No. 16-850

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 Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

DANIEL E. LAYTIN, P.C.
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, IL 60654
(312) 862-2000

CHRISTOPHER LANDAU, P.C.
Counsel of Record
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000
clandau@kirkland.com

Counsel for Respondents Trina Solar Limited & Trina Solar (U.S.), Inc.
Additional Counsel on Signature Block

March 3, 2017

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Respondents state as follows:

Trina Solar Limited is a publicly held company traded on the New York Stock Exchange. Trina Solar Limited does not have a parent corporation. Franklin Resources, Inc. owns more than ten percent of Trina Solar Limited outstanding shares.

Trina Solar (U.S.), Inc. is a wholly owned subsidiary of Trina Solar (U.S.) Holding Inc., which is a wholly owned subsidiary of Trina Solar (Switzerland) Ltd., which is a wholly owned subsidiary of Trina Solar (Luxembourg) Holdings S.A.R.L., which is a wholly owned subsidiary of Trina Solar (Singapore) Pte. Ltd., which is a wholly owned subsidiary of Trina Solar Limited. Trina Solar Limited is a publicly held company traded on the New York Stock Exchange. It does not have a parent corporation. Franklin Resources, Inc. owns more than ten percent of Trina Solar Limited outstanding shares.

Yingli Green Energy Holding Company Limited is a publicly held company traded on the New York Stock Exchange. Yingli Power Holding Company Ltd. owns approximately 28.74% of Yingli Green Energy Holding Company Limited's outstanding shares. Yingli Power Holding Company Ltd. is wholly owned by the family trust of Mr. Liansheng Miao, CEO and chairperson of Yingli Green Energy Holding Company Limited's board of directors.

Yingli Green Energy Americas, Inc. is a wholly owned subsidiary of Yingli Green Energy (International) Holding Company Limited, which is a

wholly owned subsidiary of Yingli Green Energy Holding Company Limited. Yingli Green Energy Holding Company Limited is a publicly held company traded on the New York Stock Exchange, and also a party in the above-captioned appeal.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Other Authorities

INTRODUCTION

Petitioner Energy Conversion Devices Liquidation Trust (ECD) wants to pursue a facially implausible antitrust claim: that respondents conspired to sell their solar panels at below-cost prices *without any reasonable prospect of eventually recouping their losses*. In other words, ECD complains that the alleged conspiracy generated lower prices for consumers without any threat of higher prices in the future. Not surprisingly, the district court dismissed that claim, and the Sixth Circuit affirmed on two separate and independent grounds: (1) ECD failed to plead a plausible antitrust claim under *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), *see* Pet. App. 6-16a, and, in any event, (2) ECD lacks antitrust standing to pursue any such claim, *see* Pet. App. 16-19a. To obtain any relief, ECD must overturn the Sixth Circuit's rulings on *both* of those grounds. There is no reason for this Court to review either—much less both—of them.

With respect to the *Twombly* point, this Court has long recognized that an alleged agreement to fix prices at below-cost levels with no possibility of eventual recoupment is inherently implausible. *See, e.g.*, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 592 n.16 (1986) ("[An] alleged predatory scheme makes sense *only* if [defendants] can recoup their losses.") (emphasis added). In affirming the dismissal of ECD's antitrust claim, the Sixth Circuit simply applied the settled *Twombly* pleading standard, which demands a plausible conspiracy, to the facts of this case. ECD's argument that the Sixth Circuit thereby created a conflict with precedents from this Court and other courts of

appeals is fanciful. ECD identifies no case from either this Court or any court of appeals holding that a predatory-pricing claim without any possibility of recoupment is plausible.

With respect to antitrust standing, this Court has long recognized that a private antitrust plaintiff must plead harm to competition to establish the requisite antitrust injury. *See, e.g.*, *Atlantic Richfield Co. v. USA Petrol. Co.*, 495 U.S. 328, 339-40 (1990). And low prices do not result in harm to competition without recoupment—*i.e.*, harm to consumers in the form of future supracompetitive prices. *See, e.g.*, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226 (1993). The Sixth Circuit simply applied this settled law in holding that ECD lacked antitrust standing as well as a plausible antitrust claim. *See* Pet. App. 16-19a. ECD's argument that the Sixth Circuit thereby created a conflict with the Ninth Circuit is again fanciful. The Ninth Circuit opinion on which ECD relies never addressed recoupment at all, presumably because the plaintiff there never made the implausible allegation that the defendants engaged in predatory pricing without intending to recoup their losses. ECD identifies no case from this Court or any court of appeals holding that a plaintiff has antitrust standing to pursue a predatory-pricing conspiracy claim without alleging that the defendants eventually would recoup their losses through supracompetitive prices.

Because the decision below is correct, and ECD identifies no circuit conflict on either question presented (much less both of them), this Court should deny the petition.

COUNTERSTATEMENT OF THE CASE

Petitioner ECD was a Michigan-based manufacturer of solar panels that filed for Chapter 11 bankruptcy protection in February 2012. *See* Pet. App. 3-4a. Respondents also manufacture and sell solar panels, and competed with ECD. *See id.*

ECD brought this lawsuit against respondents in the U.S. District Court for the Eastern District of Michigan in October 2013, seeking nearly $3 billion in treble damages. *See* Pet. App. 4-5a, 23a. As relevant here, the complaint alleged that respondents violated Section 1 of the Sherman Act, 15 U.S.C. § 1, by conspiring to *lower*, rather than *raise*, prices. Pet. App. 5a. The complaint did not allege, however, that respondents stood to recoup their losses from this alleged predatory scheme through eventual supracompetitive prices. *Id.*

ECD's failure to plead such recoupment was no oversight. Indeed, shortly before filing for bankruptcy, ECD reported to the SEC that "[t]he solar energy market is intensely competitive," and that the "number of solar energy product manufacturers is rapidly increasing" due to, among other things, "relatively low barriers to entry." Energy Conversion Devices, Inc., 10-K for FY ended June 30, 2011, at 10, *available at* http://tinyurl.com/hsfbp8f (last visited March 3, 2017). ECD reaffirmed these points in its bankruptcy filing, asserting that "[t]he solar energy market has grown intensely competitive" and that "[m]any competitors … have entered the market selling products with lower cost and higher conversion efficiency …." *In re Energy Conversion*

Devices, Inc., Case No. 12-43166 (Bankr. E.D. Mich.), Dkt. No. 10 at 10 ¶ 30.

Respondents moved to dismiss the complaint for failure to state a claim on which relief could be granted, and the district court (Cleland, J.) granted the motion. *See* Pet. App. 23-37a. The court held that ECD could not establish the requisite antitrust standing without alleging that respondents would eventually recoup the losses incurred in the predatory-pricing scheme—in the absence of such an allegation, ECD is merely complaining about its competitors' low prices, which does not give rise to an antitrust injury. *See* Pet. App. 27-36a.

ECD moved for reconsideration of that ruling, arguing that recoupment was unnecessary to establish antitrust injury. The court denied the motion, *see* Pet. App. 40-48a, and ECD appealed.

A unanimous panel of the Sixth Circuit, per Judge Sutton, affirmed on two separate and independent grounds. *See* Pet. App. 1-22a.

First, the Sixth Circuit held that ECD had failed to plead a plausible antitrust conspiracy under *Twombly*. *See* Pet. App. 6-16a. The complaint alleged that a conspiracy to lower prices could be inferred from respondents' parallel conduct and opportunities to conspire, but conspicuously omitted any allegation that they could eventually recoup their losses. The Sixth Circuit recognized that such allegations are facially implausible: "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." Pet. App. 8a (quoting *Matushita*, 475

U.S. at 588-89). Because the complaint failed to plead a plausible claim, "the district court properly dismissed the case" under *Twombly*. Pet. App. 13a; *see also id.* at 15-16a.

Second, as an independent "obstacle" to relief, Pet. App. 16a, the Sixth Circuit held that the district court correctly dismissed the complaint for lack of antitrust injury (and hence standing), *see id.* at 16-19a. Wholly independent of the plausibility of its claims, ECD lacks standing to pursue such claims in the absence of antitrust injury—*i.e.*, injury "'of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" Pet. App. 16a (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977); brackets omitted). A plaintiff complaining of low prices cannot establish antitrust standing by showing that it was injured, as a competitor, by those low prices; rather, a predatory-pricing plaintiff can establish antitrust standing only by showing that consumers would be injured when the defendant sought to recoup its losses through future supracompetitive prices. *See* Pet. App. 16-19a. Thus, "recoupment is not one item on a menu of ways to show that low prices hurt competition and consumers," but rather "[i]t is the *only* way." Pet. App. 17-18a (emphasis added).

ECD now seeks this Court's review of the Sixth Circuit's decision on both the *Twombly* and standing issues.

REASONS FOR DENYING THE PETITION

I. The Decision Below Is Correct.

The Sixth Circuit correctly affirmed the dismissal of ECD's complaint on two separate and independent grounds: (1) failure to plead a plausible antitrust claim under *Twombly*, *see* Pet. App. 6-16a, and (2) lack of antitrust standing, *see* Pet. App. 16-19a. Thus, in order to obtain any relief, ECD must prevail on *both* grounds. As explained below, it can prevail on neither.

A. The Sixth Circuit Correctly Applied The *Twombly* Pleading Standard.

As a threshold matter, the Sixth Circuit correctly applied the settled *Twombly* pleading standard to affirm the dismissal of the complaint. *See* Pet. App. 6-16a. ECD's complaint advanced a facially implausible theory: that respondents conspired to sell their products below cost without any eventual ability to recoup their losses. ECD thereby failed to satisfy the federal pleading standard of Rule 8, which requires "enough factual matter (taken as true)" to state a plausible claim. *Twombly*, 550 U.S. at 556. *See* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 724b (4th ed. 2015) ("Any claim of predatory pricing must be dismissed once it appears that the structural requirements for successful predation are absent. … If structural factors indicate that monopoly or oligopoly prices could not be maintained for a significant time after the predation campaign has destroyed or disciplined rivals, then such 'recoupment' is not possible, and the claim must be dismissed."). As the *Twombly* Court emphasized, rigorous application of the Rule 8

pleading standard is particularly apt in antitrust cases, given the scope and expense of discovery in this context. *See* 550 U.S. at 558-59.

ECD seems to think that it can avoid *Twombly* by simply repeating the mantra that horizontal price-fixing is *per se* unlawful. *See, e.g.*, Pet. 1-3, 10-12, 15-19, 23-26. But not every allegation of *per se* unlawful conduct is plausible. Indeed, *Twombly* itself involved an alleged horizontal price-fixing agreement—the same *per se* violation of the antitrust laws alleged here. *See* 550 U.S. at 550-51; *see also id.* at 572 (Stevens, J., dissenting). In *Twombly*, the allegation of unlawful conduct was not plausible because the plaintiffs pleaded no facts suggesting anything more than parallel business conduct. *See id.* at 564-70. Here, the conspiracy is not plausible on its face because no rational actor would agree to lose money in perpetuity without the hope of later reaping gains through supracompetitive pricing. *See, e.g.*, *Brooke Group*, 509 U.S. at 224 ("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."); Areeda & Hovenkamp, *Antitrust Law* ¶ 726a ("[T]here can be no predatory pricing with harm to consumers if recoupment is not even a part of the strategy.").

Indeed, this Court's opinion in *Matsushita* compels the Sixth Circuit's conclusion. There, as here, plaintiffs complained of a low-price conspiracy in violation of Section 1 of the Sherman Act. *See* 475 U.S. at 578-79, 584 n.8 ("[T]his is a Sherman Act § 1

case."). This Court, however, reversed the denial of summary judgment in the defendants' favor because the plaintiffs had failed to identify any facts showing that their theory of liability was economically rational—in particular, that defendants eventually could recoup their losses. *See id.* at 588-98. "[C]ourts should not permit factfinders to infer conspiracies when such inferences are implausible." *Id.* at 593. Similarly here, under *Twombly*, claims cannot survive a motion to dismiss when based on implausible inferences. *See* Pet. App. 12a.

ECD thus turns the law upside down by arguing that *Matsushita* "conclud[ed] that recoupment is *only one way* to show that below-cost price-fixing is rational." Pet. 14 (emphasis modified). To the contrary, *Matsushita* recognized that "[t]he success of *any* predatory scheme depends on *maintaining* monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain." 475 U.S. at 589 (emphasis modified).

ECD nonetheless asserts that this Court in *Matsushita* "remanded the case for 'consider[ation of] whether there is *other evidence* [besides recoupment]' supporting a 'find[ing] that [defendants] conspired to price predatorily." Pet. 14-15 (brackets and emphasis in original; quoting *Matsushita*, 475 U.S. at 597). The bracketed words "[besides recoupment]" are a figment of ECD's imagination. This Court remanded in *Matsushita* to allow the Court of Appeals to consider whether the plaintiffs had presented enough evidence to allow a reasonable factfinder to conclude that the defendants had conspired to engage in predatory pricing. But this Court in no way suggested that the plaintiffs could

carry that burden *without* adducing evidence of recoupment. To the contrary, *Matsushita* recognized that "[an] alleged predatory scheme makes sense *only* if [defendants] can recoup their losses." 475 U.S. at 592 n.16 (emphasis added). Indeed, *Matsushita* rejected the argument that defendants might engage in predatory pricing absent recoupment, emphasizing that "[w]hether or not [defendants] have the *means* to sustain substantial losses … over a long period of time, they have no *motive* to sustain such losses absent some strong likelihood that the alleged conspiracy ... will eventually pay off." *Id.* at 593 (emphasis in original).

And this Court's subsequent treatment of *Matsushita* removes any doubt that the case imposed a recoupment requirement on Section 1 claims. In *Brooke Group*, a Robinson-Patman Act case, this Court imported the recoupment "prerequisite" directly from *Matsushita* and thus from Section 1:

> The second prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a reasonable prospect or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices.

Brooke Group, 509 U.S. at 224 (citing *Matsushita*, 475 U.S. at 589); *see also Pacific Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 451 (2009) ("To avoid chilling aggressive price competition, [this Court has] carefully limited the circumstances under which plaintiffs can state a Sherman Act claim by alleging that prices are too low."); *id.* at 457 ("[L]ow prices are only actionable under the Sherman Act

when the prices are below cost and there is dangerous probability that the predator will be able to recoup the profits it loses from the low prices.") (citing *Brooke Group*, 509 U.S. at 222-24).

It is no answer for ECD to argue that the decision below threatens the interests of the Federal Government, which "has long taken a hard line on the *per se* illegality of horizontal price-fixing." Pet. 20. For that proposition, ECD simply cites the general rule that *per se* condemnation precludes a defendant from justifying the conduct based on pro-competitive benefits. But that general rule is inapplicable here. ECD's complaint was not dismissed because of purported pro-competitive benefits of the alleged conspiracy; it was dismissed for alleging an *implausible per se* agreement. The Federal Government has no interest in such situations.[1]

Nor is it any answer for ECD to argue that its failure to plead a plausible antitrust claim "threatens to embolden foreign governments such as China to harm the nation's economy." Pet. 21. According to ECD, this case opens the door for

---

[1] ECD's argument that the Justice Department and the Federal Trade Commission "recently threatened to *criminally prosecute* agreements that fix wages at low levels," Pet. 20 (emphasis in original), underscores this point. Such an agreement is economically rational without recoupment because the agreement benefits the conspirators: they profit as wages are depressed. That is nothing like a predatory pricing scheme, where the decision to price below cost only is rational if those losses ultimately are recovered through supracompetitive pricing—*i.e.*, recoupment.

foreign governments to subsidize low-cost purchases by American consumers, at the expense of American businesses. *See id.* And ECD's *amicus* doubles down on this point, arguing that "non-market economies around the world have led to increased dumping problems in the U.S.," and "coordinated and sustained foreign dumping, particularly by China, is causing extensive harm to U.S. industries and jobs, negatively affecting long term competitiveness of markets." Union *Amicus* Br. 6, 10 (capitalization modified; emphasis omitted).

These arguments conflate the province of the antitrust laws with the province of the trade laws. As the Sixth Circuit explained, "[t]he 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.'" Pet. App. 19a (citing *USX Corp. v. United States*, 682 F. Supp. 60, 65-67 (Ct. Int'l Trade 1988). ECD and other concerned parties are free to pursue appropriate remedies from the relevant trade authorities—and, as the Sixth Circuit recognized, have successfully done so. *See* Pet. App. 4a.

But that does not mean that ECD can pursue an antitrust claim. The antitrust laws, unlike the trade laws, welcome low prices, whether from a domestic or a foreign seller. As this Court has explained, "unsuccessful predation is in general a boon to consumers." *Brooke Group*, 509 U.S. at 224. Accordingly, "[t]hat below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured: It is axiomatic that the antitrust laws were passed for 'the protection of *competition*, not *competitors*.'" *Id.*

(quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962); emphasis in original).

B. The Sixth Circuit Correctly Applied The Antitrust Injury Doctrine.

In addition, the Sixth Circuit correctly applied the settled antitrust injury doctrine as a separate and independent ground for affirming the dismissal of the complaint. *See* Pet. App. 16-19a. As the court explained, "[e]very private antitrust plaintiff, including those challenging an agreement as unlawful under § 1, must include in its complaint allegations of 'antitrust injury.'" Pet. App. 16a (citing, *inter alia*, *Atlantic Richfield*, 495 U.S. at 339-40). This requirement, which "derives from the general antitrust damages right of action in § 4 of the Clayton Act, 15 U.S.C. § 15 ... ensures that private plaintiffs bring claims 'of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful.'" *Id.* (quoting *Brunswick*, 429 U.S. at 489; brackets omitted).

ECD failed to satisfy that requirement, the Sixth Circuit explained, because it never pleaded an injury that involved consumers paying higher prices. *See* Pet. App. 16-17a. The antitrust laws, after all, protect "'*competition*, not *competitors*.'" *Brooke Group*, 509 U.S. at 224 (quoting *Brown Shoe*, 370 U.S. at 320) (emphasis in original). Thus, a competitor cannot bring an antitrust claim—even a claim alleging a *per se* violation of the antitrust laws—without alleging antitrust injury in the form of supracompetitive pricing. *See, e.g.*, *Atlantic Richfield*, 495 U.S. at 334-46; *Cargill, Inc. v. Monfort*

of Colo., Inc. 479 U.S. 104, 109-22 (1986); *Brunswick*, 429 U.S. at 489.

As *Brooke Group* explained, the dual "prerequisites to recovery"—below-cost pricing and recoupment—"are not easy to establish, but they are not artificial obstacles to recovery; rather, they are essential components of real market injury." 509 U.S. at 226; *see also* Pet. App. 17a ("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."). Without a theory of recoupment, in other words, a private predatory-pricing plaintiff cannot show consumer injury and thus lacks antitrust standing as a matter of law. *See* Areeda & Hovenkamp, *Antitrust Law* ¶ 726a ("[T]he substantive evil that antitrust reprehends is not the injury to rivals, but the subsequent injury to consumers. The recoupment requirement enables the tribunal to determine whether a particular price cut is calculated to injure only rivals, or consumers as well.").

And this conclusion, the Sixth Circuit emphasized, compels a ruling in respondents' favor entirely "independent" of the *Twombly* point discussed above. Pet. App. 19a. Thus, even if ECD had pleaded a plausible antitrust claim, it "still had to prove recoupment to show a harm protected by the antitrust laws" to establish its standing to pursue such a claim. *Id.*

II. The Alleged Circuit Conflicts Are Illusory.

Apparently recognizing the importance of alleging a "conflict" between federal courts of appeals in seeking this Court's review, S. Ct. R. 10(a), ECD duly alleges two such conflicts, one on each of the questions presented. *See* Pet. at 11-15, 28-30. As explained below, both alleged conflicts are illusory.

A. There Is No Circuit Conflict On The Application Of The *Twombly* Pleading Standard In A Predatory-Pricing Case.

ECD first asserts that "[t]he 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." Pet. 11 (citing *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 306 (3d Cir. 1983), *rev'd sub. nom. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), and *Amarel v. Connell*, 102 F.3d 1494 (9th Cir. 1996)). The asserted conflict is illusory.

The issue here is not whether horizontal price-fixing is a *per se* violation of the antitrust laws—everyone, *including the Sixth Circuit*, agrees that it is. *See*, *e.g.*, *In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 907 (6th Cir. 2003) (characterizing "horizontal restraints pertaining to prices" as "classic examples" of "restraints ... subject to the *per se* rule"); *see generally* Pet. 16 (citing cases). As noted above, however, the fact that a plaintiff alleges a *per se* violation of the antitrust laws does not, *ipso facto*, mean that such an allegation is plausible. ECD's

problem is that it did not plead a *plausible per se* claim. *See* Pet. App. 12a.

Contrary to ECD's assertion, neither the Third Circuit's decision in *Matsushita*—which was *reversed* by this Court—nor the Ninth Circuit's decision in *Amarel* holds that predatory-pricing plaintiffs can pursue a Section 1 claim even where, as here, they fail to allege that the alleged conspirators will eventually recoup their losses.

With respect to the Third Circuit, ECD ironically relies on the very decision *reversed* by this Court in relevant part in *Matsushita*. Needless to say, such a decision hardly provides a basis for establishing a circuit conflict. ECD insists, however, that the Third Circuit's decision in *Matsushita* "remains valid" because this Court stated that the Third Circuit had concluded that the plaintiffs' "'allegation of a horizontal conspiracy to engage in predatory pricing, *if proved*, would be a *per se* violation of § 1" of the Sherman Act, and the defendants in that case "did not appeal from that conclusion." Pet. 2, 11-12, 13 (quoting *Matsushita*, 475 U.S. at 584-85; emphasis modified).

But that statement does not address the question of what it takes to prove (or plead) a predatory-pricing claim under Section 1 of the Sherman Act. And this Court reversed the Third Circuit on precisely that point, emphasizing that it is "implausible" that any defendant would conspire to lower prices without any possibility of eventually recouping those losses. *Matsushita*, 475 U.S. at 593; *see generally id.* at 588-98. Indeed, the Third Circuit recently reaffirmed—in a case involving claims under *both* Section 1 *and* Section 2 of the Sherman

Act—that "a plaintiff can succeed on a predatory pricing claim *only* if it can show that (1) the rival's low prices are below an appropriate measure of its costs and (2) *the rival had a dangerous probability of recouping its investment in below-cost prices*." *Eisai, Inc. v. Sanofi Aventis U.S., LLC*, 821 F.3d 394, 408 (3d Cir. 2016) (emphasis added). ECD's allegation of a conflict between the Sixth and Third Circuits is thus baseless.

And the same is true with respect to the Ninth Circuit. ECD relies on *Amarel*, which in relevant part reversed a defense judgment on a Section 1 predatory-pricing claim. *See* Pet. 13-14 (citing 102 F.3d at 1521-22). But that decision simply makes the unremarkable point that a defense verdict on a Section 2 claim does not preclude a Section 1 claim because the two claims have different elements. *See* 102 F.3d at 1521-22. The decision says *nothing* about whether an allegation of recoupment is necessary to establish a predatory pricing claim under *either* Section 1 *or* Section 2. It is thus misleading at best for ECD to suggest that *Amarel rejected* a recoupment requirement, *see* Pet. 13-14; recoupment was simply not an issue in that case, presumably because the plaintiffs there did not pursue the implausible theory that the defendants had engaged in predatory pricing without any reasonable prospect of recoupment.

Contrary to ECD's claim of a conflict of authority, the Sixth Circuit recognized that "all other appellate authority points in the same direction." Pet. App. 11-12a (citing *Eisai, Inc. v. Sanofi Aventis U.S., LLC*, 821 F.3d 394, 401-02, 408-09 (3d Cir. 2016) ("[A] plaintiff can succeed on a predatory pricing claim

only if it can show that (1) the rival's low prices are below an appropriate measure of its costs and (2) the rival had a dangerous probability of recouping its investment in below-cost prices."); *Felder's Collision Parts, Inc. v. All Star Advert. Agency, Inc.*, 777 F.3d 756, 759-60 (5th Cir. 2015) ("To ensure that antitrust liability is not imposed for conduct resulting in lower prices today but carrying no viable risk of supracompetitive pricing in the future, a plaintiff must prove two things"—below cost pricing and recoupment); *Wallace v. International Bus. Machines Corp.*, 467 F.3d 1104, 1106 (7th Cir. 2006) (Easterbrook, J.) (when "recoupment is improbable even if some producers give up the market, there is no antitrust problem"); *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1432-34, 1443-44 (9th Cir. 1995) (holding that only the "second stage [of predatory pricing schemes], the 'recoupment' period," implicates the antitrust laws); *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*, 63 F.3d 1540, 1548-49 (10th Cir. 1995) ("To establish a section 1 violation, [plaintiff] must show a conspiracy to engage in short-term price cutting to secure long-term monopoly profits.") (internal citation omitted). Not surprisingly, then, the asserted conflict of authority is a contrivance invented for this petition.

B. There Is No Circuit Conflict On The Application Of The Antitrust Injury Doctrine In A Predatory Pricing Case.

ECD next asserts that "[t]he 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." Pet. 28 (citing *Amarel*, 102 F.3d at 1508). Once again, that assertion is baseless.

It is certainly true that *Amarel* held that the particular plaintiffs there, who were the defendants' *de facto* competitors, had antitrust standing to pursue predatory-pricing claims. *See* 102 F.3d at 1506-13. But in discussing antitrust standing, *Amarel* is simply silent on the issue of recoupment, and ECD is trying to read too much into that silence. According to ECD, because *Amarel* "nowhere suggested ... that antitrust injury requires showing that consumers paid higher prices or that the defendants recouped their losses," Pet. 29, it follows by negative implication that *Amarel* rejected any such requirements. But that negative implication is unwarranted. *Amarel* involved allegations indicative of recoupment: that the defendants were already a monopoly or had a "dangerous probability" of achieving a monopoly, and already were exerting that power to "control … the market" and "used their alleged monopoly power to manipulate prices." *See* 102 F.3d at 1502-03.

Indeed, even before *Amarel*, the Ninth Circuit had held that a Section 1 predatory-pricing plaintiff cannot establish antitrust injury without showing that consumers would be harmed by the lower prices. *See Rebel Oil*, 51 F.3d at 1443-44 (9th Cir. 1995) ("To show antitrust injury under Sherman Act § 1, a plaintiff must show that the predator has market power."); *id.* ("[Plaintiff's] evidence is insufficient for a jury reasonably to conclude that [defendant] possesses market power, or is dangerously close to obtaining it, under § 1. In light of this conclusion, any injury-in-fact suffered … as a result of

[defendant's] alleged predatory maximum price fixing does not constitute antitrust injury."). That is just another reason why the negative implication ECD is trying to draw from *Amarel* is implausible: under Ninth Circuit rules, *Amarel* was bound to follow *Rebel Oil*, and thus cannot reasonably be read to have overruled that case *sub silentio* by negative implication. *See*, *e.g.*, *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001) ("[A] later three-judge panel considering a case that is controlled by the rule announced in an earlier panel's opinion has no choice but to apply the earlier-adopted rule; it may not any more disregard the earlier panel's opinion than it may disregard a ruling of the Supreme Court.").

ECD also asserts a conflict of authority because *Amarel* repeats the wholly unremarkable proposition, derived from this Court's precedent, that "[l]osses a competitor suffers as a result of predatory pricing is a form of antitrust injury because 'predatory pricing has the requisite anticompetitive effect' against competitors." Pet. 28-29 (citing *Amarel*, 102 F.3d at 1508-09 (quoting *Atlantic Richfield*, 495 U.S. at 339)). But there is no dispute on this point, which is in line with Sixth Circuit authority. *See N.W.S. Michigan, Inc. v. Gen. Wine & Liquor Co.*, 58 F. App'x 127, 129 (6th Cir. 2003) ("For antitrust claims based on pricing practices, the Supreme Court has adopted a strict antitrust injury rule requiring plaintiffs to allege predatory pricing.") (citing *Brooke Group*, 509 U.S. at 222-23).

But the phrase "predatory pricing" implicates recoupment, and, as noted above, a "predatory pricing" claim requires recoupment to be actionable. *See Matushita*, 475 U.S. at 589; *Brooke Group*, 509

U.S. at 224 ("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."); Areeda & Hovenkamp, *Antitrust Law* ¶ 726a ("[T]here can be no predatory pricing with harm to consumers if recoupment is not even a part of the strategy."). In fact, apparently recognizing that "predatory pricing" requires a showing of recoupment, ECD *disclaimed* a "predatory pricing" theory below. ECD 6th Cir. Br. 28 (asserting that the district court "inaccurately and repeatedly characterize[d] ECD's claim as a predatory pricing claim").

This explains why the quotes from *Amarel* that ECD now trumpets are absent from its earlier briefing. *Compare* Pet. 28-30 *with* ECD 6th Cir. Br. 42, ECD 6th Cir. Reply Br. 20-21; *see also* App. 13a (rejecting ECD's argument that "the label 'predatory pricing' and the requirement of proof attached to it applies only to claims under § 2 of the Sherman Act, not § 1" as "word play"). For ECD now to tout case law holding that a plaintiff can demonstrate antitrust injury through "predatory pricing" is disingenuous and irrelevant. There is no disagreement that "predatory pricing" can cause antitrust injury, but neither is there any question whether ECD alleged "predatory pricing." Because ECD failed to allege recoupment, it did not.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for writ of certiorari.

March 3, 2017

Respectfully submitted,

JONATHAN C. SANDERS
SIMPSON THACHER &
BARTLETT LLP
2475 Hanover Street
Palo Alto, CA 94304
(650) 251-5071

KAREN M. GIFT
SIMPSON THACHER &
BARTLETT LLP
900 G Street, N.W.
Washington, DC 20001
(202) 636-5539

Counsel for Respondents Yingli Green Energy Holding Co., Ltd., & Yingli Green Energy Americas, Inc.

CHRISTOPHER LANDAU, P.C.
Counsel of Record
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, DC 20005
(202) 879-5000
clandau@kirkland.com

DANIEL E. LAYTIN, P.C.
KIRKLAND & ELLIS LLP
300 North LaSalle
Chicago, IL 60654
(312) 862-2000

Counsel for Respondents Trina Solar Limited & Trina Solar (U.S.), Inc.