Nos. 10-1103, 10-1275

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

E.I. DU PONT DE NEMOURS AND CO.,

Plaintiff-Appellee,

v.

KOLON INDUSTRIES, INC.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
(Senior Judge Robert E. Payne)

BRIEF FOR THE UNITED STATES AND FEDERAL TRADE COMMISSION AS AMICI CURIAE IN SUPPORT OF VACATUR AND REMAND

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STATEMENT OF INTEREST

The United States and the Federal Trade Commission have the primary responsibility for enforcing the federal antitrust laws and have a significant interest in their correct application. The district court dismissed appellant Kolon's antitrust claims on the ground that Kolon failed to allege a proper geographic market, relying in part on the U.S. Department of Justice & Federal Trade Commission's *Horizontal Merger Guidelines*. The United States and the Federal Trade Commission express no view on the ultimate merits of Kolon's antitrust claims or on the sufficiency of its pleadings. We believe, however, that the district court's holding reflects a misapplication of the governing case law and the principles set forth in the *Horizontal Merger Guidelines* and therefore urge the Court to vacate the judgment and to remand for further consideration of Kolon's geographic market allegations under the proper standard.[1] We file this brief pursuant to Federal Rule of Appellate Procedure 29(a).

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[1] The Federal Trade Commission recently published for public comment proposed revised *Horizontal Merger Guidelines*. *See* U.S. Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* (Apr. 20, 2010), *available at* http://www.ftc.gov/os/2010/04/100420hmg.pdf. The proposed guidelines confirm and expand on the points made in this brief. *See, e.g.* Cn this b

QUESTION PRESENTED

The United States and the Federal Trade Commission will address the following issue: Whether the district court erred in holding, as a matter of law, that a relevant geographic market in an antitrust case must be defined to include not only the locations of customers put at risk by alleged anticompetitive conduct but also the locations of production for all supplies of the relevant product available to those customers.

STATEMENT

Section 2 of the Sherman Act, 15 U.S.C. § 2, makes it illegal to "monopolize[] or attempt to monopolize." This appeal involves the definition of the relevant geographic market in a Section 2 counterclaim arising in a trade dispute between two manufacturers of para-aramid fibers, E.I. du Pont de Nemours and Co. (DuPont) and Kolon Industries, Inc. (Kolon).

1. Para-aramid fibers are a type of strong synthetic fiber with low flammability, strong fabric integrity at elevated temperatures, good resistance to abrasion and organic solvents, non-conductivity, and good-strength-to-weight properties. JA 554-55 (¶¶ 5-6). They are used in a variety of end-uses, including aerospace and military applications, ballistic-rated body armor fabric, fiber optic cables, tires, and reinforced thermoplastic pipes, JA 555 (¶ 7), and are sometimes

sold pursuant to specifications for particular uses, JA 560 (¶ 22).

Producing para-aramid fibers that meet the needs of consumers is difficult and costly. JA 555 (¶ 8). Para-aramid fibers are produced by DuPont, Teijin, Kolon, Kamenskvolokno, and Yenta Spandex. *Id.* DuPont is based in the United States; Teijin in the Netherlands; Kolon in the Republic of Korea; Kamenskvolokno in Russia; and Yenta Spandex in China. *Id.*[2] DuPont, Teijin, and Kolon sell para-aramid fibers in the United States, but Kamesnkvolokno and Yenta Spandex do not. *Id.* DuPont is the "unquestioned industry leader" in the United States, selling para-aramid fibers under its Kevlar trademark. JA 555 (¶ 8(a)), 559 (¶ 17), 716.

2. DuPont filed the instant action on February 3, 2009, alleging that Kolon had wrongfully obtained its trade secrets and confidential information. JA 33-35 (¶¶ 46-50). Kolon filed a counterclaim alleging that DuPont had monopolized and attempted to monopolize the market for para-aramid fibers in the United States through the use of exclusive supply agreements and other practices in violation of Section 2 of the Sherman Act. JA 80 (¶ 1), 88 (¶ 24), 89 (¶ 28). The district court dismissed Kolon's counterclaim because its allegations of the relevant geographic

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[2] Teijin was a Japanese firm that entered the market in 1987. JA 555 (¶ 8(b)). In 2000, it acquired a Dutch company from which it sells para-aramid fibers in the United States. *Id.*

market were "lacking in detail" and appeared inconsistent with its allegations that Teijin and Kolon sold para-aramid fibers in the United States. JA 408-09.

Kolon amended its counterclaim to provide greater detail concerning the alleged geographic market:

> The relevant geographic market is worldwide supply of para-aramid fiber to commercial purchasers in the United States. The geographic market includes foreign supply practicably available to U.S. commercial purchasers, but the extent and nature of that supply is not known and will have to be determined on a factual record. Competition for U.S. commercial para-aramid buyers occurs in the United States where the buyers are located. Many U.S. buyers require particular qualification analysis and tests for their specific commercial uses. And prices in the United States are distinct from other nations. There are only five global producers of para-aramid fiber. DuPont is the only domestic producer. Teijin is the only other supplier to U.S. commercial customers, but the amount of its supply and shipments to the United States for commercial use are not known. Its capacity to divert production for supply to United States commercial customers also is not known. Accordingly, the extent of its production that should be included in market definition and market share calculations must be left for factual determination. Kolon is the only other manufacturer that supplies commercial customers in the United States, and its sales to date are de minimis. Kamenskvolokno and Yenta Spandex do not supply commercial customers or otherwise ship para-aramid fiber into the United States.

JA 561 (¶ 24). Kolon further alleged "technological and legislative barriers to entry in the U.S. para-aramid fiber market," such as the Berry Amendment to the Buy American Act, which prevents foreign firms from providing para-aramid fiber to suppliers of the Department of Defense unless they open manufacturing operations in the United States or obtain a waiver from Congress. JA 562 (¶¶ 25-

JA 731, including that "pricing in the United States is higher than other markets while U.S. supply remains low," JA 732. However, the court believed that, as a matter of law under *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961), the relevant geographic market must include the countries from which para-aramid fibers were imported into the United States. JA 740. Thus, the court concluded, "Kolon cannot acknowledge . . . that Teijin and Kolon sell" in the United States while "excluding [the locations at which they manufactured the para-aramid fibers] from the geographic market." *Id.*

The court conceded that there might be "considerable evidence that much of Kolon's supply is not practically available to consumers in the United States." JA 739. The court nonetheless concluded that "the wisdom of Landes & Posner . . . counsels [it] to include *all* of Kolon's sales to all markets within the relevant geographic market for this case." *Id.*; JA 722 (citing William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 963 (1981)).[3] The court acknowledged that "the economic model proposed by Landes and Posner is less persuasive when exclusive dealing arrangements are alleged,"

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[3] The district court recognized that obtaining a waiver from the Berry Amendment was "far from easy," JA 737 (citation and internal quotation marks omitted), and thus allowed Kolon to "exclude[] those customers with whom Kolon cannot do business by reason of the Berry Amendment." JA 742.

but nevertheless apparently required that all of Kolon’s and Teijin’s sales be

In particular, there are circumstances in which a dominant supplier (1) can identify and target vulnerable customers in certain areas for a selective price increase, and (2) arbitrage is infeasible (so that the vulnerable customers cannot protect themselves by purchasing from cu

The district court erred in reading *Tampa Electric*

principle of law that the district court adopted in this case. Affirming that legal conclusion would threaten significant harm to antitrust enforcement and potentially enhance the ability of dominant suppliers to exercise monopoly power.

ARGUMENT

THE DISTRICT COURT ERRED IN HOLDING THAT, AS A MATTER OF LAW, THE GEOGRAPHIC MARKET MUST INCLUDE BOTH THE LOCATIONS OF CUSTOMERS AND THE LOCATIONS OF PRODUCTION.

The district court held that, as a matter of law, the geographic market in an antitrust case must be defined to include not only the locations of customers put at risk by alleged anticompetitive conduct but also the locations of production for all supplies of the relevant product available to those customers. JA 740. That holding is incorrect. Market definition in antitrust cases does not follow formalistic rules, but rather "the commercial realities of the industry." *Brown Shoe Co. v. United States*, 370 U.S. 294, 336-37 (1962) (citation, footnote, and internal quotation marks omitted).

A. Market Definition Is A Factual Determination That Must Be Based On The Commercial Realities Of The Industry.

The offense of monopolization under Section 2 of the Sherman Act is (1) the acquisition or maintenance of monopoly power (2) through the use of anticompetitive conduct. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504

U.S. 451, 481-83 (1992). The offense of attempted monopolization is (1) the use of anticompetitive conduct (2) with a specific intent to monopolize and (3) a dangerous probability of success in achieving monopoly power. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

Monopoly power is the "power to contro

E.g., *Consul, Ltd. v. Transco Energy Co.*, 805 F.2d 490, 493 (4th Cir. 1986).

As this Court has explained, "[t]he penultimate question, towards which this preliminary inquiry into market definition is directed, is whether the defendant has market power: the ability to raise prices above levels that would exist in a perfectly competitive market." *Consul*, 805 F.2d at 495; *see also Gen. Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 805 (8th Cir. 1987) ("[M]arket definition is not a jurisdictional prerequisite, or an issue having its own significance under the statute; it is merely an aid for determining whether power exists." (quoting Lawrence A. Sullivan, *Handbook of the Law of Antitrust* 41 (1977))). A firm may be the only seller of a particular item and still lack monopoly power if any attempt on its part to set prices above competitive levels would be defeated by customers switching to substitutes. Thus, the relevant product market is defined to include a range of products that would constrain a firm's ability to control price. The relevant geographic market similarly is defined to include producer or customer locations that constrain pricing. Once the court has identified the product and geographic dimensions of the relevant market, the court can then turn to the question of whether the defendant's position in that market affords it monopoly power, or a dangerous probability of achieving it.

The determination of the contours of the relevant product and geographic

market is “highly factual,” *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 199 (3d Cir. 1992), and turns on “the unique market situation of each case,2dH

Mkt., Inc.

Horizontal Merger Guidelines § 1.0; *see also Coastal Fuels*, 79 F.3d at 198 ("The touchstone of market definition is whether a hypothetical monopolist could raise prices."). The price increase is measured from the price that would prevail "but for" the challenged conduct. *See Horizontal Merger Guidelines* § 1.11.[6]

In some circumstances, it is not feasible for suppliers to engage in "geographic price discrimination – charging different prices net of transportation costs for the same product to buyers in different areas." *Horizontal Merger Guidelines* § 1.22. In these circumstances, competition between suppliers effectively occurs at the points of production – *i.e.*, the market operates as if each customer purchases the product at the point of production and then incurs additional shipping costs reflecting the customer's location. A hypothetical monopolist in such an industry would not be tha9i). The phppidiffeeer'1

broad enough that a hypothetical monopolist likely would impose a significant price increase. *Id.* § 1.21.

The analysis is different, however, when suppliers can profitably charge different prices (net of costs) to different customers depending on where they are located. In particular, there are some circumstances in which (1) suppliers can identify vulnerable customers in certain areas and target them for a price increase, and (2) arbitrage is infeasible (so that the vulnerable customers cannot protect themselves by purchasing from customers in other areas). *See, e.g.*, *In re Brand Name Prescription Drugs Antitrust Litig.*, 288 F.3d 1028, 1031 (7th Cir. 2002) (Posner, J.) ("price discrimination would be feasible only if the manufacturer could prevent (or at least limit) arbitrage"). In these circumstances, a dominant

substantial group of buyers and charge them monopoly prices for a significant period has market power over the group of buyers who pay these prices"); *cf. Eastman Kodak*, 504 U.S. at 475 ("[I]f a company is able to price discriminate between sophisticated and unsophisticated consumers, the sophisticated will be unable to prevent the exploitation of the uninformed.").

When suppliers can profitably charge different prices (net of costs) to different customers in different locations, competition does not occur at the point of production but *at the customers' locations* – *i.e.*, the market operates as if each seller makes sales at customers' locations, after incurring a cost for shipping the product from the point of production to the customer. Consequently, the relevant analysis focuses on how much, if at all, a hypothetical monopolist would want to raise price at various points of consumption, and the relevant geographic market is defined around the location of those customers vulnerable to a price increase. As the federal enforcement agencies have explained:

> [I]f a hypothetical monopolist can identify and price differently to buyers in certain areas ('targeted buyers') . . . and if other buyers likely would not purchase the relevant product and resell to targeted buyers, then a hypothetical monopolist would profitably impose a discriminatory price increase. This is true even where a general price increase would cause such significant substitution that the price increase would not be profitable. [In this situation, the Agencies] will consider additional geographic markets consisting of particular locations of buyers for which a hypothetical monopolist would profitably and separately impose at least a 'small but significant and nontransitory' increase in price.

Horizontal Merger Guidelines § 1.22 (footnote omitted); *see also* U.S. Department of Justice & Federal Trade Commission, *Commentary on the Horizontal Merger Guidelines* 7-8 (2006) (explaining that “the Agencies may define relevant markets on the basis of price discrimination if a hypothetical monopolist likely would exercise market power only, or especially, in sales to particular customers or in particular geographic areas” and giving examples); *cf. U.S. Anchor Mfg., Inc. v. Rule Indus., Inc.*, 7 F.3d 986, 997-98 (11th Cir. 1993) (noting “that the ability to discriminate against a distinct group of customers by charging higher prices for otherwise similar products demonstrates the existence of market power with respect to that group” and concluding that high-priced line of anchors “may have constituted its own market” because of evidence of “price discrimination against a distinct group of consumers”); *Reynolds Metals Co. v. FTC*, 309 F.2d 223, 227-28 (D.C. Cir. 1962) (finding a separate market for “florist foil” in part because of “distinct prices”); 2B Areeda, Hovenkamp & Solow, *Antitrust Law* ¶ 534d, at 271 (in appraising “a merger between firms *X* and *Y* when both operate in large area *A* but charge significantly higher prices in a narrower segment *A1*,” “the merger must still be evaluated for its effect in area *A1* even if it is not illegal in area *A*).

Failing to account for the ability of dominant suppliers to engage in price discrimination could lead to a highly misleading market definition because it could

mask those suppliers' ability to target vulnerable customers for price increases. This failure could allow dominant suppliers to evade Section 2 liability even though they could, in fact, substantially increase price to vulnerable customers through anticompetitive conduct. *Cf. AFL v. NFL*, 323 F.2d 124, 129 (4th Cir. 1963) ("In considering an attempt to monopolize, it, of course, is appropriate to limit the relevant geographic market to the area which the defendant sought to appropriate to itself . . . .").[7]

C. The District Court's Ruling Is Not Justified By *Tampa Electric* Or "The Wisdom Of Landes & Posner."

The district court recognized that "Kolon endeavors to tether its alleged relevant geographic market to the commercial realities of the para-aramid fiber business," JA 731, including that "pricing in the United States is higher than other markets while U.S. supply remains low," JA 732. The court believed, however, that *Tampa Electric* compelled it to include the Netherlands and Korea in the geographic market because para-aramid fibers were imported from those countries

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[7] Of course, "[t]he material consideration in determining whether a monopoly exists is not that prices are raised and that competition is excluded, but that *power* exists to raise prices or to exclude competition when it is desired to do so." *Conwood Co. v. United States Tobacco Co.*, 290 F.3d 768, 783 n.2 (6th Cir. 2002) (emphasis added and internal quotation marks omitted). Thus, in appropriate circumstances, a court could define the geographic market based on the possibility of price discrimination even though the defendant had not previously charged different prices to buyers in different locations.

into the United States. JA 740 ("The market, per *Tampa Electric*, must be expanded to include the areas where the sellers operate.") (citation omitted). That reasoning is wrong.

In *Tampa Electric*, the Supreme Court addressed when an exclusive dealing arrangement violates Section 3 of the Clayton Act, 15 U.S.C. § 14. 365 U.S. at 327. The Supreme Court explained that a relevant "consideration" in identifying the affected market was a determination of the "area of effective competition," which required a "careful selection of the market area in which the seller operates, and to which the purchaser can practicably turn for supplies." *Id.* As Justice Fortas later explained, this selection demands a practical inquiry into where a potential buyer "has, or, in the absence of monopoly, would have, a real choice as to price and alternative facilities," considering "the facts of the market place" and "such economic factors as the distance over which supplies and services may be feasibly furnished, consistently with cost and functional efficiency." *United States v. Grinnell Corp.*, 384 U.S. 563, 588-89 (1966) (Fortas, J., dissenting). It is a flexible determination requiring a close examination of the actual behavior of buyers and sellers to determine the area at which competition actually occurs and the potential for the exercise of monopoly power. *See, e.g.*, *Eastman Kodak*, 504 U.S. at 467 (the search for market power requires close examination of "the

economic reality of the market at issue").

In some cases, the "area of effective competition" encompasses the locations of production. *See* pp. 15-16, *supra* (discussing market analysis when geographic price discrimination is not feasible). But in other cases, there is a distinct competition and a distinct price for customers in a particular location. *See* pp. 16-18, *supra* (discussing market analysis when geographic price discrimination is feasible). In these latter cases, the "area of effective competition" is the customers' locations. *See id.* A formalistic rule requiring in every case that the geographic market include both the customers' locations *and* the relevant points of production, regardless of the ability of a dominant firm to price discriminate and control price in just a smaller area, would subvert the practical inquiry the Supreme Court endorsed and divorce the process of market definition from its purpose. The district court erred in interpreting *Tampa Electric* to impose such a rule.

Contrary to the district court's assumption, limiting the relevant geographic market to the United States would not mean that competition from foreign producers would be ignored. Even if the geographic market were restricted to the United States, the district court could properly take account of imported para-aramid fibers and any other foreign supply practicably available to U.S.

commercial purchasers in identifying the competitors in that geographic market and assigning them market shares. *See Horizontal Merger Guidelines* § 1.3 (Identification of Firms that Participate in the Relevant Market), § 1.4 (Calculating Market Shares). This would be the appropriate approach if geographic price discrimination targeting U.S. purchasers were feasible. *Cf.* 2B Areeda, Hovenkamp & Solow, *Antitrust Law* ¶ 555c, at 353 ("When only actual imports are to be counted, courts say that the market is nationwide and includes all sales there. When the total output of foreign firms is to be counted, the market is said to be worldwide or, alternatively, that it covers the United States plus one foreign region (or more) shipping to the United States.") (emphasis omitted).

The district court believed that it was necessary to include the Netherlands and Korea – and therefore Teijin's and Kolon's total production – in "the relevant geographic market for this case," even if there is considerable evidence that their total supply is not practicably available to U.S. commercial purchasers. JA 739.[8] In support of its conclusion, the court cited "the wisdom of Landes & Posner," *id.*, who wrote that:

[I]f a distant seller has some sales in a local market, *all* its sales, wherever

[8] The court suggested that the analysis might be different where exclusive dealing is alleged but does not appear to have incorporated this insight into its ruling. *See* pp. 6-7, *supra*.

> made, should be considered a part of that local market for purposes of computing the market share of a local seller. This is because the distant seller has proved its ability to sell in the market and could increase its sales there, should the local price rise, simply by diverting sales from other markets.

Landes & Posner, *supra*, at 963. But there are at least two reasons why their analysis does not support the district court's ruling.

First, Landes and Posner's model does not allow for the possibility of geographic price discrimination. *See* Landes & Posner, *supra*, at 986-91 (presenting their formal "geographical market analysis"). If geographic price discrimination were feasible, it would be appropriate to restrict the geographic market to the United States so that the anticompetitive effects of DuPont's practices in the United States were not masked by differing competitive conditions abroad.

Second, commentators have identified numerous difficulties with Landes and Posner's analysis. For example, commentators have noted that their analysis does not fully take account of situations in which the product is highly differentiated, the distant seller does not have an established reputation with the relevant customers, much of its output is committed outside the market, current distribution networks have limited capacity, or there are logistical difficulties in diverting sales. *See, e.g.*, Gregory J. Werden, *Assigning Market Shares*, 70

Antitrust L.J. 67, 97 (2002); Robert Pitofsky, *New Definitions of Relevant Market and the Assault on Antitrust*, 90 Colum. L. Rev. 1805, 1858-59 (1990); Louis Kaplow, *The Accuracy of Traditional Market Power Analysis and a Direct Adjustment Alternative*, 95 Harv. L. Rev. 1817, 1835-43 (1982). In these

(1983). Thus, there are a variety of circumstances under which all of a foreign supplier's sales should not be included.

For these reasons, there is no basis for converting the Landes and Posner analysis into a rigid rule of law. Many factors are potentially relevant to the market definition analysis, especially in cases involving foreign trade. The district court committed legal error by disregarding the commercial realities of the para-aramid fiber industry and instead relying on an erroneous across-the-board rule that takes no account of the possibility of price discrimination.[9]

D. Endorsing The District Court's Reasoning Could Significantly Harm Antitrust Enforcement.

The ramifications of the district court's formalistic ruling extend well beyond the instant case. Geographic price discrimination is common.[10] The

[9] *United States v. Eastman Kodak Co.*, 853 F. Supp. 1454 (W.D.N.Y. 1994), does not support the district court's ruling in this case. In *Eastman*

federal enforcement agencies have brought several enforcement actions alleging geographic price discrimination and defining the relevant geographic market by

Endorsing the district court's proposed rule of law that the relevant geographic market must include the locations of production without regard to the potential for geographic price discrimination would potentially allow dominant suppliers to avoid liability under the antitrust laws and target vulnerable customers. Such a result is not warranted under the law and would harm American companies and consumers.

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discrimination through arbitrage." *United States v. Dean Foods Co.*, No. 10-CV-59, 2010 WL 1417926, at *5 (E.D. Wis. Apr. 7, 2010). In *Polypore*, an administrative law judge found that North America was the relevant geographic market in part because a hypothetical monopolist could target North American buyers for a price increase, which would not likely be defeated by arbitrage.

CONCLUSION

The Court should vacate the judgment and remand for further consideration of the sufficiency of Kolon's geographic market allegations under the proper legal standard.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,504 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect X-4 in Times New Roman 14-point font.

Dated: May 4, 2010

/s/ Nickolai G. Levin
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CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2010, I electronically filed the foregoing