05-5754-cv

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LATINO QUIMICA-AMTEX S.A., ET AL.,
Plaintiffs-Appellants,
v.

ATOFINA S.A., ET AL.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES AND IN SUPPORT OF AFFIRMANCE OF THE JUDGMENT

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STATEMENT OF INTEREST

The United States and Federal Trade Commission submit this brief in response to the court's request of May 11, 2006.

STATEMENT

1. The defendants in this private antitrust case were members of a cartel that fixed the prices of sodium monochloroacetate and monochloroacetic acid (collectively "MCAA") in the United States and foreign countries. MCAA is a chemical used in food, pharmaceutical, herbicide, and plastic additive applications. After an investigation by the Department of Justice's Antitrust Division, which was assisted substantially by a defecting cartel member that participated in the Division's criminal amnesty program, three cartel members, including defendant Akzo Nobel Chemicals B.V. and the predecessor corporation to defendant Atofina, pled guilty to violating Section 1 of the Sherman Act and were fined approximately $29 million. Three individual executives also pled guilty and served jail sentences in the United States.

The plaintiffs are foreign nationals who bought MCAA for delivery outside the United States from foreign firms, including some of the same cartel members involved in the United States' criminal prosecution. Plaintiffs allege that the MCAA cartel was global in nature and that the price of MCAA was subject to arbitrage, so that maintaining fixed prices in the U.S. resulted in higher prices

elsewhere.

2. The district court granted defendants' motion to dismiss the complaint for lack of subject matter jurisdiction, on the ground that plaintiffs' allegations did not meet the requirement of the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), 15 U.S.C. 6a(2), that for the Sherman Act to apply to foreign antitrust violations, among other things the effect of the defendants' conduct in the United States must "give[] rise to" the plaintiffs' claim under the Sherman Act. The district court observed that all parties agreed that this statutory language speaks in terms of causation, and further that the parties agreed that the governing legal causation standard is proximate causation, rather than "but for" causation, so that "the Court is not presented with any dispute between the parties as to the correct standard to apply." Op. 15.

3. The district court concluded that plaintiffs' allegations, even as proposed to be amended, do not plead proximate causation. Rather, they "merely describe . . . a 'but for' theory of causation – that, but for the conspiracy's anticompetitive effect in the United States, the global conspiracy 'could not have succeeded'" because of U.S.-based arbitrage, and therefore fail to establish proximate causation. Op. 23. The court therefore concluded that "the causal link described by [plaintiffs'] theory is simply too indirect to support this Court's

subject matter jurisdiction." Op. 25. The district court observed that the D.C. Circuit recently rejected an "identical theory" of causation, Op. 23, in *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 1043 (2006), and that plaintiffs here "acknowledg[ed] that the causation theory they articulated before the D.C. Circuit in *Empagran* is precisely the same theory at issue here." Op. 24.[1]

ARGUMENT

I. The D.C. Circuit's *Empagran* Decision is Correct and Should Be Followed

This case is analytically identical to *Empagran*. In *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.,* 542 U.S. 155 (2004), the Supreme Court held that the FTAIA does not allow antitrust claims arising solely out of a foreign injury that is independent of the domestic effects of the challenged antitrust conduct. But the Court declined to consider the plaintiffs' alternative theory that "without an adverse domestic effect (*i.e.*, higher prices in the United States), the sellers could not have maintained their international price-fixing arrangement and respondents

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[1] The United States and FTC filed four briefs as *amici curiae* in *Empagran*, including briefs to the Supreme Court and to the D.C. Circuit on remand. The antitrust agencies' position is set forth in more detail in those briefs, which are available at http://www.usdoj.gov/atr/cases/hoffman.htm. The D.C. Circuit *amicus* brief on remand is also available at 2005 WL 388672, and for the court's convenience we have lodged with the clerk copies of that brief.

would not have suffered their foreign injury." *Id.* at 175. The Court termed this a "'but for' condition," *id.*, and remanded the question of its legal sufficiency to the D.C. Circuit.

On remand, the D.C. Circuit decided the precise issue presented here – whether plaintiffs' arbitrage theory is legally sufficient to bring the price-fixing conduct within the scope of the FTAIA's exception. The D.C. Circuit's reasoning is correct, and the United States and the FTC urge this court to follow it, as the district court and other courts have. *In re DRAM Antitrust Litig.*, 2006 WL 515629 (N.D. Cal. Mar. 1, 2006); *In re Monosodium Glutamate Antitrust Litig.*, 2005 WL 2810682 (D. Minn. Oct. 26, 2005); *eMag Solutions LLC v. Toda Kogyo Corp.*, 2005 WL 1712084 (N.D. Cal. July 20, 2005).[2]

A. Plaintiffs' Proximate Cause Argument is Unsound

The D.C. Circuit, and the district court here, reasoned correctly that plaintiffs' arbitrage theory, though allegedly showing proximate cause, in substance is nothing more than legally insufficient "but for" causation. *See*

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[2] The one FTAIA case on which plaintiffs rely, *MM Global Services, Inc. v. Dow Chemical Co.*, 329 F. Supp. 2d 337 (D. Conn. 2004), is inapposite. It was not a cartel case; the plaintiffs purchased products *in the United States*, so that the commerce was not purely foreign; and the plaintiffs' claim was that the defendant imposed resale price maintenance agreements that limited plaintiffs' ability to resell products "in and from the United States." The arbitrage theory of price fixing that plaintiffs offer here was simply not at issue.

Empagran, 417 F.3d at 1271.[3] Plaintiffs have no factual allegation that increased prices for MCAA in the U.S. directly caused – without many intervening acts – the overcharges they paid outside the U.S. Nor can they argue that Congress sought to prohibit conduct that would lead to anticompetitive overcharges affecting U.S. commerce in order to protect foreign consumers purchasing goods from foreign firms abroad. The most they can claim factually is that increased U.S. prices were *necessary to* increased prices abroad, which is another way of saying that increased U.S. prices were a "but for" cause of their alleged injury. This connection simply is too attenuated to sustain U.S. jurisdiction. Under any reasonable notion of proximate cause, plaintiffs' injuries were directly caused by the purchases they made outside the U.S., and not by prices in the U.S. *See Den*

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[3] Even if the district court could be said to have erred in finding that "the Court is not presented with any dispute between the parties as to the correct [causation] standard to apply" (Op. 15), plaintiffs' argument for a "but for" standard is wrong as a matter of law. As explained in the antitrust agencies' *Empagran* brief to the D.C. Circuit, there is no evidence that Congress, in enacting the FTAIA, intended to depart from well-established principles of causation in antitrust cases. Those traditional concepts reject "but for" causation. Plaintiffs' cited cases construing "arising out of" or "arising from" as allowing a "but for" connection (Br. 22-23 & n.4), are irrelevant. These are not antitrust cases and do not involve Sherman Act-based jurisdiction. Because the antitrust laws are so broadly drafted, it is essential that courts limit the range of potential plaintiffs. In *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 477-78 (1982), and *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 535-36 (1983), the Supreme Court explained that this limitation takes the form of a proximate cause requirement.

Norske Stats Oljeselskap AS v. Heeremac VOF, 241 F.3d 420, 427 (5th Cir. 2001) ("[t]he FTAIA 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.").

Plaintiffs attempt to stretch the concept of proximate causation to encompass their "but for" causation theory. But general or conclusory allegations, or using different forms of words, do not substitute for the necessary "factual predicate." *Sniado v. Bank Austria AG*, 378 F.3d 210, 213 (2d Cir. 2004). Plaintiffs' proffered redefinitions of proximate causation would render it meaningless as a limitation on the range of potential plaintiffs that could sue in the U.S.[4]

First, plaintiffs argue that it was foreseeable that defendants' cartelization of the MCAA market in the U.S. would lead to increased prices abroad (Br. 24). But even in the tort context, what foreseeability and proximate cause signify are "those consequences which have some reasonably close connection with the defendant's

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[4] Plaintiffs are wrong in suggesting that their theory would easily distinguish between permissible suits by victims of fungible-product cartels and impermissible suits based on non-fungible products (Br. 49; Reply 25). Attempting to draw a fact-based line between fungible and non-fungible products at the outset of a case, without discovery and a potential mini-trial, would be unworkable and contrary to the Supreme Court's requirement that jurisdiction be determined "simply and expeditiously." *Empagran*, 542 U.S. at 169.

conduct." W. Page Keeton et al., *Prosser and Keeton on Torts* § 43, at 300 (5th ed. 1984). Applying proximate cause in the antitrust context, the Supreme Court has emphasized that "[i]t is common ground that the judicial remedy cannot encompass every conceivable harm that can be traced to alleged wrongdoing." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 536 (1983). Thus, injuries resulting from the "ripples" of an antitrust violation are not proximately related to the violation, *see id.* at 534 (quoting *McCready*, 457 U.S. at 476), and indirect purchasers cannot recover despite the foreseeability of their injuries, *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

Second, plaintiffs argue that an injury can have multiple proximate causes (Br. 24). That may be true as a generality, but here plaintiffs' theory that fixed prices in the U.S. were necessary for the cartel to succeed worldwide means that fixed prices for MCAA in any other countries where there were substantial sales of MCAA were equally necessary to the cartel. Plaintiffs' theory posits so many proximate causes that it guts the concept of proximate cause of any substance as a limitation on liability.

Third, plaintiffs try to equate proximate cause with "fairness" and argue that foreign-injured persons should be allowed to sue in the U.S. because defendants *intended* to injure them (Br. 29; Reply 6). But the purpose of proximate causation

is to limit the scope of liability for reasons of policy and practicality, despite the fact that persons far removed from the violation might have claims to "fairness." *See Associated Gen. Contractors*, 459 U.S. at 536-37 & n.34. And defendants' intent is legally irrelevant; the FTAIA's causal test is whether the *effect of the cartel in the U.S.* "gives rise to" the plaintiff's injury, not whether the defendant's conduct caused the injury or whether the defendant intended that injury.

B. Plaintiffs' Claims Cannot Be Reconciled With the Supreme Court's Reasoning in *Empagran*

The D.C. Circuit's *Empagran* remand decision properly recognized that an arbitrage theory of causation inevitably leads to violations of the principle of prescriptive comity, as articulated by the Supreme Court. *See* 417 F.3d at 1271. Under an arbitrage theory, a buyer of MCAA who purchases from a cartel member anywhere in the world could sue in U.S. courts. But Congress did not intend that "United States courts would provide worldwide subject matter jurisdiction to any foreign suitor wishing to sue its own local supplier, but unhappy with its own sovereign's provisions for antitrust enforcement." *Empagran*, 542 U.S. at 166 (citation omitted). Plaintiffs' theory invites foreign purchasers to seek redress under U.S. law, rather than the law of their home countries. And because virtually any plaintiff could allege that fixing prices in the U.S. was necessary to plaintiff's

harm under an "arbitrage" theory, there would be no limits on foreign plaintiffs' access to U.S. courts. This would cause precisely the kind of "legal imperialism," *id.* at 169, that the Supreme Court declined to attribute to Congress.[5]

Plaintiffs' only substantive response to this critical rationale of the Supreme Court's decision is to assert "that there are no substantive conflicts of law [between nations] in the context of cartel behavior" (Reply 22; Br. 47).[6] This is no answer, because the Court rejected that argument, 542 U.S. at 167, and went on to explain that nations "disagree dramatically about appropriate remedies." *Id.* To invite consumers injured outside U.S. commerce to sue for treble damages in U.S. courts would override the policy judgments of many countries, none of which permits the combination of treble damages, jury trials, and liberal discovery

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[5] Rejecting plaintiffs' theory would not bar all foreigners from U.S. courts. *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 318 (1978), indicates that foreign plaintiffs may invoke U.S. antitrust remedies when they "enter[] our commercial markets as a purchaser of goods or services." This is consistent with both the FTAIA and the district court's decision. *See also Caribbean Broadcasting System, Ltd., v. Cable & Wireless PLC*, 148 F.3d 1080 (D.C. Cir. 1998) (allowing plaintiff injured outside the U.S. to sue based on injury stemming directly from effects on U.S. commerce).

[6] Plaintiffs wrongly claim (Br. 46) that prescriptive comity does not apply here because the Supreme Court used it only for the purpose of interpreting the word "a" in 15 U.S.C. 6a(2), which is not at issue. In fact, analysis of "a" appears only in part V of the Supreme Court's opinion, long after the Court finished its discussion of prescriptive comity, which the Court applied to the entire "domestic exception" in 15 U.S.C. 6a(2).

available in U.S. courts.

Plaintiffs' claims also are incompatible with *Empagran* because the Supreme Court made clear that Congress, in enacting the FTAIA, did not intend "*to expand* in any significant way, the Sherman Act's scope as applied to foreign commerce." 542 U.S. at 169 (emphasis in original). The Court also found that there was no relevant precedent for U.S. courts recognizing subject matter jurisdiction over the kind of cartel class actions, based on foreign injuries from transactions taking place outside U.S. commerce, that plaintiffs seek to bring. *See id.* at 169-73. Plaintiffs here do not identify any relevant precedent for jurisdiction based on their arbitrage theory, and their claims therefore represent an expansion of the Sherman Act's scope that is contrary to the FTAIA.

II. Plaintiffs' Claims Will Undermine Deterrence and the Government's Anti-Cartel Enforcement

The Supreme Court in *Empagran* noted the "important experience-backed arguments (based upon amnesty-seeking incentives)" raised by the defendants, the United States, and foreign governments. 542 U.S. at 174.

The operation of the Department of Justice's criminal amnesty program, and its vital role in cracking international cartels, are explained in the antitrust agencies' *Empagran* briefs. The "experience" identified by the Supreme Court is

the United States' prosecutorial experience in seeing how cartel members behave: they carefully weigh their civil liability exposure when deciding whether to break ranks with the cartel and seek criminal amnesty, so that any significant increase in exposure to class action suits acts as a disincentive to exposing the cartel.

Plaintiffs' claims threaten to upset the balance of incentives and disincentives that drives the amnesty program. If consumers from around the world suddenly could bring class action suits in U.S. courts against international cartels – suits that the federal courts have not previously entertained and that cartel members never had reason to anticipate – the massive increase in potential civil liability would radically tilt the scale of incentives for conspirators against seeking amnesty. And when cartel members forgo, or hesitate to seek, amnesty, the government loses its most potent weapon for cracking international cartels.[7]

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[7] Contrary to plaintiffs' contention (Reply 10 n.8), the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 665 (2004), which limits to single rather than treble damages the private civil action liability of amnesty applicants who meet certain requirements, reinforces the United States' argument. The law *reduces* rather than *expands* the civil liability exposure of U.S. amnesty applicants. This statutory de-trebling emphasizes the importance of the government's amnesty program to the detection and deterrence of cartels. Plaintiffs' attempt to expand civil liability contradicts that policy and will weaken the incentive to seek amnesty provided by statutory de-trebling. In addition, plaintiffs' claims will discourage cartel members who do not qualify for amnesty but otherwise may want to cooperate with the government, e.g., by plea agreement. Expanded civil liability also risks undermining foreign amnesty programs (*see Empagran,* 542 U.S. at 168), which are not affected by the statute,

The antitrust agencies' *Empagran* briefs also explain the United States' leading role in coordinating tougher international anti-cartel enforcement. Because of that leading role, the United States is concerned that a decision that weakens the U.S. amnesty program will jeopardize the trend toward rigorous enforcement that the United States has worked hard to foster. The antitrust agencies also are concerned that our foreign counterparts, who often disapprove of treble damages and other features of U.S. private antitrust litigation, *see Empagran,* 542 U.S. at 167-68, will fear that the fruits of their cooperation with the United States will be used to support follow-on treble damage actions in U.S. courts, thereby straining the international relationships that are vital to anti-cartel enforcement.

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and thereby interferes again with the sovereign authority of other nations.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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June 1, 2006

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5), the type style requirement of Fed. R. App. P. 32(a)(6), and the type-volume limitations of Fed. R. App. P. 32(a)(7) and Fed. R. App. P. 29(d) because it has been prepared in a proportionally spaced typeface using WordPerfect 10 in 14-point Times New Roman and contains 2,943 words.

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Robert B. Nicholson

Dated: June 1, 2006

CERTIFICATE OF SERVICE

I certify that on June 1, 2006, two true and correct copies of the foregoing Brief for the United States and the Federal Trade Commission as *Amici Curiae* In Support of Defendants-Appellees And in Support of Affirmance of the Judgment were served, by Federal Express, next day service, on each of the following:

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CERTIFICATE OF VIRUS PROTECTION

I certify that the PDF version of the foregoing Brief for the United States and the Federal Trade Commission as *Amici Curiae* In Support of Defendants-Appellees And in Support of Affirmance of the Judgment has been scanned for viruses and no virus has been detected.

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