

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE:)
VITAMINS ANTITRUST LITIGATION)

) Misc. No. 99-197 (TFH)
) MDL No. 1285

This Document Relates To:)

)
Blue Seal Feeds, Inc., et al. v. Akzo Nobel, Inc.,)
et al., Civ. No. 99-3226)
Tyson Foods, Inc., et al. v. Akzo Nobel, Inc.,)
et al., Civ. No. 99-5134)

FILED

JUL 2 - 2001

ANCOY MAYER-WHITTINGTON, CLERK
U.S. DISTRICT COURT

MEMORANDUM OPINION

Pending before the Court is defendants' Motion for Partial Summary Judgment, seeking the dismissal of the damage claims of six plaintiffs¹ who have not purchased directly from any defendant in these actions. Upon careful consideration of defendants' Motion, plaintiffs' opposition, defendants' reply, the arguments presented at the June 26, 2001 hearing, and the entire record herein, the Court will grant defendants' Motion.

I. BACKGROUND

Each of the six plaintiffs at issue here purchased vitamin pre-mix products from non-defendant manufacturers² of such products during the period from 1990 through 1999. Vitamin pre-mixes are blends of straight vitamins and other ingredients which are formulated in various combinations for use as additives to enrich human and animal nutritional products.

¹The six plaintiffs whose claims are at issue here are: Benedict Feeding Co., J&J Dairy, Keith Smith Co., Moark Productions, Inc., Reitsma Dairy, and L.L. Murphy Co. Defendants do not seek dismissal at this time of plaintiffs' claims for injunctive relief under Section 16 of the Clayton Act; instead, their Motion is directed solely at plaintiffs' monetary damage claims under Section 4 of the Clayton Act.

²The parties refer to these non-defendant manufacturers as "blenders."

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None of the pre-mix products purchased by any of these six plaintiffs was manufactured by a defendant in this case. Plaintiffs' pre-mix suppliers are also before this Court in the Vitamins Antitrust litigation.

II. DISCUSSION

Defendants offer three arguments in favor of their Motion for Partial Summary Judgment: (1) plaintiffs' damage claims are barred by Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977); (2) plaintiffs' "umbrella" theory of liability has been rejected by the vast majority of courts, including this Court; and (3) plaintiffs waived their right to bring these claims due to contrary representations made to the Special Master at the hearing on downstream data.

A. Illinois Brick

In Illinois Brick Co. v. Illinois, the Supreme Court held that indirect purchasers are barred from claiming damages under Section 4 of the Clayton Act. Illinois Brick, 431 U.S. 720 (1977). The Illinois Brick rule prohibiting indirect purchasers from asserting claims for damages is the reciprocal of the rule established by the Supreme Court in Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1968), that an antitrust defendant cannot defend against a claim for damages under Section 4 of the Clayton Act by showing that a plaintiff who paid an illegal overcharge in turn passed on that overcharge to another downstream purchaser. In Illinois Brick, the Supreme Court concluded that any attempt to apportion an overcharge between direct and indirect purchasers would "add whole new dimensions of complexity to treble damages suits and seriously undermine their effectiveness." Illinois Brick, 431 U.S. at 737. Additionally, the Court held that allowing indirect purchasers to sue for damages "would create a serious risk of multiple liability for defendants" if, at the

same time, defendants were prohibited from asserting a pass-on defense against claims by direct purchasers. Id.

In this case, both parties concede that Illinois Brick bars indirect purchasers from asserting claims for damages based on any overcharges they may have paid as indirect purchasers of defendants. See Def's Mot. at 2-3; Pl's Opp. at 2. However, plaintiffs contend that they are not "indirect purchasers" within the meaning of Illinois Brick, but rather are "direct purchasers" of pre-mix products from competitors of the defendants and are thus entitled to recover damages in this case. The Court disagrees. As defendants point out, the use of the word "direct" here is somewhat incongruous. Regardless of how plaintiffs phrase it, they bought their pre-mix products from companies other than the defendants in this case; therefore, their relationship to these defendants is, by definition, indirect.

Plaintiffs further contend that they are not seeking recovery for overcharges as prohibited by Illinois Brick, because they intend to prove at trial that the prices charged by these non-defendant suppliers were artificially inflated by defendants' fixing of pre-mix prices, as distinguished from straight vitamins prices. Underlying plaintiffs' argument is the contention that pre-mix products constitute a "separate and distinct market from the market for straight vitamins." Pl's Opp. at 3. Defendants reserve the right to contest this market definition but contend that resolution of this issue is unnecessary for purposes of defendants' Motion. The Court agrees. Whether or not pre-mix products constitute their own markets does not alter the fact that plaintiffs are indirect purchasers of these defendants. The fact remains that these six plaintiffs purchased pre-mix products from non-defendant suppliers, who in turn had obtained the vitamins to make the pre-mix from defendants; this fact alone renders these six plaintiffs

indirect purchasers of the defendants.³ Accordingly, the Court finds that plaintiffs' damage claims are barred by Illinois Brick.

B. "Umbrella" Liability

Defendants contend that summary judgment of plaintiffs' damage claims is also warranted because plaintiffs' "umbrella" theory has been rejected by this Court in FTC v. Mylan Laboratories, Inc., 62 F. Supp. 2d 25, 38-39 (D.D.C. 1999) (holding that the umbrella theory is not a sound basis for imposing antitrust liability), as well as by numerous other courts. See, e.g., In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig., 691 F.2d 1335 (9th Cir. 1982); Mid-West Paper Products Co. v. Continental Group, Inc., 596 F.2d 573 (3d Cir. 1979); Garabet, M.D., Inc. v. Autonomous Technologies Corp., 116 F. Supp. 2d 1159 (C.D. Cal. 2000); Gross v. New Balance Athletic Shoe, Inc., 955 F. Supp. 242 (S.D.N.Y. 1997); In re Folding Carton Antitrust Litig., 88 F.R.D. 211 (N.D. Ill. 1980); Liang v. Hunt, 477 F. Supp. 891 (N.D. Ill. 1979). At the June 26, 2001 hearing, plaintiffs expressed surprise that defendants had defended on this ground and requested that the Court defer ruling on the "umbrella" theory until plaintiffs had the opportunity to take further discovery and develop a better factual record. The Court finds it curious that plaintiffs are now claiming that they were not on notice that they would be forced to defend their "umbrella"

³At the June 26, 2001 hearing, plaintiffs argued that a ruling in favor of defendants would bar recovery of other plaintiffs who purchased their pre-mix products directly from defendants. The Court sees no reason why a ruling dismissing under Illinois Brick those who purchased from non-defendants would in any way affect plaintiffs who bought the pre-mix directly from defendants. The former are indirect purchasers, while the latter are direct purchasers. Defendants have rightfully moved to dismiss only the indirect purchasers and a grant of this Motion would have no legal implications on any direct pre-mix purchasers. Therefore, the Court finds plaintiffs' concern to be ill-founded.

theory at this time. After all, plaintiffs themselves acknowledged in their opposition to defendants' Motion that their theory of liability with respect to these six plaintiffs' purchases would "fit *prima facie* within the rule adopted by this Court when it rejected the 'umbrella theory' in Mylan Labs." Pl's Opp. at 4. Moreover, defendants' reply memorandum, which discussed the "umbrella" theory at length, was filed on June 5, 2001; plaintiffs have had plenty of time to petition the Court for leave to file a sur-reply. The Court will not delay these proceedings further simply because plaintiffs did not choose to request additional briefing time until the date of the hearing on this Motion. Finally, the Court finds that additional discovery and further briefing is unnecessary here, because plaintiffs' claims are clearly barred by Illinois Brick and by the caselaw rejecting "umbrella" theories of liability.

As plaintiffs acknowledged in their opposition to defendants' Motion, following the reasoning of Illinois Brick, this Court rejected an "umbrella" theory of liability in FTC v. Mylan Laboratories, Inc., finding that "the addition of indirect purchasers to the litany of possible antitrust plaintiffs threatened to mire courts in unduly complicated and speculative damages proceedings". Mylan Laboratories, 62 F. Supp. 2d at 41. Other courts have similarly rejected assertions of "umbrella" theories in antitrust cases. See, e.g., Mid-West Paper, 596 F.2d at 585 ("Apart from its speculative nature, any attempt to determine the effect of defendants' overcharges upon their competitors' prices would transform this antitrust litigation into the sort of complex economic proceeding that the Illinois Brick Court was desirous of avoiding if at all possible"); Garabet, 116 F. Supp. 2d at 1168 ("'[U]mbrella liability' necessarily involves unacceptable processes of speculation and complexity in the award or calculation of damages"); Folding Carton, 88 F.R.D. at 220 ("The proof in a suit by

direct purchasers from non-conspiring sellers may be more complex than that in Illinois Brick").

Plaintiffs contend that this case is distinguishable from the other cases rejecting the "umbrella" theory because the blenders who supplied the pre-mix products to these plaintiffs are also before the Court and because, according to plaintiffs, "a substantial portion of these overcharges for pre-mix was attributable to causes other than defendants' inflation of straight vitamin prices, and therefore could not duplicate any damages that might be obtained by the blender plaintiffs." Id. However, even if plaintiffs' contention is true, plaintiffs' claims would still implicate the uncertainty and complex apportionment concerns articulated by the Supreme Court in Illinois Brick and Hanover Shoe⁴ and reiterated by this Court in Mylan Laboratories. See Mylan, 62 F. Supp. 2d at 39 ("The main difficulty with the umbrella theory is that, even in the context of a single level of distribution, ascertaining the appropriate measure of damages is a highly speculative endeavor"); see also Midwest Paper, 596 F.2d at 584 ("Although in selecting a price for its product, a manufacturer must also take into account the market price for comparable items, to some extent its pricing decisions remain unaffected by the prices charged by others. This is so because of entry and exit conditions in the industry, the degree of interchangeability among the products, and time lags in adjusting to changes in output, price, and demand in the market, to name just a few factors. Thus, the competitors of the

⁴In Hanover Shoe, the Supreme Court recognized that "[a] wide range of factors influence a company's pricing policies. Normally, the impact of a single change in the relevant conditions cannot be measured until after the fact; indeed, a businessman may be unable to state whether, had one fact been different (a single supply less expensive, or the labor market tighter, for example), he would have chosen a different price." Hanover Shoe, 392 U.S. at 492-93.

price-fixers may well have charged the same price notwithstanding the conspiracy, and purchasers such as [plaintiff] would be hard pressed to prove otherwise"). The fact that these antitrust actions involve treble damages underscores the risk of allowing recovery under an "umbrella" theory. See Midwest Paper, 596 F.2d at 586-87 ("Allowing recovery for injuries whose causal link to defendants' activities is as tenuous as it is here could subject antitrust violators to potentially ruinous liabilities, well in excess of their illegally earned profits . . .").

Moreover, in addition to their reliance on Judge Higginbotham's dissent in Midwest Paper Products Co., plaintiffs have cited only one case in support of their assertion of "umbrella" liability. That case, In re Beef Industry Antitrust Litigation, 600 F.2d 1148 (5th Cir. 1979), relied upon an older "target area" test for antitrust standing that has since been rejected by the Supreme Court in Associated General Contractors, Inc. v. California State Council of Carpenters, 459 U.S. 519, 537 n.33 (1983).⁵ The overwhelming majority of recent court decisions that have addressed the viability of the "umbrella" theory after Associated General have rejected "umbrella" claims. See, e.g., Garabet, 116 F. Supp. 2d at 1168-69 (C.D. Cal. 2000) ("[T]he weight of recent authority using the nuanced antitrust analysis outlined in Associated General Contractors, has found against allowing 'umbrella' standing to plaintiffs"); Mylan, 62 F. Supp. 2d at 38-40 (D.D.C. 1999) (considering both pre and post Associated General precedents and ruling against "umbrella" theory liability); Gross, 955 F. Supp. at 246-47 (rejecting "umbrella" theory based on Associated General); but see In re

⁵Although In re Beef did return to the Fifth Circuit after the Supreme Court's decision in Associated General, the Fifth Circuit's second opinion in that case did not address, let alone affirm, any of its statements regarding the "umbrella" theory contained in the first opinion.

Arizona Dairy Products Litig., 627 F. Supp. 233 (D. Ariz. 1985) (post-Associated General case accepting "umbrella" theory, but relying on pre-Associated General precedent).

Under Associated General, plaintiffs' umbrella claims are simply too remote to confer antitrust standing.⁶ Plaintiffs' theory of injury is highly speculative; in fact, plaintiffs have offered no evidence to date to support this theory; rather they contend that they will be prepared to establish this liability by the time of trial. Plaintiffs' putative damages are also highly complex and indirect, because they are at least two steps removed from defendants' alleged price fixing. See Gross, 955 F. Supp. at 246-47 ("[T]he factors outlined by the Supreme Court in [Associated General] weigh against finding that consumers who purchased from non-conspiring retailers have standing to assert an antitrust claim"). The causal connection between plaintiffs' injury and the alleged conspiracy is necessarily attenuated by significant intervening factors, such as independent pricing decisions of the nonconspiring suppliers of pre-mix. Moreover, more direct victims of the alleged conspiracy not only exist but are before this Court: the suppliers from whom these plaintiffs purchased the pre-mix are also suing defendants in the Vitamins Antitrust Litigation. Plaintiffs claim that because these non-conspiring retailers are also before this Court and seeking recovery, there is less of a risk of duplicative recovery. However, the Court finds that the presence of these blenders could in fact produce a greater risk of duplicative recovery, because these blenders have the right to

⁶The Associated General test for standing requires courts to consider: (1) the nature of the plaintiffs' alleged injury, (2) the directness or indirectness of the alleged injury, (3) whether the harm is overly speculative, (4) the complexity of apportioning potential damages, (5) the risk of duplicative recovery, and (6) the existence of more directly harmed plaintiffs. Associated General, 459 U.S. at 538-45.

seek damages and recover for inflation of pre-mix products as well as inflation of vitamins. Moreover, even if there were some method of dividing the recovery for inflation of pre-mix products between the blenders and the plaintiffs in this case, it would inevitably involve highly complex and speculative apportionment of damages. See Petroleum Products, 691 F.2d at 1335 (rejecting "umbrella" liability where plaintiffs purchased in same vertical chain as their intermediary suppliers, because the claims were barred by Illinois Brick).

The Court agrees with defendants that the facts of this case are strikingly similar to the situation in Petroleum Products. In Petroleum Products, the defendants were producers of crude oil, the plaintiffs were purchasers of refined gasoline, and the intermediaries were refiners who converted defendants' crude oil into finished gasoline products. See Petroleum Products, 691 F.2d at 1340. Here the defendants are the producers of straight vitamins, the plaintiffs are the purchasers of pre-mix, and the intermediaries are the blenders who converted defendants' vitamins into pre-mix products. Given the remarkable similarities in these two cases, the rationale underlying the Petroleum Products opinion is instructive here:

we have little hesitancy in concluding that the limitations recognized in Illinois Brick bar umbrella claims in the context of the multi-tiered distribution chain alleged here. First, to the extent that plaintiffs seek recovery for overcharges for gasoline originally purchased from defendants by independent refiners, the overcharge to plaintiffs may simply result from a pass-on of the original unlawfully inflated price. If so, it falls squarely within Illinois Brick. Even if plaintiffs were somehow able to prove that there was no pass-on, and that the inflated prices in the non-conspirators' distribution chain were the independent result of an umbrella effect, the danger of double recovery condemned by Illinois Brick would remain. The independent refiners would still have an enforceable claim for damages against the defendants for the entire unlawful overcharge to them, without reduction for damages suffered by plaintiffs. The result, if plaintiffs were to succeed here, would be liability of the defendants twice for the effects of the same

overcharge.

The second reason that plaintiffs' claims are barred by Illinois Brick wholly apart from the problems of pass-on and double recovery, is that they are unacceptably speculative and complex. Thus, any umbrella claims plaintiffs may assert for damages based on those purchases of gasoline not acquired originally from the defendants also must fail. . . .

Under an umbrella theory, the result of any attempt to ascertain with reasonable probability whether the non-conspirators' prices resulted from the defendants' purported price-fixing conspiracy or from numerous other pricing considerations would be speculative to some degree. When the fact of a multi-tiered distribution system is imposed upon the above complex set of variables, the obstacles to intelligent inquiry become nearly insurmountable. The causal effect of each pricing decision would have to be pursued through the chain of distribution. Not only would we be required to speculate that plaintiffs were injured solely as the result of umbrella pricing but also we would be required to sanction complex judicial inquiry into the pricing decisions of sellers remote from plaintiffs.

Petroleum Products, 691 F.2d at 1340-41.

The plaintiffs in this case are barred from recovery for precisely the reasons stated by the Ninth Circuit in Petroleum Products.⁷ Plaintiffs in this case are seeking to recover damages that may overlap with the claims of the blenders for overcharges. Moreover, even to the extent that plaintiffs are not seeking compensation for overcharges which were passed on to them from the blenders, there are too many intervening factors which would make it impossible to apportion damages between the overcharges and the other factors with any reasonable degree of certainty. Therefore, because plaintiffs' claims for damages under the

⁷When asked by the Court at the June 26, 2001 hearing how their claims could survive in light of the Petroleum Products decision, plaintiffs responded that the facts of this case were unique. While the Court is cognizant that many aspects of this case are indeed unusual, the claims of these six plaintiffs are analogous to those rejected by the court in Petroleum Products.

"umbrella" theory are too speculative, potentially duplicative of the claims of the blenders who are also litigants in this case, and necessarily involving highly complex and theoretical damage calculations, the Court will grant defendants' Motion for summary judgment of these claims.

C. Waiver in Front of Special Master

Defendants also reason that this Court should reject plaintiffs' "umbrella" theory of liability because they previously disavowed bringing any indirect claims when they assured the Special Master at the June 22, 2000 hearing on downstream data that all claims in these cases were based on purchases made directly from defendants. Defendants reason that, based in part upon this representation, the Special Master denied defendants' motion to compel downstream data; therefore, allowing plaintiffs to assert the "umbrella" theory of liability would be inconsistent with these representations and would prejudice defendants because they have not sought or received the requisite discovery with regard to these claims.

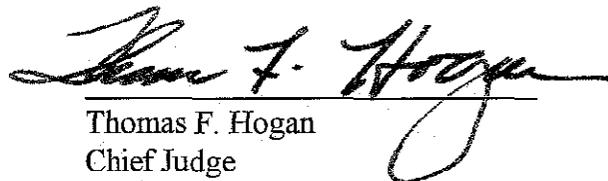
Because the Court finds that plaintiffs' claims must be dismissed as a matter of law, the Court need not resolve this waiver issue. However, the Court notes that while plaintiffs' counsel did state that the majority of his clients were only seeking damages for overcharges based upon purchases made directly from defendants, he did qualify this statement by noting that "[t]he only plaintiffs we represent who are seeking anything other than that [direct overcharges] are the handful of blender plaintiffs who have been identified in the appendix who will also be seeking lost profits." See 6/22/00 Tr. at 70 (Def's Ex. 1). It is clear that the Special Master recognized this qualification because he immediately stated that, "if there's any other plaintiffs represented here who take any position other than Mr. Adams who [sic] just stated and who are not indirect purchasers or not blenders, I would ask them to state their contrary position

or differing position now.” Id. Therefore, the Court finds that defendants were probably on notice that there would be a small group of plaintiffs -- i.e. blenders and indirect purchasers -- seeking recovery outside of direct overcharges. However, given the Court’s legal rulings on the viability of plaintiffs’ damage claims in this case, they cannot survive summary judgment even if plaintiffs have not waived their right to bring these claims. Accordingly, the waiver argument is immaterial, and defendants’ Motion for Partial Summary Judgment is granted.

III. CONCLUSION

For the foregoing reasons, defendants’ Motion for Partial Summary Judgment is granted. An order will accompany this Opinion.

June 29, 2001


Thomas F. Hogan
Chief Judge