15-519

No. _____

Supreme Court of the United States

AIRCRAFT CHECK SERVICES COMPANY, *et al.*,
on Behalf of The Class,

Petitioners,

—v.—

VERIZON WIRELESS, *et al.*,

Respondents.

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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QUESTIONS PRESENTED

In *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), the Court held that, on summary judgment, "antitrust law limits the range of permissible inferences from ambiguous evidence in a §1 case," and that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* at 588. A majority of the Courts of Appeal, however, do not apply that approach to direct evidence of antitrust conspiracy, drawing all reasonable inferences from such evidence in favor of the party opposing summary judgment. Petitioners offered direct evidence of antitrust conspiracy: an admission by an executive of Respondent T-Mobile that Respondents' parallel price increases were collusive. The Seventh Circuit did not follow the majority approach to Petitioners' direct evidence, rejecting it as inconclusive.

Additionally, the Seventh Circuit's holding that no adverse inference could be drawn from the destruction of additional e-mails, in the same e-mail chain, by the same executive who admitted that the price increases were collusive, implicates two more Circuit splits. The Circuits are split on whether a trier of fact's ability to draw an adverse inference from the destruction of evidence is predicated upon (1) bad faith on the part of the spoliator and (2) antecedent judicial findings of the facts needed to support the inference.

The questions presented are:

1. Whether the summary judgment standard articulated in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), applies when plaintiffs offer direct evidence of conspiracy.

2. Whether a finding of bad faith is required before a trier of fact may draw an adverse inference from the destruction of evidence.

3. Whether a trier of fact may draw an adverse inference from the destruction of evidence only if the trial court first makes the factual findings that authorize such an inference.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners Aircraft Check Services Company, Nicholas Iltsopoulos, David Keefer, Jim Morris, Melissa Leigh Randolph, and Premiere Investment Consulting were plaintiffs-appellants in the court of appeals proceedings.

Petitioners Aircraft Check Services Company and Premiere Investment Consulting do not issue stock, and are not subsidiaries of or otherwise controlled by a parent corporation.

AT&T Mobility, LLC ("AT&T"); Sprint Communications, Inc. (f/k/a Sprint Nextel Corporation) ("Sprint"); T-Mobile USA, Inc. ("T-Mobile"); Verizon Wireless ("Verizon"); and CTIA – The Wireless Association ("CTIA") were defendants-appellees below, and are Respondents in the proceedings before this Court.

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Black's Law Dictionary
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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit was issued on April 9, 2015. It is published as *In re Text Messaging Antitrust Litig.*, 782 F.3d 867 (7th Cir. 2015), and reproduced in the Petition's Appendix ("Pet.App."):1a-22a. The appeal was from the district court's order granting summary judgment, reported as *In re Text Messaging Antitrust Litig.*, 46 F. Supp. 3d 788 (N.D. Ill. 2014). That opinion is reproduced in the Appendix. *See* Pet.App.:26a-70a.

A previous appeal was reported as *In re Text Messaging Antitrust Litig.*, 630 F.3d 622 (7th Cir. 2010). Previous district court orders were reported as *In re Text Messaging Antitrust Litig.*, No. 08 C 7082, 2009 U.S. Dist. LEXIS 115513 (N.D. Ill. Dec. 10, 2009), and *In re Text Messaging Antitrust Litig.*, No. 08 C 7082, 2010 U.S. Dist. LEXIS 43576 (N.D. Ill. Apr. 30, 2010).

JURISDICTION

The Court of Appeals issued its judgment and opinion on April 9, 2015. Pet.App.:1a-23a. It denied a timely petition for rehearing and rehearing *en banc* on May 22, 2015. Pet.App.:24a-25a.

On August 3, 2015, Petitioners timely filed an application to extend time for filing a petition for a writ of certiorari, which Justice Kagan granted on August 6, 2015, thereby extending the time to file to October 19, 2015. *See Aircraft Check Services Co., et al., v. Verizon Wireless, et al.*, No. 15A149 (Aug. 6, 2015).

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES AND RULES INVOLVED

The Sherman Act §1, 15 U.S.C. §1, is set out verbatim in the Appendix. Pet.App.:71a.

STATEMENT OF THE CASE

A. Introduction

This is a class action suit charging Respondents, the four largest telecommunications carriers in the United States – Verizon, AT&T, Sprint, and T-Mobile ("Carriers") as well as their trade association, CTIA (Cellular Telephone Industries Association) – with fixing the price of pay-per-use ("PPU") text messaging (also known as short message service ("SMS")) sold in the United States beginning in the summer of 2005, in violation of the Sherman Act §1, 15 U.S.C. §1. The district court had subject-matter jurisdiction under 28 U.S.C. §§1331 and 1337, and jurisdiction over pre-trial proceedings under 28 U.S.C. §1407.

Petitioners, Aircraft Check Services Company, Nicholas Iltsopoulos, David Keefer, Jim Morris, Melissa Leigh Randolph, and Premiere Investment Consulting, on behalf of the Class allege that Respondents, who operate in a concentrated market with high barriers to entry and control more than 90% of the text-messaging market, conspired to fix prices for the segment of that market that chooses PPU rather than Respondents' more-popular bundled telecommunications plans. Pet.App.:13a-15a.

Prior to 2005, Respondents' PPU text pricing was varied, but over a two-year period Respondents, based upon direction from top management, executed a series of identical, parallel PPU-SMS price increases to $0.10, then $0.15, and, finally, to $0.20 for

incoming and outgoing messages.[1] Although Respondents' identical price moves were not simultaneous, they were "anomalous" as running counter to falling costs, *see Text Messaging*, 630 F.3d at 628, and to trends in both average revenue-per-text message and the price index for all wireless services during the Class Period.[2]

Moreover, Respondents' claim that the price hikes were undertaken to *encourage* PPU customers to shift to bundles was pretextual. Respondents discontinued any remaining low-priced bundles ($2.99), and set the entry level at $5.00 for each Carrier as Respondents consolidated the price of PPU text at $0.10. A1478-1480. That made bundles uneconomic for nearly 80% of all PPU texters because they used too few messages to make a $5.00 entry-level bundle attractive. A1481. Respondents' assertion that the price hikes were to encourage a shift to bundles is thus implausible.

The Court of Appeals found that Petitioners' "circumstantial evidence [is] consistent with an inference of collusion, but that evidence is equally consistent with independent parallel behavior." Pet.App.:22a. But Petitioners also presented direct evidence, an admission by an executive of Respondent T-Mobile, Adrian Hurditch, in e-mails to another T-Mobile executive, Lisa Roddy, addressing Respondents' PPU price hikes in light of a potential congressional investigation: "At the end of the day we know there is no higher cost associated with messaging. The move was col[l]usive and

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1 Seventh Circuit Appendix ("A") 0832-0833.

2 A0810.

opportunistic."[3] Messages in that e-mail exchange were intentionally destroyed by Hurditch and Roddy to conceal their contents as Hurditch directed Roddy to: "delete that last message!" and Roddy responded: "I will & u this one!!!" Pet.App.:73a-74a.

The Seventh Circuit rejected any inference of antitrust conspiracy from the direct evidence of Hurditch's admission of collusion, Pet.App.:7a-11a, employing reasoning identical to that applied by the Court to *circumstantial* antitrust evidence in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). *Matsushita* limited "the range of permissible inferences" that could be drawn from ambiguous evidence of a defendant's conduct in an antitrust case, *see id.* at 588, but multiple Courts of Appeal hold that such limitations do not apply to direct evidence. *See, e.g., In re Chocolate Confectionary Antitrust Litig.*, No. 14-2790, __ F.3d __, 2015 U.S. App. LEXIS 16405, *19 n.9 (3d Cir. Sept. 15, 2015).[4] The Seventh Circuit held otherwise, rejecting Petitioners' direct evidence as "inconclusive[]" and failing to draw inferences from Hurditch's admission in Petitioners' favor. Pet.App.:8a-11a. The Court should grant the petition and resolve the question whether on summary judgment courts must draw reasonable inferences from *direct* evidence of antitrust conspiracy in favor of the non-moving party, as the majority of Courts of Appeal do.

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[3] Pet.App.:73a. The e-mails are reproduced in the Appendix.

[4] Unless otherwise indicated, emphasis is added and citations are omitted.

The Seventh Circuit also failed to address whether a jury could draw an adverse inference from the spoliation of evidence, relying instead on its precedent requiring a showing of bad faith and antecedent judicial fact-finding. These holdings conflict with decisions of other Circuits rejecting a per se bad-faith requirement, *see, e.g.*, *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995), and rejecting judicial fact-finding as a precondition to a jury's ability to draw an adverse inference from the destruction of evidence. *See, e.g.*, *Mali v. Fed. Ins. Co.*, 720 F.3d 387, 393 (2d Cir. 2013). The Court should resolve these conflicts, and cure the disarray in the lower courts on the recurring issue of destruction of evidence.

B. Facts

1. Circumstantial Evidence of Conspiracy

a. Consolidation of the Industry at $0.10 and Removal of the Low-Price Bundles

Prior to 2005, PPU text prices varied from free to $0.02 to receive, and from $0.05 to $0.10 to send. A0171-0172. Entry-level bundles also varied starting with Sprint's monthly $1.99 bundle for 30 messages. *See* A1478. In early 2005, PPU text pricing was less diverse, but still ranged from $0.02-$0.05 and $0.10 to receive, and $0.05 to $0.10 to send. A0171-0172.

Diversity ended when the industry consolidated at $0.10 to send and receive. Verizon raised its rate for incoming text messages from $0.02 to $0.10 effective

August 1, 2005, matching Sprint and AT&T. A0232. Before the increase, Verizon did not analyze the potential consequences of price competition; it merely determined the potential revenue lift by multiplying the total incoming PPU text messages by the price hike. A0231-0232; A0234.

T-Mobile initially resisted the consolidation at $0.10, consistent with its niche as a low-cost carrier,[5] but ultimately rejected a lower, internally-recommended increase, and moved to $0.10 in March 2006. A0256.

In mid-2005, three Carriers still offered a low-price $2.99 entry-level bundle. A1478. Concurrent with the consolidation of PPU prices at $0.10, those Carriers raised their entry-level bundle to $4.99/$5.00 in the first half of 2006, A1478-1479, even though the $2.99 bundle was popular with consumers. A1479-1480; A1512; A1536.

The Carriers asserted that the PPU text price moves were implemented to *encourage* PPU text customers to move to bundles, A1504; A0001-0004, but Respondents knew that nearly 80% or more of PPU texters used less than 25 messages a month, which meant a $4.99/5.00 bundle was uneconomic. A1392; A1481-1482; Seventh Circuit Sealed Appendix ("SA") 02.

b. The Hike to $0.15

Prior to the consolidation at $0.10, Sprint had considered, for over three years, raising its PPU price,

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[5] A0253-0260. Hurditch, then in charge of text pricing for T-Mobile, initially opposed the move. Pet.App.:50a-51a; A0252-0253.

but declined because of competitive concerns. A0180-0187. On June 23, 2006, just weeks before the increase to $0.15 was approved, Sprint's marketing director advised executives that the proposed increase created an "*obvious and massive competitive disadvantage.*" A0309. Nonetheless, Sprint, a troubled company at the time, was first to move to $0.15 in 2006, as top management overrode mid-level managers' "churn" concerns.[6]

Because of competitive concerns, AT&T rejected a move to $0.12 just before Sprint's move was announced. A0207-0208. Once Sprint's increase was published, AT&T's move to $0.15 was fast-tracked after comments by AT&T's CEO, A0210-0211, and occurred in early 2007. A0174.

Verizon had similarly rejected a unilateral move to $0.12,[7] but after Sprint and AT&T moved, senior leadership "mandate[d]" an increase as of March 1, 2007. A0241. Verizon moved with little analysis other than a straight multiplication of the profits to be made on the price hike. A0238.

T-Mobile again lagged with stiff internal opposition to the move from Hurditch and other T-Mobile analysts, exemplified by Hurditch's comment that a move to $0.15 was "very dangerous territory for the value leader."[8] T-Mobile moved in June 2007. A0263.

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6 A0316; A0796; A0833. "Churn" is customer attrition. A0800.

7 A0234.

8 A1435. At this point, Hurditch's position did not directly involve him in text pricing, but his duties included "coaching" Roddy, his replacement in text pricing, through T-Mobile's final two PPU price hikes. A0398; A0375; A0402-0403; A0427-0428;

c. The Hike to $0.20

Sprint also moved first to $0.20 in fall 2007, again prompted by top management. A0198-0199; A0201-0202. The analysis was performed over a weekend and did not address churn. A1427; A0199-0200; A0202; A0188-0189.

Verizon joined Sprint at $0.20 in March 2008 with virtually no additional analysis. A0245. AT&T joined the move, ignoring churn because it believed T-Mobile would move. A1473; SA44.6.

The final price move was also controversial within T-Mobile: Hurditch called it "a price gouge on consumers." Pet.App.:8a. The decision to move in summer 2008 came from top management, prior to preparation of a business case. A0266-0268.

As Respondents hiked their PPU prices, their cost for sending text messages fell by as much as 60%, A0175, and the price index for all wireless services declined. A0810.

d. CTIA

CTIA provided a vehicle for conspiracy: "[O]pportunities for [Respondents'] senior leaders ... to meet privately in ... officers' retreats [sponsored by CTIA] abounded." Pet.App.:21a. Moreover, an AT&T executive told CTIA's president that "'we all try not to surprise each other' and 'if any of us are about to do something major we all tend to give the group a heads

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A0431; A0424-0425; A0260-0261; A0150. Hurditch's opinions on text pricing were regularly circulated to upper-most management, with whom he regularly met. A0402-0403; A1441; A0431.

up' – 'plus we all learn valuable info from each other.'" *Id.*

2. The Hurditch/Roddy E-Mail Exchange

On September 10, 2008, T-Mobile executive Roddy, then responsible for text pricing, forwarded an e-mail regarding a potential congressional investigation of text pricing to Hurditch. His response included the admission that "[a]t the end of the day we know there is no higher cost associated with messaging. The move was col[l]usive and opportunistic." Pet.App.:73a.

Hurditch and Roddy agreed to destroy earlier messages in that e-mail chain. Pet.App.:73a-74a. The destroyed evidence was never recovered.

C. Relevant Procedural History

On May 19, 2014, the district court granted Respondents summary judgment. Pet.App.:26a-70a. The district court "assum[ed] for discussion purposes that the Hurditch e-mail is admissible against all four carrier defendants," but held that Hurditch's admission of collusion was "not direct evidence of price-fixing conspiracy" because Hurditch supposedly lacked personal knowledge. Pet.App.:50a-52a. The court declined to draw an adverse inference from the Hurditch/Roddy destruction of evidence because Petitioners did not demonstrate that the deleted e-mail(s) were "adverse" as there was insufficient evidence of Hurditch's knowledge of collusion. Pet.App.:41a-42a. The district court also rejected Petitioners' circumstantial evidence of agreement. Pet.App.:55a-70a.

Petitioners timely appealed, and the Seventh Circuit affirmed. Pet.App.:1a-22a. The court held

that Petitioners "presented circumstantial evidence consistent with an inference of collusion, but that evidence is equally consistent with independent parallel behavior." Pet.App.:22a. It held that neither Hurditch's admission that the price increases were collusive nor the Hurditch/Roddy destruction of evidence supported an inference of conspiracy. Pet.App.:7a-11a.

As for Hurditch's admission, the Seventh Circuit ignored the dictionary meaning of collusion – which connotes agreement – and inferred that Hurditch referred to *tacit collusion*, defined by economists as "coordinating ... pricing without an actual agreement to do so." Pet.App.:6a. Thus, Hurditch's admission was "inconclusive[]." Pet.App.:11a.

As for the deleted e-mails, the court held that Petitioners had not established Respondents' bad faith, and inferred that the destruction was motivated by Hurditch's fear of adverse career consequences. Pet.App.:9a-11a. The court did not address whether a reasonable jury could draw a contrary inference.

REASONS FOR GRANTING THE PETITION

A. The Circuits Are Split on Whether *Matsushita*'s Approach to Circumstantial Evidence Applies to Direct Evidence of Antitrust Conspiracy

1. *Matsushita*'s Summary-Judgment Review Standard

While this Petition addresses the analysis of summary-judgment issues in the antitrust context,

the Court's general approach to summary-judgment review is well-established. Courts "review the record 'taken as a whole,'" and "draw all reasonable inferences in favor of the nonmoving party, and ... may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). "'Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.'" *Id.* at 150-51.

In *Matsushita*, plaintiffs accused defendants – who were Japanese television manufacturers and American firms, controlled by Japanese parent companies, that sold the Japanese-manufactured products – of a lengthy conspiracy to engage in predatory pricing in an effort to drive American firms from the market while at the same time maintaining artificially high prices in Japan. *See* 475 U.S. at 577-78. There was no direct evidence of the alleged conspiracy: "[t]he 'direct evidence' on which the [lower] court relied was evidence of *other* combinations, not of a predatory pricing conspiracy." *Id.* at 595 (emphasis in original); *accord id.* at 583.

Lacking direct evidence, plaintiffs contended that the other conspiracies constituted "circumstantial evidence of another conspiracy that *is* cognizable: a conspiracy to monopolize the American market by means of pricing below the market level." *Id.* at 584 (emphasis in original). But a claim such as that, which made no economic sense, *see id.* at 588-93, *and* was based on circumstantial evidence, must be supported by "more persuasive evidence ... than would otherwise be necessary." *Id.* at 587. Indeed, the Court even suggested that "it may be that only direct evidence of below-cost pricing is sufficient to overcome the strong inference that rational

businesses would not enter into conspiracies such as this one." *Id.* at 585 n.9.

Faced with the plaintiffs' circumstantial evidence-based claim, the Court noted that "antitrust law limits the range of permissible inferences from ambiguous evidence in a §1 case." *Id.* at 588. Specifically, "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* Thus, "a plaintiff seeking damages for a violation of §1 must present evidence 'that tends to exclude the possibility,' that the alleged conspirators acted independently." *Id.* This amounts to a requirement that "the inference of conspiracy [be] reasonable in light of the competing inferences of independent action." *Id.*

Matsushita held that "if [defendants] had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy."[9] Thus, in a case in which there was no direct evidence, and defendants' "conduct" was "consistent with other, equally plausible explanations," *see id.* at 596-97, the Court rejected inferring a conspiracy from the defendants' at-best ambiguous conduct, remanding for the lower court to determine whether there was any "sufficiently unambiguous" evidence tending "'to

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[9] *Id.* at 596-97. The Court observed that "cutting prices in order to increase business often is the very essence of competition," and that "mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Id.* at 594. Here, however, Respondents raised prices.

exclude the possibility' that [defendants] underpriced [plaintiffs] to compete for business rather than to implement an economically senseless conspiracy." *Id.* at 597-98.

The Court revisited *Matsushita* in *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451 (1992), another antitrust case, and confirmed that on summary judgment, "'the evidence of [the non-moving parties] is to be believed, and all justifiable inferences are to be drawn in [their] favor,'" and the non-moving parties' "version of any disputed issue of fact ... is presumed correct." *Id.* at 456. *Matsushita*'s requirement "that the plaintiffs' claims make economic sense did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases." *Id.* at 468. Rather, "*Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision." *Id.*; *see also Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 n.14 (1984) (evidence of concerted action "created a jury issue ... despite the sharp conflict in evidence"). *Kodak* further observed that a "defendant meets his burden under [Fed. R. Civ. P.] 56(c) when he 'conclusively show[s] that the facts upon which [plaintiff] relied to support his allegation were not susceptible of the interpretation which he sought to give them.'" 504 U.S. at 468 n.14.

2. A Majority of the Courts of Appeal Hold that *Matsushita* Does Not Apply to Direct Evidence of Antitrust Conspiracy

The lower courts are split on the proper approach to direct evidence of antitrust conspiracy. The

majority of the Courts of Appeal hold that *Matsushita*, as discussed in *Kodak*, did not alter the Court's approach to summary judgment, but rather articulated an approach to antitrust cases based upon inferences drawn from ambiguous *circumstantial* evidence of the defendant's *conduct*. For instance, the Third Circuit holds it "is undeniably true" that "if a plaintiff provide[s] *direct evidence* of a conspiracy, then the strictures of *Matsushita* [do] not apply," *Petruzzi's IGA Supermarkets v. Darling-Delaware Co.*, 998 F.2d 1224, 1233 (3d Cir. 1993), because such evidence "negat[es] any concern about the reasonableness of the inferences drawn from [it]." *Chocolate Confectionary*, 2015 U.S. App. LEXIS 16405, at *19 n.9. "Nor are [*Matsushita*'s] concerns implicated when there is 'strong circumstantial evidence' because such evidence is 'sufficiently unambiguous.'" *Id.*

Similarly, the Ninth Circuit holds that "the *Matsushita* inquiry [is] appropriate only '*where there is no direct evidence of a conspiracy.*'" *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 441 (9th Cir. 1990) (emphasis in original); *accord In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 63-64 (2d Cir. 2012) ("the standards established in *Matsushita* do not apply at all when a plaintiff has produced *unambiguous* evidence of an agreement to fix prices") (emphasis in original); *Tunica Web Advert. v. Tunica Casino Operators Ass'n*, 496 F.3d 403, 411 n.11 (5th Cir. 2007) ("plausible reasons for independent action do not establish that appellees are entitled to summary judgment where the plaintiff has come forward with direct, rather than circumstantial, evidence of concerted action"); *Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073, 1085 (10th Cir. 2006) ("'concerns over

the reasonableness of inferences' do not apply to direct evidence of an agreement"); *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1300 (11th Cir. 2003) ("In the unusual case where the plaintiff is able to muster direct evidence of price fixing, summary judgment is categorically inappropriate.").

Thus, when direct evidence is offered, "the court must still construe the reasonable inferences in favor of the non-moving party." *R.B. Ventures, Ltd. v. Shane*, 112 F.3d 54, 58-59 (2d Cir. 1997); *accord Adams v. Metiva*, 31 F.3d 375, 382 (6th Cir. 1994).

The lower courts have provided differing definitions of direct evidence, although the differences are simply matters of degree. The Third Circuit describes direct evidence as requiring "'no inferences ... to establish a fact,'" *see Chocolate Confectionary*, 2015 U.S. App. LEXIS 16405, at *19 n.9, but also recognizes that *Matsushita* "did not draw a distinction between direct evidence on the one hand and circumstantial evidence on the other. Rather, it stated that in the absence of a plausible theory of conspiracy, a court must consider whether the plaintiff put forward '*sufficiently unambiguous*' evidence that the defendants conspired." *Petruzzi's*, 998 F.2d at 1233 (quoting *Matsushita*, 475 U.S. at 597); *see also Publ'n Paper*, 690 F.3d at 63-64 (analyzing whether the evidence is "unambiguous"). The Fifth Circuit holds that "[d]irect evidence of concerted action ... '"explicitly refer[s] to an understanding' between the alleged conspirators,'" while circumstantial evidence requires additional inferences in order to support a claim of conspiracy." *Tunica*, 496 F.3d at 409.

Ultimately, fine distinctions in the various definitions are of little moment: "All evidence, including direct evidence, can sometimes require a

factfinder to draw inferences to reach a particular conclusion, though '[p]erhaps on average circumstantial evidence requires a longer chain of inferences.'" *Publ'n Paper*, 690 F.3d at 64. Thus, the focus should be on the definitions' common trait – they all demand a tight connection between the evidence offered and the ultimate fact, the conspiracy.

The lower courts' approaches thus vindicate *Matsushita*'s primary concern, which was to limit inferences of conspiracy from ambiguous evidence of a defendant's *conduct*. *See Matsushita*, 475 U.S. at 588 ("conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy"). Drawing such inferences from conduct such as "cutting prices" – as in *Matsushita* – may "chill the very conduct the antitrust laws are designed to protect," *see id.* at 594, but direct evidence of conspiracy, such as Hurditch's admission, does not involve drawing inferences from Respondents' conduct.

Under the majority approach, the grant of summary judgment here was error because Petitioners offered direct evidence of collusion. T-Mobile executive Hurditch, who had been in charge of text pricing at T-Mobile during the industry's consolidation at $0.10 and remained deeply involved in T-Mobile's subsequent two price moves, exchanged e-mails with T-Mobile executive Roddy, writing that "[a]t the end of the day we know there is no higher cost associated with messaging. The move was col[l]usive and opportunistic."[10] Hurditch testified

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[10] Pet.App.:72a-74a. The district court assumed the admission was "admissible against all four carrier defendants." Pet.App.:50a.

that his reference to collusion embraced the "series of price moves . . . from five [cents] to ten, ten to 15, and then, ultimately, the 15 to 20." A0410.

Hurditch's admission that the price increases were "col[l]usive" provides the requisite tight connection to the inference of conspiracy. The dictionary definition of collusion is "a secret agreement or cooperation esp. for an illegal purpose." Webster's Ninth New Collegiate Dictionary 260 (1989). That definition is consistent with the traditional legal understanding of "collusion" as "[a]n agreement to defraud another or to do or obtain something forbidden by law." *Collusion*, Black's Law Dictionary (10th ed. 2014); *accord In re New York Trap Rock Corp.*, 42 F.3d 747, 752 (2d Cir. 1994) ("'secret cooperation for a fraudulent or deceitful purpose'") (quoting Webster's Third New International Dictionary 446 (G. & C. Merriam Co. 1976 ed.)). Thus, Hurditch's statement "'explicitly refer[s] to an understanding' between the alleged conspirators," *see Tunica*, 496 F.3d at 409, and requires "no inferences ... to establish [the] fact [of collusion]." *See Chocolate Confectionary*, 2015 U.S. App. LEXIS 16405, at *19 n.9. And an explicit admission of collusion is certainly "'sufficiently unambiguous' evidence that the defendants conspired." *Petruzzi's*, 998 F.2d at 1233 (quoting *Matsushita*, 475 U.S. at 597). Consequently, *Matsushita*'s concerns regarding the inferences drawn from defendants' (ambiguous) conduct were inapposite. *See, e.g.*, *Chocolate Confectionary*, 2015 U.S. App. LEXIS 16405, at *19 n.9; *Publ'n Paper*, 690 F.3d at 63-64; *Tunica*, 496 F.3d at 411 n.11; *Petroleum Prods.*, 906 F.2d at 441.

Direct evidence "usually take[s] the form of an admission by an employee of one of the conspirators." *Text Messaging*, 630 F.3d at 628. Petitioners offered

just such an admission, and "summary judgment [was therefore] categorically inappropriate." *Williamson*, 346 F.3d at 1300; *accord Petroleum Prods.*, 906 F.2d at 441.

3. The Seventh and Eighth Circuits Reject the Majority Approach

The Eighth Circuit explicitly rejected the majority approach, *see Nitro Distrib., Inc. v. Alticor, Inc.*, 565 F.3d 417, 423-24 (8th Cir. 2009), and the Seventh Circuit adopted an identical analysis here. *Nitro* rejected arguments that *Matsushita* did not apply to direct evidence of conspiracy, holding that "[w]e apply *Monsanto* and *Matsushita* broadly, and have not made such a distinction." *Id.* at 423.

The Seventh Circuit similarly subjected Petitioners' direct evidence to an analysis identical to *Matsushita*'s approach to circumstantial evidence. *See* Pet.App.:7a-11a. Petitioners offered direct evidence of collusion, but the Seventh Circuit effectively "limit[ed] the range of permissible inferences from" Hurditch's admission even though it did not involve inferences of conspiracy from Respondents' conduct. *See Matsushita*, 475 U.S. at 588. The Opinion rejected any inference that Hurditch intended the plain English meaning of his words, failing to address the standard dictionary meaning of collusion. Rather, it posited ambiguity in the term "col[l]usive," owing to "the fundamental distinction between express collusion and tacit collusion. Express collusion violates antitrust law; tacit collusion does not." Pet.App.:8a-9a.

The Opinion explained that "'tacit collusion'" is the term "economists prefer" over the term "'conscious

parallelism'" that lawyers typically use to describe "'follow the leader' pricing." Pet.App.:6a-7a. Tacit collusion is defined as "coordinating ... pricing without an actual agreement to do so."[11] The Opinion does not define "express collusion," but it is clear in context that "express collusion" refers to collusion involving an agreement. The term "express collusion" is thus redundant because the term collusion – without a modifier – connotes agreement. *See* Webster's Ninth New Collegiate Dictionary 260 (1989).

The fact that the Opinion attributed to Hurditch an economist's technical meaning of the term collusion does not make his admission any less direct. The Opinion does not hold that a rational juror could not find that Hurditch intended the plain English meaning of the word "collusive," concluding only that the evidence was "inconclusive[]." Pet.App.:11a. Thus, contrary to the other Circuits' approach, the Seventh Circuit did not draw inferences in favor of Petitioners, the non-moving parties.

There are many reasons why a jury could choose the English meaning of collusion over an economist's technical meaning. There was no evidence that Hurditch knew of the economists' jargon. And even if there was evidence that Hurditch knew what "tacit collusion" meant – "coordinating ... pricing without an actual agreement to do so," Pet.App.:6a – he did not use that term. He described the price increases as "col[l]usive," Pet.App.:73a, not "tacitly collusive." And while the Opinion makes clear that economists "prefer" to call price coordination without an

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[11] Pet.App.:6a. The Court similarly defines "tacit collusion." *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993).

agreement "tacit collusion," *see* Pet.App.:6a, the Opinion does not say that anyone uses the term "collusion" – which connotes agreement – as a substitute for "tacit collusion," which excludes agreement.

It is thus unlikely that Hurditch would wade into this semantic thicket in the context of an informal exchange of e-mails with his colleague Roddy, and even less likely that he would seek to convey a highly technical, counter-intuitive concept such as "tacit collusion" by use of a shorthand reference to collusion (which actually bears a meaning that precludes *tacit* collusion). At best, the Opinion's "tacit collusion" inference is merely a possible one.[12]

Rather than "construe[ing] the reasonable inferences [from Hurditch's admission] in favor of the non-moving part[ies]," *Shane*, 112 F.3d at 58-59, the Opinion marshals rebuttal evidence. It asserts that "there is nothing to suggest that Hurditch was referring to (or accusing his company of) express collusion," a conclusion it supports by referring to a different e-mail sent by Hurditch months earlier in which he stated "I know the other guys are doing it [raising prices] but *that doesn't mean we have to follow*." Pet.App.:9a (emphasis in original). The Opinion reasons that "if Hurditch had thought that his company had agreed with its competitors to raise prices he wouldn't have said [that T-Mobile did not have to follow],'" because T-Mobile "would be under great pressure to follow, if they had agreed to follow." *Id.* But conspiracies are not self-executing, and "[t]he temptation of a member of a price-fixing conspiracy to

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[12] Hurditch testified he understands "collusive" to mean "competitors are cooperating on the move." A0410.

cheat his fellows by shading the agreed price is very great." *United States v. Heffernan*, 43 F.3d 1144, 1149 (7th Cir. 1994). Hurditch could have been advocating "cheating." Nor is his comment inconsistent with learning of the collusion after he made that months-earlier remark. These competing inferences are for the jury. *See Reeves*, 530 U.S. at 150-51.

The Opinion similarly seizes on the fact that Hurditch described the price increases as "col[l]sive and opportunistic" and concludes that "the word 'opportunistic' in the second email, ... is a reference to the remark in the [months-earlier] email that T-Mobile and its competitors were seizing an opportunity to gouge consumers – and in a highly concentrated market, seizing such an opportunity need not imply express collusion." Pet.App.:9a. Discounting Hurditch's admission because it supposedly "*need not imply* express collusion," Pet,App.:9a, is irreconcilable with summary-judgment review in which "'all justifiable inferences are to be drawn in [Petitioners'] favor.'" *Kodak*, 504 U.S. at 456. A jury could justifiably infer Hurditch intended the dictionary meaning of collusive, in which agreement is embedded. *See* Webster's Ninth New Collegiate Dictionary 260 (1989).

The same is true for the Opinion's conclusion that Hurditch's public relations "concerns would be present whether the collusion among the carriers was tacit *or* express." Pet.App.:9a. This observation does not preclude drawing an inference in Petitioners' favor. *See Kodak*, 504 U.S. at 456.

Finally, the Opinion again asserts that "[n]othing in any of Hurditch's emails suggests that he believed there was a conspiracy among the carriers."

Pet.App.:9a. But a jury could credit Hurditch's admission that the price hikes were collusive.[13] Moreover, the theories of admissibility that the district court assumed were satisfied – party admission and co-conspirator statement – do not require personal knowledge. *See Jordan v. Binns*, 712 F.3d 1123, 1128 (7th Cir. 2013) (party admissions); *United States v. Lindemann*, 85 F.3d 1232, 1238 (7th Cir. 1996) (co-conspirator statements).

The Opinion's rejection of Petitioners' claim turns on its identification of (supposedly) permissible inferences from Petitioners' evidence, and its selection of a preferred inference. The Opinion concludes that a jury need not decide whether Hurditch's use of the term "collusive" was intended to convey the normal, English meaning of the word – *i.e.*, an improper agreement – or to convey the opposite of the normal meaning of "collusive" – *i.e.*, no agreement. If the latter is correct, that would mean that Hurditch's use of the term "col[l]usive" is his own idiosyncratic method of saying "*tacitly* collusive," as an economist would understand that term. The Opinion does not hold that the former is not a possible interpretation, but urges the latter inference. *See* Pet.App.:7a-9a.

But "'[c]redibility determinations, the weighing of the evidence, and *the drawing of legitimate inferences from the facts* are jury functions, not those of a judge.'" *Reeves*, 530 U.S. at 150-51; *accord Kodak*, 504 U.S. at 456. The Opinion's choice of its preferred inference from Hurditch's statement is plainly improper; "drawing ... legitimate inferences from the

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[13] A reasonable trier of fact could support that conclusion by drawing an adverse inference from the destruction of evidence. *See infra* at 24-36.

facts" is a "jury function[]." *See Reeves*, 530 U.S. at 150-51. Because a jury *could* draw the inference of collusion – or "express collusion" in the Opinion's verbiage – defendants did not "meet[] [their] burden under Rule 56(c) [to] 'conclusively show[] that the facts upon which [Petitioners] relied to support [their] allegation were not susceptible of the interpretation which [Petitioners] sought to give them,'" *see Kodak*, 504 U.S. at 468 n.14, and granting summary judgment was therefore error.

The Seventh Circuit thus adopted a summary-judgment approach to *direct* evidence – not based on Respondents' conduct – that is akin to *Matsushita*'s refusal circumstantially to infer conspiracy from "conduct [that] is consistent with other, equally plausible explanations." *See* 475 U.S. at 596-97. The Seventh Circuit did so by refusing to credit the direct evidence of Hurditch's plain-English admission of collusion because it interpreted the admission to refer to tacit collusion based upon inferences it drew from other evidence, particularly months-earlier e-mails. Pet.App.:8a-9a. While that approach may be consistent with that of the Eighth Circuit, *see Nitro*, 565 F.3d at 423-24, it conflicts with decisions of the Second, Third, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits. *See Petruzzi's*, 998 F.2d at 1233 ("if a plaintiff provided *direct evidence* of a conspiracy, then the strictures of *Matsushita* did not apply"); *accord Publ'n Paper*, 690 F.3d at 63-64; *Tunica*, 496 F.3d at 411 n.11; *Champagne Metals*, 458 F.3d at 1085; *Williamson*, 346 F.3d at 1300; *Adams*, 31 F.3d at 382; *Petroleum Prods.*, 906 F.2d at 44. This case is an excellent vehicle in which to resolve this conflict regarding the proper approach to direct evidence of antitrust conspiracy because proper evaluation of Petitioners' direct evidence should be dispositive in

light of the Seventh Circuit's holding that Petitioners offered "circumstantial evidence consistent with an inference of collusion, but ... equally consistent with independent parallel behavior." Pet.App:22a. The Court should grant the Petition.

B. The Circuits Are Split on the Issues of Whether (1) Bad Faith and (2) Judicial Factual Findings Are Required Before a Jury May Determine Whether to Draw an Adverse Inference from the Destruction of Evidence

1. Introduction

"It is a well-established and long-standing principle of law that a party's intentional destruction of evidence relevant to proof of an issue at trial can support an inference that the evidence would have been unfavorable to the party responsible for its destruction." *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998). That inference is deeply rooted in the common law. *See Nation-Wide Check Corp. v. Forest Hills Distribs., Inc.*, 692 F.2d 214, 218 (1st Cir. 1982) (citing *Armory v. Delamirie*, 1 Stra. 505, 93 Eng. Rep. 664 (K.B. 1722)). Nonetheless, the lower courts' decisions addressing this long-standing principle are in disarray: there are multiple Circuit splits on the recurring issue of when the fact-finder may draw an adverse inference. *See infra* at 26-36. The lower courts are split both on whether a finding of bad faith is a necessary predicate to drawing an adverse inference from the destruction of evidence, *see infra* at 26-29, and whether such an inference may be drawn only after antecedent judicial findings of the

facts necessary to draw the inference. *See infra* at 29-36.

"[A] spoliation ruling is evidentiary in nature" and is governed by federal law. *See, e.g., Adkins v. Wolever*, 554 F.3d 650, 652 (6th Cir. 2009). Petitioners offered such evidence below as a basis for denial of Respondents' summary-judgment motion, pointing to the destruction of e-mails by T-Mobile executives in the chain of e-mails that included Hurditch's admission that Respondents' identical price increases were "col[l]usive." Pet.App.:73a.

Portions of the e-mail exchange preceding Hurditch's admission that Respondents' price increases were "col[l]usive and opportunistic," Pet.App.:73a, were intentionally deleted at Hurditch's request. Pet.App.:73a-74a. The Opinion holds that Hurditch's request for deletion "is consistent with his not wanting to be detected by his superiors criticizing their management of the company," which it describes as "equally plausible" as Petitioners' claim that "the reason for the deletion was to destroy emails that would have shown that T-Mobile was conspiring with the other carriers." Pet.App.:10a. The Opinion held that "[i]f [Petitioners' inference] were true, the plaintiffs would be entitled to have the jury instructed that it could consider the deletion of the emails to be evidence (not conclusive of course) of the defendants' (or at least of T-Mobile's) guilt." *Id.* The Opinion emphasized the supposed lack of "evidence that Hurditch was involved in, or had heard about, any conspiracy" and of bad faith, the threat to Hurditch's career posed by e-mails criticizing management, and that the "col[l]usive" e-mail was not deleted, which was inconsistent with a desire to destroy conspiracy evidence. *Id.*

The Opinion further concluded that "[e]ven if the district judge should have allowed the jury to draw an adverse inference from the destruction of the emails, this could not have carried the day for the plaintiffs or even gotten them a trial." Pet.App.:10a. It noted that T-Mobile's Record Retention Guidelines required retention of "'letters of general inquiry and replies,'" but it found that "Hurditch's emails to Roddy were not inquiries; they were gripes and worries," and further that "a subordinate employee's destruction of a document, even if in violation of company policy, [cannot] be automatically equated to a bad-faith act by the company." Pet.App.:10a-11a.

2. The Circuits Are Split as to Whether Bad Faith Is a Prerequisite to Drawing an Adverse Inference from the Destruction of Evidence

Underlying the Opinion's spoliation analysis is its per se requirement of a showing of bad faith as a prerequisite to drawing an adverse inference. The Seventh Circuit permits an adverse inference from the destruction of evidence only if a party "intentionally destroyed the [evidence] in bad faith." *See Faas v. Sears, Roebuck & Co.*, 532 F.3d 633, 644 (7th Cir. 2008). Thus, not only must the destruction be intentional, there must also be a showing of bad faith, which requires that the evidence be "destroyed 'for the purpose of hiding adverse information.'" *See id.* The Opinion followed that rule here, explaining that Petitioners are entitled to an adverse-inference instruction – and thus an adverse inference on summary judgment – only "*[i]f*" it is "true" that "the reason for the deletion was to destroy emails that

would have shown that T-Mobile was conspiring with the other carriers." Pet.App.:10a. The Opinion confirmed the centrality of its bad-faith analysis by holding that Petitioners must show "a bad-faith act by the company," which would be based upon the acts of Respondent T-Mobile's employees, Hurditch and Roddy. Pet.App.:11a.

Several Circuits similarly require bad faith. *See, e.g., Burris v. Gulf Underwriters Ins. Co.*, 787 F.3d 875, 879 (8th Cir. 2015); *United States v. Lanzon*, 639 F.3d 1293, 1302-03 (11th Cir. 2011); *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997); *Vick v. Texas Emp't Comm'n*, 514 F.2d 734, 737 (5th Cir. 1975).

Other Circuits, however, reject a per se requirement of bad faith. The Ninth Circuit holds that "a finding of 'bad faith' is not a prerequisite" to an adverse-inference instruction. *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993). Although "a finding of bad faith will suffice, ... so will simple notice of 'potential relevance [of the destroyed evidence] to the litigation.'" *Id.*

Similarly, the Second Circuit holds that "discovery sanctions, *including an adverse inference instruction*, may be imposed upon a party that has breached a discovery obligation not only through bad faith or gross negligence, but also through ordinary negligence." *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 113 (2d Cir. 2002); *accord Trull v. Volkswagen of Am., Inc.*, 187 F.3d 88, 95-96 (1st Cir. 1999) ("our case law does not require bad faith or comparable bad motive"); *Vodusek*, 71 F.3d at 156 ("While a finding of bad faith suffices to permit ... an [adverse] inference, it is not always necessary.").

Like the Ninth Circuit, the Second Circuit emphasizes the duty to preserve evidence "when a party should have known that the evidence may be relevant to future litigation." *Kronisch*, 150 F.3d at 126; *accord Gerlich v. United States DOJ*, 711 F.3d 161, 170-71 (D.C. Cir. 2013); *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001). In short, "[w]hen the evidence indicates that a party is aware of circumstances that are likely to give rise to future litigation and yet destroys potentially relevant records without particularized inquiry, a factfinder may reasonably infer that the party probably did so because the records would harm its case." *Blinzler v. Marriott Int'l*, 81 F.3d 1148, 1159 (1st Cir. 1996); *but see Bracey v. Grondin*, 712 F.3d 1012, 1020 (7th Cir. 2013) ("Simply establishing a duty to preserve evidence or even the negligent destruction of evidence does not automatically entitle a litigant to an adverse inference instruction in this circuit.").

This case represents an excellent vehicle for resolution of the Circuit split because Petitioners' evidence satisfies the standard articulated in the First, Second, Fourth, and Ninth Circuits. First, the destruction of evidence here was intentional. T-Mobile executive Hurditch requested it, and Roddy agreed. Pet.App.:72a-74a.

Second, Hurditch and Roddy plainly knew that Respondents' identical price increases could give rise to litigation, as the e-mail exchange was undertaken "in the wake of a congressional investigation of alleged price gouging by the defendants," Pet.App.:8a, and Hurditch wrote that they "[n]eed[ed] legal to look into the threat and eval future price increases within that context," a recommendation to which Roddy acceded. Pet.App.:72a-74a.

Third, there is no question that the deleted e-mail(s) were relevant to the challenged price increases because after Roddy agreed to delete evidence, she offered further analysis of the challenged price moves in response to Hurditch's deleted comment: "Don't know that I agree – would have to run the numbers, but if I come back & said that the average SMS @ TMO costs < now than 3 yrs ago – because of the value in bundles – would u have the same opinion?" Pet.App.:73a. Hurditch responded to that e-mail by pointing out that Respondents' price increases were "col[l]usive." *Id.*

3. The Circuits Are Split on Whether a Jury Can Draw an Adverse Inference Absent Judicial Fact-Finding

The Opinion also implicates a third Circuit split, one going to the division of labor between the trial (or reviewing) court and the fact-finder in assessing spoliation evidence and determining whether to draw an adverse inference. Consistent with its precedent, the Court of Appeals drew its own inferences from the facts in determining whether an adverse inference could be drawn, never once addressing whether a rational trier of fact could find the requisite facts. *See* Pet.App.:9a-11a; *accord Faas*, 532 F.3d at 644 (on summary judgment, "[i]n order to draw an inference that the [destroyed evidence] contained information adverse to Sears, *we must find* that Sears intentionally destroyed the documents in bad faith"); *Park v. City of Chicago*, 297 F.3d 606, 617 (7th Cir. 2002) (no adverse-inference instruction because "[a] finding of bad faith is not compelled on these facts"). Several other Circuits follow the same approach. *See,*

e.g., *Hallmark Cards, Inc. v. Murley*, 703 F.3d 456, 460 (8th Cir. 2013) ("a district court is required to make two findings before an adverse inference instruction is warranted: (1) 'there must be a finding of intentional destruction indicating a desire to suppress the truth,' and (2) '[t]here must be a finding of prejudice to the opposing party'"); *accord Adkins*, 692 F.3d at 505-06 (adverse inference instruction denied based upon district court's factual findings); *Henning v. Union Pac. R.R. Co.*, 530 F.3d 1206, 1219-20 (10th Cir. 2008) (same).

The First and Second Circuits properly reject that approach. The Second Circuit explains that a permissive adverse-inference instruction "is one that simply explains to the jury, as an example of the reasoning process known in law as circumstantial evidence, that a jury's finding of certain facts may (but need not) support a further finding that other facts are true. Such an instruction is not a punishment. It is simply an explanation to the jury of its fact-finding powers." *See Mali*, 720 F.3d at 393. Because such an instruction addresses inferences that "the jury was free to draw depending on the jury's findings[,] [t]he court [is] not required to make any predicate findings to give such an instruction." *See id.* at 392. In contrast, a *sanction* imposed by a court – such as a mandatory presumption – requires judicial findings. *See id.*

Thus, in evaluating a grant of summary judgment in a case where evidence was destroyed, the question whether an adverse inference can be drawn is committed to the jury, *see Kronisch*, 150 F.3d at 130, and focuses on whether the "circumstantial evidence ... is sufficient to suggest the reasonable possibility that" the deleted e-mail(s) "may have contained evidence helping to substantiate plaintiff's claim." *Id.*

at 129; *accord Ritchie v. United States*, 451 F.3d 1019, 1025 n.10 (9th Cir. 2006) (reviewing a bench trial and agreeing that the inquiry is "Was the evidence sufficient to permit a trier of fact to draw an adverse inference against the defendant?"). In short, "the prejudiced party may be permitted an inference in his favor so long as he has produced *some evidence* suggesting that a document or documents relevant to substantiating his claim would have been included among the destroyed [evidence]." *Kronisch*, 150 F.3d at 128. "[T]he level of proof that will suffice to support an inference in favor of the innocent party on a particular issue *must be less than the amount that would suffice to survive summary judgment on that issue.*" *See id.*; *accord Ritchie*, 451 F.3d at 1024-25 (if "the document destruction has made it more difficult for a party to prove that the documents destroyed were relevant," then "the trier of fact may draw such an inference based even on a very slight showing that the documents are relevant").

Consequently, where a plaintiff has "'produced enough circumstantial evidence to support the inference that the destroyed [evidence] *may have* contained documents supporting (or potentially proving) his claim, ... the possibility that a jury would choose to draw such an inference, combined with plaintiff's circumstantial evidence, is enough to entitle plaintiff to a jury trial.'" *Byrnie v. Town of Cromwell Bd. of Educ.*, 243 F.3d 93, 110 (2d Cir. 2001). Thus, while the Seventh Circuit flatly held that Petitioners' spoliation evidence "could not have carried the day for the plaintiffs or even gotten them a trial," Pet.App.:10a, the Second Circuit holds that such evidence can be sufficient to defeat summary judgment: "at the margin, where the innocent party has produced some (not insubstantial) evidence in

support of his claim, the intentional destruction of relevant evidence by the opposing party may push a claim that might not otherwise survive summary judgment over the line." *Kronisch*, 150 F.3d at 128.

Once there is circumstantial evidence "suggest[ing] the contents of destroyed evidence," the propriety of an adverse inference "becomes a matter for the jury to decide, based on the strength of the evidence presented, whether the documents likely had such content." *Byrnie*, 243 F.3d at 110; *accord DeGeorge*, 306 F.3d at 109 n.4; *see also Josendis v. Wall to Wall Residence Repairs Inc.*, 662 F.3d 1292, 1322 (11th Cir. 2011) (Korman, J., dissenting) (explaining that under *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997) (per curiam), destruction of evidence "provides a basis for denying a motion for summary judgment where there is sufficient probative evidence for a jury to find an act of spoliation and to draw the inference derived from such an act").

The question of the duty to preserve the evidence is similarly for the jury: "Assuming that *a jury were to find that [the defendant] had an obligation to preserve the ... documents* that he ordered to be destroyed, the jury would be entitled to draw an adverse inference against [the defendant]." *See Kronisch*, 150 F.3d at 130.

The First Circuit also recognizes that spoliation issues are for the jury. *See Testa v. Wal-Mart Stores*, 144 F.3d 173, 177 (1st Cir. 1998). There, defendant Wal-Mart challenged a permissive adverse-inference instruction. *Testa* explained that "the sponsor of the inference must proffer evidence sufficient *to permit the trier to find* that the target knew of (a) the claim (that is, the litigation or the potential for litigation), and (b) the document's potential relevance to that

claim." *Id.* The *Testa* court affirmed because "a rational jury could conclude that Wal-Mart was on notice of Testa's claim" prior to destruction of the evidence and "a rational jury also could conclude that Wal-Mart was on notice of the records' relevance." *See id.*

Moreover, *Testa* further held that Wal-Mart's argument that the records were destroyed "in compliance with a corporate record-retention policy" was "material to the inquiry, but the mere introduction of such evidence neither removes the question from the jury's ken nor precludes the jury from drawing a negative inference." *Id.*; *accord Byrnie*, 243 F.3d at 109. Thus, the First Circuit holds, as does the Second, that the determination whether to draw an adverse inference – as well as the subsidiary factual determinations – are committed to the jury. The same would be true even if bad faith is required because "'[b]ad faith' is a question of fact like any other." *See Mathis v. John Morden Buick, Inc.*, 136 F.3d 1153, 1155 (7th Cir. 1998).

The reasoning of the First and Second Circuits is analogous to the Court's approach in *Huddleston v. United States*, 485 U.S. 681 (1988). There, in addressing the admissibility of other-acts evidence (concerning the defendant's possession of stolen televisions) under Fed. R. Evid. 404(b), the Court determined that the evidence was conditionally relevant. In assessing whether a conditional-fact requirement is satisfied, "the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact – here, that the televisions were

stolen – by a preponderance of the evidence." *Id.* at 690. The First and Second Circuits apply a similar analysis in the context of spoliation, as when the First Circuit held that there was sufficient evidence in the record for a jury to find that the defendant was aware of the potential for litigation and the document's potential relevance to that claim. *See Testa*, 144 F.3d at 177.

The approach of the First and Second Circuits is consistent with the Court's traditional approach to summary judgment, under which "'[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.'" *Reeves*, 530 U.S. at 150-51. The approach in the Seventh Circuit, as well as the Sixth, Eighth, and Tenth Circuits, cannot be reconciled with *Reeves* given their reliance on judicial fact-finding.

This case is an excellent vehicle through which to resolve this conflict as well. The facts described in the Opinion to support rejection of an adverse inference supporting Petitioners' evidence of Respondents' conspiracy would permit a rational trier of fact to reach a conclusion opposite that drawn in the Opinion.

The Opinion concludes that Hurditch's "not wanting to be detected by his superiors criticizing their management of the company," *see* Pet.App.:10a, is an "equally plausible reason for the deletion of the e-mails in question." *Id.* But an "equally plausible" inference certainly satisfies the minimal requirement that "the prejudiced party ... produce[] *some evidence* suggesting that a document or documents relevant to substantiating his claim would have been included among the destroyed [evidence]," *see Kronisch*, 150

F.3d at 128, particularly in light of the diminished burden of proof imposed when the innocent party lacks all access to the spoliated evidence. *See Ritchie*, 451 F.3d at 1024-25; *Kronisch*, 150 F.3d at 128. Moreover, the fact that Hurditch made his statement regarding collusion immediately after Roddy's response to Hurditch's deleted e-mail, Pet.App.:73a, strongly suggests that the deleted e-mail also addressed collusion.

A jury could also conclude that the Opinion's reasoning refutes the inference that Hurditch feared career damage. *See* Pet.App.:9a-11a. The Opinion inferred that the deleted e-mail did not evince conspiracy because "the 'smoking gun' email – the 'colusive' email" was not deleted, Pet.App.:10a, but did not apply that analysis to its theory that Hurditch deleted e-mails to protect his career. Hurditch did not delete an e-mail in which he accused his company of "a price gouge on consumers," Pet.App.:8a, and the Opinion further found that Hurditch's "abus[e]" of his "corporate superiors" was "readily discernible even in Hurditch's emails that were not deleted." *See* Pet.App.:10a. That Hurditch left an accusation of price gouging and a "readily discernible" pattern of abuse of his "corporate superiors" undeleted undercuts the inference that Hurditch deleted e-mails because he feared career consequences. A jury could certainly reject the internally inconsistent inferences drawn in the Opinion.

The Opinion claims that "there is no evidence that Hurditch was involved in, or had heard about, any conspiracy," Pet.App.:10a, but a rational jury could find that Hurditch's description of the price increases as "col[l]usive," Pet.App.:73a, supported the opposite conclusion. Indeed, personal knowledge is not required under the party admission and co-

conspirator statement theories urged by Petitioners. *See Jordan*, 712 F.3d at 1128; *Lindemann*, 85 F.3d at 1238.

The Opinion's reliance on T-Mobile's document retention policy could also be rejected by a rational jury. First, a trier of fact could easily conclude that the e-mail chain was not "'routine letters and notes that require no acknowledgment or follow-up.'" Pet.App.:10a-11a. The correspondence here unquestionably *did* require follow-up, as Hurditch recommended a course of action – consulting with "legal" – that Roddy accepted and asked him to facilitate. Pet.App.:72a. And even if the deletion complied with policy, "the mere introduction of such evidence neither removes the question from the jury's ken nor precludes the jury from drawing a negative inference." *Testa*, 144 F.3d at 177.

Finally, the Opinion's observation that "a subordinate employee's destruction of a document, even if in violation of company policy, [cannot] be automatically equated to a bad-faith act by the company," Pet.App.:11a, does not preclude a rational juror from imputing the destruction at least as to T-Mobile. *See Vodusek*, 71 F.3d at 157 ("permitting the jury to draw an adverse inference if it found that [the party] *or her agents* caused destruction or loss of relevant evidence").

CONCLUSION

The Court should grant the Petition.

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Respectfully submitted,

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