13-2280

LOTES CO., LTD.,
Plaintiff-Appellant,

v.

HON HAI PRECISION INDUSTRY CO., LTD., FOXCONN INTERNATIONAL HOLDINGS, LTD., FOXCONN ELECTRONICS, INC., FOXCONN (KUNSHAN) COMPUTER CONNECTOR CO., LTD., AND FOXCONN INTERNATIONAL, INC. A/K/A FOXCOMM INTERNATIONAL, INC.,

Defendants-Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
(Honorable Shira A. Scheindlin)

JONATHAN E. NUECHTERLEIN
General Counsel

WILLIAM J. BAER

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STATEMENT OF INTEREST

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

STATEMENT OF ISSUE PRESENTED

Whether the FTAIA bars Sherman Act damages claims by a foreign plaintiff for injury suffered in wholly foreign commerce and not derived from the alleged anticompetitive conduct's effects on U.S. commerce.

STATEMENT OF THE FACTS

1. USB 3.0 Standard and Connectors

Lotes and the defendants are competing makers of Universal Serial Bus (USB) connectors that are incorporated into notebook computers and the motherboards used in desktop computers and servers. FAC ¶¶ 15, 21 (JA-34, 36-37). USB connectors are used primarily to connect computer peripherals to computers or other electronic devices and allow data transmission between the peripheral and the computer over a

previous connectors. FAC ¶ 16 (JA-34). Consequently, USB 3.0 should soon be ubiquitous. FAC ¶¶ 20, 66 (JA-36, 56).

In setting its USB 3.0 standard, USB-IF took steps to avoid the possibility that once the standard incorporates patented technology and is widely adopted, the patent owners would "demand exorbitant terms"

2. Defendants Allegedly Misled USB-IF and Brought Patent Enforcement Proceedings in China to Reduce Competition

Lotes alleges that defendants engaged in anticompetitive conduct "designed either to foreclose Lotes from several relevant competitive markets or to raise Lotes' costs in those markets to the point that Lotes becomes uncompetitive and Defendants become a monopoly." FAC ¶ 19 (JA-36). Specifically, defendants convinced USB-IF to incorporate their patented technologies into the USB 3.0 standard by falsely committing to license on RAND-Zero terms patents that are necessary to practice the standard. FAC ¶¶ 50, 73 (JA-49-50, 59). Through this deception, defendants eliminated competing technologies from consideration for the standard and "gained market power" that "their patents alone had not conferred." FAC ¶¶ 51, 73 (JA-49, 59)

connectors be stopped and its USB 3.0 connectors destroyed. FAC ¶¶ 42, 45, 53-59 (JA-45-46, 50-53). The Lotes USB 3.0 connectors identified in the enforcement action include "products shipped for use in the United States market," and enjoining their production "would disrupt the supply of computer products into the United States, especially notebook computers." FAC ¶ 58 (JA-52-53). Defendants also contacted Lotes' customers and distributers and told them defendants have the sole patent rights on USB 3.0 connectors and would sue the customers and distributors if they did not purchase from defendants. FAC ¶ 51 (JA-49-50).

Defendants also allegedly refused to license on RAND-Zero terms other makers of USB 3.0 connectors and threatened those makers with patent litigation. *Id.*

3. Defendants' Conduct Allegedly Injures Lotes in China and Affects Commerce in the United States

Lotes alleges that "[a]nything that affects the price, quantity, or competitive nature of the production market for USB 3.0 connectors will . . . have a direct, substantial, and reasonably foreseeable effect on U.S. commerce" because any price increases in USB 3.0 connectors will "inevitably" be passed on in the price paid by purchasers in the United

States for connector-incorporating computer products. FAC ¶¶ 47, 63 (JA-48, 55). In this way, Lotes contends, the injury it suffers in China—lost sales and potential elimination as a supplier of USB 3.0 connectors—"would thus damage competition, increase prices, and harm consumers in the United States." FAC ¶ 64 (JA-55).

Defendants have "endangered all of Lotes' existing and prospective business relationships" and threatened to close Lotes' factories in China that make USB 3.0 connectors. FAC ¶¶ 68-69 (JA-56-57). If defendants force the closure of those factories or raise Lotes' costs, they would become "dominant suppliers," Lotes would be "effectively eliminat[ed] . . . as a major competitor," and "major U.S. companies . . . would face loss or compromise of their electronics products." FAC ¶¶ 63, 69, 73 (JA-54-55, 57, 59). Moreover, defendants' "willingness to bring suit against Lotes in contravention of the USB-IF RAND-Zero terms has an *in terrorem* effect capable of curbing competitive manufacture and raising prices to U.S. consumers across the full range of products incorporating USB 3.0 connectors." FAC ¶ 71 (JA-58).

4. The Court Found No Direct Effect on U.S. Commerce

The district court assumed that the defendants engaged in anticompetitive conduct, but held that the court lacked subject-matter jurisdiction to adjudicate Lotes' Sherman Act claims.[3] Op. 17, 31 (JA-258, 272). The FTAIA, the court explained, sets forth a general rule that the Sherman Act does not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign

SUMMARY OF ARGUMENT

Congress enacted the FTAIA to make clear to U.S. exporters and U.S. firms doing business abroad that the Sherman Act does not apply to their business arrangements if they adversely affect only foreign markets. But Congress also sought to ensure that purchasers in the

immediate consequence or proximate cause standard, the existence of multiple foreign "transactions and manufacturing steps," Op. 23 (JA-264) (quoting Defs. Mem. 10), need not render an effect indirect. Indeed, a contrary rule would leave U.S. commerce vulnerable to anticompetitive conduct involving components incorporated into finished products abroad that increases the prices of those finished products to U.S. purchasers in a non-remote, substantial, and reasonably foreseeable way.

While the Court should not endorse the district court's analysis, it need not undertake its own, a potentially difficult and fact-intensive task. Instead, the Court should affirm on the simpler basis that Lotes' claims cannot satisfy the effects exception's requirement that the effect on U.S. import commerce "gives rise to [its] claim." 15 U.S.C. § 6a(2); *see Empagran*, 542 U.S. at 173-74. Even assuming defendants' conduct

on U.S. import commerce. Thus, that effect does not give rise to Lotes' Sherman Act claims as the FTAIA's effects exception requires.

ARGUMENT

I. Congress Enacted the FTAIA to Promote U.S. Exports While Protecting U.S. Domestic and Import Commerce and U.S. Exporters from Anticompetitive Conduct

The FTAIA should be construed in light of its history and purpose. *See F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 169 (2004). The statute "seeks to make clear to American exporters (and to

wholly foreign commerce—that is, commerce within, between, or among foreign nations. *Empagran*, 542 U.S. at 163. The FTAIA provides that:

> Sections 1 to 7 of [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—
>
> (1) such conduct has a direct, substantial, and reasonably foreseeable effect—
>
> (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>
> (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
>
> (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

15 U.S.C. § 6a.

The statutory language makes clear that the FTAIA does not apply to conduct involving import commerce. Such conduct, like conduct involving purely domestic commerce, remains fully subject to the Sherman Act. This is commonly referred to as the FTAIA's "import commerce exception," but the term is a misnomer. "Import trade and commerce are excluded at the outset from the coverage of the FTAIA in the same way that domestic interstate commerce is excluded." *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 854 (7th Cir. 2012) (en banc).

The import commerce language contained in the parentheses was included so that there would be "no misunderstanding that import restraints, which can be damaging to American consumers, remain covered by the law." H.R. Rep. No. 97-686, at 9, *reprinted in* 1982 U.S.C.C.A.N. at 2494; *see also Minn-Chem*, 683 F.3d at 854.[4]

The FTAIA declares the Sherman Act inapplicable to conduct involving only non-import commerce with foreign nations—i.e., export commerce or wholly foreign commerce—unless two requirements are met. First, the conduct must have a "direct, substantial, and reasonably foreseeable effect" on commerce within the United States, U.S import commerce, or the export trade of a U.S. exporter (collectively U.S. commerce). 15 U.S.C. § 6a(1). Second, a plaintiff seeking damages

II. The FTAIA Bars Lotes' Claim Because the Alleged Effect on U.S. Commerce Did Not Give Rise to Lotes' Claim

The district court dismissed the claim on the ground that Lotes failed to establish that the challenged conduct had a direct, substantial, and reasonably foreseeable effect on U.S. commerce. Op. 23 (JA-264); *see* 15 U.S.C. § 6a(1). Lotes' challenge to that conclusion raises difficult and fact-intensive questions, and the district court's analysis was flawed in several respects. This Court need not reach that issue,

claim. It is not sufficient that someone else might have a Sherman Act

plaintiff's claim." *Id.* at 165, 173-74; *see also Sniado v. Bank Austria AG*, 378 F.3d 210, 212 (2d Cir. 2004) (holding that the FTAIA requires plaintiff to "allege that the [foreign] conspiracy's effect on domestic commerce gave rise to *his* claims.").

On remand in *Empagran*, the D.C. Circuit held that "[t]he statutory language—'gives rise to'—indicates a direct causal relationship, that is, proximate causation," between the conduct's effects on U.S. commerce and the plaintiff's claim. *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267, 1271 (D.C. Cir. 2005) (*Empagran II*). The court explained that the proximate causation standard "accords with principles of 'prescriptive comity,'" pursuant to which courts "'ordinarily construe[ ] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations.'" *Empagran II*, 417 F.3d at 1271 (quoting *Empagran*, 542 U.S. at 164). Applying that standard, the court rejected the foreign plaintiffs' claim that the effects on U.S. commerce caused their injury. "While maintaining super-competitive prices in the United States may have facilitated the" price fixers' ability "to charge comparable prices abroad," the court concluded this fact demonstrated "at most but-for

causation." *Id.* Thus, plaintiffs had failed to establish that "the U.S. effects of the [anticompetitive] conduct—i.e., increased prices in the United States—proximately caused the foreign [plaintiffs'] injuries." *Id.*

All other courts of appeals to consider the question have joined the D.C. Circuit. They have held that, under the FTAIA exception's "gives rise to" requirement, the effect must be the "direct or proximate" cause of the plaintiff's injury. *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 988 (9th Cir. 2008); *In re Monosodium Glutamate (MSG) Antitrust Litig.*, 477 F.3d 535, 538 (8th Cir. 2007). This standard, these courts explained, is "consistent with general antitrust principles, which typically require a direct causal link between the anticompetitive practice and plaintiff's damages." *DRAM*, 546 F.3d at 988; *see MSG*, 477 F.3d at 538-39 (Proximate cause is "consistent with general antitrust principles, which typically require a more direct causation standard.").

B. Lotes' Claims Do Not Arise from the Alleged Effects on U.S. Commerce

Lotes alleges that defendants' conduct had the effect "of driving up prices of consumer electronic devices in the U.S." Lotes Br. 42 (citing FAC ¶¶ 20-23, 68-73 (JA-36-38, 56-59)). But the higher prices in the

United States did not cause Lotes' injury. To the contrary, Lotes suffered only foreign injury from lost sales of USB 3.0 connectors in wholly foreign commerce and the potential closures of its foreign factories; that injury results from defendants' conduct, not its effect on U.S. commerce.[6]

To the extent Lotes alleges any causal connection between its injury and the effects on U.S. commerce, the line of causation runs in the wrong direction. Lotes alleges that defendants' conduct will reduce competition in the supply of, and increase the prices for, USB 3.0 connectors by barring Lotes' foreign manufacture of USB 3.0 connectors, and that the resulting price increases to purchasers of USB 3.0 connectors "will inevitably [be] pass[ed] on to U.S. consumers." FAC ¶ 63 (JA-55). In this way, the "loss of Lotes in the USB 3.0 connector market would *thus* damage competition, increase prices, and harm consumers in the United States." FAC ¶ 64 (JA-55) (emphasis added). Lotes' injury precedes the higher U.S. prices in the causal chain. "An

[6] Lotes' complaint includes conclusory allegations that it suffered injury in the Southern District of New York, but does not identify any such injury. *See*, *e.g.*, FAC ¶¶ 11, 13 (JA-32-33). Without a factually specific identification of domestic injury, the Court need not credit these allegations. *See Rothstein v. UBS AG*, 708 F.3d 82, 94 (2d Cir. 2013).

There is nothing anomalous about this result. By operation of the

"such effect gives rise to a claim" under the Sherman Act, 15 U.S.C. § 6a(2). Whether these requirements are met does not necessarily turn on the location of the conduct or the nationality of the actors. Indeed, potentially anticompetitive conduct in the United States by U.S. exporters is precisely the sort of conduct Congress sought to exclude from the Sherman Act so long as it affects only non-import foreign commerce. *See* H.R. Rep. No. 97-686 at 10, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2495. Conversely, the FTAIA leaves the Sherman Act fully applicable to conduct involving U.S. import commerce, even if the conduct takes place entirely outside the United States.[7] Thus, even if Lotes' foreign injury was caused by conduct in the United States, that alone does not satisfy the requirement that the conduct's effects on U.S. commerce give rise to Lotes' claims.

[7]

III. This Court Should Not Endorse the District Court's Flawed Analysis of Direct Effects

There is no need for this Court to determine whether the district court erred in holding that the challenged conduct lacks a "direct, substantial, and reasonably foreseeable" effect on U.S. commerce. If the Court addresses this holding, however, it should reject the district court's flawed analysis.

A. In the FTAIA, "Direct" Means a Reasonably Proximate Causal Nexus, Not an Immediate Consequence

The district court's analysis errs from its outset by following *United States v. LSL Biotechnologies*, 379 F.3d 672 (9th Cir. 2004) and defining a direct effect as one that "follows as an immediate consequence of the defendant's activity." Op. 23 (JA-264) (quoting 379 F.3d at 680). In the context of the FTAIA, the term direct means only a reasonably proximate causal nexus. Thus, the Seventh Circuit recently held that proximate cause is the appropriate standard by which to determine whether there is a "direct" effect on U.S. commerce for purposes of the FTAIA. *Minn-Chem*, 683 F.3d at 857. The FTAIA thus leaves the Sherman Act applicable to conduct involving non-import foreign

commerce if it has a reasonably proximate (as well as substantial and reasonably foreseeable) effect on U.S. commerce.

The district court's analysis does not provide any reason for adopting the *LSL* definition, nor does it acknowledge the en banc holding of the Seventh Circuit in *Minn-Chem,* which expressly rejected that definition. The court does state that any higher computer prices and reduced competition in the United States resulting from the defendants' foreign anticompetitive conduct "are simply too attenuated to establish the proximate causation required by the FTAIA." Op. 24 (JA-265). The juxtaposition of this statement with the court's adoption of *LSL*'s definition of direct suggests that the district court did not

Defining directness in terms of proximate causation terms accords

substantial and reasonably foreseeable) effect on U.S. commerce, Congress sought to redress domestic antitrust injuries in this commerce. American "courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused." *Empagran*, 542 U.S. at 165.

Thus, if a conspiracy of foreign manufacturers to fix the price of components sold to other foreign manufacturers proximately caused effects on import commerce in finished products incorporating that price-fixed component—notably by increasing the price—that effect would be viewed as direct, and the FTAIA exception would apply

States would come within the direct effects exception if it created "a

without deviation or interruption"—while the definition adopted by the *LSL* dissent corresponds to another—"characterized by or giving evidence of a close especially logical, causal, or consequential relationship." *Webster's Third New International Dictionary* 640 (1981).

The *LSL* majority did not reference any definition of "direct" other than its own, much less explain why any such construction would be inferior. The majority may have adopted the first dictionary definition because it was first, but "the relative order of the common dictionary definitions of a single term does little to clarify that term's meaning within a particular context. When a word has multiple definitions, usage determines its meaning." *Trs. of the Chi. Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Pension Fund v. Leaseway Transp. Corp.*, 76 F.3d 824, 828 n.4 (7th Cir. 1996).

The *LSL* majority also relied on the fact that the Supreme Court had defined a "nearly identical term" in the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1605(a)(2), in the same way. 379 F.3d at 680 (citing *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607 (1992)). But, as the *Minn-Chem* court explained, "the Ninth Circuit

jumped too quickly to the assumption that the FSIA and the FTAIA use the word 'direct' in the same way." 683 F.3d at 857. While both statutes have a "direct effects" exception, the statutory purpose and language differ. The FSIA deals with foreign nations' general immunity from suit and applies to numerous federal statutes, while the FTAIA limits the Sherman Act's application to conduct involving export and wholly foreign commerce. And the FSIA's "direct effect" exception does not include an expressed or "unexpressed requirement of 'substantiality' or 'foreseeability,'" *Weltover*, 504 U.S. at 618, while the FTAIA requires a "direct, substantial, and reasonably foreseeable effect," 15 U.S.C. § 6a.

Placing the term "direct" in the context of the FTAIA demonstrates the flaws in the *LSL* majority's definition. Following "as an immediate consequence" could be understood to mean that there can

commerce comes close to ignoring the fact that straightforward import

own function: "direct" goes to the effect's cause, "substantial" goes to its amount, and "reasonably foreseeable" goes to its objective predictability.

Lastly, adopting the *LSL* majority's definition of "direct" could

Defining "direct effects" as reasonably proximate effects ensures the proper inquiry. And it accomp

While the court adopted *LSL*'s construction of direct, it did not correctly apply that standard. Under *LSL,* "an effect does not become 'indirect' simply because the American [brand name computer companies] use a complex manufacturing process." *In re TFT-LCD*, 822 F. Supp. 2d at 964. Nor does the existence of multiple foreign

the end (overcharges for televisions, monitors, and notebook computers [incorporating those panels])." *Id.* And thus, "the effect 'proceeded without deviation or interruption' from the LCD manufacturer to the American retail store." *Id.*

The court below sought to distinguish *In re TFT-LCD* because it involved price fixing "whose effects were easily quantifiable." Op. 30 (JA-271). But the effects exception is not limited to price fixing. *See, e.g.*, *Access Telecom, Inc. v. MCI Telecomms. Corp.*, 197 F.3d 694, 712 (5th Cir. 1999); *Korea Kumho Petrochemical v. Flexsys Am. LP*, No. C07-01057, 2008 WL 686834, at *6-7 (N.D. Cal. 2008); *CSR Ltd. v. Cigna Corp.*, 405 F. Supp. 2d 526 (D.N.J. 2005). Nor does the effects exception require quantification of the effect.

The percentage of the market controlled by defendants and the significance of the component part to the finished product may help a plaintiff show that there is an effect on U.S. commerce, but they do not impact whether that effect would be direct. Assuming Lotes established that the conduct caused USB 3.0 connector price increases and, in turn, affected the prices of connector-incorporating products imported to the

host of components" or that the market shares may significantly differ from *In re TFT-LCD*, Op. 30 (JA-271), does not render that effect indirect.

The same conclusion holds under the *Minn-Chem* proximate cause standard: anticompetitive conduct that increases the price of a component part has a direct effect when it proximately causes a price increase on a product sold in U.S. import or domestic commerce. *Cf. Minn-Chem*, 683 F.3d at 859 ("foreign supply restrictions, and the concomitant price increases forced upon the Chinese purchasers, were a direct—that is, proximate—cause of the subsequent price increases in the United States"). Indeed, in our view, the *Minn-Chem* proximate cause standard is superior because it is not as potentially susceptible to a misinterpretation focusing on the particular manufacturing process as is *LSL*'s focus on "immediate consequences."

* * *

We take no position on whether the challenged conduct could be found to have an effect on U.S. commerce and whether that effect would be direct under the appropriate standard. In our view, the Court need not remand for such determinations because any such effect would

plainly not "give rise to" Lotes' Sherman Act claims. If this Court reaches the issue of direct effects, it should make clear that the inquiry focuses on proximate causation.

CONCLUSION

The judgment should be affirmed on the alternative basis that the alleged effect on U.S. commerce of the challenged conduct does not give rise to Lotes' Sherman Act claims and therefore the FTAIA renders Sections 1 and 2 of the Sherman Act inapplicable.

Respectfully submitted.

/s/ James J. Fredricks

JONATHAN E. NUECHTERLEIN
General Counsel

WILLIAM J. BAER
Assistant Attorney General

JOHN F. DALY
Deputy General Counsel for Litigation

KRISTEN C. LIMARZI
JAMES J. FREDRICKS7SJU7(c2-.814.04 0 4.8

MARK S. HEGEDUS
Attorney
Office of the General Counsel
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20530-0001

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 6994 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 with 14-point New Century Schoolbook font.

/s/ James J. Fredricks
Attorney

CERTIFICATE OF SERVICE

I, James J. Fredricks, hereby certify that on October 7, 2013, I electronically filed the foregoing Brief for the United States and Federal Trade Commission as Amici Curiae in Support of Defendants-Appellants with the Clerk of the Court of the United States Court of Appeals for the Second Circuit by using the CM/ECF System. I also sent six paper copies to the Clerk of the Court.

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

Date: October 7, 2013

/s/ James J. Fredricks
Attorney