

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

March 21, 1997

Hon. Lawrence M. Glazer

**PLAINTIFF'S BRIEF IN REPLY TO DEFENDANTS'
BRIEF OPPOSING PLAINTIFF'S MOTION FOR
MORE DEFINITE STATEMENT AND TO STRIKE
AND SUMMARILY DISPOSE OF AFFIRMATIVE
DEFENSES**

I INTRODUCTION

On August 21, 1996, the State filed its multi-count Complaint, setting out with specificity detailed factual allegations against all named Defendants. The answering Defendants responded by filing Answers containing pages of non-specific legal "verbiage," which the Defendants attempt to pass as "affirmative defenses." The Defendants present as few as twenty-nine (29) such "affirmative defenses" and as many as seventy-three (73). These defenses range from a hodgepodge of "stock" legal defenses and repeated denials of liability to claims of deprivation of constitutional rights. They lack any logical order. Moreover, they do not say to which of Plaintiff's Counts they apply, leaving the Court and the Plaintiff to guess what Defendants' inexact pleadings mean. What the Defendants have done, in fact, is assert at least 125 boilerplate defenses without giving any though whatsoever to whether these defenses even apply to the case at hand.

Certain of the defenses in each Answer are deficient in legal and factual support and are subject to a Motion to Strike under M.C.R. 2.115(B). Other defenses should more appropriately be the object of a Motion for a More Definite Statement under M.C.R. 2.115(A). Still other defenses are subject to a motion to dismiss under M.C.R. 2.116. Defendants claim that "the State has not cited case authority for rejecting a single specific affirmative defense pled by any defendant

here." (Def's Brf. at p.6) In response, the Plaintiff addresses each group of defenses under the appropriate section of M.C.R. 2.115 and gives authority supporting rejection of each.¹ The Plaintiff would note that it is the Defendants' "shotgun" approach to pleading that has created this confusion.

**II PLAINTIFF MOVES TO STRIKE CERTAIN
ALLEGED AFFIRMATIVE DEFENSES AS BEING
REDUNDANT, IMMATERIAL, AND IMPERTINENT
AND MOVES TO DISMISS CERTAIN DEFENSES
WITHOUT LEGAL SIGNIFICANCE TO THE CLAIMS
ASSERTED IN PLAINTIFF'S COMPLAINT.**

M.C.R. 2.115(B) provides:

(B) Motion to Strike. On motion by a party or on the court's own initiative, the court may strike from a pleading redundant, immaterial, impertinent, scandalous, or indecent matter, or may strike all or part of a pleading not drawn in conformity with these rules.

As Defendants' Brief notes, "to strike an affirmative defense, the moving party must demonstrate to the court that the facts are clear, that any questions of law are equally clear and undisputed, and that under no set of circumstances could the defense succeed." (Def. Brf. at p. 11) (citing *SEC v. Sands*, 902 F. Supp. 1149, 1165 (C.D. Cal. 1995)). Additionally, Plaintiff may move this Court for dismissal of any and all defenses pled that are legally inadequate to the claims in the Plaintiff's Complaint. Closer examination reveals that most of the Defendants' alleged affirmative defenses revolve around legal concepts that simply fail to pass muster under the standard of M.C.R. 2.115(B) or 2.116(B).

¹ The first seven groups of defenses on the attached chart (Exhibit A) revolve around seven different legal concepts: (1) the Plaintiff is limited to an action in subrogation, (2) the Attorney General has no standing to bring this action, (3) various defenses under the Michigan Consumer Protection Act, (4) the Attorney General lacks Authority to enter into a contingency fee contract, (5) various defenses under the Michigan Antitrust Reform Act, (6) the State's claim to damages for a voluntarily undertaken duty, and (7) punitive damages. The Plaintiff addresses these issues in separate briefs. In particular, the validity of defenses based on subrogation, standing, and consumer protection are being addressed in briefs filed along with this brief. The issues of contingency fee validity, the propriety of Plaintiff's antitrust counts, the voluntarily undertaken duty, and punitive damages are addressed in Plaintiff's Responses to Defendants' Motions to Dismiss, filed by Plaintiff on February 28, 1997. These other briefs point out the fallacy of the defensive concepts alleged within these theories, and the Plaintiff submits that all related affirmative defenses, as presented in the charted groupings, should be stricken under M.C.R. 2.115(B) or dismissed under M.C.R. 2.116(B).

Furthermore, the Defendants present no factual support for the affirmative defenses at issue. Under these circumstances, the defenses presented here could never succeed. As such, Plaintiff respectfully requests the Court to dispose of the following affirmative defenses.

A. All Affirmative Defenses Which Depend Upon Products Liability Tort Law Fail Due To The Fact That The Instant Case Is Simply Not A Products Liability Case.

The Plaintiff respectfully requests the Court to strike or to dismiss all defenses which Plaintiff has grouped under the heading of products liability related defenses. Defendants cite portions of the Complaint for the proposition that the State is making products liability claims. (Def. Brf. at pp. 13-16) The Defendants obviously confuse the factual narrative of the detailed Complaint with the actual counts of the Complaint. The State has alleged no products liability claim but relied instead upon claims under the Michigan Consumer Protection Act, the Michigan Antitrust Reform Act, restitution based upon unjust enrichment, breach of a duty voluntarily undertaken, and injunctive relief to protect Michigan's children. In order to support the claims that Plaintiff has alleged, the Complaint contains detailed references to the wrongful conduct over the last 40 years. In particular, the Complaint explains how the Defendants' conspiracy deceptively misled the Michigan public and the State about the grave health risks associated with tobacco use. The Defendants misconstrue this factual support in an effort to recharacterize the case as a products liability case. This is unavailing since the Plaintiff has alleged no products liability count in their Complaint. The State is not bringing a "giant subrogation" case and is not suing to recover for any injured smoker.

B. The Defendants' Damages Related Defenses Are Without Merit.

As to the next group, the Defendants raise affirmative defenses regarding Defendants' claim for relief from the damages requested in this action. The Defendants raise affirmative defenses regarding Plaintiff's alleged failure to mitigate damages, the doctrine of avoidable consequences, Defendants' right to reduction by settlement, satisfaction and payment, the lack of joint and several liability, the speculative nature of the damages, and the Defendants' right to set off. Each of these defenses should be stricken in accordance with M.C.R. 2.115(B) or dismissed pursuant to M.C.R. 2.116(B).

The Defendants have no right to a claim for mitigation of damages because the Defendants

committed an intentional injury against the State of Michigan.

[C]ourts have placed one hundred percent of the fault on the party whose actions were intentional. Thus, a defendant who intentionally injures a plaintiff is not entitled to mitigation of damages on the basis of the fact that the plaintiff's negligence was also a proximate cause of his injury.

Hickey v. Zezulka, 439 Mich. App. 408, 442; 487 N.W.2d 106, 121 (1992). See also, *Willis v. Ed Hudson Towing, Inc.*, 109 Mich. App. 344; 311 N.W.2d 776 (1981) (stating that the rule requiring the injured party to mitigate damages does not apply where the invasion of rights is due to defendant's intentional, or positive and continuous, tort.) The Defendants' own willful, conspiratorial conduct as described in the State's Complaint defeats any claim for mitigation of damages. The law related to mitigation of damages does not protect Defendants' activities in pursuing this continuous, willful, and conspiratorial activity.

Likewise, the doctrine of avoidable consequences does not apply as the Defendants' conduct amounts to an intentional effort to injure. "It is only where the damage is the result of the 'defendant's intentional or positive and continuous tort' that the doctrine of avoidable consequences will not apply." *Kratze v. Independent Order of Oddfellows, Garden City Lodge*, 442 Mich. 136, 141; 500 N.W.2d 115, 141 (1993). Therefore, once again the Defendants' intentional efforts to suppress the truth about smoking and health while misleading Michigan public health officials and regulators defeats the application of the doctrine of avoidable consequences in this case.

One of the most puzzling damages related defenses posed by the Defendants is Brown & Williamson Tobacco Company's ("B&W") claim that it is entitled to a reduction of any damage award in the event that Plaintiff settles with any other Defendant. (B&W Answer - Affirmative Defense No. 70.) The Plaintiff is left to comprehend this defense in a vacuum, absent any legal or factual support for such an assertion. By claiming that one Defendant's settlement is a settlement for all, B&W admits the conspiratorial enterprise and concedes to Plaintiff's position that the tobacco industry defrauded the American public as one collusive unit. This defense is unavailing.

Considering Defendants' claim to satisfaction and payment, the Plaintiff is at a loss as to how the State of Michigan has already been compensated for the billions of dollars spent on health care as a result of

being duped by the tobacco conspiracy. Even if one considers the economic impact that the sale of cigarettes within the State of Michigan has on its economy, that falls pathetically short of compensating the State for the fraud perpetrated upon it and its citizens. "[I]t is difficult to maintain the proposition that anything short of complete satisfaction by payment will discharge it..." *Atlantic Dynamite Co. v. Andrews*, 97 Mich. 466, 470; 56 N.W. 858, 859 (1893).

Certain Defendants also present the idea that joint and several liability is unavailable in this action.

At common law, where the conduct of two or more actors proximately causes a single injury to a plaintiff, while the plaintiff may pursue compensation for the injury from any or all of the defendants, the plaintiff is entitled to only one satisfaction....

'The injured party has the right to pursue them jointly or severally at his election, and recover separate judgments; but, the injury being single, he may recover but one compensation.' [citation omitted.]

Kaminski v. Newton, 176 Mich. App. 326, 328; 438 N.W.2d 915, 916 (1988). The State seeks compensation for its aggregate but still singular injury. The State realizes that it is entitled to "but one compensation", but this compensation can be collected from any and all of the members of the tobacco conspiracy. "[T]he liability of conspirators to civil damages is joint and several, ... [citations omitted.]" *Brown v. Brown*, 338 Mich. 492, 504; 61 N.W.2d 656, 662 (1953).

Considering the Defendants' allegations concerning the speculative nature of the damages in this case, the State is fully prepared to prove its damages in accordance with the specificity required by Michigan law.

Mathematical precision in the assessment of damages is not required, where from the very nature of the circumstances precision is unattainable, particularly where the defendant's own act causes the imprecision. [citations omitted] *Public policy demands that, when damages are not susceptible of precise calculation because of an act of the wrongdoer, the risk of giving more than fair compensation be cast upon the wrongdoer.* (emphasis added).

Willis v. Ed Hudson Towing, Inc., 109 Mich. App. 344, 350; 311 N.W.2d 776, 778 (1981). Any alleged imprecision in determining how much money the State has paid in treating smoking related illnesses is a direct result of the Defendants' own fraudulent activities. The Defendants' conspiracy has such wide ranging effects upon Michigan that the sheer volume of Medicaid and other expenditures makes exact precision a difficult task. Given the tobacco industry's own malicious misconduct, any imprecision of damages should be "cast upon the wrongdoer." *Id.*

The final damages related affirmative defense presented here is the Defendants' allegation that the tobacco industry is entitled to a set-off of damages. "The matter of set-off is governed by statute, ..." *Mason v. Lee-Bert*, 326 Mich. 32, 41; 39 N.W.2d 319, 324 (1949); see also, *Roelmeyer v. Roelmeyer's Estate*, 219 Mich. 322; 189 N.W. 83 (1922). The Defendants are unable to present a single statute, applicable to the counts in the Complaint which would entitle Defendants to any amount in set-off.

Given the clear Michigan law on all of Defendants' purported affirmative defenses related to damages, the State respectfully requests the Court to strike, or in the alternative to dismiss, every defense within Plaintiff's damages group as illustrated on the attached chart. (Exhibit A.)

C. Affirmative Defenses Based Upon Constitutional Principles Are Inapplicable To The Case At Hand.

As further abuse of the pleading process, the Defendants pleaded constitutional arguments into their Answers with absolutely no factual or legal support for the defense. To the extent the Plaintiff can discern the applicability of these defenses to the case at hand, the defenses are obviously unsupported and have no chance of success. By the standards of M.C.R. 2.115(B) and M.C.R. 2.116(B), respectively, all of these constitutional oriented defenses should be stricken or dismissed.

1. Selective Prosecution

The Defendants' claims that certain defendants have been selectively prosecuted. "Selective prosecution claims require proof of intentional or purposeful discrimination." *People v. Weathersby*, 204 Mich. App. 98, 114-115; 514 N.W.2d 493, 502 (1994).

2. Retroactive Applicability Of The Law / Ex Post Facto Arguments.

The Defendants' *Ex Post Facto* defense is inapplicable to the case at bar. The *Ex Post Facto* clause of the United States Constitution prohibits the retroactive application of criminal or penal statutes. *Collins v. Youngblood*, 497 U.S. 37, 41 (1990). In this case, the plaintiff asserts civil claims for relief as opposed to subjecting the defendants to criminal penalties for their conduct. Given this clear distinction, the Plaintiff's claims are not barred by the *Ex Post Facto* clause. See also, *People v. Chapman*, 301 Mich. 584, 600; 4 N.W.2d 18, 25 (1942): "It is well established that such *ex post facto* clause of the State Constitution and also the *ex post facto* clause of the Federal Constitution, art. 1, § 9-(3), relate only to criminal cases."

Furthermore, those affirmative defenses based on a general notion of retroactivity also fail. Where the retroactive application of statutes or rules does not affect the substantive rights of a party, the *Ex Post Facto* clause does not bar the application. See *Dobbert v. Florida*, 432 U.S.282, 293 (1977). The counts of the State's Complaint seek relief for an aggregate injury to the State suffered due to the Defendants' willful, fraudulent conduct. The Defendants have never had a substantive right to avoid the responsibility of redressing injuries that this conduct caused. The State's Complaint holds the Defendants accountable for their conspiracy but does not alter any substantive rights. As such, the retroactivity defenses fail.

3. Commerce Clause And Due Process

The Defendants claim that this action is violative of the Commerce Clause of the United States Constitution. "It is undisputed that state actions are within the domain of the Commerce Clause if they burden interstate commerce or impede its free flow." *Citizens for Local Alternatives and Responsible Environment v. Clare County Board of Commissioners*, 211 Mich. App. 494, 499; 536 N.W.2d 286 (1995). The State's Complaint has no effect on the free flow of interstate commerce. This is an equitable action to recover the State of Michigan's Medicaid payments and other costs which have been endured by the State due to the tobacco cartel's intentional and wrongful behavior. The State is not legislating restrictions that affect other states but brings this suit on behalf of the State of Michigan that has been defrauded by the tobacco industry. As such, the State's requests for damages do not hinder interstate commerce but only redress the State of Michigan's aggregate injury suffered at the hands of the Defendants' conspiracy. Furthermore, the equitable injunctive relief pleaded in the State's Complaint is not a restriction no commerce but is a restriction on lying

and conspiring to defraud. In this sense, the State's action promotes the free flow of legitimate interstate commerce and only hinders collusive enterprises who attempt to infiltrate the State of Michigan.

The Defendants claim that the imposition of market share liability is violative of their due process rights. However, the market share theory is appropriate in this case in order to redress the State's injury, and the Defendants' due process rights are not implicated. Under the market share theory of liability, "each defendant will be held liable for the proportion of the judgment represented by its share of that market..." *Sindell v. Abbott Laboratories*, 163 Cal. Rptr. 132, 145; 607 P.2d 924, 937 (Cal.), cert. Denied, 449 U.S. 912 (1980). The *Sindell* court embraced the market share theory upon realizing that a court must "fashion remedied to meet...changing needs." *Id.* at 144; 607 P.2d 936. Likewise, the Michigan Supreme Court has indicated a willingness to accept the market share theory of liability in the right context. In *Abel v. Eli Lilly and Co.*, 418 Mich. 311, 337; 343 N.W.2d 164,176 (1984), the Court decided not to extend the theory to the specific facts before it; however, the Court echoed the policy of *Sindell* by stating that "when traditional concepts fail to meet the demands which are placed upon [the courts], ...novel responses develop to fill the void and answer society's need for equitable loss distribution." *Id.* at 337, 176. Notably, the Michigan Supreme Court did not even mention a due process concern when discussing the market share theory. The market share theory answers the State's need for equitable loss distribution in that it is an efficient manner of holding the Defendants individually responsible while providing the State sufficient relief for its cumulative injury.

D. The State's Action Does Not Impair The Defendants' Right To A Trial By Jury.

The Defendants claim that this action violates their right to have a jury determine whether the Defendants are responsible for injuries to specific individuals. Once again the Defendants try to rewrite the Complaint for their own benefit. Presenting evidence to a jury of an individual's injury or Medicaid expenses would be neither an adequate nor efficient method of establishing the State's cumulative damage. Also, this case is primarily an equitable action largely based on principles of unjust enrichment. In Michigan, "[t]he constitutional right to trial by jury, [citation omitted]...applies to civil actions at law that were triable by jury at the time the constitutional guarantee was adopted. [citation omitted]...There was no such right where the relief sought was equitable in nature. [citation omitted]" *Wolfenden v. Burke*, 69 Mich. App. 394, 399; 245 N.W.2d 61, 64 (1976). Given the overriding

equitable nature of the relief requested in the Complaint, Defendants claim of a right to a jury trial fails.

E. The State's Action Is Not Preempted By Federal Legislation.

The Defendants' preemption argument is mere sophistry. Defendants are fully aware that the State of Michigan's claims are efforts to meet both its responsibilities to its own taxpayers and to the federal government which shares Medicaid funding burdens. The Defendants represent the largest single source of injury paid for by Michigan Medicaid money. This action is not preempted by federal law; it is encouraged by it. The Cigarette Labeling and Advertising Act specifically does not preempt actions based on fraud and deceit. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504; 112 S. Ct. 2608; 120 L. Ed.2d 407 (1992).

F. Defendants' Fail To Prove The Elements Of The Equitable Defenses Presented In The Answers.

The Defendants assert a variety of defenses which apparently relate to the equitable claims in the Complaint. Concerning the litany of equitable defenses - estoppel, ratification, waiver, unclean hands, *in pari delicto*, laches, and no unjust enrichment - the Plaintiff provides the law relevant to each as follows:

1. Estoppel:

Equitable estoppel arises where a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, the other party justifiably relies and acts on that belief, and the other party will be prejudiced if the first party is allowed to deny the existence of those facts.

Guise v. Robinson, 219 Mich. App. 139, 144; 555 N.W.2d 887 (1996).

Plaintiff presumes that by raising this defense, Defendants are claiming that corruption would be tolerated. In reality, the State was a victim of the conspiracy's fraudulent behavior designed to mislead the State of Michigan as well as its citizens. This defense is not valid to the claims against these Defendants.

2. Ratification: *David v. Serges*, 373 Mich. 442, 443-444; 129 N.W.2d 882 (1964) stated:

"The Restatement of Agency (2d), § 82 defines ratification thusly:

'Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him.'"

See also, *City National Bank of Detroit v. Westland Towers Apartments*, 152 Mich. App. 136; 393 N.W.2d 554 (1986).

The Plaintiff never ratified the deceit and willful misconduct alleged. This defense is irrelevant.

3. Waiver:

In order for plaintiff to waive its rights against defendant, it must have intentionally and knowingly relinquished those rights.

Commercial Union Insurance Company v. Medical Protective Company, 136 Mich. App. 412; 422; 356 N.W.2d 648 91983).

The Plaintiff never waived any of its rights to hold the Defendants accountable for their deceptive behavior. In fact, due to the Defendants' suppression of the truth about smoking and health, the State had no opportunity to "intentionally and knowingly" make any decision concerning its rights against the tobacco industry.

4. Unclean Hands:

In determining whether the plaintiffs come before this Court with clean hands, the primary factor to be considered is whether the plaintiffs sought to mislead or deceive the other party, not whether that party relied upon plaintiffs' misrepresentations.

Stachnik v. Winkel, 394 Mich. 375, 387; 230 N.W.2d 529, 534 (1975).

Once again, the Defendants refuse to accept responsibility for their misconduct and try to blame the State, whose only role was that of providing medical assistance to the State's economically disadvantaged the expense of which should have been paid by the tobacco industry.

5. *In Pari Delicto*:

Although *in pari delicto* literally means "of equal fault," the doctrine has been applied, correctly or incorrectly, in a wide variety of situations in which a plaintiff seeking damages or equitable relief is himself involved in some of the same sort of wrongdoing.

Schick v. Steiger, 583 F. Supp. 841, 844 (E.D. Mich. 1984).

It is difficult to conceive how the State could be considered "of equal fault" in the matters alleged in the Complaint.

6. Laches:

A passage of time, prejudice to the defendants, and lack of diligence by the plaintiff are essential prerequisites to invoking laches.

Torakis v. Torakis, 194 Mich. App. 201, 205; 486 N.W.2d 107, 109 (1992).

"A defendant should not be heard to interpose the defense of laches where the claim against him arises from his own fraud and where *** the very success of his fraud places the aggrieved parties in temporary ignorance of their rights and thus causes the lapse of time occurring prior to the assertion of the claim."

Kozak v. Catholic Social Services of St. Clair County, 92 Mich. App. 579, 584; 285 N.W.2d 378 (1979).

The State of Michigan was defrauded by the tobacco cartel in a clever scheme that evolved over decades through the continuing wrongful conduct of Defendants. The Defendants have no claim to the doctrine of laches.

7. Plaintiff Meets All Elements Of Defendant's Unjust Enrichment:

The elements of a claim for unjust enrichment are: (1) receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendants.

Barber v. SMH (US), Inc., 202 Mich. App. 366, 375;

509 N.W.2d 791 (1993).

G. Miscellaneous.

The Defendants claim the defenses of *res judicata* and collateral estoppel in a fashion that once again attempts to characterize this action as an action on behalf of an individual injured person. The Defendants' Brief (p. 19) states "without knowing precisely whose medical costs the State wants to recover, Defendants cannot tell whether those individuals or the State were involved in previous proceedings that resulted in determinations against them that would be the basis for *res judicata* or collateral estoppel in this case." This statement misinterprets the concepts of *res judicata* and collateral estoppel. The relevant parties are the State of Michigan and the tobacco conspirators. The Defendants need no other information to determine that there has been no prior proceeding to diminish the merits of the case at hand.

Defendants claims on the State's failure to plead fraud with particularity are without merit. The State's Complaint comprises 78 pages of fact specific allegations. The State was explicit in laying out the full story of one of the most deadly and deceitful enterprises in American history.

All claims of improper venue fail. M.C.R. 2.222 provides:

(A) Grounds. The court may order a change of venue of a civil action, or of an appeal from an order or decision of a state board, commission, or agency authorized to promulgate rules or regulations, for the convenience of parties and witnesses or when an impartial trial cannot be had where the action is pending.

There exists no factual basis as that the current venue is extraordinarily inconvenient or incapable of being an impartial forum.

The last affirmative defense that Plaintiff requests the Court to dispose of is the baseless assumption that simply because the sale of cigarettes is legal, the instant cause of action should not be heard. The Defendants' Brief (p. 23) states "[t]hey seek only to rely on the legality of their conduct, approved by extensive governmental regulation and taxation of the industry, as a defense to these accusations of 'unlawful' conduct." The failure of this argument lies in the State's allegation that the legality of cigarettes is a direct result of the fraud perpetrated on federal, state,

and local governments as well as national health officials. Allowing legality as a defense on these facts as alleged is not supportable in law or logic.

III. PLAINTIFF REQUESTS A MORE DEFINITE STATEMENT OF DEFENSES WHICH ARE PLEADED WITHOUT SUFFICIENT FACTUAL OR LEGAL SUPPORT.

A. Plaintiff's Motion For A More Definite Statement Is Procedurally Proper.

Not only do the Defendants attempt to recharacterize the State's case, but the Defendants attempt to recharacterize the State's case, but the Defendants seek to rewrite the law of Michigan. The Defendant's Brief (p. 4) quotes M.C.R. 2.115(A) for the proposition that "a motion for a more definite statement...must be made 'before filing a responsive pleading.'" (emphasis added). The defendants misconstrue the true language of M.C.R. 2.115(A) which actually states:

(A) Motion for a More Definite Statement. If a pleading is so vague or ambiguous that it fails to comply with the requirements of these rules, an opposing party *may* move for a more definite statement before filing a responsive pleading. (emphasis added.)

The plain language of the rule is permissive in favor of the party who needs a more definite statement.

B. Plaintiff Is Entitled To A More Definite Statement Of Certain Affirmative Defenses Posed By Defendants.

The Defendants present the standard for pleading affirmative defenses as quoted in *Hanon v. Barber*, 99 Mich. App. 851, 855-856; 298 N.W.2d 866 (1980) which states, "[I]t is the intent of the rule to provide for fact pleading sufficient to give plaintiff notice of the affirmative defenses alleged." (emphasis in original.) The problem is that the Defendants do not live up to these standards in pleading the defenses in their Answers. The following defenses are those which the Plaintiff argues as being factually and legally insufficient as presented. In order to give the Plaintiff appropriate notice, a more definite statement is required for these defenses. Additionally, the Plaintiff respectfully requests this Court to require the Defendants to provide a more definite statement of any of the previously discussed defenses alleged by the Defendants which the Court decides not to summarily dispose of under M.C.R. 2.115(B) or M.C.R. 2.116(B).

1. First Amendment / Noerr-Pennington.

The Defendants try to avoid liability by claiming that every bad act described in the State's Complaint is protected by the First Amendment. Considering the vast depths of First Amendment law, the Plaintiff submits that such a general application of the First Amendment is an abusive misuse of the pleading process.

Within their faulty First Amendment claims, the Defendants raise the Noerr-Pennington doctrine, apparently as a shield to protect them from anticipated discovery. The Plaintiff respectfully requests this Court to require the Defendants to plead a more definite statement of their entitlement to this defense since Noerr-Pennington appears inapplicable and provides no bar to discovery. The following excerpt from Robert L. Tucker, *Vexatious Litigation as Unfair Competition, and the Applicability of the Noerr-Pennington Doctrine*, 22 Ohio N.U.L. Rev. 119, 133-134 (1995) gives a good summary of the Noerr-Pennington background:

"A. Historical Development of Noerr-Pennington Doctrine

The Noerr-Pennington Doctrine refers to a trilogy of Supreme Court cases: *Eastern Railroad Presidents v. Noerr Motor Freight*, 365 U.S. 127 91961), *reh'g denied*, 365 U.S. 875 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); and *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972). That trilogy of cases holds that activities attempting to influence legislative, executive, administrative or judicial action to eliminate competition are wholly immune from federal antitrust liability unless the conduct falls within the "sham exception" to the doctrine.

The Noerr-Pennington doctrine and the sham exception were developed by the Supreme Court in a series of cases in which it was alleged that defendants' attempts to obtain commercially favorable actions from different branches of government violated the Sherman Act. [15 U.S.C. §§ 1 and 2 (1982).] *Eastern Railroad Presidents v. Noerr Motor Freight (Noerr)* involved activities of the defendant seeking favorable legislation while *United Mine Workers v. Pennington (Pennington)* involved attempts by defendants to influence

executive actions, and *California Motor Transport Co. v. Trucking Unlimited* (*California Motor Transport*) involved the institution of administrative and judicial proceedings. Noerr and Pennington both held that efforts to secure favorable legislation or executive action were not within the scope of conduct regulated by the Sherman Act. The Noerr Court held that acts directed at the political branches of government stand outside of the antitrust laws, in part because the original purposes of the Sherman Act did not include the regulation of political activity, and in part because it was questionable whether the First Amendment would allow such regulation. See *Premier Elec. Const. Co. v. National Elec. Contractors Ass'n, Inc.*, 814 F.2d 358,371 (7th cir. 1987). The *Pennington* Court extended the doctrine to efforts to influence administrative agencies. See *Pennington*, 381 U.S. 657 (1965).

The *California Motor Transportation Court* identified the First Amendment as the principal source of the Noerr-Pennington doctrine and extended the doctrine to the conduct of litigation. The "sham" exception to the Noerr-Pennington doctrine was first established through a sentence in the Noerr opinion which stated that "[t]here may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." *Noerr*, 365 U.S. at 144. The *California Motor Court* concluded that baseless litigation brought in bad faith for the purpose of obstruction, and without reasonable prospect of success, would be a sham within the meaning of *Noerr*. [footnotes omitted.]"

Plaintiff submits that Noerr-Pennington does not provide unlimited protection from discovery in a litigation context, a point well summarized in *North Carolina Electric Membership Corp. v. Carolina Power & Light Co.*, 666 F.2d 50, 53 (4th Cir. 1981).

First, Noerr-Pennington is by definition

an exemption from anti-trust liability, and not a bar to discovery of evidence. ...[T]he [Supreme C]ourt in *Pennington* held that evidence of legislative activity, if relevant, must be accompanied by an instruction which limits the jury's consideration to non-legislative activities. 381 U.S. at 670; 85 S. Ct. at 1593. That holding presumes the admissibility of relevant evidence. If the evidence is arguably admissible, certainly it should be discoverable.

Second, the appellee's contention that the discovery of this material would have a chilling effect is without merit. In *Herbert v. Lando*, 441 U.S. 153; 99 S. Ct. 1635; 60 l. ed.2d 115 (1979), the Supreme Court ordered production of a memorandum from a producer's "behind the scenes" planning conference for a television news special. The Court held that such discovery would not have a chilling effect upon the news organization's first amendment rights. If discovery into the internal affairs of a news organization does not have a chilling effect, then neither would discovery in this case.

Finally, we think that the district court has too narrowly limited Fed. R. Civ. P. 26. ...there is no authority for fitting the Noerr-Pennington doctrine into the "privilege" exception to the rule. Nor is there any question that discovery of this material may lead to admissible evidence. Indeed, the *Pennington* decision allows at least some of that evidence to be admitted at trial if accompanied by a proper jury instruction. Thus the limitations placed upon plaintiffs' discovery are outside the discretionary control of the district court, and therefore invalid.

Id. at 53. This case reveals that Noerr-Pennington fails to give the Defendants any advantage in any stage of the litigation process. As noted in *Boone v. Redevelopment Agency of the City of San Jose*, 841 F.2d 886, 896 (9th Cir. 1988), *cert. denied*, 488 U.S. 965 (1988), "misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process."

In summary, to defeat the Defendants use of the Noerr-Pennington doctrine, the Plaintiff poses the

issue as one of judicial integrity. The Defendants are hiding behind a doctrine that was never intended to inhibit full, legitimate discovery, and a more definite statement of Noerr-Pennington's applicability is required.

2. Other Defenses Requiring A More Definite Statement

The Plaintiff also requests a more definite statement of the following defenses which have been pled with no legal or factual support to give the Plaintiff sufficient notice of how the defense applies:

- a. The instant action seeks to suspend application of the laws of Michigan for Defendant without an act of the legislative branch.
- b. The instant action is a violation of the separation of powers.
- c. This case is preempted by Michigan tort reform.
- d. This action is barred by provisions of Public Acts 161 and 249 of 1995.
- e. This suit is barred by a lack of personal jurisdiction.
- f. Various defenses to the Plaintiff's claim for breach of a duty voluntarily undertaken.
- g. Defendants' claim that the Complaint violates equal protection of the law.

Defendants' pleading of these defenses is inadequate and fails to comply with the standards of pleading affirmative defenses under M.C.R. 2.115(A).

Respectfully submitted,

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