NO. 85-1910

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

BUSINESS ELECTRONICS CORPORATION,
Petitioner

v.

SHARP ELECTRONICS CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF PETITIONER BUSINESS ELECTRONICS CORPORATION

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DATED: January 11, 1988

Alpha Law Brief Co., Inc.—8748 Westpark—Houston, Texas 77063—789-2000

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MOTION OF PETITIONER FOR LEAVE TO FILE REPLY BRIEF

Respondent's brief on the merits was filed on or about November 6, 1987. Later in November, counsel for petitioner contacted the deputy clerk of the Supreme Court in charge of filing in this case to confirm that petitioner could file a reply brief so long as it was received by the Clerk's office one week prior to oral argument, or by January 12, 1988. On December 8, 1987, the Court amended Rule 35.3 to require, *inter alia,* receipt of a reply brief within

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Counsel for petitioner first learned of this amendment on the afternoon of January 7, 1988, during a conversation with the deputy clerk about another matter. Counsel for petitioner had no notice of the Court's amendment to Rule 35.3 from the Clerk's office or otherwise. Under these circumstances, petitioner respectfully requests leave of the Court to file its reply brief on January 12, 1988.

Respectfully submitted,

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REPLY BRIEF OF PETITIONER BUSINESS ELECTRONICS CORPORATION

I. Sharp Misstates the Issue and Presents a Repudiated Version of the Facts.

Sharp's Statement of the Case bears little resemblance to the case actually before this Court. According to Sharp, it terminated BEC solely because of poor performance. Sharp made the very same contentions to the jury, *see* Tr. 1525-35, 1543, which found instead that Sharp terminated BEC pursuant to an agreement with Hartwell to eliminate price cutting. Tr. 1587, J.A. 18-19. Sharp has not appealed the sufficiency of the evidence supporting this finding.[1]

Nevertheless, altering the Question Presented to fit its repudiated version of the facts, Sharp poses the issue as whether "an agreement between a supplier and a full service dealer to terminate a free riding discounter . . . [should] be deemed a form of price fixing unlawful per se." This rendering unfairly loads the question and omits the essential ingredient of the jury's finding: an agreement to eliminate price cutting. This case concerns more than mere termination of a dealer who *happened* to be a discounter. Rather, the Court will decide whether resale price maintenance encompasses an agreement to eliminate price cutting by terminating the price cutter.

A. The "Free Rider" Canard.

Sharp repeatedly characterizes BEC as a "free rider" who did nothing more to promote sales than mail out discount flyers to customers developed at Hartwell's expense and lazily wait for orders to arrive. The evidence simply does not bear out this version of events. *See Business Electronics v. Sharp Electronics Corp.*, 780 F.2d 1212, 1219 (5th Cir. 1986) ("BEC produced evidence tending to show that it was not free riding. . . .").

If anyone "free rode" on another's efforts, Hartwell did. When BEC opened its Sharp dealership in 1968, the Sharp brand was virtually unknown in Houston. During the next four years, BEC devoted considerable effort and expense to develop Sharp business. Tr. 86-88. When Sharp added Hartwell as a dealer in 1982, Hartwell immediately asked for a list of BEC's accounts and tried to buy a customer list from a former BEC salesman. Tr. 445, 1474-75. Hartwell then called on BEC's customers. Tr. 88. Thus, far from "free riding" on Hartwell's sales efforts, BEC competed to prevent Hartwell from taking accounts already developed by BEC.

Neither does the record support Sharp's assertion that BEC "dispensed with its entire sales force, stopped advertising, and let Hartwell's sales people educate prospective customers at Hartwell's expense." Sharp Br. at 5.[2] Ehrenberger personally called on customers and made calculator demonstrations. Tr. 347. Sharp ignores Hartwell's testimony that Ehrensberger was "the most professional calculator salesman [Hartwell] had ever seen," that Ehrensberger was a "formidable opponent," and that he was "good at what he did". Tr. 397, 274, 440. BEC's requirement of fewer salesmen than Hartwell and fewer visits per customer to make a sale hardly made BEC a "free rider."

BEC did not stop advertising and begin discounting when Hartwell became a Sharp dealer. In fact, BEC used sales flyers—a form of advertising—throughout his tenure as a Sharp dealer. Tr. 87-88; *see also* Tr. 837 (Hartwell complained about BEC's "*advertising* of prices at much lower than normal") (emphasis added). Although Sharp

1. All evidence inconsistent with the jury verdict must be assumed to have been rejected by the jury. See, e.g., Branti v. Finkel, 445 U.S. 507, 512, n.6 (1980). Even if evidentiary sufficiency were at issue, Sharp's Statement of the Case violates the rule that the evidence and reasonable inferences on review are to be construed in favor of the jury's decision. See Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696 (1962).

2. Hartwell's testimony that he did not "see" BEC salesmen in the marketplace other than Ehrensberger himself, Tr. 346-48, obviously falls short of proving that BEC in fact had no other salesmen. Sharp cites Tr. 110, where Ehrensberger testified that BEC was down to only a few personnel by June 1973, but Sharp omits any reference to Tr. 111, where Ehrensberger explained that he was referring to the period *after* Sharp cancelled BEC.

states that Hartwell "advertised the Sharp product extensively," Sharp Br. at 5, there is no evidence that Hartwell advertised Sharp products at all during the time in question. Hartwell testified only about his advertising budget in 1981 and 1982 for his entire business, which included many products other than calculators. Tr. 1031. That advertising occurred *nine years* after BEC was terminated.

In short, BEC did what competitors are supposed to do — operate efficiently, use effective salesmanship, and offer competitive prices. The jury was not fooled by Sharp's "free rider" smokescreen, and this Court should not be either.

B. The Quota Excuse.

The record also contradicts Sharp's contention that "Hartwell's performance [was] generally . . . superior [to BEC's]". Sharp Br. at 6. Sharp fails to mention that BEC's sales suffered because Sharp withheld delivery of preferred calculator models as discipline for BEC's continued price cutting. *See* Tr. 77-80.[3] Despite these difficulties, BEC's sales and quota achievement record was virtually identical to Hartwell's during the one year they competed. PX 110, Tr. 1163-64, 1358. Furthermore, the record contains ample other evidence from which the jury could reasonably find that quota achievement had little, if anything, to do with BEC's termination. Sharp did not complain to BEC about quota achievement, only about pricing. Tr. 1414. Indeed, when Hartwell was first asked about Sharp's quotas at trial, he laughed. Tr. 301. Sharp's representative, too, testified that the quota levels were often arbitrary and almost a joke. Tr. 604-605, 616-17.

3. Sharp's representative told Ehrensberger that Sharp was in a position to make inventory problems very "painful" for BEC if it continued to price "arbitrarily." *Id.*

C. The True Reason for BEC's Termination: An Agreement to Eliminate Price Cutting.

According to Sharp, neither it nor Hartwell really cared about the price charged by BEC so long as BEC did not "free ride" on Hartwell's sales effort. The jury did not believe this theory, and the evidence belies it. In reality, Hartwell invited BEC to participate in a classic horizontal price-fixing conspiracy:

> One of my salesmen called on Delmar Petroleum Company. . . . At my suggestion, my salesman backed off and *we will not compete on this deal with you.* I particularly wanted to point out to you that we are making the first step on backing off so the customer won't be able to play one of us against the other in a *"discount" situation.*

PX 40 (emphasis added); Tr. 84-86. Regarding this letter, Hartwell testified that " 'discount' situation" meant:

> I was making the first step to lending some *price stability,* I guess you would say, to Mr. Ehrensberger. . . . Meaning that I was going to sell my product at the manufactured [sic] suggested list. That it was up to him what he wanted to sell it at.

Tr. 276-77 (emphasis added). Hartwell wanted to "avoid" BEC's discounting from those list prices. Tr. 278. BEC refused to cooperate. Tr. 86.

Hartwell then enlisted Sharp's aid as price policeman, complaining to Sharp that he had lost the Tenneco account because of BEC's "price cutting". PX 39, Tr. 88-90. Sharp's representative thereafter instructed BEC "to maintain the correct discount range" on the Tenneco account. Tr. 91.

Hartwell told Sharp that it was "intolerable to compete with a heavy discounter," Tr. 287, and Sharp agreed to cancel BEC to solve this problem, Tr. 287-90, 586, 587, 1355-56. Sharp says that Hartwell merely presented Sharp with a choice between Hartwell and BEC. But Hartwell expressly asked that BEC be terminated because BEC was continuing its price cutting. Hartwell did not merely complain about not having an exclusive distributorship in Houston. He wanted to eliminate discounting—the "very essence of competition" in a free market. *See Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1351 (1986).

Significantly, the record is devoid of any evidence that Sharp complained to BEC about lack of pre-sale promotional activity, such as advertising or customer sales visits. Nor did Hartwell's complaints to Sharp concern such matters. *See, e.g.*, Tr. 934 (Hartwell's primary complaint concerned BEC's "price cutting"). Rather, Sharp and Hartwell targeted BEC's unwillingness to avoid price competition.[4]

D. Effect on Competition.

Sharp implies that its brand was struggling for recognition. In fact, Sharp was the "worldwide and United States" "leader" in the calculator industry. PX 10. Contrary to Sharp's assertion that interbrand competition was "fierce", the evidence shows that Sharp had promised its competitors not to enter "into a meaningless price-cutting war" in order to "set an example for the industry." *Id.*

Equally groundless is Sharp's contention that price competition remained vigorous after BEC's termination.

4. Sharp had attempted to coerce BEC to avoid discounting even before Hartwell became a dealer—when BEC was the only dealer in Houston and hardly in a position to "free ride" on any other dealer's sales efforts. *See* Tr. 73-77, 239-40, PX 52, Tr. 244 (Sharp complained that BEC was "messing up" the market), Tr. 81 (Sharp threatened to cancel BEC unless he "clean[ed] up [his] pricing structure").

The price decline cited by Sharp says little about the vigor of price competition. Prices would have been even lower had BEC remained in the market. More telling is the substantial increase in Hartwell's gross margins following BEC's termination. PX 119; Tr. 389-91, 1156. Hartwell's avowed policy was to sell at Sharp's suggested list prices, and he adhered to that policy in the eleven years following BEC's termination. Tr. 294-95, 296, 398.

II. This Court Has Not Confined Resale Price Maintenance To Agreements to Set Prices "At Some Level."

This Court has never held that direct agreement on resale prices is the only form that *per se* unlawful resale price maintenance may take. To the contrary, the Sherman Act is also violated when a supplier conspires with its dealers to prevent a competing dealer from undercutting suggested resale prices. Sharp nevertheless contends that no per se violation occurred here since Hartwell remained "free" to engage in price competition. The fallacy of such analysis is obvious. By focusing only upon *Hartwell's* theoretical "freedom" to discount, Sharp ignores the purpose and effect of the conspiracy—to destroy *BEC's* freedom to discount. As a direct result of the conspiracy, BEC could no longer exercise *its* right to price independently.

To support its very narrow view of price fixing, Sharp resorts to smoke-and-mirror use of authorities.[5] Sharp

5. For instance, Sharp quotes from the Government's brief opposing BEC's petition:

> This Court has applied the per se rule against resale price maintenance *only* to situations in which the evidence showed that the manufacturer or wholesaler "dictat[ed] the prices charged by" a wholesaler or retailer. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. [97,] 103 [(1980)]. . . .

Sharp Br. at 16 (quoting from U.S. Br. at 8) (emphasis added). Actually, *Midcal* does not say that the per se rule applies "only" also distorts the holding in *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960), which cannot be harmonized with the decision below. At most, Sharp acknowledges that the *Parke, Davis* test requires no "direct evidence of an agreement on prices. . . ." Sharp Br. at 18. But *Parke, Davis* plainly rejected any requirement of actual agreement on prices. Writing for the majority, Justice Brennan carefully reviewed the per se rule's evolution regarding resale price maintenance. He observed the substantial limiting of *United States v. Colgate & Co.*, 250 U.S. 300 (1919), in which the Court had found no resale price maintenance absent an actual agreement obligating dealers to resell at fixed prices. Summing up, Justice Brennan wrote:

> [A]n unlawful combination is not just such as arises from a price maintenance agreement, express or implied; such a combination is also organized if the producer secures adherence to his suggested prices by means which go beyond his mere declination to sell to a customer who will not observe his announced policy.

362 U.S. at 43. Parke, Davis violated this test by "involving . . . wholesalers to stop the flow of . . . products to . . . retailers, thereby inducing retailers' adherence to its suggested retail prices. . . ." *Id.* at 45.[6]

when a supplier actually requires dealers to charge prices by direct agreement. Rather, in discussing California's system for wine pricing, this Court merely observed that "[t]he wine producer holds the power to prevent price competition by dictating the prices charged by wholesalers." 445 U.S. at 103. In other words, the Government (and Sharp) plucked language out of context and attributed to it a meaning not expressed or even implied by the Court.

6. Attempting to buttress its interpretation of *Parke, Davis*, Sharp deftly quotes from *Yentsch v. Texaco, Inc.*, 630 F.2d 46 (2d Cir. 1980). Sharp Br. at 18. The actual language of the case reveals

According to Sharp, *Parke, Davis* requires proof "that remaining dealers charged a price directed by the supplier. . . ." Sharp Br. at 18. But *Parke, Davis* cannot mean that remaining dealers must actually agree to charge fixed prices, or else the Court's explicit rejection of this element would be nonsensical. Rather, a plaintiff need only prove that his supplier and others conspired to enforce suggested resale prices—for example, by agreeing to terminate a dealer who refuses to comply, precisely the conduct found by the jury here. Like the defendants in *Parke, Davis,* Sharp and Hartwell conspired to stop the flow of Sharp calculators to BEC in order to end its non-compliance with Sharp's suggested retail prices. Given proof of an agreement that stopped *BEC's* price cutting, it would be pointless to require BEC to prove further that *Hartwell's* prices were directed by Sharp.

Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984), also cannot be read to require an agreement on price "at some level," despite Sharp's stringing together quotes taken out of context. The Court neither stated nor suggested that vertical price fixing must take the form of direct agreement on prices.[7] Significantly, *Monsanto* does not overrule or attempt to distinguish *Parke, Davis.* The Court addressed the evidentiary standard for proving

that the court merely recited *examples* of means by which resale price maintenance could be proven, not the exclusive means for proving it.

7. Sharp cannot reasonably rely on dictum in footnote 9 of *Monsanto*, which says that resale price maintenance cannot be inferred from mere evidence that a distributor acquiesced in suggested resale prices. Read in context, the footnote merely relates to the "acquiescence" theory of resale price maintenance. *See, e.g.*, Albrecht v. Herald Co., 390 U.S. 145, 151 n.6 (1963); Arnott v. American Oil Co., 609 F.2d 873 (8th Cir. 1979), *cert. denied*, 446 U.S. 918 (1980). Plainly, the footnote does not set forth the exclusive means by which vertical price fixing may be proven.

vertical collusion, not the precise form an agreement must take in order to constitute resale price maintenance.[8]

Finally, Sharp relies on several post-*Monsanto* cases supposedly rejecting a theory of resale price maintenance predicated upon "an agreement between a supplier and a dealer that is 'price-related,' or 'price-motivated'. . . ." But some of these cases actually say just the opposite. For example, in the lead case cited by Sharp—*McCabe's Furniture, Inc. v. La-Z-Boy Chair Co.*, 798 F.2d 323, 329 (8th Cir.), *petition for cert. filed,* 55 U.S.L.W. 3495 (Dec. 29, 1986) (No. 86-1101), the Court said: "The distinction emphasized in *Monsanto* between per se and rule of reason illegality . . . must turn ultimately on motive: on whether the manufacturer and nonterminated dealer conspired to terminate the plaintiff *intending* to affect price competition, or nonprice competition." *Id.* at 329 (emphasis in original). Likewise, in *Lomar Wholesale Grocery, Inc. v. Dieter's Gourmet Foods, Inc.*, 824 F.2d 582 (8th Cir. 1987), also cited by Sharp, the court read *Monsanto* to require proof of a "price-related" conspiracy. *Id.* at 589 (emphasis added). The jury finding in the instant case meets this standard precisely.

III. Against Explicit Congressional Intent, the Decision Below Would Trivialize and Dilute the Per Se Rule Against Vertical Price Fixing.

The decision below creates a substantial loophole in the prohibition against vertical price fixing. If dealers are permitted to enter into agreements with suppliers to eliminate competitors who refuse to fix prices, the per se rule would

8. The lower court decisions cited at Sharp Br. 16 n.10, some of which concern nonprice restraints, do not address the issue presented here.

be reduced to a triviality. Although agreements to charge prices "at some level" would still be nominally per se illegal, the same result could easily be accomplished by agreeing to eliminate discounters.

Congress has unmistakably opposed any such trivilization of the *per se* rule.[9] BEC Br. at 36-42. Only three years ago Congress explicitly rejected a restrictive interpretation of the *per se* rule that would have required an actual agreement to set prices. *See* Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriation Act, 1986, Pub. L. No. 99-180, 99 Stat. 1136, 1169-70 (1985). This is precisely the requirement imposed by the decision below.

Sharp's silence in response to the resounding evidence of Congressional intent is deafening. Sharp merely replies that since the *per se* rule against vertical price fixing was initially created by the Court, the Court should be able to change the rule. Construction of the antitrust laws, however, requires deference to legislative intent and recognition of long-standing congressional ratification of the *per se* rule. *See Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51 n.18 (1977); *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, 460 U.S. 150, 170 (1983); *Square D Co. v. Niagara Frontier Tariff Bureau*, 106 S. Ct. 1922, 1927-28 (1986).[10]

9. In 1983 Congress enacted legislation amending the Department's appropriations in order to prevent it from engaging in any activity "the purpose of which is to overturn or alter the *per se* prohibition of resale price maintenance under the Federal Antitrust Laws." Pub. L. No. 98-166, § 510, 97 Stat. 1071, 1102 (1983). The most recent appropriations legislation for the Department of Justice contains a similar restriction. Departments of Commerce, Justice and State, the Judiciary and Related Agencies Appropriation Act, 1987, § 605, enacted into law as part of the Continuing Appropriations, 1987, Pub. L. No. 99-591 (1987).

10. Sharp's reliance on *Sylvania*, Sharp Br. at 45, is disingenuous. *Sylvania* explicitly noted that "Congress recently has expressed its

Curiously, Sharp alludes to pending legislation that would, among other things, codify the *per se* rule against vertical price fixing. The Senate bill—the Retail Competition Enforcement Act of 1987, S. 430, 100th Cong., 1st Sess., 133 Cong. Rec. 1484 (1987)—was favorably voted out of the Senate Judiciary Committee in August 1987, and awaits the Committee's report before proceeding to the full Senate. The similar House bill—the Freedom from Vertical Price Fixing Act of 1987—H.R. 585, 100th Cong., 1st Sess. (1987)—was passed by the House of Representatives by voice vote on November 9, 1987.

Although pending legislation may be a less sure guide to congressional intent than legislation actually enacted, the House Report accompanying H.R. 585, H.R. Rep. No. 100-421, 100th Cong., 1st Sess. (1987), again demonstrates Congress' intent to retain an unqualified ban on vertical price fixing.[11] The Report criticizes cases, including the decision below, holding that an agreement to protect a competitor from discount competition is not subject to the *per se* rule against vertical price fixing. *Id.* at 23. The Report makes clear that this is not now and never has been the view of Congress. The bill "restates plainly and unequivocally that *all forms* of resale price maintenance are illegal *per se* under the antitrust laws." *Id.* at 38, 33. Thus, a violation of the *per se* rule

approval of a *per se* analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and McGuire Acts allowing [vertical price fixing]. . . ." 433 U.S. at 51 n.18. The portion of *Sylvania* relied upon by Sharp, 433 U.S. at n.27, addresses only the issue whether a court or jury can appropriately balance intra- and interbrand competition effects of nonprice restraints.

11. Copies of this Report have been lodged with the clerk for the Court's convenience. The Report observes that the prohibition against vertical price fixing is an important feature of "national competition policy where Congress has historically demonstrated an unequivocal intent to assert its role as the 'ultimate antitrust policy maker'." H.R. Rep. No. 100-421 at 4.

will lie, *inter alia,* "where a conspiracy exists between a supplier and distributor to terminate or cut off supply to a second distributor because of the second distributor's pricing policies." *Id.* at 38.

IV. Rule of Reason Treatment of Nonprice Restraints Does Not Prevent Per Se Treatment of a Conspiracy Aimed Directly at Elimination of Price Competition.

A. Sharp Fails to Recognize the Critical Distinction Between Price and Nonprice Restraints.

Sharp argues at length about the putative pro-competitive benefits of vertical restrictions, including the conduct at issue here. The short answer to these arguments is that this Court swept them away as to vertical price restraints in *Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36, 51 n.18 (1977). In discussing the "market impact of vertical restrictions," the Court made clear that it was concerned

> only with non-price vertical restrictions. The *per se* illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy. As Mr. Justice White notes . . . some commentators have argued that the manufacturer's motivation for imposing vertical price restrictions may be the same as for nonprice restrictions. There are, however, significant differences that could easily justify different treatment.

Id.; accord Filco v. Amana Refrigeration, Inc., 709 F.2d 1257, 1265 n.2 (9th Cir.), *cert. denied,* 464 U.S. 956 (1983).

Congress and others have recognized that resale price maintenance "leads to higher prices and lower output just as horizontal price-fixing does." *See e.g.*, Shores, *Vertical Price-Fixing and the Contract Conundrum: Beyond Monsanto,* 54 Fordham L. Rev. 377, 412 (1985-86); Jacobson, *On Terminating Price-Cutting Distributors in Response to Competitors' Complaints,* 49 Brooklyn L. Rev. 677, 684 (1982-83) (cites Congressional and other authority); H.R. Rep. No. 341, 94th Cong., 1st Sess. 3 (1975) ("beyond dispute that resale price maintenance increases the cost of products to consumers"). For this reason, in the context of naked restraints on price competition, the horizontal/vertical distinction has little significance. Both horizontal and vertical price restraints are subject to the *per se* rule, and they are treated differently only with respect to the *Monsanto* requirement of unambiguous evidence proving vertical collusion. Accordingly, cases broadly defining price-fixing in the horizontal context are persuasive in the area of vertical price restraints as well.

Whatever else may be said about an agreement to eliminate price cutting, it is plainly a restraint aimed directly at price competition. Sharp seeks to avoid this obvious fact by criticizing the use of intent as a means for categorizing conduct. Such criticism defies decades of well-accepted antitrust doctrine. The courts have long recognized intent as an important basis for delineating conduct subject to antitrust challenge. For example, specific *intent* to destroy competition or build monoply" is a critical element of attempting to monopolize in violation of Section 2 of the Sherman Act. *Times-Picayune Publishing Co. v. United States,* 345 U.S. 594, 626 (1953) (emphasis added). Proof of conspiracy entails establishing "conscious commitment to a common scheme *designed* to achieve an unlawful objective." *Monsanto, supra* at 764 (emphasis added). In the horizontal price-fixing area, courts focus on *purpose,* because it tends

to show effect, in separating price from nonprice restraints. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,* 441 U.S. 1, 19-20 (1979).

Vertical price restraints are no different. Finders of fact are capable of distinguishing between dealer terminations for performance reasons—such as failure to advertise—and dealer terminations pursuant to an agreement to eliminate price competition. Such fact-finding is no more difficult than discerning intent in any other antitrust context or, for that matter, in the numerous other areas of law, including criminal law, where proof of intent is required.

B. Conclusory, Speculative Assertions About Pro-Competitive Effects Cannot Justify Evisceration of the Per Se Rule Against Vertical Price Fixing.

If the decision below is affirmed, all but the most blatant forms of vertical price fixing will escape *per se* treatment. To justify this abdication of the *per se* rule, Sharp resorts to conclusory, speculative assertions as to pro-competitive motives of suppliers and supposed benefits of eliminating free riding. Not only do precedent and Congressional intent contradict such contentions, but Sharp's arguments also have insufficient basis in fact to warrant what would amount to a substantial repeal of the *per se* rule.

According to Sharp, suppliers have no real interest in maintaining resale prices, since a vertical agreement benefits a supplier only if it increases sales of the suppliers' product. This conclusory assertion ignores reasons that a supplier would serve as price policemen for dealers who wish to avoid price competition. First, as noted in *Sylvania,* industry-wide resale price maintenance may facilitate cartelizing. 433 U.S. at 51 n.18. Indeed, the evidence in this case suggests just such a motive. *See* PX 10. Second, over the long run, aggressive price competition at the retail level will drive down prices at the wholesale level as well. "The manufacturer cannot continue over time to charge a relatively high wholesale price regardless of the effects of dealer competition on the level of retail prices." Pitofsky, *In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing,* 71 Geo. L. J. 1487, 1492 (1983); *see Albrecht v. Herald Co.,* 390 U.S. 145, 151 n.7 (1968).

But Sharp's main thrust aims at the alleged benefits of eliminating "free riders" from the market. Turning fundamental Sherman Act concerns upside down, Sharp asserts that price cutting is anticompetitive, since it purportedly undercuts dealers who offer "full service" and that "service" competition is more important than price competition. Such "free rider" arguments, at least in the area of price restraints, mask a disdain for "the very essence of competition." *Cf. Matsushita,* 106 S. Ct. at 1351. Price competition can always be labelled as free riding. Any dealer who is more efficient—who can sell effectively with less overhead expense—can be branded a "free rider." Thus, removing *per se* treatment from naked price restraints on the basis of "free rider" concerns would turn Sherman Act policy on its head. Pitofsky, *supra* at 1492-93 ("To deny [so-called free riders] access to products because they are aggressive in pricing (and perhaps more efficient as well) hardly seems to be a service to consumers, or a vote of confidence in the competitive process.").

The free rider rationale also suffers from a lack of significant empirical basis. As noted by one commentator:

> . . . [D]espite the emphasis free riding has received in the economic literature and in recent decisions,

> its actual role in vertical price fixing is speculative. Indeed, Telser, who first developed the free rider theory, acknowledged that while it provides a rational explanation for resale price maintenance, its actual significance has not been established through empirical evidence and is unknown.

Shores, *supra* at 402. Thus, the "free rider" rationale, at least as it relates to price restraints, bears more the earmarks of ideology rather than of economic science.

Moreover, vertical price fixing is neither necessary nor sufficient to address the problems associated with the hypothetical "free rider" encountered in law review debates. Suppliers can deal with the free riding problem by means far less restrictive and more effective than outright agreements eliminating price cutting. The essence of "free riding" is a dealer's failure to provide services or advertising desired by the manufacturer. Rather than indirectly and overbroadly policing discounting through collusive dealer termination, a supplier can directly correct the problem by contractually requiring each dealer to provide a minimum level of advertising or service. Also, subject to the rule of reason, the manufacturer can impose various nonprice restraints, such as limiting the number of dealers in a given territory and restricting the sales territories and locations. Pitofsky, *supra* at 1493; H.R. Rep. No. 100-421 at 13 (" 'free rider' problem . . . can be addressed most effectively through . . . contractual commitments, without the harm to consumers that ensues from . . . vertical price fixing."). Furthermore, as noted by the House of Representatives, "absent a contractual commitment, resale price maintenance would, in any event, not eliminate free riders since full price retailers could still disregard dealer service and promotion standards." *Id.*

Finally, the "free rider" rationale, as applied to justify price restraints, assumes that customers really want or need the services supposedly induced by the elimination of price cutting. Each retailer brings his goods to the market in a different way with a different emphasis. Some dealers emphasize price, and others emphasize service. Collusive termination of dealers who offer better prices but less service destroys consumers' freedom to set their own priorities. See Pitofsky, *supra* at 1492-93.

The instant case well illustrates the danger of extending the "free rider" rationale to justify collusive dealer terminations aimed at eliminating price cutting. The "free rider" concerns in this case are illusory. Sharp never complained to BEC regarding advertising or presale promotional activities. Here the "free rider" argument sprang to life in the bright light of hindsight rather than in any contemporaneous Sharp effort to induce dealer services. *Cf. Com-Tel, Inc. v. DuKane Corp.*, 669 F.2d 404, 410 (6th Cir. 1982) (*Sylvania* considerations inapplicable to boycott where suppliers' marketing strategy tolerated certain amount of intrabrand competition).

Asserting that interbrand competition may act as a "check" on higher prices does not give the "free rider" rationale any more credence as a justification for killing intrabrand price competition. As Justice Brennan noted in *White Motor Co. v. United States*, 372 U.S. 253, 268 (1963): "Resale price maintenance is not only designed to, but almost invariably does in fact, reduce price competition not only *among* sellers of the affected product, but quite as much *between* that product and competing brands." (quoted with approval in *Sylvania*, 433 U.S. at 51 n. 18). Indeed, if interbrand price competition were a check on the harmful effects of vertical price restraints, there would be no point to imposing the vertical price restraint in the first place, since interbrand competitors could also "free ride."

See W. Comanor, *Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy*, 98 Harv. L. Rev. 983, 1000 (1985).

V. The Court May Properly Consider Support for the Per Se Rule Found in the Group Boycott Line of Authority.

BEC cited group boycott cases such as *United States v. General Motors Corp.*, 384 U.S. 127 (1966) and *Victorian House, Inc. v. Fisher Camuto Corp.*, 769 F.2d 466 (8th Cir. 1985) to the Fifth Circuit and in its petition. *See* BEC Pet. at 9-11. In any event, citation of additional legal authorities for reversing the decision below does not raise additional questions in violation of Sup. Ct. R. 21.1. As Justice Harlan recognized in *General Motors*, there is no bright line distinction between vertical price fixing to eliminate discounts and group boycotts to eliminate discounters. 384 U.S. at 148-49 (Harlan, J. concurring).[12]

Sharp argues that the group boycott cases are inapplicable here because they involved some horizontal element. BEC does not dispute the presence of a horizontal element. BEC Br. at 32-35. But neither this Court's precedents nor logic require horizontal collusion for application of the *per se* rule. The key factor in each *General Motors*' type boycott case is the exercise of vertical leverage against the targeted dealer. *Id.*

12. Sharp makes the straw man argument that all dealer terminations "at the behest" of another dealer would involve a group boycott under *General Motors* and related boycott cases. But *General Motors* prohibits only *collaborative* action to eliminate a competitor. 384 U.S. at 145-46 (exclusion of traders from the market by means of "combination or conspiracy" constitutes *per se* violation). Here, BEC was terminated pursuant to an actual agreement between Sharp and Hartwell to eliminate BEC's discounting.

VI. The Validity of the Per Se Rule Is Not Properly Before the Court.

Sharp devotes a substantial portion of its brief to arguing that the *per se* rule against vertical price fixing should be overturned. But this Court has not granted Sharp's cross-petition for certiorari, No. 85-2094, which raises this issue. Thus Sharp's arguments in this regard are not properly before the Court.[13]

For the reasons expressed above, this Court should reverse the Fifth Circuit's decision below and reinstate the judgment of the district court.[14]

Respectfully submitted,

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13. Moreover, as outlined in BEC's brief in opposition to Sharp's cross petition, there are compelling reasons for not granting certiorari on this issue. Foremost among them is that Congress has repeatedly and unambiguously ratified the *per se* rule against vertical price fixing in the seventy-seven years since *Dr. Miles*. For other reasons to retain the *per se* rule against vertical price fixing, *see* BEC Br. in Opp. to Cross-Pet. at 15-17; L. Sullivan, Handbook of the Law of Antitrust (1977) 385-88; D. Marks and J. Jacobson, Price-fixing: An Overview, Antitrust Bulletin (Spring 1985) 199, 245-251; H.R. Rep. No. 100-421 at 11-13.

14. Contrary to Sharp's contention, error in the exclusion of two exhibits (DX 52 and 53) does not require a new trial. Such error was not "inconsistent with substantial justice," *see* Fed. R. Civ. P. 61, and constituted harmless error since the excluded exhibits were merely cumulative, *see* Fed. R. Civ. P. 403; Sharp Br. at 6 (referring to admitted evidence cumulative of DX 52 and 53). At the very least, because the Fifth Circuit did not determine whether exclusion of the exhibits was inconsistent with substantial justice or constituted harmless error, the Court should remand the case to the Fifth Circuit for consideration of this issue before ordering a new trial.