UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 12-8086

IN RE: BLOOD REAGENTS ANTITRUST LITIGATION

On Petition for Permission to Appeal from the Order of the United States District Court for the Eastern District of Pennsylvania Granting Class Certification in Multi-District Litigation Docket No. 09-MD-2081 (JED)

PLAINTIFFS-RESPONDENTS' OPPOSITION TO DEFENDANT-PETITIONER ORTHO-CLINICAL DIAGNOSTICS, INC.'S PETITION FOR PERMISSION TO APPEAL PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)

Eugene A. Spector
Jeffrey J. Corrigan
Jay S. Cohen
Jeffrey L. Spector
SPECTOR ROSEMAN KODROFF & WILLIS, P. C.
1818 Market Street, Suite 2500
Philadelphia, PA 19103
Tel: (215) 496-0300
Fax: (215) 496-6611

Counsel for Plaintiffs-Respondents, F. Baragaño Pharmaceuticals, Inc., et al.

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PRELIMINARY STATEMENT

After performing the rigorous analysis mandated by *Hydrogen Peroxide*, the District Court correctly found that, in this "straight forward horizontal price-fixing case . . . The anticompetitive effects of horizontal price-fixing are obvious." *See* Opinion ("Op."), at A-21.[1] However, in challenging the District Court's opinion, Ortho-Clinical Diagnostics, Inc. ("Ortho") has failed to even identify the proper standard for granting a Fed. R. Civ. P. 23(f) petition, and a review of that standard reveals why: Ortho cannot satisfy it. In fact, interlocutory review is particularly unwarranted in a case like this, where certification turns on "familiar and almost routine" legal issues. *Newton v. Merrill Lynch, Pierce, Fenner & Smith*, 259 F.3d 154, 165 (3d Cir. 2001).

In claiming that the District Court reverted to a pre-*Hydrogen Peroxide* standard for evaluating predominance and erroneously applied this Court's holdings on damages in *Behrend v. Comcast Corp.*, 655 F.3d 182 (3d Cir. 2011), Ortho ignores the District Court's consideration of and direct reference to two rounds of briefing (comprising nearly 300 pages and including over 300 exhibits), over 150 pages of expert opinion, and a two-day evidentiary hearing, in which the District Court heard argument and expert testimony from both parties. In

[1] Citations to "A-_" refer to Petitioners' Appendix. Citations to "SA-_" refer to Respondents' Supplemental Appendix.

performing this "rigorous analysis," the District Court rejected each of the arguments asserted in Ortho's petition. Interlocutory review should not be granted simply because a party does not like the result it achieved in the District Court.

In its attempt to avoid the District Court's well-reasoned opinion, Ortho frequently misrepresents its conclusions and Plaintiffs' arguments. The District Court considered and rigorously analyzed *evidence* offered by Ortho, but did not get side-tracked by mere speculation offered by Ortho and its expert. In addition, Ortho, as it did below, attempts to characterize the Plaintiffs' proposed *damages* methodology as Plaintiffs' proposed methodology for proving antitrust impact, and then curiously criticizes the District Court for relying on *Behrend*'s holdings on proof of damages to evaluate Plaintiffs' proposed proof of damages.[2] This line of attack, repeated throughout Ortho's petition, demonstrates Ortho's recognition that the District Court performed the requisite analysis under *Hydrogen Peroxide* and *Behrend*, and found Plaintiffs' and their expert's arguments, evidence and opinions more persuasive than those offered by Ortho and its expert. *See In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 321-322 (3d Cir. 2008) ("Predominance is a test readily met in certain cases alleging…violations of the antitrust laws")

[2] Ortho claims the District Court cites "repeatedly – and erroneously" to "a single statement" from *Behrend* regarding whether an expert's proposed damages model could "evolve to become admissible evidence." Petition at 2. Ortho does not actually cite the opinion for this proposition, however, because the District Court only cited that particular *Behrend* holding three times, all in the section evaluating

(quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997)).

In sum, Ortho's arguments regarding the reliability of Dr. Beyer's damages methodology, the appropriate definition of antitrust impact in this *per se* horizontal price-fixing case, and the significance of Plaintiffs' decision not to submit a trial plan fail to demonstrate that the District Court's decision was likely erroneous or turned on a novel or unsettled question of law. Because Judge DuBois properly applied Third Circuit precedent, Ortho's Rule 23(f) petition should be denied.

COUNTER-STATEMENT OF FACTUAL AND PROCEDURAL BACKGROUND[3]

To begin, Ortho mis-quotes the opinion: "'[o]n the present state of the record' the [Blood Bank Leadership Program ("BBLP")] 'does not establish' when the plan was communicated to customers." Petition at 10 (purporting to cite Opinion at A-7, n.2). In fact, the District Court stated that "On the present state of the record, the Court finds that [the evidence cited by Ortho] does not establish that Ortho *implemented* the BBLP before the AABB meeting, which began on November 4, 2000." Op., at A-7, n.2 (emphasis added). Earlier in the same footnote, the District Court stated that "[t]he record contains no evidence regarding the nature of any communications between Ortho" and seven customers alleged to

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Plaintiffs' expert's proposed damages model. *See* Op., at A-31-32, A-37.

[3] Plaintiffs adopt and incorporate by reference Judge DuBois's "Background" statement of the facts at pages 3-11 of the Opinion. Op., at A-3-11. Those referenced facts are fully supported by the record before the District Court.

have been contacted prior to the AABB, *id.*, thus demonstrating that the District Court distinguished between communication and implementation. Of course, footnote 2 is just one of many examples where the District Court specifically analyzed evidence offered by both parties, and resolved a factual dispute, as required by *Hydrogen Peroxide*. 552 F.3d at 307.

Ortho further states that the District Court "concluded that the timing of the BBLP was a merits issue, inappropriate for resolution at the class certification stage," Petition at 10, but in fact, the District Court specifically held that, "Plaintiffs' theory – that Ortho … would not have executed the [BBLP] without explicit assurance that Immucor would follow – is *highly plausible and is consistent with documents* showing the BBLP only became fully operational after the meetings." Op., at A-37-38 (emphasis added).

Ortho similarly claims that the District Court somehow lowered the bar for class certification by "refus[ing] to 'saddle[] [Plaintiffs] with analyzing whether a price-fixing conspiracy might possibly have had any negative effect on the price of any product sold by the defendants,'" Petition at 15, but in fact, the District Court distinctly qualified that conclusion based upon the complete lack of evidence offered by Ortho to support its argument. Op., at A-30. The District Court refused to credit Dr. Bronsteen's "speculative" argument that the alleged price-fixing conspiracy caused lower prices for traditional blood reagents ("TBR") or another

product offered by both Defendants, proprietary blood reagents ("ABR"),[4] due to "cheating;" nor did the District Court find persuasive the "possibility" that Ortho and Dr. Bronsteen "merely suggested" that the conspiracy to fix prices of TBR caused the prices for ABR to remain "essentially flat." Op., at A-30. As a result, the District Court stated that "[*w*]*ithout stronger evidence that a price-fixing conspiracy did, indeed, have offsetting benefits to consumers, plaintiffs in this type of case should not be* saddled with analyzing whether a price-fixing conspiracy might possibly have had any negative effect on the price of any product sold by the defendants." Op., at A-30 (emphasis added).

Despite Ortho's attempts to distort its analysis, the record makes clear that the District Court considered all *relevant* arguments and evidence, and resolved all *relevant* factual and legal disputes. Op., at A-1-45. After performing that "rigorous analysis," Judge DuBois found that Plaintiffs demonstrated by a preponderance of the evidence that each § 1 element was "capable of proof at trial through evidence that is common to the class rather than individual to its members." *Hydrogen Peroxide*, 552 F.3d at 311-12; Op., at A-19, A-30, A-41.

ARGUMENT

I. The Standards for Interlocutory Review Are Not Met.

[4] Plaintiffs' Motion for Class Certification was limited to a class of purchasers of TBR, *see* Op., at A-21 ("this is a straightforward horizontal price-fixing case brought by direct purchasers of TBR"), and Plaintiffs' counsel explained the exclusion of ABR from the proposed class. Hearing Tr. at SA-18, SA-147.

Fed. R. Civ. P. 23(f) provides for discretionary interlocutory review "when the certification decision turns on a novel or unsettled question of law, or when, as a practical matter, the decision is likely dispositive of the litigation." *Newton*, 259 F.3d at 163. Interlocutory review may also be warranted where the district court's decision was "likely erroneous." *Id.* at 164. On the other hand, interlocutory review is inappropriate where certification turns on routine legal issues and where "allowing the litigation to follow its natural course would provide…an adequate remedy." *Id.* at 164-65. *See also Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 140 (2d Cir. 2001) ("the standards of Rule 23(f) will rarely be met"). The standards for interlocutory review are not met here.

In its lone, sparse paragraph regarding Rule 23(f) standards, Ortho states that it need only assert that the District Court's decision was "likely erroneous," and will impose "pressure" on Ortho to settle to merit interlocutory review. Petition at 6. *See also* Petition at 20 (claiming that class certification will impose "inordinate or hydraulic pressure on [it] to settle"). However, Ortho has failed to demonstrate that either factor justifies interlocutory review in this case.

First, Ortho does not, and cannot, argue that this case exposes them to the risk of insolvency, which is the real concern behind the "hydraulic pressure" analysis. *See Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 294 (1st Cir. 2000) ("what might be 'ruinous' to a company of modest size might be merely

unpleasant to a behemoth"). Ortho's parent company, Johnson & Johnson ("J&J"), had over $65 billion in worldwide revenues ($28.9 billion in the United States alone) in 2011, making a judgment of $1 billion far from "ruinous." *See* J&J 10-K (For the fiscal year ended January 1, 2012) at SA-503.

In addition, while Ortho claims the District Court's decision was "likely erroneous," it has failed to "*demonstrate[]*" that it was, particularly "taking into account the discretion the district judge possesses in implementing Rule 23, and the correspondingly deferential standard of appellate review." *Newton*, 259 F.3d at 164 (emphasis added). The District Court's opinion is well-reasoned, fully supported by the evidence, and consistent with both *Hydrogen Peroxide* and *Behrend*. Thus, interlocutory review will impose substantial cost and delay with little countervailing benefit.[5] In sum, each of the Rule 23(f) factors counsels against interlocutory review.

II. The District Court Properly Found That Common Issues Predominate In Satisfaction of Rule 23(b)(3) Under *Hydrogen Peroxide*.

In evaluating Rule 23(b) "predominance," the District Court conducted a "rigorous analysis" of both parties' arguments, evidence, and expert testimony, and properly concluded that each element of the alleged §1 violation – including antitrust violation, individual injury resulting from that violation, and measurable

[5] The grant of a petition for *certiorari* in *Behrend* directly counsels against a Third Circuit Rule 23(f) review in this case, a paradigm for class certification.

damages was "capable of proof at trial through evidence that is common to the class rather than individual to its members" and certified the class. However, Ortho claims the District Court impermissibly lowered *Hydrogen Peroxide*'s requirements for evaluating proof of common impact, failed to "resolve all disputes between experts" and accepted Plaintiffs' assurances of an intention to prove impact. Petition at 13. Ortho is wrong.

A. The District Court Properly Analyzed the Element of Antitrust Impact, Finding that Common Evidence Predominated.

With regard to antitrust impact, Plaintiffs must establish that "their theory of impact is 'plausible in theory' and 'susceptible to proof at trial through available evidence common to the class.'" Op., at A-19-20. While Plaintiffs offered several "elements of common proof" to satisfy that burden, *see* Op., at A-20, Ortho only identifies two of these "elements," and seriously contests only one: Dr. Beyer's proposed damages methodology. But the District Court found that other "elements" proffered by Plaintiffs also "supported" a finding of "predominance" with regard to antitrust impact, a finding Ortho completely ignores. Instead, Ortho solely attacks Dr. Beyer's benchmark methodology, which was offered as common proof of damages, not impact.

1. Ortho completely disregards most of Plaintiffs' proposed common proof of antitrust impact.

The District Court correctly noted that Plaintiffs proposed to prove antitrust impact using "five elements of common proof:" (1) application of the "*Bogosian* shortcut;" (2) Dr. Beyer's market structure analysis; (3) Dr. Beyer's empirical pricing analysis; (4) Defendants' documents; and (5) Dr. Beyer's proposed methods for calculating damages and demonstration of those calculations. Op., at A-20.

First, the *Bogosian* shortcut, reaffirmed in *Hydrogen Peroxide*, stands for the proposition that a price fixing conspiracy typically causes common injury to consumers in the form of higher prices. Op., at A-21-22. In this "straightforward horizontal price-fixing case," in which prices increased on some of Defendants' top selling products by over 2000%, in which prices increased to all customers, and in which there is no evidence that prices decreased to any customers at any time during the class period, it is "logical" that the alleged conspiracy "would impact all purchasers." *Id.* However, while Judge DuBois correctly noted that courts "often apply the *Bogosian* presumption of impact in horizontal price-fixing cases," he also recognized that it "must rigorously analyze the evidence to determine whether *Bogosian* applies to a particular case." *Id.* at A-21. The District Court did just that, and after considering and rejecting Ortho's two arguments against *Bogosian*'s application to this case, the District Court concluded that there is "a strong argument that *Bogosian* applies to the facts of this case." *Id.* at A-21-22.

However, the District Court further concluded that "the other elements of common proof offered by plaintiffs … suffice to establish that plaintiffs can prove common impact using common evidence regardless of whether *Bogosian* applies." *Id.*

The first additional element of common proof that the District Court found to be "persuasive evidence" regarding common impact was Dr. Beyer's analysis of the structure of the TBR market. "Many courts have accepted market structure analyses in finding predominance with respect to antitrust impact." Op., at A-23. As required, the District Court considered not only Dr. Beyer's analysis, but also Ortho's and Dr. Bronsteen's attacks on it. Op., at A-22-26. The District Court noted that Ortho's own expert "does not dispute that the TBR market possessed the structural features that Dr. Beyer identifies," and thus, Dr. Bronsteen's testimony "does not discredit Dr. Beyer's" market structure analysis. Op., at A-23-24. As a result, "after weighing the evidence presented by both parties," the District Court was "*persuaded by Dr. Beyer's* conclusions regarding the structure of the TBR market." Op., at A-24 (emphasis added).

The District Court further noted that Ortho's "anecdotal evidence" and "isolated testimony" was "less persuasive than the expert report and evidence the plaintiffs offered" in support of a conclusion that TBR products were considered commodities. Op., at A-24.[6] In addition, the District Court held that Plaintiffs'

[6] Courts have commonly found that cartel behavior in a commodity product market

counsel argued "persuasively" regarding the lack of substitutes for TBR and Judge DuBois "credit[ed] Dr. Beyer's conclusion" that ABR were not adequate substitutes to "threaten the success of the alleged conspiracy." *Id.* at A-25. Finally, while Ortho challenged the significance of the barriers to entry identified by Plaintiffs and Dr. Beyer, Ortho's own expert agreed that those same barriers to entry delayed entry into the TBR market. *Id.* at A-25. As a result, the District Court found "Dr. Beyer's analysis of the structure of the TBR market" to be "persuasive evidence supporting a finding of predominance with respect to impact." Op., at 26.

The next "element of common proof" of impact the District Court considered was Dr. Beyer's empirical pricing analysis, which "provides additional support" for the conclusion that Plaintiffs "will be able to prove impact using common proof." Op., at A-26-27. Here, Dr. Beyer's pricing analysis demonstrated that, during the class period, TBR prices "skyrocketed," Ortho's customers paid "identical or nearly identical" prices, and Immucor's customers paid prices that "tended to cluster at a handful of pricing points." Op., at A-26. Ortho and Dr. Bronsteen did not seriously dispute any of these points, but instead claimed that Dr. Beyer's analysis did not, *by itself*, provide a method to measure impact because

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causes common antitrust injury to consumers. *See, e.g., In re Linerboard Antitrust Litig.*, 305 F.3d 145, 153 (3d Cir. 2002) (common impact based, in part, on "the fungible nature of the products").

it did not distinguish between duopoly pricing and cartel pricing. However, whether Defendants' alleged cartel "resulted in an inflation in [] prices" is a common factual question that need not be answered at this stage. *See Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 300 (3d Cir. 2011). Moreover, this Court and others have held that similar empirical pricing analyses support a finding of common impact. *See, e.g., Linerboard,* 305 F.3d at 153 (crediting Dr. Beyer's price analysis); *In re OSB Antitrust Litig.*, No. 06-826, 2007 WL 2253418, at *5-7 (E.D. Pa. Aug. 3, 2007) (same). Finally, Judge DuBois concluded that Plaintiffs' evidence in the form of defendants' documents lent additional "support to a finding of predominance." Op., at A-27-28.

The four elements of proof described above are more than sufficient to support the District Court's conclusion that Plaintiffs established by a preponderance of the evidence that common proof of impact predominates. In addition, Dr. Beyer utilized his proposed damages methodology to calculate damages for each class member, thus demonstrating that "virtually all customers paid more for [TBR] than they would have paid in the absence of the alleged anticompetitive conduct." Op., at A-28. While the District Court found these calculations to be "persuasive evidence that 'antitrust impact is susceptible to proof at trial through available evidence common to the class,'" Op., at A-28, it also

considered and rejected Ortho's attacks, which are reasserted in its Petition, that the methodology is "speculative and unreliable." *Id.* at A-28-29.

2. The District Court properly rejected Ortho's "Net Effects" theory of antitrust impact in this horizontal price-fixing case.

The District Court also considered Ortho's claim, reasserted in its Petition, that to establish antitrust impact in a horizontal price-fixing case, Plaintiffs must account for any benefits they received as part of the alleged conspiracy. *Kottaras v. Whole Foods Market, Inc.*, 281 F.R.D. 16 (D.D.C. 2012), a merger and monopolization case, was the only case Ortho cited for this "net effects" argument. Op., at A-29. The District Court recognized that mergers, which "frequently produce pro-competitive efficiencies that outweigh their anti-competitive harm," are fundamentally different from horizontal price-fixing conspiracies, which have long been recognized to have a "pernicious effect on competition" and "*lack [] any redeeming virtue*." Op., at A-29 (emphasis in original).

Like *Kottaras*, the cases Ortho now cites for the first time in its Petition are similarly unpersuasive. While Ortho claims that "assessing antitrust impact based on the net effect of the alleged anticompetitive conduct is a basic antitrust principle," once again, Ortho relies on cases that did not involve claims of horizontal price-fixing. *See, e.g., Kypta v. McDonald's Corp.*, 671 F.2d 1282, (11th Cir. 1982) (tying arrangement); *Allen v. Dairy Farmers of Am., Inc.*, 279 F.R.D. 257, 259-260 (D. Vt. 2011) (among other things, monopolization and

attempted monopolization); *Allied Orthopedic Appliances, Inc. v. Tyco Healthcare Grp., L.P.*, 247 F.R.D. 156, 166 (C.D. Cal. 2007) (monopolization).

The one price-fixing case Ortho cites is readily distinguishable. In *Exhaust Unlimited, Inc. v. Cintas Corp.*, it was alleged that defendants agreed to exchange information and fix prices for environmental fees, 223 F.R.D. 506, 508 (S.D. Ill. 2004). However, unlike this case, in *Exhaust Unlimited*, the allegedly fixed price was not the sales price for defendants' products, but instead, was a fee that was merely a component of the product price. *Id.* at 511. In *Exhaust Unlimited*, there was also evidence to establish that some customers "likely benefitted or were not affected by environmental charges," *id.* at 513-14, whereas Ortho has offered no evidence in this case to support its "speculative" claims that some customers benefitted from its price-fixing conduct. Op., at A-30.

In a recent price-fixing case, defendants cited *Exhaust Unlimited* for the more limited proposition that "cases in which a conspiracy claim is *based only on a component of the overall price* [of a product] 'face a serious problem on class certification' because '[i]t is nearly impossible to determine, using common class-wide proof, whether the alleged conspirators never reduced (or failed to raise) other elements of the price and thereby competed on an overall price basis.'" *In re Rail Freight Fuel Surcharge Antitrust Litig.*, MDL 1869, 2012 WL 2870207, at *56 (D.D.C. June 21, 2012) (emphasis added). The *Rail Fuel* court rejected

defendants' argument, finding that defendants' actual evidence of discounting did not preclude a finding of predominance. *Id.*, at *58.

Moreover, Ortho's "net effects" argument is inconsistent with U.S. Supreme Court precedent. For example, in response to a strikingly similar argument from defendants that plaintiffs were required to subtract benefits received as a result of the alleged conspiracy from any claimed damages (which is essentially what Ortho argues here), the court in *In re Airline Ticket Commission Antitrust Litig.* noted that, "[i]n a horizontal price-fixing case, [] mitigation and offset generally do not affect the ultimate measure of damages." 918 F. Supp. 283, 286 (D. Minn. 1996) (citing *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745-46 (1977)).

Further, in *In re Cardizem CD Antitrust Litig.*, defendants argued that plaintiffs must "offset" from their overcharge damages any "benefits" that they may have received as a result of defendants' price-fixing agreement, that such an analysis requires individual inquiry, and that if "benefits" outstrip "overcharges," there is no antitrust impact. 200 F.R.D. 297, 311 (E.D. Mich. 2001). First, the court held that the "offsetting benefits" analysis concerns computation of damages in cases in which a plaintiff is a party to an illegal restraint, and does not concern the fact of injury. *Id.* at 312 (discussing *Perma Life Mufflers, Inc. v. Int'l Parts Corp.*, 392 U.S. 134 (1968)). Where plaintiff is not at fault, however, the "offset damage theory set forth in *Perma Life* is irrelevant to both [] injury and damage

claims." *Id.* Moreover, under *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968), "the injury occurs and *is complete* when the defendant sells at the illegally high price." *Cardizem*, 200 F.R.D. at 312 (emphasis added). Thus, injury occurred as soon as Ortho and/or Immucor sold a single TBR to a class member at the "illegally high price." In short, Ortho's "net effects" standard does not apply to horizontal price-fixing cases such as this one.

B. The District Court Properly Analyzed the Element of Damages.

The District Court properly held that it "must 'address only whether [p]laintiffs have provided a method to measure and quantify damages on a class-wide basis.'" Op., at A-31. The District Court correctly noted that the proposed model "need not be 'perfect,'" but must be able to "evolve to become admissible evidence." *Id.* After performing a "rigorous analysis" in which it resolved all factual or legal disputes *relevant to class certification*, and considered all *relevant* evidence and arguments offered by either party, including expert testimony, the District Court concluded that Dr. Beyer's benchmark models could "evolve to become admissible evidence," and that Plaintiffs had "presented and applied viable methodologies to calculate damages using common proof." *Id.*, at A-41.

First, while Ortho claims that Dr. Beyer's proposed damages methodology is somehow "unscientific," *see* Petition at 8, the District Court recognized that benchmark methodologies like the one offered by Dr. Beyer are "widely accepted

for calculating overcharges in antitrust cases." Op., at A-33. In addition, Ortho cites to its expert's testimony on this point, but that testimony was strongly contested by Dr. Beyer. *See* Beyer Tr. at SA-318-19, SA-324-26, SA-338-46.[7]

In addition, the District Court rightly concluded that "[v]irtually all of Ortho's arguments go to the merits of the models Dr. Beyer has constructed," and that those arguments "do not overlap with the Rule 23 requirements." Op., at A-32. Nevertheless, the District Court considered each of Ortho's arguments in turn, and determined that the arguments, evidence, and/or opinions of Plaintiffs and Dr. Beyer were more persuasive, *see, e.g., id.*, at A-34 n. 11, A-38, A-39 n. 13, A-39 n. 14. As a result, Ortho and Dr. Bronsteen "did not persuade the Court that plaintiffs' damages model could not evolve to become admissible evidence at trial." *Id.* at A-38. Consequently, while Ortho disagrees with the District Court's conclusions, its assertion that the District Court refused to "resolve all factual or legal disputes *relevant to class certification*" is baseless.

The District Court's determination that Dr. Beyer could refine his proposed benchmark methodology before trial to address Dr. Bronsteen's critiques, *see* Op., at A-38-39, is well-supported in the record.[8] *See, e.g., Behrend*, 655 F.3d at 204 n.

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[7] Ortho contests Dr. Beyer's benchmark, not his methodology. In several other cases in which classes were certified, Dr. Beyer relied on past corporate actions to create a "but-for" world, rather than using multiple regression analysis. *See* Beyer Tr. at SA-319-20.

[8] The District Court noted that the parties presented data regarding both costs and

13. Yet Ortho, again ignoring the District Court's findings, asserts that Dr. Beyer's "application of the [OCV] benchmark was haphazard," because Dr. Beyer, "shifted the but-for price increases from 2000 to 2001." Petition at 11. Ortho claimed that this adjustment was made to "lower[] [Plaintiffs'] estimated but-for prices" and constituted a "material departure" from the OCV plan. *Id.* However, the District Court considered this exact same factual argument, and, once again, found Dr. Beyer more persuasive. Op., at A-39-40 n. 14.

Lastly, the District Court considered and rejected Ortho's argument that it was necessary to "estimate but-for prices for each individual transaction separately" because "estimating a single but-for price for each product in each year is sufficient to estimate damages 'as a matter of just and reasonable inference.'" Op., at A-36. The District Court held, as have other courts, that even if there is some "variable pricing in the real world … the calculation of only one price for all customers in the but-for world" is an acceptable way to estimate damages. *Id.*

The case Ortho cites is distinguishable. In *Sheet Metal Workers Local 441 Health & Welfare Plan* v. *GlaxoSmithKline, PLC*, Plaintiffs' expert proposed to calculate damages utilizing average prices, and not the "actual price paid by each purported class member." No. 04-5898, 2010 U.S. Dist. LEXIS 105646, at *100-

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demand, so "if deemed necessary by Dr. Beyer," Ortho's criticisms could be "addressed and rectified before the merits stage of the litigation." Op., at A-38-39.

101 (E.D. Pa. Sept. 30, 2010). In this case, Dr. Beyer's proposed methodology does rely on the actual price paid by each class member. Beyer Reply Report at A-223 (p. 50), ¶ 98. Moreover, unlike *Sheet Metal Workers*, this District Court found that there was not "substantial variation in the prices paid by individual class members," *see* 2010 U.S. Dist. LEXIS 105646, at *101, because Ortho's customers paid "identical or near identical prices" throughout the class period and "the prices paid by most Immucor customers after 2005 corresponded to one of the standard pricing tiers." Op., at A-26, A-37. Thus, Dr. Beyer's damages methodology was "able to measure damages on a class-wide basis using common proof." *Id.*

In short, in considering and rejecting the assertions in Ortho's petition, the District Court rigorously analyzed arguments and evidence offered by both parties and their experts, and concluded that Dr. Beyer's benchmark models could "evolve to become admissible evidence," and that Plaintiffs had "presented and applied viable methodologies to calculate damages using common proof." Op., at A-41.

III. The District Court Properly Rejected Ortho's Argument Regarding the Lack of a Trial Plan Concerning Fraudulent Concealment.

The District Court also correctly concluded that Ortho's fraudulent concealment argument was completely contrary to this Court's decision in *Linerboard*. Op., at A-42-43. In its Sur-Reply brief, Ortho asserted for the first time that Plaintiffs were required to submit a proposed "trial plan for resolving [their] fraudulent concealment claims." Petition at 18. Ortho now claims that

Plaintiffs' failure to provide a trial plan has somehow jeopardized its substantive rights and created a "Trial by Formula." Petition at 18-19.

Judge DuBois, who presided over *Linerboard*, specifically identified Ortho's affirmative defenses, including statute of limitations, as defenses that will be tried on a class-wide basis. Order at A-47. In addition, the Opinion, which was incorporated in the Order, specifically states that "individual issues relating to fraudulent concealment 'can be resolved at a later damages phase' if necessary," directly in accord with *Linerboard*. Op., at A-43.

Ortho made the same "Trial by Formula" claim below, and the District Court appropriately rejected it as inapt. In *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011), the "formula" proposed was to be used to "calculate individual plaintiffs' damages," and there would be no "individualized proceedings" conducted. Op., at A-43 n. 16. In this case, the District Court has specifically provided for a procedure whereby "each individual plaintiff would be required to show that it was entitled to tolling of the statute of limitations." *Id.* Thus, no "Trial by Formula" is contemplated by the District Court's decision. Op., A-1-50.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully submit that class certification was appropriate and the petition for review should be denied.

Dated: September 17, 2012

Respectfully submitted,

By: /s/ Jeffrey J. Corrigan

Eugene A. Spector
Jeffrey J. Corrigan
Jay S. Cohen
Jeffrey L. Spector
SPECTOR, ROSEMAN, KODROFF & WILLIS, P.C.
1818 Market Street, Suite 2500
Philadelphia, PA 19103
Tel.: (215) 496-0300
Fax: (215) 496-6611
Counsel for Plaintiffs-Respondents, F. Baragaño Pharmaceuticals, Inc., et al.

CERTIFICATE OF BAR MEMBERSHIP

I, Jeffrey J. Corrigan, hereby certify pursuant to 3d Cir. LAR 46.1(e) that I am a member of the Bar of this Court.

DATED: September 17, 2012 /s/ Jeffrey J. Corrigan

CERTIFICATE OF SERVICE

I, Jeffrey J. Corrigan, hereby certify that a true and correct copy of Plaintiffs-Respondents' Opposition to Defendant-Petitioner Ortho-Clinical Diagnostics, Inc.'s Petition for Permission to Appeal Pursuant to Federal Rule of Civil Procedure 23(f), with Appendix Volumes I-II, was filed with the Clerk of the Court for the Third Circuit Court of Appeals and served *via* ECF and electronic mail to:

Paul H. Saint-Antoine Drinker Biddle & Reath, LLP One Logan Square, Suite 2000 Philadelphia, PA 19103 paul.saint-antoine@dbr.com *Counsel for Defendant-Petitioner, Ortho-Clinical Diagnostics, Inc.*	Thomas G. Slater, Jr., Esq. Hunton & Williams 951 East Byrd Street 13th Floor, East Tower, Riverfront Plaza Richmond, VA 23219-0000 tslater@hunton.com *Counsel for Defendant-Respondent, Immucor, Inc.*

DATED: September 17, 2012 /s/ Jeffrey J. Corrigan