

STATE OF NORTH CAROLINA  
COUNTY OF BUNCOMBE

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
NO. 05-CVS-90

MITCHELL TEAGUE, on behalf of himself and  
others similarly situated,

Plaintiff,

v.

BAYER AG; BAYER POLYMERS, LLC N/K/A  
BAYER MATERIALSCIENCE, LLC; BAYER  
CORPORATION; CROMPTON  
CORPORATION, UNIROYAL CHEMICAL  
COMPANY, INC. N/K/A CROMPTON  
MANUFACTURING COMPANY, INC.; DOW  
CHEMICAL COMPANY; EI DUPONT DE  
NEMOURS & COMPANY; DUPONT DOW  
ELASTOMERS LLC; DSM COPOLYMER,  
INC.; DSM ELASTOMERS EUROPE B.V.;  
EXXON MOBIL CHEMICAL, a division or  
subsidiary of EXXON MOBIL CORP.,

Defendants.

**DEFENDANTS' JOINT  
MEMORANDUM OF LAW IN  
REPLY TO PLAINTIFF'S  
OPPOSITION TO  
DEFENDANTS' MOTION TO  
DISMISS**

## INTRODUCTION

Plaintiff devotes much of his Response to Defendants' Joint Motion to Dismiss ("Opposition" or "Opp.") to attacking this Court's *Crouch* decision. His attack, however, rests on the same arguments advanced by the plaintiffs in the *Crouch* case and rejected by this Court in a forty-five page decision, as well as on a fundamental mischaracterization of the reasoning in that unappealed decision. No grounds exist to revisit *Crouch*. To the contrary, that decision applied traditional standing principles to indirect purchaser actions and requires a dismissal of this case.<sup>1</sup>

Plaintiff makes two additional arguments, but neither can avoid *Crouch* or dismissal. First, Plaintiff claims that the Court must accept as sufficient for standing purposes his allegation that he really purchased EPDM. In particular, he asserts that Defendants resort to "erroneous . . . speculation" (Opp. at 1-2) when they explain that consumers such as Plaintiff (like the plaintiff in *Crouch*) do not purchase EPDM, but instead purchase a product containing EPDM (like the products containing rubber-processing chemicals that were involved in *Crouch*). Plaintiff's "the-sky-is-green" argument cannot overcome his own concession that he does not buy EPDM. (Opp. at 8, 16.) Pretending that he does is not a sufficient basis to avoid dismissal.

Second, Plaintiff urges a denial based on his own failure to plead that EPDM is anything other than a small portion of the cost of the product that Plaintiff actually purchased. (Opp. at 8.) This sleight-of-hand does not work either. Plaintiff cannot avoid the force of this Court's *Crouch* decision through creative pleading, in effect circumventing the standing requirement of

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<sup>1</sup> This motion should be granted for another reason as well. Plaintiff had thirty days within which to respond to Defendants' May 27, 2005 Joint Motion to Dismiss. *See* Order dated April 27, 2005. Plaintiff's Opposition therefore should have been filed on June 27, 2005. Plaintiff, however, did not file his Opposition until June 29, 2005. Under General Rule of Practice and Procedure for the North Carolina Business Court 13.11, because Plaintiff "fail[ed] to file a response within the time required by this rule, the motion [should] be considered and decided as an uncontested motion."

that decision. Here, as in *Crouch*, Plaintiff claims injury flowing from the purchase of products that Defendants do not make, in markets in which Defendants do not participate, and at the end of a variety of distribution chains not one of which includes Defendants. Plaintiff is therefore just like the Plaintiff in *Crouch*, who also bought a product that incorporated the allegedly price-fixed product. Unless Plaintiff can plead some facts that demonstrate why *Crouch* does not apply—and here Plaintiff did not do so—that decision requires dismissal of this case. Allowing a plaintiff to avoid *Crouch* by the simple expedient of failing to plead any of the facts relevant to the *Crouch* analysis will render that decision a dead letter, because every indirect purchaser will then follow Plaintiff’s strategy and *Crouch* will have accomplished nothing.

*Crouch* governs this case, and requires dismissal of Plaintiff’s Amended Complaint (“Am. Compl.”).

## **ARGUMENT**

### **I. LEGAL STANDARDS REQUIRE DISMISSAL OF PLAINTIFF’S CONCLUSORY ALLEGATIONS.**

Plaintiff cites the proposition that “a court must treat the allegations in plaintiff’s complaint as true.” (Opp. at 2 (quoting *Hyde v. Abbott Labs., Inc.*, 123 N.C. App. 572, 473 S.E.2d 680 (1996).) Defendants do not deny that for purposes of a 12(b)(6) motion this Court must accept as true the *facts* that Plaintiff alleges, but Plaintiff alleges very few facts—and none that address the relevant issues. The Court need not—and indeed should not—accept as true Plaintiff’s bare legal conclusion that he has antitrust standing to assert his claims under North Carolina law. That is the legal question that Defendants have presented on this motion: whether this plaintiff, who is neither a consumer nor a competitor in the allegedly restrained market, but (like the plaintiff in *Crouch*) has purchased a product that incorporates the allegedly price-fixed product, has adequately alleged an injury that survives the *Crouch* decision.

The Court is not required to accept vague and conclusory allegations that fail to provide a sufficient factual predicate upon which to analyze plaintiff's standing to prosecute his purported claims. *Bender v. Suburban Hosp.*, 159 F.3d 186, 192 n.4 (4th Cir. 1998) (holding that "a conclusory claim cannot suffice under any sensible reading of notice pleading"). To the contrary, "as the party invoking jurisdiction, plaintiffs have the burden of proving the elements of standing." *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 115 N.C. App. 110, 113, 574 S.E.2d 48, 51 (2002). Here, Plaintiff, who is an indirect-purchasing plaintiff, must explain why *Crouch* does not bar his claim. He cannot do so by refusing to list the product he purchased, from whom he purchased it, and the extent to which the product he purchased contained EPDM, and then say that the Court will just have to take his word for it and blindly accept his unsupported assertions that he can avoid the rule in *Crouch*. Plaintiff's refusal to provide anything beyond mere conclusions and empty assertions dooms the Amended Complaint, and requires dismissal.

## **II. NO REASONS EXIST TO RE-VISIT THE *CROUCH* DECISION**

Plaintiff argues that under *Hyde*, status as an "indirect purchaser," without more, is always sufficient to confer standing. (Opp. at 1, 4-7.) He also argues that *Hyde* places "no limits on a consumer's standing" (Opp. at 1 (emphasis in original).) But that argument has already been squarely rejected in *Crouch*, which the plaintiff in that case did not appeal.

In *Crouch*, this Court held that remote plaintiffs such as Teague, who purchase derivative products that incorporate small quantities of the allegedly price-fixed products, lack standing as a matter of law because "there is a point beyond which the wrongdoer should not be held liable." *Crouch*, 2004 WL 2414027, at \*9 (quoting *Ill. Brick*, 431 U.S. at 760). The Court based that conclusion on the well-recognized limitation on antitrust standing articulated in *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519 (1983) ("*AGC*").

Unwilling (because he is unable) to plead facts sufficient to avoid dismissal under *Crouch*, Plaintiff resorts to a thinly-disguised effort to challenge the *Crouch* rule. Yet no reason exists to revisit that careful and well-reasoned decision.

For example, Plaintiff (like the plaintiff in *Crouch*) argue that the *AGC* analysis upon which *Crouch* is grounded is irrelevant here because it dealt with competitors rather than consumers and did not involve claims of price-fixing. (See Opp. at 5.) Yet, nothing in *AGC* indicates that the decision is so limited. So, too, the fact that *Morris v. Visa U.S.A. Inc.*, No. 03 CVS 2514, 2004 WL 2414027 (N.C. Super. Ct. Oct. 28, 2004) (Opp. at 8), involved allegations of tying instead of price-fixing has no bearing on the Court's holding in *Crouch*. To the contrary, as Defendants repeatedly have pointed out, even in states that allow indirect purchaser suits, *AGC*'s standing analysis has been used to dismiss purported indirect purchaser class actions brought on behalf of consumers who do not purchase the allegedly price-fixed product, but rather something else.<sup>2</sup>

Plaintiff is also mistaken in his assertion that "*Crouch* also is distinguishable because the putative class members [in that case] included distributors and retailers," thus rendering the damage computations more complicated than in this case. (Opp. at 8.) Rather, just as in this case, the putative class in *Crouch* contained only end-users, "those people who purchased tires at a retail level but not for resale . . . [and] would exclude commercial purchasers." Tr. of Hr'g at 21, *Crouch*, 2004 WL 2414027 (No. 02 CVS 4375) (Attachment A).

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<sup>2</sup> See, e.g., *Fucile v. Visa U.S.A., Inc.*, No. S1560-03 CNC, 2004 WL 3030037 (Vt. Super. Ct. Dec. 27, 2004) (holding under Vermont Consumer Fraud Act that Vermont Supreme Court would draw on *Associated General Contractors* for guidance and that application of those factors mandated dismissal where causal chain is too long and damages highly speculative); *Southard v. Visa U.S.A. Inc.*, No. LACV 031729, 2004 WL 3030028 (Iowa Dist. Ct. Nov. 17, 2004) (granting motion to dismiss where *Associated General Contractors* factors indicated that plaintiff's claims were too remote); *Knowles v. Visa U.S.A. Inc.*, Civ. A. CV-03-707, 2004 WL 2475284 (Me. Super. Ct. Oct. 20, 2004) (holding that despite legislative *Illinois Brick* repealer, indirect purchaser claim must be dismissed where balancing of *Associated General Contractors* indicated that plaintiffs lacked standing); *Tackitt v. Visa U.S.A., Inc.*, No. CI03-740, 2004 WL 2475281 (Neb. Dist. Ct. Oct. 19, 2004) (relying on *Associated General Contractors* despite *Illinois Brick* repealer to dismiss plaintiff's claims because claims were derivative and too remote).

### **III. PLAINTIFF'S CASE AUTHORITY IS UNPERSUASIVE**

#### **A. Other EPDM Indirect Purchaser Decisions Are Inapposite To The Claims Here.**

Recognizing the failure of his claims under North Carolina law, Plaintiff asks this Court to revisit *Crouch* in light of two decisions from other states' trial courts, *Anderson Contracting, Inc. v. Bayer AG*, Case No. CL 95959 (Polk County, Iowa District Court), and *Investors Corp. of Vermont v. Bayer AG*, Case No. S1011-04 CnC (Chittenden County, Vermont Superior Court). No reason exists to do so.

##### **1. *Anderson Contracting* (Iowa)**

In *Anderson Contracting*, the Iowa District Court declined to apply *AGC* on the formalistic observation that the decision "involved no product, no purchase, and consequently, no price-fixing." Order at 14, *Anderson Contracting* (Case No. CL 95959). The Iowa court reached this conclusion notwithstanding that nothing in *AGC* suggests that its reach is limited to cases involving antitrust offenses other than price-fixing. That decision therefore conflicts with *Crouch*, where this Court has explicitly engrafted "upon the [North Carolina antitrust laws] the requirements of standing enunciated in *AGC*." *Crouch*, 2004 WL 2414027, at \*18. The non-binding decision of an Iowa trial court does not override *Crouch*.

##### **2. *Investors Corp.* (Vermont)**

The Vermont trial court's decision does not apply either. There, the court focused on the irrelevant allegation that "EPDM [supposedly] comprises 80 to 85 percent of Ethylene-propylene elastomers." Order at 3, *Investors Corp.* (Case No. S1011-04 CnC). Here, Plaintiff has made no similar allegation, but instead articulates that "Ethylene-propylene elastomers ("EP Elastomers") constitute the third most consumed synthetic rubber worldwide. EPDM is estimated to account for 80-85% of total world production of EP Elastomers." (Am. Compl. ¶ 21.) Either way, the

relationship of EPDM to EP elastomers is irrelevant because Plaintiff bought neither, and that irrelevant relationship says nothing about the EPDM content, if any, of whatever product Plaintiff did purchase from someone other than a Defendant.

More importantly, the Vermont court recognized that *AGC* may apply to the claims of indirect purchasers to determine if they have such standing to assert their claims. Order at 3-6, *Investors Corp.* (Case No. S1011-04 CnC). In short, the factual distinction in that case does not matter here and the Vermont court's legal holding is in agreement with this Court's holding in *Crouch*.

**B. The Unrelated Decisions Cited by Plaintiff Do Not Support His Claim.**

Plaintiff also directs the Court to other so-called "incorporated product" cases (Opp. at 10-16), but those cases are irrelevant here, where *Crouch* establishes the rules for indirect purchaser standing in incorporated product cases.

*Arthur v. Microsoft Corp.*, 267 Neb. 586, 676 N.W.2d 29 (2004), involved Microsoft's Windows software, which could be purchased as a distinct product directly by consumers at retail, or software that was simply housed on a separately manufactured and purchased computer. It was not a case, as here, involving a product that was used or consumed to make an entirely different product. The courts, in *In re Sugar Industry Antitrust Litigation* and *In re Linerboard Antitrust Litigation* concluded that the plaintiffs in those cases had *directly* purchased a product containing the allegedly price-fixed product from the defendants and therefore *were* direct purchasers, and thus, certifying those classes did not violate the bar to indirect purchaser suits under *Illinois Brick*, 431 U.S. 720. Moreover, certain Defendants in both *In re Sugar* and *In re Linerboard* made both the price-fixed product and the product incorporating the price-fixed product. *In re Sugar Industry Antitrust Litig.*, 579 F.2d 13, 15 (3rd Cir. 1978); *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 148 (3rd Cir. 2002). Those cases have nothing to do with a

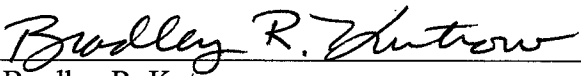
purported *indirect* purchaser (such as Plaintiff here) in a different market. Moreover, they do not govern this case; *Crouch* does.

Here, Plaintiff, a purported indirect purchaser, is necessarily remote from the alleged antitrust violation. He did not purchase EPDM. Other direct purchasers of EPDM have already filed a series of lawsuits against Defendants alleging violations of § 1 of the Sherman Act, 15 U.S.C. § 1, in federal court. *See In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 277 F. Supp. 2d 1373 (J.P.M.L. 2003). Thus, if Defendants' alleged conduct caused damages, those damages will be determined in that action. Plaintiff cannot pursue a claim here because he has not pled any way to avoid *Crouch*.

### **CONCLUSION**

Plaintiff hopes to avoid dismissal by failing to plead sufficient facts to permit this Court to conduct the standing analysis that it held in *Crouch* was necessary. Plaintiff's pleading fails to substantiate his conclusory assertions that he has suffered an ascertainable injury and has standing, and this Court should not condone such tactical pleadings. Accordingly, this Court should dismiss Plaintiff's Amended Complaint with prejudice.

This the 15th day of July, 2005.



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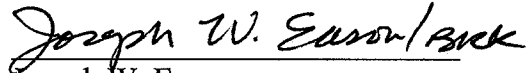
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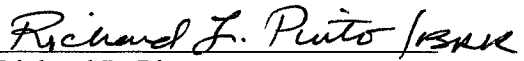
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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the foregoing Memorandum of Law in Reply to Plaintiff's Opposition to Defendants' Motion to Dismiss on all parties to this cause by:

\_\_\_\_\_ Hand delivering a copy hereof to the attorney for each said party addressed as follows:

\_\_\_\_\_ Depositing a copy hereof, postage prepaid, in the United States Mail, addressed to the attorney for each said party as follows:

\_\_\_\_\_ Depositing a copy hereof with a nationally recognized overnight courier service, for overnight delivery, addressed to the attorney for each said party as follows:

\_\_\_\_\_ ✓ Electronically filing a copy hereof with the North Carolina Business Court.

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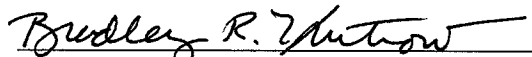
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