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' REPLY 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

Defendants concede that the part of the Order[1] that regards *Hess Dental Labs., et al. v. Dentsply Int'l, Inc.*, 99-255 (SLR), is ready for appeal. Therefore, certification of the other part of the Order—the part that dismissed Plaintiffs' exclusive dealing claims herein—will permit Plaintiffs to appeal both parts of the same Order at the same time, thereby saving the Third Circuit from having to review the same issues regarding Plaintiffs' request for an injunction on two different appeals.

Moreover, permitting Plaintiffs to appeal the dismissals in *Jersey Dental* without delay may facilitate resolution of the entire case without any further proceedings in this Court. The Supreme Court has held that the fact "that an appellate resolution of the certified claims would facilitate a settlement of the remainder of the claims" is an "important reason . . . for granting [Rule 54(b)] certification." *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8 n.2 (1980).

By contrast, Defendants have not demonstrated any just reason to delay Plaintiffs' appeal.

ARGUMENT

I. RULE 54(b) CERTIFICATION SHOULD BE GRANTED

As Plaintiffs explained in their Opening Brief, there are two requirements for Rule 54(b) certification: (1) "[a] district court must first determine that it is dealing with a final judgment," *Curtiss-Wright Corp.*, 446 U.S. at 7, and (2) "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.

A. Defendants Concede that the Dismissals in *Jersey Dental* are Final Judgments within Rule 54(b)

Defendants concede that, here, the first requirement is satisfied. *See* D.I. 323 (Defendants' brief) at 8 ("defendants agree that the dismissal of the exclusive dealing claims [in

[1] "Order" refers to both D.I. 315 (memorandum opinion) and D.I. 316 (order). Citations to page numbers in the Order are citations to pages numbers in D.I. 315.

Jersey Dental] constitutes a 'final judgment' [within Rule 54(b)]").

B. <u>There is *No* Just Reason for Delay</u>

1. <u>Certification of the *Jersey Dental* Dismissals will Permit their Appeal to be Joined with Appeal from the Same Order's Determination of the *Hess* Injunction, thus Averting the Need for Two Separate Appeals from the Same Order</u>

Defendants also concede that the *Hess* case is essentially ready for appeal. D.I. 323 at 13 n.3 (referring to "the fact of the *Hess* appeal," and "[t]he principle issue in the *Hess* appeal"); *see Hess* D.I. 273 (stipulated dismissal with prejudice of all claims in *Hess* not addressed by the Order). Because any appeal regarding Plaintiffs' request for an injunction in *Hess* must appeal from the same Order that dismissed Plaintiffs' exclusive dealing claims in *Jersey Dental*, a **denial** of Plaintiffs' request for certification of the *Jersey Dental* dismissals would require Plaintiffs to bring—and the Third Circuit to review—**two separate appeals from the same Order**. Thus, judicial efficiency is best served by **granting** Rule 54(b) certification of the *Jersey Dental* dismissals.

Defendants' only attempt to refute this iron logic is their unsupported suggestion—in a mere footnote—that the injunction issue in *Hess* is somehow unrelated to the issues in *Jersey Dental*. D.I. 323 at 13 n.3. Contrary to Defendants' suggestion, the part of the Order that addresses "injunctive relief sought against Dentsply" in ***Jersey Dental*** (Order at 26) is based **entirely** on the reasoning, citations and conclusions set forth in the preceding part of the Order that addresses the injunction issue in ***Hess***. *Id.* ("As discussed above[, *i.e.* at pages 16-18 of the Order, which regards *Hess*, the *Jersey Dental*] plaintiffs have not alleged any facts that could demonstrate a threat of future injury and/or irreparable harm"). Moreover, on Plaintiffs' appeal from the part of the Order regarding *Hess*, when the Third Circuit familiarizes itself with the question of whether collateral estoppel applies to Dentsply's liability to Plaintiffs for exclusive

dealing in violation of the Sherman Act, the Third Circuit will, by necessity, become familiar with the same alleged exclusive dealing that is at issue in *Jersey Dental*. Thus, Rule 54(b) certification will serve judicial efficiency by avoiding the necessity for two different panels of the Third Circuit to familiarize themselves with the Court's analysis regarding injunctive relief, and the nature of the alleged exclusive dealing. *See Weiss v. York Hosp*., 745 F.2d 786, 804 (3d Cir. 1984) (where certain Sherman Act claims had been dismissed and other Sherman Act claims arising from the same transaction were still pending against the same defendants, upholding Rule 54(b) certification of the dismissals because, among other reasons, "we have to review the propriety of the injunction which is based on the same factual circumstances").

2. Rule 54(b) Certification May Render Further Proceedings in this Court Unnecessary

Plaintiffs argued in their Opening Brief that, by clarifying the "damages horizon," Rule 54(b) certification would facilitate a settlement of the entire case, and thereby serve judicial efficiency. D.I. 319 at 19.

Defendants' response is that "Plaintiffs do not cite any authority that suggests that courts should consider the prospect of settlement . . . under Rule 54(b)." D.I. 323 at 15.

Contrary to Defendants' argument, in *Curtiss-Wright*, the Supreme Court was specifically analyzing Rule 54(b) certification when it stated that "a finding that an appellate resolution of certified claims would facilitate a settlement of the remainder of the claims" would be an "important reason . . . for granting certification." 446 U.S. at 8 n.2. Numerous circuit and district court decisions have followed this holding from *Curtiss-Wright*. *See*, *e.g.*, *New York v. AMRO Realty Corp.*, 936 F.2d 1420, 1426 (2d Cir. 1991) (upholding Rule 54(b) certification and quoting from *Curtiss-Wright* that, even if some factor weighs against certification, this may be "offset by a finding that an appellate resolution of the certified claims would facilitate a

settlement of the remainder of the claims"); *Alcan Aluminum Corp*., 689 F.2d 815, 817 (9th Cir. 1982) (same); *Neuberger Berman Real Estate Income Fund, Inc. v. Lola Brown Trust No. 1B*, 225 F.R.D. 171, 175 (D. Md. 2004) (granting 54(b) certification for same reason and quoting *Curtiss-Wright*).

3. Rule 54(b) Certification is Especially Appropriate for Dismissals of Antitrust Claims in Complex Class Actions

In their opening brief Plaintiffs demonstrated that "orders dismissing antitrust claims often are certified pursuant to Rule 54(b)." D.I. 319 at 17.

Defendants have not made any response to this demonstration, and, thus, essentially, concede the point.

Moreover, decisions by the Third Circuit show that Rule 54(b) certification is particularly appropriate where, as here, the antitrust claim is part of a complex class action. *See Bogosian v. Gulf Oil Corp*., 561 F.2d 434, 443 (3d Cir. 1977) (upholding Rule 54(b) certification of dismissal, where "district court was faced with a complex antitrust case," and a delayed appeal resulting in a reversal "might necessitate a second trial"); *Weis*s *v. York Hosp.*, 745 F.2d at 800, 804, 804 n.29 (upholding Rule 54(b) certification of dismissal of certain Sherman Act claims, while other Sherman Act claims were still pending against the same defendants);[2] *see In re Diet Drugs Prods. Liab. Litig.*, 401 F.3d 143, 162 (3d Cir. 2005) (concurrence) ("it remains useful to explore considerations that would allow for appellate review in complex class action litigation").

[2] Defendants try to distinguish *Weiss*, by asserting that "the Third Circuit reviewed all of the liability claims together." D.I. 323 at 14. Defendants are **wrong**. In *Weiss*, certain liability claims—namely, those that were decided against the plaintiffs—were certified pursuant to Rule 54(b), while other liability claims—namely, those that were decided against the defendants, were retained by the district court for further proceedings. *See* 745 F.2d at 802, 804.

4. Defendants' Request to Bring Yet Another Motion Pursuant to Rule 12(b)(6) is *Not* a Just Reason to Delay Plaintiffs' Appeal from the Dismissal of their Exclusive Dealing Claims

Defendants argue that Plaintiffs' appeal from the dismissal of their exclusive dealing claims should be delayed so that Defendants can first make another Rule 12(b)(6) motion—this time, moving against Plaintiffs' claim for price-fixing.

Defendants' argument is fatally flawed for each of three independent reasons: **First**, it is law of the case that Plaintiffs have adequately stated their claim for price fixing. **Second**, even if Defendants could properly make such a new Rule 12(b)(6) motion, there is no reason to believe such motion would succeed. And **third**, regardless of whether such a new Rule 12(b)(6) motion could be made or would succeed, under *Allis-Chalmers Corp. v. Philadelphia Elec. Co.*, 521 F.2d 360 (3d Cir. 1975), Defendants' desire to make such a motion does **not** provide any reason to deny Plaintiffs' request for Rule 54(b) certification of the dismissal of their exclusive dealing claims.

(a) Law of the Case Bars Defendants from Moving to Dismiss Plaintiffs' Price Fixing Claim Pursuant to Rule 12(b)(6)

As Plaintiffs explained in their Opening Brief (D.I. 319 at 3-4), the Third Circuit made it the law of the case that Plaintiffs have stated a claim herein for retail price fixing, by reversing this Court's prior decision that "the proposed amended complaint [alleging retail price fixing] would not survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6)." *See Howard Hess Dental Labs., Inc. v. Dentsply Int'l, Inc.*, 424 F.3d 363, 368 (3d Cir. 2005) ("Third Circuit's *Hess* decision") (reversing the retail price fixing portion of *Jersey Dental Labs. v. Dentsply, Int'l, Inc.*, 2002 WL 2007916, at *2 (D. Del. Aug. 27, 2002)).

Defendants do not dispute that it is law of the case that the Amended Complaint states a claim for retail price fixing. Defendants also do not dispute that they themselves stated, at the

hearing in this Court on September 18, 2006, that Plaintiffs' claim for retail price fixing "can't be addressed by a 12(b)(6) motion." D.I. 321 at A-9 (line 24) to A-10 (line 18).

Nevertheless, Defendants now argue that they can make a 12(b)(6) motion to dismiss Plaintiffs' retail price fixing claim, because, according to Defendants, "law of the case does not apply where there has been an intervening change in the controlling law," and because, according to Defendants, such intervening change in controlling law has resulted from the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955(2007), and *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

As an initial matter, Defendants do not cite **any** decision holding that an intervening change in controlling authority permits a defendant to move under Rule 12(b)(6) to challenge a claim that, as here, the Circuit Court previously held to be adequately stated. In *Pension Benefit Guaranty Corp. v. White Consolidated Industries, Inc.*, 215 F.3d 407 (3d Cir. 2000), the only decision by the Third Circuit cited by Defendants, the Third Circuit **rejected** a defendant's request to set aside the law of the case. *See id*. at 413 ("we **reject** [defendant's] contention that the Supreme Court's decision in *Landgraf* requires that we re-examine the law of the case") (emphasis added).[3]

Moreover, even in circumstances where the law of the case might be set aside because of an intervening change in controlling authority, "**mere doubt** [as to the correctness of the prior decision] is **not enough** to open the point for full reconsideration." *Fogel v. Chestnutt*, 668 F.2d

[3] In *Purcell v. Pa. Dep't of Corr.*, 2006 U.S. Dist. LEXIS 42476, at *25-26 (W.D. Pa. Mar. 31, 2006), also cited by Defendants, the district court **reinstated** a claim that the Third Circuit **had never addressed**. The only other decision cited by Defendants, *Total Benefits Planning Agency v. Anthem Blue Cross and Blue Shield*, 2007 U.S. Dist. LEXIS 53862 (S.D. Ohio July 25, 2007), was issued by a district court in another circuit. Moreover, *Total Benefits Planning Agency* involved nothing more than a motion for the district court to reconsider its own prior decision—which never had been reviewed by the circuit court. *Id.* at *2, 7.

100, 109 (2d Cir. 1981) (emphasis added).

> The law of the case will be disregarded only when the court has a "clear conviction of error" with respect to a point of law on which its previous decision was predicated.

Id. at 109, 112 (holding "[w]e have no such clear conviction," and, in fact, are "far from having 'a clear conviction of error'").

Here, the Third Circuit's *Hess* decision is fully consistent with each of the two Supreme Court cases that Defendants purport to rely on—*Twombly* and *Leegin*—and there is nothing in the Third Circuit's *Hess* decision that is clearly erroneous.

As Defendants essentially concede, the only holding in *Twombly* is that, in order to state a claim under Section 1 of the Sherman Act, "a plaintiff must plead a 'plausible conspiracy.'" D.I. 323 at 10; *see Twombly*, 127 S. Ct. at 1970 (reversing decision upholding Section 1 claim because "nothing contained in the complaint invests either the action or inaction alleged with a plausible suggestion of conspiracy").

Consistent with *Towmbly*, the Third Circuit's *Hess* decision, written by Judge Ambro, specifically found that the conspiracy alleged by Plaintiffs is plausible:

> [W]e can imagine how the exclusive-dealing conspiracy, *in combination with the RPM conspiracy*, could have been profitable to the dealers. As previously mentioned, it would presumably not have been profitable for the dealers to have joined a conspiracy in which they were overcharged (the exclusive dealing conspiracy). However, the dealers might have joined such a conspiracy if they were compensated in some fashion. Plaintiffs argue that Dentsply conspired to fix the prices that its dealers charge. This is effectively a *horizontal* price fixing conspiracy at the dealer level (which could presumably be profitable to the dealers) that is policed by Dentsply. Thus, the RPM conspiracy could be the mechanism by which Dentsply compensates its dealers in exchange for the dealers' agreement (1) not to deal with Dentsply's competitors and (2) thus to be overcharged by Dentsply.

424 F.3d at 378 n.12 (emphasis in original).

The Amended Complaint is drafted to expressly adopt Judge Ambro's theory. *See* ¶ 123 ("[t]his vertical retail price-fixing conspiracy, including Dentsply's participation in and policing of the conspiracy, is, among other things, a mechanism by which Dentsply compensates its dealers, including the Dealer Defendants, for their participation in the exclusive dealing/monopoly maintenance conspiracy alleged herein").

Thus, for this Court to dismiss on the basis of *Twombly*, it would have to, solely on the Amended Complaint, reject Judge Ambro's thoughtful analysis as implausible. *See also Baden v. Koch*, 799 F.2d 825, 829 (2d Cir. 1986) (holding recent decision by the Supreme Court "does not require us to depart from the law of the case" because "[o]ur reasoning was completely consistent with that of the Supreme Court").[4]

As Defendants also essentially concede, the only holding in *Leegin* is that *per se* illegality no longer applies to vertical resale price maintenance agreements. *See* D.I. 323 at 10; *Leegin*, 127 S. Ct. at 2710 ("[t]he question presented . . . is whether the Court should overrule the *per se* rule and allow resale price maintenance agreements to be judged by the rule of reason . . . . [w]e now hold that . . . vertical price restraints are to be judged by the rule of reason").

Here, the Complaint does **not allege** that Defendants' retail price fixing is a *per se* violation, and the Third Circuit's *Hess* decision does **not rely on any assumption** that the Complaint alleges a *per se* violation. Therefore, nothing in the *Hess* decision is contradicted by *Leegin*.[5]

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[4] Contrary to Defendants' further assertion, *Twombly* does **not** hold that plaintiffs must plead facts that "would allow [a claim] to survive a motion for summary judgment." D.I. 323 at 10. Significantly, Defendants do not provide **any** citation to support this further assertion of theirs. *See id.*

[5] Contrary to Defendants' further assertion, *Leegin* does **not** hold that "plaintiff must prove that the agreements adversely affected interbrand competition." D.I. 323 at 11. Once again, Defendants to not provide **any** citation to *Leegin* to support this further assertion.

In short, neither of the Supreme Court cases relied on by Defendants creates a "clear conviction of error" by the Third Circuit in its *Hess* decision. *Fogel*, 668 F.2d at 109. Therefore, there is no basis for disregarding the Third Circuit's holding that Plaintiffs have stated a claim for retail price fixing.

(b) Even Assuming, *Arguendo*, that the Law of the Case Could Be Disregarded, Defendants' Proposed Motion Likely Would Fail

Even assuming, *arguendo*, that the law of the case could be set aside so that Defendants could make their proposed motion, Defendants' proposed motion likely would fail.

Defendants assert that, if given permission, they would move to dismiss Plaintiffs' price fixing claim on the ground that the Complaint lacks "any allegations that the defendants' alleged agreements had anticompetitive effects at the interbrand market level." D.I. 323 at 11.

Contrary to Defendants' argument, the Complaint alleges anticompetitive effects on interbrand teeth prices. The Complaint alleges that Defendants' price fixing "has been a substantial factor causing the prices charged to dental laboratories for artificial teeth to be raised to, and/or maintained at, anticompetitive levels." ¶ 126. Nothing in this allegation limits the anticompetitive price effect to Dentsply teeth only.

Moreover, Plaintiffs already have provided expert testimony that the prices of Dentsply's teeth, as well as the teeth of Dentsply's competitors, have been maintained at anti-competitive levels. *See Hess*, D.I. 281 at A-38 ¶ 36(f), A-37 to A-43.[6]

[6] Plaintiffs' expert assumed that the reason for the anticompetitive level of the prices of the teeth of both Dentsply and its competitors was Defendants' exclusive dealing. But regardless of whether the anticompetitive prices were caused by exclusive dealing or price fixing (or a combination of these two), Plaintiffs' expert observed that the "artificial teeth were considerably more profitable . . . than were all other Dentsply Trubyte product lines." A-42 ¶42. Given "the similarities in supply and demand across these product lines" (A-41 ¶40), the reasonable

Still further, during trial of the Government's case against Dentsply, the "senior product manager" for Dentsply's tooth products testified that "Dentsply usually sets the prices in the marketplace and everyone else contributes or competes under that broad umbrella." *United States v. Dentsply, Int'l, Inc.*, 277 F. Supp. 2d 387, 422 (D. Del. 2003), *rev'd on other grounds*, 399 F.3d 181 (3d Cir. 2005).

Finally, Defendants glaringly omit to remind the Court that the very same argument that they propose to make now—*i.e.*, that Plaintiffs supposedly failed to adequately allege "anticompetitive effects"—was made by Defendants in their motion to dismiss Plaintiffs' exclusive dealing claims, and that, although the Court did dismiss the exclusive dealing claims, it did so **on other grounds**, and implicitly **declined** to adopt Defendants' argument that Plaintiffs had failed to adequately allege anticompetitive effects. *See* D.I. 265 (Dealers' brief regarding exclusive dealing claims) at 7 ("by alleging exclusive dealing agreements but failing to allege anticompetitive effects . . . plaintiffs have failed the pleading requirements"); *id.* at 8-17 (continuing the argument); Order at 25-32 (explaining reasons for dismissing Plaintiffs' exclusive dealing claims, and never even mentioning "anticompetitive effects").

Thus, even if the law of the case could be ignored so that Defendants could maker their proposed Rule 12(b)(6) motion aimed at Plaintiffs' price fixing claim, there is no reason to believe that Defendants' proposed motion would succeed in dismissing that claim.

(c) Even Assuming, *Arguendo*, that Defendants' Proposed Motion could Succeed, that *Still* would *Not* Provide any Reason to Deny Plaintiffs' Request for Rule 54(b) Certification

Even assuming, *arguendo*, that the law of the case could be set aside so that Defendants could make their proposed motion; and even further assuming, *arguendo*, that Defendants'

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conclusion is that the greater profit on teeth indicates anticompetitive prices for teeth (A-42 to A-43).

proposed motion could succeed, that *still* would *not* provide any reason to deny Plaintiffs' request for Rule 54(b) certification, as demonstrated by an analysis of the key *Allis-Chamers* factors, which include:

> (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

Allis-Chalmers Corp., 521 F.2d at 364.

Defendants concede that the first two of these factors "are not applicable here." D.I. 323 at 9 n.1.

The third factor—"the possibility that the need for review might or might not be mooted by future developments in the district court"—is meant to raise the question whether a decision on a still pending claim might make appeal of the already adjudicated claims unnecessary.[7]

Here, even assuming, *arguendo*, that Defendants' proposed motion were to result in a dismissal of Plaintiffs' price fixing claim, that still would **not** make an appeal by Plaintiffs regarding their exclusive dealing claims unnecessary.

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[7] *See*, *e.g.*, *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 5 (1980) (citing with approval district court's finding that "review of these adjudicated claims would not be mooted by any future developments in the case"); *E.I. Du Pont de Nemours & Co. v. Phillips Petroleum Co.*, 720 F. Supp. 373, 387 (D. Del. 1989) (granting Rule 54(b) certification of dismissal, because "the Court's finding and conclusions on such [dismissal] will not be altered or subject to contest when (and if) the issues [regarding the claim that still is pending] are tried and decided").

Indeed, Defendants do not argue otherwise.

Rather, Defendants strain to come within this *Allis-Chamers* factor by arguing that denial of Plaintiffs' motion for Rule 54(b) certification will "moot" any effort by Defendants to attack the Rule 54(b) certification in the Third Circuit. *See* D.I. 323 at 13. Defendants have not cited **any** authority that the kind of "mooting" relied on by them is within the kind of mooting referenced by *Allis-Chamers*. Indeed, if this kind of "mooting" were a sufficient basis to deny Rule 54(b) certification, no Rule 54(b) certification **ever** would be granted, since denying certification **always** will "moot" any effort by the appellee to attack the certification.

The fourth *Allis-Chamers* factor is "the possibility that the reviewing court might be obliged to consider the same **issue** a second time." 521 F.2d at 364 (emphasis added). Here, there is no chance that the issues regarding Plaintiffs' exclusive dealing claims will need to be considered a second time regarding Plaintiffs' price fixing claims, because, as Defendants concede, "the exclusive dealing claims are factually distinct from the vertical price-fixing claims" (D.I. 323 at 9 n.1), and involve different "legal questions" (D.I. 323 at 14 n.4).

Again, Defendants strain to come within this *Allis-Chamers* factor. They do **not** argue that Rule 54(b) certification would create any risk of the same **issue** being appealed a second time. Rather, they argue only that Rule 54(b) certification would create a risk of a second appeal from the same **complaint**. D.I. 323 at 12. Once again, the argument made by Defendants is not based on any *Allis-Chamers* factor. Moreover, it is the very purpose of Rule 54(b) to permit appeals from decisions affecting less than an entire complaint.[8] Therefore, the mere theoretical possibility that there could be a subsequent appeal from a different part of the same complaint

[8] *See* 10 Charles Alan Wright, Arthur R. Miller and Mary Kay Kane, *Federal Practice and Procedure* § 2654 (3d ed. 1998) (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") (emphasis added).

cannot, without more, be a ground for denying Rule 54(b) certification.

Finally, the last *Allis-Chalmers* factor—"miscellaneous factors"—weighs heavily **in favor** of Rule 54(b) certification.

First, as demonstrated in Part I (B)1, *supra*, Plaintiffs will be appealing the part of the Order that regards the *Hess* injunction, regardless of whether Rule 54(b) certification is granted regarding the *Jersey Dental* exclusive dealing claims. Therefore, judicial efficiency will be served best by certifying the part of the Order that dismissed exclusive dealing claims in *Jersey Dental*, so that the same issues in both cases regarding injunctive relief against exclusive dealing can be reviewed by the same panel of the Third Circuit.

Second, as explained in Part I(B)2 *supra*, an appellate determination regarding Plaintiffs' exclusive dealing claims may make any further proceedings in this Court unnecessary. Because such a result serves both judicial efficiency and the interest of the parties, the Supreme Court has held that such a possibility weighs heavily in favor of Rule 54(b) certification. *Curtiss-Wright*, 446 U.S. at 8 n.2 (holding that even if some factor weighs against certification, this may be "offset by a finding that an appellate resolution of the certified claims would facilitate a settlement of the remainder of the claims").

Third, as demonstrated in Part 1(B)3, *supra*, under Third Circuit precedent, the fact that the adjudicated claims are antitrust claims brought in a complex class action weighs in favor of Rule 54(b) certification.

Fourth, Rule 54(b) certification is favored here, because, if the dismissal of the exclusive dealing claims were to be reversed after the price fixing claim already were tried or subjected to discovery, it would raise the risk of multiple trials and/or discovery periods **involving the same parties and witnesses**—which would be highly inefficient, regardless of whether the facts and

legal issues are similar or different. *See Carter v. City of Philadelphia*, 181 F.3d 339, 347 (3d Cir. 1999) (upholding Rule 54(b) certification 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"); *Bogosian*, 561 F.2d at 443 (same).[9]

II. IN THE ALTERNATIVE, SECTION 1292(b) CERTIFICATION SHOULD BE GRANTED

A district court need not reject its own decision, in order to certify that decision pursuant to 28 U.S.C. § 1292(b). The court need only "recognize that the arguments in support of the opposite conclusion are not insubstantial." *Max Daetwyler Corp. v. Meyer*, 575 F. Supp. 280, 283 (E.D. Pa. 1983) (decision relied on by Defendants; *see* D.I. 323 at 16). Here, the Court implicitly so recognized, when it stated, at the close of the oral argument on the motions to dismiss, "trust me when I say what you've argued is difficult." D.I. 321 at A-146, lines 2-3.

Plaintiffs' Opening Brief demonstrated "a substantial ground for difference of opinion" regarding each of the four controlling issues on which the Order based its dismissals.

Defendants have made no contrary showing.

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[9] Defendants rely on several decisions that were based on circumstances unlike those here.

In *Gerardi v. Pelullo*, 16 F.3d 1363, 1365, 1368 (3d Cir. 1994), and *Hatzel & Buehler, Inc., v. Orange & Rockland Utils., Inc.*, 1993 U.S. Dist. LEXIS 2473, at *2-3, 6 (D. Del. Feb. 16, 1993), unlike here, the orders at issue involved one or more grants of partial summary judgment. Where, as here, the order of dismissal is based on the pleadings, the Third Circuit has held that Rule 54(b) certification is favored by the fact that the Third Circuit's "need to examine the record at this stage is minimal." *Bogosian*, 561 F.2d at 443.

In *Hatzel*, the Court also found that the adjudicated and pending claims were "similar both legally and factually," 1993 U.S. Dist. LEXIS 2473, at *16, whereas, here, Defendants concede that "the exclusive dealing claims are factually distinct from the vertical price-fixing claims" and that the "legal questions" are different. D.I. 323 at 9 n.1, 14 n.4.

In *Zavala v. Wal-Mart Stores, Inc.*, 2007 U.S. Dist. LEXIS 27882, at *9 (Apr. 14, 2007), also unlike here, there were "significant similarities between the factual circumstances" of the adjudicated and pending claims. Moreover, in *Zavala*, unlike here, the court found the adjudicated claim to be frivolous. *Id.* at 11.

A. The *Illinois Brick* Issue

Plaintiffs' Opening Brief explained that, by holding that the rule of *Illinois Brick* bars Plaintiffs from suing the Dealer Defendants for damages, even while conceding that "plaintiffs purchased artificial teeth 'directly' from the dealers" (Order at 28), the Order conflicts with the Supreme Court's statement in *Illinois Brick* that the only persons subject to the rule of Illinois Brick are "indirect purchasers **remote from the defendant**" (*Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) (emphasis added). *See* D.I. 319 at 26-27. As Plaintiffs further explained, this departure from *Illinois Brick* cannot be justified by the Order's observation that the "co-conspirator exception" does not apply to Plaintiffs, because "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." D.I. 319 at 26-27.

Defendants have not responded to Plaintiffs' argument, except by misrepresenting it—by erroneously asserting that Plaintiffs are relying on the co-conspirator exception. D.I. 323 at 18.

Plaintiffs' argument is substantial, because it rests on the very words of *Illinois Brick*.

B. Pleading Specific Intent

The Order held that, in order to adequately plead specific intent to conspire to monopolize, Plaintiffs were required to plead that each Defendant "wanted" Dentsply to have a monopoly. Order at 30. By contrast, Plaintiffs argue that the proper standard requires that Plaintiffs plead only that each Defendant agreed to participate in Dentsply's exclusive dealing arrangement, while "knowing" that the exclusive dealing had the unlawful purpose of preserving Dentsply's monopoly. D.I. 319 at 27-31, 29 n.15.

Plaintiffs' Opening Brief explained that, while the Order's determination is directly supported by only a single district court decision from another circuit—*In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 728 (D. Md. 2001)—the standard advanced by Plaintiffs is

supported directly by *ID Sec. Sys. Canada, Inc. v. Checkpoint Sys., Inc.*, 249 F. Supp. 2d 622 (E.D. Pa. 2003), is consistent with the general distinction between intent and motivation drawn by *Fineman v. Armstrong World Indus., Inc.* 980 F.2d 171 (3d Cir. 1992), and is consistent with the concept of specific intent under the criminal law, *see United States v. Leal-Cruz*, 431 F.3d 667 (9th Cir. 2005), and *United States v. Salerno*, 1987 WL 7934 (S.D.N.Y. Mar. 10, 1987), and the common law of torts, *see* Restatement (Second) of Torts, § 8A. See D.I. 319 at 27-31.

Defendants response is that "*ID Security Systems* had nothing to do with pleading standards." D.I. 323 at 19. But this assertion by Defendants contradicts the very Order whose conclusion the Defendants are trying to support. The Order cites to *ID Sec. Sys.* as an authority that sets forth what "[t]he specific intent element requires plaintiffs to plead." Order at 29.

Plaintiffs' argument is substantial because it rest on grounds broadly applicable throughout our legal system, and because it relies on the only authority from this circuit cited by the Order.

C. Pleading the Element of Conspiracy

The Complaint alleges facts sufficient to support **both** a series of bilateral vertical conspiracies, each involving Dentsply and one of its Dealers, **as well as** a single overarching conspiracy involving all Defendants. *See, e.g.*, ¶ 72 ("the Dealer Defendants have conspired with Dentsply and with each other"); ¶ 89 (Dentsply "demanded that each of its dealers agree to the exclusive dealing arrangement formalized in Dealer Criterion 6," and every Dealer "so agreed"); *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 306 (3d Cir. 2007) (on Rule 12(b)(6) motion, court "construe[s] the complaint in the light most favorable to the plaintiff").

As Plaintiffs pointed out in their Opening Brief, even Defendants have conceded that "Plaintiffs have alleged . . . a series of vertical conspiracies," *i.e.*, bilateral agreements between Dentsply and each of the dealers. *See* D.I. 265 at 9.

However, as Plaintiffs further explained in their Opening Brief, the Order holds that, in order for Plaintiffs to have adequately pled the element of a conspiracy, they were required to plead that all "defendants were part of a single conspiracy." Order at 31.

Plaintiffs' Opening Brief demonstrated that there is substantial ground to disagree with this holding, because, at a minimum, as even Defendants concede, Plaintiffs have adequately pled that each Defendant belonged to a bilateral vertical conspiracy, and, under *Fineman*, 980 F.2d at 212-13, a bilateral vertical conspiracy, involving a manufacturer and just one of the manufacturer's distributors, is an actionable conspiracy under the Sherman Act.

Defendants' only response is that Plaintiffs must adequately allege "that the defendants all entered into the same conspiracy" because, according to Defendants, that is the kind of conspiracy that Plaintiffs alleged. D.I. 323 at 20. Not only do Defendants contradict their prior assertion that Plaintiffs alleged a "series of vertical conspiracies" (D.I. 265 at 9), but also, Defendants distort the Complaint, which, as demonstrated, *supra*, alleges **both** a series of bilateral vertical conspiracies, **as well as** a single overarching conspiracy.

Plaintiffs' argument that they have adequately pled the element of conspiracy by pleading a series of bilateral vertical conspiracies is substantial, because it rests on controlling Third Circuit authority, namely, *Fineman v. Armstrong World Indus. Inc.*, 980 F.2d 171 (3d Cir. 1992).

D. Pleading a Threat of Injury Sufficient to Support the Grant of an Injunction under the Sherman Act, where the Government already has an Injunction against the Same Conduct

The Order denied Plaintiffs injunctive relief on the ground that such relief would be duplicative of relief already granted to the Government. Order at 17. The Order rejected Plaintiffs' argument that, under *United States v. Borden Co.*, 347 U.S. 514, 517-18, 520 (1954), a private plaintiff may obtain an injunction **under the antitrust laws** even when the Government already has obtained an injunction against the same conduct. The Order reasoned that *Borden*

only applies when the private plaintiff's injunction is the first of the two injunctions to be granted. Order at 17 n. 11.

Plaintiffs Opening Brief demonstrated that, contrary to the reasoning of the Order, *Borden*'s holding has been applied even when the private plaintiff's injunction was the second of the two injunctions to be granted. D.I. 319 at 35-37.

Defendants' response is that "Plaintiffs do not cite any Third Circuit Authority to support their position." D.I. 323 at 20-21.

However, the Order does not cite any Third Circuit authority involving an injunction under the antitrust laws. *See* D.I. 323 at 34. Moreover, unlike here, in each of the two decisions relied on by the Order, the private plaintiff already had obtained other relief besides the requested injunction. *Id.*

Plaintiffs' argument is substantial, because it is based on the only directly relevant authorities cited by either side.[10]

E. Certification Pursuant to Section 1292(b) is Consistent with Third Circuit Policy to Avoid Wasted Trial Time and Litigation Expense

The Third Circuit has held that the "key consideration" in determining whether to grant Section 1292(b) certification is "whether it truly implicates the policies favoring interlocutory appeal," including "avoidance of possibly wasted trial time and litigation expense." *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 756 (3d Cir. 1974) (en banc). Here, where the case is

[10] Defendants try to distinguish Plaintiffs' cases on the ground that the private plaintiffs therein were various states acting in a *parens patriae* capacity. D.I. 323 at 21. However, Defendants do not provide **any** citation to show that the application of *Borden* in these decisions in any way turned on the *parens patriae* capacity of the plaintiffs. On the contrary, when applying *Borden*, the court simply characterized the states as "private plaintiffs." *See New York v. Microsoft Corp.*, 209 F. Supp. 2d 132, 154 (D.D.C. 2002); *see also* 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").

complex and involves many parties, where an appellate determination of the issues requested to be certified may facilitate resolution of the entire case, and where denial of certification followed later by a reversal of some part of the Order could result in duplicative discovery periods and/or trials, the policies favoring certification clearly are implicated.

Defendants cite an older case, *Milbert v. Bison Labs., Inc.*, 260 F.2d 431 (3d Cir. 1958), for a proposition that section 1292(b) should be applied "only in exceptional cases." However, Defendants fail to mention that, following the House of Representatives' Judiciary Committee that approved 28 U.S.C. 1292(b), *Milbert* holds that key issues raised in "antitrust and conspiracy" cases are precisely such "exceptional cases" as merit section 1292(b) certification:

> There should be some way, for example, in long-drawn-out cases such as antitrust and conspiracy cases, to dispose of vital question which are raised in the trial without having to wait for the taking of testimony and the conclusion of the trial before the questions can be finally determined on appeal.

Milbert, 260 F.2d at 433 (quoting House Judiciary Committee).

Consistent with *Milbert*'s holding in **favor** of certification, the issues here involve **both** antitrust **and** conspiracy. Moreover, the Third Circuit has made clear, including in its *Hess* decision, that issues such as those under *Illinois Brick*—one of the specific issues here requested to be certified—are just such "vital questions" as are appropriate for section 1292(b) certification. *See* D.I. 319 at 23.[11]

[11] Although the issues here requested to be certified fully meet any requirement of exceptionality, such a requirement arguably was superseded by *Katz*. *See* 16 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper *Federal Practice and Procedure* § 3929 (2d ed. 1996) (view that § 1292(b) was to be used only "in exceptional cases," was "earlier view," which changed when "Judge Gibbons, writing for the Court of Appeals for the Third Circuit sitting en banc [in *Katz*], urged that the statute should be applied to allow appeals in light of the purposes of avoiding harm to litigants or avoiding the wastes of unnecessary or repeated protracted proceedings"). *See id.* ("[t]he flexible approach to § 1292(b) is far superior to blind adherence to

III. DEFENDANTS AGREE THAT IF CERTIFICATION IS GRANTED, ALL PROCEEDINGS IN THIS COURT SHOULD BE STAYED

Defendants agree that, if certification is granted, "this Court should stay discovery and all other proceedings, including the proceedings on plaintiffs' resale price maintenance claim." D.I. 323 at 23.

CONCLUSION

For the reasons stated herein and in Plaintiffs' Opening Brief, the Order dismissing Plaintiffs' exclusive dealing claims should be certified pursuant to Rule 54(b), or, in the alternative, pursuant to 28 U.S.C. § 1292(b), and all proceedings in this Court should be stayed during the pendency of any appeal.

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Respectfully submitted,

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a supposed need to construe strictly any permission to depart from the final judgment rule. The statute is not limited by its language to 'exceptional' cases.")