No. 14-8003

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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MOTOROLA MOBILITY LLC,
Plaintiff-Appellant,
v.
AU OPTRONICS CORP., et al.,
Defendants-Appellees.

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On Interlocutory Appeal from an Order of the
United States District Court for the Northern District of Illinois
Case No. 09-cv-6610 (The Honorable Joan B. Gottschall)

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# BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE IN SUPPORT OF NEITHER PARTY

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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 of 1982 (FTAIA), which added Section 6a to the Sherman Act, 15 U.S.C. § 6a. 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." The FTAIA also added Section 5(a)(3) to the FTC Act, 15 U.S.C. § 45(a)(3), which closely parallels Section 6a.

The government previously submitted an amicus brief urging the panel to vacate its decision and, at the Court's request, a supplemental amicus brief addressing this case's potential impact on U.S. foreign relations. This amicus brief is submitted pursuant to Federal Rule of Appellate Procedure 29(a).

## STATEMENT OF ISSUE PRESENTED

Whether the FTAIA bars Motorola's damages claims for overcharges on price-fixed Liquid Crystal Display (LCD) panels delivered to its foreign subsidiaries and incorporated into cellphones sold in the United States and elsewhere.

## STATEMENT

This case involves a global conspiracy to fix the price of LCD panels incorporated into cellphones and other devices. It raises questions about the reach of our antitrust laws to anticompetitive conduct that involves foreign commerce and harms consumers in the United States and elsewhere.

1. Section 1 of the Sherman Act is a criminal statute that outlaws agreements "in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. § 1. This includes conspiracies among competitors to fix prices, which are criminally prosecuted as felonies. In addition to criminal prosecutions, the government can "institute proceedings in equity to prevent and restrain [Section 1] violations." Id. § 4. Also, "any person" injured "by reason of" a violation can seek treble damages, id. § 15, and "any person" can seek "injunctive relief . . . against threatened loss or damage by a violation," id. § 26.

Congress enacted the FTAIA, which added Section 6a to the Sherman Act, with the express purpose to "increase United States exports of products and services," Pub. L. No. 97-290, § 102(b), 96 Stat. 1233, 1234. Section 6a 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; see also 15 U.S.C. § 45(a)(3) (FTAIA addition to FTC Act).

Section 6a "seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements . . . however anticompetitive, as long as those arrangements adversely affect only foreign markets." F. Hoffmann-La Roche Ltd. v. Empagran S.A. , 542 U.S.

155, 161 (2004). Congress also sought to ensure that purchasers in the United States remained fully protected by the federal antitrust laws. Accordingly, conduct involving "[i]mport trade and commerce [is] 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.

S.A. v. American Airlines Inc. , 303 F.3d 293, 303 (3d Cir. 2002)). The holding, therefore, "was clearly supported by precedent." A55.

3. This Court issued an opinion granting Motorola's petition for interlocutory appeal and affirming the judgment below, but later vacated that opinion and granted Motorola's petition.

## SUMMARY OF ARGUMENT

The FTAIA makes clear that the Sherman Act does not apply to conduct that

2. The price-fixing conspiracy also affected import and domestic commerce in cellphones by raising their price. This effect is not only substantial and reasonably foreseeable, but also direct. The natural and probable consequence of increasing the price of a significant component like LCD panels is to increase the price of cellphones that incorporate those panels. A contrary holding risks constraining the government's ability to prosecute offshore component price fixing that threatens massive harm to U.S. commerce and consumers.

While the government may prosecute conduct that has the requisite effect under Section 6a(1), Section 6a(2) requires that the effect "give rise to [plaintiff's] claim," and thus limits what injuries are redressable by damages claims. The injury to Motorola's foreign affiliates is not caused by the inflated prices of cellphones sold in import or domestic commerce, and therefore the affiliates' claims do not arise from that effect on U.S. commerce. The first purchasers of cellphones in affected U.S. commerce, however, did suffer an injury arising out of the price fixing's U.S. effect.

The *Illinois Brick* doctrine would ordinarily bar these purchasers from recovering damages under federal law because they did not purchase directly from the conspirators, but that doctrine should be construed to permit damages claims by the first purchaser in affected U.S. commerce when Section 6a(2) bars the direct purchasers' claims. That construction would permit vigorous private enforcement of the antitrust laws—the reason full recovery is ordinarily concentrated in direct purchasers—without implicating the doctrine's concerns about multiple recovery and apportionment. Absent that construction, it is possible that no private plaintiff could recover damages under the federal antitrust laws.

In any case, government enforcement is critical to combating foreign price-fixing cartels that threaten significant harm in the United States. Therefore, this Court should hold that a conspiracy to fix the price of a component can directly affect import commerce in finished products incorporating that component and that the conspiracy in this case did directly affect that commerce. That holding would ensure the government is able to enforce the federal antitrust laws regardless of any limitations on private damages claims resulting from Section 6a(2).

## ARGUMENT

"Congress' foremost concern in passing the antitrust laws was the protection of

producers agree not to sell into the United States is conduct "involving" import commerce; the conspirators restrict import commerce by agreeing not to engage in it. Likewise, conduct "involving" import commerce occurs when conspirators fix the price of services necessary to the importation of products, for example, freight transportation into the United States. And perhaps most commonly, a conspiracy to fix the price of products manufactured abroad and sold to customers in the United States, but physically imported by a third party, is conduct involving import commerce. See id. at 471 n.11 (emphasizing the importance of defendants' "sales of magnesite for delivery in the United States").

Anticompetitive conduct can also involve import commerce even though defendants did not specifically "target" that commerce. A conspiracy could fix worldwide prices, including on U.S. imports, and thus involve import commerce even when defendants did not focus on U.S. imports or they sold or delivered only a relatively small proportion of the price-fixed products into the United States. Thus, while "targeting" may be useful to explain why the import-commerce exclusion applies in some cases, "[t]argeting is not a legal element for import trade under the Sherman Act." United States v. Hsiung, __ F.3d __, Nos. 12-10492, 12-10493, 12-10500, 12-10514, 2014 WL 3361084, at *15 (9th

import commerce and thus falls outside Section 6a's coverage, regardless of who physically imported the panels.

But that conclusion, by itself, does not permit Motorola to recover on all its damages claims, Motorola Br. 50-52. As *Empagran* makes clear, the Sherman Act "can apply and not apply to the same conduct, depending upon other circumstances," including "the related underlying harm." 542 U.S. at 174. Permitting Motorola to recover on all its claims because it purchased some panels in import commerce would allow recovery for independently caused foreign injuries on the basis of happenstance.

In damages actions, courts should distinguish among claims based on the underlying transactions to ensure each claim redresses injuries consistent with Sections 1 and 6a, *see id.* at 169-70, and antitrust standing and injury rules. In this way, courts can dismiss those claims seeking damages for foreign injury caused by foreign anticompetitive conduct when the conduct causing the injury involves import commerce but the injury is unrelated to that commerce. As *Empagran* recognized, the federal antitrust laws do not "redress foreign injury in such circumstances" regardless of the FTAIA, but rather "reflect a legislative effort to redress domestic antitrust injury that foreign anticompetitive conduct has caused." *Id.* at 165, 169-73.

A different approach is required for criminal prosecutions and actions in equity brought by the government under Sections 1-4 of the Sherman Act. In these instances, the sovereign sues not to redress a particular injury in its business or to obtain compensation for damages to its property, but to prosecute or enjoin a violation of its laws. *See id.* at 170; *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 398 (2d Cir. 2002) (the government can "bring an equity action to enjoin a violation of the Sherman Act"

even “when no plaintiff has suffered an injury”),  abrogated on other grounds by Empagran , 542 U.S. 155.

If the conduct both involves import commerce and has the requisite effects on U.S. commerce, a criminal conviction or civil ju

In *Minn-Chem*, this Court rejected the Ninth Circuit's view that an effect on U.S. commerce is "direct" only "if it follows 'as an immediate consequence' of the defendant's activity." *Id.*; *see United States v. LSL Biotechs.*, 379 F.3d 672, 680 (9th Cir. 2004). As the Court explained, "[s]uperimposing the idea of 'immediate consequence' on top of the full [integrated] phrase ['direct, substantial, and reasonably foreseeable'] results in a

(citations and internal quotations omitted; ellipsis in original). The concept "provides the legal vocabulary for" excluding liability for conduct deemed too remote from its injurious effect by asking "for example, 'whether the injury that resulted was within the scope of the risk created by the defendant's [wrongful] act; whether the injury was a natural or probable consequence of the [conduct]; whether there was a superseding or intervening cause; whether the [conduct] was anything more than an antecedent event without which the harm would not have occurred.'" *Lotes*, 753 F.3d at 412 (quoting *CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2652 (2011) (Roberts, C.J., dissenting) (alterations in original)). In this way, proximate cause screens out causal connections "so attenuated that the consequence is more aptly described as mere fortuity," *Paroline*, 134 S. Ct. at 1719.

The "courts have a great deal of experience applying" the "proximate-cause inquiry." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1390 (2014). For example, courts "analyze antitrust standing by considering, among other factors, the 'directness or indirectness of the asserted injury,' *Assoc. Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 540 (1983), using familiar principles of proximate causation, see *Blue Shield of Va. v. McCready*, 457 U.S. 465, 476-77 & n. 13 (1982)." *Lotes*, 753 F.3d at 412. "Minn-Chem

immediate-consequence standard demonstrates, the mere existence of an intermediate link does not render an effect indirect. Motorola's pricing decision is not a superseding or intervening cause (nor is the cellphone purchasers' decision to accept that price). In this marketplace, as the expert evidence of what happened corroborates, see supra p. 12, the natural, predictable, and probable consequence of defendants' charging more for LCD panels was higher prices for cellphones containing those panels. See, e.g., 07-1827 N.D. Cal. Dkt. 7843-4, ¶ 451, at 196-97.

That defendants' increasing the price of a major component of cellphones increased the price of cellphones is by no means a "mere fortuity," Paroline, 134 S. Ct. at 1719, nor is it just some "antecedent event," CSX Transp., 131 S. Ct. at 2652, or a "freakish" accident impossible to predict, CDX Liquidating Trust v. Venrock Assocs., 640 F.3d 209, 214 (7.

and indirect." Id. at 413. Accordingly, the Second Circuit recognized that the district court had erred when its direct-effects analysis "placed near-dispositive weight on the fact that" the allegedly monopolized components "are manufactured and assembled into finished computer products" in China "before being sold in the United States." Id. at 412.

In another context, antitrust standing, this Court considered the same question: whether the injury to purchasers of component-incorporating products is too remote from a conspiracy to fix the price of the component. Illinois v. Ampress Brick Co. involved plaintiffs that "purchased buildings of which concrete block was a component part" and sought damages from companies fixing the price of the concrete block. 536 F.2d 1163, 1164 (7th Cir. 1976). The "critical issue" was "'whether parties more remote than the direct purchaser [e.g., a masonry contractor] from an alleged anti-trust violator have standing to sue under Section 4 of the Clayton Act.'" Id. at 1164 (citation omitted). The district court had held that "as to ultimate consumers [such as plaintiffs], their injuries are too remote and [in]consequential to provide legal standing to sue," id. (alteration in original), but this Court disagreed, id. at 1165. Relying on a decision that characterized the injury to indirect purchasers from overcharges passed on to them as proximately caused damages, this Court held that if the indirect purchases "can prove a violation which resulted in an injury to them, they ought to recover." Id.; see id. at 1165-67 (citing In re Western Liquid Asphalt Cases, 487 F.2d 191 (9th Cir. 1973), and other cases).

Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), reversed Ampress Brick on other grounds, but the Supreme Court's holding "in no way implied that anticompetitive injuries cannot be passed through to subsequent purchasers; to the contrary, the Court

acknowledged that its rule 'denies recovery to those indirect purchasers who may have been actually injured by antitrust violations.'" Lotes, 753 F.3d at 413 n.7 (quoting 431 U.S. at 746). Nor did Illinois Brick vacate Ampress Brick; the Supreme Court specifically declined to disturb this Court's standing holding. See 431 U.S. at 728 n.7.

Other courts have reached the same conclusion as Ampress Brick, holding that injuries to indirect purchasers are not too remote, even when they are several steps removed from the antitrust violation in the chain of distribution. See In re Warfarin

price of LCD panels manufactured abroad, based in part on the price fixing's effects on import commerce in products incorporating those LCD panels. These prosecutions have not caused international friction. And they have not strained the U.S. government's cooperative relations with foreign governments; rather, the U.S. antitrust enforcers continue to work with foreign enforcers so each can appropriately and successfully prosecute international price-fixing cartels. SeeUS Supp. Am. Br. 10.

This is not surprising because today price fixing is almost universally condemned, id. at 6, and the extraterritorial application of antitrust laws on the basis of effects is accepted by many jurisdictions around the world, id. at 6-9. The European Union and Japan have recently applied their competition laws to conduct involving components incorporated into products outside their borders. Id. at 9 & n.7.

In any event, it is "well established" that the federal antitrust laws apply "to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States," Hartford Fire Ins. Co. v. California , 509 U.S. 764, 796 (1993), despite the risk that "when applied to foreign conduct [they] can interfere with a foreign

jurisdictions, but some jurisdictions have occasionally expressed concern about private plaintiffs seeking treble damages under U.S. antitrust law for injuries sustained outside the United States. SeeUS Supp. Am. Br. 11-12. This disparity may reflect the government's careful consideration of internat

resources available to the Department of Justice for enforcing the antitrust laws and deterring violations." Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979).

But there are limits on what injuries, although caused by anticompetitive conduct, can be redressed through the private damages remedy. See Associated Gen. Contractors, supra ; Illinois Brick , supra ; Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc. , 429 U.S. 477 (1977); Keogh v. Chicago & Nw. Ry. Co., 260 U.S. 156 (1922). For conduct involving export or wholly foreign commerce but affecting import or domestic commerce, Section 6a(2) provides one limit by requiring that the effect on U.S. commerce "gives rise to [plaintiff's] claim." For example, in Empagran , the Supreme Court rejected the argument that foreign plaintiffs who purchased price-fixed products in wholly foreign commerce satisfied this gives-rise-to requirement by showing that the price fixing injuring them also affected U.S. commerce and that effect gave rise to claims by purchasers in the United States. 542 U.S. at 173-75.

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). All other courts of appeals to consider the question have agreed, holding the effect must be the proximate cause of the plaintiff's injury. Lotes, 753 F.3d at 414; In re Dynamic Random Access Memory (DRAM) Antitrust Litig. , 546 F.3d 981, 986 (9th Cir. 2008); Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979).

give rise to the claims of Motorola's foreign affiliates (which were assigned to Motorola). These claims are for overcharges paid on LCD panels manufactured and delivered in Asia. Thus, the cause of the affiliates' injury cannot be found in the effect defendants' conduct had on import or domestic commerce in cellphones. "[T]o the extent there is any causal connection between [the Motorola foreign affiliates'] injury and an effect on U.S. commerce, the direction of causation runs the wrong way." Lotes, 753 F.3d at 414.

The failure of the Motorola affiliates' claims to satisfy the gives-rise-to requirement, however, does not imply that no private damages claim could satisfy it. Purchasers of cellphones in U.S. import or domestic commerce at inflated prices suffered an injury arising out of the price fixing's effect on that commerce. Damages claims by the first purchaser in affected U.S. commerce would "redress domestic antitrust injury that foreign anticompetitive conduct has caused," Empagran , 542 U.S. at 165.

These purchasers did not purchase directly from the conspirators and thus would ordinarily be barred from pursuing a federal damages action by the Illinois Brick doctrine. See 431 U.S. at 735. But this Court has observed that the bar to indirect purchaser damages claims does not "apply when no purchaser could obtain damages, for then there is no risk of double recovery (and no need to calculate elasticities in order to apportion damages among multiple tiers)." U.S. Gypsum Co. v. Ind. Gas Co., 350 F.3d 623, 627 (7th Cir. 2003). In California v. ARC America Corp. , the Supreme Court emphasized that Illinois Brick "was concerned not merely that direct purchasers have sufficient incentive to bring suit under the antitrust laws, . . . but rather that at least some party have sufficient incentive to bring suit." 490 U.S. 93, 102 n.6 (1989). If direct purchaser damages claims were barred by Section 6a, allowing damages claims by the

first purchaser in affected U.S. commerce would permit "vigorous private enforcement of the antitrust laws," Illinois Brick , 431 U.S. at 745.

Although the Supreme Court has been reluctant to "carve out exceptions to the [direct purchaser] ru le for particular types of markets," Kansas v. UtiliCorp United, Inc., 497 U.S. 199, 216 (1990) (quoting Illinois Brick , 431 U.S. at 744), a holding that it does not apply if the Sherman Act itself, through Section 6a, bars recovery by the direct purchaser does not risk "litigat[ing] a series of exceptions." Id. at 217. Nor would it "entail the very problems" of proof and li ne-drawing the direct purchaser rule was meant to avoid, id. at 216-17 (quoting Illinois Brick , 431 U.S. at 744-45).

The government is "primarily charged by Congress with the duty of protecting the public interest" under the Sherman Act through criminal prosecutions and actions in equity. United States v. Borden Co., 347 U.S. 514, 518 (1954). Public enforcement is all the more important when Section 6a bars da

In that case, government enforcement actions would be not only the primary enforcement mechanism, they may be essentially the only means to counter anticompetitive conduct involving export or wholly foreign commerce that nevertheless affects import or domestic commerce. Thus, even if the claims here did not arise from an effect on U.S. commerce, this Court should recognize that such an effect can be direct, substantial, and reasonably foreseeable. Properly construing the direct effect requirement ensures that the U.S. government can protect U.S. commerce and consumers.

## CONCLUSION

This Court should hold that the conspiracy to fix the price of LCD panels had a direct, substantial, and reasonably foreseeable effect on U.S. import and domestic commerce in cellphones incorporating these panels.

Respectfully submitted.

/s/ Nickolai G. Levin

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September 5, 2014

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6,958 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii). 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 12-point Georgia font in text and the footnotes.

September 5, 2014

/s/ Nickolai G. Levin
Nickolai G. Levin

CERTIFICATE OF SERVICE

I, Nickolai G. Levin, hereby certify that on September 5, 2014, I electronically filed the foregoing Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Neither Party with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF System. Once the brief is accepted for filing by the Clerk's Office, I will send 3 copies to the Clerk of the Court by FedEx.

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

September 5, 2014

/s/ Nickolai G. Levin
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