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

MOTOROLA MOBILITY LLC

Plaintiff,

v.

AU OPTRONICS CORPORATION, *et al.*,

Defendants.

Case No. 09-cv-6610

Hon. Joan B. Gottschall

PLAINTIFF MOTOROLA MOBILITY LLC'S MEMORANDUM
IN OPPOSITION TO DEFENDANTS' MOTION FOR RECONSIDERATION

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Defendants have moved for reconsideration of Judge Illston's summary judgment decision that genuine issues of fact exist as to whether the price-fixing activities alleged by Motorola Mobility LLC ("Motorola") satisfy the substantive merits requirements of the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a (the "FTAIA").[1] Because Defendants have failed to provide a legitimate basis for reconsideration, their motion should be denied.

I. INTRODUCTION

The question of whether Motorola can satisfy the requirements of the FTAIA does not present a "single legal question" as Defendants claim. *See* Motion at 1. Rather, as Judge Illston recognized in her summary judgment decision, it presents a multifaceted factual issue that ultimately must be decided by the jury.

It is an issue that Judge Illston has carefully and thoughtfully addressed on three separate occasions in this case alone and over ten times to date in the MDL proceedings, and is an issue that Defendants unsuccessfully appealed to the Ninth Circuit. Unhappy that it has not been decided in their favor, Defendants now make this last-ditch effort to change the outcome. However, their attempt to persuade this Court to ignore the MDL process, reconsider Judge Illston's decision, and remove this case from a jury's consideration is premised entirely on a skewed picture of the factual and legal analyses applied by the MDL court.

First, Defendants present this Court with an incomplete factual record – one that focuses solely on where purchase orders were issued – and claim that Judge Illston looked only at where Defendants' illegal conduct occurred in applying the FTAIA. That is not true. Judge Illston

[1] Judge Illston's summary judgment order, *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2012 WL 3276932 (N.D. Cal. Aug. 9, 2012), is referred to herein as the "Order."

examined all the facts presented by both Motorola and Defendants at summary judgment, including where purchase orders were issued, where conduct occurred, and where the effects of that conduct were felt, and concluded "that a reasonable jury could find a concrete link between defendants' price setting-conduct . . . its domestic effect, and the foreign injury suffered by Motorola and its affiliates." *See* Order at *4. Defendants want to frame this issue as involving simple, independent transactions between foreign Motorola facilities and foreign defendants, but as Judge Illston recognized, the evidence submitted by Motorola in opposition to summary judgment (evidence that Defendants declined to provide to this Court along with their motion for reconsideration) amply demonstrates that this is a highly disputed issue of fact that should be resolved by a jury, not the Court.

Second, Defendants present this Court with a slanted recitation of the case law governing application of the FTAIA and claim that Judge Illston ignored controlling authority on the issue. That also is not true. Judge Illston's decision cites and relies on relevant case law, including the Seventh Circuit's recent decision in *Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 852 (7th Cir. 2012) ("*Minn-Chem*"). In fact, *Minn-Chem* provides the foundation for Judge Illston's decision to treat the FTAIA as a substantive merits requirement for bringing a Sherman Act claim – rather than a jurisdictional bar on the power of federal courts – and, therefore, as a factual issue to be determined by a jury. The weakness in Defendants' argument that Judge Illston applied the wrong law is underscored by Defendants' thinly-veiled attempt to repackage additional briefing on the issue as an "amicus brief" submitted by "concerned" law professors.

Defendants are not entitled to a reversal of Judge Illston's summary judgment decision simply because they do not like it. They must provide a valid basis for reconsideration, which their motion fails to do. As a result, Defendants' motion should be denied, and, as the MDL

court concluded previously, the question of whether the FTAIA applies to Motorola's claims should be decided by a jury.

II. BACKGROUND

A. Facts

Despite this Court's request for a complete record on the issue, Defendants provided only a portion of the story, one that ignores Motorola's procurement process centered in the United States and Defendants' illegal activities targeting that procurement process. Defendants attempt to convince the Court that Judge Illston rejected their argument at summary judgment without any evidence that there was a domestic effect on U.S. commerce. That assertion is false and is belied by the substantial evidence set forth in detail in Motorola's summary judgment opposition brief. The numerous facts supporting Judge Illston's decision to deny summary judgment and send this issue to the jury – facts that Defendants ignore in their motion – are discussed in greater detail below.

1. Motorola's LCD panel procurement process was controlled from the United States and started long before a purchase order was issued.

As with their summary judgment motion, Defendants have painted a skewed picture of Motorola's LCD panel procurement process, suggesting that Motorola's foreign subsidiaries acted independently in choosing LCD panel vendors and setting LCD panel prices and that Motorola's procurement of LCD panels commenced with the issuance of a purchase order by a foreign subsidiary. The record is categorically to the contrary. Motorola's LCD panel procurement is and always has been centered in the United States.

Motorola submitted substantial evidence to the MDL court demonstrating that its procurement practices and policies required that all final LCD panel pricing be approved by supply chain executives based in the United States before that pricing became effective. *See*,

e.g., Ex. 372, Tay Dep. at 263:25-267:25;[2] Robinson Decl. at ¶ 4;[3] Exs. 1-4; Ex. 5; Ex. 6 at 425, 433; Ex. 7; Ex. 8 at 241; Ex. 9 at 378; Ex. 10 at 341-42, 344, 354; Ex. 11 at 501; Ex. 363, Robinson Dep. at 118:23-120:10; Ex. 359, Metty Dep. at 259:3-16.[4] In fact, Defendants knew that the Motorola employees with whom they conducted business on a daily basis did not have authority to agree on pricing, and that the pricing information those employees collected would be sent to Motorola executives in the United States for final approval. *See, e.g.*, Ex. 65; Ex. 66 at 899; Ex. 67.

During the time period at issue in this lawsuit, there were two groups within Motorola's supply chain organization that participated in the acquisition of LCD panels: (1) the Display Commodity Team, which provided Motorola procurement executives based in the United States with the information they needed to make strategic decisions about LCD panel vendors and pricing; and (2) the Purchasing Department, which implemented the administrative and logistical

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[2] Unless otherwise indicated, exhibit numbers referenced herein refer to the exhibits attached to the Declaration of Joshua Stokes submitted with Motorola's opposition to Defendant's summary judgment motion. A copy of Motorola's summary judgment opposition was submitted as Exhibit 9 to the Declaration of Jeffrey M. Davidson ("Davidson Decl.") filed in support of Defendants' Motion for Reconsideration (Dkt. No. 116-2). That opposition contains an extended discussion of the facts relevant to the FTAIA analysis. In order to provide the Court with a complete record, Motorola is submitting courtesy copies of all summary judgment briefing, including the opposition, and accompanying exhibits to the Court.

[3] References to the "Robinson Decl." are to the May 17, 2012 Declaration of Janet Robinson in Support of Plaintiff Motorola Mobility, Inc.'s Opposition to Defendants' Joint Motion for Summary Judgment, attached hereto as Exhibit A to the Declaration of Matthew J. McBurney.

[4] Defendants appear to dispute Motorola's contention that U.S.-based executives had to approve pricing decisions. This is rather ironic given that Defendants have taken the position that their own pricing decisions needed to be approved by corporate headquarters before they could enter into binding agreements with Motorola on price. *See* Freccero Decl. Exs. 204-205; Ex. 373, Waldron Dep. at 81:20-84:6; Ex. 369, P. Smith Dep. at 70:3-17; Ex. 330, Bond Dep. at 143:20-144:15; Ex. 366, Sharif Dep. at 95:3-9, 280:3-12; Ex. 342, Iida Dep. at 28:23-30:19; Ex. 375, Yun Dep. at 295:13-296:7. Regardless, this highlights just one of the many disputed factual issues that the MDL court rightly concluded should be decided by a jury.

side of ordering LCD panels from vendors at prices approved by Motorola procurement executives based in the United States. Defendants conflate the two groups in a deliberate attempt to confuse the facts.

Once a mobile device was designed by Motorola, it was the responsibility of the Display Commodity Team centered in Illinois to determine the strategy for procuring the LCD panels to be used in that device. *See* Ex. 359, Metty Dep. at 31:14-32:02; Ex. 367, Singh Dep. at 252:19-253:1; Ex. 336, Ford Dep. at 44:5-20; Ex. 363, Robinson Dep. at 82:22-84:12. Because of the importance of LCD panels in Motorola's mobile devices, the Display Commodity Team controlled LCD panel procurement across all of Motorola's business divisions. Ex. 359, Metty Dep. 28:25-33:20. Long before a purchase order was issued, the Display Commodity Team would send requests for quotations to LCD panel suppliers detailing the technical specifications and other requirements for the displays, evaluate responses to those requests, and ultimately determine which suppliers could meet Motorola's needs for the displays. It would also engage potential LCD panel suppliers in pricing negotiations in order to establish a single LCD panel price that would apply to Motorola's operations around the world. *See* Ex. 359, Metty Dep. at 90:10-24; Ex. 373, Waldron Dep. at 234:17-236:18; Ex. 330, Bond Dep. at 214:04-215:02. The Display Commodity Team would then recommend to Supply Chain management the prices and suppliers for each panel for the coming quarter or year. The Motorola executives who had final responsibility for these decisions were at all relevant times located in the United States. *See* Robinson Decl. at ¶ 4; Ex. 363, Robinson Dep. at 118:23-120:10; Ex. 359, Metty Dep. at 259:3-16; Ex. 372, Tay Dep. at 263:25-267:25.

Once the Display Commodity Team received pricing approval from the Supply Chain management located in the United States, that price was given to the Purchasing Department to

use to issue purchase orders. The price determined in the United States applied globally to all Motorola manufacturing facilities ordering LCD panels for incorporation into Motorola mobile devices. *See* Robinson Decl. at ¶ 7; Ex. 359, Metty Dep. at 90:10-24; Ex. 329, Bodak Dep. at 166:25-167:07. Defendants understood that this was Motorola's policy. *See* Ex. 373, Waldron Dep. at 235:6-24; Ex. 330, Bond Dep. at 214:4-16. The Purchasing Department had no discretion whatsoever as to which supplier would be used or what price would be included in the purchase orders; those decisions were made by the Display Commodity Team and Supply Chain management. *See* Ex. 372, Tay Dep. at 66:03-22; Ex. 363, Robinson Dep. at 87:2-89:14. In fact, if a Motorola purchase order was inadvertently issued with a price other than the price approved by Motorola in the United States, Motorola or the LCD panel supplier issued an adjustment rebate to bring the price in the purchase order into conformity with the price negotiated by the Display Commodity Team. *See* Ex. 368, Smith Dep. at 47:17-49:14.

2. Motorola's delivery terms and quantities were set outside of the purchase orders and were controlled from the United States.

Not only do Defendants pretend that Motorola's procurement process started with the issuance of a purchase order, but they also imply that the purchasing relationship was based solely on those purchase orders. That is not true.

Most of the purchases were made under "blanket" purchase orders that did not specify a quantity of LCD panels being purchased; rather, they merely reflected the price and the *estimated* quantity of LCD panels for a particular time period. The specific terms identifying the number of panels that Motorola was purchasing in any given week were instead supplied by Motorola's Materials Requirement Planning ("MRP") system, which was controlled and set by senior management located at Motorola headquarters in Illinois. *See* Ex. 363, Robinson Dep. at 87:17-88:17; Ex. 367, Singh Dep. at 351:17-352:06; Ex. 75 at 22. As a result, not only were the

pricing terms set forth in the purchase orders determined by Motorola in the United States, but so were the quantity terms.

In addition, Motorola headquarters signed a number of "hubbing agreements" with Defendants that specified delivery and payment terms. *See, e.g.*, Freccero Decl. Exs. 51-53.[5] The hubbing agreements specifically indicate that, if there are conflicting terms with any other purchase order or supply contract, the hubbing agreement controls. *Id.*

Further, Motorola's Display Commodity Team often negotiated rebate agreements and retroactive price discounts with Defendants based on volume purchases that were payable to Motorola in the United States and were accounted for on Motorola's books and records. *See* Ex. 368, Smith Dep. at 13:21-21:25; *see, e.g.*, Exs. 76-79.

3. Motorola was directly impacted in the United States by Defendants' conspiracy.

Motorola was impacted in the United States by Defendants' illegal price-fixing conspiracy. Contrary to what Defendants imply, Motorola did not just serve as a U.S. holding company with autonomous subsidiaries around the world acting on their own behalf and for their own profit. Motorola's financial statements reflect ongoing repatriation by Motorola to the United States of all profits (other than those necessary to maintain the capital to operate its subsidiaries) generated by its foreign subsidiaries through the sale of mobile devices containing LCD panels. *See* Ex. 371, Storm Dep. at 18:14-24:02; Freccero Decl. Ex. 85. Motorola

[5] References to the "Freccero Decl." are to the April 3, 2012 Declaration of Stephen P. Freccero in Support of Defendants' Joint Motion for Summary Judgment Addressing Plaintiffs' Sherman Act Claim for Injuries in Foreign Markets, which accompanied Defendants' summary judgment motion addressing application of the FTAIA. That motion and the Freccero Declaration were submitted as Exhibits 8 and 12, respectively, to the Davidson Decl. (Dkt. No. 116-2). As mentioned above, courtesy copies of the motion and accompanying exhibits are being provided to the Court. In addition, courtesy copies of Defendant's reply brief in support of that motion and accompanying exhibits are being provided to the Court.

instructed its foreign subsidiaries to repatriate those profits, because the costs associated with intellectual property, research and development expenses, and corporate debt were borne by the parent company in the United States. *See* Ex. 371, Storm Dep. at 20:03-16, 28:15-30:20, 50:12-51:6. Moreover, the Motorola subsidiary that issued purchase orders for approximately half of the dollar value of all LCD panel purchases at issue in this case – the Motorola Trading Center ("MTC") located in Singapore – was considered a branch of the Motorola corporate parent in Illinois under U.S. tax law, and all of the MTC's profits and losses were treated as profits and losses of the U.S. parent company. *See* Ex. 371, Storm Dep. at 23:09-26:25.

4. Defendants specifically targeted Motorola in the United States.

Defendants casually dismiss the voluminous evidence that they targeted Motorola in the United States, apparently on the theory that it is irrelevant to the issue of whether the FTAIA applies to Motorola's purchases. But this evidence is plainly relevant, particularly on the issue of whether Defendants' actions had an effect on U.S. commerce. The evidence demonstrates that Defendants used their U.S. operations to further their scheme to fix prices of LCD panels sold to a U.S. company.

The evidence before Judge Illston shows that, because Motorola's LCD panel procurement organization was centralized in the United States, Defendants established operations in the United States, some even went so far as to put offices near Motorola's headquarters in Illinois, and they also had their foreign personnel travel to the United States to facilitate sales of LCD panels to Motorola. *See, e.g.*, Ex. 352, J.Y. Kim Dep. at 35:21-25; Ex. 80 at 537; Ex. 345, Imaya Dep. at 65:8-13; Ex. 89 at 104; Ex. 90 at 828-840. The evidence further shows that Defendants' U.S. subsidiaries were actively involved in negotiating LCD panel pricing with Motorola. As part of that process, Defendants' U.S. employees served as the mouthpiece to Motorola for their parent companies that were located in Asia and Europe,

relaying pricing information to Motorola and, in turn, providing pricing advice to their foreign corporate parents. Some of those U.S.-based employees also had pricing responsibility with respect to Motorola. *See, e.g.*, Ex. 375, Yun Dep. at 72:11-73:8, 81:13-23; 115:1-115:19; Ex. 330, Bond Dep. at 115:9-116:17, 132:14-134:6, 140:12-141:2; Ex. 373, Waldron Dep. at 84:7-85:14, 166:2-21; Ex. 354, Kiribuchi Dep. at 64:13-64:23; Ex. 366, Sharif Dep. at 70:2-70:19; Ex. 343, Iida Dep. at 228:12-229:1; Ex. 105; Ex. 83 at 11.

The evidence also shows that Defendants directed employees at their U.S. subsidiaries to exchange information with their counterparts at competitors regarding sales of LCD panels to Motorola. *See, e.g.*, Ex. 349, H.S. Kim Dep. at 197:10-198:2, 199:02-20; Ex. 166; Ex. 167; Ex. 168; Ex. 342, Iida Dep. at 59:21-60:7. Defendants' U.S. employees did as they were told, routinely exchanging a wide variety of competitive information about Motorola, including the prices charged to Motorola, the volume of LCD panels sold to Motorola, rebates Defendants were considering offering Motorola, as well as a variety of other aspects of their business relationship with Motorola. *See, e.g.*, Ex. 375, Yun Dep. at 146:25-149:14, 155:13-156:13, 278:1-278:11; Ex. 366, Sharif Dep. at 27:9-28:13; Ex. 175; Ex. 67; Ex. 187; Ex. 188; Ex. 113; Ex. 179. Defendants' U.S.-based employees then transmitted the competitive information they learned to their superiors in Asia and Europe. *See, e.g.*, Ex. 375, Yun Dep. at 272:24-274:12; Ex. 373, Waldron Dep. at 168:18-169:8; Ex. 366, Sharif Dep. at 254:9-22; Ex. 172.

The evidence further shows that the information Defendants' U.S. employees collected was used in setting the final LCD panel prices offered to Motorola. *See, e.g.*, Ex. 356, Matsumura Dep. at 83:15-21; Ex. 351, J.W. Kim Dep. at 69:13-70:25; Ex. 334, Chiba Dep. at 262:2-265:18; Ex. 335, Chiba Dep. at 345:12-346:7; Ex. 169; Ex. 356, Matsumura Dep. at 34:16-23, 79:18-83:21. And, of course, Epson and Sharp have expressly admitted that they fixed

the prices of panels sold to Motorola and that acts in furtherance of the conspiracy occurred in the United States.[6]

Moreover, at summary judgment, Motorola presented substantial evidence to Judge Illston showing that Defendants knew that the LCD panels they were selling to Motorola were intended to be incorporated into mobile devices bound for sale in the United States. *See, e.g.*, Ex. 354, Kiribuchi Dep. at 67:9-18; Ex. 330, Bond Dep. at 149:4-150:3; Ex. 150 at 58; Ex. 93 at 379, 383; Ex. 151 at 792; Ex. 153 at 593; Ex. 156; Ex. 157 at 209, 221, 224; Ex. 158 at 678, 681; Ex. 159 at 86-87; Ex. 90 at 824, 828, 830-31.

B. Procedural History

Judge Illston has thoughtfully considered and applied the FTAIA on ten separate occasions in the MDL proceedings. In the Motorola case alone, Judge Illston considered the issue three times, twice on motions to dismiss and again on summary judgment. *See* Motorola Docket Nos. 41, 77, 430. Additionally, Judge Illston was called upon to consider and apply the FTAIA in at least seven other motions in cases involving other major global companies, including Dell, Nokia, and Sony, as well as the indirect purchaser class action. *See* MDL Docket Nos. 1824, 2561, 3395, 3833, 4125, 4831, 6582.

Moreover, Defendants attempted to seek the Ninth Circuit's review of this issue. They successfully convinced Judge Illston to certify the issue for interlocutory appeal after she denied Defendants' second motion to dismiss on FTAIA grounds, but the Ninth Circuit declined to hear

[6] *See* Plea Agreement, *United States v. Sharp Corp.*, Case No. 08-cr-802-SI (N.D. Cal. Dec. 8, 2008) (Docket No. 9) (pleading guilty to fixing the price of LCD panels sold to Motorola for use in Razr mobile phones from fall 2005 through mid-2006) (the "Sharp Guilty Plea," attached hereto as Exhibit B); *see also* Plea Agreement, *United States v. Epson Imaging Devices Corp.*, Case No. 09-cr-854-SI (N.D. Cal. Oct. 23, 2009) (Docket No. 15) (pleading guilty to fixing the price of LCD panels sold to Motorola for use in Razr mobile phones from fall 2005 through mid-2006) (the "Epson Guilty Plea," attached hereto as Exhibit C).

the appeal. *See* Motorola Docket No. 165. Later, after Defendants' summary judgment motion based on the FTAIA was denied, they again sought certification for an interlocutory appeal, which was denied. *See* Motorola Docket No. 464. Notably, Defendants did not move for reconsideration of the MDL court's decision on the basis that Judge Illston had made a "clear error."

III. ARGUMENT

A. Motions for Reconsideration Are Granted Only In Limited Circumstances.

Motions for reconsideration are granted sparingly and only under limited circumstances, particularly when a case has been transferred between courts. As Judge Posner observed: "when judges are changed in midstream . . . . [l]itigants have a right to expect that a change in judges will not mean going back to square one. The second judge may alter previous rulings if new information convinces him that they are incorrect, but he is not free to do so . . . merely because he has a different view of the law or facts from the first judge." *Williams v. C.I.R.*, 1 F.3d 502, 503 (7th Cir. 1993).

The Seventh Circuit has expressly held that the law of the case doctrine applies when a case has been transferred in order to "discourage strategically motivated removals and other forms of judge or court shopping." *Johnson v. Burken*, 930 F.2d 1202, 1207 (7th Cir. 1991). This principle is even more compelling in the context of a multi-district litigation. When a transferor court is asked to revisit the decision of the transferee court, the prior ruling should not be lightly overturned, since "[i]t would vitiate most of the purpose of consolidating litigation if, after remand, parties could simply re-visit the transferee court's pre-trial rulings . . . ." *See Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1202 n.5 (7th Cir. 1996). Moreover, as of this moment, there are at least two other cases from the MDL that have been returned to their home districts for trial, further raising the specter of inconsistent legal rulings if this Court were to

reconsider Judge Illston's order. *See* Order Suggesting Remand to Transferor Courts, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-1827 (N.D. Cal. June 24, 2013) (Dkt. No. 8173).

In fact, even the case Defendants rely on to support their requested reconsideration notes that "transferor courts should rarely reverse, because any widespread overturning of transferee court decisions would frustrate the principal aims of the MDL process and lessen the system's effectiveness." *In re Ford Motor Co.*, 591 F.3d 406, 411 (5th Cir. 2009). In evaluating the transferee court's prior ruling, the transferor court must pay "attention to the special authority granted to the multidistrict transferee judge" and "respect the transferee court's decisions." *Id*. (internal quotations and citations omitted).

In turn, the Seventh Circuit only permits reconsideration in instances where "there is a compelling reason, such as a change in, or clarification of, law that makes clear that the earlier ruling was erroneous." *Santamarina v. Sears, Roebuck & Co.*, 466 F.3d 570, 572 (7th Cir. 2006). Those circumstances are absent here.

B. <u>There Was No Clear Error On The Part Of Judge Illston.</u>

Judge Illston correctly applied the FTAIA. Following the lead of the Seventh Circuit in *Minn-Chem*, the MDL court treated the FTAIA as a substantive merits limitation, rather than a jurisdictional bar to application of the Sherman Act.[7] In doing so at the summary judgment stage, Judge Illston properly considered all facts presented by both Motorola and Defendants and applied those facts to the language of the FTAIA in an effort to determine whether there was sufficient evidence from which a reasonable jury could conclude that Defendant's illegal conduct

[7] In *Animal Science Products, Inc v. China Minmetals Corp.*, 654 F.3d 462 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1744 (2012), the Third Circuit also concluded that the FTAIA acts as a substantive merits requirement, not a jurisdictional bar and, therefore, should be applied accordingly. Judge Illston also cited this decision in her denial of summary judgment.

had a domestic effect in the United States that gave rise to the antitrust claims asserted by Motorola. Judge Illston concluded "that a reasonable jury could find a concrete link between defendants' price setting-conduct . . . its domestic effect, and the foreign injury suffered by Motorola and its affiliates." *See* Order at *4 (internal citation omitted). This was a proper application of the FTAIA's "domestic effects exception," and none of the criticisms lodged by Defendants provides grounds for a finding that this ruling was clearly erroneous.

1. Judge Illston correctly applied the requirements of the FTAIA to the unique facts of this case.

Defendants' primary argument is that Judge Illston incorrectly applied the FTAIA's "domestic effects exception" by focusing exclusively on whether "conduct" occurred in the United States, rather than whether Motorola's injuries flow from an "effect" on U.S. commerce. That could not be further from the truth. In fact, Judge Illston summarized her analysis as follows: "The Court concludes that whether the price fixing activities alleged by Motorola in this case gave rise to direct, substantial, and reasonably foreseeable effects on domestic commerce, and whether such effects gave rise to a Sherman Act claim present issues of fact which must be resolved by the jury in this case." *See* Order at *2. Using this framework, Judge Illston properly applied the language of the FTAIA to the unique facts of Motorola's case.

As directed by the statutory language and the Supreme Court in *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) ("*Empagran*"),[8] Judge Illston first considered

[8] Despite Defendants' claim that the MDL court ignored the Supreme Court's guidance in *Empagran*, Judge Illston expressly stated that she was guided by the following instructions from *Empagran* in applying the FTAIA: "This technical language initially lays down a general rule placing all (nonimport) activity involving foreign commerce outside the Sherman Act's reach. It then brings such conduct back within the Sherman Act's reach provided that the conduct both (1) sufficiently affects American commerce, i.e., it has a "direct, substantial, and reasonably foreseeable effect" on American domestic, import or (certain) export commerce, and (2) has an

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Defendants' illegal conduct, noting that the facts presented by the parties at summary judgment showed "substantial evidence that defendants targeted Motorola in the United States for defendants' sales and marketing of LCD panels." *See* Order at *2.

Judge Illston next looked at whether that conduct – Defendants' targeting of Motorola in the United States – had a "direct, substantial, and reasonably foreseeable" effect on U.S. commerce. *See id*. at *3-4. In analyzing that question, the MDL court noted that the facts presented support the assertion that Defendants' illegal conduct had the effect of causing Motorola to unknowingly agree to a single, artificially-inflated price in the United States that applied to all LCD panels ordered by Motorola facilities around the globe. *See id*. at *3 ("Motorola has presented admissible evidence from which a jury could infer that final decisions regarding pricing of LCD panels took place in the United States").

From there, Judge Illston considered whether that "effect" on U.S. commerce – the unknowing approval of a single, artificially-inflated price in the United States – gave rise to the claims asserted by Motorola based on deliveries of price-fixed product abroad. The MDL Court noted that, because the evidence presented supports the assertion that those deliveries were requested and made at the artificially-inflated price set in the United States, it follows that the "effect" on U.S. commerce gave rise to an injury each time an order was placed at that price. *See id*. at *3 (the evidence "support[s] [Motorola's] claim that foreign affiliates issued purchase orders at the price and quantity determined by Motorola in the United States").[9]

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effect of a kind that antitrust law considers harmful, i.e., the "effect" must "giv[e] rise to a [Sherman Act] claim." *See* Order at *1 (citing *Empagran*, 542 U.S. at 162).

[9] Once again, Defendants imply that the Litigation Assignment Agreements between Motorola, Inc. and its foreign subsidiaries somehow advance their argument and undermine Motorola's

(continued…)

This is precisely the type of fact-based analysis under the FTAIA that the Seventh Circuit said was appropriate in *Minn-Chem*. In that decision, the Seventh Circuit stressed that "it is important to recall that the FTAIA itself demands the facts of each case must be evaluated for compliance with its demands." *See* 683 F.3d at 859.

2. Judge Illston did not depart from controlling Supreme Court and Seventh Circuit precedent.

Defendants also argue that Judge Illston willfully departed from controlling Supreme Court and Seventh Circuit precedent in rejecting their summary judgment motion. Again, their criticisms are misguided.

First, contrary to Defendants' argument, Judge Illston did not ignore or depart from the Supreme Court's decision in *Empagran*. In fact, as discussed above, the MDL court cited *Empagran* for the overall framework it provides for applying the FTAIA and used that framework to guide its analysis. *See* Order at *1. In addition, Judge Illston specifically looked to *Empagran* for guidance in applying the unique facts of this case to the FTAIA, but concluded that the Supreme Court had considered a completely different factual scenario, in which no U.S. conduct or effects were involved: "Motorola is not a foreign company alleging injury based on wholly foreign transactions and conduct, unlike plaintiffs in *Empagran*." *See* Order at *2.

(continued…)

position. That is not the case. The Litigation Assignment Agreements "strongly suggest" Motorola, Inc.'s "entitlement to assert claims on behalf of its foreign affiliates." *See Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 608 F. Supp. 2d 1166, 1186 (N.D. Cal. 2009). Where, as here, there is such a complete unity of interest between a parent company and its subsidiaries, it is proper for the parent company to bring claims on behalf of its affiliates. *See Farmland Dairies, Inc. v. N.Y. Farm Bureau, Inc.*, 1996 WL 191971, at *3-4 (N.D.N.Y. Apr. 15, 1996) (holding that it is proper for a parent company to bring an antitrust claim on behalf of its wholly owned subsidiary, because "any injury to [the wholly owned subsidiary] directly injures [the parent] as well").

Despite Defendants' vague references to a "controlling discussion of *Empagran*" in the Seventh Circuit's *Minn-Chem* decision, the court of appeals there came to the same conclusion as Judge Illston: "[I]n *Empagran* . . the plaintiffs . . . were foreign purchasers of allegedly price-fixed products that were sold in foreign markets . . . In our case, by contrast, the plaintiffs are all U.S. purchasers, and so the particular problem addressed in *Empagran* does not arise here." 683 F.3d at 854.

Second, Judge Illston did not ignore or depart from the Seventh Circuit's decision in *Minn-Chem*. In fact, the MDL court embraced and followed the holding in *Minn-Chem* that the FTAIA is a substantive merits requirement to a Sherman Act claim, rather than a jurisdictional bar on suit. *See id*. at 852 ("the FTAIA sets forth an element of an antitrust claim, not a jurisdictional limit on the power of the federal courts.") (citation omitted). Citing directly to *Minn-Chem*, Judge Illston held that the statute "sets forth an element of an antitrust claim, not a jurisdictional limit on the power of the federal courts." *See* Order at *1. Applying that ruling at the summary judgment stage, the MDL court recognized that application of the FTAIA presents an issue of fact for the jury to decide. *See id*.

In addition, the Seventh Circuit's application of the FTAIA's "domestic effects exception" in *Minn-Chem* supports Judge Illston's decision in this case. In *Minn-Chem*, the Seventh Circuit found the "domestic effects exception" to be satisfied where the defendants reduced supply in *foreign markets* in order to compel *foreign, third-party purchasers* to pay higher prices abroad, because those efforts set a "benchmark price intended to govern later U.S. sales." *See* 683 F.3d at 859-60. The Court described the situation as follows: "The plaintiffs allege that the defendants would first negotiate prices in Brazil, India, and China, and then they would use those prices for sales to U.S. customers. The alleged supply reductions led to price

hikes in these foreign markets, and those increases showed up almost immediately in the prices of U.S. imports." *See id*. at 859. Here, the facts presented at summary judgment show that there was not merely a "benchmark" price affected by Defendants' illegal conduct that impacted the different prices different purchasers of price-fixed products paid across foreign and domestic markets, but rather a single, artificially-inflated price that applied across the globe to a single purchaser's various facilities. As a result, it is difficult to see how the "effect" found in *Minn-Chem* could be sufficiently "direct, substantial, and reasonably foreseeable," but the "effect" at issue here fail to meet that standard under the Seventh Circuit's application. As a result, *Minn-Chem* supports Judge Illston's conclusion that the facts at issue in this case present an issue of fact as to whether the "domestic effects exception" to the FTAIA applies.

Third, Defendants criticize Judge Illston for not citing or applying the Seventh Circuit's prior FTAIA decision in *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942 (7th Cir. 2003) ("*United Phosphorus*"). Motion at 18. This argument is rather surprising, however, considering that the Seventh Circuit overruled *United Phosphorous* in *Minn-Chem*, because it was premised on the earlier standard that treated the FTAIA as a jurisdictional bar, rather than the standard articulated in *Minn-Chem* treating the statute as a substantive merits limitation on a Sherman Act claim. *See* 683 F.3d at 848 ("We hold first that the FTAIA's criteria relate to the merits of a claim, and not to the subject-matter jurisdiction of the court. We therefore overrule our earlier en banc decision in *United Phosphorus* . . .").

Further, even if *United Phosphorus* were still controlling, it presents a completely different set of facts than those at issue here and, therefore, provides little guidance to the

questions faced by Judge Illston at summary judgment.[10] In *United Phosphorus*, the plaintiffs – two Indian companies and their U.S. joint venturer – attempted to satisfy the FTAIA by alleging only hypothetical effects in the United States that may result from the defendants' illegal attempts to monopolize foreign markets for certain chemicals. *See United Phosphorus, Ltd. v. Angus Chemical Co.*, 131 F. Supp. 2d 1003, 1013 (N.D. Ill. 2001).[11] The district court noted that "there is no factual basis by which [the plaintiffs] can claim that there is a link between [the] alleged misconduct in claimed foreign [up-stream product] markets and the supply or price of [down-stream products] in the United States." *Id*.[12] Unlike in *United Phosphorus*, the effects at issue in this case are not based on events that "may" happen at some future point in time; they are concrete and do not depend on the potential for hypothetical intervening factors to occur. Moreover, *United Phosphorus* addressed application of the FTAIA in connection with a Section 2 monopolization claim, not a Section 1 price-fixing claim like the one at issue here.

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[10] Similarly, Defendants list a series of other cases and claim that "the MDL court's ruling sharply departs from all prior decisions interpreting the FTAIA." *See* Motion at 14. However, those cases did not consider a factual scenario similar to the unique facts of this case. As the Seventh Circuit reminded us in *Minn-Chem*, "it is important to recall that the FTAIA itself demands the facts of each case must be evaluated for compliance with its demands." *See* 683 F.3d at 859. In turn, each FTAIA decision should address "only the situation before [it]." *See id*.

[11] Specifically, the *United Phosphorus* plaintiffs were unable to assert: (1) that they intended to make the down-stream product for sale in the United States; (2) that they were prevented from making a single sale of the down-stream product in the United States; (3) that they would be able to obtain the required FDA authorization needed to provide the down-stream product in the United States; or (4) that the prices a third-party charged for the down-stream product in the United States would be affected if the plaintiffs were permitted to participate in the foreign up-stream market. *See* 131 F. Supp. 2d at 1013.

[12] In *United Phosphorus*, the Seventh Circuit concluded that "[t]he appellants have made little effort to demonstrate that the district court's findings of fact are clearly erroneous," so we rely on the district court's recitation of those facts here. *See* 322 F.3d at 946.

For the reasons set forth above, Judge Illston did not actively reject controlling Supreme Court and Seventh Circuit authority, as Defendants claim.

3. Judge Illston's decision does not raise comity concerns.

Contrary to Defendants' argument, permitting Motorola to recover under the Sherman Act all of the damages it suffered as a result of paying a single, artificially-inflated LCD panel price that was determined in the United States raises no comity concerns. Congress passed the FTAIA in an effort to limit the application of American antitrust laws to foreign anticompetitive conduct when that conduct causes no adverse effects in the United States. *See Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 796 n.23 (1993) ("The FTAIA was intended to exempt from the Sherman Act export transactions that did not injure the United States economy.") (citing H.R. Rep. No. 97-686, ¶¶ 2-3, 9-10 (1982)). That is not the case here.

The United States has a significant interest in policing the illegal activities at issue here and applying its antitrust laws to the claims asserted by Motorola. First, the United States has a strong interest in protecting a U.S. company, such as Motorola, from being deceived in the United States and agreeing to pay artificially-inflated prices that apply to its worldwide operations. Second, the United States has a strong interest in preventing and subsequently punishing foreign conspirators, such as Defendants, that establish cartel enforcement mechanisms in the United States (through subsidiaries and employees based in the United States that furthered the cartel's aims) for the specific purpose of targeting a U.S. company. As the Seventh Circuit admonished in *Minn-Chem*, "[f]oreigners who want to earn money from the sales of goods or services in American markets should expect to have to comply with U.S. law." 683 F.3d at 854.

Either of these interests is enough to warrant application of the U.S. antitrust laws to all claims stemming from such activities; here we have both. As a result, applying U.S. antitrust

law to the circumstances here – i.e., an international price-fixing cartel targeting a U.S. company in the United States that results in the U.S. company sustaining injury on account of that illegal activity in the United States – is a far cry from the situation that raised comity concerns in *Empagran* and its progeny (which are the ones highlighted in Defendants' motion for reconsideration), where wholly foreign plaintiffs, with no U.S. ties and wholly foreign injuries, sought to take advantage of the protections afforded by the U.S. antitrust laws. This is especially true, because Motorola itself is specifically named as a victim of the illegal price-fixing conspiracy in two criminal guilty pleas. *See* Sharp Guilty Plea (pleading guilty to fixing the price of LCD panels sold to Motorola for use in Razr mobile phones from fall 2005 through mid-2006) (Exhibit E); *see also* Epson Guilty Plea (pleading guilty to fixing the price of LCD panels sold to Motorola for use in Razr mobile phones from fall 2005 through mid-2006) (Exhibit F).[13]

Similarly, it is hard to imagine that Congress would relinquish the United States' right to protect a U.S. company from an international cartel that set up subsidiaries and stationed employees in the United States for the purpose of targeting their illegal activities at that U.S. company, as is the case here. *See Turicentro, S.A. v. Am. Airlines Inc.*, 303 F.3d 293, 305 (3d Cir. 2002) (explaining the distinction between anticompetitive conduct directed at foreign markets that only affects the competitiveness of foreign markets and anticompetitive conduct directed at foreign markets that directly affects the competitiveness of domestic markets, and explaining that antitrust laws apply to the latter sort of conduct).

[13] In connection with these guilty pleas, the DOJ agreed to forgo requiring restitution from Defendants in light of pending civil suits. Indeed, the pleas specifically state that "[i]n light of the civil class action cases filed against the defendants . . . the United States agrees that it will not seek a restitution order for the offenses charged in the Information." *See* Sharp Plea Agreement at ¶ 12; Epson Plea Agreement at ¶ 12. As a result, the DOJ has left it to victims of the cartel, such as Motorola, to seek recovery in U.S. courts for the damages they incurred.

In an attempt to bolster their argument that Judge Illston's decision misapplies the law and, therefore, offends principles of comity, Defendants have resorted to submitting additional briefing on the issue in the form of an "amicus" brief that lists the names of twelve law professors and lecturers as signatories, but contains a shocking admission that it was "primarily written by Professor David Crane . . . who is affiliated with Paul, Weiss, Rifkind, Wharton & Garrison LLP, which represents defendant Sharp in this matter." *See* Amicus Curiae Brief of Twelve Law Professors in Support of Defendants' Motion for Reconsideration at 2-3, n. 1 (Doc. No. 119-1) ("Amicus Brief"). In fact, Mr. Crane is listed as an antitrust/litigation counsel on Sharp's outside counsel's website.[14]

Even if the Court deems it appropriate to give this "amicus" brief any weight in light of the fact that it was prepared by Defendants themselves,[15] it provides little guidance in addressing the merits of this case. The brief explicitly states that it "express[es] no opinion on the actual facts of this case or whether there are genuine issues of material fact precluding or requiring the granting of summary judgment." Instead, it presents only a handful of "hypotheticals" that have no bearing on a situation, such as the one here, where a U.S. company is targeted by an international price-fixing cartel in the United States, leading to a single, artificially-inflated price being accepted in the United States that applies every time an order is placed around the globe. *See* Amicus Brief at 3. In short, these hypotheticals are entirely inapposite.

[14] A copy of Mr. Crane's law firm biography is attached hereto as Exhibit D.

[15] This is precisely the type of amicus brief the Seventh Circuit warned against in *Voices for Choices, et al v. Ill. Bell Tel. Co.*, 339 F.3d 542 (7th Cir. 2003). In that case, the Court advised against considering amicus briefs that are used to "make an end run around court-imposed limitations on the length of parties' briefs," do little "more than repeat in somewhat different language the arguments in the brief of the party whom the amicus is supporting," and fail to "assist the judges" in addressing the issues at hand. *See id*. at 545.

C. There Have Been No Changes In The Law Since Judge Illston's Decision That Warrant Reconsideration.

Unable to point to a true change in the law since Judge Illston's decision, Defendants resort to arguing that reconsideration is warranted because the MDL court's ruling applied Ninth Circuit law, rather than Seventh Circuit law. Even were this a valid ground for reconsideration (which it is not, because it would require an MDL court to consider and apply in each case the law of each and every court of appeals covering all cases transferred to the MDL), Defendants' argument misses the mark.

First, as discussed above, Judge Illston used the same framework for applying the FTAIA as did the Seventh Circuit in *Minn-Chem*. In addition, contrary to Defendants' vague criticism that the MDL court never discussed the Seventh Circuit's "controlling discussion of *Empagran*," both Judge Illston and the Seventh Circuit cited to *Empagran* as support for the framework they used and also determined that *Empagran* involved facts markedly different from those presented here; *Empagran* involved wholly foreign conduct, wholly foreign defendants, wholly foreign plaintiffs, and wholly foreign effects. *See* Order at *1-2; *see also Minn-Chem*, 683 F.3d at 854. As a result, Judge Illston and the Seventh Circuit applied *Empagran* in a similar fashion in their recent decisions.

Second, in *Minn-Chem*, the Seventh Circuit acknowledged that the Ninth Circuit applies a similar, but even stricter version of the "domestic effects exception" to the FTAIA. As a result, if that test is met under Ninth Circuit law, it necessarily is met under Seventh Circuit law. In attempting to define the term "direct" as used in the "domestic effects exception," the Seventh Circuit turned to the Ninth Circuit's decision in *United States v. LSL Biotechs.*, 379 F.3d 672 (9th Cir. 2004), which defined "direct" to mean "follow[ing] as an immediate consequence of the defendant's . . . activity," for guidance. *See Minn-Chem*, 683 F.3d at 856-57 (internal citations

omitted). In reviewing the Ninth Circuit's approach, however, the Seventh Circuit noted that "[s]uperimposing the idea of 'immediate consequence' on top of the full phrase results in a stricter test than the complete text of the statute can bear," and, instead, opted to define "direct" as only requiring "a reasonably proximate causal nexus." *See id*. at 857.

In light of the above, it cannot be said that the MDL court's application of Ninth Circuit law caused it to deviate from the Seventh Circuit's framework from applying the FTAIA's "domestic effects exception," or that Judge Illston's analysis was clearly erroneous.

D. If The Court Reconsiders Judge Illston's Decision, It Should Determine Whether The FTAIA's Import Exclusion Applies Under The Unique Facts Of This Case.

Defendants' motion for reconsideration implicates more than just application of the "domestic effects exception" to the FTAIA. If the Court determines that Defendants have met their strict burden for reconsideration and reconsiders Judge Illston's summary judgment decision, it must also revisit whether the "import exclusion" to the FTAIA applies to certain of Motorola's claims, as the MDL court's decision was limited only to whether the "domestic effects exception" to the FTAIA applies.

At summary judgment, Motorola argued that all of its claims fall under the "domestic effects exception" to the FTAIA, because Defendant's illegal "conduct" directed at Motorola in the United States had an "effect" on U.S. domestic commerce in the form of a single, artificially-inflated price being agreed upon in the United States that then applied each time a Motorola facility anywhere in the world placed an order for an LCD panel. *See* Opp. at 32-39.[16]

[16] Defendants' assertion that Motorola somehow conceded away its right to seek recovery of all its damages is patently false. The MDL court certainly did not think that was the case in its summary judgment order. Moreover, Motorola specifically stated in earlier briefing that it was not waiving its right to seek recovery on all its purchases. *See* Brief in Opposition to Motion to

(continued…)

As an alternative and completely independent ground for satisfying the FTAIA with respect to a significant portion of its claims, Motorola also argued that injuries arising from Defendants' sales of price-fixed LCD panels to Motorola manufacturing facilities abroad that Defendants knew would be incorporated into Motorola mobile devices sold in the United States fall under the "import exclusion" to the FTAIA. *See* Opp. at 39-43.

Because the MDL court denied summary judgment based on its conclusion that there were sufficient questions of fact as to whether all of Motorola's claims fall under the "domestic effects exception" to the FTAIA, it was not required to consider application of the "import exclusion" to the unique facts of Motorola's case. As a result, if the Court is inclined to reconsider Judge Illston's decision under the "domestic effects exception," it should then determine whether the "import commerce exclusion" applies to Motorola's claims based on purchases of LCD panels falling under what has been termed Category Two claims.

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(continued…)

Dismiss Second Amended Complaint, Case No. 09-cv-5840 SI (N.D. Cal. Sept. 27, 2010) (Doc. No. 64) at 1 n.1 (submitted as Exhibit 4 to the Davidson Decl. (Dkt. No. 116-2)). And during oral argument at an earlier hearing, Motorola's counsel rebutted Defendants' counsel and specifically disavowed any such waiver: "I'm not giving those up, but I'm going to defer to my brief on that." *See* Ex. Hr'g Tr. at 26:8-13 (attached hereto as Exhibit E).

IV. CONCLUSION

For the reasons stated above, Motorola respectfully submits that the Court should deny Defendants' motion for reconsideration.

Dated: October 23, 2013

Respectfully submitted,

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