No. 04-597

In The
Supreme Court of the United States

UNITHERM FOOD SYSTEMS, INC.,

Petitioner,

v.

SWIFT-ECKRICH, INC., DOING BUSINESS AS CONAGRA REFRIGERATED FOODS,

Respondent.

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

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

The Court's order of February 28, 2005 granted certiorari limited to the following question:

> Whether, and to what extent, a court of appeals may review the sufficiency of evidence supporting a civil jury verdict where the party requesting review made a motion for judgment as a matter of law under Rule 50(a) of the Federal Rules of Civil Procedure before submission of the case to the jury, but neither renewed that motion under Rule 50(b) after the jury's verdict, nor moved for a new trial under Rule 59.[1]

If this Court holds that a court of appeals may not review the sufficiency of the evidence under the circumstances described in the above question, then two additional questions would be presented:

1. Should that holding be applied retroactively in this case and in other open cases already tried in circuits where the established law was to the contrary?

2. Should ConAgra still prevail in this case under the plain error rule?

[1] The Court's formulation of the question presented contains a premise that is incorrect in this case, because ConAgra did move for a new trial. Although the motion was directed at the amount of damages, not the sufficiency of the evidence, the trial court could have granted a new trial on any meritorious ground, whether or not it was advanced in the motion. *See* Fed. R. Civ. P. 59(d).

RULE 29.6 STATEMENT

The parent company of Respondent Swift-Eckrich, Inc., now doing business as ConAgra Refrigerated Foods Food Company ("ConAgra") is ConAgra Foods, Inc., which is a publicly traded company that owns more than 10% of ConAgra's stock.

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RULES AND STATUTES INVOLVED

Title 28 of the United States Code, section 2106 states:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

Fed. R. Civ. P. 50 is reproduced at Pet'r App. 57a-60a. Fed. R. Civ. P. 59 is reproduced in the Joint Appendix at 155a-156a.

STATEMENT OF THE CASE

I. The ConAgra Patent.

ConAgra, a food processing company, filed a United States patent application in the name of its employee, Prem Singh ("Singh"). (R. A0006-A0011.) The invention claimed was a process for browning precooked turkey to achieve a "golden brown" color thought to be evocative of a traditional, home-cooked Thanksgiving turkey. (Tr. 1124, 1127.) ConAgra's patent application acknowledged that a very similar process had been used in the past to achieve a "brown" color, but the claims called for "golden brown," not "brown." (Col. 1, l. 50; Col. 2, l. 66.) The U.S. Patent Office issued ConAgra's patent No. 5,952,027 (the "'027 Patent") on September 14, 1999, although the district court and the Court of Appeals for the Federal Circuit were later to find that the distinction between "brown" and "golden brown" did not differentiate a patentable invention from the prior art.

In Spring 2000, ConAgra wrote letters offering licenses under the '027 Patent to five food processors that are its competitors, and to three oven manufacturers. (Tr. 1382.) ConAgra took no steps to compel the taking of licenses or to enforce the patent judicially.[2] (Tr. 1160.) No letter was sent to Petitioner Unitherm Food Systems, Inc. ("Unitherm"). No one accepted a license or even entered into negotiations for a license. (R. A5290.)

II. The Suit By Unitherm And Jennie-O.

This case was brought by Unitherm and Jennie-O Foods, Inc. ("Jennie-O"), a division of Hormel, Inc. Unitherm manufactures ovens and related equipment. It does not process or sell food or compete with ConAgra. Jennie-O makes and sells food products, including precooked browned turkey, in direct competition with ConAgra. (Tr. 333-334.) Jennie-O agreed to participate in this case only after Unitherm accused it of misappropriating from Unitherm the same process that was the subject of the '027 Patent. (R. A0422-A0423, A0440; Pl. Exh. 298.) To settle that dispute, Jennie-O promised to fund this case against ConAgra in exchange for one-half of the net proceeds. (Tr. 965.)

Plaintiffs' main allegations were that Unitherm's principal, David Howard, was the true inventor of the patented golden brown process; that Singh had derived the process from Unitherm; and that Singh, acting as a

[2] ConAgra ultimately filed a compulsory counterclaim charging the plaintiffs with patent infringement, but only after the plaintiffs sought a declaratory judgment of non-infringement and the district court denied ConAgra's motion to dismiss that claim. (Mot. Dismiss Pls.' 2nd Cause of Action, 10/31/01; Order, 1/10/02; R. A0283-A0284.)

ConAgra employee, had falsely purported to be the inventor of the process, thus defrauding the Patent Office. They alleged that ConAgra was using the patent so obtained to interfere with Unitherm's prospective economic advantage and to monopolize the market for "sliceable, pre-cooked turkey" in violation of Section 2 of the Sherman Act and a similar Oklahoma antitrust statute. (R. A0197-A0200.) They further alleged that ConAgra had learned of the process from Unitherm by fraudulently pretending to be interested in purchasing a Unitherm oven (fraud under Oklahoma law). (R. A0195.)

III. ConAgra's Motion For Summary Judgment.

ConAgra moved for summary judgment on the antitrust claims. (J.A. 139a-143a.) ConAgra argued that Jennie-O had admitted it was not damaged by the conduct complained of and that Unitherm did not participate in the alleged relevant market. (J.A. 139a.) The district court granted ConAgra's motion as to Jennie-O, a ruling that was not appealed. Instead of granting the motion as to Unitherm, however, the district court deemed Unitherm's pleadings to be amended to allege monopolization of a supposed market for a "browning smoking process." (J.A. 145a-146a; *compare* R. A0199, ¶ 149 [relevant market for "sliceable cooked turkey products"] *and* 3/27/02, Pl.'s Opp'n to Mot. Summ. J. at 12 [relevant market for browning process]; R. A0402-A0403.) ConAgra argued unavailingly that there is no such market. (5/10/02, Def's. Reply Mot. Summ. J. at 1-3.)

IV. Unitherm And Jennie-O's Motion For Summary Judgment.

Meanwhile, Plaintiffs moved for summary judgment that the '027 Patent is invalid because the patent claims – including the words "golden brown" – did not distinguish an earlier process referred to by Unitherm as "the Unitherm process." This much of Plaintiffs' motion was granted. (R. A0923-A0971.) However, Plaintiffs' motion also asked the district court to rule that the '027 Patent had been obtained by "inequitable conduct" and was, therefore, "unenforceable." (R. A0967-A0970.) Plaintiffs did not ask for a ruling on summary judgment that the '027 Patent had been obtained by fraud on the Patent Office, which is a concept significantly different from unenforceability.[3] The district court's opinion stated: "Because the Court finds the '027 Patent to be invalid and unenforceable, it is not necessary to discuss Plaintiffs' allegations of Defendant's fraud on the Patent Office."[4] (R. A2692-A2693.)

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[3] Inequitable conduct is an equitable defense to a charge of patent infringement. Fraud on the Patent Office is part of an affirmative cause of action and requires that the plaintiff prove more. *Kingsdown Med. Consultants, Ltd. v. Hollister, Inc.*, 863 F.2d 867, 873-74 (Fed. Cir. 1988); *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1364 (Fed. Cir. 1998) (quoting *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965)). Neither "gross negligence" nor the act of submitting claims can support a finding of fraud. *Kingsdown*, 863 F.2d at 873-74. To prove fraud, Plaintiffs were required to prove as facts not only that material information had been intentionally withheld from the Patent Office, but also that the Patent Office would not have issued the '027 Patent if this information had been disclosed.

[4] This statement reflects considerable confusion. The motion did not even raise the question of fraud on the Patent Office. Although unenforceability was raised, it was not discussed in the opinion apart from the quoted statement. What the court apparently meant was that

(Continued on following page)

V. The Trial.

A. The Claims Tried.

A jury trial was had on Unitherm's three remaining claims: (1) the antitrust claims; (2) interference with prospective economic advantage; and (3) fraudulent inducement of Unitherm to reveal the process that is the subject of the '027 Patent by pretending to be interested in buying Unitherm ovens. (R. A2889-A2891.) The parties knew beforehand, in detail, what evidence would be offered and what legal theories would be advanced, particularly with respect to the antitrust claims. This information had been revealed by various motions, expert reports, a joint pre-trial report and pre-trial briefs. (J.A. 145a-146a; R. A2893; J.A. 147a-152a.)

B. Unitherm's Antitrust Evidence At Trial Was Deficient For The Reasons Explained In ConAgra's Pre-Trial Brief And Summary Judgment Motion.

To prevail on its antitrust claim, Unitherm had to prove that ConAgra obtained the '027 Patent by fraud, and then used that patent to monopolize a properly defined relevant market. The pre-trial order and a jury instruction, to which Unitherm did not object, stated that the alleged relevant market was of the same scope as the claims of the '027 Patent. (R. A0062; A2891.) The alleged relevant market was thus limited not only to a process that included a specified succession of steps, but to such a process that yielded products of a precise color: "golden

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because the patent was invalid, the question of unenforceability (but not fraud) was moot.

brown," not just "brown," and not even "gold brown."[5] (R. A2891, A5132-A5133.) Unitherm's economic expert based his opinion on this very narrow market definition (R. A5132, A5147, A5156.) He admitted, however, that there was no market for *any* browning process:

> Q. Are you aware of anyone on the face of the earth who has ever succeeded in selling rights to a process for browning turkeys apart from selling ovens?
>
> A. No, I don't.
>
> Q. But that's the market we're talking about, isn't it, sir?
>
> A. That's right.
>
> **Q. So there's never been a transaction in this market?**
>
> **A. That's correct. . . .**
>
> Q. Now, I'd like you to assume, sir, that the market is a market for the sale of processes as distinguished from the sale of hardware that can carry out that process. The market for processes, all right? You understand that?
>
> A. I understand what you're describing.
>
> **Q. In reality, sir, there is no such market, is there?**
>
> **A. I would agree.**

[5] The construction of the patent claims, affirmed by the Federal Circuit, defined the claimed color, "golden brown," to which the scope of the patent was limited, as "a variable color averaging a strong brown that is yellower and slightly darker than gold brown, yellower and paler than average russet, and yellower and less strong than rust." (R. A2687; Pet'r App. 20a.) This construction, however, was based on a claim construction methodology that relied primarily on a dictionary definition of "golden brown" but disregarded the patent specification. This approach has been called into doubt by the Federal Circuit's recent en banc decision in *Phillips v. AWH Corp*., 2005 WL 1620331 (Fed.Cir., July 12, 2005).

Q. And so no one could harm that market?

A. Not the market you've described.

(R. A5152-A5154) (emphasis added).

ConAgra's pre-trial brief explained that this antitrust proof would inevitably fail because the claimed relevant market did not actually exist:

> According to Unitherm, the relevant antitrust market in this case is "the process for browning precooked, whole muscle meat products by coating with a browning agent and apply sufficient heat to brown the product without substantial meat shrinkage." (Mangum Report, p. 6.) Unitherm cannot prevail on antitrust claims premised upon this market definition. (J.A. 148a.)
>
> * * *
>
> A market definition must reflect the reality of the market. *See Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 722 (5th Cir. 1999). In order to establish the existence of a relevant product market, "evidence must be offered demonstrating . . . where consumers currently purchase the product [and] where consumers could turn for alternative products or sources of the product if a competitor raises prices." *Lantec [Inc. v. Novell, Inc.]*, 306 F.3d [1003,] 1026 [(10th Cir. 2002)]. When the defendant has no sales in the market as defined by plaintiff, such a market is defined too narrowly. *See Clark v. Flow Measurement*, 948 F. Supp. 519 (D.S. Carolina 1996). (J.A. 150a.)
>
> * * *
>
> Here, Unitherm cannot prove the existence of a market for the '027 golden brown process because it has no evidence of any consumer ***demand*** for the process. No one ever agreed to take

> a license from [ConAgra] for the process – in other words, [ConAgra] has no sales in the purported product market, thereby indicating that the plaintiff has defined the market too narrowly. (J.A. 150a) (emphasis in original).
>
> * * *
>
> Here, Unitherm cannot prove the existence of a product market that consists of one player ([ConAgra]) with one product (the '027 golden brown process) and zero sales. (J.A. 151a.)
>
> * * *
>
> If all of these alternatives are considered and the product market given an appropriately broad definition, Unitherm cannot possibly show that [ConAgra's] obtaining the '027 patent (which has now been invalidated) has given it market power, much less a dangerous probability of success of monopolization. *Steuer and Latham, P.A. v. Nat'l Med. Enters., Inc.*, 672 F. Supp. 1489, 1504 (D.S.C. 1987). (J.A. 152a.)

C. ConAgra's Motions For Judgment As A Matter Of Law.

During the trial, ConAgra asked the court about the opportunities counsel would have to make and argue dispositive motions. The district court responded that there would be little or no opportunity to argue such motions unless the court was predisposed to grant those motions:

> [COURT:] Well, of course I have to give you your opportunity to make those motions. What argument I give you will probably depend on whether I think I need argument. . . . Or whether you're likely to win. I'll certainly allow everybody to argue if I think you're going to prevail, and I can

> almost anticipate what your arguments are going to be at this point. I don't normally need argument, is the short answer, but I never know from time to time. (J.A. 153a.)

At the end of Unitherm's case-in-chief, ConAgra moved for judgment in its favor on all counts. This motion and the judge's response were as follows:

> [CONAGRA:] Your Honor, I would like to make a motion for directed verdict at this point with respect to each of the plaintiffs' claims. Would the Court like to hear anything further about that at this time?
>
> [COURT:] No, not unless you think you've got something that you think will persuade me. (J.A. 15a.)

The court then allowed "five minutes or less" for argument (J.A. 16a), which was clearly not enough to argue all the issues. ConAgra chose for this brief argument the claim of fraud on Unitherm (not fraud on the Patent Office), because this claim presented evidentiary issues that had not been previously briefed. (J.A. 17a-22a.)

At the conclusion of all the evidence, ConAgra again moved for judgment on each claim. The court summarily denied the motion:

> [CONAGRA:] . . . For the record, Your Honor, I would like to make a motion on behalf of the defendant for directed verdict for each of the three causes of action that the plaintiffs have brought. Would the Court like to hear further on that point now?

> [COURT:] Is it on the same basis you argued earlier?[6]
>
> [CONAGRA:] Essentially, Yes, Your Honor.
>
> [COURT:] I will overrule those motions for the same reasons I gave earlier. (J.A. 22a.)

D. The Verdict And Judgment.

The jury found that ConAgra had not defrauded Unitherm to obtain disclosure of the process in issue. (R. A0097.) The other two claims were both predicated on an alleged fraud on the Patent Office. (J.A. 24a.) The jury had little choice on this issue since the trial court had, over ConAgra's objections, essentially instructed the jury that ConAgra had defrauded the Patent Office. (R. A0054-A0055.) This instruction was apparently based on the mistaken belief that the court had "previously determined" that issue. (R. A0054-A0055.) This was simply wrong. No such determination had been made, or even sought. Thus, ConAgra was denied its right to have the jury decide this issue based on the evidence, including virtually conclusive evidence that ConAgra made a full and proper disclosure to the Patent Office.[7] (Tr. 1133-1135.) Damages for intentional interference with prospective economic advantage

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[6] Since the court had not allowed enough time for any argument on the antitrust and intentional interference claims during the trial, this had to be a reference to the pre-trial brief and other pre-trial papers, not the argument of ConAgra's motions at the close of Unitherm's case-in-chief.

[7] A party that has fully and truthfully disclosed the relevant facts to the Patent Office cannot have defrauded the Patent Office and is not responsible for errors made by the Patent Office. *See Fiskars, Inc. v. Hunt Mfg. Co.,* 221 F.3d 1318, 1327 (Fed. Cir. 2000), *cert. denied,* 532 U.S. 972 (2001). In this case, the relevant information about similar earlier processes was prominently disclosed in ConAgra's patent application and in the '027 Patent itself. (R. A5265-A5268.)

were assessed at $2,000,000; antitrust damages were assessed at $6,000,000. (J.A. 23a-24a.) Pursuant to Oklahoma law, the interference award was doubled to $4,000,000. (J.A. 26a.) The intentional interference damages were stipulated to be subsumed by the antitrust damages (J.A. 26a.) The district court trebled the antitrust damages (Tr. 1471-1472) and added $1,022,445 in attorneys' fees. (J.A. 28a, 31a.) Judgments were entered totaling approximately $19,000,000. (J.A. 28a-31a.)

E. ConAgra's Post-Trial Motion For A New Trial.

ConAgra had made essentially the same antitrust arguments in its summary judgment motion (J.A. 145a) and its pre-trial brief (J.A. 150a-152a). Its arguments that fraud on the Patent Office had not in fact been "previously determined" were stated in objections to the jury instruction that erroneously took that issue away from the jury. (R. A5886-A5888.) The trial judge had made it clear that she understood and rejected ConAgra's positions on each of these issues and did not want to hear them argued again. (*Id*.; *see also* J.A. 22a.) Tenth Circuit law does not require that a pre-trial Rule 50(a) motion be renewed post-trial under Rule 50(b) to preserve the right to argue sufficiency of the evidence and to seek a remand on appeal, as the Federal Circuit later held. (Pet'r App. 50a n.7.) Accordingly, ConAgra did not renew post-verdict its pre-verdict motion for judgment as a matter of law ("JMOL") under Rule 50(b), believing that to do so would be futile.

However, contrary to the assumption in the Court's formulation of the question presented, ConAgra *did* move for a new trial under Rule 59, or in the alternative for a remittitur. (J.A. 34a, et seq.) ConAgra argued that since there was only one damage analysis, and only one damage

argument, the different awards of $2,000,000 and $6,000,000 could not both be correct. (J.A. 36a-37a.) The court did not instruct the jury not to treble the antitrust damages,[8] and the jury must have found that the actual damages were $2,000,000 and trebled those damages to reach an antitrust award of $6,000,000. (J.A. 23a-24a.) The district court denied ConAgra's motion, then trebled the jury's antitrust award to $18,000,000 (plus attorneys' fees). (J.A. 28a, 31a.)

VI. The Appeal.

ConAgra appealed on the ground, *inter alia*, that Unitherm had failed as a matter of law to prove antitrust standing. As the Federal Circuit acknowledged, controlling Tenth Circuit law "recognizes antitrust standing, like all questions of standing to sue, as a question of law subject to *de novo* review." (Pet'r App. 13a.) The court did not, however, conduct such a review of the evidence to decide the standing issue. Instead, the Federal Circuit based its finding that Unitherm had antitrust standing on the "*allegations*" in Unitherm's complaint, *not* on any evidence. (Pet'r App. 36a, 44a.)

In the very next paragraph of its opinion, the Federal Circuit made this most perplexing statement:

> Despite possessing standing, however, Unitherm never presented any evidence that could possibly support critical factual elements of its claim. In particular, Unitherm failed to present any facts that could allow a reasonable jury to accept

[8] In antitrust cases, "courts have uniformly concluded that mentioning treble damages . . . to the jury is improper." *HBE Leasing Corp. v. Frank*, 22 F.3d 41, 46 (2d Cir. 1994) (collecting cases); *Semke v. Enid Auto. Dealers Ass'n*, 456 F.2d 1361, 1371 (10th Cir. 1972).

> either its proposed market definition or its demonstration of antitrust injury. (*Id*.)

The court thus found that Unitherm has antitrust standing, but simultaneously found there was no evidence of antitrust injury, which is an essential condition of antitrust standing. *Sharp v. United Airlines, Inc*., 967 F.2d 404, 406 (10th Cir. 1992) ("[S]tanding cannot be established without an antitrust injury.").

The court then analyzed Unitherm's antitrust claims in more detail and found that they failed utterly, summarizing:

> In short, Unitherm failed to present any economic evidence capable of sustaining its asserted relevant antitrust market, and little to support any other aspect of its Section 2 claim. Unitherm has presented conclusory testimony from its expert that defines the market as coterminous with the patent based entirely on issues of *technical* substitutability, described no market analysis, inferred market power from the possession of a patent, tautologically equated unsuccessful attempts at collecting royalties with a dangerous probability of success, and inferred antitrust injury from economic loss. ConAgra is correct in asserting that Unitherm failed to provide any evidence capable of sustaining the jury's finding of antitrust liability. (Pet'r App. 50a) (emphasis in original).

Unitherm argued that these sufficiency-of-the-evidence issues should not be considered at all since ConAgra did not renew its motion for JMOL under Rule 50(b). The Federal Circuit rejected that argument, saying:

> [W]e similarly apply Tenth Circuit law to determine whether or not ConAgra has preserved its right to appeal. In the Tenth Circuit, the failure

> of a party to move for a JMOL post-verdict does not bar the party from appealing the sufficiency of the evidence. . . . The absence of a Rule 50(b) post-verdict motion for JMOL, however, precludes our entering judgment in favor of ConAgra. 'The only remedy available is a new trial.' Thus, we may only vacate the jury's verdict in favor of Unitherm. (Pet'r App. 50a n.7) (citation omitted).

Accordingly, the court affirmed the $4,0000,000 judgment for interference with Unitherm's prospective economic advantage, but remanded the antitrust claim for a new trial. (Pet'r App. 54a.)

SUMMARY OF ARGUMENT

A. It is undisputed that ConAgra challenged the sufficiency of the evidence to support all of Unitherm's claims in the district court, doing so in pre-trial motions and briefs and in two motions for JMOL during the trial. Indeed, ConAgra cited to the district court the very same authorities the Federal Circuit later relied on when it rejected Unitherm's antitrust claim. In short, ConAgra fully and fairly raised its sufficiency of the evidence issue in the district court, and nothing more was required to preserve that issue for appeal. Neither Unitherm nor the Solicitor General suggests that ConAgra obtained any unfair procedural advantage by sandbagging or concealing issues.

Rule 50(b) does not require that a pre-verdict motion for JMOL under Rule 50(a)(2) be renewed post-verdict to preserve rights on appeal. To the contrary, Rule 50(b) expressly provides that where a Rule 50(a) motion at the close of the evidence is not granted, "the court is considered to have submitted the action to the jury subject to the court's later deciding the questions raised by the motion."

Id. Rule 50(b) thus makes clear that the question raised by the Rule 50(a) motion is before the trial court for decision after the verdict *whether or not the motion is renewed*. Rule 50(b) then sets a schedule of ten days within which the movant "may" – not "must" – renew the pre-verdict motion, if it chooses to do so. Not a word in Rule 50 suggests that a party who has made a proper motion for JMOL at the close of all the evidence and before the verdict, as ConAgra did here, loses any right on appeal by not renewing the motion after the verdict.

Unitherm and the Solicitor General argue that requiring a party to renew its motion after the verdict is desirable because it would allow more time for the parties and the district court to analyze the evidence, and *might* result in a reasoned opinion from which an appellate court can benefit. But, desirable or not, there is no such requirement in Rule 50 or anywhere else. The argument is, moreover, wishful thinking. Rule 50(b), even as Unitherm would read it, would not require the parties to file briefs or the district court to prepare findings, conclusions, or an opinion. The decision to consider written briefs or explain on the record why the motion is denied remains right where it has always been under Rule 50(a), committed to the sound discretion of the trial judge.

Unitherm and the Solicitor General rely on older cases decided by this Court, primarily the "trilogy,"[9] suggesting that requiring a Rule 50(b) post-verdict renewal of a motion for JMOL somehow preserves the right of the verdict winner to have the trial court rule on whether a

[9] Three decisions of this Court that have often been referred to in this context are *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947), *Globe Liquor Co. v. San Roman*, 332 U.S. 571 (1948), and *Johnson v. New York, New Haven & Hartford R.R.*, 344 U.S. 48 (1952).

new trial is called for instead of entering judgment for the movant. However, no such purpose would be served where, as here, the motion for JMOL is ultimately denied. The verdict winner, having survived the motion, does not ask for a new trial and the trial court does not consider that unasked question. Indeed, it is doubtful that the trial court, having concluded that the evidence is sufficient, could meaningfully rule on the question of whether a new trial should be granted without knowing precisely why its conclusion is erroneous. A renewal under Rule 50(b) would, therefore, do nothing to resolve the question of whether a new trial is called for.

The cases of the trilogy cannot be reconciled with denying ConAgra all relief on appeal. In all three cases, the evidence was in fact reviewed for sufficiency on appeal, and in all three cases, there was a remand for further proceedings. The movant under Rule 50(a) who did not renew under Rule 50(b) was not denied relief on appeal, and the non-movant was not allowed to prevail despite the absence of sufficient evidence.

To bring logic, reason, and clarity to the law in this area, this Court should hold that (1) when sufficiency of the evidence has been fairly raised in the district court by a proper Rule 50(a) motion at the close of all the evidence, that issue is fully preserved for appeal; and (2) the court of appeals can then examine the evidence and order any appropriate disposition, including entry of judgment, remand for a new trial, or other proceedings. Such a holding would conform to the established rule that governs preservation of other issues for appeal and would recognize the express statutory appellate authority conferred by 28 U.S.C. § 2106. This holding would also be fully consistent with the language of Rule 50, and it would avoid judicial creation of a formalistic procedural trap.

B. If Unitherm's proposed interpretation of Rule 50(b) is adopted, it should not be applied retroactively to this case or other open cases in circuits that have not heretofore required post-verdict renewal. Although this Court's precedents leave open many questions relating to retroactivity, the concept that certain decisions are to be applied prospectively only is well established. A decision that relates to the conduct of the trial and has no constitutional underpinnings presents the strongest possible argument against retroactivity.

Litigants should be entitled to rely on long-standing procedural precedents of the circuit in which the case is tried. ConAgra should not, therefore, lose its right to appeal, and Unitherm, which suffered no antitrust injury, should not reap a windfall because a rule of procedure has been changed after the trial. Taking away ConAgra's right to appeal based on a retroactive rule would be especially inequitable and unfair here because, as the Solicitor General admits, the rule applied by the Federal Circuit in this case is consistent with the prior decisions of this Court. (Amicus Br. 20, 24.)

C. Even if the Court adopts Unitherm's interpretation of Rule 50(b) and applies this interpretation retroactively, the Court should nevertheless review or remand the issue of antitrust liability to correct plain error. As the Federal Circuit made clear, Unitherm not only failed to present evidence sufficient to support the jury verdict, it failed to offer *any* evidence capable of supporting three elements of antitrust liability: proof of a relevant antitrust market, of a dangerous likelihood of success in monopolizing that market, or that ConAgra's alleged monopolistic behavior caused Unitherm any antitrust injury. (Pet'r App. 50a.) The district court committed plain error when it allowed the case to go to the jury and when it entered judgment, the absence of any supporting evidence being so

readily apparent. To allow judgment to stand without any supporting evidence would work a manifest injustice.

ARGUMENT

I. ConAgra Preserved Sufficiency Of The Evidence As An Issue For Appeal.

A. ConAgra Complied With The General Rule That Permits Only Issues Raised Below To Be Appealed.

The Solicitor General correctly notes that, "[o]rdinarily an appellate court does not give consideration to issues not raised below." (Amicus Br. 8.) It is equally true, however, that an appellate court *does* give consideration to an issue that *was* raised below. *Hartford Courant Co. v. Pellegrino*, 371 F.3d 49, 56-57 (2d Cir. 2004); 19 James Wm. Moore et al., *Moore's Federal Practice* § 205.05[1] (3d ed. 2005) ("an issue is 'pressed or passed on below' when it fairly appears in the record as having been raised or decided."). An issue need not be raised in any particular way, and it need not be raised more than once, although it must be raised in such a manner that the trial judge has an adequate opportunity to understand and rule on it. *Id.,* § 205.05[1], n.4. This general rule prevents a litigant from burdening the appellate courts and unfairly surprising an opponent with any issue not adequately raised below. The appellate courts determine, on a case-by-case basis, whether this requirement has been met. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). The general rule certainly does not suggest that Rule 50(b) should be read to require – not merely permit – a post-verdict renewal of a Rule 50(a)(2) motion. Indeed, the general

rule renders such an interpretation of Rule 50(b) superfluous and pointlessly formalistic.[10]

ConAgra complied with the general rule, identifying early on the precise points on which Unitherm's antitrust evidence was insufficient: there was no market for browning processes (J.A. 150a) and no market of any description in which Unitherm and ConAgra were competitors. (J.A. 139a.) The issue here was raised in ConAgra's motion for summary judgment and again in its pre-trial brief. (J.A. 139a-143a; J.A. 148a-152a.) Not only was it raised, but the relevant antitrust authorities that were cited and quoted are the same cases on which the Federal Circuit ultimately relied.[11] (Pet'r App. 41a-52a.)

ConAgra also raised the issue by two oral motions for judgment, at the close of Unitherm's case and at the close of all the evidence. (J.A. 15a-16a, 22a.) The district court, knowing that the issues before it then were precisely the same issues that had already been briefed extensively,

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[10] There is good reason to follow the general rule where an issue is raised for the first time on appeal:

> [R]eview of issues not raised below "would . . . require us to frequently remand for additional evidence gathering and findings," *Hicks v. Gates Rubber Co.*, 928 F.2d 966, 970-71 (10th Cir. 1991); would undermine the "need for finality in litigation and conservation of judicial resources," *id*. at 971; would often "have this court hold everything accomplished below for naught," *Bradford v. United States*, 651 F.2d 700, 704 (10th Cir. 1981); and would often allow "[a] party . . . to raise [a] new issue on appeal [when that party] invited the alleged error below." *Id*.

Lyons v. Jefferson Bank & Trust, 994 F.2d 716, 721 (10th Cir. 1993).

[11] It is not surprising, in view of Fed. R. Civ. P. 26 and other discovery devices, that ConAgra, like many other litigants, was able to identify and brief dispositive lack-of-evidence issues before the trial began, or that the trial judge considered these issues and reached its conclusions early in the trial, if not before the trial.

denied those motions without allowing for further argument. (*Id.; see* R. A2893; J.A. 147a-152a.) There is no doubt that ConAgra's various motions, briefs and arguments on the sufficiency of Unitherm's antitrust evidence satisfied the general rule for fully preserving appellate issues. (*Id.*)

B. ConAgra Complied With Rule 50.

The Federal Rules of Civil Procedure should be given their "plain meaning." *Bus. Guides, Inc. v. Chromatic Communications Enters., Inc.*, 498 U.S. 533, 540 (1991). Nothing in Rule 50 creates an exception to the general rule requiring a party to make a post-verdict motion under Rule 50(b) to preserve the right to argue sufficiency of the evidence on appeal. Indeed, Rule 50(b) does not require a motion to be made for any purpose, but simply provides that, "the movant *may* renew its request for judgment as a matter of law by filing such a motion not later than 10 days after entry of judgment." *Id.* (emphasis added). If the movant desires to renew, a ten-day period is allowed for that renewal. The Rule does not make renewal mandatory or a condition of review on appeal. It says nothing about an appeal. Unitherm's and the Solicitor General's position is contrary to the plain meaning Rule 50(b).[12]

[12] Until the trilogy, every court of appeals decision had read the new Rule 50(b) as permitting not only review of the sufficiency of the evidence in the absence of a post-verdict motion, but also the power to enter judgment for the verdict loser. Theodore Garver, Note, Johnson v. N.Y., N.H. & H.R.R. Co.*, 344 U.S. 48 (1952)*, 38 Cornell L.Q. 449, 450 n.9 (1952-1953) (collecting nine cases between 1940 and 1947, and citing 3 *Moore's Federal Practice* § 115 (Supp. 1947) for the same proposition).

Rule 50(b) declares that once a pre-verdict motion under Rule 50(a)(2) has been made "the court is considered to have submitted the action to the jury *subject to the court's later deciding the legal question raised by the motion.*" *Id*. (emphasis added). The rule does not say "subject to the court's later deciding the legal questions raised by the motion, but only if the motion is renewed." Even where, as here, the trial court formally denies the motion before the jury retires, the motion remains pending and the movant need do nothing more. *Johnson,* 344 U.S. at 53 (it is "wholly unnecessary for a judge to make an express reservation of his decision. . . . The rule itself made the reservation automatic."). Thus, there is no need to mandate renewal of the motion for JMOL after verdict because Rule 50(b) itself expressly preserves the issue for decision after verdict.[13]

The Solicitor General acknowledges that Rule 50(b) expressly treats any denial of a Rule 50(a) motion as a reservation of the decision until later. (Amicus Br. 15.) The Solicitor General then argues that Rule 50(b), "specifies the procedural mechanism by which that 'later decision' is to be made." (*Id*.) Therefore, the Solicitor General concludes, "if a party declines to renew its motion after the verdict, it has waived its right to obtain a final ruling from the district court on the sufficiency of the evidence, and accordingly should not be permitted to raise that issue on appeal." (*Id*.) This argument is a *non sequitur* that distorts the rule and ignores the law. Since the decision on the Rule 50(a) motion is automatically reserved until after the

[13] Of course, renewing the motion after the verdict may be helpful and appropriate in a particular case, so the rule properly authorizes it and specifies the timing.

verdict, it makes no sense to require a party to do something more to *really* reserve it. If the Solicitor General's conclusion were correct, then the Rule would not have expressly reserved the issue in the first place. And, if the Rule intended the draconian waiver of the right to appeal the Solicitor General posits, surely it would have said that Rule 50(b) motion "must," not "may," be made.

The problem with the Solicitor General's reasoning is highlighted by the fact that courts often *do* render a final decision on the sufficiency of the evidence after the verdict without a Rule 50(b) motion by deciding the reserved Rule 50(a) motion.[14] The Eleventh and Seventh Circuits, for example, hold that the district court can grant a Rule 50(a)(2) motion *post-verdict* without a renewal under Rule 50(b). *See Norton*, 806 F.2d at 1547 and *Shaw*, 249 F.2d at 439. The Federal Circuit, which follows Unitherm's interpretation of Rule 50(b), similarly notes that the district court can grant a 50(a)(2) motion *sua sponte after the verdict* and without a Rule 50(b) renewal, even though it would not permit the movant to appeal the denial of a 50(a)(2) motion without a Rule 50(b) renewal. *Biodex Corp. v. Loredan Biomedical, Inc.*, 946 F.2d 850, 861 (Fed. Cir. 1991), *cert. denied*, 504 U.S. 980 (1992).

Requiring a renewed motion for JMOL creates an anomalous and illogical situation. After the verdict is

[14] *See, e.g.*, *Norton v. Snapper Power Equip.*, 806 F.2d 1545, 1547 (11th Cir. 1987); *Shaw v. Edward Hines Lumber Co.*, 249 F.2d 434, 439 (7th Cir. 1957); *First Safe Deposit Nat'l Bank v. Western Union Tel. Co.*, 337 F.2d 743, 746 (1st Cir. 1964); *Nichols Constr. Corp. v. Cessna Aircraft Co.*, 808 F.2d 340, 355-56 (5th Cir. 1985); *Mosser v. Fruehauf Corp.*, 940 F.2d 77, 83 n.2 (4th Cir. 1991). Although these cases treat instances where the trial court reserved its ruling on the Rule 50(a) motion, again, such an express reservation is not required since the Rule renders the reservation automatic. *Johnson*, 344 U.S. at 53.

returned, the pre-verdict motion for JMOL is still pending and can be granted. When that happens, the verdict winner can appeal the grant. But if the district court denies the motion, or enters judgment against the movant – thereby implicitly denying the motion – the movant cannot appeal. That is bad enough. But what if the district court enters a separate order denying the motion *after the verdict* and writes a lengthy opinion explaining the denial? Are we to suppose that the movant still cannot appeal this denial because it did not renew before the denial? Apparently so. The Solicitor General never comes to grips with any of these problems.

The Solicitor General also argues that a Rule 50(b) motion should be required to preserve sufficiency of the evidence for appeal because district courts have discretion to deny even meritorious Rule 50(a) motions to obtain the practical benefits of a jury verdict. (Amicus Br. 11.) Therefore, the Solicitor General reasons, a district court's denial of a motion under Rule 50(a) cannot be a reversible error even if the evidence is insufficient. (Amicus Br. 18-19.) This argument is based on an erroneous assumption and a misunderstanding of the operation of the Rule.

There is no authority for the proposition that a court has "discretion" to permit a verdict to stand without sufficient supporting evidence. The trial court does have discretion to decline to rule before taking a verdict, and Rule 50(b) provides that the motion is still pending after the verdict, whether or not ruled on earlier. The Rule 50(a) motion can then be granted or finally denied post-verdict (as by entering judgment), but ultimately the final disposition of a Rule 50(a) motion cannot be a matter of discretion.

C. Distorting Rule 50(b) To Require Post-Verdict Renewal Of The Motion For JMOL Serves No Useful Purpose.

Unitherm and the Solicitor General both argue that a post-verdict motion is desirable (Pet'r Br. 25-26; Amicus Br. 15-18), but neither explains how this perceived desirability can trump the plain language of Rule 50(b). The argument that they make is not so much that there actually *is* such a rule, but that they think there *should be* such a rule.

Nor is it apparent that requiring a post-verdict renewal would achieve the benefits ascribed to this requirement. The Solicitor General asserts that making post-verdict Rule 50(b) motions mandatory "ensures that the district court has an adequate opportunity to resolve the sufficiency of the evidence issue in the first instance." (Amicus Br. 7.) However, the trial court can take whatever time is desired for reflection, listen to oral argument, order that briefs be filed and make a record of why the motion has been denied or granted *whether or not a motion for JMOL is renewed after the verdict*. It can also choose to do none of these things, but the available options are in no way changed by requiring the renewal of a motion that is already pending and remains pending until judgment is entered.

The facts of this case highlight the fallacy in Unitherm's argument and assumptions. If the district court did not have an adequate opportunity to consider ConAgra's motion for JMOL, why did it decline to hear argument and summarily deny the motion ConAgra made before the verdict? (J.A. 22a.) The evidence was all in and court was not compelled to decide anything at that time. It could have deferred its decision and asked for briefs. The obvious fact is, the court had heard all it wanted to hear

and had made up its mind on the issue. A post-verdict renewal of the Rule 50(a) motion by ConAgra would not have induced the court to hear argument and would have changed nothing.

Neither Unitherm nor the Solicitor General explains why the Court should require renewal of a motion for JMOL, but not require renewal of other motions. For example, motions to exclude crucial evidence, excuse a juror, or declare a mistrial all could be critical to the case and require reversal on appeal. Counsel may or may not renew such a motion after the verdict, and the court may or may not permit further argument or receive briefs. But renewal is not required to preserve the issue for appeal. We depend upon counsel to raise the issue, and we depend upon the trial court to make an appropriate record of reasons for denial (or grant). The general rule requiring that issues be raised in the trial court to preserve them for appeal suffices.

Unitherm, citing *Biodex*, also argues that requiring a post-verdict renewal of the motion would eliminate unnecessary appeals by giving the trial court a "chance" to correct an error. (Pet'r Br. 22.) Of course, the district court already has the same "chance" by reason of the Rule 50(a) motion, which is reserved for decision after the verdict. And, the assumption that more grants of JMOL would reduce the number of appeals is fanciful. All that would do is change the identity of the appellant.

If the need for a renewed motion for JMOL were as important to the proper functioning of the judicial system as Unitherm and the Solicitor General would have it, appellate courts lacking such a requirement would have suffered as a result. There is, however, no reason to believe that they have. The Fourth, Fifth, Tenth, Eleventh, and District of Columbia Circuits, for example, have long held

that a renewed motion for JMOL is not needed to review sufficiency of the evidence on appeal. Yet there is no indication that any problem has resulted. *See, e.g.*, *Dichmann, Wright & Pugh, Inc. v. Weade*, 168 F.2d 914, 916-17 (4th Cir. 1948), *aff'd as modified,* 337 U.S. 801 (1949); *Benner v. Nationwide Mut. Ins. Co.*, 93 F.3d 1228, 1234 (4th Cir. 1996); *Yorkshire Indem. Co. v. Roosth & Genecov Prod. Co.*, 252 F.2d 650, 657-58 (5th Cir. 1958); *Castellano v. Fragozo*, 311 F.3d 689, 704 (5th Cir. 2002);[15] *Hansen v. Vidal*, 237 F.2d 453, 454 (10th Cir. 1956); *Cummings v. General Motors Corp.*, 365 F.3d 944, 950 n.1 (10th Cir. 2004); *United States v. Valdosta-Lowndes County Hosp. Auth.*, 696 F.2d 911, 912-13 (11th Cir. 1983); *Harbor Ins. Co. v. Schnabel Foundation Co.*, 946 F.2d 930, 935-37 (D.C. Cir. 1991), *cert. denied*, 504 U.S. 931 (overruling a prior case affording only plain error review in the

[15] Unitherm cites *Adames v. Perez*, 331 F.3d 508, 511-12 (5th Cir. 2003) for the proposition that the Fifth Circuit follows the majority rule. (Pet'r Br. 10, quoting *Cummings v. General Motors Corp.,* 365 F.3d 944, 950 n.1 (10th Cir. 2004).) But *Adames* is not controlling law in that circuit. First, it conflicts with a long line of Fifth Circuit precedent that adheres to the holding in the trilogy where appellate review for sufficiency was permitted, but relief was limited to remand for a new trial. Since the Fifth Circuit follows the rule that a panel cannot overrule a prior panel absent an en banc proceeding or intervening Supreme Court case, *Adames* is not controlling. *United States v. Lipscomb*, 299 F.3d 303, 313 n.34 (5th Cir. 2002) (quoting *Burge v. Parish of St. Tammany*, 187 F.3d 452, 466 (5th Cir. 1999) ("It is a firm rule of this circuit that in the absence of an intervening contrary or superseding decision by this court sitting en banc or by the United States Supreme Court, a panel cannot overrule a prior panel's decision."')). Second, the only authority *Adames* cites to is *United States ex rel. Wallace v. Flintco Inc.*, 143 F.3d 955, 960 (5th Cir. 1998), a case where the litigant did not move for JMOL *at trial* under Rule 50(a). Thus, *Adames* is unprecedented in the Fifth Circuit.

absence of a renewed motion under Rule 50(b) as "wrongly decided").[16]

Similarly, Alaska's Rule 50(b) provides that "a party who has moved for a directed verdict *may* move to have the verdict and any judgment thereon set aside." Alaska R. Civ. P. 50(b) (emphasis added). The movant is not, however, *required* to make that second motion to fully preserve its rights on appeal. *Sherbahn v. Kerkove*, 987 P.2d 195, 198 n.5 (Alaska 1999). In Alaska, "may" means may, not "must." New Jersey Court Rule 4:40-2 provides that "[f]ailure to renew the motion shall not preclude appellate review of the denial of the motion made at trial." Idaho Rule of Civil Procedure 50(b) goes even further, permitting

[16] The holding in the trilogy used to be the majority rule, followed in nine circuits. In addition to the Fourth, Fifth, Tenth, Eleventh, and District of Columbia Circuits, four other circuits have adhered to it at some time in the past, especially in the period nearest the trilogy. In the Second Circuit, *see, e.g.*, *Guarnieri v. Kewanee-Ross Corp.*, 270 F.2d 575, 580 (2d Cir. 1959). The Third Circuit opinion in *Woods v. Nat'l Life & Accident Ins. Co.*, 347 F.2d 760, 769 (3d Cir. 1965) is cited by Unitherm as standing for the majority rule, when, in fact, its holding is in line with the trilogy in that it only limited the appellate court to a remand for new trial and did not prohibit appellate review of the sufficiency of the evidence. (Pet'r Br. 10) (quoting *Cummings*, 365 F.3d at 950 n.1). The Sixth Circuit followed the trilogy in *Union News Co. v. Hildreth*, 295 F.2d 658, 667 (6th Cir. 1961), *cert. denied*, 375 U.S. 826 (1963) and *Aquionics Acceptance Corp. v. Kollar*, 536 F.2d 712, 713 (6th Cir. 1976). There appears to be an unacknowledged internal split in the Eighth Circuit. *See, e.g.*, *Coffman v. Trickey*, 884 F.2d 1057, 1063-64 (8th Cir. 1989) (allowing review for sufficiency on appeal, but limiting relief to remand for a new trial); *but see, e.g., Cross v. Cleaver*, 142 F.3d 1059, 1069-70 (8th Cir. 1998) (erroneously citing as authority cases where no Rule 50(a)(2) motion was made at the close of all evidence). Even the Federal Circuit arguably followed the trilogy holding in *Sun Studs, Inc. v. ATA Equip. Leasing, Inc.*, 872 F.2d 978, 995 (1989), *overruled on other grounds by A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020 (Fed. Cir. 1992) (the court in *Biodex* arguing that the rule applied in *Sun Studs* is dicta at 946 F.2d at 855 n.4).

appellate review of sufficiency of the evidence without *any* motion at trial or thereafter:

> The failure of a party to move for a directed verdict, for a judgment notwithstanding the verdict or for a new trial shall not preclude appellate review of the sufficiency of the evidence when proper assignment of error is made in the appellate court.

Id. Unitherm and the Solicitor General describe problems that don't exist and prescribe a remedy that is not needed and will not cure. This rewriting of the rule would create an unwise and unfair exception to the general principal found in 28 U.S.C. § 2106 that any judgment, decree or order is available on appeal. *See Neely v. Eby Constr. Co.,* 386 U.S. 317, 322 (1967); *Weisgram v. Marley Co.*, 528 U.S. 440, 450 (2000).

D. This Court's Rule 50(b) Cases Support The Federal Circuit's Remand For A New Trial.

This Court addressed the question of whether a renewal of a motion for JMOL is required by Rule 50(b) in the so-called "trilogy," a series of cases authored by Justice Black more than half a century ago when Rule 50 took a different form. *Cone,* 330 U.S. 212; *Globe Liquor*, 332 U.S. 571; *Johnson,* 344 U.S. 48. Subsequent court of appeals cases cited by Unitherm and the Solicitor General requiring a renewal of a Rule 50(a) motion often focus not on the words of Rule 50(b) itself, but on a misreading of the trilogy. (*E.g.,* Pet'r Br. 20-22.)

In *Cone*, the defendant moved for a directed verdict and for a new trial, but did not move for judgment post-verdict. The court of appeals found the evidence insufficient and directed that judgment be entered for the defendant. *West Virginia Pulp & Paper Co. v. Cone*, 153 F.2d

576, 582 (4th Cir. 1946), *aff'd as modified*, 330 U.S. 212 (1947). This Court held that the choice between entry of judgment or a new trial should be made by the trial court because only the trial judge, "can exercise this discretion with a fresh personal knowledge of the issues involved, the kind of evidence given, and the impression made by witnesses." 330 U.S. at 216. An appellate court cannot do so and, therefore, should defer to the trial judge. Justice Black apparently attributed the absence of a ruling by the trial judge to the fact that "[r]espondent did not move for 'judgment notwithstanding the verdict,' as it might have under Rule 50(b)." *Id*. at 213. *Cone* does not explain, however, how such a post-verdict motion would have alleviated Justice Black's concern. The trial court would have no reason to consider a new trial no matter how many times the defendant's motion for JMOL were made and denied.

Although the opinion in *Cone* ends with the word "reversed," the subsequent history of the case reveals that the movant was not denied relief.[17] Consistent with the decision by the Federal Circuit here, *Cone* was, in fact, remanded for further proceedings below.

A year after *Cone* was decided, a similar fact pattern was presented in *Globe Liquor*. Justice Black again focused on the "importance of having the District Court first pass upon whether its error [in denying the pre-verdict motion] should result in a new trial or in a judgment finally ending the controversy." 332 U.S. at 573. *Globe Liquor* again suggests that a post-trial motion under Rule

[17] Upon remand, the trial court conducted a new trial and entered JNOV for the defendant after the plaintiff put on evidence nearly identical to what it had offered in the first trial. *Cone v. West Virginia Pulp & Paper Co.*, 170 F.2d 770, 773 (4th Cir. 1948). The Fourth Circuit affirmed on appeal. *Id*. at 772, 774.

50(b) would have solved this problem, but again does not explain *how*. The case was remanded for a new trial. Again, Justice Black did not prohibit or even question appellate review of the sufficiency of the evidence, but instead endorsed it, although limiting the lower court's remedial power to remand for a new trial. 332 U.S. at 574.

Johnson, the last case of the trilogy, was a wrongful death action against a railroad. When all the evidence was in, the railroad moved to dismiss. After losing at trial, the railroad moved to "set aside" the verdict on the ground that it was contrary to the weight of the evidence. 344 U.S. at 49. The court of appeals found the evidence insufficient and reversed with direction to enter judgment for the railroad. This Court concluded that because the motion, although post-verdict, was "one to set aside the verdict — not one to enter judgment notwithstanding the verdict," the dismissal could not be sustained. *Id.* at 51. The case was remanded "for further proceedings consistent with this opinion." *Id*. at 55. As with *Cone*, the plaintiff presented much the same evidence upon retrial, and the district court entered JNOV for the defendant upon a proper Rule 50(b) motion made after plaintiff won a second jury verdict.[18] Thus, in *Johnson*, as in *Cone* and *Globe Liquor*, this Court proceeded according to the rule later followed by the Tenth Circuit and applied here by the Federal Circuit. The plaintiff with insufficient evidence was not allowed to prevail.

A dissent by Justice Frankfurter in *Johnson*, joined by three other Justices, said that this Court's earlier precedents did not require following a "ritualistic formula in the

[18] *Johnson v. Palmer*, 129 F. Supp. 202 (E.D.N.Y. 1953), *aff'd sub nom. Johnson v. New York, New Haven & Hartford R.R.*, 220 F.2d 279 (2d Cir.), *cert. denied*, 349 U.S. 954 (1955).

District Court." 344 U.S. at 57. Referring to earlier cases in which there was a remand for a new trial, Justice Frankfurter said they were remanded instead of having judgment entered because, "the Court of Appeals either applied to the facts a legal theory other than the one on which the parties proceeded in the trial court, or for the first time assigned decisive importance to the choice by the losing party of a legal theory on which to claim or resist recovery." *Id.* at 58.

The trilogy thus stood for the proposition that, in the absence of a renewal under Rule 50(b) of a motion to enter judgment contrary to the verdict, an appellate court can remand, but cannot enter judgment against the verdict. No case of the trilogy held or was even reconcilable with a rule that sufficiency of the evidence should not be reviewed at all in the absence of a Rule 50(b) motion.

The question of whether to enter judgment or remand was, however, addressed more recently by this Court in *Neely*. Using 28 U.S.C. § 2106 as a starting point, this Court held:

> But these considerations [favoring the exercise of discretion by the trial judge] do not justify an ironclad rule that the court of appeals should never order dismissal or judgment for defendant when the plaintiff's verdict has been set aside on appeal. Such a rule would not serve the purpose of Rule 50 to speed litigation and to avoid unnecessary retrials. Nor do any of our cases mandate such a rule.

386 U.S. at 326.

Neely thus discards the basic rationale underlying the trilogy and holds that, in appropriate circumstances, an appellate court can itself grant a motion to dismiss based on the sufficiency of the evidence and need not remand. Justice Black dissented, arguing that "a court of appeals,

in reversing a trial court's refusal to enter judgment on the grounds of insufficiency of evidence, is entirely powerless to order the trial court to dismiss the case, thus depriving the verdict winner of any opportunity to present a motion for a new trial to the trial judge. . . . " *Id*. at 331. However, all the members of this Court in *Neely*, including Justice Black, seemed to reject the notion that a post-trial renewal of a motion for JMOL (or a directed verdict) will somehow make the trial judge's wisdom on the question of the need for a new trial available to the appellate court.

Neely, however, contains dicta that "[t]he opinions in the above cases make it clear that an appellate court may not order judgment n.o.v. where the verdict loser has failed strictly to comply with the procedural requirements of Rule 50(b), or where the record reveals a new trial issue which has not been resolved." *Id*. at 325. This vestige of the trilogy does not support the proposition that no remedy at all is available in the absence of a Rule 50(b) renewal. Indeed, it implies just the opposite, that a remand is proper. Most of the opinion in *Neely* concerns the question of when to enter judgment and when to remand. It would be implausible to argue that when *Neely* says "may not order judgment n.o.v.," it really means "may not order judgment n.o.v. *or remand*." If the dicta in *Neely* is accepted as binding, it supports the Tenth Circuit rule as applied by the Federal Circuit in this case.

In *Weisgram*, the basic holding of *Neely* was reaffirmed.

> *Neely* recognized that there are myriad situations in which the determination whether a new trial is in order is best made by the trial judge. 386 U.S., at 325-326. *Neely* held, however, that there are also cases in which a court of appeals may appropriately instruct the district court to enter judgment as a matter of law against the

> jury-verdict winner. Id. at 326. We adhere to *Neely's* holding and rationale. . . .

Id. at 456-457 (parallel citations omitted). *Weisgram* thus again decoupled the question of the need for a new trial from the renewal of a pre-verdict motion under Rule 50(b).

The Solicitor General argues that "a strong *stare decisis* effect" requires a holding that a renewal under Rule 50(b) is necessary to preserve any right of appeal. (Amicus Br. 20.) This argument is erroneously based not only on the trilogy, but on the Advisory Committee's Note to the 1963 amendment to Rule 50 that states: "[t]he amendments do not alter the effects of a jury verdict or the scope of appellate review." Fed. R. Civ. P. 50 advisory committee's note on 1963 amendment. However, in 1963, there was already a split among the circuits. The rule followed by the Federal Circuit in this case had been adopted in the Tenth Circuit and other circuits, and, indeed, appears to have been the majority rule at the time.[19] There is no reason to conclude that the 1963

[19] *See, e.g., Hansen*, 237 F.2d at 454 (appellate power limited to remand for new trial upon finding evidence insufficient); *Brown v. Alkire*, 295 F.2d 411, 414 (10th Cir. 1961); *Dunlop Tire and Rubber Corp. v. Thompson*, 273 F.2d 396, 401 (8th Cir. 1959) (same rule); *Local 978 United Bhd. of Carpenters & Joiners v. Markwell*, 305 F.2d 38, 48 (8th Cir. 1962) (dictum; same); *Yorkshire*, 252 F.2d at 657-58 (in light of the trilogy, in the absence of a Rule 50(b) motion "the case must be remanded for what under the circumstances would appear to be the useless formality of another trial") (quoting *Garman v. Metro. Life Ins. Co.*, 175 F.2d 24, 28 (3d Cir. 1949)); *Union News*, 295 F.2d at 667; *Guarnieri*, 270 F.2d at 580; *see also* cases cited *supra* note 16; *but see American Paint Svc. v. Home Ins. Co. of N.Y.*, 246 F.2d 91, 93 (3d Cir. 1957) ("American did not renew its motion after the jury's verdict as it was required to do in order for this Court to pass on the legal sufficiency of the evidence."); *Mickey v. Tremco Mfg. Co.*, 226 F.2d 956, 957 (7th Cir. 1955) (untimely motion for JNOV and new trial precludes appellate review of the same).

amendment was intended to choose one pre-existing interpretation of the rule over another. Certainly, the quoted comment indicates that the 1963 amendment was not intended to change the decisions in the cases of the trilogy, all of which were remanded for retrial.

The Solicitor General also argues that there are procedures for amending the Rules of Civil Procedure and that those procedures should be followed if the rules are to be changed. (Amicus Br. 25.) It is, however, the Solicitor General and Unitherm who want to change the rules by "interpretation." ConAgra advocates following the rules as written, there being nothing in Rule 50(b) that conditions the right of appeal on the post-verdict renewal of a Rule 50(a)(2) motion.

E. Rule 50(b) Should Be Interpreted As Written.

Neely and *Weisgram* have rejected the logical underpinnings of the trilogy. The question of whether to dismiss or remand to the district court for consideration of the possible need for a new trial now depends on the circumstances of the particular case, not the post-verdict renewal of a motion previously made. *Neely*, 386 U.S. at 325-26; *Weisgram*, 528 U.S. at 454-55. The unsound idea that a post-verdict renewal of a motion for JMOL somehow results in the trial judge passing on the need for a new trial has been abandoned. The trilogy continues, however, to distort the interpretation of Rule 50 to no good purpose, attaching an unwarranted importance to the renewal of a pending motion for JMOL.

The Tenth Circuit interpretation, which was followed here, permits review for sufficiency of the evidence and a remand to the district court, but does not permit a direction to enter judgment in the absence of a post-verdict Rule 50(b) motion. The Solicitor General agrees with

ConAgra that this practice is consistent with the trilogy. (Amicus Br. 24.) If this Court feels constrained by these precedents, this is the best alternative available. It would be better, however, to adopt a new interpretation, returning to the words of Rule 50 and recognizing that renewal after the verdict is not a prerequisite to a dismissal by an appellate court, and that all rights on appeal are fully preserved by a motion for JMOL under Rule 50(a)(2) at the close of all the evidence. This interpretation would also bring the practice into harmony with 28 U.S.C. § 2106 (an appellate court "may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.").[20]

The rule adopted in some circuits, that sufficiency of the evidence review is precluded on appeal unless a motion for JMOL has been made before the verdict and then renewed post-verdict, has little to recommend it. It imposes on litigants and the courts a need to engage in pointless formalities not required by the rules as written. It does violence to the rules, while failing to accomplish its purported objective.

II. If A Rule More Stringent Than That Of The Tenth Circuit Is Adopted, It Should Not Be Applied Retroactively In This Case.

This Court last considered whether to give a decision retroactive effect in *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97 (1993). *Harper* held that when a ruling by

[20] At minimum, of course, there should always be an exception where a party can show that a renewed motion after the verdict would have been futile. That was clearly the case here.

this Court is applied retroactively to the parties before it, that ruling must be applied in all open cases.[21] There were five opinions in *Harper*. All but Justice Scalia's concurring opinion at least implicitly recognized that not every rule of law announced by this Court should have retroactive effect. The Court divided mainly on the question of how to determine whether a particular ruling should be applied retroactively in other cases. Justice Kennedy, joined by Justice White, said that sometimes a rule should be applied only prospectively "'to avoid injustice or hardship to civil litigants who have justifiably relied on prior law.'" *Id.* at 109 (quoting *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 197 (1990)). Justice O'Connor's dissent, joined by the Chief Justice, said: "[W]hether a decision will be nonretroactive depends on whether it announces a new rule, whether prospectivity would undermine the purposes of the rule, and whether retroactive application would produce injustice." *Id*. at 113-14.

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), followed by some Justices in *Harper*, held that the interpretation of a statute of limitations announced in an earlier case should not be applied retroactively. *Chevron* sets forth three factors to be considered in this regard. *Id*. at 106. All three confirm that a decision in this case should not be applied retroactively. *First*, would the decision establish a "new principle of law . . . by overruling clear precedent on which litigants may have relied . . . ?" *Id*. at 106. In this case, it would not. The Tenth Circuit rule was well-settled and followed this Court's precedent in the trilogy. *Second*, would prospective application "further or retard [the]

[21] Eight justices joined in Part II of this opinion, which is the relevant part for present purposes.

operation" of the rule in question? *Id.* at 106-07. Prospective application would not retard operation of a new rule because very few cases will be exempted from the rule. *Third*, would non-retroactivity result in "injustice or hardship"? *Id.* at 107. It would not. Unitherm knew the basis for ConAgra's motion and was not prejudiced in any way. (J.A. 15a-22a, 139a-143a, 148a-152a.)

American Trucking, *supra*, applied the three *Chevron* factors to determine whether a decision that a state tax law was unconstitutional should be applied retroactively. This Court held that it should not because "state tax collecting authorities would have been justified in relying on state enactments valid under then-current precedents of this Court. . . . " 496 U.S. at 182. The state was, therefore, allowed to keep tax revenues to which it was not constitutionally entitled. The case for non-retroactivity is stronger here. ConAgra does not seek to keep anything that rightfully belongs to Unitherm.

This case differs from this Court's leading precedents on retroactivity in that the issue here is purely procedural. If any rule should be applied prospectively only, a procedural rule should fall in that category. When it comes to matters of trial procedure, the litigants must be able to rely on the law of the circuit where the case is tried. Otherwise, trials would be chaotic and prolonged. Counsel would be compelled to take positions called for under the law of *any* circuit, or any law that might be announced in the future when, for example, laying foundations for evidence, objecting to jury instructions, proposing jury instructions, and excusing jurors. Any formality required anywhere would be observed in every case for fear that, in the future, it might be recognized as a requirement in all cases.

Moreover, prospective application of the rule announced in this case would not violate the distinction between the judicial and legislative power, a concern that has been raised in earlier cases. *See Harper,* 509 U.S. at 108 (Scalia, J., concurring) (prospective decision-making has been criticized as "remov[ing] 'one of the great inherent restraints upon this Court's depart[ing] from the field of interpretation to enter that of lawmaking'"). Where, as here, the rule at issue concerns solely a matter of trial procedure, there is no reason why the Court should not engage in lawmaking by announcing a "new" rule to be applied only to future cases. As the Solicitor General recognizes, regulation of purely procedural matters is delegated to this Court by Congress under 28 U.S.C. § 2072(a). (Amicus Br. 25) (citing *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9 (1941)). This Court has recognized that its own powers include the power to both promulgate and interpret the Rules. *See Miss. Pub. Corp. v. Murphree*, 326 U.S. 438, 444 (1946) ("The fact that this Court promulgated the [Rules] as formulated and recommended by the Advisory Committee does not foreclose consideration of their validity, meaning or consistency.") While Congress has the power to take action to alter or reject a rule promulgated by the Supreme Court, it has never done so with respect to Rule 50(b) or its proposed and actual amendments. A rule governing a matter of pure trial procedure would not overstep the bounds of the Court's powers.

Accordingly, if this Court were to announce a rule that is stricter than the well-settled Tenth Circuit rule that governed the trial below, that rule should not apply retroactively to deprive ConAgra of its right to appeal. To do so would work a substantial injustice on ConAgra, particularly since the rule ConAgra relied on was consistent with this Court's own precedents.

III. ConAgra's Rule 50(A) Motion Was Sufficient.

Unitherm goes well beyond the scope of its own petition for certiorari and this Court's grant of that petition by attacking the sufficiency of ConAgra's *pre-verdict* motion for JMOL under Rule 50(a). (Pet'r Br. 38.) The Federal Circuit rejected this argument twice, first in its opinion and again when it denied Unitherm's petition for rehearing. (Pet'r App. 50a n.7, 55a-56a.) In any event, ConAgra's JMOL motion was more than sufficient to preserve the district court's error in permitting the jury to decide the antitrust claim.

Unitherm's argument seems to be that, even though the basis for ConAgra's motion had been explained in detail in its summary judgment motion (J.A. 139a-143a) and pre-trial brief (J.A. 148a-152a), and the motion itself was made properly at the close of plaintiff's case and after close of all the evidence (J.A. 15a-22a), the motion was nevertheless defective because the grounds for the motion were not repeated when the motion was made orally. (Pet'r Br. 4-5.) Unitherm ignores that the motion was expressly stated to be based on the same grounds previously argued, that ConAgra sought permission to argue the motion again "for the record," and that the trial judge cut off debate and denied the motion. (J.A. 22a.) No more was required.

The purpose of Rule 50(a) is served when the trial judge and the parties understand the asserted evidentiary deficiencies, whether from the motion itself, other portions of the record, or earlier filed briefs.[22] Further, where the

[22] *Gaus v. Conair Corp.*, 363 F.3d 1284 (Fed. Cir. 2004) (en banc) (defendant's "terse – even cryptic" statement of grounds for JMOL was sufficient where issues were briefed in summary judgment motion); *Lynch v. City of Boston*, 180 F.3d 1, 13 n.9 (1st Cir. 1999) (issue briefed

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details of a motion are offered "for the record," but are not stated because the trial judge declined to allow the argument, the movant should not be held responsible or penalized. *See Motorola, Inc. v. Interdigital Tech. Corp.,* 930 F.Supp. 952, 960 (D. Del. 1996), *aff'd in part, rev'd in part*, 121 F.3d 1461 (Fed. Cir. 1997).[23] Finally, where the plaintiff could not have augmented its proof in any event, no prejudice results from a motion that is stated in general

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in summary judgment motion, pre-trial memorandum, and with respect to special verdict forms); *Wimmer v. Suffolk County Police Dept.*, 176 F.3d 125, 136 (2d Cir. 1999) (motion sufficient "when viewed in context of the entire colloquy" and where "defense counsel moved for summary judgment on same ground"); *Acosta v. Honda Motor Co.*, 717 F.2d 828, 832 (3d Cir. 1983) ("despite the imprecision" of 50(a) motion, "plaintiff's counsel and the court understood and responded to defendants' counsel as well as if he had been more specific at the time"); *Nat'l Indus., Inc. v. Sharon Steel Corp.,* 781 F.2d 1545, 1549 (11th Cir. 1986) (basis of motion argued as part of request for jury instruction); *Battle v. Mem. Hosp. at Gulfport*, 228 F.3d 544, 550 n.1 (5th Cir. 2000) (issue briefed in summary judgment motion); *Lewis v. Nelson,* 277 F.2d 207, 209 (8th Cir. 1960) (trial court understood that motion was directed to absence of evidence that defendant drove on wrong side of the road); *Railway Express Agency v. Epperson,* 240 F.2d 189, 193 (8th Cir. 1957) (50(a) motion sufficiently specific because "the trial judge knew what counsel was driving at;" motion denied on its merits).

[23] In *Motorola*, the defendant's motion stated: " 'Your Honor, for the record, we do move for judgment as a matter of law in connection with the declaratory judgment claims filed by Motorola.' " *Id*. at 961. The trial judge rejected Motorola's argument that this motion was not sufficiently specific:

> The Court made clear that it *did not require or desire additional argument at the time the motion was made*, and it would be unfair to penalize [defendant] for acceding to the Court's wishes. The Court will rule on [defendant's Rule 50(b)] JMOL motion.

Id. (emphasis added). The grant of JMOL was affirmed on appeal. 121 F.3d at 1474.

terms. *See Anderson v. United Tel. Co. of Kansas*, 933 F.2d 1500, 1504 (10th Cir. 1991).

When ConAgra made its Rule 50(a) motion, everyone involved understood what ConAgra asserted as the fatal evidentiary defects in Unitherm's antitrust case. (J.A. 15a-16a, 22a, 139a-143a, 148a-152a; R. A2893.) ConAgra had briefed the absence of evidence of a properly defined relevant market and the absence of competition between the parties in its motion for summary judgment and in its pre-trial brief. (*Id.*) Nothing had changed. The trial judge's comments on the record showed that she understood the bases for ConAgra's motion and intentionally limited what she regarded as repetitious argument. On the first day of trial, the court indicated that argument on JMOL motions would be very restricted, if permitted at all, because "I can almost anticipate what your arguments are going to be at this point" (J.A. 153a), and she indicated that she would only hear argument on motions she was inclined to grant. (*Id.*) When ConAgra moved for JMOL at the conclusion of Unitherm's case-in-chief, the court limited ConAgra to "five-minutes or less of argument" as to all causes of action. (J.A. 16a.) When ConAgra moved for JMOL at the close of all the evidence on "each of the three causes of action that the plaintiffs have brought," the district court once again cut argument short after confirming that the motion was "on the same basis [ConAgra] argued *earlier*[.]"[24] (J.A. 22a) (emphasis added). The trial court and Unitherm thus knew the bases of ConAgra's motion. ConAgra's motions, read in context of the entire record, fulfilled the purposes of Rule 50(a).

[24] This reference to earlier arguments had to be a reference to the pre-trial briefs and other written arguments, not the oral motions at the close of Unitherm's case-in-chief. *See supra* note 6.

IV. Since Unitherm Presented No Evidence Of Antitrust Liability, It Was Plain Error To Allow The Jury To Decide That Issue.

If the Court interprets Rule 50(b) to require a renewed motion to preserve sufficiency of the evidence for appeal, and applies that interpretation retroactively, then an important question remains: Should ConAgra prevail based on plain error? The Federal Circuit did not consider plain error because it reversed for insufficiency of the evidence. Therefore, if the Court does not rule for ConAgra on other grounds, it should either review for plain error or remand that issue to the Federal Circuit to consider in the first instance.

Even where a party has made *no* motion for JMOL, appellate courts review the record for plain error.[25] This Court's rules also permit plain error review. Sup. Ct. R. 24.1(a) ("At its option . . . the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide.") The district court committed plain error here.

A plain error is one so serious that failure to notice and correct it would work a manifest injustice.[26] In Rule 50

[25] *See, e.g., Biodex,* 946 F.2d at 854 ("When no motion challenging the legal sufficiency of the evidence has been made at any stage in the district court, the law is uniform in all circuits that review is limited to plain error.") (citations omitted); 9 *Moore's Federal Practice* § 50.91[3], § 50.92[3] (3d ed. 2005) (collecting cases). Unitherm asks the Court to hold that "[i]f the loser of a jury trial fails to file a Rule 50(b) motion, the appellate court should not attempt to review for sufficiency of the evidence." (Pet'r Br. 40.) This would overrule a long line of cases holding that plain error review is available where no Rule 50(a) motion has ever been made at trial.

[26] Courts often describe "manifest injustice" as meaning errors that "seriously affect the fairness, integrity, or public reputation judicial

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cases, courts find manifest injustice where there is no evidence to support a jury's verdict. *See, e.g.*, *Russo v. New York*, 672 F.2d 1014, 1022 (2d Cir. 1982) (plaintiff's failure to prove element of claim is manifest injustice and hence plain error; "[w]here a jury's verdict is wholly without legal support, we will order a new trial in order to prevent manifest injustice. . . . ") (quoting *Sojak v. Hudson Waterways Corp*., 590 F.2d 53, 54-55 (2d Cir. 1978)); *Patel v. Penman*, 103 F.3d 868, 878 (9th Cir. 1996); *Zachar v. Lee*, 363 F.3d 70, 74 (1st Cir. 2004) (failure to comply with strictures of Rule 50 limits review to whether the record shows an "absolute dearth" of evidence to support the jury's verdict) (quoting *Davignon v. Clemmy*, 322 F.3d 1, 13 (1st Cir. 2003) and *Udemba v. Nicoli*, 237 F.3d 8, 13-14 (1st Cir. 2001)). As the Second Circuit pointed out in *Oliveras v. Am. Exp. Isbrandtsen Lines, Inc.*, 431 F.2d 814, 817 (2d Cir. 1970), "[t]o rule that an unintended flaw in procedure bars a deserving litigant from any relief is an unwarranted triumph of form over substance, the kind of triumph which . . . we strive now to avoid whenever possible."[27]

There was plain error here because there is *no* evidence to support Unitherm's antitrust claim. Moreover, the triumph of form over substance would be particularly acute because ConAgra raised the issue in the district court and complied with clear Tenth Circuit law to preserve it for appeal.

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proceedings." *See, e.g., Glenn v. Cessna Aircraft Co.*, 32 F.3d 1462, 1464 (10th Cir. 1994). Here, the fairness of the proceedings below would be seriously impaired.

[27] *See also Bristol Steel & Iron Works, Inc. v. Bethlehem Steel Corp.*, 41 F.3d 182, 187 (4th Cir. 1994); *Flintco*, 143 F.3d at 964.

Unitherm argues a different standard by citing authorities involving criminal cases, (*United States v. Olano*, 507 U.S. 725 (1993); *Johnson v. United States*, 520 U.S. 461 (1997); (Fed. R. Crim. P. 52(b)), failure to object to jury instructions (*Royal Maccabees Life Ins. Co. v. Choren*, 393 F.3d 1175, 1181 (10th Cir. 2005); Fed. R. Civ. P. 51(d)(2)), or failure to object to evidence introduced at trial (21 Charles A. Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5043 (1977); Fed. R. Evid. 103(d)). (Pet'r Br. 30-32.) Those authorities from other contexts are inapplicable on their face, and in all of them *no objection at all* had been made before the case was submitted to the jury. As the First Circuit explained, a party who fails to object to a jury instruction should not be rewarded on appeal from an unfavorable verdict:

> [A] litigant who accedes to the form of a special interrogatory will not be heard to complain after the fact. . . . If a slip has been made, the parties detrimentally affected must act expeditiously to cure it, not lie in wait and ask for another trial when matters turn out not to their liking.

Anderson v. Cryovac, Inc., 862 F.2d 910, 918 (1st Cir. 1988) (citations omitted). It is for this reason that "[t]he plain error standard, high in any event . . . is near its zenith in the Rule 51 milieu." *Toscano v. Chandris, S.A.*, 934 F.2d 383, 385 (1st Cir. 1991).

Similar reasoning applies where a party fails to raise evidentiary objections at trial. Thus, Unitherm cites *McEwen v. City of Norman*, 926 F.2d 1539, 1545 (10th Cir. 1991) to support its contention that plain error should be found only rarely. (Pet'r Br. 30.) But that case involved repeated failures to object to expert testimony that was arguably admissible and was subject to the trial court's

discretion in any event. *McEwen*, 926 F.2d at 1545-46. In such circumstances, and given the uncertain effect of an alleged error on a jury's deliberations,[28] appellate courts properly are reluctant to reverse for "plain" errors in evidentiary rulings. Like objections to jury instructions, objections to inadmissible evidence should be made at trial so the court can prevent error or caution the jury when it does, and to afford the party offering the evidence the opportunity to bolster its case by other means.

In contrast, ConAgra raised the issue no less than four times before the case went to the jury. (J.A. 15a-16a, 22a, 139a-143a, 148a-152a; R. A2893.) Where a party *has* moved at trial, and both the trial court and its opponent had notice of the evidentiary deficiencies complained of, and there was opportunity to correct the deficiencies or any error, there is little, if any, reason to withhold plain error review. A motion for JMOL *at the close of all evidence* serves Rule 50's aims to prevent "gambling on the verdict" and to eliminate unnecessary retrials.[29] ConAgra's Rule

[28] In *Olano*, which Unitherm also cites (Pet'r Br. 31), this Court held that allowing alternate jurors to attend deliberations was not plain error because the respondent did not show that the alternates participated in deliberations or had a chilling effect on the process. 507 U.S. at 739, 741. In contrast, allowing a verdict supported by no evidence to stand is plainly prejudicial.

[29] *See* Fed. R. Civ. P. 50(a) advisory committee note on 1991 amendment. ("The purpose of this requirement is to assure the responding party an opportunity to cure any deficiency in that party's proof that may have been overlooked until called to the party's attention by a late motion for judgment."); Memorandum from Lee H. Rosenthal, Chair, Advisory Committee on Federal Rules of Civil Procedure, to Hon. David F. Levi, Chair, Standing Committee on Rules of Practice and Procedure 109 (May 17, 2004, revised August 3, 2004) ("The earlier [Rule 50(a)] motion informs the opposing party of the challenge to the sufficiency of the evidence and affords a clear opportunity to provide additional evidence that may be available. The earlier motion also

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50(a) motion thus served both fairness and judicial economy, and plain error review is fully warranted.

The Federal Circuit reviewed the evidence Unitherm offered on its antitrust claim and found it not just insufficient as a matter of law, but wholly lacking:

> Unitherm never presented *any evidence* that could possibly support critical factual elements of its claim. In particular, Unitherm failed to present *any facts* that could allow a reasonable jury to accept either its proposed market definition or its demonstration of antitrust injury . . . .

(Pet'r App. 2a) (emphasis added). Therefore, "[t]he district court erred . . . in allowing the jury to decide Unitherm's antitrust claims despite the *total absence of economic evidence* capable of sustaining those claims." (*Id*.) (emphasis added).[30]

In the absence of *any* evidence to show a relevant antitrust market or antitrust injury, it was plain error and manifestly unjust to allow Unitherm an $18,000,000

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alerts the court to the opportunity to simplify the trial by resolving some issues, or even all issues, without submission to the jury."); *Benson v. Allphin*, 786 F.2d 268 (7th Cir. 1986), *cert. denied*, 479 U.S. 848 ("[T]he motion for directed verdict at the close of all the evidence provides the nonmovant an opportunity to do what he can to remedy the deficiencies in his case.").

[30] It is therefore untrue that the Federal Circuit's review of the evidence for antitrust liability "was not moored to any ruling admitting or excluding evidence or any grant or denial of a jury instruction, or to any ruling whatever made by the trial court." (Pet'r Br. 33, 36.) It was "moored to" the trial court's denial of ConAgra's timely motion for JMOL. Moreover, plain error review is proper even where *no* motion for JMOL has been made. *See, e.g.*, *Biodex*, 946 F.2d at 854; Sup. Ct. R. 24.1(a).

windfall for antitrust injury it never proved.[31] *See Oliveras*, 431 F.2d at 817; *Russo*, 672 F.2d at 1022. As the Federal Circuit put it, "if . . . Unitherm provided economic evidence insufficient to convince any reasonable jury that ConAgra's enforcement of the '027 Patent harmed a relevant antitrust market, the antitrust claims should never have reached the jury." (Pet'r App. 46a.)

Unitherm tries to avoid the plain error rule by arguing that sufficient evidence supported its antitrust claim. (Pet'r Br. 33-38.) This flies in the face of the Federal Circuit's analysis and findings. The court found that Unitherm failed to produce *any* evidence that could support three of the essential elements of antitrust liability for attempt to monopolize, namely, proof of a relevant geographic and product market, proof of a dangerous probability of success in monopolizing the relevant market, and proof that the attempt to monopolize injured Unitherm. (Pet'r App. 45a, 49a.) It noted that instead of producing economic evidence defining a relevant market, Unitherm's expert erroneously defined the market in terms of technological substitutability, not economic substitutability, and took the untenable position that it was coterminous with the '027 Patent. (*Id.* at 46a-47a.)[32]

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[31] Unitherm claims that "[o]ne can hardly find manifest injustice where ConAgra intentionally defrauded a federal agency, the United States Patent Office, to obtain the '027 Patent." (Pet'r Br. 33.) But fraud on the Patent Office is just the threshold requirement of a *Walker Process* claim. One can and should find manifest injustice where a plaintiff offers no evidence to support its claim, but nevertheless obtains a jury verdict for millions of dollars.

[32] Unitherm says the technology substitution point was "uttered for the first time [by the judge] at oral argument [on appeal]." (Pet'r Br. 9, n.11.) This is misleading. The point did not raise a new issue on appeal,

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The Federal Circuit also noted that the expert "testified that he was unaware of anyone who had ever sold the process that defined his relevant market – other than tied to the sale of an oven," and "steadfastly refused to clarify the relationship among the market for the specific browning process that he had identified, the market for browning processes generally, and the market for ovens that enabled their owners to use either the specified browning process or browning processes more generally." (*Id.* at 48a.) He also "testified to a lack of knowledge as to whether or not the bundling of the identified process with an oven bore any relation to the prices charged for enabling ovens." (*Id*.) Thus, Unitherm's expert could not identify *any* transaction in the claimed relevant market.

The Federal Circuit also pointed out Unitherm's failure to show causation, "a critical element needed to show antitrust injury. . . . " (*Id*. at 49a.) Its damages experts never "differentiate[d] harm attributable to ConAgra's [alleged] *antitrust* liability from harm attributable to other allegations for which ConAgra might be liable." (*Id*.) Nor did either expert "try to differentiate between ConAgra's liability and other potential causes of the [claimed] losses. . . . " (*Id*.) The Federal Circuit summarized and concluded:

> In short, Unitherm failed to present *any* economic evidence capable of sustaining its asserted relevant antitrust market, and little to support any other aspect of its Section 2 claim. Unitherm has presented conclusory testimony from its expert that defines the market as coterminous with

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but simply explained *why* Unitherm's evidence was insufficient. (Pet'r App. 48a.) No rule forbids a court from explaining its holding.

> the patent based entirely on issues of *technical* [not economic] substitutability, described no market analysis, inferred market power from the possession of a patent, tautologically equated unsuccessful attempts at collecting royalties with a dangerous probability of success, and inferred antitrust injury from economic loss. ConAgra is correct in asserting that Unitherm failed to provide *any* evidence capable of sustaining the jury's finding of antitrust liability.

(Pet'r App. 50a) (emphasis added).

That analysis describes plain error in the Rule 50 context.[33] Although this Court may notice and correct plain error, at a minimum, the case should be remanded to the Federal Circuit to perform a plain error review should the Court rule against ConAgra on Rule 50(b) and retroactivity.

CONCLUSION

Judgment should be entered for ConAgra on the antitrust claim and the case should be remanded for entry of judgment against ConAgra only on the intentional interference cause of action at most. If the Court adopts Unitherm's proposed interpretation of Rule 50(b), the

[33] *See* discussion *supra* at p. 43. Indeed, there is plain error even under the analysis applied in cases like *Olano*, 507 U.S. at 725 and *Johnson*, 520 U.S. at 461. The applicable antitrust law is clear and well-established, yet the trial court allowed Unitherm to prevail with *no* evidence of a relevant market, of a dangerous likelihood of monopolization of the purported market, or of causation. Thus the errors were clear. The damage award of $18,000,000 in trebled damages is prejudicial and affects substantial rights, and allowing the award to stand would be a manifest injustice, especially where the defects in proof were repeatedly brought to the trial court's attention.

Court should either apply the new rule prospectively, or conduct plain error review. In either case, the Court should remand to district court.

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