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**

MEMORANDUM IN SUPPORT OF MOTION BY DEFENDANTS ORTHO-CLINICAL DIAGNOSTICS, INC. AND JOHNSON & JOHNSON HEALTH CARE SYSTEMS, INC. TO DISMISS THE CONSOLIDATED AMENDED COMPLAINT

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Defendants Ortho-Clinical Diagnostics, Inc. ("Ortho") and Johnson & Johnson Health Care Systems, Inc. ("JJHCS") submit this memorandum of law in support of their motion, pursuant to Federal Rule of Civil Procedure 12(b)(6), to dismiss the Consolidated Amended Complaint (the "Complaint") filed by the Plaintiffs against them and Defendant Immucor, Inc. ("Immucor").

INTRODUCTION

The antitrust complaints that preceded the consolidation of this multi-district litigation and that led, in turn, to the present Complaint were filed shortly after Immucor and Ortho each announced the existence of an investigation by the Department of Justice into the pricing of blood reagents products. The fact of that investigation may explain *why* the Plaintiffs brought these actions, but it does not explain *what* in their Complaint is sufficient to meet their obligations under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007), to plead a plausible antitrust conspiracy. Courts have held that government investigations do not "cross-fertilize" insufficient conspiracy allegations. *See, e.g., In re Hawaiian & Guamanian Cabotage Antitrust Litig.*, 647 F. Supp. 2d 1250, 1258-59 (W.D. Wash. 2009). For pleading purposes, the pendency of a federal grand jury is simply a "non-factor". *See In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1024 (N.D. Cal. 2007).

So, stripped of the non-factor government investigations, what is left of the Plaintiffs' Complaint? Are the allegations of price fixing in blood reagents sufficient, under the pleading standard set by the Supreme Court in *Twombly*, to state a claim that Defendants violated Section 1 of the Sherman Act, 15 U.S.C. § 1? The answer is no. At most, the Complaint contains allegations of less than parallel conduct, accompanied by the following unremarkable facts:

(1) Common membership in trade associations (*see* Compl. ¶¶ 65, 113), *but see Twombly*, 550 U.S. at 567 n.12 (rejecting the use of trade association membership to support antitrust conspiracy pleadings);

(2) Hiring of a competitor's former employees (*see* Compl. ¶¶ 114-118), *but see, e.g.*, *Hawaiian Cabotage*, 647 F. Supp. 2d at 1256 (dismissing complaint which failed to identify any individuals allegedly involved in conspiratorial communications); and

(3) Market concentration (*see* Compl. ¶ 97), *but see Twombly*, 550 U.S. at 557 (explaining that market concentration can increase competitors' rational, independent interest in following each others' price increases); *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993) (illustrating that market concentration can permit lawful parallel conduct without need for agreement).

The last of these alleged market facts is particularly unhelpful to Plaintiffs' Sherman Act claim to the extent it attributes the price increases in "traditional" blood reagents to the six acquisitions in the industry by one party (Immucor, between 1994 and 1999), and not to concerted action by two parties (Immucor and Ortho, after 1999). (*See* Compl. ¶ 58.) The pre-2000 acquisitions by Immucor, regardless of their alleged market effects, have no relevance to the alleged conduct by Ortho and are not actionable under Section 1 of the Sherman Act, which is the sole antitrust provision relied upon by the Plaintiffs here.

In sum, the U.S. Supreme Court in *Twombly* and, more recently, in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), imposed on Plaintiffs an obligation to do more than allege the *possibility* of a conspiracy before the doors are open to expensive and burdensome pretrial discovery; they must allege a *plausible* conspiracy. Plaintiffs here have not alleged the specific time, place, or person involved in an unlawful agreement and, more generally, have not met the requirements for pleading a price-fixing conspiracy. Accordingly, for the reasons discussed more fully below, the Complaint should be dismissed under Rule 12(b)(6) for the failure to state a claim.

BACKGROUND TO THE COMPLAINT

Between May 18 and September 3, 2009, at least thirty nearly identical class action complaints were filed across the country alleging that Immucor, Ortho, and JJHCS (collectively "Defendants") conspired to fix the price for blood reagents. The filing of these complaints followed the announcements by Immucor and Ortho on April 24, 2009 and May 5, 2009, respectively, that they had received grand jury subpoenas from the United States Department of Justice, Antitrust Division ("DOJ"), requesting documents and information pertaining to an investigation of alleged violations of the antitrust laws in the blood reagents industry. (Compl.[1] ¶¶ 7, 88, 89.) On August 17, 2009, the Judicial Panel on Multidistrict Litigation ("JPML") transferred ten of these cases to this Court. (JPML Order dated Aug. 17, 2009, Doc. No. 1.) The JPML later transferred the additional cases that it identified as "tag-along actions." (Aug. 19, 2009 JPML Order, Doc. No. 2.)

The Court held an Initial Pretrial Conference on January 19, 2010 and set forth a schedule for the filing of a consolidated amended complaint and motions to dismiss and stay. Pursuant to the Court's scheduling order (Doc. No. 31), Plaintiffs filed the Consolidated Amended Complaint on February 16, 2010.

The Complaint alleges that Defendants violated Section 1 of the Sherman Act, 15 U.S.C. § 1, by conspiring to fix the price of traditional blood reagent products. (Compl. ¶¶ 148-152.) Plaintiffs seek treble damages and attorneys fees and costs under Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 26. (*Id.* ¶¶ 9, A-E.) The Complaint's allegations about blood reagents products and price increases are summarized below. None of these allegations, either

[1] All references herein to "Compl." refer to portions of the Consolidated Amended Complaint.

individually or in combination with others, is sufficient to state a claim under Section 1 of the Sherman Act.

Blood Reagents Products

The Complaint alleges blood reagents are products used to detect and identify certain properties of the cell and serum components of human blood, including the blood group, blood type, and presence of antibodies and infectious diseases, such as HIV and hepatitis. (Compl. ¶¶ 1-2, 39.) Reagent products are "critical to the safety of the nation's blood supply." (*Id.* ¶ 107.)

There are many different reagent products, and they have a variety of different uses. As alleged in the Complaint, one category of reagents is used by clinical laboratories to screen for various blood properties (*see id.* ¶ 1), such as the presence of certain cancers. Another category of reagents is used in conjunction with blood transfusions for donor screening or pre-transfusion blood-typing. (*See id.* ¶¶ 38-39.) The pre-transfusion tests are part of an industry known as "immunohematology." (*See id.* ¶ 35.) Within the immunohematology industry, there exist "traditional" and "proprietary" reagents. (*Id.* ¶¶ 44-51.) The price increases at issue in the Complaint concern "traditional" reagents. (*See, e.g., id.* ¶¶ 52, 54, 63, 67, 70.) "Traditional" reagents are used in conjunction with manual testing of individual test tubes and "automated" (or "proprietary") reagents are used with machines that can test multiple tubes simultaneously. (*See id.* ¶¶ 3, 41.) The Complaint states that the older manual form of testing is time- and labor-intensive (*id.* ¶¶ 45-46); the newer automated form of testing is quicker and requires less labor input (*id.* ¶ 48). The U.S. Food and Drug Administration ("FDA") regulates "human blood as a drug and as a biological product," as well as "all phases of the immunohematology industry." (*Id.* ¶ 35.)

Defendant Immucor is a Georgia corporation that manufactures many blood reagents products. (*Id.* ¶ 27.) In addition to its traditional blood reagents, Immucor also developed and brought to market its own "automated" blood reagents that rely on its proprietary "capture" technology. (*Id.* ¶¶ 3, 49.) Immucor developed automated products around 1998 and has at least three sets of FDA-approved automated reagents. (*Id.*) Immucor makes both the testing machines and the reagents that can only be used with Immucor machines. (*Id.*)

Defendant Ortho is a New York corporation that manufactures many blood reagents products. (*Id.* ¶ 28.) (In fact, although Plaintiffs do not disclose the number in the Complaint, there are over 60 different traditional reagents.) Ortho also markets a competing "automated" technology. Ortho's proprietary machines and reagents utilize "gel" technology. (*Id.* ¶ 50.) The FDA has approved automated reagent products developed by Ortho. (*Id.*)

Defendant JJHCS, though in the same corporate family as Defendant Ortho, does not manufacture blood reagents. The Complaint alleges that JJHCS "was instrumental in facilitating the sale and distribution" of Ortho's blood reagents but does not explain how or why it allegedly was instrumental. (*Id.* ¶ 29.)

Plaintiffs, which are primarily hospitals and clinical laboratories, allege that they purchased blood reagents "directly" from one or more Defendants. (*Id.* ¶¶ 12-26.)[2]

Plaintiffs further allege that the relevant geographic market is the United States and its territories.[3] (*Id.* ¶ 53.)

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[2] The Complaint does not specify what role, if any, group purchasing organizations ("GPOs") played in the Plaintiffs' purchases of blood reagents or whether any of those purchases were made indirectly through the GPOs. Ortho and JJHSC are not moving to dismiss on the basis of the *Illinois Brick* bar to indirect purchaser claims, but they do reserve the right to assert that defense if the Plaintiffs' claims survive the pleading stage.

[3] The Complaint vaguely asserts that the relevant product market is the market for "blood reagents," generally. It appears, however, that Plaintiffs direct their price-fixing claim at "traditional" blood reagents, given that the

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Price Increases for Blood Reagents

According to the Complaint, "[i]n the late 1990s, Defendants were losing money" in providing the traditional reagents essential to the safety of the nation's blood supply, so much so that Ortho and Immucor were "considering leaving the Blood Reagents business entirely because it was too unprofitable." (*Id.* ¶¶ 54-55, 73.)

The Complaint goes on to describe Immucor's "aggressive campaign to eliminate competition in the Blood Reagents industry, by acquiring six of its competitors." (*Id.* ¶¶ 58.) For example, between 1996 and 1999, Immucor acquired three other companies in the blood reagents industry. (*Id.* ¶¶ 58.) According to one financial analyst, the U.S. blood reagents market became "essentially a duopoly" between Immucor and Ortho. (*Id.* ¶ 61.)

It was during and after this period of Immucor's consolidation "campaign" that, according to the Complaint, the price increases in blood reagents began. Plaintiffs allege that, at some point around January 2000, Immucor "began a 'significant price adjustment'" to "'utilize its market leadership position . . . to realign its prices with its costs.'" (*Id.* ¶ 66.) Also, according to the Complaint, Immucor increased its prices for unspecified traditional or "various" products in 2004, 2005, and 2008. (*Id.* ¶ 70.) Immucor also implemented a "standardized pricing structure." (*Id.* ¶¶ 83-84.) Those price increases allegedly helped restore profitability to Immucor's sales of some reagents. (*Id.* ¶¶ 72-74.)

Rather than "abandon" the unprofitable industry (*id.* ¶ 73), Ortho announced significant price increases in the "Fall of 2000," approximately nine months after Immucor allegedly first

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Complaint only specifically alleges price increases for such "traditional" reagents (*e.g.*, Compl. ¶¶ 52, 54, 63, 67, 70, 71), or makes references to "price increases" generally (*see, e.g.*, *id.* ¶¶ 65, 75, 77-78, 83, 84, 87, 125, 132-33, 150; *see also* ¶ 70(a) ("wide variety" of reagents)).

raised prices (*id.* ¶ 65). Ortho implemented price increases for unspecified traditional reagents products in 2004, 2005, and 2008. At no point is Ortho alleged to have implemented a "standardized pricing structure." (*Id.* ¶ 83.)

Nowhere does the Complaint allege that Defendants increased their respective prices simultaneously, for the same products, or for a uniform amount. Instead, Plaintiffs allege price increases for "traditional" reagents generally and in widely varying amounts. (*Id.*) Ortho alone sells many (more than 60) different traditional blood reagents, each with its own costs, competitive alternatives, demand, and price. The Complaint does not attempt to identify which of these many products might have been affected by each alleged price increase, let alone whether Immucor raised prices for a similar and competing traditional blood reagent. (*Id.*) Furthermore, the Complaint asserts that, after 2000, Defendants' alleged price increases for various traditional blood reagents products ranged between 100% and 300% a year. (*Id.*) Nowhere in the Complaint do Plaintiffs allege that Immucor and OCD agreed on the specific price or rate of increase for any specific product – or at any specific time. In light of the Complaint's sweeping allegations of prices increases ranging from 100%-300%, the Defendants (and the Court) can only guess as to scope of the alleged conspiracy.

The Complaint also includes allegations regarding GPOs, but again it does not allege that Defendants' actions with respect to the GPOs were either the same or undertaken simultaneously. In January, 2005, Immucor cancelled contracts with two GPOs after those organizations separately refused to accept Immucor's price increases. (*Id.* ¶ 79.) Ortho cancelled a contract with one GPO to implement a price increase in September 2004. (*Id.* ¶ 78.)

LEGAL STANDARDS

Federal Rule of Civil Procedure 12(b)(6) provides for dismissal of a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). When deciding a motion under this rule, the court considers whether plaintiffs' complaint contains sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see Boring v. Google, Inc.*, No. 09-2350, 2010 WL 318281 (3d Cir. Jan. 28, 2010). In the Rule 12(b)(6) context, the court accepts as true a complaint's well-pleaded allegations of fact. *Phillips v. County of Allegheny*, 515 F.3d 224, 228 (3d Cir. 2008). But, a court need not credit a complaint's bald assertions or legal conclusions when deciding a motion to dismiss. *Papasan v. Allain*, 478 U.S. 265, 286 (1986); *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997); *see Fisher Bros. Sales, Inc. v. United States*, 46 F.3d 279, 286 (3d Cir. 1995) ("[T]he fact that we must accept the plaintiffs' version of the facts as true does not mean that we must accept plaintiffs' *characterization* of those facts." (emphasis in original)).

The Supreme Court's decision in *Twombly* has had a profound impact on what plaintiffs must allege in a conspiracy case to satisfy the federal pleading standards.[4] *Twombly* not only rejected *Conley v. Gibson*'s longstanding "no set of facts" pleading standard as "too lenient," *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 129 S. Ct. 1109, 1123 (2009), it also announced a shift in the entire pleading "paradigm" to that of "plausibility," *Wilkerson v. New Media Tech. Charter Sch. Inc.*, 522 F.3d 315, 322 (3d Cir. 2008). "After *Twombly*, it is no longer sufficient to

[4] Regarding the breadth of *Twombly*'s impact on pleading requirements, commentators have noted *Twombly*'s profound impact. *See, e.g.*, Douglas G. Smith, *The* Twombly *Revolution?*, 36 Pepp. L. Rev. 1063, 1100 (2009). The standard under Rule 8 of the Federal Rules of Civil Procedure remains notice pleading, but what courts will accept in a conspiracy case as meeting that standard has fundamentally changed in the wake of *Twombly* and, more recently, *Iqbal*.

allege mere elements of a cause of action; instead 'a complaint must allege facts suggestive of [the proscribed] conduct.'" *Phillips*, 515 F.3d at 233 (quoting *Twombly*). Under the *Twombly* regime, "[w]here a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 557). Specifically, in pleading a Sherman Act, Section 1 claim, *Twombly* made plain that "it is not enough to make allegations of an antitrust conspiracy that are consistent with an unlawful agreement." *In re Elevator Antitrust Litig.*, 502 F.3d 47, 50 (2d Cir. 2007).

In the wake of *Twombly*, dismissals of antitrust actions for failure to state a claim are anything but rare.[5] *See, e.g., Byers v. Intuit, Inc*., --- F.3d ---, 2010 WL 715562, at *8 (3d Cir. March 3, 2010); *St. Clair v. Citizens Fin. Group*, 340 Fed. App'x 62 (3d Cir. 2009); *In re Travel Agent Comm'n Antitrust Litig*., 583 F.3d 896 (6th Cir. 2009); *Christy Sports, LLC v. Deer Valley Resort Co., Ltd*., 555 F.3d 1188, 1194 (10th Cir. 2009); *Person v. Google, Inc.*, No. 07-16367, 2009 WL 3059092 (9th Cir. Sept. 24, 2009); *Perry v. Rado*, 343 Fed. App'x 240 (9th Cir. 2009); *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008); *Sheridan v. Marathon Petroleum Co., LLC*, 530 F.3d 590 (7th Cir. 2008) (Posner, J.); *Elevator Antitrust*, 502 F.3d at 50-52; *Building Materials Corp. of Am. v. Rotter*, 535 F. Supp. 2d 518 (E.D. Pa. 2008); *McCray v. Fid. Nat'l Title Ins. Co*., 636 F. Supp. 2d 322 (D. Del. 2009);[6] *cf. Linkline*, 129 S. Ct. at 1123

[5] In fact, empirical evidence suggests that the implementation of *Twombly*'s pleading standard has increased the rate of Rule 12(b)(6) dismissals generally. *See* Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically?*, 59 Am. U. L. Rev. 553, 624 (2010).

[6] Even before *Twombly*, dismissals in antitrust cases in this Circuit for insufficient factual allegations of required elements were not unusual. *See, e.g., Lum v. Bank of Am.*, 361 F.3d 217 (3d Cir. 2004); *Crossroads Cogeneration Corp. v. Orange & Rockland Utils.*, 159 F.3d 129 (3d Cir. 1998); *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430 (3d Cir. 1997); *Commonwealth of Pa. ex rel. Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173 (3d Cir. 1988); *In re Bath & Kitchen Fixtures Antitrust Litig.*, No. 05-cv-00510 MAM, 2006 WL 2038605 (E.D. Pa. July 19, 2006); *IDT Corp. v. Building Owners & Managers Ass'n Int'l*, No. Civ. A. 03-4113, 2005 WL 3447615 (D.N.J.

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(reversing denial of defendants' motion for judgment on the pleadings under the "too lenient" *Conley v. Gibson* standard and remanding for further proceedings consistent with *Twombly*). As the Supreme Court explained in *Twombly*, careful review of antitrust complaints at the motion to dismiss stage serves the important purpose of preventing parties from incurring the enormous expense of discovery in response to allegations that are consistent with lawful business conduct. *See Twombly*, 550 U.S. at 559 ("[I]t 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." (internal citations and quotations omitted)).

ARGUMENT

Plaintiffs bring their claim under Section 1 of the Sherman Act, which prohibits "every contract, combination . . ., or conspiracy, in restraint of trade or commerce . . . ." 15 U.S.C. § 1. To plead a claim under this section, plaintiffs must plausibly allege: (1) a contract, combination, or conspiracy; (2) in restraint of trade; (3) affecting interstate commerce. *E.g.*, *Maric v. St. Agnes Hosp. Corp.*, 65 F.3d 310, 313 (2d Cir. 1995). Ortho and JJHCS's motion to dismiss is focused on the first element, concerted action, which is essential to Plaintiffs' Section 1 claim. *See Santana Prods., Inc. v. Bobrick Washroom Equip., Inc.*, 401 F.3d 123, 131-132 (3d Cir. 2005) ("An antitrust plaintiff must first prove concerted action by the defendants."). "Unilateral 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) (citation omitted).

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Dec. 15, 2005); *Brunson Commc'ns, Inc. v. Arbitron, Inc.*, 239 F. Supp. 2d 550 (E.D. Pa. 2002); *Fresh Made, Inc. v. Lifeway Foods, Inc.*, No. Civ. A. 01-4254, 2002 WL 31246922 (E.D. Pa. Aug. 9, 2002).

Here, the Complaint does not identify the people, place, or point in time involved in any antitrust conspiracy involving blood reagents; nor does it identify any particular communication between Defendants that was in furtherance of such a conspiracy. *See, e.g., Elevator Antitrust*, 502 F.3d at 50-51 (requiring, in addition to meeting locations, specification of particular conspiratorial activities by particular defendant to plausibly plead agreement); *Travel Agent*, 583 F.3d at 905 (dismissing complaint which failed to plead "which defendants supposedly agreed or when and where the illicit agreement took place"). Instead of the requisite pleading of concerted action, the Complaint offers, at most, (1) insufficient allegations of a mere opportunity to conspire and (2) allegations of conduct that is less than parallel and more plausibly associated with economically rational unilateral conduct than with conspiratorial conduct.

Thus, as discussed in the next two sections, Plaintiffs fail to cross the line established by the U.S. Supreme Court separating the mere "possibility" of a conspiracy from the "plausibility of entitlement to relief." *Twombly*, 550 U.S. at 557.

I. THE COMPLAINT DOES NOT PLAUSIBLY ALLEGE THAT OCD OR JJHCS ENTERED INTO AN AGREEMENT WITH IMMUCOR TO FIX PRICES.

A. The Complaint Contains No Specific Allegations of an Unlawful Agreement.

Only "allegations of conspiracy which are particularized . . . will be deemed sufficient" to survive a motion to dismiss. *Commonwealth of Pa. ex rel. Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173, 181 (3d Cir. 1988). Specific actions at a particular time or specific examples of defendants' conduct in meetings have been required to survive dismissal. *E.g., Elevator Antitrust*, 502 F.3d at 50; *Hawaiian Cabotage*, 647 F. Supp. 2d at 1257 (dismissing complaint where "plaintiffs offer no particulars concerning the locations or dates of any meetings"); *In re Parcel Tanker Shipping Servs. Antitrust Litig.*, 541 F. Supp. 2d 487, 491-92 (D. Conn. 2008) (dismissing a complaint which referred to "clandestine meetings" among certain participants but

failed to state specific examples of defendants' conduct in meetings, "other than general allegations of conspiracy"); *see also, e.g., In re OSB Antitrust Litig.*, No. 06-826, 2007 WL 2253419, at *4 (E.D. Pa. Aug. 3, 2007) (allowing complaint to proceed based on specific allegations that an actual agreement was reached at specific industry meeting). The failure to "allege any meetings" between defendants, "any communications between them," or other means by which the conspiracy formed does "not come close to adequately pleading conduct amounting to" an unlawful agreement. *PepsiCo*, 836 F.2d at 181. Likewise, the failure to identify any specific communications has been held fatal to pleading a Section 1 claim. *Travel Agent*, 583 F.3d at 907; *Hawaiian Cabotage*, 647 F. Supp. 2d at 1258; *see also LTL Shipping Servs. Antitrust Litig.*, No. 1:08-MD-01895-WSD, 2009 WL 323219, at *12 (N.D. Cal. Jan. 28, 2009); *In re Pressure Sensitive Labelstock Antitrust Litig.*, 566 F. Supp. 2d 363, 372 (M.D. Pa. 2008) (considering allegations regarding "direct discussions about the need to collaborate on price increases during the October, 2000 conference").

The Complaint does not contain any allegations that a meeting took place during which Defendants formed the supposed conspiracy. Regarding an agreement to fix prices, the Complaint states baldly that, "Defendants engaged in a conspiracy." (Compl. ¶ 6; *see id.* ¶¶ 11, 57, 76, 86, 132-133, 135, 149-151 (repeating word "conspiracy"); *see also id.* ¶ 32 (describing "unnamed co-conspirators" and their unspecified "acts and . . . statements in furtherance" of the alleged conspiracy).) The Complaint thus contains only the "conclusory allegation of agreement at some unidentified point," which cannot survive under *Twombly*'s analysis, *Twombly*, 550 U.S. at 557, or formulaic pronouncements that actions were taken by unidentified "officers, directors, agents, employees or representatives" of the Defendants during some unspecified time period (Compl. ¶¶ 30-31). But, pleading a Section 1 claim requires particularized allegations. *See*

Twombly, 550 U.S. at 556 n.10; *see also PepsiCo, Inc.*, 836 F.2d at 181 (requiring "particularized" allegations); *Garshman v. Universal Res. Holding Inc.*, 824 F.2d 223, 230 (3d Cir. 1987) (rejecting insufficient allegations about "unnamed other entities").

At best, the Complaint alleges benign communications that have been held insufficient to infer conspiracy even in cases in which parallel conduct was alleged: trade association meetings (Compl. ¶¶ 65, 113), discussed below, and public communications, which do not support conspiracy allegations (*id.* ¶ 65), *see Travel Agent*, 583 F.3d at 907 (holding that public availability of defendants' rates was not possible evidence of a conspiracy). To the contrary, courts have recognized that trade associations have procompetitive benefits, *see, e.g.*, *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 999 (3d Cir. 1994), and that commerce would grind to a halt if businesses could not publicly advertise their prices, *e.g.*, *Catalano, Inc. v. Target Sales*, 446 U.S. 643, 647 (1980) (per curiam) ("[A]dvance price announcements are perfectly lawful."); *Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 94 (7th Cir. 1991) (explaining that price advertisements serve an "important purpose in the industry"). *Cf. OSB*, 2007 WL 2253419, at *4 (allowing claim to proceed based on alleged communications, plus publication of price schedules in industry newsletter, plus economically irrational parallel conduct of scheduling of downtime during period of dramatic demand and price increases). Thus, the Complaint fails to plead the essential element of a Section 1 claim because it does not allege that Defendants had any meeting or direct communications regarding an agreement – let alone any meeting of the minds or commitment regarding pricing required under *Twombly*.

In lieu of particularized facts regarding the formation of an agreement, the Plaintiffs offer 152 paragraphs discussing trade association membership, market characteristics, and wholly

irrelevant conduct in Europe (*see, e.g.*, Compl. ¶¶ 6, 11, 57, 63, 75-76, 86, 132-135, 149-151). These allegations, as discussed below, do not compensate for the Complaint's deficient and conclusory statements regarding an "agreement" or "conspiracy" between the Defendants.

B. The Complaint Offers Mere Opportunities to Meet and Implausible Inferences of Communication, Which Do Not Suffice to Plead an Agreement.

1. Trade associations offer the mere opportunity to meet lawfully.

It is well-settled that membership in a trade association does not support an inference of agreement or Section 1 conspiracy. *See Twombly*, 550 U.S. at 567 n.12 (rejecting suggestion that trade association membership and similar pricing plausibly pled a price-fixing conspiracy); *accord In re Flat Glass Antitrust Litig. (II)*, No. 08-mc-180, 2009 WL 331361, at *3 (W.D. Pa. Feb. 11, 2009) ("Membership in trade associations, without more, does not in and of itself suggest a conspiracy."); *Lubic v. Fidelity Nat'l Fin., Inc.*, No. C08-0401 MJP, 2009 WL 2160777, at *3 (W.D. Wash. July 20, 2009) ("The case law is replete with instances where participation in trade organizations has been held insufficient to establish proof of a conspiracy."); *In re Late Fee and Over-Limit Fee Litig.*, 528 F. Supp. 2d 953, 963-64 (N.D. Cal. 2007) (refusing to infer conspiracy based on allegations that trade association membership provided opportunities to communicate). Thus, the Complaint's statements about Defendants' membership in trade associations (Compl. ¶ 113) do nothing to support the claim of conspiracy.

Further, allegations that defendants attended trade association meetings do not suffice to bring allegations of parallel conduct into the realm of plausible conspiracy because such allegations "aver only an opportunity to conspire, which does not necessarily support an inference of an illegal agreement." *Travel Agent*, 583 F.3d at 905; *see also Hinds County, Mississippi v. Wachovia Bank, N.A.*, 620 F. Supp. 2d 499, 508 (S.D.N.Y. 2009) (dismissing pleading which identified specific trade association meetings because the allegations offered

only "venues to collude" and did not "'nudge [plaintiffs'] claims across the line from conceivable to plausible'" (quoting *Twombly*)); *Lubic*, 2009 WL 216077, at *3 (dismissing complaint in which plaintiffs failed "to allege which Defendants may have attended meetings of rate-setting organizations, whether the setting of rates . . . was discussed at those (or other) meetings, where those meetings were held and whether anyone who attended those meetings reported back to their parent organizations"). Competitors' "presence at such trade meetings is more likely explained by their lawful, free-market behavior" than by an illegal agreement. *Travel Agent*, 583 F.3d at 910-11; *but see OSB*, 2007 WL 2253419, at *4 (allowing complaint to proceed based on specific allegations that an actual agreement was reached at a specific industry meeting, as well as through repeated communications in an industry magazine).

Even allegations that opportunities to meet approximately corresponded to the questioned price increases have been held insufficient to plead conspiracy under Section 1. *E.g.*, *Graphics Processing*, 527 F. Supp. 2d at 1023; *cf. Pressure Sensitive Labelstock*, 566 F. Supp. 2d at 372 (holding as sufficient allegations regarding "direct discussions about the need to collaborate on price increases during the October, 2000 conference" followed one month later by nearly-simultaneous price increases, which were also linked to alleged agreement and historical factors).

Regarding trade association meetings, the Complaint only suggests the attendance of one supposed conspirator at a single trade association meeting held *after* the alleged price-fixing conspiracy had commenced. The Complaint alleges that Ortho made a presentation at a trade association meeting in the fall of 2000, during which it announced an upcoming price increase to its customers. (Compl. ¶ 65.) The Complaint does not allege, however, that Ortho and Immucor had any direct communications at this meeting. In fact, the Complaint does not even allege that Immucor was at the presentation, stating only that Ortho supposedly "knew" that representatives

from Immucor might be among those attending the presentation. (*Id.*) There are no allegations about any Immucor employee's actual attendance at the presentation. *E.g.*, *Elevator Antitrust*, 502 F.3d at 50; *Parcel Tanker Shipping*, 541 F. Supp. at 492. The implausibility of an agreement arising from the Ortho presentation is compounded by the lack of any allegations in the Complaint that the presentation disclosed the amount of the price increase, the timing of the price increase, or which products or customers would be affected.

The timing of this trade association meeting also does not fit logically with the conclusory allegations of a conspiracy which Plaintiffs allege had already formed "at least as early as January 1, 2000" (Compl. ¶ 132), well in advance of the presentation. Although the Complaint elsewhere suggests that "Immucor followed" Ortho's fall 2000 announced price increases "with its own increases" at some unspecified time (*id.* ¶ 65), the Complaint is ambiguous regarding the timing of Immucor's price increases and elsewhere claims that Immucor had instituted price increases at least eight months earlier. At one point the Complaint says that Immucor began increasing its prices "at the beginning of the class period" (*id.* ¶ 66), which is "January 1, 2000" (*id.* ¶ 125), and "immediately after the industry consolidation" (*id.* ¶ 66), which it alleges concluded in 1998 (*id.* ¶ 58) – eight or more months before Ortho's presentation. At other points, the Complaint says Immucor's price increases began "in or about 2000" (*id.* ¶¶ 67-68). While the Complaint cites an unnamed analyst's conclusion that Immucor's price increases occurred "in close proximity to Ortho's," the Complaint's factual allegations do not demonstrate this. (*Id.* ¶ 68.) To the contrary, the allegations demonstrate that Immucor increased prices nine months before Ortho announced that it would be increasing prices and thus Ortho's presentation does not support a plausible inference of conspiracy.

2. Immucor's hiring of or association with two former Ortho international employees at best offers an implausible opportunity to communicate.

The Complaint attempts to support its conspiracy claim with the fact that two people worked for Ortho in Italy and Japan, respectively, before being employed by or associated with Immucor. (*Id.* ¶¶ 114-118.) But the Complaint's factual allegations belie its illogical conclusion that these two individuals "likely" communicated with others and "facilitate[d] the opportunity" for conspiracy. (*Id.* ¶ 114, 115.) *See Papasan*, 478 U.S. at 286 (reiterating that conclusions and characterizations need not be accepted in analyzing the sufficiency of pleadings).

One of the individuals, Dr. Gioacchino De Chirico, worked for Ortho in Italy and left Ortho in 1994. (*Id.* ¶ 116.) After leaving Ortho, Dr. De Chirico became president of Immucor's Italian subsidiary and later director of Immucor's European operations. (*Id.*) He did not come to the United States until 2003 (*id.*), over nine years after he left Ortho and three years after the conspiracy allegedly started (*id.* ¶ 132). Dr. De Chirico was employed in Immucor's *European* operations during the time when the Complaint alleges the conspiracy began regarding pricing in the *United States* – and his position at Ortho involved immuno*cytometry* (*id.* ¶ 116), a semi-automated method for phenotyping lymphoid cells, not the pre-transfusion immuno*hematology* industry at issue in the Complaint (*see, e.g., id.* ¶ 35).

The other individual, Hiroshi Hoketsu, has even less relevance to the conspiracy as alleged. Mr. Hoketsu was president of Ortho's Japanese affiliate until his retirement in 2002. (*Id.* ¶ 117.) He joined Immucor's board of directors in 2005 – three years after his retirement (*id.*) and five years after the conspiracy supposedly was formed (*id.* ¶ 58).

The timing and lack of detail regarding these two individuals offer absolutely no plausible support for the alleged conspiracy. *Cf. Travel Agent*, 583 F.3d at 911 (rejecting use of

former CEO's statement because he retired at the beginning of the alleged conspiracy and because of the time lapse between his statement and the alleged conspiracy). There is no allegation that these two people participated in or facilitated any communication or agreement between Ortho and Immucor regarding a conspiracy in the U.S. or that their roles presented such an opportunity. (*See* Compl. ¶¶ 114-118.) Further, the timing of their hiring suggests that they were utterly irrelevant to any conspiracy alleged to have hatched sometime around January 2000.

II. THE COMPLAINT ALLEGES NEITHER THE PARALLEL CONDUCT NOR THE ENHANCEMENT FACTORS NECESSARY TO STATE A SECTION 1 CLAIM.

The balance of the Complaint consists of allegations aimed at (but falling short of) describing parallel conduct by Defendants – which is not unlawful and is, in fact, both rational and expected in a competitive marketplace. "Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." *Twombly*, 550 U.S. at 556-57.

Even the parallel nature of the Defendants' alleged conduct is not apparent from the face of the Complaint. Plaintiffs allege price increases by both Ortho and Immucor beginning in 2000, but they do not allege uniformity in the conduct, either with respect to the timing of the price increases, the amount of the increases, or which of Defendants' numerous blood reagents products were affected. *Cf. In re Baby Food Antitrust Litig.*, 166 F.3d 112, 132 (3d Cir. 1999) (finding defendants' non-uniform price increases were "independent pricing determined by market conditions" and "profit margins"). Instead, the Complaint alleges that Ortho instituted a price increase at least *nine months* after Immucor in 2000. Nowhere does the Complaint mention which of Ortho's 60-plus traditional blood reagents were affected. (*E.g.*, Compl. ¶¶ 65, 70.) The Complaint goes on to allege broad ranges of price increases over the course of several years,

again for unspecified products: 100% to 300% a year after 2000; between 87% and 254% in late 2004; between 24% and 42% in November 2005; and between 50% and 100% in April 2008. (*E.g.*, *id.* ¶ 70.) In other words, it would be entirely consistent with these allegations that, even if both Defendants raised prices on certain products, Immucor may have undercut Ortho's prices by starting at a lower price, implementing a lower percentage increase, or both. The Complaint separately asserts that Immucor implemented "standardized pricing" with its increases in January 2005. (*Id.* ¶ 83-84) There is not one allegation, though, that Ortho did the same.

Moreover, at no point does the Complaint attempt to link these alleged later price increases with the conspiracy allegedly formed in 2000 – or any other agreement. *See Watson Carpet & Floor Covering, Inc. v. Mohawk Indus., Inc.*, No. 3:09-cv-487, 2009 WL 2767055, at *8 (M.D. Tenn. Aug. 27, 2009) (dismissing, under *Twombly*, complaint which failed to provide "any actual facts" supporting "conclusory assertion" that later conduct was "pursuant to and in furtherance of" a conspiracy allegedly hatched outside the statute of limitations); *see also Baby Food*, 166 F.3d at 130 (affirming summary judgment for defendants where "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").

Nevertheless, even assuming the alleged pricing by Defendants for unspecified blood reagents over the course of the past decade could fairly be described as parallel conduct, that is "not itself unlawful." *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993); *Travel Agent*, 583 F.3d at 904.

A. Parallel Pricing Conduct Among Competitors Does Not Violate Section 1.

The Supreme Court in *Twombly* upheld the dismissal of price-fixing claims because the "inadequacy of showing parallel conduct or interdependence, without more, mirrors the

ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." 550 U.S. at 554. Specifically, "similar pricing can suggest competition at least as plausibly as it can suggest anticompetitive conspiracy." *Elevator Antitrust*, 502 F.3d at 51. *Twombly* thus "provides an additional safeguard against the risk of 'false inferences from identical behavior' at . . . the pleading stage." *Travel Agent*, 583 F.3d at 904 (quoting *Twombly*, 550 U.S. at 554).

Similarly, Plaintiffs here have pled behavior that was consistent with the self-interest of each Defendant and with the market conditions Plaintiffs themselves describe. In particular, the Complaint asserts that Defendants operate in a market that is "concentrated" (Compl. ¶¶ 96-97) and, according to Plaintiffs, "essentially a duopoly" (*id.* ¶¶ 4, 61, 97). Yet, as courts have recognized, such concentration makes parallel price increases both economically rational and possible without any agreement. "[P]rice coordination or conscious parallelism, describes the process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, *supra*competitive level by recognizing their shared economic interests and their interdependence with respect to price . . . ." *Brooke Group*, 509 U.S. at 227 (emphasis in original). The Complaint itself identifies independent conduct that can account for one Defendant's independent pricing: an acknowledgment by Immucor's CEO that, "by buying up its competition and consolidating the marketplace into two key players, Immucor can raise its prices." (Compl. ¶ 56.)

One common "independent response" or "discernible reason" for parallel conduct that has often rendered pleadings deficient is that the parallel conduct was in the defendant's independent economic self-interest. *Twombly*, 550 U.S. at 557 n.4. It is well established that an

individual firm serves its own rational economic interests by accounting for its competitors' actions and prices. *See, e.g.*, *Twombly*, 550 U.S. at 557; *see also In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360-61 (3d Cir. 2004); *Baby Food*, 166 F.3d at 135; *DHX, Inc. v. Surface Transp. Bd.*, 501 F.3d 1080, 1092 (9th Cir. 2007). Choosing to maximize long-run profits by meeting a competitor's price increases, even at the expense of short-term profit, serves a firm's independent self-interest. It would indeed be *against* a firm's rational economic interest *not* to account for a competitor's price increases. *See Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1311 (11th Cir. 2003) (explaining that refusing to match a competitor's price increase "likely would have resulted in little if any market share gain" and "would have *minimized* profits, given that lower prices generate smaller revenues" (emphasis supplied)).

For these reasons, dismissals of complaints alleging parallel conduct in defendants' own economic interests are common. *E.g.*, *Twombly*, 550 U.S. at 557; *Travel Agent*, 583 F.3d 908-09 ("[T]he plausibility of plaintiffs' conspiracy claim is inversely correlated to the magnitude of defendants' economic self-interest . . . ."); *America Channel, LLC v. Time Warner Cable, Inc.*, No. 06-2175 (DWF/SRN), 2007 WL 1892227, at *4 (D. Minn. June 28, 2007) (dismissing complaint where it was in defendants' self-interests to promote their own affiliates and discriminate against independent networks); *Hackman v. Dickerson Realtors, Inc.*, 520 F. Supp. 2d 954, 968 (N.D. Ill. 2007) (dismissing complaint where defendants had rational motivation to boycott plaintiff because "he was undercutting them on commissions and lowering their bottom line"); *Wellnx Life Scis., Inc. v. Iovate Health Scis. Research, Inc.*, 516 F. Supp. 2d 270, 291 (S.D.N.Y. 2007) (dismissing complaint where defendants had substantial incentive to agree with proposal to refuse advertisements from plaintiff).

Not only does the Complaint fail to adequately allege a conspiracy to fix prices, but the allegations of common market stimuli provide a plausible, economically rational, and *entirely lawful* reason for increasing prices to cover costs and to avoid continued unprofitability. The price increases, as shown in the Complaint, were taken in the context of pervasive regulation and the historical problem of costs outpacing revenues. Further, the Complaint identifies Defendants' independent economic interests in raising their respective prices: to regain profitability so they would not have to abandon an industry on which the safety of the nation's blood supply depends. (Compl. ¶¶ 55, 107.) Each Defendant would plausibly find itself "better off" by independently following its competitor's price increase to regain profitability than by retaining the former prices that brought little or no profit. *See Travel Agent*, 583 F.3d at 910.

Each company's development of more profitable automated blood testing products provides an additional legitimate explanation for its independent decision to increase prices. (*See* Compl. ¶¶ 52, 62.) The allegation that Defendants were motivated to convert their customers to automated solutions is *inconsistent* with the allegation that the competitors were conspiring – by raising prices on traditional reagents, the defendants could potentially lose their traditional customers to a competitor's automated solution for multiple years (*e.g.*, *id.* ¶¶ 49-50) – and it is *consistent* with competitive, profit maximizing behavior.[7]

While the complaint dismissed in *Twombly* failed to state a Section 1 claim because it described "merely parallel conduct that could just as well be independent action," *Twombly*, 550 U.S. at 557, the Complaint at issue here describes conduct that does not even rise to the level of

[7] Not only is this a lawful, independent reason for the price increase, but the Complaint itself explains that the legitimate "hope" that customers would switch to the innovative, and allegedly more profitable, proprietary reagent products never materialized. (Compl. ¶ 112; *see also id.* ¶ 47.)

"merely parallel." Moreover, even if the Plaintiffs' allegations could be read broadly to describe parallel pricing, there are on the face of the Complaint independent, profit maximizing reasons that provide a plausible explanation for Defendants' conduct.

B. The Complaint Does Not Plead Sufficient "Factual Enhancement" to Transform Its Bare Descriptions of Arguably Parallel Conduct into Plausible Allegations of Conspiracy.

> [W]ithout further circumstance pointing toward a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory. An allegation of parallel conduct is thus much like a naked assertion of conspiracy in a § 1 complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of 'entitle[ment] to relief.'

Twombly, 550 U.S. at 557 (internal citation omitted). Here, the Complaint's efforts to "enhance" any allegations of lawful parallel conduct all fall short.

The inquiry is not of the quantity of factual allegations, but of their plausibility. Even a list of "basically every type of conspiratorial activity" is subject to dismissal because "without any specification of any particular activities by any particular defendant," it is "nothing more than a list of theoretical possibilities." *Elevator Antitrust*, 502 F.3d at 50. The court must "first evaluate whether and to what extent each assertion contributes to the entire package." *Hawaiian Cabotage*, 647 F. Supp. 2d at 1256. Here the parts all fail and "the whole is not more than the sum of the parts." *Id.* at 1260.

1. The existence of on-going government investigations is inherently ambiguous and does not enhance any allegations of purported parallel conduct.

Plaintiffs attempt to transform their Complaint from one of parallel conduct to something more by referencing the on-going governmental investigations by the DOJ and the FTC. (Compl. ¶¶ 7, 88-94.) References to government investigations, however, do not sufficiently "cross-fertilize" the Complaint's insufficient allegations of parallel conduct. *See, e.g., Hawaiian*

Cabotage, 647 F. Supp. 2d at 1258-59 (citing cases in which courts have rejected the use of government investigations to support allegations in antitrust complaints); *Elevator Antitrust*, 502 F.3d at 52. Under the *Twombly* standard, grand jury investigations particularly have been held to carry "no weight in pleading an antitrust conspiracy claim." *Graphics Processing*, 527 F. Supp. 2d at 1024; *see, e.g.*, *Hinds County*, 620 F. Supp. 2d at 514 (dismissing complaint that cited government investigations because "the various investigations, inquiries, and subpoenas do not make the [complaint's] allegations plausible for the purposes of deciding a motion to dismiss under the standards as laid out in *Twombly* and *Iqbal*"); *In re Static Random Access Memory (SRAM) Antitrust Litig*., 580 F. Supp. 2d 896, 903 (N.D. Cal. 2008) ("Allegations regarding the [grand jury investigation] do not support Plaintiffs' antitrust claims.").

According to the Complaint, the FTC opened two investigations of Immucor in 2007 concerning (1) Immucor's acquisitions from 1994-1999[8] and (2) pricing. (Compl. ¶ 90.) The FTC then referred the pricing investigation of Immucor to the DOJ and the DOJ commenced a grand jury investigation in 2009. (*Id*. ¶ 88.) Ortho received a subpoena from the grand jury. (*Id.* ¶ 89.) Not only are the Complaint's blanket statements about the pending investigations inherently ambiguous, but, as one court explained, "[b]ecause of the grand jury's secrecy requirement, the scope of the investigation is pure speculation" and "may be broader or narrower than the allegations at issue." *Graphics Processing*, 527 F. Supp. 2d at 1024. "Moreover, if the Department of Justice made a decision not to prosecute, that decision would not be binding on plaintiffs;" thus, the "grand jury investigation is a non-factor." *Id.*

[8] The Plaintiffs' reliance on the FTC's investigation of Immucor's acquisitions is particularly misplaced, as it has no bearing on any alleged conduct by Ortho. Also, as explained above, consolidation in the industry provides a plausible explanation for the alleged price increases based on unilateral (as opposed to conspiratorial) effects.

The Complaint's conclusory statements regarding the "significance" of the grand jury investigation (Compl. ¶¶ 93-94) not only deserve no deference, *Papasan*, 478 U.S. at 286, but also elide important aspects of the grand jury process – namely that a grand jury investigation is not a foregone conclusion of liability, and does not rest on the existence of probable cause, *see Antitrust Grand Jury Practice Manual*, Vol. 1, Ch. 1. § C.6. Because the scope, import, and outcome of the grand jury subpoenas to Defendants are unknown and inherently ambiguous, they do not enhance the plausibility that an agreement exists in the face of lawful parallel conduct.[9]

2. The Complaint's statements regarding customer relationships do not enhance any allegations of purported parallel conduct.

Plaintiffs' allegations that Defendants cancelled contracts with GPOs and allocated customers fare no better than their other attempts at "factual enhancement." First, the Complaint's two sentences on customer allocation lack any detail to support plausibility and are entirely conclusory. (*See* Compl. ¶ 85.) They do not even rise to the level of parallel conduct, as the Complaint does not identify any time frame or geographic market for the alleged allocation. It does not attempt to name any customers – or even which of Defendants' numerous blood reagent products such customers may have sought.[10] (*See id.* ¶¶ 85, 133(e).)

Likewise, the allegations that Defendants cancelled contracts with GPOs to deal directly with their participants (*id.* ¶¶ 76-84) do not add an inference of agreement. Choosing the terms

[9] Likewise, the allegations regarding Dr. De Chirico's bribery conviction in Italy while employed with Immucor (Compl. ¶¶ 120) and Ortho's parent Johnson & Johnson's public statement about its internal investigation into operations in two unidentified "small market countries" (*id.* ¶¶ 124) are flatly irrelevant to the Section 1 claim at issue. Johnson & Johnson has more than 250 operating companies, doing business in more than 50 countries. The allegation that Johnson & Johnson was proactively reporting a potential violation by one of these companies does not suggest any wrongdoing by Ortho. To the contrary, it suggests that Johnson & Johnson takes its ethical obligations seriously. The foreign conviction of an Immucor executive should not be used to impugn Ortho's integrity.

[10] Notably, the Complaint does not allege that Defendants violated the antitrust laws by refusing to deal with certain customers or distributors. *E.g.*, *Alvord-Polk, Inc v. F. Schumacher & Co.*, 37 F.3d 996 (3d Cir. 1994).

on which a firm will deal with its customers is not inherently economically irrational and may reflect only market changes or a host of other factors. *See Travel Agent*, 583 F.3d at 908. The Complaint does not even allege that Ortho and Immucor dealt with GPOs in the same ways. For example, Immucor allegedly cancelled contracts with two GPOs, Premier and Novation (Compl. ¶¶ 77, 79), then implemented "standardized pricing" for non-GPO members (*id.* ¶ 83) and "converted at least four additional group purchasing contracts to a standardized pricing structure" (*id.* ¶ 84). Ortho, on the other hand, allegedly cancelled a contract with Premier, not any other GPO and not in conjunction with a switch to "standardized pricing." (*Id.* ¶ 78.)

3. The market characteristics listed in the Complaint as making the alleged blood reagents market "susceptible to conspiracy" are conclusory and all support the plausibility of independent parallel conduct.

In the Complaint, Plaintiffs list various "market factors" that they conclude "make the Blood Reagents market susceptible to an illegal conspiracy." (Compl. ¶ 95.) The alleged market characteristics, however, do not transform the faulty allegations of parallel price increases into a plausible price-fixing conspiracy. In fact, the very market characteristics the Complaint describes make independent conduct more plausible.

a. Market Concentration

The Complaint suggests that market concentration makes the blood reagents market "highly susceptible to collusion by manufacturers." (*Id.* ¶ 97.) But, as discussed above in section II.A, market concentration is precisely the force that promotes lawful parallel conduct based on independent business judgment. The alleged fact of market concentration makes independent parallel conduct the most economically rational course of business and makes it

possible for competitors to maintain parallel price increases absent any agreement.[11] Market concentration is an issue of concern to the enforcement agencies, which are charged with evaluating the competitive effects of mergers and acquisitions,[12] but it does not create an inference of an agreement among the competitors, even when such market concentration is accompanied by parallel conduct. *See, e.g., Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37, 53 (7th Cir. 1992) ("One does not need an agreement to bring about this kind of follow-the-leader effect in a concentrated industry.").

b. Entry Barriers and Lack of Reasonable Substitutes

The Complaint states that the high cost and labor investment involved in clearing the FDA's "significant regulatory hurdles" prevents new entities from entering the blood reagent market.[13] (Compl. ¶¶ 98-103.) The Complaint alleges that the blood reagent market "lack[s] reasonable substitutes" due the requirement that all immunohematology blood reagents be FDA-approved. (*Id.* ¶ 109.) But allegations that Defendants operate in an industry with "significant legal and regulatory barriers to entry" do not nudge allegations of parallel conduct into plausible conspiracy and instead may explain that their lawful parallel conduct resulted from responses to

[11] The "inelastic demand" alleged in the Complaint (Compl. ¶¶ 105-107) similarly contributes to the independent rationale for parallel conduct in a concentrated market. Demand elasticity is a concept most relevant to defining the outer edges of the "relevant market" in a Sherman Act Section 2 claim, which is not asserted here.

[12] Indeed, as the federal enforcement agencies' merger guidelines recognize, market concentration alone can enable price increases. *See generally*, Dep't of Justice and Federal Trade Comm'n, *Horizontal Merger Guidelines* § 0.1 (1997 rev. ed.) *available at* http://www.justice.gov/atr/public/guidelines/hmg.htm.

[13] While Plaintiffs' allegation of entry barriers is deemed to be true for purposes of this motion, it is contradicted by publicly-available documents, which show that a new competitor did enter the market during the class period. *See* http://www.fda.gov/BiologicsBloodVaccines/BloodBloodProducts/ApprovedProducts/LicensedProductsBLAs/BloodDonorScreening/BloodGroupingReagent/ucm134213.htm (showing FDA approval in July, 2005 of reagents manufactured by BioTest AG); *see also* http://www.fda.gov/BiologicsBloodVaccines/BloodBloodProducts/ApprovedProducts/LicensedProductsBLAs/BloodDonorScreening/ BloodGroupingReagent/default.htm (showing approval of several other BioTest AG reagents products); *see generally In re Wellbutrin SR/Zyban Antitrust Litig.*, 281 F. Supp. 2d 751, 755 n.2 (E.D. Pa. 2003) (taking judicial notice of administrative agency reports, including those published by the FDA).

the common forces of federal regulation. *See Hawaiian Cabotage*, 647 F. Supp. 2d at 1258; *LTL Shipping*, 2009 WL 323219, at *18.

c. Homogenous Products

The Complaint alleges that traditional blood reagents "tend to be interchangeable." (Compl. ¶ 110.) Allegations that defendants operate in a homogenous industry also do not nudge allegations of parallel conduct into plausible conspiracy. *Hawaiian Cabotage*, 647 F. Supp. 2d at 1258; *LTL Shipping*, 2009 WL 323219, at *18. "Given the homogenous nature of the . . . market with 'all players . . . operating from essentially the same information at the same time charging the same rates, and with '[a]ll carriers . . . equally impacted by market variables,'" courts have found it more plausible that the parallel conduct was the result of factors other than a conspiracy. *E.g.*, *Hawaiian Cabotage*, 647 F. Supp. 2d at 1261. "In a homogenous industry each major player has the same incentive to charge the same . . . and realize the same improved profit margin" such that no agreement is necessary. *LTL Shipping*, 2009 WL 323219, at *18.

III. THE COMPLAINT MAKES NO ALLEGATIONS AT ALL OF CONDUCT BY DEFENDANT JJHCS.

The Complaint is completely devoid of any specific allegation as to conduct by Defendant Johnson & Johnson Health Care Systems, warranting dismissal. The Complaint states in conclusory fashion that JJHCS "was instrumental in facilitating the sale and distribution of Blood Reagents manufactured by Ortho-Clinical during the class period." (Compl. ¶ 29.) But the Complaint adds no factual support for this conclusion and never mentions JJHCS again.

A mere corporate family relationship with one defendant does not suffice to plead antitrust claims against another entity. *See, e.g.*, *In re Pa. Title Ins. Antitrust Litig.*, 648 F. Supp. 2d 663, 687 (E.D. Pa. 2009) (dismissing complaint where the only allegations of parent corporations' participation in conspiracy were "approval and assent" and "ownership and

control" of subsidiaries). Instead, plaintiffs must allege the entity itself had "direct and independent participation in the alleged conspiracy." *Id.* at 688; *see also Commonwealth of Pa. ex rel. Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173, 181 (3d Cir. 1988) (requiring "particularized" allegations). Plaintiffs have not done this with regard to JJHCS.

CONCLUSION

The Complaint is devoid of any allegation of a plausible antitrust conspiracy involving Defendants. Accordingly, Ortho and JJHCS respectfully request that this Court grant their motion to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6), and dismiss the Plaintiffs' Complaint with prejudice.

Respectfully submitted,

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