No. 14-8003

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTOROLA MOBILITY LLC,

Plaintiff-Appellant,

v.

AU OPTRONICS CORP., et al.,

Defendants-Appellees

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

BRIEF OF THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Cir. R. 26.1, the American Antitrust Institute states that it is a nonprofit corporation and, as such, no entity has any ownership interest in it. No law firm has appeared, or is expected to appear, for amicus curiae in this matter.

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INTEREST OF AMICUS CURIAE AND SUMMARY OF ARGUMENT

The American Antitrust Institute (AAI) is an independent and nonprofit education, research, and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws.[1] AAI submits this amicus brief to address whether the Sherman Act, as modified by the Foreign Trade Antitrust Improvements Act (FTAIA), allows Motorola (or its foreign subsidiaries) to recover for overcharges paid on price-fixed components purchased overseas and incorporated into end products imported into the United States and sold at inflated prices to American consumers.

This court's en banc opinion in *Minn-Chem* held that foreign anticompetitive conduct may be actionable under the "domestic effects" exception of the FTAIA if the foreign conduct proximately causes domestic effects that give rise to a Sherman Act claim, rejecting an interpretation that required such effects to "follow[] as an immediate consequence" of the foreign conduct. *Minn-Chem, Inc. v. Agrium, Inc.* 683 F.3d 845, 857 (7th Cir. 2012); *accord Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 411 (2d Cir. 2014). *Minn-Chem* confirmed that the FTAIA's "directness" inquiry focuses on whether "foreign activities . . . are too remote from the ultimate effects on U.S. domestic or import commerce." 683 F.3d at 857.

[1] The Board of Directors of AAI alone has approved this filing for AAI. Individual views of board members or members of the Advisory Board may differ from AAI's positions. Pursuant to Fed. R. App. P. 29(c)(5), amicus states that no counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other person or entity – other than AAI or its counsel – has contributed money that was intended to fund the preparation or submission of this brief. Kenneth Adams, who is one of the attorneys representing appellant, is a member of AAI's Advisory Board, but he played no role in the Directors' deliberations or the drafting of the brief.

By contrast, defendants have argued (and the vacated panel decision held) that foreign price fixing of components sold overseas and incorporated into products imported to the United States cannot "directly" harm U.S. commerce, without regard to proximate cause. If adopted by the court, this would re-interpret the statutory text of the FTAIA to equate directness with immediacy, and it would introduce a "super" *Illinois Brick* rule as the new "directness" standard under the domestic effects exception. Whereas *Illinois Brick* ordinarily bars indirect purchasers of price-fixed components from recovering damages from foreign cartels as a matter of antitrust standing, defendants' position, if adopted, would also bar direct purchasers and the government, as well as indirect purchasers seeking alternative relief, from redressing such harm as a matter of law under the FTAIA.

Moreover, defendants argue, and the district court held, that even if Motorola can satisfy the direct effects test, it cannot satisfy the second prong of the FTAIA, namely that the effect of the foreign price fixing on domestic commerce "gives rise to a claim" under the Sherman Act, which defendants read to mean "plaintiffs' claim." While this interpretation may permit government suits, it would eviscerate private enforcement because suits by direct purchasers would be barred by the FTAIA, while suits by indirect purchasers would be barred by *Illinois Brick*. Such an extreme result is contrary to the most natural reading of the statute, the intent of

the FTAIA, and a fair reading of *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).[2]

Finally, defendants contend, and the district court held, that Motorola could not satisfy the import-commerce exclusion because the defendants did not physically import panels into the United States, notwithstanding the contrary law of the Third Circuit holding that "the import exception is not limited to importers, but also applies if the defendants' conduct is directed at an import market." *Animal Science Products, Inc. v. China Minmetals Corp.*, 654 F.3d 462, 470-71 & n.11 (3d Cir. 2011). As Motorola and the United States persuasively argue, there is no reason that the import commerce exclusion should be limited to circumstances in which the defendant is the importer. Moreover, construing the import-commerce exclusion to include importing cell phones containing price-fixed panels is consistent with the purposes of the Sherman Act and the FTAIA because it protects American consumers.[3]

Adoption of the defendants' positions would be a serious error of law with potentially grave consequences for American businesses and consumers. Deterrence of international cartels that adversely affect American victims is already

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[2] Motorola and the United States argue that an exception to the *Illinois Brick* rule might be recognized for U.S. indirect purchasers (or the first indirect purchaser) if direct purchasers are barred from recovery under the "gives rise to" requirement. While such an approach is entirely plausible, it is less than ideal from a deterrence perspective unless the first indirect purchaser can recover the full amount of the upstream overcharge.

[3] *See* Appellant's Opening Br. at 27-31. Given the treatment of the issue by Motorola and the United States, this brief does not further address the import commerce exclusion.

woefully inadequate, as demonstrated by empirical studies and the continued proliferation of such cartels. Moreover, most international cartels involve intermediate goods that reach the United States through global supply chains. If harm to American consumers resulting from importing price-fixed components sold overseas is categorically eliminated as a basis for the "extraterritorial" application of the Sherman Act, or is immune from private damages actions, deterrence of foreign cartels will only be further undermined.

ARGUMENT

I. AN EFFECT ON INDIRECT PURCHASERS IN THE UNITED STATES CAN SATISFY THE FTAIA'S "DIRECT EFFECT" REQUIREMENT

Minn-Chem held that "[t]he word 'direct' addresses the classic concern about remoteness," which is to avoid "'punish[ing] . . . conduct which has no consequences within the United States.'" 683 F. 3d at 857 (quoting *United States v. Aluminum Co. of America*, 148 F.2d 416, 443 (2d Cir. 1945) (Learned Hand, J.)). The court rejected the standard for "directness" used in cases arising under the Foreign Sovereign Immunities Act, which requires that a "direct" effect must "follow as an immediate consequence of the defendant's activity," because "[s]uperimposing the idea of immediate consequence . . . results in a stricter test than the complete text of the [FTAIA] can bear." *Id.* (internal quote marks omitted). "To demand a foreseeable, substantial, and 'immediate' consequence on import or domestic commerce comes close to ignoring the fact that straightforward import commerce has already been excluded from the FTAIA's coverage." *Id.* Accepting the Justice Department's proposed standard instead, the court held that, for purposes of the

FTAIA, "the term 'direct' means only a 'reasonably proximate causal nexus.'" *Id.* (citation omitted); *see also id.* at 859 (foreign supply restrictions "were a direct—that is, proximate—cause of . . . price increases in the United States").

The defendants (and the vacated panel decision) would reverse course, replacing the *Minn-Chem* "proximate cause" standard with an *Illinois Brick* standard that embraces the "immediacy" requirement the *en banc* court explicitly rejected. The defendants contend that the downstream impact that higher panel prices in Asia had on cell phone prices in the United States was necessarily "indirect" and does not satisfy the domestic effects exception. Resp. to Pet'n for Rehearing En Banc, Doc. 37, at 12.

Implicitly, defendants urge adoption of a "directness" standard from the *Illinois Brick* indirect-purchaser rule of antitrust standing doctrine, which, as a general rule, bars indirect purchasers from recovering damages under the Sherman Act. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 726 (1977) (defining "indirect" purchaser as antitrust victim whose injury "passes through . . . [a] separate level[] in the chain of distribution"). Defendants' *Illinois Brick* standard for "directness" closely approximates the immediacy requirement rejected by *Minn-Chem* because it limits "direct" injuries to those injuries that are the immediate result of a cartel overcharge.

This standard is *a fortiori* a departure from the *Minn-Chem* proximate cause standard, because courts have long recognized that anticompetitive harm can proximately cause injury to indirect purchasers, including those positioned similarly

to the consumers who bought from Motorola. *See, e.g., Mid-west Paper Products Co. v. Continental Group, Inc.,* 596 F.2d 573, 592-93 (3d Cir. 1979) (holding that price-fixing conspiracy proximately caused injury to indirect purchasers for purposes of injunctive relief, and noting that indirect purchasers are not merely "remotely affected by the ripples caused by" the conspiracy); *Lotes,* 753 F.3d at 412 ("antitrust law has long recognized that anticompetitive injuries can be transmitted through multi-layered supply chains"); *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1394 (2014) (proximate cause satisfied under Lanham Act even though "the causal chain linking [plaintiff's] injuries to consumer confusion is not direct"); Dan B. Dobbs, *The Law of Torts* § 183, at 452 (2000) ("The distinction between direct and indirect causes could very well be abolished, leaving courts merely to ask whether the injury that occurred was within the risk created by the defendant [that liability was intended to address].").[4]

An *Illinois Brick* standard makes no economic sense and leads to absurd results, because it confines the "directness" inquiry to the locus of the sale rather than the locus of the sale's effects.[5] Under such a standard, the availability of the

[4] Were it otherwise, the sizeable majority of state antitrust law regimes that allow suits by indirect purchasers, and the Supreme Court's decision recognizing the validity of those regimes, would be anomalous. *See California v. ARC America Corp.*, 490 U.S. 93, 102 (1989) (state laws permitting indirect purchaser recovery "are consistent with the broad purposes of the federal antitrust laws: deterring anticompetitive conduct and ensuring the compensation of victims of that conduct").

[5] Moreover, an *Illinois Brick* standard erroneously focuses on "who" is injured (direct v. indirect purchaser), rather than "where" the anticompetitive effects are felt. The former is a question of standing, which is independent of the FTAIA, a statute that "relate[s] to the merits of a [Sherman Act] claim." *Minn-Chem*, 683 F.3d at 848.

FTAIA domestic "effects" exception depends inevitably on where the cartel's sale to the first (direct) purchaser takes place, rather than where that sale's effects were substantial and reasonably foreseeable. Even if the direct purchaser of the input passed along the entire cartel overcharge to the purchasers of end products in the United States, the input made up a significant part of the cost of the end product, and all of the cartel sales were made to such direct purchasers, the effect on American commerce would be "indirect." As the Second Circuit explained, "[t]here is nothing inherent in the nature of outsourcing or international supply chains that necessarily prevents the transmission of anticompetitive harms or renders any and all domestic effects [on indirect purchasers] impermissibly remote and indirect." *Lotes*, 753 F.3d at 413.

Adopting an *Illinois Brick* standard instead of the *Minn-Chem* proximate cause standard serves neither the underlying principles of the FTAIA nor those of *Illinois Brick*. The FTAIA sought to assure exporters that they are free to form anticompetitive agreements that adversely affect only foreign markets. *Empagran*, 542 U.S. at 161. The Supreme Court, however, has left little doubt that the Sherman Act still applies to "*domestic* antitrust injury that foreign anticompetitive conduct has caused." *Id.* at 165; *cf. Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 314 (1978) ("Congress' foremost concern in passing the antitrust laws was the protection of Americans").

No principle of comity is served by permitting Americans to be injured in the United States by international cartels. *Empagran*, 542 U.S. at 165. Moreover,

where, as here, the Justice Department has brought a criminal complaint against an international cartel, judicial comity concerns arguably have no place at all in the analysis. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Enforcement Guidelines for International Operations* § 3.2 (April 1995) ("In cases where the United States decides to prosecute an antitrust action, such a decision represents a determination by the Executive Branch that the importance of antitrust enforcement outweighs any relevant foreign policy concerns. The Department does not believe that it is the role of the courts to second-guess the executive branch's judgment as to the proper role of comity concerns under these circumstances.") (internal quotation marks omitted).

Applying an *Illinois Brick* standard to the FTAIA also turns the policies of *Illinois Brick* on their head. *Illinois Brick* and *Hanover Shoe* sought to promote deterrence. The Supreme Court reasoned that "the antitrust laws will be more effectively enforced by concentrating the full recovery for the overcharge in the direct purchasers," *Illinois Brick*, 431 U.S. at 735, because wrongdoers would be less likely to "retain the fruits of their illegality" for want of an economically motivated challenger to bring suit. *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968); *see also BCS Servs., Inc. v. Heartwood 88, LLC*, 637 F.3d 750, 756 (7th Cir. 2011) ("By allowing a windfall to the direct purchasers . . . the law gives them a greater incentive to sue, which should increase deterrence, which should benefit the indirect purchasers indirectly.").

Insofar as *Hanover Shoe* and *Illinois Brick* ask who would be the most effective or efficient "enforcer" of U.S. antitrust laws, the answer cannot be "nobody." "In *Illinois Brick*, the Court was concerned not merely that direct purchasers have sufficient incentive to bring suit under the antitrust laws . . . , but rather that *at least some party* have sufficient incentive to bring suit." *ARC America*, 490 U.S. at 102 n.6 (emphasis added); *see Illinois Brick*, 431 U.S. at 746 ("'[F]rom the deterrence standpoint, it is irrelevant to whom damages are paid, so long as *someone* redresses the violation.'" (quoting dissent)) (emphasis added). However, if indirect purchasers, because of *Illinois Brick*, cannot bring suit against international cartels that increase end product prices in the United States, and direct purchasers of components abroad—who are their surrogates under *Illinois Brick*—*also* cannot bring suit because of the FTAIA, and the government likewise cannot sue, then common cartel conduct will be completely undeterred by the Sherman Act. And foreign jurisdictions have no incentive to police what to them is essentially export commerce, much as the United States does not. *See Minn-Chem*, 683 F.3d at 860 ("The host country for the [export] cartel will often have no incentive to prosecute it").

Moreover, while foreign jurisdictions are moving slowly towards permitting private remedies for antitrust violations, those jurisdictions generally do not have a *Hanover Shoe* rule prohibiting a pass-on defense, nor a class action device that

would enable indirect purchasers to recover for their harm.[6] Perversely, then, in those jurisdictions, the more that direct purchasers abroad pass on to American indirect purchasers, the less cartelists will be deterred. And if they pass on the full 100% of the overcharge to American indirect purchasers, defendants' position means there would be no deterrence whatsoever from the U.S. government or injured victims at home and abroad.

II. THE FTAIA'S "GIVES RISE TO" REQUIREMENT CAN BE SATISFIED BY DIRECT PURCHASERS ABROAD WHERE THE HARM TO DOMESTIC COMMERCE DEPENDS ON FOREIGN INJURY

Defendants have argued that even if Motorola satisfies the FTAIA's requirement that their foreign price fixing had a "direct, substantial, and reasonably foreseeable effect" on domestic or import commerce by raising the price of cell phones in the United States, Motorola cannot satisfy the FTAIA's second requirement that "such effect gives rise to a claim" under the Sherman Act. Defendants contend that *Empagran* interpreted the second requirement as entailing that the domestic effect give rise to "the plaintiffs' claim" or "the claim at issue," and higher cell phone prices would give rise at most to claims by American cell phone purchasers or the U.S. Government, but not Motorola. *See* Resp. to Pet'n for Rehearing, Doc. 37, at 5-6, 8. According to defendants, "any suggestion that

[6] *See, e.g.*, European Union, Directive of the European Parliament and of the Council on Certain Rules Governing Actions for Damages Under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union, Apr. 9, 2014 (requiring Member States to adopt laws allowing both indirect purchaser claims and pass-on defense, but not requiring collective redress mechanisms).

higher cellphone prices give rise to claims of higher panel prices has things backwards. Higher *panel* prices allegedly gave rise to higher *cellphone* prices, not vice versa." *Id.* at 8. In support, defendants cite *Lotes*, which rejected a "give rise to" theory in which the injury to plaintiff "precedes any domestic effect in the causal chain," noting that "'[a]n effect never precedes its cause.'" *Lotes*, 753 F.3d at 414 (quoting *Am. Home Prods. Corp. v. Liberty Mut. Ins. Co.*, 748 F.2d 760, 765 (2d Cir. 1984)) (alteration in original).

This argument entirely misreads *Empagran*. Nothing in *Empagran* forecloses a reading of the "gives rise to" requirement to mean the domestic effect "gives rise to *a* claim," as the statute literally provides, rather than to "the plaintiff's claim at issue," where the foreign conduct causes domestic harm *by virtue* of the foreign injury to the plaintiff.

The Court could not have been clearer in *Empagran* that it based its holding on the assumption that it was dealing with conduct that causes *independent* foreign harm. That is, there was no concrete link between the foreign harm and the domestic effects. 542 U.S. at 158 ("We here focus upon anticompetitive price-fixing activity that is in significant part foreign, that causes some domestic antitrust injury, and that independently causes separate foreign injury."). Indeed, the Court referred to "independent" foreign harm more than 20 times in the opinion. As a matter of comity and history, the Court could find no justification for reading the FTAIA to extend to claims by foreign plaintiffs based on independent foreign harm. Accordingly, although the statute uses the words "*a* claim," and "respondents'

reading [may be] the more natural reading of the statutory language," the Court rejected it where the foreign harm for which respondents sought recovery was not linked to any domestic effects. On those facts, the Court held that "respondents' reading is not consistent with the FTAIA's basic intent," and the language "*permits* an interpretation consistent with that intent" insofar as "[i]t makes linguistic sense to read the words 'a claim' *as if* they refer to the 'plaintiff's claim' or 'the claim at issue.'" *Id.* at 174 (emphases added).

However, the "more natural" reading of the statutory language *should* be adopted where, as here, there is a close link between the foreign and domestic harm, and the basic purpose of the FTAIA and the Sherman Act—protecting U.S. consumers—would be undermined by adopting *Empagran*'s linguistic gloss for cases of independent harm. There is no logical reason to treat cases of domestic harm causing foreign injury differently from cases of foreign injury causing domestic harm. The direction of the causation is irrelevant to any statutory purpose.

To be sure, the meaning of statutory language usually does not vary when applied in different circumstances. *See, e.g., United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 4 (1st Cir. 1997) (extraterritorial effect of Sherman Act is same for purposes of civil or criminal offense). But this canon of statutory construction does not always apply. *See, e.g., United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436 & n.13 (1978) (intent is element of criminal, but not civil, Sherman Act offense); *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932) (identical language in Section 1 of Sherman Act may have different meaning than in Section

3). Indeed, the Court in *Empagran* acknowledged that "[l]inguistically speaking a statute can apply and not apply to the same conduct, depending upon other circumstances." 542 U.S. at 174. And the canon is particularly inapt where, as in *Empagran*, there already is no "unitary" meaning of the statutory language (because the "gives rise to" language has a different meaning when the government is the plaintiff than when a private party is the plaintiff, *see id.* at 170-71), and the interpretation adopted by the court in one circumstance is counter-textual (but permissible) and chosen for purposive reasons. *See id.* at 174. Thus, *Empagran* itself supports adopting the more natural reading of the statutory language when "the domestic harm depend[s] . . . upon the foreign injury." *Id.* at 172 (distinguishing *Dominicus Americana Bohio v. Gulf & Western Indus., Inc.*, 473 F. Supp. 680 (S.D.N.Y. 1979)).

III. BARRING COMPONENT PURCHASERS FROM RECOVERY UNDERMINES DETERRENCE OF FOREIGN CARTELS THAT HARM U.S. BUSINESSES AND CONSUMERS

International cartels are a scourge of American commerce. The Justice Department "has prosecuted international cartels affecting billions of dollars in U.S. commerce" in numerous sectors of the world economy, cartels "cost[ing] U.S. businesses and consumers billions of dollars annually." Scott D. Hammond, Deputy Assistant Att'y Gen. for Criminal Enforcement, Antitrust Div., U.S. Dep't of Justice, Recent Developments, Trends, and Milestones in the Antitrust Division's Criminal Enforcement Program, Remarks Presented at the 56th Annual Spring Meeting of the ABA Section of Antitrust Law17 (March 26, 2008). In recent years, the

Department has prosecuted and obtained billions of dollars in fines from international cartels involving air transportation (affecting over $20 billion in U.S. commerce), auto parts (affecting over $8 billion in U.S. commerce and more than 25 million cars), and liquid crystal display panels at issue in this case (affecting over $23 billion in U.S. commerce). Statement of William J. Baer, Assistant Att'y Gen., Antitrust Div., and Ronald T. Hosko, Assistant Director, Criminal Investigative Div., Federal Bureau of Investigation, Before the Senate Judiciary Committee Subcommittee on Antitrust, Competition Policy and Consumer Rights 7 (Nov. 14, 2013).

The U.S. antitrust laws, and the criminal and private enforcement provisions of the Sherman Act in particular, were specifically designed to deter this kind of injury to the American economy. But effective deterrence requires penalties that exceed ill-gotten profits, adjusted for the likelihood of getting caught. *See* John M. Connor & Robert H. Lande, *Cartels as Rational Business Strategy: Crime Pays*, 34 Cardozo L. Rev 427, 429 (2012). An exhaustive survey of cartel detection literature shows that, conservatively, detection rates are at most 25-30%, meaning price-fixing cartelists have about a 75% chance of getting away with their crimes. *Id*. at 462-65. Because secret, foreign price-fixing agreements are so difficult to uncover, the ratio of a cartel's total economic penalties for getting caught relative to the amount of monopoly profits it can extract from American consumers (the "penalty-to-harm ratio") must exceed 400% to adequately deter international cartels that would otherwise prey on Americans. *See* John M. Connor, *Private Recoveries in*

International Cartel Cases Worldwide: What do the Data Show? 16 (Am. Antitrust Inst., Working Paper No. 12-03, Oct. 2012).

The collective efforts of the Justice Department and private attorneys general, while laudable, have not come close to achieving this level of deterrence. Combining fines and payments resulting from both government and private cases, on average the penalty-to-harm ratio for international cartels operating in the United States does not even reach 100%. *Id*. at 15. In other words, on average it is currently *net profitable* for international cartels to illicitly appropriate American wealth from U.S. consumers, including if they are caught.

The situation has been getting worse, not better. From 2000-2010, as compared to 1990-1999, the penalty-to-harm ratio for international cartels has significantly *declined*. *Id*. In the United States, the average ratio declined by 40% during that time. *Id*. Predictably, international cartels are proliferating. Over the last 15 years, 91 of the 97 cases yielding DOJ corporate fines of $10 million or more involved international cartels, the bulk of which produced intermediate goods incorporated into other goods. *See* U.S. Dep't of Justice, Antitrust Division, Sherman Act Violations Yielding a Corporate Fine of $10 Million or More (Feb. 11, 2014). The Antitrust Division has had to reallocate resources to focus on international cases involving larger volumes of commerce, and it typically has approximately 50 international cartel investigations open at a time. Scott D. Hammond, Deputy Assistant Att'y Gen. for Criminal Enforcement, Antitrust Div., U.S. Dep't Of Justice, The Evolution of Criminal Antitrust Enforcement Over the

Last Two Decades, Remarks Presented at the 24th Annual National Institute on White Collar Crime 3 (Feb. 25, 2010).

Defendants' position would categorically bar application of the Sherman Act when foreign cartels sell component goods overseas to be incorporated into finished goods imported into the United States. This result would seriously undermine the deterrence mission of the U.S. antitrust laws because it would eliminate *both* public and private enforcement actions in these instances, reducing the already insufficient deterrence value of these cases to $0. And even if government enforcement alone were permitted, deterrence would be seriously undermined. *See* Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2011 B.Y.U. L. Rev. 315, 317 ("quantitative analysis of the facts demonstrates that private antitrust enforcement probably deters more anticompetitive conduct than the DOJ's anti-cartel program"); *Mitsubishi Motors Corp. v. Soler Chrysler- Plymouth, Inc.*, 473 U.S. 614, 635 (1985) ("[t]he treble-damages provision wielded by the private litigant is a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators"); *cf. POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2239 (2014) ("Allowing Lanham Act suits takes advantage of synergies among multiple methods of regulation.").

International cartels selling industrial intermediate goods account for the large majority of all cartel sales worldwide. John M. Connor & C. Gustav Helmers, *Statistics on Modern Private International Cartels, 1990-2005*, at 17 (Am. Antitrust

Inst. Working Paper No. 07-01 (Jan. 2007). American consumers, who are direct purchasers of the end product and indirect purchasers of the intermediate goods, ultimately bear the cost of higher input prices. *See, e.g.,* Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* 307 (2005) ("Typically the final consumer is the one most seriously injured by cartel or monopoly prices, while retailers and intermediaries have relatively minor injuries caused by lost volume of sales."). Yet upholding the dismissal of the complaint, at least as to the components incorporated in phones imported into the United States, will send a clear signal to intermediate goods manufacturers abroad that insofar as they do not export their products directly to the United States, they are free to appropriate American wealth in this enormous global industrial sector, with little or no interference from the U.S. antitrust laws. And the Second Circuit recognized that this message would likely be heeded. *See Lotes*, 753 F.3d at 412, 413 (noting that "[t]his kind of complex manufacturing process is increasingly common in our modern global economy," and "given the important role that American firms and consumers play in the global economy, we expect that some perpetrators will design foreign anticompetitive schemes for the very purpose of causing harmful downstream effects in the United States").

CONCLUSION

For the foregoing reasons the decision of the district court dismissing the complaint should be reversed.

Respectfully submitted,

s/ Richard M. Brunell

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) as it contains 4513 words, excluding the parts of the brief exempted by the rule. It complies with the type-face requirements as it has been prepared in a proportionally spaced typeface using Microsoft Word in 12-point Century Schoolbook type style.

/s Richard M. Brunell

Sept. 5, 2014

CERTIFICATE OF SERVICE

I hereby certify that on Sept. 5, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system.

s/ Richard M. Brunell