STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF RAMSEY | SECOND JUDICIAL DISTRICT

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.,
BRITISH-AMERICAN TOBACCO COMPANY LIMITED,
BAT (U.K. & EXPORT) LIMITED
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.

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT DISMISSAL OF PLAINTIFFS' ANTITRUST CLAIMS (COUNTS TWO AND THREE)

REDACTED

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I. INTRODUCTION

The "sole" grounds of defendants' motion for summary judgment, is the allegation that plaintiffs have not suffered "antitrust injury." Defs. Mem., p. 2. Defendants admit that they raised this same argument in their Rule 12 motion to dismiss plaintiffs' antitrust counts (more than 2 ½ years ago). Id. The defendants also concede that this Court's Order denying that motion "implicit[ly]" concluded that plaintiffs had suffered an "antitrust injury." Id., p. 2 at n. 1. Finally, defendants admit -- as they must -- that the Court's determination that plaintiffs had standing to pursue their antitrust claims was "confirmed" by the Minnesota Supreme Court. Id., p. 2.

Defendants' present motion should be summarily rejected. This Court's Rule 12 order is unambiguous in its finding that plaintiffs have suffered antitrust injury:

> Defendants argue that Plaintiffs have not alleged the threshold requirement that the injuries allegedly sustained are "antitrust injuries." Defendants argue that increased health care costs do not flow from competitive harm in the tobacco product marketplace and are, therefore, personal injury rather than antitrust matters. Because Plaintiffs are not competitors in the tobacco industry, Defendants argue that antitrust claims must be dismissed....
>
> While the defendants have raised valid concerns, the law of this jurisdiction cannot be ignored. Minnesota is one of the few states which has promulgated legislation more expansive than federal antitrust measures. The Minnesota legislature has clearly and unambiguously stated the law in this jurisdiction:
>
>> Any person, any governmental body, or the state of Minnesota or any of its subdivisions or agencies, injured directly or indirectly by a violation of sections 325D.49 to 325D.66, shall recover three times the actual damages sustained, together with costs and disbursements, including reasonable attorneys' fees....
>
> Minn. Stat. sec. 325D. 47.
>
> Although federal precedent is relevant in determining application of antitrust remedies, the Minnesota statute has broadened the scope of those who may seek recovery.. .. Accordingly, counts two and three of the complaint shall not be dismissed.

Order of May 19, 1995, pp. 7-8 (emphasis added). The Supreme Court affirmed this finding, concluding that the "expansive grant of standing" in the Minnesota antitrust statute "reaches the injuries suffered by Blue Cross." State of Minnesota v. Philip Morris Inc., 551 N.W.2d 490, 495 (Minn. 1996) (emphasis added).

In sum, the defendants' present motion requests that this Court reverse its prior order and contradict the express holding of the Minnesota Supreme Court. Defendants, however, can point to no change in the Minnesota antitrust statute that warrants such a conclusion. Instead, defendants rely on an unpublished decision of the Minnesota Court of Appeals that has no precedential value and that expressly distinguishes this case. Nor can defendants point to specific factual materials -- after more than 2 years of fact discovery -- to support their naked assertion that plaintiffs have not suffered antitrust injury. Rather, the fact discovery in this case has revealed a multi-faceted and continuing conspiracy by these defendants that is the direct cause of the damages suffered by plaintiffs. In short, the current motion is no more than a belated motion to reconsider, unsupported by any newly-discovered facts or governing law. This Court properly denied it the first time and should do so again.

II. RECITAL OF DISPUTED FACTS AND STATEMENT OF SUPPORTING DOCUMENTS OF RECORD

Plaintiffs rely upon the facts set forth in this memorandum and those found in Plaintiffs' Combined Recital of Disputed Facts ("Combined Recital"), which is incorporated herein. Plaintiffs' opposition to this motion is supported by all documents cited herein and those submitted as exhibits to the Combined Recital.

Unlike in many antitrust cases, this summary judgment motion does not present the problem of drawing inferences of conspiracy from circumstantial evidence. Matsushita Elec. Indus. Co. v. Zenith

Radio, 475 U.S. 574, 580 (1986) (to survive a motion for summary judgment on a § 1 antitrust claim, a plaintiff must merely show that "the inference of conspiracy is reasonable in light of the competing inferences of independent action. . . .") (emphasis added). Here, the record contains an abundance of direct evidence of concerted action by the defendants to lessen competition with the respect to the health impact of smoking. For example, as set forth in the expert report of plaintiffs' antitrust economist, there is significant evidence -- from defendants' own files -- that the defendants conspired (1) to suppress in-house biological research on smoking and health; (2) not to seek competitive advantage through the introduction of an innovative 'safe' cigarette; (3) not to compete using comparative claims that explicitly relied on the link between smoking and disease; (4) to publicly deny the scientific evidence linking smoking and health hazards, while suppressing internal information supporting that link; and (5) not to place health warnings on cigarettes or in advertising unless compelled to do so by government authorities. Ex. A to the Affidavit of Tara D. Sutton Filed in Support of Plaintiffs' Opposition Memorandum ("Sutton Aff.") (Jaffe Expert Report, pp. 12-13).

For purposes of this motion, illustrative examples of the explicit, collusive agreements regarding smoking and health research and development of a safer cigarette are provided along with a discussion of their anticompetitive harm.[1]

A. DEFENDANTS CONSPIRED TO SUPPRESS SMOKING AND HEALTH RESEARCH AND THE DEVELOPMENT OF A SAFER PRODUCT

In the 1954 Frank Statement, the defendants pledged "aid and assistance to the research into all phases of tobacco use and health." Ex. 1, Combined Recital. The Frank Statement includes specific reference to scientific research at defendants' own laboratories. Despite this solemn pledge, there is substantial evidence indicating that in-house biological research was suppressed by the industry pursuant

to a conspiracy -- in the industry parlance, a "gentlemen's agreement." Biological research is the type of research a company would undertake to examine the safety of its products with respect to humans and, in this case, to determine whether smoking causes disease. Combined Recital ¶ 24. By its very nature, then, biological research involves animals. It also goes without saying that such research is necessary for development of a safer product.

Numerous documents discuss this conspiracy. For example, a 1968 "draft" memorandum by senior Philip Morris scientist, Helmut Wakeham, describes the existence of a "gentleman's agreement" prohibiting biological research:

> We have reason to believe that in spite of the gentleman's agreement from the tobacco industry in previous years, that at least some of the major companies have been increasing biological studies within their own facilities.[2]

Ex. 38, Combined Recital. REDACTED Combined Recital ¶ 42.

Similarly, a 1978 Reynolds report states that an industry conspiracy prohibited in-house biological testing involving animals:

> A wholly owned subsidiary [of Philip Morris] in Cologne, Germany engages in carcinogenic biological research, such as mouse painting, in violation of the verbal agreement among domestic companies not to perform animal testing in-house.

Ex. B to Sutton Aff. (RJR 501543061, p. 3077). A 1983 speech by Reynolds' scientist, Frank Colby, REDACTED

REDACTED. Ex. C to Sutton Aff. (RJR 501543470, p. 3504).

A similar agreement implicated the overseas tobacco manufacturers -- including BATCo. For example, a 1962 document by senior BATCo scientist, S.J. Green, states that:

> I understand that the present policy for the United Kingdom is that all research work connected with health and smoking is done on an Industry basis as far as possible and that all immediately relevant information is communicated to the Industry no matter how

> it is obtained. For example, I understand it would be contrary to this policy for biological research to be carried out on a Company basis.

Ex. D to Sutton Aff. (BAT 100159219, p. 220).

Plaintiffs' antitrust expert has testified that these types of agreements -- where in-house research activities are restrained -- reflect an arrangement that is directly contrary to how research and development is typically handled by large, industrial companies:

> The documents make clear, and economic research on the economics of research and development also confirm, that there are many ways in which research done through contracts is not as effective as research done in-house because -- from an economic point of view, because when the research is done in-house, not only do you get the -- sort of the product of the research in terms of a report or a specific scientific finding, but you also get the development of the capabilities of the research staff that comes out of that research which can be also be useful in future projects.
>
> So that, in general, that's why we observe that although there are consulting firms and contract research is done, the vast majority of the significant commercial R&D in this country is, in fact, done in in-house laboratories precisely because it's difficult to do it on a consulting basis in an effective way.

Ex. E to Sutton Aff. (Jaffe Depo., pp. 409-10) (emphasis added).

Thus, since in-house research and development is the method by which most companies develop better products, it is Professor Jaffe's expert opinion that defendants' conspiracy with respect to biological research effectively restrained development and effective marketing of a safer cigarette:

> [Defendants] are not going to test the product on humans, and so if you are going to do research, serious research, aimed at trying to develop a safer cigarette product, you would have to use animals in the course of either figuring out how to design the product to make it safer, and then, also, when you thought you had a design that was safer, to confirm that it was safer in a way that would allow you to market it.

Id. (pp. 410-11).

B. DESPITE THE LARGE COMPETITIVE ADVANTAGE TO BE GAINED IN THE MARKETPLACE, DEFENDANTS FAILED TO CONDUCT INTERNAL BIOLOGICAL RESEARCH ON SMOKING AND HEALTH

AND TO MARKET A SAFE PRODUCT

Each defendant, individually, had a competitive interest in conducting safety-related research, developing safer products, and marketing the products as safe and effective:

> A cigarette firm seeking to maximize its own profits would see large benefits to being the first to develop a safer cigarette, and to pointing out the superiority of such a product by emphasizing the danger of competitors' products. Further, any company not pursuing such a strategy would know that its competitors had every incentive to do so, creating a significant risk of being left with only more dangerous products after others had introduced safer ones. Thus, both greed and fear would have driven individual cigarette firms towards competition in research and new product development.

Ex. A to Sutton Aff. (Jaffe Expert Report, at p. 10). Similarly, the defendants realized, from early on, that reducing the harm of their products was a crucial research task and that any company that developed a safer product would garner a significant competitive advantage:

· A 1966 report by two senior Philip Morris scientists states that "[i]f we could develop a medically and governmentally endorsed 'healthy' cigarette that tasted exactly like a Marlboro, delivered the nicotine of a Marlboro, and was called Marlboro, it would probably become the best selling brand." Ex. F to Sutton Aff. (PM 1000338644, p. 651).

· A 1977 letter between Lorillard marketing executives states that REDACTED REDACTED

Ex. G to Sutton Aff. (LOR 01244294, p. 294).

· A 1983 Reynolds memorandum states that the first company to develop "new products perceived as 'safer'" would "become the dominate company in the industry almost over night." Ex. H to Sutton Aff. (RJR 501541129, p. 131). The author goes on to predict that "the company who introduces such a product might capture as much as 25 share points in the first year if supply could keep pace with demand." Id.

While the internal company documents confirm that defendants understood the tremendous competitive advantage that would accrue to the first company to market a safer cigarette, each domestic defendant (with little exception) failed to perform in-house biological research.

REDACTED. Combined Recital ¶ 29 (Senkus Depo., pp. 179-80). REDACTED

REDACTED

REDACTED

Combined Recital ¶ 30.

Preliminary results from mouse inhalation tests in the Reynolds' mouse house demonstrated "[a] diffuse, marked emphysema throughout the lungs. . . ." Ex. 28 to Combined Recital (RJR 515596267, p. 269) (emphasis added). A 1969 Philip Morris document reveals that this information was shared by Reynolds with its competitor, Philip Morris:

> I met Dr. Price from R.J. Reynolds at the CTR-USA meeting of December 11 and 12, 1969. He mentioned doing chronic cigarette smoke exposure studies with rats. The animals received up to 500 cigarettes and emphysema was produced.

Ex. 27 to Combined Recital (PM 1001882748) (emphasis added).

In 1970, Reynolds abruptly shut down the mouse house and fired 26 scientists. Ex. 30 to Combined Recital (RJR 503950745). A contemporaneous memorandum from the files of BATCo explains that the shutdown was related to the industry's "tacit agreement between the heads of the US companies" not to conduct "in-house biological research." Ex. 33 to Combined Recital (BAT 110315968). After learning that Reynolds was conducting biological studies, Philip Morris president Cullman lodged a complaint with Reynolds president Galloway. Id. The result of this conversation was a "sudden reorganization at Reynolds, resulting in the closure of the biological section." Id.[3]

Philip Morris scientists also complained about the restrictions imposed by the industry

agreement not to conduct in-house biological research. In 1964, Wakeham -- who confirmed the existence of the conspiracy in his deposition -- wrote that the "[c]ompetitive pressures suggest a breakup of the common front approach of the industry through the Tobacco Institute and TIRC." Ex. 36 to Combined Recital (PM 1000335612, p. 622). Wakeham also recommended that "[t]he industry should abandon its past reticence with respect to medical research," noting that "failure to do such research could give rise to negligence charges." Id.

Wakeham's request, however, was not followed. REDACTED. Ex. 40 to Combined Recital (Wakeham Depo., p. 86) (" REDACTED ") (emphasis added). In 1970, however, Philip Morris turned to Europe for smoking and health research by purchasing a research facility in Cologne known as INBIFO:

> Since we have a major program at INBIFO, and since this is a locale where we might do some of the things which we are reluctant to do in this country, I recommend that we acquire INBIFO either in toto or to the extent of controlling interest.

Ex. 43 to Combined Recital (PM 2022244451). One perceived value of INBIFO was that Philip Morris could control the results:

> Experiments can be terminated at will as required without delay.

Ex. 44 to Combined Recital (PM 1003123058). In addition, Philip Morris could avoid any direct contact with the research results that emanated from INBIFO. A 1977 memorandum from a Philip Morris research official describes the elimination of written contact between INBIFO and Philip Morris:

> We have gone to great pains to eliminate any written contact with INBIFO, and I would like to maintain this structure.

Ex. 45 to Combined Recital (PM 2000512794). REDACTED

REDACTED

REDACTED

Ex. 48 to Combined Recital (Charles Depo., pp. 50, 59).

Similar to Reynolds and Philip Morris, the other domestic cigarette manufacturers failed to perform in-house biological research. Lorillard has stated that a "large proportion of the internal research" was not related to smoking and health. Ex. 50 to Combined Recital (CLAD #1497). American's counsel has represented to the Court -- during a hearing on American's failure to produce scientific research in the possession of its affiliates -- that American did not perform any in-house smoking and health research. Ex. 22 to Combined Recital (Transcript of June 17, 1997 Hearing, p. 23). REDACTED

REDACTED Ex. 23 to Combined Recital (Price Depo., pp. 45, 164). Likewise, B&W has REDACTED

REDACTED. Exs. 52 & 53 to Combined Recital (Sanford Depo., p. 112; Kohnhort Depo., p. 350). The BAT Group defendants terminated all in-house biological research in 1985 and shifted their research focus to increasing nicotine transfer in cigarette smoke. Ex. 55 to Combined Recital (BAT 301122597).

III. ARGUMENT

On a motion for summary judgment, the Court should not weigh the evidence and decide issues of fact but only determine whether genuine factual issues exist. DLH, Inc. v. Russ, 566 N.W.2d 60, 70 (Minn. 1997). The Court should deny the motion unless the party opposing summary judgment has rested on "mere averments" or produced evidence establishing only a "metaphysical doubt" as to a factual issue. Id. at 71.

Here, plaintiffs have more than adequately supported their antitrust claims with specific evidence of an industry-wide concerted refusal to research, develop and market a less-hazardous cigarette, a conspiracy that has directly inflicted enormous pecuniary injury on the State and Blue Cross as purchasers of health care.

A. THE DECISION THAT PLAINTIFFS HAVE STANDING IS LAW OF THE CASE AND NECESSARILY DETERMINES THAT THEY HAVE SUFFERED ANTITRUST INJURY

Defendants attempt to reopen the issue of standing with the conceptually convoluted argument that this Court's decision upholding plaintiffs' standing to pursue their antitrust claims did not necessarily incorporate a finding of "antitrust injury." Defendants' argument is defeated not only by this Court's previous decision but also by the Minnesota Supreme Court's affirmance of that decision.

1. The Issue of Antitrust Standing Subsumes the Question of "Antitrust Injury"

Defendants attempt to artificially separate "antitrust injury" from standing, claiming that antitrust injury is a dispositive threshold determination. Antitrust injury, however, is simply a component of the overarching question of antitrust standing:

> The antitrust injury requirement specifies that to have standing under the antitrust laws, the plaintiff must have suffered "antitrust injury," meaning "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendant's acts unlawful."

William C. Holmes, Antitrust Law Handbook § 8.03[a] (1997 ed.) (emphasis added) (quoting Brunswick Corp. v. Pueblo Bowl-0-Mat, Inc., 429 U.S. 477, 489 (1977)). Indeed, the United States Supreme Court has indicated that the antitrust standing inquiry includes multiple factors, including "antitrust injury." See Associated Gen. Contrs., Inc. v. California State Council of Carpenters, 459 U.S. 519, 536-40 (1983); McCarthy v. Recordex Service, Inc., 80 F.3d 842, 850 (3d Cir. 1996)

(stating that AGC Court's five-factor standing analysis includes antitrust injury); Areeda & Hovenkamp, Antitrust Law, ¶ 360c (Rev. Ed. 1995) (antitrust injury is a "basic standing requirement").[4]

Thus, a determination that a plaintiff has standing on its antitrust claims -- as this Court and the Supreme Court have previously found -- necessarily includes the determination that the plaintiff suffered "antitrust injury."

2. This Court Already Decided That Plaintiffs Have Antitrust Standing and The Minnesota Supreme Court Affirmed

Defendants raise the same arguments -- and even the same case law -- regarding "antitrust injury," as they did in their Rule 12 motion to dismiss plaintiffs' antitrust counts. During the Rule 12 briefing, defendants argued this issue ad nauseam:

- "[P]laintiffs fail to allege an essential element of an antitrust claim--antitrust injury." Defs. Rule 12 Brf. at 15.
- "Plaintiffs have not met the threshold antitrust injury requirement." Id.
- "Plaintiffs cannot allege antitrust injury because they are not participants in the relevant market." Id. at 16.
- "Plaintiffs' alleged harm is not antitrust injury because it does not reflect the anticompetitive effect of the alleged injury." Id. at 18.
- "Plaintiffs' harm is not antitrust injury because it flows from the alleged adverse health effects of cigarettes -- not from anticompetitive conduct." Id. at 19.

In fact, during oral argument on the Rule 12 motions, counsel for defendants argued antitrust injury exclusively:

> And I think under all the circumstances, including how much we have to cover today, I'm going to confine my remarks to the absence of an allegation of antitrust injury and leave the antitrust standing questions to the briefs which have been submitted by both sides on the question.

Ex. I to Sutton Aff. (Transcript of March 10, 1995 Hearing, at p. 80) (emphasis added).[5]

This Court explicitly rejected these arguments and denied defendants' motions. Order of May 18, 1995, pp. 7-8. The Court found that "[p]laintiffs. . . complain of injuries due to the alleged conspiracy of the Defendants and their industry." Id. at 8. Accordingly, the Court rejected defendants' argument "that Plaintiffs have not alleged the threshold requirement that the injuries allegedly sustained are 'antitrust injuries.'" Id., at p. 7.

The defendants appealed this ruling -- with respect to Blue Cross -- to the Minnesota Supreme Court. In the present motion, defendants claim that they "did not assert lack of antitrust injury in the Court of Appeals or Supreme Court." Defs' Mem. at p. 3. This is simply untrue. Defendants' briefing before the Supreme Court contains several allegations that Blue Cross had not suffered an antitrust injury:

- "BCBSM's two claims under the antitrust statutes, for example, fail because BCBSM is not a participant in the market alleged to be affected, and is therefore too remote from the alleged violation to bring suit. See, e.g., Associated General Contractors of Cal., Inc. v. California State Council of Carpenters, 459 U.S. 519, 539-41 (1981)." Appellants' Brief, at p. 9, n. 4.[1]

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[1] In their reply brief in the Supreme Court, defendants attempted to back away from this statement by arguing that they were not specifically appealing the issue of standing under the antitrust laws. At the same time, however, defendants asserted that Blue Cross did not have standing under any count alleged in the complaint:

> Appellants did raise objections in the trial court that were claim-specific and that related to both BCBSM and the State -- for example, the claim that plaintiffs have neither antitrust injury nor antitrust standing -- and appellants declined to seek immediate review of the trial court's decisions on those issues. But their can no doubt that the claims appellants have pursued on appeal apply to the entirety of BCBSM's case."

Appellants' Reply Brief, p. 15 (emphasis added). In any event, regardless of whether defendants expressly argued the

- "[T]he inclusion of antitrust counts in the complaint does not help BCBSM because the alleged anticompetitive conduct took place in the cigarette market, rather than the health care or insurance markets." Appellants' Reply Brief, at p. 15 (emphasis added).

The Minnesota Supreme Court affirmed this Court's finding of antitrust standing, stating that the "Minnesota Legislature has broadly granted standing to maintain private antitrust suits" to those injured directly or indirectly. State of Minnesota, 551 N.W.2d at 495. Accordingly, the Supreme Court concluded that "this expansive grant of standing reaches the injuries suffered by Blue Cross." Id. (emphasis added).[2] Thus, the Supreme Court has already determined that the "injuries" alleged by plaintiffs in this action are covered by Minnesota's antitrust laws. Because the Supreme Court upheld this Court's ruling (with one exception not relevant here), it constitutes the law of the case and this Court therefore should not revisit the issue. Northwest Wholesale Lumber v. Citadel Co., 457 N.W.2d 244, 251 (Minn. App. 1990) (stating that appellate decision establishes law of the case that must be followed on remand).

Undeterred by the previous orders of this Court and the Minnesota Supreme Court, however, defendants attempt to argue that an unpublished and unprecedential decision of the Minnesota Court of

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antitrust injury aspect of standing on appeal, the Supreme Court specifically analyzed whether Blue Cross had standing to assert a claim under the Minnesota Antitrust Statutes. State of Minnesota, 551 N.W.2d at 495-96.

[2] The Supreme Court also indicated that plaintiffs would have standing to pursue their antitrust claims "absent" the broadened grant of standing under Minnesota law. State of Minnesota, 551 N.W.2d at 497 n.1. Thus, plaintiffs would have standing even under the more restrictive federal antitrust laws. Id. (citing Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic and Security Health Plan of Wis., 65 F.3d 1406 (7th Cir. 1995) (finding the Blue Cross of Wisconsin had standing as a direct purchaser of health care under the federal antitrust laws)).

Appeals -- Tremco, Inc. v. Holman, 1997 WL 423575 (Minn. Ct. App. July 29, 1997) -- has somehow changed the landscape of Minnesota antitrust law. Tremco, however, explicitly recognizes that "antitrust injury" is part of the standing determination. As defendants' own discussion of it reveals, Defs' Mem. at 4, the court ruled that the plaintiffs "lacked standing" because they did not suffer antitrust injury. Moreover, in ruling that the plaintiffs' lacked "antitrust standing," the Tremco court explicitly distinguished this case. Id. ("[T]he holding in Philip Morris Inc. does not require us to conclude Tremco has standing."). Thus, since this Court and the Supreme Court have previously determined that plaintiffs have antitrust standing, this case is of no value whatsoever.

Equally artificial is defendants' attempt to cast standing as an issue of "who can sue" that is entirely separate from the purported antitrust injury issue of "what can they sue for." Defs' Mem. at 4. The question of who can sue is answered, in substantial part, in terms of what injury they have suffered -- that is, whether an antitrust plaintiff has standing turns in part on the nature of their injury. See Associated Gen. Contrs., Inc., 459 U.S. at 535 (clarifying that "question whether [particular plaintiff] may recover" requires evaluation of "the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them"). Contrary to defendants' contentions, "what" plaintiffs are suing for -- increased health care costs -- was not just revealed in recent discovery. Since the filing of the Complaint and through the arguments on the Rule 12 motion, plaintiffs have clearly stated the nature of their injury and their requested relief.

Accordingly, a finding of standing necessarily reflects a determination of antitrust injury and the conceptual convolutions of defendants' current Rule 56 motion are nothing more than a repackaging of their prior -- and unsuccessful -- Rule 12 motion.

B. DEFENDANTS' INDUSTRY-WIDE HEALTH CONSPIRACY DIRECTLY

INJURES PLAINTIFFS AS PURCHASERS OF HEALTH CARE

Apart from the fact that this issue has already been decided, it is clear that this Court (and the Minnesota Supreme Court) ruled correctly. Defendants attempt to draw an artificially rigid distinction between the "cigarette market" and the "health care market" and advocate a black-letter rule limiting antitrust plaintiffs to competitors and consumers in the cigarette market. The United States Supreme Court has warned against defendants' mechanistic approach to antitrust standing, "refus[ing] to engraft artificial limitations" on the broad remedial reach of the antitrust statutes. Blue Shield of Virginia v. McCready, 457 U.S. 465, 473 (1982). The determination of antitrust standing should not degenerate into the application of rigid tests but rather should turn on the particular facts of each case. Associated Gen. Contrs., Inc., 459 U.S. at 536 n.33. Here the facts are unique -- defendants conspired to suppress health research and information, not to fix the price of cigarettes -- and defendants cite no case on point that defeats plaintiffs' standing.

1. Defendants Have Engaged In a Concerted Effort to Suppress Health Research and a Safer Cigarette

Defendants' market-distinction argument overlooks the crucial distinguishing fact that the conspiracy here is not the usual agreement to raise the price of the good itself. Rather, there is abundant evidence that defendants conspired by agreeing not to exploit the smoking and health issue for competitive advantage -- including the suppression of health research and information and concerted refusal to research, develop and market a safer cigarette. This type of conspiracy is clearly addressed by the antitrust laws. The antitrust statutes seek to protect competition in terms of not only price but also quality and safety -- "better goods and services." National Soc'y of Prof. Engineers v. United States, 435 U.S. 679, 695 (1978) (according protection to "all elements of a bargain -- quality, service,

safety and durability"); see FTC v. Indiana Federation of Dentists, 476 U.S. 447, 459 (1986) ("A refusal to compete with respect to the package of services offered to customers," violates the antitrust laws because "it impairs the ability of the market to advance social welfare"); Northern Pacific R. v. United States, 356 U.S. 1, 4-5 (1958) (recognizing that competition yields "highest quality").

Thus, the particular identity of the product or market -- be it cigarettes or widgets -- does not control the determination of who can maintain an antitrust action. Rather, the nature and object of the conspiracy, not the identity of the underlying product or market, is the relevant focus. Associated Gen. Contrs., 459 U.S. at 535. (stating that standing turns on the relationship between "alleged wrongdoing by the defendants" and plaintiff's harm).

Defendants' attempted analogy to the facts of Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., is wholly unavailing. In Brunswick, operators of bowling alleys alleged that a bowling equipment manufacturer's acquisition of the bowling alleys of its defaulting debtors violated the merger prohibition under section 7 of the Clayton Act. 429 U.S. 477, 480 (1977). The Court held that a claim of injury arising from the preservation or enhancement of competition is a claim "inimical to the purposes of [the antitrust] laws." Id. at 488.

Most obviously, plaintiffs' claim here is quite unlike the claim asserted in Brunswick for plaintiffs have not charged that defendants' conspiracy increased or preserved competition. In fact, plaintiffs claim just the opposite -- a reduction of competition with respect to vital smoking and health research and information. Plaintiffs' claim is thus entirely consonant with the Brunswick Court's ruling that an antitrust plaintiff must prove an injury that reflects the "anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." Brunswick, 429 U.S. at 489.

2. Standing Is Not Confined to Competitors and Customers, Especially

Under the Minnesota Antitrust Statute's Expansive Grant of Standing

Conspicuously missing from defendants' brief is any discussion of the impact of Minnesota's broadened grant of standing to antitrust plaintiffs. Instead, the defendants -- with the exception of an unpublished Minnesota Court of Appeals decision -- rely exclusively on federal law to argue that plaintiffs have suffered no antitrust injury. As previously found by this Court and the Supreme Court, however, Minnesota has expanded antitrust standing beyond federal law. See Order of May 19, 1995, p. 8 ("Although federal precedent is relevant in determining application of antitrust remedies, the Minnesota statute has broadened the scope of those who may seek recovery."); State of Minnesota, 551 N.W.2d at 495 ("Minnesota Legislature has broadly granted standing to maintain private antitrust suits.").

Courts in other states where standing has likewise been expanded to include "indirect" injuries have found that they are not bound by federal antitrust standing (including antitrust injury) restrictions. For example, in Cellular Plus v. Superior Court, 18 Cal.Rptr.2d 308 (Cal. App. 4 Dist. 1993), the court interpreted California's antitrust statute -- which, like Minnesota's statute, grants standing to persons who "dealt directly or indirectly with defendants" -- as expanding the concept of antitrust injury. Rejecting the argument that standing was limited to consumers or competitors, the court held that the interpretation of antitrust injury under federal law is unnecessarily restrictive and does not govern California's statute:

> Although California law similarly requires an 'antitrust injury,' the scope of that term is broader. Section 16750, subdivision (a), as quoted above, provides for lawsuits by injured persons who dealt either 'directly or indirectly' with the antitrust law offenders. This broader California definition resulted from the United States Supreme Court's restrictive decision in Illinois Brick Co. v. Illinois (1977) 431 U.S. 720, wherein the court precluded a lawsuit under federal antitrust law by indirect purchasers. Thus, the more restrictive definition of 'antitrust injury' under federal law does not apply. . . .

Id. at 313; see also Obstetrical & Gynecological Assoc. v. Landig, 384 N.W.2d 719, 723 (Wis. App. 1986) (any federal requirement that plaintiff be either competitor or consumer in restrained market is overcome by Wisconsin's broadened grant of standing to persons "injured directly or indirectly").

Contrary to defendants' suggestion that other state courts have consistently ruled that a state seeking to recover its smoking-related Medicaid expenditures has not suffered an antitrust injury, several courts have construed their state antitrust statutes to reject defendants' "competitor or consumer" standing restriction. For example, in the State of Washington Medicaid action, the court held that its antitrust standing statute -- which, like Minnesota's statute, was broader than federal law -- extended to the State's injury "even though the State is not actively engaged in the sphere of business in which an antitrust violation occurred." Ex. J to the Sutton Aff. (State of Washington v. American Tobacco Co., NO. 96-2-15056-8 SEA, at 2 (Wash. Sup. Ct. Nov. 19, 1996) (slip op.)) (The court also properly recognized that it was not bound by limitations of the antitrust injury requirement under federal law. Id. at 4.). Similarly, in the Maryland Medicaid action, the court construed its antitrust statute -- which provides that the state may maintain an action "regardless of whether it dealt directly or indirectly with the person who has committed the violation" -- to reject the tobacco companies' standing argument based on Associated General Contractors. Ex. K to the Sutton Aff. (State of Maryland v. Philip Morris, No. 96122017/CL211487, at 40-41 (Md. Cir. Ct. May 21, 1997) (slip op.) (the statute "make[s] it absolutely clear the Maryland legislature intended for the State to pursue causes of action against potential antitrust violators regardless whether injuries sustained by the State were remote and regardless of whether or not the State dealt directly with the alleged violator.")). Likewise, the West Virginia court rejected defendants' argument that only competitors, consumers or other participants in the tobacco market could recover. Ex. L to the Sutton Aff. (McGraw v. American Tobacco Co., No.

94-C-1707 (W. Va. March 31, 1997) (slip op.)).[6]

In any event, the United States Supreme Court has specifically held -- under the more restrictive federal antitrust standing statute -- that an antitrust plaintiff need not necessarily be a competitor or consumer. Blue Shield of Virginia v. McCready, 457 U.S. 465, 472 (1982) ("As we have recognized, "[t]he statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers.... The Act is comprehensive in its terms and coverage....") (quoting Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948)). Other courts also have been reluctant to engraft such a limitation. See Reazin v. Blue Cross and Blue Shield of Kansas, 899 F.2d 951 (10th Cir. 1990); Pennsylvania Dental Ass'n v. Medical Service Ass'n of Pa., 815 F.2d 270, 276 (3d Cir. 1977) ("Antitrust injury is not limited to competitors or conspirators."); Westchester Rad. Assoc. v. Empire Blue Cross, 659 F. Supp. 132, 137 (S.D.N.Y. 1987) ("An antitrust plaintiff need not be either a competitor or a consumer in the relevant market in order to have antitrust standing.").[3]

The United States Supreme Court has also stated that a plaintiff has established an antitrust injury where the plaintiff's injury is "so integral an aspect of the conspiracy alleged" or "inextricably

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[3] Despite defendants' purported black-letter rule that standing is always limited solely to competitors and consumers, the Eighth Circuit has clarified that even the federal antitrust statute does not confine "its protection solely to consumers, competitors, buyers, and sellers." State of South Dakota v. Kansas City Southern Industries, Inc., 880 F.2d 40, 46 n.16 (8th Cir. 1989) (citing McCready). Although "the fact that a party is not a participant in the relevant market must be weighed heavily against a grant of standing," id., a relevant market here is health care--in which plaintiffs clearly participate. And perhaps most importantly, defendants' competitor or purchaser limitation is contrary to the broadened scope of liability under Minnesota's antitrust statute--the governing law here. See State of Minnesota, 551 N.W.2d at 495-96 (concluding that "expansive grant of standing [clearly] reaches the injuries suffered by Blue Cross").

intertwined" with defendant's conduct. McCready, 457 U.S. at 479, 484. Here, the defendants do not dispute -- nor could they -- that the direct result of their conspiratorial conduct was an increase in the cost of health care -- of which the State and Blue Cross are the largest purchasers in the State of Minnesota. Defs' Mem. at 13 (stating that "plaintiffs arguably are a participant or consumer" in the "health care market"). Indeed, defendants' own internal documents recognize the impact of smoking on the health care market:

· A 1967 BATCo report states that REDACTED

REDACTED. Ex. M to Sutton Aff. (BATCo 109880411).

· In 1968, a senior Philip Morris scientist, in a memorandum to the president of Philip Morris, noted the direct relationship between cigarette products and health care:

> Most Philip Morris products, both tobacco and non-tobacco, are directly related to the health field. Consumer health is a focal point of interest and concern to the general public and to the government.... Consequently, if R&D is to fulfill its technical responsibilities, we will require significantly increased capabilities to investigate the health implications...

Ex. N to Sutton Aff. (PM 1000039670, p. 670).

· In 1972, a senior BATCo scientist noted "smoking has become a social problem" and that "cigarette manufacturers will become increasingly involved with those concerned with social policy in the health and medical fields." Ex. O to Sutton Aff. (BATCo 401024234, p. 234).[4]

· A 1978 memorandum from a senior Philip Morris scientist to the CEO of Philip Morris predicts that spiraling health care costs will be attributed to smoking:

> Health care costs are rising at an alarming rate. . . . More industry antagonists are using

[4] The author of this document also recommended that the industry "say in public what was believed in private," i.e., that smoking causes disease. Id.

> an economic argument against cigarettes; - i.e., cigarettes cause disease; disease requires treatment; major health costs are borne by the government; the taxpayers pay in the end. Thus, as health costs rise astronomically, the opposition becomes armed with more potent weapons. . . .

Ex. P to Sutton Aff. (PM 1003718427).

That the defendants' conspiracy and the plaintiffs' injury are inextricably intertwined is supported by plaintiffs' antitrust economist expert:

> The market for health care is connected to the cigarette market in such a way that defendants' alleged actions would have materially affected the health care market and thereby injured plaintiffs. From an economic point [of] view, the test used to determine whether two markets are connected is whether or not changes in the prices, product offerings or quantities in the first market (cigarettes, in this case) materially affect the cost or demand conditions in the second market (health care, in this case). I understand that there will be expert testimony in this case that cigarette smoking causes a variety of diseases, and that the treatment of these diseases creates significant health care costs. Based on this understanding, changes in the quantity and type of cigarettes sold would have a material impact on the cost of health care. Hence the cigarette market and the health-care market are inextricably intertwined.

Ex. A to Sutton Aff. (Jaffe Expert Report, p. 6).

Finally, defendants' proposed customer or competitor restriction also ignores the policy purposes underlying antitrust standing principles. The requirement of antitrust standing, including the antitrust injury component, is intended to confine antitrust actions to those who will best protect the chief goal of the antitrust statutes -- competition. See Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 342 (1990); see also Associated General Contractors, 459 U.S. at 542 (existence of party motivated by self-interest to enforce antitrust laws diminishes justification for according standing to more remote party).

Despite defendants' recitation of rigid standing rules, they simply have raised no valid argument that these policies are frustrated by allowing plaintiffs to pursue their antitrust claims. Because there are

no non-conspiring competitors to challenge this industry-wide refusal to compete, plaintiffs are not relegated to being second-best enforcers of the antitrust laws.[5] Accordingly, the State and Blue Cross, as two of the largest purchasers of health care in the State of Minnesota, are not only permissible plaintiffs, they are probably the best plaintiffs to challenge this industry-wide subversion of competition.[6]

C. DEFENDANTS' HEALTH CONSPIRACY WAS A SUBSTANTIAL CAUSAL FACTOR OF PLAINTIFFS' INDIVISIBLE INJURY

Finally, in an attempt to overcome antitrust standing, defendants interject issues of causation and damages. Such issues are for the jury. Canada ex rel. Landy v. McCarthy, 567 N.W.2d 496, 506 (Minn. 1997) (causation is generally for jury); Furley Sales v. North American Automotive Warehouse, Inc., 325 N.W.2d 20, 28 (Minn. 1982) (on disputed facts, issue of damages sustained as direct result of defendant's conduct is for jury); Norby v. Klukow, 81 N.W.2d 776, 780 (Minn. 1957) (issue of whether damages were due to defendant's wrongful conduct or to other cause was for jury); see also Perkins v. Standard Oil Co., 395 U.S. 642, 647-48 (1969) (even where there is "an additional link" in the causal chain, "[i]f there is sufficient evidence in the record to support an inference of causation, the ultimate conclusion as to what that evidence proves is for the jury.").

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[5] Defendants' conspiracy encompasses the entire domestic industry. Complaint ¶ 18. Furthermore, significant barriers to entry preclude new manufacturers from entering the domestic market. Ex. E to Sutton Aff. (Jaffe Depo., p. 213).

[6] The United States Supreme Court has recognized the importance of keeping antitrust suits within judicially manageable limits and of avoiding duplicative recoveries and complex apportionment of damages. Associated General Contractors, 459 U.S. at 543-44. Plaintiffs' suit is clearly more manageable and efficient than innumerable individual suits and involves no danger of duplicative recovery since plaintiffs are seeking only those health care costs paid

1. Defendants' Concerted Suppression of Competition Relating to Smoking and Health Proximately Caused Plaintiffs' Smoking-Related Health Expenditures

Defendants claim that the their anticompetitive conspiracy is not the proximate cause of plaintiffs' injury. Defs. Mem. at 5, 8, 16. This argument is easily refuted under basic principles of proximate cause, which govern antitrust law.

Causation under the antitrust counts tracks the "venerable principles of tort causation." Jack Walters & Sons Corp. v. Morton Bldgs., Inc., 737 F.2d 698, 708-09 (7th Cir. 1984) (Posner, J.). As under tort law, an antitrust plaintiff need not show that the illegal conduct is the sole cause of the plaintiffs' injury; it is enough that the violation is a "material" or "substantial" cause. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 113 n. 9 (1969); see also Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 144-45 (1968) (White, J., concurring) (It is enough to show that the "defendant 'materially contributed' to plaintiffs' injury, or 'substantially contributed, not withstanding other factors contributed also.'"), overruled in part on other grounds, Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) (intra-corporate conspiracy). Given that antitrust causation is indistinguishable from tort principles of causation, plaintiffs' response to this argument is set forth in greater detail in Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment on Causation and Damages, filed contemporaneously with this brief.

Clearly, plaintiffs' antitrust injury is indisputably linked to the defendants' anticompetitive conduct. Plaintiffs' antitrust economist, Prof. Jaffe, described the anticompetitive nature of defendants' conspiracy:

> [T]he economic purpose of the antitrust laws is to protect competition, which

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directly by them.

> has many dimensions, as I discuss in my report, and, also, to protect the benefits that flow to consumers as a result of the competition.
>
> In this particular case . . . what we are talking about here is collusion or restraint of trade, which involves an agreement among competitors to restrict the ways in which they seek to better each other in the marketplace.
>
> . . . [A]nd what we have here in this case is an agreement that there is a particular dimension, along which the firms will not -- will not seek that kind of advantage in the marketplace, and that's anti-competitive.
>
> . . .
>
> [The dimension] relates to the provision of information and the development of products through research that would give consumers more information and better choices regarding the health impacts of the cigarette products that they have available to purchase.

Ex. E to Sutton Aff. (Jaffe Depo., pp. 131-32) (emphasis added).

Prof. Jaffe testified that absent this anticompetitive collusion, each individual defendant would have had the economic motivation to have researched and developed a safer product:

> [I]n the absence of the conspiracy, there would have been a wider range of products than was actually on the market, and they would have been marketed effectively and information about them would have been effectively conveyed.

Ex. E to Sutton Aff. (Jaffe Depo., p. 266).

Thus, defendants' concerted refusal to compete was a substantial contributing factor in causing plaintiffs' antitrust injury, i.e., increased health care costs for treating smoking-related disease:

> "Given the link between health care costs and the volume and nature of cigarettes smoked, the effective elimination of safer products from the cigarette market and the suppression of research and information had material impacts on health care costs in Minnesota.
>
> The multi-faceted unlawful conduct disclosed in company documents is a substantial contributing factor to the indivisible and nonapportionable damages suffered

by plaintiffs, i.e., increased health care costs."

Ex. E to Sutton Aff. (Jaffe Depo., pp. 362-63); see also Ex. A to Sutton Aff. (Jaffe Expert Report, p. 9).

In sum, plaintiffs clearly have produced sufficient evidence regarding defendants' concerted refusal to research, develop and market a less addictive cigarette to meet the Brunswick requirement that their injury "flows from that which makes defendants' acts unlawful." 429 U.S. at 439.

2. Plaintiffs Are Entitled to the Full Measure of Damages For Their Entire Indivisible Injury

Defendants' assertion that plaintiffs do not make any attempt to relate the increased costs of treating smoking-related diseases to defendants' conspiracies is thus simply incorrect. Contrary to defendants' mischaracterization of the testimony of Prof. Jaffe, he did not testify that none of plaintiffs' health care expenditures for smoking related illness were caused by defendants' conspiracies. To the contrary, he clearly testified that "the multi-faceted unlawful conduct disclosed in company documents is a substantial contributing factor to the indivisible and nonapportionable damages suffered by plaintiffs, i.e., increased health care costs." Ex. E to Sutton Aff. (Jaffe Depo., p. 177). This more than satisfies the requirement of a "physical and economic nexus" between defendants' conspiracies and plaintiffs' injury. See McCready, 457 U.S. at 478.

Prof. Jaffe simply testified that he could not determine with sufficient precision which portion of the total health care expenditures were caused by defendants' antitrust violations and which portion of those total costs would have been incurred even absent their conspiracy:

> I think in this case it would not be possible to quantify with reliability either the market shares that safer products -- the precise quantified numerical market shares that safer products would have gotten or the impact on disease that would result form those safer products, or the effects that would have been brought about by the difference in

the availability of information to consumers.

Ex. E to Sutton Aff. (Jaffe Depo., p. 373) (emphasis added).

The inability to apportion damages does not constitute a failure to prove causation. As addressed in further detail in Plaintiffs' Opposition to Defendants' Motion for Summary Judgment on Causation and Damages, the inability to apportion does not preclude recovery by plaintiffs because under Minnesota's "single indivisible injury" rule, a plaintiff is entitled to recover its full damages unless the defendant can establish that it did not cause an identifiable portion of that injury. Canada ex rel. Landy v. McCarthy, 567 N.W.2d 496, 507-08 (Minn. 1997). In this case, defendants have failed to attempt to carry that burden.

IV. CONCLUSION

This Court has previously determined that plaintiffs have standing to proceed on their antitrust claims. Concluding that Minnesota's antitrust statute clearly extends to plaintiffs' injuries, the Supreme Court affirmed that decision. Defendants therefore cannot now reargue this issue under the pretense of "antitrust injury." Defendants' industry-wide health conspiracy directly inflicted harm on the State and Blue Cross. No competitor exists to challenge that decades-long suppression of health research. Under the single indivisible injury rule, plaintiffs are entitled to recover their full damages unless defendants can establish that they did not cause a portion of that injury. The Court should therefore deny defendants' motion in its entirety.

DATED: November 4, 1997.

RESPECTFULLY SUBMITTED,

ROBINS, KAPLAN, MILLER & CIRESI L.L.P.

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[1] The coordinated effort by defendants to suppress information about t alth hazards of smoking also is addressed in Plaintiffs' Opposition fendants' Motion for Summary Judgment on Causation and Damages, § III.A., a the Combined Recital, ¶¶ 88-120, 123-29.

[2] The "increasing biological studies" referenced by Wakeham included t ynolds biological facilities which, as described below, was short-lived.

[3] The conversation described in the document between Philip Morris' CEO a ynolds' CEO -- which led to the shut down of the mouse house -- was describ Helmut Wakeham, a senior Philip Morris research official, to G. Felton, nior BATCo research office. Combined Recital ¶ 39. Felton is now decease
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[4] Even decisions that defendants cite recognize that the antitrust inju quiry is part of the standing determination. E.g. Florida Seed Co. v Monsan ., 105 F.3d 1372, 1374 (11th Cir. 1997); Vinci v. Waste Management, Inc., 3d 1372, 1375 (9th Cir. 1996).

[5] As they do now, defendants argued during the Rule 12 motions that it eculative that "health care costs would have been lower absent defendant leged wrongful acts." Compare Defs. Rule 12 Brf. at 11 with Defs.' Mem. at -16. Defendants also argued that plaintiffs did not have standing becau eir injury was too causally remote from defendants' conspiracy. Defs. Rule f. at 21-22. In the present motion, defendants claim that they do n allenge "remoteness," but argue that their conspiracy was "not the proxima use of plaintiffs' injury" as it is "derivative of the actual antitrust inju casioned by anticompetitive conduct." Defs.' Mem. at 16. But wheth esented in terms of "remoteness" or as "derivative," whether phrased as sue of "antitrust injury" or an issue of standing, the underlying issue remai e same. Defendants simply relabel and reargue the same issues they rais fore.

[6] Defendants selectively cite only to those decisions purportedly in the vor. The Texas decision -- which is wholly conclusory as the court failed plain why the state's injury was not related to defendants' anticompetiti nduct -- was a Rule 12(b)(6) ruling on those particular pleadings. Texas

erican Tobacco, No. S-96CV-91 (Sep. 8, 1997). Moreover, the Texas court al led that -- unlike in this case -- the state antitrust claims, includi anding, would be construed consistent with federal antitrust law. Id., p. 18.