IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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IN RE COPPER MARKET
ANTITRUST LITIGATION

MDL DOCKET No. 1303

SOUTHWIRE COMPANY and
GASTON COPPER RECYCLING
CORPORATION,

Plaintiffs,

ORDER

02-C-0707-C

v.

J.P. MORGAN CHASE & CO., as
successor to J.P. MORGAN & CO.,
INC.; MORGAN GUARANTY TRUST
COMPANY OF NEW YORK; SUMITOMO
CORPORATION; SUMITOMO
CORPORATION OF AMERICA; YASUO
HAMANAKA; and GLOBAL MINERALS
AND METALS CORPORATION,

Defendants.

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Defendants J.P. Morgan & Co., Inc. and Morgan Guaranty Trust Company of New York have moved to dismiss the first amended complaint of plaintiffs Southwire Company and Gaston Copper Recycling Corporation on the grounds that (1) the suit is time-barred because the statute of limitations has run; (2) plaintiffs' Racketeer Influenced and Corrupt

Organizations claims against the moving defendants fail to state a claim; and (3) plaintiffs' antitrust and RICO claims are impermissible attempts to hold the moving defendants liable for aiding and abetting the primary violations of others. (Plaintiffs have indicated that they will be withdrawing their RICO claims so I will not address them further in this order.) Plaintiffs object to the court's entertaining any part of the motion that relates to the merits of plaintiffs' claims, pointing out that the court gave defendants leave to file a motion to dismiss only on venue and statute of limitations grounds. See Order of May 23, 2003, dkt. #467. Plaintiffs' objection is well taken. Even if it were not, however, defendants' motion to dismiss the complaint would be denied insofar as it relates to the alleged lack of aiding and abetting liability under the antitrust laws (plaintiff has pleaded participation in the conspiracy, not simply aiding and abetting) and lack of standing (plaintiff has alleged that it was a first purchaser of copper cathode and rod). If defendants want to pursue these alleged pleading deficiencies further, they will have to so by filing a motion for summary judgment. Whether they will need to proceed by way of summary judgment on the statute of limitations challenge that they were permitted to file is one of the questions I must decide in this opinion.

For the purpose of deciding this motion, I am relying on the relevant factual allegations in plaintiffs' first amended complaint, the newspaper articles defendants have submitted to show the existence of news articles about defendants' actions in connection with Sumitomo's copper market manipulations and additional articles available on Lexis-Nexis. "A court may consider judicially noticed documents without converting a motion to dismiss into a motion for summary judgment." Menominee Indian Tribe of Wisconsin v. Thompson, 161 F.3d 449, 456 (7th Cir. 1998); see also Ieradi v. Mylan Laboratories, Inc., 230 F.3d 594, 597-98 (3d Cir. 2000) (appellate court may take judicial notice of newspaper article in reviewing propriety of district court's dismissal of complaint alleging securities violations); In re Sterling Foster & Co. Inc. Securities Litigation, 222 F. Supp. 2d 312, 319-21 (E.D.N.Y. 2002) (taking judicial notice of many articles reporting fraud charges against Sterling Foster & Co. in granting defendant's motion to dismiss based on running of statute of limitations; court found from articles that plaintiffs had had timely notice of "'circumstances that would suggest to an investor of ordinary intelligence the possibility that he has been defrauded'") (quoting Dodds v. Cigna Securities, Inc., 12 F.3d 346, 350 (2d Cir. 1993)). Fed. R. Evid. 201 allows a fact to be judicially noticed if it is "one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

Although it would be improper to take judicial notice of the contents of the articles for their truth because the truthfulness of the reports is not something "capable of accurate and ready determination," I can take judicial notice of the fact that the articles were published and that they contained information about defendants, solely for the purpose of determining whether the articles would have given a reader reason to make further inquiry into defendants' liability for antitrust violations.

Plaintiffs have had an opportunity to be heard on the matter, as required under Rule 201(e). They object to any consideration of the newspaper articles, not because of any doubts about the authenticity of the articles but because they are extraneous to the complaint. They cite Albany Bank & Trust Co. v. Exxon Mobil Corp., 310 F.3d 969, 971 (7th Cir. 2002), for the proposition that such documents can never be relied upon in deciding a motion to dismiss. In Albany Bank, however, the documents at issue were "proposed access agreements and other correspondence [defendant] exchanged with [plaintiff] in reviewing the district court's ruling," rather than documents subject to judicial notice, as in this case and in Menominee Tribe, 161 F.3d at 456.

FACTUAL ALLEGATIONS

Plaintiff Southwire Company manufactures and distributes electrical quality copper rod, wire and cable in interstate and foreign commerce, directly and through its subsidiaries. Plaintiff Gaston Copper Recycling Corporation is a wholly owned subsidiary of plaintiff Southwire engaged in the same activities as its parent. Defendant J.P. Morgan Chase & Co. is the merged successor of J.P. Morgan & Co., Inc. Defendant Morgan Guaranty Trust

Company of New York is a wholly owned subsidiary of J.P. Morgan Chase & Co. (Because these defendants are the only moving defendants, I will refer to them simply as defendants.) Defendant Sumitomo Corporation is a Japanese corporation that entered into contracts or agreements with respect to physical copper and copper futures or options in order to raise, fix, stabilize and maintain the price of copper at artificially high levels. Defendant Sumitomo Corporation of America is a wholly owned subsidiary of defendant Sumitomo Corporation. Defendant Yasuo Hamanaka is a citizen of Japan. At material times, he was defendant Sumitomo's chief copper trader. He held the office of general manager of the company's copper trading operations from August 1987 until about June 13, 1996. Defendant Global Minerals and Metals Corporation is a copper merchant firm that entered into a series of supply contracts with Sumitomo covering at least the period 1994-1996.

Physical copper is purchased and sold in commercial quantities. It includes copper cathode and copper rod. The price of physical copper is linked structurally to the prices for copper futures on the London Metals Exchange, known as the LME, and on Comex, a designated contract market. Almost all transactions in copper cathode and rod in the United States are priced with reference to the Comex copper futures prices.

In an order entered on May 11, 1998, the Commodity Futures Trading Commission entered findings and an order imposing remedial sanctions against defendant Sumitomo for violating provisions of the Commodities Exchange Act by raising, fixing and maintaining the prices of physical copper and copper futures. Defendant Sumitomo settled the matter by payment of a civil penalty, without admitting or denying the findings.

Defendant Morgan was named in class actions lawsuits, some of which were settled. On July 8, 1996, a class action lawsuit against defendant Sumitomo was filed in state court in California (Heliotrope v. Sumitomo Corp., Case No. 00701697). Other class actions were filed in the same court and consolidated with Heliotrope. Plaintiffs participated as putative class members in the Heliotrope class actions, among others, and have made requests to opt out of the various settlement and litigation classes within the Heliotrope actions and others. On June 8, 1999, a class action was filed in this court, Loeb Industries, Inc. v. Merrill Lynch International, Inc. (Loeb I), 99-C-0377-C. On May 8, 2000, another class action was filed in this court, Loeb Industries, Inc. v. J.P. Morgan & Co., Inc.(Loeb II), 00-C-0274-C.

FACTS SUBJECT TO JUDICIAL NOTICE

As early as December 6, 1991, The New York Times was reporting an artificially tight supply situation on the London copper market that had led the LME to "place limits on the price premium paid for the nearest delivery month over the succeeding month, in order to defuse what some traders viewed as an attempted supply squeeze." The report said that Sumitomo denied that it had been hoarding copper supplies.

On October 20,1993, the Financial Times (London) reported that Credit Lyonnaise

Rouse had apologized to the LME for its part in a copper squeeze on the exchange and had paid 100,000 pounds toward the exchange's costs. The reporter noted that Credit Lyonnaise's clients included Sumitomo Corporation and that some traders had suggested during the height of the squeeze that Sumitomo was mainly responsible.

On June 15 and 16, 1996, The New York Times published articles about Yasuo Hamanaka and Sumitomo and alleged unauthorized trading over a ten-year period that had caused Sumitomo to lose $1.8 billion. Neither of the articles mentioned defendants. On June 17, 1996, the paper published an article in its late edition in Section D, page 4, col. 1, entitled "With Sumitomo Loss, U.S. Widens Commodities Inquiry." In the body of the article, the reporter stated that the Commodity Futures Trading Commission was investigating ties between defendant Sumitomo and Global Minerals and Metals Corporation, that authorities were trying to determine who might have helped Yasuo Hamanaka arrange fictitious trades and that J.P. Morgan was one of the institutions that took an active part in "those transactions." The article was unclear whether "those transactions" referred to hedging transactions by several major copper producers to protect themselves against falling copper prices or to contracts that Morgan had entered into with some copper producers as part of their business activity in the commodities market.

On July 23, 1996, the Associated Press issued a release reporting the investigation of J.P. Morgan and other banks by the Commodities Futures Trading Commission in connection with the financing of “gigantic copper trades by former Sumitomo Corp. trader Yasuo Hamanaka.” According to the release, the commission was looking at loan agreements known as “copper swaps” and J.P. Morgan’s swap amounted to about $400 million. The article defined “swaps” as “a type of financial agreement broadly known as derivatives, which are based on, or ‘derived’ from, the value of an underlying asset, such as stocks, bonds or commodities.”

On July 23, 1996, The Wall Street Journal published an article entitled “CFTC Probes Unusual Loans to Sumitomo -- Complex Copper Swaps May Have Financed Hamanaka’s Purchases.” The reporters stated that investigators were focusing on the possibility that Hamanaka had used millions of dollars in loans from American banks in an attempt to manipulate the copper market or mask his trading losses and that “[d]etails of the unusually structured loans, which may exceed $1 billion, have raised eyebrows in commodities markets and with U.S. and British regulators since they were disclosed in The Wall Street Journal last week.” They quoted a “commodity-derivatives specialist at one firm not involved in the loans” as saying that “[t]his is the strangest kind of commodity derivative I’ve ever seen. It should have made people [at the banks] ask what [Hamanaka] was trying to do.”

On September 20, 1996, The New York Times published an article in its late edition in Section D, page 3, col. 1, entitled “Sumitomo Increases Size of Copper-Trade Loss to $2.6

Billion." Describing Sumitomo's efforts to put the scandal behind it, the reporter wrote that Sumitomo "offered no clues to whether others might have cooperated with [Hamanaka] or how much American financial institutions knew about Sumitomo's copper dealing. Several American banks, including Chase Manhattan and J.P. Morgan & Company, lent nearly $1 billion in total to Sumitomo's copper-trading operations." In another paragraph, the reporter wrote that "Brooksley E. Born, the new head of the Commodities Futures Trading Commission, said the C.F.T.C. was working with the Federal Reserve and the Treasury Department to review the role of American banks in helping to finance Sumitomo's copper dealings."

On November 22, 1996, the Financial Times (London) published an article entitled "Questions of Management," in which the reporter focused on the LME's role in the copper scandal, the adequacy of the exchange's rules and oversight, the possible need for changes and the difficulty of controlling over-the-counter instruments over which the exchange had no authority. Near the end of the article, he reported the "revelations" that Sumitomo had arranged two large and complex copper swaps with J.P. Morgan and Chase Manhattan that had generated up to $900 million in up-front loans to support Sumitomo's trading activities.

On April 4, 1997, the Financial Times (London) published an article entitled "JP Morgan Rapped over Hamanaka Link," in which it reported that J.P. Morgan had been censured by American bank regulators for its handling of its relationship with Sumitomo

Corporation and that its president had signed a memorandum of understanding issued by the New York Federal Reserve. The reporter explained that "[a] memorandum of understanding is one action open to US regulators when banks fail to meet their criteria of safety and soundness." The reporter added that it was not clear why J.P. Morgan was censured and other banks were not and that the criticism might relate to controls over trading rather than the loan to Sumitomo.

Three days later, on April 7, 1997, The Wall Street Journal reported that federal and state banking regulators had reprimanded J.P. Morgan for lax management and controls in its base-metals business. Discussing the fact that J.P. Morgan was the only bank disciplined, the reporter speculated that one factor for the discipline might be the bank's "much deeper relationship" with Sumitomo,

> including an extensive business trading copper options with the Japanese firm. Indeed, several market participants speculate that J.P. Morgan may have financed Mr. Hamanaka's transactions in part by buying put options from Sumitomo, which are essentially a bet that the price of copper will fall, even as Sumitomo was hoarding enough copper to ensure that the metal's price remained high.

He added that J.P. Morgan had dismissed several employees and lost others, who had left voluntarily.

Earlier, on April 4, 1997, The Guardian (London) had reported that J.P. Morgan had been reprimanded for its role in the Sumitomo copper trading scandal. It explained that both J.P. Morgan and Chase had structured their loans to Hamanaka as complex derivative transactions, "apparently allowing Mr. Hamanaka to account for them as copper trades rather than standard loans."

Also on April 4, 1997, American Metal Market published an article repeating the speculation that J.P. Morgan had been disciplined because it had engaged in extensive copper trading with Sumitomo.

OPINION

Plaintiffs are seeking damages under § 4 of the Clayton Act, 15 U.S.C. § 16, for violations of § 1 of the Sherman Act, 15 U.S.C. § 16. 15 U.S.C. § 15b requires a plaintiff to bring such an action "within four years after the cause of action accrued." Although the Supreme Court has not decided whether it accrues with the injury or discovery of the injury, see Rotella v. Wood, 528 U.S. 549, 554 n.2 (2000) ("We do not, however, settle upon a final rule [for accrual]. . . . our decision in Klehr [v. A.O. Smith, 521 U.S. 179, (1997)] leaves open the possibility of a straight injury occurrence rule."), the lack of a definitive ruling is no impediment in this case because defendants are proceeding on the assumption that accrual corresponds with discovery. For the purpose of this opinion, I will assume that plaintiffs' cause of action accrued when plaintiffs knew or should have known of their injury.

Defendants contend that plaintiffs should have known of their injuries on or about June 17, 1996, when an article in The New York Times reported defendants' involvement in the allegedly fraudulent copper transactions. Plaintiffs disagree, for a number of reasons. (1) The newspaper articles were not so obvious, numerous or detailed that a reasonable person in plaintiffs' position, exercising due diligence, would have known of defendants' involvement as a conspirator before August 11, 1999, when Sumitomo brought suit against these defendants; (2) defendants' fraudulent concealment of their misconduct kept plaintiffs from recognizing that they had been injured by defendants' acts; and (3) even if plaintiffs had known of their injuries earlier, the limitations period was tolled during the pendency of certain class action lawsuits of which they were members.

Plaintiffs' first position is unpersuasive; their second is highly dubious and not supported by the allegations in their complaint; and the third depends on matters that cannot be decided on the present record. As early as 1991, at least one national newspaper (The New York Times) was reporting the possibility that Sumitomo was engaged in improper and possibly illegal schemes to manipulate the copper futures market. Obviously, this information would not have alerted plaintiffs to the possibility that defendants were involved in the scheme. It was, however, the kind of information that would have caused plaintiffs and every other player in the copper market to watch for future news items on related developments. By July 1996, when the articles were naming defendants as being potentially involved with Sumitomo, anyone with even a tangential stake in the commodities markets would have been following the Sumitomo investigation and defendants' role in the alleged market squeeze.

Plaintiffs argue that the news was hidden in the inside pages of the financial section of the papers in which it appeared. This is not a persuasive argument. Where else would persons with interests in commodities be likely to look when they opened up the paper? Many individuals with stock and bond holdings begin their reading of the newspaper in the financial section; officers of companies whose profits depend on the commodities market have at least an equal incentive to read the same section. How hard would it have been to determine an injury and the identity of possible wrongdoers by reading about it in the The New York Times, Associated Press articles or The Wall Street Journal? Most injured persons have to work much harder than that to learn the basic information they need to begin an inquiry into the causes of their injury. I conclude that plaintiffs' cause of action accrued on July 23, 1996. Although other articles appeared later that talked more about defendants' potential involvement in the scheme, the three June and July articles were specific enough to alert plaintiffs to their injury and potential tortfeasor. It is true, as plaintiffs argue, that they did not have all the facts they needed to bring a lawsuit as of July 23, 1996. All they needed was enough notice to realize they might have a cause of action. Once they had this, they had four years to collect the necessary information and file their complaint.

Plaintiffs maintain that they are entitled to equitable tolling of the limitations period because defendants were so successful at concealing their wrongdoing. As defendants point out, plaintiffs limit the allegations of fraudulent concealment in their complaint to the period in which the scheme was ongoing, not to the period after the copper squeeze had been discovered. Unless plaintiffs have other evidence of concealment that would have affected their ability to obtain enough evidence to file a complaint against defendants earlier than December 30, 2002, they will be unable to defeat the running of the statute of limitations on this ground. Certainly, the newspaper articles summarized earlier suggest that extensive information on defendants' involvement in the squeeze was coming to light in late 1996 and 1997.

Because I will be converting part of this motion to one for summary judgment, I will give plaintiffs an opportunity to propose findings of fact on their claims that defendants fraudulently concealed their role in the copper transactions and that plaintiffs exercised due diligence in trying to obtain evidence of this role.

The filing of a class action tolls the statute of limitations for all purported members of a class. Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 353-54 (1983) (commencement of class actions suspends applicable statute of limitations as to all putative class members who would have been parties had suit been permitted to continue as class action) (citing American Pipe & Construction Co. v. Utah, 414 U.S. 538, 544 (1974)); Culver v. Milwaukee, 277 F.3d 908, 914 (7th Cir. 2002). The purpose of the tolling is to avoid the inefficiencies that would result if every injured party felt the need to file a protective suit. Crown, Cork & Seal, 462 U.S. at 349.

As their last ground for denial of defendants' motion, plaintiffs argue that they are entitled to tolling for the periods of time in which they were putative plaintiffs in state antitrust litigation. Defendants object, asserting that there were only two state actions, which they refer to as Heliotrope I and Heliotrope II, and that these did not involve allegations of federal Sherman Act violations. Moreover, they point, they were not even parties to the first suit. Defendants add that even if Heliotrope II tolled the limitations period, the suit was not filed until June 5, 2000, and plaintiffs opted out of the litigation class for the suit on March 21, 2003. The statute of limitations would have resumed running that day. If the statute began to run on June 17, 1996, as defendants contend, plaintiffs' suit might be barred because plaintiffs did not file their first amended complaint until April 22, 2003, which would have been after the statute had run. (Defendants maintain that the original complaint in this case did not toll the limitations period because plaintiffs did not accomplish service of the complaint within 120 days as required under Fed. R. Civ. P. 4(m).). However, I have found that the statute did not begin to run until July 23, 1996. Using this date, plaintiffs' suit would not have been untimely.

Plaintiffs have a second string to their tolling bow. They say that the statute was tolled during the Loeb litigation in this court. That suit was filed on June 8, 1999, against a number of defendants, not including the Morgan defendants. The Loeb plaintiffs filed a second suit against these defendants (Loeb II), which was filed on May 8, 2000, and dismissed on January 2, 2001, for plaintiffs' failure to show that the putative class had antitrust standing and could be ascertained. The dismissal was appealed; the Court of Appeals for the Seventh Circuit upheld the dismissal in an opinion issued on September 20, 2002. See Loeb Industries, Inc. v. Sumitomo Corp., 306 F.3d 469 (7th Cir. 2002).

Plaintiffs contend that the limitations period was tolled for the entire time that the federal case was on appeal. Their contention ignores the relevant case law. Once they knew they were not members of a viable class they had no right to rely on the class to protect their rights; the purpose for which tolling exists had no further application to them. Crown, Cork & Seal, 462 U.S. at 353-54; Culver v. Milwaukee, 277 F.3d at 914. Plaintiffs knew in January 2001 that if they wanted to preserve their rights they would have to file their own lawsuit.

If the two Heliotrope cases are excluded from the calculations, plaintiffs' limitations period started running on July 23, 1996. That period would have expired on July 24, 2000, had it not been for the filing of Loeb II on May 8, 2000. When that suit was filed, plaintiffs had 67 days left on their limitations period. When Loeb II was dismissed on January 2, 2001, plaintiffs had until March 10, 2001, in which to file suit. They did not file until December 30, 2002, almost two years later.

I cannot tell, however, whether to exclude Heliotrope I or II from the calculations without reviewing the allegations of the complaints in those cases. If neither involved allegations of federal antitrust violations, they would have no bearing on the statute of limitations question. Although those complaints would be subject to judicial notice, neither side has made them part of the record.

In order to resolve the remaining questions, I will set briefing on a motion for summary judgment, limited to the issue of the statute of limitations. Defendants are the moving party on the motion to dismiss, but they have made a facial showing that the statute of limitations bars plaintiffs' suit. Now it is plaintiffs' burden to show that some exception to the statute permits them to sue so long after the statute has run.

ORDER

IT IS ORDERED that the motions to dismiss filed by defendants J.P. Morgan Chase & Co. and Morgan Guaranty Trust Company of New York are DENIED and converted to motions for summary judgment. Plaintiffs Southwire Company and Gaston Copper Recycling Corporation may have until October 20, 2003, in which to serve and file a brief in support of their arguments that this case is not barred by the running of the statute of limitations. No later than November 10, 2003, defendants J.P. Morgan Chase & Co. and Morgan Guaranty Trust Company of New York are to file and serve their brief in opposition.

Plaintiffs may have until November 20, 2003, in which to file and serve a reply brief.

Entered this 20th day of August, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge