No. A-

IN THE

Supreme Court of the United States

SWISHER INTERNATIONAL, INC.,

Applicant / Petitioner,

v.

TRENDSETTAH USA, INC. AND TRENDSETTAH, INC.,

Respondents.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

Pursuant to 28 U.S.C. § 2101(c) and this Court's Rule 13.5, Swisher International, Inc. respectfully requests a 60-day extension of time, to and including September 16, 2019, within which to file a petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

The court of appeals entered its judgment on February 8, 2019. *Trendsettah USA, Inc. v. Swisher Int'l, Inc.*, 761 F. App'x 714 (9th Cir. 2019) (Ex. A). The Ninth Circuit denied Swisher's timely petition for rehearing on April 18, 2019 (Ex. B). Copies of the opinion and the order denying rehearing are attached hereto. Unless extended, the time in which to file a petition for a writ of certiorari will expire on July 17, 2019. This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1).

1. Swisher is one of four established manufacturers of untipped cigarillos in the United States. In January 2011, Swisher entered into a contract with a new entrant into the untipped cigarillo market, Trendsettah USA, Inc. and Trendsettah Inc. (together, "TSI"), under which it agreed to manufacture cigarillos for sale under TSI's "Splitarillo" label. *Trendsettah USA, Inc. v. Swisher Int'l, Inc.*, No. 8:14-cv-01664 (C.D. Cal.), Dkt. 262 at 1 (Ex. C). This was a time of tremendous growth in the untipped cigarillo market, with total output jumping by more than 71% between 2011 and 2015. Although Swisher produced hundreds of millions of cigarillos under the agreement, TSI struggled to forecast its anticipated demand, and its actual orders exceeded projections by up to 900%. When the parties' dealing ended in February 2014, the relationship was

not renewed. *Id.* at 1–2.

TSI thereafter filed a complaint alleging that Swisher breached its contractual duties with TSI by failing to deliver all of the untipped cigarillos it had ordered. It also alleged that this breach of contract violated Section 2 of the Sherman Act, invoking a "refusal to deal" theory. Swisher's proposed jury instruction noted, among other things, that "[o]rdinarily, a company may deal or refuse to deal with whomever it pleases, as long as it acts independently," and therefore "Swisher's alleged refusal to deal with TSI only constitutes anticompetitive conduct if (i) it was contrary to Swisher's short-run best interests, and (ii) only made sense for Swisher because it harmed TSI and helped Swisher maintain monopoly power in the long run." The instructions given to the jury, however, omitted these essential elements. Instead, they merely charged the jury to inquire into Swisher's subjective motive for allegedly failing to fulfill TSI's orders: "You must determine whether Swisher had a legitimate business purpose for undertaking alleged anticompetitive conduct."

The jury returned a verdict for TSI on the antitrust claims, awarding $14,815,494, which was trebled to $44,446,482. But the district court ordered a new trial because "[t]he Court[] fail[ed] to instruct the jury regarding Swisher's duty to deal," explaining that "without th[is] instruction, the jury had no basis to determine whether Swisher's ordinary contract breach also constituted anticompetitive conduct . . . and indeed the Court is skeptical that it would have done so." Ex. C at 14. The district court, however, rejected Swisher's argument that it was entitled to judgment as a matter of law because TSI had failed to prove injury to competition. *Id.* at 9–10.

The Ninth Circuit reversed the new-trial ruling and affirmed the district court's antitrust injury ruling. The court held that the jury instructions "adequately and accurately reflected" refusal-to-deal law because "the principle in the instruction that was given" informed the jury that "in order for Swisher to have violated the antitrust laws, its *only* purpose must have been to harm TSI." Ex. A at 4. The court further held that "'Swisher's failure to timely deliver'" the full quantity of cigarillos demanded by TSI was sufficient to establish injury to competition because "'Swisher failed to rebut'" this alleged evidence of "'restricted market output.'" *Id.* at 6.

2. Swisher intends to seek this Court's review of the Ninth Circuit's decision, which, in addition to departing from this Court's precedent, conflicts with decisions of other courts of appeals and raises questions of recurring national importance.

First, the Ninth Circuit's holding that it is unnecessary in a refusal-to-deal case to inform a jury that there is no general duty to deal, or that the plaintiff must prove that the refusal to deal was contrary to the defendant's short-run interests, is inconsistent with binding Supreme Court authority and creates a split with the Tenth Circuit. It is the "long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to the parties with whom he will deal." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004). And although this Court acknowledged a limited exception to this rule in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), it emphasized in that case that "the evidence support[ed] an inference that [the defendant] . . . was *willing to sacrifice short-run benefits and consumer goodwill* in

exchange for a perceived long-run impact on its smaller rival." *Id.* at 610–11 (emphasis added). The Court also noted that "the trial court unambiguously instructed the jury that a firm possessing monopoly power has no duty to cooperate with its rivals." *Id.* at 600. Those factors are essential elements of a refusal-to-deal claim; as the Court observed in *Trinko*, "*Aspen Skiing* is at or near the outer boundary of § 2 liability." 540 U.S. at 409.

Drawing upon *Aspen Skiing*, the Tenth Circuit held in a decision by then–Judge Gorsuch that in order for liability to lie on a refusal-to-deal theory, "we require proof . . . that the monopolist decided to forsake short-term profits," and "the monopolist's conduct must be *irrational* but for its anticompetitive effect." *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1075 (10th Cir. 2013) (Gorsuch, J.). The Department of Justice has endorsed this approach to refusal-to-deal liability. *See* Brief for the United States as *Amicus Curiae* in Support of Neither Party, *Viamedia, Inc. v. Comcast Corp.*, No. 18-2852 (7th Cir.), Dkt. 33 at 6 ("This Court should follow the Tenth Circuit's decision by then-Judge Gorsuch in *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1075 (10th Cir. 2013), and hold that a refusal to deal does not violate Section 2 unless it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition."). But the Ninth Circuit jettisoned these requirements by upholding a verdict where the jury was not instructed to consider short-term profit sacrifice or the *objective* rationality of Swisher's conduct, but only Swisher's subjective "business *purpose*." The decision below is irreconcilable with the decision in *Novell*.

Second, the Ninth Circuit's conclusion that an antitrust plaintiff can carry its

burden of showing injury to competition based only on a decrease in its own output contradicts this Court's decision in *Ohio v. American Express Co.*, 138 S. Ct. 2274 (2018). There, the Court held that the plaintiff failed to demonstrate injury to competition where output in the allegedly monopolized market had increased, reasoning that "[w]here . . . output is expanding at the same time prices are increasing, rising prices are equally consistent with growing product demand." *Id.* at 2288. Unlike in that case, here output rose *and* prices fell during the time in question. *See* Ex. C at 10. TSI may maintain that it could have satisfied the rising consumer demand that ultimately was fulfilled by other producers, but "the antitrust laws were passed for 'the protection of *competition*, not *competitors*.'" *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993). The Ninth Circuit's contrary decision also creates a circuit conflict with *Major League Baseball Props., Inc. v. Salvino, Inc.*, 542 F.3d 290 (2d Cir. 2008), which expressly held that a reduction in a single plaintiff's output "would not suffice to support a claim of antitrust violation." *Id*. at 318.

If left uncorrected, the Ninth Circuit's decision will have profound implications not only for antitrust law, but for commerce more broadly. This Court in *Trinko* warned of the dangers that attend a legally imposed duty to deal, explaining that in light of "the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm . . . [,] [c]ompelling such firms to share the source of their advantage . . . may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities," and might counterproductively "facilitate the supreme evil of antitrust: collusion." *Id.* at 407–08. Unsurprisingly, not

a single appellate court since *Trinko* has upheld the imposition of antitrust liability on refusal-to-deal grounds—until now. And to do so under the circumstances presented here, where the only alleged wrongdoing is a pedestrian breach of contract, risks converting the antitrust law, with its treble damages remedy, into a cudgel by which to disincentivize even efficient breaches of contract. *Cf. Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 376 (7th Cir. 1986) (Posner, J.) (explaining that although one who "extend[s] a helping hand, though not required to do so, and later withdraws it . . . may be liable in tort or contract law . . . [,] the controlling consideration in an antitrust case is antitrust policy rather than common law analogies").

3. Additional time is necessary to permit counsel to prepare and file a petition that adequately addresses these important issues. An extension of 60 days is warranted because counsel has numerous preexisting professional responsibilities in the next several weeks, including several out-of-the-country business meetings from July 8–12, 2019; a motion to dismiss due on July 10, 2019 in *SC Innovations, Inc. v. Uber Techs., Inc.*, No. 3:18-cv-07440 (N.D. Cal.); a reply brief in support of a motion to dismiss due on July 10, 2019 in *Gov't of Puerto Rico v. The Carpenter Co.*, No. 3:18-cv-01987 (D. P.R.); a hearing on a motion to compel arbitration on July 15, 2019 in *Optimum Productions v. Home Box Office*, No. 2:19-cv-01862 (C.D. Cal.); a speaking engagement before the Ninth Circuit Judicial Conference from July 22–25, 2019; and a merits brief due on July 25, 2019 in *Comcast Corp. v. National Association of African American-Owned Media*, No. 18-1171 (U.S.). Swisher is not aware of any party that would be prejudiced by granting a 60-day extension.

CONCLUSION

Accordingly, Swisher respectfully requests that the time to file a petition for a writ of certiorari be extended by 60 days, to and including September 16, 2019.

Respectfully submitted,

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