Nos. 08-55671, 08-55708

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA,

Plaintiff-Appellant/Cross-Appellee,

v.

SAFEWAY INC., et al.

Defendants-Appellees/Cross-Appellants.

Appeal from the United States District Court
for the Central District of California,
No. CV 04-0687 AG-SS

BRIEF FOR AMICUS CURIAE AMERICAN ANTITRUST INSTITUTE SUPPORTING PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the American Antitrust Institute states that it is a nonprofit corporation and, as such, no entity has any ownership interest in it.

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INTEREST OF AMICUS CURIAE

All parties have consented to the filing of this brief. The American Antitrust Institute (AAI) is an independent non-profit education, research, and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws. AAI is managed by its Board of Directors, which alone has approved this filing. Its Advisory Board consists of over 115 prominent antitrust lawyers, law professors, economists and business leaders.[1] See www.antitrustinstitute.org. AAI frequently files amicus briefs in cases raising important antitrust issues, including recently in support of the position adopted by this Court on rehearing in *Shames v. Cal. Travel & Tourism Comm'n*, 626 F.3d 1079 (9th Cir. 2010).

AAI is concerned that a ruling that a quick-look analysis is inappropriate for the revenue (or profit) sharing agreement at issue in this case would undermine the use of this critical antitrust tool. Quick-look analysis is essential for inherently anticompetitive restraints because the full blown rule of reason by its nature significantly increases the expense of litigation for courts and litigants, discourages meritorious suits from being brought and prosecuted, and lessens the deterrent effect of the antitrust laws against

[1] The individual views of members of the Advisory Board may differ from AAI's positions.

behavior that has no redeeming competitive virtues. Moreover, a holding that collective action to reduce wages and benefits of workers is a legitimate "procompetitive justification" threatens to gut the enforcement of the anti-trust laws in labor and in other input markets because the same argument could be made in virtually any buyer cartel case.

FED. R. APP. P. 29(c)(5) STATEMENT

No counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other person or entity – other than AAI or its counsel – has contributed money that was intended to fund preparing or submitting this brief. One of the counsel for the State is a member of AAI's Advisory Board, but played no role in the Directors' deliberations or the drafting of the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The vacated panel decision is absolutely correct when it states, "The central issue here is whether a profit sharing agreement that would ordinarily violate the antitrust laws is excused from compliance under the nonstatutory labor exemption because it constitutes an economic weapon used by the employers in their efforts to prevail in a labor dispute." *California v. Safeway, Inc.*, 615 F.3d 1171, 1175 (9th Cir. 2010), *vacated*, 2011 U.S. App. LEXIS 2795 (9th Cir. Feb. 11, 2011).

The revenue sharing agreement amounted to a truce in the competition among the defendants (collectively referred to as the "Supermarkets") during the pendency of the labor dispute and for two weeks thereafter. Whatever happened in their labor dispute *or otherwise*, the Supermarkets agreed to hold each other harmless for any changes in their pre-dispute market shares. But the antitrust laws do not countenance the suspension of competition during a labor dispute, or at any time. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940) (Sherman Act would be "emasculated" if "[r]uinous competition" or "financial disaster" were accepted as defenses to cartels). Nor do the antitrust laws allow competitors to share profits outside of a procompetitive integration of economic activity; indeed, such cooperation is the very definition of a naked cartel.

Whether analyzed under the rubric of per se illegality, "quick look," or the rule of reason, the Supermarkets' sharing of profits is unlawful under the antitrust laws because it is inherently anticompetitive. *See Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 779-80 (1999) ("'[W]hether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same – whether or not the challenged restraint enhances competition.'") (alteration in original) (quoting *NCAA v. Board of Regents*, 468 U.S. 85, 104 (1984)); *see also American Needle, Inc. v.*

National Football League, 130 S. Ct. 2201, 2216-17 (2010) ("[D]epending upon the concerted activity in question, the Rule of Reason may not require a detailed analysis; it can sometimes be applied in the twinkling of an eye.") (internal quotation marks and citation omitted). As a result, if the agreement is to survive antitrust scrutiny it would only be because it is exempt from the antitrust laws under the nonstatutory labor exemption. While AAI believes that the district court appropriately held that the nonstatutory labor exemption does not shield the agreement from the antitrust laws, AAI does not address that issue in this brief.

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The revenue (or profit) sharing agreement is patently anticompetitive because it significantly reduces the normal incentives of the Supermarkets to compete with one another and other supermarkets. The Supermarkets' incentive to take market share away from one another by cutting prices or otherwise has been virtually eliminated because any increase in revenues at the expense of the others must be redistributed (minus expected costs) to the competitors that lose market share. Even if the Supermarkets retained other incentives to compete, that is not a defense to naked cartel activity.

Quick-look review is not limited to restraints that directly fix prices or limit output. Profit pooling does not directly fix prices or limit output but is nonetheless at least presumptively illegal. The effect of profit pooling is to limit the incentives to compete on every dimension, which may be more harmful than price fixing alone. The courts have not limited the quick-look approach to naked restrictions on price or output. While the magnitude of the anticompetitive effect of the revenue sharing agreement may not be clear, its negative direction is obvious, and thus it cannot be sustained without some countervailing procompetitive justification.

The Supermarkets have offered no legitimate procompetitive justification. The argument that the revenue sharing agreement would give the Supermarkets more leverage to negotiate a better labor contract and reduce costs, which will allow them to lower prices to consumers, even if it were factually plausible, is simply not a legitimate procompetitive justification. Cost cutting by itself is not a valid justification for an agreement to limit the prices of inputs, whether of labor or otherwise, regardless of whether consumers may benefit.

The Supermarkets' ancillary restraints argument is based on the same flawed premise that reducing labor costs by agreement is somehow procompetitive. The ancillary restraints doctrine applies to legitimate procompetitive joint ventures and restraints that are necessary to promote their procompetitive ends. A multiemployer bargaining arrangement is not a legitimate procompetitive joint venture under the antitrust laws; to the contrary, it involves no integration of economic activity and hence, absent the nonstatutory labor exemption, multiemployer agreements to set the terms and conditions of employment would constitute illegal cartel activity.

ARGUMENT

I. THE REVENUE SHARING AGREEMENT IS PATENTLY ANTICOMPETITIVE

The revenue sharing agreement at issue here is patently anticompetitive because it significantly reduces the Supermarkets' incentive to compete with each other and other supermarkets. Under the Mutual Strike Assistance Agreement (MSAA), Ralphs, Albertson's, and Vons (Safeway) agreed that if any of the firms' Southern California supermarkets were struck, all would lock out their union employees. In order to maintain each chain's predispute market share during the pendency of a strike and for two weeks thereafter, the MSAA contained a revenue sharing clause which provided that if any of the three supermarket chains or Food4Less[2] earned revenues above its

[2] Food4Less, a sister company of Ralphs, was included in the revenue sharing arrangement although it was not part of the multiemployer bargaining group and was not subject to a pending strike or lockout. It had a separate collective bargaining agreement with the unions that was due to expire several months later. Thus Food4Less would share its (presumably higher) revenues during a strike or lockout of Ralphs, Albertson's and Vons, while Ralphs, Albertson's and Vons would share their (presumably higher)

historical share of the combined revenues of the four firms, then 15% of those surplus revenues would be redistributed to the chains with a “deficit” relative to their historical market shares. The 15% figure was designed as an estimate of the incremental profits the chains would earn on incremental sales without any change in fixed costs. (Hence, the revenue sharing agreement is aptly described as a profit sharing agreement.)

There can be no doubt that the effect of the revenue sharing agreement was to reduce the incentives of the Supermarkets to compete while it was in effect. Absent the agreement, in the normal course of competition, the firms would have an incentive to take market share away from one another by, among other things, having lower prices, providing better service and amenities, adding new products, and increasing product quality. For example, if during the strike, Ralphs or Food4Less cut prices to take sales away from Vons and Albertson’s, any gains in Ralphs’ or Food4Less’s revenue would directly increase their profits. However, with the revenue sharing agreement in place, the incentive to take market share away from the other defendants has been virtually eliminated because any increase in revenue at the expense of the others would simply be redistributed (minus expected costs) to the defendants that lost market share. Moreover, the

revenues in the event that Food4Less was later struck or engaged in a lockout when its collective bargaining agreement expired.

incentive of a defendant to compete against other supermarkets not party to the agreement is also reduced because a portion of the defendant's increased (or reduced) sales *vis a vis* other supermarkets would be shared among the defendants.[3]

The Supermarkets argue that they retained incentives to compete because the revenue sharing was only temporary (albeit indefinite), did not cover the entire market (defendants "only" had a market share of 55-64% in Los Angeles-Long Beach), and did not result in the sharing of all profits (i.e., profits in excess of 15% of revenues). These incentives are dubious for the reasons stated by the vacated panel decision and the State. *See Safeway*, 615 F.3d at 1185-89; California's Opposition to Cross-Appeal and Reply in Support of Appeal 45-55 (Mar. 2, 2009). More importantly, even if the defendants retained some incentives to compete, that would not alter the fact that the revenue sharing agreement significantly reduced their normal competitive incentives and, absent some offsetting procompetitive justification, is necessarily anticompetitive. A price-fixing cartel is per se

[3] So, for example, if Food4Less were considering offering organic products to compete against Whole Foods, some of the gains in sales at the expense of Whole Foods would be shared with the other defendants, thereby reducing Food4Less's incentive to offer the products. Or if one of the non-defendant supermarkets engaged in a marketing campaign that disproportionately affected Albertson's, Albertson's would have less incentive to respond because its losses would be shared with the other defendants.

illegal even though cartel members have an incentive to compete on non-price terms or to cheat on the cartel by secretly cutting prices, or the cartel is of short duration, or it does not include the entire industry. Likewise, a naked profit sharing agreement is inherently anticompetitive even if the participants agree to share only 50% of their profits, or share their profits only on tomatoes. Antitrust does not accept the defense that although a restraint is anticompetitive, not all competition has been eliminated. *See, e.g., Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (agreement by wholesalers to restrict credit terms is per se illegal even if competition might lead to lower nominal prices); *Socony-Vacuum Oil*, 310 U.S. at 220 ("[T]he fact that sales on the spot markets were still governed by some competition is of no consequence.").

To the extent the Supermarkets argue that the revenue sharing agreement was not anticompetitive because some (but apparently not all) employees responsible for pricing were not aware of it, that argument misses the mark. Not only is the argument implausible given that the news was on the front page of the *Los Angeles Times*,[4] and incomplete because it fails to

[4] *See* Nancy Cleeland & Melinda Fulmer, *In Tactical Move, Union Pulls Pickets from Ralphs,* Los Angeles Times, Nov. 1, 2003, A1 (noting that chains had agreed to share financial burden of the strike and the possibility that Ralphs might share with Albertson's and Safeway any windfall from

address the fact that the revenue sharing agreement blunted the Supermarkets' incentives to compete on every dimension, not just price, the argument is fundamentally inconsistent with an economics-based approach to antitrust. Antitrust focuses on incentives of *firms*, and assumes they are rational profit-maximizers. *See, e.g., Copperweld Corp. v. Independence Tube*, 467 U.S. 752, 772 n.18 (1984) (treating parent and wholly owned subsidiary as a single entity under Section 1 regardless of degree of separateness in practice because economic interests of firms were identical); *American Needle,* 130 S. Ct. at 2215 (holding that a joint venture of NFL teams to license the teams' intellectual property was not a single entity under Section 1 because "each team's decision reflects not only an interest in [the joint venture's] profits, but also an interest in the team's individual profits"); *cf. Lamoille Valley R. Co. v. ICC*, 711 F.2d 295, 318 (D.C. Cir. 1983) (in analyzing railroad merger, firm's "actual financial incentives, not its professed intent, must be the dominant concern").

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being the only one of the chains without pickets); *see also* Opening Brief of Appellant 49 (Oct. 14, 2008).

II. "QUICK LOOK" REVIEW IS NOT LIMITED TO RESTRAINTS THAT DIRECTLY RESTRICT PRICE OR OUTPUT

The Supermarkets err in arguing that the quick-look doctrine is not applicable because the revenue sharing agreement does not directly fix prices or limit output. As an initial matter, this argument is wrong because there is no doubt that a "pure profit sharing arrangement across the entire market" would be per se illegal, as even Judge Wardlaw noted in her dissent on the quick-look issue. *Safeway*, 615 F.3d at 1202. A profit sharing agreement may not directly restrain price or output, but "runs afoul of the Sherman Act" because it "reduces incentives to compete." *Citizen Pub. Co. v. United States*, 394 U.S. 131, 135 (1969). Indeed, a profit sharing agreement may be more harmful than an agreement to fix prices or limit output (and create a more effective cartel) because it eliminates the incentives of the conspirators to compete against one another not only on price and output but on every dimension. As noted above, the revenue sharing agreement here similarly reduces, if not eliminates, the incentives of its participants to take market share from one another.[5]

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[5] The fact that courts have no experience with a profit sharing agreement in the context of a multiemployer bargaining arrangement arguably justifies not applying the per se rule, but the quick look rule is appropriate where, as here, the restraint bears a "close family resemblance" to "another practice that already stands convicted in the court of consumer welfare." *Polygram*

Second, the Supreme Court, Federal Trade Commission, and the lower federal courts have applied the quick-look doctrine to numerous restraints that involve something other than a naked restriction on price or output. *See, e.g., FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986) (agreement among dentists not to restrict output but to refuse to supply x-rays to insurers); *Polygram Holding,* 416 F.3d 29 (agreement among joint venture partners to restrict advertising of competitive versions of product); *In re RealComp II, Ltd.*, 2009 FTC LEXIS 250 (realtors' agreement to restrict availability of listings from discount brokers); *see also In re Detroit Auto Dealers Ass'n, Inc.*, 955 F.2d 457 (6th Cir. 1992) (agreement among auto dealers to limit showroom hours violated Rule of Reason despite absence of proof of market power or actual effects of increased prices or reduced output).

"Absent some countervailing procompetitive virtue . . . an agreement limiting consumer choice by impeding the ordinary give and take of the market place, cannot be sustained under the Rule of Reason." *Indiana Fed. of Dentists*, 476 U.S. at 459 (internal citations and quote marks omitted);

Holding, Inc. v. FTC, 416 F.3d 29, 37 (D.C. Cir. 2005); *see also In re RealComp II, Ltd.*, 2009 FTC LEXIS 250, *54, FTC Dkt. 9320 (Oct. 30, 2009) (noting that "the Supreme Court in *Indiana Federation* applied the 'quick look' analysis to a restraint that courts had not precisely seen before").

Cal. Dental Ass'n, 526 U.S. at 781 (quick look appropriate when "a confident conclusion about the *principal tendency* of a restriction will follow") (emphasis added). While the magnitude of the competitive effect of the revenue sharing agreement may not be clear, its direction is plainly negative and therefore the restraint cannot be sustained without some countervailing procompetitive justification.

III. REDUCING LABOR COSTS BY AGREEMENT IS NOT A LEGITIMATE PROCOMPETITIVE JUSTIFICATION EVEN IF IT WOULD ULTIMATELY BENEFIT CONSUMERS

Insofar as the Supermarkets contend that their revenue sharing agreement was "procompetitive" because it would permit them to negotiate a more favorable contract on labor costs, which would lead to lower prices, such a justification is not only implausible and unsupported by the evidence, as the State points out, but it is simply not legitimate under the antitrust laws.

As the Tenth Circuit explained in rejecting the NCAA's justification that an agreement limiting coaches' salaries was "procompetitive" because it would reduce the costs of member institutions:

> [C]ost cutting by itself is not a valid procompetitive justification. If it were, any group of competing buyers could agree on maximum prices. Lower prices cannot justify a cartel's control of prices charged by suppliers, because the cartel ultimately robs the suppliers of the normal fruits of their enterprises.

. . . .

> While increasing output, creating operating efficiencies, making a new product available, enhancing product or service quality, and widening consumer choice have been accepted by courts as justifications for otherwise anticompetitive agreements, mere profitability or cost savings have not qualified as a defense under the antitrust laws.

Law v. NCAA, 134 F.3d 1010, 1022-23 (10th Cir. 1998); *accord* Federal Trade Comm'n & U.S. Dept. of Justice Antitrust Division, *Antitrust Guidelines for Collaborations Among Competitors* § 3.2 (April 2000) (*Competitor Collaboration Guidelines*) ("cost savings without integration are not a basis for avoiding per se condemnation").

Indeed, this Court took the same position in holding that milk producers had standing to challenge a buyers' cartel of cheese manufacturers despite the claim that "a conspiracy to depress prices would not harm consumers but benefit them, because reduced milk acquisition costs would mean lower cheese manufacturing costs and, therefore, lower prices for cheese products." *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 988 (9th Cir. 2000). "The fallacy of this argument becomes clear when we recall that the central purpose of the antitrust laws . . . is to preserve competition. . . . The Supreme Court's references to the goals of achieving 'the lowest prices, the highest quality and the greatest material progress,' and of ‘assur[ing] customers the benefits of price competition,’ do not mean that conspiracies among buyers to depress acquisition prices are tolerated.’” *Id.* (internal citations omitted; alteration in original).

Any buyer cartel could argue that its lower input prices get passed along to consumers. *See Law v. NCAA*, 134 F.3d at 1023 (“The exercise of market power by a group of buyers virtually always results in lower costs to the buyers – a consequence of which arguably is beneficial to the members of the industry and ultimately their consumers.”) (citation and internal quote marks omitted). Yet other courts have similarly held agreements among buyers to reduce the price of inputs to be just as illegal as agreements among sellers to raise the price of outputs to consumers. *See Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 235 (1948) (sugar refiners’ conspiracy to reduce the price of California sugar beets was unlawful even though persons injured “are sellers, not customers or consumers”); *Vogel v. Am. Soc’y of Appraisers,* 744 F.2d 598, 601 (7th Cir. 1984) (Posner, J.) (buyer cartel to reduce input prices is per se illegal); *Todd v. Exxon Corp.*, 275 F.3d 191, 201 (2d Cir. 2001) (Sotomayor, J.) (agreement among employers to exchange salary information to reduce employee salaries would be anticompetitive; “a horizontal conspiracy among buyers to stifle competition is as unlawful as one among sellers”); *see also Radovich v.*

National Football League, 352 U.S. 445, 454 (1957) (complaint that NFL teams boycotted player stated a conspiracy claim; antitrust laws "protect the victims of the forbidden practices as well as the public"); Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 Antitrust L.J. 707, 735 (2007) ("Protecting consumer welfare is the principal goal of the Sherman Act, but it is only a goal: The Sherman Act protects the people by protecting the competitive process.").

If an agreement among buyers to pay lower input prices (a buyer cartel) cannot be defended on the ground that it ultimately benefits consumers, then *a fortiori* an agreement among buyers to limit competition in the output market (revenue sharing) can hardly be defended on the ground that it will strengthen a buyer cartel and thereby benefit consumers.

IV. THE ANCILLARY RESTRAINTS DOCTRINE IS NOT APPLICABLE

The Supermarkets' argument that the rule of reason should apply because the revenue sharing agreement is ancillary to a legitimate multi-employer bargaining agreement fundamentally misunderstands the ancillary restraints doctrine. The ancillary restraints doctrine provides that an otherwise anticompetitive restraint that is "reasonably necessary to achieve a joint venture's efficiency-enhancing purposes" is not necessarily illegal. *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290, 334, 339 (2d Cir. 2008) (Sotomayor, J., concurring in the judgment); *see Competitor Collaboration Guidelines* § 3.2 ("If . . . participants in an efficiency-enhancing integration of economic activity enter into an agreement that is reasonably related to the integration and reasonably necessary to achieve its procompetitive benefits, the Agencies analyze the agreement under the rule of reason even it is of a type that might otherwise be considered per se illegal."); *cf. Nw. Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 296 n.7 (1985) (concerted refusal to deal would be suspect if it was "not substantially related to the efficiency-enhancing or procompetitive purposes that otherwise justify the cooperative's practices").

The argument that multiemployer bargaining is legitimate joint activity and that revenue sharing is reasonably necessary to make multiemployer bargaining work is a *labor law* argument, not an *antitrust* argument. A multiemployer bargaining arrangement is not a joint venture and is not procompetitive under the antitrust laws because it involves no integration of economic activity. As the federal *Competitor Collaboration Guidelines* explain,

> Participants in an efficiency-enhancing integration typically combine, by contract or otherwise, significant capital, technology, or other complementary assets to achieve procompetitive benefits that the participants could not achieve

> separately. The mere coordination of decisions on price, output, customers, territories, and the like is not integration, and cost savings without integration are not a basis for avoiding per se condemnation.

Competitor Collaboration Guidelines § 3.2. The Supermarkets acknowledge that they did not integrate any of their activities. *See* Appellees'/Cross-Appellants' Principal and Response Brief 43 (Dec. 3, 2008) ("The Grocers did not consolidate any part of their operations or sales . . . for any period of time.").

Absent the nonstatutory labor exemption, multiemployer agreements to set the terms and conditions of employment would constitute illegal cartel activity. *See Anderson v. Shipowners' Ass'n of Pacific Coast*, 272 U.S. 359 (1926) (holding unlawful an agreement among members of association to fix seamen's wages); *Brown v. Pro Football, Inc.*, 518 U.S. 231, 241 (1996) ("[U]nlike labor law, which sometimes welcomes anticompetitive agreements conducive to industrial harmony, antitrust law forbids all agreements among competitors (such as competing employers) that unreasonably lessen competition among or between them in virtually any respect whatsoever."); 12 Herbert Hovenkamp, *Antitrust Law* ¶ 2010, at 125 (2d ed. 2005) ("If immunity is found lacking, employer cartels limiting the price of labor . . . are often illegal per se, just like the general run of buyers' cartels"); 1B Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶

257d, at 157 (3d ed. 2006) (noting that once immunity is lost, multiemployer agreements reducing product output "are little more than naked cartels").

The argument that cartel arrangements can be justified under the antitrust laws by other public policies, however legitimate, has been repeatedly rejected by the Supreme Court. *See, e.g., Indiana Federation of Dentists*, 476 U.S. at 463-65 (concerted refusal by dentists to supply x-rays to insurers held unlawful even if restraint would prevent the impairment of patient care and the unauthorized practice of dentistry); *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978) (argument that engineers' ban on competitive bidding was justified by the "potential threat that competition poses to the public safety and the ethics of its profession is nothing less than a frontal assault on the basic policy of the Sherman Act"); *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457, 468 (1941) (industry boycott of customers that bought "pirated" designs from rival manufacturers could not be justified by argument that rivals were engaged in tortious conduct).

CONCLUSION

The revenue sharing agreement is inherently anticompetitive and is not justified by any countervailing legitimate procompetitive justifications. Accordingly, absent implied immunity under the labor laws, it should be condemned under the antitrust laws, and the district court's denial of summary judgment under the quick look rule of reason should be reversed.

Respectfully submitted,

AMERICAN ANTITRUST INSTITUTE

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March 14, 2011

CERTIFICATE OF COMPLIANCE WITH RULE 29-2(C)(3)

Pursuant to Circuit Rules 29-2, this amicus brief is proportionally spaced, has a type of face of 14 points or more, and contains 4256 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

s/ Richard M. Brunell

Dated: March 14, 2011