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I. INTRODUCTION

As global economic trade has increased, so has the number of price-fixing plaintiffs who have sought recovery in U.S. courts under U.S. antitrust laws for damages suffered as a result of cartel activity abroad. Historically, plaintiffs suing in U.S. courts under U.S. laws have had a difficult time getting beyond the pleadings stage in cases targeting foreign price-fixing. But that may be changing.

Recent cases interpreting the Foreign Trade Antitrust Improvements Act ("FTAIA"),[2] the statute that governs the extraterritorial application of U.S. antitrust laws, may have lowered the bar for plaintiffs seeking recovery under the Sherman Act for anticompetitive behavior that occurs overseas but affects the U.S. economy. These cases have criticized the prevailing view that the FTAIA enhances the burden borne by plaintiffs to establish federal court jurisdiction in cases involving overseas conduct, and have favored, instead, the view that the statute merely adds an element to an antitrust cause of action, one that defendants must rebut to prevail on a motion to dismiss.

Under this new rule, defendants may find it more difficult to win early dismissal, and avoid expensive discovery, in antitrust cases involving foreign conduct affecting U.S. commerce. Because there is now a circuit split on the issue, it is ripe for Supreme Court attention. Given the increase, and increasing significance, of global trade, this is an invitation the Court should accept.

Recent cases have also refined the scope of the FTAIA and its application to indirect purchaser claims under state law. The emerging view suggests that U.S. courts are actively policing overseas conduct whose impact is felt on U.S. shores.

II. THE FTAIA'S TROUBLED HISTORY

The FTAIA was enacted in 1982 to put well-defined limits on the application of U.S. antitrust laws to conduct that occurs overseas. Under the Act, U.S. antitrust laws do not reach conduct involving trade or commerce with foreign nations unless it "involves . . . import commerce" or has a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce (including, e.g., imports and exports).

The statute was intended to address confusion about the extraterritorial reach of U.S. antitrust laws. Prior to its enactment, the extent to which foreign conduct fell within the purview of U.S. antitrust laws was governed by a two-part test developed at common law. Anticompetitive behavior occurring entirely overseas would be subject to U.S. competition laws

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[2] 15 U.S.C. 6a.

only if the actors "intended to affect imports and did affect them."[3] The FTAIA superseded the common law rule with one that

> initially lays down a general rule placing all (nonimport) activity involving foreign commerce outside the Sherman Act's reach. It then brings such conduct back within the Sherman Act's reach provided that the conduct both (1) sufficiently affects American commerce, i.e., it has a "direct, substantial, and reasonably foreseeable effect" on American domestic, import or (certain) export commerce, and (2) has an effect of a kind that antitrust law considers harmful, i.e., the "effect" must "giv[e] rise to a [Sherman Act] claim."[4]

This "effects" exception to the FTAIA's general rule that the Sherman Act does not reach foreign activity, applies only to non-import trade or commerce. Thus, there is a second exception to the FTAIA's general rule for conduct that "involves" import trade or commerce. Under the FTAIA, therefore, the Sherman Act does reach (a) foreign conduct that has a direct, substantial, and reasonably foreseeable effect on domestic commerce, and (b) foreign conduct that "involves . . . import trade or import commerce."[5]

Since its enactment, the FTAIA has been roundly criticized for its ambiguity and opacity.[6] Courts have struggled, for example, with the statute's use of the concept of "direct" effects on U.S. commerce.[7] Courts have also reached differing conclusions on whether U.S. impact must be both "direct" and "substantial." While most courts have required domestic effects to be both direct and substantial, some have viewed the two requirements disjunctively.[8] A further ambiguity in the statute, whether it requires the domestic effect of defendants' foreign conduct to have caused the very injury that the plaintiff is suing over rather than a hypothetical injury to a would-be U.S. plaintiff (the latter of which would permit a foreign plaintiff to sue a foreign defendant in a U.S. court under U.S. antitrust laws over entirely foreign conduct and

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[3] *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 444 (2d Cir. 1945).

[4] *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 162 (2004) (quoting 15 U.S.C. § 6a, emphasis in original). The FTAIA reads, in relevant part:

> 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.

[5] 15 U.S.C. 6a. *See also Carpet Group Int'l v. Oriental Rug Importers Ass'n*, 227 F.3d 62, 72 (3d Cir. 2000); 54 Am. Jur. 2d § 18, at 77 ("Since the FTAIA clearly states that the Sherman Act is not applicable to trade or commerce other than import trade or import commerce, the Sherman Act continues to apply to import trade and import commerce, thereby rendering the FTAIA's requirement of a direct, substantial, and reasonably foreseeable effect inapplicable to an action alleging an impact on import trade and import commerce."

[6] *See, e.g.*, PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, at 288 (3d ed. 2006); Max Huffman, *A Retrospective on Twenty-Five Years of the Foreign Trade Antitrust Improvements Act*, 44 HOUS. L. REV. 285, 286 (2007).

[7] Compare, for example, *In re Intel Corp. Microprocessor Antitrust Litig.*, 452 F. Supp. 555, 561 (D. Del. 2006), and *United States v. LSL Biotechnologies*, 379 F.3d 672, 680-81 (9th Cir. 2004), both of which adhere to a very strong proximate cause concept, with the legislative history of the statute at H.R. Rep. No. 97-686, pts. D(4), E(2) (1982), which reflects a much looser view that mere "spillover" effects of foreign cartels on domestic markets is sufficiently "direct" to invoke U.S. antitrust law.

[8] *See, e.g., Papst Motoren GMbH & Co. v. Kanematsu-Goshu (U.S.A.) Inc.*, 629 F. Supp. 864, 868 (S.D.N.Y. 1986).

foreign injury), was resolved by the Supreme Court in *Empagran*, which held that a claim under U.S. antitrust laws requires the domestic effects of the objected-to foreign conduct to have caused the plaintiff's injury.

III. THE JURISDICTION/SUBSTANTIVE ELEMENT DEBATE

The latest, and perhaps most fundamental, issue to frustrate attempts to decipher the FTAIA concerns is whether it represents a jurisdictional limit on the ability of U.S. courts to hear an antitrust claim concerning foreign conduct or, instead, constitutes a substantive element that must be satisfied for plaintiffs to have an antitrust cause of action. A substantive cause of action has been likened to a ticket permitting a plaintiff to enter the federal judicial process, and the jurisdiction of a federal court has been viewed as the power that allows that court to punch a plaintiff's the ticket.[9] The question here is whether Congress meant for the FTAIA to be an element plaintiffs must satisfy to acquire a ticket to the federal judicial process, or a limit on U.S. courts' ability to punch such tickets.

A. Recent FTAIA Jurisprudence

Until recently, courts treated the FTAIA as a jurisdictional limit on the competence of U.S. courts to hear antitrust claims based on foreign conduct; under this approach, unless plaintiffs offer evidence of U.S. impact, usually at the outset of the case, they are vulnerable to dismissal from U.S. federal court for lack of subject-matter jurisdiction. In *Animal Science Products, Inc. v. China Minmetals Corp., et al.*,[10] however, the Third Circuit overturned its previous rulings and rejected that jurisdictional interpretation in favor of one that treats the U.S. effects and import involvement requirements as substantive elements of an antitrust claim.

While plaintiffs must plead and eventually prove U.S. commercial effects or involvement in U.S. import commerce, they need not do so at the outset of a case merely to establish U.S. federal court jurisdiction. And in *In re TFT-LCD (Flat Panel) Antitrust Litigation*,[11] Judge Illston rejected prevailing Ninth Circuit law[12] and agreed with the Third Circuit "that the FTAIA is not jurisdictional." Both cases rely heavily on the Supreme Court's decision in *Arbaugh v. Y&H Corp.*,[13] which held that a threshold limitation on a statute's scope counts as jurisdictional only when Congress "clearly states" as much. [14]

B. Why the Jurisdiction/Substantive Element Debate Matters

The difference between the two interpretations of the FTAIA may seem elusive and devoid of real substance—after all, whether the FTAIA sets forth a jurisdictional requirement or

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[9] *See* Howard M. Wasserman, *Jurisdiction and Merits*, 80 WASH. L. REV. 643, 676 (2005).

[10] No. 10-2288 (3d Cir. Aug. 17, 2011).

[11] No. 3:07-md-01827 (N.D. Cal., Oct. 5, 2011).

[12] *See United States v. LSL Biotechnologies*, 379 F.3d 672, 683 (9th Cir. 2004) ("The FTAIA provides the standard for establishing when subject matter jurisdiction exists over a foreign restraint of trade.")

[13] *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006).

[14] In a third case, *Minn-Chem Inc. v. Agrium Inc.(Potash)*, Case No. 10-01712 (7th Cir. 2011), the Seventh Circuit acknowledged that *Arbaugh* and *Animal Science* may require it to revisit its own jurisdictional interpretation of the FTAIA as set forth in *United Phosphorus, Ltd. V. Angus Chemical Co.*, 322 F.3d 942 (7th Cir. 2003), but it declined to decide between the two interpretations. On the facts of the case before it, the panel ruled against the plaintiffs, stating that it did not matter which interpretation was adopted. The *Potash* plaintiffs subsequently petitioned for an en banc rehearing; that petition is currently pending.

an element in a cause of action, it must still be satisfied for a plaintiff to prevail in court.[15] In many cases, however, tremendous practical implications may flow from the resolution of this issue.

If the test is jurisdictional, then a court confronted with it in a motion to dismiss for lack of jurisdiction under Federal Rule of Procedure 12(b)(1) may look beyond the four corners of the plaintiff's complaint and determine whether there is evidence sufficient to establish the court's subject-matter jurisdiction over the controversy. And, in such factual (as opposed to facial) challenges to the court's jurisdiction, the plaintiff bears the burden of adducing such evidence, likely without the benefit of discovery or an opportunity to develop an appropriate record, and without the presumption of truthfulness of its allegations.[16] In the *Animal Science* case itself, for example, "the District Court engaged in extensive fact-finding and held that the FTAIA deprived it of subject matter jurisdiction."[17]

If, however, the test is an element in an antitrust cause of action, then a court confronted with the question in a motion to dismiss for failure to state claim under Rule 12(b)(6) may not look beyond the complaint, and must take all well-pleaded allegations as true, or treat the motion as one for summary judgment; in either case, the defendant bears the burden of persuasion.[18] Under the Third Circuit's new law rejecting the jurisdictional interpretation of the test, defendants will face greater difficulty achieving early dismissal of FTAIA cases because they will be confined to the more plaintiff-friendly Rule 12(b)(6) or summary judgment context.[19]

C. Why Courts are Rejecting the Jurisdictional Interpretation of the FTAIA

It would be a mistake to take this assault on the jurisdictional interpretation lightly. It is a carefully reasoned opinion that derives support from the Supreme Court's decision in *Arbaugh v. Y&H Corp.*,[20] and aligns itself with Judge Wood's thoughtful dissent in *United Phosphorus, Ltd. V. Angus Chemical Co*.[21] The panel in *Animal Science*, for instance, defined its task to be to:

> determine whether, in enacting the FTAIA, Congress legislated pursuant to its Commerce Clause authority to articulate substantive elements that a plaintiff must satisfy to assert a meritorious claim for antitrust relief or whether Congress acted pursuant to its Article III powers to define the jurisdiction of the federal courts.[22]

The panel found the means to fulfill this task in the Supreme Court's recent *Arbaugh* decision. In *Arbaugh*, the Supreme Court authored a bright line rule to distinguish between

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[15] Indeed, in *Potash*, the Seventh Circuit held that on the facts of that case, the distinction did not matter.

[16] *Animal Science* at 16 n.9; *see also Carpet Group*, 227 F.3d at 69.

[17] *Animal Science* at 6 (citing *Animal Science Prods., Inc. v. China Nat'l Metals & Minerals Imp. & Exp. Corp.*, 702 F. Supp. 2d 320 (D.N.J. 2010)); *see also Carpet Group*, 227 F.3d at 65-70 (describing extensive evidentiary submissions, not all of which were credited, in connection with defendants' Rule 12(b)(1) motion).

[18] *Animal Science* at 16 n.9.

[19] In *Flat Panel*, the court treated the defendants' motion under neither Rule 12(b)(1) nor 12(b)(6). After finding that the FTAIA is not jurisdictional, the court treated the motion as one for summary judgment because it was based on facts developed through discovery and disclosure materials.

[20] 546 U.S. 500 (2006).

[21] 322 F.3d 942 (7th Cir. 2003). *See also* Justice Scalia's dissent in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993). For an extended discussion of FTAIA jurisprudence that to a large extent anticipates the Third Circuit's Animal Science decision, *see* Edward Valdespino, *Shifting Viewpoints: The Foreign Trade Antitrust Improvement Act, a Substantive or Jurisdictional Approach*, 45 (2) TEXAS INT'L L.J, (January 2009).

[22] *Animal Science* at 11-12.

statutory elements that are jurisdictional and those that articulate a "substantive merits" limitation:

> If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.[23]

After noting that the statutory text of the FTAIA is "wholly silent in regard to the jurisdiction of the federal courts," the Third Circuit concluded that the FTAIA is a non-jurisdictional statute.[24]

D. A Circuit Split Ripe For Supreme Court Attention

In reaching this conclusion, the Third Circuit overturned its own previous position,[25] and expressly disagreed with the Seventh Circuit's decision in *United Phosphorus*, which predated *Arbaugh*.[26] Indeed, the *Animal Science* rejection of the jurisdictional interpretation of the FTAIA is also at odds with the views of other circuits.[27] Thus, there is now a circuit split on this issue. Though *MSG* and *DRAM* were both decided after *Arbaugh*, neither acknowledges *Arbaugh's* bright line jurisdictional rule. In light of the Third Circuit's application of *Arbaugh* to the FTAIA jurisdictional debate, the issue may now be framed in a way that is ripe for Supreme Court attention.

III. THE FUTURE OF FTAIA LITIGATION

A. A Fundamental Shift?

For purchasers of price-fixed goods damaged by overseas conduct impacting U.S. commerce, *Animal Science* may portend a welcome reversal of fortune. Rather than defend against jurisdictional motions to dismiss under Rule 12(b)(1), and risk being called upon at the outset of a case to adduce evidence supporting effects on U.S. commerce or involvement in U.S. imports giving rise to antitrust injury, plaintiffs henceforth may need only establish the legal sufficiency of their claims in the context of Rule 12(b)(6) motions. As a result, plaintiffs will more easily reach discovery. Defendants, meanwhile, will be under increased pressure to settle to avoid the expense and burden of protracted international discovery.

B. Important Refinements

The recent FTAIA cases have also added their gloss on the import involvement and U.S. effects exceptions. With respect to import involvement, *Animal Science* lowered the bar for plaintiffs by expanding the scope of the exception. Whereas the District Court in *Animal Science* held that

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[23] *Arbaugh*, 546 U.S. at 515-16. *See also Morrison v. Nat'l Austl. Bank*, ___ U.S. ___, 130 S. Ct. 2869, 2876-77 (2010), in which the Court similarly distinguished "merits question[s]" from those dealing with subject-matter jurisdiction.

[24] *Animal Science* at 14.

[25] *See Turicento*, 303 F.3d at 300-02, and *Carpet Group*, 227 F.3d at 71-73 (3d Cir. 2000).

[26] Indeed, in *Potash*, the Seventh Circuit conceded that its own precedent may not survive *Arbaugh*, stating that it "calls *United Phosphorus* into question. *Id.* at 16.

[27] *See, e.g., Filitech S.A. v. France Telecom S.A.*, 157 F.3d 922, 931 (2d Cir. 1998); *In re Monosodium Glutamate (MSG) Antitrust Litig.*, 477 F.3d 535 (8th Cir. 2007); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981 (9th Cir. 2008).

defendants are beyond the reach of U.S. antitrust laws unless they are "physical importers of goods," the Third Circuit rejected that requirement, saying, "the relevant inquiry is whether the defendants' alleged anticompetitive behavior 'was directed at an import market.'" [28] Anticompetitive conduct falls within the purview of U.S. antitrust laws, in other words, even if it merely "target[s] import goods or services."[29] The *Potash* court expressed essentially the same view.

With respect to the U.S. effects exception, the Third Circuit confirmed, contrary to the District Court's view, that it "does not contain a 'subjective intent' requirement;" it is sufficient if U.S. effects would be "reasonably foreseeable" to "an objectively reasonable person."[30] The *Potash* court focused not on foreseeability but on immediacy. An effect is "direct" if it follows "as an immediate consequence of the defendant's activity" and there are no "uncertain intervening developments" And in the recent *Flat Panel* decision, the court rejected the defendants' position that only the first sale of a price-fixed product is sufficiently direct.

C. Indirect Purchaser Litigation

Recent cases have also addressed the unique circumstances of indirect purchasers who lack standing under federal antitrust law and must therefore seek redress for foreign anticompetitive conduct under state laws.[31] A threshold issue is whether the FTAIA, which expressly refers to the Sherman Act, even applies to claims, such as those of indirect purchasers, asserted under state laws.

One court has considered directly the application of the FTAIA to state law claims and found the statute to apply. In *In re Static Random Access Memory (SRAM) Antitrust Litigation*,[32] Judge Wilken rejected an argument by the indirect purchaser plaintiffs ("IP plaintiffs") that the FTAIA did not apply to price-fixing claims brought under state law, finding that "foreign commerce is 'pre-eminently a matter of national concern' on which the federal government has historically spoken with 'one voice.'"[33] The FTAIA, warts and all, is that voice.

In applying the FTAIA, Judge Wilken anticipated the Third Circuit's reliance on *Arbaugh* in discussing the jurisdiction/substantive element debate, but felt "obliged to treat the FTAIA as jurisdictional" because "*Arbaugh* did not clearly overrule the Ninth Circuit's treatment of the FTAIA as a jurisdictional statute."[34] Under that interpretation of the statute, the court then held that the IP plaintiffs could demonstrate antitrust injury sufficient to state a claim under the FTAIA, but only if the they could adduce evidence that:

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[28] *Animal Science* at 17 (citing *Turicentro, S.A. v. Am. Airlines Inc.*, 303 F.3d 293, 303 (3d Cir. 2002), and *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 395 (2d Cir. 2002)).

[29] *Animal Science* at 18.

[30] *Animal Science* at 20.

[31] For the purpose of this section, assume the indirect purchasers have operations in states that recognize a cause of action for price-fixing under the state's antitrust laws, consumer protection laws, unfair trade laws, or common law. And assume that purchases in such states constitute contacts sufficient to meet due process requirements. *Cf. In re TFT-LCD (Flat Panel) Antitrust Litigation*, 2010 WL 2610641 at *8 (N.D. Cal., June 28, 2010) ("To decide whether the application of a particular State's law comports with the Due Process Clause, the Court must examine 'the contacts of the State, whose law [is to be] applied, with the parties and with the occurrence or transaction giving rise to the litigation." (quoting *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 (1981)).

[32] 2010 WL 5477313 (N.D. Cal., Dec. 31, 2010).

[33] *Id.* at *4 (quoting *Japan Line, Ltd. V. County of L.A.*, 441 U.S. 434, 448, 453-54 (1979).

[34] *Id.* at *3.

> certain types of SRAM products [were] specifically designed to be sold to a particular manufacturer, to be incorporated into a product in turn specifically designed for the United States market, and actually sold in the United States. Supra-competitive pricing of that SRAM could have had a domestic effect in the United States, which could have given rise to antitrust injury.[35]

Thus, under the jurisdictional interpretation of the FTAIA, the IP plaintiffs' ability to state a claim that fell within the FTAIA's jurisdictional limits depended upon whether they could "prove these jurisdictional facts." [36]

As the *SRAM* court intimated, the obligation to adduce evidence supporting "these jurisdictional facts" places a heavy burden on plaintiffs.[37] But this is a burden plaintiffs bear only so long as the FTAIA is interpreted as a jurisdictional statute. If the Ninth Circuit were to follow the Third and treat *Arbaugh* as a warrant to reject the jurisdictional interpretation of the FTAIA, or if it is forced to do so by the Supreme Court, the IP plaintiffs would not have to adduce evidence supporting any "jurisdictional facts" to survive a motion to dismiss. Such evidence could be developed through discovery or, possibly, would not have to be developed at all, as defendants would be more inclined to settle to avoid the expense of protracted international discovery and the risks of trial.

This theory was put to the test in the most recent decision in the *Flat Panel* litigation. There, the plaintiffs used discovery and disclosure materials in responding to a motion that the court treated as one for summary judgment. After rejecting the jurisdictional interpretation of the FTAIA on the basis of *Arbaugh* and *Animal Science*, the court rejected the defendants' view that a "direct" effect is limited to financial harm caused by the first sale of a price-fixed product. The court was persuaded that defendants' foreign conduct had a direct effect on U.S. commerce on the strength of evidence that the alleged cartel members intentionally targeted the U.S. markets.

Flat Panel may thus stand as a harbinger of things to come not just for indirect purchasers of foreign products but for direct purchasers as well. With the benefit of discovery and a more narrow interpretation of the U.S. effects and import involvement exceptions to the FTAIA, plaintiffs may now have an enhanced ability to sue and recover for damages caused by overseas cartel activity.

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[35] *Id.* at *7. When this test is read in conjunction with the Third Circuit's rejection in *Animal Science* of a "subjective intent" requirement in favor of an objective "reasonably foreseeable" standard (*see Animal Science* at 20-21), it becomes far more plausible to suppose that indirect purchaser plaintiffs could allege the required facts in good faith. Injury to indirect purchasers in the U.S. is arguably "reasonably foreseeable" to foreign cartels selling necessary inputs to foreign manufacturers who, in turn, sell and are widely known to sell, into the U.S. import market. For example, the injury to U.S. buyers would be objectively reasonably foreseeable to cartelized foreign car parts suppliers who sell to foreign car manufacturers who, in turn, sell cars to U.S. buyers on the import market.

[36] *Id.* at *7-8. In another recent decision out of the Northern District of California, *Flat Panel*, the court assumed the jurisdictional interpretation of the FTAIA but decline to address the application of the statute to the plaintiffs' state law claims based on foreign cartel activity.

[37] The SRAM court conceded that the IP plaintiffs had adduced some evidence to support the standard set forth above, but found that the evidence was not yet sufficient. Rather than put the IP plaintiffs through their jurisdictional paces prior to trial, however, the court recognized that the IP plaintiffs claims based on domestic sales would proceed to trial in any case, and permitted the IP plaintiffs to present their jurisdictional evidence regarding foreign sales during the damages phase of trial. But, in a nod to the difficulty the IP plaintiffs would face regarding foreign sales, the court warned, "they would be well-advised to be prepared to segregate the claims [of foreign sales from domestic sales]." *Id.*