

Empagran— Practical Considerations From the Trenches

BY JAMES R. MARTIN AND JODI TRULOVE

IN THE YEARS FOLLOWING THE U.S. Supreme Court decision in *Empagran*,¹ lower courts have gradually expanded the definition of “foreign purchase” for determining Sherman Act jurisdiction. Most of these decisions are in international cartel cases, often where liability has been established through guilty pleas or other findings, and defendants use *Empagran* to limit liability.

Many courts have applied *Empagran* and collectively articulated a broad legal framework for Sherman Act jurisdiction but have not yet settled on a single set of reliable standards to distinguish between “U.S. purchases,” which are subject to U.S. antitrust laws, and “foreign purchases,” which are not. In practice, this uncertainty leads to time-consuming evidentiary and procedural disputes. Courts seemingly endorse a transaction-by-transaction evaluation of claims under which the scope of Sherman Act jurisdiction may depend on details of international shipping law, analyses of invoices and electronic sales data, and the corporate structure of cartel victims.

We focus here on the practical issues raised by *Empagran*, and leave for another discussion whether the courts have correctly or wisely extended *Empagran* and its progeny. In particular, we address below the practical and procedural considerations that practitioners should take into account in pleading Section 1 claims with a foreign component, attacking and defending “international” claims, and dealing with discovery requests that relate to international purchases, and the implications of recent Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) developments on class certification proceedings.

FTAIA Basics

Congress enacted Section 4 of the Clayton Act to deter antitrust violators, deprive them of “the fruits of their ille-

gality,” and compensate victims.² In *Pfizer*, the Supreme Court recognized that “[t]o deny a foreign plaintiff injured by an antitrust violation the right to sue would defeat these purposes. It would permit a price fixer or a monopolist to escape full liability for his illegal actions and would deny compensation to certain of his victims, merely because he happens to deal with foreign customers.”³ The Court further reasoned that excluding foreign plaintiffs from Sherman Act claims would lessen the deterrent effect of treble damages by creating an incentive for members of global cartels and monopolists to effectively underwrite the costs of U.S. damages with illicit profits “they could safely extort abroad.”⁴

After *Pfizer*, Congress enacted the FTAIA to promote exports and “clarify” the legal standard for determining U.S. jurisdiction over international transactions.⁵ Congress expected the FTAIA to free American exporters from application of the Sherman Act to international business arrangements that exclusively affect foreign markets, but not to limit its application to violations substantially affecting domestic commerce. The House Report notes that Congress expected international conduct affecting both domestic and foreign markets would continue to exert the requisite jurisdictional effects in the United States even if some purchasers took title or suffered economic injury abroad. The House Report explicitly recognizes:

There are other reasons for preserving the rights of foreign persons to sue under our laws when the conduct in question has a substantial nexus to this country. As the Supreme Court pointed out in *Pfizer*, to deny foreigners a recovery could under some circumstances so limit the deterrent effect of United States antitrust law that defendants would continue to violate our laws, willingly risking the smaller amount of damages payable only to injured domestic persons.⁶

The FTAIA states:

Sections 1 to 7 of this title [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless—

(1) such conduct has a direct, substantial, and reasonably foreseeable effect—

(A) on trade or commerce which is not trade or commerce with foreign nations [i.e., domestic trade or commerce], or on import trade or import commerce with foreign nations; or

(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States [i.e., on an American export competitor]; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.⁷

James R. Martin and Jodi Trulove are partners in Dickstein Shapiro LLP and members of the firm's Antitrust & Financial Services practice group. Mr. Martin co-authored the Brief for Certain Professors of Economics as Amici Curiae cited by the Supreme Court in Empagran. The authors have also litigated FTAIA issues from the plaintiff's perspective in several cartel cases.

Following passage of the FTAIA, circuit courts of appeals split on how to apply the statute to Sherman Act claims brought by foreign victims of global cartels. The Fifth Circuit affirmed the lower court's denial of subject matter jurisdiction over such claims to avoid opening the floodgates to foreign plaintiffs in a variety of Sherman Act settings.⁸ Proponents of a broader reading of the FTAIA took solace in Judge Higginbotham's dissent:

I am not persuaded that when illegal conduct produces these domestic effects, that Congress intended to close the door to a foreign company injured by the same illegal conduct. That was not the law before this effort to assist American business abroad, and Congress did not intend to change it or do so unwittingly.⁹

The Second and D.C. Circuits ruled that the FTAIA provides subject matter jurisdiction over claims brought by foreign plaintiffs in global conspiracies.¹⁰ When the Supreme Court granted certiorari in *Empagran*, antitrust counsel and business executives worldwide expected the Court to address whether and when foreign companies could assert treble damage antitrust claims in U.S. courts. The Court's unanimous opinion, however, largely ducked these questions.

The Supreme Court reversed the D.C. Circuit's decision and abrogated the Second Circuit decision, but grounded its ruling on a presumed factual scenario in which injuries suffered by foreign victims were deemed wholly independent of domestic effects. The Court did not address the plaintiffs' "arbitrage" argument that the conspirators fixed prices and restricted output of products sold in an interdependent worldwide market. Instead, the Supreme Court remanded for a determination of that issue. The D.C. Circuit rejected the argument, concluding that the phrase "gives rise to" in the FTAIA requires the plaintiff to allege and show that the domestic effect "proximately caused" the plaintiff's injury and that the arbitrage theory could only show but-for causation.¹¹ The D.C. Circuit based its ruling not on standard tort principles of proximate causation (which focus in large part on foreseeability), but on principles of prescriptive comity, i.e., "the respect sovereign nations afford each other by limiting the reach of their laws."¹²

Courts in several recent decisions have applied the FTAIA to Sherman Act claims challenging international cartel conduct, and virtually all have adopted and extended the D.C. Circuit's application of *Empagran* to exclude "foreign" Sherman Act claims in interdependent markets.¹³

Practical Considerations

While some have argued that the FTAIA gives rise to issues of standing,¹⁴ the FTAIA is a jurisdictional statute, which, by its terms, makes the Sherman Act inapplicable to certain categories of conduct. As such, a defendant cannot waive lack of subject matter jurisdiction by failing to plead it as an affirmative defense, and courts can and will raise the FTAIA if the parties do not, pursuant to their right to determine subject matter jurisdiction. Even courts that apply a standing analy-

sis typically do so as a follow-on to the jurisdictional inquiry and find that the analyses overlap.¹⁵

Establishing a U.S. Effect and a "U.S. Purchase."

Courts have yet to provide clear and consistent guidance to identify the facts that a plaintiff must allege and prove to comply with the FTAIA. The first step, alleging that a cartel exerted a direct and substantial effect on domestic commerce, is generally not an issue. As a practical matter, most international cartels will include the United States, although some plaintiffs have had trouble convincing courts that foreign cartels actually targeted or reached the United States.¹⁶ As antitrust enforcement steps up around the world, plaintiffs are bringing cases based on foreign decisions, such as European Commission findings, which do not inherently demonstrate a domestic effect.

Where the conduct occurs outside the United States, courts will demand that the plaintiff draw a connection between that foreign conduct and harm to the United States.¹⁷ Plaintiffs must carefully plead the conspiracy's domestic effect to frame the next step in the analysis, which is proving that the plaintiff's injury arises from that domestic effect, which in the typical price-fixing case is higher prices.

That second step raises the fact-intensive question: "What is a 'U.S. purchase'?" Courts have identified many factors to consider, but inconsistent application of the FTAIA standards means that none of the factors is guaranteed to carry the day. The factors include: (1) purchases negotiated in the United States; (2) purchases delivered to the United States; (3) purchases invoiced in the United States;¹⁸ (4) purchases where title or risk of loss transferred in the United States; (5) purchases where a U.S. company is the ultimate payor; and (6) purchases made by a domestic company's foreign affiliates if the domestic company can establish that it exercised sufficient control over those affiliate purchases. Courts occasionally also credit factors that do not necessarily relate to the situs of the injury, such as the location of the conduct, the location of the defendants, or where conspiracy meetings occurred. The only factor that seems clearly excluded from this analysis is the one that plaintiffs have raised repeatedly, i.e., that through arbitrage and other normal market forces, the conduct of cartel members caused or set a uniform global price for the price-fixed product.

Drafting the Complaint.

LEADING THE CLAIM. Before *Twombly*,¹⁹ pleading a Sherman Act claim in a cartel case was relatively straightforward: The plaintiff would allege that a group of companies conspired to raise prices or restrict output that affected domestic commerce and that the conspiracy caused the plaintiff financial harm. When the claims involved foreign plaintiffs or defendants, the complaint on its face raised the possibility that the FTAIA might apply and the plaintiff would also have to allege a basis for subject matter jurisdiction, e.g., "Plaintiff's injuries arise from the domestic effect of the conspiratorial conduct."²⁰

Twombly altered the landscape, though. Plaintiffs now must be careful to plead the facts supporting application of the Sherman Act, including facts that address the FTAIA. Courts strictly applying *Twombly* will dismiss claims that provide only conclusory allegations to establish subject matter jurisdiction.²¹ Thus, when the plaintiff is located in the United States and one or more defendants are located outside the United States, the plaintiff should allege facts to show that (1) the conduct exerted a direct, substantial, and reasonably foreseeable effect on U.S. commerce, and (2) the plaintiff's injuries arise from that domestic effect. A domestic plaintiff with international operations might be able to plead these facts specifically enough to withstand early scrutiny, but discovery will eventually expose the existence of foreign transactions. For example, a document request for "all materials which support your claim for damages" should result in production of invoices or other transactional data (electronic or hard copy) that identify a plaintiff's purchases with specificity. Because discovery will reveal the existence of potential "foreign claims," the plaintiff should not risk losing credibility with the court by crafting its complaint too cleverly to obscure such facts.

Moreover, these claims are certain to be subject to attack, whether by a renewed motion to dismiss for lack of subject matter jurisdiction or an early summary judgment motion. Given these procedural risks, plaintiffs have little upside in failing to address the existence of arguably "foreign" claims at the outset of the case. In fact, early resolution of this jurisdictional issue may be of benefit to all, conserving resources in a case that may be subject to dismissal in whole or in large part on jurisdictional grounds.

To satisfy the FTAIA, plaintiffs should consider alleging as many facts as they can to establish a connection to the United States. At a minimum, plaintiffs should consider alleging: (1) the invoiced buyer is located in the United States; (2) the place of delivery is in the United States; (3) contractual provisions establish that title and/or risk of loss passed in the United States or that U.S. law applies to contract disputes; (4) the terms of pertinent contracts or transactions were negotiated in the United States; and (5) price and payment terms are in U.S. dollars.²² Plaintiffs should also allege any other potential contact with the United States, even where those contacts do not relate directly to the location of the injury. Thus, if one of the defendants was headquartered in the United States, the conspirators met in the United States, or the conspirators manufactured in the United States, those facts may help to establish jurisdiction.

SEVERABILITY. The fact that some, or even most, of the plaintiff's purchases clearly qualify as U.S. purchases may not rescue damage claims arising from non-U.S. transactions. Courts are willing to treat foreign transactions as separate claims. Plaintiffs may argue that severing the foreign claims is "claim-splitting" and is inconsistent with the practical definition of a "claim" as arising from the same nucleus of operative facts. For example, in *Rubber Chemicals Antitrust*

Litigation,²³ the plaintiffs argued that they should recover for both domestic and foreign transactions because their claim arose, in part, from the domestic effects of the conduct. The court agreed that their argument was "plausible" but nevertheless concluded that *Empagran* and its principles of comity foreclosed recovery for foreign transactions.²⁴

PURCHASES FOR DELIVERY ABROAD. Some, but not all, courts will find subject matter jurisdiction for purchases that are coordinated through a system centralized in the United States or where the plaintiff's U.S. affiliate bears the ultimate financial harm of the challenged conduct. Court decisions on "purchases for delivery abroad" have reached differing conclusions. In *Vitamins*, Chief Judge Thomas Hogan (who dismissed *Empagran*) permitted certain companies to pursue claims for purchases made through a global purchasing system "coordinated by the American parent companies."²⁵ In *Sun Microsystems Inc. v. Hynix Semiconductor Inc. (Sun III)*,²⁶ however, the district court dismissed claims by Sun Microsystems, which negotiated global purchases from its U.S. headquarters, even though Sun's foreign subsidiaries and affiliates implemented the global purchase plan by placing orders and invoicing the sales.²⁷

The court in *Sun III* premised its ruling on indirect purchaser issues rather than the FTAIA. *Illinois Brick* generally requires that direct purchasers bring Sherman Act claims.²⁸ When the "direct purchaser" is a foreign subsidiary or affiliate, however, the parent company in the United States must plead and prove some theory that deals with *Illinois Brick* and complies with the FTAIA. In *Sun III*, the court demanded proof that the plaintiff's damages claims fit within standard exceptions to *Illinois Brick* to establish a right to pursue claims for purchases by foreign affiliates, subsidiaries, and agents. The court demanded evidence that (i) the parent and purchasing entities operated as a single enterprise with a unified purpose in the production, sale, and procurement, or (ii) that the parent intended to have its foreign subsidiaries act on its behalf in purchasing the product, that the subsidiaries accepted or understood this role, and that there was an understanding that the parent was to be in control of the procurement.²⁹

Consider how such factual allegations may affect the course of litigation. Assume that the U.S. Department of Justice obtains a guilty plea from a foreign defendant for conspiring to fix the price of products sold to a U.S. electronics company. The conspirators, unconcerned with corporate formalities, specifically targeted the American company and even met on U.S. soil. Assume further that the American company made purchases through an overseas division, took delivery overseas, and used the price-fixed product as an input to make televisions overseas that are sold in the United States.

In order to establish jurisdiction under the FTAIA, the American company, not its foreign affiliate, must allege facts showing that it suffered injury as a direct purchaser. Myriad different facts can be relevant to this analysis. The plaintiff

may need to allege traditional indicia of control, such as interlocking directors and officers, common ownership of stock, extending credit on behalf of the subsidiaries, or entering into loan and trust agreements on behalf of the subsidiary.³⁰ The plaintiff also may wish to allege facts that show the domestic parent intended to authorize its subsidiaries to purchase on the parent's behalf, that the subsidiaries understood their role in purchasing on the parent's behalf, and any other facts that might demonstrate a unity of interest between the domestic company and the foreign buyers with respect to such procurement activities.

Twombly altered the landscape, though. Plaintiffs now must be careful to plead the facts supporting application of the Sherman Act, including facts that address the FTAIA. Courts strictly applying Twombly will dismiss claims that provide only conclusory allegations to establish subject matter jurisdiction.

ASSIGNMENT. International companies may also seek to work around the FTAIA by having subsidiaries or affiliates assign them their antitrust claims. Plaintiffs have had mixed results with this strategy. The *Rubber Chemicals* court ruled that plaintiffs “cannot convert a non-justiciable claim, originally accrued by a foreign affiliate or subsidiary and asserting only independent foreign injury, into a justiciable claim merely by assigning it to another plaintiff that holds a justiciable claim.”³¹ On the other hand, the court in *Sun III* found that assignment by a foreign affiliate to the domestic parent could support an international company's ability to show that it and its foreign affiliates acted as a “single entity.”³²

Potential Class Certification Issues. The FTAIA raises issues that defendants can use to contest class certification. Many price-fixing class actions expressly limit the class to “United States purchasers” without stating the criteria for identifying such purchasers. Class action defendants are beginning to recognize that this raises a fact issue that can be used to contest class certification. In one recent global cartel case where all of the defendants produced and sold their products from abroad, the defendants argued that each class member would have to individually establish “U.S. purchases” and that this weighed against certification because of questions about numerosity, predominance, and superiority. The defendants argued that the class “grossly overstated” the number of actual U.S. purchasers because “simply sending an invoice to a mail drop in Houston” did not establish a U.S. purchase.³³

The trial court rejected the argument and granted preliminary approval, but arguments of this type are likely to

become more prevalent in class certification proceedings. Some categorization of purchasers is inherent in defining a class in antitrust cases, and the lines between domestic and foreign purchasers may be difficult to delineate due to uncertainty about the facts that courts will accept to establish subject matter jurisdiction under the FTAIA. Class counsel can try to address these issues at the outset by more specifically pleading the class, e.g., “all purchasers who were invoiced in the United States,” “all purchasers who took delivery in the United States,” or “all purchasers who negotiated their purchases in the United States.” As discussed above, however, it is unclear whether some or all of these facts will be sufficient to define a class of U.S. purchasers with claims that satisfy FTAIA standards for subject matter jurisdiction.

Arguing the Case—Motions to Dismiss and for Summary Judgment. Defendants who seek dismissal under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction under the FTAIA may present either a facial attack or a factual attack. *Twombly* has reinvigorated the facial attack by putting the onus on plaintiffs to plead “enough [factual] heft establishing the plaintiff's claims rather than plaintiff's conjecture, or self-serving interpretations of actual events.”³⁴ Defendants often bring “facial” attacks directed solely at the allegations of the complaint, but courts can convert such a motion into more detailed factual attacks,³⁵ which enable the court to look beyond the pleadings and consider evidence relating to jurisdiction, including affidavits and documents, and even to conduct evidentiary hearings. In *American Copper & Brass, Inc. v. Halcor S.A.*,³⁶ for example, the court raised the FTAIA issue sua sponte after initially denying a motion to dismiss. Through the course of the case, the court learned the underlying basis of the plaintiffs' claim and decided to “reflect more broadly” on the issue. The court made what it considered to be a “reasonable inquiry into the facts,” found that the plaintiffs' claims were “insubstantial,” and dismissed them.³⁷

Plaintiffs may argue that the jurisdictional facts are so intertwined with the merits that the court should apply the Rule 56 standard, which requires that evidentiary disputes be resolved in the opposing party's favor. In a routine FTAIA analysis, however, the questions presented are likely to be considered sufficiently independent of the underlying merits to justify treatment under Rule 12(b)(1).³⁸ Whichever procedural avenue is applied, courts may presume a lack of subject matter jurisdiction and place the burden on the plaintiff to meet the requirements of the FTAIA.³⁹

Because the Supreme Court placed so much reliance on principles of comity in *Empagran*, defendants often argue that plaintiffs are seeking to intrude on the sovereign authority of foreign nations and their ability to independently regulate their own commercial affairs.⁴⁰ Plaintiffs routinely argue that international cartel victims have limited remedies available outside the United States. Many countries provide no meaningful remedies for private parties. Even countries such as Australia, the United Kingdom, and Canada, which permit

civil claims, provide drastically curtailed discovery rights and do not allow treble damages. Plaintiffs raise these issues to appeal to the court's sense of fairness, arguing that if the court declines jurisdiction, the conspirators will reap a wind-fall. Plaintiffs also argue that basic notions of fairness and efficiency favor resolution of claims in a single forum, especially if they all arise from a single, global conspiracy, and that there is no legitimate comity issue where hard-core cartel activity is involved. These larger equitable issues are unlikely to prove dispositive but may influence the court in one direction or the other, and should be argued in conjunction with the other issues.

Discovery. Courts may choose to defer ruling on the FTAIA issues pending further discovery,⁴¹ although in most instances the evidence necessary to show where the plaintiff suffered injury will be in the plaintiff's hands, e.g., invoices, purchase orders, contracts, and negotiating documents.⁴² On the other hand, defendants often keep better records on their sales than plaintiffs do on their purchases. In cases where plaintiffs are pursuing claims through an agency or alter-ego theory for foreign subsidiaries or affiliates, discovery may turn up evidence that the defendants believed they were dealing with a domestic company, and thus that the plaintiff's U.S. operations would suffer alleged injury.

As noted above, plaintiffs with mixed domestic and foreign transactions may argue that the jurisdictional issues are so intertwined with the merits that discovery on all transactions is warranted and will present little or no additional burden to the parties. Defendants in such cases may have difficulty showing that an early ruling on dismissal of claims with respect to foreign transactions would obviate the need for any discovery.⁴³ On the other hand, a plaintiff who succeeds in rebuffing an early dismissal motion may find that deferral of the FTAIA issue is a Pyrrhic victory. Discovery may be expensive and burdensome for the plaintiff, who often controls key evidence on FTAIA issues. Defendants will push for that evidence, including from foreign affiliates, and may depose the plaintiff's key purchasing personnel to show that the plaintiff's injury arose from foreign effects, or that the plaintiff did not exercise sufficient control over affiliates that purchased the price-fixed products abroad. Particularly for plaintiff class counsel, the cost and burden of full merits discovery may prove to be a poor investment of resources if the plaintiff faces a serious risk of later dismissal due to a lack of subject matter jurisdiction under the FTAIA.

Conclusion

As courts further define and apply *Empagran*, the lines between domestic and foreign injury may be clarified, and courts may adopt settled approaches to the procedural issues discussed above. For now, litigants must be creative and comprehensive as to the facts they allege and prove to show whether antitrust claims involving foreign transactions and conduct fall within the subject matter jurisdiction of U.S.

courts under the FTAIA. Defendants will continue to offer evidence of foreign contacts and effects to show that the proximate causation standard cannot be satisfied. To satisfy this burden, plaintiffs will use a broad range of facts about their purchases to show domestic contacts and injury, and to show that principles of comity and judicial economy support judicial application of a "real-world" perspective on where alleged antitrust injuries arise. ■

¹ *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

² *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 494 (1968).

³ *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 314–15 (1978).

⁴ *Id.* at 315. The specific issue in *Pfizer* was the scope of the term "person" in Section 4 of the Clayton Act, rather than standing or subject matter jurisdiction.

⁵ Pub. L. No. 97-290, Title IV, 96 Stat. 1246 (1982).

⁶ H.R. Rep. No. 97-686, at 10 (1982), reprinted in 1982 U.S.C.C.A.N. 2487, 2495 (citation omitted).

⁷ 15 U.S.C. § 6a.

⁸ *Den Norske Stats Oljeselskap As v. HeereMac Vof*, 241 F.3d 420 (5th Cir. 2001).

⁹ *Id.* at 431.

¹⁰ *Kruman v. Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002); *F. Hoffmann-La Roche Ltd v. Empagran SA*, 315 F.3d 338 (D.C. Cir. 2003).

¹¹ *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267, 1271 (D.C. Cir. 2005).

¹² *Id.* (citation omitted). The Antitrust Modernization Commission solicited comments on whether to recommend revisions to the FTAIA. Antitrust Modernization Commission, Request for Public Comment, 70 Fed. Reg. 28,902–07 (May 19, 2005). Some commentators questioned the direction in which courts would take *Empagran*, but agreed that it was too early to tell. The AMC concluded that, as a general principle, purchases made outside the United States from a seller outside the United States should be deemed outside the scope of the Sherman Act. ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 215 (2007), available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

¹³ See, e.g., *Centerprise Int'l, Ltd. v. Micron Tech., Inc. (Dynamic Random Access Memory (DRAM) Antitrust Litig.)*, 546 F.3d 981 (9th Cir. 2008); *Inquivosa SA v. Ajinomoto Co. (Monosodium Glutamate Antitrust Litig.)*, 477 F.3d 535 (8th Cir. 2007); *Graphite Electrodes Antitrust Litig.*, Nos. 10-md-1244, 00-5414. 2007 WL 137684 (E.D. Pa. Jan. 16, 2007); *Sniado v. Bank Austria AG*, 378 F.3d 210 (2d Cir. 2004); *Latino Quimica-Amtex S.A. v. Akzo Nobel Chems. B.V.*, No. 03 Civ. 10312 (HBDF), 2005 WL 2207017 (S.D.N.Y. Sept. 8, 2005); *Emerson Elec. Co. v. Le Carbone Lorraine, S.A.*, 500 F. Supp. 2d 437 (D.N.J. 2007).

¹⁴ *Advanced Micro Devices, Inc. v. Intel Corp. (In re Intel Corp. Microprocessor Antitrust Litig.)*, No. 05-1717-JJF, CIVA 05-441-JJF, CIVA 05-485-JJF, 2007 WL 137152, at *2 (D. Del. Jan. 12, 2007).

¹⁵ See, e.g., *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 534 F. Supp. 2d 1101, 1116–17 (N.D. Cal. 2007) (*Sun II*).

¹⁶ *Animal Sci. Prods., Inc. v. China Nat'l Metals & Minerals Imp. & Exp. Corp.*, 596 F. Supp. 2d 842, 865-66 (D.N.J. 2008); *Commercial St. Express LLC v. Sara Lee Corp.*, No. 08 C 1179, 2008 WL 5377815, at *3–*5 (N.D. Ill. Dec. 18, 2008); *Am. Copper & Brass, Inc. v. Halcor S.A.*, 494 F. Supp. 2d 873, 876–77 (W.D. Tenn. 2007).

¹⁷ See, e.g., *Animal Sci. Prods.*, 596 F. Supp. 2d at 870–77.

¹⁸ *Graphite Electrodes*, 2007 WL 137684, at *4.

¹⁹ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

- ²⁰ See, e.g., *Dee-K Enters., Inc. v. Heveafil Sdn. Bhd.*, 299 F.3d 281, 294 (4th Cir. 2002); *Turicentro, S.A. v. Am. Airlines Inc.*, 303 F.3d 293, 302 (3d Cir. 2002) (pleaded facts invited FTIA analysis).
- ²¹ *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, No. C 06-1665-PJH, 2007 WL 1056783, at *5 (N.D. Cal. Apr. 5, 2007) (*Sun I*) (complaint dismissed for failure to plead facts with clarity and specificity to distinguish foreign and domestic claims, and to show whether plaintiffs were asserting claims as indirect purchasers).
- ²² See, e.g., *id.*
- ²³ 504 F. Supp. 2d 777 (N.D. Cal. 2007) (*Rubber Chemicals Antitrust Litig.*).
- ²⁴ *Id.* at 781–84; see also *Sun I*, WL 1056783 at *4 (mixed domestic/international transactions claims “make intuitive sense”); *Paul v. Intel Corp. (Intel Corp. Microprocessor Antitrust Litig.)*, 476 F. Supp. 2d 452, 457 (D. Del. 2007); *CSR Ltd. v. CIGNA Corp.*, 405 F. Supp. 2d 526, 549 (D.N.J. 2005).
- ²⁵ *Vitamins Antitrust Litig.*, No. 99-197TFH, 2001 WL 755852, at *2 (D.D.C. June 7, 2001).
- ²⁶ 608 F. Supp. 2d 1166 (N.D. Cal. 2009).
- ²⁷ See also *Emerson Elec. Co. v. Le Carbone Lorraine, S.A.*, 500 F. Supp. 2d 437, 446-47 (D.N.J. 2007) (alleging that plaintiffs are multinational corporations with unitary purchasing organizations in the United States that paid a single global price); *Goodyear Tire & Rubber Co. v. Dow Deutschland GmbH & Co.*, Case No. 5:08 CV 1118 at 4 (N.D. Ohio Mar. 2, 2009).
- ²⁸ *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 731–35 (1977).
- ²⁹ *Sun III*, 608 F. Supp. 2d at 1185–88.
- ³⁰ *Id.* at 1180.
- ³¹ *Rubber Chemicals Antitrust Litig.*, 504 F. Supp. 2d at 784 n.3.
- ³² 504 F. Supp. 2d at 784 n.3 and 608 F. Supp. 2d at 1185–86, respectively.
- ³³ *Marine Hose Antitrust Litig.*, No. 08-MDL-1888-Graham/Turnoff, Order on Class Certification and Preliminary Settlements at 12.
- ³⁴ *Animal Sci. Prods., Inc. v. China Nat'l Metals & Minerals Imp. & Exp. Corp.*, 596 F. Supp. 2d 842, 851 (D.N.J. 2008) (quoting *Twombly*, 550 U.S. at 557).
- ³⁵ See, e.g., *Graphite Electrodes*, 2007 WL 137684, at *2. It takes only one defendant to challenge subject matter jurisdiction over the entire action. *Am. Copper & Brass, Inc. v. Halcor S.A.*, 494 F. Supp. 2d 873, 875 (W.D. Tenn. 2007).
- ³⁶ 494 F. Supp. 2d 873 (W.D. Tenn. 2007).
- ³⁷ *Id.* at 876–78.
- ³⁸ See, e.g., *Sun III*, 608 F. Supp. 2d 1166, 1185 (N.D. Cal. 2009).
- ³⁹ See, e.g., *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Animal Sci. Prods.*, 596 F. Supp. 2d at 850 n.4. In the Third Circuit, courts demand less in the way of jurisdictional proof than would be appropriate at a later stage. *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 892 (3d Cir. 1977); *CSR Ltd. v. CIGNA Corp.*, 405 F. Supp. 2d 526, 549, 551 (D.N.J. 2005).
- ⁴⁰ *Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 538 (8th Cir. 2007).
- ⁴¹ *Goodyear Tire & Rubber Co. v. Dow Deutschland GmbH & Co.*, Case No. 5:08 CV 1118 (N.D. Ohio Mar. 2, 2009) (order); *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 534 F. Supp. 2d 1101, 1117 (N.D. Cal. 2007).
- ⁴² In *Graphite Electrodes*, the court declined to authorize jurisdictional discovery to locate invoices from defendants because “such invoices are just as likely to be in the possession of plaintiff . . . [and] plaintiff . . . had ample opportunity to produce them before admitting their non-existence at oral argument.” 2007 WL 137684, at *6 n.11.
- ⁴³ Even when courts dismiss foreign transactions from a claim, they often permit foreign discovery on defendant’s intent and alleged anticompetitive conduct, and effects on competition. *United States v. Dentsply Int'l, Inc.*, No. Civ. A 99-5 MMS, 2000 WL 654286, at *5 (D. Del. May 10, 2000); *Plastics Additives Antitrust Litig.*, No. Civ. A. 03-2038, 2004 WL 2743591, at *14 (E.D. Pa. Nov. 29, 2004); *In re Intel*, 2007 WL 137152, at *12–*13.

TO: Antitrust Section Members

FROM: Ilene Gotts, *Chair, Section of Antitrust Law*

SUBJECT: Nominating Committee

■ PURSUANT TO THE BYLAWS of the Section of Antitrust Law, the Chair of the Section is called upon to appoint a Nominating Committee composed of five Section members to nominate Section members for open positions among the Officers and Council to be elected at the next Annual Meeting. I am pleased to announce that I have appointed the following distinguished members of the Section to serve on the 2009–2010 Nominating Committee:

Kathryn M. Fenton, Chair

Jones Day
51 Louisiana Avenue, NW
Washington, DC 20001-2105

Michael G. Egge

Latham & Watkins LLP
555 11th Street, NW
Washington, DC 20004-1327

Donald C. Klawiter

Sheppard Mullin Richter & Hampton LLP
1300 I Street, NW
Washington, DC 20005-3314

James W. Lowe

WilmerHale
1875 Pennsylvania Avenue, NW
Washington, DC 20006-3642

Lynda K. Marshall

Hogan & Hartson LLP
555 13th Street, NW
Washington, DC 20004-1109

Any member of the Section wishing to make recommendations to the Nominating Committee should convey comments to the Chair or to any other member of the Committee.