79-1101

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 791011

CATALANO, INC., et al.,
Petitioners,

vs.

TARGET SALES, INC., et al.,
Respondents.

BRIEF OF RESPONDENT TARGET SALES, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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Respondent Target Sales, Inc., adopts by reference and joins in the brief in opposition to petition for writ of certiorari of respondent Donaghy Sales, Inc. Target Sales urges the following points to underscore Donaghy's argument that the Court of Appeals for the Ninth Circuit correctly affirmed the ruling of the District Court for the Eastern District of California—that an alleged credit fixing agreement, standing alone, is not illegal *per se* but must be proved illegal under the rule of reason; and that no important or special reasons exist for a review of that decision by this Court. *Cf.* Fed.R.Civ.P. 19.

ARGUMENT

1. *The rulings below comport with the procedure approved by this Court in a case of first impression.*

Traditionally, *per se* rules are applied only to conduct which has been tested and found unquestionably to have anticompetitive effects. *See, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958); *White Motor Co. v. United States*, 372 U.S. 253 (1963); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978); *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, ___ U.S. ___, 1979-1 Trade Cas. ¶ 62,558 (1979). As this Court explained in *White Motor*, considering for the first time a territorial restriction in a vertical arrangement:

> "We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain. They may be too dangerous to sanction or they may be allowable protections against aggressive competitors or the only practicable means a small company has for breaking into or staying in business [citations] and within the 'rule of reason.' We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a 'pernicious effect on competition and lack any redeeming virtue' (Northern Pac. R. Co. v. United States, supra, p. 5) and therefore should be classified as *per se* violations of the Sherman Act." [372 U.S. at 263.]

The same constraint was articulated when the issue first arose of whether fraud in the procurement of a patent could be a violation of the antitrust laws. In *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 178 (1965), this Court declared "the area of *per se* illegality is carefully limited. We are reluctant to extend it on the bare pleadings and absent examination of market effect and economic consequences." Again, in *United States v. Topco*

Associates, 405 U.S. 596, 607-608 (1972): "[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act." *GTE Sylvania, supra*, reiterated "that departure from the rule of reason standard must be based upon demonstrable economic effect rather than—as in *Schwinn*—upon formalistic line drawing." And most recently, in *Broadcast Music, Inc. v. Columbia Broadcasting System*, ____ U.S. ____, 1979-1 Trade Cas. ¶ 62, 558 at 77,242, in prescribing an inquiry on whether the purpose and effect of a challenged practice is to threaten the proper operation of a free market economy, or instead to increase economic efficiency and render markets more rather than less competitive, this Court counseled that:

> "The scrutiny occasionally required must not merely subsume the burdensome analysis required under the rule of reason, see *National Society of Professional Engineers v. United States*, 435 U.S. 679, 690, 692 (1978), or else we should apply the rule of reason from the start. *That is why the* per se *rule is not employed until after considerable experience with the type of challenge and restraint.*" [____ U.S. ____, n. 33, 1979 Trade Cas., n. 33 at 77,242 (emphasis added).]

2. *There is no reason in this case to depart from recognized procedure by creating*—ad hoc—*a new category of* per se *violation.*

The petition invites this Court to depart from its traditional caution, and to create a new category of *per se* violation on an *ad hoc* basis. We respectfully submit there is no reason to do so.

There is not a single reported instance in which an industry with a substantially C.O.D. policy, standing alone, has been tested "before" and "after"; or such a practice has been examined as to its effect, actual or probable; or the competitive or economic objectives or consequences have been elicited or assessed. *See Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918). Certainly they have not yet been in the proceedings at bar.

There is no evidence in the record that the practice being challenged is likely to cause, or has caused, substantial injury to competition—in the Fresno market or elsewhere. There is no indication that an inquiry to this end in this case will be complex, time-consuming, costly or uncertain. *See United States v. Northern Pacific Ry.*, 356 U.S. 1, 5 (1958). (Indeed, some of the defendants, including Donaghy and the present owner of Target Sales, came to adopt a substantially C.O.D. policy at different times, under different circumstances, for different reasons and, perhaps, with different effect from the other defendants. Each would be entitled in any event to show the absence of an anti-competitive objective or effect.)

There is not a single reported instance in which the economic characteristics (if any) of "credit fixing," standing alone, have been discussed, let alone equated with the fixing of prices.

There is not a single reported instance in which concerted action on credit, of any sort, has been found to violate the antitrust laws without at the same time being part of an overriding conspiracy with a pricefixing objective. *Cf. Wall Products Co. v. National Gypsum Co.*, 326 F.Supp. 295 (N.D. Calif. 1971); *Swift & Co. v. United States*, 196 U.S. 375 (1905); *Plymouth Dealers' Association of Northern California v. United States*, 279 F.2d 128 (9th Cir. 1960); *United States v. Allied Florists Association of Illinois*, 1953 Trade Cas. ¶ 67,433 (N.D. Ill. 1953); *United States v. Long Island Sand & Gravel Producers Ass'n*, 1940-1943 Trade Cas. ¶ 56,048 (S.D. N.Y. 1940).

In short: to apply the *per se* rule to the facts of this case would extend the law procedurally—by presuming illegal a commercial practice as to which the courts have had no experience; conceptually—by prejudging a practice without inquiry on purpose or effect; and substantively—by proscribing a pattern of conduct without a correlative, price-fixing purpose.

CONCLUSION

The Court of Appeals clearly considered, and correctly applied, this Court's philosophy on the function of *per se* rules in antitrust enforcement. That being so, and no compelling reasons having been advanced for this Court to change its philosophy, we respectfully submit the petition be denied.

DATED: February 14, 1980.

Respectfully submitted,

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