NO. 21-156

In the Supreme Court of the United States

AMERICAN CONTRACTORS SUPPLY, LLC,

Petitioner,

v.

HD SUPPLY CONSTRUCTION SUPPLY, LTD.,

Respondent.

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

BRIEF IN OPPOSITION FOR RESPONDENT HD SUPPLY CONSTRUCTION SUPPLY, LTD.

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QUESTION PRESENTED

Did the Eleventh Circuit diverge from this Court's precedent or that of any other circuit court in affirming the district court's grant of summary judgment to Respondent HD Supply Construction Supply, Ltd. ("White Cap") for Petitioner American Contractors Supply, LLC's ("ACS's") failure to adduce evidence tending to exclude the possibility of unilateral action by the manufacturer, Meadow Burke, that terminated ACS?

PARTIES TO THE PROCEEDINGS

White Cap adopts ACS's List of Parties to the Proceeding.

CORPORATE DISCLOSURE STATEMENT

White Cap's parent corporations and other entities include Construction Supply Holdings, LLC; Construction Supply Holdings II, LLC; White Cap Supply Holdings, LLC; White Cap HoldCo, LLC; White Cap Parent, LLC; CD&R White Cap Holdings, LP; and Construction Supply Investments, LLC.

White Cap is not a publicly traded company and no publicly traded corporation owns 10% or more of White Cap or any parent company.

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INTRODUCTION

In affirming the district court's grant of summary judgment for White Cap, the Eleventh Circuit followed nearly 40 years of precedent: this Court's, its own and that of every other regional circuit court of appeal. That precedent did not permit the appellate court to regard White Cap's assumed "threat" to its supplier Meadow Burke, or Meadow Burke's reaction to that threat by terminating White Cap's rival distributor ACS, as creating a genuine issue of material fact about whether White Cap and Meadow Burke agreed to terminate ACS. The Eleventh Circuit's decision creates no legal inconsistencies between the circuit courts for this Court to resolve; that decision, in fact, was compelled by case law common to all the regional circuit courts of appeal. This Court should deny ACS's petition for writ of certiorari.

OPINIONS BELOW

White Cap adopts ACS's statement of the opinions below.

JURISDICTIONAL STATEMENT

White Cap does not dispute this Court's jurisdiction over this case pursuant to 28 U.S.C. § 1254(1). White Cap does dispute that ACS has identified any "compelling reason" for this Court to issue a writ of certiorari pursuant to Sup. Ct. R. 10. The Court docketed Petitioner's Petition for Writ of Certiorari on August 4, 2021.

STATUTORY PROVISIONS INVOLVED

White Cap adopts ACS's list of statutory provisions involved.

COUNTERSTATEMENT OF THE CASE

White Cap accepts most of ACS's Statement of the Case. As required by Sup. Ct. Rule 15.2,[1] however, White Cap notes that ACS describes White Cap sales manager Doug Bartle as having "threatened to switch purchases to Dayton Superior if 'you need to support another dealer in Florida.'" Petition for Writ of Certiorari ("Petition") at 7 (citing App.6 & n.3). The citation does not support the assertion that this evidence was before the Eleventh Circuit.

[1] "In addition to presenting other arguments for denying the petition, the Petition in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted." Sup. Ct. R. 15.2.

REASONS FOR DENYING THE PETITION

This Court should deny ACS's petition for three reasons. First, the Eleventh Circuit correctly applied Federal Rule of Civil Procedure 56 in the decision below, by reviewing the evidence *de novo* and considering it in the light most favorable to ACS. Second, the Eleventh Circuit correctly followed this Court's guidance in declining to regard ambiguous evidence as creating a genuine issue of material fact regarding the alleged anticompetitive agreement between White Cap and Meadow Burke. Third, ACS failed to identify a genuine issue of material fact on this same issue by proffering any evidence tending to exclude the possibility of Meadow Burke's independent action.

I. THE ELEVENTH CIRCUIT CORRECTLY APPLIED RULE 56 IN AFFIRMING THE DISTRICT COURT'S ENTRY OF SUMMARY JUDGMENT FOR WHITE CAP.

ACS concedes that the Eleventh Circuit reviewed the district court's decision *de novo*. Petition at 9. ACS also concedes that the Eleventh Circuit viewed the evidence in the light most favorable to ACS,[2] by assuming the truth of evidence suggesting that:

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[2] The Eleventh Circuit did in three sentences abbreviate its restatement of the requirement to regard this evidence in the light most favorable to ACS. It referred to the need for ACS to "establish facts that exclude the possibility" of Meadow Burke's independent action, rather than to "offer evidence of facts that tend to exclude" that same possibility. App.26. It stated that "ACS failed to establish concerted action" rather than "ACS failed to adduce evidence tending to establish concerted action." App. 25. And it summarized that "[m]ere equipoise of the evidence does not establish an agreement" rather than "mere equipoise

- White Cap had over a 75% share of the "Florida Market;"
- Meadow Burke had over a 65% share of the "Florida Market;"
- "ACS saw an opportunity, perceiving a competitor to be faltering and not fulfilling customer needs;"
- White Cap pressured Meadow Burke not to support ACS on additional projects in Florida;
- After internal discussions at Meadow Burke, Meadow Burke "reassured" White Cap that apart from the initial project, Meadow Burke was not going to support ACS in the Florida market;
- Meadow Burke met with ACS's representatives to inform them of Meadow Burke's decision;
- Meadow Burke attributed its decision to "pressure" from White Cap; and
- Sometime later, a White Cap employee bragged that his company's pressure had successfully caused Meadow Burke to decide not to supply ACS in Florida.

Petition at 1-2, 9, 15 (citing App.4, 6-9, 11, 23-26).

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of inference from the evidence does not establish an agreement." App.14. These verbal shortcuts do not, however, demonstrate that the Eleventh Circuit failed to apply Federal Rule of Civil Procedure 56 correctly. The appellate court reviewed the evidence *de novo*, and interpreted it in the light most favorable to ACS to determine whether that evidence created a genuine issue of material fact. Rule 56 requires nothing more.

The Eleventh Circuit thus hewed to the standard required by this Court. *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986) (at summary judgment, "the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor") (emphasis supplied).

II. THE 11TH CIRCUIT CORRECTLY FOLLOWED THE *MONSANTO* PROHIBITION AGAINST INFERRING AN AGREEMENT FROM EVIDENCE THAT COULD SUGGEST EITHER AN AGREEMENT OR INDEPENDENT ACTION.

This Court first addressed the issue of "the standard of proof required to find a vertical [agreement] in violation of Section 1 of the Sherman Act" in *Monsanto Co. v. Spray-Right Serv. Corp.*, 465 U.S. 752, 755 (1984).[3] The appeal of that case concerned whether Spray-Right, the plaintiff, could survive a motion for directed verdict in favor of Monsanto "if [Spray-Right] shows that [Monsanto] terminated [Spray-Right] in response to or following complaints by other distributors." *Id.* at 759. The trial court held that Spray-Right could defeat such a motion based solely on that evidence, and the Seventh Circuit affirmed, which put the appellate court "into direct conflict with a number of other Courts of Appeals." *Id.*

Although ultimately affirming the appellate court's decision, this Court "reject[ed] the statement by the Court of Appeals . . . of the standard of proof required

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[3] This Court's decision in *Monsanto* considered a vertical price-fixing agreement. 465 U.S. at 757. This Court's later decision in *Business Electronics Corp. v. Sharp Electronics Corp.* applied the same rule to non-price vertical agreements, such as those involving a distributor's termination. 485 U.S. 717, 726 (1988).

to submit a case to the jury." 465 U.S. at 759. "Something more than evidence of complaints" is needed, this Court held; "there must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor." *Id.* at 764, 768 (emphasis supplied). This Court recognized the economic consequences of allowing "highly ambiguous evidence" to support an inference of agreement, which included:

- "a considerable danger" that the rights of businesses to choose their customers "will be seriously eroded;"
- "an irrational dislocation in the market" that would ensue from barring "a manufacturer from acting solely because the information upon which it acts originated as a price complaint would create an irrational dislocation in the market;" and
- "inhibit[ing] management's exercise of independent business judgment."

Monsanto, 465 U.S. at 763-64 (citing *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *U.S. v. Colgate & Co.*, 250 U.S. 300, 307 (1919)). *See also Business Elec. v. Sharp Elec. Corp.*, 485 U.S. 717, 726 (1988) (affirming circuit court's reversal and remand for new trial).

In articulating this standard, the Court has acknowledged the ambiguous nature of evidence like "complaints" or threats, which could equally imply an agreement or independent action. *See Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (describing this evidence "as consistent with permissible competition as with illegal

conspiracy"). This Court has nevertheless forbidden the inference of an agreement solely from such "highly ambiguous" evidence. *Monsanto*, 465 U.S. at 763. Lower courts must require "something more." *Id.* at 764.

This Court's decision in *Monsanto* thus did not lower the summary judgment standard demanded by Rule 56. Lower courts must review the evidence *de novo*, and interpret it in the light most favorable to the non-movant. Against this procedural background, however, antitrust law limits "the range of permissible inferences from ambiguous evidence." *Matsushita*, 475 U.S. at 588 (citing *Monsanto*, 465 U.S. at 764 and *First Nat'l Bank of Ariz. v. Cities Service Co.*, 391 U.S. 253, 280 (1968)).

At "the first opportunity . . . to apply that standard," the Eleventh Circuit did so faithfully. *Helicopter Support Systems, Inc. v. Hughes Helicopter, Inc.*, 818 F.2d 1530, 1532 (11th Cir. 1987). In this case the appellate court reversed the summary judgment granted to defendant Hughes Helicopter because the district court had ignored evidence that went beyond "[m]ere complaints from other competing distributors" to include "positive evidence which tend[ed] to exclude the possibility of unilateral action."[4] *Id.* at 1534. The Eleventh Circuit acknowledged in that case, as had this Court before it, that ambiguous evidence like "mere complaints" could, by its very nature, arguably support inferences of concerted or independent action. *Id.* at

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[4] This evidence included "not merely a complaint and corrective action," but requests from the manufacturer that the distributor report "any future violation," the distributor's "thanks" for the decision, and a written distributorship agreement setting out "suggested price lists and schedule of discounts." 818 F.2d at 1536.

1533 ("This standard [required in *Monsanto*] might seem to fly in the face of the general rule . . . , since it is at least arguable that a jury might reasonably infer such an agreement from the existence of complaints by a distributor and a manufacturer's response to those complaints by terminating the offending distributor."). The Eleventh Circuit nevertheless recognized that the *Monsanto* decision's "stringent standard of proof" required evidence that "tends to exclude"—rather than "arguably implies"—"the possibility of independent action." *Id*. at 1535.[5]

At least three circuit courts have acknowledged that the 11th Circuit's approach comports with theirs. *Euromodas, Inc. v. Zanella, Ltd.*, 368 F.3d 11, 20 (1st Cir. 2004);[6] *Lovett v. GM*, 998 F.2d 575, 578 (8th Cir. 1993); *The Jeanery, Inc. v. James Jeans*, 849 F.2d 1148, 1155 n.5 (9th Cir. 1988). At least four more circuit

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[5] The Eleventh Circuit adopted a two-step inquiry in *Helicopter Support*, based on both *Monsanto* and *Matsushita*. 818 F.2d at 1534. Because this appeal does not implicate the first of those two steps—"whether the conspiracy which he alleges is, objectively, an economically reasonable one"—White Cap does not address that first step here.

[6] The First Circuit did distinguish "idiosyncratic facts" in *Helicopter Systems* that required the 11th Circuit to vacate summary judgment for the defendants: "proof that the manufacturer terminated a price-cutter, informed the complaining distributor of the termination, and requested that it advise the manufacturer if it learned about any further price-cutters," a response by the "complaining distributor in a way that the court believed reasonably could be viewed as an agreement to report future violations," and language in the surviving distributorship agreement itself "that reasonably could be read as fixing the resale price of the goods." *Euromodas*, 368 F.3d at 20 (citing *Helicopter Systems*, 818 F.2d at 1535).

courts have reached the same conclusion about the need to prove more than distributor terminations prompted by complaints. *Abraham v. Intermountain Healthcare, Inc.*, 461 F.2d 1249, 1259 (10th Cir. 2006) (affirming summary judgment because "a manufacturer's exclusion of a buyer-distributor in response to another buyer-distributor's complaints is insufficient as a matter of law to establish conspiracy"); *Apartments Nationwide v. Harmon Pub. Co.*, 78 F.2d 584 (6th Cir. 1996) (per curiam) (same); *Viazis v. Amer. Ass'n of Orthodontists*, 314 F.3d 758, 764 (5th Cir. 2002) (same); *The Garment Dist., Inc. v. Belk Store Svcs., Inc.*, 799 F.2d 905, 909 (4th Cir. 1986) (affirming judgment on directed verdict).

The Eleventh Circuit used this broadly accepted test in deciding the case below. It recognized, consistent with *Monsanto* and *Helicopter Support*, that by its nature ambiguous evidence can suggest either concerted or independent action. App.22-23 ("Although the foregoing evidence raises an inference that that there might have been an agreement . . . it is evidence of 'conduct which is as equally consistent with permissible competition . . . .'"), 26 ("ACS has merely adduced some evidence of anticompetitive conduct on the part of Meadow Burke").[7] As this Court's decision in *Monsanto*

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[7] Other circuit courts have made the same point about ambiguous evidence of an agreement. *Parkway Gallery Furniture, Inc. v. Kittinger/ Pennsylvania House Group, Inc.*, 878 F.2d 801, 806 (4th Cir. 1989) ("Any evidentiary fact may support a wide range of inferences, but the discrete inferences necessary under *Monsanto* to support a conspiracy theory simply do not flow" from ambiguous evidence); *In re Dairy Farmers of America, Inc. Cheese Antitrust Litigation*, 801 F.3d 758, 763 (7th Cir. 2015) (affirming grant of summary judgment because "Appellants' core evidence, communications between employees at Schreiber and DFA, could be

demanded, the Eleventh Circuit appropriately required more than "evidence of mere complaints from a competitor to the manufacturer . . . to establish a § 1 conspiracy." App.14-15 (citing *Helicopter*, 818 F.2d at 1534; *DeLong Equip. Co. v. Washington Mills Abrasive Co.*, 887 F.2d 1499, 1509 (11th Cir. 1989)). Absent any such additional evidence, the appellate court affirmed the district court's grant of summary judgment "[b]ecause the evidence in this case is at least 'as equally consistent with permissible competition as it is with an illegal conspiracy.'" App.2 (citing *Helicopter*, 818 F.2d at 1533), 13-14 (citing *Monsanto*, 465 U.S. at 764; *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554 (2007); *Matsushita*, 475 U.S. 574).

III. THE 11TH CIRCUIT CORRECTLY RECOGNIZED THAT ACS HAD FAILED TO PROFFER ANY EVIDENCE TENDING TO EXCLUDE THE POSSIBILITY OF MEADOW BURKE'S INDEPENDENT ACTION.

ACS criticizes the Eleventh Circuit for failing to permit the inference of an anticompetitive agreement between White Cap and Meadow Burke from evidence that White Cap complained about ACS, and Meadow Burke terminated ACS as a result. *See* Petition at 1-2, 15 (citing App.6-9, 23, 24, 26). In sum, ACS describes as "error" the Eleventh Circuit's "finding that a change in manufacturer policy in response to the threat of the loss of a distribution platform by [White Cap] tended to show independent rather than concerted action." Petition at 2.

ACS is wrong in at least two ways: one specific to this case, one as a general matter of antitrust law.

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understood as a part of a legitimate business relationship as readily as they could be understood as a part of a conspiracy.").

First, in this case the Eleventh Circuit did not find that this evidence "tended to show independent rather than concerted action." Petition at 2. Consistent with this Court's precedent and its interpretation in the circuit courts, the appellate court found that such evidence could tend to show either. App.12 ("we hold that ACS's evidence is deficient" because the alleged conduct "is equally consistent with independent conduct as it is with concerted action.") Second, and again with this Court and the other circuit courts, the Eleventh Circuit correctly required of ACS additional evidence beyond that of "a change in manufacturer policy in response to the threat" by White Cap. *See* Petition at 2. The Eleventh Circuit insisted on "something more": evidence that tended to exclude the possibility of Meadow Burke's independent action. *Monsanto*, 465 U.S. at 764; App.13-14 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007); *Matsushita*, 475 U.S. 574 (1986); *Helicopter*, 818 F.2d at 1534; *Quality Auto Painting of Roselle, Inc. v. State Farm Indemn. Co.*, 917 F.3d 1249, 1267 (11th Cir. 2019); *City of Tuscaloosa v. Harcros Chem., Inc.*, 158 F.2d 548, 569 (11th Cir. 1998)).[8]

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[8] As ACS concedes, other circuit courts have similarly required antitrust plaintiffs to "provide specific factual support for . . . . allegations of conspiracy tending to show that the defendant was not acting independently." *See* Petition at 12-13 (citing *Mkt. Force Inc. v. Wauwatosa Realty Co.*, 906 F.2d 1167, 1171 (7th Cir. 1990); *Gibson v. Greater Park City Co.*, 818 F.2d 722, 724 (10th Cir. 1987); *Apex Oil Co. v. DiMauro*, 822 F.2d 246 (2d Cir. 1987); *Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676 (9th Cir. 1985); *White v. R.M. Packer Co.*, 635 F.3d 571, 577 (1st Cir. 2011); *Petruzzi's IGA Supermarkets v. Darling-Delaware Co.*, 998 F.2d 1224, 1232 (3d Cir. 1993)).

In searching the record for that evidence, the Eleventh Circuit recognized that the evidence ACS adduced of White Cap's "pressure" and "threats" followed by Meadow Burke's response, did not suffice. App.15 (citing *Helicopter*, 818 F.2d at 1534 ("Mere complaints from other competing distributors are not sufficient . . . .")); *see also DeLong*, 887 F.2d at 1509; *Dunnivant v. Bi-State Auto Parts*, 851 F.2d 1575, 1582 (11th Cir. 1988) (affirming summary judgment); *U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 1001-02 (11th Cir. 1993) (same). The Eleventh Circuit also correctly concluded that evidence of Meadow Burke acting in its "best interest" tended not to exclude unilateral action either. App.25; *see also Twombly*, 550 U.S. at 554 (allegations of conduct in companies' individual self-interests do not raise plausible claims of agreement). In the absence of any evidence tending to exclude Meadow Burke's unilateral action, the Eleventh Circuit had no choice but to rule as it did.

CONCLUSION

Entirely consistent with this Court's precedent, its own case law, and that of the other regional circuit courts, the Eleventh Circuit declined to infer an agreement between Meadow Burke and White Cap from ambiguous evidence equally probative of Meadow Burke's independent action. ACS was unable—then or now—to provide anything more. The Eleventh Circuit's affirmance of the trial court's grant of summary judgment simply recognized these facts, and adhered to decisions going back decades. ACS has failed to identify any aspect of the Eleventh Circuit's decision "in conflict with the decision of another United States court of appeals." *See* Sup. Ct. R. 10(a). This Court should therefore deny ACS's petition for a writ of certiorari.

Respectfully submitted,

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