

**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 *
Plaintiffs, *

Civil Action No. 05-12024 (PBS)

Jury Trial Demanded

v. *

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

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO
EXCLUDE THE EXPERT REPORT AND OPINIONS OF DR. HAL SINGER**

[REDACTED VERSION]

I. INTRODUCTION

Plaintiffs Natchitoches Parish Hospital Service District and Smith Drug (collectively “Plaintiffs”) submit this memorandum in opposition to Tyco’s (“Defendants”) motion to exclude the testimony of Plaintiffs’ damages expert, Dr. Hal Singer (Docket #179). Tyco does not challenge Dr. Singer’s eminent qualifications, nor engage in a serious debate about the reliability of his methods. Instead, Tyco burdens this Court with another protestation of its innocence instead of waiting to make such arguments at a trial on the merits. Worse still, Tyco repeatedly misrepresents the record in this case, as well as basic economic principles, in order to concoct a frivolous challenge to Dr. Singer’s testimony. Tyco has shown no interest in comprehending Dr. Singer’s methods, but rather seeks to divert this Court’s attention by contriving problems where there are none. Dr. Singer’s damage analysis is clear, careful and conservative at every step, and relies on a well accepted methodology. In contrast, Tyco’s motion, much like the report of its opposing expert Ms. Guerin-Calvert, intentionally misses the point and frantically complains of invented errors that are irrelevant to the analysis to begin with. Tyco’s motion to exclude Dr. Singer should therefore be denied.

II. ARGUMENT

Tyco’s complaints about Dr. Singer’s testimony can be divided into three categories: a) that the New Empirical Industrial Organization (NEIO) model is not suitable, in any fashion, for use as a damages model in an antitrust context, b) that the homogeneous products iteration of the NEIO model is inapplicable to the sharps container market in particular, and c) that an underlying assumption in the NEIO model regarding high industry concentration being associated with higher profit margins is contradicted by the particular facts of this case. These supposed flaws are without merit, and they presuppose conditions that are overtly contradicted

by the facts here. Moreover, while Tyco has provided an overview of *Daubert* standards generally, it has failed to recognize the lower threshold required of testimony related to the amount of damages. *See Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768, 794-95 (6th Cir. 2002), *cert. denied*, 537 U.S. 1148 (2003) (noting relaxed standard for antitrust damages in rejecting *Daubert* attack on plaintiff's damages expert). It certainly “does not come with very good grace for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted,” but as shown below, Dr. Singer’s testimony satisfies any conceivable reliability test; thus far exceeding the lower standard applicable to his damages testimony. *J. Truett Payne Co. v. Chrysler Motor Corp.*, 451 U.S. 557, 565 (1981) (internal citations omitted).

A. The NEIO Model Is Properly Suited To Analyzing Antitrust Claims

Both in its introduction (Section I) and in the beginning of its argument (Section III), Tyco complains that Dr. Singer appears to be unaware of any use of the NEIO model to “estimate damages at trial.” Tyco Motion at 1, 4. Curiously, Tyco appears to argue that the controlling inquiry is the extent of Dr. Singer’s awareness of the popularity of this econometric model, and inexplicably restricts this examination to uses of the model at full trials on the merits. Tyco offers no legal support for its perspective, and indeed can not, because the suitability of the NEIO model is independent of Dr. Singer’s ability to recite instances of its use, just as full trials on the merits are not the sole avenue for establishing a model’s reliability. Tyco’s approach is a complete departure from the inquiry advocated by *Daubert* and its progeny, wherein testability, peer review and acceptance in the relevant scientific community are among the main factors for consideration. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

Had Tyco properly framed the inquiry, it would have no doubt brought to the Court’s attention the mountains of textbooks and academic articles extolling the NEIO model as a state-

of-the-art approach to the very analytical issues presented by the instant case.¹ In fact, Daniel Rubinfeld, an expert Tyco has used, co-authored an article for the American Law and Economics Review entitled “Empirical Methods in Antitrust Litigation,” wherein the NEIO model is described in great detail.² Rubinfeld is but one in a long line of economists to use the NEIO model to analyze such antitrust issues, and the model has been applied to multiple industries, including automobiles, rubber, textile, electrical machinery, tobacco, food processing, banks, coffee, aluminum, retail gasoline, soft drinks and long-distance telephone service.³

Moreover, Tyco would be misleading the Court if its observation regarding Dr. Singer’s awareness was put forward in order to suggest that the NEIO model has not in fact been used – and used successfully – in antitrust litigation. Just recently in the GPO and medical device context, the Eastern District of Missouri certified a class of antitrust plaintiffs based in part on Dr. Singer’s use of the NEIO model to “estimate prices in a but-for world given a change in seller concentration ratios.” *S.E. Missouri Hosp. v. C.R. Bard, Inc.*, 2008 WL 4372741 (2008) Slip Copy at *6. The court there held that the plaintiff “will be able to use the formulaic

¹ See, e.g., Connor, John M., Global Cartels Redux: The Amino Acid Lysine Antitrust Litigation. In *The Antitrust Revolution* (5th Edition, 2007) (discussing the use of the NEIO methods to measure price effects) at 26. See also David E. Burnstein, An Examination of Market Power in the Intrastate Long-Distance Telephone Service Markets: Evidence From a Natural Experiment, 48 J. Law & Econ. 149, 150 & n.3 (2005) (citing Pablo T. Spiller & Edgardo Favaro, The Effects of Entry Regulation on Oligopolistic Interactions: The Uruguayan Banking Sector, 9 Rand J. Econ. 305 (1984); Matthew D. Gelfand & Pablo T. Spiller, Entry Barriers and Multiproduct Oligopolies, 5 Int’l J. Indus. Org. 101 (1987); and Robert N. Rubinovitz, Market Power and Price Increases for Basic Cable Service since Deregulation, 24 Rand J. Econ. 1 (1993)). See also Jaison R. Abel, Entry into Regulated Monopoly Markets: The Development of a Competitive Fringe in the Local Telephone Industry, 45 J. Law & Econ. 289, 292-93 & n.8 (2002) (citing Pablo T. Spiller & Edgardo Favaro, The Effects of Entry Regulation on Oligopolistic Interaction: The Uruguayan Banking Sector, 15 Rand J. Econ. 244 (1984); Timothy F. Bresnahan & Peter C. Reiss, Do Entry Conditions Vary Across Markets? 18 Brookings Papers Econ. Activity 833 (1987); Peter C. Reiss & Pablo T. Spiller, Competition and Entry in Small Airline Markets, 32 J. Law & Econ. S179 (1989); Timothy F. Bresnahan & Peter C. Reiss, Entry in Monopoly Markets, 57 Rev. Econ. Stud. 531 (1990); Timothy F. Bresnahan & Peter C. Reiss, Entry and Competition in Concentrated Markets, 99 J. Pol. Econ. 977 (1991); Steven T. Berry, Estimation of a Model of Entry in the Airline Industry, 60 Econometrica 889 (1992); and Vrinda Kadiyali, Entry, Its Deterrence, and Its Accommodation: A Study of the U.S. Photographic Film Industry, 27 Rand J. Econ. 452 (1996)).

² Baker, Jonathan B. and Rubinfeld, Daniel L., Empirical Methods in Antitrust Litigation: Review and Critique. In *American Law and Economics Review*, V1 N1/2 (1999) at 386, 427-429.

³ For a detailed listing, see Bresnahan, T. (1989) Empirical Studies of Industries with Market Power. In R. Schmalensee and R. Willig, editors, *Handbook of Industrial Organization*, Amsterdam. North-Holland.

approach advanced by Dr. Singer to calculate damages,” which is precisely what Dr. Singer has done here. *Id.* at *7. In another such instance, Dr. Ray Hartman, as the economic expert for a class of antitrust plaintiffs seeking overcharge damages on tobacco purchases, employed the NEIO model to estimate the but-for price of tobacco and resulting damages in the absence of an alleged conspiracy among cigarette manufacturers. *See DeLoach v. Philip Morris Cos.*, 206 F.R.D. 551 (M.D. N.C. 2002). Indeed, this case is one of the litigations that Dr. Singer could recall at deposition, and again the court accepted use of the NEIO model employed by Dr. Hartman. The *DeLoach* case is discussed more fully below, but it suffices for present purposes to note that the class was certified based in part on the acceptability of using the NEIO model to estimate damages. Ultimately, Tyco’s general complaints about the NEIO are a sideshow in complete derogation of the analysis called for by *Daubert* and its progeny. The above citations make it abundantly clear that NEIO model is widely accepted among economic experts and has all the indicia of reliability called for in *Daubert*.

B. The Sharps Container Market Is Properly Modeled as Homogeneous

Tyco’s criticisms of Dr. Singer regarding the degree of homogeneity in the sharps container market are misplaced in a *Daubert* motion. Briefly putting aside the misrepresentations of the record, Tyco’s attacks are the stuff of cross-examination, not a motion to exclude. Even if Dr. Singer were merely assuming sufficient homogeneity for the NEIO model (which he is not), expert testimony is properly admitted where the assumptions are reasonable, even if they are in dispute. *See In re Polypropylene Carpet Antitrust Litig.*, 93 F. Supp. 2d 1348 (N.D. Ga. 2000) (admitting expert damages model where based on reasonable, though disputed, assumptions). But Dr. Singer does not assume the required degree of product homogeneity, but rather performs a detailed review of the industry and its research literature, as well as a thorough substitutability

analysis before concluding that the homogeneous products version of the NEIO model was the appropriate choice. Singer Report at 9-12, ¶¶17-19 and Table 1. Tyco has steadfastly ignored Dr. Singer’s analysis, treating his conclusions instead as assumptions, and then disputing it with testimony from their own expert. While it is unsurprising that Tyco’s expert disagrees, this “disagreement between professionals” is a matter for the jury to decide. *United States v. Barnette*, 211 F.3d 803, 816 (4th Cir. 2000); *see also In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651 (7th Cir. 2002).

Properly framed, the genuine dispute regarding product homogeneity is a two-fold inquiry: first, whether the degree of product differentiation in the sharps container market is greater than what the homogeneous version of the NEIO model employed by Dr. Singer can accommodate; and second, if it is greater, what will the impact of this greater product differentiation be on Dr. Singer’s results – *i.e.*, does it bias his results at all or otherwise render them unreliable?

As to the first question, instead of offering analysis Tyco simply claims that “Dr. Singer admitted that the version of the NEIO model he selected is able to accommodate only homogeneous or slightly differentiated products.” Tyco Motion at 6. This is a blatant mischaracterization of Dr. Singer’s testimony. The academic literature makes clear that the version of the NEIO model employed by Dr. Singer can accommodate significant product differentiation.⁴ As Dr. Singer pointed out in his Reply Report, the homogeneous products version of the NEIO model has been used – and positively peer reviewed – to model many industries with differentiated products, including roast coffee, tobacco, textiles, and cigarettes:

No sensible observer would claim that *all* brands of coffee, tobacco, textile products, or cigarettes are literally *perfect* substitutes for one another. Indeed, there are relatively few empirical examples of industries in which competing

⁴ See Bresnahan, *Handbook of Industrial Organizations*, *supra*, at 1046, n. 39

firms offer products completely devoid of any differences. Nevertheless, a homogeneous-product NEIO framework remains an effective means of modeling such industries, despite the potential for some of the products involved to be less than perfect substitutes for one another (and the editorial boards of professional economics journals have agreed). Singer Reply at 21, ¶34.

Likewise in the litigation context, in the *DeLoach* case discussed above, the “debate over class certification center[ed] on the nature of the tobacco industry,” in particular whether the different types of tobacco made the calculation of a but-for market price impossible in the class action context. *DeLoach* 206 F.R.D. at 553. “Defendants’ chief argument is that tobacco is a non-fungible [*i.e.*, non-homogeneous] product, making ... damages calculation impossible.” *Id.* at 558. But the court rejected the defendants’ arguments, taking specific notice of the advances in “scientific methods [that now] exist to address the difficulties attendant in proving impact and damages to thousands of class members.” *Id.* at 559. The scientific method employed by plaintiffs’ expert Dr. Ray Hartman in that tobacco case was of course the same NEIO model used here by Dr. Singer.⁵ The court’s final rebuke of the defendants’ argument on this point is especially instructive here:

Though Defendants argue that tobacco is inherently unique from the types of products which have been the subject of antitrust suits in the past, including flights from multiple locations with a number of fares for each city, corrugated containers of varying shapes and sizes,⁶ and other commodities such as catfish and potash, the court does not find tobacco to be in a league of its own separate from and so unique as to be immune to any antitrust challenge. *Id.* at 559 (emphasis added).

Continuing on this first question regarding whether the homogeneous products version of the NEIO model can accommodate the degree of differentiation in sharp container market, Tyco

⁵ See *DeLoach v. Philip Morris Cos.*, Plaintiffs’ Memorandum in Opposition to RJR’s Motion in Limine to Exclude the Opinions of Plaintiffs’ Damages Experts, Raymond S. Hartman and John C. Beyer, Dec. 24, 2003, *available at* 2003 WL 25683489 (M.D. N.C. 2003).

⁶ See *In Re Corrugated Container Antitrust Litig.*, 80 F.R.D. 244 (S.D. Tex. 1978) (certifying a class of direct purchasers after rejecting defendants’ arguments that, *inter alia*, the many sizes and shapes and numerous specialized features made the class wide calculation of damages impossible).

again avoids the question and distorts Dr. Singer’s responsibilities and testimony by claiming that “his reply report offers absolutely no explanation for how the record in this case shows that more expensive, allegedly homogeneous products far outsell less expensive options.” Tyco Motion at 7. According to Tyco, this “silence ... is telling.” *Id.* As shown above, Dr. Singer does not maintain that the sharps container market is perfectly homogeneous, but rather only that the NEIO model employed is more than capable of accommodating what little differentiation there is. Regarding an explanation for how Tyco’s overpriced products could outsell less expensive options, Tyco is plainly looking in the wrong place for an answer on liability. Prof. Elhauge is Plaintiffs’ liability expert, and his reports deal squarely with the conduct that permitted Tyco to avoid competition on the merits. *See* Expert Report of Professor Einer Elhauge, Docket #133 (“Elhauge Report”); *see also* Reply Expert Report of Professor Einer Elhauge, Docket #135 (“Elhauge Reply Report”); *see also* November 14, 2008 Declaration of Professor Einer Elhauge (“Elhauge Declaration”).

In any event, the evidence in this case points strongly to the conclusion that the sharps container market is not highly differentiated, and certainly within the scope of the homogeneous products version of the NEIO model. In his original report Dr. Singer constructed a data table of the six major categories of sharps containers, showing their chief characteristics and the corresponding product arrays of the seven principal manufacturers. Singer Report at 11, Table 1.

[REDACTED]

[REDACTED] Singer Reply at 31, ¶54. After a careful analysis and with voluminous citations to industry research experts and Tyco’s internal documents⁷ Dr. Singer concludes specifically that:

- (1) sharps containers do not vary significantly across usage categories for a given manufacturer and
- (2) conditional on choosing a particular type of sharps container

⁷ *See, e.g.*, Singer Reply at 17, n. 59 (citing internal Tyco document noting that customers “view our service as a commodity, such as lawn service, office cleaning”).

(for example, chemotherapy), sharps containers are effectively homogeneous across all major suppliers. With very few exceptions, each sharps container manufacturer offers the full array of containers with similar product features, sizes, and characteristics. This conclusion is confirmed by industry analysts. Thus, sharps containers are sufficiently homogeneous that the basic damage models used in my report are appropriate. Singer Report at 12, ¶19.

Furthermore, Tyco's position on product differentiation is at odds with the concession of its liability expert Prof. Ordover that the relevant market for antitrust analysis comprises all sharps containers.⁸ By definition this means low degrees of differentiation, and more precisely that no subset in the sharps container market could sustain a "small but significant and nontransitory [typically 5%] price increase" without losing so many sales to other products as to render the price increase unprofitable. *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 1.0 (1992) (rev. ed. 1997).⁹

More importantly, a *Daubert* motion is not the proper procedural vehicle to decide the issue. *See In re Pharm. Indus. Average Wholesale Price Litig.*, 491 F.Supp.2d 20, 85 (D. Mass. 2007) ("The party offering the expert testimony need not prove the testimony is correct, but rather that it rests upon good grounds, based on what is known." (internal citations omitted)). *See also, United States v. Monteiro*, 407 F. Supp. 2d 351 at 372 (D. Mass. 2006) ("The lack of absolute certainty on the part of the expert does not render her opinion unreliable under *Daubert*."). *See also, Small v. GMC*, 2006 WL 3332989 at *12 (D. Me. 2006) ("In any event, to the extent the defendants believe the [expert] opinion rests on shaky factual underpinnings, cross-examination, rather than outright exclusion, is the appropriate remedy."). But Tyco does not heed the applicable legal standard, instead using a *Daubert* motion to seek a factual finding that the sharps container market is impermissibly more differentiated than all of the other

⁸ *See* Expert Report of Prof. Janusz A. Ordover, January 31, 2008 at 32, ¶49 ("...a proper relevant market consists of the manufacture and sale of all disposable and reusable sharps containers in the United States. On this point, I agree with Professor Elhauge.")

⁹ Available at <http://www.usdoj.gov/aatr/public/guidelines/hmg.pdf>.

industries to which the NEIO model has been applied. Plaintiffs are of course prepared to meet this argument when properly presented later at trial on the merits; but turning to the second question regarding the potential impact of the alleged error, Tyco's complaint is revealed as pointless, even on the merits.

Critically, Dr. Singer clarifies that even if Tyco were correct that the products are highly differentiated (which they are not) this distinction would be one without a difference in this case. Neither Tyco nor its expert acknowledge or address Dr. Singer's response wherein he explains how his results would be unaffected from any such error. *See* Singer Reply at 21-22, ¶¶35-36. As Dr. Singer explained, if the homogeneous products version of the NEIO model were imposed on a market with impermissibly high product differentiation, the only potential bias would be in the form of an inflated value for the conduct parameter, thereby attributing a greater degree of Tyco's pricing power to its conduct instead of its differentiated products. *Id.* But such a criticism would only be relevant if Dr. Singer were using the NEIO model to infer market power from the data – *i.e.*, if his task were to opine on *liability*. Clearly Tyco's criticism is therefore wide of the mark.

As Dr. Singer further points out, it certainly imparts additional confidence in the propriety (or “fit”) of the NEIO model that it produces a conduct parameter result consistent with Prof. Elhauge's findings of market power (as well as Tyco's self-heralded power over price);¹⁰ but Dr. Singer's use of the NEIO model is confined to measuring damages attributable to market share shifts in the but-for world absent market foreclosure, and therefore holds the value of the conduct parameter constant between the actual and but-for worlds.¹¹ “Therefore, even if one

¹⁰ *See* August 29, 2008 Memorandum and Order (Docket #169) at 32 (hereinafter “Aug. Order”).

¹¹ *See* Singer Report at 18, ¶32 (“I conservatively assume that the conduct parameter is held fixed in the but-for world. ... if the conduct parameter were allowed to decrease in the but-for world (under the theory that competition

assumes incorrectly that product differentiation among sharps containers is significant, any resulting bias in the estimated conduct parameter would not result in biased damage estimates.” Singer Reply at 22, ¶35. Put plainly, the subject of Tyco’s complaint has no effect on Dr. Singer’s damage estimates, and Tyco has been repeatedly so advised.¹² Tyco’s persistent and irrelevant complaint should therefore be rejected outright.

C. High Industry Concentration Is Associated With Higher Profit Margins

Tyco’s *Daubert* motion continues with another protestation of its innocence, asserting in its next section that the “NEIO model does not fit the facts of the case here” because “higher seller concentrations and lower prices go hand-in-hand.” Tyco Motion at 8. Tyco’s support for its argument is that “suppliers in the sharps container industry engage in significant *ex ante* competition to obtain positions on GPO contracts.” *Id.* at 9. This statement is more akin to arguing that without Plaintiffs’ allegations, there would be no cause of action. It therefore goes to liability, not damages, and is addressed by Plaintiffs’ liability expert Prof. Elhauge.¹³ More important to the procedural posture of the present motion, however, is that it also completely ignores this Court’s recognition of – at a minimum – a hotly contested factual dispute:

Factually, Elhauge disputes the existence of *ex ante* competition among rivals for GPOs services, highlighting that “the evidence shows that numerous GPOs awarded Tyco sole-source contracts for sharps containers without any formal bidding at all, or with only limited *ex ante* competition, while excluding some suppliers.” He also points out side payments in the form of administrative fees paid to GPOs for sole-source contracts. This fee structure, as well as the ability of an intermediary like a GPO to pass on the externality of higher prices to the purchasers, undermines defendant’s view of the robustness of the competition for GPO contracts.

would have been more vigorous, but for Tyco’s conduct), then but-for prices would be lower than what I currently estimate. In Appendix 2, I relax this and other conservative assumptions in a sensitivity analysis.”)

¹² See Singer Reply at 22, ¶35 (“But, as I stressed repeatedly in my expert report, in my damages model the conduct parameter is held fixed in the actual and but-for worlds.”)

¹³ In his declaration filed in opposition to Tyco’s motion to exclude, Prof. Elhauge is additionally compelled to refute Tyco’s misrepresentation of his testimony as somehow supportive of Tyco’s argument that GPO’s created “buying power” that “can lead to higher, but perfectly legitimate seller concentrations *and* lower prices.” Tyco Motion at 9 and n. 5. See also Declaration of Prof. Elhauge at 3, n. 9.

* * *

Moreover, there is a fact dispute as to whether there exists ex ante competition for GPO contracts and whether in practice GPO sole source requirements give GPOs incentives to stay with Tyco rather than open up robust competition with Tyco's rivals. Aug. Order at 22-23 (internal citations omitted; emphasis added).

[REDACTED]

[REDACTED]

[REDACTED]¹⁴ Dr.

Singer extensively illustrated this fact to Tyco in his Reply Report, prior to Tyco's filing of the present motion. *See* Singer Reply at 6-10, ¶¶11-17 ("Inspection of the data indicates that the correlation between concentration and price-cost margins is indeed positive, as the NEIO model predicts, and not negative or zero, as Ms. Guerin-Calvert claims."). Yet Tyco has chosen yet again to simply ignore these efforts to correct its misunderstandings, claiming without any supporting data that the NEIO model is "fundamentally unsuitable" because in the sharps container market, "relatively higher seller concentrations and lower prices prevail." Tyco Motion at 10. This naked, self-serving assertion would not even suffice for Tyco to avoid a summary judgment in Plaintiffs' favor on this issue, much less establish that Dr. Singer's methods are unreliable.

Tyco's final effort in this section is a familiar attempt to bind Plaintiffs to the findings of a different court, in a different appellate jurisdiction, regarding a separate analysis by a different expert that was "not grounded in the economic reality of [that] market." Tyco Motion at 10, *citing Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1056 (8th Cir. 2000). Tyco has of course failed to inform this Court that, unlike the analysis proffered in *Concord Boat*, Dr. Singer did not assume Cournot, or any particular form of competitive interaction for that matter, but

¹⁴ Note that Tyco has imprecisely suggested that the NEIO model establishes a relationship between industry concentration and prices. Tyco Motion at 8. As Dr. Singer explains, the relationship is between industry concentration and price-cost margins. Singer Reply at 8, ¶15.

rather “remain[ed] agnostic with respect to the precise form of competitive interaction among firms in the industry, and allow[ed] the data to answer this question.” Singer Reply at 3, ¶2. Other than noting that *Concord Boat* involved “certain share-of-purchase discounts,” Tyco has failed to establish anywhere near the degree of similarity between to the two cases to warrant a wholesale importation of its findings. Tyco Motion at 10. Tyco has also failed to acknowledge that, in a *Daubert* motion, the “focus ... must be solely on principles and methodology, not on the conclusions that they generate, and courts should not be overly pessimistic about the capabilities of the jury since vigorous cross examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking [even] shaky but admissible evidence.” *Storage Tech. Corp. v. Custom Hardware Eng’g & Cnslt’g, Ltd.*, 2006 WL 1766434 at *21 (D. Mass. 2006)(citing *Daubert* at 595-596, internal quotation marks omitted). Rather than establishing any reliability or relevance problems, Tyco’s present motion, if anything, has instead served to confirm the fit between Dr. Singer’s methods and the economic realities of the sharps container market.

D. Key Aspects of Dr. Singer’s Damage Analysis Are Corroborated by Other Evidence In This Case

Tyco has remained silent regarding the fact that the NEIO model employed by Dr. Singer produced an excellent “fit” to the facts of this case. But this studied silence can not hide the fact that the model has yielded results that are corroborated by the other data, the documents produced by third parties, as well as Tyco’s own internal documents. For example, Dr. Singer solved for the industry elasticity with four variations of regression analysis, obtaining overwhelming statistically significant results that are consistent each time with respect to the key characteristics of demand in the sharps container market – that demand is elastic and responds negatively to price increases. Singer Report at 24-30, ¶¶45-54. Moreover, this group of

regression analyses further confirms Dr. Singer's conclusion regarding the limited product differentiation in the sharps container market:

The fact that the capacity-based regressions yield a higher elasticity estimate than the non-capacity based regressions indicates that customers reduce the capacity (quarts) demanded in response to a one percent increase in price by a greater percentage than they reduce the quantity of containers demanded. This implies that the mix of containers of various capacities that customers demand tends to vary in response to changes in price, which implies substitutability across containers of different sizes. Singer Reply at 20, n. 73.

With respect to the conduct parameter of the NEIO model, Dr. Singer notes in his original report:

Thus, according to my estimates of the conduct parameter, competitive interaction in the sharps container market is similar, although not identical, to what would be expected if the industry were monopolized. Given the concentrated nature of the sharps container industry, this result suggests that the NEIO model captures key aspects of competitive interaction in the industry rather well. Singer Report at 34, ¶63.

Likewise Dr. Singer calculated the actual industry concentration (represented by the Herfindahl-Hirschman Index, or "HHI") for each year in the class period, which Tyco has not disputed. Singer Report at 30, Table 10. These figures reveal a concentrated market corresponding to Tyco's commanding share of sales. Dr. Singer also calculates the Lerner Index in the both the actual and but-for world, corresponding to lower prices in each year of the class period. [REDACTED]¹⁵ These price decreases represent the damages directly attributable to the foreclosing conduct challenged by Plaintiffs and analyzed by Prof. Elhauge.

Dr. Singer's damage analysis is also consistent with Tyco's internal documents assessing its monopoly premium and power over price. This Court has previously recognized the "direct evidence of price premiums" as "particularly damning," noting that "[o]ne internal document states that, due to Tyco's 84% market share, it could charge '15-25% price premiums in the

¹⁵ See Supplement Revised Damage Estimates at 3, Attachment #1 to Expert Reply Declaration of Dr. Hal Singer (Docket #137).

marketplace.’’ Aug. Order at 32 (internal citations omitted). That Dr. Singer’s careful analysis produces a result consistent with Tyco’s internal assessment of its pricing premium speaks highly of its reliability. In its motion to strike his testimony, Tyco has instead offered only distraction and conjecture.

III. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Tyco’s motion to exclude the expert report and opinions of Dr. Hal Singer.

Date: November 14, 2008

Respectfully submitted,

/s/ John Alden Meade

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/s/ John Alden Meade

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