IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

____)	**No. 14-8003**

April 24, 2014

/s/ Nickolai G. Levin
Nickolai G. Levin

CERTIFICATE OF SERVICE

I, Nickolai G. Levin, certify that on April 24, 2014, I electronically filed the foregoing Unopposed Motion of the United States and the Federal Trade Commission for Leave To File an Amicus Brief in Support of Panel Rehearing or Rehearing *En Banc* and supporting declaration with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF System. If the motion is granted, I will send 30 copies of the attached amicus brief to the Clerk of the Court by FedEx.

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

No. 14-8003

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTOROLA MOBILITY LLC,

Plaintiff-Appellant,

AU OPTRONICS CORP., et al.,

Defendants-Appellees.

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)

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE IN SUPPORT OF PANEL REHEARING OR REHEARING *EN BANC*

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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

claims for price fixing of products sold abroad, no matter how massively and predictably U.S. consumers were harmed. The panel decision should be vacated.

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" who is "injured . . . by reason of" a violation can seektutcSble

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

States, (II) LCD panels purchased by Motorola's foreign subsidiaries and delivered to them outside the United States, where they were incorporated into cellphones later sold in the United States, and (III) LCD panels purchased by the foreign subsidiaries and delivered to them outside the United States, where they were incorporated into cellphones later sold in foreign countries.

The case was transferred to the Northern District of California for pretrial proceedings as part of multi-district litigation. Defendants moved for partial summary judgment, arguing that Section 6a barred Motorola's Category II and III damages claims. The MDL Court denied the motion, holding that the evidence of price-fixing conduct in the United States sufficiently established that the conduct had a direct, substantial, and reasonably foreseeable effect on U.S. commerce, which gave rise to Motorola's claims. 07-1827 N.D. Cal. Dkt. 6422, at 5.

The case was remanded to the Northern District of Illinois for trial. Defendants sought reconsideration of the MDL Court's denial of partial summary judgment, arguing *only* that any effect the price-fixing conspiracy had on U.S. commerce did not give rise to Motorola's Category II and III claims so

3. On March 13, 2014, Motorola filed an uncontested petition for interlocutory appeal. On March 27, a panel of this Court (Judges Posner, Kanne, and Rovner) granted the petition. While recognizing that this was a "complicated" case with "room for a difference of opinion," the panel nevertheless "dispense[d] with further briefing and with oral argument" and affirmed the summary judgment order. Op. 2-3. The panel concluded that Section 6a applied to Motorola's Category II and III claims and that they did not meet the requirements of the effects exception.[1] The panel deemed "frivolous" the Category III claims seeking damages based on price-fixed panels incorporated into cellphones sold in foreign countries, because those panels "never entered the United States, so never became domestic commerce." *Id.*

For the Category II claims seeking damages based on panels incorporated into cellphones sold in the United States, the panel acknowledged that, if the price fixing were proved, there was "doubtless *some* effect" on U.S. commerce in cellphones, and this effect was foreseeable. Op. 4. "And who knows what 'substantial' means in this context?" *Id.* Nevertheless, the panel held that the "effect" was "indirect or 'remote,' the term used in *Minn-Chem*." *Id.* "The effect of component price fixing on the price of the product of which it is a component is indirect, compared to the situation in *Minn-Chem*, where 'foreign sellers allegedly created a cartel, took steps outside the United States to drive the price up of a product that is wanted in the United States, and then (after succeeding in doing so) *sold that product to U.S. customers.*'" *Id.* at 4-5 (quoting *Minn-Chem*, 683 F.3d at 860; emphasis added by panel).

[1] The panel noted that Section 6a would not apply (and thus Section 1 would apply) to Motorola's Category I claims seeking damages based on LCD panels sold to Motorola in the United States, because they are within Section 6a's import commerce exclusion, but that these claims are not involved in this appeal. Op. 4.

The panel further held that the Category II claims also failed the effects exception's requirement that the effect on U.S. commerce "give[s] rise to" an antitrust claim. Op. 5. The conspiracy's effect on domestic commerce in cellphones "is mediated by Motorola's decision on what price to charge U.S. consumers for the cellphones manufactured

Department of Justice's approach" that "'direct'" means only "a reasonably proximate causal nexus" "is more consistent with the language of the statute" and properly "addresses the classic concern about remoteness," excluding "from the Sherman Act foreign activities that are too remote from the ultimate effects on U.S. domestic or import commerce." *Id.*

The panel purported to apply *Minn-Chem*, but its decision undercuts *Minn-Chem*'s holding by declaring the effects here too "remote." Op. 4-5. The panel found significant that, unlike in *Minn-Chem*, the defendants here did not sell the Category II panels directly "*to U.S. customers*." *Id.* (quoting *Minn-Chem*, 683 F.3d at 860; emphasis added by panel). But when a foreign cartel fixes the price of goods sold directly to U.S. customers, the import commerce exclusion applies. *See Minn-Chem,* 683 F.3d at 854-55 (the import commerce exclusion applies to goods "being sent directly into the United States," i.e., "pure import commerce"). Limiting the effects exception to direct sales to U.S. customers would render the exception "superfluous . . . or insignificant," violating a "cardinal principle" of statutory interpretation. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

In applying the effects exception, this Court has recognized that "domestic and foreign markets are interrelated and influence each other." *Metallgesellschaft AG v. Sumitomo Corp. of Am.*, 325 F.3d 836, 842 (7th Cir. 2003). Congress created the effects exception because it understood that conduct involving wholly foreign commerce can have significant anticompetitive effects on U.S. domestic or import commerce and wanted that conduct to remain subject to the Sherman Act's protections. *Cf. id.* (holding that the effects exception applied to claims brought by a foreign plaintiff involving its purchase of copper futures contracts on the London Metals Exchange).

To be sure, some effects on U.S. commerce would be indirect or too remote. For instance, the effect would not be direct where the causal connection between the conduct and the U.S. effect is "so attenuated that the consequence is more aptly described as mere fortuity," *Paroline v. United States*, No. 12-8561, Slip. Op. 7 (U.S. Apr. 23, 2014). *Cf.* 1B Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 272f2, at 295-96 (4th ed. 2013) (the "higher local price for electricity" outside the United States caused by "an agreement among non-American producers in Africa" to raise the price of electrical transformers would cause U.S. exporters to export "fewer electricity-using machines," but "obvious[ly]" that effect would not put the agreement in "the Sherman

specifically declined to disturb that holding, *see Illinois Brick*, 431 U.S. at 728 n.7. This conclusion—that downstream injuries are not too remote—comports with classical principles of proximate causation: "The test is not to be found in any arbitrary number of intervening events or agents, but in their character, and in the natural and probable connection between the wrong done and the injury." 1 J.G. Sutherland & John R. Berryman, *A Treatise on the Law of Damages* 35-36, 77 (2d ed. 1893)

Applying these principles to the record, the conspiracy's effect on U.S. commerce in cellphones is direct. The natural and probable consequence of increasing the price of a critical and substantial component like LCD panels is an increase in the price of cellphones. Nor does the effect become speculative or uncertain because it is "mediated" by Motorola's decision on what price to charge for its cellphones. Op. 6. There is evidence that the overcharges on the price-fixed panels have been passed on to cellphone purchasers in the United States. *See, e.g.*, 07-1827 N.D. Cal. Dkt. 7843-4, ¶ 451, at 196-97. Thus, the "effect of defendants' anticompetitive conduct did not change significantly between the beginning of the process (overcharges for LCD panels) and the end (overcharges for [cellphones incorporating those panels])," and it "'proceeded without deviation or interruption' from the LCD manufacturer to the American retail store." *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 822 F. Supp. 2d 953, 964 (N.D. Cal. 2011). This is why the effect on U.S. commerce in cellphones is "doubtless" (Op. 4).

Unless vacated, the panel's narrow view of the statutory term "direct" is likely to constrain the government's ability to effectively prosecute cartels that substantially and

had bought from foreign manufacturers." Op. 7. Anticompetitive conduct involving those component purchases often causes significant harm in the downstream consumer markets.

that conduct also causes domestic harm." *Id.* at 166, 169. Our "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." *Id.* at 165. Indeed, the "extraterritorial application of antitrust laws on the basis of the effects doctrine is by now widely accepted" around the world. Florian Wagner-von Papp, *Competition Law and Extraterritoriality*, in *Research Handbook on International Competition Law* 21, 57 (Ariel Ezrachi ed. 2012).

The panel also was incorrect to suggest that finding the effects on U.S. commerce in this case to be "direct" would "enormously increase the global reach of the Sherman Act." Op. 8. It is a "well-established principle that the U.S. antitrust laws reach foreign conduct that harms U.S. commerce." *Minn-Chem*, 683 F.3d at 858; *cf. United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 4 (1st Cir. 1997) ("the case law now conclusively establishes [that the Sherman Act authorizes antitrust actions] predicated on wholly foreign conduct which has an intended and substantial effect in the United States"). "When an international cartel has effects both within and without our borders, American law applies to at least the domestic effects." *United States v. Leija-Sanchez*, 602 F.3d 797, 801 (7th Cir. 2010). As this Court noted in *Minn-Chem*, it is important for our courts to protect U.S. consumers from foreign price-fixing conspiracies because the

that even if the first prong of the effects exception is satisfied and the government or domestic purchasers could bring an antitrust claim, foreign plaintiffs could not recover damages for their independently caused foreign harm. *See* 542 U.S. at 173-75. This is so because Section 6a's effects exception separately requires that the direct effect on U.S. commerce gives rise to the plaintiff's claim. *Id.* This "independent" requirement (Op. 5) "will protect many a foreign defendant." *Minn-Chem*, 683 F.3d at 858.

Indeed, resolving a case on the basis of the second prong of the effects exception—the "gives rise to" requirement—does not threaten the government's ability to prevent anticompetitive harm like the panel's holding on the first prong does. The second prong is claim-specific and thus tailored to the particular injury for which a particular plaintiff .5(e p)-1..1(s)8 c—

F.3d 1267, 1271 (D.C. Cir. 2005); *accord In re Dynamic Random Access Memory Antitrust Litig.*, 546 F.3d 981, 988 (9th Cir. 2008); *In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 538 (8th Cir. 2007). As a result, the Sherman Act "can

equitable remedy or criminal punishment for a Sherman Act offense that involves wholly foreign conduct that has the requisite effect on U.S. commerce. *Empagran*, 542 U.S. at 170-71; *cf. Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 398 (2d Cir. 2002) ("[T]he Sherman Act contains its own enforcement provision that can be invoked by the United States even when no plaintiff has suffered an injury."), *abrogated on other*

Respectfully submitted.

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April 24, 2014

CERTIFICATE OF COMPLIANCE

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 11-point Georgia font in the footnotes.

April 24, 2014

/s/ Nickolai G. Levin
Nickolai G. Levin

CERTIFICATE OF SERVICE

I, Nickolai G. Levin, hereby certify that on April 24, 2014, I electronically filed the foregoing Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Panel Rehearing or Rehearing *En Banc* 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 30 copies to the Clerk of the Court by FedEx.

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