IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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LOEB INDUSTRIES, INC., LOS ANGELES SCRAP IRON & METAL CORP. and METAL PREP COMPANY, INC. on behalf of themselves and others similarly situated,

Plaintiffs,

v.

J.P. MORGAN & CO. INCORPORATED and MORGAN GUARANTY TRUST COMPANY OF NEW YORK,

Defendants.

OPINION AND ORDER

00-C-0274-C

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This is a civil suit in which plaintiffs Loeb Industries, Inc., Los Angeles Scrap Iron & Metal Corp. and Metal Prep Company, Inc. have brought suit against defendants J.P. Morgan Incorporated and Morgan Guaranty Trust Company of New York, alleging that defendants violated the Sherman Act by conspiring with other entities in a cartel that had the purpose of manipulating copper prices worldwide, causing injuries to persons such as plaintiffs that purchased copper. Plaintiffs allege in addition that defendants violated the Racketeer

Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1862(d), and state antitrust laws of several states, including Wisconsin. Defendants have moved to dismiss the complaint on the grounds that suit is barred by the principle of collateral estoppel, by plaintiffs' inability to prove that they and the class they seek to represent have antitrust standing, by the fact that aiding and abetting are not actionable under the Sherman Act and by plaintiffs' failure to state a claim against defendants under RICO. I conclude that the first ground, collateral estoppel, bars the suit and that it is unnecessary to address defendants' other grounds for dismissal.

These same plaintiffs, Loeb Industries, Inc., Los Angeles Scrap Iron & Metal Corp. and Metal Prep Company, Inc. brought two suits in this court against Sumitomo Corporation, Global Minerals and Metals Corporation, Merrill Lynch & Co., Inc., Merrill Lynch Pierce Fenner & Smith (Brokers & Dealers), Limited, and Merrill Lynch International, Inc. See Loeb Industries, Inc. v Sumitomo Corporation, 00-C-1303-C (99-C-377-C) and Metal Prep Company v. Sumitomo Corporation, 00-C-1303-C (99-C-0468-C). Plaintiffs sued on their own behalf and on behalf of a class of similarly situated persons. The suits were consolidated with other cases brought against Sumitomo Corporation and others that had been transferred to this court by the Panel on Multidistrict Litigation.

In an order entered in the Loeb and Metal Prep cases on August 24, 2000, see In re Copper Antitrust Litigation, 196 F.R.D. 348 (W.D. Wis. 2000), I denied plaintiffs' motion for

class certification after finding that plaintiffs were unable to show that the class members had antitrust standing or that the class was ascertainable. Also, I granted defendants' motion to dismiss, finding that although plaintiffs' allegations would be sufficient to withstand the motion if I considered only the allegations of the complaint and construed them in the light most favorable to plaintiffs, allowing the suit to continue would be a waste of the resources of the parties and the court. It was clear from the evidence submitted in support of the motion for class certification that plaintiffs could not substantiate their claim to antitrust standing either for the class or in their own right. Plaintiffs have appealed this ruling; the appeal is pending.

In opposition to defendants' motion to dismiss the present complaint on collateral estoppel grounds, plaintiffs have submitted additional materials and additional briefing, as I invited them to do. However, they have not focused their opposition on the applicability of collateral estoppel but on what they see as errors in the ruling in the related cases and on the procedure relied upon in those cases in granting defendants' motion to dismiss. Whether the earlier rulings were erroneous is a matter for plaintiffs to take up with the Court of Appeals for the Seventh Circuit. It is irrelevant when deciding whether plaintiffs are estopped from re-arguing the viability of their antitrust claims.

In order to prove that collateral estoppel (or issue preclusion) applies, the party asserting it must show that the party to be estopped was fully represented in the prior litigation, the

issues to be precluded are identical to those decided in the prior litigation, the issues were actually litigated and decided on the merits and resolution of the issues was necessary to the judgment. See People Who Care v. Rockford Board of Education, 68 F.3d 172, 178 (7th Cir. 1995); Prymer v. Ogden, 29 F.3d 1208, 1212-13 (7th Cir. 1994). All of these questions are easily answered. Plaintiffs were represented in the earlier cases by the same able lawyers who represent them in this case. The issues are identical in all three cases (whether plaintiffs and their proposed class have antitrust standing and whether the class is ascertainable); the issues were actually litigated and decided on the merits; and their resolution was necessary to the judgment.

The fact that the earlier cases are on appeal does not lessen the preclusive effect of the judgments in those cases. Under federal law, the doctrine of collateral estoppel applies even to judgments that are on appeal. See Rogers v. Desiderio, 58 F.3d 299 (7th Cir. 1995); Prymer, 29 F.3d at 1213 n.2; 18 Charles Alan Wright et al., Federal Practice and Procedure § 4433 at 308 ("The bare act of taking an appeal is no more effective to defeat preclusion than a failure to appeal."). Plaintiffs contend that the pendency of the appeal should prevent this court from giving the judgment preclusive effect. They argue that the Seventh Circuit has "revisited the preclusive effect under Illinois law of a judgment pending appeal." Plts.' Mem., dkt. #24, at13. This statement is true but irrelevant because this case is not brought under Illinois law. See

Rogers, 58 F.3d at 301 (noting that federal courts follow majority rule in this respect and concluding that Illinois law on collateral estoppel effect of judgments on appeal is unclear).

Plaintiffs' submissions of new evidence and argument require little comment. They do not bear on the question of preclusion and they would be unpersuasive even if I were undertaking a reconsideration of the dismissal of the two related cases plaintiffs brought against Sumitomo. The materials consist primarily of new declarations of three individuals associated with the plaintiff firms and the declaration of plaintiffs' economic expert, Hendrik S. Houthakker. The thrust of all the declarations is to show that it was error to conclude as I did that copper scrap dealers paid a price that was based on any factor other than the futures prices or that the purchase prices they paid for copper included previous overcharges incurred by the sellers. The three plaintiffs' representatives retreat from their statements in their depositions that they considered profit margins or materials costs when pricing for resale and say now that their only consideration was the futures prices when setting their own prices or in negotiating a purchase. Dr. Houthakker re-emphasizes the close association of copper scrap prices to the futures markets, arguing that such a close correlation would not occur were scrap dealers not basing their selling and buying prices on the futures prices.

Even if I erred in concluding from the deposition testimony of the plaintiffs that they took factors other than the futures prices into consideration when setting their prices, I would

reach the same ultimate conclusion that plaintiffs lack antitrust standing. The point to be drawn from Illinois Brick v. Illinois, 431 U.S. 720 (1977), and its predecessor, Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968), is the practical one that the effectiveness of the antitrust remedy would be undercut if the task of tracing antitrust injuries and determining damages becomes overly complex. Courts do not have the resources to oversee such a task; the costs of undertaking it are prohibitive for violator and for victim; and the resulting economic effect could offset any of the economic and policy benefits of prosecuting antitrust violators.

Economists can take issue with the holdings in Illinois Brick and Hanover Shoe, both of which make short shrift of the tools and analyses that economists are accustomed to using. See, e.g., Illinois Brick, 431 U.S. at 731 ("The principal basis for the decision in Hanover Shoe was the Court's perception of the uncertainties and difficulties in analyzing price and output decisions 'in the real economic world rather than an economist's hypothetical model,' [Hanover Shoe], 392 U.S. at 493, and of the costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to reconstruct those decisions in the courtroom.") Whether the Supreme Court was correct in assuming that economic theories could not be applied to "real world" transactions may be debatable, particularly among economists, but the Court's antipathy to attempting complex economic analyses underpins th current law.

Plaintiffs and the class they propose to represent engaged in a complex web of transactions, selling and buying copper from one another and from others, none of whom is alleged to have been responsible for any manipulation of the futures prices but all of whom are alleged to have relied upon those prices when setting the prices at which they bought and sold. One may assume that they bargained vigorously with their counterparts to obtain the most advantageous terms for themselves. Disentangling that portion of the total price paid for each transaction would be a daunting process. See Illinois Brick, 431 U.S. at 742 ("Even if [certain] assumptions [about maximization of profits, the competitiveness of the markets, etc.] are accepted, there remains a serious problem of measuring the relevant elasticities – the percentage change in the quantities of the passer's product demanded and supplied in response to a one percent change in price. . . . 'in the real economic world rather than an economist's hypothetical model,' the latter's drastic simplifications generally must be abandoned. Overcharged direct purchasers often sell in imperfectly competitive markets. . . ." (quoting Hanover Shoe, 392 U.S. at 493. Although the Court is discussing passing on, its statements are equally relevant to the kinds of transactions in which plaintiffs and the proposed class members engaged. Acknowledging that the transactions traced a pattern that correlated to those of the futures markets does not mean that any individual transaction can be analyzed easily or straightforwardly.

Because I conclude that the judgment entered in the Loeb and Metal Prep suits against Sumitomo Corporation precludes plaintiffs from trying the same issues raised in those cases in this case against J.P. Morgan and Morgan Guaranty Trust, I will grant defendants' motion to dismiss on that ground without reaching their arguments for dismissal based on plaintiffs' alleged failure to state claims of antitrust conspiracy, violation of RICO or violation of state antitrust law.

ORDER

IT IS ORDERED that the motion to dismiss filed by defendants J.P. Morgan & Co., Incorporated and Morgan Guaranty Trust Company of New York is GRANTED. The Clerk of Court is directed to enter judgment for defendants and close this case.

Entered this 28th day of December, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge