STATE OF NORTH CAROLINA

COUNTY OF NEW HANOVER

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
02 CVS 4375

AULEY M. CROUCH, III, On behalf of himself and others similarly situated,

Plaintiff,

v.

CROMPTON CORPORATION, CROMPTON MANUFACTURING COMPANY, INC. formerly named in North Carolina as UNIROYAL CHEMICAL COMPANY, INC., UNIROYAL CHEMICAL COMPANY LIMITED, FLEXSYS NV, FLEXSYS AMERICA LIMITED PARTNERSHIP OF NORTH CAROLINA, BAYER AG, BAYER CORPORATION, RHEIN CHEMIE RHEINAU GMBH, and RHEIN CHEMIE CORPORATION,

Defendants.

DEFENDANTS' JOINT MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Defendants Crompton Corporation, Uniroyal Chemical Company, Inc., Uniroyal Chemical Company Limited, Flexsys NV, Flexsys America LP, Bayer Corporation, and Rhein Chemie Corporation respectfully submit this memorandum of law in support of their motion to dismiss the Amended Complaint ("Am. Compl.") on the grounds that it fails to state a cause of action under Chapter 75 of the North Carolina General Statutes.

PRELIMINARY STATEMENT

For antitrust purposes, an "indirect purchaser" is a consumer who purchased an allegedly overpriced product, not directly from the defendant, but from someone to whom the defendant sold the

product (or from someone else further down the distribution chain). The plaintiff here and the class he seeks to represent admittedly did not purchase any products from defendants. But they also did not purchase *from anyone* the products (rubber-processing chemicals) that they claim defendants sold at an overcharge. Rather, they purchased (and claim to have overpaid for) tires, which defendants do not manufacture, sell or distribute. Their allegation is that defendants sold (either directly or indirectly) rubber-processing chemicals to tire companies, which used those chemicals in the production of tires, which were then sold down the distribution chain to tire wholesalers, to tire retailers and, ultimately, to consumers such as the plaintiff. In other words, the plaintiff is not simply an indirect purchaser of an allegedly overpriced good, but rather can be characterized as an "indirect derivative purchaser" of a product used as an ingredient in the manufacture of the product that he bought.

Under the federal antitrust laws, only direct purchasers can sue for price-fixing damages under federal law. *See Illinois Brick Co. v. Illinois*, 431 U.S. 720, 728 (1977). In *Hyde v. Abbott Laboratories*, 123 N.C. App. 572, 473 S.E.2d 680, *disc. rev. denied*, 344 N.C. 734, 478 S.E.2d 5 (1996), however, the Court of Appeals – contrary to the direction of the North Carolina Supreme Court to interpret the North Carolina antitrust statute consistently with the federal statutes upon which it was based – declined to follow *Illinois Brick* and instead construed the North Carolina antitrust statute to grant standing to indirect purchasers who were retail purchasers of the product (infant formula) that was sold by the defendants there, at an alleged overcharge to wholesalers.

Whatever the merits of *Hyde*'s refusal to follow *Illinois Brick*, *see infra II,* pp. 10-12, this Court should decline to extend *Hyde* to the very different situation of a plaintiff who did not purchase the product allegedly sold at an overcharge by defendants. To recover damages on the allegations of this Amended Complaint, plaintiff and the putative class members will have to overcome substantial

difficulties of proof, by showing the extent to which any overcharge in the price of rubber-processing chemicals affected the prices that users of rubber-processing chemicals charged for products made with those chemicals, as well as the extent to which each defendant's rubber-processing chemicals, if any, were used in the manufacture of the tires purchased by plaintiff and the class members. These likely insurmountable issues of proof greatly magnify the complexities that were present only to a lesser degree in *Hyde* and that the *Illinois Brick* rule seeks to avoid.

In light of the factual differences between this case and *Hyde*, this Court should follow the North Carolina Supreme Court's instruction to apply federal precedents, and dismiss plaintiff's claim under the rule of *Illinois Brick*. In the alternative, in light of the *Hyde* court's departure from the interpretive principles set forth by the North Carolina Supreme Court, the Court should facilitate this case's immediate review by the North Carolina Supreme Court, so that the Supreme Court can review the holding of *Hyde* and resolve the tension between the result in *Hyde* and the Supreme Court's decisions concerning the appropriate methodology for interpreting North Carolina's antitrust laws.

BACKGROUND

This is an alleged class action brought by an individual, Auley M. Crouch, III ("Crouch"). He purports to bring his claims on behalf of all consumers within North Carolina who, since 1994, purchased tires containing miniscule quantities of rubber-processing chemicals. (Am. Compl. ¶ 20.) Crouch claims that the defendants, which either manufacture or distribute rubber-processing chemicals, fixed the prices at which they sold those products (either directly or indirectly) to tire companies, which used those chemicals in the production of tires, which they then sold to tire wholesalers, which sold the tires to tire retailers, which then sold the tires to consumers such as Crouch. (Am. Compl. ¶¶ 40-41.) For antitrust purposes, Crouch is known as an "indirect purchaser" because he did not purchase

anything directly from any of the defendants. Indeed, he is actually an "indirect derivative purchaser" because, as a buyer of tires, and not rubber-processing chemicals, he did not purchase the products sold by the defendants from anyone.

Crouch claims that, as a result of the alleged price-fixing agreement, the defendants charged artificially high prices for rubber-processing chemicals sold to tire companies, which led the tire companies to reflect that overcharge in the prices of tires even though the tire companies used only a very small quantity of rubber-processing chemicals in the tire-making process. (Am. Compl. ¶¶ 40-41.) Crouch further claims that the overcharge supposedly reflected in those tire prices filtered all the way through the distribution chain and were ultimately borne by Crouch and the other putative members of the class when they purchased tires. (Am. Compl. ¶¶ 41, 55.) In connection with these allegations, Crouch asserts a single cause of action. He claims that by conspiring to fix the price of rubber-processing chemicals at artificially high prices, defendants violated "Chapter 75 of the North Carolina General Statutes, including [sections] 75-1.1, 75-2, 75-5, 75-16 and 75-16.1." (Am. Compl. ¶¶ 51-56.)

This case is one of twenty antitrust cases filed against these defendants by indirect purchasers in various state courts around the country beginning in the fall of 2002. Almost all of those cases, including this one, were filed by the same consortium of plaintiffs' attorneys, and contained identical allegations that the defendants conspired to fix the price of rubber-processing chemicals in the United States from 1994 to the present.

ARGUMENT

As Crouch admits, he and the purported class did not purchase products directly from any of the defendants, and did not purchase the products sold by the defendants from anyone, either directly or

indirectly. Rather, Crouch concedes that he represents only individuals who purchased tires containing defendants' rubber-processing chemicals. (Am. Compl. ¶ 20.) In other words, Crouch and the putative class members are indirect purchasers seeking to recover from the suppliers of an ingredient used in the product they purchased.

The standing requirements for private causes of action under North Carolina General Statutes Section 75-16 (2002) effectively parallel the standing requirements under Section 4 of the federal Clayton Act, 15 U.S.C. § 15 (2003).[1] The North Carolina Supreme Court has held that interpretations of the North Carolina antitrust statute should be guided by federal court interpretations of comparable federal antitrust statutes. Thus, Section 75-16 should be construed to include the United States Supreme Court's restrictive standing rules, which bar plaintiffs who did not purchase the actual product sold by the defendants from pursuing damage claims for alleged price-fixing conspiracies.

I. INDIRECT PURCHASERS LACK STANDING UNDER FEDERAL ANTITRUST LAW.

Purchasers like plaintiff and his putative class are "indirect purchasers" because "[i]n the distribution chain, they are not the immediate buyers from the alleged antitrust violators." *Kansas v. UtiliCorp United, Inc.*, 497 U.S. 199, 207 (1990). Indeed, Crouch is merely an indirect purchaser of a product manufactured with the product sold by the antitrust violators. The United States Supreme Court has ruled unequivocally that indirect purchasers do not have standing under federal antitrust law,

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[1] Section 4 of the Clayton Act, 15 U.S.C. § 15, provides in pertinent part: "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. . . ." Section 75-16 of the North Carolina Antitrust Act is nearly identical: "If any person shall be injured or the business of any person . . . shall be. . . injured by reason of any act or thing done by any other person . . . in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a right of action on account of such injury done . . . for treble the amount fixed by the verdict."

and thus cannot sue for damages allegedly caused by price-fixing conspiracies. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 728-29 (1977) ("the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party 'injured in his business or property' within the meaning [of Section 4 of the Clayton Act]").

The development of this bright-line, direct-purchaser rule began with the Supreme Court's decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968). There, the Supreme Court rejected an antitrust defendant's contention that the plaintiff had "passed on" the alleged wrongful overcharge, which it purportedly paid to defendant, to its own customers and thus suffered no damages. *Id.* at 487-88. The Court reasoned that permitting antitrust defendants to assert a passing-on defense would unduly complicate treble damage actions. Specifically, if defendants were allowed to reduce their damages by examining plaintiffs' pricing practices in order to show that an overcharge was actually passed on, "[t]reble-damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories." *Id.* at 493. Further, allowing defendants to assert a passing-on defense would "substantially reduce" the effectiveness of treble damage actions as a method of effectuating Congress' intention that the antitrust laws be enforced largely through private civil litigation. *Id.* at 494.

Nearly ten years after *Hanover Shoe*, the Supreme Court was presented with the "mirror image" of *Hanover Shoe, i.e.*, given that antitrust defendants cannot reduce their damages by showing that buyers passed on unlawful overcharges to subsequent buyers, can subsequent buyers to whom overcharges are allegedly passed on, *i.e.*, indirect purchasers, maintain claims against the antitrust defendants? In *Illinois Brick*, 431 U.S. at 720, the Supreme Court followed the logic of *Hanover Shoe* and held that only direct purchasers may pursue overcharge damage claims arising from an

antitrust violation. The Court determined that "allowing offensive but not defensive use of pass-on would create a serious risk of multiple liability for defendants," *Ill. Brick*, 431 U.S. at 730, and declared itself "unwilling to 'open the door to duplicative recoveries' under § 4," *id.* at 731 (quoting *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 264 (1972)).

The Court further reasoned that:

> allowing indirect purchasers to recover using pass-on theories . . . would transform treble-damages actions into massive multiparty litigations involving many levels of distribution and including large classes of ultimate consumers remote from the defendant. In treble-damages actions by ultimate consumers, the overcharge would have to be apportioned among the relevant wholesalers, retailers, and other middlemen, whose representatives presumably should be joined.

Ill. Brick, 431 U.S. at 740.

The Supreme Court concluded that the prospect of such evidentiary complexity would not only unduly burden the courts, but would discourage private plaintiffs from initiating private antitrust suits, thwarting Congress' intention to encourage private litigants to enforce the antitrust laws. *Ill. Brick*, 431 U.S. at 746.[2]

II. SECTION 75-16, LIKE ITS FEDERAL COUNTERPARTS, DOES NOT CONFER STANDING ON INDIRECT PURCHASERS.

Just as Congress, in enacting Section 4 of the Clayton Act, did not extend the right to recover antitrust damages suits to indirect purchasers, neither did the North Carolina General Assembly when it enacted Section 75-16, a virtually identical statute.

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[2] *See also* William A. Landes and Richard A. Posner, *Should Indirect Purchasers Have Standing to Sue Under the Antitrust Laws? An Economic Analysis of the Rule of Illinois Brick*, 46 U. Chi. L. Rev. 602, 604 (1979) (concluding that allowing indirect purchasers to sue would likely "retard rather than advance antitrust enforcement," given the detrimental impact that allowing a passing-on defense would have on enforcement by direct purchasers).

Indeed, the North Carolina Supreme Court, recognizing that Section 75-1 is based on federal antitrust law, has expressly directed North Carolina courts to look to federal precedent, such as *Illinois Brick*, in interpreting comparable provisions of the North Carolina antitrust statute. *See, e.g.*, *Rose v. Vulcan Materials Co.*, 282 N.C. 643, 655, 194 S.E.2d 521, 530 (1973) ("the body of law applying the Sherman Act, although not binding upon this Court in applying G.S. § 75-1, is nonetheless instructive in determining the full reach of that statute"). Since deciding *Rose*, the Supreme Court has often looked to federal law when construing various sections of the antitrust statutes. *See, e.g.*, *Madison Cablevision, Inc. v. City of Morganton*, 325 N.C. 634, 656, 386 S.E.2d 200, 213 (1989) (stating that "Chapter 75 is based on the Sherman Act," and looking to federal law to inform its interpretation of various sections of chapter 75); *Skinner v. E.F. Hutton & Co.*, 314 N.C. 267, 274-75, 333 S.E.2d 236, 241 (1985) (stating that federal decisions "may be used as guidance in determining the scope and meaning of G.S. 75-1.1" (citation omitted)).[3] Similarly, the North Carolina Court of Appeals followed federal precedent in *North Carolina Steel, Inc. v. National Council on Compensation Insurance*, 123 N.C. App. 163, 472 S.E.2d 578 (1996), *aff'd in relevant part*, 347 N.C. 627, 496 S.E.2d 369 (N.C. 1998), reasoning that "[a]nother factor counseling us to adopt the [federal] doctrine is a desire to insure uniformity with federal antitrust law in order to avoid forum shopping" and that "absent compelling reasons to the contrary, *we are not inclined to permit a*

[3] Following the direction of the state in which they sit, federal courts in North Carolina have also looked to federal interpretations of Section 4 of the Clayton Act when construing Section 75-16. *See Sewell Plastics, Inc. v. Coca-Cola Co.*, 720 F. Supp 1196, 1222 (W.D.N.C. 1989), *aff'd*, 912 F.2d 463 (4th Cir. 1990), *cert. denied*, 498 U.S. 1110 (1991); *Am. Rockwool, Inc. v. Owens-Corning Fiberglas Co.*, 640 F. Supp. 1411, 1444 (E.D.N.C. 1986).

remedy under state law that is not allowed under federal law." *Id.*, 123 N.C. App. at 172, 472 S.E.2d at 583 (internal citations omitted, emphasis added).[4]

There are no "compelling reasons" not to follow *Illinois Brick* in North Carolina. The direct-purchaser rule: (1) avoids complex evidentiary battles over how to apportion overcharges between direct and indirect purchasers, *UtiliCorp*, 497 U.S. at 207, 208, *Ill. Brick*, 431 U.S. at 730-31; (2) avoids the prospect of multiple liability for the same alleged wrongs by the same defendants, *UtiliCorp*, 497 U.S. at 212-13; and, (3) ensures vigorous enforcement of the antitrust laws by the parties who have the greatest motivation to sue, the direct purchasers, *Ill. Brick*, 431 U.S. at 746. As the United States Supreme Court emphasized, any retreat from the direct-purchaser rule would "add whole new dimensions of complexity to treble-damages suits and seriously undermine their effectiveness." *Ill. Brick*, 431 U.S. at 737. Moreover, reading Section 75-16 to prohibit indirect purchaser suits does not leave consumers unprotected. Consumers are protected when competition is protected, and North Carolina's antitrust statutes – like the federal and the numerous state statutes discussed above – protect

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[4] Interpretations of similar antitrust statutes in other states, on which North Carolina courts may rely to inform their decisions, *see, e.g.*, *Madison Cablevision*, 325 N.C. at 657, 386 S.E.2d at 213; *Seafare Corp. v. Trenor Corp.*, 88 N.C. App. 404, 416-17, 363 S.E.2d 643, 653-54, *disc. rev. denied*, 322 N.C. 113, 367 S.E.2d 917 (1988), similarly support adoption of the *Illinois Brick* rule. In those states, like North Carolina, in which the legislature has not expressly repealed the *Illinois Brick* rule by statute, courts have refused to read indirect purchaser standing into the statutes. *See, e.g.*, *Stifflear v. Bristol-Myers Squibb Co.*, 931 P.2d 471 (Colo. Ct. App. 1996); *Lambert v. Abbott Labs.*, No. 94-CI-05684 (Ky. Dec. 9, 1995); *Keating v. Philip Morris, Inc.*, 417 N.W.2d 132 (Minn. Ct. App. 1987); *DeVincenzi v. Abbott Labs.*, No. CV94-04033 (Nev., Washoe County, Apr. 3, 1995); *Levine v. Abbott Labs*, No. 117320/95 (N.Y. Sup. Ct. N.Y. County. Nov. 25, 1996); *Abbott Labs v. Segura*, 907 S.W.2d 503 (Tex. 1995); *Blewett v. Abbott Labs.*, 938 P. 2d 842 (Wash. Ct. App. 1995), *rev. denied*, 950 P.2d 475 (Wash. 1998). Moreover, in Louisiana and Massachusetts, federal courts have interpreted state antitrust laws in a manner consistent with the federal direct-purchaser rule. *See Free v. Abbott Labs.*, 982 F. Supp. 1211, 1214 (M.D. La. 1997); *Boos v. Abbott Labs.*, 925 F. Supp. 49 (D. Mass. 1996); *In re Wiring Device Antitrust Litig.*, 498 F. Supp. 79 (E.D.N.Y. 1980).

competition by giving those with the greatest incentive to sue, direct purchasers at the wholesale or retail level, a cause of action. In any event, indirect purchasers are not left without a remedy because of the possibility that the Attorney General might be able to secure the equitable remedy of restitution for certain indirect purchasers. *See North Carolina v. Zim Chem. Co.*, 45 N.C. App. 604, 608, 263 S.E.2d 849, 852 (1980).[5] Accordingly, the direct-purchaser rule should limit suits brought under the North Carolina antitrust statute.

In *Hyde*, however, a Court of Appeals panel, stating that it was not required to follow federal precedent, declined to construe Section 75-16 consistently with *Illinois Brick*. Because *Illinois Brick* was decided in 1977, eight years after the legislature amended Section 75-16 in 1969, the Court of Appeals declined to regard it as persuasive authority as to the legislative intent behind the amended statute. *Hyde*, 123 N.C. App. at 578, 473 S.E.2d at 684. Instead, the *Hyde* court stated that, by adding the phrase "if any person [shall be injured]" to a statute that previously had applied "to a business injury," the General Assembly must have intended to extend standing to indirect purchasers. *Id.*

(continued...)

[5] In *Zim Chemical*, the Court of Appeals allowed the Attorney General to seek injunctive relief under N.C. Gen. Stat. § 75-1.1 on behalf of four indirect purchasers, when the Attorney General had not sought similar relief for any of the direct purchasers who had sold to the recovering indirect purchasers. Id. Although it is unclear whether the *Zim Chemical* decision would survive scrutiny by the state Supreme Court, it did avoid some of the problems noted in *Illinois Brick* of awarding damages to indirect purchasers, such as the possibility of duplicative recovery and difficulties in causal determinations for splintered damage awards. Moreover, the court in *Zim Chemical* expressly relied upon N.C. Gen. Stat. § 75-15.1, which provides for (1) an equitable remedy (2) in a suit brought by the Attorney General. Id. The case in no way supports plaintiff's standing argument in a suit for (1) damages (2) brought by private citizens.

Hyde's reasons for departing from the interpretive methodology endorsed by the North Carolina Supreme Court are unpersuasive. *First*, in each of *Rose*, 282 N.C. at 655-57, 194 S.E.2d at 530-32, *Madison Cablevision*, 325 N.C. at 656-57, 386 S.E.2d at 213, and *Skinner*, 314 N.C. at 274, 333 S.E.2d at 241, the Supreme Court did not hesitate to interpret Section 75-1, enacted in 1913, in light of subsequent federal decisions, including precedents decided as recently as 1985. *Second*, *Hanover Shoe*, the decision upon which *Illinois Brick* was based, was decided in 1968, before the General Assembly amended Section 75-16 in 1969. While not holding so directly, *Hanover Shoe* plainly suggested as early as 1968 that there was no federal cause of action for indirect purchasers, as numerous courts recognized shortly thereafter.[6] *Third*, nothing in the 1969 amendments suggests that the General Assembly intended to reject the direct-purchaser rule of *Hanover Shoe* and *Illinois Brick*; rather, the obvious effect of the amendment was to grant individuals, in addition to businesses, the right to sue under the State's antitrust laws (just as individuals have the right to sue under the federal antitrust laws). Whether those individuals must be direct purchasers, or may also be indirect

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[6] *See, e.g.*, *Mangano v. Am. Radiator & Standard Sanitary Corp.*, 438 F.2d 1187, 1188 (3d Cir. 1971) (*per curiam*) (denying indirect purchasers standing when they face the "'insuperable difficulty' spoken of by the Supreme Court in the *Hanover* case"); *Travis v. Fairmount Foods Co.*, 346 F. Supp 679, 680 (E.D. Pa. 1972) ("only a direct purchaser from an alleged price fixing conspiracy in a chain of economic activity . . . can sustain a claim for treble damages against the alleged conspirators unless his purchases are made pursuant to a pre-existing cost-plus contract or analogous fixed mark-up type of arrangements"); *City & County of Denver v. Am. Oil Co.*, 53 F.R.D. 620, 637 (D. Colo. 1971) (consumers can recover under § 4 of the Clayton Act "when, but only when, there is privity or, in the alternative, when a case can be shown to be within the narrow limits of the exceptions" recognized by *Hanover Shoe*); *United Egg Producers v. Bauer Int'l Corp.*, 312 F. Supp. 319, 321 (S.D.N.Y. 1970) ("Ultimate consumers are not within the economic class with standing to sue . . .where the direct injury, if any, falls on the primary buyer in the chain of distribution and cannot be passed on to the ultimate consumer.").

purchasers, is a question that is not addressed by the amendment, and therefore ought to be resolved by reading Section 75-16 consistently with its federal counterpart.

Accordingly, because both North Carolina and federal courts have held that Section 75-1 is based upon the federal antitrust statutes and is best interpreted consistently with comparable federal statutes, this Court should follow well-established federal precedent and apply the direct-purchaser rule wherever possible. As explained below, *Hyde* does not preclude that result here.

III. THE COURT SHOULD DISMISS THE AMENDED COMPLAINT OR, IN THE ALTERNATIVE, FACILITATE THIS CASE'S REVIEW BY THE NORTH CAROLINA SUPREME COURT.

For the reasons set forth above, the indirect purchaser rule of *Illinois Brick* should govern claims under the North Carolina Antitrust Act. Moreover, this Court should decline to extend *Hyde* and should apply the *Illinois Brick* rule here. Unlike the instant case, *Hyde* was a relatively straightforward indirect-purchaser case, involving allegations of wholesale price-fixing of infant formula brought by plaintiffs who were downstream retail consumers of infant formula, *i.e.*, the same product. *See Hyde*, 123 N.C. App. at 573-74. The difficulties of proof in *Hyde* were therefore quite limited. In this case, by contrast, plaintiff and the class members he seeks to represent are not downstream consumers of any product manufactured and sold by the defendants. Defendants manufacture and sell rubber-processing chemicals, and plaintiff has not alleged that he is a purchaser of rubber-processing chemicals. Rather, plaintiff has alleged that he and the putative class members are purchasers of tires, which are products that defendants do not make or sell, but which plaintiff claims were used by third parties in the tire manufacturing process. In other words, compared to the plaintiffs in *Hyde* and similar indirect purchaser cases, plaintiff here is at least one more step removed from the allegedly overpriced products.

These differences magnify the complexities of proof that were present to a lesser degree in *Hyde* and that the *Illinois Brick* rule seeks to avoid. In particular, the extent to which an overcharge in the price of rubber-processing chemicals affected the prices that users of those chemicals charged for products made partly with those chemicals will be exceedingly difficult to determine and will likely vary greatly from manufacturer to manufacturer. Moreover, there will be insurmountable traceability problems involved in determining whether and to what extent defendants' rubber-processing chemicals were used in the manufacture of the tires purchased by plaintiff and the class members. Whatever might be said of the certainty of damages in a straightforward indirect purchaser suit, such as *Hyde*, adequate proof of damages in this case will be practically impossible. The alternative will be improperly to base damages on guesswork and imprecise speculation. For these reasons, this Court should not extend *Hyde* to new and more difficult indirect-derivative-purchaser cases, like this one, where the plaintiffs are not indirect purchasers of the actual product sold by the defendants.

Should the Court disagree and consider itself bound to follow *Hyde* and deny this motion, then the Court should facilitate defendants' immediate appeal on this issue. Forcing defendants to litigate a complicated antitrust suit to resolution before seeking review on the threshold issue of standing likely will result in unnecessary and wasteful litigation. The Court and the parties would have to litigate with uncertainty over whether plaintiff (and perhaps even a plaintiff class) even has standing to bring the case. Further, both defendants' motion and the *Hyde* decision present important issues about who has standing to prosecute a private cause of action for alleged violations of North Carolina's antitrust laws and the methods by which North Carolina courts construe those laws. The Supreme Court is well-suited to resolving those issues and the tension between its cases and the result in *Hyde*.

Denial of this dispositive motion on the basis of standing would implicate a substantial right under North Carolina law. Standing is analogous to the defenses of qualified and sovereign immunity in providing a constitutional and prudential basis for the prompt dismissal of an action and for relieving defendants of the burden of litigating the action. Just as denial of a motion to dismiss based on qualified or sovereign immunity grounds implicates a substantial right, *see Faulkenberry v. Teachers' & State Employees' Ret. Sys.*, 108 N.S. App. 357, 424 S.E.2d 420, *aff'd*, 335 N.C. 158, 436 S.E.2d 821 (1995), so does denial of a motion to dismiss based on lack of standing. Accordingly, defendants ask the Court expressly to find that, to the extent the Court is compelled to deny defendants' motion on the basis of *Hyde*, the Court has denied defendants a substantial right to avoid litigating a nonjusticiable case and that review of the issue at this time will promote judicial economy. Defendants also ask the Court to find that the case presents an issue of significant public interest and involves legal principles of major jurisprudential significance to North Carolina. *See* N.C. Gen. Stat. § 7A-31(b)(1)-(2). Finally, given the foregoing findings, defendants request that the Court express the view that the North Carolina Supreme Court should review the issue immediately and overrule the decision in *Hyde*.

CONCLUSION

For the reasons stated above, the amended complaint should be dismissed with prejudice for failure to state a claim upon which relief can be granted. In the alternative, the Court's opinion denying the motion should (1) express its view that the Supreme Court should review the issue on an interlocutory basis and overrule the Court of Appeals decision in *Hyde* (2) find that the Court's ruling denies defendants a substantial right, (3) find that the subject matter of the decision has significant public

interest, (4) find that the case involves legal principles of major significance to the jurisprudence of the State, and (5) find that the interests of judicial economy strongly favor immediate review.

This the 28th day of March, 2003.

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CERTIFICATE OF SERVICE

This is to certify that the foregoing Joint Memorandum of Law in Support of Defendants' Motion to Dismiss has been served by mailing a copy thereof, by first class mail, postage prepaid, to the parties to this action, addressed as follows:

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