ORAL ARGUMENT SCHEDULED FOR APRIL 20, 2005

No. 01-7115

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EMPAGRAN, S.A., ET AL.,
Plaintiffs-Appellants,

v.

F. HOFFMANN-LAROCHE, LTD., ET AL.,
Defendants-Appellees.

ON REMAND FROM THE SUPREME COURT OF THE UNITED STATES
AND ON APPEAL FROM
THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES IN RESPONSE TO COURT ORDER OF NOVEMBER 22, 2004

JOHN D. GRAUBERT
Acting General Counsel
Federal Trade Commission
Washington, D.C. 20580

R. HEWITT PATE
Assistant Attorney General

MAKAN DELRAHIM
Deputy Assistant Attorney General

ROBERT B. NICHOLSON
STEVEN J. MINTZ
Attorneys
U.S. Department of Justice
Antitrust Division
Washington, D.C. 20530-0001
(202) 353-8629

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STATEMENT OF INTEREST

The United States and the Federal Trade Commission, which previously participated *amici curiae* before this Court and the Supreme Court, have primary responsibility for enforcing the federal antitrust laws, and therefore have a strong interest in the correct application of those laws.

STATEMENT

1. In 1997, the Department of Justice opened a grand jury investigation into price fixing in bulk vitamins. The investigation bore fruit in 1999 when one of the price fixers entered the Department's antitrust amnesty program and exposed a world-wide price-fixing and market division conspiracy among domestic and foreign makers of bulk vitamins. The Department's subsequent prosecution of the cartel led to prison sentences for eleven corporate officials and criminal fines exceeding $900 million. Large civil penalties by European Union, Canadian, Australian, and Korean antitrust authorities followed, as did successful private treble damage actions under Secti

jurisdiction because the Foreign Trade Antitrust Improvements Act of 1982, 15

claims arising solely out of a foreign injury that is independent of the domestic effects of the challenged anticompetitive conduct. *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. ___, 124 S. Ct. 2359 (2004). The Court offered "two main reasons" for its conclusion, *id.* at 2366: the importance of "constru[ing] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations" (prescriptive comity), *id.*; and fidelity to Congress'

determining which cartels might meet their arbitrage test cannot be done "simply and expeditiously," as the Supreme Court directed.

Opening U.S. courts to antitrust class actions from around the world also would interfere with the sovereign decisions of other nations about the appropriate remedies to offer their consumers, their ability to regulate their commercial affairs, and their antitrust amnesty programs. 124 S. Ct. at 2366-68. Moreover, it would negate the Supreme Court's reasoning that Congress, in enacting the FTAIA, did not intend "*to expand* in any significant way, the Sherman Act's scope as applied to foreign commerce." *Id.* at 2369 (emphasis in original). The Supreme Court could not have intended that the FTAIA's domestic injury exception would swallow its rule.

Plaintiffs' "but for" causation also fails because the established standard for causation in antitrust law is the more rigorous "proximate cause," and Congress intended to preserve the pre-existing law in the FTAIA. Plaintiffs' current attempt to show proximate causation is unavailing: their theory, in substance, is only "but for" causation, and in any event it is doubtful that they alleged proximate causation, and the Supreme Court did not remand that question.

Finally, even if the Court finds jurisdiction under the FTAIA, the Complaint nevertheless should be dismissed because plaintiffs lack antitrust standing. The

Court should re-examine its prior standing holding in light of the Supreme Court's opinion, which undermines its reasoning.

ARGUMENT

I. Plaintiffs' "Alternative Theory" Cannot Establish Subject Matter Jurisdiction

Plaintiffs argue that the particular facts of this case – fungible products easily shipped long distances at a low cost relative to value – establish that "defendants' cartel would have been unsustainable if the United States had been excluded from it," because plaintiffs either would have purchased in the United States or from "arbitrageurs selling vitamins imported from the United States." Br. 10, 20. Thus, they assert, their injuries would not have occurred "but for" the fact that the cartel included the United States, and the U.S. effect of the cartel "gives rise" to their claim as required by the FTAIA. This sweeping argument is in fundamental conflict with the Supreme Court's reasoning and well-established principles of causation in antitrust cases.

A. Plaintiffs' Claim Cannot Be Reconciled With the Supreme Court's Reasoning in *Empagran*

The Supreme Court unanimously rejected a construction of the FTAIA granting foreign plaintiffs a treble damage remedy under U.S. antitrust law for the foreign effects of conduct that also happens to injure U.S. commerce. The Court

found that the statute is ambiguous and that plaintiffs' reading was "not consistent with the FTAIA's basic intent." *Id.* The Court's conclusion was based on two fundamental principles, both of which also point to rejection of plaintiffs' alternative claim.

First, the Supreme Court emphasized that an ambiguous statute like the FTAIA should be construed "to avoid unreasonable interference with the sovereign authority of other nations." *Id.* at 2366. The Court asked: "Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct . . . ?" *Id.* at 2367. Plaintiffs' alternative theory does not change the reality that the subject of this suit is sales in foreign countries by foreign sellers to foreign purchasers, nor the principle that foreign countries have the primary role in protecting their consumers. The Supreme Court emphasized that application of U.S. antitrust law to foreign conduct is consistent with principles of prescriptive comity insofar as it reflects "a legislative effort to redress *domestic* antitrust injury," *id.* at 2366 (emphasis in original), but plaintiffs' injuries are not domestic.

Plaintiffs' theory invites foreigners overcharged on purchases from foreign firms abroad to seek redress under U.S. law, rather than the law of their home

[2] The Court did not limit its application of prescriptive comity to construction of the word "a" in 15 U.S.C. 6a(2), as plaintiffs suggest, Br. 53. *See* 124 S. Ct. at 2366 (referring to "ambiguous statutes" and the FTAIA as a whole).

redress of foreign antitrust injury based on a theoretical "but for" connection to the conduct's effects on U.S. commerce also ignores the Supreme Court's second "main reason" for its conclusion: that Congress' intent was "to clarify, perhaps to limit, but not *to expand* in any significant way, the Sherman Act's scope as applied to foreign commerce." *Id.* at 2369 (emphasis in original). Indeed, it noted, Congress sought to "*release* domestic (and foreign) anticompetitive conduct from

contract, not simply an alleged relationship between domestic and foreign cartel prices. As a non-cartel case, it does not support any anticipation by Congress that class action cartel cases could be brought in U.S. courts. Moreover, Congress was critical even of that case. *See* H.R. Rep. No. 97-686, at 5 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2490 (House Report).[3]

The Supreme Court's reasoning therefore precludes acceptance of the sweeping alternative theory of jurisdiction plaintiffs now assert. Classes of foreign plaintiffs would be able to establish jurisdiction and proceed to discovery under that theory simply by *alleging* a *theory* of arbitrage that some economists have put forward in this case as a general rule, but which is not necessarily applicable in particular cases. Plaintiffs' proposed approach would make the Supreme Court's unanimous decision meaningless. It is difficult to imagine a foreign antitrust plaintiff who could not allege some theoretical connection

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[3] Plaintiffs also cite *Dominicus Americana Bohio v. Gulf & Western Indus., Inc.*, 473 F. Supp. 680 (S.D.N.Y. 1979) as an example "of cases rejecting the view defendants advance (the requirement that claims arise 'in U.S. commerce')." Br. 50. But the court did not rule on subject matter jurisdiction in that case. To the extent that it discussed the facts, it noted that "many of the defendants as well as the plaintiffs are United States corporations, that the services said to be affected by the antitrust violations are used by Americans, and that some of the anticompetitive conduct is alleged to have occurred in this country." 473 F. Supp. at 688. The court thereby intimated that the claims did arise, at least in part, in U.S. commerce.

between the U.S. effects of a cartel and the overcharge paid by the plaintiff.

Plaintiffs' assertions that their theory of jurisdiction need not sweep so broadly, and that it can be limited to a "small subset of potential international antitrust claims," Br. 59, are unpersuasive. Foreign plaintiffs challenging virtually any international cartel could allege that "the cartel raised prices around the world in order to keep prices in equilibrium with United States prices." *Empagran*, 315 F.3d 338, 341. Plaintiffs' arbitrage theory is not the only one in which a class of foreign plaintiffs could allege that the foreign restraints that harmed them would not have come about "but for" a broader worldwide agreement.[4] Thus, plaintiffs' theory, even if it plausibly could be applied in this case, opens the door to a potential flood of "but for" claims.[5]

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[4] Contrary to the implication of plaintiffs' citation to *Den Norske Stats Oljeselskap AS v. HeereMac Vof*, 241 F.3d 420 (5th Cir. 2001), Br. 30 n.7, even in that case, which involved services not subject to arbitrage, the plaintiffs claimed that the barges were mobile and the cartel allocated them, thereby alleging in substance "but for" causation. Petition for Certiorari at 4 ("[b]ecause of the limited number of such [heavy lift] barges and their mobility, there exists a unified, world-wide market for heavy lift services").

[5] Mere "but for" causation sweeps far beyond the limited circumstances that plaintiffs describe. Consider plaintiffs' own merger hypothetical, in which a European plaintiff challenges the merger of two European companies, which has anticompetitive effects in the United States. Br. 59. Contrary to plaintiffs' assertion, this plaintiff could have a stronger "but for" causation argument than the plaintiffs do here. If the two merging companies were the only worldwide producers of a product consumed primarily in the United States, it would be

impossible for the European plaintiff to be

provide a trial court with a readily administrable means of distinguishing, at the threshold stage of litigation, between claims to which the antitrust laws apply and claims as to which they do not.

Rejecting plaintiffs' theory does not mean that all foreign antitrust plaintiffs will be barred from U.S. courts. *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978), indicates that foreign plaintiffs may invoke U.S. antitrust remedies when they "enter our commercial markets as a purchaser of goods or services." *Id.* at 318. *See also Caribbean Broadcasting System, Ltd., v. Cable & Wireless PLC*, 148 F.3d 1080 (D.C. Cir. 1998).[7] It does not follow, however, that foreign plaintiffs are automatically entitled to invoke such U.S. remedies when an antitrust violation causes injury outside the scope of U.S. commerce, as the Supreme Court's failure even to cite *Pfizer* in its *Empagran* decision attests. The Court made clear in *Empagran* that would-be plaintiffs who suffer injury when they purchase goods or services "entirely outside U.S. commerce," 124 S. Ct. at 2364,

[7] Plaintiffs, Br. 35 n.11, misunderstand the government's reference to *Caribbean Broadcasting* in its Supreme Court brief. The government cited that case only to show, like *Pfizer*, that foreign plaintiffs can sue, regardless of where they are located, if they are injured in U.S. commerce. This Court made clear in *Caribbean Broadcasting* that the plaintiff in that case was a participant in U.S. markets and that, under the peculiar facts at issue, "it appears that antitrust injury [to the foreign plaintiff] is ultimately a harm to U.S. purchasers of radio advertising." 148 F.3d at 1087.

are in a different position for purposes of subject matter jurisdiction than plaintiffs

476 n.12, which were designed to bar the claims of plaintiffs whose injuries were not, as a matter of policy, sufficiently connected to the antitrust violation. All of these tests were more rigorous than "but for" causation. The Court analogized them to the common law test of proxi

[8] Plaintiffs' cited cases outside the antitrust context construing "arising out of" or "arising from" as allowing a "but for" connection, Br. 22-23 & n.2, are irrelevant. Because the antitrust laws are potentially so open-ended, it is essential that courts limit the range of potential plaintiffs. In *McCready* and *AGC*

to expand, in any significant way, the Sherman Act's scope as applied to foreign commerce." 124 S. Ct. at 2369 (emphasis in original). Accordingly, there is no justification for interpreting the FTAIA to incorporate an expansive "but for" test of causation.

C. Plaintiffs' Fallback Proximate Cause Argument is Unsound

Plaintiffs contend in the alternative that their claims satisfy a proximate cause standard. But the FTAIA, by focusing on the *domestic effect* rather than the challenged conduct as the basis for the plaintiff's claim, requires a specialized application of the principles of proximate causation – an application that turns on the concepts of directness and remoteness. The direct cause of the plaintiffs' injuries was simply the purchase of vitamins from the defendants at prices elevated by the defendants' cartel. Plaintiffs attempt to look behind that transaction for less proximate, and increasingly remote, causes. But anything that may have helped the cartel raise prices to the plaintiffs could contribute in some way to the plaintiffs' injuries, but plainly is not the direct cause of those injuries.[9]

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[9] Plaintiffs hint that this Court already has found the directness required for proximate causation in holding that plaintiffs have standing. Br. 26 (quoting 315 F.3d at 358-59). This Court, however, was referring to the causal link between the defendants' unlawful conduct and the plaintiffs' injuries, not to the link between the effect of those unlawful activities in the United States and the plaintiffs' injuries. *See* Part III, *infra*.

Accordingly, at most plaintiffs' arbitrage theory alleges only "but for" causation.

Plaintiffs argue that their injuries were proximately caused by the U.S. effect of the cartel because defendants "expressly *intended*" to injure them by fixing prices in the United States, and because that kind of foreseeability is the "most common formulation" of proximate causation, Br. 24-25. Defendants'

[10] Plaintiffs' contention that defendants' conduct so far has "paid off" because estimated cartel profits exceeded criminal fines and civil damages, Br. 14, neglects the fact that as a result of the government's investigations, eleven high-level executives from the vitamin companies to date have *gone to prison*. The government doubts that these key actors in

This Court's prior decision in this case was based in significant part on the policy judgment that international cartels are under-deterred and the assumption

government's longstanding experience that potential amnesty applicants carefully weigh the advantages to be gained from amnesty against their potential civil liability exposure. The statute reflects Congress' understanding that cartel members are deterred from seeking amnesty by high civil damages and seeks to reduce that disincentive by de-trebling civil damages for amnesty applicants who meet certain requirements. Congress made a policy judgment that the amnesty program is a critical element of anti-cartel enforcement – because it triggers the *exposure* and *criminal prosecution* of cartels – and that damages in private civil suits against cartels should be *decreased,* not increased, in order to motivate conspirators to seek amnesty. That policy judgment is entitled to deference.

Plaintiffs' claims here conflict with the purposes of the new statute. The prospect of facing unprecedented class actions for foreign injuries in U.S. courts, even with single damages, will weaken the incentive to seek amnesty provided by de-trebling and discourage cartel members who do not qualify for amnesty but otherwise may want to cooperate with the government, e.g., by plea agreement. Expanded civil liability also risks undermining foreign amnesty programs (*see* 124

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improve deterrence is wrong because it considers only the amount of potential punishment. Deterrence depends critically on *detection* of cartels; a secret cartel cannot be punished until it is exposed.[11] And as a practical matter, plaintiffs' claims here, and the vast majority of private suits against cartels, are follow-on actions triggered by the government's exposure of a cartel. The government is not aware of a single international cartel criminal prosecution that was spurred by allegations in a class action lawsuit.[12]

Fourth, the interest in better deterrence does not compel the conclusion that the means to that end is more *civil* suits in *U.S.* courts. Since, in the government's experience, the primary deterrent to cartel activity is *criminal* penalties, we submit that the best way to increase deterrence is the method recently chosen by Congress: increasing criminal penalties and otherwise strengthening government criminal enforcement. While imprisonment is the best deterrent, criminal fines provide a stronger deterrent than civil damages because they are more immediate, certain, and are within the scope of the amnesty program, which motivates

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[11] *See* 150 Cong. Rec. H3658 (June 2, 2004) (legislative history of Antitrust Criminal Penalty Enhancement and Reform Act quoting Sen. Kohl, co-sponsor, saying that removing the disincentive to seeking amnesty "should result in a substantial increase in the number of antitrust conspiracies being detected").

[12] In the case of vitamins, the government's covert investigation began before the filing of any suits by the victims and was not helped by those suits.

conspirators to defect from cartels to avoid fines.[13]

Plaintiffs would treat the United States as the world's antitrust policeman, as if all private antitrust litigation must be filed here. But this is "legal imperialism," 124 S. Ct. at 2369, and the foreign governments that participated in the Supreme Court as *amici* properly believe their enforcement capabilities and methods of compensation to injured consumers to be appropriate. To the extent that other countries offer remedial schemes that differ from U.S. antitrust laws, the Supreme Court indicated that those sovereign choices are entitled to respect.[14] While some countries' antitrust regimes fairly can be described as developing, this is no reason to circumvent and stunt them by drawing private antitrust litigation away to U.S. courts. Indeed, Congress indicated in the legislative history of the FTAIA that clarifying the reach of U.S. antitrust law "could encourage our trading partners to take more effective steps to

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[13] Our reading of the FTAIA will not limit the government's enforcement efforts. The United States brings criminal prosecutions only when foreign conduct is meaningfully connected to harm to U.S. consumers, even when the conduct is wholly foreign. *E.g.*, *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1 (1st Cir. 1997). If a cartel does not harm U.S. consumers, there would be no jurisdiction under 15 U.S.C. 6a(1), regardless of how subsection 6a(2) is read.

[14] Of the class plaintiffs' home countries, we understand that Australia, Panama, and Ukraine prohibit price fixing and permit suits by those who suffer damages from cartel activity. Although it does not yet have a comprehensive antitrust statute, Ecuador appears to make cartel behavior illegal and make damages available in the form of consumer protection and contract suits.

protect competition in their markets." House Report at 14.

Plaintiffs' reading of the FTAIA also would create problems for coordinated international law enforcement, which is essential in "today's highly interdependent commercial world." 124 S. Ct. at 2366. Effective prosecution of an international cartel requires coordination of investigative strategies among enforcement agencies of many nations because conspiratorial meetings frequently take place in more than one country and witnesses and documentary evidence may be scattered around the world. The United States therefore has made increasing use of Mutual Legal Assistance Treaties with foreign nations, which can be used for evidence gathering in criminal antitrust investigations. Since the 1990s, the United States has entered antitrust cooperation agreements with the European Community and six other countries. The Antitrust Division organized the International Anti-Cartel Enforcement Workshop, which has become an annual event involving enforcers from more than twenty countries. And foreign governments have looked to the United States for leadership in drafting and implementing their own amnesty programs.

Because of the United States' leading role in promoting tougher anti-cartel enforcement around the world, the government is concerned that a decision that weakens the U.S. amnesty program will jeopardize the trend toward rigorous enforcement that the United States has worked hard to foster. In addition, the

dialogue and network of cooperation that the United States has developed with foreign authorities depend on mutual good will and reciprocity. It is well known, as the Supreme Court noted, *id.* at 2368, that our trading partners disapprove of treble damages and other features of U.S. private antitrust litigation, and the foreign government *amicus* briefs filed in the Supreme Court described the "blocking" and "claw back" statutes, refusals to enforce U.S. court judgments, and other measures taken by foreign governments in the past. The government is concerned that if our foreign counterparts fear that the fruits of their cooperation will be used to support follow-on treble damages actions in U.S. courts that they perceive as inappropriate, cooperation will be strained, to the overall detriment of international cartel enforcement.

III. Plaintiffs Lack Antitrust Standing

Because the Court lacks subject matter jurisdiction, it need not consider plaintiffs' antitrust standing. If, however, the Court finds FTAIA jurisdiction, it should re-examine its prior standing ruling, which derived in significant part from its reading of the FTAIA. *See* 315 F.3d at 358 ("the arguments that have already persuaded us that . . . FTAIA allows foreign plaintiffs . . . [to sue] similarly persuade us that the antitrust laws intended to prevent the harm that the foreign plaintiffs suffered here"). But the Supreme Court's intervening decision rejected that

interpretation of the FTAIA and held that the antitrust laws do not intend to prevent foreign harm that is independent of domestic effects.

The Supreme Court's decision also casts doubt on this Court's other bases for granting standing. First, this Court relied on the point that "[t]he foreign purchasers of vitamins here were injured by conduct that violated the Sherman Act – a global price-fixing conspiracy." 315 F.3d at 358. But the Supreme Court emphasized the lack of pre-FTAIA cases supporting plaintiffs' "independent harm" claim; similarly, because no court before the FTAIA ever considered plaintiffs' "but for" theory, as explained above, there is no basis for concluding that the antitrust laws meant to prevent plaintiffs' injuries in the context of their "but for" claim. *See also AGC*, 459 U.S. at 537 ("the mere fact that the claim is literally encompassed by the Clayton Act does not end the inquiry").

Second, this Court considered foreign purchasers to be proper antitrust plaintiffs here because their claimed injuries suffered none of the defects mentioned in *AGC*. *See* 315 F.3d at 358. While the factors cited by this Court persuaded the Supreme Court that the plaintiffs in that particular case lacked standing, the Court also stated that "[a] number of other factors may be controlling" in determining antitrust standing. 459 U.S. at 538.

AGC looked first to the central policies of the Sherman Act as an important

factor in determining antitrust standing. *See* 459 U.S. at 538. The paramount purpose of the antitrust laws is to protect consumers, competition, and commerce *in the United States*. *See* 1A Areeda & Hovenkamp, *Antitrust Law* ¶ 272h2, at 358 (2d ed. 2000) ("the concern of the antitrust laws is protection of *American* consumers and *American* exporters, not foreign consumers or producers") (emphasis in original); *Matsushita Elec. Indus. Co. v. Zenith Radio* Corp., 475 U.S. 574, 584 n.7 (1986) (conspiratorial conduct in Japan "cannot have caused" injury cognizable by U.S. antitrust law). Here, the Supreme Court emphasized that Congress did not intend "*to expand*" the Sherman Act's scope as applied to foreign commerce, 124 S. Ct. at 2369 (emphasis in original); instead, the FTAIA sought to facilitate joint U.S. export activities.

AGC also considered whether "massive and complex damages litigation" will "burden[] the courts." 459 U.S. at 545. Opening up U.S. courts to plaintiffs all over the world who claim to have purchased a price-fixed product in their home countries from a foreign seller can only invite a substantial increase in filings in our federal courts of antitrust cases that are "massive" in terms of their numbers of potential plaintiff-class members and the potential scope of their foreign evidence. The Supreme Court implied this in *Empagran* when it agreed with the Areeda and Hovenkamp treatise that opening U.S. courts to claims of foreign injury raises the spectre of our courts "provid[ing] worldwide subject matter jurisdiction to any

foreign suitor wishing to sue its own local supplier, but unhappy with its own

more important considerations.

CONCLUSION

Plaintiffs' "alternative theory" is legally insufficient to establish subject matter jurisdiction. Alternatively, plaintiffs lack antitrust standing. The Complaint should be dismissed.

Respectfully submitted.

JOHN D. GRAUBERT
Acting General Counsel
Federal Trade Commission
Washington, D.C. 20580

R. HEWITT PATE
Assistant Attorney General

MAKAN DELRAHIM
Deputy Assistant Attorney General

ROBERT B. NICHOLSON
STEVEN J. MINTZ
Attorneys
U.S. Department of Justice
Antitrust Division
Washington, D.C. 20530-0001

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7), Fed. R. App. P. 29(d), and Local Rule 32(a)(1) because it has been prepared in a proportionally spaced typeface using WordPerfect 10 in 14-point Times New Roman and contains 6,859 words.

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Steven J. Mintz

Dated: February 16, 2005

CERTIFICATE OF SERVICE

I certify that on February 16, 2005, two true and correct copies of the foregoing Brief for the United States and the Federal Trade Commission as *Amici Curiae* In Support of Defendants-Appellees in Response to Court Order of November 22, 2004, were served, by Federal Express, next day service, on:

Arthur F. Golden, Esq.
Davis Polk & Wardwell
450 Lexington Avenue
New York, NY 10017
Counsel for Defendants-Appellees

Thomas C. Goldstein, Esq.
Goldstein & Howe, P.C.
4607 Asbury Place, NW
Washington, D.C. 20016
Counsel for Plaintiffs-Appellants

_____
Steven J. Mintz