

13-2280-CV

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

LOTES Co., LTD.,

Plaintiff-Appellant,

—against—

HON HAI PRECISION INDUSTRY Co., LTD, FOXCONN INTERNATIONAL HOLDINGS, LTD., FOXCONN ELECTRONICS, INC., FOXCONN (KUNSHAN) COMPUTER CONNECTOR Co., LTD., FOXCONN INTERNATIONAL, INC., AKA FOXCOMM INTERNATIONAL, INC.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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I. SUMMARY OF ARGUMENT

Lotes alleges that Defendants engaged in a patent hold-up – activity that, without question, violates the U.S. antitrust laws. Years ago, Defendants expressly agreed that that such conduct on their part would be governed by U.S. antitrust laws, in lawsuits in U.S. Courts, brought by parties such as Lotes. Defendants have, to say the least, changed their minds since then.

Defendants understand that, for them to escape their day of reckoning, their agreement must somehow be ignored. Defendants first argue that 15 U.S.C. § 6a, the Foreign Trade Antitrust Improvements Act, or FTAIA, imposes a limit on subject-matter jurisdiction, rendering Defendants' agreement null and void. This Court should hold, however, consistent with the only two Circuit Courts to address the question, that the Supreme Court's *Arbaugh* decision renders the FTAIA non-jurisdictional.

Recognizing that their jurisdictional argument is likely doomed, Defendants erroneously claim that their agreement still cannot be considered on appeal, for procedural reasons – and that if it is considered, it means something quite different from what it actually says. As Lotes demonstrates below, however, the Court can, and should, enforce Defendants' agreement according to its plain terms. That action removes the FTAIA from the case, since Defendants' agreement to apply the U.S. antitrust laws in a U.S. court concedes the FTAIA element of Lotes's claims.

In the vain hope that the FTAIA element of Lotes’s case remains – *and* can somehow be determined entirely in Defendants’ favor *on the pleadings* – Defendants argue that Lotes’s allegations do not satisfy the FTAIA’s “domestic injury exception.” Meanwhile, the United States, as *amicus*, (a) does not mention Defendants’ FTAIA-waiving agreement at all, (b) disagrees at length (albeit correctly) with Defendants’ and the District Court’s analysis of the domestic injury exception, and then (c) claims that Lotes fails to satisfy an entirely different “gives rise to” requirement of the FTAIA—an argument never made by any party, nor addressed by the District Court. Although there is no need for the Court to reach any of these FTAIA issues, Defendants and the United States misapprehend Lotes’s claims, which do satisfy the FTAIA.

II. ARGUMENT

A. This Court Should Hold – Consistent With The Only Two Circuit Courts To Have Addressed The Question – That *Arbaugh* Renders The FTAIA Non-Jurisdictional

Defendants argue that the “legislative history of the FTAIA, the structure of the FTAIA, Supreme Court precedent, and principles of comity all establish the jurisdictional nature of the FTAIA.” Appellees’ Brief (“Appellees’ Br.”) at 23. But Defendants fail to confront *the language of the statute itself*, which does not in any way suggest that the FTAIA is jurisdictional. As the Supreme Court has repeatedly (and unanimously) held, that is all that matters: Only if “the Legislature clearly

states that a threshold limitation on a statute’s scope shall count as jurisdictional” will it be treated as such. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 515-16 (2006); *Morrison v. Nat’l Australia Bank, Ltd.*, 130 S. Ct. 2869 (2010). Thus, this Court should overrule *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 931 (2d Cir. 1988) and hold that the FTAIA is not jurisdictional.¹

1. Under *Arbaugh* and Progeny, the FTAIA Is Not Jurisdictional

Defendants attempt to cast *Arbaugh* off as “involving an entirely different statute” that provides a “dubious analogy” for this case. Appellees’ Br. at 23-24. Defendants miss the point. It was not the statute at issue in *Arbaugh*—but the “clearly states” test established by the case—that is controlling here. *Arbaugh*, 546 U.S. at 516. Nor was the “clearly states” test mere dicta, as Defendants suggest. Appellees’ Br. at 23. Defendants do not (and cannot) dispute that the Supreme Court has repeatedly applied the “clearly states” test to hold that limitations in various statutes are *not* jurisdictional. *See, e.g., Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161-67 (quoting and applying *Arbaugh*’s “clearly states” test to hold that the Copyright Act’s registration requirement is not jurisdictional).

¹ As Defendants begrudgingly concede in a footnote, a panel of this Court may overrule a prior decision of another panel if there has been an intervening Supreme Court decision casting doubt on that precedent. Appellees’ Br. at 10 (citation omitted). Thus, there is no dispute that a panel of this Court can overrule *Filetech* in light of *Arbaugh*. *See Animal Science Products, Inc. v. Chian Minmetals Corp.*, 654 F.3d 462, 468 (3d Cir. 2011) (panel decision overruling prior panel decision holding FTAIA jurisdictional in light of Supreme Court’s intervening decision in *Arbaugh*), *cert. denied*, 132 S.Ct. 1744 (Mar. 19, 2012).

Following *Arbaugh*, both appellate courts to have considered the issue have held that the FTAIA is *not* jurisdictional—overruling their prior precedent to the contrary. See *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 852 (7th Cir. 2012) (*en banc*), *cert. denied*, --- S.Ct. ----, 81 U.S.L.W. 3309 (July 22, 2013) (No. 12,650); *Animal Science Products, Inc.*, 654 F.3d at 467-68. These courts focused, as *Arbaugh* requires, on the plain language of the FTAIA. And, as the Seventh Circuit explained in *Minn-Chem*, “[t]he FTAIA . . . never comes close to using the word ‘jurisdiction’ or any commonly accepted synonym. Instead, it speaks of ‘conduct’ to which the Sherman Act . . . applies. This is the language of elements, not jurisdiction.” 683 F.3d at 852. This Court should follow the same course and reject Defendants’ request to create a circuit split on this issue after *Arbaugh*.

2. Defendants’ Legislative History and Other Arguments Should Be Rejected.

Defendants construct three main arguments in attempt to avoid the clear import of *Arbaugh* and progeny. None is persuasive.

First, Defendants cherry pick various statements from the legislative history of the FTAIA that refer to “jurisdiction.” Appellees’ Br. at 24-25. But as the Supreme Court explained, “[j]urisdiction . . . is a word of many, too many, meanings.” *Arbaugh*, 546 U.S. at 511 (internal quotation marks and citation omitted). Thus, the “[Supreme] Court, no less than others, has sometimes been profligate in its use of the term.” *Id.* Given the courts’ loose language related to “jurisdiction,”

it is neither surprising nor relevant that legislators, too, loosely used that term in the legislative history. What is relevant—indeed, controlling—is that the statute they enacted does not use the word “jurisdiction” or anything like it. And it is well-established that snippets of legislative history of the type that Defendants point to cannot overcome the plain language of the statute itself. *See U.S. v. Perdue Farms, Inc.*, 680 F.2d 277, 284 (2d Cir. 1982) (“The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction.”) (quoting *Gemsco, Inc. v. Walling*, 324 U.S. 244, 260 (1945)).

Second, pointing to language in 15 U.S.C. § 6a(2), Defendants argue that “satisfaction of the FTAIA does not itself give rise to a claim” and thus should be treated as authorizing “jurisdiction for a claim that must then be cognizable by satisfying the provisions of sections 1 to 7 of the Sherman Act *other than the FTAIA*.” Appellees’ Br. at 27 (emphasis in original). Defendants again miss the point. As they suggest, the FTAIA places limits on the scope of claims described elsewhere in the antitrust laws, but it does not affect a court’s ability under Article III to hear an antitrust claim in the first place. *That* is why the FTAIA is not “jurisdictional.” In fact, the Supreme Court made this very point in *Morrison*, which is controlling here.

In *Morrison*, the Supreme Court considered the extra-territorial application of § 10(b) of the Securities and Exchange Act of 1934. The Second Circuit had treated the question as one of “jurisdiction,” but the Supreme Court rejected that approach. 130 S.Ct. at 2876-77. Specifically, the Court reasoned that “to ask what conduct § 10(b) reaches is to ask what conduct § 10(b) prohibits, which is a merits question.” *Id.* at 2877. By contrast, “[s]ubject-matter jurisdiction . . . refers to a tribunal’s power to hear a case” and “presents an issue quite separate from the question whether the allegations the plaintiff makes entitle him to relief.” *Id.* (internal quotation marks and citation omitted).

Thus, just as the district court in *Morrison* had jurisdiction “to adjudicate the question whether § 10(b) applies to [Defendant]’s conduct,” here too the district court had jurisdiction to determine whether the antitrust laws reach Defendants’ conduct. *Id.* Whether the antitrust laws, in fact, reach that conduct is a merits question—not a jurisdictional one.

Third, Defendants claim that “the Supreme Court and the majority of other circuit courts that have addressed the issue treat the FTAIA as jurisdictional.” Appellees’ Br. at 28. As an initial matter, the “other circuit courts” Defendants identify *all* considered the issue *before* the Supreme Court’s decision in *Arbaugh*. *Id.* at 29-30. By contrast, both circuit courts that have considered the question after *Arbaugh* have thoroughly rejected the notion that the FTAIA is jurisdictional. *See*

Minn-Chem, Inc., 683 F.3d at 852; *Animal Science Products, Inc.*, 654 F.3d at 467-68.

Moreover, contrary to Defendants’ claim, the Supreme Court’s decision in *F. Hoffmann–La Roche Ltd. v. Empagran S. A.*, 542 U.S. 155, 164 (2004)—when considered along with the Court’s decision in *Morrison*—supports a conclusion that the FTAIA is *not* jurisdictional. As the Seventh Circuit explained:

The Supreme Court’s decision in *Morrison*, we believe, provides all the guidance we need to conclude that, like § 10(b) of the Exchange Act, the FTAIA sets forth an element of an antitrust claim, not a jurisdictional limit on the power of the federal courts. As the Court put it, limitations on the extraterritorial reach of a statute describe what conduct the law purports to regulate and what lies outside its reach. The Supreme Court itself used much the same language with respect to the antitrust laws in its decision in [*Empagran*], which dealt specifically with the FTAIA. The Court spoke, for example, of the FTAIA’s “removing from the Sherman Act’s reach” certain types of conduct, *id.* at 161, and whether it was reasonable under the facts presented there “to apply this law to conduct that is significantly foreign,” *id.* at 166. Even if one thought the language in *Empagran* to be less than dispositive, we can now see no way to distinguish this case from *Morrison*.

Minn-Chem, 683 F.3d at 852.

In sum, recent Supreme Court precedent has fundamentally altered the analysis of whether limitations in a statute are jurisdictional. Applying this precedent, this Court should reject Defendants’ arguments, overrule *Filetech*, and hold that the FTAIA is not jurisdictional.²

² Defendants also suggest that holding the FTAIA is not jurisdictional would “undermine principles of comity.” Appellees’ Br. at 27. Specifically, they reason that “motions to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1)

B. Defendants' Express Agreement to be Bound by the U.S. Antitrust Laws, as Enforced by U.S. Courts, Can and Should be Given Effect

As noted above, this case offers the Court its first opportunity to hold, consistent with the other Circuits that have considered the question post-*Arbaugh*, that the FTAIA is non-jurisdictional. That holding will be dispositive of this appeal, based on an underlying scenario that appears to be unprecedented. As alleged in the FAC, the Defendants signed at least one contract, the Contributors Agreement, in which they expressly agreed to the application of the U.S. antitrust laws to their conduct. FAC Exh. A ¶¶ 2, 6.7, 6.12 (JA 78, 81); Appellant's Brief at 24-25.

Once the FTAIA is properly considered to be an element of Lotes's claim, this agreement to abide by the U.S. antitrust laws can take effect. It constitutes either a concession of that FTAIA element, or a waiver of any defense under the FTAIA.

Defendants' attempt to wiggle free from both their agreements and precedent takes three tacks. First, Defendants claim that the waiver issue cannot be considered by this Court on appeal. Second, they argue that the antitrust compliance clause they signed somehow does *not* commit them to abide by any jurisdiction's antitrust laws—in short, Defendants argue the agreement is a nullity. Third, De-

permit fact-finding that can quickly and efficiently resolve the threshold question” of whether the antitrust laws reach foreign activity. *Id.* at 28. But there are other mechanisms to resolve this question early in a case where appropriate, including a Rule 12(b)(6) motion and, where fact-finding is necessary, an early motion for summary judgment. In any event, Congress—by not including jurisdictional language in the FTAIA—apparently did not have the same concern as Defendants. Under *Arbaugh*, that is dispositive.

defendants argue that, because the FTAIA was allegedly jurisdictional at the time Defendants signed the Contributors Agreement, Defendants could not have consented to waive the FTAIA element of Lotes's claim. All three arguments are unavailing.

1. Defendants' Concession on the FTAIA Element of Lotes's Claim is Properly Before the Court

Defendants argue that this Court should ignore their agreement to abide by state and federal antitrust law because the argument was raised for the first time on appeal. Appellees' Br. at 18-21. It is true that, in general, the Court will not consider issues raised for the first time on appeal. *Yong Qin Luo v. Miket*, 625 F.3d 772, 778 (2d Cir. 2010) (citing *Readco, Inc. v. Marine Midland Bank*, 81 F.3d 295 (2d Cir. 1996)). However, this Court's precedent is not an absolute bar, and allows for flexibility "in two circumstances: (1) where consideration of the legal issue is necessary to avoid manifest injustice or (2) where the issue is purely legal and there is no need for additional fact finding." *Id.* (quoting *Readco*).

The second exception applies here in full force. In the wake of a Rule 12(b)(1) dismissal such as this one, there are no fact issues—facts pleaded are taken as true—and the question of whether FTAIA is jurisdictional is purely a question of law for the Court. Moreover, Defendants' consent to both state and federal antitrust law was expressly pleaded, and the waiver directly flows from the clauses consented to by the Defendants. FAC ¶ 40; Exh. A ¶ 2 (JA 45, 78). In the Opposi-

tion below, Lotes cited to the antitrust compliance clause of the Contributors Agreement at least three times. Opposition at 4, 7, 8 (Dkt. No. 33).

Perhaps most importantly, the FTAIA waiver issue only has relevance once the FTAIA is found to be non-jurisdictional. Because the District Court felt constrained by *Filetech*, the waiver could never have been factored into its analysis, and thus no judicial resources or opportunities have been wasted. *See id.* at 11-15. The FTAIA waiver issue is, therefore, properly before this Court.

2. Defendants' Agreement to Abide by the U.S. Antitrust Laws Means Exactly What it Says, and it Applies Here

Next, Defendants argue that the agreement they signed “does not commit any contract signatory to the application of any particular ‘state, federal or international antitrust laws and regulations’ without a threshold determination that a particular statute governs the conduct in question.” Appellees’ Br. at 20. In short, Defendants’ argument appears to be that they are required to abide by the antitrust laws, but only if they are required to abide by the antitrust laws. Yet there is no reason to give the agreement signed by Defendants anything other than its obvious meaning.

Lotes has pleaded that the Defendants are “Contributors” of patent claims necessary to implement the USB 3.0 specification and have signed the Contributors Agreement. FAC ¶¶ 38, 62, 63; Exh. A-2 (JA 44, 54, 95). In connection with that standard-setting process, the Defendants straightforwardly consented to be

bound by state and federal antitrust law. Moreover, Defendants' antitrust law obligations were comprehensive, and were *not* limited merely to avoiding illegal "communications," as Defendants claim. Appellees' Brief at 20-22. Defendants ignore the full text of the Contributors Agreement, which is quite clear on this point:

2. Compliance With Antitrust Laws

Contributor and the Promoters are committed to fostering open competition in the development of products and services based on the Final Specification. Contributor and the Promoters understand that in certain lines of business they are or may be direct competitors and that ***it is imperative that they and their representatives act in a manner which does not violate any state, federal or international antitrust laws and regulations. Without limiting the generality of the foregoing***, Contributor and Promoters acknowledge that this Agreement prohibits any communications regarding costs, prices . . . exclusion of competitors or any other topic that may be construed as a violation of antitrust laws

FAC Exh. A ¶ 2 (JA 78) (emphasis added).

Defendants thus agreed to be bound by U.S. antitrust law. They simultaneously agreed to the exclusive jurisdiction of this Court (or New York state courts) to hear any claim that they had filed to live up to their agreement. *Id.* ¶ 6.7 (JA-81); FAC ¶ 10 (JA 31). In doing so, Defendants waived any defense under the FTAIA, and plainly recognized the "direct, substantial, and reasonably foreseeable" domestic effect any anticompetitive conduct by them would have. Once the FTAIA is held to be non-jurisdictional, the FTAIA becomes an element of a Sher-

man Act claim that effectively disappears from the case under this concession along with any concerns of “comity.”

3. The FTAIA Was Not Jurisdictional at the Time the Agreement was Signed, and in Any Event, Defendants Agreed to the Application of Current U.S. Antitrust Law

Defendants also argue that because “there was no dispute over the FTAIA’s status as a jurisdictional limitation” at the time of signature, the parties to the agreement could not have consented to waive the FTAIA. Appellees’ Br. at 22. Defendants thus claim that, whatever their obligation to abide by the U.S. antitrust laws might entail, that obligation is frozen in the legal landscape—including *Filetech*—applicable when the agreement was signed. This argument fails for three independent reasons.

First, Defendants signed the Contributors Agreement in 2007 or 2008. FAC ¶ 39 (JA 44). Thus, even if Defendants had agreed to a “frozen” version of the antitrust laws, the 2006 holding in *Arbaugh* was part of that frozen landscape. Second, and in any event, Defendants did *not* agree to be bound by a “frozen” body of antitrust law. On the contrary, Defendants expressly consented to be bound by *future* antitrust laws as well:

Anything contained in this Agreement to the contrary notwithstanding, the obligations of the parties hereto shall be subject to all laws, ***present and future***, of any government having jurisdiction over the parties hereto, and to orders, regulations, directions or requests of any such government.

FAC Exh. A, ¶ 6.12 (JA 81) (emphasis added).

Finally, even if Defendants had not expressly agreed to be bound by current and future antitrust laws and regulations, Defendants have offered no reason to depart from the rule that judicial decisions apply retroactively, even when they overrule a precedent “by which parties may previously have regulated their conduct.”³ Such retroactivity is “overwhelmingly the norm.” *Id.*

C. Defendants Mischaracterize Lotes’s Antitrust Claim, Which Satisfies both the Sherman Act and the FTAIA

1. Lotes Has Sufficiently Pleaded a Viable Cause of Action Under the Sherman Act

Implicitly recognizing that the FTAIA will likely be held to be non-jurisdictional, and in the hope that their agreement to litigate this case in this very Court will not be held against them, the Defendants spend considerable ink arguing (a) that the FAC does not satisfy the FTAIA’s domestic injury exception, *and* (b) that the FAC does not sufficiently plead antitrust causes of action alleging violations of Sections 1 and 2 of the Sherman Act. *See, e.g.*, Appellees’ Br. at 9 (“...Plaintiff Failed to Allege Antitrust Claims Whether or Not the FTAIA is a Jurisdictional Statute”). Before addressing the FTAIA’s domestic injury exception—assuming it even remains in the case in the wake of Defendants’ FTAIA waiver—Lotes turns to the latter substantive antitrust argument, which was not the basis of

³ *See James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 534-35 (1991).

the Court's decision below, and which springs from Defendants' foggy description of the FAC.

The FAC defined the relevant market as the market for USB 3.0 connectors suitable for integration into motherboards powering notebooks, desktop computers and servers. FAC ¶¶ 65, 104, 114 (JA 55, 67, 114). The alleged anticompetitive conduct was a patent hold-up, through the intentional breach of two U.S. SSO contracts to license their essential patent claims (FAC ¶¶ 38-41; JA 44-45), and false promises to a U.S. SSO to license both essential and optional intellectual property (FAC ¶ 46; JA 46-47), on which promise the SSO relied in choosing the technology for inclusion into the USB 3.0 specification (FAC ¶¶ 50, 62; JA 49, 54). This was followed by Defendants' refusal to enter into a license negotiation (FAC ¶¶ 42-45; JA 45-46) and their subsequent patent lawsuits (FAC ¶¶ 53-57; JA 50-52), asserting patent claims necessary to practice the standard (FAC ¶¶ 53, 54; JA 50-51), to illegally prevent competition in the U.S. market on a critical computer component that numbers literally in the billions of units (FAC ¶¶ 16, 52; JA 34, 50).

Accordingly, the theory of this case is, and always has been, a patent hold-up where “(1) in a consensus-oriented private standard-setting environment, (2) a patent holder's intentionally false promise to license essential proprietary technology on FRAND terms, (3) coupled with an SDO's reliance on that promise when

including the technology in a standard, and (4) the patent-holder's subsequent breach of that promise, is actionable anticompetitive conduct." *Broadcom Corp. v Qualcomm Inc.*, 501 F.3d 297, 314 (3rd Cir. 2007). There is no doubt that this allegation is actionable under the antitrust laws. *Id.* The United States fully agrees with Lotes on this point, arguing that the problem with Lotes's lawsuit is the plaintiff-limiting language of the FTAIA (discussed below), not substantive antitrust law. Accordingly, in the view of the United States, private plaintiffs or the United States itself could bring viable antitrust claims based on the conduct that Lotes has alleged. Amicus Br. at 21-22.

2. Lotes Alleges a "Substantial" Foreclosure of Competition with Respect to all USB 3.0 Connectors

Turning to the "substantiality" requirement of the FTAIA's domestic effects exception, it is important to recognize that Lotes's antitrust claim does not flow, as Defendants suggest, merely from the fact that two of Lotes's USB connectors have been targeted by Defendants' patent lawsuits. *See* Appellees' Br. at 6-7, 11-12, 15. Rather, and as the FAC describes in considerable detail, the patent lawsuits against two of Lotes's connectors are instead one part of a campaign against the entire industry; *i.e.*, they are simply the most obvious enforcement mechanism for the patent hold-up that Defendants have achieved. FAC 71 (JA 58).

Other actions taken by Defendants against Lotes include (a) disrupting the contracts Lotes has with Defendants' competitors, including Quanta, Compal, and

Inventec, and (b) disrupting Lotes's distribution network, by threatening Lotes's distributors with patent lawsuits if they do not buy USB 3.0 connectors from Foxconn. FAC 51, 68 (JA 49-50, 57). And these actions are designed not merely to harm Lotes, but *also* to freeze out competition in USB 3.0 connectors generally, by cowering "risk averse" device manufacturers, who do not want their manufacturing plans disrupted by Defendants' patent infringement suits. FAC 61 (JA 54-55). Lotes is not the only beneficiary of Defendants' agreements and promises to the USB-IF. These commitments were made to all members of the USB-IF who desired to make products that complied with the USB 3.0 specification so that Promoters, Adopters and Contributors would be free to build products free from patent litigation. FAC ¶¶ 36-41, 46 (JA 43-47). The Defendants' patents are "baked-in" to the USB 3.0 specification. FAC ¶¶ 52, 54; Exhs. A-2, D-1, H-1, I-1 (JA 50, 51, 95, 106-107, 194, 203). If an entity wants to manufacture USB 3.0 connectors, it must obtain a license from the Defendants. In sum, the FAC explains that Defendants' actions targeting Lotes are intended to have, and do have, an "*in terrorem*" effect on all "competitive manufacture" of USB 3.0 connectors generally.⁴

⁴ FAC 71 (JA 58). The lower court Opinion, and the Appellees' Brief, mention a 2011 letter submitted by Defendants' counsel as part of a declaration below. Appellees' Br. at 15. This letter, from Lotes' outside counsel, stated that Lotes believed that Defendants had entered into licenses with other Adopters. Defendants would have the Court take this letter as evidence (at the pleading stage) that weighs against Lotes's theory of market foreclosure. But Lotes does not know the number of or details of any such agreements, including whether they have been reached

Accordingly, the analysis of market power that is most relevant, at least with respect to the “substantiality” of Lotes’s claim under Section 2, begins with Defendants’ current market share in USB 3.0 connectors generally, which exceeds 50 percent. FAC ¶¶ 21, 22, 34 (JA 36, 37, 42). That substantial current market share is now augmented with an ironclad entry barrier—a patent hold-up—designed and effected by Defendants, a barrier that removes any threat to Defendants’ current share and that establishes a dangerous likelihood that Defendants’ market power in a critical component of modern electronic devices will skyrocket. Specifically, as the FAC alleges, “by leveraging their market power from the four corners of their patent portfolio,” Defendants have control of 100 percent of the USB 3.0 computer connector market *in any jurisdiction where they have issued patents*. FAC ¶ 51 (JA 49). Unless the connectors are made by Defendants, everyone in the stream of commerce (including component manufacturers, ODMs, distributors, retailers and even consumers) have potential exposure to Defendants’ patents on unlicensed USB 3.0 connectors.⁵

with any actual competitor, and/or with any entity other than Defendants’ own affiliates.

⁵ See 35 U.S.C. § 271(a) (“Except as otherwise provided in this title, whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.”).

This entire economic picture, and not merely Defendants' current market share, is appropriately pleaded and is plainly sufficient. *See, e.g., Int'l Distribution Centers, Inc. v. Walsh Trucking Co., Inc.*, 812 F.2d 786, 792 (2d Cir. 1987), *cert. denied*, 482 U.S. 915 (June 8, 1987) (market characteristics other than market share, including "barriers to entry, the nature of the anticompetitive conduct and the elasticity of consumer demand" must also be considered in "determining whether a given firm has monopoly power or has a dangerous probability of acquiring monopoly power.") (citations omitted).

3. The Domestic Effects Pleaded by Lotes Are, Under Appropriate Analysis, "Direct" and "Reasonably Foreseeable"

Defendants would have the Court believe that the causal chain of their patent hold-up is a lengthy, tortured tale, winding almost exclusively through foreign countries and mere components of finished goods, and that it therefore cannot satisfy the FTAIA's requirements of "foreseeability" and "directness." Appellees' Brief at 9-18. Yet as the FAC describes, Defendants' conduct forms a circle, with unambiguously direct, and reasonably foreseeable, effects that both begin *and* end in the United States. Even if Defendants had not agreed to the application of the U.S. antitrust laws, eliminating any FTAIA bar to Lotes's claims, these allegations are more than sufficient to satisfy the FTAIA.

a. The Initial Domestic Effect

At the beginning of the circle is a standard-setting process in the United States, governed (with Defendants’ written consent) by the U.S. antitrust laws, and culminating in a foreclosure of competition through hold-up of critical U.S. patents—patents from which foreign patents relevant to USB 3.0 manufacture are derived. FAC ¶¶ 53-54 (JA 50-51). In arguing that this U.S. nexus is irrelevant, Defendants claim it is only “conduct” that has occurred in the United States. Appellees’ Brief at 16-18. Yet Defendants fail to acknowledge that their (successful) domestic anticompetitive conduct had an immediate domestic *effect* – namely, a foreclosure of competition that was sufficient, in and of itself, to permit Lotes to invoke the antitrust laws in a U.S. Court. *See* 15 U.S.C. § 26; *Cargill, Inc., v. Monfort of Colorado, Inc.*, 479 U.S. 104, 112 (1986) (obtaining injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. § 26, “requires proof of threatened loss or damage by a violation of the antitrust laws.”) (citation and internal quotations omitted). As will be seen below, it is this initial domestic foreclosure of competition that also “gives rise to” Lotes’s antitrust claim under the FTAIA.

The FTAIA nowhere provides that the statute’s required domestic “effect” must be the domestic payment of a supra-competitive price, as Defendants (and the United States, as *amicus*) simply assume. It is true that such damages may often be the domestic “effect” that is the gateway through the FTAIA’s requirement for pri-

vate litigants in foreign price-fixing cases. But the initial domestic effect in this conceptually distinct standard-setting case, which appears to be a matter of first impression under the FTAIA, is necessarily different.

b. Subsequent Domestic Effects

The domestic effect at the *end* of Defendants’ circle of conduct – namely, higher prices paid in the United States by purchasers of electronic goods incorporating supra-competitively priced USB 3.0 connectors—also is not impermissibly remote under the FTAIA’s requirements.

As the United States argues, the FTAIA’s “directness” requirement is best understood as a proximate cause requirement. *Minn-Chem*, 683 F.3d at 857. Lotes agrees that this is the only understanding of the FTAIA that gives a distinct voice to each of the statute’s requirements of directness, reasonable foreseeability, and substantiality. *See* Amicus Br. at 31-32; Lotes Br. at 38. It is also clear that, as a practical matter, an FTAIA causal-nexus requirement that eliminated antitrust claims based on components of purchased manufactured goods would ignore economic reality, and hobble antitrust enforcement efforts generally. *See* IB Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 272i1, at 309 (4th ed. 2013); Amicus Br. at 33-36.

Once the proper standard is identified, the next question is whether Lotes’s allegations are sufficient. They plainly are. Lotes has alleged the straightforward,

predictable, and foreseeable manner in which Defendants' patent hold-up is translated into higher prices of goods in the United States. Lotes Br. at 28-30. Defendants' counter-argument boils down to a claim that the causal chain leading to domestic harm is rendered speculative, apparently as a matter of law, due to Lotes's small presence in the market. Appellees' Br. at 13-15. But in making this argument, Defendants make the (now familiar) mistake of assuming that Lotes's claim turns on the economic effect of Defendants' patent claims against only two Lotes connectors. *Id.* at 14-16 (arguing Lotes has alleged only an effect on "two of 13 components of" a small manufacturer). Again, and as discussed above, Lotes actually alleges that Defendants' patent hold-up is aimed at the entire USB 3.0 market. Thus, this case is on all fours with *Minn-Chem* and *TFT-LCD*,⁶ in that Lotes alleges that Defendants' illegal activity has market-wide effects on components.

Finally, this back-and-forth on the question of FTAIA causation highlights an additional reason that the District Court's decision should be reversed. The FTAIA, being non-jurisdictional, simply presents a question of proximate cause that is an element of Lotes's case. With Lotes arguing that the causal chain is reasonably proximate, and with Defendants arguing it is too lengthy and speculative, it is worth noting that such questions of proximate cause in antitrust cases are generally for the finder of fact. *See Story Parchment Co. v. Paterson Parchment Pa-*

⁶ *In re TFT-LCD (Flat Panel) Antitrust Litig*, 822 F.Supp.2d 953 (N.D. Cal. 2011).

per Co., 282 U.S. 555, 566-67 (1931); *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1045 (9th Cir. 1987), *aff'd*, 496 U.S. 543 (1990).

4. Lotes Has Satisfied the FTAIA’s “Gives Rise To” Requirement

The United States devotes more than eight pages of its *amicus* brief to an argument that Defendants themselves have never made, either in the District Court or in this Court. Specifically, the United States argues that Lotes’s pleading fails to satisfy the “gives rise to” requirement of the FTAIA. *Amicus Br.* at 15-23. In a curious effort to *curtail* the range of “private attorneys general” that can enforce the antitrust laws, the United States argues that Lotes—despite being an aggrieved *member* of the SSO that Defendants abused—is, essentially, the only entity *not* entitled to bring an antitrust claim based on Defendants’ conduct.⁷ This Court should reject this new statutory argument, and should do so for the same reason, no doubt, that Defendants never made it – the argument is baseless, and proceeds from a misreading of the FAC.

It is true, as the United States notes, that Lotes must establish that a domestic effect of Defendants’ conduct has given rise to—*i.e.*, proximately caused—Lotes’s own injury. *Amicus Br.* at 15-17; 15 U.S.C. § 6a(2). According to the United

⁷ *See id.* at 21; *compare* En Banc Brief for the United States as Amicus Curiae in Support of Appellee at *1, *Kotam Electronics, Inc. v. JBL Consumer Prods., Inc.*, 1996 WL 33475205 (No. 94-4984) (11th Cir. Jan. 29, 1996) (because “federal enforcement resources are limited ... the United States has a continuing concern with preserving the ability of private parties to act as private attorneys general in enforcing the antitrust laws in meritorious cases.”).

States, the domestic effect at the *end* of Defendants’ circle of conduct—an increase in U.S. prices of consumer electronic devices incorporating USB connectors—cannot satisfy the statute’s requirements, since that effect would be a result of, rather than a proximate cause of, Lotes’s own injuries. Amicus Br. at 19-21. This price-increase allegation is to be contrasted, according to the United States, with an allegation that *would* satisfy the “gives rise to” requirement: an allegation that Defendants “are refusing to license U.S. patents in U.S. commerce.” *Id.* at 22.

But of course Lotes has made *precisely* this allegation. As noted above, the direct chain of events giving rise to Lotes’s antitrust claim began with the refusal of Defendants’ attorney in the United States, in the wake of standard-setting activity in the United States, to grant the required license to crucial *U.S. patents* that Defendants contributed to the USB 3.0 Standard.⁸ Specifically, these are U.S. Pat. Nos. 7,481,677 (“the ‘677 patent”) and 7,625,243 (“the ‘243 patent”).⁹ FAC Exhs.

⁸ FAC ¶¶ 36-46 (JA 43-47). All the inventors in these U.S. patents reside in Pennsylvania. FAC ¶ 62 (JA 54).

⁹ The Defendants’ asserted Chinese patents are the progeny that “claim priority” to their respective U.S. parents, the ‘677 and ‘243 patents. FAC ¶54 (JA 51). International priority is well established in the patent law where a patent applicant may “claim priority” to his earlier filed foreign patent application for obtaining “a common priority date . . . to insure that protection will be uniform and unaffected by [invalidating] prior art with an effective date before one or more of the national patent applications.” Robert P. Merges, *Patent Law and Policy* at 454 (3rd ed. 2004, BNA Books). *See, also*, Paris Convention for the Protection of Industrial Property, Art. 4, Mar. 20, 1883, as amended Sept. 28, 1979, 21 U.S.T. 1583, 828 U.N.T.S. 305; Patent Law of the P.R.C., Art. 29, Mar. 12, 1984, as amended Dec. 27, 2008, available at

E-1, F-1(JA 121-131, 157-180). As the FAC makes quite clear, it is the “specifications of these U.S. patents [that] must support all claims in the corresponding Chinese patents” that are now being asserted against Lotes as part of Defendants’ litigation terror campaign. FAC ¶ 54 (JA 51). Being substantively identical to their Chinese counterparts, the needed U.S. patents must be licensed on RAND-zero terms. *Id.* In addition to the ‘677 and ‘243 patents, it is unknown how many U.S. patents the Defendants are obligated to license to Lotes as part of Defendants’ world-wide patent license obligations.¹⁰

Thus—as Defendants themselves have obviously long recognized—Lotes’s allegations easily satisfy the FTAIA’s “gives rise to” requirement, because Lotes’s injury has been proximately caused by an entirely domestic patent hold-up that is simply being enforced in China, where the goods are manufactured, based on patent claims *entirely* premised upon key U.S. intellectual property generated by U.S. inventors.

<http://www.wipo.int/wipolex/en/details.jsp?id=5484> (last visited Oct. 14, 2013) (“If . . . the applicant first files an application for an invention or utility model patent in a foreign country . . . [and] he files an application for patent in China on the same subject matter, he may enjoy the right of priority in accordance with . . . international treaties . . .”).

¹⁰ As shown at www.uspto.gov, a quick search of the U.S. patent collection shows that Defendant Hon Hai owns 45 U.S. patents containing the search term “USB 3.0,” and 564 U.S. patents containing the search term “USB.” (last visited Oct. 14, 2013).

D. The District Court Should Have Followed its Individual Rules and Permitted Amendment of the Complaint.

According to the District Court's Individual Rules and Procedures, "[a] party must file a letter, with a courtesy copy to Chambers, to request a pre-motion conference before brining any motion."¹¹ In compliance with the rules, counsel for Lotes sent the court a letter requesting a pre-motion conference on the issue of filing a proposed Second Amended Complaint (SAC) that included additional plaintiffs. JA 282. A few days later, counsel for Defendants wrote a letter to the District Court opposing Lotes' request, and Lotes responded. JA 279-281, 288-290. The court calendared three different dates for the pre-motion conference (to be held together with the Scheduling Conference), adjourning two hearing dates, and rendering the third moot by the court's dismissal. JA 287, 291.

In the letters requesting a pre-motion conference, Lotes did not provide a copy of the SAC to the District Court because the rules limited letters to "no more than three single-spaced pages in length, including any attached exhibits."¹² Lotes expected to discuss the need for an amended complaint at the pre-motion conference and submit formal briefing on the issue, if needed. The lower court's rules

¹¹ Individual Rules and Procedures of Judge Shira A. Scheindlin ("Individual Rules") ¶ IV.A. 3 (Rev. Sept. 2013), http://www.nysd.uscourts.gov/cases/show.php?db=judge_info&id=876 (last visited October 15, 2013) (addressing Pre-Motion Conferences).

¹² Individual Rules at 3.

state that “[m]otions will be resolved at the pre-motion conference to the extent possible. If papers are found to be necessary, the issues to be considered will be defined and a briefing schedule set.”¹³ The process set forth in the Individual Rules was followed by the District Court in the two previous pre-motion conferences attended by the parties, and Lotes had no reason to believe that the process would not be followed a third time. JA 12-26, 217-240.

Since the District Court never held the requested pre-motion conference, Lotes did not have an opportunity to brief the matter and supply a copy of the SAC to the District Court. The only copy of the SAC ever provided was an unfinished, preliminary draft that was given to Defendants’ counsel in response to a spoken request made at the April 29 meet-and-confer on the pre-motion conference. As a professional courtesy, Lotes provided a draft SAC to Defendants for the purpose of providing them with basic information regarding the new plaintiffs.¹⁴ Defendants make much of the fact that the FAC and the SAC were so similar. Appellees’ Br. at 32. The explanation is simple: being in unfinished draft form, the draft SAC was at this time merely a copy of the FAC with a description of the three new plaintiffs added. Jumping to conclusions, the Defendants seized on the opportunity

¹³ *Id.*

¹⁴ Counsel for Lotes learned from his client that there was a subsidiary with an interest in the pending case. This occurred about one week prior to the meet-and-confer held on April 29, 2013 with Defendants’ counsel on scheduling a pre-motion conference. JA 279.

to send the lower court a letter mischaracterizing the draft SAC and Lotes's motives. Thus, without benefit of the process set forth in the Individual Rules and without reviewing the SAC, the lower court improperly denied Lotes's request to file an amended complaint.

The District Court's denial of an amended complaint without a hearing or formal briefing under these circumstances was an abuse of discretion. The addition of new plaintiffs had no relevance to the consideration of Defendants' then pending motion to dismiss, and Defendants do not explain how a SAC would have materially prejudiced them in any way. The case in the lower court was still in the pleading stage; no Scheduling Conference had occurred; the lower court had not issued a Scheduling Order; and the Defendants had not answered. At this stage of the proceedings, the fact that the lower court previously allowed one amended complaint is no bar under the Federal Rules to a plaintiff filing another amended complaint. The case should be remanded back to the lower court for a review of the SAC in compliance with the Individual Rules and for fair consideration under both Rule 15 and the District Court's own rule that "[l]eave to amend a complaint will be freely granted."¹⁵

¹⁵ Individual Rules at 4.

III. CONCLUSION

This case should be returned to the District Court for discovery on Lotes's indisputably viable patent hold-up claim. Defendants, having agreed to exactly that procedure, cannot and should not be heard to complain.

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IV. RULE 32(a)(7)(C) CERTIFICATE

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6,901 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word in Times New Roman 14-point font.

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