No. 99-1844

IN THE
SUPREME COURT OF THE UNITED STATES

IN RE POTASH ANTITRUST LITIGATION
Hahnaman Albrecht, Inc., et al.,

Petitioners,

v.

Potash Corporation of Saskatchewan, Inc., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF ALABAMA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, DISTRICT OF COLUMBIA, FLORIDA, HAWAII, IDAHO, IOWA, KANSAS, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, NEW HAMPSHIRE, NEW MEXICO, NEW YORK, NEVADA, NORTH CAROLINA, NORTH DAKOTA, NORTHERN MARIANA ISLANDS, OHIO, PENNSYLVANIA, PUERTO RICO, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, VERMONT, AND WEST VIRGINIA, IN SUPPORT OF PETITIONERS

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INTERESTS OF THE AMICI STATES

Under the rule adopted by the Eighth Circuit, antitrust suits alleging horizontal price-fixing will rarely survive the summary judgment stage if the suits are based on circumstantial evidence. Because most horizontal price-fixing cases must by necessity rely on such evidence, the consequence of that rule – which the Ninth Circuit has also adopted – is to create a virtually insurmountable barrier to the successful prosecution of one of the most pernicious forms of conduct covered by the antitrust laws. The thirty-four Amici States listed on the front cover have a compelling interest in reversing that incorrect holding, and in preserving the ability of antitrust plaintiffs and law enforcers to challenge horizontal price-fixing conspiracies.

The undersigned Attorneys General are the chief law enforcement officers of their states and are charged with the duty of enforcing the antitrust laws. They accomplish this in several ways. In their capacity as *parens patriae*, they are authorized to bring federal antitrust actions on behalf of citizens of their states.[1] As counsel for states, state agencies and political subdivisions, Attorneys General often file federal antitrust actions seeking damages and injunctive relief.[2] Further, Attorneys General are the primary public enforcers of state antitrust laws, which are often interpreted in conformity with federal law.[3] The Amici States, through their Attorneys General, thus play a major role in

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[1] 15 U.S.C. § 15c (1998). *See Georgia v. Pennsylvania R.R. Co.*, 324 U.S. 439 (1945) (acknowledging the common law *parens patriae* authority of the States); *In re Toys "R" Us Litig.*, 191 F.R.D. 347 (E.D.N.Y. 2000); *and Florida et al. v. Nine West Group, Inc.*, No. 00 Civ. 1707 (S.D.N.Y. filed March 6, 2000).

[2] *See Georgia v. Evans*, 316 U.S. 159 (1942); *In re Ins. Antitrust Litig.*, 938 F.2d 919 (9th Cir. 1991), *aff'd in part, rev'd in part sub nom. Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

[3] *See, e.g., Carl N. Swenson Co. v. E.C. Braun Co.*, 272 Cal. App. 2d 366, 77 Cal. Rep.

antitrust enforcement and have a substantial interest in ensuring that federal antitrust laws are interpreted in accordance with sound antitrust policy and with this Court's prior decisions.

The ability to prosecute conspiracies that unreasonably restrain trade when only circumstantial evidence of conspiracy is available is of vital importance to the Attorneys General, particularly when such conspiracies are between competitors to fix prices. A law enforcer or plaintiff by necessity must generally rely on circumstantial evidence and the inferences that may be drawn from such evidence to prove an alleged conspiracy, as direct evidence of conspiracy is rarely available.[4] Under the Eighth Circuit's decision, however, plaintiffs and law enforcers would be rendered effectively unable to withstand summary judgment challenges so long as the proof consists solely of circumstantial evidence.

The issues involved in this case are of major importance to the preservation of free competition. For that reason, and those set forth below, the Amici States strongly urge this Court to grant the petition for certiorari.

REASONS FOR GRANTING THE WRIT

In *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587 (1986), this Court held that "if the factual context renders respondents' claim implausible – if the claim is one that simply makes no economic sense – respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary."

378, 379-80 (Cal. Ct. App. 1969); *State by Humphrey v. Alpine Air Prods., Inc.*, 490 N.W.2d 888, 894 (Minn. Ct. App. 1992), *aff'd*, 500 N.W.2d 788 (Minn. 1993); *X.L.O. Concrete Corp. v. Rivergate Corp.*, 83 N.Y.2d 513, 518 (N.Y. 1994); *State v. Milwaukee Braves, Inc.*, 31 Wis. 2d 699, 144 N.W.2d 1 (1966).

The Eighth Circuit, in a 6-5 *en banc* decision, has broadly extended *Matsushita* to cases in which the claims make obvious economic sense, namely, claims of horizontal price-fixing. In the case below, Petitioners alleged that a dramatic 48% increase in the price of granular grade potash, which was industry-wide and long enduring, was the result of a horizontal price-fixing agreement.[5] The Eighth Circuit drastically limited the inferences that can be drawn from circumstantial evidence in such horizontal price-fixing cases, essentially placing the burden on the plaintiffs to disprove – at the summary judgment stage – the defendants' proffered explanations for the circumstantial evidence. Pet. App. A-6 - A-19.

As the dissent below stated: "Because conspirators cannot be relied upon either to confess or to preserve signed agreements memorializing their conspiracies, the court's requirement for direct evidence will substantially eliminate antitrust conspiracy as a ground for recovery in our circuit." Pet. App. A-20. The Eighth Circuit's opinion conflicts with thoughtful decisions of the Third, Sixth and Seventh Circuits, conflicts with the well established precedent of this Court, and limits the ability of state and federal regulators to enforce the antitrust laws effectively. For each of these reasons, certiorari should be granted.

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[4] *See, e.g., Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 720 (1965); *accord ES Dev., Inc. v. RWM Enters., Inc.*, 939 F.2d 547, 553-54 (8th Cir. 1991).

[5] This percentage increase was calculated by comparing the September 1987 price of $58.00 per ton for granular grade potash to the January 1988 price of $86.00 per ton, although prices varied somewhat during the course of the alleged conspiracy. Pet. App. A-24.

ARGUMENT

I. THERE IS A WIDENING SPLIT IN THE CIRCUITS OVER THE PROPER SUMMARY JUDGMENT STANDARD TO BE APPLIED IN ANTITRUST CONSPIRACY CASES.

In *Matsushita*, this Court addressed the standards of proof necessary to survive a summary judgment motion in a case alleging violations of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1998). *Matsushita* is recognized as controlling precedent and cited extensively in antitrust cases in which the proof offered of an alleged conspiracy is circumstantial. However, the standards set forth in *Matsushita* have been interpreted in divergent ways among the circuits, resulting in conflicting opinions and an uneven application of the law.

Matsushita involved allegations of a predatory pricing scheme determined to be economically implausible. In *Matsushita*, this Court acknowledged the well established principle that when considering a motion for summary judgment, the court must view all facts and inferences to be drawn from them in the light most favorable to the party opposing the motion.[6] This Court limited that well established principle by limiting the inferences a court may draw from ambiguous evidence in a case brought under Section 1. Emphasizing the importance of determining the economic plausibility of the plaintiff's theory in such a case, this Court cautioned:

> It follows from these settled principles that if the factual context renders respondents' claim implausible – if the claim is one that simply makes no economic sense – respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary.

Matsushita, 475 U.S. at 587.

The case below involved allegations of horizontal price-fixing, a *per se* violation of the antitrust laws. Unlike the allegations of predatory pricing in *Matsushita*, the

plaintiffs' theory in the case below – that defendants agreed to raise prices and keep prices high – made economic sense for the defendants. The Eighth Circuit, although professing to rely on the holding in *Matsushita*, failed to take into account the economic plausibility of the plaintiffs' theory when evaluating the circumstantial evidence presented. Rather it required that the evidence rise to the same level of proof as that required if the theory had been economically implausible.

The Ninth Circuit took a similar stance in the recent case of *In re: Citric Acid Litig.*, 191 F.3d 1090, 1094-97 (9th Cir. 1999). That case, like the case below, involved allegations of horizontal price-fixing. Although the Ninth Circuit outlined what it considered to be the "two-part test" of *Matsushita*,[7] it failed to recognize the different evidentiary standards applicable only when the plaintiffs' claims are economically implausible.

In stark contrast to the Eighth and Ninth Circuits, the Third, Sixth, and Seventh Circuits, relying on the lessons of *Matsushita*, have taken into consideration the economic plausibility of the plaintiff's theory and recognized that the permissible range of inferences should be greatly restricted only if the theory is found to be economically implausible.[8] *See, e.g., Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998

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[6] *See Matsushita*, 475 U.S. at 588.

[7] *In re: Citric Acid Litig.*, 191 F.3d at 1094.

[8] Arguably, the Ninth Circuit's decision in *In re: Citric Acid Litig.*, 191 F.3d 1090 (9th Cir. 1999) is inconsistent with its decision in *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 438-40 (9th Cir. 1990) (stating that *Matsushita* should not be read to permit a court to grant summary judgment for defendants whenever circumstantial evidence is equally consistent with both inferences of conspiracy and permissible conduct; rather, *Matsushita* merely limits the range of inferences that can be drawn from ambiguous evidence depending on the potential effects of such inferences on procompetitive behavior). The internal disarray, exemplified by these two Ninth Circuit decisions, in addition to the split between circuits on this issue, demonstrates the need for guidance by this Court.

F.2d 1224, 1232-33 (3d Cir. 1993) (citing to *Matsushita* as requiring "sufficiently unambiguous" evidence to support inferences of a predatory pricing conspiracy when plaintiffs' theory was implausible and carried the risk of restricting highly procompetitive conduct (low prices)); *Ezzo's Invs., Inc. v. Royal Beauty Supply, Inc.*, 94 F.3d 1032, 1036 (6th Cir. 1996) (distinguishing the price-fixing allegation at bar from *Matsushita* by calling it the "classic anti-trust situation: an attempt to avoid a competitive marketplace by setting prices at an artificially high level"); *In re Brand Name Prescription Drugs Litig*., 123 F.3d 599, 613-14 (7th Cir. 1997) (holding that summary judgment for defendant drug manufacturers and wholesalers was inappropriate where drug retailer plaintiffs' theory that defendants conspired to fix prices was plausible and supported by some evidence, although defendants offered innocent interpretations for the evidence) *cert. denied*, 522 U.S. 1153 (1998).

In *Petruzzi's*, the Third Circuit compared the difference in the plausibility of the claims in that case, which involved market allocation and bid rigging, with the predatory pricing claim in *Matsushita.* The claims in *Petruzzi's* made "perfect economic sense" and warranted "more liberal inferences from the evidence." *Petruzzi's*, 998 F.2d at 1232. The Third Circuit explicitly followed *Matsushita*, concluding:

> [T]wo important circumstances underlying the Court's decision in *Matsushita* were (1) that the plaintiffs' theory of conspiracy was implausible and (2) that permitting an inference of antitrust conspiracy in the circumstances 'would have the effect of deterring *significant* procompetitive conduct.'. . . Thus, the Court stated that the acceptable inferences which can be drawn from circumstantial evidence vary with the plausibility of the plaintiffs' theory and the dangers associated with such inferences.

Petruzzi's, 998 F.2d at 1232 (internal citation omitted) (emphasis added in original).

Although not uniformly recognized by the circuits, *Matsushita* clearly dictates that the range of permissible inferences that can be drawn from circumstantial evidence in antitrust conspiracy cases must differ according to the economic plausibility of the plaintiff's allegations. The greater the economic implausibility and the more likely that procompetitive conduct will be inhibited if liberal inferences of illegal activity are drawn, the stricter the scrutiny that must be given to the plaintiff's evidence. The failure of the Eighth and Ninth Circuits to conform to this precedent will result in the unwarranted increase of summary judgments, and rather than protecting procompetitive behavior, illegal anticompetitive behavior will go unpunished. *See Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 479 (1992). To ensure a level playing field for all litigants regardless of the circuit in which their case is filed, this Court should resolve the split in the circuits.

II. THIS ISSUE IS IMPORTANT BECAUSE THE SUMMARY JUDGMENT STANDARD SET BY THE EIGHTH AND NINTH CIRCUITS WILL UNDULY ELIMINATE VALID ANTITRUST CONSPIRACY CASES.

The determination of the proper summary judgment standard in conspiracy cases based on circumstantial evidence of conspiracy is extremely important. The very nature of a conspiracy is to be clandestine. Thus, law enforcers or injured parties usually must rely on circumstantial evidence – and the reasonable inferences that can be drawn from such evidence – to establish the existence of a conspiracy. If an antitrust plaintiff cannot rely on circumstantial evidence of the alleged conspiracy (and concomitant reasonable inferences) to carry the plaintiff beyond the summary judgment stage in every case where a defendant can articulate a possible non-conspiratorial explanation for its conduct, such conspiracies will rarely be successfully challenged or prosecuted. Obviously, any

defendant aware of the antitrust laws will try to disguise activity that violates these laws as legal conduct to the greatest extent possible. Consequently, a rule that substantially eliminates the utility of circumstantial evidence would significantly hamper enforcement of Section 1 and its state law analogs.

The summary judgment stage of an antitrust trial is already a critical hurdle for substantial numbers of plaintiffs, particularly in federal court.[9] Expanding this standard unduly to foreclose the progress of difficult yet meritorious cases simply because such cases are based on circumstantial evidence will chill the public and private enforcement of the antitrust laws. Summary judgment is an appropriate tool for culling out unsupported cases before they reach a factfinder. Yet, the summary judgment standard employed by the Eighth and Ninth Circuits for antitrust conspiracy cases raises the bar too high and is untenable, given the importance of circumstantial evidence in antitrust conspiracy cases.

Finally, the existence of a contract, combination or conspiracy is a threshold requirement for price-fixing and other violations of Section 1 and its state law analogs. Obviously then, a legal standard that integrally affects the ability of law enforcers and plaintiffs to establish the existence of a conspiracy is of fundamental importance.

Resolution of the current circuit conflicts strongly warrants grant of certiorari in this case. Specifically, the range of circumstantial evidence, the detailed analysis by the *en banc* court below, including the dissent, provides this Court with an opportunity to

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[9] *See* Thomas Greene et al., *State Antitrust Law and Enforcement*, PRACTISING LAW INSTITUTE, 1117 PLI/Corp. 957, 980 (May-June 1999) (noting that "[t]he importance of summary judgment in federal antitrust litigation cannot be minimized"); *and* Editors, *Judges Versus Juries in Antitrust: Rush to Summary Judgment*, 20 ANTITRUST L. & ECON. REV. 1988 No. 2, at 1, 3 (noting that a preliminary analysis indicated that between

write dispositively on the treatment of various forms of classic circumstantial evidence of conspiracy and how the concomitant inferences should be drawn and weighed.

III. THE DECISION OF THE EIGHTH CIRCUIT CONFLICTS WITH SUPREME COURT PRECEDENT.

Matsushita imposed a heightened evidentiary standard when dealing with economically implausible allegations. Although the Eighth Circuit professed to follow *Matsushita*, it failed to address the economic plausibility of the plaintiff's allegations before, as the Eighth Circuit put it, applying *Matsushita* "broadly" and summarily dismissing plaintiffs' claims. Pet. App. A-7.

This Court reiterated the importance of ascertaining the economic plausibility of an alleged antitrust claim in evaluating the supporting evidence in the case of *Eastman Kodak Co. v. Image Tech. Servs*., 504 U.S. 451 (1992). In response to Kodak's contention that it was entitled to a legal presumption of lack of market power under the reasoning in *Matsushita*, this Court stated:

> Plaintiffs in *Matsushita* attempted to prove the antitrust conspiracy 'through evidence of rebates and other price-cutting activities.' … Because cutting prices to increase business is 'the very essence of competition,' the Court was concerned that mistaken inferences would be 'especially costly' and would 'chill the very conduct the antitrust laws are designed to protect.' . . . But the facts in this case are just the opposite. The alleged conduct – higher service prices and market foreclosure – is facially anticompetitive and exactly the harm that antitrust laws aim to prevent. In this situation, *Matsushita* does not create any presumption in favor of summary judgment for the defendant.

Kodak, 504 U.S. at 478 (citations omitted).

The horizontal price-fixing claims alleged by Petitioners in the case below are also "facially anticompetitive" and "exactly the harm that antitrust laws aim to prevent."

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one-half to two-thirds of the 142 antitrust cases decided in 1987 were won by defendants at the summary judgment stage in federal court) (cited in *id.)*.

See id. Yet, the Eighth Circuit neither addressed the differences in the factual allegations present in the case below and those in *Matsushita*, nor recognized the lessening of the evidentiary standards applicable to the evidence in the case below. Although such reasoning may result from the Eighth Circuit's concern over deterring procompetitive behavior, in actuality it may serve to raise the evidentiary bar high enough to allow antitrust violators to slide summarily under it. This Court obviously did not intend the reasoning in *Matsushita* to be taken to such lengths.

In *Kodak*, the Court observed, "when we weigh the risk of deterring procompetitive behavior by proceeding to trial against the risk that illegal behavior will go unpunished, the balance tips against summary judgment." *Id*. at 479. By failing to take into account the economic plausibility of the claims alleged in the case below, the Eighth Circuit unfairly tipped the scale back.

Finally, the Eighth Circuit's piecemeal method of analysis also conflicts with this Court's prior precedent. In *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), an antitrust case involving alleged violations of Section 1 of the Sherman Act, this Court stressed the necessity for evaluating the plaintiff's evidence of conspiracy as a whole, stating:

> In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. . . . [T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.

Id. at 699 (internal quotation marks and citation omitted).

Indeed, viewing the evidence as a whole is particularly important in cases involving allegations of conspiracy.

> Seemingly innocent or ambiguous behavior can give rise to a reasonable inference of conspiracy in light of the background against which the behavior takes place. Evidence can take on added meaning when viewed in context with all the circumstances surrounding a dispute.

Apex Oil Co. v. DiMauro, 822 F.2d 246, 255 (2d Cir. 1987).

In the case below, although the Eighth Circuit professed to consider the proof as a whole, it actually evaluated each portion of the evidence individually and determined that each piece standing alone did not "exclude the possibility of independent action by the producers" or did not "rebut the producers' independent business justification for their actions." Pet. App. A-9 – A-16. This piecemeal approach is contrary to this Court's clear precedent.

For these reasons, the Amici States urge the Court to grant certiorari. This Court should clarify that the appropriate analysis is exemplified by the Third Circuit's approach in *Petruzzi's*, 998 F.2d at 1231-33, in which the range of acceptable inferences varies according to the plausibility of a plaintiff's theory and the dangers to procompetitive conduct associated with such inferences. Thus, the less plausible the theory or the greater the dangers, the more unambiguous such evidence must be. This approach represents a synthesis of the *Matsushita* and *Kodak* decisions. Further, it reconciles the conflicting demands of FED. R. CIV. P. 56 standards and the policy interests of courts and defendants in rooting out implausible antitrust claims early in the judicial process. It also provides a reasonable standard which will allow law enforcers to effectively pursue civil law enforcement actions against harmful price-fixing conspiracies under the Sherman Act and state antitrust laws.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari sought by Hahnaman Albrecht, Inc., et al. should be granted.

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