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

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

REPLY MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION

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INTRODUCTION

Motorola does not deny that its Category Two and Three claims arise out of panels that were manufactured, delivered, and paid for abroad. Nor does it deny that the panels at issue were purchased by foreign companies—Motorola China and Motorola Singapore—for use at their foreign manufacturing plants. Instead, Motorola attempts to defend the MDL court's decision on the ground that there are "disputes of fact" about its procurement practices, arguing in particular that the prices its foreign subsidiaries paid for their foreign purchases were approved by procurement executives in the United States. Opp. 3-6, 13-15.

These arguments attack a straw-man. For purposes of this motion, defendants do not dispute the facts alleged by Motorola about its procurement process. Defendants also assume arguendo that the prices paid by Motorola China and Motorola Singapore were approved by Motorola executives in the United States. Even if all of these contentions were correct, they would fail as a matter of law to satisfy the domestic injury exception to the FTAIA.

The domestic injury exception requires that a plaintiff's injury arise from an effect on domestic "trade or commerce," *i.e.*, a domestic exchange of goods or services. For Motorola's Category Two and Three claims, it is undisputed that all such exchanges of goods or services occurred overseas. The FTAIA therefore bars these claims regardless of whether U.S. executives approved the transactions at issue. Domestic approval of transactions set to occur outside the United States is not domestic "trade or commerce" and does not bring the resulting *foreign* commerce within the scope of U.S. antitrust law. Motorola's alleged "domestic roots" are equally irrelevant because the domestic injury exception turns on the location of the trade or commerce, not the nationality of the plaintiff.

No other court has *ever* held that U.S. antitrust law applies to claims arising out of goods that were manufactured, delivered, and paid for abroad. Controlling authority rejects the application of U.S. law to such transactions, and this Court should reject it as well.

ARGUMENT

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

Motorola defends the MDL court's ruling on the ground that (1) U.S. executives allegedly approved the foreign purchases made by its foreign subsidiaries, (2) the Motorola parent company is a U.S. company, and (3) the defendants allegedly "targeted" Motorola in the United States. None of these arguments justifies the extra-territorial application of U.S. antitrust law to the sale of panels that were manufactured, delivered, and paid for in foreign commerce.

A. Approval of a Foreign Transaction by a Domestic Decision-Maker Is Not Domestic "Trade or Commerce."

According to Motorola, the MDL court correctly ruled that its Category Two and Three claims arise out of an "effect on U.S. commerce" because the claims allegedly arise out of the "approval of a single, artificially-inflated price in the United States." Opp. 14. The statutory text and the cases both foreclose this "domestic approval" defense of the MDL court's ruling.

Under the plain language of the domestic injury exception, U.S. antitrust laws apply only if an effect on U.S. "trade or commerce" gives rise to the plaintiff's claim. 15 U.S.C. § 6a. As we demonstrated in our opening brief—and as Motorola does not deny—"commerce" means an actual exchange of goods or services. *See* Opening Br. 21-22 & n.10; Webster's II, New Collegiate Dictionary 225 (2001) (defining "commerce" as "the exchange or buying and selling of commodities on a large scale involving transportation from place to place"); *Dedication & Everlasting Love to Animals v. Humane Soc'y*, 50 F.3d 710, 712 (9th Cir. 1995) ("Interpreting the Sherman Act, the Supreme Court has spoken of 'commerce' in terms of 'the purchase, sale

and exchange of commodities'"); *In re Potash Antitrust Litig.*, 667 F. Supp. 2d 907, 926-27 (N.D. Ill. 2009) (import "commerce" means the importation of "goods or services into the United States"), *aff'd sub nom. Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845 (7th Cir. 2012). The effect on domestic trade or commerce, moreover, must be of a type that "gives rise to a [Sherman Act] claim," 15 U.S.C. § 6a, *i.e.*, an increase in price or a reduction in supply. *See Ball Meml. Hosp. v. Mut. Hosp.*, 784 F.2d 1325, 1334 (7th Cir. 1986) (antitrust injury "means injury from higher prices or lower output, the principal vices proscribed by the antitrust laws").

Consistent with these principles, *Empagran* confirmed that to satisfy the domestic injury exception, a plaintiff's claim must flow from an adverse effect on the sale of goods or services in the United States, such as "higher prices in the United States," "higher domestic prices," or other U.S. effects "of a kind that antitrust law considers harmful." *F. Hoffmann La-Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 160, 162, 175 (2004). *Minn-Chem* likewise held that the domestic injury requirement is satisfied by payment of "artificially high [prices] *in the United States*." 683 F.3d at 858-59 (emphasis added).

Here, Motorola's Category Two and Three claims do not arise out of prices paid in the United States; they arise out of prices paid in Singapore and China. These claims therefore fail as a matter of law to satisfy the domestic injury exception: they do not arise from the requisite effect on U.S. "trade or commerce."

Motorola argues that it is enough that the prices for these foreign transactions were "approved" in the United States, *see* Opp. 14, but this argument confuses domestic *conduct* with domestic *commerce*. As noted above, "commerce" occurs when an exchange of goods or services takes place, and here, all such exchanges took place in foreign countries. As a result, approval of foreign transactions by domestic decision-makers is not domestic *commerce* that can

form the basis of a U.S. antitrust claim; it is domestic *conduct* that cannot. *See* H.R. Rep. No. 97-686, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2490 ("it is the situs of the effects, as opposed to the conduct, that determines whether United States antitrust law applies").

Any other conclusion would be inconsistent with *Empagran* and *Minn-Chem*. In *Empagran*, the Supreme Court addressed essentially the same scenario presented here: foreign purchases, foreign deliveries, and foreign payments. *See* 542 U.S. at 159-60. Despite the presence of anticompetitive *conduct* in the United States (*id.* at 165-66),[1] the Court focused on the location of the *injury* and held that the plaintiffs' claims were beyond the reach of U.S. antitrust law: "Congress sought to *release* domestic (and foreign) anticompetitive conduct from Sherman Act constraints when that conduct causes foreign harm." *Id.* at 166. *Minn-Chem* similarly held that U.S. antitrust law does not apply to injuries resulting from purchases in foreign markets. *See* Opening Br. 11, 17-18 (discussing *Minn-Chem*).

Contrary to Motorola's assertions, it makes no difference if the prices paid for Category Two and Three panels resulted from a single global price allegedly approved in the United States. Opp. 5-6. A global procurement process centered in the United States does not transform foreign commerce into domestic commerce because it does not alter the place where goods and services are actually exchanged. *See, e.g.*, *Sun Microsystems, Inc. v. Hynix Semiconductor Inc.*, 608 F. Supp. 2d 1166, 1173, 1185-86 (N.D. Cal. 2009) (rejecting application of FTAIA based on allegation that a "global procurement team based in California established a single worldwide price at which the subsidiaries were permitted to order"); *Emerson Electric Co. v. Le Carbone*

[1] In arguing that *Empagran* involved "no U.S. conduct or effects" (Opp. 15), Motorola misreads the case. Both U.S. conduct and U.S. effects *were* present in *Empagran*, but the Court held that the FTAIA barred claims arising out of the *foreign* effects of the foreign transactions at issue. 542 U.S. at 165-66, 173-74.

Lorraine, S.A., 500 F. Supp. 2d 437, 446-47 (D.N.J. 2007) (rejecting application of FTAIA based on allegations that plaintiffs were "multinational corporations, with unitary purchasing organizations, that have headquarters and/or significant operations located in the U.S."); *In re Rubber Chemicals Antitrust Litig.*, 504 F. Supp. 2d 777, 786 (N.D. Cal. 2007) (rejecting application of FTAIA based on allegations that "the price paid for deliveries abroad was actually linked to the collusively-established price set and paid in the United States" because "it must be the *domestic effects* of the Defendants' anticompetitive conduct, rather than the *anticompetitive conduct* itself, which gives rise to Plaintiffs' foreign injuries").

Finally, Motorola's "domestic approval" theory proves too much: it threatens to apply U.S. antitrust law even to Category Three panels that never entered the United States at any point in the distribution chain. For Category Three panels, the U.S. interest in applying its laws cannot possibly outweigh the interests of the foreign countries in which the panels were manufactured, sold, and consumed. No imagination is required to see why an interpretation of the FTAIA that applies U.S. law to sales of goods *that never entered the United States* would infuriate the very foreign governments that the FTAIA was intended to placate. *See* Opening Br. 5-6, 15-17.

B. Motorola's "Domestic Roots" Are Irrelevant.

Motorola repeatedly refers to itself as a "U.S. company" (Opp. 8, 19, 20), and argues that its "domestic roots" distinguish this case from *Empagran*. But, as observed in the leading treatise on U.S. antitrust law, "the focus of [the domestic injury exception] is on transactions, not on the identity or nationality of the parties." IB Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 272i (3d ed. 2006). The legislative history of the FTAIA thus declares that "[a] transaction between two foreign firms, *even if American-owned*, should not, merely by virtue of the American ownership, come within the reach of our antitrust laws." H.R. Rep. No. 97-686, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2494 (emphasis added). By the same token, foreign

companies doing business in the United States "enjoy the protection of our antitrust laws in the domestic marketplace, just as our citizens do." *Id.* at 2495. The result is an evenhanded application of antitrust law that does not discriminate based on the nationality of the plaintiff. *See* Opening Br. 19-21.

Contrary to Motorola's assertions, *Minn-Chem* is entirely consistent with these principles. When *Minn-Chem* observed that the plaintiffs in that case were "U.S. purchasers" entitled to assert their claims under U.S. law, 683 F.3d at 854, it did not mean that the plaintiffs were U.S. nationals, but rather that they purchased price-fixed products *in the United States* and therefore suffered domestic injuries. *See id.* at 858-59 (FTAIA satisfied by payment of "artificially high [prices] in the United States"); *In re Potash*, 667 F. Supp. 2d at 913 (noting that the *Minn-Chem* plaintiffs "purchased [price-fixed] products in the United States"). Here, by contrast, all of the Category Two and Three purchases occurred in foreign markets. Thus, even if a U.S. company had made these foreign purchases, the domestic injury exception would not apply.

Furthermore, the companies that made the Category Two and Three purchases—Motorola China and Motorola Singapore—are not U.S. companies.[2] Motorola China and Motorola Singapore are the true claimants here because they are the "direct purchasers" of the panels at issue, *see* Opening Br. 3-4, and only a direct purchaser has standing to sue for damages under U.S. antitrust law, *see Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1979). Motorola Singapore and Motorola China *assigned* their claims to the Motorola parent company for

[2] Motorola notes that Motorola Singapore was treated as a "check the box" entity for U.S. tax purposes, but fails to explain why a company's unilateral decisions on tax filings have any effect on the extra-territorial reach of U.S. antitrust law. It is undisputed that Motorola Singapore was incorporated and located in Singapore and received and paid for its LCD panel purchases there.

purposes of this lawsuit, but the claims remain subject to the same FTAIA bar that would exist if Motorola China or Motorola Singapore had asserted them.[3] *See* Opening Br. 19-21.

Motorola fares no better with its argument that it was "directly impacted in the United States" because its "financial statements reflect ongoing repatriation by Motorola to the United States of all profits . . . generated by its foreign subsidiaries." Opp. 7. No court—not even the MDL court—has ever held that such "balance sheet effects" support a claim of U.S. antitrust jurisdiction. *See In re Intel Corp. Microprocessor Antitrust Litig.*, 452 F. Supp. 2d 555, 560 (D. Del. 2006) ("courts have recognized that reduced income flowing from a foreign subsidiary to a domestic parent is not a direct domestic effect or injury" under the FTAIA); *Optimum S.A. v. Legent Corp.*, 926 F. Supp. 530, 533 (W.D. Pa. 1996) ("An allegation that income flows between corporations is insufficient to establish the requisite domestic effect").[4]

In a final effort to connect the Motorola parent company to the foreign purchases made by Motorola China and Motorola Singapore, Motorola asserts that "Motorola headquarters signed a number of 'hubbing agreements' with Defendants that specified delivery and payment terms." Opp. 7. Motorola is mistaken: the very evidence it cites in its brief confirms that the hubbing agreements, like the purchase orders that governed the Category Two and Three

[3] Motorola suggests that the purchases of its foreign subsidiaries should be treated as *its* purchases for purposes of this action, but the law is clear that a corporation may not pierce the corporate veil for its own benefit. Opening Br. 20-21. Furthermore, it would make no difference if Motorola had been the purchaser of the panels at issue, because the domestic injury exception turns on the place where goods and services are exchanged, not the nationality of the plaintiff.

[4] Furthermore, to the extent that Motorola suffered any "balance sheet effects" in the United States, those effects increased its profits. Motorola's own expert opined that it passed on more than 100 percent of the alleged overcharges to its customers in the form of higher mobile phone prices, thereby profiting from any overcharges. Opening Br. 20 n.7. The balance sheet argument therefore fails for the additional reason that a plaintiff's injury must arise from "some anti-competitive, *harmful* effect in this country—not just a positive or neutral domestic effect." *Den Norske Stas Oljeselskap v. Heeremac VOF*, 241 F.3d 420, 424 (5th Cir. 2001).

purchases, were signed by Motorola China and Motorola Singapore.[5] In any event, it would make no difference if a U.S. company had signed the hubbing agreements, because it would not alter the fact that the panels at issue were manufactured, delivered, and paid for in foreign markets.

Motorola nevertheless argues that the United States has a "strong interest in protecting a U.S. company" (Opp. 19), but no such "strong interest" exists when the U.S. company purchases goods in foreign markets for use at foreign factories, much less when its foreign subsidiaries do so. *See* Opening Br. 15-16. Rather, for purchases made in foreign markets, the FTAIA defers to "foreign nation[s'] ability independently to regulate [their] own commercial affairs." *Empagran*, 542 U.S. at 165.

C. Motorola's "Targeting" Allegations Are Irrelevant.

Motorola also defends the MDL court's statement that defendants may have "targeted Motorola in the United States." Opp. 8-10. This argument is simply a variation on the "domestic approval" theory: defendants allegedly engaged in conduct targeted at the U.S. procurement executives who allegedly approved the prices paid by Motorola China and Motorola Singapore. Assuming arguendo that such "targeting" took place, it does not transform foreign commerce into domestic commerce.

In their discussions of "targeting," Motorola and the MDL court reference a hodgepodge of factors including anti-competitive conduct in the United States, marketing efforts in the United States, and defendants' awareness that some of Motorola's phones were ultimately sold in

[5] *See* Exs. 274-276, attached to the April 3, 2012 Declaration of Stephen P. Freccero in Support of Defendants' Joint Motion For Summary Judgment and discussed in paragraphs 54-56 of that declaration. These hubbing agreements were incorrectly cited in Motorola's opposition (at 7 & n.5) as Freccero Decl. Exs. 51-53.

the United States. Each of these factors is irrelevant as a matter of law. *See* Opening Br. 24-25; *Empagran*, 542 U.S. at 165, 173 (no U.S. antitrust claim even though "some of the anticompetitive price-fixing conduct alleged here took place in America"); *Empagran S.A. v. F. Hoffmann-La Roche Ltd.*, 417 F.3d 1267, 1271 (D.C. Cir. 2005) (that defendants "had as a purpose to manipulate United States trade does not establish that 'U.S. effects' proximately caused [plaintiffs'] harm"); *Turicentro, S.A. v. Am. Airlines*, 303 F.3d 293, 303 (3d Cir. 2002) ("that some of the goods purchased . . . may ultimately have been imported by individuals into the United States was immaterial").

Motorola also cites *Minn-Chem* for the proposition that "[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. That is correct as far as it goes: for the Category One sales made directly into the U.S. market, Motorola may maintain an antitrust claim. But this motion concerns sales of goods in *Chinese* and *Singaporean* markets. *Empagran* and its progeny make clear that the presence of *some* claims based on effects on U.S. commerce (Category One claims) does not allow the application of U.S. antitrust law to *other* claims based on foreign injuries (Category Two and Category Three claims). *See, e.g.*, *Empagran*, 542 U.S. at 173-175; *In re Intel Corp. Microprocessor Antitrust Litig.*, 452 F. Supp. 2d at 562; *CSR Ltd. v. CIGNA Corp.*, 405 F. Supp. 2d 526, 549, 551-52 (D.N.J. 2005).

As to the Category Three claims, moreover, Motorola's "targeting" discussion highlights the infirmity of the MDL court's order. Sales of panels that never reached the United States at any point in the distribution chain are not "targeted" at the United States in any meaningful sense of the word. To the contrary, Category Three sales indisputably were targeted *away* from the

United States. Thus, to the extent that "targeting" makes a difference here, it simply underscores the oddity of applying U.S. law to panels that never reached the United States.

II. The Reconsideration Standard Has Been Met.

A. Clear Error.

The MDL court's ruling permitting the claims of Motorola China and Motorola Singapore to proceed under U.S. antitrust law is not just error, but clear error requiring reconsideration even under Motorola's version of that standard.

Motorola argues that reconsideration of MDL rulings should be rare, but this case presents a textbook example of the circumstances in which reconsideration is appropriate. No other court in the history of U.S. jurisprudence has applied U.S. antitrust law to sales of goods that were manufactured, delivered, and paid for abroad. The U.S. Department of Justice has rejected such extra-territorial applications of U.S. antitrust law; the MDL court conceded that its decision conflicts with pre-existing precedent; and even Motorola acknowledged on more than one occasion that its Category Three claims are beyond the scope of U.S. antitrust law. *See* Opening Br. 7 & n.3, 12, 14-17. Furthermore, the MDL court's ruling presents a sufficient threat to foreign sovereignty that a foreign government and a dozen distinguished law professors have taken the unusual step of weighing in at the district court level.[6]

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[6] Motorola's insinuation that the *amici* law professors may have joined an amicus brief merely because defendants asked them to is groundless. Professor Herbert Hovenkamp, for example, is the pre-eminent antitrust scholar in the United States and co-authors the leading treatise on antitrust law, a treatise cited with approval in *Empagran*. 542 U.S. at 166-67. The suggestion that he joined an amicus brief that he did not agree with scarcely requires an answer.

Granting reconsideration under these rare and extraordinary circumstances presents no risk of opening floodgates or undermining the MDL process.[7] This Court should therefore reconsider the MDL court's ruling if it is left with "the definite and firm impression that a mistake has been made." *Weeks v. Samsung Heavy Indus*., 126 F.3d 926, 943 (7th Cir. 1997); *see also Champaign-Urbana News Agency v. J.L. Cummins News Co.*, 632 F.2d 680, 683 (7th Cir. 1980) ("The only sensible thing for a trial court to do is to set itself right as soon as possible when convinced that the law of the case is erroneous. There is no need to await reversal.").

B. Change in Controlling Law.

Under the Seventh Circuit's decision in *Minn-Chem*, "U.S. antitrust laws are not to be used for injury to foreign customers" like Motorola China and Motorola Singapore. 683 F.3d at 858. The court was unequivocal: "foreign purchasers of allegedly price-fixed products that were sold in foreign markets" may not look to U.S. antitrust law for a remedy, but must look instead to the laws of "the foreign country whose consumers [were] hurt." *Id.* at 854, 860. This Court is bound by these statements and is therefore required to reconsider the MDL court's ruling. *See FMC Corp. v. Glouster Eng'g Co.*, 830 F.2d 770, 772 (7th Cir. 1987).[8]

Motorola notes that *Minn-Chem* is cited in the MDL court's order, Opp. 2, but the MDL court cited the case only for its *procedural* holding that the FTAIA is an element of an antitrust claim, rather than a jurisdictional limit on the authority of the Court. The MDL court did not cite

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[7] Motorola raises the "specter of inconsistent legal rulings" if this Court parts ways with the MDL court because two other cases have been remanded to Washington and New York. Opp. 11-12. Both of those cases involve only purchases of finished goods *in the U.S. market*, so there is no prospect for inconsistency.

[8] Motorola asserts that this Court cannot reconsider the MDL court's ruling based on Seventh Circuit law (Opp. 22), but that is not correct. *See In re Ford Motor Co.*, 591 F.3d 406 (5th Cir. 2009) (applying law of remand circuit to overturn MDL court ruling).

or apply *Minn-Chem*'s *substantive* holding that purchasers in foreign markets have no claim under U.S. antitrust law. *See* Davidson Decl. Ex. 10.

Motorola's assertion that the Ninth Circuit applies a stricter interpretation of the word "direct" than the Seventh Circuit is equally irrelevant. This case does not turn on the meaning of the word "direct," but on whether the claims at issue arise out of domestic "commerce." On that question, the Seventh Circuit looks to whether the purchases were made in the U.S. market or in foreign markets, and holds that "U.S. antitrust laws are not to be used for injury to foreign customers." *Minn-Chem*, 683 F.3d at 858.[9]

Finally, Motorola argues that in *Minn-Chem*, "benchmark" prices were set overseas and then charged to customers who purchased price-fixed goods in the United States. Opp. 16-17. But the benchmark prices at issue in *Minn-Chem* affected U.S. commerce because they were used "for sales to U.S. customers," were "intended to govern later U.S. sales" and "cause[d] subsequent price increases in the United States." 683 F.3d at 849, 859. Here, by contrast, Motorola argues only that the prices paid for *foreign* purchases were determined by U.S. conduct. Because *Minn-Chem* requires a purchase in the U.S. market as a pre-requisite to a U.S. antitrust claim, it requires dismissal of Motorola's Category Two and Three claims.

III. Settled Precedent Forecloses Motorola's "Import Commerce" Argument.

Motorola argues that its Category Two claims qualify for the FTAIA's "import commerce" exclusion, because it eventually imported Category Two panels into the United States as components of mobile phones. It does not contend—nor could it—that Category Three

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[9] Motorola misstates the facts in asserting that "Defendants unsuccessfully appealed to the Ninth Circuit." Opp. 1. Although defendants were denied permission for an interlocutory appeal, the Ninth Circuit did not adjudicate the merits.

panels are import commerce, as those panels were never imported into the United States in any form or at any time.

Settled authority rejects Motorola's argument. Defendants did not import the Category Two panels into the United States; rather, Motorola did. The MDL court and every other court to consider the question has ruled that only importation by a defendant—not a plaintiff—can trigger the import commerce exclusion. *See* Davidson Decl. Ex. 2 (MDL court decision rejecting Motorola's "import commerce" argument); *Minn-Chem*, 683 F.3d at 855 (finding import commerce exclusion met only for "transactions that are directly between the plaintiff purchasers and the defendant cartel members"); *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 470 (3d Cir. 2011) ("Any subsequent 'importing' . . . into the United States [that] occurred as a result of the plaintiff's own activities" does not trigger import commerce exclusion); *Turicentro*, 303 F.3d at 303 (the re-sale of goods initially sold by defendants in foreign commerce is "immaterial to determining if defendants were involved in import trade or import commerce"); *Kruman v. Christie's Int'l*, 284 F.3d 384, 395 (2d Cir. 2002) ("the relevant inquiry is whether the conduct of the defendants—not the plaintiffs—involves import trade or commerce").

CONCLUSION

For these reasons, the Court should dismiss Motorola's Category Two and Category Three claims. Defendants respectfully request oral argument on this motion.

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