

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION**

**BEST PALLETS INC. and BEST INDUSTRIAL PALLETS, L.L.C., by and through their President and Owner JAMES L. TAYLOR; ITNOLAP PALLET & CRATING, INC., by and through its President and Owner WILLIAM M. CLARK; ITNOLAP PALLET & CRATING, L.L.C., by and through its President and Half-Owner WILLIAM M. CLARK; PALLET EXPRESS, INC., by and through its Vice-President and Owner LYNN RIDGE BELL; and GOEMAN'S WOOD PRODUCTS, INC., by and through its President and Owner DANNY J. GOEMAN, for themselves and all others similarly situated,
PLAINTIFFS AND PROPOSED CLASS REPRESENTATIVES,**

vs.

**BRAMBLES INDUSTRIES, INC., and
BRAMBLES NORTH AMERICA, INC., d/b/a
CHEP USA,
DEFENDANTS.**

Case No. 08-2012

The Honorable Robert T. Dawson
District Judge

ORAL ARGUMENT REQUESTED

**MEMORANDUM IN SUPPORT OF MOTION FOR CERTIFICATION OF
INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. § 1292(b)**

The interlocutory appeal mechanism provided in 28 U.S.C. § 1292(b) permits a district court to certify for immediate appeal a controlling question of law as to which there is substantial ground for difference of opinion, where the resolution of that question may materially advance the ultimate termination of the litigation. The legislative history of § 1292(b) specifically provides—and the Court of Appeals for the Eighth Circuit has expressly recognized—that interlocutory appeal is especially appropriate in antitrust cases, where the extraordinary costs and burdens associated with discovery and summary judgment proceedings demand that particular care be taken before permitting such an action to proceed.

In this case, Plaintiffs' Complaint, on its face, establishes that Defendants' market share is no greater than five percent. Defendants' motion to dismiss argued *inter alia* that, as a matter of law, such an insignificant market share eliminates the possibility of Plaintiffs establishing one of the essential elements of their Section 2 Sherman Act claim, namely, that the challenged conduct creates "a dangerous probability of achieving monopoly power." The Court's denial of Defendants' motion to dismiss resolved this controlling question of law in favor of Plaintiffs. Defendants contend, however, that there is substantial ground for difference of opinion concerning this question, and that the resolution of this threshold issue will materially advance the ultimate termination of this litigation.

Accordingly, Defendants Brambles Industries, Inc. and Brambles North America, Inc. d/b/a CHEP USA (together, "CHEP") respectfully request that the Court certify for interlocutory appeal its order of August 11, 2008, denying Defendants' motion to dismiss and, in particular, the legal question of whether Plaintiffs' Complaint adequately states a claim under Section 2 of the Sherman Act.

I. The Standard For Interlocutory Appeal Under 28 U.S.C. § 1292(b)

Subsection (b) of 28 U.S.C. § 1292, governing interlocutory appeals, provides in relevant part as follows:

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). A district court's certification of an issue for interlocutory appeal does not compel the Court of Appeals to accept the appeal. Instead, upon receipt of a district court's timely application, the Court of Appeals may, in its discretion, decide whether to permit an

appeal.¹ The district court's certification for interlocutory appeal does not stay proceedings in the district court unless the district judge or the Court of Appeals specifically so orders.²

The Eighth Circuit's leading case on § 1292(b) is *White v. Nix*, in which the Court of Appeals explained that the requirements for certification of an interlocutory appeal are satisfied if: (1) the order to be appealed involves a controlling question of law; (2) there is substantial ground for difference of opinion on that question of law; and (3) certification will materially advance the ultimate termination of the litigation. 43 F.3d 374, 376 n.1 (8th Cir. 1994). The *White v. Nix* court made clear, however, that, in order to avoid burdening the courts and litigants with piece-meal appeals, a district court should certify interlocutory appeal only "sparingly and with discrimination." *Id.* Quoting the legislative history to § 1292(b), the court expressly distinguished the relatively minor discovery issue before it from the kind of cases for which interlocutory appeal mechanism was designed: "exceptional cases where a decision on appeal may avoid protracted and expensive litigation, *as in antitrust and similarly protracted cases.*" *Id.* at 376 (quoting S. Rep. No. 2434, 85th Cong., 2d Sess. (1958), *reprinted in* 1958 U.S.C.C.A.N. 5255, 5260) (emphasis added).

The Supreme Court reaffirmed the "protracted and expensive" nature of antitrust litigation just last year, in *Bell Atlantic Corp. v. Twombly*, --- U.S. ---, 127 S. Ct. 1555 (2007). The *Twombly* Court cited numerous sources documenting the extraordinary costs and burdens generated by modern antitrust litigation and the enormous waste of resources that results from permitting such cases to proceed where the allegations of the Complaint are deficient on their

¹ *Id.* ("The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order").

² *Id.* ("application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order").

face. *See Twombly*, 127 S. Ct. at 1966-67, (“[T]he costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint.”) (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984); *Asahi Glass Co. v. Pentech Pharms., Inc.*, 289 F. Supp. 2d 986, 995 (N.D. Ill. 2003) (Posner, J., sitting by designation) (“[S]ome threshold of plausibility must be crossed at the outset before a patent antitrust case should be permitted to go into its inevitably costly and protracted discovery phase.”); Note, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. Rev. 1887, 1898-1899 (2003) (discussing the unusually high cost of discovery in antitrust cases).

II. The Court Should Certify For Interlocutory Appeal Its Order Denying CHEP’s Motion To Dismiss

The threshold legal issue addressed in this Court’s denial of CHEP’s motion to dismiss is precisely the kind of ruling for which interlocutory appeal pursuant to § 1292(b) was designed. Whether Plaintiffs’ Complaint adequately pleads a Section 2 violation is a clear and controlling question of law; it is a question over which there is substantial ground for difference of opinion, particularly after the Supreme Court’s ruling in *Twombly*; and resolution of this question by interlocutory appeal will advance materially the ultimate termination of this litigation.

A. The Court’s Denial of CHEP’s Motion to Dismiss Involves a Controlling Question of Law: Whether the Complaint Adequately Pleads a “Dangerous Probability of Achieving Monopoly Power”

In *White v. Nix*, the Eighth Circuit explained that “[a] legal question of the type referred to in § 1292(b) contrasts with a ‘matter for the discretion of the trial court.’” 43 F.3d at 377 (quoting *Garner v. Wolfenbarger*, 430 F.3d 1093, 1096-97 (5th Cir. 1970)). In that case, the order for which appeal was sought involved discovery issues committed to the discretion of the

district court. *Id.* Here, by contrast, the issue is whether Plaintiffs' Complaint satisfies the basic pleading requirements to establish a cause of action under Section 2 of the Sherman Act—a quintessential legal issue.³

The elements of a Section 2 claim for attempted monopolization are “(1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power.” *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993). An attempted monopolization complaint that fails to allege facts showing the third element—dangerous probability of monopoly power—must be dismissed as a matter of law. *Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968, 971 (8th Cir. 1968) (“finding of a ‘dangerous probability of monopoly’ . . . is a prerequisite to an illegal attempt to monopolize”).

Section 1292(b)'s interlocutory appeal mechanism has been used time and time again for review of district court denials of motions to dismiss, since by definition the decision whether to permit a complaint to proceed past the motion to dismiss stage involves a controlling question of law. *See, e.g., Eggleton v. Plasser & Theurer Export*, 495 F.3d 582 (8th Cir. 2007) (permitting § 1292(b) review of an order denying motion to dismiss on limitations grounds); *Doe v. Hartz*, 134 F.3d 1339 (8th Cir. 1998) (permitting § 1292(b) review of order denying motion to dismiss for failure to state a cause of action, and reviewing complaint for essential elements of plaintiff's claim); *Remmes v. International Flavors & Fragrances, Inc.*, 435 F. Supp. 2d 936 (denying motion to dismiss for lack of personal jurisdiction and simultaneously granting certification for

³ A question of law is “controlling” where “resolution of the issue on appeal could materially affect the outcome of litigation in the district court.” *In re Cement Antitrust Litig. (MDL No. 296)*, 673 F.2d 1020, 1026 (9th Cir. 1982), *aff'd sub nom. Arizona v. Ash Grove Cement Co.*, 459 U.S. 1190 (1983). Clearly, if the Court of Appeals were to rule in CHEP's favor on interlocutory appeal, the outcome of the litigation would be materially affected as Plaintiffs' Complaint would be dismissed and, for the reasons discussed in section II.B, *infra*, amendment on the issue of dangerous probability of monopolization would be futile.

interlocutory appeal); *APCC Servs., Inc. v. Sprint Commc'ns Co.*, 297 F. Supp. 2d 90 (D.D.C. 2003) (denying motion to dismiss and simultaneously granting certification for interlocutory appeal); *Longwood Mfg. Corp. v. Wheelabrator Clean Water Sys.*, 954 F. Supp. 17, 19 (D. Me. 1997) (permitting § 1292(b) review of order denying motion to dismiss defendant's antitrust counterclaim that plaintiff's patent infringement claim was an unlawful attempt to monopolize the market in question).

Accordingly, the Court's August 11 order denying Defendant's motion to dismiss "involves a controlling question of law" and therefore satisfies the first element of § 1292(b).

B. There is Substantial Ground for Difference of Opinion on the "Dangerous Probability of Monopolization" Issue

As the Court notes, the Complaint alleges that CHEP is the leading supplier of wood pallets in the United States, and that "[a]s a result of the AVP CHEP added thousands of new customers." (Order at 5-6; *see also* Complaint ¶ 38.) Defendants respectfully suggest that there is a reasonable difference of opinion as to whether these allegations are adequate as a matter of law to plead the "dangerous probability of achieving monopoly power" requirement of *Spectrum Sports* under the pleading requirements established by *Twombly*.

Whether Plaintiffs have adequately alleged a dangerous probability of actual monopoly is initially "examined by reference to the offender's share of the relevant market." *HDC Med., Inc. v. Minntech Corp.*, 474 F.3d 543, 550 (8th Cir. 2007) (quoting *Alexander v. Nat'l Farmers Org.*, 687 F.2d 1173, 1181 (8th Cir. 1982)). Under the facts alleged in Plaintiffs' Complaint, CHEP has no more than a *five percent* share of the alleged market for wood pallets in the continental United States. (Complaint ¶¶ 38-39; *see* Defs.' Mem. in Support of their Motion to Dismiss 10). Plaintiffs plainly allege that (i) the relevant market is that for wood pallets in the continental United States (Complaint ¶ 81); (ii) there are two billion pallets in circulation in the

United States (*id.* ¶ 16); and (iii) just 90 to 100 million of those are CHEP pallets (*id.* ¶ 31).

Because 100 million is just five percent of two billion, CHEP’s share of the total pallet market alleged in the Complaint can be no greater than five percent.

No authority cited by either party suggests that such a low market share could under any circumstances be sufficient to establish a “dangerous probability of achieving monopoly power” as required under Section 2 of the Sherman Act. To the contrary, federal courts have repeatedly and consistently rejected Section 2 attempted monopolization claims against defendants with less than a **thirty percent** market share.⁴ (*See* Defs.’ Mem. in Support of their Motion to Dismiss 9.) Moreover, the Ninth Circuit held that—after *Twombly*—merely pleading that a defendant “rank[s] number one in the industry” is inadequate to show market power. *Rick-Mik Enters., Inc. v. Equilon Enters. LLC*, 532 F.3d 963 (9th Cir. 2008) (dismissing complaint under Fed. R. Civ. P. 12(b)(6) for failure to plead market power). Moreover, additional facts alleged by Plaintiffs further demonstrate their inability to possibly establish a dangerous probability of CHEP achieving monopoly power: despite Plaintiffs’ allegation that CHEP has engaged in the challenged conduct (its AVP program) for more than ten years (Complaint ¶ 39), Plaintiffs’

⁴ In *White v. Nix*, the Eighth Circuit held that § 1292(b)’s requirement of substantial grounds for difference of opinion is satisfied where there are “a sufficient number of conflicting and contradicting opinions” on the same issue. 43 F.3d at 378. In this case, there are numerous opinions holding that market shares below 30 percent cannot support a Section 2 Sherman Act claim because such low shares preclude a finding of a “dangerous probability of achieving monopoly” as required under *Spectrum Sports*. For example, the Eighth Circuit has found market shares below 50% to be insufficient to establish a dangerous probability of monopolization. *See United States v. Empire Gas Corp.*, 537 F.2d 296, 305-307 (8th Cir. 1976) (holding that there was no dangerous probability of monopolization assuming the defendant held 47% and 50% shares, respectively, of the relevant markets); *see also Hiland Dairy*, 402 F.2d at 975 (dismissing Section 2 class action complaint alleging defendant would acquire a 20% share of the market); *accord M & M Med. Supplies & Serv. v. Pleasant Valley Hosp.*, 981 F.2d 160, 168 (4th Cir. 1992) (en banc) (“claims of less than 30% market shares should presumptively be rejected”); *see also U.S. Anchor Mfg. v. Rule Indus., Inc.*, 7 F.3d 986, 1001 (11th Cir. 1993) (less than 50% market share insufficient “as a matter of law” to establish dangerous probability); *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1414-15 (7th Cir. 1989) (share just under 50% insufficient); *Broadway Delivery Corp. v. United Parcel Serv. of Am.*, 651 F.2d 122, 129 (2d Cir. 1981) (share below 50% precludes finding of dangerous probability absent “significant evidence concerning the market structure to show that the defendant’s share . . . gives it monopoly power”).

Complaint concedes that CHEP controls no more than five percent of the total pallet market and continues to face competition from four thousand recyclers, (*id.* ¶ 57) and alleges no facts to suggest that this suggestion is likely to change in the foreseeable future.

Accordingly, Defendants respectfully submit that there is “substantial ground for difference of opinion” as to whether Plaintiffs are entitled to proceed under Section 2 of the Sherman Act given the fundamental facts of the marketplace presented in the Complaint. In light of the enormous burden of litigating and fulfilling its discovery obligations in a nationwide antitrust class action spanning many years, Defendants respectfully request that the Eighth Circuit Court of Appeals be permitted an opportunity to determine whether Plaintiffs’ case could possibly succeed.

C. Certification of the “Dangerous Probability of Monopolization” Issue Will Materially Advance the Termination of the Litigation

Finally, review of a district court’s order denying a motion to dismiss plainly satisfies § 1292(b)’s requirement that “that an immediate appeal from the order may materially advance the ultimate termination of the litigation.” 28 U.S.C. § 1292(b). In *White v. Nix*, the Eighth Circuit stated that “[w]hen litigation will be conducted in substantially the same manner regardless of our decision [on the interlocutory appeal], the appeal cannot be said to materially advance the ultimate termination of the litigation.” 43 F.3d at 378-79.

Here, if the Court of Appeals were to rule in favor of Defendants on interlocutory appeal, the litigation clearly would not be “conducted in substantially the same manner”—it would not be conducted at all. Moreover, even if the Court of Appeals affirms this Court’s denial of the motion to dismiss, such a ruling is still likely to advance materially the ultimate termination of the litigation. With a final determination of the legal sufficiency of Plaintiffs’ Complaint from the Court of Appeals, the parties will be far better positioned to assess the strengths or

weaknesses of their claims and defenses going forward, which in turn will increase the chances of settlement. By contrast, if the question of whether a Section 2 claim can be sustained against a defendant with such a small market share is permitted to hang over the litigation, the prospects of resolving the matter through settlement will be seriously diminished by the possibility that an eventual appeal to the Eighth Circuit on that threshold issue will relieve CHEP of any liability, even assuming Plaintiffs are able to prove at trial every fact alleged in their Complaint.

Finally, another important consideration is that the shortcomings of Plaintiffs' Complaint are not of the sort that can be remedied through amendment: the fact that CHEP does not have a market share that approaches a level sufficient to support Plaintiffs' Section 2 claim cannot be escaped through artful pleading. Plaintiffs cannot re-plead the basic facts of the pallet market such that the five percent share alleged in their Complaint will somehow increase to thirty percent, or fifty percent. Indeed, such an increase would require CHEP to have under its control, at a minimum, 500 to 700 *million* more pallets than Plaintiffs allege it actually has. Instead, this is a case in which the facts alleged by Plaintiffs affirmatively establish that there is no dangerous probability of CHEP having or gaining monopoly power. Consequently, amendment would be futile and an adverse ruling from the Court of Appeals would terminate finally the litigation.

For all of these reasons, Defendants Brambles Industries, Inc. and Brambles North America, Inc. d/b/a CHEP USA respectfully request that the Court certify for interlocutory appeal its order of August 11, 2008, denying Defendants' motion to dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Eric Mahr, hereby certify that on the 19th day of August, 2008, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to the following:

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