Nos. 08-55671, 08-55708
Decided: August 17, 2010
Panel: Reinhardt, Pregerson, Wardlaw, Circuit Judges

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE OF CALIFORNIA, ex rel. EDMUND G. BROWN, JR.,

Plaintiff/Appellant/Cross-Appellee,

v.

SAFEWAY INC., ALBERTSON'S, INC., RALPHS GROCERY COMPANY, FOOD 4 LESS FOOD COMPANY, VONS COMPANIES, INC.,

Defendants/Appellees/Cross-Appellants.

On Appeal From the United States District Court For the Northern District of California, No. C 04-00687 AG-SS

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RULE 35 STATEMENT AND INTRODUCTION

In a 2-1 decision, the panel used a newly invented variant of "quick look" antitrust scrutiny—which it termed "per se-plus or a quick look-minus," slip op. 11941—to summarily condemn an agreement that directly furthered multi-employer collective bargaining and that the national labor laws recognized as valid. The decision conflicts with precedents of the Supreme Court and other circuits on questions of exceptional importance:

1. By applying "quick look-minus" scrutiny—over a dissent—to an agreement that directly furthered a valid multi-employer bargaining agreement and that was not a naked restraint on price or output, the panel majority expanded the scope of quick look scrutiny in conflict with *California Dental Ass'n v. FTC,* 526 U.S. 756 (1999), and decisions of the Second, Third and Sixth Circuits.

2. The panel's holding that the agreement is not immune from antitrust scrutiny under the nonstatutory labor exemption (NSLE) conflicts with *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996), and additional decisions recognizing the central role agreements like these play in multi-employer bargaining.

By using quick look scrutiny to summarily condemn an agreement that served a valid purpose under the labor laws, the panel majority has dramatically departed from accepted antitrust analysis and, as a result, has opened the door to spurious antitrust claims that will deter legitimate business activity. Similarly, the panel's narrow construction of the NSLE usurps regulatory power from the NLRB, and creates a cloud of uncertainty over all joint employer conduct associated with vigorous multi-employer bargaining.

BACKGROUND

The appellee-defendants are three grocery companies that formed a valid multi-employer bargaining unit (MEBU) to negotiate with their unionized employees. The relevant unions consented to this MEBU.

Unions commonly use "whipsaw" tactics to try to divide and conquer employers in a MEBU. To counter such tactics, the grocers here entered into a mutual strike assistance agreement (MSAA). To combat a selective ***strike***, the MSAA provided that the grocers would lock-out their union employees if any one grocer was struck. To combat selective ***picketing***, the MSAA provided that any grocer that earned disproportionate revenue during the strike would make specified payments to the others. Such defensive mutual aid agreements have long been recognized as valid. *See infra*, pp. 7-8. The unions here employed both selective strikes and selective picketing.

The State of California brought suit claiming that the MSAA's revenue sharing provision was *per se* illegal. Although declining to find the MSAA exempt from antitrust scrutiny, the district court ruled that the agreement must be evaluated under the rule of reason, which meant that the State would have to show actual anticompetitive effects. After extensive discovery, the State abandoned any claim under the rule of reason and appealed to this Court. The grocers cross-appealed as to the exemption ruling.

The panel reversed in a divided ruling. It too declined to hold the MSAA *per se* illegal. But the majority used what it called a "combined or mixed approach," or a "per se-plus or a quick look-minus analysis," to nonetheless

summarily condemn the MSAA. Slip. op. 11941. In doing so, the majority viewed the MSAA in complete isolation from the valid multi-employer bargaining arrangement that it served. And, although asserting that the agreement was ***facially*** anticompetitive, the majority relied, not on the face of the agreement, but on a purported analysis of the relevant market and defendants' supposed collective market power—an analysis that was not supported by record evidence (because the State offered none). *Id.* at 11949-54. The panel further concluded that the MSAA was not immune under the NSLE, because such mutual aid agreements are, in the panel's view, unnecessary to collective bargaining and outside the scope of the labor laws. *Id.* at 11964-79.

Judge Wardlaw dissented. She concluded that "a 'quick look' standard of review was . . . inappropriate" and criticized the majority for "devis[ing] a new standard of 'per se-plus or quick look-minus' antitrust review." Slip op. 11980, 11982. Noting that defendants' revenue sharing was adopted in the multi-employer bargaining context to counter union whipsaw tactics, she concluded that it is not "intuitively obvious" that revenue sharing in this context is anticompetitive, that it "may in fact have a pro-competitive impact," and that "a more extended examination of the evidence" was therefore required. *Id.* at 11980-82 & n.2.

ARGUMENT

I. THE PANEL'S "QUICK LOOK" RULING CONFLICTS WITH SUPREME COURT AND OTHER CIRCUIT PRECEDENT.

The presumptive antitrust standard is "rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in

fact unreasonable and anticompetitive." *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006). Although the panel correctly recognized that *per se* illegality treatment is not proper here, it erroneously concluded that a "new standard of 'per se-plus or quick look-minus'" could be applied. Slip op. 11980.

A. The Supreme Court And Other Circuits Have Limited "Quick Look" Scrutiny To Naked Restraints On Output Or Price.

Like *per se* treatment, quick look scrutiny is properly applied only to conduct that is "plainly anticompetitive" upon a "cursory examination." *Dagher*, 547 U.S. at 7 n.3. There must be a "great likelihood of anticompetitive effects [that] can easily be ascertained." *Cal. Dental*, 526 U.S. at 770. Quick look scrutiny differs from *per se* analysis, not in excusing this threshold requirement, but in allowing the defendant an opportunity, because of circumstances unique to the restraint at issue, to demonstrate the absence of anticompetitive effects or to show a pro-competitive justification. *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458-59 (1986). If the restraint "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition," summary condemnation is improper. *Cal. Dental*, 526 U.S. at 771.

Under these well-established principles, courts have applied quick look scrutiny only to naked restraints that facially limited output or fixed prices. *See, e.g.*, *NCAA v. Bd. of Regents*, 468 U.S. 85, 110 (1984) ("naked restraint on price and output" of football broadcasts); *Nat'l Soc. of Prof'l Engineers v. United States*, 435 U.S. 679 (1978) (ban on competitive bidding); *Indiana Fed'n of Dentists*, 476 U.S. at 459 (express limitation on output); *North Texas Specialty Physicians v.*

FTC, 528 F.3d 346 (5th Cir. 2008) (horizontal price-fixing); *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998) (fixed maximum salaries for coaches).

Conversely, the Supreme Court and the other federal circuits have rejected quick look scrutiny where the conduct at issue was reasonably related to valid joint behavior or where analysis of the relevant market and market power was necessary to determine anticompetitive effects. *See Dagher*, 547 U.S. at 7 n.3 (agreement among joint venturers on price for venture's output); *Cal. Dental*, 526 U.S. at 771-78 (restriction on professional advertising); *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290 (2d Cir. 2008) (revenue sharing adopted to maintain competitive balance among MLB teams); *Worldwide Basketball and Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 961 (6th Cir. 2004) (quick look proper only when anticompetitive effect can be ascertained "without the aid of extensive market analysis"); *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820 (3d Cir. 2010) (same).

B. The Panel Decision Conflicts With These Precedents.

The MSAA was not a naked restraint on output or price. Rather, it directly served the valid purposes of the grocers' multi-employer bargaining arrangement. And, as Judge Wardlaw recognized, it "may in fact have a pro-competitive impact" and its impact on competition, if any, cannot be resolved without a full market analysis. Slip op. 11981 n.2, 11982.

1. The MSAA directly served the multi-employer bargaining agreement.

The panel initially erred in viewing the MSAA in isolation from the valid multi-employer arrangement that it directly served. As this Court has elsewhere recognized, an alleged restraint "may be valid if [it is] 'subordinate and collateral to another legitimate transaction.'" *Los Angeles Memorial Coliseum Com'n v. NFL*, 726 F.2d 1381, 1395 (9th Cir. 1984). A non-compete provision in a partnership agreement is the classic illustration of what antitrust courts term such an "ancillary" restraint. *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 729 n.3 (1988); *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 970 (10th Cir. 1994) (ancillary restraint is one that is "reasonably related to . . . and no broader than necessary to effectuate the association's business"). The validity of such an "ancillary" restraint is determined under the rule of reason, as the restraint must be considered together with the legitimate transaction that it furthers. *See Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986); *see also Edwin K. Williams & Co., Inc. v. Edwin K. Williams & Co.-East*, 542 F.2d 1053, 1061 (9th Cir. 1976) (upholding "territorial restrictions [as] reasonable restraints ancillary to West's primary, legitimate purpose of protecting its tradenames and copyrights").

Here, the grocers' agreement to engage in multi-employer bargaining was a legitimate and proper transaction. Multi-employer bargaining "is a well-established, important, pervasive method of collective bargaining, offering advantages to both management and labor." *Brown v. Pro Football, Inc.*, 518 U.S.

231, 240 (1996). "[B]y permitting the union and employers to concentrate their bargaining resources on the negotiation of a single contract, multiemployer bargaining enhances the efficiency and effectiveness of the collective bargaining process and thereby reduces industrial strife." *Charles D. Bonanno Linen Service, Inc. v. NLRB*, 454 U.S. 404, 409 n.3 (1982) (internal quotation marks omitted).

The MSAA directly furthered this legitimate joint venture of multi-employer bargaining. Because union whipsaw tactics "threaten the destruction of the employers' interest in bargaining on a group basis," *NLRB v. Truck Drivers Local Union No. 449, Int'l Bhd. of Teamsters*, 353 U.S. 87, 93 (1957), employers in such arrangements routinely adopt a variety of defensive measures to combat those tactics and thereby maintain the "common front" that is "essential to multiemployer bargaining." *NLRB v. Brown*, 380 U.S. 278, 284 (1965).

Contrary to the panel's mistaken assertion, such valid defensive measures are not limited to lock-outs. Rather, revenue sharing and similar mutual aid arrangements have long been recognized and approved as a proper means of combating union whipsaw tactics—including, in particular, selective picketing, against which a lock-out is ineffectual—and thereby furthering the joint bargaining effort. *See King Soopers, Inc.*, No. 27-CA-19325/19326/19327, 2005 WL 545232, at *3 (N.L.R.B.G.C. Feb. 17, 2005); SER 428-32 (NLRB Regional Director decision concluding that revenue-sharing is a lawful "***defensive economic weapon in response to the Union's own potential use of an economic weapon***") (emphasis added); *Air Line Pilots Ass'n v. CAB*, 502 F.2d 453, 456-57 (D.C. Cir. 1974) (revenue sharing among airline employers who were not part of a multiemployer

unit); *Kennedy v. Long Island R.R.*, 319 F.2d 366, 372 (2d Cir. 1963) (strike insurance for railroad group).[1]

An agreement that directly furthers a valid joint activity is the kind of "ancillary" restraint that is subject to antitrust analysis only as part of a rule of reason analysis of the overall joint venture. It therefore is not properly subject to quick look scrutiny—let alone the "quick look-minus" scrutiny that the panel employed. *See also Berman Enter. Inc. v. Local 133, United Marine Div. Int'l Longshoremen's Ass'n*, 644 F.2d 930 (2d Cir. 1981) (relying on labor objectives of job preservation, maintenance of working conditions and safety in finding that agreement was valid under the rule of reason, even if not within the non-statutory labor exemption); *Jacobi v. Bache & Co., Inc.*, 520 F.2d 1231, 1238 (2d Cir. 1975) (holding that, although not immune under the securities laws, a New York Stock Exchange rule fixing compensation to certain employees could not be summarily condemned but must be evaluated in light of "scope and purposes of the Securities Exchange Act;" upholding rule under the rule of reason).

Contrary to the panel majority's suggestion, the MSAA's contribution to the grocers' collective bargaining goal of lowering their costs and thereby increasing their competitiveness cannot be dismissed as conflicting with "our nation's labor

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[1] Revenue sharing has also been recognized as valid in other contexts as well. *E.g., Salvino*, 542 F.3d at 331-32 (revenue sharing is "a legitimate means . . . of maintaining some measure of competitive balance" in sports leagues); *Chicago Pro. Sports Ltd. P'ship v. NBA*, 961 F.2d 667, 675-76 (7th Cir. 1992) (identifying revenue sharing as a preferable means for maintaining competitive balance in sports leagues).

laws and policies," on the notion that lower wages harm "working people and their families." Slip op. 11963. The nation's labor laws are not a one-way ratchet favoring only workers and higher wages; rather, they create a framework within which both employers and employees can exercise their collective economic power in the bargaining process. The panel's contrary view cannot be reconciled with settled law recognizing the validity and societal benefits of multi-employer bargaining, including its pro-competitive benefits. *See supra*, pp. 6-7; *see also NBA v. Williams*, 45 F.3d 684, 690 (2d Cir. 1995) (analyzing the pro-competitive purposes of multi-employer bargaining).

The panel likewise erred in its reliance on *Citizens Publishing Co. v. United States*, 394 U.S. 131 (1969), and other such "profit pooling" cases. The MSAA was a limited mutual aid arrangement, not a profit pooling arrangement. Moreover, in the cases on which the panel relied, the only competitors in a market had agreed to permanently share profits to "end any business or commercial competition between" themselves. *Id.* at 134. Here, by contrast, the revenue sharing arrangement was not a "naked restraint[] of trade with no purpose except stifling of competition." *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963). Indeed, the State itself has conceded that the "primary purpose of the [revenue sharing] was to provide Defendants with a weapon to use against union whipsawing." *E.g.*, State Br. at 51. Because the "restriction[] at issue here [is] very far from" the kind of naked profit pooling arrangements on which the panel relied, the panel erred in applying quick look scrutiny to it. *Cal. Dental*, 526 U.S. at 773.

2. The MSAA did not facially restrict output or fix price.

The panel's ruling further conflicts with the decisions of the Supreme Court and other circuits because, rather than finding the MSAA anticompetitive on its face, the panel concluded it was anticompetitive only after engaging in a purported analysis of the relevant market and defendants' supposed market power. This is exactly the situation in which quick look scrutiny is impermissible.

The panel's starting premise was that, when the "only firms in a market" agree to share their profits, a "high likelihood" exists that they will stop competing. Slip op. 11948. In adopting that premise, the majority asserted that defendants were the "chief competitors" in the market and exerted the "paramount pressure" on each other to compete. *Id.* at 11952. According to the majority, other competitors were supposedly "fragmented," lacked "brand recognition," had only "limited facilities" and had limited supply arrangements that would "substantially curtail" their ability to compete for defendants' customers during the strike or otherwise. *Id.* at 11949, 11953. In a footnote, the majority dismissed such significant competitors as Costco, Trader Joes, and Whole Foods as "incapable of competing" for much of defendants' business, because their product offerings "differed substantially" from defendants' products. *Id.* at 11953 n.7. And the majority ruled that defendants would not be worried about losing customers to the other defendants because factors such as the "long time customers' attachment to long time vendors . . . might well render the obtaining of any new customers of dubious value, and hardly worth the economic cost." *Id.* at 11951. The majority

suggested that defendants would instead rely on "future sales and promotions" to win back any customers lost during the strike. *Id.*

None of these pivotal assumptions was supported by any record evidence. As Judge Wardlaw observed in dissent, the State opted not to present any evidence on these points. Slip op. 11981. Indeed, the defendants had presented evidence to refute any such claims, and Judge Wardlaw concluded that full market analyses were necessary. *Id.* at 11981-82.

The panel majority's contrary approach further demonstrates its error. The Supreme Court and other federal circuits have recognized that quick look scrutiny is proper only when the challenged conduct is plainly anticompetitive on its face, ***without*** the need for any detailed market analysis. *See NCAA*, 468 U.S. at 110 (rule of reason treatment unnecessary when anticompetitive effects can be seen "in the absence of a detailed market analysis"); *Prof'l Eng'rs*, 435 U.S. at 692 (quick look proper only where "no elaborate industry analysis is required"); *Worldwide Basketball*, 388 F.3d at 961 (denying quick look because anticompetitive effect could not be ascertained "without the aid of extensive market analysis"); *Deutscher*, 610 F.3d at 832 (same). As then-Judge Sotomayor stated, "[w]hen empirical analysis is required to determine a challenged restraint's net competitive effect, neither a *per se* nor a quick look approach is appropriate because those methods of analysis are reserved for practices that 'facially appear[] to be one[s] that would always or almost always tend to restrict competition and decrease output.'" *Salvino*, 542 F.3d at 340 n.10 (Sotomayor, J., concurring) (citation omitted). The panel's substitution of its own, unsupported market assumptions for

actual record evidence and appropriate factual findings by a district court is precisely the approach that the Supreme Court rejected when it reversed this Court in *California Dental* and made clear that, "[w]here as here, the circumstances of the restriction are somewhat complex, assumption alone will not do." *Cal. Dental*, 526 U.S. at 775 n.12.

More broadly, the panel's newly invented "quick look-minus" standard raises issues of exceptional importance. The applicability of that standard was not limited to the labor relations context. Moreover, the panel frankly acknowledged that its approach may invalidate conduct "that would survive a full rule of reason analysis." Slip op. 11939 n.3. The panel has thus substituted judicial intuition for rigorous analysis across a potentially broad range of practices and thereby dramatically changed antitrust law. Rehearing is warranted before the mischief of this invention spreads.

II. THE PANEL'S DECISION ON THE NONSTATUTORY LABOR EXEMPTION ALSO CONFLICTS WITH GOVERNING PRECEDENT AND FEDERAL LABOR POLICY.

Rehearing is also warranted because the panel's decision on the nonstatutory labor exemption (NSLE) issue conflicts with *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996), on a matter of exceptional importance to labor relations.

A. The MSAA Falls Squarely Within the NSLE As Defined In *Brown v. Pro Football, Inc*.

Brown held that the NSLE "limit[s] an antitrust court's authority to determine, in the area of industrial conflict, what is or is not a 'reasonable' practice" and "substitutes legislative and administrative labor-related

determinations for judicial antitrust-related determinations as to the appropriate legal limits of industrial conflict." *Id.* at 237. When joint employer conduct "is unobjectionable as a matter of labor law and policy," *id.* at 238, and is "intimately related to the bargaining process," *id.* at 245, antitrust courts may not "try to evaluate particular kinds of employer understandings, finding them 'reasonable' (hence lawful) where justified by collective-bargaining necessity." *Id.* at 242. As the leading antitrust treatise recognizes, the relevant test is "not whether an immunity for a specific practice is necessary to advance particular legislative goals," but rather "whether ***spheres of immunity*** are necessary to avoid ***potential conflict***." P. Areeda & H. Hovenkamp, *Antitrust Law*, ¶ 243d, p. 325 (3d ed. 2006) (emphasis added); *see also Brown*, 518 U.S. at 238, 241-43, 245 (repeatedly citing Areeda's analysis favorably).

The MSAA was clearly and intimately connected to the collective bargaining process. The Supreme Court has recognized that the "use of economic pressure by the parties to a labor dispute is . . . part and parcel of the process of collective bargaining." *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 495 (1960). And, as the State itself has conceded, the MSAA was adopted to protect the common front essential to the preservation of the multi-employer group, for the duration of the strike plus two weeks, against the union's attempt to splinter the group through disproportionate financial consequences attributable to selective picketing. This was a direct and proportionate defense against union tactics that would themselves violate the antitrust laws if not immunized by statutory

exemptions. The MSAA thus falls within the nonstatutory exemption as joint conduct "intimately related" to the bargaining process.

B. The Panel's Reasons for Rejecting the NSLE Directly Conflict with *Brown*.

The panel asserted that *Brown* does not apply here because "collective bargaining has worked and does work quite well" without revenue sharing within multi-employer groups. Slip op. 11970. But this is the very "necessity" test that *Brown* itself rejected. Rather than asking antitrust courts to speculate about what is "necessary" for collective bargaining, *Brown* held that the exemption exists to ***prevent*** courts from "determin[ing], through application of the antitrust laws, what is socially or economically desirable collective-bargaining policy." 518 U.S. at 242. *Brown* recognized that the exemption exists to allow bargaining parties to make agreements "***potentially*** necessary to make the process work ***or its results mutually acceptable***." 518 U.S. at 237 (emphasis added); *see also id*. at 242 (noting that, absent the exemption, antitrust law would prohibit "behavior that the collective-bargaining process invites or requires"). And *Brown* made clear that the NLRB, not antitrust courts, is the proper arbiter of what bargaining tactics are "reasonable."

The panel asserted that, because the NLRA does not restrict revenue sharing in a labor dispute, it must be subject to scrutiny under the antitrust laws. Slip op. 11970-72. But, contrary to the panel's assertion, the NLRB has traditionally regulated such self-help tactics and expressly approved them under the labor laws.

See supra, pp. 7-8.[2] Moreover, the NLRA's permissive approach to economic weapons such as revenue sharing itself reflects fundamental labor law policy. Congress intended that the parties be free to exert economic pressure "unrestricted by any governmental power to regulate." *Lodge 76, Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 141 (1976). Through the NLRA, Congress created a "free zone," *i.e.*, a zone free of governmental interference, within which management and labor could establish "their own charter for the ordering of industrial relations." *Local 24, Int'l Bhd. Of Teamsters v. Oliver*, 358 U.S. 283, 295 (1959); *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 111 (1989). The panel decision improperly interjects antitrust courts into the middle of this "free zone."

Finally, the panel erroneously held that the NSLE does not apply to employer agreements that concern the underlying product market, as opposed to the labor market. Slip op. 11973-74. Of course, the MSAA is ***not*** an agreement about the product market; it is a short-duration agreement concerning the MEBU's

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[2] The panel did not address any of this authority, except for *Kennedy v. Long Island R.R.*, 319 F.2d 366 (2d Cir. 1963), which the panel asserted was different because the strike insurance covered only fixed costs. Slip. op. 11975 n.5. But the only difference is that the fund in *Kennedy* insured employers' fixed costs if they chose to cease operations during the pendency of a whipsaw strike, whereas the MSAA insured participating employers against the immediate financial consequences of relative market share losses. Of course, a joint agreement to shut down a competitor is at least as likely to decrease output and increase prices as the diminished competitive incentives the panel was concerned about here. But the real point is that the labor laws recognize both as valid employer tactics in response to a strike, and whether one or the other is more "reasonable" is not the business of the antitrust courts.

collective response to particular union tactics in labor market negotiations. But, in all events, the panel's ruling conflicts with *Brown*. Although the labor market/ product market distinction was the basis for the D.C. Circuit's decision in *Brown v. Pro Football, Inc.*, 50 F.3d 1041, 1056 (D.C. Cir. 1995), the Supreme Court did not adopt that reasoning. Instead, the Court ruled that the NSLE turns on the relationship of the conduct to the collective bargaining process. Moreover, even under the pre-*Brown* cases that relied on "product market" effects, the issue was not mere alleged indirect effects on competitive incentives of the kind asserted here, but rather agreements that directly sought to impose restraints on competitors that were not part of the bargaining relationship at issue. *See Brown*, 50 F.3d at 1051.

The panel's extension of that reasoning to the situation here would condemn practices that even the panel concedes are protected by the NSLE. For example, the Supreme Court has made clear that a lock-out agreement falls within the NSLE as a valid defensive mechanism to whipsaw tactics—even though a joint lock-out obviously impairs the companies' ability to vigorously compete against each other. *NLRB v. Brown*, 380 U.S. at 284-86; *Brown*, 518 U.S. at 245. The MSAA is adapted to the same ends, similarly was "used for the duration of the labor dispute only," 380 U.S. at 288, and if anything is a *more* proportionate and direct response to the whipsaw problem than a joint lockout.

CONCLUSION

Rehearing should be granted.

Dated: September 30, 2010

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* I hereby attest that all other parties on whose behalf this petition is submitted concur in the petition's content.

CERTIFICATE PURSUANT TO CIRCUIT RULE 32-1

The undersigned certifies that the foregoing brief is proportionately spaced, has a typeface of 14 points, and contains 4,174 words.

/s/ Craig E. Stewart
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On Appeal from the United States District Court,
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Case No. CV 04-0687 AG (SSx)

OPPOSITION TO PETITION FOR REHEARING AND REHEARING *EN BANC*

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The State of California ex rel. Edmund G. Brown Jr. ("State") hereby opposes the petition, by Safeway Inc. ("Safeway"), Albertson's, Inc. ("Albertson's"), Ralphs Grocery Co. ("Ralphs"), and The Vons Cos., Inc. ("Vons"; together with the others, "Supermarkets"), for rehearing of the instant case ("PFR").[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Neither of the two Federal Rule of Appellate Procedure ("FRAP") 35(a) requirements for rehearing *en banc* exist in this case. *First*, the Supermarkets do not and cannot identify any conflict between the instant *Safeway* decision and another U.S. Court of Appeals, Ninth Circuit, decision. Instead, the Supermarkets offer an unsound interpretation of U.S. Supreme Court and other cases to suggest a conflict although none is present. *Second*, the case is not "exceptional[ly] importan[t]," or likely to have far-reaching effects, because of the case's uncommon fact pattern, a profit-pooling scheme against the backdrop of a labor-management battle. Because profit-pooling is unnecessary and, indeed, unrelated to labor negotiations, the mixture here is almost idiosyncratic.

[1] Food 4 Less Food Co. apparently did not join the PFR.

The FRAP 40(a)(1) panel-rehearing requirement of errors or omissions in the original panel ("Panel") decision do not exist, either. The Panel faithfully applied "quick-look" antitrust scrutiny to invalidate an express profit-pooling agreement that Southern California's largest competing supermarkets used during a period of mutual labor strife. Far from inventing new Sherman Act[2] doctrines, the Panel simply followed the U.S. Supreme Court's "sliding-scale" approach outlined in *California Dental Association v. Federal Trade Commission*, 526 U.S. 756 (1999), in condemning – as somewhere *between per-se* illegal and quick-look illegal – the Supermarkets' profit-sharing scheme, which at minimum significantly reduces the participants' incentives to compete vigorously in business, yet has no "procompetitive" justifications. Eschewing automatic *per-se* invalidation of the Supermarkets' scheme, the Panel took a *conservative* approach, making fine distinctions between the scheme and closely similar ones that courts always have deemed *per-se* antitrust violations. Thereafter, the Panel made a thoroughgoing quick-look inquiry into the Supermarkets' agreement's nature, logic, and real-world context and effects, which inquiry

[2] 15 U.S.C. § 1 *et seq*.

damned the arrangement. There is no sound reason to revisit this correct ruling.

The PFR makes a brand-new joint-venture/ancillary-restraint argument that is untimely raised and, in any event, unavailing. The Supermarkets' multi-employer labor bargaining unit ("MEBU") does not fit the law's definition of a joint venture; similarly, the profit-pooling scheme is not an ancillary restraint thereof. Even were the opposite true, under well-settled law it was *still* proper for the Panel to judge the scheme under quick-look scrutiny (not the rule of reason) and the outcome would not change.

The Panel also correctly affirmed two U.S. District Court judges in rejecting the Supermarkets' invocation of the non-statutory labor exemption ("NSLE"), after applying the leading pertinent cases properly. The Supermarkets' attack on the NSLE ruling depends on a baseless, expansive reading of *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996), that no judge has ever endorsed.

PERTINENT FACTS

The Supermarkets' profit-pooling scheme is very simple, being well-described by the Panel in a single sentence: "the three largest supermarket chains in Southern California agreed to share profits amongst themselves and with a fourth supermarket chain during the indeterminate term of, and

for a short period after, an anticipated labor dispute." *Cal. ex rel. Brown v. Safeway, Inc.*, 615 F.3d 1171, 1175 (9th Cir. 2010). The Supermarkets deny that the scheme, a/k/a the "MSAA," is profit-pooling, instead using the euphemism "mutual aid arrangement." But all Panel judges, and the trial judge, correctly identified the scheme as profit-pooling.[3]

Contrary to Supermarket and U.S. Chamber of Commerce ("Chamber") intimations, both the Panel and the State *endorse* competing companies' use of MEBUs for labor negotiations (with employee consent), and accept that MEBU members may lawfully employ *some* forms of mutual financial aid, including group labor-strike insurance. 615 F.3d at 1199. The problem is specifically the pooling of profits, which runs far afoul of the Sherman Act.

The profit-sharing arrangement had three main parts. *First*, the conspiring chains – Albertson's, Food 4 Less ("F4L"), Ralphs, and Vons – calculated their historical relative shares of Southern California supermarket sales. 2 ER 238. *Second*, during every week of, and for two weeks after, a 2003-04 labor strike/lock-out involving Albertson's, Ralphs, and Vons, the

[3] Judges Pregerson and Reinhardt discussed at length the "profit-sharing agreement." Judge Wardlaw wrote, "If the MSAA were a *pure* profit-pooling arrangement across the entire market…the *per se* rule would apply." 615 F.3d at 1202 (emphasis added). Judge Guilford wrote, "Plaintiff argues that the profit pooling arrangement is…unlawful *per se*." 1 ER 6.

four chains reallocated their current profits (and losses) pursuant to a fixed formula, so that each chain would maintain the level of profitability associated with the chain's historical relative market share– *regardless of current market performance*. *Id*.[4] After the strike/lock-out ended, Ralphs and F4L gave a total of *$146,200,000* to Albertson's and Vons, to compensate the latter two chains for their weak financial performance during this period. 615 F.3d at 1176. *Third*, Albertson's and Vons promised to share their profits with F4L – which had always engaged in *separate* collective bargaining with unionized F4L employees – if F4L experienced later labor strife.[5] 2 ER 239-40.

[4] Safeway executives Richard Cox and Laree Renda testified that the monies transferred under the Supermarkets' agreement were intended to be and were *profits*. 3 ER 503, 1 FER 852 (Cox); 4 ER 699-700, 705-07 (Renda).

[5] *Any* strike or lock-out activated the profit-pooling. 2 ER 236 (¶5(F)), 239 (¶8). The Supermarkets mislead this Court in implying that union "whipsaw" tactics, i.e., selective picketing, were the trigger. (PFR at 2.)

ARGUMENT

I. THE PANEL'S "QUICK-LOOK" ANTITRUST DECISION FOLLOWS THE PRECEDENTS AND IS CORRECT

A. The Supermarkets' Profit-Pooling Arrangement Closely Resembles Past *Per-Se* Illegal Schemes

As the Panel recognized, 615 F.3d at 1178, the MSAA strongly resembles past profit-pooling schemes that courts have *repeatedly* deemed automatic antitrust violations. *Citizens Publ'g Co. v. United States*, 394 U.S. 131, 135-36 (1969) ("Pooling of profits pursuant to an inflexible ratio at least reduces incentives to compete…and runs afoul of the Sherman Act").[6] Moreover, economists have unanimously recognized profit-pooling as inherently destructive of participating businesses' incentives to try to increase their market shares.[7] This view reflects *common sense*: if a

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[6] *See also, e.g., Anderson v. Jett*, 12 S.W. 670, 671-72 (Ky. 1889); *N. Sec. Co. v. United States*, 193 U.S. 197, 328 (1904); *U.S. v. Paramount Pictures, Inc.*, 34 U.S. 131, 149-50 (1948); *U.S. v. Citizens and S. Nat'l Bank*, 372 F. Supp. 616, 625 (N.D. Ga. 1974); *In re Yarn Processing Patent Validity Litig.*, 541 F.2d 1127, 1135 (5th Cir. 1976); *U.S. v. Andreas*, 216 F.3d 645, 666-68 (7th Cir. 2000).

[7] *See, e.g.,* AOB A7-A9; Hirotsugu Uchida and James Willen, *Harvester Cooperatives, Pooling Arrangements and Market Power* 1 (Hirotsugu Uchida Working Paper, Aug. 30, 2005) *(*"[S]trict pooling of proceeds encourages 'shirking' when other forms of coordination are absent and individuals are otherwise left to make independent decisions"); Thomas McCarthy, *Declaration of Thomas R. McCarthy [Etc.]* (Jul. 13, 2006) (3 ER

(continued…)

business more successful than its competitors has to surrender to them the "excess" profits generated by extra efforts, the successful business will lose its drive to seek out those extra profits. Likewise, if a business *less* successful than its competitors gets to share in profits without having to work for them, the less successful business will remain indolent.

Notably, no contrary case law or economics literature praises revenue-sharing or profit-pooling schemes for improving incentives to compete. Perhaps as a result, the Supermarkets, and the Chamber in its *amicus* filing, try to analogize the MSAA to a fundamentally different group labor-strike insurance plan in the railroad industry in the early 1960s. PFR at 8, citing *Kennedy v. Long Island R.R. Co.*, 319 F.2d 366 (2d Cir. 1963). This argument failed to persuade *both* the *Safeway* trial court and the Panel. As the trial court realized, the financial assistance in *Kennedy* "was not a revenue sharing agreement and did not create disincentives to compete." 1 ER 6. And the Panel explained, "Unlike [the Supermarkets] under their profit sharing scheme, individual [*Kennedy*] firms purchasing such insurance would retain any increase in profits earned during the labor dispute and

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(…continued)
308-09); Stephen Stockum, *Declaration of Dr. Stephen Stockum [Etc.]* (Jan. 29, 2007) (4 ER 657-69).

suffer fully any reduction." 615 F.3d at 1200 n.14. Also off-point is *Air Line Pilots Ass'n International v. Civil Aeronautics Board*, 502 F.2d 453 (D.C. Cir. 1974). *Air Line Pilots* does reflect another – the *only other* known – case in which a group of employers pooled revenues in a fight against employees, but the D.C. Circuit *declined to rule on the merits* of the antitrust challenge to the revenue-sharing. *Id.* at 457.[8]

Accordingly, the Panel properly placed the MSAA, along the antitrust analytical "continuum" – from *per-se* illegal at one end to *per-se* legal at the other end (*Cal. Dental*, 526 U.S. at 779-80) – very close to *per-se* illegal.[9]

B. The Panel Appropriately Applied to the Profit-Sharing Scheme a Tailored Form of Quick-Look Analysis

The Panel easily could have deemed the Supermarkets' profit-pooling scheme a *per-se* antitrust offense – even if the scheme was not identical to

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[8] In deregulating the airline industry in 1978, *the U.S. Congress expressly terminated all such revenue-sharing agreements* – and severely limited their future use. Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 49(e)(1), 92 Stat. 1705, 1730; 49 U.S.C. § 42111.

[9] Although Judge Wardlaw agreed that a "pure profit-sharing agreement across the entire market" is *per-se* illegal under the Sherman Act, Judge Wardlaw apparently found certain features of the Supermarkets' agreement – its involvement of "only" the top four chains (controlling a clear majority of the market), indefinite duration, and labor-dispute context – different enough from the bulk of the other schemes to place the Supermarkets' arrangement nearly all the way on the *other* side of the antitrust continuum, mandating full-blown rule-of-reason analysis. 615 F.3d at 1202.

past voided profit-sharing arrangements. *U.S. v. Andreas*, 216 F.3d 645, 667 (7th Cir. 2000) ("[T]he fact that [a] scheme d[oes] not fit precisely the characterization of a prototypical *per se* practice does not remove it from *per se* treatment"); *accord, Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1151 (9th Cir. 2003). But, as *California Dental* teaches, courts may instead apply quick-look analysis in cases (A) where "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets" (526 U.S. at 770), or, put another way, (B) evaluating any "highly suspicious" restraint – even if "idiosyncratic." *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 317 (3d Cir. 2010) (citation omitted). The Panel thus took the *conservative* approach in embarking on quick-look analysis of the obviously-facially-anticompetitive, highly-suspicious MSAA. 615 F.3d at 1179-93.

Contrary to the Supermarkets' contentions (PFR at 4-5), there is no rule that arrangements that "nakedly" fix prices or reduce output of goods or services are the only practices that warrant quick-look analysis. Rather, *Cal. Dental* holds, "it does not follow that every case attacking a less obviously anticompetitive restraint…is a candidate for plenary market examination." 526 U.S. at 779. "[T]here is always something of a sliding scale in

appraising reasonableness" of a restraint-of-trade; hence "[w]hat is required…is an enquiry meet for the case," and "the quality of proof required should vary with the circumstances." *Id.* at 780-81; *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346, 361 (5th Cir. 2008) ("[A] 'quick-look' examination is not a rigid template. It must be tailored to fit the circumstances presented in each case").

The Panel's analysis of the MSAA conforms to these precedents and was appropriately rigorous. *First*, the Panel contemplated the likely facial competitive effects of the Supermarkets' revenue-sharing arrangement – easily finding likely anticompetitive effects, only slightly mitigated by case-specific factors. *Id.* at 1180, 1184-89.[10] *Second*, although the Panel understood that it may invalidate a restraint-of-trade in a quick-look case without finding actual anticompetitive effects (615 F.3d at 1189, 1191; Phillip Areeda and Herbert Hovenkamp, *Antitrust Law*, ("Areeda/Hovenkamp"), vol. XI, ¶1914d at 315 (3d ed. 2005)), the Panel

[10] The PFR (at 10) mistakenly criticizes the Panel's insight that, because of the MSAA's anticompetitive effects, other supermarkets likely competed for customers less vigorously during the strike/lock-out versus other times. The Supermarkets' *own evidence* supports the Panel's view. According to numerous Supermarket executives, Stater Bros., among the top five supermarket chains in Southern California (3 ER 331-34), raised prices during the strike/lock-out and still gained customers, benefiting from the Supermarkets' laxity induced by the MSAA. 3 ER 305-06.

noted the robust evidence of such effects of the MSAA. *Safeway*, 615 F.3d at 1190-92. The State's expert witness economist, Stephen Stockum, determined that the strike/lock-out-inspired, dramatic decrease in demand for the goods and services of all MEBU stores (except, for a certain time period, Ralphs) should have caused the Supermarkets to reduce prices fairly heavily – but the Supermarkets *raised* and/or stabilized prices because of the MSAA. 4 ER 732, 739-42, 756-69. *Finally*, the Panel considered, then rightly rejected as (1) illegitimate, (2) implausible, and (3) unsubstantiated, the lone procompetitive justification for the profit-pooling that the Supermarkets asserted, namely that profit-pooling could lead to lower labor costs for the Supermarkets and therefore better retail prices for groceries. *Id.* at 1192. *First*, the Panel correctly held that this "cut-employee-pay-rates" justification has always been deemed *illegitimate* under the antitrust laws. *Id.* at 1192-93. Contrary to the Supermarkets' contention that *Safeway* is an outlier in this respect (PFR at 8-9), *Safeway* squares with *every* other case to have considered the issue. *See, e.g., Law v. Nat'l Coll. Athletic Ass'n*, 134 F.3d 1010, 1022 (10th Cir. 1998) (invalidating on quick-look analysis competing colleges' arrangement to limit wages paid to assistant basketball

coaches; "mere profitability or cost savings have not qualified as a defense under the antitrust laws").[11] *Second*, the unanimous Panel agreed with the State's contention that only *Rube Goldberg* could follow the Supermarkets' convoluted, speculative chain of events and inferences going from a profit-pooling agreement to better retail prices at supermarkets. 615 F.3d at 1192 (Panel); *id.* at 1203 (Wardlaw) ("I share the majority's skepticism about the legitimacy of the grocery chains' contention that lowering labor costs by revenue-sharing would ultimately benefit consumers in the form of lower prices…") *Third*, the Supermarkets offered no evidence of resulting, lower labor costs or better retail prices, further dooming the claimed procompetitive justification. *Id.* at 1193.

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[11] *See also Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 38 (D.C. Cir. 2005); *cf. Todd v. Exxon Corp.*, 275 F.3d 191, 194-5, 214 (2d Cir. 2001) (accepting antitrust plaintiffs' theory that it was anticompetitive for employers to collude to depress employees' salaries); *Fleischman v. Albany Med. Ctr.*, __ F.Supp.2d __, 2010 WL 2998304, at *26, *28 (N.D.N.Y. Jul. 22, 2010); *U.S. v. Adobe Sys., Inc.*, 75 Fed. Reg. 60,820, 60,822 (D.D.C. Oct. 1, 2010) ("high-tech-hiring" case); *see also* Areeda/Hovenkamp, vol. VII, ¶1504 at 360-61 (critiquing courts for "the simple error of thinking lower prices [a]re good" regardless of how achieved. "*Those courts would not have made a similar mistake had they been faced with an agreement among law firms to 'split' recruitment of young lawyers in order to reduce the price (salary) paid them*" (emphasis added)); Oliver Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 Am. Econ. R. 18, 19 (Mar. 1968) (distinguishing between real and merely pecuniary efficiencies).

Still, the Supermarkets mistakenly criticize the Panel for engaging in less than full-blown rule-of-reason analysis of the MSAA, on the ground that a more cursory review might incorrectly condemn a competitively-benign restraint-of-trade. (PFR at 12.) This *exact* attack already has been deemed illegitimate by multiple U.S. Supreme Court cases. "For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a full-blown inquiry might have proved to be reasonable." *Ariz. v. Maricopa Cty. Med. Soc.*, 457 U.S. 332, 344 (1982); *accord, Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50 n.16 (1977); *N. Tex. Specialty Physicians*, 528 F.3d at 360. The Panel's analysis was appropriately tailored per the precedents, reached the correct result, and needs no reconsideration under FRAP 35 or 40.

C. The Supermarkets' Brand-New "Joint-Venture" Argument Has Been Waived and Lacks Any Merit[12]

1. Waiver

Having never before claimed that the Supermarkets' MEBU is a joint venture and the profit-pooling agreement ancillary thereto, the Supermarkets have *waived* any related argument. *U.S. v. Flores-Payon*, 942 F.2d 556, 558

[12] The PFR obscures that the Supermarkets are, indeed, making a brand-new argument.

(9th Cir. 1991). None of the three waiver exceptions defined in *Taniguchi v. Schultz*, 303 F.3d 950, 959 (9th Cir. 2002), apply. *First*, the Supermarkets easily could have raised this issue before. *Id.* *Second*, the law on this topic has not recently changed. *Id.*[13] *Third*, whether the MEBU is a joint venture is not a question of pure law (*id.*) but of fact, or a mix of law and fact, which an appellate court cannot resolve in the first instance. *In re Sulfuric Acid Antitrust Litig.*, __ F.Supp.2d __, 2010 WL 3835869, at *41-*43 (N.D. Ill. Sept. 24, 2010); *Kaljian v. Menezes*, 42 Cal.Rptr.2d 510, 518 (Cal. Ct. App. 1995).

2. Lack of merit

Even if considered on the merits, the Supermarkets' joint-venture/ancillary-restraint argument fails at every stage. *Fundamentally*, the Supermarkets' MEBU is not a joint venture – which must involve a (a) "community of interest in the object of the undertaking; (b) an equal right to direct and govern the conduct of each other with respect thereto; (c) a share in the losses if any; (d) close and even fiduciary relationship between the parties." *Honolulu Oil Corp. v. Kennedy*, 251 F.2d 424, 429 n.9 (9th Cir.

[13] *Am. Needle, Inc. v. NFL*, 130 S.Ct. 2201 (2010), a major antitrust/joint-venture ruling, *pre*dates the *Safeway* decision by three months, and did not change the pertinent law.

1957). *No case in the history of U.S. jurisprudence has even suggested that an MEBU, in and of itself, is a joint venture.* In the present case, the joint-venture frame does not fit for many reasons including that under the MEBU the Supermarkets could *not* direct *many* of one another's pertinent activities (2 ER 235 (3(B)), 236 (5(H)), and the Supermarkets refused to share key financial data with one another. 2 ER 236 (5(G)), 237 (7(A)). Even were the MEBU a joint venture, the profit-pooling scheme was not an ancillary restraint thereto.

> To say that a restraint is "ancillary"…some determination must be made whether the challenged agreement is an essential part of th[e broader] agreement, whether it is important but perhaps not essential, or whether it is completely unnecessary. …A restraint that is unnecessary to achieve a joint venture's efficiency-enhancing benefits may not be justified based on those benefits…

Ins. Brokerage, 600 F.3d at 345 (citations and internal punctuation omitted). Thousands of MEBUs have operated successfully without their members pooling profits. *Cf. W. States Reg'l Council, Int'l Woodworkers of Am. v. Nat'l Labor Relations Bd.*, 398 F.2d 770, 773-75 (D.C. Cir. 1968) (defining MEBUs). Moreover, *multiple* Supermarket witnesses denied that profit-pooling helped achieve any labor goals in this case. 4 ER 703; 3 SER 486-88, 503, 513, 518, 522-23.

The case law further provides that, even were the MEBU a joint venture, *and* the profit-pooling scheme an ancillary restraint, it *still* was proper for the Panel to apply quick-look (not rule-of-reason) analysis here. An ancillary restraint that facially appears almost always likely to restrict competition and to decrease output qualifies for quick-look analysis. *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 189 (7th Cir. 1985); *accord, Princo Corp. v. Int'l Trade Comm'n*, 616 F.3d 1318, 1339 (Fed. Cir. 2010). Indeed, in the "*Joint Ventures*" chapter of an ABA Antitrust Law Section treatise, *Mergers and Acquisitions: Understanding the Issues* (2008), Robert Schlossberg writes, "Certainly a pooling arrangement whereby horizontal competitors share risks by pooling revenues and distributing the pooled income would be treated, as it always has been, as a naked cartel arrangement." *Id.* at 331 (citation omitted). Hence the Supermarkets' joint-venture/ancillary-restraint argument does not undermine the Panel's evaluation of the MSAA.

II. THE PANEL'S NON-STATUTORY-LABOR-EXEMPTION DECISION FOLLOWS THE PRECEDENTS AND IS CORRECT

The Supermarkets (PFR at 12-16; and the Chamber) persist with the absurd argument that *Brown* greatly expanded the "limited" NSLE,[14] affording antitrust immunity for virtually any weapon – including profit-pooling and blatant price-fixing – that employers wield during times of labor strife, whatever the consequences for business markets or the general public.[15] But the unanimous Panel correctly held that the NSLE does not apply to the MSAA. 615 F.3d at 1202. As the Panel construed *Brown*, the NSLE *can* cover employer-only (as opposed to employer-employee or employee-only) conduct, but only actions that (1) address collective labor bargaining's core subjects (wages, hours, benefits, etc.) and tie tightly to the process, (2) involve only the bargaining employers, and (3) exigent circumstances have forced the employers to take, lest the collective bargaining process itself not work. *Safeway*, 615 F.3d at 1194-96, citing

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[14] *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 622 (1975); *cf. Labor Life Ins. Co. v. Pierno*, 458 U.S. 119, 126 (1982) (holding all antitrust exemptions narrowly construed).

[15] While the State has acknowledged that the Supermarkets likely entered into their profit-pooling scheme to help the Supermarkets' side in an anticipated labor battle, the State always has contended and demonstrated that the scheme primarily *affected* a business/product market, not a labor market.

Brown, 518 U.S. at 234, 237-42. Notably, *all* courts and the black-letter-law treatises have interpreted *Brown* this way.[16] The Supermarkets and the Chamber stand alone with their radical interpretation of *Brown*. Because the Supermarket's profit-pooling scheme (1) did not have *anything* to do with *any* subject of collective bargaining, (2) involved F4L, which was not a party to the pertinent MEBU (2 ER 236, 239), and (3) has been shown by profit-pooling's rarity and the testimony of multiple Supermarket employees to be *un*necessary to successful collective bargaining, it was *easy* for the Panel to decide that *Brown* provides no antitrust immunity to the MSAA.

The Supermarkets' three tangential NSLE arguments also fail. *First*, despite the Supermarkets' claims, the critical product-market/labor-market distinction in NSLE analysis remains alive and well after *Brown*. *See Am. Steel Erectors*, 536 F.3d at 79. Hence the MSAA's direct influence on the Supermarkets' business operations, and disconnection from any labor market, weighs against granting the NSLE in this case. *Second*, contrary to the Supermarkets' protests that the National Labor Relations Board, which

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[16] *See, e.g., Am. Steel Erectors, Inc. v. Local Union No. 7, Int'l Ass'n of Bridge, Etc., Workers*, 536 F.3d 68, 77 (1st Cir. 2008); *Clarett v. NFL*, 369 F.3d 124, 131 (2d Cir. 2004) (Sotomayor, J.); 2 ABA Section of Antitrust Law, *Antitrust Law Developments* 1450-51 (6th ed. 2007); 2 ABA Section of Labor Law, *The Developing Labor Law* 2460-61 (5th ed. 2006).

does not concern itself with business-competition issues, is the exclusive forum to resolve this antitrust matter, it is well-settled that the District Court and the Panel could decide (and should have decided) this case. *See BE & K Constr.*, 536 U.S. 516, 536-37 (2002); *United Food & Commercial Workers v. Food Employers Council*, 827 F.2d 519, 521 n.1 (9th Cir. 1987); *H.L. Washum*, 172 N.L.R.B. 328, 366 (1968). *Third*, vintage labor-law cases do *not* establish that labor-management battles are supposed to be lawless free-for-alls; rather, the opposing forces may marshal only lawful weapons that Congress contemplated for such use (notably excluding profit-pooling). *Lodge 76, Int'l Ass'n of Machinists v. Wisc. Employment Relations Comm'n*, 427 U.S. 132, 142-44, 150 (1976).

Finally, contrary to the heated accusations of the Supermarkets and the Chamber, the Panel did not rewrite national labor policy (or any law) in the course of making this ruling. Both the U.S. Supreme Court and the Ninth Circuit have long held, in line with the pertinent statute(s), that "the primary and legitimate goal of the federal labor law…is to permit employees to organize and act to improve wages and working conditions." *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 905 (9th Cir. 1987) (Kennedy, J.), citing *Connell*, 421 U.S. at 622 (1975); 29 U.S.C. § 151 ("The inequality of bargaining power" between relatively powerless unorganized employees and

relatively powerful employers "substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by *depressing wage rates and the purchasing power of wage earners*" (emphasis added)). The Panel merely echoed these statements, 615 F.3d at 1200, along with *others* about *other* goals of national labor policy, in making the NSLE ruling. Furthermore, the ruling does not depend upon any particular extant interpretation of national labor policy.

CONCLUSION

There is no legitimate reason to review either of the Panel's rulings in this case. The rulings do not create an intra-circuit conflict, and fully comply with the relevant precedents from other courts. The case is not exceptionally important because profit-pooling is relatively rare, particularly

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in a labor-law context, and is unnecessary for workable labor negotiations.

Finally, the rulings are analytically rigorous and correct.

Dated: October 25, 2010

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULES 35-4 AND 40-1
FOR 08-55671, 08-55708

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer is: (check (x) applicable option)

[X] Proportionately spaced, has a typeface of 14 points or more and contains 4,167 words (petitions and answers must not exceed 4,200 words).

or

[ ] In compliance with Fed.R.App.P. 32(c) and does not exceed 15 pages.

October 25, 2010
Dated

/s/
Jonathan M. Eisenberg
Deputy Attorney General