No. 19-349

IN THE

Supreme Court of the United States

SWISHER INTERNATIONAL, INC.,
Petitioner,

v.

TRENDSETTAH USA, INC. AND TRENDSETTAH, INC.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

This case presents two questions of law that have divided the federal courts of appeals concerning the scope of liability under the Sherman Act, including liability for refusals to deal with a rival. By adopting positions on both circuit conflicts that depart from the holdings of this Court, the Ninth Circuit has significantly expanded antitrust liability in the Nation's most populous circuit. And it has done so by upholding a treble damages award for an alleged breach of contract masquerading as a "refusal to deal" antitrust claim, notwithstanding this Court's repeated warning that "[c]ompelling . . . firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities" and "may facilitate the supreme evil of antitrust: collusion." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407–08 (2004).

The resolution of either of these questions would bring important clarity to an area of law that has seen a sharp rise in litigation recently, prompting the federal government to intervene in several cases in support of the rule of law urged by petitioner but rejected in the decision below.

Nevertheless, Plaintiffs Trendsettah USA, Inc. and Trendsettah Inc. (together, "TSI") urge the Court to stay its hand and allow these questions, already ripe for review, to remain unanswered, merely because the district court has ordered a retrial after discovering that TSI committed fraud on the court. Far from counseling against review, however, this development underscores the need for this Court to resolve

these widening conflicts among the circuits before the parties and the courts undertake the burden and expense of a *second* trial in this case.

For these reasons, the Court should grant the petition for certiorari and reverse the Ninth Circuit's judgment.

I. THE NINTH CIRCUIT DEPARTED FROM THIS COURT'S PRECEDENT AND DEEPENED A CIRCUIT CONFLICT REGARDING THE PROPER STANDARD OF ANTITRUST LIABILITY FOR REFUSALS TO DEAL WITH COMPETITORS.

The decision below upheld the jury's verdict imposing refusal-to-deal liability even though the district court failed to instruct the jury that (1) even a monopolist has no general duty to deal with its business rivals and (2) the plaintiff must prove that the refusal was contrary to the defendant's short-run interests. This Court emphasized the importance of both elements in the only case in which it has sustained a finding of liability on refusal-to-deal grounds. *See Aspen Skiing Co. v. Aspen Highlands Skiing Co.*, 472 U.S. 585, 600, 610–11 (1985). And by departing from this Court's teachings with respect to the second element, the Ninth Circuit deepened a conflict among the federal courts of appeals. *Compare Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064 (10th Cir. 2013), *with Del. & Hudson Ry. Co. v. Consol. Rail Corp.*, 902 F.2d 174 (2d Cir. 1990).

TSI does not so much as mention the first omitted instructional element. This is perhaps unsurprising in light of this Court's unequivocal pronouncements emphasizing its importance. For more than a century, the Court has acknowledged that the Sherman Act "does not restrict the long recognized right of [a]

trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal," *United States v. Colgate*, 250 U.S. 300, 307 (1919), with refusal-to-deal doctrine providing only a "limited exception" to this general rule, *Trinko*, 540 U.S. at 409. For this reason, the Court rejected the contention in *Aspen Skiing* that the jury's verdict was premised on a general duty to deal *only* because "the trial court *unambiguously instructed* the jury that a firm possessing monopoly power has no duty to cooperate with its business rivals." 472 U.S. at 600 (emphasis added). The omission of such an instruction is especially important where, as here, the plaintiff also alleged a *contractual* duty to deal. *See In re Aderall XR Antitrust Litig.*, 754 F.3d 128, 130 (2d Cir. 2014) (rejecting the contention that "contracts themselves g[i]ve rise to a 'duty to deal' under antitrust law").

With respect to the second instructional element, TSI does not dispute that the circuit courts are divided on the question whether an antitrust defendant must sacrifice short-term profits to be held liable for refusing to deal with a rival. The Tenth Circuit, in an opinion by then-Judge Gorsuch, has answered in the affirmative, holding that "refusal to deal doctrine requires the monopolist to sacrifice short-term profits to be held liable." *Novell*, 731 F.3d at 1075. The Second Circuit, by contrast, has held that "[a] monopolist cannot escape liability for conduct that is otherwise actionable simply because that conduct also provides short-term profits." *Del. & Hudson Ry.*, 902 F.2d at 178.

Implicitly conceding the existence of a circuit conflict, TSI simply asserts that "the Ninth Circuit *already has* the liability rule Swisher seeks." Opp. 1–2

(citing *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 836 F.3d 1171, 1184 (9th Cir. 2016)). But TSI misses the point. The defining feature of the profit-sacrifice test is that it is *objective*. The decision below, however, converts the test into one focused on the monopolist's *subjective* intent.[1] The jury was instructed only that it "must determine whether Swisher had a legitimate business *purpose* for undertaking alleged anticompetitive conduct," Pet. App. 22a (emphasis added), and the Ninth Circuit held that this instruction accurately stated the governing test for refusal-to-deal liability because it informed the jury that "in order for Swisher to have violated the antitrust laws, its *only* purpose must have been to harm TSI," *id.* at 4a.

Thus, it is not the case, as TSI asserts, that the Ninth Circuit's "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)." Opp. 2. In *Novell*, the Tenth Circuit held that for refusal-to-deal liability to lie, "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*, 731 F.3d at 1075 (emphasis added); *see also id.* at 1078 n.4 ("Our analysis . . . seeks to ascertain whether a monopolist's conduct makes *any economic sense*.") (emphasis added). In fact, the court noted that even an undisputed anticompetitive purpose would not support liability in the absence of actual profit sacrifice, acknowledging that "a monopolist can find ways to harm competition while still making money," but explaining that "[r]efusal to deal doctrine targets only a

[1] As explained below, a legitimate, subjective business purpose will *foreclose* antitrust liability. But it is not a substitute for the profit-sacrifice test. *See infra* at 6.

discrete category of section 2 cases attacking a firm's unilateral decisions about with whom it will deal and on what terms," and "[i]f the doctrine fails to capture every nuance, if it must err still to some slight degree, perhaps it is better that it should err on the side of firm independence." *Id.* at 1075–76. According to the Ninth Circuit, by contrast, the test is whether the defendant's subjective "purpose" was to harm the plaintiff. Pet. App. 4a.

TSI argues that the Court should nevertheless disregard this circuit conflict on an important and recurring question of federal antitrust law because Swisher supposedly invited the error by "mis-transcrib[ing] the accepted pattern instruction." Opp. 1. But TSI cites only Swisher's proposed instruction on the business-purpose defense (Proposed Jury Instruction No. 30), which is a red herring that has nothing to do with the question presented. Review is warranted here because, *inter alia*, the Ninth Circuit held that refusal-to-deal liability may be imposed in the absence of an instruction on the element of short-term sacrifice. Swisher had proposed precisely such an instruction (Proposed Instruction No. 29), which would have plainly informed the jury that "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." Pet. App. 86a–87a.[2]

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[2] As noted above, *see supra* at 2–3, this proposed instruction also would have informed the jury that "[e]ven a company with monopoly power in a relevant market has no general duty to cooperate with its business rivals and ordinarily may refuse to deal with them." Pet. 8.

And as the Ninth Circuit expressly held, "Swisher adequately preserved its objection to the trial court's failure to give Swisher's proposed Jury Instruction 29." *Id.* at 4a.

Indeed, TSI's attempt to gloss over the distinction between business purpose and short-term sacrifice simply doubles down on the fundamental error of antitrust law committed by the court below. As Swisher made clear in the petition, *both* the absence of a legitimate business purpose *and* short-term sacrifice are necessary conditions for the imposition of refusal-to-deal liability. Pet. 18. *Novell* likewise recognizes this:

> To avoid penalizing normal competitive conduct, then, we require proof not just that the monopolist decided to forsake short-term profits. Just as in predatory pricing cases, we *also* require a showing that the monopolist's refusal to deal was part of a larger anticompetitive enterprise, such as (again) seeking to drive a rival from the market or discipline it for daring to compete on price.

731 F.3d at 1075 (citing *Aspen*, 472 U.S. at 597 (a refusal to deal with a competitor does not violate section 2 if "valid business reasons exist for that refusal")). The Ninth Circuit adopted a contrary view, which is why certiorari is warranted.

Finally, TSI contends that this case presents a poor vehicle for resolving this question because it "is slated for retrial, which will almost certainly moot issues related to jury instructions (because new instructions will be offered)." Opp. 1 (citation omitted). To be sure, Swisher will argue in the district court that the jury should be given a proper instruction on the scope and nature of any duty to deal. But the Ninth

Circuit has expressly *upheld* the instructions the district court gave in the first trial, and there is no guarantee that the district court will do anything different the second time around. If the district court hews to the instructions that the Ninth Circuit has already approved, this Court will not have the opportunity to weigh in until the completion of an entirely new trial—at considerable burden to the parties, the jurors, and the courts alike.

Even if the district court were to venture new instructions, the decision below will continue to inform the development of refusal-to-deal liability in the Nation's largest circuit. And this will have far-reaching effects given the increasing frequency with which federal courts are confronting refusal-to-deal cases in recent years. *See*, *e.g.*, *Entrata, Inc. v. Yardi Sys., Inc.*, No. 15-cv-00102, 2019 WL 4597519, at *6–9 (D. Utah Aug. 14, 2019); *FTC v. Qualcomm Inc.*, No. 17-cv-00220, 2019 WL 2206013, at *83–84 (N.D. Cal. May 21, 2019); *Iqvia Inc. v. Veeva Sys. Inc.*, No. 17-cv-00177, 2018 WL 4815547, at *2–3 (D. N.J. Oct. 3, 2018); *Mahaska Bottling Co. v. PepsiCo Inc.*, 271 F. Supp. 3d 1054, 1069–70 & n.11 (S.D. Iowa 2017); *Viamedia, Inc. v. Comcast Corp.*, 218 F. Supp. 3d 674, 698–99 (N.D. Ill. 2016); *Mylan Pharm. v. Celgene Corp.*, No. 14-cv-2094, 2014 WL 12810322, at *3–6 (D. N.J. Dec. 23, 2014).

The Court should therefore grant the petition for certiorari to resolve this conflict.

II. THE NINTH CIRCUIT VIOLATED THIS COURT'S PRECEDENT AND CREATED A CIRCUIT CONFLICT BY HOLDING THAT INJURY TO COMPETITION CAN BE SHOWN WITH EVIDENCE OF HARM TO A SINGLE COMPETITOR'S OUTPUT.

This Court should also grant certiorari to review the Ninth Circuit's holding that an antitrust plaintiff can carry its burden of proving injury to competition merely by pointing to evidence of an impact on a single competitor's output. It is a fundamental principle of antitrust law that "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) (emphases in original). And the Court has underscored that an antitrust plaintiff must adduce *evidence* rather than invoke presumptions when proving injury to competition where market output is expanding. *See Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2288 (2018) ("*Amex*") ("This Court will 'not infer competitive injury from price and output data absent some evidence that tends to prove that output was restricted or prices were above a competitive level.'"). Nevertheless, the Ninth Circuit concluded below that TSI carried its burden merely by presenting "evidence that 'Swisher failed to timely deliver approximately 200 million cigarillos'" to *TSI*. Pet. App. 5a. And it did so despite the fact that market-wide output of untipped cigarillos increased by more than 70% during the time in question, while Swisher's cigarillo prices declined. *Id.* at 91a.

TSI offers three reasons why the Court should nevertheless decline to review this question, none of which is availing. First, TSI criticizes Swisher for "not even alleg[ing] a circuit conflict." Opp. 2. As an initial matter, even if there were not a circuit conflict, the

Court should still grant plenary review or summarily reverse the Ninth Circuit's judgment in light of its "demonstrably erroneous application of federal law." *Maryland v. Dyson*, 527 U.S. 465, 467 n.* (1999); *see also* Sup. Ct. R. 10(c) (noting that review is warranted where "a United States court of appeals has decided an important question of federal law . . . in a way that conflicts with relevant decisions of this Court").

But here, Swisher plainly *did* identify a circuit conflict created by the decision below on this question. As Swisher explained in its petition, the Ninth Circuit's decision conflicts with the Eleventh Circuit's decision in *Procaps S.A. v. Patheon, Inc.*, 845 F.3d 1072 (11th Cir. 2016). *See* Pet. 30 (noting "[t]he Ninth Circuit's departure from *Brooke Group*, *Amex*, and *Procaps*"). In what was "essentially a breach of contract case," *Procaps*, 845 F.3d at 1087, the plaintiff supported its claim of injury to competition with evidence of "'reduce[d] quantity'" after the defendant (the plaintiff's contractual joint venture partner) acquired a competitor and removed its production from the market. *Id.* at 1085. The Eleventh Circuit rejected that claim as a matter of law, holding that "more than harm to an individual competitor is required." *Id.* Here, however, the Ninth Circuit concluded that TSI carried its burden of demonstrating injury to competition in an alleged breach-of-contract case with precisely such evidence of "harm to an individual competitor." Pet. App. 5a. This holding squarely conflicts with the Eleventh Circuit's decision in *Procaps*.

Second, TSI argues that Swisher is somehow slanting the facts because "[w]hen 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." Opp. 3. But TSI's tendentious mischaracterization of the record is entirely beside the point. Swisher is not asking this Court to review the record, but rather to overturn the *legal* rule adopted by the Ninth Circuit, which expressly held that a plaintiff can carry its burden of demonstrating injury to competition merely by pointing to a single competitor's reduction of output, even when market-wide output is increasing.

Presumptions derived from "textbook" theorizing are not a substitute for *proof*. "Were theoretical effects stated only at the highest level of abstraction enough, a plaintiff could trot out these same basic principles any time conduct resulted in harm to a competitor. The Sherman Act requires more." *Procaps*, 845 F.3d at 1085. For this reason, "a plaintiff may not meet its burden of showing actual anticompetitive effects with mere conclusory assertions; rather, we have repeatedly required a plaintiff to point to specific facts demonstrating harm to competition," and "hypothetical supply and demand curves that one might expect to find in any first-year economics textbook" simply do not suffice. *Id.* at 1084–85; *see also Brooke Group*, 509 U.S. at 233–34 (rejecting "speculat[ion] . . . that the rate of segment growth would have tripled, instead of doubled" absent defendant's alleged misconduct, instead requiring "concrete evidence" of competitive harm). In short, "'absent some evidence that tends to prove that output was restricted or prices were above a competitive level,'" *Amex*, 138 S. Ct. at 2288 (quoting

Brooke Grp., 509 U.S. at 237), TSI's claim fails as a matter of law.[3]

Third, and finally, TSI claims that this Court should deny review "because the judgment has been set aside, and the evidence presented in the anticipated retrial may well moot the question presented anyway." Opp. 2. But if the Court were to reverse the Ninth Circuit's judgment on this question, there would *be no retrial*. After all, Swisher moved for judgment as a matter of law on the ground that TSI failed to show antitrust injury. *See* Pet. App. 5a. The Ninth Circuit rejected that argument based on its conclusion that evidence of a reduction to a single competitor's output was sufficient to demonstrate injury to competition. If this Court reverses that holding, the district court will be compelled to enter judgment in Swisher's favor, and the *retrial* would become moot.

Because the Ninth Circuit's holding conflicts with this Court's unambiguous caselaw and creates a conflict with the Eleventh Circuit, review is warranted.

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[3] TSI is thus wrong to suggest that "Swisher's contrary rule is that it is impossible to cause antitrust injury in an otherwise expanding market." Opp. 3. Antitrust injury can occur in an expanding market, but it must be proven by "concrete evidence," *Brooke Grp.*, 509 U.S. at 233–34, not mere speculation combined with an effect on a single competitor's output.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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