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No. 90-1029

In the Supreme Court of the United States

OCTOBER TERM, 1990

EASTMAN KODAK COMPANY, PETITIONER

v.

IMAGE TECHNICAL SERVICES, INC., ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the court of appeals erred in reversing a grant of summary judgment for a defendant equipment manufacturer alleged to have committed a violation of Section 2 of the Sherman Act and a per se violation of Section 1 by denying independent service organizations access to replacement parts for its equipment and by tying parts to service, when the manufacturer concededly lacked market power in the interbrand market for equipment.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner Eastman Kodak Co. ("Kodak") manufactures and sells copiers and micrographic equipment. It has approximately 23% of the market for high volume photocopy machines and less than 20% of the micrographic machine market. Pet. App. 8A n.3. Kodak also sells service and replacement parts for these machines. Respondents are independent service organizations ("ISOs"). In the early 1980s, ISOs began buying parts from Kodak and competing with Kodak in servicing Kodak machines, sometimes offering significantly lower prices.

In 1985 and 1986, Kodak implemented a new policy of selling replacement parts for new micrographic machines only to buyers of Kodak machines who did not purchase repair services from ISOs (that is, to buyers who either repaired their own machines or used Kodak service). The ISOs alleged that Kodak also restricted sales to them of parts for older micrographic machines in various ways.

Kodak also has a policy of not selling copier parts to ISOs and claims that it has never knowingly done so. The ISOs claim, however, that in the past some ISOs purchased directly from Kodak (Br. in Opp. 3 n.3).

Kodak contends that these policies are intended to protect its relationship with its machine customers and its reputation for quality, so as to allow it (i) better to compete in the markets for machines, (ii) to reduce its parts inventories and inventory costs, and (iii) to prevent the ISOs from freeriding on Kodak's investments in the machine industries. Pet. App. 13A; Pet. 5. A direct and intended effect of the policy, however, was to make it more difficult for ISOs to sell service for Kodak machines.

2. In 1987, a number of ISOs brought this action, alleging that Kodak had unlawfully tied the sale of Kodak parts to the sale of service for Kodak machines, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1, and had unlawfully monopolized and attempted to monopolize the sale of service for Kodak machines, in violation of Section 2 of the Sherman Act, 15 U.S.C. 2.[1]

After allowing abbreviated discovery, the district court granted summary judgment for Kodak. As to the Section 1 claim, the court found no evidence of a tying arrangement, because Kodak did not require equipment buyers to buy its parts or service, require parts buyers to buy its service, or require service buyers to buy its parts. Pet. App. 32B-33B. As to the ISOs' Section 2

[1] Additional related claims were not considered by the court of appeals.

claim, the court found no evidence that Kodak had attempted by leverage of its power in the market for servicing Kodak equipment (assuming without deciding that there was such a market and that Kodak had power in it) to gain a competitive advantage in another market. And, the court explained, although Kodak had a "natural monopoly over the market for parts it sells under its name" (Pet. App. 35B), a unilateral refusal to sell those parts to ISOs did not violate Section 2.

3. A divided panel of the Ninth Circuit reversed.

a. The court concluded that a tying agreement existed because Kodak had conditioned the sale of its parts on the buyer's agreement not to buy service from the ISOs. Pet. App. 5A-6A, citing *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 5-6 (1958).[2] Such a tying arrangement could be per se unlawful[3] only if Kodak had "sufficient economic power in the tying product market [parts] to restrain competition appreciably in the tied product market [service]." Pet. App. 4A.

It was not disputed that Kodak lacks market power in the markets for its equipment; nor was it disputed that potential equipment buyers "consider the cost of parts and service when initially deciding between Kodak's equipment and its competitors' equipment." Pet. App. 8A. Kodak argued that it therefore could not have market power in any market for parts for its equipment, since an attempt to charge supracompetitive prices for parts would cause potential equipment purchasers to purchase competitors' equipment rather than Kodak's equip-

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[2] There could be an unlawful tie between parts and service only if the two were distinct markets. The panel held that whether parts and service were one market or two presented a disputed issue of fact. Pet. App. 6A.

[3] A tying arrangement could be unlawful under the rule of reason even though not per se unlawful, but the ISOs had not relied on the rule of reason in opposing summary judgment in district court, and the court of appeals therefore declined to consider whether Kodak's conduct was unlawful under the rule of reason. Pet. App. 4A n.1.

ment, thus making the price increase unprofitable. The court saw some merit in Kodak's argument, but it nevertheless refused to affirm summary judgment "on this theoretical basis." *Id.* at 10A. It explained that "[n]ot only do we lack the benefit of the district court's consideration of the market power issue, we are presented with a record that was not fully developed through discovery on this issue. Furthermore, market imperfections can keep economic theories about how consumers will act from mirroring reality." *Ibid.* (footnote omitted).

In the court's view, a jury might conclude that Kodak had sufficient power in the parts market from evidence that it charged more than the ISOs for service that was of lower quality, evidence that competition from the ISOs drove down Kodak's service prices, and evidence that some customers paid higher prices for Kodak's service rather than switch to other brands of equipment. Pet. App. 10A-11A. Moreover, "[s]ome strength in the interbrand [equipment] market, although short of actual market power, can combine with other factors to yield power in an aftermarket." *Id.* at 12A. Without discussing what market imperfections or other factors might result in market power in this particular case, the court held that the evidence was "sufficient to raise a material issue of fact as to whether Kodak has power in the parts market." *Ibid.*[4]

In dissent, Judge Wallace argued that a lack of power in the equipment market necessarily precluded a finding of market power in the parts markets (Pet. App. 23A), particularly given the majority's failure to describe what

[4] Because a tying agreement otherwise unlawful may be saved by legitimate business reasons if no less restrictive alternative is available, the court considered Kodak's claimed reasons for its policy. It concluded that the trier of fact might find the product quality and inventory reasons to be pretextual and that there was a less restrictive alternative for achieving Kodak's quality-related goals. It held that Kodak's desire not to permit ISOs to benefit from Kodak's investments in the equipment markets could not, as a matter of law, justify the policy. Pet. App. 13A-14A.

market imperfections might exist to invalidate that conclusion and the lack of any evidence that such market imperfections in fact exist (*id.* at 22A n.1). In these circumstances, evidence of supracompetitive pricing in the parts markets could do no more than show that Kodak was engaging in self-destructive pricing with no long term effect on competition. *Id.* at 23A.

b. As to Section 2, the majority found sufficient evidence to support a finding that Kodak's implementation of its parts policy was anticompetitive and exclusionary and involved a specific intent to monopolize. Pet. App. 17A. It refused to hold as a matter of law that the service of Kodak equipment was not the relevant market. *Id.* at 19A. While recognizing the "logical appeal in Kodak's theory that it could not have monopoly power (let alone market power) in the service market since it lacks economic power in the interbrand markets" (*ibid.*), the court found sufficient evidence of monopoly power to withstand summary judgment. The majority also held that the ISOs had come forward with sufficient evidence, for purposes of summary judgment, to satisfy their burden of proving the lack of legitimate business justification. *Id.* at 18A; see also *id.* at 17A n.9.

Judge Wallace dissented as to Section 2 as well. Entirely apart from market power considerations, he concluded that Kodak was entitled to summary judgment because the evidence of legitimate business justification for Kodak's actions was extensive and undisputed. Pet. App. 25A. In his view, any business justification for Kodak's conduct was sufficient to preclude Section 2 liability even if Kodak also had monopolistic motivations. Pet. App. 25A.

DISCUSSION

This case presents issues that have occasioned much controversy in the lower courts and that warrant resolution by this Court. These issues are whether a manufacturer that lacks market power over equipment may nonetheless be deemed to have sufficient market power

with respect to replacement parts for its own equipment (i) to support liability under Section 2 of the Sherman Act for monopolization or attempted monopolization if it refuses to allow independent service providers access to those parts, and (ii) to support per se liability under Section 1 of the Sherman Act if it ties parts to service. The court of appeals' holding that the ISOs presented sufficient evidence to withstand summary judgment with respect to their monopolization and attempted monopolization claims in this case cannot be reconciled with sound economic analysis or established law. Furthermore, the court's holding that Kodak was not entitled to summary judgment on the tying claim under Section 1 of the Sherman Act seriously distorts the rationale of *Jefferson Parish Hospital District No. 2* v. *Hyde*, 466 U.S. 2 (1984).

We recognize that this case comes to the Court in an interlocutory posture, but we do not believe that that factor should dissuade the Court from stepping in now. As the Court recognized in *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), summary judgment has an important role to play in antitrust cases. This case presents an appropriate occasion for the Court to clarify the law in an area of particular significance to important technology-oriented sectors of the economy, while affirming the importance of summary judgment as a means of ensuring that the threat of burdensome antitrust litigation will not deter efficient business conduct.

1. To establish liability under Section 1 or Section 2 of the Sherman Act in this case, the ISOs must prove that Kodak had market power in the market[5] for parts

[5] For purposes of its summary judgment motion, petitioner did not contest, factually or legally, the issue of market definition. Similarly, for purposes of this brief we assume, without expressing a view on the issue, that parts for the machines of a single manufacturer may constitute a relevant market. But see, *e.g.*, *International Logistics Group, Ltd.* v. *Chrysler Corp.*, 884 F.2d 904, 908

for Kodak equipment.[6] As the court of appeals recognized, monopolization requires "monopoly power in the relevant market" (Pet. App. 15A, citing *United States* v. *Grinnell Corp.*, 384 U.S. 563 (1966)). Monopoly power is the power to control price and exclude competition. *Id.* at 571. The offense of attempted monopolization requires a "dangerous probability of success" in monopolizing, which in turn depends on the existence of significant market power. See, *e.g.*, *Richter Concrete Corp.* v. *Hilltop Concrete Corp.*, 691 F.2d 818, 827 (6th Cir. 1982) (test is whether defendant "possessed sufficient market power to achieve its aims"). Similarly, as the court of appeals acknowledged (Pet. App. 7a), a tying arrangement is not per se unlawful absent market power over the tying product. *Hyde*, 466 U.S. at 12-18. "As an economic matter, market power exists whenever prices can be raised above the levels that would be charged in a competitive market." *Id.* at 27 n.46.[7]

(6th Cir. 1989), cert. denied, 110 S. Ct. 1783 (1990); *General Business Systems* v. *North American Philips Corp.*, 699 F.2d 965, 975 (9th Cir. 1983); *Spectrofuge Corp.* v. *Beckman Instruments, Inc.*, 575 F.2d 256, 278-286 (5th Cir. 1978) (service), cert. denied, 440 U.S. 939 (1979).

[6] The court of appeals apparently treated the market within which Kodak must be shown to have power in the Section 2 context to be the market for service of Kodak equipment (Pet. App. 19A), although the ISOs had argued to the court that their claim rested on Kodak's alleged "monopoly power over the tens of thousands of copier and micrographic equipment replacement parts it makes or has made" (ISO C.A. Reply Br. 16). Indeed, the ISOs continue to identify the "key issue" for both their Section 1 and their Section 2 claims as "whether Kodak enjoys sufficient economic power in the parts market." Br. in Opp. 21 (emphasis added). As we understand the Section 2 claims, we believe they do require a showing of monopoly power over parts. But we also believe that differentiating between parts and service markets is immaterial here, because the same analysis applies to power in either.

[7] Monopoly power differs from mere market power only in degree. See, *e.g.*, *Colorado Interstate Gas Co.* v. *Natural Gas Pipeline Co.*, 885 F.2d 683, 695-696 & n.22 (10th Cir. 1989), cert. denied, 111

Because it is not disputed that Kodak lacks market power in the market for equipment (Pet. App. A8 n.3), however, the suggestion that it nonetheless could exercise market power in a market for replacement parts or service for Kodak equipment is inherently implausible. An increase in the price of the parts and service needed over the life of the equipment is, in economic substance, an increase in the price of the equipment itself. Thus, as the court of appeals acknowledged, presumably "equipment purchasers would turn to one of Kodak's competitors if Kodak tied supercompetitively priced parts or service directly to equipment." *Id.* at 9A. Similarly, as the court of appeals also recognized (*ibid.*), "equipment purchasers might turn to one of Kodak's competitors if Kodak ties supercompetitively priced service to parts." See also *Grappone, Inc.* v. *Subaru of New England, Inc.*, 858 F.2d 792, 796-798 (1st Cir. 1988); *General Business Systems* v. *North American Philips Corp.*, 699 F.2d 965, 974-975, 977 (9th Cir. 1983). This reasoning is consistent with this Court's recognition in other contexts that "interbrand competition is the primary concern of the antitrust laws" (*Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717, 726 (1988)), because "so long as interbrand competition existed, that would provide a 'significant check' on any attempt to exploit intrabrand market power." *Id.* at 725 (quoting *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 52 n.19 (1977)).

a. The court of appeals conceded that it had "trouble with the monopoly power (or dangerous probability of monopoly power) issue" (Pet. App. 18A) raised by the ISOs' Section 2 claims. It nevertheless concluded that the ISOs had presented sufficient evidence of such power to avoid summary judgment on these claims (*id.* at 19A), suggesting that "market imperfections," although not "pin-pointed" by the ISOs, could "keep economic theories

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S. Ct. 441 (1990); *Dimmitt Agri Industries, Inc.* v. *CPC International Inc.*, 679 F.2d 516, 529 (5th Cir. 1982), cert. denied, 460 U.S. 1082 (1983).

about how consumers will act from mirroring reality." *Id.* at 10A. Despite the ISOs' failure to point to any specific imperfection that might exist in the equipment market, the court concluded that "[i]t is enough that [the ISOs] have presented evidence of actual events from which a reasonable trier of fact could conclude that Kodak has power in the interbrand market and that competition in the interbrand market does not, in reality, curb Kodak's power in the parts market." [8] *Ibid.* In particular, the court referred to "evidence that Kodak charges up to twice as much as [the ISOs] for service that is of lower quality than [the ISOs'] service[,] * * * evidence that in some instances competition from ISOs drove down the price that Kodak was willing to charge for service and that in other instances some owners of large Kodak equipment packages will pay higher prices for Kodak service rather than switch to competitors' systems." *Id.* at 10A-11A.[9]

This evidence is insufficient by itself [10] to create a genuine issue of material fact as to whether Kodak has, or

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[8] We are unable to reconcile the court's reliance on a possible finding that Kodak has power in the interbrand market with the court's acknowledgement that the ISOs "do not dispute Kodak's assertion that its lacks market power in the interbrand markets." Pet. App. 8A n.3. The court apparently did not rely on a distinction between "power" and "market power," because it noted that the ISOs "have not claimed that these factors are sufficient to give Kodak power in its interbrand markets." *Id.* at 12A.

[9] The court cited this evidence in the context of the ISOs' Section 1 claim. It referred to no additional evidence in connection with the Section 2 claim.

[10] The court of appeals considered the evidence already assembled by the ISOs to be sufficient to withstand summary judgment on both the Section 1 and Section 2 claims. See Pet. App. 10A-12A, 19A. The court thus had no cause to consider, and did not specifically determine (see Pet. App. 10A & n.4), whether the ISOs had been given an "adequate time for discovery" (*Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322 (1986)) prior to the award of summary judgment by the district court. This Court need not consider in the first in-

has a dangerous probability of achieving, monopoly power in the parts markets, given the constraining effect of competition in the equipment markets on Kodak's ability profitability to charge supracompetitive prices in the parts or service markets. As Judge Wallace explained in dissent, "[a]t best, this would be evidence that Kodak is pursuing a self-destructive pricing strategy which lacks long-term effects upon competition. It is not evidence of true market power," because if Kodak prices supracompetitively in the parts market, in the absence of some imperfection in the equipment market that the ISOs and the court of appeals have failed to identify, "competitive forces will exact a heavy toll in the interbrand market, and profits gained from the short-term parts mark-ups will be quickly eclipsed." Pet. App. 23A.

As Judge Wallace concluded, the majority's analysis goes astray in focusing exclusively on customers who have already purchased Kodak equipment and who may be "locked in" to Kodak parts until they are ready to replace that equipment. By ignoring the effect of Kodak's conduct in the parts market on its sale of equipment—sales on which its future sales of parts and service depend—the majority ignores economic reality. Purchasers have an obvious economic incentive to foresee, and protect themselves from, exploitation by the manufacturer. As

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stance the complaints now voiced by respondents (Br. in Opp. 11-13) as to limitations imposed on discovery. Rather, the question whether discovery was appropriately curtailed should be addressed on remand by the court of appeals in light of this Court's determination of the applicable substantive rules to be applied to respondents' Sherman Act claims.

In any event, we have doubts whether respondents' claims in this respect are well founded. As we shall presently show, this Court's teachings make clear that the requisite market power cannot be demonstrated by showing that a handful of disgruntled customers objected to the practice. That legally inadequate showing appears to have been much of what respondents contemplated as set forth in their Rule 56(f) affidavit and their request to take the depositions of two customers.

the court noted, the ISOs "do not dispute that equipment purchasers consider the cost of parts and service when initially deciding between Kodak's equipment and its competitors' equipment." Pet. App. 8A.[11] Moreover, sellers face the obvious economic risk of losing future equipment sales if they exploit their "locked-in" customers.

Evidence that service provided by an equipment manufacturer is more expensive or of lesser quality than ISO service thus would not rebut the conclusion that the manufacturer cannot exercise market power over replacement parts for its own equipment if it lacks market power in the equipment market itself. Such evidence would, for example, be entirely consistent with a marketing strategy of spreading the cost of equipment more evenly over its life by charging a lower initial purchase price and higher service fees. Here, whatever its particular strategy, the fact remains that Kodak cannot set service or parts prices without regard to the impact on the market for equipment, in which it concededly lacks market power.

In sum, it is inherently implausible that an equipment manufacturer that lacks market power in interbrand equipment markets, could exercise monopoly power in aftermarkets for parts or service for its own brand of equipment.[12] As Judge Wallace correctly observed, the court of appeals erred in holding that the ISOs had pre-

[11] Relying on a law review article rather than record evidence, the ISOs suggest that purchasers might have difficulty discovering any restrictions in the aftermarkets or in estimating perfectly the cost of parts and service over the life of the equipment. Br. in Opp. 14-15. Whatever relevance these supposed market imperfections might have in a case where they were supported by evidence, there is no reason to think equipment buyers were taken by surprise here, for Kodak's policies are spelled out in its sales contracts (*id.* at 3).

[12] This is so even if all, rather than just "many," Kodak parts "are unique and available only from Kodak" (Pet. App. 11A), since the implausibility of the exercise of power in the parts market depends on competition in the interbrand equipment markets, not on multiple sources of replacement parts.

sented sufficient evidence to create a genuine issue of material fact on this issue in this case.

b. The result should be no different if the ISOs' claims are analyzed as a tying agreement under Section 1 of the Sherman Act. Relying on this Court's decision in *Hyde*, the court of appeals held that Kodak had sufficient market power for a per se unlawful tie if it "is able to force or to induce some potential tying-product customers (here potential Kodak parts customers) to purchase the tied product (here Kodak service) that these customers would not purchase absent the tying arrangement." Pet. App. 7A. Finding evidence that some customers were so forced or induced, because they were "locked in" to Kodak equipment by the cost of switching to a different brand of equipment (*id.* at 7A-8A, 10A-11A),[13] the court found sufficient evidence to defeat summary judgment. This analysis, however, reads the substance out of the market power requirement of *Hyde*.

In *Hyde*, this Court held that East Jefferson Hospital's policy of requiring surgical patients to use the services of anesthesiologists with whom the hospital had an exclusive contractual arrangement was not a per se unlawful tie. In reaching this conclusion, the Court proceeded from a well-established premise: "not every refusal to sell two products separately can be said to restrain competition." 466 U.S. at 11. Indeed, "[b]uyers often find package sales attractive; a seller's decision to offer such packages can merely be an attempt to compete effectively —conduct that is entirely consistent with the Sherman Act." *Id.* at 12. For this reason, "tying may have pro-

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[13] That many Kodak parts may be "unique and available only from Kodak," Pet. App. 7A, adds nothing to the "lock in" analysis. Customers need Kodak parts only because they need to repair Kodak equipment. If switching from Kodak equipment to other equipment were costless, the availability of Kodak parts would obviously matter not at all. Thus, the cost of switching alone, not limited availability of parts, results in the phenomenon noted by the court of appeals.

competitive justifications that make it inappropriate to condemn without considerable market analysis." *National Collegiate Athletic Association* v. *Board of Regents*, 468 U.S. 85, 104 n.26 (1984).

Because the propriety of adopting a per se approach to particular conduct turns on "the probability of anticompetitive consequences," per se condemnation of a tie-in is appropriate only where "anticompetitive forcing is likely." *Hyde*, 466 U.S. at 16. Such economic coercion is not likely, however, unless a "seller has some special ability—usually called 'market power'—to force a purchaser to do something that he would not do in a competitive market." *Id.* at 13-14. Thus, anticompetitive "forcing," as described in *Hyde*, does not exist simply because some purchasers of a tied sale would prefer to purchase the tying product separately. *Id.* at 25. Rather, only if consumers are "forced * * * *as a result of the [seller's] market power* would the arrangement have anticompetitive consequences." *Ibid.* (emphasis added).

Hyde establishes that "the 'market power' hurdle" to per se liability for tying is at least "moderately high," so that "it cannot ordinarily be surmounted simply by pointing to the fact of the tie itself or to a handful of objecting customers." *Grappone, Inc.* v. *Subaru of New England, Inc.*, 858 F.2d at 796.[14] Thus, the hospital's 30% market share in *Hyde*—larger than Kodak's share of the equipment markets here—did not demonstrate a "dominant market position" and provided an insufficient basis for inferring the requisite market power. 466 U.S. at 27. Moreover, *Hyde* makes clear that tying arrangements are but an alternative use of market

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[14] As the Court said in *Hyde*, "[i]f only a single purchaser were 'forced' with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of antitrust law." 466 U.S. at 16.

power that could otherwise be used to "enhanc[e] the price of the tying product." *Id.* at 14.[15]

The court of appeals thus erred in holding that sufficient market power for a per se tying violation could be shown merely by an effect on "some potential tying-product customers." Pet. App. 7A. The court compounded its error by relying solely on "locked in" customers who had already purchased Kodak's equipment, for, as we have noted, a focus on those who have already purchased Kodak equipment ignores the constraint on the manufacturer's exercise of market power in parts markets that results from interbrand competition in the equipment markets.[16] The court of appeals has held, in substance, that a reasonable jury could find a tie to be per se unlawful without evidence of effective market power.

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[15] The Court has said that per se unlawful tying does not depend on monopoly power (*United States Steel Corp.* v. *Fortner Enterprises, Inc.*, 429 U.S. 610, 620 (1977)), but at the same time it made clear that market power over price is required. *Id.* at 620 n.13. Per se unlawful tying, then, appears to require market power akin to monopoly power and quite close to monopoly power in degree. See *Grappone, Inc.* v. *Subaru of New England, Inc.*, 858 F.2d at 796-797 (power to raise prices only with respect to buyers with unusual or special need for a seller's product is insufficient to pass the *Hyde* market power screen; virtually every seller of a branded product has that much market power, and to condemn ties based on that power alone would condemn harmless, and even useful, ties).

[16] In *Hyde* itself, the Court assessed market power with reference to the time patients selected East Jefferson hospital, not the subsequent time when, having chosen East Jefferson, they were being wheeled into the operating room. 466 U.S. at 26-28. In *Digidyne Corp.* v. *Data General Corp.*, 734 F.2d 1336, 1342 (1984), cert. denied, 473 U.S. 908 (1985), the Ninth Circuit found that a "lock in" effect enhanced the defendant's market power, a less extreme position than the court of appeals took here. Nevertheless, two Justices of this Court would have granted certiorari to review, inter alia, "whether market power over 'locked in' customers must be analyzed at the outset of the original decision to purchase." 473 U.S. at 909 (White, Blackmun, J.J., dissenting from denial of certiorari).

The court ot appeals' rationale sweeps too broadly. It risks outlawing conduct that may represent nothing more than an equipment manufacturer's efforts to compete against other manufacturers by devising an equipment/parts/service package that it hopes will appeal to buyers. At least where the manufacturer lacks effective market power in the equipment markets, the tie of parts to service should not be held to so plainly "lack * * * any redeeming virtue" that it is "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm [it has] caused or the business excuse for [its] use." *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 5 (1958).[17]

2. Despite the interlocutory posture of this case, review by this Court is appropriate for at least two fundamental reasons. First, the market power questions this case raises are important and recurring (see Pet. App. 42E-43E). Indeed, this is not the first time this Court has been asked to address this question. See *Data General Corp.* v. *Digidyne Corp.*, 473 U.S. 908 (1985) (White, J., and Blackmun, J., dissenting from denial of certiorari). The marketing practices at issue here appear particularly widespread in high technology industries, notably including the computer industry. As in *Data General*, "[t]he reach of the decision in this case is potentially enormous." *Id.* at 909. The decision of the

[17] The court below held that the ISOs had raised a genuine issue of material fact as to whether Kodak's quality control justification for its conduct was "pretextual" (Pet. App. 19A), while the dissenting judge found the evidence supporting this justification to be "undisputed" (*id.* at 25A). Although we have doubts about the correctness of the court's holding, we do not believe the question warrants this Court's review. There appears to be no dispute over the proper legal standard for evaluating business justification defenses (*id.* at 18A n.10), so the question raised is a purely factual one. Moreover, proper resolution of the market power issues in this case would make resolution of the business justification issues unnecessary. If Kodak lacks significant market power over parts, it needs no business justification for its conduct.

court of appeals appears to depart from this Court's teachings with respect to market power analysis in tying cases, and it similarly appears to depart from sound analysis of monopolization law. The court's error is indicative of a more widespread uncertainty concerning the degree of market power required for per se illegality in tying cases and the proper treatment of the "lock in" effect. Guidance from this Court would be of substantial benefit both to the courts and to businesses attempting to structure their operations efficiently within the limits imposed by law.

Second, this case presents an appropriate occasion to emphasize the critical role of summary judgment in antitrust litigation. Indeed, summary judgment may be uniquely important in antitrust cases. "Not only do antitrust trials often encompass a great deal of expensive and time consuming discovery and trial work, but also * * * the statutory private antitrust remedy of treble damages affords a special temptation for the institution of vexatious litigation." *Lupia* v. *Stella D'Oro Biscuit Co.*, 586 F.2d 1163, 1167 (7th Cir. 1978), cert. denied, 440 U.S. 982 (1979); see also II P. Areeda and D. Turner, *Antitrust Law* 57-58 (1978). It is a hard, litigation-provoking fact that procompetitive and anticompetitive behavior may have similar objectives and similar consequences for competing firms; indeed, those legally polar extremes in market behavior may actually appear "indistinguishable" when "judged from a distance" (*Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752, 762 (1984)). The baleful consequence is that too easy resort to the antitrust laws by "losers" in the market place carries with it the daunting prospect of protracted litigation that may well deter procompetitive conduct (*id.* at 763-764). That is precisely the danger that requires rejection of the unsound "theory" of antitrust liability urged here by the respondents and adopted by the court of appeals.

Properly applied, the requirement that the opponent of summary judgment "set forth specific facts showing that there is a genuine issue for trial" (*Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986)) reduces the risk that antitrust litigation will deter procompetitive conduct. Not only do the elements of the offense inform the decision as to whether facts are material, but "antitrust law limits the range of permissible inferences from ambiguous evidence." *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. at 588. The evidence in this case, viewed in the light most favorable to the ISOs, is at best ambiguous, for the facts to which the ISOs point would likely be found regardless of whether Kodak had sufficient market power over parts to create a per se unlawful tie. The Court's *Matsushita* admonitions would ring hollow indeed if appellate courts are permitted to rely on speculation that as yet undiscovered and unidentified facts might point less ambiguously to prohibited behavior as a basis for reversing summary judgments granted by district courts.

On the evidence presented to the court of appeals, summary judgment for Kodak was proper. See note 10, *supra*. Nor should the issues of fact identified by the court of appeals as remaining for trial affect the outcome of the case.[18] Accordingly, no purpose would be served by awaiting a trial. To the contrary, it is important that prospective antitrust defendants be spared the costly burdens of trial when all that is complained of is proper competitive behavior. The case is, therefore, appropriate for review at this time.

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[18] If the court of appeals' opinion were read to hold that a trier of fact could conclude, on the basis of the evidence offered by respondent, that Kodak has power in the *interbrand* market (see Pet. App. 12A), then there would be a potentially determinative factual issue for trial. But the court's words, read in the context of the opinion as a whole, cannot fairly be so interpreted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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