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CASE NO. A05-2148

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State of Minnesota  
**In Court of Appeals**

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Diane Lorix, individually and  
on behalf of all others similarly situated,

*Appellant,*

vs.

Crompton Corporation, Uniroyal Chemical Company, Inc.  
Uniroyal Chemical Company Limited, and Bayer Corporation,

*Respondents.*

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**APPELLANT'S REPLY BRIEF  
AND SUPPLEMENTAL APPENDIX**

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Respondents' Brief presents an inaccurate view of jurisprudence concerning standing in indirect purchaser litigation. In Respondents' theorized world, Minnesota consumers who purchase a product whose price has been artificially increased because it contains a price-fixed product cannot sue for their injuries, even though Minn. Stat. ¶325D.57 specifically grants standing to "any person . . . injured directly or indirectly." Despite Respondents' draconian view, courts in many jurisdictions have conferred standing in cases strikingly similar to the this one. These courts have rejected the application of *Associated General Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 59 U.S. 519 (1983) ("*A.G.C.*") or applied *A.G.C.* and found that a purchaser who paid more because an ingredient was price-fixed has standing.

These results are consistent with the goals of Minnesota's antitrust laws: to provide a broad, expansive remedy to those injured by "sharp commercial practices." *State by Humphrey v. Philip Morris, Inc.*, 551 N.W.2d 490, 497 (Minn. 1996).

Defendant's cases are inconsistent with these goals and should be rejected.

**I. NUMEROUS COURTS HAVE REJECTED RESPONDENTS' CASES AND FOUND THAT PURCHASERS OF INCORPORATED PRODUCTS HAVE STANDING TO SUE FOR DAMAGES SUFFERED AS A RESULT OF RESPONDENTS' CONSPIRACY TO FIX PRICES**

**A. Many States Have Granted Standing to Purchasers of Products with Price-Fixed Components**

The issue before this Court is not unique. In the last few years, numerous state courts have analyzed the standing of a purchaser who pays too much for a product because it contains a price-fixed product. These courts have recognized that consumers

are the ultimate victim, and deserve the opportunity to prove their case and be made whole. *See, e.g., Freeman Industries v. Eastman Chem.*, 172 S.W.2d 512, 520 (2005); *Investors Corp. of Vermont v. Bayer A.G.*, Case No. 51011-04 CnC (Chittenden Cnty, Vt. Super. Ct., June 1, 2005); *Holder v. Archer Daniels Midland Co.*, No. 96-2975, 1998 WL 1469620 (D.C. Super. Nov. 4, 1998); *Anderson Contracting Inc. v. Bayer*, Case No. CL 95959 (Ia. Dist. Ct. May 31, 2005).

In *Investors Corp.* the court held that plaintiff had standing where he was an indirect purchaser of a synthetic rubber known as EPDM, which was incorporated into a variety of products purchased by the plaintiff. The *Investors Corp.* court applied the same *A.G.C.* analysis as the trial court in this matter, but reached a different conclusion. Unlike the trial court, the *Investors Corp.* court held there was a “causal connection” between the conspiracy and the harm. *Id.* Order at 3, and refused to draw inferences in favor of Defendants.<sup>1</sup> The rationale of *Investors Corp.* is more consistent with the principles of *A.G.C.*, and the plaintiff in that matter stands in the same shoes as Ms. Lorix. Thus, even if *A.G.C.* is determined to be applicable to this matter, Ms. Lorix should be granted standing.

In *Anderson Contracting*, an Iowa district court analyzed standing for a plaintiff who bought various products that contained EPDM, whose price was artificially

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<sup>1</sup>Thus, the court held that even if other inputs could affect price, and even if the price-fixed product is a small fraction of the finished product, these issues are “far afield” in a 12(b)6 analysis. *Id.* (Order at 4.)

increased. (App. 98.) Rejecting the defendants' arguments, many of which are duplicated in the present action, the *Anderson Contracting* court held:

The amount of EPDM in the products purchased by plaintiff is not at issue. Nor is the fact that plaintiff did not purchase EPDM itself at issue. . . .if defendants conspired to fix the prices of EPDM, such price fixing would undoubtedly have an effect on the price of the products purchased by plaintiff. Accordingly, this court rejects defendants' 'remoteness' argument because the occurrence of any price fixing by defendants would likely impact plaintiff's purchase of products containing EPDM. The cost of the whole bears some relation to the cost of the ingredients or parts. The fact that EPDM was merely one of several ingredients in the products plaintiff purchased does not lead to the conclusion that plaintiff is not an indirect purchaser of EPDM.

(Resp. App., 15.) Respondents also raise the spectre of damages being unmanageable.

The *Anderson Contracting* court quickly disposed of this argument. "Antitrust cases are commonly complex, but the potential for complex litigation is not a sufficient reason to find that indirect purchasers are barred from bringing suit under the Iowa competition law." (Resp. App., 16.)

Respondents attempt to distinguish *Anderson Contracting* by quarreling with its basis for rejecting *A.G.C.* (Resp. Brief, 26 n. 8.) However, as discussed above, *Anderson Contracting* contains a broad analysis that is analogous to the instant matter.

Furthermore, *A.G.C.* had already been distinguished in Iowa by *Comes*, 696 N.W.2d 318 (Iowa 2005) so Respondents' passage has minimal relevance.

Many other courts have likewise rejected these same arguments against standing for indirect purchasers. *See, Holder*, 1998 WL 1469620 (alleging that a conspiracy to fix the price of sorbates, raised prices of many grocery items), *Box Butte Cty. Sch. Dist. No.*

6, v. *Bayer A.G.*, Case No. CI04-270 (Butte County, Neb. Dist. Ct. Jan. 9, 2006) (alleging that a conspiracy to fix the price of EPDM, raised the prices of all products containing EPDM); *Muzzey Corp. v. Avery Dennison.*, Case No. C1 05-126 (Bluff County Neb. Dist. Ct. Jan. 17, 2006) (App. 127) (alleging that an increase in the price of labelstock - which is used to make labels that appear on other products, or are sold to consumers to use in printers - raised the price all products containing labelstock), *Poole v. Rohm & Haas Co.*, Case No. CI 05-21 (Morrill County, Neb. Dist. Ct. Jan. 9, 2006) (App. 135)(alleging a conspiracy in the “plastic additives” market which are used in plastics such as rubber chemicals are used in the manufacture of tires), and *Poole v. Bayer A.G.*, Case No. CI 05-20 (Morrill County, Neb. Dist. Ct. Jan. 9, 2006) (App. 132) (alleging a conspiracy in the NBR market (nitrobutadiene rubber), used in the manufacture of rubber products). Collectively, these cases demonstrate that many states actively protect indirect consumers who are the real injured parties in a price fixing conspiracy.

Minnesota courts have also certified classes involving incorporated products. *See, Gordon v. Microsoft*, No. MC 00-5994, 2003 WL 23105552, at \*1 (Minn. Dist. Ct. March 14, 2003)(certifying class of persons who “indirectly acquired . . . any version of the following software . . . or *any other software product in which MS-DOS or Windows has been incorporated in whole or in part . . .*”) (emphasis added).

Respondents contend that a party like the plaintiff, who purchases a product whose price was increased because it contained price-fixed components is not an indirect purchaser. However, the Iowa Supreme Court, in a recent decision concerning

certification of an indirect purchaser class, stated that indirect purchasers are “parties to whom [defendant] did not directly sell its products, but who ultimately obtained the products through the stream of commerce.” *Comes*, 696 N.W.2d at 320. This definition is consistent with the language of Minn. Stat. §325D.57, the remedial policies and legislative history underlying the statute, and opinions such as *Gordon*, 2003 WL 23105552, construing the Minnesota statute.

Finally, Respondents allege Ms. Lorix has no standing because rubber processing chemicals are not identifiable components of tires, have no independent economic value, and cannot be bought separately by consumers. The significance of Respondents’ contentions is unclear. First, Respondents fail to offer support for these factual allegations.<sup>2</sup> Second, these arguments have been rejected by other courts. *See, e.g., Anderson Contracting*, CL 95959 at 15 (App. 111.) (“Defendants also maintain that Plaintiff did not purchase EPDM, but rather purchased products containing EPDM, as one of several ingredients; therefore, the products did not arrive in Plaintiff’s possession unchanged from when it left Defendants’ control. . . . This Court disagrees with Defendants’ argument. The amount of EPDM in the products purchased by Plaintiff is

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<sup>2</sup>These allegations are certainly not supported by the Complaint.

not at issue, nor is the fact that Plaintiff did not purchase EPDM itself at issue.”<sup>3</sup> *See also, Investors Corp.*, Case No. 51011-04 CnC at 3-4.

Even if Respondents’ contention was true, Respondents fail to explain its relevance. Regardless of whether rubber processing chemicals are incorporated into the final product, or can somehow be teased out of it, the ultimate fact is that Respondents’ conspiracy to fix the price of chemicals directly resulted in Ms. Lorix paying more for her tires. *See, e.g., Anderson Contracting*, CL 95959 at 15 (App. 111) .

**B. Respondents’ North Carolina and EPDM Cases Are Inapposite**

Respondents argue that numerous state courts have dismissed indirect purchaser cases, and therefore, this Court should simply follow in lock step. (Resp. Brief, at 24-28.) Of course, this issue should not be decided by totaling up cases “for” and “against” as if this were a scorecard. Rather, the cases proffered by Respondents must each be examined to determine what, if any, value they can add to the analysis.

In support of its position that a plaintiff cannot be a purchaser of an incorporated product, Respondents cite to two North Carolina cases, *Crouch v. Crompton Corp.*, No. 02-cv5-4375, 2004 WL 2414027 (N.C. Super. Ct. Oct. 28, 2004), and *Weaver v. Cabot Corp.*, No. 03 CV5 04760, 2004 WL 3406119 (N.C. Super. Ct. March 26, 2004). (Resp. Brief at 16.) These cases are distinguishable. North Carolina does not have a statute

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<sup>3</sup>Justice Brennan, in his dissent to *Illinois Brick*, stated that the amount of increase in price due to an ingredient being price-fixed “is a factual matter to be determined based on the strength of plaintiff’s evidence.” *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 759 (1977).

analogous to Minn. Stat. § 325D.57. In fact, North Carolina courts were required to make their state antitrust law consistent with the federal laws, including standing. *Crouch*, 2004 WL 2414027 at \*12. Furthermore, the *Crouch* court held that state antitrust statutes “should be narrowly construed,” *Id.* at \*28, whereas Minnesota’s antitrust statute is remedial and must be broadly interpreted. Thus, the *Crouch* court began its analysis from a much narrower standpoint.

In North Carolina, indirect purchaser standing is a judicial doctrine. The case that created that standing – *Hyde v. Abbott Laboratories, Inc.*, 473 S.E.2d 680 (N.C. Ct. App. 1996) – was relied upon by the *Crouch* court. However, the *Crouch* court took an unduly restrictive view of *Hyde*. In *Hyde*, the court found that indirect purchasers of baby food had standing to sue the manufacturers. It appears that the *Crouch* court interpreted *Hyde* to *require* plaintiff to be a consumer or competitor in the allegedly restrained market, *Crouch*, 2004 WL 2414027 at \*11-12, although *Hyde* itself does not say that. Thus, *Crouch* and *Weaver* can be distinguished on two bases: First, the relevant law in North Carolina is based upon an extremely narrow basis; and secondly, *Crouch* (and *Weaver*<sup>4</sup>,

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<sup>4</sup>The *Weaver* opinion is largely devoid of analysis, citing only one case and obviously parroting *Crouch*. More importantly, the *Weaver* court believed that any plaintiff who bought a product into which a price-fixed product was incorporated, could not have standing because it would put the court “in an impossible position” of attempting to determine the amount of the price increase in the finished product. As discussed above and in Appellant’s initial brief at 26-29, this narrow view of standing has been squarely repudiated by courts, and leading economic commentators.

which is primarily a copy of *Crouch*) is based upon a single court's interpretation of a single opinion. As such, it should be given no weight here in Minnesota.<sup>5</sup>

The final case cited by Respondents is *Luscher v. Bayer A.G.*, No. CV 2004-014835 (Arizona Super. Court, September 14, 2005). In *Luscher*, a plaintiff brought suit against the manufacturers of EPDM. Unlike the present case, *Luscher* did not limit its action to a particular end product. (Respondents App., 99), whereas Ms. Lorix seeks damages based on purchases of a single product. Without analysis, the *Luscher* court adopted the *AGC* test - but made findings that actually support Ms. Lorix. *Luscher* held that there was a connection between the alleged conspiracy and plaintiff's injury; specifically, that plaintiff paid more than he would have in the absence of the conspiracy. *Luscher*, CV 2004-014835 at 2 (Resp. App., 100.). The *Luscher* court also found that the increased price for goods paid by the plaintiff is the type of damage sought to be redressed by the antitrust laws. *Id.* at 3 (Resp. App., 101.) Strangely, however, *Luscher* then concludes that the "ultimate consumer continues to enjoy the benefits of the competitive market for his various purchases." *Id.* (Resp. App., 101.) This statement is inconsistent with the court's previous statement that the plaintiff paid more for products than he would have in the absence of the conspiracy.

Finally, other courts, confronting the *same conspiracy* as alleged in *Luscher*, have found that plaintiffs have standing as a result of defendants' price-fixing of EPDM.

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<sup>5</sup>Furthermore, the *Crouch* court's concerns regarding its ability to determine damages has been squarely rejected by other state courts who have considered this same issue.

*Anderson Contracting*, No. CL 95959 and *Box Butte County School District No. 6 v. Bayer A.G*, No. CI 04-270. Therefore, *Luscher* provides no persuasive value here.

### C. Respondents' *Visa* Cases are Inapposite

Respondents and the trial court rely on the *Visa* cases<sup>6</sup> to support many of their contentions. In the *Visa* cases, plaintiffs sued Visa in a number of states, alleging that Visa forced an illegal arrangement upon merchants by “tying” acceptance of its debit card to acceptance of its credit cards. As a result, plaintiffs alleged that prices were artificially inflated for every good sold in the state.

The *Visa* cases are factually distinct from the instant matter. The tying arrangement alleged in those cases allegedly increased the price of *every good* sold in that state, regardless of whether it was purchased with cash or credit. Thus, as *Visa* courts noted, the plaintiffs never *purchased* the alleged affected products. *See, e.g., Southard v. Visa U.S.A. Inc.*, No. LACV 031729, 2004 WL 3030028 at \*3 (Iowa Dist. Ct. Nov. 17, 2004) (plaintiffs are not “indirect purchasers,” they are “derivative,” because they did not “end up” with a product that defendant supplied.)<sup>7</sup>

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<sup>6</sup> *Gutzwiller v. Visa U.S.A. Inc.*, No. C4-04058, 2004 WL 2114991 (Minn. Dist. Ct. Spet. 15, 2004); *Ho v. Visa U.S.A. Inc.*, No. 112316/00, 2004 WL 1118534 (N.Y. Sup. Ct. Apr. 21, 2004); *Fucile v. Visa U.S.A. Inc.*, No. S1560-03 CNC, 2004 WL 3030037 (Vt. Super. Ct. Dec. 27, 2004); *Knowles v. Visa U.S.A. Inc.*, Civ. A. Cv-03-707, 2004 WL 2475284 (Me. Super. Ct. Oct. 20, 2004); *Smith v. Visa U.S.A. Inc.*, No. C0-04-2096, 2005 WL 1936336 (Minn. Dist. Ct. July 12, 2005); *Southard v. Visa U.S.A. Inc.*, LACV 031729, 2004 WL 3030028 (Iowa Dist. Ct. Nov. 17, 2004).

<sup>7</sup>Ms. Lorix, on the other hand, did “end up” with a product supplied by Respondents.

Furthermore, the nature of this “derivative” tying arrangement means that damages are far more complex than in the instant case. Ms. Lorix alleges that the price of one product – tires – was increased as a result of the conspiracy; the *Visa* plaintiffs alleged the price of *every product* was increased. Damages in tying cases “present unique damages issues” and “it is difficult to imagine a more complex damage case. Plaintiff’s [*Visa*] case would require an analysis of pricing of virtually every product sold at retail in North Carolina.” *Crouch*, 2004 WL 2414027, at \*\* 26-27. Furthermore, tying damages would “depend upon the specific elasticity of demand for . . . essentially every product of any kind sold to anyone in the State.” *Knowles*, WL 2475284, at \*6. As a result, the *Knowles* court found that damages would be too complex. *Id.* However, the court recognized that “this might be a manageable inquiry if only one product were involved.” *Id.*<sup>8</sup>

In the *Visa* cases, the plaintiffs were unable to demonstrate that the restrained market “contributes in any way to the research, manufacture, production, distribution or advertising of the consumer goods for which Plaintiff contends he paid inflated prices.” *Gutzwiller v. Visa U.S.A., Inc.*, No. C4-04058, 2004 WL 2114991, at \*7 (Minn. Dist. Ct. Sept. 15, 2004). Ms. Lorix, by contrast, has alleged that the rubber chemicals were used in the manufacture and production of the consumer goods for which she paid an inflated price. (App. 2, ¶3, App. 9, ¶35.)

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<sup>8</sup>Respondents may argue that because there are different types of tires, there will similarly be different elasticities of demand. Plaintiff respectfully suggests that such assumptions are unsupported and irrelevant to the resolution of a Rule 12 motion.

This distinction has been noted by other courts. For example, in *Investors Corp.*, the court specifically analyzed *Fucile*, 2004 WL 030237, and concluded that indirect purchasers, who, like Ms. Lorix, purchased a product that was incorporated into consumer goods, “stand[] in a different posture than *Fucile*. “Financial Services [which were the basis of the *Visa* antitrust conspiracy] by contrast, are not components of common consumer goods, except, perhaps, in an extraordinary abstract sense.” *Investors Corp.*, at 3. Similarly, the *Southard* court noted that plaintiffs were not indirect purchasers because they did not end up with a product supplied by the defendants. *Southard*, 2004 WL 3030028, at\*3. Therefore, the *Visa* cases are not relevant to this appeal.

## **II. ASSOCIATED GENERAL CONTRACTORS IS INAPPOSITE TO THIS INDIRECT PURCHASER ACTION**

It is clear that *A.G.C.* is inapposite to this matter. Courts have declined to apply *A.G.C.* for two reasons: first, because it cannot be harmonized with state antitrust laws, and second, because it is easily distinguished. Both of these rationales are applicable in this matter.

### **A. Neither the Trial Court, Nor Respondents, Explain How *A.G.C.*, Which Was Created by Federal Courts to Determine Standing under Federal Law, Can Be Harmonized with Minnesota Law**

The parties do not dispute that federal and state law can only be “harmonized” where the state and federal laws do not differ. But on the issue of indirect purchaser standing, as Respondents’ own cases recognize, federal and state law are entirely

different. *See, Tremco Inc. v. Holman*, No. C8-96-2139, 1997 WL 423575, at \*2 (Minn. Ct. App. July 29, 1997). Thus, harmonization is inapplicable here.

Nor do Respondents explain why the concept of harmonization, which attempts to harmonize *substantive* areas of law, should have any applicability to a *procedural* issue such as standing. The Associate Attorney General of Minnesota, in response to questions from a Senate subcommittee regarding amendments to Minnesota statutes to allow indirect purchasers to sue, stressed that “with respect to violations there [sic] should be uniformity because it’s very important that businesses persons in the marketplace understand what violations are and what aren’t violations. ***But here we’re talking about a procedural problem.***”<sup>9</sup> (Resp. App., 131) (emphasis added). This distinction has been recognized by Minnesota courts. *See, e.g., Humphrey v. Philip Morris*, No. C1-94-8565 1995 WL 1937124, at \*3 (Minn. Dist. Ct. May 19, 1995)(“Although federal precedent is relevant in determining application of antitrust remedies, the Minnesota statute has broadened the scope of those who may seek recovery.”) *See also, Comes*, 696 N.W.2d at 446.

Significantly, no case that has thoroughly considered whether *A.G.C.* can be harmonized with state indirect purchaser statutes has subsequently applied *A.G.C.* *See, Comes*, 696 N.W.2d at 446-47; *Bunker’s Glass Co. v. Pilkington PLC*, 75 P.3d 99 (Ariz.

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<sup>9</sup>Appellant elsewhere argues that Respondents’ submission of the Subcommittee transcript is outside the pleadings. *See, supra at Sec. V.* Appellant does not waive this argument, but instead, submits it subject to the Court’s determination of whether to consider the transcript.

2003); *Arthur v. Microsoft*, 676 N.W.2d 29, 35 (Minn. 2004); *Anderson Contracting*, No. CL 95959, at 14 (Polk County, Iowa Dist. Ct. May 31, 2005) (“Defendants’ reliance on *Associated General Contractors* is misplaced, and the facts are distinguishable from the facts of the present [indirect purchaser] case.”) There is no substantive basis for Minnesota to supplant its own law for that of a federal direct purchaser case.

**B. A.G.C. Should Not be Applied to Indirect Purchaser Cases**

The test set forth in *A.G.C.* is complex and subject to confusion. Courts have interpreted *A.G.C.* to have anywhere from three to seven factors. *See, e.g., Gutzwiller*, 2004 WL 2114991 (applying three factors) and *Knowles*, 2004 WL 2475284 (applying seven factors). Courts have applied *A.G.C.* to every variety of antitrust violation.

However, the policies underlying the *A.G.C.* test, and the relevant case law, demonstrates that *A.G.C.* should not be applied to indirect purchaser cases.

The facts underlying *A.G.C.* are relevant to determine the type of case to which *A.G.C.* should be applied.<sup>10</sup> In *A.G.C.*, the plaintiff was not a consumer or competitor. Plaintiff Union alleged it was damaged by an association that coerced third parties to enter into business deals with non-union firms. The Supreme Court was concerned with whether plaintiff would benefit from increased competition. *A.G.C.*, 459 U.S. at 539. Thus, the issue was not whether a price-fixing agreement - which is a *per se* violation of the antitrust laws - injured a downstream plaintiff by raising the price of something she

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<sup>10</sup>The *A.G.C.* test was created after *Illinois Brick* precluded indirect purchasers from suing under federal antitrust law. Thus, the Supreme Court did not intend, or design, *A.G.C.* test be applied to indirect purchaser cases.

purchased. In fact, the concerns raised in *A.G.C.* are never present in a *per se* violation, because increased competition always leads to lower prices, which by definition, would benefit purchasers.

The *per se* violations in the instant litigation should be contrasted not only with *A.G.C.* but also with *Visa*. *Visa's* application of *A.G.C.* was appropriate because the *Visa* plaintiffs were not indirect purchasers of a price-fixed product; instead, they were non-purchasers -- the *Visa* plaintiffs never purchased anything containing the price-fixed product. The claims of the *Visa* plaintiffs were not even indirectly related the alleged wrong. Thus, as the court in *Visa v. Southard* noted, "plaintiffs in [this] case are not really 'indirect purchasers.' Their claim against defendant could more accurately be termed 'derivative.' These plaintiffs never ended up with a product the defendant supplied." *Southard*, 2004 WL 3030028, at \*3. By contrast, Ms. Lorix did end up "with a product the defendant supplied." *See also, Crouch*, 2004 WL 2414027 at \*27 (stating that the *Visa* case was "not a price fixing case.")

State courts have recognized that *A.G.C.* is not applicable to *per se* price fixing cases. In *Anderson Contracting*, the Iowa District Court rejected application of *A.G.C.* because it did not involve the price-fixing of a product and harm to a downstream purchaser. *Anderson Contracting*, (App. 140). The *Anderson Contracting* court understood that cases concerning the potential injury to horizontal competitors who do not allege *per se* violation is completely different that the direct injury suffered by a consumer as a result of a conspiracy to raise prices.

Ms. Lorix purchased a downstream product that incorporates the price-fixed product; was clearly injured by Respondents' conspiracy; and should have a chance to prove this. This is consistent with Minnesota and Eighth Circuit analysis of antitrust standing, which "focuses instead on whether the injury was of the type that Congress sought to redress through the antitrust laws and whether a link was demonstrated between the injury and the market restraint. *McDonald v. Johnson & Johnson*, 722 F.2d 1370, 1373-74 (8<sup>th</sup> Cir. 1983). "[M]ere causal connection between an antitrust violation and harm to a plaintiff cannot be the basis for antitrust compensation unless the injury is directly related to the harm the antitrust laws were designed to protect." *Id.* at 1374. *General Ind's. v. Hartz Mountain Corp.*, 810 F.2d 795, 809 (8<sup>th</sup> Cir. 1987). Ms. Lorix's injury is the result of Respondents' price fixing, a fundamental evil that antitrust laws were designed to combat. Therefore, *A.G.C.* is not necessary to this analysis and Ms. Lorix has standing.<sup>11</sup>

**III. EVEN IF *A.G.C.* IS APPLICABLE, MS. LORIX'S INJURIES, SUFFERED AS A DIRECT RESULT OF RESPONDENTS' CONSPIRACY, ARE SUFFICIENT TO GRANT STANDING.**

**A. Respondents Acknowledge that a Purchaser Need Not be a Consumer or Competitor in the Restrained Market.**

Respondents acknowledge that a plaintiff need not be a consumer or competitor in the alleged market. (Resp. Brief at 15.) This is consistent with the majority of courts that

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<sup>11</sup>In addition, Appellant is required to establish some *A.G.C.* factors – complexity and speculativeness – at class certification pursuant to Minn. R. Civ. P. 23. Certainly, it makes more sense to analyze these complicated issues with the benefit of a developed record.

have applied *A.G.C.*, and consistent with the antitrust principles that underlie that case.

In *A.G.C.*, the plaintiff Union failed to allege that the restraint of trade covered the entire market, so it was unclear whether the entire marketplace was affected. *A.G.C.*, 459 U.S. at 540, n.41. In this case, Ms. Lorix has alleged that the restraint of trade encompassed the entire market. (App. 9, ¶34).

Furthermore, the Supreme Court noted that it was unclear whether enhanced competition would benefit the Union. *A.G.C.* at 539. In this case, Ms. Lorix has alleged a price-fixing conspiracy, which is a *per se* violation of the antitrust laws precisely because it can have no pro-competitive effects. In the absence of the conspiracy, prices would drop to a competitive level, which benefits Ms. Lorix and the class. Thus, the fact that a purchaser is not a consumer or competitor should be viewed in light of the policies set forth in *A.G.C.*: Ms. Lorix satisfies that factor under this analysis.

Assuming, *arguendo*, that the Court applies *A.G.C.* to this matter, Appellant suggests that the “consumer or competitor” factor be replaced with the “causal connection” factor utilized by many courts. Even Respondents’ cases support the proposition that “consumer or competitor” is not an appropriate factor. *See, e.g., Fucile*, 2004 WL 3030037, at \*2; *Knowles*, 2004 WL 2475284, at \*5;<sup>12</sup> *Luscher*, No. CV 2004-

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<sup>12</sup>*Knowles* separately considers whether plaintiff was a “consumer or competitor.” *Knowles*, 2004 WL 2475284, at \*5. The court concluded that plaintiff was not a consumer or competitor, but nonetheless, because plaintiff alleged an injury of the type that Congress sought to redress, and Maine adopted an *Illinois Brick* repealer statute (just as Minnesota did), “suggests that the court should not deny standing just because plaintiffs are not participants in the actual market where trade was restrained.” *Id.*

014835, at 2; and *Tremco*, 1997 WL 423575, at \*2. Instead, cases focus on the “causal connection” between the antitrust violation and the alleged harm. *See, e.g., Tremco*, 1997 WL 423575, at \*2; *Knowles*, 2004 WL 2475284; *Ho*, No. 112316100, 2004 WL 118534 (N.Y.Sup.Ct. April 21, 2004), *Investors Corp.*, Case No. S1011-04 CnC (Chittenden County, Vt. Super. Ct., June 1, 2005) (in Resp. Appendix).

This analysis is more appropriate than the “consumer or competitor,” because “causal connection” is more akin to the definition of “antitrust injury” set forth in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (“Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes Respondents’ acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be ‘the type of loss that the claimed violations . . . would be likely to cause.’” (citation omitted)). *See also, Tremco*, 1997 WL 423575, at \*2 (applying *Pueblo Bowl-A-Mat* to determine antitrust standing).

*Knowles v. Visa*, 2004 WL 2975284, is particularly relevant on this issue. In *Knowles*, the court applied the “causal connection” analysis, and held “it is evident that plaintiffs have adequately pleaded a causal connection . . . .” *Id.*<sup>13</sup> This is significant: if

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<sup>13</sup>In *Southard*, the trial court considered “the nature of the action,” rather than the “consumer or competitor” or “causal connection” analysis. The *Southard* court held that those plaintiff were not “indirect purchasers” but were “derivative purchasers” because they “have not ended up with a product the defendant supplied.” *Southard*, 2004 WL 3030028, at \*3. By contrast, Ms. Lorix did have products that Respondents supplied. (App. 1, ¶1, App. 2, ¶¶2-3.)

a “causal connection” is “evident” in a case alleging a tying arrangement of financial services increased the price of every product sold by every merchant, it is more “evident” that a “causal connection” exists where plaintiff alleges a per se antitrust violation that raised the price on a single product.

Furthermore, courts applying *A.G.C.* hold that the “causal connection” was satisfied when a price-fixed component raised the price of a finished product. For example, in *Investors Corp.*<sup>14</sup>, No. 51011-04 CnC, the court held that there was a causal connection between the conspiracy and the injury, because an increase in the price of a component part can increase the price of the finished product. *Id.* at 3. The defendants in *Investors Corp.* – some of whom are defendants in this case – made the same argument as the defendants in this case: that there are other inputs into pricing, different forms of distribution, and different types of manufacturing, leading to speculative damages, and precluding a “causal chain.” The *Investors Corp.* court found that such facts were not relevant to a Rule 12 analysis. *Investors Corp.*, No. 51011-04 CnC at 4. Similarly, in *Luscher*, No. Cv. 2004-014835, the court held that the higher price for goods satisfied the “causal connection.” Order at 4.

Thus, Plaintiffs believe that if the *A.G.C.* test is to be applied, the first factor should focus on the relationship between the conspiracy and injury. Here, as in *Knowles*,

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<sup>14</sup>In fact, not only is *Investors Corp.* factually similar to the instant matter, but *Investors Corp.* also has a striking procedural similarity: it was preceded by a *Visa* case (*Fucile v. Visa*), just as *Lorix* was preceded by *Gutzwiller*. And, although *Fucile* denied standing, *Investors Corp.* was decided in favor of plaintiff.

*Investors Corp.*, and *Luscher*, there is a causal connection between the conspiracy and injury, and Plaintiff has satisfied the first factor of the *A.G.C.* test.

**B. Ms. Lorix's Damages Claims are Not Speculative, Duplicative nor Complex**

Respondents allege that the damages in this case are speculative. Ironically, they offer no proof of this: only their own speculation. Respondents seem to argue that because their conspiracy resulted in an allegedly small price increase, damages will be hard to calculate, and they should be granted a free pass. Clearly, antitrust law does not make exceptions for conspiracies that result in small increases to a large number of consumers. *Freeman*, 172 S.W.2d at 515 (finding cause of action for indirect purchasers even though price-fixed product was used in "small quantities" to slow growth of mold in food.). In fact, this is precisely the type of fact pattern for which class actions were designed. See, e.g., *Forcier v. State Farm Mut. Auto. Ins. Co.*, 310 N.W.2d 124, 130 (Minn. 1981).

Defendant cites to *B.W.I. Custom Kitchen v. Owens-Illinois*, 191 Cal. App. 3d 1341 (1987) as support for its claim that damages in this case are too speculative. However, *B.W.I.* analyzed "speculative" in a class certification analysis of "impact," with the benefit of a developed record. Significantly, *B.W.I.* recognized that "courts should avoid interpreting procedural requirements in such a way as 'would thwart the legislative intent . . . to retain the availability of indirect-purchaser suits as a viable and effective means of enforcing California's antitrust laws.'" *Id.* at 1355 (citation omitted). If these

issues should not be used to deny certification, then it makes no sense to use them to deny standing.

Respondents' next argument is based upon a boilerplate recitation of factors that can impact pricing. These factors are present in every price-fixing case, whether direct or indirect, and are appropriately addressed at class certification, with the assistance of experts. "Complex antitrust cases. . . invariably involve complicated questions of causation and damages. This case will likely prove no exception, but that is not reason enough to dismiss for lack of standing." *Investors Corp.*, No. 51011-04 CnC, Order at 5. (Internal quotation marks and citation omitted).

Viewed in their entirety, Respondents' arguments are based largely on *Visa* court's determinations of speculation and complexity.<sup>15</sup> The concerns raised by Respondents are simply insufficient to deny standing to Ms. Lorix. Of course, those cases are undisputably more complex and speculative than the instant matter. For example, one *Visa* court noted that "this [Visa] case presents a far easier analysis [than a price-fixing case]. It is not a price-fixing case. . . . Tying cases present unique damages issues." *Crouch*, 2004 WL 2414027 at \*26. If Respondents' contention that the existence of these

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<sup>15</sup>Respondents also cite to *Crouch*, which is distinguished elsewhere in this Brief. See §I.B. The concerns voiced in *Crouch*, like those in the *Visa* cases have been debunked by various courts and commentators (*see* App. Brief, p. 7, n. 4).

factors, which are typical in antitrust cases is sufficient to deny standing in a price-fixing case, then no antitrust plaintiff could have standing.<sup>16</sup>

Finally, Respondents contend that damages in this case would be duplicative. But the Minnesota legislature expressly delegated the power to the district court to take “any steps necessary to avoid duplicative recovery.” Minn. Stat. 325D.57. Frankly, given this judicial power, it is hard to fathom why a case should, nonetheless, be dismissed as duplicative. Nonetheless, Respondents suggest that, in furtherance of this statutory language, that trial courts should simply dismiss the case because there is a federal, direct purchaser case against the same defendants.

Respondents’ reinterpretation of this statute would effectively negate the “broad grant of standing” established by Minn. Stat. §325D.57. Furthermore, it is premature to dismiss this as duplicative of the federal action, when the federal action has not been adjudicated.

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<sup>16</sup>Similarly, the cases cited by Respondents in footnote 4 of their brief are all far more complex than the issues in this matter. *See, Lovett v. General Motors*, 975 F.2d 518, 520, (8<sup>th</sup> Cir. 1992) (individual who owned a car dealership sued individually to recover damages resulting from defendants’ alleged conspiracy with rival dealers to restrict distribution of vehicles); *S.D. Collectibles, Inc. v. Plough* 952 F.2d 211 (8<sup>th</sup> Cir. 1991) (plaintiff who was a representative of manufacturer sued manufacturer because manufacturer terminated agreement; court held that because plaintiff did not buy the product in question, it had no standing); *McDonald v. Johnson & Johnson*, 722 F.2d 1370, 1373 (8<sup>th</sup> Cir. 1983) (stockholders had no standing to sue for damages resulting from alleged fraud, because their loss was not caused by antitrust violations, and plaintiff had other remedies), *South Dakota v. Kansas City S. Ind.*, 880 F.3d 40, 47-48 (8<sup>th</sup> Cir. 1989) (injuries resulting from state’s assignment of certain rights did not result from anticompetitive nature of practices, but instead, were an incidental result of anticompetitive activity in another segment of the economy.).

#### IV. LEGISLATIVE HISTORY ESTABLISHES THAT MINN. STAT. §325D.57 PROVIDES STANDING TO PLAINTIFF

Because the language of the statute is clear, this Court need not resort to extraneous sources of information, such as legislative history. *Humphrey*, 1995 WL 1937124, at \*4. To the extent that this statute has any ambiguity, it should be construed broadly to effectuate the remedial nature of this statute. *See Humphrey*, 551 N.W.2d at 496 (citation omitted). This transcript was never referenced in the complaint, and indeed, the trial court declined “to evaluate any evidence outside the pleadings.” (App. 91). Furthermore, there is no reason to believe that the comments of an AAG to a subcommittee are evidence of legislative intent.

Respondents contend that legislative history demonstrates that standing is not limitless.<sup>17</sup> Respondents purport to establish the legislative history of the statute by referring to a few cherry-picked comments made by an associate attorney general (“AAG”) before a Subcommittee of the State Senate Judiciary Committee.

Nonetheless, a closer analysis of the AAG’s comments shows that Respondents’ quotations of the AAG do not fully explain his comments. The AAG states “the new statute is designed to give [plaintiff] the right to be in court, to prove *who actually suffered the overcharge* and to recover the damages.” Hearing on S.F. 1807 Before the Sen. Judiciary Comm. Civil Law Subcomm., 1984 Leg., 73d Sess. 9 (Minn. Mar. 19,

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<sup>17</sup>Of course, Plaintiffs are not saying that standing should be “limitless,” rather, Plaintiffs have consistently contended that standing should be determined according to longstanding principles of Minnesota law.

1984) (Resp. App. 127). It is clear that Ms. Lorix, as the end user, is the person who actually *suffered* the burden of the overcharge. This conclusion is buttressed by the AAG's later statement that this statute is designed to protect "the ultimate consumer." (Resp. App., 32.) It is important to note that the AAG, who was in charge of the antitrust division, made his comments after *A.G.C.* was issued, but failed to reference it as a limitation on standing. This commentary supports an interpretation that the statute grants standing to the consumer.

The language quoted by the Respondents in support of their contention that the AAG's comments indicate a certain interpretation of the statute must be placed in context. Respondents quote the AAG discussing the "chain of purchase" (Resp. Brief., 23-24.). The two examples that the AAG suggests as perhaps being outside the "purchase" are a taxpayer and a garage sale purchaser. (Resp. App., 133.) Neither of these "purchasers" is analogous to Ms. Lorix who is the end user and who purchased tires from a retailer and who claims injuries as a result. Finally, from the context of the comments, it is clear that the subcommittee is discussing a specific version of the bill. However, whether this bill became Minn. Stat. § 325D.57 is unknown and thus the AAG's comments on a chain of purchase have very limited value<sup>18</sup>

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<sup>18</sup>Respondents also point to the AAG's comments on the "chain of purchase" as proof that an indirect purchaser must be a "consumer or competitor." (Resp. Brief, 23.) This comment must also be considered in the larger context of his remarks. As the AAG noted in the language immediately preceding the Respondents' quote, "If you are outside the target area you cannot recover." The concept of "target area" comes from Justice Brennan's dissent in the *Illinois Brick* case. Specifically, Brennan suggested that the test for standing not focus on the "directness of the injury," but rather on whether plaintiff is

V. ***PHILIP MORRIS AND GORDON V. MICROSOFT DEMONSTRATE THAT MS. LORIX HAS STANDING.***

Respondents try to distinguish *Phillip Morris* and *Gordon* cases, both of which support Plaintiff. In *Philip Morris*, the Minnesota Supreme Court found standing without resorting to the *A.G.C.* test, noting that standing can only be acquired through a statute or by showing “injury-in-fact.” *Humphrey*, 551 N.W.2d 490, 493 (1996).<sup>19</sup> Respondents contend that because the plaintiff was a consumer in the allegedly-restrained market, analysis under *A.G.C.* was unnecessary. However, if plaintiff was a consumer, then it satisfied the first factor of *A.G.C.* Yet, the Supreme Court did not apply *A.G.C.* because it was *unnecessary* to do so. Rather, the Supreme Court, relying on long-standing Minnesota jurisprudence, found that the plaintiff had suffered injury-in-fact, and

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within the “target area of the defendants’ conspiracy.” *Illinois Brick*, 431 U.S. at 760. Put another way, the test is “whether the injury to the plaintiff is a reasonably foreseeable consequence of the defendants’ illegal conduct.” *Id.* at 760 n. 18 (citation omitted).

Certainly, Respondents, who conspired to keep the prices of rubber processing chemicals at an artificially inflated level, could foresee that the consumers will pay more for the product down the line regardless of whether it is in its original form or combined with other ingredients. *See also, Holder*, 1998 WL 1469620 (DC Super. Nov. 4, 1998) (same). Thus, the DC Superior Court has interpreted the same language set forth by the Associate Attorney General, and found that it does not preclude a grant of standing to consumers who purchased grocery items containing a price-fixed ingredient. Again, the language selected by Respondents in support of their interpretation is, at best, subject to contradictory interpretations.

<sup>19</sup>Even though *Humphrey* is an antitrust case, Respondents ignore this clear, relevant statement of the law. Similarly, the *Humphrey* court noted that the legislature may, “by statute, expand the connection between conduct and injury necessary to permit suit.” *Humphrey*, 551 N.W.2d at 495. Clearly, the Minnesota Supreme Court believed that the Legislature had expanded the scope of Minnesota’s antitrust act to include any injured party.

therefore, had standing. *Humphrey*, 551 N.W.2d at 498. Similarly, in this case, Ms. Lorix has alleged and suffered injury-in-fact, and has standing.<sup>20</sup> (App. Brief, 33-34.)

Respondents' attempt to distinguish *Gordon* is based upon unsupported factual assertions. Respondents argue that the operating system "is an identifiable product that can be removed and replaced with a different operating system." (Resp. Brief, 31.) There is no support for that proposition, either in the record or the *Gordon* opinion. Furthermore, the statement is inconsistent with the *Gordon*'s class definition, which was quite broad, certifying persons who "indirectly acquired . . . any version of the following software . . . or any other software product in which MS-DOS or Windows has been incorporated in whole or in part . . .". *Gordon*, 2003 WL 23105552, at \*1.<sup>21</sup>

Respondents further attempt to distinguish *Gordon* by relying on a *Kansas* court's class definition, *Bellinder v. Microsoft Corp.*, No. 00-C-0855, 2001 1397995 (Kan. Dist. Ct. Sept. 7, 2001), and then drawing certain factual assumptions from that definition. D. Br. at 31. However, that class definition is materially different from - and narrower than - the class certified in *Gordon*. It serves no purpose, and should be disregarded.

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<sup>20</sup>Respondents fail to explain how the analysis of Ms. Lorix's claim differs from the claim of plaintiffs in *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), discussed at Appellant's Brief, 33-34.

<sup>21</sup>As discussed *supra*, it doesn't matter if a component has been incorporated entirely to a finished product. (See Section I.A.)

**VI. CONCLUSION**

For the reasons stated in this reply Brief and Appellant's Brief, Ms. Lorig respectfully requests that this Court reverse the Order from which the appeal is taken, and remand this matter to the District Court for further proceedings consistent with the relief sought in this appeal.

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Respectfully submitted

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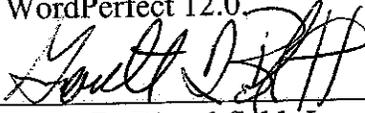
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## CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief of Appellant complies with the word count limitations of Minn. R. App. P. 132.01, subd. 3(a) in that the brief contains 9,883 words. The brief was prepared using Corel WordPerfect 12.0.



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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).