No. __-___

IN THE

SUPREME COURT OF THE UNITED STATES

EVERGREEN PARTNERING GROUP, INC.,

Petitioner,

v.

PACTIV CORPORATION, a corporation, *et al.*

Respondents.

On Petition for a Writ Of Certiorari
To the United States Court Of Appeals
For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) ("*Matsushita*"), the Supreme Court held, on claims of a long-running predatory pricing conspiracy, that to survive a motion for summary judgment in an antitrust case, a plaintiff seeking damages for a violation of Section 1 of the Sherman Act must show that the inference of conspiracy from circumstantial evidence is reasonable in light of competing inferences of independent action and collusive action. The Court in *Matsushita* further held, however, given its general skepticism of predatory pricing claims and its finding of procompetitive conduct and no rational, economic motive to collude, that the plaintiff had to present circumstantial evidence that "tends to exclude the possibility of independent conduct." In *Eastman Kodak Industry Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992) ("*Kodak*"), the Court narrowed the application of *Matsushita*'s 'tends to exclude' standard. The Court clarified that where the alleged conduct is not inherently procompetitive or economically or otherwise irrational, the conventional summary judgment standards of Rule 56 of the Federal Rules of Civil Procedure – where the defendant "bears a substantial burden" and must demonstrate that an inference of unlawful conduct is "unreasonable" – apply, and not *Matsushita*'s apparently heightened 'tends to exclude' standard. Despite this clarification, however, some Circuits have ignored *Kodak*,

including the First Circuit on the concerted refusal to deal claim in this case, and interpreted *Matsushita* as requiring judges to ask whether the circumstantial evidence tends to exclude the possibility of independent conduct even where the conduct is not inherently procompetitive or economically or otherwise irrational. In contrast, other Circuits have instead followed *Kodak*'s narrower interpretation of *Matsushita*, requiring the plaintiff simply to show a reasonable inference of conspiracy. In support of this latter view, application of the 'tends to exclude' standard to an alleged conspiracy that is economically rational and not procompetitive has been described as requiring plaintiffs to prove a "sweeping negative" – an almost impossible standard that substitutes the court for the trier of fact and 'cuts off the plaintiff's air supply' in the 90 percent of cases based on circumstantial evidence. On this view, judicial restraint is required because a court is not equipped to make fine distinctions in weighing competing inferences on summary judgment.

The question presented is whether Kodak's Rule 56 standard or the more stringent "tends to exclude the possibility of independent action" standard articulated in *Matsushita* applies where the alleged conduct, unlike in *Matsushita*, is not inherently procompetitive and is not economically or otherwise irrational.

2. Did the court of appeals in this case improvidently apply the heightened "tends to exclude" test to Petitioner's concerted refusal to deal claim, in circumstances in which it is not warranted, and thus erroneously deny the plaintiff its right to have its case heard by the trier of fact?

PARTIES TO THE PROCEEDINGS

1. Evergreen Partnering Group, Inc. is the Petitioner here and was the plaintiff below.

2. Pactiv Corporation, Solo Cup Company, Dolco Packaging, Dart Container Corporation and the American Chemistry Council are the Respondents and were defendants below.

3. Genpak, LLC was a defendant below. Evergreen's claims against Genpak were resolved before the appeal.

RULE 29.6 DISCLOSURE

The Petitioner has no parent company and is a privately held company, with no public company owning 10% or more of the shares of stock of Petitioner.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED.......................... i

PARTIES TO THE PROCEEDINGS............... iv

RULE 29.6 DISCLOSURE.............................v

TABLE OF AUTHORITIES...........................vi

PETITION FOR A WRIT OF CERTIORARI......xiii

OPINIONS BELOW.. xiii

JURISDICTION..xiii

STATUTORY PROVISIONS INVOLVED..........xiii

INTRODUCTION..1

STATEMENT OF THE CASE 5

A. Factual Background....................................5

B. Proceedings Below.................................... 10

REASONS FOR GRANTING THE PETITION...12

I. THE PROPER MEANING OF *KODAK* AND *MATSUSHITA*............ 12

II. THE LONG-STANDING CONFLICT AMONG THE CIRCUITS.........................18

III. THE FIRST CIRCUIT APPLIED A STANDARD THAT CONFLICTS WITH *KODAK* AND A NUMBER OF OTHER CIRCUITS....................................31

CONCLUSION..42

APPENDIX:

Opinion of the United States Court Of Appeals for the First Circuit, No. 15-1839 (Aug. 2, 2016) .... App A-1

Opinion of the United States District Court, District of Massachusetts, No. 11-10807 (July 10, 2015) ....App. B-1

Order Denying Petition for Rehearing ... App. C-1

Petition for Rehearing......................... App. D-1

Order Denying Emergency Motion To Supplement the Record.....................App. E-1

Emergency Motion to Supplement The Record...App. F-1

TABLE OF AUTHORITIES

CASES

Page

Advo, Inc. v. Phila. Newspapers, Inc.,
51 F.3d 1191 (3d Cir. 1995) 21

Alvord-Polk, Inc. v. F. Schumacher & Co.,
37 F.3d 996 (3d Cir. 1994), *cert. denied*,
514 U.S. 1063 (1995) 20-21

Attorney General of the United States v. Irish Northern Aid Committee, 530 F. Supp. 241
(S.D.N.Y. 1981), *aff'd*, 668 F.2d 159
(2d Cir. 1982) 35

Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, 203 F.3d 1028 (8th Cir.),
cert. denied, 531 U.S. 815 (2000) 30

Champagne Metals v. Ken-Mac Metals, Inc.,
458 F.3d 1073 (10th Cir. 2006) 29

City of Tuscaloosa v. Harcross Chemicals, Inc.,
158 F.3d, 548 (11th Cir. 1998)....................... 29

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 699 (1962).................. 37

Corner Pocket of Sioux Falls, Inc. v. Video Lottery Techs., Inc., 123 F.3d 1107 (8th Cir. 1997), *cert. denied*, 522 U.S. 1117 (1998) 30

Eastman Kodak Industry Co.v. Image Technical Services, Inc., 504 U.S. 451 (1992)...*passim*

Evergreen Partnering Group, Inc. v. Pactiv Corp., 720 F.3d 33 (1st Cir. 2013) 10

I*n re Baby Food Antitrust Litig.*, 166 F.3d 112 (3d Cir. 1999) 21

In re Brand Name Prescription Drugs Antitrust Litig., 123 F.3d 599, (7th Cir. 1997), *cert. denied*, 522 U.S. 1153 (1998) 17

In re Brand Name Prescription Drugs Litig., 186 F.3d 781 (7th Cir. 1997) 16-17

In re Chocolate Confectionary Antitrust Litig., 801 F.3d 383 (3d Cir. 2015).............................. 21, 27

In re Citric Acid Litigation, 191 F.3d 1090 (9th Cir. 1999), *cert. denied sub nom. Gangi Bros. Packaging v. Cargill*, 529 U.S. 1037 (2000).. 27

In re Coordinated Pre-Trial Proceedings in Petroleum Product Litigation, 906 F.2d 432 (9th Cir. 1990), *cert. denied*, 500 U.S. 959 (1991) 25-27

In re Flat Glass Antitrust Litigation,
385 F.3d 350 (3d Cir. 2004), *cert. denied*,
533 U.S. 948 (2005) 20

In re High Fructose Corn Syrup Antitrust Litigation, 295 F.3d 651 (7th Cir.2002),
cert. denied, 537 U.S. 118 (2003) 21-22

In re Publ'n Paper Antitrust Litig.,
690 F.3d 51 (2d Cir. 2012), *cert. denied*,
133 S.Ct. 940 (2013) 28, 36

In re Travel Agent Comm'n Antitrust Litig.,
583 F.3d 896 (6th Cir. 2009), *cert. denied*,
562 U.S. 1134 (2011) 37

In re Vitamins Antitrust Litigation,
320 F. Supp. 2d 1 (D.D.C.2004) 29

JTC Petroleum Co. v. Plasa Motor Fuels, Inc.,
190 F.3d 775 (7th Cir. 1999) 22-24

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) .... *passim*

Merck-Medco Managed Care, LLC v. Rite AM Corp., 57 F.3d 1317 (4th Cir. 1999) 30

Mohawk Constr. & Supply Co.,
577 F.3d 1164 (10th Cir. 2009) 35

Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., Inc., 998 F.2d 1224 (3d Cir.), *cert. denied*, 510 U.S. 994 (1993) 19, 38

Rossi v. Standard Roofing, Inc., 156 F.3d 452 (3d Cir. 1998) 21

Super Sulky, Inc. v. United States Trotting Ass'n, 174 F.3d 733 (6th Cir.), *cert. denied*, 528 U.S. 871 (1999) 31

Thompson Everett, Inc. v. National Cable Advertising, L.P., 57 F.3d 1317 (4th Cir. 1995) 30

United States v. Diebold, Inc., 369 U.S. 654 (1962)..17-18

United States v. Henderson, 693 F.2d 1028 (11th Cir. 1982)... 10

Williamson Oil Co., Inc. v. Phillip Morris, USA, 344 F.3d 1287 (11th Cir. 2003) 27

STATUTES AND RULES

Federal Rule of Civil Procedure 56 ....i, xiv

Sherman Act, Section 1, 28 U.S.C. § 1......i, xiii-xiv

28 U.S.C. § 1254(1)....................................i, xiii

TREATISES

C.A. Wright, 31 Fed. Prac. & Proc. Evid.
§ 7109 (1st ed. Apr. 2014)).................................. 35

Phillip E. Areeda and Herbert Hovenkamp,
Fundamentals of Antitrust Law,
§ 14.03(b), at 14–25 (4th ed. 2011) 28-29

Richard Posner, *Antitrust Law*, 100
(2d ed. 2001) 16

PETITION FOR A WRIT OF CERTIORARI

Petitioner Evergreen Partnering Group ("Evergreen") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals ("App. A") is reported at 832 F.3d 1 (1st Cir. 2016). The order of the court of appeals denying the petition for rehearing ("App. C") is not reported. The order of the district court ("App. B") is reported at 116 F. Supp. 3d 1 (D. Mass. 2015).

JURISDICTION

The court of appeals entered its judgment on August 2nd, 2016. 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:

> 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. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal 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.

- Rule 56 of the Federal Rules of Civil Procedure.

INTRODUCTION

This case poses the long-running question of what evidence an antitrust plaintiff alleging a violation of Section 1 of the Sherman Act must present to defeat a motion for summary judgment. The decision of the Court of Appeals for the First Circuit conflicts with decisions of several other circuit courts of appeal, highlighting a significant circuit split regarding the proper interpretation and application of Rule 56 of the Federal Rules of Civil Procedure on summary judgment in antitrust cases. The court's decision offers the Supreme Court an opportunity to correct significant legal error and provide further guidance on this recurrent evidentiary issue in antitrust cases and thus limit further consumer harm resulting from this error, consistent with the Court's teaching in *Kodak*.

Petitioner Evergreen Partnering Group ("Evergreen") alleges that the respondents, manufacturers-converters of polystyrene food service products (e.g., cups, trays, etc.) and their trade association, engaged in a concerted refusal to deal with Evergreen for its closed-loop, sustainable recycling of such products, by agreeing to limit the terms on which to deal with it, in violation of Section 1. In a decision issued on August 2, 2016, the Court of Appeals for the First Circuit affirmed summary judgment dismissal by the district court, concluding that "Evergreen failed to present evidence that tended to exclude the possibility that each

polystyrene manufacturer independently chose not to partner with Evergreen as required by [*Matsushita*]." In an order dated October 18, 2016, the court of appeals denied without opinion a petition by Evergreen for rehearing by the panel or *en banc*.

Evergreen contends, as the court of appeals correctly states, that "the defendants conspired to prevent its recycling model involving commission payments from becoming viable by universally rejecting any agreements that involved commissions and blocking its access to other customers through the promotion of PDR." App. A-11.

The decision is incorrect, with significant implications for summary judgment. The First Circuit's rationale is based on a significant misinterpretation of *Matsushita*, putting it in direct conflict with this Court's decision in *Kodak* and the decisions of other courts of appeal. Under the First Circuit's reasoning, it would appear that only 'smoking gun' evidence or internal documents referring to an explicit agreement could get a case to a jury. This is not the law.

- First, where defendants allege no plausible procompetitive benefits from their conduct and there is a rational motive to collude, other courts, as directed by the Court in *Kodak*, interpret *Matsushita*'s 'tends to exclude' test more liberally than in *Matsushita* itself and like cases, for in these circumstances there is

no danger of chilling possibly procompetitive conduct. Here, there are no such procompetitive benefits; the court expressly rejected defendants' request that it find that they had no rational economic motive to collude; and, notably, defendants engaged in systematic communications through their trade association over a four-to-five year period about the very subject at issue – a classic 'plus-factor'. The court failed to apply, let alone even acknowledge, *Kodak*'s limiting principles to *Matsushita*.

- Second, the court systematically drew inferences against the non-moving party, the petitioner, contrary to *Matsushita*.

- Third, the court erroneously required authentication of – and excluded – minutes of meetings among the defendants that it also said would be probative of the alleged conspiracy *if* they were admissible.

- Fourth, the court improperly dismissed one piece of direct evidence proffered by Evergreen of a concerted refusal to deal by the respondents, and completely ignored another. Even assuming, however, contrary to Evergreen's contentions, that the court was correct in these determinations on direct evidence, the circumstantial evidence alone offered the court of appeals an independent

> ground to find for Evergreen, had the court properly interpreted and applied *Matsushita* in light of *Kodak*.

This case represents a clear example of how antitrust laws are being eroded by misinterpretation and misapplication of prior Supreme Court rulings by lower courts, leading to impossible odds of surviving summary judgment. The court's misinterpretation of *Matsushita*, if broadly applied in the circuits, would effectively cut off the air supply for plaintiffs on summary judgment in the 90 percent of cases based on circumstantial, rather than direct, evidence of antitrust conspiracy. This may further encourage companies to engage in anticompetitive conduct with the assurance that they will likely prevail on summary judgment as long as they do not leave a 'smoking gun'.

The actions of the defendants in this case, whose disposable PSFS products are in widespread use, have caused significant economic and environmental harm to the public, particularly cash-strapped schools and other government institutions, by causing them to pay unnecessary waste disposal fees or switch to more costly alternative products. Unless reversed, the court's judgment will result in harm to competition and consumer welfare, possibly not confined to the First Circuit alone.

STATEMENT OF THE CASE

A. Factual Background

PSFS products comprise a significant portion of the food service packaging market, accounting for billions of dollars of sales annually and extremely high waste hauling costs. PSFS products are easily recognizable by their light weight and foam appearance.

PSFS products have received much criticism by public officials, environmental advocates and consumers due to their single use and the lack of any viable recycling programs, which have been proven no sustainable on resin sales alone. To combat the lack of producer responsibility by the PS industry, more than 100 communities nationwide have taken the drastic step of prohibiting the sale and use of PSFS products, and the number of bans continues to grow. The defendants acknowledge that these bans threaten their business.

Evergreen's founder, Michael Forrest, was a 30-year veteran of the food service business, selling various disposable packaging including PSFS products to schools and institutional cafeterias. Understanding the limited service life and lack of recycling options, he foresaw that the long-term survival of the PSFS industry depended on a sustainable recycling solution.

Forrest knew that in the 1990s the polystyrene (PS) industry had spent more than $80 million on a recycling initiative, the National Polystyrene Recycling Company (NPRC), SA0004,[1] which failed because it depended entirely on the value of recycled resin. Forrest spent 10 years working with Novacor (a virgin PS supplier), Sysco (a national distributor) and various school systems to develop an economically sustainable recycling program. He concluded that the PSFS industry needed to create demand for food service recycled resin and find other sources of revenue to offset the high collection, transportation and processing costs, and that the only solution was to produce food-grade, post-consumer resin and incorporate it into the same types of products from which it came, thus creating a "closed loop process" producing "green products."

Without creating market demand, recycled resin is limited to low-end, low-value non-food uses; thus, as the NPRC experience clearly demonstrated, such bare 'recycling' programs, depending solely on the value of the resin produced, are unsustainable. In contrast, Evergreen's model commercialized the production of food-grade, post-consumer resin for use in new PSFS products, and used shared waste disposal savings from end-users (e.g., school systems) and commissions from 'green foam' sales to cover the difference between the value of the resin and the cost

[1] "SA" and "JA" herein refer to the Sealed Appendix and Joint Appendix in the record.

to produce it, rendering the program sustainable over the long term.

Evergreen successfully implemented its business model in the Boston Public School (BPS) beginning in 2002, purchasing resin from BPS's recycling facility, using a portion of this resin in new lunch trays sold back to the BPS system and the remainder in other green foam products, SA2086, SA0008. Evergreen expanded its program in 2003 to the Providence Public Schools, working with national food service provider Sodexho. SA0009.

Based on its initial success and increasing demand for green products by major food service distributors such as Sysco, Evergreen sought to roll out its program nationally, establishing its own recycling plant in Norcross, Georgia in 2006, anchored by used PSFS products collected from the Gwinnett County, Georgia Public Schools, SA2090, SA2013. To manufacture green products on a national scale, Evergreen needed the participation of at least one of the five manufacturing defendants, which controlled 90 percent of the PSFS market. Evergreen proposed its innovative business method to the defendants to establish, for the first time, a long sought-after sustainable recycling program. SA2086-SA2087. Two of the smaller defendants, Genpak and Dolco, initially committed to Evergreen's program because they saw it as an attractive, advantageous business opportunity but backed out after industry pressure.

Defendants engaged in a pattern and course of conduct of close cooperation and regular communications on matters affecting their industry, as demonstrated by some 40 meetings/conference calls held through their trade association during the relevant 2005-2009 period. SA2097-2098. Although they were competitors, each dominated a particular market segment, SA2088, and the record evidences tight cooperation on a number of decision-making issues, including, as defendants freely acknowledge, 'what to do about recycling'. For them this was, indisputably, a matter for group decision and a topic of intense, abiding attention given the onslaught of municipal bans.

Thus, when Evergreen approached the defendants, first, severally, and then, at their request, as a group, they were representing to the public that they supported recycling, but in fact they had already agreed on – or at least were developing – a collective industry position against sustainable recycling. In early March 2007, a small inner group of key manufacturers, resin suppliers and ACC officials met to strategize 'what to do or not do' regarding PSFS recycling. SA0619-25 (the "Recycling Task Group". These executive members discussed and agreed on a short-term strategy of 'buying time' (i.e., no action) through lobbying/advocacy with a long-term strategy of an 'industry controlled' recycling program. Evergreen's model conflicted with both their short and long term strategies.

In order to create a public perception that they supported recycling , the Defendants worked closely with Packaging Development Resource (PDR), whose business model was to produce recycled resin and, it hoped, sell it at a cost competitive with virgin resin; this was a proposition that the defendants could tolerate in the short run at least because it did not challenge the status quo, although they knew that any program dependent solely on the value of the resin would fail, just like NPRC, and as PDR ultimately did.

The defendants, through their trade association, specifically requested a proposal from Evergreen in May 2007 to build a PSFS recycling facility in Los Angeles due to an onslaught of recent and proposed bans in California and interest from the Los Angeles Unified School District. The defendants then collectively discussed and voted to reject Evergreen's proposal, although Evergreen had first approached several of them individually, and they decided instead to move forward with PDR and two other small firms. Although defendants Genpak and Dolco subsequently agreed to provide a small amount of funds to Evergreen and purchase recycled resin through a joint funding agreement, this was clearly an attempt to cover their participation in this group boycott and reversal of interest since they had access to Evergreen's financials and knew that Evergreen needed to receive commissions on green products to make the program sustainable.

B. Proceedings Below

1. The District Court's Rulings

Evergreen filed the complaint in this case in May 2011. The district court granted the defendants' motion to dismiss and the court of appeals reversed in *Evergreen Partnering Group v. Pactiv Corp.*, 720 F.3d 33 (1st Cir. 2013) ("*Evergreen I*").

Discovery ensued. On defendants' joint motion for summary judgment, the district court concluded in reliance on *Matsushita* that Evergreen failed to present evidence that tended to exclude the possibility that each PSFS manufacturer independently chose not to partner with Evergreen.

2. The Court of Appeals' Summary Judgment Ruling

The court of appeals agreed with the reasoning of the district court and affirmed the grant of summary judgment. The court first addressed, in part, Evergreen's proffer of direct evidence. Petitioner offered two pieces of direct evidence.[2] The court of appeals rejected the first – testimony of a member of the defendants' Recycling Task Group that it "picked

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[2] In order to defeat a request for summary judgment on direct evidence, the nonmovant need only ask that its evidence be taken as true. In contrast, "circumstantial evidence, is not testimony to the specific fact being asserted, but testimony to other facts and circumstances from which the jury may infer that the fact being asserted does or does not exist." *United States v. Henderson*, 693 F.2d 1028, 1031 (11th Cir. 1982).

a winner" among recyclers – and ignored the second – the defendants' collective rejection of Evergreen's proposal, which they solicited, to build a recycling plant in Los Angeles. SA0646-0647, SA0662, SA2164-2174. Although such evidence primes any circumstantial evidence, the erroneous finding by the court is secondary to its erroneous assessment of the circumstantial evidence; the court's decision indeed *turned* on that assessment, which is therefore the subject of this petition.[3]

The court of appeals examined Evergreen's circumstantial evidence and concluded under *Matsushita* that this evidence, individually and as a whole, did not tend to exclude the possibility of independent conduct on the part of the defendants. The court made key findings on the defendants' economic motive (App. A–18-21), industry animus (id. at 22-28), their trade association as a means to collude (id. at 28-29), and PDR's 'sham' status (id. at 29-31). As to each of these categories of evidence, the court applied *Matsushita*'s 'tends to exclude test' and concluded that Evergreen did not present evidence raising a reasonable inference of unlawful action.[4]

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[3] Evergreen's arguments that the court erred in rejecting this direct evidence are detailed in its appellate briefs; *see, e.g.,* Petition for Rehearing , App. D.

[4] Evergreen filed a motion to supplement the record, which the court denied. App. E and F.

REASONS FOR GRANTING THE PETITION

I. THE PROPER MEANING OF *KODAK* AND *MATSUSHITA*

The correct interpretation and application of *Matsushita*, as later refined by this Court in *Kodak*, lie at the heart of this petition.

The plaintiffs in *Matsushita* asserted a 20-year predatory pricing conspiracy that the Court found was "economically senseless." They also sought an inference of conspiracy from price-cutting (as part of the alleged below-cost pricing) and rebates, which the Court found to be inherently procompetitive. As the Court explained in *Kodak*, discussing *Matsushita*, "[b]ecause the defendants had every incentive not to engage in the alleged conduct which required them to sustain losses for decades with no foreseeable profits, the Court found an 'absence of any rational motive to conspire'." *Kodak*, 504 U.S. at 468.

The Court further explained in *Kodak* that "[b]ecause cutting prices to increase business is 'the very essence of competition,' the Court [in *Matsushita*] was concerned that mistaken inferences would be 'especially costly' and would 'chill the very conduct the antitrust laws were designed to protect . . . .'" *Id.* at 478. It was on those facts, and in that context alone, that the Court in *Matsushita* "held that a reasonable jury could not return a verdict for the plaintiffs and that summary judgment

would be appropriate against them unless they came forward with more persuasive evidence to support their theory." *Id.* at 468. And the quantum of evidence that the plaintiffs would have to show on such facts, to overcome this presumption, was "evidence that tends to exclude the possibility" that the defendants acted independently." *Matsushita*, 475 U.S. at 588, 597-98.

In *Kodak*, the Court clarified and limited its ruling six years earlier in *Matsushita*, holding that *Matsushita*'s "presumption in favor of summary judgment" applied *only* in antitrust cases in which the plaintiff's theory is implausible – whether because economically senseless or otherwise – and the inferences sought to be drawn are based on procompetitive conduct by the defendants; that is, if the theory is plausible and the conduct is not procompetitive – contrary to the facts in *Matsushita* itself – the ordinary summary judgment rules apply. *Kodak*, 504 U.S. at 467, 478-79. And to satisfy the ordinary summary judgment standard under Rule 56 in an antitrust case, the defendant "bears a substantial burden" and must demonstrate that an inference of unlawful conduct is "unreasonable." *Id.*, 504 U.S. at 469.

Consequently, to defeat a summary judgment motion in an antitrust case under the ordinary Rule 56 standard, a plaintiff is *not* required to present evidence that tends to exclude the possibility of independent conduct, except in the circumstances

present in *Matsushita*; the plaintiff is required instead to present evidence such that a reasonable jury could return a verdict for the plaintiff, i.e., evidence that reasonably tends to prove its theory – a substantially lower standard than the "tends to exclude" burden.

Kodak thus made it clear that the defendants in *Matsushita* were afforded a legal presumption in favor of summary judgment – in the absence of a rational motive, where the alleged scheme would be "economically senseless," and given the lower prices to consumers over 20 years – because of the likelihood that permitting inferences of conspiracy would deter or penalize procompetitive behavior. In *Kodak* itself, however, the Court denied Kodak the same legal presumption in favor of summary judgment because it determined that *Matsushita*'s deterrence concerns were not implicated by a challenged policy that it found to be facially anticompetitive and "exactly the harm the antitrust laws aim to prevent" on the facts of that case. *Kodak*, 504 U.S. at 478.

The Court in *Kodak* made it clear that courts must weigh two competing factors on summary judgment in antitrust cases – "the risk of deterring procompetitive behavior by proceeding to trial against the risk that illegal behavior will go unpunished." *Id.* at 479. And in weighing these risks, the balance tips in favor of summary judgment only when the challenged conduct "appears always or

almost always to enhance competition." *Id.* Accordingly, the Court formulated a presumption against summary judgment and against placing any limits on otherwise permissible inferences where there is no significant likelihood of punishing or deterring procompetitive conduct. *Id.* at 478.

Matsushita's 'tends to exclude the possibility of independent conduct' test was introduced as an elaboration of the conventional Rule 56 evidentiary standard in circumstances where the challenged conduct always or almost always appears to enhance competition. The Court in *Kodak* clarified that these factors – the absence of a rational (usually economic) motive and the existence of procompetitive conduct – circumscribe *Matsushita*'s 'tends to exclude' test, and that, instead, where a plausible motive exists and there is no procompetitive conduct, the plaintiff is not held to that higher burden but must simply show evidence such that a reasonable jury could return a verdict for it, i.e., that reasonably tends to prove its theory.

The Court in *Matsushita* itself highlighted the particularity of the circumstances of that case and why and how they circumscribe the 'tends to exclude' test derived from it. Regarding its concern with discouraging legitimate price competition, the Court explained that "[i]n most cases, this concern must be balanced against the desire that illegal conspiracies be identified and punished" – but this balance was "*unusually one-sided*" in *Matsushita* itself and

similar cases in which the defendants "had no rational economic motive to conspire." *Matsushita*, 475 U.S. at 593 (emphasis added). It was, again, in this particularized context that the Court held that plaintiffs were required to present evidence that tends to exclude the possibility that "[defendants] underpriced [plaintiffs] to compete for business rather than to implement an economically senseless conspiracy." *Id.* at 597-98.

A plaintiff's normal burden under Rule 56 to show evidence that reasonably tends to prove its theory differs critically from its burden under the higher standard in *Matsushita*, and this difference is essential to the questions presented herein. Judge Richard Posner, a leading authority on antitrust, has described the "tends to exclude" standard as effectively requiring antitrust plaintiffs to disprove the defendants' case with a "sweeping negative" (Richard Posner, *Antitrust Law*, 100 (2d ed. 2001), and has characterized the effect of having to exclude the possibility of independent action as higher than the standard of proof for alleged criminal conduct:

> That would imply that the plaintiff in an antitrust case must prove a violation of the antitrust laws not by a preponderance of the evidence, not even by proof beyond a reasonable doubt (as indeed is required in criminal antitrust cases), but to a 100 percent certainty, since any lesser degree of certitude

> would leave a possibility that the defendant was innocent.

In re Brand Name Prescription Drugs Litig., 186 F.3d 781 (7th Cir. 1997).

Judge Posner has added another important – albeit apparently obvious – gloss to the correct interpretation of Rule 56 in antitrust cases: It is not the task of the court on summary judgment to decide the merits of the case, of course, but instead to determine whether the evidence is sufficient to reach the trier of fact, who then decides the merits. This is a two-phase process, and the roles and tasks must not be blurred, although they often are. *See, e.g., In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 614, 615 (7th Cir. 1997) (Posner, C.J.), *cert. denied*, 522 U.S. 1153 (1998) (reversing summary judgment and rejecting the contention that the defendants' proffered innocent explanations entitled them to summary judgment, noting that "[t]he defendants' interpretations may be correct; they are not inevitable;" and that "defendants' [. . .] evidence suggesting that [they] had not played a role in the conspiracy did "not erase the factual question of whether they joined the conspiracy [– i]t is just evidence to be weighed in the balance by the trier of fact."). And in making this preliminary assessment on summary judgment, the court is required, just as the Court instructed in *Matsushita*, to draw all reasonable inferences in favor of the non-moving party. *Matsushita*, 475 U.S. at 587-88 (citing *United*

States v. Diebold, Inc., 369 U.S. 654, 655 (1962) ("[o]n 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.").

This, then, is the second point: on summary judgment, a court must not weigh the evidence or assess the credibility of witnesses; this is the exclusive responsibility of the trier of fact, and any such weighing or assessment by the court at the summary judgment stage is an improper encroachment on the responsibility of the trier of fact, and should be grounds for reversal.

II. THE LONG-STANDING CONFLICT AMONG THE CIRCUITS

A. Courts Properly Interpreting *Matsushita* and *Kodak*

The Second, Third, Seventh and Ninth Circuits Have Prominently Interpreted *Matsushita* in Light of *Kodak* as Imposing a Higher Burden on the Non-Movant Plaintiff in Summary Judgment Cases *Only* When the Plaintiff's Theory is Implausible and Based on Procompetitive Conduct by the Defendants.

Despite the Supreme Court's clarification of *Matsushita*, confusion and imprecise analysis continue to plague the courts, resulting in an

inconsistent judicial landscape on the all-important question of what quantum of circumstantial evidence a plaintiff must present in order to survive summary judgment. Had the courts in this case followed *Kodak* – here, where there is no finding of procompetitive conduct and it was economically and otherwise rational for the defendants to engage in a concerted refusal to deal – they would have applied the conventional Rule 56 standard and found that a reasonable jury could return a verdict for the petitioner.

The Second, Third, Seventh and Ninth Circuits have clearly followed *Kodak* and on the evidence of this case would very likely have denied summary judgment. Other circuits as well have agreed.

In *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224 (3d Cir.), *cert. denied*, 510 U.S. 994 (1993), plaintiffs alleged that the defendants conspired to avoid competing for accounts to keep prices they paid supplier-customers artificially low. Reversing, the Third Circuit found sufficient evidence to defeat summary judgment. The court identified plausibility and deterrence concerns as the two principal factors underlying *Matsushita*'s "tends to exclude" test. Given that the plaintiff's theory was implausible and "the defendants' challenged activities [were] not pro-competitive," the court explained that "more liberal inferences from the evidence should be permitted than in *Matsushita*

because the attendant dangers from drawing [such] inferences [were] not present." *Id.* at 1232. Citing *Kodak*, the court explained that *Matsushita* "did not hold that an antitrust defendant is entitled to summary judgment merely by providing *an* economic theory to justify its behavior," but "simply stressed that to survive summary judgment in the absence of direct evidence, or strong circumstantial evidence of an agreement, a plaintiff must assert a theory that is plausible." *Id.* at 1231 (citing *Matsushita*, 475 U.S. at 593-94). Further, "the Court [in *Matsushita*] stated that the acceptable inferences which can be drawn from circumstantial evidence vary with the plausibility of the plaintiff's theory and the dangers associated with such inferences." *Id.* at 1232 (citing *Matsushita*, 475 U.S. at 587, 594.).

In decisions since *Petruzzi*'s, the Third Circuit has consistently interpreted *Matsushita* in the light of *Kodak* to impose a higher burden on the non-movant plaintiff on summary judgment in antitrust cases under the 'tends to exclude' standard *only* when the plaintiff's theory is implausible and challenges procompetitive conduct. *See, e.g., In re Flat Glass Antitrust Litigation*, 385 F.3d 350, 358 (3d Cir. 2004, *cert. denied*, 544 U.S. 948 (2005); *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1001 (3d Cir. 1994) ("if the alleged conduct is 'facially anticompetitive and exactly the harm the antitrust laws aim to prevent,' no special care need be taken in assigning inferences to circumstantial evidence (quoting *Kodak*, 112 S.Ct. at 2088)), *cert. denied*, 514

U.S. 1063 (1995); *Advo, Inc. v. Phila. Newspapers, Inc.*, 51 F.3d 1191, 1196-97, 1205 (3d Cir. 1995); *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 466-67 (3d Cir. 1998), *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 124 (3d Cir. 1999).[5]

The Seventh Circuit has also authoritatively recognized that *Kodak* qualifies *Matsushita*. *See, e.g., In re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651, 661 (7th Cir. 2002) (Posner, J.) (interpreting *Matsushita* as requiring a sliding evidentiary scale in which "[m]ore evidence is required the less plausible the charge of collusive conduct," reversing the district court's grant of summary judgment, and stating that the district court erroneously "require[d] that a substantial inference be drawn in order to have evidentiary significance"), *cert denied*, 537 U.S. 118 (2003).

Regarding the proper assessment of circumstantial evidence of conspiracy, Judge Posner also warned of several judicial 'traps', now generally acknowledged in antitrust case law. The first trap that a court should avoid is to weigh conflicting evidence, which is "the job of the jury." *Id.* at 655. The second "is [for the court] to suppose that if no single item of evidence presented by the plaintiff points unequivocally to conspiracy, the evidence as a whole

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[5] *But see In re Chocolate Confectionary Antitrust Litig.*, 801 F.3d 383, 396-97 (3d Cir. 2015).

cannot defeat summary judgment." *Id.* Posner explains:

> It is true that zero plus zero equals zero. But evidence can be susceptible of different interpretations, only one of which supports the party sponsoring it, without being wholly devoid of probative value for that party. Otherwise, what need would there ever be for a trial. The question for the jury in a case such as this would simply be whether, when the evidence was considered as a whole, it was more likely that the defendants had conspired to fix prices than that they had not conspired to fix prices.

Id. at 655-66. It is the courts that ignore *Kodak*'s qualification of *Matsushita* that seem to fall into Posner's 'traps', as the First Circuit did in this case.

JTC Petroleum Co. v. Plasa Motor Fuels, Inc., 190 F.3d 775 (7th Cir. 1999), a concerted refusal to deal case, is particularly instructive for how a court should assess the evidence – without falling into the trap of weighing it – on summary judgment. Judge Posner, reversing the district court and writing for the panel, found sufficient circumstantial evidence that the defendant road repair contractor applicators sought to enlist a captive market of co-defendant suppliers in enforcing a cartel by punishing plaintiff

applicator JTC through either coercion or economic inducement. JTC, a maverick, alleged that the defendant applicators enlisted the producers in a conspiracy to police the applicators' cartel by refusing to sell to applicators such as JTC which defied the cartel. Judge Posner explored several explanations for why it might *not* make sense for the producers to have shored up a cartel of their customers (the applicators), such as raising the price of asphalt and thus possibly reducing demand for it (possibly hurting the producers), but also for why under the circumstances it would have made sense. Notably, Posner drew no conclusions as to this conflicting evidence except to make threshold assessments of the competing claims, and applied the conventional Rule 56 standard:

> There may be an innocent explanation for why producers would charge lower prices elsewhere or why they refused to sell to JTC. *But the only issue for us*, in reviewing the grant of summary judgment for these defendants, is whether a rational jury, having before it the evidence developed to date, could conclude (construing the evidence as favorably to the plaintiff as the record permits) that the reason for the producers' refusal to deal with JTC was that they were in cahoots with the cartel to discourage competition in the applicator market. Given the evidence

> of [various suspicious behavior] and the pretextual character of the reasons the producers gave for the refusal to deal, a rational jury could conclude that JTC was indeed the victim of a producers' boycott organized by the applicator defendants.

Id. at 779 (emphasis added).

Posner did not apply *Matsushita*'s "tends to exclude" standard or assess whether the innocent and not-innocent explanations of the conduct were in equipoise; he simply found the not-innocent explanations to be sufficiently plausible that a rational jury could find for the plaintiff. This approach is implicitly based on recognition of the need for judicial restraint and limits – that no court can with mathematical exactitude discern on summary judgment whether competing inferences are truly in equipoise. To assume otherwise is a legal fiction and, a *fortiori*, *Kodak*'s tight limitations on the *Matsushita* test therefore must be rigorously respected. This is an entirely different exercise than the assessment undertaken by some other circuits, including the First Circuit in the instant case; there, even in the absence of procompetitive conduct and despite evidence of a rational motive for conspiracy, the courts fall into the evidentiary 'traps', weighing the evidence (beyond mere plausibility), imposing the virtually unattainable 'tends to exclude' burden on the plaintiff, and substituting their judgment for that

of a jury on whether it might reasonably find for the plaintiff.

Foreshadowing *Kodak*, a panel of the Ninth Circuit in *In re Coordinated Pre-Trial Proceedings in Petroleum Product Litigation*, 906 F.2d 432 (9th Cir. 1990), *cert. denied*, 500 U.S. 959 (1991), emphatically delineated the summary judgment standard the Supreme Court clarified two years later. The court of appeals, reversing the district court, held that genuine issues of material fact existed as to whether the defendant petroleum companies conspired to fix or stabilize prices and to restrict supply, precluding summary judgment. The panel said that in emphasizing the dangers of permitting inferences from certain types of ambiguous evidence, the Court in *Matsushita* "purported to *limit* the application of the traditional summary judgment rules in the antitrust context; it did not intend to abolish them and replace them with an entirely different set, one which raises troubling seventh amendment concerns." *Petroleum Products*, 906 F.2d. at 438.

The Ninth Circuit panel expressly rejected the proposition that unless the plaintiff presents evidence that tends to exclude the possibility of independent conduct, summary judgment should be granted "whenever the court concludes that inferences of conspiracy and inferences of innocent conduct are equally plausible." *Id.* at 438. There are two major problems with this proposition. First, as a

procedural matter, with significant Seventh Amendment implications,

> allowing the court to make [such a] decision would lead to a dramatic encroachment on the province of the jury. To read *Matsushita* as requiring judges to ask whether the circumstantial evidence is more 'consistent' with the defendants' theory than with the plaintiff's theory would imply that the jury should be permitted to choose an inference of conspiracy *only* if the judge has first decided that he would himself draw that inference. This approach would essentially convert the judge into a thirteenth juror, who must be persuaded before an antitrust violation may be found.

Id. at 438.

Second, as a logical matter, the court of appeals further explained:

> 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. *Such*

> *an approach would imply that circumstantial evidence alone would rarely be sufficient to withstand summary judgment in an antitrust conspiracy case.* After all, circumstantial evidence is nearly always evidence that is plausibly consistent with competing inferences. [. . . .] Thus, such an interpretation of *Matsushita* would seem to be tantamount to requiring direct evidence of conspiracy. *Since direct evidence will rarely be available, such a reading would seriously undercut the effectiveness of the antitrust laws.*

Id. at 439 (emphasis added).[6]

The Second Circuit also has rejected the broad reading of *Matsushita* adopted by the First Circuit in this case and by several other circuits (discussed

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[6] Other panel decisions of the Ninth, Third and Eleventh Circuits, however, reflect even *intra*-circuit splits on the appropriate reading of *Matsushita*. *See, e.g., In re Citric Acid Litigation*, 191 F.3d 1090, 1096-97 (9th Cir. 1990) (rejecting panel's approach in *Petroleum Products* and dismissing it as dicta because of direct evidence – although, Petitioner herein notes, the panel in *Petroleum Products* itself clearly limited the direct evidence to just the independent sector of the market), 906 F.2d at 460, n.22), *cert. denied*, 529 U.S. 1037 *sub nom. Gangi Bros. Packaging v. Cargill*; *In re Chocolate*, 801 F.3d 383, 396-97 (3d Cir. 2015); *Williamson Oil Co., Inc. v. Phillip Morris, USA*, 346 F.3d 1287 (11th Cir. 2003).

below). *See, e.g., In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 55, 63 (2d Cir. 2012) (where district court found that plaintiffs "failed to offer sufficient evidence to dispel the possibility that [defendants] acted independently," reversing summary judgment as to two of the defendants because "[r]equiring 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.") As a leading antitrust treatise has explained:

> It is important not to be misled by *Matsushita*'s statement . . . that the plaintiff's evidence, if it is to prevail, must "tend . . . to exclude the possibility that the alleged conspirators acted independently." The Court surely did not mean that the plaintiff must disprove all nonconspiratorial explanations for the defendants' conduct. Not only did the court use the word "tend," but the context made clear that the Court was simply requiring sufficient evidence to allow a reasonable fact finder to infer that the conspiratorial explanation is more likely than not.

Phillip E. Areeda and Herbert Hovenkamp, *Fundamentals of Antitrust Law,* § 14.03(b), at 14–25 (4th ed. 2011) (footnotes omitted)).

Other Courts: Several other circuits have also rejected a broad reading of *Matsushita*. *See, e.g., City of Tuscaloosa v. Harcross Chemicals, Inc.*, 158 F.3d, 548, 572 (11th Cir. 1998); *Champagne Metals v. Ken-Mac Metals, Inc.*, 458 F.3d 1073, 1082 (10th Cir. 2006); *see also In re Vitamins Antitrust Litigation*, 320 F. Supp. 2d 1, 13, 23 (D.D.C.2004) (applying 'sliding scale' approach and interpreting Matsushita to mean that if the alleged conspiratorial actions do not merit a presumption of precompetitive conduct, the "[p]laintiffs are entitled to the benefit of a jury determing inferences rather than the Court doing so as the summary judgment stage").

B. Courts in the Fourth, Sixth and Eighth Circuits, Like the First Circuit in This Case, Have Ignored *Kodak* and Continued to Read *Matsushita* as Requiring Plaintiffs' Evidence to Outweigh Defendants' Evidence to Survive Summary Judgment, Even if the Plaintiff's Theory is Plausible and There is No Showing of Procompetitive Conduct

Several circuits, contrary to the Court's guidance in *Kodak*, have applied *Matsushita*'s 'tends to exclude' standard even where the plaintiff's theory is plausible and there is no showing of procompetitive conduct, similar to the First Circuit. For instance,

the Fourth Circuit in several cases has articulated a standard based on *Matsushita* (1) that is *not* limited to facts where the plaintiff's theory is inherently implausible or economically senseless, or where the conduct is procompetitive, (2) under which, if an inference of innocence is at a minimum possible then the court is required to draw it and (3) wherein the plaintiff, to prevail on summary judgment, must proffer evidence that conclusively excludes – not just tends to exclude – the possibility of independent conduct. *See, e.g., Thompson Everett, Inc. v. National Cable Advertising, L.P.*, 57 F.3d 1317, 1323 (4th Cir. 1995) (citing *Matsushita* but not *Kodak*); *Merck-Medco Managed Care, LLC v. Rite AM Corp.*, 57 F.3d 1317 (4th Cir. 1999).

Representative of the Eighth Circuit's approach is *Corner Pocket of Sioux Falls, Inc. v. Video Lottery Techs., Inc.*, 123 F.3d 1107 (8th Cir. 1997), *cert. denied*, 522 U.S. 1117 (1998), in which the court expressly rejected the approaches of the Third and Ninth Circuits and stated that it "read[s] *Matsushita* more broadly" than those circuits. *Id.* at 1109 (applying the "tends to exclude" standard without regard to whether the plaintiff's theory was implausible or the suspect conduct was procompetitive and without mentioning *Kodak*); *see also Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028 (8th Cir.), *cert. denied*, 531 U.S. 815 (2000).

The Sixth Circuit also takes a broader view of *Matsushita*, also without regard to whether defendant's conduct is procompetitive. *See, e.g.*, *Super Sulky, Inc. v. United States Trotting Ass'n*, 174 F.3d 733, 739 (6th Cir.) (rejecting plaintiff's circumstantial evidence because it "d[id] not exclude a non-conspiratorial explanation for the [group's] action"), *cert. denied*, 528 U.S. 871 (1999).

III. THE FIRST CIRCUIT APPLIED A STANDARD THAT CONFLICTS WITH *KODAK* AND A NUMBER OF OTHER CIRCUITS

Ignoring *Kodak*, the Court of Appeals Erroneously Applied *Matsushita*'s 'Tends to Exclude' Test with No Finding that Plaintiff's Theory was Economically Senseless or of Procompetitive Conduct by the Defendants.

The court of appeals examined what it viewed as the critical alleged circumstantial evidence and subjected it to *Matsushita*'s 'tends to exclude' higher summary judgment evidentiary test, but without any qualification from the absence of procompetitive conduct or the existence of a rational motive on the part of the defendants to engage in a concerted refusal to deal. In these circumstances, however, as the Court made clear in *Kodak*, Evergreen is required under the law only to show that a jury could reasonably find in its favor on the record facts. Evergeen's evidence reasonably should have sufficed

to defeat summary judgment on the conventional Rule 56 standard.

Economic Motive: With respect to economic motive, the court said that on a finding that the challenged conduct is 'as consistent with permissible competition as with illegal conspiracy, Evergreen had to present evidence that tends to exclude the possibility that the alleged conspirators acted independently. But the court made a series of factual and legal errors stemming from its erroneous legal standard. First, the court misreads Evergreen's appellate arguments: it has not, contrary to the court, abandoned its claims of cost-neutrality or that the defendants had a rational, economic motive to agree to deal with Evergreen only on limited terms:

- Contrary to the court (App. A-5), Evergreen did not envision or assert that there would be any 'premium' for its green foam model. Instead, it consistently maintained that it was cost-neutral, i.e., that the overall costs that the defendants would pay Evergreen for post-consumer resin and brokerage commissions would be the same as they already paid for virgin resin and commissions under their traditional cost structure. *See* SA2294, SA 2094.
- As Evergreen has explained, contrary to the court, the *defendants* – not Evergreen – viewed the model as more expensive than using only virgin resin. Given the *defendants'* perception of higher costs, while also needing to maintain group discipline to resist bona fide recycling in the face of the bans, it

was rational for them to reject Evergreen's commission model and to support PDR's resin-sales only model; this would for a time help them fend off the bans, by appearing to support recycling even as they knew that PDR's model was not commercially sustainable. Similarly, the court itself acknowledged that "there may be a colorable argument that the defendants feared that local governments would instead mandate the use of recycled products, and [that defendants] would thus wish to prevent any expensive recycling methods from becoming viable," App.-19, n.10. The court's express refusal to reach defendants' argument that they *lacked* any rational motive to collude, id., the court's contrary suggestion that indeed they might have had a rational motive to do so, Evergreen's assertion of a rational motive, and the absence of procompetitive conduct, should reasonably have permitted more permissive inferences of collusion and tipped the balance against summary judgment on the issue of motive under the conventional Rule 56 standard, as required by the Court in *Kodak*. But the court's 'tends to exclude' standard, erroneously invoked in these circumstances, could admit no such reasonable inferences, even in the face, paradoxically, of the court's own acknowledgement of rational motive.

- The court found that the "defendants' desire to avoid [the anticipated] costs was especially understandable in light of the overwhelming evidence that they each experienced significant quality problems with Evergreen's resin" (App. A-19). In reaching this conclusion, the court ignored

significant contrary evidence that Evergreen sold over 600,000 pounds of recycled resin that was used successfully by the defendants to produce green PSFS products, generating several million dollars in in revenue, contrasted with PDR's alleged production of a mere 11,000 pounds. This record fact plausibly outweighs any dissatisfaction they may have had – and raised on summary judgment – with the product. App. A–18-21; *see* below. A jury could reasonably conclude from the aggregate evidence that the desire to "avoid the costs" instead derived more (or at least plausibly) from the group resistance to Evergreen's closed-loop recycling model than from any of the defendants' concerns about product quality. The court thus improperly weighed the evidence and made credibility determinations on summary judgment wholly inappropriate to a case reflecting economic motive and no procompetitive conduct.

Meeting Minutes Reflect Industry Animus Against Recycling: The court found Evergreen's evidence of "industry animus" or motive also to be "insufficient to create an inference of conspiracy" because it "does not tend to exclude the possibility of independent action." App. A-28. The court devalued Evergreen's motive evidence and assessed it in isolation. In this context, the court made another critical legal error: it ruled that minutes from a March 18, 2005 Plastics Group meeting "asking whether the industry could 'win out' against its critics without having to recycle" were inadmissible hearsay, not qualifying for the business records exception, because they were not

authenticated. The ruling is incorrect: the minutes do not require authentication[7] and they surely reflect an industry animus and motive on the part of the defendants. Comments by Dart's General Counsel and Pactiv's Food Service General Manager quoted in the minutes reflect an industry position developed or developing against recycling, foreshadowing and leading into some 40 trade association meetings over five years, intensely focused on how to address the bans and what to do about recycling. To rule the minutes inadmissible was not only incorrect but also suggests how an erroneous, over-aggressive application of the 'tends to exclude test can trigger derivative legal errors.

Pactiv Pressure on Genpak: As further evidence of motive, Evergreen alleged that Genpak, susceptible to pressure from the much larger Pactiv, "engaged in various behaviors when dealing with Gwinnett Schools suggesting that it was reluctant to bid with its tray[s] made from Evergreen's resin against Pactiv." App. A-27. Evergreen cited deposition

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[7] The notes were clearly written by Michael Levy, PSPC director, who took all of the notes of the PSPC/PFPG meetings, and were produced by defendant ACC. *See* C.A. Wright, 31 Fed. Prac. & Proc. Evid. § 7109 (1st ed. Apr. 2014 update); see also *Mohawk Constr. & Supply Co.*, 577 F.3d 1164, 1171 (10th Cir. 2009); *Attorney General of the United States v. Irish Northern Aid Committee*, 530 F. Supp. 241, 252 (S.D.N.Y. 1981) (if the "exhibits are reproductions of documents obtained from defendant's files, their authenticity cannot be seriously disputed"), *aff'd*, 668 F. 2d 159 (2d Cir. 1982).

testimony of a Gwinnett County Schools official stating that he felt Reilly (of Genpak) was reluctant to "battle with another competitor" (Pactiv). The court found "Genpak's last-minute attempt to withdraw its bid . . . potentially suspicious" but, given Genpak's concerns over product quality, concluded that Genpak's "reluctance to compete against Pactiv" was "equally consistent with conspiracy as independent action such that it does not tend to exclude the possibility of independent action." App. A-28. First, the court here favors speculation over fact – the undisputed evidence that Genpak bought and successfully used 300,000 pounds of Evergreen's resin – and ignores the school officials' unqualified satisfaction with the product. Second, the court again falls into Posner's first 'trap', of weighing the evidence: the question is not whether it is susceptible of an innocent interpretation, such as found by the court, but whether there is sufficient evidence to create a jury issue. *See, e.g., In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 63 (2d Cir. 2012) ("requiring a plaintiff to 'exclude' or 'dispel' the possibility of independent action places too heavy a burden on the plaintiff"), *cert. denied*, 133 S.Ct. 940 (2013).

Systematic Communications through Trade Association as 'Plus-factor': Looking through the improper lens of the 'tends to exclude' standard, the court failed to credit the undisputed evidence of some 40 meetings among the defendants through the PFPG (and its antecedents) during the 2005-2009

time period. On the court's unremarkable proposition that "a mere opportunity to conspire does not, standing along, plausibly suggest an illegal agreement," App. A-29 (quoting *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 911 (6th Cir. 2009), *cert. denied*, 562 U.S. 1134 (2011)), it is quite wrong to reject the defendants' 40 meetings and systematic communications as a classic plus-factor. Nowhere has Evergreen suggested that the meetings should be considered "standing alone" but rather, on the contrary, following the guidance of this Court in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), that this plus-factor evidence should not be "tightly compartmentalized," as a basis for the reasonable inference that defendants' behavior was not mere parallel conduct. To reject here an inference of uniformity caused by information exchanges and find defendants' "'presence at such trade meetings [. . .] more likely . . . explained by their lawful, free-market behavior'," App. A-29, is to favor pure theoretical possibility over hard facts and construe reasonable inferences *against* the non-moving party.

The Court Misconstrued the Evidence about PDR: The court concluded that Evergreen "failed to produce evidence creating a reasonable inference that PDR was a sham." App. A-29. Evergreen contended that PDR performed poorly, if at all, but that it satisfied the defendants' near-term objective of making it appear that they were committed to recycling in order to buy time and stave off the bans,

when in fact they were collectively resisting sustainable recycling. PDR was not what it was purported to be, *see* SA3336-38 – a company producing recycled food-grade resin – and in this sense clearly was a sham. And, although the court said the evidence does not support a reasonable inference that PDR was "never operational," it never was.[8] Noting that Dart entered into a purchase agreement with PDR (App. A-30), the court inexplicably ignores the far more telling facts that in June 2008 Dart rejected a shipment from PDR of over 12,000 lbs. of recycled resin due to contamination, SA3175-77 (Preston testimony), and that PDR never sold it any commercially usable resin.[9] Thus, to find that Evergreen has not raised a reasonable inference that PDR was not 'operational' (the Court's characterization) renders the term meaningless. To conclude, in the face of PDR's executives' own damning testimony, that a reasonable factfinder could not find that PDR was a sham, in the sense of not being meaningfully operational, is to require the petitioner to prove a "sweeping negative" – a virtually impossible burden to satisfy – but that is just what the court did.[10]

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[8] *See, e.g.,* co-founder Preston**'s** testimony that "we [PDR] never sold clean stream [i.e., FDA requirements for food use] that was accepted by a customer." SA3187.

[9] Even assuming PDR produced 11,000 pounds of material, that is a miniscule amount over four years, especially when contrasted with Evergreen's average production of 30,000 pounds per month for two consecutive years.

[10] Indeed, counsel for petitioner is unaware of any case in which a court has found on the "tends to exclude" standard that

• *Court Drew Further Inferences Against Evergreen on the Basis of Speculation in the Face of Hard Fact:* The court in several instances draws inferences *against* Evergreen from defendants' purchase and successful use of a substantial quantity of its recycled resin and Evergreen's earlier success. Had the court instead applied the correct test to the evidence, as *Kodak* instructs, and not fallen into the trap of substituting its own judgment for that of the trier of fact, it would likely have concluded that a reasonable jury could find for Evergreen on these issues.

-- Thus, on Forrest's contention that Reilly (of Genpak)'s requirement of group support was "a way of maintaining group course of action," the Court concluded that Reilly "may have been acting independently [. . .] [i]n light of the resin quality issue," and "Evergreen has not presented evidence that tends to exclude this possibility of independent action." App. A-20, n.12. The court took no note in this context of Genpak's purchase of 300,000 pounds of recycled resin from Evergreen and successful use

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plaintiff's evidence, short of direct evidence of conspiracy, tends to exclude the possibility of independent conduct. Even assuming a handful of such cases could be found, the point remains, and the reason is that it is a virtually unattainable standard. In this light, it is all the more compelling why it should therefore be clearly limited, just as *Kodak* requires. *See also Petruzzi's*, 998 F.2d at 1230 (holding that plaintiff need not match, item for item, each piece of evidence proffered by the movant but simply must exceed the mere scintilla standard).

it in green products, which clearly suggests that Reilly's requirement of group support may well *not* have stemmed from the resin quality issue. SA0398.

-- The court ignored evidence of Evergreen's earlier success with supplying 'green products' to Boston Public Schools for more than eight years and also to other schools in Massachusetts, Rhode Island, Connecticut and New Jersey, with customer satisfaction on product quality and performance reliability, enabling it to get SBA financing to build the recycling facility in Norcross, Georgia.

-- The Court's statement that Sysco "eventually backed out" after Dolco made a formal proposal to it in December 2005, App. A-7, accepts Dolco Senior V-P Patterson's deposition testimony but ignores Forrest's contrary deposition testimony that Dolco backed out of the deal, not Sysco. *See* JA1329, SA1515-18. Patterson also testified that Evergreen "never produced anything" when in fact it sold more than 250,000 pounds to Dolco alone in the period 2005-2008. JA1331. Given the reasonable inference that Patterson's testimony is therefore suspect, the court erred in assessing and reaching a conclusion about Patterson's credibility, instead of leaving it to the trier of fact.

Funding Agreement: The Court found that "the continued purchase of Evergreen's resin by [Dolco and Genpak]" pursuant to [their July 2007] funding agreement was "inconsistent with conspiracy" and that such purchases "would be irrational if a conspiracy in fact existed" because "these agreements

allowed Evergreen to continue operations." App. A-22. But the court substituted its own interpretation of the agreement, as allowing Evergreen to "continue operations," in the face of evidence reflecting a more limited purpose. The agreement expressly provided for most of the $75,000 in funding from each firm to Evergreen to be used to pay its existing debt obligations, listed on an exhibit thereto, and required that Evergreen send weekly financial activity reports to Dolco and Genpak. Both defendants were thus well aware of Evergreen's dire financial situation, even as of July 2007, unless it received brokerage commissions, which of course this funding did not provide. They therefore could reasonably expect that the $150,000 would not enable Evergreen to continue operations without the requested commissions.

Forrest was not shy about making known Evergreen's need for commissions for the model to work, or about voicing his suspicions about why the defendants were not accepting his proposals. Evergreen was 'dogged' and the funding was the proverbial bone thrown to it – in this case, to buy peace from Evergeen: the funding provided Dolco and Genpak with legal cover for their participation in the group rejection of Evergreen's proposal for the Los Angeles plant just two months earlier, and for their reversal of prior commitments to Evergreen to buy recycled resin for green foam products and pay industry-standard commissions. One can readily imagine Judge Posner, as he did in *JTC*, finding plausible both innocent and not-innocent

explanations for the conduct, and therefore concluding that it is a matter for the trier of fact to decide – not for the court on summary judgment.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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