No. 19-349

IN THE

Supreme Court of the United States

SWISHER INTERNATIONAL, INC.,

Petitioner,

v.

TRENDSETTAH USA, INC. AND TREND SETTAH, INC.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Swisher lost this antitrust trial before a jury. That jury was instructed that, in order for plaintiffs to prevail, they would have to show that Swisher's "*only* purpose" in restricting its output, breaching its contract with plaintiffs, and otherwise sabotaging that competing business was to harm plaintiffs and drive them out of the market. The evidence showed that Swisher had unused manufacturing capacity at the time it refused to deliver product to plaintiffs at a profit, and that it restricted output by at least 200 million units. The court of appeals approved of the jury's verdict in a six-page, unpublished disposition. In the meantime, the underlying judgment has been set aside for other reasons, and a new trial has been ordered that may involve both new jury instructions and new evidence.

The questions presented are:

(1) Is certiorari appropriately granted on trial-specific issues in a civil dispute where the judgment has been set aside and the dispute has been ordered to a new trial?

(2) Was the first jury, whose verdict was otherwise set aside, properly instructed?

(3) Was there sufficient evidence of antitrust injury presented in the first trial?

RULE 29.6 STATEMENT

Respondents Trendsettah USA, Inc. and Trend Settah, Inc. hereby state that they do not have a parent corporation and that no publicly held corporation owns 10% or more of their stock.

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REASONS FOR DENYING THE PETITION

There is no colorable argument for granting certiorari in this case. The petition seeks factbound review of trial-specific issues (the wording of one jury instruction and the sufficiency of the evidence supporting a jury verdict) decided in a six-page, unpublished opinion, respecting a judgment that has already been set aside for other reasons. In fact, Petitioner Swisher International, Inc. acknowledges that this case is slated for retrial, Pet. 32, which will almost certainly moot issues related to jury instructions (because new instructions will be offered) and the sufficiency of the evidence (because new evidence will be presented). All this easily suffices to deny the petition without further ado.

It does get worse, however. Swisher was scolded at oral argument in this case for misrepresenting the record and law,[*] and that reprimand was warranted. The reason the jury instruction Swisher dislikes does not mention Swisher suffering short-run harm from its own conduct is because Swisher itself mis-transcribed the accepted pattern instruction. *Compare* Am. Bar. Ass'n, *Model Jury Instructions in Civil Antitrust Cases* at C-39 (2006) (instructing the jury to consider harm to the "defendant's independent interests"), *with* C.A. E.R. 490 *l*.17 (Swisher's instruction, proposing that the jury consider harm to *respondents*' "independent interests"). And although Swisher's petition buries the controlling case in a single parenthetical quotation, the Ninth Circuit *already has* the liability rule Swisher seeks, under

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[*] *See* Video Recording of C.A. Oral Arg., https://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000014645 at 26:43, 29:20 (Fletcher, J., observing that Swisher's "description of the record in [its] brief was incomplete and misleading, every time I checked.")

which refusals to deal are only actionable if "the only conceivable rationale or purpose [of the monopolist's conduct] is 'to sacrifice short-term benefits in order to obtain higher profits.'" *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 836 F.3d 1171, 1184 (9th Cir. 2016) (citation omitted); *see* Pet. 11 (sole citation to *Aerotec* in entire petition). This rule is identical to the one then-Judge Gorsuch articulated for the Tenth Circuit in *Novell, Inc. v. Microsoft Corp*., 731 F.3d 1064 (10th Cir. 2013), so there is no conceivable split, and the petition does not even attempt to describe a conflict between the Ninth Circuit's *controlling, published* precedent and this Court's caselaw. Instead, the petition's sole complaint concerns the precise wording of a jury instruction in a single unpublished case where Swisher itself miswrote the instruction and the case is going to be retried anyway. It is hard to conceive of a greater misuse of this Court's resources than granting plenary review of a one-case-only issue that may well be mooted in the only case it will ever control.

As to the second question, Swisher does not even allege a circuit conflict, *see* Pet. 27, and so seeks splitless, factbound, error correction respecting a sufficiency-of-the-evidence determination in a unanimous unpublished disposition. Here, too, there is no underlying judgment to review because the judgment has been set aside, and the evidence presented in the anticipated retrial may well moot the question presented anyway. And so, again, there is more than enough reason to deny certiorari without wading into the merits of Swisher's argument.

That said, Swisher's argument is utterly meritless. Although Swisher gives *its* account of the facts, the jury ruled for respondents and plaintiffs below (Trendsettah

USA, Inc. and Trend Settah, Inc. (TSI)), and so the Court must assume that it believed the plaintiffs' evidence. That evidence showed that Swisher had *unused manufacturing capacity* at the very time it chose to lose profits (including over $9 million in contract damages) by breaching its contract and failing to deliver over 200 million cigarillos to the plaintiff/competitor. *See* TSI C.A. Reply & Resp. Br. 9-10 (compiling evidence). When a monopolist restricts its own output by foregoing sales in favor of idling capacity, it drives down market-wide output and drives up prices, causing the literal textbook definition of antitrust harm. Accordingly, the relevant question is not whether the market improved or degraded at the same time for exogenous reasons, but what *would have happened* absent the anticompetitive conduct. Perhaps an expanding market would have gotten even better, or a contracting market might not have been so bad—*as Swisher's own leading case recognizes*. *See* Pet. 28 (citing *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993)). Here, the jury was entitled to believe that aggregate supply would have increased by over 200 million units absent Swisher's output restriction, and that would have led to greater social surplus and lower prices. So far as we can tell, Swisher's contrary rule is that it is impossible to cause antitrust injury in an otherwise expanding market. No case in history supports such an economically illiterate version of the antitrust laws.

In sum, this case seeks error correction respecting an unpublished opinion that decided trial-specific issues in a case that is already being retried. Meanwhile, the two rulings it wants are ones that either the Ninth Circuit has already adopted or no sane court would ever adopt.

CONCLUSION

The petition should be denied.

Respectfully submitted,

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