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October 6, 2006

Clerk of Appellate Courts
305 Minnesota Judicial Center
25 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, MN 55155-6102

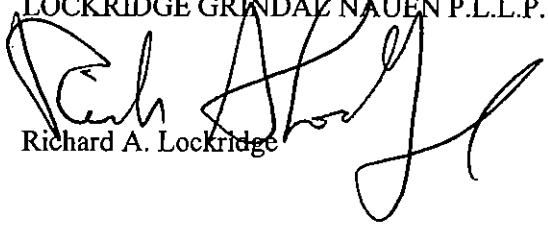
Re: *Diane Lorix v. Crompton Corporation, et al.*
Appellate Court Case No. A05-2148

Dear Clerk of Courts:

Enclosed for filing in the above-referenced matter is the original and four copies of the Request of American Antitrust Institute to Appear and Participate as *Amicus Curiae* and an Affidavit of Service.

If you have any questions, please feel free to contact me.

Very truly yours,
LOCKRIDGE GRINDAL NAUEN P.L.L.P.



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Appellate Court Case No. A05-2148

STATE OF MINNESOTA
IN SUPREME COURT

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

vs.

Crompton Corporation, et al.,
Respondents.

REQUEST OF AMERICAN ANTITRUST INSTITUTE TO APPEAR AND PARTICIPATE AS *AMICUS CURIAE*

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The American Antitrust Institute ("AAI") supports the Petition for Review by Ms. Diane Lorix ("Lorix" or "Petitioner"), and respectfully requests leave to appear as *amicus curiae* under Rules 117 and 129 of the Minnesota Rules of Civil Appellate Procedure.

AAI'S INTEREST IN THE APPEAL

The American Antitrust Institute is an independent, non-profit education, research, and advocacy organization. Its mission is to advance the role of competition, protect the interests of consumers in a competitive economy, and challenge abuses of concentrated economic power. *See http://www.antitrustinstitute.org/about.cfm.* AAI's Board of Directors authorized filing this brief in support of Lorix's petition in order to inform this Court as to how the Court of Appeals' decision could undermine the efforts of Minnesota and many other states to protect all victims of illegal, concerted activity – even those that may not purchase directly from defendants.

The AAI's interest is public in nature and is made on behalf of the practitioners, scholars, and students in the field of antitrust law who desire an antitrust policy that both fosters competition and protects consumers. AAI also recognizes the tremendous public interest in guaranteeing that all Minnesota consumers can protect themselves against concerted activity and abuses of market power.

STATEMENT AS TO WHY A BRIEF FROM THE AAI AS *AMICUS CURIAE* WOULD BE HELPFUL TO THIS COURT

The Court of Appeals held that Lorix, a Minnesota consumer of automotive tires, does not have standing to recover the overcharges she incurred as a result of the defendants fixing the price of rubber-processing chemicals because the defendants' products were combined with other components before they were sold to Lorix. Lorix v. Crompton Corp., 720 N.W.2d 15, 19 (Minn. Ct. App. 2006). Rather than deciding the case on the facts as alleged, the court based its decision on an improbable hypothetical involving attenuated harm. Id. at 18. This Petition

therefore asks this Court to answer the question of whether, under Minn. Stat. § 325D.57 (2004), a plaintiff harmed by price fixing *ipso facto* loses its ability to recover damages if the price-fixed product is combined with another component before the plaintiff purchases it. The Court of Appeals answered "yes," following the general practice of Minnesota courts to interpret state antitrust laws in conformity with the federal law. Lorix, 720 N.W.2d at 18-19; see also State v. Duluth Bd. of Trade, 107 Minn. 506, 517, 121 N.W. 395, 399 (1909). But, in this particular case, the Court of Appeals' deference to federal law conflicts with both the clear and unambiguous language of Section 325D.57, and the legislature's intent to depart from the United States Supreme Court's decision in Illinois Brick v. Illinois, 431 U.S. 720 (1977). California v. ARC America, 490 U.S. at 96, n. 3; State by Humphrey v. Philip Morris, Inc., 551 N.W.2d 490, 497 (1996).[1]

Unless reversed, this decision would place Minnesota alone among indirect-purchaser states by reinjecting federal direct-purchaser standing limitations into state law.[2] In fact,

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[1] Minnesota is one of many states that reacted to Illinois Brick, by preserving the indirect-purchaser remedy under state antitrust law. See Ala. Code § 6-5-60(a) (1993 & Supp. 2000); Cal. Bus. & Prof. Code § 16750(a) (West 1997 & Supp. 2001); D.C. Code Ann. § 28-4509(A) (1999); Haw. Rev. Stat. § 480-3 (1998 & Supp. 2000); Idaho Code § 48-108 (1997 & Supp. 2000); 740 Ill. Comp. Stat. Ann. 10/7(2) (West 2001); Kan. Stat. Ann. § 50-161 (1994 & Supp. 2000); Me. Rev. Stat. Ann. Tit. 10, § 1104(1) (West 1997 & Supp. 2000); Md. Code Ann. Com. Law II § 11-209(b)(2) (1990 & Supp. 1999); Mich. Comp. Laws Ann. § 445.778 (West 1989); Minn. Stat. Ann. § 325D.57 (West 1995 & Supp. 2000); Miss. Code Ann. § 75-21-9 (1999); Nev. Rev. Stat. §§ 598A.160, 598A.210 (1999); N.M. Stat. Ann. § 57-1-3 (Michie 1995 & Supp. 2000); N.Y. Gen. Bus. Law § 340(6) (McKinney 1999 & Supp. 2000); Or. Rev. Stat. § 646.775 (1999); R.I. Gen. Laws § 6-36-12(g) (2000); S.D. Codified Laws Ann. § 37-1-33 (2000); Vt. Stat. Ann. Tit. 9, § 2465 (1993 & Supp. 2001); Wis. Stat. Ann. § 133.18(1)(a) (West 1989 & Supp. 2000). Section of Antitrust Law, Am. Bar Ass'n, Antitrust Law Developments 811-12 & n.61 (5th ed. 2005). These statues are commonly referred to as "Illinois Brick repealers." See, e.g., Miller's Pond Co., LLC v. City of New London, 873 A.2d 965, 808 n.1 (Conn. 2005).

[2] Most courts that have confronted this issue have directly held that the number of hands through which a product passes or the number of changes it undergoes along the way are inapposite to the antitrust analysis. See Comes v. Microsoft, 646 N.W.2d 440 (Iowa 2002); Holder v. Archer Daniels Midland Co., No. 96-2975, 1998 WL146920 (D.C. Super. Ct. Nov. 4, 1998). Arthur v. Microsoft, 676 N.W.2d 29 (2004)) Investors Corp. of Vermont v. Bayer A.G., Case No. 51011-04 CnC at 3-4 (Chittenden Cnty, Vt. Super. Ct., June 1, 2005); Anderson Contracting Inc. v. Bayer, Case No. CL 95959, at 15 (Ia. Dist. Ct. May 31, 2005); Freeman Industries v. Eastman Chem., 172 S.W.2d 512, 517, 520 (2005); Muzzey v. Avery Dennison Corp., Case No. C1 05-126 (Scotts Bluff Cty., Neb. Jan. 19, 2006); D.R. Ward Co. v. Rohm & Haas, No. 2:05cv-4157 LDD May 31, 2006 E.D.Pa).

defendants convicted of fixing the price of computer memory are already seeking to use the Lorix decision to block computer purchasers' attempts to recover their monetary losses.[3]

AAI follows developments in federal and state antitrust law and can provide this Court with a broad perspective on the nationwide impact that this case may have on antitrust policy. If this Court grants AAI's motion for leave to file an *amicus* brief, its brief will discuss in an objective manner the cases on which the Court of Appeals relies and the reasons why, in light of those cases, the court's decision was in error. The brief will also explain how the decision may have the unintended effect of severely curtailing the ability of injured consumers to recover losses from undisputedly anticompetitive conduct. In addition, because AAI recognizes that standing under state indirect-purchaser laws should not be limitless, if allowed to file a brief, it will advocate an interpretation of Section 325D.57 that would allow indirect purchasers such as Lorix to bring suit, but limit the standing of parties who suffer only from the "ripples of harm" caused by price fixing. See Blue Shield of Va. v. McCready, 457 U.S. 465, 476 (1982).[4]

The Court of Appeals erred because it failed to interpret Section 325D.57, even broadly enough to overturn the result in Illinois Brick, thereby effectively nullifying the legislature's 1984 "repeal" of that decision. Act of April 24, 1984, ch. 458, § 1, 1984 Minn. Laws 228; ARC America, 490 U.S. at 96 n.3; Phillip Morris, 551 N.W.2d at 497. In Illinois Brick, the state of Illinois and other governmental entities sued concrete-block producers to recover overcharges they incurred because of the producers' price fixing. 431 U.S. at 726. Importantly, the plaintiffs

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[3] Defs.' Notice of Mot. and Mot. For J. on Pleadings re: 2d & 4th Cls. for Rel.; Memo. and Points of Auth., In re Dynamic Random Access Memory (DRAM) Antitrust Litig., MDL No. 1486 (N.D. Cal. Aug. 14, 2006).

[4] For example, AAI does not agree that "even a television purchaser would have indirect-purchaser standing to sue an oil company if price fixing increased the cost of gasoline, which in turn increased the cost of transportation and ultimately the cost of the television." Lorix, 720 N.W.2d at 18. To avoid this result, this Court may limit indirect-purchaser standing to parties whose injury is "within that area of the economy...endangered by the breakdown of [competition]." Blue Shield, 457 U.S. at 480. In this case, Lorix would fall within that area because defendants' price-fixed products are used specifically in tire production. The court of appeals' hypothetical television purchaser could not sue, however, because she is not in the area of the economy that oil-price harms.

did not purchase the price-fixed product (cement blocks) but rather a finished product that incorporated the price-fixed product among many components. Thus, in departing from Illinois Brick, the Minnesota legislature must have intended indirect purchasers of products that include price-fixed components (like the state of Illinois) to recover antitrust damages. But the Court of Appeals' reasoning in Lorix – that Petitioner was not a participant in the rubber-chemical market because rubber chemicals had been combined with other components into the final product she bought – simply reinjects Illinois Brick standing limitations into Minnesota law.

The Court of Appeals supported its decision by relying on Associated Gen. Contractors of Calif. v. California State Council of Carpenters, 459 U.S. 519, 520 (1983) ("AGC"). Lorix, 720 N.W.2d at 18-19. In AGC, a union sued an association of contractors for allegedly coercing its members and third parties into contracting with nonunion firms. The union alleged that this coercion had restrained the market for "construction contracting and subcontracting." AGC, 459 U.S. at 527. Because the union's interests were primarily in the labor market, however, it was "neither a consumer nor a competitor" in the contracting market. Id. at 540. The court found the union could not assert damages claims because, among other things, it did not stand to benefit from the competition that the antitrust laws are meant to foster. Id. at 539.

The Court of Appeals' application of the "market participant" language to this case conflicts with antitrust jurisprudence because Lorix *is* a consumer of tires made with rubber chemicals. (Am. Class Action Compl. ¶ 9, Petr.'s App. A19.) She is therefore precisely the kind of party the antitrust laws are meant to protect because she benefits from the law's goal of preserving price competition. AGC, 459 U.S. at 538; Brunswick v. Pueblo Bowl-a-Mat, Inc., 429 U.S. 477, 488-89 (1977). If allowed to file an *amicus* brief, the AAI will explain how granting

Lorix standing to sue will advance the overarching goal of the antitrust laws to promote price competition.

AAI does not believe AGC, which deals with standing in the federal Illinois Brick environment, is relevant to standing under Minnesota's "Illinois Brick repealer" law. But even if the Court of Appeals were correct to apply AGC, AAI intends to argue that the Court of Appeals misapplied AGC by basing its ruling on only one of the factors identified in that case. The AGC Court carefully considered at least five factors in determining that the union could not bring a damages action.[5] Federal and Minnesota courts that have interpreted the decision have consistently referred to the need to consider multiple factors. See Serpa Corp. v. McWane, 199 F.3d 6 (9th Cir. 1999) (referring to six-factor test); Gutzwiller v. Visa U.S.A., Inc., No. C4-04058, 2004 WL 2114991 (Minn. Dist. Ct. Sept. 15, 2004). The Court of Appeals gave no guidance on which factors should apply under Minnesota law or how much weight those factors should receive. Thus, to the extent that this Court deems it proper to read AGC into Minnesota law, the AAI will encourage that the Court provide future parties with some guidance on how it should be applied. Minn. R. Civ. App. P. 117, subd. 2(d)(1)&(3).

For the foregoing reasons, the AAI supports the Petition for Review submitted by Lorix and, in the event that review is granted, respectfully requests leave to file a brief as *amicus curiae* in this matter, supporting reversal of the Court of Appeals and clarification of the law governing indirect-purchaser standing under Minnesota law.

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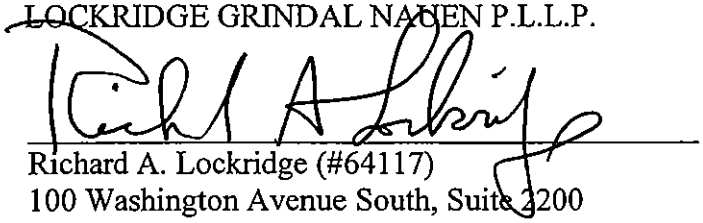
[5] These factors include the following: the nature of the plaintiff's injury; the directness or speculative character of the relationship between the injury and the violation; the potential for duplicative recovery; the potential for complex apportionment of damages; and the potential existence of more direct victims of the violation. Presumably two of these factors – the potentials for duplicative recovery and complex apportionment of damages – should not be considered, as those were key considerations that supported the Illinois Brick decision, which was written out of Minnesota antitrust law with the amendments to Minn. Stat. § 325D.57. Illinois Brick, 431 U.S. at 731-32.

Dated: October 6, 2006

LOCKRIDGE GRINDAL NAUEN P.L.L.P.



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AFFIDAVIT OF SERVICE

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Barbara R. Gilles of the City of Minneapolis, County of Hennepin in the State of Minnesota, being duly sworn says that on the 6th day of October, 2006, she served the **Request of American Antitrust Institute to Appear and Participate as *Amicus Curiae*** on the following attorney(s) in this action, by placing a true and correct copy thereof in an envelope addressed as follows and depositing same, with postage prepaid, in the United States Mail at Minneapolis, Minnesota.

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Barbara R. Gilles

Barbara R. Gilles

Subscribed and sworn to before me
this 6th day of October, 2006.

Heather N. Potteiger

Notary Public

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Notary Public-Minnesota
My Commission Expires Jan 31, 2010