No. 16-1148

IN THE
SUPREME COURT OF THE UNITED STATES

EVERGREEN PARTNERING GROUP, INC.,
Petitioner,
v.
PACTIV CORPORATION, a corporation, et al.
Respondents.

On Petition for Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

CASES Page(s)

TABLE OF AUTHORITIES – Continued

Page(s)

INTRODUCTION

Antitrust cases across the federal circuits reflect widespread inconsistency in the application of *Matsushita* [1] and *Kodak* [2] at summary judgment. Respondents' efforts to harmonize this inconsistency do not address these fundamental differences. Errors of interpretation and application have perceptibly eroded non-moving parties' rights on summary judgment in antitrust cases in derogation of constitutional and certain long-standing procedural principles. *Evergreen* is such a case, and a proper vehicle for review.

Some courts, including the First Circuit below, blend a categorical interpretation [3] of *Matsushita*'s 'tends to exclude' formulation with improper weighing of evidence and credibility determinations. Others are more restrained, rejecting the weighing of evidence and credibility determinations, and instead evaluate primarily the sufficiency of the evidence to allow a reasonable jury to find for the non-moving party. A fair reading of the surveyed cases, including the decision below, shows one group substituting its own judgment for that of the trier of fact, while another takes the opposite approach. Respondents' Opposition, once 'unpacked', underscores rather than refutes these central propositions of the Petition.

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[1] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).
[2] *Eastman Kodak Indus. Co. v. Image Tech, Services, Inc.*, 504 U.S. 451 (1992).
[3] *See* Amicus Brief in Support of Petitioner 4-7. Some courts also describe this as the "broad reading" of *Matsushita*, distinguishing it from the approach of other courts and thus acknowledging the inconsistency of interpretation. *See, e.g., Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1032 (8th Cir. 2000).

The inconsistency and errors in application of the standard warrant review to ensure the proper development of antitrust at this critical intersection of substantive and procedural law. Refinement of the standard is needed to ensure judicial restraint, in deference to the trier of fact. Evidentiary sufficiency assessment must trump the weighing of evidence and credibility and probability determination, which are the province of the jury.

Further confusion and inconsistency stem from the 'equal inferences' rule, under which a court must find for the moving party if the evidence is ambiguous and the inferences of concerted and independent conduct are in equipoise. This rule has been correctly criticized for presuming that a court can reliably weigh inferences precisely and because it effectively leads courts to make preponderance determinations on summary judgment, instead of determining only whether a jury could itself reasonably find (by a preponderance) in favor of the non-moving party.

Case law and academic commentary alike highlight the need for correction by the Court.

I. Petitioner's Claims are Timely and Not Waived

Respondents' arguments about timeliness and waiver (Opp. 12.) ignore the difference between an "argument" and a "claim," which this Court has explained is dispositive. Although a claim not previously raised is not properly before this Court for review (Opp. 3, citing *Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981), and *Wills v. Texas*, 511 U.S.

1097 (1994) (O'Connor, J., concurring)), Petitioner has consistently asserted its antitrust claim throughout this litigation. After the court of appeals applied the 'tends to exclude' formulation in its decision (whereas the district court mentioned *Matsushita* only once), Evergreen distilled its *argument*, first in its rehearing petition and again as a Question Presented in its *certiorari* petition.

As Justice O'Connor explained in *Yee v. City of Escondido, Cal.*, 503 U.S. 519 (1992), "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Id.* at 534; *see also Harris Trust and Sav. Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238, 245 n.2 (2000) (Thomas, *J.*) (quoting same). In *Yee*, although petitioners did not make a regulatory 'taking' argument below regarding an ordinance, the Court viewed their arguments that "the ordinance constituted a taking in two different ways, by physical occupation and by regulation" "not [as] separate *claims* [but instead] separate *arguments* in support of a single claim."[4] *Id.* at 534. Evergreen's arguments similarly support its original claim, which therefore is properly before the Court.

Evergreen also has not waived its argument that *Kodak* qualifies *Matsushita*, or "acknowledged" that *Matsushita* is correct. Opp. 13-14. It simply argued alternatively that it satisfied *Matsushita*'s "tends to exclude" test in its summary judgment briefs before

[4] The Court nonetheless disallowed the regulatory argument under Rule 14.1(a) because petitioners failed to include it in the Question Presented. Respondents' further case support, Opp. 13, is thus misplaced, as Evergreen satisfies the rule.

the trial and appellate courts. Evergreen explained in its rehearing petition to the First Circuit that its interpretation and application of the *Matsushita* test were incorrect. Evergreen's earlier *Matsushita* citations did not endorse the very 'tends to exclude' formulation that it now challenges, as applied by the court of appeals. Respondents cite no authority for the proposition that Evergreen is estopped from refining its argument in this way, nor, logically, should Evergreen be constrained in the manner sought by Respondents.

II. The Law on Summary Judgment in Antitrust is Not Settled

The fact that courts addressing antitrust summary judgment motions often discuss *Matsushita*'s 'tends to exclude' formulation alongside the 'reasonable jury' standard (Opp. 17-21) does not save the standard from inconsistent interpretations. The issue is, rather, whether courts are applying the formulations, and using the tools for evaluating the evidence, in a consistent manner – and they are not.

Respondents' effort to distinguish *Kodak* as irrelevant to the Petition, Opp. 20-21, misses the mark. Whether the plaintiff's burden on summary judgment concerns conspiracy or market power is immaterial to the question at issue – namely, what inferences a court may properly draw based on the circumstantial evidence, and how to *assess* that evidence. The Court squarely addressed that issue. It also expressly rejected Kodak's bid to analogize the case to *Matsushita*, which Respondents fail to mention.

Under the sliding plausibility scale test, Amicus 8-9, the less plausible the charge of collusive conduct, the more evidence required for a plaintiff to avoid summary judgment. Pet. 21. In antitrust cases, the test requires raising or lowering the bar, depending on whether the conduct is procompetitive and reflects an absence of a rational motive to collude (e.g., *Matsushita*), or the conduct has resulted in higher prices and excluded competition (e.g., *Kodak*). Respondents assert that this is "consistent with the basic principle stated in *Matsushita* that a plaintiff bears the burden of 'show[ing] that the inference of conspiracy is reasonable in light of the competing inferences'" (Opp. 25, quoting *Matsushita*, 475 U.S. at 588), and that the 'tends to exclude' formulation means no more than that. But this assertion leaves unresolved the criteria by which courts should evaluate competing inferences; a court cannot measure them precisely and should assess only whether there is sufficient evidence for a jury reasonably to find in favor of the plaintiff – not whether it would itself conclude that the plaintiff satisfies the preponderance standard.

Courts also divide on two other major methodological tools – the 'equal inferences' rule, and weighing the evidence and making credibility determinations, which are the exclusive province of the trier of fact.

First, the equal inferences rule prolongs a legal fiction that courts can engage in precise quantitative assessments of circumstantial evidence, for which they are not equipped. Also, this effectively forces them to weigh the evidence, which is prohibited (*Matsushita*), as are credibility determinations. Pet.

18. *See. e.g.,* L, Meier, "Probability, Confidence, and *Matsushita* – The Misunderstood Summary Judgement Revolution," 23 J. of Law & Pol'y (2014) 69, 94 (equal inferences rule "flawed" because it "presumes that a court, as opposed to a jury, [can] come to a *precise* conclusion as to the probabilities of that disputed material fact"); *see also Galloway v. United States*, 319 U.S. 372, 405 (1943) (Black, J. dissenting) (equal inferences rule "assumes that a judge can weigh conflicting evidence with mathematical precision").

Second, courts are not permitted on summary judgment to engage in probability assessment, which is the exclusive role of the trier of fact (jury). To pre-empt it in this manner infringes on the 7th Amendment rights of the non-moving party and the obligations of the trier of fact. *See, e.g.,* Meier, *supra*, at 112-119. Instead, the court's proper role is simply to determine the sufficiency of the evidence, Pet. 22-25.

The circuit split described by Petitioner centers on these questions, reflecting the *un*settled nature of the law, and the Opposition does not address them.

III. Respondents Mischaracterize Key Cases Reflecting the Inconsistency in the Courts

Proper analysis of key cases belies Respondents' assertion that the circuits share "broad agreement on the basic principles governing consideration of

summary judgment motions in antitrust cases," Opp. 21.[5]

The Third Circuit in *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224 (3d Cir.), *cert. denied* 510 U.S. 994 (1993), did not "emphasize" that courts' focus must remain on whether plaintiff's evidence "tends to exclude the possibility that [the defendants] were acting independently." Opp. 22 (quoting *Petruzzi's*, 998 F.2d at 1232). The emphasis is Respondents', by omitting the court's rationale that "more liberal inferences from the evidence should be permitted than in *Matsushita*" because it found the challenged activities to be not procompetitive, "in direct contrast to *Matsushita*." *Id.* at 1232. In these circumstances, the plaintiff's burden is to assert a theory that is plausible, whereas the defendants do *not* satisfy their burden simply by demonstrating a plausible rationale for their theory. *Id.* at 1232.

Furthermore (Opp. 23), the Third Circuit's affirmance as to defendant Standard Tallow shows the court rejecting the equal inferences rule, expressly avoiding the traps of weighing the evidence or assessing credibility, and instead focusing on the *sufficiency* of the evidence. *Petruzzi's* at 1241 (limiting inferences against Standard because of insufficient data, the only evidence implicating it, but reversing summary judgment as to the other two defendants in part because lower court impermissibly weighed the evidence).

[5] *Bell Atl. Corp v. Twombly*, 550 U.S. 242 (2007), Opp. 21, concerned the plausibility threshold for surviving a motion to dismiss, not summary judgment, and in any case does not contradict Petitioner's argument.

The absence of any mention of the 'tends to exclude' formulation in the Seventh Circuit cases, rather than supporting Respondents' argument, Opp. 24-26, indicates that these panels were *not* explicitly guided by the 'tends to exclude' standard. Respondents cannot credibly twist that formulation as characterized by Judge Posner (Pet. 16-17), under which the required quantum of evidence is beyond reach, into an equivalence with the reasonable jury formulation. The Seventh Circuit decisions contrast sharply with courts taking a more categorical approach. *See* Pet. 22-24.

Respondents mischaracterize the Ninth Circuit's decision in *In re Coordinated Pretrial Proceedings in Petroleum Products Litigation*, 906 F.2d 432 (9th Cir.), *cert. denied*, 500 U.S. 959 (1991). First, the Ninth Circuit panel expressly rejected the equal inferences rule (Pet. 25). Next, Respondents endorse Judge O'Scannlain's rejection in *In Re Citric Acid Litigation*, 191 F.3d 1090, 1096-97 (9th Cir. 1990), of the *Petroleum Products* panel's approach as "dicta," because based on direct evidence. Opp. 27. On the contrary (Pet. 27, n.6), the decisive evidence regarding the major oil producer defendants was clearly circumstantial in nature. Judge O'Scannlain's references to direct evidence pertained not to the collusion among the defendants but to their efforts to ensure that independent (non-party) producers coordinated their own pricing behavior – and the *Petroleum Products* panel itself said the *Matsushita* standard therefore would not apply to this discrete, direct evidence. *Petroleum Products*, *supra*, 906 F.2d at 459-60, n.22. Also, the court made no finding that such limited direct evidence was

either necessary or sufficient to deny summary judgment.

U.S. Info. Sys. Inc. v. Int'l Brotherhood of Elec. Workers, 366 F. App'x 290, 292 (2d Cir. 2010) (unpublished), rejecting the contention that *Kodak* altered the 'tends to exclude' standard (Opp. 28), does not undercut Petitioner's reliance on *In re Publication Paper Antitrust Litig.*, 690 F.3d 51 (2d Cir. 2012). Pet. 27. The court in *Publication Paper* rejected weighing the evidence or making credibility determinations and instead emphasized sufficiency of the evidence as the deciding criterion.

Respondents' arguments that certain representative cases chosen by Petitioner do not reflect a circuit split in actual application, Opp. 29-30, are unavailing. *See, e.g., Merck-Medco Managed Care, LLC v. Rite Aid Corp.*, 1999 WL 691840, *8, 201 F.3d 439 (4th Cir. 1999) (expressly adopting equal inferences rule and variously requiring plaintiff "'to *exclude* the possibility that the alleged conspirators acted independently"') (emphasis added) (citation omitted); *Corner Pocket of Sioux Falls, Inc. v. Video Lottery Technologies, Inc.*, 123 F.3d 1107, 1009, 1112 (8th Cir. 1997) (rejecting approaches of Third and Ninth Circuits and stating that "the court must necessarily weigh the summary judgment evidence of both parties"); *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1032, 1035 (8th Cir. 2000) (identifying itself as one of the "majority" of circuits to read *Matsushita* "broadly," citing *Sioux Falls*' rejection of Third and Ninth Circuit approaches, and variously requiring that plaintiff "*exclude* the possibility of independent action") (emphasis added).

IV. *Evergreen*, Which Applies One of the Dueling Interpretations of the Standard, Is a Proper Vehicle for Review

Respondents' recitation of alleged facts and characterization of the lower court decisions as "fact-bound" beg the question: it is not which competing version of the facts is correct but whether the court of appeals correctly interpreted and applied the 'tends to exclude' standard.

The appellate court's reasoning typifies the errors of interpretation and judicial overreach on summary judgment now unduly raising the bar in some courts to survive summary judgment. For instance:

- If "significant quality problems" including "bad odor," "high levels of bacterial contamination" (Opp. 4, citing Pet. App. A-19-20), and "poor melt flow" (Opp. 6), were the obstacles to Respondents' acceptance of Evergreen's model that they allege, they reasonably should have provided evidence of complaints from consumers regarding the 150,000+ cases of foam food service products the converters produced and sold to them from Evergreen recycled resin, yielding $2 M in revenue. They did not, yet the court apparently viewed alleged dissatisfaction over quality as outweighing Evergreen's substantial production and sales; thus, weighing trumped sufficiency and the court preempted the trier of fact.
- No amount of repetition of the erroneous, unsupported assertion that Evergreen saw its

model as more expensive than using virgin resin' (Opp. 16) will make it so. The model was cost-neutral[6] and it was the *Respondents* who allegedly viewed the model as more expensive (Pet. 32-33). For the court, the mere unsupported *possibility* that individual defendants unilaterally chose not to deal with Evergreen on the commission model because of perceived higher cost appears to have trumped evidence of a course of collective decision-making, *including pricing*, over the relevant five-year period.[7] Also, earlier failed recycling attempts, Opp. 4, do not yield useful inferences about Evergreen; they failed largely because the traditional recyclers produced only non-food grade recycled resin, of little value ($.05-.25/lb)/ and therefore not sustainable, unlike Evergreen.

- Contrary to Respondents' assertions (Opp. 5, 9-10 (citing Pet App. B-45)), the record reflects substantial success by Evergreen before it reached out to the converter defendants, Pet. 6-7, again reflecting its competitive viability. Weighing of evidence and credibility determination apparently trumped sufficiency.
- Regarding the Los Angeles recycling plant proposal (Op. 5-6, Pet. 8-9): If the defendants were not seeking group buy-in and action, they would not as *a group* have requested a proposal from Evergreen. At the very least, a jury could reasonably view this evidence of

[6] Evergreen was selling its recycled resin for a price similar to virgin resin ($0.60-$0.85/lb in the 2005-08 period).

[7] Pet. 8-9, 32-40 (detailing conduct). *See* SA2125 (virgin resin supplier Dow Chemical communications to defendants urging common price per pound to be paid for Evergreen resin).

concerted action, including the group's subsequent collective rejection of the proposals, as supporting Evergreen's Section 1 claim, given that Evergreen was only looking for participation from at least one converter.

- Whether a "sham" or 'barely operational', the more important point about PDR (Opp. 7), ignored by the court, is the public relations role it served for Respondents – fully aware of its non- or negligible performance – in supporting their purported but pretextual commitment to recycling. The court incorrectly requires that Petitioner exclude all non-conspiratorial explanations of the defendants' conduct concerning the role played by PDR , thus applying the 'tends to exclude' standard just as Judge Posner described it – requiring the non-moving party to prove a sweeping negative – instead of "simply requiring sufficient evidence to allow a reasonable fact finder to infer that the conspiratorial explanation is more likely than not."[8]
- The assertion that "Petitioner's product costs never went below $2.00 per pound [. . . --] four times the cost of virgin resin in late 2008," Opp. (citing B-7, -21), is misleading. Evergreen's model was competitive based on the two additional revenue streams (environmental fees and commissions), production costs notwithstanding. With no confirming evidence, the court allows

[8] *See* P.E. Areeda and H. Hovenkamp, *Fundamentals of Antitrust Law*, § 14.03(b), at 14-25 (4th ed. 2011) (footnotes omitted). The court determines evidentiary sufficiency for the *trier of fact* then to draw and weigh inferences according to the preponderance burden.

speculation about the supposed reasonableness of each defendant unilaterally rejecting Evergreen's model to trump Evergreen's allegations and evidence of success on a smaller scale.

- The court's ruling that the unauthenticated minutes of a March 18, 2005 "Plastics Group" meeting are inadmissible is erroneous, Pet. 34-35. Dismissal of the evidence as irrelevant in any case "because the claimed conspiracy did not begin until two years later," Op. 32, n.6, misses the point: the minutes reflect an industry animus and motive on the part of the defendants dating throughout the relevant time period, and from which the court should have drawn reasonable inferences of motive in favor of Evergreen.[9]

[9] Respondents' further assertions at Opp. 32, n.6, are ill-founded or matters for the trier of fact.

CONCLUSION

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

Respectfully submitted,

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