16-1277

In the
Supreme Court of the United States

MCGARRY & MCGARRY LLC,

Petitioner,

v.

RABOBANK, N.A.,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

12 U.S.C. § 1972(1)(E) prohibits a bank from making an exclusive dealing arrangement with a customer, stating "a bank shall not ... furnish any service on the condition ... that the customer shall not obtain some other ... service from a competitor of such bank ..."

BMS provides software that most Chapter 7 Bankruptcy Trustees in the United States use to administer their estates. To leverage the market power of BMS, Rabobank pays BMS to require all of BMS's Trustees to deposit substantially all of the money in each of their present and future Chapter 7 estates exclusively at Rabobank, as long as the Trustee uses BMS software for that estate. Under this arrangement, Rabobank furnishes deposit services on the condition that the Trustees using BMS software for an estate do not obtain deposit services for that estate from another bank.

The Seventh Circuit (Posner, J.) ruled that this arrangement was not an exclusive dealing arrangement, but rather a single transaction, because the Trustees had the contractual right to deposit estate funds at another bank if the Trustees give up a service, in this case the BMS software, that they otherwise want to use.

The question presented is:

What is an exclusive dealing arrangement?

PARTIES TO THE PROCEEDING

The petitioner here is, and plaintiff-appellant in the Seventh Circuit was, McGarry & McGarry LLC ("McGarry").

The respondent here is, and defendant-appellee in the Seventh Circuit was, Rabobank, N.A. ("Rabobank").

The proposed intervenor in the district court was Bankruptcy Management Solutions, Inc. ("BMS"), which sought to intervene to protect the confidentiality of certain of its documents. BMS withdrew its motion to intervene.

CORPORATE DISCLOSURE STATEMENT

McGarry is a privately held limited liability company, with its place of business in Chicago, Illinois.

Rabobank is a subsidiary of Utrecht America Holdings, Inc., Rabobank International Holdings, B.V. (new) and Cooperative Rabobank, U.A. (new), with its principal place of business in Roseville, California.

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INTRODUCTION

McGarry respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit (Posner, J.), that dismissed McGarry's complaint against Rabobank for failing to allege an exclusive dealing arrangement in violation of 12 U.S.C. § 1972(1)(E).

In *United Shoe Machinery Corp. v. United States*, 258 U.S. 451 (1922), and *Int'l Bus. Machines Corp. v. United States*, 298 U.S. 131 (1936), this Court ruled that arrangements that require customers to deal exclusively with a supplier are exclusive dealing arrangements, even if the customers could avoid the exclusivity by giving up some product or service that the customers want to use.

The Court of Appeals for the First, Second, and Fourth Circuits have remained true to these rulings.

This petition arises because the Seventh Circuit has fully departed from this Court's rulings. The Seventh Circuit has created a new *per se* rule that allows a supplier to avoid the scrutiny of an exclusive dealing prohibition by letting its customers deal with other suppliers on the condition that the customers give up a service that the customers want to use. Applying this new rule, the Seventh Circuit allowed Rabobank to avoid the scrutiny of the exclusive dealing prohibition of

§ 1972(1)(E) by letting its customers, Chapter 7 Bankruptcy Trustees, deposit money of their estates at other banks on the condition that a Trustee gives up the software of Rabobank's partner in this arrangement, BMS.

This Court has not ruled on an exclusive dealing arrangement since *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961). The Seventh Circuit's full departure from this Court's precedents, coupled with the impact of Rabobank's continuing arrangement on the administration of Chapter 7 estates, suggest that this case – arising at the intersection of banking, bankruptcy, and antitrust law – is an appropriate vehicle for this Court to revisit the law concerning exclusive dealing arrangements.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 847 F.3d 404, and a copy is annexed as Appendix A.

The transcript of the oral decision of the district court for the Northern District of Illinois is not reported, but a copy is annexed as Appendix B.

JURISDICTION

The Seventh Circuit entered its judgment on January 26, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The full text of 12 U.S.C. § 1972 below is set forth in Appendix D, and summarized below.

12 U.S.C. § 1972

"(1) A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement—

* * *

(E) that the customer shall not obtain some other credit, property, or service from a competitor of such bank, a bank holding company of such bank, or any subsidiary of such bank holding company, other than a condition or requirement that such bank shall reasonably impose in a credit transaction to assure the soundness of the credit."

12 U.S.C. § 1975

"Any person who is injured in his business or property by reason of anything forbidden in section 1972 of this title may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without regard to the amount in controversy, and shall be entitled to recover three times the amount of the damages sustained by him, and the cost of suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE

This putative class action alleges that Rabobank has used an exclusive dealing arrangement – with more than 50 percent of the Chapter 7 Bankruptcy Trustees in the United States – to eliminate Rabobank's need to compete for over a billion dollars of banking deposits of Chapter 7 estates.

A. The Factual Background

Rabobank's exclusive dealing arrangement begins with BMS software. More than 50 percent of the Chapter 7 Trustees in the United States consider this software valuable, and license it from BMS. Recognizing the market power of BMS, Rabobank pays BMS to require the Trustees who license BMS software to deposit substantially all the money of their present and future Chapter 7 estates exclusively at Rabobank, as long as the Trustee uses BMS software for those estates. BMS then enters into software agreements with Trustees, which require that exclusivity. The standard contract between BMS and the Trustees provides in applicable part:

> "Client [the Trustee] shall maintain all or substantially all of its fiduciary balances related to engagements for which Client[] utilizes the Software with (i) bank(s) designated by BMS …."

The Trustees must then enter into a separate agreement with Rabobank, and deposit the funds of their present and future estates exclusively at Rabobank, as long as they use BMS software for those estates. This arrangement has allowed Rabobank to capture more than 50 percent of the market for the banking deposits of Chapter 7 estates, without having to compete with other banks for those deposits.

Capitalizing on the fact that this exclusivity prevents Trustees from taking any portion of their estate deposits to another bank unless they give up the BMS software, Rabobank pays no interest on those estate deposits. In addition to failing to pay interest, Rabobank automatically deducts from the estate accounts a monthly fee for the combined services of Rabobank and BMS. Rabobank then pays BMS (i) all or a portion of the fee deducted from the estate accounts, and (ii) a fee for arranging the estates' deposits exclusively at Rabobank.

Following their usual practices, Rabobank and BMS each entered into a contract with Chapter 7 Trustee Eugene Crane ("Crane"). After being appointed Trustee of the Chapter 7 Estate of Integrated Genomics, Crane used BMS software for that estate. Under his contracts with Rabobank and BMS, Crane's use of the BMS software required Crane to deposit substantially all of the funds of that estate at Rabobank, and at no other bank. Rabobank paid no interest on those amounts, and automatically deducted a separate fee of

$514.16 from the estate's bank account. McGarry was a creditor of that estate, and filed a proof of claim for $78,308.94. McGarry ultimately obtained a distribution of $12,472.55, which the Seventh Circuit noted would have been greater but for Rabobank's failure to pay interest (2a-3a) and Rabobank's automatic deduction of an additional fee. (2a)

Under Rabobank's exclusive dealing arrangement, Rabobank and BMS win and the creditors of the estates – including McGarry – lose. The creditors of the estates lose for the same reason that Rabobank's exclusive dealing arrangement should violate 12 U.S.C. § 1972(1)(E). Through Rabobank's contract with BMS and BMS's contracts with Trustees, a Trustee who wants to use BMS software has no choice but to deposit substantially all the money of all their estates exclusively at Rabobank. For example, if a Trustee uses BMS software for a $1,000,000 estate, this exclusive dealing arrangement prevents the Trustee from depositing any portion of the $1,000,000 with another bank, including one that would pay interest, unless the Trustee gives up the BMS software for that estate. Because Rabobank has eliminated competition for those deposits, Rabobank has no reason to pay interest on those deposits. This failure to pay interest reduces the distribution to the creditors of the estates.

BMS has admitted in an unrelated proceeding that Rabobank is holding all the money of all the estates whose Trustees use BMS software. *In re*

On-Site Sourcing, 09-10816 (RGM) (Bkcy. E.D. Va.) at Dkt. 926 at 95/200. Based upon publicly available information, we calculate that Rabobank holds approximately $2,000,000,000 of estate deposits on which it pays no interest.

While McGarry's individual damages are small, the damages of the putative class McGarry seeks to represent are substantial. If Rabobank held $2,000,000,000 in deposits of Chapter 7 bankruptcy estates, and if a market rate of interest on those amounts were a conservative .002, then Rabobank would have avoided paying estates interest of $4,000,000 per year, and $16,000,000 over the four-year statute of limitations period, before the automatic trebling under 12 U.S.C. § 1975. Accordingly, under these assumptions, the damages to a potential class would be $48,000,000, not counting the fee, and not counting the damage that Rabobank would cause by continuing this practice, indefinitely.

B. The Proceedings in the District Court

On June 8, 2016, McGarry, on behalf of itself and similarly situated creditors, commenced a putative class action against Rabobank, asserting a claim for damages under 12 U.S.C. § 1972. (21a) The putative class could include tens of thousands of similarly situated creditors.

On August 4, 2016, Rabobank filed a motion, returnable August 10, 2016, to (i) compel arbitration, and (ii) dismiss the complaint pursuant

to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. On August 9, 2016, McGarry opposed the motion to compel arbitration, and anticipated obtaining on August 10, 2016, a briefing schedule on the motion to dismiss.

On August 10, 2016, the district court granted the motion of Rabobank to dismiss the case with prejudice. The district court ruled that 12 U.S.C. § 1972(1)(E) does not apply to exclusive dealing arrangements that involved only one service (11a-13a), even though Rabobank did not make that argument. The district court entered a final judgment on August 10, 2016. McGarry filed a notice of appeal the next day.

C. The Proceedings in the Seventh Circuit

McGarry argued that the district court erred as a matter of law in ruling that 12 U.S.C. § 1972(1)(E) does not apply to exclusive dealing arrangements that involve only one service, and that there was no other basis to affirm the judgment.

After oral argument on January 5, 2017, the Seventh Circuit affirmed on January 26, 2017. In addition to stating that McGarry had failed to adequately plead damages, the Seventh Circuit (Posner, J.) wrote:

> "The plaintiff argues that by requiring the trustee in the Integrated bankruptcy to obtain banking services exclusively from Rabobank,

the bank conditioned its provision of services on the trustee's not obtaining equivalent services from a competitor of that bank, and so violated the Act.

The district judge was right to reject the argument. The plaintiff fails to distinguish between exclusive dealing and a single transaction. **Had Rabobank conditioned its provision of services to trustee Crane on his agreeing never to hire any bank other than Rabobank in any bankruptcy proceeding in which he's the trustee, that would be exclusive dealing.** But if, as in this case, all Crane decides is that he needs a bank—not a bunch of banks—to provide banking services to him in a particular bankruptcy of which he's the trustee, there is no exclusivity; in his next trusteeship Crane will be free to hire a different bank. He may well hire Rabobank the next time too, assuming he wants to hire BMS, since BMS and Rabobank work closely together and in the present case BMS made it a condition of agreeing to work with the trustee that he hire Rabobank. But again it would be a decision based on the trustee's needs in a new and different case, not based on a commitment made before the new case existed. **Although Crane has agreed that in any future case in which he is a trustee *and* hires BMS he will hire Rabobank as well, he has not committed to hiring BMS, and if he doesn't then he won't have to hire**

Rabobank. The fact that he prefers to work with these two companies is not a commitment not to work with any others and therefore to deal exclusively with those two.

Exchange National Bank of Chicago v. Daniels, 768 F.2d 140, 143 (7th Cir. 1985), 'construed [12 U.S.C.] § 1972 as prohibiting exclusive dealing practices-those that attempt to prevent customers from dealing with other banks.' The customer in this case was trustee Crane. No one forced him to deal with BMS and Rabobank. He chose to deal with them rather than with other suppliers of banking services because they're highly experienced in the provision of the services that the trustee required. **Suppose your doctor tells you to take an 81 mg aspirin every night before going to bed, in order to reduce the likelihood of a heart attack. So you go and buy a small bottle of Bayer 81 mg aspirin. After a while it runs out and you buy another, identical, bottle of Bayer 81 mg aspirin. And so on indefinitely. Could a competitor of Bayer sue you for engaging in exclusive dealing, because you refuse to deal with Bayer's competitors? No, and the premise of the plaintiff's suit is as flimsy."** (Emphasis added.) (3a)

REASONS FOR GRANTING THE PETITION

This Court ruled in *United Shoe Machinery* and *Int'l Bus. Machines* that arrangements that require customers to deal exclusively with a supplier are exclusive dealing arrangements, even if the customers could avoid the exclusivity by giving up some product or service that the customers want to use. Contrary to these rulings, the Seventh Circuit ruled that Rabobank's arrangement with Chapter 7 Bankruptcy Trustees is *per se* not exclusive dealing, because the Trustees could avoid the exclusivity by giving up the BMS software. The Seventh Circuit's ruling allows Rabobank to continue to (i) eliminate competition for billions of dollars of deposits of Chapter 7 bankruptcy estates, unless Trustees stop using BMS software, and (ii) avoid paying interest on those deposits, thereby damaging thousands of past, present, and future unsecured creditors.

I. THE SEVENTH CIRCUIT'S NEW *PER SE* RULE CONFLICTS WITH THIS COURT'S RULINGS IN *UNITED SHOE* AND *INT'L BUS. MACHINES.*

The Seventh Circuit ruled that the arrangement Rabobank created with Chapter 7 Bankruptcy Trustees – that prevents the Trustees from depositing an estate's funds at a bank other than Rabobank unless the Trustees give up BMS software – was *per se* not an exclusive dealing arrangement. Under the Seventh Circuit's ruling, it does not matter how badly the customer wants to

use the service that it would have to give up to avoid the exclusivity. All that matters is that a customer has the contractual ability to avoid the exclusivity by giving up a service.

This ruling of the Seventh Circuit concerning the scope of an exclusive dealing arrangement directly conflicts with this Court's ruling in *United Shoe Machinery Corp. v. United States*, 258 U.S. 451 (1922). In that case, this Court considered whether an exclusive dealing arrangement existed when the contract provided "if the lessee fails to use exclusively machinery of certain kinds made by the lessor, the lessor shall have the right to cancel the right to use all such machinery so leased...." 258 U.S. at 456. The fact that the contract in *United Shoe* allowed the customer to deal with other suppliers by giving up United Shoe's leased equipment did not prevent this Court from finding that this was an exclusive dealing arrangement within the scope of § 3 of the Clayton Act, 15 U.S.C. § 14, stating:

> "While the clauses enjoined do not contain specific agreements not to use the machinery of a competitor of the lessor, the practical effect of these drastic provisions is to prevent such use. We can entertain no doubt that such provisions as were enjoined are embraced in the broad terms of the Clayton Act, which cover all conditions, agreements, or understandings of this nature."

258 U.S. at 457.

Similarly, in *Int'l Bus. Machines Corp. v. United States*, 298 U.S. 131, 134 (1936), this Court considered whether IBM engaged in an exclusive dealing arrangement by leasing "its machines for a specified rental and period, upon condition that the lease shall terminate in case any cards not manufactured by the lessor are used in the leased machine." This Court held that to be an exclusive dealing arrangement in violation of 15 U.S.C. § 14, stating:

> "It is true that the condition is not in so many words against the use of the cards of a competitor, but is affirmative in form, that the lessee shall use only appellant's cards in the leased machines. But as the lessee can make no use of the cards except with the leased machines, and the specified use of appellant's cards precludes the use of the cards of any competitor, the condition operates in the manner forbidden by the statute. *See United Shoe Machinery Corp. v. United States*, 258 U.S. 451 [1922]."

298 U.S. at 135.

If the Seventh Circuit had followed *United Shoe Machinery* and *Int'l Bus. Machines*, the Seventh Circuit would have ruled differently. In all three cases, the customer could avoid the exclusivity that the arrangement imposed by giving up a product or service that the customer wants to use. In *United Shoe*, the customer could avoid the exclusivity by giving up the machines that it leased

from United Shoe. In *Int'l Bus. Machines*, the customer could avoid the exclusivity by giving up the IBM machines when it used non-IBM cards. In the present case, the customer could avoid the exclusivity by giving up the BMS software. The conflict arises because (i) in *United Shoe* and *Int'l Bus. Machines,* this Court ruled there was an exclusive dealing arrangement, and (ii) in the present case, the Seventh Circuit ruled *per se* that there was not.

In addition to departing from this Court's precedents on exclusive dealing arrangements, the Seventh Circuit has departed from this Court's antitrust jurisprudence – by evaluating the challenged practice based upon a formalistic distinction and ignoring its practical consequences. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466–67 (1992) ("Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law. This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the 'particular facts disclosed by the record.' *Maple Flooring Manufacturers Assn. v. United States,* 268 U.S. 563, 579, 45 S.Ct. 578, 583, 69 L.Ed. 1093 (1925)"). The Seventh Circuit's *per se* rule of law is based upon the form of the transaction, and ignores the importance of the customer's need for the BMS software in creating the exclusivity.

The Seventh Circuit could not have distinguished *United Shoe* and *Int'l Bus. Machines*

because they concern the Clayton Act, 15 U.S.C. § 14, while the present case concerns the Bank Holding Company Act, 12 U.S.C. § 1972. The statutes define exclusive dealing using analogous phrasing.

12 U.S.C. § 1972	15 U.S.C. § 14
"(1) A bank shall not in any manner ...	"It shall be unlawful for any person ... to ...
furnish any service...	lease or make a sale or contract for sale of goods ...
on the condition or requirement—	on the condition, agreement, or understanding
(E) that the customer shall not obtain some other ... service from a competitor of such bank..."	that the lessee or purchaser thereof shall not use or deal in the goods of a competitor..."

Davis v. First National Bank of Westville, 868 F.2d 206, 209 (7th Cir. 1989), the only case the Seventh Circuit cited in its opinion, recognized that § 1972 is the banking equivalent of Section 3 of the Clayton Act, 15 U.S.C. § 14. *See also Parsons Steel, Inc. v. First Alabama Bank of Montgomery, N.A.*, 679 F.2d 242, 245 (11th Cir. 1982).

The Seventh Circuit could not have distinguished *United Shoe* and *Int'l Bus. Machines*

because the Clayton Act, 15 U.S.C. § 14, requires that the challenged restraint "substantially lessen competition," and the Bank Holding Company Act, 12 U.S.C. § 1972(1)(E) does not. The text and the legislative history of § 1972 demonstrate that it prohibits certain types of conduct regardless of the amount of competition that the prohibited conduct affects. *See* Senate Banking and Currency Committee Report No. 91-1084, 91st Cong., 2d Sess. (1970), reprinted in 1970 U.S. Code Cong. & Admin. News, pp. 5519, 5558. ("Moreover, as individual tying arrangements may involve only relatively small amounts, the prohibitions of this section are applicable regardless of the amount of commerce involved."). Congress therefore would not have intended to narrow the definition of an exclusive dealing arrangement under § 1972(1)(E) by grafting on to that definition a requirement of a substantial lessening of competition.

The Seventh Circuit could not have distinguished *United Shoe Machinery* and *Int'l Bus. Machines* based upon the state of mind of Trustee Crane. The record contains no allegation or evidence as to whether (i) Crane decided he needed "a bank—not a bunch of banks" (3a) or (ii) Crane "prefers" to deal exclusively with both Rabobank and BMS, and earn no interest (4a), rather than deposit at another bank and earn interest.

Because 15 U.S.C. § 14 and 12 U.S.C. § 1972(1)(E) define exclusive dealing arrangements the same way, the Seventh Circuit's new *per se* rule

of law also conflicts with rulings of the First, Second and Fourth Circuits under 15 U.S.C. § 14.

In *Signode Steel Strapping Co. v. Fed. Trade Comm'n*, 132 F.2d 48, 49 (4th Cir. 1942), the Fourth Circuit considered a lease of machinery that provided "the lessee or purchaser thereof shall not use with same any wire or strapping not acquired from the company." Even though the customers could have avoided the obligation to purchase wire exclusively from the supplier by giving up the leased machine, the Fourth Circuit rejected the supplier's argument, followed *Int'l Bus. Machines,* and ultimately held that the practice was an unlawful exclusive dealing arrangement.

In *Judson L. Thomson Mfg. Co. v. Fed. Trade Comm'n*, 150 F.2d 952, 955 (1st Cir. 1945), the First Circuit considered a lease of a rivet machine that provided the lessee "'shall not use or allow said leased machinery to be used for setting any other rivets than those made by' the [lessor]." Even though the customer could have avoided the obligation to purchase rivets exclusively from the supplier by giving up the rivet machine, the First Circuit followed *United Shoe* and *Signode Steel Strapping* and found the arrangement to be exclusive dealing in violation of 15 U.S.C. § 14.

In *Andrea Theatres, Inc. v. Theatre Confections, Inc.*, 787 F.2d 59 (2d Cir. 1986), the Second Circuit addressed an arrangement between a theatre chain and a more economically powerful concessioner. The concessioner loaned the theatre

chain money, and the theatre chain promised the concessioner the exclusive right to provide concessions at its theatre chain while the loan remained outstanding. Although the theatre chain could have avoided the obligation to provide concessions exclusively to the concessioner by repaying the loan, the Second Circuit held these allegations pled a valid claim for the violation of 15 U.S.C. § 14.

In each of these three decisions of the Court of Appeals, the customer had the ability to avoid the exclusivity by giving up a product or service that the customer wanted to use. In each case, the Court of Appeals nevertheless found an exclusive dealing arrangement.

The settled rule of law from *United Shoe* and *Int'l Bus. Machines* has led courts to consider the fact intensive question of whether an agreement that contains no express requirement of exclusivity should be prohibited because it provides an inducement, such as a rebate, that coerces *de facto* exclusive dealing. *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir. 2000); *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254 (3d Cir. 2012); *McWane, Inc. v. F.T.C.*, 783 F.3d 814 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 1452, 194 L. Ed. 2d 550 (2016). If the *per se* rule that the Seventh Circuit created were the law, the Court of Appeals for the Third, Eighth and Eleventh Circuits would not have needed to decide any issue concerning *de facto* exclusive dealing. Under the Seventh Circuit's *per se* rule, the fact that the customer had the

option to deal with other suppliers would have immunized the transaction from scrutiny as an exclusive dealing arrangement.

Accordingly, the failure of the Seventh Circuit to follow this Court's rulings in *United Shoe* and *Int'l Bus. Machines* – and instead create a new *per se* rule based upon a hypothetical involving an individual's preference for Bayer® aspirin – should provide a basis for this Court to grant the petition.

II. THE QUESTION PRESENTED HAS A SUBSTANTIAL IMPACT ON CHAPTER 7 BANKRUPTCY CASES, AND BEYOND.

The business practices of Rabobank that the Seventh Circuit approved have a substantial impact on the ability of the Chapter 7 bankruptcy system to meet its goal of efficiently distributing the assets of Chapter 7 bankruptcy estates to the parties entitled to receive those assets. *Kothe v. R.C. Taylor Trust*, 280 U.S. 224, 227 (1930) ("The broad purpose of the Bankruptcy Act is to bring about an equitable distribution of the bankrupt's estate among creditors holding just demands based upon adequate consideration.").

On a class-wide basis, the amount in dispute is substantial. If Rabobank is holding $2,000,000,000 in deposits of Chapter 7 estates, and market forces would have required Rabobank to pay interest at a conservative rate of .002, Rabobank is depriving Chapter 7 estates of $4,000,000 per year through its exclusive dealing arrangement. Those amounts

should be trebled under 12 U.S.C. § 1975. On a class-wide basis, the claim for lost interest alone is worth millions of dollars a year, indefinitely.

Rabobank's arrangement affects tens of thousands of unsecured creditors. The Executive Office for U.S. Trustees reports that there were 68,793 Chapter 7 cases closed in 2012, 59,833 in 2013, 56,482 in 2014, and 45,415 in 2015, in which unsecured creditors received a distribution from the estate. *Chapter 7 Trustee Final Reports*, U.S. DEP'T OF JUSTICE, https://www.justice.gov/ust/bankruptcy-data-statistics/chapter-7-trustee-final-reports (last checked April 20, 2017). Even if there were only two creditors in each case – not counting the Trustees with arbitration clauses in their contracts – Rabobank's exclusive dealing arrangement would affect thousands of creditors.

Rabobank's practice is continuing. Absent the granting of the petition, this issue will most likely recur, especially given the conflict between the Seventh Circuit's ruling and the precedents of this Court and the First, Second, and Fourth Circuits. Moreover, to the extent that other banks that provide bankruptcy banking services have not done so, those banks may copy the arrangement that the Seventh Circuit has approved with a *per se* rule.

The Seventh Circuit's *per se* rule could have serious consequences if extended to other banks and other software companies. If Citibank could lawfully pay Microsoft to require Microsoft's licensees of Windows® software to deposit

exclusively with Citibank as long as the licensee used Windows® software, other banks would have difficulty securing deposits given the prevalence of Windows®.

III. THIS PETITION IS AN APPROPRIATE VEHICLE TO REVIEW THE QUESTION PRESENTED.

The Seventh Circuit ruled on the precise issue that McGarry now raises, which is fully preserved for this Court's review. The Seventh Circuit's one-paragraph alternative ruling, that McGarry did not adequately plead damages, should not provide a basis to affirm the judgment because it results from an oversight. The Seventh Circuit *sua sponte* found that "[t]he only quantified harm he [sic] incurred was the $194.35 fee deducted from his [sic] share of the distribution of the bankrupt's assets to the creditors...." However, McGarry pled in its complaint that Rabobank's elimination of competition for the deposits of the estates, through its exclusive dealing arrangement, allowed Rabobank to avoid paying interest on the deposit of the Integrated Estate. (27a-30a) McGarry detailed that argument in its brief on appeal. (App. Dkt. 7 at 18-19, 27, 41-42/71) Indeed, Rabobank did not argue, in the district court or the Seventh Circuit, that the complaint failed to adequately plead damages. The Seventh Circuit's oversight should not immunize from review the fact that the Seventh Circuit has created a new *per se* rule of law that is contrary to this Court's precedent.

CONCLUSION

McGarry respectfully requests that this Court grant its petition for a writ of certiorari.

April 21, 2017

Respectfully submitted,

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