

13-2280-CV

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

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LOTES Co., LTD.,

Plaintiff-Appellant,

—against—

HON HAI PRECISION INDUSTRY Co., LTD, FOXCONN INTERNATIONAL HOLDINGS, LTD., FOXCONN ELECTRONICS, INC., FOXCONN (KUNSHAN) COMPUTER CONNECTOR Co., LTD., FOXCONN INTERNATIONAL, INC., AKA FOXCOMM INTERNATIONAL, INC.,

Defendants-Appellees.

—————
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the undersigned counsel for appellants Lotes Co., Ltd hereby certify as follows:

1. Plaintiff-Appellant Lotes Co., Ltd. states that it does not have any parent corporation.

2. No publicly held corporation holds 10 percent or more of the stock of Lotes Co., Ltd.

DATED: August 26, 2013

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I. PRELIMINARY STATEMENT

Plaintiff Lotes Co., Ltd. (“Lotes”) appeals the dismissal of its First Amended Complaint (“FAC”) against Defendants Hon Hai Precision Industry Co., Ltd., Foxconn International Holdings Ltd., Foxconn International, Inc., Foxconn Electronics, Inc. and Foxconn (Kunshan) Computer Connector Co., Ltd. (collectively “Defendants”) by the United States District Court for the Southern District of New York, Judge Shira A. Scheindlin, in *Lotes Co., Ltd. v. Hon Hai Precision Industry Co.*, Case No. 1:12-cv-7465 (SAS), 2013 WL 2099227 on May 14, 2013.

II. JURISDICTIONAL STATEMENT

This action arises under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2; Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26; and the Declaratory Judgment Act, 28 U.S.C. §§ 2201, 2202. Jurisdiction was conferred upon the district court by 28 U.S.C. §§ 1331, 1337 (federal question) and 15 U.S.C. §§ 1, 2, 15, 26. Plaintiff appeals to this Court from an Opinion and Order dated May 14, 2013 (the “Opinion”) and a final judgment entered May 20, 2013.¹ Plaintiff’s Notice of Appeal was timely filed on June 10, 2013. JA 283-84. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1291.

¹ Joint Appendix (“JA”) at 242-78.

III. STATEMENT OF THE CASE

Lotes is a foreign manufacturer of the new Universal Serial Bus (“USB”) 3.0 computer connector, a component made to a specification adopted by a United States standard-setting body. Lotes brought this case against five companies, including several “Foxconn” entities, that violated the antitrust laws through a classic and bare-fisted patent hold-up (or, perhaps more accurately, a patent ambush).² Defendants’ conduct has not only injured Lotes. Defendants have foreclosed competition generally, through a purposeful misuse of standards-setting in the United States, and with a directly related increase in prices paid by American consumers for electronic goods.

Lotes’s First Amended Complaint (“FAC”) details the three steps in Defendants’ strategy. First, Defendants incorporated their patents into the USB 3.0 standard during lengthy U.S.-based standard-setting activity, all based on Defendants’ promise to license necessary patent claims to other manufacturers on a royalty-free basis. But it is now clear that Defendants never intended to comply with

² See *Broadcom Corp. v. Qualcomm*, 501 F.3d 297, 310 (3d Cir. 2007) (“Inefficiency may be injected into the standard-setting process by what is known as ‘patent hold-up.’ An SDO [standards-determining organization] may complete its lengthy process of evaluating technologies and adopting a new standard, only to discover that certain technologies essential to implementing the standard are patented. When this occurs, the patent holder is in a position to ‘hold-up’ industry participants from implementing the standard. . . . They will have become ‘locked-in’ to the standard.”).

their obligations. Instead—as a Foxconn source stated to the trade press on February 23, 2010—with the “relevant patents” for the USB 3.0 in its possession, Foxconn expected to “monopolize [the] market,” which included a projected 2.5 billion USB 3.0 devices to be sold in 2015. FAC ¶ 52 (JA 50); FAC Exhs. D, D-1 (JA 102-07).

And that is precisely what Defendants did. Once competing manufacturers were locked in to the new USB 3.0 standard, Defendants directed their U.S. attorneys to refuse to license necessary claims. With this patent hold-up established, Defendants subsequently initiated overseas patent-infringement litigation against Lotes, combined with threats against Lotes’s customers and other market participants. The fruits of this ambush include increased prices on USB 3.0 connectors and, as a result, increased prices on the millions of consumer electronic devices sold in the United States that contain this critical technology. FAC ¶¶ 69, 72, 73 (JA 30-33).

Defendant’s patent ambush was as illegal as it was plain. The District Court’s dismissal of the FAC below, however, improperly gave Defendants immunity under the U.S. antitrust laws.

The District Court first determined—erroneously—that the relevant requirements of the Foreign Trade Antitrust Improvements Act (“FTAIA”) were jurisdictional, rather than elements of Lotes’s antitrust claim. JA 250-51, 260-63,

265. Accordingly, the District Court never accounted for the fact that Defendants expressly agreed to the application of U.S. antitrust laws by a federal court in New York. Next, without crediting the allegations of the FAC as true, the District Court found that the FTAIA barred Lotes's antitrust claims, on the ground that the harms alleged by Lotes lacked a sufficiently "direct, substantial, and reasonably foreseeable effect" on domestic commerce. JA 271-72.

The District Court then declined to exercise supplemental jurisdiction over Lotes's state-law claims, refused to give Lotes leave to amend (without a hearing or review of a proposed pleading), and granted Defendants' motion to dismiss in its entirety. This appeal followed.

IV. STATEMENT OF ISSUES PRESENTED FOR REVIEW

Lotes's appeal presents three main issues:

1. The FTAIA's Status as Jurisdictional Or Substantive. Under the Supreme Court's *Arbaugh* line of decisions, the limitations imposed in a federal statute are non-jurisdictional unless the statute "clearly states" otherwise. All Circuit Courts applying *Arbaugh* have held that the Foreign Trade Antitrust Improvements Act (FTAIA), which has no such language, is non-jurisdictional. Was the District Court's jurisdictional dismissal under the FTAIA, which relied upon pre-*Arbaugh* authority from this Court, an error of law?

2. The Domestic Effects Exception to the FTAIA. Lotes’s complaint below detailed Defendants’ admitted exclusionary abuse of U.S. standard-setting activity, along with the substantial effects of Defendants’ “patent ambush” on millions of U.S. consumers purchasing billions of dollars in electronic devices containing USB 3.0 connectors. If the FTAIA is jurisdictional, and if Defendants’ agreement to the application of U.S. antitrust laws is therefore ignored, does Lotes’s claim nevertheless satisfy the FTAIA’s “domestic effect exception”?

3. Amendment of the FAC. The District Court denied Lotes leave to amend without argument or review of a proposed amended pleading, and in the absence of any Scheduling Order under Fed. R. Civ. P. 16. Was this denial an abuse of discretion under Fed. R. Civ. P. 15, which provides that leave to amend shall be freely given when justice so requires?

V. STATEMENT OF THE FACTS

A. The Parties

Lotes is a Taiwan corporation specializing in the design and manufacture of electronics including computer connectors, CPU sockets, and antennas, primarily for notebook computers. FAC ¶ 15 (JA 34). One type of connector manufactured by Lotes is the USB 3.0 connector, described in greater detail below. *Id.*

Defendants compete with Lotes in the making and selling of USB 3.0 connectors. *Id.* Defendants also are involved in the manufacture and sale of consumer

electronic devices and components that incorporate USB 3.0 connectors. FAC ¶¶ 1-6 (JA 28-30). Defendants include:

- Hon Hai Precision Industry Co., Ltd. (“Hon Hai”)—a Taiwan corporation that is one of the world’s largest makers of electronic components, with more than one million employees and annual sales of approximately \$102.74 billion. FAC ¶ 2 (JA 28-29).
- Foxconn International Holdings Ltd.—a Cayman Islands corporation that is one of the largest exporters from China, with most of its products entering the United States through ports in California. FAC ¶ 3 (JA 29).
- Foxconn International, Inc. —a California corporation receiving products from other Foxconn companies for distribution within the United States. FAC ¶ 4 (JA 29).
- Foxconn Electronics, Inc. —a California corporation manufacturing products including circuit boards, motherboards,³ graphic cards, and personal computers. FAC ¶ 5 (JA 30).⁴

³ A motherboard is the main printed circuit board (PCB) found in computers and other expandable systems. It holds many of the crucial electronic components of the system, such as the central processing unit (CPU) and memory, and provides connectors for other peripherals. The board is the “mother” of all components attached to it, which often include sound cards, video cards, network cards, hard drives and USB connectors

⁴ Foxconn (Kunshan) Computer Connector Co., Ltd. (“Foxconn Kunshan”), a fifth defendant named below, is a China corporation that builds numerous con-

B. USB Connectors

The technology at the heart of this litigation is familiar to most computer users. Generally, USB connectors allow consumer electronic devices to transmit data and/or electrical power to each other. They are “connector systems,” in which mated prongs and receptacles allow connected devices to function together. Because communication through connectors and wires is rarely as seamless as connections internal to a single device, the connector industry has engaged in significant innovation to bring the functioning of connected devices closer to the performance capable within a single, integrated device.

USB connectors are widely regarded as one of the most successful connectors in personal computing history, with an almost 100 percent adoption by personal computer and peripheral makers. FAC ¶ 20 (JA 36). Computers and peripherals without USB connectors are undesirable and of limited use. FAC ¶ 17 (JA 35). USB 3.0, the technology prompting this lawsuit, is the most recent version of the USB connector. USB 3.0 improves upon the previous generation (USB 2.0) in several ways, including a significant increase in data transmission speeds. FAC ¶ 16 (JA 34).

sumer electronics products and components for shipment into the United States. FAC ¶ 6 (JA 30). Service under the Hague Convention has not been effected on Foxconn Kunshan, nor has Foxconn Kunshan appeared.

Because the USB 3.0 connector represents a major advance over previous generations, industry observers uniformly project that USB 3.0 connectors will entirely replace the previous generation of connectors on laptop/notebook computers, servers, desktop computers, digital cameras, and many other products within one to three years. Adoption of USB 3.0 connectors in notebook computers is forecast to reach 100 percent by 2013 year-end. FAC ¶ 20 (JA 36). This development provides a potential production and marketing chokepoint for computers and other electronic devices. It is estimated that over 2 billion devices will use USB 3.0 connectors by 2015. FAC Exhibit D-1 (JA 106).

C. USB-IF: The Venue for the Creation of the USB 3.0 Standard

The widespread adoption of USB 3.0 connectors has required significant cooperation and uniformity among competing manufacturers. Antitrust law, which has long been skeptical of cooperation among competitors, has recognized technological standardization as a type of cooperation whose benefits can suffice to overcome that general skepticism—but only if the cooperating competitors constrain their behavior in certain ways.⁵ The typical forum for such constrained coopera-

⁵ See Hill B. Wellford, Counsel to the Assistant Att’y Gen. Antitrust Div., U.S. Dep’t of Justice, Antitrust Issues in Standards Setting, address before the 2d Annual Seminar on IT Standardization and Intellectual Property, China Electronics Standardization Institute 15 (Beijing, China, March 29, 2007) (available at <http://www.justice.gov/atr/public/speeches/222236.htm>) (“[A]nalysis of SDO conduct should focus on efficiency because efficiency is the whole reason for standard-setting. The justification for cooperatively setting a standard, as opposed to

tion among competitors is a standard-setting organization, or SSO (occasionally referred to as a “standards development organization,” or SDO).

The SSO in this case is the U.S.-based USB Implementers Forum, or USB-IF, an Oregon non-profit corporation founded by California-based Intel in 1995.⁶ USB-IF’s governing procedures and membership documents constrained participants’ behavior in ways necessary to preserve the organization’s pro-competitive justification for existence. Many of these constraints placed contractual limitations on the participants’ exercise of their otherwise-legitimate intellectual property rights, explicitly including their patent rights.

Specifically, several USB-IF agreements limit the respective behaviors of USB 3.0 “Promoters,” “Contributors,” and “Adopters.” Signatories to the USB 3.0 Contributors Agreement (“Contributors Agreement”) typically contributed proprietary technology to the USB 3.0 specification. Signatories to the USB 3.0 Adopters

letting standards develop accidentally or from technological solutions proposed by individual firms, is that collaboratively-set standards can be more useful to society. In the long run, they may provide a more optimal balance of choosing more advanced technology, costing less to create and implement, and getting to market faster.”).

⁶ See <http://www.usb.org/about>; FAC ¶ 36 (JA 43). A subsidiary group of companies called the “USB 3.0 Promoter Group” (including Intel, and other U.S. companies such as Hewlett-Packard, Microsoft, and Texas Instruments) spear-headed the development of the standard for USB 3.0 connectors. FAC ¶¶ 36-37 (JA 43-44).

Agreement (“Adopters Agreement”) sought to adopt the standardized technology in their products. FAC ¶ 31, 38-41 (JA 41, 44-45).

The USB 3.0 Contributors Agreement provides that signatories “are or may be direct competitors” and, recognizing the potential domestic effects of improper standard-setting, expressly requires those companies to avoid violating the antitrust laws of the United States through, for example, conduct that results in the “exclusion of competitors.” FAC ¶ 40 (JA 45); FAC Exh. A, ¶¶ 2, 6.12 (JA 78, 81).

Both the Contributors Agreement and the Adopters Agreement include a consent to the jurisdiction of courts in New York for resolving disputes. The Contributors Agreement, for example, provides that disputes “shall be heard exclusively . . . in the state and federal courts of New York, New York,” with signatories “irrevocably consent[ing] to jurisdiction and venue in” those courts. FAC ¶¶ 10, 12 (JA 31-33); FAC Exh. A ¶ 6.7 (JA 81).

In addition to requiring compliance with U.S. antitrust laws, enforced by U.S. courts, the Contributors and Adopters Agreements include additional terms designed to prevent standard-setting activity from unlawfully excluding competitors. In provisions that are not unusual in such agreements, the contracts require that certain patents essential to practicing the standard be licensed royalty-free among all standard-adopting competitors. FAC Exhs. A, A-1 (JA 75-89). Such provisions help combat accumulation of market power or monopolization by con-

tributing companies, which might otherwise enshrine their patents and other proprietary rights in a standard, wait for the industry to “lock in” to the standard through investment and production, and then ambush the market by suing competing manufacturers of a standardized device for patent infringement.⁷

Here, in particular, the Contributors Agreement requires all Contributors to the USB 3.0 specification to grant to “any Promoter or Adopter, and their respective Affiliates . . . a non-exclusive, worldwide license under any Necessary Claim of a patent or patent application reading on such contributions . . . on a royalty-free basis and under otherwise reasonable and non-discriminatory (‘RAND-Zero’) terms.”⁸ In addition, the Adopters Agreement requires that all Adopters of the USB 3.0 specification make a similar grant related to “those specific portions of products . . . that implement and are compliant with . . . the Final Specification,” defined as Compliant Portions.⁹

⁷ See Daniel G. Swanson & William J. Baumol, *Reasonable and Nondiscriminatory (RAND) Royalties, Standards Selection and Control of Market Power*, 73 *Antitrust L.J.* 1, 5, 10-11, 41-42 (2005); see also U.S. Dep’t Of Justice & Fed. Trade Comm’n, *Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition* (2007) at 33-40 (available at <http://www.usdoj.gov/atr/public/hearings/ip/222655.pdf>).

⁸ FAC ¶ 38 (JA 44); FAC Exh. A ¶ 3.4 (JA 79). “RAND” or “FRAND” is a licensing term that is industry shorthand for fair, reasonable and non-discriminatory. When a “Z” or “Zero” is added (“RAND-Z” or “RAND-Zero”), this indicates a zero royalty, fully paid-up license.

⁹ FAC ¶ 41 (JA 45); FAC Exh. A-1 ¶ 2.1(b) (JA 86).

D. Defendants' Patent Ambush

The FAC details Defendants' unlawful abuse of the USB 3.0 standard-setting process, including their refusal to abide by the pro-competitive licensing obligations contained in their agreements.

1. Defendants Secure Inclusion of their Patents in the USB 3.0 Standard

The Defendants provided "contributions" to the USB 3.0 standard during the standard-setting process, contributions they would later patent and assert against Lotes. FAC ¶¶ 45, 62 (JA 46, 54); FAC Exh. A (JA 75). In connection with this activity, one or more of the Defendants signed the Contributors Agreement and Adopters Agreement (both agreements binding their affiliates), obligating them, as noted above, to grant royalty-free, world-wide licenses to patent claims covering the USB 3.0 specification, and to comply with U.S. antitrust laws, as determined (if necessary) through litigation in U.S. courts in New York. FAC ¶¶ 9, 40-41 (JA 4, 45).

As discussed above, Defendants nevertheless brashly announced plans to monopolize the USB 3.0 connector market in a February 23, 2010 trade press story. This story alarmed the industry. The Defendants responded by sending a letter to the USB-IF on February 10, 2012, from in-house counsel for Defendant Foxconn Electronics, Inc. The attorney, speaking on behalf of all the Defendants, "un- equivocally affirm[ed]" that the Defendants would indeed grant a license to mem-

bers (such as Lotes) for Necessary Claims on RAND-Zero terms, as Defendants had promised to do in the agreements. FAC ¶ 46 (JA 46-47); FAC Exh. C (JA 101).

Counsel for Defendants also stated that Defendants would license intellectual property that covered “optional features” (*i.e.*, optional to practice the USB 3.0 specification but not necessary) on RAND terms as required by the agreements. *Id.* Thus, by Defendants’ own admission, Lotes has at all relevant times been entitled to a RAND-Z license from Defendants for all necessary patent claims, as well as a RAND license for intellectual property covering optional features of the USB 3.0 connector.

2. Defendants, Through Their U.S. Attorneys, Refuse to License Necessary Claims in U.S. and Derivative Foreign Patents

Defendants, however, never had any intention of licensing any USB 3.0 patent claims as required under their agreements. The history of licensing negotiations described in the FAC fully bears out Defendants’ openly announced bad faith and exclusionary intent. On February 24, 2011, Defendant Hon Hai sent a registered letter to Lotes offering to license Necessary Claims and Non-Necessary Claims, and included a Non-Disclosure Agreement (“NDA”) to cover the ensuing discussions. FAC ¶ 42 (JA 45). On March 25, 2011, Lotes returned a signed copy of the NDA. *Id.* On April 15, 2011, in-house counsel for Defendant Hon Hai directed Lotes to contact Hon Hai’s outside U.S. counsel regarding a license. *Id.*

On April 20, 2011, an attorney with the Jones Day law firm, representing Hon Hai, emailed in-house counsel for Lotes and informed Lotes that Jones Day was “currently developing licensing agreements for Hon Hai’s USB 3.0 patents and will be in touch with you in the near future to discuss your interest in licensing these patents.” FAC ¶ 42-44 (JA 45-46); FAC Exh. B (JA 98-99). More than six months passed without Lotes receiving a draft agreement. On November 3, 2011, outside counsel for Lotes sent correspondence to Jones Day requesting a draft agreement. *Id.* On December 1, 2011, Jones Day responded by email that a response would be forthcoming on the following week. *Id.* As of the filing of the FAC, no response from any of the Defendants or their counsel was ever received, and no license agreement was ever sent to Lotes by the Defendants. *Id.* Defendants’ patent hold-up was now in place.

3. Defendants Launch Patent Infringement Lawsuits Against Lotes Overseas

Defendants removed any lingering doubt about their intentions regarding licensing when, on July 9, 2012, Defendant Foxconn Kunshan, without warning, filed patent infringement suits in China against Lotes’ USB 3.0 connector products. FAC ¶ 53 (JA 50); FAC Exhs. G, G-1, H, H-1 (JA 181-96). These Chinese patents are jointly owned by Defendants Hon Hai and Foxconn Kunshan and are derived from patents earlier filed in the United States. FAC ¶¶ 54-55 (JA 51). The inven-

tors listed on the face of these patents were themselves named as contributors to the USB 3.0 specification. FAC ¶ 62 (JA 54); FAC Exh. A-2 (JA 90-96).

Defendants' patents were asserted in the JiangSu Province Intellectual Property Office against two Lotes subsidiaries making all of Lotes's USB 3.0 connectors. FAC ¶ 53 (JA 50-51). Specifically, the patents were asserted against a first subsidiary located in JiangSu province along with a third-party retail store (selling motherboards with Lotes' USB 3.0 connectors), and a second subsidiary located in the GuangDong province. *Id.*

E. Proceedings Below

1. The First Amended Complaint and the Motion to Dismiss

On November 30, 2012, Defendants first moved to dismiss the Complaint under Fed. R. Civ. P. 12(b)(6) for failing to state a claim. A pre-motion conference was held on December 5, 2012. JA 12-26. Defendants' motion to dismiss was denied without prejudice, with Lotes being granted an opportunity to amend its Complaint in lieu of filing an opposition. JA 27. Lotes filed the FAC on December 21, 2012. JA 28-216.

On January 11, 2013, Defendants filed a Motion to Dismiss the FAC, under Fed. R. Civ. P. 12(b)(6), for failure to state a claim upon which relief could be granted. At a pre-motion conference, the Court denied the Motion to Dismiss without prejudice and ordered the Defendants to strike unauthenticated and extrin-

sic evidence. JA 217-240. On February 11, 2013, Defendants moved to dismiss for a third time. Lotes filed an Opposition to Defendants' Motion to Dismiss on February 25, 2013. Defendants filed a Reply in Support of their Motion to Dismiss on March 11, 2013.

2. Amendment of the FAC

On April 15, 2013, while the Motion to Dismiss the FAC was pending (and after the parties had conferred under Fed. R. Civ. P. 26(f)), Lotes sent a letter to the District Court requesting a Rule 16(b) Scheduling Conference. JA 241. On April 17, 2013, the District Court ordered a Scheduling Conference for May 8, 2013. *Id.* On April 29, 2013, counsel for Lotes wrote to the District Court requesting additional time at the Scheduling Conference for a Pre-Motion Conference to obtain leave of the District Court to amend the FAC to add three new plaintiffs to the litigation, or to request a briefing schedule on a motion seeking that relief. JA 282.

On May 2, 2013, the Court's Law Clerk sent counsel an email adjourning the Scheduling Conference to May 14, 2013, and writing that the conference would also serve as the requested Pre-Motion Conference. JA 287. On the same day, Defendants' counsel sent a letter to the Court opposing the addition of more plaintiffs. On May 10, 2013, counsel for Lotes wrote the Court responding to Defendants' counsels' letter. JA 288-290. The day before the Scheduling Conference, on May 13, 2013, the Court's Law Clerk sent counsel another email, again adjourning the

Scheduling Conference (and Pre-Motion Conference), this time to May 23, 2013.

JA 291.

3. The May 14 Opinion and Order

No Scheduling Conference or Pre-Motion Conference was ever convened, however, and Lotes never had the opportunity to submit its proposed Second Amended Complaint to the Court. Instead, on May 14, 2013, without oral argument, Judge Scheindlin issued an Opinion and Order (“Opinion”) dismissing Lotes’ First Amended Complaint for lack of subject matter jurisdiction under Rule 12(b)(1), although the parties’ briefing had largely focused on other issues. JA 242-277. The Court adopted without question opposing counsel’s representations and denied Lotes’s request to file a Second Amended Complaint. JA 274-275. On June 10, 2013, a Notice of Appeal was timely filed in the District Court. JA 283-284.

VI. SUMMARY OF ARGUMENT

This case involves Defendants’ misuse of a U.S.-based standard setting process to violate the U.S. antitrust laws, causing substantial harm to U.S. commerce—including exclusion of competing manufacturers of USB connectors, and resulting higher prices for electronics incorporating them in the U.S. Yet, despite Defendants’ explicit acknowledgement that their conduct was governed by the

U.S. antitrust laws, the District Court held that the U.S. antitrust laws do not apply. This decision must be reversed, for two reasons.

First, the District Court erroneously determined that the FTAIA established requirements for federal subject matter jurisdiction. The District Court relied upon Second Circuit authority that has been overruled by Supreme Court precedent, as the overwhelming weight of authority from other Circuits attests. Once the FTAIA is properly understood to establish necessary elements of Lotes's antitrust claim, rather than threshold requirements of subject matter jurisdiction, the FTAIA issue disappears from the case—because Defendants, in full recognition of the domestic effects of their conduct, expressly agreed to the application of U.S. antitrust laws by the District Court.

Second, and in any event, the District Court erred when it determined that the FTAIA barred the FAC. The District Court's decision was erroneous as a matter of both procedure and substance. With respect to procedure, the District Court decided facts and resolved disputes against Lotes, when it should have accepted the allegations of the FAC as true. With respect to substance, the allegations of the FAC were more than sufficient to survive a challenge under the FTAIA because those allegations included descriptions of domestic injury that were a "reasonably proximate" result of the Defendants' anticompetitive conduct. The District Court's cramped and legally incorrect interpretation of "direct" effects under the FTAIA

will, if sanctioned by this Court, improperly place beyond the Sherman Act's reach "a significant amount of anticompetitive conduct that has real consequences for American consumers."¹⁰

This Court also should reverse the portion of the District Court's order denying Lotes leave to amend. The District Court foreclosed amendment without a hearing, in the absence of any Rule 16 deadline for amendment, and without giving Lotes an opportunity to present a proposed Second Amended Complaint to the Court. This denial, under these circumstances, was an abuse of discretion, particularly given the admonition of Rule 15 that leave to amend should be "freely given when justice so requires." Fed. R. Civ. P. 15(a)(2).

VII. STANDARD OF REVIEW

This Court reviews a District Court's determination of subject matter jurisdiction (a) for clear error with respect to determinations of fact, and (b) *de novo* with respect to legal conclusions. See *Conntech Dev. Co. v. University of Connecticut Educ. Properties*, 102 F.3d 677, 681 (2d Cir. 1996). District Court decisions denying leave to amend are reviewed for abuse of discretion. *Anatian v. Coutts Bank (Switzerland) Ltd.*, 193 F.3d 85, 89 (2d Cir. 1999), *cert. denied*, 528 U.S. 1188 (2000).

¹⁰ *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 822 F.Supp.2d 953, 964 (N.D. Calif. 2011).

VIII. ARGUMENT

A. The District Court's Jurisdictional Dismissal Under the FTAIA Was Error

The *substance* of the antitrust claims in Lotes's FAC has never been open to attack. The abuse of standard-setting activity alleged by Lotes is plainly actionable under the Sherman Act.¹¹ The ruling below was instead based solely on the District Court's determination, under the FTAIA and Fed. R. Civ. P. 12(b)(1), that the District Court lacked subject matter jurisdiction. That ruling flowed from an overruled case, and was an error of law.

1. The FTAIA is Not Jurisdictional, and to the Extent it Provides Otherwise, *Filitech* Is No Longer Good Law

This Court should hold that the FTAIA establishes elements of an antitrust claim, rather than requirements for subject matter jurisdiction. As the District Court's opinion all but acknowledges, the case that the District Court felt bound by, *Filitech v. France Telecom S.A.*, has been overruled by the Supreme Court. *See Filitech S.A. v. France Telecom S.A.*, 157 F.3d 922 (2d Cir. 1998).

¹¹ Generally, "(1) in a consensus-oriented private standard-setting environment, (2) a patent holder's intentionally false promise to license essential proprietary technology on FRAND terms, (3) coupled with an SDO's reliance on that promise when including the technology in a standard, and (4) the patent holder's subsequent breach of that promise, is actionable anticompetitive conduct." *Qualcomm*, 501 F.3d at 314.

In *Arbaugh v. Y&H Corp.*, the Supreme Court set forth a “readily administrable bright line” rule, which has come to be known as the “clearly states” test, for determining whether a statute is jurisdictional:

If the Legislature *clearly states* that a threshold limitation on a statute’s scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.

546 U.S. 500, 516 (2006) (Title VII’s “employee-numerosity requirement” is a merits question not a question of subject-matter jurisdiction) (emphasis added).

The holding in *Arbaugh* has been consistently applied in subsequent Supreme Court cases.¹² The Supreme Court’s “clearly states” test was motivated by the recognition that “[b]ecause the consequences that attach to the jurisdictional label may be so drastic, we have tried in recent cases to bring some discipline to the use of the term.”¹³

Here, nothing in the FTAIA clearly states—or even suggests—that the FTAIA is jurisdictional. And seven years after *Arbaugh*, the District Court’s Rule

¹² See, e.g., *Morrison v. Nat’l Australia Bank Ltd.*, 130 S.Ct. 2869, 2877 (2010) (conduct under Securities and Exchange Act of 1934, § 10(b) is not a question of subject-matter jurisdiction); *Reed Elsevier, Inc. v. Muchnick*, 130 S.Ct. 1237, 1244-47 (2010) (Copyright Act’s registration requirement is not a question of subject-matter jurisdiction); *Henderson v. Shinseki*, 131 S.Ct. 1197, 1202-03 (2011) (deadline for filing a notice of appeal with the Veterans Court does is not a question of subject-matter jurisdiction).

¹³ *Shinseki*, 131 S.Ct. at 1202.

12(b)(1) decision was drastic indeed for Lotes: the case was improperly dismissed at the pleading stage.

In treating the FTAIA as a jurisdictional matter, the District Court noted that there was a circuit split as to whether the FTAIA is jurisdictional or an additional element of a Sherman Act claim. JA 260. In fact, the two Circuits that have considered the matter since *Arbaugh* have both held that the FTAIA is an element of an antitrust case, not a limit on subject matter jurisdiction. *See Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 852 (7th Cir. 2012) (*en banc*), *cert. denied*, -- S.Ct. --, 81 U.S.L.W. 3309 (July 22, 2013) (No. 12,650) (“the FTAIA sets forth an element of an antitrust claim, not a jurisdictional limit on the power of the federal courts.”);¹⁴ *Animal Science Products, Inc. v. China Minmetals Corp.*, 654 F.3d 462, 467-68 (3rd Cir. 2011), *cert. denied*, 132 S. Ct. 1744 (2012) (“In light of the Supreme Court’s subsequent decision in *Arbaugh* ... and other recent cases, however, we will now overturn this aspect of our ... decisions and hold that the FTAIA constitutes a substantive merits limitation rather than a jurisdictional limitation.”) (internal citations omitted).

¹⁴ As the *Minn-Chem* court noted, Congress placed no express language in the FTAIA stating that it is jurisdictional in character. “The FTAIA . . . never comes close to using the word ‘jurisdiction’ or any commonly accepted synonym. Instead, it speaks of ‘conduct’ to which the Sherman Act . . . applies. This is the language of elements, not jurisdiction.” *Minn-Chem*, 683 F.3d at 852.

The District Court also acknowledged that other courts in the Second Circuit have cast doubt on the continued viability of *Filitech* with respect to the jurisdictional nature of the FTAIA. *See* JA 262-63 (quoting *Boyd v. AWB Limited*, 544 F.Supp.2d 236, 243 n.6 (S.D.N.Y. 2008) (remarking that “nothing in the statutory language of the FTAIA indicates that its limitations are jurisdictional”)); *see also* JA 263 (n. 86) (citing *In re Vitamin C Antitrust Litigation*, 904 F.Supp.2d 310, 315 (E.D.N.Y. 2012). One district court in the Ninth Circuit has not waited for its appellate court to rule on the issue, and has held that the FTAIA is non-jurisdictional.¹⁵

The District Court nevertheless felt constrained by *Filitech* to hold that the FTAIA is jurisdictional. JA 263. After determining that the allegations in the FAC did not satisfy the FTAIA’s jurisdictional requirements, and in particular the FTAIA’s domestic effects exception (discussed below), the District Court then dismissed the antitrust counts under Rule 12(b)(1) for lack of subject-matter jurisdiction, and jettisoned all remaining counts. JA 31-34.

¹⁵ *See Flat Panel*, 822 F.Supp.2d at 959, where the district court, citing *Animal Science*, held that “the legislature must ‘clearly state’ that a statute is jurisdictional in character” and concluded that “[t]his Court agrees with the Third Circuit that application of this ‘clearly states’ test necessitates the finding that the FTAIA does not affect subject matter jurisdiction.”

It is time to put *Filitech* to rest. In keeping with *Arbaugh* and its progeny, and consistent with the two other Circuits that have addressed the matter in the wake of *Arbaugh*, this Court should hold that the FTAIA is not jurisdictional.

2. Once the FTAIA’s Provisions are Considered to be Elements of Lotes’s Antitrust Claim, They Disappear From the Case—By Agreement of the Defendants

Unlike *Morrison*, where “nothing in the analysis of the court below” turned on the distinction between a 12(b)(6) and a 12(b)(1) dismissal, *see Morrison*, 130 S.Ct. at 2877, here the distinction is crucial. Once the FTAIA’s requirements are properly characterized as elements of Lotes’s claim, the FTAIA issue disappears from the case. This is so because, in a situation that appears to be unique in FTAIA jurisprudence, the Defendants have *expressly agreed* that U.S. federal courts can and should judge Defendants’ standard-setting conduct under U.S. anti-trust laws. Although it is axiomatic that a defendant cannot agree to confer subject-matter jurisdiction on a federal court,¹⁶ a defendant can, of course, concede an element of the plaintiff’s claim.¹⁷ And that is precisely what has happened here with respect to the FTAIA elements of Lotes’s antitrust claims.

¹⁶ *See Kelsey v. Sheraton Corp.*, 662 F. Supp. 10, 12 (D. Conn. 1986) (*citing, inter alia, American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17–18, 71 S.Ct. 534, 541–42, 95 L.Ed. 702 (1951)).

¹⁷ *See, e.g., Export-Import Bank of U.S. v. Agricola Del Mar BCS*, 536 F.Supp.2d 345, 350 (S.D.N.Y. 2008), *aff’d*, 334 Fed. Appx. 353 (2d Cir. 2009); *see also Animal Science*, 654 F.3d at 469 (“Unmoored from the question of subject matter jurisdiction, the FTAIA becomes just one additional merits issue”).

Recognizing the inherent domestic effects of any abuse of the U.S.-based USB 3.0 standard-setting process, the Defendants here agreed to be bound by the U.S. antitrust laws and subjected themselves to enforcement in U.S. courts. Specifically, in keeping with the objective of “fostering open competition in the development of products and services based on the Final [USB 3.0] Specification,” USB 3.0 Promoters, Contributors, and Adopters agreed to adhere to U.S. antitrust law. FAC Exh. A ¶ 2 (JA 78). Thus, as noted above, Defendants and other SSO participants contractually agreed to “act in a manner which does not violate any state, federal, or international antitrust laws and regulations,” and further agreed that they would not, among other things, engage in “exclusion of competitors.” *Id.* Defendants then specifically granted jurisdiction over their persons to the District Court, since it is a “state [or] Federal court of New York, New York,” and, critically, agreed that *all* disputes arising out of the Contributors or Adopters Agreements would be resolved in a New York state or federal court under New York law. FAC Exh. A ¶ 6.7, 6.12 (JA 81); FAC Exh. A-1 ¶¶ 5.5, 5.6 (JA 88).

Thus, once the FTAIA is properly analyzed as presenting elements of Lotes’s antitrust claims, the limitations in the FTAIA—which prohibit application of the U.S. antitrust laws to certain types of conduct—will no longer be at issue because Defendants themselves agreed to subject their conduct to U.S. antitrust scrutiny. Defendants have already resolved the matter.

B. The FTAIA Provides No Basis for Dismissing the FAC

Even if the FTAIA's requirements were jurisdictional, and Defendants therefore could not subject themselves to U.S. antitrust laws by agreement, the District Court's dismissal under Fed. R. Civ. P. 12(b)(1) would be in error. The District Court failed to accept key allegations in the FAC as true, an error of procedure, and then it compounded that mistake with an error of substance— improperly applying the law to its erroneous conclusions of fact.

1. The District Court Failed to Accept the Allegations of the FAC as True

As a threshold matter, application of the FTAIA must be analyzed using appropriate facts. In applying Rule 12(b)(1) facially, a trial court must accept the material allegations of the complaint as true, and must construe the complaint in favor of the plaintiff.¹⁸ In applying the FTAIA to the FAC below, the District Court failed to follow this bedrock principle.

The misconduct of the Defendants detailed in the FAC forms a circle— starting in the United States, when Defendants breached their SSO agreements and promises and excluded competition, running through the launch of litigation over-

¹⁸ See *Thompson v. County of Franklin*, 15 F.3d 245, 249 (2d Cir. 1994) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). Thus, it would make no difference if the District Court's dismissal were reconstrued on appeal as an analysis, under Fed. R. Civ. P. 12(b)(6), of whether Lotes sufficiently pleaded the elements required by the FTAIA, since Rule 12(b)(6) also requires the Court to credit the FAC's factual allegations. *Grullon v. City of New Haven*, 720 F.3d 133, 139 (2d Cir. 2013).

seas in an effort to stop Lotes from making USB 3.0 connectors, and ending back on our shores by harming U.S. consumers who buy the products incorporating the connectors. The District Court, however, failed to give proper deference to the FAC.

a. The Purported “Disconnect” Between Markets

Ignoring allegations that stated otherwise, the District Court justified its dismissal on a purported “disconnect between the relevant (foreign) market as defined by plaintiff (USB 3.0 connectors)—the market which Defendants are attempting to monopolize—and the U.S. market supposedly affected by Defendants’ attempted monopolization (notebooks, desktop computers, servers, etc.).” JA 265. Yet, in numerous locations in the FAC, Lotes sufficiently alleged the direct connection between the foreign market and the U.S. market.

As a starting point, the relevant market as specified in the FAC is “USB 3.0 connectors suitable for integration into motherboards powering notebooks, desktop computers and servers.”¹⁹ Lotes also described the supply chain where inputs (USB 3.0 connectors) go into finished goods (notebooks, desktops and servers) for importation into the U.S. market. In particular, the oligopolistic aspects of assem-

¹⁹ FAC ¶ 65 (JA 55). Typically, for manufacturing reasons, USB connectors are sold directly to ODMs that manufacture notebooks for the name brands. For desktops and servers, however, USB connectors are typically sold to motherboard manufacturers who then sell the mother boards to ODMs making the finished goods for the name brands.

bling the relevant finished goods were described as follows: “[A]s of 2011, roughly 94% of global notebook computers were assembled by a small number of Taiwanese vendors, primarily Original Design Manufacturers (ODMs) maintaining production facilities in China.” FAC ¶ 20 (JA 36).

As the FAC alleges, the market for notebooks, desktop computers, and servers is *entirely* connected to the foreign market for USB connectors. This is true because *all* notebook computers incorporate as inputs “several USB connectors, and the technology is shifting quickly towards USB 3.0 Adoption rates of USB 3.0 connectors is forecast to reach 100% by 2013” *Id.* Moreover, “[t]he assembly of motherboards for computers other than notebooks is similarly concentrated.” *Id.* These inputs, USB connectors, are incorporated into finished goods in great quantities numbering “over 6 billion in the stream of commerce today.” FAC ¶ 16 (JA 34).

b. The Link Between Effects

Similarly, the District Court determined that “any effects on the U.S. market for finished computer goods are not effects linked to the relevant market of USB 3.0 connectors manufactured and sold in China.” JA 265. Again, however, the FAC plausibly alleges that effects on the U.S. market for finished computer goods are closely linked to the relevant market of USB 3.0 connectors made and sold in China.

The supply chain to the U.S. consumer is straightforward and plainly alleged in the FAC. First, name-brand companies located in the United States (*e.g.*, Dell, HP and Apple), design products specified to work with the USB 3.0 specification and contract with Taiwanese ODMs to assemble the finished goods. FAC ¶¶ 33, 34 (JA 42). Second, the USB 3.0 connectors are made in China. FAC ¶¶ 35, 47, 53 (JA 43, 47, 50). Third, these connectors are either sold to ODMs for incorporation into finished goods (notebooks, desktops and servers) or, in the case of Defendants, the manufacturer of the connector and the ODM is one and the same. FAC ¶¶ 21-23, 63 (JA 36-38, 54-55). Finally, the finished goods are distributed for sale by retail stores in the United States. FAC ¶ 63 (JA 54-55).

In the case of Lotes, for example, “Lotes maintains its entire manufacturing capability for USB 3.0 products in China, at the Lotes SuZhou and Lotes GuangZhou facilities that Defendants have targeted for closure in their Chinese patent suits.” FAC ¶ 68 (JA 56-57). The products made by Lotes are “components of motherboards and other devices intended predominantly for export to the United States, the world’s biggest market for computer products.” *Id.* More specifically, the FAC discusses how the flow of these connectors from Lotes’ manufacturing facilities to ODMs like “Quanta Computer, Inc. (‘Quanta’) and Compal Electronics, Inc. (‘Compal’) who builds products for Dell Computer” and to “Quanta,

Compal, and Inventec Corp. (‘Inventec’), who build products for HP.” *Id.* HP and Dell are well-known consumer brands for computers in the United States.

Similarly, the Defendants make USB 3.0 connectors for other ODMs and for finished goods made by the Defendants themselves. One of the Defendants’ manufacturing entities appears to be Foxconn Kunshan, which “incorporates USB 3.0 connectors made into motherboards, which are then incorporated into the product manufactured by one or more Defendants.” FAC ¶ 34 (JA 42). For example, the FAC alleges that “Foxconn manufactures one hundred percent (100%) of all iPhone5 products and over ninety percent (90%) of all iPad products for Apple. . . . Foxconn manufactures forty percent (40%) of the MacBook and twenty percent (20%) of the iMac.” *Id.*

This dominance of the Apple product line in particular gives the Defendants a large stake in the USB 3.0 market in U.S. electronics consumer electronics since “[a]lmost all the foregoing products made by Foxconn have at least one USB connector.” *Id.* In addition to Apple, the FAC also alleges that the Defendants “manufacture[] computers for numerous brand names, including HP, Dell, IBM, . . . Acer, and Sony.” *Id.*

c. Allegedly “Attenuated” Effects

The District Court based its ruling in part on its finding that to “the extent that defendants’ foreign anti-competitive conduct may result in higher prices and

less competition in the U.S., those effects are simply too attenuated to establish proximate causation required by FTAIA.” JA 265. Again, the FAC alleges otherwise.

As described above, the Defendants joined the Oregon-based USB-IF standards setting organization and contributed their intellectual property to the USB 3.0 standard. The individual contributors to the USB 3.0 specification were Defendants’ engineers residing in Pennsylvania. FAC ¶ 62 (JA 54). After locking their patents into the USB 3.0 specification, the Defendants signed contracts with California-based Intel agreeing to grant Lotes and other SSO members a RAND-Zero license per the explicit terms of the governing agreements. FAC ¶¶ 38, 41, 63 (JA 44-45, 54-55). Furthermore, in-house counsel for California-based Defendant Foxconn Electronics “unequivocally affirm[ed]” to honor its patent license agreements and promised to license “other IP not necessary to practice the USB 3.0 specification,” thus covering all potentially infringing patents (*i.e.*, Necessary and Non-Necessary Claims) used in the making of USB 3.0 connectors. FAC ¶ 46 (JA 46-47); FAC Exh. C (JA 101). The attorneys for Defendants who took responsibility for licensing transactions, and then refused to grant licenses, were based in the United States. FAC ¶¶ 43, 44 (JA 46).

Ignoring their express contractual obligations to license and their promises to the industry, Defendants next launched litigation in China to force Lotes to stop

making USB 3.0 connectors. FAC ¶¶53-59 (JA 50-53). As the FAC alleges, these activities had the intended effect on the intended market: the United States. Specifically, Defendants have violated U.S. agreements under New York law to “force[] the closure of Lotes’ factories or raises Lotes’ costs on relevant USB 3.0 connector products” that are intended for “various manufacturers of notebooks and motherboards who will incorporate Lotes’ 3.0 connectors into their products.” FAC ¶ 63 (JA 54-55). The connectors made by Lotes go into “notebooks and motherboards [for desktops and servers]” that are sold to “ODMs who manufacture finished goods for brands such as Asus, Gigabyte, Acer, Pergatron, Toshiba, Lenovo, Dell, and HP.” *Id.* Closing the circle, these finished goods (with USB 3.0 connectors) are “shipped to the United States for distribution in numerous retail consumer outlets like Best Buy, Costco, Target, Wal-Mart, and others.” *Id.* The effect, as alleged in the FAC, is “to reduce competition, to restrict supply, and to increase prices that direct purchasers will inevitably pass on to U.S. consumers.” *Id.*

d. Allegations of Market Share

The District Court also complained that Lotes did not “allege its total market share of the USB 3.0 connector market versus defendants’ market share” JA 271. Yet Lotes did, in fact, provide detailed allegations, all of which underscore

the scope of the competitive foreclosure occasioned by Defendants' patent ambush, and thus weighing against dismissal.

For example, the FAC states that "Foxconn is the world's largest supplier of motherboards and alone supplies the USB components for roughly 50% of all notebooks sold worldwide—including the United States. . . . Lotes' share of the global market is in the neighborhood of 10-15%. . . . [M]arket shares for desktop and server computers are comparable." FAC ¶ 21 (JA 36-37).

In addition to Defendants' global market share, the FAC goes into more detail by alleging market share of USB 3.0 connectors amongst the major ODMs that purchase these connectors as inputs for their finished goods. For example, Quanta—which makes notebooks made for HP, Dell, Toshiba & Fujitsu—purchases 65 percent from Defendants and 10% from Lotes. FAC ¶ 22 (Table 1) (JA 37). Inventec—which makes notebooks for HP & Lenovo—purchases 50 percent from Defendants and 35 percent from Lotes. *Id.* Pegatron, which makes motherboards for desktops and notebooks, purchases 80 percent from Defendants and 5 percent from Lotes. *Id.* The FAC has thus sufficiently alleged market shares as between Defendants and Lotes at several levels.

As described above, Lotes has filed a FAC that is not mere notice pleading. The FAC describes in detail the markets, the supply chain, the conduct of the Defendants, and the domestic effects of this conduct. As described below, the "cir-

cle” of conduct and effects Lotes has described in the FAC is, indeed, sufficient to satisfy the FTAIA’s requirements.

2. The FTAIA Generally

“The FTAIA removes ‘from the Sherman Act’s reach, (1) export activities and (2) other commercial activities taking place abroad’ subject to certain exceptions. *Vitamin C*, 904 F.Supp.2d at 316 (citing *F. Hoffman-La Roche Ltd. V. Empagran S.A.*, 542 U.S. 155 at 161 (2004)). Specifically, the FTAIA provides that:

Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

(1) such conduct has a direct, substantial, and reasonably foreseeable effect—

(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

15 U.S.C. § 6a. Accordingly, as the *Vitamin C* court noted, the language of the

FTAIA:

brings back within the reach of the Sherman Act conduct involving nonimport trade or nonimport commerce when that conduct has a direct, substantial, and foreseeable effect on import trade or import commerce, and the Sherman Act claim arises out of that effect. I shall refer to this exception as the “domestic effect exception.”

Vitamin C, 904 F.Supp.2d at 316-17 (citations, footnotes, internal quotation marks, and brackets omitted). The requirements of the “domestic effect” exception do not, however,

mean that the impact of the illegal conduct must be experienced by the injured party within the United States. As previously set forth, it is sufficient that the conduct providing the basis of the claim has had the requisite impact on the domestic or import commerce of the United States....

H.R. Rep. No. 97-686 (1982) at 12, *reprinted* in 1982 U.S.C.C.A.N at 2497.

3. Lotes’s Claim Fully Satisfies the “Domestic Effect Exception”

Contrary to the holding of the District Court, Lotes has alleged, in detail, conduct by Defendants with a “direct, substantial, and reasonably foreseeable” domestic effect—and thus Lotes’s claim does not run afoul of the FTAIA. The cramped “directness” analysis applied by the District Court in concluding to the contrary was improper as a matter of law.

a. A “Direct” Domestic Effect Under the FTAIA is a “Reasonably Proximate” Domestic Effect

As a threshold matter, the FTAIA’s “directness” inquiry is a familiar one in antitrust law. For example, prior to the elimination of the direct/indirect distinction in Commerce Clause cases, courts interpreting the Sherman Act required a “direct” effect on interstate commerce.²⁰ Generally, those courts determined that “direct-

²⁰ See *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 231 (1948); *Wickard v. Filburn*, 317 U.S. 111, 122-23 (1942).

ness” was “a question of proximity and de[g]ree.”²¹ Similarly, and to this day, the “directness” of an injury helps determine whether a party has antitrust standing, with reviewing courts applying proximate-cause principles from the common law.²²

The FTAIA’s requirement of “directness” is thus satisfied if the non-import foreign commerce and associated conduct at issue has a *reasonably proximate* domestic effect.²³ This formulation—which is supported by the U.S. Department of Justice²⁴—is consistent with precedent and economic reality. *See Metallgesellschaft AG v. Sumitomo Corp. of Am.*, 325 F.3d 836, 842 (7th Cir. 2003) (“In a global economy, where domestic and foreign markets are interrelated and influence each other, it is sometimes difficult to put strict economic boundaries around any particular country A global conspiracy to inflate prices could have anticom-

²¹ *N. Sec. Co. v. United States*, 193 U.S. 197, 409-10 (1904) (Holmes, J., dissenting); *see also Anderson*, 171 U.S. at 616 (an agreement “only indirectly and unintentionally” affecting interstate trade or commerce is not within the scope of the Sherman Act).

²² *See Blue Shield of Va. v. McCready*, 457 U.S. 465, 476-77 & nn. 12-13 (1982) (citing cases).

²³ *See generally Minn-Chem*, 683 F.3d at 856-57. *Id.*

²⁴ *Minn-Chem*, 683 F.3d at 856-57 (citing Makan Delrahim, *Drawing the Boundaries of the Sherman Act: Recent Developments in the Application of the Antitrust Laws to Foreign Conduct*, 61 N.Y.U. Ann. Surv. Am. L. 415, 430 (2005) (remarks of the Deputy Assistant Attorney General); Brief for the Appellant United States of America in *United States v. LSL Biotechnologies*, 379 F.3d 672 (9th Cir. 2004) (available at <http://www.justice.gov/atr/cases/f200200/200243.htm#IIC>).

petitive effects on the U.S. economy whether the conspiracy occurred within the United States or abroad.”).

Moreover, the “reasonably proximate” formulation dovetails with the comity considerations that are at the heart of the FTAIA. American “courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused.” *Empagran*, 542 U.S. at 165.

b. The District Court’s “Immediate Consequence” Standard for Directness Was Inappropriate

The District Court, however—following the panel majority in *LSL Biotechnologies*—determined that an effect is direct for purposes of the FTAIA only if it “follows as an immediate consequence of the defendant’s activity.” JA 264 (*citing United States v. LSL Biotechnologies*, 379 F.3d at 680 (9th Cir. 2004) (*citing Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992))). The *LSL* majority’s reasoning, however, and the holdings of the cases that have adopted it,²⁵ should be rejected.

²⁵ The District Court cited, in addition to *LSL*, two district court cases that adopted *LSL*’s “immediate consequence” formulation: *Boyd v. AWB Limited*, 544 F.Supp.2d 236 (S.D.N.Y. 2008), and *In re Intel Corp Microprocessor Antitrust Lit.*, 452 F.Supp.2d 555 (D. Del. 2006).

The *LSL* court based its definition of “direct effects” on a “nearly identical term” in the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1605(a)(2). 379 F.3d at 680 (citing *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607 (1992)). But the FSIA’s directness provision, unlike the FTAIA’s, is unaccompanied by a requirement of reasonable foreseeability. 15 U.S.C. § 6a. If the FTAIA’s “directness” requirement demanded a causal chain so short as to be an “immediate consequence,” the FTAIA’s foreseeability requirement would be surplusage—since any “immediate consequence” in this context would necessarily be “reasonably foreseeable.” Under the “surplusage canon,” however, “it is no more the court’s function to revise by subtraction than by addition,” and every word and every provision is to be given effect. Antonin Scalia et al., *Reading Law: The Interpretation of Legal Texts* 174-79 (Thomson/West 2012). The *LSL* majority’s definition of “direct” would improperly render the foreseeability requirement of the FTAIA “superfluous, void, or insignificant.” *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

Moreover, adopting “immediate consequence” as the definition of “direct” for purposes of the FTAIA would entirely immunize anticompetitive schemes, like this one, aimed at inputs in the foreign assembly of finished goods destined for the United States—even where such conduct was the proximate cause of substantial and reasonably foreseeable price effects on goods bought by U.S. consumers. Congress surely recognized the common-sense reality that conduct affecting inputs

or “intermediate” goods often ends up proximately affecting U.S. consumers who purchase finished products with such inputs, and intended to keep that conduct subject to U.S. antitrust scrutiny. *See* 1B Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 272, at 295 (3d ed. 2009) (“*Many, perhaps most, restraints are on ‘intermediate’ goods,*” but effects “that occur in upstream markets quickly filter into consumer markets as well.”) (emphasis added).

The better-reasoned cases compel recognition of a “reasonably proximate” standard for the “directness” required by the FTAIA, a standard easily met by the allegations in the FAC. For example:

- ***In re TFT-LCD (Flat Panel) Antitrust Litig.***

The material facts and allegations in *Flat Panel* closely track the allegations here. In *Flat Panel*, a case involving a price-fixing conspiracy among manufacturers of computer screens, the plaintiffs complained that the defendants’ anticompetitive conduct (cartel meetings) occurred in the U.S. as well as overseas—just as here, Lotes complains of unlawful abuse of U.S. standard-setting activity, combined with patent infringement actions asserted in China to drive home Defendants’ illegal advantage. 822 F.Supp.2d at 955. Further, the *Flat Panel* plaintiffs alleged that the increased price of the computer screens targeted by the collusive activity was passed through to the United States market when the panels were “incorporated into finished products as discrete, physical objects within the product,”

id., with those products being manufactured and sold abroad before they entered the United States. *Id.* at 959 n.2.

After determining that the FTAIA was an element of plaintiffs' claim, rather than jurisdictional, *id.* at 959, the court took up defendants' summary judgment motion, which claimed that plaintiffs' allegations of "indirect" effects in the United States—effects flowing from conduct that was primarily foreign—did not satisfy the "domestic effects" exception to the FTAIA. *Id.* at 959-68. The *Flat Panel* court disagreed, and denied the defendants' motion. *Id.* at 968.

In particular, the court rejected defendants' argument that the alleged domestic effect was only a "ripple effect" radiating outward from the original collusive activity. *Id.* at 962. Instead, the court, noting plaintiffs' evidence that the cartel had targeted the U.S. market with illegal activity that (as here) involved U.S. personnel and domestic conduct, held that defendants' proposed definition of a "direct effect" was simply "too narrow." *Id.* at 963. And the court noted that the defendants' narrow reading would make surplusage out of more than just the FTAIA's foreseeability provision. Specifically, the *Flat Panel* court pointed out that limiting a "direct effect" to the financial harm caused by the first sale of a price-fixed product

would all but eviscerate the distinction between the "domestic injury" exception and "import commerce," which is not the subject of the FTAIA.

Id. at 963-64. The *Flat Panel* court was, therefore, appropriately “skeptical that Congress intended to remove from the Sherman Act’s reach anticompetitive conduct that has such a quantifiable effect on the U.S. economy.” *Id.* at 964 (citations omitted).

- ***Minn-Chem, Inc. v. Agrium, Inc.***

Similarly, the en banc court in *Minn-Chem*, addressing an alleged price-fixing conspiracy in the global market for potash, pointedly rejected the *LSL* court’s “immediate consequence” formulation of FTAIA “directness.” *Minn-Chem*, 683 F.3d at 857.

Like the *Flat Panel* court, the *Minn-Chem* court argued that the “immediate consequence” formulation “comes close to ignoring the fact that straightforward import commerce has already been excluded from the FTAIA’s coverage.” *Id.* The *Minn-Chem* court instead adopted the Justice Department’s “reasonably proximate” causal standard for satisfying the domestic effects exception. *Id.* And it found that, under that standard, the allegations in plaintiffs’ complaint stated a claim, even though the causal chain admittedly proceeded through several steps (specifically, foreign supply restrictions forced price increases upon Chinese purchasers, which were then a proximate cause of subsequent price increases in the United States). *Id.* at 859.

Once the contours of the domestic effects exception and the “directness” inquiry are properly established, the allegations of the FAC are more than sufficient to satisfy the exception. As noted above, the FAC alleges that a group of U.S. and foreign companies is engaging in a U.S.-based patent hold-up, and is foreclosing competition with respect to USB 3.0 connectors installed abroad in U.S.-bound consumer electronic devices. The conduct of these parties has then had the reasonably proximate, substantial, and reasonably foreseeable effect not only of the foreclosure of the market for manufacture and sale of USB 3.0 connectors, but *also* of driving up prices of consumer electronic devices in the U.S. *See, e.g.*, FAC ¶¶ 20-23, 68-73 (JA 36-38, 29-33).

And even without the U.S.-based exclusionary standard-setting abuse described in the FAC, this would be precisely the sort of situation that Congress envisioned as being outside the scope of the FTAIA’s limitations, *i.e.*,

a cartel making no sales into the United States would come within the direct [domestic] effects exemption if it created “a world-wide shortage . . . that had the effect of raising domestic prices.”

H.R. Rep. No. 97-686, at 13, *reprinted* in 1982 U.S.C.C.A.N. at 2498. Although this appeal stems from Defendants’ patent ambush and not a price-fixing conspiracy, *Flat Panel* and *Minn-Chem* provide persuasive reasons to adopt a “reasonably proximate” standard for FTAIA directness.

B. The District Court Should Have Permitted Amendment of the Complaint

Under familiar principles, in the absence of a Rule 16 scheduling order providing deadlines for amending a complaint,²⁶ a court is required under Rule 15 to permit amendment “freely,” where “justice so requires.”²⁷ Leave to amend, though liberally construed, may properly be denied for “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of amendment, futility of amendment, etc.” *Foman*, 371 U.S. at 182. A District Court’s “outright refusal to grant the leave without any justifying reason appearing for the denial” is “not an exercise of discretion; it is merely abuse of discretion and inconsistent with the spirit of the Federal Rules.” *Foman* at 182; *see also Jin v. Metropolitan Life Ins. Co.*, 310 F.3d 84, 101 (2d Cir. 2002).

The District Court denied Lotes the opportunity to amend without a hearing on the matter, and indeed, because the District Court did not entertain formal brief-

²⁶ According to Rule 16(b), within 90 days after appearance of the defendant and with 120 days of the service of the complaint on a defendant, the district court shall enter a scheduling order setting deadlines for subsequent proceedings in the case, including joinder of parties and amendments to the pleadings. Fed. R. Civ. P. 16(b). Although the Complaint was served on three Defendants on October 10, 2012, the District Court never issued a scheduling order to the parties in this litigation by the time of the Opinion and Order filed on May 14, 2013.

²⁷ Fed. R. Civ. P. 15(a); *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Holmes v. Grubman*, 568 F.3d 329, 334-35 (2d Cir. 2009) (comparing regimes under Rule 16 and Rule 15).

ing, the District Court never reviewed a proposed Second Amended Complaint at all. Not surprisingly, the District Court's professed reasons for denying amendment were not well-grounded, and the denial constituted an abuse of discretion for at least the following three reasons.

First, the District Court determined that an amendment adding a Lotes domestic subsidiary as a plaintiff was a "blatant attempt to manufacture jurisdiction."²⁸ The lower court's assertion was simply lifted from the correspondence of opposing counsel to the District Court, and it was untrue: the proposed addition actually flowed from newly discovered information. JA 279.

Further, the District Court incorrectly concluded that because "the First Amended Complaint is dismissed for subject matter jurisdiction" that "[t]his defect cannot be cured by amendment" and, therefore, "there is no reason to amend, amendment would be futile." JA 275. This statement, plainly incorrect as a matter of law and pleading, was in turn based on the Court's determination that "LT Connect has no real interest in this litigation," *id.*, and thus (presumably) could not provide diversity subject matter jurisdiction if made a party. Yet again, the District Court never permitted the introduction of proposed pleadings or argument or limited discovery on the topic of LT Connect's interest. In fact, LT Connect works

²⁸ JA 275. The entity at issue is LT Connect, Inc. ("LT Connect"), a subsidiary of Lotes, incorporated under the laws of the State of Oregon.

closely with customer Intel in the State of Oregon, facilitating the marketing and development of Lotes' USB 3.0 connectors. JA 280.

Finally, the District Court based its denial on the fact that Lotes had been allowed to amend once before in the case. JA 274. Although Lotes did amend its complaint once in response to Defendants' motion to dismiss, this was before new information came to light, and nothing in the Federal Rules mandates that a plaintiff can only amend once.

None of the legitimate reasons for denying amendment under Rule 15 existed here. There was no undue delay, since the Second Amended Complaint would present one new plaintiff and allegations not known when leave to file the First Amended Complaint was allowed.²⁹ Even if delay could be shown, it would not be enough to prevent an amendment because “[m]ere delay . . . absent a showing of bad faith or undue prejudice, does not provide a basis for the district court to deny the right to amend.”³⁰ Prejudice to a defendant is “the most important factor” and “the most frequent reason for denying leave to amend.”³¹ Yet there can be no ma-

²⁹ JA 279. In addition to the LT Connect subsidiary, Lotes's two China manufacturing subsidiaries making USB 3.0 connectors were also requested to be added as plaintiffs to the complaint.

³⁰ *Ruotolo v. City of New York*, 514 F.3d 184 (2d Cir. 2008) (quoting *State Teachers Ret. Bd. v. Fluor Corp.*, 654 F.2d 843, 856 (2d Cir. 1981)).

³¹ *Ruotolo* at 191 (quoting 6 Charles Allen Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil 2d*, § 1487, at 613 (1990 & 2007 Supp.)).

terial prejudice to the Defendants because the case is still in the pleading stage, and discovery was only just beginning when the District Court dismissed the case.

IX. CONCLUSION

Defendants secured the inclusion of their patents in the USB 3.0 standard through participation in U.S.-based standard setting activity. Recognizing the inherent domestic effects if that process were abused, Defendants agreed to be bound by the antitrust laws of the United States, and they agreed that this very Court could apply those laws to them. Yet, after actually *announcing* their monopolistic intentions, Defendants gave soothing assurances to the industry, and then launched a patent ambush and enjoyed the hoped-for effect on prices paid by U.S. consumers for electronic devices. To cap their scheme, Defendants convinced the District Court that they were outside the reach of the U.S. antitrust laws.

This result was error. The District Court's jurisdictional dismissal flowed from its (understandable) reluctance to ignore *Filitech* in advance of a ruling by this Court. In the wake of *Arbaugh*, however, the FTAIA is plainly not jurisdictional, and *Filitech* should be expressly overruled. At that point, Defendants' consent to the application of the U.S. antitrust laws ends the FTAIA analysis, and returns this case to the venue Defendants agreed upon in writing—the District Court. But even if that were not the case, Lotes's allegations showed a “direct” injury more than sufficient to satisfy the FTAIA's “domestic effects” exception. The Dis-

strict Court's decision should be reversed, and this case should be remanded to permit amendment, discovery, and a decision on the merits.

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This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 10,780 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

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