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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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December 27, 2018

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

This petition presents an important question concerning a private antitrust plaintiff's right to bring an action in federal court: whether a significant drop in the value of land interests due to an anticompetitive agreement is sufficient to give rise to a private cause of action under 15 U.S.C. § 15(a), without first requiring the plaintiff to attempt to sell its land interests in the artificially rigged market. The Court of Appeals found that Petitioners adduced sufficient evidence to establish Respondent's anticompetitive agreement substantially reducing prices for oil and gas interests across northern Michigan, including Petitioners' interests. But the Court of Appeals held that Petitioners were required to attempt to sell their oil and gas interests in the artificially rigged market[1] as a prerequisite to bringing an antitrust action. This requirement is contrary to Supreme Court precedent, see Pet., pp. 15–21, and the policy objectives underlying the antitrust laws, see Pet., pp. 21–23. It is also contrary to other Courts of Appeal precedent. *See* Pet., pp. 23–25 (citing *Chipanno v. Champion Int'l Corp.*, 702 F.2d 827, 829 (9th Cir. 1983); *Toll Bros., Inc. v. Twp. of Readington*, 555 F.3d 131, 142 (3d Cir. 2009); *Andrx Pharmaceuticals, Inc. v. Biovail Corp. Int'l*, 256 F.3d 799, 806 (9th Cir. 2001); *Ross v. Bank of Am., N.A. (USA)*, 524 F.3d 217, 223 (2d Cir. 2008); *Hayes v. Solomon*, 597 F.2d 958, 973 (5th Cir. 1979); *O'Bannon v. NCAA*, 802 F.3d 1049, 1069 (9th Cir. 2015)).

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[1] As explained in the petition, Petitioners *did* actually try to sell their oil and gas interests in the artificially rigged market. *See* Pet., pp. 25–26.

Where an antitrust plaintiff adduces evidence showing a substantial devaluation of its property rights as a direct result of anticompetitive conduct, this is a stereotypical "injury-in-fact" under § 15(a). To require an antitrust plaintiff to sustain *additional* injury by attempting to sell its land interests in the artificially rigged market, as the Court of Appeals held here, antitrust plaintiffs would be required to prove *two* injuries to proceed with an antitrust claim—first, a devaluation of land interests; and, second, an unsuccessful attempt to sell or successful sale of the land interests in the artificially rigged market. Evidence of such additional injury is contrary to this Court's precedent, Courts of Appeal precedent, and the underlying policy objectives favoring broad enforcement of the antitrust laws.

Respondent attempts to change the facts in an effort to convince the Court to deny the petition. But it is undeniable that the Court of Appeals created a new hurdle for antitrust plaintiffs—a requirement that bars a plaintiff from entering the courthouse doors without attempting to sell land interests in an artificially rigged market. In this case, that would have required Petitioners to sell their land interests at pennies on the dollar. Such a deliberate, known loss cannot be required of a plaintiff as a prerequisite to bringing an antitrust claim. The petition for a writ of certiorari should be granted.

ARGUMENT

I. *MATSUSHITA* AND *CELOTEX* DO NOT REQUIRE PETITIONERS TO HAVE ATTEMPTED TO SELL THEIR OIL AND GAS RIGHTS IN AN ARTIFICIALLY RIGGED MARKET IN ORDER TO ESTABLISH AN ANTITRUST INJURY-IN-FACT, WHERE THE COURT OF APPEALS ALREADY FOUND THAT PETITIONERS' OIL AND GAS INTERESTS DRASTICALLY DROPPED IN VALUE AS A RESULT OF RESPONDENT'S ANTICOMPETITIVE ACTS

Respondent's sole argument asking the Court to deny the petition is that *Matsushita* and *Celotex* purportedly stand for the proposition that Petitioners were required to attempt to sell their oil and gas rights in an artificially rigged market as a prerequisite to establishing an antitrust injury-in-fact. *See* Respondent's Br., pp. 16–17. This is simply not true.

In *Matsushita*, the Court explained that an antitrust plaintiff is required to show "more than a conspiracy in violation of the antitrust laws; they must show an injury to them resulting from the illegal conduct." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (citation omitted). The Court found that no injury existed in *Matsushita* because the alleged anticompetitive agreement actually *benefitted* competition "by making supracompetitive pricing more attractive." *Id.* at 583. Unlike *Matsushita*, where the the anticompetitive conduct drives down the price of a plaintiff's oil and gas rights—which the Court of Appeals found sufficient evidence of in this case—that is exactly the type of injury directly harmful to competition and to the

individual antitrust plaintiff. The Court of Appeals' requirement that Petitioners take the additional step of attempting to sell into the artificially rigged market is not supported by *Matsushita*.

Nor is the Court of Appeals' erroneous decision supported by *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), which is not an antitrust case. In *Celotex*, the Court discussed the now-settled principle that, in order to survive summary judgment, a plaintiff needs to make a sufficient showing of the existence of elements essential to the party's case on which the party bears the burden of proof at trial. *See id.* at 323–24. Nothing in *Celotex* supports Respondent's position or the Court of Appeals' decision. Here, Petitioners offered sufficient proof of an injury-in-fact, an essential element of their antitrust claims: a substantial decrease in the value of their oil and gas rights resulting from Respondent's anticompetitive conduct. The Court of Appeals agreed that Petitioners offered such evidence, including evidence that excluded the possibility that Respondent and Chesapeake acted independently in rigging the market. *See* Pet. App. at 11a-12a [2018 WL 2446698, at *5]. This was sufficient under *Celotex* to establish a genuine issue of material fact as to whether Petitioners suffered an antitrust injury-in-fact.

II. RESPONDENT'S EFFORTS TO DISTINGUISH THE DECISIONS OF OTHER COURTS OF APPEAL THAT CONFLICT WITH THE SIXTH CIRCUIT'S DECISION LACK MERIT

Respondent attempts to distinguish the decisions of other Courts of Appeal, arguing that the cases do not

conflict with the Sixth Circuit's decision. Respondent's Br., pp. 19–20.[2] Respondent is wrong.

Respondent dedicates a single paragraph to argue that *Chippano*[3] and *Toll Bros., Inc.*,[4] do not conflict with the Sixth Circuit's decision. Its attempt to distinguish these cases lacks merit.

In *Chippano*, the Ninth Circuit explained that plaintiffs—individuals who acquired an option to purchase timber—could bring an antitrust action where they had alleged they were "prevented from selling the logs to be cut from timber standing on the property at competitive prices[.]" 702 F.2d at 830. In other words, the inability to sell its timber in a *fair* market was, as the Ninth Circuit found, a sufficient antitrust injury-in-fact. That is exactly the evidence Petitioners established here: they were prevented from selling their land interests at competitive prices because Respondent and Chesapeake colluded to rig the market and bring down prices across northern Michigan. Like *Chippano*, there is no additional hurdle that Petitioners were required to meet as a prerequisite to bringing an antitrust claim.

Similarly, in *Toll Bros., Inc.*, the Third Circuit held that the devaluation of an option to purchase land is a "classic form of economic injury[.]" 555 F.3d at 142. An option, by its very definition, is a right that never

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[2] Respondent chose to discuss only three cases cited in the petition. Presumably, Respondent does not dispute that the other decisions cited by Petitioners, which are not discussed in Respondent's brief, conflict with the Sixth Circuit's decision.

[3] *Chipanno v. Champion Int'l Corp.*, 702 F.2d 827 (9th Cir. 1983).

[4] *Toll Bros., Inc. v. Twp. of Readington*, 555 F.3d 131 (3d Cir. 2009).

has to be exercised. Yet, the Third Circuit explained that, in driving down the value of property that included the option, the defendant also drove down the value of the plaintiff's option, a stereotypical "injury-in-fact." *Id.* This case is no different. Respondent and Chesapeake colluded to drive down prices of oil and gas leases in northern Michigan. This reduced the value of Petitioners' land interests. If this had not occurred, Petitioners would have had the option to sell their land interests in fair market circumstances. But requiring Petitioners to have attempted to sell into a knowingly rigged market—despite already showing the devaluation of their land interests and the collusion driving down prices—is illogical. Petitioners should have been permitted to present their antitrust case to the jury.

Simply put, there is a conflict between the Sixth Circuit's decision and other Courts of Appeal that this Court should resolve.[5]

[5] Respondent also attempts to distinguish the Fifth Circuit's decision in *In re Beef Indus. Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979). But Petitioners did not cite the Fifth Circuit's decision for the proposition that it conflicts with the Sixth Circuit's decision. Rather, Petitioners cited this case in support of their argument that, where a seller faces the choice of (a) selling into a rigged market or (b) refusing to sell at all, it runs counter to the broad policy objectives underlying the antitrust laws to *mandate* the seller to choose option (a) as a prerequisite for bringing an antitrust action. *See* Pet., p. 22.

III. THE COURT OF APPEALS' HEIGHTENED REQUIREMENT FOR ESTABLISHING AN ANTITRUST INJURY-IN-FACT CLOSES THE COURTHOUSE DOOR TO ANTITRUST PLAINTIFFS WHO SUSTAIN A SUBSTANTIAL DEVALUATION OF THEIR PROPERTY INTERESTS AS A DIRECT RESULT OF A DEFENDANT'S ANTICOMPETITIVE ACTS

Respondent acknowledges the Court of Appeals' identification of evidence establishing Respondent's anticompetitive conduct that devalued oil and gas mineral rights in northern Michigan, including Petitioners' mineral rights. *See* Respondent's Br., p, 2. But Respondent argues that, without a showing that Petitioners attempted to sell their mineral rights *after* they were devalued, such "anticompetitive conduct [is] untethered to antitrust injury," and, therefore, "insufficient to give a private antitrust plaintiff standing." *Id.* Respondent is wrong. This type of heightened requirement closes the courthouse doors to an antitrust plaintiff who shows a substantial devaluation of its mineral rights as a result of a defendant's anticompetitive conduct—as Petitioners did here—but refuses to suffer *additional* injury by selling in the rigged market at the artificially reduced prices. In other words, it is enough of an injury-in-fact that a plaintiff's mineral rights were devalued. Such harm is not "untethered to an antitrust injury" because it is the anticompetitive conduct that proximately caused the devaluation of Petitioners' mineral interests.

The Court of Appeals' decision is contrary to this Court's precedent, in conflict with established Courts of Appeal precedent, and contravenes the policy objectives underlying the broad private enforcement of

the antitrust laws. The result is that, in the Sixth Circuit, the courthouse doors are now closed to antitrust plaintiffs who can establish a devaluation of their property rights as a result of anticompetitive conduct (no question harmful to competition), but who refuse to sustain additional injury by being forced to sell their property rights in an artificially rigged market. The Court should grant this petition and correct the Court of Appeals' grave error of law before other antitrust plaintiffs suffer the same fate.

IV. RESPONDENT'S RED HERRINGS DO NOT SUPPORT ITS ARGUMENT

Unable to explain the reality of the Court of Appeals' creation of a new hurdle for antitrust plaintiffs, contrary to established antitrust law, Respondent attempts to detract from the sole legal issue the Court is being asked to review.

For example, Respondent argues that evidence of Respondent's collusive agreement with Chesapeake between May and June of 2010 is irrelevant to whether Respondent and Chesapeake colluded to bring down prices across northern Michigan in October 2010. Respondent's Br., p. 15. But this evidence shows Respondent's and Chesapeake's preliminary collusion, which the Court of Appeals found sufficient evidence of by at least October 2010. Pet. App. 12a [2018 WL 2446698, at *5]. Indeed, all of this collusion, detailed on pages 7–12 of the Petition, show just how Respondent and Chesapeake colluded, over the course of months, to bring down prices across northern Michigan by October 2010.

The Court should reject Respondent's efforts to confuse the legal issue presented with red herrings.

Simply put, the Court of Appeals *agreed* with Petitioners that (a) they offered evidence of collusion between Respondent and Chesapeake to suppress lease prices in northern Michigan, bringing down the price of Petitioners' land interests; and (b) the evidence tended to exclude the possibility that Respondent and Chesapeake acted independently. Pet. App. 12a [2018 WL 2446698, at *5]. This should have been enough for Petitioners' antitrust claims to proceed to trial before the jury. Instead, the Court of Appeals erred as a matter of law by creating a new element to antitrust claims: proof that, in addition to the diminution of the value of land as a result of collusive activity, the antitrust plaintiff must also attempt to sell its land interests in the artificially rigged market to have standing to sue. The Court of Appeals created an illogical hurdle blocking access to the courthouse to antitrust plaintiffs.

CONCLUSION

For these reasons, as well as those contained in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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