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

DEFENDANT CHEP'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR LEAVE TO TAKE DEPOSITIONS OF RECYCLERS EXAMINED AND RELIED ON BY PLAINTIFFS' EXPERTS

A court must subject class certification decisions to rigorous analysis before determining that all of Rule 23's requirements have been met. *General Tel. Co. v. Falcon,* 457 U.S. 147, 161 (1982); *Her v. Regions Financial Corp.*, No. 07-2017, 2008 WL 552754, at *2 (W.D. Ark., Feb. 27, 2008) (Dawson, J.). This is, among other reasons, because class certification "may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." Fed. R. Civ. P. 23 advisory committee's note, 1998 Amendments. As a Third Circuit panel stated three weeks ago, the "Supreme Court recently cautioned that certain antitrust class actions may present prime opportunities for plaintiffs to exert pressure upon defendants to settle weak claims" given the high cost of discovery and other litigation

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expenses. *In re Hydrogen Peroxide Antitrust Litigation*, No. 07-1689, 2008 WL 5411562 at *3 (3d Cir., December 30, 2008). Thus, it is important that Defendants have opportunities to explore fully the facts presented by Plaintiffs as relevant to class certification.

To prevail on class certification, Plaintiffs must show that they have a feasible class-wide methodology for proving the elements of their case. *See In re Potash Litig.*, 159 F.R.D. 682, 693 (D. Minn. 1995) (Plaintiffs must show "there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position"). In an attempt to meet that burden, these Plaintiffs have undertaken a study of eight recyclers, and their experts rely on that study for their opinion that impact and damages can be proven on a class-wide basis.

They now assert that half of the participants in this study should be shielded from any discovery because they are so-called absent class members, not named plaintiffs. But these four recyclers whose depositions CHEP needs to take are not passive bystanders who just happen to be members of the putative class. They injected themselves into these proceedings. They participated in days-long interviews and handed over detailed financial information to Plaintiffs, while providing nothing to CHEP. In opposing CHEP's motion for leave to depose four – out of an alleged class of over 4,000 – recyclers, Plaintiffs take the position that only they get to discover facts about the participants in their study and that CHEP can only learn those facts Plaintiffs have decided to share. Such one-sided discovery is not permitted.

CHEP submits this reply brief to correct the record on three important points.[1]

[1] In addition to these points, although the statement that "for hours, far beyond the one-day-7-hour rule the defendant has methodically autopsied every aspect of the named plaintiffs" is colorful, it misstates the facts. Only one expert deposition has gone beyond one day/7 hours, and that was with Plaintiffs' counsel's consent.

First, Plaintiffs say that CHEP does not need these depositions. But Plaintiffs claim, through their experts, that every participant in its study had "opportunity costs" because they handled CHEP pallets. Opportunity costs only arise when a plant has to turn down opportunities to make additional sales because their plants are capacity constrained, and in this case, Plaintiffs argue that because the recyclers in their study handle CHEP pallets, they lose out on opportunities to sell more recycled pallets. In order to determine whether the recyclers who participated in the study experienced such opportunity costs, CHEP needs to inquire as to whether they were capacity constrained; if so, whether they were capacity constrained through the entire class period; and, if so, whether they took or could have taken any actions to increase their capacity (or reduce the number of CHEP pallets they handle). CHEP also needs to depose these recyclers to determine whether they turned down sales opportunities because of those alleged capacity constraints. These are examples of the types of inquiries that would be the subjects of the requested depositions.

Second, the Plaintiffs assert that CHEP's request to take the depositions of these four recyclers is an "attempt [] to harass and intimidate as only CHEP can do, indeed excel at" and that CHEP is "flexing its industrial muscle to discipline the recyclers for the temerity" of participating in Plaintiffs' study. Pl. Br. at 2. These inflammatory statements are not appreciated or supported. CHEP seeks only to depose those recyclers that Plaintiff hand-picked to participate in the study that Plaintiffs sponsored, and, contrary to any suggestion that CHEP's conduct is not appropriate, CHEP is seeking the Court's *permission* before taking these four depositions.[2] Far from seeking to intimidate these witnesses, CHEP has provisionally agreed not

[2] CHEP has begun efforts to schedule these depositions in hopes of completing them before its brief is due on February 26. If the Court denies CHEP permission to take these depositions, CHEP will, of course, cancel any scheduled depositions of these recyclers.

to disclose even their identities to all but a small group of CHEP employees that have been approved by Plaintiffs' counsel. There is no evidence in Plaintiffs' brief that CHEP is harassing or intimidating anyone, and that is because no such evidence exists.

Third, Plaintiffs accuse CHEP of an "attempt to mislead" the court about the testimony of Plaintiffs' expert Dr. Ray. Pls. Br. at 4. In the deposition of Dr. Charles Ray, the expert who undertook most of the quantitative work in Plaintiffs' study of the eight recyclers,[3] Dr. Ray testified that he relied on estimates or information provided by the recyclers in his study and that he did not retain documents on which the recyclers relied in developing those estimates and other information. Dr. Ray was also unable to answer questions about key aspects of the recyclers' business operations that are directly relevant to his analysis. By way of example, when asked:

- "So in arriving at the $3 average cost for the white wood cores, you looked at company records but **didn't keep a copy** of those records?", he said "That's correct." (Ray Tr., Day 2, 118:8-11.)

- "Why don't you have numbers [of CHEP pallets a particular recycler handled] for the earlier years [before 2007]?", he answered, "I **don't know the answer** to that." (Ray Tr. Day 1, 202:17-203:8)

- whether he spoke with one of the recyclers about capacity constraints related to transportation, Dr. Ray responded that it was "a typical question that we would ask at all the facilities," but that he "**d[id]n't recall**" which person he spoke to or what that person said. (Ray Tr., Day 2, 112:20-113:14.)

- "Do you know the reason for the sharp drop-off in CHEP revenue per pallet from 2007 to 2008?", he testified "Yes. Well, I **don't know it** now. Mr. [the owner of this recycling company] explained it to me, but I **forget** the reason. There is one." (Ray Tr., Day 2, 149:16-21)

- "What are those sales and marketing expenses for?", he testified "I **couldn't tell you**." He was then asked "Do you have any [reason] to believe that they are in any way related to handling CHEP pallet?", and he responded "I have **no knowledge** of that."

[3] Dr. Ray's coauthor on the expert report is Dr. Judd Michael. The two authors visited some recyclers together, but Dr. Ray visited at least half of the recyclers in the study alone. Thus, Dr. Michael will not be able to answer questions about those recyclers' operations.

(Ray Tr., Day 2, 186:16-21).

These are the types of responses CHEP referred in the statement in its opening brief that "Dr. Ray further testified no fewer than 27 times that he relied on estimates or information provided by the recyclers in his study (copies of which he did not retain), and he also could not answer at least 82 questions about key components of their business operations." These examples illustrate Dr. Ray's inability to answer important questions and thus the need for CHEP to ask such questions of the study participants themselves.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Avery Gardiner, hereby certify that on Jan. 22, 2009, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to Herb Schwartz, counsel for plaintiffs.

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