February 1, 2011

The Honorable Tani Cantil-Sakauye, Chief Justice
The Associate Justices
The Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Amicus Curiae* Letter in Support of Petition for Review, *Zubowicz v. Hospital Ass'n of Southern California,* 2d. Civil No. B215633

To the Chief Justice and the Associate Justices of the California Supreme Court:

Pursuant to California Rule of Court 8.500(g), the American Antitrust Institute ("AAI") respectfully requests that the Court grant review of the Appeals Court's unpublished opinion in *Zubowicz v. Hospital Ass'n of Southern California*. The *Zubowicz* decision applies a heightened standard for summary judgment in antitrust cases, developed by some lower courts, that is out of line with the proper interpretation of federal antitrust law and usurps the role of the jury in determining whether defendants have engaged in collusive conduct. This Court should grant review to clarify the summary judgment standard as articulated in *Aguilar v. Atlantic Richfield Company*, 25 Cal. 4th 826 (2001) in light of more recent insights provided by antitrust scholars and judges such as Judge Richard Posner in *In re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651 (7th Cir. 2002).

STATEMENT OF INTEREST

The AAI is an independent Washington-based non-profit education, research, and advocacy organization devoted. Our mission is to advance the role of competition in the economy, protect consumers, and sustain the vitality of the antitrust laws. *See* http://www.antitrustinstitute.org. The AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of more than 115 prominent antitrust lawyers, law professors, economists, and business leaders.[1] The AAI's amicus program is an important component of its advocacy work; AAI has filed more than 40 amicus briefs since 2001 and has argued as an amicus before the U.S. Supreme Court.

[1] AAI's Board of Directors alone has approved this filing. The individual views of members of the Advisory Board may differ from the positions taken by AAI. Mr. Blecher, counsel for plaintiffs-appellants, is a member of AAI's Advisory Board, but played no role in the Directors' deliberations over this filing; nor did he or his firm play any role in its drafting.

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The *Zubowicz* decision is important to AAI not only because of its legal implications, but also because AAI has been concerned that hospitals across the country are engaging in various practices to suppress nurse wages, which has adverse implications for the American healthcare system. It is widely believed that among the causes of a health care crisis in America is a lack of competition among health care providers. Hospitals across the country are defending litigation that questions the ways in which their coordinated practices compromise the foundations of the American healthcare system. Ultimately it is the end users—patients—who suffer when low levels of compensation lead to nursing shortages and the best and most capable seek employment in other lines of work that more accurately align the employee's contribution with his or her reward.

REASON FOR GRANTING REVIEW

The Plaintiff-Appellants, a class comprised of nurses practicing in Southern California, brought this action to challenge the alleged concerted adoption by certain hospitals of compensation schemes designed to negate the effect of a California statute, AB 60, which requires an employer to pay overtime wages when an employee works more than 8 hours per day. Plaintiffs allege that, under the auspices of the Hospital Association of Southern California ("HASC"), defendant hospitals conspired to suppress any increase in nurse wages in response to AB 60. AAI takes no position on the ultimate outcome of this case, but urges that review be granted to clarify the proper standard for summary judgment in antitrust cases.

By holding that inferences of conspiracy cannot be drawn from circumstantial evidence when such evidence is subject to "multiple interpretations," the Court of Appeal follows a growing trend in the lower courts imposing a heightened standard for avoiding summary judgment in antitrust cases.

This issue was last confronted in *Aguilar v. Atlantic Richfield Co.,* 25 Cal. 4th 826 (2001). The predicament facing courts is that at summary judgment they must adjudicate the plausibility of the plaintiff's claim based on the limited available evidence. This task has become increasingly challenging in the context of cartel cases. Modern antitrust enforcement must contend with increasingly sophisticated methods employed by conspiring firms to conceal their unlawful behavior.

The *Zubowicz* decision is founded on a flawed interpretation of *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). *Matsushita* set forth the current summary judgment standard, which requires the inferences drawn from the underlying facts to be viewed in the light most favorable to the nonmoving party. *Id.* at 587 (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). The Court further specified that "antitrust law limits the range of permissible inferences from ambiguous evidence in a [Sherman Act] § 1 case." *Id.* at 588. In particular "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* (citing *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984)). The Court went on to explain that "[t]o

survive a motion for summary judgment … a plaintiff seeking damages for a violation of § 1 must present evidence that 'tends to exclude the possibility' that the alleged conspirators acted independently." *Id.*

The "tends to exclude" standard has sometimes been interpreted as imposing a heightened standard of pleading for plaintiffs in antitrust cases. But this was not the intention of the *Matsushita* Court. The case merely emphasized that the plaintiffs "must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action." 475 U.S., at 588. In *Matsushita*, a predatory pricing case, the Court was wary of deterring pro-competitive price-cutting and thus required strong evidence on which to base an inference of conspiracy.

This position was clarified in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992). In that decision the Court highlighted that *Matsushita* "did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases … *Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision." *Id.* at 468 (citation omitted). In *Kodak* the Court refused to limit the range of permissible inferences drawn from otherwise ambiguous evidence because the conduct in question was not of the type "always or almost always to enhance competition." *Id.* at 479. Direct evidence was required in *Matsushita* only to make the inference of conspiracy reasonable in light of the inherently pro-competitive nature of the alleged conduct (absent a conspiracy) and the factual implausibility of the plaintiff's economic theory.

Since the alleged conduct in *Zubowicz*, a conspiracy between hospitals to suppress nurse wages against the background of a nurse shortage, is not inherently pro-competitive or factually implausible, it is improper to limit the permissible inferences in such a case. Indeed, the Court of Appeal may have been led astray by thinking that buyer cartels are less serious than seller cartels, or that hospital efforts to reduce wages were necessarily procompetitive. That is not the case. *See, e.g., Todd v. Exxon Corp.*, 275 F.3d 191, 201 (2d. Cir. 2001) (Sotomayor, J.) (declaring that a "horizontal conspiracy among buyers to stifle competition is as unlawful as one among sellers"); *see also* ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY: ANTITRUST LAW AND ECONOMICS (1993); American Antitrust Institute, The Next Antitrust Agenda 101-03 (2008), *available at* http://www.antitrustinstitute.org/node/11001.

One year after *Aguilar*, Judge Richard Posner offered some new insights into the issue of the standard to be applied at summary judgment in *High Fructose Corn Syrup* (reversing and remanding the summary judgment dismissal of a Sherman Act conspiracy case). *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651 (7th Cir. 2002). Judge Posner interpreted *Matsushita* as requiring a sliding scale approach, under which "[m]ore evidence is required the less plausible the charge of collusive conduct." *Id.* at 661. Posner also acknowledged that "most cases are constructed out of a tissue of such [ambiguous] statements and other circumstantial evidence, since an outright confession will ordinarily obviate the need for a trial." *Id.* at 662. This feature of modern

conspiracy cases has received notable commentary amongst scholars. *See* Kenneth Glazer, *Easy Facts Make Good Law: A Response to David Meyer's Article on the* High Fructose Corn Syrup *Decision*, 17 ANTITRUST 90, 92 (2003); Warren S. Grimes, *Conspiracies and Summary Judgment in Sherman Section 1 Cases: Judge Posner Takes on the Ninth Circuit*, 11 COMPETITION, Winter 2002-2003, at 15.

In *High Fructose*, Judge Posner warned of three traps set by the defendants that the court must avoid: (1) the defendants will encourage the judge to "weigh conflicting evidence" which is "the job of the jury"); (2) the defendants will encourage the conclusion that because no single piece of evidence "points unequivocally to conspiracy," the evidence as a whole cannot defeat summary judgment; and (3) the defendants will suggest that because the cartel's efficacy was limited, there is no actionable cartel violation. 295 F.3d at 655-56. The Court of Appeal failed to heed Judge Posner's warning.

The Court accepts the Defendants' portrayal of the facts, including on the questions of whether there was parallel conduct, whether the hospitals knew of each other's responses before deciding to adopt equivalency pay, whether hospitals had a good motive not to act unilaterally, and whether the trade association activities supported an inference of an agreement. In each instance, the Court failed to view the evidence in the light most favorable to the nonmoving party and weighed the evidence against the plaintiffs, despite the plausible theory of harm. While the Court ostensibly avoids the second trap by expressly reflecting on whether the evidence "considered as a whole" is sufficient to raise an inference of collusion, it also states that when any particular piece of evidence is open to a benign interpretation, it is "insufficient in itself to preclude summary judgment." The Court also found it significant that not all hospitals in Southern California engaged in the parallel conduct that reduced the pay rate of 12-hour shift nurses, but this point goes to the efficacy of the cartel, not to its existence.

As the Seventh Circuit recently reaffirmed, "Circumstantial evidence can establish an antitrust conspiracy." *In re* Text Messaging Antitrust Litig., ___ F.3d ___ , 2010 WL 5367383 (7th Cir. Dec. 29, 2010) (Posner, J.). Circumstantial evidence by definition is open to multiple interpretations. Unless this Court clarifies that no heightened standard of proof is required for proving an agreement in an antitrust case where such an agreement, as here, is plausible, then few circumstantial evidence cases will survive summary judgment.

Very truly yours,

Albert A. Foer
President
Michelle Chowdhury
Research Fellow

PROOF OF SERVICE

I, the undersigned, declare that I am over the age of 18 years and am not a party to the within action. My address is 1208 M St NW, Washington, DC, 20005.

On February 1, 2011, I caused the within document to be served on the parties in this action listed below by placing true and correct copies thereof in sealed envelopes and causing them to be served by US mail.

I declare that the foregoing is true and correct. Executed on February 1, 2011, at Washington, District of Columbia.

_____
Michelle Chowdhury

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