

CIRCUIT COURT FOR BALTIMORE CITY

STATE OF MARYLAND,
Plaintiff,

v.

PHILIP MORRIS INCORPORATED, et al
Defendants

Case No.: 96122017/211487
December 23, 1996

**SURREPLY MEMORANDUM IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS**

Defendants' Reply Memorandum proposes a series of invalid propositions. At the outset, Defendants assert, correctly, that the State "is required by law to pay for the medical expenditures of its indigent citizens," and then characterize this case as an attempt by the State "to shift that statutory obligation to private parties" -- as if there is anything wrong with that attempt given the Defendants' legal responsibility for the harm. The State is required by federal law to "ascertain the legal liability of third parties . . . to pay for care and services available under the plan" and to "seek reimbursement for such assistance to the extent of such legal liability." 42U.S.C. § 1396a(a)(25)(1994). Nothing in the federal statute limits this obligation to the recoupment of payments for which third parties have a liability to the *Medicaid recipients*. Any "legal liability" to make such payments, including liability to the State itself, is plainly included.

**I. SUBROGATION IS NOT THE STATE'S
EXCLUSIVE REMEDY**

Defendants mistakenly contend that the existence of a statutory subrogation right precludes the State's use of common law or other statutory causes of action in pursuit of third-party wrongdoers' liability.

A. Defendants erroneously cite a series of cases that have nothing to do with the availability of common law causes of action to supplement statutory causes of action.

Defendants rely primarily on cases holding that the enactment of an express statutory remedy for the violation of a statute ordinarily means that no additional implied statutory cause of action for that violation is authorized by the same statute. This is the

lesson of *National R.R. 1 Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974) and its progeny. As Defendants themselves quote from *National R.R. Passenger*, that case, which deals with who may sue for violation of the Amtrak Act, merely states that the courts should not "expand the coverage of the statute to subsume other remedies," that is, should not infer the existence of other statutory remedies under that statute.¹ It certainly does not hold that the statute implicitly repeals common law rights and remedies. In any event, the Maryland Declaration of Rights prohibits any such implied repeal of common law rights.

As Judge Eldridge has pointed out², furthermore, the materials cited by Defendants are simply variations of the *expressio unius* maxim, which is merely a guide towards legislative intent concerning the coverage of a document. Limitations and exceptions to the maxim are as familiar as are examples of its application.³

¹ The additional cases cited by Defendants are also inapplicable, either for the reasons that *National R.R. Passenger* is inapplicable, or because the doctrines under which they were decided are even more remote from the issues in this case. In *Office and Professional Employees Int'l Union v. Mass Transit Admin.*, 295 Md. 88,453 A.2d 1191 (1982), the court(per Eldridge, J.) simply held that the statute authorized collective bargaining agreements only with the groups it specified and not with others whom it did not mention. That case says nothing about the availability of common law actions which do not derive from the statute, and which, therefore are not affected by limitations on the statutory grant of authority. See also *White v. Prince George's County*, 282 Md. 641, 387 A.2d 260 (1978)("[T]he question of whether the Legislature intended a particular statutory remedy to be exclusive only arises where the claimant is pursuing a possible alternate remedy. Where the type of action which the plaintiff is attempting to bring as an alternative to the special statutory remedy simply does not lie, logically no question of exclusiveness arises."). In *Baker, Watts & Co. v. Miles & Stockbridge*, 690 F.Supp. 431, 433-34 (D. Md 1988) *rev'd in part on other grounds*, 876 F.2d 1101 (4th Cir. 1989), the portion to which the quoted material from *National R.R. Passenger* applies dealt only with the question whether a statute authorizes an unstated implied statutory remedy for its violation in addition to any express remedy in the same statute.

² *Office & Professional Employees Int'l Union v. Mass Transit Admin.*, 295 Md. at 96.

³ In *Phipps v. General Motors Corp.*, 278 Md. 337, 363 A.2d 955 (1976) (per Eldridge, J.) the Maryland Court of

B. Defendants' assertion that the State of Maryland has no common law right to, I recover its medical expenditures from third parties is unsupported and false.

Defendants' argument that subrogation is the State's exclusive remedy is not a statement of fact, but is merely an assertion of Defendants' legal claim, in the face of an overwhelming body of common law principles, well-established to the contrary, that are evidenced. e.g., in the Restatements of Torts and of Restitution. The only authorities suggested by Defendants are based on fragmentary dicta in a Florida cases which dealt with the effective date of the statutory *abrogation* of certain common law rules⁴

Appeals recognized a common law strict liability action for harm caused by defective products, notwithstanding the existence of a statutory cause of action for such harm in the Uniform Commercial Code, which statutory cause of action had more restrictive requirements than the new common law action. "In the absence of any *expression* of intent by the Legislature to limit the remedies available to those injured by defective goods exclusively to those provided by the Maryland Uniform Commercial Code, we believe that General Motors' preemptive contention is without merit." *Id.*, 278 Md. at 350, 363 A.2d at 962(emphasis added). Similarly, *Miles Lab., Inc., Cutter Lab., Div. v. Doe*, 315 Md. 704, 556 A.2d1107 (1989), is a case cited but apparently not understood by Defendants. It held that a statutory defense to strict tort liability available to suppliers of blood products (i.e. immunity against strict liability for *serum hepatitis*) did not apply to contamination not specified in the statute (i.e., AIDS). The court nevertheless held that the common law defense under the Restatement of Torts that certain blood products are "unavoidably unsafe" products would be applicable to *both* hepatitis and AIDS contamination. This newly announced common law defense was recognized despite the fact that its existence was deemed to have *preceded* the enactment of the statutory defense for *serum hepatitis*, and therefore impliedly to have made the statute unnecessary. The common law defense was also recognized as negating *statutory* claims for breach of implied warranty under the Uniform Commercial Code. *Id.*, 315 Md. at 737.

⁴ *Agency for Health Care Admin. v. Associated Indus.*, 678 So. 2d 1239. 1248-1250 (1996) (making it clear that the court uses the phrase "independent cause of action" to refer to an action where "all . . . affirmative defenses normally available to a liable third party, are

(whereas the State in the present case seeks to *apply* the common law), and a Supreme Court discussion of a question *of federal*, not state, law that is explicitly *not based on tort law*, but instead on fiscal policy to be determined by Congress.⁵ The availability or not of an action under Florida common law does not determine its availability under Maryland law, and there are no unresolved federal fiscal policy considerations that require statutory resolution under the rule of *United States v. Standard Oil Co.*

II. DEFENDANTS ERRONEOUSLY CHARACTERIZE PLAINTIFF'S RESTITUTION CLAIM AS "EQUITABLE" AS A BASIS FOR CONTENDING THAT JURISDICTION FOR THESE CLAIMS IS DEFEATED BY THE EXISTENCE OF AN "ADEQUATE REMEDY AT LAW.

"The ordinary test for whether a claim is equitable is whether a "coercive remedy is invoked," *see* D. Dobbs, Law of Remedies §2.6 (3) at 155-156 (1993), or, sometimes, whether historically a claim was one particularly identified with equity, such as mortgage foreclosure. *Id.*"[If the remedy sought is merely an ordinary damages award, the remedial test suggests that the claim is a 'common law' claim triable to a jury. The Supreme Court has not suggested how to weigh these two tests when they conflict, but it has said that the remedy sought is the more weighty consideration." *Id.* (emphasis added).

Restitution for Defendants' unjust enrichment

to be abrogated," as provided in state statutes of 1990 and 1994 peculiar to Florida.)

⁵ *United States v. Standard Oil Co.*, 332 U.S. 301, 395 (1947) ("We agree . . . that the creation or negation of such a liability is not a matter to be determined by state law."); *id.* at 314 ("[W]e have not here simply a question of creating a new liability in the nature of a tort. For grounded though the argument is in analogies drawn from that field, the issue comes down in final consequence to a question of federal fiscal policy, coupled with considerations concerning the need for and the appropriateness of means to be used in executing the policy sought to be " established."). Federal fiscal policy was then, indeed, confirmed by Congress in the FMCRA as favoring reimbursement of medical expenses, and the appropriateness of means to be used in executing the policy was confirmed in that Act as including direct actions independent of subrogation. Federal fiscal policy to require reimbursement of Medicaid expenses by wrongdoers, *inter alia*, has similarly been confirmed by Congress, in 42 U.S.C. § 1396a(a)(25).

can be characterized as "an ordinary damage award" or its equivalent. Restitution is a traditional principle in both law and equity, and therefore is not uniquely associated with equity. *See* G. Palmer, *The Law of Restitution* 1-2 (1978) (including restitution liability based on unjust enrichment as among "the principal source of civil liability at common law."); *see also id.* at 3-4 ("For a long time restitution developed more or less independently at law and in equity, and both are therefore within the scope of this book."). For instance, restitution under quasi-contract is an obvious example of a remedy *at law*. *Icl.* at 4.

Equity can, of course, grant money damages in addition to coercive relief, but this does not make a count equitable where only a money award is sought and where the basis for the relief is a claim traditionally associated with the common law. The cases cited by Defendants suggest nothing else. They are all cases where either coercive relief was sought and granted, in addition to money damages, or where the term "damages" in an insurance policy is construed for purposes of insurance law, rather than for a determination of jurisdiction in law or equity.⁶ For this purpose a distinction is sometimes drawn between monetary awards characterized as "restitution" and those characterized as "damages," but such a distinction is not determinative for classifying an action as equitable or legal. According to D. Dobbs, *The Law of Remedies* §2.6(3) at 157(1993):

Money claims for restitution: Some money claims are not damages, representing the plaintiff's loss but restitution representing the defendants' unjust gains in a transaction. As indicated below, some restitution claims were, equitable. However, many were not. Many restitution claims were brought under, the common law writ of assumpsit, using its common law counts

such as the count for money had and received. These claims are claims at law in every sense, first because they seek simply money relief, and second because they were historically brought in the separate law courts.

Money claims for restitution with equitable enforcement: constructive trusts. Just the opposite is true for some other kinds of restitutional claims. The constructive trust is the most familiar case . . . the upshot of the constructive trust is an order compelling the defendant (or the bank) to place the fund in the plaintiff's name. It differs from an ordinary judgment at law, which would adjudicate the plaintiff's right to recover an amount of money from the defendant, but would not identify the particular source...

Because the constructive trust is ultimately enforceable by a personal order (convey Blackacre or transfer the specific fund of money), it has at least a latent injunctive or coercive quality. And because it was historically and substantively equitable in nature, the constructive trust suit is almost always regarded as equitable in nature, even though it might ultimately reach a fund of money.

*If no particular property is identified as belonging to the plaintiff in equity and good conscience, the plaintiff's claim for money restitution looks like an ordinary claim for a money judgment. In that case, the claim seems to be legal by ordinary standards.*⁷ (Emphasis added;

⁶ *United States v. Long*, 537 F.2d 1151 (4th Cir. 1975) (injunction granted pursuant to authority to grant "preventive relief"); *Haines v. St. Paul Fire & Marine Ins. Co.*, 428 F. Supp. 435, 439 (D. Md. 1977) (dealing with characterization of "ancillary relief . . . available in SEC , injunction actions"); *cf. Maryland Cas. Co. v. Arrnco, Inc.*, 822 F.2d 1348, 1353 (4th Cir. 1987) (dealing with insurer's liability for toxic clean - up costs; distinguishing "damages" for purposes of comprehensive liability insurance policies from the "costs" incurred in complying with equitable or injunctive orders on grounds of insurance theory, rather than theory of equitable jurisdiction).

⁷ Professor Dobbs cites in support a Maryland case, *Kahle v. John McDonough Builders, Inc.*, 85 Md. App. 141, 151 - 52, 582 A.2d 557, 562 (1990) (recognizing the analogous proposition that an action as traditionally equitable as a claim by a beneficiary against a trustee can be an action at law "if the trustee is under a duty to pay money immediately and unconditionally to the beneficiary"); *see also Mass Transit Administration v. Granite Constr. Co.* 57 Md. App. 766, 775, 471 A.2d 1121 (1984) (restitution claim for "simple money judgment" is "action . . . at law;" notwithstanding defendants' protestations to the contrary, the Court of Special Appeals was entirely clear that this remedy makes an action one "at law," for which a question of

footnotes in original omitted.)

III. PLAINTIFF HAS A RIGHT TO RESTITUTION FOR THE ADVANTAGES CONFERRED UPON DEFENDANTS BY VIRTUE OF THE STATE'S PROVISION OF MEDICAL CARE FOR INJURED SMOKERS.

Plaintiff argues that Defendants are liable for restitution because, among other things, Defendants breached a duty owed to Maryland smokers, and the State conferred a benefit by covering the resulting health care costs. *See* Opposition Memorandum at 24 n.6. The State *also* argues that, as made clear by Restatement of Restitution § 1, comment b, it need not show, to confer a benefit, that it satisfied a legal duty of the Defendants; it suffices to show that the State conferred a benefit on the Defendants by adding to their security or advantage or saving them from expense or loss. Defendants also rely on Restatement of Restitution § 1, comment b, quoting and underlining it, but Defendants deceptively omit key disjunctive language, without even including an ellipse to indicate this omission. Reply at 10. The relevant text of that comment, with the portion omitted by Defendants in bold, states:

A person confers a benefit upon another if he . . . satisfies a debt or duty of the other, *or in any way adds to the other's security or advantage. He confers a benefit not only where he adds to the property of another, but also where he saves the other from expense or loss. The word "benefit" therefore denotes any form of advantage.*

(emphasis added).

Using the test from this commentary, which Defendants concede is the applicable analysis for "benefit," the State has adequately pleaded a benefit conferred. As explained in Plaintiff's Opposition, the State's intervention to cover health care costs caused by Defendants' misconduct added to Defendants' security and advantage by saving them from litigation expenses and increasing their profits from addicted smokers.

Furthermore, Defendants misconstrue the basis for Plaintiff's entitlement to restitution, which is based in part on Restatement of Restitution § 78,

adequacy of alternative remedy at law could not arise).

allowing recovery where a party, acting pursuant to its own legal duty, pays a third party who was actually injured by the defendant's wrongdoing. Defendants (at Reply 11-12) state that § 78 "addresses *payment by coercion*," referring to the Chapter 3 "Scope Note" of that Restatement for support. That note also states, "[A] payment is made by coercion if it is made in the performance of a legal duty . . .", Restatement of Restitution at 288. The State, of course, acted pursuant to its legal duties under the Medicaid program in paying for the medical costs of injured smokers, and was forced to do so by the deliberate and negligent actions of Defendants.

IV. DEFENDANTS' CONDUCT COMPELS THE FINDING OF DUTY TOWARDS THE STATE AND ITS RESIDENTS BASED UPON DEFENDANTS' VOLUNTARY STATEMENTS AND REPRESENTATIONS AND THE PHYSICAL HARM RESULTING FROM THE BREACH OF THOSE PROMISES.

The fundamental issue this court must confront is how the law will respond to the tremendous toll of personal physical injury caused by the conduct of Defendants detailed in Plaintiff's Complaint. "When blameworthy conduct causes harm to others, the blameworthy actor ought, in general, to compensate for those harms.... [This] fault principle applies only to conduct that is antisocial in the sense that its costs (including harms) outweigh its benefits." W. Page Keeton, *et al.*, Prosser and Keeton on the Law of Torts, § 85 at 608 (5th Ed. 1984). Plaintiff plainly asserts that Defendants' conduct has been antisocial in the broadest sense in their deliberate deception of the public and indifference to the health consequences to those addicted to cigarettes. "One factor affecting the development of tort law is the moral aspect of the defendant's conduct -- the moral guilt or blame to be attached in the eyes of society to the defendant's acts, motives and state of mind B W. Keeton § 4 at 21.

V. PLAINTIFF'S DAMAGES HAVE RESULTED FROM PHYSICAL INJURIES PERMITTING TORT RECOVERY UNDER MARYLAND LAW.

Defendants' reliance upon *Clinical Perfusionists, Inc. v. St. Paul Fire and Marine Ins. Co* 336 Md. 685, 650 A.2d 285 (1994) is misplaced; that case is not analogous to the ease at bar, and is not controlling. *Clinical Perfusionists* involved an insurance coverage dispute in which the plaintiff insured was a medical provider which had not filed the required notice with its insurer regarding a potential medical malpractice claim against one of its agents. The insured argued that the insurer had been given "constructive notice" of the claim when another

medical professional insured by the defendant had given notice of its need for defense and had included a reference to the involvement of plaintiff's agent. The court found that the facts alleged, including the claim filed by the third party, did not constitute sufficient notice to trigger the insurer's duty to defend Plaintiff under the insurance contract and that the insurer breached no duty to plaintiff by failing to investigate the third party's claim more thoroughly. The potential harm to any party in *Clinical Perfusionists* from the insurer's failure to investigate the third party's claim was purely financial.

Accordingly, when the court discusses Restatement (Second) of Torts § 324A, involving the voluntary undertaking of a duty to a third party, the court emphasized that the harm it was analyzing involved "exclusively economic loss" -- as a duty to defend dispute would necessarily involve. *Id.*, 650 A.2d at 294. Immediately thereafter, however, the court makes the following revealing citation: "C. { *United States Gypsum Co. v. Baltimore*, 336 Md. 145, 156-58, 647 A.2d 405, 410-11 (1994) (tort recovery permitted for economic loss based on a defective product where the defect creates a substantial and unreasonable risk of death or personal injury); *Council of Co-Owners Atlantis Condominium v. Whiting-Turner Contracting Co.*, 308 Md. 18, 32-35, 517 A.2d 336, 34445 (1986) (defective construction -- same)." Thus, the court clearly recognized the distinction between plaintiffs which suffer financial loss remedying a condition, involving the risk of death or personal injury and the situation before it, an insured pursuing financial protection against an insurer whose alleged tort involved no risk of death or physical injury to anyone.

The State of Maryland is analogous to the City of Baltimore in *U.S. Gypsum*, in that it has provided services that have remedied personal injury and the risk of death caused by cigarettes, the product sold and/or marketed by Defendants. Thus, the Medicaid funds have been spent due to actual personal injury and to prevent further injury and death. As emphasized in *Jacques v. First Nat 'l Bank of Maryland*, 307 Md. 527, 533-34, 515 A.2d 756, 759-60 (1980):

Where the failure to exercise due care creates a risk of economic loss only, courts have generally required an intimate nexus between the parties as a condition to the imposition of tort liability. This intimate nexus is satisfied by contractual privity or its equivalent. By contrast, *where the risk created is one of personal injury*, no such direct relationship need be shown, and the

principal determinant of duty becomes *foreseeability*.

VI. DEFENDANTS HAVE MISCHARACTERIZED THE FACTS AND LAW SUPPORTING THE CONSUMER PROTECTION ACT COUNTS.

Rather than addressing the arguments made by the State, Defendants choose to misrepresent various Maryland consumer protection cases and the significance of the Washington trial court decision in *State v. American Tobacco Co.*

Neither *Consumer Protection Division v. Consumer Publishing Co.*, 304 Md. 731, 501 A.2d48 (1985) nor *Consumer Protection Division v. Outdoor World Corp.*, 91 Md. App. 275, 603 A.2d 1376 (1992), *cert denied*, 327 Md. 523, 610 A.2d 796 (1992), limit restitution as Defendants contend (Reply pp. 24-25). Indeed, *Outdoor World* specifically *rejects* the limitation for which it is cited by Defendants. Defendants indicate that restitution is limited to consumer purchasers and cite for that proposition as follows:

Outdoor World Corp., 91 Md. App. at 290 (CPA authorizes the State to "fashion restitution orders requiring sellers to make refunds to consumers who bought products" in reliance on deceptive acts)(emphasis added).

Defendants' Reply p. 24, n.23, (emphasis in original). The quote that Defendants take out of context in order to misrepresent the court's holding in *Outdoor World* was a discussion of the specific restitution ordered in *Consumer Publishing*, not a discussion of the breadth of restitution available under the Act.

Contrary to the Defendants' argument, the Court of Special Appeals in *Outdoor World* held that restitution under the Act *was not limited to purchasers*. Rather, it held that the Division could "require OWC to refund to Marylanders who visited its campgrounds in reliance on a notice that violated the Consumer Protection Act and who *did not* subsequently *purchase* a membership an amount equal to the cost of the trip." 91 Md. App. at 293, 603 A.2d at 1385 (emphasis added).

The Defendants similarly seek to mislead the Court as to the result in the Washington trial court in *State v. American Tobacco*. First, the court, contrary to

the contention of the Defendants, did *not* dismiss the consumer protection counts, Counts I and II, in their entirety. Rather, the Court's order granted the Defendants' motion, which was limited to the monetary relief that the State was seeking as a "person." See Order, *State of Washington v. American Tobacco* at 10.

The trial court in *American Tobacco* relied upon the wording of Washington's statute which limited restitution to a "person" and limited the definition of "person" to "natural persons, corporations, trusts, unincorporated associations and partnerships." *Id.* In contrast, Maryland's, CPA provides a broad nonexclusive definition of person that, *inter alia*, "includes . . . any other legal or commercial entity." Accordingly, the *American Tobacco* decision, in addition to being far more limited in scope than represented by Defendants, is based on a far narrower statute than the one adopted by the Maryland General Assembly.

Defendants have failed to demonstrate that the Maryland General Assembly intended when it enacted the CPA to permit Defendants to reap the benefits of the type of unfair and deceptive trade practices the State has alleged and force the State and its citizens to bear the costs of that wrongdoing without redress. Defendants' failure is due to the fact that the General Assembly intended to stop those deceptive practices and to have wrongdoers, not the State and its citizens, bear the costs of their wrongdoing.

VII. THE STATE MAY PROPERLY PURSUE ANTITRUST REMEDIES TO ADDRESS THE HARMS CAUSED BY DEFENDANTS' ANTICOMPETITIVE CONSPIRACY.

A. The State is suing as sovereign enforcer of its laws and for proprietary damages.

Under Md. Comm. Law Code Ann. § 11-209(a), "The Attorney General shall institute proceedings in equity" to prevent or restrain violations of the Maryland Antitrust Act. This authority is a "sovereign power," that is, one "necessary to accomplish the legitimate ends and purposes of government." *Black's Law Dictionary* (6th ed. 1990). Inexplicably, Defendants do not comment on this sovereign power of the State, instead misdirecting the Court's attention to the State's authority to proceed criminally pursuant to § 11-207.

Further, in a proceeding brought under § 11-209(a), this Court now has the authority to exercise *all*

equitable powers necessary to remove the effects of a violation, including ordering restitution. Defendants' reliance on *State v. Jonathan Logan, Inc.*, 301 Md. 63, 482 A.2d 1 (1984), is entirely misplaced because in 1993, the General Assembly effectively overruled its holding. Under Md. Comm. Law Code Ann. § 11-209(b), the General Assembly expressly designated "the State" as "a person having standing to bring an action," establishing a category for governmental plaintiffs separate and apart from private persons. Thus, while the State is attempting to recover damages for injury to its proprietary interests, it is not, as Defendants claim, a "'private' party." Notably, Defendants do not even attempt to rebut the plain language of the statute.

As Defendants point out, the courts of Minnesota and Washington both interpreted liberally differences in language between their respective state antitrust acts and federal antitrust law. Both rejected Defendants' standing argument. In Maryland, the General Assembly has expressly instructed that the Maryland Antitrust Act "be liberally construed to serve its beneficial purposes." Md. Comm. Law Code Ann. § 11-202(b). The General Assembly also instructed that the State has standing under § 11-209(b) to bring an action for damages. This Court need only give § 11-209(b)(1) its plain meaning to grant standing the State of Maryland here.

B. The State's damages are the necessary and intended consequences of Defendants' actions.

In the present case the injury to the State of Maryland was not only foreseeable by Defendants but was intended. Defendants knew that the inevitable result of their conspiracy to suppress information and product innovations would be to transfer the costs of tobacco-related health problems from the cigarette market to the health care market. Defendants intentionally shifted costs from one market to the other where the State was indisputably a participant. Thus, through Defendants' own actions, the two markets -- for cigarettes and for health care -- became, in the Supreme Court's words, "inextricably intertwined." *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 484 (1982). As in *McCready*, having the State shoulder the burden of health care costs was necessary to the success of Defendants' conspiracy and was a principal goal of the conspiracy.

Despite Defendants' attempts in their brief to attenuate the chain of causation, the State's injury was not so remote as to deprive the State of standing to bring the present claim. *Atlantic::: Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990), teaches that "antitrust injury" is injury "attributable to an anti-

competitive aspect of the practice under scrutiny" that "flows from" that aspect. Contrary to Defendants' assertion, *Atlantic Richfield* does not require damages to be direct.

In the present case, the State does not attempt to claim standing as a supplier of an antitrust victim or as a landlord of one. It is not a union with labor-market interests that predominate over its antitrust claims. These are the flawed analogies that Defendants seek to draw. Rather, the State is like the health care consumer in *McCready*, a purchaser in an interrelated market whom the Supreme Court granted standing. This Court, guided by the decision in *McCready*, should recognize that the State would have standing under §4 of the Clayton Act, and hold that the State has standing under §11-209(b) of the Maryland Antitrust Act to bring the present action.

WHEREFORE, for the reasons discussed above, Plaintiff requests that the Motion to Dismiss be DENIED.

Respectfully Submitted,

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