No. 14-___

IN THE

Supreme Court of the United States

MOTOROLA MOBILITY LLC,

Petitioners,

v.

AU OPTRONICS ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a cartel's delivery of price-fixed goods overseas for incorporation into finished products imported directly to the United States immune from private suit under U.S. antitrust law?

2. Absent special circumstances, may a motions panel assign itself to decide the merits of a case?

PARTIES TO THE PROCEEDING

The parties to this proceeding include petitioner Motorola Mobility LLC, and the following respondents:

AU Optronics Corporation

AU Optronics Corporation America, Inc.

Chunghwa Picture Tubes Ltd.

Hannstar Display Corporation

LG Display Co. Ltd.

LG Display America, Inc.

Samsung Electronics Co., Ltd.

Samsung Semiconductor, Inc.

Samsung Electronics America, Inc.

Sharp Corporation

Sharp Electronics Corporation

Toshiba Corporation

Toshiba America Electronics Components, Inc.

Toshiba Mobile Display Co., Ltd.

Toshiba America Information Systems, Inc.

Sanyo Consumer Electronics Co., Ltd.

Samsung SDI Company, Ltd.

Samsung SDI America, Inc.

RULE 29.6 DISCLOSURE STATEMENT

Motorola Mobility LLC is a Delaware limited liability company, with its principal place of business in Illinois, and is an indirect, wholly-owned subsidiary of Lenovo Group Limited, a Hong Kong company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Motorola Mobility LLC ("Motorola") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

STATUTORY PROVISIONS INVOLVED

The Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a, provides that:

> Sections 1 to 7 of this title 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.
>
> If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.

OPINIONS BELOW

The Seventh Circuit's amended opinion (Pet. App. 1a-28a) is published at 775 F.3d 816. The court of appeals' first opinion (Pet. App. 27a-35a) is published at 746 F.3d 842. The transferor district court's opinion granting summary judgment to respondents (Pet. App. 36a-61a) is unpublished. The multidistrict litigation district court's opinion denying summary judgment to respondents (Pet. App. 62a-69a) is unpublished. The Seventh Circuit's order denying rehearing en banc (Pet. App. 70a-71a) is unpublished.

JURISDICTION

The Seventh Circuit denied petitioner's timely petition for rehearing en banc on January 12, 2015. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

I. Statutory Background

Congress enacted the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 15 U.S.C. § 6a, to help American exporters compete against foreign businesses that are not subject to U.S. antitrust laws, while continuing to protect American consumers. Congress accommodated that fundamentally protectionist goal by solely "exempt[ing] from the Sherman Act export transactions that did not injure the United States economy." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) (citing H.R. Rep. No. 97-686, at 1-3, 9-10 (1982)). "The FTAIA 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 . . ., however anticompetitive, *as long as* those arrangements adversely affect *only* foreign markets." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 161 (2004) (emphasis added).

The FTAIA announces a "general rule stating that the Sherman Act 'shall not apply to conduct involving trade or commerce . . . with foreign nations.'" *Id*. at 158 (quoting 15 U.S.C. § 6a). But the statute then narrows that provision by twice reaffirming that the Sherman Act continues to apply to anticompetitive restrictions involving U.S. imports, so there would be "no misunderstanding that import restraints, which can be damaging to American consumers, remain covered." H.R. Rep. No. 97-686, at 9.

First, in what is commonly known as the "import commerce exclusion," the FTAIA provides that the Sherman Act applies to all anticompetitive "conduct involving . . . import trade or import commerce." 15 U.S.C. § 6a. U.S. antitrust law accordingly applies to conduct involving import commerce, so long as the conduct also satisfies the longstanding background requirement that it was "meant to produce and did in fact produce some substantial effect in the United States." *Hartford Fire*, 509 U.S. at 796 (citing *United States v. Alcoa*, 148 F.2d 416, 444 (2d Cir. 1945) (L. Hand, J.)).

Second, in what is commonly known as the "direct effects exception," the FTAIA provides that the Sherman Act applies to all foreign conduct that meets two criteria; it:

> (1) sufficiently affects American commerce, *i.e.*, it 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."

Empagran, 542 U.S. at 162 (quoting 15 U.S.C. §§ 6(a)(1), (2)) (alterations in original) (emphasis omitted).

II. Facts And The Proceedings Below

1. At all times relevant to this action, petitioner Motorola Mobility (Motorola) was an American company headquartered in Illinois that designed and manufactured cell phones and other electronics. Motorola has long held a leading share of the U.S. cell phone market, and moreover sold more phones in this country than any other. Motorola's operations were overwhelmingly domestic. In this country, it designed its phones; selected component parts and suppliers; and negotiated the terms for the purchase of those parts.

Like many U.S. companies, Motorola manufactures some of its products overseas, both to be closer to its overseas suppliers and to take advantage of lower production costs. Foreign law frequently requires that the foreign manufacturing be conducted by subsidiaries incorporated in those countries.

But even these subsidiaries were subject to the complete control of the U.S. parent. In the United

States, Motorola determined the prices, quantities, and terms on which the subsidiaries would purchase components; managed the subsidiaries' manufacturing and distribution; and dictated the terms on which finished products were imported and then sold to Motorola's customers in the United States. Motorola also repatriated the subsidiaries' profits to itself in the United States, where it paid taxes on those profits.

Respondents manufacture a central component of cell phone screens: liquid crystal display (LCD) panels. Beginning in at least 1998, and continuing through 2006, respondents secretly conspired to fix the prices on more than $5 billion of LCD panels they sold to Motorola (including through its subsidiaries) and to other manufacturers. Respondents' conduct included quintessential, per se antitrust violations: express agreements among ostensible competitors to fix prices and limit output.

The cartel targeted Motorola in this country because of its large U.S. market share. Respondents established offices in Illinois for the purpose of negotiating contracts with Motorola. Those negotiations produced agreements on prices that were reached in this country. Respondents' internal communications frequently referenced Motorola's share of the U.S. market and their desire to rank among Motorola's largest suppliers. They shared information about their negotiations with Motorola. They then created bespoke panels for Motorola's phones, in consultation with Motorola's engineers in this country.

Respondents then delivered the great majority of the price-fixed panels to Motorola's manufacturing subsidiaries abroad. After respondents agreed on terms with Motorola, the subsidiaries took instructions from Motorola on how many panels to purchase at what price, then formally placed the orders for the screens. The subsidiaries then assembled the phones, which they shipped to the United States and other markets. The harm caused by the cartel with respect to phones sold in the United States thereby passed directly through to the U.S. market.

2. The cartel's activities were discovered and prosecuted by the U.S. Department of Justice. In fact, Motorola is specifically named as a victim of the conspiracy in a number of the conspirators' guilty pleas.

More than a dozen executives were sentenced to prison time in the United States, and the defendants paid record criminal fines. Those fines were based on LCD panels incorporated into U.S.-bound products, including products manufactured abroad by overseas subsidiaries of Motorola and other U.S. manufacturers. Indeed, in its prosecution of respondent AU Optronics, the Department of Justice sought and obtained a jury instruction that the defendants could be convicted under the Sherman Act for fixing the price of panels incorporated overseas into U.S.-bound products. Respondents themselves argued that the court should not impose substantial restitution orders in that criminal litigation because private civil actions in U.S. courts would compensate the victims of the conspiracy.

3. Motorola sued respondents in federal district court in Illinois, asserting both its own claims and any claims of its subsidiaries, which had been assigned to the parent company. Motorola sought recovery for three categories of purchases:

(1) LCD panels delivered to Motorola in the United States ("Category 1," about 1% of Motorola's total panel purchases);

(2) panels delivered abroad to the Motorola subsidiaries that were incorporated into phones that respondents knew would be imported into and sold in the United States ("Category 2," about 42%); and

(3) panels delivered abroad and incorporated into products ultimately sold overseas ("Category 3," about 57%).

The multidistrict litigation panel transferred and consolidated Motorola's suit for pretrial proceedings in multidistrict litigation (MDL) with dozens of other U.S. antitrust claims arising from the cartel. The same court oversaw both the civil actions and the criminal prosecution. Only respondent AU Optronics and its executives went to trial, arguing that the FTAIA barred the prosecution. The district court rejected that argument, and they were convicted on all counts. The defendants appealed to the Ninth Circuit, which affirmed. *United States v. Hsiung*, --- F.3d ----, 2015 WL 400550 (9th Cir. Jan. 30, 2015) (amended opinion), *petition for a writ of certiorari filed* No. 14-1121.

In the civil litigation, the MDL district court similarly rejected respondents' argument that the FTAIA barred the suit. Pet. App. 62a-69a. Motorola's case was then transferred back to Illinois for trial. But without hearing or argument, that court granted respondents' motion for reconsideration, rejecting the California MDL court's interpretation of the FTAIA. The Illinois court dismissed almost the entire case, concluding that Motorola's Category 2 and Category 3 claims were precluded by the FTAIA. Pet. App. 61a.

3. Because the Category 1 claims remained viable for trial, the district court's ruling was interlocutory. The district court accordingly certified its ruling for immediate appeal. Pet. App. 2a; 28 U.S.C. § 1292(b). Motorola filed a summary petition for permission to appeal, to which respondents acquiesced.

A motions panel (per Posner, J.) not only granted the petition for interlocutory review but, without permitting briefing or argument, affirmed the district court's judgment on the merits. Pet. App. 27a-28a.

4. Motorola sought rehearing en banc, objecting both to the motions panel deciding the merits of the case and to the substance of its ruling. The United States filed an *amicus* brief arguing that the panel's ruling was erroneous and would present substantial obstacles to the criminal prosecution of international cartels that target this country.

Then things got even stranger. The panel invited the Department of Commerce and Department of State to file their own separate *amicus* briefs. Solicitor General Donald Verrilli filed a letter in response, explaining that he had authorized the brief of the

United States, which set forth the views of the executive branch.

The panel was unmoved. It ordered Solicitor General Verrilli personally, within one week, to explain what it means for a brief to "reflect[] the views of the United States," and moreover to identify the specific executive branch officials whom he had consulted and the nature of that consultation. That order received considerable public attention. The panel withdrew it, but issued another directed to the Solicitor General. This one expressed concern with "the credibility" of the government's first brief disagreeing with the panel's opinion, and stated that a further submission stating the separate views of the Departments of Commerce and State would be "helpful" in that regard.

The government responded by filing another brief, this one signed by the Assistant Attorney General for Antitrust and the General Counsel of the Federal Trade Commission, as well as senior legal officers of both the Department of State and the Department of Commerce. The brief disagreed at length and in detail with the panel's contention that a ruling in Motorola's favor would harm U.S. foreign relations, reasoning that respondents' conspiracy to fix prices for LCD panels "doubtless" had an effect on the price of panels incorporated in cell phones sold in the United States.

The motions panel *sua sponte* vacated its decision. But it set the case for briefing and argument before itself, on a remarkable schedule. Motorola was given five business days (which spanned the Independence Day holiday) to prepare and file a brief on the merits

of this multi-billion-dollar international antitrust case. Respondents were given one week to file a brief defending the district court's ruling. Motorola was forbidden to submit a reply brief. The panel set the case for oral argument three business days after submission of respondents' brief, during a four-week period in which the Seventh Circuit was not otherwise hearing argument.

Motorola then sought *initial* en banc review of the motions panel's decision to seize the merits of the case for itself and to impose such a schedule. The motions panel then vacated its prior order, granted Motorola's initial petition for interlocutory appeal, and imposed a new briefing schedule.

5. The Seventh Circuit's internal operating procedures required that the case then be randomly assigned to a merits panel "in the same manner as other appeals." *See* 7th Cir. IOP 6. Nonetheless, the motions panel assigned itself to decide the merits, without addressing its authority to do so. After briefing and oral argument, the panel promptly issued another decision, again authored by Judge Posner, affirming the district court's decision. Pet. App. 1a-26a.[1]

On the merits, the panel rejected both of Motorola's alternative arguments that the FTAIA is no barrier to its suit. First, with respect to the FTAIA's "import commerce exclusion," the panel held that it

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[1] The opinion reproduced in the appendix is an amended opinion issued after Motorola again sought rehearing en banc.

was dispositive as a matter of law that respondents did not import the LCD panels. "It was Motorola, rather than the defendants, that imported these panels into the United States, as components of the cellphones that its foreign subsidiaries manufactured abroad and sold and shipped to it." *Id.* 5a.

Second, the panel rejected Motorola's reliance on the "direct effects exception." The court acknowledged that the LCD panels "were sold by [respondents] to [Motorola's] foreign subsidiaries, which incorporated them into the finished product and sold the finished product to Motorola for resale in the United States." *Id.* 6a-7a. The court of appeals therefore "assume[d] that the requirement of a direct, substantial, and reasonably foreseeable effect on domestic commerce has been satisfied." *Id*. 7a.

The court nonetheless held that the exception was inapplicable by construing the provision to require that the plaintiff's right to sue arise from the effect on domestic or import commerce. On that view, the effect must "give rise to an antitrust cause of action." *Id.* That standard was not satisfied here, the panel reasoned, whether or not Motorola operated through subsidiaries. The subsidiaries felt the effects of respondents' price-fixing abroad, not in domestic or import commerce, and Motorola's injuries were derivative of that foreign harm under "the indirect-purchaser doctrine of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977)." Pet. App. 11a. But even treating Motorola as a single integrated entity, the panel opined that Motorola was injured in foreign, not import, commerce. *Id.* 16a.

The Seventh Circuit trumpeted the importance of its decision: "Nothing is more common nowadays than for products imported to the United States to include components that the producers bought from foreign manufacturers." *Id.* 17a. Many of these "foreign manufacturers are located in countries that do not have or, more commonly, do not enforce antitrust laws consistently or uniformly, or whose antitrust laws are more lenient than ours," meaning that prices of "many products exported to the United States doubtless are elevated to some extent by price fixing or other anticompetitive acts." *Id*. 18a.

Petitioner sought rehearing en banc, which was denied. Pet. App. 70a-71a.

This Petition followed.

REASONS FOR GRANTING THE WRIT

The decision below and the process by which it was reached both substantially depart from the decisions and practices of other circuits. The Seventh Circuit held that a cartel's price fixing of goods imported into this country is immune from private Sherman Act liability whenever those goods are initially delivered abroad. That is true notwithstanding that the cartel's anticompetitive behavior targets the U.S. market and has a direct, substantial, and entirely foreseeable (indeed, intended) effect on U.S. commerce. Certiorari is warranted because that ruling conflicts with the precedent of this Court and other circuits. Moreover, the issue has surpassing importance because, as the

Seventh Circuit stressed, such global supply chains are ubiquitous.

The Court should also grant certiorari to put an end to the Seventh Circuit's anomalous practice of permitting motions panels to pick through their docket and assign themselves to decide the merits of cases they find of particular interest. Absent unusual circumstances, no other circuit allows that practice, which casts public doubt on the impartiality of the assignment process and the resulting decisions of the court. Appellate judges should not be able to pick their own cases.

I. Certiorari Should Be Granted To Consider The Seventh Circuit's Unprecedented Narrowing Of U.S. Antitrust Law As It Applies To International Cartels.

A. The Seventh Circuit's Decision Conflicts With The Precedent Of Other Courts Of Appeals.

The lower courts have accurately described the FTAIA as a "convoluted"[2] and "inelegantly phrased"[3] "web of words."[4] Unsurprisingly, the statute's oblique

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[2] *Turicentro, S.A. v. Am. Airlines, Inc.*, 303 F.3d 293, 300 (3d Cir. 2002).

[3] *Carpet Group Int'l v. Oriental Rug Imps. Ass'n*, 227 F.3d 62, 69 (3d Cir. 2000) (quoting *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 4 (1st Cir.1997)).

[4] *United States v. Hui Hsiung*, --- F.3d ----, 2015 WL 400550, at *9 (9th Cir. Jan. 30, 2015).

terminology has generated substantial disagreements over its proper interpretation. The Seventh Circuit's ruling in this case specifically conflicts with the precedent of three other courts of appeals.

1. The Seventh Circuit's decision conflicts with the Ninth Circuit's recent ruling affirming the criminal convictions and fines arising from this very cartel against AU Optronics – a respondent in this case – and its executives. *United States v. Hsiung*, --- F.3d ----, 2015 WL 400550 (9th Cir. Jan. 30, 2015) (amended opinion). Those defendants have filed a parallel petition for certiorari from the Ninth Circuit (No. 14-1121), seeking to resolve the same circuit conflict.

In *Hsiung*, "the overseas sale of panels for incorporation into products destined for sale in the United States was a key focus of the indictment." *Id.* at *16. In turn, the court instructed the jury that it could convict on the basis of the defendants' price fixing of panels "sold in the United States *or* for delivery to the United States," as well as panels "incorporated into finished products . . . sold in the United States *or* for delivery to the United States." *Id.* at *7 (emphasis added).

The defendants argued that the FTAIA barred application of the Sherman Act to this cartel "because the bulk of the panels were sold to third parties worldwide rather than for direct import into the United States." *Id*. at *1. But the Ninth Circuit rejected "defendants' efforts to place their conduct beyond the reach of United States law," *id*., holding that the cartel's activity subjected it to the Sherman

Act under not just the import commerce exclusion but also the direct effects exception.

With regard to the import commerce exclusion, the court first noted that a portion of the LCD panels were imported directly into the United States – *i.e.*, the equivalent of Motorola's Category 1 purchases. But the court went further, explaining that AU Optronics "imported over one million price-fixed panels per month into the United States," and that the members of the cartel "earned over $600 million from th[is] importation." *Id*. at *14. These figures included LCD panels sold to the foreign manufacturing subsidiaries of U.S. companies like Motorola – *i.e.*, the equivalent of Motorola's Category 2 purchases. Moreover, AU Optronics "negotiated with United States companies in the United States to sell TFT–LCD panels at the prices set" by the cartel. *Id*. Consequently, the defendants' argument "that AUO was not an 'importer' misse[d] the point," because the defendants' activity fell "squarely within the scope of the Sherman Act." *Id*. The Ninth Circuit also held that the evidence was sufficient for the jury to find that the defendants had "targeted" the United States, citing both "the negotiations in the United States and the significant direct sales to the United States." *Id*.

The Ninth Circuit held in the alternative that the cartel's activity "g[a]ve rise to" a direct, substantial, and reasonably foreseeable effect on U.S. import and domestic commerce. The court applied its prior precedent holding that the role of the "gives rise to" requirement is to specify the *degree of causation – i.e.*, "proximate cause" rather than "but for causation." *Id.*

at *17 (quoting *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 987 (9th Cir. 2008)).

The defendants argued "that the offshore conduct is too attenuated from the United States and that the intervening development, manufacture, and sale of the products worldwide resulted in a diffuse effect," not a direct effect, on U.S. markets. *Id*. at *16. But the Ninth Circuit found that the proximate causation requirement was satisfied because "[t]he constellation of events that surrounded the conspiracy leads to one conclusion – the impact on the United States market was direct and followed 'as an immediate consequence' of the price fixing." *Id*. at *17. The court explained that the internal cartel meetings, "where the price fixing initially occurred, led to direct negotiations with United States companies, both domestically and overseas, on pricing decisions." *Id*. Even though many of the panels "were sold overseas, often to foreign subsidiaries of American companies or to systems integrators, and then incorporated into finished products," all of the cartel members "understood that substantial numbers of finished products were destined for the United States and that the practical upshot of the conspiracy would be and was increased prices to customers in the United States." *Id.*

The Ninth Circuit recognized that respondents' conspiracy involved "a variety of arrangements in terms of incorporating the panels into finished products." *Id*. In one situation, a foreign factory assembled products that were solely destined for the U.S. market. "In other situations, overseas systems

integrators purchased the panels for integration into finished products, often with direct oversight of TFT-LCD panel pricing by United States manufacturers." *Id*. Moreover, "[i]t was not uncommon that the orders placed with system integrators were based on custom orders from United States customers for direct shipment to that customer." *Id*. These facts "underscored the integrated, close and direct connection between the purchase of the price-fixed panels, the United States as the destination for the products, and the ultimate inflation of prices in finished products imported to the United States. The direct connection was neither speculative nor insulated by multiple disconnected layers of transactions." *Id*.

The Seventh Circuit's ruling in this case conflicts with both of the Ninth Circuit's holdings arising from the application of the FTAIA to the participation of respondent AU Optronics in this very cartel. The Ninth Circuit held that the import commerce exception was easily satisfied *both* because the defendants directly exported some panels to the United States *and* because the negotiations in the United States independently "involved" import commerce. The Ninth Circuit expressly deemed irrelevant the fact that the Seventh Circuit held was dispositive: that "[i]t was Motorola, rather than the defendants, that imported these panels into the United States." Pet. App. 5a.

The Ninth Circuit then held that the cartel satisfied the direct effects exception, adopting an irreconcilable interpretation of the FTAIA's "gives rise to" requirement. The Seventh Circuit held that

provision "determines who may bring a suit based on" the antitrust laws, requiring that the U.S. effect be the source of the plaintiff's injury. In stark contrast, the Ninth Circuit applied its settled rule that the "gives rise to" provision merely requires that the overseas conduct be the proximate cause of the effects in the United States. Moreover, the Ninth Circuit held that the facts of this very cartel demonstrate proximate causation.

The conflict is particularly striking and unacceptable, because Motorola initially *prevailed* under the FTAIA in the MDL litigation before the California district court that resolved the criminal prosecution of AU Optronics and its executives. Indeed, the Ninth Circuit's holding mirrored the California MDL district court's earlier refusal to dismiss Motorola's civil claims under the FTAIA, because there exists "a concrete link between defendants' price-setting conduct (the collusion between the defendants to establish an artificially high price for LCD Panels), its domestic effect (the negotiations between Motorola and defendants that resulted in the setting of a global, anticompetitive price for all LCD Panels sold to Motorola) and the foreign injury suffered by Motorola and its affiliates (payment of higher prices abroad)." Pet. App. 42a-43a.

Once the MDL concluded, Motorola's suit was remanded to the Illinois district court. That court took the highly anomalous step of granting rehearing to reject the California court's interpretation of the statute – the interpretation subsequently adopted by the Ninth Circuit in the criminal case.

2. The Seventh Circuit's ruling equally conflicts with the Third Circuit's interpretation of the "import commerce exclusion." In *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 464-65 (3d Cir. 2011), purchasers brought a Sherman Act suit against foreign producers and exporters of magnesite. The district court dismissed the case under the FTAIA, reasoning that the import commerce exclusion was inapplicable because the defendants did not themselves import the magnesite into this country. Instead, they sold the magnesite to a third party, which then imported it into the United States. *See Animal Science Prods., Inc. v. China Nat'l Metals & Minerals Import & Export Corp.*, 702 F. Supp. 2d 320, 369 (D.N.J. 2010).

The Third Circuit reversed. The court of appeals held that "[t]he District Court erred" in holding that the import commerce exclusion only applies when "the defendants function as the physical importers of goods." *See* 654 F.3d at 470. "Functioning as a physical importer may satisfy the import trade or commerce exception, but it is not a necessary prerequisite." *Id*. The "[r]elevant inquiry" is, instead, "whether the defendants' alleged anticompetitive behavior 'was directed at an import market,'" or, put "slightly differently," whether "the defendants' conduct target[ed] import goods or services." *Id*. (quoting *Turicentro, S.A. v. Am. Airlines, Inc*., 303 F.3d 293, 303 (3d Cir. 2002)); *see also id.* at 471 ("On remand . . . the District Court should assess whether the plaintiffs adequately allege that the defendants' conduct is directed at a U.S. import market and not

solely whether the defendants physically imported goods into the United States.").

The Third Circuit would have held in this case that respondents' cartel behavior is subject to the Sherman Act under the FTAIA's import commerce exclusion. There is no doubt that respondents "targeted" the U.S. market. They specifically sought out contracts with Motorola (a U.S. company), negotiating prices in this country for sales of LCD panels that they knew were to be incorporated into phones for sale in the United States.

The Seventh Circuit avoided that result only by rejecting the Third Circuit's interpretation of the FTAIA. The Seventh Circuit held that the import commerce exclusion was inapplicable as a matter of law because respondents sold the LCD panels to Motorola's subsidiaries, whereas it characterized Motorola as the actual importer. Pet. App. 5a. The Seventh Circuit panel afforded no weight to the fact that the cartel unquestionably had targeted the U.S. market.

3. The Seventh Circuit's decision also conflicts with language in the D.C. Circuit's opinion on remand from this Court in *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267 (D.C. Cir. 2005). There, the defendants argued that the direct effects "exception applies only to injuries that arise in U.S. commerce, thus describing its reach by the *situs* of the transaction and resulting injuries rather than by the *situs* of the effects of the allegedly anti-competitive conduct giving rise to the appellants' claims." *Id*. at 1269. The court held that this position "has no

support" in either the text or the legislative history of the FTAIA. As the D.C. Circuit explained, "the FTAIA's 'domestic effects' requirement 'does not exclude all persons injured abroad from recovering under the antitrust laws of the United States.'" *Id.* (quoting H.R. Rep. No. 97–686, at 17a). The Seventh Circuit's holding that Motorola cannot recover for the effects on import and domestic commerce because the injuries occurred abroad cannot be reconciled with the D.C. Circuit's interpretation of the statute.

4. This case is an ideal vehicle to resolve the circuit split. The Seventh Circuit's decision presents an opportunity to resolve the pervasive uncertainty that surrounds the FTAIA's application to international cartels that deliver products abroad for importation into the United States. Both the Seventh and Ninth Circuits have denied rehearing en banc in cases arising from the very same cartel, signaling that they have no intention of reconciling their positions. The conflict is particularly untenable, because this very case was before the district court that gave rise to the circuit conflict in the criminal prosecution arising from the same cartel. Only this Court can restore uniformity to the interpretation of the FTAIA.

B. The Decision Below Conflicts With This Court's Precedents And Misconstrues The FTAIA.

This Court's intervention is also warranted because the Seventh Circuit erred in holding that no U.S. manufacturer may obtain relief for blatant antitrust violations that occur when a foreign cartel delivers price-fixed components abroad for importation

into the United States. That ruling deems irrelevant that the cartel was fully aware that the products were destined for the United States and that the cartel sought to exploit and profit from that importation. Nor does the Seventh Circuit's ruling give any weight to the fact that the cartel engaged in substantial activities in the United States in furtherance of the scheme, or that the scheme resulted in direct and substantial effects on U.S. import or domestic commerce. The only thing that matters is that the components were delivered abroad before they were imported here.

That rule has no basis in the text, legislative history, or purpose of the FTAIA, or in this Court's precedents interpreting the statute. If allowed to stand, it will severely impair the rights of U.S. manufacturers in every sector of the economy. This Court should grant certiorari to reverse.

1. The FTAIA is a protectionist statute that seeks to enhance the competitiveness of U.S. exporters entering foreign markets. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 (1993) (citing H.R. Rep. No. 97-686, at 2-3, 9-10 (1982)). It does so by preventing U.S. antitrust claims against U.S. exporters for foreign conduct. It also permits foreign companies to engage in foreign transactions that do not injure the U.S. economy without fear of U.S. antitrust liability.

But the FTAIA does not authorize foreign companies to manipulate *our* markets through foreign conduct. As this Court has explained, "application of our antitrust laws to foreign anticompetitive conduct is

. . . reasonable . . . to redress domestic antitrust injury that foreign anticompetitive conduct has caused." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004). That is why the FTAIA expressly excludes any foreign activity that even "involv[es]" import trade or commerce, and also why it preserves antitrust liability for otherwise exempt activities with effects on import *and* domestic commerce. 15 U.S.C. § 6a. As the FTAIA's legislative history explains, "import restraints, which can be damaging to American consumers, remain covered by the" Sherman Act. Moreover, the direct effects exception permits a U.S. company to recover "even if some purchasers take title abroad or suffer economic injury abroad." H.R. Rep. No. 97-686,at 10.

The Seventh Circuit thus turned the statute on its head. The effects of the Category 2 violations were all felt in the United States – indeed, they were aimed here – and Congress would not have wanted to strip Motorola of the ability to seek redress for its injuries. Each piece of the Seventh Circuit's contrary decision is flawed.

2. The Seventh Circuit's interpretation of the import commerce exclusion in particular is unduly narrow. The FTAIA provides that the Sherman Act applies to conduct "involving . . . import trade or import commerce." 15 U.S.C. § 6a. Motorola argued that this exclusion was triggered for two, independent reasons. First, respondents negotiated an unlawful price with Motorola in the United States, which resulted in a single price for all LCD panels in every Motorola phone – including the Category 1 phones

that were assembled in the United States, as well as the Category 2 and 3 phones that were assembled abroad. Because it is undisputed that claims relating to the Category 1 phones are "import commerce" (as the panels were imported into the United States before being incorporated into the phones), the entire negotiation and single-price outcome "involved" import commerce, and Motorola can bring claims arising out of it.

Second, respondents targeted Motorola's share of the U.S. market, inflating the price of LCD panels which they knew all along were destined for importation in Motorola's phones. Moreover, respondents did so by negotiating directly with the importing U.S. party: Motorola. That targeting "involves" import commerce, and injured both Motorola (which set the prices and quantities and imported the phones) and its subsidiaries (which overpaid for panels and then had to pass on that inflated price to Motorola when they exported the phones to the United States).

The court of appeals, however, concluded that "Motorola is wrong to argue that" its Category 2 purchases were "import commerce." Pet. App. 5a. That is supposedly so because "[i]t was Motorola, rather than the defendants, that imported these panels into the United States, as components of the cellphones that its foreign subsidiaries manufactured abroad and sold and shipped to it." *Id*. Put another way, the court of appeals held that the import commerce exclusion did not apply because respondents were not importers.

That analysis reads the word "involving" out of the FTAIA. As the Third and Ninth Circuits have correctly concluded, the FTAIA's exclusion is not limited to importers, but also applies when, as here, foreign entities target import commerce. By contrast, limiting the exclusion to importers would substantially contract the scope of the Sherman Act

3. The Seventh Circuit's holding regarding the direct effects exception is also incorrect. The court of appeals properly accepted that respondents' price-fixing conspiracy had a direct, substantial, and foreseeable effect on domestic commerce in the United States because "components were sold by their manufacturers to the foreign subsidiaries, which incorporated them into the finished product and sold the finished product to Motorola for resale in the United States." Pet. App. 6a. But it overlooked that the same conduct also had a similar effect on import commerce – which was *even more* direct, substantial, and foreseeable. The statute permits claims alleging effects on either import or domestic commerce.

When respondents sold price-fixed LCD panels into the stream of import commerce, they harmed Motorola's subsidiaries, and made Motorola's phones more expensive to import. Moreover, by negotiating to set a single, inflated global price for LCD panels, including panels bound for the United States, respondents distorted the import market.

The court of appeals' error answers its holding that the effect on domestic commerce did not "give rise" to a Sherman Act claim. The Seventh Circuit considered only whether the cartel's price-fixing gave

give rise to Motorola's foreign subsidiaries' injuries – which "occurred entirely in foreign commerce." Pet. App. 7a. That holding ignores that Motorola was injured in the course of *import* commerce, giving rise to antitrust claims, as well as that the subsidiaries (which have assigned their claims to Motorola) were injured import commerce as well.

But in all events, the Seventh Circuit's interpretation of the FTAIA's "gives rise to" prong conflicts with this Court's precedent. In *Empagran*, the Court correctly recognized that this statutory language does not look literally to whether the injury creates a Sherman Act "claim," a question that would involve all manner of ancillary inquiries into the precise basis for the plaintiff's suit. That reading is moreover implausible, given that the same language appears in the FTC Act, under which no civil suit is permitted *at all*.

Rather, *Empagran* explained, the question is whether the defendant has engaged in conduct that "has an effect of a kind that antitrust law considers harmful, *i.e.,* the "effect" must "giv[e] rise to a [Sherman Act] claim." *Empagran*, 542 U.S. at 162. In *Empagran*, that requirement was not met because the only domestic effects the plaintiffs cited were felt solely by other, hypothetical parties, and were wholly independent of the foreign effects at issue in that case. Here, by contrast, Motorola complains about the very transactions that caused both the domestic effects and the anticompetitive injuries to its business.

Motorola's reading of the "gives rise to" language is most consistent with not only the text of the statute,

but also its legislative history. Noting commenters' warnings that the legislation could be "read as ignoring whether conduct has an adverse effect on competition," the committee responsible for drafting the FTAIA said the bill was not:

> intended to confer jurisdiction on injured foreign persons when that injury arose from conduct with no *anticompetitive* effects in the domestic marketplace. Consistent with this conclusion, the full committee added language . . . to require that the "effect" providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws. *This does not, however, mean that the impact of the illegal conduct must be experienced by the injured party within the United States.* As previously set forth, it is sufficient that the *conduct providing the basis of the claim has had the requisite impact on the domestic or import commerce of the United States.*

H.R. Rep. No. 97-686, at 11-12 (emphasis added). Moreover, a previous version of the statute provided that "the effect upon domestic commerce" had to be "the basis of the violation alleged." *Id*. at 18. That language was changed because it might have created the misimpression "that an effect, rather than conduct, is the basis for a violation." *Id*.

In this case, because respondents' price-fixing had a direct, substantial, and foreseeable harmful effect on U.S. import and domestic commerce, and because price-fixing is prototypical conduct giving rise to a

Sherman Act claim, the "gives rise to" requirement is satisfied.

Separately, the Seventh Circuit was wrong to conclude that Motorola and its manufacturing subsidiaries are so distinct that the injuries to the subsidiaries do not give rise to a claim for either them or Motorola. As explained in the Statement of the Case, *supra*, the subsidiaries exist because they are frequently required by foreign law and they enable Motorola to take advantage of efficiencies from Asian manufacturing processes. But the subsidiaries effectively function as divisions of the parent company: Motorola dictates the terms on which they do business, is the sole purchaser of their products, and repatriates their profits to the United States. The fact that they are nominally separate companies has no antitrust significance; indeed, this Court has already made clear that "[a]ntitrust liability should not depend on whether a corporate subunit is organized as an unincorporated division or a wholly owned subsidiary." *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 754, 772 (1984). The same logic applies to Motorola's relationship with its subsidiaries: an injury to Motorola's subsidiaries, resulting from conduct directed at Motorola, naturally gives rise to a claim by Motorola.

4. This Court's review is also warranted to address the Seventh Circuit's erroneous application of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). In *Illinois Brick*, this Court construed Section 4 of the Clayton Act, which authorizes private antitrust suits, and decided that "the longstanding policy of

encouraging vigorous private enforcement of the antitrust laws" supported a rule treating direct purchasers as having been "injured to the full extent of the overcharge paid by them," and thus permitting them to sue for the full amount, acting as "a group of 'private attorneys general.'" *Id.* at 746. Downstream purchasers, termed "indirect purchasers," generally are not permitted to argue that the antitrust injuries were "passed on" to them when suing violators. *See id.* at 736. By concentrating antitrust damages upstream, the Court sought to facilitate private enforcement by a corps of parties with a strong incentive to sue. *See id*. at 746; *see also California v. ARC Am. Corp.*, 490 U.S. 93, 102 n.6 (1989) (explaining that *Illinois Brick* "was concerned . . . that at least some party have sufficient incentive to bring suit"); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 494 (1968) (reasoning that if antitrust harm could be dispersed more widely, then "those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them").

By transforming *Illinois Brick* into a source of antitrust immunity for respondents, the Seventh Circuit turned that ruling on its head. The court of appeals held that the direct purchasers – Motorola's subsidiaries – cannot sue because their injuries occurred abroad. Pet. App. 8a. In turn, Motorola, which was injured both here and abroad, cannot sue because it was chronologically downstream from its subsidiaries. *Id.* 10a-11a. The upshot of that ruling is that *no* private party can sue for the antitrust

violations in this case – neither the direct purchasers nor any downstream purchaser. So the cartel wins.

That cannot be correct. In this case, Motorola, as the parent of all the direct purchasers, and as the entity that negotiated the pricing and designed the relevant products, is properly regarded as the upstream party favored by *Illinois Brick* and *Hanover Shoe*. Indeed, the Court recognized in *Illinois Brick* that an exception to the general rule concentrating antitrust injury in direct purchasers exists when market forces have been suspended because "the direct purchaser is owned or controlled by its customer," as Motorola's subsidiaries are. 431 U.S. at 736 n.16. That criterion is amply met here: the interactions between Motorola and its subsidiaries do not follow ordinary market rules. Motorola dictates the terms on which the subsidiaries do business, it repatriates the profits, and it ultimately bore the harm incurred by the subsidiaries as a result of respondents' price-fixing.

The court of appeals nevertheless rejected that argument because the subsidiaries are incorporated under foreign law. But neither *Hanover Shoe*, *Illinois Brick*, nor any other case decided by this Court has ever suggested that this fact has any antitrust significance, and it does not. The key point is that Motorola is both the first purchaser in the United States and is the parent of its corporate family, and is

therefore the ideal party to sue to vindicate antitrust injuries to that family.[5]

5. Finally, the comity arguments set forth at the end of the Seventh Circuit's opinion provide no justification for barring Motorola's claim. This Court has "long held that application of our antitrust laws to foreign anticompetitive conduct is . . . 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. The crux of Motorola's argument is that respondents targeted its U.S. market share, and engaged in substantial conduct both in the United States and directed toward the United States, which give rise to liability. Motorola's argument does not open the door to liability for any company that sells a component that happens to make its way to the United States one day – it requires deliberate targeting, or other conduct that creates a direct, substantial, and foreseeable effect on U.S. import or

[5] In the court below, the United States took the position that if the FTAIA bars suit by Motorola's subsidiaries, then an administrable exception to the direct purchaser rule could be recognized permitting the first affected purchaser in U.S. commerce to sue. *See* U.S. C.A. Br. 23. If so, *Motorola* is obviously that purchaser. The United States suggested that Motorola's customers might fill that role as well. U.S. C.A. Br. 22-23 n.3. But they purchase from an upstream U.S. entity: Motorola. Further, requiring the downstream customers to bring suit is less preferable under *Illinois Brick*, because rather than have a single entity sue, a diffuse class of customers with relatively little at stake would have to organize itself.

domestic commerce. Here, respondents negotiated directly with the importer (Motorola) in this country over the prices of LCD screens that were installed in cell phones imported into the United States.

C. The Question Presented Is Of Surpassing Importance.

Certiorari is warranted because the importance of the Question Presented cannot be overstated. As the Seventh Circuit itself stressed, "[n]othing is more common nowadays than for products imported to the United States to include components that the producers bought from foreign manufacturers." Pet. App. 17a. Multinational manufacturers routinely utilize foreign subsidiaries to maximize efficiency. Foreign subsidiaries are often closer to raw materials and have access to larger pools of affordable labor. Ultimately, these benefits accrue to American businesses, in the form of higher profit margins, and American consumers, in the form of lower prices.

The Seventh Circuit's opinion imposes a heavy cost on this well-established business practice. By treating foreign subsidiaries as *persona non grata* in antitrust cases, and by foreclosing antitrust liability whenever a foreign supplier delivers components abroad, the court of appeals has exposed multinational manufacturers – and the domestic markets they serve – to manipulation by foreign cartels. While the United States may be able to bring enforcement actions against some of these foreign schemes, antitrust enforcement has always depended on substantial private involvement.

Until this Court resolves the circuit conflict and clarifies the scope of the FTAIA, the decision below will create tremendous uncertainty for multinational businesses. They simply will not know whether, by structuring their business to take advantage of foreign efficiencies, they are forsaking their right to seek redress against foreign cartels. Such uncertainty deters investment and hinders growth.

II. The Court Should Grant Review To Disapprove The Seventh Circuit's Non-Random Assignment Process.

This case also presents the Court an opportunity to exercise its supervisory power to put an end to a practice, unique among the circuits, that dramatically undermines the real and perceived impartiality of the appellate process in the Seventh Circuit.

This case illustrates what has just been an acknowledged for the first time as a practice in the Seventh Circuit and, as far as petitioner can determine, nowhere else. Seventh Circuit judges hearing applications to permit an interlocutory review regularly assign to themselves the merits of cases they find particularly significant and interesting, rather than leaving the case to the ordinary random assignment process. Although not permitted by the circuit's own procedures, *see supra* at 12, Chief Judge Wood and Judge Easterbrook recently acknowledged

the practice publicly.[6] Judge Easterbook thus explained that "[w]hen a motion requires the panel to consider the merits to some degree – for example, when a movant requests permission to take an interlocutory review of a class-certification order, or permission to appeal under 28 U.S.C. § 1292(b) – the motions panel decides whether it wants to keep the case for decision on the merits too." *Id.*

Judge Easterbrook frankly acknowledged that "[s]ome judges are more apt than others to prefer keeping cases." *Id.* And the deeply troubling reality is that they are inclined to do so in particular kinds of especially significant cases. For example, it is common for Judge Posner, sitting on a motions panel presented with a Section 1292(b) application, to decide antitrust cases on the merits without further briefing or argument. *See Sterk v. Redbox Automated Retail, LLC*, 672 F.3d 535, 537 (7th Cir. 2012) (Posner, J.); *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 627 (7th Cir. 2010) (Posner, J.); *In re: High Fructose Corn Syrup Antitrust Litigation*, 361 F.3d 439, 440-41 (7th Cir. 2004) (Posner, J.).

[6] *See* Ed Whelan, *Bench Memos: Seventh Circuit Motions Panels Seizing Merits Cases?*, National Review Online, (Dec. 1, 2014), http://www.nationalreview.com/bench-memos/393734/seventh-circuit-motions-panels-seizing-merits-cases-ed-whelan (Dec. 1, 2014); Ed Whelan, *Bench Memos: Judge Easterbrook Responds*, National Review Online (Dec. 2, 2014), http://www.nationalreview.com/bench-memos/393796/judge-easterbrook-responds-ed-whelan.

Judges Posner and Easterbrook have issued significant rulings interpreting Rule 23 in response to motions for permission to appeal class certification orders. Judge Posner's opinion in the famous "moldy washer" case is a recent example. *See Butler v. Sears, Roebuck and Co.*, 702 F.3d 359 (7th Cir. 2012), *vacated and remanded*, 133 S. Ct. 2768 (2013), *judgment reinstated*, 727 F.3d 796 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 1277 (2014). The case came before a motions panel on a Rule 23(f) petition for review of a class certification order. Instead of simply deciding whether to permit the appeal, the motions panel elected to decide the merits of the case without any further briefing or oral argument. *See* Docket for No. 11-8029 (7th Cir.), *available on Pacer*. Judges Posner and Easterbrook have decided numerous class action cases in the same manner. *See, e.g.*, *Parko v. Shell Oil Co.*, 739 F.3d 1083, 1084 (7th Cir. 2014) (Posner, J.); *American Honda Motor Co., Inc. v. Allen*, 600 F.3d 813, 814 (7th Cir. 2010) (Posner, J.); *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 658 (7th Cir. 2004) (Posner, J.); *Allen v. Int'l Truck & Engine Corp.*, 358 F.3d 469, 470 (7th Cir. 2004) (Easterbrook, J.); *West v. Prudential Securities, Inc.*, 282 F.3d 935, 937-38 (7th Cir. 2002) (Easterbrook, J.); *Isaacs v. Sprint Corp.*, 261 F.3d 679, 681 (7th Cir. 2001) (Posner, J.); *Blair v. Equifax Check Svcs., Inc.*, 181 F.3d 832, 837-38 (7th Cir. 1999) (Easterbrook, J.); *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 674 (7th Cir. 2001) (Easterbrook, J.); *see also Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 914 (7th Cir. 2011) (Posner, J.) (noting that court was

deciding merits despite plaintiffs not having filed a response to the Rule 23(f) petition).

The fact that a handful of judges are routinely reaching out to decide particular kinds of cases and legal questions illustrates the danger of the practice. The result is not simply a deviation from the general principle of random assignment of cases – as might occur, for example, when judges swap panels as a matter of convenience or a randomly selected panel is assigned a related case. Instead, the Seventh Circuit has effectively given judges with particular jurisprudential interests or agendas an opportunity to thumb through the docket and assign themselves cases in which to advance those interests.

The effect of this practice has been pronounced. One scholar found that the "Seventh Circuit issued seventeen reported Rule 23(f) opinions during the Rule's first nine years on the books, *every single one of which* was written by Judge Easterbrook or Judge Posner." Margaret V. Sachs, *Superstar Judges As Entrepreneurs: The Untold Story of Fraud-on-the-Market*, 48 U.C. Davis L. Rev. at *27 (forthcoming), *available at* http://blogs.reuters.com/alison-frankel/files/2014/12/usdavislawreviewarticle.pdf. "How was it that all the panels that issued the initial Rule 23(f) opinions included either Judge Easterbrook or Judge Posner," the author asked. *Id*. at * 31. A substantial part of the answer was that "eleven of the seventeen – more than sixty percent – were motions panels that

granted permission to appeal and then retained the appeal for decision." *Id*.[7]

Plainly, a rule that expressly permitted judges to call dibs on class action cases, or ask the clerk's office for preferential assignment to antitrust cases, would be intolerable. To "perform its high function in the best way 'justice must satisfy the appearance of justice.'" *In re Murchison*, 349 U.S. 133, 136 (1955). An essential part of the public perception and reality of judicial impartiality arises from the fact that judges are assigned, rather than allowed to select, their cases. The public may reasonably suspect "judges [who] sometimes gain access to a panel" do so "in order to affect the outcome of a case." J. Robert Brown, Jr. & Allison Herren Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 TEX. L. REV. 1037, 1066 (2000).

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[7] The irony of Judge Posner's oft-stated view that *this* Court is not "a real court" because, in exercising the certiorari jurisdiction established *by statute*, its members "decide what cases to hear, which doesn't strike me as something judges should do," *How I Write: Richard Posner*, www.thedailybeast.com/articles/2013/11/07/how-i-write-richard-posner.html, is palpable – as is its disrespect. *Cf.* Joel Cohen, *An Interview With Richard Posner*, ABA J. (July 1, 2014) (Justice Scalia "is excitable and prone to anger"); Richard A. Posner, *Does Chief Justice Roberts Show A Certain Casualness About the Truth*, (June 25, 2014) http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2014/scotus_roundup/scotus_end_of_term_is_roberts_casual_about_the_truth_in_the_campaign_finance.html.

Indeed, the public would be justified in assuming that a judge who selects a particular case based on its subject matter will often bring to the case an atypically strong set of preconceived views about the proper disposition of the case. In this case, for example, the panel that ultimately decided petitioner's case *literally* prejudged the outcome by issuing an opinion before any briefing or argument on the merits of the appeal, giving rise to the reasonable conclusion that the ordinary appellate process it later grudgingly permitted had no prospect of actually affecting the outcome. *See* Pet. App. 27a-28a.

The practice is particularly troubling because it operates as a one-way ratchet manipulating the substantive outcome of cases. It permits a judge to choose whether to decide the merits only *after* hearing from the other motions panel members how they would rule on the merits. If the outcome would not be favorable, the case can just be passed on to the ordinary assignment process.

It may be that in some special circumstances – for example, when the motions panel must decide merits issues as part of a stay application – a rule requiring the motions panel to also decide the ultimate merits of the appeal would be permissible. Such a rule would provide efficiency and would not risk the motions panel merely selecting cases it preferred. But there can be no such justification in an ordinary Section 1292(b) case, particularly when, as in this case, the motion is uncontested.

The very fact that the Seventh Circuit's practice contradicts its own rules and stands alone among all

the courts of appeals warrants an exercise of the Court's supervisory powers. *See* 28 U.S.C. § 2106; *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 808-09 (1987) (using supervisory power to establish rules regarding assignment of prosecutor to pursue contempt action); *Western Pac. R. Corp. v. Western Pac. R. Co.*, 345 U.S. 247, 260 (1953) (using same power to define rules regarding en banc process in courts of appeals); *see also Nguyen v. United States*, 539 U.S. 69, 74 (2003) (granting certiorari to decide whether composition of appellate panels in Ninth Circuit ""so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers") (quoting S. Ct. R. 10(a)).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 16, 2015

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 12-51063

MOTOROLA MOBILITY LLC,

Plaintiff-Appellant,

v.

AU OPTRONICS CORP., et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division

No. 09 C 6610 - Joan B. Gottschall, *Judge*.

Argued November 13, 2014 - Decided November 26, 2014

Amended - January 12, 2015*

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* This amended opinion replaced the opinion in this case that was issues by the panel on November 26 and that is reported at 2014 WL 6678622.

Before POSNER, KANNE, and ROVNER, Circuit Judges.

POSNER, *Circuit Judge*. Back in March we granted the plaintiff's unopposed petition for leave to take an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) from an order granting partial summary judgment in favor of the defendants (which include Samsung, Sanyo, and several other foreign companies besides AU Optronics), thereby extinguishing most of the plaintiff's case. The district judge certified the order for an immediate appeal. We agreed to hear the appeal, and without asking for further briefing or oral argument affirmed the district court's decision in an opinion, reported at 746 F.3d 842 (7th Cir. 2014), that we later vacated, ordering rehearing and directing further briefing and oral argument, now complete. We have also granted several requests for permission to file amicus curiae briefs, including a brief from the Department of Justice and briefs from foreign countries worried about the implications of Motorola's suit for their own competition policies.

Motorola, the plaintiff-appellant, and its ten foreign subsidiaries, buy liquid-crystal display (LCD) panels and incorporate them into cellphones manufactured by Motorola or the subsidiaries. The suit accuses foreign manufacturers of the panels of having violated section 1 of the Sherman Act, 15 U.S.C. § 1, by agreeing with each other on the prices they would charge for the panels. Those manufacturers are the defendants-appellees.

The appeal does not concern all the allegedly price-fixed LCD panels. (We'll drop "allegedly" and

"alleged," for simplicity, and assume that the panels were indeed price-fixed – a plausible assumption since defendant AU Optronics has been convicted of participating in a criminal conspiracy to fix the price of panel components of the cellphones manufactured by Motorola's foreign subsidiaries. *United States v. Hsiung*, 758 F.3d 1074 (9th Cir. 2014).) About 1 percent of the panels sold by the defendants to Motorola and its subsidiaries were bought by, and delivered to, Motorola in the United States for assembly here into cellphones; to the extent that the prices of the panels sold to Motorola had been elevated by collusive pricing by the manufacturers, Motorola has a solid claim under section 1 of the Sherman Act. The other 99 percent of the cartelized components, however, were bought and paid for by, and delivered to, foreign subsidiaries (mainly Chinese and Singaporean) of Motorola. Forty-two percent of the panels were bought by the subsidiaries and incorporated by them into cellphones that the subsidiaries then sold to and shipped to Motorola for resale in the United States. Motorola did none of the manufacturing or assembly of these phones. The sale of the panels to these subsidiaries is the focus of this appeal.

Another 57 percent of the panels, also bought by Motorola's foreign subsidiaries, were incorporated into cell-phones abroad and sold abroad. As neither those cellphones nor their panel components entered the United States, they never became a part of domestic U.S. commerce, see 15 U.S.C. § 6a, and so, as we're about to see, can't possibly support a Sherman Act claim.

Motorola says that *it* "purchased over $5 billion worth of LCD panels from cartel members [*i.e.*, the defendants] for use in its mobile devices." That's a critical misstatement. All but 1 percent of the purchases were made by Motorola's foreign subsidiaries. The subsidiaries are not Motorola; they are owned by Motorola. Motorola and its subsidiaries do not, as it argues in its opening brief, function "as a 'single enterprise.'" And from this we can begin to see the oddity of this case. If a firm is injured by unlawful acts of other firms, the firm may have a cause of action against the injurers but the firm's owner does not. The victims of the price fixing of LCD panels were Motorola's foreign subsidiaries. Motorola itself, along with U.S. purchasers of cellphones incorporating those panels, were at most derivative victims.

The district judge ruled that Motorola's suit, insofar as it relates to the 99 percent of panels purchased by the foreign subsidiaries, is barred by 15 U.S.C. §§ 6a(1)(A), (2), which are sections of the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a. That act that has been interpreted, for reasons of international comity (that is, good relations among nations), to limit the extraterritorial application of U.S. antitrust law. Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 273c2 (3d ed. 2006). Sections 6a(1)(A) and (2) provide that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless . . . such conduct has a direct, substantial, and reasonably foreseeable effect . . . on trade or commerce which is

not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations," and also, in either case, unless the "effect [on import trade or domestic commerce] gives rise to a claim" under federal antitrust law. See, e.g., *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 161-62 (2004); *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 853-54 (7th Cir. 2012) (en banc).

It is essential to understand that these are two requirements. There must be a direct, substantial, and reasonably foreseeable effect on U.S. domestic commerce – the domestic American economy, in other words – *and* the effect must give rise to a federal antitrust claim. The first requirement, if proved, establishes that there is an antitrust violation; the second determines who may bring a suit based on it.

Had the defendants conspired to sell LCD panels to Motorola in the United States at inflated prices, they would be subject to the Sherman Act because of the exception in the Foreign Trade Antitrust Improvements Act for importing. That is the 1 percent, which is not involved in the appeal. Regarding the 42 percent, Motorola is wrong to argue that it is import commerce. It was Motorola, rather than the defendants, that imported these panels into the United States, as components of the cellphones that its foreign subsidiaries manufactured abroad and sold and shipped to it. So it first must show that the defendants' price fixing of the panels that they sold abroad and that became components of cell-phones also made abroad but imported by Motorola into the United States had "a direct, substantial, and reasonably fore-

seeable effect" on commerce within the United States. The panels – 57 percent of the total – that never entered the United States neither affected domestic U.S. commerce nor gave rise to a cause of action under the Sherman Act.

If the prices of the components were indeed fixed, there would be an effect on domestic U.S. commerce. And that effect would be foreseeable (because the defendants knew that Motorola's foreign subsidiaries intended to incorporate some of the panels into products that Motorola would resell in the United States), could be substantial, and might well be direct rather than "remote," the word we used in *Minn-Chem, Inc. v. Agrium, Inc.*, *supra*, 683 F.3d at 856-57, to denote effects that the statutory requirement of directness excludes.

The price fixers had, it is true, been selling the panels not in the United States but abroad, to foreign companies (the Motorola subsidiaries) that incorporated them into cell-phones that the foreign companies then exported to the United States for resale by the parent company, Motorola. The effect of fixing the price of a component on the price of the final product was therefore less direct than the conduct in *Minn-Chem*, where "foreign sellers allegedly created a cartel, took steps outside the United States to drive the price up of a product that is wanted in the United States, and then (after succeeding in doing so) *sold that product to U.S. customers*." *Id*. at 860 (emphasis added). But at the same time the facts of this case are not equivalent to what we said in *Minn-Chem* would *definitely* block liability under the Sherman Act: the

"situation in which action in a foreign country filters through many layers and finally causes a few ripples in the United States." *Id*. In this case components were sold by their manufacturers to the foreign subsidiaries, which incorporated them into the finished product and sold the finished product to Motorola for resale in the United States. This doesn't seem like "many layers," resulting in just "a few ripples" in the United States cellphone market, though, as we'll see, the ripple effect probably was modest. We'll assume that the requirement of a direct, substantial, and reasonably foreseeable effect on domestic commerce has been satisfied, as in *Minn-Chem* and *Lotes Co. v. Hon Hai Precision Industry Co*., 753 F.3d 395, 409-13 (2d Cir. 2014).

What trips up Motorola's suit is the statutory requirement that the effect of anticompetitive conduct on domestic U.S. commerce give rise to an antitrust cause of action. 15 U.S.C. § 6a(2). The conduct increased the cost to Motorola of the cellphones that it bought from its foreign subsidiaries, but the cartel-engendered price increase in the components and in the price of cellphones that incorporated them occurred entirely in foreign commerce.

We have both direct purchasers – Motorola's foreign subsidiaries – from the price fixers, and two tiers of indirect purchasers: Motorola, insofar as the foreign subsidiaries passed on some or all of the increased cost of components to Motorola, and Motorola's cellphone customers, insofar as Motorola raised the resale price of its cellphones in an attempt to offload the damage to it from the price fixing to its

customers. According to Motorola's damages expert, B. Douglas Bernheim, the company raised the price of its cell-phones in the United States by *more* than the increased price charged to it by its foreign subsidiaries. We have no information about whether Motorola lost customers as a result – it may not have, if other cellphone sellers raised their prices as well. Perhaps because Motorola may actually have profited from the price fixing of the LCD panels, it has waived any claim that the price fixing affected the price that Motorola's foreign subsidiaries charged, or were told by Motorola to charge, for the cellphones that they sold their parent. (We'll come back to the issue of waiver.)

Whether or not Motorola was harmed indirectly, the immediate victims of the price fixing were its foreign subsidiaries, see *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, *supra*, 542 U.S. at 173-75, and as we said in the *Minn-Chem* case "U.S. antitrust laws are not to be used for injury to foreign customers," 683 F.3d at 858. Motorola's subsidiaries are governed by the laws of the countries in which they are incorporated and operate; and "a corporation is not entitled to establish and use its affiliates' separate legal existence for some purposes, yet have their separate corporate existence disregarded for its own benefit against third parties." *Disenos Artisticos E Industriales, S.A. v. Costco Wholesale Corp.*, 97 F.3d 377, 380 (9th Cir. 1996). For example, although for antitrust purposes Motorola contends that it and its subsidiaries are one (the "it" we referred to earlier), for tax purposes its subsidiaries are distinct entities paying foreign rather than U.S. taxes.

Distinct in *uno*, distinct in *omnibus*. Having submitted to foreign law, the subsidiaries must seek relief for restraints of trade under the law either of the countries in which they are incorporated or do business or the countries in which their victimizers are incorporated or do business. The parent has no right to seek relief on their behalf in the United States.

Motorola wants us to treat it and all of its foreign subsidiaries as a single integrated enterprise, as if its subsidiaries were divisions rather than foreign corporations. But American law does not collapse parents and subsidiaries (or sister corporations) in that way. Some foreign nations, it is true, treat multinational enterprises as integrated units. See, e.g., Binda Sahni, "The Interpretation of the Corporate Personality of Transnational Corporations," 15 *Widener L.J*. 1 (2005). A number of countries (mainly in the Third World) persuaded the U.N. General Assembly in 1974 to issue a resolution entitled "Charter of Economic Rights and Duties of States" that could be understood to intimate that First World parents were responsible for the actions of their Third World subsidiaries. For chapter 2, Article 2(b), of the Charter provides that each state has the right "to regulate and supervise the activities of transnational corporations within its national jurisdiction and take measures to ensure that such activities comply with its laws, rules and regulations and conform with its economic and social policies. Transnational corporations shall not intervene in the internal affairs of a host State. Every State should, with full regard for its sovereign rights, co-operate with other States in the exercise of the right set forth in this subparagraph." But the United States

and other developed countries refused to buy that theory. They insisted, and continue to insist, that corporate formalities should be respected unless one of the recognized justifications for piercing the veil, or otherwise deeming a parent and a subsidiary one, is present. See, e.g., *On Command Video Corp. v. Roti*, 705 F.3d 267 (7th Cir. 2013); Sahni, *supra*, at 13. None is present in this case.

This is thus a case of derivative injury, and derivative injury rarely gives rise to a claim under antitrust law, for example by an owner or employee of, or an investor in, a company that was the target of, and was injured by, an antitrust violation. *Mid-State Fertilizer Co. v. Exchange National Bank of Chicago*, 877 F.2d 1333, 1335-36 (7th Cir. 1989); see generally *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977). Those derivative victims are said to lack "antitrust standing." Often, as in the example just given, their claims would be redundant, because if the direct victim received full compensation there would be no injury to the owner, employee, or investor – he or it would probably be as well off as if the antitrust violation had never occurred. If Motorola's foreign subsidiaries have been injured by violations of the antitrust laws of the countries in which they are domiciled, they have remedies; if the remedies are inadequate, or if the countries don't have or don't enforce antitrust laws, these are consequences that Motorola committed to accept by deciding to create subsidiaries that would be governed by the laws of those countries. (An important, and highly relevant, application of the concept of "antitrust standing" is the indirect-

purchaser doctrine of the *Illinois Brick* case, discussed below.)

No doubt Motorola thinks U.S. antitrust remedies more fearsome than those available to its foreign subsidiaries under foreign laws. But that's just to say that Motorola is asserting a right to forum shop. Should some foreign country in which one of its subsidiaries operates have stronger antitrust remedies than the United States does, Motorola would tell that subsidiary to sue under the antitrust law of that country.

A related flaw in Motorola's case is its collision with the indirect-purchaser doctrine of *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which forbids a customer of the purchaser who paid a cartel price to sue the cartelist, even if his seller – the direct purchaser from the cartelist – passed on to him some or even all of the cartel's elevated price. Motorola's subsidiaries were the direct purchasers of the price-fixed LCD panels, Motorola and its customers indirect purchasers of the panels. Confusingly, at the oral argument Motorola's able counsel stated his approval of the *Illinois Brick* doctrine, yet Motorola's briefs assert, albeit without any basis that we can see, that the Foreign Trade Antitrust Improvements Act, because it does not mention *Illinois Brick* (or the indirect-purchaser doctrine, announced in that case), is not subject to it.

Because it is difficult to assess the impact of a price increase at one level of distribution on prices and profits at a subsequent level, and thus to apportion damages between direct and indirect (i.e., subsequent)

purchasers (here, between Motorola's subsidiaries, Motorola the parent, and Motorola's cellphone customers), the indirect-purchaser doctrine cuts off analysis at the first level. This may result in a windfall for the direct purchaser, but preserves the deterrent effect of antitrust damages liability while eliding complex issues of apportionment. In this case the first sale was to a foreign subsidiary of Motorola that could sue the price fixers under the law of the country of which the subsidiary was a citizen, or the law of the countries of which the price fixers were citizens (or a country of which a particular price fixer that the subsidiary decided to sue was a citizen). Motorola, the American parent, the harm to which from the price fixing would be so difficult to estimate, could not sue under federal antitrust law.

Speaking of the difficulty of estimating harm to Motorola, we point out that although this suit is more than five years old there is a remarkable dearth of evidence from which to infer actual harm to Motorola. Its briefs lack the numbers one would need to infer, let alone to quantify, such harm. But the report of Motorola's expert witness on damages, B. Douglas Bernheim, provides a basis for informed speculation. Suppose hypothetically that a cellphone costs a Motorola foreign subsidiary $100 to manufacture, and the subsidiary sells it to Motorola for $120 to cover the costs of assembling the components that go to make up the cell-phone, and of shipment. Motorola in turn resells the cell-phone to American consumers for $150. One of the components costs the subsidiary $10 (10 percent of the total cost of the cellphone – this appears to be an approximately accurate estimate for the LCD

panels installed in the cellphones). The manufacturers of that component form a cartel and raise the price to $12, a 20 percent increase. Now the cost of making the cellphone is $102, and to reflect this cost increase Motorola could be expected to direct the subsidiary to raise its price to Motorola from $120 to, say, $122. What would Motorola do next? It would like to maintain its profit margin, and so we might expect it to raise its resale price – the price of its cellphones to the American consumer – from $150 to $152. That would be only a 1.33 percent increase. Would Motorola lose sales and therefore profits? Who knows? The price increase is tiny, and competitors might think it more profitable to match it than to undercut it; they might think their sales would not fall appreciably and that their profit margins would be slightly higher. This would be an example of tacit collusion, which is not an antitrust violation.

It is uncertainties like these that confirm the wisdom of the indirect-purchaser doctrine of *Illinois Brick*.

Motorola claims that it told the subsidiaries how much they could pay the cartel sellers for the panels – that its subsidiaries "issued purchase orders at the price and quantity determined by Motorola in the United States" and that therefore Motorola was the real buyer of the panels and so the panels were really imported directly into the United States rather than being sold abroad to the subsidiaries. In other words, Motorola is pretending that its foreign subsidiaries are divisions rather than subsidiaries. But Motorola can't just ignore its corporate structure whenever it's in its

interests to do so. It can't pick and choose from the benefits and burdens of United States corporate citizenship. It isn't claiming that its foreign subsidiaries owe taxes to the United States instead of to the foreign countries in which they are incorporated, countries that may have lower tax rates, or be less efficient at tax collection. It isn't claiming that its foreign subsidiaries are bound by the workplace safety or labor laws of the United States. Having chosen to conduct its LCD purchases through legally distinct entities organized under foreign law, it cannot now impute to itself the harm suffered by them.

Motorola insists that it was the "target" of the price fixers – that they "integrated themselves into the design of Motorola's U.S. products, and intentionally manipulated Motorola's price negotiations by illegally exchanging Motorola-specific information." But this is just inflated rhetoric used to describe, what is obvious, that firms engaged in the price fixing of a component are critically interested in the market demand for the finished product – knowledge of that demand is essential to deciding on the optimal price of the component. If the price fixers are too greedy and fix a very high price for the component, this may result in so high a price for the finished product that the sales of that product will fall and with it the purchases of the component and quite possibly the profits of the price fixers.

Motorola's "target" theory of antitrust liability would nullify the doctrine of *Illinois Brick*. For we've just seen that in deciding how much to charge the direct purchaser, a cartel would always want to

estimate the price at which the direct purchaser would resell in order to capture some or all of the resale profits. There is nothing unusual about firms' trying to pass on cost increases to their buyers; the buyers are hurt but as long as *Illinois Brick* is the law their hurt doesn't give them an antitrust case of action. Thus in asking us not to "ignore the injuries defendants knowingly caused to Motorola's U.S. business through their deliveries abroad," Motorola ignores the fact that a cartel almost always *knowingly* causes injury to indirect purchasers, yet those purchasers are barred from suit by *Illinois Brick* and the doctrine of antitrust standing that the rule of that case instantiates.

It's true that the opinion in *Illinois Brick* states that a "situation in which market forces have been superseded and the pass-on defense might be permitted is where the direct purchaser is owned or controlled by its customer." *Id*. at 736 n.16. But "might be" is not "is," and the distinction is significant in this case. Although Motorola, the "customer," owns its foreign subsidiaries – the "direct purchasers" of the components – they are incorporated under and regulated by foreign law. What remedies they may have, if they overpay for inputs that they buy abroad, are determined not by U.S. antitrust law but by the law of the countries in which the subsidiaries are incorporated and of which they are therefore citizens of, or the law of the countries in which the price fixers they bought from operate, or of the countries in which the purchases were made. And that is quite apart from *Illinois Brick* or other sources of U.S. antitrust law.

But supposing this is wrong and Motorola is correct that it and its subsidiaries "are one," there was no sale by the subsidiaries to Motorola. Instead the component manufacturers (the price fixers) sold components to "the one," which assembled them into cellphones, and "the one" sold the cell-phones to U.S. consumers. The sales to consumers would therefore have been the first sales in the United States – the first in domestic commerce, since "the one" bought the price-fixed components abroad. Remember that the Foreign Trade Antitrust Improvements Act requires that the effect of an anticompetitive practice on domestic U.S. commerce must, to be subject to the Sherman Act, give rise to an antitrust cause of action. "The one" (Motorola and its foreign subsidiaries conceived of as a single entity) would have been injured abroad when "it" purchased the price-fixed components.

Motorola makes a last attempt to wiggle out from under *Illinois Brick* by arguing that there should be an exception to the indirect-purchaser doctrine for any case in which applying the doctrine would prevent any American company from suing. But Motorola insists that it dictates the price at which it buys cellphones from its subsidiaries, and it would be odd to think that Motorola could obtain antitrust damages on the basis of its own pricing decisions.

In any event Motorola waived in the district court any argument that it could base damages on the effect of the cartel's pricing of components on the cost to Motorola of cell-phones incorporating those components. It argued only that its foreign

subsidiaries overpaid for the LCD panels. How the overcharge may have affected Motorola's cellphone business because of the component price fixing was a path that Motorola stepped off of after the pleadings. Its *complaint* alleged that it paid more for cellphones that it purchased from its subsidiaries, but it then dropped the point in favor of arguing (as it did for example in a brief opposing summary judgment) that "this 'effect' – the approval of a single, artificially-inflated LCD panel price in the United States – proximately caused all of Motorola's damages, because that same artificially-inflated price applied wherever and whenever a Motorola facility placed a purchase order and paid for a panel." But Motorola's damages expert, Bernheim, discussed only the damages that Motorola's foreign subsidiaries incurred from having to overpay for LCD panels. He made no attempt to estimate the increase in the price paid by Motorola for finished cellphones. Motorola even refused to respond to one of the defendants' requests for an admission by saying: "Motorola is not basing its claims on the purchase of finished LCD Products [i.e., cellphones]."

There is still more that is wrong with Motorola's case. Nothing is more common nowadays than for products imported to the United States to include components that the producers bought from foreign manufacturers. See Gregory Tassey, "Competing in Advanced Manufacturing: The Need for Improved Growth Models and Policies," Journal of Economic Perspectives, vol. 28, no. 1, Winter 2014, p. 27, 31-35; Dick K. Nanto, "Globalized Supply Chains and U.S. Policy," Congressional Research Service (Jan. 27, 2010), http://assets. opencrs.com/rpts/

R40167_20100127.pdf. Even Motorola acknowledges "that a substantial percentage of U.S. manufacturers utilize global supply chains and foreign subsidiaries to effectively compete in the global economy." Some of those foreign manufacturers are located in countries that do not have or, more commonly, do not enforce antitrust laws consistently or uniformly, or whose antitrust laws are more lenient than ours, especially when it comes to remedies, notably punitive damages (such as the treble-damages antitrust remedy authorized by section 4 of the Clayton Act, 15 U.S.C. § 15). As a result, the prices of many products exported to the United States doubtless are elevated to some extent by price fixing or other anticompetitive acts that would be punished in proceedings under the Sherman Act if committed in the United States. Motorola argues that "the district court's ruling would allow foreign cartelists to come to the United States" and "unfairly overcharge U.S. manufacturers." Not true; the defendants did not sell in the United States and, if they were overcharging, they were overcharging other foreign manufacturers – the Motorola subsidiaries.

The Supreme Court has warned that rampant extraterritorial application of U.S. law "creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, *supra*, 542 U.S. at 165. The Foreign Trade Antitrust Improvements Act has been interpreted to prevent such "unreasonable interference with the sovereign authority of other nations." *Id*. at 164. The position for which Motorola contends would if adopted

enormously increase the global reach of the Sherman Act, creating friction with many foreign countries and "resent[ment at] the apparent effort of the United States to act as the world's competition police officer," a primary concern motivating the Foreign Trade Antitrust Improvements Act. *United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 942, 960-62 (7th Cir. 2003) (en banc) (dissenting opinion), overruled on other grounds by *Minn-Chem, Inc. v. Agrium, Inc.*, *supra*. It is a concern to which Motorola is – albeit for understandable financial rea-sons – oblivious.

Motorola's foreign subsidiaries were injured in foreign commerce – in dealings with other foreign companies – and to give Motorola rights to take the place of its foreign companies and sue on their behalf under U.S. antitrust law would be an unjustified interference with the right of foreign nations to regulate their own economies. The foreign subsidiaries can sue under foreign law – are we to *presume* the in-adequacy of the antitrust laws of our foreign allies? Would such a presumption be consistent with international comity, or more concretely with good relations with allied nations in a world in turmoil? To quote from the *Empagran* opinion again, "Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?" 542 U.S. at 165.

So Motorola's suit has no merit, but it remains to note the amicus curiae brief filed by the Justice

Department with endorsements by officials from the FTC, the State Department, and the Department of Commerce. Although an earlier such brief had urged us to vacate our original decision (which we did), and we assumed the Department wanted us to reverse the district court's grant of partial summary judgment in favor of the defendants, there is no such contention in its present brief. It asks us only to "hold that the conspiracy to fix the price of LCD panels had a direct, substantial, and reasonably foreseeable effect on U.S. import and domestic commerce in cellphones incorporating these panels." The brief argues that the criminal and injunctive provisions of the Sherman Act, which of course are provisions that the Justice Department enforces, are applicable to the conduct of the defendants. The brief is less than sanguine on whether Motorola can obtain damages. The indirect-purchaser doctrine is applicable only to damages suits, and the brief disclaims taking any position on the applicability of the doctrine to this case. It goes so far as to say that "permitting Motorola to recover on all its claims because it purchased some panels in import commerce would allow recovery for independently caused foreign injuries on the basis of happenstance."

All that the government wants from us is a disclaimer that a ruling against Motorola would interfere with criminal and injunctive remedies sought by the government against antitrust violations by foreign companies. The government's concern relates to the requirement of the Foreign Trade Antitrust Improvements Act that foreign anticompetitive conduct have a direct, substantial, and reasonably

foreseeable effect on domestic U.S. commerce to be actionable under the Sherman Act. If price fixing by the component manufacturers had the requisite statutory effect on cellphone prices in the United States, the Act would not block the Department of Justice from seeking criminal or injunctive remedies. Indeed, we noted earlier that the Department successfully prosecuted AU Optronics for criminal price-fixing of the LCD panels sold to Motorola's foreign subsidiaries. But the Department does not suggest that the defendants' conduct gave rise to an antitrust damages remedy for Motorola.

Motorola has lost its best friend.

That's something of a surprise but a bigger surprise, given that representatives of the State and Commerce Departments have signed on to the Justice Department's brief, is the absence of any but glancing references to the concerns that our foreign allies have expressed with rampant extraterritorial enforcement of our antitrust laws. We asked the gov-ernment's lawyer at the oral argument about those concerns, and he replied that the Justice Department has worked out a modus vivendi with foreign countries regarding the De-partment's antitrust proceedings against foreign companies. We have no reason to doubt this. Again private damages actions went unmentioned.

The United States has entered into bilateral cooperation agreements with the European Union, and with Canada and other countries. See U.S. Dept. of Justice, "Antitrust Cooperation Agreements," www.justice.gov/atr/public/international/int-arrangements.html (visited Jan. 9, 2015). Both the

Justice Department and the Federal Trade Commission now work with their foreign counterparts in major antitrust cases. No longer is the United States "the world's competition policeman," as it used to be called, because other nations have stricter antitrust laws, in some respects, than ours. Motorola's inability to mount the kind of private antitrust suit that it is attempting in this case does not foredoom the use of antitrust law to prevent and punish the kind of foreign cartelization harmful to Motorola's subsidiaries. The Justice Department, at least, seems confident that effective governmental remedies remain – and, as mentioned, the Department was successful in its criminal prosecution against AU Optronics for conduct that Motorola seeks, improperly as we believe, to recover damages for in this case.

Of course Motorola wants damages for its subsidiaries, rather than just a cessation of the cartel activities that are hurting them. And foreign antitrust laws rarely authorize private damages actions. But as we said earlier, that's just to say that Motorola is asserting a right to forum shop; that if some foreign country in which one of its subsidiaries operates happened to provide a more generous private damages remedy than American antitrust law provides, Motorola would direct that subsidiary to seek that remedy in that country.

A recent article about Motorola's suit notes the problems with private antitrust suits of this kind. It points out that "virtually every product sold in the United States has some foreign-made component," implying an enormous potential for suits of this

character should Motorola prevail, and noting too that "the U.S. government has reason to weigh comity and sovereignty concerns when bringing international component cartel case[s]," but "private plaintiffs do not." Robert Connolly, "Motorola Mobility and the FTAIA," *Cartel Capers* (Sept. 30, 2014), http://cartelcapers.com/blog/motorola blog/motorola-mobility-ftaia (visited Jan. 9, 2015). And Motorola has "only" 10 foreign subsidiaries. General Motors has 26. Walmart has 27. Exxon has 122. The mind boggles at the thought of the number of antitrust suits that major American corporations could file against the multitudinous suppliers of their prolific foreign subsidiaries if Motorola had its way. Given the further complications introduced by the *Illinois Brick* doctrine, limited however to damages suits, there is much to be said for the approach – skeptical of Motorola's suit but emphatic in asserting the government's power to obtain relief through criminal and injunctive actions without ruffling our allies' feathers – argued by Connolly and the government's amicus curiae brief.

Connolly amplifies his analysis in another recent article, "Repeal the FTAIA! (Or at Least Consider It as Coextensive with *Hartford Fire*)," *CPI Antitrust Chronicle* (Sept. 2014), www.competitionpolicyinternational.com/repeal-the-ftaia-or-at-least-consider-it-as-coextensive-with-hartford-fire/. As is apparent from the title, the article ranges far beyond the issues in our case. But the article does discuss the case at some length, offering (at pp. 3-7) a number of pertinent observations, particularly concerning the differences between a

private damages suit and a government suit seeking criminal or injunctive remedies:

> As the government notes in its amicus filings, there is a difference between actions brought by the DOJ and private class action damages. *Motorola Mobility* can be decided in such [a] way as to recognize these differences. The court can find jurisdiction under the FTAIA for DOJ prosecutions while addressing the concerns raised by China, Japan, Korea, and Taiwan about an unduly expansive application of U.S. law [that] they claim would undermine principles of international comity. . . . Finding jurisdiction for the United States to prosecute component price-fixing need not ignore the international comity concerns of foreign governments. No nation has objected to the DOJ's successful prosecution of foreign companies and even citizens of that country in the LCD panel investigation. As the United States notes in its brief, the DOJ seriously considers the views of foreign nations before bringing cases. . . . [T]he comity considerations with private plaintiffs are quite different. "[P]rivate plaintiffs . . . often are unwilling to exercise the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S. Government." [citing *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, *supra*, 542 U.S. at 171, quoting Joseph P. Griffin, "Extraterritoriality in U.S. and EU Antitrust Enforcement," 67 *Antitrust L.J*. 159, 194 (1999)] . . .

It is fair to require foreign subsidiaries of American companies to seek remedy in the courts of the country in which they choose to incorporate. Companies operate overseas facilities to take advantage of many legal provisions of that country: labor law, environmental law, and tax law. In non-legal terms: "You take the good with the bad." By contrast, American consumers have no realistic choice but to buy finished goods that are assembled from components sold and assembled around the world. Therefore, the antitrust laws should be read – where possible – to allow governmental enforcement against international cartels that were meant to have, and have had, a substantial effect[] on domestic commerce. . . . A foreign subsidiar[y's] position is more akin to an American citizen living overseas who buys price-fixed goods but then must seek any remedies under the laws [of the] country she has chosen to live in. . . .

Domestic corporate purchasers are not without remedy when buying component parts from foreign vendors. First, the U.S. parent could buy directly from the foreign vendor and preserve the right to sue as a direct purchaser (while trading off the benefits the company gained from operating through a foreign subsidiary). Or, if a U.S. parent doesn't think that antitrust laws are sufficiently, or fairly, enforced in a given country, they certainly don't have to set up a subsidiary there. . . . So, an adverse ruling in *Motorola* would not eliminate

> every avenue of damage redress for component price-fixing. . . . The *Motorola Mobility* court should reach a decision that preserves the ability of the DOJ to protect American consumers and continue to lead the way in prosecuting international cartels – including appropriate component cartels. The court could also acknowledge the comity concerns of foreign nations and find application of *Illinois Brick* a bar to foreign component civil damage cases.

The district court's grant of partial summary judgment in favor of the defendants is

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 12-51063

MOTOROLA MOBILITY LLC,

Plaintiff-Appellant,

v.

AU OPTRONICS CORP., et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division

No. 09 C 6610 - Joan B. Gottschall, *Judge*.

Submitted March 13, 2014 - Decided March 27, 2014

Before POSNER, KANNE, and ROVNER, Circuit Judges.

POSNER, *Circuit Judge*. This case is before us on the plaintiff's unopposed petition for leave to take an interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), from an order that the district judge has certified for an immediate appeal. We grant the petition for reasons explained below; and because the petition and the defendants' response, together with the district

judge's opinion explaining her order and the record in the district court, provide an ample basis for deciding the appeal, we dispense with further briefing and with oral argument.

Motorola and its foreign subsidiaries buy liquid-crystal display (LCD) panels and incorporate them into cellphones manufactured by either the parent or the subsidiaries. The suit accuses several foreign manufacturers of the panels of having violated section 1 of the Sherman Act, 15 U.S.C. § 1, by agreeing on the prices to charge for them. Only about 1 percent of the panels were bought by, and delivered to, Motorola in the United States; the other 99 percent were bought by, paid for, and delivered to its foreign subsidiaries (mainly Chinese and Singaporean). Forty-two percent of all the panels were bought by the subsidiaries and incorporated by them into products that were then shipped to Motorola in the United States for resale by Motorola (which did none of the manufacturing). Another 57 percent of the panels were also bought by the subsidiaries, but were incorporated into products that were sold abroad as well (42 percent plus 57 percent plus 1 percent equals 100 percent of the allegedly price-fixed panels). The 57 percent never entered the United States, so never became domestic commerce. See 15 U.S.C. §§ 6a, 6a(1)(A). And so, as we're about to see, they can't possibly support the Sherman Act claim.

Motorola says that it "purchased over $5 billion worth of LCD panels from cartel members [i.e., the defendants] for use in its mobile devices." That is incorrect. All but 1 percent of the purchases were

made by Motorola's foreign subsidiaries, which are not plaintiffs in this litigation.

In response to a motion for partial summary judgment by the defendants, the district judge ruled that Motorola's claim regarding the 42 percent (plus the 57 percent, but we'll ignore that, as a frivolous element of Motorola's claim) is barred by 15 U.S.C. § 6a(1)(A), a provision of the Foreign Trade Antitrust Improvements Act that says that the Sherman Act (only section 1 of that Act, but to simplify our opinion we'll now drop that qualification) "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless such conduct has a direct, substantial, and reasonably foreseeable effect on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations," and also, in either case, unless the "effect gives rise to a claim" under federal antitrust law. *See, e.g.*, *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 161-62 (2004); *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 853-54 (7th Cir. 2012) (en banc).

We agree with the district judge and the parties that in the language of section 1292(b) the judge's order presents "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Motorola's antitrust suit against the defendants, now in its fifth year, is a complicated affair. If 99 percent of the transactions on which the suit is based can be eliminated from the litigation at a

stroke (the 42 percent at issue in this appeal plus the 57 percent clearly barred by the Foreign Trade Antitrust Improvements Act from challenge under the Sherman Act) before the litigation moves into high gear, there will be a considerable economy. Although as we're about to explain we think the district judge's ruling correct, there is room for a difference of opinion, as evidenced by the fact that the judge presiding at the multidistrict-litigation phase of the proceeding had ruled for Motorola on the issue of the Sherman Act's applicability to the 42 percent. So, as in *Minn-Chem, Inc. v. Agrium, Inc.*, *supra*, 683 F.3d at 848, which also involved an interlocutory appeal presenting issues under the Foreign Trade Antitrust Improvements Act, Motorola's appeal is properly before us and we proceed to the merits.

If the defendants conspired to sell LCD panels to Motorola in the United States at inflated prices, they would be subject to the Sherman Act because of the foreign trade act's exception for importing. That is the 1 percent, which is not involved in the appeal. Regarding the 42 percent, Motorola must show that the defendants' price fixing of the panels that they sold abroad and that became components of cellphones imported by Motorola had "a direct, substantial, and reasonably foreseeable effect" on commerce within the United States. There was (assuming price fixing is proved) doubtless *some* effect; and it was foreseen by the defendants if they knew that Motorola's foreign subsidiaries intended to incorporate some of the panels into products that they would sell to Motorola in the United States. And who knows what "substantial"

means in this context? But what is missing from Motorola's case is a "direct" effect. The effect is indirect – or "remote," the term used in *Minn-Chem, Inc. v. Agrium, Inc.*, *supra*, 683 F.3d at 856-57, to denote the kind of effect that the statutory requirement of directness excludes.

The alleged price fixers are not selling the panels in the United States. They are selling them abroad to foreign companies (the Motorola subsidiaries) that incorporate them into products that are then exported to the United States for resale by the parent. The effect of component price fixing on the price of the product of which it is a component is indirect, compared to the situation in *Minn-Chem*, where "foreign sellers allegedly created a cartel, took steps outside the United States to drive the price up of a product that is wanted in the United States, and then (after succeeding in doing so) *sold that product to U.S. customers*." *Id*. at 860 (emphasis added). It is closer to the situation in which we said the foreign trade act would block liability under the Sherman Act: the "situation in which action in a foreign country filters through many layers and finally causes a few ripples in the United States." *Id*.

Motorola contends, and at this stage in the litigation we must assume the truth of the contention, that it determined what the subsidiaries paid for the LCD panels. It must have thought the price okay, or it wouldn't have let the subsidiaries pay it. It may or may not have known that it was a cartel price. But we cannot see what difference any of this makes. Suppose Motorola had bought the panels from the defendants

outright, then resold the panels to its foreign subsidiaries, which used them in manufacturing cellphones that they then exported to the United States. The effect on prices in the United States would be the same as if the foreign subsidiaries had negotiated the price charged by the alleged cartel to Motorola, because the price would be the same – it would be the cartel price. And so the (indirect) effect on U.S. domestic commerce (the sale of the cellphones in the United States) would be the same.

Motorola's claim is upended by another – and independent – requirement that must be satisfied for the statutory exemption in 15 U.S.C. § 6a(1)(A) to apply: the "effect" of the defendants' practice on domestic U.S. commerce must "give[] rise to" an antitrust claim. The effect of the alleged price fixing on that commerce in this case is mediated by Motorola's decision on what price to charge U.S. consumers for the cellphones manufactured abroad that are alleged to have contained a price-fixed component. No one supposes that Motorola could be sued by its U.S. customers for an antitrust offense merely because the prices it charges for devices that include such components may be higher than they would be were it not for the price fixing. (We say may be, not would be, because Motorola's ability to pass on the higher price to consumers would depend on competition from other cellphones and on consumer demand for cellphones.) So the effect in the United States of the price fixing could not give rise to an antitrust claim. Motorola's claim against the defendants is based not on any illegality in the prices

Motorola charges (in which event Motorola would be suing itself, as in William Gaddis's novel satirizing law, *A Frolic of His Own* (1994)), but rather on the effect of the alleged price fixing on Motorola's foreign subsidiaries. See *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, *supra*, 542 U.S. at 173-74. And as we said in the *Minn-Chem* case, "U.S. antitrust laws are not to be used for injury to foreign customers." 683 F.3d at 858. The subsidiaries are "foreign customers," being fully subject to the laws of the countries in which they are incorporated and operate – and "a corporation is not entitled to establish and use its affiliates' separate legal existence for some purposes, yet have their separate corporate existence disregarded for its own benefit against third parties." *Disenos Artisticos E Industriales, S.A. v. Costco Wholesale Corp.*, 97 F.3d 377, 380 (9th Cir. 1996).

Furthermore, derivative injury rarely gives rise to a claim under the antitrust law, especially a claim by the owner of or an investor in the company that sustained the direct injury. *Mid-State Fertilizer Co. v. Exchange National Bank of Chicago*, 877 F.2d 1333, 1335-36 (7th Cir. 1989). Such a claim would be redundant, because if the direct victim received full compensation there would be no injury to the owner or investor – he or it would be as well off as if the antitrust violation had never occurred. If Motorola's foreign subsidiaries have been injured by violations of the antitrust laws in the countries in which they do business, they have remedies; if the remedies are inadequate, or if the countries don't have or don't enforce antitrust laws, these were risks that the

subsidiaries (and hence Motorola) assumed by deciding to do business in those countries. What they didn't have if they overpaid was a claim under the Sherman Act; no more does their parent.

But we don't want to rest our decision entirely on the statutory language (the requirement of a "direct effect" on domestic commerce and the separate requirement that that "effect" give rise to a Sherman Act claim), without considering the practical stakes in the expansive interpretation urged by Motorola. The stakes are large and cut strongly against its position. Nothing is more common nowadays than for products imported to the United States to include components that the producers had bought from foreign manufacturers. *See* Gregory Tassey, "Competing in Advanced Manufacturing: The Need for Improved Growth Models and Policies," *Journal of Economic Perspectives*, vol. 28, no. 1, p. 27, 31-35 (Winter 2014); Dick K. Nanto, "Globalized Supply Chains and U.S. Policy" 4-10 (Congressional Research Service, CRS Report for Congress, Jan. 27, 2010), http://assets.opencrs.com/rpts/R40167_20100127.pdf (visited March 26, 2014). Motorola itself acknowledges "that a substantial percentage of U.S. manufacturers utilize global supply chains and foreign subsidiaries to effectively compete in the global economy." Many foreign manufacturers are located in countries that do not have or, more commonly, do not enforce antitrust laws, or whose antitrust laws are far more lenient than ours, especially when it comes to remedies. As a result, the prices of many products exported to the United States are elevated to some extent by price

fixing or other anticompetitive acts that would be forbidden by the Sherman Act if committed in the United States. Motorola argues that "the district court's ruling would allow foreign cartelists to come to the United States" and "unfairly overcharge U.S. manufacturers." Not true; the defendants did not sell in the United States and, if they were overcharging, they were overcharging other foreign manufacturers – the Motorola subsidiaries.

The Supreme Court has warned that rampant extraterritorial application of U.S. law "creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, *supra*, 542 U.S. at 165. The Foreign Trade Antitrust Improvements Act was intended to prevent such "unreasonable interference with the sovereign authority of other nations." *Id*. at 164. The position for which Motorola contends would if adopted enormously increase the global reach of the Sherman Act, creating friction with many foreign countries and "resent[ment at] the apparent effort of the United States to act as the world's competition police officer," a primary concern motivating the foreign trade act. *United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 942, 960-62 (7th Cir. 2003) (en banc) (dissenting opinion), over-ruled on other grounds by *Minn-Chem, Inc. v. Agrium, Inc.*, *supra*. It is a concern to which Motorola is oblivious.

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MOTOROLA MOBILITY, INC.,)
)
Plaintiff,)
)
v.) Case No. 09 C 6610
AU OPTRONICS)
CORPORATION, et al.,)
)
Defendants.)

MEMORANDUM OPINION & ORDER

The Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA") places all nonimport foreign commerce outside the Sherman Act's reach unless such conduct (1) has a "direct, substantial, and reasonably foreseeable effect" on American domestic or import commerce; and (2) such effect gives rise to a Sherman Act claim. Motorola Mobility, Inc. ("Motorola") alleges that numerous manufacturers of liquid crystal display ("LCD") panels (collectively, "Defendants") conspired to raise prices of LCD panels in violation of the Sherman Act. The MDL court denied Defendants' motion for partial summary judgment with respect to Motorola's Sherman Act claim based on purchases of LCD panels by its foreign affiliates, finding that Motorola had

presented admissible evidence from which a jury could find that final decisions regarding pricing of LCD panels took place in the United States. The case was remanded to this court for trial, and Defendants moved for reconsideration of the MDL court's ruling, arguing that there was no domestic effect that gave rise to Motorola's foreign affiliates' Sherman Act claims. For the reasons stated below, Defendants' motion for reconsideration is granted.

I. BACKGROUND

Motorola is a technology company based in Libertyville, Illinois, that manufactures a number of electronic devices, including mobile phones. These mobile phones contain LCD panels that Defendants sold to Motorola and its foreign affiliates. The complaint alleges that, from 1996-2006, Defendants took part in a global conspiracy to raise the price of LCD panels above the price that would have prevailed in a competitive market.

The purchases of LCD panels at issue in this case fall into three categories: (1) purchases of LCD panels by Motorola that were delivered directly to Motorola facilities in the United States ("Category I"); (2) purchases of LCD panels by Motorola's foreign affiliates that were delivered to the foreign affiliates' manufacturing facilities abroad, where they were incorporated into mobile phones that were later sold in the United States ("Category II"); and (3) purchases of LCD panels by Motorola's foreign affiliates that were delivered to the foreign affiliates' manufacturing facilities abroad and were later incorporated into mobile phones sold outside the

United States ("Category III"). Motorola's foreign affiliates have assigned their claims to Motorola.

Whether Motorola can bring claims under the Sherman Act based on the Category II and Category III purchases is the question that is now before this court. That question was addressed three times by the MDL court: first, in its order granting Defendants' motion to dismiss the first amended complaint; second, in its order denying Defendants' motion to dismiss the second amended complaint; and third, in its order denying Defendants' motion for partial summary judgment.

Motorola I

Defendants moved to dismiss the first amended complaint on the ground that the FTAIA barred Motorola's claims based on the Category II and Category III purchases by Motorola's foreign affiliates. Defendants argued that Motorola's claims based on these purchases fell under the FTAIA's general rule that the Sherman Act shall not apply to nonimport conduct involving trade with foreign nations and that Defendants' conduct did not fall under the FTAIA's exception for conduct having a direct, substantial, and reasonably foreseeable domestic effect that gives rise to a Sherman Act claim.

The MDL court agreed with Defendants and granted the motion to dismiss. First, the court noted that Motorola had conceded that it could not assert any claims based on the sale of LCD panels to Motorola subsidiaries abroad if the panels never entered the United States (Category III sales). *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 09 C 5840, 2010 WL

2610641, at *3 (N.D. Cal. June 28, 2010) ("*Motorola I*"). The issue in dispute was whether Motorola could seek to recover based on its foreign affiliates' purchases of LCD panels that were delivered to the foreign affiliates' manufacturing facilities abroad, where they were incorporated into mobile phones that were later sold in the United States (Category II purchases). *Id.*

Next, the court rejected Motorola's argument that the products at issue were "imports" that are not subject to the FTAIA. The court held that the dispositive inquiry is whether the conduct of the defendants, not plaintiffs, involves "import trade or commerce." *Id.* at *5 (citing *Turicentro, S.A. v. Am. Airlines Inc.*, 303 F.3d 293, 303 (3d Cir. 2002), *overruled on other grounds by Animal Sci. Prods. Inc. v. China Minmetals Corp.*, 654 F.3d 462, 467-68 (3d Cir. 2011)). The court noted that Motorola had not alleged that the products were brought to theUnited States by Defendants, but rather by Motorola affiliates, and so the products at issue were not "imports." *Id.*

Having found that the FTAIA's general rule of non-liability applied to Motorola's Category II claims, the court next turned to whether the claims nevertheless fell under the domestic injury exception. The court focused its analysis on the domestic injury exception's second prong: whether the alleged domestic effect gave rise to the Sherman Act claim. The court noted that, under Ninth Circuit precedent, the "gives rise to" language of the FTAIA requires a plaintiff to establish proximate cause between the alleged anticompetitive effects in the United States and the

plaintiff's foreign injury. *Id.* at *6 (citing *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 987-88 (9th Cir. 2008)). In *DRAM*, the plaintiff alleged that the domestic effect of the defendants' anti-competitive behavior – higher DRAM prices in the United States – gave rise to its foreign injury of having to pay higher DRAM prices abroad because the defendants could not have raised prices worldwide and maintained their global price-fixing arrangement without fixing the DRAM prices in the United States. *Id.* at 984. The Ninth Circuit held that such allegations were insufficient to satisfy the second prong of the FTAIA's domestic injury exception because the fact that the conspiracy had effects in the United States and abroad did not show that "the effect in the United States, rather than the overall price-fixing conspiracy itself, proximately caused the effect abroad." *Id.* at 988 (citing *In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 539-40 (8th Cir. 2007), for the proposition that proximate cause is not met by allegations that "there was a single global price kept in equipoise by the maintenance of super-competitive prices in the U.S. market"). The MDL court found that, as in *DRAM*, Motorola's allegations that Defendants engaged in a "global conspiracy" that impacted "global prices" and that Motorola's foreign affiliates "suffered injury as a result of defendants' antitrust violations" fell "far short of alleging that the domestic effect of defendants' conduct gave rise to Motorola's foreign injuries." *Motorola I*, 2010 WL 2610641, at *7. Accordingly, the court granted Defendants' motion to dismiss Motorola's foreign injury claims, with leave to amend.

Motorola II

In its second amended complaint, Motorola added allegations that senior executives of the Defendants instructed subordinates in the United States to communicate with employees of their competitors to exchange pricing and other competitive information to be used in fixing prices for LCD panels sold to U.S. companies. Motorola alleged that Defendants and their coconspirators used their U.S. affiliates, salespeople, and contacts to enter into supply agreements in Illinois to sell Motorola LCD panels at unlawfully inflated prices. It alleged that procurement teams at Motorola based in the U.S. negotiated the prices, conditions, and quantities that governed all Motorola purchases of LCD panels around the world for inclusion in Motorola devices. It alleged that its U.S. procurement teams negotiated each LCD panel purchase with Defendants through a process that involved developing requests and preliminary specifications in collaboration with U.S. representatives for Defendants and the final negotiation of the terms of purchase for LCD panels. It alleged that the prices set through this domestic negotiation process directly and immediately impacted Motorola's business plans, including its most basic business choices involving the production, pricing, and sales of its own products. After the price for LCD panels was set, Motorola's supply chain organization, which was based in Illinois, used an automatic scheduling process to determine the quantity requirements for it and its subsidiaries. This process was directed by Motorola from the U.S., and the foreign affiliates issued purchase orders at the price

and quantity determined by Motorola in the United States.

Defendants again moved to dismiss, arguing that Motorola had failed to cure the flaws that the MDL court had identified when it dismissed the first amended complaint. Defendants argued that Motorola's allegation that Motorola directed from Illinois that purchases be made abroad by its foreign affiliates was insufficient to establish that any domestic effect gave rise to its Sherman Act claim. Defendants relied on a number of cases from courts across the country that found that allegedly super-competitive domestic prices cannot proximately cause plaintiffs' foreign injuries; rather, such injuries are caused by the foreign effects of the price-fixing conspiracy itself. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, 785 F. Supp. 2d 835, 841-42 (N.D. Cal. 2011) ("*Motorola II*").

The MDL court distinguished this case, however, noting that Motorola is an American company, that Motorola alleged that the domestic effect was the setting of a global price in the United States for all LCD panel purchases around the world, that the complaint alleged that the terms of purchase were negotiated by Motorola's procurement teams within the United States and applied worldwide, and that Motorola's foreign affiliates were bound by these negotiations. *Id.* The court held:

> These allegations establish a concrete link between defendants' price-setting conduct (the collusion between the defendants to establish an artificially

> high price for LCD Panels), its domestic effect (the negotiations between Motorola and defendants that resulted in the setting of a global, anticompetitive price for all LCD Panels sold to Motorola) and the foreign injury suffered by Motorola and its affiliates (payment of higher prices abroad).

Id. at 843. The court denied the motion to dismiss, noting that, ultimately, Motorola would still need to prove that global prices were negotiated and set by Motorola's procurement team in Illinois and that a single global price was effective worldwide. *Id.* at 844.

Motorola III

The summary judgment briefing focused on whether Motorola could satisfy the standard set by the court in *Motorola II* – whether it could prove that its foreign affiliates in fact paid prices for LCDs pursuant to contracts that were negotiated and entered into in the U.S. Defendants noted that discovery had revealed that over 99% of the LCD purchases at issue were purchases by Motorola's foreign affiliates who assigned their claims to Motorola. They argued that the record demonstrated that prices were not negotiated in Illinois, as Motorola had alleged, but abroad. And they argued that, contrary to Motorola's allegations, Motorola's foreign affiliates did not pay inflated prices for LCDs pursuant to supply agreements entered into in Illinois, but rather entered into agreements outside the U.S.

Applying the standard it set out in *Motorola II*, the MDL court denied Defendants' motion for

summary judgment. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. M 07-1827, 2012 WL 3276932, at *2 (N.D. Cal. Aug. 9, 2012) ("*Motorola III*"). The court based its decision on Motorola's "domestic roots," "the locale of the transactions at issue," and the fact that Defendants (i) "targeted Motorola in the United States"; (ii) "knew that Motorola sold mobile devices in the United States and that the United States was one of the largest markets for mobile devices in the world"; (iii) "established U.S. subsidiaries to facilitate sales of LCD panels to Motorola in the United States"; (iv) "met with Motorola on several occasions in the United States to discuss, and, at times, negotiate prices for LCD panels"; (v) "used their employees – both U.S.-based and those stationed abroad – in furtherance of the price-fixing conspiracy"; and (vi) pled guilty to participating in a conspiracy to fix prices of LCD panels sold in the United States. *Id.* at *2-3.

In response to Defendants' argument that Motorola had not identified any effect on U.S. domestic commerce that gave rise to Motorola's Sherman Act claim, the court held:

> Motorola has presented admissible evidence from which a jury could infer that final decisions regarding pricing of LCD panels took place in the United States. Motorola also points to the deposition testimony of its employees to support its claim that foreign affiliates issued purchase orders at the price and

> quantity determined by Motorola in the United States.

Id. at *3 (citations omitted). The case was then remanded to this court for trial, where Defendants filed a motion for reconsideration of the MDL court's order denying summary judgment.

II. STANDARD OF REVIEW

Defendants move for reconsideration under Federal Rule of Civil Procedure 54(b), which provides that an order "that adjudicates fewer than all the claims or rights and liabilities of fewer than all the parties . . . may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." The Seventh Circuit has not addressed how transferor courts should review the pretrial determinations of transferee MDL courts.[1] The Fifth Circuit has held that transferor courts should use the law of the case doctrine to determine whether to revisit an MDL court's decision. *In re Ford Motor Co.,* 591 F.3d 406, 411 (5th Cir. 2009). Under that doctrine, "a successor judge has the same discretion to reconsider an order as would the first judge, but should not overrule the earlier judge's order or judgment merely because the later judge might have decided matters differently." *Id.* The doctrine allows

[1] A transferor court refers to the court in which the suit was begun (here, the Northern District of Illinois); the transferee court refers to the court to which the case was transferred for MDL pretrial ruling (the Northern District of California).

successor courts to "correct serious errors of the transferee court." *Id.*

One recent decision criticized the Fifth Circuit's holding, however. *See Hill v. Ford Motor Co.*, No. 11 C 799, 2013 WL 5360015, at *6 (N.D. Ga. Sept. 25, 2013). The *Hill* court noted that almost every case invoking the law of the case doctrine involved an earlier *appellate* decision, not an earlier decision of the district court. *Id.* The court suggested that the law of the case doctrine should not apply to review of MDL court pretrial rulings, because "a district judge [can] always reverse a prior ruling that she had made in the same case if she later decided she had been wrong . . . . On appeal, the appellate court is only going to care whether the ultimate ruling was right, not whether the judge's first call on the issue was arguably meritorious." *Id.* Ultimately, however, the court noted that it did not matter whether the transferor court applied the law of the case doctrine, because the standard in considering a motion for reconsideration is the same as the law of the case doctrine standard. *Id.* Under both standards, a court may correct clear errors of law. *See Zurich Capital Mkts. Inc. v. Coglianese*, 383 F. Supp. 2d 1041, 1045 (N.D. Ill. 2005) ("[U]nder Rule 54(b), a court may correct clear errors of fact or law in an interlocutory order.")

Accordingly, this court will also apply the "clear error" standard of review to the MDL court's denial of summary judgment, while being mindful of the fact that "[i]t would vitiate most of the purposes of consolidating litigation if, after remand, parties could

simply re-visit the transferee court's pre-trial rulings . . . ." *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1202 n.5 (7th Cir. 1996).

The court is reviewing the MDL court's denial of summary judgment. Summary judgment is appropriate when the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Smith v. Hope Sch.*, 560 F.3d 694, 699 (7th Cir. 2009). "[A] factual despite is 'genuine' only if a reasonable jury could find for either party." *SMS Demag Aktiengesellschaft v. Material Scis. Corp.*, 565 F.3d 365, 368 (7th Cir. 2009). The court ruling on the motion construes all facts and makes all reasonable inferences in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Summary judgment is warranted when the nonmoving party cannot establish an element of its case on which it will bear the burden of proof at trial. *Kidwell v. Eisenhauer*, 697 F.3d 957, 964 (7th Cir. 2012).

III. ANALYSIS

A. Whether Motorola Can Satisfy the Domestic Injury Exception

1. The FTAIA and *Empagran I*

Motorola brings claims under Section 1 of the Sherman Act, 15 U.S.C. § 1. In 1982, Congress amended the Sherman Act by passing the FTAIA. "The FTAIA 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 . . . , however anticompetitive, as long as those arrangements adversely affect only foreign markets." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 161 (2004) ("*Empagran I*"). Section 6(a) of the FTAIA reads as follows:

> Sections 1 to 7 of this title [*i.e.*, 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
> > >
> > > (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.
> >
> > If sections 1 to 7 of this title apply to such conduct because of the operation of paragraph (1)(B), then sections 1 to 7 title of this title

> shall apply to such conduct only for injury to export business in the United States.

15 U.S.C. § 6(a)

In *Empagran I*, the Supreme Court explained that the FTAIA "lays down a general rule placing all (nonimport) activity involving foreign commerce outside the Sherman Act's reach." 542 U.S. at 162. "It then brings such conduct back within the Sherman Act's reach provided that the conduct *both* (1) sufficiently affects American commerce, *i.e.*, it 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.'" *Id.* (quoting 15 U.S.C. §§6a(1), (2)).

In *Empagran I*, the plaintiffs were a group of foreign and domestic purchasers of vitamins who alleged that vitamin manufacturers and distributors had engaged in a price-fixing conspiracy, raising the price of vitamin products to customers in the United States and to customers in foreign countries. 542 U.S. at 159. The Court focused on the "anticompetitive price-fixing activity that [was] in significant part foreign, that cause[d] some domestic antitrust injury, and that independently cause[d] separate foreign injury." *Id.* at 158. The Court held that the domestic injury exception does not apply where the plaintiff's claim rests solely on the independent foreign injury. *Id.* at 159. The Court arrived at this conclusion for two main reasons.

First, the Court noted that it ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations. *Id.* at 164. This rule of statutory construction helps the potentially conflicting laws of different nations work together in harmony – "a harmony particularly needed in today's highly interdependent commercial world." *Id.* at 164-65. The Court noted that application of American antitrust laws to foreign anticompetitive conduct is reasonable insofar as those laws reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused. *Id.* at 165. But it questioned why it would be reasonable to apply America's antitrust laws to foreign conduct insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim, as "application of those laws creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs." *Id.* ("Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?").

Second, it found that the FTAIA's language and history suggested that Congress designed the FTAIA to "clarify, perhaps to limit, but not to *expand* in any significant way, the Sherman Act's scope as applied to foreign commerce." *Id.* at 169. And the Court noted that it saw no significant indication that at the time Congress wrote the FTAIA, courts would have thought the Sherman Act applicable where the plaintiff's claim

rests solely on independent foreign injury. Accordingly, the Court held that the domestic injury exception does not apply where the plaintiff's claim rests solely on the independent foreign injury. The Court remanded the case to the D.C. Circuit to consider the plaintiff's alternative argument that its foreign injury was not in fact independent of any adverse domestic effect.

2. *Empagran II, DRAM,* and the Proximate Causation Requirement

On remand in *Empagran II*, the D.C. Circuit first held that, in determining whether domestic effects "give rise to" a Sherman Act claim, courts should look to see whether there is "a direct causal relationship, that is, proximate causation." *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267, 1271 (D.C. Cir. 2005) ("*Empagran II*"). The court found that this interpretation of the FTAIA accords with the principle of prescriptive comity that sovereign nations should respect each other by limiting the reach of their laws. *Id.* Applying the proximate cause standard, the court considered the plaintiffs' allegations that the defendants were able to sustain super-competitive prices abroad only by maintaining super-competitive prices in the United States as well. *Id.* The court found these allegations to be insufficient because they established at most but-for causation, not proximate causation, reasoning:

> Under the appellants' theory, it was the foreign effects of price-fixing outside of the United States that directly caused, or "g[a]ve rise to," their losses when they purchased vitamins abroad at super-

> competitive prices. That the appellees knew or could foresee the effect of their allegedly anti-competitive activities in the United States on the plaintiffs' injuries abroad or had as a purpose to manipulate United States trade does not establish that "U.S. effects" proximately caused the appellants' harm. . . . It was the foreign effects of price-fixing outside of the United States that directly caused or "g[a]ve rise to" the appellants' losses when they purchased vitamins abroad at super-competitive prices.

Id.

In *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation.*, 546 F.3d 981, 986 (9th Cir. 2008), the Ninth Circuit also adopted the proximate cause standard. The court considered the plaintiff's allegations that the defendants' global conspiracy to fix DRAM prices had a domestic effect (higher DRAM prices in the United States) which gave rise to its foreign injury of having to pay higher DRAM prices abroad because the defendants could not have raised prices worldwide and maintained their global price-fixing arrangement without fixing the DRAM prices in the United States. *Id.* at 988. The court found that the plaintiff had not shown that the higher U.S. prices proximately caused its foreign injury of having to pay higher prices abroad because "[o]ther actors or forces may have affected foreign prices." *Id.* "In particular, that the conspiracy had effects in the United States and abroad does not show that the effect in the United States, rather than the overall price-fixing conspiracy

itself, proximately caused the effect abroad." *Id.* at 988-89 (citing *In re Monosodium Glutamate*, 477 F.3d 535, 539-40 (8th Cir. 2007) ("The domestic effects of the price fixing scheme (increased U.S. prices) were not the direct cause of the appellants' injuries. Rather, it was the foreign effects of the price fixing scheme (increased prices abroad).")).[2]

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[2] The Ninth Circuit did not articulate what constitutes "proximate cause" in the FTAIA context. Judge Noonan wrote a concurring opinion in which he noted that, in the law of negligence, what turns a but-for cause into proximate cause is "a value judgment that the cause in fact created an unacceptable risk of injury to a protected interest." *DRAM*, 546 F.3d at 991 (Noonan, J., concurring). He noted that, under that standard, "it would seem that reasonably prudent persons in the position of the defendants would see that their actions setting prices in the United States would negatively affect customers in the United States and elsewhere." *Id.* Nevertheless, Judge Noonan concurred in the judgment, reasoning:

> [I]t has been the judgment of Congress and the Supreme Court that the economic interests of consumers outside the United States are normally not something that American law is intended to protect. Hence it is difficult to persuade a court that injury to foreign consumers has been "caused" by price-fixing in the United States. . . . We reach this vanishing point not from guidance in words like "proximate" or "direct" but from a strong sense that the protection of consumers in another country is normally the business of that country. Location, not logic, keeps [the plaintiff's] claim out of court.

3. The MDL Court's Analysis of the "Gives Rise To" Prong

Against this backdrop, the court now turns to the MDL court's analysis of whether any domestic effect gave rise to Motorola's Sherman Act claim based on its foreign affiliates' purchases. The MDL court found that the "gives rise to" prong was satisfied because:

> Motorola has presented admissible evidence from which a jury could infer that final decisions regarding pricing of LCD panels took place in the United States. . . . Motorola also points to the deposition testimony of its employees to support its claim that foreign affiliates issued purchase orders at the price and quantity determined by Motorola in the United States.

Motorola III, 2012 WL 3276932, at *3. Defendants argue that this conclusion was a clear error of law because it conflates the concepts of domestic conduct and domestic effect. The court is not persuaded by this argument, however, because the setting of prices in the United States is both domestic "conduct" and a domestic "effect."

The more fundamental problem with the MDL court's analysis is that it did not address how the domestic conduct that Motorola argues it can prove constituted a domestic effect that gives rise to a Sherman Act claim. Although this was the only issue raised by Defendants in their motion for reconsideration, Motorola has offered no authority to support the MDL court's conclusion that because the

jury could infer that final decisions regarding pricing of LCD panels took place in the United States, Motorola could prove that this domestic effect gave rise to its Sherman Act claim.

To be sure, courts have not clearly articulated what "proximate cause" means in the FTAIA context. But courts have been clear on what it does *not* mean. The three circuits that have considered this question have all agreed that the fact that defendants "knew or could foresee the effect of their allegedly anti-competitive activities in the United States on the [plainitffs'] injuries abroad or had as a purpose to manipulate United States trade does not establish that 'U.S. effects' proximately caused the [plaintiffs'] harm." *Empagran II*, 417 F.3d at 1271; *In re Monosodium Glutamate*, 477 F.3d at 539-40 ("The domestic effects of the price fixing scheme (increased U.S. prices) were not the direct cause of the appellants' injuries. Rather, it was the foreign effects of the price fixing scheme (increased prices abroad)."); *DRAM*, 546 F.3d at 988 ("[T]hat the conspiracy had effects in the United States and abroad does not show that the effect in the United States, rather than the overall price-fixing conspiracy itself, proximately caused the effect abroad.").

Decisions from district courts are also uniform. *See In re Hydrogen Peroxide Antitrust Litig.*, 702 F. Supp. 2d 548, 553 (E.D. Pa. 2010) (holding that domestic injury exception did not apply where plaintiffs' "global procurement programs . . . involved the setting at one time of a single global price"); *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 608 F.

Supp. 2d 1166, 1186 (N.D. Cal. Mar. 31, 2009) ("Both this court and the Ninth Circuit have held that, to the extent that plaintiff's proximate causation theory rests on proof of a global procurement strategy, this is not a viable legal theory."); *In re Rubber Chems. Antitrust Litig.*, 504 F. Supp. 2d 777, 786 (N.D. Cal. 2007) (holding that domestic injury exception did not apply where plaintiffs alleged that defendants "conspired to bring about a 'single worldwide price increase'").

The MDL court believed that this case was distinguishable because of (i) Motorola's domestic roots; (ii) the locale of the transactions at issue;[3] (iii) the fact that Defendants targeted Motorola in the United States; and (iv) Defendants' anti-competitive conduct in the United States. But the MDL court did not explain *why* these facts mattered to the proximate cause analysis, insofar as the inflated prices were paid by Motorola's foreign affiliates. The court agrees with Defendants that, under a straightforward reading of *Empagran II* and *DRAM*, none of these facts establish that a domestic effect gave rise to Motorola's Sherman Act claim.

First, the fact that Motorola is a domestic company is irrelevant to whether any domestic effect gave rise to Motorola's Sherman Act claim. That claim belongs to the Motorola foreign affiliates who purchased LCD panels at inflated prices from

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[3] The MDL court did not elaborate on *what* about the locale of these transactions was significant. The record facts are described *infra* p. 17.

Defendants. That the foreign affiliates have assigned their claims to a parent company that happens to be a U.S. corporation makes it no more likely that it was a domestic effect, rather than the overall price-fixing conspiracy itself, that proximately (*i.e.*, directly) caused Motorola's foreign affiliates to purchase LCD panels from Defendants at inflated prices. *See Sun*, 608 F. Supp. 2d at 1189 ("Without a valid theory to show that it stands in the shoes of its subsidiaries for purposes of those DRAM purchases, the purchases themselves must be viewed as foreign transactions made by independent subsidiary entities, albeit pursuant to a global pricing strategy instituted by its parent corporation . . . .").

This court also fails to see how the "locale of the transactions at issue" helps Motorola, as the undisputed facts show that the transactions were overwhelmingly foreign in nature.[4] The MDL court

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[4] *See* Defendants' Joint Motion for Summary Judgment 8-9, *Motorola III* ("The Foreign Assignors, not Motorola, Inc., purchased LCDs by issuing Purchase Orders to Defendants. The Foreign Assignors, not Motorola, Inc., paid for the LCDs they purchased from Defendants. The Foreign Assignors, not Motorola, Inc., manufactured handsets for global markets. . . . Every Foreign Assignor Purchase Order that Plaintiff identified in discovery was issued outside the U.S. Every Foreign Assignor Purchase Order that Plaintiff identified in discovery that identifies a shipping address called for shipment to occur outside the U.S. Every Foreign Assignor Purchase Order that Plaintiff identified in discovery called for billing outside the U.S. Every Foreign Assignor Purchase Order that Plaintiff identified in discovery that includes Terms & Conditions contained a provision

identified one aspect of these transactions that took place domestically: Motorola's senior procurement officers in the United States approved the prices that Motorola's foreign affiliates were to pay for LCD panels. *Motorola III*, 2012 WL 3276932, at *3. But this domestic approval cannot fairly be said to give rise to Motorola's Sherman Act claim. For Sherman Act purposes, the injury arose when Motorola's foreign affiliates purchased LCD panels at inflated prices, not when Motorola decided at what price those purchases would be made. *See DRAM*, 546 F.3d at 988 (stating that the foreign injury is "having to pay higher prices abroad"); *In re Monosodium Glutamate*, 477 F.3d at 539 n.3 (stating that the injury is the "higher prices paid"). Motorola's domestic approval was not the direct cause of Motorola's foreign affiliates' claim; rather, that claim resulted from the overall price-fixing conspiracy itself. *See DRAM*, 546 F.3d at 988.

Even were Motorola's domestic approval of the prices that its foreign affiliates paid an effect that gave rise to its Sherman Act claims, the court also finds that it is not a "substantial" effect on American domestic or import commerce. Thus, Motorola's claim fails the first prong of the domestic injury exception as well. An increase in domestic prices, or a reduction in domestic supply, can constitute a substantial domestic effect that gives rise to a Sherman Act claim. *Minn-Chem,*

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requiring compliance with foreign law." (footnotes and citations omitted)).

Inc. v. Agrium, Inc., 683 F.3d 845, 859 (7th Cir. 2012) (finding that the increase in domestic prices in potash constituted a domestic effect that gave rise to a Sherman Act claim). But the fact "[t]hat certain activities might have taken place in the United States is irrelevant if the economic consequences are not felt in the United States economy." *Turicentro*, 303 F.3d at 305. This rule helps prevent the perverse result of a country with no interest in an anticompetitive conspiracy applying its own antitrust laws. It is also supported by the principles of prescriptive comity articulated in *Empagran I* and *DRAM*. Because the economic consequences of Motorola's domestic approval of LCD prices were not felt in the U.S. economy, the domestic approval cannot constitute a domestic effect that gives rise to a Sherman Act claim.

That Defendants targeted Motorola in the United States is also irrelevant to the proximate cause analysis, *Empagran II*, 417 F.3d at 1271 ("That the appellees . . . had as a purpose to manipulate United States trade does not establish that 'U.S. effects' proximately caused the appellants' harm."), as is Defendants' anti-competitive conduct in the United States, *In re Rubber Chemicals*, 504 F. Supp. 2d at 784-85 ("[I]t must be the *domestic effects* of the Defendants' anticompetitive conduct, rather than the anticompetitive conduct itself, which gives rise to [a Sherman Act claim].").

There was therefore no sound basis to find this case distinguishable from *Empagran II* and *DRAM*. As in those cases, it was the overall price-fixing conspiracy itself that proximately caused Motorola's

foreign affiliates to purchase LCD panels from Defendants at inflated prices.

B. Whether the FTAIA's Import Exclusion Applies

Motorola argues that, if this court finds (as it has) that the domestic injury exception does not apply to Motorola's foreign injury claims, then the court should also revisit the MDL court's holding that the FTAIA's general rule applies to Motorola's claims. Sherman Act claims based on "imports" are not barred by the FTAIA. *See* 15 U.S.C. §6a. Motorola argues that injuries arising from Defendants' sales of price-fixed LCD panels to Motorola manufacturing facilities abroad that Defendants knew would be incorporated into Motorola devices sold in the United States fall under the import exclusion of the FTAIA.

The MDL court found that because Motorola had alleged that the foreign-purchased products were imported into the United States by Motorola affiliates, as opposed to Defendants, the foreign-purchased products were not "imports" within the meaning of the FTAIA. This holding is supported by precedent that the dispositive inquiry used to determine whether a product is an "import" is "whether the conduct of the defendants, not plaintiffs, involves 'import trade or commerce.'" *Turicentro*, 303 F.3d at 303. The *Turicentro* court explained that because the defendants did not directly bring their product into the United States, they cannot be labeled "importers" and did not engage in "import trade or commerce." *Id.* Following *Turicentro*, the MDL court noted that Motorola had not alleged that the foreign-purchased products were brought to the United States by Defendants, but rather

by Motorola affiliates, and so the products at issue were not “imports.” *Id.* The MDL court rejected Motorola’s argument that the products were “imports” because Defendants intended for the foreign-purchased LCD panels and products to be brought to the United States, reasoning that a definition that depends on intent would be difficult to apply. Because this holding was clearly supported by precedent, the court sees no reason to reconsider it.

IV. CONCLUSION

The FTAIA applies to Motorola’s foreign injury claims because they are based on nonimport conduct involving trade with foreign nations. These claims do not fall under the FTAIA’s domestic injury exception because they do not arise from any domestic effect. Accordingly, Defendants’ motion for reconsideration is granted, and Motorola’s claims based on overseas purchases by its foreign affiliates (the Category II and III claims) are dismissed. Parties are to appear for a status hearing on January 31, 2014, at 9:30 a.m. All pre-trial deadlines are stricken for the time being.

ENTER:

/s/

JOAN B. GOTTSCHALL
United States District Judge

DATED: January 23, 2014

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE: TFT-LCD (FLAT PANEL) ANTITRUST LITIGATION

No. M 07-1827 SI
MDL No. 1827

This Order Relates to:

Motorola Mobility, Inc. v. AU Optronics Corporation, et al., C 09-5840 SI

ORDER DENYING DEFENDANTS' JOINT MOTION FOR SUMMARY JUDGMENT ON MOTOROLA'S FOREIGN INJURY CLAIMS

On August 3, 2012, the Court heard argument on defendants' joint motion for summary judgment on Motorola Mobility, Inc.'s Sherman Act claim for injuries in foreign markets. Defendants' motion asserts that Motorola's claims based on TFT-LCD purchases in foreign markets are barred by the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a ("FTAIA").

Defendants argue that Motorola has failed to prove that its foreign injury claims were caused by any domestic effect of defendants' anticompetitive conduct. Defendants contend that although Motorola alleged that "[d]efendants and their co-conspirators . . . entered into supply agreements with Motorola in Illinois to sell Motorola LCD panels at unlawfully inflated prices,"

Third Amended Complaint ("TAC") ¶ 4, in fact "[d]iscovery has shown that [Motorola's] allegations concerning supposed global price agreements negotiated and entered into in Illinois are untrue." Motion at 3. Pointing to a lack of evidence demonstrating the requisite "domestic effect" proximately causing Motorola's foreign injury claims, defendants argue that two of the three categories of claims against it[1] should not be allowed to go to trial.

The FTAIA establishes a general rule that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations." 15 U.S.C. § 6a. The FTAIA then "provides an exception to this general rule, making the Sherman Act applicable if foreign conduct '(1) has a 'direct, substantial, and reasonably foreseeable effect' on domestic commerce, and (2) 'such effect gives rise to a [Sherman Act] claim.''" *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981, 985 (9th Cir. 2008) (quoting *Hoffmann-La Roche Ltd. v. Empagran S.A.*, 541 U.S. 155 (2004) (*Empagran I*) and

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1 Motorola's TAC alleges antitrust claims based on three categories of purchases: "(1) LCD Panels delivered by the Defendants to Motorola in the United States; (2) LCD Panels delivered to Motorola manufacturing facilities abroad for inclusion in Motorola devices imported into the U.S. by Motorola and later sold by Motorola to customers in the United States; and (3) LCD Panels delivered to Motorola manufacturing facilities abroad for inclusion in Motorola devices sold to Motorola customers abroad." TAC ¶ 184. Defendants seek summary adjudication on the second and third categories of claims (the "foreign injury claims").

15 U.S.C. § 6a). This is known as the "domestic injury exception" of the FTAIA. *Id*. The Supreme Court has stated:

> This technical language initially lays down a general rule placing *all* (nonimport) activity involving foreign commerce outside the Sherman Act's reach. It then brings such conduct back within the Sherman Act's reach *provided that* the conduct *both* (1) sufficiently affects American commerce, *i.e.*, it 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."

Empagran I, 542 U.S. at 162 (quoting 15 U.S.C. § 6a) (emphasis original). The FTAIA "sets forth an element of an antitrust claim, not a jurisdictional limit on the power of the federal courts." *Minn-Chem, Inc. v. Agrium Inc.*, 683 F.3d 845, 852 (7th Cir. 2012); *Animal Sci. Prods., Inc. v. China Minmetals Corp*., 654 F.3d 462, 469 (3d Cir. 2011); *see also* October 5, 2011 Order Denying Defendants' Joint Dispositive Motion Regarding Indirect Purchaser Claims Based on Foreign Sales ("IPP Order") at 7, Master Docket No. 3833 (adopting *Animal Science* view that "the FTAIA does not implicate the subject matter jurisdiction of the federal courts").

The Court concludes that whether the price fixing activities alleged by Motorola in this case gave rise to direct, substantial, and reasonably foreseeable effects on domestic commerce, and whether such effects gave rise to

a Sherman Act claim present issues of fact which must be resolved by the jury in this case.

Motorola contends, and this Court agrees, that its domestic roots and the locale of the transactions at issue distinguish this case from *Empagran I*. As this Court has previously observed, "Motorola is not a foreign company alleging injury based on wholly foreign transactions and conduct, unlike plaintiffs in *Empagran I*." March 28, 2011 Order Denying Defendants' Joint Motion to Dismiss the Second Amended Motorola Complaint (*Motorola II* Order) at 8, Master Docket No. 2602.

Motorola points to substantial evidence that defendants targeted Motorola in the United States for defendants' sales and marketing of LCD panels. *See Animal Science*, 654 F.3d at 470 (the relevant inquiry is whether the defendants' anticompetitive behavior "target[ed] import goods or services") (citing *Turicentro, S.A. v. American Airlines Inc.*, 303 F.3d 293, 313 (3d Cir. 2002)). Defendants knew that Motorola sold mobile devices in the United States and that the United States was one of the largest markets for mobile devices in the world. *See*, *e.g.*, Declaration of Joshua Stokes ("Stokes Decl."), Ex. 379 (Samsung presentation noting that Motorola had the number one market share in the U.S.); Ex. 150 (Sharp presentation noting same); Ex. 155 (indicating Toshiba's sales plan was based on strong demand from U.S. and Europe); Exs. 156, 157-160 (defendants' presentations and analyses regarding Motorola's U.S. market share). Defendants established U.S. subsidiaries to facilitate sales of LCD panels to Motorola in the United States. *See*, *e.g.*, Opposition at

15, n. 15 (listing defendants' relevant U.S. subsidiaries and affiliates); Stokes Decl., Ex. 80 (AUO email stating that its "regional strategy" for the U.S. was "direct access to Moto/Chicago and its global network"); Ex. 352 (deposition testimony of Samsung SDI employee that "[Samsung] had an office in Chicago because Motorola was in Chicago"); Ex. 345 (deposition testimony that Sharp had an office in a Chicago suburb in order to be "close to our customer . . . [f]irst of all, Motorola").

Defendants also met with Motorola on several occasions in the United States to discuss, and, at times, negotiate prices for LCD panels. *See*, *e.g.*, Exs. 251, 254, 255, 266, 314 (defendants' PowerPoint presentations to Motorola in the United States); Ex. 375 (document indicating that Samsung had several conversations in Chicago with Motorola regarding LCD panel pricing); Ex. 96 (Toshiba America Electronic Corporation ("TAEC") report indicating in-person price negotiations with Motorola in Schaumburg, IL); Ex. 99 (email setting "Final Negotiations Meeting" in Chicago with Motorola and representatives of AUO and AUOA); Ex. 140 (Sharp email describing Motorola meeting held in U.S., where price negotiations took place). Defendants also used their employees – both U.S.-based and those stationed abroad – in furtherance of the price-fixing conspiracy. *See*, *e.g.*, Ex. 349 (deposition testimony identifying Samsung employee who was "dispatched" to the U.S. from 1999 to 2004 and given instructions "about how to gather competitive information about [Samsung's] competitors"); Ex. 167 (email requesting that Epson's U.S.-based employees "research competitor's situation" regarding a particular Motorola

phone model); Ex. 168 (Toshiba informing its U.S.-based employees that competitive information had been gathered from Sanyo about projected share awards for Razr mobile phones and instructing them to "get information as much as possible").

Motorola also points to the admissions in the guilty pleas of many companies and executives involved in the LCD price-fixing conspiracy as further evidence that the conspiracy was targeted at the United States. Opposition at 26, n. 42 (listing plea agreements of LG, Sharp, Chunghwa, Hitachi, Epson, Chi Mei, and HannStar); *see also* Special Verdict Form, *United States v. AU Optronics Corp*., Case No. 09-cr-0110 SI (N.D. Cal. Mar. 2012) (AUO convicted of participating in a conspiracy to fix prices of LCD panels sold in the United States from September 2001 to December 2006), Docket No. 85. Some defendants admitted to specifically targeting Motorola in the United States. *See* Plea Agreement, *United States v. Sharp Corp*., Case No. 08-cr-802 SI (N.D. Cal. Dec. 8, 2008) (Sharp pled guilty to fixing the price of LCD panels sold to Motorola for use in Razr mobile phones); *United States v. Epson Imagining Devices Corp*., Case No. 09-cr-854 SI (N.D. Cal. Oct. 23, 2009) (Epson pled guilty to fixing the price of LCD panels sold to Motorola for use in Razr mobile phones).

The parties dispute whether defendants' conduct gave rise to its Sherman Act claims. *See DRAM*, 546 F.3d at 989-90 ("[W]here a global price-fixing conspiracy is alleged to have affected prices both in the United States and abroad, courts have held that 'the give rise to language of [the FTAIA] requires a plaintiff to establish a direct or proximate causal relationship' between the

alleged anticompetitive effects in the United States and the plaintiff's alleged foreign injury."). Defendants argue that, because Motorola's foreign affiliates purchased LCD panels pursuant to globally-negotiated foreign contracts (*i.e.*, purchase orders), the "domestic injury exception" is inapplicable to Motorola's foreign injury claims. *See* Motion at 23-24. Defendants claim that the prices used in purchase orders Motorola used with its LCD panel suppliers were based on negotiations abroad, not in the United States. *Id*. On this basis, defendants conclude that "the effect on U.S. domestic commerce that 'gave rise to' the foreign injury claims . . . is non-existent." *Id*. at 25. The Court is not persuaded by defendants' argument. Motorola has presented admissible evidence from which a jury could infer that final decisions regarding pricing of LCD panels took place in the United States. *See*, *e.g.*, Stokes Decl., Ex. 363 (deposition testimony of Motorola's Vice President of Procurement, Janet Robinson, that it was Motorola's "practice" that senior procurement officers in the United States gave "approval to enter into an agreement on price with a display module supplier during the relevant time period . . . ."). Motorola also points to the deposition testimony of its employees to support its claim that foreign affiliates issued purchase orders at the price and quantity determined by Motorola in the United States. *See*, *e.g.*, Ex. 359 (deposition testimony of Motorola's Chief Procurement Officer, Theresa Metty, that the "decision making" regarding contract negotiations, "which would include prices," happened in Illinois); Ex. 372 (deposition testimony of Motorola's Vice President of Global Operations, E.L. Tay, that the purchasing team

"basically execute[d] what was done and planned [in the United States]").

Whether, as defendants argue, Motorola's "rubber stamp approval process falls far short of what the FTAIA requires," Motion at 6, will be left up to a jury to decide, not the Court. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . ruling on motions for summary judgment."). The Court finds that a reasonable jury could find a "concrete link between defendants' price setting-conduct . . . its domestic effect, and the foreign injury suffered by Motorola and its affiliates." *See Motorola II* Order at 8.

Accordingly, the Court DENIES defendants' joint motion for summary judgment. Master Docket No. 5415; Docket No. 312 in 09-5840.

IT IS SO ORDERED.

/s/ *SUSAN ILLSTON*
SUSAN ILLSTON
United States District Judge

Dated: August 9, 2012

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

January 12, 2015

Before

RICHARD A. POSNER, Circuit Judge, MICHAEL S. KANNE, Circuit Judge, ILANA DIAMOND ROVNER, Circuit Judge

No. 14-8003

MOTOROLA MOBILITY LLC, *Plaintiff-Appellant*, *v.* AU OPTRONICS CORP., et al. *Defendants-Appellees*.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division *No. 09 C 6610* Joan B. Gottschall, *Judge*.

ORDER

On December 17, 2014, plaintiff-appellant filed a petition for rehearing *en banc*. All the judges on the original panel voted to deny the petition, and none of

the active judges has requested a vote on the petition for rehearing *en banc*.* The petition is therefore DENIED.

* Circuit Judge Joel M. Flaum did not participate in the consideration of this petition for rehearing.