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

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

REPLY MEMORANDUM OF LAW IN SUPPORT OF IMMUCOR, INC.'S MOTION TO DISMISS THE CONSOLIDATED AMENDED CLASS ACTION COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

I. INTRODUCTION

Plaintiffs' response to the motion to dismiss filed by Immucor Inc. ("Immucor") ignores the central argument of the motion and the case law on which it rests. In order to prevail, Plaintiffs must allege not only that the Defendants acted in a parallel fashion but also additional facts that are not equally consistent with lawful, independent parallel action. Here the Plaintiffs have done neither. Their allegations of supposedly parallel action are too vague even to determine whether the parties in fact priced in lockstep or instead were aggressively competing with one another. Moreover, even if parallel action were adequately alleged in the Consolidated Complaint, which it is not, the Plaintiffs' response brief fails to allege facts that would explain why such actions could not have resulted from independent decisions by each Defendant in its self interest. That failing is fatal.

In fact, Plaintiffs' story, as told in both the Consolidated Complaint and in their response brief, explains exactly why Immucor and its competitor, Defendant Ortho-Clinical Diagnostics, Inc. ("Ortho"), could and would *independently* raise their prices. Prior to the time period in which Defendants allegedly conspired, the industry had consolidated down to only two players, Immucor and Ortho, and both of them were losing money. Indeed, according to Plaintiffs, "Immucor was in dire financial straits and had started breaking covenants with its bank," and "Ortho was considering leaving the Blood Reagents business entirely because it was too unprofitable." (Consol. Compl.

at ¶ 55.) Would it be any wonder in these circumstances if one of them might decide to attempt a price increase? And would it be any wonder if the other might largely follow? As Plaintiffs allege, the alternative would be exiting the market altogether—either voluntarily in the case of Ortho or involuntarily in the case of Immucor.

The issue squarely raised by Immucor's motion is whether, in a market like the one alleged, the Court can infer that these vaguely alleged price increases resulted from a conspiracy rather than from independent, self-interested action. The Supreme Court, in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554 (2007), answered that question in no uncertain terms. The *Twombly* Court pointed out that, to prevail, an antitrust plaintiff ultimately must present "evidence tending to exclude the possibility of independent action." *Id.* (citing *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984)). Accordingly, the *Twombly* Court held that a conspiracy may not be inferred from "allegedly conspiratorial actions [that] could equally have been prompted by lawful, independent goals." 550 U.S. 544, 566-67 (2007)(quoting *Kramer v. Pollock-Krasner Foundation*, 890 F. Supp. 250, 256 (S.D.N.Y. 1995)). Because Plaintiffs in this case have failed to allege any facts that would suggest that a conspiracy is a more likely explanation for what occurred than independent action, the Consolidated Complaint should be dismissed.

II. ARGUMENT

As noted in Immucor's opening brief, Plaintiffs have not alleged any direct evidence of a conspiracy. *See In re Travel Agent Comm'n Antitrust Litig.*, 583 F.3d 896, 905 (6th Cir. 2009) ("[W]here a 'complaint [ ] furnishes no clue' as to which defendants supposedly agreed or when and where the illicit agreement took place, the complaint fails to give adequate notice"). Plaintiffs essentially concede that the Consolidated Complaint contains no specific allegations regarding the who, what, when and where of any supposed agreement to fix prices or eliminate competition, claiming that such allegations are unnecessary. (Resp. Br. at 19.) Rather, Plaintiffs rely on allegations they contend suggest a conspiracy circumstantially. Specifically, Plaintiffs assert that the following types of allegations support a plausible inference that Defendants conspired to fix prices: (1) distinctions between Defendants conduct before and during the alleged conspiracy period; (2) conduct that they contend is parallel; (3) vaguely alleged "other anticompetitive conduct;" and (4) various market characteristics.[1] As will be discussed below, none of these circumvent the key failing of the Consolidated Complaint – that it alleges facts at least as consistent with independent, unilateral conduct as with conspiracy.

[1] For ease of reference by the Court, Immucor will reply to the arguments in the order in which they appear in Plaintiffs' Response Brief.

A. The Facts Alleged in the Consolidated Complaint Do Not Permit an Inference that Immucor Conspired with Ortho.

1. The Purported "Distinctions" Between Pre- and Post-Class Period Behavior Are Consistent with the Market Changes Alleged in the Consolidated Complaint.

The Plaintiffs' lead argument is that "distinctions" in the blood reagents market before and after the alleged class period plausibly suggest a conspiracy. In fact, the changes in the market relied on by Plaintiffs suggest just the opposite. Plaintiffs allege that the blood reagents market went from having "over a dozen" competitors to just two struggling players. (Consol. Compl. ¶¶ 57, 61.) Those two players were losing money to the point where, according to the Consolidated Complaint, Immucor was in "dire financial straits" and Ortho was considering withdrawing from the market altogether. (Consol. Compl. ¶ 55.) At this point, with only two firms remaining, one of the two struggling firms raised its prices and the other followed. (Consol. Compl. ¶ 65.) Surely such a "change" in behavior is exactly what would be expected in these new circumstances and is more consistent with lawful independent action than with any conspiracy.

The Supreme Court has repeatedly recognized that firms in a concentrated market like the one alleged here *do not need to conspire* to raise prices. *Twombly*, 550 U.S. at 553-54; *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 237 (1993) ("[R]ising prices do not themselves permit an inference of a collusive market dynamic."). And the resultant "synchronous actions" can easily be the "product of a

rational, independent calculus by each member of the oligopoly, as opposed to collusion." *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1299 (11th Cir. 2003). In other words, the very consolidation that Plaintiffs describe in the Consolidated Complaint *explains* why Defendants would change their behavior. Consequently, the "distinctions" between prices before and after the consolidation say nothing about whether Defendants actually conspired to fix prices.

The cases Plaintiffs cite on this front do not aid their cause. First, in *In re TFT-LCD (Flat Panel) Antitrust Litigation*, 586 F. Supp. 2d 1109, 1115 (N.D. Cal. 2008), the plaintiffs alleged the precise opposite of what Plaintiffs allege in this case. Unlike the allegations here of "massive consolidation in the industry," (Resp. Br. at 4), the plaintiffs in that case alleged that "new companies entered the market, resulting in increased competition." *Flat Panel*, 586 F. Supp. 2d at 1115. This distinction is critical, because it would be odd for prices to increase in the face of new entrants, but not at all odd in the aftermath of consolidation.

Similarly inapposite is *In re Graphics Processing Units Antitrust Litigation*, 540 F. Supp. 2d 1085 (2007). In that case, the plaintiffs alleged in far greater detail than here changes in pre-conspiracy and post-conspiracy behavior by participants in the market for graphics cards, including a new and apparently inexplicable coordination of the timing of introduction of new products, which allegedly allowed the defendants to coordinate pricing. *Id.* at 1092-96. Moreover, the market conditions did not change—

there were only two competitors both before and after the conspiracy allegedly started—and there were no other allegations in the complaint that would explain the new conduct. Here, by contrast, the Consolidated Complaint itself explains the increased levels of concentration in the market that might make lawful price leadership more feasible, as well as the great financial pressure on the participants that made price increases essential to their survival or continued operation in the market.

Finally, the allegations in this case are nothing like those in *Standard Iron Works v. ArcelorMittal*, 639 F. Supp. 2d 877, 884-85 (N.D. Ill. 2009), in which the opinion included twenty-five pages of specific allegations concerning the participants, times, and places of multiple meetings of defendants' senior executives as well as numerous quotes of the top executives about maintaining industry "discipline." In fact, the plaintiffs alleged that the top executives of the industry's leading firm repeatedly and publicly instructed executives at competing firms to "squeeze the cycle" and "to cut your production," and implored "a disciplined approach to bringing on supply and managing capacity." *Id.* The court also noted three specific and separate examples of meetings attended by executives of the leading producers that were quickly followed by reductions in production by all defendants. *Id.* at 885, 895 ("The timing of the statements with the alleged concerted action provides some of the requisite 'factual heft' in support of Plaintiffs' allegation of parallel conduct."). Whatever else the court discussed as supporting a conspiracy in that case was undoubtedly colored by the very

specific allegations of direct evidence of a conspiracy the likes of which are completely absent from the Consolidated Complaint in this case.

The issue here is not whether the pricing pattern changed but whether such changes tended to show a conspiracy rather than lawful, independent behavior. Because any purported distinctions between pre- and post-class period behavior are easily explained by the consolidation in the market and the poor financial condition of the parties, such changes are at least as consistent and indeed more consistent with lawful, independent action than with conspiracy.

2. ***The Consolidated Complaint Fails Adequately to Allege Parallel Conduct, and the Conduct that Is Alleged is Consistent with Lawful Independent Action.***

As Immucor pointed out in its opening brief, Plaintiffs do not even allege parallel conduct by the Defendants. Indeed, in stark contrast to the allegations in cases on which they rely, many of which contained very specific and detailed allegations regarding dates, prices, price increases and products, *see, e.g., In re Graphics Processing Units*, 540 F. Supp. 2d at 1092-96, Plaintiffs have merely alleged price increases in vague ranges across the entire spectrum of traditional blood reagents products. For instance, it would be perfectly consistent with the allegations of the Consolidated Complaint for one of the Defendants to have priced significantly lower than the other with respect to some or even all of the products that directly compete. And it is possible that any such increases took place months apart. Such possibilities highlight the deficiency in the supposed "parallel pricing" allegations of the Consolidated Complaint. *See, e.g., In re*

Baby Food Antitrust Litig., 166 F.3d 112, 130 (3d Cir. 1999) (affirming summary judgment for defendants and noting that "the undisputed evidence show[ed] sometimes competitors did not follow price increases at all, other times they followed by less, sometimes by the same amount, and sometimes they followed only in certain geographic areas"). Plaintiffs presumably have records of what they have been charged through the years for Defendants' products, and this failure of pleading cannot be excused.

But even if the Consolidated Complaint had sufficiently alleged parallel price increases or if Plaintiffs could amend to include such allegations, they would be insufficient to support an inference that Defendants conspired to fix prices. The case law on this point is clear and one-sided. A court may not infer a conspiracy from "allegedly conspiratorial actions [that] could equally have been prompted by lawful, independent goals." *Twombly*, 550 U.S. at 566-67 (quoting *Kramer v. Pollock-Kranser Foundation*, 890 F. Supp. 250, 256 (S.D.N.Y 1995).

"[C]onscious parallelism is the practice of interdependent pricing in an oligopolistic market by competitor firms that realize that attempts to cut prices usually reduce revenue without increasing any firm's market share, but that simple price leadership in such a market can readily increase all competitors' revenues." *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 570 (11th Cir.1998) (citations omitted). "'Conscious parallelism,' . . . is 'not in itself unlawful.'" *Twombly*, 550 U.S. at 553-54; *Brooke Group Ltd.*, 509 U.S. at 237; *In re Travel Agent Comm'n Antitrust*

Litig., 583 F.3d 896 (6th Cir. 2009); *In re Elevator Antitrust Litig*, 502 F.3d 47, 51 (2d Cir. 2007) (affirming dismissal of antitrust complaint and explaining that parallel conduct allegations "do not constitute 'plausible grounds to infer an agreement'"); *Williamson Oil Co.*, 346 F.3d at 1291 (recognizing that firms in highly concentrated markets benefit by being price leaders, but do not benefit by cutting prices).

In an attempt to skirt this case law, Plaintiffs repeatedly characterize Immucor's alleged price followership as having been "against [its] economic self-interest." (*E.g.*, Resp. Br. at 14, 15.) But that characterization simply begs the question. No factual allegations in the Consolidated Complaint clarify why "Immucor should have been quick . . . to undercut Ortho's prices" rather than to increase its prices as well. (Resp. Br. at 15.) Indeed, in a market like this, it would have been against Immucor's self-interest for it *not* to increase its own prices following Ortho's price increase. This is because in a highly concentrated market, "attempts to cut prices usually reduce revenue without increasing any firm's market share." *Williamson Oil Co.*, 346 F.3d at 1299. Thus, Immucor could indeed have chosen not to raise its prices when Ortho did so, but there would have been a high likelihood that Ortho simply would have rescinded its own price increase, leaving Immucor back where it started. Based on this not only plausible but relatively compelling logic, it would be entirely rational for Immucor to have concluded that any minor market share improvement Immucor might have gained before Ortho lowered its prices again could not possibly make up for the profits that would be

gained by increasing Immucor's own prices. As courts have noted, such a conclusion could easily "result from firms' rational recognition that the market structure in which they operate will most easily yield profits by means other than price competition." *Id.*

No agreement would have been necessary for either company to recognize these straightforward incentives, which is exactly why the courts have repeatedly held that allegations or evidence of price leadership or followership in a concentrated market are not enough to establish an antitrust conspiracy. *See, e.g.*, *Brooke Group Ltd.*, 509 U.S. at 237. Plaintiffs' response assumes away this well accepted and perfectly lawful phenomenon. It bears repeating: Plaintiffs never explain why Immucor could not have independently concluded that increasing its own prices in response to Ortho's price increase was in its best interest when to do otherwise would risk its financial survival.

Plaintiffs also attempt to make much of their allegations that Immucor and Ortho allegedly canceled contracts with two group purchasing organizations ("GPOs") around the same time in late 2004 – more than four years after the conspiracy allegedly began.[2] This, too, is perfectly consistent with independent decision making. (Consol. Compl. ¶74.) The Consolidated Complaint does not allege that selling to these groups was the only way to sell to their members. On the contrary it alleges that Immucor cancelled so

[2] Actually, it is not alleged that both Defendants cancelled with both GPOs. Rather, the Consolidated Complaint alleges that Immucor cancelled with both Premier and Novation (though retaining contracts with four other GPOs), but only alleges that Ortho canceled with Premier. (Consol. Compl. ¶¶ 77-79.) Thus, the Consolidated Complaint does not even alleges parallel conduct with respect to these supposed cancellations.

it could "increas[e] prices to members of each [GPO]." (Consol. Compl. ¶ 79.) If these GPOs refused to accept any price increases, each Defendant had an independent incentive to exercise its right to cancel the contracts and sell directly to the members at the higher prices then taking effect in the market, rather than continuing a contract at much lower prices with the group.[3] And each Defendant could rightly surmise that the other would have the same incentive. *See In re Travel Agent*, 583 F.3d at 908 (noting that airlines could have rational, independent motives for reducing travel agent commissions even though they might lose some business as a result); *Hackman v. Dickerson Realtors, Inc.*, 520 F. Supp. 2d 954, 968 (N.D. Ill. 2007) (dismissing complaint where defendants had an independent incentive to boycott plaintiff, who was undercutting their commissions). Plaintiffs' allegations on this front do no more to suggest a conspiracy than do the allegations of supposedly parallel pricing.

Plaintiffs assert misplaced reliance on *Starr v. Sony BMG Music Entertainment*, 592 F.3d 314 (2nd Cir. 2010), the only post-*Twombly* Circuit Court opinion Plaintiffs cite that finds a dismissal improper. Plaintiffs seem to suggest that *Starr* somehow

[3] Plaintiffs cite two cases for the proposition that the Consolidated Complaint is sufficient because it alleges "multiple instances" of parallel conduct. (Resp. Br. at 25 (citing *In re Southeastern Milk Antitrust Litig.*, 555 F. Supp. 2d 934 (E.D. Tenn. 2008).) Such cases do not apply here, because Plaintiffs do not, in fact, allege multiple instances of parallel conduct as in those cases. Here, all that is alleged with respect to Immucor is a pattern of price followership along with an incidental, one-time cancellation of contracts with two GPOs more than four years after the initial price increase. That hardly compares to the sort of conspiracy and broad-ranging parallel action alleged in *Standard Iron*, 639 F. Supp. 2d at 902, and similar cases.

loosened the pleading standard articulated in *Twombly*, which, of course, it could not have done. And when one considers the facts alleged by the *Starr* plaintiffs, it is clear that the court did nothing of the sort. In that case, at least five defendant record companies had formed joint ventures that coordinated online marketing and sale of their music. *Id.* at 318. These defendants also sold separately, entering into contracts with retailers on nearly identical terms, including not only identical pricing per song but also "most favored nation agreements," which in effect "specified that the retailers had to pay each defendant the same amount per song." *Id*. at 319. Some of the defendants allegedly kept the most favored nation agreements in secret side letters rather than in their main distributorship contracts, "because they knew [the agreements] would attract antitrust scrutiny." *Id*. at 324. Indeed, one of the defendants' executives acknowledged that "'there [we]re legal/antitrust reasons why it would be bad idea to have [most favored nation] clauses in any, or certainly all, of these agreements.'" *Id*. at 324. With the aid of the most favored nation agreements, the defendants simultaneously raised prices at a time when their costs were demonstrably falling. *Id*.

The degree of coordinated activity alleged in *Starr* clearly goes far beyond the arguably somewhat parallel price increases alleged by Plaintiffs here. Moreover, the fact that so many companies (as opposed to the two allegedly involved here) acted in the same manner makes it less likely that such extensively coordinated activity would have

happened in the absence of a conspiracy. Finally, Plaintiffs' Consolidated Complaint contains nothing like these specific allegations of discussions and express, but "hidden," agreements that were alleged in the *Starr* case. In short, the complaint in *Starr* provided far more compelling circumstantial evidence of a conspiracy than is present here.[4]

There is an inherent contradiction between Plaintiffs' arguments and the allegations in the Consolidated Complaint. As noted, Plaintiffs repeatedly argue that Defendants' actions were "against their economic self-interest." (Resp. Br. at 17.) At the same time, however, Plaintiffs allege in the Consolidated Complaint that Immucor's actions resulted in Immucor's survival and a return to profitability and increased margins for each Defendant. (Consol. Compl. at ¶ 72.) Obviously, Immucor's actions turned out to be in its own financial interest, and there is nothing in the Consolidated Complaint that would explain why Immucor would not have predicted this scenario and

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[4] Similarly unavailing is *In re OSB Antitrust Litigation*, an unpublished district court opinion. 2007 WL 2253419 (E.D. Penn. 2007). In that case, the court recounted specific allegations regarding the defendants' express communications with each other about plans to reduce production and idle capacity at a time when demand was increasing. *Id.* at *3. No such specific communications are alleged here.

In addition, Plaintiffs sent a letter to the Court attaching a recent opinion of the United States District Court for the Eastern District of Michigan, *In re Packaged Ice Antirust Litig.*, No. 08-MD-01952 (E.D. Mich. July 1, 2010). It is unclear what relevance Plaintiffs believe that opinion has to the instant motion, but the case is clearly distinguishable. In that case, several executives of one of the alleged co-conspirators had *pleaded guilty to criminal antitrust violations* in connection with the alleged conspiracy. Moreover, the complaint contained names of key executives who had allegedly conspired, as well as "insider" admissions regarding the details of the defendants' alleged market-allocation agreement. In sum, the complaint contained allegations of what would be overwhelming direct evidence of a conspiracy. Nothing of the sort appears in the Consolidated Complaint.

followed Ortho's price increase without ever talking to Ortho. Indeed, it should be obvious that Immucor had no other practical choice. Plaintiffs' entire line of argument based on what supposedly is or is not in Defendants' "self-interest" is question begging. It simply assumes the conclusion Plaintiffs wish the Court to adopt – that such actions would be profitable only with an agreement – an assumption contrary to the very facts alleged in the Consolidated Complaint.

Because Plaintiffs allege conduct that is at least as consistent with independent action as with collusion, the Consolidated Complaint should be dismissed.

3. ***The Supposed "Other" Anticompetitive Conduct Does Not Plausibly Suggest a Conspiracy****.*

Plaintiffs attempt to bolster their insufficient allegations of conspiracy by pointing to two instances of supposed "other" anticompetitive conduct. First, it is vaguely asserted that the Defendants engaged in "customer allocation behavior." (Resp. Br. at 23.) This line of argument is based on a threadbare allegation in the Consolidated Complaint that contains absolutely no specifics regarding the who, what, where and when of this supposed conduct. (Consol. Compl. at ¶ 85.) Conclusory allegations of this sort are not entitled to credit. *Twombly*, 550 U.S. at 555. Moreover, the allegations that "some" customers were quoted "unreasonably" high prices or were "refused" are perfectly consistent with independent action. The refusal to quote prices that the

Plaintiffs deemed "reasonable" is nothing but a repackaging of the unsupported allegation that the Defendants colluded to raise prices. Moreover, no facts are alleged that would allow the Court to infer that any refusal to deal with any unidentified customer resulted from a conspiracy as opposed to Immucor's independent assessment of a customer's creditworthiness or whether the customer would qualify for a volume discount.[5] The lack of such factual allegations and the vagueness of what is alleged dooms this supposed basis for inferring a price-fixing agreement.

The second type of supposed "other" anticompetitive conduct relating to Immucor is an exclusivity provision in Immucor's purchasing contract with a foreign company called Celliance, Ltd. The allegation regarding Immucor's Celliance contract is wholly irrelevant to the claimed conspiracy between Immucor and Ortho, and Plaintiffs' response does nothing to illuminate why they believe it is relevant. There is

[5] Plaintiffs cite *In re Pressure Sensitive Labelstock Antitrust Litigation*, 566 F. Supp. 2d 363 (M.D. Pa. 2008) as support for the proposition that this supposed "anticompetitive" conduct supports an inference of conspiracy. In that case, the court acknowledged that the standard is that ""[a]llegations that are equally consistent with legal conduct as with illegal conduct are insufficient to state a viable § 1 claim." *Id.* at 376. Although the court applied that correct standard and found the complaint sufficient, the facts of the case are far from on point. The plaintiffs there alleged with specificity that personnel of the two defendants met at a specific conference and "discussed the need to collaborate on price increases." *Id.* at 372. This resulted in a sophisticated merger transaction that resulted in one of three competitors leaving the market in exchange for an increased share of a different product market in Europe. In other words, the parties in that case allegedly were involved in active discussions and negotiations, which included overt discussions of price fixing and a written agreement that had the effect of allowing the defendants to avoid competing with one another. Nothing even close to such conduct is alleged in Plaintiffs' Consolidated Complaint.

no allegation that Ortho and Immucor conspired to have Immucor enter into this contract or that Ortho had anything whatsoever to do with it. Moreover, the Plaintiffs do not challenge the contract itself, and there are not even enough facts alleged in the Consolidated Complaint for the Court to determine whether the Celliance contract is anti-competitive or pro-competitive or whether it had any market effect. Plaintiffs' reliance on this irrelevant and extraneous contract fails to salvage their deficient pleading.

While obviously not relating to "other" anticompetitive conduct, Plaintiffs include in this section an argument that the Consolidated Complaint should not be dismissed because the government is investigating the conduct of Defendants. As noted in Immucor's opening brief, even an indictment would not be admissible at trial, so a mere investigation should hardly be grounds for upholding a complaint that cannot otherwise stand on its own. *In re Bath & Kitchen Fixtures Antitrust Litig.*, No. 05-cv-00510, 2006 WL 2038605 at **2, 7 (E.D. Pa. July 19, 2006) (dismissing Section 1 claim for failure to plead concerted action, notwithstanding an allegation that a grand jury investigation had been opened by the Department of Justice); *cf., Am. Home Assur. Co. v. Sunshine Supermarket, Inc.*, 753 F.2d 321, 325 (3d Cir. 1985) ("At best, the evidence of non-prosecution is evidence of an opinion by the prosecutor. The opinion of a layperson, as the prosecutor was in this case, however, is inadmissible if it [is] based on

knowledge outside the individual's personal experience."). Elemental concepts of due process should preclude reliance on the mere fact of a governmental investigation as proof in a separate proceeding of what actually did occur.

4. ***The "Conditions" That Plaintiffs Assert Make the Market "Susceptible to Collusion" Would Also Allow for Independent Oligopoly Pricing.***

Immucor will not dwell on Plaintiffs' allegations regarding the characteristics of the blood reagents markets. It is sufficient to state, as has been noted repeatedly by courts and as pointed out in Immucor's opening brief, that the same characteristics lend themselves to the equally plausible inference of lawful, independent price leadership and followership. *See Twombly*, 550 U.S. at 554; *E.I. Du Pont de Nemours & Co.* v. *Fed. Trade Comm'n*, 729 F.2d 128, 139 (2d Cir. 1984) ("[P]rice uniformity is normal in a market with few sellers and homogeneous products."). Consequently, these allegations do not support a plausible inference that Defendants conspired to raise prices.

Likewise, Plaintiffs' argument regarding Defendants' participation in trade associations misses the mark. (Resp. Br. at 32.) Plaintiffs state that the extensive case law supporting Defendants' position is "unavailing in that in all of [Defendants'] cases, allegations of trade association membership were coupled with other allegations, which taken as a whole did not plausibly suggest an agreement." (*Id.*) Defendants respectfully submit that Plaintiffs' purported distinction is precisely the point. If the other allegations are insufficient, which they are, as described above, additional allegations

that Defendants participated in trade associations do nothing to support the existence of a conspiracy.[6] Indeed, *Twombly* itself expressly rejected trade association participation as a reason for inferring a price fixing agreement. *Twombly*, 550 U.S. at 567 n.12.

Similarly, Plaintiffs' allegations regarding intercompany hiring fail to show a conspiracy. Plaintiffs cite absolutely no case law holding that intercompany hiring can support an inference of a price-fixing conspiracy. The first case they cite, *Natsource LLC v. GFI Group, Inc.*, 332 F. Supp. 2d 626, 631 (S.D.N.Y. 2004) (noting that "the hiring of employees alone generally cannot give rise to antitrust liability"), can be dismissed out of hand because it involved a monopolization claim under § 2 of the Sherman Act, which does not even have conspiracy as an element. Plaintiffs then assert that *Blomkest Fertilizer, Inc. v. Potash Corp.*, 203 F.3d 1028, 1033 (8th Cir. 2000), a case cited in Immucor's opening brief, supports their position. It is difficult to understand the basis for this assertion. In *Blomkest*, the court *affirmed summary judgment for the defendants* despite evidence of "a high level of interfirm

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[6] Plaintiffs also rely on an allegation regarding a fall 2000 conference of the "American Association of Blood Banks," a conference conducted not by the Defendants but by their customers and potential customers (the putative class members). The allegation is that Ortho announced to its customers that a significant price increase of an unspecified amount would be implemented in the future, knowing that Immucor would be present. Contrary to Plaintiffs' assertion, there is nothing wrong with the public announcement of a price increase. *See, e.g.*, *Williamson Oil Co., Inc. v. Philip Morris USA*, 346 F.3d 1287, 1306-07 (11th Cir. 2003) (noting that publication dissemination of price information is generally permissible). Surely, Ortho's giving its customers notice of an upcoming price increase could have taken place without a conspiracy, and doing so was in Ortho's own self-interest as well as the interest of its customers, who deserved and no doubt would have wanted such a "heads up."

communications between producers," which included numerous "price verifications." *Id.* Plaintiffs attempt to cherry-pick a quote, which states that "a high level of communications among competitors can constitute a plus factor." (Resp. Br. at 33.) But Plaintiffs fail to explain how hiring a competitor's former employee constitutes an interfirm communication, and Plaintiffs have not alleged that *any* interfirm communications actually took place, let alone ones that rise to the level of those that were held *insufficient* in *Blomkest.* Plaintiffs' arguments regarding intercompany hiring are without merit.

The final arrow in Plaintiffs' quiver is a supposed "corporate history of improprieties." (Resp. Br. at 34.) Plaintiffs cite absolutely no case law stating that alleged foreign misconduct, completely unrelated to the antitrust laws, can support an inference that a defendant engaged in price fixing. Plaintiffs' unseemly attempt to prejudice the Court against Immucor's CEO by bringing up completely unrelated allegations of foreign misconduct should be rejected. *Cf. Am. Copper & Brass, Inc. v. Halcor S.A.*, 494 F. Supp. 2d 873, 876-77 (W.D. Tenn. 2007) (dismissing complaint relying on foreign court decision relating to unlawful conduct overseas, even though the decision, unlike the accusations alleged here, involved foreign price fixing).

III. CONCLUSION

Plaintiffs' Consolidated Complaint fails to allege facts that plausibly show an agreement between the Defendants to fix prices. Rather, the allegations of the

Consolidated Complaint are more simply explained by and more consistent with independent and lawful conduct than they are with conspiracy. Consequently, the Consolidated Complaint is insufficient as a matter of law, and Immucor respectfully requests that the Court dismiss the Consolidated Class Action Complaint with prejudice pursuant to Fed. R. Civ. P. 12(b)(6).

Respectfully submitted this 9th day of July, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed the foregoing **REPLY MEMORANDUM OF LAW IN SUPPORT OF IMMUCOR, INC.'S MOTION TO DISMISS THE CONSOLIDATED CLASS ACTION COMPLAINT** with the Clerk of Court using the CM/ECF system, which constitutes service.

This 9th day of July, 2010.

/s/ Michele D. Hangley
Michele D. Hangley