No. 13-2280

In the United States Court of Appeals
for the Second Circuit

LOTES CO., LTD.,

Plaintiff-Appellant,

v.

HON HAI PRECISION INDUSTRY CO., LTD., FOXCONN INTERNATIONAL HOLDINGS, LTD., FOXCONN ELECTRONICS, INC., FOXCONN (KUNSHAN) COMPUTER CONNECTOR CO., LTD., AND FOXCONN INTERNATIONAL, INC. A/K/A FOXCOMM INTERNATIONAL, INC.,

Defendants-Appellees.

On Appeal From The United States District Court
For the Southern District of New York

BRIEF OF DEFENDANTS-APPELLEES

BRIAN A. HERMAN
MORGAN, LEWIS & BOCKIUS LLP
101 Park Avenue
New York, New York 10178
T. 212.309.6000
F. 212.309.6001

THOMAS M. PETERSON
MORGAN, LEWIS & BOCKIUS LLP
One Market, Spear Street Tower
San Francisco, California 94105
T. 415.442.1000
F. 415.422.1001

THOMAS J. LANG
WILLARD K. TOM
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
T. 202.739.3000
F. 202.739.3001

Attorneys for Defendants-Appellees

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendants-Appellees certify as follows:

1. Defendant-Appellee Hon Hai Precision Industry Co., Ltd. ("Hon Hai") has no parent corporation. No publicly held corporation holds 10 percent or more of Hon Hai's stock.

2. Defendant-Appellee Foxconn International, Inc. ("Foxconn International") identifies Hon Hai as the parent company of Foxconn International. Hon Hai, a publicly traded company on the Taiwan and London stock exchanges, holds 10 percent or more of Foxconn International stock.

3. Defendant-Appellee Foxconn International Holdings Ltd. ("Foxconn International CI") identifies Foxconn (Far East) Ltd. ("Foxconn Far East") as its majority owner. Foxconn Far East is a wholly owned subsidiary of Hon Hai, a publicly traded company on the Taiwan and London stock exchanges.

4. Defendant-Appellee Foxconn Electronics, Inc. ("Foxconn Electronics") has no parent corporation. Hon Hai, a publicly traded company on the Taiwan and London stock exchanges, holds 10 percent or more of Foxconn Electronics stock.

TABLE OF CONTENTS

Page

Corporate Disclosure Statement i

Statement Of The Case 1

Statement Of The Issues Presented For Review 5

Summary Of Argument...5

Argument...9

I. The District Court Correctly Dismissed Lotes' Sherman Act Claims Because They Did Not Meet The Requirements Of The Foreign Trade Antitrust Improvements Act 9

A. The FAC Fails To Allege Direct, Substantial, And Reasonably Foreseeable Effects On Domestic Commerce, Meaning Plaintiff Failed To Allege Antitrust Claims Whether Or Not The FTAIA Is A Jurisdictional Statute..9

1. The District Court Was Not Bound By The FAC's Pleading Of Legal Conclusions 9

2. The District Court Applied The Correct Legal Standard 13

3. The Location Of The Standard-Setting Organization And Its Participants Is Irrelevant.............16

B. This Court Need Not Address The Jurisdictional Character Of The FTAIA Because Nothing Turns On Whether The District Court's Dismissal Was Jurisdictional Under Rule 12(b)(1) Or Substantive Under Rule 12(b)(6) 18

C. Nevertheless, The District Court Correctly Held That The FTAIA Is A Jurisdiction-Defining Statute...............................22

1. The District Court Correctly Held That It Is Bound By This Court's Decision In *Filetech*............................22

2. This Court's *Filetech* Decision Correctly Treated The FTAIA As Jurisdictional 24

TABLE OF CONTENTS
(continued)

Page

a. Congress Intended The FTAIA To Govern Subject Matter Jurisdiction....24

b. The Structure Of The FTAIA Demonstrates That The Statute Addresses Jurisdiction And Not The Substantive Elements Of A Sherman Act Claim....26

c. Holding That The FTAIA Is Not Jurisdictional Would Undermine Principles Of Comity....27

d. The Supreme Court And The Majority Of Other Circuit Courts That Have Addressed The Issue Treat The FTAIA As Jurisdictional....28

II. The District Court Acted Within Its Discretion When It Denied Plaintiff A Second Opportunity To Amend Its Complaint....31

A. The District Court Correctly Viewed Lotes' Second Request To Amend As A Blatant Attempt To Manufacture Diversity Jurisdiction....32

B. The District Court Properly Denied Plaintiff Leave to Amend Because The Defects In The Complaint Could Not Have Been Cured By Amendment....35

Conclusion....36

Certificate Of Compliance....37

Certificate Of Service....38

TABLE OF AUTHORITIES

Page

CASES

Airlines Reporting Corp. v. Sand N Travel, Inc.,
58 F.3d 857 (2d Cir. 1995) 33

Animal Sci. Prods., Inc. v. China Minmetals Corp.,
654 F.3d 462 (3d Cir. 2011) 30

Arbaugh v. Y&H Corp.,
546 U.S. 500 (2006)..23, 24, 30

Baker v. Dorfman,
239 F.3d 415 (2d Cir. 2000) 19

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007)..9

Burch v. Pioneer Credit Recovery, Inc.,
551 F.3d 122 (2d Cir. 2008) 31

Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC,
148 F.3d 1080 (D.C. Cir. 1998)..30

Conn. ex rel. Blumenthal v. U.S. Dep't of Interior,
228 F.3d 82 (2d Cir. 2000) 27

Dee-K Enters., Inc. v. Heveafil Sdn. Bhd,
299 F.3d 281 (4th Cir. 2002) 29

Den Norske Stats Oljeselskap AS v. HeereMac Vof,
241 F.3d 420 (5th Cir. 2001) 29, 30

Eurim-Pharm GmbH v. Pfizer Inc.,
593 F. Supp. 1102 (S.D.N.Y. 1984) 17

F. Hoffmann-La Roche Ltd. v. Empagran S.A.,
542 U.S. 155 (2004)..24, 27, 28, 29

Filetech S.A. v. France Telecom S.A.,
157 F.3d 922 (2d Cir. 1998) 8, 23

TABLE OF AUTHORITIES
(continued)

Page

Flynn v. James,
513 F. App'x 37 (2d Cir. 2013) 19

Gurary v. Winehouse,
235 F.3d 792 (2d Cir. 2000) 31

In re Intel Corp. Microprocessor Antitrust Litig.,
452 F. Supp. 2d 555 (D. Del. 2006) 11

Liamuiga Tours, a Div. of Caribbean Tourism Consultants Ltd. v. Travel Impressions, Ltd.,
617 F. Supp. 920 (E.D.N.Y. 1985) 17

McElderry v. Cathay Pac. Airways, Ltd.,
678 F. Supp. 1071 (S.D.N.Y. 1988) 17

McGlinchy v. Shell Chem. Co.,
845 F.2d 802 (9th Cir. 1988) 17

Minn-Chem, Inc. v. Agrium, Inc.,
683 F.3d 845 (7th Cir. 2012) 15, 16, 30

Morrison v. Nat'l Australia Bank Ltd.,
130 S. Ct. 2869 (2010) 30

Mortimer Off Shore Servs., Ltd. v. Fed. Republic of Ger.,
615 F.3d 97 (2d Cir. 2010) 35

Navarro Sav. Ass'n v. Lee,
446 U.S. 458 (1980) 33

Papasan v. Allain,
478 U.S. 265 (1986) 9

Sharkey v. Quarantillo,
541 F.3d 75 (2d Cir. 2008) 10

In re TFT-LCD (Flat Panel) Antitrust Litig.,
822 F.Supp. 953 (N.D. Cal. 2011) 14, 15

TABLE OF AUTHORITIES
(continued)

Page

Turicentro, S.A. v. Am. Airlines Inc.,
303 F.3d 293 (3d Cir. 2002) 17

United States v. Aluminum Co. of Am.,
148 F.2d 416 (2d Cir. 1945) 17

United States v. Anderson,
326 F.3d 1319 (11th Cir. 2003) 30

United States v. Boston,
No. 12-2552-cr, — F. App'x —, 2013 WL 4488615,
at *1 (2d Cir. Aug. 23, 2013)....................23

United States v King,
276 F.3d 109 (2d Cir. 2002) 22

United States v. LSL Biotechnologies,
379 F.3d 672 (9th Cir. 2004) 14, 25, 30

United States v. Snow,
462 F.3d 55 (2d Cir. 2006) 22

WNET, Thirteen v. Aereo, Inc.,
712 F. 3d 676 (2d Cir. 2013) 23

DOCKETED CASE

Lotes Co. Ltd. v. Hon Hai Precision Indus. Co. Ltd., et al.,
No. 1:12-cv-07465-SAS (S.D.N.Y. filed Oct. 4, 2012) 2, 10, 19

STATUTES, RULES, AND OTHER AUTHORITIES

15 U.S.C. § 1, *et seq.*, the Sherman Act....................passim

15 U.S.C. § 6a, Foreign Trade Antitrust Improvements Act....................passim

FED. R. CIV. P. 12(b)(1)....................passim

FED. R. CIV. P. 12(b)(6)....................passim

TABLE OF AUTHORITIES
(continued)

Page

FED. R. CIV. P. 15(a) ... 31

128 CONG. REC. 18952 (Aug. 3, 1982) ... 25, 26

H.R. REP. NO. 5235 ... 24, 25, 29

H.R. REP. NO. 97-686,
reprinted in 1982 U.S.C.C.A.N. 2487 ... passim

S. REP. NO. 97-644 (1982) (Conf. Rep.) ... 25

PHILLIP E. AREEDA & HERBERT HOVENKAMP,
ANTITRUST LAW ¶ 272i2 (3d ed. 2006) ... 21, 22

Abbot B. Lipsky, Jr. & Kory Wilmot, *The Foreign Antitrust Improvement Act: Did* Arbaugh *Erase Decades of Consensus Building?*, THE ANTITRUST SOURCE (Aug. 2013), www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug13_lipsky_7_30f.authcheckdam.pdf. ... 27

STATEMENT OF THE CASE

This case involves allegations of anticompetitive behavior premised on two patent lawsuits in China, both of which concern the technology underlying the latest generation of Universal Serial Bus ("USB") computer connectors, USB 3.0. USB connectors allow peripherals, such as digital cameras, keyboards, hard drives, and other devices, to connect to personal computers, smart phones, and other electronic devices. J.A. 34 ¶ 16.

Defendants-Appellees Hon Hai Precision Industry Co, Ltd. ("Hon Hai"), Foxconn International, Inc. ("Foxconn International"), Foxconn International Holdings Ltd. ("Foxconn International CI"), and Foxconn Electronics, Inc. ("Foxconn Electronics") (collectively, "defendants") are companies that, directly or indirectly, make and sell USB 3.0 connector products in China, purchase USB 3.0 connector products, or incorporate such products into products manufactured outside the United States. J.A. 28-30, 37-38, 42 ¶¶ 2-5, 22-23, 34. Plaintiff-Appellant Lotes Co., Ltd. ("Lotes" or "plaintiff") is a Taiwanese corporation that also manufactures USB connector products in China. J.A. 34, 47 ¶¶ 15, 47. According to Lotes, it competes directly with defendants in making and selling USB 3.0 connectors. J.A. 34, 36-37 ¶¶ 16, 21.

On July 9, 2012, Foxconn (Kunshan) Computer Connector Co., Ltd. ("Foxconn Kunshan"), a China corporation that builds USB 3.0 computer

connector products, filed two patent infringement cases in China against two of Lotes' subsidiaries. J.A. 50 ¶ 53. Foxconn Kunshan alleged that two of the thirteen USB 3.0 connector products manufactured by Lotes infringed two Chinese patents owned by Foxconn Kunshan and Hon Hai. J.A. 51-52 ¶¶ 55-57. In response, and in an attempt to gain leverage in the Chinese lawsuits, on October 4, 2012, Lotes filed the instant action in the Southern District of New York against defendants and Foxconn Kunshan.[1] J.A. 2. Lotes alleged violations of sections 1 and 2 of the Sherman Act as well as claims for breach of contract, promissory estoppel, waiver, tortious interference with contract, and declaratory judgment.

On November 30, 2012, defendants filed a motion to dismiss the complaint in its entirety. J.A. 5 (ECF No. 17). On December 4, 2012, the district court held a pre-motion conference on a motion by defendants to strike certain references in the original complaint. J.A. 12-26. During the conference, the district court offered Lotes the opportunity to amend its original complaint in lieu of opposing defendants' motion to dismiss. J.A. 16. Lotes accepted the offer and filed its First Amended Complaint (the "FAC") on December 21, 2012. J.A. 28 (ECF No. 23). On January 11, 2013, defendants filed a motion to dismiss the FAC and an

---

[1] Although named as a defendant, Foxconn Kunshan was never served and never appeared in the action below, *Lotes Co. Ltd. v. Hon Hai Precision Industry Co. Ltd., et al.*, No. 1:12-cv-07465-SAS (S.D.N.Y. filed Oct. 4, 2012). Accordingly, Foxconn Kunshan does appear or respond on this appeal.

accompanying memorandum of law, J.A. 6 (ECF Nos. 24 & 25), which was subsequently revised and re-filed (without attaching certain contested documents) on February 11, 2013, J.A. 7 (ECF No. 29) (the "Motion"), pursuant to the district court's instructions at a pre-motion conference held on February 5, 2013. *Id.* Lotes filed a memorandum of law in opposition on February 25, 2013 (ECF No. 33) and defendants replied on March 11, 2013 (ECF No. 35). *Id.*

On May 14, 2013, the district court issued a decision (the "Opinion and Order") granting the Motion and dismissing the FAC in its entirety with prejudice. J.A. 242-77 (ECF No 49).[2] A judgment was entered on May 20, 2013, J.A. 278 (ECF No. 51), and this appeal followed.

No party is alleged in the FAC to manufacture or directly sell any USB 3.0 connectors in the United States. J.A. 249. Nor are there any allegations of price fixing. Rather, Lotes' antitrust claims arise entirely from its allegations that defendants engaged in anticompetitive conduct by: (1) deceiving the private standard-setting organization ("SSO") governing USB standards, the USB Implementers Forum, Inc. (USB-IF"); (2) refusing to grant certain patent licenses to which Lotes claims entitlement; and/or (3) filing the patent enforcement

[2] Two weeks before the Opinion and Order, on April 29, 2013, Lotes sought permission to amend its pleading a second time. The district court denied Lotes leave to file a second amended complaint for the reasons discussed herein. J.A. 9 (ECF No. 50).

proceedings in China. J.A. 30, 55-58 ¶¶ 7, 65, 68, 70. Lotes asserts that, under certain agreements with the USB-IF (to which, it alleges, defendants are parties), it has the right to certain fair, reasonable and non-discriminatory ("RAND") licenses, and defendants' refusal to grant those licenses—accompanied by commencement of the patent actions in China—constitutes anticompetitive behavior that "is designed either to foreclose Lotes from several relevant competitive markets or to raise Lotes' cost in those markets to the point that Lotes becomes uncompetitive and Defendants become a monopoly." J.A. 35-36 ¶ 19. Lotes contends this conduct is causing cognizable antitrust injury in the United States because "Defendants' willingness to bring suit against Lotes in contravention of the USB-IF RAND-Zero terms has an *in terrorem* effect capable of curbing competitive manufacture and raising prices to U.S. consumers across the full range of products incorporating USB 3.0 connectors." J.A. 58 ¶ 71.

For purposes of the Motion, the district court assumed Lotes' allegations to be true. J.A. 263. Nevertheless, the district court determined as a matter of law that the alleged conduct did not fall within the purview of the Sherman Act because it did not satisfy the requirements of the Foreign Trade Antitrust Improvements Act (the "FTAIA").[3] J.A. 264. Under the FTAIA, anticompetitive

---

[3] The district court also held that, with respect to Lotes' deception on the SSO theory of anticompetitive conduct, the FAC failed to satisfy the heightened

conduct that causes only foreign injury is outside the reach of the Sherman Act unless the challenged conduct (1) has a direct, substantial, and reasonably foreseeable effect on American domestic, import, or (certain) export commerce; *and* (2) gives rise to a Sherman Act claim. 15 U.S.C. § 6a. Following Second Circuit precedent, the district court interpreted the FTAIA requirements as jurisdictional and, because Lotes failed to meet these requirements, it dismissed Lotes' federal antitrust claims for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). The district court declined to exercise supplemental jurisdiction over Lotes' state law claims. J.A. 273-74.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the district court correctly dismissed Lotes' Sherman Act claims because the allegations in the FAC did not satisfy the requirements of the FTAIA.

2. Whether the district court acted within its discretion when it denied Lotes a second opportunity to amend its pleading.

SUMMARY OF ARGUMENT

This Court should affirm the judgment dismissing the FAC with prejudice because, after two pleading attempts, Lotes has not alleged any anticompetitive

---

pleading standards for fraud imposed by Federal Rule of Civil Procedure 9(b). J.A. 258 n.71.

conduct for which an action can be maintained under the antitrust laws of the United States. Whether as a matter of subject matter jurisdiction pursuant to Rule 12(b)(1) or as a matter of substance pursuant to Rule 12(b)(6), Lotes' Sherman Act claims fail equally and incurably for the following reasons.

First, under the FTAIA, the conduct alleged in the FAC is outside the reach of the Sherman Act. The FTAIA excludes from the Sherman Act anticompetitive conduct that causes only foreign injury unless an exception set forth in the statute is applicable. For an exception to apply, the conduct must have a direct, substantial, and reasonably foreseeable effect on the domestic, import, or certain export commerce of the United States, *and* give rise to a Sherman Act claim. J.A. 260; 15 U.S.C. § 6a. The conduct alleged by Lotes—making false representations before the USB-IF, refusing to issue Lotes RAND-Zero licenses, and/or pursuing patent enforcement proceedings in China—does not qualify. The USB 3.0 connector is but one of countless components of the electronic products imported into the United States and is subject to multiple intervening events where myriad factors other than the price of USB 3.0 connectors influence the price of domestic computer products. J.A. 272. Furthermore, Lotes does not even allege the extent, if any, to which the two types of USB 3.0 connectors—which are the basis of its refusal-to-license claims and are the subject of Chinese patent litigation—were actually incorporated into products shipped into the United States.

Nor does Lotes allege its total market share as to USB 3.0 connectors or the share attributable to its two USB 3.0 connectors that are the subject of Lotes' antitrust allegations. As the district court correctly concluded, the anticompetitive allegations asserted by Lotes against defendants may, at most, cause "ripple" effects in the United States, which are simply too attenuated to bring Lotes' alleged foreign injury within the ambit of the Sherman Act. J.A. 272.

Second, the same outcome would have been reached in this case had the district court read the FTAIA as a substantive element of a Sherman Act claim. Lotes' *only attempt* to argue to the contrary comes in a desperate afterthought that the Court should decline to even consider because the argument is raised for the first time on appeal. Lotes did not allege in any of its pleadings or argue in the district court (as it tries to now in this Court) that defendants waived the requirements of the FTAIA when they signed the USB-IF's Contributors Agreement or the Adopters Agreement. Even if the Court entertains Lotes' belated argument, it fails on its merits. The USB 3.0 Contributors Agreement has nothing to do with the FTAIA and, assuming further, *arguendo*, that defendants agreed not to act in a manner that violated the antitrust laws of the United States, nothing in those agreements can possibly be read as a concession of the elements of any antitrust claim. Lotes even admits that parties cannot agree to confer subject-matter jurisdiction on a federal court and, at the time defendants signed the

relevant agreement, there was no dispute that the requirements of the FTAIA were jurisdictional.

In any event, though this Court need not decide whether the FTAIA is jurisdictional or substantive, the dismissal under Rule 12(b)(1) for lack of subject matter jurisdiction was correct. The district court's interpretation of the FTAIA follows *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922 (2d Cir. 1998), a decision of this Court which is binding because it has not been overturned. Moreover, this Court's holding in *Filetech* that the FTAIA is jurisdictional is firmly supported by the statute's legislative history, the structure of the statute, principles of comity, and precedent from the Supreme Court and the majority of other circuits that have addressed the issue, including the Fourth, Fifth, Ninth, Eleventh, and District of Columbia Circuits.

Finally, the district court correctly denied Lotes a second opportunity to amend its pleading because Lotes' second request to amend was not made in good faith, it was untimely, and it was futile. As the district court concluded, Lotes' request was a transparent attempt to manufacture diversity jurisdiction on the eve of a decision on the Motion (i.e., more than four months after Lotes had filed the FAC, its first amended pleading). J.A. 274-75. Moreover, the proposed second amendment was futile because, among other things, it did not add to or alter a single allegation in the FAC. Accordingly, the district court exercised sound

discretion when it dismissed the FAC without granting Lotes leave to file a second amended complaint.

For these reasons, the judgment should be affirmed.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DISMISSED LOTES' SHERMAN ACT CLAIMS BECAUSE THEY DID NOT MEET THE REQUIREMENTS OF THE FOREIGN TRADE ANTITRUST IMPROVEMENTS ACT

The District Court dismissed the FAC because the Sherman Act cannot reach Lotes' antitrust claims unless an exception set forth under the FTAIA is applicable. J.A. 259. The FAC reveals no such exception. J.A. 271-72.[4] This decision was clearly correct. It merits affirmance.

A. The FAC Fails To Allege Direct, Substantial, And Reasonably Foreseeable Effects On Domestic Commerce, Meaning Plaintiff Failed To Allege Antitrust Claims Whether Or Not The FTAIA Is A Jurisdictional Statute

1. The District Court Was Not Bound By The FAC's Pleading Of Legal Conclusions

On a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). This is as true of a

[4] The exception at issue in this case is the "domestic-injury exception," which applies if the challenged conduct (1) has a direct, substantial, and reasonably foreseeable effect on American domestic, import, or certain export commerce; *and* (2) gives rise to a Sherman Act claim. J.A. 260; 15 U.S.C. § 6a.

facial challenge under Rule 12(b)(1) as it is of a motion to dismiss under Rule 12(b)(6). *See Sharkey v. Quarantillo*, 541 F.3d 75, 83 (2d Cir. 2008). Yet, at bottom, the failure to accept the FAC's legal conclusions is all that Lotes is complaining about.

Lotes *asserts* that "the market for notebooks, desktop computers, and servers is *entirely* connected to the foreign market for USB connectors," Br. 28 (emphasis in original), and 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." *Id*. (emphasis added). But the district court fairly read the FAC's factual allegations as follows:

> Plaintiff and other USB 3.0 connector manufacturers supply the USB 3.0 connector products to various manufacturers of motherboards in China, which incorporate the connectors into their motherboards *in China*. These motherboards are sold to original design manufacturers ("ODM") *in China* that manufacture the finished goods for brands such as Dell and HP *in China*. Only then are these finished goods shipped to the United States for distribution.

J.A. 264 (emphasis in original) (quoting defendants' memorandum in support of their motion to dismiss, Feb. 11, 2013, ECF No. 29). "The USB 3.0 connector is but one component . . . of the electronic products imported into the United States." J.A. 271. The path from the USB 3.0 connector component to a finished product shipped to the United States involves multiple intervening events and influences

under circumstances where "a whole host of factors other than the price of USB 3.0 connectors influence[s] the [United States] price of domestic computer products." J.A. 272. *See*, *e.g.*, *In re Intel Corp. Microprocessor Antitrust Litig.*, 452 F. Supp. 2d 555, 560-61 (D. Del. 2006) (rejecting for FTAIA purposes contention of "direct domestic effect" premised on a "multitude of speculative and changing factors affecting business and investment decisions.")

Lotes' inadequate allegations do not stop there. The FAC's allegations do not disclose the extent to which these two types of USB 3.0 connectors that are subject to the Chinese patent litigation—and thus are the sole subject of Lotes' antitrust allegations—were actually incorporated into any products shipped to the United States. Lotes admits it manufactured at least thirteen types of USB 3.0 connectors. Lotes' antitrust allegations are directed at only two of the thirteen. Apart from those two connectors at issue in Lotes' FAC, Lotes "concedes, 'Hon Hai has entered into licenses to [sic] its USB 3.0 patents with other USB 3.0 Adopters.'" J.A. 272 (alteration in original). Thus, the inadequacy of the allegations is further reflected in Lotes' failure to allege either its total market share of USB 3.0 connectors or, more critically, the share attributable to the two USB connectors that are the subject of the antitrust claims. Without such allegations, there is no basis to gauge whether the two relevant types of Lotes' USB 3.0 connectors have *any impact* on finished computer products shipped to the

United States, much less something more than attenuated ripple effects insufficient to satisfy the FTAIA.

In response, Lotes claims defendants' conduct "forms a circle," Br. 26, but then describes a circle whose ripples largely traverse foreign lands: "roughly 94% of global network computers were assembled by a small number of Taiwanese vendors, primarily Original Design Manufacturers (ODMs) maintaining production facilities in China." Br. 28 (internal quotation marks omitted). Similarly:

> The supply chain to the U.S. consumer is straightforward . . . . 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. Second, the USB 3.0 connectors are made in China. 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. Finally, the finished goods are distributed for sale by retail stores in the United States. . . . 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. 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. . . . 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.

Br. 29-30 (internal citations and quotation marks omitted). Lotes' recitation of this lengthy supply chain confirms, rather than contradicts, the district court's conclusion that, "[a]t most, then, defendants' conduct may cause 'ripple effects' which are simply too attenuated to bring plaintiff's foreign injury within the ambit of the Sherman Act." J.A. 272. Even that is speculation, given the absence of allegations showing that the two USB 3.0 connectors at issue had any measurable impact on the price of finished computer products shipped to the United States.

2. The District Court Applied The Correct Legal Standard

Taking out of context a passage in the district court's opinion, Lotes complains that the district court applied the wrong legal standard to the FAC's allegations. Lotes claims the district court erred by following the approach of the Ninth Circuit rather than that of the Seventh Circuit, ruling that an effect is "direct" only if it "follows as an immediate consequence of the defendant's activity," rather than meeting a test of "proximate causation." Br. 37-42.

The district court made clear, however, that—applying the same "proximate causation" standard Lotes advocates—the FAC still fails to establish a direct, substantial, and reasonably foreseeable effect. As the court observed: "To the extent that defendants' foreign anti-competitive conduct may result in higher

computer prices and less competition here in the U.S., those effects are simply too attenuated *to establish the proximate causation required by the FTAIA*." J.A. 265 (emphasis added). The court went on to discuss the case law, including the *TFT-LCD* case upon which Lotes relies so heavily (Br. 39-41). As the court observed, unlike the *TFT-LCD* case, which involved a conspiracy by more than 80 percent of the manufacturers to fix prices on a major component of products imported into the United States, the FAC here alleges a patent infringement suit in China against only two of Lotes' thirteen USB 3.0 connectors, potentially excluding only a small (but unidentified) share of such connectors (especially in light of Lotes' concession that defendants had licensed other USB 3.0 connector manufacturers), where such connectors were "but one component in a host of components that make up the finished products." J.A. 269-72.[5]

Lotes takes issue (Br. 32-33) with the district court's statement that Lotes had not alleged its total market share. But Lotes' discussion of that subject completely misses the court's point and serves only to confirm the inadequacy of its allegations. The court reasoned in *TFT-LCD* that a price-fixing conspiracy by

[5] *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 822 F.Supp. 953, 964 (N.D. Cal. 2011), did as the district court here, evaluating both foreseeability and the presence of "direct effects" under *United States v. LSL Biotechnologies*, 379 F.3d 672, 680 (9th Cir. 2004). Issued by a district court within the Ninth Circuit, the decision in *TFT-LCD* is hardly surprising in that regard.

more than 80 percent of the manufacturers of a major component would likely have direct, substantial, and reasonably foreseeable effects on commerce in the downstream product, whereas a patent infringement suit in China against only two of thirteen USB 3.0 connectors produced by only one of many component manufacturers—where other component manufacturers were licensed, and where the alleged infringer had an unspecified share of the component market—could not have such an effect. J.A. 271-72. In response, Lotes asserts (Br. 33) that, according to the FAC, its share of the component market "is in the neighborhood of 10-15%." (Internal quotation marks omitted.) But Lotes does not contest at all that only two of its thirteen connectors were challenged and that other component manufacturers were already licensed. Specifying Lotes' own small share, of course, serves only to make the district court's point *a fortiori* and to leave wholly unaddressed share data relevant to the only two connector products subject to Lotes' antitrust allegations. This is a far cry from cases like *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 856 (7th Cir. 2012) (en banc), where the price-fixing allegations concerned "an international cartel with a grip on 71% of the world's supply of a homogeneous commodity." *Id.* *Minn-Chem* recognized that there is necessarily a "floor" below which allegations are insufficient to show substantial and foreseeable effects in the United States. *Id.* In *Minn-Chem*, "[w]herever the floor may be, it is so far below these numbers [before the Seventh Circuit] that we

do not worry about it here." *Id*. Here, the Court does not need to worry about the line for the opposite reason: an effect on only two of thirteen products of a component manufacturer accounting for only 10-15 percent of the share of a single, relatively minor component does not come even close to the suggestion in the legislative history of the FTAIA that a cartel making no sales into the United States could fall within the direct 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. 2487, 2498. Despite multiple opportunities, Lotes has not pleaded facts showing any effect on United States product shipments.[6]

Affirmance in this case thus requires no fine parsing of any theoretical distinctions between the Ninth Circuit's "immediate consequence" language and the Seventh Circuit's "proximate cause" standard. Under either formulation, the FAC fails the test, and the district court correctly drew that conclusion.

3. The Location Of The Standard-Setting Organization And Its Participants Is Irrelevant

Lotes tries to cast a gauzy cloak of U.S. involvement over the case by referring to the "Oregon-based" standard-setting organization, a "California-based" participant, "California-based" counsel for a defendant, and licensing attorneys

[6] In its proffered second amended complaint, discussed *infra*, Lotes did not propose any further allegations relevant to its purported market share.

"based in the United States." Br. 31. The issue, however, is not whether any of the agreements forming the backdrop for the allegedly anticompetitive conduct occurred in the United States, but rather if and where any effects are felt. As the Third Circuit has observed, quoting the House Judiciary Committee Report accompanying the FTAIA, "'Since Judge Learned Hand's opinion in *United States v. Aluminum Co. of America*, 148 F.2d 416, 443-44 (2d Cir. 1945), it has been relatively clear that it is the situs of the effects, as opposed to the conduct, that determines whether United States antitrust law applies.'" *Turicentro, S.A. v. Am. Airlines Inc.*, 303 F.3d 293 (3d Cir. 2002), quoting H.R. REP. NO. 97-686, *reprinted in* 1982 U.S.C.C.A.N. at 2490. Similarly, in *Eurim-Pharm GmbH v. Pfizer Inc.*, 593 F. Supp. 1102, 1106 (S.D.N.Y. 1984), the court declared, "The [FTAIA] clearly was intended to exempt from United States antitrust law conduct that lacks the requisite domestic effect, even where such conduct originates in the United States or involves American-owned entities operating abroad."[7]

[7] *See also McElderry v. Cathay Pac. Airways, Ltd.*, 678 F. Supp. 1071, 1077 (S.D.N.Y. 1988) ("An anticompetitive effect on United States commerce is required for jurisdictional nexus, regardless [of] whether there was anti-competitive conduct in the United States."); *Liamuiga Tours, a Div. of Caribbean Tourism Consultants Ltd. v. Travel Impressions, Ltd.*, 617 F. Supp. 920, 924 (E.D.N.Y. 1985) ("It matters not if there was anti-competitive conduct in the United States or by domestic corporations."); *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 814 (9th Cir. 1988) (citing *Eurim-Pharm*, *McElderry*, and *Liamuiga* with approval).

The district court correctly held that the FAC failed to allege direct, substantial, and reasonably foreseeable effects on domestic commerce. The resulting judgment for defendants, J.A. 278, merits affirmance.

B. This Court Need Not Address The Jurisdictional Character Of The FTAIA Because Nothing Turns On Whether The District Court's Dismissal Was Jurisdictional Under Rule 12(b)(1) Or Substantive Under Rule 12(b)(6)

The district court made unmistakably clear at a February 2013 hearing that it did not want to consider any material outside the pleadings in ruling on defendants' motion to dismiss, J.A. 219-40, and it did not do so.[8] Lotes concedes that the motion below was a facial challenge. Br. 26. The court held that the FAC had failed to allege a "direct, substantial, and reasonably foreseeable" effect on U.S. commerce. J.A. 271. That determination is fatal to Lotes' antitrust claims under Rule 12(b)(1) or Rule 12(b)(6).

Nevertheless, Lotes argues (Br. 24-25) *for the first time on appeal* that, if the FTAIA's requirements are substantive rather than jurisdictional, "the FTAIA issue disappears from the case" because "Defendants have *expressly agreed* that the U.S. federal courts can and should judge Defendants' standard-setting conduct under U.S. anti-trust laws." Br. 24 (emphasis in original). This bald assertion,

[8] *See*, *e.g.*, J.A. 272 n.110 (considering a letter only because it was referenced in the complaint); J.A. 274-75 (denying leave to amend because plaintiff received notice of the deficiencies in its original Complaint and because amendment would be futile, not because of any facts showing lack of jurisdiction).

unaccompanied by any citation of authority, is a meritless afterthought that the Court should not even consider because "[a]rguments raised for the first time on appeal are deemed waived." *See Flynn v. James*, 513 F. App'x 37, 40 (2d Cir. 2013) (citing *Baker v. Dorfman*, 239 F.3d 415, 423 (2d Cir. 2000)). Like the plaintiff in *Flynn*, whose "belated argument" this Court refused to consider, Lotes' waiver occurred on two levels—Lotes never pleaded in its original, first amended, or proposed second amended complaints that an agreement by defendants satisfied one of the elements of Lotes' antitrust claims *and* it never argued this issue in the proceedings below. *Flynn*, 513 F. App'x at 40; *see generally* Pl.'s Opp'n to Defs.' Mot. to Dismiss, Feb. 25, 2013, ECF No. 33.

Even if the Court does not enforce Lotes' waiver of its belatedly raised argument, the Court should reject it on the merits.

First, Lotes' fallacious theory that defendants conceded the requirements of the FTAIA is premised on certain sections in the USB 3.0 Contributors Agreement, J.A. 76-82, and the USB 3.0 Adopters Agreement, J.A. 84-89, that have nothing to do with the FTAIA. Lotes claims that defendants "contractually agreed to 'act in a manner which does not violate any state, federal, or international antitrust laws and regulations.'" Br. 25 (citing J.A. 78). However, the Contributors Agreement states in pertinent part:

> Contributor and the Promoters understand that in certain lines of business they are or may be direct competitors

> and that it is imperative that they and their representatives act in a manner which does not violate any state, federal or international antitrust laws and regulations.

J.A. 78. This language does not commit any *contract signatory* to the application of any particular "state, federal or international antitrust laws and regulations" without a threshold determination that a particular antitrust statute governs the conduct in question. In other words, "state, federal or international antitrust laws" must be shown applicable from a source other than the Contributors Agreement before the conduct at issue can be scrutinized. This is confirmed by the language arraying *potentially* applicable antitrust laws in the alternative: "state, federal *or* international." *Id*. (emphasis added).

Lotes also misrepresents the contract by stating that defendants "agreed that they would not, among other things, engage in 'exclusion of competitors.'" Br. 25. The complete sentence from the section of the Contributors Agreement that Lotes selectively quotes is as follows:

> Without limiting the generality of the foregoing, Contributor and the Promoters acknowledge that this Agreement prohibits any *communications* regarding costs, prices, quantity or quality of production levels, methods or channels of distribution, markets customers, exclusion of competitors or any other topic that may be construed as a violation of antitrust laws.

J.A. 78 (emphasis added). This part of the Contributors Agreement addresses "communications." Additionally, the language's reference to "antitrust laws" is

necessarily read as a reference to the antitrust laws earlier referenced in the paragraph "state, federal or international antitrust laws and regulations" otherwise applicable.

The Contributors Agreement directs caution in communications among actual or potential competitors in connection with the object of that agreement, which is to foster open competition in the development of products and services based on the USB 3.0 specification. Nothing about the contract or its language suggests that it broadens the scope of antitrust law applicable and Lotes cites no authority in support of that apocryphal reading.[9]

Lotes' argument is also irreconcilable with the fact that, at the time defendants executed the Contributors and Adopters agreements, there was no dispute over the FTAIA's status as a jurisdictional limitation on federal courts. *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 272i2 (3d ed. 2006) ("At this writing all Circuits agree that the FTAIA's limitations on the

---

[9] Lotes' apparent reliance (Br. 25) on the boilerplate provisions concerning choice-of-law and personal jurisdiction contained in the Contributors Agreement, J.A. 81, and Adopters Agreement, J.A. 88, is equally unavailing. Those clauses provide that the agreements shall be construed under and controlled by the laws of the State of New York, and any disputes arising out of the agreements shall be heard exclusively in a federal or state court in New York. J.A. 81, 88. There is nothing mentioned about the application of the Sherman Act or a waiver of the FTAIA requirements and, indeed, Lotes does not even attempt to explain how these provisions could be construed as a concession of the elements of an antitrust claim.

reach of the Sherman Act are 'jurisdictional.'") and n.83 (citing cases). Thus, none of the parties to the Contributor or Adopters Agreements could have contemplated waiving the requirements of the FTAIA, given Lotes' rightful concession "that a defendant cannot agree to confer subject-matter jurisdiction on a federal court." Br. 24.

In sum, Lotes offers no basis by which this Court could conclude that the result below would have been any different under a Rule 12(b)(6) analysis—as distinguished from a Rule 12(b)(1) analysis. Accordingly, the dismissal should be affirmed without the need for this Court to rely on the FTAIA's jurisdictional character, *vel non*.

C. Nevertheless, The District Court Correctly Held That The FTAIA Is A Jurisdiction-Defining Statute

In any event, the district court was correct in ruling that the FTAIA is jurisdictional, both because the court was bound by Circuit precedent and because Congress clearly so intended.

1. The District Court Correctly Held That It Is Bound By This Court's Decision In *Filetech*

As this Court has observed, "a prior decision of a panel of this court binds all subsequent panels 'absent a change in law by higher authority or by way of an [e]n banc proceeding.'" *United States v. Snow*, 462 F.3d 55, 65 n.11 (2d Cir. 2006) (quoting *United States v King*, 276 F.3d 109, 112 (2d Cir. 2002)). It is

similarly binding on all district courts within the Circuit. *See United States v. Boston*, No. 12-2552-cr, — F. App'x —, 2013 WL 4488615, at *2 n.3 (2d Cir. Aug. 23, 2013). Since this Court has previously ruled that the FTAIA is jurisdictional, *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 931 (2d Cir. 1998), the question is whether, as Lotes so boldly asserts (Br. 20-21), *Filetech* "has been overruled by the Supreme Court" in *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006).[10]

The answer is that it has not. Just as the Supreme Court in *Arbaugh* condemned "drive-by jurisdictional rulings," 546 U.S. at 511, this Court should not countenance drive-by implicit overrulings. As discussed in the next section, the legislative history of the FTAIA, the structure of the FTAIA, Supreme Court precedent, and principles of comity all establish the jurisdictional nature of the FTAIA. Against this array of factors, Lotes clings to some dicta from a case involving an entirely different statute (Title VII of the Civil Rights Act), as to which there was no indication that Congress placed in Title VII jurisdictional

---

[10] Although one panel of this Circuit may overrule a prior decision of another panel of this Circuit if there has been an intervening Supreme Court decision that "casts doubt" on controlling precedent, *WNET, Thirteen v. Aereo, Inc.*, 712 F.3d 676, 695 (2d Cir. 2013), *Arbaugh* has no effect on *Filetech* for the reasons discussed herein.

limits.[11] Such a dubious analogy cannot serve as the basis for a district court—or a panel of this Court—to ignore settled Circuit precedent.

2. This Court's *Filetech* Decision Correctly Treated The FTAIA As Jurisdictional

a. Congress Intended The FTAIA To Govern Subject Matter Jurisdiction

The legislative history of the FTAIA demonstrates explicitly that the Congressional intent behind the passage of the FTAIA was to regulate jurisdiction and not the standard by which foreign conduct constitutes a substantive violation of antitrust law. For example, the House of Representatives report (the "House Report") from the legislative debate on the adoption of the FTAIA states the following:

> A very important question is the effect of the legislation on current antitrust law. It is the intent of the sponsors of the legislation and the Committee to address *only the subject matter jurisdiction of United States antitrust law in this legislation*. H.R. 5235 *does not affect the legal standards for determining whether conduct violates the antitrust laws, and thus the substantial antitrust issues on the merits of a claim would remain unchanged.*

---

[11] *Arbaugh* did not mention the FTAIA or antitrust law in any way, and its list of "drive-by jurisdictional rulings," 546 U.S. at 511, included only Title VII cases and not the Court's previous FTAIA decision (*F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), discussed *infra*) treating the FTAIA as jurisdictional.

H.R. REP. NO. 97-686, at 13, *reprinted in* 1982 U.S.C.C.A.N. at 2498 (emphasis added). "[A]nother significant purpose of the FTAIA was to fix the problem that arose because 'courts differ in their expression of the proper test for determining whether United States antitrust jurisdiction over international transactions exists.'" *LSL Biotechnologies*, 379 F.3d at 678 (quoting H.R. REP. NO. 97-686, at 2, *reprinted in* 1982 U.S.C.CA.N. at 2487. The House Report also states that "[b]y more precisely defining the subject matter jurisdiction of U.S. antitrust law, H.R. 5235 in no way limits the ability of a foreign sovereign to act under its own laws against an American based export cartel having unlawful effects in its territory." H.R. REP. NO. 97-686, at 13-14, *reprinted in* 1982 U.S.C.C.A.N. at 2498-99.

The Senate Conference Report (the "Senate Report") likewise confirms that Congress intended the FTAIA to affect jurisdiction and not the substantive elements of the Sherman Act. Specifically, the Senate Report states that the FTAIA created a "jurisdictional threshold for enforcement actions." S. REP. NO. 97-644, at 29-30 (1982) (Conf. Rep.)

Statements by then-Chairman of the House Judiciary Committee, Peter Rodino, confirm this conclusion. Chairman Rodino stated that one of the beneficial effects of the FTAIA was to "iron out wrinkles in the *jurisdictional fabric* that have led to legitimate doubts among exporters about what conduct is or is not permitted." 128 CONG. REC. 18952 (Aug. 3, 1982) (statement of Rep.

Rodino) (emphasis added). Chairman Rodino further stated that the changes brought about by the FTAIA do not "affect the substantive standards that a court applies in determining whether the antitrust laws have been violated. Instead, [it] draws a more precise *jurisdictional line*." *Id.* (emphasis added); *see also* H.R. REP. NO. 97-686, at 18, *reprinted in* 1982 U.S.C.C.A.N. at 2500 (statement of Chairman Rodino) ("As explained more fully in the Committee's Report, the Committee added [the effects language] to make it absolutely clear that the basis of *American antitrust jurisdiction* has to be a domestic anticompetitive effect." (emphasis added)).

b. The Structure Of The FTAIA Demonstrates That The Statute Addresses Jurisdiction And Not The Substantive Elements Of A Sherman Act Claim

Contrary to Lotes' contention, the FTAIA does not address the merits of a claim under the Sherman Act. Instead, the statute addresses jurisdiction. The language in the FTAIA's three sections illustrates the intended, jurisdictional purpose of the legislation. First, the prefatory language creates a general rule that excludes U.S. jurisdiction over foreign conduct. Next, in subsection 1, the statute carves out two exceptions to the rule where foreign conduct significantly harms domestic commerce. Finally, pursuant to subsection 2, only if the threshold conditions in subsection 1 are met may a court consider whether the substantive elements of an antitrust claim, i.e., "sections 1 to 7 of [the Sherman Act], *other*

than this section [the FTAIA]," give rise to a claim. 15 U.S.C. § 6a(2) (emphasis added). In other words, satisfaction of the FTAIA does not itself give rise to a claim—it authorizes jurisdiction for a claim that must then be cognizable by satisfying the provisions of sections 1 to 7 of the Sherman Act *other than the FTAIA*. The language of subsection 2 expressly differentiates section 6a (the FTAIA) from the Sherman Act's requirements. If the FTAIA created a substantive element for an antitrust claim, as Lotes contents, then the language in subsection 2 would be rendered superfluous—an interpretation that the Court is required to disfavor. *Conn. ex rel. Blumenthal v. U.S. Dep't of Interior*, 228 F.3d 82, 88 (2d Cir. 2000).[12]

c. Holding That The FTAIA Is Not Jurisdictional Would Undermine Principles Of Comity

The Supreme Court "ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations."

[12] Furthermore, according to Abbott Lipsky, Jr., who served as Deputy Assistant Attorney General for the Antitrust Division of the Department of Justice (DOJ) and was responsible for, among other things, coordinating the Division's positions on federal antitrust legislation at the time that the FTAIA was under consideration, subsection 2 of the FTAIA was specifically inserted at the request of the DOJ "to assure that proof of jurisdiction under the FTAIA would not be sufficient to establish substantive liability." *See* Abbot B. Lipsky, Jr. & Kory Wilmot, *The Foreign Antitrust Improvement Act: Did* Arbaugh *Erase Decades of Consensus Building?*, THE ANTITRUST SOURCE 8 n.47 (Aug. 2013), www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug13_lipsky_7_30f.authcheckdam.pdf.

Empagran, 542 U.S. at 164. Importantly, "[t]his rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws." *Id.* Interpreting the FTAIA as a jurisdiction-defining statute furthers principles of comity because even where—unlike in this case—the complaint is adequate to withstand dismissal under Rule 12(b)(6), motions to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) permit fact-finding that can quickly and efficiently resolve the threshold question of whether a dispute concerning foreign conduct should be litigated in a United States court. Accepting Lotes' interpretation of the FTAIA as substantive would result in cases with little connection to the United States being subject to lengthy and expensive proceedings in United States courts before their foreign nature could be fully vindicated. Such litigation could "threaten interference with a foreign nation's ability to maintain the integrity of its own antitrust enforcement system." *Empagran*, 542 U.S. at 168-69.

d. The Supreme Court And The Majority Of Other Circuit Courts That Have Addressed The Issue Treat The FTAIA As Jurisdictional

In *Empagran*, the Supreme Court examined the scope of the FTAIA in a price-fixing case arising from a Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, which the district court granted on the ground that an exception did not apply. The Court agreed with the district court's interpretation of the

statute, and its holding resulted in a lack of subject matter jurisdiction (not in a failure to state a claim). The Court's opinion is couched in jurisdictional terms. Among other things, the Court quotes from a Fifth Circuit decision for the proposition that it found "no case in which jurisdiction was found in a case like this—where a foreign plaintiff is injured in a foreign market with no injuries arising from the anti-competitive effect on a United States market." *See id.* at 170 (quoting *Den Norske Stats Oljeselskap AS v. HeereMac Vof*, 241 F.3d 420, 429 (5th Cir. 2001) (internal quotation marks omitted).[13] The Court also quotes from the legislative history of the FTAIA, which provides that "there should be no American antitrust *jurisdiction* absent a direct, substantial and reasonably foreseeable effect on domestic commerce or a domestic competitor. *Empagran*, 542 U.S. at 163 (quoting H.R. REP. NO. 5235, at 9-10) (emphasis added).

The view that the FTAIA is jurisdictional is also consistent with the law in the Fourth, Fifth, Ninth, Eleventh, and District of Columbia Circuits.[14] While two

---

[13] The Fifth Circuit further stated that in those cases where the domestic effect on commerce did not give rise to the plaintiff's claim, courts found subject matter jurisdiction lacking. *Den Norske*, 241 F.3d at 429.

[14] *See*, *e.g.*, *Dee-K Enters., Inc. v. Heveafil Sdn. Bhd*, 299 F.3d 281, 287(4th Cir. 2002) ("Congress legislated in this area relatively recently, establishing a threshold jurisdictional standard for conduct involving trade or commerce (other than import trade or import commerce) with foreign nations." (citing FTAIA)); *Den*

other circuits have recently held to the contrary,[15] those opinions did not consider congressional intent or the structure of the statute, all of which support the historical, and more widely held, view that the FTAIA is jurisdictional.[16]

Following precedent as well as basic principles of statutory construction, this Court should affirm the district court's conclusion that Lotes' failure to satisfy an

---

Norske, 241 F.3d at 426 (5th Cir. holding that "[t]he conduct of these defendants is foreign conduct that falls within the general parameters of the FTAIA and, thus, [plaintiff] must show that the two specific requirements of the statute are met to establish subject matter jurisdiction over its claims"); *LSL Biotechnologies*, 379 F.3d at 679 (9th Cir. holding that "[o]ur precedent supports the conclusion that the FTAIA provides the guiding standard for jurisdiction over foreign restraints of trade"); *United States v. Anderson*, 326 F.3d 1319, 1329 (11th Cir. 2003) ("Congress enacted the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a (FTAIA), to limit American courts' jurisdiction over international commerce to transactions that affect the American economy."); *Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1085 (D.C. Cir. 1998) ("It does seem clear, however, that we should use the standard set forth in the FTAIA to analyze whether conduct related to international trade has had an effect of the nature and magnitude necessary to provide us with subject matter jurisdiction.").

[15] *See Minn-Chem*, 683 F.3d at 852 (7th Cir. en banc) and *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 466 (3d Cir. 2011).

[16] Furthermore, in *Minn-Chem*, the Seventh Circuit relied on *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), to conclude that the FTAIA sets forth an element of an antitrust claim. *Minn-Chem*, 683 F.3d at 852. The Court in *Morrison*, however, raised the instant question in the context of provisions of § 10(b) of the Exchange Act, which are not analogous to the provisions of the FTAIA. Whereas the provisions of § 10(b) determine a violation of the Exchange Act, subsection 2 of the FTAIA (and the legislative history) makes clear that the elements of a Sherman Act claim are set forth in the provisions *other* than the FTAIA. Accordingly, neither *Arbaugh* nor *Morrison* serve as appropriate guidance on the question of whether the provisions of the FTAIA are jurisdictional or substantive.

exception under the FTAIA warranted dismissal for lack of subject matter jurisdiction.

II. THE DISTRICT COURT ACTED WITHIN ITS DISCRETION WHEN IT DENIED PLAINTIFF A SECOND OPPORTUNITY TO AMEND ITS COMPLAINT

Lotes argues that it should have been permitted to amend its pleading a second time notwithstanding the district court's clear and reasoned admonition that Lotes' first opportunity to amend would be its last. Br. 43; J.A. 16-17, 274-75, 289. Lotes is not entitled to another chance.

A district court has broad discretion when determining whether to grant leave to amend, and its determination is reviewed for abuse of discretion. *Gurary v. Winehouse*, 235 F.3d 792, 801 (2d Cir. 2000). While Rule 15(a) states that leave to amend should be granted "when justice so requires," motions to amend "should generally be denied in instances of futility, undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, or undue prejudice to the non-moving party." *Burch v. Pioneer Credit Recovery, Inc.*, 551 F.3d 122, 126 (2d Cir. 2008). Here, the district court acted well within its discretion when it denied Lotes leave to file a second amended complaint because, as discussed below, Lotes' request was not made in good faith, was not timely, and was futile. This Court should affirm.

A. The District Court Correctly Viewed Lotes' Second Request To Amend As A Blatant Attempt To Manufacture Diversity Jurisdiction

While asserting (Br. 44) that the district court did not review its proposed Second Amended Complaint (the "Proposed SAC"), Lotes does not dispute a critical point noted in the Opinion and Order: the Proposed SAC sought to add three wholly owned subsidiaries of Lotes as party-plaintiffs without alleging a single fact on behalf of these new proposed plaintiffs.[17] J.A. 274. Lotes also does not dispute that one of the subsidiaries, LT Connect, Inc., is an Oregon corporation that served as the basis for a new diversity jurisdiction allegation in the Proposed SAC. *Id.* Having received letter briefs on the issue, the district court did not need a hearing or formal briefing to determine what it saw as "transparent"—Lotes sought to add a party with no real interest in the litigation merely to create diversity jurisdiction. J.A. 275. The district court correctly refused to "countenance unnecessary joinder," *id.*, because a federal court must disregard nominal parties

[17] As defense counsel explained in a letter to the district court dated May 2, 2012, J.A. 288-90, Lotes' counsel provided defense counsel a copy of the Proposed SAC on April 30, 2013. Defense counsel reviewed the Proposed SAC and proffered to the district court in the May 2 letter the fact that the Proposed SAC did not contain any allegations on behalf of the new proposed party plaintiffs. Indeed, the FAC and the Proposed SAC are identical in all material respects with the exception of the naming of the three proposed plaintiffs and a new diversity jurisdiction allegation based on the addition of one of the new proposed plaintiffs. Lotes did not dispute these facts in a letter it submitted in response on May 10, 2013, J.A. 279-81, and it does not dispute these facts on appeal.

and rest jurisdiction upon the citizenship of "*real* and *substantial* parties to the controversy." *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 460-61 (1980) (emphasis added). Having asserted not a single allegation against any of the defendants in the Proposed SAC, proposed new plaintiff LT Connect, Inc. is not a real and substantial party to this controversy. *Cf. Airlines Reporting Corp. v. Sand N Travel, Inc.*, 58 F.3d 857, 862-63 (2d Cir. 1995) (stating that a parent company cannot attempt to create federal diversity jurisdiction by assigning its claim to a subsidiary).

Furthermore, Lotes' contention that the Proposed SAC was not unduly delayed and would not have materially prejudiced defendants conveniently ignores the district court's clear directive to Lotes. As the district court noted in the Opinion and Order, the deficiencies in Lotes' FAC were brought to Lotes' attention in a pre-motion letter from defense counsel dated November 21, 2012, in defendants' brief in support of their motion to dismiss, filed on November 30, 2012, and at a court conference on December 4, 2012, during which the district court offered Lotes the opportunity to amend with the "extra benefit" of having seen defendants' arguments for dismissal of the original complaint. J.A. 274. During that conference, the district court advised Lotes that it encouraged parties to amend "up front" to avoid multiple rounds of motion

practice and, consistent with that practice, it would not allow Lotes a second amendment. J.A. 15-16, 289. In particular, the district court stated:

> *[M]y practice is to get people to amend up front*, rather than have me go through the whole effort of a full briefing schedule, write a whole opinion that ends with "and you can now fix everything and amend." The whole point of this letter exchange is, [to] show you the deficiencies now if you agree there are any, fix them if you can, and then have *one round* of motion practice directed to the best possible pleading. So if you think you've seen the light, so to speak, and you can amend and want to amend, I'm going to allow them to amend and tell you to withdraw the motion [to dismiss] and refile it with the best complaint. *But then I won't grant leave to amend. . . . [Y]ou now have the brief, in addition to the letters.* You got the extra benefit. *Either you think there's something you ought to amend or you don't. . . .* I'm telling you now that, with the benefit of the letter and the brief, if you want to amend, *I will let you amend, and tell them to move against the best possible complaint … and my decision will not end with Leave to amend is granted*. It will be one way or the other, up or down.

J.A. 15-16 (emphasis added). The district court's practice promotes judicial economy by allowing plaintiffs to decide on their final pleading before a substantive ruling.

Two weeks later, on December 21, 2012, with "the benefit of [defendants' November 21 letter] and brief [in support of defendants' first motion to dismiss]," J.A. 16, Lotes filed the FAC, J.A. 274, and defendants subsequently moved to dismiss. J.A. 7 (ECF Nos. 29, 33, 35).

Lotes fails to justify why, after waiting until April 29, 2013—over four months after it filed the FAC and on the eve of a decision on defendants' fully briefed motion to dismiss—Lotes had the right to amend yet a second time. On appeal, Lotes vaguely contends that the Proposed SAC "actually flowed from newly discovered information," Br. 44, but Lotes does not identify or explain this information, or demonstrate that it was unaware in 2012 of the additional plaintiffs it proposed to add via a second amended pleading. The district court acted within its discretion when it denied amendment.

B. The District Court Properly Denied Plaintiff Leave to Amend Because The Defects In The Complaint Could Not Have Been Cured By Amendment

Even assuming, *arguendo*, that Lotes' application for leave to file the Proposed SAC was made in good faith and was timely, the district court properly denied the request as futile. *See Mortimer Off Shore Servs., Ltd. v. Fed. Republic of Ger.*, 615 F.3d 97, 99 (2d Cir. 2010) (holding that "leave to amend would be futile because the proposed amended complaint did not cure the original complaint's deficiencies."). As discussed above, the Proposed SAC did not add to or alter a single allegation in the FAC and therefore had no affect on the district court's subject matter jurisdiction or on the defects in Lotes' claims. Furthermore, though not alleged in the Proposed SAC, even if one of the proposed new plaintiffs, LT Connect, "works closely with customer Intel in the State of Oregon,

facilitating the marketing and development of Lotes' USB 3.0 connectors," as Lotes contends (Br. 45), the district court correctly held that this statement is "too attenuated to establish the type of harm needed to confer standing on LT Connect." J.A. 275 n.118.

The district court correctly denied leave to amend a second time as futile, and this Court should affirm the sound exercise of discretion.

CONCLUSION

For all of the foregoing reasons, Defendants-Appellees respectfully request that the Court affirm the judgment of the district court dismissing the First Amended Complaint (FAC) in its entirety with prejudice.

Date: September 30, 2013

Respectfully submitted,

/s/ *Thomas M. Peterson*

Thomas M. Peterson
MORGAN, LEWIS & BOCKIUS LLP
One Market, Spear Street Tower
San Francisco, California 94105
T. 415.442.1000
F. 415.422.1001

Brian A. Herman
MORGAN, LEWIS & BOCKIUS LLP
101 Park Avenue
New York, New York 10178
T. 212.309.6000
F. 212.309.6001

Thomas J. Lang
Willard K. Tom
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
T. 202.739.3000
F. 202.739.3001

Attorneys for Defendants-Appellees

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 8,870 words excluding the parts of the brief exempted Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. The brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 14-point font.

Date: September 30, 2013

Respectfully submitted,

/s/ *Thomas M. Peterson*
Thomas M. Peterson

CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Respectfully submitted,

/s/ *Thomas M. Peterson*
Thomas M. Peterson