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

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

[PROPOSED] ORDER GRANTING MOTION FOR RECONSIDERATION

AND NOW, this _____ day of _____, 2010, upon consideration of the Defendants' Motion For Reconsideration, it is hereby ORDERED that the Motion is GRANTED. Having reviewed the papers filed in support of and opposition to the Motions to Dismiss and the Motion for Reconsideration and the response thereto, Plaintiffs' Consolidated Amended Class Action Complaint is hereby DISMISSED WITH PREJUDICE as to all Defendants.

_____
DuBois, J.

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

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

[ALTERNATIVE] ORDER GRANTING MOTION FOR CERTIFICATION OF AN INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. § 1292(B)

AND NOW, this _____ day of _____, 2010, upon consideration of the Defendants' Motion For Certification of an Interlocutory Appeal, the Court finds that its Order of August 23, 2010 involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of this litigation. For the reasons set forth in the accompanying memorandum, it is ORDERED that Defendants' Motion for Reconsideration is DENIED and Defendants' Motion for Certification is GRANTED. The Court's Order of August 23, 2010 is hereby CERTIFIED to the Court of Appeals for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

_____
DuBois, J.

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

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

DEFENDANTS' MOTION FOR RECONSIDERATION OR FOR CERTIFICATION OF AN INTERLOCUTORY APPEAL

Defendants Immucor, Inc. and Ortho Clinical Diagnostics, Inc. submit this Motion requesting the Court to reconsider its August 23, 2010 Order denying, in part, their respective motions to dismiss the complaint in this action. In the alternative, Defendants move the Court to certify its Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). In support of this Motion, Defendants incorporate and rely upon the attached Memorandum of Law.

Respectfully submitted this 7th day of September, 2010.

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

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

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION OR FOR CERTIFICATION OF AN INTERLOCUTORY APPEAL

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Defendants Ortho Clinical Diagnostics, Inc. ("Ortho) and Immucor, Inc. ("Immucor") respectfully request the Court to reconsider the August 23, 2010 Order (the "Order") denying, in part,[1] their respective motions to dismiss. In the alternative, Defendants request that the Order be certified for interlocutory review by the United States Court of Appeals for the Third Circuit pursuant to 28 U.S.C. § 1292(b).

Plaintiffs' Consolidated Amended Complaint (the "Complaint") was filed in the aftermath of two landmark U.S. Supreme Court decisions, *Twombly*[2] and *Iqbal*,[3] which set forth the requirements for pleading an antitrust conspiracy. As this Court observed during one of the initial conferences with the parties, the plausibility standard of these Supreme Court decisions is different from what was in effect before. *See* Trans. of May 18, 2010 Hearing, at 15. Yet, as this Court also observed, Plaintiffs' Complaint "tracks the pleadings that were filed in pre-*Twombly* and pre-*Iqbal* cases, and the standard is different." *Id.* Like the pleadings from the earlier era, Plaintiffs' Complaint attempts to plead parallel pricing,[4] in conjunction with other factors, such as membership in trade

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[1] The Order granted the motion to dismiss as to Johnson & Johnson Health Care Systems, Inc. That aspect of the Court's decision is not at issue in this motion.

[2] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

[3] *Ashcroft v. Iqbal*, ___ U.S. ___, 129 S. Ct. 1937 (2009).

[4] Plaintiffs fall short even when attempting to plead parallel pricing. This Court noted early on that Plaintiffs "talk about price increases, but [they] don't say what they were. [The Court] ha[s] no idea whether one defendant raised its price by X, another by X plus something, another by less than X. So there are a lot of open questions." (Trans. of May 18, 2010 Hearing, at 17.)

associations, inter-company hiring, and market concentration, which are equally consistent with independent, competitive behavior as they are with conspiratorial conduct.

After briefing and argument on Defendants' motions to dismiss – and less than a week before the decision denying those motions, the Court of Appeals for the Third Circuit issued an important new decision on pleading an antitrust conspiracy, *In re Insurance Brokerage Antitrust Litigation*, _____ F.3d _____, 2010 WL 3211147 (3d Cir. Aug. 16, 2010) ("*Insurance Brokerage*"). That opinion is significant in two major respects. First, it clarifies that an antitrust conspiracy cannot be inferred when the operative pleading allows for an alternative explanation for the alleged market behavior. In this case, the independent incentives to avoid continuing unprofitable sales of "traditional" blood reagents, coupled with the substantial industry consolidation and the development of more profitable, proprietary technologies, all of which are alleged within the four corners of the Plaintiffs' Complaint, were conducive to *lawful* oligopoly pricing. Second, *Insurance Brokerage* emphasizes that a court should not treat as a plus factor conduct that is equally compatible with the alternative explanation of lawful pricing. This is particularly the case when the conduct in question may be lawful and pro-competitive, such as participation in trade associations and hiring of competitors' employees.

Defendants request that this Court reconsider, in light of the further guidance recently provided by the Third Circuit, its decision to deny, in part, their motions to dismiss as inconsistent with the pleading requirements of *Twombly* and *Iqbal*.

In the alternative, Defendants request that this Court certify its decision for interlocutory review by the Third Circuit. The Court's initial evaluation of Plaintiffs' Complaint gave it "pause"[5] as to whether the requirements of *Twombly* and *Iqbal* had been met and, even after full briefing and argument, the Court found the existence of enhancement factors presented a "closer question" than the other issues.[6] The pleading aspects of this litigation are further complicated by the existence of a federal Grand Jury investigation[7] and the prospect, in light of the Court's decision, of civil discovery proceeding concurrently with the government's investigation.

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[5] Trans. of May 11, 2010 Hearing at 7.

[6] 2010 WL 3364218, at *6.

[7] The Court's reliance on the existence of the Grand Jury investigation as an "enhancement factor" is itself an example of where the August 23, 2010 decision gives rise to a substantial difference of opinion with other courts. *See In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1149 (N.D. Cal. 2009) ("[T]he mere fact that an investigation is under way is not by itself an appropriate consideration for purposes of determining the adequacy of the pleadings."); *see also American Home Assurance Co. v. Sunshine Supermarket, Inc.* 753 F.2d 321, 325 (3d Cir. 1985) (evidence that a grand jury investigation has been terminated without an indictment is irrelevant and hence inadmissible).

Under all of these circumstances, as explained in more detail below, Defendants respectfully suggest that the ultimate resolution of this litigation would be assisted by interlocutory review by the Court of Appeals.

I. ARGUMENT

"The purpose of a motion for reconsideration . . . is to correct manifest errors of law or fact or to present newly discovered evidence." *Max's Seafood Café v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999) (quotation marks omitted). Reconsideration of a prior order is proper where the moving party shows "(1) an intervening change in the law has occurred, (2) new evidence not previously available has emerged, or (3) the need to correct a clear error of law or prevent a manifest injustice arises." *Id.*

Here, reconsideration is appropriate to correct a clear error of law and prevent a manifest injustice. The Court's ruling on Defendants' motions to dismiss did not address, as is required by both *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007) and *Insurance Brokerage*, Defendants' argument that the facts of the Complaint suggest that it was more likely that Defendants' price increases were the result of lawful and unchoreographed behavior. Moreover, *Insurance Brokerage* is contrary to this Court's finding that Defendants inappropriately attempted to "dismember" the allegations of the Complaint. *In re Blood Reagents Antitrust Litig.*, MDL No. 09-2081, 2010 WL 3364218, at *6 (E.D. Pa. Aug. 23, 2010). As described more fully below – and consistent with the recent guidance from the Third Circuit in *Insurance Brokerage*, not

one of Plaintiffs' alleged "factual enhancements" was suggestive of a conspiracy. So, whether considered individually *or collectively*, the allegations of a conspiracy in Plaintiffs' Complaint are deficient.

A. A Section 1 Complaint With No Direct Allegations of Conspiracy Must Plead Facts that, if True, Would Tend to Rule out Alternative Explanations Based on Independent Action.

The Third Circuit's recent decision in *Insurance Brokerage* undertakes an exhaustive review of the reasoning and significance of the *Twombly* decision. *In re Insurance Brokerage*, 2010 WL 3211147, at *6-14. The court confirmed that, as argued by Defendants in moving to dismiss, the proper inquiry under *Twombly* is whether there is an alternative explanation based on the parties' independent self interest that would explain the facts alleged:

> In sum, *Twombly* makes clear that a claim of conspiracy predicated on parallel conduct should be dismissed if "common economic experience," or the facts alleged in the complaint itself, show that independent self-interest is an "obvious alternative explanation" for defendants' common behavior.

Insurance Brokerage at *13.

The Defendants in this case have proffered just such obvious alternative explanations, many of which are rooted in the allegations of the Complaint itself. The Complaint alleges that the blood reagents industry had become highly concentrated, and the remaining suppliers were losing money – so much so that one of the Defendants (Immucor) was in considerable financial distress. (Complaint ¶¶ 54-61.) It is entirely

understandable in such a market that one of the participants would decide, in its own independent interest, to raise prices, and that the other would decide, in its own independent interest, that a corresponding price increase was a more rational business strategy than attempting to increase market share at margins insufficient to generate profits. Moreover, the Complaint alleges that it was in the best interest of each of the Defendants to increase prices of traditional reagents in the hopes of driving customers to that Defendant's automated solution that would provide more profits and greater assurances of continued business. (Complaint ¶¶ 63-64.)

This Court's decision fails to consider why the facts presented were not equally consistent with these alternative explanations, as is required by *Twombly* and, more recently, by the Third Circuit in *In re Insurance Brokerage*.

B. The Court Should Not Rely on Conduct as a "Plus Factor" if Such Conduct Is Equally Compatible with a Non-Conspiratorial Explanation, Particularly When the Conduct Consists of Normal, Pro-Competitive Business Activities.

The *Insurance Brokerage* decision is equally important in setting forth what should and should not count as a "plus factor" in attempting to plead a conspiracy using circumstantial evidence. Among other reasons, *Insurance Brokerage* is significant because it expressly incorporated the "plus factors" traditionally associated with the summary judgment standard into the motion to dismiss analysis. 2010 WL 3211147, at *11-12 ("We think *Twombly* aligns the pleading standard with the summary judgment standard . . ."). This Court's decision did not incorporate this guidance from the Third Circuit and does not contain a single mention of "plus factors."

The Third Circuit identified three categories of plus factors: "(1) evidence that the defendant had a motive to enter into a price fixing conspiracy; (2) evidence that the defendant acted contrary to its interests; and (3) 'evidence implying a traditional conspiracy.'" *Id.* at *11. However, the court cautioned that certain kinds of evidence relating to motivation or to action purportedly contrary to self interest may be the equally consistent with lawful interdependent oligopoly pricing and hence should not serve as a "plus factor":

> As we have cautioned, however, care must be taken with the first two types of evidence, each of which may indicate simply that the defendants operate in an oligopolistic market, that is, may simply restate the (legally insufficient) fact that market behavior is interdependent and characterized by conscious parallelism. [Citing *Petruzzi*, *infra*]; *see* 6 Areeda & Hovenkamp, *Antitrust Law* ¶ 1434c1 (2d ed. 2003); *see also Baby Food*, 166 F.3d at 135 ("[E]vidence of action that is against self-interest or motivated by profit must go beyond mere interdependence.")

Id.[8] The Third Circuit cited to its opinion in *Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co.*, 998 F.2d 1224 (3d Cir. 1993), where the court noted that evidence of failure to compete aggressively on prices is the type of evidence that may

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[8] The court also noted that motive often plays into the analysis in the narrow sense that courts will use absence of motive as grounds for dismissing a complaint. *Insurance Brokerage*, 2010 WL 3211147, at *11 & n.20. There is always a motive to increase prices, however, whether lawfully based on interdependent oligopoly behavior or unlawfully based on conspiracy. See, e.g., *Howard Hess Dental Labs, Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 255-56 (3d Cir. 2010) (rejecting dental dealers' economic incentive to elevate prices as a basis to infer participation in a conspiracy amongst themselves).

indicate nothing more than lawful, interdependent parallel pricing. *Id.* at 1244 ("[Professor] Areeda warns courts not to consider a *failure to cut prices or an initiation of a price rise* as an action against self-interest because it also reflects the interdependence of [an oligopolistic] industry.") (emphasis added); *see also Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1299 (11th Cir. 2003) (explaining how parallel pricing and resistance to price cutting are often in the independent self interest of each competitor in an oligopolistic market).

The Third Circuit's opinion in *Insurance Brokerage* also makes it clear that it is important in dealing with plus factors not to deter lawful and often pro-competitive behavior by viewing such conduct as a plus factor. *See* 2010 WL 3211147, at *10 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)) (warning that "mistaken inferences" of conspiracy from ambiguous circumstantial evidence may "chill the very conduct the antitrust laws are designed to protect"); *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 357 (3d Cir. 2004) ("to avoid deterring innocent conduct that reflects enhanced, rather than restrained, competition"). Here, recognition of the "enhancements" described by the Court would have the effect of chilling lawful and pro-competitive activity.

C. Each of the "Enhancements" Relied Upon by this Court is Equally Consistent with the Proffered Alternative Explanations for Defendants' Conduct

In the present case the alleged "factual enhancements" cited by the Court are each consistent with the "obvious alternative explanations" that Defendants have proffered based on the allegations of the Complaint itself. Viewing them as a whole does not establish a plausible conspiracy. Of equal importance is the unintended consequence of the Court's reliance on such routine business practices as "enhancements": it will deter lawful and pro-competitive conduct. By finding such conduct to be a plus factor, the Court is implicitly instructing antitrust counsel to advise their clients that such conduct is tainted and should not be undertaken.

Each of the "enhancements" cited by the Court will be addressed in turn.

1. Trade Association Membership Is Lawful and Often Pro-Competitive, and Is Equally Consistent with Non-Conspiratorial Explanations.

The first alleged plus factor addressed by this Court in denying Defendants' motions to dismiss is membership in trade associations. As Defendants have previously pointed out, the Supreme Court in *Twombly* summarily rejected such evidence, and the vast majority of courts to consider the issue have concluded that trade association membership is not a "plus factor" that can shore up otherwise deficient proof of a conspiracy. *See Twombly*, 550 U.S. at 567 n.12; *see also, e.g.*, *In re Citric Acid Litig.*, 191 F.3d 1090, 1103 (9th Cir. 1999).

Although plaintiffs in *Insurance Brokerage* proffered evidence of trade association membership as a plus factor, the court determined that the allegation did not plausibly suggest a conspiracy. 2010 WL 3211147 at *29. Moreover, such evidence is clearly among the type of evidence that the Third Circuit has rejected in concept as a plus factor. Trade association membership is common in American business and hence cannot serve to differentiate between cases in which there is a conspiracy from those in which there is lawful interdependent pricing.

Moreover, including trade association membership as an "enhancement" will deter lawful trade association membership. Trade associations serve many lawful and pro-competitive functions. *See, e.g., Merck Medco Managed Care, Inc. v. Rite Aid Corp.*, 22 F. Supp. 2d 447, 476 (D. Md. 1998) ("To permit a jury to infer a conspiracy on the basis of these contacts would risk chilling legitimate, pro-competitive trade association activities."); *O'Riordan v. Long Island Bd. of Realtors, Inc.*, 707 F. Supp. 111, 115-116 (E.D.N.Y. 1988) (holding that pro-competitive benefits of trade association outweighed harm to competition from group boycott of non-members). Under the reasoning of the Order, however, Defendants' participation in trade associations and industry conferences supposedly "enhances" what the Court considers to be sufficient allegations of parallel pricing. If so, antitrust advisors must now counsel their clients not to join a trade association. Rather than protecting competition, the Order thus would deter pro-competitive activity, merely because it may provide an

"opportunity" for firms to conspire. *See Matsushita*, 475 U.S. at 594 (use of ambiguous circumstantial evidence to infer conspiracy may "chill the very conduct the antitrust laws are designed to protect").

2. Inter-Company Hiring Is Lawful and Pro-Competitive and Is Equally Consistent with Non-Conspiratorial Explanations.

Hiring an employee from a business competitor is a quintessentially competitive act. Not only do firms compete with one another for customers, they often compete in the market for employees with industry experience. It is common for employees of one company to go work for a competitor, particularly in a concentrated industry that requires specialized knowledge, like the one involved here. Indeed, often, the only place a company may be able to find an employee with industry experience will be from its competitors. Moreover, from the employee's perspective, barring competitor hiring could markedly reduce employment options and impair the functioning of the employment market.

By relying on Immucor's hiring of two former Ortho employees as a factual enhancement – without allegations that either individual instituted or participated in the alleged conspiracy – the Court has essentially punished and hence will deter the hiring of competitors' employees in oligopoly industries. Ironically, if the competitors entered an agreement not to hire each other's employees, such an agreement could itself be unlawful under §1. *See, e.g.*, *Eichorn v. AT&T Corp.*, 248 F.3d 131, 144 (3d Cir. 2001) (noting that rule of reason applied to alleged no-hire agreement – *i.e.*, that a no-hire

agreement may constitute an agreement in restraint of trade in a relevant employment market); *see also* Miguel Heft, *Unwritten Code Rules Silicon Valley Hiring*, N.Y. Times, June 3, 2009 (describing Department of Justice investigation into alleged agreements among technology companies not to solicit each other's employees). The Order thus would have the anticompetitive effect of discouraging the lawful pro-competitive conduct of hiring a competitor's employee by subjecting any company that does so to expensive discovery and potential liability for treble damages.[9]

3. Market Characteristics Provide No Basis for Inferring a Conspiracy.

Many industries share the market characteristics relied on by the Court as a "factual enhancement" to Plaintiffs' allegations. Although these market characteristics may make a price-fixing conspiracy feasible and hence are consistent with an allegation of a conspiracy, they are equally consistent with – and indeed facilitate – interdependent oligopoly pricing. "[A]ccording to the theory of interdependence, . . . firms in a concentrated market may maintain their prices at supracompetitive levels, or even raise them to those levels, without engaging in any overt concerted action." *In re Flat Glass*,

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[9] *See In re Blood Reagents*, 2010 WL 3364218, at *7. The application of this factor as an enhancement in this case is particularly tenuous. The Court cites as evidence only two examples of such hiring – one of an employee that had worked for the competitor many years before the conspiracy allegedly commenced and one hired several years after it commenced. *See St. Clair v. Citizens Fin. Grp.*, 340 F. App'x 62, 65 (3d Cir. 2009) (rejecting conclusory allegations of intercompany hiring as basis for inferring conspiracy).

385 F.3d at 359. *In other words, the very market characteristics on which the Court relied forms the well-recognized basis for the "obvious alternative explanation" for the alleged parallel pricing.* Because the characteristics of the blood reagents market that supposedly "enhance" the allegations of conspiracy also facilitate lawful, independent oligopoly pricing, they are equally consistent with the obvious alternative explanation of the facts alleged in the Complaint and hence provide no basis for inferring a conspiracy.

4. The Change in Alleged Pre- and Post-Conspiracy Pricing Is Explained by Changes in Market Conditions and the Financial Losses Suffered by the Defendants.

Another "enhancement" the Court identified is the change in behavior from the alleged pre-conspiracy period, which was characterized by price cutting among the many firms in the market, and the behavior in the alleged post-conspiracy period in which the two remaining suppliers, each of which was losing money, decided to raised prices. However, the Complaint itself alleges changes in circumstances that would provide an obvious alternative explanation for changing conduct. Several competitors had withdrawn from the market or been acquired, resulting in a more concentrated market. Due to price competition and other factors, pricing had reached such low levels that both parties were suffering losses. Defendant Immucor was in financial distress, and Ortho was considering leaving the blood reagents business. These factors suggest the likelihood that pricing increases would be initiated by one party and followed by the

other through lawful, interdependent pricing, without any conspiracy. Thus, far from tending to rule out the alternative explanation, the changes in the market conditions and financial losses of the parties described by the Complaint and the Court provide the basis for such an explanation.

5. The Fact of a Governmental Investigation Does Not Tend to Rule Out Independent Action.

The final "enhancement" discussed by the Court is the existence of a governmental investigation and service of subpoenas on Defendants. As the Court noted, this fact merely demonstrates that a prosecutor "believes a crime *may have* occurred." 2010 WL 3364218, at *7. Defendants have not been charged with a crime, let alone tried or convicted. It is beyond question that many governmental investigations do not result in indictments, and even more do not result in convictions. Because the government can and does investigate both lawful oligopolies and illegal cartels, the existence of an investigation does not rule out that Defendants acted lawfully and independently. *See, e.g.*, *In re Flash Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1149 (N.D. Cal. 2009) ("[T]he mere fact that an investigation is under way is not by itself an appropriate consideration for purposes of determining the adequacy of the pleadings."); *Am. Copper & Brass, Inc. v. Halcor S.A.*, 494 F. Supp. 2d 873, 876-77 (W.D. Tenn. 2007) (dismissing a complaint that relied on, among other things, an investigation by the European Commission into price fixing in the European copper pipe market); *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1024

(N.D. Cal. 2007) ("The [grand jury] investigation, however, carries no weight in pleading an antitrust conspiracy claim. It is unknown whether the investigation will result in indictments or nothing at all.")[10]

6. The Sum of the Whole Is No Greater Than Its Parts.

By treating the alleged factual enhancements described above, "taken as a whole," as sufficient to make out an antitrust claim, the Order would punish and discourage activity that is unquestionably pro-competitive and lawful. Moreover, the "whole," like each of the enhancements independently, can plausibly be explained by Defendants' independent reaction to a common stimulus, *i.e.*, the *change* in the conditions of the blood reagents industry and the financial losses being suffered by the Defendants. Put another way, the evidence "as a whole" is equally consistent with the obvious alternative explanations offered by the Defendants.

At the oral argument on Defendants' motions, Plaintiffs proffered the analogy of a football game, in which each piece of evidence pushed the ball forward until it

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[10] The Court cited *Starr v. Sony BMG Music Entertainment*, 592 F.3d 314, 324 (2d Cir. 2010) in support of its reliance on the ongoing investigation. Defendants respectfully submit that *Starr* is in the minority, and its reasoning in this respect is inconsistent with the reasoning of the Third Circuit in *Insurance Brokerage* and other cases. Indeed, the Third Circuit held in *American Home Assurance Co. v. Sunshine Supermarket, Inc.* that evidence that a grand jury investigation has been terminated without an indictment is irrelevant and hence inadmissible. 753 F.2d 321, 325 (3d Cir. 1985). Evidence that an investigation has been commenced should similarly be treated as having no lawful relevance.

eventually reached the goal line of plausibility. In light of *Insurance Brokerage*, Defendants respectfully submit that a more apt analogy is to a balancing scale like the one held by Lady Justice. When the Court places a weight representing each of its cited "enhancements" on one side of the scale as evidence of a conspiracy, it must place the same weight on the other side of the scale if it also supports the alternative explanation for Defendants' behavior. The result here is that the scale remains in balance both before and after each and all of the additional alleged "factual enhancements" are added. In the words of the Third Circuit, the Complaint must be dismissed because *each and all* of "the facts alleged in the complaint itself, show that independent self-interest is an 'obvious alternative explanation' for defendants' common behavior." *In re Insurance Brokerage*, 2010 WL 3211147, at *13.

D. Plaintiffs Have Failed to Make Even the Threshold Demonstration that the Parties have Acted in Parallel and Have Failed to Compete with One Another on the Basis of Price.

As Defendants noted in their briefs on the motions to dismiss, the Complaint does not adequately allege parallel conduct. Rather, the Complaint alleges price increases by broad percentage ranges across the entire spectrum of blood reagents products. These allegations are insufficient to make the showing that Defendants' pricing practices were anticompetitive. For instance, it would be entirely consistent with the allegations of the Complaint for one defendant to have increased prices by a far lower percentage than its competitor thus effectively competing on price in an attempt to

gain market share.[11] Because the vaguely described allegations of parallel conduct fail to demonstrate a conspiracy, the Complaint does not meet the *Twombly* standard.[12]

E. In the Alternative, Defendants Request that the Court Certify its Order Denying Defendants' Motions to Dismiss and Denying the Motion to Stay for Interlocutory Appeal.

Should the Court not grant the motion to reconsider, Defendants in the alternative request that the Court certify the Order denying such motions for interlocutory appeal under 28 U.S.C. § 1292(b). Certification under that provision is appropriate if the Court finds that (1) "such order involves a controlling question of law; (2) "there is substantial ground for difference of opinion" as to such question; and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Id.*; *Simon v. United States*, 341 F.3d 193, 199 (3d Cir. 2003) (accepting choice-of-law question for interlocutory review under Section 1292(b)).

In this case, the Order denying the Motions to Dismiss of Ortho and Immucor and denying the related Motion to Stay presents questions that meet the requirements of

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[11] For example, Plaintiffs allege that in 2004, Immucor "implemented a new tiered standardized pricing structure which was made applicable to all customers who were not members of GPOs." (Compl. ¶ 83.) But it is not alleged that Ortho implemented a similar pricing structure. It is entirely possible that Immucor's "new tiered standardized pricing structure" undercut Ortho's prices in an effort to steal market share.

[12] If the Court grants reconsideration and grants Defendants' motions to dismiss, the Defendants respectfully submit that their motion to stay pending resolution of the motions would no longer be moot and should be reconsidered to stay discovery until such time as Plaintiffs have stated a plausible claim.

Section 1292(b). Specifically, the Order should be certified based on the following questions:

1. Whether the Consolidated Amended Complaint states a claim for a conspiracy under Section 1 of the Sherman Act that meets the requirements of *Twombly*?

Suggested answer: No.

Subsidiary questions:

a. Whether a complaint states a conspiracy claim under Section 1 of the Sherman Act when, reading it as a whole, the allegations provide an equally plausible explanation for the alleged price increases based on the independent interest of each supplier in avoiding continuing market losses and converting customers to its respective proprietary technology?

Suggested answer: No.

b. Whether various types of alleged lawful and procompetitive conduct, such as participation in a trade association or hiring employees who had worked for a competitor that are at least equally suggestive of independent, competitive behavior, can support in the aggregate a plausible inference of conspiracy under Section 1 of the Sherman Act?

Suggested answer: No.

c. Whether the existence of an on-going grand jury investigation either alone or in conjunction with other factors, is a factual enhancement that supports a plausible inference of a conspiracy under Section 1 of the Sherman Act?

Suggested answer: No.

d. Whether a complaint alleging that two competing suppliers raised prices on an unidentified group of products by different percentage amounts describes parallel conduct sufficient to infer a plausible conspiracy under the first part of the two-part analysis applicable to a Section 1, Sherman Act claim?

Suggested answer: No.

2. Whether Defendants' joint motion to stay was appropriately denied under the circumstances?

Suggested answer: No

Subsidiary question:

a. Whether the district court should be "reluctant" to grant a pre-indictment stay pending the resolution of a parallel criminal investigation when, as the Supreme Court directed in *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal*, care is to be taken to avoid the enormous costs of discovery in a case in which the allegations do not adequately state a Section 1, Sherman Act claim?

Suggested answer: No.

These questions meet the three requirements of Section 1292(b). First, a denial of a motion to dismiss presents a "controlling question of law." "[I]t is clear that a question of law is 'controlling' if reversal of the district court's order would terminate the action." *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 24 (2d Cir. 1990) (citations omitted); *see also Katz v. Carte Blanche Corp.*, 496 F.2d 747, 756 (3d Cir. 1974) (controlling questions of law include, *but are not limited to*, "every order which, if erroneous, would be reversible error on final appeal"); *Hunt v. United States Tobacco Co.*, 538 F.3d 217, 220 (3d Cir. 2008) (accepting interlocutory appeal of denial of motion to dismiss); *Gen. Pub. Utils. Corp. v. United States*, 745 F.2d 239, 240 (3d Cir. 1984) (same). However, the order need not be one that terminates the litigation. As the Third Circuit has further explained, the key consideration in determining whether a

question is "controlling" is whether it implicates the policies favoring interlocutory appeal, which include "the avoidance of harm to a party pendente lite from a possibly erroneous interlocutory order and the avoidance of possibly wasted trial time and litigation expense." *Katz*, 496 F.2d at 756.[13]

Here, the Order qualifies both because its reversal would terminate the litigation and because it implicates the policies discussed in *Katz*. If Plaintiffs' case should be permitted to proceed on the basis of the Complaint, Defendants would be subject to precisely the type of harm, burden, and expense articulated in *Katz*. *Twombly* and *Iqbal* underscore the concerns with imposing the costs and burdens of discovery and litigation on defendants where a Section 1 conspiracy case should not be allowed to proceed on the basis of the complaint and thus provide further support for certification under Section 1292(b).

The denial of the stay similarly presents a controlling question of law because of the potential harm to Defendants during the pendency of the litigation if the denial of the stay was erroneous. *Id.* at 756. As explained in prior briefing, Defendants face

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[13] Indeed, section 1292(b) was enacted because of dissatisfaction "with the prolongation of litigation and with harm to litigants uncorrectable on appeal from a final judgment" in the absence of an interlocutory appeal mechanism. *Id.* at 753. The court in *Katz* cited testimony in support of the legislation that "suggests that 'controlling' means serious to the conduct of the litigation. . . . And on the practical level, saving of time of the district court and of expense to the litigants was deemed by the sponsors to be a highly relevant factor." *Id.* at 755.

significant potential harm if discovery is allowed to proceed while the grand jury investigation is underway. *See id.* at 755 (reversal need not terminate the litigation in order to involve a controlling question of law); *see also Klinghoffer* at 24 ("the resolution of an issue need not necessarily terminate an action in order to be 'controlling'").

Second, as demonstrated above and in prior briefing, there is "substantial ground for difference of opinion" on each of the questions proposed for certification. Indeed, the Court itself observed that "[w]hether the factual enhancements in the Complaint lend plausibility to the allegations of conspiratorial conduct is a closer question." 2010 WL 3364218, at *6.

Finally, "an immediate appeal from the order may materially advance the ultimate termination of the litigation." If the Order is reversed, the Complaint would be dismissed.

II. CONCLUSION

Because the facts alleged in the Complaint are as consistent with lawful independent action as with conspiracy, Defendants respectfully request the Court to reconsider the denial of their motions to dismiss the Consolidated Class Action Complaint.

In the alternative, because the Order denying the motions to dismiss involves a controlling question of law about which there is a substantial ground for difference of

opinion, and the resolution of this question could result in the prompt termination of this action, the Court should certify the Order for immediate appeal pursuant to 28 U.S.C. § 1292(b).

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CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing **MOTION FOR RECONSIDERATION OR FOR CERTIFICATION OF AN INTERLOCUTORY APPEAL** with the Clerk of Court using the CM/ECF system, which constitutes service.

This 7th day of September, 2010.

/s/ Michele D. Hangley
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