UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 15-8108

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)

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PRELIMINARY STATEMENT

On August 22, 2012, after conducting a "rigorous analysis of the evidence offered by both parties,"[1] the District Court rejected Defendant Ortho's reliability challenges to Plaintiffs' expert's testimony and certified a class of direct purchasers of traditional blood reagents ("TBR"). A-77 n.1 (2012 Op.), A-121 (2012 Order). Ortho filed a Rule 23(f) Petition in the Third Circuit, which was granted on October 25, 2012. In its appeal, Ortho focused its criticism on the District Court for allegedly "deferring an analysis of the 'merits' and 'reliability'" of Plaintiffs' damages model. SA-18 (Opening Brief of Appellant Ortho-Clinical Diagnostics, Inc. ("Ortho Appellate Brief") at 1).

On April 8, 2015, the Third Circuit vacated and remanded the District Court's decision, and directed the Court to "decide in the first instance which of [defendant's] reliability attacks, if any, challenge those aspects of plaintiffs' expert testimony offered to satisfy Rule 23 and then, if necessary, to conduct a *Daubert* inquiry before assessing whether the requirements of Rule 23 have been met." *Blood Reagents*, 783 F.3d at 188.[2] After two rounds of remand briefs and a two-

[1] *In re Blood Reagents Antitrust Litig*., 283 F.R.D. 222, 240 (E.D. Pa. 2012), *vacated and remanded*, 783 F.3d 183 (3d Cir. 2015) ("2012 Op."), A-105.

[2] While the Third Circuit also directed the District Court to analyze what, if any, bearing the Supreme Court's decision in *Comcast v. Behrend*, 133 S. Ct. 1426 (2013), had on its decision, *Blood Reagents*, 783 F.3d at 186, Ortho focused its remand arguments almost entirely on *Daubert*. Nevertheless, the Court addressed *Comcast* in its decision. *See* A-68-69 (2015 Op.).

day hearing, the District Court re-certified the class in a 72-page decision, including a 34-page *Daubert* section, which rejected all of Ortho's criticisms of Plaintiffs' damages methodologies and related expert testimony, and concluded:

> The Court concludes that Dr. Beyer reliably estimated the alleged overcharge caused by the defendants' alleged price-fixing conspiracy, and that his methodologies fit the facts of this case… Thus, Dr. Beyer's testimony with respect to his proposed damages methodologies is admissible under *Daubert*.

A-47 (2015 Op.).

Ignoring the District Court's comprehensive *Daubert* analysis, Ortho claims that "the substance of the Opinion does not apply the admissibility standards of reliability and fit required by *Daubert*," and attacks the Court's alleged "failure … to conduct a meaningful *Daubert* inquiry." Defendant-Petitioner Ortho-Clinical Diagnostics, Inc.'s Petition for Permission to Appeal Pursuant to Federal Rule of Civil Procedure 23(f) ("Pet.") at 1, 19. In addition, Ortho constructs a revisionist claim that not only did the District Court not "defer" its reliability analysis in its 2012 opinion, but it found Plaintiffs' expert testimony *inadmissible*. Pet. at 1-2. This revisionist claim is particularly hard to square with Ortho's previous claim that "the district court applied no level of scrutiny to the merits and reliability of Dr. Beyer's model." SA-19 (Ortho Appellate Brief at 31). Thus, Ortho's arguments challenging the 2012 Opinion are directly in conflict with its arguments regarding the 2015 Opinion.

In short, the District Court did all it was required to do to re-certify the class, pursuant to the Third Circuit's mandate and prevailing Third Circuit and Supreme Court law. Ortho's second attempt at an interlocutory appeal is nothing more than an attempt to further delay this case and should be denied.

ARGUMENT

I. The Standards for Interlocutory Review Are Not Met.

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 v. Merrill Lynch, Pierce, Fenner & Smith*, 259 F.3d 154, 163 (3d Cir. 2001). 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. The standards for interlocutory review are not met here.

Ortho claims that interlocutory review is appropriate for "any consideration the Court finds persuasive," and that this appeal is necessary to correct a decision it claims was "likely erroneous" and will impose "pressure" on Ortho to settle. Pet. at 6. *See also* Pet. at 19-20 (claiming class certification will impose "inordinate or

hydraulic pressure on [it] to settle").[3] Ortho also asserts that this case involves unsettled legal issues and an appeal may facilitate the development of the law on class certification. Pet. at 6. However, Ortho has not established that a second interlocutory review is justified.

Ortho has failed to "*demonstrate[]*" that the District Court's decision was "likely erroneous," 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) (citations omitted). Nor has Ortho demonstrated that the District Court abused its discretion in finding Dr. Beyer's testimony admissible under *Daubert*. *See, e.g.*, *U.S. v. Mitchell*, 365 F.3d 215, 233 (3d Cir. 2004) (decision to admit expert testimony reviewed for an abuse of discretion). Finally, Ortho's arguments regarding Dr. Beyer's calculation of over 2,000 but-for prices fail to raise a novel or unsettled legal issue. The District Court's opinion is well-reasoned, fully supported by the evidence, and consistent with *Comcast*, *Hydrogen Peroxide* and *Daubert*. Thus,

[3] 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"). For example, in 2014, Ortho's previous parent company, Johnson & Johnson ("J&J"), which has retained liability for this case, sold Ortho to the Carlyle Group for $4 billion, demonstrating that this case does not impose "hydraulic pressure" on J&J to settle. *See* SA-24 (J&J Press Release dated June 30, 2014).

interlocutory review should not be granted.

II. After Arguing that the District Court Deferred its Analysis of the "Reliability" of Dr. Beyer's Model in 2012, Ortho Now Asserts that the Court Found the Model Unreliable.

The District Court engaged in an extensive review of the admissibility of Dr. Beyer's proposed models, including re-reviewing each of Ortho's reliability attacks that it had previously rejected. *See* A-13-47 (2015 Op.); A-77 n.1 (2012 Op.). As a result, based upon its conclusion that Dr. Beyer's models were admissible, the Court correctly re-certified the class. *See* A-3, A-47-72 (2015 Op.). While Ortho claims that the District Court "gloss[ed] over deficiencies" it allegedly found in Dr. Beyer's proposed methodologies in its 2012 decision (Pet. at 7), Ortho fails to note that despite those "deficiencies," the Court certified the class after concluding that Plaintiffs had "shown by a preponderance of the evidence that they will be able to demonstrate antitrust impact using predominantly common proof" and had "presented and applied viable methodologies to calculate damages using common proof." A-105, A-116 (2012 Op.).

Among other things, Ortho makes the same misleading arguments to this Court that it made to the District Court in support of its claim that Dr. Beyer failed to adequately account for costs. Pet. at 7-8. The District Court reviewed the evidence proffered by Ortho in support of this argument, and concluded that Dr. Beyer "persuasively explained and analyzed why [] additional increases [to but-for

prices] may not be necessary, but that even if they are, they would not so significantly affect his impact and damages calculations, such that his methodology should be stricken as inadmissible." *Id.* (citation omitted).[4]

Ortho claims that the District Court "acknowledged" alleged deficiencies and only certified the class because the model could "evolve to become admissible evidence." Pet. at 8 (citation omitted). However, the Court's quotation of the *Behrend* "could evolve" formulation does not mean or even suggest that the Court found Dr. Beyer's testimony inadmissible, but rather that the Court found, as a threshold matter, that Dr. Beyer's models satisfied the then-prevailing Third Circuit standard, and that nothing further was required at that time. A-112-13 (2012 Op.).

Additionally, the Court rejected Ortho's effort to use its failure to provide reliable cost data as a "sword and shield in this case." A-34 n.15 (2015 Op.). Ortho's own expert agreed that Dr. Beyer "made the right decision in not using Ortho's cost data." A-34 (2015 Op.) (citation omitted). Finally, contrary to Ortho's suggestion (Pet. at 9), the District Court did not "attempt to shift the burden" to Ortho because Plaintiffs omitted significant variables – instead, it

[4] Dr. Beyer explained how his model could be adjusted to further account for costs in a reasonable manner. *See* SA-9-12 (2012 Hr'g Tr. at 323:11-326:24).

concluded Plaintiffs had established that the major factors had been accounted for. *See* A-35-36 (2015 Op.).

With regard to the District Court's conclusion that the "proposed RhoGAM yardstick methodology is reliable and fit under *Daubert*," A-43 (2015 Op.), Ortho again cites the 2012 opinion. Pet. at 9 (citation omitted). Ortho's argument, however, ignores the Court's ultimate conclusion, which was that despite these supposed "important differences," the RhoGAM and TBR markets were sufficiently comparable so as to be "fair congeners," which is all that is required. *See* A-43 n.18 (2015 Op.); A-115-116 (2012 Op.).

Ortho further asserts that the District Court "brushed aside its challenges" and that the Court "claim[ed] that a yardstick should be rejected only when an expert has 'failed to perform any substantive analysis' of comparability factors and suggesting that the jury could make this determination." Pet. at 10 (quoting A-44 (2015 Op.)). First, the Court did not "claim[]" anything – it identified the standard for evaluating the *admissibility* of a proposed yardstick methodology.[5] In fact, the Court specifically concluded that Dr. Beyer's comparability analysis, which

[5] The cases on which the Court relied were cited to it by Ortho. *Compare* A-44 (2015 Op.) (citing *Loeffel Steel Products, Inc. v. Delta Brands, Inc.*, 387 F. Supp. 2d 794, 812-13 (N.D. Ill. 2005), *Eleven Line, Inc. v. North Texas State Soccer Ass'n, Inc.*, 213 F.3d 198 (5th Cir. 2000)) *with* SA-34-36 (Defendant Ortho-Clinical Diagnostic, Inc.'s Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification at 61-63) (citing *Loeffel Steel* and *Eleven Line*).

included at least eight factors supporting the similarity between the two markets, "adequately accounted for the relevant factors," (A-44-45 (2015 Op.)), and "pass[ed] muster under *Daubert*." *Id.* at A-46.

In reaching that conclusion, the Court reviewed the evidence, including the testimony Ortho claims Dr. Beyer "mischaracterized" (Pet. at 10), and although it acknowledged that there was "some evidence in the record that undermines Dr. Beyer's conclusion" regarding the third firm's RhoGAM market participation, it still found that "[b]ased on [Dr. Beyer's] examination [of the evidence], he has proffered a 'number of bases upon which he builds his comparison,' accounting for those factors most relevant to a comparison between RhoGAM and TBR." A-46 (2015 Op.) (citation omitted). Nothing more is required to establish the admissibility of a proposed yardstick methodology.

Without citation, Ortho wrongly claims the pricing data showed that RhoGAM prices "increased substantially after the market became a duopoly and decreased after the entry of a third competitor." Pet. at 11. What the data shows is that RhoGAM prices increased from around $60 in June 1998 to around $80 in 2000, and then stabilized.[6] That approximately 33% increase is substantially less than the 2,000% price increases in the TBR market, *see* A-58 (2015 Op.); A-221-

[6] Dr. Beyer charted RhoGAM pricing from June 1998 through December 2010. *See* A-401-402 (Beyer Reply ¶ 57 & fig. 2).

222 (Beyer Report, tbls. 3-4), and substantially less than the 305% TBR price increases provided by Dr. Beyer's Operation Create Value ("OCV") business plan benchmark for the five-year period after the TBR market became a duopoly. A-20 (2015 Op.). In addition, RhoGAM pricing stabilized in the early 2000's, well before the entry of a third competitor in 2004, *see* A-404 (Beyer Reply ¶ 61), and was relatively stable until 2010. A-401-402 (Beyer Reply ¶ 57 & fig. 2).[7]

Lastly, while Ortho attacks the authority on which the District Court relied in support of its conclusion that the Cost-Margin approach[8] is a reliable methodology, Ortho fails to identify any authority for its implicit argument that such a methodology is not generally accepted. Pet. at 12-13.[9] For example, Ortho's claim that the "same judge" who found the Cost-Margin approach to be

[7] Oddly, Ortho asserts, again without citation, that it objected to providing RhoGAM cost data and that Plaintiffs did not challenge that objection. Pet. at 11 n.3. In fact, Plaintiffs' challenge to that objection was the subject of a conference with the Court, and Ortho was ordered to produce the data. SA-27-30 (March 28, 2012 Telephone Conference Tr. at 12:1-15:10). However, its production occurred after Dr. Beyer submitted his class certification Reply Report. SA-31 (July 9, 2012 letter from J. Lewers to J. Corrigan).

[8] The Cost-Margin approach is extraneous if the District Court's decision that the RhoGAM yardstick is admissible was not an abuse of discretion.

[9] Ortho claims the District Court failed to consider the "eight *Daubert* factors," but Ortho fails to identify even one of them. Pet. at 11. More importantly, those factors are "neither exhaustive nor applicable in every case," A-17 (2015 Op.) (citation omitted), and the trial judge is granted "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Elcock v. Kmart Corp.*, 233 F.3d 734, 746 (3d Cir. 2000) (citation omitted).

generally accepted "later found Dr. Beyer's opinion to be 'unreasonable'" is both inaccurate and irrelevant. Pet. at 11-12. The court found "plaintiffs' theory of injury unreasonable," not Dr. Beyer's opinion and not the use of the Cost-Margin approach. *See In re Online DVD Rental Antitrust Litig.*, No. 09-2029, 2011 U.S. Dist. LEXIS 150312, at *78-79 (N.D. Cal. Nov. 22, 2011). In addition, the court rejected defendants' motion to exclude Dr. Beyer's testimony. *Id.* at *83-84.

Ortho also misrepresents the economic literature cited by the District Court, claiming that the author "cautioned that the model should not apply in a market with imperfect competition, such as a duopoly." Pet. at 12 n.4 (purporting to cite T. van Dijk & F. Verboven, *Quantification of Damages, in* 3 Issues in Competition Law & Policy 2331, 2337 (ABA Section of Antitrust Law 2008) ("van Dijk & Verboven")). However, the article says the exact opposite of what Ortho claims: "In utilizing this method, one must keep in mind that *the but-for world may be characterized by imperfect competition* and that the noncollusive price may be well above both long-run marginal and average cost." van Dijk and Verboven at 2337 (emphasis added).

Further, the Cost-Margin approach is only proposed to be used after the OCV benchmark, which provides for 305% TBR price increases in the duopoly market. A-20 (2015 Op.). The District Court appropriately concluded that by allowing Defendants to maintain the high margins resulting from the application of

the OCV benchmark in the but-for world, the Cost-Margin approach adequately accounted for market structure (*i.e.* duopoly), and therefore, fit the facts of this case. *Id.* at A-40. Indeed, Dr. Beyer did have "good grounds for employing the Cost-Margin approach." *Id.* at A-42.

The Court's extensive analysis under *Daubert*, the law of the land for over twenty years, hardly raises any "novel or unsettled question[s] of law."

III. Dr. Beyer Estimated Over 2,100 But-For Prices and Relied Upon Actual Purchase Data as Part of his Damages Methodology.

Ortho disingenuously asserts that Dr. Beyer utilized "one average but-for price when estimating damages," *see* Pet. at 2, 6, 12-13, whereas, in fact, Dr. Beyer calculated a "separate but-for price for each type of reagent for each year." A-37 (2015 Op.).[10] While Ortho has now couched this argument as an improper use of "averaging," what Dr. Beyer has done is calculate but-for prices based upon a reasonable benchmark. As the District Court correctly noted in its 2012 opinion, "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.'" A-111 (2012

[10] Ortho's assertion that the District Court concluded in its 2012 decision that "the use of *multiple* but-for prices 'would exponentially complicate the calculation of damages in this type of case'" is particularly egregious. Pet. at 13 (purporting to cite A-111 (2012 Op.)) (emphasis added). In fact, the Court recognized that Dr. Beyer utilized over 2,100 but-for prices (certainly qualifying as "multiple" and way more than "one average"), but held it would be inappropriate to require the calculation of nearly *one million* but-for prices. A-38 (2015 Op.).

Op.) (citations omitted). *See also Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931).

Ortho bases its claim that the use of one but-for price for each TBR in each year is inappropriate in this case primarily on a false premise that the District Court properly rejected. Ortho generally asserts that "by 2008, Immucor's highest prices were more than six times its lowest prices." Pet. at 12 (citing a pricing graph on a single TBR from Dr. Beyer's Report).[11] The Court looked at this exact same claim and concluded that "[t]his variance … is not representative of variance among Immucor pricing overall for other TBR after 2005," and "[p]ricing was significantly less varied prior to 2009." A-37 (2015 Op.) (citing Beyer Reply, tbls. 6, 7, and 10, and Beyer Report, figs. 7-10). In addition, the Court concluded that Ortho customers paid "identical or near identical prices throughout the class period." *Id.* (citing Beyer Report, figs. 5-6). These conclusions expose the "differences" Ortho claims "averaging" masked in this case as meaningless, if not nonexistent. Thus, the Court concluded that utilizing one but-for price for each TBR in each year was appropriate. A-38-39 (2015 Op.).

[11] Ortho includes in its Appendix at least thirteen pages from its briefing before the District Court, which it cites in support of additional argument. *See, e.g.*, Pet. at 12 (citing three pages of supplemental briefing); Pet. at 15 (citing six pages); Pet. at 15 n.6 (citing four pages). This egregious attempt to skirt this Court's page limitation should be disregarded, and Ortho's supplemental arguments ignored. Fed. R. App. P. 5(c) ("Except by the court's permission, a paper must not exceed 20 pages").

Ortho's suggestion that Dr. Beyer's model relies upon averaging like that used in *In re Graphics Processing Units Antitrust Litig.* ("*GPU*"), 253 F.R.D. 478 (N.D. Cal. 2008) is inaccurate. Pet. at 13. First, Dr. Beyer's model "does not rely on averages in the *actual world* at all." A-37 (2015 Op.) (emphasis in original). Unlike this case, in *GPU*, the expert had averaged actual prices paid for "many hundreds" of different products by at least six distinct broad types of customers in an attempt to show that pricing was "correlated" across products and across customers. 253 F.R.D. at 493. Because the data was "lumped together," the "averaging compromise[d] the ability to tease meaningful relationships out of the data." *Id.*[12] Here, Dr. Beyer did not "lump[] together" pricing data, instead analyzing the actual prices paid by each customer separately against the but-for world he created by utilizing a reliable benchmark that fit the facts of this case. A-37, A-47 (2015 Op.).

Similar to *GPU*, in *In re Processed Egg Prods. Antitrust Litig.* ("*Eggs*"), plaintiffs' expert averaged the prices actually paid for various egg products to demonstrate that those prices "move together." 81 F. Supp. 3d 412, 426 (E.D. Pa. 2015). Defendants' expert "demonstrate[d]" that the use of averages hid "wide

[12] The *GPU* court did note that "averaging may be tolerable in some situations," if it does not "mask[] important differences between products and purchasers." *GPU*, 253 F.R.D. at 494. TBR are commodity products sold to less diverse types of purchasers. A-3, A-64 (2015 Op.).

variations in the prices actually paid in individual transactions." *Id.* Nevertheless, the court found plaintiffs' expert's analysis admissible under *Daubert*, because the case involved commodity products and the analysis was supported by the expert's other analysis. *Id.* at 429.

The Court in this case analyzed criteria identified in *Eggs* to determine whether the use of averages was permissible: 1) if "the differentiation among the data being averaged is not so great as to make the use of averages misleading; and (2) there are other indicia that the averages are not concealing the true story of the data." A-36 (2015 Op.). First, the District Court concluded that pricing variation was not "significant" enough to "render the use of averages in the but-for world misleading." A-37 (2015 Op.). Next, the Court concluded that, to the extent Dr. Beyer's models did rely upon averaging, they did so in a "limited" manner. *Id.* As a result, the Court properly concluded that Dr. Beyer's alleged "limited" use of averaging was not "an attempt to evade plaintiffs' burden of showing common impact and damages," and was "a reliable means of demonstrating" impact and damages. *Id.* at A-39 (citations omitted).

In an attempt to pique this Court's interest, Ortho references *Tyson Foods* as a reason its Petition should be granted (Pet. at 2 n. 1,14, 20), after not mentioning it even once below during two rounds of remand briefing and a two-day hearing. *See* SA-32 (October 12, 2015 letter from J. Corrigan to Judge DuBois). Notably,

Bouaphakeo v. Tyson Foods, 765 F.3d 791 (8th Cir. 2014), involved a collective action under the Fair Labor Standards Act, which the Supreme Court has held is "fundamentally different" from a Rule 23 action like the present case. *See Genesis Heathcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1529 (2013) (cited by the dissent in *Tyson Foods*, 765 F.3d at 804-805, n.8). Because defendant Tyson did not keep records of its employees' hours worked, to prove damages, plaintiffs used average times calculated from a sample of 744 observations. *Tyson Foods*, 765 F.3d at 799.

The use of averages in *Tyson Foods*, and specifically that use of sampling, is highlighted by the question cited by Ortho on which the Supreme Court granted *certiorari*, which references a situation "where liability and damages will be *determined with statistical techniques that presume all class members are identical to the average observed in a sample*." Pet. at 14 (emphasis added). In this Rule 23 action, Dr. Beyer did not "presume all class members [were] identical to the average observed in a sample," because he did not use sampling at all, instead relying on the *actual* prices paid by *every* TBR purchaser. *See* A-37 (2015 Op.). As a result, in stark contrast to *Tyson Foods*, the Court here found:

> Dr. Beyer's calculations show that virtually all of defendants' customers purchased at least one TBR product for more than the but-for price during the class period. . . . Thus, the Court concludes that the calculations serve as persuasive evidence of classwide impact.

Id. at A-59-60. It is therefore not surprising that after a review of *Tyson Foods*, pursuant to Ortho's belated request, the District Court concluded that "the averaging issue in *Tyson* is different from the averaging issue in this case." Pet., Ex. 2. Again, the Court's rejection of Ortho's argument is not "likely erroneous" and does not raise any "novel or unsettled question[s] of law."

IV. The District Court Properly Concluded that the Evidence Supported Dr. Beyer's Decision to Utilize OCV as a Benchmark.

Consistent with *Hydrogen Peroxide*'s instruction that it may be necessary to "delve beyond the pleadings to determine whether the requirements for class certification are satisfied," *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 316 (3d Cir. 2009) (internal citations omitted), 1) Dr. Beyer's review of the evidence led him to conclude that the alleged conspiracy began in or around November 2000 *for purposes of identifying an appropriate benchmark, see, e.g.*, A-254-255 (Beyer Report ¶¶ 97-98); A-397-398 (Beyer Reply ¶ 51); SA-6-7 (2012 Hr'g Tr. at 320:6-321:10) (utilizing the BBLP pricing plan would have been using "a coordinated price … as a benchmark."),[13] and 2) the Court noted on at least

[13] Ortho's citation to *Eggs* regarding the inadmissibility of an expert's testimony "where he or she simply reads and interprets evidence of collusion," Pet. at 16 (quoting *Eggs*, 81 F. Supp. 3d at 421), ignores that the *Eggs* court found that testimony admissible because the expert "t[ied] the evidence of the case to the economic theory of collusion" explained elsewhere in the expert's report. *Eggs*, 81 F. Supp. 3d at 422-423. Dr. Beyer's testimony is "tying the evidence of the case" to the selection of a benchmark and estimation of a but-for world. As the District Court noted, "it is consistent with sound economic practice to review the factual

three occasions that Plaintiffs allege a conspiracy starting at that time. A-3, A-8, A-10 (2015 Op.).[14] Critically, Dr. Beyer's assumption regarding the start of the alleged conspiracy and selection of the OCV benchmark was "consistent with plaintiffs' theory of the case – that the November 2000 communications initiated the lengthy conspiracy that followed." A-25 (2015 Op.).[15]

It therefore would have been inappropriate for Dr. Beyer to select as a benchmark a pricing plan that was the product of collusive conduct. *See, e.g.,* A-252 (Beyer Report ¶ 91); SA-3-4 (2012 Hr'g Tr. at 258:24-259:2) (Ortho's expert testified a proposed but-for world must be free of collusive conduct). Thus, the District Court rejected Ortho's argument that Dr. Beyer "cherry-picked" the OCV pricing plan. *See* A-23 (2015 Op.) ("Dr. Beyer does not rely on a few predictive strategy documents produced by Ortho, but a significant price increase plan, designed and implemented by senior Ortho executives.").

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record and formulate a hypothesis that can then be tested using economic theory — the examination of the factual record is necessary … to confirm that the stories drawn from the data and from the factual record are consistent… That is precisely what Dr. Beyer has done." A-24-25 (2015 Op.) (citation omitted).

[14] Ortho's expert agreed that the alleged cartel activity in this case started in November 2000. SA-2 (2012 Hr'g Tr. at 247:22-24).

[15] The District Court also found the evidence relied upon by Dr. Beyer to be persuasive. *See* SA-14 (July 22, 2015 Hr'g Tr. at 105:2-5) ("the evidence on which [Dr. Beyer] relied tells him and *it tells me more importantly*, that the conspiratorial conduct began at the time *the plaintiffs are alleging* it began." (emphasis added); SA-15-16 (*id*. at 114:21-115:2) ("[T]here's evidence of collusion, and the evidence of collusion before me occurred in November, some time … in November of 2000.").

Finally, Ortho has failed to identify any authority in support of its assertion that the Court may not amend a class definition (including its start date) based on the evidence. To the contrary, there is substantial authority that it may. *See*, *e.g.*, *In re Pressure Sensitive Labelstock Antitrust Litig.*, No. 3:03–MDL–1556, 2007 WL 4150666, at *9 (M.D. Pa. Nov.19, 2007) ("In modifying the class definition, the Court notes it is not bound by Plaintiffs' proposed class definition and has broad discretion to redefine the class, whether upon motion or *sua sponte*.") (citations omitted).

Thus, the Court's rejection of Ortho's arguments regarding Dr. Beyer's selection of a proper, collusion-free benchmark is not "likely erroneous" and does not raise any "novel or unsettled question[s] of law."

V. The District Court's Opinion and Order Sufficiently Articulate the Claims, Issues and Defenses Subject to Class Treatment.

Ortho asserts that the District Court did not comply with Rule 23(c)(1)(B) and *Wachtel v. Guardian Life Ins. Co. of Am.*, 453 F.3d 179 (3d Cir. 2006), by failing to "define" the "class claims, issues and defenses" appropriate for class treatment. Pet. at 17.[16] However, the Court's class certification order and its

[16] This is the same way the District Court defined class claims, issues and defenses in its 2012 Order, *see* A-122 (2012 Order), but at that time, Ortho did not claim that the Court's reference to an incorporated opinion failed to comply with Rule 23(c)(1)(B) or *Wachtel*. SA-20-23 (Ortho Appellate Brief at 58-61). Ortho should not be permitted *another* interlocutory appeal to challenge an alleged deficiency that it failed to dispute when it previously had the opportunity to do so.

"incorporated opinion" do include "a readily discernible, clear, and complete list of the claims, issues or defenses to be treated on a class basis." *Wachtel*, 453 F.3d at 187-88. The Order clearly states that "[c]lass claims, issues, and defenses are those detailed in the Memorandum of October 19, 2015, and the affirmative defenses raised in the Answer of [Ortho]." *See* A-75 (2015 Order).

Ortho specifically points to the issue of fraudulent concealment and claims the incorporated Opinion is "unclear" with regard to how these "individualized issues" would be treated. Pet. at 18 (citation omitted). In fact, the 2015 Opinion was clear that fraudulent concealment is to be tried based on the "substantial common evidence" of concealment, *see* A-70-71, but, "as in many other[] [cases], individual issues relating to fraudulent concealment 'can be resolved at a later damages phase' *if necessary*." *Id*. (quoting *In re Linerboard Antitrust Litig.*, 305 F.3d 145, 163 (3d Cir. 2002) (emphasis added). Thus, the Court made clear that it intends to try the concealment prong of the fraudulent concealment inquiry, which predominated over individual fraudulent concealment issues, on a class-wide basis, as opposed to the other, more individualized prongs of the inquiry.

Ortho's claim regarding the Court's decision to certify a class through the present (*i.e.*, October 19, 2015) was never raised below, and has therefore been waived on appeal. *See, e.g., In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 261-62 (3d Cir. 2009) ("arguments that were properly preserved for appeal are

limited to those … presented with at least a minimum level of thoroughness to the District Court"). Importantly, there is no evidence that any of the claims, issues or defenses in this case became more individualized between December 2010 and October 2015.

Finally, Ortho argues that the District Court's alleged failure to comply with Rule 23(c)(1)(B) somehow implicates Ortho's due process rights, citing *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. __, 131 S. Ct. 2541, 2561 (2011) and *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013) for support. Pet. at 19 (citations omitted). Neither *Dukes* nor *Carrera* address Rule 23(c)(1)(B), nor do either address the statute of limitations or fraudulent concealment (the lone issue Ortho has identified which may involve any individualized inquiry). The Rules Enabling Act concern expressed in *Dukes* relates to the application of an insufficient formula to compute individual damages. *See Dukes*, 131 S. Ct. at 2561. As the Court held in its 2012 Opinion, "[t]hat is very different from the procedure envisioned in this case, in which each individual plaintiff would be required to show that it was entitled to tolling of the statute of limitations." JA-118 n.16 (2012 Op.).

CONCLUSION

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

Dated: November 12, 2015 Respectfully submitted,

By: /s/ Jeffrey J. Corrigan

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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: November 12, 2015 /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 and II, was filed with the Clerk of the Court for the Third Circuit Court of Appeals and served *via* ECF and electronic mail to:

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DATED: November 12, 2015 /s/ Jeffrey J. Corrigan