

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

NAATCHITOCHE'S PARISH HOSPITAL
SERVICE DISTRICT and JM SMITH
CORPORATION d/b/a SMITH DRUG
COMPANY on behalf of themselves and all
others similarly situated,

Plaintiffs,

v

TYCO INTERNATIONAL, LTD.; TYCO
INTERNATIONAL (US) INC., TYCO
HEALTHCARE GROUP LP; THE
KENDALL HEALTHCARE PRODUCTS
COMPANY,

Defendants.

Civil Action No. 05-12024 PBS

**DEFENDANTS' COMMENTS RE THE
DRAFT REPORT OF DR. ORLEY
ASHENFELTER**

I. INTRODUCTION

Covidien respectfully submits the following comments and responses to the draft report of Dr. Orley Ashenfelter (the "Draft Report" or "DR").¹

The Draft Report lays out an appropriate framework for understanding the flaws in Prof. Elhauge's econometric work. The Draft Report correctly finds that the validity and reliability of Prof. Elhauge's analyses rest on two vital, but untested, assumptions about the characteristics and preferences of buyers in Prof. Elhauge's various comparison groups. Put simply, Prof. Elhauge's analyses assume that the groups of buyers he examines have the very same sharp container preferences and face the very same market conditions, except that one group is impacted by Covidien's challenged contracts and the other is not. These facts are *assumed*, but never tested or demonstrated in any way. Indeed, the Draft Report correctly finds that "Professor Elhauge's

¹ At the Court's direction, Covidien is not filing these comments but is sending them directly to Dr. Ashenfelter with a courtesy copy to the Court and Plaintiffs' counsel. Covidien will request that the report and parties' comments be made part of the case record at an appropriate time.

analysis does not address this issue and, therefore, provides no guidance on this question ” (DR at 20.)

As detailed below, Covidien respectfully submits that the final version of Dr Ashenfelter’s report (the “Final Report”) should also expressly acknowledge that, because buyers that prefer Covidien will self select into the “burdened” groups in Prof. Elhauge’s comparisons and buyers that prefer rivals will self select into the “unburdened” groups, the key assumptions Dr. Ashenfelter has identified cannot hold for Prof. Elhauge’s analyses. Indeed, at the motion hearing in January 2009, Prof. Elhauge acknowledged that some of his analyses include this form of selection bias, and that he does not know the magnitude of that distorting effect. For this reason, and others detailed below, no evidence that Plaintiffs might present at trial could allow a reasonable fact finder to adopt Prof. Elhauge’s findings, and the Final Report should not imply that a jury could properly consider these fundamentally unsound econometrics.

Additionally, Covidien identifies facts regarding the Novation longitudinal study and an important defect in the so-called “switcher regressions” that should be acknowledged in the Final Report.

II. COMMENTARY

A. The simultaneous comparisons

1. Professor Elhauge “does not address” and provides “no guidance” on whether the necessary assumptions of his analyses hold true.

The Draft Report correctly concludes that Prof. Elhauge’s simultaneous comparisons rest on necessary assumptions that he not only never establishes are valid, but never even addresses. The Report explains that the simultaneous comparisons are premised on two “key assumptions,” namely: “(1) Are the groups with the challenged contracts representative of all buyers in the actual market, both in their behavior and in how others interact with them? (2)

Are the groups without the challenged contracts representative of all buyers in the “but-for” market, both in their behavior and in how others interact with them.” (DR at 6-7) (the “Key Assumptions”) It goes on to find that “[t]he *validity* of [Prof. Elhaug’s] comparison depends on whether the two groups, absent the alleged misconduct, would have behaved similarly” (*Id.* at 7 (emphasis added).) In the context of the share discount comparisons, the Draft Report states

To believe that [the share discount] analysis is a *reliable* measure of impact... one must believe that the group of buyers who chose to sign commitment contracts with Covidien is representative of the entire market in their preferences and in how others deal with them ... [and] that the group of buyers who chose not to sign commitment contracts with Covidien is representative of the entire “but-for” market in their preferences and in how others deal with them. To the extent that these assumptions are incorrect, when Professor Elhaug compares market shares in these two groups, he measures both the effects of the challenged practices (if any) and the effects of the other differences between the two groups (if any)

(*Id.* at 19) (emphasis added). The Draft Report makes the same observations for the GPO sole-source contract comparisons. (*Id.* at 20.)

Covidien agrees with Dr. Ashenfelter’s conclusion that “[the Key Assumptions] are important because if they do not hold, then it is possible that the measured difference in market share reflects differences in characteristics between groups rather than the effect of the contracts.” (*Id.* at 7.) As the Draft Report correctly states, “Professor Elhaug’s analysis does not address this issue and, therefore, provides no guidance on this question.” (*Id.* at 20.) Thus, the simultaneous comparisons rest on essential but entirely untested assumptions.⁷

⁷ As a matter of law, expert analysis that rests on untested assumptions cannot be presented to a jury. See, e.g., *Group Health Plan, Inc. v. Philip Morris USA Inc.*, 344 F.3d 753, 760 (8th Cir. 2003) (“[T]he cases are legion that assert that expert testimony is inadmissible when it is based on speculative assumptions ...”), *Vincent v. United Techs. Corp.*, 854 F.2d 1318 (4th Cir. 1988) (“At some point, the addition of assumptions to the bare facts in a record take the expert’s opinion from the realm of fact to that of mere speculation, rendering it incompetent”), *Boucher v. United States Suzuki Motor Corp.*, 73 F.3d 18, 22 (2d Cir. 1996) (“Admission of expert testimony based on speculative assumptions is an abuse of discretion.”); *Polunio v. Bayer Corp.*, 122 F. Supp. 2d 63, 69 (D. Mass. 2000) (excluding expert testimony resting on “unverified assumptions”).

2. Professor Elhauge admits the Key Assumptions do not hold for the share discount simultaneous comparisons and by implication for the sole-source contract simultaneous comparisons.

Covidien's main criticism of the simultaneous comparisons is that Prof. Elhauge's method necessarily injects substantial selection bias into his results. Specifically, because Prof. Elhauge compared groups of buyers who chose to buy through a Covidien discount contract to buyers who chose not to, buyers who prefer Covidien are overrepresented in the "burdened" group and buyers who prefer rivals are overrepresented in the "unburdened" group. Plainly, buyers who favor Covidien's products are far more likely to agree to buy a high percentage of their needs from Covidien in exchange for a discount than are buyers who prefer a rival's sharps containers. In Dr. Ashenfelter's terms, the two groups would have substantially different preferences and the Key Assumptions are necessarily false.

Covidien submits for Dr. Ashenfelter's further consideration Prof. Elhauge's admissions at the January hearing that the simultaneous comparisons for the share discounts are affected by selection bias and, therefore, the Key Assumptions do not hold for that comparison. As Prof. Elhauge testified

Q: . Now, I want you to take a group or have in mind a group of 100 buyers who are members of Amerinet. I just want to see how you're going to allocate them in your affected and unaffected groups. Now, let's say that 50 of the buyers want Covidien, and 50 of the buyers want BD. Are you with me?

A: Yes

Q: If the 50 buyers that want Covidien buy exclusively from Covidien under Covidien's share discount and the other 50 buyers choose to buy exclusively from BD, you would put the 50 who bought from Covidien in the affected group and the 50 who bought from BD in the unaffected group; is that right?

A: Sure. This is the same as your example in the brief, right; that is, that's right, and I think that shows why I from the very beginning in my reports acknowledged the possibility of selection bias. The question is whether it fits the actual facts of the case.

Q: And just sticking with my example just for a minute more, please. you would find, after allocating the buyers in that fashion, you would find that BID has a 100 percent share in the unaffected group and a zero percent share in the affected group, right?

A: In that hypothetical, yes. But notice in your hypothetical Tyco is engaged in economically irrational behavior

Q: I'm just sticking with the hypothetical right now. Is the answer "yes," you would find a 100 percent share in the unaffected group and a zero percent share in the affected group?

A: Yes, I would, and I think what that hypothetical does is illustrate the possibility of selection bias, which I acknowledge and accounted for

(1/8/09 Tr. at 102:2-103:9; *see also* 91:2-5.) As the Court said, speaking to Prof. Elhaug regarding the presence of "some selection bias" in his analyses, "It's actually not even that disputed. You haven't even really disputed that." (1/9/09 Tr. at 21:7-9.)³ Covidien believes these statements should be included in the Final Report.

Covidien also submits Prof. Elhaug's testimony that he does not know the degree to which selection bias skews his results and, therefore, does not know the extent to which the Key Assumptions are false. Indeed, Prof. Elhaug expressly disclaimed any attempt to measure or quantify the amount of selection bias in his comparisons and testified, "[m]y role is just to opine on the fact of some anticompetitive impact." (1/8/09 Tr. at 91:23-92:16.) On further questioning he testified:

Q: ... you cannot with your method, you cannot set the line to show which portion of those charts is attributable to selection bias and which isn't; in other words, which is free of the bias and which is corrupted by the bias? You can't do that, right?

³ The Draft Report briefly comments on the "access approach" and, notes that, as Covidien argued, a properly done access approach might "ameliorate to some extent certain concerns" about whether the Key Assumptions hold. (DR at 20.) Professor Elhaug has repeatedly and emphatically condemned an access-based approach, and at the hearing said it "doesn't make any sense," "is quite misguided" and "leads to a ludicrous result." (1/8/09 Tr. at 44:12-45:15.) Additionally, Covidien refers Dr. Ashenfelter to Dr. Ordover's Reply Report, which demonstrates that Prof. Elhaug's belated and incomplete attempt at an access-based analysis contained serious implementation errors and did not materially remove the selection bias from the original simultaneous comparisons. (*See* 1:136-08 Order of Reply Decl ¶¶ 55-74.)

A: That's true, I'm not opining on the amount, I'm just opining on the fact of an adverse impact on rival shares that it is not redeemed by any pro-competitive efficiencies, for this portion of my analysis, (Inaudible) other bases for the analysis.

(1/08/09 Tr. at 93:5-14; *see also id.* at 91:6-12.) Significantly, despite Prof. Elhauge's admissions about imprecision, the numbers underlying his simultaneous comparisons are incorporated -- without any correction for selection bias -- directly into Plaintiffs' damages model. (*See* 10/17/08 Covidien Motion to Exclude Elhauge at 8-9, section II(A)(3) below.) Covidien believes all this testimony is highly relevant and should be incorporated into the Final Report.

In light of Professor Elhauge's admission that selection bias affects his share discount comparisons and that he does not know the magnitude of that effect, it is undisputed that the Key Assumptions are false for the share discount comparisons and the other simultaneous comparisons that incorporate them. Prof. Elhauge also cannot say how far from accurate the Key Assumptions may be. The Final Report should reflect these facts.

With respect to the sole-source contract simultaneous comparisons, Covidien notes that Professor Elhauge admits that where a buyer is a member of two GPOs, one of which is sole-source Covidien and the other of which is not sole-source Covidien (*i.e.*, either dual source Covidien or sole source with a rival), if the buyer chooses to buy from Covidien under the sole-source GPO it will be classified as burdened and if the buyer chooses to buy from a rival under the other GPO, it will be deemed unburdened.

Q: Let me turn to your sole-source comparisons, okay, and move off share discounts for a moment. If a hospital is a member of a GPO that is sole-source with Covidien and also belongs to a dual-source GPO offering BD, okay -- so it's a member of a sole-source GPO, Covidien, and a member of a dual-source GPO that offers BD -- if the hospital decides to buy entirely from BD through its dual-source contract, you will classify that hospital as unaffected, right?

A: Yes. If they're buying entirely through a GPO that is not sole-source, then I treat them as in the unaffected group. They have to buy at least one container through the sole-source contract to be burdened by it.

Q: And if the same hospital buys from Covidien through Covidien's sole-source contract, you would classify that hospital or buyer as affected?

A: Yes. If they are making their purchases through a sole-source GPO, they are affected, yes.

(1/08/09 Tr. at 103:10-104 1.) For this reason, any such buyer with a preference for Covidien will self select into the burdened group and any such buyer with a preference for a rival will self select into the unburdened group. (See 10/17/08 Covidien Motion to Exclude Elhauge at 11-12.) Again, the preferences of buyers between the two groups will be systematically different, and neither group will have the same preferences as the buyers in the "but-for world." Although Prof. Elhauge does not openly admit this fact for his sole-source contract analyses, it is certain that the Key Assumptions, again, will not hold. Covidien believes this testimony and this conclusion also should be incorporated into the Final Report, as it follows from the findings already in the Draft Report and Prof. Elhauge's testimony at the hearing.

3. The simultaneous comparisons are "crucial" to the damages calculations and are the *only* econometric analyses that drive damages.

The Draft Report states that Prof. Elhauge's econometric analyses "form a crucial input to Dr. Singer's damages calculation [and that a] decision that Professor Elhauge has shown positive impact, but that he has not measured 'but-for' market shares, would require Dr. Singer to find an alternative measure of market shares in the 'but-for' world to use in calculating damages." (DR at 4.) This is a correct and very important finding.

Covidien's only comment is that the Final Report should also incorporate the undisputed fact that it is the simultaneous comparisons in particular, and not any of Prof. Elhauge's other econometric analyses, that drive Dr. Singer's damages calculations. (10/17/08 Covidien Motion

to Exclude Elhauge at 8-9.) The “gaps” represented in exhibits 9, 10, and 12 to Prof. Elhauge’s December 18, 2007 Report are incorporated directly into the amount of damages posited in Dr. Singer’s tables R1, R2 and R3 as the “Change in Rival Penetration.” Neither the longitudinal analyses nor the regression results figure in to Dr. Singer’s calculations in any way, as Covidien has shown and Plaintiffs have never disputed.

4. The “ultimate fact finder” cannot evaluate whether the Key Assumptions are accurate and valid.

The Draft Report makes clear that the simultaneous comparisons are only reliable if the Key Assumptions hold true. However, in its conclusion, the Draft Report proposes that “there is nothing in the econometric analysis by itself that compels any particular estimate to be chosen. The final decision about the credibility of these estimates depends on the ultimate fact finders determination of what is most appropriate based on the totality of the evidence available.” (DR at 26.) To the extent that these sentences are intended to apply to the simultaneous comparisons (or the other analyses that fail for the same reasons, as discussed below), Covidien respectfully submits that they should be deleted.

As an initial and dispositive matter, the admissions and evidence just discussed make clear that the Key Assumptions *do not hold* for the simultaneous comparisons (and the regressions that mirror them) Regardless of the evidence that may be presented at trial, a jury could not accept (and therefore, cannot be allowed to consider) results that are demonstrably unreliable and overstated, and for which, as Prof. Elhauge admits, the amount of the overstatement is unknown and unknowable. A jury cannot reasonably be asked to render a verdict based in any way on econometric analyses that are certain to incorporate an unknown

amount of selection bias.⁴ A lay jury is incapable of determining the degree of inaccuracy that the selection bias in these analyses creates and, therefore, cannot assess the extent to which the Key Assumptions are false. This is not a question the ultimate fact finder in this case could ever rationally or reasonably answer in Plaintiffs' favor or resolve in any way. It is therefore patently inappropriate for presentation to a jury.

In addition to this fundamental problem, other facts militate strongly in favor of the deletion of these sentences. From very early in this litigation, Plaintiffs have taken the position that an assessment of the preferences of buyers is totally irrelevant and should not be allowed. In fact, when Covidien sought to take discovery of buyers to assess whether it was their preferences, as opposed to the form of the contracts they utilized, that caused buyers to purchase Covidien products, Plaintiffs vigorously and successfully opposed all such discovery. In reliance on Plaintiffs' insistence that such evidence was immaterial and misleading, the Court entered an order barring Covidien from compiling such evidence and a corresponding order preventing Plaintiffs from presenting such evidence at trial (9/27/07 Order.).

Therefore, the record lacks (and will forever lack) any evidence that would enable the fact finder to determine whether the preferences of Prof. Elhaug's control and treatment groups are the same or whether they are representative of the but-for and actual worlds. As the Draft Report found, Prof. Elhaug elected not to address this question in any way. (DR at 20.) He did this because he has steadfastly maintained that his econometric analyses show the impact of the challenged practices and that evidence of buyer preference is inconsequential. As the Report

⁴ Covidien notes that courts routinely exclude expert testimony infected with selection bias. See, e.g., *Daubert v. Merit Home Prods. Corp.*, 213 F. Supp. 2d 802, 810 (N.D. Ohio 2002) (holding that an article "overly tainted with selection bias" "may not form the basis of [an expert's] opinion"); *Valentine v. Pioneer Chlor Alkali Co., Inc.*, 921 F. Supp. 666, 676-77 (D. Nev. 1996) (rejecting study where "[t]he probability of selection bias is too high to be overlooked"); *Whiting v. Boston Edison Co.*, 891 F. Supp. 12, 21 n.44 (D. Mass. 1995) (Court gives no weight to study marred by self-selection and other biases). *Allgood v. Gen. Motors Corp.*, No. 102CV1077DFFH AB 2006 WL 2669337, at *9-11 (S.D. Ind. Sept. 18, 2006) (finding expert's methodology "was not sufficiently reliable to satisfy the demands of *Daubert* and Rule 702 due to selection bias and therefore cannot be admitted").

now makes clear, Prof. Elhaug was mistaken. It simply will not be possible for the ultimate fact finder to evaluate whether the Key Assumptions are accurate. Consequently, Covidien believes the above quoted sentences regarding the “ultimate fact finders” should be deleted from the Final Report

B. The Novation longitudinal study

The Draft Report makes several important observations about the assumptions underlying the Novation longitudinal analysis. First, the Draft Report correctly notes that the analysis assumes “that other market factors, such as pricing, are not actually the cause of measured impact.” (DR at 18.) The Final Report should go on to acknowledge the undisputed fact that Prof. Elhaug does not control for price changes at Novation in any way. (10/17/08 McFadden Decl. ¶ 19.)

The Draft Report also explains that the Key Assumptions will hold for the longitudinal analysis only if “buyers at Novation before the contract change are representative of all buyers in the actual market and buyers at Novation after the contract change are representative of all buyers in the ‘but-for’ market.” (DR at 21.) The Final Report should also acknowledge that this key issue, once again, is a matter on which Prof. Elhaug undisputedly provided no analysis and as to which he offered no guidance whatsoever.

The Draft Report correctly notes that the preferences of Novation buyers would be expected to be the same before and after the contract change “unless there is some reason to think that the characteristics of these buyers changed over the course of the two-year period that the analysis encompasses” (*Id.* at 22.) However, as the Report observed earlier, it is entirely plausible that an interim change in buyer preferences in favor of Covidien’s rivals led to increased rival sales and led Novation to change its contracts. (DR at 15.) This possibility

seriously undermines Prof. Elhauge's claim that the change in the contract *caused* a change in the sales patterns.

Prof. Elhauge's methodology for determining whether a buyer is a Novation member provides an additional reason to disbelieve that the preferences of the buyers Prof. Elhauge treats as Novation members would be the same before and after the contract change. Professor Elhauge does not use Novation membership data to identify who is a "Novation buyer." (11/26/08 Ordoover Reply Decl ¶¶ 56-62.) Instead, he treats a buyer as a Novation member if he observes it purchasing sharps containers under a Novation contract. (*Id.*) This is the wrong approach. Consider a hospital that: (1) was a Novation member during the period that Novation had a sole-source contract with Covidien; (2) strongly preferred the rival Becton Dickinson ("BD"), and (3) chose to buy from BD. Such a buyer would not be recognized or counted as a Novation member in the "before" part of the analysis. Following Novation's contract with BD in 2005, however, if the hospital continued to buy from BD, but now using the Novation contract, it would, for the first time, be counted as a Novation member. Professor Elhauge's analysis would report an increase in BD sales to Novation members, but the increase would be an artifact of Professor Elhauge's classification of hospitals deemed to be Novation members -- not a result of an actual increase in BD's sales due to the contract change.⁵ The Final Report should note this problem.

The Draft Report correctly observes that "Professor Elhauge's Figure 17 and Professor McEadden's Figure 3 make it appear that there may have been a pre-existing trend in rivals' market share at Novation prior to the contract change that continued unaffected after the

⁵ Examples of such misclassifications are found in the sales data Dr. Ashenfelter possesses for (1) Sutilla Regional Medical Center in Waycross, GA (Elhauge ID Number: 98209), (2) Kennedy Memorial Hospital in Cherry Hill, NJ (Elhauge ID Number: 10836), Angel Medical Center in Franklin, NC (Elhauge ID Number: 1508). The purchasing behavior of these hospitals can be found in Prof. Elhauge's file called "Full committed volume v61 do."

change.” (DR at 22) Covidien suggests that the Final Report should also acknowledge Professor Ordover’s finding that the growth rate of Covidien’s rivals at Novation was not statistically different in the year before the contract change and the year after it. (1/26/08 Ordover Reply Decl. ¶ 26.) The Final Report should also note that this conclusion holds whether or not the growth rate of rivals is compared to the supposed control groups at Premier or at all non-Novation hospitals over the same period. (*Id.*)

C. The longitudinal regressions

1. The regressions that ignore fixed effects are unreliable for the same reasons as the simultaneous comparisons.

The Draft Report correctly concludes that

Professor Elhauge’s longitudinal regressions are quite similar to his other analyses in what they assume about how to measure market shares in the actual and “but-for” worlds. When he performs these regressions including all buyers (not just those who switch contract status) and without adjusting for static differences in characteristics across buyers... [t]hese are essentially the same comparisons he makes in his graphical simultaneous analyses. The fact that in these regressions he also adjusts for time trends in rivals’ share by including monthly dummy variables does not alter the underlying assumptions.

(DR at 23.) For this reason, the Final Report should expressly acknowledge that these econometric analyses are dependent on the Key Assumptions and undermined by the same facts and admissions as the simultaneous comparisons, as discussed above.

2. In Prof. Elhauge’s “switcher regressions,” a buyer’s burdened or unburdened status remains linked to its preferences.

The Draft Report states that when Prof. Elhauge performs the “switcher” regressions that account for fixed effects, he “measures the difference between Covidien’s rivals’ share at the same buyers when they are burdened and when they are unburdened.” (DR at 24 ; The Draft Report also says “In this way, the buyer-level fixed-effects deal with one problem that

the defendants have raised: the possibility that buyers would choose Covidien anyway because of a preference for Covidien's products." (*Id.*)

This discussion omits a *critical* defect in all the switcher regressions, including the fixed-effects switcher regressions. The "switches" are not limited to potentially exogenous events such as the beginnings or ends of challenged contracts; instead, they include every instance where a buyer's purchasing decisions cause it to switch from a burdened to an unburdened status. (See 11/26/08 Covidien Reply ISO Motion to Exclude Elhauge at 16-17 ("The Switcher Regressions analyze purchasing after both GPO-imposed *and* buyer-imposed switches and are thus, like the rest of Prof. Elhauge's work, distorted by selection bias."); 11/26/08 Ordover Reply Decl. ¶¶ 43-53 (listing examples of buyer-imposed switches included in the switcher regressions).) Prof. Elhauge admits this in his Sur-Reply Declaration, writing "Tyco and Professor Ordover also complain that my longitudinal regressions are not limited to buyers whose GPOs changed their offerings. *This is true*, but that is because the alternative approach favored by Tyco and Professor Ordover would wrongly use the Tyco 'access' approach, which is incorrect for the reasons I discussed in my declaration." (12/9/08 Elhauge Sur-Reply Decl. ¶ 22 (emphasis added))

For this reason, although the Draft Report is correct that "[a]ssuming that buyer preferences are static and that the explanatory power of strategic factors aside from the challenged practices is low, then these regressions might provide an estimate of the impact in this part of the market," there is clear evidence and every reason to believe buyer preferences are not static. When a buyer decides that it prefers a Covidien rival and changes from a burdened to an unburdened status, it is treated as a switcher. Consequently, the preferences of burdened switchers and unburdened switchers will be different and will not be representative of the actual

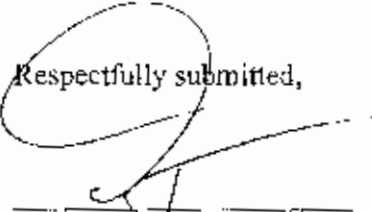
or but-for markets. Buyers preferring Covidien will be overrepresented among “burdened” switchers and buyers favoring a rival will be overrepresented among “unburdened” switchers. The Final Report should acknowledge this serious problem in the analysis and the fact that, because of this, even the switcher regressions that claim to control for fixed effects are subject to selection bias and violate the Key Assumptions.⁶

III. CONCLUSION

Covidien respectfully submits these comments for Dr. Ashenfelter’s consideration. It also thanks Dr. Ashenfelter for his time and careful attention to this matter.

Dated: July 15, 2009

Respectfully submitted,



James Donato (SBN: 146140)
COOLEY GODWARD KRONISH LLP
101 California Street, 5th Floor
San Francisco, CA 94111
Telephone: (415) 693-2000
e-Mail: jdonato@cooley.com

TYCO HEALTHCARE GROUP LP
John M. Griffin (BBO:549061)
Marc A. Polk (BBO: 631765)
15 Hampshire Street
Mansfield, MA 02048
Telephone: (508) 261-8480
e-Mail: john.griffin@tycohealthcare.com
e-Mail: marc.polk@tycohealthcare.com

⁶ Covidien notes that the fixed effects linear regressions (to which the Draft Report attributes the lowest number of untested, necessary assumptions) show *dramatically lower levels of impact* from the challenged contracts than the simultaneous comparisons and the logarithmic regression on all buyers (with no fixed effects) found in Prof. Elhauge’s original report. As Table 1 makes clear, the impact of the challenged contracts on buyers who took either share discounts or sole-source contracts is over 80% lower in the fixed effects, linear regression than in Prof. Elhauge’s original logarithmic regression (compare column 1, row 4 with column 3, row 4). Moreover, as the Draft Report calculates, the overall impact borne out by the less speculative, fixed effects regression is that rivals would have had only a 4.1 – 4.6% greater share of the market in the but-for world. The original analysis incorporated into the final damages model (*i.e.*, the simultaneous comparisons) showed levels of impact ranging from 19% to 34%, depending on the year. (3/24/08 Singer Revised Table R3 (“Change in Rival Market Share” row).)

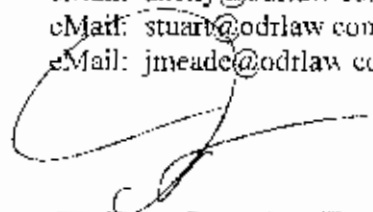
CERTIFICATE OF SERVICE

I hereby certify that a true copy of **Defendants' Comments Re the Draft Report of Dr. Orley Ashenfelter** was served upon the attorney of record for each party as indicated below by U.S. Mail and/or Electronic Mail on the 15th day of July, 2009.

**Attorneys for Plaintiffs, NATCHITOCHE PARISH HOSPITAL SERVICE DISTRICT
and J M SMITH CORPORATION:**

Brett Cebulash
Archana Tamoshunas
Bruce L. Gerstein
Noah H. Silverman
GARWIN GERSTEIN & FISHER LLP
1501 Broadway, Suite 1416
New York, NY 10036
eMail: bcebulash@garwingerstein.com
eMail: atamoshunus@garwingerstein.com
eMail: bgerstein@garwingerstein.com
eMail: nsilverman@garwingerstein.com

Andrew Kelly
Stuart F. Des Roches
John Alden Meade
ODOM & DES ROCHES, LLP
Suite 2020, Poydras Center
650 Poydras Street
New Orleans, LA 70130
eMail: akelly@odrlaw.com
eMail: stuart@odrlaw.com
eMail: jmeade@odrlaw.com



James Donato