16-3065

IN THE

United States Court of Appeals

FOR THE TENTH CIRCUIT

SUTURE EXPRESS, INC.

Appellant,

—v.—

OWENS & MINOR DISTRIBUTION, INC.,

AND

CARDINAL HEALTH 200, LLC,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

BRIEF FOR AMICI CURIAE ECONOMISTS AND ANTITRUST SCHOLARS JOSEPH P. BAUER, WILLIAM S. CHOI, JOSHUA P. DAVIS, JOHN B. KIRKWOOD, IOANNIS LIANOS, BARRY NALEBUFF, AND IVAN REIDEL IN SUPPORT OF APPELLANT URGING REVERSAL

David A. Balto*
Bradley A. Wasser
Matthew C. Lane
Law Offices of David A. Balto
1325 G. Street, N.W.
Suite 500
Washington, D.C. 20005
(202) 577-5424
David.Balto@dcantitrustlaw.com
**Counsel of Record*

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INTERESTS OF AMICI CURIAE[1]

Amici are economists and antitrust scholars whose work focuses on industrial behavior, including business strategy, risk, and competition. *Amici* often write about or serve as economic experts with respect to industrial behavior, including in the antitrust context. As economists and antitrust scholars, *amici* have a strong interest in the application of the antitrust laws for their intended purposes: to promote efficient, vigorous, and innovative competition, for the benefit of consumers and the economy as a whole. *Amici* are well situated to discuss how firms compete, and how antitrust law affects firms' competitive behavior.

Amicus Joseph P. Bauer is Professor Emeritus of Law at the University of Notre Dame Law School. Professor Bauer has served as a consultant to the Federal Trade Commission's Bureau of Competition, and has authored several article and books, including Kintner and Bauer, *Federal Antitrust Law*, volumes I-XI.

[1] Pursuant to FRAP 29(c)(5), amici curiae state that no party's counsel has authored this brief either in whole or in part; that no party or its counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than amici curiae and their counsel have contributed money intended to fund preparing or submitting the brief. Amici curiae seek leave to file this brief through attached motion.

Amicus William S. Choi is a Managing Director at AlixPartners in San Francisco. Dr. Choi has provided expert testimony and advised major companies and the US government on matters involving antitrust, statistics, and market structure, and he has taught economics courses at Duke University and UCLA.

Amicus Joshua P. Davis is Associate Dean for Academic Affairs, Director of the Center for Law and Ethics, Professor, and Dean's Circle Scholar at the University of San Francisco School of Law. Professor Davis writes extensively about antitrust law and is on the board of the American Antitrust Institute.

Amicus John B. Kirkwood is Professor of Law at Seattle University School of Law and a Senior Fellow of the American Antitrust Institute. Professor Kirkwood's specializations include antitrust law, and he has written extensively about antitrust and is the editor of the book *Antitrust Law and Economics*.

Amicus Ioannis Lianos is Professor of Global Competition Law and Public Policy at University College London Laws and Director at the UCL Centre for Law, Economics and Society. Professor Lianos has been elected to positions at a number of antitrust institutes, including the international advisory board of the Loyola University of Chicago Institute for Antitrust and Consumer studies and the international advisory board of the Global Antitrust Institute at George Mason University. He was awarded a PhD for his thesis on the transformation of competition law by economic analysis of law and he has published extensively on antitrust issues.

Amicus Barry Nalebuff is the Milton Steinbach Professor of Management at the School of Management at Yale University and an Associate Editor for the Journal of Law, Economics, and Organization. Professor Nalebuff has published extensively on the economics of bundling and tying, including widely-cited articles in peer-reviewed journals and a study on behalf of the UK Department of Trade and Industry.

Amicus Ivan Reidel is a Professor at the School of Law at the University Torcuato Di Tella, where he was also Director of the Master in Law and Economics. Professor Reidel received his Doctor of Juridical Science (S.J.D.) from Harvard Law School, where he was also a visiting researcher and Olin Fellow in Law and Economics. He has also taught and researched at Boston University, the University of Michigan and the University of Beijing. His research interests include antitrust and intellectual property.

INTRODUCTION AND SUMMARY OF ARGUMENT

We offer our views as economists and scholars on the potential antitrust implications of the practice in question. We concur with the Court's statement that "the primary concern of the antitrust laws is the corruption of the competitive process, not the success or failure of a particular firm' or individual."[2] Our focus is whether the practices in question, by leading to the exclusion of a competitor selling a narrow range of products, may adversely affect consumers, particularly when consumers benefitted from the presence of a competitor with a different operational structure.

A key issue in the present case is whether the existence of bundle-to-bundle competition, which currently is taking place among three broadline distributors, is sufficient to ensure that customers' interests are safeguarded. In particular, the Court cites Hovenkamp & Hovenkamp (2009), stating that "if bundle-to-bundle discount competition can occur in a market, then a particular firm's bundled discount cannot be exclusionary unless its overall price is below its costs. Otherwise an equally efficient firm exists that would be able to match the discounted price and earn a profit."[3]

The Court's holding assumes that the bundling firms are efficient and competitive across the entire collection of bundled goods and services. The evidence cited in the Amended Memorandum and Order suggests that, prior to Suture Express' entry into the market, incumbent firms were not efficient in their

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[2] Amended Memorandum and Order, p. 53.

[3] Herbert Hovenkamp & Eric Hovenkamp, *Complex Bundled Discounts and Antitrust Policy*, 57 BUFF. L. REV. 1227, 1231 (July 2009).

distribution of suture and endo products. The subsequent introduction of bundling rebates in response to Suture Express' success in the market could foreclose the market to other fleet-footed entrants who could improve efficiency to the benefit of customers.

There is abounding literature on the potential consequences of tying and/or bundling that was not considered in Hovenkamp & Hovenkamp (2009), and which we believe warrants further consideration by the Court to ensure that the competitive process is not harmed by the defendants' tying practices. In particular, the dynamic effects of the tying or bundling arrangements do not appear to have been fully considered. These arrangements could adversely affect future entry and innovation in the market for distribution of med-surg products. To put the point differently, the conduct at issue could eliminate rivalry from present and future disruptive and innovative competitors who could yield very substantial consumer benefits.

In this regard, the US Horizontal Merger Guidelines rightly emphasize that mergers may lessen competition by eliminating "maverick" firms, *i.e.*, firms that play a disruptive role in the market to the benefit of customers:

> For example, if one of the merging firms has a strong incumbency position and the other merging firm threatens to disrupt market

> conditions with a new technology or business model, their merger can involve the loss of actual or potential competition.[4]

This issue, of course, applies more generally to anti-competitive conduct that eliminates rivals or discourages market entry.

We agree that bundling and tying may allow firms to realize efficiencies that potentially could be passed on to consumers. However, the Amended Memorandum and Order offers no specific evidence that this occurred in the present case, nor does it offer evidence that the loyalty-inducing nature of the discounts was indispensable for achieving any claimed efficiencies. While the Amended Memorandum refers to the possibility that bundled med-surg distribution may have offered real price/cost and service quality benefits, it does not provide guidance on whether consumer interest would have been better served without a tie. In fact, the Court and the defendants appear to accept that at least some customers paid higher prices and received lower quality service than they would have in absence of the tying arrangement.[5]

Additionally, in a bidding market – where firms compete to win contracts and offer differentiated ranges of products – there would be no general presumption that

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[4] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 2.1.5 (2010) [hereinafter 2010 Guidelines].

[5] Amended Memorandum and Order, pp. 54-55.

three competitors are sufficient to ensure competitive outcomes. In some regions, the presence of regional rivals may increase competition, but regional rivals do not necessarily exert competitive pressure nationwide.

Against this background, we consider that this case raises precedent issues. If the Court's approach were to be followed more generally, it could permit the exclusion of innovative new distribution channels that challenge markets predominantly served by a small number of rivals.

ARGUMENT

I. CURRENT MARKET CONDITIONS DO NOT RULE OUT ANTICOMPETITIVE BEHAVIOR

The Court considered that "no reasonable jury could conclude that defendants have the power to exclude competition or control price."[6] The conclusion is based on the findings that

- "the record … lacks evidence of defendants' ability to control prices" and "O&M and Cardinal's profit margins have declined since 2008,"
- "acute care customers are consolidating," and

[6] Amended Memorandum and Order, p. 52.

- "several med-surg distributors, including Suture Express' CFO, testified that consolidation has increased customers' buying power and created a very competitive marketplace."[7]

These factual findings, however, do not rule out the possibility that defendants' actions have led or may lead to market foreclosure.

As Salop (2006) notes, "[e]xclusion involves a firm (*or group of firms*) raising the costs or reducing the revenues of competitors in order to induce the competitors to raise their prices, reduce output, or exit from the market" (emphasis added).[8] Exclusion and market foreclosure also can occur when incumbent competitors engage in similar practices that would be deemed exclusionary if carried out by a market actor with market power and has the combined effect of excluding new and potential entrants. This behavior is denoted by Hemphill & Wu (2013) as "parallel exclusion"[9] and does not require explicit communication between the producers. Each firm is able to deduce from the market outcome whether it is in its own best interest to continue with the practice that, collectively, forecloses the market.

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[7] Amended Memorandum and Order, pp. 51-52.
[8] Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L.J. 311, 311 (2006).
[9] *See, e.g.*, Scott C. Hemphill & Tim Wu, *Parallel Exclusion*, 122 YALE L.J. 1182 (2013).

The declining profit margins observed in the market are not necessarily an indication that defendants lack market power. In general, declining margins may also be an example of, *inter alia*, a temporary reaction of incumbent firms to entry, a breakdown of a cartel agreement, or a recurring breakdown of (tacit) cartel activity in response to a reduction in individual firms' demand.[10] An aggressive pricing strategy might "find its rationale in the attempt to create a reputation of being a strong and aggressive incumbent to discourage entry (in other markets by the same competitor, or in the same market by others) tomorrow."[11] Margins could rise above competitive levels once competitors, such as Suture Express, exit the market.

Finally, the fact that acute care customers are consolidating does not guarantee that customers have or will retain a strong bargaining position vis-à-vis suppliers. Customers' bargaining power depends on their ability to credibly threaten to switch to an alternative supplier of med-surg products.[12] If the defendants' current behavior reduces customers' choices in the future, for example by removing a credible lower-cost distributor, then buyer power might be compromised.

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[10] Edward J. Green & Robert H. Porter, *Noncooperative Collusion under Imperfect Price Information*, 52 ECONOMETRICA 87 (1984).
[11] MASSIMO MOTTA, COMPETITION POLICY: THEORY AND PRACTICE 216 (2004).
[12] SIMON BISHOP & MIKE WALKER, THE ECONOMICS OF EC COMPETITION LAW 82-84 (3d ed. 2010).

II. ABSENCE OF MONOPOLY DOES NOT IMPLY ABSENCE OF MARKET POWER

The Court notes that the absence of a monopoly means that there is no incentive to exclude rivals because excess profits would be competed away:

> In a market without a monopolist, a seller of a full range of products has no incentive to exclude the rival who sells only the tied product because other full range sellers competing in the market still can defeat any effort to raise prices. ... Even if defendants excluded Suture Express, other med-surg distributors in the market (such as Medline) can prevent defendants from raising prices.[13]

The absence of a monopolist does not necessarily mean that the market is competitive, as there are numerous other market structures in which price levels can be sustained above competitive levels. Economic theory provides numerous examples of market structures characterized by imperfect competition.[14] Even markets with several firms can be characterized by prices that are consistently above competitive levels; for example, certain types of oligopolies and markets where firms are able to collude tacitly, i.e., without communicating pricing decisions directly with each other.

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[13] Amended Memorandum and Order, p.39.

[14] For an overview of economic models that address how firms behave in markets where their actions influence prices, *see* JEFFREY CHURCH & ROGER WARE, INDUSTRIAL ORGANIZATION: A STRATEGIC APPROACH 305-415 (2000).

III. Bundle-to-Bundle Competition Does Not Ensure That Customers Get The Best Market Outcome in the Short Run

Tying clauses by definition impair or remove customers' ability to procure the various products in the bundle from separate sources. Unless every producer – or, in this case, distributor – is as efficient as every other competitor in the tying and tied markets, this can lead customers to pay more for the bundle than they would if they were able to buy components separately. That is, if one producer is more efficient (*i.e.*, has a lower cost) than the competition in the tying product and another is more efficient than the competition in the tied product, then customers would be better off buying the tying product from the former and the tied product from the latter.

For example, if there are two or more producers of type "A" who can sell the tying product at $5 and the tied product at $10, and two or more producers of type "B" who can sell the tying product at $10 and the tied product at $5, then bundle-to-bundle price-setting competition would lead consumers to pay $15 for bundles (assuming each bundle contains one tying and one tied product). However, in absence of tying, consumers would buy the tying product from a type A producer at $5 and the tied product from a type B producer at $5, paying a total of $10 for the pair of products instead of $15 for a bundle. Customers are similarly harmed in a situation where an additional producer type "C" specializes on distributing only the tied product at $5, and the tie prevents consumers from buying the tied product at the lower cost ($5) from the specialist producer.

The example above assumes that all producers sell the same products, *i.e.*, that there are no differences between the tying goods offered by the various producers, nor between their tied products. Other factors, such as product differentiation and the number of producers, introduce competitive interaction that mean that the effect of bundling on prices can be ambiguous. Nalebuff (2001) finds that in a duopoly with differentiated products, bundling can lead to lower prices, but notes that this can deter future entry because "there are much lower profits available to an entrant if the incumbent has a bundle in the market."[15] Zhou (2016) extends the analysis to three or more competitors and finds that even with differentiated products, bundle versus bundle competition can lead to higher prices.[16]

Joint distribution (or production) efficiencies may make it more efficient to produce and sell bundles, even if some individual producers have lower stand-alone production costs for some of the products. Joint distribution (or production efficiencies), also referred to as economies of scope, are "cost-saving externalities

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[15] Barry Nalebuff, *Competing against Bundles* in INCENTIVES, ORGANIZATION, AND PUBLIC ECONOMICS: PAPERS IN HONOUR OF SIR JAMES MIRRLEES 323 (Peter J. Hammond & Gareth D. Myles eds., 2001).
[16] Jidong Zhou, Competitive Bundling (March 2016) (unpublished manuscript) *available at* https://sites.google.com/site/jidongzhou77/research.

between product lines (e.g., the production of good A reduces the production cost of good B)."[17] More concretely, these efficiencies exist when the cost of producing two products jointly is lower than the sum of the standalone costs of producing them separately.[18] That is, there are joint production efficiencies if the cost of producing A and B jointly is lower than the sum of cost of producing only A and the cost of producing only B. It is not clear from the decision that the total cost of distributing endo-sutures and other med-surg products together is lower than the cost of distributing each separately. The defendants' decision, however, to establish centralized distribution centers for endo-sutures[19] is consistent with the notion that they found it to be more efficient to distribute endo-sutures separately from other med-surg products in light of the current competitive landscape.

The evidence also suggests that Suture Express' market entry with an unbundled product has benefited customers. According to the Amended Memorandum, the Plaintiff entered the market for supplying suture and endo products with a higher quality, lower priced offering than the incumbents. As the Court noted,

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[17] JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION 16 (1997).

[18] *Id.* at 20.

[19] Amended Memorandum and Order, pp. 17-18.

- "Historically, Suture Express has maintained a fill rate higher than 99%, and, in many instances, has higher fill rates than O&M and Cardinal."[20]
- "O&M recognized that customers subject to bundling will face higher prices if they choose to purchase suture and endo distribution from Suture Express."[21]
- The analysis carried out by Suture Express's expert "shows that prices are higher than they would be but for the defendants' contracts containing bundling terms. And, Suture Express contends, customers paid these higher prices while suffering lower fill rates."[22] The Court does not appear to dispute this, but notes that Suture Express failed to show that this was true market-wide.

In light of the aforementioned, we believe that there is a distinct possibility that reliance on bundle-to-bundle competition will not guarantee the best-possible outcome for consumers in the current market for distribution of med-surg products.

IV. BUNDLE-TO-BUNDLE COMPETITION DOES NOT ADDRESS THE LONG-RUN EFFECTS OF EXCLUSIONARY BEHAVIOR

[20] Amended Memorandum and Order, p.6.
[21] Amended Memorandum and Order, p.12.
[22] Amended Memorandum and Order, p. 55.

There is extensive literature that discusses the conditions under which bundling and tying can have an anti-competitive effect and reduce welfare, in particular by altering how markets evolve over time. In broad terms, the literature deals with the mechanisms through which bundling and tying may enable incumbents to curtail competitors' ability to impose a pricing constraint, and the ways in which bundling and tying can influence potential future competitors' decisions to enter the markets for the products in the bundle.

If a large fraction of suppliers, measured by aggregate market share, engages in the same type of bundling behavior, then the theoretical models described below can provide a useful starting point for assessing the effect of their behavior on competition and consumer welfare. Moreover, as noted above, margins for the main players have been decreasing, which may reflect the existence of some degree of market power prior to the entry of Suture Express.

A. THE DEFENDANTS' PRACTICES DEPRIVE ENTRANTS' ABILITY TO ACHIEVE SCALE ECONOMIES

In the present case, Suture Express has presented evidence consistent with the possibility that the defendants' tying practices limit the demand that is addressable by Suture Express and potential future entrants who aim to distribute only part of the med-surg product range. The Court's Amended Memorandum indicates that Suture Express' success in the supply of suture and endo products prompted Cardinal and

O&M to place more weight on contracts with tying or bundling clauses.[23] Tying clauses unequivocally place certain volume of suture and endo sales outside the addressable demand of an entrant who does not supply the full slate of products. As a result, Suture Express is precluded from serving a potentially large fraction of demand:

- For almost 70% of Cardinal's contracts, "at least one of the following contract terms: (1) an 80%+ med-surg distribution purchase requirement, or (2) a suture and endo distribution volume purchase requirement."[24]
- "Almost every agreement included a term allowing O&M to increase prices on other med-surg distribution if the customer switched its suture and endo distribution to another distributor, such as Suture Express."[25]

[23] "Both O&M and Cardinal engaged in separate, internal communications about the increasing threat that Suture Express, because of its superior fill rates and low pricing, posed to their businesses. Around the same time, O&M and Cardinal adopted contractual terms that made pricing contingent on a customer's purchase of suture and endo distribution through them." Amended Memorandum and Order, p. 8.

[24] Amended Memorandum and Order, p. 9.

[25] Amended Memorandum and Order, pp. 9-10.

- "In some contracts, Cardinal imposes markups on med-surg distribution unless the customer purchases 100% of its suture and endo products from Cardinal."[26]
- "Other agreements provide for higher markups on med-surg distribution if the customer reserves the right to purchase suture and endo products from other distributors." [27]
- "Some agreements make markups on med-surg distribution contingent on the customer purchasing a certain percentage (in some cases, 95%) … of all med-surg products from Cardinal."[28]
- "Cardinal's standardized agreements with the five largest GPOs have contingent pricing terms or impose markups if the customer fails to purchase a certain percentage (in some cases 100%) of suture and endo distribution from Cardinal."[29]
- "O&M agreements rendered markups on all med-surg distribution contingent on the customer purchasing a high percentage of med-surg distribution from O&M."[30]

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[26] Amended Memorandum and Order, p. 8.
[27] Amended Memorandum and Order, p. 8.
[28] Amended Memorandum and Order, pp. 8-9.
[29] Amended Memorandum and Order, p. 9.
[30] Amended Memorandum and Order, p. 9.

- "O&M made markups contingent on customers purchasing the top 10 Healthcare Products Information Services categories (which include suture and endo) from O&M."[31]
- "O&M's current standardized agreements with the five largest GPOs impose markups if the customer fails to purchase a certain percentage of suture and endo distribution from O&M."[32]

These tying and bundling clauses reduce the volume of end-suture products that customers could purchase from a separate supplier such as Suture Express.

Furthermore, according to Nalebuff (2014), tying can deprive entrants in multiproduct markets of the ability to achieve scale.[33] As a result of tying, an entrant in the market for the tied good is limited to selling only to customers who either do not have a demand for the tying product or who are not subject to a tying clause. In the presence of fixed costs, the entrant's ability to take advantage of economies of scale is impaired. Existing competitors who cannot achieve sufficient scale to cover their fixed costs may be forced to exit the market, and potential competitors may decide against entering. Even when competitors are not forced out of the market or entry is not foreclosed, the practice may lead to higher prices because the

[31] Amended Memorandum and Order, p. 9.
[32] Amended Memorandum and Order, p. 10.
[33] Barry Nalebuff, *Bundling as an Entry Barrier*, 119 Q.J. ECON. 159 (2004).

competitive pressure is reduced as a result of the non-tying rival's impaired ability to take advantage of scale economies.

B. TYING INCREASES THE RISKINESS OF ENTRY

Choi & Stefanadis (2001)[34] consider tying of complementary products in a setting where the incumbent faces potential entry in each market, *i.e.*, in the tying market and in the tied market. In their model, entry requires an investment and is risky. That is, there is a possibility that a company will invest in entering the market and not be able to establish itself successfully, irrespective of competitors' reactions.

If the incumbent commits to tying the products, then the entrant is competing against a bundle and needs to enter both markets. The entrant is thus forced to make a separate, risky investment to enter each of the bundle's markets. If any of the entrant's (costly) attempts to enter the markets in the bundle is unsuccessful – *i.e.*, if the entrant is only able to enter successfully markets for one of the products – then the entire attempt at entering the market fails because the entrant is not able to offer the full bundle. The joint probability of successful entry in both markets is smaller than that of being able to successfully offer one product. As a result, tying reduces potential entrants' expected return to investment in market entry, which reduces their willingness to invest in the first place. The higher risk means that a potential entrant

[34] Jay Pil Choi & Christodoulos Stefanadis, *Tying, Investment, and the Dynamic Leverage Theory*, 32 RAND J. ECON. 52 (2001).

will require a higher expected return to investing in entry, *i.e.*, some entry that would occur in absence of the tying practices is deterred. Choi & Stefanadis (2001) conclude that "determining the effects of tying … is an empirical matter. It may be that the dynamic leverage theory is indeed relevant to some cases, while in others tying is efficient."[35]

Forcing an entrant to address both markets – in this case, endo-sutures and other med-surg products – can also dilute consumer benefit of innovation. As discussed in the hypothetical example above, different competitors may be more efficient in different markets. For instance, if an entrant is more efficient than the incumbents in the tied market (*e.g.*, sutures and endo products) but less efficient in the market for the tying product (*e.g.*, other med-surg products), then tying the benefit of buying from the entrant would be lessened by the fact that customers have to pay a higher price for the other med-surg products to benefit from the lower prices for suture and endo. This, in turn, could also mitigate competitive pressure from innovative entry on incumbents, as customers are less likely to switch to the entrant if the benefits are less pronounced or nonexistent.

[35] *Id.* at 70.

CONCLUSION

Bundle-to-bundle competition, as seen in the markets for distributing med-surg products to hospitals, does not necessarily allay concerns about the anticompetitive effects of the tying behavior observed in these markets. As discussed above, it may lead customers to pay more than they would if they were able to buy the bundled products separately. It also limits addressable demand for new entrants, potentially impairing their ability to reach scale and lower prices, potentially discouraging future market participants from entering. It can further deter potential competitors from entering when market entry is risky and entails an up-front, sunk investment, by forcing entrants to incur risky entry costs in two markets rather than one.

Date: June 21, 2016

/s/ David A. Balto
David A. Balto
Law Offices of David A. Balto
1325 G. Street, N.W.
Suite 500
Washington, D.C. 20005
(202) 577-5424
David.Balto@dcantitrustlaw.com
Counsel of Record

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 4,343 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

Dated: June 21, 2016

By: /s/ David A. Balto
David A. Balto
Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system on June 21, 2016.

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By: /s/ David A. Balto
David A. Balto
Attorney for Amici Curiae