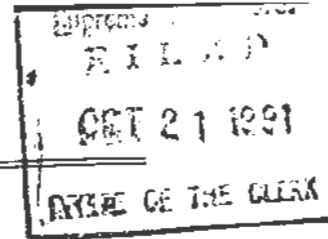


MEMORANDUM
AND
REPLIES

No. 90-1029



In The
Supreme Court of the United States
October Term, 1991

EASTMAN KODAK COMPANY,
Petitioner,
vs.

IMAGE TECHNICAL SERVICES, INC.; J-E-S-P CO., INC.;
SHIELDS BUSINESS MACHINES, INC.; MICRO-
GRAPHIC SERVICES, INC.; MICRO MAINTENANCE,
INC.; ATLANTA GENERAL MICROFILM CO., INC.;
ROGER KATONA, D/B/A G. & S. ELECTRONICS;
AMTECH EQUIPMENT MAINTENANCE, INC.;
ADVANCED SYSTEMS SERVICES, INC.; B.C.S. TECHNICAL
SERVICES, INC.; BOB INGLE, INC.; DATA PROX
EQUIPMENT CO.; FISHER MICROGRAPHICS, INC.;
I.O.A. DATA CORP.; SEARLE ENTERPRISES, D/B/A
MICRO IMAGE, INC.; MIDWEST MICROFILM EQUIP-
MENT & SERVICE, INC.; OMNI MICROGRAPHIC SER-
VICES, INC.; AND CPO, LTD.,

Respondents.

On Writ Of Certiorari To The United States Court Of
Appeals For The Ninth Circuit

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INTRODUCTION

Kodak's summary judgment motion demonstrated that Kodak's lack of market power in equipment markets restricted any possible exercise of market power in the alleged parts and service aftermarkets. Respondents countered that equipment competition was not "relevant." J.A. 339, 855.¹ Instead, they claimed that an alleged lock-in of past equipment customers gave Kodak market power over those customers. *Id.* This is how the case was presented to both the courts below and to this Court on the petition for *certiorari*.

In their brief on the merits, respondents finally admit the preeminent role of interbrand competition. They admit that (1) the equipment markets discipline the parts and service aftermarkets, (2) Kodak would lose "some new equipment customers" if it raised aftermarket prices and (3) Kodak's ability to profit from unreasonably high parts and service prices is dependent on competitive conditions in the interbrand markets. Resp. Br. 21-22, 34 (profitability depends on "demand elasticity for Kodak Equipment"). Those admissions are fatal to respondents' case – and explain why much of their brief is devoted to their new assertion that the equipment markets are *not* competitive. But since respondents never offered evidence of market power in the equipment markets, there is nothing in the record to support their new claim.

On this record, Kodak is entitled to summary judgment. The undisputed evidence demonstrates that

¹ The abbreviations used here are the same as those in Petitioner's Brief on the Merits. In addition, "Resp. Br." refers to Respondents' Brief on the Merits, and "S.G. Br." refers to the Brief for the United States as *Amicus Curiae* Supporting Petitioner.

Kodak's customers buy equipment in vigorously competitive markets and consider the long term costs of that equipment. There is no record evidence of unusual circumstances that would shield Kodak from the effects of interbrand competition.

Given this record, reinstating summary judgment in no way establishes a rule of *per se* legality for aftermarket business practices, as respondents and their *amici* claim. To the contrary, it is entirely consistent with this Court's prior rulings that interbrand competition restricts the exercise of intrabrand market power and, thus, that interbrand competition is the core of vertical restraints analysis. Nor will reinstating summary judgment result in the dire consequences predicted by respondents. Rather, it will allow interbrand competition to work. Equipment manufacturers will adopt service strategies responsive to their customers' demands. Buyers will pay competitive prices for the total package of equipment, parts and service. In certain cases ISOs may need to seek alternate sources of parts, but that does not offend antitrust policy. Antitrust law is not intended to force manufacturers in competitive equipment markets to support competitors or subject them to years of expensive litigation if they do not.

The number of *amici*, and the associations and interest groups they represent, exemplify the vast array of potential plaintiffs and defendants that exist if the service strategies of all manufacturers of branded equipment are subject to antitrust challenge. The theories advanced by respondents and their *amici* threaten *every* manufacturer of service-intensive equipment with tying and monopolization liability – even the smallest in the most competitive equipment market. That is why reinstating summary judgment in this case is important. The Solicitor General is correct that “in antitrust cases, where losers in the

competitive marketplace may resort to protracted litigation that could deter legitimate conduct," summary judgment rules act "as a protector of competition." S.G. Br. 10. To protect competition and the freedom of firms in competitive markets to offer innovative service and marketing strategies that best meet their customers' demands, Kodak asks the Court to reverse the Ninth Circuit and reinstate summary judgment.

ARGUMENT

I. The Only Issue Before the Court Is Whether a Manufacturer Which Lacks Market Power Has a Duty to Sell Replacement Parts to ISOs.

Under this Court's summary judgment trilogy, Kodak is entitled to summary judgment unless the evidence respondents submitted in opposition to its motion raised a genuine issue of material fact.² Kodak's evidence established that the equipment markets in which it competes are robustly competitive. *See, e.g.*, J.A. 159 (micrographics) & 175-78 (copiers). Kodak also submitted evidence that purchasers of new equipment consider long term costs, including service costs, when selecting among competing equipment vendors. J.A. 161-62 (micrographics) & 183-84 (copiers). Among other things, Kodak introduced a representative trade press article that

² *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Once Kodak presented its evidence, respondents had the burden of coming forward with "significant probative evidence" of their claims. *Anderson*, 477 U.S. at 249 (quoting *First Nat'l Bank of Ariz. v. Cities Service Co.*, 391 U.S. 253, 290 (1968)). Under *Matsushita*, in a case like this one that makes no economic sense, respondents had the burden of presenting even "more persuasive evidence" to defeat summary judgment. 475 U.S. at 587.

explains to prospective copier customers how to assess the true economic costs, including service costs, of a copier. J.A. 205, 213-17.

After discovery, respondents did not challenge these facts, but rather advanced a theory of the case in which equipment competition was irrelevant. They claimed that existing Kodak equipment *owners* become "locked-in" to Kodak post-purchase, J.A. 339-40, 354-58, and that this gives Kodak market power in the alleged aftermarkets only. J.A. 345 ("Kodak Has Market Power In The Service Markets"), 397 ("market dominance" in parts). Respondents claimed that the "relevant question is actually whether Kodak equipment *owners* . . . can, as a practical matter, switch brands when faced with supra-competitive prices or conditions on Kodak service." J.A. 339 (emphasis in original); *see also* J.A. 855. In fact, respondents expressly agreed with Kodak that new equipment *buyers* would "shun an equipment seller whose parts and service are priced too high." J.A. 855. There is no probative evidence to the contrary.³

³ Respondents cannot explain away the lack of evidence in the record by any reference to limitations on discovery. Respondents were permitted market power discovery, but focused on other issues consistent with their theory of the case. In any event, respondents no longer seriously dispute Judge Schwarzer's discovery rulings. *See* Resp. Br. 1.

Significantly, respondents no longer rely on the conclusory testimony of one of the plaintiffs that, in his experience, customers do not engage in life cycle cost analysis when they purchase equipment. J.A. 429. The declarant had no foundation for this claim, since he was exclusively a service provider and had no experience selling equipment. J.A. 412. His testimony was, accordingly, inadmissible under Federal Rules of Evidence 602 (lack of personal knowledge) and 701 (lay opinion). Kodak lodged a timely objection to it. Record No. 46 at 9, 11.

Now that respondents have conceded the significance of competition in equipment markets, they have an insurmountable problem. They must argue that the inter-brand markets are not competitive, when the only record evidence shows precisely the opposite. That dilemma explains respondents' attempts to offer new evidence, argue new market definition theories,⁴ and raise claims they previously abandoned – all of which are improper in this Court. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157-58 n.16 (1970) (facts “not in the record of the proceedings below . . . [m]anifestly . . . cannot be properly considered by this Court”); *Granfinanciera, S.A. v. Nordberg*, 492 U.S.

⁴ Respondents have never claimed that any of the three product categories in which they now say Kodak has a high market share is in fact a relevant market, and there is no evidence that they are. To the contrary, the only record evidence regarding copiers is that high-volume copiers compete with mid-volume copiers, and that “there is no copier market in which Kodak is even the largest firm, let alone a monopolist.” J.A. 176. For micrographics, the only evidence is that the product categories respondents cite “are not distinct markets,” and indeed that micrographics equipment alone is not even a distinct market. J.A. 157-58. There is no evidence to support respondents' new “markets.”

Based on events that post-date summary judgment, respondents claim that Kodak is now a duopolist in a high-volume copier market, and that its sole competitor, Xerox, has adopted a parts policy similar to Kodak's. Resp. Br. 16-17. Those claims are not true. *See, e.g.*, Brief *Amici Curiae* of the California State Electronics Ass'n *et al.* at 21, n.26 (1990 market data shows Canon, Konica and Mita are “closest competitor[s]” to Kodak in copier market segment); Resp. Br. 17, 1A (misstatement that Kodak acquired IBM “copier business” when annual report states Kodak only acquired ability to *service* IBM copiers). But since neither these “facts” nor their implications are before this Court – and are not properly the subject of judicial notice – no more need be said about them. *See, e.g.*, *Garner v. Louisiana*, 368 U.S. 157, 173 (1961).

33, 39 (1989) (absent exceptional circumstances, respondent may not raise new arguments before this Court); *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957) (contention made in District Court but not argued to Court of Appeals was waived).⁵

The issue presented by the record below, and the only issue before this Court, is whether Kodak, which indisputably faces a competitive market for new equipment sales, has a duty to sell parts to ISOs. Summary judgment on that issue on this record is required.

II. Kodak Cannot Exercise Market Power in Aftermarkets When It Lacks Market Power in Equipment Markets.

A. Respondents' Claim Is Inherently Implausible.

Analysis of this case begins with the question of whether it is plausible to believe that Kodak could profit from anticompetitive service strategies. See S.G. Br. 11. The answer is no. Interbrand equipment competition renders respondents' claims inherently implausible.

This Court addressed a conceptually identical issue in *Matsushita*. There the Court affirmed summary judgment because it found plaintiffs' theory of a predatory pricing conspiracy implausible. Central to this conclusion was the Court's recognition that, without "enough market power to set higher than competitive prices," defendants would likely never recoup the losses sustained in their below-cost pricing campaign. 475 U.S. at 590. The existence of a formula for a successful predation strategy (gains > losses) was not the issue. Formulas always exist. The problem the Court recognized was that without

⁵ Respondents' statement of the questions presented by the *certiorari* petition confirms that they conceded the existence of interbrand competition and abandoned both rule of reason and conspiracy claims. See Brief in Opp. to Pet. for Cert. at i.

market power it was implausible for the alleged conspirators to come out ahead in the long run.

Here the alleged sequence of predation/recoupment is reversed, but the analysis is the same. Because Kodak faces concededly competitive equipment markets, it cannot plausibly expect that any short term gain from an anticompetitive service strategy will exceed its long term losses. Respondents concede as much when they admit that Kodak's ability to profit from such a strategy is dependent on "demand elasticity for Kodak Equipment," *i.e.*, the inclination of customers to buy other manufacturers' equipment if Kodak's prices increase. Resp. Br. 22, 34. Without market power, the "demand elasticity for Kodak Equipment" is necessarily high. See Landes & Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 939-43 (1981). Thus, Kodak could not hope to maintain its equipment sales or its overall profitability by supercompetitively pricing service.

If anything, respondents' theory is even less plausible than the claim in *Matsushita*. Kodak cannot play the "waiting game" as in *Matsushita*. Rather, since Kodak is simultaneously selling new equipment and servicing old equipment, respondents' theory requires Kodak to charge supercompetitive service prices to one group of customers while at the same time offering competitive package prices to others. Resp. Br. 20-22.

Respondents have never explained how that is possible given the existence of sophisticated repeat buyers in an environment of rapidly changing technology. J.A. 163, 355, 454. Nor have respondents ever produced any evidence that Kodak actually engages in this or any other of the various price discrimination strategies that it claims Kodak hypothetically "could exploit." See Resp. Br. 20-21 & n.14 (seven usages of "could").⁶ Finally, respondents

⁶ Respondents ignore Kodak's "Copy Products Price Schedule," the comprehensive statement of Kodak's uniform
(Continued on following page)

never deal with the fact that depressing equipment sales will ultimately depress service revenues too. *See* J.A. 162 (anticompetitive service strategy “would ultimately hurt . . . service revenues since future service revenues are heavily dependent on present equipment sales”).⁷

Respondents gloss over these issues and try instead to shift the burden to Kodak to prove that it could not exploit customers. *See, e.g.*, Resp. Br. 35 n.24 (contending that Kodak’s contrary claim is “unsupported by this record”). Under this Court’s summary judgment decisions, however, that burden was respondents’, not Kodak’s. *Anderson*, 477 U.S. at 250; *Celotex*, 477 U.S. at 324-25. Since respondents did not meet their burden, Kodak was entitled to summary judgment.

B. Respondents’ Consumer Ignorance Theory Is Unsupported by the Record and Economically Flawed.

Respondents and several *amici* contend that imperfect consumer decisionmaking is enough to permit manufacturers without market power to charge supercompetitive

(Continued from previous page)

prices and terms for copier products and service. L075-100. Respondents also repeatedly miscite the record (Resp. Br. 20, 36, 42, 46) in claiming that Kodak raised service prices after allegedly changing its parts practices. There is no record evidence that Kodak raised prices. *See* J.A. 162-63, 667-68.

⁷ At most, respondents speculate that a hypothetical formula may exist such that a firm facing interbrand competition might succeed in the short run by pricing its service and parts supercompetitively to “locked-in” and uninformed customers only. But that does not rebut the inherent implausibility of respondents’ claim. It simply defines a possible “unusual case” and moves the analysis to the second question – whether respondents have persuasive evidence demonstrating that, despite the contrary presumption, Kodak’s conduct is in fact anticompetitive. *See* S.G. Br. 11. There is no such evidence.

prices in aftermarkets. This Court squarely rejected the same "market imperfections" argument in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 27 (1984).

1. There Is No Record Evidence of Market Imperfections.

Unlike this case, the record in *Jefferson Parish* included significant evidence of actual market imperfections. *Id.* at 27-28 (imperfect information and third party payors). There was even a Congressional finding that the imperfections existed. *Id.* at 27 n.45. Nonetheless, the Court held that those market imperfections did "not generate the kind of market power that justifies condemnation of tying." *Id.* at 27.

Here, there is no evidence of any unusual constraints on consumer decisionmaking, such as the third party payor issue.⁸ Indeed, there is uncontroverted evidence that copier and micrographics purchasers consider long term costs when making purchasing decisions. J.A. 161-62, 183-84, 205, 213-17. Respondents also admit that prospective buyers can and do "shun an equipment seller whose parts and service are priced too high." J.A. 855. That admission is dispositive. It shows that consumer information, whether or not it is "perfect" in these markets, is more than adequate for competition to work.

Despite that admission, respondents now contend that Kodak made it harder for customers to calculate long term costs by either changing its parts policies after they purchased Kodak equipment or by not informing them of Kodak's unwillingness to sell parts to ISOs. Resp. Br. 5-11. These new contentions are specious.

⁸ Thus, the concerns of the automobile insurance industry are unfounded. *See, e.g., Amici Curiae Brief for State Farm Mutual Automobile Ins. Co. et al.* at 20. This case simply does not present the third party payor issue which is at the core of these *amici's* arguments.

First, respondents cite no evidence that any customer was actually confused about the price of service. Respondents merely speculate that confusion may have resulted because Kodak changed its parts practices. But the undisputed evidence shows that Kodak did not change its parts practices retroactively. When Kodak changed its micrographics parts practices in 1985, it grandfathered parts for all existing Kodak equipment.⁹ As for copiers, Kodak never knowingly sold copier parts to ISOs.¹⁰

Likewise, there is no support in the record for respondents' claim that Kodak customers "likely expected aftermarket competition," and thus that Kodak misled them by not trumpeting its refusal to sell ISOs

⁹ J.A. 166 ("with respect to parts that we had historically sold to anyone, *i.e.*, parts for our older products, we would continue to do so"); *see also* J.A. 151-54 (the Kodak memorandum stating the policy). Respondents cite L125 as the evidence showing unavailability of pre-1985 micrographics parts. Resp. Br. 10. L125 concerns copiers, not micrographics, and says nothing about restrictions on parts.

¹⁰ Kodak adopted its copier parts policy when it entered the copier industry in 1975, and there has been no significant change in it since. J.A. 184-85. No doubt some ISOs bought copier parts from Kodak despite Kodak's policy (Resp. Br. 4); indeed, there is evidence that an ISO was able to buy parts using the name of his dog. J.A. 474. But these anecdotes show only that Kodak could not enforce its policy with 100% effectiveness. Kodak did not change the rules on its existing copier customers at any time.

One plaintiff claims that Kodak told him he could purchase copier parts. J.A. 415. If so, that is irrelevant. Respondents' tying theory requires that Kodak told its copier customers, not ISOs, that ISOs would be supplied with parts. Since there is no evidence that Kodak ever did that, there is no basis for postulating that Kodak fooled its customers in any way.

parts. Resp. Br. 10-11. Assuming any duty to disclose,¹¹ there is no evidence that buyers had such an expectation. To the contrary, the record shows that independent service was insignificant in the micrographics market until shortly before Kodak's policy went into effect, J.A. 726-27, and is still insignificant in the copier market. J.A. 516 (only four ISOs service Kodak copiers nationwide), 430, 514 (fewer than ten). The record does not support respondents' consumer ignorance theory in any of its varied forms.

2. A Theory of Imperfect Consumer Information Is Not an Adequate Substitute for a Showing of Market Power.

At bottom, respondents and their *amici* seem to argue that *Jefferson Parish* was wrong in its conclusions that market imperfections, such as imperfect consumer information, do not "force[] purchases that would otherwise not be made" and "do not generate the kind of market power that justifies condemnation of tying." 466 U.S. at 27. Respondents' argument boils down to the proposition that market power is unnecessary absent a showing that purchasers are perfectly informed about long term costs.

Antitrust law does not guarantee purchasers perfect information. Nor does it penalize sellers by subjecting them to *per se* tying and monopolization liability if purchasers are not perfectly informed. There is never perfect consumer information. Schwartz & Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. Pa. L. Rev. 630, 630 (1979).

¹¹ Respondents cite no authority for the proposition that one competitor must inform customers of the products available from other competitors and, of course, there is none. The very notion makes no sense. See *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 377 (7th Cir. 1986) (Posner, J.), *cert. denied*, 480 U.S. 934 (1987).

Consequently, a market imperfections exception to the market power rule is no exception at all. It swallows the rule.¹²

To accept respondents' consumer ignorance theory, the Court would not only have to overlook the record, it would have to overrule *Jefferson Parish*. The Court should decline the invitation.

C. A Theory of Post-Sale "Lock-Ins" Typical of Durable Goods Does Not Substitute for a Showing of Market Power.

The lock-in theory that was respondents' central argument in the District Court and before the Ninth Circuit is largely forgotten in their merits brief. *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336 (9th Cir. 1984), cert. denied, 473 U.S. 908 (1985), which has always been respondents' principal authority, and upon which the Ninth Circuit majority relied, is no longer even cited. That omission is a telling admission that the lock-in theory is groundless. See 9 P. Areeda, *Antitrust Law* ¶ 1703 at 43 (1991) ("the time to [assess market power] is not after a customer has been allegedly 'locked-into' an arrangement but before he entered it"); see also *Jefferson Parish*, 466 U.S. at 28 (noting that patients preferring not to be locked into an exclusive anesthesiology provider would "go to

¹² The fact that respondents and their *amici* can claim imperfect information in markets for the sale of expensive equipment to sophisticated business customers proves the point. See 9 P. Areeda, *Antitrust Law* ¶ 1712 at 145 (1991) ("[s]ophisticated business purchasers of technologically advanced and complex equipment are presumably more sensitive [than average consumers] to future maintenance and repair prices"). Moreover, the record demonstrates that copier and micrographic equipment purchasers account for long term costs, J.A. 205, 213-17, and that Kodak prices its products expecting them to do so. J.A. 194-95, L001-039.

another hospital where they can utilize the services of the anesthesiologist of their choice”).

Respondents hypothesize that a manufacturer might forego new equipment sales in reliance on service profits from lock-ins. Resp. Br. 33-35. But, once again, respondents fail to meet their burden of showing with any evidence, let alone persuasive evidence, that any gain Kodak could achieve by exploiting its existing customers would outweigh the losses from lost equipment sales. Their lock-in theory fails on that ground too.

D. The Fiction of a Parts or Service Aftermarket Cannot Bestow Market Power on Firms Constrained by Equipment Market Competition.

Respondents also argue that merely by defining Kodak parts and service as “markets,” they can avoid any analysis of the impact of equipment market competition on those aftermarkets. Resp. Br. 28-32. The argument is an empty tautology which should be firmly rejected.

The process of market definition is meant “not to . . . obscure competition, but to ‘recognize competition where, in fact, competition exists.’ ” *United States v. Continental Can Co.*, 378 U.S. 441, 453 (1964), quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 326 (1962). Therefore, any definition of the relevant market that permits a court to ignore competition that significantly constrains the exercise of market power is flawed. Yet the constraint of equipment competition is precisely what the fiction of relevant parts and service “markets” is intended to ignore.

Respondents admit they are trying to ignore interbrand competition by baldly asserting that “the definition of a market necessarily implies the possibility of its being monopolized.” Resp. Br. 25. Their syllogism is that since, by hypothesis, a service market can be monopolized, neither interbrand equipment competition nor anything

else "outside the market" can make it otherwise. See Resp. Br. 39-40 ("competition in equipment markets is beside the point").

The premise that all "markets" can be monopolized is simply false. This Court has recognized, for example, that markets without entry barriers cannot be monopolized or be subject to supracompetitive pricing. *Matsushita*, 475 U.S. at 591 n.15 ("without barriers to entry it would presumably be impossible to maintain supracompetitive prices for an extended time").¹³ Similarly, this Court has noted that interbrand competition "provides a significant check on the exploitation of intrabrand market power." *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 52 n.19 (1977). See also *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 725 (1988). In both circumstances, something ostensibly outside the market protects against supercompetitive pricing.

Interbrand equipment competition must be factored into the Court's analysis of this case. There are two choices. The Court can integrate the factor into market definition and conclude, on the ground that a market which cannot be exploited is not really a market, that parts and service are not relevant markets.¹⁴ Or the Court can assume the existence of these markets and recognize,

¹³ See also *American Academic Suppliers, Inc. v. Beckley-Cardy, Inc.*, 922 F.2d 1317, 1320-21 (7th Cir. 1991) (Posner, J.); *United States v. Baker Hughes, Inc.*, 908 F.2d 981, 987 (D.C. Cir. 1990) (Thomas, J.).

¹⁴ This approach to market definition is adopted to a significant degree by the Department of Justice's 1984 Merger Guidelines, 49 Fed. Reg. 26,823 (June 29, 1984), which expand the definition of the market to include most forces that prevent the exercise of market power. See, e.g., § 2.21 (firms which could potentially enter the market in the short term are assumed to be within the market and assigned a market share).

much as entry barrier analysis proceeds, that firms constrained by equipment competition cannot exercise market power in aftermarkets.

Kodak has advocated the latter course because it believes the fact of active interbrand equipment competition establishes the absence of power in the aftermarkets far more directly than market definition semantics ever can. See 2 P. Areeda & D. Turner, *Antitrust Law* ¶ 507 at 330 (1978) (“[m]arket definition becomes crucial only when there are no other discoverable facts establishing the existence and degree of market power more directly.”). But it does not matter which course the Court chooses so long as interbrand competition is not ignored. Either way, Kodak is entitled to summary judgment.¹⁵

III. Kodak’s Parts Practices Are Not a *Per Se* Unlawful Tying Arrangement.

Respondents’ only tying claim is for a *per se* violation. Despite their contrary assertions, respondents waived any rule of reason tying claim, as the Court of Appeals held. Pet. App. 4A n.1. Until their merits brief, respondents never once assessed Kodak’s conduct under the

¹⁵ Respondents also elevate semantics over substance in defining the alleged tie. If this is a tying case at all, the tie at issue is equipment-to-service, not parts-to-service as alleged. Respondents’ true complaint is that Kodak effectively forces its equipment customers to buy service contracts, thereby foreclosing competition from ISOs. Parts enter the picture only as the means to the alleged end. Why then, do respondents not allege an equipment-to-service tie? Because if they were ever to be that candid, they could not possibly dispute the necessity of proving, under *Jefferson Parish*, Kodak’s market power in the equipment markets. Respondents have no proof of that power, so they try to avoid the issue through the “semantic shell game” that the two product issue has become. See *Casey v. Diet Center, Inc.*, 590 F. Supp. 1561, 1565-66 & n.4 (N.D. Cal. 1984) (Schwarzer, J.).

rule of reason. See J.A. 390-401 (District Court briefing), 758-76 (Ninth Circuit briefing).¹⁶

Per se condemnation is reserved for business conduct that is plainly anticompetitive. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 8 (1979) (“BMI”); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 646 (1980). It is applied only to practices that “always or almost always tend to restrict competition and decrease output.” *BMI*, 441 U.S. at 19-20. If “facts peculiar to the business to which the restraint is applied” must be assessed before “form[ing] a judgment about the competitive significance of the restraint,” the rule of reason, not the *per se* rule, applies. *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978).

Kodak’s parts practices cannot be summarily condemned as illegal *per se*. Respondents themselves (along with their new economist) claim that the “overall profitability” of Kodak’s conduct depends on a complex economic calculus including “the size of Kodak’s installed base relative to annual sales, demand elasticity for Kodak Equipment, prices [and] costs.” Resp. Br. 34. Market power must also be assessed, along with adverse effects in the tied product market and business justifications. *Jefferson Parish*, 466 U.S. at 11-18. These factors, both

¹⁶ Respondents’ claim that they argued a rule of reason tying case in the District Court is disingenuous. See Resp. Br. 40-41 n.28. They quote the first part of a paragraph from their brief that tying “may receive a rule of reason analysis under Section 1,” but omit the second part that limited their argument to the “usual[] challenge[]” of “*per se* violations of Section 1.” J.A. 390. Moreover, respondents’ opposition to the petition for a writ of *certiorari* raised only “their *per se* claim under section 1 of the Sherman Act. . . .” Brief in Opp. to Pet. for Cert. at i. They never claimed the Ninth Circuit erred in ruling they had waived their rule of reason claim. Of course, as respondents admit, even a rule of reason claim requires evidence of market power. Resp. Br. 41. Thus, Kodak’s lack of market power also defeats a rule of reason tying claim.

individually and collectively, are inherently foreign to *per se* analysis, and evidence relating to them may not even be admissible in defense of a genuine *per se* claim. See ABA Antitrust Section, *Antitrust Law Developments* 22 (2d ed. 1984) (“the *per se* rule forecloses any analysis of the . . . nature, extent and degree of market effect”).

Whether the Court chooses to maintain dual legal standards for assessing tying arrangements or not, Kodak’s conduct ought not to be subjected to *per se* liability. Kodak does not have the market power required for *any* tying violation, and certainly not for one warranting *per se* condemnation.

IV. Kodak’s Refusal to Deal Does Not Constitute Monopolization Under *Aspen*.

Respondents claim that under *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), a monopolist cannot withdraw from a “cooperative relationship” if it is efficient. There are two short answers to this: (1) Kodak is not a monopolist, and (2) Kodak has never been party to a “cooperative relationship” with ISOs. At most, Kodak had an ordinary buyer-seller relationship with a few ISOs prior to 1985, in that it sold them micrographics parts. That is nothing like the joint marketing agreement in *Aspen*. In any event, Kodak will still sell pre-1985 micrographics equipment parts to ISOs. J.A. 151-54, 166-67, 734.

Further, as a matter of law, neither *Aspen* nor any of this Court’s other refusal to deal cases compel dealings with rivals in these circumstances. Even monopolists are free not to deal with rivals unless (1) there is an economically sound basis for application of the “essential facilities” doctrine (which respondents no longer claim there is), or (2) the refusal to deal is predatory in the sense that it lacks any legitimate justification and instead “sacrifice[s] short-run benefits and consumer goodwill in

exchange for a perceived long-run impact on its smaller rival." *Aspen*, 472 U.S. at 610-11. Here, Kodak's emphasis on high quality service is the epitome of a legitimate business justification, see 9 P. Areeda, *Antitrust Law* ¶ 1703g at 50-51 (1991), and its refusal to aid free riding is anything but predatory. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 762-63 (1984) (manufacturers may properly take steps "to see that 'free-riders' do not interfere"). In short, Kodak lacks monopoly power and has no legal duty to deal with ISOs. Its refusal to deal does not constitute monopolization.

V. Respondents Waived Any OEM Conspiracy Claim.

Respondents' claim that Kodak conspired with OEMs to deny ISOs parts, Resp. Br. 44-46, is not before this Court. Respondents waived that claim by not appealing from the District Court's dismissal of it.

In the District Court, respondents contended that Kodak conspired with original equipment manufacturers to deny ISOs non-patented parts, and that this conspiracy was illegal *per se* under *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959). J.A. 401-02. Literally all of the evidence respondents cited in support of this claim was hearsay, see J.A. 365, 429, 468, 496, and Kodak objected to it.¹⁷ Record No. 46, *citing inter alia*, Fed. R. Civ. Proc. 56(e) (opposition to summary judgment must be supported by admissible evidence). In addition, Kodak noted that any such agreements would be "paradigm vertical arrangement[s]" subject to the rule of reason, not

¹⁷ Even the hearsay evidence showed the respondents could obtain Kodak parts from some OEMs, J.A. 457-58, 490, 496, and that Kodak parts are available from disassembly of used equipment. J.A. 426. Respondents also admit that used Kodak equipment is extremely inexpensive, J.A. 733, which makes it an economical source of parts.

the *per se* rule. J.A. 699. Judge Schwarzer held that respondents' evidence of the alleged OEM conspiracy was indeed hearsay and thus that they had failed to raise triable issues regarding that claim. Pet. App. 32B.

When respondents appealed from the entry of summary judgment, they did not appeal from the conspiracy decision. None of respondents' three issues presented for review raised the conspiracy claim, J.A. 720-21; they never cited *Klors* or similar group boycott cases, J.A. 718-19; they never challenged Judge Schwarzer's hearsay ruling; and, with the exception of three sentences that were carried over verbatim from respondents' District Court papers, compare J.A. 738-39 with J.A. 365, they never mentioned the subject of conspiracy. Rather, they argued *per se* tying and monopolization. J.A. 747-86. Kodak even pointed out that respondents no longer pursued the conspiracy claim. J.A. 834. Respondents replied solely by contending that Kodak had agreements with its *customers* not to resell to ISOs (the alleged tying arrangements themselves). J.A. 857-58. Respondents said nothing about agreements between Kodak and OEMs. Accordingly, the Ninth Circuit did not address any alleged conspiracy with OEMs. Like respondents, the Ninth Circuit mentioned concerted action only in the context of tying. Pet. App. 15A.¹⁸

Respondents cannot revive their OEM conspiracy claim in this Court. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them"); accord *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 245 (1985); *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957). In any

¹⁸ In addition, respondents neither cross-petitioned for *certiorari* on the conspiracy claim nor raised the claim in their brief in opposition to Kodak's petition.

event, the conspiracy claim fails. Respondents rely solely on hearsay, and Judge Schwarzer's evidentiary ruling remains unchallenged even now. See Resp. Br. 44-46. Moreover, because respondents now admit that a conspiracy with OEMs would be subject to the rule of reason under *GTE Sylvania*, Resp. Br. 44, Kodak's undisputed lack of interbrand market power also would dispose of this claim. See, e.g., *Assam Drug Co., Inc. v. Miller Brewing Co., Inc.*, 798 F.2d 311, 315-16 (8th Cir. 1986).

CONCLUSION

For the reasons stated above and in Kodak's brief on the merits, the Ninth Circuit's decision should be reversed and summary judgment in favor of Kodak reinstated.

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