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

IN RE: BLOOD REAGENTS ANTITRUST LITIGATION	)	**MDL Docket No. 09-2081**
	)	**HON. JAN E. DUBOIS**
THIS DOCUMENT RELATES TO ALL ACTIONS	)	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR RECONSIDERATION OR FOR CERTIFICATION OF AN INTERLOCUTORY APPEAL

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INTRODUCTION

Since the Court's August 23, 2010 decision, where it analyzed and found that Plaintiffs' Complaint ("CAC") met the plausibility standard under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) ("*Twombly*") -- the controlling authority at issue -- nothing has changed. Since there has been no change in the controlling law, the alleged facts or Defendants' arguments, there is no basis to change this Court's prior decision and grant the extraordinary remedies of reconsideration or certification of that decision. *Twombly* was thoroughly briefed and extensively argued by the parties, and properly analyzed in detail by the Court in its opinion. *See In re Blood Reagents Antitrust Litig.*, No. 09-2081, 2010 WL 3364218, at *3-8 (E.D. Pa. Aug. 23, 2010) ("*Blood Reagents*"). *See also* Motion to Dismiss Hearing Transcript, July 28, 2010, p. 5 (Mr. Saint-Antoine: "I do not believe there's any dispute about the significance of the [Supreme] Court's *Twombly* decision in terms of evaluating the sufficiency of a pleading in a Section 1 Sherman Act case such as this one.").

Nevertheless, clearly unhappy with the Court's correct application of the *Twombly* plausibility standard, Defendants now ask the Court to reconsider its decision in light of two recent cases: *In re Insurance Brokerage Antitrust Litigation*, Nos. 07-4046, 08-1455, 08-1777,____ F.3d ____ , 2010 WL 3211147 (3d Cir. Aug. 16, 2010) ("*Insurance Brokerage*") and *Superior Offshore Int., Inc. v. Bristow Group, Inc.*, Civ. A. No. 1:09-CV-00438-LDD, ___F. Supp. 2d ___, 2010 WL 3699923 (D. Del., Sept. 14, 2010) ("*Superior Offshore*"), both of which do nothing more than what this Court has already done, *i.e.*, apply the controlling *Twombly* standard to the facts of each respective case.

In *Insurance Brokerage*, which this Court *considered and cited in its opinion*, *see Blood Reagents*, 2010 WL 3364218, at *4, the Third Circuit, citing many of the same *Twombly* quotes this Court also cited, merely applied the same *Twombly* plausibility standard to the facts of that case, which are significantly different from this case. *See Insurance Brokerage*, 2010 WL 3211147, at * 6-13. Likewise, in *Superior Offshore*, Judge Davis, sitting by designation in the Delaware District Court, also quoting liberally from *Twombly*, applied that same standard to the facts of that case, which are also easily distinguishable from the present case. *See Superior Offshore*, 2010 WL 3699923, at *1-4. Therefore, as neither the facts as alleged in the CAC, nor the controlling law as set out by the U.S. Supreme Court, have changed in any way since this Court considered the parties' first round of briefing, as illuminated by the Court's extensive hearing on July 28, 2010, there is no rational reason to change the result.

What also have not changed are Defendants' familiar arguments concerning the allegations regarding trade associations, inter-company hiring, market characteristics, parallel pricing and the government investigations, which have now been made four times - three times before this Court rejected them in its opinion (two rounds of briefs and oral argument), *see* Immucor opening br. (Doc. No. 59), pp. 18-22; Ortho opening br. (Doc. No. 58-2), pp. 14-18, 23-28; Immucor reply br. (Doc. No. 84), pp. 17-19, Ortho reply br. (Doc. No. 85), pp. 14-17; 7/28/10 Tr., pp. 15-19, and once again in their motion for reconsideration. *See* Defendants' Motion for Reconsideration (Doc. No. 102), pp. 9-15 ("Recon Mot."). *See also* 7/28/10 Tr., p. 3 (The Court: "I'm familiar with the case and there's a certain amount of repetition. The replies aren't really replies, I thought I was reading the lead briefs again."). Defendants, hoping the fourth time is the charm, now

claim that this Court has committed a "clear error of law" in rejecting their tired arguments. *See* Recon Mot., p. 4. They are wrong. In fact, this Court performed a textbook analysis of the CAC, as is obvious from its opinion, which is replete with citations to the alleged facts and the controlling law.[1] Consequently, Defendants' motion should be denied.

ARGUMENT

I. Defendants Do Not Meet the Standard for Reconsideration.

The purpose of a motion for reconsideration "is to correct manifest errors of law or fact or to present newly discovered evidence." *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985). Thus, the standard for granting such a motion can only be satisfied in one of three ways: (1) an intervening change in controlling law; (2) the availability of new evidence that was not available when the court issued its order; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice. *See Max's Seafood Café v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999).

In addition, "motions for reconsideration should be granted sparingly because courts have a strong interest in the finality of judgments." *Post Confirmation Trust for Fleming Companies, Inc. v. Friedland*, No. 06-CV-1118, 2006 WL 3484374, at *2 (E.D. Pa. Nov. 21, 2006) (internal citation and quotations omitted). As such, "the reconsideration of a judgment is an extraordinary remedy." *Hartshorn v. Throop Borough*, No. 3:07-cv-01333, 2009 WL 1323577, at *1 (M.D. Pa. May 7, 2009).

[1] The weakness of Defendants' arguments is demonstrated by their citations to the May 18, 2010 telephone conference as evidence that the Court had questions about whether the CAC met the *Twombly* plausibility standard. *See* Recon Mot., pp. 1, 3. However, the May conference took place before 1) Defendants' motions to dismiss were fully briefed, and 2) the Court's extensive hearing on those motions. Citing back to the May conference instead of the July 28, 2010 hearing or better yet, the Court's August 23, 2010 opinion, is indicative of the lengths to which Defendants must go to avoid the Court's well-reasoned opinion.

Furthermore, "[a] motion for reconsideration is not to be used as a means to reargue matters already argued and disposed of or as an attempt to re-litigate a point of disagreement between the Court and the litigant." *Abu-Jamal v. Horn*, No. 99-5089, 2001 WL 1609761, at *9 (E.D. Pa. Dec. 18, 2001) (internal citation and quotations omitted). *See also In re Le-Natures', Inc.*, No. 08-1518, 2009 WL 3526569, at *1 (W.D. Pa. Oct. 23, 2009) ("A court may not grant a motion for reconsideration when the motion simply restyles or rehashes issues previously presented."). Likewise, "'[i]t is improper on a motion for reconsideration to ask the Court to rethink what [it] had already thought through-rightly or wrongly.'" *Id.* (quoting *Glendon Energy Co. v. Borough of Glendon*, 836 F. Supp. 1109, 1122 (E.D. Pa. 1993)).

Here, Defendants have conceded that no intervening change in the law has occurred, and that no new evidence has emerged, thus eliminating the first two prongs of the reconsideration standard. Recon Mot., p. 4. Rather, Defendants argue that reconsideration is appropriate because the recent *Insurance Brokerage* and *Superior Offshore* cases somehow show that this Court committed "a clear error of law," resulting in "a manifest injustice." *Id.* However, in order to meet this prong, Defendants must prove that "the court's decision is 'clearly erroneous' as a matter of law." *U.S. v. $46,000 in Unites States Currency*, No. 02-6805, 2003 WL 22120261, at *2 (E.D. Pa. Sept. 9, 2003). Defendants clearly fail this test, as *Insurance Brokerage* and *Superior Offshore* do not support such a conclusion.

A. The Court's Opinion Does Not Contain a Clear Error of Law Resulting in a Manifest Injustice.

The Court stated at oral argument that "I'm familiar with the case and there's a certain amount of repetition. The replies aren't really replies, I thought I was reading the

lead briefs again." 7/28/10 Tr., p. 3. The Court also acknowledged that it looked to *Twombly* as the controlling law in formulating its decision:

> [T]he major question that I think you ought to be prepared to answer is whether taking everything that is alleged, plaintiffs have nudged their complaint across the starting line sufficient to qualify under Twombly.

Id. at 11-12. More importantly, in its opinion, the Court analyzed the facts of this case under the *Twombly* standard, as it was required to do. *See Blood Reagents*, 2010 WL 3364218, at *3 ("[i]n determining whether the Complaint fails to state a claim…the Court is guided by the standard set forth in . . . *Twombly*."). The Court further stated that "[i]n that case, the Supreme Court explained that stating a claim under §1 'requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made.'" *Id.* (quoting *Twombly*, 550 U.S. at 556). "In other words, the allegations of conspiracy must be 'plausible.'" *Id.* The Court further stated that plausibility "is not a probability requirement," but "'simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement,'" *id.*, and that *Twombly* "does [ ] not require 'heightened fact pleading of specifics.'" *Id.*, at *4 (quoting *Twombly*, 550 U.S. at 555, 570).

Clearly, the Court understood the facts, arguments, and law in making its decision, and there is nothing in *Insurance Brokerage* or *Superior Offshore* to indicate that this Court made a clear error of law which resulted in a manifest injustice. Neither case changed the *Twombly* plausibility standard; in fact, both looked to *Twombly* as the controlling law. *See Insurance Brokerage*, 2010 WL 3211147, at *9-13; *Superior Offshore*, 2010 WL 3699923, at *7-11. Therefore, this Court's application of the controlling law to the allegations in the CAC was correct. And especially in this context,

where Defendants' arguments have not changed from their opening briefs to their reply briefs to their oral argument to their motion for reconsideration, "'[i]t is improper on a motion for reconsideration to ask the Court to rethink what [it] had already thought through-rightly or wrongly.'" *Le-Natures'*, 2009 WL 3526569, at *1.

1. *Insurance Brokerage* does not support Defendants' argument that this Court committed a "clear error of law."

Defendants ignore that this Court already considered and cited *Insurance Brokerage* in its opinion. *See Blood Reagents*, 2010 WL 3364218, at *4 (*Insurance Brokerage* discussed "the standard for pleading a conspiracy in light of *Twombly* and *Iqbal*."). This, of course, is the same standard which this Court relied upon in formulating its own decision. *See id.*, at *3-4. Thus, the Third Circuit merely interpreted and applied the same *Twombly* standard to the facts of *Insurance Brokerage* as this Court interpreted and applied to the facts of this case. *See Insurance Brokerage*, 2010 WL 3211147, at *9-13.

In short, in attempting to convince this Court that it committed a clear error of law, Defendants have conveniently ignored that, 1) *Insurance Brokerage* did not change in any way the controlling precedent set out in *Twombly*, and 2) this Court already considered and cited *Insurance Brokerage* in its opinion. To avoid these inconvenient facts, Defendants misinterpret *Insurance Brokerage* in two ways.

First, Defendants incorrectly argue that *Insurance Brokerage* somehow requires this Court to address three specific categories of "plus factors" in analyzing an alleged antitrust conspiracy, namely "(1) evidence that the defendant has a motive to enter into a price fixing conspiracy; (2) evidence that the defendant acted contrary to its interest; and (3) 'evidence implying a traditional conspiracy.'" Recon Mot., p. 6. However, *Insurance*

Brokerage does no such thing. Instead, it states that "there is no finite set of [plus factors]" and that these are only "three such plus factors" that have been identified. *Insurance Brokerage*, 2010 WL 3211147, at *11. Thus, neither *Twombly* nor *Insurance Brokerage* requires this Court to specifically address these three "plus factors."[2] Consequently, the Court was correct in following *Twombly*'s direction that "[t]o state a plausible entitlement to relief under § 1, a complaint must allege parallel conduct plus 'some further factual enhancement,'" *Blood Reagents*, 2010 WL 3364218, at *4 (quoting *Twombly*, 550 U.S. at 557), and not merely the specific plus factors Defendants incorrectly outline in their brief.[3]

Second, while claiming to consider the factual enhancements "as a whole," Recon Mot., p. 15, Defendants once again "cherry pick" only certain factual enhancements identified by the Court as plausibly showing an antitrust conspiracy, and then attempt to defeat each in isolation. *See* 7/28/10 Tr., p. 11 (The Court: "I think that the defendants have tried to break out each of the allegations . . . and address them one at a time."). As to other important factors cited by the Court, once again Defendants simply ignored them.

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[2] The Court nevertheless did address these "plus factors," which were alleged in the CAC. For example, the Court stated that "[t]he allegation that Immucor was losing so much money before the conspiracy that it broke bank covenants, and that Ortho-Clinical was losing so much money it considered leaving the market altogether, provide the motive for a conspiracy to raise prices. *See In re Flat Glass Litig.*, 385 F.3d 350, 360 (3d Cir. 2004)(describing motive as a 'plus factor' to be used to determine whether an illegal agreement has occurred)." *Blood Reagents*, 2010 WL 3364218, at *7. *See also* 7/28/10 Tr., p. 37:13-23. The Court also found that Defendants' conduct was "unusual" and thus contrary to their interests. *See Blood Reagents*, 2010 WL 3364218, at *7 ("The Complaint describes other unusual behavior after the year 2000" and "[a]n industry publication noted 'it is rare for a health care supplier to invoke [a cancellation clause] just to raise prices, and even more unusual to announce that fact.'"). *See also* 7/28/10 Tr., pp. 41:17 – 42:15.

[3] Defendants are also incorrect in stating that *Insurance Brokerage* interprets *Twombly* as setting forth a summary judgment standard through the three "plus factors." Recon Mot., p. 6. *Twombly* was clear that the "plausibility standard" does not "require heightened fact pleading of specifics." *Twombly*, 550 U.S. at 570.

For example, Defendants do not even mention two significant factual enhancements that were determinative in showing that Plaintiffs alleged a plausible conspiracy - the cancellation of the group purchasing organization ("GPO") contracts, *see Blood Reagents*, 2010 WL 3364218, at *7, and certain comments made by Immucor and Ortho executives. *See id.*, at *6-7. Rather, they ignored those damaging facts and their role in the "context" as set out by this Court. *See id.*, at *4 (quoting *Twombly*, 550 U.S. at 557). Clearly, Defendants offer no business justifications for these enhancements because there are none.

Defendants' practice of attacking some enhancements in isolation (Recon Mot., pp. 9-15), while ignoring others cited by this Court in analyzing the "context" surrounding the alleged conspiracy, runs counter to a long line of cases which direct courts to consider a complaint's allegations as a whole, and not evaluate the sufficiency of each allegation independently. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 326 (2007) ("[T]he court's job is not to scrutinize each allegation in isolation but to assess all the allegations holistically."); *In re Pressure Sensitive Labelstock Antitrust Litig.*, 566 F. Supp. 2d 363, 373 (M.D. Pa. 2008) ("Nothing in *Twombly*…contemplates this 'dismemberment' approach to assessing the sufficiency of a complaint. Rather, a district court must consider a complaint in its entirety without isolating each allegation for individualized review."); *In re OSB Antitrust Litig.*, No. 06-826, 2007 WL 2253419, at * 6 (E.D. Pa. Aug. 3, 2007) ("[A]n antitrust complaint should be viewed as a whole…"); *In re Potash Antitrust Litig.*, 667 F. Supp. 2d 907, 934 (N.D. Ill. 2009) ("In determining whether the complaint satisfies the plausibility threshold required by *Twombly*, the allegations must be evaluated as a whole."); *In re Aftermarket*

Filters Antitrust Litig No. 08 C 4883, 2009 WL 3754041, at * 3 (N.D. Ill. Nov. 5, 2009) ("[D]efendants may not 'cherry pick' specific allegations in the complaint that might be insufficient standing alone. Nothing in *Twombly* or any other case has diminished the application of these general standards to a § 1 Sherman Act claim."). *See also* 7/28/10 Tr., pp. 36:19-37:12.

Furthermore, the context of a case determines whether a proposed independent business justification for the alleged anticompetitive conduct deflates the plausibility of the alleged conspiracy. *See Twombly*, 550 U.S. at 557; *Insurance Brokerage*, 2010 WL 3211147, at *11 (quoting *Twombly*, 550 U.S. at 557).

To Defendants' detriment, *Insurance Brokerage* quotes extensively from *Twombly*, *e.g.*, "[a]t the outset of its analysis, the [*Twombly*] Court remarked that the complaint's sufficiency would 'turn [] on the suggestions raised by [defendant's alleged] conduct when viewed in light of common economic experience.'" *Insurance Brokerage*, 2010 WL 3211147, at *13 (quoting *Twombly*, 550 U.S. at 565). Specifically, *Insurance Brokerage* involved a "hub and spoke scheme" in which "conspiring [insurance] brokers funneled unwitting clients to their co-conspirator insurers, which were insulated from competition; in return, the insurers awarded the brokers contingent commission payments – concealed from the insurance purchasers and surreptitiously priced into insurance premiums – based on the volume of premium dollars steered their way." *Id.*, at *1, 4. The court found that in the economic context of the insurance industry, "the obvious explanation for each insurer's decision to enter into a contingent commission agreement with a broker that was consolidating its pool of insurers was that each insurer independently calculated that it would be more profitable to be within the pool than

without." *Id.*, at *15. In other words, the alleged anticompetitive conduct was not against the defendants' economic self-interest given the context of the insurance industry. Thus, the independent business justifications for the alleged conduct were valid and worked to deflate the plausibility of Plaintiffs' allegations.

The context of this case, however, is completely different from *Insurance Brokerage*, and the independent business justifications proffered by Defendants here do not deflate the plausibility of the alleged conspiracy. Specifically, in analyzing the "further factual enhancements" to determine whether the alleged conspiracy is plausible, the Court was correct in beginning its analysis:

> *Twombly* emphasized context. Accordingly, the Court begins by exploring the unique context of the alleged conspiracy, namely the allegations concerning the nature of the blood reagents market before and after the conspiracy allegedly began in the year 2000.

See Blood Reagents, 2010 WL 3364218, at *6. *See also Insurance Brokerage*, 2010 WL 3211147, at *11, 12 (quoting *Twombly*, 550 U.S. at 557). At oral argument, the Court also made reference to the economic context of the blood reagents market when looking at Defendants' significant parallel price increases. *See* 7/28/10 Tr., pp. 6-7 (The Court: "So you're saying that the fact that for 15 years before 2000 there were no price increases and then beginning in 2000…there were numerous price increases, you say that is of no legal significance…?).

The Court then detailed the necessary "context," and in doing so referenced several important quotes attributable to Defendants' employees:

> That year, one of Immucor's founding partners, Edward Gallop, stated "I've been in this business since 1964. It's the only business where prices have done down every year. Prices go down because of all the competition. But by buying up the competition and consolidating the marketplace into two key players, Immucor can raise its prices." (CAC ¶ 56)

See Blood Reagents, 2010 WL 3364218, at *6. Furthermore:

> In early 2003, Ortho-Clinical admitted that it had implemented significant price increases along with Immucor and, in February of that year, an Ortho-Clinical Account Manager "discussed a presentation he had made which went into a lot of detail regarding why [Ortho-Clinical Diagnostics] and Immucor implemented this significant price increase." (CAC ¶ 71)

Id., at *7. Tellingly, these anticompetitive quotes are mentioned nowhere in Defendants' motion for reconsideration, nor were they mentioned in Defendants' opening and reply briefs, nor in their remarks at the hearing. *See* 7/28/10 Tr., pp. 39-41, 44-45, 56-57 (Mr. Corrigan: "Now what did Immucor say in their briefs and what did they say in their oral argument about these quotes? This is what they say, nothing.")

The Court mentioned other important facts in this context section:

> In September, 2004-around the same time defendants increased prices on a wide variety of blood reagents from 87% to as much as 254%, (CAC ¶ 70)-defendants cancelled contracts with the same group purchasing organization, Premier, in order to raise prices for individual customers. (CAC ¶¶ 77, 79) Despite the increase, Immucor boasted that it did not expect to lose any business. (CAC ¶ 81) An industry publication noted "it is rare for a health care supplier to invoke [a cancellation clause] just to raise prices, and even more unusual to announce the fact." (CAC ¶ 82)

Blood Reagents, 2010 WL 3364218, at *7. Again, nowhere in Defendants' motion for reconsideration do they even mention the simultaneous cancellations of the GPO contracts, much less attempt to proffer a pro-competitive reason for them. *See* 7/28/10 Tr., pp. 47-50, 62-63 (The Court: "Are you saying it was in . . . that [second] company's interest to raise their prices in an equal amount? . . . What about raising their prices by . . . instead of 100 percent, 75 percent, in order to attract more market share with a 75 percent increase?"). Unlike *Insurance Brokerage*, such conduct was against these Defendants' economic self-interest within the context of the blood reagents industry.

After detailing the context in which to consider the allegations, the Court went on to consider them:

> When viewed in this context, the triple-digit percentage increases in prices, closely aligned cancellations of contracts with group purchaser organizations, and substantially improved profit margins after 2000, constitute the sort of "complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reasons," that render an allegation of conspiracy plausible. *Twombly,* 550 U.S. at 557 n. 4.

See Blood Reagents, 2010 WL 3364218, at *7. Just as with the canceling of the GPO contracts and the anticompetitive comments by Defendants' executives, Defendants do not take issue with either the "triple-digit percentage increases in prices," or the "substantially improved profit margins after 2000" in their motion for reconsideration. Why do Defendants continue to ignore these facts, even in their motion for reconsideration? Because they cannot come up with independent business justifications for such conduct.

The Court went further still in finding support for its conclusion:

> Add to this the existence of a parallel criminal investigation-an allegation demonstrating that the government believes a crime may have occurred-and the result is "enough fact to raise a reasonable expectation that discovery will reveal evidence of an illegal agreement." *Twombly,* 550 U.S. at 556. *See Starr v. Sony BMG Music Entm't*, 592 F.3d 314, 324 (2d Cir. 2010) (concluding that allegation of pending investigation by New York State Attorney General, and two separate investigations by the Department of Justice, were part of context raising a plausible suggestion of illegal agreement).

Id. [4]

[4] As for the *Starr* case, Defendants understand its importance, *see* Immucor reply br. (Doc. No. 84), p. 11 ("the only post-*Twombly* circuit court opinion plaintiffs cite that finds a dismissal improper."), and have even attempted to use it in an offensive manner. *See Id.*, pp. 11-13; 7/28/10 Tr., pp. 14, 19-20. However, on the key issue this Court cited it for, Defendants try to avoid its impact by curiously suggesting that *Starr*'s "reasoning in this respect is inconsistent with the reasoning of the Third Circuit in *Insurance Brokerage*," a case in which the court did not rely on a government investigation in its plausibility analysis.

Finally, the Court stated that "[w]hether plaintiffs are able to actually prove their allegations or not, *the Complaint's charge of a conspiracy between Immucor and Ortho-Clinical is set within a context that renders it plausible*. *See id.*, at *8 (emphasis added). Thus, the Court performed exactly the type of analysis called for in *Twombly* and *Insurance Brokerage*.

The factual context surrounding the alleged conspiracy in *Insurance Brokerage*, including the nature of the defendants and the market characteristics, is completely different than the context surrounding the alleged conspiracy in this case. Consequently, while the independent business justifications outlined in *Insurance Brokerage* may have been considered by the Third Circuit to be valid within the context of the insurance industry, the independent business justifications Defendants use to attempt to justify some of their conduct, coupled with the instances of their conduct which they do not even try to justify, are completely inadequate within the context of the blood reagents industry.

This Court correctly followed *Twombly*, and nothing in *Insurance Brokerage* indicates that this Court committed any clear error of law, let alone one which resulted in a manifest injustice.

2. *Superior Offshore* does not support Defendants' argument that this Court committed a clear error of law.

As did the courts in *Insurance Brokerage* and in this case, the court in *Superior Offshore* analyzed the allegations of that case under *Twombly*. *See Superior Offshore*, 2010 WL 3699923, at *4-7. Thus, nothing in *Superior Offshore* supports Defendants' argument that this Court committed a clear error of law. Not only is *Superior Offshore* not controlling, but the allegations there are nowhere near as plausible as the allegations in this case.

For example, the *Superior Offshore* court found that "Plaintiff's only allegations of acts against each Defendant's economic self-interest are allegations of Defendant's parallel price increases during a period of decreased demand. Plaintiff makes no other allegations that Defendants acted against their self-interest in ways not attributable to interdependence." *Id.*, at *10. However, in this case, Defendants engaged in significant triple-digit parallel price increases, and simultaneously cancelled contracts with their largest GPO customers due to the GPOs not agreeing to substantial price increases:

> [D]efendants cancelled contracts with the same group purchasing organization, Premier in order to raise prices for individual customers. Despite the increase, Immucor boasted that it did not expect to lose any business. (CAC ¶ 81) An industry publication noted, "it is rare for a health care supplier to invoke [a cancellation clause] just to raise prices, and even more unusual to announce that fact."

Blood Reagents, 2010 WL 3364218, at *7. As such, Defendants in this case exhibited conduct that was strongly against their economic self-interest and thus more indicative of a conspiracy than the conduct examined in *Superior Offshore*.

Furthermore, defendants' comments in *Superior Offshore* involved ambiguous statements, some of which were not even made by defendants' employees or top executives. *See Superior Offshore*, 2010 WL 3364218, at *3-4, 8, 10. Contrast that with the anticompetitive comments made by Defendants' executives in this case. *See Blood Reagents*, 2010 WL 3364218, at *6-7.

In sum, *Superior Offshore* adds nothing new to the tired arguments Defendants previously made in their principal and reply briefs in support of their motions to dismiss, at oral argument, and now in their motion for reconsideration. As stated above, "[a] motion for reconsideration is not to be used as a means to reargue matters already argued and disposed of or as an attempt to re-litigate a point of disagreement between the Court

and the litigant." *Abu-Jamal*, 2001 WL 1609761, at *9. Furthermore, since it is obvious that *Superior Offshore* does not present any new interpretation of the *Twombly* standard, "'[i]t is improper on a motion for reconsideration to ask the Court to rethink what [it] had already thought through-rightly or wrongly.'" *Id.* (quoting *Glendon Energy*, 836 F. Supp. at 1122). As such, *Superior Offshore* does not support Defendants' argument that the Court committed a clear error of law which resulted in a manifest injustice.

II. Defendants Do Not Meet the Standard for Certification of Interlocutory Appeal pursuant to 28 U.S.C. § 1292 (b).

While Defendants obviously disagree with this Court's decision denying their motions to dismiss, "[a] motion for certification should not be granted merely because a party disagrees with the ruling of the district judge." *Max Daetwyler Corp. v. Meyer*, 575 F. Supp. 280, 282 (E.D. Pa. 1983). This is true even if that disagreement is vehement. *See First Am. Corp. v. Al-Nahyan*, 948 F. Supp. 1107, 1116 (D.D.C. 1996).

Instead, interlocutory appeals, which are purely discretionary and strongly disfavored, are reserved for "exceptional" cases, where all three prongs of the governing test are satisfied. As this Court summarized:

> Before certifying a question to the Court of Appeals a district court must determine: (1) that the certified order involves a controlling question of law; (2) that there is substantial ground for difference of opinion with respect to that question, and (3) that immediate appeal may materially advance the ultimate termination of the litigation. A court will only grant an interlocutory appeal if all three requirements under § 1292(b) are sufficiently established. The decision to certify an order for appeal under § 1292(b) lies within the sound discretion of the trial court. Certification is only appropriate in "exceptional" cases. A district court should be mindful of the strong policy against piecemeal appeals when exercising its discretion.

Koken v. Viad Corp., No. Civ. A. 03-5975, 2004 WL 1240672, at *1 (E.D. Pa. May 11, 2004) (citations omitted).

Because interlocutory appeals are so disfavored, "[t]he court must remember that certification is generally not to be granted." *Max Daetwyler*, 575 F. Supp. at 282. Rather, "[t]his Court has held such certification is proper only where the moving party demonstrates that 'exceptional circumstances justify a departure from the basic policy against piecemeal litigation and in postponing appellate review until after entry of a final judgment.'" *LePage's Inc. v. 3M*, No. Civ. A. 97-3983, 1998 WL 42274, at *1 (E.D. Pa. Jan. 13, 1998)(citing *Yeager's Fuel, Inc. v. Pa. Power & Light Co.*, 162 F.R.D. 482, 489 (E.D. Pa. 1995)). To the extent they even attempt such a demonstration, Defendants fall far short of meeting all three prongs of the certification standard.

First, there is no controlling question of law, *i.e.*, no "difficult central question of law which is not settled by controlling authority." *Leff v. Deutsche Bank AG*, No. 08-CV-733, 2009 WL 4043375, at *3 (N.D. Ill. Nov. 20, 2009). *See also Knipe v. Smith-Kline Beecham*, 583 F. Supp. 2d 553, 599 (E.D. Pa. 2008) (quoting *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974)). Here, Defendants themselves concede that *Twombly* is the controlling authority in this matter. *See* 7/28/10 Tr., pp. 4-5 (Mr. Saint-Antoine: "I do believe that there is an acknowledgement by all the parties of the importance of the Supreme Court's decision in Twombly in pleading an antitrust conspiracy case…I do not believe that there's any dispute about the significance of the Court's Twombly decision in terms of evaluating the sufficiency of a pleading in a Section 1 Sherman Act case such as this one.) *See also* Recon Mot., p. 1 ("Plaintiffs' [CAC]…was filed in the aftermath of two U.S. Supreme Court decisions, *Twombly* and *Iqbal*, which set forth the requirements for pleading an antitrust conspiracy."). In fact, this Court stated that "[i]n determining whether the Complaint fails to state a claim…the

Court is guided by the standard set forth in . . . *Twombly*." *Blood Reagents*, 2010 WL 3364218, at *3. Consequently, there is no controlling question of law in this case.

Second, certification is inappropriate unless the "controlling question of law" is one to which "substantial grounds for differences of opinion" exist. For example, "[a] movant cannot satisfy the stringent requirements of section 1292(b) by merely asserting that such differences exist." Thus, whereas the "substantial grounds" must be demonstrated, Defendants fail to identify any circuit split or conflicting precedent pertaining to the *Twombly* plausibility standard. In fact, the cases Defendants cite to demonstrate that this Court committed a "clear error of law" - *Insurance Brokerage* and *Superior Offshore* – both utilize *Twombly* as the controlling authority. In a disingenuous attempt to demonstrate substantial grounds for a difference of opinion, Defendants quote the Court as saying that "[w]hether factual enhancements in the Complaint lend plausibility to the allegations of conspiratorial conduct is a closer question . . . ;" they somehow failed to include the rest of that quote: "but one which the Court concludes must be answered in the affirmative." *Blood Reagents*, 2010 WL 3364218, at *6. Thus, simply because Defendants did not like the outcome of the Court's analysis is no reason for certification to be granted. *See Max Daetwyler*, 575 F. Supp. at 282.

Lastly, an immediate appeal will not materially advance the ultimate termination of the litigation. It is well recognized that appellate review in general benefits from a fully developed record. *See Weaver v. Mobile Diagnostech, Inc.*, Civ. A. No. 02-1719, 2007 WL 2463411, at *2 & n.2 (W.D. Pa. Aug. 28, 2007) (citing *Johnson v. Jones*, 515 U.S. 304, 309 (1995) and *In re Ford Motor Co.*, 110 F.3d 954 (3d Cir. 1997)). Here,

where no discovery has taken place, interlocutory review is disfavored. *See Roberson v. Pelosi*, Civ. A. No. 99-3574, 2001 WL 541117, at *5 (E.D. Pa. May 21, 2001).

CONCLUSION

For the foregoing reasons, Defendants' motion for reconsideration or for certification of an interlocutory appeal should be denied.

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Respectfully submitted,

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