IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

IN RE: COPPER ANTITRUST LITIGATION	:	M.D.L. Docket No. 1303
CBS CORP. (f/k/a Westinghouse Electric Corp.) and EMERSON ELECTRIC CO.,	:	
Plaintiffs,	:	99-C-621-C
v.	:	OPINION AND ORDER
SUMITOMO CORPORATION, SUMITOMO CORPORATION OF AMERICA, GLOBAL MINERALS AND METALS CORPORATION, R. DAVID CAMPBELL and CREDIT LYONNAIS ROUSE, LTD.,	:	
Defendants.	:	

This is a civil action for monetary, declarative and injunctive relief brought pursuant to the Sherman Act, 15 U.S.C. § 1; the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962; various state unfair trade practice and antitrust laws; and under the common law of fraud. Plaintiffs CBS Corp. and Emerson Electric Co. contend that defendants Sumitomo Corporation, Sumitomo Corporation of America, Global Minerals and Metals Corporation, R. David Campbell and Credit Lyonnais Rouse, Ltd. violated state and federal laws by entering into a conspiracy to raise the price of copper to artificially high levels through manipulation of the copper exchange markets. Presently before the court is a motion to dismiss

filed pursuant to Fed. R. Civ. P. 12(b)(6) and 12(b)(1) by defendants Sumitomo Corporation, Sumitomo Corporation of America, Global Minerals and Metals Corporation and R. David Campbell. These defendants contend that plaintiffs lack standing to sue under the antitrust laws and RICO, that state antitrust statutes do not apply to predominantly foreign conduct or are barred by the commerce clause and that the fraud-on-the-market theory of recovery does not apply to plaintiffs. Alternatively, these defendants request that this court transfer the action to the United States District Court for the Southern District of New York for trial. Also before the court is a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) and 9(b) filed by defendant Credit Lyonnais Rouse, Ltd., which contends that plaintiffs' RICO and antitrust claims against it are barred by the statute of limitations; plaintiffs have not adequately alleged violations of 18 U.S.C. §§ 1962(c) and (d) by defendant Credit Lyonnais Rouse; and plaintiffs have failed to allege any facts showing that defendant Credit Lyonnais Rouse conspired to restrain trade.

For the sole purpose of deciding this motion, I find that plaintiffs' complaint fairly alleges the following.

ALLEGATIONS OF FACT

I. PARTIES

Plaintiff CBS Corp., formerly known as Westinghouse Electric Corporation, is a corporation duly organized under the laws of Pennsylvania, with its principal place of business in New York, New York. During the relevant time period, Westinghouse's division Westinghouse Wire purchased in the United States and abroad hundreds of millions of pounds of copper that were used in the United States and abroad to produce copper rod and wire. Plaintiff Emerson Electric Co. is a corporation duly organized under the laws of Missouri, with its principal place of business in St. Louis County, Missouri. During the relevant time period, plaintiff Emerson purchased in the United States and abroad hundreds of millions of pounds of copper that were used in the United States and abroad to manufacture machinery and equipment.

Defendant Sumitomo Corporation is a corporation duly organized under the laws of Japan, with its principal places of business in Tokyo and Osaka, Japan. Defendant Sumitomo maintains trading offices throughout the United States. Defendants Sumitomo Corporation of America and Global Minerals and Metals Corporation are corporations duly organized under the laws of Delaware, with their principal places of business in New York, New York. Defendant R. David Campbell is a founder of defendant Global and resides in New York, New York. Defendant Credit Lyonnais Rouse, Ltd. is a corporation duly organized under the laws of England, with its principal place of business in London, England.

Throughout the relevant time period, Sumitomo was the world's largest trader of copper and conducted extensive copper transactions in the United States, both directly and through Sumitomo America, which is a wholly-owned subsidiary of Sumitomo. Sumitomo conspired with defendants Global and Campbell through numerous meetings and communications in the United States to manipulate the copper exchange market. Sumitomo instructed others in the copper market to consider Sumitomo America as Sumitomo's representative in the United States. As a dominant market player, Sumitomo had extensive knowledge about the worldwide supply of copper and the demand for it and was widely viewed by other market participants as a highly knowledgeable and influential player in the copper market. During the relevant time period, Sumitomo had expansive interests in copper mining development projects throughout the world, including in the United States.

II. COPPER MARKET

One active financial market exists for copper and copper derivative contracts. (Throughout this opinion, the futures and forward contracts traded in this market will be referred to as "copper exchange contracts" and the warehouses for delivery of copper in satisfaction of copper exchange contracts will be referred to as "copper exchange warehouses.")

The copper exchange market conducts trading in two principal places, the London Metal Exchange (LME) in London, England, and the Comex division of the New York Mercantile Exchange (Comex) in New York, New York. The Comex provides the only centralized market in the United States for trading copper exchange contracts. The LME provides a similar copper exchange contract market outside the United States. Contracts traded on the copper exchange market are firm commitments to make or accept delivery of a specified quantity and quality of copper during a specific month in the future at an agreed price. The contracts traded on the LME are called *forward contracts* and the contracts traded on the Comex are *futures contracts.* The LME forward contracts and Comex futures contracts are standardized as to quality and quantity, with the LME forward contracts approximately twice as large as Comex futures contracts.

Two "sides" exist to a copper exchange contract. The "long side" is the buyer of the contract, who agrees to take delivery of a specific quantity of copper in the future at an agreed price. The "short side" is the seller of the contract, who agrees to make delivery of a specific quantity of copper in the future at an agreed price. The price of the "nearby" (i.e., the contract month that has the closest delivery or expiration) copper exchange contract generally establishes the price of physical copper (the "spot" or "cash" price), although the prices of LME forward or Comex futures contracts include financing, insurance and storage costs and are

typically higher than those for physical copper. A continuum exists for the pricing of physical copper ranging from the spot or cash price as reflected in the price for the nearby copper exchange contract to the price for forward or futures contracts for the buying and selling of physical copper. An option contract gives a party the right, but not the obligation, to buy (call option) or sell (put option) the underlying futures or forward contract at an agreed price. The purchaser of a call or put option pays a premium to the seller for the contingent copper exchange contract rights.

Only a very small percentage of copper exchange contracts traded each year actually result in delivery of the underlying copper. Traders generally offset a copper exchange contract by purchasing or selling a countervailing contract before the contract matures. For example, a purchaser of a December Comex futures contract can cancel or offset its future obligation to take delivery of copper by selling a December Comex futures contract. The difference between the price of the initial purchase or sale and the price of the offsetting transaction represents the realized profit or loss.

Traders of copper exchange contracts can satisfy their delivery obligations through copper contained in copper exchange warehouses. The Comex exchange warehouses are all located in the United States. The LME exchange warehouses are located throughout the world, including multiple locations in the United States. Ownership rights to physical copper

contained in copper exchange warehouses are contained in "warrants" for a specific quantity and quality of copper in a specified warehouse location. Ownership of a warrant is synonymous with ownership of the underlying physical copper.

The LME is the dominant market for copper exchange contracts. Prices of Comex futures contracts are dictated effectively by LME forward contract prices because of the LME's dominance of the market and the arbitrage between the markets. During a significant portion of the relevant time period, defendants used the United States as a platform from which to orchestrate their manipulative activities on the LME in order to evade Commodities Futures Trading Commission scrutiny and the anti-manipulation provisions of the Commodities Exchange Act, 7 U.S.C. § 1.

Defendants' activities had a dramatic impact on the relative size of the copper exchange markets. For example, in 1994 and 1995, Sumitomo and Global held a long LME forward contract position in a single joint brokerage account that was at times more than twice as large as the entire open interest of all Comex futures contracts then outstanding. During this same time, Sumitomo and Global held warrants (ownership rights) for copper in the LME's warehouse in Long Beach, California equal to more than four times the entire amount of stocks in all Comex warehouses. (Copper stocks in LME warehouses were typically ten to twenty times as great as in Comex warehouses between 1994 and 1996.)

The prices of LME and Comex exchange contracts are closely arbitraged and any price divergence between the two markets is rapidly corrected by arbitrage firms that buy the lower price market and simultaneously sell the higher priced market. The consequence is that prices on the two markets move very closely together and buying and selling activity on either one of the markets carries across to the other. Therefore, the differences in contract structure between the two markets are largely irrelevant and there is effectively a single world copper market. Defendants knew of this relationship between prices for copper exchange contracts on the LME and the Comex.

In April 1995, the LME's recognition of five United States warehouses for delivery of LME copper created an opportunity for physical arbitrage. By mid-1996, there were twelve warehouses in the United States certified for LME delivery. The availability of LME exchange warehouses in the United States made it easy for arbitragers to move copper quickly between Comex and LME warehouses to take advantage of any price discrepancies between the two markets.

The prices of copper exchange contracts dictate the price for the purchase and sale of physical copper, copper ore, copper concentrate and various copper products around the world, including the United States. For example, contracts for the sale of copper concentrates are typically priced with reference to the nearby copper exchange contract price, averaged over a

defined quotational period, less a stated amount for smelting or other processing charges. Contracts for refined copper, such as copper wire, are typically priced with reference to the nearby copper exchange contract price, plus a stated premium amount. Therefore, the cash price for physical copper is directly related to copper exchange contract prices and dictated by those prices. During the relevant time period, defendant Sumitomo routinely used copper exchange contract prices to set the prices that it charged its own customers for physical copper.

III. CONSPIRATORS

Sumitomo enlisted the support of conspirators, who actively assisted its coordinated efforts to manipulate copper prices.

A. Winchester

In 1991, Ashley Levett and Charlie Vincent formed Winchester Commodities Group, Ltd. and its affiliated companies, Winchester Brokerage Limited and Winchester Trading Limited. Levett had a prior relationship with Sumitomo while working for a Vermont-based copper broker. He formed Winchester to allow him to participate more freely in Sumitomo's market manipulation endeavors. With Winchester's formation, its clients could trade anonymously on the LME to conceal their positions from LME regulators and other market

participants. Sumitomo used its "invisibility" in securing large copper trades through the willing participation and assistance of Winchester and Credit Lyonnais Rouse as a means of "flying under the radar" to accomplish its market manipulation scheme.

Beginning in 1991, Sumitomo entered a series of transactions with the cooperation and assistance of Winchester that were designed to and did manipulate prices on the world copper market. Winchester's participation was critical to the ultimate success of these market manipulation efforts.

B. Credit Lyonnais Rouse

As a broker on the LME, Credit Lyonnais Rouse helped structure, finance and broker a large number of Sumitomo and Winchester trades that were designed to and did manipulate copper prices. Also, Credit Lyonnais Rouse helped Sumitomo and Winchester structure and finance a number of copper put and call options on the LME and the over-the- counter market as part of the same effort to manipulate world copper prices. Credit Lyonnais Rouse knew that this trading activity by Sumitomo and Winchester was intended to manipulate world copper prices.

Credit Lyonnais Rouse earned commissions on the substantial copper trades that it executed for Winchester and Sumitomo. Also, it charged the companies for the very large credit

lines it provided to fund the manipulative transactions. As a conspirator, Credit Lyonnais Rouse had a direct financial interest in the success of Winchester. In contravention of its own internal risk management policy, Credit Lyonnais Rouse structured its relationship with Winchester to insure Credit Lyonnais Rouse a 20 percent profit participation on Winchester copper trades. Also, Credit Lyonnais Rouse held the option to acquire a 20 percent ownership stake in Winchester. Therefore, Credit Lyonnais Rouse held a direct and substantial financial interest in the success of the Sumitomo-Winchester copper market manipulation scheme. Credit Lyonnais Rouse did not disclose this direct financial interest to the LME because it did not want scrutiny by the exchange into Credit Lyonnais Rouse's dealing on behalf of Sumitomo and Winchester.

Credit Lyonnais Rouse's conspiratorial role extended to Sumitomo's American-based conspirator, Global. When Global was first created in 1993, Credit Lyonnais Rouse served as Global's clearing broker on the LME. In turn, Winchester guaranteed all margin losses above $750,000 that Credit Lyonnais Rouse might incur on trades carried out on behalf of Global. Credit Lyonnais Rouse provided strategic planning, financing and brokerage services to Sumitomo, Winchester and Global in connection with transactions it knew were designed to manipulate world copper prices. Credit Lyonnais Rouse's participation was critical to the success of the manipulation scheme.

C. Global and Campbell

Beginning in 1993, Sumitomo looked to the United States for another conspirator to assist it in its manipulation scheme. In 1993, David Campbell and others formed Global as a Manhattan-based copper merchant company. Prior to 1993, Campbell was president of RST Resources, Inc., a copper merchant firm that did business with Sumitomo. Between 1989 and 1992, Campbell and Sumitomo's chief copper trader, Yasuo Hamanaka, discussed various ways in which they could manipulate the price of copper through large purchases of physical copper and copper options contracts. In 1989, and again in 1992, RST declined to become involved in the proposals. Therefore, Campbell left RST to form Global in order to conspire more freely with Sumitomo in carrying forward its copper market manipulation scheme. Beginning in 1993, Sumitomo entered into a series of agreements with Global wherein Sumitomo agreed to purchase copper from Global on a monthly basis for the years 1994 through 1997. The agreements were embodied in a series of supply contracts that contained unusual minimum price and price participation provisions. The contracts were a ruse to create fictitious commercial requirements to justify defendants' manipulative "hedging" activities on the Comex and LME. The contract provisions were designed to allow both Sumitomo and Global to share in copper price appreciation, giving both firms an enormous financial interest in higher prices.

IV. DEFENDANTS' ACTIONS WITH RESPECT TO THE COPPER MARKET

A. Methods of Copper Market Manipulation

It is well established that a manipulation of copper exchange contract prices will result, directly and predictably, in a manipulation of physical copper prices. Defendants knew of this direct price relationship and took advantage of it to manipulate prices for physical copper.

Price artificiality in the copper market may result from a number of activities, including: spreading rumors or false information in relation to commercial supply and demand or other significant factors; holding large physical stocks, which otherwise would be commercially available, off the market (a "corner"); or establishing a long copper exchange contract position sufficient to force, or threaten to force, delivery (a "squeeze"). In a "squeeze" of the copper exchange market, the manipulator exploits the delivery provisions of copper exchange contracts to create an element of monopoly power so it can raise prices to its advantage. By purchasing, holding and rolling a large and unneeded long contract position, the manipulator can inject significant artificial demand and buying pressure into the pricing mechanism for copper exchange contracts and consequently, for physical copper. Sometimes the manipulator will borrow substantial funds in order to finance and perpetuate its otherwise uneconomic long contract position. By establishing and maintaining a long contract position, the manipulator forces those parties holding an offsetting short contract position to close out their position at

a substantial premium. The result is a "backwardation" in copper exchange contract prices. A backwardation exists when the cash price for a commodity is greater than the long forward or futures price. Backwardations may arise from genuine metal shortages. However, in periods of adequate metal supply, the market should be in "contango," meaning that the cash price should be at a discount to the long forward or futures price.

A party can "corner" the physical copper market by acquiring all or substantially all of the warrants for physical copper supplies in exchange warehouses. A party can also encourage producers of physical copper through a variety of artifices, such as supply contracts, to withhold copper from the market. A party can most easily manipulate prices for physical copper by manipulating exchange contract prices on both the LME and the Comex. However, because prices on the Comex are effectively controlled by LME prices, manipulation of prices for physical copper can be effected by activity on the LME alone. Because there has been less regulation of trading on the LME, it is easier, less expensive, more cost effective and less risky to manipulate Comex prices through trading on the LME than through trading on Comex. Defendants planned and entered into transactions both abroad and in the United States that were designed to manipulate both Comex and LME copper exchange prices.

B. Defendants' Actions

Beginning in 1990, Sumitomo devised a plan to manipulate the world price for copper. In a "master plan" document, the head of Sumitomo's copper team formulated Sumitomo's basic modus operandi and plan for manipulating copper exchange contract and physical copper prices. The plan was based largely on exploiting the lack of transparency on the LME and the largely unregulated over-the-counter market to accumulate long forward contract positions without legitimate commercial needs. Also, the planners contemplated hoarding significant quantities of physical copper in LME warehouses and other locations without actual commercial requirements. Over the next seven years, Sumitomo and the other defendants acted, sometimes in tandem, without commercial requirements to justify their copper positions. Instead, their actions were designed to dominate the world supply and demand for copper, thereby intentionally producing artificially high prices.

During the time that Campbell was creating Global in the United States to help Sumitomo in its market manipulation scheme, defendants Sumitomo, Winchester and Credit Lyonnais Rouse structured a complicated copper options transaction in London that resulted in trades on the LME and over-the-counter market that led to Sumitomo's immediate control of 1,005,000 metric tons of copper through call options. This was approximately 10 percent of world copper production. The largest copper deal ever, this transaction was code-named "RADR" and was intended by Sumitomo, Winchester and Credit Lyonnais Rouse to have an

artificial influence on copper prices. Originally, the RADR transaction was to take place in two phases, the second of which did not occur because of the LME intervention on September 8, 1993. Phase one of RADR was structured by Sumitomo, Winchester and Credit Lyonnais Rouse to take place in six main stages. The first stage, to be booked by Credit Lyonnais Rouse into accounts designated MAGM and RADR, involved Sumitomo's buying call options for the whole of 1995 at 670 lots a month (1,005,000 tons total) at strike prices from $2,300 to $2,500. Stage two required Sumitomo to sell $2,100 call options for the whole of 1995 at 1,750 lots a month (525,000 tons total) and to sell $1,900 put options for the same quantity and period. Stage three had Sumitomo selling 500 lots (150,000 tons total) of forward contracts each month for the whole of 1995. Stage four had Sumitomo buying 1,500 lots (112,500 tons total) of $1,750 put options for August, September and October 1993. Stage five required Sumitomo to buy 1,500 lots (112,500 tons total) of $1,800 put options for August, September and October 1993. In stage six, Sumitomo would sell 2,000 lots (100,000 tons total) of $1,950 call options a month for August and September 1993.

Sumitomo, Winchester and Credit Lyonnais Rouse structured the first phase of RADR to support and raise copper prices through 1996. A memorandum from Winchester to Sumitomo outlining the terms of RADR 1 makes clear its illegal purpose:

> The [RADR 1] proposal is designed to provide maximum flexibility around a core strategy of control of pricing spreads. This will provide opportunities to move in

> and out of the market from a position of strength over a period of two years, with the object of profit maximization. The term of the strategy avoids reliance on a specific month as a squeeze period, and also provides the ability to cover positions when required without losing the option to regain them.

A primary motivation for Sumitomo was to profit not only on its copper derivative contract positions but also on its sales of physical copper at the artificially inflated cash or spot price. As a core part of its business, Sumitomo sold approximately 500,000 metric tons of physical copper each year, or approximately five percent of the world's annual copper production. Typically, Sumitomo sold this physical copper at market prices as determined by the prices of copper exchange contracts. Therefore, by manipulating the price of LME forward contracts, Sumitomo intended to achieve the artificial inflation of physical copper prices.

Credit Lyonnais Rouse's financing and assistance in structuring the transaction was key to RADR 1, which was closed at Credit Lyonnais Rouse's London office in the presence of senior Sumitomo and Winchester management representatives, as well as the chairman and managing director of Credit Lyonnais Rouse. Representatives of Credit Lyonnais Rouse's French-based parent company also had wire communications with senior Sumitomo officials in the company's treasury department regarding the transaction. Credit Lyonnais Rouse was aware that the intended purpose of RADR 1 was to raise world copper prices through artificial means. It acted as the clearing broker to both Sumitomo and Winchester in connection with the transaction. The positions that Winchester and Sumitomo took as part of RADR 1 were closed out

prematurely in September 1993 after the LME took steps on September 8 to limit the price backwardation that had developed in the copper market.

The second phase of RADR was not carried out because of the LME intervention. Like the first phase, RADR 2 was structured to take place in six stages. Stages one, two and five were to be closing trades for stages one and two of RADR 1, meaning that they canceled the calls and puts of RADR 1. Stages three, four and six of RADR 2 were to be a new series of trades involving put and call options. As in phase one, the trades contemplated in RADR 2 were to be booked by Credit Lyonnais Rouse into accounts that were code-named RADR and MAGM. A September 7, 1993 facsimile from Winchester to Sumitomo regarding RADR 2, marked "Private and Confidential," stated: "It is imperative that we support the price of three months copper at $1,950.00 [a ton] because this is the three months price which has been used in structuring the option proposal that I have given to you on Tuesday 7 September." It added that "Ashley [Levett] is speaking to Credit Lyonnais Rouse to make sure that . . . the highest level of confidentiality is maintained." Winchester notes in facsimile that Sumitomo gave permission by telephone on September 7, 1993, for Winchester to "go ahead and book the agreed option proposal."

During October and November 1993, Credit Lyonnais Rouse received approximately $340 million in payments from Sumitomo relating to RADR 1 losses incurred after the LME

intervened to restrict the price backwardation. Sumitomo used funds from J.P. Morgan to make such payments to Credit Lyonnais Rouse. Instead of disciplining or removing Hamanaka for his blatant efforts at market manipulation, Sumitomo promoted him. Sumitomo commissioned a special audit of its 1993 copper trading activities. Thereafter, Sumitomo buried the audit recommendations and routinely allowed and effectively encouraged Hamanaka to exceed his trading limits or trade without obtaining the required authorizations. Sumitomo also allowed and effectively encouraged Hamanaka to violate in a systematic fashion the company's express policy against speculation and speculative trades.

While RADR 1 was being devised and carried out, Campbell met with Hamanaka in June 1993 to discuss the formation of Global to assist Sumitomo in its manipulative activities, among other things. Press reports suggest that Sumitomo executives offered Global a startup loan of between $1 million to $3 million that was convertible into a 75 percent ownership interest. Supposedly, the Global partners refused the offer, recognizing the enormous profit-making potential of the American-based accomplice in Sumitomo's manipulation efforts. Global earned between $75 million and $150 million in the first year of its business association with Sumitomo. At its outset, Global was also linked to Winchester and Credit Lyonnais Rouse. Credit Lyonnais Rouse served as the clearing broker for Global in consummating trades on the LME. Acting through Winchester Brokerage Limited, Winchester provided the upstart

company with an open-ended indemnity in favor of Credit Lyonnais Rouse on Global margin losses in excess of $750,000. Therefore, Credit Lyonnais Rouse and Winchester gladly assisted the new company in its startup endeavors in furtherance of their manipulation conspiracy.

By June 1994, after numerous meetings, Sumitomo and Global agreed upon a series of supposed copper purchase contracts that contained highly unusual fixed minimum price and price participation features. The contracts allowed the conspirators to claim falsely that they had a legitimate and genuine commercial need to obtain physical copper and to establish an enormous copper forward position to hedge this purported commercial need. Sumitomo knew that emergency interventions by the LME in 1991 and 1993 had impeded Sumitomo's efforts to manipulate copper prices because each time a price backwardation began to develop, raising regulatory interest, Sumitomo had been unable to demonstrate any genuine need in its cash market operations for the large copper exchange contract positions that it held. One purpose of the contracts was to provide a "commercial need" rationale for their copper exchange contract positions, thereby circumventing further intervention by the exchanges when the inevitable price backwardation would develop.

The copper contracts were highly unusual because they contained fixed minimum price features. Because copper prices fluctuate, a purchaser in a fixed price contract assumes the risk of substantial losses if the price falls below the amount fixed by the contract. Sumitomo and

Global entered into a total of seven such copper supply contracts that on their face called for the delivery of a total of 1,194,000 tons of copper from 1994 through 1997. Sumitomo America assisted in performing all of these contracts. The contracts were with Zambian Consolidated Copper Mines and Codelco, the Chilean state-owned copper mining company, or with their sales representatives or other intermediaries, among others. In one or more of these contracts, Global agreed to pay each month for specified quantities of physical copper at a fixed base price of approximately 85 cents a pound. In the event that the market price for copper increased to above 85 cents a pound, the contracts provided that the producer would share a small percentage, approximately 10 percent, of the increase.

In December 1994, Sumitomo and Global entered into an agreement with the Zambian copper producer in which they effectively canceled one-half of the physical copper deliveries called for under their copper supply contract for 1995. Through a complicated series of circular paper transactions, the Zambian firm would "sell" the physical copper to Global, which would in turn "sell" the same physical copper to Sumitomo, which would then "sell" the same amount back to the Zambian firm. None of the physical copper involved in these circular transactions was ever shipped between or among any of the three participants. In this way, Sumitomo and Global concocted a false commercial justification to purchase LME forward contracts, purportedly to hedge the non-existent delivery obligations. Subsequently Sumitomo and Global

divided the profits resulting from this scheme.

In a separate contract or series of contracts, Sumitomo and Global agreed that each month, Sumitomo would purchase from Global a quantity of physical copper equal or approximately equal to the total quantity of Global's purchase contracts. In this contract or series of contracts, Sumitomo was obligated to pay 85 cents a pound for copper regardless of the market price. In the event that market prices rose above 85 cents a pound, Sumitomo paid slightly more than 50 percent of the increase to Global.

In its cash market operations, Sumitomo sold approximately 500,000 tons of copper a year. None of Sumitomo's sales contracts contained the unusual fixed price feature pegged at 85 cents a pound. Instead, Sumitomo typically received the current market price for copper as determined by the price of the nearby copper exchange contract. The structure of their unusual contracts gave Sumitomo and Global enormous financial incentive to maintain the price of copper above 85 cents a pound and to push the price as far above that amount as possible. For example, by manipulating the market price for copper to $1.30 a pound, Sumitomo and Global created additional revenues for themselves of approximately $10 million a month on the 10,000 tons of copper moved pursuant to the contracts.

Sumitomo and Global opened highly unusual joint brokerage accounts so that the companies could both enter orders and receive copies of brokerage statements for jointly held

copper positions. Global was also given powers of attorney over some of Sumitomo's brokerage accounts that were held in the United States. In the joint accounts, Sumitomo effectively appointed Campbell and Global as its agents in the United States to enter orders with brokers and others for copper exchange contracts and warrants. No legitimate business purpose existed for these joint accounts and powers of attorney; instead, they were implemented to coordinate Sumitomo's and Global's market manipulation scheme within the United States while making Sumitomo's credit available to Global and deflecting some of the attention to Global and away from Sumitomo.

In February 1994, Sumitomo and Global agreed upon a manipulation scheme using the ruse of supply contract commitments to create fictitious commercial requirements that served as a justification for amassing an enormous long LME forward contract position. The ultimate goal was to manipulate world copper prices. Beginning in approximately April 1994, Sumitomo and Global gave orders to Merrill Lynch to develop an increasingly long LME forward contract position in defendants' joint account. Sumitomo and Global held in this account alone a long LME forward contract position in excess of 280,000 tons by the end of June 1994 and in excess of 700,000 tons by the end of September 1994. Between early April 1995 and June 1995, Sumitomo and Global held a long LME forward contract position well in excess of one million tons in their Merrill Lynch joint account. This position, which grew to almost 1.4 million tons,

was the largest long LME forward contract position ever heard of in the copper market and constituted in excess of 20 percent of the total LME open positions during April and June 1995 and approximately 20 percent of the combined long positions outstanding on both the Comex and the LME. The joint Sumitomo and Global long LME forward contract position in the joint account at Merrill Lynch caused copper prices to inflate artificially. For example, the nearby exchange contract price of copper on the LME rose from approximately $1,900 a ton in June 1994 to approximately $2,500 by the end of September 1994. Sumitomo and Global sold approximately 600,000 tons in October 1994 to lock in profits on a portion of their joint position and they rolled the balance of their position forward into 1995. The Merrill Lynch joint account was only one of more than twenty individual or joint brokerage accounts that Sumitomo and Global held from 1994 through 1996. Defendant Credit Lyonnais Rouse was another brokerage firm that maintained accounts for Sumitomo and Global, on either an individual or joint basis.

As part of its master strategy to manipulate copper prices, on or about October 11, 1995, Sumitomo increased its long LME forward contract position maturing in one week or less to 9,770 contracts, an increase of 245 contracts from the previous week. From October 11, 1995 through May 29, 1996, Sumitomo maintained in the joint Merrill Lynch account a long LME forward contract position maturing in one week or less ranging from 9,770 contracts on

October 11, 1995 to 7,548 contracts on May 29, 1996. The long position, maturing in one week or less, kept buying pressure on the nearby LME forward contract price. The costs that Sumitomo incurred to borrow funds to maintain this long contract position were uneconomic, except that the long LME forward contract position artificially inflated the prices for copper exchange contracts and physical copper and thereby allowed Sumitomo to benefit from the higher level of prices and backwardation.

During 1995, Sumitomo also began entering orders to build up a long position in Comex futures contracts. During the spring of 1995, Sumitomo almost doubled its long Comex futures contract position. On June 1, 1995, Sumitomo's long Comex futures contract position constituted approximately 10 percent of the total long positions in the regularly traded Comex futures contracts. Sumitomo held a 3,800 long contract position as of June 1, 1995, which entitled it to require the shorts to deliver 47,500 tons of copper from Comex warehouses at contract maturity. At that time, the total Comex stocks were only approximately 6,293 tons.

Sumitomo's long Comex futures position was intended to and did manipulate the Comex price upwards by injecting artificial demand into and buying pressure on Comex futures prices. Sumitomo had no legitimate commercial need or requirements to justify its long contract position. The upward manipulative effect of Sumitomo's activities on the Comex was greatly enhanced by defendants' far more significant manipulative activities on the LME.

Sumitomo and Global benefited from their manipulative copper exchange contract position in both the exchange market and in Sumitomo's substantial physical copper trading activities. By rolling forward their substantial long contract position, defendants were able to "capture the backwardation" caused by their misconduct. As a result of the backwardation, defendants sold their maturing nearby copper exchange contracts at the higher prices prevailing for such contracts and purchased the deferred delivery date contracts at the lower forward contract price resulting from the backwardation. Therefore, defendants profited by the amount of the backwardation on each rollover.

Sumitomo also profited by "capturing the backwardation" in its physical copper trading. By buying physical copper at the LME forward contract price and selling the copper at the current market price as determined by the price of the nearby LME copper exchange contract, Sumitomo profited to the extent of the backwardation brought on by defendants' manipulation scheme.

In addition to their long LME forward contract position, Sumitomo and Global also acquired control over a significant percentage of the physical copper contained in copper exchange warehouses. This process began in the summer of 1994 and culminated with Sumitomo's and Global's cornering 100 percent of the copper in LME warehouses and 90 percent of the copper in Comex warehouses between early November 1995 and early January

1996. By the end of March 1995, Sumitomo and Global held 78,000 tons of copper warrants in an individual account that Sumitomo maintained with Merrill Lynch. This amounted to approximately 32 percent of the total LME stocks as of the end of March 1995, and approximately 31 percent of the combined stocks contained in LME and Comex warehouses. During the same period, Sumitomo and Global accumulated an as yet undetermined quantity of copper warrants through brokerage firms other than Merrill Lynch. Sumitomo and Global had no legitimate commercial need for these copper stocks and acquired the copper in order to hold it off the market, thereby restricting available supply and pushing copper prices higher.

In the summer of 1995, Global and Sumitomo agreed to try to increase the market price of copper so that they could liquidate their position at an average price of approximately $3,200 a ton. Campbell proposed in late summer of 1995 that Sumitomo and Global take delivery on some of their long LME forward contracts in order to drive prices higher. By taking delivery, Sumitomo and Global aimed to foster the false impression in the marketplace that Sumitomo had a huge need for additional physical copper in the fourth quarter of 1995. Their purpose was to raise prices and unwind their enormous copper position at a profit.

Sumitomo and Global devised a false cover story that was intended to deceive the marketplace and market regulators into believing that legitimate commercial considerations

drove the taking of delivery of additional copper warrants by Sumitomo and Global. Pursuant to their plan, Campbell falsely informed Global's brokers that Global intended to sift warrants in order to find premium grade and location copper for the purpose of delivering it to Sumitomo pursuant to the supply contracts. In fact, however, Sumitomo and Global had no legitimate need for additional copper warrants. They concocted the story to obscure their real motivation, which was to control the deliverable supply of LME warrants in order to drive prices higher.

Between August 1995 and May 1996, Sumitomo America and Sumitomo acquired copper mined in the United States that had been moved from Comex warehouses to LME warehouses within the United States. These acquisitions served to reduce available copper supplies in Comex warehouses from August 1995 until June 1996, thereby artificially increasing Comex exchange prices.

Defendants' decision to force delivery on a portion of their copper exchange contracts confirms that the manipulation scheme involved activities on the market for physical copper and was intended to affect the market. By forcing delivery, defendants converted the contractual delivery obligation into the spot sale of physical copper at the price set forth in the copper exchange contracts. Having succeeded in maintaining control of copper exchange warehouse supplies, Sumitomo and Global acted in an uneconomic fashion by refusing to lend copper to market participants to take advantage of higher copper prices. Instead, Sumitomo

and Global either refused to lend such supplies or else made them available at such high prices that they were effectively withheld from the market. Sumitomo's and Global's intent in taking such actions was to reject the short-term profit of lending the copper in favor of maintaining restricted copper supplies, thereby assuring further upward pressure on prices. The withholding of their enormous copper stocks had the intended effect of greatly reducing the supply of copper available to short position holders, causing LME and Comex copper exchange prices to increase dramatically between October and December 1995. Sumitomo also acted to restrict the available supply of physical copper by encouraging copper producers to hold physical copper off the market and by making advance deliveries of physical copper to Sumitomo customers, thereby removing copper from the market.

By spring of 1996, Sumitomo's and Global's prolonged attack on copper prices and the resulting backwardation in copper exchange contract prices led the Commodities Futures Trading Commission to intensify an investigation into copper pricing that it had begun in late 1995. At the same time, the LME was beginning to investigate possible market manipulation. By May 1996, the investigations led the CFTC and LME to Sumitomo and Global as the likely targets. In early May, Sumitomo decided to fire the head of its copper team, Yasuo Hamanaka, but withheld this information from the market until June 14, 1996. In the interim, Sumitomo began selling more than one million tons of unneeded copper exchange contracts that were

commercially unnecessary and constituted part of the "corpse" of defendants' long-running manipulation scheme. As a result, the price of copper plummeted by over 30% between May 8 and June 25, even though there were no significant changes in the fundamentals of the physical copper market. Notwithstanding this initial dramatic drop in the world price for copper, copper prices remained at artificially high levels and a backwardation in the copper exchange contract market persisted into late 1996 and early 1997 as Sumitomo slowly unwound its large manipulative copper position, including long exchange contracts, options positions and warrants for physical copper. Whether this continuing price artificiality was attributable to LME intervention to control the deflationary effect of the wind-down on copper prices or to further Sumitomo's manipulative activities in an attempt to minimize its losses is the subject of ongoing regulatory scrutiny.

In June 1998, the CFTC found that Sumitomo had unlawfully manipulated the physical copper and copper exchange contract market in the United States and it concluded that Sumitomo's scheme had caused users of copper in the United States to pay higher prices. The commission levied a $150 million fine against Sumitomo. Defendants' dominance of the physical and exchange contract market for copper had a significant inflationary effect on copper prices for periods beginning in at least 1990 and continuing through the latter part of 1996 or early 1997.

Throughout the relevant time period, defendants concealed their conspiracy from plaintiffs, other purchasers of copper in the United States and abroad and regulatory authorities in the United States and abroad until on or very shortly before June 14, 1996, the day that Sumitomo announced the discharge of Hamanaka. In addition to the inherently self-concealing nature of a conspiracy to manipulate the market for physical copper and copper exchange contracts, defendants engaged in affirmative acts to conceal their unlawful conduct. For example, defendants acted in a continuous pattern of concealing their conduct, including clandestine face-to-face meetings, telephone calls, facsimiles and other exchanges of information and agreements that were conducted under a cloak of secrecy in furtherance of the unlawful conspiracy. Defendants also disseminated false information regarding the nature and purpose of their physical and copper exchange contract market activities in order to conceal the manipulation scheme.

Plaintiffs had no knowledge of the illegal activities herein alleged and did not have sufficient facts that might have led to their discovery until on or about June 14, 1996. By the exercise of due diligence, plaintiffs could not have discovered defendants' violations and misconduct any time before June 14, 1996, because the conspiracy was carried out in a manner that precluded detection and because of the fraudulent and active concealment of the conspiracy by defendants and their conspirators.

Plaintiffs filed this suit on September 27, 1999.

OPINION

I. STANDARD FOR DECIDING A MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

In considering a motion to dismiss for failure to state a claim, the court must accept as true the well-pleaded factual allegations in the complaint, drawing all reasonable inferences in favor of the plaintiff. See Hishon v. King & Spalding, 467 U.S. 69, 72 (1984). The court may dismiss a complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6) only if the plaintiff can prove no set of facts in support of its claim that would entitle it to relief. See Porter v. DiBlasio, 93 F.3d 301, 305 (7th Cir. 1996).

The standard for pleading is low, requiring only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A plaintiff is not required to plead the particulars of his or her claim unless it is based on fraud or mistake. See Leatherman v. Tarrant County Narcotics Unit, 507 U.S. 163, 168, 113 S. Ct. 1160, 1163 (1993); Hammes v. AAMCO Transmissions, Inc., 33 F.3d 774, 778 (7th Cir. 1994). "One pleads a 'claim for relief' by briefly describing the events." Sanjuan v. American Bd. of Psychiatry and Neurology, 40 F.3d 247, 251 (7th Cir. 1994). Matching facts against legal

elements comes later, such as in consideration of motions for summary judgment. See id.; Palmer v. Board of Education Community United School District, 46 F.3d 682, 688 (7th Cir. 1995). On a motion to dismiss, "the plaintiff receives the benefit of the imagination, so long as the hypotheses are consistent with the complaint." Sanjuan, 40 F.3d at 251 (citation omitted). The pleading rule is equally applicable in antitrust cases. See MCM Partners v. Andrews-Bartlett & Associates, 62 F.3d 967, 976 (7th Cir. 1995); Sanjuan, 40 F.3d at 251; Hammes, 33 F.3d at 782. Indeed, "in antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,' Poller v. Columbia Broadcasting, 368 U.S. 464, 473 (1962), dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 746 (1976). See also Continental Orthopedic Appliances v. Health Insurance Plan of Greater New York, 956 F. Supp. 367, 370 (E.D.N.Y. 1997). This does not mean, however, that "conclusory statements [may] substitute for minimally sufficient factual allegations." Electronics Communications Corp. v. Toshiba America Consumer Products, Inc., 129 F.3d 240, 243 (2d Cir. 1997). A plaintiff must provide the defendant with minimal notice of the claim, see Jackson v. Marion County, 66 F.3d 151, 153 (7th Cir. 1995), and include enough information to "outline or adumbrate" the basis of the claim, Panaras v. Liquid Carbonic Industries Corp., 74 F.3d 786, 792 (7th Cir. 1996).

II. ANTITRUST STANDING

A. Analysis Under Associated General Contractors

The Sumitomo and Global defendants argue that "[i]n all relevant respects, Ocean View is identical to this case." Mem. of Law in Supp. of Sumitomo and Global Defs.' Mot. to Dismiss the Compl. at 16. Defendants argue that this court should apply the reasoning employed by the Southern District of New York when it dismissed the complaint against defendants in Ocean View Capital v. Sumitomo Corp. of America, No. 98 Civ. 4067, 1999 WL 1201701 (S.D.N.Y. Dec. 15, 1999). However, that order was ineffectual because the case had been transferred to this court at the time the court issued its opinion. Revisiting the issues raised by defendants, I denied their motion to dismiss for lack of antitrust standing in an order dated May 9, 2000. See Ocean View Capital, Inc. v. Sumitomo Corporation of America, Nos. MDL 1303, 99-C-801-C, 2000 WL 576238 (W.D. Wis. May 9, 2000). The facts alleged in this case are similar to those alleged in Ocean View. Because I set forth in that opinion a full analysis of the factors considered in the antitrust standing inquiry under Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983), I will not repeat the entire analysis here.

Plaintiffs allege that the LME and Comex constitute one copper exchange market and that "one active financial market exists for copper and copper derivative contracts." Compl.

¶ 14. They allege also that "prices of copper exchange contracts dictate the price for the purchase and sale of physical copper" and that "the cash price for physical copper is directly related to and is dictated by copper exchange contract prices." Compl. ¶ 29. Accepting the allegations in the complaint as true, I find that plaintiffs have sufficiently alleged that the injury they suffered was of a type Congress sought to redress with the antitrust laws. See Ocean View, 2000 WL 576238, at *8-9. Unlike Ocean View Capital, plaintiffs in this case do not allege that they purchased copper directly from any of defendants. However, I determined in Ocean View that in alleging that the price of physical copper was tied directly to the price of copper exchange contracts, Ocean View had alleged enough to make the directness between the injury and the market restraint a factor in plaintiff's favor. See id. at *9-10. The same reasoning applies to the present case. For the reasons discussed in the Ocean View opinion, I will deny defendants' motion to dismiss the complaint on the basis of plaintiffs' lack of antitrust standing.

B. Analysis Under Illinois Brick

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides a federal cause of action to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" and makes it possible for successful plaintiffs to recover triple damages, costs and attorney fees. In Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), the state of Illinois sued

manufacturers and distributors of concrete block under § 4 of the Clayton Act, alleging that the defendants had engaged in a conspiracy to fix the prices of concrete block in violation of § 1 of the Sherman Act. Illinois was an indirect purchaser of concrete blocks; defendants sold concrete blocks to masonry contractors, who submitted bids to general contractors for the masonry portions of construction projects. Illinois alleged that defendants' actions caused the general contractors to charge higher prices to its customers, including the state. The Supreme Court interpreted the phrase "injured in his business or property" as used in § 4 of the Clayton Act and determined that only the direct purchaser is an injured party in the sense of the statute and not others in the chain of manufacture or distribution. See id. at 729.

In an earlier case, Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968), the Court addressed an antitrust action brought under § 4 of the Clayton Act against a manufacturer of shoe machinery by one of its customers, a manufacturer of shoes. The Court refused to allow the manufacturer to raise a lack of standing defense by contending that the plaintiff had not been injured in its business because it had passed on the claimed increase to its customers. The Court held that except in certain limited circumstances, a direct purchaser suing under § 4 of the Clayton Act is injured within the meaning of § 4 by the full amount of the overcharge it paid and that the antitrust defendant is not permitted to introduce evidence that indirect purchasers were injured by the illegal overcharge. See Illinois Brick, 431 U.S. at

724-45. An example of an exception to this rule exists where "an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged." See id. at 724 n.2 (quoting Hanover Shoe, 392 U.S. at 494).

In Illinois Brick, the Court refused "to construe § 4 to permit offensive use of a pass-on theory against an alleged violator that could not use the same theory as a defense in an action by direct purchasers." See id. at 735. In "Hanover Shoe[, the Court] indicated the narrow scope it intended for any exception to its rule barring pass-on defenses by citing, as the only example of a situation where the defense might be permitted, a pre-existing cost-plus contract. In such a situation, the purchaser is insulated from any decrease in its sales as a result of attempting to pass on the overcharge, because its customer is committed to buying a fixed quantity regardless of price." See id. at 735-36. The Court noted that allowing the offensive use of pass-on costs would decrease the incentive for direct purchasers to bring antitrust suits and concluded that "the legislative purpose in creating a group of 'private attorneys general' to enforce the antitrust laws under § 4 is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it." See id. at 746 (internal citations omitted). The Court recognized that indirect purchasers may be injured by antitrust violations but determined that the difficulties involved in ascertaining the injury suffered by any

particular indirect purchaser outweighed the benefit of providing compensation. See id. at 746-47. Therefore, indirect purchasers may not recover under the antitrust statutes.

In the Ocean View case, defendants did not raise a challenge to plaintiff's standing based on the indirect purchaser doctrine set forth in Illinois Brick so I did not address the doctrine in that case. In this case, the Global and Sumitomo defendants refer to their briefs filed in Loeb Industries, Inc. v. Sumitomo Corp., M.D.L. Docket No. 1303, No. 99-C-377-C (W.D. Wis. filed June 8, 1999), to argue that allowing plaintiffs in this case to proceed on their Clayton Act claim would allow copper purchasers "all the way up and down the distribution chain" to assert the same claims. Plaintiffs have not specified from whom they bought copper and whether they bought from the copper extractor or from some entity further down the distribution chain. At the motion to dismiss stage, all inferences must be drawn in favor of plaintiffs. Therefore, I will assume that plaintiffs will be able to show that they purchased copper from the copper extractor, that is, from the top of the distribution chain. Through discovery, defendants will have the opportunity to prove otherwise.

Contrary to defendants' assertion, plaintiffs do not allege that the unlawful price increase "was passed on from market to market and purchaser to purchaser." Instead, plaintiffs allege that the price of copper was based on the price of copper exchange contracts. This is an important difference. The price plaintiffs paid for copper was not higher because the sellers of

the copper raised prices to recoup the higher cost they had paid for the copper; rather, it was higher because it was calculated directly, using the inflated copper exchange contract price. Defendants point out correctly that plaintiffs allege that they were overcharged by sellers who were not responsible for any antitrust violation: plaintiffs do not allege that they purchased copper directly from defendants. However, the sellers sold copper and plaintiffs purchased it under the "price umbrella" allegedly spread by the conspiring defendants. See 2 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 372 (rev. ed. 1995) (noting that "[b]ecause purchasers from the innocent suppliers pay a monopoly overcharge just as certainly as if they had bought from the conspirators, their injury can be compensated only by allowing them to sue the conspirators").

Defendants agree that this case is analogous to the umbrella standing cases but cite Mid-West Paper Prods. Co. v. Continental Group, Inc., 596 F.2d 573 (3d Cir. 1979), in arguing that such an umbrella claim should be rejected because it would undermine Illinois Brick. Professors Areeda and Hovenkamp address the line of cases cited by defendants and recognize that those cases misplace Illinois Brick's concerns about complex apportionment and duplicative recovery because "no overcharge need be apportioned, for nothing has been passed on." 2 Areeda & Hovenkamp at ¶ 372. Instead, "standing for the umbrella plaintiff is limited not by Illinois Brick but by the more general requirements of proximate causation and proof of

damages governing private plaintiffs generally." Id. Plaintiffs have alleged a direct enough injury to defeat a motion to dismiss. The Court of Appeals for the Seventh Circuit has not yet addressed the issue of umbrella standing, although at least one district court in the circuit has adopted the theory. See In re Uranium Antitrust Litigation, 552 F.Supp. 518, 520 (N.D. Ill. 1982) ("Where there is no danger of [unfair or unworkable] results, the rationale of Illinois Brick is plainly inapplicable.").

Because plaintiffs did not purchase copper exchange contracts, the determination of standing under an umbrella theory is slightly more complex. Cf. 2 Areeda & Hovenkamp at ¶ 372 ("we should allow recovery by the umbrella plaintiff purchasing the 'self-same' product as the defendants sold in the same clearly defined geographical market"). (For purposes of this discussion, I am ignoring plaintiffs' cursory allegation in ¶ 169 of their complaint that "plaintiffs paid substantially higher prices for physical copper and copper exchange contracts"). In this case, in which plaintiffs allege that defendants intended to raise prices of physical copper and damages would not be unduly speculative, see Ocean View, 2000 WL 576238 at *12, it is appropriate to deny a motion to dismiss.

Plaintiffs do not fit neatly into the classic direct-indirect purchaser scheme. Plaintiffs do not allege that they obtained copper through requiring delivery on copper exchange contracts that they had purchased. Although they did not purchase the item defendants sold

(copper exchange contracts), neither did they purchase something that contained defendants' item as improved by a middle party, as was the case in Illinois Brick. In this case, there is no chain of distribution and no allegation that plaintiffs purchased from defendants, even through middlemen. Therefore, Illinois Brick is inapposite. Cf. 2 Areeda & Hovenkamp at ¶ 371h (noting that there is no problem of duplication or apportionment where plaintiff purchases from dealer who conspired illegally with manufacturer with respect to price paid by consumer because consumer is only party who paid any overcharge). Defendants may learn through discovery what form or grade of copper plaintiffs purchased and may then be able to challenge plaintiffs' purchases as a result of passed-on damages. From the complaint, it is impossible to determine whether plaintiffs bought copper in a form that is deliverable on the exchanges.

The idea that the price of physical copper is tied directly to the price of copper exchange contracts so that increases in contract prices affect physical copper prices in a way that is not passed on is difficult to reconcile with the idea that purchasers of copper who buy from other purchasers should not be able to recover damages. In this case, anyone who purchased machinery or other products made by plaintiffs using copper would be barred by Illinois Brick from bringing an antitrust claim against defendants. Plaintiff CBS Corp. produced copper rod and wire, but there is no allegation that CBS then sold the wire rather than using it itself. Plaintiffs allege that copper wire is priced with reference to the price of copper exchange

contracts; therefore, a purchaser of copper wire from CBS might seem to fit squarely within the confines of the Illinois Brick indirect purchaser doctrine yet at the same time have a legitimate argument that the higher price for wire was not passed on by CBS but resulted directly from the higher price of the exchange contracts. Because that particular situation is not alleged, I need not resolve the apparent inconsistency at this time.

Defendants distinguish Sanner v. Board of Trade of Chicago, 62 F.3d 918 (7th Cir. 1995), saying, that "in contrast to this case -- the plaintiffs there did not include buyers at different and distant levels of distribution, who purchased from and sold to other identically-situated buyers." Reply Mem. of Law in Supp. of Sumitomo and Global Defs.' Mot. to Dismiss Compl. at 9. Through discovery, defendants may be able to support this assertion. However, it is not obvious from the complaint that plaintiffs bought copper at distant levels of distribution. Therefore, defendants' motion to dismiss the complaint on this ground will be denied.

III. STANDING UNDER RICO

The Sumitomo and Global defendants argue that plaintiffs' RICO claims fail because the antitrust standing requirements apply equally to the RICO statute. (References to the Sumitomo defendants include Sumitomo Corporation and Sumitomo Corporation of America;

references to the Global defendants include Global Minerals and Metals Corporation and R. David Campbell.) My decision that plaintiffs have alleged sufficient facts to preclude a dismissal for lack of antitrust standing at this stage indicates that defendants' motion to dismiss the RICO claims should also be denied.

In Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 267-68 (1992), the Supreme Court noted that the RICO remedies provision, 18 U.S.C. § 1964(c), was modeled on section 4 of the Clayton Act. The Court concluded, therefore, that the statute required that the defendant's violation be a proximate cause of plaintiff's injury. The Court of Appeals for the Seventh Circuit has recognized that the Associated General Contractors, 459 U.S. 519, approach to remote injuries applies to RICO claims. See International Brotherhood of Teamsters v. Philip Morris, 196 F.3d 818, 825-26 (7th Cir. 1999) (concluding that claim "flunks Holmes just as it flunked Associated General Contractors"). Defendants attempt to distinguish Israel Travel Advisory Services, Inc. v. Israel Identity Tours, Inc., 61 F.3d 1250, 1257 (7th Cir. 1995), by noting that unlike Holmes, that case did "not present a similar apportionment problem, and there [was] no risk of multiple recovery." In this case, the allegations in the complaint do not indicate an apportionment or multiple recovery problem. I conclude that plaintiffs may bring a RICO claim.

IV. STATE ANTITRUST CLAIMS

Plaintiffs have brought claims under the antitrust laws of seventeen states. Defendants' argument that plaintiffs lack standing to bring the state claims under Associated General Contractors is mooted by the discussion of antitrust standing.

Defendants argue that state statutes do not apply to the conduct at issue in this case because that conduct was predominantly foreign. They argue also that even if some state statutes do apply, those statutes violate the dormant foreign commerce clause of the United States Constitution. Plaintiffs fail to address either of these arguments directly, arguing instead that defendants are subject to personal jurisdiction in United States courts and that this court should apply choice of law principles to determine whether the state statutes apply. None of the parties cite any cases indicating the types of conduct that courts have found to be predominantly foreign.

The Court of Appeals for the Seventh Circuit has noted of state antitrust laws that "[s]tates lack any comparable power [to Congress] to reach outside their borders, making the presumption of exclusive domestic application even stronger." K-S Pharmacies v. American Home Products, 962 F.2d 728, 730 (7th Cir. 1992) (holding that state statute forbidding price discrimination in prescription drugs applied only to purchasers of prescription drugs in Wisconsin and did not violate commerce clause). See also Glass v. Kemper Corp., 133 F.3d 99,

1001 (7th Cir. 1998) ("a state's attempt to regulate a transaction wholly in foreign commerce would violate the 'negative' commerce clause. 'A state cannot regulate sales that take place wholly outside it.'") (internal citations omitted). However, "when a practice has sufficient effects within the state, that state has the power to apply its antitrust law even if that law is substantively different from and more aggressive than federal law." 14 Herbert Hovenkamp, Antitrust Law ¶ 2403a (1999).

In Japan Line, Ltd v. County of Los Angeles, 441 U.S. 434, 453-54 (1979), the Supreme Court held that California's ad valorem property tax was unconstitutional under the commerce clause because it resulted in multiple taxation of the instrumentalities of foreign commerce and was inconsistent with Congress's power to "regulate Commerce with foreign Nations" "because it prevent[ed] the Federal Government from 'speaking with one voice' in international trade." In this case, plaintiffs have alleged that defendants intended to artificially inflate the price of physical copper. Plaintiffs do not allege whether they bought copper in any of the seventeen states under whose statutes they are suing. Plaintiffs have not cited to any specific paragraphs in their complaint to support the contention that defendants' conduct affected trade within any of the seventeen states significantly and adversely. On the other hand, although defendants may have achieved the alleged desired result of inflating copper prices almost entirely through foreign conduct, they allegedly intended to affect domestic copper prices and

did do so. I cannot say at this time that the application of any or all the state statutes that plaintiffs have cited would violate the commerce clause. It is possible that some of the statutes may not apply to the conduct because it is predominantly foreign, but this point has not been argued with sufficient specificity with respect to each state statute under which plaintiffs have brought a claim. I note that the fact that this court may have personal jurisdiction over defendants is not relevant to the question whether the state statutes violate the commerce clause of the United States Constitution. The commerce clause addresses federalism concerns, not a court's jurisdiction over particular parties.

V. FRAUD

Plaintiffs contend that they have stated a claim for common law fraud, arguing that "defendants knowingly misrepresented and concealed material facts and their manipulative conduct from plaintiffs with the intention that plaintiffs, as participants in the physical copper and copper exchange contract market, would rely on defendants' misrepresentations and omissions to plaintiffs' detriment, including the purchase of physical copper and copper exchange contracts at artificially inflated prices, and that plaintiffs would be deceived from learning of defendants' covert and illegal conduct." Compl. ¶ 171. Defendants urge this court to dismiss the fraud claims because plaintiffs failed to allege actual reliance on any

misstatement or omission of defendants and because the fraud-on-the-market theory of liability does not apply.

Generally, to state a claim under the common law for fraud, a plaintiff must prove actual reliance on a misstatement or omission of a defendant. Plaintiffs do not argue that they have pleaded actual reliance in this case. Instead, plaintiffs argue that defendants are liable under a "fraud on the market" theory. In Basic Inc. v. Levinson, 485 U.S. 224, 250 (1988) (4-2 decision), the Supreme Court held that "[i]t is not inappropriate to apply a [rebuttable] presumption of reliance supported by the fraud-on-the-market theory" to a claim brought under the Securities and Exchange Commission's Rule 10b-5, 17 CFR § 240.10b-5 (1987). The Court described the theory:

> 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)). Purchasers of securities are entitled to a presumption that they relied on the market price when completing securities transactions. In Levinson, the Court was interpreting the reliance requirement of Rule 10b-5, a federal cause of action, rather than a claim of common law fraud. The Court

distinguished "[t]he modern securities markets, literally involving millions of shares changing hands daily [] from the face-to-face transactions contemplated by early fraud cases." See id. at 243-44. The issue raised in this case is whether the prices for plaintiffs' purchases of physical copper were set in a way more similar to face-to-face transactions or to securities markets. Although, as already discussed, plaintiffs have alleged a direct relationship between the cash price for physical copper and the copper exchange contract prices, plaintiffs' allegations suggest that the price of physical copper is not *always* tied to that of exchange contracts. See Compl. ¶ 29 ("typically priced;" "routinely used"). Plaintiffs allege that defendants' fraud was directed at raising the price of copper, and thus at buyers of physical copper like plaintiffs. Cf. Isquith v. Caremark Int'l, Inc., 136 F.3d 531, 536-37 (distinguishing Basic Inc. and concluding that plaintiffs could not recover for fraud where defendant did not direct misrepresentations at plaintiffs or induce them to buy or sell securities).

Defendants have pointed to no cases in which a court refused to apply a fraud on the market theory to a commodities market or exchange. In In re Sumitomo Copper Litigation, 995 F. Supp. 451 (S.D.N.Y. 1998), the district court considered whether the trader plaintiffs' allegations of reliance were sufficient to withstand a motion to dismiss a RICO claim based on fraud. The claim arose out of the same actions of defendants Global and Sumitomo as alleged in the present case. The court presumed reliance under the fraud on the market theory in the

context of the RICO predicate acts of mail and wire fraud, see id. at 458, and noted that the fraud on the market theory had "been employed by [the Second] Circuit in cases involving common law fraud in both securities and commodities cases." Id. (citing In re Blech Securities Litig., 961 F. Supp. 569, 587 (S.D.N.Y. 1997); Minpeco, S.A. v. Hunt, 718 F. Supp. 168, 176 (S.D.N.Y. 1989)). Defendants argue that the cited cases do not apply here because plaintiffs were purchasers of a related physical product and did not trade on the futures markets allegedly manipulated. If the price of physical copper is tied directly to the price on the copper exchanges, the relevant place where the fraud occurred is on the copper exchange and not in the face-to-face transaction through which plaintiffs purchased physical copper. Defendants' motion to dismiss plaintiff's fraud claim will be denied.

VI. TIMELINESS OF CLAIMS

A. Statute of Limitations

Section 4B of the Clayton Act, 15 U.S.C. § 15b, requires plaintiffs to bring federal antitrust claims under the act "within four years after the cause of action accrued." The same four-year statute of limitations applies to civil RICO claims. See Agency Holding Corp. v. Malley-Duff Assocs., Inc., 483 U.S. 143, 156 (1987). Generally, "a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business."

Zenith Radio Corp. v. Hazeltine Research, 401 U.S. 321, 338 (1971). In the case of a continuing violation, each overt act that is part of the violation and that injures the plaintiff starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times. See 2 Areeda & Hovenkamp, at ¶ 338b. See also Zenith Radio Corp., 401 U.S. at 338; Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc., 669 F.2d 490, 494 (7th Cir. 1982). However, "the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period." Klehr v. A.O. Smith Corp., 521 U.S. 179, 189 (1997) (citing Zenith Radio Corp., 401 U.S. at 338).

Defendant Credit Lyonnais Rouse argues that plaintiffs have alleged two separate conspiracies and that its involvement in any alleged conspiracy ended in 1993, before defendant Global began conspiring with defendant Sumitomo. However, plaintiffs allege that "CLR served as the clearing broker for Global in consummating trades on the LME" and that "CLR and Winchester gladly assisted [Global] in its startup endeavors in furtherance of their manipulation conspiracy." Compl. ¶ 89. As in Ocean View, I conclude that plaintiffs have alleged sufficient facts that there was one conspiracy and not two. Therefore, plaintiffs' Clayton Act claim against defendant Credit Lyonnais Rouse is not barred by the statute of limitations. It is not necessary to determine at this time which of plaintiffs' damages may be

barred because they accrued more than four years before the filing of this lawsuit. See Ocean View, 2000 WL 576238 at *16.

B. Fraudulent Concealment

In antitrust cases courts have adopted the general doctrine that the statute of limitations does not run while the defendant's offense is "fraudulently concealed." See 2 Areeda & Hovenkamp at ¶ 338d (citing Holmberg v. Armbrecht, 327 U.S. 392 (1946)). Plaintiffs have the burden of establishing that there was fraudulent concealment. See id. This burden is met only if plaintiffs show that they neither knew of the offense nor could reasonably have known of the offense in the exercise of due diligence. See id. Once concealment is found, it must still be fraudulent to toll the statute. See id. Although generally fraudulent concealment requires more than mere silence or failure to volunteer information about one's activities, denial when there is no duty to speak or a failure to reveal one's intentions, courts often toll the limitation period in the case of secret conspiracies. See id.

> The allegation of a conspiracy alone is not an adequate basis from which fraudulent concealment may be inferred. Laundry Equipment Sales Corp. v. Borg-Warner Corp., 334 F.2d 788, 792 (7th Cir. 1964). Where courts have tolled limitations periods because of the existence of a conspiracy, the basis for the action has been the inherently secret nature of the conspiracy involved and its necessity as an element in the cause of action. Cf. Allis-Chalmers Mfg. v. Commonwealth Edison Co., 315 F.2d 558, 562 (7th Cir. 1963).
>
> In order to obtain the shelter of the federal doctrine of fraudulent

> concealment, plaintiffs must be prepared to adduce sufficient evidence to warrant the conclusion that defendants concealed the basic facts disclosing the existence of a cause of action and that plaintiffs remained in ignorance of those facts through no fault of their own. Bailey v. Glover,88 U.S. 342, 349 (1874). Where, as in the case of many conspiracies in violation of federal antitrust laws, the wrong is self-concealing, little need be added in order to justify tolling the statute.

Baker v. F & F Investment, 420 F.2d 1191, 1198-99 (7th Cir. 1970).

In Klehr, 521 U.S. at 196, the Supreme Court held that "'fraudulent concealment' in the context of civil RICO embodies a 'due diligence' requirement." In reaching that conclusion, the Court cited Professor Areeda with approval and noted that in the antitrust and civil RICO contexts, "private civil actions seek not only to compensate victims but also to encourage those victims themselves diligently to investigate and thereby uncover unlawful activity." Id. at 195. See also Martin v. Consultants & Administrators, Inc., 966 F.2d 1078, 1098 (7th Cir. 1992) ("fraudulent concealment doctrine. . . requires diligence on the part of the plaintiff in order to be applied at all, at least where self-concealing acts are concerned"). Two types of acts may constitute fraudulent concealment: "acts that are self-concealing (such as frauds); and acts where, absent a subsequent act of concealment, only the perpetrator, but not the fact that a cause of action might exist, would be unknown (such as a burglary). In the former case, concealment is established by the nature of the act; in the latter case, additional acts of concealment are required to trigger the tolling doctrine." Id. at 1094. This case falls within the

self-concealing category; therefore, to toll the statute of limitations on the basis of fraudulent concealment, plaintiffs must show that they exercised due diligence in discovering defendant's alleged unlawful acts. Plaintiffs have not alleged facts sufficient to show that they acted with due diligence in uncovering the claim and have failed to meet their burden of establishing fraudulent concealment. Therefore, plaintiffs will not be able to recover on claims that occurred more than four years before the filing of this lawsuit.

VII. SUFFICIENCY OF ALLEGATIONS OF CIVIL RICO VIOLATION

A. 18 U.S.C. § 1962(c)

The elements of a subsection (c) offense are (1) conduct (2) of an enterprise (3) through a pattern of racketeering activity. See Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496 (1985). A pattern is the commission of at least two statutorily enumerated "predicate acts." See id. at 496 n.14. Plaintiffs allege that Sumitomo, Winchester, Credit Lyonnais Rouse and Global as a group constituted an enterprise within the meaning of § 1962(c) or alternatively, that defendants are each an enterprise within the meaning of that section. Plaintiffs allege that defendants committed "countless acts of mail and wire fraud, in violation of 18 U.S.C. § 1341, 1343," Compl. ¶ 166, constituting a pattern of racketeering activity. Defendant Credit Lyonnais Rouse challenges the sufficiency of plaintiffs' allegations against it, arguing that

plaintiffs fail to allege any predicate acts or pattern of racketeering activity by Credit Lyonnais Rouse, an act by Credit Lyonnais Rouse that proximately caused plaintiffs' injury, the conduct of the affairs of the alleged enterprise or any predicate acts. Defendant Credit Lyonnais Rouse argues also that plaintiffs failed to allege an association-in-fact enterprise involving it.

The Supreme Court has interpreted the meaning of "conduct" and "participate" as used in § 1962(c):

> In order to "participate, directly or indirectly, in the conduct of such enterprise's affairs," one must have some part in directing those affairs. Of course, the word "participate" makes clear that RICO liability is not limited to those with primary responsibility for the enterprise's affairs, just as the phrase "directly or indirectly" makes clear that RICO liability is not limited to those with a formal position in the enterprise, but *some* part in directing the enterprise's affairs is required. The "operation or management" test expresses this requirement in a formulation that is easy to apply.

Reves v. Ernst & Young, 507 U.S. 170, 179 (1993) (internal footnote omitted) (emphasis in original). The Court concluded that subsection (c) has a more limited reach than subsections (a) and (b) and that "liability depends on showing that the defendants conducted or participated in the conduct of the '*enterprise's* affairs,' not just their *own* affairs." Id. at 185 (emphasis in original). Therefore, for a defendant to be liable under § 1962(c), it must have participated in the operation or management of the enterprise itself. See id. "[S]imply performing services for an enterprise, even with knowledge of the enterprise's illicit nature, is not enough to subject an individual to RICO liability under § 1962(c); instead the individual

must have participated in the operation and management of the enterprise itself." Goren v. New Vision Int'l, Inc., 156 F.3d 721, 728 (7th Cir. 1998) (upholding dismissal of complaint against defendants who performed certain services for enterprise).

The only acts of mail or wire fraud that plaintiffs allege defendant Credit Lyonnais Rouse was involved in are "wirings and/or mailings between Sumitomo and/or its conspirator Winchester and Credit Lyonnais Rouse, in which Sumitomo and/or its conspirator Winchester discussed, approved, structured, and/or sought financing for the purchase and/or sale of physical copper and/or copper exchange contracts in furtherance of their conspiracy to manipulate the world copper markets," Compl. ¶ 167(E), and "fund transfers by wire from, between, and among Sumitomo, Global, Winchester, and CLR." Compl. ¶ 167(M). Neither of these allegations suggests that defendant Credit Lyonnais Rouse did anything other than provide standard broker services. Plaintiffs do allege that defendant Credit Lyonnais Rouse intended to influence copper prices artificially through the RADR transaction. See Compl. at ¶ 74. However, the specific allegations of wire and mail fraud by Credit Lyonnais Rouse are not sufficient to support a finding that it had any part in directing the affairs of the enterprise.

Plaintiffs' RICO claims against defendant Credit Lyonnais Rouse suffer from several other defects. I need not review all of these shortcomings because plaintiffs' failure to allege that Credit Lyonnais Rouse conducted the alleged enterprise's affairs requires that their claim

against it under § 1962(c) be dismissed. I note, however, that the court of appeals has been quite reluctant to allow civil RICO claims based merely on predicate acts of mail or wire fraud because "virtually every garden variety fraud is accomplished through a series of mail and wire fraud acts." U.S. Textiles, Inc. v. Anheuser-Busch, 911 F.2d 1261, 1268 (7th Cir. 1990). Therefore, even if plaintiffs can cure the deficiencies in their complaint, this case appears to involve precisely the sort of "garden variety fraud" not appropriately prosecuted under RICO.

The Court of Appeals for the Seventh Circuit has interpreted the holding in Holmes v. SIPC, 503 U.S. 258 (1992), as "no more than that common law ideas about proximate causation inform the understanding of RICO. Holmes refrained explicitly from importing a theory akin to the antitrust-injury doctrine into the law of RICO." Israel Travel Advisory Service, 61 F.3d at 1257 (concluding that "a producer injured by a campaign of misinformation directed at its customers suffers an injury compensable under the law of torts; it is not cut off by the proximate-causation and foreseeability requirements."). Defendant Credit Lyonnais Rouse's motion to dismiss the 18 U.S.C. § 1962(c) claim against it will be granted.

B. 18 U.S.C. § 1962(d)

Section 1962(d) makes it unlawful to conspire to violate section 1962(c). "To state a claim for conspiracy under § 1962(d), a plaintiff must allege '(1) that each defendant agreed

to maintain an interest in or control of an enterprise or to participate in the affairs of an enterprise through a pattern of racketeering activity and (2) that each defendant further agreed that someone would commit at least two predicate acts to accomplish those goals.'" Lachmund v. ADM Investor Services, Inc., 191 F.3d 777, 784 (7th Cir. 1999) (quoting Goren, 156 F.3d at 732).

In Beck v. Prupis, 120 S. Ct. 1608, 1616 (2000), the Supreme Court held "that injury caused by an overt act that is not an act of racketeering or otherwise wrongful under RICO is not sufficient to give rise to a cause of action under § 1964(c) [which creates a private cause of action] for a violation of § 1962(d). As at common law, a civil conspiracy plaintiff cannot bring suit under RICO based on injury caused by *any* act in furtherance of a conspiracy that might have caused the plaintiff injury." (Emphasis in original) (internal citation omitted). Instead, plaintiff must allege injury from an act that is independently wrongful under RICO. See id. In Beck, the petitioner's alleged injury was caused by the termination of his employment, which was not an act of racketeering even though it may have been committed in furtherance of the respondents' conspiracy. See id. at 1612-13. The Court noted that its interpretation did not render § 1962(d) superfluous because "a plaintiff could, through a § 1964(c) suit for a violation of § 1962(d), sue co-conspirators who might not themselves have violated one of the substantive provisions of § 1962." Id. at 1617. Although Beck suggests that

defendant Credit Lyonnais Rouse might be liable as a co-conspirator even where it was not liable under § 1962(c) for its own actions, my conclusion that plaintiffs have not sufficiently alleged that Credit Lyonnais Rouse was involved in an association-in-fact enterprise dooms plaintiffs' claim under § 1962(d).

VIII. SUFFICIENCY OF ALLEGATIONS AGAINST CREDIT LYONNAIS ROUSE OF SHERMAN ACT VIOLATION

A. Standing

For the reasons already discussed, plaintiffs have antitrust standing to bring a claim under the Sherman Act. Defendant Credit Lyonnais Rouse argues that the causal connection between its alleged unlawful actions involving the RADR transaction and plaintiffs' injury is more remote than that between the actions of the other defendants and plaintiffs' injury. Defendant suggests that the only overt act by it alleged in the complaint is the RADR transaction and that plaintiffs have failed to allege that this transaction caused plaintiffs any injury. Also, defendant argues that because the RADR transaction is alleged to have involved only LME copper options and futures, LME traders would be affected more directly than users of physical copper. Finally, defendant argues that any damages caused by the RADR transaction would be even more speculative than damages caused by acts of the other

defendants because the damages calculation would require "an additional determination, regarding the effect of LME copper *options* trading on LME *futures* prices." Reply Mem. of Law by Def. Credit Lyonnais Rouse at 39. Because, as discussed below, plaintiffs have adequately pleaded that defendant Credit Lyonnais Rouse was a member of a conspiracy consisting of the other defendants, my previous analysis of plaintiffs' standing to bring an antitrust claim is sufficient to show why defendant Credit Lyonnais Rouse's motion to dismiss on this ground must be denied.

B. Conspiracy

Defendant Credit Lyonnais Rouse contends that plaintiffs have failed to properly plead a claim for conspiracy to restrain trade against it because they have failed to allege facts showing that this defendant intended to accomplish an unlawful goal. Plaintiffs' allegations in this case are sufficiently similar to those in the Ocean View case that the reasoning in that case supports the conclusion that plaintiffs have adequately stated a claim against defendant Credit Lyonnais Rouse. See Ocean View, 2000 WL 576238 at *13-15. Contrary to defendant's suggestion, plaintiffs allege that Credit Lyonnais Rouse intended to influence copper prices artificially through the RADR transaction. See Compl. ¶ 74. Plaintiffs allege that defendant Credit Lyonnais Rouse agreed to assist in the RADR 1 transaction, knowing that the

transaction's purpose was to raise world copper prices artificially. See Compl. ¶¶ 79-80. Plaintiffs allege sufficient facts concerning defendant Credit Lyonnais Rouse's actions as a broker for its alleged co-conspirators to withstand a motion to dismiss. (It bears mentioning that the standards for finding a conspiracy to restrain trade and for finding that one is a member of a RICO enterprise are different, as evidenced by the different rulings on defendant Credit Lyonnais Rouse's motion to dismiss the two claims in this case.)

IX. STATE CLAIMS AGAINST CREDIT LYONNAIS ROUSE

The state law claims form part of the same case or controversy as the federal claim under the Sherman Act. Defendant Credit Lyonnais Rouse has not argued that the state claims would raise novel or complex issues of state law. Because plaintiffs' claim against this defendant under the Sherman Act will survive this motion to dismiss, it is appropriate to exercise supplemental jurisdiction pursuant to 28 U.S.C. § 1367 over the state law claims.

X. MOTION TO TRANSFER CASE TO SOUTHERN DISTRICT OF NEW YORK FOR TRIAL

The Sumitomo and Global defendants contend that venue is not proper in this district with respect to David Campbell and that this court should transfer the case to the Southern

District of New York for trial. Defendants note that the Judicial Panel on Multi-District Litigation has consolidated related cases before this court for pre-trial purposes and do not request the case be transferred until pre-trial proceedings are concluded. This argument may have merit; however, I will delay ruling on the motion to transfer until a time closer to trial.

ORDER

IT IS ORDERED that

1. The motions to dismiss of defendants Sumitomo Corporation, Sumitomo Corporation of America, Global Minerals and Metals Corporation and R. David Campbell is DENIED;

2. The motion of defendant Credit Lyonnais Rouse, Ltd. to dismiss the claims against it under 18 U.S.C. § 1962(c) and (d) is GRANTED;

3. The motion of defendant Credit Lyonnais Rouse, Ltd. to dismiss all other claims against it is DENIED;

4. A ruling is reserved on the motion of defendants Sumitomo Corporation, Sumitomo Corporation of America, Global Minerals and Metals Corporation and R. David Campbell to transfer this case to the Southern District of New York for trial.

Entered this _____________ day of July, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge