

The Burger Court Opinion Writing Database

Matsushita Electric Industrial Co. v. Zenith Radio Corp.

475 U.S. 574 (1986)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 10, 1986

Re: 83-2004 - Matsushita Electric v. Zenith Radio

Dear Lewis:

I join.

Regards,



Justice Powell

Copies to the Conference

82 FEB 15 10 20

RECEIVED
2084

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

March 4, 1986

No. 83-2004

Matsushita Electric Industrial Co.,
Ltd., et al. v. Zenith Radio
Corporation, et al.

Dear Byron,

Please join me in your dissent in
the above.

Sincerely,

Bill

Justice White

Copies to the Conference

RE: 83-2004

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

January 27, 1986

83-2004 -

Matsushita Electric v. Zenith Radio

Dear Lewis,

In due course, I shall circulate a
dissent in this case.

Sincerely yours,



Justice Powell

Copies to the Conference

PS: IN TS. IN. WI. 50
JAN 28 1986
U.S. SUPREME COURT

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice White

Circulated: _____ 3 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-2004

**MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD.,
ET AL., PETITIONERS v. ZENITH RADIO
CORPORATION ET AL.**

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

[March —, 1986]

Join

JUSTICE WHITE, dissenting.

It is indeed remarkable that the Court, in the face of the long and careful opinion of the Court of Appeals, reaches the result it does. The Court of Appeals faithfully followed the relevant precedents, including *First National Bank v. Cities Service Co.*, 391 U. S. 253 (1968), and *Monsanto v. Spray-Rite Corp.*, — U. S. — (1984), and it kept firmly in mind the principle that proof of a conspiracy should not be fragmented, see *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U. S. 690, 699 (1962). After surveying the massive record, including very significant evidence that the District Court erroneously had excluded, the Court of Appeals concluded that the evidence taken as a whole creates a genuine issue of fact whether petitioners engaged in a conspiracy in violation of §§1 and 2 of the Sherman Act, and §2(a) of the Robinson-Patman Act. In my view, the Court of Appeals' opinion more than adequately supports this judgment.

The Court's opinion today, far from identifying reversible error, only muddies the waters. In the first place, the Court makes confusing and inconsistent statements about the appropriate standard for granting summary judgment. Second, the Court makes a number of assumptions that invade the factfinder's province. Third, the Court faults the Third

To: The Chief Justice
 Justice Brennan
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: **Justice White**

Circulated: _____

Recirculated: Mar. 1986

SEE PAGES: 2, 4-5
 THROUGHOUT.

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-2004

**MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD.,
 ET AL., PETITIONERS v. ZENITH RADIO
 CORPORATION ET AL.**

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

[March —, 1986]

JUSTICE WHITE, with whom JUSTICE BRENNAN, JUSTICE BLACKMUN, and JUSTICE STEVENS join, dissenting.

It is indeed remarkable that the Court, in the face of the long and careful opinion of the Court of Appeals, reaches the result it does. The Court of Appeals faithfully followed the relevant precedents, including *First National Bank of Arizona v. Cities Service Co.*, 391 U. S. 253 (1968), and *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U. S. 752 (1984), and it kept firmly in mind the principle that proof of a conspiracy should not be fragmented, see *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U. S. 690, 699 (1962). After surveying the massive record, including very significant evidence that the District Court erroneously had excluded, the Court of Appeals concluded that the evidence taken as a whole creates a genuine issue of fact whether petitioners engaged in a conspiracy in violation of §§1 and 2 of the Sherman Act, and §2(a) of the Robinson-Patman Act. In my view, the Court of Appeals' opinion more than adequately supports this judgment.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

November 15, 1985

Re: No. 83-2004, Matsushita Elec. v. Zenith Radio

Dear Chief:

I have carefully reexamined my position in this case and would like to change my vote from Affirm to Reverse.

Sincerely,

T.M. /d.c.R.
T.M.

The Chief Justice

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 22, 1986

Re: No. 83-2004-Matsushita v. Zenith

Dear Lewis:

Please join me.

Sincerely,

J.M.

T.M.

Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 6, 1986

Re: No. 83-2004-Matsushita v. Zenith

Dear Lewis:

I am still with you.

Sincerely,

T.M.
T.M.

Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 18, 1986

Re: No. 83-2004, Matsushita Electric Industrial Co.
v. Zenith Radio Corporation

Dear Lewis:

For now, I shall await further writings in this case.

Sincerely,



Justice Powell

cc: The Conference

82 FEB 18 AM 10

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 4, 1986

Re: No. 83-2004, Matsushita Electric Industrial Co.
v. Zenith Radio Corporation

Dear Byron:

Please join me in your dissent in this case.

Sincerely,



Justice White

cc: The Conference

82 MB-1 6451

707 1111 1111
20

November 18, 1985

83-2004 Matsushita Electric v. Zenith

Dear Chief:

Thurgood's note to you of November 15 has just come to my attention. He advises that, after careful reexamination, his vote now is to reverse.

As I now understand the situation, Thurgood's vote provides a majority of five who would reverse and remand: You, Thurgood, Bill Rehnquist, Sandra and me.

According to my Conference notes, after our considerable discussion (and I must say, possibly some confusion), those who voted to DIG or affirm were Bill Brennan, Byron, Thurgood, Harry and John. On the basis of this vote of five Justices to DIG, as we left Conference I understood it was agreed that Bill Brennan would write a brief explanation of why the Court was dismissing the case as improvidently granted. In walking down the corridor with Bill after the Conference, I said that given the five votes to dismiss I would not write in dissent.

I have just discussed this situation with you on the telephone, and I agree with you that in light of Thurgood's letter we now have five votes to reverse and remand.

Sincerely,

The Chief Justice

lfp/ss

cc: The Conference

Justice Brennan
 Justice White
 Justice Marshall ✓
 Justice Blackmun
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: Justice Powell

Circulated: _____

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-2004

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD.,
 ET AL., PETITIONERS *v.* ZENITH RADIO
 CORPORATION ET AL.

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

[January —, 1986]

JUSTICE POWELL delivered the Opinion of the Court.

This case requires that we again consider the standard district courts must apply when deciding whether to grant summary judgment in an antitrust conspiracy case.

I

Stating the facts of this case is a daunting task. The opinion of the Court of Appeals for the Third Circuit runs to 69 pages; the primary opinion of the District Court is more than three times as long. *In re Japanese Electronic Products*, 723 F. 2d 238 (CA3 1983); *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 513 F. Supp. 1100 (ED Pa. 1981). Two respected district judges each have authored a number of opinions in this case; the published ones alone would fill an entire volume of the Federal Supplement. In addition, the parties have filed a forty-volume appendix in this Court that is said to contain the essence of the evidence on which the District Court and the Court of Appeals based their respective decisions.

We will not repeat what these many opinions have stated and restated, or summarize the mass of documents that comprise the record on appeal. Since we review only the standard applied by the Court of Appeals in deciding this case, and not the weight assigned to particular pieces of evidence, we

January 25, 1986

83-2004 Matsushita Electric Industrial Co. v.
Zenith Radio Corporation

Dear Sandra,

Thank you for your join and your helpful suggestions. I agree that the sentences in question should be qualified. I will make clear that a subsequent price-fixing conspiracy will be necessary when a large number of firms conspire to price predatorily. We need not comment on the somewhat different situation of predation by two dominant firms. Accordingly, I suggest the following changes in wording:

1. For the first sentence of note 16 (page 17), substitute the following: "The alleged predatory scheme makes sense only if petitioners can recoup their losses. In light of the large number of firms involved here, petitioners can achieve this only by engaging in some form of price-fixing after they have succeeded in driving competitors from the market."

2. For the next-to-last sentence of the first full paragraph on page 19, substitute the following: "Finally, unlike predatory pricing by a single firm, successful predatory pricing conspiracies involving a large number of firms can be identified and punished once they succeed, since some form of minimum price-fixing agreement would be necessary in order to reap the benefits of predation."

I will include these changes in my next circulation. If you would like more elaboration of the difference between a conspiracy like the one alleged here and a conspiracy between two dominant firms, I will add a footnote on page 19-- though I think the point will be clear from the changes noted above.

Again, with my thanks,

Justice Brennan
 Justice White
 Justice Marshall ✓
 Justice Blackmun
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

From: Justice Powell

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Recirculated: JAN 28 1986

17, 19

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-2004

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD.,
 ET AL., PETITIONERS *v.* ZENITH RADIO
 CORPORATION ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
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February 8, 1986

PERSONAL

83-2004 Matsushita

Dear Chief:

This is merely to confirm our conversation as to Bill Rehnquist's possible defection in this case.

I am sending him some suggested changes that are clarifying in nature that I hope he will accept. My opinion is written in full conformity with Bill's vote at Conference. He also expressly said he agreed with you and me.

If Bill should decide to write separately, a possibility he has mentioned, the Court would end up 4-4-1 - a most unsatisfactory result, and one that would afford no guidance to CA3 or have any precedential effect.

Your join at this time could be influential with Bill, and we need him.

Sincerely,

The Chief Justice

lfp/ss

February 10, 1986

83-2004 Matsushita

Dear Bill:

First, my thanks for giving me the opportunity privately to try to accommodate your concerns. I enclose a number of suggested changes for your consideration. The changes are numbered for convenience, and I will briefly comment on them.

You read my draft opinion as appearing to describe a higher burden of proof on a summary judgment issue. I intended to make clear only that in view of the total implausibility of respondents' claim, they had a heavy burden to show there was sufficient evidence to go to trial - one that could last for years. In rereading my opinion, I do agree that it is less precise than it might be especially as to why I think CA3 erred in reversing the summary judgment ruling of the DC. Paragraphs No. 2 through 5 in the enclosed memorandum clarify (I hope!) what I had written.

You expressed concern that my opinion can be read as approving a per se rule in this type of case. As my dissent in Maricopa (that you joined) shows, I think the Court's 4-3 decision in that case could well be the most erroneous antitrust decision the Court has ever made. As your letter suggests, however, if we had to take a position on the applicability of the per se rule in this case, I would feel bound by Maricopa. Happily, we do not need to consider or even cite Maricopa in this case. The issue was not raised, briefed or argued, and I do not recall that it was mentioned at Conference. In my suggested changes, I am stating simply that CA3 found the conspiracy as alleged was a per se violation, and that petitioners have not appealed or challenged that finding.

You could join me, and still - in a separate concurring opinion - express your reservations as to Maricopa. This could be justified on the ground that our opinion remands the case and petitioners on remand probably could argue or reargue the proper rule.

The respondents allege a predatory pricing conspiracy among 21 companies that existed for two decades! For the reasons stated primarily in Section IV-A of my opinion, and as recognized by every commentator, this type of conspiracy even by a single company for a relatively brief period of time rarely exists, and is extremely difficult to prove. In a word, I think the DC was 100% right in dismissing this case on summary judgment, and would have been right even if it found all of the "additional evidence" admissible.

* * *

I am more concerned about this case than I usually am when an opinion I have worked on with great care is not accepted by four other Justices. I assume that it is unlikely you will join anything Byron may write. My Conference notes indicate that you agreed with the Chief Justice and me and disagreed with Byron. My guess is that Byron will find there is enough evidence to foreclose summary judgment for petitioners. Of course, my opinion does not rule out the possibility of CA3 finding sufficient evidence on remand. I do not know whether Byron will talk about Maricopa, and reiterate that the alleged conspiracy is a per se violation.

If you do not join Byron or me, we will have a fractured vote (4-4-1) in this major antitrust case, and CA3 on remand would have little or no guidance. I suppose, in such a situation, we could DIG the case, but this would reflect adversely on the Court. Last Term, I was among those who voted to DIG, but at our Conference on November 15 I expressed the view that since we had failed to DIG in June, it would seem almost irresponsible to do so after full briefing and oral argument. You stated explicitly at Conference that you also would not DIG the case, and would reverse and remand it.

It is advantageous to all concerned if a complex antitrust conspiracy case can be resolved fairly on summary judgment. Otherwise, a trial could last for a decade with inconclusive results and enormous expense. E.g., IBM and AT&T. Charlie Brown, Chairman of AT&T - a Virginian whom I have known for many years - told me that after some 12 years of enormously expensive and inconclusive litigation, AT&T decided the fight simply wasn't worth it - particularly in disruption and demands on the time of management. Moreover, the threat of litigation of an alleged predatory conspiracy could well deter some legitimate price cutting.

In sum, we need your vote, and if my suggested changes are not satisfactory, I will certainly consider any further thoughts of yours. Sandra and Thurgood have joined me, and the Chief has told me verbally that he intends to join but wants to take one last look.

Sincerely,

Justice Rehnquist

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

RECEIVED
SUPREME COURT, U.S.
JUSTICE MARSHALL

86 FEB 12 P2:07

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 12, 1986

83-2004 Matsushita

Dear Chief, Thurgood and Sandra:

Bill Rehnquist, the "fifth vote" we need in this case, suggested that my summary judgment analysis could be clarified in several respects. When I reviewed my draft, I concluded that clarification would be appropriate. Accordingly, I have made a number of changes for this purpose, particularly in Part V (pp. 19-22).

I enclose my 3rd draft on which the changes have been marked. Although they involved a good deal of rewriting, the changes do not alter the substance of my reasoning. Indeed, many of the changes can be viewed as stylistic.

I also have noted (see pp. 9-10) that petitioners do not question the view of CA3 that, if proved, the alleged conspiracy would be a per se violation of the Sherman Act. It therefore is unnecessary for us to say anything about that question.

I will assume unless I hear to the contrary that the changes are agreeable to you, but will not recirculate until Friday.

Sincerely,

Lewis

The Chief Justice
Justice Marshall
Justice O'Connor

lfp/ss

02/12

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

PP. 6, 9-15, 17-22

From: **Justice Powell**

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-2004

**MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD.,
ET AL., PETITIONERS v. ZENITH RADIO
CORPORATION ET AL.**

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

[February —, 1986]

JUSTICE POWELL delivered the Opinion of the Court.

This case requires that we again consider the standard district courts must apply when deciding whether to grant summary judgment in an antitrust conspiracy case.

I

Stating the facts of this case is a daunting task. The opinion of the Court of Appeals for the Third Circuit runs to 69 pages; the primary opinion of the District Court is more than three times as long. *In re Japanese Electronic Products*, 723 F. 2d 238 (CA3 1983); *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 513 F. Supp. 1100 (ED Pa. 1981). Two respected district judges each have authored a number of opinions in this case; the published ones alone would fill an entire volume of the Federal Supplement. In addition, the parties have filed a forty-volume appendix in this Court that is said to contain the essence of the evidence on which the District Court and the Court of Appeals based their respective decisions.

We will not repeat what these many opinions have stated and restated, or summarize the mass of documents that comprise the record on appeal. Since we review only the standard applied by the Court of Appeals in deciding this case, and not the weight assigned to particular pieces of evidence, we

03/05

To: The Chief Justice

Justice Brennan
 Justice White
 Justice Marshall ✓
 Justice Blackmun
 Justice Rehnquist
 Justice Stevens
 Justice O'Connor

Stylistic Changes Throughout.

and pp. 7, 12, 18

From: Justice Powell

Circulated: _____

Recirculated: _____ 1986

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-2004

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD.,
 ET AL., PETITIONERS *v.* ZENITH RADIO
 CORPORATION ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
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We will not repeat what these many opinions have stated and restated, or summarize the mass of documents that comprise the record on appeal. Since we review only the standard applied by the Court of Appeals in deciding this case, and not the weight assigned to particular pieces of evidence, we find it unnecessary to state the facts in great detail. What follows is a summary of this case's long history.

March 20, 1986

83-2004 Matsushita

Dear Byron:

I assume this case will be handed down next week, so I've done one last close read. Absent objection, I would like to make the following minor changes. None is substantive.

1. Page 3: Make a clarifying change of language on page 3. Only respondents actually filed a "Final Pretrial Statement"; petitioners relied on respondents' own evidence in petitioners' summary judgment motions. I would replace the circled sentence with the sentence in the margin. (I enclose p. 3).

2. Page 11: For the same reason, I would delete the "as here" on page 11.

3. Page 20: At the bottom of the page, change the word "customer" to "territorial". This is a minor point, but "territorial" may be more accurate.

There should be no problem about recirculating this afternoon.

I apologize for being so dilatory. We can carry the case over if you prefer not to look at these today.

Sincerely,

Justice White

lfps/s

03/20

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

Stylistic Changes Throughout.

and p. 3

From: Justice Powell

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Recirculated: _____
MAR

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-2004

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD.,
ET AL., PETITIONERS v. ZENITH RADIO
CORPORATION ET AL.

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

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 1, 1986

MEMORANDUM TO THE CONFERENCE

1
Cases held for 83-2004 Matsushita Electric v. Zenith
Radio

85-301 Amey, Inc. v. Gulf Abstract & Title, Inc.

This case was held for 83-2004 (March 25, 1986), Matsushita Electric Industrial Co. v. Zenith Radio Corp. Petitioners are antitrust plaintiffs who claim, inter alia,¹ that respondents--four banks, four law firms, and a title abstract company--conspired to fix artificially high real estate legal fees. The DC granted respondents' motion for summary judgment, and CALL affirmed. CALL reasoned that, where an antitrust plaintiff relies on circumstantial evidence to show price-fixing, the plaintiff must show something more than mere parallel conduct. There must be "other factors tending to show concerted action." Pet. App. 35. This analysis is consistent with Matsushita. See slip op. at 12 ("To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of §1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently") (quoting Monsanto v. Spray-Rite Service Corp., 465 U.S. 752, 764 (1984)).

Since the case is fact-bound and CALL's decision seems correct, my vote is to deny cert.

L. F. P.

1. Petitioners also claim that respondents illegally tied lending and legal services, and that they illegally exchanged price information. Nothing in these claims is affected by our decision in Matsushita, and CALL's summary judgment decision as to them is not independently certworthy.

LFP/vde

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 1, 1986

MEMORANDUM TO THE CONFERENCE

Cases held for 83-2004 Matsushita Electric v. Zenith
Radio

85-487 Ford Motor Co. v. Tunis Brothers Co.

This case was held for 83-2004 (March 26, 1986), Matsushita Electric Industrial Co. v. Zenith Radio Corp. Respondent, a former Ford tractor dealer, claims that Ford, a Ford subsidiary that took over respondent's territory, and certain officials of both companies conspired to drive respondent out of the market. The DC entered summary judgment for petitioners, and CA3 reversed. Judge Hunter dissented, arguing that the evidence clearly showed that Ford terminated respondent pursuant to a long-term marketing strategy. Judge Hunter also argued that respondent had not brought forward any evidence that "tend[ed] to exclude the possibility" of independent action. Monsanto v. Spray-Rite Service Corp., 465 U.S. 752, 764 (1984).

My vote is to GVR in light of Matsushita. CA3 did not consider whether respondent "present[ed] evidence that 'tends to exclude the possibility' that the alleged conspirators acted independently." Matsushita, slip op. at 12, quoting Monsanto, 465 U.S., at 764. See also Pet. App. A-42 to A-43 (Hunter, J., dissenting). Based on the recitation in Judge Hunter's dissent, it appears that application of that standard would result in reinstating the DC's summary judgment order: respondent had a poor sales record prior to its termination, and there was evidence that Ford had long planned to reduce the number of tractor dealerships in the area. See id., at A-44 (discussing evidence).

As stated above, my vote is to GVR in light of Matsushita.

LFP/vde

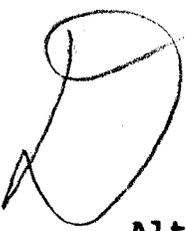
L. F. P. Jr

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 1, 1986

MEMORANDUM TO THE CONFERENCE

 Cases held for 83-2004 Matsushita Electric v. Zenith Radio

85-82 Building & Construction Trades Council v. Altemose Construction Co.

This case was held for No. 83-2004 (March 26, 1986), Matsushita Electric Industrial Co. v. Zenith Radio Corp. Respondents sued petitioners (an association of construction unions) for an alleged antitrust conspiracy, claiming that petitioners combined with construction companies in the Philadelphia area to force non-union companies such as respondents out of the construction market. The DC granted summary judgment, and CA3 reversed. CA3 held that (i) petitioners were not statutorily exempt from antitrust liability because respondents' claim was that they combined with non-union entities; (ii) there was sufficient evidence to infer a conspiracy among petitioners and contractors who employed only union labor; and (iii) one of the respondents was not collaterally estopped from relitigating an adverse finding by the NLRB because petitioners were not parties to the relevant NLRB proceeding. Petitioners seek cert on all three holdings. We held for Matsushita because CA3 explicitly relied on its decision in that case in the course of analyzing whether the evidence of conspiracy was sufficient to survive summary judgment.

I do not think a GVR is in order. In its analysis of the evidence of conspiracy, CA3 explicitly noted that there was evidence of conduct by contractors that was inconsistent with their economic self-interest: the union contractors had followed a practice of not giving business to non-union contractors, even though it was in their self-interest to award subcontracts to the lowest bidders. Pet. App. 10a. To the extent that any analogous evidence was present in Matsushita, it tended to suggest a combination that could not have harmed the plaintiffs in that case. Thus, I think

CA3's application of summary judgment principles is consistent with Matsushita.

On the statutory exemption issue (question 1 in the petition), the SG argues that we should deny because the case is interlocutory and the issue would benefit from further factual development. I agree. I also agree with respondents and the SG that the collateral estoppel issue (question 3) is not certworthy.

My vote is to deny.

L. F. P.

LFP/vde

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 31, 1986

(See Bill's
draft letter to
WHR & suggested
changes - to his
memos to me
of 2/5/86)

Re: 83-2004 Matsushita Electric Industrial
Co., Ltd. v. Zenith Radio Corp.

Dear Lewis,

I voted to "reverse" at Conference, and have read your circulating draft opinion a couple of times. I have also asked my law clerk to fill me in on some substantive antitrust law, since it is an area in which I am justifiably modest about my own knowledge. The result of all this is that I have reservations about your present draft, because it doesn't seem to me to point out with much clarity exactly what the Court of Appeals did wrong when it concluded that summary judgment shouldn't have been granted in this case. On the other hand, I realize that you as the opinion writer may feel "between a rock and a hard place" as the saying goes, being bound by what we both regard as unfortunate substantive antitrust doctrine (see your dissenting opinion in Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982) which I joined) and the traditional law of summary judgment. But I am really loath to create subcategories of evidence, or vaguely described higher burdens of proof, for purposes of summary judgment law when the real problem is with the substantive law in the area.

We have not made it clear why CA erred in not granting sum. judgment. (I think we did - see especially p 20)

My present intention is to write an opinion concurring in the judgment on the grounds stated by Justice Harlan in dissent in Albrecht v. The Herald Co., 390 U.S. 145, 156-158 (1968), and reiterated by you in Maricopa County Medical Society. But if there is some prospect that a separate concurrence in the judgment might jeopardize the judgment itself, I would certainly think twice about writing a broadside to this effect. I have a feeling that the sort of changes I would like to see made in your opinion might be ones that you would feel you could not make consistent with

Bill thinks I can't make changes he would like because of Maricopa & other precedents [e.g. Albrecht (?)]

governing antitrust precedent. I will wait to hear from you before starting to write.

Sincerely,

A handwritten signature in dark ink, appearing to be the initials 'WP' followed by a horizontal flourish.

Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 11, 1986

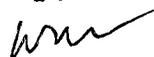
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Cheers!

Re: No. 83-2004 Matsushita Electric v. Zenith Radio

Dear Lewis,

I have reviewed the proposed changes in your present circulation suggested in your letter of February 10th, and they go a long way towards accommodating the concern about which I earlier wrote to you. I have no desire to fragment what is only a five Justice Court in the first place over differences which you have gone a long way to reconcile. Therefore, if you make the changes proposed in your letter of February 10th, I will gladly join your opinion.

Sincerely,



Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

February 18, 1986

Re: 83-2004 - Matsushita Electric Industrial Co.
v. Zenith Radio Corporation

Dear Lewis:

Please join me.

Sincerely,



Justice Powell

cc: The Conference

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RECEIVED
FEB 18 1986

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 29, 1986

Re: 83-2004 - Matsushita Electric v.
Zenith Radio

Dear Lewis:

I shall await Byron's dissent.

Respectfully,

John/cs

Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 4, 1986

Re: 83-2004 - Matsushita Electric Industrial
Co., Ltd. v. Zenith Radio Corporation

Dear Byron:

Please join me.

Respectfully,



Justice White

Copies to the Conference

TO: 1986-2 61:01

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MARCH 11 1986

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 23, 1986

No. 83-2004 Matsushita Electric Industrial Co.
v. Zenith Radio Corporation

Dear Lewis,

Although I have joined your excellent opinion in this case, I offer a suggestion for a minor change.

On p. 17 n. 16, the opinion states that petitioners "can recoup their losses only by engaging in some form of price-fixing after they have succeeded in driving competitors from the market." The full paragraph in the text on p. 19 similarly states that successful predatory-pricing conspiracies "can be identified and punished once they succeed, since they require some kind of minimum price-fixing agreement in order to reap the benefits of predation."

These statements seem an accurate description of this case given the large number of allegedly participating manufacturers. Without a recoupment conspiracy, the recoupment price presumably would be driven down to a competitive level as 21 manufacturers competed for customers. Nonetheless, I am not sure that, as p. 19 implies, every predatory-pricing conspiracy must use a price-fixing conspiracy to recoup. Suppose that just two manufacturers, for example, were able to enter the US market and destroy all competitors through predatory pricing. With only two firms left in the industry, the equilibrium price will, without the need for any price-fixing, be higher than the competitive price--the firms remaining will each have some oligopoly market power. The resulting supra-competitive price could be sufficient for recoupment.

I therefore suggest the following reformulation of the sentences on pp. 17 n. 16 and 19 that contain the statements I quoted above:

"The alleged predatory scheme makes sense only if petitioners can recoup their losses, but, in light of the large number of allegedly participating manufacturers,

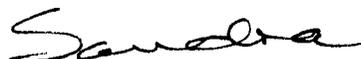
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*See my
answer of
1/25*

petitioners are likely to be able to they-can recoup their losses only by engaging in some form of price-fixing after they have succeeded in driving competitors from the market."

"Finally, unlike a predatory pricing scheme in which each remaining firm has some market power, by-a-single-firm, a successful predatory pricing conspiracies to-price predatorily-can is likely to be identified and punished once they it succeeds, since they the many remaining firms are virtually certain to require some kind of minimum price-fixing agreement in order to reap the benefits of predation."

Sincerely,



Justice Powell

W

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 23, 1986

No. 83-2004 Matsushita Electric Industrial Co.
v. Zenith Radio Corporation

Dear Lewis,

Please join me.

Sincerely,

Sandra

Justice Powell

Copies to the Conference

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To Bill

Supreme Court of the United States
Washington, D. C. 20543



CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 27, 1986

Re: 83-2004 Matsushita Electric Industrial Company
v. Zenith Radio Corporation

Dear Lewis,

Thanks for making the minor changes proposed
in your letter of January 25. I think they will be
entirely adequate to take care of my suggestion.

Sincerely,

Sandra D. O'Connor

SO'C/mrd

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

Full
2/15/86

Re: 83-2004 Matsushita

Dear Lewis,

Your changes are
certainly all acceptable
as far as I am
concerned.

Sincerely,

Sandra