IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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IN RE COPPER ANTITRUST LITIGATION M.D.L. Docket No. 1303

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VIACOM, INC., as successor by merger to CBS Corp. (f/k/a Westinghouse Electric Corp.), and EMERSON ELECTRIC CO.,

Plaintiffs,

OPINION AND ORDER

99-C-0621-C

v.

SUMITOMO CORPORATION, SUMITOMO CORPORATION OF AMERICA, GLOBAL MINERALS AND METALS CORPORATION, R. DAVID CAMPBELL, and CREDIT LYONNAIS ROUSE, LTD.,

Defendants.

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Plaintiffs Viacom, Inc. and Emerson Electric Co. brought this civil action against defendants Sumitomo, Inc., Sumitomo Corporation of America, Global Minerals and Metals Corporation and Credit Lyonnais Rouse under §§ 4 and 12 of the Clayton Act, 15 U.S.C. §§ 15 and 26, for violation of § 1 of the Sherman Act, 15 U.S.C. § 1. Plaintiffs contend that defendants conspired to raise the price of copper to artificially high prices by manipulating the copper futures market on the London Metal Exchange and the Comex division of the New York Mercantile Exchange and through the acquisition of warrants for physical copper cathode in the United States and abroad. Plaintiffs have added claims against defendants for violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), federal common law and various state unfair trade practice and antitrust laws. The Sumitomo defendants have settled this action, leaving only defendants Global and Credit Lyonnais as defendants.

Jurisdiction over the federal antitrust, RICO and federal common law claims is present, pursuant to 28 U.S.C. § 1331. Jurisdiction over the state unfair trade practice and antitrust claims exists by virtue of supplemental jurisdiction. 28 U.S.C. § 1367.

The case is before the court on defendants' motion for summary judgment on all of plaintiffs' claims and on plaintiffs' motion for partial summary judgment on the issue of antitrust standing only. I conclude that plaintiffs lack standing to pursue their antitrust claims because their injuries are indirect, their claims pose a risk of duplicative and multiple recoveries against defendants and the calculation of their damages would be extraordinarily complex.

Defendant Credit Lyonnais Rouse has adopted defendant Global's motion for summary judgment and added another reason why its motion for summary judgment should be granted: plaintiffs have adduced no evidence that the activities in which Credit Lyonnais is alleged to have participated could have caused any of plaintiffs' alleged injuries or that this defendant had any intent to manipulate the United States physical copper market. Plaintiffs have alleged in their complaint only that Credit Lyonnais financed and cleared copper futures and options on the London Metal Exchange and the overseas over-the-counter market for Sumitomo and acted as one of nine clearing brokers for defendant Global. Defendant Credit Lyonnais is correct that, with the exception of an untimely expert affidavit that cannot be considered, see discussion below, plaintiffs have not made an adequate showing of this defendant's liability. Plaintiffs have adduced no evidence to show that allegedly illegal activity affecting the London Metal Exchange or the overseas over-the-counter market had any effect upon the market for physical copper in the United States or even that the disruption of the American physical copper market was a reasonably foreseeable consequence of the conspiratorial acts of which defendant Credit Lyonnais would have been aware. However, it is not necessary to address this claim in any detail because of my conclusion that plaintiffs lack standing to pursue their antitrust claims.

Plaintiffs' RICO claims fall with their antitrust claims because the remedies provision of the RICO statute, 18 U.S.C. § 1964(c), is modeled on section 4 of the Clayton Act and requires the same showing for standing. Plaintiffs' common law claim based on fraud on the market will be dismissed because the undisputed facts show that plaintiffs cannot make the requisite showing that the price of physical copper is tied directly to the price on the exchanges. The full price plaintiffs paid for copper included a premium that was negotiated separately in a face-to-face transaction and that became an integral part of the final price.

I will exercise my discretion to dismiss plaintiffs' state law claims without prejudice once the federal claims are dismissed. A federal court is ill equipped to determine defendants' liability under state law, particularly when plaintiffs have alleged the violation of the antitrust and unfair trade practices laws of ten different states. (Originally, plaintiffs alleged that 17 states were involved; they have voluntarily withdrawn their claims as to seven of the states.)

Before discussing the motions for summary judgment it is necessary to address defendants' motions to strike. Both defendants moved to strike the affidavit of Paul Dewison and its accompanying exhibits and defendant Credit Lyonnais filed a separate motion to strike the affidavit of Reginald R. Smith of June 12, 2001, and attached documents. Plaintiffs submitted all of these materials for the first time with their reply to defendants' opposition to plaintiffs' motion for summary judgment. In opposition to the motion to strike, plaintiffs argue that the materials were nothing more than a response to arguments raised by defendants in their brief in response to plaintiffs' motion. In making this argument, plaintiffs ignore the fact that the subject of the expert materials is an issue that has been before the court from the beginning: the relationship of the London Metal Exchange to Comex and the physical copper market. Plaintiffs had no hope of holding defendant Credit Lyonnais liable for any damages or of establishing standing against this defendant unless they could make this link explicit. There is no basis for their argument that they needed an opportunity to respond to "new" arguments. Both motions to strike will be granted.

From the record and the proposed findings of fact proposed by the parties, I find that the following facts are relevant and undisputed.

UNDISPUTED FACTS

A. The Parties

Plaintiff Viacom, Inc., formerly known as Westinghouse Electric Corp., is a corporation incorporated in Delaware, with its principal place of business in New York, New York. Plaintiff Emerson Electric Co. is a corporation incorporated in Missouri, with its principal place of business in St. Louis, Missouri. Former defendant Sumitomo, Inc. is a corporation organized under the laws of Japan, with its principal places of business in Tokyo and Osaka, Japan. Former defendant Sumitomo Corporation of America is a corporation organized under the laws of New York, with its principal place of business in New York. (I will refer to both corporations as Sumitomo.) Defendant Global Minerals and Metals corporation is a corporation organized under the laws of Delaware, with its principal place of business in New York. Defendant Credit Lyonnais Rouse, Limited, is a corporation duly organized under the laws of England, with its principal place of business in London.

During the time relevant to this suit, plaintiff Viacom's predecessor, Westinghouse, owned a large copper wire rod and copper wire fabrication facility in Abingdon, Virginia. Between 1990 and 1995, Westinghouse purchased copper cathode for the Abingdon facility from producers such as Asarco, Cyprus Mines, Kennecott, Kidd Creek, Magma, Mitsubishi and Noranda. At the same time, plaintiff Emerson was buying copper magnet wire from Phelps Dodge and Essex Group Incorporated. (Emerson is not relying on its copper purchases from Essex to support its claim to antitrust standing.)

B. The Commodities Futures Trading Commission

In an investigation of Sumitomo's trading, the Commodities Futures Trading Commission found that defendants Sumitomo and Global had manipulated the physical copper and copper futures markets in the United States. It concluded among other things that Global and Sumitomo had established and maintained large and dominating futures positions in copper on the London Metal Exchange with the intent of manipulating the price of copper and that in "October through December 1995, they acquired a dominant and controlling cash and futures market position, which directly and predictably caused copper prices, including prices on the United States cash and futures markets, to reach artificially high levels." June 30, 1995 Order of Commodity Futures Trading Commission, Smith

Affid., dkt. #336, Exh. 2 at 2.

C. <u>The Copper Market</u>

During the period 1990-1996, the majority of copper cathode sold in the United States was produced using a three-stage process consisting of (1) mining and concentrating copper ore to produce copper concentrate; (2) smelting copper concentrate and copper scrap to produce copper blister or anode or both; and (3) refining copper blister, anode and scrap to produce copper cathode. (Copper cathode can also be produced through a process known as SX-EW, which does not require smelting and refining.) At each stage of the traditional process, it is common for producers to buy and sell substantial quantities of copper products, including copper concentrate, copper scrap, blister, anode and copper cathode. They do this for a variety of reasons, including marketing considerations, geography, mismatches between a producer's manufacturing facilities and unforeseen events. Their sources may be unaffiliated third parties or partially owned affiliates. In the latter case, the purchases are frequently made on an arm's length basis.

Copper cathode is the only copper product traded on the London Metal Exchange or Comex Division of the New York Mercantile Exchange. Also, it was the primary copper product available for delivery against London Metal Exchange futures contracts during the relevant period, although copper wire rod could also be used.

Approximately 39% of the copper cathode that plaintiffs purchased and for which they are asserting antitrust damages claims in this action can be traced to copper cathode purchased previously by plaintiffs' suppliers from third parties. The original source of the remaining copper purchased by plaintiffs cannot be determined. It is impossible to determine whether the copper purchased by plaintiffs was purchased previously by their suppliers.

Between 1990 and 1995, Westinghouse resold approximately 75-80% of the copper cathode it purchased to merchants and other customers in the same form it purchased it, that is, through long-term contracts to purchase and resell cathode.

Brook Hunt & Associates, Ltd. is a consulting firm for the mining and metal industry. It tracks the movement of copper concentrate, anode and blister among mines, smelters and refineries on an annual basis and publishes the information.

D. Westinghouse's Abingdon Warehouse

Westinghouse operated a warehouse at its Abingdon wire facility. This warehouse had many of the attributes of a bank: producers made deposits of copper cathode and withdrawals of copper cathode. Westinghouse charged a small fee for the paper work associated with the transfers. The copper itself never moved from Abingdon. Thus, Kennecott could send a trainload of copper cathode to Abingdon, where it would be stored for eventual conversion to wire; Kennecott might transfer some of this copper to Asarco or Magma to pay off a copper "debt" it had incurred or it might obtain permission from Westinghouse to satisfy some of its supply obligation to the company with cathode from another supplier's account. Much of the cathode was sold and resold in the same form many times over. Many of the companies that bought the cathode hedged their purchases on the futures market. In addition, it was not unusual for a Westinghouse supplier to ship copper cathode to Westinghouse at Abingdon for credit to another producer's account.

Asarco shipped copper to Westinghouse's warehouse at Abingdon, Virginia, from Asarco's refinery in Amarillo, Texas. Along with other suppliers, merchants and customers, Asarco used the warehouse to store copper cathode it acquired from third parties that also used the warehouse for storage, as reflected in toll reports that Westinghouse has produced. The reports do not provide any information regarding the terms of any transfers of copper, that is, whether the transfers occurred as a result of swaps, exchanges or purchases, but there is no economic distinction among swaps, exchanges or purchases. All of them are transactions in which each party surrenders something of value in return for something else.

Between 1990 to November 1995, Asarco acquired over 225,000,000 pounds of copper cathode from third parties at the Abingdon warehouse. On average, 30% of Asarco's total copper cathode sales to Westinghouse during this period were of copper cathode that

Asarco had acquired from other companies that had stored copper cathode at Westinghouse. In 1994, the proportion was over 62%. Asarco acquired the copper through a purchase, exchange or swap.

E. Plaintiffs' Suppliers

1. Asarco

Between 1990 and 1996, Asarco was Westinghouse's biggest supplier, providing 706,885,000 pounds of copper, or 62% of the copper for which plaintiff Viacom is seeking damages in this case. Between 1993 and 1995, Asarco purchased at least 153,000,000 pounds of copper cathode from third parties for delivery to its Amarillo refinery. It is not possible to determine how much of this copper cathode was resold to Westinghouse. In addition, Asarco purchased another 155,000,000 pounds of copper cathode. It is not possible to determine whether this cathode was delivered to Amarillo or whether any of it was sold to Westinghouse.

Between 1990 and 1996, Asarco bought copper cathode from Gerald Metals, a merchant. In addition to its purchases of copper cathode, Asarco purchased pre-cathode copper, including copper concentrate, anode and scrap, from outside sources during the same period because its smelters had more capacity than its mines could fill and its refineries had more capacity than its smelters could fill. In some years, Asarco's anode purchases for its

Amarillo refinery totaled 8,000 to 9,000 tons a month. There is no way to determine whether third-party pre-cathode products were used to manufacture the cathode that Asarco sold to Westinghouse.

Asarco acquired copper blister or anode or both from as many as twelve different smelters as well as from copper traders. Of the twelve smelters, two were wholly-owned; three were partially owned and the rest were unaffiliated. Also, Asarco acquired copper concentrate from as many as 50 mines around the world, three of which it owned, 13 of which it partially owned and the rest of which were unaffiliated. Data from Brook Hunt show that between 1990-1995, the feed for Asarco's wholly owned smelters that fed the Amarillo facility came from these sources: (1) wholly owned mines (49.0% - 72.7%); (2) partially owned mines (4.7% - 13.4%); (3) mines unaffiliated with Asarco (0.5% - 24.6%); and (4) merchants (13.4% - 22.2%). The same data show that the feed for Asarco's partially owned smelters that fed the Amarillo refinery came from the following sources: (1) wholly owned mines (0%); (2) partially owned mines (77.9% - 91.4%); (3) unaffiliated mines (3.4% - 15.1%); and (4) merchants (1.6% - 7.0%).

As much as 41% of the copper refined at Asarco's refineries was purchased from unaffiliated suppliers. Asarco used third-party pre-cathode copper to manufacture copper cathode for sale to customers such as plaintiffs. It is not possible to determine whether third- party pre-cathode copper was resold to plaintiffs in the form of copper cathode and if so, how much. Asarco's purchases of copper, including copper cathode and pre-cathode copper, were made at prices indexed to LME or Comex prices.

______(Plaintiffs assert that defendants have misrepresented the amount of pre-cathode copper that Asarco bought. They cite Asarco's 10-K filings in which the company said it was self-sufficient in the supply of copper concentrate for its smelting operation and the lack of any data in the Brook Hunt reports indicating shipments from Chemetko to Asarco's Amarillo facility. Asarco's 10-K's do say that the company was self-sufficient in some years but the same 10-K's show that the company's refining output exceeded its smelting output routinely and that its smelting output exceeded its mining output in all but one year. The Brook Hunt data show the shipments from Chemetko under the name Alton.)____

2. <u>Kennecott Utah Copper Corporation</u>

Kennecott was Westinghouse's second largest supplier. It is located in Utah and supplied approximately 12% of the copper Westinghouse bought between 1990 and 1996. According to Westinghouse's reports, Kennecott purchased over 200,000,000 pounds of copper cathodes from other companies that maintained tolling accounts at Westinghouse's Abingdon warehouse from 1990 to 1995. (Copper is "tolled" when it is delivered to a facility for conversion into another form rather than sold outright; the copper at Abingdon was stored there for conversion into copper wire.) Kennecott received only 67,000,000 pounds of copper cathode in its tolling account through railroad or truck shipments; the majority of copper cathode in its tolling account was acquired from third-parties. The remaining copper that Kennecott needed to meet its supply contract with Westinghouse was resold to the company from Kennecott's account. The cathode that Kennecott sold to Westinghouse could change hands several times before it arrived at Abingdon.

Kennecott purchased pre-cathode copper in the form of anode and scrap from Magma when its own smelter was inoperable during parts of 1994 and 1995. It paid for the copper at prices based in part on the London Metal Exchange or Comex exchange. It is not possible to determine with precision how much pre-cathode copper Kennecott purchased from Magma.

3. Magma

Magma sold 9,100,000 pounds of copper cathode to Westinghouse in 1994, or 0.6% of the copper at issue in this case. In 1994, Magma purchased at least 2,000,000 pounds of copper for delivery to Abingdon from Gerald Metals. In addition, Magma frequently purchased substantial amounts of copper cathode from many different sources, including producers, merchants and copper consumers. Between 1990 and 1996, Magma acquired copper concentrate from 23 mines, as well as from merchants. Of the 28 mines, five were wholly owned, two were partially owned and the remainder were unaffiliated. From 1990 to 1996, Magma purchased pre-cathode copper to fill its smelters from at least 24 different suppliers, including merchants and producers such as Asarco, Kennecott and Cyprus. Magma obtained between 37% and 40% of the copper for its refineries from third parties. Also, Magma sold copper concentrate to third parties, including Metallgesellschaft, and sold anode to suppliers, including Asarco, Cyprus, Kennecott, Phelps Dodge and Noranda. Magma's purchases of copper, including copper cathode and pre-cathode copper, were at prices indexed to LME and Comex prices.

4. Phelps Dodge

Phelps Dodge was plaintiff Emerson's largest supplier, providing all of the copper for which plaintiff Emerson claims damages, or about 232,000,000 pounds, from 1990 to 1996. Phelps Dodge sold copper magnet wire to Emerson under an agreement that committed Emerson to purchases of specified quantities of copper cathode from Phelps Dodge at a Comex-based price. Phelps Dodge Magnet Wire, a subsidiary of Phelps Dodge, would then fabricate the cathode into copper magnet wire for a separate fabrication fee.

The wire that Phelps Dodge sold to Emerson was made principally from copper rod manufactured at Phelps Dodge's rod mill in El Paso, Texas. Some of the wire that Phelps Dodge Magnet Wire manufactured for Emerson was made from copper rod acquired from outside sources. Phelps Dodge purchased over 65,000,000 pounds of copper cathode for its

El Paso rod mill between 1990 and 1995.

Phelps Dodge owns a refinery in El Paso, Texas, that obtained pre-cathode copper from 13 smelters, one of which was wholly owned, three of which were partially owned and the remainder of which were unaffiliated. Phelps Dodge purchased over 192,000,000 pounds of blister and almost 37,000,000 pounds of scrap for the refinery between 1992 and 1996. Phelps Dodge's smelters processed copper concentrate from 25 mines, only three of which were wholly owned and six of which were partially owned. In 1993, for example, Phelps Dodge purchased 119,350,689 pounds of concentrate. Phelps Dodge's purchases of copper, including copper cathode and pre-cathode copper, were at prices indexed to LME and Comex prices.

5. Mitsubishi International Corporation

Mitsubishi was Westinghouse's fourth largest supplier. (Plaintiffs are not making any federal antitrust claim for damages resulting from purchases made from this supplier.) Mitsubishi owned a joint interest in a copper production facility until 1991. All of the copper cathode that Mitsubishi sold to Westinghouse was purchased by Mitsubishi from a third-party at a price derived from a Comex price plus a negotiated premium.

6. Cyprus

Cyprus sold 42,666,544 pounds of copper cathode to Westinghouse in 1990 and 1991. Cyprus bought copper cathode from Kennecott during the period 1990 to 1996 and purchased pre-cathode copper from at least one third-party source from 1990 to 1996. (It purchased copper anodes and copper concentrate from Magma.). Cyprus purchased 22,000,000 pounds of copper cathode from other suppliers with accounts at Westinghouse's warehouse at Abingdon, which is 40% of the cathode Cyprus received in its toll account at Westinghouse. The toll reports confirm direct railcar shipments of 42,666,544 pounds of cathode to Westinghouse.

7. Noranda and Kidd Creek

Considered together, Noranda and Kidd Creek, which Noranda acquired in 1994, were Westinghouse's third largest supplier. Toll reports from the Abingdon warehouse show that from 1993 to 1995, over 80% of the copper cathode received into Noranda's toll account was purchased by Noranda from a third-party storing copper cathode at the warehouse. Noranda sold copper cathode to Westinghouse for delivery at locations other than Abingdon, such as the Phelps Dodge rod mill in Norwich, Connecticut. It is not possible to tell whether the copper cathode delivered by Noranda to non-Abingdon locations for Westinghouse was purchased by Noranda from outside sources. Noranda purchased pre-cathode copper from more than 50 mines. It purchased anode from Magma and scrap from Essex for conversion into cathode.

In at least one of its contracts with Westinghouse, the parties agreed that Noranda would provide "Kidd Creek FKA Brand Full-Plate Electrolytic Copper Cathodes" or "other equivalent brands if agreed between Buyer and Seller."

F. Hedging

It is routine for participants in the copper market to hedge their physical copper purchases and sales as a means of protecting themselves against the risk of price movements in the physical copper market. They do so by trading futures and options contracts on the London Metal Exchange, Comex or over-the-counter. A futures contract is a form of security traded on an exchange that obligates the holder to buy or sell a fixed quantity of a commodity at a fixed price at a specific future date. The advantage of such a contract is that it gives the holder the ability to sell or buy back the commodity before making delivery by entering a second, equal and opposite contract and paying or receiving the difference between the price of the first and second contracts. Put options protect against downside loss on a stock or commodity; as the price falls, the holder of the put has the choice of either selling the put and keeping the stock or exercising the put and selling the stock at the strike price set in the put. David L. Scott, Wall Street Words 299-300 (1988). Option purchasers pay a premium that compensates the counterparty for assuming a one-sided risk. The premium equals the value of the option and fluctuates as underlying prices changes. If prices fall, the put option increases in value, as the likelihood increases that the option will be exercised.

Phelps Dodge, Asarco, Noranda, Magma and Cyprus all used strategic hedges with their annual copper production to varying degrees; Phelps Dodge employed transactional hedges with 100% of the copper it sold to plaintiff Emerson on a forward basis, that is, it would buy futures contracts in an amount equivalent to the amount of physical copper it had agreed to deliver to Emerson in the future. At delivery time, it would sell the contracts back at the average price. Phelps Dodge's goal was to achieve the Comex average. The net of the price that it received from Emerson and the net of the realization from the futures transaction would yield the Comex average price. Phelps Dodge also hedged by selling put options.

Magma and Asarco hedged by selling both futures contracts and options. Westinghouse's merchant customers hedged their purchases of copper cathode from Westinghouse. Westinghouse did not use futures contracts or put options to protect itself. Instead, it priced its long term purchase contracts for copper cathode on the basis of the monthly average Comex settlement price in the month of delivery and then resold most of the copper cathode delivered to it at a similar price.

All hedging involves the taking of equal but offsetting positions to protect against the risk of price movements.

G. Other Litigation

Four of plaintiffs' suppliers submitted claims totaling approximately $2.7 billion for their purchases of copper cathode and rod and $1billion for their purchases of raw materials in the California litigation against defendants Sumitomo and Global. Asarco's claim against the settlement fund was based on purchases of over 500,000,000 pounds of copper cathode made between January 1, 1993 and June 1996. This figure included approximately 120,000,000 pounds of copper that Asarco sold to Westinghouse from 1993 to 1995. Kennecott asserted a claim against the settlement fund based on its copper cathode purchases of $96,500,000 as well as a $69,500,000 purchase of copper anode from Magma. Magma submitted claims to the California court based on purchases of copper anode, blister, scrap and other pre-cathode copper products totaling $1,160,000,000. Essex submitted claims to the California claims administrator totaling $1,800,000,000.

Traders on Comex submitted claims against a settlement fund of more than $100,000,000 established by Sumitomo and defendants to settle a class action brought by Comex traders to collect damages for the alleged manipulation of the copper futures market by defendants during the same period at issue in this case. Metalgesellschaft traded on the

LME; it asserted a claim against defendants based on allegations similar to those asserted in this case. Its case was dismissed for lack of subject matter jurisdiction. It has not said whether it will file a new claim in England.

H. Pricing

In general, there are two distinct components to physical copper pricing, whether the product is copper cathode or pre-cathode copper: one component is the price for copper futures contracts traded on the London Metal Exchange or Comex; the second is a premium or discount that varies depending on supply and demand, shipping costs, the business cycle, payment terms, the contracting party's desire for a profit and other considerations. If a purchaser is buying cathode that it wants converted to rod, it pays an additional rod premium that varies depending on supply and demand, costs, the fabricator's prior history with the customer, its desire to retain the customer and the particular specifications for the finished rod.

No single Comex price is quoted and used by all participants in the physical market at any one time. Instead, there are 24 different Comex prices, one each for delivery in the present month and in each month up to two years in the future. Physical copper buyers may use any one of these prices or a combination of them as an element of the price they pay for copper. Between 1990 and 1996, buyers and sellers of copper cathode might have used the

Comex month average price for the month of delivery, the Comex price at a particular time during the month of delivery, firm pricing, forward fixed pricing and the previous day's Comex closing price, among other prices.

Plaintiffs did not use the same pricing method, although their purchases of copper cathode were indexed to the Comex price. Westinghouse priced its purchases on the basis of either the monthly average Comex settlement price in the month of delivery, the Comex spot price at the time of purchase or a fixed price based on the prevailing futures market price at the time of delivery. (A "spot price" or cash price refers to the price for a transaction in which the commodity is to be delivered immediately or nearly so. Scott, supra at 57-58). Plaintiff Emerson purchased 90% of its copper by setting the price with its supplier in advance of delivery by reference to the then prevailing futures price for a contract due in the month of delivery. In other words, Emerson knew when it bought copper cathode what it would be paying for it when it took delivery in the future.

Westinghouse made the majority of its purchases on the basis of the average Comex first position settlement price in the month of delivery, that is, the average price for immediate delivery in that month. It matched its annual and spot purchase contracts with its suppliers to particular resale contracts the company had negotiated previously or that it expected to negotiate. It negotiated the pricing terms for both contracts to insure that it would earn a profit on the transactions and insulate itself from the effect of copper price fluctuations on the Comex market. For example, it would negotiate a contract for the purchase of copper cathode at a price equal to the "arithmetic average of [Comex] first position settlements for high grade copper during the calendar month of scheduled shipment plus a monthly premium based on product and destination," Trenchard Affid. III, dkt. #360, Exh. 51, often discounting the premium for cash in advance or for location or both. Then it would negotiate a resale contract with a premium discount to the buyer that was less than the premium discount it had made to the seller. Throughout the period in question, Westinghouse made substantial profits on its copper cathode trading operations.

In at least one of Westinghouse's supply contracts with Asarco, see Trenchard Affid. I, dkt. #358, Exh. 9, the parties agreed that if either believed that the Comex quotations for copper were not "properly representative of relevant market conditions then the parties [could] negotiate with a view to reaching a mutually agreeable alternative pricing basis as to all future shipments under this contract." In at least one contract with Noranda, the parties agreed that Westinghouse would have the right to elect different pricing options (averaging or spot) during the term of the agreement provided that it gave notice to Noranda before a quotational period for the Comex price chosen.

Plaintiff Emerson's pricing strategy was to "forward price" up to two years in advance of delivery as a tool for controlling the price it paid for the copper wire it purchased. In deciding the forward prices they wanted to lock in, Emerson and its divisions took into account general market information, copper prices, the present and anticipated demand for copper and projected copper prices. In practice, each of Emerson's divisions would notify the person responsible for buying copper cathode of the amount it wanted to purchase and the price it wanted. The buyer would then place an order with Phelps Dodge for a certain amount of copper cathode at the desired price; when the Comex prices for delivery in a relevant future month dropped within the range of acceptable prices, the price would be fixed and the copper would be delivered at that price. In a number of instances, the purchase orders expired unexecuted because the price never fell low enough.

Because plaintiffs used a variety of pricing mechanisms, the impact of any manipulation of the futures market upon the prices plaintiffs paid would vary widely. For example, forward pricing such as plaintiff Emerson's would tend to insulate Emerson from the effects of any "squeeze" in the market, that is, any long manipulations of the market in which the manipulator buys copper futures contracts in excess of the copper supply that can be delivered immediately, accepts the delivery that is made and exacts an artificially high price from persons who have sold the commodity short. Such manipulations have a greater effect upon spot prices than upon forward prices. ("Backwardation" or "inverted market" refers to the market condition in which "spot" or nearby prices are higher than forward prices. This is the opposite of the typical condition in which future prices are higher than spot prices (a condition known as "contango"). Scott, supra at 199.)

As a matter of economics, an alleged manipulation of the copper futures market would not be expected to have a direct, predictable, uniform or sustained effect on the price of physical copper in either the short or the long term. The existence of indexing would not have caused plaintiffs to pay artificially inflated prices for the bulk of the copper cathode they purchased over the long term, with the exception of those contracts that were negotiated before the defendants' alleged manipulation took effect and after the buyers had lost their ability to negotiate adjustments in the premium. This is because physical copper prices are influenced by fundamental supply and demand forces. When the price rises beyond what buyers are willing to pay, economic pressures force prices back to competitive levels as buyers seek out substitute products and sellers accumulate excess inventory.

I. Records

Neither Westinghouse nor many of the third parties, including Asarco, Magma and Phelps Dodge, could locate documents relating to the source of the copper that plaintiffs purchased. This is not only because many of their documents have been lost or destroyed but because the companies do not create such records pursuant to their usual business practices.

The nature of the refining process makes it impossible to determine whether the copper cathode purchased by plaintiffs was cathode processed from pre-cathode copper the suppliers had purchased for resale or from the pre-cathode copper extracted from the suppliers' own mines. It is impossible to determine the source of copper cathode used to manufacture the wire that was delivered to plaintiff Emerson by its suppliers.

Plaintiffs and their suppliers have not produced records sufficient to determine the Comex prices for all of the purchases claimed in this action. The Comex prices during the years at issue are a historical fact. However, the total prices that plaintiffs paid for copper cannot be determined unless plaintiffs can produce records relating to their copper purchases. Plaintiffs have given no indication that they can do so and have acknowledged that they no longer have examples of contracts with Magma and Cyprus.

OPINION

I. ANTITRUST CLAIMS

A. Antitrust Standing

Plaintiff Viacom is asserting antitrust claims on behalf of Westinghouse Electric Co., a predecessor to Viacom, for Westinghouse's purchases of approximately 1,150,000,000 pounds of copper cathode from suppliers, including Asarco, Cyprus Mines, Kennecott, Kidd Creek, Magma, Mitsubishi and Noranda, which it made from 1990 until November 1995, when it closed its Abingdon, Virginia facility. Plaintiff Emerson Electric Co. is asserting an antitrust claim for approximately 232,300,000 pounds of copper magnet wire it purchased from Phelps Dodge, from January 1990 through June 1998. Plaintiffs describe their suppliers as integrated copper producing companies, meaning that they owned mines, smelters and refineries.

Plaintiffs do not contend that they made any purchases from any of the defendants or that they traded copper futures contracts on either the Comex or LME. Thus, they have an uphill battle to wage if they are to prevail on their standing claim. Under the Supreme Court's decision in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), standing to sue for damages for alleged price fixing is "limited to individuals who purchase supra competitively priced products directly from a violating party." Rozema v. Marshfield Clinic, 977 F. Supp. 1362, 1375 (W.D. Wis. 1997). Plaintiffs argue that their claim to standing is based on an equally direct antitrust injury caused by defendants' illegal actions intended to affect the market in which plaintiffs traded. They maintain that such a claim was given recognition in Sanner v. Board of Trade, 62 F.3d 918 (7th Cir. 1995). In that case, the plaintiffs were soybean farmers who claimed that they had suffered antitrust damages as a result of the defendants' conspiracy to cause a sudden drop in soybean cash crop prices and to maintain those prices at artificially depressed levels. The district court had granted the defendants' motion to dismiss the complaint for lack of standing. The court of appeals held that when the plaintiffs' allegations were viewed in the light most favorable to plaintiffs, they made out a claim of antitrust standing and withstood defendants' assertions that the causal chain linking the futures and cash markets was too attenuated to permit the court to attribute any decline in the cash value of the soybeans to the manipulation of the futures market. The court found the plaintiff farmers' allegations sufficient to suggest that the two markets were so closely related that the distinction between them was of no consequence to the standing analysis. Id. at 929.

Plaintiffs contend that the artificially high prices they had to pay for physical copper were directly and explicitly tied to Comex and LME prices in the same way as the soybean cash and futures prices in Sanner and that they had no option but to pay those prices. Their allegations are sufficient to require additional inquiry to determine whether plaintiffs can meet the tests for antitrust standing. Antitrust standing is distinct from standing under Article III of the Constitution. In both instances, plaintiffs must show an injury in fact, but in antitrust actions, plaintiffs must make the additional showing that they are the proper parties to bring a private antitrust action. Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 535 n.31 (1983). Plaintiffs must show both that there is a connection between the alleged wrongdoing of the defendants and their own injury and that the injury is attributable to the "anti-competitive aspect of the conduct under scrutiny." Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334 (1990). Only those who are in the best position to vindicate the alleged violation have standing to sue. Blue Cross & Blue Shield v. Marshfield Clinic, 881 F. Supp. 1309, 1315

(W.D. Wis. 1994). In summary, a plaintiff must prove an injury in fact, that is, that defendants' actions have caused injury to plaintiff's business or property; the injury is not too remote or duplicative of the recovery of more directly injured persons; the injury is one that the antitrust laws were intended to prevent and flows from the defendants' illegal conduct; and the damages claimed measure the injury in a reasonably quantifiable way. In re Copper Antitrust Litigation (Loeb Industries, Inc. v. Sumitomo Corporation), 196 F.R.D. 348, 355 (W.D. Wis. 2000) (citing II Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶360 (rev. ed. 1995); Associated General Contractors, 459 U.S. at 537-45).

The burden is on plaintiffs to show that they have standing. II Areeda & Hovenkamp, supra at ¶ 360. They cannot simply argue that defendants have failed to show that they lack such standing. At this stage of the litigation, plaintiffs must demonstrate that they have definite and particularized proof to support their claim of antitrust standing.

B. Requirements of Antitrust Standing

1. Injury in fact

The first element of standing plaintiffs must prove is that they suffered an injury in fact as a result of defendants' actions. The complaint states a causal connection between an antitrust violation and harm to plaintiffs and it alleges that defendants intended to cause that harm. In the order denying defendants' motion to dismiss in this case, I found that plaintiffs' allegations were sufficient in this respect. Plaintiffs had alleged that the London Metal Exchange and Comex constitute one copper exchange market; prices of copper exchange contracts dictate the price for the purchase and sale of physical copper; and the cash price for physical copper is directly related to and dictated by copper exchange contract prices. This was enough to show that the injuries plaintiffs had suffered were of the type that Congress sought to redress or prevent through the antitrust laws and that there was a direct, causal connection between defendants' market restraint and plaintiffs' injuries.

The undisputed facts bear out plaintiffs' allegations that there is a causal connection between manipulation of the futures market and higher prices in the physical market. Whether that connection is direct enough to give plaintiffs antitrust standing is another question. See Associated General Contractors, 459 U.S. at 537: "[T]he mere fact that the claim is literally encompassed by the Clayton Act does not end the inquiry."

2. Remoteness of injury and duplication of recovery

a. Remoteness of injury

The second standing element requires a closer focus on the directness of the injury. Now that the record has been fleshed out with discovery, it is clear that the relationship between manipulations of the futures market and particular transactions in the physical copper market is neither direct nor predictable but subtle and complex. It is undisputed that the futures market affects the cash market, as the Commodity Futures Trading Commission found; what that effect might be on any particular transaction is a subject of considerable dispute. Because there is a wide range of pricing options and pricing strategies available to buyers of physical copper, any manipulation of the futures market will have different effects upon transactions, even those negotiated in the same month. For example, a manipulation in the form of a squeeze that raises the price of spot transactions will have a lesser effect, if any at all, on a forward contract tied to a price 24 months in the future.

The number of exchange-based pricing formulas, the variety of pricing strategies that buyers use, the laws of supply and demand and the premiums and discounts that reflect supply and demand make it enormously difficult to track the particular influence of the futures market on any one physical copper purchase. The individual decisions that go into physical copper purchases are intervening factors that refute plaintiffs' assertion of a direct, causal connection between a manipulation of the futures market and an effect on a particular transaction.

In opposition to the extensive evidence that defendants produced to show the complexities of the alleged link between the two markets, plaintiffs have produce no evidence to the contrary, except the CFTC finding. Instead, they simply reiterate their argument that their claims are based solely on the "surcharge" they had to pay on the exchange-based portion of the price for copper cathode as a result of defendants' manipulations. They assert that these surcharges mirror the manipulations in the futures market and can be determined easily simply by comparing the historical price set by the exchanges and comparing it to what it would have been without a manipulation.

Plaintiffs' assertions about the surcharge and the manner in which it could be computed are not borne out by the undisputed facts or by anything that plaintiffs have submitted in the way of proof. At this stage of the proceedings, after seven months of discovery devoted to standing, more is required of plaintiffs than mere assertions about the ease in which a court could determine the link between defendants' actions and plaintiffs' alleged antitrust injuries. Plaintiffs should be able to explain the way in which this could be done in detail and with examples.

Plaintiffs have avoided discussing the complexities of the relationship between the indexed component of the price for physical copper and the premium by disavowing any interest in making claims for damages based upon the increases in premiums. Rather, they argue, they are simply looking to recoup the penny for penny increase in the indexed component that they allege was caused by the manipulation. In saying this, plaintiffs have not only ignored the complexity of the link but have downplayed the inseparability of the premium from the total price. They have tried to portray the price of physical copper as easily divisible into its two components. As I understand it, their position is that if the indexed price for a certain month was \$.95 and the records show that plaintiffs bought copper in that month for \$1.00, the premium could only be \$.05. This approach ignores the undisputed fact that buyers and sellers of physical copper negotiated the premiums to take into consideration such matters as supply and demand and that the total price might well represent a discount on the indexed price. Unless one knows the exact amount of the premium paid and what it represented, one cannot know whether the exchange-based price was discounted for one reason or another. Physical copper prices respond to forces of supply and demand and will deviate from futures prices if the futures prices do not accurately reflect those factors. The negotiation of the premium allowed traders to account for these factors and for others as well.

Taking account of the factors intervening between the manipulation of the futures market and the prices plaintiffs paid for physical copper, including the skillfulness of the people who bought copper cathode for plaintiffs, and the unrebutted evidence that the futures market does not move in lockstep with the physical copper market, I conclude that plaintiffs' injuries are too remote from defendants' alleged wrongdoing to give plaintiffs standing to sue for redress. This conclusion does not mean that defendants will escape sanctions for their alleged manipulation. They have been fined by the CFTC, sued by indirect purchasers in the state courts in California and sued by the most direct victims of their conspiracy, the copper futures market traders, in federal court in New York.

Although the conclusion that plaintiffs' injuries are too remote to give them antitrust standing could dispose of this part of the case, I will address the remaining Associated General Contractors requirements.

b. Potential duplication of recovery

1) "first purchaser theory"

The second prong of the second inquiry relates to the potential duplication of recovery. Plaintiffs contend that their claim avoids the potential for duplicate recoveries that doomed the plaintiffs in Loeb Industries, Inc., 196 F.R.D. 348. In Loeb, the plaintiffs were dealers in scrap copper, who alleged that they had been injured each time they bought copper at prices indexed to a market that defendants had manipulated. The plaintiffs were denied standing because they were buying and selling copper that had been bought and sold previously, posing the risk that defendants would be liable for dozens of transactions involving the same copper and involving a new pass-on charge with each transaction. In this case, by contrast, plaintiffs argue that they are the "first purchasers" with respect to their purchases from integrated producers that mined, smelted and refined the copper they sold to plaintiffs. As "first purchasers," they argue, they can sue for damages without concern that the copper cathode they were buying had been bought and sold before or produced from raw copper products that had been bought and sold, that is, without concern that antitrust damages had been passed along from one purchaser to another. Their injuries would be direct and not prohibited under Illinois Brick as potentially duplicative of the injuries of other purchasers.

In their motion for partial summary judgment, plaintiffs focus on specific purchases of copper cathode Westinghouse made from Asarco and from Kennecott and on plaintiff Emerson's purchase of copper cathode delivered in the form of copper magnet wire from Phelps Dodge Magnet Wire Company. Plaintiffs believe that these purchases were "first purchases" and that neither the cathode nor its raw materials had been the subject of any previous sale or purchase. They allege that the Asarco and Kennecott copper delivered to Westinghouse was purchased under a contract requiring these companies to supply their own brand of cathode and that the unit price (cost per pound) was to be determined by the average Comex contract settlement prices for the month of shipment plus a separate and distinct premium. They allege that over 95% of the copper cathode used to make the magnet wire delivered to plaintiff Emerson was derived from Phelps Dodge's own mines and that it was purchased at a Comex-based price plus a separate and distinct premium.

In the order denying defendants' motion to dismiss this case, I assumed for the purpose of that decision that plaintiffs had bought copper cathode directly from the copper extractor so that their claims would not duplicate those of other purchasers of copper. Again, discovery has changed my original view of plaintiffs' claims. It has become apparent that plaintiffs' allegations painted a picture of the copper industry that does not reflect reality. As the undisputed facts establish, showing that purchases of copper cathode were made directly from an integrated copper producer does not prove that the cathode has never been bought or sold before, whether as cathode or as pre-cathode (concentrate, anode, blister or even scrap). Three factors in particular make it unlikely that any purchaser could insure that it is the "first purchaser" of the product it buys. First, even integrated purchasers like Kennecott, Asarco and Phelps Dodge acquire raw materials and copper cathode from many sources. Even when the acquisitions are from subsidiaries, they are generally arm's length transactions charged off on the books at market prices. Thus, there is a potential problem of passing on and duplication of recovery. Second, once copper is refined, it is impossible to know its provenance. No one can say whether any particular copper cathode was once Asarco's ore or someone else's scrap. All that can be said is that it is of a certain quality or purity. Third, even copper cathode that is "branded" after refining is treated as fungible. This is demonstrated by the transactions that Westinghouse recorded in its warehouse, where it was the usual process for producers to transfer copper among themselves to fulfill supply contracts with Westinghouse. Producer A could fulfill its supply contract with Westinghouse with copper that had been credited to producer B's account, often after the copper had gone through several previous account transfers.

Plaintiffs argue that none of these factors presents an impediment to its suit. They maintain that the only physical copper market that defendants targeted and that is at issue in this case is the market for copper cathode, so that it is irrelevant whether plaintiffs' suppliers bought concentrate or anode or blister to supplement their own supplies. They add that because defendants did not target pre-cathode copper, the pricing of this commodity was not affected directly, as was the pricing for copper cathode. Moreover, they argue, defendants traded exclusively in copper cathode during the relevant time period, not pre-cathode copper; pre-cathode copper is not traded on the exchanges defendants manipulated or contained in the warehouses defendants cornered; the pre-cathode copper their suppliers obtained is minuscule in comparison to the amount they produced themselves; and those producers who did acquire small amounts of pre-cathode copper experienced enormous windfall profits on their sales of the copper cathode that was targeted.

Plaintiffs' attitude toward the targeting of pre-cathode copper is a switch from the position they took in their original complaint, in which they alleged that they had sustained damages for the purchase of such pre-cathode copper because the prices for those products was dictated by the prices of futures contract on the copper futures market. Plaintiffs cannot avoid the force of that admission. The undisputed fact is that pre-cathode copper is priced with reference to the futures market, just as copper cathode is. Even if defendants were targeting only the market for copper cathode and even if the warehouses contained only cathode, as plaintiffs allege, defendants' actions would have affected the prices of pre-cathode copper. Therefore, if the copper cathode that plaintiffs purchased included pre-cathode copper products that the supplier had purchased, one consequence is that both plaintiffs and their suppliers would be in a position to claim damages resulting from defendants' manipulation of the futures market. Defendants would be subjected to the risk of unwarranted multiple liability.

Plaintiffs suggest in their brief that the suppliers could not have passed on any increases in the prices they had to pay for pre-cathode copper because they were "price takers" that could charge only the market price for copper cathode as set by the manipulated exchanges. This argument makes little sense. If the suppliers paid an artificially high price tied to Comex for their pre-cathode copper and sold the refined copper to plaintiffs at an artificially high price tied to Comex, the suppliers passed on an artificially high price, whether or not they were "price takers." Both the supplier and plaintiffs could claim a resulting injury. If plaintiffs are suggesting that, as "price takers," their suppliers were not in a position to pass on any artificially high price but rather had to absorb the high prices they had paid previously, plaintiffs must be saying that the suppliers were often forced to sell at a loss. If this is their argument, they have not explained why the suppliers would be willing to do so. Even if there were some surface plausibility to this suggestion, it does not square with plaintiffs' charge that their suppliers realized windfall profits during the period at issue. As to the "minuscule"nature of the amounts of pre-cathode copper purchased by plaintiffs' suppliers, at least four of them have filed claims totaling several billion dollars in the California state court litigation based on their purchases of pre-cathode copper.

Arguing that the myriad transactions involving copper cathode sales at the Abingdon warehouse are not fatal to their "first purchaser" claim, plaintiffs argue that the possibility that some of their purchases may not have been "first purchases" goes only to the question of damages. So long as some of their purchases were first ones, they maintain, they have standing to bring this action. The difficulty with this argument is that plaintiffs have not shown that they can prove that they were first purchasers as to any of the copper at issue. To the contrary, the undisputed facts indicate that plaintiffs cannot identify any copper cathode transaction and say with confidence that the copper had not been bought and sold previously. I will acknowledge, however, that it is possible that plaintiffs could show that a certain percentage of their copper purchases from certain suppliers were first purchases even if they cannot identify particular transactions. This does not end the inquiry, however, because it is undisputed that plaintiffs' suppliers and customers engaged in hedging their sales and purchases and that this hedging could give rise to duplicate claims for the same transactions on which plaintiffs rely for their claims.

2) hedging

The importance of hedging to the question of potential multiple liability is the fact that, by its nature, hedging adds to the number of transactions involved in every sale of copper. The buyer hedges its purchase of copper before it takes delivery and pays the supplier; the supplier hedges its production before it makes delivery and receives its payment. Each transaction (the seller's hedge, the purchase and the buyer's hedge), gives rise to a potential claim against defendants under plaintiffs' theory that all purchases are tied directly to the futures markets. Thus, Asarco would hedge its production or its particular contract with Westinghouse; Westinghouse would enter into a matching transaction at the same time it agreed to buy from Asarco; and Westinghouse's customer would hedge its agreement to buy the same copper from Westinghouse. Some or all of those transactions might give rise to potential claims if the indexed price at the time of the transactions was artificially high.

Rather than deny the integral nature of hedging to the copper market, plaintiffs take the position that none of the hedging is relevant to the question of duplicate recovery, for four reasons. First, most of the hedging strategies engaged in by their suppliers involved put options. Second, defendants have no real support for their position that the claims of the futures market participants are more direct than plaintiffs' claims other than the testimony of their expert economists, both of whom rely on an illusory perfect hedge and the distinctness of the two markets. Third, defendants have no legal authority that supports their position that the possibility of claims for hedging losses precludes claims for losses on the physical copper market and a similar argument was rejected in Sanner v. Board of Trade, 62 F.3d 918 (7th Cir. 1995). Fourth, suppliers are not likely to file claims in the futures litigation because they all made net profits in their hedging during the years in question. None of these arguments has merit.

a) put options and strategic hedging

Plaintiffs are correct that put options differ from futures contracts and that the evidence shows that some of the suppliers relied on hedging their entire copper production rather than specific transactions. However, these differences do not affect the analysis. The premiums of put options rise and fall with the market; if plaintiffs' suppliers paid artificially high prices for their put options, they have as good a claim against defendants for the market manipulation as plaintiffs do. Strategic hedges present the same specter of overlapping claims for recovery as do transaction-specific hedges because some proportion of the copper production sold to plaintiffs is covered by the production hedge. Even if I were to accept plaintiffs' argument and focus solely on the transaction-specific hedges that involved futures contracts, I would face inordinate difficulties in determining which if any of the transactions at issue pose no risk of duplicating another potential claim.

b) economic evidence

Plaintiffs attack the value of defendants' expert testimony by saying that the experts rely on illusory perfect hedges. This is a mischaracterization of the experts' affidavits. Kenneth R. Cone, one of defendants' experts, has explained that he does not rely on "perfect hedges." Rather, he explains at length why any kind of hedge will give rise to the potential of duplicative recovery. In any event, plaintiffs' challenge is misguided. It does not require expert economic theory to understand that under plaintiffs' theory, both the seller of a commodity who hedges the sale by buying a futures contract at an artificially high price and the buyer who pays an artificially high price have potential claims against the manipulator of the market because they are using the same futures market price as their price index. These claims would duplicate each other because they arise out of the same copper transaction. In this situation, the manipulator would be subject to multiple claims for the same conduct. It makes no difference whether the potential claimants will actually pursue their claims; the concern is with the possibility. It was this concern that led the Supreme Court to hold in Illinois Brick v. Illinois, 431 U.S. 720 (1977), that only direct purchasers of a supra competitively-priced product could sue for antitrust damages. Two policy concerns animated the Court's decision: the transformation of "treble-damages actions into massive multiparty litigations involving many levels of distribution and including large classes of ultimate consumers remote from the defendant," id. at 745, and the enormity of the task that courts would face in attempting to determine damages incurred at each level of distribution. II Areeda & Hovenkamp, supra ¶ 346c ("The point to be drawn from Illinois Brick and its predecessor, Hanover Shoe, is the practical one that the effectiveness of the antitrust remedy would be undercut if the task of tracing antitrust injuries and determining damages becomes overly complex.").

c) hedging in Sanner

Plaintiffs argue that in Sanner, 62 F.3d 918, the court of appeals rejected the idea that the possibility of duplicate claims for hedging losses would prevent the plaintiff farmers from bringing an antitrust claim. Their argument is disingenuous. Sanner said nothing about the possibility of duplicative recoveries resulting from hedging in connection with the plaintiffs' claim to standing. If the defendants in that case argued that plaintiffs' claims would duplicate the futures markets claims because the farmers had engaged in hedging, the court of appeals never addressed that argument.

d) suppliers' hedging profits

Plaintiffs argue that any hedging engaged in by their suppliers should be ignored because there is no evidence that their suppliers lost any money hedging and therefore no reason why they would want to submit claims in the pending futures market litigation. Plaintiffs miss the point. The issue is not whether the suppliers had net profits but whether they were injured by artificially high prices. If a manipulation caused the suppliers to make less money on their trades than they would have made without the manipulation, they have a potential claim.

In summary, in order to be sure of avoiding the risk of multiple liability, it would be necessary to determine whether plaintiffs had bought copper cathode that had been previously purchased by a supplier, whether the copper cathode had been made from pre-cathode copper purchased from outside sources, whether the supplier hedged its sale to plaintiffs and in what manner and whether the supplier would have a futures market claim derived from that hedging. Plaintiffs have not shown how such a determination might be made. It is not self-evident.

3. Injury that antitrust laws were designed to prevent

The third inquiry is whether the injury is one that the antitrust laws were designed to prevent and whether it flows from defendants' illegal conduct. This inquiry has no independent significance in this case that I can discern. Its importance lies in helping courts identify injuries that are caused by illegal conduct and "connect the alleged injury to the purposes of antitrust laws." II Areeda & Hovenkamp, supra, ¶ 361. It can play a part in weeding out injuries that are not antitrust injuries, such as those caused by competition. In Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477 (1977), for example, Pueblo, an operator of bowling centers was held not to have standing to sue Brunswick even though it could show that Brunswick's acquisition of failing bowling centers was a violation of the antitrust laws. The impediment to suit was Pueblo's inability to show that it would suffer an antitrust injury from the acquisitions. Pueblo was seeking damages for increased competition; increasing competition is what the antitrust laws are intended to encourage. Therefore, Pueblo was not damaged in the antitrust sense when it was "deprived of the benefits of increased concentration." Id. at 488.

As alleged, defendants' market manipulations constitute antitrust violations. The question is whether plaintiffs' injuries flowed from that conduct or whether, as discussed above, the connection is so indirect that it cannot be said that the antitrust laws were intended to protect plaintiffs from the conduct.

4. Complexity of damages calculation

I turn to the fourth inquiry, which is whether the damages claimed measure the injury in a reasonably quantifiable way. The short answer is that they do not. As I have explained, just the task of tracing what happened to the copper at issue is a daunting challenge. Calculating damages for these plaintiffs would be the kind of massive and complex undertaking that the Supreme Court has warned against. See Associated General Contractors v. Carpenters, 459 U.S. 519, 545 (1983) ("massive and complex damages litigation not only burdens the courts, but also undermines the effectiveness of treble-damages suits") (citing Illinois Brick).

Like the plaintiff in In re Copper Antitrust Litigation (Ocean View Capital, Inc. v. Sumitomo), M.D.L. Dkt No. 1303 (W.D. Wis. July 23, 2001), plaintiffs fall back on the possibility of statistics and estimates as a means of determining both the amount of "first purchase" copper they acquired and the damages sustained as a result of those acquisitions. It is notable, however, that they do not suggest how such a statistical analysis would proceed, what data they would rely upon to make the estimates or how they would tie average amounts of copper purchases to prices paid in a particular month. Moreover, as I have noted, plaintiffs have shied away entirely from the inordinately difficult problem of disentangling the premium from the indexed price, saying simply that they are not pursuing any claim for any artificiality in the premium amount.

I conclude that plaintiffs fail the Associated General Contractors test for antitrust standing. Defendants are entitled to summary judgment on this issue.

II. RICO CLAIMS

As plaintiffs admit in their brief in opposition to defendants' motion for summary judgment, dkt. #369, the considerations required to show that a racketeering act was the proximate cause of their injury are similar to those set out in Associated General

Contractors, 459 U.S. 519 (1983). See Holmes v. SIPC, 503 U.S. 258 (1992) (applying to RICO same approach that Associated General Contractors developed for antitrust); International Brotherhood of Teamsters v. Philip Morris, 196 F.3d 818, 825-26 (7th Cir. 1999) (denying standing to labor union and trust fund to assert RICO claims because the "injury for which the plaintiffs seek compensation is remote indeed, the chain of causation long, the risk of double recovery palpable because smokers can file their own RICO suits, and the damages wickedly hard to calculate").

Plaintiffs cannot satisfy the requirements for antitrust standing under Associated General Contractors. Therefore, their claim for standing to assert RICO claims fails as well.

III. FEDERAL COMMON LAW CLAIMS

In their second amended complaint, plaintiffs alleged that defendants knowingly misrepresented and concealed material facts from plaintiffs with the intention that plaintiffs would rely on defendants' misrepresentations and omissions to their detriment, as participants in the copper cathode market, and that plaintiffs would be kept from learning of defendants' covert and illegal conduct. This fraud on the market theory of liability derives from Basic, Inc. v. Levinson, 485 U.S. 224 (1988), a case in which the Supreme Court held that the ordinary requirement of reliance can be presumed in a case in which the plaintiff alleges that he was injured by misleading statements regarding the value of stock of a particular company.

> "The fraud on the market theory is based on the hypothesis that, in an open and developed securities market, the price of a company's stock is determined by the available material information regarding the company and its business . . . Misleading statements will therefore defraud purchasers of stock even if the purchasers do not directly rely on the misstatements. . . . The causal connection between the defendants' fraud and the plaintiffs' purchase of stock in such a case is no less significant than in a case of direct reliance on misrepresentation."

Id. at 242 (quoting Peil v. Speiser, 806 F.2d 1154, 1160-61 (3d Cir. 1986)). The Court distinguished the "modern securities markets, literally involving millions of shares changing hands daily [] from the face-to-face transactions contemplated by early fraud cases." Id. at 243-44.

If plaintiffs could show that the prices for their purchases of physical copper turned solely on the futures market prices, Basic, Inc. would relieve them of any need to prove that they had relied on defendants' misrepresentations in each transaction. As I have found however, plaintiffs cannot make such a showing. Even if it were sufficient to show a fraud on the market simply by proving that a portion of the total price for a particular copper transaction was artificially high as the result of misrepresentations, plaintiffs have not come forward with any evidence that they could disentangle the allegedly affected price from the total price paid. The undisputed evidence is that the prices plaintiffs paid for copper cathode purchases were arrived at only after vigorous negotiation of the purchase price and that the indexed price was only one component of the total price.

IV. STATE LAW CLAIMS

Plaintiffs have asked that the court relinquish jurisdiction over the state law claims if the federal claims are dismissed. That request will be granted. Defendants oppose it, understandably, because they would prefer to have all of the claims resolved at this time. However, federal courts are generally admonished not to retain jurisdiction over state law claims when the federal basis for jurisdiction has disappeared except in a few limited circumstances, none of which exists in this case. The statute of limitations has not run on the state law claims, the litigation has not proceeded so far in this court that it would cause another court an unwarranted duplication of effort to decide the state law claims and the state law claims are neither frivolous nor so clear that there is no doubt how they should be decided. Wright v. Associated Insurance Cos., 29 F.3d 1244, 1251 (7th Cir. 1994). See also Groce v. Eli Lilly & Co., 193 F.3d 496 (7th Cir. 1999) ("it is the well-established law of this circuit that the usual practice is to dismiss without prejudice state supplemental claims whenever all federal claims have been dismissed prior to trial"); Wentzka v. Gellman, 991 F.2d 423, 425 (7th Cir. 1993) (retention of jurisdiction over state law claims improper when state law was unsettled); 28 U.S.C. § 1367(c)(1) (district court may decline to exercise supplemental jurisdiction if claim raises novel or complex issue of state law).

Defendants suggest that the court can decide the state law claims easily because the issues are neither novel nor complex. They are wrong. Plaintiffs' claims raise difficult factual and legal issues. For example, plaintiffs contend that they have significant contacts with each of the ten states whose laws they are relying upon; defendants dispute this contention vigorously, saying that it is obvious that plaintiffs have limited contacts at best. Defendants say that these limited contacts defeat plaintiffs' claim because plaintiffs would not be allowed to sue for antitrust damages in a state if it could not be said that the state legislature had the intent to remedy injuries such as those alleged that were suffered by non-residents. Defendants add that to the extent a state legislature would try to legislate remedies for injuries suffered outside the state by non-residents, it would be running afoul of the commerce clause of the United States Constitution. Defendants may be correct but their contention does not end the inquiry. It would be necessary to determine the exact extent of plaintiffs' contact with each of the ten states, which is a complicated and controverted matter. It would take considerable time and careful research to determine the amount of contact required to avoid commerce clause questions or to insure that the state legislature intended to expand antitrust remedies to persons in the position of these plaintiffs. The relationship of state laws to the commerce clause is a complex subject in and of itself.

Plaintiff Viacom is a resident of New York. It might have sufficient contact with New York to bring it under the reach of the state's antitrust laws and avoid any commerce clause problems. If so, it would be necessary to decide whether New York law permitted antitrust actions by indirect purchasers before 1998, when it passed its "Illinois Brick" repealer statute. Only one court has ruled on this question; it was not a New York court but a federal district court in Washington, D.C. The federal court's decision may well be the correct resolution of the question but until a New York court rules on the matter, it cannot be said that the question has been settled.

Defendants suggest that a choice of law analysis might resolve the matter; plaintiffs say such an approach is ludicrous. Obviously, this is not a clear cut issue. Defendants argue that the question of plaintiffs' claims for relief under state law is not a difficult one because the states that have adopted repealer statutes have not rejected the holding in Associated General Contractors that governs the disposition of the federal antitrust claims in this case. Even if defendants are correct, it does not follow that it would be possible simply to adopt the Associated General Contractors analysis used in this case for the state law claims. It would be necessary to consult the relevant state law to see exactly how the courts in that state have interpreted and applied the analysis. In short, there are enough knotty questions of state law that retaining jurisdiction over plaintiffs' state law claims would require an unseemly intrusion into matters of state law.

ORDER

IT IS ORDERED that

1. The motion for partial summary judgment filed by plaintiffs Viacom Inc. and

Emerson Electric Co. is DENIED;

2. The motion for summary judgment filed by defendants Global Minerals and Metals Corporation and Credit Lyonnais Rouse, Ltd., is GRANTED in full except with respect to plaintiffs' state law claims;

3. Jurisdiction over plaintiffs' state law claims is relinquished and they are DISMISSED, without prejudice;

4. Defendants' motion to strike the affidavit of Paul Dewison and its accompanying affidavits is GRANTED;

5. Defendant Credit Lyonnais Rouse's motion to strike the June 12, 2001 affidavit of Reginald R. Smith and its attached documents is GRANTED.

The clerk of court is directed to enter judgment for defendants on all of plaintiffs' claims except their state law claims and close this case.

Entered this 24th day of August, 2001.

BY THE COURT:

BARBARA B. CRABB
District Judge