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

DEFENDANTS-APPELLANTS' MOTION
FOR STAY OF MANDATE PENDING THE FILING OF
A PETITION FOR CERTIORARI

Pursuant to FRAP Rule 41(d)(2), Defendants-Appellants Agrium Inc., Agrium U.S. Inc., BPC Chicago, LLC, JSC Belarusian Potash Company, JSC Silvinit, JSC International Potash Company, JSC Uralkali, The Mosaic Company, Mosaic Crop Nutrition LLC, Potash Corporation of Saskatchewan, Inc., and PCS Sales (USA), Inc. respectfully move this Court for an order staying the issuance of the mandate — and thus leaving in effect this Court's stay of all district court proceedings — pending the filing of a petition for *certiorari* in the United States Supreme Court. For

the reasons outlined below, defendants' petition will present a substantial question and there is good cause for a stay within the meaning of Rule 41(d)(2)(A).

INTRODUCTION

This Court has interpreted Rule 41(d)(2) to require a showing of a "reasonable probability of succeeding on the merits" and irreparable harm if the mandate is not stayed. *United States v. Warner*, 507 F.3d 508, 511 (7th Cir. 2007) (Wood, J., in chambers); *United States ex rel. Chandler v. Cook County*, 282 F.3d 448 (7th Cir. 2002) (Ripple, J., in chambers). To demonstrate a reasonable probability of success, the movant must show a reasonable probability that four Justices will vote to grant *certiorari* and a reasonable possibility that five Justices will vote to reverse the judgment of this Court. *Id.* As demonstrated below, that standard is met here, where the Court created a circuit split both by rejecting the Ninth Circuit's reading of the "direct effect" requirement in the Foreign Trade Antitrust Improvement Act ("FTAIA") and by taking a broader view than the Third Circuit of the circumstances under which foreign conduct "involves" import trade or commerce and thus falls outside the purview of the FTAIA.

How far the U.S. antitrust laws reach to regulate foreign conduct is an issue of exceptional importance, both for businesses that operate over-

seas and for the foreign nations (including the United States' principal trading partners) that regulate them. That is particularly true in a case like this, where the challenged foreign conduct involves joint export marketing arrangements that were encouraged by foreign governments. Having conflicting decisions in this area and a test that depends on concepts of "reasonable proximity" creates substantial uncertainty that only the Supreme Court can resolve.

Defendants should not be subjected to discovery during the short period of time necessary to determine whether the Supreme Court will grant *certiorari* in this case. As the Supreme Court has observed, discovery in complex antitrust cases like this one invariably is "a sprawling, costly, and hugely time-consuming undertaking not easily susceptible to [effective] line drawing and case management." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 560 n.6 (2007). Discovery here is likely to be even more costly and burdensome than in the ordinary antitrust case because all of the alleged misconduct took place outside the United States. This Court entered a stay to ensure that the parties and the district court would not have to begin a massive discovery effort unless and until the complaint was sustained. The same principle should be applied now to keep that stay in effect until the Supreme Court has an opportunity to decide whether to ac-

cept defendants' petition for *certiorari*.

BACKGROUND

Recognizing that discovery in this case is likely to be extremely labor intensive and expensive, and that the questions presented are contestable and controlling issues of law, this Court accepted an interlocutory appeal from the district court's order denying defendants' motion to dismiss on March 17, 2010. The district court entered a stay of all proceedings, and agreed to continue the stay during the entire pendency of this appeal if defendants sought and this Court "'accept[ed] [an] expedited briefing schedule.'" *Appellants' Joint Motion To Set An Accelerated Briefing Schedule*, 7th Cir. Dkt. 2 (Mar. 24, 2010) (quoting Hearing Tr. at 8 (Mar. 10, 2010)). In response to defendants' request, this Court ordered expedited briefing and heard argument on June 3, 2010.

In March 2011, however, the district court lifted the stay to allow plaintiffs to proceed with certain discovery, including the preparation of Rule 26 disclosures, implementation of the District Court's Standing Order on Electronic Discovery, and the immediate processing and review of defendants' relevant document collections. Mar. 22, 2011 Hearing Tr. at 12-13 (N.D. Ill. Dkt. 329). Defendants immediately sought emergency relief in this Court, pointing out that lifting the stay even partially would impose

enormous costs on both the parties and the district court and thus would largely destroy the benefits of allowing an interlocutory appeal. Among other things, defendants would have been required to run more than 25,000 individual searches through the relevant ESI. N.D. Ill. Dkt. 302, at 21 (Hearing Tr. of Mar. 4, 2010) (Mar. 26, 2010). The costs of this massive undertaking would have been compounded exponentially for the Eastern European defendants, who would have been required to translate these searches from English into Russian and then review the foreign language results.

On March 23, 2011, the panel that heard the appeal granted defendants' emergency motion, entering an order providing that "[d]istrict court proceedings shall be stayed pending resolution of this appeal." 7th Cir Dkt. 41. On September 23, 2011, the panel reversed the decision below, holding (among other things) that plaintiffs had failed to satisfy the FTAIA's "direct effect" requirement. In reaching that conclusion, the panel applied the definition of the term "direct" that the Ninth Circuit had adopted in *United States v. LSL Biotechs.*, 379 F.3d 672, 680 (9th Cir. 2004).

This Court vacated the panel decision and granted rehearing en banc on December 1, 2011. On June 27, 2012, the Court issued its *en banc* deci-

sion affirming the district court's decision denying defendants' motion to dismiss. In that opinion, the Court concluded that the Ninth Circuit had "jumped too quickly" in holding that a "direct" effect must "follow[] as an immediate consequence of the defendant's . . . activity." Op. at 22. The Court adopted instead the interpretation offered by the Department of Justice's Antitrust Division, under which, for FTAIA purposes, the word "direct" requires only a "reasonably proximate" causal nexus between the conduct and the effect on U.S. import trade or commerce. Using this different definition, the Court concluded that plaintiffs had stated a claim by alleging that defendants had engaged in anti-competitive practices that resulted in "benchmark" prices in Brazil, China, and India, which the defendants "then applied" to prices in the U.S. *Id.* at 28-29.

The Court also concluded, contrary to the panel, that plaintiffs had sufficiently alleged that defendants engaged in anticompetitive conduct "involving" import trade or commerce. The Court described the complaint as alleging a "tight-knit global cartel" that controlled 71% of the world's supply of potash and that was designed to inflate profits by increasing prices. Op. at 26. Because 85% of U.S. potash comes from overseas and the price of potash increased six-fold from 2003-08, the Court concluded that plaintiffs had sufficiently alleged that the cartel meant to and in fact did

keep prices artificially high in the U.S. — even though there were no allegations of price-fixing or production quotas for U.S. sales and no allegations of worldwide production quotas or price-fixing. As demonstrated below, that conclusion cannot be reconciled with the Third Circuit's "strict construction" of what it characterized as the "import trade or commerce exception" in *Animal Science Prods., Inc. v. China Minmetals Corp.*, 654 F.3d 462, 470 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1744 (2012).

Defendants intend to file a petition for *certiorari* from this decision, which is currently due on September 25, 2012.

ARGUMENT

I. Defendants Have A Reasonable Probability Of Success.

The existence of a split in the circuits on two important issues of statutory construction is enough, by itself, to demonstrate that there is a reasonable probability that four Justices will be persuaded to vote to grant defendants' petition. The existence of a split between this Court and the Ninth Circuit on the question of what constitutes a "direct effect" under the FTAIA is undeniable. In *LSL Biotechs*, the Ninth Circuit looked to the Supreme Court's definition of a "direct effect" in the Foreign Sovereign Immunities Act and concluded that, by adding the word "direct" to the requirement that the effect on import commerce be "substantial" and "fore-

seeable," Congress intended to limit the reach of U.S. antitrust laws to foreign conduct that affects U.S. import commerce as an "immediate consequence of the defendant's . . . activity." 379 F.3d at 680. As the panel in this case concluded, under the Ninth Circuit's view, the fact that sales by foreign sellers to foreign purchasers may have some sort of "ripple effect" on U.S. imports is not enough to subject the foreign seller to liability under the U.S. antitrust laws. Thus, under the Ninth Circuit's view, plaintiffs' allegations that cartel activity aimed at Brazil, India and China created a "benchmark" price that ultimately affected U.S. sales did not state a claim, at least in the absence of any explanation as to *how* the foreign prices were used to affect U.S. prices.

The *en banc* Court's rejection of the Ninth Circuit's definition of "direct" for a much broader "reasonably proximate" test was outcome determinative. The Court required no explanation of how the alleged "benchmark" pricing in Brazil, India, and China had an effect on prices charged to U.S. potash purchasers, presumably because under a proximate cause test any impact that was reasonably foreseeable would be deemed "direct."

The conflict between this Court and the Ninth Circuit creates a great deal of uncertainty for foreign sellers who sell their products in the U.S. and around the world. That uncertainty is compounded by this Court's

adoption of a "reasonably proximate" cause as the test for what constitutes a "direct" effect — a concept that the Supreme Court itself has observed is "difficult to comprehend" and often confusing to apply. *See CSX Transp., Inc. v. McBride*, 131 S. Ct. 2630, 2637 (2011); *Exxon Co., U.S.A. v. Sofec, Inc.*, 517 U.S. 830, 838 (1996). This case illustrates the point. Encouraged by their own governments to form joint marketing groups, the defendants sought to avoid entangling themselves in U.S. antitrust litigation by crafting their joint export marketing efforts to avoid any direct effect on the U.S. market. But if liability is based on whether a judge or jury might conclude, in hindsight, that a claimed effect on U.S. markets had a reasonably proximate causal nexus to the defendants' foreign activities, foreign sellers like defendants may well have no way of protecting themselves from expensive and time-consuming litigation in the U.S. That alone provides a powerful reason why the Supreme Court should grant *certiorari* in this case.

Apart from the clear conflict with the Ninth Circuit, this Court's conclusion that plaintiffs have pleaded anticompetitive conduct that "involved" U.S. import trade or commerce is also at odds with the test applied in the Third Circuit. There are no allegations here that the defendants entered into any agreement to fix prices or restrain supply either globally

or in the United States. Nevertheless, the Court concluded that the alleged restraints on output, which the complaint says were directed at Brazil, India and China, necessarily impacted the U.S. as well and therefore should be deemed to "involve" U.S. import trade or commerce. Although the Court did not criticize the Third Circuit's test, under which foreign conduct does not "involve" U.S. imports unless it is "directed at" or "target[s] import goods or services," Op. at 26, this Court's analysis is, on its face, impossible to reconcile with that test. The resulting uncertainty for global commerce is another compelling factor making the grant of *certiorari* at least reasonably probable.

In recent years, the Supreme Court has granted review in a number of cases to decide the extent to which American laws apply outside the United States. In *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 169 (2004), the Supreme Court concluded that Congress had not attempted to engage in "legal imperialism" in the FTAIA by imposing U.S. antitrust standards on the rest of the world through "legislative fiat." In *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), the Supreme Court overturned long-standing precedent under which U.S. securities laws could be applied to overseas transactions in some circumstances, drawing a bright line and holding that the securities laws do not apply to

sales of securities outside the United States. And this spring, the Court ordered re-argument in *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, to address an issue that had not been raised by the parties — whether the Alien Tort Statute, 28 U.S.C. § 1350, allows federal courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.

These cases suggest that the Supreme Court is focused on the question of the extent to which U.S. law and U.S. courts can be used to police the conduct of non-U.S. parties outside of the United States. That makes it more likely that the Court will grant review in a case like this, which raises significant issues of international comity because it involves (among other things) joint marketing agreements that were affirmatively encouraged by foreign governments.

For all of these reasons, it is at least "reasonably probable" that defendants' petition for *certiorari* will succeed. It is also "reasonably possible" that five members of the Court will disagree with this Court. As this Court recognized in granting defendants' interlocutory appeal, there is substantial ground for a difference of opinion with respect to the issues raised in this case. The very fact that the panel originally reached a different result and that this Court expressly disagreed with the Ninth Cir-

cuit shows that it is reasonably possible that the Supreme Court will reach a different result than this Court did on rehearing if it decides to grant review.

II. Defendants Would Suffer Irreparable Harm Absent A Stay.

Absent a stay of the mandate, discovery would begin immediately. The district court made it abundantly clear when it lifted its own stay in March 2011 that it intends to order discovery to proceed at the earliest possible opportunity. There is no doubt that discovery will be massive and therefore very costly. As the district court itself observed, discovery here "has the potential to be extremely labor intensive and expensive." Nov. 3, 2009 Order (N.D. Ill. Dkt. 202) at 74. The preliminary negotiations concerning ESI production demonstrate that ESI discovery will be an enormous undertaking. Pretrial disputes regarding international, multilingual antitrust discovery are also likely to be highly complex and burdensome. And the discovery process itself—requiring coordination of countless witnesses and interpreters, extensive foreign travel, and analysis of countless pages of documents in multiple languages—is certain to impose staggering costs on the parties, to say nothing of the district court itself. Even over the six months or so it would take to obtain a ruling on defendants' petition for *certiorari*, the parties would likely spend thousands of hours and

hundreds of thousands of dollars on discovery. If the Supreme Court were to reverse this Court's ruling, all of that time and all of that money would be wasted, without any hope of recovery.

In *Twombly* the Supreme Court cautioned that "'[t]he costs of federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery'" in cases like this unless the complaint satisfies the Court's exacting pleading criteria. 550 U.S. at 558 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)). That caution applies with particular force in a case like this, where the conduct plaintiffs challenge all took place on foreign soil, and the legal question yet to be definitively decided is whether Congress intended to subject such conduct to scrutiny under U.S. antitrust law.

This Court recognized the wisdom of staying district court proceedings until the interlocutory appeal was completed when it granted defendants' motion for a stay in March 2011. The same principle should apply if the Court concludes (as it should) that defendants have shown a reasonable probability of success in the Supreme Court. *See, e.g.*, *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 625 (7th Cir. 2010) (the burden on defendants of even "a limited discovery demand" should await a determination that the complaint satisfies *Twombly* and *Iqbal*).

Staying the mandate and thus keeping this Court's stay of district court proceedings in effect while defendants pursue Supreme Court review will not impose any hardship on plaintiffs, nor will it have any adverse impact on the public interest. *See In Re Forty-Eight Insulations, Inc.*, 115 F.3d 1294, 1300 (7th Cir. 1997). No evidence is likely to be lost over the course of the next six months while defendants pursue Supreme Court review. The district court has entered a sweeping protective order that requires defendants to "preserve and protect documents, data, and other tangible things" relevant to the litigation. *See* N.D. Ill. Dkt. 78. Thus, plaintiffs' interests are fully protected, and they will suffer no harm if the stay, which has already been in place for more than two years, continues for a few months longer until the appellate process has either fully concluded or the Supreme Court decides to take the case.

CONCLUSION

For the foregoing reasons, the Court should stay the mandate pending the filing of defendants' petition for *certiorari* and thus continue in effect the stay of district court proceedings until the time allowed for the filing of a petition for *certiorari* expires. If defendants file a timely petition, the stay should remain in effect until the conclusion of all proceedings before the Supreme Court.

Dated: July 3, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on July 3, 2012, pursuant to the parties' agreement, he caused one copy of the foregoing motion to be placed with a third-party commercial carrier for overnight delivery to the following:

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