STATE OF MINNESOTA **SECOND JUDICIAL DISTRICT**

COUNTY OF RAMSEY **Case Type: Other Civil**

THE STATE OF MINNESOTA,

COURT FILE NO. C1-94-8565

BY HUBERT H. HUMPHREY, III,
ITS ATTORNEY GENERAL,

and

BLUE CROSS AND BLUE SHIELD
OF MINNESOTA,

Plaintiffs,

vs.

PHILIP MORRIS INCORPORATED,
R. J. REYNOLDS TOBACCO COMPANY,
BROWN & WILLIAMSON TOBACCO CORPORATION,
B.A.T. INDUSTRIES P.L.C.,
LORILLARD TOBACCO COMPANY,
THE AMERICAN TOBACCO COMPANY,
LIGGETT GROUP, INC.,
THE COUNCIL FOR TOBACCO RESEARCH - U.S.A., INC., and
THE TOBACCO INSTITUTE, INC.,

Defendants.

THE STATE OF MINNESOTA'S MEMORANDUM IN OPPOSITION
TO DEFENDANTS' MOTION TO COMPEL
THE PRODUCTION OF GAMBLING DOCUMENTS

REDACTED

The State of Minnesota respectfully submits this memorandum in opposition to defendants' motion to compel the production of gambling documents. Defendants' motion seeks documents which do not even remotely relate to this action. In fact, in many respects this motion parallels an earlier motion by defendants seeking documents relating to products "other than tobacco," which was summarily denied by this Court. The same result should apply to the present motion.[1]

In this motion, defendants attempt to compare cigarettes --which, internally, defendants have long recognized contain a pharmacologically active and addictive drug -- to a wholly unrelated activity, gambling. Defendants fail to cite any case law to support their motion. The reason is clear. The law demands that another product or activity be "substantially similar" to the one at issue in litigation before discovery is permitted. See generally Rule 26.02, Minn. R. Civ. P. (information must appear "reasonably calculated to lead to the discovery of admissible evidence").

An examination of cases where courts have analyzed the issue of "similar" occurrences shows haw far distant from settled law defendants have ventured. As the Eighth Circuit has stated:

> [E]vidence of other injuries may also raise extraneous controversial points, lead to a confusion of issues, and present undue prejudice disproportionate to its usefulness. For other accident evidence to be admissible, the proponent of the evidence must show that the facts and circumstances of the other incident are substantially similar to the case at bar.
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> . . .
>
> The general rule of limiting the admission of other accident evidence to those events which were substantially similar ensures that the focus of the trial stays on the specific type of accident forming the basis of the case.

Drabik v. Stanley-Bostitch, Inc., 997 F.2d 496, 508-09 (8th Cir. 1993) (emphasis added) (citations omitted). See also Hofer v. Mack Trucks, Inc., 981 F.2d 377, 380 (8th Cir. 1992) ("While the standard of relevance in the context of discovery is broader than in the context of admissibility . . . this often intoned legal tenet should not be misapplied so as to allow fishing

[1] See Order of June 28, 1996, at ¶ 3 (denying defendants' motion to compel the production of documents responsive to Request No. 41, which related to "products associated with risk of disease or injury other than tobacco").

expeditions in discovery. Some threshold showing of relevance must be made before parties are required to open wide the doors of discovery and to produce a variety of information which does not reasonably bear upon the issues in the case."); Earl v. Gulf & Western Mfg. Co., 366 N.W.2d 160, 163 (Wis. Ct. App. 1985) (reversing trial court order allowing discovery on defendant's punch presses other than the particular model which caused plaintiff's injury), review denied, 371 N.W.2d 376 (Wis. 1985); Haukom v. Chicago Great Western Ry. Co., 132 N.W.2d 271, 279 (Minn. 1964) ("it must appear that the circumstances surrounding the other accidents were substantially the same as those involved in the accident in litigation. . . .").[2]

In the present case, it is preposterous to argue that cigarettes and gambling are substantially similar. Even if defendants' exaggerated attempts to demonize gambling[3] were accurate, the two activities -- cigarette smoking and gambling -- do not come close to meeting the test of "substantially similar" as routinely applied by courts across the country.

Indeed, no product or activity is analogous to cigarettes and cigarette smoking. Cigarette smoking is the single most preventable cause of death in our society. The number of deaths caused by smoking -- more than 400,000 each year in the United States -- surpasses the combined totals for alcohol, suicide, homicide, AIDS, cocaine, heroine, and motor vehicles. At least one out of every four regular smokers dies of smoking-related diseases. Cigarettes kill when used as intended, and there is no known level of safe consumption. See generally Complaint, at ¶¶ 76-77.

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[2] A similar rule applies to equitable claims, notwithstanding defendants' attempts to intone "unclean hands" to expand discovery to unjustifiable bounds. See, e.g., Thompson v. Winter, 42 Minn. 121, 122, 43 N.W. 796, 797 (1889) ("We have never found a case where the court refused the relief as a means of enforcing some independent claim of the defendant against the plaintiff . . . . If such could be regarded as an equitable reason for denying relief, every action of the kind might involve the investigation of all unclosed transactions between the parties, whether relating to the contract or subject-matter of the action, or entirely distinct from it.").

[3] Defendants' attacks on gambling are particularly surprising given that the very law firm which submitted defendants' memorandum (counsel for Philip Morris Incorporated) is one of the leading law firms representing gaming interests in the State of Minnesota.

None of the above applies to gambling. Indeed, any attempt to compare cigarettes to gambling, or any other activity or product, only serves to trivialize the grim realities of the toll of smoking. Certainly, neither the Minnesota Lottery nor bingo nor raffles -- three of the gambling "schemes" encompassed by the defendants' document requests -- kill when played as intended, or cause lung cancer, emphysema, bronchitis, stroke, or heart disease.

Nor is gambling an addictive behavior or a drug, comparable with cigarette smoking. Cigarettes are recognized as addictive by virtually every major medical organization, including: the Office of the U.S. Surgeon General, the World Health Organization, the American Medical Association, the American Psychiatric Association, the American Psychological Association, and the American Society of Addiction Medicine. See generally Complaint, at ¶ 64. Even the diagnostic manual cited by defendants, the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV"), classifies nicotine as a substance "dependence," which is synonymous with "addiction." Exhibit 1; see also Exhibit 2.[4] Thus, DSM-IV groups nicotine dependence in a chapter discussing "substance-related disorders," including cocaine and opiods. Id., at 177. By contrast, DSM-IV discusses gambling in a completely different chapter on "impulse-control disorders," including kleptomania and pyromania. Id., at 609.

In fact, it is increasingly recognized that nicotine -- the primary pharmacologically active component of cigarettes -- is a drug. Defendants have long been aware of this, as a number of their internal documents demonstrate. See, e.g., Exhibit 3 (CONFIDENTIAL) (xxxx

xxxxxxxxxxxxxxxxxxxxxxxxx); Exhibit 5 ("In a sense, the tobacco industry may be thought of as being a specialized, highly ritualized and stylized segment of the pharmaceutical industry. Tobacco products, uniquely, contain and deliver nicotine, a potent drug with a variety of physiological effects.").[5]

Similarly, a top scientist at Philip Morris, William Dunn, who was known within the company as "the Nicotine Kid," admitted as long ago as 1969 that "of course" cigarettes are a drug. Exhibit 7. This internal admission was sent to Dr. Helmut Wakeham, the director of Philip Morris research and development. Dunn warned Wakeham, however, of the dangers publicly admitting that cigarettes are a drug:

> I would be more cautious in using the pharmic-medical model -- do we really want to tout cigarette smoke as a drug? <u>It is, of course, but there are dangerous F.D.A. implications to having such conceptualization go beyond these walls</u>.

<u>Id.</u> (emphasis added). The "dangerous implications" include FDA regulation of cigarettes as a drug, which defendants are actively contesting to this day. Thus, in direct contradiction of their internal documents, defendants continue to deny -- in public and in litigation, i.e. "beyond these walls" -- that cigarettes are a drug.[6]

Defendants' attempts to draw parallels between cigarettes and gambling

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[5] Defendants also compare nicotine xxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx. <u>See</u> Exhibit 4 (CONFIDENTIAL) (xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx xxxxxxxxxxxxxxxxxxxx

with respect to the issues of youth and societal costs also are an unbounded stretch. By defendants' expansive arguments, there would be literally no confines to discovery. Any product or activity -- no matter how remote -- would be discoverable. The marketing of numerous brands of beer by Philip Morris Companies Inc., for example, would certainly be at issue, to draw parallels to the issues of youth and societal costs.[7]

By defendants' own description, their discovery requests on gambling would involve a search of the files of numerous state agencies for a series of wide-ranging document requests. See Defendants' Memorandum, at n. 9 (listing six different state agencies). Clearly, this Court must draw the limits on discovery at some point. Defendants' motion to compel should be denied.

Dated this 4th day of November, 1996.

ROBINS, KAPLAN, MILLER & CIRESI

By: /s/ Roberta B. Walburn
Michael V. Ciresi (#16949)
Roberta B. Walburn (#152195)
Gary L. Wilson (#179012)
Tara D. Sutton (#23199x)

2800 LaSalle Plaza
800 LaSalle Avenue South
Minneapolis, Minnesota 55402-2015
(612) 349-8500

SPECIAL ATTORNEYS FOR THE STATE OF MINNESOTA

[7] Philip Morris Companies Inc., the parent company of defendant Philip Morris, includes the following brands of beer in its annual report: Miller, Molson, Leinenkugel, Foster's, Lowenbrau, Milwaukee's Best, Red Dog, and Magnum malt liquor. Exhibit 9.