No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

IN RE: POTASH ANTITRUST LITIGATION (II)

On Petition for 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

PETITION FOR INTERLOCUTORY APPEAL

Richard Parker
O'MELVENY & MYERS LLP
1625 Eye Street N.W.
Washington, D.C. 20006
(202) 383-5300

Patrick M. Collins
PERKINS COIE LLP
131 South Dearborn Street
Suite 1700
Chicago, Illinois 60603
(312) 324-8400

Counsel for Petitioners Agrium, Inc. and Agrium U.S., Inc.

Stephen M. Shapiro
Britt M. Miller
MAYER BROWN LLP
71 South Wacker Drive
Chicago, Illinois 60606
(312) 782-0600

Richard J. Favretto
Charles A. Rothfeld
MAYER BROWN LLP
1999 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for Petitioners The Mosaic Company and Mosaic Crop Nutrition, LLC

Additional counsel listed on reverse

M. Elaine Johnston
Robert A. Milne
Jack E. Pace
WHITE & CASE LLP
1155 Avenue of the Americas
New York, New York 10036-2787
(212) 819-8200

Michael L. McCluggage
WILDMAN, HARROLD, ALLEN
& DIXON LLP
225 West Wacker Drive, Suite 3000
Chicago, Illinois 60606
(312) 201-2000

Counsel for Petitioners BPC Chicago, LLC and JSC Belarusian Potash Company

Duane M. Kelley
WINSTON & STRAWN
35 West Wacker Drive
Chicago, Illinois 60601-9703
(312) 558-5600

Thomas M. Buchanan
WINSTON & STRAWN
1700 K Street, N.W.
Washington, D.C. 20006-3817
(202) 282-5000

Counsel for Petitioners JSC Silvinit & JSC International Potash Company

Daniel E. Reidy
Michael Sennett
Brian J. Murray
Paula S. Quist
JONES DAY
77 West Wacker Drive
Chicago, Illinois 60601-1692
(312) 782-3939

Counsel for Petitioners Potash Corporation of Saskatchewan Inc. and PCS Sales (USA), Inc.

Jeffrey L. Kessler
A. Paul Victor
Eamon O'Kelly
DEWEY LEBOEUF
1301 Avenue of the Americas
New York, New York 10019-6092
(212) 259-8000

Elizabeth M. Bradshaw
DEWEY LEBOEUF
Two Prudential Plaza, Suite 3700
180 North Stetson Avenue
Chicago, Illinois 60601
(312) 794-8000

Counsel for Petitioner JSC Uralkali

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

TABLE OF AUTHORITIES
(continued)

Page(s)

Miscellaneous

INTRODUCTION

This petition for interlocutory review concerns a massive, international antitrust lawsuit involving two class actions, against twelve defendants, located in four countries across the globe. It presents two unsettled questions of law, either of which, properly answered, could end this litigation at the outset. Both questions—the first concerning the meaning of the Foreign Trade Antitrust Improvements Act ("FTAIA"), and the second the Supreme Court's recent decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009)—have engendered significant confusion among the district courts and courts of appeals over issues this Court has not yet directly addressed. Each also implicates matters of substantial practical importance, respecting both the continued litigation of this complex case and the conduct of business by concentrated industries throughout the world. These factors alone warrant interlocutory appellate review.

This Court has previously acknowledged its "duty . . . to allow an immediate appeal to be taken when the statutory criteria are met" under 28 U.S.C. § 1292(b) (*Ahrenholz v. Bd. of Trustees of Univ. of Ill.* 219 F.3d 674, 677 (7th Cir. 2000))—*i.e.*, when "(1) the appeal presents a question of law; (2) it is controlling; (3) it is contestable; [and] (4) its resolution will expedite the resolution of the litigation" (*Boim v. Quranic Literacy Inst. & Holy Land Found. for Relief & Dev.*, 291 F.3d 1000, 1007 (7th Cir. 2002) (*citing Ahrenholz*, 219 F.3d at 675)). As the district

court recognized in certifying its November 3, 2009 Memorandum Opinion and Order (the "Order") for interlocutory appeal, the issues presented here satisfy these standards as to both questions presented. *See* Jan. 15, 2010 Order (the "Certification Order"). For that reason, and because the questions presented here are ones of great practical importance, this Court should grant the petition.

QUESTIONS PRESENTED

1. The Foreign Trade Antitrust Improvements Act ("FTAIA") provides that section 1 of the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless . . . such conduct has a direct, substantial, and reasonably foreseeable effect" on United States markets. 15 U.S.C. § 6a. The first question presented is:

Whether allegations of anticompetitive conduct overseas that has no direct connection with the United States support a conclusion that the conduct "involv[ed]" United States "import trade or import commerce"—and therefore escape dismissal under the FTAIA without regard to any alleged effect on U.S. markets—simply because the sellers *also* sell their product in the United States through means *not* alleged to involve price fixing or other illegal activity.

2. To survive a motion to dismiss, an antitrust complaint "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555. Instead, the complaint must state "[f]actual allegations [sufficient] to raise a right to relief above the speculative level" (*id.*)

and "'nudge[] [the] claims . . . across the line from *conceivable* to *plausible*.'" *Iqbal*, 129 S. Ct. at 1951 (quoting *Twombly*, 550 U.S. at 570) (emphasis added). The second question presented is:

Whether an antitrust complaint states a "plausible," and not merely "conceivable," cause of action by alleging parallel market behavior and opportunities to conspire in circumstances wholly consistent with independent, unilateral decision-making under allegedly oligopolistic conditions.

BACKGROUND

A. The Complaints

The Complaints allege a conspiracy to fix the price of potash, "a key agricultural fertilizer," from July 1, 2003 to the present. Dir. Compl. ¶¶ 1-3.[1] The Complaints do not offer any direct factual support for their contention that Defendants entered into a price-fixing agreement: they do not identify or describe the persons who allegedly conspired, state when or where any agreement was consummated, describe the nature or scope of the agreement in anything but the most vague and conclusory terms, or provide the mechanism by which

[1] Plaintiffs' antitrust allegations have been the subject of reviews by the Federal Trade Commission (Letter from Donald S. Clark, Sec'y of the Fed. Trade Comm'n, to Sen. Byron L. Dorgan (Sept. 2, 2008) (available at http://74.125.95.132/search?q=cache:www.transactioninfo.com/cfindustries/docs/FTC%2520Report.pdf)) and the Australian government (*ACCC Examination of Fertiliser Prices* (July 21, 2008) (available at http://www.accc.gov.au/content/item.phtml?itemId=840441 &nodeId=8206319 56b1278e002159a71e14c7eec)), both of which found the allegations meritless.

conspiratorial decisions allegedly were made or policed.[2] Rather, the Complaints describe four principal circumstances from which Plaintiffs assert a conspiracy can be inferred:

First, Plaintiffs allege that the potash industry is an oligopoly, marked by high market concentration, sales of a fungible commodity, and high barriers to entry. Dir. Compl. ¶¶ 50-59. These perfectly legal market characteristics, Plaintiffs allege, make the industry "conducive to a conspiracy" (*id.* ¶ 56), although they do not assert that the potash industry differs in this respect from any other similarly structured industry.

Second, Plaintiffs theorize that alleged "cooperation" in the potash industry (although lawful on its face) provided the Defendants with "the opportunity to conspire." Dir. Compl. ¶ 79. This "cooperation" consisted of attendance at trade association meetings (*id.* ¶¶ 80-86), occasional visits to another producer's mining facilities for operational and safety tours (*id.* ¶¶ 74-78), and participation in joint export marketing and distribution organizations named Canpotex and BPC (*id.* ¶¶ 68-71), which are entirely legal in the countries where they operate. Plaintiffs also allege that some, but not all, of the Defendants suspended sales on one occasion when a competitor suffered supply difficulties. *Id.* ¶¶ 98-99.

---

[2] Indeed, plaintiffs' counsel have acknowledged that there is no "smoking gun" establishing price-fixing or collusion. *See* Chris Serres, *Mosaic Named in Lawsuit Alleging Price-Fixing*, Star Tribune (Sept. 11, 2008) (available at http://www.startribune.com/business/28269894.html (page 2)).

Third, Plaintiffs allege parallel business conduct. They claim that Defendants engaged in "a series of parallel price increases that dramatically increased the price of potash" throughout the world "beginning in 2003." Dir. Compl. ¶ 116. Plaintiffs also assert a series of parallel reductions in output (at a time of concededly falling demand for potash) that were "contrary to the independent economic interests of the individual producers." *Id*. ¶ 87. Plaintiffs do not allege, however, either that these alleged parallel actions were unprofitable or that other actions undertaken by a reasonable business would have been demonstrably more profitable.

Finally, Plaintiffs allege that Defendants "publicly signaled their willingness to avoid price competition." *Id.* ¶ 136. In support of this assertion, Plaintiffs point to statements allegedly made by only two defendants, a sales joint venture based in Belarus and one of its members based in Russia. *Id*. ¶¶ 137-143.

The Complaints focus almost exclusively on foreign commerce occurring entirely outside the United States. Dir. Compl. ¶¶ 90, 94-95, 120, 123-124, 127, 142. Although Plaintiffs allege that Defendants "'sold and distributed potash in the United States, directly or through [their] affiliates'" (Order 28 (citing Dir. Compl. ¶¶ 15, 16, 18, 19, 21, 22, 27, 68, 71, 145)), Plaintiffs do not allege anti-competitive conduct involving such sales (*e.g.*, that Defendants rigged bids or agreed on the prices or amounts of potash sold in the United States). Instead, Plaintiffs attempt to tie Defendants' overseas activity to their Sherman Act claim by alleging merely

that, "[b]ecause of the global nature of the potash market, defendants' conduct in other countries has . . . a direct and intended impact on the potash market in the United States." Dir. Compl. ¶ 145. Plaintiffs do not describe any mechanism by which joint sales overseas might have that effect, nor does the court's order require such a showing.

B. The District Court's Order

Defendants moved to dismiss, arguing in relevant part that (1) the district court lacked subject matter jurisdiction because Plaintiffs did not sufficiently allege that Defendants' conduct had a "direct, substantial, and reasonably foreseeable" anticompetitive effect in the United States within the meaning of the FTAIA (15 U.S.C. § 6a); and (2) the Complaints did not state a claim under *Twombly* and *Iqbal* because they alleged only a "speculative," and not a "plausible," claim for relief (550 U.S. at 555-56).

The district court denied the motion in relevant part. Addressing the FTAIA question first, the court concluded that Defendants' alleged overseas activity fell within the statute's parenthetical exception for "import trade or import commerce." Order 26-29. The court specifically found that "the complaints allege more than mere overseas sales that have an impact on the U.S. markets" because they assert that "Defendants sold and distributed potash in the United States." *Id.* at 28 (quotation marks omitted). Although the Complaints do not allege the fixing of prices *for* U.S. sales, the court concluded that the allegation *of* sales in the United

States, along with the assertion that Defendants conspired to "'fix, raise, maintain, and stabilize the price at which potash is sold,'" creates "a tight nexus between the alleged illegal conduct [*i.e.*, joint activity in foreign markets] and Defendants' import activities" sufficient "to conclude that the former 'involved' the latter." *Id.* at 29 (quoting Direct Compl. ¶ 3). The court accordingly found it "unnecessary" to determine whether the Complaints alleged overseas conduct having "a direct, substantial, and reasonably foreseeable effect" on U.S. markets. *Id*.

The district court also found that the Complaints stated a cause of action sufficient to meet *Twombly*'s "plausibility" pleading standard. Pointing to allegations of opportunities to conspire, parallel behavior, conduct allegedly contrary to self-interest, and changes in business behavior—circumstances the court appeared to acknowledge as consistent with a conclusion that "Defendants were merely uniformly following a valid alternative business strategy" (Order 48)—the court held that the allegations "propel Defendants' conduct out of 'neutral territory' to plausibly suggest entitlement to relief." *Id*. at 49. In doing so, however, the court recognized both that "[t]he Seventh Circuit has yet to provide post-*Twombly* guidance as to the 'factual enhancement' that would support a claim under section 1 of the Sherman Act" (*id*. at 43) and that "the facts of this case present a difficult question under *Twombly*." *Id*. at 50.

C. Certification For Interlocutory Appeal

On January 15, 2010, the district court issued a separate eight-page order certifying its decision for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). The district court expressly found that both questions central to its denial of Defendants' motion to dismiss warrant immediate appellate review.

RELIEF REQUESTED

Petitioners seek immediate appellate review of the district court's November 3, 2009 Order, reversal of the district court's Order, and remand with instructions to dismiss the Complaints with prejudice.

REASONS FOR PERMITTING THE APPEAL

This is precisely the kind of case at which § 1292(b) is directed: it involves "pure question[s] of law," which "the court of appeals c[an] decide quickly and cleanly," and immediate appellate review "could . . . head off protracted, costly litigation" because each question "[is] indeed a *controlling* issue." *Ahrenholz*, 219 F.3d at 677. This Court has acknowledged its "duty" to permit immediate appellate review under circumstances such as these. *Id*. Immediate review is particularly appropriate here because the questions presented—which have created confusion among federal courts throughout the Nation—involve matters of profound practical importance for this particular case, for U.S. foreign relations, and for the way business is conducted throughout the world.

I. INTERLOCUTORY APPELLATE REVIEW IS WARRANTED TO DETERMINE WHETHER THE SUIT IS BARRED BY THE FTAIA.

The FTAIA restricts "the reach of the antitrust laws over conduct occurring outside the United States" and thus "act[s] to limit the subject-matter jurisdiction of the federal courts" under the Sherman Act. *Mañez v. Bridgestone Firestone N. Am. Tire, LLC*, 533 F.3d 578, 585 (7th Cir. 2008) (*citing United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942 (7th Cir. 2003) (*en banc*)). Under the statute, federal courts lack jurisdiction to entertain antitrust suits concerning foreign trade activity unless that activity "involv[es]" United States "import trade or import commerce" or otherwise "has a direct, substantial, and reasonably foreseeable effect" on United States markets. 15 U.S.C. § 6a.

Here, the district court concluded that the Complaint states a claim "involving . . . import trade or import commerce" because it alleges that Defendants participated in U.S. import markets, albeit through sales activities that are not themselves alleged to be anticompetitive or illegal; the court therefore allowed Plaintiffs to challenge Defendants' *overseas* conduct without a showing that this conduct "had a direct, substantial, and reasonably foreseeable effect" on United States markets. Order 29. That decision warrants interlocutory review both because it meets the statutory criteria under § 1292(b) and because it has serious implications for international comity and the free operation of world markets.

A. The FTAIA question meets all of the statutory criteria for interlocutory review.

As the district court recognized in certifying its Order, all four conditions for interlocutory review of the FTAIA issue are satisfied:

First, whether the FTAIA bars this suit—a question that turns on the court's interpretation of the statutory terms "involving" and "direct"—presents a question of "pure" law suitable for "quick[] and clean[]" appellate review without the need for "immersion" into a "detailed" trial record. *Ahrenholz*, 219 F.3d at 677. Indeed, this Court has recognized that "a question of the meaning of a statutory or constitutional provision" is a paradigm example of a question of law within the meaning of § 1292(b). *Id.* at 676.

Second, the issue is controlling. As previously noted, the FTAIA "act[s] to limit the subject-matter jurisdiction of the federal courts" under the Sherman Act. *Mañez*, 533 F.3d at 585-86. Thus, if the allegations here fall outside the FTAIA's jurisdiction-retaining exceptions, the suit must be dismissed.

Third, whether the conduct challenged by the Complaint "involv[es] . . . [U.S.] import trade or import commerce" (15 U.S.C. § 6a) within the meaning of the FTAIA is, to say the least, contestable. The Order is directly at odds with the plain meaning of the word *involve*, which in ordinary usage means "to engage as a participant." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 617 (10th ed. 1996). The conflict is especially apparent because, as the Third Circuit has explained, the

statutory structure (which contrasts conduct "involving" with conduct "directly affecting" U.S. commerce) means that the word "involving" as used in the FTAIA "must be given a relatively strict construction." *Turicentro S.A. v. Am. Airlines Inc.*, 303 F.3d 293, 304 (3d Cir. 2002). Here, the district court found that Plaintiffs alleged *anticompetitive* "involv[ement]" in U.S. markets by asserting that (1) Defendants *legally* imported potash into the United States, and (2) Defendants' entirely separate, allegedly anticompetitive *foreign* trade activity somehow influenced the prices of these imports. On the face of it, this alleged anticompetitive conduct is too indirect to "involve" U.S. import commerce.

For these same reasons, whether this suit falls within the FTAIA's "direct effect" exception is also contestable. As the Ninth Circuit has explained, an effect is "direct" within the meaning of the FTAIA only if it "follows as *an immediate consequence* of the defendant's activity." *United States v. LSL Biotechnologies*, 379 F.3d 672, 680 (9th Cir. 2004) (emphasis added). A direct effect therefore must "'proceed[] from one point to another in time or space without deviation or interruption'" (*id.*) and may not be based on a "chain of effects . . . contingent upon numerous developments." *In re Intel Corp. Microprocessor Antitrust Litig.*, 452 F. Supp. 2d 555, 560 (D. Del. 2006)). As the D.C. Circuit has explained, because the FTAIA direct effect test requires something akin to "proximate causation," it "is not satisfied by [a] mere but-for 'nexus.'" *Empagran S.A. v. F. Hoffmann-LaRoche, Ltd.*, 417 F.3d 1267, 1271 (D.C. Cir. 2005). Plaintiffs' trickle-down

theory of conspiracy—that prices charged by legal export organizations in various foreign markets entirely outside the United States somehow had an *indirect* effect on the "world markets," including within the United States (*see, e.g.*, Dir. Compl. ¶ 112)—plainly does not fall within the FTAIA's "direct effect" exception.

The contestability of the FTAIA's application in this case is made all the more apparent by the general recognition of "uncertainty" in this area of the law. *LSL Biotechnologies*, 379 F.3d at 678. As the Ninth Circuit has recognized, "the precise extraterritorial reach of the Sherman Act [has] remain[ed] less than crystal clear" in the years since the FTAIA's enactment. *Id.*[3] This lack of clarity is not surprising: the district court here rightly observed that the FTAIA does not provide any definitions of its material terms (Order 26), which have been described as "'inelegantly phrased'" and "convoluted." *Turicentro*, 303 F.3d at 300. What is more, the district court acted without clear guidance from this Court, which has addressed the FTAIA's substance only twice before (*see Metallgesellschaft AG v. Sumitomo Corp. of Am.*, 325 F.3d 836 (7th Cir. 2003); *United Phosphorus*, 322

[3] *See also* Deborah J. Buswell, Note, *Foreign Trade Antitrust Improvements Act: A Three Ring Circus—Three Circuits, Three Interpretations*, 28 DEL. J. CORP. L. 979 (2003) (explaining that interpretation of the FTAIA "varies greatly" and that "the applicability of United States antitrust legislation" under the FTAIA is a "topic of controversy"); Richard W. Beckler & Matthew H. Kirtland, *Extraterritorial Application of U.S. Antitrust Law*, 38 TEX. INT'L L.J. 11, 12, 15 (2003) (the importance of the FTAIA has grown "with the expansion of international commerce," and divergent interpretation of the FTAIA "has created uncertainty").

F.3d 942), and then in ways not directly applicable here. As the district court noted, such "'questions of first impression' are ordinarily contestable." Certification Order 7 (quoting *Boim*, 291 F.3d at 1007-08).

Finally, there is no question that interlocutory appellate review of the FTAIA issue has the potential to expedite the resolution of this case. If this Court were to conclude that the district court lacked jurisdiction under the FTAIA, the Complaints would have to be dismissed in their entirety. Even a more limited holding that overseas sales may not be used to establish a Sherman Act violation "is quite likely to affect the further course of the litigation, even if not certain to do so" (*Sokaogon Gaming Enter. Corp. v. Tushie-Montgomery Assocs., Inc.*, 86 F.3d 656, 659 (7th Cir. 1996)), by substantially narrowing the scope of issues for discovery and trial. Accordingly, all the statutory criteria are met, and interlocutory appellate review is warranted.

B. Whether the FTAIA bars this suit is a matter of exceptional practical importance.

Apart from the statutory criteria, immediate interlocutory review of the FTAIA question is particularly appropriate because the issue presents matters of tremendous practical consequence, both for this particular litigation and for American foreign relations and the free and fair operation of global markets.

It is settled that § 1292(b) interlocutory review was designed, and therefore is "especially suitable," for use in "exceptionally complex" lawsuits, where

immediate appellate review might avoid "protracted and expensive litigation." 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3929, at 365 n.10 (2d ed. 1996) (emphasis added). This is precisely such a case: pretrial disputes regarding international, multilingual antitrust discovery are likely to proceed at great length and expense, and trial itself—requiring coordination of countless witnesses and interpreters, analysis of millions of pages of documents (in languages both foreign and domestic), and myriad motions—will impose significant burdens on the parties and the court. In such circumstances, "[i]t would not serve the interests of judicial economy to try a protracted case only to discover, at the end, that it should have been dismissed at the outset." *Id.* § 3931, at 459 n. 43.

Permitting the Order to stand while this suit is litigated (likely for many years) would also create an intolerable risk that the Order will "have [a detrimental] effect on foreign markets . . . while the case remain[s] pending." *United Phosphorus*, 322 F.3d at 952. As this Court has recognized, the FTAIA was enacted to "reduce[] the potential for offending the economic policies of other nations" and to further the fair and efficient operation of world markets. *Id*. The Supreme Court has agreed that hinging Sherman Act liability on overseas sales activity "creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs." *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 165 (2004). But here, disregarding the comity

concerns that underlie the FTAIA, the district court held that allegations concerning foreign transactions directed exclusively at foreign markets may give rise to U.S. antitrust liability so long as the complaint alleges that the parties to those transactions *also* participate in United States import markets, even through entirely *separate* and *legal* trade activity. *See* Order 28-29. This rule exposes virtually all multinational companies to U.S. antitrust liability for overseas activities, an outcome that will encourage baseless litigation, force defensive changes in business practice, and likely threaten "our relations with foreign governments." *United Phosphorus*, 322 F.3d at 952.

The FTAIA "limits the power of the United States courts (and private plaintiffs) from nosing about where they do not belong." *Id*. Because the district court's holding under the FTAIA may hinder world markets and undermine Congress's concern for international comity, the FTAIA's purposes are best served by resolving the statute's application "early in the litigation." *Id*. Accordingly, this Court should grant the petition for an immediate appeal.

II. INTERLOCUTORY APPELLATE REVIEW IS WARRANTED TO DETERMINE WHETHER THE COMPLAINTS ALLEGE A PLAUSIBLE ANTICOMPETITIVE CONSPIRACY.

A. The *Twombly* question meets all of the statutory criteria for interlocutory review.

The Court also should grant the petition to review the district court's decision that the Complaints state a plausible antitrust claim. The district court

was correct that all four statutory criteria are satisfied:

First, the second question presented provides an opportunity for this Court to clarify what *Twombly*'s plausibility standard requires in antitrust cases involving allegations of parallel conduct and opportunities to conspire—just the sort of threshold legal question that § 1292(b) is designed to address. *Ahrenholz*, 219 F.3d at 677. Because motions to dismiss often deal with the meaning of legal standards like that at issue here, denials of such motions commonly provide the basis for interlocutory review.[4] In this way, appellate review of the *Twombly* question would accomplish far more than merely permitting the parties to "reargue[] the case for [dismissal]." *Id*. at 676.

Second, this issue is controlling. There is no disputing that appellate resolution of the *Twombly* question will determine the course of the litigation—"[i]f the Seventh Circuit were to reverse, it could put an end to this litigation." Certification Order 4.

Third, this question is undoubtedly contestable: in certifying the case, the district court candidly acknowledged that "there could be substantial ground for difference of opinion on" the application of *Twombly* to this matter, that "[t]he Seventh Circuit has yet to provide post-*Twombly* guidance as to the factual

[4] *See, e.g., Rogers v. Baxter Int'l, Inc.*, 521 F.3d 702, 704 (7th Cir. 2008); *Metro. Water Reclamation Dist. of Greater Chi. v. N. Am. Galvanizing & Coatings, Inc.*, 473 F.3d 824, 825 (7th Cir. 2007); *Minch v. City of Chi.*, 363 F.3d 615, 622-23 (7th Cir. 2004); *Boim*, 291 F.3d at 1007.

enhancement that would support a claim under Section 1 of the Sherman Act," and that "other courts have reached inconsistent conclusions on the issue." Certification Order 4-5 & n.3 (citing cases). In fact, there is general recognition that *Twombly* is "confusing" (*Phillips v. County of Allegheny*, 515 F.3d 224, 230, 234 (3d Cir. 2008)), has generated "[s]ignificant uncertainty" (*Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, 541 (6th Cir. 2007)), and that its "formulation is less than pellucid" (*Robbins v. Okla.*, 519 F.3d 1242, 1247 (10th Cir. 2008)). It is therefore unsurprising that the district court's decision here is in considerable tension with the holdings of at least two federal courts of appeals that have considered *Twombly*'s application to similar complaints.[5]

Fourth, there is no question that interlocutory appellate review could "facilitate the conclusion of the litigation" (*Boim*, 291 F.3d at 1008), possibly saving substantial litigation and judicial resources. Such savings are a principal reason for interlocutory review: a "senseless waste of private and public resources

---

[5] *See In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896 (6th Cir. 2009) (dismissing parallel-pricing complaint alleging market concentration, high barriers to entry, and frequent opportunities to collude, and finding such conduct to be consistent with independent action); *In re Elevator Antitrust Litig.*, 502 F.3d 47 (2d Cir. 2007) (same). The Second Circuit itself appears internally conflicted concerning the standards required under *Twombly*. *See Starr v. Sony BMG*, No. 08-5637, slip op. at 15-16 (2d Cir. Jan. 13, 2010) (in a parallel conduct case, rejecting an argument that a complaint consistent with independent, self-interested conduct fails under *Twombly* or that plaintiffs must allege specific times, places, or persons involved in the alleged conspiracy).

and an unconscionable delay in the final resolution of these proceedings" (*In re Microsoft Corp. Antitrust Litig.*, 274 F. Supp. 2d 741, 743 (D. Md. 2003)) will have occurred if this Court denies review and, in some later case, makes clear that complaints like the ones here do not suffice under Rule 8. For this reason, the Supreme Court has admonished that, when the allegations in an antitrust complaint fail to "raise a claim of entitlement to relief, this basic deficiency should . . . be exposed at the point of *minimum* expenditure of time and money by the parties and the court." *Twombly*, 550 U.S. at 558 (citations and internal quotation marks omitted; emphasis added). That requirement, of itself, calls for immediate review.

B. The *Twombly* question implicates a frequently recurring issue that warrants this Court's immediate guidance.

In addition to satisfying the statutory criteria, the second question presented warrants review because district courts in this Circuit would greatly benefit from this Court's immediate guidance on the proper application of *Twombly*. We have noted that other courts of appeals have recognized considerable uncertainty about the *Twombly* standard; and as Judge McMahon put it, "[w]e district court judges suddenly and unexpectedly find ourselves puzzled over something we thought we knew how to do with our eyes closed: dispose of a motion to dismiss a case for failure to state a claim." Colleen McMahon, *The Law of Unintended Consequences: Shockwaves in the Lower Courts After* Bell Atlantic Corp. v.

Twombly, 41 SUFFOLK U. L. REV. 851, 853 (2008).[6] This confusion takes on particular importance here: Whether *Twombly* bars antitrust complaints alleging parallel conduct and opportunities to conspire is a matter that recurs with some frequency within this Circuit,[7] in cases that almost invariably have the potential to generate massive records and consume enormous amounts of attorney and judicial resources. Instruction on how such recurring and often formulaic allegations should be evaluated on a motion to dismiss therefore would greatly aid in the efficient resolution of such claims.

In the absence of this Court's direction, however, the district courts are reaching divergent results on similar facts. To offer just one example, in one case involving a complaint strikingly similar to the ones at issue here, the plaintiffs alleged that wireless service providers had instituted "historically unprecedented" parallel price increases "in a time of excess capacity," and that the defendants had opportunities to conspire at trade association meetings. *See In re Text Messaging*

---

[6] *See also* A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 11 (2009) (noting that "there is uncertainty regarding precisely what level of factual detail will make a statement of a claim plausible and nonspeculative" and that "further [appellate] specification" is necessary to ensure "consistent results across cases"); James A. Keyte, Twombly*: How Courts Are Interpreting And Extending Its Principles*, 23 ANTITRUST 65, 65 (2008) (noting "lingering ambiguity" concerning *Twombly*'s meaning).

[7] As far as we can determine, in the thirty-one months since *Twombly* was decided, at least twelve district court opinions within this Circuit have applied *Twombly* to complaints presenting Sherman Act claims.

Antitrust Litig., No. 08 C 7082, 2009 WL 5066652 (N.D. Ill. Dec. 10, 2009). Judge Kennelly dismissed the action, finding that allegations of parallel conduct and opportunities to conspire were consistent with legal trade activity and therefore did not suffice under *Twombly*. *Id*. at *10-*11. Applying Judge Kennelly's analysis in this case would have generated a different result.

Without this Court's "post-*Twombly* guidance" concerning the content of pleadings necessary to "support a claim under Section 1 of the Sherman Act" (Order 43), the standards in this Circuit for determining whether plaintiffs advancing "largely groundless claim[s]" will be permitted to proceed with "*in terrorem*" lawsuits to extract settlements from defendants in "more than usually costly" antitrust cases (*Limestone Dev. Corp. v. Village of Lemont*, 520 F.3d 797, 803 (7th Cir. 2008)), will remain hopelessly unsettled. Accordingly, the Court should take advantage of this opportunity to clarify what *Twombly* (and the FTAIA) requires under the frequently recurring circumstances of this case.[8]

CONCLUSION

The petition for interlocutory appellate review should be granted.

[8] In the event the Court grants permission to appeal, we propose expedited briefing and consideration of the appeal; the Court may wish to order that Defendants' opening brief be submitted thirty days after grant of the petition, the responsive brief thirty days later, and the reply brief fourteen days after that.

Dated: January 25, 2010

Respectfully submitted,

Richard Parker
O'MELVENY & MYERS LLP
1625 Eye Street N.W.
Washington, D.C. 20006
(202) 383-5300

Patrick M. Collins
PERKINS COIE LLP
131 South Dearborn Street
Suite 1700
Chicago, Illinois 60603
(312) 324-8400

Counsel for Petitioners Agrium, Inc. and Agrium U.S., Inc.

Stephen M. Shapiro
Britt M. Miller
MAYER BROWN LLP
71 South Wacker Drive
Chicago, Illinois 60606
(312) 782-0600

Richard J. Favretto
Charles A. Rothfeld
MAYER BROWN LLP
1999 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for Petitioners The Mosaic Company and Mosaic Crop Nutrition, LLC

M. Elaine Johnston
Robert A. Milne
Jack E. Pace
WHITE & CASE LLP
1155 Avenue of the Americas
New York, New York 10036-2787
(212) 819-8200

Michael L. McCluggage
WILDMAN, HARROLD, ALLEN & DIXON LLP
225 West Wacker Drive, Suite 3000
Chicago, Illinois 60606
(312) 201-2000

Counsel for Petitioners BPC Chicago, LLC and JSC Belarusian Potash Company

Daniel E. Reidy
Michael Sennett
Brian J. Murray
Paula S. Quist
JONES DAY
77 West Wacker Drive
Chicago, Illinois 60601-1692
(312) 782-3939

Counsel for Petitioners Potash Corporation of Saskatchewan Inc. and PCS Sales (USA), Inc.

Duane M. Kelley
WINSTON & STRAWN
35 West Wacker Drive
Chicago, Illinois 60601-9703
(312) 558-5600

Thomas M. Buchanan
WINSTON & STRAWN
1700 K Street, N.W.
Washington, D.C. 20006-3817
(202) 282-5000

Counsel for Petitioners JSC Silvinit & JSC International Potash Company

Jeffrey L. Kessler
A. Paul Victor
Eamon O'Kelly
DEWEY LEBOEUF
1301 Avenue of the Americas
New York, New York 10019-6092
(212) 259-8000

Elizabeth M. Bradshaw
DEWEY LEBOEUF
Two Prudential Plaza, Suite 3700
180 North Stetson Avenue
Chicago, Illinois 60601
(312) 794-8000

Counsel for Petitioner JSC Uralkali

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on January 25, 2010, pursuant to the parties' agreement, she caused one copy of this Petition and the attached Appendix, one copy of the Separate Appendix, and a CD-ROM containing a digital version of the Brief, the attached Appendix, and the Separate Appendix to be placed with a third-party commercial carrier for overnight delivery to the following:

W. Joseph Bruckner
Richard A. Lockridge
Heidi M. Silton
Matthew R. Salzwedel
LOCKRIDGE GRINDAL NAUEN P.L.L.P.
100 Washington Avenue South
Suite 2200
Minneapolis, MN 55401

Direct Purchaser Plaintiffs' Interim Lead Counsel

Bruce L. Simon
Jonathan M. Watkins
PEARSON SIMON WARSHAW & PENNY LLP
44 Montgomery Street, Suite 2450
San Francisco, CA 94104

Direct Purchaser Plaintiffs' Interim Lead Counsel

Steven A. Hart
SEGAL, MCCAMBRIDGE, SINGER & MAHONEY
233 South Wacker Drive, Suite 5500
Chicago, IL 60606

Direct Purchaser Plaintiffs' Interim Liaison Counsel

Christopher Lovell
Keith Essenmacher
Craig Essenmacher
LOVELL STEWART HALEBIAN LLP
61 Broadway, Suite 501
New York, NY 10006

Co-Lead Counsel for Indirect Purchasers

Marvin A. Miller
Matthew E. Van Tine
MILLER LAW LLC
115 South LaSalle Street, Suite 2910
Chicago, IL 60603

Co-Lead Counsel for Indirect Purchasers

_____
Britt M. Miller