

STATE OF MICHIGAN CIRCUIT COURT FOR THE
30TH JUDICIAL CIRCUIT INGHAM COUNTY

KELLEY *ex rel.* MICHIGAN,
Plaintiff,

v.

PHILIP MORRIS INCORPORATED, *et al.*,
Defendants.

Case No. 96-84281-CZ

February 28, 1997

**PLAINTIFFS' BRIEF IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS COUNTS II
AND VI (ANTITRUST AND INJUNCTIVE RELIEF)**

**I. ARGUMENT IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS COUNT
II.**

Introduction

Continuing their scorched earth war litigation strategy¹ which is aimed at avoiding a trial on the merits, the Tobacco Industry Defendants have filed the present Motion to Dismiss the State's antitrust claims (Count II). Interestingly, the Defendants have not expressly denied that they entered into "[a] contract, combination, or conspiracy . . . in restraint . . . trade or commerce in a relevant market" in violation of M.C.L. 445.772; M.S.A. 28.70(2). Instead, the Defendants seek to avoid litigating the State's antitrust claims by arguing that the State has not suffered an antitrust injury and, even if the State has suffered an antitrust injury, remarkably, the Attorney General of Michigan lacks standing to complain.

On a Motion to Dismiss, the Court must accept as true the material allegations in the Plaintiff's Complaint. *Prawdzik v. City of Grand Rapids*, 313

¹ As previously admitted by counsel for Defendant, R.J. Reynolds:

The aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of [RJR]'s money, but by making that other son of a bitch spend all of his.

Mich. 376; 21 N.W.2d 168 (1946). Moreover, the Court must construe the Complaint in the light most favorable to the Plaintiff. Here, the Attorney General's Complaint clearly establishes that the Defendants entered a contract, combination, and conspiracy in restraint of trade which resulted in the State's antitrust injury. The Attorney General of Michigan is the proper party Plaintiff to seek redress for the Defendants' violation of the Michigan Antitrust Reform Act.

**A. THE TOBACCO INDUSTRY'S
ANTICOMPETITIVE CONSPIRACY HAS
INFLECTED AN ANTITRUST INJURY UPON
THE STATE OF MICHIGAN.**

The Tobacco Industry Defendants argue that the State's injuries are not antitrust injuries. Specifically, the Defendants claim that the State's injuries are not attributable to any anti-competitive practice. Rather, according to the Defendants, the State's injuries flow from the harmful effects of cigarettes.

In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), the Supreme Court stated:

Plaintiffs must prove *antitrust* injury, which is to say injury of the type antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injuries should reflect the anti-competitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause." (citations omitted).

In *Brunswick*, the court found that the conduct in question was not anti-competitive, but rather it preserved competition. The "sole injury alleged [was] that the competitors were in business." *Id.* at 484. While it was clear to the Court that the plaintiffs were injured, the injury was not "by reason of" that which made the acquisition unlawful as required by antitrust laws.

The United States Supreme Court has recognized that an injury can flow from conspiracy to not manufacture a product. For instance, in *Allied Tube & Conduit, Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), the United States Supreme Court affirmed a jury verdict against a producer of steel tubing used as a conduit for electrical wires where the steel producer conspired to prevent certification of plastic electrical conduit and to maintain the National Electric Code ("NEC") requirement of a steel conduit. The steel producer recruited a large number of new members to

join the Standard Setting Association and attend meetings, obviously, intending to vote to disallow certification of plastic linings. The Court found that the steel producers' conduct was subject to antitrust scrutiny reasoning that "[a]greement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products." *Id.*

Unlike the injuries suffered by the plaintiffs in *Brunswick*, the State has been injured by the Defendants' unlawful conduct which *decreased competition*. Like the injured party in *Allied Tube*, the State has been injured by the Defendants' unlawful conspiracy to suppress research in the development and manufacturing of a safer product; specifically, a safer cigarette. Moreover, the State has been injured by the Defendants' unlawful conspiracy to restrain research and the dissemination of scientific and medical information regarding the health hazards caused by smoking. The Defendants' injurious conduct is the very type of anti-competitive activity proscribed by Michigan's antitrust laws. Accordingly, the State's injuries, including unnecessary increases in health care expenditures, "flows from that which makes defendants' acts unlawful." *Brunswick*, 492 U.S. at 489.

Next, the Defendants argue that the State's injuries, increased health care expenditures resulting from tobacco related diseases, flow from the adverse health effects of cigarettes, not from the Defendants' anti-competitive conduct. For obvious reasons, Defendants' argument fails to state the obvious conclusion, while the adverse health effects resulting from cigarettes precipitated the State's harm, this harm flows directly from the Defendants' anti-competitive behavior in conspiring to restrain and suppress research, information, and a safer product.

The Defendants suggest that any relationship between the State's injuries and the absence of a safer cigarette is too remote to be considered an antitrust injury. For support, Defendants cite *In re: Multi District Vehicle Air Pollution*, 481 F.2d 122 (9th Cir. 1973), *cert. denied*, 414 U.S. 1045 (1973), *reh'g denied*, 414 U.S. 1148, *on remand* 367 F.2d 1298 (C.D. Cal. 1973), *aff'd* 538 F.2d 231 (9th Circuit 1976), where the Court held that crop farmers, who alleged that they had suffered direct damage to crop yields as a result of antitrust violations committed by the nation's automobile manufacturers, were outside the "target area" of the alleged conspiracy. The farmers alleged that the nation's automobile manufacturers and their trade association conspired to eliminate competition among themselves in the research and manufacturing of pollution control devices. The farmers argued that the conspiracy caused damage to their crop yields.

The Court denied standing finding that, not only were the crop farmers not "aimed at" as targets of the alleged conspiracy, they were not even on the "firing range."

Unlike the farmers' allegations in *Multi District Vehicle*, the Attorney General's allegations in the present case evidence that the health care field (in which the State of Michigan is a direct participant) was a direct target of the tobacco industry's conspiracy. In fact, a 1968 internal memo acknowledged that cigarettes are inextricably intertwined with the health field, stating, "most Philip Morris products, both tobacco and non-tobacco, are directly related to the health field."

Additionally, *Multi District Vehicle* is not an antitrust injury case; it is an antitrust standing case the underlying principles of which have been superseded to a degree by the United States Supreme Court's recent pronouncements in *Blue Shield v. McCready*, 457 U.S. 465 (1982); and *Associated General Contractors v. California State Council of Carpenters*, 459 U.S. 519 (1983).

In *McCready*, a Blue Shield Health Plan subscriber alleged a restraint of trade based on Blue Shield's practice of reimbursing subscribers for services provided by psychiatrists, but not for services provided by psychologists. *McCready* engaged the services of a psychologist and had not been reimbursed for her payments to the psychologist. Blue Shield claimed that *McCready's* injuries were too fortuitous and remote from the alleged violation to provide a basis for antitrust standing. In addressing the issues of remoteness, the Court stated that "here the remedy cannot reasonably be restricted to those competitors whom the conspirators hope to eliminate from the market." *Id.* at 479. The Court noted that *McCready's* injuries were clearly foreseeable. More importantly, the Court stated that "[a]lthough *McCready* was not a competitor of the conspirators, the injury she suffered was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and psychotherapy market. In light of the conspiracy here alleged we think that *McCready's* injury "'flows from that which makes defendants' acts unlawful' . . . 'and falls squarely within the area of congressional concern" *id.* at 484. Unquestionably, the tobacco industry's conspiracy caused harm to the State of Michigan. As a direct result, the State's medical expenditures increased unnecessarily. Cigarette smoking and health are "inextricably intertwined." Defendants knew and expected that their action would require the State to pay higher costs for citizens of Michigan. Since the State's injuries flow directly from the Defendants' anti-competitive conduct,

the State has established an antitrust injury - the type the antitrust laws *were intended* to prevent.

B. THE ATTORNEY GENERAL OF MICHIGAN HAS STANDING TO PURSUE THE TOBACCO INDUSTRY DEFENDANTS FOR THEIR ANTITRUST VIOLATIONS.

The Michigan Attorney General, on behalf of the State, has standing to seek enforcement of the Michigan Antitrust Reform Act to protect the public and foster fair and honest intrastate competition by pursuing actions against all who commit Antitrust Act violations. M.C.L. 445.777-778; M.S.A. 28.70(7)-(8). In fact, the Michigan Legislature has broadly granted standing to maintain antitrust suits:

(1) The state, a political subdivision, or any public agency threatened with injury or injured directly or indirectly in its business or property by a violation of this act may bring an action for appropriate injunctive or other equitable relief, actual damages sustained by reason of a violation of this act, and, as determined by the court, interest on the damages from the date of the complaint, taxable costs, and reasonable attorney's fees.

(2) Any other person² threatened with injury or injured *directly or indirectly* in his or her business or property by a violation of this act may bring an action for appropriate injunctive or other equitable relief against immediate irreparable harm, actual damages sustained by reason of a violation of this act, and, as determined by the court, interest on the damages from the date of the complaint, taxable costs, and reasonable attorney's fees. If the trier of facts finds that the violation is flagrant, it may increase recovery to an amount not in excess of 3 times the actual damages sustained by reason of a violation of this act.

M.C.L. 445.778; M.S.A. 28.70(8). (emphasis added).

² M.C.L. 445.771(1)(a); M.S.A. 28.70(1)(1)(a) defines a "person" for purposes of the Antitrust Act as "an individual, corporation, business, trust, partnership, association, or any other legal entity." According to the provisions and comments, "person" thus includes municipal corporations, quasi-corporations and any other governmental or legal entity capable of suing or being sued.

This expansive grant of standing includes the Attorney General's present suit against the Tobacco Industry Defendants. The State has a strong and constitutionally recognized interest in the public health and general welfare of the people of the state. Const. 1963, article 4, § 51.

The antitrust allegations, which must be accepted as true for purposes of this motion to dismiss, recount a contract, combination, and conspiracy by the Defendants in restraint of trade in the cigarette market in Michigan. To earn greater profits, the Tobacco Industry Defendants, cigarette manufacturers and their allied interests, agreed to ignore and actually suppress the truth concerning the hazards of smoking cigarettes. The Defendants in concert refuted, undermined, distorted, concealed, and neutralized information coming from the scientific and medical community. Moreover, the Defendants conspired to deceive the State and its citizens about the addictive properties of nicotine and the full extent of the health risks of smoking. In secretive meetings, the Defendants created and funded front organizations to prevent the public from learning what the industry knew. The Defendants' unlawful conspiracy and conduct caused Michigan citizens to begin or continue smoking. Consequently, every year thousands of Michigan citizens who are addicted smokers die or suffer smoking related illnesses from using Defendants' products precisely as Defendants designed and intended for those products to be used. The Defendants compounded this harm through their joint action of preventing the free flow of product and health information, preventing the development of safer products, and preventing competition on the basis of safety.

The United States Supreme Court has emphasized the broad scope of antitrust laws stating that "[e]xceptions to the Sherman Act for potentially dangerous goods and services would amount to a repeal of the statute." *Nat'l Society of Professional Engineers v. U.S.*, 435 U.S. 679, 695-96 (1978).³ Nonetheless, Defendants contend that the State, through the Attorney General, lacks standing to file the present claim against the Tobacco Industry Defendants for their combination and conspiracy to harm Michigan citizens and the resulting losses incurred by the State. The Defendants' contention is based solely on the flawed premise that the State lacks standing because it is not a consumer, competitor, or participant in the restrained market.

³ Michigan courts are required to give due deference to interpretations given by the federal courts to comparable antitrust statutes. M.C.L. 445.784; M.S.A. 28.70(4).

The goal of the antitrust laws is the protection of competition, not the protection of competitors. *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488 (1977). The protection of antitrust laws is not limited "to consumers, or to purchasers, or to competitors, or to sellers. . . . [Antitrust laws are] comprehensive . . . protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Associated Blue Shield of Virginia v. McCready*, 457 U.S. 465, 472 (1982). The United States Supreme Court has recognized that it is impossible to announce a "black-letter rule" for determining standing in every case.⁴ *Associated General Contractors of Calif. V. Calif. State Counsel of Carpenters*, 459 U.S. 519 (1983). Thus, while market participation may be one factor used in analyzing antitrust standing, it is not controlling.

In denouncing the use of a mechanical test, the Supreme Court has set forth factors to be applied on a case-by-case basis to determine whether the plaintiff has standing. The factors controlling antitrust standing include: (1) a causal connection between the antitrust harm and the injury, (2) an improper motive, (3) the nature of the injury, (4) the directness or indirectness of the injury, (5) the speculative and complex nature of the damages, and (6) whether denial of standing would leave a significant violation unremedied. *Associated General Contractors*, 459 U.S. at 537-46. No single factor is decisive. *Los Angeles Memorial Coliseum Commission v. NFL*, 791 F.2d 1356, 1363 (9th Cir. 1986). Rather, a weighing of the factors determines the existence of standing. *Id.*

Clearly, the harmful and unlawful acts of the Tobacco Industry Defendants caused the complained of harm to the State of Michigan and its citizenry. The Tobacco Industry Defendants are in the business of selling nicotine, an addictive drug. For decades, the Tobacco Industry Defendants have had the results of scientific and medical research and, accordingly, have known of the grave harm caused by their product. Faced with an imminent loss of huge profits, Defendants contracted and conspired to increase their profits and reduce their business risks associated with cigarette related health problems by agreeing to, among other things, withhold information from the public regarding the health hazards associated with smoking; promote products which, when used as intended, knowingly caused death and disease; and suppress

research, marketing, and manufacturing of a "safer" cigarette. As a foreseeable and direct result, the State suffered losses, including an increase in health care expenditures. Accordingly, there is a causal connection between the Defendants' unlawful conduct and the injuries suffered by the State.

Second, the Tobacco Industry Defendants' motives were improper. The Defendants possessed medical and scientific research results regarding the addictive nature of nicotine and the harmful effects of smoking cigarettes. The Defendants knew that the inescapable outcome of withholding this information and not manufacturing "safer" cigarettes would be increased medical costs and human suffering. Motivated to increase the already large profits and reduce their business risks, the Defendants conspired to suppress dissemination of information regarding nicotine addictiveness and the health dangers associated with cigarettes. Also, Defendants conspired to prevent safer products from entering the market to avoid competition with their deadly products. Thus, through their conspiracy and combination the Defendants intentionally shifted the burden associated with cigarettes from the tobacco market to the medical-care market, a market in which the State is an active and direct participant.

Third, the nature of the injury caused by the Tobacco Industry Defendants' combination and conspiracy is the type of injury the Michigan Antitrust Reform Act was intended to address. The primary goal of antitrust laws is to protect competition and freedom in the marketplace. By protecting competition, antitrust laws accomplish a variety of objectives, including ensuring the flow of accurate information which results in competitive production and the distribution of the highest quality and safest products. *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988). The withholding of valuable information or supplying false or misleading information has no redeeming value, competitive or otherwise. Moreover, it would be incredulous for anyone to argue that circulating false or misleading information or withholding information could in anyway promote competition. "The fact that information valuable to consumers is a public good rather than an ordinary commodity capable of being easily bought and sold should not shelter from antitrust scrutiny a conspiracy to limit its production." *Accrediting and the Sherman Act*, 57 Ant. Law & Contemp. Probs. 199, 236 (1994). An agreement to restrain output, whether it is information, research, or new products is an anti-competitive practice. *See Allied*, 486 U.S. at 500. ("Agreement on a product standard is . . . implicitly an agreement not to manufacture, distribute, or purchase certain types of products" and has "serious potential

⁴ The Court noted that various standing tests were being employed by Circuit Courts; namely, the "target area," "direct injury," and "zone of interests" tests - leading to conflicting results. *Associated General Contractors*, 459 at U.S. at 536 n.33.

for anticompetitive harm."); *F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447 (1986) (Where dentists and their trade group conspired to refuse to provide insurers with xrays to evaluate claims, the court found the "denial of information" resulted in an unreasonable restraint of trade); *Berry v. U.S.*, 312 U.S. 457, 466(1940) ("limiting production" and "deterioration in quality" are prohibited by antitrust laws). Here, the Tobacco Industry Defendants conspired to withhold information and research and restricted the production of safer products. The State's injuries, including increased medical expenditures and the ever increasing harm to its citizens health, flow from the defendants' anticompetitive conduct and was inextricably intertwined with the injury the defendants sought to inflict. Therefore, the injury falls squarely within the concerns which the Michigan Antitrust Reform Act intended to address.

Fourth, the State's injuries flow from the Tobacco Industry Defendants' harmful conduct. In reviewing this factor, it is important to note that the Michigan Antitrust Reform Act, which controls this case, is more expansive in defining standing than the federal statute. M.C.L. 445.778; M.S.A. 28.70(8) specifically includes "indirect" injuries within the purview of antitrust protection. Such language in a state statutory scheme is generally referred to as an *Illinois Brick* repealer. In *Illinois Brick Co. v. State of Illinois*, 431 U.S. 720 91977), the United States Supreme Court limited antitrust standing under federal law in a price fixing case to direct purchasers. In response, several states, including Michigan, included provisions broadening standing to expressly encompass indirect injuries.

Defendants contend that the broad language contained in M.C.L. 445.778; M.S.A. 28.70(8) only extends standing to indirect "purchasers". If the Michigan Legislature had intended to limit this provision to indirect purchasers, the Legislature could have easily added the word "purchasers" to the statute. The Legislature's omission of any restricting language and the clear wording the statute support a finding that no restrictions on the "direct or indirect injury" language should be written into the provision by Defendants.

The State's injuries, including unnecessary increases in medical expenditures for cigarette related health problems, flow directly, and at a minimum indirectly, from the Defendants' anticompetitive conduct. Accordingly the fourth factor of antitrust standing is satisfied.

Fifth, the damages sought by the state are not speculative nor duplicative of other potential Plaintiffs'

damages. The Complaint evidences that the calculation of the State's recovery will not be more complex here than in most large tort cases. Moreover, the Complaint evidences that there is sufficient data available to demonstrate the State's damages; the damages are not mere speculation.

Sixth, denying the State standing would leave a significant violation unremedied. Absent the State seeking enforcement of antitrust laws against the Tobacco Industry for the harm caused to the State as a result of increased medical expenditures, it is likely that the Defendants' anticompetitive conduct will not only go unaddressed but it will continue, without restraint, and without competition as long as the Defendants continue to make a profit.

In sum, there is a clear causal connection between the Tobacco Industry's contract, combination, and conspiracy to withhold information and their restraint on improving tobacco products and the State's injuries. Solely motivated by profit, Defendants intentionally shifted the costs associated with tobacco related health problems from the tobacco market to the health care market in which the State is a participant. The State's injuries resulted from Defendants' anticompetitive conduct, the essence of antitrust concerns. Determining proper recovery will not be based on speculation. Moreover, the State through the Attorney General, must have standing to seek redress for the Defendants' violation of Michigan's antitrust laws; otherwise, the Defendants' unlawful conduct will continue completely unrestrained. Finally finding standing in the present case would be in line with decisions arising out of other jurisdictions involving similar tobacco litigation. See *Washington v. American Tobacco Co., Inc.*, No. 96-2-15056-8 SEA (King County Super. Ct.) (Exhibit 1); *Minnesota v. Philip Morris, Inc.*, 551 N.w.2d 490 (Minn. 196). Based on the foregoing, the State has antitrust standing.

CONCLUSION

The State has suffered an antitrust injury by reason of the Tobacco Industry Defendants' anticompetitive behavior. Absent a finding that the Attorney General has standing on behalf of the State to seek redress for the Tobacco Industry's unlawful conduct, the Tobacco Industry will continue to conspire to restrain the production of safer products and suppress dissemination and research of scientific and medical information relating to the health hazards associated with cigarettes. As a direct result, the State of Michigan and its citizenry will suffer needlessly.

The State of Michigan, through the Attorney General, requests that it be given its day in court.

Accordingly, for the foregoing reasons, the Attorney General respectfully requests that the Tobacco Industry Defendants' Motion to Dismiss Count II be denied.

II. ARGUMENT IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COUNT VI.

Introduction

Count Six of the State of Michigan's Complaint consists of a claim for injunctive relief wherein the State seeks to permanently enjoin the Defendants from intentionally targeting children to entice them to join the ranks of adult smokers. Defendants from intentionally targeting children to entice them to join the ranks of adult smokers. Defendants assert in their Joint Motion to Dismiss, pursuant to M.C.R. 2.116(C)(8), that the State has improperly pled a claim for injunctive relief. Specifically, Defendants aver "the State may not seek injunctive relief when it has no sustainable cause of action" and that an injunction is a specific prayer for relief and ". . . not really a separate claim or cause of action." Defendants' Motion, ¶ 3, p. 1; Brief, p.26. Defendants cite no authority supporting this contention. Defendants' Motion, ¶ 3, p.1; Brief, p.26.

A motion for summary disposition should not be granted unless the "claim is so clearly unenforceable as a matter of law that no factual development could possibly justify a right of recovery. *Jozwiak v. Northern Michigan Hosp., Inc.*, 207 Mich. App. 161; 524 N.W.2d 250 (1994). The Court must accept as true all factual allegations and all reasonable inferences or conclusions that can be drawn from the facts. *Id.* at 500; *Stehlik v. Johnson*, 206 Mich. App. 83; 520 N.W.2d 633, 635 (1994). The State of Michigan has properly pled a separate and sustainable claim for injunctive relief. No authority or support for the proposition that the State's claim is clearly unenforceable as a matter of law has been put before the Court by the Defendants.

A. STATE AUTHORIZED TO SEEK RELIEF.

The Court Rules clearly permit the State of Michigan to file a separate and distinct claim for injunctive relief.

M.C.R. 2.111(A)(2) provides:

A party may . . . (b) state as many separate claims or defenses as the party has, regardless of consistency and whether they are based on legal or equitable grounds or both.

M.C.R. 2.111(B)(2) provides in part:

Relief in the alternative or relief of several different types may be demanded.

The Constitution of the State of Michigan together with the implementing language of RJA make vest the circuit court with jurisdiction to issue the requested injunctive relief when, as in the case at bar, the public health and general welfare of the people of the state are at stake.

Const 1963, article 4, § 51 provides in part:

The public health and general welfare of the people of the state are hereby declared to be matters of primary public concern.

M.C.L. 600.2940; M.S.A. 27A.2740 provides:

All claims based on or to abate a nuisance may be brought in the circuit court. The circuit court may grant injunctions to stay and prevent nuisance.

Michigan Courts have consistently upheld the authority of the Attorney General to seek injunctive relief. *Attorney General, ex. Rel. Optometry Board of Examiners v. Peterson*, 381 Mich. 445-466; 164 N.W.2d 43 91969) held:

At common law, acts in violation of law constitute a public nuisance. Harm to the public is presumed public health, safety and welfare.* The attorney general, acting on behalf of the people, is a proper party to bring an action to abate a public nuisance. The existence of a criminal or other penalty for the practice of a profession without a license will not oust equity from jurisdiction. *In re Debs* (1895), 158 U.S. 564 (15 S. Ct. 900, 39 L.Ed. 1092).

Attorney General v. City of Grand Rapids, 175 Mich. 503, 532-533; 141 N.W. 890 (1913) stated:

If the city of Grand Rapids in emptying its sewage into the Grand river, as shown by the evidence, creates a nuisance to the public or riparian proprietors below

the city, the continuance or creation of that nuisance may properly be restrained by injunction, and the attorney general is a proper complainant.

Cross Co. v. UAW Local No. 155, 371 Mich. 184, 202-203; 123 N.W.2d 215 91963) stated:

There is no validity to defendants' claim that in the face of violence constituting even breaches of the public peace, or threats of imminent violence, the State must stand by helplessly while a Federal administrative agency determines whether or not to seek a Federal judicial remedy. At least *while Youngdahl v. Rainfair* and *United Automobile Workers v. Wisconsin Employment Relations Board* are still the land's law, Michigan's courts retain jurisdiction 'in the most elementary sense', as said in *Town & Country Motors, Inc. v. Local Union*, 355 Mich. 26, at p. 54, to entertain suits for injunctive relief against such conduct and, on a proper record to issue valid injunctive orders.

Under the *parens patriae* doctrine, the state may act on behalf of its citizens by filing a lawsuit if its sovereign or quasi-sovereign rights are implicated. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257-259; 92 S. Ct. 885, 888-889; 31 L. Ed.2d 184 (1972). *See also, Kelley v. Carr*, 422 F. Supp. 346 (W.D. Mich. 1977), *aff'd in part, rev'd in part* 691 F.2d 800 (6th cir. 1978). The State's *parens patriae* power vests it with the right to act as the representative of its citizens to prevent harm that will affect its general population in a substantial way. *Id.*; *Maryland v. Louisiana*, 451 U.S. 725; 101 S. Ct. 2114; 68 L. Ed. 576 (1981).

The unlawful targeting of children to create and maintain a consumer base of addicted smokers affects Michigan's general population by contributing to and perpetuating the State of Michigan's general population by contributing to and perpetuating the State of Michigan's and the Nation's largest health care crisis. The Defendants' conduct as alleged certainly causes harm affecting the general population of Michigan in a substantial way -- the direct effect being tremendous suffering and loss of life, resulting in billions of tax dollars being spent on State health care expenditures in response to the damage caused by the Defendants. The State is, without question, entitled to maintain a separate claim for an injunction to stop the wanton and illegal targeting of children by Defendants. This is proven through the absence of any authority to the contrary. Defendants Joint Motion is without

merit, and the State request the Court deny the same.

B. COURT'S POWER AND JURISDICTION

This Court has the power and subject matter jurisdiction to grant the requested injunctive relief. *Universal Am-Cam Limited v. Attorney General*, 197 Mich. App. 34, 37; 494 N.W. 787 (1982) held:

As a court of equity jurisdiction, the circuit court had subject-matter jurisdiction to issue a declaratory ruling, an injunction, or a writ of mandamus. Const. 1963, art 6, § 13; MCL 600.605; MSA 27A.605; *Consumers Power Co. v. Public Service Comm.*, 415 Mich. 134, 144; 327 N.W.2d 875 (1982); *State ex rel Ingham Co. Prosecutor v. American Amusement Co., Inc.* 71 Mich. App. 130, 135; 246 N.W.2d 684 (1976).

The intentional and wrongful targeting of children by Defendants for the sole purpose of maintaining and increasing profits is both unlawful and despicable. The requested injunctive relief is the most effective way to deter such future malicious conduct. Injunctive relief, if granted against all Defendants, will protect the children of Michigan from the Defendants' continued wanton and unlawful conduct. Specifically, the State seeks to have the Defendants enjoined "from promoting the sale of their cigarettes to minors. . . ." Complaint, ¶ 229. This relief is essential "to prevent substantial injury to the effected minors, such substantial injury being the danger that the minors would become addicted to cigarettes and thereby have their health and their lives placed in danger from smoking cigarettes." Complaint, ¶ 229. Injunctive relief is crucial, and the State is entitled to seek this relief due to the State's paramount interest in the preservation of its children's health and well-being. While irreparable injury need not be shown when the conduct sought to be enjoined is criminal in nature, the State will suffer an irreparable injury of the loss of its children, the additional drain on public health funds, and the continuation of an incredible health care crisis. *Berry Pontiac, Inc. v. Burke*, 19 Mich. App. 648; 173 N.W.2d 243 (1969).

Conclusion

Considering the Defendants inability to meet the standard for summary disposition and the impact of the Defendants' wanton conduct in this regard, the State respectfully requests the Court to deny Defendants' Motion and allow the separate claim for injunctive relief to remain before the Court. As Defendants' Motion is without merit and cannot meet

the standard essential for summary disposition, it is due to be denied.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

 x
(signed)_____

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