

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

JAN 07 2002

IN RE:)
VITAMINS ANTITRUST LITIGATION)

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

) Misc. No. 99-0197 (TFH)

THIS DOCUMENT RELATES TO:)
ALL DIRECT ACTIONS,)

MEMORANDUM OPINION Re: Certification of June 7, 2000 Order

Pending before the Court is a motion by the defendants¹ pursuant to 28 U.S.C. § 1292(b) to amend and certify for immediate appeal this Court's June 7, 2001 Order, which denied the defendants' joint motion to dismiss. Upon careful consideration of the defendants' motion, the opposition and reply thereto, the Court's June 7, 2001 Order and accompanying Memorandum Opinion, and the entire record herein, the Court will deny the defendants' request to amend and certify the Court's prior order for immediate appeal.

I. BACKGROUND

On June 7, 2001, the Court issued an Order and accompanying Memorandum Opinion in this case, denying the defendants' joint motion to dismiss for lack of subject matter jurisdiction

¹ The defendants joining this motion are F. Hoffman-La Roche Ltd., Hoffman-La Roche Inc., Roche Vitamins Inc., BASF AG, BASF Corporation, Aventis S.A. (f/k/a Rhone-Poulenc S.A.), Aventis Animal Nutrition S.A. (f/k/a Rhone-Poulenc Animal Nutrition S.A.), Aventis Animal Nutrition Inc. (f/k/a Rhone-Poulenc Animal Nutrition Inc.), Rhone-Poulenc Inc., Takeda Chemical Industries Ltd., Takeda Vitamin & Food USA Inc., Takeda USA Inc., Takeda America Inc., Daiichi Pharmaceutical Co. Ltd., Daiichi Pharmaceutical Corporation, Daiichi Fine Chemicals Inc., Eisai Co. Ltd., Eisai USA Inc., Eisai Inc., Bioproducts Inc., Chinook Group Ltd., ConAgra Inc., Degussa AG (f/k/a Degussa-Huls AG), Degussa Corporation (f/k/a Degussa-Huls Corporation), DuCoa L.P., DCV Inc., E.I. duPont de Nemours and Company, EM Industries Inc., Merck KGaA, E. Merck, Lonza AG, Lonza Inc., Mitsui & Co. Ltd., Nepera Inc., Reilly Chemicals S.A., Reilly Industries Inc., Sumitomo Chemical America Inc., Tanabe USA Inc., UCB Chemicals Corporation, and UCB Inc.

and for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure 12(b)(1) and (6). In re: Vitamins Antitrust Litig., No. 99-197, 2001 WL 755852 (D.D.C. June 7, 2001). In route to its decision, the Court applied the standard for subject matter jurisdiction over antitrust claims that are premised upon defendants' conduct occurring outside the United States. The foreign conduct must have been "intended to have, and did have, substantial effects on United States commerce." Id. at *1 (citing Hartford Fire Ins. Co. v. California, 509 U.S. 764, 796 (1993), and Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 582 n.6 (1986)). And the "injuries which [the plaintiffs] seek to remedy [must have arisen] from an anticompetitive effect of defendants' conduct on U.S. commerce." Id. (citing 15 U.S.C. § 6a and Kruman v. Christie's Int'l PLC, 129 F. Supp. 2d 620, 625 (S.D.N.Y. 2001)).

After applying this test, the Court found that the plaintiffs' claims did "not appear to be based solely or even largely on foreign purchases" and "appear[ed] to have the requisite direct, substantial and reasonably foreseeable domestic effects." Id. at *2 (citing Caribbean Broadcasting Sys., Ltd. v. Cable & Wireless PLC, 148 F.3d 1080, 1085 (D.C. Cir. 1998)). The Court concluded that it had subject matter jurisdiction over those claims because the plaintiffs had adequately pled that they "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." Id.

On the same day, in another case, this Court applied the same standard to different plaintiffs and found no subject matter jurisdiction over their claims. Empagran, S.A. v. F. Hoffman-La Roche, Ltd., No. 00-1686, 2001 WL 761360, **2-4 (D.D.C. June 7, 2001). The

relevant plaintiffs there were foreign purchasers who had directly purchased Class Vitamins "for delivery outside the United States." Id. at *3. They contended that the territorial effect of the defendants' conduct was irrelevant because allegations of a worldwide conspiracy could establish the requisite direct, substantial, and reasonably foreseeable effect on U.S. commerce. The Court disagreed. It found under the applicable law that it "would only have jurisdiction over plaintiffs' alleged injuries, which were suffered in consequence of overt acts that occurred outside this country, if those acts, either individually or perhaps collectively had direct, substantial and reasonably foreseeable effects within the United States that caused the injuries seeking redress here." Id. at *2 (citing 15 U.S.C. § 6a and Kruman, 129 F. Supp. 2d at 625). The Court then concluded that although the foreign plaintiffs had "generally allege[d] that the defendants' price fixing behavior had direct, substantial, and reasonably foreseeable effects on U.S. commerce," they "had not alleged that the precise injuries for which they [sought] redress . . . ha[d] the requisite domestic effects necessary to provide subject matter jurisdiction over this case." Id. at **2-4.²

The difference between these decisions, as previously explained by the Court, is that this case involves "American companies or subsidiaries of American companies that ha[d] 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

² The Court permitted the domestic plaintiffs, however, to provide more detailed allegations respecting how the defendants' conduct caused injuries to them in U.S. commerce because "subject matter jurisdiction may exist over the proposed domestic purchaser class' claims if they purchased the vitamins in interstate commerce, regardless of the fact that they planned to deliver these vitamins abroad." Id. at *4 (citing Carpet Group Int'l v. Oriental Rug Importers Ass'n, 227 F.3d 62, 75-76 (3d Cir. 2000)).

whereby these plaintiffs suffered ultimate financial injury in the United States." Vitamins, 2001 WL 755852 at *2. By contrast, the "Empagran action involved largely foreign plaintiffs who were seeking to recover for vitamins purchased for delivery abroad." Id. at *2 n.2. The foreign plaintiffs involved in Empagran, in other words, had averred no tie between their purported injury and the alleged anticompetitive effect of defendants' conduct on U.S. commerce.

The plaintiffs have appealed the Empagran decision, and the defendants filed the instant motion to amend and certify the Vitamins decision for immediate interlocutory appeal. The defendants challenge this Court's distinction between its June 7, 2001 decisions and specifically seek certification of "the question whether or not domestic companies, and their foreign affiliates, can invoke the remedies of the federal antitrust laws based on purchases occurring outside the United States." Defs.' Mem. at 11.

II. DISCUSSION

A. Legal Standard

Whether an immediate interlocutory appeal of a nonfinal order should be permitted is a discretionary decision for a district court under 28 U.S.C. § 1292(b). Swint v. Chambers County Comm'n, 514 U.S. 35, 46-47 (1995). Section 1292(b) provides in pertinent part:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

28 U.S.C. § 1292(b). In exercising its discretion, a district court thus considers three factors: (1) whether the order to be appealed involves a controlling question of law; (2) whether there is a substantial ground for difference of opinion on that question of law; and (3) whether an

immediate appeal from the order may materially advance the ultimate termination of the litigation. Id.; see, e.g., First Am. Corp. v. Al-Nahyan, 948 F. Supp. 1107, 1116 (D.D.C. 1996). Each of these elements must be met before certification may be granted. In re: Vitamins Antitrust Litig., No. 99-197, 2000 WL 673936, at *2 n.3 (D.D.C. Jan. 27, 2000) (citing Kirkland & Ellis v. CMI Corp., 1996 WL 674072, at *2 (N.D. Ill. Nov. 19, 1996), and Litton Indus., Inc. v. Lehman Bros. Kuhn Loeb., Inc., 1989 WL 162315, at *5 (S.D.N.Y. Aug. 4, 1989)). Because section 1292(b) is meant for truly exceptional cases in that the provision " 'should not be read as a significant incursion on the traditional federal policy against piecemeal appeals,' " Tolson v. United States, 732 F.2d 998, 1002 (D.C. Cir. 1984) (quoting 10 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2658.2, at 80 (2d ed. 1983)), interlocutory appeals under it are "rarely allowed." First Am. Corp., 948 F. Supp. at 1116 (citing Tolson, 732 F.2d at 1002). The movants thus bear a " 'burden of showing that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.' " Id. (quoting Chalfin v. Beverly Enter., Inc., 745 F. Supp. 1117, 1122 (E.D. Pa. 1990)).

B. Analysis

The Court must first consider whether there is a controlling question of law for appeal. For the purposes of section 1292(b), a controlling question of law is "one that would require reversal if decided incorrectly or that could materially affect the course of the litigation with resulting savings of the court's or the parties' resources." Kirkland & Ellis, 1996 WL 674072, at *3 (citing Aristotle v. Johnson, No. 88C7919, 1989 WL 121210 (N.D. Ill. Oct. 3, 1989)). The defendants contend that the Court's decision affirmatively determined a controlling question of law—namely, "whether the jurisdiction of the federal antitrust laws extends to claims of

plaintiffs and their foreign affiliates for damages based on purchases of vitamins outside the United States." Defs.' Mem. at 6. In the defendants' view, this case is indistinguishable from Empagran, and no matter what the record may ultimately show with respect to the jurisdictional allegations, "American ownership of a foreign purchaser, the existence of 'global procurement' strategies directed by its U.S. parent and 'ultimate financial injury' to that U.S. parent" cannot confer subject matter jurisdiction over the plaintiffs' claims in this case. Defs.' Reply at 4. This is a controlling question, the defendants further claim, because a later determination that the Court's distinction between the two cases is erroneous will require reversal of any judgment against the defendants based in any part on foreign purchases. Id. at 5. The plaintiffs counter that the Court's order did not involve a controlling question of law. Rather, the Court merely applied the substantial-effects-on-domestic-commerce standard to the specific factual allegations made in this case. The question answered by the Court, according to the plaintiffs, thus cannot be controlling without full development of the factual record.

The Court can find no controlling question of law in its prior decision for the purposes of section 1292(b). The order was predicated upon a factual distinction between the allegations in this case and Empagran in that this case involves allegations of "American companies or subsidiaries of American companies that ha[d] 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," while the "Empagran action involved largely foreign plaintiffs who were seeking to recover for vitamins purchased for delivery abroad." Vitamins, 2001 WL 755852 at *2 & n.2. It thus found the plaintiffs' allegations in this case sufficient to

survive the motion to dismiss at this juncture under the "direct, substantial, and reasonably foreseeable effect" standard of the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), 15 U.S.C. § 6a, and well-established case precedent, see, e.g., Hartford Fire Ins., 509 U.S. at 796; Matsushita Elec. Indus. Co., 475 U.S. at 582 n.6 (1986); Caribbean Broadcasting Sys., 148 F.3d at 1085; Kruman, 129 F. Supp. 2d at 624-26.

The Court acknowledges the defendants' effort to re-characterize its prior holding by "continu[ing] to maintain that *as a matter of law* the[] supposedly distinguishing features of plaintiffs' foreign purchases are insufficient to establish subject matter jurisdiction over plaintiffs' foreign claims." Defs.' Reply at 2 (emphasis in original). But the defendants nowhere contend that the Court applied the wrong legal standard for determining whether subject matter jurisdiction exists. Instead, the defendants simply contend in sweeping fashion that federal antitrust jurisdiction does not extend to price-fixing claims based on purchases for delivery outside the United States no matter the factual circumstances, see, e.g., id., without citing any case that articulates this precise proposition as a matter of law. Despite this strained effort by the defendants, the Court's distinction between its June 7, 2001 decisions was rooted in a difference between factual allegations, evaluated within the legal framework of the FTAIA and applicable case law. Appeal would be proper, therefore, only after the factual record can be fully developed for review. The Court therefore can find no controlling issue of law for the purposes of immediate appeal.

Even if the Court recognized the question of law proffered by the defendants, it cannot find a substantial ground for difference of opinion concerning that question. Controlling case precedent in this Circuit is clear that when a plaintiff brings antitrust claims involving foreign

trade, the Court must apply the FTAIA standard and analyze whether the conduct had the requisite direct, substantial, and reasonably foreseeable effect upon domestic commerce to confer subject matter jurisdiction. Caribbean Broadcasting Sys., 148 F.3d at 1085-86. The defendants' proposed question of law—"whether the jurisdiction of the federal antitrust laws extends to claims of plaintiffs and their foreign affiliates for damages based on purchases of vitamins outside the United States," Defs.' Mem. at 6—has thus been answered in the affirmative so long as the challenged conduct has the direct, substantial, and reasonably foreseeable effect on domestic commerce. A proper finding under this standard, as noted above, ultimately turns on a fully developed record of fact. Rather than directly addressing this clear precedent and far from citing contrary case law, the defendants merely argue that this Circuit's Court of Appeals's decision in Caribbean Broadcasting does not "foreclose[] reasonable disagreement as to whether *the facts* of American ownership, 'global procurement' strategies directed by a U.S. parent and 'ultimate financial injury' to that U.S. parent can, of themselves, satisfy the jurisdictional requirements of the FTAIA." Defs.' Reply at 6-7 (emphasis added). But "[m]ere disagreement, even if vehement, with a court's ruling on a motion to dismiss does not establish a 'substantial ground for difference of opinion' sufficient to satisfy the statutory requirements for an interlocutory appeal." First Am. Corp., 948 F. Supp. at 1116; see also Kirkland & Ellis, 1996 WL 674072, at *4 ("Interlocutory review should not be used merely to provide a review of difficult rulings in hard cases."). For support, the defendants cite cases that employ the same legal standard used by this Court, but differ from the case at hand only because they contained insufficient factual allegations. See, e.g., Ferromin Int'l Trade Corp. v. UCAR Int'l, Inc., 153 F. Supp. 2d 700, 703-06 (E.D. Pa. 2001) (applying FTAIA standard and concluding that foreign

plaintiffs' worldwide price-fixing claims concerning graphite electrodes were barred because plaintiffs specifically failed "to show that their injuries resulted from an anticompetitive effect on the United States market"); Turicentro, S.A. v. Am. Airlines, Inc., 152 F. Supp. 2d 829, 830-34 (E.D. Pa. 2001) (applying FTAIA standard and concluding that foreign plaintiffs' antitrust claims involving the lowering of commissions paid to Central American travel agents were barred because plaintiffs "aver[red] nothing from which [the] Court could find that Defendants' purported conspiracy caused any injury which was felt in the U.S. or which affected the American economy in any way"). Similarly, the defendants' proposed distinction between this case and Caribbean Broadcasting is factually based. Whether or not the cases are actually distinguishable on the facts will be determined after the record is developed. At this juncture, however, the Court has applied the FTAIA standard as informed by cases such as Caribbean Broadcasting to the facts averred in this case, construing the allegations in favor of the plaintiffs as it must do when considering a motion to dismiss, and it found that the plaintiffs have sufficiently pled the requisite direct, substantial, and reasonably foreseeable effect on domestic commerce. In this respect, the cases are indistinguishable for the purposes of section 1292(b). The Court therefore can find no substantial ground for difference of opinion respecting the purported question of law advanced by the defendants.

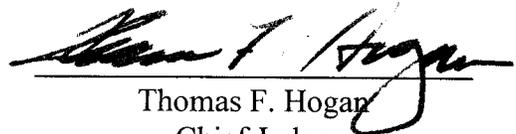
Finally, the Court finds that immediate appeal from its June 7, 2001 order would not, on balance, materially advance the ultimate termination of the litigation. On one hand, the defendants correctly note some advantages to immediate appeal. For example, the prior order may have expanded the scope of issues to be litigated at trial because expert analyses of the economic conditions in forty-six separate countries in which foreign purchases were made may

have to be performed. Reversal of the order, by eliminating the foreign purchases, could possibly streamline the litigation somewhat by eliminating the need for such analyses and help simplify what will already be extraordinarily complex trials even if they are limited to claims based on domestic purchases. Affirmance of the order also could provide a more definitive ruling on the issues prior to remand of these cases to the courts of origin, which could in turn eliminate multiple appeals for several different circuits of the same issues at a later date. Because the Empagran decision is on appeal, moreover, the cases could be consolidated for simultaneous consideration by the Court of Appeals, providing a broader context for a decision. On the other hand, however, a proper decision on the jurisdictional issues presented in this case depends upon the factual record, as noted at length above. But discovery is incomplete at this juncture. The Court of Appeals thus would be facing a fact-intensive question under the FTAIA standard with an indeterminate record. Staying discovery on the foreign purchase claims, however, is no solution as it would unduly delay the resolution of this case and perhaps result in duplicative trials. The parties thus agree that discovery must proceed regardless of the Court's decision on the instant motion. Permitting appeal at this juncture without staying discovery, however, would only muddy the waters for the Court of Appeals by providing not only an indeterminate, but also stale, record. In the Court's view, therefore, appeal at this time would not materially advance the ultimate termination of this litigation.

III. CONCLUSION

For the foregoing reasons, the Court does not find exceptional circumstances in this case sufficient to exempt it from the strong federal policy against piecemeal appeals and will accordingly deny the defendants' motion to amend and certify the order of June 7, 2001 for immediate appeal. An appropriate order will accompany this Memorandum Opinion.

January 7, 2002


Thomas F. Hogan
Chief Judge