

14-110 No. 14-

Supreme Court, U.S.

FILED

AUG 1 - 2014

OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
Supreme Court of the United States

DEAN FOODS COMPANY, DAIRY FARMERS OF AMERICA,
INC., AND NATIONAL DAIRY HOLDINGS, LP,
Petitioners,

v.

FOOD LION, LLC AND FIDEL BRETO, on behalf of
themselves and all others similarly situated,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in antitrust or other cases in which the plaintiff must prove causation in fact as an element of the claim, a plaintiff must produce evidence of causation to defeat a motion for summary judgment, or whether a court may instead presume causation at summary judgment and permit the case to proceed to trial based on that presumption.

PARTIES TO THE PROCEEDING

All parties named in the caption of this petition were parties to the proceeding in the court of appeals. In addition, Dairy Marketing Services, LLC and Southern Marketing Agency, Inc. were defendants in the district court and were named as defendants-appellees in the court of appeals, but they are not parties in this Court and have no interest in the outcome of the petition.

CORPORATE DISCLOSURE STATEMENT

Dean Foods Company has no parent corporation, and no publicly held company owns 10 percent or more of Dean Foods Company's stock.

Dairy Farmers of America, Inc. has no parent corporation, and no publicly held company owns 10 percent or more of Dairy Farmers of America, Inc.'s stock.

After this litigation commenced, as the result of a 2009 transaction between Dairy Farmers of America, Inc. and Grupo Industrial Lala, S.A. de C.V. ("Grupo Lala"), National Dairy Holdings, LP was split into two companies. One of those companies, also called National Dairy Holdings, LP, assumed the liability (if any) of former National Dairy Holdings, LP in connection with this litigation and was then merged into Dairy Farmers of America, Inc. and ceased to exist as a separate legal entity. The other company, National Dairy LLC, became a subsidiary of Grupo Lala and has no interest in this litigation and was not a party in the lower courts.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Dean Foods Company, Dairy Farmers of America, Inc., and National Dairy Holdings, LP respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-38a) is reported at 739 F.3d 262. The order of the court of appeals denying rehearing (App. 109a-110a) is unreported. The opinion of the district court (App. 39a-63a) is unreported but is available at 2012 WL 1032797.

JURISDICTION

The court of appeals entered judgment on January 3, 2014, and denied a timely rehearing petition on March 4, 2014. On April 29, 2014, Justice Kagan extended the time to file the petition for certiorari until July 2, 2014, and, on June 17, 2014, Justice Kagan further extended the time to file the petition until August 1, 2014. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND RULES

Pertinent provisions of the Sherman Act, 15 U.S.C. §§ 1 *et seq.*, the Clayton Act, 15 U.S.C. §§ 12 *et seq.*, and Rule 56 of the Federal Rules of Civil Procedure are reproduced in the Appendix.

STATEMENT

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), this Court found it necessary to model the proper application of the standards governing two critical stages of the pretrial sequence—pleading and class certification. Review is necessary here to provide similar instruction on the standard governing motions for summary judgment and to resolve disagreement in the lower courts as to the showing a plaintiff must make to defeat summary judgment on the element of causation.

This Court addressed the standard for summary judgment in a landmark trilogy of cases in 1986. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Twenty-eight years later, although lower courts generally *recite* the standard correctly, confusion and

disagreement persist in their application of that standard, particularly with respect to the element of causation in antitrust and other complex civil cases. As relevant here, some circuits correctly require an antitrust plaintiff opposing summary judgment to produce not only evidence of the defendants' alleged anticompetitive conduct and evidence of injury to the plaintiff, but also evidence of a causal link between the two. Other circuits—including the Sixth Circuit in this case—permit a plaintiff to reach a jury without any evidence of that causal link, effectively presuming causation and foreclosing summary judgment unless the defendant disproves it. That division among the circuits reflects significant confusion with respect to summary judgment generally, including whether the procedure is “disfavored”—a view that several courts, including the Sixth Circuit below, continue to maintain despite this Court’s clear instruction to the contrary.

Improper application of the summary judgment standard imposes significant costs on litigants and the courts. Summary judgment serves as a final gatekeeper before the expense, burdens, and risk of trial. By permitting a claim to reach a jury without requiring the plaintiff to produce evidence of causation, the decision below undermines that gatekeeping function and effectively shifts the burden of proof to defendants. This result contravenes this Court’s precedent, which mandates the entry of summary judgment against a plaintiff that fails to produce evidence supporting each element of its claim. As in *Twombly* and *Comcast*, this Court should grant review to demonstrate the correct application of this critical pretrial standard.

A. Factual Background

This case is a putative class action alleging a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Respondents, two retail sellers of processed milk, allege that petitioners, a raw-milk supplier and two milk processors, conspired to raise the price of processed milk. The conspiracy allegedly began around the time of an unchallenged merger that transformed the structure of the milk-processing market.

Petitioner Dairy Farmers of America, Inc. (“DFA”) is a dairy-marketing cooperative owned and managed by its dairy-farmer members. App. 69a. DFA markets the raw milk its members produce and distributes the proceeds from sales of raw milk among its members. *Id.* Petitioner Dean Foods Company (“Dean”) purchases raw milk from dairy farmers and cooperatives and processes that raw milk into consumable dairy products. App. 68a-69a. Dean was formed in December 2001, when Suiza Foods Corporation (“Suiza”) acquired the previously existing Dean Foods Company (“Legacy Dean”). App. 69a-70a. Before the merger, Suiza and Legacy Dean were the two largest milk processors in the United States, and they competed to process and sell bottled milk to retailers. *Id.* DFA was the primary supplier of raw milk to Suiza—as well as a significant investor in Suiza—and also supplied raw milk to Legacy Dean.

The U.S. Department of Justice reviewed the proposed merger. App. 70a. As part of its investigation, DOJ assessed the likely competitive effects of the merger using a “spatial-effects” regression model that compared distances between separately owned milk-processing plants before and after the proposed merger and predicted how the merger would affect milk prices.

App. 50a; R.1086-1 ¶ 109.¹ Using this model, DOJ estimated that Suiza's acquisition of Legacy Dean would result in an average price increase of 2.5% in the geographic region analyzed. App. 50a.

To alleviate concerns that the merger would lessen competition and increase prices, DOJ conditioned its approval on divestiture of 11 milk-processing plants and related assets. App. 70a. DOJ accepted petitioner National Dairy Holdings, LP ("NDH"), a partnership formed to compete with Dean after the merger, as the buyer of the divested plants. *Id.* The merger-related transactions divested DFA of its ownership interest in Suiza, but left it as a 50% shareholder in Dean's newly formed competitor, NDH. *Id.* DOJ also reviewed and accepted, with some modifications, DFA's continuing role as the primary supplier of raw milk to Dean. *Id.*

On December 18, 2001, DOJ approved the merger and divestitures to NDH. The transaction closed on December 21, 2001.

B. District Court Proceedings

1. Almost six years later, on August 9, 2007, respondent Fidel Breto, a retail seller of processed milk doing business as Family Foods, filed a class action complaint against petitioners, alleging a conspiracy to increase prices for processed milk. In 2008, Breto, joined by respondent Food Lion, LLC, filed an amended complaint. R.34. In Count I—the only claim at issue here—respondents alleged that petitioners engaged in a conspiracy “to lessen competition for sales of pro-

¹ “R.” refers, by district court docket number, to the record materials the parties designated in the Sixth Circuit, most of which were filed under seal.

cessed milk to retailers in the Southeast,” in violation of Section 1 of the Sherman Act. *Id.* ¶ 86.²

Section 1 of the Sherman Act states that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” 15 U.S.C. § 1. To recover damages under Section 1, a private plaintiff must prove that it suffered injury “by reason of” an unlawful conspiracy. *Id.* § 15(a); see *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

Here, the purported conspiracy alleged in Count I involved “a complex relationship” among petitioners in which vertical supply arrangements provided a payoff for allegedly anticompetitive behavior. App. 11a. Respondents alleged that petitioners closed plants and allocated customers and territories to weaken NDH as a competitor. R.34 ¶¶ 50-62. In exchange, according to respondents, Dean agreed to retain DFA as Dean’s primary raw-milk supplier. *Id.* “[T]he reason NDH

² The amended complaint originally asserted five causes of action. R.34 ¶¶ 78, 85-125. In addition to the conspiracy claim in Count I and two other conspiracy claims, respondents challenged certain unilateral conduct under Section 2 of the Sherman Act. *Id.* ¶¶ 100-109 (Count III) (unlawful monopolization); ¶¶ 110-119 (Count IV) (attempt to monopolize). The district court granted summary judgment on all five counts and did not reach the issue of class certification. App. 107a (granting summary judgment on Counts II, III, and IV); App. 40a (granting summary judgment on Counts I and V). Respondents limited their appeal to Count I (see Appellants’ C.A. Br. 4 n.3 (Feb. 14, 2013)), which is therefore the only claim remaining in this case.

Respondents’ suit originally named two other defendants, Dairy Marketing Services, LLC and Southern Marketing Agency, Inc. Neither defendant was named in Count I and, therefore, neither is a party in this Court.

would agree to weaken itself,” respondents claimed, was “only because DFA owned and controlled NDH, and because the conspiracy served DFA’s purposes.” App. 11a.

Respondents conceded that they did not challenge the Suiza-Legacy Dean merger. *See, e.g.*, R.1129, at 2 (“[u]ndisputed” that respondents “do not challenge the 2001 merger between [Legacy] Dean and Suiza”); App. 48a n.4 (“Plaintiffs have expressly disclaimed any legal challenge to the merger[.]”).³ Nevertheless, the start of respondents’ alleged conspiracy period coincided with the merger. R.34 ¶ 6; R.1086-1 ¶ 145.

2. On September 18, 2009, petitioners moved for summary judgment on Count I, arguing that respondents could not establish the existence of a conspiracy. App. 73a. As petitioners contended, the record showed intense competition between Dean and NDH and no evidence that petitioners conspired to allocate customers or territory or close plants. R.462, at 9-33.

The district court found “[m]any of [respondents’] arguments ... unconvincing on their merits” and further found that petitioners “rather convincingly” respond[ed] to many of the individual allegations made.” App. 78a. But it concluded that respondents had produced evidence that created a genuine issue of material fact on the element of conspiracy. App. 79a. The court therefore denied petitioners’ motion on Count I, and discovery continued.

³ Respondents also conceded that any challenge to the merger would be time-barred. App. 48a n.4; *see also* Dec. 1, 2010 Hr’g Tr. 55 (“[W]e would be out of time on that seeking to unscramble the merger.”).

3. After the close of discovery, petitioners moved again for summary judgment on additional grounds. As relevant here, petitioners argued that respondents could not establish a genuine issue of material fact on the issue of causation, an essential element of respondents' claim. See 15 U.S.C. § 15(a) (injury must be "by reason of" the antitrust violation); *Matsushita*, 475 U.S. at 586 (antitrust plaintiffs "must show an injury to them *resulting from* the illegal conduct" (emphasis added)).

In opposing petitioners' motion on the element of causation, respondents relied solely on their expert, Professor Ronald Cotterill, who performed a regression analysis purporting to show that prices of processed milk during the relevant period were 7.9% higher than he expected based on supply-and-demand factors. R.1086-1 ¶¶ 143, 157; R.1157-2 ¶ 40. Cotterill admitted, however, that he had not analyzed, and therefore could not say, whether the higher prices he observed were caused by the alleged conspiracy, by the unchallenged merger, or by other lawful, unilateral conduct. See, e.g., R.1086-2, at 259:5-8, 260:3-7; *infra* pp. 8-10.

Petitioners accordingly argued that Cotterill's analysis provided no evidence of causation, emphasizing three main points:

First, Cotterill designed his analysis in such a way that any price effects he observed were as likely to have resulted from the merger as from the conspiracy respondents allege. A proper analysis of the impact of an alleged conspiracy compares actual prices to the prices that would have prevailed but for the conspiracy, holding all else equal—*i.e.*, the "but-for world." Here, because petitioners did not challenge the merger, that benchmark should have been a "but-for world" in which the merger and related divestitures occurred, but the

alleged conspiracy did not. Instead, Cotterill defined the “but-for world” as if the merger never happened:

For all Defendant facilities involved in the Dean-Suiza merger, I define but-for world competition based on a plant’s pre-conduct owner’s competitive impact (Legacy Dean or Suiza), *assuming no other ownership or operation changes, i.e., all plants remain open and do not change owners.*

R.1086-1 ¶118 (emphasis added); *see id.* ¶ 145.

This was intentional. Cotterill explained in his deposition that he was instructed in part to measure the competitive impact of the merger. R.1086-2, at 267:15-20 (“I have been asked to analyze whether in fact the creation of NDH and the assertion [to DOJ] that there would be economies of size and lower prices through efficiencies generated by that creation from January 1, 2002 going forward, whether that in fact was true or not[.]”). Rather than considering a benchmark in which the alleged conspiracy never occurred, Cotterill accordingly considered a benchmark in which the unchallenged merger never occurred.

Second, Cotterill characterized his approach as “similar to the [one] employed by the [DOJ] in its analysis of potential anticompetitive effects of the 2001 Dean-Suiza merger.” R.1086-1 ¶ 114. The question DOJ examined was whether prices for processed milk would increase if processing plants that formerly competed with one another came under common ownership as a result of the merger. Cotterill acknowledged that his analysis mimicked that approach. As he put it, “[t]he application in this litigation is largely the same: the DOJ used a spatial model to predict the price impact of *future* conduct, while I use a spatial model to

predict the price impact of *past* conduct.” *Id.* Because Cotterill’s approach simply measured the price effects that followed ownership changes caused by the merger, his analysis could not answer the relevant question—whether the alleged conspiracy caused respondents to pay more for milk than they would have paid after the merger absent the alleged conspiracy.

Third, Cotterill admitted that his model could not distinguish between the effects of lawful, unilateral conduct and the effects of any unlawful concerted action. As Cotterill acknowledged in his deposition, his model “d[id] not distinguish between” the effects of “market power that is ... unilateral [or] coordinated.” R.1086-2, at 259:4-8. In fact, Cotterill claimed this distinction was unnecessary because respondents’ claims at that juncture challenged both unilateral and coordinated conduct and effects. *See id.* at 260:3-7; *supra* n.2. But the district court ultimately granted summary judgment to petitioners on the unilateral-conduct claims (*see* App. 107a), and respondents did not appeal that determination. *Supra* n.2. Cotterill nonetheless never attempted to isolate any price impact caused by coordinated conduct, even after that became the only theory of liability remaining in the case. To the contrary, he simply assumed that any price changes arose from some alleged anticompetitive conduct. *See* R.1086-2, at 259:4-8; R.1157-2 ¶ 40.

As a result, while Cotterill’s model claimed a 7.9% price increase, petitioners argued that the model could not support any inference that the observed increase resulted from the alleged conspiracy, as opposed to the unchallenged, DOJ-approved merger or unchallenged, lawful unilateral conduct by Dean or others. Yet respondents produced no other evidence to support the causation element of their claim.

4. After extensive briefing and oral argument, the district court granted petitioners' motion for summary judgment on Count I.⁴ On the issue of causation, the court agreed with petitioners that "Cotterill's analysis d[id] not create a material issue of fact on the question of whether the price increases were 'by reason of' an illegal conspiracy." App. 51a. And without evidence of causation, respondents could not "establish antitrust injury." *Id.*⁵

Citing Cotterill's own testimony, the court found that measuring the impact of the merger was "precisely what [Cotterill] did." App. 50a. The court relied on Cotterill's description of his assignment, which specifically included the task of measuring merger-related ef-

⁴ Concurrent with the summary judgment briefing, petitioners filed a *Daubert* motion to exclude Cotterill's testimony. R.1084, at 1. A magistrate judge denied that motion in part and granted it in part. R.1187, at 6. Both sides filed objections (R.1208; R. 1213), but the district court granted petitioners' motion for summary judgment without reaching those objections.

⁵ The lower courts discussed causation in connection with "antitrust injury" because establishing antitrust injury requires a plaintiff to prove an "injury of the type the antitrust laws were intended to prevent *and that flows from* that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (emphasis added). To establish that an injury "flows from" the challenged conduct, as in any other damages claim, a plaintiff must prove both injury in fact and a causal link between that injury and the challenged conduct. *See id.*; *see also*, e.g., *Blue Tree Hotels Inv. (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc.*, 369 F.3d 212, 220 (2d Cir. 2004) ("To establish antitrust injury, a private litigant ... must show (1) an injury-in-fact; (2) that has been caused by the violation; and (3) that is the type of injury contemplated by the statute." (citing *Brunswick Corp.*, 429 U.S. at 489)); *cf. Burrage v. United States*, 134 S. Ct. 881, 889 (2014) ("the phrase, 'by reason of,' requires at least a showing of 'but for' causation" (internal quotation marks omitted)).

facts. *Id.* And the court found Cotterill's report to be "even clearer" in acknowledging that he used a model "largely the same" as the DOJ's model—one that was designed to measure the potential price impact of the merger. *Id.*

The court therefore found it "largely beyond question" that Cotterill "measured the price impact of the merger itself" and further found it "inescapable that the price increases he identifie[d] as injury to [respondents] are related, if not totally, then at least in part, to the merger itself, conduct which is not challenged in this case." App. 50a. Cotterill "simply compare[d] pre-merger prices to post-merger prices," accounting only for supply and demand factors, and failed to address the key question on the issue of causation—*i.e.*, "how prices would have increased in the absence of a conspiracy." App. 50a-51a.

C. The Court Of Appeals' Decision

1. The U.S. Court of Appeals for the Sixth Circuit reversed. The court did not take issue with any of the facts on which the district court relied. App. 34a. But the court of appeals concluded that respondents' claim could proceed to trial because, in its view, the fact that Cotterill's model might have reflected the impact of the merger or other unchallenged conduct did "not necessarily mean" that the price increase he observed "was due to legal causes." App. 36a.

The court of appeals began by expressing its general "reluctan[ce] to use summary judgment dispositions in antitrust actions" and observing that, "[u]nfortunately, there is no general agreement on the exact standards to use when resolving antitrust cases." App. 6a. Although the court acknowledged that "anti-

trust plaintiffs must ... prove that the restraint at issue caused them to suffer an antitrust injury” (App. 31a-32a), it framed the requirements applicable at summary judgment in terms of the sufficiency of the pleadings, stating that “[a]ntitrust plaintiffs cannot survive motions for summary judgment without adequately *alleging* an antitrust injury” (App. 33a (emphasis added)).

The court acknowledged that Cotterill “stated that the purpose of his calculation” was to analyze the price impact of the merger. App. 34a-35a. But it then noted Cotterill’s testimony that he “was also charged with discerning” whether petitioners engaged in collusive decisions that “resulted in elevated prices to the plaintiffs in this case.” App. 35a. The court stated that “[a]nswering that question”—had Cotterill done so—“would expose the precise sort of injury and causation that is required, especially when [respondents] must benefit from all reasonable inferences.” App. 35a-36a.

The court also acknowledged that Cotterill used a regression model similar to the one designed by DOJ. App. 36a. But the court concluded that “[u]se of that same widely-accepted model does not necessarily mean that the [price] increase was due to legal causes.” *Id.*

Based on this discussion, the court concluded that “Cotterill’s model, as applied to the facts, reveals three conclusions which, taken together, can be viewed as evidence of antitrust injury”:

First, it is clear that [respondents] purchased processed milk from [petitioners]. Second, Cotterill’s model indicates that after the merger [respondents] were charged 7.9% more for milk than an econometric analysis could justify. And third, the district court found that evidence indicated that Dean Foods and NDH, due to the

influence of DFA, conspired to avoid competing vigorously.

App. 36a-37a. This, the court held, sufficed to defeat summary judgment. App. 37a.⁶

2. Petitioners filed a timely petition for rehearing or rehearing en banc, arguing, among other things, that the panel's decision improperly excused respondents from their burden to offer evidence creating a genuine issue of material fact on the causation element of their claim, in conflict with this Court's precedent as well as precedent of other circuits. The court of appeals denied the petition. App. 109a-110a.

Petitioners moved for a stay of the mandate pending the filing and disposition of their petition for certiorari. Petitioners again argued that the court improperly excused respondents' failure to offer any evidence of causation. The court of appeals denied the stay.

REASONS FOR GRANTING THE PETITION

In 1986 this Court decided three landmark cases addressing the standard governing motions for summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S.

⁶ The court of appeals also addressed other aspects of the district court's ruling, holding that the district court was correct to apply the rule of reason rather than the *per se* standard (App. 14a), that the district court erred in requiring respondents to prove a relevant geographic market without considering whether an abbreviated "quick-look analysis" would be appropriate (App. 16a-17a), and that the district court should not have excluded the testimony of respondents' expert on the definition of the relevant geographic market (App. 18a). While the court erred in the latter two rulings, this petition does not address them. Although the court of appeals remanded for further consideration in light of those rulings, a decision by this Court reversing the court of appeals' judgment on the issue of causation would obviate those proceedings.

317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). In that trilogy, the Court emphasized the importance of summary judgment as the “principal tool[]” for the disposition of “factually insufficient claims” before trial, *Celotex*, 477 U.S. at 328, holding that the “plain language” of Rule 56 “mandates the entry of summary judgment ... against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden at trial,” *id.* at 322. A plaintiff thus cannot defeat summary judgment “without offering any concrete evidence from which a reasonable juror could return a verdict in his favor.” *Anderson*, 477 U.S. at 256.

In explicating this standard, the Court dispelled the older notion that summary judgment “should be used sparingly,” *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962), or was a “disfavored” practice, *Fortner Enters., Inc. v. U.S. Steel Corp.*, 394 U.S. 495, 505 (1969) (citing *Poller*). Rather, the Court explained that the “[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole.” *Celotex*, 477 U.S. at 327.

Notwithstanding this Court’s clear instructions, numerous areas of conflict and confusion regarding summary judgment persist in the lower courts. See, e.g., Epstein, Bell Atlantic v. Twombly: *How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 Wash. U. J.L. Pol’y 61, 94 (2007) (“strongly different approaches to summary judgment ... have emerged in the circuit courts”); Mullenix, *The 25th Anniversary of the Summary Judgment Trilogy: Much Ado About Very Little*, 43 Loy. U. Chi. L.J. 561, 568 (2012) (appli-

cation of trilogy “seems sketchy, incomplete, or less-than-rigorous, at best”). In both antitrust cases and other contexts, courts remain divided on such basic questions as whether summary judgment is “disfavored.” See Brunet, *Six Summary Judgment Standards*, 43 Akron L. Rev. 1165, 1172 n.33 (2010) (“[C]ourts occasionally recite the *Poller* dictum as though it were contemporary gospel.”).⁷ Indeed, notwithstanding the

⁷ Some circuits persist in the view that summary judgment is disfavored or should be used sparingly in antitrust and other cases. See, e.g., *Smith Wholesale Co. v. R.J. Reynolds Tobacco Co.*, 477 F.3d 854, 862 (6th Cir. 2007) (“motions for summary judgment are disfavored in antitrust litigation”); *Toscano v. Professional Golfers Ass’n*, 258 F.3d 978, 982-983 (9th Cir. 2001) (same); see also, e.g., *His & Her Corp. v. Shake-N-Go Fashion, Inc.*, 2014 WL 1877082, at *1 (9th Cir. May 12, 2014) (“summary judgment is generally disfavored in the trademark arena”); *Doe v. C.A.R.S. Protection Plus, Inc.*, 527 F.3d 358, 369 (3d Cir. 2008) (“Summary judgment is to be used sparingly in employment discrimination cases[.]”); *Ferrell v. Leake & Watts Servs., Inc.*, 83 F. App’x 342, 344 (2d Cir. 2003) (“as we have repeatedly held, district courts should employ summary judgment sparingly in discrimination cases”); *Kohus v. Mariol*, 328 F.3d 848, 853 (6th Cir. 2003) (“In copyright infringement cases, ‘granting summary judgment, particularly in favor of a defendant, is a practice to be used sparingly[.]’”); *Cain v. Bovis Lend Lease, Inc.*, 817 F. Supp. 2d 1251, 1282 (D. Or. 2011) (“Summary judgment generally is disfavored in negligence actions[.]”). In contrast, other circuits have identified summary judgment as an “essential” tool in antitrust cases. See, e.g., *Geneva Pharm. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 495 (2d Cir. 2004) (summary judgment “is an essential tool in the area of antitrust law”); *DSM Desotech Inc. v. 3D Sys. Corp.*, 749 F.3d 1332, 1345 (Fed. Cir. 2014) (“summary judgment is not only permitted but encouraged in certain circumstances, including antitrust cases”); see also *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 73 (3d Cir. 2010); *Thompson Everett, Inc. v. National Cable Advertising, L.P.*, 57 F.3d 1317, 1322 (4th Cir. 1995); *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 521 (5th Cir. 1999); *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1493 (11th Cir. 1988).

plain language of Rule 56, courts do not even agree on whether summary judgment is mandatory when the rule's requirements have been met.⁸

Against this backdrop, this Court's intervention is needed to resolve division in the lower courts as to the showing a plaintiff must make to defeat a motion for summary judgment on the element of causation. In particular, the courts are divided on whether an anti-trust plaintiff must produce at least some direct or circumstantial evidence of a causal connection between the alleged antitrust violation and the alleged injury, or whether instead a court may presume causation, as occurred in this case. Such a presumption contravenes this Court's precedent, permitting claims to proceed to trial even where a plaintiff has not identified a genuine issue of material fact on an essential element of its claim. This result imposes needless costs on litigants and the courts, and the divergence across different courts promotes forum-shopping. Just as the Court

⁸ Compare, e.g., *Confederated Tribes of Colville Reservation v. United States*, 964 F.2d 1102, 1109 (Fed. Cir. 1992) ("courts have discretion to deny summary judgment on issues in which it might otherwise be appropriate"), and *United States v. Certain Real & Personal Property Belonging to Hayes*, 943 F.2d 1292, 1297 (11th Cir. 1991) ("A trial court is permitted, in its discretion, to deny even a well-supported motion for summary judgment, if it believes the case would benefit from a full hearing."), with *Jones v. Johnson*, 26 F.3d 727, 728 (7th Cir. 1994) (per curiam) ("Summary judgment is not a discretionary remedy. If the plaintiff lacks enough evidence, summary judgment must be granted."); see also Friedenthal & Gardner, *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 Hofstra L. Rev. 91, 104 (2002) ("Federal courts of appeals are currently split over whether judges must grant summary judgment if it is technically appropriate. Astonishingly, federal courts often do not provide a policy rationale for their positions and have failed to recognize that a contrary position exists.").

stepped in to clarify and model the standards governing the pleading and class-certification stages, *see Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), it should do so here to provide similar guidance on summary judgment.

I. COURTS ARE DIVIDED ON WHETHER A PLAINTIFF MUST PRODUCE EVIDENCE OF CAUSATION AT SUMMARY JUDGMENT

The courts of appeals are divided on whether defendants are entitled to summary judgment when an antitrust plaintiff has offered evidence of injury but no evidence that the defendants' challenged conduct caused the injury. Some courts require evidence of causation and grant summary judgment where the plaintiff fails to satisfy that burden. Other courts permit a plaintiff to survive summary judgment absent such evidence by presuming causation. And other courts either fall somewhere in the middle or apply conflicting standards—even within the same circuit—depending on the context.

In this case, the Sixth Circuit permitted respondents' claim to proceed to trial based only on evidence of conspiracy and evidence of higher prices in the relevant market, without any evidence of a causal link between the two. App. 36a-37a.⁹ The court of appeals did not disagree with the district court's finding that the price impact Cotterill observed could just as easily reflect the unchallenged merger or other unchallenged, lawful conduct. *See supra* pp. 11-12. Indeed, respondents admitted in briefing before the court of appeals that Cotterill's model—the sole evidence they submitted on

⁹ As discussed, *supra* p. 7, petitioners disputed the evidence of conspiracy as well, but that question was not at issue on appeal and is not presented here.

causation—“does not differentiate between higher prices caused by unilateral conduct (for example, if Dean and NDH decided on their own not to compete with each other) and higher prices caused by collusion.” Appellants’ C.A. Reply 12 (Apr. 5, 2013).¹⁰ The court nonetheless held that nothing more was required to survive summary judgment. The fact that Cotterill had used a model designed in part to measure the impact of the merger, the court held, “[d]id *not necessarily* mean that the [observed impact] was due to legal causes.” App. 36a (emphasis added). Thus, because petitioners had not *disproved* that the observed higher prices were caused by the alleged conspiracy, the court in effect presumed it to be so. *See id.*; *supra* pp. 12-14.

The Second Circuit has followed a similar approach. *See In re Publication Paper Antitrust Litig.*, 690 F.3d 51 (2d Cir. 2012), *cert. denied sub nom. Stora Enso N. Am. v. Parliament Paper, Inc.*, 133 S. Ct. 940 (2013). In *Publication Paper*, the plaintiffs alleged a price-fixing conspiracy between senior officials at two companies. Defendants argued on summary judgment that any agreements between the officials could not have caused injury, because junior employees had suggested and implemented the observed price increases without knowledge of the conspiracy. *Id.* at 67. The district court granted summary judgment, but the court of appeals vacated, holding that causation could be presumed merely from evidence of a price-fixing conspiracy and price increases. The court reasoned that such conspiracies are illegal precisely because of their ten-

¹⁰ *See also* Appellants’ C.A. Reply 12-13 (admitting that Cotterill’s model “does not explain *why* the plants were not competing vigorously”); *id.* at 13 (admitting that Cotterill’s model offered “only evidence that is ‘consistent with’ conspiracy”).

dency to increase prices, and that this eliminated the need for actual evidence of causation. *Id.* at 66-67.

In contrast, the Third, Fourth, Fifth, and Eighth Circuits do not presume causation, but instead require plaintiffs to submit evidence that any antitrust injury was caused by the challenged conduct. For example, in *Concord Boat Corp. v. Brunswick Corp.*, the Eighth Circuit entered a directed verdict for defendants—on facts very similar to those here—because, among other things, the plaintiffs were unable to prove a causal connection between the alleged violations and their injuries. 207 F.3d 1039, 1060 (8th Cir. 2000).¹¹ The court explained that “antitrust injury, causation, and damages all are necessary parts of the proof,” and it examined the evidence with that principle in mind. *Id.* at 1054-1055. To prove causation and damages, the plaintiffs offered an expert report that attempted to compare actual market conditions to the expert’s estimate of what market conditions would have been but for the challenged conduct. The court rejected the expert’s model because the estimated “but-for world” “failed to account for market events that both sides agreed were not related to anticompetitive conduct,” including the merger of two competitors. *Id.* at 1056. The court held that the report’s failure to “separate lawful from unlawful conduct” rendered it speculative, and that it accordingly could not “sustain a jury’s verdict.” *Id.* at 1057. Similarly, other circuits have affirmed the entry of summary judgment where a plaintiff fails to come forward with evidence of the requisite causal connection.¹²

¹¹ The summary judgment standard “mirrors the standard for a directed verdict.” *Anderson*, 477 U.S. at 250.

¹² See, e.g., *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 125 (3d Cir. 1999) (“[T]o survive summary judgment, there must be

Falling somewhere between these two lines of cases, the First, Seventh, and Ninth Circuits have followed inconsistent approaches to issues of causation arising in different contexts. These courts have at times required evidence of causation before permitting a case to proceed past summary judgment, but have also issued decisions to the contrary. The Seventh Circuit, for example, has held in the antitrust context that a plaintiff must produce evidence of causation to survive summary judgment. *See, e.g., Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 401-404 (7th Cir. 1993) (summary judgment appropriate where numerous unchallenged economic and market factors might have caused the relevant injury rather than the challenged conduct). In contrast, in the civil RICO context, the Seventh Circuit has held that “[o]nce a plaintiff presents evidence that he suffered the sort of injury that would be the expected consequence of the defendant’s wrongful conduct, he has done enough to withstand summary judgment on the ground of absence of causation.” *BCS Servs., Inc. v. Heartwood 88, LLC*, 637 F.3d 750, 758 (7th Cir. 2011).¹³ The Second Circuit re-

evidence that the [challenged conduct] had an impact on pricing[.]”); *Abcor Corp. v. AM Int’l, Inc.*, 916 F.2d 924, 931 (4th Cir. 1990) (affirming grant of summary judgment; “[w]hile ... profit margin may have declined, the plaintiffs have failed to show a causal link to anticompetitive activity”); *El Aguila Food Prods., Inc. v. Gruma Corp.*, 131 F. App’x 450, 454-455 (5th Cir. 2005) (“Though jury inferences of causation are in some instances permissible, the required causal link must be proved as a matter of fact and with a fair degree of certainty.”).

¹³ The statutes authorizing civil RICO suits and antitrust suits both require the plaintiff to have been injured “by reason of” the statutory violation, suggesting that the same causation standards should apply in both contexts. *Compare* 18 U.S.C. § 1964(c) (“Any person injured in his business or property *by reason of* a violation of section 1962 of this chapter may sue therefor” (empha-

lied on that holding when it adopted a presumption of causation in *Publication Paper*. 690 F.3d at 66-67. Decisions in the First and Ninth Circuits similarly run in both directions, depending on the context.¹⁴

II. A PRESUMPTION OF CAUSATION CONFLICTS WITH THIS COURT'S PRECEDENT

The court of appeals' presumption of causation conflicts with this Court's precedent on the summary judgment standard. A defendant need not negate the plaintiff's case to obtain summary judgment. *Celotex*, 477 U.S. at 319; *see id.* at 323. Yet by presuming causation in the absence of any evidence—a presumption that is found nowhere in substantive antitrust law and

sis added)), with 15 U.S.C. § 15(a) (“any person who shall be injured in his business or property *by reason of* anything forbidden in the antitrust laws may sue therefor” (emphasis added)).

¹⁴ Compare, e.g., *Sterling Merch., Inc. v. Nestlé, S.A.*, 656 F.3d 112, 122-123 (1st Cir. 2011) (affirming summary judgment for defendants; “[e]ven had [plaintiff] made an adequate showing of harms to competition ... , [plaintiff] would have to show those market impairments were the result of antitrust violations”), and *In re eBay Seller Antitrust Litig.*, 433 F. App'x 504, 506 (9th Cir. 2011) (affirming summary judgment where plaintiffs' evidence failed to “connect the allegedly anticompetitive acts with the charging of supracompetitive fees”), with *In re Neurontin Mktg. & Sales Practices Litig.*, 712 F.3d 60, 68 (1st Cir. 2013) (concluding, in civil RICO case, that “[o]nce a plaintiff presents evidence that he suffered the sort of injury that would be the expected consequence of the defendant's wrongful conduct, the burden shifts to the defendant to rebut this causal inference”), and *Pacific Shores Props., LLC v. City of Newport Beach*, 730 F.3d 1142, 1168 (9th Cir. 2013) (concluding, in Fair Housing Act case, that “[o]nce a plaintiff presents evidence that he suffered the sort of injury that would be the expected consequence of the defendant's wrongful conduct, he has done enough to withstand summary judgment on the ground of absence of causation”).

thus would not apply at trial—the court of appeals required defendants to do just that.

a. A plaintiff's evidentiary burden in opposing a motion for summary judgment turns on the substantive law governing its cause of action. *Anderson*, 477 U.S. at 248. Here, causation is an essential element of respondents' antitrust claim. Private plaintiffs seeking damages under Section 1 of the Sherman Act must demonstrate that their alleged injury was caused "by reason of" the defendant's alleged anticompetitive conduct. 15 U.S.C. § 15(a); *see also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 126 (1969). Plaintiffs "need not exhaust all possible alternative sources of injury," but they must show that the illegality is "a material cause of the injury." *Id.* at 114 n.9; *see also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Doing so requires direct or circumstantial evidence; a plaintiff cannot rely on "speculation or guesswork." *Zenith Radio Corp.*, 395 U.S. at 124. And if an injury "[i]s attributable to ... other factors independent of" the challenged unlawful conduct, the plaintiff "would not have met its burden." *Id.* at 126-127; *see also Matsushita*, 475 U.S. at 585; *Brunswick Corp.*, 429 U.S. at 489.

Because causation is an element of the substantive claim, a plaintiff opposing summary judgment must produce "significantly probative" evidence "from which a reasonable juror could return a verdict in [its] favor" on that element. *Anderson*, 477 U.S. at 249-250, 256; *see Matsushita*, 475 U.S. at 586 (plaintiffs "must do more than simply show that there is some metaphysical doubt as to the material facts"). In *Matsushita*, for example, the Court held that to defeat summary judgment on the element of conspiracy, plaintiffs must come forward with evidence tending to exclude the possibil-

ity that defendants were acting independently. 475 U.S. at 588, 597-598. Because “antitrust law limits the range of permissible inferences from ambiguous evidence” in a Sherman Act § 1 case, the Court explained, evidence of conduct consistent with either conspiracy or independent action—*i.e.*, evidence that shows only the *possibility* of conspiracy—is insufficient to establish a genuine issue for trial. *Id.* at 588.

Respondents failed to produce the requisite “significantly probative” evidence here. After years of extensive discovery, respondents relied solely on their expert, Cotterill, for “evidence” of causation. But by his own admission, Cotterill could not say whether the price increase he observed was caused by conspiracy, by effects of unchallenged, merger-related changes in the structure of the market, or by other lawful, unilateral conduct. *See supra* pp. 8-10. Although Cotterill could have performed a different analysis to explore the price effects of a world in which the merger occurred but the alleged conspiracy did not, Cotterill did not investigate or show what caused the higher prices he observed.¹⁵ Respondents thus produced no evidence of causation, and summary judgment was warranted.

b. Permitting a claim to survive summary judgment based on a presumption of causation despite the absence of actual evidence, as the court of appeals did

¹⁵ The court of appeals noted that Cotterill “was also charged with discerning” whether petitioners’ allegedly collusive decisions “resulted in elevated prices” (App. 35a), and that “[a]nswering that question would expose the precise sort of injury and causation that is required, especially when [respondents] must benefit from all reasonable inferences” (App. 35a-36a). But the court ignored that Cotterill’s analysis in fact did not and could not “[a]nswer[] that question” because he did not isolate any impact caused by the alleged collusion from the impact of other factors.

here, contravenes this Court's precedent and turns the summary judgment standard upside down. A moving party is not required to produce evidence "tending to *negate*" the opponent's claim. *Celotex*, 477 U.S. at 319; *see id.* at 323. Rather, where the nonmoving party bears the burden of proof on an element at trial, it is that party's obligation to produce "affirmative evidence" establishing a genuine issue of material fact. *Anderson*, 477 U.S. at 257; *see also id.* at 249-250, 256-257; *Celotex*, 477 U.S. at 323-324; *Matsushita*, 475 U.S. at 586-587. By denying summary judgment on the ground that Cotterill's analysis did "not necessarily mean" that the price increase he observed "was due to legal causes" (App. 36a), the court of appeals improperly imposed a burden on petitioners to produce evidence negating causation.

A presumption of causation also contravenes this Court's holding in *Comcast*.¹⁶ There, the Court emphasized that "at the class-certification stage (as at trial), any model supporting a 'plaintiff's damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation.'" 133 S. Ct. at 1433. An expert's model must be able "to bridge the differences between supra-competitive prices in general and supra-competitive prices attributable to the [challenged conduct]." *Id.* at 1435. The same principles should apply at summary judgment. Here, as in *Comcast*, Cotterill failed to "translat[e] ... the legal theory of the harmful event into an analysis of the economic impact of that event,"

¹⁶ This Court decided *Comcast* after petitioners filed their principal brief in the court of appeals. Petitioners filed a letter under Rule 28(j) to alert the court of appeals to the decision, which respondents addressed in their reply brief. *See* Appellants' C.A. Reply 15 n.12. The court of appeals did not address the decision.

id.—*i.e.*, the alleged conspiracy. Instead, as in *Comcast*, Cotterill's model reflected not only the merger, but also alternative theories of liability based on alleged unilateral conduct that the district court had rejected and respondents did not appeal. *Supra* p. 10 & n.2. His model was therefore useless for purposes of establishing causation. The court of appeals nevertheless excused this gap in the evidence by effectively presuming causation based solely on disputed evidence of conspiracy and evidence of higher prices, contrary to *Comcast*.

Finally, presuming causation for purposes of summary judgment cannot be justified by resort to general “reluctan[ce] to use summary judgment dispositions in antitrust actions.” App. 6a. Like other circuits that treat summary judgment as “disfavored,” *supra* p. 16 & n.7, the court of appeals invoked that “reluctan[ce]” in reliance on a line of circuit precedent tracing back to this Court's long-discarded dicta in *Poller*, 368 U.S. at 473. App. 6a. But this Court has rejected the view that summary judgment is “disfavored” and made clear that a plaintiff's “complete failure of proof concerning an essential element of [the plaintiff's] case necessarily renders all other facts immaterial” and “mandates the entry of summary judgment.” *Celotex*, 477 U.S. at 322. That principle precludes any presumption of causation and should have led the court of appeals to affirm the grant of summary judgment in this case.

c. Respondents' arguments below do not justify the result. In the court of appeals, respondents acknowledged that they could not “blindly ascribe all price increases to unlawful conduct.” Appellants' C.A. Reply 8. But they then argued that “[a]ll that is necessary to avoid summary judgment is a showing of ‘some admissible evidence that higher prices during the peri-

od of the alleged conspiracy cannot be fully explained by causes consistent with active competition.” *Id.* (quoting *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 660 (7th Cir. 2002)). The antitrust laws, however, require a plaintiff to show that the challenged conduct is “a material cause of the injury.” *Zenith Radio Corp.*, 395 U.S. at 114 n.9. Accordingly, whether the plaintiff seeks to do so by using “direct and positive proof” or by supporting an inference with circumstantial evidence, *id.* at 124 (quoting *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-265 (1946)), Rule 56 requires the plaintiff to come forward with that evidence to show that there is a genuine issue for trial, *Anderson*, 477 U.S. at 256-257. Assuming that 7.9% of the observed price increase must have been caused by the challenged conspiracy simply because Cotterill’s model could not attribute it to market forces does not meet that requirement.

In the alternative, respondents argued as a matter of substantive antitrust law that their evidence of higher prices and their evidence of conspiracy—which had barely survived summary judgment even as to that element, *supra* p. 7—sufficed to support an inference of causation. See Appellants’ C.A. Br. 35-36; Appellants’ C.A. Reply 11, 13-14. “Given th[e] evidence” of conspiracy, respondents contended, it was no “leap of faith” for Cotterill to conclude that any price increase he could not attribute to market factors must have been caused by the alleged conspiracy. *Id.* at 13. But even where evidence of conspiracy exists, plaintiffs must prove causation at trial and therefore must create a genuine issue of fact as to causation to defeat a motion for summary judgment. See *Celotex*, 477 U.S. at 322; see also, e.g., *Todorov v. DCA Healthcare Auth.*, 921 F.2d 1438, 1459 (11th Cir. 1991) (defendants are “not

liable under section 1, even if they conspired,” where a plaintiff fails to “show that the defendants caused the alleged injury”).

As this Court’s decision in *Zenith* confirms, that is so even when the injury plaintiffs allege (here, higher prices) is the type of injury one would expect the alleged conspiracy to cause. There, *Zenith* alleged a conspiracy between the defendants and patent pools in three countries, in which the conspirators refused to license certain patents in an effort to exclude competitors from their markets. 395 U.S. at 105. This Court did not disturb the lower courts’ findings of a conspiracy with respect to each market. *Id.* at 113 n.8, 132 n.26. And *Zenith* claimed the same injury—lost profits based on diminished market shares—with respect to each market. *Id.* at 106 n.1, 116 n.11. The Court nonetheless held that, with respect to two of the markets, *Zenith* had not proven damages caused by reason of the conspiracy as opposed to other possible explanations. *Id.* at 125-129. Thus, no presumption of causation saved *Zenith*’s claims at trial in that case. Under this Court’s summary judgment precedent, it should follow that no presumption of causation can relieve a plaintiff of its evidentiary burden at summary judgment.

III. LAX ENFORCEMENT OF THE SUMMARY JUDGMENT STANDARD HAS SIGNIFICANT NEGATIVE CONSEQUENCES

Litigation of antitrust and other complex civil claims is frequently “a sprawling, costly, and hugely time-consuming undertaking.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 560 n.6 (2007). Summary judgment plays a critical, and often final, gatekeeping role in limiting those costs. See *Matsushita*, 475 U.S. at 594. As one court has observed, “[t]he ultimate deter-

mination, after trial, that an antitrust claim is unfounded may come too late to guard against the evils that occur along the way.” *Valley Liquors, Inc. v. Renfield Imps., Ltd.*, 822 F.2d 656, 660 n.4 (7th Cir. 1987). Rule 56 is thus the “principal tool[]” for preventing “factually insufficient claims ... from going to trial with the attendant unwarranted consumption of public and private resources.” *Celotex*, 477 U.S. at 327; *see id.* at 323-324. Permitting factually insufficient claims to proceed to trial by presuming causation in the absence of evidence eliminates that gatekeeping function, imposing significant burdens on both litigants and the judiciary.

As discussed, although the lower courts are generally consistent in reciting the summary judgment standard properly, significant conflict persists about the proper application of that standard. *Supra* pp. 14-18 & nn.7-8. Despite broad acknowledgment that this Court “pave[d] the way toward mainstream acceptance of the summary judgment procedure with its trilogy” in 1986, *Rand v. Rowland*, 154 F.3d 952, 956-957 (9th Cir. 1998), courts in practice “more widely ignore than honor” the “analytical framework so elaborately set forth” by this Court, Mullenix, 43 Loy. Univ. Chi. L.J. at 568. As a result, as recent studies reveal, the 1986 trilogy has had “scant impact” on lower courts’ use of the summary judgment procedure. *Id.* at 561; *see Eisenberg & Lanvers, Summary Judgment Rates Over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts*, at 19 (Cornell Law Sch. Legal Studies Research Paper Series, Paper No. 08-022, 2008) (finding “no evidence of a broad-based increase in summary judgment rates after the Supreme Court’s 1986 trilogy”), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1138373.

The court of appeals' decision here illustrates the problem. By permitting a claim with "no factual basis" supporting a key element to proceed to trial, the court's approach gives rise to the "attendant unwarranted consumption of public and private resources" that this Court sought to prevent in *Celotex*, 477 U.S. at 327. Allowing a factually insufficient claim to survive summary judgment based on a presumption of causation burdens litigants and courts with "a great deal of expensive and time consuming ... trial work," *Valley Liquors, Inc.*, 822 F.2d at 659 n.4. Moreover, such an approach, when combined with the availability of treble damages, increases the leverage of plaintiffs with meritless claims in settlement negotiations. *See id.* ("the statutory private antitrust remedy of treble damages affords a special temptation for the institution of vexatious litigation"); *see also* Hovenkamp, *The Antitrust Enterprise: Principle and Execution* 59 (2005) ("many marginal and even frivolous antitrust cases are filed every year, and antitrust litigation is often used as a bargaining chip").

Presuming causation at summary judgment also presents risks for jury decisionmaking at trial. "The problems with jury decisionmaking in technical areas have been well documented, especially in the antitrust context." Haw, *Adversarial Economics in Antitrust Litigation: Losing Academic Consensus in the Battle of Experts*, 106 Nw. U. L. Rev. 1261, 1293 (2012). The court's approach here heightens the likelihood that juries will presume causation at trial when presented with an expert's report showing only higher prices—a prospect that "introduce[s] considerable risk into all business decisions." Easterbrook, *On Identifying Exclusionary Conduct*, 61 Notre Dame L. Rev. 972, 979 (1986).

Finally, unless resolved by this Court, the divergent approaches to summary judgment in the lower courts could lead to “unfortunate dynamic consequences that undermine the effectiveness of the antitrust laws.” Epstein, 25 Wash. U. J.L. & Pol’y at 95. Plaintiffs will often be able to fashion their complaints to avoid certain circuits and flock to others, like the Sixth, that apply more permissive summary judgment standards, leading to forum-shopping and inconsistent decisions. *See id.* “Setting the bar too low”—as the Sixth Circuit’s decision does—“raises the direct prospect of opening a set of floodgates that should be tightly fastened.” *Id.*

Faced with similar uncertainty, this Court has found it appropriate to model the proper application of the standards governing two critical stages of the pre-trial sequence. In *Twombly* and *Comcast*, the Court underscored the importance of rigorous enforcement of the standards governing pleading and class certification in antitrust and other civil cases.

In *Twombly*, the Court held that, at the pleading stage, antitrust plaintiffs must make factual allegations that would plausibly establish their right to relief. *See* 550 U.S. at 555-557; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (“[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—that the pleader is entitled to relief.”). Recognizing the costs of an overly lax application of this standard, the Court emphasized the importance of “hedg[ing] against false inferences” in antitrust cases, and reiterated *Matsushita*’s requirement that “proof of a § 1 conspiracy must include evidence *tending to exclude* the possibility of independent action.” 550 U.S. at 553 (emphasis added); *see id.* at 553-554, 557; *see also*

Iqbal, 556 U.S. at 684 (affirming that *Twombly* “expounded the pleading standard for ‘all civil actions’”).

Shortly thereafter, the Court stepped in to demonstrate the proper application of the Rule 23 class-certification standard and to emphasize the importance of “rigorous analysis” at that stage. *Comcast*, 133 S. Ct. at 1432; *see also Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). Rule 23, the Court made clear, sets forth “no mere pleading standard”; rather, plaintiffs must “prove ... *in fact*” that the requirements of the rule have been satisfied. *Comcast*, 133 S. Ct. at 1432 (quoting *Wal-Mart Stores*, 131 S. Ct. at 2551). *Comcast*, moreover, established that an expert’s “model purporting to serve as evidence of damages in [a] class action must measure only those damages attributable to that theory.” *Id.* at 1433. “If the model does not even attempt to do that, it cannot possibly” satisfy Rule 23. *Id.*

There is a similar need for the Court’s intervention here. Given the disagreement and confusion that characterizes the lower courts’ application of the summary judgment standard, the error in the court of appeals’ approach below, and the pernicious consequences of a presumption of causation that allows factually insufficient claims to proceed to trial, the Court should grant review as it did in *Twombly* and *Comcast* to clarify and apply the summary judgment standard.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2014

APPENDIX