

EXHIBIT A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

NATCHITOCHEs PARISH HOSPITAL SERVICE
DISTRICT and J.M. SMITH CORP. d/b/a
SMITH DRUG CO., on behalf of itself
and all others similarly situated,
Plaintiffs,

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

Case Number 05-12024

VIDEOTAPED DEPOSITION OF
Professor Einer R. Elhauge
March 11, 2008
Boston, Massachusetts
Lead: Linda F. Callison, Esquire
Firm: Cooley Godward

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1 MS. TAMOSHUANAS: Archana
2 Tamoshunas from Garwin Gerstein & Fisher
3 Fisher, also for the plaintiffs and the
4 witness.
5 MR. MEADE: John Alden Meade, from
6 Odom & Des Roches, also for the plaintiff and
7 the witness.
8 THE VIDEOGRAPHER: And the court
9 reporter is Deborah Roth.
10 Would you please swear in the
11 witness.
12 EINER R. ELHAUGE,
13 having been satisfactorily
14 identified by the production of his
15 Massachusetts driver's license, and duly sworn
16 by the Notary Public, was examined and
17 testified as follows:
18 DIRECT EXAMINATION
19 BY MS. CALLISON:
20 Q. Good morning.
21 Could you please state your full
22 name for the record.
23 A. Einer Elhauge.
24 Q. And do you go by "Professor Elhauge"?

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1 A. Yes.
2 Q. Have you been retained as an expert in
3 this matter?
4 A. Yes, I have.
5 Q. Who retained you?
6 A. I think it was Berger & Montague
7 originally, but I think it's some consortium
8 of law firms now.
9 Q. Have you worked with any of the
10 different law firms that form this consortium
11 in past endeavors?
12 A. I don't think so. I think this is the
13 first -- well, I think I have worked with
14 Berger & Montague on some case. I'm not sure
15 it ever came to fruition, though.
16 Q. You do believe you have been retained
17 by the law firm of Berger & Montague on at
18 least one previous occasion?
19 A. I think so.
20 MR. KELLY: And I will correct for
21 the record, it's "Berger & Montague."
22 MS. CALLISON: "Montague."
23 THE WITNESS: "Montague."
24 MR. KELLY: If you wanted to look

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1 them up at some point.
2 BY MS. CALLISON:
3 Q. What do you consider your expertise to
4 be for which you were retained in this case?
5 A. I am an expert in antitrust economics.
6 Q. How would you define "antitrust
7 economics"?
8 A. It's the application of economic
9 principles and methods to antitrust issues.
10 Q. Do you consider that to be distinct, in
11 your mind, from economics, in general?
12 A. Yes.
13 Q. Okay. What is the distinction, in your
14 mind?
15 A. Well, it's an applied field. So
16 there's special expertise in the antitrust
17 issues raised by economics.
18 So it's like many applied fields.
19 It's the relevance of those principles and
20 methods to a particular set of issues that are
21 raised in antitrust cases.
22 Q. Do you consider yourself to be an
23 expert in economics, in general?
24 A. Well, I have expertise in economics in

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1 general, but I'm not, say, an econometrician.
2 It's more the application to
3 antitrust issues or to healthcare issues, for
4 example, or contract issues, or specific
5 applied fields of economics that I have
6 expertise in.
7 Q. How would you describe an
8 econometrician?
9 A. "Econometrician."
10 Q. "Econometrician."
11 A. Yes.
12 Q. What is an econometrician, in your
13 mind?
14 A. An econometrician is somebody who
15 specializes in developing methodologies for
16 statistical analysis of economic problems.
17 Q. And you don't consider yourself to be
18 in that particular area of expertise?
19 A. No. I mean, I use -- there's
20 applications of econometric methods to various
21 issues that I have used, but I'm not a scholar
22 who develops methodology in econometrics.
23 Q. Do you consider yourself to be an
24 expert in any other field?

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1 while, but there was a number of cases against
2 tobacco companies that involved antitrust
3 claims, and I represented some Taft-Hartley
4 funds; and I remember appearing in court, I
5 think it was one case in New Jersey and one in
6 New Mexico; and there was another case that I
7 think was about roads and paving, Aggregated
8 -- I'm blanking on name -- but there was an
9 antitrust claim in that case.
10 **Q. Did you ever represent defendants as a**
11 **lawyer in situations in which they were being**
12 **accused of violating U.S. antitrust law?**
13 THE WITNESS: Could you read the
14 question back.
15 (The record was read.)
16 A. I don't think so. I might have to look
17 at my CV to refresh my recollection, but I
18 can't recall any cases right now.
19 **Q. Do you know who Professor Ordoover is?**
20 A. Yes.
21 **Q. Did you want to take a moment to**
22 **double-check your CV on that last question?**
23 A. Yes. The case I was fumbling with
24 involving asphalt was ABI versus Granite, and

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1 there are a few other cases listed on my CV I
2 forgot about. One was VVL Grace -- VVL versus
3 Grace and the other was Bay State versus
4 Amtrak.
5 **Q. Were any of those cases situations in**
6 **which you were representing a defendant as**
7 **opposed to the plaintiff?**
8 A. No.
9 **Q. So having reviewed your CV, is your**
10 **memory refreshed as to whether there was any**
11 **situation that you can recall where you were**
12 **representing a defendant as a lawyer that had**
13 **been accused of antitrust violations?**
14 A. Oh, actually, there is Verizon versus
15 Trinko case before the Supreme Court. I
16 forgot about that one.
17 **Q. What, in brief, was the issue that was**
18 **being litigated in the Verizon case?**
19 A. In the Verizon case, the issue was the
20 extent of antitrust duties to deal, for a
21 defendant, and the extent to which those
22 antitrust duties would be modified by
23 regulations in the telecommunications industry
24 that mandated certain kinds of dealing.

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1 **Q. I take it that case did not involve**
2 **GPOs in any way, shape or form?**
3 A. No. It did not involve GPOs.
4 **Q. Did it involve allegations of bundling?**
5 A. I think in the lower court there was
6 some allegations of bundling; but in the
7 Supreme Court, it seemed to be a straight
8 duty-to-deal claim.
9 **Q. Okay. Do you know who Professor**
10 **Ordoover is?**
11 A. Yes, I do.
12 **Q. And who is Professor Ordoover?**
13 A. He is a professor, I believe now at
14 NYU, formerly at Yale, who also specializes in
15 antitrust economics.
16 **Q. Does he have a good reputation as an**
17 **antitrust economist?**
18 MR. KELLY: I'll object to the
19 form.
20 A. Yeah, he's, I would say, a prominent
21 scholar in antitrust economics.
22 **Q. Do you respect him as an economist?**
23 A. Yes.
24 **Q. I believe it's evident from the**

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1 **questions I have been asking you, but I want**
2 **to confirm.**
3 **As you sit here today, you are**
4 **offering opinions as an antitrust economist**
5 **and not as a lawyer, correct?**
6 A. That's correct.
7 **Q. You are not, for example, offering an**
8 **opinion about whether anything Covidien did**
9 **was against the law?**
10 A. I'm not offering an opinion on that, on
11 whether anything Covidien did is against the
12 law.
13 **Q. Do you agree that you may deem conduct**
14 **to be anticompetitive as a matter of economics**
15 **that can nonetheless be lawful under United**
16 **States law?**
17 A. That could be the case, yes.
18 **Q. Would you agree that vigorous healthy**
19 **competition can nonetheless sometimes destroy**
20 **a competitor in the marketplace?**
21 A. Yes.
22 **Q. And would you agree that the antitrust**
23 **laws don't guarantee any competitor any**
24 **particular level of success?**

1 A. Yes, I would.
 2 But I'm not rendering a legal
 3 opinion, I guess, that's for law, and I would
 4 not be testifying in court about whether the
 5 antitrust laws guarantee anything.
 6 **Q. Okay. Would you agree that vigorous**
 7 **competition can sometimes impair the ability**
 8 **of a particular competitor to succeed in the**
 9 **market?**
 10 A. Yes. Vigorous competition could impair
 11 rivals.
 12 **Q. Would you agree that some competitors**
 13 **simply compete better than others?**
 14 A. Yes.
 15 **Q. Some manage their businesses better,**
 16 **correct?**
 17 A. Yes.
 18 **Q. Some work longer hours and try harder,**
 19 **correct?**
 20 A. Yes.
 21 **Q. Some have better reputations than**
 22 **others?**
 23 A. Yes.
 24 **Q. Some have more experience, they have**

1 **What are some the other medical**
 2 **device manufacturers that you have opined on**
 3 **in the past where your opinion has been that**
 4 **they engaged in anticompetitive conduct?**
 5 THE WITNESS: Can you read back
 6 that question.
 7 (The record was read.)
 8 A. For purpose of your question, do
 9 pharmaceutical makers count as manufacturers?
 10 **Q. Sure.**
 11 A. Okay. Amgen versus F Hoffmann-La
 12 Roche; Applied Medical Resources versus
 13 Ethicon; Masimo Corporation versus Tyco;
 14 Rochester Medical versus Bard; Retractable
 15 Technologies Incorporated versus Becton
 16 Dickinson; Spartanburg versus Hillenbrand. I
 17 believe that's it.
 18 **Q. You gave me some cases.**
 19 **Ethicon is a manufacturer that you**
 20 **opined had engaged in anticompetitive conduct?**
 21 A. That is true.
 22 **Q. And is Bard another medical device**
 23 **manufacturer that you opined engaged in**
 24 **anticompetitive conduct?**

1 **been in the market longer, correct?**
 2 A. Yes.
 3 **Q. And would you agree that all those**
 4 **factors can dictate or can influence whether**
 5 **or not a particular competitor succeeds in the**
 6 **marketplace?**
 7 A. Yes.
 8 **Q. We talked about some of the work you**
 9 **have done as a lawyer.**
 10 I now want to direct the next
 11 question into situations where you've served
 12 as an expert or an expert consultant, okay?
 13 A. Okay.
 14 **Q. My client, Covidien, isn't the only**
 15 **manufacturer that you've offered opinions**
 16 **against in terms of whether a manufacturer has**
 17 **engaged in anticompetitive conduct, correct?**
 18 A. That is correct.
 19 **Q. What are some of the other**
 20 **manufacturers -- and let's limit it, first of**
 21 **all, to manufacturers who make medical**
 22 **products -- that you've opined in the past**
 23 **have violated -- or excuse me -- let me strike**
 24 **that and start a clean question.**

1 A. Yes.
 2 **Q. And is Becton Dickinson another**
 3 **manufacturer that you opined had engaged in**
 4 **anticompetitive conduct?**
 5 A. Yes.
 6 **Q. Is Hillenbrand another such**
 7 **manufacturer?**
 8 A. Yes.
 9 **Q. Did each of these cases involve, in one**
 10 **way or another, group purchasing**
 11 **organizations?**
 12 MR. KELLY: I'll object to the
 13 form.
 14 A. Well, they involved certain
 15 exclusionary agreements that sometimes were
 16 brokered by group purchasing organizations.
 17 **Q. And for each of those manufacturers,**
 18 **your opinion was ultimately that the companies**
 19 **did something that hindered competition,**
 20 **correct?**
 21 A. Yes.
 22 **Q. Have you ever worked as an expert in**
 23 **which you offered an opinion that a medical**
 24 **device manufacturer did not engage in**

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1 anticompetitive conduct?
2 A. No.
3 **Q. Are you currently also retained as an**
4 **expert by a company called Daniels Sharpsmart?**
5 A. I'm not sure expert designations are
6 public in that case or not. So I'm not sure
7 I'm allowed to answer that question.
8 **Q. Well, we can mark this as confidential.**
9 **Have you done any consulting work,**
10 **testifying or not, for Daniels Sharpsmart?**
11 A. Why don't I make a phone call at a
12 break to find out whether this is something I
13 can speak about or not.
14 **Q. And, again, I'm not asking if you are**
15 **going to give testimony in that case or what**
16 **your opinions may be. Just to be clear, I**
17 **just want to find out if you have done any**
18 **kind of work for them for which you have been**
19 **paid.**
20 A. I understand, but generally whenever
21 I'm hired by a client, there is a
22 confidentiality agreement until such time as I
23 might be disclosed as an expert. So I have to
24 check to see whether I can answer your

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1 question.
2 **Q. All right. I don't believe that's a**
3 **basis for not answering my question, but we**
4 **will take it from there.**
5 **Do you understand that Daniels**
6 **Sharpsmart had sued Covidien?**
7 A. Yes.
8 **Q. And do you understand that Daniels**
9 **Sharpsmart is seeking money from Covidien?**
10 A. Yes.
11 **Q. In connection with your retention in**
12 **this matter, the class action matter, how much**
13 **have either yourself or people working at your**
14 **direction billed to whoever you are sending**
15 **your bills to in this case?**
16 A. About \$800,000.
17 **Q. Is that current through today?**
18 A. Not through today. I mean, through
19 billing, yes. I think billing is current
20 through today.
21 **Q. Is there about a 30-day lag time that**
22 **is not reflected in that calculus?**
23 A. Well, we bill as of the 25th. So I
24 guess there a 16-day lag time right now.

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1 **Q. Have you yourself put money -- let me**
2 **stand back.**
3 **This \$800,000, was that billed by**
4 **Legal Economics?**
5 A. Billed by Legal Economics.
6 **Q. After you paid for whatever the**
7 **salaries and expenses are, how much profit of**
8 **that \$800,000 remained?**
9 A. I'm not sure. I would have to do
10 accounting for that. It's hard to tell
11 because there are salaried employees.
12 **Q. You are not a salaried employee,**
13 **correct?**
14 A. No. But the billings include work by
15 salaried employees, and I don't know how you
16 allocate rent and utilities and things like
17 that.
18 **Q. How many salaried employees does Legal**
19 **Economics have?**
20 A. We have two full-time salaried
21 employees, and we also have research
22 assistants who work more as independent
23 contractors.
24 **Q. What positions are the two full-time**

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1 **employees?**
2 A. They both are senior economists.
3 **Q. Did either of those two senior**
4 **economists assist regarding this particular**
5 **matter?**
6 A. Yes.
7 **Q. What are the names of those two senior**
8 **economists?**
9 A. Ken Reinker and Andrea Grieve.
10 **Q. Do either Ken or Andrea have degrees in**
11 **economics?**
12 A. Yes.
13 **Q. Do they have master's degrees in**
14 **economics?**
15 A. Andrea has a master's and is just about
16 to get his Ph.D. from Harvard.
17 Ken, I don't think has a master's.
18 He has an undergraduate degree in economics.
19 **Q. Other than the two senior economists**
20 **that you just mentioned, did anyone else**
21 **assist you in preparing your opinions or**
22 **reports for this matter?**
23 A. Well, I'm sure some of the other
24 research assistants helped, but that's really

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1 Exhibit 8, isn't both your opening and reply,
2 and in such case, what has been attached as
3 part of Exhibit 6, is meant to replace them
4 both.
5 Do I have that right?
6 A. Yes. Yeah. Well, the reply would have
7 already replaced the original one. This one
8 replaces the reply one, but...
9 Q. Other than the corrections that are
10 noted in Exhibits 5 and 6, do you believe your
11 reports to be accurate?
12 A. Yes, I do.
13 Q. And you stand behind everything you've
14 written in them?
15 A. Yes.
16 Q. Are those reports intended to be a
17 summary of all the opinions that you intend to
18 offer in this matter?
19 A. Yes, my intention. It's always
20 possible that something new may arise, but
21 this is what I intend to testify about.
22 Q. As you sit here today, are you aware of
23 any opinion you intend to give that is not
24 described in either Exhibits 1 or 2?

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1 A. Well, there the ones in Exhibits 5 and
2 6.
3 Q. As modified by 5 and 6?
4 A. As modified by 5 and 6, no, there is
5 nothing that I'm aware of or intend to opine
6 on outside of these exhibits.
7 MR. KELLY: Linda, your question
8 did not include Exhibits 3 and 4. I think
9 those also hold his opinion, but not
10 necessarily his opinions for trial.
11 MS. CALLISON: No. I meant to
12 limit my question to the opinions at trial.
13 MR. KELLY: Right.
14 MS. CALLISON: I assume he is not
15 going to be addressing client certification
16 issues at trial.
17 THE WITNESS: I assume that is the
18 case as well.
19 Q. I want to confirm with you some things,
20 to be sure, I didn't see in your report, but I
21 want to make sure I'm with you.
22 Do you understand what "tying"
23 means from an antitrust perspective?
24 A. Yes.

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1 Q. What is "tying" from an antitrust
2 perspective?
3 A. Well, it's really a legal term. So I'm
4 not going to opine on the law in this case,
5 but I can answer it, but I want to make clear
6 this is not something that I'm planning to
7 offer testimony on.
8 Q. Let me ask a more -- I'm sorry, I just
9 apologize. I just want to, with that
10 clarification, to ask a more precise question.
11 As an antitrust economist, do you
12 have an understanding of what "tying" is?
13 A. Well, as an antitrust economist, I
14 would say "tying" is really a legal term, and
15 limited to a certain subset of the economic
16 relevant category of bundling.
17 So bundling is really the economic
18 phenomenon, some manifestations of which are
19 called tying, thus subject to special legal
20 rules.
21 Q. Are you offering an opinion in this
22 case that any of the conduct that you observed
23 in your capacity as an economic antitrust
24 expert constitutes tying?

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1 THE WITNESS: Could you read back
2 that question?
3 (The record was read.)
4 A. I'm not offering an opinion on that,
5 no.
6 Q. Okay. Are you offering any opinion in
7 this matter that Covidien engaged in
8 price-fixing?
9 A. Well, I mean --
10 MR. KELLY: I object as vague.
11 A. So not in the legal sense of horizontal
12 or vertical price-fixing. Of course it sets
13 its prices.
14 So, in, you know -- if you -- not
15 the way we usually use the term in antitrust,
16 but in a common usage of the term, they are
17 setting -- they are fixing their prices that
18 they trade at, but I'm assuming that's not
19 what you meant. I just want to be precise.
20 Q. Being precise in the antitrust sense,
21 are you offering any opinion that Covidien
22 engaged in price-fixing?
23 A. No.
24 Q. In an antitrust sense, are you offering

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1 **Q. -- or constitute a conspiracy?**
2 A. An agreement is a conspiracy in
3 antitrust economics terms.
4 **Q. Okay. So if Covidien entered into a**
5 **contract with a hospital whereby the hospital**
6 **agreed to purchase a certain share of products**
7 **from Covidien in exchange for a certain price,**
8 **in your mind, that would be a conspiracy**
9 **between the hospital and Covidien.**
10 **Do I have that right?**
11 MR. KELLY: I object to the form.
12 A. Well, it would be -- yes. It would be
13 an agreement; and, therefore, a conspiracy
14 within the meaning of antitrust.
15 It wouldn't necessarily be an
16 agreement in restraint of trade if this is one
17 single hospital. I am not opining that there
18 was any sort of per se anticompetitiveness
19 about the agreement.
20 **Q. I want to clarify, because I think, as**
21 **many people look at the lay term "conspiracy,"**
22 **they are thinking of something other than a**
23 **written agreement.**
24 A. I don't know why. I mean, conspiracy

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1 is simply an agreement.
2 **Q. So your view is there is a conspiracy**
3 **because you're basing your analysis on written**
4 **agreements, correct?**
5 A. Well, almost all the analysis is based
6 on written agreements.
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 **Q. Okay. And I apologize if I asked this**
16 **before, but are you offering any opinion that**
17 **there was a conspiracy between Covidien and**
18 **any other manufacturer to set prices in this**
19 **market?**
20 A. You know, not in a conventional sense
21 of horizontal price-fixing.
22 You know, they did enter into, as I
23 said, these multi-manufacturer agreements with
24 -- brokered by GPOs, and I suppose as part of

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1 that they set the prices in their loyalty
2 discounts; but I'm not alleging they agreed
3 with each other about what price each other
4 would charge.
5 **Q. You are not alleging there was some**
6 **backroom meeting between Covidien and another**
7 **manufacturer to reach some agreement that is**
8 **not reflected in the contracts, just to be**
9 **clear?**
10 A. I'm not alleging that, no.
11 MS. CALLISON: Okay. We can take a
12 break.
13 THE VIDEOGRAPHER: This is the end
14 of tape number one. The time is 10:21. We
15 are off the record.
16 (A recess was taken.)
17 THE VIDEOGRAPHER: Stand by. Okay.
18 Stand by. We are back on the record. This is
19 tape number two. The time is 10:31.
20 BY MS. CALLISON:
21 **Q. Before we broke, we were talking about**
22 **conspiracies, and I just wanted to clarify,**
23 **are you alleging in this case there was**
24 **unwritten or backroom conspiracy between Tyco**

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1 **and any other manufacturer in which they**
2 **colluded to try to exclude reusables?**
3 A. No.
4 **Q. You are familiar, are you not, with the**
5 **practice of GPO charging administrative fees?**
6 A. Yes.
7 **Q. Are you offering an opinion that any**
8 **administrative fee paid by Covidien represents**
9 **a bribe or a kickback?**
10 A. Not -- I mean, I guess that's a legal
11 term, and I am not offering any legal opinions
12 in this case.
13 **Q. Do you consider "bribe" to be a legal**
14 **term?**
15 A. Yes.
16 **Q. Do you have a lay understanding of**
17 **"bribe"?**
18 A. Well, I do, and I have an economic
19 understanding of "bribe." So that's why I
20 answered the question that way.
21 Sometimes in the literature they
22 suggest that, you know, one can think about
23 payments made in exchange for exclusivity as
24 kind of a bribe of individual buyers to get

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1 just not particularly relevant to their task,
2 which is to take the profit-maximizing steps
3 within the market that they actually face in
4 the actual world rather than compare it to
5 some but-for world without exclusionary
6 agreements that they don't have the luxury of
7 being able to take.
8 **Q. In simple terms, are GPOs contracts**
9 **capable of negotiating a competitive price on**
10 **behalf of their membership?**
11 MR. KELLY: I object to the form.
12 I believe you asked if GPO contracts were
13 capable.
14 MS. CALLISON: Okay. Excuse me.
15 **Q. In simple terms, are GPO capable of**
16 **negotiating a competitive price on behalf of**
17 **their membership?**
18 A. They certainly are capable of
19 negotiating competitive prices; and if they
20 don't agree to exclusionary terms, we don't
21 have this distorting effect, and then they
22 could just compete based upon price.
23 **Q. So it is your testimony that GPOs are**
24 **capable of negotiating competitive prices,**

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1 **they are just not doing it here?**
2 A. Well, if they were prohibited from
3 entering into these exclusionary agreements,
4 then their incentives would be aligned with
5 pro-competitive incentives, and they would
6 engage in competitive pricing.
7 Given the actual incidence of
8 exclusionary agreements, they would be
9 capable, but it might be contrary to their
10 economic incentives, because of the
11 externality problem, and so they would be --
12 you know, I guess there is a question about
13 whether you call a firm capable of doing
14 something when it requires taking a stand that
15 would result in economic harm to itself and
16 its members. In economics, we don't always
17 think of them doing that.
18 **Q. Sitting here today in the real world,**
19 **the real world, is Premier capable of**
20 **negotiating a pro-competitive price on behalf**
21 **of its membership for sharps containers?**
22 MR. KELLY: I object to the form.
23 **Q. No changes.**
24 A. Well, a lot turns on whether in the

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1 real world you assume that anticompetitive
2 exclusionary agreements are outlawed or not.
3 **Q. Let me correct that, because you are**
4 **making an assumption I am trying to not have**
5 **as part of my thing.**
6 **Sitting here today, with the**
7 **landscape exactly as it is today, is it your**
8 **testimony that a GPO such as Premier is**
9 **incapable of negotiating a pro-competitive**
10 **price on behalf of its membership?**
11 A. Well, if we understand pro-competitive
12 price to be a price relative to the but-for
13 price, what I would say is the answer to your
14 question turns on: One, do we assume that all
15 these exclusionary agreements are prohibited?
16 If so, then there is no problem with their
17 capability of negotiating competitive prices.
18 If instead we assume that they are
19 out there, and that they are not prohibited or
20 they are not detoured from being offered by a
21 firm like Tyco, then my testimony is that
22 their economic incentives are such that a
23 sophisticated GPO would enter into them,
24 despite the fact that they lead to prices

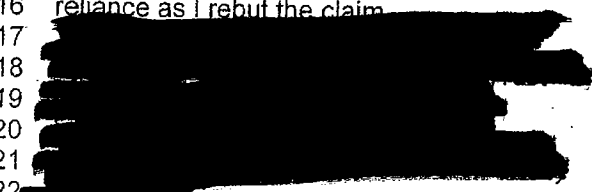

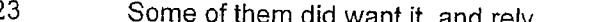



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1 worse than the competitive level, and it's
2 just not the question that a capable manager
3 would ask.
4 They would ask themselves the
5 profit-maximizing question: What can I do for
6 my firm? Not a question that's not open to
7 them, which is: Can I change to a but-for
8 world that is not available to me?
9 **Q. Listen to my question. I want you to**
10 **assume the market is exactly as it is today,**
11 **which I understand from your analysis, the**
12 **contracts you contend are anticompetitive are**
13 **out there and in force. They have not been**
14 **outlawed. Okay.**
15 **You have the market exactly as it**
16 **exists today in your mind, fixed firmly?**
17 A. No. Because you are assuming that
18 these agreements are not outlawed. That's
19 exactly what this litigation is about:
20 Whether these agreements should be outlawed or
21 not.
22 So I can't assume the future
23 conclusion of the trial in this case.
24 **Q. I'm asking you about the actual world**

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1 **Q. Is it your testimony that those**
2 **examples in the documents you saw are**
3 **representative of the switching costs that any**
4 **member would face?**
5 A. I can't recall whether the documents
6 say they are representative.
7 I mean, there's some specific
8 examples where somebody wasn't able to switch,
9 but there's also some Tyco documents that talk
10 about switching costs; and maybe those suggest
11 that these examples are representative. I'm
12 just not recalling right now.
13 **Q. I'm not asking if the documents say**
14 **they are representative. I'm asking if you**
15 **are relying on them as representative as part**
16 **of forming your opinions in this case.**
17 A. No.
18 **Q. Is evidence of hospitals purchasing**
19 **preferences relevant to your analysis?**
20 A. I think it's best inferred from actual
21 market decisions rather than by a direct
22 inquiry into their preferences.
23 I mean, there are specific examples
24 where it seems clear that the hospitals do say

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1 they would have preferred to switch but
2 couldn't, but I think as a matter of
3 economics, we are better off relying on
4 revealed preferences rather than on survey
5 sorts of evidence; and here, the revealed
6 preferences show that these hospitals do buy a
7 much higher share from rivals in the portions
8 of the market that aren't burdened. So I
9 would rely more on that than direct evidence
10 of preferences.
11 **Q. You say "rely more."**
12 **Are you relying to any extent on**
13 **what you consider to be direct evidence of**
14 **hospital preferences?**
15 A. I would say I don't put as affirmative
16 reliance as I rebut the claim.
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23 Some of them did want it, and rely
24 on it for rebuttal purposes, but I think in

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1 terms of doing sound economic analysis, the
2 general view is you should look at revealed
3 preferences, and that's the more systematic,
4 class-wide phenomenon that is relevant here
5 that I would affirmatively rely on.
6 **Q. Let me make sure I understand you**
7 **correctly.**
8 **Are you relying on any direct**
9 **evidence from hospitals in formulating the**
10 **affirmative opinions you plan on giving in**
11 **this case?**
12 A. I would say just for illustrative
13 purposes. Sometimes it helps to not only have
14 the abstract theory, but to show some specific
15 examples, where you can see this actually
16 affected buyer decisions, but I think the best
17 evidence that I'm basing my analysis on is the
18 statistical evidence of how they do when
19 burdened versus -- what choices hospitals make
20 when burdened versus unburdened.
21 **Q. So I understand that you don't believe**
22 **it is the best evidence, but do you consider**
23 **examples of individual hospital behavior to be**
24 **relevant to the conclusions that you plan on**

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1 **giving in your affirmative testimony?**
2 MR. KELLY: I think that is asked
3 and answered now.
4 A. I think it's just illustrative.
5 I mean, I guess -- so suppose that
6 you had some hospital that said: I'm not
7 influenced by this; but in fact you can
8 demonstrate that even though the hospital says
9 this, its behavior changes when it is not
10 burdened, then I think you've got to go with
11 the actual evidence of its behavior, not what
12 it says about its preferences.
13 But one hospital -- you know, you
14 look at the evidence, and it shows that what
15 they are saying about their preferences
16 coincides with what the economic evidence
17 shows about the revealed preferences, then I
18 think it can be relevant as illustrative proof
19 of the economic phenomenon.
20 **Q. You intend to rely on the illustrative**
21 **examples you cite to in your reports as to**
22 **hospital preferences as part of the**
23 **affirmative opinions that you are giving in**
24 **this case?**

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1 A. I think I may use illustrative examples
2 as a practical matter.
3 My experience is that there is never
4 a time to testify enough to all this stuff.
5 There are 300 pages here. I probably testify
6 for a short time.
7 So I don't think -- I don't have an
8 intention to be able to fit it in, frankly,
9 but I think it would be relevant, illustrative
10 proof.
11 **Q. I believe you testified to this, but**
12 **you haven't attempted to do any surveys from**
13 **hospitals in this case as part of formulating**
14 **your opinions, correct?**
15 A. Not unless you mean a survey to include
16 what the data shows the hospitals actually
17 bought. That's kind of a survey of their
18 actual transactions, but not a survey of what
19 they say about their preferences.
20 **Q. And you haven't spoken to**
21 **representatives of hospitals as to which**
22 **sharps containers they think is the best**
23 **product on the market, correct?**
24 A. No.


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1 **Q. And you haven't spoken to hospitals to**
2 **understand how they view GPO contracts as**
3 **fitting into their purchasing decisions,**
4 **correct?**
5 A. That's correct.
6 **Q. Do you consider Mr. Crowder's testimony**
7 **relevant to the opinions you are prepared to**
8 **give in this case?**
9 A. I can't remember Mr. Crowder's
10 testimony.
11 **Q. Do you know who Mr. Crowder is?**
12 A. I can't remember.
13 **Q. Do you recall reviewing testimony from**
14 **Natchitoches Hospital?**
15 A. I think so. It's been a while, but I
16 can't recall what he said.
17 **Q. Okay. So sitting here today, you can't**
18 **tell me whether or not you intend to rely on**
19 **that testimony?**
20 A. I can't say.
21 If I say it in the report, I give
22 the reliance I give in the report to it, but I
23 just -- I'm not matching right now the name to
24 a recollection.

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1 **Q. Do you plan on offering any opinion as**
2 **to what the actual but-for price should look**
3 **like?**
4 A. No. I take that to be the task of
5 Dr. Singer.
6 **Q. So you're not in any way calculating**
7 **the but-for competitive price, correct?**
8 A. That's right. I take that to be his
9 task and not mine.
10 **Q. What is price discrimination?**
11 A. Price discrimination is charging
12 different buyers different prices for the same
13 item.
14 **Q. Does the existence of price**
15 **discrimination demonstrate per se that a**
16 **company has market power?**
17 A. That's a good question. A lot of
18 economist would say so.
19 A big view in the literature is in
20 fact that any price discrimination shows
21 market power.
22 I actually have a more conservative
23 view on that. I would say that is only true
24 if you prove it is above-cost price

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1 discrimination, because it seems to me there
2 are some cases in which you could have a price
3 discrimination schedule that just covers your
4 average costs.
5 **Q. So, in your opinion, above-cost price**
6 **discrimination is indicative of market power?**
7 A. Yes.
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22 **Q. Is Stericycle --**
23 **MR. KELLY: May I interject here.**
24 **Was your question to Becton Dickinson or to**

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1 Q. Paragraph 158 states, "Finally, even
2 assuming that Tyco would give additional
3 volume-based discounts in the but-for world,
4 smaller hospitals in the but-for world would
5 be able to combine, perhaps through GPOs, to
6 get such volume-based discounts."
7 Do you see that?
8 A. Uh-huh.
9 Q. I gather from reading this that you
10 don't believe that volume discounts would be
11 prohibited in the but-for world?
12 A. That is correct, unless they were
13 tailored volume-based discounts of the sort
14 that amount to de facto share-based discounts.
15 Q. What do you mean by "a tailored volume
16 discount"?
17 A. Oh, that's where you tailor the volume
18 threshold to the actual requirements of the
19 buyer.
20 So if you know there is a buyer that
21 buys, you know, a hundred units of a product,
22 that's what it needs every year to run its
23 business, and you say, "Oh, we won't make it a
24 hundred percent share requirement. We will

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1 just say you have to buy a hundred units from
2 us." That's equivalent to share based.
3 A true volume-based one would set
4 the same volume thresholds across all buyers.
5 So that it would really be based on the
6 volume-based efficiencies rather than tailored
7 to achieve the same effects as a share-based
8 requirement.
9 Q. Let's say there is a contract that
10 gives a buyer additional discount if they
11 match the volume of sharps containers they
12 purchased from the prior year, but upon
13 investigation you learn that the volume they
14 bought during the prior year was only 10
15 percent of that hospital's sharp container
16 needs, would that be an impermissible tailored
17 volume discount in your opinion?
18 A. I don't understand the hypothetical,
19 because how could you have only bought 10
20 percent of what you need for something? You
21 would have to buy your needs in the prior
22 year.
23 Q. Let's take a hypothetical: The company
24 is buying 90 percent from Daniels, but is

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1 buying 10 percent of, let's say, chemotherapy
2 containers from Covidien.
3 A. Yeah.
4 Q. And the deal that Covidien strikes with
5 this hospital is you will still get a discount
6 if you match your volume from last year?
7 A. Uh-huh.
8 Q. Would that be an impermissible tailored
9 volume discount?
10 A. Well, I think it's a low percentage,
11 but from what you are describing is the
12 equivalent of a 10 percent share-based
13 discount.
14 If they are using the same volume
15 everywhere, that is a difference story, but
16 that seems to try to guarantee a particular
17 share of the purchases of that buyer.
18 Q. So that would be an impermissible
19 tailored volume discount in your opinion?
20 A. I think so, in a but-for world in this
21 case, given the finding of invalidity, it
22 would be one of the invalid contracts.
23 I mean, the foreclosure effect would
24 be small. It would only be 10 percent in that

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1 case, but it would be part of the picture.
2 Q. In setting a uniform volume discount,
3 is it fair to say that an amount that some
4 members or hospitals might meet easily might
5 prove impossible for smaller hospitals to
6 meet?
7 THE WITNESS: Could you read back
8 that question?
9 (The record was read.)
10 A. It's possible if the buyers in fact
11 cannot offer the same volume, although, it
12 seems to me, they often could combine with
13 other buyers to achieve volume-based purchases
14 and achieve volume-based efficiencies, unless
15 there were something about the individual
16 delivery that mattered.
17 So, for example, if the efficiency
18 comes from filling the whole truck container,
19 then that may be hard to achieve for a small
20 hospital if it can't buy an entire container,
21 and here I mean like the container they put on
22 the truck rather than the sharps container.
23 Q. In positing that small hospitals might
24 be able to combine together to aggregate their

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1 **purchasing to meet a larger volume-based**
 2 **discount, do you assume that the hospitals are**
 3 **committing to each other to purchase from a**
 4 **single manufacturer?**
 5 A. Well, they could do it brokered by the
 6 GPO and just all make parallel agreements to
 7 the GPO to contribute towards a group
 8 commitment.
 9 **Q. But such an arrangement would be lawful**
 10 **in your but-for world?**
 11 A. Well, I'm not opining about legality, I
 12 guess, but I would assume it could continue to
 13 exist if -- under my but-for world.
 14 **Q. And it could continue to exist because**
 15 **it wouldn't have an anticompetitive effect, in**
 16 **your opinion?**
 17 A. Well, I'm not saying volume-based
 18 discounts could never have an anticompetitive
 19 effect, but they've not been -- ones that are
 20 truly volume-based and tailored haven't been
 21 challenged in this case.
 22 So, therefore, I would assume they
 23 would continue to exist in the but-for world.
 24 **Q. In your but-for world, would you please**

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1 **describe the negotiating leverage a GPO would**
 2 **have in trying to extract the lowest possible**
 3 **price from a manufacturer?**
 4 A. Sure. Let's see. The leverage they
 5 have is that GPOs provide economies of scale
 6 in contracting.
 7 So they provide that benefit to
 8 sellers, and, thus, they can -- sellers are
 9 willing to give them a lower price, because
 10 they get that benefit, and they also provide
 11 effective marketing, so you get a predictable
 12 increase in your sales if you purchase through
 13 a GPO.
 14 **Q. Do you believe it's pro-competitive for**
 15 **GPOs to tell or promise manufacturers that**
 16 **they are likely to see an increase of business**
 17 **if they are awarded a contract position at the**
 18 **GPO?**
 19 A. Yeah, as long as it comes without any
 20 exclusionary conditions, I think that's fine.
 21 **Q. If a GPO awarded a contract to every**
 22 **viable manufacturer in the business, would you**
 23 **still expect to see that manufacturer's sales**
 24 **increase as a result of the GPO contract?**

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1 THE WITNESS: I'm sorry, I lost the
 2 thread on that one. Repeat that back.
 3 (The record was read.)
 4 A. Yes. Compared to not being a GPO
 5 contract, yes, because they would face lower
 6 marketing costs getting to customers than they
 7 otherwise would.
 8 **Q. Would you expect their profits to**
 9 **increase or their sales relative to other**
 10 **competitors to increase?**
 11 A. Well, that will depend on the
 12 competitive interaction between them. In the
 13 perfectly competitive market, their profits
 14 wouldn't change because nobody makes any
 15 super-normal profits in a perfectly
 16 competitive world. They just have lower
 17 costs, and they would pass that on to
 18 customers.
 19 In an imperfect market, with market
 20 power, some of the share would be passed on,
 21 but only some of it, on to customers, and some
 22 of it would be effected in prices.
 23 **Q. If all viable manufacturers are on**
 24 **contract, would you expect the existence of**

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1 **that contract to give any one competitor any**
 2 **advantage over another?**
 3 A. If they are all on contract and equally
 4 promoted, no. The advantage is over people
 5 who aren't on the GPO contract at all.
 6 So it is sort of like being a
 7 retailer for all -- on same retail shelf.
 8 There is no relative advantage, but we're
 9 certainly going to do a lot better than if we
 10 were not in retail stores at all.
 11 **Q. Do you believe that the quality of**
 12 **sharps containers would be higher in your**
 13 **but-for world?**
 14 A. I haven't reached an affirmative
 15 opinion about that.
 16 I think it's possible that
 17 competition would include higher quality
 18 products or that with greater economies of
 19 scale, better products, higher quality
 20 products might be produced, or that a greater
 21 share of customers would get a product that
 22 they view as higher quality, but I didn't
 23 affirmatively reach a conclusion about quality
 24 in the but-for world.