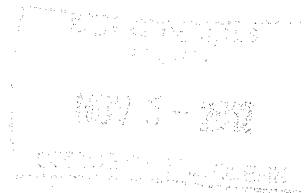


12-569
No.



In the Supreme Court of the United States

STORA ENSO NORTH AMERICA,
Petitioner,

v.

PARLIAMENT PAPER, INC., et al.,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

M. MILLER BAKER
McDERMOTT WILL &
EMERY LLP
500 North Capitol St., N.W.
Washington, D.C. 20001
(202) 756-8000

DAVID MARX, JR.
Counsel of Record
McDERMOTT WILL &
EMERY LLP
227 West Monroe Street
Chicago, Illinois 60606
(312) 372-2000
dmarx@mwe.com

Attorneys for Petitioner

QUESTIONS PRESENTED

In this antitrust case in which respondents alleged a price-fixing conspiracy based upon a theory of "conscious parallelism," the district court granted summary judgment to petitioner because (1) respondents' circumstantial evidence was "at least as consistent with independent business activity as it is with a price-fixing conspiracy," and (2) respondents produced no evidence demonstrating that the alleged conspiracy "affected the prices charged." The Second Circuit vacated, reasoning that (1) because the "totality of the evidence admits of alternative interpretations," it was the "province of the jury" to weigh the evidence, and (2) a court should "presume" that the plaintiff's injury "was caused by" the alleged antitrust violation. The questions presented are:

1. Whether, when circumstantial evidence of a price-fixing conspiracy between competitors is ambiguous such that it permits equally reasonable "alternative interpretations," one of conspiracy and the other of independent conduct, this Court's decision in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), requires that summary judgment be granted in favor of the defendant on a plaintiff's Sherman Act § 1 claim.
2. Whether a plaintiff seeking damages under § 4 of the Clayton Act has the burden at summary judgment of producing evidence demonstrating that the alleged antitrust violation caused plaintiff's injury.

PARTIES TO THE PROCEEDING

The parties to the proceeding in this Court are petitioner Stora Enso North America and respondents Parliament Paper, Inc., Austin Printing Company, Inc., and Digital Color Imaging Holdings Inc.

Parties to the proceedings in the courts below but which are not part of the proceeding in this Court are Stora Enso Oyj, UPM-Kymmene Corporation and UPM-Kymmene, Inc.

CORPORATE DISCLOSURE STATEMENT

Petitioner Stora Enso North America is the wholly-owned subsidiary of NewPage Corporation.

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OPINIONS BELOW

The Second Circuit's decision below, *In re: Publication Paper Antitrust Litig.*, 690 F.3d 51 (2012), is reprinted at Pet. App. 1.

The district court's Ruling on Defendants' Motion for Summary Judgment, granting petitioner's motion for summary judgment (which is not reported but is available on Westlaw, 2010 WL 5253364), is reprinted at Pet. App. 37. The district court's Judgment is reprinted at Pet. App. 79.

JURISDICTIONAL STATEMENT

The Second Circuit issued its opinion in this case on August 6, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

§ 1. Trusts, etc., in restraint of trade illegal;
penalty

Every 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. * * *

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides in pertinent part:

§ 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest

[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained[.] * * *

STATEMENT OF THE CASE

1. Section 1 of the Sherman Act prohibits “[e]very . . . conspiracy, in restraint of trade.” 15 U.S.C. § 1. Section 4 of the Clayton Act in turn provides a private right of action for treble damages to “any person who shall be injured . . . by reason of” a violation of the “antitrust laws.” 15 U.S.C. § 15(a).

The “crucial question” in every § 1 case is whether the challenged conduct “stems from independent decision or from an agreement, tacit or express.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007) (citations and internal quotation marks omitted). Although evidence of “parallel business behavior is admissible circumstantial evidence from which the fact finder may infer agreement,” it does not conclusively establish an anticompetitive agreement in violation of

§ 1. *Id.* Even “conscious parallelism,” in which “firms in a concentrated market recognize their shared economic interests and their interdependence with respect to price and output decisions,” is not in itself unlawful. *Id.* at 553-54; *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) (same).

To survive an antitrust defendant’s motion for summary judgment, a plaintiff alleging a § 1 violation “must establish that there is a genuine issue of material fact as to whether [defendants] entered into an illegal conspiracy that caused [plaintiffs] to suffer a cognizable injury.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986). Although on summary judgment the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion, *see id.* at 577, “antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case.” *Id.* at 588. Thus, ambiguous evidence that is “as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy. *Id.* To defeat a motion for summary judgment, a § 1 plaintiff “must present evidence that tends to exclude the possibility that the alleged conspirators acted independently.” *Id.* (internal quotation marks omitted).

2. Petitioner Stora Enso North America Corporation manufactures “publication paper,” which is used for magazines and catalogs. In 2002-2003, it was one of the three largest manufacturers of publication paper in the United States.

In 2004, the Justice Department launched a criminal antitrust investigation into the publication paper industry, which culminated in the 2006 indictment and 2007 trial of petitioner in the District of Connecticut on charges that petitioner and another paper manufacturer, UPM-Kymmene Corporation, and its affiliate UPM-Kymmene, Inc. (collectively “UPM”) had entered into a conspiracy to fix publication paper prices. After a full trial, the jury acquitted petitioner of all charges.

3. After the Justice Department’s investigation became public, respondents (direct purchasers of petitioner’s paper products) brought several class action antitrust actions against petitioner, its former parent, Stora Enso Oyj (“SEO”), and UPM. The Judicial Panel on Multi-District Litigation transferred those actions to the district court in Connecticut, where they were consolidated as MDL 1631, *In re: Publication Paper Antitrust Litigation*.

The district court certified respondents as representatives of a class of all persons who directly purchased publication paper from petitioner, SEO or UPM in 2002-2003. In their final single-count amended complaint seeking treble damages under § 4 of the Clayton Act, respondents alleged that petitioner, SEO, and UPM conspired with each other to fix paper prices and thereby violated § 1 of the Sherman Act.¹ More specifically, respondents alleged that SENA and UPM “came to an understanding that SENA and UPM

¹ By that point in the case, UPM had settled, leaving petitioner and SEO as the only defendants.

would follow price increases announced by other industry participants.” Pet. App. 38. After discovery, petitioner moved for summary judgment.

a. In ruling on petitioner’s summary judgment motion, the district court observed that in the absence of any direct evidence of a price-fixing agreement, “the plaintiffs may present circumstantial evidence” from which the existence of a conspiracy could be inferred. Pet. App. 60. As there was no such direct evidence here, respondents’ “theory of liability is one of conscious parallelism.” *Id.* Consciously parallel acts “permit an inference of conspiracy between competitors,” Pet. App. 61, but “no conspiracy can be inferred from mere parallelism when ‘defendant[s]’ conduct can be explained by individual business reasons’.” *Id.* (citing *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 122 (3d Cir. 1999)).

The district court then summarized *Matsushita’s* summary judgment standard as “whether the plaintiffs have marshaled sufficient evidence to dispel the inference that the defendants acted permissibly. Put another way, if it is just as reasonable to infer from the evidence that the defendant engaged in permissible, independent business activity as it is to infer that it engaged in a price-fixing conspiracy, then a section 1 claim fails on summary judgment.” Pet. App. 62 (citing *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1032 (8th Cir. 2000)).

Applying these principles to the evidence produced by respondents, the district court concluded that “[t]he record evidence . . . is entirely consistent with [petitioner] and UPM acting independently and in their

own self-interests in following the price increases announced by competitors.” Pet. App. 68; *see also id.* at 69 (“Plaintiffs have failed to identify any evidence – and I find none in the record – that shows that any challenged price increase by [petitioner] was anything other than a legitimate business decision. . . .”); *id.* at 76 (“the conduct complained of is at least as consistent with independent business activity as it is with a price-fixing conspiracy”); *id.* at 78 (respondents’ “evidence does not tend to exclude the possibility that defendants acted in accordance with independent, permissible business justification when following a rival’s price increase”).

b. Without denominating it as such, the district court’s summary judgment ruling also provided an independent ground for entering summary judgment in favor of petitioner. The district court observed that to the extent that respondents’ evidence established a conspiracy to fix prices, respondents also had to demonstrate some effect on future price increases announced by petitioner. Pet. App. 71 (citing *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 44[1] n.16 (1978)). Respondents’ evidence, however, “does not bear out that [petitioner] and UPM altered their conduct to conform with such an agreement.” *Id.* Accordingly, respondents “failed to create a genuine issue of material fact that an agreement between [petitioner] and UPM affected the prices charged for publication paper in the United States during the class period.” Pet. App. 78.

* * *

Based upon the foregoing summary judgment ruling, the district court entered judgment for petitioner. Pet. App. 79.²

4. Respondents appealed to the Second Circuit, which vacated the summary judgment ruling in favor of petitioner.

a. Regarding the question whether there was a triable issue of fact as to the existence of a conspiracy to fix prices, the Second Circuit began by observing that the district court had “cited extensively” to this Court’s decision in *Matsushita*. Pet. App. 19-20. The court of appeals noted that the parties dispute “the extent to which the ‘tends to exclude’ formulation articulated in *Matsushita* . . . applies under the circumstances presented here.” Pet. App. 20. Thus, the court of appeals would “take this opportunity to clarify the application of the [*Matsushita*] standards.” *Id.*

The court of appeals then characterized *Matsushita* as having established a sliding scale, in which “the range of inferences that may be draw[n] from such [ambiguous] evidence depends on the plausibility of the plaintiff’s theory.” Pet. App. 21. Under that sliding scale, “where a plaintiff’s theory of recovery is implausible, it takes ‘strong direct or circumstantial evidence’ to satisfy *Matsushita*’s ‘tends to exclude’ standard.” *Id.* (citations omitted). By contrast, where

² The district court also granted summary judgment in favor of SEO for different reasons, Pet. App. 77, which the Second Circuit affirmed. Pet. App. 35.

the plaintiff's theory is more plausible, "broader inferences are permitted, and the 'tends to exclude' standard is more easily satisfied." *Id.*

The court of appeals then identified what it perceived as the critical error in the district court's summary judgment ruling:

At several points in its opinion, intermingled with its use of the "tends to exclude" standard, the district court stated that plaintiffs were required to "exclude" or "dispel" the possibility that defendants acted independently. * * * Requiring a plaintiff to "exclude" or "dispel" the possibility of independent action places too heavy a burden on the plaintiff. Rather, if a plaintiff relies on ambiguous evidence to prove its claim, the existence of a conspiracy must be a reasonable inference that the jury could draw from that evidence; it need not be the *sole* inference.

Pet. App. 21-22 (citations omitted and emphasis in the original).

The court of appeals then reviewed the ambiguous evidence. On the one hand, "the record in this case presents strong, if not irrefutable, evidence of a conspiracy in a context where the conspiracy's goals were aligned with the conspirators' economic interests." Pet. App. 26-27. The court of appeals further stated that this evidence "would be sufficient to satisfy *Matsushita's* 'tends to exclude' standard even if plaintiffs' theory were implausible, which it is not." Pet. App. 24. On the other hand, it acknowledged that

the totality of the evidence admits of *alternative interpretations*—namely, that [petitioner] as a corporation acted independently of UPM in deciding to increase its prices and that the price increases each company announced were the product of certain characteristics of the industry and not any agreement between [petitioner and UPM]. But it is the province of the jury to determine how much weight to accord Tynkkynen’s testimony and the other relevant evidence.

Pet. App. 26 (emphasis added). In sum, according to the court of appeals, the district court erred in granting summary judgment to petitioner under *Matsushita* when the ambiguous evidence admitted of equally reasonable “alternative interpretations.” *Id.* In so holding, the Second Circuit thereby implicitly disagreed with the Eighth Circuit’s decision in *Blomkest*, which the district court followed in holding that “if it is just as reasonable to infer from the evidence that the defendant engaged in permissible, independent business activity as it is to infer that it engaged in a price-fixing conspiracy, then a section 1 claim fails on summary judgment.” *See* Pet. App. 62 (citing *Blomkest*, 203 F.3d at 1032).

b. The Second Circuit next addressed whether “there was enough evidence for a jury to find that such an agreement actually *caused* the price increases that occurred.” Pet. App. 27 (emphasis in the original). Petitioner contended, and the district court agreed, that there was an inadequate basis on which to find that the claimed agreement caused respondents’ injuries. That was because petitioner’s employees and

UPM's employees, who had no knowledge of the alleged agreement, were responsible for initiating, recommending, and implementing pricing decisions, Pet. App. 30, and that the only two individuals (one at petitioner, the other at UPM) with knowledge of the alleged agreement "never altered or vetoed" those employees' pricing recommendations. Pet. App. 31. As a result, the agreement "had no effect on [petitioner's] pricing decisions." *Id.*

In its review of the district court's ruling accepting petitioner's argument as outlined above, the court of appeals applied "causation principles as developed in the tort law context," Pet. App. 28, under which injury is presumed from the wrongful act. Pet. App. 29. Upon a showing of price-fixing conspiracy and injury, "the burden then shifts to the defendant 'to bring in evidence tending to rebut the strong inference, arising from the injury, that the act was in fact a but-for cause of the plaintiff's injury.'" *Id.* (brackets and citation omitted).

Applying these principles, the Second Circuit determined that petitioner did not "conclusively rebut[]" the presumption "that the alleged agreement was both a material and but-for cause of the price increases as to permit an award of summary judgment for [petitioner]." Pet. App. 31. Thus, "[t]he question of causation is therefore a jury question." Pet. App. 34.

* * *

Having vacated the district court's grant of summary judgment in favor of petitioner, the court of appeals remanded the case to the district court for

further proceedings. Pet. App. 36. Petitioner then moved to stay the mandate, which the court of appeals denied.

REASONS FOR GRANTING THE WRIT

I. The Second Circuit’s Decision Widens an Existing Circuit Split over Application of *Matsushita*’s “Tends to Exclude” Summary Judgment Standard

The essence of a Sherman Act § 1 claim is the existence of an agreement—“a conscious commitment to a common scheme.” *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984). That is because Sherman Act § 1 liability is predicated upon some form of concerted action; unilateral activity by a defendant, no matter the motivation, cannot give rise to a § 1 violation. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (“Section 1 of the Sherman Act . . . reaches unreasonable restraints of trade effected by a ‘contract, combination . . . or conspiracy’ between *separate* entities. It does not reach conduct that is ‘wholly unilateral.’”) (emphasis added and citation omitted).

Because § 1 of the Sherman Act only reaches concerted action, this Court emphasized in *Matsushita* that to defeat a motion for summary judgment a Sherman Act § 1 plaintiff must present evidence “that tends to exclude the possibility that the alleged conspirators acted independently.” *Matsushita*, 475 U.S. at 588. This Court recently reiterated that standard in *Twombly*. *See* 550 U.S. at 554 (“at the summary judgment stage a § 1 plaintiff’s offer of

conspiracy evidence must tend to rule out the possibility that the defendants were acting independently”) (citing *Matsushita*, 475 U.S. at 588).

Nevertheless, the courts of appeals are in conflict over the application of *Matsushita*’s “tends to exclude” standard and disagree over the evidentiary threshold an antitrust plaintiff must meet to survive summary judgment.

Several courts of appeals, including the Second Circuit in this case, have acknowledged the confusion regarding the proper application of *Matsushita*. See Pet. App. 20 (“We take this opportunity to clarify the application of the standards established in [*Matsushita*].”); *Blomkest*, 203 F.3d at 1032 (8th Cir.) (“We are among the majority of circuits to apply *Monsanto* and *Matsushita* broadly. . . .”); *Merck-Medco Managed Care, L.L.C. v. Rite-Aid Corp.*, No. 98-2847, 1999 WL 691840, at *5 (4th Cir. Sept. 7, 1999) (“The standards for summary judgment and the limits on inferences in antitrust lawsuits are often quoted but not universally agreed upon.”). Scholarly commentary confirms the widespread confusion. See Daniel R. Shulman, *Proof of Conspiracy in Antitrust Cases & the Oligopoly Problem*, 4 Sedona Conf. L. J. 1, 15 (2003) (“The law now . . . is a mess. Courts cannot agree on what the relevant plus factors are, and their relative weights.”).

As discussed below, the Second Circuit’s decision widens an existing conflict concerning application of *Matsushita*’s “tends to exclude” standard in antitrust cases. Moreover, there is an intra-circuit conflict in at least one circuit. Present review by this Court is

essential to restore order in a fundamental area of the law.

a. On one side of the *Matsushita* divide and reflecting the majority rule are the First, Fourth, Fifth, Eighth, Tenth, and Eleventh Circuits, which hold that ambiguous (or circumstantial) evidence that is as consistent with the existence of a conspiracy as it is with independent action is insufficient as a matter of law to withstand summary judgment. See *White v. R.M. Packer Co.*, 635 F.3d 571, 585 (1st Cir. 2011) (“The sum total of this evidence simply does not rise to the level *Matsushita* requires. Plaintiffs’ ambiguous evidence is entirely consistent with permissible conscious parallelism. Plaintiffs have failed to produce evidence that ‘tends to exclude the possibility of independent action.’”) (citation omitted); *Thompson Everett, Inc. v. Nat’l Cable Adver., L.P.*, 57 F.3d 1317, 1323 (4th Cir. 1995) (“[O]n summary judgment motions in antitrust cases, the Supreme Court has instructed that when there is evidence of conduct that is consistent with both legitimate competition and an illegal conspiracy, courts may not infer that an illegal conspiracy has occurred without other evidence.”); *Golden Bridge Tech., Inc. v. Motorola, Inc.*, 547 F.3d 266, 273 (5th Cir. 2008) (“It is not sufficient under *Matsushita* for [a plaintiff] to simply propose conceivable motives for conspiratorial conduct; [a plaintiff’s] evidence must tend to show that the possibility of independent conduct is excluded [W]e decline to infer conspiratorial action on the basis of limited circumstantial evidence, particularly where this evidence is at least as consistent with permissible competition, and with independent action, as with unlawful conspiracy.”); *Blomkest*, 203 F.3d at 1032 (8th

Cir.) (“In order to state a section 1 case, plaintiffs must present evidence that ‘tends to exclude the possibility of independent action’ by the defendants Applied in this case, the standard requires that if it is as reasonable to infer from the evidence a price-fixing conspiracy as it is to infer permissible activity, then the plaintiffs’ claim, without more, fails on summary judgment.”) (citation omitted); *Gibson v. Greater Park City Co.*, 818 F.2d 722, 724 (10th Cir. 1987) (“Our review of the record shows that evidence upon which the plaintiffs rely is ambiguous. On the basis of *Matsushita*, we affirm the grant of summary judgment because Gibson failed to present any evidence that would tend to exclude the possibility that the alleged conspirators acted independently.”); *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1300 (11th Cir. 2003) (“Evidence that does not support the existence of a price fixing conspiracy any more strongly than it supports conscious parallelism is insufficient to survive a defendant’s summary judgment motion.”).

b. On the other side of the *Matsushita* divide is the Second Circuit’s decision in this case and the Ninth Circuit, both of which hold that when a plaintiff produces ambiguous evidence of a price-fixing conspiracy that supports conflicting inferences, summary judgment should be denied. See Pet. App. 26 (acknowledging that the ambiguous evidence supported “*alternative interpretations*,” “[b]ut it is the province of the jury to determine how much weight to accord [the evidence]”) (emphasis added); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 439 (9th Cir. 1990) (“Nor do we think that *Matsushita* and *Monsanto* can be read as authorizing a court to award summary judgment to

antitrust defendants whenever the evidence is plausibly consistent with both inferences of conspiracy and inferences of innocent conduct.”).

c. The Third Circuit straddles both sides of the divide with an unresolved intra-circuit conflict.

The most recent pronouncement of the Third Circuit aligns that circuit with the majority rule. In *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57 (3d Cir. 2010), the court of appeals held that “the plaintiff in an antitrust case responding to a summary judgment motion must overcome a higher threshold.” *Id.* at 73 (internal quotations and citations omitted). Moreover, the *Race Tires* court stated that “[w]hen the evidence in the record is as consistent with permissible competition as it is with an illegal conspiracy, such evidence, standing alone fails to support an inference of an illegal conspiracy.” *Id.*

Race Tires, however, conflicts with at least two earlier decisions of the Third Circuit that reject any heightened requirement for antitrust plaintiffs to defeat summary judgment and thereby align with the rule followed by the Second and Ninth Circuits. See *Big Apple BMW, Inc. v. BMW of N. Am., Inc.*, 974 F.2d 1358, 1363-64 (3d Cir. 1992) (stating that *Matsushita* “did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases”). Similarly, in *Petruzzi’s IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224 (3d Cir. 1993), the Third Circuit also construed *Matsushita* as not “invent[ing] a new requirement for an antitrust plaintiff to meet . . . [n]or do we think that *Matsushita* and *Monsanto* can be read as authorizing a court to award summary judgment to

antitrust defendants whenever the evidence is plausibly consistent with both inferences of conspiracy and inferences of innocent conduct.” *Id.* at 1231.

II. The Second Circuit Created a New Circuit Split over the Standard for Causation under Section 4 of the Clayton Act

Rather than require the respondents to produce evidence that the alleged conspiracy caused injury in this case, the Second Circuit presumed that “an injury, if it occurred, was caused by the [wrongful] act.” Pet. App. 29. This holding conflicts with the rule followed in the Third, Fifth, Seventh, Eighth, and Ninth Circuits, all of which hold that § 4 of the Clayton Act requires an antitrust plaintiff on summary judgment to produce evidence demonstrating that the alleged conspiracy *caused* the plaintiff’s injury. *See In re Baby Food Antitrust Litig.*, 166 F.3d 112, 125 (3d Cir. 1999) (“[T]o survive summary judgment, there must be evidence that the exchanges of information had an impact on pricing decisions The plaintiffs here contend . . . that the evidence they presented concerning the exchange of future pricing information impacted the market as a whole and is more than sufficient to survive summary judgment. We do not agree.”); *El Aguila Food Prods., Inc. v. Gruma Corp.*, 131 F. App’x 450, 455 (5th Cir. 2005) (affirming summary judgment “because plaintiffs failed to present substantial evidence demonstrating that [defendant’s] conduct was a material cause of its actual or threatened injury”); *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 404 (7th Cir. 1993) (affirming summary judgment because “the plaintiffs have failed to show with a fair degree of certainty that

‘but for’ the alleged antitrust violation, the plaintiffs would not have suffered the injuries of which they complain”); *Blomkest*, 203 F.3d at 1034 (8th Cir.) (“To survive summary judgment, there must be evidence that the exchanges of information had an impact on pricing decisions. There is no evidence here that price increases resulted from any price verification or any specific communication of any kind. Subsequent price verification evidence . . . cannot support a conspiracy.”) (internal citations omitted); *Dolphin Tours, Inc. v. Pacifico Creative Serv., Inc.*, 773 F.2d 1506, 1510 (9th Cir. 1985) (“Causation evidence under section 4 must establish that the injury which the plaintiff claims is attributable to the conspiracy, and not to other factors.”).

III. The Questions Presented Are Important and Recurring

Both questions presented are important, as summary judgment plays a vital gate-keeping function in antitrust litigation. *See Matsushita*, 475 U.S. at 594 (“[M]istaken inferences in cases such as this one are especially costly, because they chill the very conduct that the antitrust laws are designed to protect. We must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition.”) (citation and internal quotation marks omitted); *see also Valley Liquors, Inc. v. Renfield Imps., Ltd.*, 822 F.2d 656, 659 n.4 (7th Cir. 1987) (“The ultimate determination, after trial, that an antitrust claim is unfounded, may come too late to guard against the evils that occur along the way.”). Both questions are also plainly recurring, as underscored by the

number of opinions addressing both *Matsushita* and causation. Indeed, notwithstanding the frequency with which the *Matsushita* question arises, even the Second Circuit, in its opinion in this case, recognized the need to clarify its application in a conscious parallelism case based upon ambiguous evidence. Pet. App. 20.

IV. The Second Circuit's Summary Judgment Standard Is Inconsistent with *Matsushita* and Makes Summary Judgment for Defendants in Conscious Parallelism Cases Based upon Ambiguous Evidence Virtually Impossible

a. The Second Circuit's decision contravenes the holding of *Matsushita* and directly violates this Court's summary judgment standard. See *Twombly*, 550 U.S. at 554 (reaffirming that "at the summary judgment stage a § 1 plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently") (citing *Matsushita*). *Matsushita* held that plaintiffs cannot escape summary judgment by relying on ambiguous or circumstantial evidence that is just as consistent with conspiracy as it is with independent action. *Matsushita*, 475 U.S. at 588 ("[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy."); see also II Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 308, at 148 (3d ed. 2007) ("if the proffered evidence is equally consistent with competition and collusion, then no fact issue of collusion is established"). Rather than requiring plaintiffs to point to proof that tends to exclude the possibility of independent action, the Second Circuit

adopted the erroneous legal principle that ambiguous evidence leading to “alternative interpretations” is sufficient to defeat summary judgment. Pet. App. 26. Defendants in conscious parallelism cases predicated on ambiguous evidence that does not “tend to exclude” the possibility that the defendant acted unilaterally in its own economic self-interest, like petitioner in this case, are now at serious risk of being subject to treble damages. The erroneous legal principle adopted by the Second Circuit conflicts with *Matsushita* and will only exacerbate the confusion extant in lower courts.

b. This decision also conflicts with the purpose of *Matsushita* and its progeny—to prevent speculative and legally insufficient cases from proceeding to trial. That is the reason this Court established the “tends to exclude” standard. Instead, defendants will confront the possibility of massive judgments or extorted pre-trial settlements. See *Valley Liquors*, 822 F.2d at 660 n.4 (“summary judgment should be a favored practice in antitrust cases”); *Lovett v. Gen. Motors Corp.*, 998 F.2d 575, 581 (8th Cir. 1993) (“[T]he jury’s finding of a conspiracy in this case shows why cases . . . based on highly ambiguous evidence should not be submitted to a jury.”).

c. By misapplying *Matsushita* and lowering the bar for plaintiffs to defeat summary judgment, the Second Circuit imposed a burden that will make it virtually impossible for defendants in conscious parallelism cases to obtain summary judgment. Ambiguous evidence that the Second Circuit concedes leads to “alternative interpretations,” Pet. App. 26, which should not defeat summary judgment under *Matsushita*, now creates a triable jury issue. Virtually

every conscious parallelism case is built on ambiguous proof—parallel conduct, commodity products, publication of list prices in advance of their effective date, trade association meetings, and concentrated market structure—that plaintiffs claim should provide a basis to infer a conspiracy. There is a significant risk that the Second Circuit’s erroneous *Matsushita* interpretation will affect the outcome of other cases based on ambiguous evidence and create more inconsistency among and within the circuits; the same ambiguous evidence offered by respondents in this case would not survive summary judgment in those circuits that adhere to the majority rule.

d. Rather than “clarifying” the law concerning *Matsushita*’s “tends to exclude” standard, the Second Circuit’s decision widened an existing circuit split. The Second Circuit’s decision, however, presents a vehicle for this Court to provide a much-needed clarification. This Court should do so by adopting the Seventh Circuit’s explanation of *Matsushita* in *In re Brand Name Prescription Drugs Antitrust Litigation*, 186 F.3d 781 (7th Cir. 1999) (“*Prescription Drugs*”). Writing for the Seventh Circuit, Judge Posner explained that *Matsushita*’s “tends to exclude” standard means that a plaintiff must present “economic evidence that would show *that the hypothesis of collusive action was more plausible than that of individual action.*” *Id.* at 787 (emphasis added). This does not mean, however, that a plaintiff has to “exclude all possibility that the manufacturers’ price discrimination was unilateral rather than collusive.” *Id.* Instead, “because price discrimination is as consistent with individual as with collusive behavior, . . . plaintiffs have the burden of rebutting, by the normal civil standard of a

preponderance of the evidence, the hypothesis of individual maximizing action.” *Id.* at 788-89.

Thus, although the Second Circuit below correctly recognized that that the inference of a conspiracy “need not be the *sole* inference” that a “jury could draw from [the] evidence,” Pet. App. 22 (emphasis in the original), under *Matsushita* it was incumbent upon respondents to rebut, by a preponderance of the evidence, the hypothesis of independent action. Respondents’ evidence, however, did no such thing, as the Second Circuit admitted that “*the totality of the evidence admits of alternative interpretations*” of independent, rather than concerted behavior. Pet. App. 26 (emphasis added). This Court should use this case to explicate the correct application of *Matsushita*, as explained by Judge Posner for the Seventh Circuit in *Prescription Drugs*.

V. The Second Circuit Erroneously Presumed Causation

The Second Circuit’s decision presumed that respondents created a triable issue on causation based solely on the *per se* nature of the antitrust violation alleged. Pet. App. 29. A plaintiff bringing a claim under § 4 of the Clayton Act must prove, however, that its injury was “*by reason of*” an antitrust violation. 15 U.S.C. § 15(a).

A party opposing summary judgment must proffer evidence in support of the essential elements of its claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (“[T]he plain language of Rule 56(c) 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 of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."). Causation is an essential element in an antitrust claim, and thus, is subject to the summary judgment standard enunciated by this Court. *See Matsushita*, 475 U.S. at 586 (to defeat a defendant's summary judgment motion, an antitrust plaintiff must "show *more* than a conspiracy in violation of the antitrust laws; they must show an injury to them *resulting from* the illegal conduct") (emphasis added); *see also* IIA Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 335, at 72-73 (3d ed. 2007) ("Litigants, commentators, and even judges sometimes speak of 'standing,' 'causation,' or 'antitrust injury' as if these are 'threshold' requirements that need only to be pleaded properly to get an antitrust suit started. They are indeed threshold requirements, but they are not only threshold requirements But it is quite wrong to think of standing, causation, or antitrust injury questions as merely preliminary issues to be forgotten once the court resolves them as best it can early in the suit. Judgment must be given to the defendant whenever it appears that any essential element of the plaintiff's claim is missing, whether early or late"). The Second Circuit's decision improperly eliminates the need for plaintiffs in antitrust cases alleging *per se* violations of Sherman Act § 1 to prove that the allegedly unlawful conduct, in fact, caused their harm.

CONCLUSION

For the reasons provided above, this Court should grant the petition for certiorari.

Respectfully submitted,

DAVID MARX, JR.
Counsel of Record
MCDERMOTT WILL & EMERY LLP
227 West Monroe Street
Chicago, Illinois 60606
(312) 372-2000
dmarx@mwe.com

M. MILLER BAKER
MCDERMOTT WILL & EMERY LLP
500 North Capitol St., N.W.
Washington, D.C. 20001
(202) 756-8000

Attorneys for Petitioner

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