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11
12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA WESTERN DIVISION**

14 GLOBAL MUSIC RIGHTS, LLC,)

15 *Plaintiff,*)

16 v.)

17 RADIO MUSIC LICENSE)
18 COMMITTEE, INC. et al.,)

19 *Defendants.*)
20)
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22)
23)
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28)

Case No. 2:16-cv-9051-TJH(ASx)

**[PROPOSED] BRIEF OF AMICUS
CURIAE NATIONAL
ASSOCIATION OF
BROADCASTERS**

The Honorable Terry J. Hatter, Jr.

Hearing Date: February 24, 2020

Hearing Time: Under Submission

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1 Department and courts regarding the ASCAP and Broadcast Music, Inc. (“BMI”)
2 consent decrees. Similarly, NAB was involved in the development and passage of
3 the Orrin G. Hatch-Bob Goodlatte Music Modernization Act, which also involves
4 the relationship between PROs and content licensees. NAB has a strong interest in
5 the litigation between the Radio Music Licensing Committee (“RMLC”) and
6 Global Music Rights (“GMR”), as it too involves the relationship between
7 licensees and a PRO, and threatens to harm NAB members that are not involved
8 directly in the litigation.

9 ARGUMENT

10 In this brief, NAB addresses the U.S. Department of Justice’s
11 Statement of Interest insofar as it suggests that buying collaborations should be per
12 se illegal.

13 As an initial matter, it is worth emphasizing that this Court owes no
14 deference to the views of the United States offered here. “28 U.S.C. § 517 does
15 not create a right for the Government to appear and submit argument in any case in
16 which the United States articulates an interest in the development and correct
17 application of the law.” *Oscar Ins. Co. of Fla. v. Blue Cross and Blue Shield of*
18 *Fla., Inc.*, 2019 WL 5295091, at *1 (M.D. Fla. 2019) (describing the
19 Government’s briefing as “unhelpful”). Courts “owe[] no particular deference to”
20 the views of the United States about how to construe the antitrust laws. *U.S. v.*
21 *Anthem, Inc.*, 855 F.3d 345, 349 (D.C. Cir. 2017); *see also, e.g., Olin Corp. v.*
22 *FTC*, 986 F.2d 1295, 1299 (9th Cir. 1993) (Department policy is “not binding on
23 the courts”); *FTC v. PPG Indus.*, 798 F.2d 1500, 1503 n.4 (D.C. Cir. 1986)
24 (Department policy is “by no means to be considered binding on the court”); *FTC*
25 *v. Owens-Illinois, Inc.*, 681 F. Supp. 27, 48 (D.D.C. 1988) (characterizing
26 Department legal analysis as a “suggest[ion]”). NAB further notes that it is
27 unorthodox for the Department to intercede in private litigation, especially at the
28 pleading stage.

1 Turning to the substance of the Statement of Interest, implicit in it are
2 three substantial deviations from historical Department policy that are relevant to
3 assessing the Statement of Interest’s usefulness to the Court. *First*, the Statement
4 of Interest offers no explanation for the striking shift from protecting our nation’s
5 citizens against the illegal activities of PROs to suggesting (through a Statement of
6 Interest in a private litigation) that a PRO is a victim of per se illegal conduct in an
7 industry that has been under active Department supervision for decades. Indeed,
8 the Department has been active in enforcing the antitrust laws against the illegal
9 activity of PROs since at least 1934. *U.S. v. ASCAP*, Equity Number 78-388
10 (S.D.N.Y. filed Aug. 10, 1934). During the intervening decades since the
11 Roosevelt Administration, the Department has, heretofore, fought to protect the
12 country from the anticompetitive effects of PROs. As part of that decades-long
13 mission, the Department repeatedly acknowledged the role of entities like RMLC
14 organized for the purpose of collectively negotiating reasonable rates with PROs—
15 and never once to NAB’s knowledge suggested to a court that they were illegal let
16 alone per se illegal. *E.g.*, Brief of the Department of Justice at 8 n.5 *U.S. v. BMI*
17 (*Application of AEI Music Network, Inc.*), 275 F.3d 168 (2d Cir. 2001), available at
18 <https://www.justice.gov/atr/case-document/file/489861/download> (“[s]ome classes
19 of user, such as broadcasters, negotiate their rates with ASCAP and BMI through
20 trade associations organized for that purpose”); Mem. of the Department of Justice
21 in Response to Public Comments on the Joint Motion to Enter Second Amended
22 Final Judgment (Mar. 16, 2001), *U.S. v. ASCAP*, 2001 WL 1589999 (S.D.N.Y.
23 2001), available at <https://www.justice.gov/atr/case->
24 [document/file/485971/download](https://www.justice.gov/atr/case-document/file/485971/download) (noting that negotiating groups within an industry
25 “purport[ed] to set a rate for the industry”).

26 *Second*, even assuming that GMR has sufficiently pleaded the
27 existence of an agreement among competitors, the Department’s long-standing
28 enforcement policy about competitor collaborations unequivocally characterizes

1 buying collaborations as arrangements that are subject to the rule of reason, not the
2 per se rule. U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N, ANTITRUST
3 GUIDELINES FOR COLLABORATION AMONG COMPETITORS § 3.31 (April 2000)
4 (hereinafter "COMPETITOR COLLABORATION GUIDELINES"). Under the
5 Department's own long-standing enforcement standards, it is clear that buying
6 collaborations are not per se illegal so long as they are reasonably related to an
7 efficiency:

8 If, however, participants in an efficiency-enhancing
9 integration of economic activity enter into an agreement
10 that is reasonably related to the integration and
11 reasonably necessary to achieve its procompetitive
 benefits, the Agencies analyze the agreement under the
 rule of reason, even if it is of a type that might otherwise
 be considered per se illegal.

12 COMPETITOR COLLABORATION GUIDELINES § 3.2 at 8. GMR's own complaint
13 gives ample proof that music licensing is complex, difficult, and time-consuming,
14 and that licensee collaboration would have obvious benefits, which helps explain
15 why, instead of approaching each radio station individually, "GMR approached
16 RMLC with the explicit purpose of negotiating license fees for its members" and
17 why the Southern District of New York has mandated fees "to fund the RMLC's
18 operations." GMR Complaint and Demand for Jury Trial ¶¶ 59, 99, Dkt. 23.
19 PROs rely on blanket licenses "due to the enormous administrative costs that
20 would occur in a world where each performance of each composition is
21 individually negotiated and documented." *Id.* ¶ 29. Further evidencing the
22 Department's long history of treating buying collaborations as entities permissible
23 under the rule of reason are no fewer than thirty-two Business Review Letters from
24 every Administration since President Ford condoning the sort of conduct that the
25 Department now suggests is per se illegal. (The attached Appendix provides
26 descriptions and citations.) Given this precedent, the Department's about-face here
27 is unjustified and unwarranted.
28

1 *Third*, the December 2019 Statement also fails to address why the
2 Department is seeking to encourage this Court to expand the scope of per se
3 illegality under the antitrust laws. As the United States has previously
4 acknowledged, “Per se treatment is inappropriate when the economic impact of the
5 type of conduct at issue is not obviously and predictably anticompetitive.” Brief
6 for the United States as Amicus Curiae Supporting Petitioner, *Leegin Creative*
7 *Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007). Prior Administrations
8 have consistently noted the potential chilling effect of overbroad approaches to the
9 application of antitrust law. Rules that attempt to distinguish precisely between
10 competitive and anticompetitive practices can “court[] intolerable risks of chilling
11 legitimate conduct.” *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*,
12 509 U.S. 209, 223 (1993). This is particularly true where the underlying conduct
13 at issue is not merely not illegal but actually procompetitive—which the
14 Department has previously acknowledged is the case with buying collaborations:

15 Competitor collaborations may involve agreements
16 jointly to purchase necessary inputs. Many such
17 agreements do not raise antitrust concerns and indeed
18 may be procompetitive. Purchasing collaborations, for
19 example, may enable participants to centralize ordering,
20 to combine warehousing or distribution functions more
21 efficiently, or to achieve other efficiencies.

19 COMPETITOR COLLABORATION GUIDELINES § 3.31(a). *See also* Brief for the United
20 States as Amicus Curiae Supporting Reversal, *Nw. Wholesale Stationers, Inc. v.*
21 *Pac. Stationery*, 472 U.S. 284 (1985) (“Joint ventures of competitors, including
22 purchasing cooperatives, are often substantially procompetitive.”); Brief for the
23 United States as Amicus Curiae Supporting Petitioner, *Leegin Creative Leather*
24 *Prods., Inc.*, 551 U.S. 877 (“Application of a per se rule to conduct that often
25 would be procompetitive has the potential to erode the rationale for per se
26 treatment and foster judicial reluctance to use such a blunt instrument even in those
27 circumstances when it is appropriate.”). Low pleading standards in private
28 antitrust actions can particularly risk chilling efficient economic activity—“the

1 very conduct the antitrust laws are designed to protect.” *Verizon Commc’ns Inc. v.*
2 *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004). Claims, like
3 GMR’s per se claims in this action, that are not promptly dismissed can create
4 economic inefficiencies by forcing parties to defend procompetitive behavior, and
5 in so doing, chill procompetitive conduct. “Meritless antitrust suits, ... if not
6 promptly dismissed, [] create economic inefficiencies, chill procompetitive
7 conduct, and act as a drain on the economy.” Brief for the United States as
8 Amicus Curiae Supporting Petitioners, *Bell Atlantic Corp. v. Twombly*, 550 U.S.
9 544 (2007). In its Statement of Interest, the Department fails to acknowledge these
10 traditional concerns about the application of the antitrust laws to overly broad per
11 se claims.

12 CONCLUSION

13 For the foregoing reasons, the Court should dismiss GMR’s per se
14 claims against RMLC.

15 Respectfully submitted,

16 Dated: January 14, 2020

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Appendix

Year	Requesting Entity	Relevant Language	Citation
2012	STARS Alliance LLC	“To the extent that the proposed cooperative activities increase efficiencies that result in lower costs, the proposed conduct could have a procompetitive effect.”	U.S. Dep’t of Justice Business Review Letter to STARS All. LLC (Dec. 20, 2012)
2000	Containers America LLC	“Finally, we note that to the extent that the contemplated joint selling and/or purchasing activities provide steel drum customers with additional purchasing options or lower their costs, the proposed conduct could have procompetitive effects.”	U.S. Dep’t of Justice Business Review Letter to Containers Am. LLC (Mar. 8, 2000)
1999	NSM Purchasing Association	“Moreover, to the extent that the proposed joint purchasing reduces NSM members’ costs and such savings are shared with consumers, the proposal could have a procompetitive effect.”	U.S. Dep’t of Justice Business Review Letter to NSM Purchasing Ass’n (Jan. 13, 1999)
1998	Armored Transport Alliance	“Finally, the proposed joint purchasing by ATA on behalf of its members should not have any adverse effects on competition.”	U.S. Dep’t of Justice Business Review Letter to Armored Transport All. (Mar. 12, 1998)

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Year	Requesting Entity	Relevant Language	Citation
1997	California Large Electric Power Purchasing Association	“To the extent that the contemplated joint purchasing reduces the costs of electric power to CLEPPA’s members, it could have the procompetitive effect of increasing output to the benefit of consumers. “	U.S. Dep’t of Justice Business Review Letter to California Large Elec. Power Purchasing Ass’n (Nov. 20, 1997)
1995	Business Travel Contractors Corp.	“The BTCC proposal does not appear to pose a significant risk of anticompetitive results and may have procompetitive effects.”	U.S. Dep’t of Justice Business Review Letter to Bus. Travel Contractors Corp. (July 14, 1995)
1993	Nickel Users Purchasing Association, Inc.	“There also appears to be a procompetitive justification for this proposal. Collective price negotiation has the potential to create efficiencies that could result in lower prices for nickel and thus for nickel-based products manufactured by the members.”	U.S. Dep’t of Justice Business Review Letter to Nickel Users Purchasing Ass’n, Inc. (Jun. 2, 1993)
1989	Shippers of Recycled Textiles, Inc.	“In the past, we have endeavored to conduct the required investigation when a shippers’ association is being formed.”	U.S. Dep’t of Justice Business Review Letter to Shippers of Recycled Textiles, Inc. (Dec. 11, 1989)

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Year	Requesting Entity	Relevant Language	Citation
1988	FRA Shippers' Association	"Collective rate negotiation has the potential to create efficiencies that result in lower freight rates. To the extent that this occurs, the formation and operation of a shippers' association could be procompetitive."	U.S. Dep't of Justice Business Review Letter to FRA Shippers' Ass'n (Jun. 17, 1988)
1988	Columbia River Shippers Association	"Collective rate negotiation has the potential to create efficiencies that result in lower freight rates. To the extent that occurs, the formation and operation of a shippers' association could be procompetitive."	U.S. Dep't of Justice Business Review Letter to Columbia River Shippers Ass'n (May 30, 1988)
1988	North American Shippers' Association, Inc.	"Collective rate negotiation has the potential to create efficiencies that result in lower freight rates. To the extent that this occurs, the formation and operation of a shippers' association could be pro-competitive."	U.S. Dep't of Justice Business Review Letter to N. Am. Shippers' Ass'n, Inc. (Mar. 16, 1988)
1987	The Shippers' Association, Inc.	"Collective rate negotiation has the potential to create efficiencies that result in lower freight rates. To the extent that this occurs, the proposed activities would be procompetitive."	U.S. Dep't of Justice Business Review Letter to The Shippers' Ass'n (Nov. 17, 1987)

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Year	Requesting Entity	Relevant Language	Citation
1987	Pacific Northwest Asia Shippers Association	“Collective rate negotiation has the potential to create efficiencies that result in lower freight rates. To the extent that this occurs, the proposed activities would be procompetitive.”	U.S. Dep’t of Justice Business Review Letter to Pac. NW Asia Shippers Ass’n (Oct. 28, 1987)
1987	American Furniture Manufacturers Association	“Collective rate negotiation has the potential to create efficiencies that result in lower freight rates. To the extent that this occurs, the proposed activities would be procompetitive.”	U.S. Dep’t of Justice Business Review Letter to Am. Furniture Mfrs. Ass’n (July 6, 1987)
1987	Fashion Accessories Shippers’ Association	“Collective rate negotiation has the potential to create efficiencies that result in lower freight rates. To the extent that this occurs, the formation and operation of a shippers’ association would be procompetitive.”	U.S. Dep’t of Justice Business Review Letter to Fashion Accessories Shippers’ Ass’n (Mar. 25, 1987)
1986	Hong Kong Shippers’ Association	“Collective rate negotiation has the potential to create efficiencies that result in lower freight rates. To the extent that occurs, the formation and operation of a shippers’ association could be pro-competitive.”	U.S. Dep’t of Justice Business Review Letter to Hong Kong Shippers’ Ass’n (July 3, 1986)

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Year	Requesting Entity	Relevant Language	Citation
1986	Gulf Wine and Spirit Shippers' Council Inc.	"Collective rate negotiation has the potential to create efficiencies that result in lower freight rates. To the extent that occurs, the formation and operation of a shippers' association could be procompetitive."	U.S. Dep't of Justice Business Review Letter to Gulf Wine and Spirits Shippers' Council, Inc. (May 30, 1986)
1985	International Beverage Shippers Association, Inc.	"Collective rate negotiation has the potential to create efficiencies that result in lower freight rates . . . [which] could be procompetitive."	U.S. Dep't of Justice Business Review Letter to Int'l. Beverage Shippers Ass'n, Inc. (Dec. 13, 1985)
1985	Household Goods Forwarders Association of America, Inc.	"Collective purchasing of transportation services generally produces significant efficiencies and therefore can result in enhanced competition, increased output, and lower consumer prices."	U.S. Dep't of Justice Business Review Letter to Household Goods Forwarders Ass'n of Am., Inc. (Sept. 19, 1985)
1985	Mid-America National Cable Television Cooperative, Inc.	"The cooperative will negotiate on behalf of its members with suppliers of proگرامing and hardware used by cable companies. . . . On the basis of the information currently available to us, it does not appear that the operation of the Mid-America cooperative will be anticompetitive."	U.S. Dep't of Justice Business Review Letter to Mid-America Nat'l. Cable Telev. Coop., Inc. (Aug. 30, 1985)

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Year	Requesting Entity	Relevant Language	Citation
1985	Wine and Spirits Shippers Association, Inc.	“Collective purchasing can produce certain efficiencies that may increase output and enhance competition.”	U.S. Dep’t of Justice Business Review Letter to Wine and Spirits Shippers Ass’n, Inc. (Aug. 30, 1985)
1985	New World Shippers’ Association	“The formation and operation of NWSA may result in significant economies through reduced transportation and negotiation costs for shippers, and appears to have little potential for producing anticompetitive harm.”	U.S. Dep’t of Justice Business Review Letter to New World Shippers’ Ass’n (Aug. 26, 1985)
1985	American Institute for Shippers’ Associations, Inc.	“Collective negotiation of FAK rates also could raise competitive concerns if it significantly impaired competition either among shippers’ associations or among individual shippers. Neither appears to be the case here.”	U.S. Dep’t of Justice Business Review Letter to Am. Inst. For Shippers’ Ass’n, Inc. (Feb. 12, 1985)
1985	Transportation Brokers Conference of America, Inc.	“Collective purchasing can produce certain efficiencies that may increase output and enhance competition.”	U.S. Dep’t of Justice Business Review Letter to Trans. Brokers Conf. of Am., Inc. (Feb. 8, 1985)

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Year	Requesting Entity	Relevant Language	Citation
1984	Radio Advertising Bureau	“We understand, based on the information and materials you have submitted in support of your request, that the RAB negotiating committee would represent virtually all radio stations in the country in negotiations designed to obtain from Arbitron . . . a new ratings contract with Arbitron or a replacement vendor. . . . Even if RAB is a monopsonist, the proposed joint purchasing might not have demonstrable anticompetitive effects.”	U.S. Dep’t of Justice Business Review Letter to Radio Advert. Bureau (May 8, 1984)
1983	National Small Shipments Traffic Conference, Inc.	“Collective rate negotiation has the potential to create efficiencies that result in lower freight rates. To the extent that occurs, the formation of the shippers’ council could be pro-competitive.”	U.S. Dep’t of Justice Business Review Letter to Nat’l. Small Shipments Traffic Conf., Inc. (July 19, 1983)

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Year	Requesting Entity	Relevant Language	Citation
1983	Greater Detroit Theatre Operators Purchasing Corp.	“We further understand that Greater Detroit will purchase goods and services such as theater equipment, resale merchandise, and advertising and promotional services for its participating shareholders. . . . [W]e are aware of no likelihood that Greater Detroit’s joint purchasing program will restrain trade in any relevant product market.”	U.S. Dep’t of Justice Business Review Letter to Greater Detroit Theatre Operators Purchasing Corp. (Jun. 16, 1983)
1982	Ohio Hospital Purchasing Consortium	The Department “does not presently intend to institute an enforcement proceeding to prevent OHPC from implementing its hospital group purchasing plan.”	U.S. Dep’t of Justice Business Review Letter to Ohio Hosp. Purchasing Consortium (Jun. 9, 1982)
1981	New York State Association of Service Stations, Inc.	“It has been held that acquisition and retention of greater buying power through a cooperative purchasing agency is not, in and of itself, inherently unlawful.”	U.S. Dep’t of Justice Business Review Letter to N.Y. State Ass’n of Service Stations, Inc. (Mar. 27, 1981)

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Year	Requesting Entity	Relevant Language	Citation
1978	Motion Picture Exhibitor Cooperative	The Department determined to take no action, but acknowledged that “[t]his expression . . . would not bar appropriate action by the Department if the actual operation of the proposed cooperative proved to have anticompetitive consequences.”	U.S. Dep’t of Justice Business Review Letter to Motion Picture Exhibitor Coop. (Apr. 11, 1978)
1975	Gales Rexall Drug	“The association expects to contract with manufacturers and wholesalers of these products to sell the same to its members at quantity discounts. . . . [W]e have no present intention to institute action in this matter.”	U.S. Dep’t of Justice Business Review Letter to Gales Rexall Drug (Nov. 17, 1975)