Exhibit A

Proposed Statement of Interest of the United States

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KRAFT FOODS GLOBAL, INC., *et al.*, Plaintiffs, v. UNITED EGG PRODUCERS, INC., *et al.*, Defendants.	No. 11-cv-8808 Hon. Steven C. Seeger

STATEMENT OF INTEREST OF THE UNITED STATES

The United States respectfully submits this Statement 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 a suit pending in a court of the United States." The United States enforces the federal antitrust laws and has a strong interest in their correct application.

As relevant here, the United States has a strong interest in the correct application of the antitrust laws to conduct involving trade associations. While trade associations can serve legitimate purposes, "members of such associations often have economic incentives to restrain competition." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988). Accordingly, trade association policies and practices "have traditionally been objects of antitrust scrutiny," *id.*, and (where appropriate) liability, *see, e.g.*, *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 577–78 (1982). Consistent with this precedent, the United States regularly investigates whether trade association practices harm competition. The United States hereby submits this Statement of Interest to promote sound antitrust analysis.

DISCUSSION

In their motions for judgment as a matter of law, Defendants do not appear to dispute that Plaintiffs introduced sufficient evidence of a "contract, combination . . . , or conspiracy," *i.e.*, "concerted action." *See* 15 U.S.C. § 1; *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 186 (2010). The remaining element of a Section 1 violation is whether that concerted action "unreasonably restrain[ed]" trade.[1] *Id.* at 186. This inquiry, outside of *per se* violations, entails a "fact-specific assessment" to determine the conduct's "effect on competition." *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018). The ultimate causal question is reserved for the factfinder as long as a "reasonable mind" could conclude on the basis of "the record," "economic theory," or "common sense" that the concerted action "had the effect of suppressing competition." *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 455–57 (1986).

At trial last fall, a jury found that four Defendants and certain non-parties "conspired to restrict the supply of eggs." ECF No. 584 at 1. Defendants allegedly did so through an initiative known as the "UEP Certified Program," as well as other conduct. *See, e.g.*, ECF No. 608 at 1. The UEP Certified Program included "space restrictions and a backfilling ban," which according to Plaintiffs "restricted the nationwide flock of hens." ECF No. 584 at 1. Plaintiffs contend that this program "had the effect of reducing supply, even if other egg producers were not in on the conspiracy," because Defendants "used UEP as a mouthpiece" to "popularize" the program. *Id.* at 1–2. The Court instructed the jury that "[t]he question is whether a conspiracy existed and *caused* the supply to be lower than it otherwise would have been without a conspiracy." ECF No. 545 at

[1] This Statement of Interest does not address the elements beyond an antitrust violation itself that a private plaintiff must establish (*e.g.*, antitrust standing) or any factual issues.

36 (emphasis added); *see also id.* at 47 ("a material cause of Plaintiffs' injury"). The verdict in favor of Plaintiffs reveals that the conspiracy unreasonably restrained trade in a relevant market.

Nevertheless, Defendants argue that two purported legal rules would have precluded a reasonable jury from finding that the conspiracy unreasonably restrained trade. Neither proposed rule comports with established law. First, Defendants erroneously contend that Plaintiffs must rely on the market shares of proven "conspirators" to demonstrate competitive effects.[2] But analysis of market shares is not necessary to establish anticompetitive effects, and even if it were, market shares should reflect competitive conditions and account for all firms that restrict supply. Second, Defendants argue that a trade association program presumptively does not harm competition if it is "voluntary."[3] This, too, lacks merit: competitors often voluntarily enter into anticompetitive contracts, combinations, or conspiracies because they can earn more overall by cooperating than by competing. This Court should reject Defendants' unsupported and unsound propositions.

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[2] ECF No. 608, UEP and USEM Mem., at 12 ("Plaintiffs did not elicit any evidence that all 177 egg producers shared a conscious commitment to a common scheme to restrict the supply of eggs."); ECF No. 611, Rose Acre Farms Mem., at 7 ("Market share of 20.4 percent . . . is insufficient to demonstrate market power as a matter of law."); ECF No. 622, Cal-Maine Foods Mem., at 9 ("In the Seventh Circuit, proof of substantial market power is a prerequisite to proving anticompetitive effects and injury."); *id.* at 11 ("[B]ecause the total of the market share of the egg producer conspirators was 15.5%, the participation of these four in the UEP Certified Program could not have caused the program itself to constitute an unreasonable restraint on trade.").

[3] ECF No. 608, UEP and USEM Mem., at 13 (distinguishing UEP program from NCAA plan that "was binding on and enforced against all member NCAA schools"); ECF No. 611, Rose Acre Farms Mem., at 11 ("The Certified Program, in contrast [to the NCAA program cited by Plaintiffs], was a voluntary program, and some egg producers chose not to join."); ECF No. 622, Cal-Maine Foods Mem., at 4 (arguing that "there can be no restraint of trade when UEP had no means by which to enforce its committees' recommendations against anyone").

I. Plaintiffs Can Establish Competitive Effects Without Relying on Market Shares, Much Less Only the Market Shares of Adjudicated "Conspirators"

Defendants argue that Plaintiffs had to rely on market shares to establish anticompetitive effects, and that those market shares are limited only to the egg producers found liable for the conspiracy at trial. *See* Note 2, *supra*. Both assertions are wrong.

First, while market shares are often used to show market power, a plaintiff need not rely on market shares to establish competitive effects. "[T]he purpose of the inquiries into market definition and market power," the Supreme Court has explained, is simply "to determine whether an arrangement has the potential for genuine adverse effects on competition"; market shares are not ends in and of themselves. *Ind. Fed'n of Dentists*, 476 U.S. at 460. Thus, "proof of actual detrimental effects, such as a reduction of output, can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects." *Id.* at 460–61; *see Am. Express*, 138 S. Ct. at 2285 n.7 (reaffirming *Indiana Federation* for horizontal restraints). In other words, a plaintiff can prove anticompetitive effects under the rule of reason using only direct evidence, such as evidence of "a reduction of output." *Ind. Fed'n of Dentists*, 476 U.S. at 460–61.

Applying this principle, the Seventh Circuit has explained that plaintiffs can prove anticompetitive effects without relying on the defendant's market share. In *Toys "R" Us, Inc. v. FTC*, the defendant (a toy retailer) had a market share of approximately 20% nationally and 35–49% in some metropolitan areas. 221 F.3d 928, 930 (7th Cir. 2000). The defendant argued that "anticompetitive effects in a market cannot be shown unless the plaintiff, or here the Commission, first proves that it has a large market share." *Id.* at 937. The court disagreed, explaining this argument "has things backwards. As we have explained elsewhere, the share a firm has in a properly defined relevant market is only a way of estimating market power, which is the ultimate consideration." *Id.* Anticompetitive effects were proven because the defendant successfully

"caus[ed] the 10 major toy manufacturers to reduce output," which "protected [the defendant] from having to lower its prices." *Id.* In another case, the Seventh Circuit held that a plaintiff had demonstrated harm to competition by showing a sports association's "agreement to reduce output," even without "an analysis of market power." *Chicago Pro. Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 961 F.2d 667, 674 (7th Cir. 1992).

Second, to be "economically significant," market shares should "correspond to the commercial realities of the industry." *Brown Shoe Co. v. United States*, 370 U.S. 294, 336–37 (1962); *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 467 (1992) (explaining that "the existence of market power" depends on "economic reality"). For market shares to reflect the "commercial realities" of a conspiracy to restrict output, they should include all firms that restricted supply because of the scheme. Consistent with this approach, courts typically assess trade associations' market share by measuring the aggregate share of market participants involved in the anticompetitive conduct, regardless of whether those participants are named defendants. *See, e.g.*, *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 111 (1984) (holding that an association possessed market power over broadcasts of college football produced by its member schools, even when many members resisted the association's anticompetitive rules); *Wilk v. Am. Med. Ass'n*, 895 F.2d 352, 360 (7th Cir. 1990) (affirming district court finding that American Medical Association had "market power within the health care services market" based on its "membership's substantial market share"); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1374 (5th Cir. 1980) (holding that association had market power in part because "its members constitute a vast majority of the active residential real estate brokers in Muscogee County, Georgia [the relevant geographic market]").

Defendants have cited no authority—and the United States has found none—holding that a factfinder cannot consider the market share of firms that complied with a trade association's anticompetitive program in determining whether that program harmed competition. Nor have Defendants provided any reason to think that adjudicated conspirators and others have different effects if they engage in the same conduct.

In analogous circumstances, a defendant may be liable where the competitive harm depends in part on the actions of third parties. For example, Judge Durkin recently denied T-Mobile's motion to dismiss a suit brought by customers of AT&T and Verizon, finding a plausible "causal link between the [T-Mobile/Sprint] merger," "reduced competition in the retail mobile wireless market," and "AT&T and Verizon charg[ing] higher prices than they would have otherwise." *Dale v. Deutsche Telekom AG*, No. 22-CV-3189, 2023 WL 7220054, at *1, *10–11 (N.D. Ill. Nov. 2, 2023). This approach accords with basic causation principles of tort law, which can inform antitrust causation standards. *See* Restatement (Third) of Torts: Phys. & Emot. Harm § 26 & cmt. c (2010) (noting that tortious conduct can lead to liability even if the harm was also caused by third parties that were "influenced by the tortious conduct or independent of it"); Restatement (First) of Torts § 432 & cmt. d (1934) (similar); *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535 (1983) (drawing on tort law principles); *Hydrolevel*, 456 U.S. at 569 (relying on common-law agency principles and explaining that antitrust law is "at least as broad as a plaintiff's right to sue for analogous torts, absent indications that the antitrust laws are not intended to reach so far").[4]

[4] Even if the conspirators' market share alone is probative of competitive effects, this Court instructed the jury that market share is an "important factor" in assessing Defendants' market power, and that "[i]f conspirators do not possess a substantial market share, it is less likely that the conspirators possess market power." ECF No. 545 at 41–42.

II. A Trade Association's Supposedly "Voluntary" Program to Restrict Output Can Violate Section 1 If It Produces Anticompetitive Effects

Defendants equally miss the mark in arguing that a trade association cannot suppress competition by organizing and promoting an output-restricting program if that program is "voluntary" or "not enforced." *See* Note 3, *supra*. What matters under the rule of reason is the association's "impact on competitive conditions," *Nat'l Soc'y of Pro. Eng'rs v. United States*, 435 U.S. 679, 688 (1978), not formalistic distinctions, such as whether a particular program could be characterized as "voluntary."

For example, in *Hydrolevel*, the Supreme Court affirmed a finding of liability against a trade association that promulgated "codes and standards for areas of engineering and industry" that were "only advisory," not mandatory. 456 U.S. at 559. There, an incumbent co-opted a trade association into issuing a letter indicating that a rival's technology did not comply with the trade association's standards. *Id.* at 561. "As a result," the incumbent "was able to use" the trade association's influence "to hinder [the rival's] competitive threat." *Id.* at 572. The Supreme Court made clear that the association, even when acting through a letter interpreting its code, had the "power to frustrate competition in the marketplace" and thereby violate the Sherman Act. *Id.* at 571. *Hydrolevel* thus contradicts defendants' proposed enforcement requirement.

In *Allied Tube*, the Supreme Court upheld a jury verdict where the anticompetitive effect depended entirely on the influence of non-binding trade association standards. 486 U.S. 492. The conspirators were several members of a trade association that manipulated the association's voting procedures to exclude a rival's offering from a list of approved products under the association's electrical code. *Id.* at 496–97. The association harmed competition not because its standards were "binding," but because they were influential: "many underwriters will refuse to insure structures that are not built in conformity with the Code; and many electrical inspectors, contractors, and

distributors will not use a product that falls outside the Code." *Id.* at 495–96, 498. In other words, the causation required under the Sherman Act was satisfied even though non-conspirators made independent decisions to follow the standards set by the association.[5]

Other precedents likewise look at competitive effects, however obtained, not whether there is a minimum level of "enforcement." *See N.C. State Bd. of Dental Exam'rs v. FTC*, 717 F.3d 359, 364–65 (4th Cir. 2013) (dental board restrained competition by sending 47 cease and desist letters to 29 teeth whiteners, which "effectively caused" supply restrictions even though the board "d[id] not have the authority to discipline unlicensed individuals or to order non-dentists to stop"), *aff'd*, 574 U.S. 494 (2015); *Wilk*, 895 F.2d at 356 (anticompetitive boycott of chiropractors by medical association continued even after the association "adopted new opinions which permitted medical physicians to refer patients to chiropractors"). Other decisions recognize that, even where a conspiracy involves some enforcement mechanisms, market participants may be motivated by a mix of incentives. *Goldfarb v. Va. State Bar*, 421 U.S. 773, 781–82 (1975) (finding antitrust violation where a "rigid price floor arose" from both the prospect of discipline by the state bar association and "assurance that other lawyers would not compete by underbidding"). Defendants have put forward no workable standard for what degree of "enforcement" is sufficient or how to reconcile these varying circumstances. And even if they had, Defendants have provided no reason why the degree of "enforcement" presents a legal question, rather than a fact issue appropriate for resolution by the jury in this case.

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[5] The Court explained that "most lower courts . . . apply rule-of-reason analysis to product standard-setting by private associations," while efforts to "enforce" the standard may be *per se* unlawful. *Allied Tube*, 486 U.S. at 501 & n.6. The Court's statement contradicts Defendants' claim that enforcement is required under the rule of reason. Moreover, Congress recognized in the Standards Development Organization Advancement Act of 2004 that "developing . . . or otherwise maintaining a voluntary consensus standard" can violate the antitrust laws based on its "effects on competition." 15 U.S.C. §§ 4301(a)(7), 4302.

Defendants' proffered rule also defies economic theory and common sense. *See Ind. Fed'n of Dentists*, 476 U.S. at 456. Any trade association policy or program could be considered "voluntary" if a firm can leave the organization. But trade associations still are liable for their initiatives that restrict competition. *See, e.g.*, *id.* at 455–57; *Hydrolevel*, 456 U.S. at 559. And regardless of direct "enforcement," firms may join and comply with a trade association's anticompetitive program for the same reason they may otherwise collude: to reap supracompetitive prices. *See Allied Tube*, 486 U.S. at 500 ("There is no doubt that the members of such associations often have economic incentives to restrain competition . . . ."). Members might also follow anticompetitive programs out of practical or commercial necessity. *See PLS.Com, LLC v. Nat'l Ass'n of Realtors*, 32 F.4th 824, 836 (9th Cir. 2022) (reversing dismissal where realtor association coerced members to follow anticompetitive policy, even though members "technically have a choice"). Defendants' proffered "legal presumption" thus rests on "formalistic distinctions rather than actual market realities," and therefore should be rejected. *Am. Express*, 138 S. Ct. at 2285 (quoting *Eastman Kodak*, 504 U.S. at 466–67); *see also Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1524 (2019) (rejecting proposed legal rule that would "create an unprincipled and economically senseless distinction"); *Am. Needle*, 560 U.S. at 191–92 (antitrust analysis looks at "the central substance of the situation" rather than "label[s]").

Neither of the cases cited by Defendants supports the presumption they seek. In *Schachar*, an association merely "state[d] as its position that radial keratotomy [a procedure to treat nearsightedness] was 'experimental' and issue[d] a press release with a call for research." *Schachar v. Am. Acad. of Ophthalmology, Inc*., 870 F.2d 397, 398 (7th Cir. 1989). The trade association did not organize or orchestrate any concerted action among competing firms to restrain the treatment, such as a boycott of practitioners or their partners. *Id.* As the Seventh Circuit later explained,

Schachar simply stands for the proposition that antitrust law does not "compel [market participants] to praise or sponsor [a competitor's] work." *Wilk*, 895 F.2d at 364 n.2. Similarly, *Santana Products* involved a marketing campaign disparaging a competitor. *Santana Prods., Inc. v. Bobrick Washroom Equip., Inc.*, 401 F.3d 123, 125–26 (3d Cir. 2005). The defendants did not organize competing firms to boycott the competitor, restrict output, or otherwise restrain competition—whether through a trade association or otherwise. *Id.* at 132; *see also id.* at 134 (distinguishing *Allied Tube* on the ground that the defendant did not "organize or orchestrate" a campaign to restrain trade through any trade association). These cases do not bar a jury from finding a trade association liable for organizing a concerted program to restrict output—a quintessential harm to competition cognizable under Section 1.

Respectfully submitted,

JONATHAN S. KANTER
Assistant Attorney General

DOHA G. MEKKI
Principal Deputy Assistant Attorney General

MICHAEL B. KADES
Deputy Assistant Attorney General

MAGGIE GOODLANDER
Deputy Assistant Attorney General

DAVID B. LAWRENCE
Policy Director

MARKUS A. BRAZILL
Counsel to the Assistant Attorney General

DANIEL S. GUARNERA
DANIEL E. HAAR
NICKOLAI G. LEVIN
ANDREW L. KLINE
DEVIN L. REDDING
JOHN J. SULLIVAN
Attorneys

/s/ Andrew L. Kline
ANDREW L. KLINE
U.S. Department of Justice
Antitrust Division
450 Fifth Street NW, Suite 8600
Washington, DC 20530
Tel: (202) 549-6655
Email: Andrew.Kline@usdoj.gov

Counsel for the United States of America