IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

NATCHITOCHES PARISH HOSPTIAL 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; and THE KENDALL HEALTHCARE PRODUCTS COMPANY, Defendants.	*	Civil Action No. 05-12024 (PBS) Jury Trial Demanded

PLAINTIFFS' SUPPLEMENTAL BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO EXCLUDE THE EXPERT REPORT AND OPINIONS OF PROFESSOR EINER ELHAUGE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

I. INTRODUCTION

Pursuant to the Court's Order of November 24, 2008, Plaintiffs respectfully submit this supplemental brief in opposition to Defendants' Motion to exclude the expert report and opinions of Prof. Einer Elhauge. During the ordinary course of expert discovery, Tyco produced reports from three separate experts – Prof. Ordover, Ms. Guerin-Calvert, and Mr. Hughes – to attack the expert opinions of Prof. Elhauge. In spite of having already leveled three sets of attacks upon which to base its motion, Tyco – eight months after the expert disclosure deadline – additionally employed the services of yet another economist, Dr. Daniel McFadden, for the sole purpose of rearguing the unreliability of Prof. Elhauge's opinions under Rule 702.

Ironically Dr. McFadden's two declarations are themselves unreliable and irrelevant, failing to adhere to the very *Daubert* standards that Tyco accuses Prof. Elhauge of failing to meet.[1] Dr. McFadden's declarations are directed not at Prof. Elhauge's primary analyses regarding anticompetitive impact, but instead only the backup, secondary analyses that Prof. Elhauge has used to confirm his primary conclusions.[2] As revealed in Dr. McFadden's declarations, and confirmed in his deposition testimony, Dr. McFadden's testimony is completely and purposefully divorced from reality. The exceedingly narrow scope of Dr. McFadden's assignment combined with his lack of sufficient time and preparation have left him entirely unfamiliar with Plaintiffs' allegations, Prof. Elhauge's primary analyses, the undisputed facts in support of Prof. Elhauge's conclusions, the decisions of this Court, the contracting

---

[1] *See* Declaration of Daniel L. McFadden In Support Of Motion To Exclude The Expert Report and Opinions of Professor Einer Elhauge ("McFadden Declaration," Doc. 177); *see also* Reply Declaration of Daniel L. McFadden In Support Of Reply Brief In Support of Motion To Exclude The Expert Report and Opinions of Professor Einer Elhauge ("McFadden Reply," Doc. 207); *see also Daubert v. Merrell Dow Pharms Inc.*, 509 U.S. 579 (1993).

[2] Dr. McFadden has only addressed Prof. Elhauge's regression analyses, and not the primary analyses comparing differences in rival penetration between the foreclosed and unforeclosed portions of the sharps container market, upon which Prof. Elhauge bases his conclusions regarding anticompetitive impact. *See* Expert Report of Einer Elhauge, December 18, 2007 ("Elhauge Report," Doc. 133) at ¶¶179-187.

practices of GPOs, the industry practices within the sharps container market, and even the testimony of Tyco's other expert economists Prof. Ordover and Ms. Guerin-Calvert.

At the time of his deposition Dr. McFadden remained oblivious to how his assumptions and criticisms contradicted key elements that have been established in the record over the more than three year course of this litigation. Dr. McFadden was similarly unaware that the scope of his work did not include an assessment of Prof. Elhauge's primary analyses and conclusions. Thus, as another court has already found, Dr. McFadden's criticisms "may be explained as much or more by his redefinition of the question to be answered than by his correction of [Plaintiffs' experts'] alleged methodological errors." *Cook v. Rockwell Int'l Corp.*, 580 F.Supp.2d 1071, 1117, n. 44 (D. Colorado 2006) (*a.k.a.* "Rocky Flats"). Dr. McFadden's declarations are therefore excludable in their own right, and, even if wholly accepted, would still fail to establish the unreliability of Prof. Elhauge's opinions. As a result, these declarations have no bearing on the present *Daubert* motion and should be disregarded entirely.

II. LAW AND ARGUMENT

A. Relevance Within The Standards Of *Daubert* and Rule 702

As noted, Tyco has presented the testimony of Dr. McFadden for the sole and narrow purpose of arguing that Prof. Elhauge's regression analyses are unreliable under *Daubert* and Rule 702. Though Dr. McFadden reiterates his opinion that certain of Prof. Elhauge's analyses are "of no probative value," – an opinion which Dr. McFadden acknowledges is legal in nature and for which he is utterly unqualified to offer – the actual standard to which Prof. Elhauge's analyses will be held is an issue not much in dispute. *See* McFadden Declaration at ¶¶8, 9, 10,

29, 33.[3] As Tyco itself writes in its Motion to Exclude the Expert Report and Opinions of Professor Einer Elhauge ("Opening Brief," Doc. 176):

> Under Federal Rule of Evidence 702, this Court acts as the gatekeeper to ensure that proposed expert testimony "is not only relevant, but reliable" and that it "is sufficiently tied to the facts of the case [such] that it will aid the jury in resolving a factual dispute." *Daubert,* 509 U.S. at 589, 591 (internal citation omitted); Opening Brief at 3-4.

Here, Tyco has kept Dr. McFadden completely in the dark regarding the facts of this case, requiring him to operate in an academic vacuum. The result is that Dr. McFadden has leveled criticisms at Prof. Elhauge that evidence only his confusion with regard to fundamental aspects of Plaintiffs' claims and Prof. Elhauge's analysis. This confusion has produced testimony that not only fails to fit, but actually contradicts the contours of this case. It is therefore itself unreliable.

Another aspect of legal relevance within the *Daubert* context is that a flaw in an "expert's method only warrants exclusion 'if the flaw is large enough that the expert lacks good grounds for his or her conclusions." *Cook,* 580 F.Supp.2d at 1116 (citing *In Re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717 at 746 (3rd Cir. 1994)). By restricting his analysis to the secondary analyses that simply confirm Prof. Elhauge's conclusions, Dr. McFadden has offered testimony that is completely unhelpful in the context of a *Daubert* proceeding. This is because, even if it were reliable *and* correct, Dr. McFadden's testimony would affect only the strength of Prof. Elhauge's conclusions (*i.e.*, the weight afforded to his testimony), and not its admissibility.

Finally, even within the four corners of Dr. McFadden's narrowly focused testimony, the centerpiece of his criticism relates to whether or not Prof. Elhauge included all the proper explanatory variables in his regression analyses. As shown below, this criticism is ill-founded

[3] Dr. McFadden conceded at deposition that the phrase "no probative value" is not a term of art in econometrics but is instead "a borrowed term from legal terminology." McFadden Depo. at 24.

because it again results from Dr. McFadden's lack of familiarity with Plaintiffs' case. More importantly, it fails to raise a *Daubert* issue because "the Supreme Court and other courts have held that the actual or alleged omission of explanatory variables from a regression analysis normally affects the weight of the analysis, but does not render it inadmissible." *Cook*, 580 F.Supp.2d at 1113 (citing *Bazemore v. Friday*, 478 U.S. 385, 400 (1986), *Watson v. City of Kansas City*, 857 F.2d 690, 695 (10th Cir.1988), and *Cullen v. Ind. Univ. Bd. of Trs.*, 338 F.3d 693, 701 n. 4 (7th Cir.2003)). *See also, In re Pharm. Indus. Average Wholesale Price Litig.*, 491 F.Supp.2d 20 at 86 (D. Mass. 2007) ("An economist's failure to consider certain data is not fatal to admissibility if the expert sufficiently explains her choice of data for her analysis. Such shortcomings in an expert's analysis go to the weight, not the admissibility, of the testimony, and the opposing party is free to argue at trial that the trier of fact should discredit it.") (citing *Cummings v. Std. Register Co.*, 265 F.3d 56, 65 (1st Cir.2001)).

Therefore in this somewhat unique *Daubert* within a *Daubert* context, Dr. McFadden's testimony should be disregarded because it is unreliable in that it contradicts the contours of this case, and because it is unhelpful in that it fails to even raise issues that could warrant the exclusion of Prof. Elhauge's testimony.

B. Dr. McFadden's Testimony Is Plagued By His Lack Of Knowledge Of The Facts Of The Case

In a belated recognition that its three other experts had failed to undermine Prof. Elhauge's analyses, Tyco quickly retained Dr. McFadden as yet another expert economist, for the sole purpose of excluding Prof. Elhauge's testimony. Dr. McFadden testified at deposition that he was not retained in this matter until mid-September, 2008, giving him approximately one month to familiarize himself with this case and render an expert opinion. *See* Transcript of Videotaped Deposition of Daniel L. McFadden, Ph.D., dated December 12, 2008, and attached

hereto as Exhibit A ("McFadden Depo.") at 8. In this short period of time prior to completing his initial report, Dr. McFadden did not review *any* of the underlying contracts or their challenged provisions. Id. at 33. Nor did he review *any* depositions, not even the deposition of Prof. Elhauge, whose analyses he has criticized. Id. at 11-12.[4] Nor did Dr. McFadden read Prof. Elhauge's reply report,[5] which responds to and refutes all of the purported criticisms leveled by Tyco's other experts, prior to submitting his reports, and still had not done so at the time of his deposition on December 12, 2008. Id. at 15. Dr. McFadden did not review *any* other documents produced in this case, not even the ones cited by Prof. Elhauge in support of his analyses and conclusions. Id. at 16-17. Even as to Prof. Elhauge's initial report dated December 18, 2007 – the very report that he is criticizing – Dr. McFadden did not review the bulk of its contents:

> I was concentrating solely on his -- his statistical analysis and associated graphical analysis. So I certainly have looked at his backup materials for that. But beyond that, no, I have not looked at the other materials that would be, perhaps, germane to the broader antitrust issues -- the substantive antitrust issues in the case.
> Id. at 17.

Dr. McFadden also did not read this Court's two class certification orders, wherein the viability of Prof. Elhauge's methods and their fit to the facts of this case were examined. Id. at 33. Dr. McFadden has made no study of the contracting practices of Group Purchasing Organizations ("GPOs"), nor of manufacturers' financing of GPOs, nor of Tyco's bidding and pricing procedures in the sharps container market, nor in particular how Tyco sets product prices and GPO fees based on whether a GPO grants it sole, dual, or multi-source status. Id. at 63-64, 70-71, 76. It is clear that Dr. McFadden did not even cursorily review the sections in Prof. Elhauge's reports wherein he analyzes the evidence showing how Tyco's conduct corrupted the

[4] In fact, Dr. McFadden was not even aware that Prof. Elhauge's deposition was available until he received it *after* submitting his initial report. McFadden Depo. at 12. Even after receiving it, he deferred to his staff to "flag" those portions that they deemed relevant only to the statistical analyses. Id. at 13.
[5] Reply Expert Report of Professor Einer Elhauge, February 15, 2008 ("Elhauge Reply," Doc. 137).

GPO bidding process. *See* Elhauge Report at ¶¶121-126, 138-142. Nor has Dr. McFadden read or familiarized himself with Prof. Elhauge's academic writings on these very topics. Id at 15. Nor has he even reviewed the reports of Tyco's own liability expert, Prof. Ordover, which purport to deal with the type and quality of proof needed to measure potential anticompetitive effects in the sharps container market. Id. at 32.[6]

The main result of all these cumulative failings is Dr. McFadden's statement that "there's nothing that I have learned about Tyco which would suggest to me that [Tyco doesn't] compete the way most firms do…" Id at 77-78. But without a review of the facts, such an opinion can not be meaningful in any way. This failure to familiarize himself with the volume and force of Prof. Elhauge's analysis and supporting evidence perhaps explains how he could make the following nonsensical indictments of the few Elhauge analyses that he does consider.

C. The Lack Of Relevant Scope In Dr. McFadden's Testimony

Dr. McFadden explains his assignment as having "been asked by counsel for [Tyco] to review and comment upon the econometric and statistical analysis used in the reports issued by plaintiff's expert, Professor Einer Elhauge, in the current Natchitoches class action case." McFadden Declaration at ¶6. The principal conclusion in Dr. McFadden's declaration is the sweeping, unsupported, repetitive, and impermissibly legal pronouncement that Prof. Elhauge's "statistical analysis is *of no probative value* in determining the impact of the alleged anti-competitive practices." McFadden Declaration at ¶¶8, 9, 10, 29, 33 (emphasis added). But it is already clear that Dr. McFadden is not even familiar with what these anti-competitive practices are, much less with how they would manifest themselves in the sharps container market.

[6] Dr. McFadden testified that he was provided with Prof. Ordover's expert reports two days before his December 12 deposition, and had "skimmed" certain sections on the plane to Boston. McFadden Depo. at 19 and 64.

During his deposition, Dr. McFadden attempted to justify his lack of familiarity with Plaintiffs' claims by stating that he "was not retained as an antitrust expert, and [has] offered no opinions on the antitrust matters in this case." McFadden Depo. at 16. As such, Dr. McFadden frequently refuses to take an affirmative position on his own selected topics for criticism. For example, Dr. McFadden states that he has "no opinion myself as to whether there are or are not economies of scale" in the manufacture of sharps containers, but rather only that the evidence, in his view, is "inconsistent." McFadden Depo. at 41-42. Similarly, even though Dr. McFadden criticizes Prof. Elhauge for using a 90% statistical confidence level that is undoubtedly commonly accepted in the scientific community (including by Dr. McFadden himself), Dr. McFadden nevertheless refuses to "offer[] an opinion … on what significance levels the Court should use." Id. at 45.[7] Regarding his linear regression model, Dr. McFadden states he "did not propose the alternative models as a better model or a correct model for this analysis." Id. at 57.

Though Dr. McFadden apparently believes his lack of familiarity with the facts is excused by his narrow assignment to only address Prof. Elhauge's statistical analyses, when he strays into other subjects it becomes clear that his misunderstandings severely impact his own analysis. For example, Dr. McFadden revealed at deposition his mistaken belief that Plaintiffs are pursuing a per se theory of antitrust liability.[8] To be clear, Dr. McFadden's failure to acknowledge Plaintiffs' claims here owes not to an inability to understand, as he has in fact opined for plaintiffs in cases involving allegations similar to those here. As Dr. McFadden clarified at deposition:

> Q. You -- well, you've mentioned predatory pricing. You have not mentioned exclusive dealing at all. Are you familiar with the concept of exclusive dealing?

[7] See Expert Declaration of Professor Einer Elhauge ("Elhauge Declaration," Doc. 198) at ¶88, n. 114

[8] *See, e.g.*, McFadden Depo. at 94: "And I think that [Elhauge] paints too broad a brush when he simply says that sole source contracts, in and of themselves, are anticompetitive." *See also*, Id. at 94: "in a perfectly competitive situation, sole-source contracting *could* be perfectly competitive." (emphasis added).

A. Yes.
Q. Have you ever been retained as a expert in a case where exclusive dealing was among the allegations?
A. I have.
Q. Okay. And what -- what cases -- case or cases -- would that be?
A. Okay. In the -- in the late 1970s, I was involved as a plaintiffs' expert for Murphy Tug in a case that involved concerted refusals to deal and exclusive dealing. And in the more recent decades, I was involved as a plaintiffs' expert for Netscape, and again, for Sun Microsystems in their suits against Microsoft, and again, the issue was exclusive dealing.
* * *
Q. And do you recall the types of contracting practices that Microsoft engaged in vis-à-vis Netscape/Sun?
A. Well, yes. It -- it would offer favorable terms to internet providers if they agreed to provide only -- only Microsoft products. And they famously offered Internet Explorer for free, and in -- in dealing with original equipment, companies would offer them more favorable terms if they would avoid putting any other products on the -- on the desktop.
Q. Would -- among the more favorable terms -- be pricing terms?
A. The -- the price of the operating system, yes.
Q. It would be lower if they agreed not to put competing internet browsers on, correct?
A. That's correct.
McFadden Depo. at 83-85.

The Microsoft cases where Dr. McFadden opined on behalf of the plaintiffs and where "the issue was exclusive dealing," settled for approximately $1 billion each. Id at 86. Thus Dr. McFadden's comprehension failures in this case are instead the direct and unavoidable result of his lack of preparation coupled with the exceedingly narrow scope of his assignment.

Ironically, when presented with a hypothetical that actually has considerable support in the evidence (in contrast to his own hypotheticals that have no support whatsoever),[9] Dr. McFadden acknowledges that under a rule of reason analysis where the facts are important, Plaintiffs' allegations could in fact support a finding of anticompetitive impact.[10] Dr. McFadden states that "one must look carefully at the circumstances," but has avoided doing so himself. This error alone makes it clear that the scope of testimony delineated for Dr. McFadden by Tyco is

[9] *See* McFadden Depo. at 98 and 100-101 (discussing a pricing band within which all manufacturers' bids would be accepted by the GPO).
[10] *See* McFadden Depo. at 102 ("I think that would – one would want to look carefully at the circumstances. … If it's the result of specific anticompetitive practices by [Tyco], then it seems Plaintiffs would have an argument.")

incapable of producing results relevant to Plaintiffs' claims. Dr. McFadden's belief that he can nevertheless determine "whether the question that [Elhauge] posed and tried to answer statistically is helpful to the resolution of the case" is simply not credible. Id. at 31.

D. Fundamental Errors In Dr. McFadden's Testimony

As a result of these severe limitations, Dr. McFadden makes critical errors in his own econometric criticisms, proving that such an analysis can not occur in a vacuum without regard to the facts. For example, Dr. McFadden concludes that Prof. Elhauge's "statistical analysis, which omits relative prices, has a substantial risk of confounding the effect of the variables that are included in the regression – namely, whether contracts are restricted or not, and the effects of the variables excluded from the regression – namely, relative prices." Id. at 75. But Prof. Elhauge has not omitted relative prices, because his contract status variable (*i.e.*, foreclosed or not) is what drives relative prices, and therefore contains this information. More importantly, the contract status variable also contains the most relevant information regarding the exclusionary terms of Tyco's challenged contracts.[11] Had Dr. McFadden been familiar with the manner in which Tyco attaches exclusionary provisions to relative price differences, he likely would have realized his mistake.[12] As it stands, Dr. McFadden error-laden testimony is only that Prof. Elhauge's regressions have a "*potential* to confound." Id. at 73 (emphasis added).

Dr. McFadden makes other errors that are not tied to the facts of the case. For example, regarding his testimony on the presence of economies of scale, Dr. McFadden stated at deposition that the "only conclusion I've reached is that the statistical evidence that Professor Elhauge presents and that my own analysis finds is that these data don't show a consistent

[11] *See* Elhauge Declaration at ¶74-76, explaining the conceptual errors in Dr. McFadden's criticisms.
[12] As it is, Dr. McFadden is inadvertently advocating the inclusion of an explanatory variable (relative price) that would covary almost perfectly with contract status, and thus would introduce multicollinearity into the regression – a "confounding" statistical problem for which Dr. McFadden has criticized other experts. See *Rocky Flats* at 1115.

statistical result, one way or the other." McFadden Depo. at 42. Not only is this a rather weak statement, but the inconsistency Dr. McFadden finds actually results only from his arbitrary decision to exclude Tyco's top ten selling products (comprising 40% of Tyco's sales) from the analysis. Though Prof. Elhauge was able to discern this omission by parsing Dr. McFadden's backup materials, Dr. McFadden himself made no mention of it in his declaration to this Court.[13]

Additionally, when purporting to demonstrate the sensitivity of Prof. Elhauge's log-specification in his regression, Dr. McFadden proffered an analysis that only reconstituted half of the appropriate data.[14] Dr. McFadden conceded this error at deposition, and Prof. Elhauge has shown that using all the data appropriate to a linear regression results in a slightly higher damage estimate by Dr. Singer, albeit one which is very much in line with his original estimates.[15] The same is true with all of Dr. McFadden's proffered alternatives: they are not only incorrect, but had Dr. McFadden implemented them, he would have concluded that they are also irrelevant because they still generate results confirming the existence of anticompetitive impact.[16]

III. CONCLUSION

For the above and all the reasons urged in Plaintiffs' prior opposition memoranda, Tyco's motion to exclude the expert reports and testimony of Prof. Einer Elhauge should be denied.

Date: January 5, 2009

Respectfully submitted,

/s/ John Alden Meade

Stuart Des Roches (*pro hac vice*)
Andrew Kelly (*pro hac vice*)
John Alden Meade (*pro hac vice*)
ODOM & DES ROCHES, LLP
Suite 2020, Poydras Center

[13] *See* McFadden Depo. at 36, 38, 41, 49 and 51.
[14] *See* McFadden Declaration at ¶23-29.
[15] *See* McFadden Depo. at 56-58; *see also* Elhauge Declaration at ¶48-53.
[16] See Elhauge Declaration at ¶54-73.

650 Poydras Street
New Orleans, LA 70130
(504) 522-0077

Thomas G. Shapiro BBO #454680
Adam Stewart BBO #661090
SHAPIRO HABER & URMY LLP
53 State Street
Boston, MA 02109
(617) 439-3939

GARWIN GERSTEIN & FISHER LLP
Bruce E. Gerstein
Brett Cebulash
Archana Tamoshunas
1501 Broadway, Suite 1416
New York, NY 10036
(212) 398-0055

THE SMITH FOOTE LAW FIRM, LLP
W. Ross Foote
David P. Smith
David Raphael
720 Murray Street
P.O. Box 1632
Alexandria, LA 71309
(318) 445-4480

BERGER & MONTAGUE, P.C.
Daniel Berger
Eric L. Cramer
David Sorensen
Keith Verrier
1622 Locust Street
Philadelphia, PA 19103
(215) 875-3000

KOZYAK TROPIN &
THROCKMORTON, P.A.
Adam Moskowitz
Tucker Ronzetti
2800 Wachovia Financial Center
200 Sourth Biscayne Boulevard
Miami, FL 33131
(305) 372-1800

LAW OFFICE OF ALFRED G. YATES JR. PC
Alfred G. Yates, Jr.
519 Allegheny Building
429 Forbes Avenue
Pittsburgh, PA 15219
(412) 391-5164

BERGER SINGERMAN, P.A.
Mitchell W. Berger
Rene Harrod
350 Las Olas, Suite 1000
Fort Lauderdale, FL 33301
(954) 525-9900

HANGLEY ARONCHICK SEGAL & PUDLIN
Steve D. Shadowen
30 North Third Street, Suite 700
Harrisburg, PA 17101
(717) 364-1030

SCHIFFRIN & BARROWAY, LLP
Joseph H. Meltzer
John Gross
280 King of Prussia Road
Radnor, PA 19087

CERTIFICATE OF SERVICE

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on January 5, 2008.

/s/ John Alden Meade
John Alden Meade