

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

IN RE:  
BLOOD REAGENTS ANTITRUST  
LITIGATION

MDL NO. 2081

THIS DOCUMENT RELATES TO:  
ALL ACTIONS

MASTER FILE NO. 09-MD-2081

DuBois, J.

July 19, 2017

**MEMORANDUM**

**I. INTRODUCTION**

In these consolidated antitrust actions, plaintiffs allege that the two leading producers of blood reagents— Ortho Clinical Diagnostics, Inc. (“defendant” or “Ortho”), and Immucor, Inc.<sup>1</sup> (“Immucor”)—conspired to unreasonably restrain trade and commerce in violation of § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. Presently before the Court is Ortho’s Motion to Exclude the Expert Testimony and Reports of John C. Beyer, Ph.D. The Court previously rejected several *Daubert* challenges to Dr. Beyer’s testimony as part of its October 19, 2015, Memorandum and Order recertifying the present class. For the reasons that follow, Ortho’s Motion to Exclude is denied.

**II. BACKGROUND**

The relevant facts are set forth in detail in the Court’s Memoranda of August 22, 2012, and October 19, 2015, certifying and recertifying the Class,<sup>2</sup> and the Court’s Memorandum of July 19, 2017, granting in part and denying in part Ortho’s Motion for Summary Judgment. In this Memorandum, the Court only includes the facts necessary to explain its decision.

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<sup>1</sup> By Order dated September 6, 2012, the Court granted plaintiffs’ Motion for Final Approval of the Settlement with Immucor.

<sup>2</sup> *In re Blood Reagents Antitrust Litig.*, 283 F.R.D. 222 (E.D. Pa. 2012); *In re Blood Reagents Antitrust Litig.*, MDL No. 09-2081, 2015 WL 6123211 (E.D. Pa. Oct. 19, 2015).

The Court held a hearing on plaintiffs' initial Motion for Class Certification on July 26, 2012. Ortho's economics expert, Dr. Peter Bronsteen, testified at the hearing. Plaintiffs' economics expert, Dr. John C. Beyer, was unable to attend the July 26th hearing, but his testimony was presented to the Court by video, recorded on August 6, 2012. The Court granted plaintiffs' initial motion for class certification by Order dated August 22, 2012. Ortho petitioned the United States Court of Appeals for the Third Circuit for leave to appeal pursuant to Federal Rule of Civil Procedure 23(f), and that petition was granted on October 25, 2012.

The granting of plaintiffs' initial Motion for class certification was based on the Third Circuit's class certification opinion in *Behrend v. Comcast Corporation*, which was thereafter reversed by the United States Supreme Court. Based on that reversal, the Third Circuit vacated this Court's class certification opinion and directed this Court on remand to "decide in the first instance which of [defendant's] reliability attacks, if any, challenge those aspects of plaintiffs' expert testimony offered to satisfy Rule 23 and then, if necessary, to conduct a *Daubert* inquiry before assessing whether the requirements of Rule 23 have been met." *In re Blood Reagents Antitrust Litig.*, 783 F.3d 183, 188 (3d Cir. 2015).

On June 26, 2015, the parties submitted post-remand briefing. The Court held a hearing on the post-remand class certification issues on July 21, 2015. After a lengthy and thorough inquiry of the testimony of plaintiffs' expert Dr. Beyer, the Court rejected Ortho's *Daubert* challenges to his testimony. The class, consisting of "all individuals and entities who purchased traditional blood reagents in the United States directly from defendants [Immucor] and [Ortho] at any time from November 4, 2000 through the present, excluding defendants, and their respective parents, subsidiaries and affiliates, as well as any federal government entities," was recertified on October 19, 2015. Pursuant to Case Management Order No. 4 dated January 26, 2016, Ortho filed its

Motion to Exclude the Expert Testimony and Reports of John C. Beyer, Ph. D., and its Motion for Summary Judgment.<sup>3</sup> For the reasons stated below, Ortho's Motion to Exclude is denied.

### III. APPLICABLE LAW

Federal Rule of Evidence 702 provides that:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

“Faced with a proffer of expert scientific testimony . . . the trial judge must determine . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue.” *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 592 (1993). This gatekeeping function extends beyond scientific testimony to testimony based on “technical” and “other specialized” knowledge. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999).

Rule 702 has “a liberal policy of admissibility.” *Pineda v. Ford Motor Co.*, 520 F.3d 237, 243 (3d Cir. 2008) (quoting *Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 806 (3d Cir. 1997)). As such, the “rejection of expert testimony is the exception and not the rule.” Fed. R. Evid. 702 advisory committee's note. “Rule 702 embodies three distinct substantive restrictions on the admission of expert testimony: qualifications, reliability, and fit.” *Elcock v. Kmart Corp.*, 233 F.3d 734, 741 (3d Cir. 2000); *Daubert*, 509 U.S. at 597. The party offering the expert opinion must prove each of these requirements by a preponderance of the evidence. *In re TMI Litig.*, 193 F.3d 613, 663 (3d Cir. 1999).

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<sup>3</sup> The Court only addresses Ortho's Motion to Exclude in this decision. The Court has issued a separate Memorandum and Order dated July 19, 2017, granting in part and denying in part Ortho's Motion for Summary Judgment.

Only the reliability and fit restrictions of *Daubert* are at issue in this case. The reliability requirement “means that the expert’s opinion must be based on the ‘methods and procedures of science’ rather than on ‘subjective belief or unsupported speculation’; the expert must have ‘good grounds’ for his or her belief.” *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 742 (3d Cir 1994). The test of reliability is “flexible” and “the law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination.” *Kumho Tire*, 526 U.S. at 141-42. In determining whether the reliability requirement is met, courts examine the following non-exclusive list of factors:

- (1) whether a method consists of a testable hypothesis;
- (2) whether the method has been subject to peer review;
- (3) the known or potential rate of error;
- (4) the existence and maintenance of standards controlling the technique’s operation;
- (5) whether the method is generally accepted;
- (6) the relationship of the technique to methods which have been established to be reliable;
- (7) the qualifications of the expert witness testifying based on the methodology; and
- (8) the non-judicial uses to which the method has been put.

*United States v. Mitchell*, 365 F.3d 215, 235 (3d Cir. 2004) (citing *In re Paoli*, 35 F.3d at 742 n.8). These factors are neither exhaustive nor applicable in every case. *Kannankeril*, 128 F.3d at 806-07.

Under the *Daubert* reliability prong, parties “do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are *correct*, they only have to demonstrate by a preponderance of evidence that their opinions are reliable.” *In re Paoli*, 35 F.3d at 744. “The evidentiary requirement of reliability is lower than the merits standard of correctness.” *Id.* “As long as an expert’s scientific testimony rests upon good grounds, based on what is known, it should be tested by the adversary process—competing expert testimony and active cross-examination—rather than excluded from jurors’ scrutiny for fear that they will not grasp its complexities or satisfactorily weigh its inadequacies.” *Mitchell*, 365 F.3d at 244 (citations and internal quotation marks omitted).

For expert testimony to meet the *Daubert* “fit” requirement, it must “help the trier of fact to understand the evidence or to determine a fact in issue.” Fed. R. Evid. 702. “This condition goes primarily to relevance. Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful.” *Daubert*, 509 U.S. at 591 (citations and internal quotation marks omitted). “‘Fit’ is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes.” *Id.*

#### **IV. DISCUSSION**

In its Motion, Ortho seeks to exclude the expert testimony and reports of plaintiffs’ economics expert, Dr. Beyer. The Court notes at the outset that Dr. Beyer’s reports are not admissible evidence. For purposes of this Motion, the Court considers Dr. Beyer’s opinions as expressed in both his testimony and reports.

The Court addresses the *Daubert* arguments as presented by the parties without considering the impact of its ruling on summary judgment on Dr. Beyer’s testimony. The Court considers its conclusion on liability at summary judgment, specifically its conclusion that the 2005 and 2008 price increases were not the product of collusion, to be separate from a determination of the damages period. As Ortho states in its Reply Memorandum in support of its Motion for Summary Judgment,

Nor is it sufficient for Plaintiffs to argue that the 2001 price increases had an effect that persisted throughout the class period. While that argument, if credited, might address the class certification issues of common impact and damages, it does not resolve the distinct liability issue of whether there was any unlawful price coordination beyond 2001.

Ortho’s Summ. J. Reply Br. at 9. As Judge Baylson observed in *Domestic Drywall*, “[t]he parties should not confuse this [conspiracy period] window with the possibly different time period for the calculation of damages. It is possible that [plaintiffs] may be able to prove damages for a broader

time period than the scope of discovery and liability.” *In re Domestic Drywall Antitrust Litig.*, No. 13-2437, 2016 WL 3453147, at \*4 n.5 (E.D. Pa. June 22, 2016).

Plaintiffs offer Dr. Beyer’s opinions on evidence of collusive behavior and antitrust impact and damages. Ortho raises numerous challenges, many of which were previously addressed by this Court in its opinion granting plaintiffs’ second Motion for class certification, to Dr. Beyer’s testimony and reports, which can be grouped into five main categories. Ortho argues that (1) Dr. Beyer’s opinions on damages and liability are inconsistent; (2) Dr. Beyer’s opinion on the 2004 Group Purchasing Organizations (GPOs) contract cancellations is unreliable; (3) Dr. Beyer’s “Operation Create Value” (OCV) benchmark is unreliable and lacks fit with the facts of this case; (4) Dr. Beyer’s proposed benchmarks for prices after 2005 are not reliable; and (5) Dr. Beyer’s use of one annual but-for price is incompatible with price dispersion in the actual world. The Court addresses each of Ortho’s challenges in turn.

A. Whether Dr. Beyer’s Opinions on Damages and Plaintiff’s Liability Case Are Inconsistent

Ortho challenges Dr. Beyer’s testimony on the ground that his opinions on damages are inconsistent with his opinion on liability. That is not an issue for *Daubert* purposes. The correct inquiry on a *Daubert* challenge is whether or not Dr. Beyer’s opinions on damages align with plaintiffs’ liability case. In opining on damages, Dr. Beyer accepted plaintiffs’ “allegations of the conspiracy in the Complaint to be true,” as Ortho notes. Ortho Mot. to Exclude the Expert Testimony of Dr. Beyer 5; Mot., Ex. 2, Tr. of Apr. 22, 2016, Dep. of Dr. John Beyer (“Beyer Apr. Dep.”), 65:9-16. Ortho also states that the Complaint alleges a “continuing conspiracy.” Mot. 5; Mot., Ex. 3, Consolidated Am. Class Action Compl. (“CAC”), Feb. 16, 2009, ¶¶ 132-133. In an effort to establish alleged inconsistency, Ortho contends that Dr. Beyer “opined only that there was price coordination in advance of the 2001 price increase” but did not address price coordination prior to the 2005 and 2008 price increases. Mot. 6.

The Court rejects Ortho's argument that Dr. Beyer's opinions are excludable due to an alleged inconsistency between *his* opinions on damages and *his* opinion on liability. A model supporting a plaintiff's damages case must be consistent with the plaintiff's liability case. *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013) (holding that the damages model must be consistent with the plaintiff's liability case at the class certification stage through trial). At the class certification stage, this Court concluded that "Dr. Beyer's damages methodologies match the sole theory of liability asserted by plaintiffs in this case." *Blood Reagents*, 2015 WL 6123211, at \*33. In the motion papers, plaintiffs allege a continuing conspiracy and Dr. Beyer properly relied upon those allegations in crafting his damages model.

Dr. Beyer's damages models are not inconsistent with plaintiffs' liability case as presented in the motion papers. However, Dr. Beyer's damages models are inconsistent with the Court's ruling that the 2005 and 2008 price increases were not the product of collusion. For that reason, those damages models will have to be revised.

**B. Whether Dr. Beyer's Opinion on the GPO Contract Cancellations Is Unreliable**

Dr. Beyer opines that the 2004 cancellations of Group Purchasing Organization ("GPO") contracts by both Ortho and Immucor in short succession were "most consistent with cooperative behavior based on the unlikelihood of both firms independently choosing this highly risky behavior." Beyer Aug. Rep., ¶ 83. According to Dr. Beyer, Ortho's cancellation of its contract with the GPO Premier and Immucor's cancellation of its contracts with the GPOs Premier and Novation would have been "unusual and highly risky" absent cooperative behavior. Beyer Aug. Rep. ¶¶ 77-78.

Ortho argues that Dr. Beyer's opinion on this point is unreliable because his methodology consisted "entirely of his reading documents, without critical scrutiny, and without undertaking any independent economic analysis." Mot. 8. Specifically, Ortho contends that Dr. Beyer based his

contract cancellations opinion entirely on a January 2005 Internet article that characterizes the cancellations as unusual and risky. *Id.* The Court disagrees.

An economics expert is permitted to testify whether certain conduct is consistent with collusion and to use the factual record when formulating his or her opinion. *See In re Processed Egg Prods. Antitrust Litig.*, 81 F. Supp. 3d 412, 424 (E.D. Pa. 2015). In *Processed Egg*, defendants challenged an economics expert's opinion that their conduct was consistent with collusion, not self-interest. *Id.* at 422-23. The defendants contended that the expert impermissibly relied solely on the record when formulating his opinion. *Id.* at 420. The court rejected this argument, stating that the expert had assessed the factors that make a market more conducive to collusion and used his expertise to determine "whether actions can be explained by rational self-interest." *Id.* at 422-24.

In this case, Dr. Beyer made a similar inquiry concerning the 2004 GPO contract cancellations. As the expert did in *Processed Egg*, Dr. Beyer conducted an analysis of the traditional blood reagent ("TBR") market and the factors that may have made the market more conducive to collusion. Beyer Aug. Rep. ¶¶ 36-61. Dr. Beyer's opinion is not limited to his analysis of the 2004 contract cancellations. Contrary to Ortho's assertion that Dr. Beyer's opinion is based wholly on an Internet article, Mot. 8, Dr. Beyer considered that each company could have converted the other's customers, the amount of revenue that Immucor put at risk by cancelling its contracts with two GPOs, the statements of multiple individuals employed by Ortho and Immucor, the marketplace reaction, and the GPOs inability to use "their typically powerful negotiating ability with Immucor or Ortho to achieve more favorable pricing." Beyer Aug. Rep. ¶¶ 77-83.

To support its challenge, Ortho cites two cases, *In re Wellbutrin XL Antitrust Litig.*, 308 F.R.D. 134 (E.D. Pa. 2015), and *Maldonado v. Walmart Store No. 2141*, No. Civ. A. 08-3458, 2011 WL 1790840 (E.D. Pa. May 10, 2011). Both cases are inapposite. In *Wellbutrin*, the court excluded an economics expert's conclusions because she relied on instructions from counsel and the

court's choice of law analysis—not economic analysis—in formulating her opinion. 308 F.R.D. at 147. In *Maldonado*, a case arising out of a drowning, an aquatics consultant offered opinions on how a child entered a swimming pool, despite never visiting the accident site or testing any of her hypotheses. 2011 WL 1790840, at \*10. She also offered an opinion on the “most likely” cause of the child's drowning by ruling out environmental conditions and medical conditions. *Id.* at \*11. The aquatics expert did not conduct tests, cite literature to support her conclusion, or review the child's medical records. *Id.* at \*10-11. The *Maldonado* court excluded her testimony in large part because her background as an aquatics expert “[did] not enhance the reliability of her conclusion as to what may have led to [the child's] drowning.” *Id.* at \*11.

In this case, Dr. Beyer used his economics expertise when assessing the 2004 GPO contract cancellations. He conducted research on the market, reviewed and cited to the factual record, and assessed the 2004 cancellations in the context of a broader, well-analyzed Report. His opinion is not merely based on conjecture. Thus, the Court rejects Ortho's challenge to Dr. Beyer's testimony on this ground.

C. Whether Dr. Beyer's “OCV” Benchmark Is Unreliable and Lacks Fit with the Facts of This Case

Dr. Beyer's methodologies for calculating antitrust impact and damages distinguish between price increases resulting from the creation of a duopoly and price increases resulting from the alleged price-fixing conspiracy. Dr. Beyer used a benchmark model to estimate the pricing that would have occurred in a lawful duopoly. For the period between 2001 and 2005, Dr. Beyer based his benchmark on the price increases Ortho planned and partially implemented under the OCV pricing strategy after the duopoly was created but before defendants allegedly formed their price-fixing conspiracy. Dr. Beyer proposes a standard and alternative calculation for formulating but-for prices during the 2001 to 2005 time period.

Under the standard approach, Dr. Beyer calculated but-for prices based on five years of annual 25 percent price increases. Beyer Aug. Rep. ¶ 106. Under his proposed alternative approach, Dr. Beyer based the distribution of but-for price increases for each product on the distribution of actual price increases, but did not change the weighted average but-for price increase of 25 percent per year from 2001 to 2005. *Id.* ¶ 107. Dr. Beyer formulated the alternative approach to account for the “differences in Ortho’s reagent-specific gross profits in 2000 as well as any other reagent-specific factors that occurred between 2000 and 2004. *Id.* Although Dr. Beyer states that cost increases are already incorporated into the OCV benchmark, he also opines that, if required by the Court, he can control for costs by adding the dollar amount of unit cost increases to the but-for prices that he already calculated. *Id.* ¶ 115. Ortho raises a number of challenges to this testimony of Dr. Beyer.<sup>4</sup> The Court will address each of Ortho’s challenges to Dr. Beyer’s use of the OCV benchmark in turn.

1. *Whether Dr. Beyer impermissibly relied on the OCV plan*

Ortho argues that Dr. Beyer did not validate the price recommendations in the OCV business plan and is required “to vouch for the market assumptions underlying that pricing plan.” Mot. 12. The Court rejects this argument. Experts frequently use business plans in calculating damages. *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 292 (3d Cir. 2012). The Court “must perform a case-by-case inquiry to determine whether the expert’s reliance on the business plan in a given case is reasonable.” *Id.*

The Court previously addressed Dr. Beyer’s use of the OCV plan as a benchmark and concluded that it “provides a reliable basis for Dr. Beyer’s benchmark methodology for the first part of the class period.” *Blood Reagents*, 2015 WL 6123211, at \*11. Contrary to Ortho’s contention,

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<sup>4</sup> Ortho challenged Dr. Beyer’s use of the OCV benchmark at the class certification stage on numerous grounds. After analyzing the challenges under *Daubert*, the Court rejected Ortho’s arguments. *See Blood Reagents*, 2015 WL 6123211, at \*9-18. Many of the arguments presented in the current Motion mirror the challenges presented at the class certification stage.

Dr. Beyer did not merely accept the OCV pricing plan “without critical scrutiny.” Mot. 12. Dr. Beyer identified the creators of the plan, Ortho senior management—including eleven senior Ortho managers—and a consulting firm, Norbridge, which was paid nearly \$300,000 for its services. Beyer Aug. Rep. ¶ 66. He observed that Ortho and Norbridge “considered several price increases, conducted dozens of customer interviews, drafted detailed communication plans,” crafted a 172-page presentation on the OCV plan, and recognized that the duopoly with Immucor enabled Ortho to raise prices. *Id.* ¶¶ 66-67. Dr. Beyer also assessed Ortho’s modeling of five different price increase schemes and the motivation behind its ultimate selection of a 25 percent price increase two years in a row. *Id.* ¶ 68.

Ortho itself began to implement the OCV pricing plan in 2000. *Blood Reagents*, 2015 WL 6123211, at \*10. The plan was constructed, designed, and implemented by senior Ortho employees. *See In re Actiq Sales & Mktg. Practices Litig.*, No. 07-4492, 2014 WL 3572932, at \*6 (E.D. Pa. July 21, 2014) (rejecting a similar challenge by the defendant to an expert’s use of the defendant’s internal documents in a damages model because, *inter alia*, the documents supporting the model were prepared by the defendant company and produced during discovery). Furthermore, Ortho had control over its own pricing for products. Dr. Beyer’s selection, after careful scrutiny, of the OCV plan as a benchmark reflects the recognition that the OCV plan was “the product of deliberation by experienced businessmen [within Ortho] charting their future course.” *Blood Reagents*, 2015 WL 6123211, at \*11 (quoting *Autowest, Inc. v. Peugeot, Inc.*, 434 F.2d 556, 566 (2d Cir. 1970)). The Court concludes that Dr. Beyer’s reliance on the OCV pricing plan in calculating damages for the first part of the class period—from 2001 to 2005—was based on Dr. Beyer’s scrutiny of the OCV plan and its foundation. Accordingly, the Court rejects Ortho’s challenge to Dr. Beyer’s testimony on this ground.

2. *Whether Dr. Beyer arbitrarily transformed OCV from a two-year to five-year plan*

Ortho again argues that Dr. Beyer arbitrarily transformed OCV from a two-year to a five-year plan. Mot. 14; *see Blood Reagents*, 2015 WL 6123211, at \*14-15. The Court previously rejected this argument and found that several internal Ortho documents supported Dr. Beyer's use of the OCV pricing plan as a benchmark from 2001 through 2005. *Blood Reagents*, 2015 WL 6123211, at \*14. Ultimately, the Court concluded that "Dr. Beyer's use of the 25% annual increases from 2001 through 2005 as a benchmark is sufficiently reliable and fits the case, and thus satisfies *Daubert*." *Id.* Ortho advances no new arguments on this issue.

Ortho contends that Dr. Beyer's use of the OCV benchmark fails to account for the likelihood that Ortho would adjust its price plans based on information obtained after the adoption of OCV. Dr. Beyer explicitly rejected the use of 1990s prices as a benchmark because it would not "[control] for the change in industry structure." Beyer Aug. Rep. ¶ 102. In contrast, the OCV plan was "based on [Ortho's] recognition that the traditional blood reagents industry in the U.S. had changed into a duopoly." *Id.* ¶ 105. Ortho executives characterized OCV as a multi-year price increase and favored its adoption over a single "market correction." *Blood Reagents*, 2015 WL 6123211, at \*14. When formulating and adopting the strategy, Ortho was aware of its position in a duopoly market and the potential that Immucor might or might not follow Ortho's price increases.

As the Court stated in its October 19, 2015, Memorandum, plaintiffs need not, for purposes of *Daubert*, conclusively demonstrate that the OCV plan would have been implemented through 2005 but for the alleged conspiracy. *Id.* Such a requirement sets the bar too high. *Id.* (citing *Oddi v. Ford Motor Co.*, 234 F.3d 136, 156 (3d Cir. 2000)). Ortho may test Dr. Beyer's assumptions and conclusions with respect to his use of the OCV benchmark beyond 2001, including the effects, if any, of new information obtained after adoption of OCV on continuation of the projected 25% annual price increases, through cross examination at trial. *Id.* at \*15 (citing *Aetna, Inc. v. Blue*

*Cross Blue Shield of Mich.*, No. 11-15346, 2015 WL 1497826, at \*4 (E.D. Mich. Mar. 31, 2015)).

Thus, the Court rejects Ortho's challenge to Dr. Beyer's testimony on this ground.

3. *Whether Dr. Beyer's OCV benchmark fails to account for salient economic factors*

Ortho claims that Dr. Beyer's OCV benchmark does not reliably account for salient economic factors, specifically demand and cost. The Court previously rejected these challenges at the class certification stage. *See Blood Reagents*, 2015 WL 6123211, at \*15-18.

With respect to Ortho's argument that Dr. Beyer's use of the OCV benchmark does not account for changes in demand, Mot. 19, the record demonstrates that demand for TBR was "relatively stable" during the relevant period. Mot., Ex. 7, Reply Rep. of John C. Beyer, Ph.D. Regarding Liability and Damages ("Beyer Reply Rep."), March 25, 2016, ¶ 40 (citing Weiss Decl. ¶ 21). Dr. Beyer acknowledges that aggregate demand for traditional and proprietary reagents grew modestly over time, but states that "the demand for traditional reagents was not increasing because of customers' adoption of proprietary reagents." *Id.* ¶ 41. Dr. Beyer analyzed the total quantity of TBRs sold by Ortho and Immucor from 1999 to 2010, using Ortho and Immucor's transaction data, and determined that the quantity of TBRs sold decreased. *Id.* Dr. Beyer also concluded that changes in price did not affect demand because the demand for TBRs is highly inelastic. *Id.* ¶ 42. After evaluating Dr. Beyer's analysis, the Court concludes that Dr. Beyer's decision not to separately account for demand in the OCV benchmark is not "so important as to render his analysis unreliable," *Processed Egg*, 81 F. Supp. 3d at 430, and rejects this argument as it did at the class certification stage. *See Blood Reagents*, 2015 WL 6123211, at \*15-18.

Ortho also challenges Dr. Beyer's "alternative" calculation of damages, which includes a dollar-for-dollar adjustment for costs, during the period 2001 to 2005.<sup>5</sup> Mot. 18. Dr. Beyer

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<sup>5</sup> Ortho cost data became available in the wake of defense expert Dr. John Bigelow's Report. Dr. Beyer states that use of this new data has not impacted his analysis. Beyer Reply Rep. ¶ 37.

proposes “add[ing] the dollar amount of unit cost increases to the but-for prices” that were previously calculated. Beyer Aug. Rep. ¶ 115. Ortho claims that Dr. Beyer’s use of a dollar-for-dollar adjustment during the first half of the class period compared to his use of a percentage change in costs for the period 2006 to 2010 “cannot be explained on the basis of any economic principle” and “blunt[s] the effect of costs in his estimation of but-for prices.” Mot. 18. It is Ortho’s position that accounting for costs on a percentage basis during the 2001-2005 period would have significantly changed Dr. Beyer’s predicted but-for prices. Mot. 18-19.

The percentage cost adjustment advocated by Ortho was previously rejected by the Court. *Blood Reagents*, 2015 WL 6123211, at \*16-17. The Court agreed with plaintiffs that the use of a “percentage cost adjustment from 2001 to 2005 . . . would distort the extent of cost increases during those years” and that Dr. Beyer had not ignored costs during the first half of the class period. *Id.* at 17; *see also* Mot., Ex. 17, Testimony of Dr. Beyer Class Certification Hr’g Tr. (“Hr’g Tr.”), July 26, 2012, 323:11-326:24 (explaining Dr. Beyer’s decision to account for costs on a dollar-to-dollar basis). Dr. Beyer stated that the percentage cost adjustment advocated by Ortho could result in a cost pass through rate of 10,000 percent. Beyer Reply Rep. ¶ 91.

The Court concludes Dr. Beyer has supported his reasoning for accounting for costs on a dollar-to-dollar basis. Therefore, the Court rejects Ortho’s challenge to Dr. Beyer’s testimony on this ground. As this Court previously stated, “these alleged flaws are appropriate fodder for cross examination at trial, and Ortho may argue to a jury that further accounting for cost and demand would have resulted in a more precise model.” *Blood Reagents*, 2015 WL 6123211, at \*18 (citing *Daubert*, 509 U.S. at 580).

4. *Whether Dr. Beyer’s selection of the OCV plan over the BBLP Plan as the benchmark was arbitrary*

Ortho argues that Dr. Beyer’s selection of the OCV pricing plan instead of the more aggressive Blood Bank Leadership Program (“BBLP”) pricing strategy as a benchmark is arbitrary

because Dr. Beyer “has no *economic* foundation to opine that OCV is evidence of lawful duopoly pricing (and therefore is an appropriate benchmark) and that BBLP is evidence of unlawful collusive pricing (and therefore not an appropriate benchmark).” Mot. 20. Ortho claims that Dr. Beyer’s “disregard of the [BBLP] plan is arbitrary and renders his opinion unreliable.” *Id.* at 22. According to Ortho, Dr. Beyer’s observations about Ortho’s behavior in connection with OCV and its behavior with BBLP should not be credited. *Id.* at 21. Even if his observations are credited, Ortho contends that Dr. Beyer cannot “disqualify BBLP as an appropriate benchmark of duopoly pricing because, as he himself acknowledges, duopolies are susceptible to both *lawful* tacit collusion and *unlawful* collusion.” *Id.*

The Court previously rejected a similar challenge by Ortho, *Blood Reagents*, 2015 WL 6123211, at \*13, and there is no reason to change that determination. Dr. Beyer’s use of Ortho’s OCV plan aligns with “[p]laintiffs’ theory—that Ortho began to consider the BBLP before the American Association of Blood Banks (“AABB”) meetings but would not have executed the plan without explicit assurance that Immucor would follow,” and “is consistent with documents showing that the BBLP only became fully operational after the meetings.” *Blood Reagents*, 283 F.R.D. at 243. The Court previously ruled that evidence presented by Ortho was insufficient to conclusively establish that the BBLP was implemented before the AABB meetings. *Id.* at 229 n.2. The Court rejects Ortho’s challenge to Dr. Beyer’s testimony on this ground and concludes that “this alleged flaw in Dr. Beyer’s methodology ‘may be explored at trial,’ and ‘the trier of fact may properly consider [any such] deficiencies in determining the weight to be accorded to his ultimate conclusions.’” *Blood Reagents*, 2015 WL 6123211, at \*13 (quoting *Poust v. Huntleigh Healthcare*, 998 F. Supp. 478, 498 (D.N.J. 1998)).

D. Whether Dr. Beyer Has a Reliable Benchmark or Yardstick for Prices After 2005

Ortho next challenges Dr. Beyer’s two proposed methods for calculating damages after 2005. Dr. Beyer’s two proposed damage methodologies are a cost-margin benchmark based on cost data<sup>6</sup> and a Rho(D) yardstick that calculates but-for TBR prices based on the price behavior of Rho(D), an Ortho prescription pharmaceutical. Ortho claims that Dr. Beyer’s alleged “failure to account for [d]efendants’ continued market power when estimating TBR prices calls into question both of his post-2005” methods. Mot. 24.

1. *Whether Dr. Beyer’s post-2005 cost-margin benchmark is unreliable and does not fit the facts of this case*

Ortho argues that Dr. Beyer impermissibly relies solely on costs to craft his cost-margin benchmark, while ignoring market structure and demand.<sup>7</sup> *Id.* at 28. The Court previously rejected this argument. *Blood Reagents*, 2015 WL 6123211, at \*20. However, Ortho contends that “subsequent merits discovery has revealed significant problems with this approach here.” Mot. 29. To support this contention, Ortho points to testimony that Dr. Beyer provided in another antitrust case and asserts that the cost-margin benchmark is inconsistent with plaintiff’s academic authority proffered to support the use of this methodology. *Id.* at 29. The Court addresses each argument in turn.

Ortho first highlights testimony given by Dr. Beyer in another antitrust case, *In re Online DVD Rental Antitrust Litigation*, stating that “Dr. Beyer admitted in *Online DVD* that the use of this methodology would *not* be appropriate in a duopoly.” *Id.* at 29. Ortho contends Dr. Beyer opined that “it was unlikely prices in a duopoly would equal marginal costs because in a duopoly the

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<sup>6</sup> Dr. Beyer states that using Ortho’s material cost data to calculate but-for prices only resulted in modest changes to his previously calculated class-wide damages. Beyer Reply Rep. ¶ 37.

<sup>7</sup> Although Ortho raises Dr. Beyer’s failure to account for demand as a challenge, it does not include any substantive arguments about demand in its post-2005 cost-margin benchmark discussion. As Ortho offers no new arguments concerning demand in this Motion, the Court rejects this argument as it did at the class certification stage. *Blood Reagents*, 2015 WL 6123211, at \*20.

parties have some degree of market power” and “there is a significant difference between a duopoly and a market with three competitors . . . prices in a market with two competitors would stabilize at higher levels.” *Id.* at 29.

Ortho mischaracterizes Dr. Beyer’s testimony in *Online DVD*. In that case, Dr. Beyer stated that “the Bertrand model prediction of price equal to marginal cost does not always hold.” Mot., Ex. 32, Expert Report of Dr. Beyer for Class Certification in *Online DVD* (“Beyer *Online DVD*”), ¶ 61. He also stated that markets “with only two participants tend to reach stable prices at higher levels.” *Id.* ¶ 50.

However, these assertions do not render Dr. Beyer’s use of a cost-margin benchmark unreliable or a poor fit under the facts in this case. Dr. Beyer stated, in substance, that the prediction of price equal to marginal cost is not always applicable in a duopoly. In this case, Dr. Beyer posits a but-for price that includes marginal cost plus the benefits from preceding years of price increases. By incorporating multiple years of price increases, Dr. Beyer accounted for the fact that prices in duopolies tend to stabilize at higher levels.

Ortho also contends that Dr. Beyer’s use of a cost-margin benchmark is inconsistent with plaintiffs’ academic support for use of the methodology. Ortho Mot. to Exclude 29-30. Ortho claims that Dr. Beyer has not included a “markup for reasonable profit” as required by the academic work. The Court disagrees. Dr. Beyer’s cost-margin benchmark for the post-2005 years incorporated the annual 25 percent price increases used in his 2001 to 2005 OCV benchmark. These increases represent a “markup for reasonable profit.” The Court concludes Dr. Beyer has good grounds for employing the cost-margin approach for the latter half of the class period. Thus, the Court rejects Ortho’s challenge to Dr. Beyer’s testimony based on his use of the cost-margin methodology for calculating damages after 2005.

2. *Whether use of the Rho(D) yardstick is unreliable*

Ortho challenges Dr. Beyer's use of Rho(D) as a yardstick to calculate damages after 2005. Ortho asserts that there are significant differences in the markets, costs, and demand for TBR and Rho(D). Mot. 24. The Court previously rejected these arguments and concluded that Dr. Beyer's proposed Rho(D) yardstick methodology is reliable and is a fit under *Daubert*. *Blood Reagents*, 2015 WL 6123211, at \*21. While Ortho provides some additional evidence, its arguments remain the same. The Court addresses each argument in turn.

Ortho first argues that the presence of a third firm in the Rho(D) market renders Rho(D) an unreliable yardstick despite Dr. Beyer's opinion that Talecris, the third firm, did not actively compete for market share. Mot. 25. The Court previously rejected this argument. *Blood Reagents*, 2015 WL 6123211, at \*22. Ortho highlights statements by the Federal Trade Commission ("FTC") in the FTC's Complaint seeking to enjoin a proposed merger between two of the three companies in the Rho(D) market and statements by Dr. Beyer in his expert testimony in a separate antitrust case. Mot. 26-27. The FTC stated that the post-merger Rho(D) market would be "significantly more concentrated, and less competitive, with the elimination of Talecris as an independent competitor," and alleged that Talecris competed aggressively in the Rho(D) market. *Id.* According to the FTC, Talecris responded to competition by "lowering its prices and increasing its marketing and promotion activities in an effort to defend market share." Mot., Ex. 31, Federal Trade Commission's Complaint for Temporary Restraining Order and Preliminary Injunction ("FTC Compl."), November 10, 2009, ¶ 77. Ortho argues that these statements contradict Dr. Beyer's opinion on the nature of the Rho(D) market and render the use of the Rho(D) yardstick unreliable. Ortho Reply in Supp. of Mot. 9-10.

Dr. Beyer provides three main reasons why the FTC Complaint does not change his opinion on the use of Rho(D) as an effective yardstick, Beyer Reply Rep. ¶ 58, all based on evidence

presented after issuance of the Court's initial ruling. First, Dr. Beyer concludes that the Rho(D) market was not a primary focus of the Complaint so the statements are of limited use in this case. *Id.* ¶ 59. Second, Dr. Beyer believes that Talecris did not actively compete in the hospital channel, which was Ortho's focus, and the competition referenced by the FTC is in the distributor segment, as demonstrated by Talecris's large decline in market share in the hospital segment during that time period. *Id.* ¶ 60. Third, Dr. Beyer references the decline in Talecris's overall market share from 23 percent in 2003 to 18 percent in 2007. *Id.* ¶ 57.

Ortho also offers testimony from Dr. Beyer in the *Online DVD* case that "[c]ompared to three-firm markets, those with only two participants tend to reach stable prices at higher levels because the removal of the third firm allows for tacit (as opposed to overt) collusion to be reached more quickly." Mot. 26; Beyer *Online DVD* ¶ 50. Ortho argues that "Dr. Beyer did not dismiss the importance of the presence of a third firm in the market, even though that third firm, Walmart, held a less than 2% share of the market." Mot. 27.

Ortho is correct that Dr. Beyer did not dismiss the importance of Wal-Mart's presence in the market despite its small market share. However, Dr. Beyer's complete analysis is more nuanced than Ortho's portrayal. In full, Dr. Beyer stated,

The Federal Trade Commission and Department of Justice merger guidelines expressly recognize that the presence of a *maverick* firm, even if it holds a small share, can effectively prevent coordinated pricing (whether tacit or explicit). Wal-Mart, with deep resources and commitment (prior to the alleged Market Allocation Agreement) to being the low cost leader is the type of price maverick referenced by the merger guidelines.

Beyer *Online DVD* ¶ 50 (emphasis added). Furthermore, *Online DVD* involved accusations that Wal-Mart exited the market pursuant to an agreement with a competitor, as opposed to exercising its full potential as a market maverick. *Id.* ¶¶ 48-50. In *Online DVD*, Dr. Beyer identified Wal-Mart as a maverick firm given its unique position in the market and characteristics. In this case, Dr. Beyer did not conclude that Talecris possessed the same characteristics or potential.

Ortho also reasserts its arguments concerning alleged demand and cost differences between the TBR market and the Rho(D) yardstick. As the Court previously noted, “Dr. Beyer has pointed to evidence that demand was ‘relatively stable,’ or increased only incrementally, just as demand for Rho(D) did during the class period.” *Blood Reagents*, 2015 WL 6123211, at \*22. Dr. Beyer also compared the products because prices for both products were primarily driven by competition in the market, not cost and demand. *Id.*; Beyer Reply Rep. ¶ 67. Based on the same evidence presented at this stage of the proceedings, the Court previously held “even if the demand for the two products differed, it would not render the Rho(D) yardstick so dissimilar as to be inadmissible.” *Blood Reagents*, 2015 WL 6123211, at \*22.

Despite some evidence in the record that undermines Dr. Beyer’s conclusion that Talecris was a passive market participant, Dr. Beyer’s comparability analysis passes muster under *Daubert*. Dr. Beyer accounted for relevant factors, such as product and market comparability. *See Blood Reagents*, 2015 WL 6123211, at \*22 (listing the reasons that Dr. Beyer selected Rho(D) as the yardstick). “While defendant and its expert may take issue with the ultimate conclusions that can reasonably be drawn from the evidence, we leave it to [defendant’s] no-doubt robust efforts at trial to call into question the weight that the jury should accord [an expert’s] testimony.” *Washington v. Kellwood Co.*, No. 05-10034, 2015 WL 2258098, at \*17 (S.D.N.Y Apr. 21, 2015). Accordingly, the Court rejects Ortho’s challenge to Dr. Beyer’s use of Rho(D) as a yardstick to calculate damages after 2005.

E. Whether Dr. Beyer’s Use of One Annual But-For Price Is Incompatible with Price Dispersion

Finally, Ortho argues that Dr. Beyer’s averaging of but-for prices for TBR despite price dispersion in the actual world renders his opinion unreliable. According to Ortho, the unreliability of Dr. Beyer’s assumption of one but-for price becomes even more pronounced after 2004, when Immucor adopted tiered pricing for its TBRs. Courts should “view averages as at least somewhat

suspect, but not as fatally flawed so long as (1) the differentiation among the data being averaged is not so great as to make the use of averages misleading; and (2) there are other indicia that the averages are not concealing the true story of the data.” *Processed Egg*, 81 F. Supp. 3d at 428.

The Court previously rejected this argument as it applied to prices after 2004 and concluded “that Dr. Beyer’s use of averaging in the but-for world does not render his post-2005 damages methodologies inadmissible.” *Blood Reagents*, 2015 WL 6123211, at \* 18. The Court concluded in that opinion “that the variance in pricing for TBR in the actual world was not so significant as to render the use of averages in the but-for world misleading.” *Id.* Ortho has provided no new evidence to support its contention that Dr. Beyer’s averaging of but-for prices is unreliable for the period before or after 2004.

Although it may be possible to construct a benchmark that estimates a separate but-for price for every transaction, in order to do so, plaintiffs would be required “to estimate almost a million different but-for prices,” *Blood Reagents*, 2015 WL 6123211 at \*19, on “no basis other than speculation to estimate [the prices] quantitatively,” *id.* (quoting Hr’g Tr. 492:18-20). Such a requirement would be unduly burdensome. *See J. Truett Payne Co., Inc., v. Chrysler Motors Corp.*, 451 U.S. 557, 565 (1981) (“[D]amage issues in [antitrust] cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts.”).

As the Court stated in its second class certification opinion, Dr. Beyer established separate but-for prices for each type of reagent for each year and he does not rely on averaging for actual prices in the real world. *Id.* at \*19. Dr. Beyer stated he will use the prices actually paid by defendant’s customers in calculating the damages incurred by individual plaintiffs. *Id.*; Beyer Aug. Rep. ¶ 100 (“[F]or purposes of applying overcharge percentages to calculate damages, the universe of purchases will be compiled by customer, product and year for periods . . . January 2001 through December 2010 for Ortho, from . . . [its] electronic database[.]”) Thus, the Court concludes that

variance in pricing for TBR in the actual world does not render Dr. Beyer's methodologies, which use limited averaging in the but-for world, "inexorably unreliable or unhelpful for *Daubert* purposes." *Processed Egg*, 2015 WL 337224, at \*15. Accordingly, the Court rejects Ortho's challenge to Dr. Beyer's use of one annual but-for price for each type of reagent.

## V. CONCLUSION

The Court concludes that Dr. Beyer's use of the OCV and cost-margin benchmarks and the Rho(D) yardstick and his opinion on the 2004 GPO contract cancellations are reliable and fit the facts of this case as presented in the motion papers. For these reasons, Ortho's Motion to Exclude the Expert Testimony and Reports of John C. Beyer, Ph.D., is denied without prejudice to Ortho's right to object at trial to any question or other evidence deemed inadmissible. An appropriate order follows.

Any reliability or fit issues presented by the ruling on Ortho's Motion for Summary Judgment may be addressed by motions *in limine*. A telephone conference for the purpose of scheduling all further proceedings, including the filing of motions *in limine*, will be conducted in due course.