No. 18-475

IN THE

Supreme Court of the United States

ZAREMBA FAMILY FARMS, INC., A MICHIGAN CORPORATION; ZAREMBA GROUP, L.L.C., A MICHIGAN LIMITED LIABILITY COMPANY; WALTER ZAREMBA, AN INDIVIDUAL,

Petitioners,

v.

ENCANA OIL & GAS (USA), INC., A DELAWARE CORPORATION,

Respondent.

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

BRIEF IN OPPOSITION

ROBERT WIERENGA
JESSICA SPROVTSOFF
SCHIFF HARDIN LLP
350 S. Main St., Suite 210
Ann Arbor, MI 48104
(734) 222-1500

NEIL LLOYD
Counsel of Record
SCHIFF HARDIN LLP
233 S. Wacker Dr., Suite 7100
Chicago, IL 60606
(312) 258-5500
nlloyd@schiffhardin.com

Counsel for Respondent

284226

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

CORPORATE DISCLOSURE

Pursuant to Rule 29.6, Encana Oil & Gas (USA) Inc. states that it is a wholly-owned subsidiary of Encana Corporation, a publicly held parent corporation.

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES

STATUTES AND OTHER AUTHORITIES

INTRODUCTION

Did a rogue panel of the Court of Appeals seek arbitrarily to strip a beleaguered Michigan business of the chance to present a $180 million antitrust claim to a Kalamazoo federal jury by creating a new rule of antitrust law? So Petitioners (collectively, the Zarembas) would have the Court believe. Dropped from the sky like the supposed rule it seeks to challenge, the petition swaps the context necessary to gain a foothold into years of hard-fought litigation in favor of strobe lights that flash on turns of phrase and go black.

There is a reason that the district court and the Court of Appeals did not designate their opinions for publication, but it is not a sinister one. This case involved the straightforward application of decades of substantive antitrust law to decades of summary judgment practice. The Zarembas lost their antitrust claims on summary judgment in the district court because they lacked evidence creating a triable issue of a conspiracy between respondent Encana Oil & Gas USA and non-party Chesapeake Energy Inc. and because they lacked evidence creating a triable issue of antitrust injury. On de novo review, the Zarembas lost their antitrust claims on appeal from the district court's summary judgment rulings for the same reasons, with a caveat.

The heart of the Zarembas' claims in both the district court and the Court of Appeals was that either on June 29, 2010 or on July 15, 2010 (dates that matter crucially) Encana and Chesapeake engaged in a traditional market allocation scheme under which they attempted to suppress the price for the Zarembas' oil and gas interests in an

area in the northern part of Michigan's lower peninsula known as the "Collingwood play." The Court of Appeals agreed with the district court that there was no evidence of a conspiracy in June and July 2010; the Zarembas (while continuing to recite in the petition much of the evidence that both courts rejected about these supposed conspiracies) notably do not challenge those conclusions in this Court.

The Court of Appeals briefly parted company with the district court, though, on whether there was evidence from which a jury could conclude that Encana and Chesapeake colluded when they bid on mineral rights owned by the State of Michigan, which the State auctioned in October 2010. While Encana respectfully disagrees with that conclusion, it agrees with the Court of Appeals that the conclusion does not matter because the Zarembas had no evidence of antitrust injury related to any October 2010 conspiracy. The Zarembas see a Charlie Brown and Lucy football-yanking moment, but this Court has long held that anticompetitive conduct untethered to antitrust injury is insufficient to give a private antitrust plaintiff standing. And the Court of Appeals was right that the Zarembas lack proof of antitrust injury.

On summary judgment, Encana made a *Celotex* motion, pointing to the absence of any evidence that the Zarembas were affected by the prices paid for leases at the October 2010 Michigan state auction. The Zarembas came back with nothing. After the Court of Appeals raised the same issue during oral argument, the Zarembas filed a letter brief citing evidence concerning their leasing efforts during June and July 2010, not in October 2010.

And little wonder. The Zarembas did not present to the Court of Appeals evidence that they had offered in the district court to defeat the *Celotex* motion concerning the supposed October 2010 agreement. Instead, they offered evidence that they had introduced *at trial* and evidence that ended in June 2010.

Trial evidence could not help, for three reasons. First, the trial had nothing to do with October 2010. The district court had already granted summary judgment on all of the antitrust claims, so those claims were no longer in the case (not the allegations of an antitrust conspiracy in June and July 2010 and not the allegations of an antitrust conspiracy in October 2010). Second, the trial itself concerned whether the Zarembas were required to return to Encana $1.8 million of a $2 million earnest money payment that Encana had made as part of negotiations *in June and July 2010* to acquire the Zarembas' mineral interests, not in October 2010. Third, trial evidence concerning one claim does not matter when the issue on appeal is the propriety of granting summary judgment on a different claim.

The Sixth Circuit did not strip the Zarembas of a supposed $180 million claim by requiring them to "sell into a rigged market" in order to prove antitrust injury. It merely required them to come forward with evidence that they were *participants in* the market in October 2010, when the undisputed evidence showed that they had ceased their leasing efforts months earlier in July 2010. And in a separate part of its opinion that the Zarembas do not challenge, the Sixth Circuit required the Zarembas to remit the $1.8 million.

The Zarembas had their day in court and lost. They had their appeal of right and lost. The Sixth Circuit's unpublished opinion matters a lot to them and it matters a lot to Encana. But the factual and procedural static that affect many complex litigation matters makes the opinion of essentially no interest to anyone else. The Court should deny review.

PROCEEDINGS IN THE DISTRICT COURT AND COURT OF APPEALS

The Zarembas' petition rests on fundamental and multiple misstatements of the trial court and appellate proceedings, necessitating this submission under Rule 15.2.

A. Encana's Claim

There is no dispute that (a) the Zarembas own mineral interests in Michigan; (b) that Encana and Chesapeake during 2010 purchased mineral interests in Michigan; (c) that both Encana and Chesapeake during 2010 took steps to acquire the Zarembas' mineral interests in Michigan, including by competing against one another to bid up the price for the Zarembas' interests; and (d) that neither ultimately acquired those interests. *See* Pet. at 5-6; Pet. App. A at 2a.

Further, there is no dispute that Encana made an offer to negotiate with the Zarembas through a non-binding letter of intent, which expired on June 25, 2010; that on June 29, 2010, the Zarembas and Chesapeake broke off negotiations under which Chesapeake would acquire the Zarembas' mineral interests; or that on June 29, 2010, the

Zarembas asked Encana to reinstate Encana's expired June 25, 2010 offer to negotiate through a non-binding letter of intent and that Encana did so. Pet. App. C at 29a.

Specifically, on June 29, 2010, the Zarembas and Encana signed a non-binding letter of intent under which Encana paid the Zarembas $2 million as earnest money and the Zarembas agreed to return 90% of this amount if the parties did not reach a definitive agreement concerning the Zarembas' mineral interests before September 2010. Pet. App. C at 24a, 39a. Encana advised the Zarembas on July 15, 2010, that it was no longer interested in acquiring their mineral interests and that it was withdrawing from the non-binding letter of intent. Pet. App. C at 29a. Encana then negotiated with the Zarembas concerning the return of the $1.8 million. Pet. App. C at 24a. When the Zarembas refused to return the money, Encana sued for breach of contract. Pet. App. A at 2a.

As postured before this Court, Encana's claim has been reduced to a final judgment: the Court of Appeals held that Encana was entitled to the $1.8 million from the Zarembas (Pet. App. A at 21a), a conclusion that the Zarembas have not challenged here. But because Encana was the original plaintiff, the single antitrust claim that is before this Court originated as a counterclaim, to which we now turn.

B. The Zarembas' Antitrust Counterclaim

While the petition is rife with misstatements of the previous proceedings, the Zarembas' own factual recitation confirms that their antitrust counterclaim focused almost entirely on the allegation that Encana and

Chesapeake, in the course of discussing a possible joint venture in Michigan related to Michigan's Collingwood play, entered into an illegal agreement that caused the Zarembas to suffer antitrust injury. This injury occurred no later than July 15, 2010, the date that Encana withdrew from the non-binding letter of intent with the Zarembas. *See* Pet. at 5-12; Pet. App. C at 33a-34a; Pet. App. D at 47a. Pointing to a series of communications between Encana and Chesapeake employees during May to July 2010, the Zarembas claimed that the two companies entered into two distinct illegal agreements.

First, the Zarembas claimed that Encana and Chesapeake agreed, on June 29, 2010, that Chesapeake would scuttle its own ongoing contract negotiations with the Zarembas by taking an unreasonable position concerning post-production expenses. *See* Pet. at 7; Pet. App. A at 7a; Pet. App. C at 29a, 35a. The Zarembas claimed that Chesapeake's behavior "forced" them to sign with Encana rather than with Chesapeake, denying the Zarembas the opportunity to benefit from Chesapeake's supposedly more generous offer. *Id.*

Second, the Zarembas claimed that Encana and Chesapeake agreed, on July 15, 2010, that both companies would stop pursuing mineral leases held by the Zarembas and by other private landowners in Michigan. The Zarembas claimed that it was this supposed agreement that caused Encana to tell the Zarembas, on that same day, that it was withdrawing from the non-binding letter of intent that it had signed a few weeks earlier to acquire the Zarembas' mineral interests. Pet. App. N at 141a-142a. The Zarembas claimed that Chesapeake carried out its part of the alleged agreement by not making a further

bid for the Zarembas' leases after the Zarembas told Chesapeake that those interests were back on the market. Pet. at 10-11.

As noted, the Zarembas principally relied on a series emails created in May, June, and July 2010 to support these two theories. And while the Court of Appeals affirmed the district court's conclusion that there was insufficient evidence to create a triable issue concerning a conspiracy in either June or July 2010 based on these communications, and while the Zarembas do *not* challenge that holding, these pre-July emails nonetheless make up the bulk of the evidence cited in the petition.[1] In those emails, Encana and Chesapeake discussed – both with one another and internally – the possibility of the two companies entering into an Area of Mutual Interest agreement, a type of joint venture under which the parties would have engaged in joint leasing and exploration activities. Pet. at 10; Pet. App. A at 6a; Pet. App. C at 28a.

In addition to these May-July communications, the Zarembas also offered evidence of communications between Encana and Chesapeake related to the October 2010 auction that the State of Michigan held to lease its own mineral rights. In these communications, created in September and October 2010, Encana and Chesapeake discussed the possibility of coordinating their bidding activities at the October 2010 auction (a possibility that they did not ultimately pursue). The Zarembas did not offer evidence that these September-October

1. Of the fourteen cited examples of email correspondence between Encana and Chesapeake (Pet. at 8-10), twelve occur prior to October, 2010.

communications (and the effect that they supposedly had on the prices that the State of Michigan received at the October 2010 auction) affected *the Zarembas'* ability to lease their mineral rights following that auction. Indeed, because the only rights being leased at that auction were those held by the State of Michigan, the Zarembas could not claim that they, personally, were the targets of this alleged conspiracy.

Instead, the Zarembas' theory was different: they claimed that the September-October communications were circumstantial evidence supporting their theory that Encana and Chesapeake conspired either in June or July 2010, when they were competing for the Zarembas' rights, the period in which the Zarembas did claim antitrust injury. Pet. App. D at 47a.

C. Summary Judgment

After the close of discovery, the parties filed cross-motions for summary judgment on the antitrust counterclaim. In its briefs on these motions, Encana argued that all of the communications discussed above – both the May-June communications, and the September-October communications – were insufficient to create a triable issue concerning the essential Sherman Act Section 1 element of an agreement. Pet. App. C at 30a-34a.

Encana also argued that, even if the Zarembas had provided sufficient evidence of conspiracy, their Section 1 claim failed because they had failed to provide sufficient evidence of antitrust injury. Opp. App. B at 6a-9a. Specifically, Encana noted that the Zarembas had "failed to point to any evidence demonstrating that their failure

to lease their mineral rights was the result of an overall reduction in leasing activity in the Collingwood play after July 15," or any evidence "that their failure to sell was caused by collusively suppressed Collingwood leasing activity." *Id.* at 6a. Encana also noted that "there is no evidence that the lower prices paid at the October auction were the result of an anti-competitive agreement that also affected the Zarembas," and that the Zarembas' expert economist conceded that he did not "attempt to account for the effect that . . . non-collusive explanations for reduced demand might have had on prices at that auction." *Id.* at 6a-7a, n. 25.[2] Finally, Encana noted that the Zarembas had "failed to show any overall reduction in leasing from private landowners as a result of the alleged collusion," or that other oil and gas companies who the Zarembas conceded were in the relevant market had "ceased or altered their leasing activities in the wake" of the alleged collusion. *Id.* at 7a.

The district court granted Encana's motion for summary judgment on the antitrust counterclaim, and denied the Zarembas' motion. On the conspiracy issue, the district court agreed that the May-July communications failed to support Petitioners' claim that Encana and Chesapeake had conspired on either June 29 or July 15. Pet. App. C at 26a-33a. With respect to the September-October communications, the district court held that "any

2. Encana also argued that the Zarembas lacked antitrust standing to pursue claims based on the alleged conspiracy to manipulate prices at the October 2010 auction, since they were not participants in that auction. *See* Opp. App. C at 11a, n.18. The antitrust injury argument discussed in the text above was incorporated into Encana's summary judgment briefing. *See* Opp. App. A at 2a-4a.

evidence that [Encana] and Chesapeake reached some agreement prior to the October 2010 auction of Michigan public lands does not establish an agreement between the two energy companies that would implicate [the Zarembas'] land." *Id.* at 33a. The district court further emphasized this point when it denied the Zarembas' motion for reconsideration of its earlier summary judgment decisions. In the reconsideration opinion, the district court rejected the Zarembas' argument that the value of their leases had been damaged by the October 2010 auction prices, noting that "[e]ven if the value of the leases fell, the Zarembas have not alleged, nor have they put forth evidence to show, that after mid-July 2010 any company wanted to lease their land for the purpose of exploiting the Collingwood shale formation. Accordingly, the Zarembas cannot establish an antitrust injury arising from an alleged collusion between Encana and Chesapeake concerning the October 2010 auction of leases for public land." Pet. App. D at 47a.

D. Trial, Judgment, and Appeal to the Sixth Circuit

Following the summary judgment decision, the case proceeded to trial on Encana's breach of contract claim, the Zarembas' defense to that claim, and a separate claim by the Zarembas alleging fraud. The jury accepted the Zarembas' defense that Encana had waived its right to recoup the $1.8 million and rejected the Zarembas fraud claim. As noted above, those issues are not before the Court, but we provide them for context.

After trial, the district court entered a final judgment. The Zarembas appealed the previous summary judgment

ruling on the antitrust counterclaim (among other issues).[3] As in the district court, the Zarembas focused on the alleged June 29, 2010 and July 15, 2010 conspiracies, which they claimed were directed at them and injured them at that time. To be sure, the Zarembas discussed the *evidence* related to the alleged September-October conspiracy, but they claimed that this evidence was relevant because it tended to prove the conspiracy affecting them in June and July. Pet. at 11; Pet. App. A at 10a-12a.

Notably, the Zarembas did ***not*** point to evidence creating a triable issue that the alleged October conspiracy caused them to suffer an antitrust injury in the time period following the State of Michigan's October 2010 auction. *Id*. Nor did they claim that the district court erred when it held that "any evidence that [Encana] and Chesapeake reached some agreement prior to the October 2010 auction of Michigan public lands does not establish an agreement between the two energy companies that would implicate [Petitioners'] land." Pet. App. C at 33a; Pet. App. D at 47a-60a.

E. The Decision Affirming

In its decision affirming summary judgment for Encana on the Zarembas' antitrust counterclaim, the Court of Appeals separated the Zarembas' three theories by time period: (1) the alleged June 29, 2010 conspiracy (which the Sixth Circuit referred to as the

3. Encana appealed concerning its right to the $1.8 million. *See* Pet. App. A at 12a-17a (discussing Encana's contract claim; the jury's verdict; the district court's Fed. R. Civ. P. 50 decision; and reversing).

"poison pill" (Pet. App. A at 5a-10a)); (2) the alleged July 15, 2010 conspiracy (which the Sixth Circuit referred to as the "freeze out" (*Id.* at 10a-11a)); and (3) the October 2010 conspiracy (which the Sixth Circuit referred to as "ongoing price depression" (*Id.* at 11a-12a)).

The Court of Appeals concluded that none of the evidence from the May to July 2010 period — alone or collectively — was sufficient to create a triable issue regarding the agreement element of a conspiracy for either of the first two theories. Oddly, the Zarembas repeat this evidence at length in their petition (Pet. at 5-11), even though they have not sought review in this Court of the Sixth Circuit's conclusions on either of their first two theories. Disturbingly, the Zarembas assert that the Sixth Circuit reviewed this evidence and "*agreed* that Petitioners offered sufficient evidence to establish a collusive agreement between Respondent and Chesapeake resulting in a decrease of the going rate for . . . Petitioners' rights." Pet. at 2. That statement is simply inaccurate, as the Court of Appeals' opinion makes clear. If the Zarembas suffered an injury in July 2010 because they were unable to sell their mineral rights, it was decidedly *not* because of collusive activity.

Concerning the Zarembas' third theory, the Sixth Circuit held that the September to October 2010 evidence "tends to exclude the possibility that Encana and Chesapeake acted independently" in connection with the October 2010 State of Michigan Auction and therefore created a fact question on the agreement element of a Section 1 claim.[4] Pet. App. A at 11a-12a.

4. For the reasons stated in its summary judgment papers in the District Court and reiterated in its briefing to the Sixth

Like the district court before it, however, the Sixth Circuit held that evidence of alleged collusion in October 2010 was insufficient to create a triable issue because the Zarembas "failed to connect the companies' alleged collusion to any harm that they suffered." Pet. App. A at 12a. In particular, the Zarembas failed "to point to evidence suggesting that they even considered leasing their rights after their last communication with Chesapeake in July 2010. They claim they did so in their briefing, but appellate briefing is not summary-judgment evidence." *Id.*

In their petition, the Zarembas claim that "[t]his statement by the Court of Appeals *is untrue*," asserting that they identified evidence in a post-argument letter brief. Pet. 13-14 n.1 (emphasis added), citing 84a-85a. Specifically, they contend that "testimony was offered at [] the summary judgment stage . . . detailing Petitioners' unsuccessful attempts to lease their oil and gas interests *after* [Encana] and Chesapeake's collusion" (*id.* (emphasis in original)), but that the "Court of Appeals *ignored* this evidence" (*id.* (emphasis added)).

That is a serious charge, but it is inaccurate. During oral argument on May 3, 2018, the Sixth Circuit panel asked the Zarembas' counsel whether there was evidence in the *summary judgment record* that the Zarembas went out on the open market and sought to sell after the

---

Circuit, Encana respectfully disagrees. Encana respectfully submits that a detailed recitation of that evidence and why it does not meet this Court's standards for a Section 1 agreement will not aid the Court in deciding whether to grant review, given the Sixth Circuit's disposition regarding the October 2010 alleged conspiracy.

October 2010 State of Michigan auction.[5] The Zarembas' counsel was unable to point to any summary judgment evidence during oral argument, but in the letter brief cited in the Zarembas' petition, included in their appendix, and filed with the Court of Appeals on May 4, 2018 (Pet. App. L at 84a-86a), the Zarembas pointed to three supposed pieces of evidence: (1) *trial* testimony (*id.* at 87a-91a); (2) a chart compiling communications between Encana and Chesapeake, which was submitted as an exhibit to the Zarembas' expert's report on summary judgment (*id.* at 94a-95a); and (3) communications between one of the Zarembas' agents and third parties, which was also submitted on summary judgment (*id.* at 95a-108a).

The trial testimony was not in the summary judgment record and therefore was not germane to the Sixth Circuit's consideration whether the district court erred in granting summary judgment.[6] But the cited testimony

---

5. The oral argument has not been transcribed. An audio recording of the oral argument is available online:

http://www.opn.ca6.uscourts.gov/internet/court_audio/aud2.php?link=audio/05-03-2018%20-%20Thursday/16-2065%2017-1429%20Encana%20Oil%20Gas%20USA%20Inc%20v%20Zaremba%20Family%20Farms%20Inc.mp3&name=16-2065%2017-1429%20Encana%20Oil%20Gas%20USA%20Inc%20v%20Zaremba%20Family%20Farms%20Inc

(Last retrieved December 13, 2018). The colloquy between the Zarembas' counsel and the Sixth Circuit concerning summary judgment evidence of market participation during the July to October 2010 time period is at 12:03-14:22.

6. *See Meridian Leasing, Inc. v. Accepted Aviation Underwriters, Inc.*, 409 F.3d 342, 346 (6th Cir. 2005) ("We review the District Court's grant of summary judgment de novo. Our

was also completely unspecific as to time; the Zarembas' agent testified only that he attempted "to find other people who may be interested in purchasing" their interest after Encana withdrew from the non-binding letter of intent. *Id*. at 88a.

The expert's summary chart details communications between May 4, 2010 and June 30, 2010, *before* Encana withdrew from the non-binding letter of intent with the Zarembas on July 15, 2010. *Id*. at 94a-95a.

And the communications between the Zarembas' agent and third parties include three communications on June 9, 2010 (*id.* at 97a-99a; 100a-103a; and 103a-106a) and one on June 10, 2010 (*id*. at 106a-108a).

None of this is evidence that "the Zarembas even considered leasing their rights after their last communication with Chesapeake in July 2010." Pet. App. A at 12a. And none of it was ignored: the Court of Appeals had the submission for several weeks before it issued its decision on May 31, 2018.

The Zarembas' failure to identify evidence of antitrust injury was fatal to their "ongoing price depression" theory because Encana had pointed to the absence of evidence of antitrust injury at the summary judgment stage. Under this Court's precedents, that shifted the burden to the

---

review is limited, however, to the evidence before the lower court at the time of its ruling.") (internal citations omitted); *Landefeld v. Marion General Hosp., Inc.*, 994 F.2d 1178, 1181 (6th Cir. 1993) ("When reviewing a grant of summary judgment, this court must confine its analysis to evidence which was before the district court.").

Zarembas to point to evidence creating a genuine issue of material fact for trial.

The Sixth Circuit concluded:

> As the Supreme Court has held, antitrust plaintiffs are required to show "that the conspiracy caused *them* an injury for which the antitrust laws provide relief," not just that the defendant was up to no good. *Atl. Richfield* [*Co. v. USA Petroleum Co.*], 495 U.S. [328,] 344 (*quoting Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*], 475 U.S. [574,] 584 n.7 (1986)). So, since the Zarembas have not pointed to any competent summary judgment evidence from which a reasonable juror could infer that they suffered an injury in the months after the companies walked away from their deal, their price-depression theory fails. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986) (holding that moving party may discharge its burden on summary judgment by pointing out the absence of evidence to support the non-moving party's case).

Id. (emphasis in original).

REASONS FOR DENYING THE PETITION

More than 30 years ago, in *Matsushita* and *Celotex*, this Court provided the straightforward guidance that animated the Sixth Circuit's holding concerning the October 2010 alleged conspiracy. Its decision was nothing more than a routine application of those long-settled

standards. There is no conflict between the Sixth Circuit's decision and any other decision of the Court of Appeals. The Court should deny review.

Encana moved for summary judgment on the Zarembas' antitrust claim — and on every theory the Zarembas' advanced to support that claim. The June 29, 2010 theory. The July 15, 2010 theory. And the October 2010 theory. Encana relied on *Celotex* and *Matsushita,* pointing to the absence of evidence of any agreement concerning any of the three theories and to the absence of any antitrust injury. As this Court made clear in *Matsushita*, surviving summary judgment requires more than claimants simply showing "a conspiracy in violation of the antitrust laws;" it also requires showing of "an injury to them resulting from the illegal conduct." *Matsushita*, 475 U.S. at 586.

In their petition, the Zarembas have dropped any contention that the Court of Appeals erred in its conclusion that there was *no evidence* creating a triable issue concerning their June 29, 2010 or July 15, 2010 theories. This matters to the Court's consideration of the petition because the *injury* that the Zarembas contended that they suffered was the loss of a sale of their mineral rights either to Chesapeake or to Encana, a loss that occurred no later than July 15, 2010. The *theory* of antitrust injury in June and July 2015 may have had some resonance viewed through the lens of traditional antitrust law — if the Zarembas could have mustered evidence to create a triable issue that Chesapeake and Encana agreed to divide the market and either buy the Zarembas' interests on unfavorable terms, to have depressed the value of their rights, or to have frozen them out of the market

altogether, then they might have been able to show an injury that flowed from the alleged illegal conduct. But again, there was no evidence of any illegal conduct. And while the Zarembas continue to put their aspirational, closing-argument spin on the May to July 2010 evidence in their petition, they acknowledge now that they were not entitled to have a jury hear it.

That leaves October 2010. The Zarembas' key turn of phrase in their petition is that the Sixth Circuit created a new rule of law by forcing them to sell their interests "into an artificially rigged market" in order to show that they suffered an antitrust injury. Pet. at 22. The Sixth Circuit's opinion, however, confirms that it articulated no such rule. Nor did it conclude that the Zarembas had demonstrated that the alleged October 2010 conspiracy affected prices offered to *them*. Instead, the court merely required the Zarembas, at the summary judgment stage, to come forward with admissible evidence that they were market participants after July 2010, and that they suffered an antitrust injury as a result of the alleged October 2010 collusion.

The Zarembas never attempted to do so. They presented no evidence that they even attempted to make a sale after the October 2010 auction, let alone that they suffered damages that flowed from any alleged post-October auction injury to competition.

They did not attempt to do so in the district court. They did not attempt to do so in the Court of Appeals. Even their post-argument letter brief (which they brazenly say the Court of Appeals "ignored") did not attempt to do so — the summary judgment evidence to

which they pointed cut off in June 2010, months before the October 2010 Michigan auction. And the trial evidence to which they pointed was utterly vague as to time, but *had* to have also dealt with the May to July time period for the simple reason that the trial was not about the antitrust claims and was not about October. The trial instead was principally about whether the Zarembas were required to return $1.8 million to Encana after Encana withdrew from the non-binding letter of intent in July 2010.

The Zarembas also assert that the Sixth Circuit's decision "is contrary to the *decisions* of other Circuit Courts of Appeal." Pet. at 4 (emphasis added). But none of three cases that they cite supports this assertion. To be sure, the Zarembas accurately quote from *In re Beef Indus. Antitrust Litig.*, 660 F.2d 1148, 1158 (5th Cir. 1979). But far from representing a "decision of" the Fifth Circuit about the "Hobson's choice" of selling into a "rigged market," the quoted language merely reflected the court's characterization of the *plaintiffs'* assertion of the harm that supposedly flows from monopsony price fixing. The *decision* was to reject the plaintiffs' contention that the court should carve out a monopsony price fixing exception to the *Illinois Brick* rule. *Id.* at 1158-59. *Chipanno v. Champion Int'l Corp.*, 702 F.2d 827, 831 (9th Cir. 1983) and *Toll Bros., Inc. v. Township of Readington*, 555 F.3d 131, 142 (3d Cir. 2009) both arose on the pleadings, not on summary judgment, and both involved options that were allegedly affected by anticompetitive conduct. In *Chipanno*, the court noted that the plaintiffs were "potential seller[s] of timber in the market affected by the alleged conspiracy." 702 F.2d at 831. And in *Toll Bros.*, the court noted that the alleged anticompetitive conduct drove down the value of the "option." 555 F.3d at 142. In

contrast, the Zarembas came forward with no evidence on summary judgment that they were market participants at all following the October 2010 auction. The Zarembas would have lost in the Third, Fifth, and Ninth Circuits on the evidentiary record that they presented here.

The Zarembas are simply no different than anyone else who owned mineral interests in Michigan in October 2010, but decided to hold onto them rather than attempt to sell or lease them, learning months or years later of evidence that something was allegedly afoul in October 2010. The bar that the Sixth Circuit set was the bar that this Court set 32 years ago — those outside the market cannot prove antitrust injury. The Zarembas were well aware of the bar and well aware of *Celotex*. They had no evidence of injury.

PRAYER FOR RELIEF

For the foregoing reasons, Encana respectfully requests that the Court deny review.

Dated: December 14, 2018

Respectfully submitted,

Robert Wierenga
Jessica Sprovtsoff
Schiff Hardin LLP
350 S. Main St., Suite 210
Ann Arbor, MI 48104
(734) 222-1500

Neil Lloyd
Counsel of Record
Schiff Hardin LLP
233 S. Wacker Dr., Suite 7100
Chicago, IL 60606
(312) 258-5500
nlloyd@schiffhardin.com

Counsel for Respondent

APPENDIX

APPENDIX A — EXCERPTS FROM ENCANA'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT IN THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, FILED ON SEPTEMBER 15, 2014

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:12-cv-00369-PLM

ENCANA OIL & GAS (USA) INC.,
A DELAWARE CORPORATION,

Plaintiff/Counter-Defendant,

v.

ZAREMBA FAMILY FARMS, INC., A MICHIGAN CORPORATION, ZAREMBA GROUP, L.L.C., A MICHIGAN LIMITED LIABILITY COMPANY, AND WALTER ZAREMBA, AN INDIVIDUAL,

Defendants/Counter-Plaintiffs.

Chief Judge Paul L. Maloney

Magistrate Judge Phillip J. Green

Appendix A

ENCANA'S REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT ON THE ZAREMBAS' SECOND AMENDED COUNTERCLAIMS

***

C. The Zarembas' October allegations are irrelevant

The Zarembas next point to discussions between Encana and Chesapeake in ***October*** of 2010 and claim that this, somehow, shows that Encana and Chesapeake had reached agreement in July. Dkt. 378, 11-13, 18-20. But the documents they cite simply do not support that inference. Those documents make no reference to a pre-existing agreement between Encana and Chesapeake, reached on July 15 or any other date.[3] W.D. Ex. 2, 5, 6,

3. The Zarembas attempt to use an email authored on October 8, 2010 by Erika Enger, an Encana attorney, as generic proof that Encana and Chesapeake had a practice of reaching illegal agreements that were not reduced to writing. Dkt. 358-32, Ex. FF. Even if that email is read in the incorrect manner urged by the Zarembas, it gets them nowhere, for several reasons. First, as noted above, the ***actions*** taken by Chesapeake and Encana on June 29 and July 15 were ***not*** consistent with conspiracy, putting the lie to any argument that there was a secret, undocumented agreement between the companies. Second, this record simply does not support the argument that Encana and Chesapeake were careful not to discuss their supposedly illegal arrangements in writing, since the Zarembas have cited several emails in which, they claim (incorrectly), Encana and Chesapeake did just that in May, June, September and October. Finally, the Zarembas have cited no case – and Encana is aware of none – in which an antitrust plaintiff

10. To the contrary: those documents make it clear that Encana and Chesapeake had not yet reached an agreement as of October, and were exploring the possibility of doing so on a going-forward basis. *Id.*[4] If an agreement had been reached in July there would have been no need to start anew – as Encana and Chesapeake undisputedly did – with new draft agreements. *Id.* Finally, the evidence demonstrates these October discussions ended just as the June discussions ended, with a clear rejection of any cooperation or coordination at the auction. Dkt. 360-1, Ex. 46; W.D. Ex. 5.

Finally, the Zarembas argue that the October auction results somehow show that Encana and Chesapeake were conspiring in June and July. Dkt. 378, 11-12, 20. Again, this is simply a *non sequitur*; even if there were evidence of price collusion in October, it would not prove conspiracy in July. Moreover, the cited evidence is not even sufficient to establish price collusion in October. As Encana has explained previously, the October auction results are fully consistent with each company's independent decision to

---

was excused from submitting evidence of conspiracy with the argument that the conspirators had deliberately failed to create such evidence. Sixth Circuit law prohibits the use to which the Zarembas are attempting to put the Enger email. *See Little Caesar Enterprises, Inc. v. Smith*, 895 F. Supp. 884, 890 (E.D. Mich. 1995) ("a nonmovant must do more than raise some doubt as to the existence of a fact; [it] must produce evidence … sufficient to require submission to the jury of the dispute over the fact.")

4. Moreover, any agreement reached ***after*** July 15 could not have caused the Zarembas antitrust injury – because the only injury that they have alleged occurred no later than July 15.

scale back leasing in light of poor well results. Dkt. 381 at 5-6, 12-15; Dkt. 360 Ex. C (Wojahn Decl.) ¶¶12-15, 19; Dkt 360-1, Ex. 96.[5]

***

V. THE ZAREMBAS CANNOT PROVE ANTITRUST INJURY

Nor have the Zarembas pointed to evidence that would permit them to prove antitrust injury. Their failure to prove market-wide harm to competition means that they have alleged only an injury to themselves. Injury to an individual competitor is not antitrust injury. *Indeck Energy Servs., Inc. v. Consumers Energy Co.*, 250 F.3d 972, 977 (6th Cir. 2000); *see also* Dkt. 381, 21-25. Similarly, their failure to prove that Chesapeake had anything to do with Encana's decision not to close on a final purchase of their leases means they have failed to satisfy the Sixth Circuit's "necessary predicate" test for antitrust injury. Dkt. 360. 17-18. For this reason as well, Encana is entitled to summary judgment.

****

5. There is also evidence of independent motivations that explain why Encana and Chesapeake bid in different counties, including Mr. Wojahn's testimony that prior to the auction, "Encana believed that Chesapeake had already leased a large amount of land in the N1 area and…decided that it was not worth Encana's time or money to bid in an area where Encana would not be able to secure a large enough position to drill and test that portion of the play." Dkt. 360 Ex. C ¶19.

APPENDIX B — EXCERPTS FROM ENCANA'S OPPOSITION TO THE ZAREMBAS' MOTION FOR SUMMARY JUDGMENT IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, FILED SEPTEMBER 8, 2014

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:12-cv-00369-PLM

ENCANA OIL & GAS (USA) INC.,
A DELAWARE CORPORATION,

Plaintiff/Counter-Defendant,

v.

ZAREMBA FAMILY FARMS, INC., A MICHIGAN CORPORATION, ZAREMBA GROUP, L.L.C., A MICHIGAN LIMITED LIABILITY COMPANY, AND WALTER ZAREMBA, AN INDIVIDUAL,

Defendants/Counter-Plaintiffs.

Chief Judge Paul L. Maloney
Magistrate Judge Phillip J. Green

ENCANA'S OPPOSITION TO THE ZAREMBAS' MOTION FOR SUMMARY JUDGMENT ON ANTITRUST COUNTERCLAIMS

Further, the Zarembas have failed to point to any evidence demonstrating that their failure to lease their mineral rights was the result of an overall reduction in leasing activity in the Collingwood play after July 15.[24] Nor is there any evidence in the record that would permit the Zarembas to make the required showing that their failure to sell was caused by collusively suppressed Collingwood leasing activity. It is undisputed that the State of Michigan succeeded in leasing several thousand acres of Collingwood land during its October auction, to Encana, Chesapeake and several other oil and gas companies. S.D. Ex. 18. Some of this land was rated by Encana to be very similar to the Zarembas' land, but was put on the market by the State at per acre prices far below those being demanded by the Zarembas. S.D. Ex. 97; D.D. Ex. 16; D.D. Ex. 17 at ECA-ZAREMBA00042966. The fact that Encana, and other oil and gas companies, chose to obtain low-cost leases from the State of Michigan,[25] rather than expensive leases from

---

24. *Care Heating & Cooling, Inc.*, 427 F.3d at 1014 ("Individual injury, without accompanying market-wide injury, does not fall within the protections of the Sherman Act."); *Indeck Energy Servs., Inc. v. Consumers Energy Co.*, 250 F.3d 972, 977 (6th Cir. 2000) (dismissing antitrust claims where "no indication that *competition* itself was harmed by any act of the defendants").

25. The Zarembas' speculation that lower prices at the October auction were the result of an anticompetitive agreement does nothing to help the Zarembas prove antitrust injury (or conspiracy for that matter). Not only are there many independent business reasons why the companies bid less aggressively at the October auction, *see e.g.* S.D. Ex. 49, 77, 95, 96; Ex. E to Dkt. 360 Ex. C; D.D. Ex. 7, 8, 20,

the Zarembas, demonstrates the existence of competition, not its absence. *Care Heating & Cooling, Inc.*, 427 F.3d at 1014-1015 (holding that because "competition is the *sine qua non* of the antitrust laws, a complaint alleging only adverse effects suffered by an individual competitor cannot establish an antitrust injury.")

Similarly, the Zarembas have failed to show any overall reduction in leasing from private landowners as a result of the alleged collusion.

***

And the Zarembas have not even attempted to provide evidence demonstrating that other oil and gas companies they now concede were competitors in the relevant market – companies like Atlas, Devon, and others – ceased or altered their leasing activities in the wake of Encana's July 15 decision. D.D. Ex. 18 at 36:5-20, 37:5-7; D.D. Ex. 19 at 246:13-18. Without making such a demonstration, all the Zarembas have shown is that after July 15 they lost sales to their competitors, both private and public (e.g., the State of Michigan). The Zarembas cannot base

---

24-26, there is no evidence that the lower prices paid at the October auction were the result of an anti-competitive agreement that also affected the Zarembas. Moreover, the Zarembas' expert concedes that when he conducted his analysis of the October auction, he did not even attempt to account for the effect that these (or other) non-collusive explanations for reduced demand might have had on prices at that auction. D.D. Ex. 18 at 205:13-207:9. His proposed testimony regarding the cause of these allegedly "suppressed prices" cannot help the Zarembas in light of this failure.

an antitrust claim on sales lost to competition. *See, e.g., Partner & Partner, Inc. v. ExxonMobil Oil Corp.*, 326 Fed. Appx. 892, 897-898 (2009); *see also Gentile v. Fifth Ave. Otolaryngology, Inc.*, 4:05 CV 2936, 2006 WL 2505915, *6 (N.D. Ohio Aug. 28, 2006) ("In absence of a showing that the market as a whole has been affected, the mere fact that one disappointed competitor must practice elsewhere does not constitute an antitrust injury. Antitrust plaintiffs do not suffer antitrust injury merely because they are in a worse position than they would have been had the challenged conduct not occurred.") (citations and quotations omitted).

B. The Zarembas have failed to show that the alleged conspiracy was a necessary predicate to their alleged injury

The record also provides no support for the idea that the alleged collusion had anything to do with Encana's decision not to close on the purchase of the Zarembas' leases. This Court has already ruled that Encana's "withdrawal" from its agreement with the Zarembas was in accordance with and permitted by the terms of the LOI, and it is undisputed that the LOI terms were the result of competition. Dkt. 181, 19-20. D.D. Ex. 18 at 114:22-115:20; 178:15-181:4; *see also*, *In re Cardizem*, 332 F.3d at 913 (If a defendant has "taken an action that it was lawfully entitled to take, independent of the alleged antitrust violation, which was the actual, indisputable, and sole cause of the plaintiff's injury," there can be no antitrust injury). Additionally, there is no record evidence that Chesapeake played any role in Encana's decision to

forego leasing the Zarembas' land. Dkt. 360 Ex. D at ¶15; Dkt 360 Ex. C at ¶13; Dkt. 360 Ex. B at ¶27; S.D. Exs. 14-16.[26] The Zarembas' economic expert, again, concedes that this is the case. D.D. Ex. 18 at 215:21-224:7. These facts make it impossible for the Zarembas to show that the alleged conspiracy between Encana and Chesapeake was a "necessary predicate" for Encana's exercise of its contractual right not to finalize the purchase. Because the Zarembas have not demonstrated "antitrust injury," they cannot even survive Encana's motion for summary judgment on the "evidence" they have proffered, much less prevail on the instant motion. *Valley Products v. Landmark*, 128 F.3d 398, 403-404 (6th Cir. 1997).

****

26. Similarly, there is no record support for the notion that Chesapeake's decision not to renew its offer to the Zarembas was the result of an agreement with Encana. S.D. 42, 54.

APPENDIX C — EXCERPT OF ENCANA'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, FILED AUGUST 18, 2014

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 1:12-cv-00369-PLM

ENCANA OIL & GAS (USA) INC.,
A DELAWARE CORPORATION,

Plaintiff/Counter-Defendant,

v.

ZAREMBA FAMILY FARMS, INC., A MICHIGAN CORPORATION, ZAREMBA GROUP, L.L.C., A MICHIGAN LIMITED LIABILITY COMPANY, AND WALTER ZAREMBA, AN INDIVIDUAL,

Defendants/Counter-Plaintiffs.

Chief Judge Paul L. Maloney
Mag. Judge Joseph G. Scoville

ENCANA'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON THE ZAREMBAS' SECOND AMENDED COUNTERCLAIMS

Appendix C

ORAL ARGUMENT REQUESTED

***

3. The Zarembas' conspiracy theory has already been rejected

The Zarembas' theory has already been rejected by one court in this State. The State of Michigan's attempt to prosecute Chesapeake for violating the Michigan Antitrust Reform Act, on the same theory advanced by the Zarembas here, was recently rebuffed by Judge Barton of the Cheboygan County District Court due to the State's failure to introduce evidence of conspiracy sufficient to warrant a trial. Just like the Zarembas, the State accused Chesapeake of conspiring with Encana through July 2010 to restrain trade with respect to the purchase of private landowners' gas rights. S.D. Ex. 55 at 2. The State's theory explicitly included the idea that the Zarembas were victimized by the alleged conspiracy, and Mr. Zaremba himself testified in support of the State's case during the week-long evidentiary hearing. S.D Exs. 55, 88.[18]

---

18. The State also pursued charges against Chesapeake relating to the October 2010 State auction, and Judge Barton permitted those charges to go to trial. This does not help to the Zarembas, since they were not competitors in the market to sell leases held by the State of Michigan, and therefore have no antitrust standing to pursue claims related to any State auction. *See, e.g., Indeck Energy Serv. v. Consumers Energy Co.*, 250 F.3d 972, 976 (6th Cir. 2000).

Yet after considering the evidence, Judge Barton held that the State had failed to demonstrate probable cause that Encana and Chesapeake conspired with respect to the Zarembas' or other private landowners' oil and gas rights, noting that "the evidence is lacking as to an actual conspiracy." S.D. Ex 55 at 2, 4. She did so even though the State faced a very low burden of proof – it needed to show only that "a person of ordinary prudence and caution [could] conscientiously entertain a reasonable belief" that Encana and Chesapeake had engaged in such a conspiracy. *See, e.g., People v. Perkins*, 468 Mich. 448, 452, 662 N.W.2d 727, 730 (2003).

****