IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

JERSEY DENTAL LABORATORIES f/k/a Howard Hess Dental Laboratories Incorporated, and PHILIP GUTTIEREZ d/b/a Dentures Plus, on behalf of themselves and all others similarly situated,	:	
Plaintiffs,	:	Civil Action No. 01-267 (SLR)
-against-	:	
DENTSPLY INTERNATIONAL, INC., et al. And named tooth dealers,	:	
Defendants.	:	

PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION REQUESTING CERTIFICATION OF THE COURT'S ORDER DISMISSING PLAINTIFFS' EXCLUSIVE DEALING CLAIMS, PURSUANT TO RULE 54(b) OR 28 U.S.C. § 1292(b), AND FOR A STAY OF PROCEEDINGS DURING THE PENDENCY OF ANY APPEAL

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INTRODUCTION

Plaintiffs respectfully request certification of the Court's opinion and order, dated September 26, 2007, dismissing their exclusive dealing claims herein, so that the dismissals may be appealed immediately, while discovery and other proceedings in this Court are stayed.

Because *Howard Hess Dental Laboratories, Inc. v. Dentsply*, C.A.. No. 99-255-SLR ("*Hess*"), which involves the same allegations of exclusive dealing that are alleged herein, essentially was terminated by the same order that dismissed Plaintiffs' exclusive dealing claims herein, and because, therefore, the denial of Plaintiffs' request for injunctive relief in *Hess* soon will be appealed to the Third Circuit, now is the judicially efficient time for Plaintiffs to also appeal the dismissal of their exclusive dealing claims herein, so that the appeals from the two parts of the same order might be joined in a single appeal to the Third Circuit.

Because Plaintiffs' exclusive dealing claims herein were dismissed in their entirety, and because they allege wrongful conduct different from the conduct alleged in Plaintiffs' lone surviving claim—which is a claim for price fixing—the dismissals are especially appropriate for Rule 54(b) certification as final judgments.

Because there is a substantial ground for difference of opinion as to each of the bases on which Plaintiffs' exclusive dealing claims were dismissed, and, indeed, because there is not any controlling authority regarding some, if not most, of the issues raised by the dismissals, the dismissals are especially appropriate, in the alternative, for Section 1292(b) certification.

An expeditious and final determination of whether Plaintiffs have any exclusive dealing claims might make possible a settlement, without the need for any further proceedings herein, while a delay of such determination, if it is followed by a reversal of any part of the dismissals,

could result in a need for multiple trials and/or discovery periods that would be burdensome for plaintiffs, if not for all parties and many non-party witnesses, as well as the Court.

NATURE AND STAGE OF THE PROCEEDING

On January 5, 1999, the Government filed suit against Dentsply International, Inc. ("Dentsply") (the "Government's case") alleging that its exclusive dealing with its dealers constituted unlawful monopolization in violation of the antitrust laws. *See United States v. Dentsply, Int'l., Inc.*, C.A. No. 99-005-SLR.

On February 24, 2005, after a bench trial in the Government's case and a review of the District Court's decision by the Third Circuit, the Third Circuit held that Dentsply's exclusive dealing had unlawfully "choked off the market for artificial teeth" made by Dentsply's competitors, and that therefore Dentsply had violated Section 2 of the Sherman Act. *United States v. Dentsply*, 399 F.3d 181, 196-97 (3d Cir. 2005).

On April 21, 1999, Plaintiffs filed suit against Dentsply in *Howard Hess Dental Laboratories, Inc. v. Dentsply*, C.A.. No. 99-255-SLR ("*Hess*"), regarding the same exclusive dealing arrangement sued on by the Government. Unlike the Government's action, the *Hess* complaint alleges that, not only Dentsply, but also "the Dentsply dealers have entered into contracts and a conspiracy to restrain trade or the sale of artificial teeth." ¶ 29 (emphasis added). Nevertheless, the only defendant named in the *Hess* case, was Dentsply.

On April 24, 2001, Plaintiffs filed suit herein ("*Jersey Dental*"), again alleging antitrust violations arising from the **same exclusive dealing arrangement alleged in *Hess* and the Government's case**, but this time naming as defendants twenty-six of Dentsply's dealers, as well as Dentsply.

Pursuant to the rule of *Illinois Brick v. Illinois*, 431 U.S. 720 (1977), the Court partly granted motions by Dentsply in *Hess, see United States v. Dentsply Int'l, Inc.*, 2001 WL 624807,

at *13 (D. Del. Mar. 30, 2001), and herein, *see Jersey Dental Labs. v. Dentsply Int'l, Inc.*, 180 F. Supp. 2d 541, 543 (D. Del. 2001), in each instance dismissing Plaintiffs' claims against Dentsply only, for damages arising from the exclusive dealing arrangement.

On January 7, 2002, Plaintiffs moved to amend the complaint herein, in order to add, first and foremost, an allegation "that defendants have engaged in a retail price-fixing conspiracy." *Jersey Dental Labs. v. Dentsply, Int'l, Inc.*., 2002 WL 2007916, at *2 (D. Del. Aug. 27, 2002).

On August 27, 2002, the Court denied Plaintiffs' motion to amend, on the ground that "the proposed amended complaint would not survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6)." *Id.* at 3.

Pursuant to 28 U.S.C. § 1292(b), Plaintiffs appealed the dismissals of their damages claims against Dentsply, in both *Hess* and herein, and the denial of their request herein to amend. *Howard Hess Dental Labs., Inc. v. Dentsply Int'l, Inc.*, 424 F.3d 363, 368 (3d Cir. 2005) ("the Third Circuit's *Hess* decision").

The Third Circuit affirmed the dismissal of the damages claims against Dentsply for exclusive dealing, but reversed the denial of Plaintiffs' request to amend the complaint to allege a retail price-fixing conspiracy by Dentsply and the dealer defendants. *Id.* at 384.

By reversing, as to Plaintiffs' price-fixing claim, this Court's decision that "the proposed amended complaint would not survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6)," the Third Circuit made it the law of the case that Plaintiffs have stated a claim herein for retail price fixing.

On September 18, 2006, at a hearing in this Court, Defendants requested permission to move to dismiss the exclusive dealing claims, but not the price-fixing claim, in the Amended Complaint that the Third Circuit's *Hess* decision had given Plaintiffs permission to file. Without

contradiction by any attorney for any other Defendant, Dentsply's attorney stated that "I think in this regard I speak on behalf of all the defendants . . . [Plaintiffs] say we fixed resale prices . . . [i]t's not true as a matter of fact, your Honor, but that's a question of fact. **It can't be addressed by a 12(b)(6) motion**." Appendix ("App.") at A-9:24 to A-10:18 (emphasis added).

Pursuant to the Court's order, on October 10, 2006, Plaintiffs filed the Amended Complaint. D.I. 259. Regarding Defendants' alleged exclusive dealing conspiracy, the Amended Complaint alleges claims against Dentsply, under Section 1 and Section 2 (Counts III and V), for an injunction only, and not for damages, while alleging claims against the dealer defendants ("Dealers") under Section 1 and Section 2 (Counts II and IV), for both injunctive relief and damages. The only other claim, Count I, is a claim against all Defendants, under Section 1, for retail price fixing.

Also on October 10, 2006, also pursuant to the Court's order, Plaintiffs served document requests directed to six of the Dealers and Dentsply, these being the first discovery requests permitted to be served in *Jersey Dental*. *See* Declaration of Richard T. Joffe, signed on October 26, 2007 (Joffe Decl.) at ¶ 2. The Court's intention, expressed at the hearing on September 18, 2006, was, generally, for Defendants to produce documents responsive to Plaintiffs' price fixing claim immediately, while gathering documents responsive solely to Plaintiffs' exclusive dealing claims, but not producing them until and unless Defendants' motions to dismiss the exclusive dealing claims were denied. *See* App., at A-32.

On June 12, 2007, with no documents yet having been produced by any Defendant, because, among other reasons, Defendants' objections to Plaintiffs' document requests had not yet been entirely resolved, the Court held a hearing regarding disputes arising from such objections. Thereafter, the parties reached agreement on a protective order, and it was entered by

the Court, but, otherwise, the disputes raised at the hearing have not yet been decided. *See* Joffe Decl. at ¶ 3.

Meanwhile, on December 1, 2006, eighteen of the Dealers moved pursuant to Rule 12(b)(6) to dismiss counts II and IV of the Amended Complaint, *see* D.I. 264 & 274, and Dentsply moved to dismiss counts III and V, *see* D.I. 279.

Also meanwhile, in the *Hess* case, having been denied standing, by the Third Circuit's *Hess* decision, to sue Dentsply for damages regarding its exclusive dealing, Plaintiffs moved for summary judgment and injunctive relief on their claim for monopoly maintenance based on exclusive dealing in violation of Section 2 of the Sherman Act. *Hess* D.I. 256.

On March 14, 2007, the Court heard oral argument on Defendants' motions to dismiss Plaintiffs' exclusive dealing claims in *Jersey Dental*, and Plaintiffs' request, in *Hess*, for an injunction against the same alleged exclusive dealing arrangement.

At the end of oral argument, the Court stated, "trust me when I say what you've argued is difficult." App. at A-146: 2-3.

On September 26, 2007, the Court issued a memorandum opinion and order (together, the "Order"),[1] granting Defendants' motions in *Jersey Dental* in their entirety—dismissing counts II-IV in the Amended Complaint (the "Dismissals")—and denying Plaintiffs' motion for summary judgment and injunctive relief in *Hess*.[2]

In *Hess*, by denying that Plaintiffs have standing to obtain injunctive relief, the Order essentially makes it impossible for Plaintiffs to prevail on any of their claims, including those

[1] Citations herein to page numbers in the Order are citations to the memorandum opinion part of the Order.

[2] The Court also granted the motion of certain Dealers who moved to dismiss all claims against them on the grounds of lack of jurisdiction and improper venue. Plaintiffs are **not** requesting certification of the dismissals based on the jurisdiction/venue motion.

that were not formally at issue in their motion for summary judgment. Therefore, in a motion separate from this motion, that Plaintiffs are filing in *Hess*, Plaintiffs are moving to voluntarily dismiss with prejudice all claims not formally determined by the Order's denial of Plaintiffs' request for summary judgment on their claim for monopoly maintenance. As a result the entire *Hess* case will soon be terminated.

Therefore, among other reasons, so that an appeal from the Dismissals herein may be joined with an appeal from the final determination of the *Hess* case, Plaintiffs move herein for certification of the Dismissals pursuant to Rule 54(b), or, in the alternative, 28 U.S.C. § 1292(b), and for a stay of all proceedings herein until the determination of any appeal, or until the time to appeal has expired.

SUMMARY OF ARGUMENT

The Dismissals should be certified as final judgments, pursuant to Rule 54(b), so that Plaintiffs can appeal them immediately; and proceedings in this Court should be stayed until the determination of such appeal. As required by Rule 54(b), each of the dismissals is a final judgment within 28 U.S.C. § 1291, and there is no just reason for delay of their entry as final judgments.

Each Dismissal is a final judgment because it was an ultimate disposition of an individual claim. Moreover, the dismissed claims involve different alleged wrongful conduct than does the sole surviving claim, because the dismissed claims involve alleged exclusive dealing, whereas the surviving claim involves alleged price fixing. Therefore, any factual overlap between the dismissed claims and the surviving claim does not prevent the Dismissals from being "final" within Rule 54(b).

There is no just reason for delay, because, regardless of the disposition of this motion, the Third Circuit will be reviewing the denial in *Hess* of Plaintiffs' request for injunctive relief—which regards the same alleged exclusive dealing alleged herein, and which was denied by the same Order that ordered the Dismissals herein. *See Weiss v. York Hospital*, 745 F.2d 786, 804 (3d Cir. 1984) (upholding Rule 54(b) certification because "we have to review the propriety of the injunction which is based on the same factual circumstances"). The Third Circuit will be reviewing the denial in *Hess* of Plaintiffs' request for injunctive relief, because, even though the Order denied injunctive relief regarding only one of Plaintiffs' claims in *Hess*, Plaintiffs previously were denied standing in *Hess* to ask for any relief other than injunctive relief, and the grounds of the denial would apply equally to any of Plaintiffs' claims in *Hess*. To facilitate formal completion of the entire *Hess* case, Plaintiffs are stipulating in *Hess* to the dismissal with prejudice of all of their claims that were not formally determined by the Order.

In addition, there is no reason for delay regarding Plaintiffs' appeal from the Dismissals herein, because the grounds on which the dismissals were based are not at issue regarding Plaintiffs' lone surviving claim—for price fixing. Therefore, the proceedings on the lone surviving claim will not moot the appeal of the Dismissals, and will not lead to another appeal of the issues raised by the Dismissals.

Delay of Plaintiffs' appeal from the Dismissals could result in a multiplication of trials and/or discovery periods that would be burdensome to Plaintiffs, if not also to Defendants and the Court.

Therefore, the equities, as well as judicial efficiency, favor certification.

In the alternative, the Order should be certified for immediate appeal, pursuant to 28 U.S.C. § 1292(b), because such certification may materially advance the ultimate termination of

the *Jersey Dental* litigation, by avoiding duplicative trials and/or discovery and/or by facilitating settlement, and because the dismissals were based on conclusions of law as to which there is substantial ground for difference of opinion. Indeed, there is no controlling authority for some, if not most, of the four legal conclusions on which the Order is based.

STATEMENT OF FACTS

"Each and all of the Defendants have acted with the specific intent to unlawfully maintain a monopoly in violation of Section 2 of the Sherman Act, and with the expectation that they would succeed in so doing." (¶ 143). Dentsply has had a "monopoly share of the market" for the manufacture of artificial teeth from at least as early as 1987 (¶ 81; see ¶¶ 139, 152). Dentsply "demand[ed] that its dealers participate with it in [an] exclusive dealing arrangement" "formalized in Dealer Criterion 6." (¶¶ 81, 84). "At all relevant times, each and every Defendant knew that this exclusive dealing arrangement was and is an illegal restraint of trade designed to maintain Dentsply's monopoly" (¶ 74; *see* ¶ 73). "[E]ach Dealer Defendant agreed with every other Dealer Defendant, as well as with Dentsply, and has continued to agree, to implement and abide by the exclusive dealing arrangement described herein and formalized in Dealer Criterion 6." (¶ 89) "The Defendants have intended, and may still be intending, to maintain, enforce and abuse Dentsply's monopoly position by the anticompetitive conduct alleged herein to the detriment of dental laboratories and consumers in the United States." (¶ 116; *see* ¶¶ 140, 153)

"Dentsply and its dealers consider Dealer Criterion 6 to be an agreement between them." *United States v. Dentsply, Int'l, Inc.*, 277 F. Supp. 2d 387, 450 (D. Del. 2003), *rev'd on other grounds*, 399 F.3d 181 (3d Cir. 2005). Dentsply "demanded that each of its dealers agree to the exclusive dealing arrangement formalized in Dealer Criterion 6," and every Dealer "so agreed." (¶89)

"Plaintiffs purchased artificial teeth 'directly' from the [D]ealers." Order at 28.

Plaintiffs assert that they are "threatened with loss or injury proximately resulting from the recurrence of Dentsply's exclusive dealing [arrangement]." Order at 17.

ARGUMENT

I. THE DISMISSALS OF PLAINTIFFS' EXCLUSIVE DEALING CLAIMS (COUNTS II-V) SHOULD BE CERTIFIED AS A FINAL JUDGMENTS, PURSUANT TO RULE 54(b)

A. Standard for Granting Rule 54(b) Certification

Rule 54(b) was created "to facilitate the entry of judgments upon one or more but fewer than all the claims or as to one or more but fewer than all the parties in an action involving more than one claim or party." 10 Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, *Federal Practice and Procedure* § 2654 (3d ed. 1998). The rule provides that

> [w]hen more than one claim for relief is presented in an action . . . or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

Fed. R. Civ. P. 54(b).[3]

"The Rule's purpose is to permit the district court to separate out final decisions from non-final decisions in multiple party and/or multiple claim litigation in order to allow the losing party an immediate appeal." *Weiss v. York Hospital*, 745 F.2d 786, 802 (3d Cir. 1984)

Entry of a final judgment pursuant to Rule 54(b) is predicated on a two-step analysis.

"A district court must first determine that it is dealing with a 'final judgment.'" *Curtiss-Wright Corp. v. General Electric. Co.*, 446 U.S. 1, 7 (1980).

[3] The combination of the court's direction to enter judgment along with its "express determination that there is no reason for delay" "is often referred to as *certification* of the order under Rule 54(b)." 10 James Wm. Moore et al., *Moore's Federal Practice,* § 54.24[1] (3d ed. 2007).

> It must be a 'judgment' in the sense that it is a decision upon a cognizable claim for relief, and it must be "final" in the sense that it is "an ultimate disposition of an individual claim entered in the course of a multiple claims action."

Id. (quoting *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 436 (1956)).

Next, having found that a judgment regarding a specific claim or party is a "final judgment," "the district court must go on to determine whether there is any just reason for delay" of any appeals from that judgment. *Id.* at 8. Such determination "is left to the sound judicial discretion of the district court . . . tak[ing] into account judicial administrative interests as well as the equities involved." *Id.* at 8; *accord In re Diet Drugs Prods. Liability Litig.*, 401 F.3d 143, 164 (3d Cir. 2005) (concurrence).[4]

B. <u>The Dismissal of Plaintiffs' Exclusive Dealing Claims Satisfies the Standard</u>

1. <u>The Dismissals are Final Judgments within 28 U.S.C. § 1291</u>

The Order dismissed each of the Counts II through V in the Amended Complaint, in their entirety (the "Dismissals"). Opinion at 2, 32; Order at 2. Each of these dismissals satisfies both of the requirements for finality under *Curtiss-Wright Corp.*

First, each of these Dismissals of a Count was a "decision upon a cognizable claim for relief." *Id.* at 7.[5]

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[4] While there is no requirement that Rule 54(b) certification be granted "routinely," the Supreme Court has specifically rejected any test that would reserve Rule 54(b) certification for the so-called "infrequent harsh case." *Curtiss-Wright Corp.*, 446 U.S. at 9 (holding that such a test "reflects a misinterpretation of the standard of review for Rule 54(b)," vacating decision of the Third Circuit that applied such inappropriate test, and holding that "the standard against which a district court's exercise of discretion is to be judged is the 'interest of sound judicial administration'"). Nevertheless, as demonstrated, *infra*, unjust and harsh results would follow if Plaintiffs request for Rule 54(b) certification were denied.

[5] *See* Count II (against **Dealers** for violation of Sherman Act, **Section 2**, "by means of exclusive dealing"); Count III (against **Dentsply** for violation of Sherman Act, **Section 2**, "by means of exclusive dealing"); Count IV (Against **Dealers** for violation of Sherman Act,

Second, each Dismissal of a claim was "an ultimate disposition." *Id.* at 7; *see Sears, Roebuck and Co.*, 351 U.S. at 436 (where dismissal on the pleadings of claim under the Sherman Act was one of the judgments certified under Rule 54(b), "there is no doubt that each of the claims dismissed is a 'claim for relief' within the meaning of Rule 54(b), or that their dismissal constitutes a 'final decision' on individual claims'").[6]

Indeed, if any of the dismissed claims originally had been brought in an independent action devoted solely to that claim, and then such claim had been dismissed in the same way that the such claim was dismissed by the Order, the independent action would have been terminated. *See* 10 James Wm. Moore et al., *Moore's Federal Practice*, § 54.22[2][a][i] ("[i]f the adjudication would be final in such a hypothetical independent action, it is final for the purposes of certification under Ruler 54(b)").

Here, to the extent that there is any factual overlap between the dismissed claims, which are based on exclusive dealing, and the lone surviving claim, which is based on price fixing, such overlap does not prevent the Dismissals from being "final" within Rule 54(b). *Carter v. City of Philadelphia*, 181 F.3d 339, 346 n.20 (3d Cir. 1999) ("It is generally recognized that complete legal or factual distinction is not necessary to 54(b) certification."); 10 Wright et al., *Federal Practice and Procedure* § 2657 ("[Supreme Court] decisions repudiate the notion that a separate claim for purposes of Rule 54f(b) is one that must be entirely distinct from all the other claims").

In *Weiss*, where a plaintiff doctor alleged that a hospital and its staff had denied hospital privileges to him and a class of osteopathic doctors, certain claims under the Sherman Act were

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Section 1, "by means of exclusive dealing"); Count V (Against **Dentsply** for violation of Sherman Act, **Section 1**, "by means of exclusive dealing").

[6] *See Mackey v. Sears, Roebuck and Co.*, 218 F.2d 295 (7th Cir. 1955) (decision reviewed by Supreme Court in *Sears, Roebuck and Co. v. Mackey*, 351 U.S. 427 (1956), explaining that district court's dismissal of Sherman Act claim certified under Rule 54(b) was ordered in response to motion made by defendant before it had answered).

dismissed, while other claims under the Sherman Act still were pending against the same defendants. *See* 745 F.2d at 791-92. Even though the dismissed claims and the pending claims all arose from the exact same transaction and the exact same conduct by the defendants, the Third Circuit held that the dismissals were "final judgments." *Id.* at 803-04, 804 n.29.[7]

Here, for each of two independent reasons, the case for the finality of the Dismissals is even stronger than in *Weiss.*

First, here, the dismissed claims and the sole surviving claim involve different alleged wrongful conduct by defendants: Each of the counts dismissed by the Order is based on Defendants alleged exclusive dealing, while, by contrast, the sole surviving count—Count I—is based on Defendants' alleged price fixing. *See* 10 James Wm. Moore et al., *Moore's Federal Practice*, § 54.22[2][b] ("if, however, the causes of action depend upon *proof of different facts* or have different burdens of proof, they may be considered separate claims for purposes of Rule 54(b) even if factual overlap is present") (emphasis added).

[7] In *Weiss*, the plaintiff had brought claims under Sections 1 and 2 of the Sherman Act, both individually and as representative of a class, against York hospital and its staff, based on the defendants' denial of hospital privileges to doctors who graduated from osteopathic rather than allopathic medical schools. 745 F.2d at 791-92. After the liability phase of a trial that had been bifurcated between liability and damages, the court issued judgments based on the jury's verdict. **Regarding the claims of the class**, the court held (a) **against the staff** under Section 1, but **in favor of the staff** under Section 2, and (b) **against the hospital** under Section 2, but **in favor of the hospital** under Section 1. **Regarding the claims brought by Weiss individually**, the court held **against the hospital** under Section 2, but **in favor of the hospital** under Section 1 (and the court held in favor of the staff under both sections). *Id.* at 792-93. The court also entered an injunction against both the hospital and its staff. *Id.* at 792. Each of the judgments dismissing a Sherman Act claim against one of the defendants was held by the Third Circuit to be a "final judgment" within Rule 54(b), despite the fact that another claim under the Sherman Act, brought by the same plaintiff, still was pending against the same defendant—because defendant had been held liable on such other claim, and damages remained to be determined—and despite the fact that all claims, both final and still pending, arose from the same alleged refusal by the York hospital and its staff to deal with Weiss and other osteopaths. *Id.* at 803-04, 804 n.29.

Second, here, the dismissed claims were based on pleading defects or lack of standing, whereas the pleading of the lone surviving claim, and the standing of Plaintiffs to bring such claim, already has been upheld by the Third Circuit. *See Hess*, 424 F.3d at 366, 368 (where district court denied leave to amend "because the amended pleading would not withstand a motion to dismiss," reversing as to addition of the price fixing claim; App. at A-9:24 to A-10:8 (statement by Dentsply's attorney that "I think in this regard I speak on behalf of all the defendants . . . [Plaintiffs] say we fixed resale prices . . . [i]t's not true as a matter of fact, your Honor, but that's a question of fact. **It can't be addressed by a 12(b)(6) motion**") (emphasis added).

2. Regardless of the Disposition of this Motion, the Third Circuit will be Reviewing the Denial in *Hess* of Plaintiffs' Request for Injunctive Relief Similar to the Request Dismissed in *Jersey Dental*

The Court dismissed Count V—which was pled only against Dentsply and sought only injunctive relief—on the ground that, "[a]s discussed above [*i.e.*, for the reasons stated in the Order's denial of Plaintiffs' motion in *Hess*], plaintiffs have not alleged any facts that could demonstrate a threat of future injury and/or irreparable harm." Order at 26.

This part of the Dismissals—which is based, in its entirety, on the reasoning in the Order's disposition of Plaintiffs' motion in *Hess*—soon will be reviewed by the Third Circuit, regardless of the disposition of this motion in *Jersey Dental*, because, as explained, *supra*, in "Nature and Stage of the Proceeding," the Order substantially terminated the *Hess* case by holding that Plaintiffs cannot justify any grant to them of injunctive relief, which, under the Third Circuit's *Hess* decision, is the only relief that they have standing to ask for in *Hess*. *See Hess*, 424 F.3d at 384 ("Plaintiffs may not recover damages in *Hess*").

To the extent that any further steps must be taken before the *Hess* case can be terminated formally, Plaintiffs are filing a motion in *Hess*, to accomplish those steps, by, *inter alia*,

voluntarily dismissing with prejudice all claims and requested relief in *Hess* that was not addressed by the Order.[8]

Thus, regarding *Hess*, it is reasonable to expect that the Order soon will be appealable pursuant to 28 U.S.C. § 1291. *See Fassett v. Delta Kappa Epsilon*, 807 F.2d 1150, 1155 (3d Cir. 1986) (although order that granted summary judgment in favor of all but one defendant "was not a final order when entered," nevertheless, holding that such order "became final" when claims against the remaining defendant were voluntarily dismissed such that they could not be refiled, and noting "it would be anomalous to hold that a plaintiff had no right to appeal the dismissal of all but one of his claims after that one claim, not initially dismissed, had thereafter been voluntarily and finally abandoned").

Therefore, because, the Third Circuit will be reviewing portions of the Order as they regard *Hess*, and because, pursuant to such review, the Third Circuit will be considering the same alleged exclusive dealing that is at issue in *Jersey Dental*, judicial efficiency will be served by certifying the dismissals of Plaintiffs' exclusive dealing claims in *Jersey Dental*, so that Plaintiffs can combine their appeals from both parts of the Order—the part regarding *Hess*, and the part regarding *Jersey Dental*—in a single appeal. *See Weiss*, 745 F.2d at 804 (upholding Rule 54(b) certification because, among other reasons, "we have to review the propriety of the injunction which is based on the same factual circumstances").

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[8] Plaintiffs' *Hess* motion (1) requests the voluntary dismissal with prejudice of all claims and requests for relief in *Hess* not addressed by the Order, (2) responds to the Court's inquiry regarding whether Plaintiffs are capable of supplementing the record regarding either of the two alternative grounds on which their request for injunctive relief was denied (*see* Order at 17 n.12), and (3) asks the Court to amend the Order as it sees fit, to account for completion of the record. Because Plaintiffs' motion in *Hess* seeks to supplement the record only on one of the Court's two alternative grounds for denial of Plaintiffs' request for injunctive relief, it is reasonable to expect that, in response to their motion, an amended Order will dismiss Plaintiffs' claims in *Hess*.

3. The Other Bases for the Dismissals of Plaintiffs' Exclusive Dealing Claims are Legal Conclusions that are Not at Issue Regarding Plaintiffs' Claim for Price Fixing

Aside from the Order's dismissal of Count V based on Plaintiffs' failure to adequately plead a request for injunctive relief, the Order based its Dismissals of Counts II through V on three other legal conclusions: (1) that, regarding all four counts, Plaintiffs lack standing under *Illinois Brick v. Illinois*, 431 U.S. 720 (1977), to recover damages for Defendants' alleged exclusive dealing, Order at 27-28, (2) that counts II and III must be dismissed because Plaintiffs failed to adequately plead one of the elements of a Section 2 claim for conspiracy to monopolize, namely, specific intent to conspire to monopolize, Order at 28-32, and (3) that all four counts must be dismissed, because Plaintiffs failed to adequately plead "that defendants were part of a single conspiracy." Order at 31, 31 n.25.

The first point, regarding standing under *Illinois Brick*, is not at issue regarding Plaintiffs' pending price-fixing claim, because the Third Circuit already has determined that Plaintiffs have standing under *Illinois Brick* to bring such claim. *Hess*, 424 F.3d at 384.

The second point, regarding specific intent to conspire to monopolize, is not at issue regarding Plaintiffs' pending price-fixing claim, because specific intent, including specific intent to conspire to monopolize, is not an element of any claim under Section 1 of the Sherman Act, such as Plaintiffs' price fixing claim.

The third point, regarding Plaintiffs' failure to allege facts from which it could be inferred that the Dealers were part of a single exclusive dealing conspiracy, also is not at issue regarding Plaintiffs' price fixing claim, first, because, under the Third Circuit's *Hess* decision, pleading is not at issue regarding Plaintiffs' price fixing claim, and, second, because, whether or not the Defendants conspired to fix prices cannot, without more, determine whether or not they conspired to deal exclusively in Dentsply teeth.

Because the Dismissals were not based on points at issue regarding Plaintiffs' price fixing claim, there is no chance that the Dismissals will be altered by trial of the price fixing claim, or that any appeal from a judgment determining the price fixing claim would raise any of the same issues raised by the Dismissals of the exclusive dealing claims. *See Carter*, 181 F.3d at 346 (upholding Rule 54(b) certification of dismissal because, among other reasons, "basis of the District Court's dismissal is not asserted to be applicable" to any of the remaining claims); *Commissariat a L'Energie Atomique v. Chi Mei Optoelectronics Corp.*, 293 F. Supp.2d 430, 435 (D. Del. 2003) (certifying dismissal under Rule 54(b), because basis for dismissal resolved an issue "which is not present . . . in any of the remaining claims"), *vacated on other grounds*, 395 F.3d 1315 (Fed. Cir. 2005); *E.I. Du Pont de Nemours & Co. v. Phillips Petroleum Co.*, 720 F. Supp. 373, 380, 387 (D. Del. 1989) (certifying dismissal of counterclaim under Rule 54(b), because "the Court's findings and conclusions on [such counterclaim] will not be altered or subject to contest when (and if) the issues [on the original claim] are tried and decided").

4. Certification of the Order is in the Interest of Judicial Efficiency as well as the Equities

(a) Certification will Serve Judicial Efficiency by Avoiding the Risk of Duplicative Rounds of Discovery and Trial

Rule 54(b) certification of an order dismissing a claim should be granted where a delayed appeal followed by a possible reversal could result in the need for burdensome, multiple discovery periods and/or multiple trials. *Carter v. City of Philadelphia*, 181 F.3d 339, 347 (3d Cir. 1999) (holding Rule 54(b) certification was proper because "denial of an immediate appeal may pose a substantial risk that the District court and the parties will be forced to undergo duplicative trials," and "to hold otherwise would undermine the policies which Rule 54(b) seeks to advance").

For this reason, orders dismissing antitrust claims often are certified pursuant to Rule 54(b). *See, Gas-A-Car, Inc. v. American Petrofina, Inc.*, 484 F.2d 1102, (10th Cir. 1973) (where Sherman Act claim "premised upon related facts" was still pending, certification of dismissal of Robinson-Patman act claim was appropriate "because if there is reversible error it will save a future trial on [the Robinson-Patman act claim]," whereas "refusal to hear the Rule 54(b) order might create undue hardships on appellants [and] necessitate a piecemeal approach at the trial level"); *see also Sears, Roebuck and Co.*, 351 U.S. at 429-31, 436 (upholding Rule 54(b) certification of Sherman Act claim, while common law unfair competition law still pending against same defendant); *Santana Prods. Inc. v. Bobrick Washroom Equip., Inc.*, 401 F.3d 123, 126, 130 n.11 (3d Cir. 2005) (reviewing dismissal of Sherman Act claim certified pursuant to Rule 54(b)); *Weiss*, 745 F.2d at 800. 804, 804 n.29 (upholding Rule 54(b) certification of judgment dismissing certain Sherman Act claims while other Sherman Act claims remained pending against same defendants).[9]

[9] *See also Geneva Pharmaceuticals Tech. Corp. v. Barr Labs., Inc.*, 386 F.3d 485, 494 (2d Cir. 2004) (reviewing judgment dismissing Sherman Act claims certified pursuant to Rule 54(b)); *In re Brand Name Prescription Drugs Antitrust Litig.*, 288 F.3d 1028, 1029-30 (7th Cir. 2002) (reviewing dismissal of Sherman Act claims against some but not all defendants, certified pursuant to Rule 54(b); *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 602, 604 (7th Cir. 1997) (same); *DeLong Equipment Co. v. Washington Mills Abrasive Co.*, 887 F.2d 1499, 1504-05 (11th Cir. 1989) (reviewing dismissal of Sherman Act and some but not all Robinson-Patman Act claims, certified pursuant to Rule 54(b)); *Thurman Indus., Inc. v. Pay 'N Pak Stores, Inc.*, 875 F.2d 1369, 1371-73 (9th Cir. 1989) (reviewing dismissal of Sherman Act claims, certified pursuant to Rule 54(b), while Robinson-Patman act claim still pending against same defendant); *H&W Indus, Inc. v. Formosa Plastics Corp.*, 860 F.2d 172, 176 (5th Cir. 1988) (upholding Rule 54(b) certification of order dismissing Sherman Act claim, while Section 7 Clayton Act claim still pending against same defendant); *USA Petroleum Co. v. Atlantic Richfield Co.*, 859 F.2d 687, 688 (9th Cir. 1988) (reviewing dismissal of Sherman Act claim, certified pursuant to Rule 54(b), while Robinson-Patman Act claim still pending against same defendant); *Columbia Steel Casting Co. v. Portland General Elec. Co.*, Civ. Nos. 90-524-FR, 90-592-FR, 1993 WL 312703, at *1, 6-7 (D. Or. Aug. 11, 1993) (judgment that defendant was liable under Sherman Act Section 1 certified pursuant to Rule 54(b), while Sherman Act Section 2

For the same reason, Rule 54(b) certification is especially appropriate in the context of a class action. *See Weiss*, 745 F.2d at 800. 804, 804 n.29 (upholding Rule 54(b) certification of dismissal of—among other claims—(1) class' claim against hospital, under Section 1 of the Sherman Act, while class' claim against hospital under Section 2 was still pending, and (2) class' claim against hospital staff under Section 2 of the Sherman Act, while class' claim against hospital staff under Section 1 was still pending); *In re Diet Drugs*, 401 F.3d at 161-65 (concurrence) (where no party had sought Rule 54(b) certification, nevertheless, analyzing Rule's applicability, because "it remains useful to explore considerations that would allow for appellate review in complex class action litigation in order to work around requirements that might lead to substantial delay").

Here, Rule 54(b) certification will avoid the risk that there could be a burdensome second trial regarding Plaintiffs' exclusive dealing claims.

Moreover, here, Rule 54(b) certification, along with a stay of proceedings in this Court until Plaintiffs' appeal is determined, will avoid the risk of a burdensome second round of discovery devoted solely to Plaintiffs' exclusive dealing claims.

Defendants, themselves, have insisted on tailoring the proceedings herein to avoid multiple rounds of discovery. For this stated reason, most of the Defendants served with discovery requests have, until now, refused to conduct a search of their electronically stored information ("ESI"), on the ground that such a search is expensive, that they want to conduct such a search only once, and that, before initiating such a search, they want to have certainty regarding which of Plaintiffs' claims are at issue. *See, e.g.*, Joffe Decl., Exhibit A (letter from Darby to Plaintiffs, dated July 31, 2007), at 2, paras. 1-2 (arguing that "with respect to ESI data,

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claim still pending against same defendant), *rev'd on other grounds*, 60 F.3d 1390 (9th Cir. 1995).

search costs can be minimized if only one(1) search is conducted . . . [a]ccordingly, it is our request that the ESI searches be delayed until the court has ruled on the motions").

For the same reason that Defendants have objected to two rounds of ESI production, two rounds of depositions would be inefficient and burdensome for all parties—as well as third parties, possibly including dealers who have been dismissed from the case on jurisdictional grounds.[10]

Not only will Rule 54(b) certification and immediate appeal of the dismissals avoid the risk of multiple trials and/or rounds of discovery, but also, by clarifying the possible damages horizon, Rule 54(b) certification and immediate appeal will create a possibility that, following review of the dismissals by the Third Circuit, the parties will be able to reach a settlement on all claims—both the claims regarding exclusive dealing and the claim regarding price fixing—without any substantial further proceedings in this Court:

> [a]n authoritative determination by the Court of Appeals of the damages horizon may sufficiently narrow the discrepant hopes and expectations of the parties with respect to a likely jury verdict so as materially to enhance the possibilities of settlement.

Calhoun v. Yamaha Motor Corp., C.A. No. 90-4295, 1993 U.S. Dist. LEXIS 9047, at *6 n.2 (E.D. Pa. June 2, 1993) (certifying order pursuant to Section 1292(b)), amended, 1993 U.S. Dist. LEXIS 8267, at *41 (June 21, 1993), *reversing dismissal of certain damages claims*, 40 F.3d 622, 645 (3d Cir. 1994), *aff'd sub nom., Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 203, 216 (1996).

Finally, Rule 54(b) certification will not inefficiently burden the Third Circuit Court of Appeals, first, because, as explained, *supra*, the Third Circuit already will be reviewing the denial of injunctive relief in *Hess* arising from the same Order and regarding the same alleged

[10] No depositions have yet been taken herein. *See* Joffe Decl. at ¶ 5.

exclusive dealing, and second, because, given that all the bases for appeal from the Dismissals are legal issues, the Third Circuit will not need to review any factual record.

(b) Rule 54(b) Certification is Justified by the Equities

As explained, *supra*, in the previous Part, denial of Plaintiffs' request for Rule 54(b) certification would impose on all parties and the Court the risk of multiple trials and/or multiple rounds of discovery, in a case that will involve expensive electronic discovery, expensive review of such discovery, confidentiality review, filings under seal, possibly numerous party and non-party witnesses, *see e.g.*, *United States v. Dentsply Int'l, Inc*., 277 F. Supp. 2d 387, 442 (D. Del. 2003) (at the time when Dentsply's expert in the Government's case "reached his opinion," Dentsply had 30 dealers), hearings on discovery issues, and expensive testimony by experts.

Plaintiffs, if not also the other parties and non-parties, should not be required to bear the risk of going through this process twice, especially when Plaintiffs previously offered to minimize the initial burden of discovery on Defendants by voluntarily postponing discovery on all but a limited number of Defendants. *See* D.I. 243

Because Plaintiffs will appeal the Dismissals sooner or later, and because briefing the appeal will not require citation to any factual record, there can be no burden on Defendants from defending that appeal now, rather than later, that is as great as the burden that will be imposed on Plaintiffs if Rule 54(b) certification is denied and Plaintiffs are required to undergo multiple discovery periods and/or trials.

(c) Analysis of the *Allis-Chalmers* Factors Supports Rule 54(b) Certification

It has been held that, when considering whether there is "no just reason for delay," the district court should consider the following list of factors:

> (1) the presence or absence of a claim or counterclaim which could result in a set-off against the judgment sought to be made final;

(2) the relationship between the adjudicated and unadjudicated claims;

(3) the possibility that the need for review might or might not be mooted by future developments in the district court;

(4) the possibility that the reviewing court might be obliged to consider the same issue a second time;

(5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense and the like

Waldorf v. Shuta, 142 F.3d 601, 609 (3d Cir. 1998) (citing *Allis-Chalmers Corp. v. Philadelphia Elec. Co.*, 521 F.2d 360, 364 (3d Cir. 1975) (the "*Allis-Chalmers* Factors").

Here, each of the *Allis-Chalmers* Factors is a reason to grant Rule 54(b) certification. **First**, no claim or counter-claim has been brought by any Defendant that could result in a set-off against any judgment sought to be made final. **Second**, as demonstrated, *supra*, in Parts I(B)1&3, the adjudicated and unadjudicated claims are independent of each other, first, because they are based on different alleged wrongful conduct by Defendants—exclusive dealing for the adjudicated claims, price fixing for the unadjudicated claim—and, second, because the bases of the Dismissals are legal conclusions not at issue regarding the lone unadjudicated claim. **Third**, as demonstrated, *supra*, in Parts I(B)1&3, there is no possibility that the need for review of the adjudicated claims will be mooted by future developments in the district court, because the adjudicated claims were dismissed on their pleadings, and cannot be revived by factual showings regarding a different kind of alleged wrongful conduct by Defendants. **Fourth**, immediate appeal will not increase the number of times that the reviewing court will need to review the issues on which the Dismissals were based, because, as demonstrated, *supra*, in Parts I(B)2&3, in *Hess*, the reviewing court already will be reviewing whether injunctive relief can be justified; and because otherwise the bases for the Dismissals in *Jersey Dental* are legal conclusions on

issues not involved in the pending price fixing claim. **Fifth**, permitting immediate appeal will avoid the most significant risks of expense and delay by avoiding the risk of multiple trials and/or discovery periods, and will not impose any substantial burden on the parties or the judicial system, because the appeal and review will not involve any factual record.

Therefore, Plaintiffs' request for Rule 54(b) certification of the Dismissals in *Jersey Dental* should be granted.

II. IN THE ALTERNATIVE, THE ORDER SHOULD BE CERTIFIED PURSUANT TO U.S.C. 28 § 1292(b)

A. The Order Satisfies the Requirements for Certification Pursuant to 28 U.S.C. § 1292(b)

A federal appellate court has discretion to permit an appeal from an interlocutory decision or order if the order is certified under Section 1292(b). *See* 28 U.S.C. § 1292(b).

Section 1292(b) "imposes three criteria" that must be satisfied in order for the district court to be able to grant such a certificate, *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 754 (3d Cir. 1974): (1) the order must "involve[] a controlling question of law"; (2) there must be "substantial ground for a difference of opinion" with the answer given by the district court, and (3) it must appear that "an immediate appeal from the order may materially advance the ultimate termination of the litigation," § 1292(b); *see Katz*, 496 F.2d at 754.

1. The Bases for the Dismissals Involve Controlling Questions of Law

"Controlling questions of law . . . include the question of whether a claim exists as a matter of law . . . and questions as to . . . standing." 19 James Wm. Moore et al., *Moore's Federal Practice*, § 203.31[2].[11]

[11] A "controlling" question of law is one that is "serious to the conduct of the litigation, either practically or legally." *Katz*, 496 F.2d at 755. Controlling questions "must encompass at the very least every order which, if erroneous, would be reversible error on final appeal." *Id.*

Here, where the Order dismissed Plaintiffs' exclusive dealing claims in *Jersey Dental* on the pleadings, each of the bases for dismissal—discussed in detail, *infra*—involved "the question of whether a claim exists as a matter of law," and/or whether Plaintiffs have standing to request a certain kind of relief—either damages or an injunction. *See Gould Elec., Inc. v. U.S.*, 220 F.3d 169, 178 (3d Cir. 2000) ("[i]n a Rule 12(b)(6) motion, the court evaluates the merits of the claims . . . determining whether they state a claim as a matter of law").

Moreover, the Third Circuit has made clear that appeal pursuant to 28 U.S.C. § 1292(b) is the appropriate way to resolve issues arising from the application of *Illinois Brick*—one of the issues here requested to be certified. Thus, the Third Circuit repeatedly has granted section 1292(b) petitions to appeal decisions applying *Illinois Brick*, including previously in this very action. *See Hess*, 424 F.3d at 368; *Link v. Mercedes-Benz of north America, Inc.*, 788 F.2d 920, 930 (3d Cir. 1986); *Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958, 962 (3d Cir. 1983).[12]

Therefore, the Dismissals are based on controlling questions of law.

2. There is a "Substantial Ground for Difference of Opinion" Regarding Each of the Issues Requested to be Certified

District judges will find "a substantial ground for a difference of opinion" even when they are "confident" that their own analysis of the question is "correct." *Zenith Radio Corp. v. Matsushita Electric Indus. Co.*, 494 F. Supp. 1190 (E.D. Pa. 1980) (certifying order pursuant to 1292(b)), *aff'd in part, rev'd in part*, 723 F.2d 319 (3d Cir. 1983); *accord Public Interest Research Group of New Jersey, Inc. v. Hercules, Inc.*, 830 F. Supp. 1549, 1556-57 (D.N.J. 1993) (certifying order pursuant to Section 1292(b) and stating that "[w]hile this court obviously

[12] *See also Star Satellite, Inc. v. City of Biloxi*, 779 F.2d 1074, 1076-77 (5th Cir. 1985) (pursuant to § 1292(b), reviewing holding that plaintiff lacked standing to move for preliminary injunction).

believes in the correctness of its decision . . . there does appear to be a substantial ground for difference of opinion"), *aff'd in part, rev'd in part*, 50 F.3d 1239 (3d Cir. 1995).

Here, at the end of the oral argument on Defendants' motions to dismiss the exclusive dealing claims in *Jersey Dental*, the Court stated "trust me when I say what you've argued is difficult." App. at A-146: 2-3.

Indeed, here, there is no controlling authority regarding certain of the issues requested to be certified. *See Levin v. General Pub. Utilities Corp.*, C.A. No. 1:CV-88-1452, 1551, 1558, 1994 U.S. Dist. LEXIS 20713, at *4 (M.D. Pa. July 13, 1994) (granting 1292(b) certification, and finding substantial ground for difference of opinion, because "[t]he questions presented are issues of first impression in this circuit"); *Calhoun*, 1993 U.S. Dist. LEXIS 8267, at *40 (same, because "there is no Supreme Court or Third Circuit authority that squarely compels the conclusion I came to").

For these and other reasons explained, *infra*, there is a substantial ground for difference of opinion regarding each of the issues requested to be certified.

3. Immediate Appeal Will Permit the Third Circuit to Consider Plaintiffs' Pleading of their Exclusive Dealing Claims, at the Same Time that it Will Be Considering the Final Determination of the *Hess* Case, and May Materially Advance the Ultimate Termination of the *Jersey Dental* Case

Here, permitting immediate appeal "may materially advance the ultimate termination of the litigation" because it will give the Third Circuit an opportunity to consider Plaintiffs' pleading of their exclusive dealing claims at a time when the Third Circuit will, in any event, be considering Plaintiffs' request in *Hess* for an injunction against the same alleged exclusive dealing arrangement, and the determination of such request in *Hess* by the very same Order that is at issue in *Jersey Dental*. *See Taylor v. PPG Indus., Inc.*, 256 F.3d 1315, 1316 (Fed. Cir. 2001) (where portion of order was being appealed from under rule 54(b), and where remainder of

order had been certified pursuant to § 1292(b), granting permission to appeal under § 1292(b), because "[a]llowing the appeals to proceed simultaneously will promote judicial efficiency"); *Santana Prods., Inc.*, 401 F.3d at 130, 130 n.11 (reviewing appeal pursuant to § 1292(b) together with appeal from same case under rule 54(b)).

Here too, permitting immediate appeal "may materially advance the ultimate termination of the litigation" because, as explained, *supra*, it may avoid a multiplication of trials and/or discovery proceedings. *See Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 494 F. Supp. 1190, 1244 (E.D. Pa. 1980) (where possibility of post-trial reversal on issue determined prior to trial would require trial of additional issues with a new jury and "general jury orientation as to the background of the litigation," pre-trial appeal pursuant to Section 1292(b) "unquestionably will materially advance the ultimate termination of the litigation"), *aff'd in part, rev'd in part on other grounds*, 723 F.2d 319 (3d Cir. 1983).[13]

Indeed, as also explained, *supra*, an immediate resolution of whether Plaintiffs will be able to proceed with their exclusive dealing claims may render any trial or even discovery unnecessary, because

> [a]n authoritative determination by the Court of Appeals of the damages horizon may sufficiently narrow the discrepant hopes and expectations of the parties with respect to a likely jury verdict so as materially to enhance the possibilities of settlement.

Calhoun v. Yamaha Motor Corp., C.A. No. 90-4295, 1993 U.S. Dist. LEXIS 9047, at *6 n.2.

[13] "The requirement that an appeal may materially advance the ultimate termination of the litigation is closely tied to the requirement that the order involve a controlling question of law." *Public Interest*, 830 F. Supp. at 1557 (quoting 16 Wright et al., *Federal Practice and Procedure* § 3930, at 163 (1977)). This is because questions that are found to be controlling "commonly involve the possibility of avoiding trial proceedings, or at least curtailing and simplifying pretrial or trial." 16 C. Wright et al., *Federal Practice & Procedure* § 3930, at 432 (1996).

B. Issues Requested to be Certified

1. Does *Illinois Brick* or the Third Circuit's *Hess* Decision Bar Plaintiffs from Recovering Damages from Dealers who Sold to them Directly?

The Order dismisses counts II and IV—against the Dealers for exclusive dealing in violation of, in turn, Sections 1 and 2 of the Sherman Act—on, among other grounds, that, according to the Order, under the rule of *Illinois Brick*, as applied by the Third Circuit's *Hess* decision, Plaintiffs lack standing to recover overcharge damages from the Dealers. Order at 28.

Plaintiffs argued that, while they are barred under *Illinois Brick* and the Third Circuit's *Hess* decision from recovering overcharge damages from **Dentsply**, they are **not** barred from recovering overcharge damages from the **Dealers**, first, because the only parties in front of the Third Circuit for its *Hess* decision were Plaintiffs and Dentsply, and, second, because, whereas Plaintiffs are **indirect** purchasers from Dentsply, they are **direct** purchasers from the Dealers. D.I. 288 at 37.

The Order acknowledges that "Plaintiffs are correct that the Third Circuit had no occasion in *Hess* to evaluate plaintiffs' standing to sue the dealers for damages," and that "plaintiffs purchased artificial teeth 'directly' from the dealers." Order at 28. Nevertheless, without citing to any supporting language in the *Hess* decision, the Order interprets *Hess* as barring a purchaser from recovering overcharge damages from **any member** of a conspiracy involving dealers as well as a manufacturer, so long as the conspiracy was not a vertical price fixing conspiracy, and so long as the dealers' involvement in the conspiracy was not "truly complete." Order at 28.

While the Order does quote language from the *Hess* decision showing that the "co-conspirator exception" to *Illinois Brick* is limited to those instances in which the intermediaries' involvement in a conspiracy was "truly complete," nothing in *Illinois Brick* or

the Third Circuit's *Hess* decision suggests that an exception to the rule of *Illinois Brick* must apply, before a purchaser can sue its direct seller. As Plaintiffs pointed out in their opposition brief, in *Illinois Brick*—just as in the Third Circuit's *Hess* decision—the direct sellers were not even named as defendants. *See* D.I. 288, at 38 n.37 (citing 431 U.S. at 726)).

Moreover, contrary to the Order's interpretation, in *Illinois Brick*, the Supreme Court specifically stated that persons subject to the rule of *Illinois Brick* are "indirect purchasers **remote from the defendant.**" *see* D.I. 288, at 38 (quoting 431 U.S. at 741) (emphasis added). Under the Supreme Court's language, the rule of *Illinois Brick* cannot apply to Plaintiffs' claims against the Dealers, because, as the Order acknowledges, Plaintiffs are direct purchasers from the Dealers, not "indirect purchasers remote from the defendant."

Therefore, there is a substantial question, although the Court does not agree, as to whether either *Illinois Brick* or the *Hess* decision's application of *Illinois Brick* bars Plaintiffs from recovering overcharge damages from the Dealers, who sold to Plaintiffs directly.

2. Can a Specific Intent to Conspire to Monopolize be Adequately Pled against a Dealer, by Allegations that the Dealer Agreed to the Exclusive Dealing Policy of a Monopolist Manufacturer, with Knowledge that the Purpose of the Manufacturer's Policy was to Illegally Maintain the Manufacturer's Monopoly?

The Amended Complaint alleges that:

> Dentsply has had a "monopoly share of the market" for the manufacture of artificial teeth from at least as early as 1987 (¶ 81; see ¶¶ 139, 152);
>
> Dentsply has "demand[ed] that its dealers participate with it in [an] exclusive dealing arrangement" "formalized in Dealer Criterion 6" (¶¶ 81, 84);
>
> "[a]t all relevant times, each and every Defendant knew that this exclusive dealing arrangement was and is an illegal restraint of trade designed to maintain Dentsply's monopoly" (¶ 74; *see* ¶ 73);

> "each Dealer Defendant agreed with every other Dealer Defendant, as well as with Dentsply, and has continued to agree, to implement and abide by the exclusive dealing arrangement described herein and formalized in Dealer Criterion 6" (¶ 89).[14]

The Order dismisses counts II and III—for conspiracy to monopolize by exclusive dealing, in violation of Section 2 of the Sherman Act, against, in turn, the Dealers and Dentsply—because, among other reasons, according to the Order, Plaintiffs failed to adequately allege the specific intent element of a Section 2 claim for conspiracy to monopolize. Order at 30-31.

Initially, the Order quotes from *ID Security Systems Canada, Inc. v. Checkpoint Sys., Inc.*, 249 F. Supp. 2d 622, 660 (E.D. Pa. 2003), a case cited by Plaintiffs in their brief opposing the Dealers' motion, stating that the specific intent element requires each conspirator to have "a conscious commitment to [Dentsply's] common scheme designed to achieve an unlawful objective, namely that of endowing [Dentsply] with monopoly power." Order at 29 (quoting 249 F. Supp. 2d at 660).

Plaintiffs respectfully submit that the Amended Complaint meets this standard, because, as the quotations from the Amended Complaint, *supra*, show, it alleges that Dentsply's exclusive dealing arrangement was "designed to maintain Dentsply's monopoly" (¶ 74), that Dentsply created the exclusive dealing policy and each of the Dealers agreed to participate in it (thus making it a "common scheme") (¶¶ 81, 84, 89), and that "[a]t all relevant times, each and every Defendant knew that this exclusive dealing arrangement was and is an illegal restraint of trade designed to maintain Dentsply's monopoly" (thus making the Dealers' commitment a fully

[14] The Amended Complaint also alleges that "the Defendants have intended, and may still be intending, to maintain, enforce and abuse Dentsply's monopoly position by the anticompetitive conduct alleged herein to the detriment of dental laboratories and consumers in the United States" (¶ 116; *see* ¶¶ 140, 153), and that "[e]ach and all of the Defendants have acted with the specific intent to unlawfully maintain a monopoly in violation of Section 2 of the Sherman Act, and with the expectation that they would succeed in so doing," (¶ 143).

conscious commitment to a common scheme designed to maintain Dentsply's monopoly) (¶¶ 73-74).[15]

However, the Order does not rest with the standard applied by the *ID Security Systems* case. Rather, the Order adds an additional, more demanding, pleading requirement, based on *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 728, 731 (D. Md. 2001), a single district court decision from a court not in the Third Circuit. Quoting from this District of Maryland decision, the Order states that specific intent to conspire to monopolize is not adequately pled, unless Plaintiffs plead that "maintaining [Dentsply's] monopolies was a goal that [the Dealers] themselves **wanted** to accomplish." Order at 30 (quoting 127 F. Supp. 2d at 731) (emphasis added). Under this more demanding standard, it is not enough to plead that the conspirators **knowingly** agreed to participate in a scheme designed to maintain Dentsply's monopoly, but, rather, plaintiffs must **also** plead that the conspirators made this agreement because, all other things being equal, they "**wanted**" Dentsply to have a monopoly.

Because, according to the Order, "plaintiffs have maintained throughout this litigation that the dealers were coerced into accepting Dentsply's terms," the Order concludes that the Amended Complaint does not meet this more demanding standard. Order at 30.

As shown by the fact that the Order relies on a district court decision from another circuit, the Third Circuit never has decided this precise issue. However, there is reason to believe that, if faced with this issue, the Third Circuit would reject the additional, more demanding, requirement previously imposed only by a single District of Maryland decision.

[15] As Plaintiffs stated during oral argument: "The test is: When you do this act, are you aware that you're doing an act that is anticompetitive or is this unintentional."? App. at A-90: 2-4.

As Plaintiffs argued in their brief, unlike the District of Maryland decision, the Third Circuit has, in similar circumstances, though under Section 1 of the Sherman Act, drawn a sharp distinction between "motive," *i.e.*, whether a person "wants" some specific result, and "objective," *i.e.*, whether a person "intends" some result. *See Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 212 (3d Cir. 1992) (reversing decision that "fails to recognize the difference between motive and objective" and noting that a test requiring vertically related conspirators to have identical motives "would dramatically alter the antitrust landscape in a manner unjustified by either precedent or policy considerations").

Moreover, as Plaintiffs also argued in their brief, under criminal law, where the concept of specific intent originated, the majority view is that specific intent is *not* negated by the presence of coercion. *See United States v. Leal-Cruz*, 431 F.3d 667, 672 (9th Cir. 2005) (holding "duress does not negate the specific intent element" of illegal re-entry into the U.S.); *United States v. Salerno*, No. S 86 CR. 245 (MJL), 1987 WL 7934, at *16 (S.D.N.Y. Mar. 10, 1987) ("when the victim chooses (because of fear of economic repercussions) to cast his lot with the extortionist, he is not given carte blanche to engage in criminal activity in furtherance of the extortionist scheme"; his "criminal responsibility" is "not excused . . . under the claim of lack of specific intent").

Still further, as Plaintiffs also pointed out during oral argument, under the definition of "intent" in the Restatement of Torts, "[i]ntent is not limited to consequences which are **desired**. If the actor **knows** that the consequences are certain or substantially certain to result from his act and still goes ahead, he is treated by the law as if he had, in fact, desired to produce the result." App. at A-89: 5-11 (quoting Restatement (Second) of Torts, § 8A (emphasis added).

During oral argument, even this Court was reluctant to adopt the unusually demanding standard for specific intent promulgated by the District of Maryland, and advanced herein by the Dealers, telling the Dealers' attorney, "[i]t sounds like a high standard that you are setting." App. at A-101:16-17.

Therefore, there is a substantial question, although the Court does not agree, as to whether the Amended Complaint fails to allege a specific intent by the Dealers to conspire to monopolize, despite having alleged that the Dealers agreed to Dentsply's exclusive dealing arrangement, with full knowledge that it was designed to illegally maintain Dentsply's monopoly.

3. Where it is Alleged that a Manufacturer Conspired with its Dealers to Deal Exclusively, Must it be Alleged that all of the Defendants were Part of a Single Conspiracy, in Order to State Claims Under the Sherman Act?

The Order dismisses counts II and III (for conspiracy to monopolize, in violation of Section 2, against, in turn, the Dealers and Dentsply), as well as counts IV and V (for conspiracy to restrain trade, in violation of Section 1, against, in turn, the Dealers and Dentsply) because, among other reasons, according to the Order, the Amended Complaint does not plead facts from which it could be inferred that "defendants were part of a single conspiracy." Order at 31, 31 n.25. For authority, the Order again relies on a single district court case from another circuit, *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 728 (D. Md. 2001). The *Microsoft* decision based its conclusion on the fact that, in that case, where intermediaries were alleged to have conspired with a manufacturer, there was "no allegation that the [intermediaries] made any agreement among themselves." *Id.* at 733.

Here, unlike in the *Microsoft* decision, the Amended Complaint alleges, among other things, that "[e]ach Dealer Defendant agreed with every other Dealer Defendant . . . to implement and abide by the exclusive dealing arrangement." ¶ 89.

Nevertheless, assuming, *arguendo*, that the Amended Complaint does not adequately allege agreements made directly among the Dealers, there still is substantial reason to believe that the Order is wrong about the law.

Under controlling Third Circuit precedent, a conspiracy under the Sherman Act involving exclusive dealing or related conduct can be stated adequately, based on an allegation that a manufacturer and no more than one of its dealers made an agreement to engage in such conduct. *See Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 212-13 (3d Cir. 1992) (Sherman Act conspiracy proven, where conspiracy resulted from "pressure brought by a manufacturer upon its distributor to aid it in driving a competitor out of business").

At a minimum, as the **Dealers** conceded in their brief supporting their motion to dismiss, "Plaintiffs have alleged . . . a series of vertical conspiracies," *i.e.*, bilateral agreements between Dentsply and each of the Dealers. D.I. 265 at 9; *see* ¶ 89 (Dentsply "demanded that each of its dealers agree to the exclusive dealing arrangement formalized in Dealer Criterion 6," and every Dealer "so agreed").

Moreover, in the Government's case, this Court, itself, concluded that "Dentsply and its dealers consider Dealer Criterion 6 to be an agreement between them." *United States v. Dentsply, Int'l, Inc.*, 277 F. Supp. 2d at 450; *compare* Order at 31 n.25 (relying on a conclusion from this Court's decision in *United States v. Dentsply*).[16]

[16] Unlike the Order, the Dealers did not argue in their motion to dismiss that Plaintiffs failed to allege the element of an agreement. Rather, the Dealers argued that, because, according to the Dealers, Plaintiffs failed to allege a single conspiracy involving all the Defendants, therefore Plaintiffs failed to adequately allege the element of a restraint of trade with anticompetitive effects. D.I. 265 at 2, 11. The Order does not adopt this argument by the Dealers, and, in any event, Plaintiffs demonstrated in their opposition brief that the Dealer's argument is meritless. *See* D.I. 288 at 12-32.

Therefore, there is a substantial question, although the Court does not agree, regarding whether the Amended Complaint must allege that all of the Defendants participated in a **single** conspiracy, in order to adequately state exclusive dealing claims against each of the Defendants, under Sherman Act, Sections 1 and 2.[17]

4. Can a Private Plaintiff Plead a Threat of Future Injury and/or Irreparable Harm Adequate to Support a Request for an Injunction, where the Government already has Obtained an Injunction Against Substantially the Same Wrongful Conduct

The Order dismisses Count V—against Dentsply, for injunctive relief, for violation of Section 1 of the Sherman Act—because "in view of the injunction that has already been secured by the government . . . plaintiffs have not alleged any facts that could demonstrate a threat of future injury and/or irreparable harm." Order at 26.[18] In support of this conclusion, the Order incorporates its discussion determining Plaintiffs' request for an injunction in the *Hess* case,

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[17] As Plaintiffs argued in their opposition brief, even if it were necessary for Plaintiffs to allege a single conspiracy involving all of the Defendants, under Third Circuit precedent, Plaintiffs have adequately done so. In *United States v. Lester*, 282 F.2d 750, 753 (3d Cir. 1960), the Third Circuit considered and flatly rejected the argument that every conspirator must make an agreement with every other conspirator, in order for all of the conspirators to belong to the same conspiracy. Where all conspirators make agreements with one, central, conspirator who organizes the conspiracy, with each conspirator having knowledge that the others also are participating, and that the participation of the others will contribute to the conspiracy's success, all conspirators are considered part of a single conspiracy. *See K-Dur Antitrust Litig.*, 338 F. Supp. 2d 517, 536-38 (D.N.J. 2004); ¶ 84 (Dentsply informed each Dealer that every other Dealer also was participating), ¶ 85 (each Dealer understood the cooperation of every Dealer was "necessary to the success of this exclusive dealing arrangement), ¶ 86 (if any one Dealer had agreed to the exclusive dealing arrangement, and the other Dealers had declined to agree, "the complying dealer would face the prospect of possibly losing certain sales to competition from non-complying Dentsply dealers who, under this hypothetical situation, would retain their ability to sell non-Dentsply teeth to such laboratories as might, in certain instances, prefer them").

[18] Under Section 16 of the Clayton Act, the section invoked by Plaintiffs' request for an injunction, there is **not** any requirement that plaintiffs prove "irreparable injury." *See Mid-West Paper Prods. v. Cont'l Group, Inc.*, 596 F.2d 573, 594 n.85 (3d Cir. 1979). Even leaving aside Section 16 of the Clayton Act, as the Order concedes, "[t]he Third Circuit has recently recognized a conflict in its precedent regarding whether irreparable harm is a prerequisite to the grant of permanent injunctive relief." Order at 17 n.10 (citing *Stolt-Nielsen, S.A. v. U.S.*, 442 F.3d 177, 185 n.5 (3d Cir. 2006).

which, in turn, relies on two decisions to support this conclusion: *Harthman v. Witty*, 480 F.3d 337, 339-40 (3d Cir. 1973), and *Ellis v. Gallatin Steel Co.*, 390 F.3d 461, 476 (6th Cir. 2004); *see* Order at 17-18.

Plaintiffs respectfully submit that the *Harthman* and *Ellis* decisions are not applicable here.

In *Harthman*, unlike here, **the private plaintiff already had been granted an injunction**, and the Third Circuit merely stated that no second injunction was needed **by the same plaintiff** to enjoin conduct already prohibited by the existing injunction. 480 F.3d at 338-40.[19] Moreover, unlike here, in *Harthman*, the only law that applied was the **common law**. *Id.*

In *Ellis*, unlike here, the **private plaintiff already had been awarded compensatory and even punitive damages** for violations similar to those that they sought to enjoin. 390 F.3d at 469-72. Moreover, in *Ellis*, unlike here, the private plaintiffs sought an injunction under the **Clean Air Act**, which, by stark contrast with the antitrust laws, authorizes private suits "only when environmental officials '**fail** to exercise their enforcement responsibility." Id. at 475 (emphasis in original).

Unlike injunctions under the common law or the Clean Air Act, the Supreme Court has held that "[**t]he private-injunction action**[, **under Section 16 of the Clayton Act,**] **supplements Government enforcement of the antitrust laws** . . . . These private and public

[19] The plaintiff in *Harthman* did not ask for a second injunction; rather, the district court concluded that the on-going wrongful conduct was not the same as the conduct originally enjoined; that, therefore, the first injunction did not apply; and that, if the violation continued, the plaintiff should ask for a new and different injunction. *Id.* at 339. The Third Circuit held nothing more than that first injunction **did** apply, while stating, in dicta, that, if the plaintiff had asked for a new injunction, the appropriate response, under the circumstances in *Harthman*, would have been to deny it. *Id.* at 340.

actions were designed to be **cumulative, not mutually exclusive**." *United States v. Borden Co.*, 347 U.S. 514, 517-18, 520 (1954) (emphasis added).

Although, as the Order notes, in *Borden*, it was the private plaintiff rather than the Government who had obtained the first of two overlapping antitrust injunctions, *see* Order at 17 n.11, *Borden*'s holding also has been applied where, as here, it was the Government, rather than the private plaintiff, who was first to obtain an antitrust injunction. *See New York v. Microsoft Corp.*, 209 F. Supp.2d 132, 154 (D.D.C. 2002) (where injunctive relief already had been obtained by the Government, quoting from *Borden* and holding that injunctive relief also could be awarded to private plaintiffs, because "the Supreme Court has expressly acknowledged that the rights of private plaintiffs pursuant to Section 16 of the Clayton Act are meant to 'supplement [ ] Government enforcement of the antitrust laws'").[20]

As Plaintiffs explained in their opposition to Dentsply's motion in *Jersey Dental*, in the suits brought against Microsoft, in 1998, one by the Government, and another by the several states, the "private" plaintiffs[21] were essentially granted an injunction against the exact same conduct that had just been enjoined by a consent decree on behalf of the Government.

In the Microsoft litigation, two suits were brought in the District Court for the District of Columbia—one by the Government, and, the other, by 18 states and the District of Columbia—both of which alleged violations of Sections 1 and 2 of the Sherman Act, arising from the same

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[20] An injunction granted in *Jersey Dental* would be broader than the injunction against Dentsply obtained by the Government, because, aside from the fact that, as in *Hess*, Plaintiffs would ask for provisions in addition to those granted to the Government, an injunction in *Jersey Dental* would be enforceable against the Dealers **as well as** against Dentsply. *See* D.I. 290 at 33-34.

[21] *See* 2 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 335a, at 286 n. 1 (2d ed. 2000) ("Everyone other than the federal government falls in the 'private' plaintiff category, which thus includes a state attorney general invoking federal antitrust law—whether on behalf of the state or of its citizens").

business practices of Microsoft. *Compare United States v. Microsoft Corp.*, 231 F. Supp. 2d 144, 150 (D.D.C. 2002) (the "Government Case"), *aff'd sub nom., Massachusetts v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004); *with New York v. Microsoft Corp.*, 224 F. Supp. 2d 76, 86 (D.D.C. 2002) (the "States Case"), *aff'd sub nom., Massachusetts v. Microsoft Corp.*, 373 F.3d 1199 (D.C. Cir. 2004); *see Massachusetts v. Microsoft Corp.*, 373 F.3d 1199, 1203-04 (D.C. Cir. 2004) (appeals from both cases).

Initially, the two Microsoft cases were consolidated, and they proceeded to a trial on the merits, which resulted in a judgment against Microsoft. 373 F.3d at 1205; 231 F. Supp. 2d at 150; 224 F. Supp. 2d at 86. However, the Court of Appeals reversed in part, vacated the remedial decree, and remanded to the District Court—which ordered the parties to enter settlement negotiations. 373 F.3d at 1205; 231 F. Supp. 2d at 150; 224 F. Supp. 2d at 86.

"The United States and Microsoft were able to reach a resolution in *United States v. Microsoft Corp*. . . . in the form of a proposed consent decree, filed with the Court as the 'Revised Proposed Final Judgment' on November 6, 2001." 231 F. Supp. 2d at 150. Nine of the states joined in that consent decree, but the other nine and the District of Columbia "refused to enter into the consent decree," so the district court bifurcated the proceedings, 373 F.3d at 1205, and the non-settling states resumed litigating the remedy, 224 F. Supp. 2d at 87.

The proposed final judgment in the Government's Case was, for all practical purposes, effective immediately:

> Pursuant to the stipulation filed with the Court on November 6, 2001, Microsoft began complying with portions of the proposed final judgment on December 16, 2001, as if "it were in full force and effect." . . . On August 28, 2002, the United States submitted a "Notice" to the Court advising "the Court of Microsoft's compliance with various milestones established by the Second Revised Proposed Final Judgment."

231 F. Supp. 2d at 151 n.2.

Nevertheless, approximately one year after Microsoft had begun complying with the proposed final judgment entered in the Government's Case, the same Court and same judge issued a final judgment in the States Case, awarding an injunction to the states—i.e., the private plaintiffs. 224 F. Supp. 2d at 266-277.

> Moreover, "**[t]he judgment entered by the district court in [the States Case] closely parallels the consent decree negotiated by the United States**." 373 F.3d at 1204; *see* 373 F.3d at 1233. (emphasis added). The only significant difference is that there are a few respects in which the injunction granted to the states is slightly more restrictive of Microsoft's conduct. *See* 373 F.3d at 1245; *see also* 373 F.3d at 1250 (affirming both the remedial order in the States Case and the "order approving the consent decree in the public interest" in the Government Case).

Therefore, there is a substantial question, although the Court does not agree, regarding whether, because the Government already has obtained an injunction enforceable against Dentsply for its exclusive dealing arrangement, Plaintiffs have failed to plead a threat of future antitrust injury that is adequate to support their being granted their own injunction against the alleged exclusive dealing of the *Jersey Dental* defendants.

CONCLUSION

For the reasons stated herein, Plaintiffs respectfully request that the Court enter an order substantially in the form of the proposed order being filed herewith, certifying the Dismissals as final judgments pursuant to Fed. R. Civ. P. 54(b), or, in the alternative, certifying the Order pursuant to 28 U.S.C. § 1292(b), and staying proceedings in this Court until the determination of any appeal resulting from such certification, or until the time to appeal has expired.

Dated: October 26, 2007

Respectfully submitted,

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