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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, v. LSL BIOTECHNOLOGIES, INC. *et al.*, Defendants.	Case No.: CV-00-529-TUC-RCC **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF UNITED STATES' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

I. INTRODUCTION

The United States sued Defendant LSL Biotechnologies, Inc. ("LSL"), its joint venture partner, Seminis Vegetable Seeds, Inc. ("Seminis"), and their joint venture company, LSL PlantScience LLC, (collectively "Defendants") to enjoin them from enforcing an illegal agreement that prevents Hazera Quality Seeds from competing with them. The United States alleges in its Complaint, and intends to prove at trial, that this agreement injures competition in the commerce of the United States to the detriment of U.S. farmers and consumers.

As noted in paragraph 24 of the Complaint, the contractual agreement that the Defendants use to exclude Hazera provides that:

> Hazera shall not engage, directly or indirectly, alone, with others and/or through third parties, in the development, production, marketing or other activities involving tomatoes having any long-shelf-life qualities.

Read in conjunction with other relevant contractual provisions, this agreement (hereinafter, the "Non-Compete Agreement") prohibits Hazera, for all time, from ever selling long or extended shelf life tomato seeds, developed by any technological method, in the United States or anywhere else in North America. Complaint ¶ 4.[1]

In an effort to avoid a trial on the merits of this naked and permanent restraint, the Defendants filed a motion to dismiss, a memorandum of points and authorities ("Def. Memo") and declarations.[2] The Defendants do not deny that the Non-Compete Agreement prohibits Hazera from selling long or extended shelf life tomato seeds to U.S. farmers, and from selling seeds in Mexico that would produce long or extended shelf life tomatoes for the U.S. winter tomato market. Nonetheless, the Defendants assert that this Court should dismiss this action before they even answer the Complaint for three basic reasons: (1) they currently do not sell long shelf life seeds in the United States (although they do sell conventional seeds to U.S. farmers to grow tomatoes that compete with long shelf life tomatoes in the winter tomato market); (2) they say the United States can only "speculate" that Hazera would succeed in developing and marketing long

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[1]The Non-Compete Agreement is also referred to as the "Restrictive Clause" in the Complaint. That agreement and subsequent amendments are attached in Exhibit 1.

[2]The Defendants rely on the affidavits attached to their motion to dismiss to support their argument that the Complaint should be dismissed for lack of subject-matter jurisdiction. The United States, therefore, has attached exhibits to this memorandum to show that there is a genuine dispute of facts on those issues.

or extended shelf life seeds for the United States if freed from the constraints of the Non-Compete Agreement; and (3) LSL filed lawsuits in Israel seeking to enforce their contractual rights under the agreement.

That LSL currently sells long shelf life seeds only in Mexico, and not in the United States, is of no relevance to the Defendants' jurisdictional arguments. What matters is that the challenged restraint harms U.S. consumers by excluding a competitor. Even in making this argument, however, the Defendants admit that the long shelf life seeds that are planted in Mexico produce long shelf life tomatoes that are imported into the United States. Def. Memo at 1. As discussed below, that effect on U.S. commerce alone is more than sufficient to confer subject-matter jurisdiction on this Court.[3]

The Defendants' "speculation" argument (Def. Memo at 7) is unavailing as a matter of law and fact. The United States need not "prove" that Hazera will achieve commercial success in order to prevail on the merits -- much less to survive a motion to dismiss. The United States need only allege that Hazera is a potential competitor in the market alleged in the Complaint, and prove that allegation at the appropriate stage of this suit.

Finally, the Defendants' international comity arguments (Def. Memo at 14-17) are misplaced. Neither the filing of the Complaint, nor the Court's exercise of its jurisdiction to hear

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[3]This is LSL's second attempt to convince this court of the merits of its jurisdictional arguments. It previously argued that it should be allowed to shield the Non-Compete Agreement from the United States' investigation by refusing to comply with our Civil Investigative Demand ("CID"). Judge Roll summarily rejected essentially the same jurisdictional arguments that the Defendants raise in this motion, and issued an order requiring that LSL comply with the CID. *See* LSL's Opposition to Petition to Enforce Civil Investigative Demand at 14, 15, and Judge Roll's Order granting the United States' petition in *United States v. LSL Biotechnologies, Inc.*, No. 98-7-JMR (D. Ariz. 1998). (Exhibit 2).

the case, can reasonably be expected to interfere with the Executive Branch's foreign relations with the Government of Israel (the Executive Branch, after all, made the decision to initiate this suit); and the Court's ultimate decision on the merits will not place anyone in a position in which he or she cannot obey the laws and rulings of both the United States and Israel.

In short, the Defendants are consistently wrong on the law, and often wrong on the facts. This Court has jurisdiction to enjoin Defendants from enforcing the Non-Compete Agreement under Federal Rule of Civil Procedure 12(b)(1); the United States has pled a cause of action on which relief may be granted under Rule 12(b)(6); and the trial before this Court would not raise any plausible comity issues.

II. FACTUAL BACKGROUND

In the early 1980's, corporate parents of LSL and Hazera were involved in a research project at a university in Israel to develop winter tomatoes with a longer shelf life for the American market.[4] At that time, "mature gassed green tomatoes" were the predominant fresh-market winter tomatoes in the United States.[5] By introducing a ripening inhibitor (RIN) gene into

[4]Page 2 of the Israel-United States Binational Industrial Research and Development Foundation (BIRD) proposal (which the Defendants produced in response to the United States' CID) states that: "The purpose of the project is to develop tomatoes with better taste. This will satisfy a strong need in the American market." Throughout the agreement, the parties refer to tomatoes that will appeal to American consumers. *E.g.*, "It is no secret that American tomatoes are harvested prematurely today and suffer from qualities of mealiness, lack of taste, poor color and aroma and a high percentage of spoilage" (p. 2); "It [the tomato to be developed] will be of the larger beefsteak variety with size and weight to appeal to the American market" and will be "able to be . . . shipped for long distances via surface transportation with no spoilage and need for preservation" (pp. 2, 3). Exhibit 3.

[5]The Complaint and the Schwarz Declaration include detailed descriptions of the markets and commerce involved in this action. In summary: "Fresh-market" tomatoes are sold directly to consumers (as opposed to "processed" tomatoes that are sold to producers of processed tomato products, such as catsup, tomato paste and salsa). "Summer" tomatoes are grown in every state

varieties of tomatoes that are popular in the United States, they successfully inhibited the ripening process long enough to allow vine-ripened tomatoes to be trucked relatively long distances without spoiling. Winter tomatoes grown from these RIN seeds (commonly known as "long shelf life" tomatoes) are now sold in grocery stores throughout the United States. Declaration of Amit Schwarz, President of Hazera Seeds, Inc. ("Schwarz Dec.") ¶ 17 (Exhibit 5).

Now, years after Hazera last collaborated with the Defendants on any aspect of long shelf life tomato research and development, Hazera, on its own, is developing what it believes will be a better winter tomato for the U.S. consumer -- using traditional breeding techniques to produce tomatoes that stay firm long enough to be trucked to consumers without gassing or the RIN gene (commonly known as "extended shelf life" tomatoes). Schwarz Dec. ¶ 15, 23. Nonetheless, the Defendants insist that the Non-Compete agreement grants them the "right" to prohibit Hazera <u>for all time</u> from selling <u>any</u> tomato seeds with long or extended shelf life attributes (including

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except Alaska, and harvested from about July or August through September in most states. "Winter" tomatoes are grown in southern portions of the United States and Mexico, and shipped to grocery stores throughout the United States from about October through June of the next year (when summer tomatoes are not available in most regions of the United States). Conventional vine-ripened tomatoes begin to soften shortly after they are picked, and have a shelf life of about one to two weeks after they are packed. That is not a major concern for summer tomatoes that typically move relatively short distances from local farms to nearby grocery stores. The vine-ripened tomato's brief shelf life is a big problem, however, for growers of winter tomatoes who must find some to way keep them from spoiling while they are trucked long distances to grocery stores throughout the United States. Growers of "mature green" tomatoes lengthen their shelf life to three to four weeks by picking them from the vine before they ripen, and then "reddening" them through the application of an ethylene gas sometime before they reach the grocery store. Complaint ¶¶ 1-3,14-15, 18, 20-22, 33-34, 35-39; Schwarz Dec. ¶ 9 - 15. For general market background information, see D. Plunkett, "Mexican Tomatoes -- Fruit of New Technology," ("Mexican Tomatoes"), G. Lucier, "Tomatoes: A Success Story," *Agricultural Outlook/July 1994* "Tomatoes: Background," and "Tomatoes: Questions and Answers," (USDA Economic Research publications attached as Exhibit 4).

seeds developed by traditional plant breeding methods without RIN or other ripening inhibitor genes) to farmers located anywhere in North America. Complaint ¶¶ 23 - 28; Schwarz Dec. ¶ 19.

In the absence of the Non-Compete Agreement, it is highly likely Hazera would commit significant financial resources, and its considerable experience and skill as a tomato breeder, to the development of non-RIN extended shelf life seeds that would produce better tasting winter tomatoes for U.S. consumers. Hazera's impressive record of success in improving the quality of tomato seeds for markets throughout the world provides compelling evidence that it is an important potential competitor in U.S. markets -- and explains the Defendants' unstinting efforts to keep it from ever selling any long or extended shelf life tomato seeds to any farmers whose winter tomatoes could ever be trucked to U.S. consumers. Schwarz Dec. ¶ 7, 19.

III. THE COURT HAS SUBJECT-MATTER JURISDICTION OVER THIS ACTION UNDER RULE 12(b)(1)

Like other courts of appeal, the Ninth Circuit has established a very high standard for prevailing on a motion to dismiss for lack of subject-matter jurisdiction. "[T]he moving party should prevail only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Trentacosta v. Frontier Pac. Aircraft Indus., Inc.*, 813 F.2d 1553, 1558 (9th Cir. 1987); *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir.1983); *Thornhill Publ'g Co. v. General Tel. & Elecs. Corp.*, 594 F.2d 730, 733-35 (9th Cir.1979). If a defendant relies upon matters outside the pleadings to dismiss for lack of subject-matter jurisdiction, the plaintiff may produce declarations or other evidence to support its allegations. *Trentacosta*, 813 F.2d at 1558; *see also* 5 Wright & Miller, *Federal Practice and Procedure*, § 1363, at 653-54 (1969). Moreover, the Ninth Circuit has observed that, ordinarily, the courts

should not resolve jurisdictional facts that are intertwined with the merits (such as many of the "facts" alleged in the Defendants' memorandum) in a Rule 12(b)(1) motion; instead they should be resolved at trial. *Careau Group v. United Farm Workers,* 940 F.2d 1291 (9th Cir. 1991).[6]

Section 1 of the Sherman Act declares illegal every contract, combination or conspiracy "in restraint of trade or commerce among the several States, or with foreign nations." 15 U.S.C. §1. The jurisdictional requirement of the Sherman Act with respect to interstate commerce "may be satisfied under either the 'in commerce' or the 'effect on commerce' theory." *McClain v. Real Estate Board,* 444 U.S. 232, 242 (1980); *United States v. ORS, Inc.*, 997 F.2d 628, 629 n.4 (9th Cir. 1993).

The "in commerce" test was adopted "to exempt local commerce from regulation, while reaching every transaction that crosses a state line." Areeda & Turner, *Antitrust Law* ¶267b (2000). As recognized in the landmark *Swift* case, the courts have jurisdiction over a transaction if it involves the movement of the product in question across state lines, *i.e.*, the flow of the product in interstate commerce. *Swift & Co. v. United States,* 196 U.S. 375, 398 (1905).

To meet the "effect on commerce" test, it need only be shown that the Defendants' enforcement of the Non-Compete Agreement has a "not insubstantial effect" on interstate commerce. *Turf Paradise, Inc. v. Arizona Downs*, 670 F.2d 813, 818-19 (9th Cir. 1982) (citing *McClain*, 444 U.S. at 242-43); *Community Builders, Inc. v. City of Phoenix*, 652 F.2d 823, 827 (9th Cir. 1981) ("We will find that an antitrust defendant's activities have a sufficient nexus with

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[6]The Third Circuit has adopted a similar rule: "[B]ecause, in the Sherman Act context, jurisdictional facts are often closely intertwined with the merits of the claim, 'it is incumbent upon the trial judge to demand less in the way of jurisdictional proof than would be appropriate at a trial stage.'" *Mortensen v. First Fed. Sav. & Loan Ass'n,* 549 F.2d 884, 891, 892 (3rd Cir. 1997).

interstate commerce to involve Sherman Act jurisdiction where they can be shown as a practical matter of economics to have had a not insubstantial effect on the line of commerce involved"); *ORS*, 997 F.2d at 630. It is not necessary to "make the more particularized showing" that the alleged illegal conduct of the defendant has a substantial effect on interstate commerce. *Turf Paradise*, 670 F.2d at 818; *McClain*, 444 U.S. at 242-43; *see also Palmer v. Roosevelt Lake Log Owners Ass'n*, 651 F.2d 1289, 1290-91 (9th Cir. 1981) (finding a substantial effect on interstate commerce where the plaintiff had sold $7,000 worth of logs and presented evidence that it could have sold five times that amount but for the alleged anticompetitive activities of the defendant).

A. The Non-Compete Agreement Excludes a Competitor from Selling Long or Extended Shelf Life Seeds in the Commerce of the United States

As alleged in the Complaint and described in the Schwarz Declaration, the Defendants are using their contractual agreement to prevent Hazera from conducting business activities in the interstate commerce of the United States. Indeed, the Non-Compete Agreement expressly purports to give LSL the right to prohibit Hazera from selling any long or extended shelf life seeds anywhere in North America (which, of course, includes the United States). Complaint ¶¶ 19, 23-28; Schwarz Dec. ¶ 19. Ignoring the clear U.S. scope of the clause, however, the Defendants argue that there is no "U.S. market" for long shelf life tomato seeds, because they erroneously claim that they are not selling those seeds to U.S. farmers today.[7] Consequently, under the Defendants' theory, any finding that Hazera would sell long or extended shelf life seeds

[7]This allegation is controverted by the sworn statement of one of LSL's founders that it has sold long shelf life seeds in California. Deposition of Martin Gans at 26, 27 (Exhibit 6). Moreover, Defendant Seminis sells millions of dollars worth of tomato seeds in the United States -- including seeds that produce gassed mature green winter tomatoes, which compete with long or extended shelf life tomatoes in the winter tomato market. Complaint ¶¶ 29, 34.

to U.S. farmers if freed from the Non-Compete Agreement must be based on speculation. Def. Memo at 7.

The Defendant's legal argument relies upon flawed circular logic (*i.e.*, if firms fail in their efforts to keep rivals out of a geographic area, there is a market in that area; but if they succeed, there is no market in that area). This Court's jurisdiction does not depend on proof that Hazera or anyone else has already sold some minimum volume of long or extended shelf life seeds to U.S. farmers. As recognized by the Supreme Court:

> The proper analysis focuses, not upon actual consequences, but rather upon the potential harm that would ensue if the conspiracy were successful. . . . Thus, respondent need not allege, or prove, an actual effect on interstate commerce to support federal jurisdiction.

Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 330 (1991)*; see also American Ad Management v. GTE Corp.*, 92 F.3d 781, 792 (9th Cir. 1996) (alleged conspiracy among Yellow Page publishers to eliminate commissions to sales representatives had the potential to affect interstate commerce).

In short, the Sherman Act is not limited to agreements among current competitors -- it also prohibits agreements that exclude potential entrants. *See United States v. Topco Assoc. Inc.*, 405 U.S. 596, 608 (1972) (agreement by which firms that had never previously competed agreed to stay out of one another's markets held illegal *per se*); *Engine Specialties, Inc. v. Bombardier Ltd.*, 605 F.2d 1, 9 (1st Cir. 1979), *cert. denied*, 449 U.S. 890 (1980) (agreement precluding a snowmobile manufacturer from entering minibike market held illegal *per se*); *Yamaha Motor Co. v. FTC***,** 657 F.2d 971, 978-79 (8th Cir.1981) (non-compete agreement between Japanese firm that had never sold outboard motor engines in the United States and a U.S. manufacturer of outboard motors held illegal).

The face of the Non-Compete Agreement itself is, in effect, an admission in this regard. It provides clear evidence that LSL perceived Hazera to be a likely new entrant -- unless excluded by a contractual agreement -- in U.S. markets that LSL wished to control. In an analogous situation, the Third Circuit recognized in *United States v. Sargent Elec. Co.*, 785 F.2d 1123, 1127 (3rd Cir. 1986), that:

> To some extent, of course, a horizontal agreement tends to define the relevant market, for it tends to show that the parties to it are at least potential competitors. If they were not, there would be no point to such an agreement. Thus, its very existence supports an inference that it would have an effect in a relevant market.

In this case, however, the Court need not rely solely on the text of the Non-Compete Agreement to conclude that, at a minimum, there is a factual dispute over whether Hazera is a potential entrant into the market alleged in the Complaint. As noted in the Schwarz Declaration, Hazera has already launched limited research, development and marketing programs in Florida and California. It has transferred several employees to California, and leased land in that state for field tests. In Florida, Hazera has begun to conduct initial marketing efforts to sell its Tomato Yellow Leaf Curl Virus resistant seeds.[8] According to Mr. Schwarz, these activities represent a fraction of the effort that Hazera would put into developing superior extended shelf life tomato seeds for the U.S. market if it were freed from the Non-Compete Agreement. These efforts are more than sufficient, however, to demonstrate that Hazera clearly is a potential competitor, who has already begun to develop a U.S. seed business and test-market its product, and has the potential to become a major competitive force in the United States seed business if freed from the constraints of the Non-Compete Agreement. *See* Schwarz Dec. ¶ 21-23, 25.

[8]Hazera has also sold a significant volume of non-RIN long shelf life seeds to Mexican farmers, who are selling their tomatoes to U.S. consumers. *See* Schwarz Dec. ¶ 20.

It is also likely that Hazera's extended shelf life seeds would be transported in the commerce of the United States. If Hazera develops and grows seeds in the United States, it is likely that seeds grown in one state will be sold in nearby states with similar soil and climatic conditions (*e.g.*, seeds produced in California may be sold to farmers in Arizona). Schwarz Dec. ¶ 23. If, like LSL, Hazera grows its seeds in Israel, the seeds would be imported into the United States and thus move in U.S. foreign commerce. Def. Memo at 6.

B. The Non-Compete Agreement Has an Adverse Effect on U.S. Commerce in Winter Tomatoes

The United States' Complaint alleges that the Non-Compete Agreement, in addition to prohibiting Hazera from selling long or extended shelf life tomato seeds in the commerce of the United States, also has a not insubstantial effect on the interstate movement of winter tomatoes grown from those seeds -- the movement of long or extended shelf life tomatoes from farms in southern portions of the United States to grocery stores throughout the country. Complaint ¶ 18. The Defendants appear to find some comfort in the fact that the Non-Compete Agreement only restricts the sale of long or extended shelf life tomato seeds, but the primary monetary impact of this restriction is on the tomatoes grown from those seeds. Def. Memo at 5. This is a distinction without a jurisdictional difference.

As the Supreme Court and this Circuit have ruled, Sherman Act jurisdictional requirements are met when the intrastate restraints on one product affect the downstream interstate movement of related products. *See Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948) (an agreement to fix the prices of sugar beets in California was within the jurisdiction of the Sherman Act because the sugar made from the beets moved in

interstate commerce); *McClain*, 444 U.S. at 232 (conspiracy among New Orleans real estate brokers to fix minimum commission levels sufficiently affected interstate commerce to confer Sherman Act jurisdiction, because it affected the interstate flow of real estate loans and insurance); *Palmer*, 651 F.2d at 1292 (finding Sherman Act jurisdiction over restrictions on harvesting logs in the State of Washington, because they were sold to lumber mills who sold processed lumber products outside the state); *see also Rasmussen v. American Dairy Ass'n*, 472 F.2d 517, 525 (9th Cir. 1972) (jurisdiction over conspiracy to drive beverage manufacturer from the Arizona market established by upstream interstate movement of ingredients for the product).

C. The Non-Compete Agreement's Restraints on Hazera's Sales of Long or Extended Shelf Life Seeds in Mexico Affect U.S. Commerce

The Defendants attempt to shift the focus of the Court's jurisdictional inquiry from their restrictions on Hazera's interstate sales of seeds to U.S. farmers, and the effect of that restriction on interstate commerce in winter tomatoes, by suggesting that this case is solely about foreign conduct. They argue that the Court lacks subject-matter jurisdiction, because prohibiting Hazera from selling long or extended shelf life seeds to Mexican farmers does not have a "direct, substantial and reasonably foreseeable effect on commerce within the United States." Def. Memo at 9-11.

This Court has jurisdiction over the Non-Compete Agreement because it injures competition in U.S. markets. This jurisdiction does not somehow evaporate because they drafted it (a) to prohibit Hazera from selling seeds to Mexican farmers, as well as U.S. farmers; or (b) to preclude U.S. consumers from purchasing better winter tomatoes that would be grown in Mexico, as well as in the United States. But, even if the Defendants had only excluded Hazera from selling

its long or extended shelf life seeds to Mexican farmers, that hypothetical agreement would still violate the Sherman Act, and this Court would still have jurisdiction to strike it down.[9]

The standard for determining whether foreign conduct has an impact on U.S. commerce that is sufficient to confer jurisdiction of the U.S. courts was articulated by the Supreme Court in *Hartford Fire Ins. v. California*, 509 U.S. 764 (1993). After reviewing a long line of cases on the issue, the Court held: "It is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." Id. at 796.

The Defendants suggest that Section 402 of the Foreign Trade Antitrust Improvements Act (FTAIA) (15 U.S.C. § 6a) is also relevant to the jurisdictional issue in this case. Def. Memo at 9-11. In *Hartford*, the Supreme Court indicated that it was unclear whether the FTAIA's "direct, substantial, and reasonably foreseeable effects" standard amends, or merely codifies the traditional "meant to and did produce some substantial effects" test; but, in any event, the alleged

[9]Drafting a broad Non-Compete Agreement that prohibited Hazera from selling or long or extended shelf life seeds to U.S. and Mexican farmers alike was the result of a deliberate effort. If it was to insulate itself from unwelcome competitive constraints, LSL had to exclude Hazera from the United States and from Mexico. If Hazera were allowed to compete for sales of seeds in Mexico, LSL would run the risk that farmers in Mexico might prefer Hazera's seeds. And, if Hazera were free to sell its extended shelf life seeds in the United States, LSL would run the risk that U.S. consumers would prefer the winter tomatoes grown from those seeds to the tomatoes grown from LSL's RIN seeds in Mexico; and that Mexican farmers consequently would buy fewer seeds from LSL. In reaction to that shift in consumer demand, Mexican farmers would either switch to Hazera's seeds (if Hazera had developed comparable seeds for Mexican soil and climatic conditions), or plant fewer seeds as a consequence of losing market share to Florida farmers. Moreover, if U.S. consumers preferred vine-ripened, extended shelf life tomatoes grown from Hazera's seeds to gassed mature green tomatoes grown from Seminis's seeds, Seminis would encounter the unwelcome discipline of a competitive market.

conduct in that case plainly met either standard. 509 U.S. at 796 n.23.[10] Likewise, the conduct in this case plainly meets either standard.

The Complaint describes the obvious connection between prohibiting Hazera from selling long or extended shelf life tomato seeds in Mexico and its effect on U.S. commerce in winter tomatoes. Complaint ¶¶ 39-41. Indeed, the Defendants admit that "some" tomatoes grown from long shelf life seeds in Mexico are imported into the United States. Def. Memo at 1. U.S. Department of Agriculture publications note that most of the long shelf life tomatoes grown in the Sinaloa region of Mexico (the center for Mexico's production of winter tomatoes) are exported to the United States. *Mexican Tomatoes, supra* note 4, at 1. The face of documents produced by LSL shows that LSL knew that long shelf life seeds grown in Mexico would affect the import of winter tomatoes into the United States.[11] Moreover, the absolute amount of commerce affected by the Non-Compete Agreement is substantial -- approximately $250 million worth of winter tomatoes are imported into the United States from Mexico each year.[12] If the Defendants were

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[10]*See also United States v. Nippon Paper Indus.,* 109 F.3d 1, 4 (1st Cir. 1997), where the court stated: "The FTAIA is inelegantly phrased and the court in Hartford Fire . . . declined to place any weight on it. . . We emulate this example and do not rest our ultimate conclusion about Section One's scope on the FTAIA."

[11]See note 4 for a sample of clauses in the BIRD proposal reflecting the intent to develop long shelf life seeds that would produce long shelf life tomatoes that appeal to U.S. consumers. *See also* Letter from David Mendell (who we understand to be a consultant to LSL and Seminis) to Dr. Mark Stowers (Seminis's Vice-President, Worldwide Marketing) of 9/9/99, at 2 ("Production of fruit governed by the patent [long shelf life tomatoes grown from LSL's seeds] will originate predominately from the Mexican states of Sonora and Sinaloa . . . Nearly all of this fruit will pass into the United States.") (Exhibit 7).

[12]U.S. Int'l Trade Comm'n Pub. 3367, *Monitoring of U.S. Imports of Tomatoes,* (Investigation No. 332-350) at 45, Table 25 (Nov. 2000). The average annual volume of U.S. tomato imports from Mexico for the October through June winter tomato harvest season during the past three crop years is $255,930,000. These imports amounted to an average of 308,266

enjoined from enforcing the Non-Compete Agreement, Hazera would have the incentive to begin at once to develop better extended shelf life seeds designed for Mexican soil and climatic conditions and U.S. consumer preferences, and it is likely that most of tomatoes grown from those seeds would be imported into the United States during the winter tomato season.

In *Hartford*, the Supreme Court ruled that the trial court had Sherman Act jurisdiction over restrictive activities in the London reinsurance market that produced substantial effects in a related product market in the United States -- the primary insurance market. *Id.* at 796.[13] In this case, the United States' Complaint alleges, and the Schwarz Declaration provides a solid basis for concluding, that prohibiting Hazera from selling extended shelf life seeds to Mexican farmers adversely affects the U.S. market for the tomatoes grown from those seeds in a way that easily satisfies all relevant jurisdictional tests.

D. The Court has Subject-Matter Jurisdiction Whether or Not Other Firms Might Compete with the Defendants and Hazera

Finally, the Defendants argue that this Court does not have subject-matter jurisdiction because the Non-Compete Agreement only eliminates one firm from a market crowded with competitors. Def. Memo at 14. Again, the Defendants are wrong on the law and the facts. The United States has alleged that Hazera is one of a very small number of seed companies whose expertise and track record leave it poised to develop extended shelf life seeds for U.S. soil and

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metric tons of winter tomatoes per year over the same time frame. *Id.* at 44, Table 25. Relevant portions of this publication are attached as Exhibit 8.

[13]This conclusion is consistent with the analogous principles established in *Mandeville Island, McClain* and *Parker* (discussed *supra*) that courts have jurisdiction to consider challenges to restrictions that initially affect intrastate commerce, but subsequently affect interstate commerce.

climatic conditions, and the Schwarz Declaration shows that it had a solid factual basis for these allegations. Complaint ¶ 35; Schwarz Dec. ¶ 27. As a matter of law, the number of potential competitors in this market is not relevant to any jurisdictional issues; and the United States' allegations, therefore, must be taken as true at this stage of the proceedings. Thus the Defendants stray far beyond the boundaries of a proper motion to dismiss under Rule 12(b)(1) (or 12(b)(6)), by speculating that the United States will not be able to prove the competitive harm alleged in the Complaint when all the relevant evidence is in the record.

IV. THE UNITED STATES HAS SATISFIED THE REQUIREMENTS OF RULE 12(b)(6) BY STATING A CLAIM ON WHICH RELIEF MAY BE GRANTED

The standard for deciding a motion to dismiss under Rule 12(b)(6) is well settled: The trial court may not grant a motion to dismiss for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). This standard rests upon several basic principles, which the Defendants' memorandum ignores.

First, "the court must presume all factual allegations of the complaint to be true." *Usher*, 828 F.2d at 561. Second, the Court must "draw all reasonable inferences in favor of the nonmoving party." *Id.* "The issue is not whether the plaintiff ultimately will prevail, but whether he is entitled to offer evidence to support his claim." *Id.* (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). Moreover, motions to dismiss are subject to an even more "rigorous standard" in antitrust cases than in other matters and "dismissals prior to giving plaintiff ample opportunity for

discovery should be granted very sparingly." *See Hospital Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 746 (1975).

Finally, in ruling on a Rule 12(b)(6) motion, the Court must exclude from consideration factual allegations extraneous to the Complaint. Fed. R. Civ. P. 12(b). Therefore, unless the portion of the Defendants' motion concerning Rule 12(b)(6) is converted into a motion for summary judgment -- and the procedures prescribed in Rule 56 observed -- the Court must limit its consideration to those facts pled in and implied by the Complaint. The United States urges the Court to exclude all evidence outside the Complaint when considering the 12(b)(6) portion of the Defendants' motion to dismiss.

The Defendants' motion ignores the 12(b)(6) standard and alleges facts outside of and contrary to allegations in the Complaint.[14] For example, the Defendants assert that "[a]t most the alleged restraint eliminated one competitor -- Hazera -- from an otherwise crowded field" (Def. Memo at 14), but the United States alleges that "Hazera is one of the few firms with the experience, track record and know-how likely to develop seeds that will allow United States and other North American farmers to grow better fresh-market tomatoes for United States consumers during the winter months." Complaint ¶ 39. The Defendants also allege that there is no market for the sale of long shelf life tomato seeds for winter harvest in the United States (Def. Memo at 9); but that allegation is irrelevant because the Complaint alleges a different market -- "seeds designed to grow fresh-market tomatoes in North America during the winter months." Complaint

[14]Indeed, the Defendants themselves ironically highlight this deficiency when they incorporate into their argument for dismissal under 12(b)(6) "the same reasons that the Complaint fails to establish subject-matter jurisdiction." (Def. Memo at 13.)

¶ 33.[15] In short, none of the Defendants' quarrels with the facts alleged in the Complaint have any bearing on their motion to dismiss under Rule 12(b)(6).[16]

In summary, the Complaint clearly alleges that the Defendants' agreements have harmed competition in the markets for tomato seeds in the United States and North America, causing further harm in the market for winter tomatoes throughout the United States. Because the Complaint alleges facts that, if proved, would violate Section 1 of the Sherman Act, the Defendants' motion to dismiss under Rule 12(b)(6) must be denied.

V. THIS ACTION DOES NOT RAISE ANY COMITY CONCERNS TO JUSTIFY DECLINING TO EXERCISE JURISDICTION OVER THIS CASE

In their motion to dismiss, Defendants also argue that, because LSL filed two contract law cases against Hazera in Israel, the Complaint should be dismissed on grounds of international comity. Defendants' argument is without merit because, notwithstanding the litigation in Israel, the case before this Court does not implicate either of the purposes behind international comity: (1) avoiding embarrassment to the Executive Branch in its conduct of foreign relations; and (2) protecting a party in private litigation from being unfairly subjected to the conflicting orders of two legal systems. *See, e.g., Hilton v. Guyot*, 159 U.S. 113, 163-164 (1895) (international comity concerns both international relations and the interests of private parties), *cited with*

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[15]The Defendants allegation is also based on inadmissible hearsay (*see* Cocke Dec. ¶ 9, attached to Def. Memo), and it is now controverted (*see* Schwarz Dec. ¶¶ 20, 22).

[16]The Defendants' reliance on the *Antitrust Guidelines for the Licensing of Intellectual Property* is also premature. At this point, the United States' allegation that Hazera is one of only a small number of firms with the resources to develop a better long or extended shelf life tomato for the U.S. winter tomato market is sufficient to withstand a motion to dismiss. At the appropriate time, the United States will tender evidence to support these allegations, and submit legal arguments concerning the application of any relevant guidelines to this case.

approval in Societe Nationale Industrielle Aerospatiale v. United States District Court, 482 U.S. 522, 543 n.27 (1987); *Hartford Fire Ins. v. California*, 509 U.S. 764, 798-99 (international comity an issue where court finds conflict between U.S. and foreign law such that a person cannot comply with both sets of laws).

This litigation does not raise judicially cognizable issues of international comity, because it is an enforcement action brought by the United States. A decision by the Justice Department to bring an antitrust action is a determination by the Executive Branch that the interests of the United States are at stake and "that the importance of antitrust enforcement outweighs any relevant foreign policy concerns." U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Enforcement Guidelines for International Operations* § 3.2 (1995). Such a determination should be given deference by the courts. *United States v. Baker Hughes, Inc.*, 731 F. Supp. 3, 6 n.5 (D.D.C.), *aff'd*, 908 F.2d 981 (D.C. Cir. 1990) (it is not the court's role to second guess the Executive Branch's decision to proceed with a case after it has considered comity issues); *see also Societe Nationale*, 482 U.S. at 552. (Blackmun, J., concurring in part and dissenting in part) ("courts are generally ill equipped to assume the role of balancing the interests of foreign nations with that of our own"). While it may at times be appropriate for courts to apply international comity analysis to litigation between private parties, once the Executive Branch has determined that the interests of U.S. law enforcement outweigh any detriment to our foreign relations, separation of powers principles dictate that the court should not second guess the Executive with its own international comity determination.[17]

[17]In this instance, there is no reason to believe that the Government of Israel opposes the United States' decision to prosecute despite any potential issues of comity. In fact, the Israel Antitrust Authority has explicitly supported this U.S. antitrust enforcement action and is holding

Even if this were private litigation and the Court examined issues of international comity, Defendants' motion to dismiss should fail on the merits because it does not meet applicable legal standards. In deciding whether to retain jurisdiction where international comity is at issue, a court should consider (1) whether an actual conflict exists between U.S. and foreign laws such that a person cannot comply with both sets of laws; (2) the nationality or allegiance of the parties and the locations or principal places of business of corporations; (3) the extent to which enforcement by either state can be expected to achieve compliance; (4) the relative significance of effects on the United States as compared with those elsewhere; (5) the extent to which there is explicit purpose to harm or affect United States commerce; (6) the foreseeability of such effect; and (7) the relative importance to the violations charged of conduct within the United States as compared with conduct abroad. *See Hartford Fire*, 509 U.S. at 798-99; *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 614 (9th Cir.1976).[18]

This Court should retain jurisdiction over this case under the standards articulated in *Hartford* and *Timberlane*. First, Defendants proffer no set of facts under which they will be unable to comply with any rulings made by this Court and an Israeli court.[19] Thus, this case raises

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its own investigation of the Non-Compete Agreement in abeyance pending outcome of this case. *See* Letter from Ariel Katz to Robert McGeorge of 1/22/01. (Attached as Exhibit 9.)

[18]*Hartford* also holds that, under comity principles, a court cannot decline jurisdiction on the ground that the conduct in question is lawful in a foreign state, or even strongly encouraged by that state. *Id.* at 798-99.

[19]For instance, if this Court enjoins enforcement of the Non-Compete Agreement and an Israeli court allows it, LSL can comply with both judgments by not enforcing the Non-Compete Agreement. Moreover, any potential conflict between U.S. and Israeli courts is of LSL's own making -- it initiated both cases currently being litigated in Israel after it received CIDs notifying it that the United States was investigating the Non-Compete Agreement as a violation of U.S. antitrust law. *See United States v. LSL Biotechnologies Inc.*, No. 98-7-JMR (D. Ariz. 1998).

no actual (or even potential) conflict. Even if there were a potential conflict, the Court should keep jurisdiction over this case because, under all other *Hartford-Timberlane* principles, the interests of the United States predominate: this is a case about U.S. antitrust law enforcement; the outcome affects commerce in tomatoes and tomato seeds almost entirely in the United States, not Israel; the agreement in question explicitly concerns, and was therefore meant to affect, this U.S. commerce in tomatoes and seeds, not Israeli commerce;[20] the defendants are U.S. corporations with principal places of business in the United States, and subject to U.S. law enforcement for compliance purposes; and, finally, the consumers and farmers harmed by the anticompetitive effects of the Non-Compete Agreement are predominantly Americans, not Israelis. In short, this case has almost everything to do with U.S. commerce, law, and policy, and comparatively little to do with Israeli commerce, law, and policy.

The private contract litigation between LSL and Hazera pending before Israeli courts does nothing to change this conclusion. The Israeli actions are contract disputes: U.S. antitrust law is not the issue before the Israeli courts, nor should it be.[21] The Israeli courts are being asked to determine the "scope and meaning" of the Non-Compete Agreement as a matter of Israeli contract law. Def. Memo at 14-15; Raviv-Berson Dec. ¶¶ 13-15 (attached to Def. Memo).[22] In

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[20]*See* note three, *supra*, discussing the BIRD proposal's purposes.

[21]The disputes in Israel involve disagreements between Hazera and LSL over compliance with an arbitration agreement stemming from earlier litigation between Hazera and LSL over the Non-Compete Agreement. Def. Memo at 14-15.

[22]In a misleading attempt to bolster their international comity arguments, Defendants make much of the dismissal by a Florida court of an action brought by LSL against Hazera to enforce the Non-Compete Agreement. Despite Defendants' intimations to the contrary, the Florida action was dismissed based solely on the forum selection clause contained in the 1987 agreement between the parties that requires LSL to bring any contractual dispute against Hazera in Israel.

sum, the Israeli litigation between LSL and Hazera may resolve private contract grievances between them as a matter of Israeli law, but it will not address the legality of the Non-Compete Agreement under U.S. antitrust law, or protect the interests of U.S. consumers and farmers.

VI. CONCLUSION

For the aforementioned reasons, Defendants' Motion to Dismiss the Complaint should be denied.

Respectfully submitted,

"/s/"
Robert L. McGeorge
Tracey D. Chambers
Janet R. Urban
Andrew K. Rosa
John R. Read

Dated: February 1, 2001

(Incidentally, the same agreement requires Hazera to bring any contractual dispute against LSL in New York.) (*See* Attachment 7 to Def. Memo.) A forum selection clause in an agreement between two private parties should have no effect on whether an American court should exercise jurisdiction in an action brought by the United States under the U.S. antitrust laws.