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

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

The Third Circuit's August 16, 2010 Opinion in *In re Insurance Brokerage Antitrust Litigation*, MDL No. 1663, ___ F. 3d ___, 2010 WL 3211147 (3d Cir. 2010), coupled with the even more recent decision of the District of Delaware in *Superior Offshore International, Inc. v. Bristow Group Inc.*, No. 1:09-CV-00438-LDD, ___ F. Supp. 2d ___, 2010 WL 3699923 (D. Del. Sept. 14, 2010), provide this Court with ample reason to reconsider its prior order and dismiss the Complaint. These cases show that lawful interdependent pricing behavior in an oligopolistic market presents, on the facts alleged here, an "obvious alternative explanation" for alleged parallel price increases. As the courts in both cases observed, there is nothing "irrational or self-defeating" about competitors in a highly concentrated market independently and unilaterally raising prices to increase their profits, even when such price increases may be adverse to consumer interests. *Superior Offshore*, 2010 WL 3699923, at *6 (citing *Ins. Brokerage*, 2010 WL 3211147, at *10 & nn.10, 19).

Defendants will concentrate here primarily on the district court's decision in *Superior Offshore*, which was issued after Defendants' initial brief. That decision is persuasive in showing how the principles of *Insurance Brokerage* properly should be applied to reject the strikingly similar plus factors proffered by Plaintiffs. Finally, and very briefly, Defendants will explain why they have requested certification for interlocutory appeal should the Court deny the

motion for reconsideration, focusing on the fact that certification would be unlikely to delay discovery in this case unless the Third Circuit accepts the appeal.

A. In Light of *Insurance Brokerage* and *Superior Offshore*, the Court Should Reconsider Its Prior Decision and Dismiss Plaintiffs' Complaint.

It would be consonant with justice for the Court to reconsider its denial of Defendants' motions to dismiss in light of the *Insurance Brokerage* and *Superior Offshore* decisions that were issued after those motions were briefed and argued.[1] With its opinion in *Insurance Brokerage*, the Third Circuit articulated the controlling principle for evaluating Plaintiffs' Complaint in this case, holding that a complaint should be dismissed when "'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." 2010 WL 3211147, at *13. Moreover, the Third Circuit cautioned that, in an oligopolistic market like the one at issue here, particular care must be taken to avoid mistaking lawful, independent conduct for conspiracy. *Id.* at *11.

After Defendants' motion for reconsideration was filed, the Delaware district court applied the principles of *Insurance Brokerage* to dismiss a complaint with allegations strikingly similar to the ones in this case. *Superior Offshore*, 2010 WL 3699923, at *11-12. There, the plaintiffs alleged that the defendant operators of helicopter flights to offshore drilling rigs had conspired to fix prices. The plaintiffs alleged no direct evidence of a price-fixing conspiracy.

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[1] Defendants note that the Plaintiffs have in their opposition relied on cases involving reconsideration of final judgments. The reconsideration standard is applied more loosely to interlocutory orders. "So long as the district court has jurisdiction over the case, it possesses inherent power over interlocutory orders, and can reconsider them when it is consonant with justice to do so." *United States v. Jerry*, 487 F.2d 600, 605 (3d Cir. 1973); *Walker v. Pearl S. Buck Found.*, No. 94-1503, 1996 WL 706714, at *2 (E.D. Pa. Dec. 3, 1996) (Dubois, J.); *see also Blue Mountain Mushroom Co. v. Monterey Mushroom, Inc.*, 246 F. Supp. 2d 394, 398-99 (E.D. Pa. 2002); *cf.*, Fed. R. Civ. P. Rule 54(b).

Instead, as in the present case, they sought to establish a conspiracy circumstantially by alleging a series of substantial parallel price increases, which occurred after a lengthy period of stable pricing.[2] *Id.* at *1-2. These allegations were combined with a list of putative plus factors virtually identical to those offered by Plaintiffs here, including, trade association membership, intercompany hiring, market factors allegedly conducive to conspiracy, a pending DOJ investigation, and certain alleged anticompetitive statements by defendants' employees. *Id.* at *2-4. The *Superior Offshore* court concluded that the allegations of the complaint failed to state a claim because "[i]n a highly concentrated, interdependent market . . . , the alleged price coordination . . . might be the result of an understanding among the sellers to fix prices *or it equally might be the result of each seller's lawful independent pricing decisions.*" *Id.* at *9 (emphasis added).

The court in *Superior Offshore* recognized that putative "plus factors" must be viewed skeptically when the defendants operate in an oligopolistic market. *Id.* at *7 (quoting *Ins. Brokerage*, 2010 WL 3211147, at *11). In such a market, "'evidence implying a traditional conspiracy,' becomes crucial" – *i.e.*, "allegations of 'non-economic evidence that there was an actual, manifest agreement not to compete, which may include proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan.'" *Id.* (quoting *Ins. Brokerage*, 2010 WL 3211147, at *11).

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[2] Indeed, the most significant distinction between *Superior Offshore* and this case weighs in favor of Defendants. In *Superior Offshore*, the price increases took place in the face of declining demand for defendants' services, 2010 WL 3699923, at *1-2, which is not a market condition normally associated with rising prices. Yet, the district court still found no basis to infer a conspiracy. Here, in contrast, the Plaintiffs do not have the benefit of an allegation of declining demand for Blood Reagents.

The *Superior Offshore* court thus rejected all of the factual enhancements alleged by the plaintiffs in that case, which are virtually identical to those advanced by the Plaintiffs here, on the grounds that they were equally compatible with lawful oligopolistic behavior and did not therefore, "*taken singly or together*," justify an inference of conspiracy. *Id*. at *9 (emphasis added). Specifically, the court found that the market structure allegedly conducive to conspiracy was equally conducive to oligopoly pricing, *id.* at *9; that trade association participation and inter-company hiring[3] merely provided an "opportunity to conspire," *id*. at *11; and that proof of an ongoing DOJ investigation was "equally consistent with [the] defendants' innocence," *id*. at *11-12.

Superior Offshore also rejected as plus factors purportedly suspicious statements of the defendants that were markedly similar to statements relied upon by Plaintiffs here. *Id.* at *8, 10. Plaintiffs focus on a statement by Edward Gallup, one of Immucor's founders, that "by buying up the competition and consolidating the marketplace into two key players, Immucor can raise its prices." (Pls.' Opp'n Br. at 10.) This statement says nothing about fixing prices or conspiring with Ortho. Instead, the statement is most consistent with Defendants' proposed alternative explanation of the parallel conduct alleged in the complaint, *i.e.*, that the consolidation of the market helps explain Defendants' change in pricing. *Superior Offshore*

[3] Also noteworthy is the recent outcome of the Department of Justice's investigation, referred to in Defendants' initial brief, of anti-competitive non-hiring agreements among technology companies. (*See* Opening Br. at 12.) This investigation resulted in a tentative consent decree forbidding the defendant companies from agreeing to refrain from recruiting each other's employees. *See United States v. Adobe*, No. 1:10-cv-01629-RBW, Dkt. 2 at 10 (D.D.C. Sept. 24, 2010). This U.S. enforcement policy, which clearly regards inter-company hiring as a pro-competitive activity to be protected, cannot be reconciled with Plaintiffs' proposed treatment of such hiring as an enhancement factor.

dismissed similar statements by the president of one of the defendants. 2010 WL 3699923, *3, 10.

The second alleged statement relied upon by Plaintiffs here is the description of a presentation of an anonymous Ortho "account executive" explaining the reasons for the Defendants' price increase. *Superior Offshore* rejected as suggestive of conspiracy a far more damning statement by an unidentified "operator," on the grounds that it was vague, ambiguous, and "require[d] multiple speculative inferences" – notably that the statements were correctly described and that "the operator was in a position to participate in that Defendant's pricing decisions and did so participate." *Id.* at *8.[4]

Plaintiffs also attempt to distinguish *Insurance Brokerage* and *Superior Offshore* by characterizing Defendants' alleged parallel conduct here as "against their economic self-interest." (Pls.' Opp'n Br. at 14.) Yet, that same argument was rejected in *Superior Offshore*:

> Plaintiff alleges that Defendants' prices for helicopter services uniformly increased in a parallel fashion during a period of decreased demand, concluding that the increases must have resulted from Defendants' illegal agreement because the increases make no economic sense when viewed from the perspective of an ideally competitive market. . . . As the Third Circuit instructed, in a market where there are a few dominant sellers, and where each seller's pricing decision is

[4] Plaintiffs also accuse Defendants of "ignor[ing]" the Complaint's allegation that Defendants each cancelled their contract with the same GPO in order to raise prices. (Pls.' Opp'n Br. at 7-8.) Setting aside the fact that the Court did not identify such allegations as "enhancements" and that Plaintiffs themselves ignore the fact that *only Immucor* cancelled the Novation GPO contract, this allegation does not support a finding of conspiracy. The Court correctly treated this allegation as an instance of parallel conduct, no different from parallel pricing. Indeed, it is alleged that such cancellations were undertaken for the purpose of effectuating the alleged parallel price increases on sales to the GPO's members. (Complaint at ¶¶ 76-79.) As the Third Circuit has made clear, allegations of parallel conduct do not suffice to make out a § 1 claim in an oligopolistic market, because they are equally consistent with lawful interdependent action.

> interdependent on the decisions of its rivals, each seller may have a business motive to coordinate parallel pricing in order to maximize its own business goals. . . . *There is nothing irrational or self-defeating about the alleged parallel pricing in an oligopolistic market in which enlightened economic actors may independently and unilaterally choose to adopt and maintain supra-competitive pricing in order to increase industry profits*. . . .

2010 WL 3699923, at *9-10 (emphasis added).

Defendants' alleged price increases in the present case, like those in *Superior Offshore*, are fully compatible with rational market behavior in an oligopoly. Defendants respectfully submit that the Court should follow the guidance of *Insurance Brokerage* and *Superior Offshore* and dismiss Plaintiffs' complaint, because Defendants have proffered an "obvious alternative explanation" for the alleged parallel conduct.

B. In the Alternative, Certification for Interlocutory Appeal Is Appropriate.

Although Defendants' opening brief fully addressed the certification issue, three supplemental points are worth making in reply. First, given the recently entered Case Management Order No. 2 (Dkt. 106), if the Court certifies the denial of Defendants' motions to dismiss, phase one discovery will commence, and de facto there will be no delay of any discovery, unless the Third Circuit accepts the appeal. Second, if this Court denies Defendants' motion for reconsideration, the contrast between its holding and that in *Superior Offshore* would underscore the fact that there is "substantial ground for difference of opinion." Finally, Plaintiffs' argument that denials of motions to dismiss are inappropriate for Section 1292(b) certification because discovery has not yet occurred is not supported by any of the cases Plaintiffs cite and is contrary to previously cited Third Circuit cases accepting Section 1292(b) appeals of such orders. (Opening Br. at 19.) *See also Dailey v. Nat'l Hockey League*, 987 F.2d 172, 175 (3d Cir. 1993) (considering § 1292(b) appeal of denial of motion to dismiss).

CONCLUSION

Defendants respectfully request the Court to reconsider the denial of their motions to dismiss. In the alternative, the Court should certify the denial for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

Respectfully submitted this 13th day of October, 2010.

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CERTIFICATE OF SERVICE

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

This 13th day of October, 2010.

/s/James R. McGibbon
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