

**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
District Judge

**MEMORANDUM IN SUPPORT OF MOTION FOR EXTENSION OF TIME TO REPLY
TO PLAINTIFF'S MOTION FOR CLASS CERTIFICATION**

Pursuant to Fed. R. Civ. P. 6(b)(1)(A), Defendants Brambles Industries, Inc. and Brambles North America, Inc. d/b/a CHEP USA ("CHEP"), respectfully request 90 days extension of time to reply to the Plaintiff's Motion for Class Certification. Counsel for Plaintiffs has said they would agree to a 45-day extension but has refused to agree to a 90-day extension.

INTRODUCTION

The complaint in this action alleges that CHEP is attempting to monopolize a nationwide market for wood pallets in the lower 48 states. In their Motion for Class Certification, the four named plaintiffs ask the Court to certify a nationwide class that would include all persons who recycle wood pallets in the United States and who have had business dealings with CHEP, the

number of which they variously estimate as somewhere between 2,000 and 5,000 recyclers. Plaintiffs filed this motion on November 13, 2008, just two days after the Parties' Rule 26(f) conference and before any discovery has been – or could have been – conducted. In support of their motion, Plaintiffs filed reports from five experts, who have apparently been preparing their reports since before the Complaint was first filed in February 2008. Further, Plaintiffs began their investigation into the facts of this case over one year *prior* to filing their Complaint, Memo. of Law in Support of Class Certification 23, working for a full 13 months before Defendant was even on notice that this litigation was looming. The Defendant is now at a significant disadvantage in responding to the Plaintiffs' lengthy Motion for Class Certification. The Court's local rules provide that a Plaintiff must normally file a Motion for Class Certification within 90 days of the Rule 26(f) meeting to allow both Parties to conduct needed discovery – here, where Plaintiffs moved for class certification just two days after the 26(f) conference, Plaintiffs managed to virtually eliminate the time generally provided for discovery for class certification.

In order to respond to Plaintiffs' Motion for Class Certification, CHEP needs time to conduct discovery and to prepare its own its own rebuttal evidence to support its opposition. Accordingly, CHEP requests a 90-day extension to file its response. CHEP also requests that the Court shorten the Plaintiffs' time for reply to ensure that the Court can rule on this Motion well in advance of November 28, which is the Defendant's current deadline to reply to the Plaintiff's Motion for Class Certification.

ARGUMENT

I. PRE-CERTIFICATION DISCOVERY IS ESSENTIAL IN EVERY CASE FOR THE COURT TO UNDERTAKE THE REQUIRED “RIGOROUS EXAMINATION” OF WHETHER THE CASE SATISFIES THE RULE 23 REQUIREMENTS FOR A CLASS ACTION

For a class to be certified under Fed. R. Civ. P. 23, Plaintiffs must show that the proposed class meets the prerequisites under both Rule 23(a) and Rule 23(b). Under Rule 23(a), the Plaintiffs must show that (1) the class is so numerous that joinder of all of the parties is impracticable; (2) that there are questions of fact or law common to all class members; (3) that the claims or defenses of the class representatives are typical of the class as a whole; and (4) that the representative parties will fairly and adequately protect the interests of the class. Rule 23(b)(3) requires Plaintiffs to show, in addition, that common questions of law or fact predominate over individual ones and that a class action is a superior method for adjudicating the controversy. This requires Plaintiffs to demonstrate that the alleged violation and its impact on the members of the class can be proven through common proof on a class-wide basis. *Blades v. Monsanto Co.*, 400 F.3d 562, 569 (8th Cir. 2005) (“[T]o satisfy the ‘predominance’ standard, plaintiffs must show that both the conspiracy and impact can be proven on a systematic, class-wide basis.”).

The Court must conduct a “rigorous analysis” to ensure that these requirements for class certification are met. *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982); *Jones v. Forrest City Grocery, Inc.*, No. 4:06CV00944-WRW, 2007 WL 1704590, at *2 (E.D. Ark. June 12, 2007). Such an analysis necessarily requires that the Court look beyond the pleadings to examine the facts the Plaintiffs have put forth to support class certification, *see Blades*, 400 F.3d at 566, and to resolve factual disputes between the parties as to those facts. *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006) (certifying a class under Rule 23 is only possible after a judge resolves factual disputes related to each Rule 23 requirement and determines that established facts support the ruling).

Pre-certification discovery is essential to enable the Court to conduct the rigorous analysis that is required before it can rule on class certification. “Failure to allow discovery, where there are substantial factual issues relevant to certification of the class, makes it impossible for the party seeking discovery to make an adequate presentation either in its memoranda of law or at the hearing on the motion if one is held.” *Chateau de Ville Prod., Inc. v. Tarns-Witmark Music Library, Inc.*, 586 F.2d 962, 966 (2d Cir. 1978). Although the scope of pre-certification discovery needed to allow parties to flesh out the necessary facts is within the sound discretion of the court, some degree of pre-certification discovery is “essential in order to determine the class action issue.” *Stewart v. Winter*, 669 F.2d 328, 331 (5th Cir. 1982); *see also Folding Cartons, Inc. v. Amer. Can Co.*, 79 F.R.D. 698, 700 (N.D. Ill. 1978) (“an extensive period of discovery is vital” in helping courts decide class certification proceedings). In fact, “a district court may be reversed for premature certification if it has failed to develop a sufficient evidentiary record from which to conclude that the requirements of numerosity, typicality, commonality of question and adequacy of representation have been met.” *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 571 (2d Cir. 1982).

CHEP’s need for discovery to prepare its Opposition to Plaintiffs’ Motion for Class Certification is apparent. Plaintiffs have submitted five expert reports in support of their motion. Those expert reports include a study of the costs incurred by eight members of the putative class – four of which have not even been identified – in handling CHEP pallets and the compensation they received from CHEP for doing so. The experts’ analysis includes an unnamed recycler that is a “special case”¹ in terms of its operations and includes costs estimates from the eight recyclers that range from \$1.62 per pallet to almost ten times that much.² Plaintiff’s disclosures

¹ Plaintiff’s Exhibit 6B to its Motion for Class Certification, ¶ 21.

² *Id.* at Table 3.

of expert testimony further do not provide the information required under Fed. R. Civ. P. 26(a)(2), such as the data considered by the experts in forming their opinions. CHEP needs discovery in order to get the information required under the Federal Rules, probe the bases for these expert reports, and prepare its own expert report to rebut the Plaintiffs' claims.

In addition, while Plaintiffs have provided CHEP with a partial "preliminary" initial disclosure pursuant to Rule 26(f), their full initial disclosure is not due under the Court's First Scheduling Order until November 28, 2008, two days after CHEP's Opposition to Plaintiffs' Motion for Class Certification would have to be filed, absent an extension. Plaintiffs' preliminary initial disclosure does not include any of the information CHEP needs from the Plaintiffs in order to prepare its Opposition, such as detailed financial records of the costs they incur in handling CHEP pallets and customer lists.³

In addition to receiving from the Plaintiffs this information as required by Rule 26 itself, CHEP also needs discovery in order to obtain additional documents and information from the named Plaintiffs and third parties to develop its arguments in opposition to class certification, as described in more detail below, and to take the depositions of the named Plaintiffs and the Plaintiffs' five experts to probe the basis for the opinions they have proffered in support of the Motion for Class Certification, as well as of the other class members whose plants were included in the experts' sample. None of this can be accomplished without a 90-day extension. Plaintiffs themselves recognize the centrality of discovery for class certification – they identified it as the very first topic on which discovery is needed in the draft Rule 26(f) report they provided to CHEP.

³ Plaintiffs may well be unwilling to produce confidential information until an order to protect its confidentiality has been entered. CHEP proposed such an order at the parties' Rule 26(f) conference, but Plaintiffs' counsel declined to stipulate to CHEP's proposed order, arguing that issues of confidentiality should be handled "on an ad hoc basis" during the course of discovery.

II. PRE-CERTIFICATION DISCOVERY IS NEEDED IN THIS CASE IN ORDER FOR CHEP TO SHOW THAT COMMON QUESTIONS OF FACT AND LAW DO NOT PREDOMINATE

CHEP intends to show in its Opposition that common questions of law or fact do not predominate with respect to the elements of the offense of attempted monopolization or as to its impact on the members of the putative class of all recyclers. To develop support for these arguments, CHEP must conduct discovery both of the named Plaintiffs and of third parties.

A. Plaintiffs Will Not Be Able to Prove that CHEP Has Violated Section 2 on a Common Basis as to All Members of Their Nationwide Class of Recyclers

Plaintiffs allege that CHEP has attempted to monopolize a nationwide market for wood pallets in violation of Section 2 of the Sherman Act. To prove a violation of Section 2 of the Sherman Act, the plaintiff must show that CHEP engaged in exclusionary or predatory conduct with a specific attempt to monopolize and that CHEP has a dangerous probability of achieving monopoly power as a result. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

Under Plaintiff's apparent theory of the case, to satisfy the first element and to show that CHEP's conduct was exclusionary, Plaintiffs must prove not only that the compensation CHEP paid to recyclers for returning CHEP pallets was less than the costs an individual recycler accrues in sorting, storing, and returning a CHEP pallet, but also that the under-compensation was so great as to impair the ability of those recyclers to compete.⁴ *Id.* at 458-59 (antitrust laws are only directed against behavior that tends to destroy competition); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985) (whether conduct can be properly characterized as exclusionary depends on whether it has impaired competition).

⁴ The Plaintiffs even concede that conduct cannot be found to violate Section 2 unless the conduct in question lacks a non-exclusionary business justification. Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss 26. Here, CHEP has a clear business justification for the asset recovery program: to track and regain control over pallets, the asset that form the center of CHEP's business and financial viability. The program is built to incentive recyclers to return CHEP pallets, but not to create such a high incentive that pallet recyclers try to obtain CHEP pallets from other distributors.

CHEP believes that it will be able to show through discovery of the named Plaintiffs and other recyclers that proof of exclusionary conduct in this case will require an examination of the individualized circumstances of each individual recycler, which cannot be shown by common proof. Through discovery, CHEP expects to develop evidence to show, first, that the number of CHEP pallets handled by recyclers varies widely among those recyclers; second, that the costs they incur in handling those pallets also varies widely; third, that some recyclers profit from handling CHEP pallets, receiving compensation in excess of the costs of returning a CHEP pallets; and, fourth, that many recyclers handle too few CHEP pallets for any shortfall in compensation to threaten their competitive viability. CHEP believes, therefore, that discovery will show that Plaintiffs will not be able to prove exclusionary conduct without a highly individualized, rather than common, inquiry unique to the particular operations and financial structure of each Plaintiff.

CHEP further expects to be able to show through discovery that Plaintiffs also will not be able to prove the second element of an attempted monopolization offense, dangerous probability of acquiring monopoly power in a properly defined relevant antitrust market, through common proof on a class-wide basis. Proving a dangerous probability of success requires that Plaintiffs first define the relevant market CHEP is allegedly attempting to monopolize. *See Spectrum Sports*, 506 U.S. at 456 (to determine whether there is a dangerous probability of monopolization, courts must first consider the relevant market); *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965) (without a proper market definition there is no way to measure the defendant's ability to lessen or destroy competition). Here, Plaintiffs have alleged a single nationwide market for wood pallets in the lower 48 states (Complaint ¶ 81), as they must in order to have a single nationwide class certified. *See Heerwagen v. Clear*

Channel Commc'ns, 435 F.3d 219, 228-29 (2d Cir. 2006) (plaintiff must show that the relevant market is national to certify a nationwide class, or local issues would predominate and defeat class certification); *Rodney v. Northwest Airlines, Inc.*, 146 Fed. Appx. 783, 787-88 (6th Cir. 2005) (where plaintiff could not show a common market across class members, the failure to properly define a market weighs against certification); *White Industries, Inc. v. Cessna Aircraft Co.*, 845 F.2d 1497, 1502-03 (8th Cir. 1988) (“Because we reject White’s theory of nationwide markets for most Cessna aircraft, we affirm the District Court’s findings that individual questions of fact (in this case, the extent of distributor competition with individual dealerships) predominate over common questions.”); *Blades*, 400 F.3d at 570 (plaintiff must show that the market operates on a class-wide basis to justify class certification).

CHEP expects to show through discovery that Plaintiffs are wrong – that there is not a single nationwide pallets for wood pallets, but multiple local markets. The Supreme Court has made it clear that the relevant geographic market is the area in which the seller operates and the buyer can reasonably turn to an alternative source supply. *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 331-32 (1961). Here, CHEP expects to show through discovery that each of the named Plaintiffs and most other members of the proposed class operate out of one or, at most, a small number of facilities, from which they are able to service customers only within a limited geographic radius from each of their plants. CHEP also expects to be able to show through discovery that customers will purchase pallets only from suppliers who have a facility near the location at which they need those pallets.

B. Plaintiffs Will Not Be Able to Prove Antitrust Injury to Their Business or Property as Required to Recover Under Section 4 of The Clayton Act on a Common Basis as to All Members of Their Nationwide Class of Recyclers

To maintain a class action for damages under Section 4 of the Clayton Act, 15 U.S.C. 15(a), Plaintiffs must show not only that they will be able to prove a violation of the Sherman Act through common proof, but also that they will be able to use common proof to show both the fact of injury – that is, that all members of the class have suffered injury to their business or property – and antitrust injury, which is injury caused by or resulting from a lessening of competition. *Spectrum Sports*, 506 U.S. at 458-59; *Spanish Broad. Sys. v. Clear Channel Commc'ns, Inc.*, 376 F.3d 1065, 1074 (11th Cir. 2004); *Cannon v. Elk Horn Bank and Trust*, 258 F. Supp. 2d 908, 913 (W.D. Ark. 2002) (Dawson, J.).

CHEP expects to be able to show through discovery that Plaintiffs will be unable to prove either fact of injury or antitrust injury through common proof and instead would require a highly individualized inquiry into the circumstances of each individual Plaintiff and the local geographic market in which each competes. As explained above, CHEP needs discovery to show that the impact of its asset recovery program on recyclers is disparate, with some recyclers benefiting, rather than being harmed, by that program. In addition, CHEP needs discovery to demonstrate that an individualized inquiry will be necessary to evaluate whether any injury each recycler suffers constitutes antitrust injury – that any injury is sufficiently serious so as to impair the individual recycler's ability to compete and sufficiently broad-ranging to threaten to exclude so many recyclers from the local markets such that CHEP could raise prices or exclude competition. *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488 (1977) (the antitrust laws are designed to protect competition, not competitors).

C. An Extension of 90 Days Will Provide the Plaintiffs With the Needed Time to Conduct the Discovery Necessary to Demonstrate that Common Facts or Law Do Not Predominate

Plaintiffs spent nearly two years preparing for class certification – over one year gathering facts to file the Complaint followed by an additional nine months assembling

information and preparing expert reports to support class certification. An extension of less than 90 days does not provide the Defendant with time to complete the many steps it must take to obtain the information necessary to respond to the Plaintiffs' Motion. The Defendant must take discovery of the Plaintiffs themselves by serving document requests and interrogatories on each named Plaintiff, reviewing the necessary material, and deposing named Plaintiffs. At the same time, the Defendant plans to seek documents from and depose the four unnamed recyclers profiled in the Plaintiff's expert reports, as well as other necessary third parties. Only after Defendant obtains these documents, serves interrogatories, takes the necessary depositions, and reviews the product of this process will the Defendant be in a position to depose the Plaintiffs' experts, which will be a central component in building Defendant's Opposition to class certification.

Obtaining and reviewing documents is, in and of itself, at least a 30-day process. Defendant is serving written requests on November 17, 2008. Pursuant to F.R.C.P. 26(d)(1), Defendant was not allowed to submit written discovery until the Rule 26(f) conference. The conference was conducted on November 11, 2008. Defendant tried to conduct the conference in early October to expedite this matter, but the Plaintiffs were unable to attend until early November. After obtaining the responses to discovery from the Plaintiffs, the Defendant will prepare for depositions and depose named Plaintiffs, unnamed Plaintiffs, the Plaintiff's experts, and third parties. This process will take, at the very least, a further 30 days. It is likely that the depositions will take longer than 30 days because of scheduling issues with the attorneys, Plaintiffs, and experts during the holiday season, as the Plaintiffs' proposed deadline places the height of discovery at the Thanksgiving, Christmas, and New Year holidays. Additionally, the Defendants may acquire information during the discovery process that results in the need for

depositions of additional persons and entities. The Defendant's own experts will subsequently review and digest the materials in order to draft their rebuttal expert reports. The Defendant's experts will need time to review the deposition transcripts and other materials to formulate their opinions and prepare their reports. Finally, when this process is complete, the Defendant will then need time to draft and file its Opposition to the Motion to Dismiss. These final steps – the preparation of the expert report and drafting of an Opposition – require the final 30 days the Defendant seeks.

CONCLUSION

Plaintiffs initially retained their experts in February 2008, when they first filed their complaint. CHEP has had no opportunity to conduct any discovery of Plaintiffs until the Rule 26(f) Conference last week. CHEP needs time to take discovery so that it may respond to Plaintiffs' motion. Accordingly, CHEP moves the court to extend its time to respond by 90 days. This is approximately the date on which, under the Court's standard practice, the class certification motion would have been due, so it should not result in any delay in the trial date for this case. The Defendant is available for a telephonic hearing on this matter should the Court so desire.

Dated: November 17, 2008

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Eric Mahr, hereby certify that on the 17th day of November, 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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