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. Gotschall)

APPELLANT'S MOTION TO FILE REPLY BRIEF IN SUPPORT OF ITS PETITION FOR REHEARING EN BANC

Appellant Motorola Mobility LLC respectfully moves for leave to file the attached short reply brief (one-half the length of Defendants' Opposition) in support of its petition for rehearing en banc. Among other things, the reply is necessary to respond to certain new arguments—including allegations of waiver—contained in Defendants' opposition, as well as an *amicus* filing from the Korea Fair Trade Commission, and to address filings on behalf of the United States subsequent to the petition's filing. The reply brief should assist the Court, which unlike in the ordinary case does not have the benefit of briefing on the merits of the case from Appellants. Defendants nonetheless oppose this Motion.

For the foregoing reasons, the Court should grant leave to file the attached reply brief.

Respectfully Submitted,

/s/Thomas C. Goldstein
Thomas C. Goldstein
GOLDSTEIN & RUSSELL, P.C.
5225 Wisconsin Ave. NW
Washington, D.C. 20015
(202) 362-0636

May 28, 2014

CERTIFICATE OF SERVICE

I, Thomas C. Goldstein, hereby certify that on May 28, 2014, electronically filed the foregoing motion to file a reply brief in support of the Petition For Rehearing En Banc with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit using the CM/ECF system. If the motion is granted, I will send 30 copies of the attached reply 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.

/s/Thomas C. Goldstein

Thomas C. Goldstein
GOLDSTEIN & RUSSELL, P.C.
5225 Wisconsin Ave. NW
Washington, D.C. 20015
(202) 362-0636

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REPLY BRIEF IN SUPPORT OF PETITION FOR REHEARING EN BANC

Jerome A. Murphy
Matthew J. McBurney
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 624-2500

Thomas C. Goldstein
Eric F. Citron
GOLDSTEIN & RUSSELL, P.C.
5225 Wisconsin Ave. NW
Washington, DC 20015
(202) 362-0636

Janet I. Levine
Jason C. Murray
Joshua C. Stokes
CROWELL & MORING LLP
515 South Flower St., 40th Floor
Los Angeles, CA 90071
(213) 622-4750

Counsel for Petitioner Motorola Mobility LLC

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I*n re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-cv-1827, 2012 WL 3276932 (N.D. Cal. Aug. 9, 2012) (Dkt. 6422) 8

No one doubts that this is one of the decade's most important international antitrust cases. The many submissions regarding the en banc petition—from the parties, two governments, and other *amici*—confirm the need for review by the full Court. The panel's ruling would critically undermine deterrence of international cartels that target this country. Defense counsel are highlighting the panel's ruling and invoking it before other courts. Pet. 2, 7. The panel stressed that the questions presented have great and increasing importance for international antitrust enforcement, as U.S. companies produce still more goods abroad for U.S. consumers. Op. 7-8. The United States government agrees that all of the panel's holdings are erroneous and merit further review by this Court. At the very least, the high-stakes questions presented by the case deserve a chance to be addressed in detail with the plenary briefing that the panel declined.[1]

I. The Panel's "Directness" Holding Requires En Banc Review.

Defendants briefly defend the panel's core holding that cartels are immune from Sherman Act liability for fixing the price of inputs delivered abroad to make products for U.S. consumers. That sweeping exemption equally applies when the price-fixed goods were purchased directly by a U.S. company, not its foreign subsidiary. The panel construed the FTAIA to exempt that classical antitrust violation because "[t]he effect of component price fixing on the price of the product of which it is a component is *indirect*." Op. 4 (emphasis added). Like the panel, defendants ignore that the en banc Court in *Minn-Chem* held that "direct" under the FTAIA does not mean "*immediate*," and instead requires only a "reasonably proximate" effect. *Minn-Chem v. Agrium*, 683 F. 3d 845, 857 (7th Cir. 2012). This square conflict requires en banc review. Defendants' only response is to crib from the facts of *Minn-Chem* that the cartel activity there increased for-

[1] There is no apparent explanation for defendants' assertion that they have identified "more than a dozen" cases "contrary to" the petition's explanation that it is unprecedented for a panel to finally dismiss an appellant's claims on the merits based solely on the §1292(b) papers. Opp. 4 n.1; Pet. 6 n.1. Defendants cite three cases. Not one finally dismissed claims on the merits. None are even §1292(b) appeals.

eign prices, which "'almost immediately' increased U.S. commodity prices paid by the plaintiffs." Opp. 13 (quoting 683 F.3d at 859). That is still a substantially less direct causal relationship than this case. But in any event, the *Minn-Chem* Court rejected that as the *legal standard*.

Defendants' hypothetical of a claim against a price-fixing Egyptian cotton farmer based on higher U.S. clothes prices thus backfires. Opp. 13. That causal chain presumably includes (at least) a farmer, merchant, textile mill, clothier, retailer, and consumer, most dealing in a fungible commodity with countless worldwide uses. The chain here runs from LCD panels specifically made for Motorola, through Motorola's subsidiaries, to Motorola—a U.S. plaintiff importing a huge portion of its phones for U.S. consumers. *Minn-Chem* easily distinguishes that "reasonably proximate" effect on U.S. import and domestic commerce from a forbidden "indirect" one.[2]

Defendants and their *amicus* argue that the panel's ruling is supported by comity concerns. But as the Solicitor General confirmed at this Court's request, "Motorola alleges substantially the same unlawful conduct as gave rise to [DOJ's] prosecutions" of this cartel—which resulted in foreign nationals being sent to federal prison—and yet no "foreign government has expressed disapproval of those prosecutions to any [U.S.] official." SG Letter 2.

Defendants nonetheless advocate the principle that U.S. law must give way whenever price-fixing has "a greater impact in the foreign countries," because in that circumstance "foreign nations are the better enforcers of antitrust prohibitions." Opp. 12. Even under that rule, this case would go forward: The principal effects of defendants' price fixing were felt in the United States, whether by Motorola (which imported the phones at higher cost and directly absorbed the

[2] Defendants' passing suggestion (at 15) that en banc review should be denied because Motorola "made no factual record" on direct effects is nonsensical: (1) the panel's holding relies on a sweeping legal theory, not factual findings; (2) such a contested factual question cannot be resolved in *defendants' favor* on summary judgment; and (3) to the extent Motorola did not develop a record on this question, it is because *defendants' motion did not raise it*, as the United States points out. *See* U.S. Br. 6.

higher prices paid by its subsidiaries) or else by U.S. consumers (who bought the phones).

In any event, that is *not* the FTAIA's standard, which asks whether the effect on U.S. commerce was "direct, substantial, and reasonably foreseeable." 15 U.S.C. § 6a. *Empagran* and *Minn-Chem* both reaffirm the "long held" view that "application of our antitrust laws to foreign anticompetitive conduct is … reasonable, and hence consistent with principles of prescriptive comity, *insofar as* they reflect a legislative effort to redress domestic antitrust injury." *Minn-Chem*, 683 F.3d at 858 (quoting *F. Hoffmann-La Roche v. Empagran*, 542 U.S. 155, 165 (2004) (emphasis added)). That principle reflects the reality that, despite the prospect of actions from multiple regulators, international cartel behavior is substantially under-deterred. *See* AAI Br. 2-5; Economists' Br. 1-5. It is thus no obstacle to the enforcement of U.S. law that other nations might also take action against anticompetitive conduct that harms their markets as well.

The *amicus* brief of the Korea Fair Trade Commission (KFTC) shows why. It cannot rest on a preeminent enforcement concern regarding the conduct at issue: Of Motorola's $5 billion in relevant LCD purchases, *less than $500,000 worth* were shipped to Korea for manufacturing. The brief might be better explained by the fact that some of the cartel's largest members are Korean and that (although not disclosed) the antitrust attorneys from the Korean firm that "assisted … in the drafting," KFTC Br. 1 n.1, have also "advised … Samsung Group … [and] LG Group" and represented Samsung in connection with *this cartel*. *See* http://tinyurl.com/ljw23kh; *see also* Japan Br. 1 n.1 (brief submitted below was *avowedly* paid for and written in substantial part by counsel for defendant Sharp). As *Minn-Chem* emphasizes, "[t]he host country for the cartel will often have no incentive to prosecute it," being content to offset "losses from higher prices … by the gains from the cartel price their exporters collect." 683 F.3d at 860.[3]

[3] Notably, Korea does not permit treble damages, *see* KFTC Br. 3, and does not even regard price-

II. The Panel's "Gives Rise To" Holding Requires En Banc Review.

Defendants also defend the panel's alternative holding that a cartel's sales to foreign subsidiaries are *per se* immune from Sherman Act liability because any effects on U.S. commerce—though direct, substantial, and reasonably foreseeable—do not "give rise to a claim." Opp. 4-11; Op. 5-7. *Amicus* AAI rightly characterizes this as an overgrown version of *Illinois Brick*'s direct-purchaser rule: *viz.*, that the only claim belongs to the foreign subsidiaries, and that the parent company has no "claim" of its own because its request for damages would depend on a forbidden theory of "pass on" damages or "derivative" injury. AAI Br. 5-10; Opp. 8-9. The United States agrees that the panel's ruling is "mistaken[]," U.S. Br. 14, and that Motorola and the government should at least be allowed a chance to brief this question to the Court. Indeed, the panel's analysis errs in several respects that can only be summarized in the available space.

The panel's ruling conflicts with the Supreme Court's holding in *Empagran* that the FTAIA's domestic-effects exception

> brings [non-import] 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 effect of a kind that antitrust law considers harmful*, *i.e.*, the "effect" must "giv[e] rise to a [Sherman Act] claim."

542 U.S. at 162 (emphases omitted and added). The panel here ignored that holding and ruled to the contrary that if the direct purchase occurs abroad, no one in the U.S. (including the parent of the direct purchaser) ever has a claim.[4]

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fixing as *per se* illegal, *see* http://tinyurl.com/llqv9u8, limiting its ability to deter unlawful behavior with deleterious effects in the United States.

[4] Ignoring the Supreme Court's actual holding, defendants argue that *Empagran* requires that the domestic effects of a cartel's price-fixing "give rise to 'the claim at issue.'" Opp. 6 (quoting 542 U.S. at 174-75). That argument takes one clause of one sentence entirely out of context. *Empagran* involved foreign plaintiffs who bought price-fixed goods overseas that never entered the U.S. They argued that the FTAIA allowed them to subject all of the cartel's activities to the Sherman Act, so long as a completely

The Supreme Court's test (*i.e.*, is the "effect of a kind that antitrust law considers harmful?") is easily met here. A parent company that directs purchases by subsidiaries and sells the resulting assembled products in U.S. commerce unquestionably *does* have a "literal Sherman Act claim" (Opp. 6) against a cartel that fixed the components' prices: The parent is among the victims of unlawful horizontal price fixing in violation of Section 1. The United States fully agrees that it, Motorola, and anyone else who suffers the domestic effects of defendants' price-fixed sales *has a Sherman Act claim* against the conspirators. U.S. Br. 14.

The Supreme Court's rule looking to the existence of an anticompetitive harm tracks perfectly with the FTAIA's purposes. Congress enacted the statute to "remov[e] from the Sherman Act's reach … commercial activities taking place abroad, *unless* those activities adversely affect … imports." *Id.* at 161 (emphasis added). By contrast, the panel's ruling turns entirely on whether Motorola itself manufactures a phone abroad for sale in the U.S. (which would be a permissible direct claim) or instead directs a subsidiary to build the identical phone (which would not). But that fact has nothing to do with whether the defendants' price-fixing harms U.S. imports, companies, and consumers, all of which are left unprotected by the panel's rationale that no one in the U.S. has a claim regarding sales to subsidiaries abroad.

The panel's ruling in turn conflicts with the en banc Court's holding in *Minn-Chem* applying the domestic-effects exception to defendants' sales of potash in foreign markets. Defendants argue that the plaintiffs there had "literal Sherman Act claims." Opp. 6. But the sales at issue in *Minn-Chem* did not "give rise to" those claims for damages in the sense the panel required here: No U.S. person bought the potash directly from those defendants, and thus (as the en banc

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different U.S. purchaser had "*a* claim" arising from entirely separate purchases in U.S. commerce. In the language quoted by defendants, the Court merely recognized that the statutory text does not compel that result, because it could be read either way. *See* 542 U.S. at 174 ("It *also* makes linguistic sense to read the words 'a claim' as if they refer to the 'plaintiff's claim' or 'the claim at issue.'" (emphasis added)).

Court recognized) any direct claim for damages arising from those sales was prohibited by "*Illinois Brick*'s prohibition on 'pass on' antitrust damages." 683 F.3d at 855-56.

Even defendants acknowledge that Motorola has "a claim" regarding defendants' price-fixing based on the 1% of panels shipped to the U.S., Opp. 6; that claim satisfies the domestic-effects exception *and* the import-commerce exclusion, and should bring all the cartel "conduct" directed at Motorola within the reach of U.S. law. *See* Pet. 15. Defendants respond by arguing that "the focus of the FTAIA is on transactions," *see* Opp. 6, 9, but if so, that *unambiguously* concedes that the panel's holding is irreconcilable with *Minn-Chem*: The "transactions" held subject to U.S. law under the direct-effects exception in *Minn-Chem* occurred abroad and did not themselves give rise to any domestic Sherman Act claim.

Defendants' focus on *Illinois Brick* misses not only that Motorola has a substantive Sherman Act claim, but also Motorola's right to relief. For example, as *amicus* United States explains, *Illinois Brick* is no obstacle to indirect purchasers (including Motorola) suing for an injunction, because "*Illinois Brick* was concerned [with] a single statute—§ 4 of the Clayton Act." *California v. ARC America Corp.*, 490 U.S. 93, 104 (1989). Its prudential rule regarding certain damage claims does not concern the Sherman Act's substantive provisions or the plaintiff's right to injunctive relief, so even if "claim" means "right to relief," Motorola has that, too.[5]

[5] Even if the FTAIA fully incorporates *Illinois Brick* and other rules against "downstream" or "derivative" injury, those doctrines do not bar Motorola's claim. *Illinois Brick* by its own terms should not apply when an indirect purchaser is committed to purchasing at a price that reflects the direct purchaser's costs, and when "the direct purchaser is owned or controlled by its customer"—*both of which are true of Motorola's intra-corporate purchases here*. *See* 431 U.S. at 736 & n.16; U.S. Br. 14 n.2; *US Gypsum Co. v. Indiana Gas Co., Inc.*, 350 F.3d 623, 627 (7th Cir. 2003) (*Illinois Brick* does not apply "when there is no risk of double recovery (and no need to calculate elasticities in order to apportion damages)"). Neither the panel nor the defendants have cited a single case holding that a parent company may not assert harms passed to it through sales "within the corporate family," Opp. 8, from a wholly owned and controlled subsidiary, especially where, as here, there is some alleged defect in the subsidiary's ability to recover. As to "derivative" injury, defendants incorrectly suggest that the one case anyone has cited remotely addressing similar facts—*Chrysler Corp. v. Fedders Corp.*, 643 F.2d 1229, 1235 (6th Cir. 1981)—is no longer good

Ultimately, defendants' argument appears to be that the domestic effects of their conduct must correspond exactly not to Motorola's legal "claim" but instead its *measure of damages*. *See* Opp. 8. Defendants attempt to leverage that argument into the assertion that Motorola has waived any claim that their price fixing of LCD "panels" increased the prices of Motorola's "cellphones," because Motorola's damage measure is the panel overcharge. *Id*. Motorola's complaint asserted that defendants' price fixing increased the prices at which it imported its phones—that theory was recognized and rejected by the MDL court in the proceedings now on appeal, *see* 07-1827 N.D. Cal. Dkt. 41 at 8-10 (citing Complaint ¶15), and it was the theory *the panel actually addressed* in the decision requiring en banc review. *See* Op. 5-6 (addressing effects on cellphone market). Further, there is no plausible assertion that Motorola has "waived" any argument, given that neither the panel nor the district court allowed briefing on this issue.[6]

Waiver aside, this theory is legally untenable. The FTAIA requires "a claim," not a particular damages measurement; it *expressly* refers to the Sherman Act sections that establish a substantive violation, not the Clayton Act provisions governing remedies. And as a statute addressed to prescriptive jurisdiction, it addresses the "conduct" subject to U.S. law, not the particular remedies a plaintiff may obtain.

Lastly, the panel and defendants ignore the separate point that the supposedly "foreign" purchases here resulted from a number of obvious U.S. effects. First, the setting of a single, artificially inflated U.S. and global panel price between the cartel and Motorola *in the United States*

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law. Only *other* aspects of *Chrysler* (the "zone of interests" test) were rejected in *Meyer Goldberg, Inc. v. Goldberg*, 717 F.2d 290, 293 (6th Cir. 1983). The case defendants cite preventing individual shareholders from asserting derivative antitrust injury through an entity with its own right to recover is far afield. *See Sw. Suburban Bd. of Realtors v. Beverly Area Plan*, 830 F.2d 1374, 1378 (7th Cir. 1987).

[6] Defendants' argument that Motorola did not advance this measure of damages in response to their motion for reconsideration also makes no sense. Motorola had prevailed on summary judgment on other grounds, and appropriately argued that there was no basis to reconsider that ruling.

had an effect on U.S. domestic commerce. Unlike any previous case, the foreign cartel here specifically targeted a U.S. company, setting up offices in Chicago to effectuate its scheme. The harm resulting from foreign purchases using that same U.S. price is inexorably tied to that domestic effect. Second, the charging of an artificially inflated price for components bound for the U.S. had an anticompetitive effect on U.S. import commerce. The harm resulting from foreign purchases at those prices likewise is inexorably tied to that effect on import commerce.

Motorola is entitled to recover for these harms in its own right and alternatively as an assignee. Defendants' theory depends on characterizing these purchases differently—as wholly foreign transactions with no U.S. connection, *see* Opp. 2-3—but this just tries to win a factual dispute at summary judgment, as Judge Illston found. *See* 07-1827 N.D. Cal. Dkt. 6422, at 4-5. Almost every page of *Empagran* emphasized that it barred only foreign purchases that were wholly "independent" of any domestic effect. *See, e.g.*, 542 U.S. at 158-62, 164-66, 168-69, 171-73, 175. That standard is in no way satisfied here.

CONCLUSION

This Court should grant rehearing en banc.

Respectfully submitted,

/s/Thomas C. Goldstein
Thomas C. Goldstein
GOLDSTEIN & RUSSELL, P.C.
5225 Wisconsin Ave. NW
Washington, DC 20015
(202) 362-0636

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/s/Thomas C. Goldstein

Thomas C. Goldstein
GOLDSTEIN & RUSSELL, P.C.
5225 Wisconsin Ave. NW
Washington, D.C. 20015
(202) 362-0636

May 28, 2014