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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INTRODUCTION

This case is a class action alleging a global conspiracy to reduce output and raise the price of potash, a key ingredient in fertilizer. Plaintiffs allege that the conspiracy took place through defendants' price-setting for potash sales in overseas markets, as well as alleged parallel cuts in foreign potash production, which they claim had an impact on U.S. potash prices. For two reasons, these allegations should not have survived the motion to dismiss.

First, the claim here is barred by the Foreign Trade Antitrust Improvements Act (the "FTAIA"), 15 U.S.C. §6a, which provides that the Sherman Act does not extend to foreign commerce unless the challenged conduct either "involv[es]" U.S. import commerce or "direct[ly] ... [a]ffects" U.S. commerce. Neither of those exceptions applies here. Plaintiffs allege anticompetitive conduct taking place entirely outside the United States and directed exclusively at foreign markets; the impact of that alleged conduct on the United States, if there was any at all, was indirect and tangential. The FTAIA was intended to bar precisely this sort of claim, so as to keep "the United States courts (and private plaintiffs) from nosing about where they do

not belong." *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 952 (7th Cir. 2003) (en banc).

Second, the claims are speculative and fully consistent with independent conduct, and thus do not survive under the pleading standard stated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). The complaints are devoid of even the most elementary and essential factual support for their claims, failing to "answer the basic questions: who, did what, to whom (or with whom), where, and when?" *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008); *see also Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 437 (6th Cir. 2008) (dismissing "bare allegations without any reference to the 'who, what, where, when, how or why'"). So far as sales in the United States are concerned, the complaints allege only that defendants had opportunities to conspire, did not produce at full capacity, and raised prices in parallel fashion. But it has long been settled, as then-Judge Breyer put it, that "[o]ne does not need an agreement to bring about this kind of follow-the-leader effect in a concentrated industry." *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 484 (1st Cir. 1988).

These allegations do not "nudge[] [the] claim … across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570.

JURISDICTIONAL STATEMENT

Plaintiffs filed several putative class action lawsuits that were consolidated on December 2, 2008, in the Northern District of Illinois pursuant to 28 U.S.C. §1407. Plaintiffs invoked the district court's jurisdiction under 28 U.S.C. §§1331 and 1337(a), and 15 U.S.C. §§15(a) and 26. The district court denied defendants' motion to dismiss on November 3, 2009, and certified the dismissal order for interlocutory appeal pursuant to 28 U.S.C. §1292(b) on January 15, 2010. A1, SA95. This court granted defendants' petition for interlocutory appeal on March 17, 2010. This Court's jurisdiction accordingly rests on 28 U.S.C. §1292(b). This appeal relates to all claims and all parties currently before the district court.

ISSUES PRESENTED FOR REVIEW

1. Whether this Sherman Act suit is barred by the FTAIA; and

2. Whether the complaints state a plausible cause of action within the meaning of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

STATEMENT OF THE CASE

These class actions allege a global conspiracy to reduce output and raise the price of potash in violation of the Sherman Act, 15 U.S.C. §1. Defendants moved to dismiss the complaints on the grounds that they are barred by the FTAIA and fail to state a plausible cause of action. The district court denied the motion, but certified the order for interlocutory review. This Court granted the petition for immediate appeal.

STATEMENT OF FACTS

A. Factual Background

1. Potash and the defendants

The Canadian province of Saskatchewan is the largest global producer of potash, an important ingredient of agricultural fertilizer. Deposits there currently yield about one-third of world production; the potash industry is a major contributor to the Saskatchewan economy. *See* Janet MacKenzie, *Nourishing the Crops of the World: Saskatchewan's Potash Industry*, Western Development Museum (Jan. 27, 2003), http://tinyurl.com/yj6zld9; Government of Saskatchewan, *2009 Potash Fact Sheet*, http://tinyurl.com/ygo4h6j. Other major national producers of potash include Russia and Belarus. *See* James P.

Searls, *Potash*, U.S. Geological Survey (1994), http://tinyurl.com/yl9chha. Potash also plays an important role in the economies of these nations; in Belarus, for example, where potash accounts for more than one-third of the nation's export trade (Republic of Belarus, *Main Indicators of Foreign Trade*, http://tinyurl.com/ykmwebj), potash has "special significance" to the nation's "socio-economic development" and "national security." Decl. of Valeriy Kirienko, Dkt. #190 Ex. 2.

Given the importance of potash to the economies of Canada, Belarus, and Russia, production and export are subject to substantial regulation by those nations. Saskatchewan, for example, subjects potash to a special taxation scheme designed to encourage potash exports. *See* The Potash Production Tax Regulations (The Mineral Taxation Act of 1983) ch. M-17.1 Reg. 6 (Sask. 1990), *available at* http://tinyurl.com/yghnh94 (providing incentives for potash producers in Saskatchewan to participate in the "industry sales organization," called "Canpotex Ltd." to coordinate "offshore sales").

Canpotex, which is named as a co-conspirator in this action, is a joint export marketing and distribution company owned by three of the defendants here: the Potash Corporation of Saskatchewan, The Mosaic

Company, and Agrium, Inc. *See* SA8 ¶31.[1] From the time that Canpotex was formed in the 1970s, it has been the policy of the Saskatchewan Department of Mineral Resources to encourage "[potash] producers intending to participate in offshore markets [to] become members of [Canpotex]" as a means of ensuring that the Department's regulation of the potash industry "work[s] effectively." *See Cent. Canada Potash Co. v. Saskatchewan*, [1979] S.C.R. 42, ¶22 (Can.). Export marketing through Canpotex by Canadian potash producers, which plaintiffs acknowledge excludes the U.S. market (SA8 ¶31; SA16-17 ¶¶68, 70), is permitted by Canadian law. *See In re Potash Antitrust Litig.*, 954 F. Supp. 1334, 1354 n.19 (D. Minn. 1997) ("[C]reated pursuant to Canadian law," Canpotex lawfully "set[s] prices for potash ... sold outside of the United States."), *aff'd sub nom. Blomkest Fertilizer, Inc. v. Potash Corp.*, 203 F.3d 1028 (8th Cir. 2000) (en banc); Canadian Competition Act §45(5) (permitting cooperation "related only to the export of products from Canada").

[1] This case involves two amended complaints, one by direct and the other by indirect purchasers. The complaints are substantially identical in relevant part. For simplicity's sake, we generally cite to the direct purchasers' complaint only.

Another defendant to this action, JSC Uralkali of Russia, participates with dismissed defendant RUE "PA Belaruskali,"[2] in a similar joint marketing and distribution company called the Belarusian Potash Company ("BPC"), which is also a named defendant here. Like Canpotex, BPC's joint export operations are permitted by its home country's laws. In fact, Belaruskali's participation in BPC is expressly approved by executive order. See Exec. Order No. 398 (Repub. of Belarus), "Improving the Export of Potash Fertilizers," National Register of Legal Acts, No. 1/6734 (Aug. 25, 2005), *available at* Dkt. No. 224 Ex. 5 (certified English trans.). Defendant JSC Silvinit similarly distributes its potash through defendant JSC International Potash Company. SA8 ¶30.

2. The plaintiffs and the complaints

Plaintiffs are direct and indirect purchasers of potash in the United States. SA1 ¶1; SA2 ¶2; SA26 ¶112; SA45 ¶1. They contend that defendants "conspired and combined to fix, raise, maintain, and stabilize the price at which ... potash was sold" by "exchang[ing]

[2] The claims against Belaruskali, which is owned by the Republic of Belarus, were dismissed as barred by the Foreign Sovereign Immunities Act. *See In re: Potash Antitrust Litig.*, No. 08 C 6910 (N.D. Ill. Feb. 23, 2010) (Dkt. No. 289).

sensitive non-public information about prices, capacity, sales volumes, and demand; allocat[ing] market shares, customers, and volumes to be sold; and coordinat[ing] on output, including the limitation of production." SA2 ¶3. The complaints, however, are vague concerning the scope of the alleged conspiracy and how it worked. It is described at various points as a conspiracy relating to prices "in the United States" (SA25 ¶109), at others as a "global conspiracy" (SA33 ¶144), and at others as one aimed at a geographically undefined "potash market." SA25 ¶110. Plaintiffs offer no factual allegations that directly support their assertion that defendants entered into any agreement relating to sales in the United States: the complaints do not identify or describe (by name or position) the persons who allegedly conspired; state when or where the agreement was consummated; describe the nature or scope of the agreement in anything but the vaguest terms (that is, as an agreement to cut production and raise prices by unspecified amounts); identify market share, customers, or volumes allegedly "allocated"; or suggest any mechanism by which the agreement was implemented and policed.

Instead, plaintiffs describe four circumstances from which, they contend, one might infer the existence of a conspiracy.[3] *First*, plaintiffs allege that the potash industry is an oligopoly characterized by high market concentration: "[T]hree producers with mines located in Canada (PCS, Mosaic and Agrium), and three former Soviet Union producers (Uralkali, Belaruskali and Silvinit), accounted for approximately 71% of the [world] potash market" in 2008. SA14 ¶57. Plaintiffs also assert that "[p]otash reserves are confined to relatively few areas throughout the world," that "[p]otash is a homogenous commodity product" in which "buyers make purchase decisions based largely, if not entirely, on price," and that "[t]he potash industry has very high barriers to entry." SA12 ¶¶49, 50; SA13 ¶53; SA14 ¶56. These market characteristics allegedly make the industry "conducive to a conspiracy." SA14 ¶56.

Second, plaintiffs theorize that an alleged "high level of cooperation" in the potash industry, although lawful on its face,

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[3] Many of plaintiffs' allegations rest on snippets of alleged quotations that lack citations to the documents from which they are drawn. *See, e.g.*, SA14 ¶58; SA17-18 ¶¶ 73-74, 76; SA21-25 ¶¶ 94, 96, 97, 99, 101, 107; SA30-34, ¶¶131, 134, 136-44, 146-47. These strategically edited quotations are presented in isolation, and plaintiffs' failure to provide citations makes it impossible to determine what they really say. *Twombly* cautions that such out-of-context quotations are misleading. 550 U.S. at 568 n.13.

provided the defendants an "opportunity to conspire." SA18 ¶79. In addition to participation in Canpotex or BPC (SA16-17 ¶¶68-71), this alleged "cooperation" consisted of trade association meetings, which plaintiffs concede were attended by the press, government economists, suppliers, and customers, among others (SA119-20 ¶¶80-86); and occasional visits by producers to one another's mining facilities for operational and safety tours, which were also covered by the press. *See* SA17-18 ¶¶74-78. In all, plaintiffs specifically identify three trade association meetings and two mutual plant visits that took place over the five-year course of the alleged conspiracy. They do not directly allege, however, that any agreements were made between or among potash producers at any of these meetings.

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." SA27 ¶116; SA25-30 ¶¶109-30. Plaintiffs also assert a series of parallel reductions in output in 2005-06 (at a time of concededly falling demand for potash). SA20-25 ¶¶87-108. And plaintiffs allege that some, but not all, of the defendants suspended new

sales on one occasion when Silvinit announced that it might have to suspend shipments from one of its mines because of possible production interruptions stemming from a sinkhole. SA23 ¶¶98-99. Aside from this single episode and joint sales to *overseas* markets (*see* SA21-22 ¶¶90, 94, 95; SA28-29 ¶¶120, 123), these pricing and supply actions were non-simultaneous, with one defendant allegedly following another's price increase or production cut by a period of weeks or months. *See* SA20 ¶88; SA21 ¶¶91-92.

Finally, plaintiffs allege that defendants, most of which are publicly traded and accountable to shareholders, "publicly signaled their willingness to avoid price competition." SA32 ¶136. In support of this assertion, plaintiffs point to statements – taken from unidentified articles and analysts' reports and provided absent any context – allegedly made by only two defendants, BPC and Uralkali. SA32-33 ¶¶137-143.

Although plaintiffs allege that defendants "'sold and distributed potash in the United States, directly or through [their] affiliates'" (SA5-7 ¶¶15-16, 18-19, 21-22, 27; SA16-17 ¶¶68, 71; SA34 ¶145), plaintiffs' allegations of joint or coordinated pricing and production concern

activities occurring entirely outside the United States and involving commerce exclusively with foreign nations. Plaintiffs thus claim that defendants conspired to reduce supply and increase prices in Brazil, China, and India. SA13 ¶¶52; SA21-22 ¶¶90, 94-95; SA25-26 ¶111; SA28-29 ¶¶120, 123-24, 127; SA33 ¶¶142, 144. This conduct, plaintiffs say, had a spillover effect in the United States because the setting of prices in foreign countries "influence[d] prices in ... other major markets, including the United States." SA25-26 ¶111; *see also* SA26 ¶112 (defendants "knew and intended that their global conspiracy would directly affect prices of potash in the United States"); SA34 ¶145 ("defendants' conduct in other countries" had an "impact on the potash market in the United States"). Plaintiffs do not, however, suggest or describe any mechanism by which coordinated sales overseas precluded or limited competition in the United States. They do not, for example, allege that defendants agreed to charge any particular foreign prices in the United States. *See, e.g.*, SA29 ¶127 ("After potash producers reached an agreement on a price increase to customers in China in late July 2006, and Brazil later in 2006, potash prices in the United States increased as well, as defendants knew and intended.").

B. Procedural Background

Defendants moved to dismiss the complaints, arguing in relevant part that (1) the district court lacks subject matter jurisdiction under the FTAIA, which provides that 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 U.S. markets (15 U.S.C. §6a); and (2) the complaints fail to satisfy the test stated in *Twombly* and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), because they allege only a "speculative," and not a "plausible," claim for relief.

The district court denied the motion. Addressing the FTAIA question first, the court concluded that defendants' alleged overseas activity fell within the statute's parenthetical exception for conduct involving "import trade or import commerce." A26-A29. The court reasoned 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*

potash sales in the United States, along with the assertion that defendants conspired to fix prices in overseas markets, created a "tight nexus between the alleged illegal conduct [*i.e.*, export activity in foreign markets] and Defendants' import activities" sufficient "to conclude that the former 'involved' the latter." *Id.* at 29.

The court also found three allegations sufficient to meet *Twombly*'s and *Iqbal*'s "plausibility" pleading standard: (1) an alleged change in behavior by the Russian defendants, who "had previously reduced price to maintain volume during periods of weakening demand" (*id.* at 45 & n.22); (2) "opportunities to conspire" provided by meetings between defendants and their involvement in legal export trading associations (*id.* at 45-47); and (3) the response of certain defendants to Silvinit's announcement of a sinkhole. *Id.* at 47-48. The court held that these allegations "propel Defendants' conduct out of 'neutral territory' to plausibly suggest entitlement to relief." *Id.* at 49. The court recognized, however, "that the facts of this case present a difficult question under *Twombly*." *Id.* at 50.

SUMMARY OF ARGUMENT

A. This action is barred by the FTAIA. The anticompetitive acts alleged here were exclusively foreign. The gist of the complaints is that the defendants engaged in joint sales to foreign purchasers and limited supply or production abroad to facilitate overseas price increases. On the face of it, the alleged anticompetitive "conduct" did not "involve" or have a "direct effect" on import commerce, as required by the plain terms of the FTAIA; the complaints themselves make clear that any U.S. impact of this conduct would have been indirect and attenuated.

If there is any doubt on this score, it must be resolved by reference to the principles of international comity that underlie the FTAIA. Application of the Sherman Act in the circumstances here would interfere with foreign nations' regulation of their *own* commerce, threatening to disrupt the United States' foreign relations. The FTAIA was intended to avoid just such adverse consequences of "legal imperialism." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 169 (2004).

B. The claims here also fail the *Twombly* test. It is fundamental that a complaint "requires more than labels and conclusions, and a

formulaic recitation of the elements of a cause of action will not do. ... Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. In the antitrust context, this means that "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice." *Id.* at 556.

That, however, is all plaintiffs provide in their cookie-cutter complaints. They describe potash price increases and production cuts, but it is settled doctrine that parallel price and production decisions are a "common reaction of 'firms in a concentrated market that recognize their shared economic interests and their interdependence with respect to price and output decisions.'" *Twombly*, 550 U.S. at 553-54 (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) (Court's alterations omitted)). Such acts do not form a plausible basis for inferring conspiracy. The remainder of plaintiffs' allegations – involving the "opportunity to conspire" provided by innocuous trade association meetings and lawful joint ventures – are the sort of boilerplate claims that appear as a makeweight in every insubstantial antitrust complaint. *Twombly* rejected just these sorts of allegations as inadequate.

ARGUMENT

I. THE COMPLAINTS ARE BARRED BY THE FTAIA.

The FTAIA provides that 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. This language "initially lays down a general rule placing *all* (nonimport) activity involving foreign commerce outside the Sherman Act's reach." *Empagran*, 542 U.S. at 162. Insofar as is relevant here, "[i]t then brings such conduct back within the Sherman Act's reach" (*id.*) if one of two conditions is satisfied: if that conduct is "import trade or commerce," or if it "has a direct, substantial, and reasonably foreseeable effect" on domestic or import commerce. This rule is of such importance that Congress gave it jurisdictional force, making the FTAIA a limitation on "the subject-matter jurisdiction of the federal courts" over Sherman Act claims relating to "conduct occurring outside the United States." *Mañez v. Bridgestone Firestone N. Am. Tire, LLC*, 533 F.3d 578, 585 (7th Cir. 2008) (*citing United Phosphorus*).

In this case, there is no doubt that the conduct alleged to be actionable by plaintiffs – joint export sales to China, India, and Brazil, and production cuts in Canada and nations of the former Soviet Union – involves "trade or commerce ... with foreign nations" within the meaning of the FTAIA. *See Turicentro, S.A. v. American Airlines, Inc.*, 303 F.3d 293, 301-302 (3d Cir. 2002). The suit therefore may go forward only if these actions involved import commerce, or had a direct effect on U.S. or import commerce. But they did not. Plaintiffs' argument to the contrary departs from the plain language and clear purpose of the FTAIA, and would work the very interference with other nations' regulation of their own markets that the FTAIA was designed to prevent.

A. The Complaints Do Not Fall Within The FTAIA's Import Exception.

Plaintiffs do not allege that defendants conspired to take any particular step with respect to U.S. imports; they notably do not assert, for example, that defendants agreed on prices to be charged in the United States, allocated U.S. customers, failed to negotiate independently with those customers, or agreed to limit sales in the United States. Instead, their allegation is that prices set for sales in

foreign nations had a spillover effect in the United States by "influenc[ing]" or "affect[ing]" the market for potash "in the United States, as well as in world markets generally" (SA25-26 ¶¶111-12), and that foreign production cuts – none alleged to have been directed at the United States, but many alleged to have been directed at specific overseas markets (SA21 ¶90) – also had indirect effects on customers in this country.

On the face of it, these allegations of overseas activity should have been evaluated under the FTAIA's "direct effect" test. The district court nevertheless concluded that the complaints alleged "conduct involving" United States "import trade or import commerce" within the meaning of the FTAIA because plaintiffs allege that, in addition to limiting supply and fixing prices in foreign markets, defendants *also* "sold and distributed potash in the United States" through entirely independent conduct not itself alleged to have been illegally coordinated in any way. A28. That conclusion is wrong, for several reasons.

1. *Statutory language*. To begin with, the plain language of the FTAIA's import exception, although not artful, is unambiguous: it provides that the antitrust laws "shall *not* apply to conduct involving

trade or commerce (*other than* import trade or import commerce) with foreign nations." 15 U.S.C. §6a (emphasis added). This double negative means that the Sherman Act "applies to conduct 'involving' import trade or import commerce with foreign nations." *Turicentro*, 303 F.3d at 301 (citing *Carpet Group Int'l v. Oriental Rug Importers Assoc., Inc.*, 227 F.3d 62, 69 (3d Cir. 2000)). There is no fuzziness in these words: for the exception to apply, the anticompetitive "conduct" said to be actionable must *itself* " involv[e] ... import trade or import commerce."

Every circuit to have considered the issue has read the statute to mean what it plainly says. Thus, as the Third Circuit put it, the "proper inquiry" under the FTAIA's import exception is "whether *the ... conduct ... being challenged as violative of the Sherman Act[]* 'involved' import trade or commerce." *Carpet Group*, 227 F.3d at 71 (emphasis added). The Second Circuit agreed that the conduct "that is the focus" of the FTAIA's import exception is the conduct "that [is] illegal under the Sherman Act," such as the "formation of [an] agreement to fix prices." *Kruman v. Christie's Int'l PLC*, 284 F.3d 384, 395, 398-99 (2d Cir. 2002) (internal quotation marks omitted), *abrogated on unrelated grounds by Empagran*, 542 U.S. 155. Or as the D.C. Circuit put it, under the

FTAIA the word "'conduct' [means] 'acts that are illegal under the Sherman Act.'" *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338, 344 (D.C. Cir. 2003) (quoting *Kruman*), *vacated on unrelated grounds*, 542 U.S. 155 (2004).

That is the necessary implication of the statutory language. In the import exception, Congress did not say that any activity having an *effect* on U.S. import commerce falls within the Sherman Act; the exception is limited to circumstances where the anticompetitive "conduct" is *itself* an element of the import commerce. "[T]he statutory term 'involving' has a precise meaning" (*Turicentro*, 303 F.3d at 303), that of "engag[ing]" or "tak[ing] part" in. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 617 (10th ed. 1996). Under this plain language, an agreement by five German widget manufacturers to fix the price of German widgets sold into the United States, or to limit to a fixed amount the number of German widgets allocated to the U.S. market, would fall within the exception. By itself being a part of the import transaction, such joint "conduct" would "involve" U.S. import commerce. An agreement by those same German manufacturers to fix the price of widgets sold in France would not, however – even if the German manufacturers

simultaneously (but independently) sold widgets into the United States. The anticompetitive "conduct" underlying the suit (the collusive sales in France) would not in any ordinary sense have "involved" the manufacturers' participation in U.S. import commerce.

In ruling to the contrary, the district court asked whether the defendants *themselves* were involved in U.S. import trade, rather than whether the specific anticompetitive "conduct" alleged in the complaint, to which the Sherman Act allegedly "appl[ies]," involved such trade. Of course, Congress could have drafted the FTAIA to focus on that question by, for example, providing that the Sherman Act "shall not apply to conduct involving trade or commerce (other than trade or commerce *by parties involved in* U.S. import trade or import commerce) with foreign nations." But the court's approach is plainly incompatible with the statute that Congress actually wrote, which provides that the antitrust laws "shall ... apply" to *conduct involving*, and not *parties involved in*, import commerce. Sales to Brazil, China, or India surely cannot themselves be characterized as U.S. import commerce, even if the seller *also* sells in the United States.

This distinction is fundamental. The first approach (the one Congress actually adopted) appropriately grounds jurisdiction to hear antitrust claims upon the domestic nature of the conduct that allegedly violated the Sherman Act. The second (the one adopted by the district court), by contrast, grounds jurisdiction on the participation of the parties in the U.S. market, even though the conduct giving rise to the suit is activity in foreign markets. Such a rule is irreconcilable with the plain terms of the FTAIA.

2. *Statutory context*. The district court's interpretation of the FTAIA suffers from more than inconsistency with the plain language of the import exception; it also ignores the "fundamental principle of statutory construction" that the meaning of statutory language "cannot be determined in isolation, but must be drawn from the context in which it is used." *Textron Lycoming Reciprocating Engine Div., AVCO Corp. v. UAW*, 523 U.S. 653, 657 (1998).

Here, the import exception operates alongside the *separate* FTAIA exception that focuses on whether the foreign anticompetitive conduct had a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce. 15 U.S.C. §6a(1). The FTAIA's text contains no hint of a

statutory purpose to permit recovery based on the *indirect* domestic spillover effects of a defendant's anticompetitive activity in overseas markets, simply because the defendant independently participates in U.S. import commerce. Rather, the most natural reading of the import exception, taken in context, is to exempt a narrow range of conduct – *import transactions* that are *themselves* challenged as unlawful under the antitrust laws – from the FTAIA's reach, leaving the direct effect test to govern all other allegedly anticompetitive foreign trade activity.

For a very large category of companies – those that conduct business both in the United States and overseas – the district court's approach reads the direct effect test out of the FTAIA. It exposes all participants in U.S. import trade to antitrust liability for their overseas activity without any regard for whether their alleged anticompetitive conduct in foreign markets in fact had a direct or substantial effect on U.S. consumers. Anticipating just this problem, the Third Circuit explained: "[T]he FTAIA differentiates between conduct that 'involves' such [import] commerce, and conduct that 'directly, substantially, and foreseeably' affects such commerce. To give the latter provision meaning, the former must be given a relatively strict construction."

Turicentro, 303 F.3d at 304 (internal quotation marks omitted). This conclusion accords with "one of the most basic interpretive canons, that 'a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.'" *Corley v. United States*, 129 S. Ct. 1558, 1566 (2009) (alterations omitted). The district court here took no account of that principle.

3. *International comity*. The statutory language is enough, on its own, to establish the error in the district court's holding. But if there is any doubt on that point, it is resolved by the principles of international comity. It is a settled principle, stated repeatedly by the Supreme Court, that federal courts should "construe[] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *Empagran*, 542 U.S. at 164; *see also* Restatement (Third) of Foreign Relations Law of the United States §403 (1986). This central rule of statutory interpretation "assume[s] that legislators take account of the legitimate sovereign interests of other nations when they write American laws" (*Empagran*, 542 U.S. at 164-65), and thus "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *EEOC v. Arabian*

American Oil Co., 499 U.S. 244, 248 (1991). In this way, it "helps the potentially conflicting laws of different nations work together in harmony – a harmony particularly needed in today's highly interdependent commercial world." *Empagran*, 542 U.S. at 164-65.

"[T]here has long been concern about overreaching under our antitrust laws" (*United Phosphorus*, 322 F.3d at 946); "[n]o one denies that America's antitrust laws, when applied to foreign conduct, can interfere with a foreign nation's ability independently to regulate its own commercial affairs." *Empagran*, 542 U.S. at 165. Because "[t]he extraterritorial scope of our antitrust laws touches our relations with foreign governments," this Court found it "prudent to tread softly in this area" and, where possible, to interpret the FTAIA in a manner that "reduces the potential for offending the economic policies of other nations." *United Phosphorus*, 322 F.3d at 952. Indeed, avoiding conflict with America's trading partners was a principal purpose underlying the FTAIA's enactment. *See, e.g.*, *Foreign Trade Antitrust Improvements Act: Hearings on H.R. 2326 Before the Subcomm. on Monopolies and Commercial Law of the H. Comm. On the Judiciary*, 97th Cong., at 2 (1981) (statement of Rep. Peter W. Rodino, Jr., Chairman, H. Comm. on

the Judiciary) (the FTAIA was intended to allay "foreign animosity toward U.S. antitrust enforcement").

The holding below, however, cuts the FTAIA loose from this anchor of international comity. Its rule would open U.S. courts to many complex antitrust disputes based on overseas activity of only indirect interest to the United States, activity that ought to be governed by the competition laws of the countries where the alleged activity actually has a direct effect. *Cf. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985) (rejecting the "parochial concept that all disputes must be resolved under our laws and in our courts"). Of course, the United States has an interest in resolving a dispute with international implications when the challenged conduct *does* have a direct and substantial domestic effect (*see Empagran*, 542 U.S. at 165) – but the district court's reliance on the FTAIA import exception, rather than the direct effect test, allows imposition of liability without any showing of such an effect.

The prospect of foreign antagonism arising from this holding is neither fanciful nor speculative. Other nations participated before the Supreme Court in *Empagran* to complain about the ways in which an

expansive assertion of U.S. antitrust jurisdiction could interfere with their domestic commerce. *See Empagran*, 542 U.S. at 167-168 (citing amicus briefs from Canada, Germany, and Japan asserting nations' interest "in seeing that [their domestic] companies are not subject to the extraterritorial reach of the United States' antitrust laws" and finding "particularly troublesome" the potential "interfere[nce] with [foreign] governmental regulation of [foreign] market[s]"). The same danger is evident in this case.

Here, participation in joint export associations has been sanctioned and approved under the laws of the exporters' respective home countries. Indeed, participation in Canpotex is affirmatively encouraged by Saskatchewan as an "imperative" element of its economic regulations (*Cent. Canada Potash Co*, [1979] S.C.R. 42, ¶22), and participation in BPC is approved by Belarusian law (Dkt. #224 Ex. 5). And while neither Canpotex nor BPC engages in any illegal activity in U.S. markets (*e.g.*, SA8 ¶31; SA16 ¶68), the complaints allege that participation in these organizations – with respect to conduct directed entirely at *foreign* markets – establishes liability under U.S. antitrust laws. *See* SA19-20 ¶¶80-86. Allowing use of the Sherman Act to punish

company operations that are permitted (and even expressly approved) by the nations in which they occur, is precisely the sort of interference with foreign sovereignty that the Supreme Court has instructed U.S. courts to avoid.[4]

If nations like China, India, and Brazil – the only countries at which plaintiffs allege price fixing was actually directed – wish to enforce antitrust regulations against such conduct, they are capable of doing so. *See* Donald I. Baker, *Antitrust and World Trade: Tempest in an International Teapot*, 8 Cornell Int'l L.J. 16, 41 (1974). But "if America's antitrust policies could not win their own way in the international marketplace for such ideas, Congress, [this Court] must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat." *Empagran*, 542 U.S. at 169.[5]

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[4] The prospect of foreign resentment is especially acute because the United States itself has encouraged – as part of the same legislation through which the FTAIA was passed – *American* companies to form "export trading associations" like Canpotex and BPC, exempting such domestic associations from U.S. antitrust regulation to ensure that foreign companies subject to less "strict antitrust limitations" do not enjoy "a marketing advantage" over American exporters. H.R. Rep. No. 97-637(1), 1982 U.S.C.C.A.N. 2431, 2437-38; *see* Export Trading Company Act of 1982, Pub. L. No. 97-290, 96 Stat. 1233 (codified at 15 U.S.C. §§4001-03); *see also* Webb-Pomerene Act, 15 U.S.C. §§61-66.

[5] The Supreme Court has noted that both the substantive scope and the remedial provisions of the antitrust laws of many foreign nations differ from those of the (*continued...*)

Accordingly, to the extent the Court finds the FTAIA's import exception susceptible to more than one interpretation, it should resolve any ambiguity so as not to offend international comity.

4. *Legislative history and legal context*. Finally, the "contemporary legal context in which Congress acted when" enacting the FTAIA further refutes the district court's expansive interpretation of the import exception. *Assoc. Gen. Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519, 532 (1983). Congress drafted the FTAIA as a "straightforward clarification of *existing* American law" concerning the application of U.S. antitrust regulations to foreign transactions. H.R. Rep. No. 97-686, at 2 (1982) (emphasis added). Thus, "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 as of the date of the FTAIA's enactment, no court had ever entertained claims arising from an alleged foreign conspiracy, involving foreign transactions, directed at foreign markets and lacking

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United States. *Empagran*, 542 U.S. at 167-68. *See also* Brenden Sweeney, *International Competition Law and Policy: A Work in Progress*, 10 Melb. J. Int'l L. 58, 62 (2009) (different antitrust approaches taken by China and India).

a direct link to U.S. commerce, simply because the defendant was *separately* involved in U.S. import markets. *Cf. id.* at 169-73. The district court's holding below is therefore an unprecedented enlargement of U.S. antitrust jurisdiction that cannot be reconciled with the congressional scheme.

In fact, the legislative history shows that Congress intended the FTAIA to eliminate "American antitrust jurisdiction" over "purely foreign transactions" (like those here) that lack a "direct, substantial, and reasonably foreseeable effect on domestic commerce or a domestic competitor." H.R. Rep. No. 97-686, at 9-10. That history likewise shows that the character of the parties to a given transaction is not relevant; a "transaction between two foreign firms, even if American-owned," for example, "should not, merely by virtue of the American ownership, come within the reach of our antitrust laws." *Id.* at 9. By the same token, there is no reason that a company that happens to sell to U.S. customers should be subject to liability because that company also jointly sets prices on products sold in *another* country in a manner that has no direct impact on U.S. prices. The import exception therefore has no application here.

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

Because plaintiffs challenge purely foreign transactions, taking place in and directed exclusively at foreign markets – and *not* "conduct involving ... import trade or import commerce" – this suit may proceed only if plainffs allege facts demonstrating that the claimed conspiracy had a "direct, substantial, and reasonably foreseeable effect" on the U.S. market. 15 U.S.C. §6a(1). It is evident from the face of the complaints that plaintiffs cannot meet this burden.[6]

The plain terms of the direct effect exception are (like those of the import exception) unambiguous. As the Ninth Circuit has explained, the term *direct* means "'proceeding from one point to another in time or space without deviation or interruption.'" *United States v. LSL Biotechnologies*, 379 F.3d 672, 680 (9th Cir. 2004) (quoting WEBSTER'S NEW INT'L DICTIONARY 640 (3d ed. 1982)). Thus, an effect is "direct" within the meaning of the FTAIA "if it follows as an immediate consequence of the defendant's activity." *Id.* (citing *Republic of*

[6] Because the FTAIA states a jurisdictional rule, "[o]n a motion to dismiss [under the FTAIA] the party asserting jurisdiction bears the burden of persuasion." *Boyd v. AWB Ltd.*, 544 F. Supp. 2d 236, 242 (S.D.N.Y. 2008); *see also United Phosphorus*, 322 F.3d at 946 ("The burden of proof" is on "the party asserting jurisdiction.").

Argentina v. Weltover, Inc., 504 U.S. 607, 618 (1992)). An effect is *not* direct if it is "speculative" and "depends on ... uncertain intervening developments." *Id.* at 681; *see also In re Intel Corp. Microprocessor Antitrust Litig.*, 452 F. Supp. 2d 555, 560 (D. Del. 2006) (not direct if it relies on a "chain" of events and thus is "contingent upon numerous [intervening] developments").[7]

There are compelling reasons for this rule. Once courts look beyond acts having an immediate and non-speculative effect on domestic commerce, the FTAIA will impose no limit at all. After all, at some level, there is no denying that "everything is related to everything else." *Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195, 2203-2204 (2009) (citation omitted). And as Judge Hand wrote for the court in *United States v. Alcoa*, 148 F.2d 416 (2d Cir. 1945) – the seminal case adopting the direct effects test later codified in the FTAIA – "[a]lmost any limitation of the supply of goods in Europe, for example, or in South

[7] Courts routinely hold that the direct effect requirement is not satisfied by allegations that anticompetitive conduct directed at a foreign market had a spillover impact on U.S. consumers. It is not enough, for example, that "the fungible nature and worldwide flow of the[] products made the domestic and foreign market interconnected." *In re Monosodium Glutamate Antitrust Litig.*, 477 F.3d 535, 536 (8th Cir. 2007); *see also, e.g.*, *Dee-K Enters. Inc. v. Heveafil SDN. BHD*, 299 F.3d 281, 295 (4th Cir. 2002); *Animal Sci. Prods., Inc. v. China Nat'l Metals & Minerals Imp. & Exp. Corp.*, 596 F. Supp. 2d 842, 863 (D.N.J. 2008).

America, may have repercussions in the United States if there is trade between the two." 148 F.2d at 443. Yet despite those "repercussions," Judge Hand considered it self-evident that U.S. antitrust laws do not reach anticompetitive "agreements made beyond our borders" and directed at foreign markets: "the international complications likely to arise from an effort in this country to treat such agreements as unlawful" demonstrated that "Congress certainly did not intend the [Sherman] Act to cover them." *Id.* The *Alcoa* court held the effect test satisfied in that case only because the complaint there alleged, not indirect domestic "repercussions" of a conspiracy directed at foreign markets, but the immediate domestic effects of a foreign agreement that was itself aimed at U.S. markets. *Id.* at 444.[8]

On the face of it, the complaints here do not allege anticompetitive acts that have direct effects in the United States. Although they allege that "Defendants coordinated their conspiracy, at least in part, through

[8] This is a familiar concept in antitrust law. The Supreme Court explained just three months before Congress enacted the FTAIA that "ripple[]" effect theories of causation like plaintiffs' fail to confer standing under the antitrust laws, even for alleged anticompetitive conspiracies directed entirely at *domestic* markets. *See Blue Shield of Virginia v. McCready*, 457 U.S. 465, 476-77 (1982) (although "[a]n antitrust violation may be expected to cause ripples of harm to flow through the ... economy," Congress "did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages").

coordinated restrictions in potash output" (SA20 ¶ 87), they describe only cutbacks in output occurring in and directed at markets *outside* the United States. *See* SA20-23 ¶¶88-89, 91-93, 96-98. The same is true of their recitations of coordinated sales. *See* SA21 ¶90 ("joint cutbacks in sales to international customers" – *i.e.*, Brazil); SA21-22 ¶¶94-95 ("leading suppliers of potash around the world jointly limited supply of potash to Chinese consumers"); SA27 ¶117 (Brazil); SA28 ¶120 (Brazil and India); SA28-29 ¶¶123-24 (China); SA29 ¶127 (China and Brazil); SA33 ¶142 (China, India, and Brazil). As for any impact on U.S. markets from that foreign conduct, the most plaintiffs can offer is that they "influence[d] prices in other major markets" (SA25-26 ¶111) because "[t]he prices for cartelized term contracts become benchmarks for spot market sales" that "directly affect prices of potash in the United States." SA25-26 ¶¶111-12. *See also* SA34 ¶145 ("defendants' conduct in other countries" has had an "intended impact on the potash market in the United States"); *id.* (U.S. potash sales occur at prices "set according to benchmarks established by defendants based on sales in India, China and elsewhere"); SA34 ¶146 ("Global prices set a benchmark for

domestic potash prices.").[9] Plaintiffs' theory accordingly is that, by some unidentified mechanism, prices and output restrictions in overseas markets influence U.S. prices.

This sort of ripple-effect allegation is manifestly insufficient under the FTAIA. Plaintiffs allege only that transactions in the United States, in some undefined respect, took account of prices charged elsewhere; there is no allegation that defendants *agreed* to use the foreign prices as a benchmark in the United States, or that those foreign prices necessarily (or actually) governed domestic sales. To the contrary, the complaints themselves make clear that there were many intermediate steps between the alleged setting of prices for sales in other countries and any impact of those sales on the U.S. market: each defendant *individually* would have had to negotiate prices with U.S. purchasers, and the terms of those transactions would have been dictated by the very different market and competitive situations that existed in the United States. *See* SA25-27 ¶¶111, 115 (sales in the United States set

[9] The allegations concerning benchmarks are inconsistent. Elsewhere plaintiffs claim that regional potash prices "chart[ed]" by *Green Markets* "are considered benchmark prices in the industry," without any allegation that these regional prices in any way follow from the alleged anticompetitive conduct directed at Brazil, India, and China. SA27 ¶¶114-15.

by "contracts" independently "negotiate[d]" by domestic purchasers).

This is not a case in which prices for potash in the United States – reached in independent, arm's length transactions taking place under variable market conditions – would "follow[] as an immediate consequence" (*LSL Biotechnologies*, 379 F.3d at 680) from prices set in Brazil, China, or India. Plaintiffs suppose that "increased prices throughout the world" followed from such variables as whether the alleged anticompetitive pricing "tied up" supply, "stimulating" a "boom" in "spot market[s]." SA33 ¶144. But that indirect "chain of effects is full of twists and turns, which themselves are contingent on numerous developments." *Intel*, 452 F. Supp. 2d at 560. And "the FTAIA prevents the Sherman Act from reaching such 'ripple effects.'" *Id.* at 561.

Moreover, even if ripple effects of the sort alleged in the complaints ever *could* be sufficient under the FTAIA, the allegations here that the overseas conduct *did* have domestic effects are too vague and conclusory to be actionable. We explain *Twombly*'s pleading requirements in more detail below. For present purposes, it is enough to note that "labels and conclusions [or] a formulaic recitation of the elements of a cause of action" are insufficient (*Twombly*, 550 U.S. at

555-63) – a rule that applies with special force here, given the pro-comity policies of the FTAIA.

Yet that is all plaintiffs offer to satisfy the FTAIA. Most of plaintiffs' allegations of U.S. effects simply parrot the statutory language without elaboration.[10] Others refer only to effects in foreign countries or assert that U.S. price increases followed foreign ones over time, without even a bare allegation that the latter *caused* the former.[11] Perhaps the closest plaintiffs come to alleging the required effect are the few unadorned assertions that foreign prices negotiated by joint exporters served as "benchmarks" for subsequent U.S. price negotiations. SA25-26 ¶¶111-12; SA29 ¶127; SA33-34 ¶¶144-46. But the complaints do not expressly tie the so-called "benchmarks" to the

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[10] *See* SA3 ¶8(d) (defendants "engaged in an antitrust conspiracy that was directed at and had a direct, foreseeable and intended effect of causing injury ... throughout the United States"); SA11 ¶47 ("Defendants' business activities substantially affected interstate trade and commerce in the United States"); SA26 ¶112 ("Defendants knew and intended that their global conspiracy would directly affect the prices of potash in the United States"); SA34 ¶145 ("Because of the global nature of the potash market, defendants' conduct in other countries has had a direct and intended impact on the potash market in the United States").

[11] *See* SA27 ¶¶117-118 (increase pre-dating class period); SA28 ¶120 (price increases in January 2004), ¶121 (no geographical market identified); SA28-29 ¶¶123-125 (price increases in China and United States, evidently by different amounts), ¶127 (price increases in China, Brazil, and United States by unspecified amounts).

alleged anticompetitive conduct directed at China, India, and Brazil, or assert an agreement among the defendants to use such benchmarks in the United States. Indeed, plaintiffs make no attempt at all to explain *how* foreign prices were used to set domestic ones, the relationship between them, or whether U.S. sales actually were completed at any level relating to the alleged foreign "benchmark" price. In short, the complaints' "benchmark price" allegation "tenders [only] 'naked assertion[s]' devoid of 'further factual enhancement,'" which "do not suffice." *Iqbal*, 129 S. Ct. at 1949 (citation omitted).

II. THE COMPLAINTS DO NOT ALLEGE A PLAUSIBLE CONSPIRACY.

Wholly apart from the FTAIA, the Sherman Act claim must be dismissed because the complaints fail to state a plausible claim for relief. Here, as in *Twombly*, although a "few stray statements [in the complaints] speak directly of agreement, on fair reading these are merely legal conclusions." 550 U.S. at 564. Also as in *Twombly*, once those assertions are put aside, it is apparent that "the complaint[s] do[] not set forth a single fact in a context that suggests an agreement," as distinguished from the wholly lawful parallel conduct that is to be expected in any concentrated industry. *Id.* at 561-62. The district court

therefore erred in failing to dismiss complaints that offer little more than "threadbare recitals of the elements" of the claim. *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009).

A. Under *Twombly* And *Iqbal*, A Complaint Must Be Dismissed If It Does Not Allege Facts From Which An Agreement Can Plausibly Be Inferred.

1. In *Twombly*, the Supreme Court explained that, as a general matter, a complaint "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. ... Factual allegations must be enough to raise a right to relief above the speculative level." 550 U.S. at 555. The Court reaffirmed this standard in *Iqbal*, reiterating that, to survive a motion to dismiss, a complaint must contain "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." 129 S. Ct. at 1949. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice"; "[i]t is the conclusory nature of [a plaintiff's] allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth." *Id.* at 1949, 1951. Under this rule, it is not enough to allege that a defendant may, conceivably, have violated the law; the complaint must "'nudge[] [the] claims ... across the line from

conceivable to plausible.'" *Id.* at 1950-51 (quoting *Twombly*, 550 U.S. at 570).

In a case arising under the Sherman Act, the rule of *Twombly* must be applied within the framework of substantive antitrust law. Because Section 1 of the Sherman Act prohibits only restraints of trade "effected by a contract, combination, or conspiracy," the critical question posed by a motion to dismiss an antitrust complaint is whether the alleged conduct arises from independent action rather than an agreement. *Twombly*, 550 U.S. at 553. And as *Twombly* emphasized, parallel business behavior does not itself "constitut[e] a Sherman Act offense." *Id.* (quotation omitted). "Even 'conscious parallelism,' a common reaction of 'firms in a concentrated market [that] recogniz[e] their shared economic interests and their interdependence with respect to price and output decisions' is 'not in itself unlawful.'" *Id.* at 553-54 (citation omitted). Thus, allegations of naked parallel conduct do not support Section 1 liability because such behavior is ambiguous – "consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." *Id.* at 554; *see also* IV AREEDA &

HOVENKAMP, ANTITRUST LAW ¶1433a (2d ed. 2003) (courts are "nearly unanimous in saying that mere interdependent parallelism does not establish the contract, combination, or conspiracy required by Sherman Act §1").

Follow-the-leader behavior naturally emerges in concentrated markets without collusion because, even when "each firm acts independently in its own self-interest," it knows that its choices "will affect [its competitors], who are likely to respond" with a matching course of action. IV AREEDA & HOVENKAMP, ANTITRUST LAW ¶¶1410b, 1429b. And it is often "implausib[le]" that parallel behavior would take place by deliberately "coordinated action among several firms" – *i.e.*, an agreement – because such "conspirac[ies]" are "incalculably ... difficult to execute." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993).

To avoid dismissal, the plaintiff's obligation at the pleading stage in an antitrust case is accordingly to present conduct "in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Twombly*, 550 U.S. at 557. "Factual allegations must be enough to raise a right to

relief above the speculative level" (*id.* at 555), and "[w]here a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 557). This means, at a minimum, that "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice"; a Section 1 claim must be dismissed if the facts pleaded by plaintiffs have reasonable, and innocent, "natural explanation[s]," *Twombly*, 550 U.S. at 556, 568, consistent with independent action.[12]

This rule is supported by the practical imperative of "hedg[ing]" against "false positives in §1 suits." *Twombly*, 550 U.S. at 554. Allowing speculative claims to proceed causes significant societal harms by

[12] *See In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 909 (6th Cir. 2009) ("the plausibility of plaintiffs' conspiracy claim is inversely correlated to the magnitude" of defendants' independent "economic self-interest in" acting as they did); *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1049 (9th Cir. 2008) ("Allegations of facts that could just as easily suggest rational, legal business behavior by the defendants as they could suggest an illegal conspiracy are insufficient to plead a violation of the antitrust laws."); *In re Elevator Antitrust Litig.*, 502 F.3d 47, 51 (2d Cir. 2007) (parallel conduct identified by the plaintiffs "can reflect similar bargaining power and commercial goals ... and can suggest competition at least as plausibly as it can suggest anticompetitive conspiracy").

deterring efficient, lawful conduct.[13] And plaintiffs impose substantial costs on defendants and the courts when they file speculative complaints in an attempt to use the discovery process to fish for evidence of an agreement from "multibillion dollar corporation[s] with legions of management level employees." *Id.* at 560 n.6. The prospect of engaging in such discovery, at "potentially enormous expense," often will "push cost-conscious defendants to settle even anemic cases." *Id.* at 559. These dangers "'counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint.'" *Id.* at 558 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)). Indeed, because these costs are so daunting in complex international antitrust cases like this one, where "discovery is likely to

[13] *See generally* Mark Anderson & Max Huffman, Iqbal, Twombly, *and the Expected Cost of False Positive Errors*, 20 CORNELL J. L. & PUBLIC POLICY (forthcoming Sept. 2010; cited with permission), *available at* http://tinyurl.com/yyzq54o ("If threatened with antitrust liability, a competitor might be disinclined to attend trade shows, where engineering and marketing improvements – including cost savings, which in a competitive marketplace inure to consumers' benefit – may be discussed. The firm might be disinclined to imitate product improvements implemented by competitors, for fear of the optics of parallel conduct. The firm might be disinclined to match price reductions implemented by competitors for the same reason."); *Valley Liquors, Inc. v. Renfield Imps., Ltd.*, 822 F.2d 656, 659 n.4 (7th Cir. 1987) ("The ultimate determination, after trial, that an antitrust claim is unfounded, may come too late to guard against the evils that occur along the way.").

be more than usually costly" and the discovery process may entail intrusive discovery demands regarding foreign governmental industry regulation, "a fuller set of factual allegations ... may be necessary to show that the plaintiff's claim is not 'largely groundless.'" *Limestone Dev. Corp. v. Village of Lemont*, 520 F.3d 797, 803 (7th Cir. 2008) (citation omitted); *see also Cooney v. Rossiter*, 583 F.3d 967, 971 (7th Cir. 2009) ("height of the pleading requirement is relative to circumstances," such as the cost of discovery and the complexity of the case); Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. Rev. 635, 638 (1989).

2. Applying this standard, the *Twombly* Court found that the plaintiffs had not adequately alleged the existence of a conspiratorial agreement. The plaintiffs, a putative class of subscribers of local telephone services, claimed that four previously regulated incumbent local exchange carriers ("ILECs"), which together controlled 90% of the market at issue, unlawfully inflated charges to customers. 550 U.S. at 550 n.1. The plaintiffs alleged (1) conspiracy in general terms; (2) "parallel conduct" that impeded the growth of smaller competitors; and (3) the absence of competition among the ILECs, as evidenced by their

failure to enter one another's geographic markets despite "profitable" opportunities to do so. *Id.* at 564-69. Plaintiffs claimed that this conduct was anomalous in the absence of a conspiracy among the ILECs.[14]

The Supreme Court held that the complaint failed to state a claim because the plaintiffs based their case on descriptions of parallel conduct and "not on any independent allegation of actual agreement." *Id.* at 564. Rather than present a plausible claim of unlawful joint action, the allegation that the ILECs all resisted entry by smaller rivals had a "natural explanation" that could well be nothing "more than the natural, unilateral reaction of each ILEC intent on keeping its regional dominance." *Id.* at 566, 568. Such allegations of self-interested parallel conduct in an oligopolistic market were not enough to state a claim; otherwise, "pleading a §1 violation against almost any group of competing businesses would be a sure thing." *Id.* at 566. With respect to the allegations that the ILECs refused to compete with one another in local exchange service, the Court concluded that "a natural explanation

[14] Plaintiffs further alleged that defendants' lockstep refusal to compete in local exchange markets conflicted with their independent economic interest and cited statements from an ILEC CEO that suggested collusive intent. 550 U.S. at 566-69 & n.13. None of this, however, was found sufficient by the Supreme Court to support a plausible conspiracy claim.

for the noncompetition alleged" was that the ILECs "were sitting tight, expecting their neighbors to do the same thing," and were "surely [aware of] the adage about him who lives by the sword." *Id.* at 568. That was especially so because the complaint did not "allege that competition [in competitors' service areas as local exchanges] was potentially any more lucrative than other opportunities being pursued by the ILECs during the same period." *Id.*

B. Plaintiffs Have Not Pleaded Facts Plausibly Supporting An Inference Of An Agreement Regarding Potash Prices Or Output.

Against this legal backdrop, the district court erred in refusing to dismiss the complaints. The complaints offer no allegations directly indicating that defendants entered into a price-fixing agreement. They also contain no allegations as to how, when, or by whom the defendants allocated customers or sales, or how or when any of the alleged conspirators agreed on pricing or production.[15] So far as sales in the

[15] That plaintiffs are unable to plead more than parallel conduct and opportunities to conspire is unsurprising. Two government bodies (the Federal Trade Commission and the Australian Competition and Consumer Commission) studied increases in potash prices and concluded that they were attributable to ordinary, global market forces. *See* Letter from Donald S. Clark, Sec'y of the Fed. Trade Comm'n, to Sen. Byron L. Dorgan (Sept. 2, 2008) (reproduced in the Appx. to Petr's 1292(b) Reply (*continued...*)

United States to the putative class are concerned, the complaints allege only that (1) the potash industry was "conducive" to collusion, (2) defendants had opportunities to conspire, and (3) defendants acted in parallel fashion to raise prices and cut production. Precisely the same cookie-cutter allegations could be made about scores of industries doing business in the United States. But it has long been settled, as then-Judge Breyer put it, that "[o]ne does not need an agreement to bring about this kind of follow-the-leader effect in a concentrated industry." *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 484 (1st Cir. 1988), *quoted in Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 53 (7th Cir. 1992). If the oligopoly conduct alleged by plaintiffs were sufficient, "pleading a §1 violation against almost any group of competing businesses would be a sure thing." *Twombly*, 550 U.S. at 566. That approach is not the law.

1. Market structure

Plaintiffs begin by alleging that the potash industry is an oligopoly, marked by high market concentration, sales of a

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Br., Ct. of App. No. 10-8007, dkt. #7); *ACCC Examination of Fertiliser Prices* (July 21, 2008), *available at* http://tinyurl.com/y6v36xx.

"homogeneous commodity product," and high barriers to entry. SA12-14 ¶¶49-59. They suggest that these factors "are *conducive* to a conspiracy" and "*facilitated* defendants' ability to implement the conspiracy." SA14-15 ¶¶56, 66 (emphasis added). But these words themselves reveal that the complaints merely speculate about the *possibility* of collusion. Plaintiffs' allegations concerning the structure of the potash industry simply describe features of an oligopoly – a concentrated, but perfectly legal, market structure. *See Reserve Supply*, 971 F.2d at 50; *In re Late Fee & Over-Limit Fee Litig.*, 528 F. Supp. 2d 953, 964 (N.D. Cal. 2007) ("even if the alleged market were concentrated, this would not render the asserted conspiracy plausible"); *In re Elevator Antitrust Litig.*, No. 04 CV 1178(TPG), 2006 WL 1470994, at *10 (S.D.N.Y. May 30, 2006) ("courts have repeatedly stated that allegations of oligopoly are insufficient to state a claim under the antitrust laws"), *aff'd*, 502 F.3d 47 (2d Cir. 2007). Indeed, plaintiffs' allegations concerning the oligopoly structure of the potash industry actually undermine their subsequent reliance on parallel behavior as suggesting conspiracy because, as we have noted, it is natural for each company in a concentrated market to decide (independently) to price its products or services at the same level

as other industry participants. *See, e.g.*, *Brooke Group*, 509 U.S. at 227; *E.I. Du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 139 (2d Cir. 1984).

Other structural features of the potash industry weigh heavily against the plausibility of collusion. As plaintiffs acknowledge, potash production occurs throughout the world: there are major suppliers in Russia, Canada, Jordan, Israel, and Chile, and 15 countries produce "notable quantities" of it. SA4-8 ¶¶15-32, SA12 ¶50, SA14-15 ¶57-65. Yet cartels are less likely when the alleged participants are spread out geographically. *See* DENNIS W. CARLTON & JEFFERY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 134 (4th ed. 2004). And defendants are but six of numerous potash producers who allegedly control just 71% of the worldwide potash market. SA14 ¶57. Yet when the members of an alleged cartel "control[] less than the whole market," illegal collusion becomes "commensurately less likely." IA AREEDA & HOVENKAMP, ANTITRUST LAW ¶104a & n.76 (collecting cases). Plaintiffs also recognize that potash suppliers vary considerably in size. *Compare* SA4-5 ¶15 (alleging that Agrium produced 1.7 million tons of potash in 2007) *with* SA6 ¶24 (alleging that Uralkali produced 5.1 million tons of

potash that same year). Yet cartels face insurmountable coordination problems when individual members differ in size and costs of production; these differences make it extraordinarily difficult to agree on price or output. *See* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY 148 (3d ed. 2005) (explaining that the "wider the variations" in cost structure, the "less stable the cartel will be); *id.* at 170 ("collusion" is "less successful if the firms in the market are not equally efficient").[16]

In fact, the claim here is considerably weaker than the one rejected in *Twombly*. There, just four ILECs were alleged to control 90% of the national market for local telephone service. 550 U.S. at 550 n.1. Breach of an agreement not to enter one another's territories, of the sort alleged in *Twombly*, is easy to monitor, while the detection of cheating on independently negotiated U.S. prices by members of a global potash cartel would be very difficult. And the relevant buyers in *Twombly* were

[16] In addition, plaintiffs propose an extraordinarily complex price formation mechanism, which involves (1) the setting of term contract prices in Brazil, India, and China; (2) use of these negotiated prices as "benchmarks" to "determine" (in some unspecified way) spot market prices in other markets; and (3) spot prices in turn affecting (again, in some unspecified way) the terms on which buyers in the U.S. negotiate purchases, at prices and under contracts that vary from area to area. SA25-27 ¶¶111, 113-15; SA33-34 ¶¶144-146. Cartels are inherently implausible when pricing is complex, because "cheating [*i.e.*, chiseling by members of the cartel] will be far more difficult to detect." HOVENKAMP, *supra,* FEDERAL ANTITRUST POLICY 150; *see also* GEORGE J. STIGLER, THE THEORY OF PRICE 220 (3d ed. 1966).

consumers with few real options, while purchasers of potash in the United States include large, sophisticated businesses that independently negotiate private, long-term contracts with variable terms and conditions. SA25-27 ¶¶111, 115.[17] In the aggregate, far from being conducive to conspiracy, the characteristics of the potash industry make the antitrust allegation here highly implausible.

2. Opportunities to conspire

Plaintiffs also allege that "'opportunities to conspire' amongst Defendants" nudged the claim here "towards the plausibility threshold." A45; *see also* SA15-20 ¶¶67-86. The district court agreed. In this regard, the court started off by correctly recognizing that proof of opportunity to conspire is not sufficient to make out a Sherman Act claim. A46 (citing *Twombly*, 550 U.S. at 567 n.12); *see also Weit v. Cont. Ill. Nat'l Bank & Trust Co. of Ch.*, 641 F.2d 457, 460, 462 (7th Cir. 1981) (defendants' "ample opportunity to discuss interest rates ... at annual bankers' meetings[] and even on social occasions" did not suggest existence of

[17] For example, class member CHS, Inc. – a $25.7 billion dollar gross revenue company – bargains for a "price advantage" by negotiating simultaneously with six different potash suppliers in various parts of the world subject to different energy costs. *See* CHS, Inc., *Annual Report* (SEC Form 10-K), Aug. 31, 2009, *available at* http://tinyurl.com/y7x5rzl.

conspiracy). It is settled that "[m]ere conspiratorial opportunity is routinely and correctly held insufficient to support a conspiracy finding," lest the Sherman Act "imperil" all manner of perfectly "reasonable and procompetitive collaborations." VI AREEDA & HOVENKAMP, ANTITRUST LAW ¶1417b.

But the district court was wrong in nevertheless finding that defendants' site visits and attendance at trade events *did* plausibly support the inference of conspiracy. *See* A46. In actuality, the meetings identified in the complaint are notable for their *infrequency* and lack of substance. Plaintiffs specifically identify some defendants' involvement in only two plant meetings over the five-year course of the alleged conspiracy. SA17-18 ¶¶74-79.[18] Similarly, despite plaintiffs' conclusory assertion that "trade associations and trade events ... provided opportunities to conspire and share information" (SA19 ¶80), plaintiffs identify only three such meetings conducted over the entire course of the alleged conspiracy period – and only one of these is alleged to have

[18] Plaintiffs assert in conclusory terms that "Defendants have conducted numerous such visits during the Class Period" (SA18 ¶78), but they describe the time and location of only the two, a striking omission given that they are relying on easily accessible press accounts to support this assertion. *See* SA17 ¶74.

been attended by representatives of more than two defendants. SA19-20 ¶¶82-86. If anything, this is a considerably *lower* level of contact among competitors than is typical in other industries. *See, e.g.*, *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1014-17 (N.D. Cal. 2007) (dismissing complaint alleging participation by defendants in approximately thirty industry conferences and events identified by date and location). And notably lacking from the complaints is any allegation that the defendants *actually* exchanged sensitive information and agreed to fix prices in the United States at those meetings. Indeed, the complaints offer no clue how potash sellers – distributed across the globe and of varying sizes and efficient levels of production – could agree on price and output.[19]

a. Meetings among competitors. Plaintiffs assert that defendants' representatives "routinely held meetings ... as part of an 'exchange

[19] The district court also cited defendants' "overlapping business ventures" (Order at 49; *see also* SA15-16 ¶67), pointing to membership in Canpotex. By plaintiffs' own admission, however, Canpotex does not have any marketing, distribution, or sales role in the United States (SA8 ¶31; SA16 ¶68), and the complaints contain no allegations that Canpotex ever conducted any activity involving sales within or into the U.S. market. Plaintiffs ultimately rely on the defendants' participation in Canpotex solely for the opportunities it provided to conspire (SA18 ¶79) – but, as we explain above, the opportunity to conspire is not enough to make out an antitrust claim.

program of mutual visits.'" SA17 ¶74. The allegations concerning these visits, however, are lacking in any detail on how they constituted or furthered an alleged price-fixing conspiracy in the United States. This omission is striking because the meetings were conducted openly in furtherance of routine plant or mine inspection tours. To say the least, it is a novel form of conspiracy where the conspirators hatch their plans at meetings that were – as plaintiffs acknowledge was the case here – the subject of contemporaneous "news reports." *Id.*

Plaintiffs' own language describing the visits underscores their benign nature. At the only such meeting relied upon by the district court (A46), defendants are alleged to have discussed "*what could be deemed* highly sensitive production plans of at least one of the world's largest potash suppliers." SA17 ¶75 (emphasis added). This artful choice of words says nothing about what was *actually* discussed during the October 2005 meeting, is consistent with the discussions related to joint marketing through lawful export associations, and does not

provide any basis to move plaintiffs' allegations from the realm of possibility to that of plausibility.[20]

The district court juxtaposed the timing of the October 2005 tour with certain defendants' production cuts in November and December of 2005. A56. But this is not a situation where the entire industry made "concerted and unprecedented production curtailments ... on the heels" of (*i.e.*, weeks or, in some instances, days after) meetings where the defendants made statements "endors[ing] an industry strategy to reduce ... output." *Standard Iron Works v. ArcelorMittal*, 639 F. Supp. 2d 877, 889 n.7, 892, 897 (N.D. Ill. 2009). Here, plaintiffs "offer no statements by any of the defendants suggesting the presence of an agreement." *In re Text Messaging Antitrust Litig.*, 2009 WL 5066652, at *6 (N.D. Ill. Dec. 10, 2009). Moreover, only two of the defendants – PCS and Mosaic – are even alleged to have reduced production in

[20] As for the other meeting mentioned in the complaints, held in July 2006, plaintiffs allege merely that its purpose was to allow a Uralkali delegation to learn about "Mosaic's management structure" (facts that are neither sensitive nor confidential, as they are discussed in Mosaic's annual report) and to "tour[] potash mining operations of the company." SA18 ¶76. There is no allegation that any price or output information was shared during the tour. The next specific price increase or supply reduction identified by plaintiffs took place over a year later, in October 2007. SA23 ¶98. *See In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 910 (6th Cir. 2009) (parallel behavior four months after a meeting between industry executives did not plausibly suggest a conspiracy).

November and December 2005 (SA20 ¶¶88-89); the others are not alleged to have acted until months later. And plaintiffs themselves offer a "natural explanation" (*Twombly*, 550 U.S. at 568) for the supply cuts: "global demand for potash declined in the second half of 2005." SA20 ¶88.

b. Trade associations. The district court also relied on plaintiffs' allegation that in "May 2007, defendants' representatives attended an IFIA [International Fertilizer Industry Association] Conference during which they 'announced an additional price increase on their potash products.'" A46 (quoting SA19 ¶82). But it is hardly surprising that individual producers would take advantage of an industry-wide conference to talk individually with their customers about a price increase – an increase that plaintiffs do not claim was directed at U.S. purchasers.[21] What *is* perhaps surprising is the suggestion that defendants would conspire to fix prices at a conference attended by their customers. SA19 ¶¶82-83.

[21] The International Fertilizer Industry Association is a not-for-profit industry organization with 525 members in 85 countries. *See* IFA: International Fertilizer Industry Association, *About IFA*, http://tinyurl.com/yy9pnry.

The plain fact is that trade association events are ubiquitous in almost every industry. Such "ordinary and justifiable contact between rivals ... do[es] not suggest existence of a conspiracy," particularly when the alleged competitors "assemble publicly for relatively open meetings conducted with a particular and justifiable purpose in mind." VI AREEDA & HOVENKAMP, ANTITRUST LAW ¶1417b. And again, it is difficult to find anything suspicious in defendants' presence at events that also were attended by "financial analysts, business consultants, trade press representatives and government economists." SA19-20 ¶85. The hollow nature of such allegations explains why the Supreme Court in *Twombly* stressed the inadequacy of attendance at trade association events to support a plausible inference of conspiracy (550 U.S. at 567 n.12), a conclusion embraced by other courts. *See, e.g.*, *In re Travel Agent Comm'n Antitrust Litigation*, 583 F.3d at 910-11; *Blomkest Fertilizer*, 203 F.3d at 1033, 1045; *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d at 1023.

3. Parallel business conduct

a. Production cuts. The complaints allege that "Defendants implemented their conspiracy, at least in part, through coordinated

restrictions in potash output, which resulted in higher prices in the potash market." SA20 ¶87. But plaintiffs support this bare assertion only with tedious recitals of parallel production decisions rather than with evidence of an agreement. SA20-25 ¶¶88-108.

As explained above, similarly timed decisions are to be *expected* as a legitimate and "common reaction of 'firms in a concentrated market that recognize their shared economic interest and their interdependence with respect to price and output decisions.'" *Twombly*, 550 U.S. at 553-54; VI AREEDA & HOVENKAMP, ANTITRUST LAW ¶1425c. There was certainly nothing odd here about firms in a concentrated industry responding similarly to the same market forces, such as a decline in the "global demand for potash" in the second half of 2005 and 2006. SA20-21 ¶¶88, 93. In such a setting, "[e]ach [firm] knows that expanding its sales" would come to the attention of its rivals and trigger a price war to the benefit of none. VI AREEDA & HOVENKAMP, ANTITRUST LAW ¶1410b.

These principles apply with special force in the context of this case. Where demand is largely "inelastic" – as plaintiffs allege here (SA13 ¶54) – declining production "during [a] period of excess capacity [is] at least as consistent with acting in [the producers'] own self-

interest as acting against it." *See, e.g.*, *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 799 F. Supp. 840, 844 (N.D. Ill. 1990), *aff'd*, 971 F.2d 37 (7th Cir. 1992). It is, as the Supreme Court explained, rational at a time of declining demand to "limit[] production" to avoid "accumulation of surplus" that would drive prices down. *Maple Flooring Mfrs.' Ass'n v. United States*, 268 U.S. 563, 583 (1925).[22] Indeed, the complaints do not allege that an alternative strategy of increased production "was potentially any more lucrative than" the one actually pursued by the defendants. *Twombly*, 550 U.S. at 568. Quite the contrary: plaintiffs maintain that defendants' strategy "has been immensely profitable for them." SA34 ¶148. And the experience of the potash industry gave its members particularly compelling individual reasons to limit output when demand weakened, as during a recent

[22] Even if there were potash producers with excess capacity who *could* have brought additional supply onto the market (*e.g.*, SA30-32 ¶¶131-135), that would not mean that it was economically rational for them to do so. In an industry where "[t]he majority of production costs ... are *variable*" it makes sense that there would be "less incentive to operate [] facilities at full capacity" and to adjust supply to meet changing demand. SA13-14 ¶55 (emphasis added). For a producer to have maintained or even increased production, as plaintiffs suggest, while others cut back in the face of diminished demand could have sparked competing overproduction by other suppliers, with catastrophic effects for all. *Reserve Supply Corp.*, 971 F.2d at 53 (when a market leader announces production cuts and corresponding price increases, other firms "'ha[ve] reason to decide (individually) to copy [the] industry").

period of overproduction "the price of potash was at historic lows and the producers were losing millions." *Blomkest Fertilizer*, 203 F.3d at 1034.[23] The alleged conduct thus is fully and most logically explained as independent parallel acts by producers who "surely knew the adage about him who lives by the sword." *Twombly*, 550 U.S. at 568.

b. Price Increases. The complaints' allegations of parallel pricing suffer from precisely the same defects. Plaintiffs assert that "Defendants' collusion is evidenced by unusual price movements in the potash market" (SA25 ¶110) that were "inconsistent and at variance with legitimate market forces and economic trends in this market." SA30 ¶129. The prices are said to "have risen exponentially during the

[23] The district court placed stock in plaintiffs' allegation that the Russian defendants' supply reductions were "radical" and historically "unprecedented." Order 45 & n.22; SA21 ¶93 (alleging that "many years earlier," Russian producers had "sought to maintain volume over price and flooded the market with excess supply"). But as explained above, there is nothing surprising about individually reducing supply in response to falling demand. Nor is there anything suspicious about the Russian producers deciding not to trigger a price war this time around, knowing how disastrous it had been in the past. *See Holiday Wholesale Grocery Co. v. Philip Morris Inc.*, 231 F. Supp. 2d 1253, 1316 (N.D. Ga. 2002), *aff'd*, 346 F.3d 1287 (11th Cir. 2003); *see also* D.E. GARRETT, POTASH—DEPOSITS, PROCESSING, PROPERTIES AND USES (1995) (historically, "great excess of [potash] capacity over the market demand [was] basically caused by the industry being dominated by nationalistic interests. In the former iron curtain countries of Russian and East Germany, for instance, the governments ran the operations and expanded production without much economic control.").

last five years," to "have occurred in lockstep throughout the Class Period," and to be inexplicable "by demand factors." SA30 ¶¶129, 130. But again, there is nothing suspicious in this alleged conduct.

So far as general parallel pricing is concerned, it is axiomatic that "similar prices" may "simply reflect ordinary forces of competition at work." *Clamp-All Corp.*, 851 F.2d at 484 (Breyer, J.). That is so because parallel pricing is consistent with the independent economic interest of the participants: if one company reduces its price in an attempt to gain market share, the others will likely match the lower price, thus defeating the attempt of the first to gain business and ensuring only that all experience lower revenues. *See Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1299 (11th Cir. 2003); VI AREEDA & HOVENKAMP, ANTITRUST LAW ¶1429; HOVENKAMP, *supra,* FEDERAL ANTITRUST POLICY 167 ("Soon firms will learn that any cut threatens collapse of the oligopoly[,] ... [s]o the dominant strategy of each firm is not to [engage in price 'wars'] ... without anything resembling a Sherman Act 'agreement.'").

This principle, too, applies with special force here. "Particularly when the product in question is fungible, as potash is, courts have noted

that parallel pricing lacks probative significance." *Blomkest Fertilizer,* 203 F.3d at 1033. In fact, given the oligopoly structure of the potash market, it would have been "ridiculous" for defendants not to copy each other's prices and pricing methods – as the en banc Eighth Circuit observed in rejecting a prior antitrust complaint against this very same potash industry premised on, among other things, parallel price movements. *Id.* at 1034-35; *see also In re Elevator Antitrust Litig.*, 502 F.3d at 51 ("similar pricing can suggest competition at least as plausibly as it can suggest anticompetitive conspiracy"); *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 122 (3d Cir. 1999) ("In an oligopolistic market … interdependent parallelism can be a necessary fact of life but be the result of independent pricing decisions."); *Reserve Supply Corp.*, 971 F.2d at 40 (in light of "readily available [pricing] information, the fungibility of the product, and the relatively small number of producers," parallel pricing did not support an inference of conspiracy).

In short, the allegations are entirely consistent with a conclusion that "ordinary forces of competition [were] at work." *Clamp-All Corp.*, 851 F.2d at 484. The complaints admit that industry output fell with shrinking demand in the middle of the decade. SA20-21 ¶¶88, 93. And,

as the FTC concluded, prices rose later in the decade during the global economic expansion as a result of increasing demand. *See* Letter from Clark to Dorgan, *supra* n.15, at 2 ("[R]ecent fertilizer price increases are primarily attributable to rising global demand for agricultural crops.").

c. Sales suspensions following the Silvinit sinkhole. Other than follow-the-leader supply and pricing decisions, the only market conduct alleged by plaintiffs and identified by the district court as supporting the conspiracy claim is the alleged decision of certain producers to suspend sales in response to Silvinit's announcement that it might stop shipments from one mine upon discovery of a sinkhole. A47-A48; SA67-68 ¶¶80-85. The district court found it suspicious that these firms "gave up an opportunity to gain market share" at Silvinit's expense. A47. But that is not so.

To the contrary, it is predictable market behavior for producers unilaterally to postpone sales in response to unexpected industry developments until they know whether market conditions *really* have changed in a way that will support a price increase on *all* sales. IV AREEDA & HOVENKAMP, ANTITRUST LAW ¶1415e ("One must not characterize a firm's sacrifice of short-run interest in favor of long-run

interest as contrary to its self-interest. Such a sacrifice by itself tells us nothing about possible conspiracy, because a firm often makes this choice even about noninterdependent matters."). After all, continuing to sell at old, lower prices in the absence of that information would mean that producers might be forgoing available higher prices; on the other hand, a premature and unsustainable price increase could affirmatively harm a producer's long-term market position if conditions have not changed permanently. As plaintiffs themselves allege, subsequent events showed the wisdom of this course: Silvinit resumed sales less than two weeks after its initial suspension (SA23 ¶101), which would have made problematic an immediate price increase by competitors.

In any event, plaintiffs' sinkhole contention collapses under its own weight because it is inconsistent with other allegations in the complaints. As the district court recognized (A47 n.23), Mosaic – the world's second largest potash producer (SA5 ¶18) – is *not* alleged to have suspended sales. *See* SA23 ¶99. The claim that the brief suspension by *some* defendants was part of a broader, long-running conspiracy among *all* of them is belied on its face by the failure of a large producer to participate. Mosaic's decision not to suspend sales also

shows that the other producers' alleged suspensions would have made sense as an exercise of *independent* business judgment; if it had not, the others would have canceled their suspensions once it became clear that Mosaic was still selling. But the complaints allege that the others continued their suspensions until Silvinit announced that it would resume sales. SA23 ¶101.[24]

4. Signals

Finally, plaintiffs cannot inflate ordinary parallel pricing into something more sinister by baldly asserting that the defendants "publicly signaled their willingness to avoid price competition." SA32 ¶136. In substantial part, plaintiffs' description of "signals" rests on a single producer's observation that lawful *overseas* joint ventures might lead to stable prices (SA32-33 ¶¶139-143); but this statement about lawful joint export activity was not an invitation to conspire. Beyond

[24] The district court also found it suspicious that "the announcement of PCS's suspension was made by Uralkali, its purported competitor." Order 48 (citing SA23 ¶99). Notably, however, neither the text of this "announcement" nor the nature of the document in which it allegedly appeared is provided in the complaints. This omission makes it equally likely that Uralkali learned whatever it knew of PCS's action from a PCS public release or a customer; if plaintiffs wish to draw support from the alleged Uralkali statement, they are obligated to provide enough factual context to allow the Court to make a meaningful and informed evaluation of the statement. *Cf. Twombly*, 550 U.S. at 568 n.13.

this, the complaints allege only that one defendant publicly stated, evidently in communications with the investment community, that it would pursue a "price over volume" strategy. SA32 ¶¶136-137. Such a statement by a single producer to the market is not at all probative of conspiracy; the Supreme Court made just that point regarding similar comments by a defendant's CEO in *Twombly*. *See* 550 U.S. at 568 n.13; *see also*, *e.g.*, *In re Baby Food Antitrust Litig.*, 166 F.3d at 133 ("courts generally reject conspiracy claims that 'seek to infer an agreement from ... communications despite a lack of independent evidence tending to show an agreement'"); *Williamson Oil Co.,* 346 F.3d at 1310 ("None of the [public statements] by [defendants] that appellants label 'signals' tend to exclude the possibility that the primary players in the … industry were engaged in rational, lawful, parallel pricing behavior that is typical of an oligopoly."). Like the rest of the thin gruel served by plaintiffs, the conclusory allegations of "signals" cannot sustain the complaints.

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: April 16, 2010

Respectfully submitted,

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