No. 02-16472

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

LSL BIOTECHNOLOGIES, INC., SEMINIS VEGETABLE SEEDS, INC.,
AND LSL PLANTSCIENCE LLC,

Defendants-Appellees.

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

SUPPLEMENTAL BRIEF FOR APPELLANT UNITED STATES OF AMERICA

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TABLE OF CONTENTS

STATEMENT 1

ARGUMENT 2

I. *Empagran* Has No Impact on the District Court's Dismissal of the Domestic Conduct Allegations Under Rule 12(b)(6) 3

II. *Empagran* Has No Impact on the District Court's Dismissal of the Foreign Conduct Allegations Under Rule 12(b)(1) 4

III. *Empagran* Confirms that LSL's Argument Based on 15 U.S.C. 6a(2) Should Be Rejected 5

CONCLUSION 6

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases: **Page**

Den Norske Stats Oljeselskap AS v. Heeremac VOF, 241 F.3d 420 (5th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002) 5, 6

F. Hoffman-LaRoche Ltd. v. Empagran S.A., 542 U.S. ____, 72 U.S.L.W. 4501 (June 14, 2004) 1, 2, 3, 4

Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993) 4, 5

Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002) 3

United States Gypsum Co. v. Indiana Gas Co., Inc., 350 F.3d 623 (7th Cir. 2003) 4

STATUTES

15 U.S.C. 1 1

15 U.S.C. 6a(1) 2, 3, 5

15 U.S.C. 6a(2) 2, 5, 6

The United States submits this supplemental brief in response to the Court's order of December 18, 2003, directing the parties to file briefs "addressing the impact of the decision [by the Supreme Court in *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. __, 72 U.S.L.W. 4501 (June 14, 2004)] on this case."

STATEMENT

1. This case challenges the legality of a territorial allocation created by a private agreement that prevents Hazera Quality Seeds, Inc., a competitor of defendant LSL, from *ever* (1) selling currently existing or future long shelf-life tomato seeds to growers in the United States, and (2) selling currently existing or future long shelf-life seeds to growers in Mexico who would export the bulk of the resulting tomatoes to the United States. The territorial allocation provision (the "Restrictive Clause") is aimed directly at United States growers and consumers of tomatoes (*see, e.g.*, ER 3, 7, 11, 130), and it prevents competition to provide millions of United States consumers with superior fresh-market winter tomatoes. The United States contends that the Restrictive Clause is a naked restraint of trade, or in the alternative an unreasonable restraint of trade, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1.

2. The district court read the United States' complaint to allege "both

foreign and domestic conduct by defendants," ER 384.[1] The court analyzed the sale of seeds to growers in the United States as domestic conduct, ER 384, and the sale of "seeds developed to be sold and grown in Mexico," ER 387, as foreign conduct. The district court dismissed the complaint, and the United States appealed.

3. Subsequent to oral argument, the Supreme Court granted certiorari in *Empagran*, a private antitrust suit against members of an international vitamins cartel. The cartel indisputably had "a direct, substantial, and reasonably foreseeable effect" on domestic commerce, and thus met the requirements of subsection 6a(1) of the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), 15 U.S.C. 6a(1). The *Empagran* plaintiffs, however, were all foreign nationals who had purchased price-fixed vitamins abroad for use abroad, and therefore had been injured abroad.

The question presented in *Empagran* was thus whether the language of 15 U.S.C. 6a(2) – requiring that "such [domestic] effect gives rise to a claim under the provisions of sections 1 to 7 of this title" – bars the foreign plaintiffs' claims. The

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[1] The United States' complaint did not characterize any conduct as "foreign" because the critical conduct in this case is the Restrictive Clause itself, and there is evidence that the agreement was executed in New York. *See* ER 81 and Addendum to U.S. Reply Br.

Supreme Court held that the Sherman Act, as amended by the FTAIA, "does not apply where the plaintiff's claim rests solely on the independent foreign harm," so that "a purchaser in the United States could bring a Sherman Act claim under the FTAIA based on domestic injury, but a purchaser in Ecuador could not bring a Sherman Act claim based on foreign harm." 72 U.S.L.W. at 4501-02.

ARGUMENT

I. *Empagran* Has No Impact on the District Court's Dismissal of the Domestic Conduct Allegations Under Rule 12(b)(6)

Empagran has no conceivable bearing on the district court's dismissal of the domestic conduct allegations of the United States' complaint. The district court's dismissal of those allegations was premised on the mistaken view that the complaint defined an overbroad market. ER 384-87. *Empagran* had nothing to do with antitrust market definition or with claims based on domestic effects. Indeed, the Supreme Court carefully specified that its decision pertained *only* to situations "where the plaintiff's claim rests solely on the independent foreign harm." 72 U.S.L.W. at 4501. The dispositive Supreme Court authority here is *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512-14 (2002), which requires that the district court's order be reversed because the United States' complaint met the standard of notice pleading: a "short and plain statement of the claim." *See* U.S. Reply Br. 4 & n.4; *United States Gypsum Co. v. Indiana Gas Co., Inc.*, 350 F.3d 623, 626 (7th Cir.

2003) (applying *Swierkiewicz* in reversing dismissal of antitrust complaint).

II. *Empagran* Has No Impact on the District Court's Dismissal of the Foreign Conduct Allegations Under Rule 12(b)(1)

The district court's ruling on the alleged foreign conduct was based solely on 15 U.S.C. 6a(1), a provision of the FTAIA that *Empagran* did not construe. It is worth noting, however, that this government antitrust case, brought to redress injury to *U.S. consumers and growers*, is fully consistent with the Supreme Court's statement in *Empagran* that "application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused." 72 U.S.L.W. at 4503 (emphasis in original).

Thus, the dispositive Supreme Court precedent is not *Empagran* but *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993), because the United States' complaint here is analogous to the complaints in *Hartford* that the Supreme Court unanimously determined met the FTAIA's "direct, substantial, and reasonably foreseeable" standard (U.S. Br. 15-16, 40-42; U.S. Reply Br. 10-12). On the strength of *Hartford*, this Court can reverse the district court's judgment

without having to interpret 15 U.S.C. 6a(1).[2]

III. *Empagran* Confirms that LSL's Argument Based on 15 U.S.C. 6a(2) Should Be Rejected

LSL argued that 15 U.S.C. 6a(2), as construed by *Den Norske Stats Oljeselskap AS v. Heeremac VOF*, 241 F.3d 420 (5th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002), should apply here (LSL Br. 34). That argument misrepresents the United States' claims, because the alleged substantial effect is not merely higher "tomato prices in the United States" but also the thwarting of competition to innovate long shelf-life tomatoes to be sold in the United States. LSL's argument is also wrong as a matter of law because subsection 6a(2) bars cases only "where the plaintiff's claim rests solely on the independent foreign harm." *Empagran*, 72 U.S.L.W. at 4501. The United States' claim here is expressly based on harm to *United States* commerce, and is not comparable to the foreign purchaser claims dismissed in *Empagran*.

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[2] The United States adheres to its alternative arguments that, should this Court conclude that it must interpret 15 U.S.C. 6a(1):

(1) The complaint and the United States' supplemental material satisfied the common law standard for subject matter jurisdiction as set forth in *Hartford*, which the FTAIA codified in slightly different words (U.S. Br. 14-15, 25-35; U.S. Reply Br. 12-18); and

(2) That even if the FTAIA is read as substantively changing the prior law, the United States sufficiently alleged that the Restrictive Clause has a "direct" effect on United States commerce (U.S. Br. 15, 35-40; U.S. Reply Br. 18-22).

The Supreme Court emphasized, moreover, that the United States is not comparable to a private plaintiff for the purposes of subsection 6a(2) because the government "must seek to obtain the relief necessary to protect the public from further anticompetitive conduct and to redress anticompetitive harm." *Id.* at 4505. Whereas a private plaintiff's particular injury might not satisfy subsection 6a(2) (as in *Den Norske)*, the United States is not dependent on any particular plaintiff's injury and can sue whenever "foreign conduct" violates the Sherman Act and has a sufficient effect on United States commerce.

CONCLUSION

For the foregoing reasons, and those set forth in the United States' opening and reply briefs, the district court's amended judgment should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Steven J. Mintz, hereby certify that today, July 13, 2004, I caused two copies of the accompanying SUPPLEMENTAL BRIEF FOR APPELLANT UNITED STATES OF AMERICA to be served on the following by Federal Express:

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Certificate of Compliance Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number 02-16472

I certify that:

2. The attached brief is **not** subject to the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because

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Dated: July 13, 2004

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STEVEN J. MINTZ