No. 10-8007

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

IN RE: POTASH ANTITRUST LITIGATION (II)

On Petition for Interlocutory Appeal from an Order of the United States District Court for the Northern District of Illinois

MDL Docket No. 1996, Case No. 08-cv-6910

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Plaintiffs almost entirely fail to engage the arguments favoring interlocutory review that are presented in the petition. Their opposition has virtually *nothing* to say about the FTAIA question: it very notably does not deny either that this question satisfies all four § 1292(b) criteria or that the Order will "have [a detrimental] effect on foreign markets . . . while the case remain[s] pending." *United Phosphorus, Ltd. v. Angus Chem. Co.*, 322 F.3d 942, 952 (7th Cir. 2003) (en banc). As for the *Twombly* question, Plaintiffs largely content themselves with (1) boilerplate recitations that § 1292(b) is not appropriately invoked in routine cases and (2) quotations from the district court's analysis of the merits. But this case is hardly routine: the very important legal question how *Twombly* applies in antitrust suits is a recurring and broadly applicable one, while this international suit is itself massive and complex. This is precisely the kind of "big" and "protracted" case that 28 U.S.C. § 1292(b) was designed to address. 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3929, at 365 (2d ed. 1996).

A. Whether this suit is barred by the FTAIA is a question that warrants immediate appellate review.

1. Plaintiffs do not directly take issue with *any* of the points raised in the petition demonstrating the suitability of the FTAIA question for immediate review. To begin with, they evidently accept our description of the holding below: that it treats *foreign* sales as "involving" U.S. commerce under the FTAIA so long as the defendants *also* sell the same product in the United States. Plaintiffs also seem to

recognize that the question whether that holding is correct states a controlling and contestable legal issue. And they ignore our demonstration that this question is especially important because of its effect on foreign markets. Those omissions on Plaintiffs' part are themselves enough to warrant interlocutory review.

2. Moreover, the arguments that Plaintiffs do make are insubstantial. Plaintiffs first suggest that Defendants "waived" the "involving import trade or import commerce" question before the district court by failing to argue it "in either their principal or reply brief." Opp. 16. This contention is simply wrong. It is true that we did not address the point in our opening brief below because we believed that the "involving commerce" exception is self-evidently inapposite here. We did, however, argue the issue in our reply brief, contending that Plaintiffs "wholly misse[d] the point" in asserting that "the FTAIA is inapplicable here because the defendants sold to U.S. customers and the statute does not apply to import sales into the United States." *See* Certain Defendant's Reply at 12 (Dkt. No. 159). That was so, we explained, because "sales and related activity taking place entirely overseas" do *not* constitute activity "involving" U.S. import trade, and therefore "may be used to support a domestic antitrust claim *only* if this foreign activity had a 'direct, substantial, and reasonably foreseeable' effect in the United States." *Id*. (emphasis added). These are the arguments we now repeat before this Court.[1]

[1] Of course, even if we had failed to address the "involving import trade or import commerce" issue, there is simply no doubt that the district court "passed upon" it (cont'd)

3. Plaintiffs also are wrong in their related assertion that review is not warranted because "the District Court [did] not reach" the "direct . . . effect" FTAIA exception. Opp. 18-19. To begin with, the question whether the "involving commerce" FTAIA exception applies in the circumstances here is itself an enormously important question that warrants review: the district court's holding that it does relieve plaintiffs of having to show that the challenged foreign activity had any material effect in the United States, a standard that vastly expands the permissible scope of U.S. antitrust litigation directed at overseas activity.

But beyond that, as we showed in the petition (at 10-11) and as the Third Circuit has recognized, interpretation of the "involving commerce" and "direct effect" FTAIA exceptions is inextricably linked: it is the statute's *contrast* between conduct "involving" and that with a "direct effect" on U.S. commerce that compels giving "involving" "a relatively strict construction." *Turicentro S.A. v. Am. Airlines Inc.*, 303 F.3d 293, 304 (3d Cir. 2002). As leading commentators have noted, § 1292(b) authorizes a court of appeals to "consider any question reasonably bound up with the certified order." 16 FEDERAL PRACTICE AND

(… cont'd)

in its Order. *See* Opp. 17 ("[T]he District Court did decide this issue."). And the courts of appeals may "consider questions of law" that were either "pressed" by the parties *or* "passed upon by the court . . . below." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941). For precisely this reason, as Plaintiffs themselves acknowledge (Opp. 19), "an appeal under § 1292(b) brings up the whole certified order," including any and all issues decided by the district court. *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605, 609 (7th Cir. 2000).

PROCEDURE § 3929, at 388. And that principle applies with particular force in this case because the two FTAIA exceptions are so closely related, turning ultimately here on Plaintiffs' assertion that there is some connection between Defendants' overseas activities and domestic sales. *See* Opp. 18 ("'Defendants knew and intended that their global conspiracy would directly affect prices of potash in the United States.'") (citing Dir. Compl. ¶¶ 112, 144-46).[2] In these circumstances, it is wholly appropriate for this Court to determine whether Plaintiffs have alleged that overseas activities had a "direct effect" on U.S. commerce within the meaning of the FTAIA.[3]

4. Finally, plaintiffs defend the district court's FTAIA holding on the merits in the most conclusory terms, asserting that it is supported by three

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[2] As a "threadbare recital of the elements" necessary to satisfy the FTAIA, Plaintiffs' allegation that "'Defendants knew and intended that their global conspiracy would directly affect prices of potash in the United States'" (Opp. 18 (citing Dir. Compl. ¶¶ 112, 144-46)), is not entitled to be taken as true. *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009) (citing *Iqbal*).

[3] In any event, as the Supreme Court has explained, "[t]he matter of what questions may be . . . resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). The "general rule . . . that a federal appellate court does not consider an issue not passed upon below" is intended to afford the parties an "'opportunity to offer all the *evidence* they believe relevant to the issues'" and to avoid "surprise." *Id*. at 120 (emphasis added) (quoting *Hormel*, 312 U.S. at 556). But where (as here) development of a record is not necessary and surprise not an issue, and where (as here) "'injustice might otherwise result'" from a failure to address an issue on appeal, "a federal appellate court is justified in resolving an issue not passed on below." *Id*. at 121 (quoting *Hormel*, 312 U.S. at 557).

decisions of other circuits. Opp. 17-18. This argument is an obvious makeweight. One of the cited decisions is *Turicentro* – which, as we have explained, casts considerable *doubt* on the district court's ruling here. The other two rulings have nothing at all to do with the issues presented here. Plaintiffs also invoke "the legislative history of the FTAIA" (Opp. 18), but fail even to offer particular citations to that history, let alone explain in what respect they believe it bolsters their case. This argument cannot be thought to cut against interlocutory review.

B. What the *Twombly* pleading standard requires in a Sherman Act case is a question that warrants immediate appellate review.

As for the *Twombly* question presented in the petition, Plaintiffs maintain (1) that it is not suitable for interlocutory review and (2) that the district court's decision is correct on the merits. Both of these contentions are wrong.

1. Plaintiffs argue that denial of a motion to dismiss is almost never suitable for review under § 1292(b) and that, in any event, our argument presents a fact-bound issue rather than a "true question[] of law." Opp. 5; *see id*. at 7 (maintaining that we are "unhapp[y]" "with how the District Court applied *Twombly* . . . to the facts in Plaintiffs' complaint"). But our disagreement with the holding below concerns an unresolved legal question regarding what *Twombly*'s "plausibility" standard *means* in a Sherman Act case, an inquiry that turns in significant respects on substantive antitrust law. Whether an antitrust complaint is supportable cannot be answered in the abstract by *Twombly*'s general principles requiring that a complaint be "plausible on its face" (550 U.S. at 570) or "above the speculative

level" (550 U.S. at 555); *Twombly*'s meaning must be found in the developing legal doctrine that defines what particular types of conduct "plausibly" suggest the existence of a conspiracy in various recurring contexts.

For this reason, Plaintiffs' assertion that this Court has already "concisely summarized" – *in just three sentences* – the entire "legal landscape" concerning "motions to dismiss after *Twombly*" (Opp. 6-7 (citing *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009)) is wrong. Most of the "approximately seventy different cases" that the Plaintiffs claim to have "provided guidance" on this question (Opp. 6-7) do no more than mention *Twombly* in passing, shedding no light on the meaning of its holding. *See, e.g.*, *Rodriguez v. Plymouth Ambulance Serv.*, 577 F.3d 816, 821 (7th Cir. 2009) (citing *Twombly* and stating simply, "The Supreme Court has stated that '[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'"). Moreover, not one of these cases involved an antitrust claim, and thus none provides any guidance on what *Twombly* means within the Sherman Act's unique legal context. Plaintiffs do not contend otherwise. They hardly could: the district court itself *twice* expressed its concern that this Court "has yet to provide post-*Twombly* guidance as to the 'factual enhancement' that would support a claim under Section 1 of the Sherman Act." Order 43; Certification Order 4.

These considerations also demonstrate why Plaintiffs are wrong in contending (Opp. 6-8 & nn.3, 5) that § 1292(b) review is *never* appropriate to

consider denial of a motion to dismiss. As we explain in our petition (at 16 & n.4), this Court routinely grants interlocutory review in such circumstances. In fact, other courts of appeals have granted § 1292(b) appeals on motions to dismiss so as to review, in part, *Twombly*'s application to particular complaints. *See, e.g.*, *Benzman v. Whitman*, 523 F.3d 119, 128-29 (2d Cir. 2008) (in a § 1292(b) appeal, affirming a grant of a motion to dismiss in part because "Plaintiffs' Complaint has not adequately pleaded an allegation of knowing falsity" sufficient under *Twombly*); *Owens v. Republic of Sudan*, 531 F.3d 884, 894-95 (D.C. Cir. 2008) (in a § 1292(b) appeal, affirming a denial of a motion to dismiss in part because plaintiffs had satisfied the *Twombly* pleading standard).

Accordingly, given the "[c]onsiderable uncertainty" that still "surrounds" *Twombly*'s *general* meaning (*In re Elevator Antitrust Litig.*, 502 F.3d 47, 50-52 (2d Cir. 2007) (quotation marks omitted)) – and a lack of guidance from this Court concerning its *specific* meaning with respect to Sherman Act claims – an argument that the district court "misapplied" the "plausibility" standard here presents a contestable question of "pure law" within the meaning of § 1292(b).

2. As for Plaintiffs' defense of the decision below, they simply quote an excerpt from the district court's decision. Opp. 15-16. But reliance on the persuasive force of that opinion as a ground for denying interlocutory review is decisively undermined by the decision itself: Judge Castillo candidly acknowledged that the *Twombly* question in this case is a difficult one and that, in

circumstances like those here, "other courts have reached inconsistent conclusions on the issue." Certification Order 4-5 & n.3. The point is confirmed by conflicting court of appeals authority cited in the petition (at 17 n.5), which Plaintiffs make no attempt to rebut. In the face of such confusion on a matter of such importance, immediate review by this Court is warranted.[4]

C. This is the sort of "exceptional" case to which § 1292(b) applies.

Finally, Plaintiffs declare that § 1292(b) review is reserved only for "exceptional" cases. *See, e.g.*, Opp. 3-4, 10-14, 20. But it should be manifest that this massive international antitrust suit *is* exceptional. Virtually every court to address the matter has "expressly indicate[d] that interlocutory appeal is appropriate . . . in 'big' cases, in which it is expected that prolonged pretrial and protracted trial efforts will follow the disputed ruling." 16 FEDERAL PRACTICE AND PROCEDURE § 3929, at 365 (citing cases). The framers of § 1292(b) themselves explained that such review is warranted "'where a decision of the appeal may avoid protracted and expensive litigation, as in antitrust and similar protracted

[4] Plaintiffs question the existence of a letter from the Federal Trade Commission to Senator Byron L. Dorgan that is described in the petition at 3 n.1, and that also had been cited to the district court. *See* Opp. 14 n.7. The petition cited an Internet URL pointing to a "cached" copy of the letter. In the time since we filed our opening brief, Google appears to have taken down the cached website. We regret any confusion this may have caused and have attached a copy of the letter as an appendix to this reply.

cases.'" *Id*. at 367 (quoting Report, 1958 U.S. Code Cong. & Admin. News 5260–61).

This case is thus exactly the kind of "exceptional" case in which § 1292(b) was meant to apply. Plaintiffs do not dispute our showing (Pet. 14) that further proceedings in this litigation will be extremely burdensome and expensive, both for the parties and for the district court. Nor do they deny that, as we explain in the petition (*id.*), these considerations apply with special force in this case because the district court's decision resolved legal issues of substantial practical importance and widespread applicability that have significant implications for the foreign relations of the United States.[5]

Finally, Plaintiffs are incorrect when they argue against review because the possibility that they might "replead" means that reversal on appeal will "not necessarily terminate this action." Opp. 9. By Plaintiffs' reasoning, no lawsuit would ever terminate on a motion to dismiss because the plaintiffs could always "replead." But dismissal motions under the FTAIA and *Twombly* commonly result in the final termination of burdensome antitrust class action lawsuits like this one. *See, e.g.*, *In re DRAM Antitrust Litig.*, 546 F.3d 981 (9th Cir. 2008) (affirming

[5] Plaintiffs' assertion that granting immediate review in this case will "lead to a flood of applications for interlocutory appeals" (Opp. 10) and "eviscerate the final-judgment rule" (Opp. 14) is without merit. The requirement of district court certification is "the indispensable first step of [a] § 1292(b) appeal" that stands between the courts of appeals and litigants with "fragmentary and frivolous appeals." 16 FEDERAL PRACTICE AND PROCEDURE § 3929, at 371.

district court's dismissal under the FTAIA and its denial of leave to amend as futile); *William O. Gilley Enters., Inc. v. Atlantic Richfield Co.*, 588 F.3d 659 (9th Cir. 2009) (affirming district court's dismissal under, in part, *Twombly* and its denial of leave to amend as futile).

In any event, there is no reason to believe that Plaintiffs here *could* "replead" to avoid the deficiencies of the Complaints. Plaintiffs never suggested below an intent or ability to add additional facts to the Complaints – and, if they could have pled more than foreign trade activity with indirect effects on U.S. markets, or parallel conduct and opportunities to conspire,[6] they surely would have done so from the beginning. In any event, we must show only that "an immediate appeal from the order *may* materially advance the ultimate termination of the litigation" (28 U.S.C. § 1292(b) (emphasis added)) – *i.e.*, that "interlocutory reversal *might* save time for the district court, and time and expense for the litigants." *Johnson v. Burken*, 930 F.2d 1202, 1206 (7th Cir. 1991) (emphasis added) (citation omitted). That burden is satisfied here.

CONCLUSION

The petition for interlocutory appellate review should be granted.

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[6] As the Supreme Court has explained, "oligopolistic price coordination or conscious parallelism" is "not in itself unlawful." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993). Although parallel behavior is not uncommon in "concentrated markets," it is generally "implausib[le]" that it would take place by deliberately "coordinated action among several firms" because such "conspirac[ies]" are "incalculably . . . difficult to execute." *Id*.

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The undersigned attorney hereby certifies that on February 8, 2010, pursuant to the parties' agreement, she caused one copy of this Reply and the attached Appendix, and a CD-ROM containing a digital version of the Reply and the attached Appendix to be placed with a third-party commercial carrier for overnight delivery to the following:

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