No. 14-8003

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTOROLA MOBILITY LLC,

Plaintiff and Appellant,

vs.

AU OPTRONICS CORPORATION, et al.,

Defendants and Appellees.

On Interlocutory Appeal from an Order of the
United States District Court for the Northern District of Illinois
Case No. 09-cv-6610

APPELLANT'S REPLY BRIEF

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 14-8003

Short Caption: Motorola Mobility LLC v. AU Optronics Corporation

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

Google Inc.

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INTRODUCTION

Defendants formed a hard-core cartel that targeted an American company manufacturing goods for American consumers. They sold price-fixed LCD panels to Motorola for incorporation into U.S.-bound phones. The cartel is thus obviously subject to U.S. antitrust law, which exists for one reason: to protect U.S. businesses, markets, and consumers from anticompetitive conduct.

Defendants argue, however, that Congress exempted them from U.S. law insofar as they delivered their price-fixed goods abroad. Here, Motorola manufactured its phones in Asia, so defendants delivered their panels to Motorola's Asian subsidiaries. Defendants seek a "simple rule" that, because *they* didn't sell the product at issue directly into the U.S., their prototypical antitrust violation is immune from U.S. law, whatever its U.S. harms.

The method by which defendants delivered their price-fixed panels does not determine whether the Sherman Act applies, however, because it diminishes neither the cartel's targeting of the U.S. import market for cellphones nor the anticompetitive effect of their conduct on Motorola and U.S. consumers. Of course, the Sherman Act does not apply—and never has applied—to conduct in foreign commerce that causes no substantial harm to U.S. commerce. But that is no aid to defendants. Their cartel's purpose was to raise the U.S. manufacturer's price for U.S.-bound panels; its effect was to raise the price of products Motorola imported and U.S. consumers bought. So the U.S. interest in subjecting the cartel to U.S. antitrust law is the same, too.

There is thus no merit to defendants' argument that the FTAIA exempts them from antitrust liability. That statute enacted one material change to U.S. antitrust law: It exempted U.S. export cartels that do not harm the U.S. economy. It would have been absurd for Congress to create immunity for international cartels that do the opposite: purposefully harm the U.S. economy. Congress has never left it to foreign authorities to take actions—frequently against their own nationals—that are essential to protect U.S. markets. Accordingly, by its terms, the FTAIA's limitations are inapplicable because the cartel's conduct either (1) involved U.S. import commerce or, at the least, (2) had a direct, substantial, and reasonably foreseeable effect that gave rise to anticompetitive harms in U.S. import and domestic markets.

Defendants' contrary view is that applying U.S. law to their U.S.-targeting cartel violates principles of international comity. But the Sherman Act has always applied to foreign conduct that causes substantial harm in this country. Cartels are the classic example. Nothing in the FTAIA departs from that principle, and a contrary interpretation would pose a threat not only to private claims, but public prosecutions as well. Defendants' arguments depend on a fictitious version of the legislative history and wild extrapolation from cases involving conduct with only a tangential relationship to this country—for example, sales to wholly foreign plaintiffs that might affect U.S. prices only through the possibility of arbitrage. This case, involving sales to a U.S. original equipment manufacturer (OEM) making U.S.-bound products, is worlds apart.

To the extent the factual nuances matter, they confirm that the Sherman Act applies. Defendants do not dispute that they targeted Motorola because of its large U.S. market share, worked to incorporate their panels into Motorola's U.S.-bound phones, and monitored U.S. street prices of Motorola products containing the price-fixed panels. Defendants moreover engaged in *Motorola-specific* price-fixing—conspiring to set the prices Motorola would pay for bespoke panels whose sole use was in Motorola phones—and thus ensured that their price-fixed product would flow in U.S. import commerce.

Motorola is the correct—and only possible—private enforcer of the Sherman Act here. It is plainly the right party to complain about price-fixing defendants targeted at it. Motorola is also the first domestic purchaser of the price-fixed goods, both formally (because it separately purchased the finished phones) and practically (because its affiliates purchased the price-fixed panels as part of a single, integrated supply process). If Motorola cannot sue, no one can. And that cannot be right.

STATEMENT REGARDING DISPUTED FACTS

Defendants attempt to characterize this as a wholly foreign case by relying on their version of the facts, including the terms of purchase orders, the location of negotiations, and how "immediately" LCD panels were incorporated into Motorola's cellphones. RB5-9. Defendants simply omit all unfavorable facts, including contracts made directly with Motorola (as the U.S. parent) that were part of their overall supply agreements. *See* SA236-37. Moreover, defendants ignore that the key terms of the purchase orders they reference—price and quantity—were determined by Motorola in the U.S. SA237. Most notably, while they rely heavily

on the foreign corporate identity of Motorola's subsidiaries, RB34, they omit that many panels were purchased by an entity considered part of Motorola itself under U.S. tax law. SA236.

Indeed, while defendants make much of Motorola's allegedly "complex manufacturing chain," they identify no evidence that these allegations have any economic substance or effect. Accordingly, defendants have never previously contested the basic premise below: that Category Two panels "were delivered to the foreign affiliates' manufacturing facilities abroad, *where they were incorporated into mobile phones* that were later sold in the United States." A37; *see* A18 ("Motorola alleges that the prices set … '*directly and immediately* impacted Motorola's business plans, including its most basic business choices involving the production, pricing, and sales of its own products.'" (emphasis added)). Indeed, defendants admit that the facts they flag concern only what "might" or "could" happen "at times" to *some* panels. RB7-8. If defendants newly believe that anything turns upon alleged "complexities" in Motorola's internal operations or the corporate citizenship of various subsidiaries—and they have preserved this argument—they would need on remand to distinguish which panels are excluded, and why.

In this posture, all disputed facts and inferences are taken in Motorola's favor. And, in any event, the economic realities are undisputed. Defendants represented to the MDL court that *all* harms associated with overcharges on Category Two panels passed into the U.S. cellphone market, leaving no harm in

foreign economies. SA426.[1] Accordingly, the question in this case has never been *whether* defendants' price-fixing affected U.S. import and domestic commerce in Motorola's cellphones, but rather whether that effect is non-actionable based on the mere fact that the price-fixed components were first delivered abroad.

ARGUMENT

I. THE IMPORT-COMMERCE EXCLUSION PERMITS MOTOROLA'S CLAIM

Although it is logically antecedent, defendants bury the import-commerce exclusion at the end of their brief. RB48-52. The reason is plain: The simplest way to see that defendants' conduct is actionable is to recognize that it "involv[ed]" import commerce, 15 U.S.C. §6a, because it "targeted" Motorola's import commerce in cellphones. Under that standard—adopted by other courts and regarded by the government as too defendant-friendly—Motorola's Category Two purchases clearly fall within the import-commerce exclusion.

Motorola's brief demonstrated that the lower courts erred by mistakenly relying on outdated Third Circuit precedents to hold that the import-commerce exclusion cannot apply where defendants themselves did not act as importers. BB27-31. The government agrees that the reasoning below was error. U.S. Br. (ECF No. 92) at 8. The Third Circuit does too. *Animal Sci. Prods. v. China Minmetals Corp.*, 654 F.3d 462, 470 (3d Cir. 2011) ("Functioning as a physical

[1] Defendants argued that these harms passed through to U.S. consumers, preventing Motorola from arguing that a domestic effect gave rise to its claim. *Id.* This argument is foreclosed by *Hanover Shoe*, and defendants do no repeat it. Instead, they omit this point, which refutes their argument that effects on U.S. cellphone imports were waived below. *See infra* pp.21-22.

importer may satisfy the import trade or commerce exception, but it is not a necessary prerequisite.").

Defendants do not openly defend the lower-courts' reasoning, but attempt to smuggle it in under other terms. They suggest that their sales of price-fixed panels abroad were not "import commerce," and that the government would agree, because these were non-import transactions. RB49-50. But this ignores the statutory text. It asks whether defendants' "*conduct*" "*involv[ed]*" import commerce, not whether defendants engaged in import transactions. *See* 15 U.S.C. §6a; U.S. Br. 9 (correct standard must "convey the full breadth of the statutory term 'involving'"). Limiting the import-commerce exclusion to "import transactions" is exactly the same as limiting it to importers, thereby reading the term "involving" out of the statute.

Accordingly, the Third Circuit has held that the exclusion covers conduct that "target[s] import goods," *Animal Science*, 654 F.3d at 470. The government proposes a still-broader standard, under which conduct directed at imports is subject to U.S. law even if not targeted at import goods in particular. U.S. Br. 7-9. The government advanced the same position in *Minn-Chem v. Agrium*, 683 F.3d 845 (7th Cir. 2012) (en banc), where it noted that it had prosecuted certain of these very defendants—and obtained a jury instruction—based on its reading of the exclusion. *See* Br. Of U.S., at 19-20, *Minn-Chem,* No. 10-1712 (7th Cir. Jan. 12, 2012) (ECF No. 62-2). No court or party save defendants believes the import-commerce exclusion is limited to "simple import transactions." RB48.

Defendants nonetheless remarkably claim support from *Minn-Chem*, confusing its description of the *minimum* content of the import-commerce exclusion with its maximum scope. *Minn-Chem* did apply the exclusion to simple import transactions between foreign sellers and domestic buyers, noting that such transactions "*are* the import commerce of the United States." 683 F.3d at 855. But the Court's italics reflect that this is only the most obvious case: Conduct that *is* import commerce also *involves* import commerce. Later, the Court would only "assume" that a supply restriction by a Canadian company with no U.S. sales, directed at "price negotiations with China," did not "literally involve[] import trade." *Id.* at 859. The relevant aspect of *Minn-Chem* is its citation, with apparent approval, of the Third Circuit's targeting standard—a fact defendants omit. *See id.* at 858. Everything else reduces to a transparent effort to turn *Minn-Chem*'s sufficient conditions into necessary ones.

Under the correct standard, this case is easy. Defendants suggest that there is no evidence "that it actually mattered to the defendants whether the panels they sold abroad ended up in the United States," RB51, but that is simply false. Motorola's opening brief details substantial evidence that defendants targeted Motorola domestically because of its large U.S. market share, worked hard to ensure that their panels were incorporated into U.S. phones, and then engaged in *Motorola-specific* price fixing, thereby ensuring that price-fixed panels would flow in the stream of import commerce. BB5-6. That is not conduct where defendants merely foresaw that their panels might "end[] up in the United States." RB51.

Nor is this a case where defendants dealt with wholly independent foreign entities that just happened to be interested in U.S.-bound commerce. The decisive consideration is that defendants were dealing with a U.S. OEM making and importing goods for U.S. sale. Unlike the (now-outdated) cases defendants cite, RB48-49, there is no independent foreign actor here to break the import chain. Defendants' conduct thus "involved" import commerce under any standard.

Defendants call this inquiry "subjective," RB51, but it is not. The question is only whether a person who undertook defendants' actions in the relevant context would be understood to have targeted import commerce. And there is no way to hold that defendants' conduct fails that standard *on a motion to dismiss* given the facts at issue. *See Animal Science*, 654 F.3d at 470-71 (remanding where district court applied same incorrect standard in same procedural posture).

Contrary to defendants' assertion, RB49-50, the government does not agree that Category Two sales fall outside the import-commerce exclusion. On the exclusion, the government agrees with (or advocates a broader standard than) Motorola on every point save one: namely, that defendants' Category One sales are alone sufficient to subject their *Category Three sales* to U.S. law. *See* U.S. Br. 9-10 (citing only BB50-52). Even then, the government's apparent view is that defendants' conduct respecting Category Three sales did "involve[] import commerce" but that Motorola cannot recover because its "injury is unrelated to that commerce." *Id.* 10. Of course, the injury from Category Two sales, which by definition flowed in import commerce, is not "unrelated" to import commerce.

In a footnote, RB51 n.14, defendants attempt to distinguish the one other place in the U.S. Code that discusses "import trade." *See* BB28-29. Although defendants have said the similar terms of the ITC statute reach components sold abroad (to their benefit), they maintain that the FTAIA does not, because it "serves different purposes." *Id*. But both statutes govern U.S. law's application to foreign conduct that violates U.S. competition rules and implicates import trade. It is impossible that Congress would want "import trade" to be construed in opposite ways in these two settings, always to the benefit of foreign companies who would restrain competition and harm U.S. consumers.

Ultimately, defendants cite no case with facts remotely on point, and ignore the closest analog: The government's prosecution of defendant AUO, recently affirmed by the Ninth Circuit. That omission is startling because AUO has itself told the Ninth Circuit that the decision's "core holding on the FTAIA is that a foreign components manufacturer who sells its goods to foreign purchasers can be covered by the 'import trade' provision so long as finished products end up in the United States." Pet. For Reh'g En Banc, at 12, *United States v. AU Optronics*, No. 12-10492 (9th Cir. Aug. 25, 2014) (ECF. No. 99).

Indeed, the Ninth Circuit held that defendants' conduct manifestly involved import commerce because they (1) negotiated in the United States with U.S. parent companies and (2) "imported over one million price-fixed panels per month into the United States." *United States v. Hsiung*, 758 F.3d 1074, 1091 (9th Cir. 2014). Critically, the latter figure reflects sales to U.S. parent companies, most of which

were delivered to subsidiaries or third parties *abroad* for manufacturing into finished goods. *See* Br. Of U.S., at 8-9, *United States v. AU Optronics*, No. 12-10492 (9th Cir. Apr. 5, 2013) (ECF No. 42). One of the U.S. targets the Ninth Circuit was discussing *was Motorola itself*. *See Hsiung*, 758 F.3d at 1078.

Given AUO's targeting of these U.S. importers, the Court held that the fact that "AUO was not an 'importer' misses the point." *Id.* at 1091. Whether AUO imported them or not, "[t]he panels were sold into the United States." *Id.* This is, quite literally, the same case. There is thus more than sufficient evidence for a jury to conclude that targeting import commerce was a specific object of defendants' price-fixing conspiracy against Motorola.

II. THE DIRECT-EFFECTS EXCEPTION PERMITS MOTOROLA'S CLAIM

Even if the Court rejects the import-commerce exclusion standards endorsed by the government and the Third and Ninth Circuits and holds that defendants' conduct could not involve import commerce as a matter of law, that conduct at least *affected* U.S. import commerce. Here, however, defendants argue that the effect was not "direct" and did not "give rise to" a claim by Motorola in any capacity. These arguments must fail, because both would preclude *anyone* from complaining about the substantial harms that defendants surely imposed on the U.S. economy—the government included.

A. "Direct" Effects

In arguing that their price-fixing lacked "direct" U.S. effects, defendants cite only two cases about that term. RB43-48. One is *Minn-Chem*, which adopted the

broader, "reasonably proximate" standard the government advocated with reference to this very fact pattern, *see* 683 F.3d at 857; BB33-34. The other is *Lotes v. Hon Hai Precision Industries*, 753 F.3d 395, 413 (2d Cir. 2014), which expressly held that defendants' conduct can have "direct" effects on downstream markets. The government too explains that defendants' conduct directly affected import commerce. U.S. Br. 11-20. Only defendants disagree.

Defendants' arguments on this front are insubstantial. They suggest that there is no evidence that their price-fixing affected U.S.-bound cellphones—criticizing the government's record citations, RB46—but omit that they *themselves* represented below that all of the panel overcharges were passed into the U.S. cellphone market. SA426. Defendants previously conceded that "Category Two purchases … may … implicate effects on U.S. commerce, [in] the finished handset market." *Id.* This fact is undisputed, but not in defendants' favor.

Accordingly, defendants' only hope is to limit *Minn-Chem* to its facts and argue that an effect is only direct if it raises "benchmark prices" for "homogeneous commodit[ies]" sold in the U.S. RB44. They do not even discuss the well-recognized legal meaning of the "proximate cause" standard *Minn-Chem* adopted. That "legal vocabulary" includes questions like "whether the injury was a natural or probable consequence of the [conduct]." *Lotes*, 753 F.3d at 412. And such questions have obvious answers here: Increasing the price of Motorola's LCD-containing goods was so "natural and probable" that defendants actually monitored U.S. street prices to coordinate their conspiracy. In any event, whether "defendants' conduct

proximately caused the plaintiff's injury ordinarily is a question for the finder of fact." *Palay v. United States*, 349 F.3d 418, 432 (7th Cir. 2003).

B. "Gives Rise To"

Defendants focus most of their efforts on disputing whether the effects of their conspiracy "gave rise to" Motorola's claim. RB14-42. At the heart of those arguments is a supposed "simple rule" that when price-fixed goods are purchased abroad, U.S. law is inapplicable—no matter how severe the effects on the plaintiff's U.S. import or domestic commerce. RB19; *see id.* 9 (only "plaintiffs who purchase price-fixed goods in U.S. markets satisfy the gives-rise-to requirement."). But as explained below, defendants misunderstand the gives-rise-to requirement and, in any event, the effects of defendants' conduct still give rise to Motorola's claims under defendants' interpretation.

1. Defendants Misconstrue The Gives-Rise-To Requirement.

The problem with defendants' "simple rule" that only domestic purchasers satisfy the gives-rise-to requirement is that it has been roundly rejected. As the D.C. Circuit has explained, it "has no support from the text of the statute" and is dispelled by the legislative history, which provides that the effects exception "'does not exclude all persons injured abroad from recovering under the antitrust laws of the United States.'" *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267, 1269 (D.C. Cir. 2005) (quoting H.R. Rep. No. 97-686, at 10); *see* U.S. Supp. Br. (ECF No. 57) at 14-15 (so arguing).

The legislative history—presented fully in Motorola's brief, BB39-40, while only excerpted, footnoted, and paraphrased in defendants', RB19-22—makes this unmistakable. A party does not have to be "injured within the United States" if the "conduct providing the basis of the claim had the requisite impact on the domestic or import commerce of the United States." H.R. Rep. No. 97-686, at 11-12. The paradigm case would seem to be where defendants' conduct affects a *U.S. importer*, since that harm necessarily has the "requisite impact" on U.S. import commerce and, as the FTAIA's authors expressly contemplated, "import restraints … can be damaging to American consumers." BB29. Put otherwise, unless the authors did not understand their own statute (as defendants' openly suggest, RB22), *at least* U.S. importers may recover under U.S. law when they "take title abroad." H.R. Rep. No. 97-686, at 10-12.

Defendants protest that *Empagran* makes U.S. antitrust laws unavailable "for injury to foreign customers," RB17, 22, but this stretches *Empagran* far beyond the question it decided or even the opinion's dicta. *Empagran* stated, repeatedly, that it addressed only the case of a "foreign plaintiff" whose injuries were wholly "independent" from any injuries to U.S. import or domestic commerce. BB36-37. It did not remotely address a plaintiff engaged in (and targeted for) its U.S. imports.

Ultimately, defendants' argument collapses the direct-effects exception into the bare-minimum version of the import-commerce exclusion—a result *Minn-Chem* rejects. *See* 683 F.3d at 857. If only those who purchase price-fixed products in the U.S. can complain, there would be no scope to *either* the direct-effects exception *or*

the term "involving" in the import-commerce exclusion, and the statute would be limited to simple import transactions. That result is not only inconsistent with the structure of the statute, but condemned by the legislative history in so many words. *See* H.R. Rep. No. 97-686, at 10 (U.S. law applies to conduct with requisite effect "even if some purchasers take title abroad or suffer economic injury abroad").

Defendants' second error is misunderstanding the gives-rise-to requirement as a limitation on proper plaintiffs, when it was actually intended to limit the *conduct* subject to U.S. law by requiring that it be anticompetitive. That is exactly how *Empagran* describes it. *See F. Hoffman La-Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 162 (2004) (FTAIA requires "an effect of a kind that antitrust law considers harmful, i.e., the 'effect' must 'give rise to a Sherman Act claim.'"). And Chairman Rodino explained that these very words appear in the statute to preclude defendants' argument. BB39-40. *Empagran* makes clear that, under international comity principles, a foreign plaintiff can only complain where their harm is not "independent" from—and is, in fact, "inextricably bound up" with—harms to U.S. commerce, and that the FTAIA's text does not affirmatively require a different result. 542 U.S. at 171-72; BB24. But where the very same transactions harm the plaintiff and the U.S. economy, the FTAIA cannot bar the claim because the statute

was "not intended to restrict the application of American laws to extraterritorial conduct where the requisite effects exist." H.R. Rep. No. 97-686, at 13.[2]

Motorola's opening brief explained that the gives-rise-to requirement makes no structural sense as a limitation on who can sue, BB38-39—a point defendants do not even attempt to refute. This language amends the *Sherman* Act (which specifies the substance of antitrust law and applies to both private plaintiffs and the government), not the *Clayton* Act (which provides standing for civil claims), and even appears in the FTC Act, which has *only one possible plaintiff*. If Congress had meant that the alleged direct effect on U.S. import or domestic commerce must give rise to the plaintiff's claim under Clayton Act §4, it would have said so. And, in fact, we know that that is not what Congress meant at all.

Ultimately, however, the Court need not agree that the gives-rise-to requirement focuses only on whether an effect is anticompetitive. Even if one accepts the inordinately cartel-friendly view that it was intended to require a sequential relationship between the U.S. effect and the particular party's claim, that standard is still met here.

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[2] Notably, while foreign *amici* raise generalized comity concerns, none discusses the specifics of this case. Thus, Japanese entities have somehow filed three briefs without mentioning that Japan applied its domestic law to a different cartel on these exact facts. *See* Press Release, JFTC, Orders Against Manufacturers of Cathode Ray Tubes (Oct. 7, 2009) (fining Korean, Thai, and Malaysian companies that fixed the price of CRTs sold to subsidiaries of Japanese manufacturers in foreign nations that built televisions for the Japanese market), http://www.jftc.go.jp/en/pressreleases/yearly-2009/oct/individual-000037.files/2009-Oct-7.pdf.

2. The Effect On Import and Domestic Commerce Gives Rise To Motorola's Subsidiaries' Claims

As an initial mater, Defendants' conduct gave rise to Motorola's subsidiaries' claims because they purchased Category Two panels for importation into the United States. Import commerce begins at the *purchase for import*, and when that purchase is completed at an artificial overcharge—and the cartelists know that the product is headed straight for U.S. shores—there is undoubtedly a direct, substantial, and reasonably foreseeable effect on U.S. import commerce that gives rise to a claim by the importer who pays the tainted price.

Citing the Second Circuit's decision in *Lotes* and the government's brief, defendants argue that the foreign subsidiaries here are "upstream" from the U.S. effect. RB24. But while Motorola's subsidiaries may be upstream from the effects of defendants' price-fixing in the *domestic* market, they are not upstream from the *import* market—they are participating in it. The "upstream" party in *Lotes*, by contrast, was not an importer of finished goods, and was far removed from effects in either domestic *or* import commerce. *Lotes*, 753 F.3d at 399. And even though the direct-effects exception includes effects on import commerce alongside domestic commerce, defendants and the government ignore this point.

Moreover, while both *Lotes* and the government contemplate that the upstream importer's claim may be foreclosed, that is only because the U.S. party to the importation will have a claim. *Id.* at 413 n.7; U.S. Br. 22-24. Only defendants advance the self-serving proposition that *no one* will have a claim under U.S. law for harms felt in U.S. markets. As explained below, *infra* pp.18-21, Motorola agrees

that the better view may be to acknowledge its claim as the U.S.-party importer of the phones incorporating the price-fixed panels. But simultaneously rejecting the claims of *all* parties to the import transaction is impossible: It deprives U.S. law of the power to protect U.S. markets in a way the FTAIA, its history, and the doubled preservation of claims associated with imports all expressly disavow. BB20-27.

Motorola's subsidiaries also have a claim under the MDL court's "single-price" rationale, which defendants dismiss only by caricature. Defendants argue that this theory confuses "conduct" with "commerce," RB25-29, and that Motorola cannot complain merely because the prices were negotiated or approved in the U.S. But Motorola's point was that defendants affected U.S. commerce by negotiating, in the United States, the price for all panels—including U.S.-bound, Category One panels—and that this effect *on U.S. prices* gave rise to any allegedly foreign injuries because that same price was applied to Motorola's purchases at its subsidiaries abroad. BB47-50.

Ultimately, defendants acknowledge (as they must) that while other courts have rejected theories in this general family, they have done so *on the facts*, and not because they fail as a matter of law. Each applied the same standard: proximate cause. In each, the plaintiff argued broadly that there was a unified worldwide market—where foreign and domestic prices were connected by forces like arbitrage—and the courts held that this kind of relationship was merely "but for" causation. *See* BB49; RB27 (collecting such cases). Motorola, in contrast, asserts the most proximate possible relationship between fixed U.S. prices and foreign

prices: namely, that both arise from the same, *plaintiff-specific* negotiations and acts of conspiratorial price-fixing.

Defendants' only discussion remotely on point is a footnote arguing that proximate causation is impossible because Motorola's foreign and domestic purchases were "separate." RB28 n.5. This is, once more, simply a *per se* rule that foreign purchases are never actionable under U.S. law no matter how connected to harms in U.S. commerce—upstream *or* downstream. Every authority, including the Supreme Court, has rejected that legal rule, BB48, and the facts here thus suffice to create a jury question on proximate cause.

3. The Effect On Import Commerce Gave Rise To The Parent's Claim

Especially if Motorola's subsidiaries do not have a claim, Motorola has its own claim as the U.S. company that actually imported the goods tainted by price-fixing into the U.S. for sale. That is true in both form (because Motorola separately purchased the phones) and substance (because Motorola functioned with its subsidiaries as a single entity). Defendants try to break these arguments apart and turn them against each other, but at bottom, the straightforward point is that some party to injured U.S. import commerce, undertaken by a U.S. manufacturer building phones for U.S. consumers, must have a claim.

As Motorola's opening brief explained, the distinction between Motorola and its subsidiaries with respect to the antitrust injuries suffered in this case is chimerical. BB9, 40-41. In economic terms, Motorola and its subsidiaries operated with respect to these transactions as a single entity. Defendants respond that, if

Motorola is a single entity, it cannot recover because it first experienced its harms abroad. But this is the most radical of arguments: It suggests that an American OEM making products for the American market cannot invoke U.S. law with respect to price-fixed components delivered abroad even if it *has no subsidiaries*.

This ignores that the FTAIA extends to direct-effects on import commerce, not just domestic sales. According to defendants' view, if a U.S. company bought price-fixed panels abroad to put in phones—or even *boxes*—bound for American consumers, its claim would not arise from harms to U.S. import commerce because "increased costs were incurred at the time the single entity paid the alleged overcharges." RB35. Put otherwise, U.S. importers will never have claims about the price-fixed goods they buy for import, even though the transaction is between a foreign seller and domestic buyer with respect to goods headed for the U.S.

Defendants also dispute whether Motorola operated as a single entity with its subsidiaries. At a minimum, this is a disputed factual issue. Defendants seem to propose that it is *never* possible to "disregard the[] separate existences" of corporate entities to corporation's benefit—citing a non-antitrust case, RB34—before acknowledging that, of course, the Supreme Court's decision in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 777 (1984), does exactly that. The Court has made clear that, when it comes to antitrust law, the consequences of corporate-organization decisions should be determined based on questions of antitrust policy and economics. *Id.* Defendants do not even try to show that the distinction

between Motorola and its subsidiaries mattered in that regard (and, of course, ignore that the major subsidiary is part of Motorola itself under U.S. tax law).

Having rejected the proposition that Motorola should be deemed a single entity for these purposes, defendants argue that—even considering Motorola and its subsidiaries separately—*neither* has a claim, because Motorola is barred by various, newly-asserted bars on downstream recovery. RB36-39. As explained in Motorola's opening brief, however, the U.S. parent has a claim for the harm that passed to it when it purchased cellphones from the subsidiaries for importation, and that claim is not barred by *Illinois Brick*, which has a recognized ownership-or-control exception. BB45-47. Defendants do not dispute that Motorola satisfies the ownership-or-control exception, but instead attempt to make it meaningless.

Defendants now argue that because Motorola dictated the terms of import transactions and experienced the harm in a downstream market, it lacks "antitrust standing" or injury. *See* RB36-40. It is impossible to fully address these newly minted arguments, but as the government ably explains, this Court has held that injured parties in downstream markets *do* have relevant injuries and antitrust standing—a view that was superseded only by *Illinois Brick*. U.S. Br. 16-17. Thus, the important question is whether *Illinois Brick* applies or not. If the ownership-or-control exception applies, and *Illinois Brick*'s bar on pass-through claims does not, Motorola has antitrust standing and injury because it complains about a prototypical antitrust harm (collusive price-fixing) passed through to it.

Indeed, defendants' arguments merely seize on the necessary predicates for the ownership-or-control exception, which *requires* that "market forces" be superseded. The lack of competition with respect to downstream transactions obviates the usual complications, which is what allows the parent to claim the harms that pass through. In other words, defendants' arguments about Motorola "dictating" terms, "causing its own harm," or suffering that harm in a "downstream" market, RB37-38, are true of every case asserting the ownership-or-control exception, and exactly what make it applicable. All defendants really argue is that an exception recognized by this Court and the Supreme Court, BB45-47—which they do not dispute on its own terms—does not really exist.

Ultimately, defendants do not contest that Motorola owned and controlled the relevant subsidiaries, or that Motorola's downstream injuries would therefore be actionable even under *Illinois Brick*. That means Motorola has a viable claim about the harms it suffered as a purchaser of the tainted cellphones in import commerce—a claim that obviously satisfies every possible version of the gives-rise-to requirement.

Because that is so, defendants try a last-ditch effort to show that this argument was waived. That would be a surprising result, as a claim based on effects in the U.S. cellphone market is the only one this Court discussed when it first considered this appeal. SA828-30.

Indeed, defendants' suggestion that Motorola did not assert its own injuries as an importer of cellphones lacks candor. Defendants' core argument is that,

notwithstanding the many relevant allegations in Motorola's complaint and throughout the motion-to-dismiss stage, BB12-14, this argument was waived because it was not *re*-asserted on summary judgment. RB29-33. But defendants' citations to Motorola's summary judgment brief stop at SA259. Here is how that brief continues on the very next page:

> The Court has already concluded that …. "the effect of defendants' anticompetitive conduct did not change significantly between the beginning of the process (overcharges for LCD panels) and the end (overcharges for [finished LCD-containing products])." It would be impossible to have, … a "direct" effect that "proceeded without deviation or interruption from the LCD manufacturers to the American retail store" with respect to American consumers, that is not also "direct" with respect to American OEMs, such as Motorola, that manufactured abroad and sold in the United States the LCD-containing products purchased by the American consumer. Thus, at a minimum, a material question of fact exists as to whether the "domestic effects" exception applies to Motorola's damages arising from LCD panels that were incorporated into mobile devices imported into the United States.

SA259-60 (citations omitted).

Defendants did not say this argument was a surprise, or somehow waived in discovery. Instead, they acknowledged and attempted to refute "Motorola's claim that *it* suffered a downstream injury as a result of the [subsidiaries'] purchases," Defs.' SJ Reply at 13, *Motorola Mobility v. AU Optronics*, No. 09-5840 (N.D. Cal. July 2, 2012) (ECF No. 6050) (defendants' emphasis), asserting the *Hanover Shoe*-foreclosed (and now abandoned) argument that Motorola's injury was further passed on to U.S. consumers. *Id.* Discovery amply allowed defendants to represent

that all panel overcharges passed into the U.S. cellphone market. *Id.*; SA426.[3] It is only because Motorola's claim is indisputably within the gives-rise-to requirement that defendants now try to make it disappear.

In any event, defendants confuse victory with waiver. A key dispute below was whether the MDL court should focus on Motorola's own harms as an American OEM importing its products for U.S. sale, or rather exclusively on the alleged "foreign injuries" of its subsidiaries. BB14. Motorola argued that it should be understood as an American importer with foreign agents abroad, or at least as a "single entity." *Id.* But defendants prevailed, and starting with *Motorola I*, the MDL court "agree[d]" with defendants' "content[ion] that Motorola's foreign injuries occurred when the panels were purchased abroad, before Motorola imported those panels (as contained in finished products) into the United States." A10. These are the same arguments defendants make now. *E.g.*, RB34-36. They were not waived, they were *decided against Motorola*, which is why it is appealing. And because Motorola's theory was rejected on a motion to dismiss, defendants cannot exclude the contrary allegations of Motorola's complaint.

Defendants close by suggesting that even if no party to U.S. import commerce can recover, there is "no threat to government enforcement actions or U.S. purchaser claims." RB40. This is not correct.

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[3] While irrelevant for the reasons just given, defendants' waiver claims are also self-evidently taken out of context. Below, Motorola waived a damages measure based on lost profits in the cellphone market, and its own claims as an indirect purchaser of other companies' LCD-containing products for internal use. *See* SA364; SA714-15. Neither is relevant here, which is why defendants' claims of being denied discovery involve only vague generalizations. RB29-30.

Motorola is the single most proximately injured U.S. entity who alone suits the purposes of *Illinois Brick* and *Hanover Shoe* by aggregating all damage claims and locating them as close as possible to the price-fixing cartel. Defendants suggest that the "first U.S. purchasers" are Motorola's customers, RB41 n.11, but that is silly. It ignores the existence of Motorola as a U.S. company which first received the finished phones on the U.S. side of U.S. import commerce. RB7 (conceding that phones were transferred to local Motorola entity for sale). It is not possible for that harm to have somehow gotten to U.S. consumers without touching Motorola. If Motorola cannot sue under the substantive provisions of the Sherman Act—if it has no "claim under the provisions of sections 1 to 7 of this chapter," 15 U.S.C. §6a—there is no way any further downstream U.S. person does.

And if that is so, then neither does the government. Because Motorola is a U.S.-party importer, the only way to avoid acknowledging Motorola's claim is to endorse defendants' view that harms initially incurred abroad stay abroad. RB24-25 (arguing that no party has standing in downstream market). To be sure, the government never needs to worry about Clayton Act §4, but no part of the FTAIA mentions Clayton Act §4, and *Minn-Chem* explains that the provisions that *do* appear apply equally to the government and private parties. 683 F.3d at 856. If defendants' conduct does not give rise to a substantive Sherman Act claim by any U.S. person, it cannot give rise to a claim by the government on their behalf. That is a nonsensical result for a statute "not intended to restrict the application of

American laws to extraterritorial conduct where the requisite effects exist." H.R. Rep. No. 97-686, at 13.

III. UNDER THESE UNIQUE FACTS, MOTOROLA CAN RECOVER FOR CATEGORY THREE PURCHASES

Motorola's opening brief explains why, in this rare case, it is appropriate under the statutory text and principles of comity to apply U.S. law even to panels incorporated into phones sold abroad. BB50-54. Defendants do not even respond—preferring instead to treat damages from Motorola's Category Three purchases as obviously off-limits. Accordingly, they do not dispute that plaintiffs must typically bring claims arising from a series of related transactions in a single forum, BB52-53, or offer an interpretation of the final clause of the FTAIA, which distinguishes conduct that harms the export opportunities of U.S. plaintiffs (which is only actionable *to the extent* of those particular harms) from conduct that harms import or domestic markets (for which no such limitation applies). BB52. At least where, as here, far more harm was experienced in the U.S. than any other forum, it is appropriate to apply U.S. law to the entire harm that defendants' transactions with Motorola caused.

That rule does not remotely mean that every case becomes a U.S. case, or that global companies can "forum shop" their antitrust actions, as defendants imply. RB29. A court can surely decline to hear such cases based on comity concerns if the bulk of the harm was experienced elsewhere. BB53-54. But it is undisputed that defendants' sales to Motorola had a far greater effect in this country than any other. Indeed, it is precisely for the sake of the U.S. market that defendants' targeted

Motorola in particular. Breaking up that conduct into tiny pieces that must be separately litigated—and, consequently, will not likely be pursued—is just an invitation for others to do the same. The FTAIA's drafters specifically intended that it would not deprive U.S. markets of protection from that incentive. *See* H.R. Rep. No. 97-686, at 10 (noting that FTAIA must allow for recovery of harms experienced abroad to deter price-fixing with domestic effects). And given that most cartels go undiscovered, the real risk is under-deterrence of harm to U.S. commerce, not the other way round.

* * * * *

One final note. This case proceeded as an MDL so that one court could understand the connections among the claims of various plaintiffs and apply uniform legal rules. The MDL court here understood that effects in the U.S. cellphone market satisfied the FTAIA and flowed to consumers through harms caused to American OEMs like Motorola. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 07-1827, 2011 WL 4634031 (N.D. Cal. Oct. 5, 2011). While plaintiffs with similar claims to Motorola abound, no other court has dismissed them, partly because post-MDL proceedings are not do-overs. BB14-15 & n.3. Meanwhile, defendant AUO has been criminally convicted for what the Solicitor General personally confirmed to be "substantially the same unlawful conduct as gave rise to" Motorola's claims. Letter (ECF No. 34) at 2. Only Motorola has been denied the chance to prove its harms.

Moreover, despite defendants' protestations regarding "international comity" and feigned surprise at the application of U.S. law, the reality is that defendants have long acknowledged (and even relied on) on U.S. law's applicability to at least Category Two sales. LG acknowledged in its plea allocution that Category Two purchases were included in the commerce affected by its conduct. Transcript at 33-34, *United States v. LG Display Co.*, No. 08-cr-0803 (N.D. Cal. Dec. 15, 2008). Epson and Sharp confessed to fixing the price of panels included in Motorola's imported phones. SA 29; SA45. Samsung evidently reported its Category Two conduct against Motorola to DOJ, allowing it to claim treble-damage protection as an amnesty applicant. The government has secured $1.5 billion in fines from this cartel based on calculations including Category Two conduct—a figure that would seem constitutionally excessive if only the relatively insignificant Category One sales were subject to U.S. law. Defendant Sharp has even brought its own Category Two lawsuit respecting a related cartel with allegations that could be substituted word-for-word for the facts of this case. *See* Second Am. Compl. ¶28, *Sharp Electronics v. Hitachi*, No. 13-1173 (N.D. Cal. June 13, 2014) (ECF No. 119).[4]

These realities demonstrate that defendants' claims of unanimity with respect to the FTAIA's application to cases like this one ring utterly hollow. This would be the very first case barring the claim of an American OEM regarding price-fixed components that defendants worked hard to get into U.S.-bound products. No

[4] "Plaintiffs also purchased CRT Products in the U.S. from affiliated [foreign] entities …. [and] suffered direct, substantial and foreseeable injuries …. In the inter-company sales, the cost of the price-fixed good was passed along to [Sharp]. Accordingly, for purposes of antitrust law, there effectively has only been one sale."

amount of hand-waving can obscure how far a step that is beyond any previous precedent or plausible account of congressional intent.

CONCLUSION

The decisions below should be reversed.

Dated: October 21, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for the Appellant, Motorola Mobility LLC, furnishes the following in compliance with F.R.A.P. Rule 32(a)(7):

I hereby certify that this brief conforms to the rules contained in F.R.A.P. Rule 32(a)(7) for a brief produced with proportionally spaced font. The length of the brief is 6,989 words.

Dated: October 21, 2014

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I hereby certify that on October 21, 2014, Appellant's Reply Brief was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

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