No. 01-7115

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EMPAGRAN, S.A., ET AL.,
Plaintiffs-Appellants,

v.

F. HOFFMANN-LAROCHE, LTD., ET AL.,
Defendants-Appellees.

ON REMAND FROM THE
SUPREME COURT OF THE UNITED STATES

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

JOHN D. GRAUBERT
Acting General Counsel
Federal Trade Commission
Washington, D.C. 20580

R. HEWITT PATE
Assistant Attorney General

MAKAN DELRAHIM
Deputy Assistant Attorney General

ROBERT B. NICHOLSON
STEVEN J. MINTZ
Attorneys
U.S. Department of Justice
Antitrust Division
Washington, D.C. 20530-0001
(202) 353-8629

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) Parties and Amici

All parties appearing before the district court and in this court are listed in the Brief for Plaintiffs-Appellants. The United States and Federal Trade Commission participated in this court as *amici curiae*.

(B) Rulings Under Review

References to the rulings at issue appear in the Brief for Plaintiffs-Appellants.

(C) Related Cases

The case on review was previously before this court. No. 01-7115, *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd*.

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Steven J. Mintz

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Authorities upon which we chiefly rely are marked with asterisks.

STATEMENT OF INTEREST

The United States and the Federal Trade Commission, which previously participated *amicus curiae* before this Court and the Supreme Court, address the legal question raised by issue 3(ii) of this Court's Order of June 21, 2004, in an effort to insure that the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. 6a(2) ("FTAIA"), not be construed so as to harm the government's ability to break up international cartels or to undermine law enforcement relationships between the United States and its trading partners.[1]

SUMMARY OF ARGUMENT

This Court should decide issue 3 now. Plaintiffs' "alternative theory," as described by the Supreme Court, is not sufficient to come within the domestic injury exception of the FTAIA. Because the issue is purely legal and requires no further factual development by the district court, this Court should address the validity of the plaintiffs' theory in the first instance. Moreover, resolution by this Court now would prevent both the expenditure of unnecessary time and resources by the parties and courts, and harm to the interests of the United States in deterring violations of the antitrust laws and avoiding friction with our trading partners.

To allow plaintiffs' "alternative theory" to establish subject matter jurisdiction would undermine the rationales of the Supreme Court's decision,

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[1] *Amici* take no position on issues (1), (2), and 3(i).

which preclude any theory that would, as a practical matter, transform U.S. courts into "world courts" for a broad class of antitrust disputes. Alternatively, plaintiffs' "but for" theory is not legally sufficient because it fails the traditional causation standard in antitrust law, embodied in 15 U.S.C. 6a(2), proximate causation.

ARGUMENT

1. *Amici* submit that this Court should decide issue 3 now. Whether alleged or assumed facts are sufficient to establish subject matter jurisdiction is a pure question of law that should be determined "simply and expeditiously," a concern that animates all of the Supreme Court's rationales in *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359, 2369 (2004). Deciding the issue here and now promotes judicial economy in this case. A quick resolution of the remaining uncertainty over the scope of cartel members' potential civil liability in U.S. courts will promote deterrence of international cartels by removing a disincentive to seek amnesty from the government.

2. To the extent this Court may wish to give some consideration to the merits of issue 3(ii) in deciding whether to resolve that issue now, the government submits the following so that the Court may have the benefit of the government's views for that purpose:

Plaintiffs claim that "the cartel raised prices around the world in order

to keep prices in equilibrium with United States prices in order to avoid a system of arbitrage," and therefore that "the foreign plaintiffs were injured as a direct result of the increases in United States prices even though they bought vitamins abroad." *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 315 F.3d 338, 341 (D.C. Cir. 2003). Even if these claims are true, they do not furnish a basis for jurisdiction under the FTAIA. To allow these claims would conflict directly with the rationales of the Supreme Court's decision, creating many of the very harms to international antitrust enforcement that the Court sought to avoid.[2]

First, plaintiffs' claims would present the "unreasonable interference with the sovereign authority of other nations" that the Supreme Court found intolerable. 124 S. Ct. at 2366. The Court asked: "Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct[?]," *id*. at 2367. Allegations that foreign injuries are connected to domestic injuries do nothing to answer that question. *See also id*. (plaintiffs' reading of the FTAIA raises the spectre of giving U.S. courts "worldwide subject

[2] Foreign plaintiffs may bring antitrust actions in U.S. courts when, unlike the plaintiffs here, they suffer anticompetitive injury in U.S. commerce. *See Pfizer, Inc. v. Government of India*, 434 U.S. 308, 318 (1978) (foreign plaintiff "enter[ed] our commercial markets as a purchaser of goods or services").

matter jurisdiction to any foreign suitor wishing to sue its own local supplier, but unhappy with its own sovereign's provisions for private antitrust enforcement") (citation omitted).[3]

Second, plaintiffs' alternative theory, just like the assumed "independent" theory considered by the Supreme Court, would "undermine foreign nations' own antitrust enforcement policies by diminishing foreign firms' incentive to cooperate with antitrust authorities in return for prosecutorial amnesty." *Id*. at 2368. The same consequence would follow for the Department of Justice's antitrust criminal amnesty program because, in the United States' experience, any expansion in the scope or uncertainty of cartel members' potential civil liability in U.S. courts creates a disincentive to seek criminal amnesty. Cartel members know that once they admit to criminal conduct in order to obtain amnesty, there will be (as in the vitamins cases) immediate follow-on civil class actions, and therefore they weigh their civil liability exposure in deciding whether to seek amnesty. The Supreme Court described the disincentives to seek amnesty that would follow from expanded civil liability as "important experience-backed arguments." *Id*. at 2372. And when cartel members forgo, or hesitate to seek, amnesty, the government

[3] The governments of Germany and Ecuador – home country of one of the named plaintiffs – wrote letters to the State Department urging the United States to submit this brief and stating that plaintiffs' alternative theory will harm the interests of those governments.

loses its most potent weapon for cracking international cartels.[4]

Third, the Supreme Court read the FTAIA's language and history to reject any intention by Congress to expand the Sherman Act's scope as applied to foreign commerce. *See id*. at 2369. But to allow plaintiffs to proceed on their "alternative theory" would represent just that kind of expansion. We are aware of only one pre-FTAIA case that even arguably permitted a private plaintiff's claim of foreign antitrust injury on the ground that the injury was dependent on domestic harm, *Industria Siciliana Asfalti, Bitumini, S.p.A. v. Exxon Research & Engineering Co.*, 1977 WL 1353 (S.D.N.Y. Jan. 18, 1977). But that case involved a tying or reciprocal dealing *contract*, not simply an alleged relationship between domestic and foreign cartel prices. Moreover, the legislative history of the FTAIA is critical of that case. *See* H.R. Rep. No. 686, 97th Cong., 2d Sess. 5 (1982) (House Report). Congress' focus in the FTAIA was on codifying existing case law *limits* on the extraterritorial reach of the antitrust laws. Congress would not

[4] The recent Congressional elimination of treble damages awarded against a defendant who has received criminal antitrust amnesty (Pub. L. No. 108-237, 118 Stat. 661) will only modestly ameliorate a disincentive to seek amnesty. The prospect of facing numerous, unprecedented class actions for foreign injuries in U.S. courts, even with single damages, will deter cartel members from seeking amnesty. Nor does the law remove the disincentives for cartel members who do not qualify for amnesty but otherwise may want to cooperate with the government, e.g., by plea agreement. And the law does not address the potential for friction with foreign antitrust authorities caused by expanded civil liability. The statute, however, does show Congress' strong support for the policy of encouraging antitrust violators to seek criminal amnesty from the Department of Justice.

have intended at the same time to open U.S. courts to claims from all over the world simply upon the basis of pleading some connection with a domestic effect.

3. Plaintiffs' alternative theory, described by the Supreme Court as a "'but for' condition," 124 S. Ct. at 2372, is not legally sufficient for another reason: "but for" is not the traditional legal standard for causation in antitrust law and therefore is inconsistent with the "gives rise to a claim" language of 15 U.S.C. 6a(2). Rather, the proper test is proximate causation.

Causation in antitrust arises most frequently in determining whether private plaintiffs have standing to sue under Section 4 of the Clayton Act, which allows lawsuits by any person injured "by reason of anything forbidden in the antitrust laws." 15 U.S.C. 15(a). In this context, "but for" causation never has been considered sufficient. In *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 477 (1982), the Supreme Court held that "Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action." From the outset of the twentieth century, courts developed various tests for evaluating "remoteness," such as "directness" and the "target area test," *see id*. at 476 n.12, all of which were designed to cut off the claims of plaintiffs with injury-in-fact but injuries that were not, as a matter of policy, sufficiently connected to the antitrust violation. All of these tests therefore were more rigorous than simple "but for"

causation. The Court analogized them to the common law test of proximate cause, and then applied proximate causation to the facts before it. *See id*. at 477-78. *See also Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 535-37, 540, 542 (1983) (rejecting claim of "but for" connection where causal chain was attenuated and injury may have been produced by independent factors); *Holmes v. SIPC*, 503 U.S. 258, 266-70 (1992) (rejecting "but for" standard for RICO provision based on Clayton Act § 4).

The FTAIA did not amend the Clayton Act; indeed, Congress made clear that it did "not intend to alter existing concepts of antitrust injury or antitrust standing." House Report at 11. Since the pre-existing law of antitrust standing was, in effect, proximate causation, there is no support in the FTAIA for a "but for" standard.[5]

CONCLUSION

Plaintiffs' "alternative theory" is legally insufficient to establish subject matter jurisdiction, and their complaint should be dismissed.

[5] Thus, the complaint also should be dismissed for lack of antitrust standing under Section 4 of the Clayton Act, as fully explained in *amici*'s brief in the Supreme Court.

Respectfully submitted.

JOHN D. GRAUBERT
*Acting General Counsel**
Federal Trade Commission
Washington, D.C. 20580

R. HEWITT PATE
Assistant Attorney General

MAKAN DELRAHIM
Deputy Assistant Attorney General

ROBERT B. NICHOLSON
STEVEN J. MINTZ
Attorneys
U.S. Department of Justice
Antitrust Division
Washington, D.C. 20530-0001
(202) 353-8629

September 9, 2004

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* The General Counsel is recused in this case.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7), Fed. R. App. P. 29(d), Local Rule 32(a)(1), and the Court's Order of June 21, 2004 because it has been prepared in a proportionally spaced typeface using WordPerfect 10 in 14-point Times New Roman (12-point Times New Roman for footnotes) and is no more than one-half the 15-page maximum length authorized by the Court's Order of June 21, 2004 for a party's brief.

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Steven J. Mintz

Dated: September 9, 2004

CERTIFICATE OF SERVICE

I certify that on September 9, 2004, two true and correct copies of the foregoing Brief for the United States and the Federal Trade Commission as *Amici Curiae* In Support of Defendants-Appellees were served, by Federal Express, on:

Arthur F. Golden, Esq.
Davis Polk & Wardwell
450 Lexington Avenue
New York, NY 10017
Counsel for Defendants-Appellees

Thomas C. Goldstein, Esq.
Goldstein & Howe, P.C.
4607 Asbury Place, NW
Washington, D.C. 20016
Counsel for Plaintiffs-Appellants

_____
Steven J. Mintz