IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Motorola Mobility, Inc.	)	No. 1:09-cv-06610
	)	
v.	)	Hon. Joan B. Gottschall, J.
	)	
AU Optronics Corporation, et al.	)	

MEMORANDUM OF LAW IN SUPPORT OF
MOTION FOR RECONSIDERATION

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Introduction

This motion presents a single legal question regarding the extent to which U.S. antitrust law applies to claims by foreign companies for injuries that flow out of foreign commerce. Defendants ask this Court to reconsider the MDL court's decision on this issue because the MDL court applied the wrong legal standard by failing to focus its analysis on adverse effects on U.S. commerce.

Plaintiff Motorola Mobility, Inc. alleges that defendants in this action fixed the prices for liquid crystal display ("LCD") panels sold to Motorola and its foreign subsidiaries. Less than 1 percent of the $5.4 billion in commerce at issue here—$43 million—actually involves sales to Motorola in the United States. The remaining 99 percent involves overseas purchases by Motorola's *foreign subsidiaries*, whose injuries occurred in foreign commerce and are independent of any effect on U.S. commerce. The MDL court nevertheless held that U.S. antitrust claims based on these foreign injuries may proceed. This was unprecedented. No other court has applied U.S. antitrust law to foreign commerce of this kind, and the Seventh Circuit has flatly held that "U.S. antitrust laws are not to be used for injury to foreign customers."

The MDL court's decision relies on a misinterpretation of the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a ("FTAIA"). The FTAIA aimed to strike an appropriate balance between the U.S. interest in exercising appropriate oversight over U.S. commerce and the interests of foreign governments in regulating their own economies. The MDL court's rulings would upend that balance. The gateway to U.S. courts in antitrust cases is a direct, substantial, and reasonably foreseeable effect on *domestic* commerce. Injury directly flowing from such an effect on U.S. commerce is covered by U.S. antitrust laws. But injury that occurs *independent of* or *before* any effect on U.S. commerce is not covered. Our legislators made the judgment that those injuries are more properly addressed by the regulators in the

jurisdictions in which they occur. *See F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 161, 164-65 (2004); *Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 860 (7th Cir. 2012) (en banc). All of the claims of Motorola's foreign subsidiaries fall into this category.

The MDL court allowed these claims to go forward because the foreign companies that made the relevant purchases were owned by a U.S. corporate parent, because negotiations over LCD purchases sometimes took place in the United States and U.S. executives allegedly had authority to approve such purchases, because anticompetitive conduct took place in the United States, and because defendants allegedly targeted Motorola in the United States. The MDL court's ruling thus focused on whether any *conduct* occurred in the United States—which cases have made clear is irrelevant—instead of whether the plaintiff's injury flows from an *effect on U.S. commerce*.

The MDL court's error led it to the untenable conclusion that Motorola may apply U.S. antitrust law even to sales of panels that never reached the United States in any form at any time. For these sales, it is hard to discern any effect *at all* on U.S. commerce, let alone the type of direct and substantial effect that could support an extraterritorial application of U.S. law. No interpretation of the FTAIA that permits this implausible result can be reconciled with the statutory purpose of respecting foreign sovereignty over foreign transactions.

Defendants respectfully ask this Court to hold that U.S. antitrust law does not allow recovery of damages for a foreign company's antitrust injuries arising from foreign commerce. This question needs to be determined *now* because the answer will drastically alter the scope of the trial and may well avoid the need for a trial altogether.

Background

A. Undisputed Facts.

Motorola is a global manufacturer of mobile phones. Defendants are a group of foreign manufacturers of LCD panels, together with certain U.S. affiliates of those companies.[1] Motorola accuses the defendants of conspiring in violation of the antitrust laws to fix the prices at which Motorola's foreign subsidiaries purchased LCD panels for incorporation into mobile phones at foreign manufacturing facilities.

Although "Motorola Mobility, Inc." (a U.S. company) is the named plaintiff in this lawsuit, it purchased less than 1 percent of the LCD panels at issue. Over 99 percent of the purchases were made by Motorola's foreign subsidiaries—mainly Motorola Trading Center Pte. Ltd. ("Motorola Singapore") and Motorola (China) Electronics Ltd. ("Motorola China"). (Ex. 13 at 4, Table B; *id.* at 2, Table A.) These foreign subsidiaries assigned their claims to Motorola Mobility, Inc. for purposes of this lawsuit. (*See* Ex. 7 at ¶ 28.)[2]

Motorola's complaint divides its LCD panel purchases into three distinct categories:

- Category One, consisting of panels purchased in the United States for use in the United States (less than one percent of the total purchases);
- Category Two, consisting of panels purchased overseas for use at overseas factories, and that were assembled into mobile phones that eventually reached the United States (approximately 40 percent of the purchases); and

[1] The defendants are Korea-based Samsung Electronics Co., Ltd., LG Display Co. Ltd., and Samsung SDI Co. Ltd.; Japan-based Sharp Corporation, Toshiba Corporation, and Sanyo Consumer Electronics Co., Ltd.; and Taiwan-based AU Optronics Corporation, Chimei Innolux Corporation, Chunghwa Picture Tubes Ltd., and HannStar Display Corporation, along with certain U.S. subsidiaries of these companies. (Ex. 7 at ¶¶ 30-69.) All citations to exhibits refer to the exhibits attached to the concurrently filed Declaration of Jeffrey M. Davidson.

[2] In addition to the claims of Motorola China and Motorola Singapore, Motorola Mobility has been assigned the relatively small claims of a number of other overseas subsidiaries in Germany, Israel, and other countries. The material facts are no different for these subsidiaries.

- Category Three, consisting of panels purchased overseas for use at overseas factories, and that never reached the United States at all (approximately 60 percent of the purchases).

(*See* Ex. 7 at ¶¶ 184-87; Ex. 13 at 2, Table A.) This motion is directed at Category Two and Category Three panels—panels that were sold and delivered abroad. As to those purchases, the following facts are undisputed.

The chain of distribution began with Motorola China or Motorola Singapore issuing purchase orders to the defendant manufacturers. (Ex. 18, Khoo Dep. 263:20-264:17.) The purchase orders provided for foreign payment and foreign delivery and included foreign compliance-with-law clauses. (Ex. 12 at ¶¶ 203-08, 213; Ex. 17, Guo Dep. 180:10-181:2.) The purchase orders specified that an offer to purchase was accepted—and a binding contract was created—upon shipment of the panels to the foreign manufacturing facilities in China and Singapore. (Ex. 12 at ¶ 211.) Integration clauses provided that the purchase order's terms and conditions constitute "the entire agreement" governing the purchase and "supersede[] all prior or contemporaneous agreements, arrangements, representations and communications" between the parties. (*Id.* at ¶ 212.)

Defendants manufactured all of the Category Two and Category Three panels at their foreign manufacturing plants and delivered them to Motorola China and Motorola Singapore at foreign locations. (Ex. 19, Khoo Dep. 378:11-379:24; Ex. 22, Singh Dep. 240:7-241:19.) Motorola's subsidiaries then incorporated the panels into mobile phones at their foreign factories. (*Id.*) The mobile phones were then distributed worldwide. (*See* Ex. 15, Brda Dep. 37:10-38:12.)

Category Two panels eventually reached the United States as part of fully assembled mobile phones. For the Category Three panels, neither the panels nor the finished mobile phones ever entered the United States. (*Id.* at 196:22-197:4.)

B. The Foreign Trade Antitrust Improvements Act.

The FTAIA, 15 U.S.C. § 6a, governs Motorola's attempt to apply U.S. antitrust law to Motorola China and Motorola Singapore's foreign purchases. Congress enacted the FTAIA to reduce conflicts with foreign governments over the extra-territorial application of U.S. antitrust law. *See Empagran*, 542 U.S. at 161, 164-65; *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 961-62 (7th Cir. 2003) (en banc) (overruled on other grounds by *Minn-Chem*, 683 F.3d 845).

Before the FTAIA's enactment, the global reach of U.S. antitrust law was governed by the judge-made "effects test" first articulated in *United States v. Alcoa*, 148 F.2d 416, 444-45 (2d Cir. 1945). Under the *Alcoa* effects test, U.S. courts would apply the Sherman Act to foreign conduct so long as the conduct "was meant to produce and did in fact produce some substantial effect" on U.S. commerce. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 795-96 (1993). The effects test, however, "was not warmly received in other countries, which as of the mid-1940s did not as a rule have antitrust laws and which resented the apparent effort of the United States to act as the world's competition police officer." *United Phosphorus*, 322 F.3d at 960-62. Congress responded by enacting the FTAIA "to assure foreign countries and their citizens that they would not be swept into a U.S. court to answer under U.S. law for actions that were of no legitimate concern to the United States." *Id*.

The FTAIA provides in relevant part:

> [The Sherman Act] 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 [i.e., domestic trade or commerce], 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 [i.e., on a U.S. export competitor]; and
>
> (2) such effect gives rise to a claim under the provisions of [the Sherman Act].

15 U.S.C. § 6a.

As construed by the Supreme Court in *Empagran*, this language "lays down a general rule placing all (nonimport) activity involving foreign commerce outside the Sherman Act's reach." 542 U.S. at 162. The FTAIA then "brings such conduct back within the Sherman Act's reach" if it meets the so-called "domestic injury" exception to the general rule. *Id.* at 162; Ex. 2 at 4-5. Under the domestic injury exception, courts may apply the Sherman Act to cases involving foreign conduct if (i) the conduct "has a 'direct, substantial, and reasonably foreseeable effect'" on U.S. domestic commerce, and (ii) this "domestic effect" gives rise to the plaintiff's Sherman Act claim. *Empagran*, 542 U.S. at 162.

The FTAIA thus strikes a balance between respect for foreign sovereignty and enforcement of U.S. antitrust laws. Under the FTAIA, the United States applies its antitrust laws only as necessary to "redress *domestic* antitrust injury," *Empagran*, 542 U.S. at 165, and otherwise defers to foreign sovereigns to regulate foreign transactions.

C. Procedural History.

This case was filed in this Court in 2009 and then transferred to the MDL court for pre-trial proceedings. The MDL court addressed the FTAIA three times before remanding the case back to this Court on July 8, 2013.

It did so first on defendants' motion to dismiss the complaint on FTAIA grounds. The MDL court initially dismissed all claims relating to Category Two and Three panels on the

ground that Motorola had failed to allege a sufficient effect on U.S. commerce. (Ex. 2 at 1, 10.) Significantly, in responding to defendants' motion, Motorola denied that it was even seeking to apply U.S. law to Category Three panels, stating that "[o]vercharges incurred as a result of deliveries of price-fixed LCD panels . . . abroad that never entered the United States *are not sought in this action*." (Ex. 1 at 7 (emphasis added).)

The second time was on defendants' motion to dismiss Motorola's second amended complaint. This time, Motorola alleged that the procurement negotiations that led to the foreign panel purchases took place exclusively in the United States. (*See* Ex. 3 at ¶¶ 129-33.) Motorola argued that these allegations satisfied the "domestic injury" exception to the FTAIA as to Category Two claims. It still conceded away its Category Three claims, observing that "it [is] difficult to see" how Category Three claims could proceed.[3] The MDL court nevertheless denied defendants' motion to dismiss as to both Category Two and Three claims, reasoning that the domestic procurement allegations, if supported by the facts, could satisfy the domestic injury exception to the FTAIA. (*See* Ex. 6.)

The MDL court next considered the FTAIA at summary judgment. Defendants sought summary judgment because discovery revealed that Motorola China and Motorola Singapore's procurement negotiations had *not* taken place exclusively in the United States and that *no* purchase agreements were entered into in the United States; to the contrary, all of the Category Two and Three purchase orders were issued abroad by Motorola's foreign subsidiaries. (Ex. 8.) Motorola's response made no attempt to defend the exaggerated allegations in its complaint.

[3] *See* Ex. 4 at 18. Motorola also conceded away its Category Three claims at oral argument, a fact that the MDL court noted on the record. (Ex. 5 at 31:10-15 ("[Counsel for defendants]: [Y]ou noted that Motorola concedes [that] it cannot assert any claims based on the sale of [Category Three panels]. The Court: Well, I just made a note that he did it again.").)

(*See* Ex. 9.) Instead, Motorola fell back on an argument that *some* of the procurement negotiations had taken place in the United States and that authority to *approve* LCD panel purchases resided with U.S. executives. (*See id.*)

The MDL court accepted these arguments, finding that Motorola's "domestic roots and the locale of the transactions at issue," if proven at trial, could satisfy the domestic injury exception. (Ex. 10.) For the reasons set forth below, this Court should reconsider the MDL court's order and hold that the Category Two and Three claims are beyond the scope of U.S. antitrust law.

Standard Of Review

Under Federal Rule of Civil Procedure 54(b), any order or other decision in a case involving multiple parties or claims may be revised at any time before entry of final judgment. Now that the case has returned to this Court, the Court has the "power to vacate or modify rulings made by the transferee judge, subject to comity and 'law of the case' considerations." Manual for Complex Litigation (Fourth) § 20.133. The law of the case doctrine permits this Court to revisit rulings of the MDL court if (i) the MDL court's decision was clearly erroneous or (ii) there has been a change in controlling authority. *See In re Ford Motor Co.*, 591 F.3d 406, 411-12 (5th Cir. 2009); 17 James Wm. Moore et al., Moore's Federal Practice § 112.07 (3d ed.) ("[I]f the case is remanded back to the original transferor court, that court should use the law of the case doctrine to determine whether to revisit a decision of the transferee court.").

This Court has both the authority and the obligation to ensure that the legal rulings it has inherited are correct, and to modify those rulings to the extent that "good sense" requires it. *Champaign-Urbana News Agency v. J. L. Cummins News Co.*, 632 F.2d 680, 683 (7th Cir. 1980); *id.* ("The only sensible thing for a trial court to do is to set itself right as soon as possible when convinced that the law of the case is erroneous. There is no need to await reversal.");

accord Santamarina v. Sears, 466 F.3d 570, 572 (7th Cir. 2006). "By revisiting an earlier conclusion that the Seventh Circuit likely would have overturned on appeal, the court believes it is serving the broader goals of the law-of-the-case doctrine to promote 'finality and efficiency of the judicial process.'" *In re Soybean Futures Litig.*, 892 F. Supp. 1025, 1043 (N.D. Ill. 1995).

Argument

I. The FTAIA Bars Motorola's Foreign Injury Claims.

A. Controlling Authority Prohibits U.S. Antitrust Claims Based On Foreign Injuries.

No other court has ever applied U.S. antitrust law to foreign claims where an injury occurs first in foreign commerce and is not caused by a direct, substantial, and reasonably foreseeable effect on U.S. domestic commerce. Key decisions—including the Supreme Court's decision in *Empagran* and the Seventh Circuit's ruling in *Minn-Chem*—frame the issues and leave no doubt that the MDL court reached an erroneous conclusion. They make clear that the key inquiry is the impact on *domestic commerce*.

Empagran

In *Empagran*, the Supreme Court addressed antitrust claims similar to those asserted here and held that such claims are beyond the reach of U.S. antitrust law. *Empagran* involved a vitamins cartel centered in Asia that sold vitamins worldwide. The plaintiffs were "foreign purchasers, . . . five foreign vitamin distributors located in Ukraine, Australia, Ecuador, and Panama, each of which bought vitamins . . . for delivery outside the United States." *Empagran*, 542 U.S. at 159-60. Even though the vitamins at issue were sold and resold exclusively in foreign commerce, the foreign purchasers attempted to assert U.S. antitrust claims on the theory that the vitamins conspiracy *also* affected U.S. purchasers and U.S. commerce, allegedly

providing a sufficient connection to U.S. commerce to satisfy the FTAIA's domestic injury exception. *See id*. at 173-74.

The Supreme Court rejected the plaintiffs' arguments, asking, "why is it reasonable to apply [U.S. antitrust] laws to foreign conduct insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim?" *Id.* at 165. The Court found that such an application of U.S. law "creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs." *Id*. The Court was unmoved by the fact that "some of the anti-competitive price-fixing conduct alleged here took place in America," *id.*, reasoning that U.S. price-fixing conduct does not trigger U.S. antitrust law if the end result is only "foreign harm," *id.* at 165-66.

Empagran is controlling with respect to the purchases of Motorola's foreign subsidiaries. There, as here, the foreign purchasers' claims arose out of overseas purchases of allegedly price-fixed products. *Id.* at 159-60. There, as here, the allegedly price-fixed products were purchased "for delivery outside the United States." *Id.* at 160. There, as here, most but not all of the alleged misconduct took place overseas. *Id.* at 165. And there, as here, the alleged misconduct affected both foreign and domestic purchases, but the claims at issue arose solely from *foreign* purchases. *Id.* at 164. Accordingly, here, as in *Empagran*, the purchases at issue are beyond the scope of U.S. antitrust law. *See id.* at 169, 173.

Even Motorola effectively admitted in the MDL court that *Empagran* dictates this conclusion—at least with respect to Category Three claims—observing that "[t]he plaintiffs [in *Empagran*] were foreign companies that purchased abroad and then resold abroad. It was difficult to see why the United States should be concerned about their foreign injury. To the contrary, one would expect foreign governments to protect their consumers and take the lead in

vindicating their claims." (Ex. 4 at 18.) Likewise here, Motorola China and Motorola Singapore are foreign companies that purchased in foreign commerce, and it is "difficult to see why the United States should be concerned about their foreign injury."

Minn-Chem

Minn-Chem involved "the mirror image of the situation described in *Empagran*." 683 F.3d at 860. Plaintiffs in *Minn-Chem* were U.S. companies that purchased large quantities of potash from members of a global potash cartel. *See id.* at 855 ("The plaintiffs are U.S. entities that have purchased potash directly from members of the alleged cartel"); *id*. at 859 ("several members of the cartel sold directly into the United States and others allegedly worked with them in connection with those efforts"). Furthermore, the complaint in *Minn-Chem* adequately alleged that the cartel had raised the prices of U.S. imports. *See id.* at 856, 859. The Seventh Circuit therefore affirmed a district court ruling allowing U.S. potash purchasers to assert their claims under U.S. antitrust law, reasoning that the plaintiffs had alleged a "direct, substantial, and reasonably foreseeable effect on either the domestic or import commerce of the United States." *Id.* at 860.

In reaching this conclusion, the Seventh Circuit also made clear that the FTAIA would bar U.S. antitrust claims based on *foreign* purchases of potash. The court observed that *Empagran* "holds that the U.S. antitrust laws are not to be used for injury to foreign customers." *Id*. at 858. Rather, the FTAIA reflects "'a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused.'" *Id.* (emphasis added) (quoting *Empagran*, 542 U.S. at 165). As to "foreign purchasers of allegedly price-fixed products that were sold in foreign markets," *id.* at 854, "the foreign country whose consumers are hurt would [be] the better enforcer," *id.* at 860.

Minn-Chem and *Empagran* underscore that the domestic injury exception to the FTAIA requires more than mere *conduct* occurring in the United States. Instead, the exception applies only when the plaintiff brings claims arising from a direct, substantial, and reasonably foreseeable effect on domestic "trade or commerce." 15 U.S.C. § 6a.

Consistent with these principles, numerous courts have rejected attempts to invoke U.S. antitrust law based merely on price-fixing *conduct* in the United States. *See, e.g.*, *In re Hydrogen Peroxide Antitrust Litig*., 702 F. Supp. 2d 548, 554 n.8 (E.D. Pa. 2010) ("Holding a meeting in West Virginia does not meet the [trade or commerce requirement]"); *CSR Ltd. v. Cigna Corp*., 405 F. Supp. 2d 526, 546 (D.N.J. 2005) ("the Court must reject any implication that the FTAIA's 'direct, substantial, and reasonably foreseeable effect' requirement is met because certain of Defendants' actions were taken or overseen in the United States"). The government's chief enforcer of antitrust laws—the Department of Justice Antitrust Division—has reached the same conclusion, noting that "[t]he FTAIA makes application of the Sherman Act turn on the type of commerce involved or affected, and not on the location of the conduct." (Ex. 26, Br. of United States, *United States v. AU Optronics Corp.*, Case No. 12-10492, at 37 (9th Cir. April 5, 2013).)

B. Motorola's Foreign Affiliate Claims Fail As A Matter of Law.

The MDL court conflated domestic *conduct* and domestic *effect* in holding that the claims of Motorola's foreign affiliates could proceed. For Motorola's Category Three claims, *all* of the sales took place abroad, and none of the panels ever reached the United States at any point in the distribution chain. The "trade or commerce" at issue was entirely foreign, and there was never any effect on U.S. domestic commerce whatsoever. Accordingly, the FTAIA bars the application of U.S. antitrust law to these claims regardless of whether certain business activities or price-fixing conduct occurred in the United States.

For the Category Two claims, all of the panel commerce likewise took place abroad—between foreign defendants and Motorola's foreign subsidiaries. Although Category Two panels eventually reached the United States as part of fully assembled mobile phones, the only direct injuries claimed in Category Two are injuries that *Motorola China* and *Motorola Singapore* allegedly suffered when they purchased the panels overseas. Those injuries occurred abroad.

The Category Two claims thus fail for the same reason as the Category Three claims: the injuries do not flow from an effect on domestic commerce. True, there is some eventual indirect effect on domestic commerce—phones with allegedly price-fixed panels later made their way to the United States. But that eventual downstream effect had no impact on Motorola China or Motorola Singapore, and it is not relevant to the injuries they claim here. In order to respect foreign sovereignty and prevent the United States from becoming the world's antitrust police officer, the FTAIA requires that before a party may avail itself of U.S. antitrust laws, it must suffer an injury that flows from an effect on U.S. commerce. *See Empagran, S.A. v. F. Hoffmann-La Roche Ltd.*, 417 F.3d 1267 (D.C. Cir. 2005) (holding that the FTAIA is satisfied only when an effect on domestic commerce precedes and proximately causes a foreign injury, not the reverse); *In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 539-40 (8th Cir. 2007); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 989 (9th Cir. 2008). Injuries that do not result from an effect on U.S. commerce are not subject to U.S. antitrust law.

C. The Standard For Reconsideration Is Satisfied.

This Court may reconsider the MDL court's order if either "clear error" or a "change in controlling law" exists. *Supra* at 8-9. Both of those circumstances are present here.

Clear Error

Clear error exists when a court is left "with the definite and firm conviction that a mistake has been made." *Weeks v. Samsung Heavy Indus.*, 126 F.3d 926, 943 (7th Cir. 1997). Here, that standard is satisfied—at least under Seventh Circuit law—for several reasons.

First, as discussed above, the MDL court's ruling that U.S. antitrust law applies to purchases by foreign companies of panels that were manufactured, delivered, and paid for abroad is foreclosed by controlling decisions in *Empagran* and *Minn-Chem*.

Second, the MDL court's ruling sharply departs from all prior decisions interpreting the FTAIA. No other court has ever applied U.S. antitrust law to purchases of goods manufactured, paid for, and delivered abroad, whether or not the products eventually reached the United States as part of a different product. To the contrary, all other courts have emphatically rejected any attempt to make the United States "the world's competition police officer" by applying U.S. antitrust law to transactions occurring in foreign commerce. *See, e.g.*, *United Phosphorus*, 322 F.3d 942 (7th Cir. 2003) (foreign manufacturer's claims based on potential overseas sales of drug components barred by FTAIA); *Den Norske Stats Oljeselskap AS v. Heeremac Vof*, 241 F.3d 420, 426 (5th Cir. 2001) ("we doubt that foreign commercial transactions between foreign entities in foreign waters is conduct cognizable by federal courts under the Sherman Act"); *Empagran*, 417 F.3d 1267 (D.C. Cir. 2005) (foreign vitamin distributor's claims based on price-fixing of global vitamins sales barred by FTAIA); *Turicentro, S.A. v. Am. Airlines*, 303 F.3d 293 (3d Cir. 2002) (claims based on price-fixing of commissions on overseas ticket sales barred by FTAIA); *In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535 (8th Cir. 2007) (same); *Sun Microsystems, Inc. v. Hynix Semiconductor, Inc.*, 608 F. Supp. 2d 1166 (N.D. Cal. 2009) (same); *In re Rubber Chems. Antitrust Litig*., 504 F. Supp. 2d 777 (N.D. Cal. 2007) (same); *Emerson Elec. Co. v. Le Carbone Lorraine, S.A.*, 500 F. Supp. 2d 437 (D.N.J. 2007) (same).

Even the MDL court acknowledged that its FTAIA ruling conflicted with pre-existing law. (*See* Ex. 6 at 9-10 & n.1 (noting "depart[ure] from" and "disagree[ment] with" prior FTAIA decisions).) The U.S. Department of Justice likewise has acknowledged that U.S. antitrust law does not apply to claims like those at issue here, i.e., claims in which

> ***[the] alleged injuries . . . flow from sales transactions that occurred outside the United States, either entirely within one foreign country or between a seller in one foreign country and a purchaser in another***. . . . Such an application [of U.S. antitrust law] . . . would subject wholly foreign sales transactions having no significant effect on United States commerce to regulation under our antitrust laws, by affording a Sherman Act claim to injured purchasers [] in foreign countries against the defendants who charged them supracompetitive prices in those foreign transactions.

(Ex. 25, *Empagran*, Br. of Amicus Curiae DOJ & FTC at 14-15 (Feb. 3, 2004).)

Third, applying U.S. antitrust law to the claims of Motorola China and Motorola Singapore would frustrate the FTAIA's purpose of respecting foreign sovereignty over foreign transactions. The FTAIA is intended to ensure that U.S. antitrust law does not "interfere with a foreign nation's ability independently to regulate its own commercial affairs." *Empagran*, 542 U.S. at 165. As the Supreme Court observed in *Empagran*, "Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?" *Id.* The MDL court's ruling nevertheless permits U.S. law to supplant the law of the foreign nations in which foreign companies bought and sold LCD panels that were manufactured, paid for, and delivered abroad for use at foreign factories.[4]

[4] Foreign governments have consistently argued that overbroad application of the FTAIA violates basic principles of international law. *See, e.g.*, Brief for the United Kingdom of Great Britain and Northern Ireland, and the Kingdom of the Netherlands as *Amici Curiae* Supporting

Applying U.S. antitrust law especially to Category Three sales—sales of panels that never reached the United States at any time or in any form—would stretch the FTAIA to the point of absurdity. The FTAIA was intended to reassure foreign governments that the United States would "withdraw[] [its] hand from transactions which exhaust all market consequences abroad." Hearings on S. 795 Before the Senate Committee on the Judiciary, 97th Cong. 24, 44 (1981) (statement of FTC Commissioner Robert Pitofsky). Category Three transactions, by definition, are transactions "which exhaust all market consequences abroad." Motorola therefore repeatedly *conceded*, before the MDL court's ruling, that Category Three claims are beyond the scope of U.S. antitrust law. *See supra* at 7 & n.3.

Motorola's Category Three claims would not have satisfied even the more relaxed pre-FTAIA *Alcoa* test (*see supra* at 5). That test required "an effect on American commerce," *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 582 n.6 (1986), meaning a "restraint of United States trade," Restatement (Third) of the Foreign Relations Law of the United States § 415 (1986). This, in turn, meant interference with "(i) the production or sale of goods and services in the United States; (ii) the price or availability of goods or services in the United States . . . ; (iii) the importation of goods and services into the United States; and (iv) the exportation of goods and services from the United States." *Id.* cmt. c.

Petitioners at 2, *F. Hoffman-La Roche Ltd. v. Empagran, S.A.*, 542 U.S. 155 (2004) (No. 03-724); Brief of the Government of Japan as *Amici Curiae* Supporting Petitioners at 2, *F. Hoffman-La Roche Ltd. v. Empagran, S.A*, 542 U.S. 155 (2004) (No. 03-724); Brief of the Governments of the Federal Republic of Germany and Belgium as *Amici Curiae* Supporting Petitioners at 5, *F. Hoffman-La Roche Ltd. v. Empagran, S.A.*, 542 U.S. 155 (2004) (No. 03-724); Brief for the Government of Canada as *Amici Curiae* Supporting Petitioners at 3, *F. Hoffman-La Roche Ltd. v. Empagran, S.A.*, 42 U.S. 155 (2004) (No. 03-724). The MDL court's decision exacerbates these comity concerns.

Here, because the Category Three panels never entered the stream of American commerce (or passed through the hands of an American company), they could not have been the subject of a pre-FTAIA antitrust action. It follows *a fortiori* that Category Three does not satisfy the more stringent FTAIA test, because "Congress designed the FTAIA to clarify, perhaps to limit, but not to expand in any significant way, the Sherman Act's scope as applied to foreign commerce." *Empagran*, 542 U.S at 169; *see also id*. (claims involving foreign commerce cannot proceed where there is "no significant indication that at the time Congress wrote [the FTAIA] courts would have thought the Sherman Act applicable in [the same] circumstances").

In sum, the MDL court's order adopts an unprecedented reading of the FTAIA; it departs from controlling Supreme Court and Seventh Circuit authority; and it thwarts the FTAIA's purpose of respecting foreign sovereignty. Taken together, these circumstances justify reconsideration because they leave "the definite and firm conviction that a mistake has been made." *Weeks*, 126 F.3d at 943.

Change in Controlling Law

Even if the MDL court's order were merely ordinary error as opposed to clear error, reconsideration would be warranted because the MDL court's FTAIA rulings apply Ninth Circuit law.[5] As a result, the court never discussed the Seventh Circuit's controlling discussion of *Empagran*,[6] in which the Seventh Circuit read *Empagran* to hold that "the U.S. antitrust laws are not to be used for injury" to "foreign purchasers of allegedly price-fixed products that were sold

[5] *See* Ex. 2 at 9-10 (extended discussion of Ninth Circuit's *DRAM* decision; no citations in opinion to Seventh Circuit authority); Ex. 6 (extended citations of Ninth Circuit and Northern District of California authority; no citations to Seventh Circuit authority); Ex. 10 (no discussion of *Minn-Chem* or other Seventh Circuit authority in section applying FTAIA).

[6] Although the MDL court cited *Minn-Chem* for a proposition not at issue here—that the FTAIA is a substantive element of U.S. antitrust law rather than a limitation on the jurisdiction of the U.S. courts—it did not apply *Minn-Chem*'s substantive analysis of *Empagran* or of the FTAIA.

in foreign markets." *Minn-Chem*, 683 F.3d at 854, 858. Nor did the MDL court cite or apply the Seventh Circuit's ruling in *United Phosphorus* rejecting application of the Sherman Act to an overseas market for drug components. *See* 322 F.3d 942.

Now that the case has returned to the Seventh Circuit, Seventh Circuit law governs, and any appeal will be taken to the Seventh Circuit. *See FMC Corp. v. Glouster Eng'g Co.*, 830 F.2d 770, 772 (7th Cir. 1987). Indeed, in urging the MDL court to deny an interlocutory appeal on FTAIA issues, Motorola asserted that it would be "unwise" to certify an appeal to the Ninth Circuit because the case "is being imminently transferred to an entirely different circuit, . . . *where there are issues involved that will be litigated under the law of that circuit and where that circuit has recently spoken to the issues*." (Ex. 11 at 3 (emphasis added).) Thus, as Motorola itself recognized, this Court should consider the FTAIA issues in this case under Seventh Circuit law. *See, e.g.*, *Whitford v. Boglino*, 63 F.3d 527, 530 (7th Cir. 1995) ("A renewed or successive summary judgment motion is appropriate especially if one of the following grounds exists: [] an intervening change in controlling law . . . ."); *In re Ford Motor*, 591 F.3d at 406 (applying transferor circuit law to reverse decision from MDL circuit).

II. The MDL Court's Grounds For Permitting The Foreign Injury Claims To Proceed Are Incorrect.

The MDL court upheld the claims of Motorola's foreign affiliates on four main grounds: (i) Motorola's U.S. parent company has "domestic roots"; (ii) Motorola allegedly required that U.S. procurement executives "approve" foreign transactions and sometimes participated in negotiating terms of those transactions; (iii) certain anticompetitive conduct took place in the United States; and (iv) defendants allegedly "targeted" Motorola in the United States. Each of these rationales fails to justify application of U.S. antitrust law to Category Two and Three claims, because each relies on domestic *conduct* rather than a domestic *effect on commerce*, as

required under the FTAIA. *See, e.g.*, Ex. 26, Br. of United States, *United States v. AU Optronics Corp. et al.*, Case No. 12-10492, Dkt. No. 42-1, at 37 (9th Cir. April 5, 2013) ("The FTAIA makes application of the Sherman Act turn on the type of commerce involved or affected, and not on the location of the conduct."); *In re Rubber Chems. Antitrust Litig.*, 504 F. Supp. 2d at 786 ("it must be the *domestic effects* of the Defendants' anticompetitive conduct, rather than the *anticompetitive conduct* itself, which gives rise to Plaintiffs' foreign injuries").

"Domestic roots."

The domestic roots of the Motorola U.S. parent company do not provide a basis for applying U.S. law to the purchases of Motorola China and Motorola Singapore.

The legislative history of the FTAIA confirms that a "transaction between two foreign firms, *even if American-owned*, should not, merely by virtue of the American ownership, come within the reach of our antitrust laws." H.R. Rep. No. 97-686, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2494 (emphasis added). Accordingly, under the FTAIA, "[w]hether plaintiffs are United States citizens is irrelevant," *Turicentro*, 303 F.3d at 301 n.5, as are "allegations that [plaintiff] is an American company engaged in a world-wide market," *In re Intel Corp. Microprocessor Antitrust Litig.*, 452 F. Supp. 2d 555, 561 (D. Del. 2006).

Moreover, the claims at issue here are not claims of the Motorola parent, but only its foreign affiliates, assigned to it for purposes of this litigation. Such claims, which originated in foreign commerce and accrued to foreign entities, do not become any more "domestic" simply because they were contractually assigned to a U.S. parent company. "The assignee . . . stands in the shoes of the assignor and therefore takes the assignment subject to any defenses against the assignor's . . . claim that arose before the assignment was made." *Coplay Cement Co. v. Willis & Paul Group*, 983 F.2d 1435, 1442 (7th Cir. 1993). The assigned claims of Motorola China and

Motorola Singapore are therefore subject to the same FTAIA limitations that would apply if those companies had sued in their own names.[7]

It is no mere technicality that Motorola's foreign subsidiaries made the purchases at issue. Motorola made a conscious decision to set up foreign companies to conduct these foreign activities. Motorola also consciously decided to move its factories outside the United States in order to take advantage of the looser regulatory environment, preferential tax rates, and lower labor costs that exist overseas.[8] These decisions were made after weighing costs and benefits, and they have consequences—one of which is a diminished claim to remedies in U.S. courts.

The Supreme Court has emphasized that "it is a general principle of corporate law deeply ingrained in our economic and legal systems [that] a corporation and its stockholders are generally to be treated as separate entities." *United States v. Bestfoods, Inc.*, 524 U.S. 51, 61 (1998) (internal quotations omitted). Any involvement that the Motorola parent company may have had in Motorola China or Motorola Singapore's purchases is therefore irrelevant—those companies are separate legal entities. The Seventh Circuit has firmly endorsed the principle of Illinois law that, having set up subsidiaries for its own purposes, a company cannot later deny their separate existence for litigation purposes. *Wachovia Securities, LLC v. Loop Corp.*, __ F.3d

[7] Motorola has at times argued that the effect on the U.S. parent company's balance sheet is a sufficient "domestic injury" to warrant application of U.S. antitrust law. Not so. As a matter of law, "courts have recognized that reduced income flowing from a foreign subsidiary to a domestic parent is not a direct domestic effect or injury" under the FTAIA. *In re Intel Corp. Microprocessor Antitrust Litig.*, 452 F. Supp. 2d at 560. Furthermore, if "balance sheet" effects mattered, Motorola would have to abandon all of its antitrust claims. Motorola's own economist, Professor Douglas Bernheim, has opined that Motorola passed through any overcharges to its customers more than dollar-for-dollar (i.e., that Motorola profited from any overcharges it incurred). (Ex. 14, Bernheim Dep. 729:25-730:13 (Motorola "recouped the overcharge" by passing it through to customers at a rate greater than 100 percent).)

[8] Ex. 20, Metty Dep. 67:22-68:22; Ex. 23, Storm Dep. 76:9-77:13, 88:13-89:5; Ex. 24, Tay 30(b)(6) Dep. 58:21-59:10, 83:9-18, 86:10-87:1, 101:14-104:4, 111:5-13.

__, 2013 WL 4017403, at *8 (Aug. 8, 2013) ("the corporate veil is never pierced for the benefit of the corporation or its shareholders").

"Domestic approval."

The MDL court's finding that there were disputes of fact as to whether U.S. procurement executives approved all foreign panel purchases is similarly irrelevant. (Ex. 10 at 5.) Even assuming that every approval decision took place in the United States,[9] those decisions do not matter under the FTAIA.

First, the FTAIA's domestic injury exception requires a domestic "injury," not a mere domestic "approval." The text of the FTAIA requires an effect on U.S. "trade or commerce," meaning an effect on domestic purchases of goods or services.[10] The challenged conduct must therefore have a direct impact on the price or volume of goods or services sold in the United States. *See supra* at 9-12; *Minn-Chem*, 683 F.3d at 858 ("U.S. antitrust laws reach foreign conduct *that harms U.S. commerce*" (emphasis added)); *id.* ("the U.S. antitrust laws are not to be

[9] Solely for purposes of this motion, Defendants assume *arguendo* that all of Motorola's approval decisions happened in the United States. However, the record does not in fact show that U.S. executives "approved" every overseas transaction. To the contrary, Motorola's Rule 30(b)(6) witness testified that she could not identify any written policy requiring such approval or any specific instance in which such approval occurred or was denied (Ex. 21, Robinson Dep. 120:11-21, 122:1-13, 123:8-15), and defendants generally approved the transactions overseas (Ex. 16, Ford Dep. 54:16-55:5; Ex. 8 at 30 n.26).

[10] *See, e.g.*, *In re Potash Antitrust Litig.*, 667 F. Supp. 2d 907, 926-27 (N.D. Ill. 2009), *aff'd*, 683 F.3d 845 (for purposes of import commerce exclusion, "only conduct by the defendant involving the importation of *goods or services* into the United States is covered by this exclusion to the FTAIA's coverage"); *Dedication & Everlasting Love to Animals v. Humane Soc'y*, 50 F.3d 710, 712 (9th Cir. 1995) ("Interpreting the Sherman Act, the Supreme Court has spoken of 'commerce' in terms of 'the purchase, sale and exchange of commodities'"); Webster's II, New Collegiate Dictionary 225 (2001) (defining "commerce" as "the exchange or buying and selling of commodities on a large scale involving transportation from place to place"); *see also United States v. Am. Bldg. Maint. Indus.*, 422 U.S. 271, 276 (1975) ("commerce," as used in Section 7 of the Clayton Act, refers to '"the practical, economic continuity in the generation of *goods and services* for interstate markets and their transport and distribution to the consumer'").

used for injury to foreign customers"); *Empagran*, 542 U.S. at 162 (direct effect on U.S. commerce must be "of a kind that antitrust law considers harmful"); *Turicentro*, 303 F.3d at 305 ("That certain activities might have taken place in the United States is irrelevant if the economic consequences are not felt in the United States economy."). Mere domestic "approval" of a transaction set to occur elsewhere is not itself an effect on U.S. "trade or commerce"; it is simply a preliminary step that occurs before the actual "trade or commerce" takes place. Here, the "trade or commerce" occurred when Motorola China and Motorola Singapore allegedly overpaid for LCD panels. Those panels were transmitted from foreign defendants to Motorola's foreign subsidiaries, and any effect on that commerce was an effect on *foreign* commerce, not on domestic commerce.[11]

Second, the FTAIA was intended to create a "single, objective test" and a "clear benchmark"[12] for when the United States, rather than "the foreign country whose consumers are hurt," is the better enforcer of the antitrust laws. *Minn-Chem*, 683 F.3d at 860. It draws that line according to where the *commerce* was affected, not according to the nationality of the last executive who approved a given transaction for *one* of the parties to the transaction. *See id.* at 856 (analyzing effects on U.S. import transactions); H.R. Rep. No. 97-686, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2494 (nationality of plaintiff irrelevant).

Third, the FTAIA should be construed to avoid "unreasonable interference with the sovereign authority of other nations." *Empagran*, 542 U.S. at 164. The MDL court's focus on the place where a transaction was "approved" would thwart that purpose: it would permit the application of U.S. law to wholly foreign commerce whenever a U.S. decisionmaker appears in

[11] For the Category Two purchases, to the extent there was a later downstream effect on domestic commerce in finished mobile phones, that indirect effect did not cause the foreign injury.

[12] H.R. Rep. No. 97-686, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2487-88.

the chain of approvals required to initiate the foreign commerce. It would also invite an equally intrusive application of foreign law to commerce occurring in the United States. Suppose a Korean court sought to apply a Korean statute to a U.S. transaction between two U.S. companies—in goods that were manufactured, delivered, and paid for in the United States—solely on the ground that the U.S. purchaser obtained approval for the transaction from a Korean parent company. A U.S. defendant in that situation would rightly complain of an outrageous violation of U.S. sovereignty. The MDL court's reasoning invites precisely this result.

Finally, the MDL court's "approval" reasoning undermines the FTAIA's intended treatment of U.S. exporters. One goal of the FTAIA was to allow U.S. exporters to engage in collaborative export activities without fear of U.S. antitrust liability. *Empagran*, 542 U.S. at 161 ("The FTAIA seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements (say, joint-selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets."). That is, U.S. exporters are permitted to meet in the United States, reach agreements in the United States, and approve transactions in the United States, so long as their activities affect only foreign markets. Motorola's "approval" theory would turn the FTAIA's exemption of export commerce upside down by assigning liability based on where approvals occurred. If U.S. "approvals" of overseas transactions could be used to invoke the U.S. antitrust laws, the FTAIA's intended protection of U.S. exporters would become a nullity. *See* H.R. Rep. No. 97-686, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2487-88, 2493-95.[13]

[13] For example, in *Turicentro,* plaintiffs alleged that four U.S. airlines conspired in the United States to set commissions to foreign travel agents and presumably "approved" the price-fixed commissions here. 303 F.3d at 297, 301 n.6, 305. The Third Circuit rejected these claims on

Domestic anti-competitive conduct.

The MDL court also referred to certain anti-competitive conduct that took place in the United States, in particular the conduct admitted in the guilty pleas of several defendants. But the Supreme Court has rejected the argument that domestic anti-competitive *activity* of the type referenced in the guilty pleas can satisfy the domestic *injury* test under the FTAIA when the injuries occur elsewhere. *Empagran*, 542 U.S. at 165 (no U.S. antitrust claim even though "some of the anticompetitive price-fixing conduct alleged here took place in America"); *see also Empagran*, 417 F.3d at 1271 (that defendants "had as a purpose to manipulate United States trade does not establish that 'U.S. effects' proximately caused [plaintiffs'] harm"). To the contrary, the FTAIA's general rule against application of U.S. antitrust law applies to all "conduct" that so much as "involv[es]" foreign commerce. 15 U.S.C. § 6a. The exception to the general rule, by contrast, applies when the plaintiff's injury flows from an effect on domestic *commerce*. *See supra* at 9-12.

"Targeting."

The MDL court found that the defendants "targeted Motorola in the United States for defendants' sales and marketing of LCD panels" (Ex. 10 at 3), but this so-called "targeting" is irrelevant. "Targeting" of the United States occurs when a defendant imports goods or services into the United States. *See Minn-Chem*, 683 F.3d at 855 (citing *Animal Science Prods.* v. *China Minmetals*, 654 F.3d 462, 470 (3d Cir. 2011) (discussing "target[ing of] import goods or services")). Although such "targeting" may have occurred with respect to Category One panels shipped directly to the United States, Category Two and Three panels by definition were *not*

FTAIA grounds, finding that the "economic consequences are not felt in the United States economy." *Id.* at 305. This ruling would have to be reversed if "approval" satisfied the FTAIA.

targeted at the United States.[14] To the contrary, those panels were manufactured, delivered, and paid for abroad for use at foreign factories. Furthermore, while *Motorola* eventually imported Category Two panels into the United States as components of mobile phones, defendants had no influence over Motorola's internal distribution decisions.

Finally, the MDL court's reliance on "targeting" of the United States cannot be reconciled with its determination that Motorola may proceed on its Category Three claims. Panels that never reached the United States at any time or in any form are not "targeted" at the United States in any meaningful sense of the word. The MDL court's "targeting" rationale thus underscores why its interpretation of the FTAIA is untenable: any reading of the statute that supports the application of U.S. antitrust law to goods that never reached the United States would turn the statute on its head.

Conclusion

For these reasons, the Court should dismiss Motorola's Category Two and Three claims.

[14] Motorola must separately satisfy the FTAIA for each purchase on which it hopes to obtain damages and cannot bootstrap its Category Two and Three purchases to its Category One purchases. *See, e.g.*, *In re Rubber Chems. Antitrust Litig*., 504 F. Supp. 2d at 784 & n.3 (rejecting plaintiffs' argument that they were "merely asserting a single [Sherman Act] 'claim'" that could not "be split or analyzed for its separate domestic and foreign components").

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