No. 10-1712

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MINN-CHEM, INCORPORATED, ET AL.,

Plaintiffs – Appellees

v.

AGRIUM INCORPORATED, ET AL.,

Defendants – Appellants

On Interlocutory Appeal from an Order of the
United States District Court for the Northern District of Illinois
MDL Docket No. 1996, Case No. 08-cv-6910
The Honorable Ruben Castillo

RESPONSE BRIEF FOR PLAINTIFFS-APPELLEES

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Plaintiffs-Appellees' Interim Co-Lead Counsel

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DISCLOSURE STATEMENTS

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 10-1712

Short Caption: Minn-Chem, Incorporated, et al., v. Agrium Incorporated, et al.

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Lockridge Grindal Nauen P.L.L.P.; Pearson Simon Warshaw & Penn, LLP; Segal McCambridge Singer & Mahoney, Ltd.; Shefsky & Froelich Ltd.

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

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

No parent corporations

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

N/A

Attorney's Signature: /s/ J. Timothy Eaton Date: 4/21/10

Attorney's Printed Name: J. Timothy Eaton

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

Address: 111 E. Wacker Drive, Suite 2800
Chicago, IL 60601

Phone Number: (312) 527-4000 Fax Number: (312) 527-4011

E-Mail Address: teaton@shefskylaw.com

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N/A

Attorney's Signature: /s/ Patricia Susan Spratt Date: May 6, 2010

Attorney's Printed Name: Patricia Susan Spratt

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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N/A

Attorney's Signature: /s/ Cary E. Donham Date: May 6, 2010

Attorney's Printed Name: Cary E. Donham

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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N/A

Attorney's Signature: /s/ Steven A. Hart Date: 3-7-10

Attorney's Printed Name: Steven A. Hart

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

Address: Segal McCambridge Singer & Mahoney, Ltd.
233 S. Wacker Dr., Ste. 5500, Chicago, Illinois 60606

Phone Number: (312) 645-7800 Fax Number: (312) 645-7711

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N/A

Attorney's Signature: /s/ Scott W. Henry Date: 3-7-10

Attorney's Printed Name: Scott W. Henry

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

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233 S. Wacker Dr., Ste. 5500, Chicago, Illinois 60606

Phone Number: (312) 645-7800 Fax Number: (312) 645-7711

E-Mail Address: shenry@smsm.com

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N/A

Attorney's Signature: /s/ W. Joseph Bruckner Date: 05-04-10

Attorney's Printed Name: W. Joseph Bruckner

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

Address: 100 Washington Avenue South, Suite 2200
Minneapolis, MN 55401

Phone Number: 612-339-6900 Fax Number: 612-339-0981

E-Mail Address: wjbruckner@locklaw.com

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Attorney's Signature: /s/ Richard A. Lockridge Date: 05-04-10

Attorney's Printed Name: Richard A. Lockridge

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

Address: 100 Washington Avenue South, Suite 2200
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Phone Number: 612-339-6900 Fax Number: 612-339-0981

E-Mail Address: ralockridge@locklaw.com

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N/A

Attorney's Signature: /s/ Heidi M. Silton Date: 05-04-10

Attorney's Printed Name: Heidi M. Silton

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

Address: 100 Washington Avenue South, Suite 2200
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E-Mail Address: hmsilton@locklaw.com

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N/A

Attorney's Signature: /s/ Matthew R. Salzwedel Date: 05-04-10

Attorney's Printed Name: Matthew R. Salzwedel

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

Address: 100 Washington Avenue South, Suite 2200
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Phone Number: 612-339-6900 Fax Number: 612-339-0981

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None.

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None.

Attorney's Signature: /s/ Bruce L. Simon Date: May 6, 2010

Attorney's Printed Name: Bruce L. Simon

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

Address: Pearson Simon Warshaw & Penny, LLP
44 Montgomery Street, Suite 2450

Phone Number: (415) 433-9000 Fax Number: (415) 433-9008

E-Mail Address: bsimon@pswplaw.com

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Attorney's Signature: /s/ Jonathan M. Watkins Date: May 7, 2010

Attorney's Printed Name: Jonathan M. Watkins

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

Address: Pearson, Simon, Warshaw & Penny, LLP
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STATEMENT OF JURISDICTION

The Appellants' jurisdictional statement is complete and correct.

STATEMENT OF ISSUES

1. Are allegations sufficient to state a plausible claim under Sherman Act § 1 when they describe an oligopolistic industry whose economic characteristics are conducive to collusion in which there were:

(i) meetings of defendants close in time to parallel supply reductions and price increases;

(ii) parallel price increases without commensurate increases in the cost of production or other input costs or increases in demand;

(iii) parallel supply reductions, at least one of which was directly against producers' unilateral self-interest; and

(iv) statements strongly supporting an inference of collusion.

2. Is the FTAIA inapplicable to Sherman Act § 1 violations when it is alleged that:

(i) the price-fixed product, potash, is imported into the U.S. and sold directly to U.S. purchasers; and

(ii) defendants, as a pattern and practice, collusively restricted the global supply of potash creating shortages that allowed them to artificially raise potash prices to certain non-U.S. countries used as benchmarks to set U.S. prices.

STATEMENT OF THE CASE

Plaintiffs allege a conspiracy among the three major sellers of potash (and their affiliates) who have a 71% share of the global market that raised prices and restricted supply worldwide and in the U.S. since July 2003. The Direct Purchaser Amended Consolidated Class Action Complaint (Dkt. 142, the "Complaint"[1]) alleges facts showing:

(1) "that the structure of the market was such as to make secret price fixing feasible," *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 655 (7th Cir. 2002), an oligopolistic market dominated by a few defendant sellers, high barriers to entry, a commodity product, no close economic substitutes, inelastic demand, and excess capacity;

(2) "the market behaved in a noncompetitive manner" (*id.*):

(a) a series of parallel lockstep price increases after July 2003 that drove prices up approximately 600%, which cannot be explained by changes in costs or in demand; and

(b) a series of coordinated supply restrictions that represented a dramatic break from the prior behavior of former Soviet Union defendant suppliers, including a 12-day announced suspension of sales in October to November 2007 by all but one producer

[1] Herein, "A" references the page number of the Appendix containing the Memorandum Opinion and Order (Dkt. 202), filed November 3, 2009. "SA" references the page number of the Separate Appendix, which includes the Complaint as well as the Indirect Purchasers' Amended Consolidated Class Action (Dkt. 50), filed April 3, 2009 and the District Court's Order dated January 13, 2010 (Dkt. 285) granting in part Defendant's Motion for Certification of Interlocutory Appeal. "BR" references the page number of the Opening Brief for Appellants.

> within a day of their erstwhile competitor's announcement that a sinkhole had reduced its production. Truly competitive producers acting in their own unilateral self-interest, particularly the two with substantial excess capacity, would have sought to sell more potash—or at the very least maintain sales—rather than sell none at all.

The Complaint also alleges non-economic facts "suggesting that [the defendants] were not competing because they had agreed not to compete" (*id.*):

(1) the announcement by one producer (Uralkali) that a different producer (PCS) would be suspending sales due to the October 2007 sinkhole;

(2) production and export shutdowns and reductions by several producers in November 2005 through early February 2006 following a meeting on October 11, 2005, among three CEO's, an Executive Vice President, and other representatives of defendants and co-conspirator Canpotex Ltd. at one defendant's premises;

(3) an announced price increase during a trade association annual meeting in May 2007; and

(4) common ownership of two potash producers by a professed believer that "joint operation allows [producers] to avoid needless competition."

Defendants moved to dismiss the Complaint for failing to state a claim for relief under the Federal Rules of Civil Procedure 12(b)(6). Denying the motion, the

District Court found in addition to other factors indicating the plausibility of the alleged conspiracy:

(1) "the fact that several Defendants collectively suspended sales and gave up an opportunity to gain market share, begins to suggest that there was an agreement amongst Defendants to do so" (A47); and

(2) "these suspensions [that] all took place over the same twelve-day period and that the announcement of PCS's suspension was made by Uralkali, its purported competitor . . . are more suggestive of concerted action than 'independent business judgment'" (A48.)

It concluded, in summary:

> Plaintiffs allege parallel production cuts which at least for some Defendants represented a "radical change" in behavior; overlapping business ventures; specific meetings attended by Defendants which precipitated production cuts and price increases; and a "joint sales suspension" that was contrary to Defendants' economic interests . . . [which taken] as a whole . . . satisfied the *Twombly* standard; the allegations propel Defendants' conduct out of "neutral territory" to plausibly suggest entitlement to relief.

A49.

At defendants' request, the District Court certified the following question:

> Whether an international antitrust complaint states a plausible cause of action within the meaning of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), where it alleges parallel market behavior and opportunities to conspire."

SA102.

The defendants also moved under Rules 12(b)(1) and 12(b)(6) to dismiss the Complaint under the Foreign Trade Antitrust Improvements Act of 1982, 15 U.S.C. § 6(a) (the "FTAIA"), arguing that the District Court did not have jurisdiction over

conduct involving trade or commerce with foreign nations unless such conduct had a "direct, substantial, and reasonably foreseeable effect" on American domestic import or certain export commerce and that their alleged overseas anti-competitive behavior did not have such a "direct, substantial, or reasonably foreseeable effect" on American commerce.

The District Court also rejected this basis for dismissal. It found the FTAIA's introductory language "provides that the antitrust law *shall* apply to conduct 'involving import trade or commerce' with foreign nations." A26 (emphasis in original). In finding this exception applied, the court found:

> [T]he complaints allege more than mere overseas sales that have an impact on the U.S. markets. Plaintiffs specifically allege that Defendants "sold and distributed potash in the United States, directly or through its affiliates." (R. 142, Am. Direct Compl. at ¶¶15, 16, 18, 19, 21, 22, 27, 68, 71, 145 . . . .) Further, Plaintiffs allege that Defendants entered into a conspiracy and combination to "fix, raise, maintain and stabilize the price at which potash is sold." (R. 142, Am. Direct Compl. at ¶3 . . . .) The tight nexus between the alleged illegal conduct and Defendants' import activities leads this Court to conclude that the former "involved" the latter. Thus, Plaintiffs have pleaded enough to fall under the FTAIA's parenthetical "import trade or import commerce" exclusion, rendering any examination of the FTAIA's "direct, substantial, and reasonably foreseeable" effects test unnecessary."

A28-29.

In addition, because the U.S. is one of the top two world consumers of potash, every output restriction used by defendants directly led to a substantial supply restriction in the U.S. based on this country's share of the global potash market.

Again, at defendants' request, the District Court certified the following question:

> Whether a defendant who sold a product in the United States with a price that was allegedly artificially inflated through anti-competitive activity involving foreign markets, engaged in "conduct involving import trade or import commerce" under the FTAIA, 15 U.S.C. § 6(a).

SA102.

STATEMENT OF FACTS

I. THE PRODUCT

Potash refers to mineral and chemical salts containing potassium mined from naturally occurring ore deposits. SA12 ¶48. Canada, Russia, and Belarus have over 50% of world potash supplies. SA12 ¶50. Potash is principally used as an agricultural fertilizer, but it is also used in metal plating and production of glass, ceramics, soaps, and animal feed supplements. SA12 ¶48.

II. DEFENDANTS

There are just three principal sellers of potash worldwide, whose affiliates produced 71% of the world's potash in 2008 (SA14 ¶57) they are:

(1) defendant JSC Belarusian Potash Company, a joint venture between and exclusive distributor for potash producers defendant JSC Uralkali and former defendant RUE PA Belaruskali (dismissed on sovereign immunity grounds (Dkt. 289)), with a wholly-owned U.S. subsidiary defendant BPC Chicago L.L.C. (JSC Belarusian Potash Company and BPC Chicago L.L.C. are together called "BPC" throughout the Complaint) (SA6-7 ¶¶24-28);

(2) defendant JSC International Potash Company ("IPC"), the exclusive distributor of potash produced by defendant JSC Silvinit (SA7-8 ¶¶29-30); and

(3) Canpotex Ltd., a Canadian corporation that is owned in equal shares by Agrium (defendant Canadian corporation Agrium Inc. and its wholly-owned U.S. subsidiary defendant Agrium U.S. Inc.), Mosaic (defendant Mosaic Company and its wholly-owned subsidiary defendant Mosaic Crop Nutrition L.L.C.), and PCS (defendant Canadian corporation Potash Corporation of Saskatchewan, Inc. and its wholly-owned U.S. subsidiary defendant PCS Sales (USA), Inc.) (SA4-6 ¶¶15-23; SA8 ¶31.) Canpotex is the unified sales, marketing and distribution company for Agrium, Mosaic and PCS throughout the world, except in Canada and the United States. SA8 ¶31.

III. THE POTASH MARKET IS CONDUCIVE TO COLLUSION

Potash is a homogeneous commodity product (SA13 ¶53) that is sold in a *global market*. SA33-34 ¶¶145, 146. Canada is the largest producer and exporter, accounting for nearly one-third of total production and 40% of world trade. SA13 ¶52. The world potash market is dominated by BPC, IPC and Canpotex and their affiliates, whose market shares have not changed in any material way since July 2003. SA14 ¶57; SA1 ¶1. As PCS's CFO stated, "There's not a lot of competition out there." SA14 ¶59.

The potash industry has very high barriers to entry. SA14 ¶56. A new mine requires approximately $2.5 billion in up-front costs and five to seven years of development time. SA14 ¶56. Such barriers are conducive to a cartel, because they protect existing suppliers from competition and perpetuate high market concentration. SA14 ¶56.

The potash industry is conducive to formation of a supply-restriction cartel. SA13 ¶54. Because there is no cost-effective substitute for potash as an agricultural fertilizer and the cost of potash is a relatively small part of total crop production costs, demand for potash is inelastic. SA12 ¶48; SA13 ¶54. Therefore, as potash prices increase, buyers tend to purchase at the higher price, rather than decrease the amount of their purchases. SA13 ¶54

The majority of potash producers' costs are variable costs, providing less incentive for a producer to operate at full capacity. SA13-14 ¶55. This can allow a cartel to boost prices artificially with greater success than when fixed costs are the largest component of production costs. SA13-14 ¶55.

IV. EXCESS CAPACITY AMONG PRODUCERS.

During the 1990s, potash producers, particularly those located in the former Soviet Union, increased the supply of potash in world markets, resulting in substantial price declines and limiting the profits of producers around the world. SA2 ¶3. A remarkable run-up in prices began in 2003 (SA25-27 ¶¶110, 113-115), but, between 2003 and 2008, PCS, the world's largest potash producer, operated at low capacity utilization rates, ranging from 54% to 69%. SA31 ¶133. Also, in the

first half of 2006, Uralkali reduced its capacity utilization to 68%, and in December 2007, it claimed it had the ability to add "significant capacity on the cheapest basis" versus its peers. SA22, SA31 ¶¶95, 134.

V. THERE HAS BEEN A HIGH LEVEL OF COOPERATION AND COMMUNICATIONS AMONG DEFENDANTS.

The Complaint directly alleges an extraordinary level of cooperation among defendants since 2003. PCS, Agrium, and Mosaic, as joint venturers in Canpotex, had access to the others' information about production, capacity, and pricing. SA16 ¶¶68-69. Since 2005, Uralkali and Belaruskali have similarly been joint venturers in BPC. SA16-17 ¶71. Dmitry Rybolovlev, a major owner of both Uralkali (at least 66%) and Silvinit (about 20%), has acknowledged that "joint operation allows [potash producers] to avoid needless competition." SA17 ¶¶72-73.

According to an outside analyst, "BPC and Canpotex have a dominant role in setting annual prices with large potash customers, such as China, India, and Brazil." SA33 ¶142. Defendants then use these prices to determine the prices in other markets, including the U.S. SA25-26 ¶111; SA34 ¶146. Uralkali has told analysts that the "[t]wo major export associations [Canpotex and BPC] ensure [a] stable pricing environment" for potash. SA33 ¶141. In 2007, BPC's Director General admitted that BPC was "a leader to create an acceptable world market price condition for all manufacturers of potash fertilizers." SA33 ¶143.

In addition, senior executives have visited each others' plants, thereby creating a ready opportunity to reach agreements. For example, on October 11, 2005, PCS's President and CEO William Doyle, Canpotex's CEO Michael Wilson, Mosaic's

Executive Vice President James T. Thompson, Uralkali's General Director, President, and CEO Vladislov Baumgertner, and representatives of Belaruskali and Silvinit met at Uralkali's premises. SA17 ¶75. After the meeting, in November and December 2005, PCS and Mosaic announced production shutdowns, and, in January 2006, Uralkali reduced production while Belaruskali cut exports. SA20-SA21 ¶¶88-89, 92.

In July 2006, Uralkali executives visited Mosaic's plant and met with Mosaic's Executive Vice President. SA18 ¶76. Silvinit and Belaruskali executives often visited each other. SA18 ¶77.

Senior officials of defendants attended the International Fertilizer Industry Association ("IFIA") annual conferences, which they regularly used as a venue to negotiate potash prices. SA19 ¶81. Thus, in May 2007, representatives of PCS, Mosaic, Agrium, Belaruskali, Canpotex, and BPC attended the 75th annual IFIA meeting in Istanbul, Turkey, during which major potash manufacturers announced a price increase. SA19 ¶82.

Defendants are also members of The Fertilizer Institute ("TFI"), and defendant representatives attended annual Fertilizer Outlook and Technology Conferences sponsored by TFI and the Fertilizer Industry Round Table. SA19-20 ¶¶83, 85.

Defendants' high level of cooperation and their involvement in long-standing joint ventures have given them continuous opportunities to discuss potash pricing, capacity utilization and other important prospective information. SA18 ¶79. And, as

discussed below, the Complaint alleges that the defendants took advantage of these opportunities to cause prices in the potash market to increase approximately 600% between 2003 and the present, often during times of slack or decreasing demand. SA22-23, 25-26, 30 ¶¶97, 130-131, 110, 113.

VI. POTASH PRICES BEGAN SKYROCKETING IN 2003.

Defendants set U.S. potash prices according to benchmarks based on sales in China, India, and elsewhere. SA13 ¶52; SA34 ¶145. Defendants negotiate term contracts for purchases of potash throughout the world. SA25-26 ¶111. Agreements with buyers in China, India, and Brazil typically are made first. SA25-26 ¶111. Once defendants establish these prices, they use them to determine potash prices in other major markets, including the U.S. SA25-26 ¶111; SA34 ¶146. The prices for term contracts become benchmarks for spot market sales, which typically are higher than those of term contracts. SA25-26 ¶111. Defendants knew and intended that their global conspiracy to establish prices for sales to potash buyers abroad would directly affect the prices that U.S. potash purchasers had to pay. SA26 ¶112; SA34 ¶146. Indeed, these global potash prices set a benchmark for domestic potash prices. SA34 ¶146. According to one analyst, "The barriers that we have seen in the past between domestic and international prices have just fallen down. We're now participating in a global fertilizer market." SA34 ¶146.

In mid-2003, after years of stable and sometimes declining prices, the price of potash began to increase dramatically. SA26-27 ¶¶113-15; SA36 ¶156. From July 2003 through 2008, through a series of parallel lockstep price increases, U.S. potash

prices increased at least 600%. SA26-27 ¶¶113-14; SA27-30 ¶¶116-129. These increases were not commensurate with producers' changes in costs of production or other inputs (SA30 ¶129); cannot be explained by demand (SA30 ¶130), which at crucial times, such as in 2005 and 2006 or late 2008, was decreasing (SA21 ¶¶90-91; SA30 ¶130); and far exceeded increases in the price of seeds (30%), livestock (27%), and fuels (43%). SA34 ¶147. Moreover, even though prices for fertilizers began to decline dramatically in late 2008 and early 2009, prices for potash, a key fertilizer component, remained high and increased. SA30 ¶130.

For example, in early 2003, IPC announced it would increase potash prices by $8 per ton, and, within a month, Canpotex announced an identical increase for sales to Brazil. SA27 ¶117. In March 2003, Mosaic's predecessor, IMC Global Inc. ("IMC"), announced a price increase from $81 to $89 per ton for its sales to the U.S., and PCS disclosed an identical increase. SA27 ¶118.

As a second example, in January 2004, Canpotex announced increases in potash prices to buyers in Brazil, and IPC announced increases to buyers in India. SA28 ¶120. Shortly afterwards, PCS and IMC announced two $5 per ton price increases setting prices for potash for their U.S. customers at $108 - $110 per ton, up from $89 per ton in March 2003. SA27-28 ¶¶118, 120.

Similarly, in May 2004, Canpotex, which does not sell in North America, announced a $20 per ton price increase, and two-thirds of its shareholders, PCS and IMC, then announced an immediate $5 per ton increase and a $15 per ton increase effective in July 2004 for their U.S. customers. SA28 ¶121.

Further, during the first half of 2006, Uralkali and PCS jointly reduced their capacity utilization rates to 68% and 60%, respectively, thereby reducing their sales by 23% and 20%, respectively, to eliminate discounted prices to Chinese purchasers and set a benchmark for other buyers around the world. SA21-SA22 ¶¶94-96.

VII. DEFENDANTS COORDINATED RESTRICTIONS IN OUTPUT AND SUPPLY OF POTASH RESULTING IN INCREASED PRICES

Defendants implemented their conspiracy, at least in part, through coordinated restrictions in potash output that resulted in higher prices in the global potash market, including the U.S. SA20 ¶¶87; SA22 ¶95; SA24 ¶¶105-06.

A. Output Restrictions at the End of 2005

As global demand for potash declined in the second half of 2005, defendants jointly restricted output as a means of maintaining price levels. SA20 ¶88. On October 11, 2005, defendants as well as joint venture and co-conspirator Canpotex met. SA17 ¶75. Shortly thereafter, Mosaic announced temporary output cuts at several North American locations for November and December 2005 removing 200,000 tons from the market. SA20 ¶89. Similarly, in November 2005, PCS announced that it would shut two mines from December 11, 2005, to January 7, 2006, removing approximately 250,000 to 300,000 tons from the market. SA20 ¶88. On December 22, 2005, PCS further announced that it was shutting its Rocanville mine in January and early February 2006 removing approximately 1.34 million tons from the market. SA20 ¶88.

B. Joint Reductions in Output in 2006

Joint reductions in output continued in 2006 following the October 11, 2005 meeting. SA21 ¶91. In January 2006, Uralkali shut down potash production removing approximately 200,000 tons from the market, and Belaruskali cut exports by 50 percent removing approximately 250,000 tons. SA21 ¶92. During the first quarter of 2006, PCS took 32 mine shutdown weeks reducing output from 2.4 million tons to 1.3 million tons. SA21 ¶91. In the second quarter of 2006, Silvinit shut down mines to remove approximately 100,000 tons from the market, and the other former Soviet Union producers removed a further approximately 400,000 tons. SA21 ¶¶92-93.

This "discipline" was in sharp contrast to the years before 2003 when the same former Soviet Union producers had sought to maintain volume over price and flooded the market with excess supply when potash demand declined. SA21 ¶93.

C. The Silvinit Sinkhole in October-November 2007

Defendants again jointly restricted supply in 2007 to impose price increases. SA23 ¶98. On October 25, 2007, Silvinit announced it might have to suspend shipments from one mine due to a sinkhole. SA23 ¶98. Within a day, Uralkali, Agrium and BPC all announced they would suspend sales of their own potash because of Silvinit's suspension, and *Uralkali* announced that PCS would also suspend PCS's sales. SA23 ¶99.

On November 6, 2007, Silvinit announced it would resume sales as the sinkhole was advancing more slowly. SA23 ¶101. Within a day, Uralkali, PCS, and

Agrium announced they too would resume sales. SA23 ¶101. Shortly after these announcements that major suppliers of potash were resuming sales, potash prices increased to record highs on fears of a global shortage. SA24 ¶102.

The joint suspension of sales by PCS, Uralkali, Agrium, and BPC during the 12-day shutdown by Silivinit made no economic sense absent a cartel because, in a truly competitive market, producers would have had an incentive to increase, not suspend, sales to take advantage of their competitor's reduced output and thus gain market share. SA24 ¶103. This would be especially true of PCS and Uralkali, both of which had substantial excess capacity. SA22 ¶95; SA31 ¶¶133-34. In late October 2007, in the midst of the suspensions, at an IFIA meeting in Vancouver, Canada, PCS's President and CEO publicly stated that the effect of the suspensions, "[i]n terms of guessing where the price could go, I'd just say hold on to your hat because it would have a major impact on pricing." SA23 ¶100.

D. The Second Silvinit Sinkhole Gambit in May 2008

In May 2008, Silvinit disclosed that an expanding sinkhole threatened its potash supply, although within two weeks it disclosed that the sinkhole had stopped growing and the situation could not get worse. SA24 ¶104.

Shortly thereafter, potash prices increased dramatically. SA24 ¶106. On July 8, 2008, PCS announced that prices of potash to the U.S. would increase by $250 per ton, 48% above the previous price. SA24 ¶105. Canpotex (which only sells outside the U.S and Canada) then announced a spot price of $1,000 per ton effective for the fourth quarter 2008, and BPC contracted to supply 30,000 tons of potash to U.S.

purchasers beginning in August 2008 at $1,000 per ton. SA8 ¶31; SA7 ¶27; SA24 ¶106.

E. Joint Output Reductions at the End of 2008

On November 1, 2008, Uralkali announced that it would cut potash production. SA24-25 ¶107. In December 2008, PCS's CFO complimented the Belarusian defendants on their "tremendous discipline . . . in terms of managing supply in the marketplace." SA25 ¶108. In the same month, PCS announced it would cut potash production by two million tons (15% of capacity) in the first quarter of 2009. SA24-25 ¶107. In December 2008, Agrium also announced that it would cut production in its North American plants. SA24-25 ¶107.

PCS's CFO separately commented on why potash prices had not fallen as other fertilizer prices had (as would have been expected in the severe worldwide economic downturn in the fourth quarter 2008 and first quarter 2009), "a big part of the story that is here is that you're just seeing a lot of good discipline by all the producers right now in the marketplace, whether they're cutting back production or building some inventory." SA24 ¶108.

F. Defendants' Potash Sales in the U.S.

The Complaint alleges defendants' direct involvement in the U.S. potash market. For example, each defendant, either directly or indirectly, sold potash in the U.S. (SA11 ¶45) and defendants sold potash to U.S. customers at anticompetitive prices (SA37-SA38 ¶163.) In 2008, 5.3 million tons of the 6.2 million tons of potash consumed in the U.S. was imported. SA13 ¶51. Canadian potash

manufacturers supply 40% of the world trade (SA13 ¶52) with half of Canadian exports going to the U.S. (SA13 ¶51) while BPC markets and sells Russian potash in the U.S. (SA16-17 ¶71).

SUMMARY OF ARGUMENT

The Complaint states more than a mere "allegation of parallel conduct and a bare assertion of conspiracy," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007), and it readily "allows the court to draw the reasonable inference that the defendant[s are] liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S. Ct. 1937, 1949 (2009). It contains "enough factual matter (taken as true) to suggest that an agreement was made" by all defendants, *Twombly*, 550 U.S. at 556, establishing:

(1) a market structure conducive to collusion;

(2) noncompetitive conduct through (i) a series of parallel lockstep price increases that cannot be explained by changes in costs or demand, and (ii) a series of coordinated supply restrictions representing a dramatic break from the past; and

(3) noneconomic facts suggesting agreement including (i) the announcement of PCS's suspension of sales in October 2007 by Uralkali, (ii) production and export shutdowns and reductions following a meeting among defendants' CEOs and others, (iii) the announcement of price increases during a trade association annual meeting; and (iv) the pub-

lic statement by a major owner of two defendant producers that joint operation avoids "needless competition."

The FTAIA is inapplicable here by its own terms because this case involves "import commerce." 15 U.S.C. § 6(a). *See Dee-K Enters., Inc. v. Heveafil Sdn. Bhd.*, 299 F.3d 281, 287 (4th Cir. 2002); *Carpet Group, Int'l v. Oriental Rug Importers Ass'n*, 227 F.3d 62, 72-73 (3d Cir. 2000). Despite defendants' attempts to redefine the commerce at issue, the Complaint plainly alleges that plaintiffs' claims stem from defendants' importation of potash into the U.S. and sales in the U.S. to U.S. customers. SA11 ¶¶45-47; SA13 ¶¶51, 52. Accordingly, the Court need look no further than the first sentence of the FTAIA providing that the Sherman Act applies to "import trade or import commerce." 15 U.S.C. § 6(a).

Second, even if defendants' sales of potash in the U.S. were tested under the standard of the FTAIA, it would not bar plaintiffs' claims. The alleged conspiracy to fix the global price of potash prices by way of output restrictions that increased benchmark prices had a direct, substantial, and reasonably foreseeable effect on U.S. commerce. Defendants intentionally restricted output in order to create global supply shortages and artificially raise prices. These artificial price increases initially resulted in increasing prices in China, India, and Brazil. These "benchmark" prices were then used to establish prices throughout the rest of the world, including the U.S. Thus potash prices in the U.S. were determined by the global pricing mechanism established and carried out by defendants. The U.S., one of the two largest consumers of potash in the world, imports over 80% of its potash

needs. SA13 ¶¶51-52. Accordingly, defendants foresaw and, in fact, intended that their foreign conduct (restricting output at potash mines located outside the U.S. and raising benchmark prices) would result in increased U.S. potash prices. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 n.23 (1993); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 n.6 (1986).

ARGUMENT

I. THE COMPLAINT STATES A PLAUSIBLE SHERMAN ACT CLAIM

"To survive a motion to dismiss, the complaint's factual allegations need not be detailed but must be sufficient to 'state a claim to relief that is plausible on its face.'" *Doe-2 v. McLean County Unit Dist. No. 5 Bd. of Dirs.*, 593 F.3d 507, 511 (7th Cir. 2010) (quoting *Ashcroft v. Iqbal*, 556 U.S. __, 129 S. Ct. 1937, 1949 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, at 570 (2007))). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949. Contrary to defendants' argument (Br. 41, 43), the complaint in an antitrust action need not exclude all possibility of independent action (*cf. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (on summary judgment, plaintiff "must present evidence that *tends* to exclude the possibility that the alleged conspirators acted independently" (emphasis added) (internal quotation marks omitted))), just as "a pleading [need not] exclude all *possibility* of honesty in order to give the particulars of fraud" (*U.S. ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 854 (7th Cir. 2009) (emphasis added)).

> While for purposes of a summary judgment motion, a Section 1 plaintiff must offer evidence that "tend[s] to rule out the possibility that the defendants were acting independently," to survive a motion to dismiss under Rule 12(b)(6), a plaintiff need only allege "enough factual matter (taken as true) to *suggest* that an agreement was made."

Starr v. Sony BMG Music Entm't, 592 F.3d 314, 321 (2d Cir. 2010) (alteration in original) (emphasis added) (quoting *Twombly*, 550 U.S. at 554 & 556) (citations omitted).

On a motion to dismiss, the court must "construe the complaint in the light most favorable to the plaintiff, accepting as true all well-pleaded facts alleged, and drawing all possible inferences in her favor." *Tamayo v. Blagojevich*, 526 F.3d 1074, 1081 (7th Cir. 2008). This Court recently analyzed *Twombly, Iqbal*, and *Erickson v. Pardus*, 551 U.S. 89 (2007) and held:

> First, a plaintiff must provide notice to defendants of her claims. Second, courts must accept a plaintiff's factual allegations as true, but some factual allegations will be so sketchy or implausible that they fail to provide sufficient notice to defendants of the plaintiff's claim. Third, in considering the plaintiff's factual allegations, courts should not accept as adequate abstract recitations of the elements of a cause of action or conclusory legal statements.

Brooks v. Ross, 578 F.3d 574, 581 (7th Cir. 2009). Under the pleading standards articulated in *Brooks*, the Complaint in this case easily passes muster.

Although defendants mischaracterize plaintiffs' allegations (Br. 2, 39-40, 47-48, 53 n.18, 55, 58-59), the Complaint contains far more than conclusory statements or the mere recital of the elements of an antitrust claim. Moreover, "[s]pecific facts are not necessary; the statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Brooks*, 578 F.3d at 581 (alterations in original).

Although "the narrowest holding in *Bell Atlantic* is merely that an antitrust complaint charging an agreement between firms not to compete must contain 'enough factual matter (taken as true) to suggest that an agreement was made[,] [and] [a]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice'" (*Limestone Dev. Corp. v. Village of Lemont*, 520 F.3d 797, 803 (7th Cir. 2008) (quoting *Twombly*, 550 U.S. at 556))), there is much more than a mere allegation of parallel conduct here, as the District Court found. Indeed, the allegations of the Complaint taken as true "nudge[] their claims across the line from conceivable to plausible" (*Twombly*, 550 U.S. at 570), and even satisfy this Court's higher standard to deny summary judgment under *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 654-55 (7th Cir. 2002), as "evidence from which the existence of . . . an agreement [to fix prices] can be inferred": (a) "[economic] evidence that the structure of the market was such as to make secret price fixing feasible," (b) "[economic] evidence that the market behaved in a noncompetitive manner," and (c) "noneconomic evidence suggesting that [the defendants] were not competing because they had agreed not to compete." The Complaint alleges wrongful conduct at the heart of the Sherman Act—a naked restraint where "a group of firms agree on price but do not integrate any of their productive facilities. . . [which] should be held unlawful." Frank H. Easterbrook, "*The Limits of Antitrust*," 63 TEX. L. REV. 1, 18 (Aug. 1984). "Cartels reduce output and produce nothing in return." *Id.*

Further, concerns about the burden of discovery (*see* Br. 43-45) do not justify dismissing every antitrust complaint alleging facts from which an inference of collusion must be drawn.

> [Direct evidence] is evidence tantamount to an acknowledgement of guilt; [circumstantial evidence] is everything else *including* ambiguous statements. These are not to be disregarded because of their ambiguity; most cases are constructed out of a tissue of such statements and other circumstantial evidence, since an outright confession will ordinarily obviate the need for a trial.

Fructose, 295 F.3d at 662 (emphasis in original).

A. Standard of Review

This Court reviews *de novo* a district court's decision on a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss for failure to state a claim. *See Doe-2*, 593 F.3d at 511.

B. The Structure of the Potash Market Was Conducive to Collusion

Among the market conditions in *Fructose* that showed that "secret price fixing might actually have an effect on price and thus be worth attempting" were: few sellers, a highly standardized product, no close substitutes, and a lot of excess capacity. *Fructose*, 295 F.3d at 656-57. Each is present here: a concentrated market dominated by defendants (SA1 ¶1; SA14 ¶57; SA14 ¶59); a commodity product (SA13 ¶53); no cost-effective substitute (SA12 ¶48), as well as inelastic demand (SA13 ¶54); and excess capacity (SA31 ¶¶133-34). That such conditions may be found in other markets (Br. 48) is irrelevant. Easterbrook, *supra* at 17-18 ("First, the plaintiff should be required to offer a logical demonstration that the firm or firms employing the arrangement possess market power. . . . Second, the plaintiff

should be required to demonstrate that the defendants' practices are capable of enriching the defendant by harming consumers. That is, the plaintiff must show that the defendant has an incentive to behave in an anticompetitive way.").

Defendants suggest that the potash market is insufficiently concentrated for a cartel among defendants to be plausible (Br. 50-51). Yet DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 135 (4th ed. 2004), relied on by defendants (Br. 50), presents the results of an empirical study that found, in 42% of Department of Justice price-fixing cases studied, the four-firm concentration ratio was over 75%, and, in 34% of the cases, it was between 51% and 75%. The three-firm concentration ratio here is 71%. SA14 ¶57.

Defendants' additional argument (which is based improperly on information outside the record) that Canpotex's and BPC's marketing efforts on behalf of their constituent producers are permitted by their home country laws (Br. 6-7, 29 & n.4) does not legitimize anti-competitive agreements between them and IPC.

In another argument improperly based on "facts" that are nowhere in the record (Br. 52 n.17), defendants claim that because the U.S. potash market "include[s] large, sophisticated businesses that independently negotiate private, long-term contracts" so that a conspiracy is "highly implausible" (Br. 52). But defendants are wrong and the answer is in *Fructose*: "[T]here are some very large buyers of HFCS, notably Coca-Cola and Pepsi-Cola, and, as theory predicts, they drove hard bargains and obtained large discounts from the list price of HFCS 55. But it does not follow that the defendants could not and did not fix the price of

HFCS 55." *Fructose*, 295 F.3d at 658. In other words, so long as the baseline price is elevated artificially by the alleged price fixing, even negotiated contract prices will be impacted. This is particularly true where there is a fixed global price that dictates the price in the U.S. and a spot market price that is similarly affected. Thus, the starting point for negotiations is higher because of the price fixing.

C. The Potash Market Behaved in a Noncompetitive Manner

The Complaint alleges a global potash market in which prices for sales under contracts in China, India, and elsewhere established benchmarks for prices charged to customers in the U.S. and describes many specific examples. SA13 ¶52; SA21-22 ¶¶94-96; SA25-26 ¶¶111-12; SA27-28 ¶¶117-118, 120; SA34 ¶¶145-46. Ignoring what the Complaint says, defendants argue that no mechanism for U.S. pricing was alleged (Br. 8, 12, 36) and inconsistently that "plaintiffs propose an extraordinarily complex price formation mechanism" (Br. 51 n.16). These arguments ignore the similarity between list prices and the benchmark prices plaintiffs allege in the Complaint. As this Court described in *Fructose*, "[T]he list price is usually the starting point for the bargaining and the higher it is (within reason) the higher the ultimately bargained price is likely to be." *Fructose*, 295 F.3d at 656. Thus, the specific allegations in this Complaint are easily distinguished from the allegations in *In re Elevator Antitrust Litig.*, 502 F.3d 47 (2d Cir. 2007), relied on by defendants (Br. 63), where "there [were] no allegations of global marketing or fungible products, no indication that participants monitored prices in other markets, and no allegations of the actual pricing of elevators or maintenance

services in the United States or changes therein attributable to defendants' alleged misconduct." 502 F.3d at 52 (citations omitted).

The Complaint further alleges that, from July 2003 through 2008, there were a series of parallel lockstep price increases that drove prices up approximately 600%, as opposed to the stable market for potash prices in the preceding years. SA26-27 ¶¶113-15; SA36 ¶156. Prices continued to rise in late 2008 and early 2009, when the prices for other fertilizers began to decline dramatically. SA26-30 ¶¶113-30. Contrary to defendants' arguments (Br. 59-60, 63-64), the price increases after July 2003 cannot be explained by changes in costs or demand (SA21 ¶¶90-91; SA30 ¶¶129-30), which distinguishes *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 52 (7th Cir. 1992), where prices increased when costs increased, even though demand decreased. Defendants' assertion (Br. 60-61) that "during a recent period of overproduction 'the price of potash was at historic lows and the producers were losing millions,'" citing *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028 (8th Cir. 2000), overlooks the fact that the "recent period" in *Blomkest* was "during the 1980's" (*id.* at 1031), long before the former Soviet Union suppliers were a factor in the potash market.

In addition, the Complaint delineates a series of coordinated supply restrictions, which represented a dramatic break from the behavior before July 2003 of the former Soviet Union suppliers. SA20-25 ¶¶87-108. The most blatant restriction was the shutdown of the Silvinit mine for 12 days in October to November 2007, during which time all the other defendant producers, except perhaps Mosaic, simultane-

ously suspended all their sales as well. SA23 ¶¶98-99, 101. Absent collusion to drive potash prices higher (an outcome PCS's President and CEO publicly recognized), a *suspension* of sales by nearly *all* defendant producers makes no economic sense. SA23-24 ¶¶100, 103. One would expect the defendants to have sought to increase market share by taking advantage of their supposed competitor's reduced output in pursuing new sales at IPC's customers. SA24 ¶103. That Mosaic may not have made a similar announcement as others did does not mean that other producers were acting in their independent self-interest. *See In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 363 (3d Cir. 2004) ("If six firms act in parallel fashion and there is evidence that five of the firms entered into an agreement, for example, it is reasonable to infer that the sixth firm acted consistent with the other five firms' actions because it was also a party to the agreement."). In addition, the argument that Mosaic did not join in this one output restriction is of no great weight as it did join in others (SA20 ¶89; SA21-22 ¶94) becuse a defendant does not have to participate in all acts in furtherance of the conspiracy to be liable therefor. *Paper Systems Inc. v. Nippon Paper Indus. Co.*, 281 F.3d 629 (7th Cir. 2002).

PCS and Uralkali in particular should have sought new customers, because they demonstrably had excess capacity. SA22 ¶95; SA31 ¶¶133-34. That there may have been "less incentive" to operate at full capacity (Br. 60 n.22) does not mean that there was *no* incentive to increase market share and capacity utilization when capacity utilization was low. *Dicta* from *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 583 (1925), a much criticized case (*see* RICHARD A. POSNER,

ANTITRUST LAW 166-67, 169 (2d ed. 2001)), relied on by defendants (Br. 60, 61 n.23), should not be considered as an *economic* basis for a contrary view.

The lack of an economic rationale for the joint suspension of sales distinguishes this case from *In re Travel Agent Comm'n Anti-trust Litig.*, 583 F.3d 896 (6th Cir. 2009) on which defendants rely (Br. 43 n.12, 56 n.20 & 58). There, the court found that technological innovations, principally direct purchase of airline tickets by customers on the internet rather than through travel agents, provided a reasonable independent economic incentive for each competitor to cut travel agent commissions. 583 F.3d at 908. Here, there was no equivalent technological innovation in the potash market. *Travel Agent Comm'n* does not aid the defendants here.

D. The Complaint Alleges Sufficient Noneconomic Evidence To Justify an Inference of Improper Agreement

Defendants below, and in their brief before this Court, argue primarily that the Complaint fails to allege sufficient facts to support an illegal conspiracy. The District Court properly rejected this argument, and this Court should affirm this ruling. The Complaint contains specific allegations, which defendants overlook, from which an inference of improper agreement follows.

At the time of the Silvinit mine shutdown in October 2007, Uralkali, not PCS, announced PCS's suspension of sales. SA23 ¶99. The logical inference is that PCS told and agreed with Uralkali that PCS was suspending sales before Uralkali's announcement. Defendants' claim that Uralkali "learned whatever it knew . . . from a PCS pubic release or a customer" (Br. 66 n.24) is nowhere found in the Complaint

and is directly contrary to the principle that courts must "accept[ ] as true all well-pleaded facts alleged." *Tamayo*, 526 F.3d at 1081.

Following a meeting at Uralkali's premises on October 11, 2005, among PCS's President and CEO, Canpotex's CEO, Mosaic's Executive Vice President, Uralkali's General Director, President and CEO, and representatives of Silvinit and Belaruskali, PCS and Mosaic announced production shutdowns in November and December 2005, Uralkali reduced production in January 2006, and Belaruskali cut exports in January 2006. SA17 ¶75; SA20-21 ¶¶88-89, 92. This factual detail belies defendants' suggestion (Br. 2, 8) that plaintiffs have not identified who did what when. These well-pleaded specifics also readily distinguish the too general allegations and the specific allegations involving others than the relevant defendants, which were found to be insufficient in *Travel Agent*, 583 F.3d at 905, 910, cited by defendants (Br. 43 n.12, 56 n.20, 58), and the lack of factual detail in *Kendall v. VISA U.S.A., Inc.*, 518 F.3d 1042, 1050 (9th Cir. 2008) ("[a]ppellants . . . simply allege the Consortiums are coconspirators, without providing any facts to support such an allegation"), also cited by defendants (Br. 43 n.12).

During an IFIA annual meeting in Istanbul attended by representatives of Canpotex, BPC, PCS, Mosaic, Agrium, and Belaruskali, major manufacturers announced a price increase. SA19 ¶82. The presence of customers at these conferences (Br. 57) does not make it implausible that defendants' representatives met and agreed outside the presence of their customers. *See In re Citric Acid Litig.*, 191 F.3d 1090, 1097 (9th Cir. 1999) ("Although the evidence makes clear that

representatives of the admitted conspirators gathered in 'unofficial' meetings to fix prices and to allocate market shares – often in the same city as, and within a few days of, officially scheduled ECAMA meetings – there is no evidence that illegal activities took place during ECAMA meetings attended by Cargill representatives.").

A major owner of defendants Uralkali and Silvinit, Dmitry Rybolovlev, acknowledged that "joint operation allows [potash producers] to avoid needless competition," SA17 ¶¶72-73, which echoes the noneconomic evidence of an agreement in *Fructose* of ADM's "significant ownership interests in two other defendants" and executives' descriptions of "friendly competitors." *Fructose,* 295 F.3d at 663 & 662.

These allegations are far more than "abstract recitations" of the elements of a Sherman Act claim, and are neither "sketchy" nor "implausible." *Brooks*, 578 F.3d at 581. As the District Court found, these allegations, taken as a whole, satisfy the *Twombly* standard: "The allegations propel Defendants' conduct out of 'neutral territory' to plausibly suggest entitlement to relief." A49, citing *Twombly*, 550 U.S. at 557.

No more evidence should be expected at the pleading stage when plaintiffs have not had an opportunity to discover what was actually said at meetings of conspirators and where "the proof is largely in the hands of the alleged conspirators," *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 599 F. Supp. 2d 1179, 1184 (N.D. Cal. 2009) (quoting *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962)).

"'[D]irect evidence will rarely be available' to prove the existence of a price[-]fixing conspiracy," so that "'circumstantial evidence is the lifeblood of antitrust law.'" *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1147 (N.D. Cal. 2009) (quoting *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 439 (9th Cir. 1990) and *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 534 n.13 (1973)). *See Lusby*, 570 F.3d at 854 (rejecting pleading requirement that a plaintiff in a fraud action allege and produce invoices and accompanying representations because "much knowledge is inferential—people are convicted beyond a reasonable doubt of conspiracy without a written contract to commit a future crime—and the inference that [plaintiff] *Lusby* proposes is a plausible one"). Defendants' contrary suggestion—for example, that the Complaint fails to allege what was actually discussed at an October 2005 meeting among defendants after which they announced production shutdowns—would establish an insurmountable pleading burden. The implication that victims of an antitrust conspiracy would be invited to a meeting of conspirators is nonsense.

Defendants here also set the second trap identified by this Court in *Fructose*, 295 F.3d at 655, "dismembering [plaintiffs' allegations] and [only] viewing its separate parts." *Cont'l Ore Co. v. United Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) (quoting *United States v. Patten*, 226 U.S. 525, 544 (1913)). (Br. 52-58, 66-67.)

> The second trap to be avoided in evaluating evidence of an antitrust conspiracy for purposes of ruling on the defendants' motion . . . is to suppose that if no single item of evidence presented by the plaintiff points unequivocally to conspiracy, the evidence as a whole cannot

> defeat [defendants' motion]. . . . But evidence can be susceptible of different interpretations, only one of which supports the party sponsoring it, without being wholly devoid of probative value for that party.

Fructose, 295 F.3d at 655. Defendants here rely heavily on this approach by referring to the factual allegations of meetings and subsequent price increases or production reductions in isolation, without addressing the impact of these allegations taken as true and examined as a whole, as required by *Fructose*.

Defendants also improperly rely on studies, reports, and other documents that were not attached to or referenced in the Complaint, and not the proper subject of judicial notice. *See Reger Dev., LLC v. Nat'l City Bank*, 592 F.3d 759, 764 (7th Cir. 2010) and *Doss v. Clearwater Title Co.*, 551 F.3d 634, 640 (7th Cir. 2008). For example, the Federal Trade Commission's September 2, 2008 letter to Senator Byron L. Dorgan (Br. 47 n.15, 63-64) analyzed many fertilizer products, and not just potash. In addition, the letter neither states nor implies that the conspiracy alleged here was implausible. For one, the "[p]otash prices [we]re less amenable to staff's statistical analysis," so that "the conclusions of the statistical analysis regarding the degree of integration of potash markets are less robust than the conclusions for the other fertilizer markets." Letter at 2 n.4. Nonetheless, even if considered, the letter confirms the existence of a global market, where "domestic price increases appear to be related to global market forces" (*id.* at 1), and "economic policies adopted by major importers and exporters of fertilizer [India and China] have an important impact on prices paid by farmers in the United States" (*id.* at 9). Further, the letter was sent just before the large divergence in potash prices from other fertilizer prices, in which potash prices stayed high while other fertilizer prices dove. SA30

¶130. This strongly suggests that something was happening in the potash market that was not occurring in the other fertilizer markets.

The Australian Competition & Consumer Commission study, *ACCC examination of fertilizer prices*, also referenced by defendants (Br. 47 n.15), but not properly before this Court, is of even less relevance than the FTC letter. It identified three categories of fertilizers—phosphate, nitrogen and potassium—but in analyzing prices focused entirely on DAP (di-ammonium phosphate) and urea, the most common nitrogen fertilizer used in Australia. http://tinyurl.com/y6v36xx at 14-25.

The allegations in the Complaint "considered as a whole and in combination with the economic evidence, [are] sufficient to defeat" defendants' motion to dismiss. *Fructose*, 295 F.3d at 661.

II. THE FTAIA DOES NOT BAR JURISDICTION OVER PLAINTIFFS' CLAIMS

A. Standard of Review

The District Court denied defendants' facial challenge to subject matter jurisdiction based on the FTAIA. An appellate court reviews *de novo* a district court's decision on a Rule 12(b)(1) motion to dismiss for want of subject matter jurisdiction, accepting all facts alleged in the complaint as true and drawing all

reasonable inferences in the plaintiffs' favor. *Patel v. City of Chicago*, 383 F.3d 569, 572 (7th Cir. 2004).[2]

B. The Complaint's Antitrust Claims Involve "Import Commerce" Which Are Not Barred By The FTAIA

Defendants ignore what plaintiffs actually allege to avoid the import commerce exception to the FTAIA, which the District Court found applies to the Complaint. Plaintiffs plainly allege that defendants' conspiracy involved import commerce—that is, defendants sold potash produced outside the U.S. to customers in the U.S.[3] Plaintiffs allege that defendants agreed to limit supply in order to increase potash prices globally, including the price of potash defendants imported into the U.S. SA11 ¶45; SA13 ¶51, SA 16-17 ¶71; SA 37-38 ¶163. The Complaint alleges that defendants fixed, maintained, or stabilized the prices charged to U.S. customers by virtue of their output restrictions and by setting U.S. prices by reference to benchmark prices that defendants' cartel set in China, India, and elsewhere.

Plaintiffs' claims are not based upon a "trickle down," "spillover" theory or any indirect effect, but rather are directly tethered to the economic consequences of defendants' pattern and practice of collusive global output restrictions and agreements to set benchmark prices that dictated U.S. potash prices. Much of

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[2] But, assuming this Court accepts plaintiffs' argument, *infra*, that the FTAIA does not limit jurisdiction, but merely defines an element of a Sherman Act claim involving foreign commerce, then defendants' motions to dismiss under the FTAIA should be viewed as Rule 12(b)(6) motions rather than under Rule 12(b)(1) motions. The standard of review under Rule 12(b)(6) is also *de novo*.

[3] Some potash was produced in the U.S. and sold here (SA13 ¶51) and those sales are not included in the defendants' FTAIA challenge, or should not be.

defendants' argument addresses broad policy concerns about U.S. courts extending their jurisprudential reach into matters within the province of foreign nations to regulate. But defendants' comity arguments make no sense when viewed in the context of what plaintiffs allege.

Under the plain language of the FTAIA, if the defendants' alleged wrongful conduct involves import commerce, as it does here, then by its own terms the FTAIA is not applicable.

1. The FTAIA Does Not Reach Claims Based on Imports.

The FTAIA was enacted to facilitate the export of domestic goods by exempting from the Sherman Act non-import transactions with foreign nations that do not injure the U.S. economy, freeing U.S. exporters from competitive disadvantages in foreign trade. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 n.23 (1993). The FTAIA specifically exempts the importation of goods and domestic commerce from its reach. *See Carpet Group, Int'l v. Oriental Rug Importers Ass'n*, 227 F.3d 62 72-73 (3d Cir. 2000). The FTAIA provides:

> 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, 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; and

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

15 U.S.C. § 6(a) (emphasis added).

"This technical language initially lays down a general rule placing *all* (non-import) activity involving foreign commerce outside the Sherman Act's reach." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.* (*Empagran I*), 542 U.S. 155, 162 (2004) (emphasis in original). In other words, the parenthetical exclusion, "other than import trade or import commerce," by its own terms exempts import trade and commerce from the reach of the FTAIA. Accordingly, "the initial sentence of Section 6(a), along with its 'import trade or import commerce' parenthetical, provides that the antitrust law[s of the United States] *shall* apply to conduct 'involving' import trade or commerce with foreign nations." *Carpet Group Int'l*, 227 F.3d at 69 (emphasis in original); *Dee-K Enters., Inc.*, 299 F.3d at 287 ("[b]ecause this case involves importation of foreign-made goods, however—conduct Congress *expressly exempted* from FTAIA coverage as 'involving . . .import trade or commerce. . . with foreign nations,' [citing FTAIA]—the FTAIA standard obviously does not directly govern the case") (emphasis in original). The "import trade or import commerce" exclusion was added to the legislation so that "there [would] be no misunderstanding that import restraints, which can be damaging to American consumers, remain covered by the [Sherman Act]." *See* P.L. 97-290, Export Trading Company Act of 1982, H.R. Rep. 97-686, 2d Sess. 1982, *reprinted in* 1982 U.S.C.C.A.N. 2487, at 2494 (prepared statement of Mr. James R. Atwood).

In assessing whether the import commerce exception to FTAIA applies, it is the defendants' alleged wrongful conduct that is analyzed (*Turicentro, S.A. v. Am. Airlines, Inc.*, 303 F.3d 293, 302-03 (3d Cir. 2002)), that is, whether the defendants' alleged wrongful conduct involves import trade or commerce. Plaintiffs and defendants do not disagree on this point. Where the parties disagree is whether the defendants' wrongful conduct in restricting the output of potash in the global market and fixing prices of potash sold to U.S. customers based upon collusive benchmark prices involves import commerce.

2. The Complaint Alleges Activities by the Defendants That Involve Import Commerce

Statutory construction begins with the language Congress used and the assumption that the ordinary meaning of that language expresses the legislative purpose. *Gross v. FBL Fin. Servs., Inc.*, __ U.S. __, 129 S. Ct. 2343, 2350 (2009).

Although the FTAIA itself does not define what an "import" is, there is no indication that Congress intended anything other than its ordinary meaning. The term "generally denotes a product (or perhaps a service) . . . brought into the United States from abroad." *Turicentro*, 303 F.3d at 303 (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1986) ("defining an 'import' as 'something (as an article of merchandise) brought in from an outside source (as a foreign country)'"), and BLACK'S LAW DICTIONARY (6th ed. 1990) ("defining an 'import' as a 'product manufactured in a foreign country, and then shipped to and sold in this country'")). Under its plain meaning, potash produced in other countries and sold at a price in the U.S. to U.S. customers is an import by definition.

The other operative term in the FTAIA exemption, "commerce," is similarly undefined in Section 6(a), but its ordinary meaning is "the buying and selling of goods, especially when done on a large scale between cities, states or countries; trade." WEBSTER NEW WORLD COLLEGE DICTIONARY at 293 (4th ed. 2004). Thus, the parenthetical "other than import commerce" means the purchase and sale of a product brought into the U.S. This implies both a product—here potash—and a price—that defendants fixed by restricting output and then using benchmark pricing in China, India, and Brazil to set the price of potash defendants sold in the U.S.

Contrary to defendants' argument, plaintiffs do not rely on purely foreign conduct affecting foreign purchasers. Plaintiffs allege that defendants' unlawful conduct directly involves import commerce—sales into the U.S. at prices elevated by defendants' concerted restrictions on output and fixed by defendants' practice of setting and using benchmark pricing. Thus, the FTAIA does not apply.

(a) Defendants Sold Potash in the United States

In 2008, the U.S. consumed 6.2 million tons of potash, 5.3 million of which was imported. SA13 ¶51. Each defendant directly, or through affiliates, sold potash in the U.S. at non-competitive prices. SA11 ¶45, SA37-38 ¶163. Canada, the world's largest potash exporter, supplied 40% of the world's is potash, with half of Canadian potash exports going to the U.S. SA13 ¶52. Canadian potash manufacturers supply 70% of the U.S. yearly potash consumption. SA13 ¶52. Similarly, BPC markets and sells Russian potash in the U.S. SA16-17 ¶71. Beginning in August 2008, BPC contracted to sell 30,000 tons of potash to U.S. buyers. SA24 ¶106, SA30 ¶128.

(b) Defendants Restricted Output to Raise Prices

Additionally, defendants made concerted efforts to restrict the global supply of potash, which resulted in higher prices in the U.S. potash market. SA20-25 ¶¶87-108. The Complaint alleges numerous examples.

Following an October 11, 2005 meeting among the co-conspirators, Mosaic and PCS announced output cuts, which occurred in the remainder of 2005 (SA17 ¶75, SA20 ¶¶88-89), and Uralkali, Belaruskali, PCS, and Silvinit reduced output in the first half of 2006. SA21 ¶¶91-93.

Defendants continued their consistent pattern of reducing output in 2007 and 2008. On October 25, 2007, Silvinit announced the suspension of shipments from a mine due to a sinkhole, and within a day Uralkali, Agrium, and BPC all announced they would also suspend sales. Moreover, Uralkali also announced that its purported competitor PCS would also suspend its sales. SA23 ¶¶98-99. Although defendants shortly thereafter announced that they would resume sales, potash prices nonetheless increased to record highs on fears of a global shortage, as PCS's President and CEO had publicly predicted they would. SA23-24 ¶¶100-102.

In May 2008, Silvinit again announced that a sinkhole threatened its potash supply. Although Silvinit two weeks later disclosed that the sinkhole had stopped growing, potash prices shortly thereafter increased dramatically, reaching $1,000 per ton around the world and in the U.S. SA8 ¶31; SA24 ¶¶104, 106. In November and December 2008, Uralkali, PCS and Agrium again announced that they would cut production, as potash prices stayed high in stark contrast to the decline in other fertilizer prices, and contrary to what would have been expected in the severe

worldwide economic downturn in the fourth quarter of 2008 and first quarter of 2009. SA24-25 ¶¶107-108.

These supply restrictions, in a global market such as that for potash, impacted prices for potash in the U.S., one of the two largest potash consumers in the world. SA13 ¶51, SA33-34 ¶¶144-145.

(c) Defendants Used Benchmark Pricing to Set Potash Prices in the U.S

Plaintiffs clearly allege that defendants fixed the prices of potash that they sold in the U.S. by creating inflated benchmark prices. These import sales in the U.S. at deliberately inflated prices make the "import commerce" exception of the FTAIA applicable. Defendants try to dismiss plaintiffs' benchmarking allegations by claiming that only foreign conduct is involved, ignoring the full context of plaintiffs' allegations (Br. 36-39).

The Complaint alleges that defendants consistently and customarily used benchmark potash prices to set the price of potash sold to U.S. consumers. PCS, Mosaic, Agrium, and BPC made the vast majority of potash sales in the U.S., at prices the defendants set according to benchmarks based on sales to buyers in China, India, Brazil, and elsewhere. SA13 ¶52, SA25-26 ¶111. Beginning in 2003, defendants announced increased potash prices in Brazil and India. Shortly thereafter, continuing into 2004, similar price increases were announced for U.S. customers. SA27-29 ¶¶116-123. Late in 2004, IPC, PCS, and Mosaic announced identical price increases to Chinese customers and were joined shortly thereafter by Uralkali (SA29 ¶124), and between December 2004 and February 2005, PCS and

Mosaic announced price increases for U.S. customers. SA29 ¶125. In 2006, potash producers reached an agreement on a price increase to customers in China and Brazil. Shortly thereafter, potash prices in the U.S. increased, as defendants knew and intended would happen. SA29 ¶127. During the past five years, North American prices for potash have risen dramatically, but these increases are not commensurate with producers' costs of production, other input costs or other legitimate market forces. SA29-30 ¶¶129-130.

Courts have recognized that a cartel can affect market-wide price increases by fixing prices as to some customers or products, and then using the fixed price as a benchmark for prices the cartel members charge other customers or for other products. *See, e.g., Fructose,* 295 F. 3d at 658-59 (fixing higher list prices, "the starting point for . . . bargaining," means "the higher the ultimately bargained price is likely to be"); *accord Flat Glass*, 385 F.3d at 355, 362-63 ("sellers would not bother to fix list prices if they thought there would be no effect on transaction prices" (alterations omitted) (quoting *Fructose*, 295 F.3d at 656)); *E & J Gallo Winery v. EnCana Corp.*, 503 F.3d 1027, 1048-49 (9th Cir. 2007) (plaintiff stated a valid antitrust claim "based on damages it incurred due to paying retail rates pegged to indices it alleges were artificially inflated by illegal practices") As one district court recently noted, "it is the norm that a price-fixing conspiracy with industry-wide impact would be expected to employ output reductions or benchmark price manipulation as a means for carrying out the overarching conspiracy." *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 608 F. Supp. 2d 1166, 1199 (N.D.

Cal. 2009). Here, the Complaint links the benchmark prices set in China, India, and Brazil to the prices defendants charged U.S. customers.

Defendants' argument and criticism of the District Court's opinion is disingenuous and mischaracterizes the way the District Court analyzed the Complaint. Simply put, large portions of the same potash that was produced outside the U.S. found its way into the U.S. with prices that were intentionally inflated by output restrictions and benchmark pricing. There is necessarily a direct correlation and connection between the two, and import commerce is defined by the entire process, not by one piece of it. The District Court did not rule that if defendants themselves are involved in import commerce then the FTAIA does not apply, irrespective of the nature of the alleged wrongful conduct. Rather, the District Court correctly found that "the tight nexus between the alleged illegal conduct and Defendants' import activities leads this Court to conclude the former 'involved' the latter." A29. The District Court therefore held that defendants' alleged conduct involved import commerce. There is no other reasonable interpretation of the District Court's ruling.

Importantly, once it is established that defendants' alleged wrongful conduct involves import commerce, the FTAIA inquiry ceases and any further analysis of the effects on U.S. commerce awaits a full merits determination as an element of the Sherman Act. *See Dee-K Enters., Inc.*, 299 F.3d at 287 n.2 & 296.

3. Defendants' Statutory Interpretation Is Inconsistent with Congress' Chosen Language

Defendants offer a tortured statutory analysis of Section 6(a). They first agree that the parenthetical "other than import trade or import commerce" means

that the FTAIA does not apply to conduct involving import commerce (Br. 20). Defendants then leap to the conclusion that the "import exception" must be read in context, even though they previously concede that Section 6(a) is unambiguous (Br. 20, 23). They claim that if all conduct involving "import commerce" is potentially subject to Sherman Act scrutiny, it "reads the direct effects test out of the FTAIA" (Br. 24). This is mere hyperbole. First, based on the plain language of Section 6(a), Congress intended for conduct involving sales and purchases of imports into the U.S. to be subject to the Sherman Act. The "direct effects" test then applies to all trade or commerce with foreign nations *other than* import trade or commerce (or domestic commerce). This could include export activity or trade involving other countries, so long as such activity has a direct, substantial, and foreseeable effect on domestic trade or on import trade.

Furthermore, defendants' strained statutory construction is belied by the statute itself. The "direct effects" test applies to activity other than import commerce that has an "effect . . . on *import trade or import commerce with foreign nations*." 15 U.S.C. § 6(a)(1)(A) (emphasis added). If import commerce itself were subject to the "direct effects" test, there would have been no reason for Congress to equate "import commerce" with "commerce which is not trade or commerce with foreign nations," *i.e.*, domestic commerce, as the subject of the direct effect that brings conduct "other than import trade or import commerce" back within the reach of the Sherman Act.

Defendants offer a hypothetical agreement by five widget manufacturers to fix the price of German widgets sold in the U.S., and concede that such an agreement would fall into the "import commerce" exemption in the FTAIA. They then suggest that an agreement by those same manufacturers to fix the price of widgets sold in France would not involve U.S. import commerce even if those German manufacturers independently sold widgets in the U.S. (Br. 21-22). Although perhaps true, defendants' hypothetical is not what plaintiffs allege.

Rather, the Complaint is analogous to a conspiracy by those same German widget makers producing 71% of the world's widgets who collusively restrict the global widget supply and then sell their widgets to U.S. customers at prices reflective of the shift in the supply curve. These manufacturers, like the defendants, are involved in import commerce and are not exempted from Sherman Act liability. *See Turicentro*, 303 F.3d at 303. Defendants' global output restrictions and pattern and practice of benchmark pricing comprise the alleged unlawful conduct that directly affected the price of the potash defendant sold in the U.S.

Likewise, assume that the German widget makers operate in a global widget market in which prices for sales under term contracts in China, India, and elsewhere established benchmarks for prices charged to U.S. customers. Those widget makers' sales to U.S. customers at supracompetitive prices that were set by reference to the collusively determined benchmark prices would also involve import commerce, and thus be exempt from the FTAIA. Again, plaintiffs allege facts that are directly analogous to this hypothetical.

Defendants' misguided interpretation of the FTAIA is not supported by any of their cited precedent or recent dismissals under the FTAIA. These cases uniformly considered whether the FTAIA prevented extension of American antitrust law to cover foreign purchasers who purchased products or services *outside* the U.S. *See, e.g., Empagran I*, 542 U.S. at 160 (noting "[r]espondents have never asserted that they purchased any vitamins in the United States or in transactions in United States commerce, and the question presented assumes that the relevant 'transactions occurr[ed] entirely outside U.S. commerce'" (second alteration in original)); *In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 537 (8th Cir. 2007) (applying the FTAIA where plaintiffs did "not assert that they purchased or attempted to purchase MSG or nucleotides in the United States market. Rather, they allege that they purchased overpriced MSG and nucleotides abroad"); *United States v. LSL Biotechnologies*, 379 F.3d 672, 680 n.6 (9th Cir. 2004) (applying the FTAIA to a claim premised on the exclusion of a competitive product from the United States market based on foreign anticompetitive conduct where it was "sheer speculation" that the excluded company would have been able to develop a product suitable for sale in the United States); *In re Intel Corp. Microprocessor Antitrust Litig.*, 452 F. Supp. 2d 555, 559 (D. Del. 2006) (applying FTAIA where "conduct alleged in the Complaint clearly applies to foreign trade in that it concerns [defendants'] conduct selling microprocessors to foreign companies located in foreign countries"); cf. *Dee-K Enters., Inc.*, 299 F.3d at 287 (court expressly held that FTAIA was inapplicable because the "case involves importation of foreign-made

goods . . . conduct Congress *expressly exempted* from FTAIA coverage" (emphasis in original), although court held plaintiffs there did not adequately prove subject matter jurisdiction at trial under the Sherman Act as an element of their claim).

In *Empagran S.A. v. F. Hoffmann-La Roche, Ltd.*, 417 F.3d 1267, 1270-71 (D.C. Cir. 2005), on remand from the Supreme Court, the D.C. Circuit found that the domestic effects of the conspiracy were only a "but for" and not a "proximate" cause of the plaintiff's *foreign injuries* and that therefore the FTAIA applied. Here, direct sales into the U.S. are alleged to have directly injured U.S. plaintiffs—a classic example of proximate cause. *See* SA13 ¶¶51,52; SA16-17 ¶71; SA30 ¶128; SA33 ¶144.

United Phosphorus, Ltd. v. Angus Chemical Co., 322 F.3d 942, 952 (7th Cir. 2003), also is distinguishable. There, this Court upheld factual findings that there was virtually no evidence that the plaintiffs would have made any sales in the U.S. Here, in contrast, defendants' attack is purely facial, based on the allegations in the Complaint. And, more importantly, the sales at issue indisputably occurred in the U.S.

C. The Complaint Alleges That Defendants' Conspiracy Had a Direct, Substantial and Reasonably Foreseeable Effect on United States Commerce.

Because the "import commerce" exception in the FTAIA applies, at this stage of the proceedings, the Court does not need to further address the required showing on the merits of the impact that defendants' activities had on U.S. commerce. Even

if they were required to do so, however, plaintiffs have more than sufficiently pleaded that defendants' anticompetitive activities directly affected U.S. commerce.

In *Metallgesellschaft v. Sumitomo Corp. of America*, 325 F.3d 836 (7th Cir. 2003), this Court considered when the direct, substantial, and foreseeable effects of foreign conduct would allow for FTAIA jurisdiction. The *Metallgesellschaft* Court reversed the district court, holding that the FTAIA did not preclude an antitrust claim brought by a German company that purchased "shorts" on the London Metals Exchange ("LME"). Plaintiffs claimed that as a result of defendants' illegal cornering of the market for physical copper, plaintiffs were forced to cover their short positions by tendering high-priced warrants and physical copper to various LME warehouses, including one in Long Beach, California. *Id.* at 840-41. Therefore, plaintiffs alleged they paid an overcharge in the U.S. for the physical copper that they would not have had to procure but for defendants' conspiracy. *Id.* This Court rejected defendants' claim that the effect on U.S. commerce was not direct, substantial, and reasonably foreseeable because plaintiffs alleged only a "ripple effect" on the U.S. market that indirectly resulted in higher prices for U.S. copper purchasers. *Id.* at 841-42. Although there were some intermediary steps in plaintiffs' damage theory, this Court held that the plaintiffs were injured in the U.S. market and the foreign activities had a direct, substantial and reasonably foreseeable effect on U.S. non-import commerce. *Id.* at 842.

The *Metallgesellschaft* opinion is consistent with the RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES ¶415(2), which provides:

> (2) Any agreement in restraint of United States trade that is made outside the United States, and any conduct or agreement in restraint of such trade that is carried out predominantly outside of the United States, are subject to the jurisdiction to prescribe of the United States, if a principal purpose of the conduct or agreement is to interfere with the commerce of the United States and the agreement or conduct has some effect on that commerce.

The Complaint here sufficiently alleges a direct, substantial, and foreseeable effect in the United States (assuming this is the operative test) from defendants' global potash conspiracy so that the case should be permitted to proceed. *See* SA11 ¶¶45, 46, 47; SA26 ¶112; SA33-34 ¶¶ 144, 145, 146. For example, as discussed above, defendants used a pattern of output restrictions and benchmark pricing set primarily in China, Brazil, and India to establish potash prices in the U.S. (SA25-26 ¶111), and as defendants fixed prices in China, Brazil, and India, potash prices in the U.S. increased shortly thereafter, as intended. SA26 ¶112-113; SA27 ¶¶117-118; SA28 ¶¶120-121; SA29 ¶127. This benchmarking mechanism was not indirect in any way. The effects of defendants' conspiracy on purchases made by U.S. customers in the U.S. were direct and non-attenuated. *See* SA11 ¶47; SA33 ¶144; SA34 ¶¶145 & 146. Therefore, considerations of comity have no role to play at all. *Compare* Br. 25-30.

D. The FTAIA is Not Jurisdictional, but Instead States an Element of the Claim

As noted above, the FTAIA by its own terms is inapplicable here because plaintiffs have adequately alleged "import commerce." Assuming *arguendo*, however, that the FTAIA's substantial effect on U.S. commerce standard is applicable (in other words, assuming that this case does not involve import

commerce) then, whether the FTAIA limits jurisdiction or defines the elements of the claim determines when the FTAIA issue should be decided and by whom. If the FTAIA is an element of plaintiffs' claim, "the jury is the proper trier of contested facts." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006).

In a split *en banc* decision in *United Phosphorous*, this Court decided that the FTAIA's provision that the complained-of conduct must have a substantial effect on commerce in the United States is necessary to confer federal subject matter jurisdiction, rather than an element of the claim. 322 F.3d at 952. But since that decision, the Supreme Court issued its opinion in *Arbaugh*, after which this Court issued its opinion in *Miller v. Herman*, 600 F.3d 726, 2010 U.S. App. LEXIS 6189 (7th Cir. Mar. 25, 2010), both of which cast serious doubt on the result in *United Phosphorous*, which therefore bears revisiting.

In *United Phosphorous*, the majority reached the conclusion that the FTAIA strips jurisdiction from the federal courts based on its analysis of the history limiting the extraterritorial reach of U.S. laws in international trade and relations (322 F.3d at 946); the writings of commentators (322 F.3d. at 949); opinions issued by sister circuits (*id.* at 950-52); the FTAIA's legislative history (*id.* at 951-52); and "good policy reasons" (*id.* at 952). In contrast, Judge Wood, writing for the minority, analyzed the language of the statute:

> One will search in vain in this brief passage for any hint that the Congress was attempting to strip federal courts of their competence to hear and decide antitrust cases with a foreign element. In my view, that alone should be enough to tip the balance toward the "element" characterization. . . . Language like that of the FTAIA, stating that a law does not "apply" in certain circumstances, cannot be equated to

> language stating that the courts do not have fundamental competence to consider defined categories of cases.

Id. at 954-55.

Without question, the majority's analysis in *United Phosphorous* was thorough, but it is not the analysis later announced in *Arbaugh*. There, the Supreme Court addressed how to determine whether a statutory provision (such as the FTAIA in this case) limits the Court's jurisdictional reach or simply sets out an element of the claim that must be established on the merits. The Court cautioned against so called "drive-by jurisdictional rulings," where courts have tended to describe the non-existence of a critical fact as a jurisdictional defect rather than merely a failure to prove an element of the claim. *Arbaugh*, 546 U.S. at 511. This imprecision can have "significant consequences." *See Ayyash v. Bank Al-Madina*, No. 04 Civ. 9201 (GEL), 2006 WL 587342, at *4 n.2 (S.D.N.Y. Mar. 9, 2006). Thus, in *Arbaugh*, the Court established "a readily administrable bright line" test to determine whether a provision is jurisdictional or simply a pleading guideline. *Arbaugh*, 546 U.S. at 516.

> 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. . . . [W]hen Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.

Id. at 515-16 (emphasis added). This is the very analysis employed by the minority in *United Phosphorous*, and, more importantly, the analysis quoted by and employed by this Court in *Miller*, where the Court said "[t]he Supreme Court has provided a 'readily administrable bright line' test to resolve the question of whether

a provision is jurisdictional," after which this Court quoted the above language from *Arbaugh*. *See Miller*, 600 F.3d 726, 2010 U.S. App. LEXIS 6189, at *13. Applying that very simple, bright line test, this Court concluded that whether an item is a "consumer product" is not a jurisdictional requirement of the Magnuson-Moss Act. *Id*. at *14.

Applying that very same analysis to the facts here, as the minority did to the facts before it in *United Phosphorous*, should lead to the same result. Accordingly, the FTAIA's substantial effect on commerce in the United States provision is not jurisdictional, but instead describes an element of the claim. As a result, then under *Arbaugh* plaintiffs satisfy the subject matter hurdle by merely pleading a "colorable claim." *Arbaugh*, 546 U.S. at 513. Any challenge by defendants to whether plaintiffs adequately pled the FTAIA elements of the claim would be under Rule 12(b)(6) of the Federal Rules of Civil Procedure and plaintiffs, as set forth above, have satisfied the pleading requirements of that rule.

III. IF THIS COURT REVERSES, PLAINTIFFS SHOULD BE ALLOWED TO REPLEAD

In the event this Court determines that the trial court erred in denying defendants' motion to dismiss on either or both the *Twombly* or FTAIA grounds, the appropriate result under the circumstances of this case is to remand to the district court with instructions to grant Plaintiffs leave to replead. Fed. R.Civ.P. 15(a)(2) "dictates that leave to amend a pleading shall be freely given 'when justice so requires.'" *Foster v. DeLuca*, 545 F.3d 582, 583 (7th Cir. 2008).

The circumstances of this case begin with the Transfer Order from the United States Judicial Panel on Multidistrict Litigation, dated December 2, 2008, which transferred multiple pending Sherman Act lawsuits to the district court under matter No. 08 C 6910. Dkt. 1. On February 24, 2009, the trial court granted Plaintiffs leave to file an Amended Consolidated Complaint (Dkt. 35), which Plaintiffs filed on April 3, 2009 (Dkt. 51). Defendants then filed motions to dismiss based on Rules 12(b)(1) and 12(b)(6). While those motions were pending, on July 9, 2009, Plaintiffs filed a second Consolidated Amended Complaint that corrected the caption. Dkt. 142.

This brief procedural history is important because none of the amended complaints filed here were filed as a result of the dismissal of the predecessor complaint for pleading deficiencies. In fact, this case reaches this Court as an interlocutory appeal from the trial court's *denial* of the Defendants' motions to dismiss. Thus, assuming this Court is persuaded by Defendants' arguments that the Complaint fails to state a claim or there is an issue regarding this Court's subject matter jurisdiction based upon the current pleading, Plaintiffs have not yet been given an opportunity to replead their claims to cure any perceived deficiencies.

In *William O. Gilley Enterprises, Inc. v. Atlantic Richfield Co.*, 588 F.3d 659 (9th Cir. 2009), after having given plaintiffs *three* opportunities to plead a legally sufficient Sherman Act § 1 claim against defendants (*id.* at 661-62), the trial court granted the defendants' motion to dismiss with prejudice. *Id.* at 662. The Ninth Circuit, however, "reversed and remanded, holding that the *district court erred in*

not giving Gilley an opportunity to correct the newly identified deficiencies." *Id.* (emphasis added). And in *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 975 (9th Cir. 2009) citing *Twombly*, the court reversed dismissal of the plaintiffs' complaint with prejudice and remanded to allow them leave to replead, stating that plaintiffs "may be able to amend their complaint to include facts that will state a plausible claim, and thus the interests of justice would be served by granting them a chance to do so." *Id. See also Phillips v. County of Allegheny*, 515 F.3d 224, 236 (3d Cir. 2008) (employing *Twombly*'s analysis, appellate court upheld dismissal of plaintiff's complaint, but remanded to the trial court to allow plaintiff an opportunity to replead).

As a result, should this Court reverse the trial court's order denying the motions to dismiss, Plaintiffs should be afforded an opportunity to amend their complaint to cure any perceived deficiencies.

CONCLUSION

This Court should affirm the denial of defendants' motions to dismiss the Complaint.

Dated: May 7, 2010

Respectfully submitted,

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RULE 32(a) CERTIFICATION

The undersigned attorney certifies, pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure that this Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,443 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

The undersigned further certifies that this Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) in that it was prepared using a proportionally spaced typeface, specifically Microsoft Word 2003 12-point Century for the text and 11-point Century for footnotes.

Dated: May 7, 2010

/s/ Patricia S. Spratt

CIRCUIT RULE 31(e) CERTIFICATION

The undersigned attorney certifies, pursuant to Circuit Rule 31(e), that a version of this Brief in non-scanned PDF format has been electronically filed with this Court. None of the Disclosure Statements in the the paper version of this brief, however, are available in an electronic non-scanned PDF format.

Dated: May 7, 2010

/s/ Patricia S. Spratt

PROOF OF SERVICE

I, Brunetta Bishop, a non-attorney, pursuant to the penalties of perjury as provided by law, state that the statements set forth herein are true and correct. I served two (2) copies of the foregoing **RESPONSE BRIEF FOR PLAINTIFFS-APPELLEES** and media disk of same upon:

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