No. __-____

In the Supreme Court of the United States

ENERGY CONVERSION DEVICES LIQUIDATION TRUST,
BY AND THROUGH ITS LIQUIDATING TRUSTEE,
JOHN MADDEN, PETITIONER

v.

TRINA SOLAR LIMITED; TRINA SOLAR (U.S.), INC.;
YINGLI GREEN ENERGY HOLDING COMPANY LIMITED;
YINGLI GREEN ENERGY AMERICAS, INC., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In at least eleven decisions spanning 120 years, this Court "ha[s] not wavered in [its] enforcement of the *per se* rule against price fixing" under Section 1 of the Sherman Act. *Arizona* v. *Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 347 (1982). Whether the aim of the agreement is "raising, depressing, fixing, pegging, or stabilizing the price" (*United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940)), all price-fixing rests on "the same legal—even if not economic—footing." *Maricopa Cty.*, 457 U.S. at 348. This "has been held too often to require elaboration." *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305, 309–310 (1956). And Congress has given "any person who shall be injured in his business or property" (15 U.S.C. § 15) the right to sue for Section 1 violations.

The questions presented are:

1. Whether the Sixth Circuit erred in holding, in conflict with the Third and Ninth Circuits and this Court's precedents, that there is an exception to the rule that horizontal price-fixing among competitors is illegal *per se* under Section 1 of the Sherman Act where the prices are fixed below cost and the plaintiff does not allege that the conspirators' purported losses will later be recouped via higher prices;

2. Whether a competitor bankrupted by its rivals' below-cost horizontal price-fixing agreement has antitrust standing to challenge that agreement under Section 1 (as the Ninth Circuit has held), or whether, absent allegations of recoupment, only consumers may challenge a price-fixing agreement under Section 1 and only if it fixes prices at supra-competitive levels (as the Sixth Circuit held below).

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Energy Conversion Devices Liquidation Trust, by and through its liquidating trustee, John Madden. Petitioner, a nongovernmental corporate party, certifies that it has no parent corporation, and that no publicly held corporation owns 10% or more of its stock.

Respondents are Trina Solar Limited, Trina Solar (U.S.), Inc., Yingli Green Energy Holding Company Limited, and Yingli Green Energy Americas, Inc.

TABLE OF CONTENTS

Page(s)

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES vii

INTRODUCTION 1

OPINIONS BELOW 5

JURISDICTION 5

STATUTES INVOLVED 5

STATEMENT 6

- A. Respondents' price-fixing conspiracy 6
- B. The destruction of American industry 7
- C. The district court's decision 7
- D. The Sixth Circuit's decision 9

REASONS FOR GRANTING THE PETITION 10

I. Certiorari is warranted to confirm that horizontal price-fixing is illegal *per se*, regardless of the resulting prices, and cannot be justified by alleged pro-consumer benefits. 10

- A. The Sixth Circuit's decision conflicts with Third and Ninth Circuit precedent holding that below-cost horizontal price-fixing is illegal *per se*. 11
- B. The decision below conflicts with eleven decisions of this Court holding that horizontal price-fixing is illegal *per se*. 15

C. The decision below governs the Section 1 claims of the government, which has long taken a hard line on the *per se* illegality of horizontal price-fixing agreements. 19

D. The decision below threatens to facilitate the dumping of foreign products in U.S. markets at below-cost rates, bankrupting American industry. 21

E. The decision below is incorrect and eviscerates critical distinctions between Sections 1 and 2 of the Sherman Act. 23

II. This Court should review the Sixth Circuit's holding that, unless the defendants recoup their losses, competitors do not suffer antitrust injury even when driven from the market by their rivals' below-cost fixed prices. .. 28

A. The decision below conflicts with Ninth Circuit precedent holding that companies harmed by competitors' below-cost price-fixing conspiracies have antitrust standing to challenge them. 28

B. The decision below conflicts with this Court's antitrust injury precedents................ 31

C. The Sixth Circuit's antitrust injury holding conflicts with the text and purpose of Section 4 of the Clayton Act and the legislative history of the Sherman Act... 34

CONCLUSION 36

APPENDIX A: *Energy Conversion Devices Liquidation Trust, by and through its Liquidating Trustee, John Madden* v. *Trina Solar Limited, Trina Solar (U.S.), Inc., Yingli Green Energy Holding Company Limited, Yingli Green Energy Americas, Inc., Suntech Power Holdings Co., Ltd., Suntech America, Inc.*, No. 15-2130, Opinion, United States Court of Appeals for the Sixth Circuit, August 18, 2016, reported at 833 F.3d 680 (6th Cir. 2016) 1a

APPENDIX B: *Energy Conversion Devices Liquidation Trust, by and through its Liquidating Trustee, John Madden* v. *Trina Solar Limited, Trina Solar (U.S.), Inc., Yingli Green Energy Holding Company Limited, Yingli Green Energy Americas, Inc., Suntech Power Holdings Co., Ltd., Suntech America, Inc.*, No. 13-14241, Opinion and Order, United States District Court for the Eastern District of Michigan, October 31, 2014 .... 23a

APPENDIX C: *Energy Conversion Devices Liquidation Trust, by and through its Liquidating Trustee, John Madden* v. *Trina Solar Limited, Trina Solar (U.S.), Inc., Yingli Green Energy Holding Company Limited, Yingli Green Energy Americas, Inc., Suntech Power Holdings Co., Ltd., Suntech America, Inc.*, No. 13-14241, Judgment, United States District Court for the Eastern District of Michigan, October 31, 2014 .... 38a

APPENDIX D: *Energy Conversion Devices Liquidation Trust, by and through its Liquidating Trustee, John Madden, Plaintiff* v. *Trina Solar Limited, Trina Solar (U.S.), Inc., Yingli Green Energy Holding Company Limited, Yingli Green Energy Americas, Inc., Suntech Power Holdings Co., Ltd., Suntech America, Inc., Defendants*, No. 13-14241, Opinion And Order Denying Plaintiff's Motion for Reconsideration, August 20, 2015 .... 39a

TABLE OF AUTHORITIES

Page(s)

Cases

Albrecht v. *Herald Co.*,
390 U.S. 145 (1968), overruled on other grounds by, *State Oil Co.* v. *Khan*, 522 U.S. 3 (1997) 17

Am. Needle v. *Nat'l Football League*,
560 U.S. 183 (2010) 23–25

Am. Tobacco Co. v. *United States*,
328 U.S. 781 (1946) 24

Amarel v. *Connell*,
102 F.3d 1494 (9th Cir. 1996) 2–3, 11–14, 28–30

Arizona v. *Maricopa Cty. Med. Soc'y*,
457 U.S. 332 (1982) 2–3, 10, 16–19, 24–25

Associated Gen. Contractors of Cal., Inc. v. *Cal. State Council of Carpenters*,
459 U.S. 519 (1983) 35–36

Atl. Richfield Co. v. *USA Petroleum Co.*,
495 U.S. 328 (1990) 29, 35

Blue Shield of Va. v. *McCready*,
457 U.S. 465 (1982) 35–36

Brooke Group Ltd. v. *Brown & Williamson Tobacco Corp.*,
509 U.S. 209 (1993) 23

Brown Shoe Co. v. *United States*,
370 U.S. 294 (1962) 35

Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*,
429 U.S. 477 (1977) 33

Cargill, Inc. v. *Monfort of Colo., Inc.*,
479 U.S. 104 (1986) 32–34

Catalano, Inc. v. *Target Sales, Inc.*,
446 U.S. 643 (1980) 16

Copperweld Corp. v. *Indep. Tube Corp.*,
467 U.S. 752 (1984) 17–18, 24–25

Eisai, Inc. v. *Sanofi Aventis U.S., LLC*,
821 F.3d 394 (3d Cir. 2016).................................. 27

Felder's Collision Parts, Inc. v. *All Star Advert. Agency, Inc.*,
777 F.3d 756 (5th Cir. 2015) 27

Full Draw Prods. v. *Easton Sports, Inc.*,
182 F.3d 745 (10th Cir. 1999) 30

Gelboim v. *Bank of Am. Corp.*,
823 F.3d 759 (2d Cir. 2016).................................. 30

In re Japanese Elec. Prods. Antitrust Litig.,
723 F.2d 238 (3d Cir. 1983)............................ 12–13

Kiefer-Stewart Co. v. *Joseph E. Seagram & Sons, Inc.*,
340 U.S. 211 (1951), overruled on other grounds by *Copperweld Corp.* v. *Indep. Tube Corp.*, 467 U.S. 752 (1984) 16, 18–19, 25

Leegin Creative Leather Prods., Inc. v. *PSKS, Inc.*,
551 U.S. 877 (2007) 17

Mandeville Island Farms, Inc. v. *Am. Crystal Sugar Co.*,
334 U.S. 219 (1948) 35

Matsushita Elec. Indus. Co. v. *Zenith Radio Corp.*,
475 U.S. 574 (1986) ... 2, 4, 9, 11–15, 26, 31–32, 34

Multistate Legal Studies, Inc. v. *Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*,
63 F.3d 1540 (10th Cir. 1995) 27

Nat'l Soc'y of Prof'l Eng'rs v. *United States*,
435 U.S. 679 (1978) 18, 25, 35

Pace Elecs., Inc. v. *Canon Comput. Sys., Inc.*,
213 F.3d 118 (3d Cir. 2000).................................. 30

Rebel Oil Co. v. *Atl. Richfield Co.*,
51 F.3d 1421 (9th Cir. 1995) 27

Solyndra Residual Trust ex rel. Neilson v. *Suntech Power Holdings Co.*,
62 F. Supp. 3d 1027 (N.D. Cal. 2014) 24, 30

Spectrum Sports, Inc. v. *McQuillan*,
506 U.S. 447 (1993) 27

United States v. *Bausch & Lomb Optical Co.*,
321 U.S. 707 (1944) 17

United States v. *Columbia Steel Co.*,
334 U.S. 495 (1948) 24

United States v. *McKesson & Robbins, Inc.*,
351 U.S. 305 (1956) 16, 18

United States v. *Nat'l Ass'n of Real Estate Bds.*,
339 U.S. 485 (1950) 3, 16, 18

United States v. *New Wrinkle, Inc.*,
342 U.S. 371 (1952) 16

United States v. *Parke, Davis & Co.*,
362 U.S. 29 (1960) 16

United States v. *Socony-Vacuum Oil Co.*,
310 U.S. 150 (1940) 16, 18

United States v. *Trans-Missouri Freight Ass'n*,
166 U.S. 290 (1897) 16

United States v. *Trenton Potteries Co.*,
273 U.S. 392 (1927) 16–17

Wallace v. *IBM Corp.*,
467 F.3d 1104 (7th Cir. 2006) 27

Zenith Radio Corp. v. *Hazeltine Research, Inc.*,
395 U.S. 100 (1969) 35

Statutes

11 U.S.C. § 362... 7

15 U.S.C. § 1.. 5

15 U.S.C. § 15... 3, 5, 28, 34

28 U.S.C. § 1254(1) 5

Antimonopoly Law of the People's Republic of China of 30 Aug. 2007, Presidential Order No. 68, Art. 15... 22

Other Authorities

21 Cong. Rec. 2569 (1890) 19, 36

21 Cong. Rec. 4100 (1890) 36

Br. for United States in Opp'n, *Apple, Inc.* v. *United States*, 136 S. Ct. 1378 (2016) (No. 15-565) 20

Crystalline Silicon Photovoltaic Products from China, 77 Fed. Reg. 31309 (Dep't of Commerce, May 25, 2012).................................... 22

Crystalline Silicon Photovoltaic Products from China, 80 Fed. Reg. 8592 (Feb. 18, 2015).. 8

Department of Justice Antitrust Division and Federal Trade Commission, *Antitrust Guidance for Human Resource Professionals* 4 (Oct. 2016)............................ 20–21

Leslie, *Antitrust Made Too Simple*, 79 Antitrust L. J. 917 (2014).................................... 32

Owen et al., *China's Competition Policy Reforms: The AntiMonopoly Law and Beyond*, 75 Antitrust L. J. 231 (2008).................. 22

Reed, *Creating Competitive Market Economies in Poland and Hungary*, 48 Admin. L. Rev. 515 (1996).................................... 22

Tor, *Illustrating a Behaviorally Informed Approach to Antitrust Law: The Case of Predatory Pricing*, Antitrust, Fall 2003, at 52 32

INTRODUCTION

This case involves two important and closely related questions concerning what is arguably the most fundamental principle of American antitrust law—the time-honored rule that horizontal price-fixing is illegal *per se*. Although this Court has narrowed the range of anticompetitive activity that is subject to *per se* scrutiny, horizontal price-fixing—at any level—has consistently been subjected to that exacting standard. And for good reason. Price-fixing by competitors destroys the central tenet of our economy—that prices are reasonable only when set by market forces, not when set by a cabal of competitors.

The dispute arose when respondents—Chinese solar panel manufacturers and their U.S. affiliates—agreed to fix prices for their solar panels well below cost, ultimately bankrupting petitioner Energy Conversion Devices ("ECD"), a leading manufacturer of innovative solar panels, and several other American manufacturers. Backed by massive subsidies from the Chinese government, respondents dumped 95 percent of their panels, obtaining a jump in market share from one percent to 80 percent in just three years. ECD thus brought suit, invoking Section 1 of the Sherman Act.

The Sixth Circuit acknowledged that ECD adequately pled that respondents engaged in a horizontal, below-cost price-fixing conspiracy. App. 2a (ECD "alleges that three solar-panel producers agreed to decrease prices to below-cost levels and, by doing so, drove the company into bankruptcy"). Nevertheless, the court deemed this insufficient, creating an unprecedented exception to the longstanding rule that horizontal price-fixing is illegal *per se*.

Announcing that below-cost fixed prices mean "only good things" for "consumers," the court held that, absent allegations that the defendants recouped their losses, horizontal price-fixing raises "no antitrust concerns." App. 8a. The court relied heavily on cases involving Section 2 of the Sherman Act—which requires a showing of at least attempted monopolization—concluding that "[t]here is no sound reason to impose a recoupment requirement in the context of § 2 claims but not § 1 claims." App. 9a. The court ignored that the Chinese government's subsidies made respondents' below-cost pricing at least arguably rational. Worse, the court held that the lack of recoupment allegations precluded ECD—a competitor bankrupted by respondents' fixed prices—from satisfying the "antitrust injury" requirement. App. 16a–17a.

The Sixth Circuit's decision urgently calls out for review. First, the notion that below-cost price-fixing among competitors does not violate Section 1 unless the defendants recoup their losses—i.e., that such behavior is *not* illegal *per se*—creates a dangerous exception to the Court's settled framework for assessing horizontal price-fixing. The court's decision applies to both private and governmental claims, and it squarely conflicts with Third and Ninth Circuit precedent as well as eleven decisions of this Court. See *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 584–585 (1986) (noting that "Petitioners did not appeal" the Third Circuit's holding that "a horizontal conspiracy to engage in predatory pricing, if proved, would be a *per se* violation of § 1"); *Amarel* v. *Connell*, 102 F.3d 1494, 1521–1522 (9th Cir. 1996); *Arizona* v. *Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 348 (1982).

Indeed, the Court has repeatedly held that whether the prices at issue are low, high, minimum, maxi-

mum, below cost, supra-competitive, or "reasonable," "[t]he anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation." *Maricopa Cty.*, 457 U.S. at 351. The law "place[s] horizontal agreements to fix maximum prices on the same legal—even if not economic—footing as agreements to fix minimum [prices]," and arguments "that the *per se* rule is inapplicable" based on "procompetitive justifications" reflect "a misunderstanding of the *per se* concept." *Id.* at 348, 351. "It is not for the courts to determine whether in particular settings price-fixing serves an honorable or worthy end" (*United States* v. *Nat'l Ass'n of Real Estate Bds.*, 339 U.S. 485, 489 (1950)), and this Court "ha[s] not wavered in [its] enforcement of the *per se* rule against price fixing" (*Maricopa Cty.*, 457 U.S. at 347). Certiorari is needed to confirm that these decisions remain binding in cases involving below-cost prices—and to ensure that the *per se* rule remains a *per se* rule.

Second, the idea that competitors bankrupted by their rivals' conspiracy to fix prices below cost have not suffered an "antitrust injury" conflicts with Ninth Circuit precedent, this Court's precedents, and the Clayton Act's express provision that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" (15 U.S.C. § 15) may invoke Section 1.

As the Ninth Circuit has held, "predatory pricing against a de facto competitor falls squarely within the category of antitrust injury." *Amarel*, 102 F.3d at 1509. Similarly, this Court has repeatedly recognized that competitors injured by rivals' below-cost fixed prices have standing to challenge them. Such competitors "suffer[] an antitrust injury" whenever the defendants "conspir[ed] to drive [them] out of the rel-

evant markets by (i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure of cost." *Matsushita*, 475 U.S. at 584–585 n.8. None of the relevant cases requires a showing of recoupment to establish antitrust injury. Yet the court below held that direct competitors lack an antitrust injury even when challenging below-cost price-fixing that drove them into bankruptcy.

This Court has jealously guarded the distinction between below-cost prices and low, but above-cost, prices. Low but above-cost prices resulting from independent competition are the hallmark of a market economy, and generally reflect a competitor's greater efficiency. By contrast, below-cost prices effected by horizontal conspiracies both threaten competition and establish antitrust injury. Such prices do not arise from greater efficiencies, but from anticompetitive activity, and unfairly drive competitors from markets in which they could honestly compete.

The decision below upends this fundamental distinction. And foreign governments, especially in nonmarket economies such as China, are certain to notice. As a result of respondents' price-fixing conspiracy, dozens of American firms have shuttered their doors. These firms represented cutting-edge technological innovation, consumer choice, and ultimately competition. But respondents' price-fixing conspiracy, backed by foreign subsidies that obviated the need for respondents to recoup their losses, eliminated those benefits.

Review is warranted both to confirm that there is indeed "sound reason" to require recoupment "in the context of § 2 claims but not § 1 claims" (App. 9a), and to ensure that competitors bankrupted by their

rivals' below-cost price-fixing agreements can establish the antitrust injury required to challenge them. If the legality of horizontal price-fixing turns on whether the resulting prices mean "good things" for consumers (App. 8a), this Court's *per se* rule is no longer a *per se* rule. The Court's intervention is needed to prevent that result.

OPINIONS BELOW

The Sixth Circuit's opinion (App. 1a–22a) is reported at 833 F.3d 680. The district court's decision (App. 23a–37a) dismissing the complaint with prejudice is unreported and is available at 2014 WL 5511517. The district court's decision denying reconsideration (App. 39a–47a) is also unreported and is available at 2015 WL 4966856.

JURISDICTION

The Sixth Circuit issued its decision on August 18, 2016. On October 28, 2016, Justice Kagan extended the time to petition for certiorari to January 5, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

15 U.S.C. § 1 provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

15 U.S.C. § 15 provides: "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States."

STATEMENT

A. Respondents' price-fixing conspiracy

Before the events that led to this case, ECD's solar panels were at the forefront of technological innovation. As compared to respondents' panels, ECD's panels generated electricity for longer, performed better in diffused light and high temperatures, were lighter, and were easier to install. App. 3a. These benefits derived from ECD's use of proprietary technology including thin-film material, rather than the traditional polysilicon used by respondents, who make solar panels using 1970s-era technology. *Ibid.*

Respondents are China-based solar manufacturers and their U.S. subsidiaries operating as alter egos of the China-based entities. Threatened by ECD's technology, and backed by massive Chinese governmental subsidies for exporting their products, respondents conspired to drive ECD and other American manufacturers out of business via below-cost fixed prices.

Respondents, operating in a non-market economy, are driven less by profit-maximization than by eliminating competition, maintaining full employment in Chinese factories, and reaping rewards for other non-profit maximizing behavior. In pursuit of these goals, respondents collectively slashed prices by 60 percent —well below their costs, and contrary to economists' predicted market conditions, including increasing demand. Unsurprisingly, respondents' market share jumped from roughly one percent to 80 percent in just three years. App. 3a–4a, 24a.

Moreover, despite the lower costs of transporting products in China and the country's dire need for clean energy, respondents chose to export over 95

percent of their product—effectively allocating non-Chinese markets to themselves.

B. The destruction of American industry

The Department of Commerce ("DOC") and International Trade Commission ("ITC") investigated respondents' pricing practices and ruled that they were unlawful and injurious to American industry. Specifically, the DOC found that respondents were selling their products at "less than fair value" and receiving massive countervailing subsidies—including, for example, polysilicon (their main material input), loans, and land. App. 30a.

The ITC also found that respondents' pervasive underselling enabled them to gain market share and "materially injure[]" the "[U.S.] solar manufacturing industry." App. 30a–31a. In fact, nearly a dozen American companies shuttered their doors—and dozens more closed plants and laid off American workers —because of respondents' conspiracy. App. 4a.

ECD was one such victim. It operated for nearly 30 years, made more than $1 billion in sales, and employed some 2,500 Americans before being forced into bankruptcy by respondents' conspiracy in 2011.

C. The district court's decision

ECD filed this suit in 2013, invoking Section 1 of the Sherman Act.[1] In 2014, respondents moved to

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[1] ECD also named Suntech Power Holdings Co., Ltd. and Suntech America, Inc. as defendants. But these companies, which have since filed for bankruptcy and are subject to an automatic stay under 11 U.S.C. § 362, are no longer parties. Suntech's Chinese successor continues to dump in

dismiss. Without scheduling a hearing (or holding a single discovery or Rule 16 conference), the district court granted their motion with prejudice.

The court acknowledged that ECD "adequately allege[d] that [respondents] engaged in below-cost pricing" pursuant to a horizontal price-fixing agreement. App. 30a. Nevertheless, the court held that, because ECD alleged below-cost price-fixing, it needed to allege recoupment, a Section 2 element. App. 31a–34a. The court believed this was necessary to keep competitors from using the antitrust laws "to harm, rather than protect[,] competition." App. 33a. The court thus found that ECD had not alleged either a Section 1 violation or antitrust injury. App. 36a. The same day, the court entered final judgment dismissing the case with prejudice. App. 37a–38a.

ECD moved for reconsideration and leave to file an amended complaint. Nine months later, the court scheduled oral argument on these motions. Hours after argument, the court issued an opinion. The court acknowledged that no Supreme Court or Sixth Circuit precedent had ever required a Section 1 plaintiff "to allege recoupment in order to state a claim" challenging horizontal, below-cost price-fixing (App. 41a, 43a–44a), but denied both reconsideration and leave to amend the complaint.

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the U.S. under the Suntech brand. *Crystalline Silicon Photovoltaic Products from China*, 80 Fed. Reg. 8592, 8595 (Feb. 18, 2015).

D. The Sixth Circuit's decision

The Sixth Circuit affirmed. App. 22a. The court acknowledged that "'price fixing' between competitors" and "'predatory pricing'" are distinct Section 1 theories supported by distinct authorities. App. 6a. Yet the court called it "word play" to conclude that having to prove recoupment "applies only to claims under § 2." App. 13a. Because "low prices" mean "only good things" for consumers, the court declared, "no antitrust concerns arise" and "[t]here is no sound reason to impose a recoupment requirement in the context of § 2 claims but not § 1 claims." App. 8a–9a.

The court asserted that "no Supreme Court decision supports" any other view (App. 10a), but without discussing this Court's Section 1 decisions holding that horizontal price-fixing is *per se* illegal regardless of the price level. *Infra* at 15–18. Citing *Matsushita* and several Section 2 decisions, the court reasoned that "[t]he possibility of recoupment is what makes the choice to 'forgo profits' 'rational.'" App. 8a. Yet the court never acknowledged that Chinese subsidies made respondents' below-cost price-fixing rational regardless of whether they later raised prices.

The court then held that ECD's lack of antitrust injury "ought to be clear" because "a conspiracy that drops prices, but does not intend to raise them later," furthers "'consumer welfare.'" App. 16a. That is, the court held that the antitrust laws protect only consumers and only from high prices; they do not, absent

recoupment, protect companies from being bankrupted by rivals' below-cost fixed prices. App. 16a–17a.[2]

REASONS FOR GRANTING THE PETITION

I. Certiorari is warranted to confirm that horizontal price-fixing is illegal *per se*, regardless of the resulting prices, and cannot be justified by alleged pro-consumer benefits.

This Court's review is needed to ensure that the recoupment requirement of Section 2 monopolization claims involving predatory pricing does not upend the settled framework for analyzing horizontal price-fixing under Section 1—a framework that governs both private and governmental claims. As this Court has repeatedly held, whether the resulting prices are low, high, minimum, maximum, below cost, supra-competitive, or allegedly reasonable, "[t]he anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation." *Maricopa Cty.*, 457 U.S. at 351.

The Sixth Circuit has created a dangerous exception to this rule: A Section 1 plaintiff who alleges a horizontal agreement to fix prices below cost cannot state a claim without further alleging recoupment. This exception applies even if there is a plausible

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[2] The court also affirmed the district court's refusal to dismiss ECD's complaint without prejudice and to allow an amended complaint, reasoning that leave to amend need not be "freely give[n]" after an adverse judgment—even if judgment is entered immediately upon entry of an order dismissing the first complaint. App. 19a–20a.

reason—here, respondents' receipt of foreign subsidies—why recoupment might never occur.

The Sixth Circuit's decision squarely conflicts with the Third Circuit's holding in *Matsushita* that "a horizontal conspiracy to engage in predatory pricing, if proved, would be a *per se* violation of § 1"—a ruling that "Petitioners did not appeal." 475 U.S. at 584–585. It also conflicts with Ninth Circuit precedent. *Amarel*, 102 F.3d at 1521–1522. Moreover, this Court has never held that plaintiffs must allege recoupment to state a Section 1 below-cost horizontal price-fixing claim. On the contrary, on eleven occasions spanning 120 years, this Court has held that horizontal price-fixing is *per se* illegal under Section 1.

Time and again, the Court has rejected arguments that the lawfulness of horizontal price-fixing turns on the level of the prices or whether they are "reasonable," pro-competitive, or good for consumers. Certiorari is warranted to confirm that these decisions remain applicable to cases involving below-cost horizontal price-fixing—and to ensure that the *per se* rule remains a *per se* rule.

A. The Sixth Circuit's decision conflicts with Third and Ninth Circuit precedent holding that below-cost horizontal price-fixing is illegal *per se*.

The Sixth Circuit is squarely in conflict with the Third and Ninth Circuits over whether horizontal below-cost price-fixing agreements violate Section 1 of the Sherman Act *per se*—i.e., regardless of whether the defendants recoup their losses. As the Court noted in *Matsushita*, the Third Circuit there "found that respondents' allegation of a horizontal conspiracy to engage in predatory pricing, if proved, would be a *per*

se violation of § 1," but "Petitioners did not appeal from that conclusion." 475 U.S. at 584–585 (citing *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 306 (3d Cir. 1983)). More recently, the Ninth Circuit has validated Section 1 below-cost price-fixing claims that do not allege recoupment. *Amarel*, 102 F.3d at 1521–1522. In holding that horizontal below-cost price-fixing agreements violate Section 1 only if the defendants recoup their losses, the court below created a conflict with these decisions.

1. The plaintiffs in *Matsushita*, American electronics manufacturers, sued several Japanese manufacturers, alleging that they had conspired to fix high prices in Japan, while further agreeing to allocate customers and sell goods in the United States with "rebates and sales at prices that produced losses." 723 F.2d at 305. The Third Circuit first explained that horizontally allocating customers alone "would not injure" the American manufacturers, as "it would leave them free to compete for all customers, and tend to insulate them from competition." *Id.* at 306. When "coupled with [the defendants'] home market price stabilization conspiracy" and "predatory tactics" in the United States, however, the court held that "if the evidence would permit a finding that there was a conspiracy having these features, it would support [a Section 1 violation]" for which the plaintiffs "may recover under section 4 of the Clayton Act." *Ibid.*

The court then assessed the evidence. Noting that "an agreement fixing minimum prices for the American market would ordinarily be a per se violation of section 1," the court stressed that private plaintiffs must show antitrust injury, and that conspiracies "to set *minimum* prices would in isolation protect non-party competitors like [the plaintiffs] from competi-

tion." *Id*. at 310 (emphasis added). But since there was evidence of "sales below cost"—of "predatory pricing"—the court held that "a conspiracy to sell at artificially high prices in Japan at the same time selling at artificially low prices in the United States would support liability." *Id*. at 310–311.

One searches this decision in vain for any suggestion that the plaintiffs had to prove recoupment. And the defendants appealed only the Third Circuit's assessment of the evidence, not its holding that "a horizontal conspiracy to engage in predatory pricing, if proved, would be a *per se* violation of § 1." 475 U.S. at 584–585. That holding remains valid.[3]

The Sixth Circuit's holding that horizontal below-cost price-fixing is not actionable under Section 1 absent recoupment likewise conflicts with Ninth Circuit precedent. In *Amarel*, rice farmers brought Section 1 and 2 claims against their competitors (two cooperatives) and their competitors' export marketing agent. The plaintiffs proffered evidence that the defendants conspired to "eliminate all independent rice farmers" using tactics including "predatory pricing" at levels "below defendants' costs." 102 F.3d at 1503, 1508. The court validated the price-fixing claim under Section 1 without requiring recoupment.

Noting that Sections 1 and 2 proscribe "separate and distinct statutory offense[s]," the court explained that only Section 2 requires "a dangerous probability

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[3] As discussed below (at 31–32), this Court's decision in *Matsushita* did address antitrust injury, and the decision below conflicts with that analysis.

of achieving 'monopoly power.'" *Id.* at 1521. Unlike Section 2, Section 1 "prohibits concerted action that 'unreasonably' restrains trade," and thus "encompass[es] a wide variety of anticompetitive practices, including horizontal and vertical price fixing." *Ibid.* Section 1 requires only "a contract, conspiracy or combination intended to restrain competition" and "an anticompetitive effect." *Id.* at 1522. Thus, the plaintiffs stated a viable Section 1 claim without regard to recoupment. *Ibid.*

2. The court below, by contrast, reached the opposite result on substantively identical facts. Announcing that "low prices" mean "only good things" for consumers, the court held that, absent allegations that the defendants will "recoup the losses by charging anti-competitive prices," "no antitrust concerns arise" from below-cost price-fixing agreements among competitors. App. 2a, 8a. Principally citing cases involving Section 2, the court declared that "[t]here is no sound reason to impose a recoupment requirement in the context of § 2 claims but not § 1 claims." App. 9a.

The court purported to find support for its holding in this Court's decision in *Matsushita*, which did not address whether "a horizontal conspiracy to engage in predatory pricing * * * would be a *per se* violation of § 1." 475 U.S. at 584–585. The court cited *Matsushita* in concluding that "[t]he possibility of recoupment is what makes the choice to 'forgo profits' 'rational.'" App. 8a.

Matsushita, however, addressed only whether the American manufacturers' conspiracy allegations were plausible on that record, concluding that recoupment is only *one way* to show that below-cost price-fixing is rational. Indeed, the Court remanded the case for

"consider[ation of] whether there is *other evidence* [besides recoupment]" supporting a "find[ing] that [defendants] conspired to price predatorily." 475 U.S. at 597 (emphasis added).

In sum, plaintiffs in the Third and Ninth Circuits need not allege recoupment to plead a *per se* Section 1 violation. Rather, they need only allege a horizontal price-fixing agreement—precisely what ECD alleges. App. 2a. Yet the court below made recoupment an element of Section 1, ignoring the fact that, even if respondents never raised their prices, Chinese subsidies provided an "apparent motive" for below-cost price-fixing and made it "rational." *Matsushita*, 475 U.S. at 597. Review is needed to resolve the circuit split over whether "a horizontal conspiracy to engage in predatory pricing" is "a *per se* violation of § 1" without proof of recoupment. *Id.* at 584–585.

B. The decision below conflicts with eleven decisions of this Court holding that horizontal price-fixing is illegal *per se.*

It is unsurprising that the petitioners in *Matsushita* "did not appeal from th[e] conclusion" that "a horizontal conspiracy to engage in predatory pricing, if proved, would be a *per se* violation of § 1." *Ibid*. Ever since this Court's first Sherman Act decision addressing horizontal price-fixing under Section 1, such behavior has been illegal *per se*. Once the plaintiff establishes a horizontal price-fixing agreement, illegality is *conclusively* established—whether the prices are low, high, reasonable, or unreasonable.

In the first Sherman Act case to address horizontal price-fixing, the defendants justified their price-fixing on the theory that it "will not be prejudicial to the public interest so long as such restraint provides

for reasonable rates." *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290, 333 (1897). The Court disagreed, adopting the government's view: "Competition * * * is a necessity for the purpose of securing in the end just and proper rates." *Ibid.* In other words, no price is intrinsically pro-competitive—only prices set by the market are reasonable.

The Court has reaffirmed this *per se* rule at least ten times, in cases brought by both private plaintiffs and the government and involving a host of different price-fixing conspiracies. *Maricopa Cty.*, 457 U.S. at 347 ("[w]e have not wavered in our enforcement of the *per se* rule"); *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (this "has long been settled"; "[i]t is no excuse that the prices fixed are themselves reasonable."); *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 47 (1960) ("illegal per se"); *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305, 309–310 (1956) (this "has been held too often to require elaboration"); *United States* v. *New Wrinkle, Inc.*, 342 U.S. 371, 377 (1952) (price-fixing is "per se" unlawful, even if the prices are "reasonable"); *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951) ("illegal per se"), overruled on other grounds by *Copperweld Corp.* v. *Indep. Tube Corp.*, 467 U.S. 752 (1984); *Nat'l Ass'n.*, 339 U.S. at 489 ("*per se* an unreasonable restraint"); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) ("this Court has consistently and without deviation adhered to [this] principle"); *United States* v. *Trenton Potteries*

Co., 273 U.S. 392, 398 (1927) (this has "often been decided and always assumed").[4]

The Court has repeatedly rejected arguments that horizontal agreements are legal if they set *maximum* prices or otherwise ensure *low* prices for consumers. In *Maricopa County*, for example, the Court expressly rejected "the argument that the agreements at issue escape *per se* condemnation because they * * * fix maximum prices" that are "procompetitive." 457 U.S. at 348, 351. As the Court stated, precedent "place[s] horizontal agreements to fix maximum prices on the same legal—even if not economic—footing as agreements to fix minimum or uniform prices." *Id.* at 348. Arguments "that the *per se* rule is inapplicable" based on "procompetitive justifications" reflect "a misunderstanding of the *per se* concept. The anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation." *Id.* at 351. In short, "[t]he per se rule is 'grounded on faith in price competition as a market force [and not] on a policy of low selling prices at the price of eliminating competition.'" *Id.* at 348 (brackets in original; citation omitted).

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[4] This excludes cases involving vertical arrangements in which the Court has reiterated the *per se* rule for horizontal price-fixing. *E.g.*, *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 886 (2007); *Copperweld Corp.* v. *Indep. Tube Corp.*, 467 U.S. 752, 768 (1984); *Albrecht* v. *Herald Co.*, 390 U.S. 145, 152–153 (1968), overruled on other grounds by, *State Oil Co.* v. *Khan*, 522 U.S. 3 (1997); *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 720 (1944).

Horizontal price-fixing that keeps prices low is also harmful because it may "discourage entry into the market" or "deter experimentation and new developments by individual entrepreneurs"—i.e., regardless of whether consumers benefit from lower prices. *Ibid*. As the Court explained in *Kiefer-Stewart*, "[maximum price-fixing] agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." 340 U.S. at 213, overruled on other grounds by *Copperweld*, 467 U.S. 752.

Other decisions confirm that "[i]t makes no difference * * * whether the effect of the agreement is to raise or to decrease prices." *McKesson*, 351 U.S. at 310. "[A] combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se"—"all such schemes" pose an "actual or potential threat to the central nervous system of the economy," and thus are "beyond the pale." *Socony-Vacuum*, 310 U.S. at 221, 223, 224 n.59; accord *Nat'l Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 692 (1978).

Even if horizontal price-fixing conspiracies "benefit consumers," and "even in the absence of incipient monopoly," such conspiracies are illegal *per se*. *Copperweld*, 467 U.S. at 769. Indeed, the rule "that price fixing is contrary to the policy of competition underlying the Sherman Act" regardless of "its unreasonableness" "has been held too often to require elaboration." *McKesson*, 350 U.S. at 309–310. In sum, "[i]t is not for the courts to determine whether in particular settings price-fixing serves an honorable or worthy end." *Nat'l Ass'n*, 339 U.S. at 489.

The decision below, however, sharply conflicts with this precedent. Citing the need "to screen out some claims—those that will do more harm than good for consumers" (App. 9a)—the court reasoned that horizontal conspiracies to fix prices below cost are *not* illegal *per se*. In its view, because "low prices" mean "only good things" for consumers, "no antitrust concerns arise" absent "recoupment." App. 8a.

As the foregoing decisions confirm, however, the notion "that the *per se* rule is inapplicable" based on "procompetitive justifications" such as consumer benefits reflects "a misunderstanding of the *per se* concept." *Maricopa Cty.*, 457 U.S. at 351. Some such agreements harm consumers by raising prices; others "discourage [market] entry," deter "new developments by individual entrepreneurs" (*ibid.*), or "cripple the freedom of traders." *Kiefer-Stewart*, 340 U.S. at 213. Regardless, "[t]he anticompetitive potential inherent in all price-fixing agreements" (*Maricopa Cty.*, 457 U.S. at 351) drives the rule.

Indeed, as Senator Sherman himself put it: When competitors "combine with a purpose to prevent competition [and] sell their product at a loss or give it away in order to prevent competition," "then it is the duty of the courts to intervene." 21 Cong. Rec. 2569 (1890). Review is warranted to address the conflict between the decision below and 120 years of this Court's precedent.

C. The decision below governs the Section 1 claims of the government, which has long taken a hard line on the *per se* illegality of horizontal price-fixing agreements.

The need for review is even more urgent given that the decision below will govern the claims of both

private and public plaintiffs. Indeed, the government was the plaintiff in seven of the eleven decisions discussed above (at 16–17), and the same is true of hundreds if not thousands of lower court cases.

The government has long taken a hard line on the *per se* illegality of horizontal price-fixing. As the government recently explained: "'A horizontal agreement to fix prices' has long been the 'archetypical example' of a restraint subject to per se condemnation," and "the Sherman Act 'places all such schemes beyond the pale.'" Br. for United States in Opp'n at 16, *Apple, Inc.* v. *United States* 136 S. Ct. 1378 (No. 15-565) (citations omitted). Further, "[t]he very premise of the per se rule is that '[t]he anticompetitive potential inherent in all price-fixing arrangements justifies their facial invalidation' without regard to any purported 'pro-competitive justifications.'" *Id.* at 28.

In a similar vein, the Justice Department and the Federal Trade Commission recently threatened to *criminally prosecute* agreements that fix wages at low levels. Such agreements "eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers, which have traditionally been criminally investigated and prosecuted as hardcore cartel conduct." Department of Justice Antitrust Division and Federal Trade Commission, *Antitrust Guidance for Human Resource Professionals* 4 (Oct. 2016).[5] The government thus reaffirmed its long-standing position that "[i]t is unlawful for competitors to expressly or implicitly agree not to compete with one another, even if they are motivated

[5] https://www.justice.gov/atr/file/903511/download/.

by a desire to reduce costs." *Id.* at 2. Under the decision below, however, preventing higher prices is the *exclusive* value served by Section 1.

D. The decision below threatens to facilitate the dumping of foreign products in U.S. markets at below-cost rates, bankrupting American industry.

If allowed to stand, the decision below also threatens to embolden foreign governments such as China to harm the nation's economy. By subsidizing goods of foreign competitors who conspire to dump them at fixed, below-cost prices, governments in non-market economies can literally bankrupt entire American industries—safe in the knowledge that, provided the foreign companies do not *increase* prices, their conduct is immune from antitrust scrutiny.

Here, for example, the Sixth Circuit cited Commerce Department and International Trade Commission findings that "[o]ver twenty firms" were forced to "file[] for bankruptcy or close[] their operations" as a result of respondents' "agree[ment] to export more products to the United States and to sell them below cost." App. 3a–4a. What prompted this anticompetitive agreement? "[T]he Chinese government provided below-cost financing." App. 4a.[6]

Indeed, China's "AntiMonopoly Law" outright encourages horizontal price-fixing activity that purportedly (i) "safeguard[s] legitimate interests in foreign

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[6] These findings confirm that, regardless of recoupment, ECD's allegations of below-cost price-fixing are not only plausible, but backed by powerful proof.

trade and in economic cooperation with foreign counterparts," (ii) "mitigate[s] sharp decrease in sales volumes or obvious overproduction caused by economic depression," or (iii) serves "other purposes as prescribed by law or the State Council." Antimonopoly Law of the People's Republic of China of 30 Aug. 2007, Presidential Order No. 68, Art. 15.[7] As is typical of non-market economies, China is concerned not with competition, but with market stabilization—the antithesis of the Sherman Act's concerns. See Owen et al., *China's Competition Policy Reforms: The Anti-Monopoly Law and Beyond*, 75 Antitrust L. J. 231, 249–250 (2008).

Even without express encouragement, managers in non-market economies "tend to collude rather than compete." Reed, *Creating Competitive Market Economies in Poland and Hungary*, 48 Admin. L. Rev. 515, 516 (1996); see *Crystalline Silicon Photovoltaic Products from China*, 77 Fed. Reg. 31309–31310 (Dep't of Commerce, May 25, 2012) (Prelim. Dumping Order). Participants in such economies are driven by maximizing employment or executive compensation. There is little in the law of these countries to deter below-cost price-fixing. And if the decision below stands, there will be little in U.S. law either.[8]

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[7] http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045909.shtml.

[8] That respondents are listed on the New York Stock Exchange does not change this fact, especially when their publicly filed reports state that their operating companies (their alter egos) are Chinese-based and substantially influenced or owned by the Chinese government. For exam-

E. The decision below is incorrect and eviscerates critical distinctions between Sections 1 and 2 of the Sherman Act.

Review is also warranted because the decision below eviscerates critical differences between Section 1 and Section 2. The Sixth Circuit asserted that not requiring recoupment in Section 1 cases involving below-cost pricing conspiracies "would destroy the § 2 requirement in multi-defendant claims." App. 9a. In reality, however, it is the decision below—in creating an unprecedented exception to the *per se* rule prohibiting price-fixing agreements—that improperly incorporates Section 2 requirements into Section 1.

All agree that those challenging below-cost pricing under Section 2 must plead that the defendants "had a reasonable prospect" of "recouping" their losses. *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993). But Sections 1 and 2 bar distinct anti-competitive conduct, and *Brooke Group*'s concern with chilling unilateral price-cutting does not apply to concerted price-fixing.

"Section 1 applies only to concerted action that restrains trade. Section 2, by contrast, covers both concerted and independent action, but only if that action 'monopolize[s],' or 'threatens actual monopolization,' a category that is narrower than restraint of trade." *Am. Needle* v. *Nat'l Football League*, 560 U.S. 183,

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ple, Trina admits that the Chinese government "exercises significant control" over it (FY 2014 Trina 20-F at 23), and the Chinese government owns a large part of Yingli's manufacturing facility (FY 2014 Yingli 20-F at 41).

190 (2010) (citations omitted). This "basic distinction * * * between concerted action and independent action" is what "distinguishes § 1 * * * from § 2." *Ibid.* (quotations omitted). Thus, conduct that violates Section 1 might not violate Section 2, and vice versa. *E.g.*, *Copperweld*, 467 U.S. at 767 (unilateral conduct may violate Section 2, but Section 1 "does not reach conduct that is "wholly unilateral"); *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 531–532 (1948).

By requiring Section 1 plaintiffs who challenge below-cost price-fixing agreements to show recoupment, however, the court below effectively imported the requirement to show monopoly power into Section 1. Recoupment reflects the "power * * * to raise prices" to supra-competitive levels, which is "the material consideration in determining whether a monopoly exists" under Section 2. *Am. Tobacco Co.* v. *United States*, 328 U.S. 781, 811 (1946); see also *Solyndra Residual Trust ex rel. Neilson* v. *Suntech Power Holdings Co.*, 62 F. Supp. 3d 1027, 1042 (N.D. Cal. 2014) ("[to] find that the two-part test for predatory pricing claims under § 2 applies also to § 1 claims would inappropriately conflate these two sections"). Yet monopoly power has never been an element of Section 1 claims—regardless of the restraint at issue.

Until now. Under the decision below, a Section 1 plaintiff must effectively prove not only joint action that restrains trade but also monopolization in the form of recoupment. App. 8a–13a. Any other conclusion, the court asserted, would deter the "robust competition" that the antitrust laws promote. App. 7a. But "robust competition" is not served by horizontal price-fixing, which short-circuits the market's control over prices. Such agreements "discourage [market] entry," "deter experimentation" (*Maricopa Cty.*, 457

U.S. at 348), and "cripple the freedom of traders" (*Kiefer-Stewart*, 340 U.S. at 213). That is why such agreements "are 'illegal *per se*'"—i.e., "so plainly anti-competitive that no elaborate study of the industry is needed to establish their illegality." *Prof'l Eng'rs*, 435 U.S. at 692.

Even though no court had previously required recoupment under Section 1, the court below thought it "strange" to require recoupment only in Section 2 cases. App. 10a. But this Court has routinely treated concerted action under Section 1 more severely than unilateral action under Section 2. *E.g.*, *Am. Needle*, 560 U.S. at 190; *Copperweld*, 467 U.S. at 767. There is nothing anomalous about limiting the recoupment requirement to cases where plaintiffs must show at least attempted monopolization.

Joint action is "fraught with anticompetitive risk" (*Copperweld*, 467 U.S. at 768–769), and "there is less risk of deterring a firm's necessary conduct" under Section 1 "because concerted action is discrete" and limiting such action "leaves untouched a vast amount of business conduct." *Am. Needle*, 506 U.S. at 190. By contrast, it can be "difficult to distinguish robust competition from conduct with long-run anti-competitive effects." *Copperweld*, 467 U.S. at 767–768. Thus, actions of "single firms" receive scrutiny "only when they pose a danger of monopolization"; otherwise, the law might "dampen the competitive zeal of a single aggressive entrepreneur." *Ibid.*

Citing *Matsushita*, the court below declared that "no Supreme Court decision supports" the view that recoupment is not an element of Section 1 claims involving below-cost prices, and that "several strongly suggest" otherwise. App. 10a. Yet the court outright

ignored this Court's Section 1 decisions holding that price-fixing is illegal *per se*—regardless of the resulting price or its alleged pro-consumer benefits. *Supra* at 16–18. Nothing in *Matsushita* purports to narrow those decisions.

The court below also failed to acknowledge that the *Matsushita* petitioners "did not appeal" the Third Circuit's holding that "a horizontal conspiracy to engage in predatory pricing, if proved, would be a *per se* violation of § 1." 475 U.S. at 584–585. Thus, even if, "[i]n all ways," *Matsushita* "treats predatory-pricing claims under both sections of the Sherman Act the same" (App. 11a)—a point we dispute (*infra* at 31–32, 34)—*Matsushita* never reached the first question presented here.

Indeed, the Court remanded the case for the Third Circuit to "consider whether there is *other evidence* [besides recoupment]" supporting a "find[ing] that [defendants] conspired to price predatorily." 475 U.S. at 597 (emphasis added). That remand makes perfect sense in light of the passages from *Matsushita* cited by the court below. App. 9a–11a. As those passages confirm, recoupment is one way to show that agreements to fix prices below cost—which "generate losses"—are "rational" or have "a plausible motive." 475 U.S. at 595. But that reasoning lacks force where foreign governmental subsidies provide an independent motive for companies to fix prices below cost. And nothing in *Matsushita* suggests that recoupment

must be shown even where other facts confirm that a below-cost price-fixing agreement is plausible.[9]

In short, "this Court and other courts have been careful to avoid constructions of § 2 which might chill competition." *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 458 (1993). Review is warranted to ensure that critical distinctions between Section 1 and 2 are not eviscerated by the decision below.

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[9] The circuit decisions described by the court below as "not distinguish[ing] between" Sections 1 and 2 (App. 12a) did not involve horizontal price-fixing, let alone at below-cost levels. See *Eisai, Inc.* v. *Sanofi Aventis U.S., LLC*, 821 F.3d 394, 401–402, 408–409 (3d Cir. 2016) (exclusive dealing); *Felder's Collision Parts, Inc.* v. *All Star Advert. Agency, Inc.*, 777 F.3d 756, 759–760 (5th Cir. 2015) (above-cost rebate from manufacturer to distributors); *Rebel Oil Co.* v. *Atl. Richfield Co.*, 51 F.3d 1421, 1443–1444 (9th Cir. 1995) (vertical conspiracy); *Multistate Legal Studies, Inc.* v. *Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*, 63 F.3d 1540, 1548–1549 (10th Cir. 1995) (non-competing licensor and licensee tying). The only arguable exception involved would-be competitors who accepted a software-licensing deal that barred charging for derivative works. Noting that the agreement "facilitate[d] production of new derivative works," the court held that "agreements that yield new products that would not arise through unilateral action are lawful." *Wallace* v. *IBM Corp.*, 467 F.3d 1104, 1106–1108 (7th Cir. 2006).

II. This Court should review the Sixth Circuit's holding that, unless the defendants recoup their losses, competitors do not suffer antitrust injury even when driven from the market by their rivals' below-cost fixed prices.

This Court should also review the Sixth Circuit's closely related holding that competitors lack antitrust injury to challenge rivals' horizontal below-cost fixed pricing that harms their business. That decision conflicts with Ninth Circuit precedent, this Court's precedents, and the text of the Clayton Act—which permits "any person who shall be injured in his business or property" by antitrust violations (15 U.S.C. § 15) to invoke Section 1.

A. The decision below conflicts with Ninth Circuit precedent holding that companies harmed by competitors' below-cost price-fixing conspiracies have antitrust standing to challenge them.

1. The Sixth Circuit's holding that ECD lacked antitrust standing to challenge respondents' conspiracy to fix prices at below-cost rates sharply conflicts with Ninth Circuit precedent. As discussed above (at 13), the rice farmers in *Amarel* sued competing cooperatives and their marketing agent, alleging that they conspired to "eliminate all independent rice farmers" by fixing prices "below defendants' cost[s]." 102 F.3d at 1508. This in turn "harmed [the plaintiffs] because it depressed prices below their costs," in alleged violation of Sections 1 and 2. *Ibid.*

The Ninth Circuit held that "[t]his type of predatory pricing against a de facto competitor falls squarely within the category of antitrust injury." *Id.* at 1509. "Losses a competitor suffers as a result of

predatory pricing," the court explained, "is a form of antitrust injury because 'predatory pricing has the requisite anticompetitive effect' against competitors." *Id*. at 1508 (quoting *Atl. Richfield Co*. v. *USA Petroleum Co.,* 495 U.S. 328, 339 (1990)).

As the court recognized, "[a]n important rationale for condemning predatory pricing 'is to protect competition from improper destruction. The injured competitor fits within that rationale and therefore suffers antitrust injury.'" *Id*. at 1509 (citation omitted). The court nowhere suggested, however, that antitrust injury requires showing that consumers paid higher prices or that the defendants recouped their losses.

2. The decision below squarely conflicts with *Amarel*. The court acknowledged ECD's allegation that respondents "agreed to decrease prices to below-cost levels," thus "dr[iving] the company into bankruptcy." App. 2a. Nonetheless, reasoning that "[t]he antitrust laws are a consumer welfare prescription," the court held that "a conspiracy that drops prices, but does not intend to raise them later in order to recoup the losses, does not cause injury of the type the antitrust laws were intended to prevent." App. 16a–17a (quotations omitted). Indeed, without explaining how respondents' actions created cost savings or introduced innovations that benefitted consumers, the court declared that respondents' price-fixing conspiracy "amounted to a triumph of consumer choice, not a limitation on it." App. 18a.

In the Sixth Circuit, then, "recoupment is not one item on a menu of ways to show that low prices hurt competition and consumers. It is the only way." App. 17a–18a. But this "low prices über alles" approach cannot be reconciled with the Ninth Circuit's holding

that "[l]osses a competitor suffers as a result of predatory pricing" are "a form of antitrust injury because 'predatory pricing has the requisite anticompetitive effect' *against competitors*." *Amarel*, 102 F.3d. at 1508 (emphasis added). As *Amarel* and other cases recognize, there is a critical difference between situations where "a competitor fell prey to competition" and situations where "competition fell prey to a competitor." *Full Draw Prods.* v. *Easton Sports, Inc.*, 182 F.3d 745, 754 (10th Cir. 1999).

The court below dismissed ECD's "caselaw saying that a reduction in consumer choice can show anticompetitive harm," asserting that "none of these cases concerns allegations that market prices are too low." App. 18a. The court could say this, however, only by ignoring ECD's citation of *Amarel* (C.A. Br. 43; C.A. Reply Br. 20–21), which squarely conflicts with its decision. See also *Gelboim* v. *Bank of Am. Corp.*, 823 F.3d 759, 777, 773 (2d Cir. 2016) (holding that plaintiff bondholders, banks, and exchange asserting a Section 1 claim challenging a conspiracy to depress the prices of financial instruments pled an antitrust injury; explaining that "rigging a price component to thwart ordinary market conditions" creates an antitrust injury whether it "raise[s], lower[s] or stabilize[s] prices"); *Pace Elecs., Inc.* v. *Canon Comput. Sys., Inc.*, 213 F.3d 118, 123 (3d Cir. 2000) (to require a showing that a *per se* violation harms competition "comes dangerously close" to transforming the *per se* rule into a rule of reason analysis); *Solyndra*, 62 F. Supp. 3d at 1044 (predatory pricing and the resulting loss to industry plaintiffs "show antitrust injury"). Only this Court can resolve the conflict.

B. The decision below conflicts with this Court's antitrust injury precedents.

The Sixth Circuit's decision also conflicts with this Court's precedent holding that antitrust injury may be present when a competitor is driven out of business by below-cost pricing.

1. Most notably, the decision conflicts below with *Matsushita*, where American electronics manufacturers sued Japanese manufacturers for conspiring to fix high prices in Japan while selling electronics below cost in the United States. In addressing antitrust injury, the Court first "emphasiz[ed] what [the American manufacturers'] claim is *not*" and could not be. 475 U.S. at 582. For example, the plaintiffs could not recover damages for conspiracies "to charge higher than competitive prices in the American market"—which "would indeed violate the Sherman Act"—or for conspiracies "to impose nonprice restraints that have the effect of either raising market price or limiting output." *Id*. at 582–583. Such conspiracies would be "harmful to competition," but "could not injure" the plaintiffs—"competitors" who "st[ood] to gain" sales by undercutting the higher prices. *Id*. at 583.

The Court took a different view, however, of the alleged "conspiracy to monopolize the American market by means of pricing below the market level." *Id*. at 584. For that claim, the American manufacturers simply needed to "show that the conspiracy caused them an injury for which the antitrust laws provide relief," which "depends in turn on proof that [the defendants] conspired to price predatorily in the American market." *Id*. at 584 n.7.

The Court then explained that it "need not resolve th[e] debate," noted in its earlier Section 2 cases, over

"what 'cost' is relevant" to show predatory pricing. *Id.* at 584 n.8. "[Because] this is a Sherman Act § 1 case," the Court continued, "it is enough to note that respondents have not suffered an antitrust injury *unless* petitioners conspired to drive respondents out of the relevant markets by (i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure of cost." *Ibid.* In short, "[a]n agreement without these features would either leave [competitors] in the same position" or "benefit [them] by raising market prices," but competitors challenging an agreement *with* those features *can* state a cognizable antitrust injury. *Ibid.*

That same Term, *Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104, 121 (1986), rejected a *per se* rule "denying competitors standing to challenge an acquisition on the basis of predatory pricing theories." Even assuming that predatory behavior occurs infrequently, the Court stated, "nothing in the language or legislative history of the Clayton Act suggests that Congress intended this Court to ignore injuries caused by * * * predatory pricing," which "harms both competitors and competition." *Id.* at 121–122.[10] Unlike "price cutting aimed simply at increasing market share, predatory pricing has as its aim the elimina-

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[10] Even then, the Court hastened to add that "there is ample evidence suggesting that the practice does occur." *Id.* at 121. And recent economic theory suggests that predatory pricing occurs more frequently than earlier believed. *E.g.*, Leslie, *Antitrust Made Too Simple*, 79 Antitrust L. J. 917 (2014); Tor, *Illustrating a Behaviorally Informed Approach to Antitrust Law: The Case of Predatory Pricing*, Antitrust, Fall 2003 at 52.

tion of competition," is "inimical to the purposes of [the antitrust] laws," and is "capable of inflicting antitrust injury." *Id.* at 118. The Court sustained the merger at issue only because the plaintiff had disavowed any "injury from below-cost pricing." *Id.* at 118–119.

Brunswick Corp. v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), is similar. In holding that the plaintiffs there suffered no antitrust injury from others' low but above-cost prices that decreased their profits, the Court contrasted harm from increased competition—which antitrust law protects—with harm involving less competition. Although "[t]he short-term effect of certain anticompetitive behavior[,] predatory below-cost pricing, for example[,] may be to stimulate price competition," the Court stressed that "competitors may be able to prove antitrust injury" either "before they actually are driven from the market and competition is thereby lessened" or after "competition has been diminished"—when "the case for relief will be strongest." *Id.* at 489 n.14. In short, "below-cost pricing" may be challenged by "competitors" who are "driven from the market"—even if the defendants' behavior "stimulate[s] price competition" that benefits consumers. *Ibid.*

2. The decision below conflicts with this precedent. In the Sixth Circuit's view, "a conspiracy that drops prices, but does not intend to raise them later in order to recoup the losses," *never* causes antitrust injury. App. 16a. The court uncritically accepted respondents' position that this Court's use of the term "predatory" necessarily refers to recouped losses—and blurred the distinction between horizontal price-fixing claims and predatory pricing claims under Section 1. App. 17a.

"Predatory pricing," however, simply means "pricing below some appropriate measure of costs." *Matsushita*, 475 U.S. at 584 n.8. None of the decisions analyzed above—even those that discuss recoupment—suggest that antitrust injury requires the plaintiff to show recoupment. On the contrary, the plaintiff in "a Sherman Act § 1 case" need only allege that the defendants "conspired to drive [them] out of the relevant markets by (i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure of cost." *Ibid*.

Review is warranted to ensure that the Sixth Circuit's decision does not undermine this Court's settled framework for analyzing antitrust injury in Section 1 cases involving below-cost price-fixing.

C. The Sixth Circuit's antitrust injury holding conflicts with the text and purpose of Section 4 of the Clayton Act and the legislative history of the Sherman Act.

The Sixth Circuit's antitrust injury holding is also incorrect. For starters, it contravenes the text of the Clayton Act, which broadly grants standing to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15. "The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers"; it "is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices." *Mandeville Island Farms, Inc*. v. *Am. Crystal Sugar Co*., 334 U.S. 219, 236 (1948). Not surprisingly, then, this Court's cases "emphasize[] the central interest in protecting the economic freedom of participants in the relevant market" (*Associated Gen. Contractors of Cal., Inc*. v.

Cal. State Council of Carpenters, 459 U.S. 519, 538 (1983) (internal citations omitted)) and repeatedly recognize competitors' standing to challenge their rivals' predatory pricing. *Supra* at 31–33; see also *Atl. Richfield*, 495 U.S. at 339 ("predatory pricing has the requisite anticompetitive effect" against competitors); *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 344 (1962) (discussing "Congress' desire to promote competition through the protection of viable, small, locally-owned business").

The decision below flouts both Section 4's text, which the court never discussed, and its "expansive remedial purpose." *Blue Shield of Va.* v. *McCready*, 457 U.S. 465, 472 (1982). "Congress sought to create a private enforcement mechanism that would deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations." *Ibid*. "[T]he purpose" of these remedies is "not merely to provide private relief," but to serve "the high purpose of enforcing the antitrust laws." *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 130–131 (1969).

"[W]hile an increase in price resulting from a dampening of competitive market forces is assuredly one type of injury for which § 4 potentially offers redress, that is not the only form of injury remediable under § 4." *McCready*, 457 U.S. at 482–483 (citations omitted). Competitors' injuries are covered, along with other consumer harms, including loss of alternatives and technological innovation. *Ibid*. (consumer's interest in being treated by her chosen practitioner). In short, "competition is the best method" of ensuring choice in "all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost." *Prof'l Eng'rs*, 435 U.S. at 695.

The Sherman Act's legislative history confirms this. As Representative Mason observed: "Some say that the trusts have made products cheaper, have reduced prices; but if the price of oil, for instance, is reduced to 1 cent a barrel, it would not right the wrong done to the people of this country by the 'trusts' which have destroyed legitimate competition and drive honest men from legitimate business enterprises." 21 Cong. Rec. 4100 (1890). And as Senator Sherman himself put it: "[W]hen [men] combine with a purpose to prevent competition, so that if a humble man starts a business in opposition to them," and they "crowd him down" and "sell their product at a loss or give it away in order to prevent competition," "then it is the duty of the courts to intervene." 21 Cong Rec. 2569 (1890).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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JANUARY 2017

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ENERGY CONVERSION DEVICES LIQUIDATION TRUST, BY AND THROUGH ITS LIQUIDATING TRUSTEE, JOHN MADDEN,
Plaintiff–Appellant,

v.

TRINA SOLAR LIMITED; TRINA SOLAR (U.S.), INC.; YINGLI GREEN ENERGY HOLDING COMPANY LIMITED; YINGLI GREEN ENERGY AMERICAS, INC.; SUNTECH POWER HOLDINGS CO., LTD.; SUNTECH AMERICA, INC.,
Defendants–Appellees.

No. 15-2130

Appeal from the United States District Court for the Eastern District of Michigan at Detroit

No. 2:13-cv-14241—Robert H. Cleland, District Judge

Argued: June 15, 2016

Decided and Filed: August 18, 2016

Before: SILER, ROGERS, and SUTTON, Circuit Judges.

COUNSEL

ARGUED: W. Gordon Dobie, WINSTON & STRAWN LLP, Chicago, Illinois, for Appellant. Daniel E. Laytin, P.C., KIRKLAND & ELLIS LLP, Chicago, Illinois, for Appellees. **ON BRIEF**: W. Gordon Dobie, William C. O'Neil, Kathryn W. Bayer, WINSTON & STRAWN LLP, Chicago, Illinois, for Appellant. Dan-

iel E. Laytin, P.C., Leonid Feller, James R.P. Hileman, KIRKLAND & ELLIS LLP, Chicago, Illinois, Matthew J. Reilly, Karen M. Gift, SIMPSON THACHER & BARTLETT LLP, Washington, D.C., James S. Fortinsky, SHEARMAN & STERLING LLP, New York, New York, Mikael A. Abye, SHEARMAN & STERLING LLP, San Francisco, California, Catherine T. Dobrowitsky, RIVENOAK LAW GROUP, P.C., Troy, Michigan, Jonathan C. Sanders, SIMPSON THACHER & BARTLETT LLP, Palo Alto, California, Patrick Seyferth, BUSH SEYFERTH & PAIGE, PLLC, Troy, Michigan, for Appellees.

OPINION

SUTTON, Circuit Judge. Consumers benefit when market competition leads to lower prices. Competitors do not. Because antitrust law protects "competition, not competitors," *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962), courts are leery of antitrust claims brought by competitors alleging only that their rivals lowered prices and forced them out of business.

That is the claim Energy Conversion Devices pursues. It alleges that three solar-panel producers agreed to decrease prices to below-cost levels and, by doing so, drove the company into bankruptcy. Missing from the complaint is any allegation that the competitors not only agreed to lower prices but also planned to earn back what they lost—to recoup the losses by charging anti-competitive prices in a cornered market. In the absence of such an allegation or any willingness to prove a reasonable prospect of recoupment, the district court correctly rejected the claim on the pleadings. We affirm.

I.

As is always the case in reviewing a dismissal under Civil Rule 12(b)(6), we accept the facts as Energy Conversion, the plaintiff, has pleaded them.

Solar energy is not new. Seeking to reduce dependence on fossil fuels (and in some instances seeking to save money in the process), businesses and homeowners sometimes install solar panels on their roofs. Rooftop solar systems are not one type fits all. Two technologies are available for commercial and industrial purchasers. The older, conventional technology uses "[p]olysilicon-based" "flat" panels. R. 1 at 14. The newer technology uses "flexible thin-film silicon" panels. *Id.* Thin-film panels produce more electricity, are easier to install, and maintain their performance longer after the sun sets or is eclipsed by clouds.

At the time of the relevant events in this case, Suntech Power, Trina Solar, and Yingli Green Energy, all based in China, produced conventional panels. Energy Conversion, along with a number of other American manufacturers, produced the newer thin-film panels. The two technologies competed, each obtaining significant sales in the American market for commercial and industrial rooftops. Suntech reported up to $750 million in annual sales in that market in recent years, Trina $440 million, Yingli $340 million, and Energy Conversion over $300 million.

In the absence of restraints on trade, competition rarely is static. So too in this industry. The Chinese producers sought greater market shares. They agreed to export more products to the United States and to sell them below cost. A host of entities supported their endeavor. Suppliers provided discounts on silicon, a trade association facilitated cooperation, and

the Chinese government provided below-cost financing. Between 2008 and 2011, the average selling prices of Suntech, Trina, and Yingli's panels fell over 60%.

The agreement took a toll on some domestic producers of solar panels. Struggling American manufacturers sought refuge, turning first to the Department of Commerce and the International Trade Commission, the agencies that administer this country's international trade laws. *See generally* 19 U.S.C. §§ 1671–1677n. The agencies found that the Chinese firms had harmed American industry through illegal dumping. *See Changzhou Trina Solar Energy Co. v. U.S. Int'l Trade Comm'n*, 100 F. Supp. 3d 1314, 1318–19 (Ct. Int'l Trade 2015); 80 Fed. Reg. 40,998 (July 14, 2015); 77 Fed. Reg. 31,309 (May 25, 2012). As a result, the agencies assessed substantial tariffs on several manufacturers, including Suntech, Trina, and Yingli.

The American solar-panel manufacturers nonetheless continued to suffer. Over twenty firms, including Energy Conversion, filed for bankruptcy or closed their operations. R. 1 at 17–18. As of 2012, shortly after Energy Conversion filed its Chapter 11 petition, there were still roughly thirty producers of solar panels in the United States. *See* Int'l Energy Agency, National Survey Report of PV Power Applications in the United States 2012, at 14 tbl.6 (2013), *available at* http://goo.gl/BJnsJq.

Energy Conversion turned from the executive branch to the judicial branch for additional relief. It filed this lawsuit in the Eastern District of Michigan. Invoking § 1 of the Sherman Act, 15 U.S.C. § 1, and its Michigan equivalent, Mich. Comp. Laws §

445.772, the company sought nearly $3 billion in treble damages. Its complaint boiled down to the allegation that the three Chinese companies had unlawfully conspired "to sell Chinese manufactured solar panels at unreasonably low or below cost prices . . . in order to destroy an American industry." *Id.* at 29. Because this allegation did not state that Suntech, Trina, and Yingli could or would recoup their losses by charging monopoly prices after they drove their competitors from the field, the district court dismissed the claim with prejudice. No. 13–14241, 2014 WL 5511517, at *3–7 (E.D. Mich. Oct. 31, 2014). And because the legal requirements of the Michigan antitrust statute mirror those of its federal cousin, the district court did the same for the state law claim. *Id.* at *7.

After the district court's ruling, Energy Conversion asked the court for permission to amend its complaint to add a recoupment allegation. The court rejected the request.

II.

On appeal, Energy Conversion argues that the district court erred (1) in dismissing the complaint for failure to plead that the Chinese companies would recoup their losses and (2) in preventing Energy Conversion from filing an amended complaint that added this allegation.

A.

The Sherman Act contains two prohibitions. Act of July 2, 1890, ch. 647, 26 Stat. 209. The first declares illegal "[e]very contract, combination . . . , or conspiracy . . . in restraint of trade." 15 U.S.C. § 1. As suggested by the words "contract," "combination," and "conspiracy," § 1 claims require two or more defendants. *Am. Needle, Inc. v. Nat'l Football League*, 560

U.S. 183, 190 (2010). Here are a few types of claims, for illustrative purposes, recognized under this provision: "price fixing" between competitors, *see United States v. Trenton Potteries Co.*, 273 U.S. 392, 396–98 (1927); unreasonable "vertical" agreements between a supplier and its distributors, *see Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 881–82 (2007); "boycotts" of a seller by a group of buyers, *see FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 421–24 (1990); and "predatory pricing," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 584 n.8, 588–93 (1986).

The second prohibition punishes any "person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize" commerce. 15 U.S.C. § 2. As the language of this provision suggests, a plaintiff may bring a § 2 claim against a single monopolist (a "person who shall monopolize") or against two or more (those who "combine or conspire . . . to monopolize"). *Am. Needle*, 560 U.S. at 190. Here are a few types of claims, for illustrative purposes, recognized under this provision: exclusionary conduct that allows a monopoly to unfairly maintain its position, *see Lorain Journal Co. v. United States*, 342 U.S. 143, 153–55 (1951); "tying" products together so a monopoly in one market becomes a monopoly in two, *see Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 464, 480–86 (1992); and "predatory pricing," *see Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993).

1.

It is common ground that a predatory-pricing claim under § 2 requires the plaintiff to plead and

prove (1) that the defendants charged below-cost prices, *Brooke Grp.*, 509 U.S. at 222; and (2) that they "had a reasonable prospect . . . of recouping [their] investment in below-cost prices," *id.* at 224. Had Energy Conversion filed this claim under § 2, the parties agree that we would have to dismiss it on the pleadings. The complaint alleges only that the three defendants charged below-cost prices, not that they had a fair prospect of recouping their investment by later charging non-competitive prices.

The question at hand is whether a § 1 predatory-pricing claim contains these same two requirements. Energy Conversion concedes that one requirement (below-cost prices) applies to both claims but not the other (recoupment).

Both claims—§ 1 and § 2 claims—require below-cost pricing *and* a reasonable prospect of recoupment for several reasons.

First, the explanation for applying the two requirements to § 2 claims applies with equal force to § 1 claims. Predatory-pricing claims of any sort usually contain an allegation that a rival "reduce[d] the sale price of its product[s] . . . to below cost, hoping to drive competitors out of business." *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 318 (2007). The problem with that sort of allegation—by itself—is that the conduct claimed to be illegal looks a lot like the "robust competition" that the antitrust statutes "serve[ ] to promote." *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1109 (2015). Yes, "cutting prices in order to increase business" may put bottom-line pressure on competitors or indeed drive some competitors out of business; but lowering prices to increase market share, usually a

zero-sum game, is “the essence of competition.” *Matsushita*, 475 U.S. at 594.

At their core, the antitrust laws are a “consumer welfare prescription,” Robert Bork, The Antitrust Paradox 66 (1978), making them unconcerned with low prices (even below-cost prices) that will remain low. That’s why courts have “carefully limited the circumstances under which plaintiffs can state a Sherman Act claim by alleging that prices are too low.” *Pac. Bell Tel. Co. v. Linkline Commc’ns, Inc.*, 555 U.S. 438, 451 (2009). It does not suffice for a plaintiff to allege only that “the defendant has tried to knock out other businesses”; the plaintiff must show that “the means it has employed to that end are likely to . . . injure consumers.” *R.J. Reynolds Tobacco Co. v. Cigarettes Cheaper!*, 462 F.3d 690, 696 (7th Cir. 2006). And that requires the plaintiff to show below-cost prices *and* recoupment. *Brooke Grp.*, 509 U.S. at 222, 224. Else, the adoption of low prices leads only to more low prices—a benefit, not a burden, for consumers.

Recoupment looks at what happens after low prices have “vanquished” the competition, when the “predator” can hope to “raise[ ] . . . prices” to a monopoly level in order to make back “with interest” “the losses suffered from pricing goods below cost.” *Weyerhaeuser*, 549 U.S. at 318. The possibility of recoupment is what makes the choice to “forgo profits” “rational,” and it’s what makes the battle of attrition caused by predatory pricing worth the wait and the cost. *Matsushita*, 475 U.S. at 588–89. Unless low prices today will come with high prices tomorrow, only good things happen for consumers. They receive the “boon” of lower prices, “consumer welfare is enhanced,” and no antitrust concerns arise. *Brooke*

Grp., 509 U.S. at 224. The antitrust laws after all should not lightly be used to impose judgments that require defendants to *increase* prices.

There is no sound reason to impose a recoupment requirement in the context of § 2 claims but not § 1 claims. If, as the Supreme Court has explained, a cognizable predatory-pricing claim requires below-cost pricing and recoupment in the one setting, there is no basis for ignoring it in the other. The point of adding these requirements to the wide-textured language of the Sherman Act is to screen out some claims—those that will do more harm than good for consumers and those that enable "the harmful habit" of courts and law enforcement to "see[ ] predation in behavior that is actually vigorously competitive." Bork, *supra*, at 148. If anti-competitive conduct in a low-price claim requires both elements in one setting, it requires them in the other.

Second, any other approach would destroy the § 2 requirement in multi-defendant claims. Why bring such a claim under § 2 if the plaintiff can dispense with the recoupment requirement—as a matter of pleading, proof in discovery, and proof at trial—by the expedient of bringing a predatory-pricing claim under § 1? There is no good reason. The upshot of plaintiff's contrary position is to destroy the recoupment requirement in § 2.

Nor would it make any sense to impose the requirement only in § 2 claims. A predatory-pricing scheme undertaken by a *single firm*, the kind actionable only under § 2, is "general[ly] implausib[le]." *Brooke Grp.*, 509 U.S. at 227; *see also Weyerhaeuser*, 549 U.S. at 323. A predatory-pricing *conspiracy*, actionable under either § 1 or § 2, is "incalculably more

difficult to execute." *Matsushita*, 475 U.S. at 590. The alleged conspiracy not only must allocate the losses caused by below-cost pricing, but it also must police against free-riding conspirators. Every individual conspirator wants to be around when the conspiracy succeeds, but each one has every reason to shirk its duty to price below cost. If enough participants cheat in that way, the conspiracy never succeeds. *Id.* No such problem arises with the single-firm predatory-pricing scheme. How strange to include a recoupment requirement where it is needed least (a single-firm defendant) and excuse the requirement where it is needed most (multi-firm defendants).

Third, no Supreme Court decision supports Energy Conversion's argument and several strongly suggest, if not hold, that both requirements apply to both sections of the Sherman Act. Start with *Matsushita*, a case filed under § 1 and § 2 of the Sherman Act. American manufacturers of television sets alleged that Japanese competitors conspired to set low prices for television sets sold in the United States. 475 U.S. at 577–78. The Supreme Court did not draw any distinction between the two types of claims in establishing the prerequisites of a claim. "The success of any predatory scheme," it said, "depends on *maintaining* monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain. Absent some assurance that the hoped-for monopoly will materialize, *and* that it can be sustained for a significant period of time, '[t]he predator must make a substantial investment with no assurance that it will pay off.' For this reason, there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful." 475 U.S. at 589 (quoting Frank H. Easterbrook,

Predatory Strategies and Counterstrategies, 48 U. Chi. L. Rev. 263, 268 (1981)). A predatory-pricing scheme, the Court added, "makes sense only if petitioners can recoup their losses. In light of the large number of firms involved here, petitioners can achieve this only by engaging in some form of price fixing *after* they have succeeded in driving competitors from the market." *Id.* at 592 n.16. In all ways, *Matsushita*, a summary judgment case, treats predatory-pricing claims under both sections of the Sherman Act the same.

Seven years later, *Brooke Group* clarified that below-cost pricing and recoupment are elements of a § 2 claim that must be proved at trial. 509 U.S. at 222–27. No decision of the Supreme Court says, or even suggests, that these requirements for a predatory-pricing claim apply in full to a § 2 claim but in half to a § 1 claim. Why a § 1 low-price claim would import one requirement from *Brooke Group* but not the other, as Energy Conversion maintains, is beyond us.

Fourth, our court has followed these cues. In *Superior Production Partnership v. Gordon Auto Body Parts Co.*, 784 F.3d 311 (6th Cir. 2015), we addressed a predatory-pricing claim filed under § 1 and § 2. "[W]e think it best," the court said, "to infer these same elements"—below-cost pricing and recoupment—"in a § 1 predatory pricing claim." *Id.* at 320. A claimant thus "must grapple with these concepts in proving its case under § 1"—a requirement just as relevant at the pleading stage of a case as at the summary judgment and proof stages of a case. *Id.*

Fifth, all other appellate authority points in the same direction. After *Brooke Group*, every circuit to consider the question has required the elements of § 2

predatory-pricing claims in similar claims under § 1 or (like *Matsushita*) has not distinguished between the two provisions. *See, e.g.*, *Eisai, Inc. v. Sanofi Aventis U.S., LLC*, 821 F.3d 394, 401–02, 408–09 (3d Cir. 2016); *Felder's Collision Parts, Inc. v. All Star Advertising Agency, Inc.*, 777 F.3d 756, 759–60 (5th Cir. 2015); *Wallace v. Int'l Bus. Machines Corp.*, 467 F.3d 1104, 1106–08 (7th Cir. 2006); *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1432–34, 1443–44 (9th Cir. 1995); *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*, 63 F.3d 1540, 1548–49 (10th Cir. 1995). The leading treatise writers have reached the same conclusion. *See* 12 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 2007b1 (Supp. 1999); *see also* William L. Greene et al., Predatory Pricing 20 (ABA Antitrust Section, Monograph No. 22, 1996).

Measured by this test, Energy Conversion's claim fails. It never alleges that Suntech, Trina, and Yingli had a reasonable prospect of recouping their losses. The most the company included in its complaint was a reference to the possibility that, at some future date, "American consumers will pay more than they would in a competitive market." R. 1 at 27. The complaint gave no further details about how this would occur, when this would occur, why this would occur, or whether this *could* occur given the ease of access (or barriers to entry) to the solar-panel market. We thus do not know whether the Chinese companies' conspiracy extended past the point of cutting prices or how the conspiracy otherwise ensured that Suntech, Trina, and Yingli would recover what they had lost in setting "unreasonably low and/or below-cost prices." *Id.* at 2. The district court therefore correctly concluded that Energy Conversion had failed to plead

recoupment adequately. 2014 WL 5511517, at *6–7. Notably, Energy Conversion hinted as much during a hearing in the district court. And it admitted as much at oral argument in our court, acknowledging that it had not pled recoupment and had no duty to show it would occur. The district court properly dismissed the case.

Energy Conversion offers several rejoinders, each unconvincing.

It first argues that the label "predatory pricing" and the requirement of proof of recoupment attached to it applies only to claims under § 2 of the Sherman Act, not § 1. That is word play. The Supreme Court has already used "predatory pricing" to describe claims in each setting, whether filed under one section or the other. *Matsushita*, 475 U.S. at 584 n.8, 588–93. And this court too has rejected any such distinction. *Superior Prod.*, 784 F.3d at 320. It is also impossible to square this argument with Energy Conversion's concession that one element of predatory pricing *does* apply here, even though the primary case on which it relies discusses neither element. *See Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 348 (1982).

It next points out that the Northern District of California concluded in parallel litigation that a "claim under § 1 of the Sherman Act is [not] subject to dismissal for failing to plead a likelihood of recoupment." *Solyndra Residual Trust ex rel. Neilson v. Suntech Power Holdings Co.*, 62 F. Supp. 3d 1027, 1042 (N.D. Cal. 2014). "The recoupment requirement," the court concluded (in a five-sentence analysis), "derives directly from the Supreme Court's insistence that § 2 claims be supported by a showing of

monopolization or the dangerous threat of monopolization." *Id.* The court may be right that § 2 claims always require some proof of monopolization. But it is not right that monopolization is the only source of the recoupment requirement in predatory-pricing claims. Recoupment, to repeat just one reason, ensures that *any* claim bottomed on low prices involves an actual harm to consumers through an eventual increase in prices. *See Wallace*, 467 F.3d at 1106–07. Whether in a § 1 or § 2 predatory-pricing claim, the recoupment requirement ensures that antitrust suits themselves do not "interfere with the achievement of the Sherman Act's basic and important low price objectives." *Monahan's Marine, Inc. v. Bos. Whaler, Inc.*, 866 F.2d 525, 527 (1st Cir. 1989) (Breyer, J.).

Energy Conversion adds that, even if § 1 contains a recoupment requirement in predatory-pricing claims, all that is required in the complaint is a "plausible" showing that a price-fixing conspiracy existed between Suntech, Trina, and Yingli. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Recoupment thus becomes relevant only after discovery, so the argument goes.

But this position misunderstands the structure of federal civil litigation. To survive a motion to dismiss, a complaint must "state[ ] a plausible claim for relief," *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009), which requires that the complaint "show[ ] that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2). If proof of recoupment is required to succeed on the claim, allegations of recoupment must appear *in the complaint* to show an entitlement to relief. During discovery, the plaintiff must show that there is factual support for each component of the claim or it will be rejected as a matter of law on summary judgment.

At trial, the jury will be instructed on each component of the claim and will resolve any material factual disputes related to the claim. Whether at the complaint stage of the case, the discovery stage, or the trial stage, the plaintiff must address each aspect of the claim. As the master of the complaint, the plaintiff may decide what claims to bring and how to prove them. But it cannot avoid responsibility for dealing with each aspect of the claim at each phase of the case.

Energy Conversion insists that the alleged conspiracy is economically rational (and worthy of prohibition) even if the conspirators never planned to make back their losses. Because Suntech, Trina, and Yingli are all Chinese companies and because China is a "non-market economy," the company argues, the three conspirators "had little interest in making a profit" but instead priced at unprofitable levels "to eliminate American competition and maintain full employment in Chinese factories." Appellant's Br. 32. It's not clear that this is what's happening, given that each company is listed on the New York Stock Exchange, and given that one company has filed for bankruptcy under American law. But if this is what's happening, it's not recoupment. It shows only that the Chinese companies, impervious to the profit motive, are happy to *maintain* low prices. That's a form of charity, not a use of monopoly power to lower production and raise prices. The antitrust laws, as opposed to the statutory prohibition on dumping, do "not pose an obstacle" to the "inept," the happy-go-lucky, indeed the generous, "predat[or]" who sells below cost, benefits consumers, and finds itself unable to recoup—or uninterested in recouping—its losses. *Superior Prod.*, 784 F.3d at 324 n.5. Because Energy

Conversion failed to plead recoupment in bringing this § 1 claim, the district court correctly dismissed the complaint.

2.

Even if Energy Conversion managed to clear this hurdle, it would face another, related obstacle. Every private antitrust plaintiff, including those challenging an agreement as unlawful under § 1, must include in its complaint allegations of "antitrust injury." *NicSand, Inc. v. 3M Co.*, 507 F.3d 442, 450 (6th Cir. 2007) (en banc); *see Atl. Richfield Co. v. USA Petrol. Co.*, 495 U.S. 328, 339–40 (1990). This requirement is not an element of a specific substantive prohibition such as § 1, but instead derives from the general antitrust damages right of action in § 4 of the Clayton Act. 15 U.S.C. § 15; *see Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 109–10 (1986). The requirement ensures that private plaintiffs bring claims "of the type the antitrust laws were intended to prevent and that flow[ ] from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc.*, 429 U.S. 477, 489 (1977). And it ensures the plaintiff is a "proper" enforcer of those laws. *Cargill*, 479 U.S. at 111 n.6.

Energy Conversion has not pleaded a cognizable antitrust injury for reasons that ought to be clear by now. "[L]ower aggregate prices in the market" "enhance[ ]" "consumer welfare." *Brooke Grp.*, 509 U.S. at 224. The antitrust laws are a "consumer welfare prescription," *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (quoting Bork, *supra*, at 66), meaning a conspiracy that drops prices, but does not intend to raise them later in order to recoup the losses, does not cause injury "of the type the antitrust laws were

intended to prevent," *Brunswick*, 429 U.S. at 489.

This conclusion is of a piece with decisions from this court and the Supreme Court. We concluded that a competitor could not show antitrust injury in a § 2 claim complaining of low prices without an allegation that the defendant had predatorily priced—selling "below cost" *and* having "the goal of recouping its losses by charging monopolistic prices later." *NicSand*, 507 F.3d at 451–52. Even if a supplier had agreed with its distributors to lower prices, the Supreme Court similarly concluded, a rival seller could not show antitrust injury in a § 1 claim unless the agreement "result[ed] in predatory pricing." *Atl. Richfield*, 495 U.S. at 339. In those cases, as in this one, antitrust injury requires not just low pricing but predatory pricing. What makes pricing a form of predation is not the downswing in prices but the gouging upswing in prices after the competition has been eliminated or disciplined. Otherwise, the predator is no less a victim, indeed more of a victim, than the target. Bork, *supra*, at 144–59. Any other approach runs the risk of "chill[ing] the very [price-cutting] conduct the antitrust laws are designed to protect." *Matsushita*, 475 U.S. at 594; *see Atl. Richfield*, 495 U.S. at 338, 340–41; *NicSand*, 507 F.3d at 452.

Energy Conversion offers a potential way around the recoupment requirement in the antitrust injury context, trying to create a decreased choice/less innovation alternative in its place. The low prices charged by Suntech, Trina, and Yingli, it contends, show antitrust injury because they hurt the American solar-panel industry, leading to "reduced consumer choice and loss of innovation." Appellant's Br. 42.

Yet recoupment is not one item on a menu of ways

to show that low prices hurt competition and consumers. It is the only way. "Low prices," one leading author has noted, "are a princip[al] if not the primary goal of antitrust policy." Herbert Hovenkamp, Federal Antitrust Policy § 8.1 (4th ed. 2011). Yes, low prices on their own may lead to market inefficiencies in some cases. But a loss of consumer choice is often anything but anti-competitive. As it became available and affordable, gunpowder largely put the sword industry out of business. The Pony Express could not have competed with Federal Express. Netflix made Blockbuster less relevant. Newer, cheaper, better technology frequently makes old technology unavailable, even to consumers who preferred the old ways and the old technology.

The same reasoning applies here. And that is so even if Suntech, Trina, and Yingli's low prices forced "technologically superior" solar panels off the market. R. 1 at 17. Companies compete not only over the quality of their products but also over their prices. Innovation need not be solely about better technology; it can also be about cost reduction. In the solar-panel market, consumers apparently preferred the quality-price combination offered by the Chinese companies to the combination offered by Energy Conversion and (some of) its compatriots. The result, even if it came out of an agreement that harmed Energy Conversion, amounted to a triumph of consumer choice, not a limitation on it. *Cf. NicSand*, 507 F.3d at 456; *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1000 (6th Cir. 1999).

Energy Conversion points us to caselaw saying that a reduction in consumer choice can show anti-competitive harm. But none of these cases concerns allegations that market prices are too low. *See, e.g.*,

Blue Shield of Va. v. McCready, 457 U.S. 465, 481–84 (1982); *Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768, 789–90 (6th Cir. 2002). Also of little help is the international trade authorities' conclusion that the practices of these three Chinese companies harmed the American solar-panel industry. It should come as no surprise that anti-dumping statutes bar the kinds of injuries caused by dumping. That conclusion, however, says nothing about whether these same injuries are a concern of the antitrust laws. The trade laws have a protectionist focus on "injury to [domestic] industry," which does not always square with the antitrust laws' focus on consumers and "injury to competition." *USX Corp. v. United States*, 682 F. Supp. 60, 65–67 (Ct. Int'l Trade 1988); *see also* 19 U.S.C. § 1673; *Goss Int'l Corp. v. Man Roland Druckmaschinen AG*, 434 F.3d 1081, 1090–91 (8th Cir. 2006). Accordingly, even if a § 1 predatory-pricing claim does not require recoupment, Energy Conversion still had to prove recoupment to show a harm protected by the antitrust laws. With no allegation on that score, its claim fails for this similar but independent reason.

B.

Energy Conversion separately claims that the district court erred when it dismissed the case with prejudice. It should have made the dismissal without prejudice and should have allowed the company to file an amended complaint that included a recoupment allegation.

Under Civil Rule 15, a court must "freely give" parties leave to amend their pleadings before trial "when justice so requires." Fed. R. Civ. P. 15(a)(2). But this permissive standard does not apply when a party seeks to amend its complaint *after* an adverse

judgment. "Courts in that setting must consider the competing interest of protecting the finality of judgments and the expeditious termination of litigation." *Leisure Caviar, LLC v. U.S. Fish & Wildlife Serv.*, 616 F.3d 612, 615–16 (6th Cir. 2010) (quotation omitted). A party seeking such an amendment thus must satisfy both the "modest requirements of Rule 15" and the "heavier burden" that applies to requests "for reopening a case." *Id.* at 616; *see also Foman v. Davis*, 371 U.S. 178, 182 (1962). Under Civil Rule 59, Energy Conversion could satisfy that burden in several ways, including by showing its proposed amendment "prevent[ed] manifest injustice." *Intera Corp. v. Henderson*, 428 F.3d 605, 620 (6th Cir. 2005). Any such challenge is reviewed for abuse of discretion. *Leisure Caviar*, 616 F.3d at 615.

Nothing of the sort happened here. Energy Conversion had ample notice of the issue. Its lawyers were the same ones that pursued parallel litigation in the Northern District of California. In that case, they filed a complaint that initially alleged recoupment. For reasons of their own, they amended the complaint and removed the allegation. *Compare* No. 4:12–cv–05272–SBA, R. 1 at 34–36 (N.D. Cal. Oct. 11, 2012), *with* No. 4:12–cv–05272–SBA, R. 70 at 38–41 (N.D. Cal. Feb. 14, 2013). The Supreme Court, moreover, had noted the relevance of recoupment to low-price claims under § 1, had held it required in low-price claims under § 2, and numerous circuit courts had, before the company filed suit, treated § 1 and § 2 predatory-pricing claims similarly. *Brooke Grp.*, 509 U.S. at 224; *Matsushita*, 475 U.S. at 592–93; *Wallace*, 467 F.3d at 1106–08; *Rebel Oil*, 51 F.3d at 1432–34, 1444; *Multistate Legal Studies*, 63 F.3d at 1548–49. Even after Suntech, Trina, and Yingli moved to dis-

miss the complaint largely based on Energy Conversion's failure to plead recoupment, the company did not amend the complaint, even if just to add the allegation in the alternative. It instead argued that it was "not required to plead recoupment." R. 38 at 20. Only after the district court rejected the argument and dismissed the case under Rule 12(b)(6)—a dismissal presumptively with prejudice, *Pratt v. Ventas, Inc.*, 365 F.3d 514, 523 (6th Cir. 2004)—did it seek an amendment.

Plaintiffs may not use Rule 59 motions to "raise arguments which could, and should, have been made before judgment issued" and may not "use the court as a sounding board to discover holes in their arguments, then reopen the case by amending their complaint to take account of the court's decision." *Leisure Caviar*, 616 F.3d at 616 (quotations omitted). The district court was well within its "considerable discretion" in denying Energy Conversion the opportunity to add an allegation it should have raised earlier. *Id.* at 615.

This case offers a poor analogy to *United States ex rel. Bledsoe v. Community Health Systems, Inc.*, 342 F.3d 634 (6th Cir. 2003). *Community Health Systems* concerned a situation where the plaintiff included all of the relevant elements in his complaint but lacked notice of a heightened pleading standard until the moment the district court dismissed the complaint. *Id.* at 645; *see also Ohio Police & Fire Pension Fund v. Standard & Poor's Fin. Servs. LLC*, 700 F.3d 829, 844 (6th Cir. 2012). That is not remotely this case.

Energy Conversion last of all points to the district court's failure to issue a scheduling order setting a deadline to "amend the pleadings," as required by

Civil Rule 16(b). Without such a deadline, says the company, a request to amend the complaint, even after judgment, should face minimal hurdles. Energy Conversion never complained about the lack of a deadline below and so has failed to preserve the argument. *See Scottsdale Ins. Co v. Flowers*, 513 F.3d 546, 552 (6th Cir. 2008). Even if it had, this court has been abundantly clear that, once judgment issues, concerns about finality dilute the otherwise permissive amendment policy of the Civil Rules. *Leisure Caviar*, 616 F.3d at 616. The request, the district court reasonably found, came too late and contained too little justification.

For these reasons, we affirm.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ENERGY CONVERSION DEVICES LIQUIDATION TRUST, by and Through Its Liquidating Trustee, John MADDEN,
Plaintiff,

v.

TRINA SOLAR LIMITED, et al.,
Defendants.

No. 13–14241

OPINION AND ORDER GRANTING DEFENDANTS' JOINT MOTION TO DISMISS PLAINTIFF'S COMPLAINT

On October 4, 2013, Plaintiff Energy Conversion Devices Liquidation Trust filed a complaint against Defendants Trina Solar Limited and its wholly-owned American subsidiary Trina Solar (U.S.), Inc. (collectively, "Trina"), Yingli Green Energy Holding Company Limited and its wholly-owned American subsidiary Yingli Green Energy America, Inc. (collectively "Yingli"), and Suntech Power Holdings Company, Ltd. and its wholly-owned American subsidiary Suntech America, Inc. (collectively "Suntech"). Plaintiff alleges that Defendants violated the Sherman Act, 15 U.S.C. § 1, and the Michigan Antitrust Reform Act (the "MARA"), Mich. Comp. Laws § 445.772, by engaging in "an unlawful conspiracy and combination to fix prices at unreasonably low and/or predatory levels and to dump product" in restraint of trade. (Dkt. # 1, Pg. ID 30–31.) Now before the court is Defendants'

Rule 12(b)(6) motion to dismiss for failure to state a claim, filed on April 18, 2014. The matter is fully briefed, and no hearing is needed. *See* E.D. Mich. LR 7.1(f)(2). For the following reasons, Defendants' motion to dismiss will be granted.

I. BACKGROUND

From 2003 until 2012, Plaintiff produced flexible, thin-film photovoltaic solar panels. (Dkt. # 1, Pg. ID 7.) Plaintiff earned $239.4 million in revenue from solar panel sales in 2009 and $302 million in 2009. (*Id.* at 16.) Plaintiff's solar panel revenues dropped to $211 million in 2010 and $193 million in 2011, leading Plaintiff to file for bankruptcy in 2011. (*Id.* at 2, 17.) According to Plaintiff's complaint, Trina Solar Limited, Yingli Green Energy Holding Company Limited, and Suntech Power Holdings Company, Ltd. are leading manufacturers of solar panels, each incorporated in the Cayman Islands and headquartered in China, with billions in assets and annual revenue. (*Id.* at 7–11.)

Plaintiff alleges that, through the China New Energy Chamber of Commerce ("China New Energy")—a leading trade association in China for alternative energy—Defendants would, *inter alia,* "share market and industry information, 'collaborate', [and] coordinate efforts with the government." (*Id.* at 11.) Plaintiff further alleges that, starting in 2008, Defendants agreed to sell solar panels at artificially low and/or below-cost prices and "simultaneously reduced prices at rates in tandem by approximately 75%" (*id.* at 17), which forced approximately twenty American companies out of the solar panel market and resulted in Defendants' collective market share exceeding 80%. (*Id.* at 17–18.) According to Plaintiff, following the annual

China New Energy International Forum in 2007, 2008, and 2010, Defendants "uniformly" reduced the price of imported solar panels by 40%, 18%, and then 20%. (*Id.* at 23–24.)

II. STANDARD

Federal Rule of Civil Procedure 8(a)(2), requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." In order to survive Defendants' motion to dismiss, the complaint must allege "[f]actual allegations . . . enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007). Accordingly, the court views the complaint in the light most favorable to the plaintiff and takes all well-pleaded factual allegations as true. *Tackett v. M&G Polymers, USA, LLC,* 561 F.3d 478, 488 (6th Cir. 2009). However, the court "need not accept as true legal conclusions or unwarranted factual inferences." *Directv, Inc. v. Treesh,* 487 F.3d 471, 476 (6th Cir. 2007). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief." *Id.* at 679.

"In determining whether to grant a Rule 12(b)(6) motion, the court primarily considers the allegations in the complaint, although matters of public record, orders, items appearing in the record of the case, and

exhibits attached to the complaint, also may be taken into account." *Amini v. Oberlin College,* 259 F.3d 493, 502 (6th Cir.2001) (emphasis omitted). The court may also consider documents introduced by defendants in their motion to dismiss if the documents "are referred to in the plaintiff's complaint and are central to her claim." *Weiner v. Klais & Co.,* 108 F.3d 86, 89 (6th Cir.1997).

III. DISCUSSION

A. The Sherman Act

Plaintiff alleges that Defendants violated § 1 of the Sherman Act by engaging in a conspiracy "to fix prices at unreasonably low and/or predatory levels and to dump product." (Dkt. # 1, Pg. ID 30.) Section 1 of the Sherman Act provides, in relevant part, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1. In general, "[t]o establish an antitrust violation, a plaintiff must show a contract, combination, or conspiracy that affects interstate commerce and unreasonably restrains trade. To show unreasonable restraint of trade, the plaintiff must show that the conspiracy has the potential to produce adverse, anti-competitive effects within relevant product and geographic markets." *Lie v. St. Joseph Hosp. of Mount Clemens, Mich.,* 964 F.2d 567, 568 (6th Cir. 1992) (internal quotation marks and citations omitted).

The Supreme Court has set forth "two complementary categories of antitrust analysis." *Nat'l Soc'y of Prof'l Eng'rs v. United States,* 435 U.S. 679, 692 (1978). Courts typically analyze the alleged conduct under the "rule of reason" which "requires the fact-

finder to decide whether under all the circumstance of the case the restrictive practice imposes an unreasonable restraint on competition." *Arizona v. Maricopa Cnty. Med. Soc.,* 457 U.S. 332, 344 (1982). The rule of reason analysis requires courts "to 'evaluate[ ] [the agreement] by analyzing the facts peculiar to the business, the history of the restraint, and the reasons it was imposed . . . to form a judgment about the competitive significance of the restraint.'" *Lie,* 964 F.2d at 569 (quoting *Nat'l Soc'y of Prof'l Eng'rs,* 435 U.S. at 692). However, "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality . . . are 'illegal per se.'" *Nat'l Soc'y of Prof'l Eng'rs,* 435 U.S. at 692. "Per se illegal restraints on trade . . . do not require proof of market power." *Lie,* 964 F.2d at 569. Plaintiff alleges both that Defendants' price-fixing and dumping conspiracy is a *per se* restraint of trade and that, in the alternative, it is an unreasonable restraint of trade.

B. Antitrust Standing

In addition to establishing Article III standing, when bringing an action under the Sherman Act, the plaintiff must establish antitrust standing in order to survive a Rule 12(b)(6) motion to dismiss. *NicSand, Inc. v. 3M Co.,* 507 F.3d 442, 449 (6th Cir. 2007) (en banc). To establish antitrust standing, "an antitrust claimant must do more than make 'allegations of consequential harm resulting from a violation of the antitrust laws,' and that is true even when the complaint is 'buttressed by an allegation of intent to harm the [plaintiff].'" *Id.* (quoting *Ass'n Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters,* 459 U.S. 519, 545 (1983)). Likewise, a plaintiff does not have antitrust standing when certain "relevant

factors—the nature of the [claimant's] injury, the tenuous and speculative character of the relationship between the alleged antitrust violation and the [claimant's] alleged injury, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims of the alleged conspiracy—weigh heavily against judicial enforcement." *Id.* (citing *Ass'n Gen. Contractors of Cal., Inc.,* 459 U.S. at 545.).

"[A]ntitrust standing 'ensures that a plaintiff can recover only if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior.'" *Id.* (quoting *Atl. Richfield Co. V. USA Petroleum Co.,* 495 U.S. 328, 344 (1990)). As such, a "necessary, but not always sufficient," requirement for antitrust standing is an antitrust injury. *Id.* at 450 (citing *Cargill, Inc. v. Monfort of Colo., Inc.,* 479 U.S. 104, 110 n.5 (1986)).[1] An antitrust injury is an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Id.* (citing *Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc.,* 429 U.S. 477, 489 (1977)). "Far from being 'a mere technicality,' antitrust standing 'is the glue that cements each suit with the purposes of

[1] The fact that Plaintiff alleged "a *per se* illegal restraint of trade does not obviate the need to . . . adequately allege[ ] antitrust injury." *In re Cardizem CD Antitrust Litig.,* 332 F.3d 896, 909 n.15 (6th Cir. 2003); *see Atlantic Richfield Co. v. USA Petroleum Co.,* 495 U.S. 328, 341–42 (1990) ("We . . . reject respondent's suggestion that no antitrust injury need be shown where a *per se* violation is involved. The *per se* rule is a method of determining whether § 1 of the Sherman Act has been violated, but it does not indicate whether a private plaintiff has suffered antitrust injury . . . .").

the antitrust laws, and prevents abuses of those laws' by claimants seeking to halt the strategic behavior of rivals that increases, rather than reduces, competition." *Id.* at 449–50 (quoting *HyPoint Tech., Inc. v. Hewlett–Packard Co.,* 949 F.2d 874, 877 (6th Cir. 1991).

Defendants argue that Plaintiff has not suffered antitrust injury and therefore lacks antitrust standing. (Dkt. # 17, Pg. ID 121.) The complaint alleges that Defendants sold solar panels at "unreasonably low and/or [at] predatory levels." (Dkt. # 1, Pg. ID 30.) It asserts that "Defendants directly harmed competition in the United States for commercial and industrial rooftop solar panels by reducing consumer choice, stifling innovation, drastically undercutting solar panel prices, and forcing a substantial part of American production into bankruptcy." (*Id.* at 26.) However, unreasonably low and/or below-cost pricing does not harm competition and, thereby, confer antitrust standing by itself. Such "[p]ricing is predatory when a company foregoes short-term profits in order to develop a market position such that the company can later raise prices and recoup profits. Predatory pricing differs from healthy competitive pricing in its motive: a predator by his pricing practices seeks to impose losses on other firms, not garner gains for itself." *Richter Concrete Corp. v. Hilltop Concrete Corp.,* 691 F.2d 818, 823 (6th Cir. 1982). In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,* 509 U.S. 209, 222–24 (1993), the Supreme Court set forth two prerequisites for a plaintiff to recover on a claim for predatory pricing under § 2 of the Sherman Act: a plaintiff must show that (1) "the prices complained of are below an appropriate measure of its rival's costs" and (2) "the competitor had . . . a dangerous probabil-

ity[ ] of recouping its investment in below-cost prices." *Id.* at 222–24.

i. The Complaint Alleges Below–Cost Pricing

Regarding the first prerequisite, the complaint adequately alleges that Defendants engaged in below-cost pricing. Plaintiff claims that Suntech's former CEO admitted that "Suntech, to build market share, is selling solar panels on the American market for less than the cost of materials, assembly, and shipping." (Dkt. # 1, Pg. ID 4.) Additionally, Plaintiff reported that, on October 10, 2012, the United States Department of Commerce "found that Defendants and other Chinese manufacturers of solar panels dumped product in the United States market at less than fair value.[2] Commerce assigned to each of Suntech, Trina, and Yingli a weighted average dumping margin[3] of up to 31%." (Dkt. # 1–1, Pg. ID 33.)

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[2] For the purposes of the United States's [sic] antidumping statutes, the determination as to whether goods are being sold "at less than fair value" is based upon a comparison of the export price for the goods and the "normal value" of the goods. 19 U.S.C. § 1677b(a). The "normal value" of goods is, generally, the price at which "like product" is first sold in the exporting country (or the price at which like product is sold in a different country when certain requirements are met). 19 U.S.C. § 1677b(a)(1)(B)-(C); *see generally* 19 C.F.R. § 351.401–351.415 (regulating the calculation of export price, constructed export price, fair value, and normal value). Thus, the Department of Commerce's finding that Defendants dumped product at less than fair value is not equivalent to a finding of below-cost pricing.

[3] A "dumping margin . . . is the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." (Dkt. # 1–1, Pg. ID 34.)

Plaintiff also states that the International Trade Commission conducted hearings on Defendants' pricing scheme and concluded "that the solar manufacturing industry in the United States has been materially injured by reason of the subsidized Chinese [s]olar panels that are sold at less than fair value in the United States."[4] (Dkt. # 1, Pg. ID 19.)

ii. Plaintiff Is Required to Allege Recoupment

Regarding the second prerequisite, Plaintiff first contends that it was not required to allege recoupment to survive a motion to dismiss because the recoupment requirement only applies to claims of monopolization asserted under § 2 of the Sherman Act and not to claims asserted under § 1 of the Sherman Act. (Dkt. # 38, Pg. ID 373.) Section 2 of the Sherman Act provides, in relevant part, "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . ." 15 U.S.C. § 2. Plaintiff relies on *American Needle, Inc. v. National Football League,* 560 U.S. 183 (2010), in which the Supreme Court discussed the differences between § 1 and § 2 of the Sherman Act, to argue that case law involving § 2 of the Sherman Act has limited precedential value when evaluating a claim brought under § 1. However, Plaintiff's reliance on *American Needle* is misplaced. In *American Needle,* the Supreme Court noted that

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[4] According to Plaintiff, the United States Department of Commence [sic] "determined that illegal subsidies accounted for 14.78%, 15.97%, and 15.24% of Suntech, Trina, and Yingli's respective prices." (Dkt. # 1–1. Pg. ID 35.)

"Section 1 applies only to concerted action that restrains trade," whereas "Section 2, by contrast, covers both concerted and independent action, but only if that action 'monopolize[s]' or 'threatens actual monopolization,' a category that is narrower than restraint of trade." *Id.* at 190 (internal quotation marks and citations omitted). The Court then expounded on the logic behind these two provisions:

> [I]n § 1 Congress treated concerted behavior more strictly than unilateral behavior. This is so because unlike independent action, [c]oncerted activity inherently is fraught with anticompetitive risk insofar as it deprives the marketplace of independent centers of decisionmaking that competition assumes and demands. And because concerted action is discrete and distinct, a limit on such activity leaves untouched a vast amount of business conduct. As a result, there is less risk of deterring a firm's necessary conduct; courts need only examine discrete agreements; and such conduct may be remedied simply through prohibition. Concerted activity is thus judged more sternly than unilateral activity under § 2. For these reasons, § 1 prohibits any concerted action in restraint of trade or commerce, even if the action does not threate[n] monopolization. And therefore, an arrangement must embody concerted action in order to be a contract, combination . . . or conspiracy under § 1.

Id. (internal quotation marks and citations omitted).

American Needle does not support Plaintiff's contention that case law discussing § 2 of the Sherman Act has little value when considering a claim brought under § 1. In *American Needle,* the Court merely rec-

ognized that a § 1 violation requires concerted action whereas a § 2 violation requires monopolization or a threat of actual monopolization. This distinction does not impact the purpose behind requiring a plaintiff to allege recoupment in order to state a claim of predatory pricing. The logic for such a requirement applies with equal force to claims brought under § 1 or § 2. In *Brooke Group,* the Supreme Court explained that below-cost pricing without recoupment—"unsuccessful predation"—would generally be a boon to consumers:

> Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation. Without it, predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced. Although unsuccessful predatory pricing may encourage some inefficient substitution toward the product being sold at less than its cost, unsuccessful predation is in general a boon to consumers.

Brooke Group, 509 U.S. at 224.

"That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured." *Id.* In order for a complaint to allege that below-cost pricing injures competition, it must allege that "there is a likelihood that the predatory scheme alleged would cause a rise in prices above a competitive level that would be sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it." *Id.* at 225.

Furthermore, by requiring plaintiffs to allege recoupment, courts reduce the risk of litigants using the Sherman Act to harm, rather than protect compe-

tition. *Brooke Group,* 509 U.S. at 226–27 ("It would be ironic indeed if the standards for predatory pricing liability were so low that antitrust suits themselves became a tool for keeping prices high."). As the Court explained in *Brooke Group,* below-cost pricing and recoupment "are not artificial obstacles to recovery; rather, they are essential components of real market injury." 509 U.S. at 226. "[T]he mechanism by which a firm engages in predatory pricing—lowering prices—is the same mechanism by which a firm stimulates competition; because 'cutting prices in order to increase business often is the very essence of competition . . . [;] mistaken inferences . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'" *Cargill, Inc. v. Monfort of Colo., Inc.,* 479 U.S. 104, 122 n.17 (quoting *Matsushita v. Elec. Indus. Co., Ltd.,* 475 U.S. 574, 594 (1986)).

Conversely, there is little fear that dismissing a predatory pricing conspiracy for failure to allege recoupment would encourage such conspiracies because *"successful* predatory pricing conspiracies involving a large number of firms can be identified and punished once they succeed, since some form of minimum price-fixing agreement would be necessary in order to reap the benefits of predation." *Matsushita,* 475 U.S. at 595 (emphasis in original) (reviewing claims that defendants violated §§ 1 and 2 of the Sherman Act by engaging in a scheme that involved maintaining low prices for television receivers sold in the United States).

iii. The Complaint Does Not Allege a Dangerous Probability of Recoupment

Plaintiff has failed to adequately allege antitrust

injury caused by predatory pricing because the complaint does not allege that "the competitor had . . . a dangerous probability[ ] of recouping its investment in below-cost prices." *Brooke Grp.,* 509 U.S. at 222–24. Although the complaint alleges that Defendants have sold solar panels at below-cost prices in order "to build market share" (Dkt. # 17, Pg. ID 34), "[e]vidence of below-cost pricing is not alone sufficient to permit an inference of probable recoupment and injury to competition." *Brooke Grp.,* 509 U.S. at 226. The complaint does not allege that Defendants intend to raise prices to, and sustain prices at, supracompetitive levels sufficient to recoup the losses (with interest) that were allegedly sustained as a result of below-cost pricing. The complaint merely states that, in light of Defendants' 80% market share, Defendants have the *ability* to raise prices to such a level. (*See* Dkt. 1, Pg. ID 18 ("Defendants can freely raise prices"); *id.* at 26–27 ("[T]he steady and sustained low and/or predatory pricing and the resulting destruction of American commerce resulted in Defendants having power and control over entry and price so that Defendants are able to raise prices and thus injure consumers.").)

Furthermore, accepting the factual allegations contained in the complaint as true, not only has Plaintiff failed to allege a dangerous probability of recoupment, it is questionable whether Plaintiff has alleged any probability of recoupment. "[W]ithout barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time" in order for conspirators to recoup their losses (including interest) from their below-cost prices. *Matsushita,* 475 U.S. at 591 n.15. In the absence of barriers to entry, "[i]f the defendants should try to

raise prices [to high enough prices to recoup losses from below-cost pricing], they would attract new competition." *Id.* (quoting Frank H. Easterbrook, *The Limits of Antitrust,* 63 Texas L. Rev. 1, 26 (1984)).

Plaintiff alleges that "[t]here are substantial barriers to entry into the production of commercial and industrial rooftop solar systems," namely (1) "[Plaintiff's] intellectual property and successful history of producing industry-progressing technologies," (2) "[t]he cost for acquiring the necessary land and commodities, and constructing the required plant facility," and (3) the need to "hire hundreds of highly educated employees . . . and invest tens of millions of dollars in research and development." (Dkt. # 1, Pg. ID 14–15.) However, the complaint also states that "many solar companies, including Defendants, recently entered the solar panel industry in the past ten to fifteen years." (*Id.* at 16.) Accepting as true Plaintiff's allegations of barriers to entry into the solar panel market, the ability of "many" companies to enter the market in recent years makes it implausible that Defendants would be able to recoup their alleged losses. Even if recoupment were economically feasible, the complaint does not plausibly allege that there is "a dangerous probability[ ] of recoup[ment]." *Brooke Grp.,* 509 U.S. at 224.

Because the court finds that Plaintiff has failed to allege a dangerous probability of recoupment and, therefore, has failed [sic] allege antitrust standing, the court does not consider Defendants' additional arguments for dismissing Defendant's [sic] Sherman Act claim.

C. The MARA Claim

Section 445.772 of MARA provides, "A contract,

combination, or conspiracy between 2 or more persons in restraint of, or to monopolize, trade or commerce in relevant market is unlawful." That section "adopted language from and is interpreted consistent with the Sherman Act, 15 U.S.C. § 1." *Perceptron, Inc. v. Sensor Adaptive Machines, Inc.,* 221 F.3d 913, 919 n.6 (citing *Compton v. Joseph Lepak, D.D.S., P.C.,* 397 N.W.2dd 311 (Mich. 1986)); *see* Mich. Comp. Laws Ann. § 445.784(2) (1985) ("It is the intent of the legislature that in construing all sections of [MARA], the courts shall give due deference to interpretations given by the federal courts to comparable antitrust statutes . . . ."). "Because [MARA] and the Sherman Anti–Trust Act mirror each other, [the court] appl[ies] the same analysis to both the federal and state anti-trust claims." *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc.,* 323 F.3d 366, 368 n.1 (6th Cir. 2003); *First Med. Representatives, LLC v. Futura Med. Corp.,* 195 F. Supp. 2d 917, 922 (E.D. Mich. 2002) ("Michigan courts apply Sherman Act analysis to the MARA . . . ."). Accordingly, Plaintiff's MARA claim will be dismissed as well.

IV. CONCLUSION

For the reasons stated above, IT IS ORDERED that Defendants' Joint Motion to Dismiss Plaintiff's Complaint (Dkt.# 17) is GRANTED.

s/ Robert H. Cleland

ROBERT H. CLELAND

UNITED STATES DISTRICT JUDGE

Dated: October 31, 2014

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ENERGY CONVERSION DEVICES LIQUIDATION TRUST, by and Through Its Liquidating Trustee, John MADDEN,
Plaintiff,

v.

TRINA SOLAR LIMITED, et al.,
Defendants.

No. 13–14241

JUDGMENT

In accordance with the court's "Opinion and Order Granting Defendants' Joint Motion to Dismiss Plaintiff's Complaint" dated October 31, 2014,

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of Defendants Trina Solar Limited, Trina Solar (U.S.), Inc., Yingli Green Energy Holding Company Limited, Yingli Green Energy Americas, Inc., Suntech Power Holdings Co., Ltd., and Suntech America, Inc. Dated at Detroit, Michigan, this 31st day of October 2014.

DAVID J. WEAVER

CLERK OF THE COURT

s/ Lisa Wagner

By: Lisa Wagner, Case Manager

to Judge Robert H. Cleland

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ENERGY CONVERSION DEVICES LIQUIDATION TRUST, by and Through Its Liquidating Trustee, John MADDEN,
Plaintiff,

v.

TRINA SOLAR LIMITED, et al.,
Defendants.

No. 13–14241

OPINION AND ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

On October 31, 2014, the court issued an Opinion and Order Granting Defendants' Joint Motion to Dismiss Plaintiff's Complaint. (Dkt. # 40.) Thereafter, Plaintiff Energy Conversion Devices Liquidation Trust filed a Motion for Reconsideration pursuant to Eastern District of Michigan Local Rule 7.1(h) and the Federal Rules of Civil Procedure. (Dkt. # 42.) Defendants Trina Solar Limited *et al.* filed an Opposition to Plaintiff's Motion for Reconsideration. (Dkt. # 47.) The court's previous order set forth the general factual and procedural history of this case, and familiarity with such history is presumed. This matter is fully briefed, and no hearing is needed. *See* E.D. Mich. LR 7.1(f)(2). For the reasons stated below, Plaintiff's motion will be denied.

I. STANDARD

Subject to the court's discretion, a motion for reconsideration shall be granted only if the movant "demonstrate[s] a palpable defect by which the court and the parties . . . have been misled" and "show[s] that correcting the defect will result in a different disposition of the case." E.D. Mich. L.R. 7.1(h)(3). "A 'palpable defect' is 'a defect that is obvious, clear, unmistakable, manifest or plain.'" *Buchanan v. Metz,* 6 F. Supp. 3d 730, 752 (E.D. Mich. 2014) (quoting *United States v. Lockett,* 328 F. Supp. 2d 682, 684 (E.D. Mich. 2004). The court "will not grant motions for . . . reconsideration that merely present the same issues ruled upon by the court." E.D. Mich. L.R. 7.1(h)(3).

II. DISCUSSION

In its Opinion and Order Granting Defendants' Joint Motion to Dismiss Plaintiff's Complaint, the court dismissed Plaintiff's claims that Defendants violated the Sherman Act, 15 U.S.C. § 1 and the Michigan Antitrust Reform Act (the "MARA") by "engaging in 'an unlawful conspiracy and combination to fix prices at unreasonably low and/or predatory levels and to dump product' in restraint of trade." (Dkt. # 40, Pg. ID 440 (quoting Dkt. # 1, Pg. ID 30–31).) The court held that Plaintiff failed to state a claim under § 1 of the Sherman Act and MARA because Plaintiff failed to allege a dangerous probability of recoupment and, therefore, did not adequately allege antitrust standing. *See NicSand, Inc. v. 3M Co.,* 507 F.3d 442, 450 (6th Cir.2007) (en banc) ("[A]ntitrust standing is a threshold, pleading-stage inquiry and when a complaint by its terms fails to establish this requirement

we must dismiss it as a matter of law—lest the antitrust laws become a treble-damages sword rather than the shield against competition-destroying conduct that Congress meant them to be.").

In its motion for reconsideration, Plaintiff attempts to reargue that "recoupment is not required to plead antitrust injury in the instant Section 1 case," insisting that the court erroneously interpreted Supreme Court cases which established that recoupment must be alleged in predatory lending cases brought pursuant to § 2 of the Sherman Act to also require recoupment in predatory lending cases brought pursuant to § 1 of the Sherman Act. (Dkt. # 42, Pg. ID 459–60.) However, the court did not hold in its previous order that Supreme Court precedent had explicitly established that a plaintiff alleging predatory pricing under § 1 of the Sherman Act was required to allege recoupment in order to state a claim; rather, the court found that "[t]he logic for such a requirement applies with equal force to claims brought under § 1 or § 2." (Dkt. # 40, Pg. ID 449.)

In so finding, the court relied on *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.,* 509 U.S. 209 (1993), in which the Supreme Court explained that below-cost pricing without recoupment—"unsuccessful predation"—would generally be a boon to consumers. (*Id.*) The Supreme Court reasoned:

> Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation. Without it, predatory pricing produces lower aggregate prices in the mar-

> ket, and consumer welfare is enhanced. Although unsuccessful predatory pricing may encourage some inefficient substitution toward the product being sold at less than its cost, unsuccessful predation is in general a boon to consumers.

Brooke Grp. Ltd., 509 U.S. at 224.

Additionally, in a parallel argument, Plaintiff insists that it demonstrated antitrust injury in the form of loss of consumer choice and innovation because, as a result of Defendants' conduct, "at least twelve domestic manufacturers have been shut down and ten domestic companies have been forced out of business, some of which offered alternative products to those offered by Defendants." (Dkt. # 42, Pg. ID 462.) This is just another way of arguing that Plaintiffs need not allege recoupment to state a claim of an unlawful predatory pricing scheme in violation of § 1 of the Sherman Act. The court rejected this argument in its previous order. (*See* Dkt. # 40, Pg. ID 445–46 ("[The complaint] asserts that 'Defendants directly harmed competition in the United States for commercial and industrial rooftop solar panels by reducing consumer choice, stifling innovation, drastically undercutting solar panel prices, and forcing a substantial part of American production into bankruptcy.' However, unreasonably low and/or below-cost pricing does not harm competition and, thereby, confer antitrust standing [without recoupment].").)

The Sixth Circuit recently recognized the similarities between § 1 predatory pricing schemes that involve only concerted action and § 2 predatory pric-

ing schemes that involve monopolization. *Cf. Am. Needle, Inc. v. Nat'l Football League,* 560 U.S. 183, 190 (2010) ("Section 1 applies only to concerted action that restrains trade. Section 2, by contrast, covers both concerted and independent action, but only if that action monopolize[s], or threatens actual monopolization . . . ." (internal quotation marks and citations omitted)). On April 22, 2015, after the court entered the order dismissing Plaintiff's complaint, the Sixth Circuit decided *Superior Production Partnership v. Gordon Auto Body Parts Co.,* 784 F.3d 311 (6th Cir. 2015). In *Superior Production Partnership,* the plaintiff filed antitrust claims pursuant to § 1 and § 2 of the Sherman Act alleging that the defendants engaged in an illegal predatory pricing scheme. *Id.* at 316. The Sixth Circuit acknowledged that "[t]he law on predatory pricing claims under § 2 is significantly clearer" than under § 1 claims and set forth the prerequisites for liability under § 2, including establishing a dangerous probability of recoupment. *Id.* 318. The Sixth Circuit then addressed the elements of a § 1 predatory pricing claim, stating:

> Courts have rarely addressed the application of § 1 to the scenario before us.
>
> *Matsushita [v. Elec. Indus. Co., Ltd.,* 475 U.S. 574 (1986)], undoubtedly the leading case, declared single-firm predatory pricing generally implausible and a conspiracy to charge predatory prices even more so. 475 U.S. at 589–91. But *Matsushita* did not make it entirely clear if § 1 liability required a showing of prices below some "appropriate" level of cost, as in *Brooke Group*. *See Matsushita,* 475 U.S. at 584 n. 8 (noting that, for that particular case, the Court would view the threshold as either "(i) pricing

> below the level necessary to sell [plaintiff's] products, or (ii) pricing below some appropriate measure of cost" without deciding if those tests applied to future cases). Nor did Matsushita expressly lay out a recoupment requirement.
>
> Nonetheless, we think it best to infer these same elements in a § 1 predatory pricing claim. *Matsushita* clearly considered both below-cost pricing and the likelihood of recoupment to impact, if not fully determine, the plausibility of a predatory pricing conspiracy. *See id.* at 590–91. And whether predation and recoupment are merely considerations that inform the plausibility of inferring an agreement, as [Plaintiff] suggests, or are formally independent requirements beyond a § 1 agreement and antitrust injury, as [Defendants] argue[ ], is a technicality we need not address here. Either way, a plaintiff must grapple with these concepts in proving its case under § 1.

Id. at 320.

While the Sixth Circuit came short of identifying a dangerous probability of recoupment as a necessary element for establishing a predatory pricing scheme in violating of § 1 of the Sherman Act, the Circuit's reasoning acknowledges the similarities between § 1 and § 2 predatory pricing schemes. *Superior Production Partnership,* thus, bolsters the court's holding dismissing Plaintiff's complaint.

Plaintiff next contends that Defendants need not plead recoupment because Defendants "are not motivated by rational economic principles but rather full employment." (Dkt. # 42, Pg. ID 472.) This argu-

ment is unavailing. As an initial matter, Plaintiff did not raise this argument in its opposition to Defendants' motion to dismiss, and "[a] motion for reconsideration is not properly used as a vehicle to . . . advance positions that could have been argued earlier but were not." *DiPonio Const. Co. v. Int'l Un. of Bricklayers & Allied Craftworkeres, Local 9,* 739 F. Supp. 2d 986, 1004–05 (E.D. Mich. 2010). Second, Plaintiff cites to no authority supporting its contention that recoupment would not be necessary to establish an antitrust injury where a predatory pricing scheme is motivated by the desire to maintain full employment. As stated above, artificially low pricing unaccompanied by recoupment "is in general a boon to consumers." *Brooke Group Ltd.,* 509 U.S. at 224. Third, the complaint does not allege that Defendants are not motivated by rational economic principles, as Plaintiff now argues. The complaint states, "Defendants' actions defied short term economic principles—instead of seeking profitability, Defendants sold their solar panels at any cost necessary to support full employment in the Chinese manufacturing facilities and handsome payments to their executives." (Dkt. # 1, Pg. ID 4.) However, it would not be surprising for a predatory pricing scheme intended to enhance long-term profits to appear to defy short term economic principles inasmuch as the defendants would choose to forgo profit until the recoupment phase of their scheme. Alleging that Defendants' reductions in price "defied short term economic principles" is wholly consistent with a predatory pricing scheme motivated by rational economic principles. Plaintiff acknowledges as much later in the complaint when it warns, "Finding themselves now able to manipulate the market with their newly achieved market power, Defendants can freely raise prices, coordinate output and distri-

bution, and ensure employment in Chinese manufacturing facilities . . . ." (*Id.* at 18.) Plaintiff has not demonstrated why a business decision motivated in part by the desire to maintain certain levels of employment would render the recoupment requirement inapplicable. *Cf. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.,* 506 A.2d 173, 182 (Del.1986) ("A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders.").

Last, Plaintiff contends that it has alleged a dangerous probability of recoupment, but these arguments are substantially similar to those addressed by the court in its previous order. (Dkt. # 42, Pg. ID 473) The court finds that Plaintiff has not alleged a dangerous probability of recoupment for the same reasons set forth in the order dismissing Plaintiff's complaint. (*See* Dkt. # 40, Pg. ID 450–52.) Namely, "[t]he complaint does not allege that Defendants intend to raise prices to, and sustain prices at, supracompetitive levels sufficient to recoup the losses (with interest) that were allegedly sustained as a result of below-cost pricing. The complaint merely states that, in light of Defendants' 80% market share, Defendants have the *ability* to raise prices to such a level."[1] (*Id.* at 451.)

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[1] Notably, in its motion, Plaintiff emphasizes that Defendants' alleged predatory pricing scheme poses a barrier of entry into the solar panel industry which makes Defendants' recoupment plausible. (Dkt. # 42, Pg. ID 475–76.) This argument ignores the fact that the alleged barrier to entry—low prices—would abate were Defendants to begin recouping their alleged losses, as Defendants would recoup

In sum, Plaintiff has failed to demonstrate a palpable defect in the court's conclusion that Plaintiff was required to plead a dangerous probability of recoupment in order to state a claim of predatory pricing in violation of § 1 of the Sherman Act and in its conclusion that Plaintiff failed to do so.

IV. CONCLUSION

For the reasons stated above, IT IS ORDERED that Plaintiff's Motion for Reconsideration (Dkt. # 42) is DENIED.

s/ Robert H. Cleland
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

Dated: August 20, 2015

I hereby certify that a copy of the foregoing document was mailed to counsel of record on this date, August 20, 2015, by electronic and/or ordinary mail.

s/ Lisa Wagner
Case Manager and Deputy Clerk
(313) 234-5522

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their losses by raising prices. But, even assuming Defendants' recoupment were plausible, the complaint does not allege a dangerous probability of recoupment, as the complaint does not allege any intention to raise prices to, and sustain prices at, supracompetitive levels.