Nos. 12-10492, 12-10493, 12-10500, 12-10514

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

United States of America,

Plaintiff-Appellee,

v.

AU Optronics Corporation,

Defendant-Appellant.

United States of America,

Plaintiff-Appellee,

v.

AU Optronics Corporation America,

Defendant-Appellant.

United States of America,

Plaintiff-Appellee,

v.

Hui Hsiung,

Defendant-Appellant.

United States of America,

Plaintiff-Appellee,

v.

Hsuan Bin Chen,

Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of California, No. 3:09-cr-0110-SI
Hon. District Judge Susan Illston

BRIEF OF CORNING INCORPORATED AND APPLIED MATERIALS, INC. AS AMICI CURIAE IN SUPPORT OF DEFENDANTS-APPELLANTS' PETITIONS FOR REHEARING EN BANC

Steven C. Sunshine
Sean M. Tepe
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Ave., N.W.
Washington, D.C. 20005
(202) 371-7000 (telephone)
(202) 393-5760 (facsimile)
steven.sunshine@skadden.com

Counsel for the Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Amici make the following statements per Federal Rules of Appellate Procedure 29(c)(1) and 26.1.

Amicus Curiae Corning Incorporated hereby states that it has no parent corporation and that there is no publicly held corporation that owns 10% or more of its stock.

Amicus Curiae Applied Materials, Inc. hereby states that it has no parent corporation and that there is no publicly held corporation that owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

INTEREST OF THE AMICI CURIAE

Amicus Curiae Corning Incorporated is a world leader in the manufacture of specialty glass and ceramics and operates in five business segments: Display Technologies, Optical Communications, Environmental Technologies, Specialty Materials and Life Sciences. Corning is a supplier to Petitioner AU Optronics Corp. Corning is a global company that operates in over 100 countries and maintains manufacturing facilities in 15 countries, with multiple facilities in many countries outside the U.S., including China, Taiwan, Mexico and Germany.

Amicus Curiae Applied Materials, Inc. is the leading supplier of manufacturing equipment, services and software to the global semiconductor, flat panel display, solar photovoltaic and related industries. Applied operates in four business segments: Silicon Systems Group, Applied Global Services, Display, and Energy and Environmental Solutions. Applied is a supplier to Petitioner AU Optronics Corporation. Applied is a global company with business locations in 18 countries and sales predominantly outside the United States.

Amici are subject to numerous countries' trade laws and regulations and can offer the Ninth Circuit their perspective as U.S.-domiciled corporations subject to the competition laws of other countries. Amici believe courts must carefully consider each effort to apply U.S. antitrust law to foreign conduct so as to

ensure such efforts are consistent with the limited reach of the Sherman Act and provide clear and consistent precedent to guide businesses in international transactions. Amici believe the Panel's opinion in the above-captioned matters falls short of this standard in certain respects, and therefore supports the petitions for en banc rehearing submitted by corporate Defendants AU Optronics Corp. and AU Optronics Corp. America, and individual Defendants Hui Hsiung and Hsuan Bin Chen, respectively (Dkt Nos. 91 (12-10500) and 98 (12-10492)).

In accordance with Fed. R. App. P. 29(a), Amici state that all parties consented to the filing on this brief.

The law firm of Skadden, Arps, Slate, Meagher & Flom LLP assisted Amici in the preparation of this brief. No party's counsel participated in writing this brief in whole or part. No party or party's counsel contributed money to the preparation or submission of the brief. No person other than the Amici contributed money that was intended to fund preparing or submitting the brief.

REASONS FOR GRANTING EN BANC REVIEW

The Panel's opinion raises questions of exceptional importance concerning the reach of U.S. law to foreign conduct, including questions of first impression. The need for rehearing en banc is further supported by the fact that these questions arise at a time of greater complexity in global supply chains, increased litigation concerning the extraterritorial application of U.S. antitrust law,

and increased antitrust enforcement by other countries. Thus, even before considering the specific legal questions raised by the Panel's opinion, it is important to recognize the need for clarity and comity in this growing and complicated area of the law.

A. To Remove Uncertainty In the Extraterritorial Application of U.S. Law

Rehearing is warranted in order to clarify a variety of legal questions raised by the Panel's decision. The uncertainties created by the Panel's decision concerning the extraterritorial application of U.S. antitrust law merit rehearing because the rise in global commerce has made this issue a more important and frequent subject of judicial consideration and because Congress explicitly sought through the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a, to bring clarity to the extraterritorial application of U.S. antitrust law.

As the Supreme Court recognized, "the FTAIA's language and history suggest that Congress designed the FTAIA to clarify . . . the Sherman Act's scope as applied to foreign commerce." *F. Hoffmann–La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 169 (2004). Congress stated that the "ultimate purpose" of the FTAIA "is to promote certainty in assessing the applicability of American antitrust law to international business transactions and proposed transactions." H.R. Rep. No. 97-686 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2494. Congress believed that "no legitimate purpose is served by perpetuating uncertainty"

regarding the "fundamental question" of the extraterritorial reach of U.S. antitrust law because "international trade plays an immense and increasingly important role in the economy." *Id*. at 2491.

More than 30 years later, international trade is at the heart of the U.S. economy. A single product can have a global supply chain spanning multiple continents and numerous countries.[1] As such, the promotion of certainty in the application of U.S. antitrust law to international and foreign commercial conduct is all the more important. Indeed, along with the rise in global commerce, there has been a marked increase in litigation over the meaning of the FTAIA and its application to foreign conduct and commerce. Under these circumstances, and in light of Congress's goal of promoting clear standards in this area of the law, the uncertainties raised by the Panel's decision and discussed below deserve rehearing en banc and closer review.

B. To Ensure the Reach of U.S. Antitrust Law is Reasonable and Consistent with Principles of Comity

Rehearing is also warranted to ensure that the application of U.S. antitrust law does not interfere with or proceed inconsistent with the antitrust enforcement of foreign nations.

---

[1] *See, e.g.*, Dick K. Nanto, Cong. Research Serv., *Globalized Supply Chains and U.S. Policy* (Jan. 27, 2010), *available at* http://assets.opencrs.com/rpts/R40167_20100127.pdf (visited Sept. 3, 2014).

The Supreme Court has warned that the extraterritorial application of U.S. law "can interfere with a foreign nation's ability independently to regulate its own commercial affairs." *Empagran*, 542 U.S. at 165. Thus, the Court interpreted the FTAIA in that case "consistent with principles of prescriptive comity" so as "to avoid unreasonable interference with the sovereign authority of other nations." *Id.* at 164, 165. "Considering comity in this way is just part of determining whether the Sherman Act prohibits the conduct at issue." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting). In contrast, and despite the conduct and commerce at issue here being almost entirely foreign, it appears the Panel did not consider principles of comity in its opinion. The risk of interference resulting from the Panel's decision counsels in favor of granting rehearing en banc.

This is not a hypothetical concern. In a parallel civil case arising from the same allegations in this matter, *Motorola Mobility LLC v. AU Optronics Corp.*, No 14-8003, the governments of the Republic of China, Taiwan and South Korea made amicus submissions before the Seventh Circuit (and Japan weighed in before the district court). The Korea Fair Trade Commission requested that the reach of U.S. law "be applied with care" because expansive applications are "likely to create conflicts with the sovereignty of other countries . . . and interfere with their antitrust enforcement," including their own leniency programs. KFTC Br. at 2-4

(Dkt. No. 42). Similarly, Taiwan's Ministry of Economic Affairs wrote that "expansive extraterritorial application of US law would undermine principles of international comity." MEA Letter (Dkt. No. 45).

The potential for conflict grows as the number of countries implementing antitrust laws increases and as those countries become more assertive in applying their own laws. One published account claims that "more than 115 countries now have antitrust regimes in place."[2]

That same article highlights that extraterritorial antitrust enforcement by other countries is on the rise. In briefing before the Seventh Circuit in *Motorola*, the United States government confirmed this fact: "[T]he extraterritorial application of antitrust laws on the basis of effects on a country's own commerce is now accepted by many jurisdictions." Supp. Amicus Br. at 7 (Dkt. No. 57) (citing instances of countries engaging in extraterritorial enforcement). In this environment, it is not simply a matter of whether the application of U.S. law is overly expansive and constitutes interference in another country's domestic enforcement. There is a separate but related concern about consistency among nations in their application of extraterritorial enforcement. Therefore, if "domestic effects" has become the accepted basis for extraterritorial enforcement, then it is

[2] John Terzaken, *Antitrust Enforcement Goes Global*, Reuters, Nov. 22, 2013, *available at* http://blogs.reuters.com/great-debate/2013/11/22/antitrust-enforcement-goes-global/ (visited Sept. 2, 2014).

critical that U.S. courts likewise find the existence of domestic effects before applying U.S. law to foreign conduct. Here, however, the Panel did not affirm the convictions under the FTAIA's direct effects test, and there is some question as to whether there was sufficient evidence of any effects on U.S. commerce from AUO's purported, but disputed, import conduct. Maintaining a prosecution without sufficient effects on U.S. domestic commerce would be inconsistent with how other countries enforce their antitrust laws extraterritorially.

In addition, there is a concern that enforcement actions in the U.S. against foreign defendants creates precedent for foreign jurisdictions to initiate enforcement actions against U.S. companies. This is not an argument against enforcing U.S. law; rather, it is an argument in favor of the careful and well-articulated application of U.S. law.

In sum, because expansive U.S. extraterritorial enforcement creates a risk of interference with other nations' domestic enforcement and of inconsistent application in extraterritorial enforcement, rehearing en banc is warranted to ensure that the Panel's ruling is within the reasonable limits of the Sherman Act and properly applies legal precedent.

C. To Clarify Questions of Exceptional Importance Raised by the Panel Decision

1. Scope of the FTAIA import commerce provision

The Panel affirmed Defendants' convictions based on a finding that Defendants engaged in "import trade or commerce," but it appears the Panel did not give that clause the "strict construction" necessary to give meaning to the FTAIA's "direct effects" test. *Animal Science Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 470 (3d Cir. 2011).

The term "import commerce" appears twice in the very brief statute but is not defined by the FTAIA. The term first appears in the FTAIA's introductory clause setting forth that conduct "involving" import commerce is excluded from the reach of the FTAIA's limitations. It appears again as part of the exception clause, wherein the FTAIA's limitations are made inapplicable to foreign conduct having a "direct, substantial, and reasonably foreseeable effect on . . . import trade or commerce with foreign nations." 15 U.S.C. § 6a(1)(A). The Third Circuit explained that the introductory exclusion clause and the exception clause must be read in harmony: "[T]he FTAIA differentiates between conduct that 'involves' [import] commerce, and conduct that 'directly, substantially, and foreseeably' affects such commerce. To give the latter provision meaning, the former must be given a relatively strict construction." *Carpet Group Int'l, v. Oriental Rug Importers Ass'n*, 227 F.3d 62, 72 (3d Cir. 2000).

Giving the latter provision meaning is crucial because Congress enacted the FTAIA to create a "single, objective test – the 'direct, substantial, and reasonably foreseeable effect' test" to serve as a "clear benchmark" for the application of U.S. antitrust law to foreign commercial conduct. H.R. Rep. No. 97-686 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487-88. Anything less than a strict construction of the introductory clause would enable a greater range of conduct to avoid the effects test, thereby vastly increasing the scope of foreign conduct subject to the Sherman Act and undermining the function of the FTAIA. Moreover, reliance on the import commerce provision, where a domestic effect is presumed but not actually found, risks creating inconsistencies with other nations that require a domestic effect for extraterritorial enforcement. *See* Part B, *supra*.

Here, the Panel endorsed the interpretation of import commerce as conduct involving "transactions between the foreign defendant producers of TFT-LCDs and purchasers located in the United States,"[3] yet the jury instruction is arguably broader than that definition. The jury instruction asks whether members of the conspiracy engaged in "fixing the price of TFT-LCD panels targeted by participants to be sold in the United States or for delivery to the United States."

[3] Amici assume the "transactions" involve "direct importation" of price-fixed LCD panels, although this is not entirely clear where the Panel refers to the "direct importation of foreign goods" more generally. Slip Op. at 33 n. 7.

On its face, the instruction is not limited to conduct that directly (or actually) involved LCD panel import commerce.

With regard to the sufficiency of the evidence, Petitioners dispute the Panel's finding that AUO imported any price-fixed panels. This creates a question about the factual accuracy of the Panel's import commerce ruling. Furthermore, the Panel cited evidence that "AUOA executives and employees negotiated with United States companies in the United States to sell TFT-LCD panels at the prices set at the crystal Meetings," but it is not clear whether those negotiations involved LCD panels that were sold and imported directly into the U.S. or sold and shipped in foreign countries. Sales and shipments within or between foreign countries would not satisfy the import commerce provision.

Amici support rehearing on the above questions because there is a risk that the convictions were affirmed based on an overly expansive interpretation of the "import commerce" clause and/or insufficient evidence of import commerce. Such convictions would thus create significant uncertainty as to the reach of U.S. antitrust laws.

2. Application of the Hartford Fire test

The Panel held that the "other than import trade or commerce" language in the FTAIA's introductory clause acts to make such trade or commerce subject to the Sherman Act. Slip Op. at 31-32. The Panel also recognized that the

Supreme Court has held that the Sherman Act applies only to foreign conduct that "was meant to produce and did in fact produce some substantial effect in the United States." *Id*. at 15 (quoting *Hartford Fire*). Yet, the district court's jury instruction may have allowed the jury to convict without fulfillment of the *Hartford Fire* test, and the Panel's ruling appears to allow, at the very least, a conviction without a requirement that any effect be "substantial."

With respect to the jury instruction, the district court offered an alternative to the *Hartford Fire* test if "at least one member of the conspiracy took at least one action in furtherance of the conspiracy within the United States" (referred to as instruction "part A"). This alternative instruction was improper and would render *Hartford Fire* nugatory. The Panel appears to have agreed this was a flawed instruction, yet concluded part A "passes legal muster" because a different jury instruction required the jury to find Defendants "targeted" the United States, thereby "subsum[ing] intentionality" that is an element of the *Hartford Fire* test. Slip Op. at 17-19.

Assuming it is proper to cure one faulty jury instruction through another, the Panel's analysis reads the "substantial effect" element right out of the *Hartford Fire* test. It would be a tremendous expansion of U.S. law if foreign conduct that has a *de minimis* effect in the U.S. can be reached so long as that effect is intended. That would run counter to Judge Learned Hand's observation,

"[w]e should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States." *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 443 (2d Cir. 1945).

As explained above, Congress intended the FTAIA's direct effects test to be *the* gatekeeper governing the application of U.S. antitrust law to foreign conduct. For that to happen, the import commerce provision must be strictly construed to give effect to the remainder of the FTAIA. When the import commerce provision is not strictly construed, as appears to have been the case here, it is even more important that the *Hartford Fire* test be applied correctly. The Ninth Circuit should grant rehearing en banc to clarify the proper application of the *Hartford Fire* test to situations in which "import commerce" is found.

3. Scope of a defendant's legal liability when that defendant's conduct did not satisfy or only partially satisfied the elements of the FTAIA

The Panel concluded that the FTAIA is not a jurisdictional statute, but rather is "a component of the merits of a Sherman Act claim."[4] What the Panel did

[4] The Panel stated that the FTAIA is "a component of the merits of a Sherman Act claim involving *nonimport trade or commerce*" and "provides substantive elements under the Sherman Act in cases involving *nonimport trade with foreign nations*." Slip Op. at 26, 28 (emphases added). A further issue for clarification is whether the Panel intended to hold that the "import trade or import commerce" provision, which the Panel recognized elsewhere as a "provision of the FTAIA" introductory clause (30), is somehow not a

(cont'd)

not consider is how that holding affects the scope of a defendant's liability—here, criminal liability, although the FTAIA applies in civil cases as well—when that defendant's conduct did not satisfy or only partially satisfied the elements of the FTAIA. These may be issues of first impression, which would further support rehearing en banc.

According to Petitioners, AUO did not engage in import commerce of LCD panels. Petitioners further contend that the Panel affirmed Defendants' convictions based on the LCD panel imports of alleged co-conspirators. Given that the Panel declined to affirm Petitioners' convictions on the basis of the FTAIA's direct effects test, and if Petitioners' factual assertion is correct regarding its lack of LCD panel imports, then rehearing is necessary to clarify on what basis, if any, a defendant may incur criminal liability when that defendant's conduct fails to satisfy the FTAIA.[5] As a substantive element of a Sherman Act claim, the failure of proof on the FTAIA element should result in no liability. The Panel's ruling, if it stands, risks subjecting companies to prosecution for foreign conduct based on the unknown and unforeseen imports or domestic effects of another company.

(cont'd from previous page)

substantive element of a Sherman Act claim. None of the other Circuits to have ruled that the FTAIA is substantive has made a similar distinction.

[5] If the Panel employed vicarious liability, that should be clarified and the evidentiary basis for such liability articulated.

Again, this ruling would lead to significant uncertainty for any company as to whether U.S. laws would apply to its foreign transactions or agreements, and that uncertainty would contravene the intent of the FTAIA and could lead other governments to similarly extend their laws to U.S. transactions or agreements.

Even if Petitioners were engaged in some importation of LCD panels, there is a question regarding the appropriate scope of liability when most of the foreign conduct (approximately 99%) does not involve import commerce. The Panel affirmed Defendants' convictions only on the basis of evidence that "defendants engaged in import trade" or commerce. Slip Op. at 42. Petitioners, however, argue that sentencing was based on the other 99% of foreign conduct not covered by an FTAIA exception. The Court should clarify whether the scope of sentencing should be limited to Petitioners' import commerce.

Dated: September 4, 2014

Respectfully submitted,

/s/ Steve Sunshine
Steven C. Sunshine
Sean M. Tepe
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Ave., N.W.
Washington, D.C. 20005
(202) 371-7000 (telephone)
(202) 393-5760 (facsimile)
steven.sunshine@skadden.com

Counsel for the Amici Curiae

CERTIFICATE OF SERVICE

I certify that the foregoing Brief was filed with the Clerk for the USCA Ninth Circuit using the appellate CM/ECF system on September 4, 2014. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

/s/ Steve Sunshine
Steven C. Sunshine

CERTIFICATE OF COMPLIANCE

I certify, pursuant to Fed. R. App. P. 29(c)(7) and Circuit Rule 29-2(c)(2), that this brief complies with the applicable type-volume and type-face limitations. This brief is 14 pages and contains 3,091 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief was prepared with 14-point Times New Roman font in Microsoft Word 2010.

/s/ Steve Sunshine
Steven C. Sunshine