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 ACTIONS	**HON. JAN E. DUBOIS**

PLAINTIFFS' MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS
THE CONSOLIDATED AMENDED CLASS ACTION COMPLAINT

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INTRODUCTION

The separate motions by Immucor, Inc. ("Immucor"), and Ortho-Clinical Diagnostics, Inc. ("Ortho") and Johnson & Johnson Health Care Systems, Inc. ("JJHCS") together ("Defendants") to dismiss Plaintiffs' Consolidated Amended Complaint ("CAC) are meritless and should be denied. Among other things, Plaintiffs allege a pre-conspiracy period where Defendants struggled to survive financially, undertook a series of mergers to concentrate the industry in order to control its pricing, and then during the conspiracy period, engaged in massive, unprecedented, collusive and successful price increases. As part of their unlawful scheme, Defendants also took the unusual, and seemingly counterproductive, step of canceling contracts with two of the nation's largest group purchasing organizations ("GPOs") in order to raise prices of their Blood Reagents. CAC, ¶ 76. This same conduct understandably caught the attention of the Federal Trade Commission ("FTC") and the Antitrust Division of the U.S. Department of Justice ("DOJ"), both of which are investigating "whether Immucor or others engaged in unfair methods of competition *by restricting price competition*." *See* Affidavit of Philip Moise, ¶¶ 3, 6, Ex. A to Reply Memo in Support of Defs' Motion to Stay Discovery (Doc. No. 71) (emphasis added).

At a minimum, Plaintiffs' allegations provide "plausible grounds to infer an agreement." *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007) ("*Twombly*"). Indeed, the CAC goes well beyond the requisite "short and plain statement of the claim showing that the pleader is entitled to relief," and does allege specific facts, even though "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007) (quoting *Twombly*, 550 U.S. at 555).

In fact, contrary to Defendants' position, *Twombly* does not "require[] elaborate fact pleading." *In re: TFT-LCD (Flat Panel) Antitrust Litig.*, 599 F. Supp. 2d 1179, 1184 (N.D. Cal. 2009). Nor does *Twombly* "require Plaintiffs to prove their allegations before taking discovery." *In re OSB Antitrust Litig.*, No. 06-826, 2007 WL 2253419, at *5 (E.D. Pa. Aug. 3, 2007). Considering that "the Supreme Court has recognized that 'in complex antitrust litigation,' 'motive and intent play leading roles,' and 'the proof is largely in the hands of the alleged conspirators,'" *Flat Panel*, 599 F. Supp. 2d at 1184 (quoting *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 473 (1962)), Plaintiffs have asserted a plausible antitrust claim against Defendants for engaging in parallel conduct in the form of coordinated, near-simultaneous and drastic price increases that were against their economic self-interest, as well as the concurrent cancellation of their contracts with GPOs, all of which was undertaken in combination with other anticompetitive conduct in a market susceptible to such collusive activity.

FACTUAL ALLEGATIONS

The Blood Reagents Market

Defendants manufacture and market Blood Reagents, which are used in tests performed prior to blood transfusions to determine the blood group and type of patients' and donors' blood, in the detection and identification of blood group antibodies, in platelet antibody detection, in paternity testing and prenatal care, and in the testing of blood for infectious diseases. CAC, ¶ 39. The Food and Drug Administration ("FDA") requires accurate testing of blood and blood components prior to transfusions using only FDA-licensed Blood Reagents. CAC, ¶ 40. In short, Blood Reagents are vital in the functioning of the health care industry.

The Blood Reagents manufactured by Defendants fall into two categories, 1) traditional Blood Reagents that are used to conduct manual blood testing, and 2) proprietary Blood

Reagents that are used in semi-automated and automated blood testing. CAC, ¶ 41. Manual blood testing using traditional Blood Reagents is time-consuming and labor-intensive. CAC, ¶ 45. Traditional Blood Reagents, which make up 75% of the total U.S. Blood Reagents market, are a "fungible product," meaning that one Defendant's traditional Blood Reagent can be substituted for the other Defendant's traditional Blood Reagent. CAC, ¶ 47.

In connection with proprietary, automated Blood Reagent technology, each Defendant's customers commit to a multi-year contract to purchase a large percentage of their Blood Reagents products from that Defendant, and each Defendant's technology works only with its own Blood Reagent products. CAC, ¶¶ 49-50. Proprietary Blood Reagents are generally more profitable than traditional Blood Reagents and enable Defendants to "lock in" customers who have already made a significant investment in a Defendant's proprietary automation technology. CAC, ¶ 51. Thus, the more customers that purchase their proprietary automation technology, the more profits Defendants make.

Pre-Conspiracy Blood Reagents Market

Prior to Defendants' conspiracy, which Plaintiffs allege began in 2000, Defendants were losing money in the traditional Blood Reagents business. CAC, ¶¶ 54, 55. Immucor's former CEO and Chairman of the Board, Edward Gallup, stated that prices of traditional Blood Reagents were falling every year. *Id.* In fact, both Immucor and Ortho were experiencing significant financial trouble in their respective Blood Reagents businesses, *e.g.*, Immucor had started breaking covenants with banks and Ortho was considering leaving the Blood Reagents business entirely because it was too unprofitable. CAC, ¶¶ 55, 73. Furthermore, during the pre-conspiracy era, the price for traditional Blood Reagents had not increased in over 15 years. CAC, ¶ 67.

Massive Consolidation in the Industry Sets Stage for Conspiracy

In the mid-1990s, Immucor embarked on an aggressive campaign to eliminate competition in the Blood Reagents industry by acquiring six of its competitors. Immucor's statements on this subject left no doubt about its motives: "During fiscal 1999 the Company implemented its strategic plans to consolidate the U.S. blood bank market, leaving Immucor and Ortho Clinical Diagnostics as the only two companies offering a complete line of blood banking reagents in the U.S." Soon thereafter, Ortho did its part to further consolidate the market by acquiring Micro Typing Systems, Inc. ("MTS"), a manufacturer of Blood Reagents, such that an industry analyst recently remarked that "[t]he market domestically is essentially a duopoly between Immucor and J&J." CAC, ¶¶ 57-61.

To eliminate any mystery about Immucor's reasons for consolidating the industry, an Immucor executive admitted that the company's efforts to eliminate its competitors were part of a concerted strategy to raise the prices of Blood Reagents: "I've been in this business since 1964. It's the only business where prices have gone down every year. Prices go down because of all the competition. But by buying up its competition and consolidating the marketplace into two key players, Immucor can raise its prices." CAC, ¶ 56.

Defendants Agree to Implement Drastic Price Increases

Now that Immucor and Ortho were the only "two key players" in the Blood Reagents market, Defendants proceeded with the next phase of their scheme, by agreeing to drastically raise the price of traditional Blood Reagents to exorbitant levels. CAC, ¶ 63. Their agreement (now that they essentially had the market to themselves) aimed to, among other things, force their customers away from traditional manual blood testing and into automated blood testing, which involved signing multi-year contracts, and purchasing Defendants' proprietary automated

blood testing systems and related high-margin proprietary Blood Reagents. CAC, ¶ 63.

Beginning in 2000, Defendants commenced a series of drastic price increases that continued throughout the class period, during which time the price of *traditional blood bank products increased for the first time in more than 15 years.* CAC, ¶ 67 (emphasis added). In fact, an industry analyst noted that Immucor's price increases occurred in close proximity to Ortho's price increases. CAC, ¶ 68. Once the conspiracy was up and running, Defendants raised their prices of traditional Blood Reagents between at least 100-300% a year. CAC, ¶ 70.

In the fall of 2000, Ortho attended the annual conference of the American Association of Blood Banks ("AABB"), where it knew Immucor's representatives would be, to conduct a presentation on the costs of Blood Reagents. Conveniently, during the presentation, Ortho announced significant upcoming price increases. Not surprisingly, Immucor followed Ortho with its own price increases. CAC, ¶ 65.

By the end of 2001, Immucor began signing three-year contracts with certain groups which contained built-in price hikes of as much as 200%. Average test prices rose from a previous average of $.25 per test to $1.25 per test. CAC, ¶ 69. Then, by early 2003, Ortho conceded that Defendants had implemented *significant and coordinated* price increases for traditional Blood Reagents, which in some cases were as high as 300%. CAC, ¶ 71 (emphasis added). Further, in February 2003, an Ortho Account Manager discussed a "presentation" he had made, which went "into a lot of detail regarding why OCD [Ortho] and Immucor implemented this significant price increase." *Id.* As a result, Blood Reagents prices increased so much that Immucor was able to retain nearly 80% of its revenues as profits for traditional Reagents, and 85% for proprietary Reagents. CAC, ¶ 73.

In late 2004, Defendants substantially increased prices for traditional Blood Reagents

from 87% to as much as 254%. CAC, ¶ 70(a). At around that same time, in late September 2004, Immucor demanded that Premier and Novation, both large GPOs, agree to an average price increase of 105-110% for its Blood Reagents products. In October 2004, Premier and Novation rejected the proposed increase, prompting Immucor to cancel the contracts, "for the purpose of increasing prices to the members of each group which will occur simultaneously with the cancellation." CAC, ¶¶ 77, 79.

Also in September 2004, Ortho demanded that Premier agree to an average price increase of 110%, essentially the same amount that Immucor had demanded. Premier also rejected Ortho's demand for a price increase, which caused Ortho to immediately cancel its contract with Premier. CAC, ¶ 78.

Defendants' nearly simultaneous demands to substantially raise prices in late 2004, followed by their simultaneous terminations of their contracts with the two largest purchasing groups in the market were extremely unusual. As one 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.

In subsequent years, Defendants continued their practice of nearly-simultaneous price increases. For example, in November 2005, Defendants increased prices for Blood Reagents from 24% to 42%, and in April 2008, Defendants increased prices for Blood Reagents from 50% to 100%. CAC, ¶¶ 70(b)(c).

Immucor also furthered its conspiracy with Ortho by contracting with potential competitors to restrict or eliminate competition in both the U.S. and abroad. CAC, ¶ 86. Specifically, between at least 2003 and 2006, Immucor entered into a joint manufacturing agreement with Celliance, Ltd., a Blood Reagents supplier to, and potential competitor of,

Immucor, pursuant to which Celliance agreed to refrain from marketing its branded monoclonal antibody-based Blood Reagents products in North America and Western Europe. CAC, ¶ 86. Consequently, during that same time, Defendants raised prices for Blood Reagents between 200-400%. CAC, ¶ 87.

In addition, Defendants aided their price-fixing scheme by engaging in customer-allocation. According to the CAC, at least some of each Defendant's customers attempted to secure Blood Reagents from the other Defendant, but were unable to do so, either because the customers were quoted unreasonably high prices for the other Defendant's products, or the other Defendant simply refused to entertain customers' requests to purchase Blood Reagents products. CAC, ¶ 85.

Finally, Plaintiffs have also alleged other circumstances and market conditions that support the existence of the conspiracy (CAC, ¶¶ 96-124), which include:

- A highly concentrated Blood Reagents industry, which facilitates the operation of a price-fixing cartel by making it easier to coordinate behavior among co-conspirators, and more difficult for customers to avoid the effects of collusive behavior (CAC, ¶ 96);
- Significant barriers to entry into the Blood Reagents market, which thwart competition and facilitate the operation of a cartel (CAC, ¶ 98);
- The inelastic demand for Blood Reagents, which allows Defendants to illegally raise prices without losing sales revenues (CAC, ¶ 107);
- The lack of reasonable substitutes for Blood Reagents, which forces health care providers to purchase them no matter how expensive they become (CAC, ¶ 109);
- That traditional Blood Reagents are a standardized product with a high degree of

interchangeability, which makes it easier for Defendants to unlawfully agree on Blood Reagents prices, and to effectively monitor those prices (CAC, ¶¶ 110-112);

- That Defendants participate in numerous trade association activities and events together, which provide ample opportunities to conspire and share information (CAC, ¶ 113);
- Inter-competitor hiring, which facilitates the opportunity for tacit and express agreements between competitors (CAC, ¶ 114);
- A corporate history of improprieties, which have gone undisciplined (CAC, ¶¶ 119-124).

U.S. Government Investigations

Around October 2007, the Federal Trade Commission ("FTC") began investigating whether Immucor "or others" "violated federal antitrust laws or engaged in unfair methods of competition through three acquisitions made in the period from 1996 through 1999, and whether Immucor or others engaged in unfair methods of competition by restricting price competition.'" CAC, ¶ 90.[1]

In addition, the Antitrust Division of the Department of Justice ("DOJ") is also conducting a criminal grand jury investigation into Defendants' conduct, as admitted by Immucor on April 24, 2009, and by Ortho (J&J) on May 5, 2009. CAC, ¶ 88. Specifically, "[t]he Justice Department is looking into possible violations of the federal criminal antitrust laws in the blood reagents industry," and the DOJ has subpoenaed Immucor and Ortho for documents

[1] While the FTC investigation appears to still be open, it is inactive, and may remain so for as long as it takes the DOJ to complete its criminal investigation. *See* Plaintiffs' Sur-Reply to Defendants' Motion for Stay of Discovery Pending the Court's Ruling on Their Motions to Dismiss and Completion of Parallel Criminal Investigations, filed simultaneously with this brief.

and information from September 2000 through the present. CAC, ¶¶ 88-89. The DOJ criminal investigation lends support to Plaintiffs' allegations that Defendants entered into a price-fixing conspiracy in violation of Section 1 of the Sherman Act.

LEGAL STANDARD

In deciding a motion to dismiss under Fed.R.Civ.P. 12(b)(6), the Court must "accept as true all factual allegations in the complaint and all reasonable inferences that can be drawn therefrom, and view them in the light most favorable to the plaintiff." *Kanter v. Barella*, 489 F.3d 170, 177 (3rd Cir. 2007) (quoting *Evancho v. Fisher*, 423 F.3d 347, 350 (3rd Cir. 2005)); *see also Philips v. County of Allegheny*, 525 F.3d 224, 233 (3rd Cir. 2008). Furthermore, "the Third Circuit has explained that antitrust complaints, in particular, should be liberally construed." *In re Hypodermic Products Antitrust Litig.*, No. 05-CV-1602, 2007 WL 1959224, at *5 (D. N.J. June 29, 2007) (citing *Commonwealth of Pa. ex rel. Zimmerman v. PepsiCo., Inc.*, 836 F.2d 173, 179 (3rd Cir. 1988)).

The analysis starts with Fed. R. Civ. P. 8(a)(2), which dictates that all that is required to survive a motion to dismiss is a "short and plain statement of the claim showing that the pleader is entitled to relief." *Erickson*, 551 U.S. at 93. Consistent with the rule, *Twombly* explained that a plaintiff must allege "only enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. *See also Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."). In addition, "[s]pecific facts are not necessary; the statement only needs to 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" *Erickson*, 551 U.S. at 93 (quoting *Twombly*, 550 U.S. at 555). Furthermore, contrary to Defendants' argument, *Twombly* firmly

stated that the "plausibility standard" *does not* "require heightened fact pleading of specifics." *Id.* at 570. *See also Hypodermic Products*, 2007 WL 1959224, at *5 ("there is no heightened pleading standard in antitrust cases").

In determining the plausibility of a complaint, the Court must consider the 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."); *OSB*, 2007 WL 2253419 at * 6 ("[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 Liti*g 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.").

To properly plead a § 1 Sherman Act claim, "'[t]he crucial question' is whether the challenged anticompetitive conduct 'stem[s] from independent decision or from an agreement, tacit or express.'" *Twombly*, 550 U.S. at 553. In other words, stating a § 1 Sherman Act claim "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability

requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Id.* at 555. And in fact, "[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" *Id.* at 556. *See also Philips*, 525 F.3d at 231 (*Twombly* does not require "detailed factual allegations" or "pleading with particularity"; rather, it "requires only a short and plain statement that the pleader is entitled to relief in order to give the defendant fair notice of what the . . . claim is the grounds upon which it rests."); *Labelstock*, 566 F. Supp. 2d at 370 ("[T]he claims presented need not be alleged with particularity, but there must be sufficient factual averments that place the defendants on notice of the bases for the claims; and plaintiffs entitlement to relief on the bases for the claim presented against a particular defendant must be plausible."); *Hiltabidel v. Herald Standard Newspaper*, No. 2:08-cv-409, 2008 WL 2576480, at *4 (W.D. Pa. June 26, 2008) (denying defendant's motion to dismiss because complaint's allegations rendered plaintiffs claims plausible); *Behrend v. Comcast Corp.*, 532 F. Supp. 2d 735, 741 (E.D. Pa. 2007) (citing *Twombly* as basis for denying defendants' motion to dismiss because federal courts should evaluate such motions based on reasonable, pre-discovery inferences drawn from the facts alleged and in the proper context, such as where antitrust plaintiffs can only necessarily know so much before committing to take full discovery, including depositions); *Walker v. S.W.I.F.T. SCRL*, 491 F. Supp. 2d 781, 788 (N.D. Ill. 2007) (noting *Twombly's* confirmation that a complaint "does not need detailed factual allegations" and finding the complaint sufficient under Rule 8(a)(2) to put defendant on notice and establish plaintiff's standing).

ARGUMENT

I. Plaintiffs Have Alleged a Plausible § 1 Sherman Act Claim.

Plaintiffs have alleged in detail that Defendants engaged in a plausible conspiracy in violation of Section 1 of the Sherman Act. CAC, ¶¶ 54-87. According to 15 U.S.C. § 1, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." Because "[t]he existence of an agreement is an essential component of any § 1 claim," "[a]t the pleading stage, plaintiff's complaint must aver facts creating a plausible inference that defendants entered an agreement to restrain trade." *In re Chocolate Confectionary Antitrust Litig.*, 602 F. Supp. 2d 538, 575 (M.D. Pa. 2009) (citing *Twombly*, 550 U.S. at 555).

Here, Plaintiffs have alleged a plausible conspiracy whereby Defendants took steps to consolidate the market for the purpose of eliminating competition, and then reaped what they had sown in initiating coordinated, unprecedented, near-simultaneous and drastic price increases. In addition, Defendants remarkably and concurrently canceled contracts with each one's largest customers, to facilitate their agreement and achieve these drastic price increases. These actions would have been contrary to each Defendant's independent economic self-interest in the absence of a collusive agreement. An Immucor executive, who was tired of "[p]rices go[ing] down because of all the competition," explained these actions plainly: "[B]y buying up its competition and consolidating the marketplace into two key players, Immucor can raise its prices." CAC, ¶ 56. Furthermore, Plaintiffs have also alleged market conditions conducive to anticompetitive behavior, anticompetitive statements by Defendants' employees, and places where and opportunities through which the alleged conspiracy was formed.

A. Distinctions Between Defendants' Conduct Before and During the Alleged Conspiracy Period Suggest That They Engaged in a Plausible Anticompetitive Agreement.

The sharp contrast between Defendants' conduct prior to and then during the conspiracy period suggests a plausible anticompetitive agreement. Specifically, prior to the conspiracy to raise prices that commenced in 2000, the price of traditional blood bank products had remained stable for over 15 years. CAC, ¶ 67. Thus, Defendants' 2000 price increase of up to 100% was the first increase the market had experienced in almost two decades. CAC, ¶ 68. Thereafter, Defendants continued their drastic price increases for traditional Blood Reagents of at least 100-300% a year. CAC, ¶ 70. These unprecedented price increases naturally attracted the attention of industry analysts, *i.e.*, one analyst noted that Immucor's increases occurred in close proximity to Ortho's price increases. CAC, ¶ 68. Such dramatic and unprecedented price increases after a period of historic price stability is exactly the type of conduct that suggests a plausible claim. *See Twombly*, 550 U.S. at 556 n. 4 ("complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason would support a plausible inference of conspiracy.")

Even more compelling is that Defendants' drastic price increases occurred during a period of stark unprofitability, which is an unusual reaction to such an economic environment. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1115-1116 (N.D. Cal. 2008). In *Flat Panel*, the court found that plaintiffs met the *Twombly* standard by alleging "complex and unusual pricing practices by defendants, which cannot be explained by the forces of supply and demand." Specifically, the *Flat Panel* complaint alleged that:

> [I]n the pre-conspiracy market, the industry faced declining TFT-LCD panel prices, which industry analysts attributed to advances in technology and improving efficiencies. In addition, new companies entered the market, resulting in increased competition and significant price declines. The complaint

> alleges that beginning in 1996, however, the TFT-LCD product market has been "characterized by unnatural and sustained price stability, as well as certain periods of substantial increases in prices" as well as a compression of price ranges for TFT-LCD products, which is inconsistent with natural market forces.

Id. Thus, the *Flat Panel* court found that Defendants' unprecedented price increases, occurring in a declining market, plausibly supported an anticompetitive conspiracy under *Twombly*. Similarly, these Defendants' unprecedented price increases, in a declining market, plausibly support an anticompetitive conspiracy under *Twombly*.

Furthermore, around this time, Immucor began its unprecedented strategy of aggressively buying up competition and consolidating the market, leaving only "two key players" and allowing "Immucor [to] raise its prices." CAC, ¶ 56. Such a distinct change in Defendants' behavior further adds to the plausibility of the CAC. *See In re Graphics Processing Units Antitrust Litig.* ("*GPU II* "), 540 F. Supp. 2d 1085, 1092-1093, 1096 (N.D. Cal. 2007) (Court found that plaintiffs' allegations "would show plausible entitlement to relief on claims of antitrust conspiracy based on 'historically unprecedented change' in behavior" and that "plaintiffs' allegations show that there was a marked change in defendants' behavior in the market around the time the conspiracy allegedly started"); *Standard Iron Works v. ArcelorMittal*, 639 F. Supp. 2d 877, 900 (N.D. Ill. 2009) ("[D]istinct differences in Defendants' behavior before and during the alleged conspiracy…support the plausible conclusion that the cause of the turnaround was something other than consolidation.").

B. Defendants' Parallel Price Increases and their Concurrent Cancellation of GPO Contracts, Both of Which Were Against their Economic Self-Interest, Suggest a Plausible Anticompetitive Conspiracy.

Defendants' parallel price increases, which were against their economic self-interest, enhance the plausibility of the alleged conspiracy. CAC, ¶¶ 65-75. As stated above, the traditional Blood Reagents market had been suffering from a very unprofitable period during the

late 1990s. CAC, ¶ 54. Nevertheless, at the fall 2000 annual conference of the AABB, knowing that Immucor representatives were there, Ortho announced significant upcoming price increases. CAC, ¶ 65. Such an action was undoubtedly against Ortho's economic self interest, in the absence of a collusive agreement, as such an increase in such an unprofitable market should have caused Ortho great concern that Immucor would undercut its prices in order to gain market share. But Ortho went right ahead with its announcement and increase.

Likewise, Immucor should have been quick to seize the opportunity to undercut Ortho's prices, as Defendants' traditional products were interchangeable – for to not do so was counter to Immucor's economic self-interest. But Immucor did not seize this opportunity. *See Chocolate Confectionary*, 602 F. Supp. 2d at 552 ("None of the defendants implemented permanent price increases during this period because a unilateral increase would have caused a decline in sales as consumers purchased competitors' products at lower prices"). *See also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) ("[C]utting prices in order to increase business often is the very essence of competition."); *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 361 (3rd Cir. 2004) ("In a competitive industry, for example, a firm would cut its price with the hope of increasing its market share if its competitors were setting prices above marginal costs."). Rather, instead of undercutting Ortho's prices to gain market share, Immucor similarly increased its own prices for traditional Blood Reagents.[2] CAC, ¶ 65.

Clearly, Ortho knew that Immucor would not undercut Ortho's prices in order to gain market share, and Immucor was likewise confident in passing on the opportunity to undercut

[2] Defendants attempt to reinterpret Plaintiffs' allegations in order to confuse the timing of Immucor's first price increase to make it seem as though it occurred eight or nine months before Ortho's first price increase. *See* Ortho Br. p. 16 , Immucor Br. p. 12. However, nowhere in the CAC is such an allegation made, nor can the timing of the price increases be so interpreted therefrom. Rather, Plaintiffs allege that Immucor began its price increases "at the beginning of the class period" (CAC, ¶ 66), which commenced from at least January 1, 2000 through the present. CAC, ¶ 125. This coincides with Plaintiffs' allegation that Ortho first increased its price for traditional Blood Reagents after the fall 2000 conference of the AABB, which was followed by Immucor's own increases. CAC, ¶ 65.

Ortho's prices. This confidence, so unusual for the only two competitors in a declining market, clearly suggests a conspiracy. This is especially so in that it had been over 15 years since the price of traditional Blood Reagents had increased. CAC , ¶ 67.

Defendants continued to act against their own economic self-interest by engaging in near-simultaneous price increases for traditional Blood Reagents in 2004 (87% to as much as 254%), November 2005 (24% to 42%), and April 2008 (50% to 100%). CAC, ¶ 70. In fact, in early 2003, Ortho admitted that Defendants had implemented significant and coordinated price increases for traditional Blood Reagents, which in some cases were as high as 300%. CAC, ¶ 71. Consequently, Defendants' profit margins increased dramatically, at the expense of Plaintiffs and the proposed class. CAC, ¶ 73. Along these lines:

> Defendants' ability to raise the prices of Blood Reagents year after year without losing market share to each other is not consistent with free competition. As profit margins increase, so does the opportunity for one competitor to undercut another's pricing in order to gain market share. That has not occurred in the Blood Reagents market. To the contrary, Defendants have refused to compete with each other on price for nearly a decade – something that did not occur prior to the class period and the consolidation within the industry.

CAC, ¶ 75.

Furthermore, such allegations are consistent with Immucor's former CEO and Chairman of the Board, Edward Gallup's statement that "I've been in this business since 1964. It's the only business where prices have gone down every year. Prices go down because of all the competition. But by buying up its competition and consolidating the marketplace into two key players, Immucor can raise it prices." CAC, ¶ 56. This consolidation and the related price increases on traditional Blood Reagents, coupled with the market allocation behavior, enabled Defendants to further increase their profits by trying to move customers to their more profitable proprietary Blood Reagents. CAC, ¶¶ 85-87.

An even more compelling example of Defendants' parallel conduct, which was against their economic self-interest in the absence of an agreement, was the simultaneous cancellation of their contracts with GPOs Premier and Novation for the purpose of implementing Defendants' drastic price increases. CAC, ¶¶ 76-84. According to the CAC, Premier and Novation negotiate contracts which set pricing and other terms on behalf of some purchasers of Blood Reagents. In a market free of collusion, these entities should have had the leverage necessary to avoid (or at least minimize) Defendants' non-negotiable price increases. CAC, ¶ 80. Not surprisingly, Immucor boasted that it did not expect to lose any business because of the price increases. CAC, ¶ 81. However,

> [I]n a competitive market….there could be no assurance that one competitor's sudden and economically unjustified demand to more than double prices would not result in a substantial loss in market share due to price competition of another competitor. That is particularly true where, as here, the demands are made to the largest and most sophisticated groups in the market - groups that have the means and motivation to avoid such increases by playing competitors off each other.

Id. Thus, the Defendants' canceling of their GPO contracts is simply not the type of independent conduct that would exist in a competitive market.

It is well-settled that "allegations which demonstrate that defendants acted against self-interest enhance the plausibility of the conspiracy." *Potash*, 667 F. Supp. 2d at 934-35. *See also Babyage.Com v. Toys "R" Us, Inc.*, 558 F. Supp. 2d 575, 582-83 (E.D. Pa. 2008) (conduct against defendant's "economic self-interest" constituted a "plus factor" in favor of conspiracy); *Labelstock*, 566 F. Supp. 2d at 371 (Court found allegation, that "absent a pre-agreement," "it made no sense economically for [defendant] to idle its excess capacity," was a contributing factor in determining that the complaint plausibly suggested a concerted action). Therefore, Defendants' price increases, and their simultaneous cancellations of their contracts with the GPOs, were against their economic self-interest, which is strong evidence that this conduct

involved more than just independent business decisions, and is indeed suggestive of a conspiracy, as alleged. *See* Immucor Br., pp. 10-15; Ortho Br., pp. 18-28.

Defendants argue that Plaintiffs have not alleged "uniform prices or uniform increases for competing products." *See* Immucor Br., p. 12; Ortho Br., p. 7. However, specifics as to the exact dates of the price increases are not required at the pleading stage and can be determined during the course of discovery. *See Erickson*, 551 U.S. at 93 (quoting *Twombly*, 550 U.S. at 555) ("[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'"). Plaintiffs have done what is required, which is that they have alleged coordinated price increases between Defendants. CAC, ¶¶ 55, 65, 66, 67, 68, 69, 71, 86, 70, 77, 78, 79, 82, 86. Nevertheless, "[p]rice-fixing can occur even though the price increases are not identical in absolute or relative terms." *City of Moundridge v. Exxon Mobil Corp.*, No. 04-940, 2009 WL 5385975, at *5 (D. D.C. Sept. 30, 2009). *See also In re Baby Food Antitrust Litig.,* 166 F.3d 112, 132 (3rd Cir. 1999) ("Parallel pricing does not require 'uniform prices,' and permits prices within an agreed upon range"). Thus, Defendants' other argument that Plaintiffs' CAC alleges price increases in the form of ranges, and that it does not allege that the Defendants increased their prices by the exact same amounts is baseless. *See* Immucor Br., pp. 11-12. Furthermore, in a secret conspiracy, it would be only logical that the antitrust violators would not increase their prices at the exact same time or by the exact same amounts, so as to deflect scrutiny. *See In re Aluminum Phosphide Antitrust Litig.*, 905 F. Supp. 1457, 1470 (D. Kan. 1995)(Court stated that plaintiffs allegation that defendants staggered price increases "comes closer to the type of conduct that may constitute an affirmative act of concealment").

Defendants also argue that Plaintiffs have not specified a time, place or person involved

in the alleged conspiracy. *See* Immucor Br., pp. 7-10; Ortho Br., pp. 11-14. However, not only have Plaintiffs set forth sufficient allegations to put Defendants on fair notice of the claims asserted against them, as required under Rule 8(a)(2), *Twombly* does not require that a plaintiff allege a specific time, place, or person involved in an alleged antitrust conspiracy. *See Erickson*, 551 U.S. at 93 (quoting *Twombly*, 550 U.S. at 555).

In *Starr v. Sony BMG Music Entertainment*, 592 F.3d 314, 325 (2d Cir. 2010), the Second Circuit rejected precisely the same argument - that a complaint must mention a specific time, place or person involved in the alleged conspiracy – and held that such argument was "incorrect." The court stated:

> The *Twombly* court noted, in dicta, that had the claim of agreement in that case not rested on the parallel conduct described in the complaint, "we doubt that the…references to an agreement among the [Baby Bells] would have given the notice required by Rule 8… [because] the pleadings mentioned no specific time, place, or person involved in the alleged conspiracies." 550 at 565 n. 10. In this case, as in *Twombly*, the claim of agreement rests on the parallel conduct described in the complaint. **Therefore, plaintiffs were not required to mention a specific time, place or person involved in each conspiracy allegation.**

Id. (emphasis added). In any event, Plaintiffs' CAC contains not only allegations of coordinated conduct between the Defendants, but also separate allegations of the timing and places where the conspiracy plausibly took place, e.g., the 2000 trade association conference. CAC, ¶¶ 55, 65, 66, 67, 68, 69, 70, 71, 76, 77, 78, 79, 80, 81, 82, 83, 84, 86, 113. *See also Philips*, 525 F.3d at 231 (*Twombly* does not require "detailed factual allegations" or "pleading with particularity"); *Labelstock*, 566 F. Supp. 2d at 370 ("[T]he claims presented need not be alleged with particularity, but there must be sufficient factual averments that place the defendants on notice of the bases for the claims; and plaintiffs entitlement to relief on the bases for the claim presented against a particular defendant must be plausible."); *Behrend*, 532 F. Supp. 2d at 741 (citing

Twombly as basis for denying defendants' motion to dismiss because federal courts should evaluate such motions based on reasonable, pre-discovery inferences drawn from the facts alleged and in the proper context, such as where antitrust plaintiffs can only necessarily know so much before committing to take full discovery, including depositions); *Walker*, 491 F. Supp. 2d at 788 (noting *Twombly's* confirmation that a complaint "does not need detailed factual allegations" and finding the complaint sufficient under Rule 8(a)(2) to put defendant on notice and establish plaintiff's standing).

Plaintiffs' CAC undoubtedly "gives the defendant[s] fair notice of what the claim is and the grounds upon which it rests" and provides more than sufficient detail about the alleged conspiracy. *See Erickson*, 551 U.S. at 93 (quoting *Twombly*, 550 U.S. at 555). *See also In re Southeastern Milk Antitrust Litig.*, 555 F. Supp. 2d 934, 943 (E.D. Tenn. 2008) ("These complaints, while not answering all specific questions about 'who, what, when and where,' do put defendants on notice concerning the basic nature of their complaints against the defendants and the grounds upon which their claims exist.").

Furthermore, courts have acknowledged that conspiracies are inherently secret, and it is therefore very difficult for an antitrust plaintiff to allege specific and direct facts regarding the conspiracy. For example, the court in *GPU II*, 540 F. Supp. 2d at 1096, stated that "direct allegations of conspiracy are not always possible given the secret nature of conspiracies. Nor are direct allegations necessary." *See also Oltz v. St. Peter's Community Hosp.*, 861 F.2d 1440, 1450 (9th Cir. 1988) ("Because direct evidence of concerted action in violation of antitrust laws is so rare, the Supreme Court has traditionally granted fact finders some latitude to find collusion or conspiracy from parallel conduct and inferences drawn from the circumstances"); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, 587 F. Supp. 2d 27, 34 (D. D.C. 2008) ("[S]hort of being

in the boardroom at the meeting, it is hard…to imagine how plaintiffs could more fulsomely allege that defendants entered into an agreement."); *Hackman v. Dickerson Realtors, Inc.*, 557 F. Supp. 2d 938, 945 n.4 (N.D. Ill. 2008)("The anticompetitive agreement need not…be explicit, and parallel business behavior may be circumstantial evidence of a tacit agreement that violates the Sherman Act").

Defendants' cases to the contrary are easily distinguishable. For example, in *Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 905 (6th Cir. 2009), the plaintiffs, unlike Plaintiffs in this case, completely failed to mention certain defendants in their complaint. Likewise, in *Hawaiian & Guamanian Cabotage Antitrust Litig.*, 647 F. Supp. 2d 1250, 1259 (W.D. Wash. 2009), the plaintiffs did not allege any pricing practices predating the conspiracy and failed to link the product's price increases "to anything other than the type of parallel conduct generally present in a homogenous market." Here, Plaintiffs have alleged the distinction between the Defendants' pricing practices prior to and during the alleged conspiracy, as well as specific price increases for the traditional Blood Reagents, along with other anticompetitive conduct, *e.g.*, the GPO contract cancellations, customer allocation, the DOJ and FTC investigations, and the numerous anticompetitive market characteristics, as described more fully below. As such, *In re Elevator Antitrust Litig.*, 502 F.3d 47, 49-52 (2d Cir. 2007), is also unlike the instant matter because there, the complaint alleged solely parallel conduct, conclusory averments of a conspiracy, and a European enforcement action with no connection to the United States.

The other cases cited by Defendants are also inconsequential to the instant matter. In *St. Clair v. Citizens Fin. Group*, 340 Fed. Appx. 62, 64-65 (3rd Cir. 2009), plaintiff brought an implausible claim against defendant banks for their alleged monopolization of the market or, alternatively, a conspiracy between defendants and various "unknown person conspirators of

competitor banks and/or bank enterprises" as a result of plaintiff and his mother opening a checking account with one defendant bank and incurring fees for overdrawing his checking account. In support of the conspiracy claims, plaintiff provided only "the overdraft fee structures of several competing banks" and alleged that several of the defendants' bank officers "had prior work experience at other banks with similar overdraft fee structures, thereby giving them opportunity to enter into a conspiracy." Further, in *Rick-Mik Enters, Inc. v. Equilon Enters, LLC*, 532 F.3d 963, 975 (9th Cir. 2008), unlike this case, the court stated that "all that is alleged is there was an agreement on price. The co-conspirator banks or financial institutions are not mentioned. The nature of the conspiracy or agreement is not alleged. The types of agreements are not alleged. And the discernible theories do not implicate antitrust laws." Surely, Plaintiffs here have alleged a far more plausible conspiracy than those set out in Defendants' cases.

In effect, Defendants are attempting to require Plaintiffs to prove their allegations before even taking discovery. However, in this or any conspiracy, it would be virtually impossible, prior to taking any discovery, for a plaintiff to meet that erroneous standard in order to survive a motion to dismiss, as all of the necessary proof would remain in possession of the defendant. Thus, if that were the law, it would be rare for any antitrust complaint to survive a motion to dismiss. *See OSB*, WL 2253419, at *5 ("*Twombly* does not, however, require Plaintiffs to prove their allegations before taking discovery."); *Flat Panel*, 599 F. Supp. 2d at 1184 ("the Supreme Court has recognized that 'in complex antitrust litigation,' 'motive and intent play leading roles,' and 'the proof is largely in the hands of the alleged conspirators.'") (quoting *Poller*, 386 U.S. at 473).

C. Other Anticompetitive Conduct by Defendants That Plausibly Suggests an Anticompetitive Conspiracy.

As stated above, Plaintiffs have asserted a plausible antitrust claim against the

Defendants for engaging in parallel conduct in the form of coordinated, near-simultaneous and drastic price increases that were against their economic self-interest, in the absence of an agreement, from 2000 through 2008 (CAC, ¶¶ 55, 65, 66, 67, 68, 69, 70, 71, 77, 78, 79, 82, 86), as well as the concurrent cancellations of their GPO contracts. CAC, ¶¶ 76-84. What enhances the plausibility of Plaintiffs' CAC even further is that such parallel conduct took place in combination with other anticompetitive conduct.

For example, Defendants engaged in customer allocation behavior, such that each Defendant's customers were unable to secure Blood Reagents from the other Defendant, either because the customers were quoted unreasonably high prices for the other Defendant's products, or the other Defendant simply refused to entertain customers' requests to purchase Blood Reagents products. CAC, ¶ 85. Furthermore, between at least 2003 and 2006, Immucor entered into a joint manufacturing agreement with Celliance, Ltd., a Blood Reagents supplier to, and potential competitor of, Immucor, pursuant to which Celliance was prohibited from marketing its Blood Reagents products in North America and Western Europe. CAC, ¶ 86. Consequently, during that time, Defendants raised Blood Reagents prices between 200-400%. *Id.* Clearly, these allegations exhibit anticompetitive behavior, and enhance the plausibility of the CAC.

Second, ongoing FTC and DOJ criminal investigations of Defendants for possible violations of federal antitrust laws are also strongly suggestive of an antitrust conspiracy. CAC, ¶¶ 88-94. *See Starr*, 592 F.3d at 323-24 (court found as a "non-conclusory factual allegation of parallel conduct" that "defendants' price-fixing [was] the subject of a pending investigation by the New York State Attorney General and two separate investigations by the Department of Justice," which goes toward "plausibly suggest[ing] that the parallel conduct alleged was the result of an agreement among the defendants").

Several courts in this Circuit and elsewhere have upheld complaints that similarly alleged parallel conduct along with other instances of anticompetitive conduct. For example, in *OSB*, 2007 WL 2253419, at *5, where plaintiffs alleged coordinated output restrictions, record high prices, and mechanisms to coordinate and monitor pricing, the court found such allegations to plausibly allege a conspiracy, "[a]s *Twombly* requires."

Likewise, in *Labelstock*, 566 F. Supp. 2d at 375, the court upheld plaintiffs' complaint and found that allegations of, *inter alia*, independently risky price increases, a market susceptible to collusion, customer allocation, failures to compete notwithstanding considerable excess production capacity, stable market shares and labelstock prices set at supracompetitive levels all plausibly suggested that defendants conspired to restrain competition.

Furthermore, in *Starr*, 592 F.3d at 323, the Second Circuit found that plaintiffs' allegations of parallel conduct against defendants, taken together with other allegations, *e.g.*, 1) "defendants control over 80% of the digital Music sold to end purchasers in the Unites States," 2) "one industry commentator…suggest[ed] that some form of agreement among defendants would have been needed to render the enterprises profitable," and 3) that "defendants price-fixing is the subject of a pending investigation by the New York State Attorney General and two separate investigations by the Department of Justice," placed the parallel conduct "in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action."[3]

[3] Other courts within this Circuit have likewise ruled that plaintiffs have asserted a plausible antitrust claim against the defendant for parallel conduct that was in combination with other anticompetitive conduct. *See In re Flat Glass Antitrust Litig. (II)*, Civ. No. 08-mc-180, 2009 WL 331361, at *2-3 (W.D. Pa. Feb. 11, 2009) (Court found plaintiffs' allegations to be plausible where they alleged that "there was a history of inability to raise and maintain prices prior to the conspiracy and a history of varying surcharges by region of the country," but after conspiracy "Defendants did not vary their surcharges by region" and "an agreement [ ] existed for over 30 months beginning in June of 2002, by raising prices by identical percentages and charging energy surcharges in virtual lockstep while providing customers with identical charts and justifications for the same…."); *Chocolate Confectionary*, 602 F. Supp. 2d at 576 (Court found plaintiffs' allegations that "defendants engaged in three coordinated price increases"

Thus, this case is similar to *Labelstock*, *OSB* and *Starr* because the CAC alleges that Defendants engaged in 1) parallel price coordination and concurrent cancellations of their GPO contracts, both contrary to their economic self-interest in the absence of an agreement, and 2) other anticompetitive conduct, the combination of which undoubtedly meets the plausibility standard articulated in *Twombly*.

Defendants' argument that "alleged efforts to convert customers to proprietary automated technology are more consistent with competition than with any alleged conspiracy" (Immucor Br., pp. 16-18) is an improper attempt to dismember Plaintiffs' complaint and view its allegations in isolation. Defendants' conduct regarding market consolidation, the related price increases on traditional Blood Reagents, and the simultaneous cancellations of their GPO contracts, coupled with the market allocation behavior, is more than enough to put Defendants on notice of the claim against them. CAC, ¶¶ 85-87. Considering the multiple instances of Defendants' parallel conduct, in conjunction with the other anticompetitive conduct, the court must give plaintiffs the benefit of all doubts in deciding on whether to dismiss the complaint. *See Kanter v. Barella*, 489 F.3d 170, 177 (3rd Cir. 2007) (quoting *Evancho v. Fisher*, 423 F.3d 347, 350 (3rd Cir. 2005)).

Plaintiffs' CAC, as described above, is also supported by *Southeastern Milk*, 555 F. Supp. at 944, which stated:

> [t]he fact that multiple instances of parallel conduct are alleged makes it far less likely that a business justification exists for all of the acts taken in total. It seems to this Court to be only logical that the more individual instances of parallel conduct alleged by the plaintiffs, the stronger the inference that can be drawn

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plausible); *Babyage.Com*, 558 F. Supp. 2d at 582-83 (Plaintiffs may allege concerted action by claiming "parallel conduct coupled with circumstances that tend to negate the possibility that BRU and each manufacturer acted independently…Accepted 'plus factors' include (a) that the parallel conduct at issue was against each manufacturer's independent economic self-interest…(b) that BRU wielded sufficient influence over each manufacturer to create a duress situation…and (c) that BRU threatened to retaliate against each manufacturer if each manufacturer did not implement minimum price maintenance ("RPM") agreement with its retailers, and the manufacturers in turn acquiesced….").

> from those acts of parallel conduct to support an illegal conspiracy and the less likely it is that these parallel acts occurred unilaterally without any conspiracy or agreement. Whether the acts committed by the defendants are simple, benign business decisions made by these individual defendants or whether they represent concerted effort in violation of the Sherman Act are issues of fact which this Court cannot decide on the pleadings and which require discovery prior to resolution.

See also Standard Iron, 639 F. Supp. 2d at 902 ("While individual Defendants may be able to suggest business justifications for some of the mill shutdowns (e.g., scheduled maintenance, specific supply/demand projection for a particular product), 'the fact that multiple instances of parallel conduct are alleged makes it far less likely that a business justification exists for all of the acts taken in total'…Whether the production curtailments were simple, benign unilateral business decisions made by the individual Defendants or whether they represent concerted effort in violation of the Sherman Act *are issues of fact which I cannot decide on the pleadings and which require discovery prior to resolution*.") (emphasis added).

Thus, if Defendants' actions taken are viewed together as a whole, and not on piecemeal basis, Defendants' conduct is inconsistent with active competition. Thus, it is unlikely that in the face of all the above allegations that Defendants can assert any valid independent business justifications for Defendants' conduct. Furthermore, even if it there is the slightest chance that there is a legitimate independent business reason may exist, such a determination should not be decided on the pleadings, as it requires discovery prior to resolution. *See Standard Iron*, 639 F. Supp. 2d at 902.

D. That the Blood Reagents Market is Susceptible to Collusion Supports a Plausible Anticompetitive Conspiracy.

Several market factors indicate that the Blood Reagents market is susceptible to collusion and thus support the existence of a plausible conspiracy. *See Flat Glass*, 385 F.3d at 360 ("[I]t is evidence that the structure of the market was such as to make secret price-fixing feasible.");

Labelstock, 566 F. Supp. 2d at 371, 375 (denying motion to dismiss where, in addition to parallel conduct, plaintiffs pled "behavior and market conditions that suggest [defendant]'s conduct was something other than a natural, unilateral reaction to market forces" and that "[n]othing in *Twombly* compels the reversal" of the determination that "[Plaintiffs' theory of conspiracy - an agreement among oligopolists…to fix prices at a supracompetitive level - makes perfect economic sense because the Amended Complaint described market conditions that support an inference that collusive conduct was both plausible and in [Defendants'] economic interests.") (quoting *Flat Glass*, 385 F.3d at 358); *In re SRAM Antitrust Litig.*, 580 F. Supp. 2d 896, 902 (N.D. Cal. 2008) (market characteristics "conducive" to collusion). Defendants, however, attempt to isolate particular market characteristics and argue that because each one alone is insufficient to allege a plausible conspiracy, then the entire CAC cannot plausibly allege an antitrust conspiracy. However, in determining the plausibility of a complaint, the Court must consider the allegations as a whole, and not evaluate the sufficiency of each allegation independently. *See Tellabs*, 551 U.S. at 326. Therefore, as stated below, several market factors enhance the plausibility of Plaintiffs' allegations.

1. Highly Concentrated Industry.

The Blood Reagents market is highly concentrated, as illustrated by the Herfindahl-Hirschchman Index ("HHI"), a widely accepted measure of industry concentration, which is close to 5032 on a scale on which the DOJ considers an HHI higher than 1800 to be a highly concentrated market. CAC, ¶¶ 96-97. The high number indicates that Defendants were operating in a "duopoly" in which they controlled virtually all Blood Reagents sales in the United States. CAC, ¶ 97. Thus, a high degree of concentration in a particular industry facilitates the operation of a price-fixing cartel because it makes it easier to coordinate behavior

among co-conspirators, and more difficult for customers to avoid the effects of collusive behavior. CAC, ¶ 96. *See OSB*, 2007 WL 2253419, at *3 (denying motion to dismiss where "market is highly concentrated, facilitating collusion"); *Todd v. Exxon Corp.*, 275 F.3d 191, 208 (2d Cir. 2001) ("the possibility of anticompetitive collusive practices is most realistic in concentrated industries").

2. Significant Barriers to Entry.

There are significant barriers to entry into the Blood Reagents market, which aid conspirators in price-fixing conspiracies. CAC, ¶ 99. *See In re Hydrogen Peroxide Antitrust Litig.*, 240 F.R.D. 163, 172 (E.D. Pa. 2007) ("high barriers to entry…allow a conspiracy such as the one alleged here to continue indefinitely with limited risk that a new competitor would enter the market and undercut the agreed-upon prices"; industry therefore deemed "susceptible to a price-fixing conspiracy"); *Chocolate Confectionary*, 602 F. Supp. 2d at 551 ("Material to the antitrust claims, the supply market for chocolate candy features formidable entry barriers."); *Empagram S.A. v. Hoffman-LaRoche, Ltd.*, 388 F.3d 337, 340 (D.C. Cir. 2004) (allegation of "significant barrier to entry" supported conspiracy claim). Thus, a collusive agreement that raises product prices above competitive levels would, under normal circumstances, attract new entrants seeking to benefit from the supra-competitive pricing. However, where there are significant barriers to entry, new entrants are less likely. Thus, barriers to entry help to facilitate the operation of a cartel. CAC, ¶ 98.

Here, the Blood Reagents market presents "formidable" barriers to entry. CAC, ¶¶ 98-104. Specifically, a new entrant into the Blood Reagents market would have to incur significant start-up costs, which would be comprised of millions of dollars.[4] CAC, ¶ 99. Furthermore, there

[4] According to a potential competitor, "With our current involvement in the blood donor market, we are an obvious choice as a distributor. However, when we investigate the potential for these products versus the cost of bringing

are significant and regulatory hurdles in getting products approved by the FDA, and Immucor has stated publicly that the requirement to register Blood Reagents with the FDA, and have them produced at an FDA-licensed facility, acts as a barrier to entry into the market. As a result, the FDA licensing process takes years to complete and is exceedingly expensive. CAC, ¶¶ 100-101. Likewise, entry is inhibited by patents and technological know-how. CAC, ¶ 102. The high barriers to entry are also exemplified in the December 2003 comments of Olympus America, Inc.: "[r]egulatory hurdles in getting products approved and the subsequent FDA lot release requirements are huge … The current lack of suppliers not only inhibits innovation among competitors; but it also threatens the safety of the blood supply and transfusion medicine in general." CAC, ¶ 103.

3. Inelastic Demand.

The demand for Blood Reagents is highly inelastic. CAC, ¶ 106. Using Immucor's own words, "the cost of Blood is a small component of the overall cost of a health care provider's bill," and thus, "[c]onsumers are less likely to change consumption patterns when the overall effect of a price increase is small." CAC, ¶ 106. Furthermore, because Blood Reagents are critical to the safety of the nation's blood supply, Blood Reagents manufacturers have been able to raise prices without losing sales revenues, rendering it profitable for Defendants to illegally fix prices. CAC, ¶ 107. Courts have consistently found inelastic demand for a particular product to be a characteristic of an anti-competitive market. *See U.S. v. Alcoa, Inc.*, No. CIV.A. 2000-954, 2001 WL 1335698, at *13 (D. D.C. June 21, 2001) ("The…market has certain characteristics conducive to anticompetitive coordination, including…stable, predictable, and inelastic demand and supply"). Thus, the inelastic demand for Blood Reagents supports Plaintiffs' CAC.

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them to market, we cannot justify the expenditure. Paying millions of dollars in user fees [to the FDA] is cost prohibitive. Unfortunately, the customer and the US blood bank industry will be denied innovative products that are available elsewhere in the world." CAC, ¶ 99.

4. Lack of Reasonable Substitutes

There are no available substitutes for Blood Reagents at any price. Only FDA-approved Blood Reagents can be used to screen blood and, accordingly, health care providers must purchase them no matter how expensive they become. CAC, ¶ 109. The lack of reasonable substitutes fosters the success of a price-fixing cartel, as when few or no substitutes for a price-fixed item are available, producers of the item can raise a product's price and maintain it over time without losing significant sales. Consumers have little choice but to pay the higher price. CAC, ¶ 108.

5. Standardized Product with a High Degree of Interchangeability.

Traditional Blood Reagents tend to be interchangeable across manufacturers and are essentially functional equivalents. CAC, ¶¶ 110, 112. Thus, when products offered by different suppliers are viewed as interchangeable by purchasers, it is easier to unlawfully agree on the price for the product in question, and it is easier to effectively monitor agreed-upon prices. This makes it easier to form and sustain an unlawful cartel. CAC, ¶ 112.[5] *See State of N.Y. by Abrams v. Anheuser-Busch, Inc.*, 811 F. Supp. 848 (E.D.N.Y. 1993) ("Relevant 'product market' for purposes of civil antitrust action is composed of products that have reasonable interchangeability for purpose for which they are produced"); *SRAM*, 580 F. Supp. 2d at 902 (That "SRAM is a homogenous product sold by Defendants and purchased by Plaintiff and members of the class primarily on the basis of price" adds to the allegation that the "market for SRAM is conducive to price-fixing").

Defendants' reliance on *Hawaiian Cabotage*, 647 F. Supp. 2d at 1258 and *In re LTL*

[5] Although in recent years Defendants have endeavored to create proprietary Blood Reagents to be used in their automated testing systems, during the class period the vast majority of Blood Reagent sales were traditional, non-proprietary Blood Reagents. CAC, ¶ 112.

Shipping Services Antitrust Litig., No. 1:08-MD-01895-WSD, 2009 WL 323219 (N.D. Ga. Jan. 28, 2009) are completely misplaced. In *Hawaiian Cabotage*, the court found that the plaintiffs alleged only parallel conduct "'and a bare assertion of conspiracy,'" *id.* at 1261, and in *LTL Shipping*, the court found that the plaintiffs alleged "parallel conduct that could just as well be independent action." *Id.* at *15. Thus, the "homogenous nature" of the market was not the defining factor that caused the courts in both of those cases to dismiss plaintiffs' complaints.

6. Conspiracy Furthered Through Trade Associations.

It is well-settled that trade organization participation supports the plausibility of a price-fixing cartel. *See SRAM*, 580 F. Supp. 2d at 903 ("such participation [in trade organizations] demonstrates when and how Defendants had opportunities to exchange information or make agreements."); *Potash*, 667 F. Supp. 2d at 936 ("Allegations of specific meetings that occur 'on the heels' of defendants' parallel conduct could support an inference of concerted action."); *Flat Glass II*, 2009 WL 331361, at * 3 ("While it is true that membership in trade associations, without more, does not in and of itself suggest a conspiracy, the meeting dates provide the Defendants with notice of specific time frames and manner of the alleged agreement, and thus, dismissal based on the same is not warranted. Furthermore, attendance at said meetings should easily be ascertained through discovery such that there is a reasonable expectation that discovery may reveal evidence of the alleged illegal conspiracy").

Participation in trade associations can be used to foster and facilitate an unlawful conspiracy. CAC, ¶ 113. Specifically, in the fall of 2000, at the annual conference of the AABB, Ortho conducted a presentation regarding Blood Reagents costs and announced significant upcoming price increases. Ortho knew that it was Immucor's practice to have representatives attend their presentations, and that they would be in the audience. Shortly after

this conference, Ortho implemented its first significant price increase, and Immucor followed with increases of its own. CAC, ¶ 65. In addition, Defendants participate in numerous trade association activities and events together, which provided ample opportunities to conspire and share information, *i.e.*, Defendants are members of various Blood Bank and medical technology associations, including the Advanced Medical Technology Association, as well as supporting functions of the AABB, the California Blood Bank Society, Heart of America Association of Blood Banks, the Indiana State Association of Blood Banks, the Michigan Association of Blood Banks, the South Central Association of Blood Banks, and other similar industry organizations. CAC, ¶113.

Defendants' arguments to the contrary are unavailing in that in all of their cases, allegations of trade association membership were coupled with other allegations, which taken as a whole did not plausibly suggest an agreement. *See Lubic v. Fidelity Nat'l Fin., Inc.*, No. C08-0401 MJP, 2009 WL 2160777 (W.D. Wash. July 20, 2009); *In re Late Fee and Over-Limit Fee Litig.*, 528 F. Supp. 2d 953 (N.D. Cal. 2007). Here, Defendants' memberships in the trade associations, taken together with all the other substantial allegations in the CAC, plausibly suggest an antitrust conspiracy. Furthermore, Defendants are wrong in citing *Flat Glass II*, 2009 WL 331361, at * 3, as support for their argument that membership in trade associations are irrelevant to finding a plausible antitrust conspiracy, and rather supports Plaintiffs' position: "While it is true that membership in trade associations, *without more*, does not in and of itself suggest a conspiracy, the meeting dates provide the Defendants with notice of specific time frames and manner of the alleged agreement, and thus, dismissal based on the same is not warranted. Furthermore, attendance at said meetings should easily be ascertained through discovery such that there is a reasonable expectation that discovery may reveal evidence of the

alleged illegal conspiracy." *Id.* (Emphasis added).

7. Conspiracy Furthered Through Inter-Competitor Hiring and Communications.

Plaintiffs have alleged a significant degree of inter-competitor hiring and communications. Specifically, immediately prior to joining Immucor, and eventually being promoted to its CEO, Dr. Giocacchio De Chirico had been previously employed by Ortho from 1979-1994 as a top executive. CAC, ¶ 116. Furthermore, prior to joining Immucor's Board of Directors in 2005, Hiroshi Hoketsu was the former President of Ortho-Clinical Diagnostics, K.K. in Japan from 1981 until his retirement in 2002. CAC, ¶ 117. Such inter-competitor hiring facilitates the opportunity for tacit and express agreements between competitors. CAC, ¶ 114. In addition, the movement of these senior (and long-serving) executives from Ortho to Immucor heightens the potential for an express or tacit meeting of the minds between them and their former colleagues at Ortho. CAC, ¶ 118. *See Natsource LLC v. GFI Group, Inc.*, 332 F. Supp. 2d 626, 631 (S.D.N.Y. 2004)("the hiring of a competitor's employees in conjunction with other wrongful acts…can constitute anticompetitive conduct in violation of the Sherman Act.")

Defendant Immucor's reliance on *St. Clair*, 340 Fed. Appx. at 65, is misplaced because in that case, there was no allegation that any senior level employees with relevant decision-making authority moved from bank to bank. In other words, *St. Clair* involved multiple defendant banks where lower level employees may have moved from bank to bank, whereas this case involved only two competitors whose top executives were involved in the inter-competitor hiring. Furthermore, the other case cited by Immucor, *Blomkest Fertilizer, Inc. v. Potash Corp.*, 203 F.3d 1028, 1033 (8th Cir. 2000), actually supports Plaintiffs' position, in that the Eighth Circuit stated that "Courts have held that a high level of communications among competitors can constitute a plus factor which, when combined with parallel behavior, supports an inference of

conspiracy." However, the facts of *Blomkest* are distinguishable from this case because that case did not even involve inter-competitor hiring.

8. Corporate History of Improprieties.

As further support for Defendants' unlawful conspiracy, Plaintiffs have highlighted Immucor's prior history of corporate improprieties. CAC, ¶¶ 119-124. Specifically, in 2005, Immucor's audit committee concluded that Dr. De Chirico had violated a 'technical' provision of the Foreign Corrupt Practices Act when he caused Immucor to make a cash payment to a former executive at Niguarda Ca Granda Hospital in Milan, in order to induce the hospital to enter into valuable supply contracts with Immucor. CAC, ¶ 120. Consequently, Dr. De Chirico was found guilty of bribery in an Italian court on or about April 17, 2008. *Id.*[6] Furthermore, Immucor's audit committee found evidence of six additional instances where De Chiro had caused Immucor to make questionable payments to doctors with influence over purchasing decisions. CAC, ¶ 121.

Despite the repetition of illegal conduct by Dr. De Chirico, Immucor failed to discipline its CEO. CAC, ¶ 122. In fact, after De Chirico's conviction, Joseph E. Rosen, Immucor's Chairman of the Board, publicly stated that "[i]t has always been and continues to be the Board's strong desire that Nino should continue to lead Immucor and he remains the company's CEO with the full support of the Board." Rosen continued: "the reasons for supporting him are straightforward: the company has excelled under his leadership…his results speak for

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[6] The CAC also alleges that "Ortho may also have been involved in the Italian bribery scheme." According to Johnson & Johnson, Ortho's parent,

> In February 2007, Johnson & Johnson voluntarily disclosed to the DOJ and the SEC that subsidiaries outside the United States are believed to have made improper payments in connection with the sale of medical devices in two small-market countries, which payments may fall within the jurisdiction of the Foreign Corrupt Practices Act (FCPA). In the course of continuing dialogues with the agencies, other issues potentially rising to the level of FCPA violations in additional markets may have been brought to the attention of the agencies by the Company. CAC, ¶ 124.

themselves: in revenue, EPS and profitability, all have been phenomenal during his tenure as President and CEO…" *Id.* Thus, Immucor's support of a CEO that engaged in repeated instances of illegal conduct sends the message to all employees that revenue and profits are valued more than legal compliance. It also makes it more plausible that Immucor participated in the collusion alleged herein. CAC, ¶ 123.

Taking all of the above into consideration, Plaintiffs' allegations that the Blood Reagents market is conducive to price fixing enhance the plausibility of the CAC. Thus, Plaintiffs have fulfilled *Twombly's* requirement that they assert "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555.

II. JJHS Should Not Be Dismissed From the Complaint.

Contrary to Defendants' assertions (Immucor Br., p 2 and Ortho Br., pp. 28-29), Defendant Johnson & Johnson Health Care Systems, Inc. (JJHS), should not be dismissed from the CAC, as Plaintiffs have alleged that JJHS has had "direct and independent participation in the alleged conspiracy." *In re Pa. Title Ins. Antitrust Litig.*, 648 F. Supp. 2d 663, 688 (E.D. Pa. 2009). Specifically, Plaintiffs have alleged that JJHS:

> provides account management, contracting, supply chain and e-business services to key health care customers, including hospital systems and group purchasing organizations, leading health plans, pharmacy benefit managers, and government health care institutions. JJHS was instrumental in facilitating the sale and distribution of Blood Reagents manufactured by Ortho during the class period.

CAC, ¶ 29. This allegation is bolstered by Ortho's submission of an affidavit in connection with its motion to stay discovery from Michelle Bacorn, an employee of Johnson & Johnson. It seems unlikely that Ortho would have made such a choice if JJHS had not been involved in this case. Thus, JJHS should remain as a defendant in this litigation.

PREJUDICE TO PLAINTIFFS STEMMING FROM NOT HAVING ANY DISCOVERY

If Plaintiffs were required to meet Defendants' erroneous standard of essentially proving their conspiracy at this pleading stage, Plaintiffs would not be able to do so without any discovery. In addition, because Defendants' automated Blood Reagents technology is proprietary, Plaintiffs would need some discovery to determine how the automated Blood Reagents pricing follows the traditional Blood Reagents pricing. Also, before JJHS is dismissed as a Defendant, as Defendants request, Plaintiffs would also need some discovery on exactly how JJHS facilitated Ortho's conspiracy with Immucor and exactly which of their employees were involved in it.

CONCLUSION

Plaintiffs' allegations of Defendants' conduct during the conspiracy period (especially when contrasted to conduct and events prior to the conspiracy), including the mergers and consolidation, Defendants' massive, unprecedented and successful price increases and their remarkable cancellation of contracts with their largest customers in order to carry out their price increases, when considered together – as they must be- with Plaintiffs' allegations that the Blood Reagents market was susceptible to collusive conduct, more than sufficiently provide "plausible grounds to infer an agreement" under *Twombly*, and go well beyond Rule 8(a)(2)'s requirement of a "short plain statement of the claim showing that the pleader is entitled to relief." At this stage of the litigation, bearing in mind that "the proof [remains] largely in the hands of the alleged conspirators," *Poller*, 368 U.S. at 473, Plaintiffs have more than adequately pled a plausible antitrust conspiracy.

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Respectfully submitted,

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