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,	)	C.A. No. 01-267-SLR
v.	)	
DENTSPLY INTERNATIONAL INC., and named tooth dealers,	)	
Defendants.	)	

DEFENDANTS' OPPOSITION TO PLAINTIFFS' 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)

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Defendants respectfully submit this brief in opposition to the motion of plaintiffs Jersey Dental Laboratories f/k/a Howard Hess Dental Laboratories, Inc. and Philip Guttierez d/b/a Dentures Plus ("plaintiffs") for immediate appellate review of this Court's dismissal of their exclusive dealings claims pursuant to Fed. R. Civ. P. 52(b) or 28 U.S.C. § 1292(b).

This case began nearly nine years ago as a tag-along case to the government's litigation when plaintiffs filed suit and claimed that Dentsply's exclusive dealing policy was an unlawful monopoly under Section 2 of the Sherman Act. When their indirect purchaser status barred their damages claim, plaintiffs named most of Dentsply's dealers as defendants. This Court, however, dismissed plaintiffs' complaint against all defendants for failure to state a claim which, again, left them without a damages claim. Plaintiffs then filed a third complaint and sought damages based on allegations that defendants engaged in price-fixing violative of Section 1 of the Sherman Act. Although defendants did not move to dismiss the Section 1 claim, they have now obtained dismissal of all of plaintiffs' Section 2 claims.

In an explicit attempt to expedite settlement, plaintiffs now want review of their Section 2 claims but are hamstrung by the fact that their Section 1 claim is still (for now) alive. But Rule 54(b) and § 1292(b), which permit piecemeal review in the most limited of circumstances, are not tools for a plaintiff to expedite appellate review simply because it wants to expedite settlement. Instead, to obtain immediate appellate review, plaintiffs must show that either principles of judicial expediency (Rule 54(b)) or a substantial ground for disagreement over a controlling question of law (§ 1292(b)) require expedited review. Plaintiffs fail to carry their burden on both scores. Two recent Supreme Court cases provide clear grounds for dismissal of all remaining claims so an immediate appeal is not judicially expedient at this juncture. Moreover, plaintiffs do not identify substantial grounds for disagreement with this Court's

decision. Accordingly, this Court should deny plaintiffs' motion for immediate review of the dismissed claims under Rule 54(b) or § 1292(b).

NATURE AND STAGE OF PROCEEDINGS

On January 5, 1999, the United States Department of Justice Antitrust Division filed a complaint against Dentsply in this Court. (*United States v. Dentsply Int'l Inc.* ("*DOJ*") C.A. No. 99-005, D.I. 1.) The government alleged that Dentsply's policy that dental products dealers who sell Dentsply's artificial teeth to dental laboratories may not sell competing tooth lines violated Sections 1 and 2 of the Sherman Act and Section 3 of the Clayton Act. (*Id*.) After a four-week bench trial, this Court held that Dentsply's conduct did not violate Sections 1 or 2 of the Sherman Act or Section 3 of the Clayton Act. *United States v. Dentsply Int'l, Inc.*, 277 F. Supp. 2d 387 (D. Del. 2003). The government appealed this Court's ruling on its Section 2 claim, and, on February 24, 2005, the Third Circuit reversed, holding that Dentsply's conduct violated Section 2 of the Sherman Act. *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181 (3d Cir. 2005). On September 14, 2005, Dentsply petitioned for a writ of certiorari to the United States Supreme Court. The Supreme Court later denied Dentsply's request to review the Third Circuit's decision. *United States v. Dentsply Int'l Inc.*, 546 U.S. 1089 (2006). Following the Third Circuit's mandate, this Court entered injunctive relief in the government's favor on April 26, 2006. (*DOJ* D.I. 559.) The injunction will be in effect for seven and one-half years. (*Id*.)

On April 21, 1999, Howard Hess Dental Laboratories filed a tag-along complaint to the government's complaint and challenged Dentsply's exclusive dealing policy as violative of the antitrust laws. *Howard Hess Dental Labs Inc. et al. v. Dentsply International, Inc.*, C.A. No. 99-255 (SLR). (*Hess* D.I. 1.) This Court granted summary judgment for Dentsply on the ground

that, as indirect purchasers of artificial teeth from Dentsply, plaintiffs lacked standing to sue for damages based on the rule established in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

Hess reacted by filing a new complaint on April 24, 2001, this time under the name Jersey Dental Laboratories. *Jersey Dental Labs., Inc. v. Dentsply Int'l Inc.*, Civ. No. 01-267-SLR ("*Jersey*"). (*Jersey* D.I. 1.) The "*Jersey I* complaint" again alleged that Dentsply and its dealers engaged in a conspiracy to restrain the sales of artificial teeth and to permit Dentsply to establish and maintain a monopoly, but also added 26 of Dentsply's 28 dealers as defendants. The factual allegations contained in the *Jersey I* complaint were substantially identical to those contained in the *Hess* complaint, the only change being a liberal sprinkling of the word "conspiracy" throughout the allegations. This Court again dismissed plaintiffs' claims as barred by *Illinois Brick* on December 19, 2001. (*Jersey* D.I. 166, 167.)

On January 7, 2002, plaintiffs moved to reargue the Court's Rule 12(b)(6) decision that dismissed the *Jersey I* complaint and to amend the *Jersey I* complaint. (*Jersey* D.I. 170.) Plaintiffs' proposed "*Jersey II* complaint" added new allegations that the dealers and Dentsply violated Section 1 when they engaged in a vertical resale price maintenance agreement to fix the resale price of artificial teeth. On August 27, 2002, this Court denied plaintiffs' motion to reargue and request for leave to amend the complaint as futile. (*Jersey* D.I. 208 (noting that the new allegation of resale price fixing was contrary to the undisputed facts of the record).)

Plaintiffs appealed the *Hess* and *Jersey I* and *II* decisions to the Third Circuit on May 24, 2004. The Third Circuit affirmed the dismissal of *Hess* in its entirety and, as to *Jersey*, affirmed in part, reversed in part and remanded for further proceedings. *Howard Hess Dental Labs. v. Dentsply Int'l Inc.*, 424 F.3d 363 (3d Cir. 2005). The Third Circuit agreed with this Court's

determination in *Jersey I* that plaintiffs lacked the requisite antitrust standing to pursue claims against Dentsply for an overcharge or lost profits for their supposed inability to sell Dentsply's rivals' teeth. However, the Third Circuit held that this Court erred in its refusal to allow plaintiffs to amend their complaint in *Jersey II* because they have standing to seek damages from Dentsply for its alleged price-fixing conspiracy with the dealers. *Id*. at 378.

Plaintiffs later petitioned for a writ of certiorari to the United States Supreme Court. On May 26, 2006, the Supreme Court denied plaintiffs' request to review the Third Circuit's decision. *Jersey Dental Labs. v. Dentsply Int'l Inc.*, 126 S. Ct. 2320 (2006).

On remand, plaintiffs filed their amended complaint (the "*Jersey III* complaint") against Dentsply and most of its tooth dealers on October 10, 2006. (*Jersey* D.I. 259.) Plaintiffs alleged a price-fixing conspiracy among Dentsply and the tooth dealers, but also included Section 2 claims for conspiracy to monopolize and group boycott based on Dentsply's exclusive dealing policy. (*Id*.) Because of the Third Circuit's ruling, in Counts III and V, plaintiffs only sought injunctive relief against Dentsply. In Counts II and IV, plaintiffs sought damages from Dentsply's dealers. On December 1, 2006, defendants moved to dismiss all of the Section 2 claims (Counts II-V) in the *Jersey III* complaint. (*Jersey* D.I. 265, D.I. 279.) Among other things, defendants argued that (1) as to Counts II and IV, the Third Circuit's decision in *Hess* precluded plaintiffs from recovering damages from the dealers absent allegations that Dentsply and its dealers fell within *Illinois Brick*'s co-conspirator exception; (2) as to Counts II and III, the *Jersey III* complaint failed to allege factual allegations that support plaintiffs' claim that the dealers shared Dentsply's specific intent to monopolize the artificial tooth market; and (3) as to Counts III and V, that plaintiffs could not obtain injunctive relief because such relief was duplicative of injunctive relief that the government had already obtained. (*Id*.)

During this time, on October 23, 2006, plaintiffs also filed a motion for summary judgment in *Hess*. (*Hess* D.I. 256.) Plaintiffs argued that the Third Circuit's decision in the government litigation collaterally estopped Dentsply from challenging their Section 2 claim. (*Id.*)

On September 26, 2007, in a consolidated opinion and order, this Court denied plaintiffs' motion for summary judgment in *Hess* and granted defendants' motion to dismiss the Section 2 claims in the *Jersey III* complaint. (*Jersey* D.I. 315.) In *Hess*, the Court agreed with Dentsply that the Third Circuit's February 24, 2005 opinion in the government litigation did not collaterally estop Dentsply from contesting whether plaintiffs suffered antitrust injury because the issue of whether the Hess plaintiffs suffered antitrust injury was not litigated in the government action. The Court also held that plaintiffs could not obtain injunctive relief because such relief was duplicative of injunctive relief that the government had already obtained.

As to *Jersey*, the Court held that the plaintiffs could not obtain damages for their Section 2 exclusive dealing claims because (1) the Third Circuit's decision in *Hess* precluded plaintiffs from recovering damages from the dealers absent allegations that Dentsply and its dealers fell within *Illinois Brick*'s co-conspirator exception, and (2) the *Jersey III* complaint did not plausibly allege that the dealers could have shared Dentsply's intent to monopolize the artificial tooth market. The Court also held that the plaintiffs could not obtain injunctive relief against Dentsply because such relief was duplicative of the injunction entered in the government action.

On October 26, 2007, the parties stipulated to the dismissal of the remaining Section 2 claims in *Hess* that were not the subject of plaintiffs' summary judgment motion. (*Hess* D.I. 273.) That same day, plaintiffs filed a motion for immediate appellate review of the dismissed exclusive dealing claims under Fed. R. Civ. P. 54(b) or 28 U.S.C. § 1292(b). (*Jersey* D.I. 319.)

The plaintiffs request that this Court make its decision that dismissed Counts II-V in the *Jersey III* complaint immediately appealable to the Third Circuit, notwithstanding the pendency of their Section 1 price-fixing claims. (*Id.*) Defendants hereby submit this brief in opposition to plaintiffs' motion.

SUMMARY OF ARGUMENT

This Court should reject plaintiffs' attempt to circumvent the Third Circuit's established policy against piecemeal appeals because they fail to carry their burden to show that immediate appellate review is proper under Rule 54(b) or § 1292(b).

First, this Court should deny plaintiffs' motion for immediate appellate review of its dismissal of their Section 2 exclusive dealing claims because plaintiffs fail to show that there is "no just reason to delay" appellate review of those claims. As detailed below, defendants intend to seek this Court's permission to file a motion to dismiss plaintiffs' sole remaining claim (Count I) for a conspiracy to restrain trade through a vertical price-fixing conspiracy in violation of Section 1 based on two recent Supreme Court decisions, *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007), and *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S.Ct. 2705 (2007), which altered the pleading standards that govern their Section 1 claims. Because there are good reasons to believe that defendants will prevail on that motion, appellate review of this Court's dismissal of plaintiffs' Section 2 claims in the *Jersey* litigation is premature. Appellate review at this time will place the Third Circuit in the potentially wasteful position of needing to review two separate dismissals of the same complaint. That is particularly unnecessary where, as here, plaintiffs have only the most minimal chance of success in their Section 2 appeal. For these reasons, plaintiffs cannot carry their burden to show that this case falls within the narrow circumstances in which piecemeal appellate review is proper under Rule 54(b).

Second, this Court should also deny plaintiffs' motion for certification of four separate questions that relate to their exclusive dealing claims because, as to each question, plaintiffs fail to carry their burden to show that there is a "substantial ground for difference of opinion" as to a "controlling question of law." Indeed, plaintiffs fail to identify any legal authority (controlling or otherwise) that doubts the correctness of this Court's decision. That glaring omission leads to the inescapable conclusion that plaintiffs merely disagree with the Court's opinion, but lack any principled legal basis for doing so. This Court should therefore exercise the broad discretion that the law provides it on this issue to deny plaintiffs' motion.

If, however, this Court grants plaintiffs' motion for immediate appellate review on either ground, defendants agree with plaintiffs that a stay of discovery and all further proceedings is appropriate. For reasons detailed below, a stay of all proceedings under those circumstances would be most efficient for the parties as well as the Court.

ARGUMENT

I. PLAINTIFFS HAVE NOT DEMONSTRATED THAT THIS COURT SHOULD EXERCISE ITS DISCRETION TO GRANT PLAINTIFFS' MOTION FOR IMMEDIATE APPELLATE REVIEW OF THEIR EXCLUSIVE DEALING CLAIMS UNDER RULE 54(B)

A. To Prevail Under Rule 54(b), Plaintiffs Must Show That There Is "No Just Reason To Delay" Immediate Appellate Review

The federal courts have a long-standing policy disfavoring piecemeal litigation. *Sussex Drug Prods. v. Kanasco, Ltd.*, 920 F.2d 1150, 1153 (3d Cir. 1990). In certain rare circumstances, Fed. R. Civ. P. 54(b) permits a court to remediate "harsh effects" that may result from a delayed appeal if the court enters a final judgment as to fewer than all of the parties and determines "that there is no just reason for delay." Fed. R. Civ. P. 54(b). "[T]he burden is on

the party seeking final certification to convince the district court that the case is the 'infrequent harsh case' meriting a favorable exercise of discretion.'" *Hatzel & Buehler v. Rockland Utils., Inc.*, No. 88-391, 1993 U.S. Dist LEXIS 2473, at *11 (D. Del. Feb. 16, 1993) (quoting *Allis-Chalmers Corp. v. Philadelphia Electric Co.*, 521 F.2d 360, 365 (3d Cir. 1975)). As the Third Circuit has instructed, "a district court should be conservative in invoking Rule 54(b) to certify a judgment as final because if an aggrieved party appeals following the certification, the district court effectively will be electing to control the docket of a court of appeals." *Gerardi v. Pelullo*, 16 F.3d 1363, 1372 (3d Cir. 1994).

Here, although defendants agree that the dismissal of the exclusive dealings claims constitutes a "final judgment," plaintiffs nevertheless fail to carry their burden because they fail to show that, weighing the equities, there is no "just reason for delay." *See Hatzel*, 1993 U.S. Dist. LEXIS 2473, at *15 n.4 (denying Rule 54(b) certification where the parties did not dispute finality, but where plaintiff failed to sustain its burden to show that there was no just reason to delay the appeal).

B. Plaintiffs Fail To Carry Their Burden To Show That There Are No Just Reasons To Delay Appeal Of The Exclusive Dealing Claims

To demonstrate that there is no "just reason for delay" in the Third Circuit, a party who seeks immediate appellate review under Rule 54(b) must show that five factors, on balance, weigh in its favor: (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in a set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay,

economic and solvency considerations, shortening the time of trial, frivolity of competing claims, and expense. *Allis-Chalmers Corp.*, 521 F.2d at 364. For reasons explained below, while the fourth factor is irrelevant here, the second, third, and fifth factors weigh decisively against plaintiffs.[1]

1. The Supreme Court's *Twombly* And *Leegin* Opinions Mandate Dismissal Of Plaintiffs' Sole Remaining Claim For Vertical Price-Fixing

Plaintiffs argue that immediate appellate review under Rule 54(b) is necessary because, if this Court fails to grant their motion, the Third Circuit will be unable to review the dismissal of their exclusive dealing claims until this Court completes discovery, summary judgment, and possibly a trial on plaintiffs' Section 1 claim. That suggestion is misleading. As plaintiffs are well aware, defendants intend to file a motion to dismiss plaintiffs' remaining Section 1 vertical price-fixing claim on the grounds that plaintiffs fail to state a resale price maintenance claim. If defendants prevail on that motion (and there are strong reasons to believe that they will), plaintiffs' entire case will be ripe for appeal.

Plaintiffs argue that this Court cannot rule on defendants' forthcoming motion to dismiss the Section 1 claim because it is "the law of the case that Plaintiffs have stated a claim herein for retail price fixing" sufficient to pass must under Rule 12(b)(6). (Pls.' Br. In Supp. Of Mot. For Certification Under Rule 54(b) or § 1292(b) ("Pls.' Br.") at 3, 4 (noting that defendants stated at a September 18, 2006 hearing that plaintiffs' vertical price-fixing claim cannot be addressed by a Rule 12(b)(6) motion).) However, it is well-settled that the "law of the case" doctrine is

[1] Both parties agree that the first and fourth *Allis-Chalmers* factors are not applicable here because (1) as to prong one, the exclusive dealing claims are factually distinct from the vertical price-fixing claims, and (2) as to prong four, defendants have not brought a counterclaim that could result in a set-off. Defendants therefore do not discuss these factors in any detail.

discretionary and does not apply where there has been an intervening change in the controlling law. *See, e.g., Pension Benefit Guar. Corp. v. White Consol. Indus.*, 215 F.3d 407, 412 (3d Cir. 2000) (acknowledging that if the Supreme Court issues a decision that would constitute a "supervening change in the law," the law of the case doctrine does not apply); *Purcell v. Pa. Dep't of Corr.*, No. 00-181J, 2006 U.S. Dist. LEXIS 42476, at *25-26 (W.D. Pa. Mar. 31, 2006) (refusing to apply the law of the case doctrine where a recent Supreme Court case changed the law governing the case). Such a change in the law is exactly what happened here.

At the conclusion of its last term, the Supreme Court decided a pair of cases, *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007), and *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S.Ct. 2705 (2007), which together dramatically altered the requirements for pleading a vertical resale price maintenance claim. These cases provide new grounds for moving to dismiss plaintiffs' remaining Section 1 claim. In *Twombly*, the Supreme Court established the pleading standards for allegations of an antitrust conspiracy brought in federal court. The Court held that, to state a claim under Section 1 of the Sherman Act, a plaintiff must plead a "plausible conspiracy" and that the determination of whether a plaintiff alleges a "plausible conspiracy" turns on whether a plaintiff pleads the minimum facts necessary to satisfy Rule 8's requirement that it "is entitled to relief." 127 S.Ct. at 1964. The Court suggested that, to show entitlement to relief, a plaintiff must plead facts that, if proven, would allow it to survive a motion for summary judgment and thus obtain relief. Among other things, *Twombly* therefore ties a plaintiff's pleading burden in a Section 1 case to substantive antitrust law.

In *Leegin*, the Court altered the substantive law that controls plaintiffs' Section 1 vertical price-fixing claim. *Leegin* rejected the nearly century-old *Dr. Miles* rule that vertical resale price maintenance agreements were *per se* illegal and held that such agreements are subject to the rule

of reason. 127 S.Ct. at 2725 ("The Court's decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), is now overruled. Vertical price restraints are to be judged according to the rule of reason."). Thus, after *Leegin*, to survive a defense motion for summary judgment where the plaintiff alleges that the defendants entered into a minimum resale price maintenance agreement, the plaintiff must prove that the agreements adversely affected interbrand competition in a properly-defined market.

Relevant here, *Leegin* coupled with *Twombly* means that, to allege that defendants entered into an illegal resale price maintenance agreement, a plaintiff must allege that the agreement was unreasonable because it had cognizable and plausible adverse effects on interbrand competition that outweigh the pro-competitive benefits of such an agreement. *See Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 2007 U.S. Dist LEXIS 53862, *4-5, *19 (S.D. Ohio July 25, 2007) (granting defendants' (insurance providers) motion to reconsider a prior holding in light of *Leegin* and dismissing plaintiffs' (insurance agents) allegations that defendants fixed insurance prices because plaintiffs "failed to plead . . . elements under the rule of reason analysis" because they did "not plead a scheme which produced anticompetitive effects or identify the relevant market"). Plaintiffs' amended complaint does not remotely meet that standard because it is devoid of any allegations that the defendants' alleged agreements had anticompetitive effects at the interbrand market level. Defendants will therefore argue that it must be dismissed. *See, e.g., E & L Consulting, Ltd. v. Doman Industries Ltd.*, 472 F.3d 23, 28-30 (2d Cir. 2006) (affirming grant of motion to dismiss vertical conspiracy claim "because [plaintiffs] have not alleged an injury to competition"); *Crane & Shovel Sales Corp. v. Bucyrus-Erie Co.*, 854 F.2d 802, 806 (6th Cir. 1988) (holding that, to

state a violation of the rule of reason, a plaintiff must "allege[] anticompetitive effect at the interbrand level").[2]

2. Under The *Allis-Chalmers* Factors, Defendants' Motion To Dismiss Plaintiffs' Remaining Vertical Price-Fixing Claim Provides A "Just Reason To Delay" Review Of The Exclusive Dealing Claims

In light of the fact that defendants will move to dismiss plaintiffs' remaining Section 1 claim, plaintiffs cannot shoulder their burden to show that the Third Circuit's *Allis-Chalmers* factors weigh in their favor.

First, if this Court permits plaintiffs to appeal the dismissal of the exclusive dealing claims, it will substantially increase the likelihood that the Third Circuit will consider appeals from the same complaint twice (once on the dismissal of the Section 2 exclusive dealing claims and once on dismissal of the Section 1 vertical price-fixing claim). Plaintiffs thus ask this Court to require two separate Third Circuit panels to familiarize themselves with this case's complex procedural history and their allegations of a conspiracy between Dentsply and its dealers. As this Court held in *Hatzel*, the possibility of such repetition weighs heavily against certifying a decision under Rule 54(b). *Hatzel*, 1993 U.S. Dist. LEXIS 2473, at *15 n.4, *18-19 (refusing to grant plaintiff's Rule 54(b) motion where granting it would require the Third Circuit to review appeals from the same case twice); *see also Zavala v. Wal-Mart Stores, Inc.*, No. 03-5309, 2007 U.S. Dist. LEXIS 27882, at *13 (D.N.J. April 14, 2007) (denying a Rule 54(b) motion and noting that "[a] single appeal also avoids judicial waste in that two separate Third Circuit panels will not

[2] *Twombly* and *Leegin* provide other bases to dismiss plaintiffs' remaining Section 1 claim. Defendants here do not purport to list every reason why the intervening change in law requires dismissal, but instead offer the Court one example of how the Supreme Court's recent decisions require dismissal of plaintiffs' Section 1 claim.

have to familiarize themselves with the extensive record in this case").[3] Second, as in *Zavala*, this Court's previous decision on plaintiffs' claims "was not a 'close call'" and "[p]laintiffs' chances of success on appeal are minimal." *Zavala*, 2007 U.S. Dist. LEXIS 27882, at *11-13. Thus, "[t]he foremost reason for delay is that the costs, in time and judicial economy, of appeal greatly outweigh the prospect of a successful appeal." *Id.* at *11. Third, because this Court may dismiss plaintiffs' Section 1 claim, which will make the dismissal of the *Jersey III* complaint final, this Court's decision may moot the need for Third Circuit briefing and review of whether this Court's decision to permit expedited review under 54(b) was appropriate.

Plaintiffs make several arguments that the equities nevertheless weigh in their favor, but none are persuasive. First, they argue that this Court should grant their motion to avoid the possibility of multiple trials. (Pls.' Br. at 16.) As this Court has already held, however, the possibility of multiple trials standing alone is not a sufficient basis to grant plaintiffs' motion. *Hatzel*, 1993 U.S. Dist. LEXIS 2473, at *15-16 n.4. If it was sufficient, parties could prevail on a Rule 54(b) motion anytime they lost a motion to dismiss on less than all of their claims. Rule 54(b) relief is not so broad. *See Ebrahimi v. City of Huntsville Bd. of Educ.*, 114 F.3d 162, 167 (11th Cir. 1997) (observing that sound judicial administration weighs against "piecemeal appeals that require two (or more) three-judge panels to familiarize themselves with a given case, instead of having the trial judge, who sits alone and is intimately familiar with the whole case, revisit a

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[3] Plaintiffs wrongly suggest that the fact of the *Hess* appeal necessarily weighs in favor of their Rule 54(b) motion because the Third Circuit will already have their related case under consideration. (*See* Pls.' Br. at 14.) The principle issue in the *Hess* appeal, however, is whether this Court erred when it held that the Third Circuit's decision in *United States v. Dentsply* did not collaterally estop defendants from contesting whether plaintiffs suffered antitrust injury. That is a narrow and discrete issue. In contrast, because the Third Circuit will, at some point likely grapple with the vertical price-fixing claim, it will need to address the *Jersey* case again. Rather than requiring the Third Circuit to revisit the *Jersey* case twice, this Court should keep the plaintiffs' claims together.

portion of the case if he or she has erred in part and that portion is overturned following the adjudication of the whole case") (quoting *Harriscom Svenska AB v. Harris Corp.*, 947 F.2d 627, 630 (2d Cir. 1991)).[4]

Second, plaintiffs cite two cases to support their sweeping assertion that "Rule 54(b) certification is especially appropriate in the context of a class action." (Pls.' Br. at 18.) Plaintiffs' cases do not support their position. In *Weiss v. York Hospital*, 745 F.2d 786, 802 (3d Cir. 1984), for example, the court conducted a trial in a complex antitrust matter and resolved all issues of liability. The court then certified its decision on liability as final and proper for appellate review under Rule 54(b). The fact that the Third Circuit reviewed all of the liability claims together in *Weiss* militates in favor of not separating plaintiffs' claims here. Plaintiffs' citation to the concurring opinion *In re Diet Drugs*, 401 F.3d 143 (3d Cir. 2005), is likewise not persuasive because the majority in that case held that an order which awarded attorneys' fees was not final for the purposes of Rule 54(b) or § 1292(b). *Id.* at 157-58.

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[4] The Third Circuit's decision in *Carter v. City of Philadelphia*, 181 F.3d 339, 346 n.20 (3d Cir. 1999), is not to the contrary. Although in that case the Third Circuit did cite the need to avoid multiple trials, (*see* Pls.' Br. at 11, 16), the circumstances in that case were vastly different from the circumstances here. The issue in *Carter* was whether it was proper to certify the court's order which found that some of the defendants in a multi-defendant suit were immune from liability. The court concluded that the equities weighed in favor of one trial that included all of the defendants because (1) the pending trial against the same defendants would raise identical questions of liability which created a substantial risk of duplicative trials, and (2) there was no real risk of duplicative appeals. As plaintiffs themselves emphasize, (Pls.' Br. at 11-12), the exclusive dealing and vertical price-fixing allegations are substantially different. Plaintiffs therefore cannot show that there is a risk of duplicative trials that turn on the same legal questions. Moreover, in contrast to *Carter*, there is a risk here of duplicative appeals because plaintiffs may seek to appeal two separate decisions that dismiss the same complaint. The determinative factors that were present in *Carter*, therefore, are not present here.

Finally, plaintiffs argue that a decision to permit immediate appellate review will expedite settlement. Plaintiffs do not cite any authority that suggests that courts should consider the prospect of settlement in weighing the equities under Rule 54(b). In any event, to the extent plaintiffs seek finality in order to leverage settlement (notwithstanding their failure at this time to state a claim), they will obtain finality on all of their claims once this Court addresses defendants' motion to dismiss the Section 1 claim. At that point plaintiffs will know, once and for all, whether their third complaint states a claim for any relief under Rule 8.

In sum, three of the four *Allis-Chalmers* factors that are relevant here weigh against granting plaintiffs' motion under Rule 54(b). Thus, because plaintiffs fail to carry their burden, defendants respectfully request that this Court deny plaintiffs' motion for expedited review under Rule 54(b).

II. PLAINTIFFS ARE NOT ENTITLED TO INTERLOCUTORY REVIEW BECAUSE THEY HAVE NOT SATISFIED THEIR HEAVY BURDEN UNDER § 1292(B)

Plaintiffs similarly fail to show that certification of their four proposed issues is appropriate under 28 U.S.C. § 1292(b). To obtain certification under § 1292(b), this Court must make three independent findings as to each proposed issue: (1) that the order appealed from "involves a controlling question of law," (2) that the order is one "as to which there is substantial ground for difference of opinion," and (3) that "an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Katz v. Carte Blanche Corp*., 496 F.2d 747, 752 (3d Cir. 1974) (citing 28 U.S.C. § 1292(b)). This Court has held that the party who seeks certification bears the "burden of showing that exceptional circumstances" warrant certification. *Hatzel*, 1993 U.S. Dist. LEXIS 2473, at *26 (D. Del. Feb. 16, 1993). Plaintiffs' motion for certification fails on the first and second grounds.

A. The Issues That Plaintiffs Present For Certification Do Not Involve "Controlling Questions Of Law" As To Which There Is A "Substantial Ground For Difference Of Opinion"

For a "substantial ground for difference of opinion" to exist as to a "controlling question of law" under § 1292(b), plaintiffs must establish that there exists "genuine doubt or conflicting precedent as to the correct legal standard," *Behrend v. Comcast Corp.*, No. 03-6604, 2007 U.S. Dist. LEXIS 67271, at *2-5 (E.D. Pa. Sept. 11, 2007), and not mere disagreement with how the district court applied the acknowledged law to the facts of a particular case. *Hatzel*, 1993 U.S. Dist. LEXIS 2473, at *27-28 (denying § 1292(b) certification where plaintiff's purported controlling questions of law merely concerned how principles of New York law should be applied to facts of case). Moreover, though plaintiffs incorrectly suggest otherwise, (Pls.' Br. at 23-24), "[t]he mere fact that the appeal would present a question of first impression" is generally "not, of itself, sufficient to show that the question is one on which there is a substantial ground for difference of opinion." *Max Daetwyler Corp. v. Meyer*, 575 F. Supp. 280, 283 (E.D. Pa. 1983)) ((citing 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure*, § 3930 n. 6 (1977 & Supp. 1983)).[5] Rather, "it is the duty of the district judge . . . to analyze the strength of the arguments in opposition to the challenged ruling when deciding whether the issue for appeal is truly one on which there is a *substantial* ground for dispute." *Id.* at 283 (emphasis in original).[6]

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[5] *See also Neuner v. C.G. Realty Capital Ventures-I.L.P.*, 157 B.R. 766, 779 n.6 (D.N.J. 1993) (same); *Kowslowe v. Dime Mortgage of New Jersey*, No. 97-960, 1999 U.S. Dist. LEXIS 21212, *8 (D.N.J. Jan. 5, 1999) (same); *Flor v. BOT Fin. Corp.*, 79 F.3d 281 (2d Cir. 1996) (same); *see also cf. Singh v. Daimler-Benz, AG*, 800 F. Supp. 260, 263 (E.D. Pa. 1992)) (holding that where there was only one other case on point, and that case indicated a different result, those circumstances did not imply that there was substantial ground for a difference of opinion).

[6] Plaintiffs cite two district court cases for the proposition that, even if the court is confident in its decision, it may still find the requisite difference of opinion for certification.

Here, plaintiffs do not cite any legal authority that suggests this Court applied the wrong standards when it dismissed their complaint. Instead, plaintiffs argue that this Court's application of the controlling legal standards to their case creates a "substantial question." That is a red herring. The test for § 1292(b) certification is not whether there is a "substantial question," (Pls.' Br. at 27, 31, 33, 37 (arguing that plaintiffs identify a "substantial question")), but whether there is a "substantial ground for difference of opinion." As discussed below, with respect to each of the questions proposed for certification, plaintiffs do not carry their burden to show that there exists a "substantial ground for difference of opinion" over a "controlling question of law."

1. There Is Not A Substantial Ground For Difference Of Opinion Over Whether Plaintiffs May Recover Damages From Dealers Who Sold To Them Directly

Plaintiffs argue that this Court erred by dismissing their exclusive dealings claims against the dealers because there is a "substantial question" as to whether the Supreme Court's decision in *Illinois Brick*, as a matter of law, precludes their claims against dealers for damages. (Pls.' Br. at 26-27.) Plaintiffs do not cite any authority (from the Third Circuit or otherwise) to support their position, but instead quibble with this Court's application of the law of the case. Plaintiffs' unhappiness with this Court's application of a legal standard at the motion to dismiss phase does

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(Pls.' Br. at 23). In *Zenith Radio Corp. v. Matsushita Electric Indus. Co.*, 494 F. Supp. 1190 (E.D. Pa. 1980), however, there were few prior decisions construing the 1916 Antidumping Act, the issues presented were novel, and the court was "construing a statute which [was] not clear on its face." *Id*. at 1243. Plaintiffs here do not identify a similarly novel question of first impression. In any event, as discussed *supra*, the mere fact that a decision raises a question of first impression is generally not a sufficient basis for certification under § 1292(b). In *Public Interest Research Group of N.J., Inc. v. Hercules, Inc*., 830 F. Supp. 1549, 1556-57 (D.N.J. 1993), the district court granted the plaintiffs' certification motion because it acknowledged that, in conflict with several other decisions, it was the first to recognize that it lacked jurisdiction to hear certain of plaintiffs' claims under the Clean Water Act. Plaintiffs fail to identify any such similar conflict here.

not supply a basis for § 1292(b) certification. *See Hatzel*, 1993 U.S. Dist. LEXIS 2473, at *27-28; *Behrend*, 2007 U.S. Dist. LEXIS 67271, at *4-6 (noting the application of Court's recent decision in *Twombly* was not "exceptional" enough "to overcome the policy against piecemeal appeals" and that such grounds only exist "when there is genuine doubt or conflicting precedent as to the correct legal standard").

In any event, this Court correctly applied the controlling law. In *Howard Hess Dental Labs., Inc. v. Dentsply Int'l Inc.* 424 F.3d 363 (3d Cir. 2005), plaintiffs argued (as they do again now) that they could recover damages under *Illinois Brick*'s co-conspirator exception. Under that exception, plaintiffs may recover damages as a result of purchases from an intermediary (here, the dealers) for a manufacturer's overcharges, provided that the intermediaries participated in a conspiracy with the manufacturer. After an exhaustive analysis of *Illinois Brick*, the Third Circuit held that plaintiffs could not recover damages under such a theory. Plaintiffs retort that, because this Court adopted the Third Circuit's rationale, it did not confront the preliminary question of whether *Illinois Brick* provides them with standing to sue the dealers for monetary damages. (Pls.' Br. at 26-27.) That argument, however, misses the point. The Third Circuit has already held that plaintiffs can only recover damages under an exclusive dealing theory if the dealers fall within *Illinois Brick*'s co-conspirator exception. This Court's application of controlling precedent to dismiss plaintiffs' claims does not warrant interlocutory review.

2. There Is No Substantial Ground For Difference Of Opinion Over Whether Plaintiffs' Amended Complaint Alleged That The Dealers Had A Specific Intent To Conspire To Monopolize

Plaintiffs' assertion that there is a "substantial question" as to whether their complaint pleads that Dentsply and its dealers had a specific intent to enter a conspiracy, (Pls.' Br. at 27), suffers from the same fatal flaws.

Plaintiffs once again do not identify any actual disagreement, substantial or otherwise, among the courts as to what a plaintiff must plead to allege a specific intent to monopolize. Instead, they attempt to gin up a conflict between *ID Security Systems Canada, Inc. v. Checkpoint Sys., Inc.*, 249 F. Supp. 2d 622, 660 (E.D. Pa. 2003), and *In re Microsoft Antitrust Litig.*, 127, F. Supp. 2d 728, 731 (D. Md. 2001), with their assertion that *Microsoft* imposes a heightened pleading standard. (Pls.' Br. at 29 (noting that the Court added "an additional, more demanding, pleading requirement, based on" *Microsoft*).) That is misleading. *ID Security Systems* had nothing to do with pleading standards. Instead, the issue in that case was whether, after trial, there was sufficient evidence to convict the defendants for conspiracy to monopolize. 249 F. Supp.2d at 657. The court held that the evidence was insufficient because the plaintiff failed to introduce evidence that demonstrated the defendants acted independently or legitimately. *Id.* at 661.

The *Microsoft* decision, which also went in the defendants' favor, did not reach a different conclusion. Instead, in *Microsoft*, the court merely required that the plaintiff plead facts, and not simply generalized allegations, to support their allegations that defendants shared a specific intent to monopolize. The fact that this Court cited *Microsoft* for the rule that a plaintiff must plead facts to support their allegation that the dealers had a specific intent to monopolize is not evidence that this Court imposed a heightened pleading standard. Instead, it is evidence that this Court held plaintiffs to their burden to plead some facts in support of their conspiracy theory to state a claim.[7] (D.I. 315 (September 26, 2007 Order) at 30 ("The amended complaint does not

[7] Nor does *Microsoft* depart from the Third Circuit's decision in *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171 (3d Cir. 1992). (*See* Pls.' Br. at 30.) The issue in *Fineman* was whether, at trial, plaintiff adduced enough evidence to prove an antitrust conspiracy claim under Section 1. That case did not touch on, and the court had no reason to address, the standard for

appear to contain, and indeed, plaintiffs do not point out any facts that could supplement their general assertion of intent.").) *See generally Twombly*, 127 S. Ct. 1955 (requiring plaintiff to pleading a "plausible" conspiracy). Again, plaintiffs' unhappiness with the Court's application of a legal standard does not supply a basis for § 1292(b) certification.

3. Plaintiffs Do Not Identify Any Disagreement Over What A Plaintiff Must Plead To State A Conspiracy Claim Against Multiple Defendants Under The Sherman Act

Plaintiffs similarly cite no legal authority for their novel contention that, to state a conspiracy claim against several defendants, they need only allege that two of the defendants conspired. (Pls.' Br. at 31-32.) Instead, they cite the Third Circuit's decision in *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 212-213 (3d Cir. 1992), for the unremarkable proposition that, to show a conspiracy between one manufacturer and one dealer, a plaintiff need only allege facts that suggested those two parties entered into an agreement. *Fineman* does not control the question of law at issue here because plaintiffs allege that Dentsply and several of its dealers entered into a conspiracy. Plaintiffs do not cite any cases to refute this Court's holding that, to state such a claim, plaintiffs must allege facts that demonstrate that the defendants all entered the same conspiracy. Accordingly, plaintiffs fail to identify a basis for interlocutory appeal on this question.

4. Plaintiffs Do Not Show That There Are Substantial Grounds For Difference Of Opinion Over Whether The Case Law Entitles Private Plaintiffs To Litigate A Sherman Act Claim For The Purpose Of Securing A Duplicative Injunction

Plaintiffs also fail to show that there is a substantial ground for difference of opinion as to whether their request for duplicative injunctive relief is permissible. Plaintiffs do not cite any

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pleading a Section 2 conspiracy to monopolize claim. *Fineman* is not on point and does not supply the "substantial grounds for disagreement" needed to obtain interlocutory review.

Third Circuit authority to support their position. Instead, they simply recycle their assertion that this Court should follow the decisions in *New York v. Microsoft Corp.*, 209 F. Supp. 2d 132, 154 (D.D.C. 2002), and *United States v. Borden Co.*, 347 U.S. 514, 517-18, 520 (1954) (emphasis added). For reasons defendants already noted in their opposition to plaintiff's summary judgment motion in *Hess*, (*Hess* D.I. 262), those decisions are not on point. In both instances, the issue was whether the United States (*Borden*) or a group of states (*Microsoft*) could obtain injunctive relief when it filed suit acting in a parens patriae capacity and therefore litigating in the public interest. Those cases did not turn on, and the courts had no occasion to consider, whether a private plaintiff is entitled to similar relief. Because *Microsoft* and *Borden* do not create a "substantial ground for difference of opinion," plaintiffs' citation to those decisions does not supply a basis for interlocutory review.

B. This Circuit's Strong Policy Against Allowing Piecemeal Appeals Defeats Plaintiffs' Request For Interlocutory Appeal

Significantly, even if plaintiffs did carry their burden to establish all three criteria under § 1292(b) as to any or all of their four proposed questions, this Court nonetheless must exercise its discretion to certify their questions, "mindful of the strong policy against piecemeal appeals." *United States v. Exide Corp.*, 2002 U.S. Dist. LEXIS 8790, at *7 (E.D. Pa. May 15, 2002).

The Third Circuit and its district courts repeatedly have held that certification under § 1292(b) is the "exception" to be "sparingly" applied. *Milbert v. Bison Labs., Inc.*, 260 F.2d 431, 433 (3d Cir. 1958) ("Congress intended that section 1292(b) should be sparingly applied. It is to be used only in exceptional cases . . . and is not intended to open the floodgates to a vast number of appeals from interlocutory orders in ordinary litigation"). By avoiding piecemeal appeals, the district court can ensure that the Third Circuit will "have the entire controversy presented to it at

one time, on a full record from which it can make a final determination of the issues in the case." *Piazza v. Major League Baseball*, 836 F. Supp. 269, 272-73 (E.D. Pa. 1993) (denying defendant's motion for certification).

This Court already has decided that denial of a § 1292(b) certification motion is appropriate if the "[u]ltimate termination" of the litigation "will be advanced most by proceeding to trial without delay due to appeals or otherwise," and, where the parties, including plaintiff, can then file their appeals after trial of this case "in a single, consolidated appeal to the Third Circuit." *Hatzel*, 1993 U.S. Dist. LEXIS 2473, at *29; *see also Roberson v. Detective Patrick Pelosi*, No. 99-3574, 2001 U.S. Dist. LEXIS 6647, at *13 (E.D. Pa. May 21, 2001).[8] By denying plaintiffs' motion, this Court can ensure that the Third Circuit will have the entire controversy over the *Jersey III* complaint presented to it at one time. Accordingly, even if this Court finds that plaintiffs have met their burden on all or some of the issues proposed for certification, this Court should deny their motion.

III. IN THE ALTERNATIVE, IF THIS COURT GRANTS PLAINTIFFS' MOTION FOR IMMEDIATE APPELLATE REVIEW UNDER RULE 54(B) OR § 1292(B), DEFENDANTS AGREE THAT A STAY OF ALL PROCEEDINGS IS APPROPRIATE

Plaintiffs contend that, if this Court grants plaintiffs' motion for an immediate appeal of the dismissed claims, it should stay "discovery and other proceedings in this Court." (Pls.' Br. at

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[8] In *Roberson*, the district court denied plaintiff's motion for certification of the court's order granting summary judgment to defendants. The court held that immediate appeal would not eliminate the need for trial unless the Third Circuit reversed its denial of summary judgment. *Roberson v. Detective Patrick Pelosi*, No. 99-3574, 2001 U.S. Dist. LEXIS 6647, at *17 (E.D. Pa. May 21, 2001). The court acknowledged the possibility of duplicative trials should the Third Circuit reverse summary judgment as to certain other defendants. *Id.* But even under those circumstances, the court held, "on balance it is better to avoid piecemeal review and have a full review in the normal manner when all issues have been resolved." *Id*.

1.) Although defendants do not believe an immediate appeal of the dismissed claims is appropriate under Rule 54(b) or § 1292(b), if this Court nevertheless grants plaintiffs' request on either ground, defendants agree that this Court should stay discovery and all other proceedings, including the proceedings on plaintiffs' resale price maintenance claim.[9]

Principles of judicial efficiency weigh strongly in favor of a stay of all further proceedings. If this Court grants plaintiffs' motion, but does not stay proceedings on the resale price maintenance claim, it will force the parties to simultaneously litigate this case in both this Court and the Third Circuit. Regardless of the outcome in the Third Circuit, such litigation in this Court would be wasteful. If the Third Circuit affirms this Court's dismissal of the exclusive dealing claims, defendants believe that plaintiffs will drop their remaining resale price maintenance claim. In the alternative, if the Third Circuit reverses this Court's dismissal of the exclusive dealing claims, the *Jersey* case will nevertheless need to go forward on all of the claims. In that event, discovery on both the Section 1 and Section 2 claims will be inextricably intertwined. It would therefore be wasteful for this Court to permit further proceedings on the resale price maintenance claim during the appeal of the dismissed claims.

At the very least, defendants respectfully urge that, if this Court grants plaintiffs' motion, a stay of discovery is appropriate. As *Twombly* makes clear, because "proceeding to . . . discovery can be expensive" in antitrust cases, a plaintiff should not be able to use discovery to harass a defendant where it is unclear whether the plaintiff states an antitrust claim. 127 S.Ct. at 1967. For this reason, a discovery stay is appropriate in an antitrust case when, as here, there are

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[9] This Court has broad discretion under Federal Rule of Civil Procedure 26(c) to issue a protective order to stay discovery for "good cause shown" in order to "protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . ." Fed. R. Civ. P. 26(c).

reasons to believe that the plaintiffs' complaint may not survive a motion to dismiss. *See Weisman v. Mediq, Inc.*, No. 95-1831, 1995 U.S. Dist. LEXIS 5900, at *5-6 (E.D. Pa. May 4, 1995) (noting that a discovery stay is appropriate where a dispositive motion may result in dismissal of the entire case).[10] Thus, even if this Court decides that a stay of all proceedings is not appropriate, defendants respectfully request that, for all of the reasons noted above, this Court stay discovery.

CONCLUSION

Plaintiffs and their successors have litigated various iterations of this case for nearly nine years without a single victory on the merits. They are desperate to make this case ripe for settlement so that they can recoup some portion of the costs that they have been unable to recover. Rule 54(b) and § 1292(b), however, are not vehicles to speed up settlement. For the foregoing reasons, defendants respectfully request that this Court deny plaintiffs' motion for an immediate appeal of the dismissed claims under Rule 54(b) or § 1292(b) and allow briefing on whether, in light of changes in the controlling precedent, plaintiffs state a claim for resale price maintenance under Section 1. In the alternative, if this Court determines that immediate appellate review is appropriate on either ground, defendants respectfully request that this Court grant plaintiffs' request for a stay of discovery and further proceedings, including the proceedings on plaintiffs' resale price maintenance claim.

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[10] *See also Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)) ("The costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint.") (cited favorably in *Twombly*); *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528, n. 17 (1983) (noting in the antitrust context that "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed").

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CERTIFICATE OF SERVICE

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