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PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-2004

TITLE MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., ET AL., Petitioners V. ZENITH RADIO CORPORATION, ET AL.

PLACE Washington, D. C.

DATE November 12, 1985

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IN THE SUPREME COURT OF THE UNITED STATES

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MATSUSHITA ELECTRIC INDUSTRIAL CO. LTD., ET AL. :

Petitioners, :

V. : No. 83-2004

ZENITH RADIO CORPORATION, ET AL. :

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Washington, D.C.

Tuesday, November 12, 1985

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:47 o'clock p.m.

APPEARANCES:

DONALD J. ZOELLER, ESQ., New York, New York, on behalf of the petitioners.

CHARLES F. RULE, Deputy Assistant Attorney General, Antitrust Division, Department of Justice, Washington, D.C. (Pro Hac Vice), for United States, as amicus curiae, in support of the petitioners.

EDWIN P. ROME, ESQ., Philadelphia, Pennsylvania, on behalf of the respondents.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments last this afternoon in Matsushita Electric Industrial, Co., Ltd., et al. v. Zenith Radio Corporation, et al. Mr. Zoeller, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF DONALD J. ZOELLER, ESQ.,

ON BEHALF OF PETITIONERS

MR. ZOELLER: Thank you, Mr. Chief Justice, and may it please the Court:

This appeal involves the circumstances under which courts may permit factfinders to infer from a mix of evidence that there has been a conspiracy in violation of the United States antitrust laws.

In this case, the district court, after carefully reviewing and analyzing the mountain of evidence that had been gathered by the plaintiffs during the pretrial phase, determined that that evidence could not support a rational inference that the defendants had entered into and carried out the alleged conspiracy to establish low and predatory prices in the United States market.

The court accordingly granted summary judgment. The court of appeals reversed and said a trial was necessary.

In reversing, the court of appeals made two fundamental errors. First, it failed to follow and carry out this Court's inference standards as enunciated in the case of First National City of Arizona v. Cities Service.

As a result of that error, the court was led to authorize a factfinder to speculate that pricing conduct in the United States market, indistinguishable from the kind of vigorous pricing competition fostered by the antitrust laws and beneficial to consumers, that is low prices for the purpose of getting business, was actually not competition as it appeared to be but was conspiracy.

In reversing and finding summary judgment inappropriate, the court of appeals also held and made basic reliance on its conclusion that a factfinder could incur -- infer, excuse me, that conduct by the defendants which their government ordered them and said it ordered them to enter into in furtherance of a Japanese governmental program was part of a conspiracy that violated our laws.

Now, these two errors not only call for reversal in this case but established a dangerous precedent that this Court should deal with.

First of all, they are dangerous from the

standpoint of antitrust policy. Permitting an inference of conspiracy to be drawn from conduct indistinguishable from competition can chill the vigorous competition that the antitrust laws seek to foster in the interest of American consumers.

Secondly, this precedent is dangerous from the standpoint of judicial administration. District -- carving out and fashioning exceptions to this Court's inference standards in order to turn down motions for summary judgment can cause district courts to say all the monumental effort that it takes to tame and control a case of the size of this case is simply not worth it; that it will simply be frustrated by the courts above.

And this decision is dangerous from the standpoint of the relationship of the United States to its most valued trading partners.

I would like to deal first with the inference of conspiracy question. Now, the court of appeals held that a factfinder could infer from the record in this case that the pricing activities of the defendants in the United States market were not individual competitive activites, but were coordinated and orchestrated pursuant to some common plan or some agreement.

For such an inference to be rational, however, the record should show there should be evidence of

uniform prices suggestive of conspiracy, or at the very minimum that those prices showed some discernible pattern in the United States market.

There is no such evidence in this case. The plaintiffs don't even pretend there is such evidence in this case. The most that the evidence in this case shows, such pricing evidence as there is, is that the prices by the Japanese defendants in this market were, as the district court stated, all over the lot; that they ran at every price level in the United States market from the highest price levels on down; that they were so varied that the plaintiffs could describe the allegedly conspiratorial conduct only in terms of competition. They say the Japanese defendants agreed to charge prices necessary to get the sale. So does every competitor.

The court of appeals said that the jury or a factfinder could infer that these pricing activities were predatory and that they were part of an overall scheme under which supposedly high prices and profits in the Japanese market could be dumped into the United States market for the purpose of supporting low prices here; for the ultimate purpose of jointly monopolizing the United States market.

Now, for such an inference to be rational, the

plaintiffs should be able to produce some evidence that there was a purpose to predation; that ultimately those who paid the price of predation could recover their predatory losses through monopoly profits at some foreseeable point where it made some sense.

They should also have some evidence that those smaller Japanese competitors, those who had smaller shares of the United States market, had a mechanism to share the burdens and benefit of predation at the one hand and monopolization at the other.

Far from showing that, the record in this case is entirely to the contrary. The undisputed facts of this case are that from the beginning of the alleged period of conspiracy when these companies entered the United States market with zero market shares, on through the roughly 20 years covered by this case, the two market leaders in the United States, Zenith and RCA, remained the two market leaders in the United States; lost none of their market shares.

And there is no evidence of any high barriers to entry in this market. It was a highly competitive market; therefore, where could an inference be drawn that predation would make any sense, that there could ever be a recoupment. The plaintiffs don't address themselves to it. The court of appeals did not address

itself to it.

There is no evidence whatever of a sharing mechanism among these companies.

Thus, the undisputed facts of this case show that the pricing activities of the defendants in the United States are entirely indistinguishable from normal pricing activities by competitors, and that there is no basis for an inference of predatory purpose behind their activities.

QUESTION: Mr. Zoeller, in your view, is the evidence about what happened in the Japanese market entirely irrelevant?

MR. ZOELLER: Yes, Your Honor, it is entirely irrelevant.

QUESTION: Is the evidence about sharing the figures on production and inventories entirely irrelevant?

MR. ZOELLER: That evidence has to do with sharing figures on production and inventory in the Japanese, as to the Japanese market. It is entirely irrelevant --

QUESTION: I thought the production figures showed that they produced much more than they consumed in Japan.

MR. ZOELLER: Your Honor, as a matter of fact,

the experts that the defendants rely upon say -- didn't say that they began by producing much more than they consume. They said that as time went on, they built plants to produce more, which doesn't suggest a predatory purpose, Your Honor, but it suggests that there is competition taking place, and they are attempting now to satisfy increasing shares in the United States through investment in new plant and facilities; not that they had it on their hands and had to dump itself.

QUESTION: Does the evidence explain why they exchanged this information about production and inventory?

MR. ZOELLER: They were members of trade associations, Your Honor, and they exchange a lot of kinds of information that people do in trade associations. There is some evidence that there was allegedly collusive activities in the Japanese market designed to hold up the prices of the Japanese market, but there is no evidence that would show any rational, logical or natural connection between that and activities in the United States.

And on this record of the type of activities that were engaged in in the United States, such a connection would not make sense.

What really happened here is that when it came to the critical, Your Honor, when it came to the critical question of what was happening in the United States market, whether the activities in the United States market showed the signs of conspiracy, the court of appeals said it did not have to follow this Court's inference standards for that purpose.

The court of appeals said that the fact that it saw some evidence of some collusion in Japan and that it saw the Japanese companies engaging in their government's export program, which would have had a natural tendency to hold up prices in the United States, not drive them down, but since it saw some collusion someplace, it said all it had to do then as far as the critical question of what was going on in the United States market is see some "circumstantial evidence having some tendency to suggest that other kinds of conduct of concert of action may have occurred."

And that's at page 165a of the record, and there the court, in deciding the critical question of whether the activities in the United States were beneficial to American consumers or were injurious, collusive activities, said we look at it in terms of possibilities, not what flows naturally and logically from the record, as this Court required in Cities

Service.

And to make that point unmistakably clear, the court expressly said that a line of Third Circuit cases based on Cities Service did not apply and that the court did not have to follow the usual rules of the inference-drawing process.

QUESTION: Let me just -- You focus our attention on that page. The court says direct evidence of some kinds of concert of action like price fixing in Japan may be circumstancial evidence of a broader conspiracy.

Do you agree or disagree with that statement of law?

MR. ZOELLER: Your Honor, under some circumstances they might be, but on the record of this case there's no basis to suggest that they were. Then, in other words, what the court was really saying, and it's the point I addressed earlier, that the pricing activities in the Japanese market were designed to create profits that could be then poured into the United States market to assume losses.

That is a design of predatory intent, but on this record with 20 years having gone by and no opportunity to recoup and no possibility of a rational inference that recoupment could take place in the near

future, such an inference would not be appropriate. So, the relationship was not shown in this case.

Those activities did not constitute circumstantial evidence of a U.S. pricing conspiracy in this case. The proof of the putting, if the court had looked at it from the standpoint of the United States market, the proof of the putting is that by the plaintiffs' own theory, for 20 unbroken years all of the pricing activities of the Japanese defendants in the American market were beneficial to American consumers, because it is the plaintiffs' contention that those prices were always low; that they brought down pricing competition in the United States market.

But at the end of the period the two American market leaders are still the American market leaders with no loss of market share and no basis for a rational suggestion that that condition would change at any time in the foreseeable future.

On the basis of that, to suggest predatory conspiracy when you see none of its footprints in the United States market we say is a wrong reading of the law of inference and a dangerous standpoint, because now the United States antitrust laws are used by those who wish to protect themselves from competition as a way of blocking competition.

QUESTION: Mr. Zoeller, do you think the Cities Service case laid down a rule of inference drawing through summary judgment that's peculiar to antitrust law, or does it apply across the board in summary judgment?

MR. ZOELLER: Well, I would say, Your Honor, it is not peculiar. It applies basic the principles of inference drawing, but it does have cognizance, I believe, of another principle as well and that is, in addition to the fact that it's wrong and inappropriate to draw an inference of -- to draw an inference unless that inference flows naturally and logically from the facts before you, it is also dangerous, and I think the Cities Service case recognized it, from the standpoint of antitrust policy to take conduct that could either be competition or could possibly be conspiracy and treat it as conspiracy because, as this Court warned in Monsanto, there is a danger of intruding on normal competitive activity.

So, I think both policies coalesce in that case.

QUESTION: Well, to that extent then, if you just had an ordinary action for fraud and not antitrust, I suppose you would say Cities Service didn't apply because there's no harm in showing fraud.

MR. ZOELLER: That might be possibly so, but to the extent that Cities Service also says that the inference of conspiracy must be natural and logical, it applies. But the same broader policy that the record must be rationally explainable in terms of conspiracy than in terms of inference, which is the Cities Service standard as we read it, would not necessarily have to apply in a fraud case.

The court of appeals committed a second fundamental error when it failed to apply the sovereign compulsion and active state defenses to the conduct of the Japanese defendants in following their government's export program.

The Japanese government has said in a clear, detailed, explicit and unequivocal statement and in a note verbal that it compelled the conduct in question. That should be recognized for reasons, among others, that the defense is supported in this case by the American government, by the executive branch of this government. It is appropriate because the conduct, the program by the Japanese government is a fundamental government program, the control and regulation of its own exports; because it was not designed by the Japanese government to be harmful to the United States but to avoid trade frictions with this country.

QUESTION: Is it logically possible that you could win on the antitrust case and lose on the dumping part of the case?

MR. ZOELLER: In theory it is, Your Honor, but the facts of the case show that there would be no basis to find a predatory intent as we see it, absent the evidence of conspiracy. But as a matter of theory, there are individual claims --

QUESTION: Then if the claim of government authorization of whatever conduct is alleged, if that is sustained, it also undermines the dumping case, is that it?

MR. ZOELLER: Not necessarily, Your Honor, in that sense. It undermines any conspiratorial claim, and therefore it undermines it in the sense that it destroys the evidence of predatory intent. But if there were low prices not compelled by the Japanese government, we don't intend that a finding of sovereign compulsion would bar that.

QUESTION: Well, the dumping case under the court of appeals judgment would still be tried, too, wouldn't it?

MR. ZOELLER: Yes, it would, Your Honor. If there were anything to try --

QUESTION: But you think that part of it

should be reversed, too?

MR. ZOELLER: I think it should, Your Honor, because the failure of the conspiracy evidence would destroy any evidence of predatory intent under the record of this case.

QUESTION: Do you think your questions presented, your petition, raises anything about the dumping charges?

MR. ZOELLER: It does not directly, Judge Rehnquist. What it does is it indicates how the conspiracy claim must fail, and I think we have shown in our arguments that that should cause the dumping claims to fail as well.

QUESTION: It would any joint predatory -- it would undermine any finding of a joint predatory intent.

MR. ZOELLER: Yes, and we don't see any other evidence in this record of predatory intent, Your Honor, so that I think the court of appeals relied upon the conspiracy in showing any predatory intent joint or individual, and that is why they dismissed the dumping claims jointly and individually as to the defendant Sony, for example.

If I may, Mr. Chief Justice, I would like to reserve the rest of my time for rebuttal.

CHIEF JUSTICE BURGER: Mr. Rule?

ORAL ARGUMENT OF CHARLES F. RULE, ESQ.,
AMICUS CURIAE ON BEHALF OF PETITIONERS

MR. RULE: Mr. Chief Justice, and may it please the Court:

This case, we believe, is an unfortunate example of the distortion of the antitrust laws by competitors to thwart competition; precisely the sort of case that the rules of Cities Service were created for.

It's important to note and remember the background of this case in our view. After nine years of discovery, seven different judges, hundreds of depositions and literally hundreds of thousands of documents, district Judge Becker took several months to sift through the evidence very carefully and wrote a 430 page opinion granting the petitioners' motion for summary judgment on the ground that there was no reasonable inference that could be drawn from all the evidence of a low price conspiracy that injured the respondents.

QUESTION: Mr. Rule, perhaps I should have asked your opponent, but do I correctly recall that the district judge held a great deal of evidence inadmissible that the court of appeals said was admissible, so the court of appeals decided the case on a different record?

MR. RULE: The court of appeals did reverse Judge Becker as to a number of evidentiary motions; however, Judge --

QUESTION: But most of its opinion deals with evidentiary ruling.

MR. RULE: Yes, sir. Judge Becker, though, in deciding the summary judgment motions, in effect assumed, arguendo, that certain evidence was admissible. Moreover, when you look at the evidence that the court of appeals relied on in reversing Judge Becker, and when you distill it down to its essence, essentially you have four facts that the court of appeals relied on.

The respondents have characterized those facts in various ways to make the list look a little broader and bigger, but the fact is there are four facts. And because there was direct evidence as to at least two of those facts, the court felt that it didn't have to apply the rules of inference drawing of Cities Service.

However, I think when you look at those four facts, either individually or together, the four facts are not even probative circumstantial evidence of an agreement to charge low prices in the United States that injured the respondents, much less direct evidence of such an agreement; therefore, Cities Services requires

summary judgment.

Those four facts are essentially these. First, there was an agreement, let's assume, to stabilize price in a protected Japanese market; that is, the Japanese got together, the petitioners in this case, to fix prices, hold them up at higher levels. They were protected from competition from foreign parties. Now, that very well have injured Japanese consumers, but no one, including the respondents, would argue that that's an American antitrust violation.

Next, the court relied on Japanese mandated export control arrangements and so-called check price agreements, which fixed the minimum export prices below which the petitioners were not to sell in the United States, and the so-called five company rule, which established that the petitioners could only sell to five customers in the United States, although one of those customers could be their subsidiary who could in turn resell to almost anyone in this country.

If these agreements were effective at all, and I think that even respondents recognize that they were less effective than the Japanese would have liked, the effect of those agreements was simply to keep prices higher in the United States to, in effect, reduce the competitive vigor of Japanese manufacturers in this

market, and while that may be objectionable under the antitrust laws, it certainly doesn't create the sort of antitrust violation that the respondents have alleged, in that indeed they must prove to establish injury that they are entitled to claim under the antitrust laws.

Moreover, as we pointed out in our brief --

QUESTION: Have you reached all four facts?

MR. RULE: No. There's --

QUESTION: Is there more than one?

MR. RULE: Two more, actually. I view the mandated export program as, in effect, one factor, although there may have been various --

QUESTION: Along with the five companies.

MR. RULE: Right, which was part of that program, and those agreements were also compelled, in effect, by the government of Japan as it's indicated twice to the court.

The third fact is the secret rebates that were not disclosed by petitioners. In effect, the petitioners engaged in, so the court said, more than 25 different rebating schemes that resulted in prices varying from the very lowest to the very highest.

Again, this is more indicative of individuals evading regulatory constraints that hampered their individual efforts to try to compete in the marketplace

and sell at the lowest price possible.

The final fact was the allegations that the petitioners sold at dumping prices in the United States. Again, the petitioners dispute that. Even assuming that it's true, it's to be expected. You had a Japanese market that was protected, where there was a price stabilization agreement; therefore, prices were artificially high. In the United States, you had a competitive environment; no protected environment. It's inevitable that prices would be lower in the United States than Japan. It simply proves nothing.

Taken together, the inference is overwhelming that the evidence is indicative of individual competitors responding unilaterally and vigorously to market forces; in effect, their new entrance, the petitioners, through the relevant time, trying to make a place in the market by competing on the basis of price, trying to develop customer loyalty, that sort of thing.

Now, that may have injured the respondents, but that's competition, and competition is what the antitrust laws are designed to promote, not to thwart.

We believe that the Third Circuit's decision offers strong encouragement, if it's upheld, to beleguered competitors seeking protection from the vigors of competition, and we think that's precisely the

wrong thing that the antitrust laws should do.

The threat of treble damages and never-ending litigation such as this is precisely the sort of thing that can, in effect, undermine the competitive enthusiasm of very efficient firms and result in the perversion of prices and competition that the antitrust laws were designed to prevent.

We are very much concerned, the United States government, about this case and about the abuse it pretends for the law. To the extent the protection of domestic industries from foreign competition is necessary, there is an extensive body of trade laws with safeguards to do precisely that.

It seems to us that unless the courts are willing and able to enter summary judgment in suits such as this, respect for the antitrust laws at home and abroad will be seriously eroded.

For all these reasons, including as I have indicated the fact that we believe the statements, two statements, by the Japanese government, that they compelled the export control arrangements, the five company rule and the check price agreement, and that therefore evidences to those agreements cannot be the basis of liability against the petitioners, that for all these reasons the Court should reverse the Third Circuit

and reinstate the summary judgment on dismissing respondents' antitrust claims.

Thank you.

CHIEF JUSTICE BURGER: Mr. Rome?

ORAL ARGUMENT OF EDWIN P. ROME, ESQ.,

ON BEHALF OF RESPONDENT

MR. ROME: Mr. Chief Justice, may it please the Court:

At the argument below which lasted two full days, counsel for petitioners here said that what the court had to do was to look at the record. That's what the case is all about. The court of appeals did exactly that over a period of fourteen months, examining a record of some 18,000 pages, as its lengthy opinion shows in detail, and decided unanimously that there are disputed issues of material fact which preclude the grant of summary judgment to petitioners here.

The court of appeals said that respondents are entitled to have a trial on the merits. After 12 years of the most arduous effort in which we had to overcome every possible and conceivable defensive tactic, the court of appeals reached its decision after reversing most of the evidentiary rulings of the district court and after a careful consideration of the restated evidentiary record, much of which came from the files of

the petitioners themselves.

In doing so, the court of appeals applied the appropriate standards of sufficiency of evidence of a Sherman Act conspiracy and correctly drew all reasonable inferences in favor of respondents who were the opponents of the summary judgment motions.

In fact, the court below tested the respondents' evidence by an unusally stringent standard under Rule 56 of the Federal Rules. Thus, the court of appeals ignored the fact that petitioners' summary judgment motions were inadequately based, in that on their own application to the district court they had been relieved from filing their final pretrial statement setting forth their view of the evidence in the record.

Under the normal summary judgment procedures, this would alone have been sufficient to require their motions to be denied. Instead, the court tested the sufficiency of the respondents' evidence, sifted through the massive factual record for the 14 months, and upheld unanimously the sufficiency of the evidence.

In addition, respondents' unrebutted expert economic reports evidence analyzing the admissible evidence and concluding that it pointed only to collusion is dispositive, we respectfully submit, on summary judgment.

Now, petitioners argue that the concept of sovereign compulsion insulates them from liability for the wrongful acts done in the United States which restraied the interstate and foreign commerce of the United States. This, with great respect for my friends, is a false issue belatedly raised and is based on an obvious misinterpretation of what the court of appeals said and did.

The Solicitor General, in his brief, acknowledges and concedes that sovereign compulsion is an affirmative defense, yet it was not raised by petitioners in their answers to the complaints with the exception of MELKO, which posed it in the context of questioning subject matter jurisdiction.

But both the district court and the court of appeals have upheld subject matter jurisdiction, which holdings are not questioned in this Court. Sovereign compulsion was not discussed by the district court and was not briefed or argued in the court of appeals, again except by MELKO in the context of a question as to subject matter jurisdiction.

In fact, counsel for petitioners, my friend here, told the court of appeals that sovereign compulsion was of no importance on the appeal and was not being pressed by petitioners. The court of appeals

in its decision cited specific reasons why summary judgment on the ground of sovereign compulsion was not possible, the most important being that petitioners simply did not do what they say the Ministry of International Trade and Industry in Japan directed them to do.

And that is unquestionably the fact, because MITI did not direct the petitioners to dump or to lie to the U.S. Customs on the thousands of entry documents about their prices in the United States, or to lie to the U.S. Treasury about their prices in their responses to the government proceedings and to the Antidumping Act of 1921, or to sell their products in the United States below the so-called minimum or check prices, or to pay millions of dollars in so-called difference money in a myriad of secret ways in the United States.

Moreover, there simply cannot be compulsion since, under the very Japanese export and import trading act on which my friends rely, petitioners had the right to withdraw from the very agreements that are here in evidence, which right to withdraw could not, under the Japanese statute, be unduly restricted.

That it was intentional on their part and not directed or compelled by MITI is evidenced by the fact that it is admitted that the petitioners continued their

course of conduct after there was not a renewal of the agreements and rules in 1973.

QUESTION: Mr. Rome?

MR. ROME: Sir?

QUESTION: There's a certain tendency, I think, on the part of your briefs. They're going to pass in the night; namely, yours and your opponents'.

In their -- in your opponents' description of your case, they say that respondents alleged that from the mid-50s to at least 1977, you claimed seven Japanese television manufacturers and 17 other named defendants participated in a low price export conspiracy to destroy their competitors and take over the U.S. market for television receivers.

Now, is that a reasonably accurate description of your claim?

MR. ROME: Yes, sir. The reason being, Mr. Justice Rehnquist, is that the entire evidentiary record has to be looked at as an entirety without fragmentation, and what we were charging here is a conspiracy in restraint of trade and a conspiracy to monopolize which manifested itself in dumping in the United States.

There must not, we respectfully suggest, be an ignoring of what happened in the Japanese market, and

when that is examined as a unitary course of conduct, we then find that there were high prices admittedly charged in Japan which indeed did enable the penetration of the U.S. market to be undertaken at a lesser cost than would otherwise be the case.

QUESTION: Is it a necessary element of your claim that eventually these people would have to recoup their losses?

MR. ROME: No, sir. That is a completely contention advanced by my friends, because in actuality it ignores the fact of what was occurring in the Japanese market where they were in a closed market that no U.S. competitor could enter --

QUESTION: But how does that bear on a claim of the American antitrust law?

MR. ROME: Because, sir, if it had an impact on the interstate and foreign commerce of the United States and is to be considered as part of the unitary course of conduct, then indeed it must be considered as the court of appeals held below.

QUESTION: Well, but supposing your evidence of what happened in this country shows nothing more than that these people constantly lowered their prices and met competition and tried to compete so heavily as to become the only people and the only suppliers in the

American market?

Now, if that proof -- if there's nothing more than that, how can showing something that happened in the Japanese market fortify that case?

MR. ROME: But what they did, sir, was as the result of collusion. It is admitted by my friends that there was indeed collusion in the Japanese market. That conduct there was found to have violated even Japanese law, and then what happened here in the United States was not just the minimum prices that are referred to in these agreements, but in actuality they continued predation because they were charging actual prices that were significantly lower in the United States, with all of them knowing that those prices were lower --

QUESTION: Well, what was their motive?

MR. ROME: Their motive, indeed, Your Honor, was to take control, as happened, of the U.S. market for consumer electronic products, because -- well, my friend says that the two leaders are still here, RCA and Zenith.

There had been, initially over 20 companies in the U.S. market, and only two are now left, and those two have suffered losses so that while they have managed to survive despite the losses, they have indeed ended up taking over the U.S. market with more than 50 percent of --

QUESTION: But surely they didn't take over the U.S. market with the intent to just continue dumping and charging low prices, did they?

MR. ROME: Sir, they have been doing that all of this time, because the prices are in fact dumping prices, as has been found by the expert testimony which is unrebutted; and moreover, their losses, which they admittedly suffered in the United States, were protected by the high prices that they were getting in Japan, and that is the very essence of dumping --

QUESTION: But this is --

MR. ROME: price discrimination in the two markets.

QUESTION: Does that state a claim under the antitrust laws?

MR. ROME: Oh, yes, sir, because it is a restraint of trade and an attempt to monopolize. We do, indeed, contend that it violates the antitrust laws as well as the separate Antidumping Act of 1960, which issue is not presently before Your Honors.

QUESTION: Were the American companies selling in competition with the Japanese in Japan?

MR. ROME: No, sir. Zenith attempted, Your Honor, Motorola attempted, and were unable to do so. It is admitted on this record that the Japanese market was

closed.

Excuse, me, sir.

QUESTION: If Japan had these inflated prices, couldn't the American producers have returned the compliments?

MR. ROME: If they had been able to. There was an ardent desire on their part of American companies to do that, but there had not been an ability to sell in Japan, sir. That's undisputed on this record, showing, indeed --

QUESTION: I'm trying to get at the reason. What was the reason?

MR. ROME: A variety of both tariff and other barriers that prevented their attempting to carry through their attempt to sell in the U.S. market.

Zenith made a number of repeated efforts, sir, and were forbidden the opportunity to --

QUESTION: To sell in Japan, you mean?

MR. ROME: To sell in Japan, yes, sir. Yes sir.

QUESTION: Well, what did you say was not at issue here?

MR. ROME: We say that the Antidumping Act is not in issue because that is something that is still for trial below, and although my friend charges that the

conspiracy issue, if it were to go out, would take out the antidumping case. That is not an issue before this Court, because there is independent evidence of predatory intent and individual dumping, and that Antidumping Act claim is not before this Court.

QUESTION: Well, I suppose that if reversing the judges below with respect to the antitrust case nevertheless rubs off on the dumping case, then it --

MR. ROME: If that were so, I would agree, Your Honor. But our respectful position is that it does not because --

QUESTION: Well, the other side says it does, so you disagree on that?

MR. ROME: Only as to the conspiracy, sir. But there is independent evidence of individual acts done by the individual petitioners over a sufficiently long period of time that represents a separate cause of action under --

QUESTION: Well, that's your view of the evidence. Of course, I gathered from what your opposition said that if you take away the conspiracy evidence, there's just no evidence of any kind of a predatory intent, individual or joint.

MR. ROME: On the contrary, Your Honor, there are -- is the evidence of the experts in this case --

QUESTION: Yes, I know. That's your position about the evidence.

MR. ROME: But there is also evidence of the continued long period of time in which the prices charges were below their own costs as well as the fact that their prices resulted in losses on the part of the companies.

QUESTION: So, I gather if we happen to, if we reverse the lower court on the antitrust case, you would -- you think we should say that this has absolutely nothing to do with the dumping case?

MR. ROME: Indeed, sir. Indeed, sir. That issue is not here. There was no effort to seek certiorari as to the cause of action under the 1916 Antidumping Act.

QUESTION: And if we don't agree with you on the predatory action, you can't win, can you?

MR. ROME: On the contrary, sir. I think that --

QUESTION: Well, how can you win when the only evidence is that they dropped prices?

MR. ROME: Well, sir, there is much more evidence than that they dropped prices. There is undisputed evidence that they met over a period of years at every level of the heirarchy and exchanged elaborate,

detailed information about production, about prices, and a variety of --

QUESTION: What effect did that have on the American market?

MR. ROME: It was aimed at the American --

QUESTION: What effect did it have?

MR. ROME: It had the result, sir, of taking over the American market, as I've attempted to describe, and driving out of business the National Union Electric Company, which is one of the respondents here, along with some 18 or 20 other --

QUESTION: And it also drove down prices, too.

MR. ROME: It drove down prices, but that is the very essence of dumping, and the fact that it drove down pricing as the result of a combination in conspiracy, and representing an unlawful act is the very reason why we are here --

QUESTION: As a consumer, why am I worried about a drop in prices?

MR. ROME: As a consumer, you may not be, Your Honor, but in actuality the Congress has said that even a low price, if fixed as a result of conspiracy, is something that violates the antitrust laws of the United States. It is not sufficient merely to say that there is a reasonable price being fixed or a low price being

fixed. It is the very fact that a price has been fixed which runs counter to our laws, and it is that which makes the vice here.

And, moreover, in this instance we have a conspiracy and restraint of trade which manifests itself in dumping, which is a price discrimination in two geographic markets, which has always historically been recognized as the extreme example of predation, as it has been under the GATT, the General Agreement on Trade, which is a -- to which agreement Japan itself is a signatory, as is the United States.

And that low price is the definition of dumping. It is a lower price here than the higher price in Japan.

QUESTION: And I'm worried about the prices in Japan.

MR. ROME: So, with respect, I think our whole point is that there has to be an examination of the entire evidentiary record. I agree, if this had only occurred in Japan without having an impact; if it had not been aimed with effects taking place in the United States, it would be a very different case. But when it does affect the interstate commerce of the United States in its foreign commerce, then indeed it is a situation as to which all must be concerned, with respect, sir.

QUESTION: May I ask this question?

MR. ROME: Sir?

QUESTION: Did I understand your competitor to say that your clients had not lost share of market over the past 15 to 20 years?

MR. ROME: He did so say, sir. He did so say, but in actuality it is demonstrated on this record that the pricing in the United States has been woefully under -- the pricing by the petitioners has been woefully under the prices charged by other competitors in the United States.

QUESTION: But my question was whether or not your clients have lost share of market?

MR. ROME: We have maintained a degree brought but not have been able to go out of separate losses because the prices at which the goods have been sold have been sufficiently depressed.

QUESTION: You maintain the market share by cutting your prices to beat the predatory prices?

MR. ROME: Yes, sir.

QUESTION: That's your position?

MR. ROME: Yes, sir.

QUESTION: Did the court of appeals expressly find that?

MR. ROME: I have no recollection, sir, that

there was any specific reference to the position of the respective market shares of the respondents here.

It should be noted with regard to the 1975 statement from the Ministry of International Trade and Industry on which my friends rely that that statement was sent five years after the NUE complaint was filed, eight months after the Zenith complaint was filed, and long after petitioners had filed their answers to the complaint, without raising the affirmative defense of sovereign compulsion.

That MITI statement is unsigned. It purports to refer to an alleged direction given 13 years before, without saying by whom or to whom it was given, whether it was oral or in writing. It makes no reference whatever to the right on the part of the petitioners to withdraw or to their right of appeal, nor is there any statement from Japan's highest legal officer stating the consequences under Japanese law.

And the MITI statement --

QUESTION: Do you think that there has to be some fact finding with respect to that statement, or not?

MR. ROME: No, sir. What I'm attempting to suggest is that the issue of sovereign compulsion is not properly in our respectful submission before the Court because, number one, even if it be assumed that MITI

mandated or directed the petitioners to do something, they did not do what MITI directed them to do, as I've attempted to suggest.

And I'm attempting now to turn my attention, if I may, sir, to the diplomatic communications which have come from the Japanese Embassy, because the MITI statement itself makes no reference to the right to withdraw, and the communication from the embassy of Japan when first transmitted in 1975 made no reference, however, to that.

But in 1984, six months after the court of appeals had handed down its decision, then there is again a transmittal of the same 1975 MITI statement by the Japanese embassy, and then a parenthetical reference which seeks to import into the 1975 statement a reference to the five company rule which is not there in the original statement.

We say, therefore, that those diplomatic communications do not meet the normal criteria recognized to give effectiveness to a diplomatic communication, in that they were neither timely nor sufficient specific.

Now, what happened then is that in addition to sovereign compulsion, which we say is a false issue, there is indeed the further point that even if there had

been a mandate by MITI of what they did under the decisions of this Court going back 80 years, that would not prevent that conduct being admissible in evidence and being a part of the overall course of conduct which is capable of being shown to violate our laws, because 80 years ago this Court said no conduct has such an absolute privilege as to justify all possible schemes of which it may be a part.

The most innocent and constitutionally protected facts may be made a step in a criminal plot, and it is -- if it is a step in a plot, neither its innocence nor the Constitution is sufficient to prevent the punishment of the plot by law.

Our contention, therefore, is that if constitutionally protected conduct, speech, may become a part in a scheme which violates the law and force your right, this purported unspecific mandate from MITI may similarly be so considered.

A word should be added here, if I may, about the position advanced by the brief of the Solicitor General that although the government prosecuted these same petitioners for many years under the 1921 Antidumping Act, ultimately successfully, in which proceedings neither the petitioners nor the Japanese government ever raised the defense of sovereign

compulsion, the U.S. government in its brief now argues inconsistently against the respondents pursuing their private rights of action against the same petitioners for the same course of conduct.

It is suggested by the Solicitor General's brief that sovereign compulsion should not be available in the action brought by the U.S. government, but that it should be limited in its applicability to suits by private litigants. This novel contention, we suggest, is unprecedented, and runs afoul not only of the long recognition by this Court that the private litigant has been a bulwark of the enforcement of the antitrust laws, but also of the specific grant by the Congress of private rights of action.

If there is to be a change in that law, it should be legislated by the Congress, we respectfully suggest, not in response to a rather casual reference in an amicus brief.

But in similar fashion, petitioners' formulation of the conspiracy issue in terms of alleged parallel acts and other circumstantial evidence is again a false issue in our view and a misstatement of what the circuit court said and did. The court below expressly said that this is not simply a parallel action case, nor is it one based on circumstantial evidence alone.

On the contrary, the circuit court carefully distinguished the line of cases based on conscious parallelism from this case, which presents a record in which there is both direct evidence of certain kinds of concert of action and circumstantial evidence which suggests certain other kinds of concert of action.

The court of appeals expressly said that thus none of those conscious parallelism cases can be dispositive on the propriety of summary judgment in this case. The court of appeals followed the direction of this Court in refusing to fragment the evidence and examined all the admissible evidence, both direct and circumstantial, in the restated evidentiary record to determine what legitimate inference could be drawn as to the ultimate facts in issue.

Contrary to the contentions by my friends, the court of appeals did not create an exception to the rule in Cities Service, which was a totally different case. There, in Cities Service, was not a horizontal price fixing case. Petitioners in Cities Service were not competitors.

It was conceded there that the interests of Cities Service were directly opposed to those of the other defendants. Mr. Justice Marshall noted that the record cited an overwhelming amount of evidence as to

Cities Service motives, which evidence came from Cities Service itself.

In that case, the only evidence there cited was the refusal to buy, while in our case there is extensive evidence, both direct and circumstantial, of collusion, meetings at all levels, exchanges of all kinds of information, including price information, aimed at the U.S. market and carefully coordinated concealed activities that leave no doubt about petitioners' conscious commitment to a common scheme to achieve an unlawful objective.

Whereas, Cities Service made a conclusive showing on its part, in actuality what happened here below was that there was no showing by the petitioners at all, because as I have said they were relieved on their own application by the district court of any obligation to file their final pretrial statement.

Mr. Justice Marshall, in Cities Service, said the question whether summary judgment is appropriate in any case is one to be decided upon the particular facts of that case.

Here, petitioners simply ignore the vastly different evidentiary record of our case in their reliance upon the inapposite facts of Cities Service. Petitioners' response to the undisputed record is to

argue that the direct evidence of their collusive conduct in Japan relates to a different conspiracy from the one alleged by the respondents.

They seek, thereby, to impermissibly fragment their unitary course of conduct, the single conspiracy that we have charged, into two separate conspiracies and to argue that what they did in Japan is nonactionable. The reason why they say it is nonactionable is because of the alleged mandate from MITI, which I have attempted to refer to in my argument about sovereign compulsion.

Whatever MITI directed the petitioners to do lost its exempt character when it became part of petitioners' common design and understanding regarding their conduct outside of Japan which affected the interstate and foreign commerce of the U.S., and in any event, their conduct and agreements in Japan are admissible in our case to illuminate the character and effect of their conduct in the United States.

Moreover, their attempt to fragment the record into different conspiracies and to take up each piece of evidence item by item, scrutinize it, and then wipe the slate clean runs counter to the dictate of this Court in Continental Ore.

The entire body of evidence must be viewed in the light most favorable to respondents to give them the

benefit of all inferences which the evidence fairly supports even the contrary inferences -- even though contrary inferences might reasonably be drawn.

Nor was it permissible for the district court to attempt, as it did, to decide which reasonable inferences are the more probable, because as has been said in Tennant, cited again in Continental Ore, it is not the function of the court to search the record for conflicting circumstantial evidence nor to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences.

Petitioners have not really challenged, because they cannot challenge our statement of the procedural history of this case and the careful detailed reference to the factual record. The conclusory arguments of lawyers cannot prevail over the particular facts of this case established by evidence held to be admissible, which evidentiary rulings are not subject of attack here before Your Honors, and when it is all examined together without fragmenting, we saw that it reasonably tends to prove that petitioners had a conscious commitment to a common scheme designed to achieve an unlawful objective, and therefore the court below should be affirmed.

Thank you, sir.

CHIEF JUSTICE BURGER: Do you have anything further, Mr. Zoeller?

ORAL ARGUMENT OF DONALD J. ZOELLER, ESQ.,

ON BEHALF OF PETITIONERS - REBUTTAL

MR. ZOELLER: Just a minute or two, Your Honor.

If I was able, successfully, to pick my way through the last part of Mr. Rome's argument, I think he and I did agree on one thing, and that is that the Third Circuit did not follow the teachings of the Cities Service case, and they had good reason not to.

The record would not support a rational, logical inference that a conspiracy to establish predatory low prices in the United States ever existed. Indeed, this is an unusual case where the record directly rebuts it.

That is perhaps the reason, also, why Mr. Rome, now having spent an additional half hour, has never touched on the question of what the record of the activities of these companies in the United States market was; hasn't discussed their pricing activities; disavows any intention to show that there was recoupment; shows no way that those activities could be distinguished from the competition beneficial to consumers which the antitrust laws are seeking to foster, not to squelch.

QUESTION: Mr. Zoeller, do you contend that recoupment is an essential part of the cause of action?

MR. ZOELLER: I am -- as far as an inference is concerned, yes, Your Honor. In other words, I am saying that this is an inference case, and in order to draw an inference that there was a predatory conspiracy, in order to distinguish the activities of these companies, the pricing activities from competition, predation would be an essential part of what they're saying.

QUESTION: Would proof that sales were below cost tend to prove that conclusion?

MR. ZOELLER: Not on this record, Your Honor, and I'll take that on two fronts. One, it would be illogical to assume that a group of companies would engage together to sell below costs for 20 years with no hope of ever getting that back out of those activities, and this record will not support such a hope.

As a matter of fact, the record in this case shows only very brief, very sporadic losses by four of the petitioners, and as to even one of those four, no sales losses on the critical area of color television receivers. As another one of those petitioners, only one instance of a sale of cost in the critical area of television, of color television receivers.

So, there really isn't evidence of sales below costs on any pervasive record in this case, and it would be illogical to assume that there would be one because it would simply be an act of insanity to go for 20 years predating and then hope ever to get it back. Even forget the future, just take 20 years --

QUESTION: --thesis, is it true that some 17 or 18 companies have gone out of business in the American market?

MR. ZOELLER: Oh, I don't know how many companies have gone out of business. I do know this, Your Honor, that the record shows that the rate of failure of companies before the Japanese in this market, before the Japanese companies entered and their rate of failure afterward was actually greater before than after.

And as far as Mr. -- Justice Powell asked me about, or asked Mr. Rome about market shares, there is a reference to market shares in the plaintiffs' own evidence at page 2576a of the record, and it picks up at the year 1969, and Zenith's market share was 21.1. At the end of the period relevant, or the period raised by --

QUESTION: What about the other plaintiff?

MR. ZOELLER: -- these plaintiffs, it was 22 percent.

QUESTION: What about the other plaintiff?

MR. ZOELLER: The other plaintiff had gone out of business in the year 1970, and that other plaintiff was one of, as far as this record shows, a number of companies that --

QUESTION: And even as to Zenith --

MR. ZOELLER: -- didn't make --

QUESTION: -- as I read the court of appeals opinion, they say that you conceded the fact of damage; that there was enough evidence. I don't mean you conceded on the merits, but that you didn't contend that the record was deficient with regard to proof of damage, is that right?

MR. ZOELLER: On this record, Your Honor, we have argued on summary judgment only the issue of liability. We have not addressed the issue of damage either in the court below or in the court of appeals, or not do we address it at this Court. It simply is not raised by the motion for summary judgment, which raises itself to the more basic issue of liability.

Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 2:45 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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#83-2004 - MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., ET AL., Petitioners

V. ZENITH RADIO CORPORATION, ET AL.

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BY Paul A. Richardson

(REPORTER)