21-0643-cv(L), 21-651-cv(CON), 21-660-cv(CON), 21-663-cv(CON), 21-954-cv(CON)

United States Court of Appeals

for the

Second Circuit

In Re: ALUMINUM WAREHOUSING ANTITRUST LITIGATION

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(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFFS-APPELLANTS FUJIFILM MANUFACTURING U.S.A., INC., MAG INSTRUMENT, INC., EASTMAN KODAK COMPANY, AGFA CORPORATION AND AGFA GRAPHICS NV

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FUJIFILM MANUFACTURING U.S.A., INC., MAG INSTRUMENT, INC., EASTMAN KODAK COMPANY, AGFA CORPORATION, AGFA GRAPHICS NV, AMPAL, INC., CUSTOM ALUMINUM PRODUCTS, INC., CLARIDGE PRODUCTS AND EQUIPMENT, INC., EXTRUDED ALUMINUM CORP.,

Plaintiffs-Appellants,

SUPERIOR EXTRUSION INCORPORATED, MASTER SCREEN INCORPORATED, GRACE ADRIANNA FLETCHER, GULF DISTRIBUTING CO. OF MOBILE, LLC, RIVER PARISH CONTRACTORS, INC., individually, and on behalf of all others similarly situated, VIVA RAILINGS, LLC, on behalf of themselves and all others similarly situated, REGAL RECYCLING, INC., D-TEK MANUFACTURING, on behalf of itself and all others similarly situated, PETERSON INDUSTRIES, INC., individually and on behalf of all others similarly situated, THULE, INC., individually and on behalf of all others similarly situated, EXTRUDED ALUMINUM INC., INTERNATIONAL EXTRUSIONS INC., TEAM WARD INC., individually and on behalf of all others similarly situated, DBA War Eagel Boats, EVERETT ALUMINUM INCORPORATED, on behalf of itself and all others similarly situated, PIERCE ALUMINUM COMPANY, INC., Individually and on Behalf of All Others Similarly Situated, DAVID J. KOHLENBERG, WELK-KO FABRICATORS, INC., TYLER SALES INC., DBA Norther Metals, Incorporated, QUICKSILVER WELDING SERVICES, INC., LEXINGTON HOMES, INC., BREEZIN METAL WORKS, INC., TALAN PRODUCTS, INC., BIG RIVER OUTFITTERS, LLC, SEATING CONSTRUCTORS USA, INC., ADMIRAL BEVERAGE CORPORATION, CENTRAL ALUMINUM COMPANY, HALL ENTERPRISES METALS, INC., BRICK PIZZERIA LLC, behalf of themselves, and all others similarly situated, Sunporch Structures, Inc., ENERGY BEVERAGE MANAGEMENT, LLC, GOLDRING GULF DISTRIBUTING COMPANY, LLC, ALLSTATE BEVERAGE COMPANY, LLC, DUNCAN GALVANIZING CORPORATION, individually and on behalf of all those similarly situated, COMMERCIAL END-USER PLAINTIFFS, REYNOLDS CONSUMER PRODUCTS LLC, SOUTHWIRE COMPANY, LLC,

Plaintiffs,

– v. –

GOLDMAN SACHS & CO. LLC, GOLDMAN SACHS INTERNATIONAL, J. ARON & COMPANY, METRO INTERNATIONAL TRADE SERVICES, L.L.C., J.P. MORGAN SECURITIES PLC, HENRY BATH LLC, GLENCORE LTD., PACORINI METALS USA, LLC, PACORINI METALS VLISSINGEN B.V., JPMORGAN CHASE BANK, N.A., GLENCORE INTERNATIONAL AG, GLENCORE AG,

Defendants-Appellees,

GOLDMAN SACHS GROUP, INC., GLENCORE XSTRATA PLC, LONDON METAL EXCHANGE LIMITED, GOLDMAN SACHS & CO., PARCORINI METAL AG, HENRY BATH & SON LIMITED, F&F CUSTOM BOATS, LLC,

GOLDMAN SACHS GROUP, INC., GS POWER HOLDINGS LLC, JOHN DOES 1-10, GLENCORE XSTRATA INCORPORATED, THE LONDON METAL EXCHANGE POWER HOLDINGS LLC, UNIDENTIFIED PARTIES, PARCORINI METALS USA, LLC, LIMITED METAL EXCHANGE LIMITED, LME HOLDINGS LIMITED, JOHN DOES 1-20, JOHN DOES 1-25, MCEPF METRO I, INC., NEMS (USA) INC., HONG KONG EXCHANGES & CLEARING, LTD., LIME HOLDINGS LIMITED, GLENCORE UK LTD, BURGESS-ALLEN PARTNERSHIP LTD., ROBERT BURGESS-ALLEN,

Defendants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

REPLY ARGUMENT

I. PLAINTIFFS ARE EFFICIENT ENFORCERS

A. Plaintiffs' Injuries Were a Direct Result of Defendants' Anti-Competitive Conduct

Following the filing of IPs' opening brief, this Court decided *In re American Express Anti-Steering Rules Antitrust Litigation*, No. 20-1766, 2021 WL 5441263 (2d. Cir. Nov. 22, 2021) ("*Amex Anti-Steering*"). In that decision, which did not involve a benchmark price, the Court reiterated that "[t]he first efficient-enforcer factor asks whether 'the violation was a direct or remote cause of the injury.'" *Id.*, at *5 (quoting *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 772 (2d Cir. 2016)). The Court explained that "[t]his factor turns on 'familiar principles of proximate causation.'" *Amex Anti-Steering*, 2021 WL 5441263, at *5 (quoting *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 412 (2d Cir. 2014)). The Court further explained that "proximate cause generally follows the first-step rule." *Amex Anti-Steering*, 2021 WL 5441263, at *5. "Under the rule, injuries that happen at the first-step following the harmful behavior are considered proximately caused by that behavior." *Id*.

In *Amex Anti-Steering*, the Court determined the plaintiffs did not suffer a direct injury from defendant's conduct. *Id.*, at *6. Plaintiffs were merchants who accepted payment cards, but not American Express. *Id.*, at *1. Plaintiffs alleged that American Express's anti-steering rules, when combined with Amex's higher

merchant fees, caused higher fees from competing networks, such as Visa and MasterCard. The Court rejected plaintiffs' claim of a direct injury from this conduct. The Court found the first step following Amex's conduct was for Amex to raise its own prices for its customers – not anyone else's. *Id.*, at *6. The Court further found that Amex's conduct may have then enabled other credit card companies to raise their prices in similar fashion, but that did not occur as the first step after Amex's conduct. *Id.*

In contrast, the first step following Defendants' conspiracy to increase benchmark premiums in the aluminum market was the payment of those increased benchmark premiums by all purchasers, such as IPs, who have those benchmark premiums incorporated into their supply contracts per market convention. Unlike *Amex Anti-Steering*, Defendants' conduct was not limited to the pricing of their contracts with their customers. *See id.*, 2021 WL 5441263 at **5-6. Rather, Defendants targeted an industry benchmark price used as a market convention to price metal. *See* IPs' Br. at 20-23. This Court previously recognized, IPs' "injuries were a direct result of the defendants' anticompetitive conduct." *Eastman Kodak Co. v. Henry Bath LLC*, 936 F.3d 86, 96 (2d Cir. 2019) ("*Aluminum VI*"). The injuries were not "an 'incidental byproduct' of the defendants' alleged violation." *Id.*

Defendants complain that IPs misread this Court's decision in *Aluminum VI*, because *Aluminum VI* decided antitrust injury and not efficient enforcer. Defs' Br. at 110-12. While this Court's conclusion was made in the context of deciding antitrust injury, the same concepts of direct versus remote injury apply. Antitrust injury requires the court to (1) identify the conduct complained of; (2) identify plaintiff's actual injury; and (3) compare the anticompetitive effect of the conduct to the actual injury. *Gatt Commc'ns, Inc. v. PMC Assocs., L.L.C.*, 711 F.3d 68, 76 (2d Cir. 2013). That is a causal analysis just like the first factor of the efficient enforcer test.

Defendants attempt to avoid this clear conclusion by arguing that IPs "rely on an unusually complex and attenuated chain of causation." Defs' Br. at 84. Despite Defendants' efforts to break up the various steps they took to achieve their conspiracy, the purpose and effect of Defendants' conduct was to drive up the regional premiums so they could sell aluminum at artificially high premiums. *See Aluminum VI*, 936 F.3d at 95 (explaining defendants restrained the aluminum market to drive up the premium and inflate their sales price). Defendants' internal documents admit that their conduct was driving up premiums and forcing all market participants to pay higher prices for aluminum. *See, e.g.*, IPs' Br. at 20-23 ("The bottleneck effect . . . will support premiums."). Defendants' documents demonstrate their conduct corrupted the entire physical aluminum market and was not limited to

just their customers. *See id.* ("one way to manipulate ***the market***, not allowing metal to flow into ***the consumption market***"). *Id*. at 22 (emphasis in original and added). Because Defendants' conduct targeted the industry benchmark premiums, the first step following their conduct was an increase in premiums to all purchasers. In fact, if the first step following Defendants' conduct was not increased premiums, then under this test, no one would have standing.

Defendants also argue that the district court was correct that "the independent decision by non-defendant sellers to charge plaintiffs a price containing the allegedly inflated [premiums] – breaks the chain of causation between defendants' actions and plaintiffs' injury." Defs' Br. 88. Defendants ask this Court to disregard disputes regarding material issues of fact and draw improper inferences to conclude smelters could or should suddenly have abandoned the decades-long market pricing convention simply because Defendants manipulated the premiums. In *Gelboim*, instead of finding non-defendant lenders can freely abandon LIBOR, a conventional benchmark, when pricing their financial instruments, this Court correctly found "no difference in the injury alleged by those who dealt in LIBOR-denominated instruments, whether their transactions were conducted directly or indirectly with the Banks." 823 F.3d at 779.

The decisions of smelters are but one fact – not the conclusive fact – to consider in determining whether the chain of causation is broken. While smelters

have some autonomy in deciding their own prices, there are other factors to consider before determining whether a chain of causation is broke. Here, those factors include, among other things, the existence of an industry pricing convention, sellers' adherence to that pricing convention, and IPs' ability to negotiate away from that convention. *See, e.g.*, IPs' Br. at 5-6 (evidence of the market convention for pricing metal); and 8-9 (IPs' inability to negotiate terms other than the market convention). By finding the mere fact smelters can decide their own prices breaks the chain of causation, the district court effectually drew an improper bright line that denies standing to all plaintiffs who do not transact directly with a defendant.

Moreover, both Defendants and the district court ignored IPs' evidence that Defendants knew, understood, and intended the benchmark premiums to rise throughout the market. These are important facts that must also be considered in determining whether IPs' injuries were the direct result of Defendants' conduct and whether the chain of causation has been broken. *Amex Anti-Steering*, 2021 WL 5441263, at *5 (the first efficient enforcer factor is a proximate cause analysis). If the question is whether the "violation was a direct or remote cause of the injury" (*id.*), then IPs' evidence that Defendants knew and understood their conduct was

causing injuries to market participants beyond their immediate customers, such as IPs, creates a disputed issue of material fact.[1]

Defendants' argument that smelter decisions broke the chain of causation makes even less sense during the early stages of the conspiracy. At that time, IPs' contracts containing floating premium pricing terms were already set. Defendants then engaged in their conduct which drove up the premiums. IPs then paid inflated premiums per those pre-existing contracts. In fact, the reasonable inference the district court should have drawn was that the Defendants were taking advantage of the industry convention to effectuate their conspiracy. After all, if the smelters did not include the premiums as part of the price per industry convention, Defendants would not have been able to force their clients to pay premiums as part of their sales contracts. *See Aluminum VI*, 936 F.3d at 97 ("the defendants' objective was to restrain the market for the purchase and sale of aluminum by inflating the prices the defendants would realize in their sales by reason of the inclusion of the inflated Midwest Premium as a price element").

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[1] Defendants argue that antitrust standing is a threshold, pleading stage inquiry, such that IPs are not entitled to a jury trial. Defs' Br. at 114-15. But the issues of causation and damages are certainly factual disputes for the jury to decide. *See In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 136 (2d Cir. 2001) ("[T]he three required elements of an antitrust claim [are] (1) a violation of antitrust law; (2) injury and causation; and (3) damages. . . ."). The threshold, pleading stage inquiry of whether IPs, who did not buy directly from Defendants, were efficient enforcers was decided by the district court on the pleadings in 2015.

Likewise, Defendants' argument that IPs had some ability to negotiate the all-in price and thereby offset the damage caused by Defendants' artificial increases to the premiums is meritless. *Gelboim*, 823 F.3d at 773 ("True, appellants remained free to negotiate the interest rates attached to particular financial instruments; however, antitrust law is concerned with influences that corrupt market conditions, not bargaining power."). Defendants' argument entirely ignores that the artificial inflation of the premium meant all IPs were starting their negotiations from an artificially inflated starting point. *See, e.g.*, *Fears v. Wilhelmina Model Agency, Inc.*, No. 02 Civ. 4911 HB, 2003 WL 21659373, at *6 (S.D.N.Y. July 15, 2003) (even if the plaintiffs had been able to negotiate for a lower commission rate with the defendant modeling agencies, they were nonetheless impacted by the conspiracy because those negotiations still began at the artificially elevated rate established by the cartel). Defendants' argument, which the district court accepted, actually punishes market participants who try (even if they do not succeed) to mitigate the harm caused by the unlawful conduct.

B. Defendants Do Not Face Disproportionate Damages

Defendants complain that if IPs are found to have standing as efficient enforcers, they will face disproportionate liability. First, the evidence demonstrates that Defendants targeted the market to manipulate benchmark premiums. *See, e.g.*, IPs' Br. at 20-23 ("one way to manipulate the market"). Their conduct was not

simply limited to pricing decisions affecting only their customers in the first instance. Thus, their liability for their ill-gotten gains is directly tied to their manipulation of the regional benchmark premiums in the physical aluminum market. Unlike *Gelboim* and other cases, finding the IPs have standing will not expose Defendants to liability "beyond conception." 823 F.3d at 780. There are no other markets to consider – just the one Defendants conspired to corrupt.

Second, as the Court noted in *Amex Anti-Steering* when considering efficient enforcer standing, '"relative significance of each factor will depend on the circumstances of the particular case."' 2021 WL 5441263, at *7 (citation omitted). When Defendants filed their motion for summary judgment this case was over seven years old. Fact discovery had long closed. The case had been up and down on appeal relating to antitrust injury. Defendants faced individual suits from eight plaintiffs. The district court had denied class certification. Thus, the circumstances of this particular case are readily distinguishable from those of *Gelboim* and other cases decided at the motion to dismiss stage. Defendants do not face disproportionate damages given "the circumstance of the particular case." *Id.*

Finally, Defendants' remaining arguments are heavily dependent on the facts presented by each side. *Compare* IPs' Br. at 17-18 (Defendants held 60% of the worldwide aluminum inventory, excluding China, in 2012-13) *with* Defs' Br. at 95 (discussing large quantities of sales by smelters during the relevant period). The

district court was required to draw the reasonable inferences from those facts in favor of the non-moving parties, here, the plaintiffs, such as IPs. *See Aluminum VI*, 936 F.3d at 93 (noting that, at summary judgment, the court is required to draw all reasonable inferences in favor of the non-moving party).

C. The Existence of Other Victims Who Suffered the Same Injury as IPs Does Not Weigh Against IPs' Standing as an Efficient Enforcer

Defendants contend that the existence of two other plaintiffs (Reynolds and Southwire) who bought directly from Defendants weighs against IPs' standing as an efficient enforcer. Defs' Br. at 101. However, IPs have suffered the exact same injury as those other plaintiffs – the payment of an artificially inflated premium. *See Gelboim*, 823 F.3d at 779 (benchmark cases give the second factor diminished weight). IPs' injury is a direct result of Defendants' conduct. Moreover, IPs need to be an efficient enforcer, not necessarily the best efficient enforcer. *See In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 689 (2d Cir. 2009).

D. IPs' Damages Are Not Highly Speculative

The district court originally determined, for purposes of the efficient enforcer test, that IPs' damages were not highly speculative. *See In re Aluminum Warehousing Antitrust Litig.*, 95 F. Supp. 3d 419, 444 (S.D.N.Y. 2015) ("*Aluminum II*"). Instead, the district court originally determined that IPs' damages are defined by the amount the regional premium was inflated by Defendants' conduct. *Id*. This

Court, too, understood IPs' injury was paying artificially inflated premiums. *See Aluminum VI*, 936 F.3d at 97 ("Because the defendants manipulated the Midwest Premium, the plaintiffs were forced to pay a higher Midwest Premium.").

Nevertheless, the district court granted Defendants' motion for summary judgment, finding IPs' damages are highly speculative.[2] In their opening brief, IPs explain how the district court erred by confusing "highly speculative" with "complex" and by drawing inferences against IPs based on contracts to which they were not even a party. Defendants' response is to reiterate that the supposed parade of horribles stated by the district court which supposedly rendered IPs' damages highly speculative.

This Court, however, recognizes that "'[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.'" *Gelboim*, 823 F.3d at 779 (citing *DDAVP*, 585 F.3d at 689). Furthermore, "some degree of uncertainty stems from the nature of antitrust law." *Gelboim*, 823 F.3d at 779-80 (citing *J. Truett Payne*

[2] Defendants argue that the district court did not reverse itself by granting summary judgment on enforcement enforcer standing because *Aluminum II* only denies Defendants' argument that users of warehouses services are better positioned to prosecute the alleged antitrust violation. Now they are arguing direct purchasers are more efficient enforcers. Defs' Br. at 112. But Defendants provide no explanation as to why the district court's summary judgment finding that IPs' damages are highly speculative was not directly contrary to its own finding in *Aluminum II*.

Co., Inc. v. Chrysler Motors Corp., 451 U.S. 557, 566 (1981)) ("Our willingness to accept a degree of uncertainty in these cases rests in part on the difficulty of ascertaining business damages as compared, for example, to damages resulting from a personal injury or from condemnation of a parcel of land. The vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation."). IPs' injury, paying higher premiums, is the direct result of Defendants' artificial inflation of the premiums. Like any other antitrust case, it will require expert modeling and testimony, but it is not highly speculative.[3]

E. IPs' Contracts Incorporate the Regional Premiums

Contrary to Defendants' argument, all but one of IPs' contracts contains an express reference to a regional premium either Midwest or Rotterdam. IPs' Br. at 8-13. Defendants now contend that some contracts do not include an express regional premium, because they use the MWTP (Midwest Transaction Price). This is sleight of hand.

It is a common industry understanding that MWTP is the LME cash price and the Midwest Premium. *Id.*; *see also* CA1755 (at 210:17-20). IPs' own contracts state that the MWTP or the U.S. Midwest Transaction Price is comprised of two

[3] Defendants filed their motion prior to the preparation and service of IPs' expert report on damages.

components: (1) the LME Cash Price and (2) the Midwest Premium. IPs' Br. at 6-7. Likewise, Defendants' attempts to further confuse the issue by referencing all-in prices ignores the evidence that market participants were required to break out the component prices (LME Cash + premium) when reporting an all-in number. *See* CA587.

CONCLUSION

For the foregoing reasons and for those in IPs' opening brief, the Court should reverse the district court's summary judgment order.

Dated: December 22, 2021
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the foregoing brief is in 14-Point Times New Roman proportional font and contains 2,674 words and thus is in compliance with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure.

Dated: December 22, 2021
San Diego, California

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