No. 23-____

IN THE
SUPREME COURT OF THE UNITED STATES

AMORY INVESTMENTS LLC, ET AL.,

Petitioners,

v.

TYSON FOODS INCORPORATED, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a district court order permitting significant interference with private enforcement of federal antitrust law implicate an interest sufficiently important to warrant immediate appellate review under the collateral order doctrine?

PARTIES TO THE PROCEEDING

Petitioners, plaintiffs-appellants below, are: Amory Investments LLC; Campbell Soup Company; Campbell Soup Supply Company; McLane Company, Inc.; McLane/Mid-Atlantic, Inc.; McLane/Midwest, Inc.; McLane Minnesota, Inc.; McLane New Jersey, Inc.; McLane/Eastern, Inc.; McLane/Suneast, Inc.; McLane Ohio, Inc.; McLane/Southern, Inc.; McLane/Western, Inc.; McLane Express, Inc.; Kinexo, Inc.; McLane Foodservice Distribution, Inc.; McLane Foodservice, Inc.; and Target Corporation. Sysco Corporation, a plaintiff-appellant below, recently assigned its claims in this case to Carina Ventures LLC. Carina therefore joins this Petition. A motion to substitute Carina for Sysco is pending in the District Court. No. 1:16-cv-08637 (N.D. Ill. June 28, 2023), ECF No. 6630.

Respondents, defendants-appellees below, are: Case Foods, Inc.; Case Farms, LLC; Case Farms Processing, Inc.; Foster Farms, LLC; Foster Poultry Farms, a California Corporation; Harrison Poultry, Inc.; House of Raeford Farms, Inc.; Koch Foods Incorporated; JCG Foods of Alabama LLC; JCG Foods of Georgia LLC; Koch Meat Co., Inc.; Mar-Jac Poultry, Inc.; Mar-Jac Poultry MS; LLC, Mar-Jac Poultry AL, LLC; Mar-Jac AL/MS, Inc.; Mar-Jac Poultry, LLC; Mar-Jac Holdings, Inc.; Mountaire Farms Inc.; Mountaire Farms, LLC; Mountaire Farms of Delaware, Inc.; Norman W. Fries, Inc. d/b/a Claxton Poultry Farms; Perdue Farms, Inc.; Perdue Foods LLC; Pilgrim's Pride Corporation; Sanderson Farms, Inc.; Sanderson Farms, Inc. (Processing Division);

Sanderson Farms, Inc. (Production Division); Sanderson Farms, Inc. (Foods Division); Simmons Foods, Inc.; Simmons Prepared Foods Inc; Tyson Foods, Inc.; Tyson Chicken, Inc.; Tyson Breeders, Inc;. Tyson Poultry, Inc.; and Wayne Farms LLC.

CORPORATE DISCLOSURE STATEMENT

Amory Investments LLC is not the subsidiary of any parent corporation, and no publicly held corporation owns more than 10% of its stock. Amory Investments LLC is indirectly owned by Burford Capital Ltd., a publicly held corporation.

Campbell Soup Company, a publicly held company, is not the subsidiary of any parent corporation, and no publicly held corporation owns more than 10% of its stock.

The sole shareholder of Campbell Soup Supply Company L.L.C. is Campbell MFG 1 Company, which is a wholly owned subsidiary of Campbell Soup Company.

McLane Company, Inc., d/b/a McLane/Southwest, McLane/Southeast, McLane Southeast, McLane/Northwest, McLane/Southeast–Dothan, McLane/High Plains, and McLane/North Texas, is a wholly owned subsidiary of Berkshire Hathaway, Inc., which is a publicly held company.

McLane/Mid-Atlantic, Inc., d/b/a McLane/Carolina; McLane/Midwest, Inc., d/b/a McLane/Cumberland, McLane/Midwest, McLane Midwest, and McLane/Ozark; McLane Minnesota, Inc.; McLane New Jersey, Inc.; McLane/Eastern, Inc., d/b/a McLane/Northeast, McLane/Northeast-Concord,

and McLane PA; McLane/Suneast, Inc., d/b/a McLane/Pacific, McLane/Southern California, McLane/Sunwest, McLane Sunwest, McLane/Suneast, and McLane Ocala; McLane Ohio, Inc.; McLane/Southern, Inc.; McLane/Western, Inc.; McLane Express, Inc., d/b/a C.D. Hartnett Company, Inc.; Kinexo, Inc.; McLane Foodservice Distribution, Inc.; and McLane Foodservice, Inc. are wholly owned subsidiaries of McLane Company, Inc.

Target Corporation, a publicly held company, is not the subsidiary of any parent corporation, and no publicly held corporation owns more than 10% of its stock.

Carina Ventures LLC is not the subsidiary of any parent corporation, and no publicly held corporation owns more than 10% of its stock. Carina Ventures LLC is indirectly owned by Burford Capital Ltd., a publicly held corporation. Carina's assignor, Sysco Corporation, is not the subsidiary of any parent corporation, and no publicly held corporation owns more than 10% of its stock.

RELATED PROCEEDINGS

In re Broiler Chicken Antitrust Litigation, N.D. Ill. Case No. 1:16-cv-08637. Order entered May 4, 2022.

Amory Investments LLC, et al. v. Tyson Foods, Inc., et al., 7th Cir. Case No. 22-01994. Order entered June 23, 2023.

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The Seventh Circuit's Order is unreported, but reproduced in the Appendix at 1a. The District Court's Order is unreported, but available at 2022 WL 2028237, and reproduced in the Appendix at 7a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Seventh Circuit's Order is dated June 23, 2023. Pet. App. 1a.

STATUTORY PROVISION INVOLVED

28 U.S.C. § 1291 provides in relevant part: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

INTRODUCTION

This Petition concerns the Seventh Circuit's erroneous conclusion that it lacks appellate jurisdiction under the collateral order doctrine to review a district court decision that readily satisfies the requirements for the doctrine's application: the district court order (1) is conclusive on the issue presented; (2) resolves an important question separate from the merits of the underlying action; and (3) is effectively unreviewable on an appeal from the final judgment of the underlying action.

Petitioners have asserted claims under Section 1 of the Sherman Act, 15 U.S.C. § 1, alleging a conspiracy to fix, raise, stabilize, and maintain prices of broiler chicken meat in the United States.

During the litigation, fourteen of the Defendants entered into a so-called "Judgment Sharing Agreement" ("JSA"). The JSA itself states, and the JSA signatories conceded below, that a purpose and effect of the JSA is to limit Defendants' exposure to joint and several liability—an established feature of federal antitrust law.

Petitioners filed a motion in the District Court seeking to preclude enforcement of specific provisions of the Defendants' JSA, including those impairing joint and several liability. The motion contended the challenged provisions extend well beyond "judgment sharing," are antithetical to the federal antitrust regime carefully constructed and maintained by Congress, and interfere with private enforcement of federal antitrust law.

Although the District Court acknowledged the challenged JSA provisions may "lessen[] the negotiating power of a plaintiff" and "make it more difficult for a plaintiff to settle on more advantageous terms," it denied the motion to preclude their enforcement (the "JSA Order").

Petitioners appealed, invoking the collateral order doctrine as the basis for appellate jurisdiction. The Court of Appeals requested briefing on the application of the collateral order doctrine. Nearly one year after jurisdictional briefing was complete, the Seventh Circuit dismissed for lack of appellate jurisdiction. The *sole ground* for dismissal was the court's conclusion that "the interests [] appellants raise do not meet the doctrine's high bar."

The Seventh Circuit's holding that the JSA Order does not implicate an interest sufficiently important to warrant immediate appellate review under the collateral order doctrine is wrong, conflicts with this Court's long-standing antitrust jurisprudence (*see* SUP. CT. R. 10(c)), and poses a significant threat to private enforcement of federal antitrust law and the public interest.

This Court has emphasized the importance of federal antitrust laws and the public interest in their private enforcement. *See, e.g.*, *Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 502 (1969) (Congress "has encouraged private antitrust litigation not merely to compensate those who have been directly injured but also to vindicate the important *public interest* in free competition.") (emphasis added). The collateral order doctrine is applied when "delaying review until the entry of final judgment 'would imperil a substantial public interest.'" *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 107 (2009) (quoting *Will v. Hallock*, 546 U.S. 345, 353 (2006)).

As the JSA Order acknowledges, the challenged JSA provisions are intended to alter the dynamics of settlement negotiations, and the terms of settlement agreements, in favor of the JSA Defendants. If the JSA Order is left in place until final judgment, along with the Seventh Circuit's Order denying appellate review, defendants in every antitrust case across the country will have carte blanche to enter into "joint defense" compacts like the one at issue here, dramatically tilting the settlement playing field in Section 1 cases in their favor—arrogating to

themselves the ability to alter the framework for private antitrust enforcement enacted by Congress.

While this Court has described the collateral order doctrine as "narrow and selective," it has never declared membership in the "'small class' of collaterally appealable orders" to be closed. *Will*, 546 U.S. at 350. The JSA Order is "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). The Petition should be granted.

STATEMENT OF THE CASE

A. Petitioners' Claims Pending in the District Court

Petitioners are each Direct Action Plaintiffs ("DAPs") bringing claims against broiler chicken producers and other co-conspirators under Section 1 of the Sherman Act, 15 U.S.C. § 1. Petitioners allege that Defendants and their co-conspirators entered into a conspiracy, which began at least as early as 2008 and continued through at least 2019, the purpose and effect of which was to fix, raise, stabilize, and maintain prices of broiler chicken meat in the United States.

Although some of the Petitioners' original complaints were filed as early as 2018, due to numerous procedural complexities, including a parallel federal criminal investigation and trials, Petitioners' cases are still in discovery.

B. Motion to Preclude Enforcement of Two Provisions in Defendants' "Judgment Sharing Agreement"

Fourteen of the Defendants in this case entered into a so-called "Judgment Sharing Agreement" ("JSA") during the pendency of the litigation. The signatories to this agreement (the "JSA Defendants") include the biggest chicken producers—among them the two largest, both of which have acknowledged committing antitrust violations related to their chicken production: Pilgrim's Pride[1] and Tyson.[2]

"A JSA is a contract among antitrust defendants (and potential antitrust defendants) whereby the signatories agree in advance to their relative responsibility for any antitrust damages awarded at trial against any of them." Christopher R. Leslie, *Judgment-Sharing Agreements*, 58 Duke L.J. 747, 755 (2009).

On October 28, 2021, Petitioners, along with other DAPs, filed a motion in the District Court seeking to preclude enforcement of two specific provisions of the Defendants' JSA, contending those particular

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[1] *See United States v. Pilgrim's Pride Corp.*, 1:20-cr-00330-RM, (D. Colo. Feb. 23, 2021), ECF No. 58, ¶ 9 (plea agreement, including agreement to recommend jointly with the United States that the court impose a sentence requiring Pilgrim's Pride to pay a criminal fine of $107,923,572).

[2] *See* News Release, Tyson Foods Inc., Tyson Foods' Statement on Dep't of Justice Indictment in Broiler Chicken Investigation (Jun. 10, 2020), https://www.tysonfoods.com/news/news-releases/2020/6/tyson-foods-statement-department-justice-indictment-broiler-chicken.

provisions extend well beyond "judgment sharing," and are antithetical to the federal antitrust regime carefully constructed and maintained by Congress.[3]

First, Petitioners contended the JSA impairs a central element of federal antitrust law: joint and several liability. With joint and several liability, each defendant "is liable for the overcharges on its co-conspirators' sales." Leslie, 58 Duke L.J. at 752. But the JSA Defendants have agreed on language to include in settlement agreements with plaintiffs which would reduce or eliminate this:

> "Settling Plaintiff(s) agrees to reduce the dollar amount collectable from non-Settling Parties pursuant to any Final Judgment by a percentage equal to the Settling Party's Sharing Percentage calculated pursuant to [the JSA] . . . ."

JSA § 6(D)(1) (referred to in this Petition as the "**J&S Negation Provision**"); *see also* Pet. App. 8a. The JSA's Appendix confirms the intent and effect of this provision: to "limit" Defendants' "exposure to such joint and several liability." JSA App-1.

Because the JSA Defendants impaired joint and several liability by coordinating and agreeing about imposition of the J&S Negation Provision in

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[3] Petitioners challenged only two pernicious features of the JSA, even though a garden-variety JSA may undermine antitrust goals and stabilize cartels. *See* Leslie, 58 Duke L.J. at 768-84; *see also* Manual for Complex Litigation (Fourth) § 13.23 (2004) at 178 (JSAs "create a disincentive for defendants to make available evidence indicating liability on the part of codefendants.").

settlement negotiations with plaintiffs, Petitioners sought to preclude enforcement of this provision of the JSA.

Second, the JSA provides that each JSA Defendant must furnish the others with a copy of any settlement agreement to which a JSA Defendant is a party, within seven days after executing the agreement (the "**Settlement Agreement Sharing Provision**"). *See* JSA § 6(A); *see also* Pet. App. 8a. The Provision does not permit a settling plaintiff to share the settlement with other plaintiffs. Petitioners alleged this compact among JSA Defendants to provide one another with a copy of each confidential, non-public settlement agreement with a plaintiff lacks any legitimate justification, puts the Defendants at a competitive advantage *vis-à-vis* plaintiffs, and discourages settlements. Petitioners, therefore, sought to preclude enforcement of this provision of the JSA.

C. District Court's JSA Order

After briefing, and oral argument requested by the District Court, on May 4, 2022, the District Court denied Petitioner's motion to preclude enforcement of the two challenged provisions of the JSA. Pet. App. 7a.

In its Order denying the motion, the District Court acknowledged that "by entering into the JSA, and in particular § 6(D), [the JSA Defendants] seek to eliminate or soften the impact of joint and several liability on the settlement defendants." Pet. App. 9a. The District Court also acknowledged that the challenged JSA provisions may "lessen[] the negotiating power of a plaintiff" and "make it more

difficult for a plaintiff to settle on more advantageous terms" *Id.* at 12.[4]

D. Seventh Circuit Proceedings

On June 3 2022, Petitioners timely filed a notice of appeal, seeking Seventh Circuit review of the District Court's JSA Order. On June 6, 2022, the Court of Appeals ordered appellants to file a memorandum stating why the appeal should not be dismissed for lack of jurisdiction. Pet. App. 5a. On June 10, 2022, Petitioners timely filed a docketing statement asserting appellate jurisdiction under the collateral order doctrine. That same day, the Court of Appeals issued an order directing Petitioners to "fully discuss" in their jurisdictional memorandum the application of the doctrine to the District Court's order, "in light of" this Court's "admonition of the doctrine's expansion." Pet. App. 4a. Petitioners timely filed their jurisdictional memorandum, and Respondents timely filed a response.

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[4] The District Court did not question its authority to preclude enforcement of the JSA. This Court has confirmed that courts can void agreements incompatible with the federal antitrust regime, explaining it would have "little hesitation in condemning [an] agreement as against public policy" if it prospectively waived the remedies available to a victim of an antitrust violation. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985); *see also Simpson v. Union Oil Co. of Cal.*, 377 U.S. 13, 18 (1964) (considering that government interests "frequently override arrangements that private parties make" and an otherwise lawful agreement "must give way before the federal antitrust policy").

Almost one year later, on June 23, 2023, the Seventh Circuit issued an Order dismissing the appeal for lack of appellate jurisdiction, finding "the interests that appellants raise do not meet the doctrine's high bar." Pet. App. 2a. The Seventh Circuit's Order did not otherwise question that the collateral order doctrine is satisfied here.

REASONS FOR GRANTING THE PETITION

I. The Seventh Circuit's Holding that the "Interests" at Stake in the JSA Order are Insufficient for Appellate Jurisdiction Under the Collateral Order Doctrine Conflicts With this Court's Long-Standing Antitrust Jurisprudence

The Seventh Circuit's Order dismissing Petitioners' appeal for lack of appellate jurisdiction under the collateral order doctrine identified only one ground for dismissal: "the interests that appellants raise do not meet the doctrine's high bar." Pet. App. 2a. But that was clearly wrong. The bar for all prongs of the doctrine's requirement is readily cleared here.

The collateral order doctrine permits immediate appellate review before final judgment when an order: (1) is conclusive on the issue presented; (2) resolves an important question separate from the merits of the underlying action; and (3) is effectively unreviewable on an appeal from the final judgment of the underlying action. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 105 (2009). Each of these criteria are met by the JSA Order.

A. The JSA Order is Conclusive as to the Disputed Issue

The JSA Order "fully disposed" of the disputed issue—the enforceability of the challenged JSA provisions—and includes no indication that the District Court might decide to revisit it during the course of the litigation. *See Abney v. United States*, 431 U.S. 651, 658 (1977).

The Seventh Circuit's Order did not state or suggest otherwise.

B. The JSA Order is Separate from the Merits

The enforceability of the challenged JSA provisions is entirely separate from resolution of the underlying merits of the Petitioners' Sherman Act claims.[5] An appeal from a final judgment in the underlying actions will not turn in any way on whether the District Court erred in refusing to preclude enforcement of the challenged JSA provisions. The JSA Order is, by its "very nature," collateral to and separable from the underlying Sherman Act litigation. *Cf. Abney*, 431 U.S. at 659.

The Seventh Circuit's Order did not state or suggest otherwise.

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[5] The JSA is not mentioned in any of Petitioners' complaints. Petitioners were unaware of the JSA's existence until February 2021 when it was first disclosed in the context of a motion for preliminary approval of settlements between Pilgrim's and Tyson and the Direct Purchaser Plaintiffs (one of three classes pursuing class action relief against Defendants).

C. The JSA Order Cannot Be Reviewed Effectively on Appeal From the Final Judgment

The JSA Order cannot "be reviewed effectively on appeal from the final judgment." *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974). If a plaintiff accedes before final judgment to a settlement applying the challenged JSA provisions, that plaintiff will be unable to appeal the JSA Order at the end of the case. And if a plaintiff elects to not settle under the distorted settlement conditions created by the JSA, and proceeds to final judgment on the merits, there is a significant risk the courts will find an appeal of the JSA Order non-justiciable at that point (*e.g.*, due to purported mootness or lack of standing). Thus, it is near-certain that the JSA Order will be *unreviewable* at the conclusion of the case.

The Seventh Circuit's Order did not state or suggest otherwise.

D. The Seventh Circuit Erroneously Held that the "Interests" Implicated by the JSA Order Do Not Satisfy the Collateral Order Doctrine

The Court of Appeals is wrong that the "interests" implicated by the District Court's JSA Order do not meet the collateral order doctrine's "high bar."

1. The Court Has Emphasized the Importance of Federal Antitrust Laws, and the Public Interest in Their Private Enforcement

This Court has repeatedly explained: "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). They "reflect Congress' appraisal of the value of economic freedom; they guarantee the vitality of the entrepreneurial spirit. Questions arising under these Acts are among the most important in public law." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 652 (1985) (Stevens, J., dissenting).

When fashioning federal antitrust law, "Congress had many means at its disposal to penalize violators" and specifically established a scheme "encourag[ing] . . . 'private attorneys general.'" *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 262 (1972). There has been a "longstanding policy of encouraging vigorous private enforcement of the antitrust laws," *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745 (1977), and the "vindication of rights" in private antitrust suits "supplements federal enforcement and fulfills the objects of the statutory scheme." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 642 (1981). *See also Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1524 (2019) (rejecting Apple's proffered view of the Sherman Act, which would "contradict the longstanding goal of

effective private enforcement and consumer protection in antitrust cases"); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969) ("[T]he purpose" of creating and encouraging private antitrust lawsuits "was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws."); *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134, 136 (1968) (reversing court of appeals rulings which "seemed to threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States").

Congress, therefore, "has encouraged private antitrust litigation not merely to compensate those who have been directly injured but also to vindicate the important ***public interest*** in free competition." *Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 502 (1969) (emphasis added); *see also Mitsubishi Motors Corp.*, 473 U.S. at 652 (Stevens, J., dissenting) (noting "[t]he unique ***public interest*** in the enforcement of the antitrust Laws") (emphasis added).

The collateral order doctrine is applied when "delaying review until the entry of final judgment 'would imperil a substantial public interest.'" *Mohawk Indus.*, 558 U.S. at 107 (quoting *Will v. Hallock*, 546 U.S. 345, 353 (2006)). Here, the challenged JSA provisions are antithetical to the federal antitrust regime carefully constructed and maintained by Congress, and the public interest strongly favors immediate appellate review of the JSA Order. The Seventh Circuit's erroneous Order to the contrary disregarded and conflicts with this Court's

long-standing antitrust jurisprudence. *See* SUP. CT. R. 10(c).

2. Joint and Several Liability is Vital to Private Antitrust Enforcement

The imposition of joint and several liability on antitrust co-conspirators is a central element of the private antitrust enforcement regime. *See Tex. Indus.*, 451 U.S. at 646 ("defendants should be jointly and severally liable" in antitrust cases) (citing *City of Atlanta v. Chattanooga Foundry & Pipeworks*, 127 F. 23, 26 (6th Cir. 1903), *aff'd*, 203 U.S. 390 (1906)).[6]

Under "the rule of joint and several liability, . . . each member of a conspiracy is liable for all damages caused by the conspiracy's entire output." *Paper Sys. Inc. v. Nippon Paper Indus. Co.*, 281 F.3d 629, 632 (7th Cir. 2002) (citing *Tex. Indus.*, 451 U.S. 630). "If [plaintiffs] can prove that there was indeed a conspiracy, they may collect damages not just firm-by-firm according to the quantity each sold, but from all conspirators for all sales." *Id.*; *see also* IIA Phillip E. Areeda, et al., Antitrust Law ¶ 330d (4th ed. 2014) ("Federal antitrust law follows the common law tort doctrine of joint and several liability for co-conspirators. This means that each co-conspirator can be held liable for the entire damage award even if that particular co-conspirator was responsible for only a small portion of the injury."); Leslie, 58 Duke L.J. at 752 (with joint and several liability "each price-fixing

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[6] *Texas Indus.*, 451 U.S. at 646-47, held that under federal antitrust law defendants have no statutory or common law right to contribution from co-conspirators.

firm is liable for the overcharges on its co-conspirators' sales").

Despite its common law origins, joint and several liability has long been firmly entrenched as part of the federal antitrust regime created and maintained by Congress. The Ninth Circuit observed more than six decades ago that joint and several liability is both "firmly rooted" and a "well-settled principle." *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 397 (9th Cir. 1957). Four decades ago, the Fourth Circuit explained that joint and several liability "has been the established doctrine of antitrust law for the better part of a century," and that "Congress has not seen fit to disapprove." *Burlington Indus. v. Milliken & Co.*, 690 F.2d 380, 394 (4th Cir. 1982).

In the years since, Congress has *expressly* embraced the critical role of joint and several liability in the private enforcement of federal antitrust law. When Congress enacted the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA"), a statutory leniency program designed to promote cooperation and full disclosure by antitrust law offenders, it did two specific things with respect to joint and several liability. First, it specified that one of the statutory inducements to encourage amnesty should be the elimination of joint and several liability for successful leniency applicants. *See* ACPERA, Pub. L. No. 108–237, § 213(a), 118 Stat. 661 (2004); *see also* ABA Section of Antitrust Law, Antitrust Law Developments 977 (8th ed. 2017) ("ACPERA offers the successful amnesty applicant . . . relief from joint and several liability."). Second, the statute provided that nothing in the Act "shall be construed to . . . affect, in

any way, the joint and several liability of any party to a civil action . . . other than that of the antitrust leniency applicant and cooperating individuals . . . ." ACPERA § 214(3). Thus, ACPERA adopted and reaffirmed the centrality of joint and several liability in private actions brought under federal antitrust law.

3. The JSA Order Significantly Interferes With Private Antitrust Enforcement

Through the JSA, the Defendants—by their own admission—seek to weaken or displace joint and several liability as a feature of the federal antitrust regime governing this case.

The JSA makes explicit in its Preamble that joint and several liability is a primary target:

> [L]iability in the Broiler Chicken Cases is "joint and several," without the right to seek "contribution" from other Defendants for their respective shares of the total judgment. That means that even if Plaintiffs go to trial against just one (or a small number) of Defendants, such Defendant(s) might have to pay three times the damages found to have been caused by the conduct of all the Defendants, even those that already settled (less any amounts they paid to settle). It also means that if a jury returns a verdict for triple damages and attorneys' fees against multiple Defendants, Plaintiffs can force a single Defendant to pay that entire amount, *i.e.*, three times the damages associated with all of the Defendants' sales, and that single Defendant would have no right to recover any of

> what it paid from the Defendants who paid nothing.

JSA § 1.

The J&S Negation Provision states:

> Settling Plaintiff(s) agrees to reduce the dollar amount collectable from non-Settling Parties pursuant to any Final Judgment by a percentage equal to the Settling Party's Sharing Percentage as calculated pursuant to [the Agreement] under the assumption that the Settling Party had not settled . . . .

Id. § 6(D)(1); *see also* Pet. App. 8a.

Reflecting the value of the J&S Negation Provision to a JSA Defendant which is *not* a party to a given settlement, the JSA designates all non-settling Defendants as "third party beneficiaries" of any settlement. JSA § 6(D)(3).

The Appendix to the JSA confirms the intent and effect of the J&S Negation provision:

> Because liability under the Sherman Act is joint and several, any defendant found to have violated the Act is potentially responsible for both the damages resulting from its sales and also the damages of its alleged co-conspirators' sales (all trebled). **This scenario demonstrates how [the JSA] limits a company's exposure to such joint and several liability**.

Id. App-1 (underlining in original; bold added).

In the JSA Order, the District Court recognized that "by entering into the JSA, and in particular § 6(D) [the J&S Negation Provision], [the JSA

Defendants] seek to eliminate or soften the impact of joint and several liability on the settlement defendants." Pet. App. 9a.

* * *

The J&S Negation Provision is antithetical to the federal antitrust regime in several respects.

First, impairing or displacing joint and several liability is directly contrary to the statutory scheme enacted and maintained by Congress. Not only has Congress rejected numerous attempts to eliminate joint and several liability from the federal antitrust regime, but when enacting ACPERA in 2004, Congress expressly reaffirmed its importance. With ACPERA, Congress set out the one and only way to avoid joint and several liability: a successful amnesty application. The JSA runs directly counter to the overall structure for private antitrust enforcement under the federal antitrust regime—and could undermine the very goals of ACPERA by allowing wrongdoers to minimize or avoid joint and several penalties without having to cooperate and make full disclosures to the Department of Justice. *See* ABA Section of Antitrust Law, Antitrust Law Developments 757 (8th ed. 2017) ("The potential impact of joint and several liability in antitrust cases was deemed sufficiently significant by the Antitrust Division of the Department of Justice that its disallowance plays a major role in the collection of benefits to applicants to the division's leniency program.").

Second, the J&S Negation Provision interferes with the goal of deterring antitrust violations. As the Seventh Circuit itself has observed, "[j]oint and

several liability is [a] . . . vital instrument for maximizing deterrence." *Paper Sys.*, 281 F.3d at 633. If defendants are permitted to displace joint and several liability, a critical source of deterrence will be undermined.

Third, permitting enforcement of the J&S Negation Provision results in under-enforcement of penalties with respect to the specific conduct at issue in these cases. Under established federal antitrust law, if liability is proven at trial, the victims are entitled to, *inter alia*, both joint and several liability and treble damages. The JSA improperly seeks to strip away a vital part of the statutory remedial scheme.[7]

* * *

Each JSA Defendant was free to negotiate *on its own* with any plaintiff, in an attempt to convince that plaintiff to not only release its claims against that Defendant in a settlement, but also to reduce its claims against *non-settling* Defendants. But convincing any plaintiff to reduce its claims against non-settling Defendants would be exceedingly difficult for a solitary Defendant. Recognizing that challenge, the JSA Defendants instead opted for concerted action, agreeing on the J&S Negation Provision—giving themselves negotiating power they did not and could not possess acting unilaterally.

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[7] Impairing joint and several liability not only reduces single damages to which a prevailing plaintiff is entitled under the statutory scheme, but also deprives that plaintiff of treble damages to which it is automatically entitled under federal antitrust law. *See* 15 U.S.C. § 15.

Settlements are a critical part of private antitrust enforcement. *See generally* Robert H. Lande & Joshua P. Davis, *Benefits From Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. Rev. 879 (2008) (discussing settlements); Joshua P. Davis & Robert H. Lande, *Toward an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 Seattle U. L. Rev. 1269 (2013) (same). The antitrust laws do not guarantee plaintiffs any particular outcomes in settlement negotiations. But the antitrust laws themselves establish the playing field for settlement negotiation—leaving the parties to weigh the risks imposed by application of the law governing liability and damages to the facts. Yet the JSA Order has permitted distortion of that playing field, by *allowing Defendants to coordinate and agree* about imposition of the J&S Negation Provision in settlement negotiations with plaintiffs.[8]

* * *

In the JSA Order, the District Court placed great weight on the fact that the JSA allows a settling Defendant to exempt a given settlement from the JSA's terms—a so-called "unqualified settlement." *See* Pet. App. 10a. But the District Court declined to ask the JSA Defendants whether, or how often, that

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[8] At oral argument before the District Court, the JSA Defendants conceded their agreement sought to "ameliorate the impact of joint and several liability on the settlement dynamic." No. 1:16-cv-08637 (N.D. Ill. Feb. 22, 2033), ECF No. 5448 (transcript of Feb. 17, 2022 oral argument) at 33:20-21.

has occurred—ignoring how the JSA is operating in the real world.[9]

The mere inclusion of language permitting "unqualified settlements" cannot immunize the challenged JSA provisions from scrutiny. One would expect capable counsel for Defendants to include in the JSA language permitting "unqualified" settlements even if the JSA Defendants never intended to enter into one, so they could use the presence of that language to defend their agreement if challenged, like here.

The JSA Defendants featured the J&S Negation Provision in their compact for a reason—*to use it*. Defendants admit, and the District Court acknowledges, the purpose and effect of the J&S Negation Provision is to reduce or avoid joint and several liability. Given that, and given the absence of evidence that "unqualified settlements" are commonly entered into, there is good reason to think the

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[9] *See* No. 1:16-cv-08637 (N.D. Ill. Feb. 22, 2033), ECF No. 5448 (transcript of Feb. 17, 2022 oral argument); *see also id.* at 17:14-18 (Plaintiffs' counsel inviting counsel for the JSA Defendants to tell the Court "the number of settlements that the JSA signatories have entered into . . . where they have agreed to not include the contested provision regarding joint and several liability"); *id.* at 53:4-8 (Plaintiffs' counsel observing that defense counsel "didn't take up my invitation to inform the Court whether there were any examples where . . . the JSA signatory defendants[ ] have agreed not to include the provision"); *id.* at 16:3-6 (Plaintiffs' counsel: the JSA Defendants "make a big point that they're free to do away with [the J&S Negation Provision], but there's no evidence that they have. My personal experience fully supports our position that they're abiding by it.").

language permitting "unqualified settlements" is "window dressing." *Cf. In re Terazosin Hydrochloride Antitrust Litig.*, No. 99-MDL-1317, 2002 WL 35651678, at *1 (S.D. Fla. Aug. 28, 2002) (observing the JSA's provision that either defendant was "free to settle unilaterally at any time" was "mere window dressing for the agreement's true effect," which foreclosed settlements unless a plaintiff agreed to reduce its claim against the non-settling defendant).

* * *

The JSA's requirement that the participating Defendants promptly provide each other with full copies of all settlement agreements with any plaintiff also undermines private antitrust enforcement. *See* JSA § 6(A) ("A Settling Party shall provide to the other Parties within seven days of execution of any Settlement (i) written notice of any such Settlement, (ii) the identity of each Plaintiff that is a party to the Settlement, and (iii) a copy of the Settlement.").

Settlement agreements are typically considered confidential by the parties, unless they are required to be publicly disclosed—*e.g.*, when courts must approve a settlement, as under Federal Rule of Civil Procedure Rule 23.

It is widely recognized that the confidentiality of settlement agreements encourages settlements. *See, e.g.*, *Cali Express, Inc. v. Bermingham*, No. 1:14-cv-1683, 2015 WL 13631361, at *3 (S.D. Ind. July 20, 2015) (noting "the strong federal policy favoring settlements and encouraging them through maintaining the confidentiality of negotiations and agreements"); *Hasbrouck v. BankAmerica Housing Servs.*, 187 F.R.D. 453, 458 (N.D.N.Y. 1999)

("[P]rotecting the confidentiality of the settlement agreement promotes the important public policy of encouraging settlements.").

Here, the JSA Defendants have agreed they will promptly exchange settlement agreements with one another, without any valid justification, and without letting plaintiffs do the same (*i.e.*, share a settlement agreement with other plaintiffs). As with the J&S Negation Provision, the JSA Defendants have imposed their Settlement Agreement Sharing Provision on plaintiffs by coordinating and agreeing with one another, since no rational plaintiff would accept such a provision if it could settle without it.

Allowing all JSA Defendants to know the confidential terms a given plaintiff has entered into with a given JSA Defendant puts that plaintiff at a disadvantage if and when the plaintiff subsequently negotiates with another JSA Defendant. That is unfair. It also discourages plaintiffs from negotiating and entering into settlements with JSA Defendants, frustrating the federal policy of encouraging settlement of antitrust cases.[10]

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[10] *See, e.g.*, *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 117-18 (2d Cir. 2005) ("[f]ederal antitrust cases are complicated, lengthy, and bitterly fought" and "[t]he compromise of complex litigation is encouraged by the courts and favored by public policy"); *see also In re Sch. Asbestos Litig.*, 921 F.2d 1330, 1333 (3d Cir. 1990) (noting the "policy of encouraging settlement of complex litigation that otherwise could linger for years"); *Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 312 (7th Cir. 1980) ("It is axiomatic that the federal courts look with great favor upon the voluntary resolution of litigation through settlement.");

II. This Court's Review is Required to Prevent Significant Interference With Private Antitrust Enforcement

Although this Court has described the collateral order doctrine as "narrow and selective," it has never declared membership in the "'small class' of collaterally appealable orders" to be closed. *Will*, 546 U.S. at 350 (internal quotation omitted).

As the JSA Order acknowledges, the challenged JSA provisions are intended to alter the dynamics of settlement negotiations, and the terms of settlement agreements. Pet. App. 12a (recognizing the JSA may "lessen[] the negotiating power of a plaintiff" and "make it more difficult for a plaintiff to settle on more advantageous terms"). If the JSA Order is left in place until final judgment, along with the Seventh Circuit's Order denying appellate review, defendants in every antitrust case across the country will have carte blanche to enter into "joint defense" compacts like the one at issue here, dramatically tilting the settlement playing field in Section 1 cases in favor of defendants—arrogating to themselves the ability to alter the framework for private antitrust enforcement enacted by Congress.

The Court has repeatedly granted certiorari to consider important antitrust questions without

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In re Ins. Brokerage Antitrust Litig., 282 F.R.D. 92, 102 (D.N.J. 2012) ("The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation.") (quoting *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 784 (3d Cir. 1995)).

waiting for conflicts among courts of appeals to emerge. *See, e.g.*, *Nat'l Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 820 (1978) ("Because of the importance of the issue for the agricultural community and for the administration of the antitrust laws, we granted certiorari."); *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 311 (1978) ("We granted certiorari to resolve an important and novel question in the administration of the antitrust laws."); *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 326 (1955) ("We granted certiorari because of the importance of the question thus presented in the enforcement of the federal antitrust laws."); *see also Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141, 2147 (2021) (certiorari granted where petitioner "[i]n essence . . . seeks immunity from the normal operation of the antitrust laws"). The Court should do so here.

CONCLUSION

The JSA Order is "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). This Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED JUNE 23, 2023

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

June 23, 2023

Before:

Frank H. Easterbrook, *Circuit Judge*
Diane P. Wood, *Circuit Judge*
Michael B. Brennan, *Circuit Judge*

No. 22-1994

AMORY INVESTMENTS LLC, *et al.*,

Plaintiffs-Appellants,

v.

TYSON FOODS INCORPORATED, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 1:16-cv-08637

Thomas M. Durkin, Judge.

Appendix A

ORDER

On consideration of the papers filed in this appeal and review of the short record,

IT IS ORDERED that this appeal is DISMISSED for lack of jurisdiction.

Twenty-eight plaintiffs appeal a district court order entered on May 4, 2022, "denying their motion to preclude enforcement of certain provisions in the Judgment Sharing Agreement to which fourteen groups of Defendants are parties." Plaintiffs' claims against these defendants remain pending in the district court.

Plaintiffs assert appellate jurisdiction based on the collateral order doctrine, which permits an appeal of select categories of interlocutory orders. Arguments to extend collateral-order review beyond the few, well established categories of orders usually fail. *Herx v. Diocese of Fort Wayne-SouthBend, Ind.*, 772 F.3d 1085, 1088-90 (7th Cir. 2014). Like so many other litigants who have tried to expand the small class of collaterally appealable orders, and mindful of the Supreme Court's admonition against expansion of the doctrine's selective membership, *see Will v. Hallock*, 546 U.S. 345, 350 (2006), the interests that appellants raise do not meet the doctrine's high bar.

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED JUNE 10, 2022

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

June 10, 2022

No. 22-1994

AMORY INVESTMENTS LLC, *et al.*,

Plaintiffs-Appellants,

v.

TYSON FOODS INCORPORATED, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 1:16-cv-08637

Thomas M. Durkin, Judge.

Appendix B

ORDER

On consideration of the Circuit Rule 3(c) Docketing Statement filed by appellants on June 10, 2022, asserting appellate jurisdiction based on the collateral order doctrine,

IT IS ORDERED that appellants fully discuss, in their jurisdictional memorandum due on June 21, 2022, the application of the doctrine to the order appealed in light of the Supreme Court's admonition of the doctrine's expansion. As the Supreme Court bluntly put it, "we have meant what we have said; although the court has been asked many times to expand the 'small class' of collaterally appealable orders, we have instead kept it narrow and selective in its membership." *Will v. Hallock*, 546 U.S. 345, 350 (2006); *see generally* Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit (2020 ed.) at pp. 63-65.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED JUNE 6, 2022

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

June 6, 2022

No. 22-1994

AMORY INVESTMENTS LLC, *et al.*,

Plaintiffs-Appellants,

v.

TYSON FOODS INCORPORATED, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois Eastern Division.

No. 1:16-cv-08637

Thomas M. Durkin, Judge.

Appendix C

ORDER

A preliminary review of the short record indicates that the order appealed from may not be a final appealable judgment within the meaning of 28 U.S.C. § 1291.

Twenty-eight plaintiffs appeal a district court order entered on May 4, 2022, "denying their motion to preclude enforcement of certain provisions in the Judgment Sharing Agreement to which fourteen groups of Defendants are parties." There is no indication, however, that the plaintiffs' claims against any of the "fourteen groups of Defendants" were resolved. Put another way, it appears that plaintiffs' claims against these defendants remain pending in the district court. There appears no basis to seek appellate review of the May 4, 2022 order at this time – unlike the appeal filed by eight plaintiffs (all of whom are appellants in this appeal) against five *different* defendants (pursuant to a Rule 54(b) partial judgment) which the court docketed as Appeal No. 22-1858. Accordingly,

IT IS ORDERED that appellants file, on or before June 21, 2022, a brief memorandum stating why this appeal should not be dismissed for lack of jurisdiction. A motion for voluntary dismissal pursuant to Fed. R. App. P. 42(b) will satisfy this requirement. Briefing shall be suspended pending further court order.

NOTE: Caption document "JURISDICTIONAL MEMORANDUM." The filing of a Circuit Rule 3(c) Docketing Statement does not satisfy your obligation under this order.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, FILED MAY 4, 2022

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 16 C 8637

IN RE BROILER CHICKEN ANTITRUST LITIGATION

May 4, 2022, Decided
May 4, 2022, Filed

Judge Thomas M. Durkin

ORDER

The majority of Defendants in this case (the briefs say 14 of them) have entered into what is titled a "judgment sharing agreement." The second amended judgment sharing agreement (or JSA) is the subject of the motion. A copy was provided to the Court, along with the motion and the briefs in support and opposition to it. Having heard oral argument, the motion is denied for the following reasons.

Because antitrust claims carry the risk of treble damages and attorney's fees and a verdict against multiple defendants allows joint and several liability with no right of contribution, a defendant with a very small market share could be required to pay damages attributable

to the entire conspiracy. Who has to pay such a large verdict among liable defendants is entirely up to the winning plaintiffs. A ruinous or bankruptcy producing collection action could occur. Defendants believe, and some commentators have written, that this situation could lead to coercive settlements. Plaintiffs disagree and say that joint and several liability is an essential part of the overall antitrust enforcement scheme.

Plaintiff challenge two parts of the JSA. One is the language in § 6(D):

> Settling plaintiff agrees to reduce the dollar amount collectible from non-settling parties pursuant to any final judgment by a percent equal to the settling parties sharing percentage as calculated pursuant to the JSA.

Plaintiffs contend this provision allows Defendants to effectively disable joint and several liability, which they argue is contrary to Congressional intent to maximize deterrence for antitrust violations. Plaintiffs also argue that the JSA violates Section 1 of the Sherman Act in that it constitutes a group boycott prohibiting settlements that do not include this language.

The second part of the JSA that plaintiffs challenge is the requirement that each JSA defendant provide the others with a copy of any settlement agreement. The plaintiffs believe this exchange of settlement agreements lacks any justification and puts the defendants at a competitive advantage with respect to each Direct Action Plaintiff, thereby discouraging settlement.

Appendix D

Defendants concede that federal antitrust law has long imposed joint and several liability on co-conspirators and that by entering into the JSA, and in particular § 6(D), they seek to eliminate or soften the impact of joint and several liability on the settlement defendants. But they also point out that such agreements have been common for many years.

The widespread use of JSAs is reflected in the paucity of case law finding them unlawful or even criticizing their use. There is no binding authority either way on the validity of the challenged sections of the JSA from either the Supreme Court or the Seventh Circuit. And almost all of the district courts to have addressed language similar to that of § 6(D) at issue here have found its use to be lawful. *See, e.g., California v. Infineon Techs. AG*, 2007 U.S. Dist. LEXIS 98333, 2007 WL 6197288 (N.D. Cal. Nov. 29, 2007); *In re Brand Name Prescription Drugs Antitrust Litig.*, 1995 U.S. Dist. LEXIS 4738, 1995 WL 221853 (N.D. Ill. Apr. 11, 1995);[1] *Cimarron Pipeline Const., Inc. v. Nat'l Council on Comp. Ins.*, 1992 U.S. Dist. LEXIS 18560, 1992 WL 350612, (W.D. Okla. Apr. 10, 1992). These courts found JSAs permissible as long as they do not impose absolute prohibitions on a signatory defendant's right to settle with a plaintiff individually or contain provisions demonstrating an improper motive to prevent resolution of litigated claims, or that the JSA otherwise has an adverse impact on settlement negotiations. None of those factors are present here.

As an initial observation, there is nothing improper about a JSA, and "they are generally appropriate." *See*

1. The Court finds Judge Kocoras's reasoning in *In re Brand Name* persuasive and adopts it here.

Manual of Complex Litigation (4th ed.), at 178. "These agreements serve the legitimate purposes of controlling parties' exposure and preventing plaintiffs from forcing an unfair settlement by threats to show favoritism in the collection of any judgment that may be recovered." *Id.*

The Court would be more skeptical of an agreement that "expressly prohibit[ed] or indirectly discourage[d] individual settlements." *Id.* But that is not the case here. To the contrary, it expressly allows for them, providing that any "party may settle a plaintiff claim, in whole or in party, at any time for monetary or non-monetary consideration or injunctive or other relief." The JSA describes as an "unqualified settlement" any settlement that does not require a settling plaintiff to reduce the dollar amount collectible from non-settling parties pursuant to any final judgment by a percentage equal to the settling parties sharing percentage (generally the settling defendant's market share). Defendants are free to enter into unqualified settlements, which do not contain this judgment sharing language.

Plaintiffs' primary argument is that the JSA somehow jeopardizes joint and several liability. But nothing in the JSA destroys Plaintiffs' entitlement to the full remedies under the law for a trial verdict in their favor. The JSA does not—and cannot—change the fact that any defendant who loses at trial will be subject to joint and several liability with no right of contribution. The JSA simply provides incentives for defendants to reach an agreement with a plaintiff to give up some of the remedies it has if it had gone to trial, such as joint and several liability and treble damages. That's an unremarkable proposition. Parties on both sides of settlement agreements give up

something and that is simply the nature of settlement agreements. If a plaintiff wants joint and several liability and treble damages on the table, that will always remain a possibility through the avenue of trial. Obviously, a plaintiff can hold out for a better settlement because a defendant is avoiding the risk of joint and several liability and treble damages. That's part of the risk analysis that does into every decision by both parties to settle. These are settlements between sophisticated parties represented by sophisticated lawyers who are eminently capable of advising their clients regarding the balance of those risks.

When viewed in that light, Plaintiffs' arguments become less compelling. The bottom line is that no agreement between defendants can alter a plaintiff's rights. A plaintiff's rights can only be altered with the plaintiff's consent. The idea that JSA's trample Congressional intent is illusory. Plaintiffs always have the right to pursue full remedies provided by federal law by refusing to settle.

Congress never passed a law prohibiting JSAs in the antitrust context. There is no question from the briefs each side submitted that Congress knew of JSAs and could have passed a law to prohibit them if Congress believed such agreements served to undermine some statutory or regulatory scheme Congress thought needed to be protected. Plaintiffs argue that provisions in the Antitrust Criminal Penalty Enhancement & Reform Act indicate Congressional disapproval of JSAs. But nothing in that Act prohibits JSAs, and there's a limit to how much can be read into Congressional inaction on a subject. The bottom line is there is no law that prohibits JSAs, either expressly or by implication.

Appendix D

Plaintiffs' contention that a JSA is otherwise unlawful under antitrust law is rejected. Coordination among defendants on how to address litigation is not a group boycott. As discussed, defendants remain free to settle with any plaintiff on any terms. As such, Defendants are not engaged in a boycott. Moreover, federal antitrust law does not speak to settlement agreements, and the agreements in this case, as far as the Court knows, do not concern the commercial transactions between plaintiffs and defendants in the operations of their businesses. Multiple plaintiffs and multiple defendants often agree with their group about a variety of ways to deal with various litigation matters. This situation is no different. Unless it deprives an opposing party of a right the law grants that opposing party, there is nothing unlawful about it. For the same reason, a JSA is not unlawful under Illinois law.

The Court also finds that the JSA does not discourage settlements. In this case, there have been defendants who are not party to a JSA who have settled with class plaintiffs, and defendants who are parties to the JSA who have settled with class plaintiffs. I'm not privy to the settlement agreement of non-class plaintiffs. But the mere fact that defendants have reached an agreement among themselves in the form of a JSA that is entirely rational and not illegal, even it is lessens the negotiating power of a plaintiff, is not a basis to declare it or parts of it unlawful or unenforceable.

The JSA may make it more difficult for a plaintiff to settle on more advantageous terms. But that is a product of the parties balancing the risks and costs of continuing to proceed with this litigation. It is not the Court's role

to interfere with that private cost-benefit analysis or the ensuing private agreements unless there is something illegal about those agreements. As discussed, the Court rejects Plaintiffs' arguments that JSAs in general and this JSA in particular are illegal.

The JSA also provides that each JSA defendant must provide the others with a copy of any settlement agreement to which a JSA defendant is a party, within seven days after executing the agreement. The plaintiffs claim this lacks any legitimate justification, puts the defendants at a competitive disadvantage with respect to each Direct Action Plaintiff, and discourages settlement. But nothing prevents a settling plaintiff from insisting on language in a settlement agreement that says to a settling defendant that they must keep the settlement agreement confidential. The cases Plaintiffs cite to support the idea that settlement agreements are confidential all deal with a productions of settlement agreements, which is irrelevant to the circumstances at issue here. Plaintiffs are free to decide whether to insist on confidentiality of any settlement agreement. The JSA does not materially impair that right.

For all those reasons, Plaintiffs' motion [5163] is denied.

ENTERED:

/s/ Thomas M. Durkin
Honorable Thomas M. Durkin
United States District Judge

Dated: May 4, 2022