No. 14-110

IN THE

Supreme Court of the United States

DEAN FOODS COMPANY, et al.,
Petitioners,

v.

FOOD LION, LLC AND FIDEL BRETO, on behalf of themselves and all others similarly situated,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR AMICI CURIAE NATIONAL ASSOCIATION OF MANUFACTURERS AND INTERNATIONAL DAIRY FOODS ASSOCIATION IN SUPPORT OF PETITIONERS

PATRICK N. FORREST
NATIONAL ASSOCIATION OF MANUFACTURERS
733 Tenth Street, N.W.
Suite 700
Washington, DC 20001

CLAYTON L. HOUGH
INTERNATIONAL DAIRY FOODS ASSOCIATION
1250 H Street, N.W.
Suite 900
Washington, DC 20005

TILLMAN J. BRECKENRIDGE*
DIANE Y. (DIVONNE) SMOYER
REED SMITH LLP
1301 K Street, NW
Washington, DC 20005
Telephone: 202-414-9200
Facsimile: 202-414-9299
tbreckenridge@reedsmith.com

*Counsel of Record

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (CONTINUED)

Rules

Other Authorities

INTEREST OF AMICI CURIAE[1]

Amicus Curiae the National Association of Manufacturers is the largest association of manufacturers in the United States, representing small and large manufacturers in every industrial sector, and in all 50 states. Manufacturing employs nearly 12 million men and women, contributes more than $1.8 trillion to the American economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of private-sector research and development. NAM advocates for sensible approaches to the law that help manufacturers compete in the global economy and create jobs across the United States.

Amicus curiae the International Dairy Foods Association ("IDFA"), Washington, D.C., represents the nation's dairy manufacturing and marketing industries and their suppliers, with a membership of 550 companies within a $125-billion a year industry. IDFA is composed of three constituent organizations: the Milk Industry Foundation, the National Cheese Institute, and the International Ice Cream Association. IDFA's nearly 200 dairy processing members run nearly 600 plant operations, and range from large multi-national organizations to single-plant companies. Together they represent more than 85 percent of the milk, cultured products, cheese, ice

---

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amici curiae or their counsel made a monetary contribution to its preparation or submission. The parties were timely notified of the intent to file this brief more than ten days in advance of the due date, and have consented to its filing.

cream and frozen desserts produced and marketed in the United States.

Amici have a substantial interest in the outcome of this case. The petition presents serious problems with the application of the summary judgment standard in complex civil and antitrust cases. And while Amici agree with the Petitioner as to the broader problem, this brief will focus more narrowly on the issue of antitrust law presented by this case, which is directly relevant to amici's members, who are too often subject to meritless private antitrust litigation that can result in large settlements due to business disruption, litigation costs, and the always-present risk of an erroneous ruling after trial.

The trilogy of *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986), *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and *Celotex Corp.* v. *Catrett*, 477 U.S. 317 (1986) provides strong protection against vexatious suits that are filed to extort large settlements from law-abiding companies, particularly in the antitrust context. But pre-trilogy sentiment against summary judgment in antitrust cases remains a pernicious influence in district and circuit courts all over the country.

The decision below is the latest example of how persistent the sentiment against summary judgment in antitrust cases remains. And if it is allowed to stand, it will further entrench that notion in the Sixth Circuit—where it is most prevalent—as well as provide persuasive authority against summary judgment in antitrust cases around the country. The Court should grant certiorari and reverse the Sixth Circuit's judgment, so that (1) it will be clear that there is no general disfavor toward summary

judgment in antitrust cases, and (2) fewer cases lead to unjust settlements based on the threat of a costly and time-consuming trial with hundreds of millions—or billions—of dollars of exposure.

SUMMARY OF ARGUMENT

"Time and again private treble damage cases have gone off the rails, and the Supreme Court has had to put things right."[2] This case is off the rails in a way that inexplicably and repeatedly recurs, and it is time for the Court to put this right. In 1962, this Court raised the sentiment that "[s]ummary procedures should be used sparingly in complex antitrust cases" in *Poller* v. *CBS, Inc.*, 368 U.S. 464, 473 (1962). Twenty-four years later, the trilogy of *Matsushita*, 475 U.S. at 587, *Liberty Lobby*, 477 U.S. at 254, and *Celotex*, 477 U.S. at 323 made it abundantly clear that summary judgment should be applied in the same way, no matter the subject of a case. Yet, the *Poller* sentiment lives on nearly 30 years after the Court ruled in the trilogy.

Since the trilogy, the circuits have expressed the *Poller* sentiment in numerous opinions, and the district courts apply it often. Some courts attempt to reconcile the *Poller* sentiment with the trilogy by stating that the summary judgment rules stated in the trilogy still apply. Others, like the Sixth Circuit here, brazenly overturn summary judgments without requiring proof supporting a key element of an anti-

---

[2] J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Antitrust Modernization Commission Remarks 8 (June 8, 2006), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/antitrust-modernization-commission-remarks/rosch-amc20remarks.june8.final.pdf.

trust claim. All of them are wrong. The trilogy stands for more than a set of rules within which courts are granted substantial wiggle room to apply them differently based on the nature of the case. The trilogy was clear that *all* cases must be treated the same for summary judgment purposes.

Thus, this case should have been a simple one—indeed, it was for the district court. The plaintiffs relied solely on one expert to satisfy their burden of proof on causation. Pet. 8. That expert performed a regression analysis purporting to show that prices were higher than he expected based simply on changes in supply and demand. *Id.* But he admitted he did not provide evidence that the purported collusion *caused* the higher prices. *Id.* The district court recognized that the plaintiffs had not met their burden on summary judgment. Pet. App. 34a-35a. But, the Sixth Circuit reversed, holding that a jury could infer causation, solely based on the evidence of collusion and higher prices. Pet. App. 35a-36a. That, of course, reads causation out of the claim. The Sixth Circuit adopted the sentiment from *Poller*—citing cases from a line that originates with *Poller*—and made this ruling in the name of disfavor toward summary judgment in antitrust cases. Pet. App. 6a. This case underscores the resilient tendency of some judges to rule against summary judgment in antitrust cases unless it is a near frivolous lawsuit. Thus, this case presents a proper vehicle to address the too-frequent disregard of the trilogy over the past thirty years and set clear guidelines by which the lower courts will determine whether summary judgment is appropriate for the foreseeable future.

In light of the Sixth Circuit's adoption of the *Poller* sentiment, the Court should grant a writ of certiorari in this case to clarify that the *Poller* sentiment has no place in American jurisprudence since this Court declared—in *Celotex*, 477 U.S. at 327—that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole."

ARGUMENT

I. PRE-TRILOGY SENTIMENT AGAINST GRANTING SUMMARY JUDGMENT IN ANTITRUST CASES STILL PERSISTS

Summary proceedings can be traced back to fourteenth century simplifications on the processes for resolving legal disputes. Michael J. Davidson, *A Modest Proposal: Permit Interlocutory Appeals of Summary Judgment Denials*, 147 Mil. L. Rev. 145, 153 (1995). But they did not flourish until nineteenth century England. *Id.* Faced with unscrupulous lawyers taking advantage of technical rules to increase expense and delay in proceedings against debtors, the English Parliament enacted a summary judgment procedure "to expedite legal enforcement of debts" in 1855. *Id.* at 154. The use of summary judgment then gradually expanded to most other areas of law. *Id.*

The United States eventually followed suit. *Id.* "American courts encountered the identical sham pleadings found in England," and summary judgment procedures proliferated in the states during the early twentieth century. *Id.* at 154-55. These rules "limited summary judgment to certain classes of

actions, and usually did not permit defendants to avail themselves of the procedure." *Id*. at 155.

In 1938, the Federal Rules of Civil Procedure became effective, and Rule 56 provided for summary judgment in all federal courts that was available to all parties in all civil actions. *Id*. at 156. "The drafters envisioned FRCP 56 serving as the primary mechanism for disposing of facially valid claims and defenses that, when probed, proved to be groundless." *Id*.

For nearly 50 years, the judiciary treated summary judgment as disfavored. *Id*. at 157. This disfavor reached its pinnacle in *Poller,* 368 U.S. 464. In *Poller*, a local television station alleged that a national network conspired with another television station to "eliminate [it] from the broadcast field in Milwaukee." *Id*. at 465-66. Ruling that C.B.S. was not entitled to summary judgment, the Court summed up the prevailing sentiment of the time toward summary judgment in antitrust cases: "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Id*. at 473.

After *Poller*, lower courts adopted the sentiment that summary judgment is disfavored in antitrust cases with fervor, and they were influenced heavily by *Poller*'s dictum. Edward Brunet, *Antitrust Summary Judgment and the Quick Look Approach*, 62 S.M.U. L. Rev. 493, 506 (2009). Indeed, "the felicitous words of *Poller* . . . acquired a charmed life of their own" in the lower courts. Stephen Calkins, *Summary Judgment, Motions to Dismiss, and Other*

Examples of Equilibrating Tendencies in the Antitrust System, 74 Geo. L. J. 1065, 1120 (1985-1986).

But Justice Harlan had filed a powerful dissent in *Poller*, in which he noted that Rule 56 "does not indicate that it is to be used any more 'sparingly' in antitrust litigation than in other kinds of litigation." *Poller*, 368 U.S. at 478 (Harlan, J. dissenting). And "having regard for the special temptations that the statutory private antitrust remedy affords for the institution of vexatious litigation . . . there is good reason for giving the summary judgment rule its full legitimate sweep in this field. *Id.* That assertion gradually won out. Leading up to the mid-1980s, the Court gave indications that it was not hostile to lower courts granting summary judgment in antitrust cases. Brunet, 62 S.M.U. L. Rev. at 507-08. Then, in three cases "[i]n 1986, [this] Court liberalized summary judgment procedure to encourage its use as a means to dispose of factually unsupported cases." Davidson, 147 Mil. L. Rev. at 150. Those 1986 cases became known as the summary judgment "trilogy."

First, the Court decided *Matsushita*, 475 U.S. 574. There, the plaintiffs alleged an antitrust conspiracy. *Id.* at 582-83. The Court recognized that to prove antitrust liability, the plaintiffs had to prove that the defendants had engaged in predatory pricing as an essential element of the claim. *Id.* at 585. "Conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy," so the plaintiffs had to put forth evidence of illegal conspiracy that was not also indicative of permissible competition. *Id.* at 587. None of the plaintiffs' evidence was inconsistent with permissible

competitive conduct, so summary judgment was warranted. *Id*. at 598.

Then, in *Liberty Lobby*, 477 U.S. 242, the Court ruled that the applicable standard of review must be taken into account when ruling on a motion for summary judgment. Notably, the Court stated that "there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Id*. at 249. Thus, the summary judgment standard "mirrors the standard for a directed verdict." *Id*.

The Court decided *Celotex*, 477 U.S. 317, the same day. There, the Court ruled that a summary judgment movant need not present evidence tending to negate the non-movant's theory if the non-movant has the burden of production. *Id*. at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id*. at 323.

"Significantly, in all three cases, the Supreme Court overturned circuit court reversals of summary judgment awards by district courts." Davidson, 147 Mil. L. Rev. at 166. But despite the trilogy's clear directions, and some academics' willingness to declare "the Demise of the *Poller* Dictum," Brunet, 62 S.M.U. L. Rev. at 509, the language and sentiment of *Poller* live on. For instance, the Ninth Circuit cited the *Poller* dictum when reversing a summary judgment order in an antitrust case in *Toscano* v. *Prof'l Golfers' Ass'n*, 258 F.3d 978, 982-82 (9th Cir. 2001). Then, a few years later, it cited *Poller* and a pre-trilogy case from that circuit to claim that summary judgment standards "'are applied even more stringently and summary judgments granted

more sparingly'" in antitrust cases. *Dagher* v. *Saudi Refining Inc.*, 369 F.3d 1108, 1114 (9th Cir. 2004) (citation omitted) (reversing district court's summary judgment order), *rev'd sub nom. Texaco Inc.* v. *Dagher*, 547 U.S. 1 (2006). As further evidence of lack of understanding of the applicable standards and need for clarification, some cases have expressed the *Poller* sentiment, but then ruled that summary judgment was proper.[3] That they express the *Poller* sentiment suggests that they still have held the moving defendant to a higher standard than in other summary judgment cases, but that the standard was met. That, of course, is improper.

Worse, the district courts have adopted the *Poller* sentiment as well. This is particularly dangerous because these denials of summary judgment cannot be appealed. And the pressure to settle suits after losing defense motions for summary judgment in antitrust cases is intense. *See* §II, *post* at 12-14. For instance, in *Cason-Merenda* v. *Detroit Med. Ctr.*, 862 F. Supp. 2d 603, 623-24 (E.D. Mich. 2012), when plaintiff nurses alleged a conspiracy to keep their salaries low, the court cited Sixth Circuit precedent stating that summary judgment is disfavored in antitrust cases. The court went on to state this Court's broad standards for summary judgment still apply, *id*, but using the *Poller* sentiment expressed the court's intent to shade its analysis with a general disfavor toward summary judgment. And like in this

---

[3] *E.g. HDC Med., Inc.* v. *Minntech Corp.*, 474 F.3d 543, 546 (8th Cir. 2007); *Green Country Food Mkt., Inc.* v. *Bottling Group, LLC*, 371 F.3d 1275, 1278 n.1 (10th Cir. 2004); *Podiatrist Ass'n* v. *La Cruz Azul de Puerto Rico, Inc.*, 332 F.3d 6, 13 (1st Cir. 2003).

case, the district court found that causation could be inferred based on the fact that the plaintiffs had met their burden on two *other* elements of their claim—collusion and "below-competitive" outcomes. *Id.* at 645 (likening record to another case in which the "expert opinion as to the competition-softening effect of information exchanges was 'persuasive for inferring causation' and sufficient for the plaintiffs to withstand summary judgment"). *See also In re Pressure Sensitive Labelstock Antitrust Litigation*, 356 F. Supp. 2d 484, (M.D. Pa. 2005) (expressing *Poller* sentiment when denying motion to dismiss antitrust action).

That cases expressing the *Poller* sentiment exist, despite contrary law from this Court, "demonstrates a degree of uneasiness with granting summary judgment in antitrust litigation." Edward Brunet, *Six Summary Judgment Safeguards*, 43 Akron L. Rev. 1165, 1173 (2010). And that degree of uneasiness is evident in this case as well.

Here, the Sixth Circuit expressed the *Poller* sentiment—citing cases that trace their reasoning back to *Poller*'s dictum—before reversing the district court's summary judgment. In so doing, it violated the principal holdings of both *Matsushita* and *Celotex*. There was a complete lack of proof on causation—an essential element of the Respondents' claims. The respondents only presented one item of evidence, an expert's testimony, on causation. Pet. 8. And that expert plainly stated his description of the price variations in milk was potentially the effect of legal commercial behavior. *Id.* He could not testify that the price variations were in fact caused by the alleged conspiracy. Thus, under *Matsushita*, 475 U.S. at 587, the price variations were no evidence of

causation at all, and under *Celotex*, 477 U.S. at 323, the Respondents had to come forward with some evidence of causation to meet their burden of production.

But the *Poller* sentiment ruled the day, and the Sixth Circuit ruled a reasonable jury could accept the expert's pricing discrepancy information as establishing causation, even though it was equally consistent with legal pricing behavior. Pet. App. 35a-36a. Then, it ruled that Dean Foods had a burden to come forward with evidence disproving the Respondents' theory of causation. *Id*. This case is another in a line establishing that the *Poller* sentiment is alive and well, and this Court should step in to clarify that summary judgment must be applied uniformly regardless of the substantive claims made in a case.

II. THIS CASE PRESENTS AN ISSUE OF NATIONAL IMPORTANCE

"Summary judgment's availability in antitrust litigation is essential because the possibility of obtaining treble damages and statutory attorney's fees provides an incentive to file potentially equivocal claims." *Summary Judgment Safeguards*, 43 Akron L. Rev. at 1172. Decisions like the Sixth Circuit's diminished evidentiary standard for causation here in complex and antitrust litigation inflicts unjust costs of great magnitude on manufacturers across industries.

Antitrust cases should not be evaluated under a enhanced summary judgment burden. Indeed, their nature makes them particularly appropriate for summary judgment. "Treble damages and statutory attorneys fees create a substantial incentive to file antitrust claims, including some claims that may be

marginal." Brunet, 62 S.M.U. L. Rev. at 514. These suits "were relatively unimportant until about 1950," but by the time the Court decided the trilogy, "they ha[d] become increasingly common and . . . represent[ed] the overwhelming majority of antitrust suits." Calkins, 74 Geo. L. J. at 1081. "[T]here may have been less of an unseemly 'deluge' had treble damages not enticed plaintiffs," Calkins, 74 Geo L. J. at 1097, but with the current state of antitrust law, there is a natural tendency for plaintiffs to bring high-dollar, but groundless cases.

As a result of the proliferation of meritless treble damages suits, the availability of summary judgment often is critical in an antitrust case, where a defendant cannot risk an adverse jury verdict even if the plaintiff's argument lacks merit. Thus, "[o]nce a motion for summary judgment is made and denied, the settlement value for the non-movant generally is enhanced." *Summary Judgment Safeguards*, 43 Akron L. Rev. at 1167. And in class action or other large antitrust cases, "it takes a very brave—or foolish—defendant to take a case to trial." Rosch Remarks at 10. Commissioner Rosch's remarks provide an example:

> [I]n 1999, I had an indemnified client go to trial with four defendants that weren't indemnified. Those four were literally betting billions of dollars that a Chicago jury would do the right thing. There was little doubt about the lack of merit in that case. After 8 weeks of trial, the judge granted judgment as a matter of law. But I know first-hand how good an extortionate settlement looked during trial to those who were

> not indemnified, and I just thanked my lucky stars I wasn't representing one of them.

Id. This scenario plays out repeatedly in the district courts. *Pressure Sensitive Labelstock* and *Cason-Merenda*, *infra*, p. 9-10, provide examples. *Pressure Sensitive Labelstock* exhibits the sentiment at work at the motion to dismiss stage. This Court corrected the problem in *Bell Atlantic Corporation* v. *Twombly*, 550 U.S. 544 (2007). *Cason-Merenda* shows that the problem persists at the summary judgment stage, and the time has come to provide similar guidance to *Twombly*'s guidance on motions to dismiss.

In *Pressure Sensitive Labelstock*, some defendants settled near the beginning of merits discovery after the district court expressed the *Poller* sentiment in denying their motion to dismiss the case and the district court certified a class in a separate order. *In re Pressure Sensitive Labelstock Antitrust Litigation*, 584 F. Supp. 2d 697, 699 (M.D. Pa. 2008) (*Pressure Sensitive Labelstock II*). In approving the settlement, the district court noted that the risk that the plaintiffs would not be able to establish liability and damages was "substantial." *Id*. at 701. But the litigation had "already proven to be complex, expensive, and protracted," and merits discovery was "projected to extend for a considerable period of time." *Id*. at 701. And, as noted by Commissioner Rosch, even in a case lacking merit, there is substantial pressure to settle when the amount in controversy is very high. Rosch Remarks at 10.

Ultimately, the case settled for $8.25 million. *Pressure Sensitive Labelstock II*, 584 F. Supp. 2d at 702. That amount constituted "approximately 35% of

single damages attributable to the Settling Defendants' sales during the Class period," *id.* (emphasis added), which means that it only represented 12% of what the plaintiffs claimed to be entitled to after treble damages.[4] If the motion to dismiss had been granted, the defendants would have paid nothing. Instead, they paid millions to resolve a case that the plaintiffs apparently did not give themselves more than a one-in-eight chance of succeeding on. Those millions could have been used for business purposes to create jobs or otherwise benefit the economy. This Court corrected the problem of disfavor toward granting motions to dismiss in antitrust cases in *Twombly*, so cases lacking facial validity are less likely to go to discovery.

Now, similar guidance to that provided in *Twombly* is needed in the summary judgment context, Pet. 18—to reach the cases that present "facially valid claims and defenses that, when probed, prove[] to be groundless," Davidson, 147 Mil. L. Rev. at 156. In *Carson-Merenda*, denial of summary judgment proved too much for several defendants in a case where the plaintiffs asserted entitlement to treble damages for an antitrust claim.

---

[4] The remaining defendants settled for $37.8 million. *In re Pressure Sensitive Labelstock Antitrust Litigation*, Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Approval of Settlements, No. 03-1556 ECF No. 476 at 13 (M.D. Pa. May 26, 2009). Neither the motion for approval nor the order approving settlement identified exposure, but the motion for approval only represented that the settlement provided "a significant percentage of the estimated damages suffered by Class members," though the plaintiffs had previously claimed entitlement to treble damages. *Id.*

Carson-Merenda v. *Detroit Med. Ctr.*, Third Corrected Class Action Complaint, No. 06-15601, ECF No. 67 at 15 (E.D. Mich. June 15, 2007). There, the plaintiffs claimed that collusive behavior had resulted in an 8.7 percent diminution in nurses' salaries, which would render a 26.1 percent recovery of total salaries under the plaintiffs' estimated damages. *Carson-Merenda* v. *Detroit Med. Ctr.*, Plaintiffs' Motion for Preliminary Approval of Settlement With St. John Health, No. 06-15601, ECF No. 321 at 11 (E.D. Mich. June 15, 2007).

After the district court denied summary judgment, all but one of the defendants remaining in the suit at the time settled for two percent of salaries paid or less.[5] Given the fact that the plaintiffs claimed entitlement to 26.1 percent of salaries, that settlement figure amounts to less than eight percent of the recovery the plaintiffs claimed to be entitled to.[6] The settlements totaled around $100 million—

---

[5] *Carson-Merenda* v. *Detroit Med. Ctr.*, Plaintiffs' Motion for Preliminary Approval of Settlement With Trinity Health System, No. 06-15601, ECF No. 789 at 11 (E.D. Mich. April 2, 2013); *Carson-Merenda* v. *Detroit Med. Ctr.*, Plaintiffs' Motion for Preliminary Approval of Settlement With Henry Ford Health System, No. 06-15601, ECF No. 786 at 11 (E.D. Mich. March 22, 2013); *Carson-Merenda* v. *Detroit Med. Ctr.*, Plaintiffs' Motion for Preliminary Approval of Settlement With Mount Clemens General Hosp., Inc. No. 06-15601, ECF No. 759 at 7 (E.D. Mich. June 22, 2012; *Carson-Merenda* v. *Detroit Med. Ctr.*, Plaintiffs' Motion for Preliminary Approval of Settlement With William Beaumont Hosp., No. 06-15601 ECF No. 746 at 9 (E.D. Mich. Apr. 20, 2012);

[6] Two defendants settled for two percent of salaries paid shortly after failure of a defendant's motion to dismiss the complaint. *Carson-Merenda* v. *Detroit Med. Ctr.*, Plaintiffs' Motion for Preliminary Approval of Settlement With Oakwood Healthcare

all in litigation that the plaintiffs apparently did not give themselves more than a one-in-twelve chance of prevailing in.

As to the last defendant, it may ultimately be the "very brave—or foolish" defendant willing to take the case to trial. Everyone else, faced with a potential trial and the risk of a jury ruling against them regardless of the merits, ended the litigation at a loss of millions. There is no way of knowing whether this Court expressly rejecting the *Poller* sentiment would have made a difference in the district court's rulings in either of these cases, but it is possible. And given the fact that the courts relied on inapplicable law, they committed an error that appears to be recurring at a significant enough rate to establish extant danger of more and more companies having to settle antitrust claims for millions of dollars when the cases lack merit.

"[S]ummary judgment's utility as a mechanism for the efficient resolution of disputes would be undermined seriously if unsubstantiated assertions were sufficient to compel a trial merely because they were factually or legally complex." Davidson, 147 Mil. L. Rev. at 179-80. Yet, that is what the *Poller*

Inc., No. 06-15601, ECF No. 462 at 4 (E.D. Mich. May 18, 2009); *Carson-Merenda* v. *Detroit Med. Ctr.*, Plaintiffs' Motion for Preliminary Approval of Settlement With St. John Health, No. 06-15601, ECF No. 321 at 3 (E.D. Mich. June 15, 2007). One defendant appears to have settled for significantly less than two percent of wages because it "no longer operate[d] in Detroit and ha[d] zero net worth." *Carson-Merenda* v. *Detroit Med. Ctr.*, Plaintiffs' Motion for Preliminary Approval of Settlement With Bon Secours Cottage Health Svcs., No. 06-15601, ECF No. 584 at 9 (E.D. Mich. Sept. 14, 2009).

sentiment expresses, and that is the inevitable result of failing to stem the flow of cases that treat summary judgment as a disfavored procedure in antitrust cases.

CONCLUSION

For the foregoing reasons, the petition should be granted and the judgment below reversed.

Respectfully submitted,

PATRICK N. FORREST
NATIONAL ASSOCIATION OF MANUFACTURERS
733 Tenth Street, N.W.
Suite 700
Washington, DC 20001

CLAYTON L. HOUGH
INTERNATIONAL DAIRY FOODS ASSOCIATION
1250 H Street, N.W.
Suite 900
Washington, DC 20005

TILLMAN J. BRECKENRIDGE*
DIANE Y. (DIVONNE) SMOYER
REED SMITH LLP
1301 K Street, NW
Washington, DC 20005
Telephone: 202-414-9200
Facsimile: 202-414-9299
tbreckenridge@reedsmith.com

*Counsel of Record

Counsel for Amici Curiae