

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS

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NATCHITOCHEES PARISH HOSPITAL  
SERVICE DISTRICT, on behalf of itself  
and all others similarly situated,

Plaintiff,

v.

TYCO INTERNATIONAL, LTD.; and  
TYCO INTERNATIONAL (U.S.), INC.;  
TYCO HEALTHCARE GROUP, L.P.  
THE KENDALL HEALTHCARE  
PRODUCTS COMPANY,

Defendants.

Civil Action No.

05-12

Referred to MJ AB College

U.S. DISTRICT COURT  
DISTRICT OF MASS.  
AMOUNT \$ 905  
LOCAL RULES  
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JURY TRIAL DEMANDED

CLASS ACTION COMPLAINT

1. Natchitoches Parish Hospital Service District dba Natchitoches Regional Medical Center ("Natchitoches" or "Plaintiff") brings this action on behalf of itself and others similarly situated to recover overcharges it and the other members of a class (defined below) paid for Sharps Container systems ("Sharps Containers") as a result of anticompetitive conduct by defendants Tyco International, Ltd., Tyco Healthcare Group, L.P., Kendall Healthcare Products Company (collectively "Tyco" or "Defendants") in violation of the federal antitrust laws. The prices that Plaintiff and the other class members paid for Sharps Containers were artificially inflated because Tyco illegally restrained trade and acquired and/or maintained monopoly power in the relevant market for Sharps Containers during the class period (defined below) by improperly impairing and/or excluding competition from less expensive and/or superior forms of Sharps Containers.

2. Sharps Containers are products that are used for the disposal of needle-inclusive bio-hazard medical products, such as syringes, blood collection devices, and IVs ("sharp" or "sharps"). Hospitals and other health-care entities which use sharps are required by federal regulation and other

practical necessities to dispose of such medical waste in a safe manner. During the Class Period (October 4, 2001 to the present), Tyco has dominated the market for Sharps Containers, selling 70% or more of the Sharps Containers in the United States. As alleged below, Tyco has obtained and/or maintained its domination of the market through an anti-competitive scheme that it has implemented since the late 1990s (if not earlier) to improperly impair, frustrate and/or exclude competition from less expensive and/or superior forms of Sharps Containers. Tyco's anti-competitive practices include: imposing on hospitals and/or other health-care entities market share purchase requirements tied to maintaining or increasing Tyco's dominant market share; bundling its goods for exclusionary purposes; agreeing with Group Purchasing Organizations ("GPOs") to impose exclusionary contracts; and conspiring with other established manufacturers to impose rebate penalties on purchasers relating to a bundle of products.

3. Prior to, and during the Class Period, Tyco bundled or tied its rebates for Sharps Containers with rebates for various unrelated products, such as incontinence products, monitoring electrodes, pneumatic compression devices, pulse oximetry products, and wound care products. Under many of its contracts, Tyco required during the Class Period that a health-care entity use Tyco's Sharps Containers for a high percentage of the health-care entity's Sharps Container needs as a necessary condition for receiving rebates on Sharps Containers **and** other Tyco products, such as those listed above. Tyco's imposition of high and/or dominant market-share-purchase-requirements effectively threatened health-care entities with financial penalties on all Sharps Containers and other Tyco products unless the health-care entity bought nearly all of its Sharp's Containers from Tyco. Thus, a health-care entity that missed meeting an excessively high and arbitrarily-imposed market-share purchase requirement for Tyco's Sharps Containers by only one or two percent would be penalized by losing, *inter alia*: (a) various rebates on *all* of the Tyco Sharps Containers that the health-care entity bought; and (b) various rebates not only on the Tyco Sharps Containers, but also on other Tyco products listed above. Given Tyco's dominance in the markets for many of these other bundled products, the loss of the bundled rebates: (a) would be an extremely

steep and disproportionate penalty that would make it economically impractical (if not impossible) for a health-care entity to use more than *de minimus* amounts of a competitor's Sharps Containers, if any; and (b) made it economically impractical (if not impossible) for a health-care entity to use more than a small amount of a competitor's Sharps Containers.

4. As alleged in more detail below, Tyco's bundled rebates were not based on the absolute volume of Sharps Containers that a health-care entity bought from Tyco, but rather the extent to which the health-care entity denied sales to Tyco's competitors. Tyco's market-share purchase requirements were imposed to create competitive barriers to impair and frustrate fair price competition from rival Sharps Container manufacturers. As a result, Tyco's market-share purchase requirements: (a) had the purpose and effect of improperly denying sales to, and/or excluding from the market, Tyco's competitors through the illegal leveraging of monopoly power; and (b) were not structured to create significant offsetting, pro-competitive manufacturing efficiencies.

5. As part of its scheme, Tyco entered into various agreements with GPOs, which negotiate contracts on behalf of large groups of hospitals and similar entities. These agreements have yielded exclusionary contracts and GPO procedures that prevent GPO members (*e.g.*, hospitals) from purchasing, or even testing, Sharps Containers from Tyco's competitors. Further, Tyco conspired with other established medical device manufacturers to force hospitals and other health-care entities to fill a dominant percentage of their respective Sharps Container needs with Tyco's products. As alleged below, Tyco and other manufacturers used various GPO programs as vehicles to assist each other to exclude their respective competitors. Under these programs, several manufacturers refused to give a hospital rebates on various different, unrelated products unless the hospital filled the excessively high percentage purchase requirement for their Sharps Container needs with Tyco's products. A hospital's potential loss of rebates on a wide variety of products made by different manufacturers was a strong penalty that made it economically impractical (if not impossible) for a hospital to use more than a small amount of the Sharps Containers from Tyco's competitors. By threatening to impose steep price penalties on their products if a health-care entity

used purchased even a small amount from a Tyco competitor, these other manufacturers helped Tyco to maintain and enhance its dominant market share. Tyco reciprocated by imposing similar conditions on rebates for its products, thereby: (a) significantly penalizing hospitals that failed to use the products made by the other conspiring manufacturers; and (b) helping the other conspiring manufacturers to deny sales to, and exclude competition from, their rivals.

6. The cumulative effect of these practices has been to impair and foreclose competing manufacturers of Sharps Containers (such as those competitors with superior and/or less expensive products) from a substantial portion of the Sharps Container market, and to prevent those competitors from (a) gaining market share, (b) achieving economies of scale and scope, and (c) driving down the prices charged by both Tyco and its competitors in the Sharps Container market. Furthermore, by erecting artificial barriers to entry through the exclusionary conduct alleged herein, Tyco also discouraged potential rivals from even attempting to invest the resources necessary to challenge Tyco's dominance in the relevant market (defined below).

7. Absent Tyco's anti-competitive conduct, Plaintiff and the other Class members would have paid less for the Sharps Containers that they purchased during the Class Period. Prices for these products would have been lower with unfettered competition because absent the exclusionary conduct: (a) Tyco would have lowered its prices for Sharps Containers in response to the threat of actual and/or potential competition; and/or (b) members of the Class would have replaced some of their Tyco Sharps Containers with less-expensive Sharps Containers sold by Tyco's competitors. Given that: (a) unfettered competition would have allowed Tyco's rivals to achieve efficiencies that would have enabled them to lower their prices to all purchasers; and (b) the presence of actual and/or potential competition would have forced Tyco to lower its prices, all direct purchasers of Tyco's Sharps Containers would have paid lower prices for the Sharps Containers they bought. Due to Tyco's unlawful conduct, Plaintiff and the other Class members paid supra-competitive prices for their purchases of Sharps Containers during the Class Period. Plaintiff seeks to recover the improper overcharges on behalf of itself and a class of other entities that purchased Sharps

Containers directly from Tyco during the Class Period. Plaintiff demands a jury trial.

**JURISDICTION AND VENUE**

8. Plaintiff brings this action pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15(a) and 26, to recover treble damages, costs of suit and reasonable attorneys' fees for Defendants' violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2. Subject matter jurisdiction is proper pursuant to Section 4(a) of the Clayton Act, 15 U.S.C. § 15(a), and 28 U.S.C. §1331 and 1337, because the action arises under the laws of the United States.

9. Venue is proper in this judicial district pursuant to Section 12 of the Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. § 1391(b) and (c) because, during the Class Period, Defendant resided, transacted business, was found, or had agents in this district, and because a substantial part of the events giving rise to Plaintiff's claims occurred, and a substantial portion of the affected interstate trade and commerce described below has been carried out, in this District.

10. The Court has personal jurisdiction over Defendants pursuant to Section 12 of the Clayton Act, 15 U.S.C. § 22.

**PARTIES**

11. Natchitoches Parish Hospital Service District is organized under the laws of the State of Louisiana and is located at 501 Keyser Avenue, Natchitoches, Louisiana, 71457. Plaintiff bought sharps disposal containers during the Class Period directly from Tyco.

12. Tyco International, Ltd. is a Bermuda corporation headquartered at 90 Pitts Bay Road, Pembroke HM 08, Bermuda. Tyco International, Ltd. reported \$40.2 billion in net revenue in connection with worldwide sales and \$21.2 billion in net revenue in connection with U.S. sales for fiscal year 2004.

13. Tyco International (US), Inc. is a corporation duly formed and existing under the laws of the State of Massachusetts. On information and belief, Tyco International (US), Inc. was formerly known by the name "Tyco International, Ltd." Tyco International (US), Inc. has corporate headquarters in Princeton, New Jersey and Portsmouth, New Hampshire.

14. Tyco Healthcare Group, L.P. is a Delaware partnership, and a Tyco International (US), Inc. affiliated company. On information and belief, Tyco Healthcare Group, L.P. was formerly named the Kendall Company, L.P.

15. The Kendall Healthcare Products Company is located at 15 Hampshire Street, Mansfield, Massachusetts, 02048. Kendall is a business unit of Tyco Healthcare that manufactures and markets a broad range of sharps disposal, wound care, needles and syringes, vascular therapy, urological care, incontinence care, and nursing care products. The term "Tyco" herein includes and refers to all of the Defendants named herein, as well as their parents and subsidiaries.

### CLASS ALLEGATIONS

16. Plaintiff brings this action as a class action pursuant to the Federal Rules of Civil Procedure 23(a) and/or (b)(3), on its own behalf and as a representative of the following class of persons and entities ("the Class"):

All persons who purchased Sharps Containers in the United States directly from Tyco at any time during the period October 4, 2001 through the present (and continuing until the effects Tyco's anticompetitive conduct alleged herein cease) (the "Class Period"). The Class excludes Tyco, Tyco's parents, subsidiaries and affiliates.

17. Joinder of all Class members is impracticable. While the size of the Class is not yet known with certainty, based on the nature of the trade and commerce involved, Plaintiff believes that the Class numbers potentially in the hundreds, if not thousands. Class members are geographically dispersed throughout the United States. The Class members are readily identifiable from information and records in the exclusive possession of Defendants.

18. Defendants' conduct in violation of the antitrust laws, the effects of such violations, and the relief sought are all issues that are common to the Plaintiff and the Class. Questions of law and fact that are common to the Class, include but are not limited to:

- a. whether Tyco obtained, maintained and/or possessed market and/or monopoly power in the market for Sharps Containers in the United States during the Class Period;
- b. whether Tyco obtained and/or maintained its market and/or monopoly power through willful, anti-competitive and/or unlawful activity;

- c. whether Tyco engaged in illegal agreements, contracts, combinations, and/or conspiracies, the purpose and effect of which was to unreasonably restrain competition in the Sharps Containers market;
- d. whether Tyco's illegal agreements, contracts, combinations, and/or conspiracies have caused Plaintiff and the members of the Class to suffer antitrust injury;
- e. whether Tyco's sole-source contracts with GPOs, as part of its overall scheme to monopolize, are unreasonable restraints on trade and competition in violation of the federal antitrust laws;
- f. whether Tyco's unlawful conduct caused Plaintiff and other Class members to pay more for Sharps Containers than they otherwise would have paid;
- g. the appropriate Class-wide measure of damages; and
- h. the proper definition of the relevant market;

19. Plaintiff's claims are typical of the claims of the members of the Class. Plaintiff and other Class members purchased Sharps Containers directly from Tyco and were injured by the same wrongful conduct.

20. As a representative of the Class, Plaintiff will fairly and adequately protect the interests of all Class members, and has engaged counsel experienced and competent in antitrust and class litigation. The interests of the Plaintiff are coincident with, and not antagonistic to, the interests of the other Class members.

21. The questions of law and/or fact that are common to the members of the Class predominate over any questions affecting only individual Class members. Whatever possible difficulties may exist in the management of the class action are greatly outweighed by the advantages of the class action procedure, including, but not limited to, providing Class members with a method for redress of claims that might otherwise not warrant individual litigation.

22. Class action treatment is a superior method for the fair and efficient adjudication of the controversy, in that, among other things, such treatment will permit a large number of similarly situated persons to prosecute their common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of evidence, effort, and expense that numerous individual actions would engender. A class action enables injured persons or entities to obtain redress on claims that might not

be practicable to pursue individually. Class treatment also eliminates the potential for inconsistent adjudications.

### **TYCO'S MONOPOLY POWER**

23. The relevant geographic market for analyzing this case is the United States.

24. The relevant product market for analyzing the claims in this case is the market for Sharps Containers. Domestic sales for Sharps Containers is over \$250 million to \$300 million annually.

25. By virtue of its power to control prices and/or exclude competition in the market for Sharps Containers, at all relevant times, Tyco had market and/or monopoly power with respect to Sharps Containers. During the Class Period, Tyco's share of the nationwide market for Sharps Containers has been 70% or more.

26. Other factors indicative of Tyco's market and/or monopoly power include, *inter alia* that: (a) Tyco had the ability to, and did, engage in price discrimination among and between various categories of Sharps Container purchasers; (b) Tyco charged well above the marginal cost for its Sharps Containers; and (c) Tyco excluded, frustrated and/or impaired actual and potential Sharps Container competitors by creating substantial barriers to market entry. As a result of its market and/or monopoly power in the Sharps Container market, Tyco charged supra-competitive prices for its Sharps Containers during the Class Period. Tyco has had annual revenue of approximately \$200 million in the United States Sharps Container market.

### **FACTUAL ALLEGATIONS**

#### **A. The Market For Sharps Containers**

27. Sharps Containers are systems used for the disposal of needle-inclusive bio-hazard medical products, such as syringes, blood collection devices, and IVs ("sharp" or "sharps"). Hospitals' use (and purchase) of Sharps Containers has substantially increased since the mid-1990s as hospitals have placed greater emphasis on preventing accidental needle-stick injuries. This increased emphasis on needle-stick injury prevention was prompted, in significant part, by the Needlestick Safety and Prevention Act which President Clinton signed on November 6, 2000. The Needlestick Safety and



Prevention Act modified the Bloodborne Pathogens Standard, 29 C.F.R.1910.1030 (the "Act"), which is one of the health and safety standards promulgated by the U.S. Department of Labor's Occupational Safety and Health Association ("OSHA"). The Act directed that employers of workers with occupational exposure to blood-borne pathogens must use effective engineering controls, including safer medical devices, in order to reduce the risk of injury from needle-sticks and other sharp medical instruments. The requirement that hospitals and health-care entities begin switching to safety-engineered products -- including the use of Sharps Containers -- to prevent needle-stick injuries, became effective on April 12, 2001.

28. While the Needle-Stick Injury Prevention Act was not passed until November 2000, it was the result of several years of efforts to have such safety legislation passed. As a result, it was foreseeable well before 2000 that there would eventually be legislation that encouraged (if not mandated) the use of various safety precautions in connection with sharps and hypodermic products.

29. During the mid-to-late 1990s, there were various companies which manufactured Sharps Containers. As it became increasingly apparent that there would be safety legislation regarding needle-stick injuries, Tyco began increasing its position in the Sharps Container market by acquiring several notable Sharps Container manufacturers. For example, on November 2, 1998, Tyco acquired Graphic Controls Corp. Similarly, on May 5, 2000, Tyco acquired Sage's Sharps Container product line, which was a well known brand of Sharps Containers.

30. By these (and other) acquisitions, Tyco was able to not only increase its share of the Sharps Container industry, but also to obtain additional exclusionary GPO contracts, which had the effect of impairing and/or foreclosing rival Sharps Container manufacturers from substantial portions of the relevant market. For example, Graphics Control received a five-year Sharps Container contract with one large, national GPO (Premier, Inc.) in April 1997 and a Sharps Container contract with another large national GPO (HSCA) in February 1998. By acquiring Graphics Control in November 1998, Tyco obtained these GPO contracts. Similarly, in August 1999, another GPO (AmeriNet) signed a

Sharps Container contract with Graphics Control and Sage. The May 2000 Sage Acquisition resulted in Tyco controlling both of the Graphics Control and Sage product lines under that contract.

31. In addition to increasing its market dominance through various acquisitions, Tyco also used the multi-faceted scheme alleged below to improperly impair, frustrate and exclude competition from other Sharps Container manufacturers. While Graphics Control and Sage had notable Sharps Container product lines, they were not the only competing Sharps Container manufacturers. For example, Daniels Sharpsmart (“Daniels”) designs, develops, manufactures and markets reusable Sharps Container systems. In or about 2000, Daniels began marketing and selling its Sharps Containers in the United States, after receiving FDA Approval. In addition to the containers themselves, Daniels also provides service for the containers (“washing”) by an automated robotic decanting and sanitization process known as Washsmart™. This machine sanitizes the containers and makes them fit for reuse in patient-care environments. Collectively, the containers and the Washsmart™ machine are the basic elements of the “Daniels Sharpsmart Solution.” The containers are available in multiple sizes and variations.

32. Daniels’ Sharps Container products and services not only provide an efficient and economical method of bio-hazardous waste disposal, but also increase healthcare worker safety. In a study entitled, “Sharps Injury Reduction Using Sharpsmart™ - A Remarkable Sharps Management System,” which was published in the Journal of Hospital Infection, Vol. 54, Issue 3, pp. 232-238, the authors found an 86% reduction of container related sharps injuries (“CRSI”). Sharps injuries, which number in the hundreds of thousands annually in the United States alone, are a serious issue for healthcare workers who are placed at risk of fatal diseases such as AIDS and Hepatitis C.

33. Unlike other Sharps Containers on the market, Daniels’ Sharpsmart™ is puncture resistant, leak proof, restricts hand access and prevents overflow. Such features serve to greatly enhance the safety of healthcare workers and those disposing and/or transporting the bio-hazardous waste containers. While the use of other Sharps Containers continues to result in sharps injuries, the Daniels’ system appears to have virtually eliminated CRSI.

34. In contrast to Daniels, Tyco markets disposable, non-reusable Sharps Containers. Whether reusable or disposable, the Tyco and Daniels products can be used for disposal of virtually any sharp. Tyco's Sharps Containers are more costly in terms of both hard and soft costs. In addition, to extra costs that are eliminated or avoided because of the reduced safety risks associated with the Daniels' system, the Daniels' system is priced at or below Tyco's prices.

35. In an open and competitive market, the superior combination of product efficacy, health and protection, and pricing would have enabled Daniels to obtain significant sales in the United States market for Sharps Containers, which would have forced Tyco to lower the prices of its Sharps Containers as a competitive response. Since 2000, when Daniels started marketing its Sharps Containers in the United States, Daniels has sold approximately 40,000 Sharps Containers to healthcare facilities in the United States, which constitutes approximately 2% of the sales in the market. By contrast, in other countries -- such as Australia, New Zealand, Great Britain (UK), and Canada -- where Daniels has been allowed to freely compete without the kinds of artificial barriers to entry alleged herein, Daniels Sharps Containers have obtained market shares ranging from 30% - 80%.

**B. TYCO'S SCHEME TO IMPAIR AND EXCLUDE COMPETITION**

36. Tyco's strategy to impair, frustrate and/or foreclose competition from rival manufacturers of Sharps Containers included three primary components: (a) exclusionary market-share maintenance requirement contracts; (b) exclusionary bundling practices; and (c) exclusionary agreements with GPOs and other manufacturers. All of these activities had the purpose and effect of substantially impairing and/or foreclosing competition from rival Sharps Container manufacturers.

**1. Background Regarding Group Purchasing Organizations**

37. A significant number of health-care entities in the United States buy their Sharps Containers from Tyco based on contracts that are negotiated for them by various GPOs. The GPOs do not buy the products for their members. Instead, the GPOs negotiate contracts with manufacturers and suppliers on behalf of the GPO-members. The GPO-member hospitals -- not the GPOs -- actually sign the contracts with the manufacturers, and a hospital's purchases must be pursuant to provisions of the

model contracts that are negotiated with GPOs. As alleged in more detail below, member hospitals that do not comply with the contracts negotiated by their GPOs face the risk of significant and varied financial penalties.

38. Varying sources estimate that between 68% to 98% of the nation's hospitals currently belong to at least one GPO. Although at one time there were many relatively small GPOs, mergers in the mid-1990s have yielded a handful of massive, dominant GPOs.

39. Premier and Novation are the two largest GPOs in the United States. Premier was formed in 1996 by a merger of three smaller GPOs, and Novation was formed by the 1998 merger of VHA (which consists of veterans' hospitals) and UHC (which consists primarily of university hospitals). Novation negotiates model contracts with manufacturers for approximately 2,200 health-care entities nationwide, which buy approximately \$19.6 billion worth of various products, including, medical supplies, surgical supplies, pharmaceuticals, diagnostic imaging products, business products, laboratory products, dietary and food products, and capital equipment. Premier (and its subsidiaries or affiliates) represents over 1,600 member hospitals in the United States on whose behalf Premier negotiates model contracts with manufacturers. Together Novation and Premier negotiate contracts for \$34 billion in annual sales (not including VHA's other company, HPPI, which has 8,000 members with \$8 billion in annual purchases).

40. VHA/Novation's hospital members buy an estimated 35% of the Sharps Container products sold every year in the United States, and collectively the VHA/Novation hospital members and Premier's hospitals members buy an estimated 65% or more of the Sharps Container products purchased every year in the United States. As a result, Tyco's ability to impair, frustrate and/or prevent its rivals from selling to Novation and Premier hospitals has substantially foreclosed competition in the Sharps Container market.

## **2. Tyco's Market-Share Maintenance Purchase Requirements**

41. Prior to, and throughout, the Class Period, Tyco used (and continues to use) exclusionary contracts with hospitals and/or other health-care entities in order to impair, frustrate and/or

foreclose competition from actual or potential Sharps Container manufacturers. Under Tyco's exclusionary contracts, the price that a health-care entity pays for Tyco's Sharps Containers is explicitly conditioned on the requirement that the health-care entity help maintain Tyco's market share by agreeing to fill all, or nearly all, of its Sharps Containers needs with Tyco products. Under these contracts, health-care providers risked forfeiting substantial rebates if they filled even a small percent of their Sharps Containers needs with products from Tyco's competitors. Indeed, under Tyco's contracts, if a health-care entity were to purchase less than the imposed percentage requirement of Sharps Containers from Tyco, then the health-care entity would be penalized by: (a) being required to pay higher prices for all the Tyco Sharps Containers that the entity bought; (c) losing post-purchase rebates for all the Tyco Sharps Containers it bought; and (d) in some circumstances, being forced to re-pay past rebates that it received in connection with its prior purchases of Tyco Sharps Containers.

42. For example, in January 2001, Tyco and Novation entered into an agreement which sets the terms under which Tyco sells Sharps Containers to Novation's more than 2,200 member hospitals. This contract -- which initially lasted until July 31, 2005 (and was then subsequently renewed for another multi-year term) -- provides that hospitals will suffer substantial penalties, such as being forced to pay high penalty prices if they do not buy 80% to 90% of their Sharps Container products from Tyco. Thus, the most favorable rebates and prices are not linked to the volume that a health-care entity purchases, but instead are explicitly linked to the shunning of Tyco's rivals.

43. Tyco ensures adherence to the exclusivity provisions in its contracts by various means. For example, under the Novation agreement, Tyco's sales representatives review hospitals' purchases to determine "member's market share level and eligibility for associated discounts." The agreement also requires hospitals to disclose their purchases to Tyco, which has complete discretion to determine the hospital's compliance with exclusivity requirements. In some instances, hospitals are advised that they may be running afoul of their exclusivity requirements when that is not the case. Hospitals that do not comply with these exclusivity requirements (or that are deemed to have not complied) face significant financial penalties. Because of the manner in which compliance with Tyco's contracts is policed, and

because of the prohibition on evaluation of competing products, GPO member hospitals are deterred from purchasing non-Tyco Sharps Container products.

44. Finally, these contracts generally provide that if a hospital determines that it no longer desires to continue purchasing the required percentage of Tyco's Sharps Container products, then all rebates received at any time on all products under the contract must be forfeited and repaid to Tyco. Thus, as an economic reality, the penalties are so high that hospitals are not free at will to either terminate or reduce their purchases of Tyco's Sharps Containers (by, for example, buying a competitor's Sharp Containers).

45. Tyco also has contracts with GPOs such as Premier and Consorta, which, like the Novation contract, are vehicles to lock out competitors and enhance Tyco's monopoly position. Premier has over 1,600 member hospitals, while Consorta has hundreds more members. As such, these two GPOs constitute a significant portion of the Sharps Container market. If the members fail to adhere to the contractually required percentage of purchases, rebates are forfeited and costs rise. Again, this serves as a strong-arm enforcement mechanism to maintain exclusivity. Thus, these GPO agreements effectively guarantee market share to its manufacturer of choice.

46. Because of the GPO contracts, Daniels, and possibly other actual or potential Sharps Container rivals, have been prevented from selling (or even demonstrating for evaluation) their Sharps Container system to GPO member facilities, including, but not limited to New Hanover in Wilmington, North Carolina, HSHS (Hospital Systems Health Sisters) in Central Illinois, and St. James, Illinois.

47. Tyco's market-share maintenance purchase requirements: (a) have the purpose and effect of denying sales to, and/or excluding from the market, actual and/or potential rivals who were seeking to enter or increase their sales and market share, and thereby to benefit from economies of scale and sell their products to all direct purchasers at lower prices; (b) have the purpose and/or effect of discouraging potential rivals from even attempting to invest the resources necessary to challenge Tyco's dominance in the relevant market; and (c) do not create any significant offsetting, pro-competitive manufacturing efficiencies.

## 2. Tyco's Bundling Practices

48. Tyco also impaired and/or foreclosed competition by forcing contract customers to buy a high percentage of an entire bundle of multiple Tyco products (such as incontinence products, monitoring electrodes, pneumatic compression devices, pulse oximetry products, and wound care products) in order to avoid paying penalty prices or losing rebates on any of the products in the bundle. Tyco is a large, diversified company, that sells several different types of health-care products. Through Tyco's bundling practices, a health-care entity would forfeit rebates for its purchases of several different Tyco health-care products merely because the health-care entity failed to satisfy Tyco's market-share maintenance provisions by buying a high percentage of each of these different products, including Tyco's Sharps Containers.

49. Through its bundling practices, Tyco threatened penalties on a variety of products in order to exclude competition in the market for Sharps Containers, and thus increase and/or maintain its monopoly power in the Sharps Container market. Because Tyco's rebates were tied to meeting the market-share maintenance requirements for each and every product in Tyco's bundle, health-care entities faced severe penalties on multiple products even if they used Tyco products for more than the high-percentage requirements of their needs in the other product categories but chose to buy even a small percentage of a competitor's Sharps Containers that exceeded the arbitrarily-imposed limit. The threatened penalties act as an enforcement mechanism to prevent hospitals from buying Sharps Containers from Tyco's rivals.

50. Many of Tyco's actual or potential competitors in the Sharps Containers market were smaller and less powerful companies with a far smaller range of products, and in some instances, only a single product or line of products. As a result, in many (if not all) instances, the smaller, excluded potential or actual competitors (such as Daniels) could not seek to attract Sharps Containers sales by offsetting (or offering greater) discounts, because even if the excluded rival were to substantially discount its competing Sharps Containers it could not possibly compensate a health-care entity for all

of the penalties that the health-care entity would be forced to pay for the entire bundle of Tyco products if it shifted even a small percentage of its Sharps Containers purchases to one of Tyco's rivals.

51. Tyco's bundling practices, market-share maintenance requirements, and other exclusionary practices, foreclosed and/or impaired actual or potential competitors in the Sharps Container market, and entrenched Tyco's monopoly power in that market.

**3. Tyco's Agreements with GPOs and Other Manufacturers to Impair And Foreclose Competition From Rival Sharps Container Manufacturers**

52. Tyco's scheme to impair or exclude competition from rival Sharps Containers manufacturers, was aided by: (a) various GPOs who took steps, and enacted procedures that induced, pressured and/or effectively coerced GPO-members not to buy Sharps Containers made by other manufacturers; and (b) a conspiracy between Tyco and other manufacturers, who collectively used the GPO programs as a vehicle to help each other impair and/or frustrate competition from their respective rivals.

**a. GPOs Aided Tyco's Scheme**

53. GPOs were originally conceived as a way for hospitals to save money by allowing them to pool their purchasing power in order to negotiate lower prices from manufacturers on an array of medical products and other goods. For example, Novation maintains agreements with almost 500 supply and distribution partners, encompassing 75 percent of the products that its members purchase, including medical supplies, surgical supplies, pharmaceuticals, diagnostic imaging products, business products, laboratory products, dietary and food products, capital equipment and related services. Other GPOs, such as Premier and MedAssets, also negotiate agreements for their members with hundreds of different suppliers regarding hundreds (if not thousands) of different products.

54. Because GPOs are nominally acting as the hospitals' bargaining agents, member-hospitals originally funded the GPOs. Prior to 1986, any payments that a manufacturer made to a GPO would be considered an illegal "kickback" in violation of the Social Security Act's "anti-kickback" provisions. In order to allow manufacturers (rather than the hospitals) to pay the GPOs, the Social Security Act "anti-kickback" provisions were amended to create an exception for amounts paid by



vendors to a GPO so long as: (a) the fees were kept at 3% or less of the purchase price; and (b) the GPO fully disclosed, in writing, to each member, all fees received from each vendor with respect to purchases made by, or on behalf of, the member.

55. Partially as a result of this change in the law, GPOs are now financed by the very suppliers -- such as Tyco -- that the GPOs are supposedly negotiating against at arms-length, and whose products the GPOs are supposed to be independently evaluating. Because Tyco sells numerous different products to GPO-member hospitals, it pays the GPOs millions of dollars in fees each year. As a result, the more GPO-member hospitals spend on Tyco's products, the more money the GPOs receive from Tyco, and thus the more influence Tyco has over the GPOs.

56. While the GPOs ostensibly appear to be administrative "middlemen," who act as negotiating conduits between manufacturers and health-care entities, the true function of many GPOs as it relates to Sharps Containers has been to deliver substantial market share to Tyco in exchange for substantial fees and other forms of remuneration. For example, Tyco pays GPOs an "administrative fee" on Sharps Container products sold to the GPO member hospitals. Tyco also makes additional sizable payments to GPOs in return for so-called "committed contracts," which obligate member hospitals to buy these products from Tyco. As alleged in more detail below, through these payments and other means, Tyco has induced GPOs to enter into multi-year agreements that contain exclusivity provisions that have the purpose and/or effect of preventing competitors from challenging Tyco's monopoly (and supra-competitive prices) in the Sharps Container market. As a result of these agreements, a substantial portion of the Sharps Container market has been foreclosed from competition.

57. Prior to, and during, the Class Period, GPOs undertook various actions, and enforced various policies and procedures, all of which had the purpose and/or effect of helping Tyco to exclude competition from rival Sharps Container manufacturers. Through the payment of sizable fees, Tyco has induced Novation and Premier to enter into anti-competitive agreements, the purpose and effect of which was to maintain and advance Tyco's monopoly power in the Sharps Container market and to impair or exclude competition from rival Sharps Container manufacturers.

58. For example, in January 2001 Novation awarded Tyco a sole-source contract which effectively made Tyco the only Novation-approved Sharps Container manufacturer from which the Novation-member hospitals could buy without being subject to substantial penalties. Tyco's sole-source contract with Novation has been significant, because various GPOs enacted policies and procedures that would heavily penalize any GPO-member hospitals that did not buy Sharps Containers from GPO approved vendors. For example, according to Daniels, it had attempted to sell its Sharps Containers to Wadley Regional Medical Center in Texarkana, Texas. However, when contacted, the purchasing manager for Wadley Regional Medical Center advised that "Wadley is a Novation Hospital" and that Wadley could not utilize Daniels' products unless and "until Daniels is awarded a Novation Contract." According to Daniels, it has experienced the same problem in other Novation facilities, such as Riverside in Chicago, Illinois, Erlanger in Chattanooga, Tennessee, Harbor Hospital in Baltimore, Maryland, and MCV in Richmond, Virginia. Such facilities are not choosing Tyco Sharps Container products based upon merit. Rather, they "chose" Tyco's Sharp Container product based on one criteria -- which manufacturer is on the exclusive contract.

59. Similarly, Premier has awarded a sole-source contract to Tyco for Sharps Containers. Premier's board of directors has adopted a general policy of commitment that requires all member hospitals to sign a letter of intent to comply with any commitment contracts that Premier negotiates with suppliers. Any Premier member that bought Sharps Containers made by other, non-approved manufacturers (such as Daniels), ran the risk of being expelled from the Premier organization and losing rebates on hundreds of other products.

60. Because of Premier's policies, Premier's member hospitals are effectively forced to contract only with suppliers approved by Premier. Because GPOs such as Premier negotiate discounts and rebates from hundreds of suppliers regarding hundreds of different, unrelated products -- such as Jello, rubber gloves, pharmaceuticals, etc. -- expulsion from a GPO like Premier would mean that any significant purchases from non-approved manufacturers could cause a hospital to lose current (and

potentially past) discounts and/or rebates on hundreds of unrelated products from hundreds of different, unrelated manufacturers.

61. The effect of Premier's policies coerced Premier members to: (a) enter into Tyco's exclusionary contracts; and/or (b) avoid Sharps Containers made by other, non-approved, rival manufacturers. As a result of this arrangement, Premier-member hospitals are effectively prohibited from buying competing Sharps Containers without significant penalties.

62. Tyco's sole-source contracts with Novation, Premier, and other GPOs including, among others, Consorta, worked to significantly impair and/or foreclose other Sharps Container manufacturers from selling their products to health-care entities.

**b. Tyco Used GPO Programs as Vehicles to Conspire with Other Medical Device Manufacturers to Assist Each Other to Impair and Foreclose Their Respective Competitors**

63. In addition to Tyco's bundling practices involving its own diverse product-line, alleged above, Tyco's exclusionary scheme also involved using various GPO programs to expand its bundling practices even further by conspiring with other manufacturers. As a result, rebates on **other manufacturers'** products were conditioned on the requirement that a health-care entity fill an artificially high percentage of its Sharps Containers needs with Tyco products. Accordingly, a health-care entity that chose to buy significant amounts of Sharps Containers from one of Tyco's rivals would lose rebates on **other manufacturers'** products in other markets.

64. For example, in 1995, VHA (Novation's parent) created a program entitled the "Opportunity" program, which according to VHA, is a "portfolio" purchasing program that combines 13 unrelated products made by 7 different manufacturers. Under the Opportunity program, a VHA-member hospital will not receive rebates from any of the 7 manufacturers regarding the products in the portfolio, unless the VHA-member bought at least 95% of its needs of each of the 13 products from the VHA-designated vendors. In January 2001, VHA/Novation extended the Opportunity program under the name the "Spectrum" program, which involved 3 different baskets or "portfolios" of products from

different manufacturers. Since January 2001, Tyco's Sharps Containers have been included in both the Spectrum I and Spectrum III portfolios.

65. Under programs such as these, a hospital would be threatened with losing certain rebates on numerous unrelated products made by different manufacturers if the hospital failed to buy at least 95% of its Sharps Container needs from Tyco. Thus, if a hospital that participates in the Opportunity/Spectrum programs fall even marginally below Tyco's high market-share percentage purchase requirements for Sharps Containers, the hospital would be denied rebates from all of the different manufacturers in the program for various products in the portfolio, regardless of the volume or amount of products that the hospital bought from these other manufacturers.

66. The threatened, punitive loss of rebates under programs like VHA's Opportunity/Spectrum program was magnified by the fact that a participating hospital that failed to comply with the program's 95%-commitment requirements would not only lose rebates on the different manufacturers' products for its current and future purchases, but also could be forced to repay rebates on the various products that the hospital received for *past* purchases while it was in the program. The effect of these program terms was that the penalties for buying Sharps Containers from rival manufacturers substantially increased over time. Because a hospital could lose past rebates on all of the different unrelated products in Novation's program if the hospital failed to remain in compliance, the longer the hospital stays in the program (and continues to buy 90% of its product needs from the other participating manufacturers), the more the hospital could potentially lose from deviating from the program.

67. A Novation hospital would violate the rules for the VHA's Opportunity/Spectrum program, even if the hospital did not buy a rivals Sharps Container, but merely considered it. The VHA Opportunity/Spectrum program expressly prohibits hospitals that participate in the program from soliciting bids from competing Sharps Container manufacturers, examining rival products, or even entertaining rival proposals. Such contracts provided that "organizations that perform evaluations of competitive products may lose the Novation discounts within 30 days of the start of the evaluation."

If a hospital violates these restrictions, the hospital would lose not only the additional rebates from Tyco, but also: (a) the rebates regarding the various products sold by the other manufacturers that participated in the program; and (b) past rebates that were paid by Tyco and the other manufacturers in the program. Thus, a Novation hospital that even tested Sharps Containers from a rival (such as Daniels) risked severe and extraordinary penalties. Because hospitals generally will not purchase products without testing them first, hospitals that wish to avoid the significant penalty provisions of the Tyco contracts are prevented by this agreement from purchasing Daniels' Sharps Containers. According to Daniels, because of Tyco's contracts with GPOs prohibit hospitals from evaluating competing products, many hospitals refused to even meet with Daniels' sales representatives or to evaluate or consider its products. Thus, even though the Novation contract does not expressly require hospitals to buy 100% of their Sharps Container products from Tyco, the hospitals' inability to test or evaluate competitors' Sharps Containers has that practical effect.

68. The practical effect of the foregoing restrictions has been to force participating hospitals to buy all (or substantially all) of their needs for the different products from the manufacturers in the program, including Tyco. This is because it is difficult (if not practically impossible) for a hospital to purchase a rival product if the hospital cannot initially consider the product in connection with a sales presentation, the hospital cannot test or evaluate the rival product, and the hospital cannot even request or consider a bid or pricing proposal from the rival without losing rebates on other products from other manufacturers.

69. As alleged above, the various multi-manufacturer programs described above are intentional conspiracies in which different unrelated manufacturers have agreed to use the rebates on their various products with the purpose and effect of maintaining Tyco's market share, and entrenching its market and/or monopoly power by excluding competitors. Because of its ongoing involvement with these various GPO programs, Tyco knew throughout the Class Period that it was giving GPO-member hospitals additional rebates on Sharps Containers based on the extent to which the GPO-member hospitals were buying other manufacturers' unrelated products in other markets. In addition