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

BRIEF OF THE KOREA FAIR TRADE COMMISSION AS AMICUS CURIAE IN SUPPORT OF APPELLEES' OPPOSITION TO REHEARING *EN BANC*

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May 23, 2014

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Cir. R. 26.1, the Korea Fair Trade Commission states that it is a governmental entity of the Republic of Korea and, as such, no entity has any ownership interest in it. The law firm of Katten & Temple LLP is the only law firm that has appeared or is expected to appear for Amici Curiae in this case. Katten & Temple LLP has not previously represented a party to this action.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE AND SUMMARY OF ARGUMENT[1]

The KFTC is a Korean governmental body that enforces the Korean antitrust laws to protect consumers and competition in Korea and has a keen interest in the correct interpretation of extraterritorial application of foreign countries' antitrust laws for the globally harmonized enforcement of each jurisdiction's antitrust laws. Claiming injuries from alleged price-fixing by Korean, Japanese, and Taiwanese suppliers of liquid-crystal display (LCD) panels, Plaintiff seeks to apply the U.S. antitrust laws to transactions between non-U.S. companies that took place outside the United States and had no direct effect on U.S. commerce. Such unduly expansive application of the U.S. antitrust laws, if adopted by this Court, could create conflicts with the sovereignty of other countries including Korea and could interfere with their antitrust enforcement.

ARGUMENT

I. Application of U.S. Antitrust Laws In the Context Proposed by Plaintiff Could Create Conflicts With Other Countries' Sovereignty.

Plaintiff's claims arise out of three types of transactions: (i) transactions in which LCD panels were purchased by Plaintiff and delivered to its U.S. manufacturing plants (Category I Transactions); (ii) transactions in which LCD panels were purchased by Plaintiff's non-U.S. subsidiaries, incorporated into mobile phones assembled at Plaintiff's non-U.S. manufacturing plants, and ultimately sold

[1] The views, opinions and statements expressed herein are those of the KFTC. The law firm of Katten & Temple LLP assisted the KFTC in the preparation of this amicus brief. Yulchon LLC, a law firm in Seoul, Korea, also assisted the KFTC in the drafting of this brief. No party's counsel participated in writing this brief in whole or part. No party or party's counsel contributed money to fund preparing or submitting the brief.

in the United States (Category II Transactions), and (iii) transactions in which LCD panels were purchased by Plaintiff's non-U.S. subsidiaries, incorporated into mobile phones assembled at Plaintiff's non-U.S. manufacturing plants, and ultimately sold outside the U.S. (Category III Transactions). Plaintiff seeks to apply the U.S. antitrust laws to all three categories. However, Plaintiff's Category II and III claims are claims against non-U.S. companies arising out of transactions between non-U.S. companies that took place outside the United States and had no direct effect on U.S. commerce.[2]

The KFTC fully agrees with Judge Posner's apt observation in the panel decision that extraterritorial reach of U.S. law, including the antitrust laws, should be applied with care:

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

Slip. Op. at 8-9.

[2] This brief primarily addresses Category II Transactions because Category III transactions indisputably have no effect whatsoever on U.S. markets and therefore cannot trigger application of the U.S. antitrust laws.

If this Court applies the U.S. antitrust laws to the present case as urged by Plaintiff, the reach of the U.S. antitrust laws will in effect extend to any intermediary product produced or purchased outside the United States, so long as it is eventually incorporated into an end product sold in the United States. Such unduly expansive application of the U.S. antitrust laws is likely to create conflicts with the sovereignty of other countries including Korea and interfere with their antitrust enforcement. Under prevailing international norms, claims should be brought in a country in which the underlying transactions took place and should be governed by the laws of that country rather than by the antitrust laws of the U.S., the commerce of which was not directly affected by the transactions.

Numerous countries have adopted their own antitrust enforcement regimes. Korea, for example, has developed a vigorous antitrust enforcement regime in the form of the Monopoly Regulation and Fair Trade Act (MRFTA), which the KFTC enforces. The KFTC has vigorously enforced the MRFTA by, for instance, investigating and sanctioning price-fixing cartels, including an LCD cartel in Korea. Private enforcement of the MRFTA is also widely available, given that any party injured by a cartel activity may bring a damages action in the appropriate Korean court. Thus, vigorous public and private antitrust enforcement takes place in Korea.

Furthermore, the antitrust regime of a country typically accommodates the country's unique legal tradition and socioeconomic characteristics. For example, in Korea, the MRFTA, unlike the Sherman Act, does not provide for treble damages. Similarly, no punitive damages are awarded by Korean courts. If this Court

disregards such fundamental differences and applies the U.S. antitrust laws to claims arising out of transactions that took place outside the U.S. between non-U.S. entities without any direct effect on the U.S. market, such expansive application of the U.S. antitrust laws is likely to create conflicts with other countries' sovereignty.

II. Application of U.S. Antitrust Laws in the Context Proposed by Plaintiff Will Interfere With Other Countries' Antitrust Enforcement.

The expansive application of the U.S. antitrust laws urged by Plaintiff will also undermine one of the most fundamental features of other countries' public antitrust enforcement regimes: leniency programs. Like the U.S. Department of Justice and the European Commission, the KFTC has adopted a delicately balanced leniency program that effectively detects and deters cartel activities, which by nature are often undertaken in secret. To the KFTC's knowledge, numerous other countries have also adopted similar leniency programs. If the U.S. antitrust laws are applied to claims arising out of transactions that take place outside the United States without any direct effect on the U.S. markets, companies will be discouraged from seeking leniency from non-U.S. antitrust authorities, including the KFTC. Under those circumstances, filing for leniency with non-U.S. antitrust authorities might actually result in a greater likelihood of facing private antitrust damages actions in the United States. Such disincentive is likely to undermine substantially the effectiveness of other countries' leniency programs and will interfere with those countries' overall antitrust enforcement.

It is the KFTC's understanding that the U.S. government itself recognized the foregoing issue when it enacted the Foreign Trade Antitrust Improvement Act of

1982 ("FTAIA"), 15 U.S.C. § 6a, to clarify the scope of extraterritorial application of the U.S. antitrust laws. The FTAIA excludes from the scope of the Sherman Act non-import activities involving foreign commerce unless (i) such activities have a direct, substantial, and reasonably foreseeable effect on domestic trade, import, or (certain) export commerce, and (ii) such effect gives rise to a Sherman Act claim. *F. Hoffman-La Roche Ltd. v. Empagran S.A.,* 542 U.S. 155, 161-62 (2004); *Minn-Chem, Inc. v. Agrium, Inc.,* 683 F.3d 845, 853-54 (7th Cir. 2012) (*en banc*). A panel of this Court held that Category II Transactions had only an indirect effect on the domestic commerce in the United States. That panel also concluded that Category II and Category III Transactions did not give rise to any antitrust claim because Plaintiff at its discretion set prices of the mobile phones that it sold in the U.S. Hence, the FTAIA bars Plaintiff's Category II and III claims. A contrary ruling will undermine the delicate balance that the FTAIA sought to achieve and preserve.

CONCLUSION

The KFTC is seriously concerned about the potential negative impact of expansive application of the U.S. antitrust laws to claims where, as here, the underlying transactions took place outside the United States and had no direct effect on the U.S. market. The KFTC respectfully requests that this Court deny Plaintiff's motion for rehearing *en banc*.

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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 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 CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that I have mailed the foregoing document to participants in the case who are not CM/ECF users via US Mail on May 23, 2014:

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains **2,112** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Cir. R. 32(b) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2013 with 12-point Century font in the body and 11-point Century font in the footnotes.

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