No. 20-13561

IN THE
United States Court of Appeals for the Eleventh Circuit

JARVIS ARRINGTON et al.,
Plaintiffs-Appellants,

v.

BURGER KING WORLDWIDE, INC. et al.,
Defendants-Appellees.

On Appeal from the
United States District Court for the Southern District of Florida
No. 1:18-cv-24128 (Hon. Jose E. Martinez)

BRIEF OF AMICUS CURIAE UNITED STATES OF AMERICA IN SUPPORT OF NEITHER PARTY

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Pursuant to Eleventh Circuit Rules 26.1-1 to 26.1-3, 28-1(b), and 29-2, the undersigned certifies that, in addition to those persons and entities set forth in the Certificate of Interested Persons and Corporate Disclosure Statement in Appellants' brief, the persons and entities listed below are known to her to have an interest in the outcome of this case or to have participated as attorneys or judges in the adjudication of this case. Counsel notes that the stock symbol for Restaurant Brands International Inc., a publicly traded entity listed in Appellants' brief, is QSR.

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STATEMENT OF INTEREST

The United States enforces the federal antitrust laws and has a strong interest in their correct application. In particular, the United States enforces Section 1 of the Sherman Act, 15 U.S.C. § 1, through both civil actions and criminal prosecutions. Section 1 applies to agreements between two or more individuals or entities (often referred to as "firms" in antitrust jurisprudence), but it does not apply to the unilateral conduct of a single firm. Given the importance of the distinction between concerted action, which is subject to Section 1, and unilateral single-firm conduct, which is not, the United States has filed amicus briefs and statements of interest in cases addressing the law applicable to Section 1's concerted-action requirement. *See, e.g.*, *Visa Inc. v. Osborn*, No. 15-961, 2016 WL 11663129 (U.S., filed Oct. 24, 2016); *Am. Needle, Inc., v. Nat'l Football League*, No. 08-661, 2009 WL 10730635 (U.S., filed Sept. 25, 2009); *Stigar v. Dough Dough, Inc.*, No. 2:18-cv-244, 2019 WL 7756377 (E.D. Wash., filed Mar. 8, 2019). It does so again here, pursuant to Federal Rule of Appellate Procedure 29(a)(2).

STATEMENT OF THE ISSUE

Whether the district court erroneously applied a categorical rule that a franchisor and franchisee are legally incapable of conspiring over the terms of their franchise agreement, instead of correctly evaluating how the franchise system allegedly operated in practice and determining whether the complaint plausibly pleaded that the franchisor and franchisees had disparate economic interests and decisionmaking authority concerning employee hiring.

STATEMENT OF THE CASE

Jarvis Arrington, Geneva Blanchard, and Sandra Munster (the employees) sued Burger King Corporation and its corporate parents for allegedly violating Section 1 of the Sherman Act, 15 U.S.C. § 1. The district court dismissed the employees' first consolidated complaint (Compl.) and denied their motion for leave to file an amended complaint. The employees appeal.[1]

[1] Because this appeal arises (in part) from a dismissal under Fed. R. Civ. P. 12(b)(6), the United States treats the allegations as if they were true, without taking any position on their accuracy.

I. Legal Background

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. By its terms, the statute applies only to conduct that constitutes a "contract, combination . . . , or conspiracy," *id.*—also referred to as "concerted action." "The question whether an arrangement is a contract, combination, or conspiracy is different from and antecedent to the question whether it unreasonably restrains trade." *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 186 (2010). To qualify as concerted action, the alleged arrangement must be (i) an agreement (ii) between two or more entities capable of engaging in concerted action. *See id.* at 189-90.

Entities are legally capable of engaging in concerted action if the arrangement alleged to exist between them "'deprives the marketplace of independent centers of decisionmaking' . . . and thus of actual or potential competition." *Am. Needle*, 560 U.S. at 195 (quoting *Copperweld Corp. v. Indep. Tube Corp.*, 467 U.S. 752, 769 (1984)). Determining whether this standard is met requires "a functional

consideration of how the parties involved in the alleged anticompetitive conduct actually operate." *Id.* at 191.

Antitrust law treats the coordinated activity of certain related entities as the conduct of a single entity. *See Am. Needle*, 560 U.S. at 195-96. For example, the "internally coordinated conduct of a corporation and one of its unincorporated divisions" and "the coordinated activity of a parent and its wholly owned subsidiary" are not that of independent centers of decision-making. *Copperweld*, 467 U.S. at 770, 771. When such entities coordinate their conduct, they "pursue[] the common interests of the whole," *id.* at 770, "have a complete unity of interest," *id.* at 771, and thus "must be viewed as a single economic unit," *id.* at 772 n.18. This rule rests on the principle of corporate-wide profit maximization, which "posits that a business with multiple divisions will seek to maximize its total profits." *United States v. AT&T, Inc.*, 916 F.3d 1029, 1043 (D.C. Cir. 2019); *see also, e.g.*, Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*[2] ¶ 113 ("business firms are

[2] This treatise is cited herein as Areeda & Hovenkamp, *Antitrust Law* [paragraph number]. All citations are to the version in Wolters Kluwer's Cheetah online library.

(or must be assumed to be) profit maximizers"). In other words, antitrust law assumes that divisions within a corporation, or wholly owned subsidiaries within a corporate family, "will act to pursue the common interests of the whole corporation" in order to maximize the profits of the whole corporation. *AT&T*, 916 F.3d at 1043.

The treatment of other combinations of actors is fact-dependent. Members of joint ventures and similar associations generally are "substantial, independently owned, and independently managed business[es]" with distinct and potentially competing interests. *Am. Needle*, 560 U.S. at 196. Courts have consistently applied Section 1 to the conduct of joint ventures and other cooperative arrangements when they restrain actual or potential competition among their members. For example, in 2010, the Supreme Court held that the National Football League Properties (NFLP), a separate entity formed by the 32 teams in the National Football League (NFL), was capable of engaging in concerted action when it made decisions about the licensing of the teams' trademarks and other "separately owned intellectual property." *Id.* at 201. The Court in *American Needle* explained that the teams were acting through the NFLP, but "not like the components of a single

firm that act to maximize the firm's profits." *Id.* Instead, the teams "remain[ed] separately controlled, potential competitors with economic interests that [we]re distinct from [the jointly owned corporation's] financial well-being." *Id.*

By contrast, the actions of these types of associations are unilateral when they concern matters over which the members' separate businesses would not otherwise act independently. For example, "if the [American Bar Association] decides to have its annual meeting in San Francisco, or to enlarge its committee on the accreditation of law schools, these decisions would be treated as unilateral" because such decisions do not eliminate the independent "market behavior of individual members." Areeda & Hovenkamp, *Antitrust Law* ¶ 1477.

II. Factual And Procedural Background

Burger King Corporation (BKC or Burger King) "is the current franchisor of Burger King brand franchise restaurants in the United States and also owns and operates approximately fifty Burger King branded restaurants in the Miami area." Compl. ¶ 22 (Dkt. 34).[3]

[3] Docket citations (Dkt.) refer to the district court ECF number.

According to the employees, from at least 2010 to September 2018, all Burger King franchise agreements included the following provision:

> Neither BKC [Burger King Corporation] nor Franchisee will attempt, directly or indirectly, to entice or induce, or attempt to entice or induce any employee of the other or of another Franchisee of BKC to leave such employment, or employ such employee within six (6) months after his or her termination of employment with such employer, except with the prior written consent of such employer.

Id. ¶ 8 (brackets in original). The employees refer to this provision as the "No-Hire Agreement" among Burger King and its franchisees. *Id.* ¶ 1. According to them, "[a]s part of the system that has made Burger King the fastest-growing fast food restaurant chain in the United States, Burger King franchisees, at the direction of and with the assistance of Burger King itself, have together colluded to depress the wages and employment opportunities of employees who work in Burger King branded restaurants throughout the United States." *Id.* ¶ 7; *see also id.* ¶ 10 (describing this agreement as "between and among Burger King and its franchisees").

The employees worked at independently owned Burger King restaurants in Illinois (Arrington and Munster) and Louisiana (Blanchard). Compl. ¶¶ 106-16 (Dkt. 34). Both Arrington and Munster

sought to transfer to different Burger King restaurants within Illinois. *Id.* ¶¶ 106, 113-14. Arrington, a line cook, applied to work at a Chicago location, but was told he needed his original Dalton location's permission to transfer and then did not receive any further communication from the Chicago Burger King. *Id.* ¶ 106. Munster, a general manager, left employment at an Ottawa Burger King and applied for a job at a Marseilles location, but the Ottawa owner denied Munster the requisite release that would have allowed her to take the new job. *Id.* ¶¶ 113-14. Blanchard, a crew member, worked at a restaurant in Slidell and experienced a reduction in pay and reduced shifts. *Id.* ¶ 109. All three employees alleged that, "[a]s a result of Defendants' No-Hire Agreement," they were "paid artificially depressed wages and suffered decreased benefits and job mobility." *Id.* ¶¶ 107, 110, 116.

The employees challenged the legality of the No-Hire Agreement under Section 1 of the Sherman Act, filing a putative class action against Burger King and its corporate parents. Compl. (Dkt. 34). The employees alleged that, "[i]n a properly functioning and lawfully competitive labor market, Burger King and its franchisees would

compete for labor." *Id.* ¶ 33. "In the absence of a No-Hire Agreement, a Burger King store or a franchise owner would face increased pressure to offer periodic pay increases, superior benefits, better working hours, and better work-schedule flexibility to retain employees." *Id.* ¶ 44. "The No-Hire Agreement eliminates any incentive for, and in fact prohibits, Burger King branded restaurants from competing with each other for employees. Thus, employees are deprived of higher wages and better job growth opportunities." *Id.* ¶ 46.

The employees characterized the No-Hire Agreement as one "to allocate service markets," which is "functionally the same as" an agreement "to allocate territories for the sale of products. Both are simply a means to fix prices." Compl. ¶ 39 (Dkt. 34). Accordingly, they claimed, the agreement was per se unlawful or, in the alternative, unlawful under the quick-look doctrine. *Id.* ¶¶ 156-57.

Burger King moved to dismiss the amended complaint under Fed. R. Civ. P. 12(b)(6). Dkt. 42. It argued that the complaint alleged a restraint subject to analysis under the rule of reason instead of the per se rule or the quick-look doctrine; failed to include any allegations concerning the relevant market (as required under the rule of reason);

alleged a conspiracy between entities legally incapable of conspiring (a franchisor and its franchisees); failed to include allegations of any wrongdoing by BKC's corporate parents; and sought relief for conduct outside of the statute of limitations.

The district court granted Burger King's motion to dismiss, addressing only one of the grounds raised in the motion: Burger King's argument that the employees had not, and could not, plead concerted action because Burger King was legally incapable of conspiring with its franchisees under the Sherman Act. *See* Mar. 24, 2020 Order (Dkt. 67). The court concluded that the Burger King franchise system was "a paragon example of the type of unity decisionmaking untouched by § 1." *Id.* at 10. Giving "controlling significance" to "the standard franchise agreement in this matter," *id.* at 12, the court determined that each franchisee's "residual economic autonomy with respect to employment decisions" was "insufficient to convert" each franchisee "into a separate economic actor," *id.* at 10. According to the court, therefore, "Burger King's No-Hire Agreement constitutes an 'internal "agreement" to implement a single, unitary firm's policies,'" which "does not implicate

antitrust principles." *Id.* at 12 (citation omitted; quoting *Copperweld*, 467 U.S. at 769).

The district court ordered that the complaint be dismissed because "the allegations of concerted action are wholly coextensive with the standard franchise agreement before the Court." Mar. 24, 2020 Order 11-12 (Dkt. 67). The court gave the employees permission to file a motion for leave to amend the complaint. *Id.* at 12.

The employees filed such a motion. Dkt. 71. They argued that, "under *American Needle*, to determine whether Burger King and its franchisees are capable of an antitrust conspiracy with respect to the labor market, the Court must undertake a fact-based evaluation of whether, but for the alleged No-Hire Agreement, they would otherwise be separate and independent decisionmakers with respect to their employees" *Id.* at 6. They asserted that their proposed amended complaint offered "new and more detailed allegations" demonstrating that the answer to this question was yes. *Ibid.*

The district court denied the employees leave to amend. *See* Aug. 24, 2020 Order (Dkt. 74). It acknowledged that their "new allegations further unravel how Burger King and its franchisees compete in the

market for labor," but the court agreed with Burger King that "these matters were already considered in the dismissal order." *Id.* at 3. The court explained that the employees' "amended pleading is predicated on the same theory this Court already rejected, namely, that micro-competition in the realm of labor is sufficient to classify two entities as independent source of economic power for Section 1 purposes without taking stock of the broader relationship between with parties." *Ibid.*

The district court entered a final judgment of dismissal with prejudice. Dkt. 75. This appeal followed.

SUMMARY OF ARGUMENT

The district court's orders dismissing the complaint and denying the employees leave to file an amended complaint were premised on legal error. Although the court correctly acknowledged that the concerted-action analysis should be functional and fact-intensive, the court incorrectly applied a formalistic and categorical rule in this case. The court gave "controlling significance" to the fact that the challenged No-Hire Agreement was contained within Burger King's franchise agreement. According to the court, because the franchise agreement established certain uniform standards across the Burger King franchise

system, it did not matter whether Burger King and the franchisees engaged in what it called "micro-competition" in the labor market; Burger King and its franchisees were a single economic unit.

The district court's reasoning is contrary to the principles articulated by the Supreme Court in *Copperweld* and *American Needle*. Because the independently owned franchisees are not corporate divisions or subsidiaries of Burger King, they are not categorically a single entity under *Copperweld*. The court should have followed the analysis set forth in *American Needle*, evaluated how the franchise system allegedly operates in practice, and determined whether the complaint plausibly pleaded that the franchisor and franchisees had disparate economic interests concerning employee hiring.

The United States respectfully submits that this Court should reject the district court's concerted-action analysis and explain the correct legal standard. The United States takes no position on the existence or viability of any potential alternative bases to affirm,[4]

[4] To the extent this Court elects to consider the other elements of the employees' Section 1 claim, the United States' Corrected Statement of Interest, *Stigar v. Dough Dough, Inc.*, No. 2:18-cv-244, 2019 WL 7756377 (E.D. Wash., filed Mar. 8, 2019) (Dkt. 34), discusses at length the United States' views on the correct standards of legality applicable

however, and therefore takes no position on the ultimate disposition of this appeal.

ARGUMENT

Section 1 Requires Courts To Engage In A Functional, Fact-Specific Analysis To Determine Whether The Plaintiff Has Pleaded Plausibly That A Franchisor Is Legally Capable Of Conspiring With Its Franchisees.

The district court was generally correct that "assessing whether a franchisor-franchisee relationship is capable of constituting a concerted action" requires a "fact-specific and functional approach." Mar. 24, 2020 Order 11 (Dkt. 67). The court erred, however, by failing to apply such an approach correctly and instead giving "controlling significance" to the fact that the No-Hire Agreement existed within the "standard franchise agreement" governing the relationship between Burger King and its franchisees. *Id.* at 12. According to the court, "Burger King's No-Hire Agreement constitutes an 'internal "agreement" to implement a single, unitary firm's policies,' and does not implicate antitrust principles." *Ibid.* (citation omitted; quoting *Copperweld Corp. v.*

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to agreements among employers in a franchise relationship not to solicit or hire each other's employees.

Independence Tube Corp., 467 U.S. 752, 769 (1984)). The court's ruling reflects a misunderstanding of applicable law.

A. Concerted-Action Analysis Should Focus On The Alleged Conspirators' Economic Interests As They Relate To The Challenged Restraint.

1. There appears to be no dispute that "Burger King franchises are independently owned and operated and generally responsible for their own hiring." Mar. 24, 2020 Order 2 (Dkt. 67). This case therefore does not present the circumstances described in *Copperweld*, 467 U.S. at 771, where closely related corporate entities—such as a parent and its wholly owned subsidiary, or a corporation and its unincorporated division—are assumed to "have a complete unity of interest." Because no such legal assumption applies here, the district court should have applied the fact-specific approach set forth in *American Needle, Inc. v. National Football League*, 560 U.S. 183 (2010), to assess the plausibility of the employees' allegations of concerted action.

American Needle recognized that an association of multiple entities might share aligned interests and coordination among them might result in each maximizing its own profits—in that circumstance, however, each entity retains its own interest in profit maximization

irrespective of how the association fares as a whole. *See* 560 U.S. at 198. In reaching its decision, the Court evaluated the summary-judgment record to determine whether the 32 NFL teams that had formed the NFLP to "market their NFL brands through a single outlet," *id* at 197, were "still separate, profit-maximizing entities" "in the relevant functional sense," *id.* at 198. The Court disagreed with the court of appeals' conclusion that the teams "can function only as one source of economic power when collectively producing NFL football" and, therefore, "only one source of economic power controls the promotion of NFL football." *Id.* at 188, 189 (quoting Seventh Circuit decision). The Court instead explained that, although the teams "may be similar in some sense to a single enterprise that owns several pieces of intellectual property and licenses them jointly, . . . they are not similar in the relevant functional sense." *Id.* at 198. The teams shared "common interests such as promoting the NFL brand," but they were "still separate, profit-maximizing entities, and their interests in licensing team trademarks [we]re not necessarily aligned." *Ibid.*

Pursuant to *American Needle*'s approach (appropriately tailored to apply to the pleadings rather than the summary-judgment record), the

district court should have accepted as true any "well-pleaded, nonconclusory factual allegation[s]," *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009), concerning "how the parties involved in the alleged anticompetitive conduct actually operate[d]," *Am. Needle*, 560 U.S. at 191. Then, the court should have assessed whether "the complaint's well-pleaded facts g[a]ve rise to a plausible inference," *Iqbal*, 556 U.S. at 682, that, with respect to the alleged anticompetitive activity (restrictions on employee hiring), BKC and the franchisees did "not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action," *Am. Needle*, 560 U.S. at 196.

Rather than engaging in this analysis, however, the district court incorrectly distinguished *American Needle*, *see* Mar. 24, 2020 Order 8-9 (Dkt. 67), and treated the fact that the No-Hire Agreement appeared in the Burger King franchise agreement as dispositive, *id.* at 12. In so doing, the court resolved factual disputes in a manner that was inappropriate on a Fed. R. Civ. P. 12(b)(6) motion to dismiss, and it misread and misapplied *American Needle* in at least two respects. First, the court misconstrued *American Needle* as requiring a single

answer governing all coordinated activity among related parties, when it should have evaluated functionally whether the franchisor and franchisees had disparate economic interests *with respect to the challenged restraint*. Second, the court misconstrued *American Needle* as inapplicable to cases in which coordination and uniformity among the parties is necessary for the success of a common endeavor, when *American Needle* expressly addressed these considerations and explained that they were justifications for the cooperation—not factors relevant to determine whether the challenged restraint was the product of concerted action.

2. a. First, the district court purported to apply what it termed *American Needle*'s "totality-of-the-circumstances" approach, Mar. 24, 2020 Order 9 (Dkt. 67), when it unduly minimized what it deemed the Burger King restaurants' "micro-competition in the realm of labor," Aug. 24, 2020 Order 3 (Dkt. 74). The court appeared to misconstrue *American Needle* as requiring a court to resolve whether the participants in a cooperative endeavor are capable of concerted action for all purposes, without regard to the particular restraint being challenged. *American Needle* does not support this approach. The

Court there explained that the analysis should focus on the particular agreement challenged as a restraint of trade: "The question is whether *the agreement* joins together independent centers of decisionmaking. If it does, the entities are capable of conspiring under § 1, and the court must decide whether the restraint of trade is an unreasonable and therefore illegal one." *Am. Needle*, 560 U.S. at 196 (emphasis added; citation and quotation marks omitted)); *see also, e.g.*, Areeda & Hovenkamp, *Antitrust Law* ¶ 1478d3 (agreeing that concerted-action analysis should "focus on the particular practice under antitrust scrutiny").

The *American Needle* Court declined to adopt the very analysis that the district court applied in this case—that is, to decide whether the NFL as a whole (like, here, the Burger King franchise system as a whole) acted as a single entity for all purposes. The NFL had argued that "coordinated team trademark sales are necessary to produce 'NFL football,' a single NFL brand that competes against other forms of entertainment." *Am. Needle*, 560 U.S. at 199 n.7. The Court rejected that argument, however, noting that the fact that "the NFL produces NFL football"—a separate product competing in a separate market from

the intellectual-property licensing at issue in the case—"does not mean that cooperation amongst NFL teams is immune from [Section] 1 scrutiny." *Ibid.* After all, the Court explained, "[m]embers of any cartel could insist that their cooperation is necessary to produce the 'cartel product' and compete with other products." *Ibid.* Moreover, the NFL's argument was directed at the wrong activity: "even if leaguewide agreements are necessary to produce football, it does not follow that concerted activity in marketing intellectual property is necessary to produce football." *Ibid.*

Instead, the Court evaluated whether the NFL teams, acting through the NFLP, were capable of concerted action with respect to the conduct or activity challenged by the plaintiff: licensing of the NFL teams' intellectual property. It placed significant weight on the fact that, "[d]irectly relevant to this case, the teams compete in the market for intellectual property." *Am. Needle*, 560 U.S. at 197. Even though, explained the Court, the "NFL teams have common interests such as promoting the NFL brand," what mattered was that "their interests *in licensing team trademarks* are not necessarily aligned." *Id.* at 198 (emphasis added). As to the challenged licensing practice, "[a]part from

their agreement to cooperate in exploiting those assets, including their decisions as the NFLP, there would be nothing to prevent each of the teams from making its own market decisions relating to purchases of apparel and headwear, to the sale of such items, and to the granting of licenses to use its trademarks." *Id.* at 200. Thus, the Court held, the NFLP, like the NFL teams that acted through it, was "subject to § 1, at least with regards to its marketing of property owned by the separate teams." *Ibid.*

In this case, the district court did not dispute the plausibility of the employees' allegations that "Burger King franchises are independently owned and operated and generally responsible for their own hiring." Mar. 24, 2020 Order 2 (Dkt. 67). It acknowledged that the employees had alleged that "a franchisee retains some residual economic autonomy with respect to employment decisions," *id.* at 10, and that Burger King and the franchisees were, "at least in an abstract sense, potentially capable of competing with each other for employees or customers," *id.* at 9. Following the employees' motion for leave to file an amended complaint, the court ruled even more definitively that the employees' allegations plausibly demonstrated that "Burger King and

its franchisees compete in the market for labor." Aug. 24, 2020 Order 3 (Dkt. 74); *see also ibid.* (describing this as "micro-competition in the realm of labor"). Based on this determination, it should follow that, "[a]part from their agreement" not to hire each other's employees in specified circumstances, "there would be nothing to prevent" the franchisor and "each of the [franchisees] from making its own market decisions relating to" employee hiring. *See Am. Needle*, 560 U.S. at 200. Under *American Needle*, therefore, the court should have found dispositive that the franchisor and franchisees allegedly "remain[ed] separately controlled, potential competitors with economic interests" in employee hiring "that [we]re distinct from [Burger King's] financial well-being." *See id.* at 201; *see also, e.g.*, *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593, 600 (7th Cir. 1996) (opining that "the ability of McDonald's franchises to coordinate the release of a new hamburger," which likely would be considered the conduct of a single firm, "does not imply their ability to agree on wages for counter workers," which likely would be considered concerted action). Instead, the court erroneously concluded that "this alone does not answer the question of whether a franchisor and franchisee should be treated as a

single entity under the antitrust laws." Mar. 24, 2020 Order 9 (Dkt. 67).

b. Second, the district court appears to have treated *American Needle* as inapplicable to entities that sell a common product or service, or that depend on each other to maintain uniform brand standards or to otherwise promote the overall success of the common endeavor. In distinguishing this case from *American Needle*, the court listed a number of "key requirements imposed by BKC on franchisees," which included the payment of royalties, maintaining uniform product and training standards, and maintaining a consistent appearance in employee uniforms and store design. *See* Mar. 24, 2020 Order 8-9 (Dkt. 67). According to the court, "[t[he success of BKC and its franchises are wholly dependent on systemwide uniformity," and, "in the absence of uniformity guaranteed by the Burger King franchise agreement, there would be no franchise." *Id.* at 9.

The district court's distinctions do not identify meaningful differences between this case and *American Needle*. In *American Needle*, the Court identified similar shared interests among the NFL teams that nevertheless did not render their interests unitary with

respect to licensing. It acknowledged the NFL's argument that NFL teams should be considered a single entity because certain uniform rules of play were required and, "without their cooperation, there would be no NFL football." *Am. Needle*, 560 U.S. at 198. The Court also accepted as "true that the clubs that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival." *Ibid.* (citation and quotation marks omitted). These characteristics were unexceptional, however, because "[a]ny joint venture involves multiple sources of economic power cooperating to produce a product"—but "that does not mean that necessity of cooperation transforms concerted action into independent action." *Id.* at 199.

In its efforts to distinguish *American Needle*, the district court appeared to fall into the very trap that *American Needle* warned against: treating a shared interest in success as determinative of whether participants are legally capable of concerted action. As *American Needle* explained, "[t]he justification for cooperation is not relevant to whether that cooperation is concerted or independent action." 560 U.S. at 199; *cf. id.* at 202 (noting, in the section involving

the distinct question of whether the challenged restraint was reasonable, that "[t]he fact that NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions").

Most sellers of a single brand presumably have a common interest in the success of that brand. Unsurprisingly, then, the Supreme Court has decided several Section 1 cases in the single-brand context without ever doubting that the manufacturer or franchisor was legally capable of conspiring with its distributors or franchisees. *See, e.g.*, *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988) (applying Section 1 to agreement between manufacturer and dealer); *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977) (applying Section 1 to restrictions in a franchise agreement)[5]; *United States v. Gen. Motors Corp.*, 384 U.S. 127

[5] Although *GTE Sylvania* predates *Copperweld* and did not expressly address whether the franchisor and franchisee were legally capable of conspiring, the Supreme Court has since confirmed that *GTE Sylvania* involved "concerted action." For example, in a decision issued during the same Term as *Copperweld*, the Court described *GTE Sylvania* as a "distributor-termination case[]" addressing "concerted action on nonprice restrictions." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984); *see also, e.g.*, *Bus. Elecs. Corp*, 485 U.S. at 723 (quoting

(1966) (applying Section 1 to agreement among franchised dealers and manufacturer).

In the end, although the district court appeared to accept the employees' allegation that "Burger King franchises are independently owned," Mar. 24, 2020 Order 2 (Dkt. 67), it never considered the extent to which this and similar allegations demonstrated that BKC and each of the franchisees retained independent profit-maximizing interests. Its assumption that BKC's and the franchisee's shared interest in success of the brand was enough to show a unitary profit-maximizing interest was therefore inconsistent with *American Needle*'s determination that, when sellers of a single brand remain "separate, profit-maximizing entities," they retain "distinct, potentially competing interests." 560 U.S. at 198.[6]

GTE Sylvania's explanation of when "particular concerted action violates § 1 of the Sherman Act").

[6] The district court expressed concern over "the anomaly that would result if BKC corporate stores were considered to be part of a single corporate conscious, but franchised stores were not." Mar. 24, 2020 Order 10 (Dkt. 67). That concern would not materialize in a case like this where BKC is alleged to have conspired with independently owned franchises and thus all Burger King restaurants are considered part of the conspiracy. To the extent a different case might result in different treatment of BKC-owned and independently own restaurants, that would be the result of the functional and substantive differences

B. The District Court Relied On Cases That Are No Longer Good Law Or Are Distinguishable.

The district court's erroneous analysis of Section 1's concerted-action requirement followed in part from its reliance on cases that either are no longer good law or are distinguishable. For instance, the court repeatedly referenced *United States v. Citizens & Southern National Bank*, 422 U.S. 86 (1975), a case it described as "approvingly cited" by *American Needle*. *See* Mar. 24, 2020 Order 7-9 (Dkt. 67). In *American Needle*, however, the Court described *Citizens & Southern National Bank* only as an early step in the evolution of current doctrine. According to the Court, although the decision was one contributing to "[t]he decline of the intraenterprise conspiracy doctrine"—a doctrine that "treated cooperation between legally separate entities as necessarily covered by § 1"—that doctrine was not "finally re-examined" until *Copperweld*. *See American Needle*, 560 U.S. at 193, 194. Thus, *Citizens & Southern National Bank* was not resolved on concerted-

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between the economic interests of the two, as mandated by *American Needle*—not any empty formalism. Moreover, to the extent consumers or employees might not appreciate the difference between BKC-owned and independently owned restaurants, the same could be said of the 32 teams making up the NFL, yet *American Needle* nevertheless held that those teams retained independent economic interests.

action grounds. The Court there did *not* hold that the defendant bank and its "de facto branches" were a single firm not subject to scrutiny under Section 1, although it took their relationship into account when determining whether the agreements among them eliminated competition such that they were unreasonable restraints of trade. *See Citizens & S. Nat'l Bank*, 422 U.S. at 117-19. Rather, the Court held that "the de facto branching program of C&S has plainly been procompetitive" and thus "C&S's program of founding new de facto branches, and maintaining them as such, did not infringe § 1 of the Sherman Act." *Id.* at 119, 120; *see also id.* at 116 ("C&S has operated the 5-percent banks as de facto branches as a direct response to Georgia's historic restrictions on de jure branching, and the question therefore remains whether restraints of trade integral to this particular, unusual function are unreasonable.").

The district court also cited *Williams v. I.B. Fischer Nevada*, 999 F.2d 445 (9th Cir. 1993), and derivative decisions that each held, on the particular facts of the cases before them, that the franchisor was incapable of concerted action with its franchisees. *See* Mar. 24, 2020 Order 10-11 (Dkt. 67). The court noted that, in *Williams*, the Ninth

Circuit concluded that a provision in Jack-in-the-Box franchise agreements that precluded franchisees from "offer[ing] employment to the manager of another Jack-in-the-Box restaurant within six months of that manager's termination from employment" "did not violate Section 1 of the Sherman Act because the franchisor was incapable of conspiring with the franchisee." *Id.* at 11. That is an accurate description of the case, but it fails to recognize that the Ninth Circuit decided *Williams* under a "common enterprise" rule—members of a "common enterprise" are "incapable of conspiring"—that derived from case law decided in the pre-*Copperweld* days of the intra-enterprise conspiracy doctrine. 999 F.2d at 447; *see id.* (crediting the rule to *Thomsen v. W. Elec. Co.*, 680 F.2d 1263, 1266-67 (9th Cir. 1982)). The common-enterprise rule was created to determine whether "a parent and its subsidiaries" were engaged in concerted action, *Williams v. Nevada*, 794 F. Supp. 1026, 1031 (D. Nev. 1992) (describing *Thomsen*), which is a possibility that *Copperweld* eliminated, abrogating the need for the common-enterprise rule.

To the extent *Williams* and other cases rested on a formalistic rule holding that franchisors and their franchisees are a single entity

categorically exempt from Section 1 scrutiny, that rule would not survive *American Needle*. The *American Needle* Court clarified that "asking whether the alleged conspirators are a single entity" is "perhaps a misdescription . . . because the question is not whether the defendant is a legally single entity or has a single name; nor is the question whether the parties involved 'seem' like one firm or multiple firms in any metaphysical sense." 560 U.S. at 195. Applying *American Needle* here, so long as the franchisees "remain separately controlled, potential competitors with economic interests that are distinct" from each other and the franchisor's "financial well-being," *id.* at 201, it does not matter that the franchisor and franchisees "have common interests such as promoting [their shared] brand," *id.* at 198, or "share[] in profits or losses" from the franchise relationship, *id.* at 201. "[T]hey are still separate, profit-maximizing entities," such that their interests in hiring employees "are not necessarily aligned." *Id.* at 198.

C. Even If The Franchise Agreement Unified The Interests Of The Franchisor And Franchisees, The Agreement Is Still Subject To Section 1 Scrutiny.

The district court's refusal to subject the No-Hire Agreement to Section 1 scrutiny, due to the fact that it appears in Burger King's

standard franchise agreement, is flawed for an additional reason. Even if the franchise agreement unified the relevant interests of the franchisor and the franchisees (which, as explained above, it did not), the agreement itself would still be subject to scrutiny under Section 1.

In *Copperweld*, the Supreme Court described concerted action as "a sudden joining of two independent sources of economic power previously pursuing separate interests." 467 U.S. at 771. Under this definition, the act of joinder of multiple independent parties—through, for example, acquisition, merger, or creation of a joint venture—is subject to antitrust scrutiny. Thus, an acquisition or pattern of acquisitions "may itself create a combination illegal under § 1," in which case "the affiliation of the defendants [i]s irrelevant because the original acquisitions were themselves illegal." *Id.* at 761. The Court reaffirmed this principle in *Texaco Inc. v. Dagher*, 547 U.S. 1, 6 n.1 (2006), when it cited *Copperweld* for the proposition that the formation of a joint venture is reviewable under Section 1.

This Court has likewise recognized that a merger between two previously independent entities does not render the conduct up to and including the merger outside the scope of Section 1. "[I]n Section 1

antitrust cases where the defendant has undergone a merger during or around the time of the challenged conduct, courts have been careful to distinguish between pre- and post-merger conduct." *Procaps S.A. v. Patheon, Inc.*, 845 F.3d 1072, 1082 (11th Cir. 2016). A Section 1 plaintiff can "challenge[] the merger itself as anticompetitive," even though the result of the merger is the unification of multiple entities into one firm. *Ibid.*; *accord, e.g.*, *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 354 (1963) ("The Sherman Act, of course, forbids mergers effecting an unreasonable restraint of trade."); Areeda & Hovenkamp, *Antitrust Law* ¶ 1476 ("The merger or other collaboration of two independent firms constitutes a 'conspiracy or combination in the form of trust' covered by Sherman Act § 1 and, for mergers, by Clayton Act § 7 as well."); *id.* ¶ 1478a ("A venture's formation results from the founders' 'agreement,' which, like any other formation agreement, can be appraised for 'reasonableness' under Sherman Act § 1.").

Because the individual or entity that becomes a Burger King franchisee is separate and independent from Burger King until the parties execute the franchise agreement, it is irrelevant that "Burger King's products, and all of the operational parameters necessary to

bring them to the marketplace, are fully realized long before a franchisee joins the Burger King system." Mar. 24, 2020 Order 9 (Dkt. 67). The soon-to-be franchisee is an independent economic actor when agreeing to the terms of the franchise agreement, and that agreement might include various restrictions eliminating competition—for instance, a restriction prohibiting the franchisee from hiring the employees of the franchisor or other franchisees. Because the franchise agreement is what forms the franchise relationship between the franchisor and the franchisee, that agreement, "like any other formation agreement," constitutes concerted action under Section 1. Areeda & Hovenkamp, *Antitrust Law* ¶1478a.

CONCLUSION

The United States respectfully submits that this Court should reject the district court's concerted-action analysis and explain the correct legal standard. The United States takes no position on the existence or viability of any potential alternative bases to affirm, however, and therefore takes no position on the ultimate disposition of this appeal.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I certify that this Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this Brief contains 6,406 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(f).

I further certify that this Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the Brief has been prepared in New Century Schoolbook, 14-point font, using Microsoft Office Word Professional Plus 2019.

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CERTIFICATE OF SERVICE

I certify that on December 7, 2020, I caused the foregoing to be filed through this Court's CM/ECF filer system, which will serve a notice of electronic filing on all registered users, including counsel of record for all parties. In addition, I caused seven paper copies of this Brief to be shipped overnight via Federal Express to the Clerk's Office.

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