UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 12-8086

IN RE: BLOOD REAGENTS ANTITRUST LITIGATION

On Petition for Permission to Appeal from the Order of the United States District Court for the Eastern District of Pennsylvania Granting Class Certification in Multi-District Litigation Docket No. 09-MD-2081 (JED)

DEFENDANT-PETITIONER ORTHO-CLINICAL DIAGNOSTICS, INC.'S REPLY IN SUPPORT OF PETITION FOR PERMISSION TO APPEAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)

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Defendant-Petitioner Ortho-Clinical Diagnostics, Inc. ("Ortho") respectfully submits this reply to Plaintiffs-Respondents' Opposition to Ortho's Petition for Permission to Appeal Pursuant to Federal Rule of Civil Procedure 23(f).

INTRODUCTION

Plaintiffs' Opposition to Ortho's Rule 23(f) petition argues primarily that certification of this case as an antitrust class action should not be questioned because this is a "straightforward" horizontal price-fixing case.[1] Ortho submits this reply to explain why that is not so and why, given the unique duopoly market structure for blood reagents, it was clear error to rely on the five "elements of common proof" proffered by Plaintiffs and their economic expert, John C. Beyer, Ph.D. This reply also highlights the important legal issues that Plaintiffs seek to obscure in their Opposition, including the class certification issue currently on appeal before the U.S. Supreme Court in another antitrust class action, *Comcast Corp. v. Behrend*.[2] These unsettled legal issues, in the context of a claim for more than a billion dollars in treble damages, provide a further basis to grant Ortho's request for interlocutory review, pursuant to Rule 23(f).

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[1] (*See, e.g.*, Plaintiffs-Respondents' Opposition ("Opp'n"), at 1 (citing District Court Opinion ("Op."), at A-21).) Significantly, Plaintiffs omit the qualifier "[i]n many ways" from the District Court's statement about this particular price-fixing case and, moreover, ignore its finding that proof of impact was "particularly difficult" in this case, given the duopoly market structure at issue. (Op., at A-33.)

[2] No. 11-864, 2012 U.S. LEXIS 4754, at *1 (June 25, 2012). Oral argument before the Supreme Court in *Behrend* is scheduled for November 5, 2012.

ARGUMENT

I. NONE OF PLAINTIFFS' "ELEMENTS OF COMMON PROOF" IS CAPABLE OF ESTABLISHING CLASS-WIDE IMPACT, WHEN PRICES FOR BLOOD REAGENTS WERE ALREADY EXPECTED TO INCREASE.

The District Court found it "particularly difficult" for Plaintiffs to be able to prove antitrust impact in this case because the market structure for blood reagents was a duopoly, and that duopoly was created "only a short time" before the alleged conspiracy began. (Op., at A-33.) Although Plaintiffs obscure these unique market facts in their Opposition,[3] they are critically important. Unlike in other price-fixing cases, Plaintiffs in this case must distinguish the price effect of the duopoly from the price effect of the alleged conspiracy. (*Id.*) These market facts also mean that their five "elements of common proof" are not, as discussed below, capable of establishing class-wide impact here.

First, Plaintiffs cited the so-called *Bogosian* shortcut as an element of common proof of antitrust impact. However, even in those instances where it applies, this Court has been clear that the shortcut is not sufficient, by itself, to establish the predominance requirement of Rule 23(b)(3). *See, e.g.*, *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 326 (3d Cir. 2008) ("Applying a presumption of impact based solely on an unadorned allegation of price-fixing would appear to conflict with the 2003 amendments to Rule 23 . . . ."). The

[3] Tellingly, Plaintiffs use the word "duopoly" only once in their Opposition.

District Court agreed. (Op., at A-21 ("*Bogosian* alone does not suffice to satisfy the predominance requirement").) A presumption of impact would be particularly unwarranted in this case, when the prior change to a duopoly provides an alternative, non-conspiratorial explanation for the price increases.

Plaintiffs rely on their second element of common proof – Dr. Beyer's "market structure analysis" – to argue that the characteristics of the market for blood reagents make the products more vulnerable to price-fixing. This "proof" does not, however, address the relevant antitrust impact question, which is whether prices of blood reagents were higher for all class members than they would have been absent the alleged conspiracy. In fact, the same market characteristics cited by Plaintiffs and Dr. Beyer – commodity products, high price inelasticity of demand, high barriers to entry – would also make it difficult for purchasers of blood reagents to avoid price increases in a duopoly free of collusion. (Hr'g Tr. 184:3-185:1, at A-422-23.)

The "empirical pricing analysis" cited by Plaintiffs as their third element of common proof demonstrates only that prices for blood reagents increased during the class period. The District Court acknowledged, however, that the fact that prices increased "does not, in and of itself, demonstrate antitrust impact." (Op., at A-26.) Such empirical observations are insufficient to establish class-wide impact

because, given the change to a duopoly market structure, even Plaintiffs' expert predicted that prices for blood reagents would rise absent a conspiracy.

Likewise, Plaintiffs' fourth element – "Defendants' documents" – was used to show only that prices increased for all purchasers, not that they were higher than the but-for price. Again, the District Court found that the documents did "not suffice to prove impact on their own," but only "len[t] support" to a finding of predominance. (*Id.* at A-28.)

That leaves Plaintiffs' fifth and final "element of common proof" – Dr. Beyer's benchmark model. As a preliminary matter, Plaintiffs insist that their expert's model is proffered only as evidence of damages, not as common proof of impact (§ II, *infra*). If that were so, Plaintiffs would be without any proof that even attempts to meet the standard of antitrust impact. Dr. Beyer's model is the only "element" identified by the District Court that even purports to "distinguish between price increases resulting from the creation of a duopoly and price increases resulting from the alleged price-fixing conspiracy." (Op., at A-28.) Nevertheless, even if the District Court were right to treat Dr. Beyer's benchmark model as proof of impact, the model cannot withstand the rigorous scrutiny required at the class certification stage. It is, as discussed in Ortho's Petition (Pet., at 8-11), based on hearsay statements from Ortho business records cherry-picked

by Dr. Beyer, and it relies on unscientific methods that ignore basic economic variables, such as demand factors and costs of production.

In sum, the change to a duopoly market structure makes proof of impact not only "particularly difficult" (Op., at A-33), but it precludes Plaintiffs and their expert from relying on the typical forms of economic proof relied upon in other price-fixing cases. Take away Dr. Beyer's unreliable benchmark model, which the District Court recognized had "some deficiencies" (*id.* at A-37), and Plaintiffs are left with no common proof on the essential element of antitrust impact.

II. PLAINTIFFS CANNOT AVOID THE RIGOROUS SCRUTINY OF DR. BEYER'S BENCHMARK MODEL BY CHARACTERIZING IT AS "COMMON PROOF OF DAMAGES, NOT IMPACT."

As noted above, Plaintiffs in their Opposition portray their expert's benchmark model as common proof of damages, not impact. (*See* Opp'n, at 8 ("Ortho solely attacks Dr. Beyer's benchmark methodology, which was offered as common proof of damages, not impact.").) By making this distinction, Plaintiffs seek to invite less rigorous scrutiny of Dr. Beyer's model, as some district courts have allowed with proof of damages, in contrast to proof of antitrust impact. *See, e.g.*, *In re Flat Glass Antitrust Litig.*, 191 F.R.D. 472, 487 (W.D. Pa. 1999). Like the District Court, Plaintiffs also cite repeatedly the language "evolve to become admissible evidence" from this Court's discussion of proof of damages in *Behrend*,

as justification for deferring further analysis of Dr. Beyer's model until summary judgment. (*See* Opp'n, at 16, 17, 19.)

The basic problem with Plaintiffs' argument is that Dr. Beyer's benchmark model was treated by the District Court as *common proof of impact*. Indeed, it was listed by the District Court as one of the five "elements of common proof of impact" (Op., at A-28) and, as discussed above, it is the only "element" that even purports to distinguish between price increases resulting from the creation of a duopoly and those resulting from the alleged conspiracy, (*id.*). The fact that Dr. Beyer's model might also play a role in Plaintiffs' damages calculation does not eliminate the need to apply rigorous scrutiny to it as proposed common proof of antitrust impact, which is "critically important" for evaluating the predominance requirement of Rule 23(b)(3). *Hydrogen Peroxide*, 552 F.3d at 311.

Furthermore, despite the heavy reliance by both the District Court and the Plaintiffs on this Court's language ("evolve to become admissible evidence") in *Behrend v. Comcast Corp.*, Plaintiffs barely acknowledge that the case is now on appeal before the U.S. Supreme Court. *See* 655 F.3d 182, 204 n.13 (3d Cir. 2011). Their discussion of the pending appeal is relegated to a single sentence in a footnote to their Opposition. (Opp'n, at 7 n.5.) Nevertheless, Plaintiffs cannot deny that the grant of *certiorari* underscores the importance of the class certification issue at stake in both *Behrend* and in this case, nor can they deny the

prospect that a reversal in *Behrend* would overturn the authority that both they and the District Court have cited as justification to defer any further analysis of Dr. Beyer's benchmark model.

III. PLAINTIFFS' OVERLY-NARROW STANDARD OF "IMPACT" IS NOT SUPPORTED BY SETTLED ANTITRUST LAW.

Plaintiffs also confuse the issues of antitrust impact and damages in responding to Ortho's argument that the District Court accepted an overly-narrow standard of antitrust impact. The legal issue of whether Plaintiffs must account for the net economic effect of their blood reagent purchases to prove antitrust impact – also known as "fact of injury" – is not settled by the damages cases they cite.

For example, Plaintiffs cite *Hanover Shoe* and *Illinois Brick* for the proposition that "Ortho's 'net effects' argument is inconsistent with U.S. Supreme Court precedent." (*See* Opp'n, at 15-16.) However, *Illinois Brick* involved an entirely different issue: whether indirect purchasers have antitrust standing to sue for damages under the Clayton Act. *See Ill. Brick Co. v. Illinois*, 431 U.S. 720, 726 (1977). *Illinois Brick* followed the Supreme Court's decision in *Hanover Shoe*, which held that defendants could not reduce the amount of antitrust damages by proving that some or all of the overcharge in price was passed on to indirect purchasers. *Hanover Shoe, Inc. v. United Shoe Mach. Co.*, 392 U.S. 481, 494 (1968). Likewise, *In re Airline Ticket Commission Antitrust Litigation* involved

mitigation and offset defenses that affect the "ultimate measure of damages." 918 F. Supp. 283, 286 (D. Minn. 1996).

Plaintiffs' remaining case law authority does not support a narrow standard of antitrust impact. *See, e.g.*, *In re Rail Freight Fuel Surcharge Antitrust Litig.*, No. 07-489, 2012 U.S. Dist. LEXIS 97178, at *234 (D.D.C. June 21, 2012) ("impact asks '*whether* the plaintiffs were harmed,' whereas damages 'quantify *by how much*'"). Indeed, *Rail Freight* did not reject a broader standard of antitrust impact; it rejected only the net effects argument based on the record. *See id.* at *186-95 (noting defendants did not challenge the expert's methodology itself). In addition, *Rail Freight* and *Cardizem* address transactions involving one component allegedly impacted by the conspiracies at issue in those cases. *See id.* at *27-28 (transactions consisted of a base rate previously agreed upon by the parties and the disputed fuel surcharge); *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 297, 300 (E.D. Mich. 2001) (transactions involved a single product – a patented pharmaceutical).

Where the alleged antitrust violation involves a bundle of distinct products, the District Court must consider the price effect on the total transaction for the entire bundle of products, not merely the price of *one* product within *one* transaction during the class period. *See Kottaras v. Whole Foods Market, Inc.*, 281 F.R.D. 16, 25 (D.D.C. 2012).

IV. PLAINTIFFS HAVE YET TO EXPLAIN HOW THE DISTRICT COURT WILL RESOLVE OVER 11,000 FRAUDULENT CONCEALMENT CLAIMS IN ONE CLASS ACTION.

Plaintiffs do not dispute in their Opposition that the class certified by the District Court raises more than 11,000 individual fraudulent concealment claims. Nor do Plaintiffs question the prospect that each individual member of the class would be required to show that it was entitled to a tolling of the statute of limitations. Yet Plaintiffs fail to explain *how* the 11,000 fraudulent concealment claims will be adjudicated.

Will the 11,000 claims be resolved in one proceeding? Will the concealment claims go to the same jury that decides the liability issues? Will Ortho be permitted to call representatives of each class member to testify on issues of notice and due diligence? Will Ortho be permitted to conduct any fact discovery of the 11,000 absent class members in advance of such testimony?

Simply stating that the thousands of fraudulent concealment claims will be resolved "in a later damages phase," as the Plaintiffs propose (Opp'n, at 20), does not answer these critical questions, nor does it satisfy the "critical need" under the 2003 amendments to Rule 23 to determine how this case will be tried. Fed. R. Civ. P. 23 advisory committee note on 2003 amendments.[4]

[4] Plaintiffs continue to rely primarily on this Court's decision in *In re Linerboard Antitrust Litig.*, 305 F.3d 145 (3d Cir. 2002), notwithstanding that it pre-dated the 2003 amendments to Rule 23.

CONCLUSION

For the reasons set forth in its Petition and in this reply, Ortho respectfully requests the Court allow interlocutory review of the Class Certification Order and, after briefing and oral argument, reverse the Order. In the alternative, Ortho requests that this Court grant its Petition and hold briefing in abeyance pending the outcome of the appeal in *Behrend*, which is scheduled for oral argument on November 5, 2012.

Respectfully submitted,

Dated: September 26, 2012

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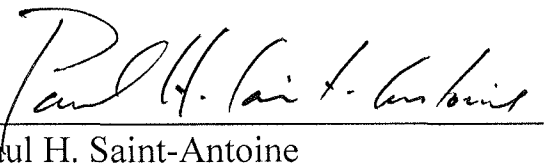
CERTIFICATE OF SERVICE

I, Paul H. Saint-Antoine, hereby certify that a true and correct copy of Defendant-Petitioner Ortho-Clinical Diagnostics, Inc.'s Reply in Support of Petition for Permission to Appeal Pursuant to Federal Rule of Civil Procedure 23(f) was electronically filed with the United States Court of Appeals for the Third Circuit, which sent a "Notice of Docket Activity" to counsel of record.

Dated: September 26, 2012



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