01-7115

IN THE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

EMPAGRAN, S.A., NUTRICION ANIMAL, S.A., WINDRIDGE PIG FARM, AND CONCERN STIROL, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

– against –

F. HOFFMANN-LA ROCHE LTD, HOFFMANN-LA ROCHE INC., ROCHE VITAMINS INC., BASF AG, BASF CORPORATION, RHÔNE-POULENC ANIMAL NUTRITION INC., RHÔNE-POULENC INC., HOECHST MARION ROUSSEL S.A., RHÔNE-POULENC S.A., TAKEDA PHARMACEUTICAL CO., LTD. (F/K/A TAKEDA CHEMICAL INDUSTRIES, LTD.), TAKEDA VITAMIN & FOOD USA, INC., DAIICHI PHARMACEUTICAL CO., LTD., DAIICHI PHARMA HOLDINGS, INC. (F/K/A DAIICHI PHARMACEUTICAL CORPORATION), DAIICHI FINE CHEMICALS, INC., EISAI CO., LTD., EISAI U.S.A., INC., EISAI INC., AKZO NOBEL CHEMICALS B.V., AKZO NOBEL INC., BIOPRODUCTS INCORPORATED, CHINOOK GROUP LTD., COPE INVESTMENTS LTD., DEGUSSA AG, DEGUSSA CORPORATION, DUCOA, L.P., DCV, INC., EM INDUSTRIES, INC., MERCK KGAA, E. MERCK, LONZA INC., LONZA AG, ALUSUISSE-LONZA GROUP LTD, MITSUI & CO., LTD., NEPERA, INC., REILLY CHEMICALS, S.A., REILLY INDUSTRIES, INC., SUMITOMO CHEMICAL CO., LTD., SUMITOMO CHEMICAL AMERICA, INC., TANABE U.S.A., INC., AND UCB CHEMICALS CORPORATION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES IN RESPONSE TO THE COURT'S ORDER OF JUNE 21, 2004

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CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES <u>REQUIRED BY CIRCUIT RULE 28(a)</u>

Pursuant to Circuit Rule 28(a), the undersigned counsel certify as follows on behalf of all defendants-appellees:

A. PARTIES AND AMICI

Except for the following, all parties, intervenors, and *amici* appearing before the district court and in this court are listed in the Opening Brief for plaintiffs-appellants:

In response to this Court's March 7, 2003 Order, the United States and the Federal Trade Commission filed a Brief as *Amici Curiae,* on March 24, 2003, in support of defendants-appellees' petition for rehearing en banc.

B. RULINGS UNDER REVIEW

A reference to the ruling at issue appears in the Opening Brief for plaintiffs-appellants.

C. RELATED CASES

Except for the following, references to the case on review appear in the Opening Brief for plaintiffs-appellants:

The case on review was previously considered in this Court. *Empagran, S.A., et al. v. F. Hoffmann-La Roche Ltd, et al.*, 315 F.3d 338 (D.C. Cir. 2003), *vacated by* 124 S.Ct. 2359 (June 14, 2004).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Rule 26.1 of the Circuit Rules of the U.S. Court of Appeals for the District of Columbia Circuit, defendants-appellees state:

F. Hoffmann-La Roche Ltd is a corporation engaged in the manufacture of pharmaceuticals, diagnostic products and bulk vitamins. F. Hoffmann-La Roche Ltd is a wholly-owned subsidiary of Roche Holdings Ltd. Novartis AG, a publicly-held company, owns approximately 32.7% of the voting shares of Roche Holdings Ltd. Novartis AG has no representation on Roche Holdings Ltd's board of directors and does not in any way control Roche Holdings Ltd or any of its subsidiaries. Apart from Roche Holdings Ltd (and, indirectly, Novartis AG), there is no publicly-held company with a 10% or greater ownership interest in F. Hoffmann-La Roche Ltd.

Hoffmann-La Roche Inc. ("HLRI") is a corporation engaged in the manufacture and sale of pharmaceuticals. Roche Vitamins Inc. ("RVI") is a corporation engaged in the manufacture and sale of bulk vitamins and vitamin-containing products. HLRI and RVI are indirect subsidiaries of Roche Holdings Ltd. Apart from Roche Holdings Ltd (and, indirectly, Novartis AG), there is no publicly-held company with a 10% or greater ownership interest in HLRI or RVI.

BASF Aktiengesellschaft ("BASF AG") is a foreign corporation engaged in the production of numerous chemical products including bulk vitamins and is headquartered in Ludwigshafen, Germany. No publicly-held company has a 10% or greater ownership interest in BASF AG.

BASF Corporation is a corporation engaged in the manufacture and sale of certain vitamin and vitamin-containing products and is an indirect subsidiary of BASF AG. Apart from BASF AG, there is no publicly-held company with a 10% or greater ownership interest in BASF Corporation.

Aventis Animal Nutrition Inc. (f/k/a Rhône-Poulenc Animal Nutrition Inc.), Aventis CropScience USA Inc. (f/k/a Rhône-Poulenc Inc.) and Hoechst Marion Roussel SA are corporations engaged in the life sciences business, specifically in the manufacture and/or sale of pharmaceutical

products, animal health and nutrition products and crop protection products. Aventis Animal Nutrition Inc. and Aventis CropScience USA Inc. are wholly-owned indirect subsidiaries of Rhône-Poulenc S.A. ("RPSA"), n/k/a Aventis SA, which is a publicly-traded holding company. Hoechst Marion Roussel SA is a wholly-owned indirect subsidiary of Hoechst A.G. RPSA, n/k/a Aventis SA, owns substantially all of the outstanding shares of Hoechst A.G. Apart from RPSA, n/k/a Aventis SA, there is no publicly-held company with a 10% or greater ownership interest in Aventis Animal Nutrition Inc., Aventis CropScience USA Inc. or Hoechst Marion Roussel SA.

Takeda Pharmaceutical Co., Ltd. (f/k/a Takeda Chemical Industries, Ltd.) ("TPC") is a corporation engaged, among other things, in the manufacture of certain vitamins.

Takeda Vitamin & Food USA, Inc. ("TVFU") was a corporation engaged in the manufacture and distribution of certain vitamins and was a wholly-owned subsidiary of Takeda America, Inc., now known as Takeda America Holdings, Inc., which in turn is a subsidiary of TPC. TVFU was merged into BASF Corporation as of approximately January, 2001.

Daiichi Pharmaceutical Co., Ltd. is a corporation engaged in the manufacture and sale of pharmaceutical products and certain vitamin products. It is the direct parent of Daiichi Pharma Holdings, Inc. (f/k/a/ Daiichi Pharmaceutical Corporation) and the indirect parent of Daiichi Fine Chemicals, Inc. There is no publicly-held company with a 10% or greater ownership interest in Daiichi Pharmaceutical Co., Ltd.

Daiichi Pharma Holdings, Inc. (f/k/a/ Daiichi Pharmaceutical Corporation) is a corporation engaged in the clinical development and sale of pharmaceuticals and is a subsidiary of Daiichi Pharmaceutical Co., Ltd. Daiichi Pharma Holdings, Inc. has no outstanding securities in the hands of the public. Daiichi Pharmaceutical Corporation was prior to October 2002 the parent of Daiichi Fine Chemicals, Inc.

Daiichi Fine Chemicals, Inc. is a corporation engaged in sales and intermediary services for fine chemicals and related products and was prior to October 2002 a direct subsidiary of Daiichi

Pharmaceutical Corporation, which in turn was a subsidiary of Daiichi Pharmaceutical Co., Ltd. Daiichi Fine Chemicals, Inc. has no outstanding securities in the hands of the public.

Eisai Co., Ltd. is a corporation engaged in the production and sale of ethical pharmaceutical and certain other products. There is no publicly-held company with a 10% or greater ownership interest in Eisai Co., Ltd. Eisai Co., Ltd. is the indirect parent of Eisai Inc. and Eisai U.S.A., Inc.

Eisai U.S.A., Inc. is a corporation that was engaged in the production and sale of bulk vitamin and certain other products. It is an indirect subsidiary of Eisai Co., Ltd.

Eisai Inc. is a corporation engaged in the production and sale of ethical pharmaceutical and certain other products. It is an indirect subsidiary of Eisai Co., Ltd.

Akzo Nobel Chemicals B.V. is a corporation engaged in the manufacture and sale of chemicals. Akzo Nobel Inc. is a holding company which does not manufacture or sell any product. Both are indirect, wholly-owned subsidiaries of Akzo Nobel N.V. Apart from Akzo Nobel N.V., there is no publicly-held company with a 10% or greater ownership interest in Akzo Nobel Chemicals B.V. or Akzo Nobel Inc.

Bioproducts Incorporated is a Delaware corporation engaged in the business of manufacturing animal grade choline chloride and is a subsidiary of Mitsui & Co. (U.S.A.), Inc. Mitsui & Co., Ltd., a publicly-held company, owns a 20% interest in Bioproducts Incorporated.

Chinook Group Limited is a corporation organized and existing under the laws of Ontario, Canada and is a wholly-owned subsidiary of Cope Investments Limited. Chinook Group Limited is engaged in the manufacturing and selling of animal-grade choline chloride. There is no publicly-held company with a 10% or greater ownership interest in Chinook Group Limited.

Cope Investments Limited is a corporation organized and existing under the laws of Ontario, Canada. As a holding company, it does not manufacture or sell any product. There is no publicly-held company with a 10% or greater ownership interest in Cope Investments Limited.

Degussa AG (f/k/a Degussa-Hüls AG) is a corporation engaged in the manufacture of specialty chemicals and is headquartered in Dusseldorf, Germany. E.On AG and RAG AG, two German corporations, collectively own more than 90% of Degussa AG's stock. No other entity owns more than 10% of the stock of Degussa AG.

Degussa Corporation (f/k/a Degussa-Hüls Corporation) is a corporation engaged in the manufacture of specialty chemicals and is a subsidiary of Degussa AG. Apart from Degussa AG, there is no publicly-held company with a 10% or greater ownership interest in Degussa Corporation.

DuCoa, L.P. is a Delaware limited partnership and formerly was engaged in the manufacture of animal grade choline chloride. There is no publicly-held company with a 10% or greater ownership interest in DuCoa, L.P.

DCV, Inc. is a Delaware corporation and is the general partner of DuCoa, L.P. DCV Holdings, Inc. is the parent company of DCV, Inc. Metropolitan Life Insurance has over a 10% interest in DCV, Inc.'s parent company.

E. Merck is a general partnership organized under German law and is engaged in the pharmaceutical, chemicals and other lines of business.

Merck KGaA is a corporation with general partners limited by shares organized under German law and is engaged in the pharmaceutical, chemicals and other lines of business. There is no publicly-held company with a 10% or greater ownership interest in Merck KGaA.

EM Industries, Inc., now known as EMD Chemicals Inc., is a New York corporation engaged in the specialty chemicals business. E. Merck and Merck KGaA together directly or indirectly own 100% of the shares of EM Industries, Inc.

Alusuisse-Lonza Group Ltd, a former affiliate of Lonza Inc. and Lonza AG, is a corporation with interests in various businesses including alumina and bauxite. It is now known as Alcan (Switzerland) Ltd and is a wholly-owned subsidiary of Alcan Inc.

Lonza AG is a business corporation engaged in several lines of business including the sale and manufacturing of niacin and niacinamide and is a direct, wholly-owned subsidiary of Lonza Group Ltd. Apart from Lonza Group Ltd, there is no publicly-held company with a 10% or greater ownership interest in Lonza AG.

Lonza Inc. is a business corporation engaged in several lines of business including the sale of niacin and niacinamide. Lonza Inc. is an indirect, wholly-owned subsidiary of Lonza Group Ltd. Apart from Lonza Group Ltd, there is no publicly-held company with a 10% or greater ownership interest in Lonza Inc.

Mitsui & Co., Ltd. is a Japanese corporation engaged in business as a trading company. There is no publicly-held company with a 10% or greater ownership interest in Mitsui & Co., Ltd. and it has no parent company.

Nepera, Inc. is a corporation engaged in the manufacture, sale and distribution of specialty chemicals, including niacinamide. It is a wholly-owned subsidiary of Cambrex Corporation.

Reilly Industries, Inc. is an Indianapolis, Indiana based corporation engaged in the business of manufacturing bulk chemicals. Reilly Industries, Inc. has no parent corporations and there is no publicly-held company with a 10% or greater ownership interest in Reilly Industries, Inc.

Reilly Chemicals, S.A. is a Belgian corporation engaged in the business of manufacturing bulk chemicals and is a subsidiary of Reilly Industries, Inc. There is no publicly-held company with a 10% or greater ownership interest in Reilly Chemicals, S.A.

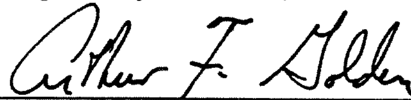
Sumitomo Chemical Company, Ltd. is a Japanese publicly-traded corporation engaged in the manufacture, sale and distribution of chemicals, including biotin. There is no publicly-held company with a 10% or greater interest in Sumitomo Chemical Company, Ltd.

Sumitomo Chemical America, Inc. is a New York corporation engaged in the sale and distribution of certain chemical products in the United States, including biotin. It is a wholly-owned subsidiary of Sumitomo Chemical Company, Ltd.

Tanabe U.S.A., Inc. is a Delaware corporation that distributes and sells certain vitamins. Tanabe U.S.A., Inc. is an indirectly owned subsidiary of Tanabe Seiyaku Co., Ltd. Apart from Tanabe Seiyaku Co., Ltd., there is no publicly-held company with a 10% or greater ownership interest in Tanabe U.S.A., Inc.

UCB Service Specialties, Inc., f/k/a UCB Chemicals Corporation, a corporation doing business in the specialty chemicals and flexible films industry, is wholly-owned by UCB, Inc., which in turn is wholly-owned by UCB S.A. UCB S.A., a corporation doing business in the pharmaceutical, specialty chemicals, and flexible films industries, is aware of one publicly traded company, Financiere d'Obourg S.A., that owns more than 10% of UCB S.A.'s stock.

Respectfully submitted,



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INTRODUCTION

Responding to the Court's questions of June 21, 2004: Appellants neither pled nor adequately preserved their "alternative theory." However, even if this "alternative theory" were deemed preserved, this Court should reject it now, without remand, as an insufficient basis for jurisdiction. Appellants' current position – that pleading a global market and conspiracy with "linked" prices in the U.S. and abroad is sufficient to establish jurisdiction over purely foreign transactions – would effectively nullify the Supreme Court's unanimous ruling in *F. Hoffmann-La Roche Ltd v. Empagran S.A.*, 124 S.Ct. 2359 (June 14, 2004).[1]

The Court held in *Empagran* that an antitrust plaintiff's claim must arise from a direct, substantial and reasonably foreseeable effect on U.S. commerce. Appellants seek an "exception" that would permit a plaintiff to plead around that jurisdictional requirement virtually at will. Foreign plaintiffs claiming multinational price fixing can always allege that inflated prices in the United States facilitate inflated prices in their own countries. Indeed, appellants' own *amicus* economists argued to the Supreme Court that cartels operating in international markets *must* inflate prices in *all* countries to limit arbitrage opportunities and succeed. *See* Brief for Certain Professors of Economics as *Amici Curiae* in Support of Respondents at 3, 5-7, *Empagran,* 124 S.Ct. 2359 (No. 03-724); S.App. 71, 73-75. Appellants' theory conflicts not only with the Supreme Court's holding on the meaning of the FTAIA and its directive to "avoid unreasonable interference with the sovereign authority of other nations" (124 S.Ct at 2366) but also with the view of the Government that adopting appellants' "alternative theory" would undermine global efforts to stamp out cartels and protect competition. *See* Brief for the United States as Amicus Curiae Supporting Petitioners at 19-21, 124 S.Ct. 2359 (No. 03-724); S.App. 115-117. Adopting appellants' theory also would impose enormous

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[1] The decision was 8-0; Justice O'Connor took no part in consideration of the case.

burdens on the district courts at the jurisdictional threshold of global price-fixing cases, precisely what the Supreme Court sought to avoid through its *Empagran* ruling.

STATEMENT

The Supreme Court's ruling in *Empagran* confirmed that Congress enacted the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA") "to clarify, perhaps to limit, but not *to expand* in any significant way, the Sherman Act's scope as applied to foreign commerce." 124 S.Ct. at 2369 (emphasis in original). It found "no significant indication" that in 1982 "courts would have thought the Sherman Act applicable in these circumstances." *Id.* The Court held that the U.S. effect of illegal conduct must give rise to the plaintiff's (not merely someone else's) claim, concluding that appellees' reading of the FTAIA "is correct," "furthers the statute's basic purposes," and "properly reflects considerations of comity, and * * * Sherman Act history." *Id.* at 2372.[2]

The Court – mindful of the views of the United States and the seven countries that filed *amicus* briefs – followed 200 years of Supreme Court precedent rejecting statutory interpretations that interfere with the sovereign authority of other nations and their "ability independently to regulate [their] own commercial affairs." *Id.* at 2367. The Court recognized that appellants alleged that "vitamin sellers around the world" had agreed to fix prices "to customers in the United States and to customers in foreign countries." *Id.* at 2363. It did not, however, find those "global conspiracy" allegations adequate to support Sherman Act jurisdiction. Instead, it held that while international price fixing alleged to have injured purchasers in the United States is covered by the Sherman Act, enabling them to sue, purchasers in foreign countries who were injured in separable, wholly foreign transactions do not have claims under U.S. antitrust law. *Id.* The Court explained that "a statute can apply and not apply to the same conduct, depending upon other circumstances." *Id.* at 2372. Here

[2] Despite Appellants' suggestions, Appellants' Br. at 1, the Court most definitely did not – as appellants suggest – hold that the mere "demonstration" of a "nexus" between a plaintiff's injury and a U.S. effect would suffice to establish Sherman Act jurisdiction.

the key "circumstance" is that appellants did not make their purchases in U.S. commerce, which is the exclusive concern of the U.S. antitrust laws.

The Sherman Act proscribes harms to U.S. domestic and U.S. foreign (*i.e.*, export and import) commerce, and the Clayton Act furnishes a remedy for injuries that result from *those* harms. That remedy is not available to redress injuries that result from purely foreign harms. Appellants' allegation of a "worldwide" vitamins market and price-fixing conspiracy does not make every vitamin purchase in Australia or Ecuador a concern of the United States or warrant converting the federal courts into "world courts" for competition disputes from around the globe. To do so would expand the jurisdiction of the U.S. antitrust laws beyond "commerce among the several States, or with foreign nations." 15 U.S.C. §§ 1, 2. Congress did not attempt to regulate commerce within or among foreign nations; the Supreme Court has consistently resisted any attempt to do so (*e.g.*, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986)); and appellants offer no plausible reason why their "alternative theory" authorizes this Court to expand the antitrust laws to reach claims not arising in U.S. commerce.

The Supreme Court did not decide whether, in a limited class of cases, jurisdiction over foreign claims might lie if the domestic and foreign harm were sufficiently linked. Because this Court had not ruled on the validity or scope of any such exception to the proscriptions of the FTAIA, the Supreme Court declined to do so. Appellants' current position would accord such "exceptional" status to virtually every claim of global price fixing, despite their concession in the Supreme Court (Tr. at 40; S.App. 53) that any such exception must be limited to "a narrow class of cases." Nor can it be reconciled with their representations (*id.* at 41-42; S.App. 54-55) that, regardless of "linkage," courts should "reject claims from places like Australia [home to one appellant] and Canada" and that "there's an extremely strong argument that if you can go somewhere else, if there's some substantial

remedy available in another country, then you can go somewhere else."[3] Finally, the elaborate threshold inquiries that would be required to determine the applicability of appellants' proclaimed theory weigh heavily against its acceptance. *See Empagran*, 124 S.Ct. at 2368 (rejecting appellants' amorphous approach to Sherman Act jurisdiction as "too complex to prove workable").

ARGUMENT

I. APPELLANTS DID NOT PLEAD THEIR "ALTERNATIVE THEORY."

Appellants did not plead – or seek to plead – a linkage between the foreign injury they claim to have suffered and any harm to U.S. commerce. Notwithstanding the liberal standards of notice pleading, a complaint must provide notice of the claim for which the plaintiff seeks relief. *See, e.g., Stokes v. Cross*, 327 F.3d 1210, 1215 (D.C. Cir. 2003). Appellants failed to claim relief under their "alternative theory" in the district court. To the contrary, plaintiffs argued, *and the district court understood them to argue,* "that the jurisdictional nexus is provided solely by the global nature of defendants' conduct" and that "[i]n plaintiffs' view the territorial effect of that conduct is irrelevant." *Empagran, S.A., et al. v. F. Hoffmann-La Roche Ltd, et al.*, No. 00-1686, 2001 WL 761360, at *3 (D.D.C. June 7, 2001). No amount of *post hoc* wordplay can equate the claim actually alleged – that appellants were charged supracompetitive prices in overseas transactions due to an alleged worldwide conspiracy that also harmed U.S. commerce – with their current "alternative theory."

Appellees highlighted this failure to plead "linkage" in their motion to dismiss: "Nor do plaintiffs allege, as they must, that the alleged injuries that they seek to remedy in connection with these foreign transactions 'arise' from an anticompetitive effect of defendants' alleged conduct upon

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[3] Indeed, appellants' counsel have already publicly proclaimed their intention to initiate litigation abroad to pursue claims of certain foreign plaintiffs. Husnara Begum, *Irwin Mitchell joins U.S. class action vitamin assault,* TheLawyer.com, at http://www.thelawyer.com/cgi-bin/item.cgi?id=110630&d=11&h=24&f=46 (June 28, 2004). In addition, one of the named plaintiffs in this case, Windridge Pig Farm, has apparently chosen to participate simultaneously in a pending class action in Australia. Letter from Federal Court of Australia to Maurice Blackburn Cashman & Co., Solicitors (5 Aug. 2004); S.App. 287-88.

U.S. commerce." Mot. to Dismiss, 8, 16-19; App. 18, 20-23. Appellants replied merely that jurisdiction exists because they were harmed by an alleged worldwide conspiracy that also harmed U.S. commerce, claiming "[t]he proper focus for jurisdiction purposes is not Plaintiffs' transactions, *nor is it necessary for Plaintiffs to establish that those transactions – as distinguished from Defendants' conduct – had effects on domestic commerce.*" Opp. to Mot. to Dismiss at 11 (emphasis added); App. 27.

II. APPELLANTS FAILED TO PRESERVE THEIR "ALTERNATIVE THEORY."

Although their pleading deficiency was clearly at issue, appellants never sought to amend their complaint, either prior to or after dismissal, despite ample opportunity to do so. *See, e.g., Guam v. Amer. President Lines*, 28 F.3d 142, 150 (D.C. Cir. 1994). In these circumstances, comments at a status conference do not constitute a constructive amendment. *See Ali v. Dist. of Columbia*, 278 F.3d 1, 8 (D.C. Cir. 2002).[4] Nor is the Supreme Court's *Empagran* decision a "change in the law" that would justify an amendment. Appellants' Br. at 9 n.2. Indeed, Appellants conceded that *their* theory was "novel." D.D.C. Tr. at 102-03; App. 30-31. The Supreme Court merely rejected appellants' attempt to change antitrust law.

Appellants waived their "alternative theory" by failing to raise it clearly in the district court. *See Cruz v. Amer. Airlines*, 356 F.3d 320, 329 (D.C. Cir. 2004). Courts of appeals ordinarily will not entertain "issues and legal theories not asserted at the District Court level," especially where the theory is "a novel one." *Dist. of Columbia v. Air Florida, Inc.*, 750 F.2d 1077, 1078, 1084 (D.C. Cir. 1984); *see Albrecht v. Comm. on Employee Benefits*, 357 F.3d 62, 66 (D.C. Cir. 2004). In rare cases where this Court considered a theory raised only in oral argument below, *Fraternal Order of Police*

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[4] Appellants' suggestion, Appellants' Br. at 7, that appellees waived their right to argue waiver in this Court by failing to do so at the district court status conference is absurd. After appellants used up all the district court's time at the conference, Chief Judge Hogan asked appellees to speak "briefly," noting that he was already late for a meeting, and felt compelled to deny appellees' request to allow co-counsel to speak for "sixty seconds." D.D.C. Tr. at 117; App. 33. Appellees focused their limited time on their affirmative arguments.

v. United States, 173 F.3d 898, 902 (D.C. Cir. 1999), the proponent had not expressly disclaimed that theory, as appellants have done in this Court and the court below. Appellants told the district court that they did not have to show that any U.S. effect gave rise to their claims (Opp. to Mot. to Dismiss at 11; App. 27), just as they told this Court that it would be improper to "require that the injury of domestic purchasers be the basis for the injury suffered by Plaintiffs." Reply Br. for Appellants at 6-7; App. 43-44. This is far from a clear indication of reliance on an "alternative theory" and cannot circumvent the Supreme Court's rejection of the position appellants actually presented.

III. THIS COURT SHOULD REJECT APPELLANTS' ALTERNATIVE THEORY AS LEGALLY INSUFFICIENT.

We agree with appellants that, if the issue is not waived, this Court should (as the Supreme Court indicated) decide if the alleged "link" between the U.S. effects of appellees' conduct and appellants' injuries in each of their respective countries is "legally sufficient to trigger application of the FTAIA's domestic-injury exception." Because that question can be answered as a matter of law, this Court should resolve it without remand, as the Second Circuit did with a similar "alternative theory." *Sniado v. Bank Austria AG*, No. 02-7012, 2004 WL 1753473, at *2 (2d Cir. Aug. 5, 2004) (*per curiam*) (vacating, in light of *Empagran*, a prior ruling that reversed the district court's dismissal of a Sherman Act global price-fixing claim and dismissing the appeal); *see also Empagran S.A. v. F. Hoffmann-La Roche, Ltd*, 315 F.3rd 338, 357 (D.C. Cir. 2003) (discussing need to resolve standing issue without remand).[5] As explained below, the link alleged by appellants is legally insufficient.

A. Appellants Cannot Establish That The U.S. Effects of Appellees' Conduct "Gave Rise To" Their Foreign Injuries.

The FTAIA exempts from antitrust scrutiny conduct that affects non-import U.S. foreign commerce, unless two conditions are met: (1) the defendants' conduct has a "direct, substantial and

[5] In *BHP New Zealand Ltd.*, a case pending on appeal but never decided, the Third Circuit remanded the case for reconsideration in light of the Supreme Court's *Empagran* decision. *BHP New Zealand Ltd. v. UCAR Int'l, Inc.*, (*In re: Graphite Electrodes Antitrust Litigation*), Nos. 01-3329, 01-3340, 01-3991 (MDL No. 1244), 2004 WL 1771436, at *2 (3rd Cir. Aug. 9, 2004).

reasonably foreseeable effect" on U.S. domestic or foreign commerce, and (2) that effect on U.S. commerce "gives rise to a claim" under the Sherman Act *by the plaintiff before the court.* 15 U.S.C.§ 6(a); *Empagran*, 124 S.Ct. at 2372. Appellants – foreign purchasers who bought vitamins from foreign sellers in transactions occurring entirely outside of U.S. commerce – now contend that they meet this test under what they call their "worldwide market theory." They claim that the U.S. effect of the cartel's behavior "gave rise" to their purely foreign injuries because the supracompetitive prices in the United States were necessary to – a "but for" cause of – the cartel's imposition of supracompetitive prices on appellants in their various home countries.

The Supreme Court consistently has rejected such expansive "but for" theories in closely related contexts, explaining that Congress could not have intended to stretch statutes to reach such remote injuries. *E.g., Associated Gen. Contractors v. California State Council*, 459 U.S. 519, 534-35, 540-42 (1983); *Holmes v. SIPC*, 503 U.S. 258, 266-70 (1992) (rejecting "but for" causation standard in RICO context and citing *Associated Gen.* as rejecting it in antitrust context). Appellants' attempt to sweep into court even more remote injuries predicated on the loss of speculative arbitrage opportunities should be rejected as well.

The only circuit to have considered appellants' worldwide market theory squarely rejected it. In *Den Norske Stats Oljeselskap AS v. Heeremac v.o.f.*, 241 F.3d 420 (5th Cir. 2001), *cert. denied sub nom. Statoil ASA v. Heeremac v.o.f.*, 534 U.S. 1127 (2002), plaintiffs based jurisdiction on interlinked price effects in the U.S. and other countries caused by a conspiracy in a "unified global market" for heavy-lift barge services. Plaintiffs paid supracompetitive prices outside U.S. commerce (in the North Sea), but argued that those higher foreign prices "arose from" the higher prices charged by the conspirators in U.S. commerce (in the Gulf of Mexico). *Id.* at 425. The court rejected this theory as a matter of law, holding that a mere "connection and an interrelatedness between the high prices paid for services in the Gulf of Mexico and the high prices paid in the North Sea" was insufficient under the FTAIA, which "requires more than a 'close relationship' between the domestic

injury and the plaintiff's claim; it demands that the domestic effect 'gives rise' to the claim." *Id.* at 427. The court recognized Congress's desire that "foreign purchasers should enjoy the protection of our antitrust laws *in the domestic marketplace*, just as our citizens do," but concluded that purchasers who are not injured in U.S. commerce do not. *Id.* at 427 n.23 (emphasis added).

As the *Den Norske* court recognized, its construction of the FTAIA was supported by the Supreme Court's decision in *Matsushita*, where plaintiffs also claimed injury from price fixing in two interlinked markets. Evidence of price fixing by television manufacturers in Japan was deemed insufficient to infer the existence of a predatory pricing scheme by those same Japanese manufacturers in the U.S. The Court noted that "whether there is one conspiracy or several – respondents must show that the conspiracy caused them an injury for which the antitrust laws provide relief," *i.e.*, one that was suffered "in the American market." 475 U.S. at 584 n.7. Allegations of an international conspiracy that included price fixing in Japan did not provide a basis for relief because "American antitrust laws do not regulate the competitive conditions of other nations' economies." *Id.* at 583.

Appellant's contention that a mere connection between pricing in the U.S. and pricing abroad is sufficient for Sherman Act jurisdiction cannot be squared with *Den Norske* or *Matsushita* or with the Supreme Court's holding in *Empagran* that the requisite effect on U.S. commerce must give rise to the plaintiff's antitrust claim. If the mere fact that the alleged conduct caused overcharges in both the U.S. and foreign countries is not enough to authorize a Sherman Act claim by foreign buyers, as the Court made plain in *Empagran*, it cannot be sufficient merely to plead that overcharges in the U.S. facilitated overcharges in foreign countries. It could just as easily be said that overcharges in Japan, Great Britain, Germany, France or any other country in which a cartel operates are equally necessary to prevent arbitrage and maintain the effectiveness of the conspiracy and hence that pricing in those countries also "gives rise" to appellants' claim. There is no limiting principle to appellants' "alternative theory," which would create Sherman Act jurisdiction over all claims of multinational

price fixing, precisely what the Supreme Court in *Empagran* sought to preclude. Appellant's alternative theory should be rejected to prevent the "exception" from becoming the rule.[6]

B. The Principles Articulated in the Supreme Court's Opinion Compel Rejection of Appellants' Alternative Theory.

1. Adoption of appellants' theory would infringe the rights of other sovereign nations.

The Supreme Court's first ground for its *Empagran* decision was the principle that ambiguous statutes must be construed "to avoid unreasonable interference with the sovereign authority of other nations." *Empagran,* 124 S.Ct. at 2366. Under this rule of "prescriptive comity," U.S. laws may apply to foreign anticompetitive conduct only to "reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused." *Id.* The Court explained that there is scant justification for "the serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs" where "foreign harm alone gives rise to the plaintiff's claim." *Id.* at 2367. Appellants' "alternative theory" flouts these principles.

The Supreme Court found that, through the FTAIA, "Congress sought to *release* domestic (and foreign) anticompetitive conduct from Sherman Act constraints when that conduct causes foreign harm." *Id.* Accordingly, whether the foreign harm is "independent" of the harmful effect on U.S. commerce (as the Court assumed for the purposes of its opinion) or "linked" in some way to a harmful effect on U.S. commerce (as appellants now contend), there is inadequate justification for extraterritorial application of U.S. antitrust laws when the foreign harm occurs *entirely* outside of U.S. commerce. In such situations, U.S. interests are satisfied by compensating participants in U.S. commerce (regardless of their nationality or location, *see Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 313-14 (1978)) and prosecuting the behavior that injured those participants. It is neither necessary

[6] In *Sosa v. Alvarez-Machain,* 124 S.Ct. 2739, 2749, 2780-82 (June 29, 2004), all of the Justices warned against the same type of analysis that appellants urge here (there regarding the "headquarters doctrine") that would allow an exception to "swallow" the general rule by a simple pleading tactic.

nor appropriate to go further and trample on legislative and regulatory judgments of foreign sovereigns by regulating transactions that occur entirely outside U.S. commerce.

The Supreme Court accepted the contentions of seven foreign governments that applying U.S. treble damage remedies to claims of foreign plaintiffs injured in foreign transactions would "upset[] a balance of competing considerations that their own domestic antitrust laws embody" and would "undermine foreign nations' own antitrust enforcement policies by diminishing foreign firms' incentive to cooperate with antitrust authorities in return for prosecutorial amnesty." 124 S.Ct. at 2368 (citing *amicus* briefs of Germany, Canada and Japan).[7] These adverse consequences are not dispelled by labeling the U.S. and foreign harms as "linked" in a "world market." Unreasonable interference occurs whenever foreign persons injured in purely foreign commerce are allowed to use U.S. remedies and procedures to avoid the regimens of their own countries. The Court concluded that Congress "would not have tried to impose" American antitrust policies on its trading partners "in an act of legal imperialism" and that the courts have no business doing so. *Id.* at 2369.[8]

2. Adoption of appellants' theory would impose unreasonable administrative burdens on the district courts.

With these concerns in mind, the Supreme Court ruled that the FTAIA's jurisdictional test must be capable of being applied "simply and expeditiously." 124 S.Ct at 2369. It warned against "lengthier proceedings, appeals, and more proceedings – to the point where procedural costs and delays could themselves threaten interference with a foreign nation's ability to maintain the integrity of its own antitrust enforcement system." *Id.* Appellants' "alternative theory" ignores that

[7] It is the possible availability in U.S. courts of treble damages for foreign commercial transactions that has provoked the greatest discord and threat to the harmony of U.S. antitrust laws with those of other countries – "a harmony [the Supreme Court views as] particularly needed in today's highly interdependent commercial world." *Empagran,* 124 S.Ct. at 2366.

[8] The Supreme Court reiterated in *Sosa*, citing its prior decision in *Empagran*, that it is necessary for each nation "to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement, which is "a matter of increasing importance in an ever more interdependent world." 124 S.Ct. at 2782 (Breyer, J., concurring).

admonition. It would require courts, at the outset of every case, to make complex, fact-intensive determinations whether, and to what extent, injuries to different purchasers were linked. Courts would have to grapple with the "enormous complexities of market definition" (*FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 430-31 (1990)), simply to determine the threshold question of jurisdiction; indeed, appellants seek just such proceedings here. Appellants' Br. at 10. This case alone would require factual determinations about markets for many different products during varying time periods in many countries, each having its own economic and legal features (trade laws, supply and demand conditions, language and cultural differences, exchange rates, etc.). No court could be expected to complete such complex analysis as a prompt threshold jurisdictional inquiry.

Resolving such issues could take years and impose severe burdens on the district courts, the parties, the United States, and affected foreign governments, contrary to the intent of both Congress and the Supreme Court. The Supreme Court has emphasized the courts' "strong interest in keeping the scope of complex antitrust trials within judicially manageable limits" (*Associated Gen.*, 459 U.S. at 543) and consistently has rejected complex inquiries of this kind in antitrust cases (*see Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977); *Hanover Shoe Inc. v. United Shoe Mach. Corp.,* 392 U.S. 481 (1968)). As the Government told the Supreme Court in *Empagran*, appellants' attempt to "make an end run around the FTAIA by defining a so-called one-world market or one big conspiracy theory * * * [would] embroil the district courts [in] all forms of satellite litigation." Tr. at 20-21; S.App. 33-34. The Court heeded this plea to "pay attention to the practical realities of enforcement and avoid * * * creating friction with our trading partners." *Id.* at 21; S.App. 34. This Court should do so as well.

C. Any Exception to the Supreme Court's Holding Would Be Extremely Narrow and Is Not Satisfied By Appellants' Alternative Theory.

The Supreme Court declined to decide what, if any, link between U.S. effects and a plaintiff's foreign injury might be sufficient to trigger a domestic injury exception, if one were

recognized. However, the Court made clear that the mere existence of a worldwide cartel, which is all that appellants allege here, could not suffice. The Court assumed – for the purpose of the question it did decide – that higher prices were being charged in both the United States and in appellants' countries. Thus the mere allegation of higher prices in the United States and foreign countries and "price fixing conduct [that] affects both customers outside [and] within the United States" cannot be sufficient to demonstrate the type of "linked" injury that might be necessary to support Sherman Act jurisdiction for foreign transactions. *Empagran,* 124 S.Ct. at 2366.

The Supreme Court's reference, *id.* at 2370, to *Industria Siciliana Asfalti, Bitumi, S.p.A. v. Exxon Research and Engineering Co.*, No. 75-5828 (CSH), 1977 WL 1353 (S.D.N.Y. Jan. 18, 1977), does provide some guidance. It suggests that if any exception is permitted, it would be in circumstances drastically different from those advanced by appellants. In *Industria,* a foreign plaintiff sued to recover an overcharge it paid to a U.S. exporter of engineering and design services. Plaintiff alleged that the U.S. exporter's foreign affiliate unlawfully conditioned its purchases of plaintiff's services on the plaintiff's use of the U.S. exporter (despite the existence of other U.S. exporters offering better prices). *Id.* at *11. This reciprocal dealing arrangement – *a single act* – radiated harm simultaneously in two separate directions: it harmed U.S. commerce by foreclosing competition by other U.S. suppliers of design and engineering services, and harmed foreign consumers of those services, such as plaintiff, who paid more for the services at issue.

Unlike appellants, the *Industria* plaintiff's injury arose *directly* from the effect of the Sherman Act violation *on U.S. commerce*; *i.e.*, foreclosure of competition in the U.S. export market was the same act that produced the overcharge to plaintiff. "[T]he two types of damage cannot be distinguished * * * and * * * merge into a single antitrust injury." *Id.* The foreign plaintiff – unlike appellants – participated, and suffered its injury, in the very channel of U.S. commerce that was adversely affected by the anticompetitive conduct. *See id.* at *13. As the Supreme Court explained,

"[t]he [*Industria*] court made clear * * * that the foreign injury was 'inextricably bound up with * * * domestic restraints of trade,' and that the plaintiff 'was injured * * * by reason of an alleged restraint of our domestic commerce.'" 124 S.Ct. at 2370 (quoting 1977 U.S. Dist. LEXIS 17851, at *11, *12). Significantly, the *Industria* court indicated that its view on jurisdiction would have been different if plaintiff had been neither an importer from nor exporter to the United States – if "rather, its dealings were entirely outside the sphere of American business enterprise." 1997 WL 1353, at *13.

Even if domestic effects could, in *some* circumstances, "give rise to" otherwise purely foreign injury, the requisite "linkage" would have to be similar in character to that in *Industria* (where the *simultaneous* exclusion of a domestic rival from the U.S. market was the sole cause of the foreign buyer's injury). Here, by never alleging that they made purchases in U.S. commerce, appellants *concede* that their "dealings" were "entirely outside the sphere of American business enterprise." *Id.* The acts that directly caused their injury took place entirely in foreign countries without U.S. participants or U.S. impact. Appellants allege only that the existence of inflated prices in the U.S. made the imposition of inflated prices abroad possible, not that they ever participated or sought to participate in any transactions that harmed U.S. commerce.

In sum, to hold, as appellants urge, that the mere existence of higher prices in the United States establishes that those U.S. prices "give[] rise to" higher prices abroad would allow the exception to trump the rule. The Supreme Court could not have intended the scope of its *Empagran* ruling to be so constricted, as its warning against just such a result in *Sosa* confirms. *See* 124 S.Ct. at 2749, 2780-81.

D. Appellants Lack Antitrust Standing

The Supreme Court's *Empagran* decision also requires reconsideration of this Court's prior determination that appellants have standing to sue. Appellants' foreign harms, even if somehow linked to an effect on U.S. commerce, were directly caused by transactions in and effects on the

commerce of Australia, Ecuador, Panama and Ukraine, and resulted from market conditions in those countries. Since it is now clear that the U.S. effect must "give rise" to appellants' (not someone else's) claim, any speculative link between appellants' claims and the U.S. effects of the allegedly global price-fixing scheme is far too indirect, attenuated, and complex to confer standing. *See Associated Gen.*, 459 U.S. at 529. Section 4 was never intended "to encompass every harm that can be attributed directly or indirectly to consequences of an antitrust violation." *Id.* at 529-33. *See also Brunswick v. Pueblo Bowl-o-Mat, Inc.*, 429 U.S. 477, 489 (1977); *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 124 S.Ct. 872, 884 (2004) (Stevens, J., concurring in judgment). As the Court stated in *Holmes,* 503 U.S. at 268, "we held [in *Associated Gen.*] that a plaintiff's right to sue under § 4 required a showing that the defendant's violation not only was a 'but for' cause of his injury, but was the proximate cause as well."

Courts consistently have denied standing to persons who do not participate in U.S. commerce. In *de Atucha v. Commodity Exchange, Inc.*, 608 F. Supp. 510, 511-12 (S.D.N.Y. 1985), the foreign plaintiff alleged a world market for silver futures contracts and complained that injuries sustained in trades on the London Metal Exchange were caused by a conspiracy on the U.S. exchanges. *Id.* at 512. The court dismissed the antitrust claim for lack of standing because the injury was "too remote from the antitrust violation to serve as the gravamen of a Section 4 claim," *id.* at 514-18, it was not directly linked to the allegedly anticompetitive conduct, and damages calculations would be "hopeless[ly] speculat[ive]" because "countless other market variables" aside from the higher prices in the U.S. "could have intervened to affect those pricing decisions." *Id.* at 516. The court concluded that the plaintiff's injury did not "reflect[] Congress' core concerns in prohibiting the antitrust defendants' course of conduct." *Id.* at 517 (noting that "the primary purpose of the antitrust laws is to protect American consumers"). *See also Turicentro v. American Airlines,*

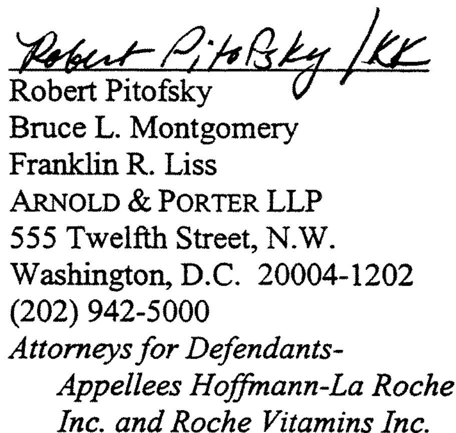
303 F.3d 293, 307 (3d Cir. 2002); *Galavan Supplements, Ltd. v. Archer Daniels Midland Co.*, No. C 97-3259 FMS, 1997 WL 732498, at *2 (N.D. Cal. Nov. 19, 1997).[9]

The FTAIA was "not intend[ed] to alter existing concepts of antitrust injury or antitrust standing." H.R. Rep. No. 97-686, at 11. The remedy appellants seek – treble damages for injuries caused by restraint of foreign commerce – is unavailable because Section 4 of the Clayton Act provides no remedy for injuries sustained outside U.S. commerce. *See Matsushita*, 475 U.S. at 584 n.7; 1A AREEDA ET AL., ANTITRUST LAW ¶ 272h (2d ed. 2000) ("[T]he concern of the antitrust laws is protection of *American* consumers and *American* exporters, not foreign consumers or producers").

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,



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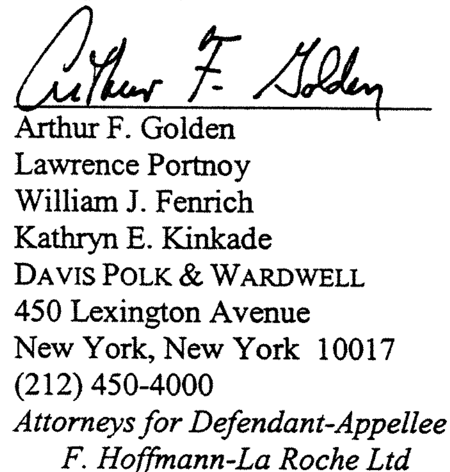

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9. Granting standing to these foreign buyers would produce at least one other anomalous result. Courts have routinely rejected claims of U.S. buyers who were injured in U.S. commerce by purchases at cartel prices – in the United States – from nonconspiring sellers because such claims are deemed "too remote to confer antitrust standing" under *Associated Gen. See, e.g., In re Vitamins Antitrust Litig.*, No. 99-197, 2001 U.S. Dist. LEXIS 12114 * 22 (D.D.C. Jul. 2, 2001) (collecting cases). Unlike appellants, who are free to sue in foreign jurisdictions, such U.S. claimants have no alternative forum for relief.

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Dated: September 9, 2004

CERTIFICATE OF SERVICE

I hereby certify in accordance with Fed. R. App. P. 25(d) that on September 9, 2004, I served the foregoing Brief for Appellees in Response to the Court's Order of June 21, 2004, the enclosed Appendix to Brief for Appellees, and the enclosed Supplemental Appendix to Brief for Appellees on lead counsel for plaintiffs-appellants to this proceeding by causing two true copies of the Brief, one true copy of the Appendix, and one true copy of the Supplemental Appendix to be delivered by hand to the following address:

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and by serving a true copy thereof upon all other counsel of record by means of the electronic service protocols established by the May 17, 2000 Order Regarding Electronic Service in *In re Vitamins Antitrust Litigation,* (M.D.L. No. 1285), of the Hon. Thomas F. Hogan, C.J., in accordance with the prior consent of the parties.

Dated: New York, New York
September 9, 2004

William J. Fenrich