No. 16-1345

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

THE VALSPAR CORPORATION AND VALSPAR SOURCING, INC.,

Plaintiffs-Appellants,

—v.—

E.I. DUPONT DE NEMOURS AND COMPANY,

Defendant-Appellee.

On Appeal From The United States District Court
For The District of Delaware

BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF APPELLANTS' PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the American Antitrust Institute states that it is a nonprofit corporation and no entity has any ownership interest in it.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

The American Antitrust Institute (AAI) is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through education, research, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. *See* http://www.antitrustinstitute.org.[1] Having submitted an amicus brief on the merits, AAI submits this brief in support of rehearing because, as the dissent explains, the panel's decision makes it virtually impossible for plaintiffs to defeat summary judgment in price-fixing cases without "smoking gun" evidence of an express agreement. If it stands, this heightened burden will harm consumers by substantially weakening deterrence against price fixing.

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[1] Individual views of members of AAI's Board of Directors or Advisory Board may differ from AAI's positions. One of AAI's directors was recused from this matter because her law firm is involved in a pending related class action. Pursuant to Rule 29(c)(5), amicus curiae states: No counsel for a party has authored this brief in whole or in part; no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief; and no person or entity other than amicus curiae has made a monetary contribution to its preparation or submission.

INTRODUCTION

Supracompetitive oligopoly pricing is harmful to consumers. But if it is the product only of interdependent, follow-the-leader behavior, it is not illegal. Rather, to be unlawful, such pricing must be the product of an agreement, tacit or express. For decades, courts have elaborated "plus factors," or the "'extra ingredient of centralized orchestration of policy which will carry parallel action over the line into the forbidden zone of implied contract and combination.'" William E. Kovacic et al., *Plus Factors and Agreement in Antitrust Law*, 110 Mich. L. Rev. 393, 405 (2011) (quoting Louis B. Schwartz et al., *Free Enterprise & Economic Organization: Antitrust* 439 (6th ed. 1983)). In this case, involving a "'text book example of an industry susceptible to efforts to maintain supracompetitive prices,'" *Valspar Corp. v. E.I. Du Pont de Nemours & Co.*, 152 F. Supp. 3d 234, 242 (D. Del. 2016) (quoting *In re Titanium Dioxide Antitrust Litig.*, 959 F. Supp. 2d 799, 827 (D. Md. 2013)), the panel set the bar for this extra ingredient very high.

As the dissent points out, the majority has created an "unworkable burden," and "too high a hurdle," "all but explicitly stat[ing] that, now, 'the so-called smoking gun' is required." Diss. 1, 2, 7 (quoting *Petruzzi's IGA Supermarkets, Inc. v. Darlington Delaware Co.*, 998 F.2d 1224, 1230 (3d Cir. 1993)). Not only has the panel essentially dispensed with plus-factor analysis, but *because* the market was "primed for anticompetitive interdependence and . . . operated in that manner," Op.

20, the panel majority perversely required *more* evidence of conspiracy. Rehearing *en banc* is necessary to correct this aberrational opinion and align this circuit with sound antitrust policy.[2]

ARGUMENT

I. EN BANC CONSIDERATION IS NECESSARY TO ENSURE UNIFORMITY OF THIS COURT'S DECISIONS

A. The Panel's "More Likely Than Not" Standard is Inconsistent with Supreme Court and Third Circuit Precedent

The panel majority held that, to survive summary judgment, "a plaintiff in an oligopoly case must provide inferences that show that the alleged conspiracy is 'more likely than not.'" Op. 9 n.1; *see also id.* at 13, 13 n.4, 29 n.14, 30. But this heightened standard is contrary to Supreme Court and Third Circuit precedent holding that "*Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 468 (1992); *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 466 (3d Cir. 1998); *accord Petruzzi's*, 998 F.2d at 1231 (*Matsushita* merely requires that "the inferences drawn from the proffered evidence must be reasonable").

[2] Notably, the panel majority recognized that its standard was dispositive of the case as it distinguished the contrary result of the Maryland District Court (on essentially the same record) on the basis that that court applied a "quite different" standard. Op. 32 (referring to court's quotation of Second Circuit case). In fact, as Appellants note, the Maryland court relied primarily on this Court's *Flat Glass* opinion, which it cited over twenty times.

To be sure, *Matsushita*, *Monsanto*, and other cases have recited that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (citing *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984)). But for summary judgment purposes, this simply means that a plaintiff "'must show that the inference of illegal conspiracy is reasonable in light of the competing inferences of independent action or collusive action.'" *Tunis Bros. Co. v. Ford Motor Co.*, 823 F.2d 49, 50 (3d Cir. 1987) (quoting *Matsushita*, 475 U.S. at 588) (brackets omitted). It does not mean that "a district court may grant summary judgment to antitrust defendants whenever the court concludes that inferences of conspiracy and inferences of innocent conduct are equally plausible." *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 438 (9th Cir. 1990); *see also Petruzzi's*, 998 F.2d at 1231 ("'Nor do we think that *Matsushita* and *Monsanto* can be read as authorizing a court to award summary judgment to antitrust defendants whenever the evidence is plausibly consistent with both inferences of conspiracy and inferences of innocent conduct.'" (quoting *Petroleum Products*, 906 F.2d at 439)).

Adopting the "more likely than not" standard "would lead to a dramatic judicial encroachment on the province of the jury." *Petroleum Products*, 906 F.2d at 438. As the Ninth Circuit explained,

> To read *Matsushita* as requiring judges to ask whether the circumstantial evidence is more "consistent" with the [plaintiffs'] theory than with the [defendants'] theory would imply that the jury should be permitted to choose an inference of conspiracy *only* if the judge has first decided that he would himself draw that inference. This approach would essentially convert the judge into a thirteenth juror, who must be persuaded before an antitrust violation may be found.

Id.; see also Petruzzi's, 998 F.2d at 1230 ("at the summary judgment stage, a court is not to weigh the evidence"); *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002) (courts must be careful to avoid the trap of "weigh[ing] conflicting evidence (the job of the jury)"); *see generally* Luke Meier, *Probability, Confidence, and* Matsushita*: The Misunderstood Summary Judgment Revolution*, 23 J. L. & Pol'y 69, 128 (2014) (noting Seventh Amendment problems in reading *Matsushita* as involving a probability assessment by the court).[3]

[3] It goes without saying that to survive summary judgment a plaintiff must provide "'sufficient evidence to allow *a reasonable fact finder* to infer that the conspiratorial explanation is more likely than not.'" *In re Publ'n Paper Antitrust Litig.*, 690 F.3d 51, 63 (2d Cir. 2012) (quoting Phillip E. Areeda & Herbert Hovenkamp, *Fundamentals of Antitrust Law*, § 14.03(b), at 14–25 (4th ed. 2011)) (emphasis added). But on summary judgment, that fact finder is not the district court (or the court of appeals). The majority's belief that *the court* is to "assess whether . . . it is more likely than not that the defendants conspired to fix prices," Op. 13 (brackets and quotation marks omitted), encouraged it to weigh evidence, make findings, and compartmentalize the evidence. *See* Diss. 1, 16, 19, 21-22.

B. The Panel's Rejection of the Sliding-Scale Approach Is Inconsistent with Third Circuit Precedent

The panel majority rejected this Court's sliding-scale approach to evaluating circumstantial evidence of collusion under which "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. In *Petruzzi's*, this Court recognized that *Matsushita* was based on the determination "(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.'" *Id.* (quoting *Petroleum Products,* 906 F.2d at 439) (emphasis in *Petruzzi's*).

Accordingly, this Court held that "more liberal inferences from the evidence should be permitted than in *Matsushita* [when] the attendant dangers from drawing inferences recognized in *Matsushita* are not present." *Id.* The Third Circuit has followed this approach in numerous cases since. *See, e.g.*, *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1001 (3d Cir. 1994); *Rossi*, 156 F.3d at 467; *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 124 (3d Cir. 1999); *Intervest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 161-62 (3d Cir. 2003); *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 357-58 (3d Cir. 2004).

The panel did not question the plausibility of plaintiffs' economic theory of conspiracy and it recognized that the activities challenged here are not facially pro-competitive (unlike the price cutting at issue in *Matsushita*). Indeed, it assumed that "oligopolistic conscious parallelism is *by nature* anticompetitive." Op. 25. Nonetheless the panel held that *Matsushita* sharply limited the permissible inferences from circumstantial evidence in cases involving oligopolistic interdependence. The panel's rationale for rejecting the sliding-scale approach, which it described as "reasonable, [but] contrary to Third Circuit jurisprudence," Op. 9 n.1, does not withstand scrutiny.

The panel majority cited *Flat Glass*'s statement, "'*[D]espite the absence of the* Matsushita *Court's concerns*, this Court and others have been cautious in accepting inferences from circumstantial evidence in cases involving allegations of horizontal price-fixing among oligopolists.'" *Id.* (quoting *Flat Glass*, 385 F.3d at 358) (emphasis and brackets in majority opinion).[4] But as the dissent pointed out,

> [T]his Court did draw liberal inferences in *Flat Glass*, and reversed summary judgment, partly because the plaintiff's economic theory made perfect sense. It simply stated, in passing, that courts must be

[4] The panel majority also found support in *Flat Glass*'s supposed rejection of academic commentary critical of "our extension of *Matsushita*." Op. 9-10 n.1. But *Flat Glass* expressed no disagreement with that commentary, which was directed primarily at cases in other circuits. *See* Herbert Hovenkamp, *The Rationalization of Antitrust*, 116 Harv. L. Rev. 917, 925-26 nn.32, 37 (2003). Indeed, *Flat Glass* cited one of those cases for its *dissenting* opinion. *See Flat Glass*, 385 F.3d at 361 n.12 (citing *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1046-47 (8th Cir. 2000) (Gibson, J., dissenting)).

> "cautious in accepting inferences from circumstantial evidence" in these types of cases—not that they do not do so.

Diss. Op. 30 (quoting *Flat Glass*, 385 F.3d at 358). And *Petruzzi's*, which also drew liberal inferences where plaintiffs' economic theory of conspiracy was plausible, involved interdependent conduct. *Petruzzi's*, 998 F.2d at 1242.[5] In any event, there is a difference between being "cautious" in applying a standard and supplanting it altogether, as the panel did here. *See* Diss. 19 n.12, 30.

C. The Panel's Rejection of Tacit Agreements Is Inconsistent with Supreme Court and Third Circuit Precedent

The panel recognized that "tacit agreements remain illegal under § 1." Op. 12 n.3 (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007)); *see White v. R.M. Packer Co.*, 635 F.3d 571, 576 & n.3 (1st Cir. 2011). However, it then read the concept of tacit agreements out of the Sherman Act. It stated that "the third plus factor requires evidence implying a *traditional* (i.e., explicit) conspiracy." Op. 12 n.3 (emphasis in original). According to the majority, the Third Circuit has resolved the "confusion" over how tacit agreements can be unlawful if proof of an

[5] *Baby Food* applied the sliding-scale approach to allegations of oligopolistic price fixing and did not draw liberal inferences, but plaintiffs' economic theory of conspiracy was not plausible in the circumstances. *See Baby Food*, 166 F.3d at 124, 137 (no mechanism to detect cheating).

explicit agreement is required by "decid[ing] to focus on evidence generally required to show an explicit, manifest agreement." *Id.*; *see also id.* at 27 n.13 (noting the absence of evidence of an "explicit agreement").

This flouts black letter law. *See, e.g., Alvord-Polk*, 37 F.3d at 1000 ("An agreement need not be explicit to result in section 1 liability."). Moreover, it seriously misreads *Flat Glass*. For one thing, *Flat Glass* never used the term "explicit" agreement to describe the evidence relevant to the third plus factor. Rather it used the term "actual" agreement. A tacit agreement *is* an actual agreement, although not an explicit one. For another thing, as the dissent emphasized, *Flat Glass* recognized that the evidence relevant to the third plus factor "may involve . . . proof that the defendants . . . *adopted a common plan even though no meetings, conversations, or exchanged documents are shown*." *Flat Glass*, 385 F.3d at 361 (emphasis added) (internal quotation marks omitted).

Third, while *Flat Glass* noted that the first two plus factors "largely restate the phenomenon of interdependence," it recognized that "certain types of 'actions against self interest' may do more than restate economic interdependence." *Id.* at 361 n.12 (citing the "apparently unilateral exchanges of confidential price information" discussed in the *Blomkest* dissent). Fourth, *Flat Glass* recognized that the three plus factors it identified are not the only ones "that suffice to defeat summary judgment[.] There is no finite set of such criteria; no exhaustive list exists." *Id.* at

360.[6] In short, *Flat Glass* does not reject the venerable concept of a tacit agreement nor require evidence of an explicit agreement.

II. EN BANC CONSIDERATION IS NECESSARY BECAUSE THE PROCEEDING INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE

The standard of proof that a plaintiff must satisfy to survive summary judgment when seeking to prove a price-fixing conspiracy with circumstantial evidence is a question of exceptional importance for the deterrence of cartels and of the use of anticompetitive practices (*e.g.*, signaling and information exchanges) that facilitate oligopoly pricing.

It is well established in the economic literature that supracompetitive oligopoly pricing is a serious problem. *See, e.g.*, Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 Antitrust L. J. 1, 12-13 (2015); Louis Kaplow, *Competition Policy and Price Fixing* 251 (2015); James W. Brock, *Antitrust Policy and the Oligopoly Problem*, 51 Antitrust Bull. 227 (2006). And it is a problem of increasing concern, as markets become

[6] For example, some courts have held that plus factors include "practices which unjustifiably facilitate interdependent pricing and which can be readily identified and enjoined." *Petroleum Products*, 906 F.2d at 448 (internal quotation marks omitted); *accord Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001) (Sotomayor, J.); *In re Flat Glass Antitrust Litig. (II)*, MDL No. 1942, 2012 WL 5383346, *3 (W.D. Pa. Nov. 1, 2012); *see also* Herbert Hovenkamp, *The Antitrust Enterprise* 131 (2005) ("an agreement may be inferred from additional actions that firms take in order to make an oligopoly market more stable").

increasingly concentrated. *See, e.g.*, *Too Much of a Good Thing*, The Economist, Mar. 26, 2016, http://www.economist.com/news/briefing/21695385-profits-are-too-high-america-needs-giant-dose-competition-too-much-good-thing.

There is also consensus that supracompetitive oligopoly pricing is harmful to consumers whether it is the product of an explicit cartel or "merely" interdependent interaction. *See, e.g.*, 6 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1429b, at 221 (3d ed. 2010); Kaplow, *supra*, at 218. Indeed "the aggregate harm of interdependence may well exceed that of relatively rare express cartels." Areeda & Hovenkamp, *supra*, ¶1432b2, at 243; *see also* Herbert Hovenkamp, *The Pleading Problem in Antitrust Cases and Beyond*, 95 Iowa L. Rev. Bull. 55, 63 (2010) ("interdependence . . . is a potentially dangerous condition").

Given this harm, the panel's treatment of oligopolistic interdependence as a *negative* factor, rather than as a "plus factor," stands antitrust policy on its head. Indeed, the panel's approach suggests that the *more* prone an industry is to supracompetitive oligopoly pricing, the *greater* is the quantum of traditional conspiracy evidence that is required to prove an agreement. Such a "paradox of proof" makes no sense from a public policy perspective. *See* Kaplow, *supra*, at 126 (in situations "in which the danger [of coordinated pricing] is most serious, liability may become less likely"); Richard A. Posner, *Antitrust Law* 100 (2d. ed. 2001). It also may not make sense empirically. *See Blomkest Fertilizer*, 203 F.3d at 1042

(Gibson, J., dissenting) (explaining why "successful price coordination" often requires an "actual agreement"); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp*, 509 U.S. 209, 227-28 (1993) ("Firms that seek to [raise prices] through the conscious parallelism of oligopoly must rely on uncertain and ambiguous signals to achieve concerted action. . . . This anticompetitive minuet is most difficult to compose and to perform, even for a disciplined oligopoly.").

CONCLUSION

Because the panel's decision departs from precedent, is bad policy, and would harm consumers by weakening antitrust law's deterrence of price fixing, Appellants' petition for rehearing and rehearing en banc should be granted.

Respectfully submitted,

s/ Richard M. Brunell

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CERTIFICATE OF COUNSEL

I, Richard M. Brunell, hereby certify that:

1. Pursuant to Local Appellate Rule 46.1, I am member of the bar of this court;

2. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 2599 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Local Appellate Rule 29.1(b).

3. This brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point font.

s/ Richard M. Brunell

October 20, 2017

CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system. To the best of my knowledge, all parties to this appeal are represented by counsel who are registered CM/ECF users and will be served electronically by the appellate CM/ECF system.

s/ Richard M. Brunell