

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

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

THIS DOCUMENT RELATES TO ALL) HON. JAN E. DUBOIS
ACTIONS)

)

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

In a perfect example of “if at first you don’t succeed . . . ,” Defendants are now in the midst of their fifth round of making the very same arguments regarding the *Twombly* plausibility standard. In this latest version, Defendants desperately assert that the recent *Superior Offshore* case changes the equation, and thus, should change the result. *See 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*”). It does not. At the Court’s July 28, 2010 hearing, Mr. Saint-Antoine aptly stated: “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.” *See Motion to Dismiss Hearing Transcript*, July 28, 2010, p. 5. *Superior Offshore* is simply an instance where the District Court applied the controlling *Twombly* standard to the facts and surrounding context of that particular case, and reached a different result. It does not change the applicable law in this case, it does not change the facts in this case, and therefore it does not support a change in this Court’s ruling.

The fortuitous, in Defendants' eyes, and late, in relation to the briefing schedule of this motion, entry of *Superior Offshore* does spur Defendants to finally, and for the first time, attempt to address the damning quotes made by their executives. *See In re Blood Reagents Antitrust Litig.*, No. 09-2081, 2010 WL 3364218, at *6-7 (E.D. Pa. Aug. 23, 2010) ("*Blood Reagents*"). It has also given them one last chance, which they declined in their initial reconsideration brief, to attempt to explain away the simultaneous cancellations of the GPO contracts, which they now weakly dismiss as yet another harmless and, no doubt, "pro-competitive" parallel price increase. *See* Defendants' Reply Brief (Doc. No. 109), p. 5 n. 4 ("Reply Br."). *See also Blood Reagents*, 2010 WL 3364218, at *7. However, in doing so, Defendants do nothing more than confirm this Court's prior reasoning using the *Twombly* standard.

In its prior detailed opinion, this Court discussed the damning quotes and the simultaneous cancellations of the GPO contracts, among many other facts, while "exploring the unique context of the alleged conspiracy." *See Blood Reagents*, 2010 WL 3364218, at *6 ("*Twombly* emphasized context."). Indeed, the Court's use of the word "unique" connotes that the context of this conspiracy is "unique" and, therefore, different from, the context of the *Superior Offshore* conspiracy, or any other conspiracy. In Defendants' first attempt to address their own damning quotes, they merely state that the *Superior Offshore* court dismissed "similar" and "far more damning" quotes, within the context of that case, of course. *See* Reply Br., p. 5. However, Defendants again ignore this Court's determination, based on *Twombly*, that Defendants' quotes are not to be analyzed in a vacuum, but rather within the unique context of this case.

Moreover, Defendants' assertion that since the damning quotes do not directly refer to "fixing prices" or "conspiring with Ortho" (Reply Br., p. 4), they do not support this Court's opinion is equally wrong. It is enough is that the quotes, taken along with all the other allegations, and viewed in the "unique context" of the blood reagents industry, "raise a reasonable expectation that discovery will reveal evidence of an illegal agreement." *See Blood Reagents*, 2010 WL 3364218, at *7 (quoting *Twombly*, 550 U.S. at 556).

This Court looked to *Twombly* as the controlling law in formulating its decision. *See Blood Reagents*, 2010 WL 3364218, at *3-8. *See also In re Insurance Brokerage Antitrust Litig.*, Nos. 07-4046, ____08-1455, 08-1777,____ F.3d ____, 2010 WL 3211147, at *11-14 (3d Cir. Aug. 16, 2010);¹ *Superior Offshore*, 2010 WL 3699923, at *4-7. This Court analyzed the unique facts of this case, within the proper "unique context," as it was required to do. *See id.* Nothing in *Superior Offshore* provides "substantial ground for difference of opinion" or indicates that this Court made a clear error of law which resulted in a manifest injustice. *Twombly* does not require what Defendants demand: that statements referenced in a complaint need to specifically mention price fixing or conspiring (Reply Br. at 4). Adherence to such an unreasonable standard would likely eviscerate any civil antitrust case not based upon a criminal conviction or guilty plea. *Superior Oil* simply demonstrates that the district court, in applying the same correct standard to different facts within the unique context of that case, reached a different result. *See Superior Offshore*, 2010 WL 3699923, at *7-11. It happens all the time.

¹ In *Insurance Brokerage*, extensive discovery proceeded while the motions to dismiss were pending, and two amended complaints were filed prior to the district court's final decision on the motions. *See Insurance Brokerage*, 2010 WL 3211147, at *2-3.

For the foregoing reasons, this Court's application of the controlling law to the facts and context of this case was correct, and Defendants' motion for reconsideration or for certification of an interlocutory appeal should be denied.

Dated: October 19, 2010

Respectfully submitted,

/s/ Jeffrey J. Corrigan

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CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing **Plaintiffs'** **Sur-Reply Memorandum of Law in Opposition to Defendants' Motion for Reconsideration or for Certification of an Interlocutory Appeal** with the Clerk of Court using the CM/ECF system, which constitutes service.

Dated: October 19, 2010

/s/ Jeffrey J. Corrigan

Jeffrey J. Corrigan