No. 16-953

In the Supreme Court of the United States

RETRACTABLE TECHNOLOGIES, INC.
AND THOMAS J. SHAW,

Petitioners,

v.

BECTON, DICKINSON & CO.,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioners here contend that they were entitled to an award of treble damages for attempted monopolization under section 2 of the Sherman Act because respondent allegedly engaged in false advertising and allegedly "tainted" the market by selling a flawed product. The following question is presented: Whether (a) petitioners presented sufficient evidence under the Sherman Act to establish that the alleged false advertising harmed competition, and (b) petitioners' "tainting" theory was both unsupported by the evidence and incoherent on its own terms.

CORPORATE DISCLOSURE STATEMENT

Respondent Becton, Dickinson and Company is a publicly traded corporation, it has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF THE CASE

Becton, Dickinson and Company ("BD") and Retractable Technologies, Inc. ("RTI"), along with two other firms, compete in the U.S. product market for safety syringes. Pet. App. 2a. RTI manufactures one type of safety syringe: a retractable syringe (the VanishPoint®), which features a needle that is supposed to retract into the barrel of the syringe after the medication is administered. BD manufactures four types of safety syringes, each of which is best suited for different clinical environments, including a retractable syringe (the Integra™). *Id.*

Over the period relevant to this litigation, BD had a 49% share and RTI a 6% share of the safety syringe market; their other competitors divided the remaining 45% share. *Id.* 3a.[1] In the retractable submarket, however, RTI was dominant, with a market share that grew during the relevant period to two-thirds. *Id.*

In 2007, RTI filed this suit in the Eastern District of Texas, alleging that BD infringed its patents and violated the antitrust laws. *Id.* 4a. The district court bifurcated the patent claims from the other claims and tried the patent case first. The jury returned a verdict of non-willful infringement on BD's 1mL and 3mL models of the Integra, which the Federal Circuit reversed as to the 3mL syringe. Pet. App. 4a; *Retractable Techs., Inc.* v. *Becton, Dickinson & Co.*, 653 F.3d 1296 (Fed. Cir. 2011), *cert. de-*

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[1] Without citation or reference to the record, RTI's Petition departs from the market share figures cited by the Fifth Circuit. *See* Pet. 24. This is but one example of the numerous instances where RTI departs from the Fifth Circuit's recitation of the facts to give, without citation, its own conflicting account.

nied, 133 S. Ct. 833 (2013). BD removed the 1mL Integra from the market. Pet. App. 4a.

The district court subsequently permitted RTI to go forward with its amended non-patent claims, which included the antitrust claims as well as false advertising claims under the Lanham Act. *Id.* "A large portion of RTI's trial presentation" related to its allegation that BD monopolized or attempted to monopolize the safety syringe market through allegedly exclusionary contracting practices. *Id.* 7a. RTI also argued that BD engaged in three forms of allegedly anticompetitive "deception": patent infringement, false advertising, and "'tainting the market' for retractable syringes." *Id.* The false advertising conduct was alleged as the basis for RTI's Lanham Act claim as well as a basis for its antitrust claims.

At the close of evidence, RTI made a tactical decision to drop its claim for damages under the Lanham Act and dismissed its state law claims. *Id.* 5a. As a result, the jury was instructed by the court that it could award damages for false advertising only under the Sherman Act. The district court submitted twelve antitrust interrogatories, covering four theories of liability and three product markets, to the jury: monopolization, attempted monopolization, contractual restraint of trade, and exclusive dealing. Antitrust damages were submitted on two bases: "anticompetitive contracting damages" and "deception damages." *Id.*

The jury rejected eleven of the twelve antitrust claims. *Id.* The jury rejected all of the antitrust claims relating to BD's contracting practices. (RTI did not appeal.) It found liability only for attempted monopolization of the safety syringe market by "deception," and awarded "deception damages" in

the amount of $113,500,000. *Id.* The jury also found liability under the Lanham Act. *Id.*

The district court wrote a "brief opinion" rejecting BD's motion for Judgment as a Matter of Law, *id.* 5a, 31a–48a, and entered judgment for RTI after trebling the Sherman Act damages. BD appealed the attempted monopolization (by "deception") judgment on multiple independent grounds, including that the false product advertising and patent infringement were not predatory or exclusionary. BD also argued that there was no evidence of a "dangerous probability" that BD would acquire monopoly power;[2] that there was no evidence of antitrust injury; that the district court erred by refusing to instruct the jury properly, admitting into evidence the patent infringement verdict, and refusing to grant special interrogatories; and that the damages award should be reversed because the evidence adduced to support it was unreliable and invalid as a matter of law. *See* Pet. App. 6a n.1.

In December 2016, the Fifth Circuit reversed the denial of BD's motion for Judgment as a Matter of Law concerning the attempted monopolization claim and rendered judgment on that claim in favor of BD. *Id.* 29a. The Fifth Circuit considered and rejected each of RTI's theories of anticompetitive conduct in turn.

First, recognizing the "different and incongruent purposes" of the patent and antitrust laws, the

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[2] In its Petition, RTI misstates the relevant legal standard for an attempted monopolization claim by suggesting that it was only required to show that BD had a "reasonable probability of becoming . . . a monopolist." Pet. (i). This is not correct. *See Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 456 (1993).

court reaffirmed its long-held conclusion that "patent infringement is not an injury cognizable under the Sherman Act."[3] *Id.* 10a–11a (quotation marks omitted).

Next, the court closely analyzed the evidence presented at trial and determined that RTI had failed to show that "BD's advertising in fact harmed competition." *Id.* 18a. Following a careful review of the decisions of the other circuits, the court concluded that RTI had not satisfied "any relevant test that circuit courts have devised to render false advertising claims cognizable under the antitrust laws." *Id.*

Finally, after again reviewing the evidence adduced at trial, the court concluded that RTI's "tainting" theory was "unsupported" by the evidence and "incoherent." *Id.* 2a.

The Fifth Circuit thus held that "RTI has not demonstrated that BD engaged in predatory or anticompetitive conduct as a matter of law" and that

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[3] RTI does not challenge the Fifth Circuit's determination that patent infringement is not anticompetitive conduct as a matter of law in its Petition, but instead asserts that its allegations of patent infringement against BD were "simply a part of the tainting theory." Pet. 30 n.3. That is not how RTI presented those allegations at trial. In any event, as the Fifth Circuit held, because patent infringement is not anticompetitive, it had no place in the trial regardless of which antitrust theory it was presented to support. BD therefore argued on appeal that the district court's admission of the patent verdict was reversible error. After reversing the antitrust judgment on other grounds, the court did not consider this argument. Pet. App. 6a n.1. Were the Fifth Circuit's decision to be disturbed, however, the propriety of the district court's admission of the patent verdict, and several other grounds for reversal of the district court's decision, would need to be addressed.

"[t]he verdict for § 2 liability rests on legal conclusions [that] . . . cannot in law be supported by those findings." *Id.* 21a (quotation marks omitted, alterations in original). Accordingly, the court reversed the district court's denial of BD's motion for Judgment as a Matter of Law, and rendered judgment in BD's favor, on the attempted monopolization claim. *Id.* 29a.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW WAS BASED ON AN APPLICATION OF ESTABLISHED ANTITRUST PRINCIPLES TO THE RECORD EVIDENCE, AND DOES NOT PRESENT A CIRCUIT SPLIT

RTI's petition is based on a false premise. In an attempt to create a circuit conflict where none exists, RTI claims that the Fifth Circuit "joined the Seventh Circuit" in holding that false advertising "cannot be the basis for antitrust liability." Pet. 2, 17. But that is not what the Fifth Circuit held. The Fifth Circuit did not create "a rule of per se legality under the Sherman Act" for false advertising. *Id.* 15. Rather, it reviewed the trial record under general "settled principles of antitrust law," Pet. App. 7a, to determine whether the conduct here was, in fact, exclusionary and harmful to competition. It found that there was no sufficient evidence of anticompetitive conduct: "no facts adduced at trial indicated that BD's advertising in fact harmed competition." *Id.* 18a.

RTI cannot demonstrate that this fact-bound decision of the Fifth Circuit was in conflict with the decisions of any other circuit. On the contrary, the circuits are in unanimous accord that "false advertis-

ing alone hardly ever operates in practice to threaten competition." *Id.* 15a. Of all the cases RTI cites involving antitrust claims predicated on false advertising, only one upheld a judgment for the plaintiff, and it was decided 37 years ago. *Int'l Travel Arrangers, Inc.* v. *Western Airlines, Inc.*, 623 F.2d 1255 (8th Cir. 1980). Even in that case, the Eighth Circuit found that false advertising "is, in fact, a form of competition," and—like every other circuit to address this issue—urged caution in applying the antitrust laws to such conduct. *Id.* at 1267.

Since then, circuit courts have variously expressed skepticism regarding claims that false advertising violates the antitrust laws. Some courts express their skepticism by applying a presumption of no harm to competition. Other courts, like the Fifth Circuit, simply apply conventional tests of anticompetitive conduct to the particular false advertising in dispute. But no circuit's approach would dictate a different outcome in this case, as the Fifth Circuit expressly held. RTI's arguments to the contrary amount to a dispute with the Fifth Circuit's interpretation of the record, making this case an especially poor vehicle for this Court's review.

A. The Courts of Appeals and this Court Are in Agreement that False Advertising and Other Business Torts Rarely, If Ever, Constitute Anticompetitive Conduct

This Court has cautioned against "transform[ing] cases involving business behavior that is improper for various reasons . . . into treble-damages antitrust cases." *NYNEX Corp.* v. *Discon, Inc.*, 525 U.S. 128, 137 (1998). The antitrust laws "do not create a federal law of unfair competition or 'purport to

afford remedies for all torts committed by or against persons engaged in interstate commerce.'" *Brooke Grp. Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993) (quoting *Hunt* v. *Crumboch*, 325 U.S. 821, 826 (1945)). Rather, "the antitrust laws were passed for the protection of *competition*, not *competitors*." *Id.* at 224 (quotation marks omitted, emphasis in original). Accordingly, "[e]ven an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws." *Id.* at 225.

The courts of appeals have heeded these cautions, as the decision below reflects. *See* Pet. App. 9a–10a, 16a–17a. Nearly 40 years ago, the Fifth Circuit recognized that "the purposes of antitrust law and unfair competition law generally conflict." *Nw. Power Prods., Inc.* v. *Omark Indus., Inc.*, 576 F.2d 83, 88 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979). That is because "[u]nfair competition is still competition." *Id.* It is "the elimination of the competition," not an "unfair method" of competing, "that is the concern of the antitrust law." *Id.* at 89.

Citing *Northwest Power*, the Fifth Circuit here emphasized this distinction "between business torts, which harm competitors, and truly anticompetitive activities, which harm the market" as key to understanding why false advertising so rarely has been found to support a treble-damages antitrust claim. Pet. App. 14a–15a. On this basic principle of antitrust law, the circuit courts uniformly agree with the Fifth Circuit:

- The Third Circuit, which RTI portrays as the polar opposite of the Fifth on this issue, has recognized "that making false statements about a rival, without more, rarely

interferes with competition enough to violate the antitrust laws." *W. Penn. Allegheny Health Sys., Inc.* v. *UPMC*, 627 F.3d 85, 109 n.14 (3d Cir. 2010).

- The D.C. Circuit, which RTI also portrays as in conflict with the Fifth, has found that "an otherwise lawful monopolist's use of deception simply to obtain higher prices normally has no particular tendency to exclude rivals and thus to diminish competition." *Rambus Inc.* v. *F.T.C.*, 522 F.3d 456, 464 (D.C. Cir. 2008).
- The Second Circuit has adopted the view of the leading antitrust treatise that "[b]ecause the likelihood of a significant impact upon the opportunities of rivals is so small in most observed instances—and because the prevalence of arguably improper utterance is so great—the courts would be wise to regard misrepresentations as presumptively de minimis for § 2 purposes." *Nat'l Ass'n of Pharm. Mfrs., Inc.* v. *Ayerst Labs.*, 850 F.2d 904, 916 (2d Cir. 1988) (quoting 3 Areeda & Turner, Antitrust Law ¶ 738a, at 279 (1978)).
- The Sixth Circuit has observed "[b]usiness torts," including false advertising, "will be violative of § 2 only in 'rare gross cases.'" *Conwood Co., L.P.* v. *U.S. Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002) (quoting 3A Areeda & Turner, Antitrust Law, ¶ 782(a), at 272 (2002)); *see also Am. Council of Certified Podiatric Physicians & Surgeons* v. *Am. Bd. of Podiatric Surgery*, 323 F.3d 366,

371–72 (6th Cir. 2003) (adopting a de minimis presumption for false advertising).

- The Seventh Circuit has stated that the "genuine anticompetitive effects of false and misleading statements about a competitor are minimal, at best," and that "[t]o the extent that a falsehood results in some harm to a competitor, that is a matter better suited for the laws against unfair competition or false advertising, not the antitrust laws, which are concerned with the protection of competition, not competitors." *Mercatus Grp., LLC* v. *Lake Forest Hosp.*, 641 F.3d 834, 852 (7th Cir. 2011) (quotation marks omitted).
- The Ninth Circuit has held that "[w]hile the disparagement of a rival . . . may be unethical and even impair the opportunities of a rival, its harmful effects on competition are ordinarily not significant enough to warrant recognition under § 2 of the Sherman Act." *Am. Prof'l Testing Serv., Inc.* v. *Harcourt Brace Jovanovich Legal & Prof'l Pubs., Inc.*, 108 F.3d 1147, 1151 (9th Cir. 1997).
- The Eleventh Circuit has said that "[d]isparagement is rarely a basis for finding attempted monopolization under § 2, because even false statements about a single competitor often do not meet the requisite standard of generating harm to competition." *Duty Free Americas, Inc.* v. *Estée Lauder Cos., Inc.*, 797 F.3d 1248, 1268 (11th Cir. 2015).

There is no split of opinion. No circuit court has expressed a contrary view.[4] RTI places great weight on the Eighth Circuit's 1980 decision in *Western Airlines*. But that case expresses the same core principles as the above cases.

Western Airlines involved an undisputed monopolist that used false advertising "purposefully designed to eliminate" its sole and nascent competitor. 623 F.2d at 1266. As the defendant was aware, "*such elimination of competition* would be the natural and probable consequence of its conduct." *Id.* (emphasis added). Despite that evidence of harm to competition by a firm with monopoly power—the very evidence the Fifth Circuit found lacking here—the Eighth Circuit stated that whether false advertising could be actionable under the Sherman Act was "a difficult question." *Id.* at 1267. Unlike a "conventional 'restraint of trade,'" false advertising "*is, in fact, a form of competition*." *Id.* (emphasis added). Citing the Fifth Circuit's decision in *Northwest Power*, the court explained that "because competition is the object sought to be preserved by the antitrust laws . . . we must be careful in drawing a line between fair competition, unfair competition and competition that is so unfair as to rise to the level of an unreasonable restraint of trade." *Id.*

RTI argues that the Fifth Circuit's observation that false advertising "generally sets competition in

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[4] The Tenth Circuit has applied, without adopting, the presumption that "trade disparagement bears only a *de minimis* effect on competition." *Lenox MacLaren Surgical Corp.* v. *Medtronic, Inc.*, 762 F.3d 1114, 1127 (10th Cir. 2014). BD has been unable to locate any Fourth Circuit decision addressing these issues.

motion" puts it in conflict with other circuits. Pet. 16 (quoting Pet. App. 15a). The Eighth Circuit's recognition that false advertising is "a form of competition," *Western Airlines*, 623 F.2d at 1267, belies that argument. RTI also points to the Fifth Circuit's language as if to suggest that the court somehow endorses false advertising. To the contrary, the Fifth Circuit merely was observing that false advertising—like many other forms of "business behavior that is improper for various reasons," *NYNEX*, 525 U.S. at 137—often results in increased competitive activity among rivals (*e.g.*, more advertising) and only rarely results in harm to competition. These observations are accepted by all circuits that have addressed this question and are confirmed by the fact that neither the Eighth Circuit nor any other circuit court has affirmed a judgment of antitrust liability based on false advertising alone in the nearly four decades since *Western Airlines*.

In short, the circuits are not in conflict on these core issues—they are in harmony.

B. To Distinguish Anticompetitive Conduct from Ordinary Business Torts, Some Courts Have Adopted a Presumption that False Advertising By One Competitor Against Another Does Not Harm Competition Itself

Consistent with this shared reluctance to convert false advertising claims into antitrust claims, some circuit courts have adopted a presumption that false advertising has only a de minimis effect on competition and therefore does not violate § 2 of the Sherman Act. In the Seventh Circuit, this presumption is not rebuttable "absent an accompanying coer-

cive mechanism of some kind." *Mercatus*, 641 F.3d at 852. In the Second, Sixth and Ninth Circuits, the presumption is rebuttable where the plaintiff can meet a multi-factor test, which includes showing not only that the advertising was "clearly false," but also that it was "not readily susceptible of neutralization or other offset by rivals." *Ayerst*, 850 F.2d at 916 (quotation marks omitted); *see Harcourt*, 108 F.3d at 1151; *Podiatric Physicians*, 323 F.3d at 371.

The de minimis presumption is based on two principles. The first is that although false advertising "may be unethical and even impair the opportunities of a rival, its harmful effects on competitors are ordinarily not significant enough to warrant recognition under § 2 of the Sherman Act." *Harcourt*, 108 F.3d at 1151. The second is that to the extent that false advertising does result "in some harm to a competitor, that is a matter better suited for the laws against unfair competition or false advertising, not the antitrust laws, which are concerned with the protection of competition, not competitors." *Mercatus*, 641 F.3d at 852 (quotation marks omitted).

As discussed above, both of these underlying principles are universally accepted among the circuit courts. Thus, while not all circuits adopt the presumption, and those that do have somewhat different articulations of what is required to overcome it, the courts all begin their analysis from common ground.[5]

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[5] It is therefore not surprising that circuit courts that have not adopted the presumption regularly cite to the decisions of those that have as being in accord with their own decisions, and *vice versa*. *See, e.g.*, *Covad Comms. Co.* v. *Bell Atlantic Corp.*, 398 F.3d 666, 674 (D.C. Cir. 2005) (discussing the Second Circuit's decision in *Ayerst*); *Ayerst*, 850 F.2d at 916 (citing the

The courts also end up in the same place. In those circuits that have adopted the presumption, it is typically applied to screen cases at the motion to dismiss or summary judgment stage. *See Podiatric Physicians*, 323 F.3d 366 (affirming summary judgment); *Ayerst*, 850 F.2d 904 (reversing Rule 12(b)(6) dismissal); *Mercatus*, 641 F.3d 834 (affirming summary judgment); *Sanderson* v. *Culligan Int'l Co.*, 415 F.3d 620 (7th Cir. 2005) (affirming Rule 12(b)(6) dismissal); *see also Lenox MacLaren Surgical Corp.,* 762 F.3d 1114 (reversing summary judgment and applying, without adopting, the presumption and six-factor test); *Duty Free Americas,* 797 F.3d 1248 (affirming Rule 12(b)(6) dismissal and identifying factors applied by other circuits as "relevant").[6] Where the plaintiff is unable to plead or prove facts showing that the false advertising had a tendency to harm competition, as opposed to one or more competitors,

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Eighth Circuit's decision in *Western Airlines*). Likewise, courts that have adopted different formulations of the presumption describe their decisions as being in harmony with one another. *See, e.g.*, *Duty Free Americas*, 797 F.3d at 1269 (describing Second, Sixth, Seventh, Ninth and Tenth Circuit precedent as in accord with Eleventh); *Mercatus*, 641 F.3d at 852 (discussing Second, Sixth and Ninth Circuit precedents as in accord with the Seventh); *Podiatric Physicians*, 323 F.3d at 371 (stating that all of the factors in the Second and Ninth Circuit tests "are relevant," while declining to hold that all must be met).

[6] In *Harcourt*, the Ninth Circuit applied the presumption in affirming a decision granting Judgment as a Matter of Law for the defendant after a jury trial. Because the plaintiff had presented insufficient evidence that consumers were likely to rely on the false advertising or that it was not susceptible to neutralization by competitors, the court held that the plaintiff was unable to show that the conduct was capable of having "a significant and enduring adverse impact on competition itself in the relevant markets." 108 F.3d at 1152.

the claims are dismissed. *See, e.g.*, *Duty Free Americas*, 797 F.3d at 1269–70; *Podiatric Physicians*, 323 F.3d at 371–72. By contrast, where the plaintiff can plead such facts, the claims are allowed to proceed. *See, e.g.*, *Ayerst*, 850 F.2d at 916–17; *Lenox*, 762 F.3d at 1127. Though, as noted earlier, claims that false advertising alone constitutes anticompetitive conduct almost never make it to a jury, in *any* circuit.

Circuits that do not have the presumption engage in fundamentally the same analysis. For example, in a decision RTI cites as conflicting with the de minimis presumption cases, the D.C. Circuit affirmed dismissal of a claim on the grounds that plaintiff had failed to allege harm to competition through false advertising. *Covad*, 398 F.3d at 674. While the court did not apply a presumption, its reasoning was indistinguishable from cases that do. The court observed that the fact that plaintiff, a competitor, might have lost sales due to false advertising "does not state an antitrust claim" because the antitrust laws protect "'*competition*, not *competitors*.'" *Id.* at 674 (quoting *Brooke Grp.*, 509 U.S. at 224) (emphasis in original). Further, the court found that on the facts alleged consumers would be able to discover the falsity of the claims, and as a result "there can be no plausible harm to competition." *Id.* at 675. In this regard, the court expressly contrasted the claim before it with that in *Ayerst*—a de minimis presumption decision from the Second Circuit, where dismissal was reversed because the complaint alleged sufficient facts to show, *inter alia*, that the "falsehood was 'likely to induce reasonable reliance' and was 'not readily susceptible of neutralization or other offset.'" *Id.* at 674 (quoting *Ayerst*, 950 F.2d at

916–17). The substantive standards applied by both courts were identical.[7]

As the Fifth Circuit summarized in the decision below: "Each circuit seems to have tweaked the Areeda six-factor test somewhat, but the basic intent of each court is to create a sharp distinction between ordinary false advertising torts and a defendant's course of conduct that could actually exclude competition." Pet. App. 16a. This distinction is uniform across the circuits, as is the recognition that false advertising rarely will be found to "actually exclude competition." *Id.*

C. The Fifth Circuit Did Not Apply a Presumption or Per Se Rule in Deciding that RTI Failed to Prove Harm to Competition from False Advertising

Contrary to RTI's assertions, the Fifth Circuit did not apply a presumption or "rule of per se legality" to the claim that BD violated the Sherman Act through false advertising. Pet. 15. Rather than imposing a blanket ban on such claims, the Fifth Circuit found that *the evidence* at trial failed to show that BD's advertising had any anticompetitive poten-

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[7] The Tenth Circuit, without adopting a de minimis presumption, likewise has stated that "[b]usiness torts generally, and acts of fraud more particularly, can sometimes give rise to antitrust liability," but qualified this statement by adding: "At least when the defendant's deceptive actions . . . are so widespread and longstanding and practically incapable of refutation that they are capable of injuring both consumers and competitors." *Novell, Inc.* v. *Microsoft Corp.*, 731 F.3d 1064, 1079–80 (10th Cir. 2013) (citing D.C. Circuit and Sixth Circuit precedent and the Areeda treatise, all of which RTI argues are in conflict with one another).

tial or effect: "RTI may have lost some sales or market share because of BD's false advertising, but it remains a vigorous competitor, and it did not contend that BD's advertising erected barriers to entry in the safety syringe market." Pet. App. 15a. Moreover, "not a single buyer's representative came forward to testify to a purchase motivated by" the advertising in question. *Id.* 16a. And *the facts* demonstrated that "competition within the overall safety syringe market—particularly between BD [and its other competitors], Covidien, and Smiths—has remained robust." *Id.* 18a.

RTI may not agree with these findings, but they hardly reflect the adoption or application of a hard-and-fast rule that "false commercial speech cannot be exclusionary conduct." Pet. 15. Instead, they reflect core principles of antitrust law that are uncontroversial and incontrovertible. *See, e.g.*, *Rambus*, 522 F.3d at 464 ("Deceptive conduct—like any other kind—must have an anticompetitive effect in order to form the basis of a monopolization claim."); *see also Spectrum Sports*, 506 U.S. at 458 (The Sherman Act "directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself.").

Nor did the Fifth Circuit's application of its own precedent, *Stearns Airport Equipment Co.* v. *FMC Corp.*, 170 F.3d 518 (5th Cir. 1999), put it in conflict with other circuits as RTI contends. In *Stearns*, the court held that where a defendant's "conduct has no rational business purpose other than its adverse effects on competitors, an inference that it is exclusionary is supported." 170 F.3d at 522 (citing *Aspen Skiing Co.* v. *Aspen Highlands*, 472 U.S.

585 (1985)). When one competitor touts the merits of its product to potential customers, however, the "business justification" for such conduct is "obvious: it [i]s trying to sell its product." *Id.* at 524. That remains true regardless of whether the communications to customers were "wrong, misleading, or debatable." *Id.* "To the extent a competitor loses out in such a debate, the natural remedy would seem to be an increase in the losing party's sales efforts on future potential bids, not an antitrust suit." *Id.* at 525.

The Third Circuit, which RTI argues is in direct conflict with the Fifth, has quoted the reasoning above from *Stearns* and found it "instructive" with respect to a claim that a false product promotion constituted anticompetitive conduct. *Santana Prods., Inc.* v. *Bobrick Washroom Equip., Inc.*, 401 F.3d 123, 132–33 (3d Cir. 2005);[8] *see* Pet. App. 13a. The D.C. Circuit, which RTI also claims is in conflict with the Fifth, has likewise recognized that to the extent that false advertising causes a competitor "to increase its own advertising, *competition [i]s only enhanced*." *Covad*, 398 F.3d at 674 (emphasis added). As the Fifth Circuit explained, "[t]he broader point underlying *Stearns* is the distinction embodied in our precedents between business torts, which harm competitors, and truly anticompetitive activities, which harm the market." Pet. App. 14a. Again, there is no split of authority with respect to these principles, as the body of precedents from other circuits demonstrates.

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[8] A subsequent Third Circuit panel described *Santana* as speaking "perhaps in overly broad terms," but did not disturb its holding or criticize its discussion of *Stearns*. *W. Penn*, 627 F.3d at 109 n.14.

The Fifth Circuit applied these principles not by fashioning a presumption or per se rule out of *Stearns*, but rather by examining the factual record to see whether RTI had presented evidence of something more than a claim that BD falsely advertised the merits of its products. Specifically, the court looked to the factual record for evidence of actual or potential harm to competition, as opposed to merely an effect on RTI as a competitor. Finding none, *see id.* 15a–16a, 18a, the court held that Judgment as a Matter of Law was appropriate. If anything, the Fifth Circuit's analysis most closely resembles the "case-by-case" approach of the D.C., Third and Eighth Circuits, which RTI champions. Pet. 10–12. It plainly does not reflect a holding that "false commercial speech per se cannot be the basis for antitrust liability." *Id.* 17.

D. The Outcome of This Case Would Have Been the Same Under Any Circuit's Standards

This case is an exceptionally poor vehicle for this Court's review because the Fifth Circuit analyzed RTI's claim under not only its own precedents, but also those of every other circuit that RTI argues is in conflict, and expressly held that the outcome would be the same: "RTI did not satisfy *Stearns* or any relevant test that circuit courts have devised to render false advertising claims cognizable under the antitrust laws." Pet. App. 18a.

First, the Fifth Circuit observed that some circuits, including the Second, Sixth, and Ninth, have "adopted the *de minimis* presumption along with variations on a six-part test that a plaintiff must satisfy to support an antitrust claim premised on false

advertising." *Id.* 16a. It held that if this test were to apply to the factual record here, RTI could not meet it because: (i) BD's advertising was not directed "to unsophisticated parties (part 4), but to hospitals and GPOs that used multidisciplinary committees who had experience with the competing products"; (ii) the advertising was "not shown to be 'clearly likely to induce unreasonable reliance' (part 3) on the part of customers"; and (iii) there was no showing that the advertisements "could not be readily disproved . . . by rivals." *Id.* 17a.

Next, the court observed that other circuits, including the Third, D.C., and Eleventh, have viewed claims of false advertising as anticompetitive conduct "critically without announcing a particular test." *Id.* 16a–17a. It found that RTI's claims would fail under these circuits' precedents as well, because "no facts adduced at trial indicated that BD's advertising in fact harmed competition." *Id.* 18a. Rather, the record evidence, including admissions from RTI's own economic expert, pointed in the opposite direction. *Id.*

RTI's response to these findings is to insist that the Fifth Circuit got the facts wrong: "Contrary to the court's conclusion that RTI did not satisfy any relevant test, RTI did in fact satisfy two of the three tests." Pet. 21. RTI proceeds to make a lengthy recitation of facts the Fifth Circuit supposedly failed to acknowledge or misunderstood. *See id.* 23–27. Virtually all of these arguments are made without any citation to the underlying record.[9]

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[9] For example, RTI takes the Fifth Circuit to task for having described an exchange of e-mails as being between BD sales representatives when, according to RTI, they were in fact be-

RTI's request that this Court reevaluate the evidence from trial based on RTI's say-so is inappropriate and confirms why the Petition should be denied. The Fifth Circuit engaged in a careful, fact-specific analysis and concluded that no matter which circuit's test applied, RTI had failed to establish that BD's advertising constituted anticompetitive conduct as a matter of law. The Petition offers no reason for this Court to revisit that conclusion.

II. THERE IS NO CIRCUIT SPLIT REGARDING RTI'S NOVEL AND NONSENSICAL "TAINTING" THEORY

RTI asserts that the Fifth Circuit created a split with the D.C. Circuit relating to RTI's "tainting" theory of anticompetitive conduct. It argues that the Fifth Circuit held that a firm's attempt to "taint" the market against a product can never be anticompetitive, while the D.C. Circuit takes a "case-by-case" approach to such claims. *Id.* 29–31.

But that is not what the Fifth Circuit held. It did not establish a new per se bar against so-called "tainting" claims. It did exactly what RTI contends the D.C. Circuit did in *United States* v. *Microsoft*, 253 F.3d 34, 77 (D.C. Cir. 2001), and what courts do every day in antitrust cases: it conducted a fact-specific analysis of the record evidence to determine whether there was sufficient proof that the alleged conduct was anticompetitive. And based on its re-

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tween a Senior Director of Marketing and Senior Product Manager. Pet. 23 n.1. RTI also takes issue with the court's characterization of the audience for BD's advertisements (hospitals, doctors and nurses) as sophisticated consumers, claiming that "specially-written computer programs" were required to assess the claims made in the ads. *Id.* 27.

view of the facts in evidence, the court concluded that RTI's "tainting" claim was "unsupported and incoherent" and "entirely illogical." Pet. App. 2a, 19a.

RTI alleged that BD "tainted" the market for retractable syringes by deliberately marketing a defective version of such a product. BD's master plan, according to RTI, was to depress demand for all retractable syringes until RTI's patents expire, and then take over the market by introducing a new BD retractable syringe based on RTI's expired patents. *Id.* 18a–19a. In other words, RTI accused BD of planning to launch a product (lawfully) that it previously had persuaded customers was terrible.

The Fifth Circuit examined the record to evaluate the evidentiary support for RTI's claim. After finding some support for the allegation that BD's retractable syringe had uncorrected design flaws, the court determined that "the tainting theory . . . must be addressed further." *Id.* 19a. Plainly, the court did not subject this claim to a per se prohibition.

The Fifth Circuit did, however, find "*no direct evidence* of BD's intent to 'taint'" the market and no evidence that the market was actually tainted.[10] *Id.*

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[10] The Fifth Circuit also found unsupported RTI's claim that BD's ultimate objective was to introduce a new retractable product after RTI's patents expired. Pet. App. 21a & n.7. In addition, the court concluded that even if BD had planned to exploit RTI's technology after its patents expired, this could not "constitute anticompetitive conduct because it is precisely the type of activity to be expected from competitors when valuable patent rights expire; the patentee's monopoly is eliminated, and the free market reigns where anybody can exploit the formerly protected technology." *Id.* 19a. RTI offers no basis for challenging the court's conclusion that this aspect of its tainting theory cannot be deemed anticompetitive.

(emphasis added). On the contrary, the evidence demonstrated that BD had a "rational business purpose" for selling its retractable syringe: it was a profitable product with receptive customers. *Id.* 20a. The Fifth Circuit thus concluded that the evidence of this conduct was a "far cry" from the type of anticompetitive conduct that lacks any "rational business purpose other than to exclude competitors." *Id.* 20a & n.6 (quotation marks omitted). In short, the Fifth Circuit applied the conventional test for determining anticompetitive conduct to the proof (or lack thereof) supporting RTI's unconventional theory.

The Fifth Circuit also observed that RTI's tainting theory was "entirely illogical as a vehicle to prove exclusionary conduct" and "incoherent." *Id.* 19a. But these observations do not amount to the adoption of a per se rule. Rather, the Fifth Circuit was employing economic logic to explain why it found no evidence to support RTI's theory. This approach was entirely consistent with this Court's admonition "that if the factual context renders [plaintiffs'] claim implausible—if the claim is one that simply makes no economic sense—[plaintiffs] must come forward with more persuasive evidence to support their claim than otherwise would be necessary." *Matsushita Elec. Indus. Co., Ltd.* v. *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). RTI's disagreement with the Fifth Circuit's assessment of the evidence, Pet. 30–31, is no basis for reviewing the court's decision.

Finally, contrary to RTI's assertion, the Fifth Circuit's review of the sufficiency of the evidence in this case was no different than the approach taken by the D.C. Circuit in *Microsoft*. Microsoft allegedly fortified its existing monopoly in operating systems by, among other things, deceiving software develop-

ers into writing programs that were compatible only with Microsoft's operating system. *Microsoft*, 253 F.3d at 77. On the evidence in that case, the D.C. Circuit upheld the district court's finding that Microsoft had, in fact, unlawfully maintained its monopoly. *Id.* That a different court addressing a different theory on different facts reached a different result is not proof of any circuit conflict.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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