

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

IN RE: )  
VITAMINS ANTITRUST LITIGATION )

) Misc. No. 99-197 (TFH)

THIS DOCUMENT RELATES TO: )  
ALL DIRECT ACTIONS )

**FILED**

**JUN 07 2001**

NANCY MAYER WHITTINGTON, CLERK  
U.S. DISTRICT COURT

MEMORANDUM OPINION Re: Joint Motion to Dismiss

Pending before the Court is defendants' Joint Motion to Dismiss<sup>1</sup> plaintiffs' claims in the direct action cases pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction insofar as these claims are based upon transactions in foreign commerce and pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted insofar as these claims are actually the claims of plaintiffs' non-party subsidiaries and affiliates that have not been assigned to plaintiffs. Upon careful consideration of defendants' Joint Motion, plaintiffs' oppositions, defendants' reply, the arguments presented at the May 23, 2001 hearing, and the entire record herein, the Court will deny defendants' Joint Motion to Dismiss.

---

<sup>1</sup> The Joint Motion to Dismiss is brought by defendants F. Hoffman-La Roche Ltd., Hoffman-La Roche Inc., Roche Vitamins Inc., BASF Corp., Aventis S.A. (f/k/a Rhone-Poulenc S.A.), Aventis Animal Nutrition S.A., Rhone-Poulenc Animal Nutrition Inc., Rhone-Poulenc Inc., Hoechst Marion Roussel S.A., Takeda Chemical Industries Ltd., Takeda Vitamin & Food USA Inc., Takeda USA Inc., Takeda America Inc., Daiichi Pharmaceutical Co. Ltd., Daiichi Pharmaceutical Corp., Daiichi Fine Chemicals Inc., Eisai Co. Ltd., Eisai USA Inc., Eisai Inc., Lonza AG, Lonza Inc., Bioproducts Inc., Degussa AG (f/k/a Degussa-Huls AG), Degussa-Huls Corp., DuCoa L.P., DCV Inc., E.I. duPont de Nemours and Co., EM Industries Inc., Merck KgaA, E. Merck, Mitsui & Co. Ltd., Nepera Inc., Reilly Chemicals S.A., Reilly Industries Inc., Sumitomo Chemical America Inc., Tanabe USA Inc., UCB Chemicals Corp., and UCB Inc.

001

## I. DISCUSSION

### A. Foreign Commercial Transaction Claims

Defendants argue that plaintiffs' claims based on purchases in foreign commerce should be dismissed for lack of subject matter jurisdiction, because plaintiffs have failed to allege that the purchases of vitamins in foreign commerce had a direct, substantial, and reasonably foreseeable effect on U.S. commerce and because plaintiffs have failed to allege that their claims based on injuries suffered in foreign commerce arose from the U.S. effects of defendants' alleged price-fixing in foreign commerce. Additionally, defendants assert that plaintiffs lack standing to pursue claims based on injuries sustained outside of United States commerce.

Subject matter jurisdiction in this case is governed by 28 U.S.C. § 1337(a), which states in pertinent part: "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies. . . ." The plaintiffs in these direct action cases allege that their causes of action arise under the Sherman Act, that they are entitled to injunctive relief and damages under Sections 4 and 16 of the Clayton Act, and that consequently this Court has original jurisdiction under Section 1337(a).

Under federal antitrust law, when antitrust claims are premised upon defendants' conduct occurring outside the United States, this Court's subject matter jurisdiction is limited to foreign conduct that was intended to have, and did have, substantial effects on United States commerce. Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993) ("Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States"); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 582 n.6 (1986) ("The Sherman Act does reach conduct outside our borders but only when the conduct has an effect on

American commerce”). Additionally, in order to establish subject matter jurisdiction, plaintiffs must also allege that the injuries which they seek to remedy “arise” from an anticompetitive effect of defendants’ conduct on U.S. commerce. See 15 U.S.C. § 6(a); see also Kruman v. Christie’s Internat’l PLC, 129 F. Supp. 2d 620, 625 (S.D.N.Y. 2001) In other words, the effect providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws. Id.

Defendants argue that the foreign purchase claims in this case are identical to the claims in the Empagran class action and should thus be dismissed for lack of subject matter jurisdiction.<sup>2</sup> However, the claims in the direct action cases differ significantly from those being asserted for the proposed foreign plaintiffs class in Empagran, because the direct action plaintiffs here are American companies or subsidiaries of American companies that have purchased substantial volumes of vitamins for delivery both in the United States and abroad as part of a global procurement strategy formulated and directed by United States parent corporations whereby these plaintiffs suffered ultimate financial injury in the United States.<sup>3</sup> Therefore, the claims in the direct action cases do not appear to be based solely or even largely on foreign

---

<sup>2</sup> The Empagran action involved largely foreign plaintiffs who were seeking to recover for vitamins purchased for delivery abroad. The claims of these foreign plaintiffs have been dismissed for lack of subject matter jurisdiction.

<sup>3</sup> While there is evidence before the Court that the purchases of the foreign subsidiaries and affiliates were in fact coordinated by personnel at the United States parent companies, these allegations are largely absent from the relevant complaints. Therefore, the Court will require plaintiffs to amend their complaints to make these subsidiary-parent relationships explicit and thus to highlight this Court’s jurisdiction over the foreign subsidiaries’ claims. Kellogg’s proposed third amended complaint accomplishes this purpose, see Prop. Third Amend. Compl ¶ 42(a), so Kellogg need not file another amended complaint; however, the other plaintiffs should follow Kellogg’s example and flesh out their parent-subsidiary financial relationships.

purchases, as do the claims in the Empagran action; and the claims do appear to have the requisite direct, substantial and reasonably foreseeable domestic effects, unlike the claims in the Empagran action. See Caribbean Broadcasting System, Ltd. v. Cable & Wireless PLC, 148 F.3d 1080 (D.C. Cir. 1998) (upholding federal antitrust subject matter jurisdiction over foreign plaintiffs' claims against foreign defendants because some – though not all – of the transactions in question occurred in the American segment of the relevant international market and thereby injured plaintiffs as well as other American consumers). In summary, after reviewing the pleadings in the direct action cases as well as the entire record herein, the Court is satisfied that these plaintiffs were substantially injured in United States commerce and that the injuries for which they seek redress were sustained in United States commerce because the purchases, including those of the foreign subsidiaries, were coordinated by the American parent companies and thus affected the financial status of these American companies. Accordingly, the Court finds that it has subject matter jurisdiction over the direct action plaintiffs' claims.

Plaintiffs have also established the requisite standing to sue for their foreign transaction claims. To determine a plaintiff's standing to assert antitrust claims, the Court must consider: (1) the causal connection between the alleged violation and the harm and the defendant's intent to cause that harm; (2) the directness of the claim; (3) the existence of more direct victims of the alleged antitrust violations; (4) the problem of speculative injury or complex apportionment of damages; and (5) whether the harm is the type for which the antitrust laws provide redress. See Associated General Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 537-45 (1983). The causal connection between defendants' conspiratorial actions and the overcharges paid by these plaintiffs is well established in the pleadings. Specifically, plaintiffs allege that they are United States companies or subsidiaries of United States companies with

global headquarters in the United States and that defendants' actions have directly and substantially impacted their United States operations. See, e.g., Bristol-Myers Squibb Compl. ¶ 6; Quaker Oats Co. Second Amend. Compl. ¶¶ 7-8, 95; Cargill Third Amended Compl. ¶¶ 3-9, 67-76. Moreover, these plaintiffs allege that they and their subsidiaries were direct purchasers of these vitamins so their injuries are not too attenuated. Furthermore, given the record in this case, including the guilty pleas by several of the defendants in this action, the Court cannot find that the damages sought by these plaintiffs are too speculative. Additionally, there is no risk of duplicative recovery, because, unlike the Empagran plaintiffs, these plaintiffs and their subsidiaries are litigating all of their claims in this country. Finally, causing American companies to pay inflated prices for vitamins clearly qualifies as an antitrust injury and, unlike the Empagran plaintiffs, these direct action plaintiffs are seeking to recover for injuries to United States companies and closely controlled subsidiaries of United States companies and are thus injuries sustained in American commerce. Therefore, plaintiffs have alleged injuries which the federal antitrust laws are designed to redress. Accordingly, plaintiffs have met the standing requirements articulated in Associated General Contractors.

In conclusion, since plaintiffs have plead adequate domestic effects and relation to interstate commerce to satisfy the jurisdictional requirements and since plaintiffs can satisfy the standing requirements for these claims, defendants' Joint Motion to Dismiss plaintiffs' claims based on foreign purchases is denied.

#### **B. Affiliate Claims**

Defendants further contend that plaintiffs lack standing to assert claims based on harms they themselves allegedly suffered as a result of injuries to their affiliates, because the antitrust laws do not provide remedies for indirect harms, because these actions are not being maintained

by the real parties in interest (*i.e.* plaintiffs' affiliates), and because plaintiffs have not shown that these claims have been validly assigned to them.

However, the Supreme Court has held that "the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act." Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 777 (1984). In fact, in Illinois Brick Co. v. Illinois, where the Supreme Court first articulated the principle that indirect purchasers lack standing to assert such claims under the federal antitrust laws, the Court itself suggested an exception for situations "where the direct purchaser is owned or controlled by its customer." Illinois Brick, 431 U.S. 720, 76 n.16 (1977); see also Chrysler Corp. v. General Motors Corp., 589 F. Supp. 1182, 1200 (D.D.C. 1984) ("despite a formal separation between the parent and the subsidiary, where the parent exercises continuing supervision and intervention in the subsidiaries' affairs, the subsidiaries' activities are attributable to the parent for Clayton Act venue purposes"). Based upon the evidence now before the Court, the plaintiffs and their subsidiaries do appear to have acted as single enterprises.<sup>4</sup> The cases cited by defendants for the proposition that shareholders may not sue directly for injuries to their corporation are inapposite here. See, e.g., Information Resources, Inc. v. The Dun & Bradstreet Corp., 127 F. Supp. 2d 411, 412 (S.D.N.Y. 2001) (holding that "[m]erely derivative injuries sustained by employees, officers, stockholders, and creditors of an injured company do not constitute antitrust injury sufficient to confer standing"); Data Broadcasting Corp. v. Tele-Communications Inc., No. 92-4840, 1992

---

<sup>4</sup> The record contains numerous exhibits and affidavits detailing the coordination between the parent companies and their subsidiaries. As discussed above, the Court is requiring plaintiffs to amend their pleadings to specifically incorporate this evidence of the financial control of the parent companies over their subsidiaries.

WL 350624, at \*2 (S.D.N.Y. Nov. 19, 1992) (discussing general principle that standing bars stockholders of corporation injured by antitrust violation from asserting Clayton Act claim, because these stockholders are neither consumers nor competitors in the market which was restrained).

Moreover, plaintiffs are not suing for any injuries suffered in their capacity as customers or suppliers to their subsidiaries, but rather as all customers of defendants who have been directly injured by defendants' price fixing conspiracy. The direct action complaints and the attached exhibits make it very clear that the plaintiffs here intended to bring these actions on behalf of themselves and their affiliates who directly purchased vitamins from defendants. See, e.g., Cargill Third Amend. Compl. ¶¶ 3, 5, 7 and exhibits A-G. Additionally, as plaintiffs point out, defendants have requested and received substantial discovery from these subsidiaries and affiliates so it is hard to see how they are being surprised by these claims.<sup>5</sup> Furthermore, it is hard to imagine what prejudice defendants suffer by having plaintiffs bring these actions on behalf of their subsidiaries who were directly harmed by defendants. The subsidiaries have provided defendants with discovery showing the bases for their claims. Moreover, the subsidiaries have expressly indicated their willingness to proceed in this fashion and have agreed

---

<sup>5</sup> Nevertheless, plaintiffs' argument that defendants have waived any real party in interest objection by not raising it earlier is without merit. Although plaintiffs are correct that such objections must be raised with "reasonable promptness" and can be waived, courts have generally only found waivers where the objections were raised during pretrial proceedings or on the eve of trial. See, e.g., Whelan v. Abell, 953 F.2d 663, 676 (D.C. Cir. 1992) (defense waived when raised after trial was already underway); see also United Healthcare Corp. v. American Trade Insurance Co., 88 F.3d 563, 569 (8<sup>th</sup> Cir. 1996) (defense waived when raised at pre-trial conference, held one week before trial). The objection here was raised in a motion to dismiss while the parties are still in the discovery phase of this litigation. Therefore, the Court does not find that defendants have waived their right to argue that plaintiffs are not the real parties in interest.

to be bound by the result of these proceedings.<sup>6</sup> Therefore, there is no danger that defendants would be exposed to multiple recoveries as these actions would plainly operate as *res judicata* with respect to the transactions at issue.

Rule 17(a) states that “[e]very action shall be prosecuted in the name of the real party in interest.” Fed. R. Civ. P. 17(a). In other words, the action must be brought by a person entitled under the governing substantive law to enforce the asserted right. See Whelan v. Abell, 953 F.2d 663, 276 (D.C. Cir. 1992). A real-party-in-interest defense may be raised as a Rule 12(b)(6) motion. Rule 17(a), however, provides that “no action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by . . . the real party in interest; and such ratification . . . shall have the same effect as if the action had been commenced in the real party in interest.” Fed. R. Civ. P. 17(a). The Advisory Committee has explained that the function of Rule 17(a)’s real party in interest requirement is “simply to protect the defendant against a subsequent action by the party actually entitled to recovery, and to insure generally that the judgment will have its proper effect as *res judicata*.” Since the Court is requiring the affiliates to file formal notices of ratification, there is no danger that this Court’s judgment will

---

<sup>6</sup> All of the affiliates have not yet filed formal ratifications, but all have indicated their willingness to do so should the defendants and the Court request this action. See, e.g., Cargill Mem. at 41 n.28. Such formal ratification may in fact be unnecessary given the representations by these affiliates that they agree to be bound by this action. See Honey v. George Hyman Construction Co., 63 F.R.D. 443, 448 (D.D.C. 1974) (formal ratification deemed “a meaningless act” in light of evidence that the real parties in interest had consented to the commencement of the action by plaintiff). However, in the interests of caution and in order to ensure that defendants are fully protected against the risk of multiple recoveries, the Court will require the affiliates to file formal notices of ratification such as that filed by the Kellogg affiliates.

lack the requisite *res judicata* effect. Accordingly, because plaintiffs are only suing for direct injuries and because there will be adequate ratification by the affiliates to remedy any standing concerns, defendants' Joint Motion to Dismiss plaintiffs' affiliate claims pursuant to Fed. R. Civ. P. 12(b)(6) is denied.

## II. CONCLUSION

For the reasons stated above, defendants' Joint Motion to Dismiss the direct action plaintiffs' foreign and affiliate claims is denied. An order will accompany this Opinion.

June 7<sup>th</sup>, 2001

  
Thomas F. Hogan  
United States District Judge

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

IN RE: )  
VITAMINS ANTITRUST LITIGATION )

) Misc. No. 99-197 (TFH)

THIS DOCUMENT RELATES TO: )  
ALL DIRECT ACTIONS )

**FILED**

**JUN 07 2001**

ORDER Re: Joint Motion to Dismiss

NANCY MAYER WHITTINGTON, CLERK  
U.S. DISTRICT COURT

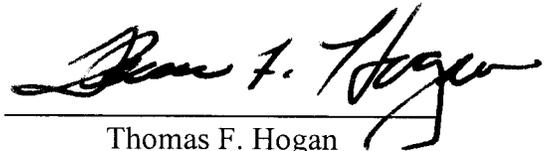
In accordance with the accompanying Memorandum Opinion, it is hereby

**ORDERED** that defendants' Joint Motion to Dismiss is **DENIED**. It is further hereby

**ORDERED** that plaintiffs supplement their complaints within twenty days of the date of this Order to add the necessary allegations to make explicit the relationships between the United States parent companies and their foreign subsidiaries. And it is further hereby

**ORDERED** that all affiliates file formal notifications of ratification within ten days of this Order or the claims brought by these affiliates will be dismissed.

June 7<sup>th</sup>, 2001



Thomas F. Hogan  
United States District Judge