IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

NATCHITOCHES PARISH HOSPITAL SERVICE DISTRICT and JM SMITH CORPORATION d/b/a SMITH DRUG COMPANY, on behalf of themselves and all others similarly situated,	:	Civil Action No. 05-12024 (PBS)
Plaintiffs,	:	
v.	:	
TYCO INTERNATIONAL, LTD.; and TYCO INTERNATIONAL (U.S.), INC.; TYCO HEALTHCARE GROUP, L.P. THE KENDALL HEALTHCARE PRODUCTS COMPANY,	:	
Defendants.	:	

SUR-REPLY MEMORANDUM OF LAW IN FURTHER OPPOSITION TO DEFENDANT'S MOTION TO EXCLUDE THE EXPERT REPORT AND TESTIMONY OF PROFESSOR EINER ELHAUGE

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I. INTRODUCTION

Plaintiffs respectfully submit this sur-reply in further opposition to Defendants' (collectively "Tyco") Motion to Exclude the Expert Report and Opinions of Prof. Elhauge.

As shown in Plaintiffs' Opposition brief,[1] Prof. Elhauge is an expert in the field of antitrust economics and qualified to render an opinion in this case. His methodologies are sound, tested and supported by scholarship in the field. Plt. Opp. at 4-7. Those methodologies have been employed frequently in similar cases, and Prof. Elhauge has applied them reliably to the facts of this case. This is what is required under Rule 702 and *Daubert*, and Prof. Elhauge has more than cleared the hurdle. Accordingly, Tyco's Motion should be denied.

Since Prof. Elhauge's expertise and methodologies are unassailable, Tyco has instead resorted to other tactics such as implying that it is Plaintiffs and Prof. Elhauge who have offered "new" analysis here. This should not be countenanced. Prof. Elhauge's Declaration (and Sur-Reply Declaration) were submitted *in response* to four unprovoked and new expert reports, two from an "expert" that has never before appeared in this case, all aimed at newly attacking Prof. Elhauge's reports that were submitted nearly a year ago, despite Tyco's experts having the opportunity at that time to fully respond to and criticize Prof. Elhauge's methodologies and opinions. In light of all of Tyco's new reports, it is perfectly reasonable and necessary for Prof.

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[1] Refers to Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Exclude the Expert Report and Opinions of Professor Einer Elhauge, dated November 14, 2008, cited herein as "Plt. Opp." Prof. Elhauge's Declaration of that date is cited herein as "Elhauge Decl.", and his Sur-Reply Declaration dated December 9, 2008, is cited herein as "Elhauge Sur-Reply Decl." Prof. Elhauge's Expert Report dated December 18, 2007, and his Reply Report dated February 15, 2008, are cited herein as "Elhauge Report" and "Elhauge Reply." Defendants' Reply Brief in Support of the Motion to Exclude the Expert Report and Opinions of Professor Einer Elhauge, dated November 26, 2008, is cited herein as "Def. Reply."

Elhauge to defend himself against a barrage of attacks from multiple experts.[2] Similarly, Tyco claims that Prof. Elhauge is supposedly trying a "do-over" with respect to Tyco's preferred "access" approach for classification of buyers. Def. Reply at 13. This is patently false and misleading.[3] In fact, it is Tyco that is attempting a "do-over," and has sent its experts "back to the drawing board." *Id.* Sometime between February and October of this year, Tyco apparently realized that its expert reports were woefully inadequate and thus decided to engage in a lay-in-wait ambush strategy for the *Daubert* briefing. Tyco has now put in five new declarations during the *Daubert* process (totaling over 100 pages). Not a single one of them contains anything that could not have been raised by Tyco's experts in originally responding to Plaintiffs' experts' reports.

Tyco's strategy is especially transparent where it claims that Plaintiffs have "conceded" issues that have been consistently denied for over a year in this litigation. In fact, Prof. Elhauge preemptively discussed the absence of selection bias in his initial merits expert report in December 2007. Tyco ignores Prof. Elhauge's Report and Reply wherein all of the issues that Tyco claims Plaintiffs have supposedly "conceded," as well as all of the fall-back arguments that Tyco attempts to reintroduce here, were refuted and put to rest long ago.[4] In addition to

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[2] It is unclear whether Prof. Ordover's and Dr. McFadden's November 26, 2008 Reply Declarations are properly before the Court, since on November 24, 2008, the Court ordered that "there shall be no reply or supplemental defendant's expert reports;" however, Plaintiffs and Prof. Elhauge have kept up with the barrage and have responded to those dubious filings here and in Prof. Elhauge's accompanying Sur-Reply Declaration.

[3] As shown below, Prof. Elhauge has repeatedly explained that Tyco's "access" approach is nonsensical, and he has no intention of using it to affirmatively prove anything.

[4] Although Tyco apparently would prefer to consider this a first-time battle on these issues, Plaintiffs should not have to reiterate and recite, and this Court should not have to review, all the same arguments and responses *ad nauseam* in each new brief and report.

repeatedly hypothesizing about the presence of selection bias in the face of Prof. Elhauge's demonstrations disproving that it drives any of his results, Tyco's experts have studiously avoided the powerful factual evidence in this case which completely corroborates Prof. Elhauge's conclusions, and which he has discussed extensively in his reports. Tyco skirts the issue of its own experts' carelessness and mistakes, and instead sets forth an irrelevant mix of quarrels with Elhauge's results and then engages in a lengthy and pointless discussion about the access approach. Tyco's statement that Plaintiffs have failed to "rehabilitate" Prof. Elhauge's regressions incorrectly assumes that there was some need to do so. Tyco has yet to launch a credible attack that does any damage to Prof. Elhauge's regressions (or any other part of his analysis), and it is Dr. McFadden's flawed opinions that have yet to be rehabilitated.

Additionally, Tyco has made no serious challenge to Prof. Elhauge's qualifications. Besides pointing out that he has a law degree, Tyco has not in any way shown that Prof. Elhauge lacks the knowledge or ability to opine on the area of antitrust economics, which is exactly the area of expertise most relevant here. Indeed, the very fact that Prof. Elhauge has more than capably engaged in a multi-round battle of the experts with Dr. McFadden and Prof. Ordover, demonstrates Prof. Elhauge's facility and expertise with the relevant concepts and econometric methods.

At bottom, Tyco has gleefully used this opportunity to re-stage the battle of the experts with new characters and multiple new expert reports as if the parties had not already spent months engaged in that battle during the time to submit expert reports, and during the class certification briefing on predominance where the experts' opinions were extensively and thoroughly vetted. Yet Tyco has not mustered any legitimate challenge to Prof. Elhauge's

methodologies or qualifications. Tyco has presented no justification under *Daubert* for excluding Prof. Elhauge's methodologies, and has instead merely raised disagreements between experts that can be raised with the trier of fact. As a result, Tyco's motion should be denied.

II. ARGUMENT

A. Professor Elhauge Is Qualified to Give an Expert Opinion in This Case

Tyco's attempts to sully Prof. Elhauge's reputation (by suggesting that he does nothing but testify for plaintiffs and other false implications) fall flat. It is not Prof. Elhauge who is trying to get a "free pass" as Tyco has attempted to do with the late arrival of Dr. McFadden. To the contrary, no "free pass" is necessary since Prof. Elhauge has amply demonstrated his competence with all of the issues and methodologies involved here, as he has done in other cases. Other courts have qualified him in the specific area of antitrust economics to testify on similar issues, including courts that Tyco claims supposedly rejected him.

Again, all Tyco has done is list some, but not all, cases in which Prof. Elhauge was qualified as an expert and testified at trial. For instance, Tyco has failed in its attempt to draw a parallel between this case and the hearing that it cites from the *Masimo* case. Def. Reply at 5. Prof. Elhauge, of course, is not testifying on "the impact of the jury verdict" in this case. The appropriate parallel is between this case and the *Masimo* ***liability*** trial, in which the jury found Tyco liable for antitrust violations, based on Prof. Elhauge's testimony using similar theories and methodologies to those he has applied here. The *Masimo* court rejected Tyco's *Daubert* challenge to Prof. Elhauge based on many of the same arguments it advances here, and stated that "despite his lack of an economics degree, Mr. Elhauge's 'knowledge, skill, experience, training

or education' give him special expertise in the area in which he seeks to testify."[5] Similarly, in *Applied Medical*, the court noted that "Elhauge's background and experience, including participation on boards of peer-reviewed economics publications, qualify him as an expert in the field of antitrust economics."[6] As Plaintiffs have already pointed out, the *Applied Medical* court did nothing more than instruct the jury that it should disregard any opinions from any expert that conflict with the court's instructions on the law.[7] In addition to the courts that have qualified Prof. Elhauge, the United States Senate, unrelated to any litigation, has recognized that he is a leading authority on the issues on which he has opined in this case.[8] *See, e.g., Ambrosini v. Labarraque,* 101 F.3d 129, 139-40 (D.D.C. 1996) ("That Dr. Goldman testified to his opinion of general causation in a public hearing, without any connection to the Ambrosinis' litigation, reduces concerns that Dr. Goldman is simply 'a gun for hire.' That he was ***called upon by the F.D.A.*** to testify on causation of birth defects ***suggests that he is recognized in his field*** and that he employs scientifically valid methodologies") (emphasis added).

Tyco turns the qualification requirement of *Daubert* and Rule 702 on its head. There is no authority suggesting that having a law degree, being a legal scholar, or being qualified to be a

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[5] Elhauge Decl. at ¶94 (citing Memorandum of Decision Re: Motions in Limine, *Masimo Corp. v. Tyco*, No. CV 02-4770 MRP, at 10-11 (C.D. Cal. May 28, 2004)).

[6] Rulings on Parties Motions in Limine, *Applied Medical Resources Corp. v. Ethicon Inc.*, SACV 03-1329-JVS (C.D. Cal. July 11, 2006), Exhibit B to Gutkin Declaration in Support of Defendants' Reply Briefs, dated November 26, 2008, ("Gutkin Declaration") at 24.

[7] Hearing Transcript, Exhibit C to Gutkin Declaration at 60.

[8] *See* Plaintiffs' Opposition at 6, n. 9, citing Prof. Elhauge's Senate Report.

lawyer, automatically disqualifies one from testifying regarding other areas of expertise.[9] Prof. Elhauge has not offered a single opinion on any legal issue or rule of law in this case. The fact that Prof. Elhauge has a law degree does not in anyway disqualify him from drawing on his expertise in the field of antitrust economics and his extensive study and research on the particular issues pertinent to this case.[10]

Antitrust economics is not a "general area," nor is it a "related field." Def. Reply at 2. Antitrust economics is the field of expertise most specifically relevant to the issues in this case. It is ludicrous for Tyco to suggest that Prof. Elhauge's expertise in the precise area relevant to this case somehow qualifies him less than having a general degree in economics. Tyco tries to claim that "[choosing] the type of regressions to run, select[ing] the variables, pick[ing] the data to analyze (and discard), and decid[ing] how to populate test groups" is not application of econometric principles. Def. Reply at 3. To the contrary, that is precisely what it is. Prof. Elhauge has taken already developed methodologies and applied them to the particular circumstances and evidence presented by this case. Tyco has no credible critique showing that Prof. Elhauge has incorrectly performed any of his economic or econometric analyses, nor has it credibly defended its own experts' faulty attempts to discredit it. Indeed, Prof. Elhauge's Reports

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[9] Other courts have qualified law professors to testify on matters of antitrust economics. *See, e.g., National Bancard v. Visa*, 779 F.2d 592, 600, n.13 (11th Cir. 1986) (relying on economic testimony of Professor William F. Baxter and referring to his "excellent explanation of the economic arguments favoring an interchange fee. . ."). Professor Baxter was a Professor of Antitrust Law at Stanford Law School and did not have an economics degree. *See* Memorial Resolution, William F. Baxter, Jr., Stanford Law School, http://facultysenate.stanford.edu/archive/1999_2000/reports/106339/106421.pdf; *see also* "W. F. Baxter, 69, Ex-Antitrust Chief, Is Dead," New York Times, Dec. 2, 1998.

[10] Plaintiffs' Opposition and Prof. Elhauge's *Daubert* Declaration (as well as his Report) detail his extensive qualifications, experience and expertise in the area of antitrust economics. *See* Plt. Opp. at 4-7; Elhauge Decl. at ¶¶92-106.

and *Daubert* Declarations amply demonstrate his proficiency with the econometric concepts and his ability to engage and fully respond to any argument that any of Tyco's three economic experts puts forward.

B. Tyco's Claims About Selection Bias Are Misleading and Unsupported

Tyco continually claims that it has "shown" or "demonstrated" that selection bias "renders Prof. Elhauge's methods invalid," but in fact, Tyco has done nothing but baldly assert, theorize or hypothesize that there is a potential for selection bias. In contrast, Prof. Elhauge has repeatedly demonstrated how the tests he ran disprove that his conclusions resulted from selection bias. *See* Elhauge Sur-Reply Decl. at ¶7; Decl. at ¶¶16-41; Report at ¶¶194-199; Reply at ¶¶81-85. Tyco is well aware that neither Plaintiffs nor Prof. Elhauge has conceded that selection bias explains any of Prof. Elhauge's conclusions, and nothing in any of Plaintiffs' submissions suggests otherwise. The fact that Prof. Elhauge's results on the simultaneous comparisons of share-based commitments are confirmed by the results of Prof. Elhauge's other tests rules out the presence of selection bias in those results. Indeed, the very fact that Prof. Elhauge has consistently obtained the same results with so many different cross-checks not only rules out selection bias, but also confirms generally the reliability of his conclusions.

On the issue of economic rationality, Tyco does nothing but concede that the exclusionary contracts did have some impact on rivals' sales. Def. Reply at 19 ("Covidien never claimed that the challenged practices had *no* impact on purchasing") (emphasis in original). Tyco says Plaintiffs have "misconstrued" its contentions, and that "[t]o the extent that the challenged practices increased Covidien's (and reduced rivals') sales, that is attributable to the expected and pro-competitive reality that a supplier offering better prices and products will deprive its rivals of

sales in a properly functioning market." *Id.* at 20. Plaintiffs are not misconstruing Tyco's willful ignorance of the claims in the case. Tyco is ignoring that the challenged contract provisions indicate that a buyer ***cannot buy from a rival***. If buyers are choosing "better prices and products," all Tyco would need to do is offer those better prices and products, not make sure that the buyer is penalized for choosing a rival. Tyco's rationalization does not in any way explain why provisions expressly prohibiting purchasing from rivals are necessary if buyers are simply making decisions based on "better prices and products." If this truly were a "properly functioning market," buyers would be able to choose solely on the basis of prices and products, and there would be no need, nor would Tyco wield its market power, to make sure that even buyers who may prefer Tyco must make a commitment not to purchase any sharps containers from any rival. If purchasers are going to select Tyco anyway, Tyco does not need to stop them from choosing someone else.

Plaintiffs have never claimed that the challenged conduct is responsible for ***every*** sharps container sale that Tyco has ever made or that Tyco's market share in sharps containers would be ***zero*** in the but-for world. Rather, Plaintiffs allege, and their experts have demonstrated, that the challenged contract provisions allow Tyco to charge inflated prices while maintaining its market share. In other words, but-for the challenged conduct, Tyco's sharps container prices would be lower. The exclusionary contracts were not just a way to reward those with a preference for Tyco's products (as Tyco's selection bias argument suggests), but rather as a means of excluding rivals in order to remove the competitive discipline that those rivals would otherwise impose on Tyco's prices.

Tyco's selection bias arguments are belied by the evidence in this case, including Tyco's

own documents, and Prof. Elhauge has repeatedly demonstrated this as well. Plaintiffs' experts analysis confirms what Tyco already knows. There is a mountain of evidence confirming that Tyco realizes that the exclusionary contracts are crucial to, and largely responsible for, its success in the sharps container market. Prof. Elhauge has detailed many examples of this evidence in his reports. Therefore, Prof. Elhauge has not only disproved the presence of selection bias in the data, but has shown its absence through the documentary evidence as well. Below are some examples of such evidence presented in Prof. Elhauge's reports:

Prof. Elhauge also noted that evidence from Tyco's rivals showed the impact of the

exclusionary contracts on rivals' business:

Mr. Skinner gave similar testimony regarding Premier and Consorta. *Id.*

Even as far back as Prof. Elhauge's opening class certification report, he had reviewed and identified much of this corroborating evidence. As he stated in that report:

Despite the slew of evidence demonstrating that selection bias cannot be responsible for Prof. Elhauge's results, Tyco continues to mistakenly assert that such bias drives these results, going so far as to claim that both Prof. Elhauge's simultaneous comparisons and his regressions suffer from this defect. Not only have the regressions and comparisons been properly applied, even if Tyco's purported "corrections" were made to these analyses, the results would be substantively similar. This similarity of results actually confirms the absence of selection bias in the analyses as run by Prof. Elhauge.

For example, with respect to the simultaneous comparisons, Prof. Elhauge has explained that there is no reassignment from the burdened group unless a buyer fails to buy a single

container through a sole-source contract. Moreover, Tyco does not refute Prof. Elhauge's conclusion that "the predicted anticompetitive effects from the sole-source GPO comparisons would be 9% *higher* without *any* reassignment." Elhauge Sur-Reply Decl. at ¶20 (emphasis in original); *see also* Decl. at ¶65, n. 89. This renders pointless Tyco's complaints about Prof. Elhauge's classification of buyers.

Similarly, with respect to the regressions, Tyco again admits that Prof. Elhauge has demonstrated fact of injury and anticompetitive impact, but feels compelled to quibble with Prof. Elhauge's calculations. Putting aside that methodology, not results, is the proper inquiry under *Daubert*,[11] Prof. McFadden's preferred linear regression also consistently shows fact of injury and anticompetitive impact. As Prof. Elhauge's declaration indicates, McFadden's calculations, if applied properly, would in some cases show even greater impact than Prof. Elhauge's:

> Tyco and Professor McFadden do not deny that a linear regression (with or without using fixed effects) that includes all the relevant data would show anticompetitive impact; they just claim the amount of the impact shown by the regressions would be smaller. Their argument thus (once again) simply *confirms* my conclusion that Tyco's contracts had an anticompetitive impact. Nor is it even true that the linear regressions that Professor McFadden prefers always lead to a smaller impact than calculated in my original reports; in 3 of the 8 regressions without fixed effects, Professor McFadden's own calculations show that his linear regression leads to a *larger* impact."

Elhauge Sur-Reply Decl. at ¶21.

C. Tyco's Critique of Professor Elhauge's Novation Longitudinal Study Has No Merit

As shown above, Tyco has stubbornly missed the point with its selection bias arguments. Prof. Elhauge preemptively addressed the issue in his original merits report, and Prof. Ordover

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[11] *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 595 (1993) ("The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate").

raised it in his original opposition report, and has raised it anew ever since. Prof. Elhauge ruled out the potential for bias under the approach that Prof. Ordover concedes is proper, in that the other tests, which Tyco concedes are not subject to selection bias (such as the Novation study), confirm Prof. Elhauge's results.[12]

Tyco does not argue that Prof. Elhauge's Novation longitudinal study is affected by selection bias, but instead attempts to divert attention from Prof. Elhauge's showing that (i) there was a statistically significant increase in growth after the Novation multi-source contract began, (ii) rival share at Novation was much lower than in the rest of the market before the multi-source contract began, and (iii) after the multi-source contract began, rival share at Novation began to catch up to rival share in the rest of the market. *See* Elhauge Decl. at ¶¶29-33. Tyco and Dr. McFadden have proposed to substitute unreliable regressions, using problematic data and suggesting that Prof. Elhauge should have run the regression using data with a 9-month gap in the middle of the period. As Prof. Elhauge explains, this cannot possibly render reliable results, but even if one were to rely on those results, they would confirm Prof. Elhauge's conclusions.

> Performing the regression with the dates Tyco suggests, I find that the average absolute monthly rival share growth was 0.92% higher after the Novation contract switched to multi-source than when the contract was sole-source, and thus this difference is statistically significant at the 97.2% confidence level.

Elhauge Sur-Reply Decl. at ¶13. Prof. Elhauge also explains why it is proper to use moving averages and that doing so produces a difference between the sole-source and multi-source periods of 0.68%, which is significant at the 99.9% confidence level. *Id.* at ¶¶13, 15. Prof.

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[12] Strangely, Tyco refers to Prof. Elhauge's Novation longitudinal analysis as "merely corroborative." Def. Reply at 18. The fact that these results are corroborative is ***exactly*** Plaintiffs' point – it proves that selection bias does not skew the results.

Ordover compounds the problem by performing a regression that starts in September 2004 and ends in October 2006, which does not match anything that Dr. McFadden did. As Prof. Elhauge explains,

> this particular manipulation of the start dates is no more reliable than the others, because there is no reason for the analysis to exclude the period starting in October 2003, when there was indisputably reliable data on rival shares and which even Professor McFadden used as a start date. Professor Ordover also misstates the econometric meaning of his results when he states that he finds 'with 95% confidence that the average share growth in these two periods were not different.' In fact, what Professor Ordover found is a lack of 95% confidence that such a difference does exist; this finding of a more than 5% likelihood of no difference does not at all make it over 95% likely there is no difference.

Id. at ¶17.

D. The Access Approach Is Improper and Does Not Change Professor Elhauge's Conclusions, Even If Implemented

Notwithstanding Tyco's contortions, Prof. Elhauge has not and has no intention of "walking away" from his analysis or adopting the nonsensical "access" approach that Tyco has been advocating. Prof. Elhauge has repeatedly explained that the access approach makes no sense for classifying buyers. Plaintiffs' opposition brief makes clear (with substantial quotation from Prof. Elhauge, as Tyco notes) why "[f]ocusing on whether buyers had access to the challenged contracts would . . . be economically incorrect and fail to test the relevant anticompetitive theory." Plt. Opp. at 11, quoting Elhauge Decl. at ¶59; *see also* Elhauge Sur-Reply Decl. at ¶¶23-24.[13] The only reason that Prof. Elhauge implemented the access approach in his *Daubert* Declaration was to highlight the fact that Tyco and its experts had not even

[13] As Prof. Elhauge notes in his Sur-reply Declaration: "Tyco claims that I 'should test the effect of belonging to a GPO with a challenged contract' [Tyco Reply at 12, n.13]. But that is completely wrong — the relevant anticompetitve effect is on buyers who actually buy through the challenged contracts and thus are burdened by the contracts' exclusionary terms." Sur-Reply Decl. at n. 46.

bothered to investigate the necessary implications of its criticisms. Plaintiffs point was, and still is, that Dr. McFadden did not even check whether his own suggested methodology would reveal results consistent with Tyco's position.[14] This sloppiness demonstrates that Tyco has done nothing but throw mud at the wall and hope that something sticks. Moreover, Prof. Ordover, despite advocating the access approach since at least his initial merits report, only saw fit to actually attempt it, a "modified" access approach, in his latest Reply Declaration.[15] Notably, his new analysis confirms that even if one follows this faulty "access" methodology, the results show impact and in fact are similar to Prof. Elhauge's own results. For instance, Prof. Ordover's Table 2 shows a difference of only 2% between his and Prof. Elhauge's results in the gap between rivals' "affected" and "unaffected" shares in the sole source comparisons in four of the six years examined. Elhauge Sur-Reply Decl. at ¶30; Ordover Reply Decl. at Table 2. Make no mistake, the access approach is wrong, but even if it were right, it would still prove impact, and with results similar to those generated by Prof. Elhauge.[16]

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[14] Tyco makes the curious remark that Prof. Elhauge's access analysis is "a purely academic exercise that the jury will never hear." Def. Reply at 13. However, if Tyco persists in its flawed argument that the access approach is correct, Plaintiffs will of course rebut that testimony before the jury showing why it is not and why even if implemented, it does not change the results. It is also odd given Tyco's introduction of Dr. McFadden as a *Daubert* expert, and his two entirely new expert declarations, none of which the jury will ever hear.

[15] Expert Reply Declaration of Prof. Janusz A. Ordover In Support of Reply Brief In Support of The Motion to Exclude The Expert Report and Opinions of Professor Einer Elhauge, dated November 26, 2008 ("Ordover Reply Decl."), at ¶64.

[16] Moreover, given that the access approach is Tyco's invention, the purported criticisms of Prof. Elhauge's implementation of it are simply a sideshow. This includes Prof. Ordover's insistence that membership rosters should have been used. If Prof. Ordover needed GPO membership rosters to show how he would implement his favored approach, there was nothing stopping Tyco from obtaining such rosters in discovery. Since Prof. Elhauge has never had any intention of implementing the access approach to affirmatively prove any aspect of Plaintiffs' case, he had no obligations to endeavor to get membership rosters. Further, as Prof. Elhauge explains, there is no reason to believe that GPO

Further, as Prof. Elhauge explains, the existence of a smaller gap does not indicate a smaller anticompetitive impact, "because the 'access' approach necessarily increases the size of the burdened group," which means that "even if the gap is smaller using the 'access' method, the overall anticompetitive effect could be larger if the size of the burdened group increased sufficiently. Elhauge Sur-Reply Decl. at ¶31.[17]

Tyco has conceded impact by saying that the contracts have an affect on sales, and its alternate methodologies, including the access approach, also prove impact; therefore, the only argument, is whether or not the cause of those sales is illegal. This is an issue to be determined at trial and has no bearing on a *Daubert* analysis. Accordingly, Tyco's motion should be denied.

III. CONCLUSION

For the foregoing reasons, and for the reasons in Plaintiffs' Opposition brief and Prof. Elhauge's Declarations, Plaintiffs respectfully request that the Court deny in its entirety Tyco's Motion to Exclude the Report and Opinion of Professor Elhauge.

Date: December 9, 2008

Respectfully submitted,

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membership rosters are more accurate than the purchase data that he used for his own (and correct) method of classification.

[17] To illustrate the point, Dr. Singer has run his damages analysis using the figures from Prof. Ordover's access methodology and has shown that damages would be even higher using this approach. See Expert Declaration of Dr. Hal Singer, dated December 9, 2008.

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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 December 9, 2008.

/s/ Archana Tamoshunas
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