No. 09-56785

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROB BRANTLEY, et al.,

Plaintiffs-Appellants,

v.

NBC UNIVERSAL, INC. et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
(No. CV-07-6101 CAS VBK, Hon. Christina A. Snyder, U.S.D.J.)

BRIEF FOR AMICUS CURIAE AMERICAN ANTITRUST INSTITUTE SUPPORTING PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING AND REHEARING EN BANC

RICHARD M. BRUNELL
RANDY M. STUTZ
AMERICAN ANTITRUST INSTITUTE
2919 Ellicott St., N.W.
Washington, D.C. 20008
202-600-9640

April 20, 2012

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.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES...... ……………………………………………….iii

INTEREST OF AMICUS CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. THE PANEL WAS WRONG TO SUGGEST THAT VERTICAL AGREEMENTS CANNOT INJURE COMPETITION WITHOUT EXCLUDING RIVALS OR FACILITATING COLLUSION 5

A. Vertical Agreements Can Have Collusive Effects Without Facilitating Actual Collusion 6

B. Tying Agreements Can Be Unlawful Without Exclusion in the Tied Product Market 9

C. The Complaint Alleges Harm to Horizontal Competition 13

CONCLUSION 16

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases | Page

Blough v. Holland Realty, Inc.,
574 F.3d 1084 (9th Cir. 2009)....................9, 12, 12n

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,
509 U.S. 209 (1993)....................3

Brown Shoe Co. v. United States,
370 U.S. 294 (1962)....................3

Cascade Health Solutions v. PeaceHealth,
515 F.3d 883 (9th Cir. 2008).................... 13

Continental T.V., Inc. v. G.T.E. Sylvania Inc.,
694 F.2d 1132 (9th Cir. 1982)....................8

Eastman Kodak Co. v. Technical Image Servs., Inc.,
504 U.S. 451 (1992)....................13

Fortner Enterprises, Inc. v. U.S. Steel Corp.,
394 U.S. 495 (1969)....................11

Glen Holly Entertainment Inc. v. Tektronix Inc.,
352 F.3d 367 (9th Cir. 2003)....................8n

Hirsh v. Martindale-Hubbell, Inc.,
674 F.2d 1343 (9th Cir. 1982)....................12

Illinois Tool Works Inc. v. Independent Ink, Inc.,
547 U.S. 28 (2006)....................13

Jefferson Parrish Hosp. Dist. No. 2 v. Hyde,
446 U.S. 2 (1984)....................4, 10n, 11, 13

Leegin Creative Leather Products, Inc. v. PSKS, Inc.,
551 U.S. 877 (2007)....................3, 7, 7n, 13, 15, 16

The Mozart Co. v. Mercedes-Benz of North America, Inc.,
833 F.3d 1342 (9th Cir. 1987)..12

NCAA v. Board of Regents,
468 U.S. 85, 107 (1984) 3

Paladin Assocs., Inc. v. Montana Power Co.,
328 F.3d 1145 (9th Cir. 2003)...11

Reiter v. Sonotone Corp.
442 U.S. 330 (1979) 3

United States v. American Express Co.,
C.A. No. 10-4496 (E.D. N.Y. filed Dec. 21, 2010) 8n

United States v. Delta Dental of Rhode Island,
943 F. Supp. 172, 177 (D. R.I. 1996)...8n

United States v. Loew's, Inc.,
371 U.S. 381 (1962) 10

Other Authorities

Phillip E. Areeda & Herbert Hovenkamp,
Antitrust Law (2d ed. 2004) 7n, 8n, 10

Jonathan B. Baker, *Vertical Restraints with Horizontal Consequences: Competitive Effects of "Most-Favored-Customer" Clauses*,
64 Antitrust L. J. 517 (1996)...9n

Aaron S. Edlin, *Do Guaranteed-Low-Price Policies Guarantee High Prices, and Can Antitrust Rise to the Challenge?*,
111 Harv. L. Rev. 528 (1997) 9n

Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 Harv. L. Rev. 397 (2009) 10n, 12

Andrew I. Gavil, William E. Kovacic & Jonathan B. Baker,
Antitrust Law in Perspective (2d ed. 2008)...6, 7n

Thomas R. Overstreet, Jr., *Resale Price Maintenance: Economic Theories and Empirical Evidence* (1983) 15

F.M. Scherer & David Ross, *Industrial Market Structure and Economic Performance* (3d ed. 1990) 7n

Fiona Scott-Morton, Deputy Asst. Atty. General, Antitrust Division, *Contracts that Reference Rivals*, Remarks Presented at Georgetown University Law Center, April 5, 2012, http://www.justice.gov/atr/public/speeches/281965.pdf 5n, 9n

Carl Shapiro, Deputy Asst. Atty. General for Economics, Antitrust Division, *Update From the Antitrust Division*, Remarks as Prepared for the ABA Section of Antitrust Law Fall Forum, Nov. 18, 2010, http://www.justice.gov/atr/public/speeches/264295.pdf 5n

INTEREST OF AMICUS CURIAE

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 with the guidance of an Advisory Board consisting of over 115 prominent antitrust lawyers, law professors, economists and business leaders.[1] AAI submits that panel rehearing or rehearing en banc is necessary because the Panel's decision distorts the concept of "injury to competition" to immunize vertical restraints from antitrust liability unless they exclude rivals from the market or facilitate cartels. If left standing, this unprecedented constriction of antitrust law will impair the ability of private plaintiffs and the government to protect consumers against all manner of vertical restraints that have "collusive effects," including tying agreements that impair consumer welfare.

[1] The Board of Directors alone has approved this filing; individual views of members of the Advisory Board may differ from AAI's positions. Pursuant to Fed. R. App. P. 29(c)(5), amicus states that 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. Certain members of AAI's Advisory Board represent or have advised appellants, but played no role in the Directors' deliberations or the drafting of the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The complaint in this action challenges industry-wide vertical agreements between "cable television" programmers and common distributors, whereby the programmers require the distributors to take their full lineup of channels in order to gain access to the programmers' "must have" networks. The result of these agreements is that the programmers' low-demand channels are insulated from competition at the programmer level, and the various cable, satellite and telecommunications distributors are unable to compete by offering basic channels on an *a la carte* basis or in smaller, consumer-friendly packages. Prices paid by consumers (and presumably distributors) are higher than they would be in the absence of the "forced bundling" agreements.

Notwithstanding these straightforward allegations of anticompetitive effects, the Panel held that the complaint failed to state a claim under the rule of reason because it did not allege a horizontal conspiracy, or that independent programmers were excluded from the market, or that the agreements facilitated horizontal collusion. Therefore, according to the Panel, the plaintiffs failed to allege an "injury to competition."

The Panel's crabbed checklist of so-called "standard-issue" competitive harm, slip op. at 3496, is inconsistent with the fundamental purpose of the antitrust laws, which is to protect consumers. "It is axiomatic that the antitrust laws were

passed for 'the protection of *competition*, not *competitors*.'" *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). And because "Congress designed the Sherman Act as a 'consumer welfare prescription,'" *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979), "[a] restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of anti-trust law." *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 107 (1984); *see also Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (the rule of reason "distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest").

When industry-wide vertical restraints are alleged to raise prices, reduce choice, and impair quality and innovation, a court may reasonably inquire the mechanism by which such an untoward result arises, wonder whether there are offsetting efficiencies, and demand proof; in short, apply the rule of reason. But questioning whether there is a "harm to competition" if the allegations are proven to be true amounts to questioning the validity of a good swath of the Sherman Act as it applies to vertical restraints.

The Panel's holding has potentially far-reaching consequences. It suggests that all manner of vertical restraints – including resale price maintenance, non-price distribution restraints, most favored nations (MFN) clauses, and anti-steering restraints – are *per se lawful* unless they exclude rivals from the market or support an otherwise unlawful horizontal agreement. That is plainly not the law, which recognizes that vertical restraints may be illegal under the rule of reason when they have "collusive effects" that harm consumers, without facilitating any actual collusion. Moreover, contrary to the Panel's suggestion, well-established tying law makes clear that the exclusion of rivals in the tied product market is not a necessary element of a tying violation. Rather, consistent with the rule of reason, the Court "[has] condemned tying arrangements when the seller has some special ability – usually called 'market power' – to force a purchaser to do something he would not do in a competitive market." *Jefferson Parrish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 13-14 (1984).[2]

If the Panel's decision is not reversed, then a wide range of conduct having collusive effects that does not necessarily exclude competitors or abet an illegal horizontal agreement will be immune from challenge in this Circuit, with the result that conduct indistinguishable in economic outcome from cartel conduct will be

---

[2] Plaintiffs bring their complaint under the rule of reason and thus will have to prove their alleged anticompetitive effects; the qualified "per se" rule against tying is not at issue.

categorically exempt from antitrust scrutiny. Indeed, recent Department of Justice initiatives challenging MFN clauses in the health insurance industry and anti-steering agreements in the credit card industry may be called into question insofar as those cases depend on collusive anticompetitive effects.[3] Panel rehearing or en banc review is necessary to secure and maintain uniformity in the vertical restraints jurisprudence of this Circuit and to bring the Panel's opinion out of conflict with the Supreme Court.

ARGUMENT

I. THE PANEL WAS WRONG TO SUGGEST THAT VERTICAL AGREEMENTS CANNOT INJURE COMPETITION WITHOUT EXCLUDING RIVALS OR FACILITATING COLLUSION

The Panel identified three scenarios that constitute the universe of injuries to competition for purposes of a Section 1 claim, namely "agreements between competitors in the same market (. . . 'horizontal agreements')," slip op. at 3490, "[v]ertical agreements that foreclose competitors from entering or competing in a

[3] *See* Fiona Scott-Morton, Deputy Asst. Atty. General, Antitrust Division, *Contracts that Reference Rivals*, Remarks Presented at Georgetown University Law Center, April 5, 2012, at 15, http://www.justice.gov/atr/public/speeches/281965.pdf ("[T]he horizontal nature of what may appear to be a purely vertical [contract] creates the possibility of consumer harm. . . . [Such contracts] have been and remain the subject of active government enforcement."); Carl Shapiro, Deputy Asst. Atty. General for Economics, Antitrust Division, *Update From the Antitrust Division*, Remarks as Prepared for the ABA Section of Antitrust Law Fall Forum, Nov. 18, 2010, at 5-7, http://www.justice.gov/atr/public/speeches/264295.pdf (describing recent cases that "challenge vertical agreements aimed at suppressing horizontal competition").

market," *id*. at 3491, and vertical agreements that "facilitat[e] horizontal collusion," *id*. This characterization fails to recognize, among other things, that vertical agreements can be illegal in certain circumstances when they have collusive *effects* that do not facilitate actual horizontal collusion.[4] Collusive effects are present when vertical agreements reduce competition among upstream producers or downstream distributors, not unlike a cartel. If such collusive effects outweigh the procompetitive benefits of a vertical agreement, the agreement is perforce an unreasonable restraint of trade. The weighing of pro- and anticompetitive effects should be left to the trier of fact, not to a court on a motion to dismiss.

A. Vertical Agreements Can Have Collusive Effects Without Facilitating Actual Collusion

Antitrust law has long recognized that vertical agreements with collusive effects can injure competition and be unlawful. Indeed, vertical intrabrand restraints (such as resale price maintenance and territorial restraints) are potentially anticompetitive *primarily* because of these collusive effects. *See, e.g.,* Andrew I. Gavil, William E. Kovacic & Jonathan B. Baker, *Antitrust Law in Perspective* 355 (2d ed. 2008) ("Intrabrand restraints tend to raise concerns about collusive effects"). Intrabrand distribution restraints typically do not exclude upstream or

[4] Plaintiffs disclaimed any horizontal conspiracy, but alleged that the vertical agreements had horizontal effects.

downstream competitors; rather, by limiting the ways that distributors compete with one another, they may have adverse effects on competition analogous to those of a cartel.[5]

Leegin clearly demonstrates that resale price maintenance (RPM) may be illegal in the absence of foreclosure or horizontal collusion.[6] It establishes that, under the rule of reason, RPM agreements may be anticompetitive when they are the product of retailer pressure,[7] when they facilitate coordinated pricing among manufacturers,[8] or when they are so widespread in an industry that consumers are deprived of meaningful choice.[9] Similarly, courts hold that non-price distribution

---

[5] Conduct that has collusive effects "*directly* impairs the market's mechanisms for determining output, price, product quality and characteristics, and innovation." Gavil *et al*. at 46 (emphasis added).

[6] Foreclosure (a manufacturer exchanging RPM for an exclusive agreement with retailers) is not considered a major detriment of RPM, *see* 8 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1632c2, at 319 (2d ed. 2004), and rules against RPM are hardly necessary to police horizontal agreements to fix prices because such agreements are already per se illegal. *See id.* ¶ 1632c5, at 321.

[7] *See Leegin* at 897-98 (citing Brief for William S. Comanor & Frederic M. Scherer as *Amici Curiae* Supporting Neither Party, 2007 WL 173679, at 7-8, which states, "there are no arguments in economic analysis supporting restraints arising from distributor actions or pressures. In such circumstances, RPM and similar restraints lead to higher consumer prices with no demonstrated redeeming values").

[8] *See Leegin* at 892; *id.* at 911 (Breyer, J., dissenting) (resale price maintenance agreements "tend to prevent price competition from 'breaking out'; and they will thereby tend to stabilize producer prices"); *see generally* 8 Areeda & Hovenkamp ¶ 1632d1, at 321-22.

[9] *See Leegin* at 897 (citing F.M. Scherer & David Ross, *Industrial Market Structure and Economic Performance* 558 (3d ed. 1990), for the proposition that widespread coverage of RPM "'depriv[es] consumers of a meaningful choice

restraints may be illegal under the rule of reason when their anticompetitive effects in the intrabrand or interbrand markets are not outweighed by their procompetitive benefits; foreclosure, collusion, or the facilitation of collusion is not required. *See, e.g., Continental T.V., Inc. v. G.T.E. Sylvania Inc.*, 694 F.2d 1132, 1137 (9th Cir. 1982) (on remand from the Supreme Court, upholding location restriction under rule of reason where it was "likely to promote interbrand competition without overly restricting intrabrand competition"). Other types of vertical restraints, such as MFN clauses[10] and anti-steering clauses,[11] also can be illegal when they reduce

---

between high-service and low-price outlets'"); *see also Glen Holly Entertainment Inc. v. Tektronix Inc.*, 352 F.3d 367, 377 (9th Cir. 2003) ("'Antitrust law addresses distribution restraints in order to protect consumers from the higher prices or diminished choices that can sometimes result from limiting intrabrand competition.'") (quoting 2 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 357b, at 457 (2d ed. 2000)).

[10] *See, e.g., United States v. Delta Dental of Rhode Island,* 943 F. Supp. 172, 177 (D.R.I. 1996) (MFN clause could be unreasonable vertical restraint where it "ultimately results in higher prices for Rhode Island dental service consumers;" exclusion also alleged but competitive harm did not depend on it).

[11] A good example is the Justice Department's recent suit challenging the major credit card networks' restrictions that prevent merchants from using discounts or other incentives to induce consumers to use competing credit cards that charge lower fees to the merchant. *See* Amended Complaint, *United States v. American Express Co*., C.A. No. 10-4496 (E.D. N.Y. filed Dec. 21, 2010), http://www.justice.gov/atr/cases/f265400/265401.pdf. The Department alleged, "Each Defendant's vertical Merchant Restraints are directly aimed at restraining horizontal interbrand competition." *Id.* ¶ 2. The vertical agreements had "anticompetitive effects by protecting Defendants from competition over the cost of card acceptance by merchants, and restraining merchants from encouraging customers to use lower-cost payment methods," which resulted in higher prices to merchants and consumers, and reduced innovation. *Id.* ¶ 77.

horizontal competition without necessarily foreclosing competitors or facilitating collusion.[12] If the Panel did not mean to suggest that vertical agreements as such could be actionable only if they exclude competitors or facilitate horizontal collusion, then it should at least clarify the opinion to that effect.

B. Tying Agreements Can Be Unlawful Without Exclusion in the Tied Product Market

The Panel evidently still agrees with the position of the defendants and the district court that "any claim of tying or bundling requires foreclosure of actual or potential competition." Dist. Ct. Order at 15 (Oct. 15, 2009). Hence the Panel emphasized that "Plaintiffs disavow any intent to allege that the practices engaged in by Programmers and Distributors foreclosed rivals from entering or participating in the upstream or downstream markets," slip op. 3496, and that "there is effectively 'zero foreclosure' of competitors," *id.* at 3495 n.9 (quoting *Blough v. Holland Realty, Inc.*, 574 F.3d 1084, 1090-91 (9th Cir. 2009)). To be sure, the Panel acknowledged that tying arrangements may be of concern when they "cause

[12] *See* Scott-Morton, *supra* note 3, at 5, 12 (explaining that contracts referencing rivals, like MFNs, can lead to higher industry prices because they soften price competition); Jonathan B. Baker, *Vertical Restraints with Horizontal Consequences: Competitive Effects of "Most-Favored-Customer" Clauses*, 64 Antitrust L. J. 517 (1996) (explaining that vertical restraints can harm horizontal competition by facilitating coordination, raising rivals' costs, or dampening competition); *see also* Aaron S. Edlin, *Do Guaranteed-Low-Price Policies Guarantee High Prices, and Can Antitrust Rise to the Challenge?*, 111 Harv. L. Rev. 528, 555-58 (1997) (explaining that vertical price-matching agreements can unlawfully harm horizontal competition).

consumers to forego the purchase of substitutes for the tied product,"[13] *id.* at 3495 (citing *United States v. Loew's*, *Inc.*, 371 U.S. 38, 45 (1962)), but the Panel made clear that "[t]he relevant injury in *Loew's* was to competition *not to the ultimate consumers* because the challenged practices forced television stations to forego the purchase of other movies, *and therefore created barriers to entry for competing movie owners*," slip op. at 3498 (emphasis added).[14]

Contrary to the Panel's statements, a tying arrangement may be unlawful without excluding rivals from the tied product market. For one thing, tying arrangements can facilitate oligopolistic coordination in the tied product market. *See* 9 Areeda & Hovenkamp ¶ 1707; *id.* ¶ 1707c, at 70 ("Ties could discourage price competition in an oligopolistic tied market by reducing the occasions for price competition or its attractiveness to sellers.").

---

[13] The Panel asserted that the plaintiffs have not alleged the arrangement "forces Distributors . . . to forego purchases of alternative low-demand channels," slip op. 3496; *see also id.* at 3498, but this inference is apparently based on the fact that plaintiffs have disavowed any claim that upstream rivals were foreclosed. The logic is faulty. Plaintiffs do not allege that any programmers were actually excluded from the market, but it is obvious from the complaint that the bundling arrangements affected the ability of distributors to choose among alternative low-demand channels and play one programmer off against another as to those channels. *See* Third Amended Complaint (TAC) ¶¶ 2, 43, quoted *infra* page 14.

[14] This reading of *Loew's* is inconsistent with the fact that, as Professor Elhauge points out, *Jefferson Parrish* favorably cited George Stigler's article explaining *Loew's* as a ban on using tying to promote price discrimination. *See* Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 Harv. L. Rev. 397, 423 (2009); *Jefferson Parrish*, 466 U.S. at 15, n.23.

More significantly, the Supreme Court has long recognized that, as Justice White noted in his dissent in *Fortner Enterprises, Inc. v. U.S. Steel Corp.*,

> In addition to . . . anticompetitive effects in the tied product, tying arrangements may be used to evade price control in the tying product through clandestine transfer of the profit to the tied product; they may be used as a counting device to effect price discrimination; and they may be used to force a full line of products on the customer so as to extract more easily from him a monopoly return on one unique product in the line.

394 U.S. 495, 513-14 (1969). In *Jefferson Parrish*, the Court quoted this statement and explained that tying can "either harm existing competitors or create barriers to entry of new competitors in the market for the tied product, *and can increase the social costs of market power by facilitating price discrimination, thereby increasing monopoly profits over what they would be absent the tie.*"[15] 466 U.S. at 13 n.19, 14-15; *see id.* at 35 (O'Connor, J., concurring) ("Our prior opinions indicate that the purpose of tying law has been to identify and control those tie-ins that have a demonstrable exclusionary impact in the tied product market, *or that abet the harmful exercise of market power that the seller possesses in the tying product market*. Under the rule of reason tying arrangements should be disapproved only in such instances.") (emphasis added); *see also Paladin Assocs., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1159 n.14 (9th Cir. 2003) (quoting Justice White's statement in *Fortner* to explain why tying arrangements are

[15] In quoting *Jefferson Parrish*, the Panel neglected to include the italicized language. Slip op. at 3491.

"harmful to competition"); *The Mozart Co. v. Mercedes-Benz of North America, Inc.*, 833 F.2d 1342, 1345 n.3 (9th Cir. 1987) ("Tying arrangements are also viewed with disfavor because they can be used to facilitate price discrimination."); *Hirsh v. Martindale-Hubbell, Inc.*, 674 F.2d 1343, 1349 (9th Cir. 1982) ("First, tying arrangements are prohibited because they are thought to facilitate price discrimination."); *see generally* Elhauge, 123 Harv. L. Rev. at 401, 420-26 ("Supreme Court precedent explicitly holds that . . . power [i.e., non-foreclosure] effects are anticompetitive").

In support of the proposition that harm to competitors in the tied product market is an essential element of an unlawful tying arrangement, the Panel cites to *Blough v. Holland Realty, Inc.*, 574 F. 3d 1084 (9th Cir. 2009), for the proposition that a tying arrangement that forces a buyer to purchase a completely unwanted product is not actionable. Slip op. 3498-99. Even if such a "zero foreclosure" case were not actionable, this is not such a case. The plaintiffs claim that if the cable channels were unbundled, the distributors "either . . . would not acquire at all, *or would separately negotiate channel-by-channel based upon consumer demand*." TAC ¶ 43 (emphasis added).[16] Indeed, the price discrimination theory advanced by

[16] *Blough* itself allowed that a tying claim might be viable if *some* buyers would have bought the tied product, that is, as long as a market for the tied product existed. *See* 574 F.3d at 1090.

plaintiffs depends on consumers as a whole placing some (but differing) value on the "unwanted" channels. *See* Appellants' Reply Brief at 15.

Moreover, the Panel misconstrues settled law in reading *Blough* to suggest that a tying claim is necessarily barred when the tied product would not otherwise be purchased by the buyer. In *Cascade Health Solutions v. PeaceHealth,* 515 F.3d 883 (9th Cir. 2008), this court emphasized that coercion of buyers is the "key aspect of an illegal tie," quoting *Jefferson Parrish*'s statement that,

> "[T]he essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to *force* the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms."

Id. at 913-14 (quoting *Jefferson Parrish*, 466 U.S. at 12) (alteration and emphasis in original); *see also Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 34-35 (2006) (same); *Eastman Kodak Co. v. Technical Image Servs., Inc.*, 504 U.S. 451, 464 n.9 (1992) (same).

C. The Complaint Alleges Harm to Horizontal Competition

The Panel acknowledged that "competition could be injured or reduced due to a widely applied [vertical] practice that harms consumers," citing *Leegin* as "indicating that vertical restraints, such as resale price maintenance, 'should be subject to more careful scrutiny' if the practice is adopted by many competitors." Slip op. at 3499 (quoting *Leegin*, 551 U.S. at 897). However, the Panel concluded

that "plaintiffs here have not alleged in their complaint how competition (rather than consumers) is injured by the widespread practice of packaging low- and high-demand channels." *Id.*

Yet the complaint has many such allegations. Plaintiffs allege that horizontal interbrand competition among programmers and among distributors was adversely affected by the bundling practice, with harmful consequences in terms of price, quality and choice. The complaint alleges that the bundling is designed to enable programmers "to avoid competing with one another and with independent programmers for access to distributor systems," TAC ¶ 2, that it "is done by each programmer with the knowledge and anticipation that each other major programmer will do likewise and each does so with the intention to eliminate or suppress competition among and between the programmer defendants," *id.* ¶ 43, and that, absent bundling, the distributors "would not acquire [certain channels] at all, or would separately negotiate channel-by-channel based upon consumer demand," *id*. Moreover, absent bundling, the distributors "would develop ways to differentiate themselves from one another," *id.* ¶ 3, including offering channels *a la carte* and/or offering "smaller, custom tailored packages of channels for consumers," *id.* ¶ 44.

Nevertheless, the Panel found these allegations insufficient because "[t]he complaint did not allege that Programmers' sale of cable channels in packages has

any effect [1] on other programmers' efforts to produce competitive programming channels or [2] on Distributors' competition as to cost and quality of service." Slip op. at 3499-3500. Insofar as the reference to "other programmers" restates the requirement of exclusion of rivals, there is no such requirement. Insofar as the Panel believed that competition among distributors over the size, content, and price of programming packages did not amount to "competition on cost and quality of service" or was otherwise irrelevant, the Panel was clearly mistaken.

The Panel seems to have been misled by the fact that *Leegin* rejected the contention that the per se rule against resale price maintenance "is justified because a vertical price restraint can lead to higher prices for the manufacturer's goods." *Leegin*, 551 U.S. at 895. The Court said that the *Leegin* plaintiff was "mistaken in relying on pricing effects absent a further showing of anticompetitive conduct." *Id.* However, this does not mean that a restriction on the way in which distributors compete with one another that injures consumers cannot be anticompetitive, as the Panel apparently believed. *Leegin* holds that higher prices to consumers, standing alone, are insufficient to support per se illegality because the higher prices may be accompanied by services that consumers desire and benefit from. *See id.* at 895 (citing Thomas R. Overstreet, Jr., *Resale Price Maintenance: Economic Theories and Empirical Evidence* 106 (1983), as "explaining that price surveys 'do not necessarily tell us anything *conclusive* about the welfare effects of [RPM] because

the results are generally consistent with both procompetitive and anticompetitive theories'") (emphasis added); *id.* at 897 (noting that RPM can "lead to increased demand despite the higher prices"). But that hardly suggests that RPM agreements (or other restraints on the way in which distributors compete) would be per se lawful when they *do* harm consumers by raising prices without offsetting procompetitive benefits, particularly when the price increase is industry-wide.

CONCLUSION

The court should grant the appellants' petition for rehearing or rehearing en banc and clarify that vertical restraints, including the ones alleged in the complaint, may be unlawful ("harm competition") even when they do not exclude rivals or support a horizontal agreement.

Respectfully submitted,

AMERICAN ANTITRUST INSTITUTE

s/ Richard Brunell

RICHARD M. BRUNELL
RANDY M. STUTZ
2919 Ellicott St., N.W.
Washington, D.C. 20008
(617) 600-9640

April 20, 2012

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 29-2(c)(2), this amicus brief is proportionately spaced, has a typeface of 14 points or more, and contains 3989 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

s/ Richard M. Brunell

Dated: April 20, 2012

CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have served them by U.S. Mail or by e-mail with their consent, as follows:

David Dunn
Hogan Lovells US LLP
875 Third Avenue
New York, NY 10022
david.dunn@hoganlovells.com

Steven Cherry
Wilmer Hale LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
steven.cherry@wilmerhale.com

Kenneth R. Logan
Simpson, Thacher & Bartlett LLP
425 Lexington Ave.
New York, NY 10017
klogan@stblaw.com

s/ Richard M. Brunell