

CASE NO. A05-2148

**State of Minnesota
In Supreme Court**

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

Plaintiff-Appellant,

vs.

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

Defendants-Respondents.

**BRIEF OF RESPONDENTS CHEMTURA CORPORATION (F/K/A CROMPTON
CORPORATION), UNIROYAL CHEMICAL COMPANY, INC., AND
UNIROYAL CHEMICAL COMPANY LIMITED**

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STATEMENT OF THE ISSUES

I. Whether the Court of Appeals properly held that Plaintiff-Appellant Diane Lorix lacks standing to assert an antitrust damages claim based on her purchase of a product the Defendants-Respondents did not make, market, sell, or distribute?

Applying well-settled law, the Court of Appeals held that antitrust standing is not limitless and that Lorix lacks standing because she did not purchase the price-fixed product, and thus is not a participant in the market restrained by the alleged antitrust violation.

- *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 534 (1983)
- *State by Humphrey v. Philip Morris, Inc.*, 551 N.W.2d 490, 493 (Minn. 1996)
- *Howard v. Minnesota Timberwolves Basketball Ltd. Partnership*, 636 N.W.2d 551, 556 (Minn. Ct. App. 2001)

II. Whether the Court of Appeals properly held that although the 1984 amendment to Minn. Stat. § 325D.57 removes the categorical bar to indirect-purchaser claims, the amendment does not eviscerate well-established principles of antitrust standing so that any self-proclaimed indirect purchaser, no matter how remote or attenuated her claim for injury might be, has standing to sue?

The Court of Appeals properly recognized that while the 1984 amendment to § 325D.57 eliminates the categorical restriction on indirect-purchaser actions, it does not alter the analytically distinct principle of antitrust standing; namely, whether any particular plaintiff (in any given case) has sustained injuries too remote to confer standing to sue for damages.

- *Blue Shield v. McCready*, 457 U.S. 465, 472-77 (1982)
- *State v. Gray*, 413 N.W.2d 107, 113 (Minn. 1987)
- *Hanson v. Woolston*, 701 N.W.2d 257, 262 (Minn. Ct. App. 2005)
- *Keating v. Philip Morris, Inc.*, 417 N.W.2d 132, 136 (Minn. Ct. App. 1987)

STATEMENT OF THE CASE

This appeal centers on whether any plaintiff labeling him or herself an “indirect purchaser” may sue under the Minnesota Antitrust Act, Minn. Stat. § 325D.57 (2005), no matter how remote, attenuated, or speculative the plaintiff’s claim for injury might be. The answer is no. While Minnesota law does not categorically bar indirect-purchaser claims, those claims are not limitless. Rather, Minnesota courts (including the courts below) routinely apply common-sense principles of remoteness and proximate cause to determine whether a plaintiff in any given action has antitrust standing.

The plaintiff in this case, Diane Lorix, argues that antitrust standing has no limit. Lorix brings this case despite the fact that she never actually purchased the product she claims was the subject of the alleged price-fixing conspiracy. Still, she hypothesizes that she and “every Minnesota citizen” could bring an antitrust suit against Defendants because their alleged “price-fixing resulted in the increased price of tires, which in turn increases the cost of transportation, and therefore, the cost of goods transported by truck” into the State. (Ct. of App. Order at 5, App. App. at 28.) That unreasonable, limitless view of standing is simply not the law.

Both the District Court and the Court of Appeals properly rejected Lorix’s claim on the grounds that because she does not allege she purchased the price-fixed product, and thus fails to allege that she is a consumer or a competitor in the market restrained by the alleged antitrust violation, she lacks standing. This result is consistent with Minnesota caselaw and with the purpose, intent, and legislative history of the 1984 amendment to the Minnesota Antitrust Act. That amendment eliminated the prior

categorical restriction that barred indirect purchasers from bringing suit. But it did not jettison the antitrust standing inquiry, which was the law before the 1984 amendment and remains the law today. To hold otherwise (namely, that indirect-purchaser standing is limitless) would stretch application of the Minnesota Antitrust Act beyond reason, create absurd results, and contravene the legislature's plain intent. The Court of Appeals' ruling should be affirmed.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Defendants-Respondents Chemtura Corporation (f/k/a Crompton Corporation), Uniroyal Chemical Company, Inc., and Uniroyal Chemical Company Ltd. ("Defendants") produce and sell rubber-processing chemicals.¹ They sell these chemicals to a variety of industrial manufacturers who use them to transform crude rubber into rubber that is commercially usable. Specifically, rubber-processing chemicals help cure and protect rubber, increase its durability and fatigue life, control color, and provide heat resistance. (Am. Compl. ¶¶ 27-28, App. App. at 8.) Once these industrial manufacturers have processed rubber using rubber-processing chemicals, they then use that rubber to manufacture products such as tires, belts, hoses, and even footwear, depending on their specific businesses. The final products ultimately are then sold to other manufacturers or consumers (such as Lorix), often through complex distribution and retail networks.

¹ Defendant Bayer Corporation filed a stipulation for voluntary dismissal from this appeal on January 12, 2007.

Lorix did not buy rubber-processing chemicals. Rather, she purchased automobile tires — a product “manufactured utilizing rubber chemicals.”² (Am. Compl. ¶ 9, App. App. at 3.) Her claim of injury therefore arises from the purchase of a product that Defendants do not make, market, distribute, or sell. Lorix has not alleged that she was ever a link, at any level, in the manufacturing or distribution chain for rubber-processing chemicals. She also has not alleged (and cannot allege) that Defendants fixed the price of automobile tires, the product she actually purchased. Instead, Lorix complains about a conspiracy to fix the price of rubber-processing chemicals, alleging that these price-fixed chemicals were sold to tire companies who used the chemicals to process rubber and eventually to manufacture tires. These tire companies allegedly then sold the tires at inflated prices to wholesalers or other distributors who then resold those tires, again supposedly at inflated prices, to retailers. The retailers then resold them to consumers such as Lorix, allegedly causing her injury.

Accepting these allegations as true and drawing all factual inferences in favor of Lorix, the Court of Appeals concluded that Lorix lacked standing. (Ct. of App. Order at 8, App. App. at 30.) While acknowledging that “indirect purchasers” are not categorically barred from bringing damages actions under the Minnesota Antitrust Act, the Court of Appeals adhered to the principle that Minnesota antitrust law should be

² As the District Court recognized, Lorix does not allege in her Complaint that she purchased tires actually containing the rubber-processing chemicals in question. (Dist. Ct. Order at 5, App. App. at 19.)

construed consistently with federal courts' interpretation of federal antitrust laws. (Ct. of App. Order at 4, App. App. at 26.) The Court of Appeals then applied well-established law that analyzes the relationship between a plaintiff's alleged injury and the alleged wrongdoing to conclude that Lorix's alleged harm was far too remote from Defendants' purported anticompetitive conduct to confer standing. (Ct. of App. Order at 7, App. App. at 29.)

Looking to the antitrust standing analysis set forth in the United States Supreme Court's decision in *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983) ("AGC"), for guiding principles, the Court of Appeals found that an antitrust plaintiff "must be a consumer or competitor in the market restrained by the alleged antitrust violation." (Ct. of App. Order at 7, App. App. at 29.) Here, the alleged antitrust violation involves the market for rubber-processing chemicals, a market in which Lorix has never participated. The Court of Appeals also properly rejected Lorix's limitless reading of the Minnesota Antitrust Act, recognizing that under her theory, that statute would reach an "absurd or unreasonable result" which "[the Court] presume[d] the legislature did not intend." *Id.* The judgment of the Court of Appeals should be affirmed.

STANDARD OF REVIEW

Statutory interpretation is an issue of law that this Court reviews *de novo*. *State v. Anderson*, 683 N.W.2d 818, 821 (Minn. 2004). Its "canons of statutory construction demand that [the Court] 'construe words and phrases according to rules of grammar and according to their most natural and obvious usage unless it would be inconsistent with the

manifest intent of the legislature.” *Id.* (quoting *Amaral v. St. Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999) (citing Minn. Stat § 645.08(1) (2002))). “The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature.” Minn. Stat. § 645.16 (1998). “If a statute is ambiguous . . . we must then determine the probable legislative intent and give the statute a construction that is consistent with that intent.” *Tuma v. Comm’r of Econ. Sec.*, 386 N.W.2d 702, 706 (Minn. 1986). “A statute is ambiguous when it can be given more than one reasonable interpretation.” *Id.*

This Court also applies de novo review to issues of standing, *Frost-Benco Elec. Ass’n v. Minn. Pub. Utils. Comm’n*, 358 N.W.2d 639, 642 (Minn. 1984), which are appropriately addressed at the motion for judgment on the pleadings stage. *Alliance for Metro. Stability v. Metro. Council*, 671 N.W.2d 905, 913 n.6 (Minn. Ct. App. 2003). When considering a motion for judgment on the pleadings, the court must accept the allegations contained in the pleading under attack as true, and assumptions made and inferences drawn must favor the non-moving party. *State ex rel. City of Minneapolis v. Minneapolis St. Ry. Co.*, 56 N.W.2d 564, 567 (Minn. 1952). But, “[c]ourts are *always* able to dismiss pleadings consisting solely of vague or conclusory allegations, wholly unsupported by fact.” *In re Milk Indirect Purchaser Antitrust Litig.*, 588 N.W.2d 772, 775 (Minn. Ct. App. 1999) (emphasis in original).

ARGUMENT

Antitrust standing is not limitless. Hence, even where a plaintiff alleges an injury from an antitrust violation, that person does not automatically have standing to sue.

Rather, the doctrine of antitrust standing requires courts to evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, the relationship between the two, and whether the alleged injury is of the type the antitrust laws were meant to address.

Before the Minnesota legislature amended § 325D.57 of the Minnesota Antitrust Act in 1984, Minnesota followed the federal rule that categorically prohibits indirect-purchaser actions. In 1984, the Minnesota legislature decided to eliminate this categorical bar. In passing the 1984 amendment, however, the legislature did not abolish long-held principles of antitrust standing. It simply removed the categorical restriction against indirect-purchaser damages claims.

The text of § 325D.57, as well as the purpose, intent, and legislative history of the 1984 amendment, demonstrate that it only eliminates the *per se* restriction on indirect-purchaser actions. The amended statute does not address whether any particular plaintiff has sustained injuries too remote to have standing to sue for damages. This latter inquiry, which is separate from the question of whether indirect purchasers have a remedy at all under § 325D.57, is governed by the body of law defining the permissible limits of antitrust standing, including this Court's decision in *State by Humphrey v. Philip Morris, Inc.*, 551 N.W.2d 490 (Minn. 1996), and the United States Supreme Court's decision in *AGC*.

Minnesota courts, like their federal counterparts, have long recognized and applied prudential limits on standing that go beyond the basic constitutional requirement that a plaintiff allege injury. Those limits encompass the principles underpinning the antitrust standing analysis — namely, inquiries into remoteness, causation, and whether a plaintiff

has alleged a harm that is of a type that the antitrust laws were designed to prevent. This was the case before the 1984 amendment to § 325D.57, and it remains the case today.

Applying these limits to Lorix's claim, the Court of Appeals correctly concluded that she lacks standing, as she never purchased the alleged price-fixed product and thus is not a link, at any level, in its sales and distribution chain. (Ct. of App. Order at 8, App. App. at 30.) This result is fully consistent with the 1984 amendment.

I. STANDING IS NOT LIMITLESS UNDER THE MINNESOTA ANTITRUST ACT.

A. Under Well-Established Minnesota Law, Antitrust Standing Includes Both A Constitutional And A Prudential Element.

Minnesota law requires that all plaintiffs have standing in order to pursue an action and recognizes that the standing inquiry has both constitutional *and* prudential components. *See, e.g., State v. Gray*, 413 N.W.2d 107, 113 (Minn. 1987) (prudential principles underlie standing principles); *Hanson v. Woolston*, 701 N.W.2d 257, 262 (Minn. Ct. App. 2005) (potential litigants must satisfy constitutional standing requirements and also demonstrate that “[p]rudential limitations on standing” are met).³ Both Minnesota and federal courts recognize the appropriateness of these principles to an analysis of whether the plaintiff in each particular case is an appropriate party to bring an action under the antitrust laws. *See, e.g., Philip Morris*, 551 N.W.2d at 495, 497 (granting standing where plaintiff was the proper party to assert an antitrust claim based

on its relationship to the alleged anticompetitive conduct); *Tremco, Inc. v. Holman*, No. C8-96-2139, 1997 WL 423575, at *1-4 (Minn. Ct. App. July 29, 1997) (denying standing where plaintiff did not suffer the type of injury the antitrust laws were designed to prevent); *see also AGC*, 459 U.S. at 535 n.31 (“Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action.”).

Thus, while it is understood that an antitrust violation may “cause ripples of harm to flow through the Nation’s economy,” antitrust law does not permit “every person tangentially affected by an antitrust violation to maintain an action to recover[] damages for the injury to his business or property.” *Blue Shield v. McCready*, 457 U.S. 465, 476 (1982); *Gutzwiller v. Visa U.S.A., Inc.*, No. C4-04-58, 2004 WL 2114991, at *10 (Minn. Dist. Ct. Sept. 15, 2004) (“not every person claiming some remote or tangential injury from an antitrust violation can maintain a suit under the Minnesota antitrust laws”).⁴

³ *See also Nat’l Fed. of the Blind v. Cross*, 184 F.3d 973, 979 (8th Cir. 1999) (the inquiry into prudential standing is simply a common-sense inquiry into whether “as a prudential matter . . . the party is the appropriate proponent of the legal rights raised”).

⁴ The doctrine of antitrust standing addresses this issue and the corresponding common-sense concerns about the unmanageable litigation that would result if every conceivable plaintiff, regardless how remote his or her injury was from the alleged wrongdoing, could pursue an antitrust claim. *See, e.g., Fla. Seed Co. v. Monsanto Co.*, 105 F.3d 1372, 1374 (11th Cir. 1997) (“[T]he doctrine of antitrust standing reflects prudential concerns and is designed to avoid burdening the courts with speculative or remote claims.”).

Lorix urges this Court to construe the language of “any person” in § 325D.57 as limitless, endowing every person with standing to sue who is brushed by these endless “ripples of harm” flowing through the economy from an antitrust violation. (*See App. Br.* at 6.) This is not the law. The United States Supreme Court recognized in *AGC* that the Clayton Act’s reference to “[a]ny person who shall be injured in his business or property” was no more intended to be taken literally, to its fullest conceivable extent, than is the language “[e]very contract in restraint of trade” in the Sherman Act or similar uses of such terms as “every” and “any” in other statutes. *See* 459 U.S. at 529-33; *see also Gutzwiller*, 2004 WL 2114991, at *10 (holding that a literal reading of § 325D.57 would encompass any harm no matter how remote or tangential to an alleged antitrust violation and would lead to illogical and absurd results). The Supreme Court recognized that this language is subject to construction by reference to reasonable common law principles, informed by foreseeability, proximate cause, remoteness, and whether the injury is of the type the antitrust laws were meant to address. *AGC*, 459 U.S. at 529-33. Moreover, this Court agrees that the “any person” language in Minnesota’s sales and consumer fraud statutes is not boundless: “we do not hold that the scope of those enforcement statutes is entirely without limit.” *Group Health Plan, Inc. v. Philip Morris, Inc.*, 621 N.W.2d 2, 11 n.7 (Minn. 2001).

Accordingly, despite the broad language of the Minnesota antitrust law as set forth in § 325D.57, not every person who claims some tangential injury has standing to sue. *See McCready*, 457 U.S. at 476 (despite the expansive language of section 4 “[i]t is reasonable to assume that Congress did not intend to allow every person tangentially

affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property”). Instead, as explained in Section I.C. below, courts must evaluate the causal connection between the plaintiff’s alleged harm and the defendant’s alleged wrongdoing to determine whether the plaintiff has asserted an injury that is redressable under the antitrust laws.⁵

B. The 1984 Amendment To Section 325D.57 Eliminates The Categorical Bar To Indirect-Purchaser Actions — It Does Not Abolish The Doctrine Of Antitrust Standing.

Because Lorix did not purchase anything from Defendants, she is foreclosed from suing for damages under the federal antitrust laws. *See Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977) (holding that “indirect purchasers,” (*i.e.*, persons who buy a defendant’s allegedly price-fixed product from an intermediary) are generally precluded from bringing suit for damages). Seven years after the decision in *Illinois Brick*, the Minnesota legislature decided that Minnesota’s antitrust law should not automatically preclude

⁵ Lorix’s argument that she has standing under Minnesota law simply because she has alleged an injury-in-fact fails. (App. Br. at 38-40.) In making this assertion, Lorix is just repeating the *sine qua non* of all standing — that “[t]o establish *constitutional* standing, a potential litigant must demonstrate ‘injury in fact’ . . .” *Hanson*, 701 N.W.2d at 262 (emphasis added). The existence of an injury-in-fact says nothing about whether the additional, prudential limits on standing with which Minnesota and other courts are concerned, particularly in the antitrust context, are established. *See, e.g., Philip Morris*, 551 N.W.2d at 495; *Sullivan v. Tagliabue*, 25 F.3d 43, 45 n.5 (1st Cir. 1994) (“It is unquestioned that the requirements of antitrust standing exceed those of standing in a constitutional sense.”); *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1448 (11th Cir. 1991) (“[A]ntitrust standing is not simply a search for an injury in fact; it involves an analysis of prudential considerations aimed at preserving the effective enforcement of the antitrust laws.”); *see generally AGC*, 459 U.S. at 535 n.31 (1983).

indirect purchasers from recovery, and amended the Minnesota Antitrust Act to permit “any person . . . injured directly or indirectly by a violation” of the act to seek redress under Minnesota law.

Minnesota courts, including this Court, consistently have held that the 1984 amendment to § 325D.57 simply removes the Minnesota Antitrust Act’s bar to indirect-purchaser actions. *Philip Morris*, 551 N.W.2d at 495; *Keating v. Philip Morris*, 417 N.W.2d 132, 136 (Minn. Ct. App. 1987); *see also Gutzwiller*, 2004 WL 2114991, at *4-5.⁶ Nothing in the 1984 amendment so eviscerates the doctrine of antitrust standing as to create unlimited standing for any and all self-styled indirect purchasers.

Section 325D.57’s legislative history underscores this conclusion. Steve Kilgriff, the Assistant Attorney General in charge of the state’s Antitrust Division in 1984, assured the subcommittee considering the amendment that antitrust standing principles would bar claims asserted by more attenuated litigants. He stated that “there is an established area of the law here that hopefully will control who is recovering in antitrust cases.⁷ . . . [T]he only purpose of the language [‘]directly or indirectly[’] is specifically to deal with this

⁶ As Lorix herself points out (*see* App. Br. at 12), the 1984 amendment’s purpose was to repeal the effect of *Illinois Brick*, a decision that had limited the private right of action under federal law’s Clayton Act to persons *directly* injured. Under established Minnesota harmonization principles, which this Court has held require state antitrust law to be interpreted consistently with federal antitrust law whenever possible, *e.g.*, *Minnesota Twins Partnership v. Hatch*, 592 N.W.2d 847, 851 (Minn. 1999), that United States Supreme Court ruling had a comparable effect in restricting the remedy available under Minnesota’s Antitrust Act.

⁷ The speaker here is listed as unidentified, but context suggests that it was the Assistant Attorney General.

[*Illinois Brick*] case. Nothing else changes with respect to the law.” (See App. App. at 61-62, Transcript: *Hearing on S.F. 1807 Before the Sen. Judiciary Comm. Civil Law Subcomm.*, 1984 Leg., 73d Sess. 9, at 10, 11 (Minn., Mar. 19, 1984) (statement of Assistant Attorney General Kilgriff) (hereinafter “Sen. Comm. Tr.”).)

To illustrate the amendment’s intended effect, Kilgriff used the example of a group of television manufacturers who conspire to fix the price of television sets to retailers. As Kilgriff explained, in a purchase chain that includes a manufacturer, wholesaler, retailer, and ultimate consumer, the proposed amendment would give that ultimate consumer of the television set a right of recovery. Kilgriff stated that in order to recover, one must be “in the chain of purchase.” (*Id.* at 9, App. App. at 60.) Consequently, some potential litigants who were not in the chain of purchase would not be able to recover under the amendment.⁸ This testimony corroborates that Minnesota sought to lift the absolute ban on indirect-purchaser claims but retain the distinct doctrine

⁸ Kilgriff emphasized this point in responding to one senator’s concern about how far the word “indirectly” might be stretched:

[T]here are doctrines in the antitrust law dealing with targets and who are the targets of a conspiracy. If you’re outside that target area[,] you cannot recover. So the taxpayer [who might be affected indirectly through higher taxes, when the State buys a price-fixed product] has been denied standing. The person at the garage sale has also been denied standing under antitrust laws. We have to be in the chain of purchase. That’s understood.

(*Id.*)

of antitrust standing. It also confirms that the architects of the 1984 amendment intended that the scope of indirect-purchaser claims under the amendment would not be limitless but would be restricted to plaintiffs in the chain of purchase, *i.e.*, plaintiffs who purchased the price-fixed product.

Lorix’s suggestion that the 1984 amendment entirely abrogates antitrust standing principles conflates the separate concepts of whether an indirect purchaser is allowed to bring suit under the statute and whether any particular plaintiff has sustained injuries too remote to the alleged antitrust violation to give him or her standing to sue. The question of which indirect purchasers have standing in a given case is different from the threshold question of whether indirect claimants as a general matter can bring a case. *McCready*, 457 U.S. at 476 (1982) (“Analytically distinct from the restrictions on the [antitrust] remedy recognized in . . . *Illinois Brick*, there is the conceptually more difficult question ‘of which persons have sustained injuries *too remote* [from an antitrust violation] to give them standing to sue for damages’” (emphasis and alteration in original) (quoting *Illinois Brick*, 431 U.S. at 728)).⁹ Thus, as previously explained, in passing the 1984

⁹ The Supreme Court itself noted in *Illinois Brick* that its decision was not directed at standing:

Because we find *Hanover Shoe* dispositive here, we do not address the standing issue, except to note as did the Court of Appeals below, that the question of which persons have been injured by an illegal overcharge for purposes of § 4 is analytically distinct from the question of which persons have sustained injuries too remote to give them standing to sue for damages under § 4.

Illinois Brick, 431 U.S. at 728 n.7.

amendment, the legislature did not create any rules regarding indirect-purchaser standing and most certainly did not abolish the well-established principle of antitrust standing.

C. The Court Of Appeals Appropriately Looked To *Associated General Contractors* For Guidance In Its Standing Analysis.

Having correctly determined that standing under § 325D.57 is not limitless, the Court of Appeals appropriately looked to the law of antitrust standing as it has been consistently interpreted and applied by both Minnesota and federal courts (including the United States Supreme Court's seminal antitrust standing decision in *AGC*) to determine whether Lorix has standing. (Ct. of App. Order at 7, App. App. at 29.) In *AGC*, the Supreme Court acknowledged that despite the agreement among courts discussed above "that the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing," courts had struggled "to articulate a precise test to determine whether a party injured by an antitrust violation may recover treble damages." 459 U.S. at 535-36. The Court articulated factors to guide courts in determining the permissible limits of antitrust standing. Those factors include: whether the plaintiff was a consumer or competitor in the allegedly restrained market, *id.* at 538-39; "the directness or indirectness of the asserted injury," *id.* at 540; whether victims more directly harmed exist to maintain an antitrust action against the defendant, *id.* at 541-42; whether the plaintiff's damages claim is highly speculative, *id.* at 543; and whether affording standing comports with the goal of "keeping the scope of complex antitrust trials within judicially manageable limits" by "avoiding the risk of duplicative recoveries on the one hand, or the danger of complex apportionment of damages on the other." *Id.* at 543-44.

The Court of Appeals and other Minnesota courts correctly recognize that these general principles comport with common sense and prudence. (Ct. of App. Order at 7-8, App. App. at 29-30); *see also Smith v. Visa U.S.A., Inc.*, No. C0-04-2096, 2005 WL 1936336, at *6-7 (Minn. Dist. Ct. July 12, 2005) (analyzing indirect-purchaser action using *AGC*'s antitrust standing analysis); *Gutzwiller*, 2004 WL 2114991, at *3-9 (same); *Tremco*, 1997 WL 423575, at *1 (same).

1. *Associated General Contractors* applies here because Minnesota interprets its antitrust law in harmony with federal law.

“Minnesota antitrust law should be interpreted consistently with federal court interpretations of federal antitrust law unless Minnesota law clearly conflicts.” *Howard v. Minn. Timberwolves Basketball Ltd. P’ship*, 636 N.W.2d 551, 556 (Minn. Ct. App. 2001); *see also Minn. Twins*, 592 N.W.2d at 851 (“Minnesota’s antitrust laws are generally interpreted consistently with federal courts’ construction of federal antitrust laws.”). Hence, the Court of Appeals correctly determined that the federal antitrust standing principles articulated in *AGC* apply in indirect-purchaser cases in Minnesota. (*See* Ct. of App. Order at 7, App. App. at 29.) The only point at which federal and Minnesota antitrust law diverge is on the issue of whether indirect purchasers have a statutory remedy at all; on the distinct issue of standing both federal and Minnesota law are congruent. Although certain of the *AGC* factors may become less pronounced in light of the 1984 amendment — for example, the inquiry into the directness of the plaintiff’s

alleged injury and whether there exists a more directly injured class of victims to sue¹⁰ — the *AGC* analysis presents a workable approach to antitrust standing that must be applied consonant with Minnesota precedent requiring harmonization between state and federal antitrust laws. See *Gutzwiller*, 2004 WL 2114991, at *6 (stating that applying the *AGC* factors “in assessing the issue of standing[] is consistent with the concerns addressed by the state legislators who debated the 1984 amendment prior to its passage, and consistent with federal law”); see also *Tremco*, 1997 WL 423575, at *2 (relying on *AGC* in its determination of whether a plaintiff had antitrust standing after the 1984 amendment); *Smith*, 2005 WL 1936336, at *5 (same).

Indeed, as discussed in Section I.B, *supra*, the Assistant Attorney General’s testimony confirms that the 1984 amendment only eliminates *Illinois Brick*’s categorical bar on indirect-purchaser actions — it leaves all other aspects of Minnesota antitrust law unchanged. Particularly given the legislature’s awareness that Minnesota antitrust law is

¹⁰ Although the legislature expanded the concept of “directness” by passing the 1984 amendment, the concerns underlying these factors — ensuring that even an indirect injury is not so attenuated from alleged wrongdoing that the plaintiff is not the appropriate party to sue — continue to have vitality in the indirect-purchaser context. See *Crouch v. Crompton Corp.*, Nos. 02 CVS 4375, 03 CVS 2514, 2004 WL 2414027, at *19 (N.C. Super. Ct. Oct. 28, 2004) (stating that although these factors are modified in indirect-purchaser actions, “[t]he causal connection between the act and the claimed injury cannot be too remote”). These basic concerns regarding attenuation unquestionably flow through the analysis of whether a plaintiff is a consumer or competitor in the restrained market and whether a plaintiff’s damages claims are too speculative, raise the risk of duplicative recovery, or would require complex apportionment by the courts.

construed consistently with federal law (Sen. Comm. Tr. at 6, App. App. at 57), there is no support in the legislative history for Lorix's apparent position that the 1984 amendment removes all prudential standing limitations for indirect-purchaser actions. Logic dictates that in light of: 1) the long-standing jurisprudence on antitrust standing, cogently articulated in *AGC* (decided the year before the amendment was enacted);¹¹ 2) Minnesota antitrust law's well-established harmonization principle; and 3) the Assistant Attorney General's assurance to the legislature that the amendment would change nothing about Minnesota antitrust law other than opening the door to potential indirect-purchaser actions, the legislature would expect Minnesota courts to continue to apply antitrust standing principles in indirect-purchaser cases.

2. *Associated General Contractors* should be applied because it articulates a workable, common-sense standing test for antitrust cases, regardless of the context.

Even if Minnesota precedent did not require the application of relevant *AGC* factors, the Court of Appeals and other Minnesota courts still correctly recognized that *AGC* provides the best approach to evaluating prudential standing concerns in the antitrust context, regardless what type of antitrust case is involved.¹² This Court has long

¹¹ Lorix and the Attorney General contend that the fact that *AGC* was decided a year before enactment of the 1984 amendment somehow renders it irrelevant because the legislature could have incorporated its standing limits into the amended statute. (App. Br. at 33; AG Br. at 12.) It is equally if not more plausible that the legislature understood that it was passing the amendment against the backdrop of existing antitrust standing law, which at that time included *AGC*. See Section I.B, *supra*.

¹² Contrary to Lorix's assertion, *AGC*'s antitrust standing doctrine was not developed to apply only to direct-purchaser cases. After all, even under *Illinois Brick* certain

recognized that “[a]s a practical matter, legal responsibility must be limited to those causes which are so close to the result, or of such significance as causes, that the law is justified in imposing liability. This limitation is not a matter of causation, it is one of policy. . . .” *Lewellin v. Huber*, 465 N.W.2d 62, 65 (Minn. 1991) (quoting William Prosser, *The Minnesota Court on Proximate Cause*, 21 Minn. L. Rev. 19, 22 (1937)) (holding that in statute providing that dog’s owner was liable if a dog attacked or injured “any person,” “public policy and legislative intent are best served by limiting proximate cause to direct and immediate results of the dog’s actions”). *AGC* is a reasoned articulation of the key factors to be considered in determining where limits should be drawn in the antitrust context.

In *AGC*, the Supreme Court acknowledged that, like the inquiry into the parameters of proximate causation, it is difficult to articulate a “precise test” for antitrust standing, but, as with causation principles, limits on antitrust standing are necessary. *See* 459 U.S. at 535-36 & nn.32 & 33; *see also Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 964 (3d Cir. 1983) (stating that in *AGC*, “[t]hrough this concept of ‘antitrust standing,’ the Court has engrafted on [the antitrust laws] an analysis akin to proximate

indirect-purchaser actions may still be maintained in federal court. *See Illinois Brick*, 431 U.S. at 736 n.16 (permitting the pass-on defense where the direct purchaser is owned or controlled by its customer); *see also, e.g., Paper Sys. Inc. v. Nippon Paper Indus. Co., Ltd.*, 281 F.3d 629, 631 (7th Cir. 2002) (“The right to sue middlemen that joined the conspiracy is sometimes referred to as a co-conspirator ‘exception’ to *Illinois Brick*.”). Rather, *AGC* represents a broader effort by the Supreme Court to provide guidance regarding the antitrust standing analysis with which the lower courts had been struggling. *See* 459 U.S. at 535-36 & n. 35.

cause to determine whether a particular injury is too far removed from an alleged violation to warrant a . . . remedy” (internal citation omitted)). The viability of the *AGC* factors as a mode of antitrust standing analysis is evident from the range of situations to which they have been applied. *See, e.g., 2660 Woodley Rd. Joint Venture v. ITT Sheraton Corp.*, 369 F.3d 732, 740-43 (3d Cir. 2004) (applying *AGC* factors to find hotel owners lacked antitrust standing against hotel operating corporation for commercial bribery claim); *South Dakota v. Kan. City S. Indus.*, 880 F.2d 40, 45-49 (8th Cir. 1989) (denying State-supplier of water rights antitrust standing to assert claims against railroad opposing coal pipeline); *McDonald v. Johnson & Johnson*, 722 F.2d 1370, 1374-79 (8th Cir. 1983) (holding former shareholders alleging fraud in sale of stock lacked antitrust standing under six-factor *AGC* test). Additionally, numerous courts in other states have dismissed claims of indirect purchasers for lack of antitrust standing under *AGC* in cases virtually identical to this one.¹³ *See, e.g., Crouch*, 2004 WL 2414027 (applying *AGC* factors to

¹³ This Court “often look[s] to case law from other states for guidance when [its] own jurisprudence is lacking.” *Gordon v. Microsoft*, 645 N.W.2d 393, 402 n.9 (Minn. 2002). Lorix argues that other states have construed similar statutes to include suits by all indirect purchasers. (App. Br. at 8.) However, in the majority of the cases that she cites, the courts were merely concerned with whether state statutes allowing “any person” to sue for an antitrust violation encompassed potential claims by indirect purchasers. *See Freeman Indus., LLC v. Eastman Chem. Co.*, 172 S.W.3d 512, 517-520 (Tenn. 2005); *Bunker’s Glass Co. v. Pilkington, PLC*, 75 P.3d 99, 102 (Ariz. 2003) (en banc); *Comes v. Microsoft Corp.*, 646 N.W.2d 440, 443 (Iowa 2002). In Minnesota, the legislature already has resolved that issue by amending the state’s antitrust statute to eliminate the bar to indirect purchasers as potential claimants.

Of the cases Lorix cites that do grapple with *AGC*, one recognized that *AGC* might apply to determine whether indirect purchasers had standing. *See Investors Corp. of Vt. v. Bayer AG*, Case No. S1001-04 CnC (Chittenden County, Vt. Super. Ct. June 1, 2005)

dismiss for lack of standing claims of alleged indirect purchaser of rubber-processing chemicals used to make tires); *Luscher v. Bayer AG*, No. CV-2004-014835 (Ariz. Super. Ct. Maricopa Cty., Sept. 14, 2005) (applying *AGC* factors to deny standing of alleged indirect purchaser of ingredient used to make tires); *Weaver v. Cabot Corp.*, No. 03 CVS 04760, 2004 WL 3406119 (N.C. Super. Ct. Mar. 26, 2004) (same). Other state courts have also, like the *Gutzwiller* and *Smith* decisions in Minnesota, applied the *AGC* factors to dismiss indirect-purchaser claims brought against Visa and MasterCard, even in the face of explicit *Illinois Brick* repealer statutes. See, e.g., *Fucile v. Visa U.S.A., Inc.*, No. S1560-03 CNC, 2004 WL 3030037, at *2 (Vt. Super. Ct. Dec. 27, 2004) (observing that although Vermont had statutorily allowed indirect-purchaser actions, “the standing issue in the instant case is a separate matter from the indirect purchaser issue,” and applying

(acknowledging potential applicability of *AGC* but holding that plaintiff had standing based on its allegation that it purchased, in sum and substance, the price-fixed product). Another declined to apply *AGC* based on the formalistic observation that *AGC* was irrelevant as it “involved no product, no purchase, and consequently no price-fixing,” *Anderson Contracting, Inc. v. Bayer AG*, Case No. CL 95959 (Polk County, Iowa Dist. Ct. May 31, 2005), reasoning that is undercut by other courts’ application of *AGC* in multiple and varied contexts. Still another case involved a statute that, by its very terms, envisions that even indirect purchasers at the end of long and complex distribution chains can sue. See *Holder v. Archer Daniels Midland Co.*, No. 96-2975, 1998 WL 1469620, at *2 (D.C. Super. Ct. Nov. 4, 1998) (language of statute expressly stating that “[a]ny indirect purchaser in the chain of manufacture, production, or distribution of goods or services” who could prove an overcharge would be “deemed to be injured” “suggest[ed] a chain of considerable length” and “impl[ied] a process that involves fundamentally changing the form of the product as it travels along the chain” (internal quotation marks omitted)). The law of the District of Columbia is itself unsettled on this issue, and a subsequent court applied the *AGC* factors to dismiss an indirect-purchaser claim. See *Peterson v. Visa U.S.A., Inc.*, No. Civ. A. 03-8080, 2005 WL 1403761 (D.C. Super. Ct. Apr. 22, 2005).

the *AGC* factors to determine whether plaintiff had standing).¹⁴ In light of the weight of authority demonstrating that the *AGC* factors apply in many different antitrust contexts, the Court of Appeals and other Minnesota courts addressing this issue correctly found them to provide a workable test for antitrust standing in this case and others like it.

II. LORIX LACKS ANTITRUST STANDING.

The most germane *AGC* factors in light of the 1984 amendment are: (1) “whether the plaintiff is a consumer or competitor in the allegedly restrained market”; (2) “whether

¹⁴ In total, in addition to *Gutzwiller* and *Smith*, courts in eleven other states and the District of Columbia have also applied *AGC* to dismiss indirect-purchaser claims brought against Visa and MasterCard. The plaintiffs in those cases alleged that they were injured when Visa and MasterCard forced merchants that accepted their credit cards also to accept their debit cards and to pay excess fees for use of those cards. The merchants then allegedly passed on these overcharges to plaintiffs in the form of increasing the prices of consumer goods. The consistent theme of these opinions is that plaintiffs, like Lorix here, lacked standing because they were not purchasers of the services provided by defendants, did not participate in the relevant market that was the subject of the restraint, and were consequently asserting purely derivative harms to those suffered by more directly injured parties. The District of Columbia, California, Maine, Michigan, New York, and Vermont courts applied *AGC* in these indirect-purchaser cases even though those states have *Illinois Brick* repealer statutes similar to Minnesota’s. See *Credit/Debit Card Tying Cases*, No. J.C.C.P. No. 4335, 2004 WL 2475287 (Cal. App. Dep’t Super. Ct. Oct. 14, 2004); *Peterson*, 2005 WL 1403761; *Southard v. Visa U.S.A., Inc.*, No. LACV 031729, 94491, 2004 WL 3030028 (Iowa Dist. Ct. Nov. 17, 2004); *Knowles v. Visa U.S.A., Inc.*, No. Civ.A. CV-03-707, 2004 WL 2475284 (Me. Super. Ct. Oct. 20, 2004); *Stark v. Visa U.S.A. Inc.*, No. 03-055030-CZ, 2004 WL 1879003 (Mich. Cir. Ct. July 23, 2004); *Tackitt v. Visa U.S.A., Inc.*, No. CI03-740, 2004 WL 2475281 (Neb. Dist. Ct. Oct. 19, 2004); *Kanne v. Visa, U.S.A., Inc.*, No. 1033, 469, 2005 WL 1403764 (Neb. Dist. Ct. Feb. 4, 2005); *Ho v. Visa U.S.A., Inc.*, No. 112316/00, 2004 WL 1118534 (N.Y. Sup. Ct. Apr. 21, 2004), *aff’d*, 793 N.Y.S.2d 8 (N.Y. App. Div. 2005); *Crouch*, 2004 WL 2414027; *Beckler v. Visa U.S.A. Inc.*, No. Civ. 09-04-C-00030, 2004 WL 2475100 (N.D. Dist. Ct. Sept. 21, 2004); *Cornelison v. Visa U.S.A., Inc.*, No. CIV03-1350 (S.D. Cir. Ct. Oct. 22, 2004) (motion hearing); *Fucile*, 2004 WL 3030037; *Strang v. Visa U.S.A., Inc.*, No. 03 CV 011323, 2005 WL 1403769 (Wis. Cir. Ct. Feb. 8, 2005).

the damages claims are speculative”; and (3) “whether the plaintiff’s claims would risk duplicative recoveries and would require a complex apportionment of damages.”

Gutzwiller, 2004 WL 2114991, at *5-6; *Smith*, 2005 WL 1936336, at *6 (same).

Assessing this case through the lens of these factors confirms that Lorix lacks standing.

A. Lorix is not a participant in the allegedly restrained market.

AGC emphasizes that courts should start their antitrust standing analysis by asking whether the plaintiff is “a consumer []or competitor in the market in which trade was restrained.” 459 U.S. at 539; *see also Tremco*, 1997 WL 423575, at *2 (“The antitrust laws were intended for the protection of competition, and, therefore, standing is generally limited to consumers and competitors.” (citing *AGC*, 459 U.S. at 538)); *S.D. Collectibles, Inc. v. Plough, Inc.*, 952 F.2d 211, 213 (8th Cir. 1991) (rejecting plaintiff’s claim because “standing is generally limited to actual market participants, that is, competitors or consumers” and plaintiff was neither); *Southaven Land Co., Inc. v. Malone & Hyde, Inc.*, 715 F.2d 1079, 1086 (6th Cir. 1983) (noting that a “significant element” of the antitrust standing inquiry “is the nature of the plaintiff’s alleged injury either as a ‘customer’ or ‘participant’ in the ‘relevant market’”). In the context of a purported indirect-purchaser case, such as this one, “[o]ne key question is whether the plaintiff claims injury in a market collateral to the market in which the alleged restraint took place.” *Crouch*, 2004 WL 2414027, at *18. Where the two markets are different, the attenuated relationship between the plaintiff and defendant demonstrates the remoteness of any alleged injury. *See McCready*, 457 U.S. at 472 (emphasizing that some potential plaintiffs have sustained injuries that are simply “*too remote* from an antitrust violation to

give them standing to sue for damages” (emphasis in original)).

Lorix alleges only that she is a purchaser of tires, products that Defendants do not make and that are sold in a market in which Defendants do not participate. (Am. Compl. ¶ 9, App. App. at 3.) The Court of Appeals correctly held, therefore, that she had “fail[ed] to allege any facts to allow an inference that she is a participant in the rubber-processing-chemical market, which is the market restrained by respondents’ alleged antitrust violations.” (Ct. of App. Order at 8, App. App. at 30.) Although Lorix criticizes the focus of the Court of Appeals on this particular factor, its analysis hews to this Court’s decision in *Philip Morris*, which recognized that participation in the allegedly restrained market is critical to a finding of antitrust standing.

In *Philip Morris*, this Court was presented with the question whether Blue Cross had standing under Minnesota’s antitrust law and other statutes to sue tobacco companies. Blue Cross claimed that a conspiracy on the part of those companies to suppress research findings regarding the ill effects of smoking on health caused it injury in the form of “increased costs associated with increased medical care needed by its nicotine-addicted consumers” 551 N.W.2d at 496. Because Blue Cross and its customers had been injured by increased costs in the *market for healthcare* — the market affected by the alleged conspiracy — this Court held that antitrust standing was appropriate. *Id.* at 492 (finding that Blue Cross was a participant in the market for healthcare); *see also Gutzwiller*, 2004 WL 2114991 at *7 (“[A] close reading of the Supreme Court decision in *Phillip Morris*[] confirms that in order to have standing, a plaintiff must be a purchaser or competitor, either directly or indirectly, of goods or

services in the market allegedly restrained by an antitrust violation.”).

The Court of Appeals’ attention to this factor is also in line with the legislative history of the 1984 amendment. As discussed in Section I.B, *supra*, the Assistant Attorney General explained that in a price-fixing action against television manufacturers, the ultimate consumer of the television set had a right of recovery because that consumer was “in the chain of purchase.” (Sen. Comm. Tr. at 9, App. App. at 60.) Consistent with the decision in *Philip Morris* and the legislative history’s emphasis on the importance of whether a putative indirect-purchaser plaintiff is a participant in the allegedly restrained market, the Court of Appeals correctly decided that Lorix lacks standing because she is not a participant in the rubber-processing chemicals market.¹⁵

B. Lorix’s Damages Are Highly Speculative, Lead To The Risk Of Duplicative Recovery, And Would Be Extraordinarily Complex For A Court To Apportion.

The remaining *AGC* factors — speculative damages, the risk of duplicative recovery, and unmanageably complex actions — reinforce the conclusion that Lorix lacks

¹⁵ Lorix argues that rather than focusing on participation in the restrained market, this Court should focus on the causal connection between her alleged injury and Defendants’ conduct. (App. Br. at 42-43.) The causal connection, if any, between Lorix’s claims and any alleged antitrust violation is highly attenuated, as evidenced by her sheer remoteness (as a buyer of tires that are not even alleged to contain rubber-processing chemicals) from the claimed violation (the sale of rubber-processing chemicals at artificially increased prices to companies that make tires). *Cf. Gutzwiller*, 2004 WL 2114991, at *8 (rejecting plaintiff’s argument that he satisfied the first *AGC* factor because “there is no industry, business, or market nexus or link between the monopoly overcharge on Defendants’ debit card services and the alleged artificially inflated prices”). Accordingly, even under Lorix’s proposed standard, she has failed to allege a sufficiently close causal relationship between her alleged injury and the alleged violation to satisfy the first *AGC* factor.

standing because she is not a participant in the allegedly restrained market. The Court of Appeals' recognition of this is implicit in its evident concern with the "absurd and unreasonable result[s]" that would occur if claims such as Lorix's went forward. (Ct. of App. Order at 7, App. App. at 29.) The Court of Appeals emphasized that under Lorix's proposed rule urging limitless standing under Minnesota's antitrust statute, "every Minnesota citizen could bring an antitrust suit against rubber-processing chemical manufacturers because price-fixing resulted in the increased price of tires, which in turn increases the cost of transportation and, therefore, the cost of goods transported by truck." *Id.* (emphasis added). Such actions would obviously involve speculative and unmanageably complex damages claims.

1. Lorix's damages are speculative.

In antitrust standing analysis, "it is appropriate . . . 'to consider whether a claim rests at bottom on some abstract conception or speculative measure of harm.'" *AGC*, 459 U.S. at 543 (quoting *McCready*, 457 U.S. at 475 n.1)); *see also Tremco*, 1997 WL 423575, at *3. Damages can be speculative because of: 1) the attenuated causal connection between the alleged misconduct and the claimed harm, and 2) the difficulty in discerning whether independent factors contributed to any alleged damages. *AGC*, 459 U.S. at 542; *see also Todorov*, 921 F.2d at 1451. Both concerns are present here.

"As damage claims move from direct to indirect and the distribution chain becomes more complex, the possibility of factors intervening to affect causation and price multiplies, and claims [of injury] become more speculative." *Crouch*, 2004 WL 2414027, at *19. Rubber-processing chemicals are only one component (and a very

small one at that) employed in the process of manufacturing rubber for tires. As the *Crouch* court observed, “[u]nlike a component that remains unchanged when incorporated in the final product, manufacturing costs are less directly passed through and may be affected by differing manufacturing processes used by producers.” *Id.* at *24; *see also B.W.I. Custom Kitchen v. Owens-Ill., Inc.*, 191 Cal. App. 3d 1341, 1352 (1987) (indicating that the effects of price-fixing might be “obscured by substantially altering or adding to the item received from the manufacturer”). Thus, the effects of any alleged price fixing of rubber-processing chemicals are substantially diminished by the fact that they are but a very small component in the manufacturing process used to cure certain types of rubber used to make tires.

Adopting Lorix’s proposed rule here would require the lower courts to determine for an eleven-year period: 1) the alleged overcharge paid by thousands of consumers who purchased *any* type of tire from *any* retailer, who in turn purchased from *any* wholesaler, who in turn purchased from *any* manufacturer, and 2) whether the tire that the manufacturer produced and then sold was made using rubber processed with chemicals whose price had been raised to supracompetitive levels by Defendants’ acts. *See, e.g., Fucile*, 2004 WL 3030037, at *4 (granting motion to dismiss and stating: “Assuming that the merchants actually passed along added expenses in the price of goods sold, the court would need to determine the degree to which these expenses were passed along. . . . The court would then have to determine actual sales of goods to the plaintiff class during the relevant time period. . . . [T]hese alleged damages venture into uncharted territories of sheer guesswork.”). Under these circumstances, Lorix could, at best, show only a

theoretical link between any alleged overcharge for rubber-processing chemicals and the price she paid for tires. Minnesota courts faced with such convoluted damages theories have held that they were too speculative for purposes of antitrust standing. *See Tremco*, 1997 WL 423575, at *3 (holding that plaintiff had not established antitrust standing when his alleged damages were potentially attributable to significant factors other than the defendants' alleged conduct and therefore "impermissibly called for speculation"); *Smith*, 2005 WL 1936336, at *9-10 (dismissing claims of plaintiffs who had purchased consumer goods with defendants' debit cards at allegedly inflated prices as "inherently and hopelessly speculative"); *Gutzwiller*, 2004 WL 2114991, at *9 (same).

2. Lorix's alleged damages are unmanageably complex and likely to be duplicative.

There is a "strong interest . . . in keeping the scope of complex antitrust trials within judicially manageable limits." *AGC*, 459 U.S. at 543. The concern is twofold: "the risk of duplicate recoveries on the one hand, or the danger of complex apportionment of damages on the other." *Id.* at 544. In circumstances where indirect purchasers have been permitted to sue, a concern exists over duplicate recovery among indirect purchasers. *See Crouch*, 2004 WL 2414027, at *19. That possibility certainly exists here, as there are indirect purchasers of rubber-processing chemicals, such as manufacturers who purchase the chemicals from distributors, who may seek to recover from Defendants. The legislature recognized this problem and made at least an effort to address it by mandating that "court[s] . . . take any steps necessary to avoid such duplicative recovery against a defendant." *See Minn. Stat. § 325D.57.*

The Attorney General has conceded the complexity of what the AG terms “far-fetched” indirect-purchaser claims, acknowledging that they present “insurmountable obstacles of proof.” (AG Br. at 9.) Although the AG apparently does not believe that Lorix’s claim fits this characterization, if one examines the levels of the distribution chain, the remote nature of Lorix’s alleged injury, and the size of the purported class in this case, it is clear that it would be impossible for a court to avoid undertaking a complex apportionment of damages among different levels of purported indirect purchasers.¹⁶ *See Gutzwiller*, 2004 WL 2114991, at *9 (“Plaintiff’s claims would require apportionment of virtually every single purchase that Plaintiff (and his class) made during the years in which he seeks damages. The Court is convinced that no expert witness would be capable of accurately assessing a fair and impartial ‘apportionment’ of the damages to the respective parties, including the prior merchant plaintiffs.”). Indeed, to determine the price differential, if any, caused by the alleged price-fixing “would be a Herculean task and one . . . not [] free from speculation given the enormous number of disaggregating factors to be considered in the process.” *Crouch*, 2004 WL 2414027 at *22. The district court in this case recognized this and determined that while “Plaintiff may have felt some economic repercussions from Defendants’ anticompetitive actions upstream . . . it is

¹⁶ The AG’s concern that antitrust violations will go unpunished under the Court of Appeals’ decision lacks merit. As explained above, indirect purchasers with appropriately ascertainable claims may still have standing to bring a damages action against Defendants under § 325D.57. Moreover, Defendants have faced multiple direct-purchaser lawsuits brought by tire manufacturers and other rubber-processing chemical purchasers.

neither judicially manageable nor efficient to extend standing so far down the economic chain.” (Dist. Ct. Order at 5, App. App. at 19.)

C. Lorix’s Attempts To Salvage Her Claim By Reference To Other Standing Doctrines Must Fail.

Apparently mindful of the absurd results that would ensue if her position that all indirect purchasers have standing by virtue of the 1984 amendment were adopted, Lorix now — for the first time — purports to acknowledge some limits on antitrust standing. (App. Br. at 15-16.) She now asks this Court to look to the “target area” and “inextricably intertwined” tests rather than following the numerous other courts that have applied *AGC* in the indirect-purchaser context. *Id.* But these tests do not evince the current state of antitrust standing analysis — and to the extent that they embody useful principles, those principles were drawn upon by the Supreme Court in the *AGC* test. *See Sullivan*, 25 F.3d at 46 n.6 (noting that in *AGC* the Supreme Court drew on the pre-existing tests [target-area, directness of the injury, and zone of interests] to outline its series of factors). Moreover, even if these tests were applicable, Lorix’s claim to standing still fails.

1. Lorix would not have had standing even before *Illinois Brick*.

Lorix first strenuously argues that the 1984 amendment “restore[d] standing to indirect purchasers as it existed prior to *Illinois Brick*,” and that therefore the “target area” test should be applied to her claims. (App. Br. at 16.) As previously explained, the 1984 amendment (like the *Illinois Brick* decision) does not address standing. Moreover, Lorix’s claim regarding the “target area” test is pure fallacy. That test was not the settled

law of antitrust standing even before *Illinois Brick*. See generally Clare Deffense, *A Farewell to Arms: The Implementation of a Policy-Based Standing Analysis in Antitrust Treble Damages Actions*, 72 Cal. L. Rev. 437, 442-47 (1984) (discussing the different standing tests in play prior to *Illinois Brick*). In his *Illinois Brick* dissent, Justice Brennan merely acknowledged that, of the antitrust standing tests being applied at that time, the “target area” test was more widely accepted than a restrictive test focusing on the directness of the alleged injury. 431 U.S. at 760-61. He did not indicate that it should be applied in all cases.¹⁷ Notably, Justice Brennan joined the majority opinion in *AGC*, demonstrating his agreement with the Court’s articulation of the appropriate guiding principles in an antitrust standing analysis. Moreover, even courts applying the “target area” test before *AGC* recognized the importance of inquiring into the connection between the plaintiff’s alleged injury and the allegedly restrained market, just as the Court of Appeals did here. See, e.g., *Pan-Islamic Trade Corp. v. Exxon Corp.*, 632 F.2d 539, 545-48 (5th Cir. 1980) (analyzing whether plaintiff oil brokerage had standing to pursue its claims of antitrust violations in various markets against defendant oil companies by determining what, if any, nexus plaintiff had alleged with those markets); *Calderone Enters. Corp. v. United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1296 (2d Cir. 1971) (denying standing to “[n]on-operating landlord of motion picture theatres

¹⁷ In rejecting the argument that the “target area” test referred to by Justice Brennan should be adopted in Minnesota in lieu of *AGC*, the *Gutzwiller* court noted that “the ‘target area’ test has never been adopted by Minnesota Supreme Court, the United States Supreme Court and/or the Eighth Circuit Court of Appeals . . . as an appropriate test for determining standing under the federal antitrust law.” 2004 WL 2114991, at *8-9.

leased to an exhibitor” who was outside the target market of the alleged conspiracy, which was intended to restrain competition in the exhibition of motion pictures).¹⁸

Lorix’s assertion that “[p]rior to *Illinois Brick*, [she] would have had standing,” (App. Br. at 17), also ignores the pre-*Illinois Brick* caselaw showing that even absent the categorical bar imposed by *Illinois Brick* not every putative indirect-purchaser plaintiff had standing. Rather, courts at that time undertook a case-by-case analysis to determine standing in indirect-purchaser cases. Compare *In re Antibiotic Antitrust Actions*, 333 F. Supp. 310 (S.D.N.Y. 1971) (plaintiffs who purchased finished animal-feed products containing allegedly price-fixed antibiotic drugs lacked standing due to the remoteness of their alleged injury from the violation, the fact that the finished feed had been passed through a second market of competitive sellers, and the fact that more direct consumers existed who were better situated to pursue these claims) and *In re Sugar Indus. Antitrust Litig.*, 73 F.R.D. 322, 340 (E.D. Pa. 1976) (denying standing to purchaser of products containing allegedly price-fixed sugar while granting it to purchaser of refined sugar even though the purchaser bought the sugar from a middleman and not directly from the

¹⁸ Lorix’s argument that she would have standing under the “reasonably foreseeable” aspect of the target area test essentially repeats her prior assertion that this Court should focus only on the causal connection she has alleged between her injury and Defendants’ conduct. See note 14, *supra*. Given that many of Defendants’ rubber-processing chemicals are not even sold to tire manufacturers and are used to process rubber ultimately found in a multitude of consumer products, it is highly doubtful that someone in Defendants’ position would reasonably have foreseen that a consumer, such as Lorix, of one particular end-use product that had passed through a competitive market and a long distribution chain would have been injured by their alleged wrongdoing, particularly when that injury could only have occurred if the alleged overcharge had been passed all the way down that long chain.

manufacturer) with *In re Western Liquid Asphalt Cases*, 487 F.2d 191, 199 (9th Cir. 1973) (holding that consumers suing suppliers of asphalt on the theory that those suppliers overcharged contractors who then passed the overcharge on to consumers had standing, in part because the contractors themselves had not come forward to sue the suppliers). Accordingly, pre-*Illinois Brick* antitrust standing doctrine reveals that even when indirect-purchaser suits were not categorically barred in federal court, the courts undertook a careful case-specific analysis of the question of standing, rather than giving a blanket grant of standing to all indirect purchasers, as Lorix would have this court believe.

2. Lorix’s alleged injury was not “inextricably intertwined” with the alleged violation.

Lorix’s argument that she should have standing based on the Supreme Court’s decision in *McCready* also fails.¹⁹ In *McCready*, the plaintiff was a group health plan subscriber whose insurer, defendant Blue Shield, refused to reimburse her for treatment by a clinical psychologist. Blue Shield would only have reimbursed her for psychotherapy services if they had been provided by a psychiatrist or had been billed through a physician. *McCready* brought an action on behalf of all subscribers who had incurred costs for psychological services but had not been reimbursed, alleging that Blue Shield and a consortium of psychiatrists had conspired in violation of federal antitrust

¹⁹ Defendants note that Lorix’s assertion that this Court should apply *McCready*, a federal decision, to allow her standing is somewhat disingenuous given her repeated argument that *AGC* should not be applied merely because it “was designed and intended to be applied to determine the standing of plaintiffs under federal law.” (App. Br. at 28.)

law “to exclude and boycott clinical psychologists from receiving compensation under the Blue Shield plans.” 457 U.S. at 468-70 (internal quotation marks omitted).

McCready had standing because “the injury she suffered was inextricably intertwined with the injury the conspirators sought to inflict on psychologists and the psychotherapy market.” *Id.* at 484.

Nothing in *McCready* confers standing on Lorix. In that case, the conspiracy could not have been accomplished absent the involvement of patients such as the plaintiff in that case. The Court held that McCready’s claims of injury were not too remote to state an antitrust violation because “[t]he harm to McCready and her class was clearly foreseeable; indeed, it was a necessary step in effecting the ends of the alleged illegal conspiracy.” *Id.* at 479. By contrast, no reasonable construction of Lorix’s claim could lead to the conclusion that her injury was the focus of the alleged conspiracy and a necessary step in effectuating the conspiracy’s ends.²⁰

In sum, Lorix did not purchase rubber-processing chemicals, the product she alleges was the subject of the price-fixing conspiracy. She is not a participant in the allegedly restrained market. Moreover, given the highly attenuated connection between

²⁰ The Supreme Court in *McCready* noted that Blue Shield had conceded “McCready’s participation in the market for psychotherapy services,” the market that was allegedly restrained in that case. 457 U.S. at 481. Another difference between Lorix and McCready is evident from the Supreme Court’s decision, which acknowledged that McCready did not pay a higher price for the services that she received than she would have if the conspiracy had not existed. *Id.* As such, McCready’s damages, unlike Lorix’s, were not speculative; rather, they were readily ascertainable as McCready was seeking the exact sums she had paid out of pocket for psychotherapy services and for which she had not been reimbursed.

her claimed harm and the alleged misconduct, her alleged damages rest on mere speculation and go well-beyond judicially manageable means of apportionment. Accordingly, the Court of Appeals correctly concluded that Lorix lacks standing.

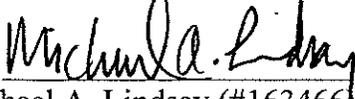
CONCLUSION

For the foregoing reasons, Defendants respectfully request that this Court affirm the decision of the Court of Appeals.

Respectfully submitted,

Dated: January 16, 2007

DORSEY & WHITNEY LLP

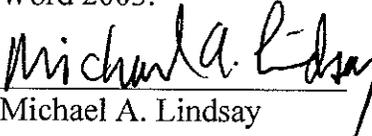
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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief of Respondents complies with the typeface requirements of Minn. R. Civ. App. P. 132.01, subd. 1 and the word count limitation of Minn. R. Civ. App. P. 132.01, subd. 3(a) in that the brief contains 11,747 words. The brief was prepared using Microsoft Word 2003.


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