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**

REPLY 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 reply memorandum of law in support of their motion, pursuant to Federal Rule of Civil Procedure 12(b)(6), to dismiss the Consolidated Amended Class Action Complaint ("Complaint") filed by Plaintiffs against them and Defendant Immucor, Inc. ("Immucor"; Ortho, JJHCS and Immucor are referred to collectively herein as "Defendants").

INTRODUCTION

Plaintiffs' opposition to the Defendants' motions to dismiss reiterates, at considerable length, the allegations in their Complaint. And, yet, nowhere in that presentation of their allegations have Plaintiffs identified the facts necessary to state a plausible antitrust conspiracy consistent with the Supreme Court's decision in *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007).

On the contrary, the facts that Plaintiffs do allege in their Complaint and highlight in their opposition papers – (a) the loss of money on blood reagents sales during the 1990s; (b) the consolidation in the industry as a result of Immucor's six acquisitions between 1994 and 1999; and (c) the economic interest in encouraging customers to switch to newer (and more profitable) automated blood testing technology – are consistent with unilateral (*i.e.*, non-conspiratorial) conduct by Defendants. Indeed, these alleged market facts make the post-2000 price increases in blood reagents "not only compatible with, but indeed . . . more likely explained by, lawful, unchoreographed free-market behavior." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009).

In their opposition brief, Plaintiffs have not even explained how the post-2000 price increases constitute parallel conduct between Defendants. While they point to allegations of a range of price increases (*e.g.*, between 100% and 300%) over a range of years, Plaintiffs have not

met the threshold test of alleging parallel pricing, either as to amount or timing – and have failed to do so even though they should have pricing information in their possession as alleged direct purchasers. Nor have the Plaintiffs pointed to allegations about the person, place, or time of any meetings or communications that preceded Defendants' less than parallel pricing behavior.

Thus, as discussed further below, Plaintiffs have not come close to the starting line in pleading a Section 1 antitrust claim, let alone included enough alleged facts in their Complaint to "nudge[] their claims across the line from conceivable to plausible" conspiratorial conduct. *Twombly*, 550 U.S. at 570. Accordingly, consistent with *Twombly* and *Iqbal*, Plaintiffs' Complaint should be dismissed.

ARGUMENT

I. PLAINTIFFS' OWN ALLEGATIONS ABOUT MARKET CONDITIONS IN THE 1990s PROVIDE A PLAUSIBLE (AND NON-CONSPIRATORIAL) EXPLANATION FOR THE SUBSEQUENT PRICES IN BLOOD REAGENTS.

In their opposition brief, Plaintiffs repeatedly state that Defendants' decisions to raise the prices of blood reagents were against their economic self-interest. These conclusory statements are not only insufficient to avoid dismissal, but they are also contradicted by the specific allegations in the Plaintiffs' own Complaint.

A. Unprofitability in Its Earlier Blood Reagents Sales, Accompanied By Market Consolidation, Explains Ortho's Decision to Raise Prices.

As emphasized in the Complaint and Plaintiffs' opposition brief, in the late 1990s both Immucor and Ortho were losing money in the traditional blood reagents business and were in "significant financial trouble." (Compl. ¶¶ 54-55). "Ortho was considering leaving the Blood Reagents business entirely because it was too unprofitable." (*Id*. ¶ 55). During this period prior to 2000, there were more than a dozen blood reagents suppliers and competition had prevented Defendants from increasing prices for more than fifteen years. (*Id*. ¶¶ 57, 67).

Market consolidation, largely as a result of Immucor's acquisitions of competing suppliers between 1994 and 1999, was a natural consequence of this unprofitability in blood reagents sales.[1] Plaintiffs themselves have acknowledged that it was Immucor's acquisitions that made it possible for Defendants to increase prices. (Pls.' Opp'n at 4, 14). As a general matter, a more concentrated market makes it easier for a company to raise its prices. (*See* Mem. in Supp. of Mot. by Ortho and JJHCS to Dismiss ("Mot. to Dismiss") at 20-21 (citing *Brooke Grp., Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993)). Implementing such a price increase, moreover, is entirely consistent with a company's economic self-interest, particularly when, as Plaintiffs have alleged, its earlier sales were at a loss.

Post-*Twombly*, "[a]llegations that are equally consistent with legal conduct as with illegal conduct are insufficient to state a viable § 1 claim." *In re Pressure Sensitive Labelstock Antitrust Litig.*, 566 F. Supp. 2d 363, 376 (M.D. Pa. 2008). In *Twombly*, the Court concluded that, based on "common economic experience," the parallel conduct allegedly taken by defendants was consistent with defendants' economic self-interest and there was "no reason to infer that the companies had agreed among themselves to do what was only natural anyway." *Twombly*, 550 U.S. at 566. The Court ruled that the allegations of parallel conduct were not "placed in a context that raise[d] a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Id*. at 557. Likewise here, the Defendants' decisions to increase prices were a natural response to changing market conditions and were "not only

[1] While Plaintiffs' opposition misleadingly suggests that Immucor's acquisitions were part of a "scheme" hatched by Defendants, there are no factual allegations in the Complaint suggesting that Ortho ever encouraged or even communicated with Immucor about these acquisitions. (Pls.' Opp'n at 15). Likewise, Plaintiffs' argument that Ortho "further consolidate[d]" the market by acquiring Micro Typing Systems, Inc. ("MTS") is contradicted by the Complaint. This acquisition was made in March 2002, more than two years after Immucor's market consolidation allegedly allowed Defendants to increase prices. (Compl. ¶ 60). Moreover, Ortho was already serving as MTS's "exclusive distributor" and was therefore not in competition with MTS. (*Id*.).

compatible with, but indeed [were] more likely explained by, lawful, unchoreographed free-market behavior." *Iqbal*, 129 S. Ct. at 1950.

The situation in the blood reagents market after Immucor's acquisitions was exactly the opposite of the conditions in the TFT-LCD market after new companies entered in the *TFT-LCD (Flat Panel) Antitrust Litigation*, 586 F. Supp. 2d 1109 (N.D. Cal. 2008). The *Flat Panel* court relied in part on the allegation that prices did not decrease despite this new competition to determine that the pricing practices in the TFT-LCD market were "unusual" or "unnatural" and plausibly suggested a conspiracy to fix prices. *Id*. In contrast, increased prices are natural in a market with fewer competitors, such as the blood reagents market after it was consolidated by Immucor,[2] and do not plausibly suggest a conspiracy.

As Defendants were losing money at the prices they were charging (Compl. ¶¶ 54-55), it was decidedly in their economic self-interest to raise prices. Plaintiffs allege Ortho was considering exiting the industry prior to 2000. It could either exit an unprofitable business, or it could raise prices. By choosing to raise prices and remain in an industry alleged by Plaintiffs to be "critical to the safety of the nation," Ortho ensured that there would still be a source of supply for blood reagents if one of the two remaining competitors was forced to stop production because of manufacturing or safety issues (*Id*. ¶¶ 107, 113) and that Immucor would continue to face price competition.

For similar reasons, it was also in the independent economic self-interest of the suppliers of blood reagents to renegotiate their respective contracts with Group Purchasing Organizations ("GPOs"). Specifically, in light of allegations that prices were unprofitable and market

[2] As discussed below, the Federal Trade Commission ("FTC") is investigating whether these acquisitions by Immucor constitute a separate violation of § 5 of the FTC Act, 15 U.S.C. § 45. Unlike § 1 of the Sherman Act, § 5 of the FTC Act does not require concerted conduct by two or more parties as an essential element of a claim.

conditions were favorable for an increase, it was in the interest of both Ortho and Immucor to independently increase prices to GPOs or to cancel contracts with GPOs if they did not agree to the increase. Moreover, as to these negotiations with the GPOs, Plaintiffs have not even alleged that the Defendants' conduct was in parallel. Ortho allegedly cancelled its contract with Novation after Novation refused to accept an Ortho price increase. (*Id*. ¶ 78). About four months later, Immucor allegedly cancelled contracts with Premier and Novation after the GPOs refused to agree to a price increase, and it renegotiated contracts with four other GPOs. (*Id*. ¶¶ 77, 84). Cancelling contracts with GPOs allowed Immucor, not Ortho,[3] to implement a new standardized pricing structure for the hospitals that belonged to the GPOs. (*Id*. ¶¶ 83-84). Even as to Novation, Ortho and Immucor continued selling directly to the hospitals that were members of these GPOs. (*Id.* ¶ 79). As such, Plaintiffs' insinuation that Defendants risked losing significant revenue or business as a result of the cancellation of GPO contracts is not persuasive.

Plaintiffs also argue that Ortho would not have raised prices absent an agreement because it should have been concerned that Immucor would undercut its prices and gain market share. (Pls.' Opp'n at 15). This also makes no sense.[4] Ortho was losing money at current prices. Absent a price increase, it would have actually *saved* money by losing market share. Again, this decision to raise prices to forestall further losses is entirely consistent with Plaintiffs' own allegations that Ortho was considering exiting the marketplace prior to 2000.

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[3] As explained in Ortho's opening brief, Plaintiffs do not allege that Ortho implemented a standardized pricing structure or cancelled contracts with any GPOs other than Novation. (Mot. to Dismiss at 25-26).

[4] In addition to being nonsensical, this argument is also inconsistent with the allegations of the Complaint. As discussed below, Plaintiffs do not allege that Defendants increased prices in parallel but instead describe increases that varied widely in amount. For example, Plaintiffs allege that prices increased between 87% and 254% in 2004. (Compl. ¶ 70(a)). If, hypothetically, Ortho increased its prices by 254% and Immucor increased its prices by 87%, Immucor could have significantly undercut Ortho's prices. Thus, in keeping with the allegations in the Plaintiffs' Complaint, it would be entirely consistent under that hypothetical to state that Immucor did *in relative terms* undercut Ortho's prices, while at the same time raising prices *in absolute terms* to restore its own profitability.

The Sixth Circuit rejected an argument similar to Plaintiffs' in *In re Travel Agent Commission Antitrust Litigation*, 583 F.3d 896 (2008). Plaintiffs in *Travel Agent*, like Plaintiffs here, argued that the defendants would not have reduced travel agent commissions absent agreement out of a fear that the first defendant to cut commissions would lose revenue to its competitors. *Id*. at 908. The *Travel Agent* court found this argument implausible for at least two reasons. First, changes in technology (similar to changes in blood reagent technology that will be discussed below) made it reasonable for the defendant airlines to assume that any losses from reduced revenue from travel agent sales would be more than made up for by customers purchasing tickets directly on the internet. *Id*. Second, it was simple for a leader airline to cut commissions, wait and see whether its competitors would institute similar cuts, and then retract the cut if the competitors did not follow. Plaintiffs here offer no explanation for why a similar strategy would not work in the traditional blood reagents business, when these products are allegedly "interchangeable" and can easily be substituted for each other. (Pls.' Opp'n at 15; Compl. ¶ 47). As explained by the *Travel Agent* court, if Plaintiffs' undercutting argument is followed to "its logical end," it is "difficult to imagine a scenario" where a blood reagent price increase "could *ever* occur without collusion." *Id*. (emphasis in original).

B. Defendants' Technological Advances Also Made It Natural for Them to Increase Prices for Traditional Blood Reagents.

Ortho's independent decision to increase prices was also a natural result of its efforts to encourage its customers to use its more profitable automated blood reagent products. At about the same time that the blood reagent industry was consolidating, Defendants developed new automated technology for blood testing. (Compl. ¶¶ 49-50). Manual blood testing is "time-consuming and labor-intensive." (*Id*. ¶ 45). Manual tests can take from 30 minutes to an hour and may need to be repeated, resulting in a significant amount of expensive labor to complete the

tests. Consequently, labor costs associated with manual testing represent the largest component of the costs of operating a hospital blood bank. (*Id*.). Automated testing, on the other hand, uses a machine to test a large number of blood samples at once and therefore reduces turn-around time and labor costs. (*Id*. ¶ 48). As a result, the use of automated technology may actually save hospitals money by reducing labor costs.

Defendants' customers have typically committed to long-term contracts when switching to automated technology because each Defendant's automated reagents only work with each respective Defendant's proprietary machines and the purchase of these machines requires a significant capital investment. (*Id*. ¶¶ 49-51). It made sense for Defendants to independently increase prices on traditional reagents in order to encourage their customers to switch to their new and more profitable automated technology without being concerned about losing traditional reagent market share. *Travel Agent*, 583 F.3d at 908. What makes no sense is Plaintiffs' assertion that Ortho acted in concert to encourage its customers to switch to *Immucor's* automated technology. If it had done so, Ortho would have risked having its customers sign a "multi-year contract" with Immucor. (*Id*. ¶¶ 49, 52).

This case can be distinguished from *Flat Panel* and *Starr v. Sony BMG Music Entertainment*, 592 F.3d 314 (2d Cir. 2010), because this new blood reagent technology did not make it cheaper to produce traditional reagents. In both *Starr* and *Flat Panel*, advances in technology made it cheaper for the defendants to produce the products for which prices were allegedly fixed. In both cases, the court concluded that, along with a number of other factors, allegations that the prices for these products did not decrease despite these reduced costs of production plausibly suggested conspiracy. *See Starr*, 592 F.3d at 318, 323 ("However, these dramatic cost reductions were not accompanied by dramatic price reductions for Internet Music,

as would be expected in a competitive market."); *Flat Panel*, 586 F. Supp. 2d at 1115 (finding that pricing practices could not be explained by the forces of supply and demand because, *inter alia*, advances in technology and improving efficiencies led to lower prices in pre-conspiracy market). Unlike *Starr* and *Flat Panel*, there is no allegation here that advances in automated technology made it *less* expensive to produce manual reagents.

Under *Twombly*, an antitrust conspiracy claim "must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Twombly*, 550 U.S. at 557. Here, based on Plaintiffs' own allegations of market conditions and the industry consolidation preceding the price increases, the Defendants' conduct, *even if parallel*, can be explained on the basis of its own, independent economic self-interest. *Id*. at 568. Furthermore, as discussed below, Plaintiffs have not even identified in their Complaint or their opposition papers alleged facts that constitute parallel conduct.

II. PLAINTIFFS HAVE FAILED TO ESTABLISH THAT DEFENDANTS ACTED IN PARALLEL.

An examination of the allegations of parallel conduct is just the beginning of the analysis required by *Twombly*. "An allegation of parallel conduct and a bare assertion of conspiracy will not suffice" to state a claim because an allegation of parallel conduct only gets the complaint "close to stating a claim." *Twombly*, 550 U.S. at 555-57. A plaintiff must add "***further*** factual enhancement" to an allegation of parallel conduct to "nudge[] [a] claim[] across the line from conceivable to plausible." *Id*. at 557 (emphasis added), 570. Here, Plaintiffs have not alleged that Defendants increased prices in the same amounts, at the same time, for the same products. Because they have failed to allege parallel conduct, Plaintiff have not even reached the ***starting*** line in the test of their antitrust pleading.

Plaintiffs' allegations of parallel conduct assert broad ranges of price increases over a period of several years: 100% to 300% a year after 2000;[5] between 87% and 254% in late 2004; between 24% and 42% in November 2005; and between 50% and 100% in April 2008. (*E.g.*, Compl. ¶ 70). These alleged price increases – none of which is tied to particular products offered by Defendants – cover too broad a range to plausibly fall within an agreed upon range of price increases.[6]

Notably, Plaintiffs' allegations do not identify which of Ortho's or Immucor's traditional blood reagents were affected by the price increases. (*See id.* ¶ 70(a) ("In late 2004, Defendants substantially increased prices *for a wide variety of Blood Reagents* from 87% to as much as 254% *for some products*.") (emphasis added)). As explained in Ortho's opening brief and alleged in the Complaint, different blood reagent products are used to test for the four types of blood groups and the two blood types; to detect and identify different blood group antibodies; to detect platelet antibodies; and to test for infectious diseases such as hepatitis B, hepatitis C, HIV types 1 and 2, human T cell lymphotropic virus types I and II, and HIV RNA. (Compl. ¶¶ 37, 39; Mot. to Dismiss at 7 (describing the more than 60 different blood reagent products sold by Ortho)).

Plaintiffs also fail to allege that prices increased at the same time. They instead allege, for example, that Defendants raised prices "[i]n late 2004" (*id.* ¶ 70) and "[i]n early 2003" (*id.* ¶ 71) without identifying which Defendant raised its prices and when the increases took effect.

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[5] This allegation is contradicted by Plaintiffs' claim that the average price for Immucor's tests rose by 500% (from $0.25 to $1.25) in 2001. (Compl. ¶ 69).

[6] As Plaintiffs point out, the Third Circuit has, in the context of determining that plaintiffs ***failed*** to demonstrate parallel conduct, recognized that "parallel pricing does not require 'uniform prices.'" *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 132 (3d Cir. 1999). It does, however, require "prices within an agreed upon range." *Id.* Like the increases in *Baby Food*, Plaintiffs have failed to allege that any price increases here were within a uniform range.

Plaintiffs' vague allegations of parallel conduct are a stark contrast to the allegations in cases where plaintiffs were found to have adequately alleged (or showed evidence of) parallel behavior. *See, e.g.*, *In re Chocolate Confectionary Antitrust Litig.*, 602 F. Supp. 2d 538, 552-53 (M.D. Pa. 2009) (denying motion to dismiss where plaintiffs alleged price increases for the same types of products – *e.g.*, standard-size candy bars or six packs – that fell within a few percentage points of each other and that occurred within days of each other); *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 355 & n.5 (3d Cir. 2004) (explaining that plaintiffs had demonstrated that defendants increased their prices for flat glass within days of each other, and these price increases fell within a few percentage points of each other). Plaintiffs' allegations here do not provide a factual framework "sufficient to 'nudge[] the[ir] claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570.

Plaintiffs' failure to allege parallel conduct is particularly problematic because, unlike proof of motive and intent which may be largely in the hands of alleged conspirators (Pls.' Opp'n at 2), all the facts necessary to plead that Defendants increased prices in parallel are in the hands of the Plaintiffs. As alleged direct purchasers, Plaintiffs know (1) the prices they paid for specific products, (2) the dates the prices for these specific products increased, and (3) the amounts by which the prices of each product increased. Despite possessing this pricing information, Plaintiffs have come up empty in their attempt to even meet the standard of parallel conduct by Defendants.

III. THE CASES RELIED UPON BY PLAINTIFFS REQUIRE THEM TO DO MORE THAN MAKE ALLEGATIONS OF PARALLEL CONDUCT.

In a case brought under Section 1 of the Sherman Act, "the crucial question is whether the challenged anticompetitive conduct stems from an independent decision or from an agreement tacit or express." *Twombly*, 550 U.S. at 553. Like the plaintiffs in *Twombly*, other

than a few stray and conclusory allegations of an agreement, Plaintiffs here "rest their § 1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement." *Id*. at 564. A plaintiff trying to base a Section 1 claim solely on allegations of parallel conduct must allege enough additional factual matter to "raise a reasonable expectation that discovery will reveal evidence of an illegal agreement." *Id*. at 556.

While Plaintiffs are correct that *Twombly* does not explicitly require a plaintiff to allege a specific time, place, or person involved in an antitrust conspiracy to survive a motion to dismiss (Pls.' Opp'n at 19), it is notable that ***every single case*** described by Plaintiffs as "similar" to this case does in fact include detailed allegations of the time, place, and persons involved in the meetings or communications used to further the alleged agreement to fix prices.[7] (Pls. Opp'n at 25-26). Of further note, each of the cases cited by Plaintiffs also ties the parallel conduct to the referenced meetings and communications. (*Id*.).

- In *OSB*, plaintiffs identified the dates and content of two specific communications made by defendant Louisiana-Pacific that were shortly followed by parallel conduct, as well as the name of an industry publication that defendants used to fix prices. *In re OSB Antitrust Litig.*, No. 06-826, 2007 U.S. Dist. LEXIS 56573, at *7-8 (E.D. Pa. Aug. 3, 2007).[8]

[7] After submitting their opposition brief, Plaintiffs sent the Court a decision denying defendants' motion to dismiss in *In re Packaged Ice Antitrust Litig.,* No. 08-1952, 2010 U.S. Dist. LEXIS 65549 (E.D. Mich. July 1, 2010). There, the court distinguished cases that dismissed complaints for failure to plead time, place, and person specifics on the basis that "none involved the level of factual content proffered in this case, i.e. government and internal investigations of the very corporate entities and individual executives involved on the same claims of conspiracy as well as guilty pleas by the Defendants and their executives to the same anticompetitive conduct in a significant market." *Id*. at *55-56. Plaintiffs here have no comparable factual content, including no guilty pleas by Defendants or their executives. Further, the district court in *Packaged Ice* went on to note that the complaint did, in fact, provide specific details about the who, what, where, and when of the conspiracy. *Id*. at *58-59.

[8] The procedural posture in which the motion to dismiss in *OSB* was denied is much different from the one here. Prior to the Supreme Court's ruling in *Twombly*, Judge Diamond denied the defendants' motions to dismiss and allowed the case to proceed to discovery. The decision summarized above and cited by Plaintiffs was a *renewed* motion to dismiss filed after *Twombly*. *Id*. at *1-2. By the time Judge Diamond ruled on the renewed motion, the parties had completed significant discovery. In fact, Judge Diamond issued an opinion certifying a class on the same day he issued the opinion denying the renewed motion to dismiss. *In re OSB Antitrust Litig.*, No. 06-826, 2007 U.S. Dist. LEXIS 56584 (E.D. Pa. Aug. 3, 2007) (granting in part and denying in part motion for class

(continued . . .)

- In *Labelstock*, plaintiffs alleged the specific date and location of a meeting attended by both defendants at which they held "direct discussions about the need to collaborate on prices increases" and that both defendants increased prices within a month of the meeting. *Labelstock*, 566 F. Supp. 2d at 372. These price discussions were confirmed by an e-mail summarizing the meeting that the *Labelstock* court found supported an inference of an anticompetitive agreement. *Id*. at 375.[9]

- The *Chocolate Confectionary* decision relied on, among other things, more than twenty specifically identified pricing communications that were followed by simultaneous price increases in Canada and the United States as well as e-mails and meetings between a cooperating witness who was a senior executive of one defendant and a senior executive of another defendant. *Chocolate Confectionary*, 602 F. Supp. 2d at 554, 577. In one instance, the defendants all increased the price of a standard-sized chocolate bar by an identical percentage within four days of each other. *Id*. at 552.[10]

- Finally, in *Starr*, the defendants were all members of two joint ventures, which "provided a forum and means through which defendants could communicate about pricing, terms and use restrictions." *Starr*, 592 F.3d at 318.

The courts in all four of these cases cited by Plaintiffs also relied on, *among other things*, specific allegations of parallel conduct as well as findings that the defendants' parallel conduct was unusual or inconsistent with market conditions in denying motions to dismiss.[11]

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certification). Additionally, Judge Diamond had already granted preliminary approval to a settlement with one defendant. *In re OSB Antitrust Litig.*, No. 06-826 (E.D. Pa., May 10, 2007, Doc. No. 372) (order granting preliminary approval of settlement).

[9] Like *OSB*, the *Labelstock* decision cited by Plaintiffs ruled on a post-*Twombly* motion to dismiss filed after the parties had commenced discovery and after Judge Vanaskie had already denied a motion to dismiss prior to the Court's decision in *Twombly*. *Id*. at 365-66.

[10] Despite these extensive allegations of specific communications and meetings and parallel conduct, the *Chocolate Confectionary* court decided that its ruling presented a close enough question for certification of an interlocutory appeal. *In re: Chocolate Confectionary Antitrust Litigation*, 607 F. Supp. 2d 701, 707 (M.D. Pa. 2009). ("[T]he *Twombly* standard is in its infancy and capable jurists may disagree about its effect on plaintiffs' pleading obligations. Such disagreement could lead to differing outcomes between this matter and analogous cases addressing motions similar to those raised by defendants.").

[11] *OSB*, 2007 U.S. Dist. LEXIS 56573, at *6 (describing allegation that defendants cut production in parallel despite increasing demand); *Labelstock*, 566 F. Supp. 2d at 371 (concluding that supra-competitive prices despite excessive capacity plausibly suggested agreement); *Chocolate Confectionary*, 602 F. Supp. 2d at 577 (finding that

(continued . . .)

Here, as discussed above, Plaintiffs have not alleged parallel conduct. Nor have Plaintiffs alleged that Defendants' conduct was inconsistent with market conditions. Plaintiffs have included only one factual allegation providing a date and place when Defendants *could have* communicated about a price increase, a fall 2000 meeting of the American Association of Blood Banks ("AABB"). (Compl. ¶ 65). Even in connection with this meeting, however, Plaintiffs do not identify which Ortho employee made a presentation, whether Ortho actually specified how much it intended to increase prices, or whether an Immucor employee was actually at the Ortho presentation. Instead, the Complaint only says that it was Immucor's practice to attend Ortho presentations. (*Id*.). More importantly, Ortho made the presentation nine months *after* Immucor initiated price increases and therefore it could not have been the basis for a parallel price increase.[12]

Plaintiffs' remaining allegations of additional opportunities to conspire are conclusory and should be ignored by the Court. *Iqbal*, 129 S. Ct. at 1949 ("[T]he tenet that a court must accept as true all allegations contained in a complaint is inapplicable to legal conclusions."). For

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anticompetitive parallel increases were a plausible reaction to a saturated, declining market with decreasing or stagnant demand); *Starr*, 592 F.3d at 323 (relying on allegation that none of the defendants reduced prices despite dramatic decreases in costs of production to infer agreement). Similarly, in *Standard Iron Works v. ArcelorMittal*, 639 F. Supp. 2d 877 (N.D. Ill. 2009), another case relied upon relied by Plaintiffs, the court's opinion included more than twenty-five pages of discussion of the detailed allegations of the time, place, and persons of meetings in furtherance of the conspiracy and found it significant that three of these meetings were specifically tied to industry downtime. *Id*. at 884-92, 895 ("The timing of the statements with the alleged concerted action provides some of the requisite 'factual heft' in support of Plaintiffs' allegation of parallel conduct."). *Standard Iron Works* can also be distinguished on the grounds that the industry downtime was against defendants' economic self-interest because, among other reasons, demand was greater than supply and defendants were making a profit at current prices. *Id*. at 881-82, 896.

[12] Plaintiffs' assert in a footnote that Defendants "reinterpret" Plaintiffs' allegations to "make it seem as though it occurred eight or nine months before Ortho's price increase." (Pls.' Opp'n at 15 n.2). But in this very same footnote they acknowledge that they have alleged that Immucor began its increases at the beginning of the class period or January 1, 2000. (*Id*.). Assuming a commonplace interpretation of "fall," this would have been eight or nine months before Ortho's announcement of a future price increase at the fall 2000 AABB meeting.

example, Plaintiffs' allegation that Defendants are members of trade associations sponsored by hospitals, such as the Plaintiffs here,[13] without any details about the specific meetings attended by either Ortho or Immucor does not even adequately allege an *opportunity* to conspire, which in itself is not a plausible basis to suggest a conspiracy. *Travel Agent*, 583 F.3d at 905 (stating that averments of an opportunity to conspire do "not necessarily support an inference of illegal agreement").

Tellingly, Plaintiffs go so far as to describe the hiring of two former Ortho employees by Immucor – both of whom worked outside of the United States and the first of whom Immucor hired six years before the supposed conspiracy began[14] – as "significant" intercompany hiring that provided an opportunity to conspire. (Pls.' Opp'n at 33). Again, these misplaced allegations fail to demonstrate even an *opportunity* to conspire.

IV. PLAINTIFFS' REMAINING ASSORTMENT OF ALLEGED CONDUCT DOES NOT "ENHANCE" THEIR PRICE FIXING CLAIMS.

As Plaintiffs have not alleged parallel conduct, the Court should ignore Plaintiffs' hodgepodge of allegations intended to "enhance" allegations of parallel conduct. As explained above, an allegation of parallel conduct is not sufficient to state a Section 1 claim. An allegation of parallel conduct only gets a complaint to the starting line. *Twombly*, 550 U.S. at 557. Plaintiffs must also provide further "factual enhancement" to place the allegations of parallel conduct "in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Id*. Plaintiffs have not done so.

[13] The AABB's Board of Directors includes representatives from the American Red Cross, Dartmouth-Hitchcock Hospital Center, and Beth Israel Deaconess Medical Center but no representatives from a blood reagent supplier. *See* http://www.aabb.org/about/governance/Pages/default.aspx.

[14] The second former Ortho employee was elected to Immucor's board more than five years after the alleged conspiracy commenced.

First, Plaintiffs argue that the allegations that Defendants' increase in 2000 was the first increase in fifteen years and that the blood reagents market is "susceptible to collusion" support an inference of conspiracy. (Pls.' Opp'n at 5, 26-31). As explained above and in Ortho's opening brief, the blood reagents market did not become "susceptible to collusion" until 2000, after a period of consolidation. Therefore, 2000 marked the first opportunity for Defendants to raise prices. The concentrated market made parallel price increases both economically rational and possible without any agreement. In the consolidated market, it would have been *against* Ortho's rational economic interest *not* to raise prices in response to Immucor's price increases, or vice versa. (Mot. to Dismiss at 20-21 (citing *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1311 (11th Cir. 2003)). Thus, even if Defendants had acted in parallel, this conduct would have been "in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market" and would not suggest that an agreement had been made. *Twombly*, 550 U.S. at 554.

Second, Plaintiffs offer the vague allegation that Defendants engaged in customer allocation. (Pls.' Opp'n at 23). The paragraph of the Complaint dealing with customer allocation is completely conclusory and should be disregarded. (Compl. ¶ 85); *Iqbal*, 129 S. Ct. at 1950 (recommending that a court considering a motion to dismiss should begin its analysis by identifying conclusory allegations that are not entitled to an assumption of truth). It contains no facts concerning the customers or geographic markets supposedly allocated or the time frame for the alleged allocation.

Third, Plaintiffs contend that government investigations are "suggestive" of an antitrust conspiracy. (Pls.' Opp'n at 23). As an initial matter, it is not clear that either of the investigations described in the Complaint relates to the price-fixing claim asserted in the

Complaint. While some paragraphs of the Complaint misleadingly allege that the FTC is investigating "restrictions on price competition" (Compl. ¶ 7), paragraph 90 of the Complaint accurately alleges that the FTC is investigating whether Immucor's three acquisitions in the 1990s violated antitrust laws. The DOJ investigation is vaguely described as "looking into possible violations of the federal criminal antitrust laws in the blood reagents industry." (*Id*. ¶ 88). Moreover, even if the scope of the government investigations was consistent with the allegations of the Complaint, an allegation that a prosecutor has some suspicions about an industry but has not returned an indictment against Defendants carries "no weight in pleading an antitrust conspiracy claim." (Mot. to Dismiss at 23-24 (citing *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1024 (N.D. Cal. 2007)).[15]

Fourth and finally, Plaintiffs' reassertion of the argument that Immucor's alleged history of corporate impropriety should be attributed to Ortho is entirely inappropriate. (Pls.' Opp'n at 34 n.6). As explained in Ortho's opening brief, Plaintiffs' argument that Johnson & Johnson's proactive self-reporting of a potential Foreign Corrupt Practices Act violation by one of its 250 operating companies in two unidentified small-market countries suggests that Ortho was involved in Immucor's "Italian bribery scheme" (Compl. ¶ 124) is spurious. Like their allegations of intercompany hiring, this allegation of foreign misconduct demonstrates the wide net Plaintiffs have cast in their failed attempt to state a conspiracy claim that meets the standard of *Twombly* and *Iqbal*.

[15] As the grand jury has only issued subpoenas in this case, the government investigation is in its infancy and can be distinguished from the nearly resolved investigation described by *Packaged Ice*. In *Packaged Ice*, two of the three conspirators alleged to have allocated the market and a number of their employees had already plead guilty to § 1 violations, one of these conspirators had already reached a proposed settlement with the plaintiffs, and the third alleged conspirator had commenced an internal investigation that led to the dismissal of an Executive Vice President. *Packaged Ice*, 2010 U.S. Dist. LEXIS 65549, at *24 n.1, *30-33, *65-71. The *Packaged Ice* complaint also included detailed factual statements from a whistle-blower and a number of confidential witnesses. *Id*. at *27-29. None of those circumstances is present here.

In sum, even if Plaintiffs had alleged parallel conduct by Defendants, their factual "enhancements" fail, individually and collectively, to allow for an inference of a conspiracy. As a result, Plaintiffs' argument that these allegations must be considered "as a whole" is a red herring because there is nothing to combine. (Pls.' Opp'n at 26).

V. DEFENDANT JJHCS SHOULD BE DISMISSED.

Plaintiffs effectively concede that JJHCS should be dismissed by acknowledging that they need discovery to determine how JJHCS "facilitated Ortho's conspiracy."[16] (Pls.' Opp'n at 36). The only allegation Plaintiffs cite to support their argument that JJHCS should not be dismissed is the entirely conclusory statement that JJHCS had "direct and independent participation in the alleged conspiracy." (*Id*. at 35). "*Twombly* made clear that sprinkling a complaint with conclusory assertions that a party was a 'participant in coordinated conduct' or a 'conspirator' or acted in 'concert' with others does not make the requisite showing of entitlement to relief mandated by Rule 8(a)(2)." *In re Pressure Sensitive Labelstock Antitrust Litig.*, 566 F. Supp. 2d at 376. Plaintiffs' claim is apparently based entirely on JJHCS's corporate affiliation with Ortho, which courts have repeatedly held is an insufficient basis to state a cause of action. *See, e.g.*, *id*. at 375-76 (holding that a defendant "cannot be held liable . . . merely because a viable Sherman Act claim has been asserted against its subsidiary"); *In re Pa. Title Ins. Antitrust Litig.*, 648 F. Supp. 2d 663, 687 (E.D. Pa. 2009) (dismissing parent corporation when only

[16] In this section of their Opposition and their Sur-Reply Memorandum in Opposition to Defendants' Motion for Stay, Plaintiffs also concede that they will not be prejudiced by a stay pending the Court's ruling on Defendants' Motions to Dismiss. (Opp'n at 36; Sur-Reply at 5). Instead, Plaintiffs argue that they will be prejudiced by an "indefinite" stay and ask that Defendants' "open-ended stay request" be denied. (Sur-Reply at 1). In that regard, Plaintiffs' request is actually consistent with Defendants' suggestion that the Court grant a temporary stay until it rules on Defendants' Motions to Dismiss and then reevaluate whether a further stay is necessary after these rulings. (Defs.' Reply in Supp. of Mot. for Stay at 15).

allegations of participation in conspiracy were "approval and assent" and "ownership and control").

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,

Dated: July 9, 2010

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CERTIFICATE OF SERVICE

I, Paul H. Saint-Antoine, hereby certify that a true and correct copy of the foregoing **Reply Memorandum in Support of Motion by Defendants Ortho-Clinical Diagnostics, Inc. and Johnson & Johnson Health Care Systems, Inc. to Dismiss the Consolidated Amended Complaint** was filed with the United States District Court for the Eastern District of Pennsylvania using the ECF system. This document is available for reviewing and downloading.

Dated: July 9, 2010

/s/ Paul H. Saint-Antoine
Paul H. Saint-Antoine