

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

JOHN HERZOG, individually and on behalf of
others similarly situated,

Plaintiff,

v.

FLUOR FEDERAL SERVICES, INC., a
Foreign Profit Corporation; ATKINSON
CONSULTING LLC, a Foreign Limited
Liability Company; BJMC GLOBAL, LLC, a
Foreign Limited Liability Company;
IPARAMETRICS, LLC, a Foreign Limited
Liability Company; EMERGENCY
MANAGEMENT PARTNERS, LLC, a Foreign
Limited Liability Company; NOVACES,
L.L.C., a Foreign Limited Liability Company;
and DOES 1-50, inclusive,

Defendants.

Case No: 0:25-cv-61991-MD

**STATEMENT OF INTEREST OF
THE UNITED STATES OF AMERICA**

OMEED A. ASSEFI
Acting Assistant Attorney General

DINA KALLAY
Deputy Assistant Attorney General

DAVID B. LAWRENCE
Policy Director

ALICE A. WANG
Counsel to the Assistant Attorney General

DANIEL E. HAAR
NICKOLAI G. LEVIN
STRATTON C. STRAND
PETER M. BOZZO
Attorneys

*United States Department of Justice
Antitrust Division
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
(202) 803-1196 (phone)
peter.bozzo@usdoj.gov*

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INTEREST OF THE UNITED STATES

The United States submits this Statement of Interest under 28 U.S.C. § 517, which permits the Attorney General to direct any officer of the Department of Justice to attend to the interests of the United States in any case pending in a federal or state court.

The United States has a strong interest in the correct application of the antitrust laws. The United States enforces Section 1 of the Sherman Act, 15 U.S.C. § 1, and brings cases under both the per se rule, *see, e.g., United States v. Aiyer*, 33 F.4th 97 (2d Cir. 2022); *United States v. Lischewski*, 860 F. App'x 512 (9th Cir. 2021); *United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015), and the rule of reason, *see, e.g., United States v. Am. Airlines Grp. Inc.*, 121 F.4th 209 (1st Cir. 2024); *United States v. Visa U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003); *United States v. Agri Stats, Inc.*, No. 23-3009 (JRT/JFD), 2026 WL 508844 (D. Minn. Feb. 24, 2026). The United States also files amicus briefs and statements of interest in private civil actions that raise significant Section 1 issues. *See, e.g., Br. for the United States of America as Amicus Curiae in Supp. of Panel Rehearing, Winn-Dixie Stores, Inc. v. E. Mushroom Mktg. Coop., Inc.*, No. 22-2289 (3d Cir. Nov. 20, 2023) (per se rule); *Br. for the United States of America and the Federal Trade Commission as Amici Curiae in Supp. of Neither Party, Deslandes v. McDonald's USA, LLC*, Nos. 22-2333, 22-2334 (7th Cir. Nov. 18, 2022) (per se rule and ancillary-restraints doctrine); *Br. of Amicus United States of America in Supp. of Neither Party, Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, No. 20-55679 (9th Cir. Nov. 19, 2020) (same); *Statement of Interest of the United States of America, In re: Apple Inc. Smartphone Antitrust Litig.*, No. 2:24-md-03113-JXN-LDW (D.N.J. Dec. 16, 2025) (per se rule).

The pending motion to dismiss advances two arguments that misconstrue the scope of the per se rule, a critical tool for protecting markets from agreements that have a “pernicious effect on competition” and lack “any redeeming virtue,” *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5

(1958). Specifically, Defendants assert that (1) the challenged restraint is a “hybrid” restraint and thus exempt from the per se rule under *United States v. Brewbaker*, 87 F.4th 563 (4th Cir. 2023), and *Winn-Dixie Stores, Inc. v. Eastern Mushroom Marketing Cooperative, Inc.*, 89 F.4th 430 (3d Cir. 2023); and (2) the challenged restraint is ancillary to a procompetitive collaboration and thus exempt from the per se rule. *See* Defs.’ Mot. To Dismiss Class Action Compl. with Prejudice & Incorporated Mem. of Law (“MTD”) at 13-15, Doc. 70. The first argument is incorrect because *Brewbaker* and *Winn-Dixie* are not the law in the Eleventh Circuit, which—like the Supreme Court—has never recognized an intermediate category of “hybrid” restraints between vertical and horizontal agreements. The second argument faces an uphill battle because the ancillary-restraints doctrine is an affirmative defense that justifies dismissal of a per se claim only where the defense is apparent from the face of the complaint. The United States takes no position on Defendants’ other arguments, including whether the challenged restraint is vertical, or on the ultimate disposition of the motion to dismiss.

STATEMENT

This case relates to two “Technical Assistance Contract[s]” awarded by the Federal Emergency Management Agency (“FEMA”) for “disaster recovery support” services. Pl.’s Antitrust Class Action Compl. (“Compl.”) ¶¶ 8, 36, Doc. 1. Defendant Fluor was the prime contractor for both contracts. *Id.* ¶ 8. Fluor subcontracted work to the five remaining defendants: Atkinson Consulting, BJMC Global, iParametrics, Emergency Management Partners, and Novaces (the “Subcontractor Defendants”). *Id.* ¶¶ 9-13. Plaintiff John Herzog, in turn, subcontracted with Atkinson to serve as a “site inspector.” *Id.* ¶ 7.

According to Herzog, Defendants agreed to refrain from recruiting or contracting with each other’s subcontractors and employees who worked on FEMA Technical Assistance Contracts. Compl. ¶ 16. Herzog alleges that, when he tried to move from Atkinson to other

Subcontractor Defendants, he was told repeatedly that he could not apply because of “an anti-poaching mandate” enforced by Fluor. *Id.* ¶¶ 21-25, 28. Herzog claims that this “non-solicitation and anti-poaching agreement” was “not only a bilateral agreement between Fluor and the other Defendants,” but “also a comprehensive and overarching agreement . . . among all of the Defendants.” *Id.* ¶ 17. In addition, Herzog alleges that Defendants entered into “wage-fixing agreements” and that, as a result, the Subcontractor Defendants offered “fixed hourly wage rates” to their own subcontractors and employees. *Id.* ¶ 1; *see id.* ¶¶ 30-32.

Herzog alleges that Defendants violated Section 1 of the Sherman Act, 15 U.S.C. § 1, as well as the Florida Antitrust Act, Fla. Stat. § 542.15, *et seq.*, by “agree[ing] to restrict competition for . . . FEMA [Technical Assistance Contract] services through non-solicitation agreements, non-poaching agreements, and agreements to fix . . . wage ranges.” Compl. ¶¶ 63, 69. He asserts that the challenged conduct is a “*per se* violation[.]” because its “nature and necessary effect are so plainly anticompetitive.” *Id.* ¶¶ 65, 72.

Defendants have moved to dismiss. They argue that the challenged restraint is not *per se* unlawful because it is (1) vertical or, alternatively, “hybrid” and (2) ancillary to a procompetitive collaboration. MTD 9-15.

LEGAL BACKGROUND

Section 1 of the Sherman Act bars “every contract, combination . . . or conspiracy, in restraint of [interstate or foreign] trade or commerce.” 15 U.S.C. § 1. Given the background law against which the Sherman Act was enacted, courts have long “understood § 1 to outlaw only *unreasonable* restraints.” *Ohio v. Am. Express Co.*, 585 U.S. 529, 540 (2018) (citation and internal quotation marks omitted).

Section 1 claims have two primary elements. *See Am. Needle, Inc. v. NFL*, 560 U.S. 183, 186 (2010). First, the plaintiff must show the existence of a “contract, combination, or

conspiracy” (i.e., “concerted action”). *Id.* at 186; *see Arrington v. Burger King Worldwide, Inc.*, 47 F.4th 1247, 1253 (11th Cir. 2022). Second, the plaintiff must show that the concerted action “unreasonably restrains trade.” *Am. Needle*, 560 U.S. at 186.

Restraints are properly categorized as either “horizontal” or “vertical.” *See Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730 (1988). Horizontal restraints are “agreement[s] among competitors on the way in which they will compete with one another.” *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 99 (1984); *see also Am. Express*, 585 U.S. at 543 n.7 (“[H]orizontal restraints involve agreements between competitors not to compete in some way.”); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 229 (D.C. Cir. 1986) (“[H]orizontal restraints . . . eliminate some degree of rivalry between persons or firms who are actual or potential competitors.”). By contrast, when “firms at different levels of distribution” agree on matters over which they do not compete, those agreements are “vertical.” *Bus. Elecs.*, 485 U.S. at 730 & n.4; *see DeLong Equipment Co. v. Wash. Mills Abrasive Co.*, 887 F.2d 1499, 1505 (11th Cir. 1989) (“Vertical restraints occur between entities at different levels of distribution in order to control the price or path of a product after the product leaves the manufacturer[.]”).

“Restraints can be unreasonable in one of two ways.” *Am. Express*, 585 U.S. at 540. Some restraints are per se unreasonable based on their inherently anticompetitive “nature and character.” *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 64-65 (1911); *see, e.g., NCAA v. Alston*, 594 U.S. 69, 89 (2021). Per se unlawful restraints include horizontal agreements to fix prices, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940); rig bids, *United States v. Dynalectric Co.*, 859 F.2d 1559, 1574-75 n.19 (11th Cir. 1988); or allocate markets, *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46, 49-50 (1990) (per curiam). *See* 15 U.S.C.

§ 7a note (Findings; Purpose of 2020 Amendment) (“Conspiracies among competitors to fix prices, rig bids, and allocate markets are categorically and irredeemably anticompetitive and contravene the competition policy of the United States.”). Restraints that are not unreasonable per se are evaluated under the “rule of reason,” a “fact-specific assessment of . . . ‘the restraint’s actual effect’ on competition.” *Am. Express*, 585 U.S. at 541 (brackets and citation omitted); *see Jacobs v. Tempur-Pedic Int’l, Inc.*, 626 F.3d 1327, 1333 (11th Cir. 2010). “[N]early every . . . vertical restraint . . . should be assessed under the rule of reason.” *Am. Express*, 585 U.S. at 541.

Restraints that would otherwise be subject to the per se rule can be exempted from the rule by a valid defense. As relevant here, when a legitimate joint venture (or other similar business collaboration) restricts activities outside of the collaboration, the restraint and the collaboration are evaluated as a whole under the rule of reason if the defendant satisfies the ancillary-restraints defense. *See Texaco Inc. v. Dagher*, 547 U.S. 1, 7 (2006); *Deslandes v. McDonald’s USA, LLC*, 81 F.4th 699, 705 (7th Cir. 2023); *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 338 (2d Cir. 2008) (Sotomayor, J., concurring in the judgment). To establish the ancillary-restraints defense, the defendant must demonstrate that the challenged restraint is (1) “secondary and collateral to an independent and legitimate” collaboration and (2) “‘reasonably necessary’ toward the [collaboration]’s objective of utility and efficiency.” *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1072-73 (11th Cir. 2005); *see Aya Healthcare Servs., Inc. v. AMN Healthcare, Inc.*, 9 F.4th 1102, 1109 (9th Cir. 2021) (to be ancillary, “restraint must be (1) ‘subordinate and collateral to a separate legitimate transaction,’ and

(2) ‘reasonably necessary’ to achieving that transaction’s pro-competitive purpose” (citations omitted)).¹

ARGUMENT

The per se rule protects markets and consumers from “agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.” *Nat’l Soc’y of Pro. Eng’rs v. United States*, 435 U.S. 679, 692 (1978). But Defendants misapprehend the rule’s scope. This Court should decline their invitation to rely on the out-of-circuit decisions in *Brewbaker* and *Winn-Dixie*. This Court should also evaluate Defendants’ ancillarity argument in light of the high bar that applies at the motion-to-dismiss stage.

I. THE LABEL “HYBRID” DOES NOT DETERMINE THE PER SE RULE’S APPLICABILITY

Relying on *Brewbaker* and *Winn-Dixie*, Defendants suggest that the per se rule does not apply when the parties to an agreement have a “‘hybrid,’ *i.e.*, mixed vertical and horizontal,” relationship. MTD 14-15 (quoting *Brewbaker*, 87 F.4th at 576, and *Winn-Dixie*, 89 F.4th at 441). But these decisions are not the law in the Eleventh Circuit, and this Court should instead be guided by Supreme Court and binding circuit precedent.

¹ See also *Deslandes*, 81 F.4th at 706 (Ripple, J., concurring) (explaining that “the ancillary restraint defense requires that the defendants establish *both* that the restriction in question be ‘subordinate and collateral’ to a ‘legitimate business collaboration’ among the defendants, *and* be reasonably necessary to achieve a procompetitive objective” of the collaboration (citations omitted)); *Salvino*, 542 F.3d at 338 (Sotomayor, J., concurring in the judgment) (“[U]nder the doctrine of ancillary restraints, when a challenged restraint is not reasonably necessary to achieve any of the efficiency-enhancing purposes of a joint venture, it will be evaluated apart from the rest of the venture.”); *Rothery Storage*, 792 F.2d at 224 (to be ancillary, restraint “must be subordinate and collateral to a separate, legitimate transaction”); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281 (6th Cir. 1898) (“Before . . . agreements are upheld” as ancillary restraints, “the court must find that the restraints . . . are reasonably necessary” to achieve legitimate objectives.), *aff’d in relevant part*, 175 U.S. 211 (1899).

Specifically, the Supreme Court has repeatedly treated as horizontal—and thus potentially subject to per se condemnation—agreements among competitors over how they will compete, even when the parties also have a vertical relationship. In *Palmer*, for example, the Supreme Court held an agreement “unlawful on its face” under the per se rule against horizontal market-allocation agreements even though one of the parties not only competed with, but also (vertically) licensed materials from, the other. 498 U.S. at 47, 49-50.² Similarly, in *Socony-Vacuum*, the Court held that a conspiracy, whose members included competing oil refiners and their vertically related customers, was horizontal price fixing and thus per se unlawful. 310 U.S. at 166-69 & n.4, 218; see *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 133 (1988) (citing *Socony-Vacuum* as an example of a horizontal price-fixing case).³

Court of appeals decisions, including decisions binding on this Court, have followed the same approach. In *Hobart Bros. Co. v. Malcolm T. Gilliland, Inc.*, the Fifth Circuit held that a

² *Palmer* reversed a decision from the Eleventh Circuit holding that the market-allocation agreement was not per se unlawful. 874 F.2d 1417, 1424 (11th Cir. 1989). A dissent from that decision had warned against “essentially nullify[ing] the *per se* rule” by allowing “horizontal competitors [to] avoid antitrust liability by simply entering into anticompetitive agreements that have vertical aspects.” *Id.* at 1433 (Clark, J., dissenting).

³ See, e.g., *United States v. Gen. Motors Corp.*, 384 U.S. 127, 129, 145 (1966) (group boycott among competing car dealers, as well as a vertically related car manufacturer, was per se unlawful); *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 208-09, 211-13 (1959) (group boycott among competing manufacturers and distributors, as well as a vertically related retailer, was per se unlawful); *United States v. Paramount Pictures*, 334 U.S. 131, 140-42 (1948) (holding, in case involving defendants that competed but also had vertical distribution relationships, that “all the defendants” were part of a “horizontal” “price-fixing conspirac[y]”); *Fashion Originators’ Guild of Am. v. FTC*, 312 U.S. 457, 461 (1941) (group boycott among competing garment retailers, their vertically related suppliers (competing garment manufacturers), and the manufacturers’ vertically related suppliers (competing textile producers) was per se unlawful); see also *NYNEX*, 525 U.S. at 135 (“[P]recedent”—including *Klor’s* and *Fashion Originators’ Guild*—“limits the *per se* rule in the boycott context to cases involving horizontal agreements among direct competitors.”).

manufacturer's "distribution agreement, while appearing to allocate territory vertically, in fact, resulted in a horizontal territorial allocation between [the manufacturer] and its own distributors." 471 F.2d 894, 899 (5th Cir. 1973);⁴ *cf. Arrington*, 47 F.4th at 1250 (noting that Burger King and its vertically related franchisees "compete against each other[] . . . for employees"). More recently, the Eleventh Circuit addressed a mattress manufacturer, TPX, that required distributors to sell its mattresses at specified minimum prices, while adhering to those same prices when making direct sales through the TPX website. *Jacobs*, 626 F.3d at 1331. The court explained that, if "TPX, qua manufacturer, used the vertical minimum price agreements as a guise for horizontally setting uniform prices above the market equilibrium level when it acted as a distributor," then "a horizontal arrangement would exist between TPX, qua distributor, and its distributors." *Id.* at 1341.⁵ As these cases show, when the parties to a conspiracy are related both as competitors and as supplier-customers, the conspiracy's orientation depends on the nature of the restraint it imposes: If the parties conspire to restrict their competition with each other, the conspiracy is horizontal.⁶ *See, e.g., United States v. Apple, Inc.*, 791 F.3d 290, 297 (2d Cir. 2015) ("[T]he Sherman Act outlaws *agreements* that unreasonably restrain trade and

⁴ Fifth Circuit decisions issued before October 1, 1981, are binding in the Eleventh Circuit. *See Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

⁵ The court ultimately held that the plaintiff had failed to plead that such a horizontal arrangement existed. *See* 626 F.3d at 1341-43.

⁶ *See also, e.g., Deslandes*, 81 F.4th at 703 (applying per se rule to a "horizontal restraint" through which McDonald's and its vertically-related franchisees agreed not to compete for labor); *Aya*, 9 F.4th at 1109 (holding that agreement not to compete for labor was a "horizontal" restraint, even though parties were in a "subcontractor-subcontractee relationship"); *United States v. Apple, Inc.*, 791 F.3d 290, 316-21 (2d Cir. 2015) (holding that agreement was horizontal and per se unlawful even though participants were (1) Apple and (2) book publishers that competed with each other but were vertically related to Apple).

therefore requires evaluating the nature of the restraint, rather than the identity of each party who joins in to impose it, in determining whether the *per se* rule is properly invoked.”⁷

The “hybrid” restraints approach not only contravenes precedent, but also misapprehends another important principle of antitrust law: the ancillary-restraints defense. This defense is the established framework for addressing defendants’ claims that a horizontal restraint should be exempted from the *per se* rule and considered together with a vertical (or other) collaboration among the defendants under the rule of reason. *See Dagher*, 547 U.S. at 7; *Schering-Plough*, 402 F.3d at 1072-73; *Salvino*, 542 F.3d at 338 (Sotomayor, J., concurring in the judgment). When defendants properly raise such a defense, the correct course is to assess whether they have established the defense’s elements, *see supra* at 5-6 & n.1—not to create a novel “hybrid” restraints category, as *Brewbaker* and *Winn-Dixie* did. *See Winn-Dixie*, 89 F.4th at 441, 443 (discussing “hybrid” restraints without referencing ancillary-restraints defense); *Brewbaker*, 87 F.4th at 576, 578 (same).

In this case, Herzog alleges that “Defendants depend on the labor of hundreds of FEMA [Technical Assistance Contract] subcontractors and/or employees.” Compl. ¶ 36; *see, e.g., id.* ¶ 16 (“Defendants had and have an agreement to control their FEMA [Technical Assistance Contract] subcontractors’ and employees’ wages and mobility by agreeing to not recruit or contract with each other’s FEMA [Technical Assistance Contract] subcontractors and

⁷ The Supreme Court and the Eleventh Circuit have used the term “hybrid restraints” in a different context to refer to “regulatory scheme[s]” in which “private actors are . . . granted ‘a degree of private regulatory power.’” *Fisher v. City of Berkeley, Cal.*, 475 U.S. 260, 267-69 (1986) (citations omitted); *see 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345 n.8 (1987); *Danner Constr. Co. v. Hillsborough Cnty., Fla.*, 608 F.3d 809, 811-13 (11th Cir. 2010). But these “hybrids” of public and private authority have nothing to do with the purportedly horizontal-vertical “hybrid” restraints discussed in *Brewbaker* and *Winn-Dixie*. Under the precedents cited above, the latter are not a valid category of antitrust analysis.

employees.”); *id.* ¶ 49 (“Defendants considered each other’s wages to be competitively relevant regardless of location[.]”). Based on these allegations, Defendants appear to have competed for the labor of certain employees and subcontractors. Herzog also asserts that one Defendant, Fluor, was vertically related to the other Defendants, which were Fluor’s subcontractors. *Id.* ¶¶ 1, 8-13, 36. Contrary to Defendants’ argument (MTD 14-15), the mere existence of the vertical, prime-subcontractor relationship between Fluor and the Subcontractor Defendants does not render the restraint a “hybrid,” rather than horizontal, conspiracy.

Rather, the Court must assess whether any alleged conspiracy among Defendants is an agreement among competitors about the way in which they compete with one another. If Defendants all compete for the labor of certain subcontractors and employees and agreed about how they would compete for this labor, the conspiracy is horizontal. *See, e.g., Deslandes*, 81 F.4th at 702-03 (holding that, where McDonald’s corporate operated many McDonald’s restaurants itself, agreement between McDonald’s and its vertically related franchisees not to poach each other’s restaurant workers was “horizontal” and subject to the *per se* rule). The same is true if (1) the Subcontractor Defendants compete with each other for the labor of certain subcontractors and employees, (2) the Subcontractor Defendants agreed about how they would compete for this labor, and (3) Fluor organized, enforced, or otherwise participated in the agreement among the Subcontractor Defendants. That conclusion holds because, where a “vertical organizer . . . agree[s] to participate in [a] horizontal conspiracy,” the vertical actor’s participation does not alter the agreement’s orientation. *Apple*, 791 F.3d at 325; *see also id.* at 322 (“the Supreme Court and our Sister Circuits have held all participants in ‘hub-and-spoke’ conspiracies liable when the objective of the conspiracy was a *per se* unreasonable restraint of trade” (citing, *inter alia*, *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959)), and

United States v. Gen. Motors Corp., 384 U.S. 127 (1966))). If, on the other hand, any alleged conspiracy is an agreement between firms at different levels of distribution on matters over which they do not compete, the conspiracy is vertical.

II. THE ANCILLARY-RESTRAINTS DOCTRINE IS AN AFFIRMATIVE DEFENSE THAT APPLIES AT THE MOTION-TO-DISMISS STAGE ONLY IF ITS ELEMENTS ARE ESTABLISHED ON THE COMPLAINT’S FACE

Defendants also resist the per se rule’s application on the ground that the alleged restraint is purportedly ancillary to Defendants’ “collaboration to provide a key governmental service to disaster victims.” MTD 13; *see id.* at 14. As Defendants correctly recognize, the ancillary-restraints doctrine requires a showing that the alleged “restraint is ancillary to a separate, legitimate transaction and reasonably necessary to achieving that transaction’s pro-competitive purpose.” *Id.* at 13 (quoting *Aya*, 9 F.4th at 1109); *see supra* at 5-6 & n.1. Defendants also correctly acknowledge that the ancillary-restraints doctrine is an “exempt[ion] from the *per se* rule” (MTD 13 (quoting *Aya*, 9 F.4th at 1109)), but they fail to grapple with the implications of that acknowledgement.

Specifically, “the general rule” is that “the burden of proving justification or exemption under a special exception to the prohibitions of a statute . . . rests on one who claims [the exemption’s] benefits.” *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948); *see Thomas v. George, Hartz, Lundeen, Fulmer, Johnstone, King, & Stevens, P.A.*, 525 F.3d 1107, 1110 (11th Cir. 2008). As an exemption from Section 1’s per se rule, ancillarity is an affirmative defense to per se claims, and defendants thus bear the burden of persuasion. *See Deslandes*, 81 F.4th at 705 (“[T]he classification of a restraint as ancillary is a defense[.]”); *United States v. Aiyer*, 33 F.4th 97, 115 (2d Cir. 2022) (describing “ancillary restraints doctrine” as an “exception[.]” and “exempt[ion]” from the otherwise “categorical” per se rule); *see also Freeman*

v. S.D. Ass'n of Realtors, 322 F.3d 1133, 1152 (9th Cir. 2003) (defendants' ancillarity argument "fail[ed] to state a valid defense"); *Blackburn v. Sweeney*, 53 F.3d 825, 828-29 (7th Cir. 1995) (rejecting ancillarity defense where defendants' evidence and arguments did not support it); *Bd. of Regents of Univ. of Okla. v. NCAA*, 707 F.2d 1147, 1154 n.9 (10th Cir. 1983) (burden of "proving the effectiveness and necessity" of allegedly ancillary restraints rightly placed on defendant), *aff'd*, 468 U.S. 85 (1984).

"[A] plaintiff is 'not required to negate an affirmative defense in [its] complaint.'" *Wainberg v. Mellichamp*, 93 F.4th 1221, 1224 (11th Cir. 2024) (citation omitted). A complaint thus "should not ordinarily be dismissed based on an affirmative defense unless the defense is apparent on the face of the complaint." *Isaiah v. JPMorgan Chase Bank*, 960 F.3d 1296, 1304 (11th Cir. 2020).⁸ Applying these principles here, this Court should not dismiss the complaint on ancillarity grounds unless Defendants have shown, based on Herzog's own allegations, that the restraint is (1) "secondary and collateral to an independent and legitimate" collaboration and (2) "'reasonably necessary' toward the [collaboration]'s objective of utility and efficiency," *Schering-Plough*, 402 F.3d at 1072-73.

CONCLUSION

The Court should assess Defendants' arguments that the alleged restraint is "hybrid" and ancillary under the principles described in this Statement.

⁸ The primary case on which Defendants' ancillarity argument rests (MTD 13-15) was decided on summary judgment. *See Aya*, 9 F.4th at 1107-08, 1114.

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Respectfully submitted,

OMEED A. ASSEFI
Acting Assistant Attorney General

DINA KALLAY
Deputy Assistant Attorney General

DAVID B. LAWRENCE
Policy Director

ALICE A. WANG
Counsel to the Assistant Attorney General

DANIEL E. HAAR
NICKOLAI G. LEVIN
STRATTON C. STRAND
PETER M. BOZZO
Attorneys

/s/ Peter M. Bozzo
United States Department of Justice
Antitrust Division
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
(202) 803-1196 (phone)
peter.bozzo@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2026, I electronically filed the foregoing brief by using the CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

/s/ Peter M. Bozzo
Peter M. Bozzo