No. 83-2004

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Petitioners,

v.

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION,
Respondents.

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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

INTRODUCTION

In an effort to discourage any meaningful analysis of their conspiracy claims, respondents have filled their brief with conclusory allegations, string citations to thousands of documents, and characterizations of what the record allegedly shows. This diversionary tactic, however, cannot obscure the fact that respondents seek to infer the alleged predatory export conspiracy from conduct that is indistinguishable from competition, that the alleged conspiracy makes no economic sense, and that there is no evidence in the record capable of satisfying this Court's conspiracy inference standards. (P. Br. 23-35).

Thus, as we show below (pp. 13-22, *infra*), despite respondents' attempt to convince this Court that there must be *some* documents hidden *somewhere* in the record which support their conspiracy claims, they are unable to point to any evidence capable of overcoming the following critical failures of proof which the district court found and the court of appeals did not question:

(i) there is no "direct evidence" of the "low price" export conspiracy alleged (Pet. App. 259a-260a, 621a);

(ii) there is no evidence showing any "connection" between the alleged price stabilization in Japan and defendants' exports to the United States (Pet. App. 421a-463a, 615a);

(iii) there is no evidence that defendants ever discussed among themselves their prices to United States customers (other than the Japanese Government-compelled *minimum* export prices) (Pet. App. 421a-422a, 613a);

(iv) there is no evidence that defendants sold at uniform prices or price levels in the United States; instead, the record shows that they sold at every price level ranging "from the lowest to the highest" (Pet. App. 476a n.202, 613a);

(v) there is no evidence of "any agreement among defendants concerning rebates" (Pet. App. 500a);

(vi) there is no evidence of an exchange of export price information or economic data relevant to the alleged "low price" export conspiracy (Pet. App. 421a-422a, 613a);

(vii) there is no evidence that the minimum "check prices" were used by defendants as "reference prices" (Pet. App. 327a-328a, 380a-381a);

(viii) there is no evidence that the "five-company rule" prevented defendants from registering the same United States import customers or registering their United States sales subsidiaries, which in turn sold to hundreds of other customers in the United States (Pet. App. 383a-385a);

(ix) there is no evidence of any mechanism to share profits and losses among the defendants (Pet. App. 483a, 615a-616a); and

(x) there is no evidence that defendants could have acquired or maintained the monopoly power necessary to recoup the "losses" which would have been generated by the alleged predatory export scheme (Pet. App. 484a).

It is because of these failures that respondents have been forced to construct their export conspiracy claims from conduct that mirrors competition. Unable to dispute that defendants sold their products in the United States at every price level, "ranging from the lowest to the highest" (Pet. App. 476a n.202), respondents argue that petitioners entered into a conspiracy to sell at "whatever price was necessary to make the sale." (Pet. App. 301a, 478a-479a & n.204). Under this theory, "variations in petitioners' pricing [become] immaterial" (R. Br. 69) and evidence that individual petitioners granted "secret rebates" and charged "low" competitive prices becomes evidence of conspiracy. (R. Br. 30-42). Respondents offer nothing to dispute that petitioners' alleged export pricing behavior was perfectly consistent with each petitioner's independent economic self-interest in entering and becoming established in the U.S. television market. Far from supporting an inference of an antitrust conspiracy, such conduct reflects vigorous competition.

Similarly, respondents' brief cannot cover up the economic implausibility of the alleged predatory export conspiracy. Faced with an undisputed record demonstrating that petitioners would not have had any hope of acquiring and maintaining the monopoly power necessary to recoup the "losses" which would have resulted from such a scheme (P. Br. 24-27), respondents' brief simply ignores this fundamental defect in their claims. No rational firm, however, would have a motive to pour money into a loss-generating, predatory export conspiracy unless there were some realistic possibility of recoupment through the exercise of monopoly power.

It is thus difficult to imagine a more compelling case for application of this Court's safeguards against speculative inferences of conspiracy. Although respondents seek to distinguish and limit *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968), they are unable to avoid the commonsense principle underlying that decision, *i.e.*, that an antitrust conspiracy may not be inferred in the absence of "significant probative evidence" that defendants' conduct is rationally *more* explainable as the product of conspiracy than as independent action. *Cities Service*, 391 U.S. at 280. And, despite respondents' assertion that the court of appeals' decision "is fully consistent with" this Court's ruling in *Monsanto Co. v. Spray-Rite Service Corp.*, —— U.S. ——, 104 S. Ct. 1464 (1984) (R. Br. 82), they fail to identify *any* conspiracy inference standard applied by the court of appeals or to explain how evidence of export pricing "all over the lot" (Pet. App. 613a) which is indistinguishable from competition can "exclude the pos-

sibility of independent action." *Monsanto*, 104 S. Ct. at 1473.

Respondents also fail to advance any valid justification for the court of appeals' treatment of the Japanese Government-compelled export control arrangements as a "feature" of the alleged conspiracy. Disregarding the ruling of this Court in *United States v. Pink*, 315 U.S. 203 (1942), the court of appeals ignored the official representations of the Japanese Government that petitioners' participation in the export control arrangements was compelled by that Government as an integral part of its foreign trade policy. Respondents' assertions that the "Japanese government communications in this case . . . are entitled to no legal effect" (R. Br. 94), and that "[n]o 'compulsion' claim can be recognized as *bona fide*" in this case (R. Br. 91), invite precisely the type of judicial encroachment upon U.S. foreign policy that the sovereign compulsion and act of state doctrines are intended to prevent. (U.S. Gov. Br. 15-27).

For all of these reasons, respondents' brief only confirms that the decisions of the court of appeals should be reversed and that summary judgment should be reinstated. If summary judgment is to have any utility in antitrust conspiracy cases, it is essential that it be reinstated in a case like this, in which competitors are trying to use the antitrust laws to penalize price competition, the alleged conspiracy makes no economic sense, the district court has spent years reviewing all of the proffered evidence and found nothing to support respondents' allegations, and neither respondents nor the court of appeals have been able to point to any evidence which would satisfy this Court's conspiracy inference standards.

I. RESPONDENTS CANNOT JUSTIFY THE COURT OF APPEALS' FAILURE TO APPLY THIS COURT'S CONSPIRACY INFERENCE STANDARDS

In our opening brief (P. Br. 17-23), we demonstrated that the court of appeals refused to apply this Court's conspiracy inference standards, holding that the normal "limitations of the inference-drawing process" do not

apply to this case. (Pet. App. 165a). Respondents' brief does not dispute this point or identify *any* conspiracy inference standard applied by the court of appeals. Instead, respondents advance several alternative legal arguments in an effort to justify the court of appeals' decision.

First, respondents argue that this Court's decision in *Cities Service* is "inapposite" because it is a narrow and insignificant pronouncement which should be "limited to its particular and unusual facts." (R. Br. 72). *Second*, respondents argue that, even if *Cities Service* is apposite, the court of appeals' rulings on "motive" are "not inconsistent" with that decision. (R. Br. 74-81). *Third*, respondents argue that to the extent this Court's decision in *Monsanto* applies, the court of appeals' decision is "fully consistent" with *Monsanto*. (R. Br. 82). *Fourth*, respondents assert that the rule which permits a trial judge to determine on summary judgment that a requested inference of conspiracy is impermissible (the *Cities Service* standard) is somehow inconsistent with authority which permits a fact finder to choose between competing reasonable inferences. (R. Br. 67, 74 n.65). *Fifth*, respondents argue that a conspiracy may be inferred from the combination of petitioners' allegedly parallel export pricing behavior and other circumstantial evidence, even though such behavior is entirely consistent with the independent economic self-interest of each petiitoner. (R. Br. 82-85). *Finally*, respondents suggest that the court of appeals' failure to apply any conspiracy inference standard was proper because of the existence of "direct evidence" of certain "aspects" of the alleged conspiracy. (R. Br. 64). As we show below, all of these arguments are baseless.

1. *Cities Service.* This Court's decision in *Cities Service* was not some narrow ruling limited to its "particular and unusual facts." It was a basic statement of the need to guard against speculative antitrust conspiracy claims and a recognition that not every "antitrust

complaint setting forth a valid cause of action" warrants a trial. *Cities Service*, 391 U.S. at 290. The fundamental rule established in that decision—that participation in an antitrust conspiracy may not be inferred unless plaintiffs come forward with "significant probative evidence" that defendants' conduct is rationally *more* explainable as the product of a conspiracy than as independent action—is vitally important to prevent meritless antitrust conspiracy claims from burdening the parties and the judicial system with unnecessary trials. 391 U.S. at 280, 290.

Respondents' suggestion that the *Cities Service* safeguards should be relaxed in horizontal price-fixing cases brought by competitors (R. Br. 73-75) turns antitrust policy on its head. Application of the *Cities Service* conspiracy inference standard is unquestionably appropriate in horizontal price-fixing cases.[1] Indeed, it is nowhere more appropriate than in price-fixing cases in which competitors complain of *low pricing* by their rivals. *See* Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1, 35 (1984). Far from being ill-suited for summary judgment under established inference standards, cases premised on "low pricing" conduct which mirrors competition require the most stringent form of judicial scrutiny to ensure that the antitrust laws are not being misused by firms seeking shelter from the rigors of competition. (P. Br. 21-22 & n.12).[2] There is thus no more

[1] *See, e.g., Proctor v. State Farm Mutual Auto Insurance Co.*, 675 F.2d 308, 334 (D.C. Cir.), *cert. denied*, 459 U.S. 839 (1982) (alleged horizontal fixing of insurance reimbursement rates); *Weit v. Continental Illinois National Bank & Trust Co.*, 641 F.2d 457, 463 (7th Cir. 1981), *cert. denied*, 455 U.S. 988 (1982) (alleged horizontal fixing of interest rates).

[2] As recently explained by FTC Commissioner Terry Calvani, non-price predation by firms seeking to exclude or alter the aggressive pricing practices of their rivals, such as by filing burdensome litigation, is far more likely to occur than price predation, which is "costly" and "risky." Calvani, "Non-Price Predation: A New Antitrust Horizon," 5 Trade Reg. Rep. (CCH) ¶ 50,475 (July 9, 1985). Commissioner Calvani's remarks apply precisely to this case.

important situation in which to apply the principles recognized in *Cities Service* than in a "low price" conspiracy case such as this.

2. *Motive to Conspire.* Equally unavailing is respondents' assertion that the court of appeals' decision is "not inconsistent" with *Cities Service* because there is "extensive evidence" of petitioners' "motive" to conspire. (R. Br. 75-81). Neither respondents nor the court of appeals have pointed to *any* evidence capable of satisfying this crucial test.

Respondents assert that the record shows that petitioners had a motive to dispose of their "excess" manufacturing capacity and to do so at prices low enough to beat the competition. (R. Br. 77-78). But this is nothing more than a normal competitive motive for each petitioner to increase sales, not the required motive to enter into the alleged "low price" export conspiracy. *See United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610, 612 n.1 (1977) (" 'increasing sales' and 'increasing market share' are normal business goals" not forbidden by the antitrust laws). The relevant question is not whether petitioners had *individual* motives to export to the United States to secure business, even at "low prices," but whether there is evidence that they had a motive to achieve their objectives through *concerted* predation. There is no such evidence in this case.

As petitioners have shown (P. Br. 24-26, 33), it would have been irrational for petitioners to have entered into the alleged predatory export conspiracy since the undisputed facts establish that there was no possibility that they could have acquired and maintained the monopoly power necessary to recoup the "losses" which would have been generated by such a scheme.[3] Respondents' brief

[3] It is undisputed that after more than twenty years of alleged predatory pricing, the *combined* sales of petitioners and former defendant Sony never exceeded a minority share of the U.S. television market. (Pet. App. 512a-513a, 644a). It is also undisputed that after all those years, Zenith and RCA still maintained their

does not dispute petitioners' inability to recoup through the exercise of monopoly power.

Respondents' only response to the economic illogic of their claim is to assert that petitioners have overlooked "the subsidization of petitioners' coordinated dumping in the United States made possible by their price-fixing in the Japanese market." (R. Br. 60). But we did not overlook respondents' subsidization theory; we demonstrated why it had no merit. (P. Br. 24-27, 33). As the Second Circuit pointed out in *Northeastern Telephone Co. v. American Telephone & Telegraph Co.*, 651 F.2d 76, 88-89 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982), the use of profits from one business or market to "subsidize" predatory pricing in another makes no economic sense unless there is a realistic possibility of earning "supranormal returns" in "the not-too-distant future." *Id.*

The irrationality of respondents' subsidization argument is further underscored by the undisputed absence of any evidence of an "administrative mechanism" to share profits and losses among the alleged conspirators. (Pet. App. 483a). Neither respondents nor the court of appeals attempt to explain why companies like Sanyo and Sharp, whose shares of Japanese exports to the United States were larger than their shares in Japan, would have had a rational motive to enter into a conspiracy in which they would be expected to absorb a major share of the alleged losses in the United States while earning only a small share of the alleged profits in Japan. (Pet. App. 616a).

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dominant market positions. (Pet. App. 484a, 611a). Moreover, respondents have never come forward with any evidence of high barriers to entry in the highly competitive U.S. television market (Pet. App. 484a), or any explanation of how petitioners could have expected to acquire and maintain monopoly power, particularly when their exports to the United States would be perpetually vulnerable to the imposition of tariffs, quotas and other barriers to trade by the U.S. Government.

In sum, respondents have completely failed to demonstrate the rational motive to conspire which *Cities Service* requires in order to infer an antitrust conspiracy. The "motive" found by the court of appeals and relied upon by respondents amounts to nothing more than *individual* motives by each petitioner to compete.[4]

3. *Monsanto.* Respondents' suggestion that *Monsanto* —but not *Cities Service*—may provide the appropriate inference standard does not advance their cause. (R. Br. 56, 63, 82). Respondents simply ignore the fact that both *Cities Service* and *Monsanto* embody the same fundamental concern with protecting against speculative inferences of conspiracy. (P. Br. 17-18, 20-23). Indeed, the decision in *Monsanto* expressly recognizes that courts must be particularly vigilant against speculative antitrust conspiracy claims in a case such as this, in which there is a threat that pro-competitive conduct (*i.e.*, the promotion of interbrand competition in *Monsanto*, and the charging of "low" prices here) may be penalized and deterred. *Monsanto*, 104 S. Ct. at 1470-71.

Nor is there any support for respondents' assertion that the court of appeals' decision is "fully consistent" with *Monsanto*. In *Monsanto*, the Court held that antitrust plaintiffs seeking to infer a conspiracy from marketplace behavior must adduce evidence that logically tends "to exclude the possibility of independent action." 104 S. Ct. at 1473. The court of appeals applied no such standard

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[4] In addition to its logical invalidity, the factual predicate for the court of appeals' "motive" analysis has been effectively repudiated by respondents' brief. Apparently speculating that excess capacity was created *prior* to the alleged conspiracy, the court of appeals opined that such capacity would have provided petitioners with a motive to enter into the alleged scheme to export to the United States at low prices. (Pet. App. 176a-177a). Respondents, however, acknowledge that the alleged excess capacity was created in the 1960's and 1970's (R. Br. 76, 78, 80 n.67), *well after* the alleged formation of the conspiracy in the 1950's. (R. Br. 13).

and respondents' evidence of export pricing by petitioners at "whatever price was necessary to make the sale" cannot satisfy the *Monsanto* test.

4. *"Competing Inferences."* There is also no merit in respondents' contention that the "more probable" inference standard (established in *Cities Service*) conflicts with decisions holding it to be within the province of the fact finder to choose between competing *reasonable* inferences. (R. Br. 67, 74 n.65). The *Cities Service* standard simply recognizes that, on a motion for summary judgment, courts must determine whether a proffered inference of conspiracy could be found by the fact finder to be *more* probable than not, and hence one of the competing *reasonable* inferences that may be drawn. *Cities Service*, 391 U.S. at 280. As Judge Weinfeld explained in *Miller v. Schweickart*, 413 F. Supp. 1062 (S.D.N.Y. 1976):

> "[T]he inference to be drawn from an established fact must be left to the fact finder. But a precondition is that 'the inference, to qualify as a fact found, *must be reasonable*, and, in the context of the known facts, be one that springs readily and logically to mind and . . . *not one of two or more inferences, both or all of which are about equally probable.*'" *Id.* at 1066 (*quoting NLRB v. Gleason*, 534 F.2d 466, 474 (2d Cir. 1976) and citing *Cities Service*, 391 U.S. at 281-84) (emphasis added).

The inference of a predatory export conspiracy which respondents seek in this case is not supported by evidence which would enable a fact finder to conclude that it is more probable than not. Hence, it is not one of the competing *reasonable* inferences which a fact finder may draw.

5. *Conduct Contrary to Independent Economic Self-Interest.* Respondents also argue (R. Br. 82-88) that a fact finder should be permitted to infer the alleged conspiracy from the combination of petitioners' allegedly parallel export pricing activities and other circumstantial

evidence (such as meetings in Japan),[5] even though the alleged export pricing behavior was not contrary to each petitioner's independent economic self-interest. But, as the United States has explained, an antitrust conspiracy can be inferred from parallel marketplace behavior only if the conduct is "inconsistent with the independent competitive interests of the defendants and therefore unlikely to occur in the absence of collusion." (U.S. Gov. Br. 9). This is particularly true in a case such as this, in which the defendants' conduct mirrors competition, the alleged conspiracy is economically implausible, and a speculative inference of conspiracy would penalize and deter procompetitive behavior that benefits American consumers. (P. Br. 21-22).

The "contrary to independent economic self-interest" test is derived from economic logic and common sense. Under competitive conditions, each seller seeks to secure sales through unilateral decisions concerning output and price. This competitive process frequently results in "parallel" unilateral responses to prevailing market conditions.[6] In order to prevent parallel competitive actions from being treated as conspiratorial, therefore, the test

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[5] It is well established that mere attendance at industry meetings and exchanges of general economic data are legitimate activities which do not support a permissible inference of an antitrust conspiracy. *See, e.g., United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978); *United States v. Citizens & Southern National Bank*, 422 U.S. 86, 113 (1975); *Maple Flooring Manufacturers Association v. United States*, 268 U.S. 563, 584-86 (1928) (exchanges of general industry information on costs, production and prices); *Proctor v. State Farm Mutual Automobile Insurance Co.*, 675 F.2d 308, 323, 334-35 (D.C. Cir.), *cert. denied*, 459 U.S. 839 (1982); *Weit v. Continental Illinois National Bank & Trust Co.*, 641 F.2d 457, 460-65 (7th Cir. 1981), *cert. denied*, 455 U.S. 988 (1982); *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1359-60 (9th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977) (attendance at industry meetings).

[6] *E.g., Weit v. Continental Illinois National Bank & Trust Co.*, 467 F. Supp. 197, 210-13 (N.D.Ill. 1978), *aff'd*, 641 F.2d 457, 462-63 (7th Cir. 1981), *cert. denied*, 455 U.S. 988 (1982); *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656, 661 (9th Cir.), *cert. denied*, 375 U.S. 922 (1963).

requires plaintiffs to show that the challenged conduct would not be in the economic self-interest of each defendant if it acted independently, but would be in its self-interest if it participated in a conspiracy.

Neither respondents nor the court of appeals have shown that the alleged parallel export pricing behavior was in any way contrary to each petitioner's independent economic self-interest. For this reason alone, the decision of the court of appeals should be reversed.

6. *"Direct Evidence."* Despite respondents' contention that this is a "direct evidence" case, both courts below recognized this to be an *inference* case. (Pet. App. 165a-166a, 179a, 259a-260a). Respondents have never been able to point to, nor has the district court or the court of appeals ever found, any "direct evidence" of the predatory export conspiracy alleged. Rather, as respondents' brief makes clear (R. Br. 59, 64, 69), the so-called "direct evidence" upon which respondents rely relates only to two "aspects" of the alleged conspiracy (*i.e.*, alleged price stabilization in Japan and the Japanese Government-compelled *minimum* export prices and "five-company rule"). But neither of these "aspects" provides any support, direct or otherwise, for the actionable "low price" export conspiracy alleged. (P. Br. 19-20, 32-33, 34-35).

"Direct evidence" that petitioners allegedly agreed to stabilize prices in Japan (which would have been beneficial to them without regard to exports) does not directly or inferentially suggest that petitioners also agreed to enter into a predatory, "low price" export conspiracy. Nor does "direct evidence" that petitioners participated in the Japanese Government-compelled arrangements establishing *minimum* export prices directly or inferentially suggest that petitioners also formed a predatory conspiracy to *depress* export prices. Respondents' rhetorical argument that non-actionable conduct is somehow part of a broader "unitary" conspiracy does not provide the required logical or evidentiary basis for establishing that such a unitary conspiracy existed. (Pet. App. 463a, 616a).

II. RESPONDENTS HAVE FAILED TO ADDUCE ANY EVIDENCE CAPABLE OF SATISFYING THIS COURT'S CONSPIRACY INFERENCE STANDARDS

Respondents' extensive citations and conclusory allegations are an attempt to create the illusion that there are genuine issues of material fact which preclude summary judgment. But there are no such issues in this case. The district court carefully analyzed all of respondents' proffered evidence and concluded that it did not support their allegations of a predatory export conspiracy. (Pet. App. 243a-244a). The court of appeals did not disturb the factual predicates relied upon by the district court and did not base its reversal of summary judgment upon its disagreement over the admissibility of evidence. Rather, the court of appeals found a permissible inference of the alleged conspiracy because it disagreed with the district court over the proper legal standards to be applied and the permissible inferences which could be drawn under those standards.

In their brief, respondents reassert conclusory allegations which neither the district court nor the court of appeals accepted.[7] In doing so, respondents characterize their evidence as coming within the traditional type of circumstantial proof which courts have found to be probative in antitrust conspiracy cases, asserting that:

> "Circumstantial evidence of conspiracy traditionally recognized in antitrust cases has included evidence of (1) *'things actually done,'* such as parallel business behavior, other business behavior, or a course of dealing; [and] (2) *'an exchange of words,'* such as communications at meetings, telephone discussions or correspondence among competitors." (R. Br. 84).

[7] Respondents' predilection toward relying upon documents which "do not support the conclusory propositions for which they are cited" (Pet. App. 367a) was frequently criticized by the district court during its review of respondents' evidence (*e.g.*, "[a]s is so often the case, plaintiffs' FPS contains conclusory statements about what the evidence shows without support in the evidence itself" (Pet. App. 400a)). (*See also* Pet. App. 416a-417a, 442a).

But, as we show below, the record facts disclose neither "things actually done" nor any "exchange of words" by petitioners capable of satisfying this Court's conspiracy inference standards.

1. "*Things actually done.*" Respondents point to evidence of "things actually done" which they contend supports their predatory export conspiracy claims. However, as the district court's careful analysis shows, the record does not disclose any conduct by petitioners in the U.S. market contrary to their independent economic self-interests, or in any other way probative of the alleged export conspiracy.

a. *Petitioners charged lower prices in the United States than in Japan.* (R. Br. 30-31). This evidence does not suggest conspiracy. Charging different prices in two different geographic markets with different supply, demand and other marketing conditions is precisely the behavior that would be expected as a result of competition, not conspiracy. (P. Br. 29). Indeed, respondents' experts have vehemently argued that competitive conditions in Japan and the United States differed dramatically (*e.g.*, Rec. 2291a-2323a, vol. 6) in a way which would naturally tend to cause prices to be higher in Japan than in the United States. Moreover, as the district court observed, petitioners had well-established brand names in Japan, but were unknown in this country when they began to compete against well-entrenched U.S. firms. (Pet. App. 479a, 610a). The charging of "lower prices," particularly by new entrants trying to establish themselves in a market, is precisely the result that competition would produce under such circumstances. (Pet. App. 478a-480a, 610a).

b. *Petitioners granted rebates and concealed those rebates from the authorities.* (R. Br. 31-53). Respondents' allegations that there is evidence of *collusive* rebating and concealment have been flatly rejected by the district court, and the court of appeals did not disturb those findings.

The district court expressly found, after reviewing all of respondents' rebating evidence (whether admissible or not) (Pet. App. 494a), that respondents "have been unable to adduce any direct evidence as to collusive activity by [petitioners] with respect to rebates, nor have they cited any facts to support their claim that [petitioners] adopted a common rebating strategy, or that there was any agreement among [petitioners] concerning rebates." (Pet. App. 500a). To the contrary, the district court found that respondents' own evidence showed that:

(i) "[t]he pattern of rebating was variegated, with at least 25 different rebating techniques considered or employed by various of the [petitioners]" (Pet. App. 612a);

(ii) "the prices at which various [products] were sold under the different rebate schemes were very different, . . . the amounts of rebates given by individual [petitioners] differed, and hence . . . the net prices charged by the individual [petitioners] were significantly different" (Pet. App. 612a-613a); and

(iii) "[d]espite [respondents'] contentions to the contrary, there is also no evidence that [petitioners] had knowledge of each other's rebates except insofar as they might have learned of them from an American customer using another Japanese [petitioner's] prices as a vehicle to extract a better bargain" (Pet. App. 613a).

The court of appeals did not question these findings. Rather, it concluded only that there was evidence which would permit a finding that various petitioners "engaged in various schemes to rebate part of the sales price to a number of mass marketing retail customers in the United States"; that efforts were made by individual manufacturers and importers "to conceal this activity both from MITI and from the United States Customs Service"; and

that "at least some of the [petitioners] knew that others were engaged in rebating but did not report it . . . ." (Pet. App. 179a).

Accordingly, when respondents' conclusory allegations are stripped away, all that remains is a record of *individual* secret rebating suggestive only of independent and competitive behavior.[8] As the district court correctly found, rebating to get the business and concealing that rebating from the authorities would have been in the independent economic self-interest of each petitioner and "sounds more in competition than in antitrust conspiracy." (Pet. App. 496a).[9]

c. *The "check prices" served as "reference prices."* (R. Br. 29). Neither the district court nor the court of appeals ever found any support for this allegation. As the district court pointed out: "[petitioners] are said to have sold above, at, and below the check price, but we are never told of the relationship between the check price and the actual price." (Pet. App. 265a). Indeed, the district court found a "total absence of evidence (or even of any credible theory)" to support respondents' "reference price" allegation, noting that "the actual prices

[8] In an effort to point to some evidence of rebating "collusion," respondents repeatedly cite documents which purportedly show discussions about rebates between individual Japanese television manufacturers and their "co-conspirators." (R. Br. 34, 38, 42, 45, 49-52). These so-called "co-conspirators," however, turn out to be U.S. customers, who were demanding secret rebates as part of the competitive process. (Pet. App. 495a n.219, 496a, 502a).

[9] Respondents' assertion that the alleged rebating violated other American and Japanese laws (R. Br. 15, 31-34, 44, 57, 61, 70) adds nothing to their claims of a conspiracy in violation of the U.S. antitrust laws. As the district court explained:

> "The question . . . is only whether or not [the acts complained of] give rise to an inference of conspiracy in violation of the Sherman Act, and not whether . . . [they] violate some other law, American or Japanese, which does not require proof of collusion." (Pet. App. 481a).

(and the rebates) were 'all over the lot' . . . ." (Pet. App. 613a; *see also* Pet. App. 259a).

Far from disagreeing with the district court on this issue, the court of appeals never even mentioned the possibility that the "check prices" could have served as "reference prices." This is not surprising, since the documents cited by respondents in support of their "reference price" allegation (R. Br. 29 n.37) show only that, despite their awareness of the "check prices," individual U.S. customers were bargaining for the lowest prices they could obtain from their Japanese suppliers.[10]

In short, the "check prices" were *minimum* prices and there is no evidence to suggest that they were "reference prices" in a "low price" predatory scheme.

d. *Petitioners' U.S. sales produced "losses."* (R. Br. 61, 81). Respondents fail to reply to the showing in our opening brief (P. Br. 29-30) that their alleged evidence of "losses" by *some* of the petitioners on *some* of their sales during their early years of entry into the U.S. television market (1967-70) would have been perfectly consistent with each petitioner's independent economic self-interest. (Pet. App. 481a-483a, 611a). Respondents' related contention that petitioners' American sales subsidiaries sustained "losses" (R. Br. 61) is equally unavailing and, indeed, was not even mentioned by the court of appeals. Respondents rely on taxable income figures which show that various of petitioners' sales subsidiaries lost money in certain years and made money in others and that some of these subsidiaries were successful and others were not. (Rec. 4171a-4173a, vol. 11). Indeed, according

[10] Respondents' evidence of sales below the check prices consists of nothing more than their evidence of rebates and, as the district court found, "there is no evidence of rebates for any sales other than those to private label or OEM purchasers." (Pet. App. 265a n.28; *see also* R. Br. 33). Thus, there is no evidence of sales below the check prices on petitioners' "branded products" (*i.e.*, those sold under their own name) which the district court described as constituting a "massive portion of [respondents'] case." (Pet. App. 265a n.28).

to respondents' own figures, Matsushita Electric Corporation of America, the sales subsidiary with by far the greatest amount of business in the United States, was also the most successful, realizing significant profits. (*Id.*). Such facts do not suggest a predatory conspiracy.

e. *The "five-company rule" served as a customer allocation device.* (R. Br. 25-26). As we showed in our opening brief (P. Br. 35), the district court found, and the court of appeals did not question, that respondents' own evidence demonstrated that: (i) such mass merchant retailers as Sears, J. C. Penney, W. T. Grant, Montgomery Ward and Western Auto were all supplied by two or more of the petitioners; (ii) the "five-company rule" did not limit the number of U.S. customers to whom petitioners' products could be resold; and (iii) most of the petitioners sold to hundreds of other customers in the United States through their American sales subsidiaries who were registered as one of their five direct customers. (Pet. App. 383a-385a). Unable to dispute that showing, respondents now speculate that the alleged allocation agreement must have permitted several of the largest mass merchant customers to have more than one Japanese supplier (R. Br. 71), while also leaving "room for [petitioners] to compete with each other for small accounts and local dealers that were not specifically allocated." (R. Br. 71 n.63). But respondents do not cite any *evidence* to show that such a "flexible" allocation agreement existed.

Even assuming, *arguendo*, that the "five-company rule" could nonetheless be found to have allocated U.S. customers among petitioners (as the court of appeals hypothesized), neither respondents nor the court of appeals have advanced any basis for *inferring* a predatory conspiracy from such an "allocation" scheme. Indeed, as the district court found, eliminating competition among petitioners for specific U.S. customers would have tended to *raise*, not lower, export prices. (Pet. App. 303a, 323a-326a, 601a).

2. *"Exchange of words."* Although respondents hint darkly throughout their brief that there was some "exchange of words" among petitioners suggestive of a predatory export conspiracy, they fail to cite a single document which would support such an allegation. Rather, as the district court concluded after carefully reviewing the entire record (admissible or not) (Pet. App. 422a), there is *no evidence* of any exchange "which refers or relates to the setting or coordination of export prices, the exchange of export price information relative to the claimed conspiracy, the impermissible dissemination of other export-related economic data, or any other aspect of the 'export' component of the 'unitary' conspiracy claimed by [respondents]." (Pet. App. 421a-422a, 606a-608a). The court of appeals never disturbed this finding. Although it referred to alleged conversations and exchanges of data as supporting a finding of collusive price stabilization *in Japan*, the court of appeals did not purport to find any evidence of "exchanged words" or information suggestive of the alleged predatory export conspiracy.[11]

Ultimately, respondents are reduced to referring to or quoting from statements by *non-petitioners* which are somehow characterized as exchanges of information among the petitioners themselves. For example, a non-petitioner Japanese trading company's internal memorandum, reporting to its management on the status of the U.S. Government's antidumping investigation (Rec.

[11] Respondents cite certain documents as allegedly supporting the claim that, at meetings of the Television Export Council, petitioners "discussed their United States prices, and agreed upon their United States pricing strategy." (R. Br. 27). The cited documents, however, show no such discussions or agreements. As the documents show on their face, the only price-related discussions pertained to minimum check prices required by the Government of Japan's export control arrangements. Similarly, documents cited to show exchanges of "export" information (R. Br. 22, 61) were found by the district court to relate either to *domestic* shipments or to *aggregate* export statistics with no individual company breakdowns of exports to the United States. (Pet. App. 418a, 421a-430a). Thus, the court of appeals never accepted any of these contentions.

6361a, vol. 15), is quoted in respondents' brief as proof of "*petitioners*' mutual awareness of each other's dilemma." (R. Br. 47) (emphasis added). Similarly, an internal memorandum by non-petitioner Sears, describing the conflicting information one of its employees received in separate conversations with two petitioner-suppliers, is characterized by respondents as proof that "Toshiba and Sanyo [were] devising a strategy through their joint customer, Sears . . . in furtherance of petitioners' conspiracy." (R. Br. 45). Here, once again, as the district court stated, "numerous documents do not support the conclusory propositions for which they are cited." (Pet. App. 367a).

3. "*Fragmenting.*" Unable to adduce any evidence of acts or communications by petitioners which could permissibly support an inference of the predatory export conspiracy alleged, respondents seek to salvage their case by arguing that any effort to logically evaluate their mass of documentary materials under this Court's inference standards amounts to a "fragmenting" and "dismembering" of the alleged conspiracy in violation of the teaching of *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-99 (1962). (R. Br. 64-67). Respondents, however, are not objecting to fragmentation; they are objecting to *any* analysis of their claims.

Respondents have good reason to fear such analysis. For, taking all of their evidence together, as did the district court (Pet. App. 338a-343a, 621a), it is clear that there is no evidence of rational conspiratorial motive, conduct against independent economic self-interest, or anything else which would tend to support a reasonable and non-speculative inference of the predatory export conspiracy alleged. To the contrary, respondents' evidence, taken together, shows nothing more than hard competition by new entrants seeking to establish themselves in the United States market.[12]

[12] Nor can respondents circumvent this Court's conspiracy inference standards by relying upon the opinions of their economists that the alleged conspiracy occurred. (R. Br. 62, 75-81). If respondents' evidence cannot pass muster under *Cities Service* and *Monsanto*, an expert's opinion based upon that same evidence must necessarily fail or else those standards would be rendered meaningless. *See United States v. Various Slot Machines*, 658 F.2d 697, 700-01 (9th Cir. 1981); *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666, 672-73 (D.C. Cir. 1977). Indeed, the court of appeals affirmed the summary judgment in favor of defendant Sony because it concluded that the evidence against Sony was too "speculative" (Pet. App. 183a-185a), even though respondents' experts had opined that Sony was a participant in the alleged scheme. (Rec. 1746a-1761a, vol. 6).

Indeed, as respondents' brief illustrates, their approach is to simply assume that a conspiracy among petitioners must have existed, and then to speculate how the assumed conspiracy can be adapted to accommodate any evidence they find. Thus, according to respondents' reasoning, sales made by any petitioner at *any* price in the U.S. market—right up to the highest price level—were artificially low and predatory; prices that were "all over the lot" (Pet. App. 613a) were "parallel" and suggestive of conspiracy; and rebates on sales from Japanese television manufacturers to American television manufacturers (such as General Electric and Magnavox) were evidence that both the purchasers and the sellers were "co-conspirators" plotting the destruction of the U.S. television industry.[13] It is because respondents' case has always been a theory in search of supporting facts that it has constantly been amended and revised by respondents, causing them to describe it as "protean." (Pet. App. 266a).[14] It is for this same reason that respondents seek to rely upon string citations to non-probative materials, while invoking *Continental Ore* to avoid any analysis of what their evidence actually shows. *Continental Ore* pro-

[13] Respondents make this last charge notwithstanding the fact that NUE itself demanded and received secret rebates from Japanese suppliers. (Pet. App. 489a n.212, 495a n.219).

[14] For a discussion of the multiple variations of respondents' "protean" conspiracy theory, see the district court's opinion at Pet. App. 256a-268a.

vides no such exemption from this Court's conspiracy inference standards.

III. RESPONDENTS HAVE FAILED TO ADVANCE ANY VALID REASON FOR NOT APPLYING THE SOVEREIGN COMPULSION AND ACT OF STATE DOCTRINES TO THE JAPANESE GOVERNMENT-COMPELLED EXPORT CONTROL ARRANGEMENTS

Respondents do not dispute (or even discuss) the authorities cited by petitioners which establish that the act of state and sovereign compulsion doctrines prevent petitioners' Japanese Government-compelled participation in the export control arrangements from being treated as a "feature" of the alleged antitrust conspiracy. (P. Br. 38-44). Instead, respondents advance a series of arguments against applying these doctrines which are irrelevant, non-responsive or incorrect.

1. Respondents' assertion that petitioners may have merely been encouraged, rather than compelled, to participate in the export control arrangements (R. Br. 95-97) directly contradicts the official representations of the Government of Japan contained in the 1975 Japanese Government Statement. (P. Br. 36-38). Under this Court's decision in *United States v. Pink*, 315 U.S. 203, 218-21 (1942), such representations must be given "conclusive" effect. (P. Br. 38-41; U.S. Gov. Br. 22-23, 24-27). Respondents do not discuss the authorities which establish the conclusivity principle; they simply ignore them. But the conclusivity doctrine was formulated to prevent the very result that respondents seek here—a judicial inquiry into a foreign government's official pronouncement concerning its own sovereign acts, laws and policies.[15]

[15] Respondents' allegation that petitioners were not "compelled" because they were allegedly free to "withdraw" from the export control arrangements (R. Br. 96-97) has been refuted by the Government of Japan, which pointed out that if such a withdrawal had been attempted, petitioners would not have been permitted to export to the United States. (J. Gov. Br. 6).

2. There is similarly no merit in respondents' anomalous assertion that the court of appeals accepted the 1975 Japanese Government Statement "at face value." (R. Br. 89). The court of appeals completely disregarded the 1975 Japanese Government Statement, leading it to conclude that a fact finder could treat petitioners' participation in the export control arrangements as a "feature" of the alleged antitrust conspiracy. (Pet. App. 177a-178a, 188a-189a). Had the court of appeals accepted the 1975 Japanese Government Statement "at face value," as it should have, under its own analysis the sovereign compulsion doctrine would have applied. (Pet. App. 188a).

3. Respondents' attack upon the "specificity" and timeliness of the communications by the Japanese Government is also without foundation. Those communications clearly set forth the role of the Japanese Government in the establishment and implementation of the export control arrangements. (P. Br. 36-38). As the U.S. Government has stated, the "detailed" 1975 Japanese Government Statement:

> (i) "clearly establishes that the Japanese government both compelled petitioners to agree on minimum export prices for televisions and supervised implementation of those check price agreements" (U.S. Gov. Br. 25); and
>
> (ii) "affirmed that both the check price agreements and certain regulations of the Japan Machinery Exporters Association (which included the five-company rule) 'have come into existence pursuant to the direction of MITI.'" (U.S. Gov. Br. 24).

Although, as the Solicitor General has noted, the 1975 Japanese Government Statement did not expressly iden-

tify the particular part of those regulations embodying the "five-company rule," the Japanese Government has transmitted a Note Verbale to the State Department and to this Court in which "it stated unequivocally that it had compelled adoption of the five-company rule." (U.S. Gov. Br. 26 n.26). For this reason, the United States has urged this Court to treat this "clear, definitive statement of the Japanese government as dispositive on this point." (*Id.*).

There is also no merit to respondents' assertion that the Government of Japan's Note Verbale was not submitted in a timely fashion. (R. Br. 88). The Note Verbale was submitted by the Japanese Government in May 1984 in order to "express its deep concern" about the December 5, 1983 court of appeals ruling and to correct the court of appeals' mistaken view of the role of the Japanese Government in the export control arrangements. (J. Gov. Br. App. 1a-5a). The timely nature of the Note Verbale is confirmed by this Court's ruling in *Pink*, in which the Court afforded conclusive effect to a foreign government statement which was not made part of the record until *after* all of the lower court proceedings in the case had been concluded. 315 U.S. at 220-21.

4. Respondents' assertion that they are challenging conduct by petitioners *other* than that compelled by the Government of Japan, which conduct allegedly formed "a broader unlawful arrangement" (R. Br. 89-92), is of no significance in determining whether the sovereign compulsion and act of state doctrines should be applied to the specific conduct that *was* indisputably compelled by the Japanese Government (*i.e.*, petitioners' participation in the export control arrangements). (J. Gov. Br. 8). Such government-mandated behavior cannot be treated as a "feature" of an alleged antitrust violation, even though the violation is also alleged to have other aspects which are not government-compelled. *See United Mine Workers of America v. Pennington*, 381 U.S. 657, 670 (1965) (immunized conduct is not "illegal, either standing alone or as a part of a broader scheme itself violative of the Sherman Act.").[16]

Despite respondents' contentions to the contrary (R. Br. 89-90), petitioners *do not* claim that the sovereign compulsion and act of state doctrines shield from antitrust liability any larger unlawful scheme. Our position is that, if respondents wish to challenge a "broader" conspiracy premised on non-government-compelled conduct, they must adduce "significant probative evidence" of that broader scheme without relying upon the export control arrangements as the foundation for their claims.[17]

5. Respondents' attempt to characterize the export control arrangements as "[m]ere *commercial* acts" actionable under the antitrust laws (R. Br. 92-93) disregards both the nature of those arrangements and the applicable law. To the extent that a "commercial" exception to the act of state doctrine exists, that exception applies only to acts of a foreign government undertaken in its *proprietary* capacity, not to regulatory acts by a government undertaken pursuant to its foreign trade policies. *See, e.g., Braka v. Bancomer S.N.C.*, 762 F.2d 222, 225 (2d Cir. 1985) (exercise of sovereign regula-

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[16] *Accord, City of Cleveland v. Cleveland Electric Illuminating Co.*, 734 F.2d 1157 (6th Cir.) (conduct immune from the antitrust laws under the *Noerr-Pennington* doctrine cannot be used as the basis for inferring a broader violation of the Sherman Act), *cert. denied*, 105 S. Ct. 253 (1984); *Bass v. Boston Five Cent Savings Bank*, 478 F. Supp. 741, 746 (D. Mass. 1979) ("that the [defendants] joined together for a lawful [immunized] purpose is not evidence that they joined together for an unlawful one. Therefore no inference may be drawn from the existence of such an agreement....").

[17] The various cases cited by respondents (R. Br. 90) do not suggest otherwise. For example, in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 702-07 (1962), this Court allowed the conduct at issue to be considered a feature of an antitrust conspiracy only *after* it had determined that the conduct at issue was *not* "compelled" by the Canadian Government or otherwise protected by the sovereign compulsion doctrine.

tory powers "trigger[s] no commercial exception").[18] A similar limitation on any "commercial" exception would apply *a fortiori* to the sovereign compulsion doctrine, whose very purpose is to protect private commercial behavior that is compelled pursuant to the policy of a foreign government.

The 1975 Japanese Government Statement and the Japanese Government's Note Verbale amply attest to the sovereign character of the export controls at issue here. (Pet. App. 9a-11a; J. Gov. Br. App. 2a-3a). As explained by the Japanese Government, "[o]ne of the fundamental attributes of national sovereignty is the conduct of foreign relations, including foreign economic and trade relations." (J. Gov. Br. 8). Indeed, nothing could intrude more "sharply" on the Government of Japan's "national nerves," *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964), than a determination by a U.S. court that Japanese Government-mandated export controls, imposed upon Japanese nationals, pursuant to Japan's foreign trade policies, may be found to be a "feature" of a violation of U.S. law. (J. Gov. Br. 8).

6. There also is no merit in respondents' contention that the sovereign compulsion and act of state doctrines should not apply to this case because the course of conduct alleged to be unlawful did not occur wholly within the territorial boundaries of Japan. (R. Br. 92-93). As the Government of Japan has stated, the export controls at issue involved "only [the Japanese Government's] control of the activity of its own nationals within its territory with respect to its own export trade." (J. Gov. Br. 7). The Japanese Government, no less than the United States Government, is entitled to restrain and control the

[18] *See also MOL, Inc. v. Peoples Republic of Bangladesh*, 736 F.2d 1326, 1329 (9th Cir. 1984) (regulation of imports and exports is a "sovereign prerogative" not within the commercial activity exception to the sovereign immunity doctrine).

exportation of goods from its own territory.[19] Such "control of foreign trade . . . involves a decision of a government acting within its own territory." *Van Bokkelen v. Grumman Aerospace Corp.*, 432 F. Supp. 329, 333 (E.D.N.Y. 1977).

7. Finally, if respondents' arguments concerning the sovereign compulsion and act of state doctrines were accepted, *all* export controls imposed on foreign companies by their governments as instruments of trade policy with the United States would be subject to private challenge under the U.S. antitrust laws. (P. Br. 44-46). As recognized by this Court's precedents, and as strongly urged by the Government of the United States and its principal trading partners as *amici curiae* in this case, such a judicial intrusion upon foreign trade policies would interfere with the Executive Branch's conduct of foreign relations and is precisely the type of action that the sovereign compulsion and act of state doctrines are designed to prevent. (U.S. Gov. Br. 16-20; J. Gov. Br. 8-10; Br. of Aust., Can., Fr. and U.K. 2-5).

IV. RESPONDENTS CANNOT DIVORCE THEIR 1916 ANTIDUMPING ACT CLAIMS FROM THE COURT OF APPEALS' ANTITRUST CONSPIRACY ANALYSIS

Respondents argue that they have presented sufficient evidence of predatory intent under the Antidumping Act of 1916, and that, regardless of this Court's disposition of the antitrust conspiracy issue, their "individual" Antidumping Act claims should survive. (R. Br. 97-98).[20]

[19] The United States, like Japan, exercises mandatory control over its exports in order to achieve foreign policy objectives. *See, e.g.*, Export Administration Act of 1979, *as amended*, 50 U.S.C.A. app. § 2401 *et seq.* (West Supp. 1985).

[20] In their attempt to resurrect their "individual" 1916 Act claims, respondents ignore the fact that, as noted by the district court, they have never attempted to show any injury or damages, apart from the alleged conspiracy, attributable to *individual* dumping by *individual* petitioners. (Pet. App. 652a, 653a n.396).

However, respondents disregard the fact that, as to both their conspiracy and *individual* 1916 Act claims, the court of appeals relied *exclusively* upon its erroneous antitrust conspiracy analysis in finding a genuine issue of material fact with respect to the specific predatory intent required under that statute. (P. Br. 46-47).

Respondents nonetheless argue that they have evidence of individual predatory intent which must be considered on remand. (R. Br. 97-98). No such remand is required. As we have shown, respondents' evidence of purported price differentials between national markets, concealment of rebates, and "losses" by petitioners (R. Br. 97-98) does not indicate anything other than normal competitive behavior in the individual economic self-interest of each petitioner. Similarly, respondents' putative evidence of "specific statements evincing an intention to restrain and monopolize the United States market or injure United States industry" (R. Br. 98) was carefully scrutinized by the district court, which concluded that these "statements," on their face, showed nothing more than a legitimate business objective to increase sales and engage in hard competition. (Pet. App. 463a-473a). The court of appeals did not disturb this finding. Accordingly, the district court's dismissal of respondents' 1916 Act claims (individual and conspiratorial) should be reinstated.

V. COMPELLING POLICY CONSIDERATIONS WARRANT REINSTATEMENT

Respondents close their brief with a plea for a remand to the court of appeals (rather than a reinstatement of summary judgment) in the event of reversal. Their sole justification is that the court of appeals reversed some evidentiary rulings by the district court and left other evidentiary issues open, thereby redefining the summary judgment record. (R. Br. 98). But that "redefinition" and those evidentiary issues are irrelevant to this Court's disposition of this case. The factual predicates relied upon by the court of appeals, following its admission of further evidence, add nothing to the facts

assumed by the district court and do not support a permissible inference of the predatory export conspiracy alleged.

As we have pointed out (P. Br. 6 n.4), the district court analyzed all of respondents' contentions about what the proffered evidence might show, consistently assumed the admissibility of respondents' key evidence, and found that none of the facts that any of the proffered evidence could support was sufficient to give rise to an inference of the alleged conspiracy. *There is not one reference in respondents' 99-page brief to a specific fact the significance of which was not analyzed by the district court in its exhaustive opinion.*

We recognize that this Court possesses broad discretion to decide whether to remand this case or to reinstate the district court's judgments. We respectfully submit that the most compelling considerations of public policy require the latter course. Respondents had a full and fair opportunity to conduct discovery and submitted all of their evidence in a documentary record which the district court likened to a complete "trial record." (Pet. App. 270a, 294a & n.56). After exhaustively reviewing this preclusive record for "months and months" (Pet. App. 255a), the district court concluded that, "notwithstanding all its sound and fury," this lawsuit contains "nothing which justifies . . . [it going to a] trial which will last a year or more, with countless untold further burdens and expense upon the parties, their counsel, and the court system." (Pet. App. 666a). Similarly, the Antitrust Division, after conducting its own "detailed review" of respondents' "best evidence," found "no evidence" to support respondents' charges. (Pet. App. 21a-23a).

After fifteen years, and after the massive effort expended by the district court, the interests of sound judicial administration require that this meritless litigation be brought to an end. Any other disposition would endanger consumer welfare by encouraging protectionist-minded competitors to use the antitrust laws to entangle

their rivals in enormously burdensome and costly litigation. It would also chill the conscientious application of Rule 56 in large antitrust cases that call most imperatively for its application, and strip away a vitally necessary tool of judicial administration at precisely the time when federal judges require the greatest flexibility in managing their caseloads.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that the decisions of the court of appeals be reversed and that the judgments of the district court be reinstated.

October 24, 1985

Respectfully submitted,

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