

16-1303  
No. \_\_\_\_\_

Supreme Court, U.S.  
FILED

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**In the Supreme Court of the United States**

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SOLIDFX, LLC,

*Petitioner,*

v.

JEPPESEN SANDERSON, INC.,

*Respondent.*

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*On Petition for Writ of Certiorari to the  
United States Court of Appeals for the Tenth Circuit*

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**PETITION FOR WRIT OF CERTIORARI**

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**QUESTION PRESENTED FOR REVIEW**

Whether a monopolist who asserts ownership of a valid intellectual property right has absolute immunity from antitrust liability, even where the monopolist has conceded that its intellectual property did not relate to its anticompetitive conduct?

**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Supreme Court Rule 29.6, Petitioner SOLIDFX, LLC states that it has no parent company, and that no publicly held company owns 10% or more of its stock.

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The Tenth Circuit’s opinion affirming the district court is reported at *SOLIDFX, LLC v. Jeppesen Sanderson, Inc.*, 841 F.3d 827 (10th Cir. 2016).

## STATEMENT OF JURISDICTION

The Tenth Circuit issued its opinion affirming the district court’s grant of summary judgment to Jeppesen on SOLIDFX’s antitrust claim on October 31, 2016. SOLIDFX petitioned for rehearing, and the Tenth Circuit denied that petition on January 25, 2017. This Court has jurisdiction over this timely-filed petition pursuant to 28 U.S.C. § 1254(1).

## RELEVANT STATUTORY PROVISION

### 15 U.S.C. § 2

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

## STATEMENT OF THE CASE

This case raises the novel question of whether actions taken by a monopolist that might otherwise violate the antitrust laws are per se immune from antitrust liability simply because the monopolist claims to be protecting its intellectual property. The Circuits are split on this issue. The Federal Circuit has concluded that a claim of protection of intellectual property rights gives rise to a presumption of legitimacy under the antitrust laws, and that this presumption can be rebutted *only* by evidence that the monopolist's intellectual property is invalid. This is not a "presumption" at all, but is simply a rule that, where a monopolist has valid intellectual property, it cannot be held liable in antitrust. The Ninth Circuit, on the other hand, has held that the presumption may *also* be rebutted through evidence that protection of intellectual property is a mere pretext for the monopolist's anticompetitive motivation.

Here, Respondent Jeppesen Sanderson, Inc. ("Jeppesen"), the defendant below, has been the overwhelmingly dominant provider of airplane terminal charts—used by pilots to maneuver safely in and around airports—for decades. In 2008, Jeppesen entered into an agreement with Petitioner SOLIDFX, LLC ("SOLIDFX"), a software development company, to develop apps that would allow pilots to view Jeppesen's terminal charts on mobile devices. This relationship was initially successful and profitable for both parties. But when Apple announced its iPad in 2010, Jeppesen finally understood the potential magnitude of the app market and changed course, refusing to further cooperate with SOLIDFX, and

denying SOLIDFX access to its charts and software, as the agreement required.

After SOLIDFX brought suit under, *inter alia*, § 2 of the Sherman Act, Jeppesen claimed that its actions were immune from antitrust scrutiny because they were undertaken to protect Jeppesen's copyrights. SOLIDFX had ample evidence that Jeppesen's purported motive to protect its copyrights was pretext—including testimony from Jeppesen's 30(b)(6) corporate representative that protection of copyrights did not "relate in any way" to Jeppesen's refusal to deal with SOLIDFX. Under the Ninth Circuit approach, this is exactly the evidence needed to send the question to the jury. The district court and Tenth Circuit, however, adopted the Federal Circuit approach, which rendered all of SOLIDFX's pretext evidence—including Jeppesen's own admission that protection of IP did not relate to its conduct toward SOLIDFX—irrelevant. According to the Tenth Circuit, because SOLIDFX did not prove (and does not argue) that Jeppesen's copyrights are invalid, it could not otherwise rebut the presumption that Jeppesen's actions did not violate the Sherman Act.

This Court has repeatedly held that possession of intellectual property, on its own, is no license to violate the Sherman Act. Because the Federal Circuit's approach creates a conclusive presumption of validity where a monopolist claims to act to protect valid intellectual property, it is inconsistent with these repeated holdings. The Tenth Circuit thus erred in joining the Federal Circuit and affirming summary judgment on SOLIDFX's § 2 claim. The Court should grant certiorari to resolve this circuit split, correct the

Tenth Circuit's error, and clarify the relationship between antitrust and intellectual property law.

### 1. **Factual Background.**

SOLIDFX brought its claims under § 2 of the Sherman Act, which prohibits “monopoliz[ing] any part of the trade or commerce among the several States.” 15 U.S.C. § 2. In order to survive summary judgment on a § 2 claim, a plaintiff must point to evidence demonstrating a genuine issue of material fact on two elements: “(1) the possession [by the monopolist] of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966). To support its claim, SOLIDFX presented the following evidence.

Historically, airplane terminal charts were provided in paper form and pilots lugged heavy, bulky binders of charts with them everywhere they flew. (Appendix (“Ap.”) at 34.) Accordingly, Jeppesen developed as primarily a printing company. (SA1529.)<sup>1</sup> SOLIDFX is a small software company with extensive experience developing software applications that access, organize, and manage data. (Ap. at 34.) In 2008, two years before Apple released the iPad, SOLIDFX anticipated rapid development in the efficiency, battery life, display capabilities, and computing power of mobile electronic

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<sup>1</sup> SOLIDFX submitted a 39 volume consecutively-paginated supplemental appendix to the Tenth Circuit. Cites to “SA\_\_\_\_” are to documents in that supplemental appendix.

devices. (Ap. at 34-35.) And so SOLIDFX began developing software for pilots to view their airport terminal charts on mobile devices. (SA1432.)

Jeppesen learned of SOLIDFX's activities and contacted SOLIDFX in November 2008. (Ap. at 35.) Jeppesen was interested in forming a business relationship with SOLIDFX whereby SOLIDFX would develop apps to display Jeppesen's terminal charts on mobile devices. (Ap. at 35; *see also* SA2315.) In July 2009, SOLIDFX released its first app displaying Jeppesen terminal charts on an e-ink device called the iRex. (SA2315.) This app was well received in the market. Both customers and aviation industry media gave SOLIDFX's iRex app excellent reviews. (Ap. at 37; SA2424-26; *see also* SA2429; SA5073.) As a result, many commercial airlines—Jeppesen's most lucrative customers—inquired about using the SOLIDFX app.

In December 2009, after working together for more than a year, the parties entered into a five-year, automatically-renewing cooperation agreement. (Ap. at 36; SA2344, 2349 § 5.) Under the Agreement, SOLIDFX would develop and sell apps to display Jeppesen's terminal charts on mobile devices. (Ap. at 36.) Jeppesen, in return, was responsible for providing SOLIDFX with the Jeppesen Integration Tool Kit ("JIT"), a software development package that SOLIDFX needed to read and display Jeppesen's terminal charts. (Ap. at 36-37.) SOLIDFX was not allowed to alter the terminal charts in any manner. (Ap. at 36.)

In January 2010, shortly after the parties signed the Agreement, Apple announced that it would release the iPad in April of that year. Jeppesen's terminal chart customers immediately began clamoring for an

iPad app (SA5007), and SOLIDFX, with Jeppesen's encouragement, quickly got to work designing such an app. SOLIDFX confirmed that its app would be ready in April when the iPad launched as long as Jeppesen provided SOLIDFX with the necessary JIT. (SA4856-57.)

After encouraging SOLIDFX's efforts for months, in May 2010, Jeppesen abruptly notified SOLIDFX that it would not provide the JIT needed to develop an app for the iPad or any other mobile device. (Ap. at 38.) At the time, Jeppesen said nothing about copyrights, but rather explained to SOLIDFX that "[d]irect competition with a Jeppesen offering[] will generally be avoided." (SA2493.) Jeppesen's internal emails reveal that its employees understood that attempting to "compete" with SOLIDFX and other "third party solution providers" might "result[] in a potentially undesirable market condition." (Ap. at 111-12 (SA2501).) When Jeppesen thought that the iPad was just a "toy," Jeppesen was willing to honor the Agreement, work with SOLIDFX, and compete lawfully. (SA2503; SA2505; SA2512.) But upon realizing the iPad's full commercial potential, Jeppesen breached its Agreement with SOLIDFX in what *even Jeppesen* called an "anticompetitive reaction." (SA2503; SA2505; SA2512.)

Jeppesen also understood that its anticompetitive conduct in breaching its agreement with SOLIDFX would cause it to lose money in the short term. According to Jeppesen, partnering with SOLIDFX would have cost less and put a product on the market sooner. (SA1753-56, SA1759, SA1772; SA1805-06, SA1817, SA1831.) As one Jeppesen employee wrote,

“truth be told, the [SOLIDFX] user generates greater income for Jeppesen” as compared to Jeppesen’s own app. (SA2965.) Another Jeppesen employee described Jeppesen’s refusal to work with third parties as “isolationist” and as causing Jeppesen to “leav[e] money on the table, potentially a lot.” (Ap. at 101 (SA1566).)

After the lawsuit was filed, Jeppesen asserted for the first time that its anticompetitive conduct was based on a desire to protect its copyright. But Jeppesen also admitted that this justification was merely a pretext. Jeppesen’s 30(b)(6) representative on intellectual property testified that Jeppesen’s copyrights did not “relate in any way” to its refusal to provide the JIT. (SA1619-20.) Further, the internal guidance that Jeppesen issued to its employees regarding working with third parties does not mention copyright concerns—rather it focuses only on protecting Jeppesen’s market position. (SA1769; Ap. 111-12 (SA2501).) And even if Jeppesen had provided the JIT as required, the terms of the Agreement gave it complete control over the display of its terminal charts, thus ameliorating any copyright concerns. (SA1545; SA1620; Ap. at 36.) And, of course, Jeppesen had specifically licensed its copyrighted charts to SOLIDFX and had never expressed any concern about their display in the many months leading up to the launch of the iPad. (See SA2346-47 § 3.)

Because it has excluded SOLIDFX and all other competitors from the market for mobile apps that display terminal charts, Jeppesen is able to charge artificially high prices for a product that customers regularly complain about. The price of the Jeppesen

app and accompanying data subscription is between two and ten times higher than the price charged by Jeppesen's most successful competitors. (SA2040; SA2164; SA2181-82.) For example, in the general aviation market, Jeppesen charged \$787 per year for a U.S. terminal chart subscription (which included access to the electronic charts through its app), while its competitor Foreflight charged only \$74.99 for its app displaying U.S. government terminal charts. (SA2164; SA2181-82.) And in the commercial aviation market, where it has virtually no competitors, Jeppesen's app prices are even higher. (*See, e.g.*, SA5896.)

Jeppesen's high price cannot be justified on the basis that Jeppesen offers a better product. Indeed, customers regularly complain about the app. (SA2972-73.) And other customers and industry media specifically requested that SOLIDFX develop an app for Jeppesen charts on the iPad. (SA2178.) Yet, despite the high price and widespread user complaints about the quality of Jeppesen's app, Jeppesen nevertheless enjoys more than 70% of the terminal chart app market. (SA2147-48, SA2152.)

## **2. History of the Litigation.**

SOLIDFX brought suit in 2011. In addition to claiming breach of the Agreement, SOLIDFX alleged that Jeppesen violated § 2 of the Sherman Antitrust Act, 15 U.S.C. § 2, by unlawfully acquiring and maintaining a monopoly in the market for terminal chart apps. (SA1354-1361, ¶¶ 113-143.) Jeppesen moved for summary judgment on SOLIDFX's antitrust claims, arguing that it was exempt from the Sherman Act because it "used its intellectual property as the Copyright Act allows" when it terminated its

relationship with SOLIDFX. (SA192.) Jeppesen argued that unless SOLIDFX could establish that Jeppesen's copyrights in its terminal charts and the JIT were invalid, SOLIDFX's § 2 claim necessarily failed. (SA190-92.) In response, SOLIDFX presented the evidence summarized above—along with numerous other documents and deposition admissions—establishing that, at a minimum, there were triable disputes of fact concerning whether Jeppesen's claim of IP protection was a mere pretext for anticompetitive conduct.

In deciding the § 2 claim, the district court assumed that Jeppesen possessed monopoly power in the relevant market (and SOLIDFX presented ample evidence on that point). (Ap. at 44.) The court granted summary judgment, however, based on the presumption that the “assertion of one's copyright is *per se* legitimate,” and that actions to protect a copyright cannot constitute anticompetitive conduct under the Sherman Act. (Ap. at 48.) The district court took at face value Jeppesen's assertion that it was “exercising its right to refuse to license its copyrighted work,” and disregarded SOLIDFX's evidence that Jeppesen's post hoc justification was a pretext. (Ap. at 45, 48.)

SOLIDFX proceeded to trial on its non-antitrust, state law claims. After an 8-day trial, the jury found against Jeppesen, and awarded SOLIDFX \$43 million for breach of contract. On appeal, however, the Tenth Circuit held that the limitation of liability provision in the parties' contract barred all of the damages sought by SOLIDFX, and denied SOLIDFX any opportunity to

prove other damages on remand.<sup>2</sup> On SOLIDFX's cross-appeal of the antitrust ruling, the Tenth Circuit affirmed the district court's conclusion that actions taken for the purported purpose of protecting intellectual property are *per se* legitimate, and cannot give rise to § 2 liability.

### ARGUMENT

To escape § 2 liability and prove that its conduct is not “exclusionary” or “anticompetitive,” an alleged monopolist may argue that it has a “valid business justification[]” for its predatory conduct. *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 483 (1992) (“*Kodak I*”). This Court should grant certiorari to determine whether possession of valid intellectual property rights constitutes a *per se* “valid business justification,” immune from attack.

The courts of appeal are split over this question. In this case, the Tenth Circuit followed the Federal Circuit, holding that a monopolist's assertion of a valid intellectual property right is an absolute defense to antitrust liability. It rejected the position of the Ninth Circuit, which has held that intellectual property rights are a presumptively valid business justification, but that this presumption is subject to challenge based on evidence of pretext.

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<sup>2</sup> Because a contractual limitation of liability cannot relieve a party of statutory antitrust liability, this issue is not relevant to SOLIDFX's antitrust claim, or to the issue raised in this Petition. See *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 329 (1955) (an agreement that confers “a partial immunity from civil liability for future violations” of the antitrust laws is inconsistent with the public interest).

The Tenth Circuit should be reversed. Allowing a monopolist to use its intellectual property rights to avoid antitrust liability, even when the monopolist admits its IP did not “relate in any way” to its anticompetitive conduct, does not advance the purposes of the intellectual property laws and should not provide an absolute defense to antitrust liability. Such a rule would conflict with the precedents of this Court, which have recognized the inherent tension between the Sherman Act on the one hand and the Copyright and Patent Acts on the other, but have made clear that possession of intellectual property does not give monopolists *carte blanche* to violate antitrust laws. *See FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2231 (2013).

SOLIDFX’s evidence of pretext in this case was undeniable—Jeppesen’s own Rule 30(b)(6) witness admitted its IP defense was pretextual. Thus, its antitrust claim could be dismissed only if evidence of that pretext was irrelevant. For this reason, this case provides an ideal vehicle for this Court to resolve this issue and hold that a monopolist’s assertion of an IP defense to antitrust liability is subject to challenge through evidence of pretext.

**I. THE CIRCUITS ARE SPLIT REGARDING WHETHER A MONOPOLIST’S ASSERTION OF INTELLECTUAL PROPERTY IMMUNIZES IT FROM ANTITRUST LIABILITY UNDER § 2 OF THE SHERMAN ACT.**

The Circuit Courts of Appeal to have addressed this issue have diverged. Initially, the First Circuit articulated the presumption that protection of IP rights is a valid business justification for otherwise-

anticompetitive conduct, but did not describe the circumstances under which the presumption could be rebutted. The Ninth Circuit then also recognized this presumption, and further held that it may be rebutted by evidence that the monopolist's assertion of IP rights is a mere pretext for an anticompetitive motive. The Federal Circuit rejected that approach, holding that the presumption may be rebutted *only* by evidence that the monopolist's intellectual property rights are invalid.

Here, the district court expressly adopted the Federal Circuit approach, which was the only way it could dispose of SOLIDFX's antitrust claim on summary judgment. The Tenth Circuit affirmed, thus aligning it with the Federal Circuit and against the Ninth Circuit.

#### **A. The First Circuit Articulated a Presumption that Intellectual Property Protection Is a Valid Business Purpose.**

The First Circuit was the first to address this issue in *Data General Corp. v. Grumman Systems Support Corp.*, 36 F.3d 1147 (1st Cir. 1994), a case that arose from a computer manufacturer's refusal to provide its software diagnostic tools to anyone other than its own technicians or in-house technicians of the purchasers of its computer systems. *Id.* at 1154-55. When a third-party servicer used illicit copies of the tools, the manufacturer brought suit for copyright infringement, and the servicer asserted an antitrust violation as a defense and counterclaim. *Id.* at 1155.

Examining the policy objectives of both antitrust and intellectual property law, the First Circuit considered under what circumstances a copyright

holder's unilateral refusal to license copyrighted material could violate § 2. The court acknowledged that "the Copyright Act tolerates behavior that may harm both consumers and competitors." *Id.* at 1185. At the same time, the court observed that, in enacting the Copyright Act, Congress "made an empirical assumption that allowing copyright holders to collect license fees and exclude others from using their works creates a system of incentives that promotes consumer welfare in the long term." *Id.* at 1186-87. The court noted that it would be inefficient to "require antitrust defendants to prove and reprove the merits of this legislative assumption in every case." *Id.* at 1187.

To harmonize the policy aims of the Sherman Act and intellectual property law, the court adopted a presumption: "while exclusionary conduct can include a monopolist's unilateral refusal to license a copyright, an author's desire to exclude others from use of its copyrighted work is a presumptively valid business justification for any immediate harm to consumers." *Id.* In a footnote, however, the court noted that this presumption is not conclusive: "Wary of undermining the Sherman Act, however, we do not hold that an antitrust plaintiff can never rebut this presumption, for there may be rare cases in which imposing antitrust liability is unlikely to frustrate the objectives of the Copyright Act." *Id.* at 1187 n.64. The court declined to state what those "rare" circumstances might be, however, and so gave no express guidance regarding *how* the presumption could be rebutted in future cases.

**B. The Ninth Circuit Held that the Presumption Can Be Rebutted by Evidence that the Monopolist's Reliance on Its Intellectual Property Is Pretextual.**

The Ninth Circuit next addressed this issue on remand from this Court's decision in *Kodak I*. See *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997) ("*Kodak II*"). In that case, Kodak had attempted to monopolize the market for service of its photocopiers by refusing to sell replacement parts for its machines to third-party servicers, or "ISOs." *Id.* at 1200-02. The ISOs brought claims under the Sherman Act that were initially validated by this Court in *Kodak I*; on remand, a jury awarded the ISOs \$71.8 million against Kodak. *Id.* at 1202.

In its second appeal, Kodak argued that the district court erred in failing "to instruct the jury that Kodak's numerous patents and copyrights provide a legitimate business justification for Kodak's alleged exclusionary conduct." *Id.* at 1214. Reviewing case law regarding the intersection of IP and antitrust, the court recognized two guiding principles: "(1) neither patent nor copyright holders are immune from antitrust liability, and (2) patent and copyright holders may refuse to sell or license protected work." *Id.* at 1215. The court observed that this Court in *Kodak I* had rejected the proposition that possession of IP rights precludes all antitrust liability. *Id.* at 1215-16 (citing *Kodak I*, 504 U.S. at 479 n.29). But it also recognized that "[a]t the border of intellectual property monopolies and antitrust markets lies a field of dissonance yet to

be harmonized by statute or the Supreme Court.” *Id.* at 1217.

To navigate this “field of dissonance,” the Ninth Circuit adopted a “modified version” of the First Circuit’s approach. *Id.* at 1218. The court recognized that protection of IP rights is a “presumptively valid business justification for any immediate harm to consumers.” *Id.* (quoting *Data General*, 36 F.3d at 1187) (quotation marks omitted). By failing to instruct the jury on this presumption, the court held that the district court had erred. *Id.* However, the *Kodak II* court held that the presumption “is rebuttable” in two ways—through evidence that the monopolist’s IP is invalid, or “by evidence of pretext.” *Id.* at 1219. “Neither the aims of intellectual property law, nor the antitrust laws justify allowing a monopolist to rely upon a pretextual business justification to mask anticompetitive conduct.” *Id.* (citing *Kodak I*, 504 U.S. at 484 (where monopolist’s actions “cast[] doubt” on its proffered justification, “a reasonable trier of fact could conclude that [this justification] is pretextual” (second alteration in original))).

Considering testimony from a Kodak manager that its patents “did not cross [his] mind” in refusing to deal with ISOs, and evidence of a mismatch between Kodak’s actions and protection of its intellectual property (for example, Kodak refused to sell both parts that incorporated patented technology, as well as those that did not), the court held that the record contained ample evidence that Kodak’s justification was pretextual. *Id.* (alteration in original). “Evidence regarding the state of mind of Kodak employees may

show pretext, when such evidence suggests that the proffered business justification played no part in the decision to act.” *Id.*

Ultimately, because the record supported a finding of pretext, the court held that the instructional error was harmless, and denied Kodak’s appeal. *Id.* at 1220.

**C. The Federal Circuit Rejected the Ninth Circuit Approach, and Held that the Presumption Can Be Rebutted Only By Evidence that the Monopolist’s Intellectual Property Rights Are Invalid.**

Three years later, the Federal Circuit rejected the Ninth Circuit approach. *In re Indep. Serv. Orgs. Antitrust Litig. CSU, L.L.C.*, 203 F.3d 1322 (Fed. Cir. 2000) (“*Xerox*”). As in *Kodak*, ISOs sued Xerox over Xerox’s refusal to sell parts to the third-party service market. *Id.* at 1234. Like *Kodak*, Xerox argued that its patents and copyrights provided a valid business justification for its refusal to deal with the ISOs. *Id.*

While noting that “[i]ntellectual property rights do not confer a privilege to violate the antitrust laws,” *id.* at 1325, the Federal Circuit nevertheless conferred just such a privilege. The court disposed of the patent issue decisively: “We [] will not inquire into [the monopolist’s] subjective motivation for exerting his statutory rights, even though his refusal to sell or license his patented invention may have an anticompetitive effect, so long as that anticompetitive effect is not illegally extended beyond the statutory patent grant.” *Id.* at 1327-28. As to copyright, the court reviewed the holdings of *Data General* and *Kodak II* and concluded that the Ninth Circuit’s

willingness to examine the motivation of the monopolist for pretext represented “a significant departure” from the First Circuit’s holding in *Data General*. *Id.* at 1329 (citing *Data General*, 36 F.3d at 1187 n.64).

The Federal Circuit thus “reject[ed the ISOs’] invitation to examine Xerox’s subjective motivation in asserting its right to exclude under the copyright laws for pretext, in the absence of any evidence that the copyrights were obtained by unlawful means or were used to gain monopoly power beyond the statutory copyright granted by Congress.” *Id.* Without “definitive rebuttal evidence” from the ISOs that Xerox’s copyrights were invalid, Xerox’s refusal to sell to the ISOs “was squarely within the rights granted by Congress . . . and did not constitute a violation of the antitrust laws.” *Id.*

The Federal Circuit thus shut the door to any method of rebutting the presumption that IP protection is a valid business justification other than by proving that the monopolist’s intellectual property is invalid, thus granting antitrust immunity to any holder of valid intellectual property rights.

## **II. THE TENTH CIRCUIT ERRED BY FOLLOWING THE FEDERAL CIRCUIT’S APPROACH BECAUSE IT CONFLICTS WITH THIS COURT’S PRIOR TREATMENT OF THE INTERSECTION BETWEEN INTELLECTUAL PROPERTY AND ANTITRUST.**

Here, the Tenth Circuit sided with the Federal Circuit and against the Ninth Circuit, adopting the

*Xerox* approach to render SOLIDFX's evidence of pretext irrelevant. Because the Federal Circuit approach conflicts with this Court's prior treatment of the IP-antitrust nexus, this was error, and this Court should review and reverse.

**A. The Tenth Circuit Adopted the Federal Circuit's Standard to Render SOLIDFX's Evidence of Pretext Irrelevant.**

Here, had the district court and Tenth Circuit applied the approach articulated by the Ninth Circuit in *Kodak II*, it would have been impossible to grant summary judgment to Jeppesen on SOLIDFX's § 2 claim. SOLIDFX presented evidence that demonstrated a genuine issue of material fact regarding whether Jeppesen's claimed justification for refusing access to the charts and the JIT—protection of its copyright—was in fact a pretext. In particular, SOLIDFX pointed to evidence that:

- Jeppesen's refusal to provide access to the terminal charts and JIT to SOLIDFX did not "relate in any way" to any interest in protecting its copyrights, according to Jeppesen's Rule 30(b)(6) corporate representative, (SA1619-20);
- Jeppesen issued internal guidance to its employees warning them against working with third-parties like SOLIDFX, but this warning focused on protecting Jeppesen's market position and said nothing about Jeppesen's copyrights, (Ap. at 111-12 (SA2501)); and
- the terms of the Agreement between SOLIDFX and Jeppesen gave Jeppesen complete control over the manner in which its terminal charts

were displayed, thus ensuring the integrity of Jeppesen’s copyrighted material in SOLIDFX’s app, (Ap. at 36).

This evidence, which is even more robust than the evidence *Kodak II* found sufficient to establish pretext, raised a genuine issue of material fact that Jeppesen’s assertion of copyright was a pretext, particularly when “all justifiable inferences are . . . drawn in [SOLIDFX’s] favor.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Indeed, if an antitrust plaintiff cannot establish pretext via Rule 30(b)(6) testimony *from the monopolist itself* that IP protection was not related to its decision-making, it is difficult to imagine what evidence might otherwise meet this standard.

The district court was able to grant summary judgment to Jeppesen only by adopting a legal standard that rendered SOLIDFX’s evidence of pretext irrelevant. The Tenth Circuit agreed, following the Federal Circuit and holding that Jeppesen’s invocation of its copyrights in the JIT and terminal charts was a “presumptively rational business justification.” *SOLIDFX, LLC v. Jeppesen Sanderson, Inc.*, 841 F.3d 827, 843 (10th Cir. 2016) (Ap. at 29). And because SOLIDFX had not argued that Jeppesen’s copyrights were invalid, it could not rebut this “presumption.”<sup>3</sup>

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<sup>3</sup> The Tenth Circuit also asserted that the Federal Circuit approach is more consistent with the Tenth Circuit’s precedent in *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064 (10th Cir. 2013), a case that had not yet been issued at the time the district court granted summary judgment. *SOLIDFX*, 841 F.3d at 842 (Ap. at 28). But *Novell* did not involve an assertion of intellectual property rights in defense of a § 2 claim at all. And contrary to the Tenth Circuit’s assertion, *Novell* actually supports *denying*

## **B. The Tenth Circuit Erred in Adopting the Federal Circuit's Standard Because It Conflicts With This Court's Precedent.**

In *Xerox*, the Federal Circuit claimed that its presumption that IP protection is a legitimate business purpose was not conclusive and could be rebutted. See *Xerox*, 203 F.3d at 1329. In reality, however, a “rebuttable” presumption that can only be rebutted by evidence that the monopolist’s IP is invalid is no presumption at all, and rather is simply a *rule* that, where a monopolist’s IP was not obtained illegally, its actions regarding that IP cannot violate § 2. This regime places a thumb on the scales in favor of intellectual property protection over antitrust law. Allowing a monopolist to violate the antitrust laws simply because it has valid intellectual property rights is akin to “the proposition that use of one’s personal property, such as a baseball bat, cannot give rise to tort liability.” *United States v. Microsoft Corp.*, 253 F.3d 34, 63 (D.C. Cir. 2001).

This is squarely inconsistent with this Court’s prior treatment of the nexus between intellectual property and antitrust law. In *Kodak I*, for example, the Court observed that it had “held many times” that a

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summary judgment here, because SOLIDFX presented evidence satisfying the two elements identified by then-Judge Gorsuch in *Novell* for § 2 claims based on a unilateral refusal to deal with a competitor. See *Novell*, 731 F.3d at 1074-75 (requiring (1) “a preexisting voluntary and presumably profitable course of dealing between the monopolist and rival,” and (2) that “the monopolist’s discontinuation of the preexisting course of dealing must ‘suggest[] a willingness to forsake short-term profits to achieve an anti-competitive end’” (alteration in original) (citations omitted)).

monopolist who uses “some natural and legal advantage such as a *patent, copyright*, or business acumen can [be subject to] liability if ‘a seller exploits his dominant position in one market to expand his empire into the next.’” 504 U.S. at 479 n.29 (emphasis added) (citations omitted). Here, Jeppesen sought to “exploit [its] dominant position” in the market for printed terminal charts by using its legal advantage (its copyrights on its terminal charts and the JIT) to expand that empire into a new market—apps for terminal chart display. This Court’s precedents do not suggest that actions such as Jeppesen’s should be immunized from antitrust scrutiny simply because Jeppesen’s intellectual property was valid.

More recently, in *FTC v. Actavis*, 133 S. Ct. 2223 (2013), the Court considered the legality under the Sherman Act of pharmaceutical settlements in which a patent holder essentially pays challengers not to sue for infringement. While the Eleventh Circuit had based its analysis of the legality of such agreements on whether “the settlement agreement . . . fall[s] within the legitimate scope of the patent’s exclusionary potential,” *id.* at 2231 (alterations in original) (citation omitted) (quotation marks omitted), this Court disagreed. “[I]t would be incongruous to determine antitrust legality by measuring the settlement’s anticompetitive effects solely against patent law policy, rather than by measuring them against procompetitive antitrust policies as well.” *Id.*

Instead, the Court held that the legality of such arrangements under the antitrust laws must be evaluated “by considering traditional antitrust factors such as likely anticompetitive effects, redeeming

virtues, market power, and potentially offsetting legal considerations present in the circumstances, such as here those related to patents.” *Id.* The Court thus refused to give special consideration to the settlements simply because they were tied to IP rights, and instead endorsed a standard antitrust analysis to determine whether the settlements violate the Sherman Act.

Moreover, the Court in *Actavis* also approved of examining the *motivations* of monopolists in the antitrust inquiry, even where intellectual property is concerned:

Although the parties may have reasons to prefer settlements that include reverse payments, the relevant antitrust question is: *What are those reasons?* If the basic reason is a desire to maintain and share patent-generated monopoly profits, then, in the absence of some other justification, the antitrust laws are likely to forbid the arrangement.

*Id.* at 2237 (emphasis added). *Actavis* is thus fully consistent with the Ninth Circuit’s approach in *Kodak II*, which permits evidence of pretext on the part of the monopolist to rebut the presumption that IP protection is a valid business justification of otherwise-anticompetitive conduct. And *Actavis* is contrary to the Federal Circuit approach.<sup>4</sup>

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<sup>4</sup> The Tenth Circuit dismissed SOLIDFX’s argument concerning *Actavis* in a footnote, opining that “because *Actavis* was a § 1 case involving potentially collusive behavior among competitors,” it did not apply to SOLIDFX’s § 2 claim. *SOLIDFX*, 841 F.3d at 843 n.7 (Ap. at 29). But nothing in *Actavis* limits the scope of its discussion of intellectual property to § 1 cases, and the lower

*Xerox* is part and parcel of the Federal Circuit’s repeated broad application of intellectual property rights—an overzealous position that this Court has often reined in. *See, e.g., Life Techs. Corp. v. Promega Corp.*, 137 S. Ct. 734, 743 (2017) (reversing Federal Circuit regarding liability for patent infringement in case involving multicomponent invention); *Samsung Elec. Co. v. Apple, Inc.*, 137 S. Ct. 429, 436 (2016) (reversing Federal Circuit interpretation of Patent Act related to damages for patent infringement); *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 843 (2015) (abrogating Federal Circuit precedent regarding standard of review for certain factual issues in patent claim construction).

Because it is inconsistent with this Court’s prior treatment of the nexus between intellectual property law and antitrust, this Court should reject the *Xerox* approach. Instead, it should adopt the reasoning of *Kodak II*, and hold that, where a monopolist asserts intellectual property protection as a valid business

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courts have applied its reasoning in § 2 cases. *See, e.g., New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 660 (2d Cir. 2015) (in the context of analyzing a § 2 monopolization claim, holding that “[t]he Court’s decision in *Actavis* reaffirmed the conclusions of circuit courts that a patent does not confer upon the patent holder an ‘absolute and unfettered right to use its intellectual property as it wishes,’ and ‘[i]ntellectual property rights do not confer a privilege to violate the antitrust laws” (alterations in original) (citations omitted)); *In re Adderall XR Antitrust Litig.*, 754 F.3d 128, 133 (2d Cir. 2014) (in a § 2 refusal-to-deal case, recognizing that “[t]he *Actavis* court held that . . . reverse payment settlements are not immune from antitrust scrutiny because they may ‘fall within the scope of the exclusionary potential of the patent’ at issue” (citations omitted)).

justification in defense of a § 2 claim, any presumption that may arise from the intellectual property rights may be rebutted by showing that the assertion of intellectual property rights is merely a pretext for anticompetitive conduct.

**III. JEPPESEN'S CANDID ADMISSIONS THAT INTELLECTUAL PROPERTY PROTECTION DID NOT RELATE TO ITS ANTICOMPETITIVE CONDUCT MAKE THIS CASE AN IDEAL VEHICLE TO RESOLVE THIS ISSUE.**

This case presents an excellent vehicle through which the Court can resolve this issue, due principally to the stark nature of Jeppesen's own admissions regarding its intentions in terminating its relationship with SOLIDFX. Jeppesen's counsel maintained that Jeppesen did so out of a desire to protect its copyrights. Under oath in a Rule 30(b)(6) deposition, however, Jeppesen's corporate representative admitted that copyright protection "did not relate in any way" to Jeppesen's decision to jettison SOLIDFX. Moreover, Jeppesen knew that attempting to "compete" with SOLIDFX and other "third party solution providers" might "result[] in a potentially undesirable market condition." And even Jeppesen characterized its course of action as an "anticompetitive reaction."

If, in the face of these admissions, Jeppesen is *still* entitled to invoke an intellectual property defense that automatically exonerates it from § 2 liability, then there is no outer limit to the Federal Circuit's *Xerox* principle. As the Ninth Circuit recognized in *Kodak II*, "[n]either the aims of intellectual property law, nor the antitrust laws justify allowing a monopolist to rely

upon a pretextual business justification to mask anticompetitive conduct.” 125 F.3d at 1219. Permitting Jeppesen to categorically escape not just liability, but even the threat of having to explain its conduct to a jury, not only fails to serve the ends of antitrust law, it would actively encourage monopolists to adopt IP fig leaves as cover for their anticompetitive actions.

Here, there is a clean split between the Federal Circuit and the Ninth Circuit regarding whether evidence of pretext can defeat the presumption of validity. The evidence presented by SOLIDFX on summary judgment establishes an issue of fact that Jeppesen’s IP-protection claim was pretextual, and thus precludes summary judgment under the Ninth Circuit’s standard. The Court’s resolution of the split will determine whether SOLIDFX can make its case to a jury, or whether Jeppesen may escape the consequences of its actions simply because it happens to have intellectual property related to its business with SOLIDFX. For these reasons, this case presents an excellent vehicle for the Court to address and resolve the circuit split described above.

**CONCLUSION**

The Court should grant a writ of certiorari, review and reverse the Tenth Circuit's opinion, and remand for a trial on SOLIDFX's Sherman Act § 2 claim.

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