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

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

In an order signed July 7, 2000 and docketed July 12, 2000, I denied the motion of defendants Sumitomo Corporation, Sumitomo Corporation of America, Global Minerals and Metals Corporation and R. David Campbell to dismiss the claims filed against them. These defendants have requested that I certify that order for interlocutory appeal. Defendants contend that in the July 7 opinion, I decided three novel questions of law that are appropriate for certification. I disagree and will deny the motion.

A district court may authorize the appeal of an interlocutory order if "such order

involves a controlling question of law as to which there is substantial ground for difference of opinion and . . . an immediate appeal from the order may materially advance the ultimate termination of the litigation. . . ." 28 U.S.C. § 1292(b). See Ahrenholz v. Board of Trustees of the University of Illinois, No. 00-8010, 2000 WL 987772 at *1 (7th Cir. Jul. 18, 2000) ("There are four statutory criteria for the grant of a section 1292(b) petition to guide the district court: there must be a question of law, it must be controlling, it must be contestable, and its resolution must promise to speed up the litigation.").

Interlocutory appeals are contrary to the general scheme of federal appellate jurisdiction permitting appeals only from final judgments. See Johnson v. Burken, 930 F.2d 1202, 1208 (7th Cir. 1991) (Ripple, J., dissenting). Such appeals are appropriate only in the "most narrow of circumstances." Id. The Court of Appeals for the Eighth Circuit has explained why an interlocutory appeal is inappropriate at a time such as this, when the factual record has not been developed.

> While it might be conceivable that an issue includes a controlling question of law, and while it might be seemingly apparent that it is a difficult question as to which there is a substantial ground for difference of opinion, and while a decision thereon might materially advance the ultimate outcome, the case must be of sufficient ripeness so that this can be determined from the record. The purpose of § 1292(b) is not to offer advisory opinions "rendered on hypotheses which (evaporate) in the light of full factual development." Minnesota v. United States Steel Corp., 438 F.2d 1380, 1384 (8th Cir. 1971). Consideration of the factual basis must be such that a sound premise exists upon which the legal issues can be determined with precision. Id.

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> Further, once the factual and legal development of this case is completed to the extent that our court has the judicially desirable record upon which the appellate court acts, the decision requested of us may no longer be necessary. There are threshold issues to a private antitrust cause of action which hold the possibility of either being determinative of the outcome or of changing the focus of the cause of action. "Appellate courts cannot waste their time on problems that may never arise or speculate on how the problem will arise." Control Data Corp. v. IBM Corp., 421 F.2d 323, 327 (8th Cir. 1970). The record before us should assure us that the legal issue has arisen and exactly how the problem arose before we fashion a response.

Paschall v. Kansas City Star Co., 605 F.2d 403, 406-407 (8th Cir. 1979). See also Baxter International Inc. v. Cobe Laboratories, Inc., No. 89 C 9460, 1992 WL 151894, *6 (N.D. Ill. June 15, 1992) ("in a complex case that involves unresolved factual questions which have a bearing on the precise question of law presented by the case, 'proper exercise of judicial restraint [can avoid] an abstract answer to an abstract question [which] is the least desirable of judicial solutions.'") (quoting Slade v. Shearson, Hammill & Co., 517 F.2d 398, 400 (2d Cir. 1974)).

The lack of a factual record at the motion to dismiss stage makes this an inappropriate time for the court of appeals to address the issues raised by defendants in their motion. After the parties have conducted discovery, the case may appear in an entirely different light and the challenged rulings may be moot. For example, the decision that plaintiffs were not barred by

the holding in Associated General Contractors v. California State Council of Carpenters, 459 U.S. 519 (1983), depended on factual allegations in the complaint that may be shown to be untrue. Similarly, defendants may be able to show through discovery that plaintiffs lack standing under the umbrella theory or that the fraud-on-the-market theory is not properly applied to this case. An appeal at this time would be premature. Furthermore, allowing an interlocutory appeal in this case is as likely to slow down as to speed up the litigation, by interrupting and delaying proceedings in this court. As defendants note, this is a "massive and complex" case; its termination is best advanced by developing facts through discovery so that legal conclusions may be based on facts and not allegations. Defendants' motion to certify the July 7 order for an interlocutory appeal will be denied.

## ORDER

IT IS ORDERED that the motion of defendants Sumitomo Corporation, Sumitomo Corporation of America, Global Mineral and Metals Corporation and R. David Campbell to certify the order entered on July 7, 2000 for interlocutory appeal is DENIED.

Entered this 26th day of July, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge