13-2280

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LOTES CO., LTD.,
Plaintiff-Appellant,
v.

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

Defendants-Appellees,

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

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

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STATEMENT OF INTEREST

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

STATEMENT OF ISSUE PRESENTED

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

STATEMENT OF THE CASE

Lotes Co., Ltd., a Taiwan corporation, sued Hon Hai Precision Industry Co., Ltd., another Taiwan corporation, and Foxconn International Holdings Ltd., a Cayman Islands corporation, and several other Foxconn entities, including both foreign and U.S. corporations. First Am. Compl. (FAC) ¶¶ 1-6 (JA-28-30). Lotes alleges that defendants' conduct in connection with a standard-setting organization in the United States and patent-enforcement proceedings in China violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. FAC ¶¶ 7, 104, 114 (JA-30-31, 67, 70).[1] The defendants moved to dismiss arguing, among other things, that the FTAIA makes the Sherman Act inapplicable to the alleged conduct because it had no direct effect on U.S. commerce. Mem. of Law in Supp. of Defs.' Mot. to Dismiss Pl.'s First Am. Compl. 8 (ECF No. 29) (Defs. Mem.). The district court granted the motion, holding that the FTAIA deprives the court of jurisdiction to adjudicate Lotes' Sherman Act claims. Op. and Order (Op.) 31 (JA-272). Lotes appealed.

[1] Lotes brought additional causes of action, FAC ¶ 7 (JA-31), which this brief does not address.

STATEMENT OF THE FACTS

1. USB 3.0 Standard and Connectors

Lotes and the defendants are competing makers of Universal Serial Bus (USB) connectors that are incorporated into notebook computers and the motherboards used in desktop computers and servers. FAC ¶¶ 15, 21 (JA-34, 36-37). USB connectors are used primarily to connect computer peripherals to computers or other electronic devices and allow data transmission between the peripheral and the computer over a standardized data link. FAC ¶ 16 (JA-34). They are a "critical component of contemporary computers and consumer electronic devices" and "a practical necessity for all competitors in these markets." FAC ¶ 17 (JA-35).

USB Implementers Forum, Inc. (USB-IF) is a non-profit organization based in the United States that sets the technical standards for USB connectors. FAC ¶¶ 18, 25, 31, 36 (JA-35, 38, 41, 43). These standards allow different manufacturers to produce connectors and devices that communicate seamlessly over a USB connection. FAC ¶ 37 (JA-43). USB 3.0 is the latest standard, and USB connectors that meet it provide much faster data transfer rates than

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

In setting its USB 3.0 standard, USB-IF took steps to avoid the possibility that once the standard incorporates patented technology and is widely adopted, the patent owners would "demand exorbitant terms" to license their patents "or even refuse to license [them] altogether." FAC ¶¶ 28-31 (JA-39-41). USB-IF reached agreements with contributors of patented technology to the USB 3.0 standard, including defendants, committing them to license the necessary patents on reasonable and non-discriminatory, zero-royalty (RAND-Zero) terms. FAC ¶¶ 38, 48-50 (JA-44, 48-49). USB-IF represented to adopters of the USB 3.0 standard, including Lotes, that they are entitled to RAND-Zero licenses for all patents necessary to practice the USB 3.0 standard. FAC ¶ 31 (JA-41).

Relying on these RAND-Zero commitments, Lotes "invested millions of dollars in research & development and has built two factories in China" to manufacture USB 3.0 connectors. FAC ¶ 48 (JA-48). Lotes' connectors are "components of motherboards and other

devices intended predominantly for export to the United States." FAC ¶ 68 (JA-56).

Lotes and other USB connector makers compete for market share in the markets for USB 3.0 connectors for notebooks, desktops, and servers by selling to foreign-located original design manufacturers. FAC ¶ 22 (JA-37). These manufacturers make and assemble connector-incorporating computer products for many brand-name computer companies. *Id.*[2] Under this "outsourcing" business model, these companies have these products made more cheaply in "low-cost countries." FAC ¶ 33 (JA-42). These products, "in turn, make their way into the hands of businesses and consumers around the globe," including "numerous retail consumer outlets like Best Buy, Costco, Target, Walmart, and others" in the United States. FAC ¶¶ 19, 63 (JA-36, 55).

[2] In "combination," the defendants allegedly have "dominant market power as a manufacturer" of connector-incorporating products. FAC ¶ 34 (JA-42). Defendants incorporate their USB 3.0 connectors into these products. FAC ¶ 23 (JA-37-38).

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

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

Defendants then violated their agreements to license essential patents on RAND-Zero terms, "and instead launched enforcement campaigns capable of raising rivals' costs and/or driving them from the market." FAC ¶ 73 (JA-59). Defendants did not enter "good faith" patent license negotiations with Lotes, but rather sued Lotes in China for infringing Chinese patent claims allegedly necessary to practice the USB 3.0 standard and requested that Lotes' production of USB 3.0

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

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

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

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

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

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

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

The district court assumed that the defendants engaged in anticompetitive conduct, but held that the court lacked subject-matter jurisdiction to adjudicate Lotes' Sherman Act claims.[3] Op. 17, 31 (JA-258, 272). The FTAIA, the court explained, sets forth a general rule that the Sherman Act does not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations, but includes an exception when the conduct "significantly harms domestic commerce." Op. 18 (JA-259). This "domestic-injury exception" applies where the conduct "(1) has a 'direct, substantial, and reasonably foreseeable effect' on American domestic, import, or (certain) export commerce, *and* (2) has an effect of a kind that antitrust law considers harmful, *i.e.*, the 'effect' must 'giv[e] rise to a [Sherman Act] claim.'" Op. 19 (JA-260) (quoting *F. Hoffmann-La Roche Ltd. v.*

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[3] The court noted an apparent circuit split on whether the FTAIA strips the courts of subject-matter jurisdiction or "imposes a substantive merits limitation." Op. 19-22 (JA-260-63) (quoting *Animal Science Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 466 (3d Cir. 2011)). It considered itself bound by *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922 (2d Cir. 1998), to treat the FTAIA as a "jurisdiction-defining statute." Op. at 22 (JA-263). This brief addresses neither this question nor whether defendants engaged in anticompetitive conduct.

Empagran S.A., 542 U.S. 155, 162 (2004) (quoting 15 U.S.C. § 6a(1), (2))).

The court addressed only the first requirement, concluding that any effect the conduct had on the relevant U.S. commerce was not direct. Op. 23-24 (JA-264-65). The court held that "an effect is 'direct' if it follows as an immediate consequence of the defendant's activity." Op. 23 (JA-264) (quoting *United States v. LSL Biotechnologies*, 379 F.3d 672, 680 (9th Cir. 2004) (citing *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992))). Applying this holding to the "'long and convoluted series of transactions and manufacturing steps'" alleged here, the court found "a disconnect between the relevant (foreign) market [in USB 3.0 connectors] – the market which defendants are allegedly attempting to monopolize – and the U.S. market supposedly affected by defendants' attempted monopolization (notebooks, desktop computers, servers)." Op. 23-24 (JA-264-65) (quoting Defs. Mem. 10). Thus, any increase in computer prices or reduction in competition in the United States resulting from defendants' conduct is not sufficiently linked to that conduct to qualify as its direct effect. Op. 24 (JA-265).

SUMMARY OF ARGUMENT

Congress enacted the FTAIA to make clear to U.S. exporters and U.S. firms doing business abroad that the Sherman Act does not apply to their business arrangements if they adversely affect only foreign markets. But Congress also sought to ensure that purchasers in the United States remained fully protected by the federal antitrust laws. Thus, the FTAIA leaves the Sherman Act applicable to (1) conduct "involving" import trade or commerce (the import commerce exclusion) and (2) conduct that has a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce when that effect causes the plaintiff's injury and thus "gives rise to [the] claim" at issue (the effects exception). 15 U.S.C. § 6a.

The district court's conclusion that Lotes' Sherman Act claims do not satisfy the effects exception is based on a flawed analysis. The court erred by defining "direct . . . effect" as an "immediate consequence" because "direct" in the context of the FTAIA means a reasonably proximate causal nexus. *See Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 856-58 (7th Cir. 2012) (en banc). The court also erred by focusing on the number of steps in the manufacturing process. Under either an

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

While the Court should not endorse the district court's analysis, it need not undertake its own, a potentially difficult and fact-intensive task. Instead, the Court should affirm on the simpler basis that Lotes' claims cannot satisfy the effects exception's requirement that the effect on U.S. import commerce "gives rise to [its] claim." 15 U.S.C. § 6a(2); *see Empagran*, 542 U.S. at 173-74. Even assuming defendants' conduct had a direct, substantial, and reasonably foreseeable effect on U.S. import commerce in connector-incorporating computer products, that effect would not be the cause of Lotes' injuries—lost sales in wholly foreign commerce and the potential closure of its foreign factories. In the causal chain, Lotes' injuries precede, indeed contribute to, the effect

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

ARGUMENT

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

The FTAIA should be construed in light of its history and purpose. *See F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 169 (2004). The statute "seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements (say, joint-selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets." *Id.* at 161. By making clear to U.S. firms when the antitrust laws apply to conduct involving export commerce or other commerce outside the United States, Congress intended to "increase United States exports of products and services." Pub. L. No. 97-290, § 102(b), 96 Stat. 1233, 1234; *see also* H.R. Rep. No. 97-686, at 7-8 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2487, 2494.

To this end, Congress limited the application of the Sherman Act when the challenged conduct involves either (1) export commerce or (2)

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

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

15 U.S.C. § 6a.

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

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

The FTAIA declares the Sherman Act inapplicable to conduct involving only non-import commerce with foreign nations—i.e., export commerce or wholly foreign commerce—unless two requirements are met. First, the conduct must have a "direct, substantial, and reasonably foreseeable effect" on commerce within the United States, U.S import commerce, or the export trade of a U.S. exporter (collectively U.S. commerce). 15 U.S.C. § 6a(1). Second, a plaintiff seeking damages must establish that this effect "gives rise to a claim under" the Sherman Act. 15 U.S.C. § 6a(2).

Because failure to meet this second requirement disposes of Lotes' Sherman Act claims, we turn to the "gives rise to" requirement first.

[4] Lotes did not argue that defendants' conduct involves import commerce, and the district court did not consider the import commerce exclusion. Therefore, this brief does not address its application here.

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

The district court dismissed the claim on the ground that Lotes failed to establish that the challenged conduct had a direct, substantial, and reasonably foreseeable effect on U.S. commerce. Op. 23 (JA-264); *see* 15 U.S.C. § 6a(1). Lotes' challenge to that conclusion raises difficult and fact-intensive questions, and the district court's analysis was flawed in several respects. This Court need not reach that issue, however, because there is a simpler basis for affirming: the challenged conduct does not meet the exception's requirement that the effect on U.S. commerce "gives rise to a claim under [the Sherman Act]," 15 U.S.C. § 6a(2).[5]

A. To Give Rise to a Claim, the Effect on U.S. Commerce Must Proximately Cause the Plaintiff's Injury

The FTAIA requires an antitrust plaintiff challenging conduct involving only non-import foreign commerce to show that the conduct's effect on U.S. commerce "gives rise to" the plaintiff's own Sherman Act

[5] The Court "may affirm on any grounds for which there is a record sufficient to permit conclusions of law, including grounds not relied upon by the district court." *Olsen v. Pratt & Whitney Aircraft*, 136 F.3d 273, 275 (2d Cir. 1998).

claim. It is not sufficient that someone else might have a Sherman Act claim arising from the conduct's U.S. effects.

In *Empagran,* the Supreme Court expressly rejected the argument that foreign plaintiffs who purchased price-fixed products in wholly foreign commerce satisfied the FTAIA exception's "gives rise to" requirement by showing that the price-fixing that injured them also gave rise to claims by purchasers in the United States. 542 U.S. at 173-75. The Court explained that "Congress would not have intended the FTAIA's exception to bring independently caused foreign injury within the Sherman Act's reach." *Id.* at 173. No case prior to the FTAIA had applied the Sherman Act to allow foreign plaintiffs to recover for "foreign injury" caused by "foreign anticompetitive conduct" producing both "an adverse domestic effect" and "an independent foreign effect giving rise to the claim." *Id.* at 158-59. And the FTAIA did not expand the Sherman Act's reach. *Id.* at 169-73.

Consistent with the pre-FTAIA understanding that the antitrust laws "redress domestic antitrust injury that foreign anticompetitive conduct has caused" and "principles of prescriptive comity," the Court explained, the term "gives rise to a claim" must mean "gives rise to the

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

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

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

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

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

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

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

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

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

effect never precedes its cause," *American Home Products Corp. v. Liberty Mutual Insurance Co.*, 748 F.2d 760, 765 (2d Cir. 1984), and therefore the effect on U.S. commerce, the higher U.S. prices, cannot be the proximate cause of Lotes' injury.

While the Sherman Act does not apply to Lotes' challenge to defendants' conduct, the statute could apply to that same conduct if another plaintiff made a claim arising out of effects on U.S. commerce. For example, the Sherman Act would apply if purchasers of connector-incorporating computer products in the United States paid higher prices and those price increases were a direct, substantial, and reasonably foreseeable effect of defendants' conduct. In that scenario, the conduct's effect on U.S. commerce would give rise to those plaintiffs' claims. Similarly, the government would have ample authority to bring an action to enforce the Sherman Act. *See Empagran*, 542 U.S. at 170; *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 grounds by Empagran*, 542 U.S. 155.

There is nothing anomalous about this result. By operation of the FTAIA exception's "gives rise to a claim" requirement, the Sherman Act "can apply and not apply to the same conduct" depending on whether the particular plaintiff's claim arises from the requisite effect. *Empagran*, 542 U.S. at 173-74. Thus, for example, while the price-fixing conspiracy in *Empagran* "did have domestic effects, and those effects were harmful enough to give rise to 'a' claim," the FTAIA barred the foreign plaintiffs' claims on the assumption that the conduct "independently caused [their] foreign injury." *Id.* at 174-75.

Nor is it dispositive that some of the alleged conduct occurred in the United States. Lotes contends "that a group of U.S. and foreign companies is engaging in a U.S.-based patent hold-up." Lotes Br. 42. But Lotes does not contend defendants are refusing to license U.S. patents in U.S. commerce. Rather, they are allegedly enforcing Chinese patents in China, and thus allegedly foreclosing "competition with respect to USB 3.0 connectors installed abroad in U.S.-bound consumer electronic devices." *Id.*

The FTAIA's exception requires the plaintiff to establish that the challenged conduct affects U.S. commerce, 15 U.S.C. § 6a(1), and that

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

[7] "[T]he Sherman Act applies 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. Cal.*, 509 U.S. 764, 796 (1993). Thus, the Sherman Act authorizes antitrust actions "predicated on wholly foreign conduct which has an intended and substantial effect in the United States." *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 4 (1st Cir. 1997).

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

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

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

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

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

The district court's analysis does not provide any reason for adopting the *LSL* definition, nor does it acknowledge the en banc holding of the Seventh Circuit in *Minn-Chem,* which expressly rejected that definition. The court does state that any higher computer prices and reduced competition in the United States resulting from the defendants' foreign anticompetitive conduct "are simply too attenuated to establish the proximate causation required by the FTAIA." Op. 24 (JA-265). The juxtaposition of this statement with the court's adoption of *LSL*'s definition of direct suggests that the district court did not appreciate the difference between *LSL*'s immediate consequence standard and *Minn-Chem*'s proximate causation standard. Op. 23-24 (JA-264-65).

While the *LSL* and *Minn-Chem* standards may lead to the same result in some cases, the distinction is important. The *LSL* definition "results in a stricter test than the complete text of the statute can bear," *Minn-Chem*, 683 F.3d at 857, and thus imposes a higher burden on plaintiffs than Congress intended.

Defining directness in terms of proximate causation terms accords with antitrust law's understanding of "direct" and the term's use in the FTAIA. Antitrust courts have long relied on the concept of "directness" in determining whether a private plaintiff's injury gives rise to standing under the antitrust laws. *See Blue Shield of Va. v. McCready*, 457 U.S. 465, 476-77 & n.12 (1982) (citing cases). The courts have contrasted the "directness" of some injuries with the "remoteness" of others and have applied the common-law concept of proximate cause. *Id.* at 476-77 nn.12-13. "[D]irectness relates to the question whether there exists a chain of causation between a defendant's action and a plaintiff's injury or (in contrast) if the connection is based instead only on 'somewhat vaguely defined links.'" *Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 486-87 (7th Cir. 2002) (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 540 (1983)).

Defining "direct" for purposes of the FTAIA's effects exception in terms of proximate causation addresses this "classic concern about remoteness." *Minn-Chem*, 683 F.3d at 857. It is also fully supported by principles of prescriptive comity. By leaving the Sherman Act applicable to conduct that has a reasonably proximate (as well as

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

Thus, if a conspiracy of foreign manufacturers to fix the price of components sold to other foreign manufacturers proximately caused effects on import commerce in finished products incorporating that price-fixed component—notably by increasing the price—that effect would be viewed as direct, and the FTAIA exception would apply (assuming the effect was also reasonably foreseeable and substantial). *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, 822 F. Supp. 2d 953, 959-64 (N.D. Cal. 2011); *cf. Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235-38 (1948) (a restraint of local commerce in sugar beets had the requisite effect on interstate commerce in sugar). Similarly, a cartel making no sales into the United

States would come within the direct effects exception if it created "a world-wide shortage . . . that had the effect of raising domestic prices." H.R. Rep. 97-686, at 13, *reprinted in* 1982 U.S.C.C.A.N. 2487, 2498. But "foreign activities that are too remote from the ultimate effects on U.S. domestic or import commerce" are excluded from the Sherman Act's reach. *Minn-Chem*, 683 F.3d at 857.

The panel majority in *LSL* offered no sound reason for its holding that an effect is "direct" in the context of the FTAIA if "it follows as an immediate consequence of the defendant's activity," and hence, "[a]n effect cannot be 'direct' where it depends on . . . uncertain intervening developments," 379 F.3d at 680-81.[8] The majority's reliance on a dictionary definition, *see id.*, is unpersuasive. When the FTAIA was enacted in 1982, there were many "ordinary and common" usages of the term "direct." *LSL*, 379 F.3d at 692 (Aldisert, J., dissenting). The definition of "direct" adopted by the *LSL* majority corresponds to one such usage—"proceeding from one point to another in time or space

[8] In *LSL*, the government argued that "direct" in the context of the FTAIA invoked the concept of proximate causation. While the panel majority declined to define direct effect in terms of proximate causation, the dissent agreed with the government. 379 F.3d at 691-94 (Aldisert, J., dissenting).

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

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

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

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

Placing the term "direct" in the context of the FTAIA demonstrates the flaws in the *LSL* majority's definition. Following "as an immediate consequence" could be understood to mean that there can be no subsequent sales or other steps before the product is sold or delivered into the United States. If so, the direct effects exception would reach only conduct that qualifies for the import commerce exclusion. *See Minn-Chem*, 683 F.3d at 857 ("To demand a foreseeable, substantial, and 'immediate' consequence on import or domestic

commerce comes close to ignoring the fact that straightforward import commerce has already been excluded from the FTAIA's coverage.").

Moreover, any antitrust injury that is an "immediate consequence" of anticompetitive conduct would be "reasonably foreseeable," so the *LSL* majority's definition of "direct" robs the "reasonable foreseeab[ility]" requirement of any function. The *LSL* majority's definition of "direct" thus violates the "cardinal principle" that a statute should be interpreted so that, if possible, "no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

In contrast, if "direct" is defined as "reasonably proximate," the import commerce exclusion and the effects exception fit comfortably together: the former applies when the challenged conduct itself involves import commerce, while the latter applies when the challenged conduct proximately causes an effect on import commerce (or on commerce within the United States or certain export commerce). While proximate cause includes notions of foreseeability, proximate cause and reasonable foreseeability are distinct concepts. And defining direct as reasonably proximate gives each of the three parts of the direct effects exception its

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

Lastly, adopting the *LSL* majority's definition of "direct" could undermine Congress's objective of protecting purchasers in the United States from anticompetitive conduct. Many finished products sold in the United States are manufactured or assembled abroad and incorporate component parts sold, manufactured, or assembled in other countries. Courts applying the *LSL* definition could erroneously find that the foreign assembly of these finished products constitutes an "interruption" that places anticompetitive conduct involving the component parts outside the reach of the Sherman Act, even though that conduct proximately causes substantial and reasonably foreseeable effects on U.S. import commerce in those finished products.[9] *See* IB Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 272i1, at 309 (4th ed. 2013) ("Many, perhaps most, restraints are on 'intermediate' goods," but effects "that occur in upstream markets quickly filter into consumer markets as well.").

[9] One district court applying *LSL* has avoided this error. *In re TFT-LCD*, 822 F. Supp. 2d at 959-64; *see infra* pp. 34-35.

Defining "direct effects" as reasonably proximate effects ensures the proper inquiry. And it accomplishes Congress's primary goal of protecting purchasers in the United States, while allowing U.S. firms to engage in export or wholly foreign commerce that has no U.S. effects without fear of treble damages lawsuits under the Sherman Act based on sales outside the United States.

B. A Multiple-Step Foreign Manufacturing Process Does Not Preclude a Direct Effect on U.S. Commerce

"In a global economy, where domestic and foreign markets are interrelated and influence each other, it is sometimes difficult to put strict economic boundaries around any particular country." *Metallgesellschaft AG v. Sumitomo Corp. of Am.*, 325 F.3d 836, 842 (7th Cir. 2003). Yet, the court below focused its analysis on the number and the location of steps in the manufacturing process. *See* Op. 23-24 (JA-264-65). The application of the effects exception turns on the challenged conduct's impact on purchasers in the United States, not the manufacturing process used. *Cf. Metallgesellschaft*, 325 F3d at 842 ("A global conspiracy to inflate prices could have anticompetitive effects on the U.S. economy whether the conspiracy occurred within the United States or abroad.").

While the court adopted *LSL*'s construction of direct, it did not correctly apply that standard. Under *LSL,* "an effect does not become 'indirect' simply because the American [brand name computer companies] use a complex manufacturing process." *In re TFT-LCD*, 822 F. Supp. 2d at 964. Nor does the existence of multiple foreign "transactions and manufacturing steps," Op. 23 (JA-264) (quoting Defs. Mem. 10), preclude a finding of a direct effect under either *LSL* or *Minn-Chem*.

In *In re TFT-LCD*, the court held that a direct effect on U.S. commerce exists where a conspiracy to fix the price of LCD panels that were made in foreign countries, sold to foreign entities, and generally incorporated into finished products at foreign factories, had increased the prices for finished products sold in the United States. 822 F. Supp. 2d at 959-64. Applying *LSL*, the court explained that when "the nature of the effect does not change in any substantial way before it reaches the United States consumer, the effect is an 'immediate consequence' of the defendant's anticompetitive behavior." *Id.* at 964. 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 televisions, monitors, and notebook computers [incorporating those panels])." *Id.* And thus, "the effect 'proceeded without deviation or interruption' from the LCD manufacturer to the American retail store." *Id.*

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

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

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

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

* * *

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

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

CONCLUSION

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

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

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

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/s/ James J. Fredricks
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CERTIFICATE OF SERVICE

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

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

Date: October 7, 2013

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