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

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 10-1712

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

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

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Kevin Gillespie; Gordon Tillman; Feyh Farms Company, a privately-held Kansas corporation; William H. Coaker, Jr.; and David Baier

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

LEGISLATIVE HISTORY

MISCELLANEOUS

JURISDICTION STATEMENT

The jurisdictional statement in appellants' opening brief is complete and correct.

ISSUES PRESENTED FOR REVIEW

1. 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; and

2. 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. § 6a.

STATEMENT OF FACTS

A. Parties

Defendants, Potash Corporation of Saskatchewan Inc., PCS Sales (USA), Inc., Mosaic Company, Mosaic Crop Nutrition L.L.C., Agrium Inc., Agrium U.S. Inc., JSC Uralkali, RUE PA Belaruskali, JSC Silvinit, RUE PA Belarusian Potash Company, BPC Chicago L.L.C., and JSC International Potash Company (collectively, "Defendants") supply a vast majority of the potash in the world. During the Class Period, Defendants

sold millions of tons of potash in the United States. SA45 ¶1. Defendants account for approximately 71% of the World's potash market, SA60 ¶53, while PCS, Mosaic, Agrium and BPC sell the majority of potash in the United States. SA58 ¶47.

Potash Corporation of Saskatchewan Inc. ("Potash Corp.") is the world's largest producer of potash. Its subsidiary, PCS Sales (USA), Inc. ("PCS Sales"), executes potash marketing and sales on behalf of Potash Corp. within the United States. SA48 ¶11.

Mosaic Company ("Mosaic") is the world's third largest potash producer. Mosaic Crop Nutrition L.L.C. is a wholly-owned operating subsidiary of Mosaic Company. SA49 ¶14.

Agrium Inc. is the third largest Canadian potash producer. SA49 ¶16. It also has a wholly owned U.S. subsidiary, Agrium U.S. Inc. SA49 ¶17.

JSC Uralkali ("Uralkali"), a Russian joint venture, is the fifth largest potash producer in the world. SA49 ¶19. RUE PA Belaruskali is a Belarusian business entity which has nearly an 18% share of the global fertilizer market. SA50 ¶20. Together they own RUE PA Belarusian Potash Company ("BPC"), which was established in April 2005. BPC is the exclusive distributor of potash produced by Uralkali and Belaruskali throughout the world. SA50 ¶22. BPC Chicago L.L.C. is a wholly-owned

operating subsidiary of Belarusian Potash Company. During the Class Period, BPC Chicago L.L.C. marketed, sold, and distributed potash throughout the United States. SA50 ¶23.

JSC Silvinit ("Silvinit") is a Russian joint stock company. JSC International Potash Company ("IPC"), a Russian joint stock company, is the exclusive distributor of potash produced by Silvinit. During the Class Period, IPC marketed, sold, and distributed potash throughout the United States. SA51 ¶25.

B. Background of the Potash Industry

Potash is principally used as an agricultural fertilizer. There is no cost-effective substitute for potash. SA57 ¶44. Over half of the world's global potash production capacity is located in Canada, Russia and Belarus. SA58 ¶46.

The potash mining industry has very high barriers to entry. A single new mine requires $2.5 billion in upfront costs and five years in development time. Such extremely high barriers are conducive to a conspiracy because they protect existing suppliers from competition and perpetuate the high market concentration. SA58 ¶48.

Potash is a fungible, homogenous commodity product, and one supplier's type is readily substituted for another supplier. As a result, buyers make purchase decisions based largely, if not entirely, on price. SA59 ¶49.

While prices remained stable during the 1990s, spot prices for potash have risen exponentially during the last six years. Such dramatic price increases are inconsistent and at variance with legitimate market forces and economic trends in this market. These price increases are not commensurate with producers' costs of production or other input costs during the Class Period. SA74 ¶107.

C. Joint Ventures

The potash industry is marked by a high degree of cooperation among supposed competitors.

PCS, Agrium, and Mosaic are Canada's major potash suppliers. These three potash suppliers are equal shareholders in Canpotex Ltd. ("Canpotex"), which acts as a unified sales, marketing and distribution company for these companies' potash supplies throughout the world – except in Canada and the United States. SA60 ¶55. Canpotex potash sales are allocated among the producers based on production capacity of each shareholder. Through PCS, Agrium, and Mosaic's participation in

Canpotex, the companies have ready access to sensitive information about production capacity and pricing. SA61 ¶56.

Producers from the former Soviet Union have also consolidated sales and marketing of their potash supplies with a single entity, the BPC. It was formed in 2005, as a joint venture between Uralkali and Belaruskali. BPC jointly markets and sells their potash throughout the world, including the United States. SA61 ¶58.

Silvinit, which supplies potash through the International Potash Company, is aligned with the other producers of potash in the former Soviet Union. Silvinit has been in active negotiations to join BPC, raising the prospect of further consolidation of the potash industry. SA61 ¶59.

D. Meetings/Visits

Defendants have fostered a striking degree of cooperation through reciprocal visits to their production facilities, participation in trade associations and attendance at industry conferences. SA62 ¶61. Silvinit's Director General , acknowledged in a 2005 interview that the company has "old and friendly connections with potassium manufacturers from Belarus and [that] we still are pretty good partners." SA63 ¶65.

On October 11, 2005, Defendants' senior executives met and discussed highly sensitive production plans of at least one of the world's

largest potash suppliers. Shortly following the meeting, in November and December 2005, PCS and Mosaic announced production shutdowns at certain mines. The two partners in BPC also reduced production in January 2006, and IPC shut down mines later in the second quarter of 2006. SA62 ¶63.

E. Trade Associations Facilitate The Conspiracy

Defendants also participated in trade associations and trade events that provided opportunities to conspire and share information. Defendants are all members of International Fertilizer Industry Association ("IFIA"), which sponsors annual conferences that are attended by senior officials of Defendants. In May 2007, representatives of PCS, Mosaic, Agrium, Belaruskali, Canpotex, BPC and others attended the 75th annual IFIA conference in Istanbul, Turkey. During this IFA conference, the major potash manufacturers announced an additional price increase on their potash products. SA64 ¶68.

F. Coordinated Reductions in Output Capacity by Defendants

Defendants possess excess capacity to produce potash. SA69-70 ¶¶91-94. At the same time, all of them are participating in coordinated production cuts which cause rising prices. These capacity reductions would be against

the economic interest of any individual defendant in the absence of agreement amongst Defendants. SA64 ¶70.

In November 2005, PCS announced the shutdown of two mines from December 11, 2005 through January 7, 2006. PCS also shutdown another mine at Rocanville in January and February 2006. Mosaic also announced reductions in output at several North American locations in November and December 2005. SA65 ¶72.

Defendants continued reducing potash supply in 2006. In early 2006, PCS cut production through mine shutdowns. In January 2006 the two partners in BPC also reduced potash supply. Uralkali shut down its potash production, Belaruskali cut exports by 50 percent, and IPC announced that Silvinit would also shut down its mines. SA65 ¶74. Other potash suppliers commended Defendants' action noting that in the past the Soviet Union Defendants had undermined efforts to control prices by flooding the market during low demand periods. SA66 ¶75.

In early 2006, during negotiations over potash prices, Canpotex and BPC jointly limited production in an effort to compel Chinese buyers (the largest consumers in the world) to accept a price increase that would eliminate their "discount" and set a benchmark for other buyers around the world. The Chairman of Uralkali explained the action as: "here the point is

not to supply [potash] to them with USD 30-40 discount, as earlier, but to adjust the prices to the level of the neighbor Asian consumers. Therefore we will never ship anything there, until we get a contract reasonable from our point of view." SA66 ¶76.

Consistent with the agreement, the leading suppliers of potash around the world jointly limited production to bring the Chinese potash consumers in line with consumers in other countries, including the United States. SA66 ¶77.

In late 2008, when potash spot prices were near $1000 per ton PCS's CFO, Brownlee, commended the Belarusian Defendants for "tremendous discipline . . . in terms of managing supply in the marketplace." The same month he also explained why potash prices had not fallen in line with other fertilizer prices by stating that "[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." SA69 ¶89.

G. Other Actions Against Self-Interest

Approximately October 25, 2007, Silvinit announced that it might have to suspend shipments of potash from one of its mines due to the presence of a sinkhole caused by mine flooding. SA67 ¶80. Within a day,

PCS, Uralkali, Agrium and BPC, all competitors of Silvinit, announced that they would suspend sales of their own potash because of the suspension of sales by Silvinit. Significantly, the announcement of PCS's suspension of sales was made, not by PCS, but by its competitor, Uralkali. Uralkali also declared that "these decisions could have an upward impact on potash prices, including in those markets where Uralkali's potash is sold." SA67 ¶81.

On November 6, 2007, Silvinit resumed sales of potash. Within a day after Silvinit announced the resumption of its potash sales, Uralkali announced that BPC would also resume sales of Uralkali potash after the 12 day stoppage. Uralkali refused to explain the reason for resuming sales; however, a BPC official told a reporter the decision had been made "after studying the market." SA67 ¶82. On November 7, 2007, PCS and Agrium announced that they would also resume potash sales. SA68 ¶83.

H. Prices set in India, China, and Brazil Determine the U.S. Price

Defendants negotiate contracts for the sale of potash throughout the world. Contracts with buyers from China, Brazil and India are made first. The prices established there determine prices charged in the United States. Prices for contracts with buyers in China, Brazil and India become a basis for the spot market prices. SA65,73,74 ¶¶71, 105, 110. In turn, purchases in

the United States are made at these spot market prices from PCS, Mosaic, Agrium and BPC. SA74 ¶111.

Defendants intended and were aware that increases in potash prices internationally due to a global conspiracy would have a direct effect on prices in the United States. SA75 ¶113.

I. Parallel Price Increases In Foreign Markets Are Transmitted to the U.S. Market

Potash prices had remained stable until 2003, when Defendants began to implement a number of unprecedented parallel prices increases that raised the price of potash to historic levels. SA75 ¶114.

In January 2004, several Defendants announced parallel price increases as well. IPC announced a price increase to Indian buyers and Canpotex to Brazilian customers. PCS and the predecessor to Mosaic then shortly thereafter announced two separate $5 per ton increases within a five week period. SA76 ¶118.

These price increases were transmitted to the U.S. market. In May 2004, Canpotex announced a $20 per ton increase for the price of potash to some customers. PCS and IMC, the predecessor to Mosaic, announced $5 per ton price increases on potash to the United States followed by an additional $15 per ton increase in July 2004. In September 2004, PCS and IMC again increased potash prices by $10 per ton. SA76 ¶119.

Defendants' price escalation for potash continued throughout 2004. At a TFI meeting, IPC announced that it was seeking a $40 per ton increase from its Chinese customers. Canadian suppliers stated that they would seek a similar increase but not until Chinese importers had a chance to raise the domestic price for potash. On November 5, 2004, IPC announced that it had negotiated a price increase of $40 per ton from certain Chinese customers. The same day, PCS and Mosaic announced that Canpotex had also increased prices to certain Chinese customers by the same amount. Within a few weeks, Uralkali had also announced that it had increased potash prices to certain Chinese customers by virtually the same amount. SA76 ¶120.

In December 2004, PCS announced a price increase to its U.S. customers as well, in the amount of $20 per ton. Mosaic announced the same price increase that was effective at the same time a few weeks later. PCS announced two additional price increases for its U.S. customers in May 2005 despite estimates that potash demand in Brazil, one of the largest importers of potash, was declining by 44%. SA76 ¶121.

Potash prices remained stable through the first half of 2006, because Defendants were awaiting negotiation outcomes for proposed price increase of potash between them and Chinese customers. After an agreement was

reached for Chinese and Brazilian customers in late 2006, potash prices increased in the U.S. SA77 ¶122.

PROCEDURAL BACKGROUND

Defendants moved to dismiss the complaints in the District Court and argued that 1) the District Court lacked subject matter jurisdiction under the FTAIA, and that 2) Plaintiffs have failed to plead a plausible claim for relief under the standard set forth by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

The District Court denied the Defendants' motion and ruled that : 1) it does have subject matter jurisdiction, and 2) Plaintiffs have pled a plausible claim for relief. Defendants now appeal that decision.

For the FTAIA argument, the Court ruled "the complaint alleges more than mere overseas sales that have an impact on the U.S. markets". A28. Plaintiffs specifically allege that Defendants 'sold and distributed potash in the United States directly or through its affiliates.'" A28. Further, the Court stated that "the tight nexus between the alleged illegal conduct and the Defendants' import activities" was sufficient to fall under the import exception of the FTAIA. A29. The Court ruled "in every case involving direct sales to the United States in which our antitrust laws condemn an activity *per se*, however the foreign conduct, United States Courts would

have jurisdiction without any showing whatsoever of an effect on US commerce." A29. Accordingly, Direct and Indirect Purchaser Plaintiffs' allegations suffice to preserve this Court's subject matter jurisdiction" A29.

The District Court also ruled that Plaintiffs have pled a plausible claim for relief under the *Twombly* and *Iqbal* standards. The Court said: "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." A49. Additionally, the Court found that "Reading these allegations as a whole, the Court finds that Plaintiffs have satisfied the *Twombly* standard; the allegations propel the Defendants' conduct out of 'neutral territory' to plausibly suggest entitlement to relief. *Twombly*, 50 U.S. at 557. Moreover, Plaintiffs have sufficiently alleged the involvement of each Defendant and put them on notice as to the claims against them." A49.

SUMMARY OF THE ARGUMENT

Indirect Purchaser Plaintiffs incorporate by reference the Direct Purchaser Plaintiff brief in its entirety.

This Court should affirm the District Court's conclusion that the FTAIA does not bar Plaintiffs' Sherman Act claims because the conspiracy that they allege involves import trade or commerce. Alternatively, this Court should affirm the District Court's decision because Defendants' price-fixing conspiracy had a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce, as the Supreme Court interpreted that language in *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004).

Defendants have mischaracterized Plaintiffs' complaint. Plaintiffs have alleged a conspiracy to fix potash production and prices worldwide, with the intention and effect of decreasing the supply and increasing the price of potash imported into the United States. Defendants characterize Plaintiffs' complaint as alleging a wholly foreign conspiracy that has little or no impact on the United States. However, as the District Court recognized, Plaintiffs have alleged "more than mere overseas sales that have an impact on the U.S. markets." Plaintiffs' complaint explains in detail Defendants' control over the worldwide potash market, Defendants' opportunity and incentive to conspire to fix prices, and the effect that foreign price increases have on the U.S. market. According to the District Court, Plaintiffs have alleged a "tight nexus" between Defendants' conduct and their import activities. Also, according to guidelines established by the U.S. Department

of Justice and Federal Trade Commission, a price-fixing conspiracy by a foreign cartel that sells into the United States "involves" import trade or commerce.

Contrary to Defendants' arguments, international comity does not counsel against applying the Sherman Act to Plaintiffs' claims. Comity is an affirmative defense that Defendants must prove. Defendants have not identified any conflict between the Sherman Act and foreign law because no foreign law compels Defendants to engage in the conduct that Plaintiffs allege.

Because Defendants' conspiracy involved import trade or commerce, this Court need not apply the FTAIA analysis to the Complaint. However, the FTAIA offers an alternative ground for affirming the District Court's decision, particularly in light of the Supreme Court's pronouncements in *Empagran*. The Court held that in a case of "significant foreign anticompetitive conduct with … an adverse domestic effect … a purchaser in the United States could bring a Sherman Act claim under the FTAIA based on domestic injury." *Empagran*, 542 U.S. at 159.

This Court, therefore, should affirm the District Court's holding that the FTAIA does not bar Plaintiffs' claims, on one of two independently adequate grounds. Plaintiffs have alleged a conspiracy that involves import

trade or commerce and they have alleged foreign conduct that had a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce.

The District Court properly held that Plaintiffs have more than adequately alleged a plausible conspiracy. Defendants have attempted to compartmentalize the Complaint into individual issues instead of looking at the Complaint as a whole. This is not the current law. In order to plead a "further circumstance" under *Twombly*, Plaintiffs need only allege facts that "point to" an unlawful agreement. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 555 (2007). Plaintiffs need not also eliminate the possibility that such fact may be consistent with individual action. *See* Argument Point II.C. *infra*. The Complaint goes far beyond the sparse complaint in *Twombly* that "came close" to satisfying *Twombly*'s pleading standard. *See* Argument Point II. Plaintiffs' factual allegations must be taken as true and all reasonable inferences therefrom must be drawn in Plaintiffs' favor. *Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007) (citing *Twombly*); *Iqbal v. Hasty*, 490 F.3d 143, 164 (2d Cir. 2007).

Therefore, any one of Plaintiffs' additional facts would, by itself, constitute the "further circumstance" required by *Twombly* to nudge the inference of agreement from the conceivable to the plausible. However, in

price-fixing cases especially, the Court must view Plaintiffs' allegations as a whole and no one "further circumstance" need suffice.

Plaintiffs have more than amply stated a claim for price-fixing in violation of the Sherman Act. The decision of the District Court should be affirmed.

ARGUMENT

I. The District Court Properly Found That It Had Subject Matter Jurisdiction

The District Court found that Plaintiffs' claim is not barred by the FTAIA for lack of subject matter jurisdiction because the import trade or commerce exclusion applied. This decision is correct. The Complaint does not raise any novel issues concerning subject matter jurisdiction. It only concerns the effects of Defendants' anticompetitive conduct on U.S. commerce. There is no difference between this case and the many antitrust cases brought by both the government and by private consumers against participants in international price-fixing cartels.

A. The District Court Properly Held That The FTAIA's Import Trade or Commerce Exclusion Applies

Defendants mischaracterize the Complaint as alleging that Defendants entered into a foreign conspiracy that had little or no relationship with U.S. commerce. Def. Br. 17-18. Defendants' FTAIA arguments depend on these

mischaracterizations, and their arguments fail for that reason alone. In addition, a plain reading of the FTAIA statute, its legislative history, its statutory context and federal agency guidelines on the statute's implementation support the District Court's holding.

1. FTAIA Statute

The FTAIA lays down a general rule that places all (nonimport) activity involving foreign commerce beyond the scope of the Sherman Act. *F. Hoffmann-LaRoche, Ltd. v. Empagran S.A.* (*Empagran I*), 542 U.S. 155, 158 (2004). "It does so by setting forth a general rule stating that the Sherman Act 'shall not apply to conduct involving trade or commerce ... with foreign nations.' 96 Stat. 1246, 15 U.S.C. § 6a." It then brings such conduct back within the Sherman Act's reach provided that the conduct (1) has a direct, substantial, and foreseeable effect on U.S. markets, and (2) the Sherman Act claim arises out of that effect. 15 U.S.C. § 6(a); *Empagran I*, 542 U.S. at 162.

The FTAIA's introductory clause provides that conduct involving import trade or commerce is exempt from the FTAIA's requirements. 15 U.S.C. § 6(a); *see, e.g., Carpet Group Int'l v. Oriental Rug Importers Ass'n, Inc.*, 227 F.3d 62, 71 (3d Cir. 2000). The term "import commerce" is not defined under the statute, but it generally "denotes a product (or perhaps a

service) that has been brought into the United States from abroad." *Turicentro, S.A. v. American Airlines, Inc.*, 303 F.3d 293, 302 (3d Cir. 2002)(citation omitted); *see also* IB P. Areeda & H. Hovenkamp, Antitrust Law ¶272 (3d ed. 2006) ("Import commerce involves transactions in which the seller is located abroad while the buyer is domestic and the goods flow into the United States."). Thus, when parties bring goods or services into the United States, the FTAIA is not triggered (*i.e.*, an antitrust claim against the parties will fall within the traditional scope of the Sherman Act). *See Turicentro*, 303 F. 3d at 302. However, if "[d]efendants did not directly bring items or services into the United States …, they cannot be labeled 'importers' [nor could it be said that Defendants] have engaged in 'import trade or commerce." *Id*. In such a situation, an inquiry under the FTAIA would be warranted. *See id*. at 304; *see also Dee-K Enterprises, Inc. v. Heveafil Sdn. Bhd.*, 299 F.3d 281 (4th Cir. 2002) (finding that FTAIA did not apply at all because only import commerce affected).

Here, the District Court reasoned that the FTAIA did not apply. Contrary to the Defendants' argument, the Court articulated the proper legal standard under the FTAIA. A26-28. It made numerous findings based on its review of the Complaint that leave no doubt, in its view, that the FTAIA does not bar Plaintiffs' claims. A3-12, 28-29. Because Plaintiffs had

alleged "more than mere overseas sales that have an impact on the U.S. markets," the District Court rejected Defendants' claim – like the one resurrected on appeal – that the allegations are based wholly on conduct overseas. A28. It found a "tight nexus between the alleged illegal conduct and Defendants' import activity." *Id*. Thus, the District Court held that since "Plaintiffs have pleaded enough to fall under the FTAIA's parenthetical 'import trade or import commerce' exclusion,' [it] did not need to decide whether Defendants' conduct had a 'direct, substantial, and reasonably foreseeable' effect on United States commerce." A28-29.

Indeed, the allegations in the Complaint support the District Court's finding that the conspiracy impacted import commerce. The Complaint alleges that all Defendants sold millions of tons of potash in the United States. SA45 ¶1; SA49 ¶¶10-25, SA56 ¶41, SA61 ¶58. They collectively controlled a vast majority of the U.S. potash market. SA56 ¶42. PCS, for example, had 22% market share by capacity and 17% of global production, and had sales in North America that represented 37% of its total potash sales in 2008, most of which were attributable to potash customers in the United States. SA46 ¶¶10-11. Mosaic is the world's third largest potash producer with 14% of global production and 38% of North American production. SA49 ¶13. "PCS, Mosaic, Agrium and BPC sell the majority of potash in

the United States." SA58 ¶47. And, half of Canada's potash exports go to the United States and prices are based on world spot prices. SA74 ¶111.

Given this volume, "Defendants knew that commerce in each of the States identified in this Complaint perforce would be affected adversely through implementation of their conspiracy." SA57 ¶43. Defendants also conspired to fix, raise, maintain, and stabilize the prices of potash sold in the United States through setting, for instance, benchmarks. SA45 ¶2; SA68-SA74 ¶¶87-108. As a result of their price-fixing conspiracy, potash prices were artificially inflated in the United States and worldwide, and are evidence of the conspiracy. SA2 ¶3, SA27-30 ¶¶116-130.

2. Legislative History, Statutory Context and Agency Guidelines

Defendants argue that the "District Court's holding below is … an unprecedented enlargement of U.S. antitrust jurisdiction that cannot be reconciled with the congressional scheme." Def. Br. 31. However, legislative history supports the District Court's decision since the FTAIA has "no effect on the application of the antitrust laws to imports." H.R. Rep. No. 97-876 § III.D.3 (1982). Just because Defendants disagree with the District Court's application of the "import trade or commerce" exclusion does not mean that it misinterpreted the FTAIA.

The District Court's holding also follows current international antitrust enforcement policies and priorities of the U.S. Department of Justice ("DOJ") and Federal Trade Commission ("FTC"). *See* DOJ and FTC, Antitrust Enforcement Guidelines for International Operations (1995) (hereinafter "Guidelines"). Both agencies have taken the position that where foreign manufacturers enter into a price-fixing cartel and collectively make substantial sales into the United States, their conduct can be deemed "involving import commerce." *See* Guidelines, § 3.11 and Illustrative Example A. In an illustration, the Guidelines address a situation in which a foreign cartel produces products outside the United States; members agree to fix prices for that product; and they "make substantial sales into the United States." *Id*. The Guidelines state that the "transaction is *unambiguously* an import into the U.S. market," and thereby, "subject matter jurisdiction is clear." *Id*. (emphasis added).[1]

Defendants are also wrong to assert that the District Court should have considered whether the anticompetitive conduct at issue involved import trade or commerce, rather than whether the actors themselves are

[1] Contrast that hypothetical situation to one in which the cartel "[r]ather than selling directly into the United States, . . . sells to an intermediary outside the United States, which they know will resell the product in the United States." Guidelines § 3.121, Illustrative Example B. The Guidelines state that such a transaction does not "involve import trade or commerce" and, thereby, falls within the scope of the FTAIA."

involved in import trade or commerce. Def. Br. 22-23. That distinction is irrelevant. Since Defendants' alleged anticompetitive conduct involves imports into the United States, whether the District Court focused on the conduct or the actors, the result is the same – because import commerce is involved, the FTAIA does not apply.

Defendants also overreach when claiming that the District Court's holding subjects all participants in U.S. import trade to antitrust liability for overseas anticompetitive conduct. Def. Br. 23-25. The District Court did not "write out" the substantial effects test from the FTAIA. It simply concluded that the FTAIA did not apply here because the U.S. import market was manipulated and affected by Defendants' international price-fixing scheme.

3. International Comity

Comity is "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard to both international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). It is a prudential doctrine that "come [s] into play, if at all, only after a court has determined that the acts complained of are subject to Sherman Act jurisdiction." *Hartford Fire Ins. v.*

California, 509 U.S. 764, 797 n.24 (1993). Since comity is an affirmative defense, Defendants bear the burden of establishing its application. *Allstate Life Ins. Co. v. Linter Group Ltd*., 994 F.2d 996, 999 (2d Cir. 1993). The extension of comity is also discretionary. *See, e.g., In re Uranium Antitrust Litig*., 617 F.2d 1248, 1255 (7th Cir. 1980). Defendants' "straw-man" arguments for the extension of comity here fail for several reasons. Def. Br. 25-30.

First, Defendants' arguments again rest on mischaracterizations of Plaintiffs' allegations. Contrary to Defendants' assertion, Plaintiffs do not allege that Defendants' involvement in trade associations was itself anticompetitive. Plaintiffs allege that trade association meetings, *inter alia*, "provided opportunities to conspire and exchange highly sensitive competitive information." SA64 ¶67. It was during or shortly after these trade association meetings and other of gatherings when Defendants made public announcements of price increases. SA62-SA64 ¶¶61-69. Defendants' assertion that participation in trade association was "affirmatively encouraged" by a foreign government is irrelevant. Def. Br. 28-29. Even if relevant, it would still not excuse Defendants' conduct to enter into a price-fixing conspiracy to inflate the prices charged to purchasers in the United States. *Hartford Fire*, 509 U.S. at 798.

Second, Defendants have not identified any conflict between foreign law and the Sherman Act's prohibition on price-fixing. *Hartford Fire*, 509 U.S. at 798 (citations omitted). For an actual conflict to exist, Defendants would have to point to a foreign law requiring them to enter collusive agreements with their competitors regarding sales prices. *Id.* at 799; *see Metro Indus. v. Sammi Corp.*, 82 F.3d 839, 847 (9th Cir. 1996) (citing *Hartford Fire*) (finding comity concerns inapplicable because foreign government did not "compel" conduct at issue, even though government representatives were involved); *see also Pillar Corp. v. Enercon Indus. Corp.*, 694 F. Supp. 1353 (E.D. Wis. 1988) (denying motion to dismiss because Defendants failed to demonstrate international comity warranted dismissal). Because foreign law does not "require[] them to act in some fashion prohibited by the law of the United States," Defendants have not met the threshold for extending comity. *Hartford Fire*, 509 U.S. at 799. Thus, the Court need not "address other considerations that might inform a decision to refrain from the exercise of jurisdiction on the grounds of international comity." *Id.*

Third, regulation of an industry by a foreign government does not provide a basis for extending comity where the alleged conduct has domestic effects. Even if a foreign government arguably sanctioned or approved any

of the Defendants' conduct – and nothing indicates that occurred – it "will not, of itself, bar application of the United States antitrust laws,' even where the foreign state has a strong policy to permit or encourage such conduct." *Hartford Fire*, 509 U.S. at 799 (quoting Restatement (Third) Foreign Relations Law § 415, Comment j).

Defendants' purported authorities to the contrary arose in dissimilar circumstances and are unavailing. selectively citing *Empagran* (Def. Br. 26-27), Defendants fail to mention that the Court also stated that: "[O]ur courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused." 542 U.S. at 165 (underlined emphasis added). The *Empagran* Court cited concerns about international comity in applying the FTAIA to a foreign Plaintiff. *Id.* at 165-66. However, Congress made the opposite policy choice regarding foreign conduct that harms domestic interests. *Id*.

Defendants' reference to *United Phosphorus, Ltd. v. Angus Chemical Co.*, 322 F.3d 942 (7th Cir. 2003) is inapposite. There, this Court was, as a matter of first impression, examining the primary issue of whether the FTAIA is jurisdictional or whether it states an additional element under the

Sherman Act. *Id.* at 952. In deciding that the FTAIA was jurisdictional, this Court affirmed the lower court's finding of no FTAIA effect because "there was virtually no evidence that the Plaintiffs would have made any sales in the United States." *Id*.

B. Defendants' Conspiracy Had A "Direct, Substantial and Reasonably Foreseeable Effect" On U.S. Commerce

Even if the import commerce exclusion does not apply – a conclusion belied by the District Court's findings and the allegations contained in the Complaint – it would still have subject matter jurisdiction because Defendants' conspiracy had a "direct, substantial and reasonably foreseeable effect" on U.S. commerce. Plaintiffs have alleged anticompetitive acts that have direct effects in the United States and have alleged a direct link between the conspiracy and the U.S. market.

As to what such an effect is, "[s]ince Judge Learned Hand's opinion in *United States v. Aluminum Co. of America*, 148 F.2d 416, 443-44 (2d Cir. 1945), it has been relatively clear that it is the situs of the effects as opposed to the conduct, that determines whether United States antitrust law applies." H.R. Rep. No. 97-876 § III.E.2 (1982). Moreover,

> [a]ny major activities of an international cartel would likely have the requisite impact on United States commerce to trigger United States subject matter jurisdiction. For example, if a domestic export cartel were so strong as to have a 'spillover' effect on commerce within its country-by creating a world-wide

> shortage or artificially inflated world-wide price that had the effect of raising domestic prices-the cartel's conduct would fall within the reach of our antitrust laws.

H.R.Rep. No. 97-686, § III.E.2 (1982); *see also Crompton Corp. v. Clariant Corp*., 220 F. Supp.2d 569, 573 (M.D. La. 2002) (citation omitted).

The FTAIA's legislative history shows that the FTAIA covers conduct between two foreign firms outside of the U.S. when there is a global price-fixing conspiracy. H.R. Rep. No. 97-876 § III.D.2 (1982). "Such foreign transactions should … be treated in the same manner as export transactions," requiring a "direct, substantial and reasonably foreseeable effect on domestic commerce or a domestic competitor." *Id*.

Like a domestic export cartel, a foreign cartel that engaged in significant anticompetitive conduct would have, *a fortiori*, similar effects on U.S. commerce. *See Empagran*, 542 U.S. at 159 (stating that in a case of "significant foreign anticompetitive conduct with … an adverse domestic effect … a purchaser in the United States could bring a Sherman Act claim under the FTAIA based on domestic injury.") (emphasis added)[2]; *see also MM Global Services, Inc. v. The Dow ChemSical Co.*, 329 F. Supp. 2d 337,

[2] Although this language was *dicta*, this Court has recently stated that it "must treat with great respect the prior pronouncements of the Supreme Court, even if those pronouncements are technically dicta." *McBride v. CSX Transp., Inc.*, 598 F.3d 388, 405 (7th Cir. 2010).

342 (D.Conn. 2004) (citation omitted). ("[I]t is ... quite foreseeable to conclude that a conspiracy to fix prices in the Indian market might reasonably cause direct and substantial effects on the prices charged for the same products in the United States."). This is consonant with Seventh Circuit law. *See Metallgesellschaft AG v. Sumitomo Corp. of America*, 325 F.3d 836, 841 (7th Cir. 2001) ("A global conspiracy to inflate prices could have anticompetitive effects on the U.S. economy whether the conspiracy occurred within the United States or abroad.").

Here, Plaintiffs' allegations support a finding of subject matter jurisdiction under the FTAIA because Defendants' conduct did result in an adverse domestic effect that was reasonably foreseeable. Thus, Defendants are wrong to claim that Plaintiffs rely on indirect effects in the United States based on conduct abroad and that Plaintiffs have not alleged a direct link between the conspiracy and the U.S. market. Def. Br. 32-39. Plaintiffs allege that the U.S. and global markets are inextricably linked: the worldwide market is interrelated such that half the world's global capacity is located in Canada, Russia and Belarus (SA58 ¶46); six of the foreign producers accounted for 71% of the world potash market (SA60 ¶53); "Potash is a fungible, homogenous commodity product, and one supplier's

type is readily substituted for another supplier" (SA59 ¶49); the global trade in potash is even more concentrated than OPEC for oil (SA59 ¶52).

Moreover, the Complaint alleges that Defendants' conduct had a direct effect on U.S. commerce: purchase contracts of potash with buyers in India and China directly influence prices in other major markets including the U.S. (SA65 ¶71); Defendants sell in these other major markets, including the United States (SA58 ¶47); Defendants engaged in discussions regarding the "world market price condition" (SA73 ¶106); prices in the United States increased after an agreement was reached for Chinese and Brazilian customers (SA77 ¶122); prices of potash sold by Defendants have been raised (SA78 ¶127(a.)); Defendants negotiate contracts throughout the world (including the United States) (SA74 ¶110); prices charged elsewhere become the basis for the spot market prices that Defendants used to charge purchasers in the United States (SA65 ¶111); U.S. companies participated in the conspiracy (SA75-6 ¶¶116-118, 121); and Defendants conspired to affect prices in the United States (SA72 ¶100).

The Complaint further alleges that a foreseeable result of Defendants' conduct was that prices would remain constant or would increase: simultaneous "reduction of production capacities by companies in different parts of the world as motivated by common wish to hold prices…" (SA67

¶79); Defendants threatened shut downs that resulted in price increases in potash in the United States (SA68 ¶87); Defendants controlled supply to raise prices (SA71 ¶96); Defendants were aware that increases in international prices would affect (their own) sales in the United States (SA75 ¶113).

Plaintiffs have sufficiently alleged that Defendants sold millions of tons of potash in the United States and engaged in a conspiracy with the intent and effect of fixing potash prices everywhere it is sold, including the United States. Plaintiffs have also explained the nature of the potash market in detail and have alleged that when prices rise in other markets, price increases in the United States necessarily follow. The Supreme Court has stated that in a case of "significant foreign anticompetitive conduct with … an adverse domestic effect … a purchaser in the United States could bring a Sherman Act claim under the FTAIA based on domestic injury." *Empagran*, 542 U.S. at 159. The plaintiffs in *Empagran* alleged a worldwide conspiracy to fix the price of vitamins. Based on the domestic impact of that conspiracy, the Supreme Court stated that the FTAIA would not prevent domestic vitamin purchasers from bringing a Sherman Act claim. Specifically, the Court wrote that in a case of "significant foreign anticompetitive conduct with … an adverse domestic effect … a purchaser

in the United States could bring a Sherman Act claim under the FTAIA based on domestic injury." *Empagran*, 542 U.S. at 159. Plaintiffs here have alleged a worldwide conspiracy to fix the price of potash. Thus, like the plaintiffs in *Empagran*, they have alleged significant foreign conduct with an adverse domestic effect. Because the FTAIA would not have applied to the *Empagran* plaintiffs had they been domestic purchasers, it does not apply to Plaintiffs here. The District Court properly sustained Plaintiffs' claims under the FTAIA.

II. TWOMBLY REQUIRES THAT THE ALLEGATIONS OF THE COMPLAINT, CONSIDERED AS A WHOLE, RAISE A REASONABLE EXPECTATION THAT DISCOVERY WILL REVEAL EVIDENCE OF ILLEGAL AGREEMENT

A. Plaintiffs' Fact Allegations Are To Be Accepted As True And Construed In The Manner Most Favorable To Plaintiffs

Federal Rule of Civil Procedure 8(a)(2) provides that a complaint:

> requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests,' *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L.Ed.2d 80 (1957) ["*Conley*"].

Twombly, 550 U.S. at 555.

Twombly announced the "retirement" of *Conley*'s formulation that a complaint should not be dismissed under Rule 12(b)(6) unless it appears beyond doubt that a plaintiff can prove "no set of facts in support of his

claims which would entitle him to relief." *Id.* at 561-63. In its place, *Twombly* required "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement". *Id*. at 556. But *Twombly* continued *Conley*'s other well-settled "general standards." *Id*.

Plaintiffs have alleged a multitude of facts that, taken in light most favorable to Plaintiffs, handily clear the plausibility hurdles set forth in *Twombly*. As the Second Circuit recently stated in vacating under *Twombly* the dismissal of an antitrust complaint, "factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true, even if doubtful in fact." *Starr v. Sony BMG Music Entertainment*, 592 F.3d 314, 327 (2nd Cir. 2010).

B. *Twombly* Merely Requires The Pleading Of A Plausible Ground For Relief Under Section 1

Twombly does not require "particularity" in a complaint as the Defendants contend. Rather, it merely requires "more than labels and conclusions" in support of grounds that "raise a right to relief above the speculative level." *Twombly,* 550 U.S. at 555. *Twombly* applied what it described as a new "gloss" on the well-settled standards of Rule 8(a)(2) to consider what a plaintiff must plead to state a claim that corporations had agreed to divide markets in violation of Section 1 of the Sherman Act:

> In applying these general standards to a § 1 claim, we hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. *Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.* And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'

Id. at 556(emphasis supplied) (footnote omitted), quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

A plaintiff therefore must merely allege "enough fact" or a "circumstance" that, taken as true, "raises a suggestion of a preceding agreement." *Id*. at 557. The allegations do not need to raise a probable inference of agreement, and allegations which raise a plausible inference of agreement must be permitted to go forward. *Id*. at 556.

Defendants' contention that Plaintiffs must plead the "who, what, and where" of a conspiracy to survive dismissal finds no support in the great weight of authority. Numerous courts have held that detailed direct evidence is not necessary, but that circumstantial evidence is sufficient to make a claim plausible under *Twombly*. *E.g.*, *Starr*, 592 F.3d at 321 (allegations of fact sufficient "to raise a right to relief above the speculative level"); *In re Graphics Processing Units Antitrust Litig.*, 540 F.Supp.2d 1085, 1096 (N.D.Cal. 2007) ("[D]irect allegations of conspiracy are not

always possible given the secret nature of conspiracies. Nor are direct allegations necessary."); *City of Moundridge v. Exxon Mobil Corp.*, 250 F.R.D. 1, 7 (D.D.C. 2008) ("Because the complaint alleged some circumstantial facts that support an inference of an agreement, the plaintiffs' claim is plausible."). Facts similar to those alleged here, including the absence of competition and presence of excess production capacity, combined with parallel conduct, have been found sufficient to state a plausible claim under *Twombly*. *See In re Pressure Sensitive Labelstock Antitrust Litig.*, 566 F.Supp.2d 363, 372-73 (M.D.Pa. 2008)("[A]llegations of observed conduct—actual forbearance from competition for customers, parallel price increases, and excess production capacity—are placed among other factual allegations that plausibly suggest a preceding agreement."). *See also In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 361 (3rd Cir. 2004).

C. *Twombly* Does Not Require The Elimination of Contrary Inferences Or The Pleading of the Most Plausible Inference

Twombly's plausibility standard for pleading an unlawful agreement at the motion to dismiss stage is far less demanding than the standard for proving an unlawful agreement at the summary judgment stage. Under the summary judgment standard, a plaintiff seeking damages for a violation of Section 1 must present evidence "tend[ing] to rule out the possibility that the defendants were acting independently." *Id.* at 554, citing *Matsushita*

Electric Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986) and *Monsanto Co. v. Spray-Rite Serv. Corp*., 465 U.S. 752, 764 (1984).[3] Under the *Twombly* pleading standard, in contrast, a complaint must only: (a) give fair notice to Defendants of plaintiffs' claims; and (b) contain enough to raise a right to relief above the speculative level. *Twombly,* 550 U.S. at 554-56 & n. 3.[4] Further, Rule 8(a)(2) requires no heightened degree of pleading particularity, and the heightened standard of particularity of Federal Rule 9(b) does not apply to determining whether a Section 1 claim has been stated. *Id*. at 569 n. 14 (broadening the scope of Rule 9 "can only be accomplished 'by the process of amending the Federal Rules, and not by

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[3] "While a showing of parallel 'business behavior is admissible circumstantial evidence from which' agreement may be inferred, it falls short of 'conclusively establish[ing] agreement or . . . itself constitut[ing] a Sherman Act offense.'" *Twombly*, 550 U.S. at 553, quoting *Theatre Enterprises v. Paramount Film Distributing Corp.*, 346 U.S. 537, 540-41 (1954). Thus**, to survive summary judgment**, a plaintiff must not only adduce evidence of facts "pointing toward" an unlawful agreement, but must go further and submit evidence tending to exclude the possibility of individual decision-making. *Compare Twombly*, 550 U.S. at 554 *with Matsushita*, 475 U.S. at 588.

[4] In *Erickson v. Pardus*, 551 U.S. at 93-94 (2007), decided barely two weeks after *Twombly*, the Supreme Court reaffirmed that under Rule 8(a)(2), "[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,'" accepting all well-pleaded allegations in the complaint as true and drawing all reasonable inferences in favor of the non-moving party. *Id.* (quoting *Twombly*, 550 U.S. at 555-56).

judicial interpretation'").

Of course, the even higher standards of particularity required by the Private Securities Litigation Reform Act, 15 U.S.C. § 78u-4 ("PSLRA"), to plead "a strong inference" of scienter, do not apply. But even as regards the PSLRA, the Supreme Court has held that a complaint's *scienter* allegations "need not be irrefutable, *i.e.*, of the 'smoking-gun' genre, or even the 'most plausible of competing inferences.'" *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 323-24 (2007) (citation omitted) ("*Tellabs*"). Rather, even under the much higher PSLRA standard,[5] the so-called "strong inference need only be equal to any opposing inference. *Id*.

Thus, under a close reading of *Twombly*, Plaintiffs' allegations: (a) need not tend to eliminate a competing inference; and (b) need not tend to be the "most plausible of competing inferences," in order adequately to support a Section 1 price-fixing claim. *Starr*, 592 F.3d at 321-22, 330 (complaint need not rule out the possibility of independent action by defendants, but "to survive a motion to dismiss for failure to state a claim, a plaintiff need only allege enough factual matter, taken as true, to suggest that an agreement was

[5] One commentator, who primarily represents defendants, has compared the *Twombly* plausibility standard to that for *scienter* analyzed in *Tellabs* and has agreed that there is "an apparently stricter standard established by Congress for securities fraud. *See* 15 U.S.C. § 78u-4(b)(2)." R.M. Steuer, *Plausible Pleading: Bell Atlantic v. Twombly*, 82 ST. JOHN'S L.REV. 861, 862 n. 5 (2008).

made"); *In re Rail Freight Surcharge Antitrust Litig*., 2008 WL 4831214 at *8 (D.D.C. Nov. 7, 2008) (even when an innocent explanation for trade association activities may exist, complaint "need not be dismissed where it does not exclude possibility of independent action"), citing *Moundridge*, 250 F.R.D. at 4-5., citing *Twombly*, 500 U.S. at 554-56.

Defendants' attempt to place a summary judgment burden upon the Plaintiffs, is contrary to *Twombly* and the weight of authority.

D. This Court Has Emphasized That After *Twombly* Courts Are To Continue To Adhere To A Notice Pleading Standard.

This Court has emphasized that after *Twombly* courts are to continue to adhere to a notice pleading standard. *Tamayo v. Blagojevich*, 526 F.3d 1074, 1083 (7th Cir. 2008); *see also Frayne v. Chicago 2016*, No. 08 C 5290, 2009 WL 65236 at *1 (N.D. Ill. Jan. 8, 2009). To state a claim under federal notice pleading standards, all the courts in this Circuit require is that the complaint set forth a "'short and plain statement of the claim showing that the pleader is entitled to relief....' Fed.R.Civ.P. 8(a)(2)." *OSF Healthcare Sys. v. Banno*, No. 08-1096, 2008 WL 5170638 at *1 (C.D. Ill. Sept. 24, 2008). Factual allegations are accepted as true and need only give "fair notice of what the ... claim is and the grounds upon which it rests." *EEOC v. Concentra Health Serv., Inc.*, 496 F.3d 773, 776-77 (7th Cir. 2007), *quoting*

Twombly, 550 U.S. at 555. The plaintiff's "... allegations [must only] show that it is plausible, rather than merely speculative, that he is entitled to relief." *Tamayo*, 526 F.3d at 1083.

In *Tamayo*, this Court made clear that *Twombly* should not be over-read to suggest that the Supreme Court had abrogated the liberal and long-standing pleading standards of the Federal Rules:

> Since *Bell Atlantic*, we cautiously have attempted neither to over-read nor to under-read its holding. We have stated that the Supreme Court in *Bell Atlantic* 'retooled federal pleading standards,' and retired 'the oft-quoted *Conley* formulation.' *Killingsworth*, 507 F.3d at 618-19 (quoting *Bell Atlantic*, 127 S. Ct. at 1968 (quoting *Conley*, 355 U.S. at 45-46, 78 S. Ct. 99)). We also have cautioned, however, that *Bell Atlantic* 'must not be overread.' *Limestone Dev. Corp. v. Vill. of Lemont, Ill.*, 520 F.3d 797, 803 (7th Cir. 2008). Although the opinion contains some language that could be read to suggest otherwise, the Court in *Bell Atlantic* made clear that it did not, in fact, supplant the basic notice-pleading standard. *Bell Atlantic*, 127 S. Ct. at 1973 n. 14 (expressly disclaiming the establishment of any 'heightened pleading standard'); *see also Lang v. TCF Nat'l Bank*, 249 Fed.Appx. 464, 466-67 (7th Cir. 2007) (noting that notice-pleading is still all that is required); *Limestone*, 520 F.3d at 803 (same). A plaintiff still must provide only 'enough detail to give the defendant fair notice of what the claim is and the grounds upon which it rests, and, through his allegations, show that it is plausible, rather than merely speculative, that he is entitled to relief.' *Lang*, 249 Fed.Appx. at 466 (citing *Bell Atlantic*, 127 S. Ct. at 1964) (internal quotation marks and ellipses omitted).

Tamayo, 526 F.3d at 1082-83; *DSM Desotech Inc. v. 3D Sys. Corp.*, No. 08 CV 1531, 2009 WL 174989 at *2 (N.D. Ill. Jan. 26, 2009) (same).

In *Concentra*, this Court explained that Rule 8(a)(2), as interpreted by *Twombly*, imposed "two easy-to-clear hurdles":

> First, the complaint must describe the claim in sufficient detail to give the defendant 'fair notice of what the ... claim is and the grounds upon which it rests.' *Bell Atlantic Corp. v. Twombly*, --- U.S. ----, 127 S. Ct. 1955, 1964, 167 L.Ed.2d 929 (2007) (*quoting Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L.Ed.2d 80 (1957)) (alteration in *Bell Atlantic*). Second, its allegations must plausibly suggest that the plaintiff has a right to relief, raising that possibility above a 'speculative level'; if they do not, the plaintiff pleads itself out of court. *Bell Atlantic*, 127 S. Ct. at 1965, 1973 n. 14.

Concentra, 496 F.3d at 776; *Tamayo*, 526 F.3d at 1084.

III. PLAINTIFFS' ALLEGATIONS PRESENT GROUNDS TO INFER AGREEMENT WHICH ARE FAR MORE PLAUSIBLE THAN THOSE WHICH THE SUPREME COURT FOUND "CAME CLOSE" TO DOING SO IN *TWOMBLY*

If Plaintiffs' fact allegations are true, discovery will reveal many substantial evidence of an agreement to fix prices.

A. The Allegations Considered As A Whole, And The "Further Circumstances" Support The Inference Of Agreement

On a motion pursuant to Rule 12(b)(6), the well-pleaded allegations of the Complaint must be considered as a whole without "tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co. v. Union Carbide & Carbon Corp*., 370 U.S. 690, 699 (1962). *Twombly* did not change this long-established standard. *Twombly*, 550 U.S. at 569 n. 14 ("the complaint

warranted dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible"). For example, *In re Southeastern Milk Antitrust Litig*., 555 F.Supp.2d 934 (E.D. Tenn. 2008), the court denied motions to dismiss, noting that the price-fixing complaints' allegations:

> taken together . . . . while not answering all specific questions about 'who, what, when and where,' do put defendants on notice concerning the basic nature of their complaints against the defendants and the grounds upon which their claims exist. While viewing each of these factual allegations in isolation may lead one to the conclusion drawn by the defendants, *i.e*., that there is a legitimate business justification for each of the acts, a view of the complaint as a whole, which this Court must take, and accepting all of the factual allegations as true, does support a plausible inference of a conspiracy or agreement made illegal under § 1 of the Sherman Act.

In re Southeastern Milk, 555 F.Supp.2d at 943. *See also In re Rail Freight Surcharge Antitrust Litig*., 2008 WL 4831214 at *4 n. 4 ("the character and effect of a [Sherman Act] conspiracy are not to be judged by dismembering it and viewing its separate parts"), quoting *Continental Ore*, 370 U.S. at 699; *In re Pressure Sensitive Labelstock Antitrust Litig*., 566 F.Supp.2d at 373 (*Twombly* requires that "a district court must consider a complaint in its entirety without isolating each allegation for individualized review").

Defendants attempt to analyze Plaintiffs' allegations separately, and argue that they do not plead a plausible conspiracy. Defendants compartmentalize the complaint in arguing that the opportunity to conspire

does not alone suffice to survive *Twombly*. Opening Brief for Appellants ("Def. Br.") at 53. This approach is without support. Defendants must analyze and view the Complaint as a whole. When the allegations are viewed in the context of the entire complaint, it is clear that Plaintiffs have alleged sufficient "further circumstances pointing toward a meeting of the minds." *Twombly*, 550 U.S. at 557.

B. Plaintiffs Allege Far, Far More Than Was Present In T*wombly*

Twombly did not limit what could constitute a "further circumstance" pointing to an agreement and, instead, cited to commentators such as 6 Areeda & Hovenkamp, ANTITRUST LAW, ¶1425 (2d ed. 2003) ("Areeda") and Blechman, *Conscious Parallelism, Signaling and Facilitating Devices: The Problem of Tacit Collusion Under the Antitrust Laws*, 24 N.Y.L. SCH. L. REV. 881, 899 (1979) ("Blechman"). 127 S.Ct. at 1965 n. 4.

Judge Posner has written authoritatively on antitrust in judicial opinions and in his treatise ANTITRUST LAW (2d ed. 2001) ("Posner"). The Supreme Court and other courts rely frequently on Judge Posner's treatise.[6]

[6] *See, e.g., Leegin Creative Leather Products v. PSKS, Inc.*, 551 U.S. 877, 891-98 (2007); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 221, 223-24 (1993); *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 338 (1991); *Jefferson Parrish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 15 (1984); *Freeman v. San Diego Association of Realtors*, 322 F.3d 1133,

The foregoing commentators or court decisions show that each fact alleged in the Complaint is probative of an agreement to fix prices. For example, Plaintiffs allege that Defendants:

(1) agreed to exchange price information and terms of sale information, SA61 ¶¶62-66, SA67 ¶¶80-83 (Posner at 86-87);

(2) signaled their intent to refrain from competing with each other, SA72-73 ¶¶101-06 (Blechman 899);

(3) engaged in parallel production shutdowns in response to problems at a single competitor's mine, SA67 ¶¶80-83;

(4) announced the mine problem through a competitor different than the actual owner of the mine, SA67 ¶81;

(5) engaged in parallel price increases after engaging in communications among themselves, SA62 ¶63, SA64 ¶68, SA65 ¶72-74, SA66 ¶76-77, SA67-68 ¶80-82, SA68-69 ¶88, SA75 ¶115-16, SA76 ¶118-21; and

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1145 (9th Cir. 2003); *General Commercial Packaging, Inc. v. TPS Package Engineering, Inc.*, 114 F.3d 888, 890-91 (9th Cir. 1997).

(6) did so when their respective costs of providing the product had *declined*, SA65 ¶¶72-73, SA68-69 ¶88, SA 69-70 ¶¶90-94, SA77 ¶¶124-25 (Blechman at 886; Posner at 88).[7]

As to characteristics of the market which support the inference of collusion, Plaintiffs have alleged that:

(7) the lack of substitutes for Potash gave Defendants a strong collective motive to fix prices without concern for losing market share, SA61 ¶65 (Blechman at 886);

(8) Defendants had similar cost structures favorable to supply restrictions, SA60 ¶55 (Posner at 69-79); and

(9) potential new entrants were constrained by high barriers to entry SA61 ¶56 (Areeda ¶1430g).

Because the very sparse complaint in *Twombly* "came close" to stating a claim, Plaintiffs' much more detailed complaint clearly has more than "enough factual matter (taken as true) to suggest that an agreement was made." *Twombly*, 550 U.S. at 556-57.

[7] Indeed, competitors' exchange of price information, and prices unjustified by changes in defendants' costs may make it "possible to demonstrate through economic evidence the existence of collusive pricing even though no overt acts of collusion are detected." Posner at 86-87.

Plaintiffs' allegations, considered as a whole and under the proper standards on a motion to dismiss, rise far above the "speculative" level and far beyond "the line from conceivable to plausible." *Id*. at 555, 570.

C. Defendants' Communications With One Another And Exchange Of Highly Sensitive Information, Constitute Classic "Further Circumstances" Which Satisfy *Twombly*.

The Complaint alleges that highly sensitive information was exchanged between Defendants on numerous occasions. SA62 ¶62-66. The fact that Defendants were in communication with each other shortly before coordinated announced capacity reductions or price increases leads to a strong inference that Defendants exchanged pricing and capacity information before the announcements.

Defendants argue that Plaintiffs must allege "that the Defendants actually exchanged sensitive information and agreed to fix prices at those meetings." Def. Br. at 54. At this stage of litigation, the law does not require that Plaintiffs have had a representative in the room witnessing the transfer of information among Defendants' representatives. In direct contrast to Defenants' assertions, numerous courts have held that direct evidence is not necessary and circumstantial evidence is sufficient to make a claim plausible under *Twombly*. *E.g.*, *Starr*, 592 F.3d at 321 (allegation of "parallel business behavior is admissible circumstantial evidence from which the fact finder

may infer agreement") (internal quotation omitted); *Graphics Processing Units*, 540 F.Supp.2d at 1096 ("[D]irect allegations of conspiracy are not always possible given the secret nature of conspiracies. Nor are direct allegations necessary."); *Moundridge*, 250 F.R.D. at 7.

Describing a market of few sellers such as this one, Judge Posner has stated that "[s]ystems of price exchange are **likely** to be good evidence of price fixing." Posner at 86-87 (emphasis supplied). Particularly in concentrated markets, the inference is stronger" that price information "is sought primarily to facilitate cartelization." *Id*.

> Confronting a price-fixing rule that attaches conclusive significance to proof of an 'actual' agreement to fix prices, competitors have an incentive to take all the preliminary steps required to coordinate their pricing but stop just short of 'agreeing' on what price to charge. The most important step is the exchange of information as to what prices each seller is charging, or charged in the recent past, or intends to charge in the future. Such exchanges foster collusive pricing both by enabling convergence on a single supracompetitive price and by facilitating detection of, and thereby discouraging, sales below that price.

Id. at 159-60.

Judge Posner's conclusion has been echoed by the Supreme Court and other courts. *See, e.g., United States v. Container Corp. of America*, 393 U.S. 333, 337 (1969) ("The inferences are irresistible that the exchange of price information has had an anticompetitive effect to the industry, chilling

the vigor of price competition."); *American Column & Lumber Co. v. United States*, 257 U.S. 377, 398 (1921) (exchange of price information "plainly invited an estimate and discussion of future market conditions by each member, and a co-ordination of them by an expert analyst could readily evolve an attractive basis for cooperative, even if unexpressed 'harmony' with respect to future prices."); *In re Flat Glass Antitrust Litigation*, 385 F.3d 350, 369 (3d Cir. 2004) ("exchanges of information had an impact on pricing decisions"); *Todd v. Exxon Corp.*, 275 F.3d 191, 212 (2d Cir. 2001) ("Price exchanges that identify particular parties, transactions, and prices are seen as potentially anticompetitive because they may be used to police a secret or tacit conspiracy …").[8]

[8] *See also In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 906 F.2d 432, 452 (9th Cir. 1990)(allegations that Defendants exchanged price information support "an inference that the exchange of price information … was done with the purpose and effect of allowing greater coordination and stabilization of prices."); *Greenshaw v. Lubbock County Beverage Association*, 721 F.2d 1019, 1030 (5th Cir. 1983)(exchanges of price information among competitors may establish existence of unlawful agreement or conspiracy); *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1152 (10th Cir. 1981)(unlawful price fixing includes informal and direct, as well as formal and direct, agreements to exchange price information.); *C-O-Two Fire Equipment Co. v. United States*, 197 F.2d 489, 493 (9th Cir. 1952)(publication and distribution of price information among competitors sufficient to support an inference of § 1 conspiracy).

1. Plaintiffs Have Alleged Numerous Meetings Among Defendants As Providing An Opportunity To Conspire

The Complaint alleges that highly sensitive information was exchanged between Defendants numerous other times. SA62 ¶62-66. The fact that Defendants were in communication with each other shortly before coordinated announced capacity reductions and/or price increases raises a strong inference that Defendants exchanged pricing and capacity information before the announcements. These allegations do more than merely "suggest" that an agreement was made and effectuated during the meetings. Plaintiffs have alleged that Defendants engaged in counter-intuitive, highly coordinated activities, including parallel price increases, an industry- wide sales shutdown of exactly twelve days after the October 25, 2007 sinkhole announcement, and the announcement by one firm of a mine shutdown by another "competing" firm. These allegations raise a strong inference that Defendants used their numerous meetings as an opportunity to plan and implement their illegal agreement.

Defendants cite *In re Text Messaging Antitrust Litigation* 2009 WL 5066652 (N.D.Ill. Dec. 10, 2009) for the proposition that Plaintiffs must have statements by the Defendants "suggesting the presence of an agreement." But Plaintiffs have more than "suggested" that these meetings

were used to make and effectuate an illegal agreement, and have made a multitude of allegations suggesting an agreement was made.

2. Plaintiffs Allege that Defendants Abused Various Trade Association Meetings To Communicate About Pricing Before During and After Their Price Increases

Plaintiffs have further alleged that Defendants used the cover of various trade show meetings to advance their conspiracy. Plaintiffs allege, that Defendants conspired to raise prices at the International Fertilizer Industry Association conference in Istanbul, Turkey in May 2007. SA64 ¶68. Plaintiffs further allege that Defendants nearly simultaneously announced an intention to raise prices at a TFI meeting in 2004. SA76 ¶120.

Even without the detailed allegations of actual agreement, Defendants' communications before, during and after these parallel price increases and capacity reductions, which occurred at various points throughout the Class Period, would be enough to infer an agreement. This Court has noted that "almost any market can be cartelized if the law permits sellers to establish formal, overt mechanisms for colluding, such as exclusive sales agencies." *In re High Fructose Corn Syrup Antitrust Litig*., 295 F.3d at 655. *See In re Rail Freight Surcharge Antitrust Litig*., 2008 WL 4831214 at *7, (otherwise lawful acts such as attending meetings of the Association of American Railroads, a major trade association dominated by

the four rail defendants, provided defendants with the means to coordinate their conspiratorial acts, and in conjunction with their total conduct, may have become illegal acts as part of conspiracy) citing *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946). Even when an innocent explanation for trade association activities may exist, a complaint "need not be dismissed where it does not exclude possibility of independent action." Id., 2008 WL 4831214 at *8, citing *Moundridge*, 250 F.R.D. at 5, quoting *Twombly*, 127 S. Ct. at 1966. *See also In re Flat Glass Antitrust Litig*., 385 F.3d at 366 (price increase allegedly discussed and agreed to at "Glass Fair" trade show); *In re TFT-LCD (Flat Panel) Antitrust Litig*., 2008 WL 3916309 at *3-4 (allegations of "keynote address" by defendant's CEO alleged as an effort to get competitors to decrease output; alleged that defendants "exchanged numerous types of sensitive competitive information, including pricing information, through trade association meetings"); *In re Pressure Sensitive Labelstock Antitrust Litig*., 566 F.Supp.2d at 372 (need for collaboration on price increases discussed at trade conference); *In re OSB Antitrust Litig*., 2007 WL 2253419 at *3 (E.D.Pa. August 3, 2007) (alleged confirmation of price-fixing agreement at trade shows and industry events, in context of other allegations, raised "a

right to relief above the speculative level," citing *Twombly*, 127 S. Ct. at 1965).

Defendants again seek to compartmentalize the allegations about the trade association meetings, and even opine that it is counter-intuitive "that defendants would conspire to fix prices at a conference attended by their customers." Def. Br. at 57. Such arguments do not detract from the plausibility of Defendants' abuse of trade association meetings to further their agreement. Such meetings generally involve the presence of all the major industry participants, as well as the presumed availability of more than a single meeting room, private meals and/or other outings outside the presence of customers.

Trade association meetings are commonplace throughout every major industry, but the unprecedented activities Plaintiffs allege that followed the trade meetings are not commonplace. In response to Defendants' argument that the "hollow nature of such allegations" should be dismissed, Plaintiffs contend, that when looking at the totality of the circumstances alleged in the Complaint, the multitude of allegations along various legal fronts strongly suggests agreements were made during the trade association meetings that cannot be ignored or compartmentalized.

D. Defendants' Parallel Price Increases and Capacity Reductions, Which Were Historically Unprecedented and Not Explained by Supply and Demand, Constitute Separate And Additional "Further Circumstances" Which Alone Satisfy *Twombly*

In evaluating antitrust complaints under *Twombly*, courts have considered the high number of allegations of parallel conduct and concluded that the inference of an agreement is strengthened by numerous such allegations. *E.g.*, *Starr*, 592 F.3d at 321 (allegation of "parallel business behavior is admissible circumstantial evidence from which the fact finder may infer agreement") (internal quotation omitted); *Southeastern Milk*, 555 F.Supp.2d at 944. *See also In re Rail Freight Surcharge*, 2008 WL 4831214 at *6, quoting *Southeastern Milk*.

Plaintiffs allege several coordinated price increases and capacity reductions by Defendants throughout the class period. SA62 ¶63, SA64 ¶68, SA65 ¶72-74, SA66 ¶76-77, SA67-68 ¶80-82, SA68-69 ¶88, SA75 ¶115-16, SA76 ¶118-21. The sheer number of coordinated price increases and production shutdowns or reductions by the Defendants constitutes a separate and additional "further circumstance" that infer a preceding agreement by Defendants.

Plaintiffs have further alleged that several of Defendants' price increases and capacity reductions were preceded by communications among

the Defendants. SA62 ¶63, SA64 ¶68, SA65 ¶72, SA76 ¶120. As the District Court properly held, price increases or production reduction that followed meetings by Defendants constitutes yet another additional "further circumstance" suggesting that Defendants had a preceding agreement to engage in such coordinated conduct. A46. Other courts have similarly held that parallel conduct that follows meetings by defendants infers a preceding agreement by them. *Standard Iron Works v. ArcelorMittal*, 639 F.Supp.2d 877, 897 (N.D. Ill. 2009).

Plaintiffs have alleged that Defendants' price increases were historically unprecedented. Plaintiffs further alleged that the potash market price was stable in the years preceding the Class Period and only dramatically increased during the Class Period as a result of Defendants collusion. SA74-75 ¶107-109,114. Allegations of historically unprecedented pricing are a "further circumstance" sufficient to survive a motion to dismiss under *Twombly*. *Graphics Processing Units*, 540 F.Supp.2d at 1094 (allegations comparing GPU and CPU markets showed that price-raising actions in GPU market, where there existed excess capacity and declining costs, were "a sharp departure from previous market activity" and suggestive of agreement); *In re TFT-LCD (Flat Panel) Antitrust Litig*., 2008 WL 3916309 at *3 (N.D. Cal. Aug. 25, 2008) (where

complex and unusual pricing practices not explained by supply and demand, including pre-conspiracy price declines attributed to technology, improved efficiencies, and new entrants, supported an inference that the price increases resulted from an unlawful agreement).

Plaintiffs have also alleged that potash prices increased in periods where costs remained constant and excess capacity existed. SA69-70 ¶90-95, SA74 ¶107, SA77 ¶124-25. These allegations plausibly suggest an illegal agreement for numerous reasons. One important benefit of competition to consumers is price reductions. Competitors whose costs remain constant would be expected to not increase prices. Prices should bear a direct relation to costs in competitive markets. Samuelson and Nordhaus, ECONOMICS (18th ed. 2005) pp. 149-150; ("Samuelson").

Plaintiffs' allegation of Defendants'excess capacity while prices were rising is also indicative of a price-fixing conspiracy. Defendants have blamed price increases on tightening of supply and demand, but Plaintiffs have alleged that, in fact, demand was waning as prices were increasing. SA65 ¶72-73, SA68-69 ¶88, SA69-70 ¶90-94, SA77 ¶124-25. Specifically, Plaintiffs alleged that the Russian Defendants removed a half million tons of potash from the market in 2006 and the other producers commended this change in their behavior from prior periods of low demand where the

Russian Defendants had instead flooded the market. SA66 ¶75. This radical change in behavior clearly suggests that a preceding agreement was made with the Russian Defendants to restrict supply in order to control prices. The District Court correctly held that the Russian Defendants' unprecedented behavior in reducing output during decreased demand instead of increasing output was an additional "further circumstance" supporting an inference that Defendants had entered into a preceding agreement to coordinate output reductions. A45, A49. Other courts have similarly held that a radical change in behavior such as here raises the inference of a preceding agreement. *Twombly*, 550 U.S. at 557, n.4; *Standard Iron Works*, 639 F.Supp.2d at 900; *Graphics Processing Units*, 540 F.Supp.2d at 1095.

Defendants have offered as alternative explanations for their coordinated price increases and output reductions, the Russian Defendants' change in behavior during low demand periods and the coordinated price increases and supply reductions proximity to various meeting of Defendants. While Plaintiffs believe that their explanations are more plausible than Defendants', Plaintiffs must simply show that the inferences they draw suggest a preceding agreement was plausible. Indeed, Plaintiffs' inferences are sufficient to withstand a motion to dismiss under *Twombly* even if Defendants' inferences are plausible as well. It is not Plaintiffs "burden to

allege facts that cannot be squared with unilateral action" *Standard Iron Works*, 639 F.Supp.2d at 895, *citing In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 663 (7th Cir.2002). Plaintiffs have offered plausible interpretations of Defendants' parallel conduct that can infer existence of a preceding agreement. Defendants' citations to show that their conduct alleged is not sufficient to render Plaintiffs' claims plausible are distinguishable. Most of the cases involved a summary judgment standard that required Plaintiffs to provide evidence that tends to exclude Defendants actions as innocent. As stated above, no such standard exists on a motion to dismiss for failure to state a claim. *See supra*. Moreover, Defendants' cases involved different fact patterns that had far less evidence in addition to parallel pricing than here.

The Defendants cite *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 122 (3d Cir. 1999) to show that parallel pricing allegations does not make Plaintiffs' claim plausible. That case is distinguishable as an appeal of a summary judgment motion where plaintiff was required to exclude the possibility that defendants' action was the product of independent decisions. *Id*. at 124. Further, the Court found that, unlike this case, there was actually no parallel pricing present. *Id.* at 128. The Court also found that no additional evidence existed including the fact that no meaningful exchange

of price information had occurred among Defendants. *Id.* at 133. Defendants' reliance on *In re Elevator Antitrust Litig.*, 502 F.3d 47, 51 (2d Cir. 2007) is equally unavailing. There, Plaintiffs alleged that parallel conduct had occurred along with conduct that occurred in Europe. *Id.* at 50. Plaintiffs, however, did not allege any facts that would supplement their allegations and make their claims plausible. *Id.*

Defendants' reliance on *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 40 (7th Cir. 1992) is also unavailing. That case was in a summary judgment posture where there was a heightened burden for Plaintiffs, unlike here. *Id.* at 39. Also, Defendant there brought evidence that increased costs and not collusive activity were the reason for parallel price increases. *Id.* at 52. Here, Plaintiffs have alleged much more than parallel conduct and they must only show that their claims are plausible. They need not show evidence that tends to exclude Defendants' explanations for their conduct at this time. *See supra.*

Other cases cited by Defendants to show that parallel conduct does not allow an inference of agreement can be distinguished because they are all cases involving summary judgment where the plaintiffs' burden is heightened and do not contain factual enhancement to bolster their claims. Defendants cite to *Clamp-All Corp. v. Cast Iron Soil Pipe Institute*, 851 F.2d

478 (1st Cir. 1988) to show that parallel pricing allegations do not make a claim plausible. But the evidence there was "little more than the price lists" and was not sufficient to tend to exclude defendants' innocent explanations of their parallel conduct. *Id*. at 484. The allegations here contain many more facts than just parallel conduct. *See infra*. Defendants' cite to *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1299 (11th Cir. 2003) is without merit. *Williamson* refers only to the fact that "conscious parallelism" is not sufficient on its own to survive a motion for summary judgment, in a context of refraining from lowering prices rather than raising prices as is alleged here. Finally, Defendants cite to *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1033-34 (8th Cir. 2000) is without merit. That case did not contain enough factual enhancement to tend to exclude defendant's innocent explanations and also was an appeal of a summary judgment motion. *Id*. The Complaint here contains many instances of concerted parallel price increases and output reductions and allegations of parallel conduct that occurred in proximity of Defendants meetings'. This Complaint also includes allegations that there were unprecedented actions by Defendants. In total, the allegations here contain more than sufficient factual enhancement to render Plaintiff claims plausible under *Twombly*.

E. Defendants' Parallel Suspension of Sales following Discovery of the Silvinit Sinkhole Constitutes A Separate And Additional "Further Circumstance" Which Alone Satisfies *Twombly*

On October 25, 2007, Silvinit announced that it might suspend shipments from one of its mines because of a sinkhole. SA67 ¶80. Within a day of the announcement, the majority of Defendants also announced that they too would suspend sales. SA67 ¶81. Further, the announcement of suspension of sales for PCS was made by its competitor Uralkali. SA67 ¶81. Within one day of Silvinit resuming sales all the Defendants that suspended sales resumed selling potash. SA67 ¶82-83. The suspension of sales had occurred over the same 12 day period for all Defendants who had suspended sales. *Id.*

Defendants' actions surrounding the announcement of the sinkhole at a Silvinit mine cannot be explained absent a prior agreement by Defendants. The District Court correctly found that Defendants' suspension of sales by following the announcement of a shutdown of shipments from a competitor's mine was a "further circumstance" to infer a conspiracy to fix prices of potash. A 47-48. The DistrictCourt further found that the facts that the suspensions had occurred over the same period and that Uralkali's announced suspension of sales by its competitor were more suggestive of concerted action than independent decision-making. A 48.

Defendants argue that the suspension of sales was independent business judgment and not the result of collusion. The arguments defy logic and are without merit. First, in a competitive market, Defendants would have attempted to gain market share from Silvinit. Even if Defendants' arguments that they were trying to evaluate the market before raising prices were proper on a motion to dismiss, a defendant in a competitive market would not suspend all of its sales to perform the evaluation. Legitimate businesses constantly evaluate market conditions, and they do not suspend sales while making these judgments. The plausible conclusion is that Defendants were acting in a concerted action.

The fact that all of the suspensions occurred over the same time period also gives rise to an inference that Defendants had a preceding agreement to fix prices of potash. It is implausible that all Defendants that had suspended sales to evaluate the market needed exactly the same time period to make the evaluation. Further, the announcement by a competitor of a suspension of sales by PCS is highly suspicious and infers a preceding agreement. The District Court correctly found that all of these preceding facts suggested concerted action by Defendants and not innocent independent action. A 47-48. "While more innocent inferences can be drawn from the statements that Plaintiffs contend [imply] an agreement to cut production, it is not Plaintiffs'

burden to allege facts that cannot be squared with the possibility of unilateral action." *Standard Iron Works*, 639 F.Supp.2d at 895 (citing *Fructose*, 295 F.3d at 663).

Finally, Defendants suggest in a footnote that because Plaintiffs did not provide any documentation of the announcement of a suspension by its competitor that the fact is not accurate. Def. Br. at 66, n. 24. This argument is completely without merit. Defendants may not rewrite the Complaint, whose well-pled allegations must be taken as true. Nor does Defendants' citation to *Twombly*, 550 U.S. at 568, 569 n. 13, avail them. The cited footnote dealt with the fact that a court could consider an entire document once the document was cited in the complaint. *Twombly* is silent on any supposed requirement that all allegations must be supported with actual documentary evidence in a complaint before they are to be considered as factual enhancements to make allegations plausible.

F. Defendants' Price Signaling Constitutes A Separate And Additional "Further Circumstance" Which Satisfies *Twombly*

Contrary to Defendants'assertions, their price signaling is a "further circumstance" that enhances the plausibility of Plaintiffs allegations. Plaintiffs have alleged several instances where Defendants signaled competitors that they did not wish to engage in price competition. SA72-73

¶101-106. Plaintiffs' allegations suggest cooperation between Canadian and Russian Defendants and are much more than just a single producer's observations. Defendants' reliance on *Twombly* here is again inapposite. Def. Br. at 61, n. 23. All that case stated was that the quote was taken out of context and the Court had the duty to consider the entire document that was referenced in the complaint. The Court never stated, as Defendants imply, that a statement to the market by a producer is never probative of a conspiracy. *Twombly*, 550 U.S. at 569

Other cases cited by Defendants can be distinguished as well. Defendants' cite to *Baby Foods* takes the quote completely out of context. The Court actually stated that "courts generally reject conspiracy claims that seek to infer an agreement from … communications despite a lack of independent evidence tending to show an agreement and in the face of uncontradicted testimony that only informational exchanges took place." *Baby Foods* 166 F.3d at 133. Here, of course, there is no uncontradicted testimony that only informational exchanges took place. The cite by Defendants to *Williamson Oil* likewise is without merit. First, the court found that the statements labeled signals by Plaintiffs were not really signals. *Williamson Oil*, 346 F.3d at 1310. Second, the standard of proof

was different because it was a summary judgment which requires Plaintiffs to offer facts that tend to exclude innocent action by Defendants. *Id.*

The allegations of price signaling in the Complaint are clearly that, signals by producers to their competitors to not engage in price competition. As such, these public statements are just one of many other facts that give rise to the plausibility of Plaintiffs' claims.

G. Plaintiffs Have Alleged That The Market Structure Of The Potash Industry Was Conducive To A Conspiracy

The potash market structure was favorable for a conspiracy. Plaintiffs have alleged that its pertinent characteristics are: few sellers controlling a large share of the market (SA59 ¶¶52, 57); a homogeneous, commodity product (SA60 ¶53); high barriers to entry (SA61 ¶56); no ready substitutes (SA60 ¶54); excess capacity (SA79 ¶¶132, 134); and a cost structure favorable to a supply restriction cartel (SA60 ¶55). Their presence here supports an inference there was a conspiracy, *In Re High Fructose Corn Syrup*, 295 F.3d at 654. *See also In re Flash Memory Antitrust Litig.*, No. C 07-0086 SBA, 2009 WL 1096602, at *7 (N.D. Cal. Mar. 31, 2009) (finding that allegations of high market concentration along with allegations of high barriers to entry, product homogeneity, and multiple and on-going business relationships, cross-licensing and joint venture agreements "can appropriately be relied upon as a factor to suggest price collusion").

As in *In re Pressure Sensitive Labelstock Antitrust Litig.*, 566 F. Supp. 2d 363 (M.D. Pa. 2008), where the court denied the motion to dismiss, "[p]laintiffs [here] plead more than conclusory assertions of conspiracy; they describe behavior and market conditions that suggest [defendants'] conduct was something other than a natural, unilateral reaction to market forces." *Id.* at 375.

Finally, Defendants' assertion that six Defendants control of 71% of the world market is insufficient concentration to support an inference of collusion is out of step with authority, most recently the Second Circuit. *Starr*, 592 F.3d at 323-24, citing 7 Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law* § 1431a (2d ed. 2003) ("[E]mpirical studies considering many industries have suggested that noncompetitive pricing [that may be the result of price coordination] is likely to appear when the four leading firms account for some 50 to 80 percent of the market.").

CONCLUSION

For the foregoing reasons, the District Court's order should be affirmed.

Dated: May 7, 2010

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)(7)

The undersigned, counsel of record for the Indirect Purchaser Plaintiffs-Appellees, furnishes the following in compliance with Fed. R. App. P. 32(a)(7):

I hereby certify that this brief conforms to the rules contained in Fed. R. App. P. 32(a)(7) for a brief produced with a proportionally spaced font. The length of this brief is 13,715 words including footnotes and excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on May 7, 2010, pursuant to the parties' agreement, he caused the foregoing brief to be served by email and by overnight courier on the following:

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