No. 16-1148

In the Supreme Court of the United States

EVERGREEN PARTNERING GROUP, INC., PETITIONER

v.

PACTIV CORPORATION, ET AL.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in affirming the district court's grant of summary judgment.

PARTIES TO THE PROCEEDING

Petitioner (plaintiff-appellant below) is Evergreen Partnering Group, Inc.

Respondents (defendants-appellees below) are Pactiv Corporation, now known as Pactiv LLC, Solo Cup Company LLC, Dolco Packaging, Inc., Dart Container Corporation, and American Chemistry Council, Inc. Genpak, LLC ("Genpak") was a defendant in district court, but settled with petitioner and did not participate in the appeal.

RULE 29.6 STATEMENT

Pactiv Corporation, now known as Pactiv LLC ("Pactiv"), is wholly owned by Reynolds Group Holdings, Inc., which is privately held. No publicly held corporation owns 10% or more of its stock.

Solo Cup Company LLC ("Solo") is wholly owned by SCIC LLC, which is wholly owned by DS Holdings LLC, which is privately held. No publicly held corporation owns 10% or more of Solo's stock.

Dolco Packaging, Inc. ("Dolco"), a division of Tekni-Plex, Inc., is an operating division of Tekni-Plex, Inc., which is a wholly owned subsidiary of Tekni-Plex Holdings, LLC, a Delaware limited liability company ("TPI Holdings LLC"). TPI Holdings LLC is a wholly owned subsidiary of ASP TPI Holdings, Inc., a Delaware corporation ("TPI Holdings Inc."). TPI Holdings Inc. is owned approximately 98% by ASP TPI Investco LP, a Delaware limited partnership ("TPI Investco") (and approximately 2% by members of Tekni-Plex, Inc. management and other investors). TPI Investco is owned by funds managed by American Securities LLC (an investment ad-

visor registered with the U.S. Securities & Exchange Commission). American Securities Partners VI, LP, a Delaware limited partnership, owns approximately 98% of the limited partnership interests of TPI Investco. Limited partners in American Securities LLC funds include large institutional investors, pension funds, sovereign wealth funds, and other investors, which may include publicly traded entities, but no publicly held corporation or other investor owns more than a 10% interest in the funds.

Dart Container Corporation ("Dart") is privately held and has no parent corporation. No publicly held corporation owns 10% or more of Dart's stock.

American Chemistry Council, Inc. ("ACC") has no parent corporation. No publicly held corporation owns 10% or more of ACC's stock.

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The opinion of the court of appeals (Pet. App. A-1 to A-31) is reported at 832 F.3d 1. The opinion of the district court (Pet. App. B-1 to B-46) is reported at 116 F. Supp. 3d 1. A previous opinion of the court of appeals reversing the grant of a motion to dismiss is reported at 720 F.3d 33. A previous opinion of the district court granting respondents' motion to dismiss is reported at 865 F. Supp. 2d 133.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 2016. On August 15, 2016, the court of appeals extended the time for filing a petition for rehearing to and including September 21, 2016, and a petition was filed on that date. The court of appeals denied rehearing on October 18, 2016. On January 5, 2017, Justice Breyer extended the time for filing a petition for a writ of certiorari to and including March 17, 2017, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT

For claims brought under § 1 of the Sherman Act, "[t]he crucial question" is whether the conduct alleged "stem[s] from independent decision or from an agreement." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 553 (2007) (internal quotation marks and citation omitted). In *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), this Court provided its fullest explanation to date of the proof of antitrust conspiracy necessary to survive summary judgment:

> [A]ntitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. Thus, in *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U. S. 752 (1984), we held that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. *Id.*, at 764. To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently. 465 U.S., at 764. Respondents in this case, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents.

475 U.S. at 588 (citations omitted).

Relying on an argument it did not timely raise below, petitioner now contends that "in *Eastman Kodak Industry Co.* v. *Image Technical Services, Inc.*, 504 U.S. 451 (1992), the Court narrowed the application of *Matsushita*'s 'tends to exclude' standard." Petitioner contends *Kodak* holds that "where the alleged conduct is not inherently procompetitive or economically or otherwise irrational," the "tends to exclude" standard is inapplicable and "the conventional summary judgment standards of Rule 56" apply instead, Pet. i (parenthetical omitted). Petitioner failed to properly raise that issue below—indeed, it endorsed the very "tends to exclude" standard it now challenges, Pet. C.A. Br. 35; Pet. C.A. Reply 13-14—and that fact by itself warrants denial. See *Delta Air*

Lines, Inc. v. *August*, 450 U.S. 346, 362 (1981) ("question [that] was not raised in the Court of Appeals * * * is not properly before us").[1] Petitioner's argument is also meritless. *Kodak* involved allegations of unlawful tying and raised questions concerning the appropriate analysis of a single manufacturer's market power in such cases. 504 U.S. at 461-463. *Kodak* did not address what inferences may properly be drawn about evidence of conspiracy, because the existence of agreements was not in question. This Court in *Twombly* reaffirmed *Monsanto* and *Matsushita*'s "tends to exclude" standard without reservation, see 550 U.S. at 553, and courts, including this Court in *Kodak*, 504 U.S. at 468-469, have widely recognized that the "tends to exclude" standard the First Circuit applied here embodies ordinary principles of summary judgment law.

All four judges below considered the evidence in detail under ordinary summary judgment standards, declining to apply a higher evidentiary burden on the ground that the scheme Evergreen alleged is implausible. Pet. App. A-19 to A-20 n.10. In two exhaustive opinions totaling 66 pages, they

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[1] Petitioner cannot rely upon any (arguable) attempt to raise this argument for the first time in its rehearing petition below because "[i]t has been the traditional practice of this Court * * * to decline to review claims raised for the first time on rehearing in the court below." *Wills* v. *Texas*, 511 U.S. 1097, 1097 (1994) (O'Connor, J., concurring). Moreover, by advocating the standard it now challenges, petitioner not only forfeited but affirmatively waived that argument. *Wood* v. *Milyard*, 132 S. Ct. 1826, 1832 n.4 (2012) ("A waived claim or defense is one that a party has knowingly and intelligently relinquished * * * .").

unanimously held that petitioner failed to produce evidence sufficient to justify a verdict in its favor, concluding that the evidence instead demonstrated that petitioner's business failed not because of any conspiracy, but because using its product "would cause [respondents] to incur additional costs" and was dogged by "significant quality problems" including "bad odor" and "high levels of bacterial contamination." Pet. App. A-19 to A-20; accord *id.* at B-45 (evidence shows that "Evergreen's business model failed because it could not thrive, or even survive, in a competitive capitalist economy"). At bottom, petitioner merely seeks to revisit the lower courts' application of long-settled and consistently applied summary judgment standards to the facts of this case. But those courts' factbound conclusion conflicts with no decision of this Court or any court of appeals. The petition should be denied.

A. Background

Michael Forrest founded petitioner Evergreen Partnering Group, Inc. in 2000. Previous polystyrene recycling efforts had trouble turning a profit, in part because "virgin" resin has historically been much less expensive than recycled resin. One such effort, in the late 1990s and early 2000s, lost as much as $85 million. Pet. 6. Petitioner sought to "succeed where others had failed by obtaining revenue from three different sources." Pet. App. A-4. First, petitioner sought to charge large polystyrene users (such as school districts using polystyrene cafeteria trays) an "environmental fee" to collect used polystyrene goods. *Id.* at A-5. Second, petitioner would sell recycled resin to polystyrene converters (traditionally, re-

cyclers' sole revenue source). Third, petitioner "sought to charge converters a commission on products sold containing its resin." *Ibid.*; *id.* at B-5 to B-6.

Petitioner established its first independent recycling plant in 2005 in Gwinnett County, Georgia. The next year, the county's public school system began paying petitioner to collect its used polystyrene trays. Pet. App. A-5 to A-6. After experiencing "little success" selling its resin to small polystyrene converters, petitioner reached out to Genpak and respondents Dart, Dolco, Pactiv, and Solo. *Id.* at A-6; *id.* at B-7 to B-8. Dolco told petitioner it would be willing to pay a royalty to use its recycled resin "as long as the relationship could be profitable," *id.* at A-7, but the deal "fell through" when the third-party distributor for the products "backed out," *ibid.* Genpak began making lunch trays with petitioner's resin and won Gwinnett County Schools' contract to supply lunch trays for the 2007-2008 academic year by substantially underbidding Pactiv's bid for virgin-resin trays. *Ibid.*

In 2007, Forrest sought additional financing for a hoped-for new recycling plant in California and for upgrades to petitioner's Georgia facility. At the recommendation of Genpak's president, Forrest approached the Plastics Foodservice Packaging Group ("Plastics Group"), a subgroup of the American Chemistry Council focused on promoting public awareness of "the benefits of plastic foodservice packaging." Pet. App. B-13 to B-14. All respondents have been members of the Plastics Group at various times.

Forrest held a conference call with the Plastics Group and submitted proposals asking it to help fund

petitioner's Georgia operations and launch operations in California, including payment of financing costs and commissions, purchasing all of petitioner's output, and providing subsidies. Pet. App. A-8 to A-9 & n.7. The Plastics Group held a conference call in May 2007 to discuss Forrest's proposals. Forrest later submitted two other proposals, seeking as much as $3,100,000. *Id.* at A-8 n.7. None of the proposals were accepted. *Id.* at A-9. Petitioner ultimately did not build a California recycling plant.

Nevertheless, two members of the Plastics Group immediately negotiated a funding and resin output purchase agreement with petitioner directly. In July 2007, Genpak and Dolco entered into a joint funding agreement with petitioner, agreeing to provide financing and to purchase any "acceptable quality" resin petitioner produced in exchange for exclusive rights to use petitioner's resin in certain product categories. Pet. App. A-22. Under that agreement, Genpak and Dolco purchased hundreds of thousands of pounds of petitioner's resin. Pet. App. A-9 to A-10, A-22, B-18. Genpak found petitioner's recycled resin to be of poor quality; it could blend in only a small amount of recycled resin (5%), C.A. Jt. App'x JA978-979—a blend rate so low it undercut the converters' ability to claim the resulting products were "green"—and there were concerns and complaints about its smell, bacterial contamination, and poor melt flow. Pet. App. at B-41 to B-42 n.46. Petitioner's samples never met Pactiv's quality control standards. *Id.* at A-20; C.A. Jt. App'x JA272-273. Solo purchased resin to test in May 2008 but stated it would not pay commissions on sales. Pactiv and Dart tested sam-

ples of petitioner's resin in 2008-2009, but did not reach an agreement to purchase it commercially. Pet. App. A-10.

By early 2007, another company, Packaging Development Resources (PDR), was attempting to develop commercially viable recycled polystyrene in California. PDR was skeptical that petitioner's model would work because "in most localities, schools 'were constrained by law to select the cheapest product * * *' and could not pay [petitioner] a premium for recycled content." Pet. App. B-16. In mid-2008, Pactiv loaned PDR money in exchange for the right to purchase PDR's recycled resin, and conducted a "stewardship" program to bring PDR's resin into compliance with Pactiv's standards. Beginning in August or September 2008, PDR sold Pactiv "tens of thousands of pounds" of recycled resin that was of sufficiently high quality that "Pactiv was able to produce products containing high percentages of PDR resin, some with a recycled content approaching 100%." *Id.* at A-30 to A-31, B-20.

"Despite the dealings with PDR, the Plastics Group continued to promote Evergreen as a recycler," *ibid.*, inviting it to present at a group executive session in March 2008 and mentioning petitioner to Dolco as a possible recycling partner in New York. The Plastics Group sent petitioner a letter "recognizing the success of [petitioner's] closed-loop recycling system" in the New England and Atlantic Coast region. *Ibid.*

When Genpak bid to supply Gwinnett County Schools with trays for the following school year (2008-2009), it raised its price to account for the higher

price of petitioner's recycled resin, and lost the contract to Pactiv's virgin-resin proposal. Pet. App. A-10. Petitioner "also found itself largely unable to attract customers who would pay [petitioner] to remove their waste products or pay a premium for polystyrene products containing recycled resin." *Ibid.* Neverthless, in February 2009, Genpak wrote petitioner to say that it was "willing to pay this additional [commission] fee" for use of its resin. Pet. App. B-21. The following month, "Pactiv presented Evergreen with a letter of intent to purchase a minimum of 300,000 pounds of its recycled resin yearly," if of acceptable quality, but "Evergreen never signed the letter." *Ibid.*

Petitioner ceased operations in late 2008-early 2009. Pet. App. B-21. Petitioner's production costs never went below $2.00 per pound, *id.* at B-7 n.10, four times the cost of virgin resin in late 2008, *id.* at B-21.

PDR folded in early 2009 as virgin resin prices continued to plummet (to $.50 a pound by October 2008) while the production costs of PDR's recycled resin were many times higher ($8.10 per pound in October 2008), "well above what any converter was willing to pay." Pet. App. B-21.

B. Procedural History

1. Petitioner and Forrest brought suit in May 2011, alleging that respondents unlawfully boycotted petitioner in violation of the Sherman Antitrust Act. After two amendments, petitioner alone brought the operative complaint. The district court granted respondents' motion to dismiss after concluding that

"the [complaint's] factual allegations * * * did not 'possess enough heft' to amount to 'a plausible entitlement to relief.'" Pet. App. B-22 (quoting *Twombly*, 550 U.S. at 557). Petitioner appealed. The First Circuit, expressing concern that the district court applied too high a pleading standard, reversed, concluding that the complaint's allegations, if proven, were "sufficient to establish a context for plausible agreement in the form of industry information and facilitating practices." *Id.* at A-11 (internal quotation marks omitted).

2. Following discovery, the district court granted respondents' motion for summary judgment. After reviewing the evidence in detail, the court concluded that "the facts fail to demonstrate 'that the [respondents] had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" Pet. App. B-44 (quoting *Monsanto*, 465 U.S. at 764). Instead, "[t]he hard truth is that Evergreen's recycled resin was more expensive than its virgin counterpart (and became even more expensive as the price of oil began to drop in 2008)." *Ibid.* Accordingly, "Evergreen's own expert opined that Evergreen could not survive on the proceeds of recycled resin sales alone," and needed customers to pay it "an 'environmental fee'" to collect waste polystyrene, "as well as a royalty on the sale of all of a converter's products containing Evergreen's resin." *Ibid.* "Evergreen never succeeded in persuading a single customer"—including converters not in the Plastics Group—"to pay an environmental fee" to collect used polystyrene goods, and customers were "either unable * * * or unwilling * * * to enter deals structured with all of the addi-

tional unprofitable components that Evergreen insisted upon." *Id.* at B-45.

"In sum, the evidence does not even faintly support" the claim of "a conspiracy to drive Evergreen out of the polystyrene recycling business." *Id.* at B-38; *id.* at B-42 (evidence "fail[s] to sustain even the faintest suggestion of a conspiracy"). Rather, "discovery has demonstrated that Evergreen's business model failed because it could not thrive, or even survive, in a competitive capitalist economy," *id.* at B-45.

3. The court of appeals unanimously affirmed. Petitioner argued that the district court considered the evidence "piecemeal" rather than considering "the direct and circumstantial evidence supporting Evergreen's refusal to deal claim" as a whole, "contrary to the standard of review laid out by the Supreme Court in *Matsushita*." Pet. C.A. Br. 31-32. Petitioner also argued that it had presented direct evidence of conspiracy, and that "[w]hen a plaintiff presents *direct* evidence of conspiracy, it need not make the showing required by *Matsushita* to avoid summary judgment." *Id.* at 36 (emphasis added); Pet. C.A. Reply 14. Lastly, petitioner argued that it had presented circumstantial evidence and evidence of "plus factors" that would "tend to exclude" the possibility that respondents' conduct was innocent. See Pet. C.A. Br. 35, 37-39, 47, 49.

After reviewing petitioner's evidence in detail under the "tends to exclude" standard petitioner then endorsed, see Pet. C.A. Br. 35; Pet. C.A. Reply 13-14, the court concluded that "the record taken as a whole could not lead a rational trier of fact to find for" petitioner. Pet. App. A-12 (quoting *Matsushita*, 475

U.S. at 587). The court explicitly declined to give weight to respondents' argument that Evergreen had "to present stronger conspiracy evidence" because its scheme was economically implausible, though it "acknowledg[ed] [respondents'] point that driving a viable recycler such as Evergreen out of business would be a risky proposition." Pet. App. A-19 to A-20 n.10.

The court disagreed that petitioner's supposed "direct" evidence of conspiracy supported its reading, concluding the evidence could not "reasonably—let alone unambiguously—be construed as meaning the Plastics Group decided to throw its support behind PDR to [petitioner's] detriment." Pet. App. A-14. The court identified "no evidence that the Plastics Group discouraged [polystyrene] users from working with Evergreen." *Id.* at A-17. The circumstantial evidence was equally unhelpful; the court noted that petitioner's own reading of the evidence

> acknowledges that any agreement with Evergreen [to purchase resin] would cause the [respondents] to incur additional costs. The [respondents'] desire to avoid these costs is especially understandable in light of the overwhelming evidence that they each experienced significant quality problems with Evergreen's resin. Both Dolco and Genpak * * * complained to Evergreen that its resin had a bad odor; [Dolco]'s Patterson also notified Evergreen that its resin had high levels of bacterial contamination. Dart, Solo, and Pactiv also tested Evergreen's resin between 2008 and 2009 and found that it did not meet their standards.

Pet. App. A-19 to A-20 (footnote omitted). The remaining evidence "[wa]s either not traditional conspiracy evidence or does not have the meaning Evergreen ascribes to it." *Id.* at A-23. Lastly, the court "conclude[d] that a reasonable factfinder could not find that PDR was a sham" given its delivery of thousands of pounds of "high quality" resin. *Id.* at A-30 to A-31.

REASONS FOR DENYING THE PETITION

A. Whether *Kodak* Modified The "Tends To Exclude" Standard Is Not Properly Before This Court

Petitioner contends that "in *Eastman Kodak Industry Co.* v. *Image Technical Services*, 504 U.S. 451 (1992), the Court narrowed the application of *Matsushita*'s 'tends to exclude' standard," arguing that "where the alleged conduct is not inherently procompetitive or economically or otherwise irrational," *Matsushita*'s "tends to exclude" standard is inapplicable and "the conventional summary judgment standards of Rule 56" apply instead. Pet. i (parenthetical omitted). Petitioner repeatedly accuses the First Circuit of "ignor[ing] *Kodak* * * * in this case," Pet. i-ii; accord *id.* at 22, 29, 31.

Petitioner did not timely raise this issue below. "[O]rdinarily, this Court does not decide questions not raised or resolved in the lower court[s]." *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 646 (1992) (internal quotation marks omitted). Petitioner cannot seriously maintain that it fairly presented this argument to the First Circuit. Petitioner cited *Kodak* only once below, for the uncontroversial proposition that courts

must resolve "inferences in the light most favorable to the party opposing summary judgment." Pet. C.A. Br. 35 (citing *Kodak*, 504 U.S. at 456). Neither brief even hints that a different summary judgment standard would apply "where the alleged conduct is not inherently procompetitive or economically or otherwise irrational." Pet. i. Neither brief ever references the economic rationality of the alleged conduct, and whether conduct was "pro-competitive" appears only once in a passing reference to petitioner's since-abandoned claim that respondents' conduct was "*per se* illegal, admitting no justification * * * on efficiency or other possible pro-competitive grounds." Pet. C.A. Br. 44. The First Circuit can hardly be faulted for "[i]gnoring" (Pet. 31) arguments petitioner never bothered to present, and this Court "will not address" arguments petitioner "did not raise * * * in the Court of Appeals." *Kennedy* v. *Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 290 n.2 (2009).

The argument petitioner made instead—that "[t]he *Matsushita* standards do not apply to direct evidence * * * of conspiracy," Pet. C.A. Br. 36 (emphasis omitted), turns on a fundamentally different theory based not on economics but on evidence—that direct evidence of conspiracy "must be treated with more deference, for no inferences are required * * * and thus a court need not be concerned about the reasonableness of the inferences to be drawn from such evidence." *Ibid.* (internal quotation marks omitted). But petitioner identified little conspiracy evidence it even *alleged* was "direct"; the court of appeals rejected that characterization, see Pet. App. A-17 ("we do not view" a witness's statement "as direct evidence of

a conspiracy"); accord *id.* at A-13 to A-14, and that factbound conclusion plainly would not warrant this Court's review even if petitioner seriously disputed it. See note 6, *infra*. Petitioner cannot adopt a brand-new theory of error in this Court simply because the court of appeals foreclosed its last one.

Moreover, for (at best) ambiguous circumstantial evidence like that at issue here, see Pet. ii, 3, 4, 19, 31, petitioner endorsed the *very standard* the First Circuit employed, conceding that "Evergreen sustains its burden [in avoiding summary judgment] * * * if, given ambiguous evidence that is equally consistent with independent as with concerted conduct, it can present evidence that tends to exclude the possibility of independent conduct." Pet. C.A. Reply 13-14; compare Pet. App. A-20 ("[W]here the challenged conduct is 'as consistent with permissible competition as with illegal conspiracy,' a plaintiff 'must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.") (quoting *Matsushita*, 475 U.S. at 588 (internal quotation marks omitted)). There is no need for this Court to review the factbound application of a rule petitioner acknowledged to be correct.

B. The First Circuit Correctly Applied Settled Law

The standards for awarding summary judgment are well settled. "Rule 56(e) provides that, when a properly supported motion for summary judgment is made, the adverse party must set forth specific facts showing that there is a genuine issue for trial." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986) (internal quotation marks and footnote omit-

ted). That showing requires a plaintiff to "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. Rather, the plaintiff has the "burden of producing * * * affirmative evidence," *Anderson*, 477 U.S. at 256-257, sufficient that "the jury could reasonably find for the plaintiff," *id.* at 252. In the context of petitioner's claim that respondents engaged in a conspiracy in restraint of trade in violation of Section 1 of the Sherman Act, it is undisputed that petitioner "must establish that there is a genuine issue of material fact as to whether [respondents] entered into an illegal conspiracy that caused [petitioner] to suffer a cognizable injury," *Matsushita*, 475 U.S. at 585-586, meaning that it must "present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Monsanto Co.* v. *Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984); see also Pet. C.A. Br. 36 (acknowledging this as "correct[]" standard); Pet. C.A. Reply 13 (quoting *Monsanto* with approval). Faithfully applying that standard, each of the four judges who reviewed petitioner's proffered evidence unanimously concluded that it fell short. There is no reason to review that factbound conclusion.

1. In a 32-page, 18-footnote opinion, the court of appeals carefully analyzed the evidence petitioner presented for each of its claims. The court rejected petitioner's proffered "direct" evidence of conspiracy, concluding "[w]e do not think" the cited testimony "can reasonably—let alone unambiguously—be construed as meaning that" respondents conspired to fa-

vor a competitor. Pet. App. A-14. It then discussed other statements, emails, and meeting minutes, before concluding that "we do not think a reasonable factfinder would view them as supporting an inference of" unlawful conspiracy. *Id.* at A-15; accord *id.* at A-15 to A-17. The court identified "no evidence that [respondents] discouraged [polystyrene] users from working with Evergreen." Pet. App. A-17.

The court then reviewed petitioner's "circumstantial evidence" in detail and found it similarly wanting. As the court noted, petitioner's theory turned on respondents "oppos[ing] its business model because the [respondents] 'did not want to pay more for recycled resin than for virgin resin,' and its business model involv[ed] commissions" and other payments. Pet. App. A-19. As the court correctly concluded, petitioner's own theory is inconsistent with conspiracy as opposed to individual action because it "acknowledges that any agreement with Evergreen would cause the defendants to incur additional costs," which respondents were unwilling to do "in light of the overwhelming evidence that they each experienced significant quality problems with Evergreen's resin," including "bad odor" and "high levels of bacterial contamination." *Id.* at A-19 to A-20. Lastly, the court discussed and rejected each of the "plus factors" petitioner presented as "proxies for direct evidence" of conspiracy, *id.* at A-21, including "substantial evidence inconsistent with conspiracy: specifically, the continued purchase of [petitioner's] resin by several of the [respondents]," *id.* at A-22. The court of appeals thus unanimously reached the same conclusion as the district court: "Ultimately, discovery has

demonstrated that Evergreen's business model failed because it could not thrive, or even survive, in a competitive capitalist economy." *Id.* at B-45. Conduct that amounts to declining to pay for costlier but inferior product would seem to be precisely the sort of "inherently procompetitive" conduct to which the "tends to exclude" test would apply even under petitioner's current theory. See Pet. ii. Each respondent has an incentive to use the highest quality supplies at the lowest cost available in order to best compete with other manufacturers of packaging products.

2. Petitioner contends that the court of appeals applied an elevated summary judgment standard that was inappropriate because the behavior alleged was not procompetitive. Pet. 31-32. But the court of appeals here invoked the ordinary Rule 56 principles that petitioner claims to seek.[2] Respondents had argued that "the plaintiff must produce more persuasive evidence to support its claim" of conspiracy if the theory "makes no economic sense and if drawing inferences in its favor would deter procompetitive conduct." Resp. C.A. Br. 49 n.53 (internal quotation marks omitted). The court explicitly "decline[d] to

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[2] See Pet. App. A-4 n.2 ("consider[ing] any evidence Evergreen has cited as creating a dispute and draw[ing] all reasonable inferences in Evergreen's favor"); *id.* at A-12 ("plaintiff 'must establish that there is a genuine issue of material fact as to whether [defendants] entered into an illegal conspiracy that caused [plaintiff] to suffer a cognizable injury'" (quoting *Matsushita*, 475 U.S. at 585-586 (citing Fed. R. Civ. P. 56(e)); *id.* at A-27 n.17 (recognizing that "courts may neither evaluate the credibility of witnesses nor weigh the evidence") (internal quotation marks omitted).

address the [respondents]' argument that Evergreen's conspiracy claim is economically irrational, which would, in turn, require Evergreen to present stronger conspiracy evidence." Pet. App. A-19 to A-20 n.10 (emphasis added). Petitioner explicitly endorsed the "tends to exclude" standard for the circumstantial evidence that is at issue in this case, see Pet. C.A. Br. 35; Pet. C.A. Reply 14; and that was the standard the First Circuit applied, without holding petitioner to a higher burden.

At bottom, petitioner's argument rests on the fact that the court of appeals stated that—consistent with petitioner's position at the time—"[w]here the challenged conduct is 'as consistent with permissible competition as with illegal conspiracy,' a plaintiff 'must present evidence that tends to exclude the possibility that the alleged conspirators acted independently." Pet. App. A-20 (quoting *Matsushita*, 475 U.S. at 588 (internal quotation marks omitted)). But as *Matsushita* itself demonstrated, that statement is entirely consistent with conventional summary judgment analysis. *Matsushita* explained what the "tends to exclude" standard meant: "in other words, [a plaintiff] must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents." 475 U.S. at 588.

That represents a straightforward application of *Liberty Lobby*: If "the inference of conspiracy" were *not* reasonable "in light of the competing inferences," *ibid.*, it cannot seriously be maintained that it could support a jury verdict in favor of a conspiracy finding.

See, *e.g.*, *Monsanto*, 465 U.S. at 764 ("tends to exclude" inquiry is way to determine whether evidence "reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective") (internal quotation marks omitted); *Williamson Oil Co.* v. *Philip Morris USA*, 346 F.3d 1287, 1303 (11th Cir. 2003) ("tends to exclude" standard "does not represent a new hurdle," but "simply represents an explication of th[e] requirement" that a "plaintiff's evidence must create a '*reasonable*' inference of conspiracy to withstand a summary judgment motion"). It was in that context that the First Circuit wrote that "[v]iewing, in combination, all the admissible evidence * * *, and drawing all reasonable inferences in Evergreen's favor, we conclude that Evergreen has failed to provide evidence that suffices to raise a reasonable inference of unlawful action." Pet. App. A-31. That factbound conclusion does not warrant further review.

3. The "tends to exclude" standard comes from *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984), which forecloses petitioner's argument that the standard is inapplicable in cases involving allegations of anticompetitive behavior that are economically rational. *Monsanto* addressed the standard to be applied to an alleged conspiracy to fix prices enforced by the manufacturer's termination of price-cutting distributors. There, the Supreme Court rejected the Seventh Circuit's conclusion that evidence of complaints by competing distributors who maintained higher prices and the ensuing termination of the discounting distributor was itself

sufficient to infer conspiracy. This Court held in *Monsanto*—a case where the alleged anticompetitive conduct was economically rational, *id.* at 767—that the party resisting summary judgment must show evidence that "tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." *Id.* at 764.

While the predatory pricing conspiracy alleged in *Matsushita* may have been economically implausible, the Court explained that the "tends to exclude" standard that *Monsanto* established is not limited to such facts:

> We do not imply that, if [the defendants] had had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy. Our decision in *Monsanto Co.* v. *Spray-Rite Corp.*, 465 U.S. 752 (1984), establishes that conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy. *Id.* at 763-764.

Matsushita, 475 U.S. at 597 n.21.

Kodak is not to the contrary. As the Court there explained, "*Matsushita* demands only that the non-moving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision." 504 U.S. at 468 & n.14 (collecting authorities, including *Liberty Lobby*, 477 U.S. at 248). Moreover, *Kodak* did not even address what inferences may permissibly be drawn from ambiguous evidence of conspiracy, because the existence of agreements underlying the

tying claim was not in question; instead, the case involved the question of how to assess *market power*. *Id.* at 461-63. Tellingly, in more recent decisions, this Court has restated *Matsushita*'s "tends to exclude" standard without suggesting that *Kodak* carved away from it or limited its application to instances where the alleged conduct was economically irrational. Thus, in *Bell Atl. Corp* v. *Twombly*, this Court stated without qualification that "at the summary judgment stage a § 1 plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently." 550 U.S. at 554; see also *id.* at 585-586 (Stevens, J., dissenting) (same; suggesting *Matsushita* applies to claims based on circumstantial evidence of conspiracy).

C. The First Circuit's Decision Accords With Those Of Other Circuits

Petitioner maintains that the courts of appeals are divided between those that recognize that *Kodak* renders the "tends to exclude" standard inapplicable for cases "where the alleged conduct is not inherently procompetitive or [not] economically * * * irrational," and courts that "ignore" that decision. Pet. i; see also Pet. 18-31. But even a brief review of the cases petitioner cites shows broad agreement on the basic principles governing consideration of summary judgment motions in antitrust cases, even if cases sometimes frame the inquiry in slightly different ways. Moreover, there is no indication that many of the decisions petitioner cites even considered the issue, much less took sides on the supposed "split." Even if there *were* a colorable claim of circuit disagreement, the courts should be afforded the opportunity to con-

sider the issue in the wake of *Twombly*'s intervening reaffirmation of *Matsushita*'s "tends to exclude" standard.[3]

1. The very cases petitioner cites in outlining its purported "conflict" demonstrate that it is mistaken in claiming that "a plaintiff is *not* required to present evidence that tends to exclude the possibility of independent conduct" when its "theory is plausible and the conduct is not procompetitive." Pet. 13-14; see also Pet. i. Petitioner claims that the Third Circuit "would very likely have denied summary judgment" here, and points first to *Petruzzi's IGA Supermarkets, Inc.* v. *Darling-Delaware Co.*, 998 F.2d 1224 (3d Cir. 1993). But that case involved allegations that "ma[de] perfect economic sense," *id.* at 1232, and yet the Third Circuit emphasized that the courts' "focus must remain on the evidence proffered by the plaintiff and whether that evidence '*tends to exclude the possibility that [the defendants] were acting independently*.'" *Ibid.* (quoting *Monsanto*, 465 U.S. at

[3] Petitioner's amici likewise claim that the courts of appeals are divided on the question whether *Kodak* modified the "tends to exclude" standard—although, remarkably, they frequently disagree on which side of the "split" various courts fall. Compare, *e.g.*, Pet. 29, 31 (Sixth Circuit "[i]gnore[s] *Kodak*"), with Amicus Br. 2, 13 (Sixth Circuit holds that *Kodak* limits "tends to exclude" standard); compare Pet. 29 (Eleventh Circuit *supports* petitioner's reading), with Amicus Br. 15 (Eleventh Circuit *opposes* petitioner's reading). But because that brief does not acknowledge that petitioner's argument is defaulted, disregards *Twombly*'s reaffirmation of the rule, and does not attempt to demonstrate that different statements of the governing test would have had made any practical difference given the evidence in this case, it is of little value in determining whether further review is warranted here.

764) (emphasis added). The court's explanation belies petitioner's vision of a circuit split on the applicable summary judgment standard:

> [T]he mere facts that a plaintiff alleges a plausible conspiracy and that that allegation does not threaten to chill procompetitive behavior do not mean that there are no restrictions on the inferences that can be drawn from the evidence it puts forward. * * * Instead, in a conscious parallelism case, a plaintiff also must demonstrate the existence of certain 'plus' factors, *for only when these additional factors are present does the evidence tend to exclude the possibility that the defendant acted independently*.

Ibid. (emphasis added). Indeed, that court affirmed the grant of summary judgment with respect to one defendant because "the evidence put forward does not tend to exclude the possibility that [the defendant] acted independently." *Id.* at 1228. Nothing in the subsequent Third Circuit cases petitioner cites detracts from that clear holding.[4]

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[4] See, *e.g.*, *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 358, 360 (3d Cir. 2004) (although plaintiff's theory "makes perfect economic sense" and defendants' alleged conduct was not procompetitive, "we have required that plaintiffs basing a claim of collusion on inferences from consciously parallel behavior show that certain 'plus factors' also exist. Existence of these plus factors tends to ensure that courts punish 'concerted action'—an actual agreement—instead of the 'unilateral, independent conduct of competitors." (quoting *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 122 (3d Cir. 1999)) (citations omitted)); *Baby Food*, 166 F.3d at 122, 138 (affirming summary judgment because plaintiffs "failed to produce sufficient circumstantial evidence to prove concerted collusion that tends

The Seventh Circuit would be surprised to learn that it "authoritatively recognized that *Kodak* qualifies *Matsushita*" in *In re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651 (7th Cir. 2002), Pet. 21, given that the opinion never cites *Kodak*, nor ever mentions the "tends to exclude" test. In fact, *none* of petitioner's Seventh Circuit decisions mentions the "tends to exclude" test, and either do not

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to exclude the possibility of independent action"); *Rossi* v. *Standard Roofing, Inc.*, 156 F.3d 452, 457 (3d Cir. 1998) (affirming summary judgment as to certain defendants "since Rossi has failed to overcome his burden of showing that either Servistar's or Wood Fiber's actions tended to exclude the possibility of independent action on their part"; placing more emphasis on existence of direct evidence of conspiracy); *In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 396-397 (3d Cir. 2015) ("even when armed with a plausible economic theory, a plaintiff relying on ambiguous evidence alone cannot raise a reasonable inference of a conspiracy sufficient to survive summary judgment"; plaintiff must present "evidence [that] tends to exclude the possibility" of independent action) (internal quotation marks omitted). While *Alvord-Polk, Inc.* v. *F. Schumacher & Co.*, 37 F.3d 996, 1001 (3d Cir. 1994), contains language that "no special care need be taken in assigning inferences to circumstantial evidence" if "the alleged conduct is 'facially anticompetitive,'" *id.* at 1001 (quoted at Pet. 20), the opinion makes clear that *evidence*, not allegations, is the focus of the inquiry, and that when evidence is ambiguous, plaintiffs must "submit 'evidence tending to exclude the possibility' of independent action." *Ibid.*; accord *Rossi*, 156 F.3d at 466 ("even with a plausible motive to conspire, ambiguous conduct will not create a triable issue of fact with respect to the existence of a conspiracy"). *Advo, Inc.* v. *Phila. Newspapers, Inc.*, 51 F.3d 1191, 1196-1197, 1205 (3d Cir. 1995), simply does not discuss the standard, and because the allegations at issue there involved predatory pricing allegations like those addressed in *Matsushita*, there would have been no occasion for the Third Circuit to depart from *Matsushita*'s holding.

cite *Kodak*, see *In re Brand Name Prescription Drugs Antitrust Litigation*, 186 F.3d 781 (7th Cir. 1999), or cite *Kodak* only once to support a *factual* statement, see *JTC Petroleum Co.* v. *Piasa Motor Fuels, Inc.*, 190 F.3d 775, 779 (7th Cir. 1999) (noting, as factual matter, that "reasons the producers gave for refusing to sell to JTC were pretextual, as in *Eastman Kodak Co.*"); *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599, 614 (7th Cir. 1997) (citing *Kodak* with approval as the second of four cases in a string cite supporting the factual statement that "the [defendants] argue * * * that summary judgment for a defendant is proper, even if there is some evidence of an antitrust violation, if the plaintiff's theory of violation makes no economic sense"). While the Seventh Circuit took pains in *High Fructose* "to avoid three traps that the defendants in this case have cleverly laid in their brief," 295 F.3d at 655; compare Pet. 21 (asserting those traps are "now generally acknowledged in antitrust case law"), *none* of the debunked "traps" involved the "tends to exclude" standard. See 295 F.3d at 655-656.

As petitioner notes, *High Fructose* states that "[m]ore evidence is required [for a plaintiff to avoid summary judgment] the less plausible the charge of collusive conduct." 295 F.3d at 661 (quoted at Pet. 21). But as explained above, that is consistent with the basic principle that a plaintiff bears the burden of "show[ing] that the inference of conspiracy is reasonable in light of the competing inferences." *Matsushita*, 475 U.S. at 588; *id.* at 587 ("It follows from these settled [summary judgment] principles that if the factual context renders respondents' claim

implausible—if the claim is one that simply makes no economic sense—respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary."). That statement in no way undermines the basic notion that an antitrust plaintiff must show evidence that "tends to exclude" the possibility of independent action. Indeed, on the *very same page* of its decision, the Seventh Circuit cited the discussion in *Matsushita* quoted above to support the proposition that antitrust plaintiffs "must present evidence that would enable a reasonable jury to reject the hypothesis that the defendants foreswore price competition without [unlawfully] agreeing to do so." 295 F.3d at 661 (citing *Matsushita*, 475 U.S. at 588). The other opinions petitioner cites are to the same effect. See, *e.g.*, *Brand Name Prescription Drugs*, 186 F.3d at 787 ("As there is neither an a priori reason nor direct evidence to suppose" collusion instead of independent action, "and as the plaintiffs bore the burden of persuasion, it was necessary for them to present economic evidence that would show that the hypothesis of collusive action was more plausible than that of individual action."). That is no different than the "tends to exclude" standard.

Although petitioner counts the Ninth Circuit among the courts that "have clearly followed *Kodak* and on the evidence of this case would very likely have denied summary judgment," Pet. 19, buried in a footnote are concessions that belie that claim, see Pet. 27 n.6. The Ninth Circuit plainly has answered the "question of what quantum of circumstantial evidence a plaintiff must present in order to survive summary

judgment," Pet. 19, in a manner *unfavorable* to petitioner. In *In re Citric Acid Litigation*, 191 F.3d 1090 (9th Cir. 1999), Judge Diarmuid O'Scannlain, writing for the court, explained that it is "well-established in both this circuit as well as in our sister circuits" that plaintiffs who rely on "circumstantial evidence of conspiracy * * * must produce evidence tending to exclude the possibility that defendants acted independently." *Id.* at 1096 (citations omitted). For cases like petitioner's that rest on circumstantial evidence, the Ninth Circuit applies the same standard the First Circuit applied in affirming summary judgment here.

In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 906 F.2d 432 (9th Cir. 1990), does not support petitioner's effort to identify a circuit split. As Judge O'Scannlain explained, that case "presented *direct* evidence of conspiracy, thus making dicta any discussion therein of the standard applicable" when plaintiffs rely on circumstantial evidence. *Citric Acid*, 191 F.3d at 1096 (citation omitted). Petitioner's claim of an "*intra*-circuit split on the appropriate reading of *Matsushita*" (Pet. 27 n.6) not only provides no basis for this Court's review, see *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam); it is simply wrong. The Ninth Circuit rejected a rehearing petition in *Citric Acid* alleging that the decision was inconsistent with *Coordinated Pretrial Proceedings* without a single judge even requesting a response. And the Ninth Circuit recently reaffirmed *Citric Acid*'s conclusion without any suggestion of intra-circuit conflict. See *Stanislaus Food Prods. Co.* v. *USS-POSCO Indus.*, 803 F.3d 1084, 1088 (9th Cir. 2015) ("to survive

summary judgment on the basis of circumstantial evidence, a plaintiff * * * must present evidence that tends to exclude the possibility that the alleged conspirators acted independently") (internal quotation marks omitted).

Far from supporting petitioner's reading, the Second Circuit has squarely "disagree[d]" with the contention that "the Supreme Court altered this ['tends to exclude'] standard in *Eastman Kodak*," noting *Twombly*'s reaffirmance of that standard. See *U.S. Info. Sys., Inc.* v. *Int'l Brotherhood of Elec. Workers*, 366 F. App'x 290, 292 (2d Cir. 2010). *In re Publication Paper Antitrust Litigation*, 690 F.3d 51 (2d Cir. 2012), which petitioner cites (Pet. 27-29), is not to the contrary. That decision plainly did not hold that the "tends to exclude" standard is inapplicable when a conspiracy is plausible—only that "the 'tends to exclude' standard is more easily satisfied[] when the conspiracy is economically sensible * * * and 'the challenged activities could not reasonably be perceived as procompetitive.'" 690 F.3d at 63 (quoting *Flat Glass Antitrust Litig.*, 385 F.3d at 358). But that, again, is simply an application of the basic principle that an inference must be reasonable in light of possible competing inferences, including inferences based on the "economic sens[e]" of the alleged scheme. *Ibid.*; see pp. 25-26, *supra*. The opinion noted that the standard does not require evidence that *actually* "'exclude[s]' or 'dispel[s]' the possibility that defendants acted independently," just evidence that *tends* to do so. 690 F.3d at 63. That is the standard both courts below correctly applied here.

The other cases petitioner cites as evidence of a supposed circuit "conflict" fare no better. *Champagne Metals* v. *Ken-Mac Metals, Inc.*, 458 F.3d 1073 (10th Cir. 2006) (cited at Pet. 29), simply noted that some decisions had limited *Matsushita* to instances where there was no direct evidence of conspiracy, which does not assist petitioner's circumstantial case; but *Champagne Metals* "d[id] not decide whether [the plaintiff's] weak direct evidence [of conspiracy] suffices by itself to remove this case from the *Matsushita* framework." *Id.* at 1085. *Instructional Systems Development Corp.* v. *Aetna Casualty & Surety Co.*, 817 F.2d 639 (10th Cir. 1987) (cited at Amicus Br. 15), applied the "tends to exclude" test, and held it satisfied because the evidence of conspiracy there "cannot be characterized as indirect or ambiguous"—i.e., it was direct evidence, unlike here. *Id.* at 646. As petitioner's own amici note, Amicus Br. 15, the Eleventh Circuit in *City of Tuscaloosa* v. *Harcros Chemicals, Inc.*, 158 F.3d 548 (11th Cir. 1998) (cited at Pet. 29), explicitly *embraced* the "tends to exclude" standard, *id.* at 570, and held that plaintiffs "must show 'plus factors' that tend to exclude the possibility that the defendants merely were engaged in lawful conscious parallelism," *id.* at 572, emphasizing that if "evidence is in equipoise, * * * in the absence of further evidence of collusion, summary judgment against the plaintiffs would be in order," *id.* at 569.

2. The cases that petitioner contends are on the "other" side of the circuit conflict are noteworthy for how similar they are to the cases petitioner claims support its position—suggesting that whatever differences may exist in the *statement* of governing rules

do not yield material differences in *application*. *Merck-Medco Managed Care, LLC* v. *Rite Aid Corp.*, 1999 WL 691840, 201 F.3d 436 (4th Cir. Sept. 7, 1999), for example, did conclude (as the Second Circuit did, see p. 28, *supra*) that "*Eastman Kodak* did not overrule or modify the requirements explained in *Matsushita* and *Monsanto*." 1999 WL 691840, at *7. But its application of the "tends to exclude" standard is remarkably similar to the decisions petitioner endorses. *Merck-Medco* concluded (as the Seventh Circuit did, see p. 25, *supra*) that "the quantum of evidence required to exclude the possibility of independent action" is inversely related "to the plausibility of the plaintiff's theory": "If the plaintiff advances a strong, plausible theory then the quantum of evidence tending to exclude independent action is not as great as if the plaintiff advances a weak or implausible theory." 1999 WL 691840, at *8. But as explained above, see pp. 25-26, *supra*, that is simply an application of the basic principle that an inference must be reasonable in light of possible competing inferences. As *Merck-Medco* explained, the basic inquiry is whether "the evidence viewed together * * * create[s] a reasonable inference of conspiracy." 1999 WL 691840, at *15.

Corner Pocket of Sioux Falls, Inc. v. *Video Lottery Technologies, Inc.*, 123 F.3d 1107 (8th Cir. 1997) (cited at Pet. 30), broadly accords with the analysis of other cases, emphasizing that it was affirming the grant of summary judgment because critical evidence was "too ambiguous to help plaintiffs defeat summary judgment," and that "the market conditions emphasized by plaintiffs do not prove that the inference of

conspiracy is reasonable in light of the competing inference[] of independent action." *Id.* at 1112 (quoting *Matsushita*, 475 U.S. at 588). As petitioner notes, Pet. 30, the opinion states that the plaintiffs there relied on "cases from the Third and Ninth Circuits" in arguing that economically rational conspiracies were not subject to *Matsushita's* statement that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." 123 F.3d at 1109. But the court there did not state that it *accepted* the litigant's characterization of Third and Ninth Circuit precedents (which as demonstrated above, were inaccurate). And the court made clear that it was basing its decision on widely accepted, hornbook principles of antitrust law, see *ibid.* (citing 2 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* 70-72, 75-81 (1995)), embodying the commonsense idea that "when the evidence is in equipoise, * * * summary judgment will be granted," 2 *Antitrust Law* at 70-72.[5]

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[5] The remaining cases petitioner cites turned on the weakness of the evidence, and there is no reason to believe the outcomes would have been different under any formulation of the summary judgment standard. See *Blomkest Fertilizer, Inc.* v. *Potash Corp. of Saskatchewan, Inc.*, 203 F.3d 1028, 1034-1035, 1037 (8th Cir. 2000) (en banc) (emphasizing plaintiff's "weak circumstantial evidence" that was "at most, ambiguous," "far too ambiguous to defeat summary judgment," and "strong evidence of independent action"); *Super Sulky, Inc.* v. *U.S. Trotting Ass'n*, 174 F.3d 733, 738-739 (6th Cir. 1999) (summary judgment proper because "the evidence is ambiguous" and the "conspiracy claim is based upon circumstantial evidence, coincidence, and speculation").

* * * * *

The courts below, applying settled principles of antitrust law, correctly concluded that the record evidence was far too ambiguous to support petitioner's claims of antitrust conspiracy.[6] Far from identifying any clear division of authority, the authorities petitioner cites reveal remarkable agreement about the

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[6] The final quarter of the petition contains a series of factual arguments that do not alter the analysis here. In any event, the fact-bound conclusions of the district court and the court of appeals were fully justified. Economic motive, Pet. 32-34, fails when petitioner's actual cost of production was *four times* that of virgin resin, Pet. App. B-21 & nn.24-25. References to an unauthenticated March 2005 draft memorandum, Pet. 34-35, are unavailing where the claimed conspiracy did not begin until two years later, Pet. App. A-7 n.6. Petitioner complains about the one bid that it won with Genpak, Pet. 35-36, but ignores that, a year later, Genpak lost to a lower Pactiv bid about which it has no complaint, see Pet. 5, 7. Petitioner fails to link any of the alleged events to any trade association meeting, Pet. 36-37, and omits the undisputed evidence that petitioner was invited to make presentations at one or more such meetings, see Pet. 7. Absent such linkage, the meetings do not become a plus factor. Reference to Genpak seeking group support, Pet. 39-40, ignores the court of appeals' observation that Genpak "did not want to bear the investment risk [of a California plant] alone," Pet. App. A-20 n.12. Petitioner's statements about its Northeast operations, Pet. 40, neglect that it did not process the resin produced in Boston, Pet. App. B-3 to B-4. Hearsay testimony by Forrest as to the end of dealings between Sysco and Dolco, Pet. 40, did not create an issue of fact as to Patterson's direct knowledge regarding the end of those dealings, especially given that Dolco continued to deal with petitioner. Funding petitioner, even if not to the level petitioner desired, Pet. 40-41, remains inconsistent with the claimed attempt to drive it out of business, Pet. App. A-22. Petitioner thus furnishes no basis to revisit the lower court's well-supported conclusions.

basic principles governing summary judgment motions in the antitrust context, and there is no reason to believe that any court would have decided this case differently. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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