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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MISCELLANEOUS

INTRODUCTION*

Plaintiffs' briefs are notable for what they do *not* say. Plaintiffs point to nothing in their complaints alleging *any* anti-competitive conduct aimed at the U.S. market: they identify no allegation that defendants *agreed* to fix U.S. prices, avoid competition for U.S. customers, reduce supplies allocated for sale in the United States, charge foreign "benchmark" prices in the United States, exchange U.S. prices, or engage in any other joint or coordinated U.S. activity. Instead, the complaints contend that conduct taking place entirely abroad – much of which plaintiffs concede was specifically directed at foreign purchasers – had a nebulous and indirect impact on prices in the United States because there is a "global market" for potash. We are not aware of any court that has permitted such a claim to proceed under the FTAIA.

Moreover, what plaintiffs *do* say about defendants' conduct is demonstrably wrong. Their briefs are replete with labels and conclusions: the centerpiece of their claim is their repeated assertion

* Defendant JSC Belarusian Potash Company joins in this reply brief only as it pertains to the Direct Plaintiffs' Response Brief. BPC has not been served with a complaint by the Indirect Purchaser Plaintiffs.

that defendants engaged in "lockstep," "joint," or "coordinated" price increases and production cuts. But that contention is belied by plaintiffs' own complaints. In virtually every instance (other than those of lawful joint sales to overseas markets), the complaints allege that defendants' actions followed seriatim in textbook follow-the-leader fashion, with one company's move separated from another's by weeks or months. This is just what one would expect in a concentrated industry, as defendants separately and predictably responded to the same market forces; production went down as demand fell, and prices went up as demand rebounded to record levels during a global food shortage.

There is a reason such threadbare claims should not proceed: plaintiffs offer no response to the demonstration in our opening brief of the harms that would follow from the continuation of this case. International discovery (doubtless requiring, among other things, the translation and review of huge numbers of Russian and Belarusian documents) would be enormously expensive and burdensome. It also would be injurious to U.S. foreign relations, as a federal court scrutinizes (and possibly threatens substantial liability for) actions taking place abroad that have not been challenged by the concerned

foreign governments. Such deeply flawed complaints, which would have such harmful consequences, should be dismissed.

ARGUMENT

I. THE COMPLAINTS FAIL UNDER THE FTAIA.

A. Overseas Pricing And Production Decisions Not Directed At The United States Do Not "Involve" U.S. Import Commerce Within The Meaning Of The FTAIA.

1. To begin with, the allegations in this case do not "involve" import commerce within the meaning of the FTAIA. Plaintiffs acknowledge that, to be actionable under the "import commerce" exception to the statute, the alleged "*wrongful conduct* [must itself] involve[] import trade or commerce." Direct Br. 37 (emphasis added). But they never explain the meaning of the controlling statutory term "involves."

As we showed in our opening brief (at 20-23), that meaning comes clear from the statutory language. The most natural reading of the FTAIA is that, to "involve" import commerce, an anticompetitive restraint must itself be part of, and restrict, particular U.S. sales or purchase transactions. An agreement to fix the price of products sold in the United States, or to refrain from selling to certain customers or in certain locations in the United States (as alleged, for example, in

Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993)), would satisfy this requirement because it would involve particular import transactions; an agreement to engage in conduct abroad that is unrelated to particular U.S. import transactions would not. Plaintiffs offer no intelligible alternative explanation of the term.

The Department of Justice's 1995 Antitrust Enforcement Guidelines lend powerful support to this understanding of the FTAIA. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, *Antitrust Enforcement Guidelines for International Operations* (1995), *available at* http://tinyurl.com/22vjpp8 (the *Guidelines*). Of course, we do not dispute plaintiffs' unremarkable observation that, under the Guidelines, the "selling [of] products directly into the United States" is "unambiguously an import into the U.S. market" that may be subject to U.S. antitrust jurisdiction. *See* Indirect Br. 22 (citing *Guidelines* § 3.11). But as the *Guidelines* also make clear, "sales in or into the United States" are *not* grist for a U.S. antitrust suit, even if the seller is a member of a global cartel, so long as "sales in or into the United States *are not within the scope of the [cartel] agreement*." *Guidelines* § 3.121 (ill. ex. C, var. 1) (emphasis added). Indeed, "in the absence of an agreement with respect

to the U.S. market, [non-predatory] sales into the U.S. market ... do not raise antitrust concerns"; and "[t]he mere fact that ... U.S. prices may ultimately be affected by the cartel agreement is not enough for ... the FTAIA." *Id.* That is an exact description of this case.

This point is confirmed by the statutory context, which distinguishes conduct "involving" "import trade or commerce" from conduct that has a "direct … effect" on "import trade or import commerce." 15 U.S.C. § 6a, 6a(1)(A). As we showed in our opening brief (at 23-25), reading the phrase "involves import commerce" to mean anything that has an impact (however remote) on products imported into the United States would largely read the distinct FTAIA "direct effect" test out of the statute. *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (alterations omitted) (it is a "cardinal rule" that "statutory language must be read in context since a phrase gathers meaning from the words around it"). And because a more expansive reading of the "involving imports" exception would greatly expand the international reach of U.S. antitrust law, applying that law to overseas conduct that has not been shown to have *any* direct and substantial effect in the United States,

such a construction is precluded by considerations of comity. *See* Opening Br. at 25-30.

This last point is of special importance here: plaintiffs would use the "import commerce" exception to impose liability for joint overseas marketing arrangements approved by foreign governments, basing their case on conduct that took place abroad and that (on even the most generous reading of plaintiffs' allegations) had its principal effects overseas. Such an outcome is just what this Court warned against when it emphasized that U.S. "courts (and private plaintiffs) [should not] nos[e] about where they do not belong" – a rule with jurisdictional force that must be applied "early in the litigation." *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 952 (7th Cir. 2003) (en banc).

In arguing to the contrary, plaintiffs simply misunderstand our position. We obviously did not invoke international comity as an "affirmative defense." Indirect Br. 24; *see also* Direct Br. 48; Indirect Br. 15, 23-27. Instead, comity principles require federal courts to "construe[] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004). That principle has obvious

force in a case like this one, where plaintiffs challenge the operation of export organizations that are approved and encouraged by the nations in which they were formed.

2. The allegations of the complaints do not satisfy the controlling "import commerce" test. In addressing this point, it is important to bear in mind what the complaints actually say. In their briefs to this Court, plaintiffs assert, for the first time, that defendants "fix[ed] prices of potash sold to U.S. customers" (Direct Br. 37) and "enter[ed] into a price-fixing conspiracy to inflate the prices charged to purchasers in the United States" (Indirect Br. 24). But plaintiffs do not cite any paragraphs in the complaints for these bald conclusions, and with good reason: aside from their invocation of conclusory labels, the complaints conspicuously omit any allegation that defendants entered an agreement to fix U.S. prices or, for that matter, to engage in *any* joint conduct directed at the U.S. market. What the complaints do allege about concerted activity is manifestly insufficient to satisfy the import exception.

First, plaintiffs point to what they characterize as anticompetitive pricing and coordinated sales directed at China, India, and Brazil. SA13

¶52; SA21-22 ¶¶90, 94-95; SA25-26 ¶111; SA27 ¶117; SA28-29 ¶¶120, 123-24, 127; SA33 ¶¶142, 144. But this foreign sales conduct certainly does not involve the "buying and selling of goods" (Direct Br. 38) in *U.S.* import markets, and thus does not "involve" import commerce within the meaning of the FTAIA import exception; plaintiffs do not contend otherwise. In fact, such foreign conduct is the paradigm of action that lies outside the jurisdiction of U.S. courts: plaintiffs "cannot recover antitrust damages based solely on the alleged cartelization of [a foreign] market, because American antitrust laws do not regulate the competitive conditions of other nations' economies." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 582 (1986).

Plaintiffs nonetheless argue that the foreign sales became, in practical effect, the basis for pricing "benchmarks" that subsequently influenced U.S. prices. Direct Br. 40; Indirect Br. 21. But this adds nothing to their import exception claim. As we have explained (Opening Br. 34-36, 38-39) – and as plaintiffs do not deny – the *complaints*[1] do not

[1] Plaintiffs allege, for the first time on appeal, that defendants entered into "agreements to set benchmark prices that dictated U.S. potash prices." Direct Br. 34. Once more, this conclusory assertion is made without citation to any allegation actually appearing in the complaints, again with good reason: there is none.

allege an *agreement* to set foreign benchmark prices, to adhere to foreign prices in U.S. sales, or to coordinate U.S. sales activity in any way. Instead, they suggest vaguely that, through some sort of unexplained alchemy, "prices for cartelized term contracts *become* benchmarks for spot market sales" (SA26 ¶111 (emphasis added)) and that prices appearing in a weekly industry publication called *Green Markets* "are *considered* benchmark prices in the industry." SA27 ¶114 (emphasis added).[2] Yet whether or not the fixing of prices for overseas

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[2] Plaintiffs are loose in their use of the label "benchmark." They say that overseas prices serve as "benchmarks" for U.S. sales, and also allege that prices appearing in *Green Markets*, a BNA weekly report, "are considered benchmark prices." SA27 ¶114. But there is no indication in the complaints that the *Green Markets* prices are in any way "based on sales to buyers in China, India, Brazil, and elsewhere." Direct Br. 40 (citing SA13 ¶52, SA25-26 ¶111). Nor do plaintiffs say anything about the actual relationship (if any) between overseas prices and the *Green Markets* "benchmark" prices. In fact, *Green Markets* reports *ranges* that "do not reflect actual transactions, but represent current market conditions as perceived by selected buyers and sellers"; they vary among three North American regions – sometimes by as much as ten percent or more – reflecting "localized price differences within [each] region." GREEN MARKETS, Feb. 15, 2010, at 5, *available at* http://tinyurl.com/33xqsg4.

We note that, because *Green Markets* is cited in the complaints (SA27 ¶114), the Court is free to consider portions of the publication that plaintiffs failed to quote. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 568 n.13; *Rosenblum v. Travelbyus.com Ltd.*, 299 F.3d 657, 661-62 (7th Cir. 2002) (when the plaintiff characterizes "only a part" of the relevant document, the defendant is entitled to "append what it contends is the remainder"). Under this principle, the Court may "consider[] [as] part of the pleadings" any "written instrument" that is "referred to in the plaintiff[s'] complaint" and is "central" to their claims. *McCready v. eBay, Inc.*, 453 F.3d 882, 891 (7th Cir. 2006). In reviewing such documents, the court is "not bound to accept [plaintiffs'] allegations as to the effect of the [documents], but

(*continued...*)

sales may have a sufficiently direct effect on U.S. commerce as to avoid the FTAIA under the statute's separate "direct effect" exception (a point we address below), such foreign sales assuredly do not "involve" U.S. imports in the requisite way.

Second, plaintiffs get no further when they allege parallel supply cuts by producers in Belarus, Russia, and Canada. SA20-25 ¶¶88-89, 91-93, 107. Although plaintiffs disregard the point in their briefs, many of these supposed supply reductions are alleged in the complaints to have been specifically directed at markets *outside* the United States. *See* SA20-23 ¶¶88-89, 91-93, 96-98. And even leaving that aside, decisions to adjust production levels at mines in foreign nations cannot in any sense be characterized as involving "the purchase and sale of a product brought into the U.S." Direct Br. 38. No doubt, foreign production adjustments may sometimes have an *effect* on later transactions in U.S. import markets, but they are in no way themselves *involved* in particular import transactions.

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can independently examine [them] and form [its] own conclusions as to the proper construction and meaning to be given the material." *Id.* A free sample copy of the weekly *Green Markets* report is available online at http://tinyurl.com/33xqsg4.

Here, the alleged production cuts did not control U.S. potash transactions. Their U.S. effects depended on a range of other, and intervening, overseas developments: whether the available potash supply was effectively "tied up," "stimulating" a "boom" in "spot market[s]" as a result of initial negotiations with large purchasers in Brazil, India, and China. SA33 ¶144. This, in turn, would depend on the availability of supply from the 30% of the potash production, located in at least a dozen nations across the globe (including the United States itself), *not* alleged to be a part of the purported conspiracy. SA12 ¶50; SA14 ¶57. Again, conduct that affects the United States only through its general impact on global prices does not "involve" import commerce within the meaning of the FTAIA.

B. The Complaints Do Not Allege Facts Establishing A Direct, Substantial, And Reasonably Foreseeable Effect On U.S. Markets.

Plaintiffs also have not adequately alleged that defendants' conduct abroad falls within the other FTAIA exception by imposing a direct, substantial, and reasonably foreseeable effect in the United States. As an initial matter, plaintiffs do not take issue with our definition of a "direct effect" as one that "follows as an *immediate*

consequence of the defendant's activity," or dispute that an effect is *not* direct if it is "speculative" or "depends on ... uncertain intervening developments." *United States v. LSL Biotechnologies*, 379 F.3d 672, 680-81 (9th Cir. 2004) (emphasis added) (citing *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992)). And although plaintiffs nevertheless suggest that effects may be direct even when there are "intermediary steps" between the foreign acts and their U.S. impact, or when the foreign conduct had "'some'" effect on U.S. commerce (Direct Br. 47-48 (citation omitted)), that is not what the statute says: the FTAIA requires a "direct" U.S. effect.[3]

It is, of course, not enough simply to assert the existence of such an effect; "naked assertions" will not do the trick. *Ashcroft v. Iqbal*, 129 S. Ct. 1949, 1950 (2009). But that is all plaintiffs offer. They

[3] Plaintiffs' citation to the FTAIA's legislative history (Indirect Br. 27-28) does not undermine this conclusion. As the Supreme Court has explained, "the FTAIA's language and history suggest that Congress designed the FTAIA to clarify, perhaps to limit, but not *to expand* in any significant way, the Sherman Act's scope as applied to foreign commerce." *Empagran*, 542 U.S. at 169. Yet extending the antitrust laws to permit attenuated ripple-effect theories of jurisdiction would do just that, going well beyond the seminal formulation of the effect test laid out in *Alcoa* and codified in the FTAIA. *See* Opening Br. 33-34. Beyond this, the cited House Report (Indirect Br. 27-28) simply rejects a claim that the FTAIA would permit a global cartel "to include the United States in [its] market allocation" (H.R. Rep. No. 97-686, at 13 (1982)) – a description of a direct restraint on U.S. markets. It does not suggest any loosening of the then-prevailing direct effect standard.

substantially hinge their argument on the conclusory assertion that the defendants "used a pattern of output restrictions and benchmark pricing set primarily in China, Brazil, and India to establish potash prices in the U.S.," and that the "benchmarking mechanism was not indirect in any way." Direct Br. 48. As we demonstrated in our opening brief (at 38-39) and note above, however, plaintiffs make no attempt to show how foreign prices were used to set domestic ones that (plaintiffs do not dispute) were negotiated by individual buyers and sellers; that there was any direct relationship between foreign and domestic prices; or that there was any *agreement* by defendants to use foreign prices or "benchmarks" in the U.S. market. Given these omissions in plaintiffs' complaints, the conclusory allegation that higher foreign prices somehow inspired higher domestic ones is the very model of an *indirect* effect.

Plaintiffs finally retreat to the position that "the U.S. and global markets are inextricably linked" and that "when prices rise in other markets, price increases in the United States necessarily follow." Indirect Br. 29, 31. But if that were enough to satisfy the FTAIA, it is not an exaggeration to say that *any* concerted action overseas could give

rise to a U.S. antitrust suit. As the Eighth Circuit has explained, that is not the law: it is not enough for FTAIA purposes that "the fungible nature and worldwide flow of the[] products made the domestic and foreign markets interconnected." *In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 536, 540 (8th Cir. 2007); *see also* cases cited at Opening Br. 33 n.7. Plaintiffs are unable to cite *any* decision of *any* court embracing their theory of ripple-effect jurisdiction.[4] This case, where comity concerns and the danger of disrupting both U.S. foreign relations and settled international markets are especially acute, should not be the first. For these reasons, the complaints here should be dismissed under the FTAIA.[5]

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[4] *Metallgesellschaft AG v. Sumitomo Corp. of America*, 325 F.3d 836 (7th Cir. 2003), cited at Direct Br. 47 and Indirect Br. 29, certainly is not such a case. The claim there was that the defendant cornered the market in copper available to satisfy copper futures contracts on the London Metals Exchange, which inevitably increased the price of every contract on that exchange. *See id.* at 837, 841-42. This alleged conspiracy "necessarily and directly inflated the price of the products purchased by the plaintiffs." *Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 474 (7th Cir. 2002). *See Metallgesellschaft AG*, 325 F.3d at 842 (plaintiffs in that case "alleged *more* than a global conspiracy that [they claimed] ha[d] significant effects in the United States") (emphasis added). The claim here – that prices charged overseas trickled down into the U.S. market – is quite different.

[5] *United Phosphorus* held that the FTAIA is jurisdictional. 322 F.3d at 952. Despite plaintiffs' suggestion to the contrary (Direct Br. 48-51), the Supreme Court's decision in *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006), presents no occasion to revisit that holding. *Arbaugh*, a domestic Title VII case, had nothing to do with the FTAIA and implicated none of the international comity concerns that animated this

(*continued...*)

II. THE SUIT SHOULD BE DISMISSED UNDER *TWOMBLY* AND *IQBAL*.

Wholly apart from the FTAIA, the complaints fail to satisfy the pleading requirements recognized in *Twombly* and *Iqbal*. The arguments to the contrary in plaintiffs' briefs rely almost entirely on labels and conclusions that are not supported by the allegations of the complaints, and by manifest distortions of the documents relied upon in the complaints.

The standards that govern here are familiar. Under *Twombly* and *Iqbal*, an antitrust complaint must contain non-conclusory factual allegations sufficient to raise a "plausible suggestion" of conspiracy. *Iqbal*, 129 S. Ct. at 1950. When plaintiffs allege nothing more than "parallel conduct … consistent with an unlawful agreement" or conduct merely "compatible" with conspiracy (*id.*) and there is an "obvious alternative explanation" (*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,

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Court's decision in *United Phosphorus*. Thus, this is not a case in which intervening Supreme Court authority has rendered *United Phosphorus* "unsound in principle or unworkable in practice." *United States v. Sykes*, 598 F.3d 334, 338 (7th Cir. 2010)); *see also Buchmeier v. United States*, 581 F.3d 561, 566 (7th Cir. 2009) ("[I]t takes more than argument that a decision is mistaken to justify overruling [it]"). And because *United Phosphorus* certainly is not the sort of "unrefined," "drive-by" decision that lacks "precedential effect" concerning jurisdiction (*Arbaugh*, 546 U.S. at 511), there is no reason to doubt its continuing validity.

567 (2007)), the complaint will not "plausibly suggest an illicit accord." *Iqbal*, 129 S. Ct. at 1950. Such a claim may not go forward when the challenged conduct could just as well have been "the natural, unilateral reaction of each" defendant to market events. *Twombly*, 550 U.S. at 566. Instead of entertaining "suspicion[s]" and "speculative" musings that wrongdoing might nonetheless be afoot (*id.* at 555), the court, "draw[ing] on its judicial experience and common sense," should dismiss the complaint. *Iqbal*, 129 S. Ct. at 1950.

Moreover, in cases involving a "vast, encompassing conspiracy" embracing defendants across the globe, "the plaintiff[s] must meet a *high standard of plausibility*" before defendants "become entangled in discovery." *Cooney v. Rossiter*, 583 F.3d 967, 971 (7th Cir. 2009) (emphasis added). The "height of the pleading requirement is relative to circumstances," and "complexity" counsels in favor of rigorously reviewing the complaints. *Id.*[6] No less stringent a standard would adequately protect litigants from the "burden of discovery imposed on a

[6] *Tamayo v. Blagojevich*, 526 F.3d 1074 (7th Cir. 2008), is to the same effect. There, the Court explained that "what allegations are necessary to show that recovery is 'plausible'" depends on "context" and that "[f]or complaints involving complex litigation – for example, antitrust or RICO claims – a fuller set of factual allegations may be necessary." *Id.* at 1083.

defendant by implausible allegations perhaps intended merely to extort a settlement." *Id.*; *see also Twombly*, 550 U.S. at 558.[7]

Here, as plaintiffs implicitly acknowledge (Direct Br. 30-31; Indirect Br. 34-35), the complaints point to no direct evidence of an agreement to fix prices charged to U.S. buyers. This case is therefore unlike *In re High Fructose Corn Syrup Antitrust Litigation*, 295 F.3d 651 (7th Cir. 2002), where this Court catalogued abundant direct evidence of such an agreement, including overheard statements and scores of corporate memoranda. *Id.* at 662-64. Instead, plaintiffs' briefs make clear that their claim rests on inferences from three general classes of allegations: (1) that the structure of the potash industry was conducive to collusion (Direct Br. 23-25; Indirect Br. 3-5, 63-64); (2) that, on a number of occasions, defendants increased prices or reduced production (Direct Br. 25-28; Indirect Br. 52-55, 59-61); and (3) that defendants had opportunities to conspire (Direct Br. 28-31; Indirect Br.

[7] Plaintiffs' protestation that they cannot be expected to plead more because they "have not had an opportunity to [conduct] discover[y]" (Direct Br. 30) conflicts with the Supreme Court's reasoning. *See Iqbal*, 129 S. Ct. at 1953-54; *Twombly*, 550 U.S. at 559. "It is no answer to say that a claim just shy of a plausible entitlement to relief can … be weeded out early in the discovery process … given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side." *Twombly*, 550 U.S. at 559.

45-51). But the inferences plaintiffs would have the Court draw from these allegations are speculative and implausible. Whether considered individually or collectively, these contentions are entirely consistent with "lawful, unchoreographed free-market behavior." *Iqbal*, 129 S. Ct. at 1950.

A. The Structure Of The Potash Industry Makes Plaintiffs' Allegations Implausible.

1. At the outset, as in *Twombly*, "the complaint[s] [themselves] give[] reasons to believe" that there is nothing more at work here than potash producers individually doing what "was only natural anyway." *See* 550 U.S. 566, 568. The very structural characteristics of the potash industry that plaintiffs allege are "favorable" for a conspiracy – *e.g.*, a small number of sellers and a homogenous, "commodity" product with few substitutes (Direct Br. 8-9; Indirect Br. 1-4; 63)[8] – are those that make copycat behavior likely to emerge from *independent* business decisions. *See* Opening Br. 41-42, 49-50; *e.g.*, *Twombly*, 550 U.S. at 553-

[8] The direct purchasers misleadingly assert that there are only *three* principal sellers of potash, arriving at this figure by combining the three North American producers into one under the Canpotex umbrella. Direct Br. 7-8; *cf.* Indirect Br. 64 (acknowledging that there were *six* sellers). But as plaintiffs elsewhere repeatedly concede, Canpotex has *no marketing role in the United States*. *E.g.*, SA8 ¶31; SA16 ¶¶68, 70.

54 (describing "conscious parallelism" as a "common reaction" of "'firms in a concentrated market [that] recogniz[e] … their interdependence with respect to price and output decisions'").

Because a "firm in a concentrated industry typically has reason to decide (individually) to copy an industry leader" (*Clamp-All Corp. v. Cast Iron Soil Pipe Institute*, 851 F.2d 478, 484 (1st Cir. 1988)), this Court unsurprisingly has "noted that parallel pricing or conduct lacks probative significance when the product in question is standardized or fungible." *Weit v. Continental Illinois Nat'l Bank & Trust Co.*, 641 F.2d 457, 463 (7th Cir. 1981). Thus, plaintiffs' "market structure" contention actually *undermines* the force of their allegations that the defendants acted similarly in pricing and production. *See* Opening Br. 58-64; *cf.* Direct Br. 23-24; Indirect Br. 52-58. That "economic evidence," after all, has a "reasonable, alternative explanation" (*In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 908 (6th Cir. 2009)) that *requires no agreement* – such parallel behavior is "normal in a market with few sellers and homogeneous products." *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 139 (2d Cir. 1984); *see also Twombly*, 550 U.S. at 553-54.

2. Matters are even worse for plaintiffs. For at the same time that the potash industry's structure makes it *more* likely that parallel conduct is "explained by lawful, unchoreographed free-market behavior" (*Iqbal*, 129 S. Ct. at 1950), that structure also makes it *less* likely that a conspiracy would be manageable. We explained in our opening brief (at 50-51) that potash is produced all over the world and that the costs of extraction differ because not every supplier is equally efficient.[9] "[C]ommercial sized potash deposits are quite common throughout the world," yet "each deposit is unique" and the "size and economic attractiveness of the world's commercial potash operations varies considerably." D.E. GARRETT, POTASH – DEPOSITS, PROCESSING, PROPERTIES AND USES vii-viii, 564 (1996).[10] The "majority of production

[9] Potash is found in at least 15 countries (SA12 ¶50), yet only producers in three of them – Canada, Russia, and Belarus – are even alleged to be involved in the purported potash conspiracy. D.E. GARRETT, POTASH – DEPOSITS, PROCESSING, PROPERTIES AND USES viii (1996) (listing Brazil, Chile, China, Congo, France, Germany, Israel, Italy, Jordan, and Spain as among the producers of potash).

[10] The Court is entitled to take account of this general industry background. In addition to taking judicial notice of any documents incorporated in the complaints, this Court may also notice any facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(a)-(b). To that end, books of general reference may be consulted by the court. *See*, *e.g.*, *Schaffer v. Clinton*, 240 F.3d 878, 885 n.8 (10th Cir. 2001); *Rich v. Woodford,* 210 F.3d 961, 962 (9th Cir. 2000); *B.V.D. Licensing Corp. v. Body Action Design, Inc.*, 846 F.2d 727, 728 (Fed. Cir. 1988). The Court may consider such judicially noticed facts "'without converting a motion to dismiss into a motion for (*continued...*)

costs … are variable," which gives producers "less incentive to operate [] facilities at full capacity" and good reason unilaterally to adjust supply to meet changing demand. SA13-14 ¶55.[11]

And once potash is produced and refined, plaintiffs themselves postulate a complex and difficult-to-monitor mechanism that determines prices in the United States. *See* Opening Br. 51 n.16. This mechanism includes: (1) negotiated contracts with large buyers in China and India; (2) whose terms allegedly become "benchmarks" for "spot market" prices in other major markets; (3) which in turn "affect" the price at which purchases are negotiated in the United States. *See* Indirect Br. 7, 9-10; SA25-27 ¶¶111-115; SA33-34 ¶¶144-146. Plaintiffs do not explain how such vague "benchmarks" could be used to fix U.S.

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summary judgment.'" *520 S. Mich. Ave. Assocs., Ltd. v. Shannon*, 549 F.3d 1119, 1137 n.14 (7th Cir. 2008) (citation omitted).

[11] That variable costs dominate distinguishes the potash industry from the corn syrup (*High Fructose*, 295 F.3d at 657) and steel (*Standard Iron Works v. ArcelorMittal*, 639 F. Supp. 2d 877, 896 n.15 (N.D. Ill. 2009)) industries. Sellers will "have a big incentive to fix prices" when there is a "discrepancy between total and variable cost" on account of high fixed costs. *Fructose*, 295 F.3d at 657. On the other hand, where (as here) the "ratio of fixed to variable costs" is low, excess capacity (*cf.* SA21-22 ¶¶91-94) does not make a conspiracy more likely. *Id.*; *see also In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 361 (3d Cir. 2004) (describing "flat glass industry" as "a text book example of an industry susceptible" to cartel formation, and noting "high fixed costs"). Excess capacity (fostered by foreign government supervision) has always been characteristic of the potash industry, even before the alleged cartel period. *See* GARRETT, POTASH at viii, 81-82, 561 ("The 1991 production rate was at about 68% of the industry's capacity").

prices, nor do they identify any mechanism by which the defendants exchanged *U.S.* pricing information or could police their cartel. *Cf.* Indirect Br. 44-46 & n.7.[12] Plaintiffs do not, in fact, identify *any* cartel that has ever operated on such a Rube Goldberg model.[13]

Plaintiffs dispute none of this. Nor could they credibly do so – these background facts about industry structure are drawn from the complaints, whose allegations are deemed admitted by plaintiffs (*see S. Austin Coal. Cmty. Council v. SBC Commc'ns Inc.*, 274 F.3d 1168, 1171 (7th Cir. 2001)), and from other materials that are the subject of judicial notice (*see supra* note 10).[14] Plaintiffs have no response to our argument

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[12] We have noted the range of widely varying "benchmark" prices described in *Green Markets* (*supra*, note 2). The prices reported "do not reflect actual transactions, but represent current market conditions as perceived by selected buyers and sellers" and vary to reflect "localized price differences within [each] region." GREEN MARKETS, Feb. 15, 2010, at 5, *available at* http://tinyurl.com/33xqsg4. It is difficult to see how weekly-varied price estimates based on qualitative perceptions of the local market could function as the basis for an international price-fixing agreement.

[13] Compare again *Fructose*, where the defendant manufacturers allegedly agreed to adopt a rigid formula fixing the price of one grade of corn syrup "to 90 percent of the price" of another grade of corn syrup, and engaged in extensive "inter-competitor transactions" to protect each seller's relative market share. *See* 295 F.3d at 658-59. Plaintiffs allege nothing like that in this case.

[14] Plaintiffs complain that the involvement of large buyers who independently reach agreements with potash suppliers, noted in our opening brief, is not alleged in the complaints. Direct Br. 24. But "in resolving a motion to dismiss, the district court is entitled to take judicial notice of matters in the public record" (*Palay v. United States*, 349 F.3d 418, 425 n.5 (7th Cir. 2003)), including filings with the government (*e.g.*, *Horizon Asset Mgmt. Inc. v. H & R Block, Inc.*, 580 F.3d 755, 761 (8th Cir.

(*continued...*)

that there would be significant obstacles to the operation of a conspiracy that would require widely dispersed participants to make common decisions, allocate output, and monitor prices and production in the face of complex and rapidly changing market conditions. Opening Br. 50-52. All of this weighs heavily against the plausibility of collusion.

B. The Complaints' Allegations Relating To Prices And Production Show Follow-The-Leader Conduct That Is Consistent With Independent Decision-Making.

Plaintiffs also rely on what they characterize as "parallel lockstep price increases" and "coordinated supply restrictions." Direct Br. 26. But one scours the complaints in vain for any factual allegations that would support these characterizations. Apart from overseas sales though lawful foreign joint export organizations, which are outside the scope of the Sherman Act, the complaints' allegations pertain almost entirely to follow-the-leader conduct, spaced out over weeks or months, and even then often not involving all of the defendants. While truly *simultaneous* behavior may be suspicious, *sequential* copycat actions are common in concentrated markets for fungible products without an

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2009)). And plaintiffs admit that prices are "negotiated" in this country. *See* SA25 ¶111.

agreement. "Labelling one producer's price change in such a market as a 'signal' [or] parallel price changes as 'lock-step' … hardly converts its pricing into" a violation of the antitrust laws. *E.I. du Pont*, 729 F.2d at 139.

1. Price increases

Consider first plaintiffs' allegations of "lockstep price increases." Direct Br. 26; Indirect Br. 53. The following chart, which summarizes the specific price increases alleged in the complaints, does not depict synchronized pricing behavior at all:[15]

	Canpotex			**BPC**		
Announce-ment Date	**PCS**	**Mosaic**	**Agrium**	**Uralkali**	**Bela-ruskali**	**Silvinit, IPC**
Early 2003						¶117 (Brazil)
"Within a month"	¶117 (Brazil)	¶117 (Brazil)	¶117 (Brazil)			
March 2003	¶118 (United States)	¶118 (United States)				
"[M]id-2003"				¶117 (Brazil)	¶117 (Brazil)	
January 2004	¶120 (Brazil)	¶120 (Brazil)	¶120 (Brazil)			¶120 (India)
February 2004	¶120 (United States)	¶120 (United States)				

[15] All of the paragraph cites in this chart and the chart that appears *infra* at p. 30 are to the Direct Purchasers' Complaint (SA1-44).

	Canpotex			BPC		
Announce-ment Date	**PCS**	**Mosaic**	**Agrium**	**Uralkali**	**Bela-ruskali**	**Silvinit, IPC**
May 2004	¶121 (non-U.S. cus-tomers")	¶121 (non-U.S. cus-tomers")	¶121 (non-U.S. cus-tomers")			
"Shortly thereafter"	¶121 (United States)	¶121 (United States)				
July 2004	¶121 (United States)	¶121 (United States)				
September 2004						¶123 (China)
Mid-October 2004 "at the earliest"	¶123 (China)	¶123 (China)	¶123 (China)			
November 2005	¶124 (China)	¶124 (China)				¶124 (China)
"Within weeks"				¶124 (China)		
February 2005	¶125 (United States)					
"Two weeks later"		¶125 (United States)				
May 2005, effective June and September 2005	¶126 (United States)					
July 2006	¶127: unspecified increases by unspecified producers in China					
Later in 2006	¶127: unspecified increases by unspecified producers in Brazil					
July 2008	¶105, ¶128 (United States)					

	Canpotex			BPC		
Announce-ment Date	**PCS**	**Mosaic**	**Agrium**	**Uralkali**	**Bela-ruskali**	**Silvinit, IPC**
"Shortly thereafter," with ship-ments starting in August 2008				¶128 (United States)	¶128 (United States)	

If these alleged price increases are supposed to reflect the agreed-upon pricing behavior of a genuine cartel, it is a singularly ineffectual one.[16] The price movements are irregular and haphazard – precisely what one would expect from non-conspiratorial price leadership in any concentrated market. *See Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 52-53 (7th Cir. 1992); *Clamp-All Corp.*, 851 F.2d at 484. "Particularly when the product in question is fungible, as potash is, courts have noted that parallel pricing lacks probative significance." *Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan*, 203 F.3d 1028, 1033 (8th Cir. 2000). That is so because "all producers in

[16] This conclusion is confirmed by Figure 1 of the complaint (at SA26 ¶113), which shows that the prices for potash did not go up in lockstep. Prices in one region are flat through practically all of 2007, while prices in other regions increase by different amounts and starting at different times. Similarly, although potash prices do increase in 2008, the peak price varies from $550 to $900. By the middle of 2008, prices in some regions flatten off; in other areas they begin to decrease by differing amounts.

an oligopoly must charge roughly the same price or risk losing market share." *Id.* at 1031.

Of course, "complex and historically unprecedented changes in pricing structure *made at the very same time* by multiple competitors, and *made for no other discernible reason* would support a plausible inference of conspiracy." *Twombly*, 550 U.S. at 556 n.4 (emphasis added; internal quotation marks omitted). But here, so far as the alleged U.S. prices are concerned, defendants demonstrably did not change prices "at the very same time." And there was a natural, discernible explanation for the sequential increase in potash prices that purportedly did occur toward the end of the class period. *See* Direct Br. 26 (citing SA30 ¶130). Industry output had declined in the middle of the decade because of reduced global demand. SA20-21 ¶¶88, 93. The price increases that followed were a natural consequence of rising demand at a time of limited supply marked by a global food shortage, rising transportation costs, and a weakening U.S. dollar.

To arrive at this conclusion, the court need not rely only on "common economic experience," although that alone would suffice, as it did in *Twombly*. See 550 U.S. at 564; *see also id.* at 595 (Stevens, J.,

dissenting). Two antitrust enforcement agencies – the Federal Trade Commission and the Australian Competition and Consumer Commission – have reviewed the same events and concluded that the increase in fertilizer prices is naturally explained by global economic expansion and sharply increased demand for food from emerging markets. Opening Br. 47 n.15, 64.[17] The FTC observed "that the recent fertilizer price increases are primarily attributable to rising global demand for agricultural crops," which "reflects the strong global growth in average income combined with rising population." FTC Report at 2, 6. And the ACCC agreed that "2007 ... marked the beginning of a period of rapidly rising demand for fertilisers in both the developed and developing world," explaining that "[t]he key factors ... which have caused world fertiliser prices to escalate sharply in 2007 and 2008" were "[h]igh commodity prices," "[p]roduction capacity constraints,"

[17] Plaintiffs criticize our reference to the FTC and ACCC reports (at Direct Br. 32-33), but it is they who brought into play these government investigations. *See* SA71 ¶97. Defendants are entitled to describe the results of those investigations. And the reports are properly the subject of judicial notice for the purpose of confirming legislative facts concerning global conditions that explain price increases. *See Menominee Indian Tribe of Wis. v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998) ("Judicial notice of … documents contained in the public record[] and reports of administrative bodies is proper."). *Cf. Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 325 (2d Cir. 2010) (noting ongoing government investigations); *Fructose*, 295 F.3d at 662-663 (noting criminal convictions for price-fixing in related markets).

"[i]nternational freight rates," and "[d]evelopments in China [such as] rapidly expanding domestic requirements." ACCC Report at 14, 15. The ACCC concluded that the fertilizer industry could not "respond quickly to rapid changes in demand" because new facilities take time to bring into operation. *Id.* at 7-8, 15.

Other sources cited in the complaints tell an identical story. *See World Food Program Speaker Highlights Global Hunger*, GREEN MARKETS, Sept. 15, 2008, at 1, 16 (describing the "perfect storm of factors contributing to the global food crisis, including a shift to a high-protein diet in China, India and Brazil that is taking grain off the world market; the surging price of oil; the global linking of food and fuel; increasingly severe weather due to global climate change; and the falling value of the U.S. dollar").

2. Production cuts

The production cuts alleged in the complaints are not probative of the alleged conspiracy for similar reasons. Direct Br. 26-28; Indirect Br. 53-55. As the following chart shows, these reductions varied widely in timing and amount:

	Canpotex			BPC		
Announce-ment Date	**PCS**	**Mosaic**	**Agrium**	**Uralkali**	**Bela-ruskali**	**Silvinit, IPC**
October 11, 2005	¶75: *Uralkali site visit*					
November 2005	¶88 250k–300k tons (in 12/2005 and 1/2006)					
December 2005	¶88 1m tons (in 1/2006 and 2/2006)					
November-December 2005		¶89 200k tons				
Q1 2006	¶91 1.1m tons					
"around" January 2006				¶92 200k tons	¶92 250k tons	
Q2 2006						¶92 100k tons
April 2006				¶93: cuts totaling 50k tons		
First half of 2006	¶95 utilization rate reduced to below 60%			¶95 utiliza-tion rate reduced to 68%		
July 2006	¶76: "*a delegation of Uralkali management visited Mosaic*"					
November 2008				¶107 unspe-cified amount		
December 2008	¶107 unspecified amount		¶107 unspe-cified amount			

This is hardly "lockstep" or "coordinated" behavior. It is quintessentially sequential parallel conduct: diverse production decisions by different suppliers, coming days, weeks, or even months apart. Moreover, these decisions often "deviated" from one another in their particulars, which "support[s] the inference that the similarity … reflects *individual* decisions to copy, rather than any more formal pricing agreement." *Clamp-All Corp.*, 851 F.2d at 484.

To be sure, the *direction* of many of these alleged actions – decreases in production – was the same, but so were the economic forces and "common perceptions of the market" that prompted the production adjustments in the first place. *Twombly*, 550 U.S. at 554. As we have explained (at Opening Br. 59-60 & n.22), when "global demand for potash decline[s]" (SA20-21 ¶¶88, 93), production cuts are just the sort of follow-the-leader conduct that is to be expected in a concentrated industry, particularly one with predominantly variable costs (SA13-14 ¶¶54-55). Such a strategy made more sense for *each* producer than cutting price to maintain sales volume. "Because the market … was inelastic, a drop in price [by any single producer, with the aim of increasing sales,] would not have led to an appreciable increase in

industry-wide demand." *Reserve Supply Corp.*, 971 F.2d at 52. It simply would have triggered an industry-wide round of "price-cutting," leaving behind "static market shares … and reduced profit margins" for everyone. *Id.* at 53.[18] Under these circumstances, leaving excess capacity unexploited – which is not costly when the "majority of production costs … are variable," as they are in the potash industry (SA13-14 ¶55) – is the economically rational course. Opening Br. 60 n.22.[19]

3. The Silvinit Sinkhole

Plaintiffs also make much of the reaction of other producers to Silvinit's October 25, 2007, announcement that it might suspend

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[18] Plaintiffs quibble with our reliance on *Maple Flooring Mfrs.' Ass'n v. United States*, 268 U.S. 563, 583 (1925), for the proposition that it is rational for producers to reduce production to avoid driving down prices through overproduction. Direct Br. 27-28. But this Court has embraced virtually identical reasoning. *See Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 799 F. Supp. 840, 844 (N.D. Ill. 1990) (output limitations by producers "during the period of excess capacity [are] at least as consistent with acting in their own self-interest as acting against it"), *aff'd*, 971 F.2d 37, 52 (7th Cir. 1992) (rejecting the plaintiff's argument that a "strategy of raising prices and decreasing capacity" when "demand … w[as] depressed" makes "no economic sense").

[19] Producers knew full well what could happen if they continued to mine potash in "quantities that far outstripped global demand." *See Blomkest*, 203 F.3d at 1031. Because potash cannot be stockpiled (SA67 ¶79), the excess potash mined would have to be sold at rock-bottom prices, causing "huge losses" across "the entire potash industry." *Blomkest*, 203 F.3d at 1031. *See also* ACCC Report at 5-6 ("[S]torage of fertilisers during periods of low demand is difficult because of ... the decline in quality of fertilisers over time due to moisture").

shipments from one mine in response to a sinkhole. Direct Br. 26-27; Indirect Br. 59-61. But for the reasons noted in our opening brief (at 64-66), there was nothing unusual about competitors holding back on new sales until they could determine the market impact of the supply disruption; no producer would want to enter into long-term contracts if prices would increase further (SA23 ¶¶99-100).[20] As for our argument (at pp. 65-66) that Mosaic's decision *not* to suspend sales refutes their sinkhole conspiracy theory, plaintiffs construct a work of fiction: *if* (contrary to the complaints' allegations) Mosaic had decided to "act in parallel fashion" by suspending sales *and* there were evidence that the *other* five defendants had an agreement to suspend sales, one could infer that Mosaic *also* was a party to that agreement. Direct Br. 27. But *neither* of those predicates is alleged in the complaints.

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[20] Plaintiffs say that "[t]ruly competitive producers acting in their own unilateral self-interest … would have sought … at the very least [to] maintain [existing] sales" after the Silvinit announcement. Direct Br. 4. *See* Indirect Br. 60 ("a defendant in a competitive market would not suspend all of its sales"). But *that is precisely what defendants did*. For example, BPC "temporarily suspend[ed] entry into new potash sale contracts" but would "continue to deliver under existing contracts." *See* Press Release, BPC, *BPC notifies of temporary suspension of entry into new potash sale contracts* (Oct. 2007), *available at* http://tinyurl.com/39zro2t (follow URL, select "ENG" at top-right, and follow URL again). PCS did the same thing, explaining that, while it would "suspend[] all new potash sales until further notice, … . tonnes will continue to be delivered to our loyal customers as we have planned." Remarks of William J. Doyle, Pres. and CEO of PCS, Third Quarter Earnings Conf. Call (Oct. 25, 2007) at 5, available at http://tinyurl.com/2fy5oje.

Plaintiffs also suggest that it is "implausible that all [d]efendants that had suspended sales to evaluate the market needed exactly the same time period to make the evaluation." Indirect Br. 60. That grossly distorts what plaintiffs actually allege, which is that the defendants other than Mosaic suspended sales *until Silvinit announced that it would resume sales*. SA23 ¶101. Once Silvinit resumed sales, there was no need for any producer to continue evaluating the market.

Most misleading of all is plaintiffs' assertion that "Uralkali, not PCS, announced PCS's suspension of sales," a contention upon which they place considerable weight. Direct Br. 28; Indirect Br. 59, 61. In fact, the October 26, 2007, news article that the complaints draw upon for this allegation (at SA23 ¶99) states only that "Uralkali said that Canada's Potash Corp also decided *yesterday* to suspend new potash sales because of the supply problems at Silvinit." AFX News Ltd., *Uralkali's BPC suspends new potash deals after supply problems at rival (Update)*, Forbes.com (Oct. 26, 2007), *available at* http://tinyurl.com/27kzdtn (emphasis added). "Yesterday" was October 25, 2007, when PCS held its earnings call for the third quarter of 2007. PCS's CEO announced on that call that, "[i]n light of these events [at

the Silvinit mine], our company has suspended all new potash sales until further notice." Remarks of William J. Doyle, Pres. and CEO of PCS, Third Quarter Earnings Conf. Call (Oct. 25, 2007) at 5, *available at* http://tinyurl.com/2fy5oje.[21] So Uralkali's statement was not an "announcement" at all; Uralkali was repeating what the public *already had learned of PCS's plans from PCS's public earnings call*. Opening Br. 66 n.24. As plaintiffs themselves quoted the earnings call in their complaints and surely were aware of this reality, they appear to be playing a very fast and loose game here.[22]

C. The "Non-economic Evidence" Advanced By Plaintiffs Adds Nothing To Their Case.

Finally, although plaintiffs' briefs speak loosely of communications and meetings between the defendants, the allegations

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[21] The complaint quotes from, and therefore incorporates by reference, the conference call transcript. *Compare* SA23 ¶100 ("In terms of guessing where the price could go, I'd just say hold on to your hat because it would have a major impact on pricing") *with* Remarks of William J. Doyle, Pres. and CEO of PCS, Third Quarter Earnings Conf. Call (Oct. 25, 2007) at 11, available at http://tinyurl.com/2fy5oje (identical quote).

[22] Plaintiffs seek to bolster their argument by asserting that defendants tried the "Silvinit Sinkhole Gambit" again in 2008. Direct Br. 16. This contention is mystifying. The complaints do allege that Silvinit announced an expanding sinkhole at that time. SA24 ¶104. But quite unlike the first sinkhole episode, no producer is alleged to have suspended sales in response. Alleged price increases that followed the Silvinit statement in May 2008 took place in July and August 2008, *months* after the announcement. SA24 ¶¶105-106. These alleged sequential price increases are a model of independent, follow-the-leader pricing.

in the complaints on these subjects are strikingly vague and conclusory. The indirect (but not the direct) purchasers refer to "systems of price exchange" (Indirect Br. 46), but the complaints contain *no* allegations at all that the defendants exchanged U.S. prices (or foreign prices, for that matter). As for gatherings of defendants, the complaints actually identify only a handful of such meetings, not all of which involved all the defendants, not all of which were followed by any actions labeled suspicious by plaintiffs, and (with the exception of one trade association meeting in 2007 where price increases were announced), none of which was followed by simultaneous actions on the defendants' part.[23]

Thus, plaintiffs juxtapose an October 2005 tour of Uralkali's facilities with production cuts that took place afterwards. Direct Br. 4, 29. But the reductions actually occurred sequentially over several months, and in different amounts – unexceptional, follow-the-leader

[23] Even as to this meeting, which took place in Turkey and involved an organization with more than 500 members from 85 countries (see Opening Br. 57 & n.21), the complaints' allegations are vague. Plaintiffs claim only that "the major potash manufacturers announced an additional price increase on their potash products" at the meeting. SA19 ¶82. The allegation does not name the manufacturers involved, the respective amounts by which they increased price, or the countries affected by the increase, all things one would have to know for the allegation to have meaning. In fact, the allegation logically suggests that the increase was announced in Turkey for overseas sales, and reflected independent business decisions in the face of rising market demand. Such an allegation is so devoid of substance – apparently, intentionally so – as to have no probative value.

behavior. Opening Br. 56-57. PCS announced over a million tons in production cuts in November and December 2005, followed by additional cuts in the first quarter of 2006; Mosaic cut 200,000 tons in November and December 2005; Uralkali cut 200,000 tons in January 2006; and Belaruskali cut 250,000 tons around the same time. SA20-21 ¶¶88-89, 91-92.

Moreover, other production cuts did not have even arguable connections to a plant visit, while the only other plant visit identified by plaintiffs was not associated with any joint action by the defendants. Silvinit cut 100,000 tons in the second quarter of 2006 and the Russian producers cut 50,000 tons in April 2006. SA21 ¶¶92-93. Yet the next plant visit plaintiffs identify did not take place until July 2006. SA18 ¶76. And following that visit, there were no further production cuts until November 2008, more than two years later. SA24-25 ¶107. These timing and quantity irregularities make plaintiffs' argument that an agreement to restrict production was reached during these visits farfetched indeed. *See* Opening Br. 54-57. And such visits, which provide an opportunity for cross-industry education, may serve valuable public purposes that should not be discouraged: it is a matter of

common experience that extractive industries such as mining and oil drilling involve inherent dangers.

Plaintiffs also place weight on defendants' participation in trade associations. Direct Br. 29; Indirect Br. 49-51. We have explained (at Opening Br. 57-58) why trade association membership does not support a plausible inference of conspiracy, particularly when there are many legitimate reasons why producers would meet with other industry participants. *See Travel Agent Comm'n*, 583 F.3d at 911; *see also Twombly*, 550 U.S. at 567 n.12 (dismissing suggestion that membership in "various trade associations" should be enough to force defendants "to hire lawyers, prepare for depositions, and otherwise fend off allegations of conspiracy"). In response, plaintiffs speculate that there *might* have been secret, conspiratorial get-togethers "outside the presence of customers" at these meetings. Indirect Br. 51. But under *Twombly*, the plausibility of plaintiffs' claims must be determined by reference to the complaint's "factual matter" – *not* by the scope of plaintiffs'

imaginations. 550 U.S. at 556. Because rootless speculation is all plaintiffs offer here, the complaints should be dismissed.[24]

III. PLAINTIFFS SHOULD NOT BE ALLOWED TO REPLEAD.

If the Court agrees with our submission and orders the complaints dismissed, it should not accept plaintiffs' suggestion to remand the case with instructions that they be permitted to replead. Direct Br. 51-53. There is no reason to believe that remand here would be anything other than "futile." *See Johnson v. Hondo, Inc.*, 125 F.3d 408, 419 (7th Cir. 1997) (declining to remand because the plaintiff "could prove no set of facts" sufficient for relief). Plaintiffs have already amended both of the complaints to add factual allegations (Dkt. Nos. 50, 51), and they have not suggested that they have any additional facts with which to supplement their pleadings in a *third* bite at the apple. If they could have pled facts sufficient to overcome the complaints' significant deficiencies, they surely would have already done so.

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[24] Plaintiffs get no further by pointing to alleged statements by an owner of Uralkali (who also had a minority ownership interest in Silvinit) and by BPC officials that plaintiffs characterize as showing an intent to avoid competition. Direct Br. 10, 30 (citing SA17 ¶¶72-73); Indirect Br. 61-62 (citing SA72-73 ¶¶101-106). On examination, these statements appear to refer to the ordinary joint and lawful sales efforts of BPC. Plaintiffs neither fully quote nor provide citations to the documents from which these allegations are drawn, making it impossible to determine the context in which the statements were made. *See Twombly*, 550 U.S. at 568 n.13.

What is more, allowing this litigation to drag on in the district court following this appeal would undercut the purpose of the FTAIA by increasing "the potential for offending the economic policies of other nations" and harming the efficient operation of "foreign markets ... while the case remain[s] pending." *United Phosphorus*, 322 F.3d at 952. For this reason, dismissal motions under the FTAIA commonly result in the final termination of antitrust lawsuits like this one, without further proceedings before the district court. *See*, *e.g.*, *In re DRAM Antitrust Litig.*, 546 F.3d 981 (9th Cir. 2008) (affirming district court's dismissal under the FTAIA and its denial of leave to amend as futile). That outcome is appropriate here.

CONCLUSION

The district court's order denying the motion to dismiss should be vacated, and the matter should be remanded with instructions to dismiss the complaints with prejudice.

Dated: May 17, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel for Appellants The Mosaic Company and Mosaic Crop Nutrition, LLC certifies that the foregoing brief:

(i) complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(ii), as amended by the Court's Order dated May 12, 2010, because it contains 8978 words including footnotes and excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14-point Century Schoolbook.

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Stephen M. Shapiro

CIRCUIT RULE 31(e) CERTIFICATION

The undersigned, counsel for Appellants The Mosaic Company and Mosaic Crop Nutrition, LLC, certifies that he has filed electronically, pursuant to Circuit Rule 31(e), a version of the brief in non-scanned PDF format.

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Stephen M. Shapiro

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on May 17, 2010, pursuant to the parties' agreement, she caused one copy of the foregoing brief to be placed with a third-party commercial carrier for overnight delivery to the following:

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