plaintiffs were unable to offer any estimate of the percentage of time-barred claims. SPA116 (“The ‘time study’ ... has been withdrawn by plaintiffs.”).

Instead of denying plaintiffs’ certification motion due to their failure to make the showing called for by the district court, the court declared that “[t]he issue of timeliness goes to the merits of the case, and cannot be decided now to deny certification.” SPA233. This is wrong. A district court’s “obligation” to

make “determinations that each of the Rule 23 requirements has been met,” including predominance, is “not lessened by overlap between a Rule 23 requirement and a merits issue, even a merits issue that is identical with a Rule 23 requirement.” *IPO*, 2006 WL 3499937, at \*15. The court may not evade the requirements of Rule 23 by simply declaring that an issue should be submitted to the jury even though plaintiffs have not satisfied their burden to show that it can be adjudicated on a class-wide basis.

The law is also “settled” that defenses, such as statute of limitations, “should be considered in making class certification decisions.” *Waste Mgt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 295 (1st Cir. 2000). Where properly resolving a statute of limitations issue requires a plaintiff-by-plaintiff adjudication—as it does in this case—a claim is *not* susceptible of resolution on a class-wide basis. *See, e.g., Barnes*, 161 F.3d at 149 (statute of limitations “raises individual issues that prevent class certification”); *Broussard*, 155 F.3d at 342 (“[W]hen the defendant’s affirmative defenses (such as ... the statute of limitations) may depend on facts peculiar to each plaintiff’s case, class certification is erroneous.”) (internal

quotation marks omitted); *LaBauve v. Olin Corp.*, 231 F.R.D. 632, 675 (S.D. Ala. 2005) (collecting decisions).<sup>14</sup>

#### **D. Proof Of Injury Is Another Individual Issue Defeating Certification**

The district court also erred by disregarding the individual issues concerning whether each class member suffered a cognizable injury.

This Court has held that injury to “business or property”—as required by 18 U.S.C. § 1964(c)—means an actual out-of-pocket loss, not the failure to receive the benefit of a bargain. *Commercial Union Assurance Co. v. Milken*, 17 F.3d 608 (2d Cir. 1994), explained that under the “business or property” limitation, plaintiffs may only recover damages necessary to put them “in the same position they would have been in but for the illegal conduct.” *Id.* at 612. Because an out-of-pocket award restores plaintiffs to the position they would have been in if they had not purchased the product, those are the only recoverable damages. *See also First*

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<sup>14</sup> Neither of the decisions relied upon by the district court supports its conclusion that it could ignore the limitations defense. SPA233. To the contrary, *In re Monumental Life Ins. Co.*, 365 F.3d 408 (5th Cir. 2004), explained that “[t]he predominance of individual issues necessary to decide an affirmative defense may preclude class certification.” *Id.* at 420. The court merely held that the statute of limitations did not defeat certification there because, in asserting the defense, the defendants were relying primarily on constructive notice, which is objective. *Id.* at 420-21. Similarly, *Chiang v. Veneman*, 385 F.3d 256, 269 (3d Cir. 2004), declined to consider at the certification stage whether the claims were actually barred by the statute of limitations; it did not rule that courts should ignore individual issues presented by the defense in determining predominance. *Id.*

*Nationwide Bank*, 27 F.3d at 768 (“The general rule of fraud damages is that the defrauded plaintiff may recover out-of-pocket losses caused by the fraud.”).

Consistent with *Commercial Union*, courts have repeatedly held that plaintiffs are not entitled to recover benefit-of-the-bargain or expectation damages under RICO, but instead are limited to their out-of-pocket losses. *Henkind v. Brauser*, 1989 WL 54109, at \*6 (S.D.N.Y. 1989) (“lost benefit of the bargain, while arguably an ongoing injury, does not qualify as ‘an injury resulting from a RICO violation’”); *Academic Indus., Inc. v. Untermeyer Mace Partners, Ltd.*, 1992 WL 73473, at \*2 n.1 (S.D.N.Y. 1992); *Scivally v. Graney*, 21 F.3d 420 (table), 1994 WL 140413, at \*3 (1st Cir. 1994); *Line v. Astro Mfg. Co.*, 993 F. Supp. 1033, 1037 (E.D. Ky. 1998); *Heinold v. Perlstein*, 651 F. Supp. 1410, 1411 (E.D. Pa. 1987).

Plaintiffs have no means of establishing out-of-pocket losses on a class-wide basis. This is not a case where class members were charged a premium based on the alleged representation. *It is undisputed that Lights have always been priced the same as their full-flavored counterparts.* A1365; A1366; A5073. Plaintiffs allege that they purchased a cigarette (Lights) that in reality was no different from a full-flavored cigarette. Yet plaintiffs paid the same price for Lights as they would have paid for full-flavored cigarettes. They therefore suffered no out-of-pocket loss. *See Price*, 848 N.E.2d at 55-60 (Karmeier, J., concurring).

To be sure, it may possible for certain class members to prove *individually* that they suffered an out-of-pocket loss. For example, individuals who would have quit smoking “but for” the claimed fraud may assert a claim for the out-of-pocket cost of purchasing cigarettes. But plaintiffs do not, and cannot, make such an allegation on a class-wide basis. Whether and why a smoker might have quit is a quintessentially individual issue. Moreover, plaintiffs’ own experts concede that there is *no* market-wide evidence that Lights caused fewer smokers to quit or caused more people to start smoking. A3786.

Faced with the undeniable fact that class members never paid a premium for the “Light” feature, plaintiffs offered two models that they claimed allow injury to be established on a class-wide basis. In certifying the class, the district court expressed concern that “the amount of possible damages has been grossly exaggerated by plaintiffs,” SPA26, but ultimately ruled that these models offered at least “colorable” means of establishing injury and were sufficient for certification purposes. SPA231. This “colorable” standard for satisfying Rule 23 has already been rejected by this Court (*see IPO*, 2006 WL 3499937, at \*13-15), in favor of a preponderance of the evidence standard (that the court below rejected). SPA171-72. On this basis alone, certification must be reversed. Beyond that, the models on their face also do not satisfy the legal requirements of RICO.

## **1. Plaintiffs’ “Loss Of Value” Model Does Not Measure RICO Injury**

Plaintiffs’ “loss of value” model purports to measure the increase in price a consumer would subjectively be willing to pay for a safer cigarette. A3517. As the district court recognized, “this is a ‘benefit of the bargain’ measure of damages,” which is based on the theory that class members were injured because they did not receive the health attribute they allegedly were promised. SPA92; *see also* A3914; A3528-29. Accordingly, the “loss of value” model does not measure out-of-pocket losses. Nevertheless, once again rewriting the RICO statute, the district court held that plaintiffs should be able to recover benefit-of-the-bargain damages. SPA92-94. The court cited no RICO precedent allowing such recoveries and disregarded the numerous cases limiting plaintiffs’ recoveries to out-of-pocket losses.<sup>15</sup>

## **2. Plaintiffs’ Price Impact Model Does Not Measure RICO Injury**

Plaintiffs’ “price impact” model is based on the theory that the sale of Lights started a chain reaction that (1) caused the demand for all cigarettes to be higher than it otherwise would have been, which in turn (2) caused the price of all

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<sup>15</sup> The district court erroneously reasoned that *Commercial Union* was consistent with a benefit-of-the-bargain recovery, SPA105, but ignored the *holding* there, which was that plaintiffs could not recover under RICO because they had no out-of-pocket losses.

cigarettes to be higher, which in turn (3) caused Lights smokers to spend more money on Lights. A3532; A5198. The model purports to calculate the additional money that smokers spent on Lights as a result of this alleged increased demand. A5198.

On its face, plaintiffs' "price impact" model is foreclosed by *Anza v. Ideal Steel Supply Corp*, 126 S. Ct. 1991 (2006).<sup>16</sup> Plaintiff there alleged that its competitors engaged in a fraudulent scheme to deprive New York of tax revenue. *Id.* at 1995. Plaintiff claimed it was harmed because defendants "us[ed] the proceeds from the fraud to offer lower prices designed to attract more customers." *Id.* at 1997. Based on *Holmes v. Securities Investor Protection Corp.*, 503 U.S.

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<sup>16</sup> Another problem with the model is that plaintiffs' damages expert, Dr. Beyer, does not estimate the percentage of class members who relied. A5159. And even if the jury could properly estimate the percentage of class members who relied (and it cannot), neither the jury nor the district court would be able to apply this reliance "finding" to Dr. Beyer's model. Dr. Beyer explained that whether prices would have increased as a result of reliance on the alleged fraud depends on whether "a significant portion of the population believed that light cigarettes were a healthier alternative to regular cigarettes, thereby causing an increase in the demand for cigarettes." A5820. Thus, to connect the alleged fraud to the alleged price inflation, the jury would have to determine whether *enough* people relied on the alleged fraud to increase prices and then would have to determine the size of any increase attributable to such reliance. Dr. Beyer conceded that he could not make this calculation without further analysis that he has not done. A5160-61. If Dr. Beyer cannot make this calculation, the jury clearly could not be expected to do it.

258 (1992), *Anza* held that this causal chain was too attenuated to satisfy proximate causation. 126 S. Ct. at 1997-98.

The Supreme Court explained that RICO's proximate causation element includes a "directness requirement" in light of "the difficulty that can arise when a court attempts to ascertain the damages caused by some remote action." *Id.* at 1997. The Court noted the "speculative nature of the proceedings that would follow if [plaintiff] were permitted to maintain its claim," which would require a court "to begin by calculating the portion of [defendants'] price drop attributable to the alleged pattern of racketeering activity," and then "to calculate the portion of [plaintiff's] lost sales attributable to the relevant part of the price drop." *Id.* at 1998. The need for such proof illustrated the remote nature of the claim because "[t]he element of proximate causation recognized in *Holmes* [was] meant to prevent these types of intricate, uncertain inquiries from overrunning RICO litigation." *Id.*

These principles apply here. Plaintiffs allege no direct impact flowing from the alleged misconduct. Instead, their theory is that the alleged misconduct mixed with market forces, which resulted in a change of price, which in turn caused harm to the plaintiffs. This "price impact" theory would require a jury to engage in pure speculation as to whether, and to what extent, pricing decisions made separately by each defendant over the past 35 years were the result of the introduction of Lights

or whether, and to what extent, such decisions were motivated by countless other factors that affect price like production and transportation costs, the state of the economy, and inflation. A5221; A1419. These are precisely the “types of intricate, uncertain inquiries” that *Anza* precludes.<sup>17</sup>

## **II. THE DISTRICT COURT ERRED IN ADOPTING AN AGGREGATE, STATISTICAL APPROACH BASED ON FLUID RECOVERY**

To certify the class, the district court adopted a radical theory of statistical aggregation and fluid recovery, according to which the jury would be permitted to resolve individual issues with statistical proof. Not only did plaintiffs fail to show that this case can be tried in accordance with the court’s approach (*see supra* at 12-15, 28-30, 36-38), but the court’s attempt at “trial by statistics” is riddled with error.

### **A. The District Court’s Approach Violates Rule 23, The Rules Enabling Act, and RICO**

Rule 23(b)(3) is absolutely clear that plaintiffs are entitled to certification only to the extent they can establish (among other things) that “common” questions predominate over “individual” ones. The whole premise of Rule 23(b)(3) is that there is a meaningful distinction between “common” and “individual” issues, and

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<sup>17</sup> The district court concluded that *Anza* was distinguishable because the target of the alleged fraud here is also the alleged injured party. SPA77. But *Anza*’s rationale did not depend on whether the target of the fraud and the injured party are the same. Rather, the Court focused on the remote causal connection between the injury and the alleged fraud. 126 S. Ct. at 1997.

that individual issues must be adjudicated on an individual basis. But, if individual issues could be rendered common through statistical homogenization or other aggregate proof—as the district court would have it—this distinction would collapse and the predominance requirement would become a nullity. *Any* case could be certified for class treatment, no matter how many individual issues are in it, so long as a court is willing to accept the use of statistics to “resolve” the individual issues. A class action trial conducted under the district court’s regime would be either a “battle of statistics,” or worse, as in this case, an invitation to the jury to guess at what percentage of the class has valid claims. This would “comprise something other than a trial within [a court’s] authority. It is called a trial, but it is not.” *In re Fibreboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990) (reversing certification order where district court proposed class trial with “statistical estimates” on individual issues such as causation). There is absolutely no support in Rule 23 for the court’s radical approach to a class action. *Cf. Castano*, 84 F.3d at 745 n.21 (rejecting aggregate approach that would lead to “automatic certification in every case where there is a common issue, a result that could not have been intended”).

Moreover, under the Rules Enabling Act, procedural rules such as Rule 23 shall not be used to “abridge, enlarge, or modify any substantive right.” 28 U.S.C. § 2072(b); *see also Ortiz*, 527 U.S. at 845. In particular, the Act prohibits the use

of aggregate evidence to “circumvent individualized proof requirements and alter the substantive rights at issue.” *Molski v. Gleich*, 318 F.3d 937, 954 (9th Cir. 2003); *see also, e.g., In re Hotel Tel. Charges*, 500 F.2d 86, 89-90 (9th Cir. 1974) (rejecting aggregate procedure “allowing gross damages by treating unsubstantiated claims of class members collectively” because such an approach “significantly alters substantive rights” in contravention of the Rules Enabling Act).

That is what happened here. By permitting individual issues to be resolved in the aggregate on a percentage basis, the district court effectively altered these elements and defenses, giving claims to untold millions of class members whose individual claims would be barred.<sup>18</sup> In fact, the court candidly recognized that plaintiffs’ request for certification seeks “in effect a change of substantive law applicable because it’s a class action.” A3229. The Rules Enabling Act precludes a court from granting a certification motion in these circumstances. *See generally In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002) (“Tempting

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<sup>18</sup> *Sikes*, 281 F.3d at 1361, 1366 (reliance and injury are “individual” issues that require “individualized inquiries”); *Poulos*, 379 F.3d at 664 (causation presents “individualized reliance issues”); *Sandwich Chef*, 319 F.3d at 224 (“plaintiffs must demonstrate causation on an individual basis”); *Corley v. Entergy Corp.*, 220 F.R.D. 478, 487 (E.D. Tex. 2004) (“proximate cause standard requires each plaintiff to *individually* prove a causal link between his or her injuries and the defendant’s conduct”) (emphasis in original), *aff’d*, 152 F. App’x 350 (5th Cir. 2005).

as it is to alter doctrine in order to facilitate class treatment, judges must resist so that all parties' legal rights are respected.”).

Finally, the district court's resort to aggregation highlights a fundamental RICO standing problem:

A RICO plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the RICO violation, and only when his or her actual loss becomes clear and definite.

*Denney v. Deutsche Bank AG*, 443 F.3d 253, 266 (2d Cir. 2006) (internal quotation marks, citations and alterations omitted). Given the court's recognition that numerous members of the class were not defrauded by the “Lights” descriptor or otherwise have no claim, *see supra* at 23, 34-37, the class cannot be certified because it indisputably includes members who suffered no “injury-in-fact” and therefore lack RICO standing.

#### **B. The Use Of Fluid Recovery Is Unlawful**

The district court's use of a fluid recovery procedure is also unlawful. The court acknowledged that fluid recovery was an indispensable component of its aggregate scheme: “If I decide against [plaintiffs] on fluid recovery, essentially, I think [plaintiffs are] out of the court.” A3288.

Over the last 35 years, this Court has expressly and repeatedly *prohibited* the use of fluid recovery in contested class actions. Starting in *Eisen*, the Court

declared that fluid recovery is a “fantastic,” “wholly improper,” “illegal,” and “unconstitutional” procedure:

All the difficulties of management are supposed to disappear once the “fluid recovery” procedure is adopted. The claims of the individual members of the class become of little consequence... .

But if the “class as a whole” is or can be substituted for the individual members of the class as claimants, then the number of claims filed is of no consequence and the amount found to be due will be enormous... .

Even if amended Rule 23 could be read so as to permit any such fantastic procedure, the courts would have to reject it as an unconstitutional violation of the requirement of due process of law. But as it now reads amended Rule 23 contemplates and provides for no such procedure... . ***We hold the “fluid recovery” concept and practice to be illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper.***

479 F.2d 1005, 1017-18 (2d Cir. 1973) (emphasis added). In so ruling, the Court considered—and implicitly rejected—an article by Judge Weinstein advocating the precise use of fluid recovery adopted here. *Id.* at 1008 (citing Weinstein, “The Class Action Is Not Abusive,” 5/1-2/72 N.Y. LAW JOURNAL).

Subsequently, in *Van Gemert v. Boeing Co.*, 553 F.2d 812 (2d Cir. 1977), this Court saw “no reason to change our position, firmly stated in *Eisen*[], disallowing a ‘fluid class’ recovery.” *Id.* at 815 (citation omitted). *In re “Agent Orange” Product Liability Litigation*, 818 F.2d 179 (2d Cir. 1987), reaffirmed that position, explaining that “such an unwarranted relaxation” of Rule 23 would

“induce[] plaintiffs to pursue ‘doubtful’ class claims for ‘astronomical amounts’ and thereby ‘generate ... leverage and pressure on defendants to settle.’” *Id.* at 185 (citation omitted); *see also Abrams v. Interco Inc.*, 719 F.2d 23, 31 (2d Cir. 1983) (Friendly, J.) (“‘fluid’ class recovery” has “not found favor in this circuit”).

Notwithstanding this overwhelming contrary authority, the district court embraced fluid recovery as a means of adjudicating claims and allocating damages on an aggregate basis. SPA521-29. The court rejected *Eisen* as “not in the highest intellectual tradition of the Second Circuit Court of Appeals” and stated that, notwithstanding *Eisen*’s broadly stated holding rejecting fluid recovery, the case should be “confined to its particular facts.” SPA512-13, 523.

The district court defended its rejection of *Eisen* by asserting that post-*Eisen* Second Circuit law on fluid recovery “has been mixed.” SPA516. This is wrong. The cases cited by the court as purportedly supporting the use of fluid recovery all involved *settlements, i.e.*, where a defendant consents to a class-wide award. SPA516-20. *No Second Circuit case has upheld a fluid recovery outside the settlement context.* In fact, *Eisen* drew a sharp distinction between settled and contested cases: “There is no settlement. Every issue is contested and litigated.” 479 F.2d at 1012. Later, in *Agent Orange*, which involved a proposed class settlement, the Court again distinguished a settlement from a contested litigation:

[T]he instant case, unlike *Eisen* and *Van Gemert*, arises out of a pretrial settlement. As the Supreme Court has

recognized, a district court may “provide[] broader relief [in an action that is resolved before trial] than the court could have awarded after a trial.” Indeed, we have previously recognized that some “fluidity” is permissible in the distribution of settlement proceeds.

818 F.2d at 185 (citations omitted).

In short, under this Court’s long-standing precedents, the district court erred by invoking fluid recovery as a way to overcome the individual issues that preclude class certification in this case.<sup>19</sup>

### **C. The District Court’s Aggregate Approach Violates Defendants’ Constitutional Rights**

The district court’s aggregate approach also violates defendants’ constitutional rights.

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<sup>19</sup> Apart from *Eisen* and its progeny, the fluid recovery proposed here is unlawful for several other reasons. *First*, it is an equitable remedy and therefore unavailable to private RICO plaintiffs. *See, e.g., Sedima, S.P.L.R. v. Imrex Co.*, 741 F.2d 482, 489 n.20 (2d Cir. 1984), *rev’d on other grounds*, 473 U.S. 479 (1985); *Trane v. O’Connor Secs.*, 718 F.2d 26, 28 (2d Cir. 1983). *Second*, fluid recovery serves the function of punitive damages, which are not available under RICO. *Galerie Furstenberg v. Coffaro*, 697 F. Supp. 1282, 1289 (S.D.N.Y. 1988); *Bingham v. Zolt*, 823 F. Supp. 1126, 1135 (S.D.N.Y. 1993), *aff’d*, 66 F.3d 553 (2d Cir. 1995). *Third*, its application here violates due process. There must be a reasonable relationship between punitive and compensatory damages. *See State Farm Mut. Aut. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). Under the district court’s fluid recovery procedure, however, a court could not determine what portion of a damages award was compensatory and what part was punitive. *See also In re Simon II Litig.*, 407 F.3d 125, 138 (2d Cir. 2005) (identifying same concern in reversing a class certification order by Judge Weinstein against tobacco companies).

As this Court has cautioned in rejecting a previous attempt at aggregation by the same district court: “[c]onsiderations of convenience and economy must yield to a paramount concern for a fair and impartial trial.” *In re Repetitive Stress*, 11 F.3d at 373 (internal quotation marks omitted). In *Eisen*, for example, this Court held that an aggregate procedure by which a recovery would be divorced from individual proof is “an unconstitutional violation of the requirement of due process of law.” 479 F.2d at 1018; *see also Fibreboard*, 893 F.2d at 710-11 (“We are also uncomfortable with the suggestion that a move from one-on-one ‘traditional’ modes is little more than a move to modernity... . *Ultimately, these concerns find expression in defendants’ right to due process.*”) (emphasis added). Moreover, even if plaintiffs were permitted to rely on aggregate proof in making out their *prima facie* case, defendants cannot be denied their due process right “to raise individual defenses against each class member.” *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 192 (3d Cir. 2001). “[T]o deny [defendants] the right to present a full defense on the issues would violate due process.” *W. Elec. Co. v. Stern*, 544 F.2d 1196, 1199 (3d Cir. 1976).

The district court’s proposed use of aggregate procedures to resolve individual issues also violates defendants’ Seventh Amendment right to a jury trial. “[T]he applicability of the Seventh Amendment is not altered simply because the case is a Rule 23(b)(3) class action.” *Cimino v. Raymark Indus., Inc.*, 151 F.3d

279, 312 (5th Cir. 1998). Rather, under the Seventh Amendment, defendants have a right to a jury determination of individual issues such as causation and damages for “each individual plaintiff.” *Id.* at 314.

The district court’s proposed use of a claims form process only compounds the constitutional errors, because no jury would determine whether defendants are actually liable to any individual. *See, e.g., Neal v. Dir., D.C. Dep’t of Corr.*, 1995 WL 517246, at \*4 (D.D.C. 1995) (rejecting use of special master to resolve individual issues because “defendants have not agreed to waive their Seventh Amendment right to a jury trial”); *In re Peterson*, 253 U.S. 300, 309-10 (1920) (appointment of an auditor is permitted in a jury-triable case only if auditor’s report is presented to the jury and jury has power to decide issues of fact). Moreover, because this process would require two different fact finders to examine the same issues—*i.e.*, first, a jury makes an aggregate determination of liability, and, second, an administrator determines which class members have valid claims—it would violate the Seventh Amendment’s prohibition that “no fact tried by a jury, shall be otherwise re-examined in any Court of the United States.” U.S. CONST. amend. VII; *see also Blyden v. Mancusi*, 186 F.3d 252 (2d Cir. 1999) (same facts may not be tried to successive finders of fact).

Finally, we note that, in *Blue Cross & Blue Shield of New Jersey, Inc. v. Philip Morris USA, Inc.*, 344 F.3d 211, 227 (2d Cir. 2003), this Court permitted an

aggregate approach *only* because the claims involved a *single* plaintiff (a health insurance company) using “aggregated proof” as “evidence of [its] own harms.”

*Id.* The Court specifically contrasted the facts there with the “consolidation of other individual claims” provided in “class action claims,” where each claimant’s individual issues must be resolved with individual proof. *Id.*

### **III. PLAINTIFFS HAVE NOT SATISFIED OTHER REQUIREMENTS FOR CERTIFICATION**

#### **A. A Class Action Is Not A Superior Method Of Adjudicating Plaintiffs’ Claims**

Rule 23(b)(3) requires that plaintiffs demonstrate that certification is “superior to other available methods for the fair and efficient adjudication of the controversy.” “The rule requires consideration of various factors, including ... the difficulties likely to be encountered in the management of a class action.” *Parker v. Time Warner Entm’t Co., L.P.*, 331 F.3d 13, 21 (2d Cir. 2003) (internal quotation marks omitted).

In light of the individual issues discussed above, a class action is not the “superior” method of adjudicating plaintiffs’ claims. It is not even feasible. Identifying which class members relied on the “lights” descriptor, whether they compensated completely, whether they suffered any injury, and whether they are time-barred raises insuperable manageability concerns. Any proper trial of plaintiffs’ claims as a class action in these circumstances would be a huge,

unmanageable task for a proposed class that includes tens of millions of people who chose different brands for different reasons at different times. *See Abrams*, 719 F.2d at 31; *In re Hotel Tel. Charges*, 500 F.2d at 89; *Windham v. Am. Brands, Inc.*, 565 F.2d 59, 68 (4th Cir. 1977); *Andrews*, 95 F.3d at 1025.

Even the threshold question of determining who is in the class is unmanageable. The district court adopted a class definition turning on whether an individual has ever purchased even a single pack of Lights. SPA539. Just to determine class membership would thus require an examination of each individual's claims to have purchased Lights and his or her purchasing history, and inevitably would entail a series of mini-trials. As this Court noted in an analogous context: “[W]e point out the need for numerous individualized determinations of class membership in order to provide further support for our basic conclusion that individual questions will permeate this litigation... . [T]he problems we have identified on this topic further indicate the obstacles to proceeding with the [] case[] as [a] class action.” *IPO*, 2006 WL 3499937, at \*18; *see also Ludke v. Philip Morris Cos.*, 2001 WL 1673791, at \*3 (Minn. Dist. Ct. 2001) (refusing to certify class of “all cigarette purchasers in Minnesota” based on difficulties in identifying class).

The district court was determined to certify this case as a class action, however, because in its view a class action “is likely to be the *only* method of

adjudication open to plaintiffs.” SPA218 (emphasis in original). In this case, however, potential “damages” for some lifetime smokers under plaintiffs’ models would range in the hundreds of thousands of dollars with trebling. And, even if the damages for all Lights smokers were considered relatively small, plaintiffs would still have to satisfy their burden to establish that *all* of Rule 23’s requirements—including predominance and manageability—are satisfied. *In re Hotel Tel. Charges*, 500 F.2d at 90 (“[T]he desirability of allowing small claimants a forum to recover for largescale antitrust violations does not eclipse the problem of unmanageability.”).

Moreover, the district court ignored the substantial incentives for individual plaintiffs to pursue their own claims. An individual plaintiff who brought a successful RICO action would not be limited merely to his or her out-of-pocket damages, but could also recover treble damages, attorneys’ fees, and costs. *See* 18 U.S.C. § 1964(c). “[T]he ability to recover attorney[s]’ fees and costs provides substantial incentives to bring meritorious individual suits.” *Hamilton v. O’Connor Chevrolet, Inc.*, 2006 WL 1697171 (N.D. Ill. 2006). Courts have thus repeatedly rejected similar “negative value” arguments and denied certification where the statutes at issue provide for attorneys’ fees and costs. *See, e.g., Andrews*, 95 F.3d at 1025; *Castano*, 84 F.3d at 748; *Sanneman v. Chrysler Corp.*, 191 F.R.D. 441, 456 (E.D. Pa. 2000).

Finally, a class trial is not the “*only* method” to take action against the alleged fraud. As discussed above, the FTC has a long history of regulating the precise issues raised by this lawsuit: how tar and nicotine yields should be measured and what manufacturers should be permitted to say about those measurements. *See supra* at 5-9. The FTC also has jurisdiction to prevent deceptive cigarette advertising. 15 U.S.C. § 45(a)(1), (b), (m); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 548 (2001) (“to the extent that Congress contemplated additional targeted regulation of cigarette advertising, it vested that authority in the FTC”). And the FTC may seek redress on behalf of consumers, including “the refund of money” or “the payment of damages.” 15 U.S.C. § 57b(a)(2), (b). That the FTC can seek remedies itself *and on behalf of consumers* further underscores that this unmanageable case is not a “superior” method of adjudicating any purported “fraud” in connection with defendants’ marketing of Lights. *See In re Bridgestone/Firestone, Inc.*, 288 F.3d at 1019 (“[R]egulation by the [National Highway Transportation Safety Administration] coupled with tort litigation by persons suffering physical injury, is far superior to a suit by millions of *uninjured* buyers ... .”) (emphasis in original); *Kamm v. Cal. City Dev. Co.*, 509 F.2d 205, 210-11 (9th Cir. 1975) (class certification denied where attorney general action addressed same controversy).

## **B. The Class Representatives Fail The Typicality Requirement**

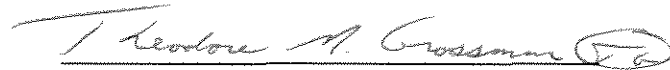
Finally, plaintiffs fail the typicality requirement. *Marisol A. v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997) (typicality “is satisfied when each class member’s claim arises from the same course of events, and each class member makes similar legal arguments”) (internal quotation marks omitted). On its face, there could not be any “typical” plaintiff to assert these claims on behalf of smokers of 65 different brands. *See Cocca*, 2001 WL 34090200, at \*2-3 (determining that plaintiffs failed to satisfy typicality and noting differences in cigarette brands at issue). Individual Lights smokers widely differ as to their beliefs about and reasons for purchasing Lights, how they smoked Lights, and whether and when they first became aware (for statute of limitations purposes) that Lights may be as dangerous as full-flavored cigarettes depending upon how they are smoked. No single person can typify the claims of every person who has ever purchased a Lights cigarette. Indeed, not only is there no supermajority of “typical” Lights smokers who believed Lights are safer than full-flavored cigarettes, but, as studies by one of plaintiffs’ own experts showed, the *majority* of smokers do not believe Lights are safer and do not purchase Lights for health reasons. A1640-41.

## CONCLUSION

The Court should reverse the certification order.<sup>20</sup>

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<sup>20</sup> On remand, this Court may wish to consider reassignment to a different district court judge. *See, e.g., Armstrong v. Guccione*, \_\_\_ F.3d \_\_\_, 2006 WL 3404803, at \*21 (2d Cir. 2006).

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## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation in Federal Rule of Appellate Procedure 32(a)(7)(B)(1). It contains 13,935 words as counted by the word-processing system used to prepare the brief, exclusive of the parts of the brief exempted from the type-volume limitation by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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## ANTI-VIRUS CERTIFICATION

Case Name: American Tobacco v. Karen McLaughlin

Docket Number: 06-4666-cv

I, Natasha R. Monell, hereby certify that the Appellants' Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using Norton Antivirus Professional Edition 2003 (with updated virus definition file as of 2/14/07) and found to be VIRUS FREE.

/s/ Natasha R. Monell

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