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.

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF ECONOMISTS AND PROFESSORS IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING *EN BANC*

Certain Economists and Professors, identified separately below and in the appended brief, move pursuant to Federal Rule of Appellate Procedure 29(b) for leave to file an amicus curiae brief in connection with this Court's consideration of Appellant Motorola Mobility LLC's Petition for Rehearing *En Banc*.

In support of this motion, the Economists and Professors state as follows:

1. Economists and Professors are a group of academics with a special interest in and knowledge of the economics and competition laws. They have taught, researched, and/or published analyses of the economics of cartels and the effect of government policy on the incentive to engage in price-fixing behavior. Economists and Professors believe the legal

ruling articulated in the panel decision of this Court in *Motorola Mobility LLC v. AU Optronics et. al*, No. 14-8003 (7th Cir. Mar. 27, 2014), namely the proper interpretation of the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6a ("FTAIA"), creates significant economic and legal consequences that bear careful and considered review.

2. Economists and Professors have no stake in the outcome of this litigation. However, they are concerned that the Court's opinion on the one hand articulates a sweeping but incorrect standard for assessing the application of the Sherman Act, but on the other, failed to provide Economists and Professors (or other interested parties) with any opportunity to offer views to the Court which, if considered, will help the Court to fairly and properly adjudicate the important issues at bar.

3. In their amicus curiae brief, a copy of which accompanies this motion, Economists and Professors explain that the Court's panel opinion appears to conclude that U.S. businesses should be precluded from bringing claims under U.S. antitrust law for overcharges exacted by global price-fixing cartels if those U.S. businesses took delivery of the price fixed products through their foreign-based wholly-owned subsidiaries. Our position is that economic logic counsels that such victims should be permitted to seek treble damages in U.S. courts to deter the formation of cartels that harm U.S. consumers and businesses alike.

4. Economists and Professors believe that their amicus curiae brief will provide the Court with valuable perspective on the issues presented in Appellant's Petition for Rehearing *En Banc*, and will substantially aid the Court in its consideration of the petition. Additionally, none of the parties will be prejudiced by granting leave for the amicus curiae brief to be filed and considered by this Court. The attached brief complies with all of the

requirements set forth in Federal Rule of Appellate Procedure 29 applicable to amicus filings in the United States Seventh Circuit Court of Appeals.

WHEREFORE, Economists and Professors respectfully move for leave to file the attached amicus curiae brief and for such other and further relief that this Court deems necessary and proper.

Dated: April 24, 2014

Respectfully submitted,

John Asker, PhD
Jonathan Eaton, PhD
Roger Noll, PhD
Ariel Pakes, PhD
Robert Porter, PhD

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Counsel to Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 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 by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days of April 24, 2014, addressed to the following:

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FOR THE SEVENTH CIRCUIT

MOTOROLA MOBILITY LLC,

Plaintiff and Appellant,

vs.

AU OPTRONICS CORPORATION, et al.,

Defendants and Appellees.

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

AMICUS CURIAE BRIEF OF ECONOMISTS AND PROFESSORS IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING *EN BANC*

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 14-8003

Short Caption: Motorola Mobility LLC v. AU Optronics, et al.

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

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used**.

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

John Asker, Jonathan Eaton, Roger Noll, Ariel Pakes, and Robert Porter

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

Schmiedeskamp, Robertson, Neu & Mitchell, LLP

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

Not Applicable

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

Not Applicable

Attorney's Signature: /s/ Brett K. Gorman Date: April 24, 2014

Attorney's Printed Name: Brett K. Gorman

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes X No ____

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AMICUS CURIAE RULE 26.1 DISCLOSURE

Pursuant to Federal Rule of Appellate Procedure 26.1 and Seventh Circuit Rule 26.1, Amici Curiae disclose the following:

Amici Curiae are natural persons. Amici Curiae are:

- John Asker, Associate Professor of Economics, New York University
- Jonathan Eaton, William R. Rhodes Professor of International Economics, Brown University
- Roger Noll, Professor Emeritus of Economics, Stanford University
- Ariel Pakes, Thomas Professor of Economics, Harvard University
- Robert Porter, William R. Kenan, Jr. Professor of Economics, Northwestern University

The law firm of Schmiedeskamp, Robertson, Neu & Mitchell LLP is the only law firm that has appeared or is expected to appear for Amici Curiae in this case. The law firm of Schmiedeskamp, Robertson, Neu & Mitchell LLP has not previously represented any party to this action.

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AMICUS CURIAE RULE 29 STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29, Amici state the following:

The Amici Curiae filing this brief are professors and scholars who teach and write on economic issues and are concerned about the effectiveness of U.S. antitrust laws in protecting American consumers and businesses. They are John Asker, Associate Professor of Economics, New York University; Jonathan Eaton, William R. Rhodes Professor of International Economics, Brown University; Roger Noll, Professor Emeritus of Economics, Stanford University; Ariel Pakes, Thomas Professor of Economics, Harvard University; and Robert Porter, William R. Kenan, Jr. Professor of Economics, Northwestern University.

Various of the amici have taught, researched, and/or published analyses of the economics of cartels and the effect of government policy on the incentive to engage in price-fixing behavior. Amici write the Court solely as individuals and not on behalf of the institutions with which they are affiliated. None of the Amici represents or is employed by any party in this action.

The law firm of Schmiedeskamp, Robertson, Neu & Mitchell LLP assisted the Amici Curiae in the preparation 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. No person other than the Amici Curiae or their counsel contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION

Amici support *en banc* rehearing of the decision of the three-member panel of the U.S. Court of Appeals for the Seventh Circuit because the issues involved are a matter of exceptional public importance.[1] Amici request permission to file a brief addressing the economic policy issues surrounding the decision, namely whether a claim under U.S. antitrust law may be brought based upon purchases by foreign affiliates of U.S. companies from members of a global cartel. In the remainder of this brief, we summarize our position: economic logic counsels that such victims should be permitted to seek treble damages in U.S. courts to deter the formation of cartels that harm U.S. consumers and businesses.

ARGUMENT

It is generally recognized that the primary focus of U.S. antitrust law is to deter behaviors that harm U.S. commerce.[2] In international markets where products move relatively freely, a successful price-fixing cartel must take into account product flows between regions. If a price-fixing cartel tries to raise price in only one region of its relevant geographic market,[3] market forces will reallocate sales so as to restrain the effectiveness of

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[1] *Motorola Mobility LLC v. AU Optronics Corp.*, No. 14-8003 (7th Cir. Mar. 27, 2014).

[2] Regarding deterring cartels, see, *e.g.*, *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 314 (1978); John Connor, "Extrateratorriality of the Sherman Act and Deterrence of International Private Cartels," http://www.agecon.purdue.edu/staff/connor/papers/Extraterritoriality_LR_Version_5-04-04.pdf Gregory Werden, Scott Hammond, and Belinda Barnett, "Deterrence and Detection of Cartels: Using All the Tools and Sanctions," 56 *Antitrust Bulletin* 207–234 (2011), http://www.justice.gov/atr/public/speeches/283738.pdf; and Gregory Werden, "Sanctioning Cartel Activity: Let the Punishment Fit the Crime," *European Competition Journal* 5 (2009): 19–36, http://www.justice.gov/atr/public/articles/240611.htm.

[3] A relevant geographic market constitutes the set of regions in which the flow of product is sufficiently responsive to regional differences in price to keep those differences in price small. "A region forms a relevant geographic market if this [hypothetical region-specific] price increase

any region-specific price increase.[4] As a result, a cartel that operates in a global geographic market has an incentive to increase prices and restrict sales both inside and outside the United States.

Relatedly, when facing multinational buyers who procure an input in several regions, a cartel may be forced to fix prices in all regions in order to prevent arbitrage among buyers that undermines the profitability of the cartel. For instance, had the LCD conspirators attempted to limit their conspiracy to regions outside the United States, Motorola would have had a strong financial incentive to purchase LCD panels in the United States at the lower U.S. prices and supply those panels to its foreign affiliates directly. Therefore the LCD conspirators had an incentive to increase prices in all regions that Motorola (and other multinational buyers) operated, including the United States.[5]

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would not be defeated by substitution away from the relevant product or by arbitrage, e.g., customers in the region travelling outside it to purchase the relevant product." U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines*, August 19, 2010, § 4.2.2 (Geographic Markets Based on the Locations of Customers).

[4] Abstracting from transportation and other transaction costs, the underlying economic concept is known as the "Law of One Price"; see e.g., Walter P. Nicholson. *Microeconomic Theory*, Thomson-Southwestern, Mason, OH (2005, 9th ed.), at 335–336 ("[Assuming zero transaction costs and perfect information], each good obeys the law of one price: A homogenous good trades at the same price no matter who buys it or which firm sells it. If one good is traded at two different prices, demanders would rush to buy the good where it was cheaper, and firms would try to sell all their output where the good was more expensive.").

See also James Martin, *Revisiting Empagran – a Proposed Solution to Insufficient Compensation for Victims and Deterrence of International Cartels*, http://www.antitrustinstitute.org/files/Martin_Paper%20for%2012.8.09_121520091504.pdf.

[5] See, *e.g.*, Alvin Klevorick & Alan Sykes, "United States Courts and the Optimal Deterrence of International Cartels: a Welfarist Perspective on *Empagran*," in Eleanor Fox and Daniel Crane (eds.), *Antitrust Stories*, New York: Foundation Press (2007), http://dido.econ.yale.edu/P/cd/d16a/d1617.pdf.

The economic question presented by the decision at bench is whether precluding foreign affiliates of U.S. companies from pursuing a claim under U.S. antitrust law against members of a global cartel will promote or undermine the formation of cartels that unquestionably harm domestic commerce.

The histories of many examples of international price-fixing cartels, including the vitamins, lysine, citric acid, graphite electrodes, air cargo, dynamic random access memory, liquid crystal display panels, cathode ray tubes, and automotive parts cartels, illustrate that there is already inadequate deterrence to protect U.S. commerce from global price-fixing cartels. In the case of the vitamins cartel, for example, worldwide financial gains attributable to conspiracy have been estimated to substantially exceed the total value of government fines and the civil recoveries obtained.[6] More generally, given that antitrust enforcement outside the United States is less aggressive, and hence penalties significantly lower than in the United States, non-U.S. gains from conspiracy often can outweigh even the maximum possible criminal and civil financial sanctions available within the United States and abroad.[7]

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[6] John Connor, *Global Price Fixing,* Kluwer Academic Publishers: Boston, MA (2007, 2nd and revised ed.) at 426–430 (total sanctions equaled about two-thirds the overcharge amount, but when adjusted for the time difference between earning the overcharges and paying the sanctions, real total sanctions were only one-eighth the overcharge amount); Martin, *supra*.

[7] See, *e.g.*, John Connor, "Effectiveness of Antitrust Sanctions on Modern International Cartels," *Journal of Industry, Competition and Trade* 6 (2006), Table 6 and 211–212 ("The median total sanction (government and private) on all types of international cartels is 39.8% of the estimated global overcharges—less than half of single damages. U.S. government and private penalties together amount to almost 150% of U.S. damages. Outside North America, because there are virtually no private antitrust actions, international cartels pay out one-third or less of their overcharges. Less than 20% of the sampled cartels pay penalties in excess of single damages.") and Eleanor Fox, testimony before the Antitrust Modernization Commission (Feb. 15, 2006) at 11 ("other nations' private action remedies are exceedingly weak, and global cartels' profits from sales outside of America may overwhelm losses from damages on sales within."), http://govinfo.library.unt.edu/amc/commission_hearings/pdf/Statement_Fox_final.pdf.

A focus on deterring formation of international cartels is particularly important in view of estimates suggesting that more than two-thirds of conspiratorial activity goes undetected and unpunished.[8] That deterrence is weak in practice is illustrated by the observed recidivism of cartel members, many of which are serial offenders.[9] As long as the gap between the expected costs and benefits of forming a cartel is large, which is more likely to be the case when cartels are international in scope and antitrust enforcement outside the United States is less aggressive, firms will have an incentive to engage in price-fixing behavior that harms U.S. consumers and businesses.[10]

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[8] See, *e.g.*, Peter Bryant and E. Woodrow Eckard, "Price Fixing: The Probability of Getting Caught," *Review of Economics and Statistics* 73 (1991): 531–536 at 535 (estimating the probability that a price-fixing conspiracy will be detected in a given year is at most between 13 and 17 percent); John Connor, "Private International Cartels: Effectiveness, Welfare, and Anticartel Enforcement," Purdue Agricultural Economics Working Paper No. 03-12 (2003) at 40 (reporting most studies seem to suggest a 10- to 20-percent chance a cartel is caught), http://ageconsearch.umn.edu/bitstream/28645/1/sp03-12.pdf. Research on cartels caught in Europe also finds similarly low rates. See Emmanuel Combe, Constance Monnier, and Renaud Legal, "Cartels: The Probability of Getting Caught in the European Union," Bruges European Economic Research Paper 12 (2008) at 17 ("the probability of detection in a given year is at most between 12.9 % and 13.2%.") and Peter Ormosi, "A Tip of the Iceberg? The Probability of Catching Cartels," *Journal of Applied Econometrics*, forthcoming ("this method provides evidence that less than a fifth of cartelising firms are discovered.").

[9] John Connor, "Recidivism Revealed: Private International Cartels 1990–2009," *Competition Policy International* 6 (2010): 101–127 at 101 (there are "389 recidivists that engaged in international price-fixing in the past 20 years. Recidivism appears to be increasing rapidly, both in number and relative to all corporate cartelists."), https://www.competitionpolicyinternational.com/recidivism-revealed-private-international-cartels-1990-200. On the overlap of companies and even employees involved in the various electronics cartels, see Roger Noll, "The DRAM Antitrust Litigation," in John Kwoka, Jr. and Lawrence White (eds.), *The Antitrust Revolution*, Oxford University Press: New York (2013, 6th ed.).

[10] John Connor, "Effectiveness of Antitrust Sanctions on Modern International Cartels," *Journal of Industry, Competition and Trade* 6 (2006) at 210 (evidence of low or nonexistent sanctions outside of North America and Europe and evidence of higher overcharges outside of North America and Europe "may explain why the historically high penalties in North America and Europe since 1990 do not yet deter global-cartel formation: even if antitrust detection has improved in the last decade, expected profits net of penalties are still large in the continents with weak anticartel enforcement.").

Moreover, the Court's decision creates incentives that may adversely affect the use of international supply chains,[11] and it may encourage some foreign countries to permit cartel formation to attract business.[12] These incentives may raise the expected costs of sourcing components and manufacturing finished goods abroad for sale in the United States, as the Court noted.[13] Companies could, as a result, decide to reorganize their supply chains in a different and less efficient manner.[14]

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[11] Gordon Hanson, Raymond Mataloni Jr., and Matthew Slaughter, "Vertical Production Networks in Multinational Firms," *Review of Economics and Statistics* 87 (2005): 664–678 (foreign countries with lower costs and export-friendly policies have greater exports of inputs to U.S. multinational parents by their foreign affiliates); Kei-Mu Yi, "Can Vertical Specialization Explain the Growth of World Trade?," *Journal of Political Economy* 111 (2003): 52–102 (changes in trade costs have a more than proportional impact in the total cost of production when the good is produced by a sequential, vertical chain stretching across multiple countries); and Jonathan Eaton and Samuel Kortum, "Technology, Geography, and Trade," *Econometrica* 70 (2002): 1741–1779 (quantifying how an increase in costs in any country gets augmented in costs worldwide).

[12] See*, e.g.*, Kathryn McMahon, "Competition Law and Developing Economies: Between 'Informed Divergence' and International Convergence," in Ariel Ezrachi (ed.), *Research Handbook on International Competition Law*, Edward Elgar Publishing: Cheltenham UK (2012) at 231 ("developed jurisdictions have no incentive to prosecute or assist other competition agencies to prosecute anticompetitive conduct where the detrimental welfare effects are external to their domestic market.") and Paul Victor, "Export Cartels: An Idea Whose Time Has Passed," *Antitrust Law Journal* 60 (1991): 571–581 at 571 ("export cartel protection statutes are attempts by one country to profit at the expense of others.").

[13] *Motorola Mobility LLC v. AU Optronics Corp.*, No. 14-8003 (7th Cir. Mar. 27, 2014) at 8 ("Many foreign manufacturers are located in countries that do not have or, more commonly, do not enforce antitrust laws…As a result, the prices of many products exported to the United States are elevated to some extent by price fixing or other anticompetitive acts that would be forbidden by the Sherman Act if committed in the United States.").

[14] For example, reorganizing the supply chain may result in the loss of efficiencies from locating near key foreign suppliers. See Gregory Tassey, "Competing in Advanced Manufacturing: The Need for Improved Growth Models and Policies," 28 *Journal of Economic Perspectives* (2014): 27–48 at 30 ("advanced manufacturing often displays important co-location synergies resulting in benefits to new-product development when manufacturing firms are located close to their research and development efforts and to many of their key suppliers. These synergies arise from the fact that much of the technical knowledge developed in the early phases of the research and development cycle is tacit in nature (as opposed to being codified in, say, patents). As a result,

CONCLUSION

In summary, we believe that the Court's decision raises important policy concerns that warrant a full review with the benefit of input from all affected parties and respectfully ask the Court to consider these issues *en banc*.

Dated: April 24, 2014

Respectfully submitted,

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person-to-person interactions are critical to advancing and transferring such knowledge.") (citation omitted).

CERTIFICATE OF SERVICE

I hereby certify that on April 24, 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.

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