

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

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

An attempted monopolization claim requires a plaintiff to establish three distinct elements: “(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). Defendants’ Motion requests that the Court certify for interlocutory appeal a single question: whether Plaintiffs’ Complaint adequately pleaded the third of those elements—that there is “a dangerous probability of [Defendants] achieving monopoly power,” *id.* Plaintiffs’ do not rebut either of the two basic arguments in favor of Defendants’ motion: (1) Plaintiffs’ allegations show that CHEP could not

have more than a five percent share of the wood pallet market Plaintiffs allege (Defs.' Mem. at 6-7), and (2) there is a reasonable difference of opinion as to whether a five percent market share is sufficient to find a dangerous probability that Defendants will achieve monopoly power (*id.* at 7-8 & n.4).

Indeed, neither the phrase “dangerous probability” nor “realistic probability” appears anywhere in Plaintiffs’ Opposition. Aside from Plaintiffs’ arguments about the proper use of § 1292(b), the sole focus of their Opposition is on Defendants’ supposedly “exclusionary and anticompetitive conduct” (Opp’n at 2, 6).¹ Plaintiffs’ attempt to redirect the Court’s attention from the dangerous probability of monopoly element (which is at issue in this motion) to the anticompetitive conduct element (which is not) is telling. Plaintiffs seek to hold Defendants liable for attempted monopolization on the basis of their conduct alone, without separately establishing a dangerous probability of actual monopoly. That is precisely the avenue to an attempted monopolization claim foreclosed by *Spectrum Sports*. In *Spectrum Sports*, the Supreme Court reversed because the lower courts “allowed the jury to infer . . . dangerous probability of success from the defendants’ predatory conduct, without any proof of the relevant market or of a realistic probability that the defendants could achieve monopoly power in that market.” 506 U.S. at 459. Regardless of the abstract “purpose” of the antitrust laws (Opp’n at 2, 5, 7), the governing law requires that Plaintiffs show a dangerous probability of monopoly apart from an inference from the anticompetitive conduct itself.

Plaintiffs deride Defendants’ monopoly power analysis as “meaningless percentages” (Opp’n at 3), but just last year the Eighth Circuit reaffirmed that dangerous probability of actual

¹ See also Opp’n at 3 (“actual behavior”), 4 (“exclusionary acts”), 5 (“predatory act”), 7 (“Conduct that will support a claim of attempted monopolization . . .”).

monopoly is “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) (emphasis added); 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”). Indeed, Plaintiffs have cited no case in any jurisdiction to support the notion that the five percent market share they pleaded could be consistent with a finding of a dangerous probability of monopoly.

The cases Plaintiffs do cite demonstrate that the five percent market share shown by their Complaint falls below the threshold for Section 2 liability. (*See* Opp’n at 2.) In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, the defendant had an 89% share of the relevant market, compared to the plaintiff’s 11% share. 472 U.S. 585, 594-95 (1985). In *Eastman Kodak Co. v. Image Technical Services*, the Court found that defendants controlled “80% to 95% of the service market.” 504 U.S. 451, 480 (1992). In *NCAA*, the defendant had “almost absolute control over the supply of college football which is made available . . . to the viewing public.” *NCAA v. Bd. of Regents*, 468 U.S. 85, 96 (1984); *see also id.* at 95 (“defin[ing] the relevant market as ‘live college football television’”).²

The two cases Plaintiffs cite in which antitrust claims failed are also instructive. In *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, the court dismissed the suit because the defendant’s market share was only five or six percent: “so impotent to raise prices is a firm with a market share of 5 or 6% that any attempt by it to engage in a monopolistic restriction of output would be little short of suicidal.” 792 F.2d 210, 217 (D.C. Cir. 1986). Plaintiffs’ reliance on *Republic Tobacco Co. v. North Atlantic Trading Co.* is similarly puzzling, given that the antitrust

² Note that *NCAA* and *Rothery* were decided under Section 1 of the Sherman Act. Plaintiffs face a higher bar to show monopoly power under Section 2. *See Eastman Kodak*, 504 U.S. at 481 (“Monopoly power under § 2 requires, of course, something greater than market power under § 1.”).

defendants prevailed on summary judgment because the plaintiffs admitted they could not establish a dangerous probability of monopoly power in the relevant market. 381 F.3d 717, 739 (7th Cir. 2004).

Defendants respectfully request that the Eighth Circuit be given the opportunity, for the first time after *Twombly*, to elucidate the standards in this Circuit to adequately plead the dangerous probability of monopoly element of a Section 2 case. Despite Plaintiffs' protestations that interlocutory is inappropriate here,³ they never deny that § 1292(b) has been repeatedly used to review denials of motions to dismiss. *See* Defs.' Mem. at 5-6; *Camacho v. Puerto Rico Ports Authority*, 369 F.3d 570, 573 (1st Cir. 2004) (granting § 1292(b) interlocutory appeal of a motion to dismiss) *cited in* Opp'n at 9. This motion is Defendants' last opportunity to attempt to resolve this case without facing the cost and burden of protracted discovery in a nationwide class action suit. (Defs.' Mem. at 2-4.) As even a case Plaintiffs cite admits, avoiding such unnecessary burdens is a central purpose of the interlocutory review statute. *See Weber v. U.S. Trustee*, 484 F.3d 154, 159 (2nd Cir. 2007) ("Congress passed § 1292(b) to 'avoid protracted litigation.'") *cited in* Opp'n at 9. Given that there is substantial ground for a difference of opinion as to whether the facts presented in the Complaint can give rise to a Section 2 claim, Defendants respectfully request the Eighth Circuit be permitted the option to decide this question now rather than later.

³ Plaintiffs quote several cases applying § 1292(b) in procedural postures totally unlike this case. *See Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 74 (1996) (concluding failure to seek certification under § 1292(b) does not constitute a waiver) *cited in* Opp'n at 9; *Moorman v. Unum Provident*, 464 F.3d 1260, 1272 (11th Cir. 2006) (declining § 1292(b) review of issue not properly raised in the district court) *cited in* Opp'n at 9; *In re: Flor*, 79 F.3d 281, 284 (2nd Cir. 1996) (no party moved for § 1292(b) certification) *cited in* Opp'n at 10.

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CERTIFICATE OF SERVICE

I, Eric Mahr, hereby certify that on the 25th 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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