Robert L. McGeorge
D.C. Bar No. 91900
United States Department of Justice
325 Seventh Street, N.W., Suite 500
Washington, DC 20530
(202) 307-6361; (202) 307-2784 (fax)
Attorney for Plaintiff United States of America

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 **PLAINTIFF UNITED STATES' SURREPLY AND MEMORANDUM OF POINTS AND AUTHORITIES**

The Defendants cite three cases for the first time in the Reply that they recently filed in support of their Motion to Dismiss -- *United Phosphorus, Ltd. v. Angus Chem. Co.*, __ F.Supp 2d __, 2001 WL 135657, U.S. Dist. LEXIS 1578 (N.D. Ill. 2001) (*"Angus"*); *Kruman v. Christie's Int'l, PLC*, 2001-1 Trade Cas. (CCH) ¶ 73,249, 2001 WL 77059, 2001 U.S. Dist. LEXIS 712 (S.D.N.Y. Jan. 29, 2001) (*"Christie's"*); and *Den Norske Stats Oljeselskap AS v. Herremac VOF*, 2001-1 Trade Cas. (CCH) ¶ 73,160, 2001 WL 99807, 2001 U.S. App. LEXIS 1522 (5th Cir. Feb. 5, 2001) (*"Statoil"*). None of these cases provides a basis for dismissing this case for lack of subject-matter jurisdiction under the Foreign Trade Antitrust Improvements Act (FTAIA) jurisdictional test as the Defendants suggest*;* and one case -- *Statoil* -- actually provides considerable support for the United States' position that this Court does have subject-matter jurisdiction over this action.

The Defendants cite *Angus* for the proposition that the FTAIA bars all antitrust actions alleging restraints in foreign markets for inputs that are used in the manufacture of downstream products that may later be imported into the United States. Reply at 6. If the *Angus* case (which, of course, is not controlling authority in this circuit) is read to stand for this proposition, however, it is at odds with the text of the FTAIA and established precedent. The text of the FTAIA does not include any explicit (or implicit)

references to "inputs," or require that the foreign anticompetitive conduct adversely affect the same product or service in the commerce of both the foreign country and the United States. And, the controlling and persuasive cases that address this issue flatly reject the proposition that the Defendants attribute to the *Angus* decision.[1]

Moreover, the facts of this case are clearly distinguishable from the facts in *Angus*. Long shelf life and extended shelf life tomato seeds are not "inputs" in the sense that the *Angus* court uses the term. Chemicals (the inputs in *Angus*) are used to manufacture a variety of end products, some of which eventually may be imported into the United States. Long or extended shelf life tomato seeds that are sold to Mexican farmers, however, inevitably "become" (or are "transformed into") long or extended shelf life tomatoes designed to satisfy U.S. consumer preferences: they cannot feasibly be used in the manufacture or production of any other product.

The *Christie's* case merely stands for the proposition that the foreign restrictive conduct in that case -- fixing commissions on Christie's auctions in London -- did not have a direct, substantial and reasonably foreseeable effect on U.S. commerce, just because some items that were purchased in London subsequently ended up in the United States. *Christie's* might support the Defendants' position if the United States had argued that U.S. commerce is subjected to a direct, substantial and reasonably foreseeable effect because U.S. tourists occasionally bring tomatoes back home from vacation trips to Mexico -- but it provides no guidance on the far more direct, substantial and foreseeable effect on U.S. commerce in this case.

The Fifth Circuit's *Statoil* case, on the other hand, provides a clear guide for the determination of the minimum effect on U.S. commerce that is required to establish subject-matter jurisdiction under the FTAIA test. In that case, Statoil -- a Norwegian oil company that does business solely in the North Sea --

---

[1] *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) (subject-matter jurisdiction found when plaintiff alleged that anticompetitive conduct in London reinsurance market had requisite effect on U.S. market for primary insurance) (discussed at page 15 of the United States' opposition); *Statoil* (subject-matter found jurisdiction when plaintiff alleged that anticompetitive conduct in the North Sea that inflated barge expenses caused increase in price of crude petroleum imported into the United States) (discussed below).

brought a case under Sections 1 and 2 of the Sherman Act. Statoil alleged that the defendants conspired to fix prices, rig bids and allocate customers for heavy-lift barge services in the North Sea and the Gulf of Mexico, which caused it to pay inflated prices for those services in the North Sea and to charge higher prices for the North Sea crude that it sold throughout the world, including the United States. *Id.* at 2, 3.

The district court in *Statoil* concluded that the alleged activities in the North Sea did not satisfy the FTAIA's "direct, substantial, and reasonably foreseeable anticompetitive effect on United States trade or commerce" test for giving it subject matter jurisdiction over Statoil's claims. *Id.* at 3. On appeal, however, the Fifth Circuit corrected the trial court judge's misapprehension about the jurisdictional reach of the U.S. antitrust laws:

> We accept the contention that Statoil has sufficiently alleged that the defendants' conduct -- that is, the agreement among heavy-lift providers to divide territory, rig bids, and fix prices -- had a direct, substantial, and reasonably foreseeable effect on the United States market. Statoil alleges that the conspiracy not only forced purchasers of heavy-lift services in the Gulf of Mexico to pay inflated prices, but also that the agreement compelled Americans to pay supra-competitive prices for oil. These allegations are sufficient to satisfy the first requirement of the FTAIA. *Id.* at 5.[2]

In some important respects, the relevant competitive facts in this case and in *Statoil* are quite similar. In both cases: (a) a single agreement among competitors restricted competition for one product or service in the United States and foreign countries (long and extended shelf life tomato seeds in the United States and Mexico in this case; barge services in the Gulf of Mexico and the North Sea in *Statoil*); and (b)

[2]In the end, the Fifth Circuit affirmed the district court's decision to dismiss on another ground -- that any adverse impact of the North Sea barge operators' anticompetitive activities on U.S. commerce did not "give rise" to Statoil's private antitrust claims. It found that the FTAIA "precludes subject matter jurisdiction over claims by foreign plaintiffs where the situs of the injury is overseas and that injury arises from effects in a non-domestic market." *Id.* at 6. Of course, this point is not relevant to the United States' claims against the Defendants. Unlike Statoil, the United States is not seeking compensation for damages suffered outside the United States. The exclusive situs of the United States' claims is the United States -- where U.S. farmers are denied the opportunity to buy Hazera's non-RIN extended shelf life tomato seeds, and where U.S. consumers are denied the opportunity to buy the better winter tomatoes that would be grown from those seeds (whether planted in the United States or Mexico). The adverse effect of the Non-Compete Agreement on U.S. commerce, therefore, clearly "gives rise" to our antitrust claims in this case.

the anticompetitive conduct that occurred in foreign countries had a "direct, substantial and reasonably foreseeable" effect on U.S. commerce in a related product (winter tomatoes in the United States in this case; crude petroleum in the *Statoil* case). The effect of the Defendants' agreement to prohibit Hazera from selling its extended shelf life seeds to farmers in Mexico, however, has a far more "direct, substantial and reasonably foreseeable" effect on U.S. imports of winter tomatoes than any possible effect that the payment of inflated heavy-lift barge charges had on U.S. imports of North Sea crude oil.

- The plaintiff and most of the defendants in *Statoil* were foreign citizens. Here, the plaintiff in this case is the United States, and all defendants are U.S. citizens.

- North Sea crude was not produced to meet specific consumer requirements in any particular country. The long shelf life seeds that LSL currently sells to farmers in Mexico, and the extended shelf life seeds that Hazera would sell in Mexico if it were free to do so, however, are specifically designed to produce winter tomatoes that meet the tastes and preferences of U.S. consumers.

- The crude found in the Norwegian sector of the North Sea is consumed in Norway and exported to many countries around the world. Most long shelf life and extended shelf life tomatoes grown in Mexico, however, are exported to the United States.

- The alleged restrictive activities in the North Sea did not shut off the flow of North Sea crude to the United States, or force Statoil or any other North Sea oil company out of the U.S. market. At most (but not to diminish the seriousness of those allegations), any increase in North Sea oil companies' heavy-lift costs might have raised the price of North Sea crude petroleum in the United States by a relatively small amount. By enforcing the Non-Compete Agreement, however, the Defendants (so far, at least) have prevented any non-RIN extended shelf life tomatoes from entering the U.S. winter tomato market.

Even though the Fifth Circuit agreed with the district court's ultimate decision in *Statoil*, it issued a decision pointing out the trial court's error in finding that the alleged anticompetitive activities in the North Sea did not have a "direct, substantial and reasonably foreseeable" effect on U.S. commerce. This Court should reject the Defendant's invitation to make the same erroneous finding in this case with far less justification.

DATED this 23rd day of March, 2001.

FOR PLAINTIFF UNITED STATES

"/s/"

Robert L. McGeorge

Tracey D. Chambers

Janet R. Urban

Andrew K. Rosa

John R. Read

Trial Attorneys

U.S. Department of Justice

Antitrust Division