

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

**OPPOSITION TO
PLAINTIFFS' MOTION TO
APPOINT INTERIM CLASS
COUNSEL**

Defendants Brambles North America, Inc., and Brambles Industries, Inc., d/b/a CHEP USA, ("CHEP") respectfully submit this Opposition to Plaintiffs Best Pallets Inc., Itnolap Pallet & Crating, Inc., Itnolap Pallet and Crating, L.L.C., Pallet Express, Inc., and Goeman's Wood Products, Inc.'s (together, "Plaintiffs") Motion to Appoint Interim Class Counsel.

Plaintiffs' motion is premature and should be denied. The appointment of interim class counsel under Rule 23(g)(3) is a discretionary measure available if necessary to protect the interests of the putative class where several rival plaintiffs' counsel are vying for the lead in a matter. Here, no related cases have been filed and no other counsel seeks to represent the putative class or to otherwise assert the Sherman Act claims raised in the complaint.

Appointment of interim class counsel is therefore unnecessary. Moreover, Plaintiffs'

complaint fails on its face to plead the basic elements of a Sherman Act claim, or even to allege the kind of antitrust injury that is a prerequisite for standing under the federal antitrust laws. Accordingly, CHEP is preparing a motion to dismiss Plaintiffs' complaint in its entirety on the ground that Plaintiffs fail to state a cause of action under Section 2 of the Sherman Act. That motion will be filed on or before April 11, 2008. Should the Court dismiss Plaintiffs' complaint, the premature appointment of interim class counsel will have been a waste of the Court's time and resources.

The lack of any need for interim counsel, combined with the weakness of Plaintiffs' complaint, strongly counsels against appointment of interim class counsel. Defendant CHEP respectfully requests that the Court deny Plaintiffs' motion.

1. Plaintiff's Motion is Premature and Unnecessary

Appointment of interim class counsel at this early stage of the litigation is unnecessary and will waste the Court's and parties' time and resources. As a general rule, the "type of situation in which interim class counsel is appointed is one in which overlapping, duplicative, or competing class suits are pending before a court, so that appointment of interim counsel is necessary to protect the interests of class members." *Donaldson v. Pharmacia Pension Plan*, No. 06-3-GPM, 2006 WL 1308582, at *1 (S.D. Ill. May 10, 2006) (denying motion to appoint interim class counsel where no "special circumstances" required appointment). On the other hand, the MANUAL FOR COMPLEX LITIGATION explains that "[i]f the lawyer who filed the suit is likely to be the only lawyer seeking appointment as class counsel, appointing interim class counsel may be unnecessary." MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.11 (2004).

In determining whether and when to appoint interim class counsel, courts consult the Advisory Committee Notes to the 2003 amendments to Fed. R. Civ. P. 23(g), the rule authorizing appointment of interim class counsel. Fed. R. Civ. P. 23(g) cmt. ¶ (2)(A) (2003) (amended

2007).¹ The Advisory Committee Notes explain that an interim appointment is appropriate “if necessary to protect the interests of the putative class” in cases where rivalry or uncertainty exists. *Id.* Circumstances necessitating appointment of interim class counsel arise “when it is apparent fairly early in the proceedings that there will be substantial competition for the position of class counsel” 5 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 23.121 (3d. ed. 2007). Where such rivalry exists, uncertainty may arise with respect to which attorney is empowered to make or respond to motions on behalf of the putative class. The Advisory Committee Notes make clear, however, that “[o]rdinarily, such work is handled by the lawyer who filed the action” and that “[f]ailure to make the formal designation does not prevent the attorney who filed the action from proceeding in it.” Fed. R. Civ. P. 23(g) cmt. ¶(2)(A) (2003) (amended 2007). As a result, the majority of cases do not call for the appointment of an interim class counsel. MOORE’S FEDERAL PRACTICE § 23.121; *see also In re Issuer Plaintiff Initial Public Offering Antitrust Litigation*, 234 F.R.D. 67, 69-70 (S.D.N.Y. 2006) (denying motion for appointment of interim class counsel where, *inter alia*, there was “no rivalry among competing law firms to represent the putative class.”).

The appointment of interim counsel is not necessary in the present case where there is no conflict between different attorneys and class members, and not a single competing case has been filed in this or any other court asserting claims similar to those in the complaint. Herbert T. Schwartz of Bailey & Galyen and Joe D. Byars, Jr. of Christian & Byars, acting together, are the sole counsel of record for the proposed class of plaintiffs, and no formal appointment is required for their continued representation of the purported class’s interests. No other attorney has sought

¹ As a result of the 2007 amendments to the Federal Rules of Civil Procedure, Rule 23(g)(2)(A) concerning the appointment of interim counsel has been renumbered to Rule 23(g)(3); the substance of the Rule, however, is unchanged.

to represent the named plaintiffs or the class, nor are there other plaintiffs seeking to represent the proposed class.

Under these circumstances, there is simply no justification for the consumption of the Court's time and resources to properly evaluate Mr. Schwartz's suitability for the role of interim counsel, and there is no justification to do so at this early stage, before the size, membership, and needs of the purported class are fully understood. Indeed, appointment of interim counsel at this early stage does not make sense in any of three possible scenarios concerning the future of this case: (1) if the case is dismissed, any resources spent on the appointment of interim class counsel now will have gone to waste; (2) if the case is not dismissed, and no other plaintiffs' counsel compete with Mr. Schwartz for the lead role in the litigation, the appointment of interim counsel now will have been unnecessary; and (3) if the case is not dismissed, and other plaintiffs' counsel do contend for the lead role in the litigation, the premature appointment of interim class counsel now will have robbed those other counsel of the opportunity to present their qualifications to the Court. Consequently, under any scenario, the appointment of interim class counsel now would be either unnecessary, premature, or both.

2. The Weakness of Plaintiff's Sherman Act Claims Further Counsels Against Appointment of Interim Class Counsel

Until the Court has the opportunity to consider CHEP's motion to dismiss, then, Plaintiffs' request for appointment as interim class counsel risks the needless waste of the Court's and parties' time and resources. Without getting too far ahead of itself, CHEP notes that Plaintiffs' complaint suffers from a number of infirmities, including the following three:

First, Plaintiffs have failed to adequately state a cause of action under Section 2 of the Sherman Act. To plead a violation for attempted monopolization under Section 2, a plaintiff must allege facts sufficient to show (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). The facts alleged in Plaintiffs' complaint make clear that CHEP does not possess anything close to the level of market power required to establish a dangerous probability of achieving monopoly power. Failure to plead facts sufficient to show a dangerous probability of achieving monopoly power requires dismissal of the complaint. *See Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968, 972-75 (8th Cir. 1968).

Second, the conduct that Plaintiffs allege is anticompetitive—CHEP's institution of legal actions against recyclers—is immune from antitrust liability under the *Noerr-Pennington* doctrine, which shields an antitrust defendant from liability for instituting legal actions. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972); *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993).

Third, Plaintiffs lack antitrust standing to pursue this action. The Plaintiffs must properly allege antitrust injury—that is, an injury directly related to harm to competition, not an injury to individual competitors—to proceed with a Sherman Act claim. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488-89 (1977). *See also Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, --- U.S. ---, 127 S.Ct. 2705, 2724 (2007) (purpose of the antitrust laws is “the protection of *competition*, not *competitors*”) (citations omitted).

These and other deficiencies on the face of Plaintiffs' complaint provide further reason for the Court to deny Plaintiffs' motion and to address class counsel issues only if Plaintiffs' Complaint survives CHEP's motion to dismiss.

* * *

The lack of any need for interim counsel, combined with the weakness of Plaintiffs' complaint, strongly counsels against appointment of interim class counsel. Accordingly,

defendant CHEP respectfully requests that the Court deny Plaintiffs' Motion to Appoint Interim Class Counsel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Clifford W. Plunkett, hereby certify that on the 17th day of March, 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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