No. _____

In the
Supreme Court of the United States

AMERICAN CONTRACTORS SUPPLY, LLC,
Petitioner,

v.

HD SUPPLY CONSTRUCTION SUPPLY, LTD.,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does Federal Rule of Civil Procedure 56 permit the court to weigh competing evidence of a material fact from the moving party to grant summary judgment if the nonmoving party has offered evidence giving rise to the inference of the material fact.

LIST OF PARTIES TO THE PROCEEDINGS

Petitioner American Contractors Supply, LLC was plaintiff in the district court and appellant in the court of appeals.

Respondent HD Supply Construction Supply, Ltd. was defendant in the district court and appellee in the court of appeals.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *American Contractors Supply, LLC v. HD Supply Construction Supply, Ltd.*, No. 1:16-cv-03595 (N.D. Ga.) (memorandum and order granting summary judgment, issued February 26, 2020);
- *American Contractors Supply, LLC v. HD Supply Construction Supply, Ltd.,* No. 20-10813 (11th Cir.) (opinion affirming summary judgment, issued March 4, 2021).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

CORPORATE DISCLOSURE STATEMENT

Petitioner American Contractor Supply, LLC, is a limited liability company. It does not have any parent companies, and no entity or other person has any ownership interest in it.

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INTRODUCTION

Does the jury retain the unique role of weighing the reasonable inferences from the evidence to determine an ultimate fact under Federal Rule of Civil Procedure 56? The Eleventh Circuit said no: before sending a case to trial under Rule 56, the judge must first weigh competing inferences from the evidence if the plaintiff offers evidence giving rising to the inference of the ultimate fact. As a result, the court conducted a paper trial to weigh all the evidence offered by plaintiff and defendant by the preponderance of the evidence. App. 14-15, 30.

In the case, a monopolist distributor allegedly violated Sections 1 and 2 of the Sherman Act by pressuring a manufacturer to withdraw its support for a rival distributor in the same market. App. 18. The plaintiff had "adduced some evidence of anticompetitive conduct" by the monopolist distributor. App. 27. In fact, the Eleventh Circuit conceded that evidence in the record "raises an inference that there might have been an agreement." App. 23-24. Thus, a reasonable trier of fact could find for ACS.

Specifically, the manufacturer withdrew its support for the plaintiff distributor in response to threats from the monopolist distributor that it would cut off its purchases from the manufacturer if the manufacturer continued to supply the plaintiff distributor that had entered the market. App. 6-9. The court found that "the decision was prompted by [the] threat." App. 24. That sort of evidence is "substantial direct evidence" of the kind that is plainly "relevant and persuasive as to a meeting of the minds" under *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 765 & n.10 (1984). The manufacturer had also informed the rival dealer that it was being terminated in Florida

because of "pressure," and the monopolist dealer later admitted it had "sent them packing." App. 8.

Judge Posner has warned that courts at summary judgment in antitrust conspiracy cases must be careful to avoid the "trap" of taking the additional step of weighing conflicting evidence, which is "the job of the jury." *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002). Nevertheless, the court in this case accepted certain evidence offered by the defendant to be true (even though it conflicted with other evidence) and conducted a paper trial requiring the nonmoving party "prove" the material fact of an agreement between a monopolist distributor and a manufacturer that the manufacturer withdraw its support for a rival distributor in the same market. App. 18.

The court weighed the competing inferences from the evidence by the preponderance of the evidence. App. 14-15, 30. The court compounded the error by finding that a change in manufacturer policy in response to the threat of the loss of a distribution platform by the monopolist distributor tended to show independent rather than concerted action. App. 24-25; see *Monsanto*, 465 U.S. at 765 n.10.

In conducting a paper trial, the Eleventh Circuit takes an extreme departure from the recognized roles of the judge and the jury in adjudicating disputes of fact. Summary judgment is not a paper trial of declarations or depositions. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The judge does not weigh the evidence on an issue of fact. *Id.* Rule 56 asks the judge to determine whether the nonmoving party has offered sufficient evidence to require the jury to resolve the ultimate fact. Rule 56 does not require the judge itself to resolve the ultimate fact in the first instance.

The judge only asks whether a jury could reasonably find for either party on the ultimate fact in dispute. *Id.* The judge "must disregard all evidence favorable to the moving party that the jury is not required to believe." *See Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 151 (2000) (reviewing evidence after trial under Rule 50). On the issue of antitrust conspiracy, the nonmoving party only needs to provide evidence at summary judgment "that tends to exclude the possibility of independent action." *Monsanto*, 465 U.S. at 768. It is the role of the jury, not the judge, to weigh the competing evidence from the moving party on that ultimate issue of fact.

Consequently, the Eleventh Circuit sets out a deep split with every other circuit to address the issue of whether the court weighs the evidence at summary judgment on the material fact of an agreement under the Sherman Act. Consistent with the mandate of Rule 56, other circuits ask whether the nonmoving party has offered evidence that gives rise to a reasonable inference of concerted action and do not weigh competing inferences from the evidence. *White v. R.M. Packer Co.*, 635 F.3d 571, 577 (1st Cir. 2011), *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224, 1232 (3d Cir. 1993), *Mkt. Force Inc. v. Wauwatosa Realty Co.*, 906 F.2d 1167, 1171 (7th Cir. 1990), *Riverview Invs., Inc. v. Ottawa Cmty. Imp. Corp.*, 899 F.2d 474, 483 (6th Cir. 1990), *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 253 (2d Cir. 1987), *Gibson v. Greater Park City Co.*, 818 F.2d 722, 724 (10th Cir. 1987), *Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676, 681 (9th Cir. 1985).

No other circuit asks the nonmoving party to persuade the judge that the evidence on paper at summary judgment "proves" the existence of concerted action before the judge asks the jury to weigh the evidence live

at trial. Yet the Eleventh Circuit suggests that it has been doing so for decades. App. 14-16. Therefore, the case presents a deep and entrenched circuit conflict on the very important matter of deciding whether an antitrust plaintiff – consumer or competitor – can exercise its right to a jury trial and present its affirmative evidence of concerted action under Section 1 or Section 2 of the Sherman Act to a jury.

The basic interpretation of our federal antitrust laws is an important matter. "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise." *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). The antitrust laws also have a major effect on the social and political fabric of our country. The rise of global trade and information technology has heightened the dangers of cartels and monopolies in control of production capacity (*e.g.*, rare earth elements and microprocessor chips) and distribution platforms (*e.g.*, supply chains and search engines). The legal standards for scrutiny of such monopolies – and their anticompetitive practices – must be drawn fairly and clearly, sooner than later.

Furthermore, there is no reason why judges would be restrained in rewriting Rule 56 on other issues of fact or other causes of action. Moreover, there is no reason why the decision would not be equally applicable to reviewing the allegations in a complaint under Fed. R. Civ. Proc. 12 or reviewing the evidence at trial under Fed. R. Civ. Proc. 50. Is the claimant now required to persuade the court that its allegations if true eliminate the need for a jury to decide the ultimate fact? Or is it enough to plead allegations that, if supported by evidence, would require a jury to make that determination? Is the plaintiff now required to persuade the court that its evidence at trial

will prove an ultimate fact? Or is it enough to present evidence at trial that would permit a jury to make that determination?

OPINIONS BELOW

The Eleventh Circuit's decision is reported at 989 F.3d 1224 and reproduced at App. 1. The district court's decision is reproduced at App. 36.

JURISDICTION

The court of appeals entered judgment on March 4, 2021. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The Seventh Amendment provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. Const. amend. VII.

Federal Rule of Civil Procedure 56 provides, in relevant part: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

Section 1 of the Sherman Act provides, in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1.

Section 2 of the Sherman Act provides, in relevant part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign

nations, shall be deemed guilty of a felony . . .” 15 U.S.C. § 2.

STATEMENT OF THE CASE

A. Factual background

Tilt concrete construction is a system of casting concrete walls on site, lifting them in place, and linking them together to form a concrete building. App. 2. Tilt distributors provide the specialized tilt lifting and bracing equipment, *i.e.*, the inserts and braces, for tilt construction. Id. ACS and White Cap are longtime distributors of Meadow Burke tilt products in the Georgia market. App. 3. Construction Materials is a longtime distributor of Dayton Superior tilt products in the Georgia market. Id. In the Georgia market, Construction Materials has a market share of 40%, White Cap has a market share of 35%, and ACS has a market share of 25%. Id.

Prior to 2016, White Cap and Construction Materials were the only tilt distributors in the Florida market. Id. Construction Materials distributed Dayton Superior tilt products in Florida and had a 25% share of the Florida market. Id. White Cap distributed Meadow Burke tilt products in Florida and had a 75% share of the Florida market. Id. White Cap and Meadow Burke deny that there was any exclusive distribution agreement in place to incentivize White Cap to promote Meadow Burke in the Florida market.

In Spring 2016, ACS arranged to enter the Florida market. App. 4. Meadow Burke was aware of some customer dissatisfaction with service from White Cap and agreed to supply ACS in Florida if ACS opened an office in Tampa. Id. In advance of opening the Tampa office, ACS forwarded engineering drawings to Meadow Burke’s engineering department to facilitate its first bid in Florida for a contractor named Flagship for a project called

Horizon VII. App. 5. ACS opened the Tampa office on July 1 and won the Horizon VII bid on July 5. Id.

When Doug Bartle of White Cap learned that ACS won the Flagship project, he called the Meadow Burke sales representative Lori Dykes on July 13. Id. Bartle referenced a meeting planned for the following day with John House of Dayton Superior and threatened to switch purchases to Dayton Superior if "you need to support another dealer in Florida." Op at 6 & n.3. Bartle also said White Cap was putting a hold on orders for new braces from Meadow Burke. App. 6 & n.4. After the call, Dykes recounted the conversation in an email to her supervisors at Meadow Burke, including Wolstenholme. App. 6. She implored that "[w]e need damage control ASAP" and asked them to "confirm we will NO Longer allow anyone other than WC to sell Tilt in Florida." "Please call to discuss how we can move forward and fix what we have done." *Id.*

After receiving the email from Dykes, Wolstenholme called Bartle that same day. App. 6-7. Bartle demanded a sit-down, face-to-face conversation. App. 7. Wolstenholme agreed and offered to meet White Cap at its offices in Tampa. App. 7. Wolstenholme then replied to the email from Dykes. Id. He did not deny that Meadow Burke had opened ACS in Florida. Id. Instead, he told his colleagues to get off email and that he was meeting with White Cap in person to "get things straight." Id. Indeed, Wolstenholme and his team met with Bartle and his team at White Cap's Tampa offices on July 25. App. 8. Meadow Burke "reassured" White Cap that Meadow Burke would not supply ACS in Florida after Horizon VII. Id.

Later that same day, Wolstenholme and a colleague met with ACS CEO Jason Reuter and his brother Jacob

Reuter in ACS's new Tampa office. Id. Wolstenholme told them that Meadow Burke was cutting ACS off in Florida. Id. Wolstenholme acknowledged that they "wouldn't be sitting [at the meeting] if [they] didn't receive pressure." Id. Since that time, Meadow Burke has not backed off the reversal of its decision to open ACS in the Florida market. Id.

Bartle later admitted to Johnny Workman at Flagship that he used the threat of pulling his purchases to get Meadow Burke to agree to cut off ACS in Florida: "We sent him packing. We do millions a year with Meadow Burke." App. 8. Without support from Meadow Burke in Florida, ACS was left with a significant investment in opening a new office in Tampa and tried to distribute a new brand of tilt products from SureBuilT. App. 9. SureBuilT had issues with product quality and customer acceptance in the Florida market. Id. ACS sold only nine jobs over two years and had to exit the market entirely in 2018. Id. During that time, White Cap increased its 75% market share and was able to raises its prices and margins in the Florida market. Id. After ACS exited Florida, White Cap acquired its last remaining competitor Construction Materials in October 2020. See App. 33 at n. 11.

B. Procedural background

ACS sued White Cap for restraining and monopolizing trade in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 & 2) and tortiously interfering with the business relations of ACS in violation of state law. Jurisdiction was based on 28 U.S.C. §§ 1331 and 1337 and 15 U.S.C. §§ 15 and 22 for the federal antitrust claims and 28 U.S.C. § 1367 for the state tortious interference claim. After discovery, White Cap moved for summary judgment on all claims, and ACS moved for partial summary judgment on market definition for its antitrust claims.

The district court's decision. The district court granted White Cap's motion for summary judgment on all claims and denied ACS's motion for partial summary judgment on market definition as moot. App. 36.

The Eleventh Circuit's decision. The Eleventh Circuit reviewed the grant of summary judgment on all claims *de novo*. App. 11. The court found ACS had "adduced some evidence of anticompetitive conduct" by the monopolist distributor. App. 27. In fact, the court conceded the evidence in the record "raise[d] an inference that there might have been an agreement." App. 23-24.

Nevertheless, the Eleventh Circuit held that ACS needed "to meet the standard of *proving* concerted action." (emphasis added). App. 13. It would not be enough that ACS offered substantial evidence that Meadow Burke did not act independently: "Mere equipoise of the evidence does not establish an agreement." App. 14.

The court conceded the threats from White Cap "prompted" Meadow Burke to abruptly reverse its decision to sell to ACS in Florida. Furthermore, it was in the "best interest" of Meadow Burke to preserve its relationship with White Cap, which controlled 75% of the market, when faced with the threat to choose between ACS and White Cap. App. 26. In the eyes of the court, however, this was evidence of independent action rather than concerted action: "If White Cap carried through on its threat to transfer its business to Dayton Superior, Meadow Burke would have had an uphill battle to maintain its market share." App. 26.

The Eleventh Circuit therefore concluded that ACS "failed to *establish facts* that exclude the possibility that Meadow Burke acted independently." App. 27 (emphasis added). ACS had only adduced "some" evidence that

Meadow Burke did not act independently. Id. Since ACS was unable to prove to the Eleventh Circuit that Meadow Burke did not act independently in terminating ACS, the court affirmed summary judgment on the Section 1 claim (App. 30), the Section 2 claim (App. 32-33), and the tortious interference claim (App. 33-34).

REASONS FOR GRANTING THE PETITION

I. The decision below departs from Supreme Court jurisprudence and creates a deep circuit split on the important matter of the right to a jury trial on claims under federal antitrust law.

The Eleventh Circuit has taken an extreme departure from Rule 56. Rule 56 merely asks "whether the evidence presents a sufficient disagreement to require submission to a jury." *Anderson v. Liberty Lobby*, 477 U.S. at 251–52.

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.

Id. at 255.

Specifically, there is no exception for the issue of the existence of concerted action under the antitrust laws. *Id.* at 248. In reviewing its jurisprudence under Rule 56, the Court quoted extensively from its decision in the antitrust case *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 288-89 (1968). "[T]he plaintiff could not rest on his allegations of a conspiracy to get to a jury without 'any significant probative evidence tending to support the complaint.'" *Anderson v. Liberty Lobby*, 477

U.S. 242 at 248–49 (quoting *Cities Service*, 391 U.S. at 290). "[A]ll that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Cities Service*, 391 U.S. at 288–289.

The substantive antitrust law merely governs what constitutes circumstantial evidence of the ultimate fact of concerted action. Schwarzer, The Analysis and Decisions of Summary Judgment Motions (Federal Judicial Center 1991), p. 63. For example, *Monsanto* and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) do not ask the judge to step into the shoes of the jury to weigh the evidence of concerted action. The Court merely cautioned that "highly ambiguous evidence" was not probative of concerted action. *Monsanto*, 465 U.S. at 763. "[C]onduct as *consistent with permissible competition* as with illegal conspiracy does not, *standing alone*, support an inference of antitrust conspiracy." *Matsushita*, 475 U.S. at 588 (emphasis added). Simply reducing your price was evidence of trying to make the sale. *Id.*

The Court in *Monsanto* would not permit the inference of concerted action by a manufacturer and its distributors regarding resale prices based on "mere complaints" from distributors that other distributors were violating the *manufacturer's preexisting* resale price policy. 465 U.S. at 764. If the nonmoving party offers evidence that gives rise to the inference of concerted action, however, the judge does not weigh it against any evidence offered by the moving party. See id. at 765.

In fact, the Court in *Monsanto* upheld a jury verdict for the plaintiff because "there was sufficient evidence for the *jury* reasonably to have concluded that [the manufacturer and distributors] were parties to an 'agreement' or

'conspiracy' to maintain resale prices and terminate price-cutters." *Id*. at 765 (emphasis added). There was testimony that the manufacturer threatened noncompliant distributors with reduced access to supply and later demanded and obtained assurances from the distributor that it would comply with the resale price policy. *Id.* It was enough to allow "the *jury* reasonably to have concluded" that that there was concerted action regardless of the other evidence. *Id.* (emphasis added)

Similarly, the Court in *Matsushita* ordered the court of appeals to upheld summary judgment on allegations of a twenty-year predatory conspiracy if plaintiffs could only show parallel conduct by defendants that were "pricing at levels that succeeded in taking business away from" plaintiffs." 475 U.S. at 597. The plaintiffs needed to offer something more than parallel conduct to overcome the reality that their allegations did not make any economic sense. *Id.* Even on reversal and remand, however, the Court allowed the plaintiffs to point the court of appeals to "other evidence that is sufficiently unambiguous to permit a trier of fact to find [concerted action]." *Id.*

The Eleventh Circuit sets out a deep split with every other circuit to address the issue of whether the court weighs the evidence proffered by the parties at summary judgment on the material fact of an agreement under the Sherman Act. The Sixth, Seventh, and Tenth Circuits have adopted the same two-part test asking ultimately whether the plaintiff has offered "any" evidence that tends to show concerted action. *Mkt. Force*, 906 F.2d at 1171, *Riverview*, 899 F.2d at 483, *Gibson*, 818 F.2d at 724. Similarly, the Second and Ninth Circuits have ruled out the weighing of competing inferences from the evidence. *Apex Oil*, 822 F.2d at 253, *Barnes*, 759 F.2d at 681. The First and Third Circuits have expressly focused the inquiry on the

plaintiff's evidence. *White v. R.M. Packer Co.*, 635 F.3d at 577, *Petruzzi's IGA Supermarkets*, 998 F.2d at 1232.

The Eleventh Circuit has upended this consensus and raised the specter of the judge taking over the role of jury – like courts in Europe – in adjudicating disputed facts. It is one thing for the court to ask for the plaintiff to offer evidence that is "sufficiently unambiguous to permit a trier of fact to find [concerted action]." *Matsushita*, 475 U.S. at 597. It is quite another for the court to take over the role of the jury by weighing reasonable inferences from the evidence and render its own finding of fact. The result is a deep split in the application of Rule 56. There is no reason to believe that it does not predict a similar split in the application of Rule 12 at the pleading stage and Rule 50 at the trial stage as well.

II. The question presented is clearly raised in this case and lies at the heart of application of Rule 56.

This deep split should be resolved sooner than later. The question is plainly raised in the decision below. The Eleventh Circuit is clear in requiring ACS to prove the ultimate fact of concerted action by preponderance of the evidence to the court before taking the same issue to the jury. The substantive law merely requires "*evidence* that *tends to exclude* the possibility of independent action by the manufacturer and distributor." *Monsanto*, 465 U.S. at 768 (emphasis added). The Eleventh Circuit concedes that the "evidence raises an inference that there might have been an agreement between Meadow Burke and White Cap." App. 23. Nevertheless, the Eleventh Circuit held that ACS needed "to meet the standard of *proving* concerted action." (emphasis added). App. 13.

The Eleventh Circuit emphasizes again and again that it wanted ACS to *prove the fact* – rather than *offer evidence* in support of a genuine dispute of fact. It was not

sufficient that ACS offered substantial evidence that Meadow Burke did not act independently: "Mere equipoise of the evidence does not *establish* an agreement." App. 14 (emphasis added). ACS "failed to *establish* concerted action." App. 26 (emphasis added). ACS "failed to *establish facts* that *exclude* the possibility that Meadow Burke acted independently." App. 27 (emphasis added).

The Eleventh Circuit has rewritten Rule 56 and thereby usurped the role of the jury in deciding the facts under the Seventh Amendment. The Court has "carefully preserved the right to trial by jury where legal rights are at stake." *Chauffeurs, Teamsters & Helpers, Loc. No. 391 v. Terry*, 494 U.S. 558, 565 (1990). "Maintenance of the jury as a *fact-finding* body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Id*. (emphasis added) (internal quotations omitted).

Moreover, the decision in this case dramatically rebalances the role of judge and jury throughout a case. The legal standards for summary judgment and directed verdict are the same. *Matsushita*, 475 U.S. at 588. There is no reason why the judge is prevented from weighing the competing evidence after verdict at trial if the judge is entitled to do so before trial. The same rationale potentially applies at the pleading stage: is it no longer enough that the allegations if proven true would create a genuine issue of material fact? In any event, the Eleventh Circuit has empowered the judge to take the case from the jury before or after trial based on its own weighing of the evidence of a disputed fact. Such precedent dramatically undermines public confidence in our democratic institutions generally and federal courts specifically.

III. The decision below is wrong.

This leads to the last reason to grant certiorari: the decision itself is plainly wrong. The Eleventh Circuit acknowledges that there is evidence giving rise to the inference of an agreement. App. 23. Specifically, White Cap had 75% of the market. App. 3, 26. Meadow Burke had taken the unilateral action of opening ACS in Florida and immediately reversed that decision at the prompting of White Cap. App. 24. White Cap threatened Meadow Burke with the loss of the dominant distribution platform in the market and demanded assurances from Meadow Burke that it would reverse its decision to sell to ACS. App. 26.

In exchange for keeping its position on the leading distribution network, Meadow Burke went to the offices of White Cap and "reassured" White Cap that it would not sell to ACS. App. 8. On the same day, Meadow Burke informed ACS that Meadow Burke would not supply any additional jobs for ACS in Florida after the completion of the initial one due to the "pressure" from Meadow Burke. Id. White Cap later bragged to the customer on that first ACS project that White Cap had sent ACS "packing." Id.

Instead of allowing ACS to take that compelling evidence of concerted action to the jury, the Eleventh Circuit weighed that abundant evidence of an agreement against rationalizations offered by White Cap and Meadow Burke after the fact. The Eleventh Circuit credited the uncorroborated testimony of a single witness from Meadow Burke that Meadow Burke wanted to incentivize the efforts of White Cap in promoting Meadow Burke. App. 21-22. Yet that is a reason why manufacturers and distributors enter exclusive distributor agreements, which are then analyzed under the rule of reason, in the first place. *Cont'l T. V., Inc. v. GTE*

Sylvania Inc., 433 U.S. 36, 55 (1977). The jury was not required to believe that was the reason why White Cap and Meadow Burke did *not* have an exclusive distribution agreement.

Regardless, a reasonable jury could return a verdict for ACS on the ultimate fact of the existence of concerted action between White Cap and Meadow Burke. Meadow Burke had unilaterally decided that it was in its interest to open ACS in Florida to distribute the Meadow Burke product line in that market. Meadow Burke abruptly reversed that decision at the behest of White Cap. By using its monopoly position in distribution, White Cap made it in the interest of Meadow Burke to terminate ACS in Florida.

Specifically, White Cap threatened to switch manufacturers and demanded and received assurances from Meadow Burke that it would only sell through White Cap in Florida. App. 6-8. Meadow Burke admitted it. App. 8. White Cap bragged about it. Id. at 8. The Eleventh Circuit acknowledged it. Id. at 23, 26.

Yet the Eleventh Circuit appeared to want nothing less than a confession in court from White Cap admitting the ultimate fact of an agreement between White Cap and Meadow Burke. That is not the law under Rule 56. It is tantamount to a violation of the right to trial by jury under the Seventh Amendment.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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