IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: BLOOD REAGENTS ANTITRUST LITIGATION	MDL Docket No. 09-2081
	ALL CASES

ORDER

AND NOW, this ____ day of _____, 2010, upon consideration of the Motion to Dismiss of Immucor, Inc., it is hereby ORDERED that said Motion is GRANTED. Plaintiffs' Consolidated Amended Class Action Complaint is hereby DISMISSED WITH PREJUDICE as to Defendant Immucor, Inc.

_____
DuBois, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: BLOOD REAGENTS ANTITRUST LITIGATION	MDL Docket No. 09-2081
	ALL CASES

DEFENDANT IMMUCOR, INC.'S MOTION TO DISMISS THE CONSOLIDATED AMENDED CLASS ACTION COMPLAINT

Defendant Immucor, Inc. submits this Motion to Dismiss the Consolidated Class Action Complaint as to Immucor, Inc., with prejudice pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. In support of this Motion, Immucor, Inc. incorporates and relies upon the attached Memorandum of Law.

Pursuant to Rule 7.1(f) of the Local Rules of Civil Procedure, Immucor respectfully requests oral argument on this Motion.

Dated: March 17, 2010

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: BLOOD REAGENTS ANTITRUST LITIGATION	MDL Docket No. 09-2081
	ALL ACTIONS

MEMORANDUM OF LAW IN SUPPORT OF IMMUCOR, INC.'S MOTION TO DISMISS THE CONSOLIDATED AMENDED CLASS ACTION COMPLAINT

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I. INTRODUCTION

Defendant Immucor, Inc. submits this memorandum in support of its motion to dismiss Plaintiffs' "Consolidated Amended Class Action Complaint" (the "Consolidated Complaint" or "Consol. Compl.") with prejudice pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiffs' allegations, taken as true, fall far short of the requirements established in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007). In *Twombly*, the Supreme Court held that to state a claim under Section 1 of the Sherman Act, a plaintiff must allege *facts* that provide "plausible grounds to infer an agreement" and "not merely parallel conduct that could just as well be independent action." *Id.* at 556-557. Here, the Consolidated Complaint contains nothing but conclusory allegations of agreements, without specifying a time, place, or person involved. As the Court held in *Twombly*, such allegations are insufficient to support a Section 1 claim. Furthermore, the Consolidated Complaint's scant allegations regarding supposedly parallel conduct are insufficient to support a circumstantial inference of conspiracy. Consequently, the Consolidated Complaint fails to state a claim, and it should be dismissed.

II. ALLEGATIONS OF THE COMPLAINT

Plaintiffs allege that the Defendants have agreed to fix prices in the markets for "blood reagents."[1] The Consolidated Complaint alleges that in the 1990's, the blood reagents business was unprofitable, presumably because, prices were lower than costs. This allegedly resulted in Defendant Immucor nearly failing and Defendant Ortho-Clinical Diagnostics, Inc. ("Ortho") considering leaving the market altogether.[2] (Consol. Compl. ¶¶ 55-56.) Instead, however, Plaintiffs allege that the industry consolidated, leaving the two Defendants as the only competitors offering a "complete line" of blood reagent products. Subsequently prices allegedly began to rise significantly, rendering each Defendant profitable. Plaintiffs blame the increased prices on a purported "conspiracy" between the two Defendants.

In addition to conclusory allegations of a conspiracy, the Consolidated Complaint alleges the following categories of circumstantial facts that Plaintiffs contend support an inference of a price-fixing conspiracy:

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[1] The non-conclusory factual statements in this section are drawn from the Consolidated Complaint and assumed to be true, as they must be for purposes of a motion to dismiss. Immucor in no way concedes, however, that any of the allegations in the Consolidated Complaint are true.

[2] Although Plaintiffs also named Johnson & Johnson Healthcare Systems, Inc. ("J&J") as a Defendant, because there are no factual allegations regarding J&J in the Consolidated Complaint, this memorandum focuses on the claims as they relate to Defendants Immucor and Ortho. The Consolidated Complaint is clearly deficient as to any supposed conspiracy between Immucor and J&J.

- Somewhat parallel conduct by Defendants Immucor and Ortho, including supposedly parallel price increases;
- Efforts to convert customers to proprietary automated technology;
- A Department of Justice investigation of a possible conspiracy;
- Market characteristics, specifically that the markets for blood reagents are concentrated, have barriers to entry, have inelastic demand, do not have reasonable substitutes, and are standardized with interchangeable products;
- Opportunities to conspire, including participation in trade associations and Immucor's hiring of former Ortho employees; and
- Unrelated employee misconduct.

Notably lacking from the Consolidated Complaint are any specific factual allegations about who conspired, when they conspired, where they conspired or the specific terms of the conspiracy. Also absent are any allegations that the prices for competitive products were ever made uniform, or that the percentage price increases were uniform with respect to competitive products. The Consolidated Complaint instead relies on averages and broad "ranges" of percentage price increases, without ever alleging that the result was for competitive products to be priced the same. The sufficiency of these factual allegations under *Twombly* is the issue before the Court.

III. ARGUMENT

A. Motion to Dismiss Standard.

A complaint must be dismissed if it does not allege "enough facts to state a claim to relief that is *plausible* on its face." *Twombly,* 550 U.S. at 570 (emphasis added). A "plaintiffs' obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'" *Id.* at 555 (internal citations omitted). "Factual allegations must be enough to raise a right to relief above the speculative level," thus rendering the claim "plausible" as opposed to merely "possible." *Id.* (internal citations omitted).

When reviewing a motion to dismiss a complaint under Rule 12(b)(6), courts assume the truth of all well-pleaded *facts* in the complaint. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) (citing Fed. R. Civ. P. 8(a)(2)). Moreover, "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Id.* at 1949.

B. Section 1 of the Sherman Act Requires Allegations Sufficient to Establish a Contract, Combination or Conspiracy in Restraint of Trade.

Section 1 of the Sherman Act forbids "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade." 15 U.S.C.A. § 1. "To establish a violation of Section 1, a plaintiff must prove: (1) concerted action by the

defendants; (2) that produced anti-competitive effects within the relevant product and geographic markets; (3) that the concerted actions were illegal; and (4) that it was injured as a proximate result of the concerted action." *Gordon v. Lewiston Hosp.*, 423 F.3d 184, 207 (3d Cir. 2005).

The first element of a Section 1 claim, a contract, combination or conspiracy, often referred to as "concerted action," is at issue here. "[T]he antitrust plaintiff bears the burden of proving 'concerted action' . . ., because '[u]nilateral activity by a defendant, no matter the motivation, cannot give rise to a section 1 violation.'" *Cosmetic Gallery, Inc. v. Schoeneman Corp.*, 495 F.3d 46, 55 (3d Cir. 2007) (quoting *InterVest v. Bloomberg*, 340 F.3d 144, 159 (3d Cir. 2003)) (second capitalization alteration in original).

Concerted action may be shown by either direct or circumstantial evidence. "Direct evidence in a Section 1 conspiracy must be evidence that is explicit and requires no inferences to establish the proposition or conclusion being asserted." *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 118 (3d Cir. 1999). When there is no direct evidence of a conspiracy (such as an admission by one of the conspirators or a video of a meeting among the conspirators), one may be inferred only if the plaintiff establishes facts 'that tend[] to exclude the possibility that the alleged conspirators acted independently.' *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). "[C]onduct as consistent with permissible competition as with illegal

conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* Thus, at the pleadings stage, a Section 1 complaint must be dismissed if it alleges only "certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical, independent action." *Twombly*, 550 U.S. at 548-49.

In *Twombly,* the Supreme Court cautioned that "proceeding to antitrust discovery can be expensive," and that "it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no 'reasonably founded hope that the [discovery] process will reveal relevant evidence' to support a § 1 claim." *Id.* at 558-59 (citations omitted). The Court expressed deep concern that, given the enormous costs of antitrust litigation, failing to weed out inadequate complaints before discovery will unfairly "push cost-conscious defendants to settle even anemic cases before reaching [summary judgment] proceedings." *Id* at 559. Consequently, to survive a motion to dismiss, a claim under Section 1 must contain "enough factual matter (taken as true) to suggest that an agreement was made." *Id.* at 556. "[A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice." *Id.*

C. The Consolidated Complaint Does Not Allege Facts Sufficient to Support Its Conclusory Allegations that Immucor Conspired with Ortho to Fix Prices for Blood Reagents.

The critical lesson of *Twombly* is that, in order to survive a motion to dismiss for violation of Section 1 of the Sherman Act, a complaint must allege a conspiracy with specificity and may not rely on conclusory allegations that a conspiracy has occurred. The Supreme Court noted that a complaint that "mentioned no specific time, place, or person involved in the alleged conspiracies" would be insufficient in a Section 1 case. *Id.* at 1971 n.10; *see In re Travel Agent*, 583 F.3d 896 (discussed below); *In re Hawaiian & Guamanian Cabotage Antitrust Litig.*, 647 F. Supp. 2d 1250, 1256-57 (W.D. Wash. 2009) ("A distinguishing factor between these [cases upholding complaints rather than dismissing them after *Twombly*] has been the inclusion of specific allegations concerning time, place, and person versus general allusions to 'secret meetings,' 'communications,' or 'agreements.'").

Moreover, a conspiracy may not be inferred from "allegedly conspiratorial actions [that] could equally have been prompted by lawful, independent goals." *Twombly*, 550 U.S. at 556-57. "[P]arallel conduct or interdependence, without more" is not sufficient to support an inference of conspiracy because, while it may be "consistent with conspiracy," it can be "just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." *Id.* at 554.

1. Plaintiffs' Allegations of a Conspiracy Are Conclusory and Lack the Specificity Required by Twombly.

Since *Twombly*, courts have consistently dismissed Section 1 claims if they are based on conclusory allegations that lack specificity as to the who, what, where and when of the purported agreement. For example, in *In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896 (6th Cir. 2009), the court held: "[W]here a 'complaint [ ] furnishes no clue' as to which defendants supposedly agreed or when and where the illicit agreement took place, the complaint fails to give adequate notice as required by Fed. R. Civ. P. 8," and it should be dismissed. *Id.* at 905 (quoting *Twombly*, 550 U.S. at 565 n.10). Similarly, conclusory attribution of conspiratorial actions to unnamed corporate executives does not meet the requisite standard of specificity:

> Plaintiffs attempt to implicate these defendants in the purported conspiracy by relying on several vague allegations . . . that refer to . . . 'defendants' executives.' However, plaintiffs' reliance on these indeterminate assertions is misplaced because they represent precisely the type of naked conspiratorial allegations rejected by the Supreme Court in *Twombly*.

In re Travel Agent, 583 F.3d at 905. *See also St. Clair v. Citizens Fin. Group*, 340 Fed. Appx. 62, No. 08-4870, 2009 WL 2186515 (3d Cir. N.J. July 23, 2009),*65 (dismissing Section 1 complaint for failure to allege enough facts to show a conspiracy); *Rick-Mik Enters., Inc. v. Equilon Enters., LLC*, 532 F.3d 963, 975 (9th Cir. 2008) ("After *Twombly*, we readily conclude that Rick-Mik's complaint lacks specific details of an illegal price-fixing scheme.").

The Consolidated Complaint contains only the type of vague and conclusory allegations that *Twombly* and its progeny have rejected. For example, the Consolidated Complaint repeatedly describes price increases as "collusive" and refers generically to an "anticompetitive conspiracy," and it more broadly asserts that the Defendants "engaged in a continuing agreement, understanding, or conspiracy in restraint of trade to artificially raise, fix, maintain and/or stabilize the price of Blood Reagents in the United States." ((*E.g.*, Consol. Compl. ¶¶ 72-73, 132.) But the Consolidated Complaint contains no details about the purported conspiracy or agreement. Instead, the allegations "are precisely the kind of 'labels and conclusions' and 'formulaic recitation of the elements of a cause of action' that the Supreme Court condemned in *Twombly*." *Jacobs v. Tempur-Pedic Int'l, Inc.*, No. 4:07-cv-02-RLV, 2007 WL 4373980, at *3 (N.D. Ga. Dec. 11, 2007) (quoting *Twombly,* 550 U.S. at 555). Such "conclusory allegation[s] of agreement at some unidentified point do [] not supply facts adequate to show illegality." *Id.* at 557.

Specifically, the Consolidated Complaint fails to allege which of Defendants' employees supposedly agreed to fix prices, when the agreement or agreements were made, where the agreements were made, which specific products were involved or any other information regarding the purported conspiracy. *See In re Travel Agent,* 583 F.3d at 905. The failure to allege any specifics regarding the supposed conspiracy is fatal under *Twombly*. 550 U.S. at 565 n.10.

Similarly lacking in specificity are Plaintiffs' vague allegations that Defendants had a "customer-allocation scheme," apparently based on the assertion that one or more defendants may have been unwilling to sell to plaintiffs or plaintiff class members on terms that that plaintiff or class member believed to be "reasonable." (Consol. Compl. ¶ 85.)[3] There are no specific allegations with respect to who allegedly entered into this purported conspiracy on behalf of Defendants, or where or when this took place. Indeed, Plaintiffs even fail to assert with specificity the customers and Defendants involved, or the circumstances of the purported refusal to deal on "reasonable" terms that would suggest that such a refusal was based on a conspiracy, rather than an independent credit decision or the customer's failure to qualify for quantity discounts.[4] In sum, Plaintiffs' conclusory allegations of conspiracy are plainly insufficient to meet the requirements of *Twombly*.

2. Plaintiffs Have Not Alleged Parallel Conduct, and Even If They Had, Allegations of Parallel Conduct Are Insufficient as a Matter of Law.

Given the conspicuous lack of factual allegations showing a conspiracy, Plaintiffs resort to an ineffective attempt to show a conspiracy circumstantially. Chief among Plaintiffs' circumstantial allegations are those of supposedly parallel price increases,

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[3] Although customer allocation is alleged in the body of the Consolidated Complaint, there is actually no claim asserted for customer allocation.

[4] Plaintiffs' allegations regarding the exclusivity provision of Immucor's purchasing contract with a company called Celliance are extraneous and irrelevant. (Consol. Compl. ¶ 86.) The Consolidated Complaint does not challenge the legality of this contract directly, and it fails to

rising profit margins and other allegedly parallel conduct. (Consol. Compl. ¶¶ 72,76, 87.) Even if Plaintiffs' allegations of parallel pricing (*e.g.*, *id.* ¶ 72) showed parallel conduct, which they do not, such allegations would be insufficient to show that the Defendants agreed to fix prices as a matter of law.

It is first important to note what is *not* alleged with respect to the supposedly parallel conduct by the Defendants. Plaintiffs do not allege that the Defendants priced competing products identically, that they increased prices at exactly the same time, or that they increased their prices by uniform amounts for directly competing blood reagent products. Instead, the Consolidated Complaint alleges generally that prices increased with reference to large "ranges" of percentage increases. (Consol. Compl. ¶ 70.) For example, Plaintiffs allege that in "late 2004" the Defendants "increased prices for a wider variety of Blood Reagents from 87% to as much as 254% for some products." (Consol. Compl. ¶ 70(a).) But there is no way of knowing from the Consolidated Complaint where on that range any particular product would fall or whether one of the parties significantly undercut the other with respect to particular competitive products, or generally.[5]

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allege generally, much less with specificity, that the Defendants conspired to cause Immucor to enter into such contract.

[5] Similarly, the Consolidated Complaint does not allege, with respect to group purchasing organizations ("GPOs"), that the Defendants actually engaged in parallel conduct. At most, Plaintiffs allege that Ortho cancelled a contract with Premier around the same time that Immucor cancelled a contract with Premier. Plaintiffs do not allege that Ortho cancelled a

It is worth repeating that the Consolidated Complaint *does not allege* that the Defendants charged the same prices for directly competing products or that the prices for competing products increased by the same amounts or same percentage. (*See* Consol. Compl. ¶¶ 68-70.) Indeed, the Complaint does not even allege that prices increased at the same time. For instance, the Consolidated Complaint alleges that in 2000, Ortho announced a price increase approximately *nine months* after Immucor announced an increase. (Consol. Comp. ¶ 65.) And again, it is not alleged that this nine-months later increase made the Defendants' prices for competing products uniform.

In an attempt to mask Plaintiffs' inability to plead such facts, the Consolidated Complaint relies on averages and ranges of percentage price increases. (*E.g.*, Consol. Compl. ¶ 72.) Critically missing, however, is an allegation that such increases resulted in uniform prices or uniform increases for competing products. Indeed, the Consolidated Complaint does not even allege that the *average* prices of Defendants' product lines were the same. Thus, Plaintiffs have not alleged that parallel pricing occurred with respect to Defendants' competing products, either individually or in the aggregate. This is significant, because if, as Plaintiffs allege, blood reagents are standardized and interchangeable products, even small variations in prices would spark customer migration. The failure of the Consolidated Complaint to allege parallel prices

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contract with Novation or any of the other, unspecified GPOs with which Immucor allegedly cancelled. (Consol. Compl. ¶¶ 77-84.)

or parallel price increases for competing products totally undermines Plaintiffs' attempt to establish a conspiracy circumstantially. *See In re Baby Food Antitrust Litig.*, 166 F.3d at 130 (affirming summary judgment for defendants and noting that "the undisputed evidence show[ed] sometimes competitors did not follow price increases at all, other times they followed by less, sometimes by the same amount, and sometimes they followed only in certain geographic areas.").

Moreover, even if the Consolidated Complaint actually alleged parallel conduct, it would still fail as a matter of law. Higher prices and margins are not, in themselves, evidence of collusion, even when competitors increase prices contemporaneously. *See, e.g., Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 237 (1993) ("[R]ising prices do not themselves permit an inference of a collusive market dynamic."). Nor do parallel price increases provide the necessary evidence of a conspiracy. Parallel price increases are entirely consistent with unilateral behavior in a concentrated market, and they cannot give rise to an inference of conspiracy or a price fixing agreement. *Twombly*, 550 U.S. at 554. Where a market is concentrated and products are interchangeable, as Plaintiffs allege is the case here (Consol. Compl. ¶¶ 96-97) uniform prices and price movements are "normal." *See, e.g., E.I. Du Pont de Nemours & Co.* v. *Fed. Trade Comm'n,* 729 F.2d 128, 139 (2d Cir. 1984) ("[P]rice uniformity is normal in a market with few sellers and homogeneous products.").

"'Conscious parallelism,' a common reaction of 'firms in a concentrated market [that] recogniz[e] their shared economic interests and their interdependence with respect to price and output decisions' is 'not in itself unlawful.'" *Twombly,* 550 U.S. at 553-54 (quoting *Brooke Group,* 509 U.S. at 227). Thus, "neither parallel conduct nor conscious parallelism, taken alone, raise the necessary implication of conspiracy." *Twombly*, 550 U.S. at 561 n.7; *In re Elevator Antitrust Litig.,* 502 F.3d 47, 51 (2d Cir. 2007) (affirming dismissal of antitrust complaint and explaining that parallel conduct allegations "do not constitute 'plausible grounds to infer an agreement'") (quoting *Twombly,* 550 U.S. at 556)).

No non-conclusory factual allegations in the Consolidated Complaint show, or even suggest, that the prices of blood reagents rose because of an alleged agreement rather than as a result of independent pricing decisions in a concentrated market. This is an overt failure of pleading under *Twombly*. (dismissing complaint alleging "certain parallel conduct unfavorable to competition" but failing to allege "factual context suggesting agreement, as distinct from identical, independent action.") (*Id.* at 548-049.); *see St. Clair*, 340 Fed. Appx. at 65 ("St. Clair's conspiracy claims fail because he too has alleged only parallel conduct and gross speculation.").

For the same reasons, the allegation that Ortho cancelled a group purchasing organization ("GPO") contract and at around the same time as Immucor cancelled several contracts with GPOs (Consol. Compl. ¶¶ 76-84) does not provide the basis to infer any

conspiracy. Indeed, as the Consolidated Complaint alleges, each would have had an independent motive to cancel the contracts—to raise prices to the organizations' members. *See In re Travel Agent*, 583 F.3d at 908 (noting that airlines could have rational, independent motives for reducing travel agent commissions even though they might lose some business as a result). Once one competitor canceled a GPO contract to raise prices, it is natural that the other competitor might follow similarly to seek price increases. *See, e.g., Hackman v. Dickerson Realtors, Inc.*, 520 F. Supp. 2d 954, 968 (N.D. Ill. 2007) (dismissing complaint where defendants had an independent incentive to boycott plaintiff, who was undercutting their commissions). And if the GPO refused to entertain any increases in prices, each Defendant would have had an incentive to cancel its contract with the GPO.[6] The Supreme Court has repeatedly stated that this type of parallel, independent behavior does not violate the antitrust laws, even if it has anticompetitive effects. *E.g., Brooke Group*, 509 U.S. 209 at 235.

Because Plaintiffs' allegations of parallel behavior are insufficient as a matter of law, and because Plaintiffs have not even alleged actual parallel conduct, the Consolidated Complaint fails to allege facts plausibly suggesting that the Defendants conspired to fix prices.

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[6] In the absence of any allegation that the prices were in fact the same, it becomes doubly difficult for Plaintiffs to show that contemporaneous cancellations of group purchasing contracts is evidence of conspiratorial behavior. If one of the defendants has lower prices than the other, it may have lesser willingness to provide further discounts to a buying agent.

3. Alleged Efforts to Convert Customers to Proprietary Automated Technology Are More Consistent with Competition than with any Alleged Conspiracy.

The Consolidated Complaint also alleges in conclusory fashion that the Defendants conspired to "force their customers away from traditional manual blood testing and into automated blood testing." (Consol. Compl. ¶ 63.) This would allegedly result in the customers' being "lock[ed] in" with the Defendant from whom they purchased automated testing equipment. (*Id.* ¶ 51.) It is unclear whether this agreement is allegedly different from the general price-fixing conspiracy to raise the price of what Plaintiffs refer to as "traditional" reagents set forth in the Consolidated Complaint. In any event, the allegations regarding the supposed agreement to force customers to switch to automated blood testing contain no more specifics than the allegations of a general price-fixing conspiracy. The Consolidated Complaint does not provide the who, what, when and where of this supposed agreement, which is fatal under *Twombly*. *In re Travel Agent*, 583 F.3d at 905 (citing *Twombly*, 550 U.S. 565 n.10).

Moreover, alleged actions by the Defendants to encourage customers to switch to proprietary automated testing are perfectly consistent with competition. Assuming the truth of the allegations in the Consolidated Complaint, each Defendant had an incentive to encourage customers to switch to automation, because doing so would lock in its customers and permit it to make higher profits. (Consol. Compl. ¶ 51.) "[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing

alone, support an inference of antitrust conspiracy." *Matsushita,* 475 U.S. at 588. There simply is no reason that the Defendants would have needed to conspire to encourage their customers to switch to automation, because it was in each Defendant's interest for its customers to do so. *See Hackman*, 520 F. Supp. 2d at 968.

Finally, the allegation of a conspiracy to convert customers to the defendants respective proprietary technologies is entirely implausible. The parties would necessarily compete with respect to their proprietary product offerings, and customers choosing to switch to automation would presumably base their decisions on analyses of the competing automation instruments and technologies offered by the Defendants, along with the parties' relative pricing of such products (as to which the Consolidated Complaint contains no allegations). The result of such competition on automated products would be completely destabilizing to any purported conspiracy in the "traditional" product arena, since there could be no guarantee that, if any customer decided to switch to automation (the purported aim of the conspiracy), it would switch to automation from the same Defendant from which it was purchasing traditional reagents. In other words, neither Defendant could have been sure that it would not lose market share to the other when the customers switched to automation. And because of the alleged lock-in feature, there would be no way to win those customers back once they had incurred the cost of the competitor's automated system. Thus, far from suggesting a conspiracy, Defendants' offering of incentives to customers to switch to

automation suggests that they were competing and not working together. *Matsushita*, 475 U.S. at 592. In sum, this allegation not only fails to support an inference that Defendants entered into a conspiracy but actually suggests the opposite.

4. The Fact of a Governmental Investigation Is Not Evidence that a Conspiracy Occurred.

The allegations regarding an investigation by the Department of Justice similarly fail to show that the Defendants entered into a price-fixing agreement. *See In re Bath & Kitchen Fixtures Antitrust Litig.*, No. 05-cv-00510, 2006 WL 2038605 at **2, 7 (E.D. Pa. July 19, 2006) (dismissing Section 1 claim for failure to plead concerted action, notwithstanding an allegation that a grand jury investigation had been opened by the Department of Justice). In essence, this allegation amounts to a statement that someone else is suspicious of the Defendants. Defendants have not been indicted, let alone convicted. The existence of the criminal probe should not even be admissible in a trial of this case. *See Am. Home Assur. Co. v. Sunshine Supermarket, Inc.*, 753 F.2d 321, 325 (3d Cir. 1985) ("At best, the evidence of non-prosecution is evidence of an opinion by the prosecutor. The opinion of a layperson, as the prosecutor was in this case, however, is inadmissible if it [is] based on knowledge outside the individual's personal experience."). The allegation of an inadmissible fact cannot support an otherwise deficient complaint. *In re Bath,* 2006 WL 2038605 at **2, 7; *see also Am. Copper & Brass, Inc. v. Halcor S.A.*, 494 F. Supp. 2d 873, 876-77 (W.D. Tenn. 2007) (dismissing

a complaint that relied on, among other things, an investigation by the European Commission into price fixing in the European copper pipe market).

5. The Additional "Factors" Cited by Plaintiffs Are Inadequate to Support an Inference of Conspiracy.

Unable to plead facts showing either an agreement or even that the Defendants priced their products identically, the Plaintiffs finally make several allegations of the "where-there-is-smoke" variety. Specifically, the Consolidated Complaint alleges that the blood reagents market is concentrated, that Immucor and Ortho participated in trade associations, that Immucor hired some of Ortho's former employees, and that an Immucor employee caused a doctor to be bribed in Italy. None of these allegations will support an inference that the Defendants conspired to fix prices.

a. Market Characteristics.

Plaintiffs allege that certain market characteristics lend support to their conclusory allegations that a conspiracy took place. Specifically, Plaintiffs allege that the markets for blood reagents (1) are highly concentrated, (2) have significant barriers to entry, (3) have inelastic demand, (4) do not have reasonable substitutes, and (5) are standardized with interchangeable products. (Consol. Compl. ¶¶ 96-112.) At most, such allegations suggest that a conspiracy is possible – not that one occurred. These same market factors lend themselves to the equally plausible inference of parallel *independent* price increases, as well. *See Twombly,* 550 U.S. at 1964; *Brooke Group*, 113 S. Ct. at 2596. As pointed out above, "price uniformity is normal in a market with

few sellers and homogeneous products." *E.I. Du Pont,* 729 F.2d at 139. And the character of the market, in and of itself, says nothing about whether Defendants *actually conspired.*

If all it took to make out a Section 1 complaint was an allegation of a concentrated commodity market and parallel price movements, antitrust plaintiffs would have license to conduct expensive and extortive fishing expeditions nearly every time the price moved in the broad swath of American industries that have these market characteristics. Fortunately, the Supreme Court has repeatedly made clear that more is required. *Twombly*, 127 S. Ct. at 1968 n.7; *Brooke Group*, 113 S. Ct. at 2594.

b. Trade Association Membership.

Plaintiffs also allege that the Defendants participated in trade associations, and that such associations "can be used to foster and facilitate an unlawful conspiracy." (Consol. Compl. ¶ 113.) This allegation is worthy of no weight. *Twombly* and other cases have expressly rejected trade association participation as a reason for inferring a price fixing agreement. *See Twombly*, 550 U.S. at 567 n.12; *In Re Citric Acid Litig.*, 191 F.3d 1090, 1103 (9th Cir. 1999) (holding that participation in a trade association cannot support an inference of conspiracy as "meetings, at least in and of themselves, do not tend to exclude the possibility of legitimate activity"). Consequently, the allegation

that Defendants participated in various trade organizations cannot save the Consolidated Complaint from dismissal.[7]

c. Intercompany Hiring.

Hiring former employees from a competitor is perfectly consistent with lawful competition. In fact, if anything, recruiting a rival's employee is a quintessentially competitive act. And it makes perfect sense for a company to seek out employees who have experience in the same industry. In short, intercompany hiring does not plausibly show a conspiracy. *See St. Clair,* 340 Fed. Appx. at *65 ("His conspiracy claims rely on the parallel fee structures of several competing banks and the assertion that the individual defendants, officers of Citizens Bank, each had prior work experience at other banks. These accusations are wholly inadequate.").[8]

Moreover, Plaintiffs have alleged no facts showing that any employees hired from a competitor did anything inappropriate or even communicated with his or her former colleagues. Instead, Plaintiffs assert simply that "there was very likely direct

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[7] Similarly, the allegation regarding a public presentation by an Ortho representative at a conference in 2000 conducted by a trade association of Defendants' customers is insufficient to suggest a conspiracy. At most, this allegation amounts to an allegation that Ortho publicly announced a price increase in advance, which the Supreme Court has described as "perfectly lawful." *Catalano Inc. v. Target*, 446 U.S. 643, 647 (1980).

[8] Any reliance on the simple hiring of a competitor's employees as evidence in support of a conspiracy would have the plainly anticompetitive effect of discourage such hiring and thus should be rejected. *Cf. Matsushita,* 475 U.S. at *593* ("[C]ourts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter procompetitive conduct"); *Gordon*, 423 F.3d at 208 ("[M]istaken inferences in this context may serve to chill the very conduct that the antitrust laws are designed to protect.").

communications." (Consol. Compl. ¶ 115.) That allegation is clearly insufficient under *Twombly*. Of course, even if there were some direct communications between high-level employees at Immucor and Ortho, that obviously would not mean, *ipso facto*, that there was a price-fixing conspiracy. The *content* of the communications would be critical. *See Blomkest Fertilizer, Inc. v. Potash Corp.*, 203 F.3d 1028, 1033 (8th Cir. 2000) (affirming summary judgment despite evidence of "a high level of interfirm communications between producers"). Here, the Plaintiffs have not even alleged that communications actually took place, let alone the content of such communications. Therefore, this allegation fails to support the existence of a price-fixing conspiracy. *See id.*

d. Unrelated Improprieties.

Finally, Plaintiffs allege that Immucor's CEO was purportedly convicted of bribery by an Italian Court, indicating a lawless atmosphere at Immucor that would make an antitrust violation more likely to occur. (Consol. Compl. ¶ 120.) This (somewhat desperate) allusion to a pending foreign proceeding that is not even remotely related to the antitrust laws or the alleged conspiracy in this action cannot prevent the Consolidated Complaint from being dismissed. *Cf. Am. Copper & Brass, Inc.*, 494 F. Supp. 2d at 876-77 (dismissing complaint relying on foreign court decision relating to conduct in Europe, even though the decision related to price fixing). Indeed, this alleged conviction and the related facts and circumstances would not even be admissible

at trial, because they are prejudicial, would constitute improper propensity evidence, and are utterly irrelevant. *See* Fed. R. Evid. 404(b).

IV. CONCLUSION

Because the Consolidated Complaint fails to allege facts that plausibly show an agreement between the Defendants to fix prices, Immucor respectfully requests the Court to dismiss the Consolidated Class Action Complaint with prejudice pursuant to Fed. R. Civ. P. 12(b)(6).

Respectfully submitted this 17th day of March, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing **MEMORANDUM OF LAW IN SUPPORT OF IMMUCOR, INC.'S MOTION TO DISMISS THE CONSOLIDATED CLASS ACTION COMPLAINT** with the Clerk of Court using the CM/ECF system, which constitutes service.

This 17th day of March, 2010.

/s/ Michele D. Hangley
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