IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTOROLA MOBILITY LLC, Plaintiff-Appellant, v. AU OPTRONICS CORP., et al., Defendants-Appellees.	No. 14-8003 On Interlocutory Appeal from an Order of the United States District Court for the Northern District of Illinois Case No. 09-cv-6610 (The Honorable Joan B. Gottschall)

UNOPPOSED MOTION OF THE UNITED STATES AND THE FEDERAL TRADE COMMISSION FOR LEAVE TO FILE THE ATTACHED AMICUS BRIEF IN SUPPORT OF PANEL REHEARING OR REHEARING *EN BANC*

The United States and the Federal Trade Commission respectfully move for leave to file the attached amicus brief in support of panel rehearing or rehearing *en banc* under Federal Rule of Appellate Procedure 29(a) and Seventh Circuit Rule 35. This case raises important issues regarding the proper interpretation of the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA). The United States and the Federal Trade Commission enforce the federal antitrust laws and have a strong interest in the correct interpretation of the FTAIA.

In this case, Motorola Mobility LLC has alleged a global conspiracy to fix the price of LCD panels incorporated into cellphones and other popular consumer devices in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. On March 27, 2014, a three-judge panel of this Court granted Motorola's petition for interlocutory appeal and simultaneously rendered a decision concluding that the FTAIA bars Motorola's claims

for damages based on overcharges on LCD panels that were delivered to its foreign subsidiaries abroad for incorporation into cellphones sold in the United States.

The panel did not have the benefit of the government's views before rendering its decision. The United States and the Federal Trade Commission believe that the attached amicus brief setting forth the government's views would be of substantial assistance to the Court.

On April 23, 2014, the United States asked counsel for the parties what their position would be on a motion for leave to file a government amicus brief in support of panel rehearing or rehearing *en banc*. Thomas Goldstein informed the government that Motorola consents. Derek Ludwin informed the government that he is authorized to represent that defendants-appellees do not oppose the motion and that, because they have not yet seen the motion for leave, they have not yet determined whether they intend to a file a response to the motion.

The government will file 30 copies of the amicus brief should the Court grant the motion.

Respectfully submitted,

April 24, 2014

/s/ Nickolai G. Levin
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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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DECLARATION

I, Nickolai G. Levin, a member of the Bar of the District of Columbia, declare as follows:

1. The United States and the Federal Trade Commission enforce the federal antitrust laws.

2. The United States and the Federal Trade Commission have a strong interest in the proper interpretation of the Foreign Trade Antitrust Improvements Act of 1982.

3. On April 23, 2014, I asked counsel for the parties what their position would be on a motion for leave to file a government amicus brief in support of panel rehearing or rehearing *en banc*. Thomas Goldstein informed the government that Motorola consents. Derek Ludwin informed the government that he is authorized to represent that defendants-appellees do not oppose the motion and that, because they have not yet seen the motion for leave, they have not yet determined whether they intend to a file a response to the motion.

I affirm under penalties of perjury that the foregoing is true and correct pursuant to 28 U.S.C. § 1746.

April 24, 2014

/s/ Nickolai G. Levin
Nickolai G. Levin

CERTIFICATE OF SERVICE

I, Nickolai G. Levin, certify that on April 24, 2014, I electronically filed the foregoing Unopposed Motion of the United States and the Federal Trade Commission for Leave To File an Amicus Brief in Support of Panel Rehearing or Rehearing *En Banc* and supporting declaration with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF System. If the motion is granted, I will send 30 copies of the attached amicus brief to the Clerk of the Court by FedEx.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

April 24, 2014

/s/ Nickolai G. Levin
Nickolai G. Levin

No. 14-8003

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTOROLA MOBILITY LLC,

Plaintiff-Appellant,

AU OPTRONICS CORP., et al.,

Defendants-Appellees.

On Interlocutory Appeal from an Order of the
United States District Court for the Northern District of Illinois
Case No. 09-cv-6610 (The Honorable Joan B. Gottschall)

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE IN SUPPORT OF PANEL REHEARING OR REHEARING *EN BANC*

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STATEMENT OF INTEREST

The United States and the Federal Trade Commission enforce the federal antitrust laws and have a strong interest in the correct interpretation of the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), which added Section 6a to the Sherman Act, 15 U.S.C. § 6a. Section 6a makes the Sherman Act's other sections inapplicable to conduct involving export or wholly foreign commerce except when that conduct (i) has a "direct, substantial, and reasonably foreseeable effect" on certain U.S. commerce and (ii) that effect "gives rise to a claim." The FTAIA also added Section 5(a)(3) to the FTC Act, 15 U.S.C. § 45(a)(3), which closely parallels Section 6a. This amicus brief addresses both prongs of the effects exception, and is submitted pursuant to Federal Rule of Appellate Procedure 29(a) and Seventh Circuit Rule 35.

STATEMENT OF ISSUES

1. Whether the panel erred in holding that fixing the price of a component sold abroad cannot have a direct effect on U.S. domestic or import commerce in products incorporating the component.

2. Whether the panel erred in holding that such an effect cannot give rise to an antitrust claim in the United States.

STATEMENT

This case involves a global conspiracy to fix the price of LCD panels incorporated into cellphones and other popular consumer devices. Without the benefit of briefing by the parties and amici or oral argument, the panel affirmed summary judgment on a basis neither advanced by the parties nor adopted by either of the district courts that ruled on summary judgment. The panel held that Section 6a precludes any antitrust

claims for price fixing of products sold abroad, no matter how massively and predictably U.S. consumers were harmed. The panel decision should be vacated.

1. Section 1 of the Sherman Act is a criminal statute that outlaws agreements "in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. This includes conspiracies among competitors to fix prices, which are criminally prosecuted as felonies. In addition to criminal prosecutions, the government can "institute proceedings in equity to prevent and restrain [Section 1] violations." *Id.* § 4. Also, "any person" who is "injured . . . by reason of" a violation can seek treble damages, *id.* § 15, and "any person" can seek "injunctive relief . . . against threatened loss or damage by a violation," *id.* § 26.

Congress enacted the Foreign Trade Antitrust Improvements Act of 1982, which added Section 6a to the Sherman Act, with the express purpose to "increase United States exports of products and services," Pub. L. No. 97-290, § 102(b), 96 Stat. 1233, 1234. Section 6a provides that:

> Sections 1 to 7 of [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, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

15 U.S.C. § 6a; *see also* 15 U.S.C. § 45(a)(3) (FTAIA addition to the FTC Act).

Section 6a "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 . . . however anticompetitive, as long as those arrangements adversely affect only foreign markets." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 161 (2004). Congress also sought to ensure that purchasers in the United States remained fully protected by the federal antitrust laws. Accordingly, conduct involving "[i]mport trade and commerce are excluded at the outset from the coverage of the FTAIA in the same way that domestic interstate commerce is excluded." *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 854 (7th Cir. 2012) (*en banc*). And the FTAIA leaves conduct involving export or wholly foreign commerce inside the Sherman Act's reach when "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 effect of a kind that antitrust law considers harmful, *i.e.*, the 'effect' must 'giv[e] rise to a [Sherman Act] claim.'" *Empagran*, 542 U.S. at 162 (quoting 15 U.S.C. §§ 6a(1), (2)).

2. Motorola Mobility Inc. (Motorola) filed suit against foreign makers of LCD panels in the Northern District of Illinois, alleging that defendants violated Section 1 of the Sherman Act by conspiring to fix the price of LCD panels world-wide from 1996 to 2006. Motorola alleged that the conspiracy not only raised prices on LCD panels but also led to increased prices on cellphones and other products in which the panels were incorporated, many of which were "specifically destined for sale and use in the United States." 07-1827 N.D. Cal. Dkt. 3173, at 52.

Motorola sought damages for overcharges based on three categories of price-fixed panels: (I) LCD panels purchased by Motorola that were delivered to it in the United

States, (II) LCD panels purchased by Motorola's foreign subsidiaries and delivered to them outside the United States, where they were incorporated into cellphones later sold in the United States, and (III) LCD panels purchased by the foreign subsidiaries and delivered to them outside the United States, where they were incorporated into cellphones later sold in foreign countries.

The case was transferred to the Northern District of California for pretrial proceedings as part of multi-district litigation. Defendants moved for partial summary judgment, arguing that Section 6a barred Motorola's Category II and III damages claims. The MDL Court denied the motion, holding that the evidence of price-fixing conduct in the United States sufficiently established that the conduct had a direct, substantial, and reasonably foreseeable effect on U.S. commerce, which gave rise to Motorola's claims. 07-1827 N.D. Cal. Dkt. 6422, at 5.

The case was remanded to the Northern District of Illinois for trial. Defendants sought reconsideration of the MDL Court's denial of partial summary judgment, arguing *only* that any effect the price-fixing conspiracy had on U.S. commerce did not give rise to Motorola's Category II and III claims so they are barred by Section 6a. 09-6610 N.D. Ill. Dkt. 182, at 15. The district court granted the motion. It assumed that the conspiracy had a direct effect on U.S. commerce, but held that this effect did not give rise to the claims at issue because Motorola had not shown that these injuries were proximately caused by the domestic effect rather than by the price fixing itself. *Id.* at 17. The court also held that even if "Motorola's domestic approval of the prices that its foreign affiliates paid [were] an effect that gave rise to its Sherman Act claims," that effect would not be "a 'substantial' effect on American domestic or import commerce." *Id.* at 18.

3. On March 13, 2014, Motorola filed an uncontested petition for interlocutory appeal. On March 27, a panel of this Court (Judges Posner, Kanne, and Rovner) granted the petition. While recognizing that this was a "complicated" case with "room for a difference of opinion," the panel nevertheless "dispense[d] with further briefing and with oral argument" and affirmed the summary judgment order. Op. 2-3. The panel concluded that Section 6a applied to Motorola's Category II and III claims and that they did not meet the requirements of the effects exception.[1] The panel deemed "frivolous" the Category III claims seeking damages based on price-fixed panels incorporated into cellphones sold in foreign countries, because those panels "never entered the United States, so never became domestic commerce." *Id*.

For the Category II claims seeking damages based on panels incorporated into cellphones sold in the United States, the panel acknowledged that, if the price fixing were proved, there was "doubtless *some* effect" on U.S. commerce in cellphones, and this effect was foreseeable. Op. 4. "And who knows what 'substantial' means in this context?" *Id*. Nevertheless, the panel held that the "effect" was "indirect—or 'remote,' the term used in *Minn-Chem*." *Id*. "The effect of component price fixing on the price of the product of which it is a component is indirect, compared to the situation in *Minn-Chem*, where 'foreign sellers allegedly created a cartel, took steps outside the United States to drive the price up of a product that is wanted in the United States, and then (after succeeding in doing so) *sold that product to U.S. customers*.'" *Id*. at 4-5 (quoting *Minn-Chem*, 683 F.3d at 860; emphasis added by panel).

[1] The panel noted that Section 6a would not apply (and thus Section 1 would apply) to Motorola's Category I claims seeking damages based on LCD panels sold to Motorola in the United States, because they are within Section 6a's import commerce exclusion, but that these claims are not involved in this appeal. Op. 4.

The panel further held that the Category II claims also failed the effects exception's requirement that the effect on U.S. commerce "give[s] rise to" an antitrust claim. Op. 5. The conspiracy's effect on domestic commerce in cellphones "is mediated by Motorola's decision on what price to charge U.S. consumers for the cellphones manufactured abroad" that contain price-fixed LCD panels. *Id.* at 6. Motorola could not be "sued by its U.S. customers for an antitrust offense merely because the prices it charges for devices that include such components may be higher than they would be were it not for the price fixing," nor could Motorola sue itself. *Id.* Thus, "the effect in the United States of the price fixing could not give rise to an antitrust claim." *Id.*

The panel also rested its decision on "practical" considerations apart from the statutory language. Op. 7. In its view, allowing the Category II claims would "enormously increase the global reach of the Sherman Act," "creating friction with many foreign countries." *Id.* at 8.

ARGUMENT

Defendants' motion for reconsideration raised a single issue: whether the effect on U.S. commerce gave rise to Motorola's Category II and III claims. 09-6610 N.D. Ill. Dkt. 182, at 15. The panel, however, held Motorola's claims deficient on a separate, broader basis: that a conspiracy to fix the price of a component cannot have a direct effect on domestic or import commerce in the products incorporating that component as a matter of law. The panel thus limited the application of a federal criminal statute on a basis not found in the decision under review or addressed by the parties in their briefing in this Court or in the court below. The panel also did not have the benefit of views from the government or other affected amici.

Rehearing or rehearing *en banc* is necessary because the panel decision conflicts with *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 853-54 (7th Cir. 2012) (*en banc*), and other Circuit precedent, and raises exceptionally important questions about the reach of the Sherman Act. The panel decision should be vacated because its resolution of these questions threatens the ability of government law enforcement and private actions to prevent and redress massive harm to U.S. consumers.

I. The Panel's View Of The Effects Exception's Directness Requirement Conflicts With *Minn-Chem* And Other Circuit Precedent

"Congress' foremost concern in passing the antitrust laws was the protection of Americans." *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 314 (1978). When adding the FTAIA to the antitrust laws, Congress "preserv[ed] antitrust protections in the domestic marketplace for all purchasers." H.R. Rep. No. 97-686, at 10 (1982), *reprinted* in 1982 U.S.C.C.A.N. 2487, 2495. Thus, Section 6a leaves the Sherman Act applicable to anticompetitive conduct involving U.S. domestic or import commerce, and to conduct involving U.S. export commerce and wholly foreign commerce when that conduct harms U.S. domestic or import commerce (or certain export commerce).

In *Minn-Chem*, the *en banc* Court rejected the idea that an effect on U.S. commerce is "direct" only "if it follows 'as an immediate consequence' of the defendant's activity." 683 F.3d at 857. As the Court explained, "[s]uperimposing the idea of 'immediate consequence' on top of the full [integrated] phrase ['direct, substantial, and reasonably foreseeable'] results in a stricter test than the complete text of the statute can bear." *Id.* Moreover, demanding an "'immediate' consequence on import or domestic commerce comes close to ignoring the fact that straightforward import commerce has already been excluded from the FTAIA's coverage." *Id.* The Court was thus "persuaded that the

Department of Justice's approach"—that "'direct'" means only "a reasonably proximate causal nexus"—"is more consistent with the language of the statute" and properly "addresses the classic concern about remoteness," excluding "from the Sherman Act foreign activities that are too remote from the ultimate effects on U.S. domestic or import commerce." *Id.*

The panel purported to apply *Minn-Chem*, but its decision undercuts *Minn-Chem*'s holding by declaring the effects here too "remote." Op. 4-5. The panel found significant that, unlike in *Minn-Chem*, the defendants here did not sell the Category II panels directly "*to U.S. customers*." *Id.* (quoting *Minn-Chem*, 683 F.3d at 860; emphasis added by panel). But when a foreign cartel fixes the price of goods sold directly to U.S. customers, the import commerce exclusion applies. *See Minn-Chem,* 683 F.3d at 854-55 (the import commerce exclusion applies to goods "being sent directly into the United States," i.e., "pure import commerce"). Limiting the effects exception to direct sales to U.S. customers would render the exception "superfluous . . . or insignificant," violating a "cardinal principle" of statutory interpretation. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

In applying the effects exception, this Court has recognized that "domestic and foreign markets are interrelated and influence each other." *Metallgesellschaft AG v. Sumitomo Corp. of Am.*, 325 F.3d 836, 842 (7th Cir. 2003). Congress created the effects exception because it understood that conduct involving wholly foreign commerce can have significant anticompetitive effects on U.S. domestic or import commerce and wanted that conduct to remain subject to the Sherman Act's protections. *Cf. id.* (holding that the effects exception applied to claims brought by a foreign plaintiff involving its purchase of copper futures contracts on the London Metals Exchange).

To be sure, some effects on U.S. commerce would be indirect or too remote. For instance, the effect would not be direct where the causal connection between the conduct and the U.S. effect is "so attenuated that the consequence is more aptly described as mere fortuity," *Paroline v. United States*, No. 12-8561, Slip. Op. 7 (U.S. Apr. 23, 2014). *Cf.* 1B Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 272f2, at 295-96 (4th ed. 2013) (the "higher local price for electricity" outside the United States caused by "an agreement among non-American producers in Africa" to raise the price of electrical transformers would cause U.S. exporters to export "fewer electricity-using machines," but "obvious[ly]" that effect would not put the agreement in "the Sherman Act's reach"). But the existence of several steps in the causal chain does not alone render an effect indirect or too remote. In *Loeb Industries v. Sumitomo Corp.*, 306 F.3d 469 (7th Cir. 2002), this Court held the injury of copper wire producers was "direct" because it was not too remote from unlawful activity in the copper futures market. *Id.* at 486-89.

Similarly, injuries to indirect purchasers are not too remote, even when they are several steps removed from the antitrust defendant in the chain of distribution. *See In re Warfarin Sodium Antitrust Litig.*, 214 F.3d 395, 399-401 (3d Cir. 2000). While *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), would ordinarily bar indirect purchasers from recovering damages for these injuries, such indirect purchasers can seek injunctive relief. *Warfarin Sodium*, 214 F.3d at 399-400; *see also U.S. Gypsum Co. v. Indiana Gas Co.*, 350 F.3d 623, 627 (7th Cir. 2003) (*Illinois Brick*'s "direct-purchaser doctrine does not foreclose equitable relief").

In the decision under review in *Illinois Brick*, this Court had held that a downstream (indirect) purchaser's injury based on passed-on overcharges is not too remote, *Illinois v. Ampress Brick Co.*, 536 F.2d 1163, 1164-66 (7th Cir. 1976), and the Supreme Court

specifically declined to disturb that holding, *see Illinois Brick*, 431 U.S. at 728 n.7. This conclusion—that downstream injuries are not too remote—comports with classical principles of proximate causation: "The test is not to be found in any arbitrary number of intervening events or agents, but in their character, and in the natural and probable connection between the wrong done and the injury." 1 J.G. Sutherland & John R. Berryman, *A Treatise on the Law of Damages* 35-36, 77 (2d ed. 1893)

Applying these principles to the record, the conspiracy's effect on U.S. commerce in cellphones is direct. The natural and probable consequence of increasing the price of a critical and substantial component like LCD panels is an increase in the price of cellphones. Nor does the effect become speculative or uncertain because it is "mediated" by Motorola's decision on what price to charge for its cellphones. Op. 6. There is evidence that the overcharges on the price-fixed panels have been passed on to cellphone purchasers in the United States. *See, e.g.*, 07-1827 N.D. Cal. Dkt. 7843-4, ¶ 451, at 196-97. Thus, the "effect of defendants' anticompetitive conduct did not change significantly between the beginning of the process (overcharges for LCD panels) and the end (overcharges for [cellphones incorporating those panels])," and it "'proceeded without deviation or interruption' from the LCD manufacturer to the American retail store." *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 822 F. Supp. 2d 953, 964 (N.D. Cal. 2011). This is why the effect on U.S. commerce in cellphones is "doubtless" (Op. 4).

Unless vacated, the panel's narrow view of the statutory term "direct" is likely to constrain the government's ability to effectively prosecute cartels that substantially and intentionally harm U.S. commerce and consumers, as well as prevent those injured in the United States from redressing that harm. "Nothing is more common nowadays than for products imported to the United States to include components that the producers

had bought from foreign manufacturers." Op. 7. Anticompetitive conduct involving those component purchases often causes significant harm in the downstream consumer markets. *See, e.g.*, 1B Areeda & Hovenkamp, *Antitrust Law* ¶ 272i1, at 309 ("Many, perhaps most, restraints are on 'intermediate' goods," but effects "that occur in upstream markets quickly filter into consumer markets as well.").

Lastly, the "practical" considerations cited by the panel, including the need to avoid "friction with many foreign countries," Op. 7-8, do not support its view that the Sherman Act cannot apply here. Congress "deliberately" phrased Section 6a to "include commerce that . . . was wholly foreign," *Empagran*, 542 U.S. at 163, leaving the Sherman Act applicable to conduct involving such commerce when it sufficiently affects U.S. domestic or import commerce. It has been well-established since Judge Hand's opinion in *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 796 (1993); *see Minn-Chem*, 683 F.3d at 855. When enacting the FTAIA, Congress was thus fully aware that "America's antitrust laws, when applied to foreign conduct, can interfere with a foreign nation's ability independently to regulate its own commercial affairs," *Empagran*, 542 U.S. at 165, but nonetheless determined that application of those laws was reasonable when it redressed domestic harm, because of the United States' interest in protecting U.S. consumers from anticompetitive conduct.

That congressional determination "avoid[s] unreasonable interference with the sovereign authority of other nations" because it is consistent with principles of prescriptive comity. *Id.* at 164. While "comity counsel[s] against" applying U.S. antitrust laws to foreign conduct causing only foreign injuries, the situation is different "where

that conduct also causes domestic harm." *Id.* at 166, 169. Our "courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused." *Id.* at 165. Indeed, the "extraterritorial application of antitrust laws on the basis of the effects doctrine is by now widely accepted" around the world. Florian Wagner-von Papp, *Competition Law and Extraterritoriality*, in *Research Handbook on International Competition Law* 21, 57 (Ariel Ezrachi ed. 2012).

The panel also was incorrect to suggest that finding the effects on U.S. commerce in this case to be "direct" would "enormously increase the global reach of the Sherman Act." Op. 8. It is a "well-established principle that the U.S. antitrust laws reach foreign conduct that harms U.S. commerce." *Minn-Chem*, 683 F.3d at 858; *cf. United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 4 (1st Cir. 1997) ("the case law now conclusively establishes [that the Sherman Act authorizes antitrust actions] predicated on wholly foreign conduct which has an intended and substantial effect in the United States"). "When an international cartel has effects both within and without our borders, American law applies to at least the domestic effects." *United States v. Leija-Sanchez*, 602 F.3d 797, 801 (7th Cir. 2010). As this Court noted in *Minn-Chem*, it is important for our courts to protect U.S. consumers from foreign price-fixing conspiracies because the price fixers' host countries "often have no incentive" to enforce their antitrust laws because they "would logically be pleased to reap economic rents from other countries" whose consumers ultimately bear the burden of the inflated prices. 683 F.3d at 860.

Holding that the effect on U.S. cellphone purchasers is direct would not open U.S. courts to damages claims from plaintiffs around the world. *Empagran* specifically holds

that even if the first prong of the effects exception is satisfied and the government or domestic purchasers could bring an antitrust claim, foreign plaintiffs could not recover damages for their independently caused foreign harm. *See* 542 U.S. at 173-75. This is so because Section 6a's effects exception separately requires that the direct effect on U.S. commerce gives rise to the plaintiff's claim. *Id*. This "independent" requirement (Op. 5) "will protect many a foreign defendant." *Minn-Chem*, 683 F.3d at 858.

Indeed, resolving a case on the basis of the second prong of the effects exception—the "gives rise to" requirement—does not threaten the government's ability to prevent anticompetitive harm like the panel's holding on the first prong does. The second prong is claim-specific and thus tailored to the particular injury for which a particular plaintiff seeks redress. For the reasons explained above, the record establishes a "direct" effect on U.S. commerce in cellphones causing harm to many U.S. consumers that Congress intended to be redressable under the Sherman Act. Whether Motorola's Category II claims are an appropriate means of doing so is a separate question which the panel failed to analyze properly.

II. Whether The Effect On U.S. Commerce Gives Rise To Motorola's Claims Warrants Further Briefing And Argument

Even if the anticompetitive conduct has a direct, substantial, and reasonably foreseeable effect on U.S. domestic, import, or certain export commerce, Section 6a's effects exception applies to a particular plaintiff's claim only when "such effect gives rise to a claim." 15 U.S.C. § 6a(2). And not any claim will do; it must be "the 'plaintiff's claim' or 'the claim at issue.'" *Empagran*, 542 U.S. at 174-75. This requires "a direct causal relationship, that is, proximate causation," between the conduct's effects on U.S. commerce and the plaintiff's injury. *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 417

F.3d 1267, 1271 (D.C. Cir. 2005); *accord In re Dynamic Random Access Memory Antitrust Litig.*, 546 F.3d 981, 988 (9th Cir. 2008); *In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 538 (8th Cir. 2007). As a result, the Sherman Act "can apply and not apply to the same conduct" depending on the connection of the particular plaintiff's injury to the requisite effect. *Empagran*, 542 U.S. at 173-74.

Here, the panel concluded that Motorola's Category II claims were "upended by" the "give[] rise to" requirement. Op. 5. But the panel mistakenly believed that "the effect in the United States of the price fixing [in this case] could not give rise to an antitrust claim" by anyone for any reason. Op. 6. The panel thus never addressed the pertinent question of whether there is a close causal connection between the effect on U.S. commerce and Motorola's injuries.

While the panel correctly observed that U.S. consumers cannot sue a device manufacturer for incorporating a price-fixed component—even if incorporation of that component caused the price of the device to increase—and that the manufacturer could not sue itself, Op. 6, those observations are beside the point. Regardless of whether U.S. consumers can sue *the device manufacturer* (here, Motorola), they clearly can sue *the conspirators* (here, the LCD makers) at least for injunctive relief "against threatened loss or damage." 15 U.S.C. § 26.[2] The government also has ample authority to seek an

[2] While *Illinois Brick* ordinarily bars "indirect purchasers" from recovering "passed-on" overcharges from a price-fixing conspiracy, thereby "concentrating full recovery for the overcharge in the direct purchasers" and avoiding the "risk of duplicative recoveries," 431 U.S. at 728-35, it is an open question whether this bar exists when the Sherman Act does not apply to the direct purchasers' claims because they cannot satisfy the "gives rise to" requirement, 15 U.S.C. § 6a(2). In that circumstance, it may be that indirect purchasers whose claims do arise from the effect on U.S. commerce can recover damages because full recovery cannot be concentrated in the direct purchaser and duplicative recoveries are not possible. *Cf. U.S. Gypsum*, 350 F.3d at 627 (*Illinois Brick* does not apply when "there is no risk of double recovery (and no need to calculate elasticities in order to apportion damages among multiple tiers)").

equitable remedy or criminal punishment for a Sherman Act offense that involves wholly foreign conduct that has the requisite effect on U.S. commerce. *Empagran*, 542 U.S. at 170-71; *cf. Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 398 (2d Cir. 2002) ("[T]he Sherman Act contains its own enforcement provision that can be invoked by the United States even when no plaintiff has suffered an injury."), *abrogated on other grounds by Empagran*, 542 U.S. 155.

Moreover, whether anyone could sue Motorola for an antitrust violation does not answer the relevant inquiry of whether Motorola can sue the defendants under the Sherman Act. Motorola has alleged that the upstream panel market is "inextricably linked and intertwined" with the downstream U.S. cellphone market because the LCD panels were "the most expensive and significant component of [its cellphones]" and had "no independent utility" apart from the products in which they were incorporated. 07-1827 N.D. Cal. Dkt. 3173, at 23, 53; *cf. Blue Shield of Va. v. McCready*, 457 U.S. 465, 477, 484 (1982) (injury "inextricably intertwined" with antitrust violation established "proximate cause" necessary for antitrust standing); *Empagran*, 542 U.S. at 171 (distinguishing *Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research & Eng'g Co.*, No. 75 Civ. 5828, 1977 WL 1353 (S.D.N.Y. Jan. 18, 1977), in which the foreign injury was "inextricably bound up with the domestic restraints of trade"). Neither the panel nor the court below addressed whether these allegations would, if proved, establish the requisite causal connection between the U.S. effects and Motorola's injuries. This issue warrants briefing and argument.

CONCLUSION

The Court should vacate the panel decision and order briefing and argument before the panel or *en banc* court.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 with 12-point Georgia font in text and 11-point Georgia font in the footnotes.

April 24, 2014

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CERTIFICATE OF SERVICE

I, Nickolai G. Levin, hereby certify that on April 24, 2014, I electronically filed the foregoing Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Panel Rehearing or Rehearing *En Banc* with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF System. Once the brief is accepted for filing by the Clerk's Office, I will send 30 copies to the Clerk of the Court by FedEx.

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