No. 90-1029

In The

Supreme Court of the United States

October Term, 1991

EASTMAN KODAK COMPANY,

Petitioner,

vs.

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

Respondents.

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

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QUESTIONS PRESENTED

1. Is it per se lawful for a manufacturer facing some competition for basic equipment sales to monopolize aftermarkets for parts and service of its machines and for its used equipment, or to tie sales by using market power in one aftermarket to restrain competition in a second?

2. Is there sufficient evidence in the record to raise as a triable issue whether Kodak has market power in certain markets for new copier and micrographic equipment?

3. Is there sufficient evidence in the record to raise as a triable issue whether Kodak (a) monopolized the aftermarkets for parts and service for Kodak equipment in violation of Section 2 of the Sherman Act, and (b) unlawfully tied service to parts to foreclose ISOs and unreasonably to restrain competition in violation of Section 1 of the Sherman Act?

LIST OF PARTIES AND STATEMENT UNDER RULE 29.1

All parties are set forth fully in the caption. The eighteen Respondents have no corporate parents and no subsidiaries other than wholly-owned subsidiaries.

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STATEMENT OF THE CASE

A. Introduction.

The version of the facts presented by Eastman Kodak Company ("Petitioner" or "Kodak") ignores most of the evidence presented below by Image Technical Service, Inc. ("ITS") and the seventeen other plaintiffs ("Respondents"). It is undisputed that, prior to the initiation of Kodak's restrictive program, independent service organizations ("ISOs") engaged in effective competition with Kodak to service Kodak copier and micrographic equipment and to sell used Kodak machines and that, thereafter, ISOs were largely driven from these markets. Even the minimal discovery permitted by the district court showed that Kodak had power in three basic equipment markets, and that Kodak acted in concert with others (i) to monopolize a market for Kodak parts, (ii) to use that monopoly to cut off the essential parts supply to ISOs and independent enterprises which previously supplied ISOs, and (iii) to restrain competition in markets for Kodak photocopier and micrographic service and used machines.

As various amici have pointed out, this case implicates a wide range of expensive, high technology, basic equipment products. Automobiles were the first and remain the best example. Automobile owners are free to buy competing brands of parts made by independent parts manufacturers even though automobile manufacturers prefer that customers use only authorized replacement parts. Similarly, independent garages vigorously compete with each other and with authorized dealer/service agencies in the automobile service market.

The consequence of adopting Kodak's rule of per se legality, permitting a manufacturer facing some competition in the sale of its basic equipment to control parts and

service for its output, regardless of the means employed and their anticompetitive effects, would be to reduce competition in the major and growing equipment service segment of the U.S. economy. In most markets today, ISOs compete with each other and basic equipment manufacturer-controlled service organizations. Under the new order Kodak seeks, however, ISOs would exist only at the whim of basic equipment manufacturers. Service for copiers and micrographic equipment would be available only from manufacturers. Corner garages would provide service and repair only if auto manufacturers allowed it. The result would be the same in many other industries. As a consequence, service markets would become more concentrated. Consumers would be left with fewer choices, lower quality and higher prices.

B. The Parties and the Markets.

Respondents are small businesses located in ten states. They repaired and serviced Kodak copiers and/or micrographic equipment ("Kodak Equipment"), sold parts for Kodak Equipment, and reconditioned and sold used Kodak Equipment until Kodak began refusing to supply needed parts.[1]

Respondents' principal customers were federal, state and local government agencies, such as the Internal Revenue Service, U.S. Department of Agriculture, U.S. Veterans Administration, State of California, and Harris County Clerk's Office;[2] and banks and insurance

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[1] *See, e.g.*, Joint Appendix ("JA") 411, 449, 462, 470-71, 504.

[2] JA 487; Documents lodged with Clerk by Petitioner with the filing of the JA ("L") 165; L 149-50; JA 492-93.

companies, such as the Commercial Trust Company, Colorado Student Loan Program, State Farm, and Blue Cross and Blue Shield of Minnesota. JA 540-41, 501, 488. Some customers were major industrial enterprises, such as Dow Chemical, Mobil Oil, Pennzoil, Bechtel Corporation and Burlington Northern Railway; some were providers of specialized copy and microfilming services to the public (all of the preceding referred to generally as "Service Customers"). JA 492-93, 488. Some Service Customers purchased their own parts and hired ISOs to perform maintenance and repair using them. L 144-45. Others chose ISOs to supply both parts and service. L 133.

The two broad equipment industries at issue are copiers and micrographics. JA 10-11. Kodak manufactures, markets, sells and services a wide variety of photocopier and micrographic equipment. It also markets and sells supplies and parts for them. The photocopy industry is divided into three product markets: (1) high volume copiers with machine speeds in excess of sixty copies per minute; (2) mid-volume copiers with machine speeds of between twenty-five and sixty copies per minute; and (3) low-volume copiers with machine speeds of less than twenty-five copies per minute. JA 175-76, 198. The micrographics industry is divided into at least four product markets.[3] The geographic market for each of the basic equipment markets and the aftermarkets is the United States.

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[3] These are: (1) capture products (microfilmers and electronic scanners); (2) retrieval products (microfilm viewers and viewer/printers); (3) systems products (computer assisted retrieval systems (or "CAR systems") that provide access to stored data); and (4) computer output microfilm recorders (or "COM recorders") ("data processing peripherals that record computer generated data onto microfilm"). JA 156-58.

C. Kodak Changed its Longstanding Policy of Allowing Parts to be Sold Freely to ISOs.

Prior to December, 1985 Kodak stated the following policy in its parts catalog:

> Kodak distributes parts throughout the world and does not rely upon dealers, agents, or distributors in the U.S. to perform this distribution function. Therefore, Kodak will sell replacement parts *to any party* who intends to use them to repair Kodak Equipment. Orders will be accepted only from the customer to be billed.

JA 435 (emphasis added). In fact, Kodak imposed no restrictions on the sale of Kodak parts during this time.

With respect to copier parts, notwithstanding its own published policy statement, by 1987 Kodak was saying that its real policy, "unchanged since 1975," was not to sell copier parts to ISOs. JA 185. Kodak fails to offer contemporaneous supporting documents. There is additional contrary evidence in the record. Kodak specifically told Paul Hernandez in 1984, when he was considering starting Respondent ITS, that he would have no problem buying parts for Kodak copiers directly from Kodak. JA 415-16. Subsequently, a Kodak official warned an ISO owner that "Kodak *would be* taking action to put [ISOs] out of the Kodak business." JA 517 (emphasis added); and a Kodak employee denied copier parts to a former purchaser of such parts based on "our current business practice" not to sell such parts (L 157).

With respect to micrographic parts, Kodak admits that prior to mid-1985 it had an open sales policy, and that thereafter this policy changed. JA 99-100, 152.

Kodak did not seek to prevent ISOs from competing in the markets for Kodak service or used Kodak Equipment until well into 1985. JA 449-50, 470 *et seq.* However, Kodak then changed its longstanding policy to one of foreclosure.

D. Kodak Changed its Policy in 1985.

Kodak characterizes its policy as a "unilateral refusal to deal" with ISOs. Petitioner's Brief ("Pet. Br.") 15. In fact, it was much more: it involved an extensive range of conspiratorial action with third parties to prevent enterprises other than Kodak from providing parts to Respondents.

In 1985, ISOs had four non-Kodak sources of parts for Kodak Equipment: (1) independent original equipment manufacturers ("OEMs"); (2) brokers; (3) customer intermediaries who bought parts from Kodak and made them available to third parties such as ISOs; and (4) used equipment stripped for parts. Kodak sought control of these sources to drive competing ISOs out of business.

Kodak disingenuously says that ISOs are free to buy Kodak parts from others, just not from Kodak. Pet. Br. 37-38. After Kodak implemented its foreclosure policy, that became virtually impossible.

1. Kodak and Independent Manufacturers of Kodak Parts Agreed not to Sell to ISOs.

Kodak now concedes that 90% of parts for Kodak Equipment are made to Kodak's order by OEMs. Pet. Br. 37-38. Kodak also concedes that it totally controlled the supply of OEM parts. JA 120. Kodak says it did not tell OEMs they could not sell parts to ISOs. However, an internal Kodak memorandum reports that at least some OEMs required Kodak's approval to sell to ISOs, and this approval was refused. L 150. In addition, ISOs who sought to buy parts directly from OEMs were told that was impossible because of existing restrictive arrangements the OEMs had with Kodak. JA 429, 468, 474, 496. ISOs unsuccessfully attempted to buy parts from Acme

Electronics, Barber Coleman Company, Sola Electric (JA 429); Merkle Motor Company, Bodine Electric Company (JA 468); and Pittman Company (JA 496).[4]

Kodak "does not manufacture replacement parts to be used as components of other manufacturers' finished products." JA 432, 442. Reciprocally, Kodak Equipment is not designed to use parts manufactured or sold by its basic equipment competitors for their own equipment. Therefore, Kodak's concerted action with OEMs effectively eliminated ISOs' access to the primary alternative parts sources.

2. Kodak Pressured Independent Customers not to Sell Parts to ISOs.

When an owner of Kodak Equipment wanted to purchase parts sometime after it had bought the new equipment, Kodak required it to agree in writing "that the parts that you purchase from Kodak Parts Service will be used only to service the unit identified above." L 178; *see also* JA 590. Kodak threatened not to sell parts to Service Customers who resold them to ISOs. JA 428-29.

3. Kodak Pressured Parts Brokers and Their Agents not to Sell Kodak Parts to ISOs.

Independent parts distributors, or brokers, also sold parts to Service Customers and ISOs in the mid-1980s. These distributors would buy parts from Kodak or others who purchased parts from Kodak, or strip used Kodak

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[4] Kodak refused in discovery to disclose what it later conceded – its lack of proprietary rights to prevent others from selling to ISOs most parts which fit Kodak equipment. JA 293; Pet. Br. 37. This type of non-responsiveness limited the value of what little discovery was permitted.

Equipment to obtain the useful parts. JA 415-16, 99, 517; L 169; Pet. Br. 38.

Kodak adopted an aggressive campaign to prevent these distributors from selling parts to ISOs. In August 1986, Kodak told a San Jose State University employee that it would not service any Kodak Equipment the University purchased from an independent broker. JA 512. A Kodak internal document dated July 8, 1987, states that Kodak is "not obligated to sell [an equipment customer] parts" if it believed the parts would be used to "support" Kodak Equipment purchased from a broker. L 143; *see also* L 140. The document also states that it would be appropriate to cut off the customer to starve the brokers, whether or not the customer is an ISO or is suspected of selling parts to or obtaining service from ISOs. In addition, Kodak used its private security force to seize shipments of suspected grey or black market parts possessed by others without authority. *See, e.g.* JA 517-18.

4. Kodak Effectively Closed the Used Machine Market as a Parts Source.

Stripped, used Kodak machines were a fourth potential non-Kodak source of Kodak parts in the 1980s. L 169; Pet. Br. 38. Among the steps Kodak took to restrict the availability of used machines were the following:

a. It bought used machines, in one case 33 copiers from RCA, and scrapped them to keep them out of the market. JA 511. Kodak also demanded the right of first refusal to repurchase used machines from leasing companies after the leases expired. JA 510.

b. It refused to service some used machines acquired by customers who wanted Kodak service. JA 423.[5]

c. It charged a mandatory pre-installation inspection fee before agreeing to service some used machines purchased from brokers, even on a per-call basis where the used machines were operating smoothly. *See* L 93-94. This fee was often almost as much as the price of the used Kodak copiers. Lynn Gleason, a Kodak Customer Technical Service specialist, testified that during the time Kodak implemented its new restrictive policy, this fee for Ektaprint 100 and 150 copiers went from $250 to $1,500 – a six-fold increase in two years. JA 650.

5. Kodak Forced Service Customers to Boycott ISO Service and Used Equipment.

Kodak tied continued access to Kodak parts to each parts customer's agreement to boycott ISO service and ISO used equipment. L 163; JA 428-29; L 140.[6] In addition, if ISOs wanted to buy Kodak parts from Kodak, the only practicable parts source by 1987, they had to stop servicing any Kodak Equipment other than their own. L 143, 159.

Kodak also told Service Customers identified as dealing, or likely to deal, with ISOs, that ISOs could no longer

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[5] Kodak told a prospective customer that it would not sell it parts if its machine was purchased from a broker and self-serviced by one of its own employees. L 138. This is contrary to Kodak's assertion that it permits customer self-service. Pet. Br. 3; JA 171-72, 442.

[6] On some occasions Kodak did allow a few customers to purchase parts to be installed by ISOs, L 145, but this was the exception rather than the rule, *e.g.*, L 163, and is an issue for trial.

obtain parts to service machines. For example, in January 1987, Kodak's Denver District Sales Manager, Jack Murray, told the Treasurer of Adams County, Colorado that:

> He should not turn his equipment maintenance over to B.C.S. Technical Services [an ISO], because [it] could not get parts from Kodak. Mr. Murray did not mention parts delays, but simply said [B.C.S.] could not get parts at all. JA 466.

6. Monopolizing Parts was a Key to Monopolizing Service.

Kodak's new policy focused on monopolizing the Kodak parts market. Once the source of parts was controlled, the Kodak service market could be monopolized by denying parts to ISOs. An internal Kodak document, L 180, speaks for itself:

> Several fairly reliable sources from the field have recently mentioned that there are third parties repairing Kodak copiers. There are no legitimate channels for obtaining parts, yet good service is apparently being provided because of an adequate supply of Kodak parts. No one that I have talked to knows the source of the parts. We are concerned, as I'm sure you are too, about third party service nibbling away our profits. . . . *See also* L 187.

Kodak's refusal to deal directly with ISOs became lethal once other sources of Kodak parts had been significantly foreclosed and, consequently, high barriers to new entry by independent service providers had been erected.

E. Kodak did not Disclose to Buyers of Kodak Equipment That it was Restricting Competition in Aftermarkets; Buyers Lacked Alternative Information Sources.

The court of appeals, relying on Kodak's brief, stated that Respondents conceded that new equipment purchasers consider the cost of parts and service when initially deciding between Kodak's and its competitors' equipment. Petition for Writ of Certiorari ("Pet. App.") 8A. That is not so.[7]

The Ninth Circuit quoted the post-1985 Kodak "Terms of Sale" restricting parts sales to those "who service only their own Kodak equipment." Pet. App. 15A. This document was the Terms of Sale for parts, not for basic equipment. The parts sales terms were not disclosed when the customer purchased new Kodak Equipment.

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[7] *See* Kodak's brief, JA 823, purporting to rely on Respondents' brief at JA 779-80. Respondents' brief below did not even discuss whether such information is available, much less whether it is actually considered by buyers prior to purchase. Respondents disagree with two other statements in the opinion below. Specifically, contrary to the opinion, evidence *was* offered that Kodak's post-1985 micrographic parts policy as to pre-1985 machines was in fact exclusionary (L 125), and Respondents did *not* concede that Kodak lacked market power as to basic equipment. Respondents only referred to Kodak's market power for new equipment twice in their brief to the Ninth Circuit: (1) acknowledging that Kodak was arguing it lacked such power, and (2) arguing that Kodak's lack of market power would not foreclose Respondents' claims. The Solicitor General says that facts which the court of appeals considered undisputed, presumably including facts contained in the record, are not properly before this Court. That is wrong. The standard for summary judgment is based on what the record contains, not what any particular judge or panel thinks the record contains or has been conceded. *See* p. 26 below. In any event, these facts in the record were not repudiated or waived.

Kodak's sales and its service/parts ("CESD") divisions are separate. The former deals with new equipment, the latter with parts and service. JA 93, 156, 160-161, 174. A consumer purchasing a Kodak photocopier receives, from the sales division, terms of sale which nowhere mention restrictive parts policies. L 76-100. These policies are only disclosed to a potential parts customer who specifically obtains the "microfiche containing the complete CESD parts list." JA 261-262, 415, 431-447.

Consumers can only consider costs they know. The evidence shows a failure by Kodak or anybody else to disclose to equipment purchasers the lack of competitive alternatives for service, parts and used products for their Kodak machines. They likely expected aftermarket competition from their experience with other high-tech durable products, especially automobiles. As a result, buyers of Kodak Equipment have had no basis for knowing that aftermarkets for Kodak Equipment were or would be any less competitive than they had been prior to 1986. The brochures on which Kodak relies, L 40-58, are not designed to and do not inform customers about the aftermarkets for parts or service. They merely say that Kodak service is the best. L 40-62. One of them does warn that "maintenance . . . is one of the *hidden* expenditures connected to copying equipment." JA 215 (emphasis added). One is openly misleading, touting "readily available parts." L 61.

F. The Anticompetitive Effects of Kodak's Policy.

By 1987, Kodak's attempt to monopolize the service market had largely succeeded. The choices of Service Customers were reduced. Many had to pay more for lower quality service. JA 425-27 (ITS placed one of its technicians on-site for its customer Computer Science

Corporation ("CSC"), which Kodak refused to do, and charged CSC $100,000 while Kodak had charged $200,000); JA 420-22 (ITS was forced to drop service to California's Department of Mental Health and Department of Transportation to which ITS had charged less than one-third Kodak's published prices); *see also* JA 422, 474-75, 482-84, 514.

ISOs were unable to obtain Kodak parts from any reliable source. Many ISOs exited the service business (*see, e.g.*, JA 422, 463), and remaining ISOs have lost substantial revenues and accounts. JA 501-02, 495-96, 458-59. As a direct result, the relevant service markets have become increasingly concentrated – moving from a competitive market structure to a Kodak monopoly, not due to Kodak's "cost effective service" but due to its parts foreclosure. *See* L 107.

G. Kodak's Justifications for Driving ISOs From the Market are Pretextual.

Kodak gives three justifications for its exclusionary practices: (1) ISOs undermined the Kodak image of quality service; (2) not selling to ISOs lowered inventory costs; and (3) ISOs were not entitled to a "free ride" on Kodak's capital investment in equipment, parts and service. Pet. Br. 6. The factual bases of these "justifications" are disputed.

1. Concern With Quality Service is a Pretext.

The documents produced by Kodak show no concern with either the purported poor quality of ISO performance or with the adverse impact of ISOs on the public's perception of the quality and competitiveness of Kodak

Equipment. On the contrary, Kodak's own documents recognize that ISOs have highly accomplished personnel. For example, an internal Kodak memorandum dated October 28, 1986, reports that Kodak more than once found that its equipment maintenance agreements were not competitive with ISO service contracts in California. L 133. One interviewed customer chose ITS over Kodak because ITS provided better service at half the price:

> To date they have received an average of 2 hour response time, no problem with parts, and overall are very satisfied with the quality of service they have been receiving from ITS. They will give us a chance to bid on the EMA at the time of renewal. However, at this point I am not sure we have much to offer. *Id.*

ITS's customer CSC processed medical and dental benefits records for the states of California, Washington and Colorado. CSC replaced Kodak with ITS because ITS was cheaper and willing to place a full-time service representative on CSC's premises during working hours:

> [This] in-house service representative at CSC, and with extra machines at ITS which can replace any 'down machine' at CSC . . . ITS has provided more reliable and substantially more expeditious service than Kodak provided, with much less down time. JA 426.

One would expect Kodak documents to distinguish between good and poor ISOs if Kodak officials were actually concerned about the ISOs' impact on Kodak's quality. They do not. One would also expect Kodak documents to explain how some ISOs were damaging the Kodak image. They do not. Instead, the documents produced focus on how to knock out *all* ISOs to improve Kodak service profits; quality is not a consideration. L 126 *et seq.* Nor are there Kodak documents discussing

how Kodak could compete more effectively with equipment competitors (such as IBM and Xerox) by pricing Kodak Equipment low and Kodak service high; nor are there Kodak documents explaining how Kodak could better service clients or make better products by driving all ISOs out of business.

2. Concern With Inventory Cost Control is a Pretext.

Kodak claims that its new policy was necessary to achieve a reasonable return on parts and that Kodak needed to save money through better control of its parts inventory. Except for self-serving Kodak statements made after-the-fact, the record is to the contrary. Kodak buys 90% of its parts from OEMs and sells them to customers at a substantial mark-up. JA 468, 490, 457-58. Even before the new policy, Kodak charged ISOs significantly more, often twice what it charged its in-house equipment service representatives for the same parts. Kodak's mark-up on parts sold to ISOs, when other sources were still available, was almost twice as high as that of other vendors. JA 457-58, 490.

Contrary to Kodak's contentions, JA 104-05, Kodak's CESD Parts Service had *always* kept replacement parts stocks limited to Kodak's actual machine population. Kodak "maintained [parts] . . . at a level carefully planned to fulfill Kodak's commitments" to regular servicers, self-servicers and Kodak's CESD service. JA 435. The new policy only replaced the demand for parts of "regular servicers" (i.e., ISOs) with Kodak CESD's demand when it took over the ISOs' service business. Both demands were the same: they simply conformed to Kodak's long-standing "Replacement Parts Principles," to stock parts for the entire Kodak machine population

regardless of who serviced the machines. Kodak's effort to identify and ferret out ISOs, which Kodak admits resulted in less than 5% of the specially processed parts orders being denied, L 112, was necessarily more expensive than any alleged savings from lower parts inventories. The facts belie the excuses and should be tried.

3. ISOs are not Free Riders.

ISOs were not free riders "exploiting" Kodak in any meaningful legal or economic sense, let alone enterprises whose foreclosure was justified. Kodak's suggestion that ISOs are free riders on its capital investment in equipment is like Henry Ford complaining that companies selling gasoline and lubricants to owners of Ford cars are free riders on the Ford Motor Company. ISOs offered low cost, high quality service and invested in their own parts inventory. JA 467. If anything, they enhanced the demand for Kodak Equipment by ensuring that customers would be well served after they purchased new equipment. Free riders generally sell goods without service, or inferior service for a lower price by not providing some costly services others offer. *See* VIII P. AREEDA, ANTITRUST LAW ¶¶ 1161-62 (1989). There is no evidence of that here.[8]

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[8] In its brief, Pet. Br. 7, Kodak seems to raise two addiional efficiency justifications for Kodak's monopolizing conduct: (1) some customers will prefer the manufacturer to be responsible for repair problems to avoid divided responsibility, and (2) Kodak learns more about satisfying customers when it provides follow-up service. These assertions provide no justification for Kodak's anticompetitive conduct. If customers believe that service from Kodak is valuable because it eliminates divided responsibility and the potential for "finger pointing," they will voluntarily purchase service from Kodak in a competitive market. If Kodak believes that direct service strengthens its relationships with existing captive customers, it can price its service contract competitively to attract more service customers.

H. Kodak has Market Power in at Least Three of the Significant Markets for Kodak Equipment.

Kodak claims it cannot, regardless of the facts, monopolize a service market for Kodak Equipment *if* it lacks market power in the basic equipment markets. Kodak says the record shows that its new equipment markets are competitive. Pet. Br. 2-3.[9] Kodak's admissions, buttressed by a Kodak merger since the summary judgment motion was filed, show Kodak market power in at least three significant new equipment markets. This belies the assertion of fierce competition in those markets.

1. Kodak is a Duopolist in the High Volume Copier Market.

In 1987, Kodak had a 28% share of the high volume copier market. JA 177, 198.[10] It identified IBM and Xerox as the only other significant competitors in this market, both Xerox and IBM having even larger shares. JA 198, 176-77, 192. Kodak seems to believe that this high a share in a three-firm market is consistent with fierce competition. However, barriers to entry were so formidable that between 1985 and 1987, using Kodak's own market share data, even Japanese copier manufacturers could not significantly penetrate the market. In April 1988, eight months after filing its motion for summary judgment,

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[9] Kodak's witnesses have identified at least seven product markets for Kodak Equipment: high, mid and low volume copiers in the copier industry, and capture, retrieval, CAR systems and COM recorders in the micrographics industry. *See* p. 3 above.

[10] Kodak variously defines this market as machine speeds of 60 copies per minute ("cpm") and 70 cpm, and variously sets its market share for 70 cpm machines at 23% and 27.6%. JA 177. The difference is not material.

Kodak acquired IBM's copier business. The high volume copier equipment market thereupon became a duopoly.[11] By 1988, Kodak had a near monopoly share of this important and lucrative basic equipment market.

At about the same time Kodak acquired IBM's copier business, the third firm in this market, Xerox, was changing its policy toward Xerox ISOs so that, by mid-1988, not one high volume copier manufacturer permitted competition in the sale of copier service.[12] Consequently, choice of service was effectively unavailable to any purchasers of high volume copiers.

2. Kodak has Significant Power in the Market for Capture Products and the Market for Computer Assisted Retrieval Systems.

Kodak concedes that, in 1986, it had a 42% share of the market for capture products. JA 159. If this is now disputed, the issue should be tried. Kodak concedes that computer assisted retrieval systems are a separate market in micrographics and that, in 1986, Kodak had a 51%

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[11] See pp. 5 and 25 of Kodak Annual Report to Stockholders for 1989, Appendix A. Copies of this Annual Report have been lodged with the Clerk by Respondents. This fact is "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). Thus, this Court may take judicial notice. Fed. R. Evid. 201(f). *See, e.g., Detroit Edison Co. v. NLRB*, 440 U.S. 301, 318 (1979). This acquisition is raised here to show Kodak's heightened market power in basic equipment. It will be relevant on remand in seeking injunctive relief and post-merger damages.

[12] *Canada (Director of Investigation and Research) v. Xerox Canada Inc.*, 33 C.P.R. 83, 97, 99, 127 (3d 1990) (stating that Xerox United States restricted supply of parts to U.S. ISOs). Copies of this opinion have been lodged with the Clerk by Respondents.

share of this product market. JA 159. If now disputed, this issue should be tried.

I. Kodak Equipment Purchasers are Locked-In to Kodak Equipment.

Kodak Equipment buyers are locked-in. They cannot change equipment brands when confronted with a price increase for parts or service above the competitive level. The lock-in occurs because the cost of replacing the basic equipment exceeds the cost of paying monopoly prices for parts and service over the life of the machine. By 1987, a Kodak Ektaprint 150AF copier which costs $75,000 new, had an open market resale value of only $2,500-$3,500. JA 506, 427-28, 519-21, 358-59. Any Kodak customer with several relatively new copiers was therefore constrained, locked-in, from buying competing new equipment in response to higher service prices. One customer, CSC, for example, owns more than 100 pieces of Kodak micrographic equipment which would cost about $1.5 million to replace. JA 424-25. Costly micrographic software would have to be reprogrammed. JA 425. Personnel would have to be retrained. *Id.*

Kodak disputes the existence of a lock-in in the retrieval devices market. JA 707-08. However, Kodak fails to explain why it cannot price parts and service above competitive levels in the face of high replacement costs. JA 425-26, 537.

J. Parts and Service Markets for Kodak Equipment Have Distinct Characteristics.

In the mid-1980s, before Kodak implemented its boycott policy, demand for Kodak parts and service was

developing separate from the demand for basic copier and micrographics equipment. Thus, many large purchasers of Kodak Equipment chose the more responsive, more skilled, less expensive ISOs to service and provide parts for their Kodak Equipment. Some of these customers had different employees responsible for purchasing basic equipment than for purchasing parts and service. Often these purchase decisions were not in fact coordinated. JA 429-30. Without such a distinct consumer demand for service, ISOs could not have developed.

Kodak parts are not interchangeable with parts designed for competing copiers and micrographic products. There is nothing in the record to indicate that substitute parts, especially a full line of them, can be made cheaply in small quantities by potential suppliers not presently in the market. There is thus a barrier to entry into the market for the sale of Kodak parts to Service Customers. Kodak has further discouraged potential parts supply substitutability by referring OEMs vaguely to its unspecified "proprietary rights" in parts for Kodak Equipment. L 150. In fact, however, Kodak has no such rights. *See* p.6 n.4.

Service for other brands of copier and micrographic equipment is not reasonably interchangeable with Kodak service. Service for Kodak Equipment requires special knowledge and training that many service organizations do not possess. Equipment technicians must complete training programs to service Kodak copier and micrographic equipment. Many ISOs were started by former Kodak service employees who spent years learning the complexities of Kodak Equipment. JA 412-13.

K. Both in Fact and Logic, an Absence of Power in new Equipment Markets Does not Prevent Kodak From Exercising Monopoly Power in Kodak Aftermarkets.

Kodak is wrong to contend it cannot monopolize an aftermarket if the equipment market is competitive.[13]

Kodak's unanticipated change in its service policy in late 1985 allowed Kodak to raise the price of service to captive owners of Kodak Equipment. Kodak earned higher service revenues, harming both captive consumers and ISOs as a result of this opportunistic behavior against its locked-in customers. Since Kodak's new service policy was not widely disclosed, uninformed customers purchasing equipment after the new policy went into effect also would be locked-in. Therefore, the captive population is large.

Kodak claims that these anticompetitive effects are implausible based on its hypothesis that it lacks market power in the market for new equipment. Because of this lack of market power in new equipment, it is argued, Kodak cannot profitably raise the prices of parts and service because buyers view parts and service as parts of the total life cycle cost of Kodak Equipment. Pet. Br. 4.

Kodak's counterargument is incorrect for both theoretical and factual reasons. Even if, arguendo, after 1985, prospective new customers for basic equipment were apprised of Kodak's control of parts, service and used

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[13] This analysis and that in Section II of the Argument have been developed with the assistance of Professor Steven C. Salop, Professor of Economics and Law at Georgetown University Law School. Professor Salop is a recognized economic expert in the fields of industrial organization, competition, and antitrust. He is cited with approval by Kodak. Pet. Br. 37.

equipment, as well as the effect of Kodak parts and service pricing on life cycle costs, Kodak could still profitably charge monopoly prices for parts and service to existing captive Kodak Equipment owners who bought equipment prior to 1985. It could do this by avoiding any effect of such price increases on prospective new equipment purchasers,[14] and Kodak could continue to extract substantial monopoly rents from the pre-disclosure captives. The captives would have no choice but to pay the higher service charges.

Furthermore, even if Kodak lost some new equipment customers as a result of its policy to raise service costs monopolistically, it is a factual question whether enough prospective new customers would respond as Kodak predicts to deter such monopolistic pricing of parts and service. Even if Kodak had no market power in new equipment, it would lose only *some* new equipment sales from the policy change, not all of its customers. It is far from clear on this record whether Kodak would lose enough new sales to offset the increased service profits earned from captives. The kind of strong inference Kodak wishes to make requires data on the size of the

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[14] For example, Kodak could choose not to raise the price of parts and service to some new customers by offering them a lower priced service contract at the time of purchase. Alternatively, Kodak could reduce the price of basic equipment by the same amount as the monopoly surcharge for parts and service. In this way, the full, life cycle price of equipment plus parts and service would not rise for the new prospective customers who retained the ability to purchase alternative brands of equipment. At the same time that these customers were immunized from the price increases, Kodak could opportunistically raise service and parts prices to the existing, locked-in owners of Kodak Equipment. Kodak has regularly charged, through negotiations and the bidding process, different prices for equipment, parts and service for different customers. *See, e.g.*, JA 420-22, 536. In this way it could exploit the lock-in for captive customers without affecting the sales of new equipment.

installed base of existing captive equipment owners versus the number of new equipment prospects over time, the elasticity of demand for new Kodak Equipment, the fraction of profits accounted for by equipment and service, the costs of equipment, parts and service, and other factors not yet fully identified. Put simply: on the present record, there is an abundance of evidence that Kodak can extract monopoly prices from Service Customers without any substantial adverse effect on Kodak Equipment sales. JA 423-27, 420, 422, 474-75.

L. Proceedings Below.

The Complaint, filed April 14, 1987, alleged *inter alia* the violations addressed by this brief. JA 14-35.

Kodak's Answer broadly denied these allegations. JA 65-84. On September 11, 1987, Kodak moved for summary judgment before Judge William W. Schwarzer in the district court for the Northern District of California. Kodak's position was that the facts as stated by Respondents were essentially undisputed. JA 91-92 (Kodak policies, "with relatively minor corrections, are as the Complaint describes them. . . . [T]he purpose of this summary judgment motion is not to say 'No, we didn't do it.' ").

Over objection, the district court limited Respondents' discovery to 30 interrogatories (JA 255-98), 22 document requests (JA 315-25) and four one-day depositions. The court refused to permit further discovery beyond two more (one-day) depositions of Kodak witnesses to explore market power issues. Some information was developed, over Kodak resistance, showing Kodak's power in aftermarkets. *See* JA 609-82 *passim*, especially 650. Nonetheless, the court denied Respondents' Rule

56(f) motion for further specified discovery. JA 243-47; Pet. App. 37B-38B.

On April 18, 1988, the district court granted Kodak's motion and dismissed the action. It rejected the Sherman Act Section 1 allegations of conspiracy as based on hearsay, even though Kodak had admitted there were no "seriously disputed" issues alleged in the Complaint.[15] The court also ignored Kodak documents in the record which support an inference that Kodak conspired with others to cut off ISOs. Kodak's conduct was viewed simply as a legal unilateral refusal to deal with ISOs.

Respondents appealed to the Ninth Circuit. While focusing primarily on the leveraging of monopoly power over parts to monopolize the Kodak service market, Respondents indicated they were not just arguing a per se theory of tie-in liability. They sought the chance to try the material issues of fact alleged in the Complaint. JA 746-47. Kodak conceded that the appeal preserved Respondents' allegations *if* there were any genuine issues of material fact between the parties, which it denied. JA 808-09.

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[15] Most of the evidence of concerted action is admissible as hearsay exceptions such as records of regularly conducted activity, co-conspirator declarations, and commercial publications, or as non-hearsay, such as admissions of a party opponent. *See, e.g.*, Fed. R. Evid. 801(d)(2), 803(6). In addition, the district court's refusal to grant Respondents' motion for further discovery, including third-party discovery, which could have cured any admissibility problems, make it inappropriate to ignore any of this evidence. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 326 (1986) (summary judgment is inappropriate if non-moving party lacked adequate opportunity to obtain discovery). The evidence is more than sufficient to show the correctness of the court of appeals in reversing the summary judgment order. Evidentiary problems can most appropriately be addressed after discovery has been completed.

On May 1, 1990, the Ninth Circuit, in a two-to-one decision, reversed the order of dismissal, finding that triable issues of fact existed as to both Respondents' Sherman Act Section 1 and Section 2 claims. Writing for the majority, Judge Charles E. Wiggins concluded that requiring a person not to deal with another can be an illegal tie-in, Pet. App. 5A-6A, and that whether parts and service are separate markets is a disputed issue of fact. *Id.* at 6A. The court further concluded that whether it is possible for a firm in a competitive basic equipment market to charge supercompetitive prices for parts is not a question that should be decided on a "theoretical basis," but should be tested by facts. *Id.* at 10A. The court noted the "very limited discovery" allowed Respondents. *Id.* at 10A n.4. To require Respondents at this stage in the proceedings to conduct a market analysis and pinpoint "specific imperfections in the copier and micrographics markets . . . in order to withstand summary judgment," the majority held, "would elevate theory above reality." *Id.* at 10A. The majority further held that whether Kodak's business justifications were legitimate or pretextual is likewise a disputed issue of fact, as is whether Kodak's conduct was unilateral. *Id.* at 14A-15A. Judge J. Clifford Wallace dissented.

SUMMARY OF ARGUMENT

There is one core legal issue in this appeal. Does the record present sufficient evidence of triable issues of fact which, if resolved in Respondents' favor, would result in a determination of antitrust liability under the allegations in the Complaint? Despite the truncated discovery permitted below, Respondents have presented sufficient evidence.

Under Kodak's analysis, the most important factual question is whether Kodak has market power in certain markets for new equipment. Kodak's essential argument is that it cannot have committed the violations Respondents allege *if* it lacks market power in these "highly competitive" markets. A fortiori, if there is sufficient evidence to put in issue the presence or degree of market power and competitiveness in these basic equipment markets, Kodak's summary judgment motion must fail on its own terms. Such evidence is present here.

Kodak says that the key legal issue is whether it is economically plausible for a manufacturer lacking power over price in "competitive" new equipment markets to monopolize aftermarkets for its own brands, or to exploit market power in one of these aftermarkets by tying sales in the other. The answer is that even if Kodak did not have market power over basic equipment, it still would have a rational incentive to act opportunistically by raising prices of service against its large installed base of locked-in customers who either (1) purchased Kodak Equipment before Kodak's 1985 policy change, or (2) purchased equipment after 1985 not knowing of the change and expecting competition, not monopolization, in the service market for the equipment they were buying. In fact, Kodak's concession that distinct Kodak aftermarkets exist undermines its defense because the definition of a market necessarily implies the possibility of its being monopolized. Summary judgment is inappropriate if Kodak now chooses to dispute this material fact.

This Court would have to reject almost eighty years of its jurisprudence favoring unimpeded competition in aftermarkets to accept Kodak's arguments and prevent Respondents from proving monopolization and tying in aftermarkets for Kodak Equipment. It would be using a

case with limited facts as the basis for accepting a controversial economic theory. Nevertheless, even if it were decided that equipment manufacturers without power in basic equipment markets have a per se right to monopolize and tie parts and service aftermarkets for their products, the issue of equipment market power remains and is triable.

Another triable issue is whether Kodak engaged in a conspiracy with independent OEMs and non-ISO Kodak parts and service customers to boycott ISOs and thereby unreasonably restrain competition. If the record contains sufficient evidence to raise this as a triable issue, as the court of appeals found, dismissal of this action is similarly improper.

ARGUMENT

I. The Record Contains Genuine Issues of Material Fact Which Preclude Summary Judgment.

A motion for summary judgment must fail if the record contains a genuine issue of material fact "that might affect the outcome of the suit under governing law," and as to which a jury might reasonably find for the respondent. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In this Court, evidence on summary judgment is reviewed de novo; the Court does not merely rely on the understanding of the record of the lower courts. *Board of Education v. Pico*, 457 U.S. 853, 872-73 (1982); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962). The evidence must be construed in the light most favorable to the Respondents, and all reasonable inferences must be drawn in their favor. *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986).

Respondents have raised as a material issue of fact, with supporting evidence in the record, that separate markets exist for parts and service for Kodak Equipment. To seek summary judgment, Kodak must concede, as it has, that market definition is not in issue.[16] Otherwise, it cannot be entitled to summary judgment. However, if parts and service aftermarkets exist, they are, by definition, capable of being monopolized.[17] Accordingly, Kodak must concede that there is a material issue of fact as to whether separate markets for parts and service exist or it must dispute the material issue of monopoly power in the parts and service markets. Either way, Kodak should not be granted summary judgment.

In *Matsushita*, this Court held that when an antitrust plaintiff's claim "makes no economic sense, respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Id.* at 587. That rule has no bearing on this case. The plaintiffs in *Matsushita* presented an implausible theory of predatory pricing including, *inter alia*, a claim that defendants priced their televisions below cost for more than two decades. *Id.* at 592.[18] In this case, in contrast, Respondents have shown that it makes economic sense

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[16] *See* JA 688; Pet. Br. 16; Solicitor General's Brief in Support of Certiorari ("SGB Cert.") 6 n.5; Solicitor General's Brief ("SGB") 12 n.10. Kodak then inconsistently asserts that these markets cannot be restrained or monopolized. Pet. Br. 15-16, 33.

[17] *See, e.g.*, U.S. DEPARTMENT OF JUSTICE, MERGER GUIDELINES § 2.1 (1984) ("[T]he Department will include in the product market a group of products such that a [monopolist] could profitably impose a 'small but significant and nontransitory increase in price.' ").

[18] The defendants in *Matsushita* moved for summary judgment only "[a]fter several years of detailed discovery." *Id.* at 578. The "essence" of the evidence considered by the lower courts and filed with the Court consumed 40 volumes. *Id.* at 577.

for Kodak (1) to conspire with OEMs and Service Customers to boycott ISOs, (2) to monopolize the parts market, (3) to leverage its parts monopoly to monopolize the service market, and (4) to illegally tie parts to service. They have also come forward with specific evidence that "tends to exclude" the possibility that Kodak's conduct was consistent with permissible competition.

There are almost two dozen issues of disputed material fact identified in this brief. Even so, a full record can only be developed following remand for discovery which, to date, Respondents have largely been denied.

II. There is Substantial Evidence of Kodak's Monopoly Power in the Markets for Kodak Parts and Kodak Service and of Kodak's Market Power in at Least Three Basic Equipment Markets.

A. A Fact Finder Could Reasonably Find That the Markets for Equipment, Parts and Service are Separate and Distinct.

1. Market definition is a question of fact dependent upon the special characteristics of the industry involved. *See, e.g., NCAA v. Board of Regents*, 468 U.S. 85, 111 (1984). A market is the smallest group of products as to which a monopolist could profitably raise prices over competitive levels. *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966); MERGER GUIDELINES § 2.11.

Cross-elasticity of demand is the principal criterion for defining markets. If the cross-elasticity of demand is high, then a firm cannot effectively raise the price of its products because a substantial percentage of its customers will switch to a substitute soon after the price increase takes effect. *See Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). Cross-elasticities of demand here

are low. Kodak could benefit from an increase in the price of Kodak parts or service over competitive levels notwithstanding some potential loss of new equipment sales. Kodak is able to increase the cost of parts and service for its equipment above a competitive level, without causing a significant number of its customers to substitute competitor's equipment for more expensive parts and service. Moreover, lack of readily available information concerning the cost and availability of parts and service strengthens the divisions between the new equipment markets and these two aftermarkets. *See* pp. 10-11, 19 above.[19]

2. The parts market at issue in this case consists of parts that fit Kodak copiers and micrographic equipment, *not* the Kodak brand parts market as now claimed by Kodak. Pet. Br. 12. The market is "limited" to Kodak simply because parts from other brands of basic equipment cannot be used in Kodak Equipment. This Court has itself defined relevant markets to include only one or two brands of products. *See, e.g., Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927) (the professional photographic parts and supplies market was made up entirely of Kodak parts and supplies); *IBM Corp. v. United States*, 298 U.S. 131, 132, 136 (1936) (relevant market for punch cards, of which IBM produced 81%, included all punch cards that could be used in IBM tabulation machines, though IBM had several competitors in the market for tabulation machines).

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[19] Supply or production substitution provides no effective constraint on Kodak's power in the parts and service markets. *See* MERGER GUIDELINES § 2.21. To compete effectively in the sale of parts to Service Customers, access to a full line of Kodak parts is required. The breadth of the line of Kodak parts, coupled with Kodak's restrictive agreements with OEMs, make it infeasible for anyone to compete against Kodak in the parts market. Similarly, supply substitution in the service market was impossible because of Kodak's denial of access to the necessary parts.

Kodak cites the famous dictum in *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 393 (1956), to the effect that the power every manufacturer has over its own nonstandardized product does not make that product a market. Pet. Br. 33. Nothing in *duPont* or elsewhere, however, says that a single brand *cannot* constitute a relevant product market if that brand has no acceptable substitutes. In fact:

> [d]etermination of the competitive market for commodities depends on how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for another.

351 U.S. at 393. In *duPont*, cellophane did not constitute its own market because other products were "alternatives that buyers may readily use for their purposes." It was not because cellophane was a single brand. *Id.* at 394.

3. Below, Kodak stated it did not challenge the existence of a service market for Kodak Equipment for the purposes of its summary judgment motion. JA 688.[20] Kodak now claims, however, that the Kodak service market cannot be separated from the Kodak parts market because replacement parts are only an input into service and therefore not functionally independent. Pet. Br. 14-15 n.3. Functional independence is not the test of a market. This Court has held that whether two separate markets exist depends "not on the functional relation between them, but rather on the character of the demand for the two items." *Jefferson Parish Hospital v. Hyde*, 466 U.S. 2, 19 (1984).

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[20] Kodak does not dispute the existence of a service aftermarket in its brief, but it now purports to dispute the market's boundaries. Pet. Br. 33. *See also* SGB 12 n.10. As indicated above (p. 26-28), that, in itself, is sufficient grounds to deny summary judgment on Kodak's core question.

Functionally linked products have been found to be distinct markets. An interrelationship between two products does not necessarily suggest a tie, but it may make a tie especially easy to arrange and attractive due to the seller's increased ability to maximize profits by, in effect, charging a higher price to buyers of the tying product. *Id.* at 19 n.30. This Court has held, for example, that anesthesiologist services are distinct from hospital care despite a functional relationship, *id.*, and that salt is distinct from a salt machine despite a functional relationship, *International Salt Co. v. United States*, 332 U.S. 392, 394-96 (1947). Amici have shown the separation between equipment, parts and service for automobiles. *See Mozart Co. v. Mercedes Benz of North America, Inc.*, 833 F.2d 1342 (9th Cir. 1987), *cert. denied*, 488 U.S. 870 (1988); *Metrix Warehouse, Inc. v. Daimler-Benz AG*, 828 F.2d 1033 (4th Cir. 1987), *cert. denied*, 486 U.S. 1017 (1988).

There is substantial record evidence showing that customers' demand for the provision of service was separate from the demand for the provision of equipment and parts, and that prior to 1986, service was sold separately by ISOs in competition with Kodak. *See* pp. 2, 11-12, 18-19 above. Customers view new Kodak Equipment as separate from parts and service, and they view parts and service as separate from each other. Some Kodak Equipment owners purchased parts from Kodak and then serviced their machines themselves or hired ISOs to perform the service. *See* p. 3 above. In fact, the Kodak service market is an "interbrand market" that includes several different "brands" of service. The ITS brand of service was obviously different from the Kodak brand, as Kodak concedes. Pet. Br. 18.

If Kodak now wishes to contest Respondents' market definitions, it should do so after full discovery, as did

almost every defendant in the cases Kodak relies on for the proposition that the Kodak service market is not distinct.[21]

4. Irrespective of the degree of Kodak power in basic equipment markets, there is little doubt that if, as Respondents maintain, parts and service for Kodak Equipment are distinct relevant markets, Kodak has monopoly power in each. *See* pp. 28-34.

B. There is Substantial Evidence of Kodak Market Power in at Least Three Basic Equipment Markets.

Kodak says it faces "fierce competition" in the basic equipment markets for its products. Pet. Br. 3. That is hard to believe when one of these markets is a duopoly (high volume copiers), when Kodak acknowledges a 51% market share of another (computer assisted retrieval systems), and when in a third (micrographic capture equipment), Kodak admits a 42% market share. These large shares are prima facie evidence that Kodak has market power in these markets and that the markets are not fiercely competitive, but oligopolistic. *See, e.g., United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 364-65 (1963) (presumption of market power based on 30% share); MERGER GUIDELINES § 3.12 (presumption of market power based on 35% share). The record therefore fully supports the Ninth Circuit majority in its conclusion that the level of competition in the basic equipment markets does

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[21] *See duPont*, 351 U.S. 277 (1956); *Mozart*, 833 F.2d 1342 (1987); *Kenworth of Boston, Inc. v. Paccar Financial Corp.*, 735 F.2d 622 (1st Cir. 1984) (court of appeals vacated district court's preliminary injunction); *Kingsport Motors, Inc. v. Chrysler Motors Corp.*, 644 F.2d 566 (6th Cir. 1981) (J.N.O.V. granted after full trial); *Spectrofuge Corp. v. Beckman Instr., Inc.*, 575 F.2d 256 (5th Cir. 1978), *cert. denied*, 440 U.S. 939 (1979); *Telex Corp. v. IBM Corp.*, 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975).

not preclude, as a matter of law, monopolization and tying in the parts and service aftermarkets for Kodak products, and is an issue that should be tried. Pet. App. 12A, 15A, 19A.

C. Even as to new Equipment Over Which Kodak Does not Have Market Power, it Makes Economic Sense for Kodak to Act Opportunistically by Recovering Monopoly Profits From Captive Customers in Servicing its own Brands.

Record evidence shows that Kodak changed its service policy in 1985 to prevent ISOs from providing service to the installed base of Kodak Equipment owners. The Solicitor General (SGB 16 n.13) and Kodak claim it is implausible for Kodak to have sufficient market power to exploit Service Customers if the basic equipment markets are competitive. Although Kodak could raise parts and service prices it charges current locked-in equipment owners, Kodak claims that it would lose so many new equipment sales as a result that the price rise would not be profitable overall. Pet. Br. 24-26. This claim is disputed and is inherently a factual matter. *See* pp. 20-22 above. There is no reason to think that Kodak's loss of new equipment sales would be greater than gains from monopolistic profits extracted from captive customers through parts and service monopolization. Some customers were locked-in to Kodak Equipment for replacement sales because the cost of switching equipment brands exceeded the monopoly rents for parts and services that the customer would pay to Kodak. *See* p. 18 above. There is nothing in the record to show that Kodak informed prospective new customers that it would not

sell parts to ISOs or that it would require Service Customers to boycott ISOs. Uninformed customers of new equipment also would not be likely to switch brands in response to the higher prices of parts and service. Kodak could also insulate new equipment purchasers from monopolist parts and service prices. *See* p. 21 above.[22]

The overall profitability of the change in policy depends on the size of Kodak's installed base relative to annual sales, demand elasticity for Kodak Equipment, prices, costs and other variables referred to above. Even if, arguendo, Kodak had no market power in new equipment, it would not follow that Kodak's loss in new equipment revenues would outweigh its gain in parts and service revenues. Lack of market power in new equipment would only mean that a price increase would reduce demand for new equipment to some degree. It would *not* mean that demand for new equipment would disappear entirely, or that demand would necessarily fall by enough to offset the gain in profits earned on parts and service supplied to the locked-in equipment

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[22] The Solicitor General states that the Court's analysis in *Hyde* was unaffected by customers who were locked-in to the hospital's services because they were already checked into the hospital. SGB 9. This comparison does not support Kodak's position as a factual matter. At the time the hospital changed its policy, only a very small number of patients were locked-in as a result of already having entered the hospital, relative to the potential annual loss in patients from the policy change. In contrast, at the time of Kodak's change in policy, a far higher installed base of customers were locked-in to Kodak for service because they had already purchased Kodak Equipment with a useful life of several years. This number is even larger since Kodak's opportunistically-changed policy was generally undisclosed to the public, at least until this lawsuit was publicized. There is evidence that each Respondent had numerous customers who were forced against their wishes to use Kodak rather than ISOs for service. There is no basis for the Solicitor General's speculation that there are only a "handful of objecting customers" in this case. SGB 22-23.

owners.[23] Thus, even if Kodak did not have market power in new equipment, it was still likely to possess market power in parts and service. Kodak's contrary claim cannot be validated without additional discovery.[24]

Similarly, lack of equipment market power does not mean that there will be no long run effects on consumers, as suggested in Judge Wallace's dissent. Pet. App. 23A. To the contrary, even if some future equipment sales were lost, locked-in customers would pay more for service over the life of their equipment. And, even if Judge Wallace's economics were right, and all monopolies are eliminated in the "long run," short run monopolization nevertheless harms consumers and is prohibited by antitrust laws.

III. Kodak's Conduct Constituted Monopolization, Attempted Monopolization, and Tying in Violation of Sections 1 and 2 of the Sherman Act.

Section 2 of the Sherman Act prohibits monopolization and attempts to monopolize. It is violated when the defendant (1) possesses monopoly power in the relevant market, and (2) has willfully acquired or maintained that power. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 595-96 & n.19 (1985); *Grinnell*, 384 U.S. at 570-71. Tying is prohibited by Section 1 of the Sherman Act. The "essential characteristic" of the tying offense is

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[23] This is the logic of the circuit court's statement that "[s]ome strength in the interbrand market, although short of actual market power, can combine with other factors to yield power in an after-market." Pet. App. 12A.

[24] There is also a factual issue as to whether Kodak can effectively price discriminate, giving informed customers better terms than the uninformed. Kodak's hypothesis that uninformed customers will automatically benefit from lower prices for parts and service to the sophisticated, Pet. Br. 23, is unsupported by this record. *See* pp. 20-22 above.

"the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer . . . might have preferred to purchase elsewhere on different terms." *Hyde*, 466 U.S. at 12.

The record establishes that Kodak monopolized the market for parts for Kodak Equipment and then used that monopoly to obtain monopoly power over the market for service of Kodak Equipment, preventing buyers from obtaining service elsewhere on different terms. This conduct constitutes both unlawful monopolization and unlawful tying.

A. Monopolization.

1. Monopoly Power. Kodak has monopoly power in the nationwide market for the sale of *parts* for Kodak Equipment to Service Customers. Monopoly power is "the power to control prices or exclude competition." *duPont* 351 U.S. at 391. Market share is indicative of monopoly power. *Grinnell*, 384 U.S. at 571. Kodak's market share for the sale of replacement parts for Kodak Equipment to Service Customers approaches 100%. JA 120. Kodak has demonstrated its ability to raise prices and to eliminate competitive sources of parts. *See* pp. 5-12 above.

Under the standards set forth in *duPont* and *Grinnell*, Kodak also has monopoly power in the *service* market. Kodak has forced ISOs out of the market, leaving Kodak as the only source of service for the vast majority of Service Customers who do not self-service their machines. Kodak has demonstrated its power to raise prices and to eliminate ISOs from the market. *See* pp. 9-12 above.

2. Willful Acquisition or Maintenance. Monopolization requires proof only of a *general* "purpose or intent to exercise" monopoly power. *Aspen*, 472 U.S. at 602-03; *United States v. Griffith*, 334 U.S. 100, 105 (1948). Respondents need only show some element of deliberateness, for

"no monopolist monopolizes unconscious of what he is doing." *United States v. Aluminum Co. of America*, 148 F.2d 416, 432 (2d Cir. 1945) (L. Hand, J.). *See Aspen*, 472 U.S. at 602-603 ("As Judge Bork stated more recently: 'Improper exclusion (exclusion not the result of superior efficiency) is always deliberately intended.' "

Both Kodak's parts monopoly and its service monopoly were acquired and maintained deliberately. As to parts, Kodak instructed OEMs not to sell parts to ISOs, coerced Service Customers not to sell parts to ISOs, and closed the used machine market as a source of parts. As to service, the record is clear – in fact, there appears to be no dispute (*see* Pet. Br. 6) – that Kodak's specific purpose was to capture for itself the entire market for servicing Kodak Equipment.

When the objective is to create a monopoly, otherwise legal unilateral refusals to deal become unlawful. *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). *See Lorain Journal Co. v. United States*, 342 U.S. 143, 155 (1951) (publisher's attempt to maintain its monopoly by forcing advertisers to boycott a competing radio station violated Section 2); *see also Griffith*, 334 U.S. at 107 (use of monopoly power in one market, even if lawfully acquired, to foreclose competition in another market, violates Section 2); *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 340 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954) (Sherman Act Section 2 was violated because, *inter alia*, United Shoe lease-only policy "has had the effect that there are no independent service organizations to repair complicated machines"). Following *Colgate*, *Lorain Journal*, *Griffith* and *United Shoe*, Kodak's acquisition of monopoly power in the service market by, among other things, forcing Service Customers to boycott competing ISOs, violated Section 2 – whether "unilateral" or not.[25]

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[25] *But see* pp. 5-9 above (the conduct here was concerted, not unilateral).

A monopolist also violates Section 2 when it discontinues long-standing and efficient distribution policies in "a deliberate effort to discourage its customers from doing business with its smaller rival." *Aspen*, 472 U.S. at 610. Such a change alters the character of the market:

> In any business, patterns of distribution develop over time; these may reasonably be thought to be more efficient than alternative patterns of distribution that do not develop. The patterns that do develop and persist we may call the optimal patterns. By disturbing optimal distribution patterns, one rival can impose costs upon another, that is force the other to accept higher costs.

Id. at 604 n.31 (quoting R. BORK, THE ANTITRUST PARADOX 156 (1978)). The record firmly supports the inference that Kodak violated Section 2 by discontinuing long-standing cooperative arrangements with ISOs in order to monopolize the service market.

B. There is Unlawful Tying Under Either a Per Se or Rule of Reason Approach.

1. Per Se Tying. The critical anticompetitive feature of tying arrangements is the "suppression of competition" in the tied product market. *Northern Pacific Ry. v. United States*, 356 U.S. 1, 6 (1958). Tying arrangements could unjustifiably ensure the success of a qualitatively inferior (or unfairly priced) tied product, harm existing competitors, create barriers to entry into the market for the tied product, and deprive consumers of the freedom to choose the best-priced, highest quality product in the tied product market. *Hyde*, 466 U.S. at 14-15; *Northern Pacific*, 356 U.S. at 6-8. This Court's opinions have consistently condemned as per se unlawful – unlawful without

further examination of purpose or effect – tie-in conduct where "the existence of forcing is probable." *Hyde*, 466 U.S. at 15, 16; *Northern Pacific*, 356 U.S. at 5-6; *International Salt*, 332 U.S. 392.

Kodak's defense to the per se tying charge is (a) that its conduct constituted mere unilateral refusals to deal, and (b) that its purported lack of power over basic equipment markets deprived it of sufficient economic power required to support a per se claim. Pet. Br. 15-17. *Cf. Hyde*, 466 U.S. at 12-14. Both arguments were properly rejected by the court of appeals.[26]

a. As discussed at p. 8 above, Kodak sold parts to ISOs only on the condition that the ISOs not provide service on any Kodak Equipment other than their own. Kodak also sold parts to equipment users who serviced their own machines only on the condition that these purchasers not obtain service from ISOs. These conditioned sales are not unilateral refusals to deal; they are classic tying arrangements. This Court held in *Northern Pacific*, 356 U.S. at 5-6, that "an agreement by a party to sell one product but only on the condition that the buyer . . . will not purchase that [tied] product from any other supplier" may constitute an unlawful tying arrangement. *Northern Pacific* requires rejection of Kodak's argument here; *see also United Shoe Machinery Co. v. United States*, 258 U.S. 451, 457 (1922).

b. Kodak asks this Court to infer that it lacked sufficient market power to support a tie from the existence of some competition in equipment markets. Whether there was competition in equipment markets is

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[26] Kodak also argues that parts and service form one product, rather than the two required to establish a tie. Pet. Br. 15. For the reasons stated at pp. 18-19, 28-32 above, the court of appeals properly rejected this argument.

beside the point. Even assuming that competitiveness in equipment markets is relevant for purposes of Respondents' tying claim, the real issue is *whether Kodak had sufficient market power in the tying market (parts) to force purchasers to take the tied product (service) from Kodak.* As the court of appeals recognized, Kodak tied service to parts, not service to equipment. Pet. App. 5A. It also recognized that Kodak did not even "dispute [Respondents'] claim that [some] equipment owners would have contracted with ISOs for service if they could have obtained parts separately." Pet. App. 6A-7A. The evidence in the record, discussed in detail at pp. 11-13, 18 above, is at least sufficient to create an issue of fact as to whether Kodak's power over parts forced undesired purchases of Kodak service.[27]

2. Rule of Reason. Even if this Court were to rule that Respondents cannot prevail under a per se analysis of their tying claims, the case should still be remanded for further development of facts relating to the effects of Kodak's conduct on competition in the service market – whether Kodak's conduct had an adverse effect on the price, quality, and choice of service available to Kodak Equipment owners. *Hyde*, 466 U.S. at 29-32; *id.* at 37-41 (O'Connor, J., concurring); *Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495, 504 (1969).[28]

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[27] As Justice Stevens stated in *Hyde*, "*per se* condemnation. . . is . . . appropriate if the existence of forcing is probable," and again, "*per se* prohibition is appropriate if anticompetitive forcing is likely." 466 U.S. at 15, 16. Thus, once a showing of actual forcing has been made, it is no longer necessary to show the mere likelihood of forcing as a result of "market power." *Cf. FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 460-61 (1986) (market power is a surrogate for proof of adverse effects on competition).

[28] The court of appeals erroneously determined that Respondents had failed to raise a rule of reason argument in response to Petitioner's

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The three "threshold criteria" for subjecting a tying arrangement to a rule of reason analysis are: (1) the seller must have power in the tying product market; (2) there must be a substantial threat that the tying seller will acquire market power in the tied product market; and (3) there must be a coherent economic basis for treating the tying and tied products as distinct. *Hyde*, 466 U.S. at 37-41 (O'Connor, J., concurring). Kodak's tying arrangement easily passes these criteria – it has market power in parts, and there is substantial evidence that it has market power in certain equipment markets as well (*see* pp. 32-33 above); it already has acquired market power in the tied product (service) by driving the ISOs out of business (*see* pp. 11-12 above); and there is a strong basis, rooted in the historically separate demands for equipment, parts and service, to treat the tying and tied products as distinct (*see* pp. 28-32 above).

Once the "threshold criteria" have been met, the trier of fact must evaluate "the demonstrated economic effects" of the arrangement in question. *Id.* at 41 (O'Connor, J., concurring). These include the effects of the arrangement on price, quality, and consumer choice. In this case, there is substantial evidence that since Kodak

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motion for summary judgment. Pet. App. 4A n.1. Quite to the contrary, Respondents specifically stated in opposition to Kodak's summary judgment motion that "[i]llegal tying arrangements may receive a rule of reason analysis under Section 1" (JA 390). Although Respondents focused on the argument that Kodak had engaged in per se illegal conduct, they also argued that the tying arrangements instigated by Kodak had an adverse effect on price competition, quality competition, and consumer choice, and discussed the evidence in the record that supported those contentions. *See, e.g.*, JA 339-42, 369-71, 388-90. Moreover, Respondents acknowledged that if one viewed the per se test as creating a presumption of illegality, "the defendant may still escape liability by proving overall competitive reasonableness." JA 391.

implemented its restrictive practices, the price of service has increased, the quality of service has declined, and many ISOs have left the service business, thereby increasing market concentration and limiting consumer choice. *See* pp. 11-14 above. Whether this anticompetitive impact of Kodak's conduct is outweighed by any purported "contribution to efficiency," *Hyde*, 466 U.S. at 42 (O'Conner, J., concurring), should be determined at trial.

C. This Court Should not Abandon the Longstanding Antitrust Policy Prohibiting the Extension of Monopoly Power Through Leverage.

At bottom, the arguments of Kodak and its supporting amici are based on the proposition that the antitrust laws should not prohibit the extension of monopoly power into adjacent markets. At one point, in fact, Kodak openly suggests that this Court's many precedents holding that tying arrangements are illegal per se should all be overruled. Pet. Br. 16 n.6. For the most part, however, the requests to overturn the longstanding policy prohibiting the extension of monopoly power through leverage are disguised, grounded in quasi-economic speculation. Respondents urge the Court not to cast aside almost 80 years of national policy and precedent on so flimsy a foundation.[29]

Prior to 1914, there was no antitrust policy prohibiting the extension of monopoly power from one market to another. In the patent context, in fact, extension of

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[29] The economic theory that extension of monopoly power to adjacent markets "cannot" be harmful to consumers has been discredited by more recent learning. *See, e.g.*, Kaplow, *Extension of Monopoly Power Through Leverage*, 85 COLUM. L. REV. 515 (1985); Krattenmaker & Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209 (1986).

power from one market to another was expressly upheld – largely on the basis of the very arguments advanced by Kodak and its supporting amici here. *See Henry v. A.B. Dick Co.*, 224 U.S. 1 (1912). In 1914, however, Congress passed the Clayton Act, Section 3 (15 U.S.C. § 14) which recognized the potential anticompetitive effects of tying and of the extension of monopoly through leverage. Three years later, *Henry v. Dick* was expressly overruled in *Motion Picture Patents Co. v. Universal Film Co.*, 243 U.S. 502, 518 (1917).

The policy against extension of monopoly power through leverage was affirmed in 1936 in *IBM*, 298 U.S. at 137-38, 140. In 1947, *International Salt*, 332 U.S. at 396, announced the rule that tying arrangements imposed by firms with market power were illegal per se. Between 1947 and 1983, the per se rule against tie-ins was reaffirmed many times. *See Hyde*, 466 U.S. at 10 n.14 (collecting cases). In 1984, in the face of a frontal assault on the rule, this Court decided in *Hyde* that "[i]t is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable *'per se.'* " *Id.* at 9.

Economic theory – even if valid – is not a substitute for law. *See* Spivack, *The Chicago School Approach to Single Firm Exercises of Monopoly Power: A Response*, 52 ANTITRUST L.J. 651, 651-54, 672-74 (1983). Section 3 of the Clayton Act reflects a congressional determination that tying arrangements can be and sometimes are anticompetitive in the legal sense – irrespective of what certain economists may believe. The Clayton Act,[30] and this Court's

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[30] Standards for tying are largely the same under Section 3 of the Clayton Act and Section 1 of the Sherman Act. *Hyde*, 466 U.S. at 23 n.39.

precedents under the Sherman Act, establish a national policy favoring "competition on the merits" in adjacent markets. *Hyde*, 466 U.S. at 9-15. To displace that long-standing policy in favor of an economic theory that is at best controversial would improperly usurp the authority of Congress to say what the antitrust laws mean. *See Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, 460 U.S. 150, 170 (1983) (Powell, J.) ("it certainly is 'not for [this Court] to indulge in the business of policy-making in the field of antitrust legislation.' "); *see also Payne v. Tennessee*, No. 90-5721, Slip op. at 18, 111 S. Ct. 2597, 2610 (1991) (Rehnquist, C.J.) ("[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved").

IV. There is Substantial Record Evidence That Kodak Conspired With OEMs and Service Customers to Effect a Boycott of Parts Sales to ISOs and of ISO Service to Service Customers in Violation of Section 1 of the Sherman Act.

Section 1 of the Sherman Act makes illegal conspiracies between two or more independent persons which unreasonably restrain competition. Conspiracies can occur where non-price restrictions are imposed between firms in vertical relationships. Some forms of such concerted action are legal, but these must generally be tested by a fact-based rule of reason analysis. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977).

The record indicates that Kodak has acted in concert with OEMs and non-ISO parts and Service Customers to enforce a concerted refusal to deal with ISOs. The legality of these upstream and downstream restrictions depends

on their reasonableness in light of the possible anticompetitive and procompetitive effects of the boycott. *Id.* at 50-52, 58-59. But it is implausible and without record support that these boycotts of ISOs had the requisite redeeming procompetitive purposes or effects. In any event, Kodak does not challenge the legal theory of Respondents' conspiracy claim, and the record provides specific examples of concerted action.[31]

Kodak conspired with OEMs and with Service Customers to refuse to sell parts to ISOs, and with Service Customers to refuse to buy service from ISOs. Kodak says that ISOs could avoid its parts restrictions by purchasing parts directly from OEMs. Pet. Br. 37-38. The record, however, indicates that Kodak caused OEMs to refuse to sell parts to ISOs. Kodak has produced no evidence of exclusive patent rights over OEM-made parts for Kodak equipment (even though such information was sought by interrogatory). *See* p. 6 n.4. Accordingly, the only plausible explanation on this record for the OEMs' refusal to deal with ISOs is that they agreed, or were compelled to agree, to Kodak's ISO boycott.

Kodak required Service Customers to agree in writing "that the parts that you purchase from Kodak Parts Service will be used only to service the unit identified," i.e., that the Service Customer would not sell the part to an ISO. L 178. Kodak also threatened to refuse to supply parts to Service Customers who resold them to ISOs. JA 428-29. Some non-ISO Service Customers had been making money by selling parts bought from Kodak to

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[31] Like Kodak, the Solicitor General ignores the Ninth Circuit's decision on Respondents' Section 1 conspiracy claim. *See* Pet. App. 15A.

ISOs at a substantial markup. The most reasonable explanation on this record for their sudden refusal to deal with ISOs is that they were complying with Kodak's boycott.

Kodak entered into sales agreements for parts with equipment owners that required owners to boycott the use of ISO service. Pet. App. 15A; JA 442, 439. Kodak required some equipment owners to boycott ISOs if they wished to buy parts from Kodak. *See* p. 8 above. Prior to Kodak's new restrictive policy in 1985, many Service Customers chose ISOs to service their machines. *See* pp. 2-3 above. Kodak's new policy illegally forced Service Customers to change this practice.

The boycott agreements unreasonably restrained competition in the market for service of Kodak Equipment. As ISOs were driven out, the market became more concentrated, customer choice declined, and prices increased. *See* pp. 9-12 above. Kodak cannot dispute that these effects were anticompetitive. *See, e.g., NCAA*, 468 U.S. at 98-100, 106-08; *Aspen*, 472 U.S. at 603, 605-08. Whether these anticompetitive effects were justified by any procompetitive efficiencies is a contested issue of material fact.[32]

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[32] In one Kodak document, a Kodak official reports attending a meeting in June 1985 with a representative of Xerox, its only significant competitor by 1988 in the high volume copier market, and many others, to discuss third party maintenance. L 130-32. Upon remand, Respondents would want to explore the connection between this meeting and the subsequent adoption by both Kodak and Xerox of a policy to prohibit the sale of parts to ISOs. *Cf. Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 294 (1985) (group boycotts by competitors having market power are illegal per se). In *Sylvania*, this Court also left open the possibility that certain vertical restrictions "might justify *per se* prohibition." 433 U.S. at 58.

V. There is Substantial Record Evidence That Kodak's Efficiency Justifications for its Conduct are Pretexts for Intentionally Anticompetitive Activity.

Kodak presents three theories to justify its monopolistic practices: (1) ISOs undermined Kodak's image of quality service; (2) not selling to ISOs lowered inventory costs; and (3) ISOs were "free riding" on Kodak's capital investment. In fact, these "justifications" are mere pretexts for anticompetitive conduct, without evidentiary support in the record. *See* pp. 12-15 above. At most, the validity of these justifications presents triable issues of fact.

Contrary to the suggestion of the Solicitor General, SGB 14-15, it generally is not economically efficient for sellers to charge prices for complementary products that bear no relationship to costs. Efficiency is achieved when the price of each component reflects its marginal cost. *See generally* F. SCHERER & D. ROSS, INDUSTRIAL MARKET STRUCTURE & ECONOMIC PERFORMANCE 521 (3d ed. 1990) (preferred outcome is "competitive behavior at *all* stages"). Parts and service are not natural monopolies.

In contrast, if one component is priced above marginal cost and the other is priced below marginal cost, consumers will overconsume the low-priced component and underconsume the other. For example, if Kodak raises the price of service and lowers the price of equipment, at some point (an issue of fact) consumers will tend to buy new equipment when it would be more efficient to extend the used machine's life with additional service.[33]

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[33] The Solicitor General's example of bidding behavior of stenographic reporters for the FERC is not an example of efficiency enhancing conduct. SGB 15. Instead, it is a classic case of "rent seeking" by the bidders. In effect, FERC was awarding an absolute monopoly on the later sale of transcripts from FERC proceedings. The bidders clearly took into

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Economic theory (as well as the record) suggests that Kodak's exclusionary conduct is anticompetitive and inefficient. Kodak disagrees, so far without evidence. These are genuine issues of material fact properly resolved at trial. Injustice is likely to result if Respondents are not given a chance to test these claims during a discovery process so far largely denied them. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976).

VI. The Global Competitiveness of U.S. High Technology Manufacturers Will not be Promoted by the Rule Kodak Seeks.

Kodak (JA 104; Pet. Br. 41) and the Solicitor General (SGB Cert. 15-17) suggest that allowing this case to go forward will undermine the international competitiveness of Kodak and other U.S. high technology equipment manufacturers by raising litigation costs and promoting other unspecified inefficiencies. This is doubtful – unless the theory of antitrust enforcement itself is to be questioned, or one believes that the only way U.S. firms can compete in global markets is by receiving mercantilist protection at home. Because the antitrust laws and antitrust enforcers in the principal foreign markets in which U.S. manufacturers compete prohibit the conduct at issue in this case, even if Kodak gets protection in U.S. markets from a favorable ruling by the Court, it will still have to compete with ISOs in these foreign aftermarkets on non-exclusionary terms set by foreign competition laws.

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account future anticipated monopoly revenues in formulating their bids. But the result of high bids reflected the value of the monopoly, not economic efficiency. It is surprising that antitrust enforcers would point with pride to government-sanctioned monopoly conduct and mistake it for efficiency.

The antitrust laws of the European Community, Canada and Japan, the three most important foreign markets for most U.S. manufacturing exporters, ECONOMIC REPORT OF THE PRESIDENT 405 (Feb. 1991), would all lead to a ruling in this case in favor of Respondents.[34]

The experience and judgment reflected in this foreign case law should be given credence by this Court. Put simply, other sophisticated competition authorities and their courts would consider Kodak's conduct inefficient and anticompetitive.

The position embraced in this case by Kodak, by a disturbing number of basic equipment manufacturers and, surprisingly, by the Justice Department, is that big companies should be presumed to be acting procompetitively when they seek and gain control over markets to service their equipment. Any contrary rule, we are told, including one which says such claims should be tested by factual support where material evidence to the contrary exists, is inefficient.

On the contrary, economic efficiency will not be served by giving Kodak and other high technology basic equipment manufacturers judicially sanctioned control over the service of their products. Efficiency is generally best served when prices equal marginal cost for each level of a complementary product stream. It is particularly ironic that the Justice Department is suggesting that U.S. companies need to control domestic aftermarkets to compete globally. The Justice Department has criticized Japan's use of the same type of practices the Solicitor General asks this Court to endorse.[35]

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[34] Brief amicus curiae of Computer Service Network International.

[35] *See generally* Justice Department Briefing, Federal News Service 4-8 (July 2, 1990) (criticizing vertical and horizontal boycotts in Japan, claiming that they restrict U.S. market entry); *see also "Survey Finds Auto Parts Prices in Japan Dramatically Higher Than Those in the U.S.,"* 8

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Long run efficiency and competitiveness are also better served by economic and judicial policies which encourage rather than retard service differentiation and specialization. This is especially true where, as here, it was the market mechanism, demand by Kodak Service Customers, which created a service market for Kodak Equipment. If, as this record and common sense suggest, prices are lowered and quality of services is enhanced by establishment of a specialized service industry, long run competitiveness is most likely to be served by judicial policies that allow these specialists to compete. A contrary conclusion pits manufacturer welfare against consumer welfare. The primary goal of U.S. antitrust law is to promote consumer welfare. That is the result Respondents seek here.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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INT'L TRADE REP. (BNA) No. 27 at 1013 (July 3, 1991) (Referencing DOC/MITI Automotive Price Survey which shows non-competitive auto parts market in Japan with market access barriers on foreign manufacturers).

APPENDIX A

Kodak acknowledged its 1988 acquisition of IBM's copier business in its 1989 Annual Report.[1]

> Contributing to [the growth of copy product sales] was the 1988 acquisition of IBM's copier service business which significantly broadened the division's base.

Eastman Kodak Company 1989 Annual Report, p. 25.

The fact that Kodak sold IBM copiers is confirmed by Kodak's identification of IBM copiers as part of its copy product division.

> Copy product division • ColorEdge copier-duplicators • Ektaprint copier-duplicators • Ektaprint 1392 printers • IBM series of copiers (50-70-85).

Eastman Kodak Company 1989 Annual Report, p. 5.

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[1] A copy of Kodak's 1989 Annual Report has been lodged with the Court.