Appeal No. 10-1712
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

APPELLEES' PETITION FOR REHEARING EN BANC

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SHEFSKY & FROELICH LTD.
111 East Wacker Drive, #2800
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Plaintiffs-Appellees' Interim Co-Lead Counsel

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 10-1712

Short Caption: Minn-Chem, Incorporated, et al. v. Agrium Incorporated, 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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(3) If the party or amicus is a corporation:

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

None.

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

None.

Attorney's Signature: s/ J. Timothy Eaton Date: October 7, 2011

Attorney's Printed Name: J. Timothy Eaton

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

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

E-Mail Address: teaton@shefskylaw.com

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None.

Attorney's Signature: s/ Patricia Susan Spratt Date: October 7, 2011

Attorney's Printed Name: Patricia Susan Spratt

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

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

E-Mail Address: pspratt@shefskylaw.com

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Attorney's Signature: s/ Cary E. Donham Date: October 7, 2011

Attorney's Printed Name: Cary E. Donham

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E-Mail Address: cdonham@shefskylaw.com

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None.

Attorney's Signature: s/ Steven A. Hart Date: October 7, 2011

Attorney's Printed Name: Steven A. Hart

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

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

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

E-Mail Address: shart@smsm.com

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Attorney's Signature: s/ Scott W. Henry Date: October 7, 2011

Attorney's Printed Name: Scott W. Henry

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None.

Attorney's Signature: s/ W. Joseph Bruckner Date: October 7, 2011

Attorney's Printed Name: W. Joseph Bruckner

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Address: Lockridge Grindal Nauen P.L.L.P., 100 Washington Avenue South, Suite 2200
Minneapolis, MN 55401

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

E-Mail Address: wjbruckner@locklaw.com

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Attorney's Signature: s/ Heidi M. Silton Date: October 7, 2011

Attorney's Printed Name: Heidi M. Silton

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E-Mail Address: hmsilton@locklaw.com

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Attorney's Signature: s/ Craig S. Davis Date: October 7, 2011

Attorney's Printed Name: Craig S. Davis

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None.

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

None.

Attorney's Signature: s/ Kristen G. Marttila Date: October 7, 2011

Attorney's Printed Name: Kristen G. Marttila

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

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Appellate Court No.: 10-1712

MINN-CHEM, INCORPORATED, et al. v. AGRIUM INCORPORATED, et al.

Circuit Rule 26.1 – Disclosure Statement

ATTACHMENT 2

MALKINSON & HALPERN, P.C.;
LEVIN, FISHBEIN, SEDRAN & BERMAN, LLP;
SHEFSKY & FROELICH LTD.
THE COFFMAN LAW FIRM;
McDONALD HOPKINS, LLC;
JERNIGAN & McMILLAN, P.C.;
THE MILLER LAW FIRM;
VICKERS, RIIS, MURRAY AND CURRAN, LLC; and
BERMAN DEVALERIO

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 10-1712

Short Caption: Minn-Chem, Incorporated, et al. v. Agrium Incorporated, 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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None.

Attorney's Signature: s/ Bruce L. Simon Date: October 7, 2011

Attorney's Printed Name: Bruce L. Simon

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

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None.

Attorney's Signature: s/ Jonathan M. Watkins Date: October 7, 2011

Attorney's Printed Name: Jonathan M. Watkins

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

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Attorney's Signature: s/ Thomas K. Boardman Date: October 7, 2011

Attorney's Printed Name: Thomas K. Boardman

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COUNSEL'S STATEMENT

Plaintiffs allege that defendants conspired to restrict output and raise potash prices worldwide, with the intended effect of increasing United States potash prices a staggering 600% from 2003 to 2008. The quorum panel of this Court held that the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), 15 U.S.C. § 6a, bars U.S. buyers from bringing Sherman Act claims against global importers who have conspired in part to fix and inflate prices for U.S. potash imports sold to U.S. purchasers. The panel's opinion conflicts with a recent decision of this Court and with Supreme Court precedent, and creates a split among the circuits.

For the panel to find plaintiffs' allegations insufficient under *Twombly* conflicts with this Court's decision in *In re Text Messaging,* as well as the Third Circuit's decision in *Animal Sciences*. Furthermore, the panel misconstrued the FTAIA's two exceptions, and ignored Supreme Court guidance that the FTAIA does not bar U.S. plaintiffs from bringing claims against global cartels for injury to domestic commerce. Similarly, the panel's ruling that the FTAIA does not extend Sherman Act liability to foreign cartel activity with a "ripple effect" on the domestic market is in direct conflict with the legislative history of the FTAIA, which explicitly states that members of global cartels are still liable under the Sherman Act if their foreign anticompetitive conduct has a "spillover" effect on the domestic market. Finally, by declining to decide whether the FTAIA is "jurisdiction-stripping" or simply prescribes an element of an antitrust claim against a global cartel, the panel sidestepped *United Phosphorus*, ignored Supreme Court precedent, ignored the impact of that question on district courts and parties, and created division among the circuits.

En banc review is appropriate under Fed. R. App. P. 35(b)(1)(A) and 35(b)(1)(B).

CONFLICTING CASES FROM THE SUPREME COURT AND SEVENTH CIRCUIT

- *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869 (2010)
- *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006)
- *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004)
- *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942 (7th Cir. 2003) (*en banc*)
- *In re Text Messaging Antitrust Litig.*, 630 F.3d 622 (7th Cir. 2010)

CONFLICTING CASES FROM OTHER CIRCUITS

- *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, No. 10-2288, 2011 WL 3606995 (3d Cir. Aug. 17, 2011)

ARGUMENT

I. THE PANEL'S *TWOMBLY* ANALYSIS OF PLAINTIFFS' ALLEGATIONS CONFLICTS WITH THIS COURT'S DECISION IN *TEXT MESSAGING*.

The panel used the "plausibility" standard of *Twombly*[1] and *Iqbal*[2] to determine whether plaintiffs had adequately pleaded that they fell within one of the FTAIA's exceptions. Panel Opinion at 17-18. But by holding that plaintiffs' allegations failed to satisfy *Twombly*, *id.* at 24-26, the panel's opinion misconstrued plaintiffs' allegations in conflict with this Court's decision in *In re Text Messaging Antitrust Litigation*, 630 F.3d 622 (7th Cir. 2010).

The plaintiffs in *Text Messaging* alleged "a mixture of parallel behaviors, details of industry structure, and industry practices, that facilitate collusion," including allegations that defendants controlled 90% of the national market share; that defendants could easily and informally detect "cheating" by one another because there were only four of them; that defendants belonged to a trade association and exchanged pricing information at the

[1] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

[2] *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

association's meetings; that defendants were part of a "leadership council" within the trade association, and that the express purpose of the leadership council was to foster "co-opetition" as opposed to cooperation; that defendants' costs fell sharply while their prices rose; and that defendants abandoned their heterogeneous and complex pricing structures in favor of one uniform pricing structure, under which they simultaneously "jacked up" prices by a third — a level of coordination that, plaintiffs suggested, could not have been possible without cooperation among defendants. 630 F.3d at 627, 628. This Court upheld the sufficiency of those allegations.

Plaintiffs in this case allege collusive conduct with a level of detail far exceeding that which was described by this Court in *Text Messaging*. Here, plaintiffs allege a concentrated market dominated by defendants, SA2 ¶2; SA14 ¶¶57, 59; a commodity product, SA13 ¶53; a lack of a cost-effective substitute, SA12 ¶48; inelastic demand, SA13 ¶54; and excess capacity, SA31 ¶¶133-34. They allege numerous opportunities for defendants to collude as to potash prices and global supply. SA17-20 ¶¶74-86.

In addition to these structural characteristics of the global potash market, plaintiffs allege that defendants conspired to restrict output and raise potash prices worldwide, which had the intended effect of increasing U. S. potash prices 600% from 2003 to 2008 despite weak demand and a lack of commensurate increases in costs of production or other inputs. After years of stability in the potash market, July 2003 through 2008 saw a series of parallel, lockstep price increases that drove up prices approximately 600%, and prices continued to rise in late 2008 and early 2009 even as prices for other fertilizers began a dramatic decline. SA26-30 ¶¶113-30. In early 2003, IPC and Canpotex announced foreign price increases of $8/ton; in March 2003, IMC (Mosaic's predecessor) increased its U.S. price by $8/ton. SA27 ¶¶117-18. Beginning in January 2004, IPC and Canpotex announced foreign price increases; shortly thereafter, PCS and

IMC announced two $5/ton increases for U.S. buyers. SA28 ¶120. By May 2004, Canpotex announced a $20/ton foreign-price increase; shortly thereafter PCS and IMC announced an immediate $5/ton U.S.-price increase, soon followed by a $15/ton U.S.-price increase. SA28 ¶121. After potash producers reached an agreement on Brazilian and Chinese price increases in late 2006, potash prices in the United States increased, too. SA29 ¶127. Plaintiffs allege that these post-July-2003 price increases cannot be explained by changes in costs or demand. SA30 ¶¶129-30. Plaintiffs allege, in detail, several coordinated supply restrictions by the former Soviet Union suppliers of a type not previously seen — supply restrictions that, absent a collusive agreement, make no economic sense. SA20 ¶87; SA21-24 ¶93-103; SA24-25 ¶107-08.

Plaintiffs further allege that defendants collusively set potash prices in China, India, and Brazil, and then knowingly used those prices to set benchmark prices in the United States and elsewhere. SA13 ¶52; SA21-22 ¶¶94-96; SA25-26 ¶¶111-12; SA27 ¶¶117-18; SA34 ¶¶145-46.[3] It is well established that a cartel can cause market-wide price increases by fixing a price as to some customers or products, and then using the fixed price as a benchmark for prices the cartel members charge other customers or for other products. *See, e.g.*, *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 656 (7th Cir. 2002) (fixing higher list prices, "the starting point for . . . bargaining" means "the higher the ultimately bargained price is likely to be"); *accord In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 355, 362-63 (3d Cir. 2004) (("[S]ellers would not bother to fix list prices if they thought there would be no effect on transaction prices.") (alteration original) (quoting *Fructose*, 295 F.3d at 656)); *E & J Gallo Winery v. EnCana Corp.*, 503 F.3d 1027, 1048-49 (9th Cir. 2007) (plaintiff stated a valid antitrust claim "based on

[3] To be clear, although the conspiracy had a global dimension and affected potash markets around the world, plaintiffs seek to recover only for injury suffered by U.S. potash purchasers.

damages it incurred due to paying retail rates pegged to indices it alleges were artificially inflated by illegal practices").

The only difference here is that the benchmarks were not established by collusively set prices in other markets within the United States, but on the basis of collusively set prices in different countries within the global potash market, which plaintiffs allege defendants knew and intended would directly affect U.S. import prices. Just as defendants' anticompetitive conduct in *Fructose* — that is, the price-benchmarking conspiracy — plainly "involved" the purchases made at prices pegged to collusively set benchmarks, the price-benchmarking conspiracy in this case "involves" the inflated prices paid by U.S. buyers in U.S. import commerce — prices that were pegged to collusively set benchmarks for markets in China, India, and Brazil.[4]

Such allegations satisfy *Twombly* and this Court's pronouncement in *Text Messaging*:

> We need not decide whether the circumstantial evidence that we have summarized is sufficient to *compel* an inference of conspiracy; the case is just at the complaint stage and the test for whether to dismiss a case at that stage turns on the complaint's "plausibility."

630 F.3d at 629 (emphasis in original). Plaintiffs' allegations lead to very plausible inferences that defendants' conduct involved import commerce, and that their agreements had a direct, substantial, and reasonably foreseeable effect on potash prices in the United States, which even under the panel's interpretation of the FTAIA is all that is required.

[4] Plaintiffs contend that even if defendants' anticompetitive conduct does not "involve" import commerce, the domestic-benchmarking cases demonstrate that the link between the fixed benchmark prices and the ultimate importation of potash into the United States at inflated prices is a "direct" one for purposes of the direct-effects exception. As this Court made clear in *Metallgesellschaft AG v. Sumitomo Corp.*, 325 F.3d 836, 839-40 (7th Cir. 2003), the effect of anticompetitive conduct in foreign markets may be direct even though intermediate steps exist between that conduct and the ultimate injury to the plaintiff. *Accord* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES ¶415(2).

II. THE PANEL OPINION CONFLATES THE FTAIA'S IMPORT-COMMERCE EXCEPTION AND THE DIRECT-EFFECTS EXCEPTION, AND ALSO CREATES A SPLIT AMONG THE CIRCUITS IN LIGHT OF THE THIRD CIRCUIT'S DECISION IN *ANIMAL SCIENCES*.

Although this Court has interpreted other aspects of the FTAIA, this case presents its first opportunity to interpret the two statutory exceptions to the FTAIA's general bar against Sherman Act liability for certain defined foreign conduct. The first exception, which the panel refers to as the "import commerce exception," applies to conduct involving "import trade or import commerce." 15 U.S.C. § 6a. The second exception, which the panel refers to as the "direct effects exception," applies to conduct that "has a direct, substantial, and reasonably foreseeable effect" on domestic or import commerce or on certain types of export commerce, 15 U.S.C. § 6a(1)(A)-(B). If plaintiffs allege international anticompetitive conduct by defendants that falls within *either* exception, then the FTAIA's general bar against Sherman Act liability does not apply. *Carpet Grp. Int'l v. Oriental Rug Importers Ass'n*, 227 F.3d 62, 69 (3d Cir. 2000).

Plaintiffs contend that their allegations meet both the import commerce exception and the direct-effects exception of the FTAIA. The district court found that plaintiffs' allegations met the import-commerce exception because of the "tight nexus" between defendants' conspiracy and their U.S. imports, and thus found it unnecessary to address the direct-effects exception. Memorandum Opinion And Order at 29 (Nov. 3, 2009) (ECF No. 202) (deciding motions to dismiss). The panel, by contrast, concluded that plaintiffs had not adequately alleged that defendants' anticompetitive conduct "involved" U.S. imports *or* that U.S. imports had been directly affected. It therefore held that the FTAIA barred plaintiffs' claims.

There is no dispute that plaintiffs alleged that defendants, in their respective foreign countries, and plaintiffs, in the United States, were engaged in import commerce. There is no dispute that plaintiffs alleged that defendants engaged in anticompetitive conduct with respect to

the global potash market. The only issue for purposes of the import-commerce exception is whether plaintiffs have sufficiently alleged that such anticompetitive conduct "involves" import commerce with respect to the United States. *See Turicentro, S.A. v. Am. Airlines, Inc.*, 303 F.3d 293, 302-03 (3d Cir. 2002) (the issue for purposes of FTAIA's import-commerce exception is whether defendants' alleged wrongful conduct involves import commerce). The Third Circuit has suggested that one way (though not the only way) plaintiffs may satisfy the import-commerce exception is to allege that a defendant — like defendants here — functioned as physical importers in connection with the anticompetitive conspiracy. *Animal Sci. Prods., Inc. v. China Minmetals Corp.*, No. 10-2288, 2011 WL 3606995 at *5 (3d Cir. Aug. 17, 2011) ("Functioning as a physical importer may satisfy the import trade or commerce exception, but it is not a necessary prerequisite."). The panel herein, however, concluded otherwise. *See* Panel Opinion at 20 ("Contrary to what the district court seemed to think, it is not enough that the defendants are engaged in the U.S. import market, though that may be relevant to the analysis.") (citation omitted).

The only way to avoid reading one of the two statutory exceptions out of the FTAIA is to recognize the existence of both (1) a category of anticompetitive conduct that *involves* import commerce and (2) a category of anticompetitive conduct that *does not involve* import commerce but that nonetheless has a direct, substantial, and reasonably foreseeable *effect* on import commerce which gives rise to a Sherman Act claim. But the panel opinion reads the second category of conduct out of the FTAIA, rendering the direct-effects exception's explicit reference to import commerce superfluous.

The panel held that anticompetitive conduct "involves" import commerce only when a defendant's "foreign anticompetitive conduct target[s] U.S. import goods or services." Panel

Opinion at 20-21 (alterations omitted). According to the panel, plaintiffs could have satisfied that standard by alleging that defendants had agreed to a fixed price or production quota for potash imported to the United States or that defendants had agreed to a worldwide production quota or a single, global cartel price (thus necessarily determining the quantity or price of potash available to U.S. buyers). The panel reads an intent requirement into the exceptions where other circuits have found none. *See Animal Sci.*, 2011 WL 3606995 at *6 (holding that the "effects exception does not contain a subjective intent requirement.") (quotation omitted).

In other words, the panel opinion does what it criticized the district court for doing: it conflates the FTAIA's two exceptions. If conduct that *involves* import commerce by definition has a *direct effect* on import commerce (which under the panel's reading of the exception it necessarily would), Congress would have had no reason to include a separate exception in § 6a(1)(A) for conduct that has a direct effect on import commerce. Such conduct would already be covered by the import-commerce exception.[5] But as a matter of basic statutory construction, that cannot be correct. "[A] court should not construe a statute in a way that makes words or phrases meaningless … or superfluous." *United States v. Chemetco, Inc.*, 274 F.3d 1154, 1160 (7th Cir. 2001) (internal quotation omitted, alteration supplied); *Gillespie v. Trans Union Corp.*, 482 F.2d 907, 909 (7th Cir. 2007) ("we try to avoid interpretations of statutes that render other words, or other sections, superfluous").

By making the direct-effects exception a subset of the import-commerce exception, the panel's opinion leads inescapably to the conclusion that when U.S. buyers purchase imported goods from members of a global cartel that manipulate the quantity and price at which their

[5] The panel further holds that, for purposes of the direct-effects exception, an effect is "direct" only where "'it follows as an immediate consequence of the defendant's activity'" and that "'[a]n effect cannot be "direct" where it depends on . . . uncertain intervening developments.'" Panel Opinion at 22 (quoting *United States v. LSL Biotechs.*, 379 F.3d 672, 681 (9th Cir. 2004).

goods may be imported to the United States, that collusive conduct does not "involve" import commerce. The panel's denial of protection for U.S. potash buyers is inconsistent with Supreme Court guidance in *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004):

> To clarify: The issue before us concerns (1) significant foreign anticompetitive conduct with (2) an adverse domestic effect and (3) an independent foreign effect giving rise to the claim. In more concrete terms, this case involves vitamin sellers around the world that agreed to fix prices, leading to higher vitamin prices in the United States and independently leading to higher vitamin prices in other countries such as Ecuador. We conclude that, *in this scenario, a purchaser in the United States could bring a Sherman Act claim under the FTAIA based on domestic injury*, but a purchaser in Ecuador could not bring a Sherman Act claim based on foreign harm.

Id. at 159 (emphasis added). The panel decision would bar claims against global price-fixing cartels by U.S. buyers even though, according to *Empagran*, such U.S. buyers "could bring a Sherman Act claim under the FTAIA based on domestic injury."[6] *Id*. Such a result deserves careful reconsideration before it is imposed on U.S. businesses and consumers.[7]

III. THE PANEL DECISION WILL FRUSTRATE THE POLICIES UNDERLYING THE FTAIA BY INSULATING FROM SHERMAN ACT LIABILITY GLOBAL CARTEL ACTIVITY THAT USES U.S. IMPORT MARKETS AS PART OF A LARGER PLAN TO RESTRAIN GLOBAL TRADE.

Despite the fact that for nearly 30 years the FTAIA has governed the scope of Sherman Act relief for plaintiffs injured by global antitrust conspiracies, there has been limited guidance from courts of appeals as to the contours of the import-commerce exception or the direct-effects exception. The panel's interpretations of those exceptions ignore the purposes of modern U.S.

[6] Those statements were technically dicta. However, those dicta are on point for this case, and as this Court recently stated, the Court "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).

[7] As plaintiffs allege, the United States is one of the world's largest potash importers. SA 13 ¶ 51.

antitrust law and the realities of an increasingly globalized marketplace. The proper interpretation of the FTAIA's import-commerce exception and its direct-effects exception presents an issue of first impression in this circuit, and one that has far-reaching consequences for U.S. consumers injured by global cartel activity.

A. The Panel's Opinion Conflicts With Explicitly Stated Congressional Intent.

The panel concluded that plaintiffs' allege a "ripple effect on the United States domestic market," and that "the FTAIA prevents the Sherman Act from reaching such ripple effects." Panel Opinion at 26 (quotation omitted). The panel cited a single district court decision in support. *Id*. But this holding is in clear conflict with congressional intent in enacting the FTAIA. Congress explicitly stated that such "ripple," or to use Congress's term, "spillover," effects on the U.S. market would still subject foreign cartels to Sherman Act liability:

> Any 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 this 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.*** Such an impact would, at least over time, meet the test of a direct, substantial and reasonably foreseeable effect on domestic commerce.

P.L. 97-290, Export Trading Company Act of 1982, H.R. Rep. 97-686, at 12, 2d Sess. 1982, reprinted in 1982 U.S.C.C.A.N. 2487, at 2498 (emphasis added).

The FTAIA was enacted to facilitate the export of domestic goods by exempting from the Sherman Act non-import transactions with foreign nations *that do not injure the U.S. economy*, freeing U.S. exporters from competitive disadvantages in foreign trade. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796 n.23 (1993). But the FTAIA specifically exempts the *importation* of goods and *domestic* commerce from its reach. *See Carpet Grp. Int'l*, 227 F.3d at 72-73. The import-commerce exception was added to the legislation so that "'there [would] be

no misunderstanding that *import restraints, which can be damaging to American consumers, remain covered by the [Sherman Act].'"* *See* H.R. Rep. 97-686, at 9, 1982 U.S.C.C.A.N. 2487, at 2494 (quoting James Atwood) (emphasis added). In other words, Congress included the import-commerce exception precisely to clarify that the Sherman Act continues to protect U.S. consumers from injury caused by global cartels such as this.

B. The Panel's Opinion Frustrates the Goals of Antitrust Law And Sacrifices U.S. Buyers To A Globalized Marketplace.

The panel's interpretation permits global cartels to conspire with impunity to rig the global marketplace (thereby choking supply to U.S. import markets and driving up prices paid by U.S. buyers) so long as the conspirators' initial step in restraining trade was to affect some market other than the U.S. import market. If the conspirators acted initially to drive up benchmark contract prices for purchases by Brazilian, Chinese, and Indian buyers, for example, the panel opinion holds that the FTAIA insulates those conspirators from Sherman Act liability, and the fact that those very same actions resulted as intended in inflated prices for U.S. imports is an insufficient basis for Sherman Act liability.[8]

This massive enlargement of cartel immunity for domestic injury contravenes the overarching purposes of modern U.S. antitrust law: to prohibit economic arrangements that harm U.S. consumers, whether by causing supracompetitive prices, output restrictions, or reduced quality or innovation. *See* Jonathon Baker, *Beyond Schumpeter vs. Arrow: How Antitrust Fosters Innovation*, 74 Antitrust L.J. 575, 602 (2007) ("The benefits of antitrust rules and enforcement extend beyond lower prices, greater output, and higher product quality; they also include increased innovation."); *see also Bus. Elecs. v. Sharp Elecs. Corp.*, 485 U.S. 717,

[8] Of course, as discussed in Section I *supra*, plaintiffs allege that the dramatic price increases for potash imported to the United States were a specifically intended consequence of the global cartel's anticompetitive conduct.

723 (1988) (*per se* prohibitions reserved for "conduct that would always or almost always tend to restrict competition and decrease output") (internal quotation omitted); Howard Shelanski, *Enforcing Competition During an Economic Crisis*, 77 Antitrust L.J. 229, 242-45 (2010) (discussing merger enforcement and innovation).[9]

There are many global antitrust conspiracies that have and continue to injure U.S. consumers. For example, three foreign companies that dominated the global market for lysine conspired to fix world prices, without independent U.S. participation in the conspiracy until Archer Daniels Midland began producing lysine and joined the cartel. *United States v. Andreas*, 216 F.3d 645, 651 (7th Cir. 2000). Similarly, another group of defendants attempted to corner the market on internationally traded copper futures, thereby inflating the prices paid by U.S. consumers, the largest consumers of copper cathode in the world. *Metallgesellschaft AG v. Sumitomo Corp.*, 325 F.3d at 837. Global antitrust conspiracies will have an increasingly substantial and immediate effect on U.S. consumers as trade becomes ever more globalized. As the United States continues to import scarce raw materials, and increasingly competes with other

[9] In 1995, the United States Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") issued "Antitrust Enforcement Guidelines for International Operations" ("Guidelines") that are still in force. http://www.justice.gov/atr/public/guidelines/internat.htm The Guidelines offer an "Illustrative Example B," involving a foreign price-fixing cartel producing a product in several foreign countries, but with no U.S. production or U.S. subsidiaries. The cartel sells the product to an intermediary outside the United States, which they know will resell the product in the United States. The intermediary is not part of the cartel. The agencies analyze this example by noting that the fact that the illegal conduct occurs prior to the import would trigger the application of the FTAIA and a determination of whether the conduct had "direct, substantial and reasonably foreseeable effects" on U.S. domestic or import commerce. The Guidelines note that "since 'the essence of any violation of Section 1 [of the Sherman Act] is the illegal agreement itself--rather than the overt acts performed in furtherance of it,' the Agencies would focus on the potential harm that would ensue if the conspiracy were successful, not on whether the actual conduct in furtherance of the conspiracy had in fact the prohibited effect upon interstate or foreign commerce."

countries for supplies of those raw materials, U.S. consumers will be increasingly vulnerable to supply restrictions and inflated prices engineered by global cartels.

IV. THE PANEL'S FAILURE TO ADDRESS *UNITED PHOSPHORUS* IN LIGHT OF INTERVENING SUPREME COURT DECISIONS PRESENTS A SEPARATE AND INDEPENDENT GROUND FOR *EN BANC* REVIEW.

This Court, sitting *en banc*, previously held in *United Phosphorus, Ltd. v. Angus Chemical Co.* that the FTAIA imposed a subject matter jurisdictional limitation, not an additional element of a Sherman Act claim.[10] 322 F.3d 942, 952 (7th Cir. 2003) (*en banc*). Accordingly, defendants styled their FTAIA challenge as a facial challenge to the district court's subject-matter jurisdiction over plaintiffs' claims, pursuant to Rule 12(b)(1), and separately argued that plaintiffs had failed to state a claim under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). The panel noted that Supreme Court decisions issued after *United Phosphorus* cast doubt on that case's continued viability, *see Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2877 (2010); *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 510-11 (2006), and that the Third Circuit recently overruled its precedent in light of *Morrison* and *Arbaugh* to hold that the FTAIA does not impose a jurisdictional limit but instead establishes an additional element of a Sherman Act claim, *see Animal Sci.*, 2011 WL 3606995, at *2.

The panel left open the question of whether *United Phosphorus* remains good law after *Morrison* and *Arbaugh* because "substantive review of the FTAIA is no different whether viewed through the lens of Rule 12(b)(1) or 12(b)(6)." Panel Opinion at 16. But as the *United Phosphorus* dissent recognized, that is not correct. Unlike a Rule 12(b)(6) motion, district courts resolving a factual attack on subject-matter jurisdiction may hold hearings, may consider matters outside the pleadings, and make judicial findings of fact as to whether subject-matter jurisdiction

[10] A substantial minority of the panel dissented. *See* 322 F.3d at 953 (J. Wood, dissenting).

exists. *United Phosphorus*, 322 F.2d at 963 (J. Wood, dissenting) (citing 5A Charles Alan Wright and Arthur R. Miller, *Federal Practice and Procedure* § 1350 at 234-35 (2d ed. 1990)). The district court's factual findings would then be subject to deferential, not *de novo*, review. *Id*.

Although defendants' current challenge is a facial one, the panel's failure to rule on whether *United Phosphorus* remains controlling after *Morrison* and *Arbaugh* creates further confusion within this Circuit, and sets the parties up for lengthy, costly, and potentially unnecessary further proceedings in the district court. If *United Phosphorus* continues to control, plaintiffs here will doubtless face another round of Rule 12(b)(1) motions contending that, although they might have amended their complaint to plausibly plead facts that give rise to an inference of subject-matter jurisdiction under the FTAIA, their amended allegations cannot be substantiated, and their amended complaint therefore must be dismissed on a factual challenge under Rule 12(b)(1). The district court would then have to entertain evidence, hold a hearing, and make factual rulings as to whether plaintiffs actually fall within either of the two FTAIA exceptions. If, on the other hand, *United Phosphorus* is no longer good law, then plaintiffs may cure any jurisdictional defect in their complaint by making good-faith amendments to their complaint pursuant to Rule 15(a)(2), with any determination as to the evidentiary substantiation of their good-faith allegations held in abeyance until a merits determination.

CONCLUSION

The panel's finding that plaintiffs' allegations were insufficient under *Twombly* conflicts with this Court's decision in *In re Text Messaging*, as well as the Third Circuit's decision in *Animal Sciences*. The panel misconstrued the FTAIA's two exceptions, and ignored Supreme Court dicta that the FTAIA does not bar U.S. plaintiffs from bringing claims against global cartels for injury to domestic commerce — precisely the circumstances alleged here. Similarly,

the panel's ruling that the FTAIA does not extend Sherman Act liability to global cartel activity that has only a "ripple effect" on the domestic market also is in direct conflict with the legislative history of the FTAIA. Finally, by declining to decide whether the FTAIA is jurisdictional or simply prescribes an element of an antitrust claim against a global cartel, the panel sidestepped *United Phosphorus*, ignored Supreme Court precedent, ignored the impact of that question on district courts and parties, and created division among the circuits.

For these reasons, Appellees respectfully ask this Court to rehear this matter *en banc*.

Respectfully submitted,

Dated: October 7, 2011

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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

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2011, the undersigned caused to be electronically filed with the Clerk of the Seventh Circuit United States Court of Appeals, **APPELLEES' PETITION FOR REHEARING EN BAN**, a copy of which is attached hereto and hereby served upon you.

Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Respectfully submitted,

MINN-CHEM INCORPORATED, et al.

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