Nos. 04-805 & 04-814

In The
Supreme Court of the United States

TEXACO INC., *et al.*,

Petitioners,

vs.

FOUAD N. DAGHER, *et al.*,

Respondents.

SHELL OIL COMPANY,

Petitioner,

vs.

FOUAD N. DAGHER, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* OF NORTHWEST OHIO PHYSICIAN SPECIALISTS COOPERATIVE, LLC IN SUPPORT OF PETITIONERS TEXACO INC., *ET AL.*

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF NORTHWEST OHIO SPECIALISTS COOPERATIVE, LLC IN SUPPORT OF PETITIONERS TEXACO INC., *ET AL.*

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court of the United States, Northwest Ohio Specialists Cooperative, LLC ("NWOS") respectfully moves this Court for leave to file the attached brief as *amicus curiae* in support of Petitioners.

Petitioners Texaco Inc. and Shell Oil Company have given consent to the filing of this *amicus* brief. However, counsel for respondents has refused all requests for consent to the filing of *amicus* briefs.

Amicus NWOS is an administrative association of 18 physician groups in different specialties including cardiology, ENT, neurosurgery, urology and orthopedics.

Like the majority of the nearly 600,000 physicians in the United States, NWOS physicians practice in small groups. Thus, they, like other physicians and other health care providers, can proactively participate in innovative efforts to provide better patient care more cost effectively only through what antitrust law terms "joint ventures."

However, as this case vividly illustrates, antitrust joint venture law applied by the court below here and by many others is so unclear, uncertain, risky and expensive to evaluate in the planning and operations stages, let alone defending in court, that many physicians as a practical matter simply cannot risk or afford to participate in or lead the many innovative ventures that health care in the U.S. so desperately needs. Joint ventures can succeed as businesses only with agreements on prices for customers externally, and with agreements on prices internally with suppliers including providers within the joint ventures.

The formalistic view of *per se* price-fixing by the court below ignores this Court's recent hard work and precedent, as well as sound public policy. This case thus presents a crucial opportunity for the Court to provide the antitrust guidance on joint ventures that the health care field and the Nation so urgently need.

Accordingly, *amicus* respectfully requests leave to file the attached brief.

Respectfully submitted,

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QUESTION PRESENTED

Whether it is *per se* illegal concerted action under Section I of the Sherman Act for an economically integrated joint venture to set the selling price of its own products.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICUS*[1]

Amicus NWOS is an administrative association of 18 physician groups in different specialties including cardiology, ENT, neurosurgery, urology and orthopedics.

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[1] Petitioners Texaco Inc. and Shell Oil Company have given consent to the filing of this *amicus* brief. However, counsel for respondents has refused all requests for consent to the filing of *amicus* briefs.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the a*micus curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

The formalistic view of *per se* price-fixing by the court below in this case ignores this Court's recent hard work, precedent and sound public policy. It thus presents a crucial opportunity for the Court to provide the antitrust guidance on joint ventures that the health care field and the Nation so urgently need.

ARGUMENT

I. Joint Ventures Are Now a Vital Form of Doing Business for U.S. Companies and Workers in Today's Global Economy in General, and for Health Care In Particular, and Urgently Need Much Clearer Antitrust Guidance.

The emergence of joint ventures as a vital and economically advantageous form of business entity, in the United States and worldwide, is widely recognized. Joint ventures in the antitrust sense of the term – business "relationships that are not based on *ownership* but on *partnership*" – have become an essential form of doing business in the U.S. and around the world. This central fact of economic development has had wide-ranging implications for the organization of businesses, and it likewise has important implications for the evolution and articulation of federal antitrust doctrine. This case provides the occasion for the Court to undertake this crucial effort.

The importance, indeed, the urgency of new and clear antitrust guidance for joint ventures flows from the economic and technological imperatives that have made them such a powerful emergent economic form. Peter

Drucker, the "preeminent management thinker of our time", explains incisively:[2]

> [T]he trend toward alliances of this sort in which nobody has control – that is, the trend toward partnerships – is accelerating. One reason is that no one company, not even the telephone giants, has enough money to swing the deal alone. A more important reason is that no one company by itself has the needed technology. And in many parts of the world, especially in "emerging countries" like coastal China or Malaysia, business cannot be done except through a joint venture or an alliance with a local partner. "Today," the CEO of a major pharmaceutical company said recently, . . . "[it] is simply impossible for us – and we are among the world's research leaders – to have enough scientific expertise in *all* the new fields. It is equally impossible for us – and we pride ourselves on our marketing organization – to serve all the new channels through which health care products will be marketed as the health care systems of the world are re-engineering themselves."

[2] "Peter Drucker on the New Business Realities," in Symposium: New Foundations For Joint Ventures and Antitrust, 44 *Antitrust Bulletin* 787, 799 (1999) (C. Weller Guest Editor). E.g., there are hundreds of joint ventures in the auto industry world-wide, including the GM-Toyota joint venture. See "Ward's Automotive 'Spider Chart' " & Hogan, "The General Motors-Toyota Joint Venture: A General Motors Perspective," Symposium *supra*, 44 *Antitrust Bulletin* at 791-93, 821-40. Peter Drucker has been described as "the preeminent management thinker of our time" by Theodore Levitt, a former Editor of the *Harvard Business Review*, quoted in Bennett, "Management Guru," *Wall Street J.*, at A-1 (July 28, 1987).

The Federal Trade Commission recognized these powerful forces in 1996, reporting that "Global and innovation-based competition is driving firms toward ever more complex collaborative agreements."[3]

These trends, and the accompanying urgent need for refined antitrust doctrine, are particularly pronounced in the economic realm in which NWOS operates: health care. The convergence, within this realm, of myriad economic pressures, technological innovation, and the need for innovation and reform make it a singular, and singularly important area for clear and sophisticated antitrust analysis.

To be sure, as everybody knows, the nation's health care system needs major innovation and reform. The reality and continuing prospect of radical technological innovation carries with it at once great promise and tremendous cost, the kinds of astronomical cost that fall squarely within the rationale advanced by Drucker.

Further, the health care marketplace is characterized by exceptional dispersal of the crucial economic actors. The majority of the nation's 600,000 practicing physicians practice as solo-practitioners or in small groups. And there are tens of thousands of hospitals, pharmacies and other providers, insurers, reinsurer, and other crucial actors. This vast and diverse structure increasingly demands that the participants form joint ventures if they are to participate (and compete) successfully in the world of health care, and keep pace with the ever-increasing demands for

[3] FTC, *Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace,* Vol. I, Chap. 10, "Joint Ventures," at 1 (1996).

innovation and reform. Yet the most routine economic analysis suggests that these vital health care actors will participate in this ongoing evolution, which is so urgently needed, only if the antitrust doctrines applicable to joint ventures are sufficiently clear and well defined to provide reasonably reliable guidance. This case provides the opportunity for the articulation of such guidance through the correction of the doctrinal errors of the appellate court.

The time for such guidance is particularly ripe. A year ago, a new model for health care was fashioned, based on intensive study of the particular market dynamics affecting health care. The study concluded that private competition in health care, if re-directed from insurance ("health plans, networks and hospital groups") to health care (the "prevention, diagnosis, and treatment of individual health conditions or co-occurring conditions of patients"), can produce "stunning gains in quality and efficiency."[4] Of course, the vibrancy of this model depends on, among other things, physicians and other crucial actors being able to operate within a regime of antitrust joint venture law that acknowledges and accommodates the particular demands of the health care marketplace.

The need for this evolution in antitrust law is acute. Antitrust analysts are "all but unanimous that *per se* rules are inappropriate for joint venture analysis" because, unlike "cartels, joint ventures are devices that frequently achieve legitimate business advantages."[5] But, as *Dagher*[6]

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[4] Porter & Teisberg, "Redefining Competition in Health Care," *Harvard Business Review* 65, 66 (June 2004).

[5] Pitofsky, "A Framework for Antitrust Analysis of Joint Ventures," 74 *Georgetown L. Rev.* 1605, 1621 (1986).

[6] *Dagher v. Saudi Refining Inc.*, 369 F.3d 1108 (9th Cir. 2004).

poignantly illustrates, "joint ventures receive a more hostile reception in the agencies and courts" than do mergers.[7] The "case law and enforcement policies applied to joint ventures" is "incoherent[ ] and inconsistent[ ]," and is, frankly, a "mystery shrouded in a riddle wrapped in an enigma."[8]

These doctrinal shortcomings are manifest in this case, in which the record demonstrates overwhelmingly that the challenged joint ventures were not the product of ravenous economic malfeasance but, rather, were economically sound and necessary responses to changing market conditions. The joint ventures in this case are supported by, among other things, a "voluminous record documenting the economic justifications for creating the joint ventures," including annual savings of $800 million. The "Federal Trade Commission and several State Attorneys General [had] approved the formation of the joint ventures" (with modifications), and the joint ventures included "the collective assumption of risk and resource pooling."[9]

Yet the important and productive economic innovation reflected in Petitioners' joint ventures faces massive economic exposure. Unless the appellate decision is reversed, the joint venturers will face trial in a class action by 23,000 service stations that will proceed, not under a sophisticated and sensible body of antitrust law, but on a formalistic *per se* price-fixing theory with mechanistic jury

[7] Gellhorn & Miller, "Competitor Collaboration Guidelines – A Recommendation," 42 *Antitrust Bulletin* 851, 854 (1997).

[8] November 2, 1984 J. Paul McGrath remarks, 18th Annual New England Antitrust Conference, 5 *CCH Trade Reg. Rep.* ¶ 50,470, at 56,137 (borrowing the words of Winston Churchill).

[9] 369 F.3d at 1111-12.

instructions used as "gospel" for many years.[10] And, incredibly, the defendants will have no chance to provide evidence to the jury on the actual markets affected by the joint ventures, the manner in which the joint ventures compete, or the effects of the joint venture on competition, efficiencies, quality, or prices to consumers. Indeed, they will have no opportunity to contest the "naked" restraint element of a *per se* theory, which the court below ruled should be taken from the jury.

The prospect of this case proceeding to trial under the rulings announced by the court below is harrowing for the litigants. But, worse, those rulings, if permitted to stand, will have far-reaching and deleterious effects in an inconceivably wide range of settings, indeed, in economic and market settings ranging far beyond those affecting the Petitioners and NWOS. Thus this Court's careful consideration of the broad social and economic implications of the issues in this case should lead the Court to reverse the court below. This reversal should correct the two fundamental errors raised by the Question Presented. Further, the Court should take this opportunity to provide clear, refined antitrust guidance for the courts, innovators, business, physicians, other health care providers, antitrust agencies, and antitrust practitioners.

[10] See, e.g., ABA, *Model Jury Instructions In Civil Antitrust Cases 2005 Edition* (2005); at B-19 to 21 ("Plaintiff claims that it was injured because defendants conspired to fix the prices for [*product* X]. Under the Sherman Act it is illegal for competitors, regardless of their size or amount of sales, to agree on the prices to be charged for their competing products . . .). The "gospel" observation is made by a past Chair of the ABA Antitrust Section, at xiv.

The following section of this brief demonstrates the errors of the court below. Section II.A shows the court below applied the wrong standard for the "naked" restraint element of a *per se* theory, which is now controlled by this Courts decision in *California Dental v. FTC.*[11] Section II.B analyzes the lower court's erroneous view, which blurred distinct elements and assumed that proof of price setting is sufficient to establish the "naked" restraint element of a *per se* antitrust violation.

II. The Court Below's Decision Includes Two Fundamental Errors Requiring Reversal and Invites Much Needed Guidance on Antitrust Joint Venture Law.

A. This Court's *California Dental* and *Cracking Oil* Decisions Are Controlling Here and Provide the Clear and Elegant Antitrust Guidance Long Needed for Beneficial Joint Ventures to Flourish Without the Chilling Effect of *Per Se* Exposure, While Preserving the *Per Se* Rule for "Naked" Restraints of Trade.

California Dental is controlling here. *California Dental* is a sea-change advance in antitrust analysis by the Court after 22 years of refining the law on *per se* and "quick look" presumption theories that started with *GTE Sylvania.*[12] The Court in *California Dental* significantly

[11] *Calif. Dental Assn. v. FTC*, 143 L. Ed. 2d 935 (1999).

[12] *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). See also *NYNEX Corp. v. Discon, Inc.*, 142 L. Ed. 2d 510 (1998); *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988); *NCAA v. University of Oklahoma*, 468 U.S. 85 (1984); *Broadcast Music, Inc. v. CBS,* 441 U.S. 1 (1979).

advanced and refined antitrust doctrine by adopting a fact- and market-focused analysis instead of the shop-worn and mechanistic verbal formalism that has dominated antitrust analysis since Justice Douglas' Footnote 59 in *Socony-Vacuum Oil*[13] in 1940.

In *California Dental*, as here, the "very issue at the threshold of this case" was whether the price restraints at issue are "sufficiently verifiable in theory and in fact to fall within such a general rule" – the general theory in each case being one presuming net anticompetitive effects (a "quick look" theory there, a *per se* theory here). *Id.* at 951. Justice Souter elaborated in a footnote how *California Dental* was a fundamental break from the antitrust analysis of the past.[14]

The Court's new antitrust analysis is directly supported by, and is fundamentally similar to, an often overlooked but crucial precedent in this Court: Justice

[13] *U.S. v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 223 n. 59 (1940) (this footnote is used in jury instructions and otherwise to define *per se* price-fixing to this day, that is, a "combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing . . . price" is "illegal *per se*"). See, e.g., ABA, *Model Jury Instructions In Civil Antitrust Cases 2005 Edition* (2005), at B-19 to B-21; ABA, *Sample Jury Instructions in Civil Cases* B-16 (1999).

[14] "The absence of any empirical evidence on this point indicates that the question was not answered, merely avoided by implicit burden-shifting of the kind accepted by JUSTICE BREYER. The point is that before a theoretical claim of anticompetitive effects can justify shifting to a defendant the burden to show empirical evidence of procompetitive effects, as quick-look analysis in effect requires, there must be some indication that the court making the decision has properly identified the theoretical basis for the anticompetitive effects and considered whether the effects actually are anticompetitive. Where, as here, the circumstances of the restriction are somewhat complex, assumption alone will not do." *Id*. at 953-54 n. 12.

Brandeis' Final Rule of Reason opinion in *Cracking Oil*[15] in 1931. As Milton Handler explained in his classic article "The Judicial Architects of the Rule of Reason,"[16] Justice Brandeis required "'a definite factual showing'" with "definite content" in antitrust analysis, and his "precise mind recoiled" from "elusive and question-begging epithets" such as "Peckham's 'direct and indirect dichotomy,'" and "White's 'undue limitations on competitive conditions.'"[17]

Justice Brandeis in *Cracking Oil* and the Court in *California Dental* take the same basic approach to antitrust analysis, requiring "'a definite factual showing'" with "definite content," and eschewing "elusive and question-begging" words like today's "ancillary restraints," "reasonably necessary," "essentiality" and "economic integration" formalisms.

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[15] *Standard Oil of Indiana v. U.S.,* 283 U.S. 163 (1931).

[16] In M. Handler, *Twenty Five Years of Antitrust* 1, 30 (1973). Justice Brandeis' First Rule of Reason opinion, *Chicago Bd. of Trade v. U.S.,* 246 U.S. 231 (1918) is well-known, but his Final Rule of Reason opinion, *Cracking Oil in 1931,* although little known, is still valid precedent and provides the sophisticated next generation Rule of Reason analysis *California Dental* requires. Remarkably, it is also fundamentally the same method as the new and different economic theory based on innovation and productivity, not efficiency theory that is static and "dangerously incomplete," developed by Harvard's Michael Porter. See Porter, Staudhammer, Stern & Weller, Ed., *Unique Value: Competition Based on Innovation Creating Unique Value* (2004) (Prof. Porter Chaps. 2-6, Weller Chaps. 1, 7 on *California Dental* and this new *California Dental-Cracking Oil*-Porter Rule of Reason and economic theory).

[17] Handler, "The Judicial Architects of the Rule of Reason," *supra*, at 29, quoting *Cracking Oil*, 283 U.S. at 179.

The court below misread or ignored *California Dental.*[18] Its analysis instead is dominated, and doomed, by these old verbal formalisms that are no longer part of antitrust joint venture law.

At issue in *California Dental* were alleged price restraints by a dental association that the FTC ruled unlawful, using a "quick look" presumption theory. This Court vacated the Ninth Circuit's decision because the Court of Appeals "did not scrutinize the assumption of relative anticompetitive tendencies." This Court held that a "quick look" presumption can be used only in sharply limited circumstances, for instance, when the "likelihood of anticompetitive effects" are "intuitively obvious," and "easily ascertained," and where there are no "plausible explanations of neutral or procompetitive effects." In contrast, "quick look" presumptions are inappropriate in "somewhat complex," settings. And, in all events, an antitrust plaintiff's claims of anticompetitive effects must be based on sound theoretical and factual evidence because "assumption alone will not do." *Id.* at 951-54 n. 12.

The *California Dental* standards for "quick look" rebuttable presumption theories apply *a fortiori* to *per se* theories because they are conclusive presumptions. Moreover, *California Dental* provides a simple yet elegant legal standard, now controlling, for determining the "naked" restraint element of a *per se* theory.[19] This standard is, of

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[18] The court below relegated *California Dental* to a short footnote only discussing plaintiffs' "quick look" rebuttable presumption theory, missing completely its implications for *per se* conclusive presumption theories. *Id*. at 1116 n. 7.

[19] The court below recognized these two elements of a *per se* theory, whether the restraint is "naked," and whether the restraint is a type of

(Continued on following page)

course, dependent on context, in this instance a context limited by three crucial points.

First, the Court in *Business Electronics* set the stage by making clear that the use of *per se* theories is the exception, not the rule. In the Court's word's, "there is a presumption in favor of a rule-of-reason standard." Further, "departure from that standard [such as the departure entailed in *per se* theories] must be justified by demonstrable economic effect" such as a demonstration of "the facilitation of cartelizing." It cannot be justified by "formalistic distinctions."[20]

Second, the archetypical "naked" restraint is a cartel. "Cartels are neither easy to form nor easy to maintain," this Court has wisely observed, as "[u]ncertainty over the terms of the cartel, particularly the prices to be charged in the future, obstructs both formation and adherence by making cheating easier."[21] Thus cartels are "easily ascertained" with discovery, are not "complex", and their anticompetitive effects are "intuitively obvious." Whatever camouflage a cartel may try to use, discovery will reveal much evidence of what is really going on because cartels require a lot of work to succeed. Thus the phrase "naked"

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per se price-fixing, see, e.g., *id*. at 1118, 1119-24, but used the wrong standard for the "naked" restraint element.

[20] *Business Electronics Corp. v. Sharp Electronics Corp*., 485 U.S. 717, 726 (1988).

[21] *Id. California Dental* elaborates on the "demonstrable economic effect" requirement stating that "a theoretical claim of anticompetitive effects" requires proof of both the "theoretical basis for the anticompetitive effects" and of "whether the effects actually are anticompetitive." 143 L. Ed. 2d at 953-54 n. 12.

restraint was carefully chosen, a verbal picture that is consonant with the economic reality being described.

Third, the scope of "naked" restraint analysis is highly constricted, and therefore is applicable only under the narrow conditions for which it was designed: cartels and similarly flagrant endeavors. The relevant evidence for determining the "naked" restraint element is largely limited to the internal operations of defendant(s), avoiding extensive evidence of the reality of the markets involved or of actual market effects. This deliberate avoidance of economic evidence must be exercised with great caution, because of the inherent danger of evaluating antitrust issues without attention to the ultimate issue of the impact on competition in the markets in which the business operates.

These specific limitations are soundly addressed in *California Dental*. Joint price-setting by competitors, or any other restraint by competitors and others, is a "naked" restraint if and only if:

> (1) the anticompetitive effects of the restraint are easily ascertained or obvious in the markets alleged to be affected, and sufficiently verified in theory and in fact, and
>
> (2) there is no plausible reason why the restraint has a net procompetitive effect or is competitively neutral in the markets alleged to be affected.

The new *California Dental* standard for "naked" restraints readily distinguishes *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969), a case at the heart of the analysis by the court below, and, indeed, at the heart of Respondent's case. *Citizen Publishing* involved a cartel by the only two local newspapers with 100% of the affected markets. The anticompetitive effects of the joint-pricing restraint were obvious and easily ascertained. Further, there was no plausible reason why joint pricing by the only two newspapers in town could have a net procompetitive effect or be competitively neutral. Thus, "naked" restraint *per se* analysis was appropriate.

Here, in contrast, the Petitioners' joint ventures established new businesses and set prices for those businesses they were in. They did so as partners, as they would have done following a merger. Of course, a business must set prices; that's part of being in business, of participating in the marketplace, and of conducting commerce. The idea that setting a price for one's product can itself constitute a *per se* violation in such a setting is a perfect example of the illogic of mechanically applying the *per se* rule to joint ventures.

The actual anticompetitive effects of the alleged pricing restraint cannot be easily ascertained and are not obvious, making clear the inapplicability of "naked" restraint principles. Likewise, those principles led the court below to view as irrelevant the fact that Petitioners' joint ventures produced annual savings of $800 million, a fact that even in the most cursory thinking would constitute a very plausible reason why the joint ventures were procompetitive, or, at worst, competitively neutral.

Any antitrust doctrine that leads to the conclusion that these crucial economic facts are irrelevant lacks a certain refinement. But the problem is not with existing doctrine, as this Court has made clear in *California Dental*. Rather, the problem is reflected in the decision of the lower court, its ignorance of or inattention to *California Dental,* and its rigid adherence to outmoded principles.

B. The Court Below Erred By Assuming Price-Setting Had *Per Se* Price-Fixing Effects Sufficient to Establish The "Naked" Restraint Element of a *Per Se* Theory

The court below also erred by blurring two distinct elements of the requisite proof of a *per se* violation. It did so by assuming that proof of *per se* price-fixing effects (the second element) is sufficient to establish the "naked" restraint element (the first element).

The reversed "logic" of the court below is facially silly. If the activity of setting a price were itself sufficient to establish the crucial element of "naked" restraint, then all joint selling ventures would be illegal price-fixers. That is why the doctrine requires, *first*, proof of a "naked" restraint, and then, and only then, proof of *per se* type price-fixing.

A joint venture, like any other business, is a business that must set prices for its products and services, decide how much to pay its members and other input costs, determine how it will beat its competitors in the markets it serves, seek profits high enough to support innovation, satisfy its future business needs, and satisfy its investors.[22] These internal business decisions are logically irrelevant to the "naked" restraint element of a *per se* theory. And,

[22] On joint ventures as businesses, see, e.g., Bamford, Ernst & Fubini, "Launching a World-Class Joint Venture," *Harvard Bus. Rev*. (Feb. 2004).

under the *California Dental* standard, they are treated as irrelevant.

As Judge Fernandez, in his *Dagher* dissent, explained clearly, at 1127:

> In this case, nothing more radical is afoot than the fact that an entity, which now owns all of the production, transportation, research, storage, sales and distribution facilities for engaging in the gasoline business, also prices its own products. It decided to price them the same as any other entity could. What could be more integral to the running of a business than setting a price for its goods and services?

He then elaborated, with a telling story:

> We now have an exotic beast, no less strange than a manticore, roaming the business world. This beast would otherwise be a true business, but when it acts like a true business – sets prices for its own goods – it subjects its otherwise insulated members to the severe sting of antitrust liability. While it has the head of a business man and the body of an entrepreneurial lion, it has the tail of a liability scorpion. I suppose I am as taken with stories of exotic beasts as the next person, but I prefer to leave them in the realm of the unknown; I would rather not confront them in the marketplace.

The majority in the court below ignored these common-sense observations, opting instead for circular reasoning. As the majority below saw it, the "uniform pricing scheme" was a "naked" restraint; in the inflamed words of the opinion, an "abomina[ble] . . . agreement to fix prices."

In short, the court below concluded that the Petitioners' decision to set a price for their product was *per se* price-fixing and therefore a "naked" restraint. The mischief of this grievous logical flaw is clear and this case provides a perfect opportunity to rectify the flaw, and clarify antitrust law.

In the course of clarifying the crucial distinction between the "naked" restraint and *per se* price-fixing elements of antitrust law, this Court should clarify that the elements stand separately, and require separate and legally sufficient proof. The decision of the court below not only blurred this distinction analytically, it compounded the error by treating the issue of whether an alleged restraint is "naked" as an issue of law, to be decided by the court even when the record contains disputed facts.[23]

Of course, such an error has serious constitutional implications, infringing as it does on the right to trial by jury and the right to due process. In antitrust specifically, it is well-settled but often confused that it is a jury question when the facts on the "naked" restraint element are disputed. For example, the 2005 Edition of the ABA's *Model Jury Instructions In Civil Antitrust Cases* states that when "the determination as to whether a pricing agreement is naked . . . involves a question of fact, this [jury] instruction should be provided."[24]

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[23] *Dagher,* at 1122.

[24] ABA, *Model Jury Instructions In Civil Antitrust Cases 2005 Edition* (2005), at B-24. See, e.g., *U.S. v. Gaudin*, 115 S. Ct. 2310, 2320 (1995).

In the course of rectifying the error below, and disentangling the elements of "naked" restraint and price-fixing, this Court should make clear that whenever there are genuine issues of fact or contested issues that blend law and fact, the law requires that these issues be submitted to the jury. Antitrust defendants have a constitutional right to jury trials on the "naked" restraint element. And, given the widespread confusion and misunderstanding in antitrust on this jury trial issue, the Court's opinion should make clear that antitrust jury instructions on *per se* theories should include a distinct "naked" restraint element.[25]

In summary, 20 years ago Prof. Areeda in effect wrote that Judge Fernandez' dissenting analysis in this case quoted above was absolutely correct. Specifically, Prof. Areeda wrote that joint selling ventures by two competitors, like Petitioners' joint ventures here, that jointly fix selling prices and eliminate competition between the two competitors is not "the kind of conduct that we want to discourage with bright-line prohibition," and that "no one [should] believe[ ] that they violate the per se rule against 'price fixing:' "[26]

> Virtually all horizontal agreements among competitors ultimately affect price. * * * Suppose, for example, that two small producers, *A* and *B*, in a highly competitive market form a joint venture partnership, *C*, to realize economies of scale in purchasing a component or in selling the finished

[25] The ABA *Model Jury Instructions In Civil Antitrust Cases 2005 Edition* illustrates the common practice not to include the "naked" restraint element as a distinct element in *per se* theory jury instructions. See, e.g., *id.* at B-24 to B-56.

[26] P. Areeda, VII *Antitrust Law* ¶1510c at 422 (1986) (footnotes omitted).

> product. Assume that *C* negotiates the buying or selling price with suppliers or customers. In every ordinary sense, *A* and *B* are jointly fixing their buying or selling price; competition between them on the buying or selling side of the market is eliminated. Yet no one believes that they violate the per se rule against "price fixing." The obvious explanation is that the rationale of the per se rule does not apply. Joint selling (or buying) ventures are not always or almost always pernicious. Indeed, they are not pernicious at all in the absence of market power. * * * Nor is this the kind of conduct that we want to discourage with bright-line prohibition. To be sure, there may be administrative difficulties in appraising it, but that is never a sufficient basis for categorical prohibition.

Unfortunately, as this case illustrates, the exact opposite is nearly true. The court below, many courts and many others believe that joint ventures among competitors that set the price for the products and services the joint venture is marketing is "naked" price-fixing.

Now, more than ever, for the American economy in general, and health care in particular, it is time to make Prof. Areeda's academic vision legal reality for joint ventures.

CONCLUSION

The court below's decision in *Dagher* should be vacated and the Court should provide clear and refined guidance for all on the application of antitrust law to joint ventures.

Respectfully submitted,

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