

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS**

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
U.S. District Judge

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANTS' MOTION FOR CERTIFICATION
OF INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. § 1292(b)**

A governing maxim of debate says that if one can change the question one can control the issues, the discussion and enhance his likelihood of prevailing. CHEP's memorandum argument engages in exactly that ploy. CHEP cites cases that, while generally correct in what the cases say, are simply not material to this action as pled or to the court's order (Doc. 23) denying CHEP's motion to dismiss. That is so because nowhere in the instant complaint (Doc. 1) is there any mention, allegation or concern with whatever market share CHEP may possess in any relevant market; that is not what this case is about.

In the primary case relied upon by CHEP, *Spectrum Sports v. McQuillan*, 506 U.S. 456 (1993), CHEP overlooks or ignores the seminal definition of the *Spectrum Sports* case:

The purpose of the Act (antitrust) is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest. at 458.

CHEP urges the court to ignore the authoritative cases affirming that unmistakable anticompetitive and exclusionary conduct, when successful, is the precursor to the achievement of unlawfully acquired monopoly. In sum, the argument is that we must wait “until the putsch is upon us.”¹ CHEP’s failure to acknowledge to the court that the Supreme Court and subordinate federal courts have written numerous opinions, such as *Aspen Ski Co. v. Aspen Highlands Corp.*, 472 U.S. 585 (1985), *Eastman Kodak Co. v. Image Tech. Services*, 504 U.S. 451 (1992), *NCAA v. Board of Regents*, 468 U.S. 85 (1984), *Republic Tobacco Co. v. North Atlantic Trading Co.*, 381 F.3d 717 (7th Cir. 2004), *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir.) and *Spectrum Sports v. McQuillan*, 506 U.S. 456 (1993) among others cited in plaintiffs’ memorandum (Doc. 13) – as well as scholarly journals, have all described section two criteria as met by the type of conduct illustrated in this action.

The text of *Spectrum Sports* continues to teach courts and the bar that merely unfair, or even predatory tactics, while proof of intent to monopolize, must be supplemented by allegations of facts demonstrating effect; that the complaint in this action has done.

Facts – not defensive argument – are comprised of sufficient allegations and, ultimately, proof. In the instant case that proof comes at a later time when the merits are explored. CHEP

¹ “Must we wait until the putsch is upon us?” is a phrase borrowed by an early Cold War case in which Justice Frankfurter dissented.

not only is seeking to change the necessary question to be asked at this stage of the case, but is also expressing its fervent wish that the court ignore the teachings of *Aspen Ski Co. v. Aspen Highlands Corp.*, 472 U.S. 585 (1985) and *NCAA v. Board of Regents*, 468 U.S. 85 (1984) as raised in plaintiffs' memorandum opposing CHEP's 12(b)(6) motion (pages 8-9, 13-15, 17-21, 24-28 of memorandum dated April 18, 2008 (Doc. 13)). Do the facts alleged address the questions of provable output restraint by CHEP's conduct? Leading antitrust scholars generally ask that question when theoretical assumptions about the robustness of a given market doesn't offer any reason for concern. Today's antitrust, after *Aspen* and *Eastman Kodak Co. v. Image Tech. Services*, 504 U.S. 451 (1992) (pages 9, 13, 15, 17-21, 24-28 of memorandum dated April 18, 2008 (Doc. 13)) especially, give greater attention to the actual behavior and the context of the market participants. The reason for reduced reliance on labels and meaningless percentages that do not address the competitive environment is because today's antitrust doctrine uses the Sherman Act, especially section two, as a mechanism to preserve the competitive functioning of the market, to minimize privilege and power and to safeguard competition on the basis of merit. *See* "The FTC and the Law of Monopolization Timothy Muris 67 Antitrust L. J. 693 (2000); The Modernization of Antitrust---A New Equilibrium", 66 Cornell L. Rev. 1140 (1981). *See also*: Judge Easterbrook-dissent in *Fishman v. Estate of Wirtz*, 807 F.2d 530, 563 (7th Cir. 1986). *See also*: The Kolasky & Dick article, *supra* at 207-08.

Primary counsel for CHEP argued properly and well contrary to CHEP's assertions of arithmetic rubrics regarding what the competitive process, and hence, what the antitrust laws are all about.

“When the competitive process is allowed to run its course – unfettered by exclusionary practices or anticompetitive agreements among firms – the incentive of firms to lure away rivals’ customers by offering them lower prices, superior quality or new product features will necessarily lead these firms to seek more efficient ways to do business...antitrust enforcement therefore assumes as its mandate the deterrence of business conduct that threatens to distort the competitive process in product or innovation markets. (emphasis added)

The fundamental reason we favor competition over monopoly is that competition tends to drive markets to a more efficient use of scarce resources. ...competition promotes dynamic efficiency...” (emphasis in the original). William J. Kolasky and Andrew R. Dick “The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers”, 71 Antitrust law Journal #2 at 207-08 (2003) [introducing the article].

As argued in plaintiffs’ previous memorandum, CHEP’s conduct represents and is the direct cause of a failed market which the recyclers are attempting to correct and make legitimately competitive. Their inevitable elimination, absent success in this litigation, will indicate the failure and impotency of the Sherman Act in stopping a monopoly in its ascendancy when there was both time and opportunity to mean what it says about an attempt to monopolize “...any part” of trade or commerce.

By a single scheme CHEP is able to (1) exclude actual competitors on a basis other than merits competition, (2) obtain monopolistic higher prices than if the recycler/competitors were unweighted of CHEP’s pallet costs, (3) continue its march to inevitable monopoly, and (4) erect an entry barrier that any potential pallet recycler can plainly see and thus choose to not enter the market. It is not rhetorical to ask: Is not that scenario as alleged the quintessential successful attempt that has morphed into a statutorily proscribed monopoly obtained by unlawful means?

CHEP’s effort to shift the focus of its exclusionary acts, the failed 48” x 40” wood pallet market it has created and the brazenly coercive act of distorting the market by forcing the

plaintiffs to bear its costs and the increased and monopoly costs imposed on consumers is a monumental exercise of predation and ultimate monopolization.

Ignoring the Supreme Court authorities such as *Aspen* at 605, *Kodak* at 469, *NCAA* at 107 by assertions of questionable appropriateness is evidence of a non-viable view of governing authority that not even CHEP's most fervent wish could grant. As Judge Posner articulated in *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430, 1437 (7th Cir. 1986): "The purpose of antitrust law, at least as articulated in the modern cases, is to protect the competitive process as a means of promoting economic efficiency." (emphasis added).² Another Seventh Circuit decision explained that: "a healthy and unimpaired competitive process is presumed to be in the consumer interest." *Fishman v. Estate of Wirtz*, 807 F.2d 520, 536 (7th Cir. 1986). A Tenth Circuit decision that is particularly apropos to the instant case against CHEP and its alleged corruption of the market as a consequence of its anticompetitive scheme in operation is: *Tal v. Hogan*, 453 F.3d 1244, 1258 (10th Cir. 2006) ("The primary concern of the antitrust laws is the corruption of the competitive process..."). Another non-rhetorical question: What other description is appropriate for a situation in which an actor in the market (CHEP), the proverbial 400-pound gorilla, forces a competitor to incur CHEP's business costs and then using its own lower costs against the victim of that coercion when they meet at the competitive crossroad?

Even the manifestly antitrust phobic Cato Institute opines that when a clearly predatory act by a firm that raises rivals' costs and creates a dysfunctional market without a lawful plausible explanation, a finding of unlawful exclusion is apt.^{3, 4}

² See also: *Olympica Equipment Leasing v. Western Union Tel. Co.*, 797 F.2d 370, 375, (Judge Posner) 1986.

³ Donald Boudreaux 13 Regulation Magazine #3, p. 5, 10 Cato Institute. "Until they offer a plausible explanation of how predatory firms can raise rivals' costs or otherwise disadvantage efficient rivals in the real world, Predation theorists have not made an adequate case..." id. at 10.

⁴ See generally: "Anticompetitive Exclusion: Raising Rivals; Costs to Achieve Power Over Price", 96 Yale L.J. 209, (Dec. 1996), Thomas Krattenmaker & Steven Salop; "Predation, Monopolization and Antitrust", Janusz Ordover & Garth Saloner, Handbook of Industrial Organization; Vol. I, 1989 p. 565-70; "Predation: The Changing View in

Put succinctly, there is no argumentative legerdemain that can transform the instant action from one of exclusionary and anticompetitive conduct and unlawful exploitation to one of CHEP's preference for numbers and percentages. CHEP's tunnel vision acknowledges an attempt to monopolize not relevant to this action. They set up a straw man and argue only that. If CHEP were not engaging in the conduct alleged, they would argue that – and have in the earlier motion; and did not prevail. Judge Easterbrook (when a law professor) described what makes this case, and the court's order of August 11th (Doc. 23) precisely what it is and why it is within the ambit of section two attempt. Judge Easterbrook noted that conduct such as the complaint describes inexorably leads to monopoly. Of course, that is precisely CHEP's goal and all innovative argument or foot-stomping will not change the empirical data or facts alleged and subject to proof. *see*: "Predatory Strategies and Counterstrategies", Frank H. Easterbrook, 48 Univ. of Chicago L. Rev., 263, 267 (Spring 1981).

In *Aspen* at 596-598, 605 the questions were raised that, when answered through discovery and testimony in this action, would demonstrate not only CHEP's nefarious intent, but also its inevitable acquisition of monopoly in the market. Those questions were:

(a) (Is there) Evidence as to whether the conduct "unnecessarily exclud[ed] or handicap[ed] competitor" and has the firm "been attempting to exclude rivals on some basis other than efficiency?"

(b) (Can CHEP demonstrate) The distinction between "practices which tend to exclude or restrict competition on the one hand and the success of a business which reflects only a superior product, a well-run business, or luck, on the other"—has the firm "impaired competition in an unnecessarily restrictive way?"; and

Economics and the Law", James Miller, III & Paul Pantler, 38 Journal of Law & Economics 495, 500, May 1985, Univ. Chicago. P. 500; "Turning Back the Antitrust Clock Non-Price Predation Theory and Practice,"

(c) (Determine) Whether there were “legitimate business reasons for the [conduct]”—if so, there would be no violation. (emphasis added).

The court’s order of August 11th (Doc. 23) recognized the difference with a real distinction between CHEP’s attempt to execute a shell-and-pea type refocus of what makes this case to be properly at issue and the authorities that recognize this complaint as stating a viable attempt to monopolize claim; a small caliber and singular claim.

“Conduct that will support a claim of attempted monopolization must be such that its anticipated benefits were dependent upon its tendency to discipline or eliminate competition and thereby enhance the firm’s long term ability to reap the benefits of monopoly power.” *Inman Oil Co.*, 774 F.2d at 905 (internal quotation omitted). (court’s order Doc. 23 at 4).

See *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 218 (D.C. Cir.) (Judge Bork) (“the purpose of the antitrust laws is the promotion of consumer welfare); *Brook Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 221 (1993) (“the antitrust laws’ traditional concern for consumer welfare and price competitions.”); *L.A.P.D. v. General Electric Corp.*, 132 F.3d 402, 404 (7th Cir., Judge Easterbrook, 1997) “Antitrust law is designed to protect consumers from the higher ...prices and society from the reduction in allocative efficiency...”; *Schachar v. America Academy of Ophthalmology*, 870 F.2d 397, 399 (7th Cir., Judge Easterbrook, 1989) “Antitrust law is about consumer welfare and the efficient organization of production. It condemns reductions in output that drive up [consumer prices].” All of the above definitions of section two attempts to monopolize are alleged in the complaint and relied upon by the court. The authorities cited previously and here as well neither discuss nor require any numerical threshold of market share as they found those cases’ defendants engaging in transgression of the Sherman Act.

Can CHEP offer truthful testimony that forcibly causing recyclers to bear the described costs has a lawful plausible competitive justification? If CHEP had that ability it would have no need to stretch to invent a 28 U.S.C. 1292(b) motion.

The court's focus on the teaching of *Inman* and the other authorities relied upon in its order of August 11th properly did not "go with the head-fake" (to offer a colloquial football term) that ignores *Aspen*, *Kodak* and the other authorities on exclusionary anticompetitive conduct as a viable section two attempt action.

Difference of Opinion

The only difference of opinion that CHEP can properly raise is one that simply announces that it most earnestly would have preferred the opposite result in the court's order of August 11th (Doc. 23).

Conspicuous by its absence is a difference of opinion by CHEP in which it disagrees with the wealth of authority cited in plaintiffs' memorandum (Doc. 13) that, as does *Inman*, describe the other method of properly alleging all of the section two criteria for an attempt to monopolize. CHEP's singular, gun barrel focus refuses to even acknowledge those authorities and their teachings on anticompetitive exclusionary predation as inevitably providing the likelihood of success in an attempt to monopolize "any part" of commerce. (section two)

Of course CHEP is disappointed that this court denied its motion to dismiss. But trying to shoehorn a theory of attempting to monopolize into an ill-fitting complaint and order of denial is not sufficient to assuage CHEP's disappointment or warrant relief under 28 U.S.C. § 1292. by ignoring the other than arithmetic method of properly alleging CHEP's attempt to monopolize, CHEP's claim that a controlling question of law properly should fall of its own weight. There is no difference of opinion that non-plausible, coercive and exclusionary anticompetitive conduct

that denies the consuming public for pallets the lowest price a competitive market would produce is appropriate to state a claim in all section two elements.

Resort to the 28 U.S.C. § 1292(b) interlocutory appeal is a device much disfavored. One observant court said that its grant should be not merely sparingly used but “rare as hen’s teeth.” *Camacho v. Puerto Rico Ports Authority*, 369 F.3d 570, 573 (1st Cir. 2004).

The Supreme Court has noted that the time-consuming and expensive process must be reserved for “...exceptional cases and not be contrary to Congress’ purpose to maintain the firm final judgment rule within the federal courts.” *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 74 (1996). *See also, Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978).

The proper division of labor between the district courts and the court of appeals and the efficiency of judicial resolution of cases are protected by the final judgment rule, and are threatened by too expansive use of the § 1292(b) exception to it. Because permitting piecemeal appeals is bad policy, permitting liberal use of § 1292(b) interlocutory appeals is bad policy.

Moorman v. Unum Provident, 464 F.3d 1260, 1272 (11th Cir. 2006)

In a recent 28 U.S.C. § 1292(b) matter the Second Circuit expressed its view of the method in clear and unambiguous terms. “Congress did not intend 28 U.S.C. § 1292(b) to serve an error-correction function.” *Weber v. U.S.*, 484 F.3d 154, 159 fn3 (2007)

Even what purports to be a disputed issue of first impression on which the adverse parties have substantial difference of opinion will not suffice.

As we have repeatedly cautioned, however, use of this certification procedure should be strictly limited because “only ‘exceptional circumstance [will] justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment.’” *In re: Flor*, 79 F.3d 281, 284 (2nd Cir. 1996).⁵

CONCLUSION

CHEP is fervently wishing for this court to engage in what Justice Scalia described as “...a remarkable feat of jurisprudential jujitsu.”⁶ There is an elegant subtlety to a defendant asking the court to abide by the principle that by simply ignoring governing caselaw authority it ceases to exist.⁷

CHEP seeks to needlessly engage in piecemeal, multiple appeals. That quest properly should be denied.

⁵ CHEP’s imprecise use of a short passage from purported legislative history of 28 U.S.C. § 1292 is best discounted by the Supreme Court’s view of such proposed authority in *Exxon Mobil v. Allapattah Service, Inc.*, 545 U.S. 546, 568 (2005) (Kennedy, J.)

As we have repeatedly held, the authoritative statement is the statutory text, not the legislative history or any other extrinsic material. Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature’s understanding of otherwise ambiguous terms. Not all extrinsic material are reliable sources of insight into legislative understanding, however, and legislative history in particular is vulnerable to two serious criticisms. First, legislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal’s memorable phrase, an exercise in “‘looking over a crowd and picking out your friends.’”

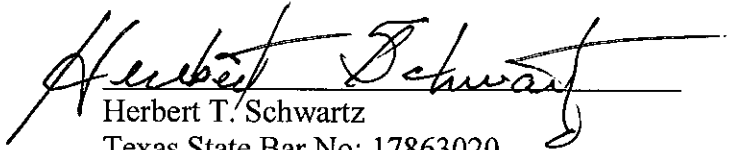
....

Second, judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text.

⁶ *Kansas v. Crane*, 534 U.S. 407, 425 (2002) (Scalia J. dissenting)

⁷ see “Ghost in the Machine”; Arthur Koestler (1967) (paraphrased without permission)

Respectfully submitted,



Herbert T. Schwartz
Texas State Bar No: 17863020
Florida Bar No: 100248
BAILEY & GALYEN
18333 Egret Bay Blvd., Suite 120
Houston, TX 77058-3860
(281) 335-7744 Telephone
(281) 335-4774 Facsimile

**COUNSEL FOR THE NAMED
PLAINTIFFS AND PROPOSED CLASS**

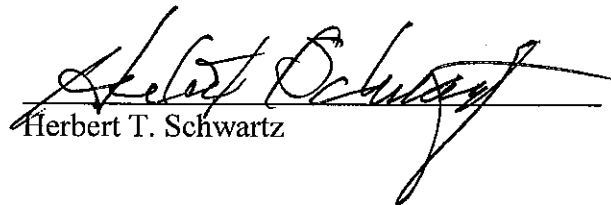
Joe D. Byars, Jr., esq.
Arkansas State Bar No: 95107
CHRISTIAN & BYARS
502 Garrison Avenue
P.O. Box 1725
Fort Smith, AR 72902
(479) 782-9147 Telephone
(479) 782-3623 Facsimile
OF COUNSEL

CERTIFICATE OF SERVICE

I, Herbert T. Schwartz, hereby certify that on the 22nd 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:

Clifford W. Plunkett, esq.
Friday Eldredge & Clark, L.L.P.
3425 North Futrall Drive, Suite 103
Fayetteville, AR 72703-4811
(479) 695-1103 Telephone
(501) 244-5343 Facsimile

William Kolasky, esq.
Eric Mahr, esq.
Wilmer Cutler Pickering Hale and Dorr, LLP
1875 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 663-6357 Telephone
(202) 663-6363 Facsimile



Herbert T. Schwartz