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I. INTRODUCTION

Plaintiffs' Opposition to Covidien's motion to exclude the testimony of Dr. Hal Singer is an amalgam of (1) responses to arguments that Covidien never made, (2) criticisms that Covidien has already answered, and (3) misstatements of both Covidien's and, remarkably, Dr. Singer's positions on various issues.¹ Plaintiffs fail to refute the fundamental points of Covidien's *Daubert* motion and, indeed, often end up confirming the points Covidien made, even as they purport to dispute these points and express seeming indignation.

In short, Plaintiffs' Opposition provides no basis for this Court to deny Covidien's Motion to exclude Dr. Singer's testimony. Dr. Singer relies on a novel, untested methodology that is unsuited to the basic features of this market and fails to address critical facts regarding product heterogeneity. As a result, Dr. Singer's testimony and opinions are unreliable and inadequately tied to the facts at hand and should be excluded.

II. ARGUMENT

A. **Covidien Never Claimed That The NEIO Model Was Categorically Unsuitable and, In Any Case, Plaintiffs Do Not Show That It Is Suitable**

Plaintiffs begin by claiming that one of Covidien's three complaints about Dr. Singer's testimony is "that the New Empirical Industrial Organization (NEIO) model is not suitable, in any fashion, for use as a damages model in an antitrust context." (Plaintiffs' 11/14/08 Memorandum in Opposition to Defendants' Motion to Exclude Singer Report ("Opposition" or "Opp'n") at 1.) The absence of any record citation for this claim is unsurprising, given that Covidien never took this position. Rather, Covidien described Dr.

¹ "Plaintiffs" are Natchitoches Parish Hospital Service District and JM Smith Corp. d/b/a Smith Drug Co.; "Covidien" refers to Tyco International (US) Inc., Covidien (formerly Tyco Healthcare Group LP), and The Kendall Healthcare Products Company.

Singer's NEIO model and argued, correctly, that Dr. Singer and Plaintiffs cannot establish that it is suitably fitted to the facts of *this* case. (Covidien's 10/17/08 Motion to Exclude the Expert Report and Opinions of Dr. Hal Singer ("Motion") at 8-10.)

Rather than discuss how and why the NEIO model is appropriate to use in this case, Plaintiffs instead attack Covidien's ancillary argument that the NEIO model has a very short litigation track record and that Dr. Singer's attempt to use it to prove damages in an antitrust case is clearly novel. Even here, however, Plaintiffs miss the mark. Plaintiffs cite to only two cases in which NEIO has been proffered to model damages, which are the same two cases that Covidien already referenced in its Motion. (Motion at 4.) What's more, Plaintiffs do not deny that these are both cases in which Dr. Singer himself is involved as a consulting or testifying expert. (*Id.*) Thus, Plaintiffs now confirm that they too are unable to locate any additional litigations in which the NEIO model has been proposed for any purpose, and confirm that NEIO has never been admitted at trial.

Moreover, contrary to Plaintiffs' assertions, neither of the two litigations in which NEIO was proposed established that it is an accepted approach for modeling antitrust damages. Instead, both are class certification rulings which, as Plaintiffs have repeatedly argued in this case, hold experts to a lower standard than those applicable under *Daubert*. *See Se. Missouri Hosp. v. C.R. Bard, Inc.*, No. 1:07cv0031 TCM, 2008 WL 4372741 (E.D. Mo. Sept. 22, 2008); *DeLoach v. Philip Morris Cos., Inc.*, 206 F.R.D. 551 (M.D.N.C. 2002). Public records show that the *Southeast Missouri* litigation has not reached the point where *Daubert* challenges are due to be filed. (Ex. E (showing that *Daubert* motions are not due until December 26, 2008).)²

Similarly, Plaintiffs' claim that in *DeLoach* "the court accepted used [sic] of the NEIO

model employed by Dr. Hartman” (Opp’n at 4), is misleading at best. In *DeLoach*, defendants *did* move to exclude the testimony of the plaintiffs’ damages expert in part because the NEIO model was not grounded in the facts of the case. (Ex. F at 4-9.) However, the case appears to have settled before the Court could rule on the motion. (Ex. G (showing that the motion to exclude was set to be heard on 4/16/04 and that the case settled on 4/22/04).) Moreover, because the plaintiffs in *DeLoach* proffered no fewer than seven different damages benchmarks in their motion for class certification, the court did not need to accept or validate the NEIO model in order to certify the class. 206 F.R.D. at 564-65. Thus, Plaintiffs’ Opposition does nothing to demonstrate either that the NEIO model has been admitted to show damages in an antitrust trial or that it has survived a *Daubert* challenge.

Plaintiffs also devote a lengthy footnote to citing (seemingly) every academic article in which the NEIO model is referenced. (Opp’n at n.1). However, they nowhere show that these articles confirm the acceptance of his NEIO model for use in computing antitrust damages,³ or in any way demonstrate that his NEIO model is appropriate for modeling damages in this case. Indeed, the article by Daniel Rubinfeld that Plaintiffs highlight in their text does not discuss the use of NEIO as a damages model, but instead discusses its potential application in merger analyses. Baker, Jonathan B. and Rubinfeld, Daniel L., *Empirical Methods in Antitrust Litigation: Review and Critique*, American Law and Economics Review, V1 N1/2 (1999) at 386, 427-429. Because Plaintiffs make no showing that the NEIO model is an accepted method of

² All references to an exhibit (“Ex.”) refer to the lettered exhibits attached to the concurrently filed Declaration of Jeffrey M. Gutkin.

³ In the *one* cited academic article that relates in any way to antitrust damages, the researcher did not use Dr. Singer’s, or any other, NEIO model to generate but-for prices based on hypothesized changes in seller concentration, as Plaintiffs propose to do here. (Connor, John M., *Global Cartels Redux: The Amino Acid Lysine Antitrust Litigation*, The Antitrust Revolution (5th Edition, 2007) at 28.) Instead, the researcher considered and rejected the standard Cournot model as a basis for determining a competitive benchmark. (*Id.*)

computing antitrust damages, their claim that the “NEIO model is widely accepted among economic experts” is irrelevant. As the *Daubert* decision itself makes clear, “[f]it’ is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes.” *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591 (1993); *United States v. Shay*, 57 F.3d 126, 133 n.5 (1st Cir. 1995) (citing *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 743 (3d Cir. 1994), *cert. denied*, --- U.S. --- (1995)) (holding that expert testimony that chemical X causes cancer in animals is not relevant to whether it also causes the disease in humans without reliable evidence that results observed in the animal studies are transferable to humans); *see also United States v. Monteiro*, 407 F. Supp. 2d 351, 357-58 (D. Mass. 2006). The NEIO model may be suited to aiding an academic researcher in various ways, but, as Covidien demonstrated in its Motion, it does not serve as a reliable litigation damages model in this case.

B. Plaintiffs’ Internally Contradictory Arguments Do Not Disprove The Heterogeneity of Sharps Containers

In its Motion, Covidien established both that the evidence firmly shows that sharps containers are heterogeneous and that this is a vital fact that must be accounted for in order for Dr. Singer’s damages model to be sufficiently reliable to be presented to a jury. (Motion at 6-8.) In their Opposition, Plaintiffs first assert that Dr. Singer never claimed that sharps containers were “perfectly homogeneous” and then claim that his NEIO model can surely accommodate the degree of differentiation present here. Plaintiffs’ position is contrary to both the evidence and Dr. Singer’s own testimony, and it fails to grasp the essential problem that heterogeneity presents for Dr. Singer’s attempt to use an NEIO model to calculate damages.

In her expert report, Ms. Guerin-Calvert proffers an objective demonstration of sharps container heterogeneity based upon the actual sales records of Covidien and Becton Dickinson. Her analysis shows that, accounting for container type, container size, and GPO contract

positioning, more expensive sharps container models frequently outsell cheaper ones. (1/31/08 Expert Report of Margaret E. Guerin-Calvert (“Guerin-Calvert”) ¶¶ 132-35 (Docket No. 132).) Indeed, Ms. Guerin-Calvert demonstrates that this pattern is “more the rule, than the exception.” (*Id.* ¶ 133.) Accordingly, it is clear that there are features of certain sharps containers that make customers willing to pay more even when lower-priced models are equally available. It is also clear that Dr. Singer entirely ignores these relevant metrics of value. (*Id.* ¶ 135.) As Dr. Singer himself put it: “conditional on choosing a particular type of sharps container (for example, chemotherapy), sharps containers are effectively homogeneous across all major supplier. . . . Thus, sharps containers are sufficiently homogeneous that the basic damage models used in my report are appropriate.” (12/18/07 Expert Report of Dr. Hal Singer (“Singer”) ¶ 19 (Docket No. 136).) Dr. Singer’s claim that the products here are “effectively homogeneous” is simply not compatible with the facts.

As set forth in Covidien’s Motion, Dr. Singer’s reply report failed to provide a rebuttal *of any kind* to Ms. Guerin-Calvert’s data-driven analysis demonstrating heterogeneity. (Motion at 7.) Plaintiffs’ inability to point to a single citation from Dr. Singer’s report even arguably addressing this analysis confirms that Dr. Singer simply has no rebuttal. (*See* Opp’n at 4-10.) Now, apparently recognizing the insupportable and extreme nature of Dr. Singer’s opinions on homogeneity, Plaintiffs attempt to backtrack, claiming that “Dr. Singer does not maintain that the sharps container market is perfectly homogeneous.” (*Id.* at 7.) Plaintiffs apparently place a great deal of importance on the word “perfectly” in this sentence, because Dr. Singer has unequivocally and repeatedly stated that sharps containers are “homogenous, commodity like-products.” (Expert Reply Declaration of Dr. Hal Singer (“Singer Rep.”) ¶ 3 (Docket No. 137);

Ex. H at 148:17-20.) Plaintiffs' attempted revisionism does not change the fact that Dr. Singer's opinions rest on the demonstrably incorrect premise that the products at issue are "homogenous."

Plaintiffs next try to fill the gap left by Dr. Singer's failure to address Ms. Guerin-Calvert's heterogeneity analysis by claiming this is a "liability issue" and arguing that the fact that more expensive products outsell cheaper ones must be a function of Covidien's anticompetitive corruption of free market forces.⁴ This argument reveals either that Plaintiffs did not read Ms. Guerin-Calvert's report or they are willing to engage in pure sophistry. Ms. Guerin-Calvert's analysis was designed to eliminate the very concern that Plaintiffs purport to raise. For example, [REDACTED]

[REDACTED] (Guerin-Calvert ¶ 134.) Additionally, Covidien's Motion and Ms. Guerin-Calvert's report make quite clear that her data analyses control for GPO contract positioning, so Plaintiffs' liability theories, even if correct, cannot explain these results. (*Id.* ¶¶ 133-34; Motion at 7.) In other words, Ms. Guerin-Calvert took care to compare sharps containers that were simultaneously offered by the same GPO, and thus equally available for members to purchase. Plaintiffs' notion that the challenged practices, and not actual heterogeneity, explain Ms. Guerin-Calvert's results is simply fallacious.

Plaintiffs also argue that the products must be homogeneous because Prof. Ordover agreed that the relevant market consists of all sharps containers. Plaintiffs contend that "[b]y definition this means low degrees of differentiation." (Opp'n at 8.) Not so. Prof. Ordover's discussion of the relevant market in no way resolves the heterogeneity issue in favor of the

⁴ Plaintiffs argue, "[r]egarding 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."

Plaintiffs. Products that are part of the same relevant market can still reflect significant heterogeneity. In the example from Ms. Guerin-Calvert's report referenced above, [REDACTED] Such a price premium could not exist in a market without significant differentiation. Significant differentiation is, in fact, evident both from actual differences in product design and from the customer's demonstrated willingness to pay the premium.

Finally, as Covidien's Motion explained, Ms. Guerin-Calvert specifically evaluated whether Dr. Singer's expression of the NEIO model can accommodate the heterogeneity of the products in this industry and concluded that it cannot. (Motion at 8; Guerin-Calvert ¶¶ 136-43.) In their Opposition, Plaintiffs now try to claim that even if Dr. Singer incorrectly ignored differentiation, that mistake would have no impact on his damages calculations. (Opp'n at 9.) But, Plaintiffs' Opposition is clearly at odds with several statements of Dr. Singer himself. To compare, Plaintiffs' brief says "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." (Opp'n at 9 (emphasis added).) But, in contrast, Dr. Singer's report states that if products were "highly differentiated," his NEIO model would have to be adapted to account for such differentiation. (Singer ¶ 19.) Moreover, though Dr. Singer claims his model *could* be easily adapted, he has never tried to do so or even described the specification (or formula) that such an adaptation would use.

Plaintiffs also claim that differentiation is irrelevant because it would only affect the conduct parameter, which does not impact the damages calculations and is merely informative. (Opp'n at 9-10.) Plaintiffs apparently are unable (or unwilling) to recognize the problems that

(Opp'n at 7.)

significant differentiation creates for the particular manner in which Dr. Singer employs the NEIO model. The model itself, as Dr. Singer acknowledges, is designed only to estimate the relationship between seller concentrations and average, *industry-wide* price-cost margins. Indeed, in his deposition Dr. Singer stated that “the NEIO model as I have implemented it only can tell us how industry-wide prices will change.” (Ex. H at 175:7-9.)⁵ Yet Dr. Singer purports to use the model to predict Covidien’s but-for prices and merely assumes that Covidien’s prices will fall, lock-step, by the same amount as the industry average. (*See, e.g.*, Singer ¶ 24.) Because of differentiation, it is entirely possible that, even if industry-wide prices fell, Covidien’s prices and margins could fall substantially less than the industry-wide average, based on reputation, service and unique product features. If customers have significantly different preferences for Covidien’s products, a downward shift in average prices across the industry could affect Covidien far less than its competitors. For this reason, Dr. Singer’s obliviousness to heterogeneity and his attempt to use the NEIO model to predict a single supplier’s prices renders his analyses unreliable and unfit for the jury.

⁵ Dr. Singer also testified as follows:

- Q.** ... the NEIO model isn’t designed to give you the correlation between industry HHI and an individual supplier’s change of margins?
- A.** That’s certainly true with respect to the version of the NEIO model that I implemented. To the extent that there is a more sophisticated version of the NEIO model that would allow one to make predictions of individual suppliers, it is conceivable that someone has developed that innovation. Economists get tenure at universities by coming up with things like that. So I don’t want to rule out that such an innovation hasn’t occurred.
- Q.** But you are not aware of it sitting here today?
- A.** As I sit --
- Q.** You have not seen it in the literature? Sorry.
- A.** It is conceivable that I have seen it, but as I sit here today I can’t think up examples.

(Ex. H at 176:24-177:20.)

C. Plaintiffs Do Not Establish That Seller Concentrations and Sharps Container Margins Are Correlated

In its opening motion, Covidien also demonstrated that the fundamental assumption underlying the NEIO model -- that higher seller concentrations must lead to higher margins and higher prices -- was inapposite in this market, because fierce competition for GPO contract placement can lead to both higher seller concentrations *and* lower prices for sharps containers. (Motion at 8-10.) As Ms. Guerin-Calvert's expert report shows, the existence of *ex ante* competition is confirmed by, among other things, the actual history of GPO bidding and contracting in this market (Guerin-Calvert ¶¶ 51-59, 83), the deposition testimony of GPO employees (*id.* ¶¶ 60-61), and the testimony of Covidien's rivals (*id.* ¶ 81).

Plaintiffs offer three unpersuasive responses. First, Plaintiffs claim that because the Court's order on class certification acknowledged that the parties dispute whether there is *ex ante* competition for GPO contracts, this subject cannot be the basis of a *Daubert* challenge. (Opp'n at 10-11.) This is not the law. An expert's opinions must "fit" the evidence of the case. *Daubert*, 509 U.S. at 591; *Shay*, 57 F.3d at 133 n.5; *Monteiro*, 407 F. Supp. 2d at 357-58. It is unsurprising that Plaintiffs dispute Covidien's view that Dr. Singer's model is fundamentally flawed. But, the test is not whether the parties dispute an issue, as this will always be the case. In fact, the First Circuit has described the district court's role in *Daubert* proceedings as testing whether there is a "valid connection" between the expert's "testimony and a *disputed* issue." *Shay*, 57 F.3d at 133 n.5 (emphasis added). Thus, that Plaintiffs dispute the existence of *ex ante* competition is irrelevant. Instead, the proper question is whether Plaintiffs' "dispute" is reasonable, and whether Dr. Singer's opinions are reliable and properly grounded in the facts of this case.

Plaintiffs next claim that the “undisputed facts” show that higher seller concentrations in the sharps container market are associated with higher margins. (Opp’n at 11.) This claim refers to the “univariate regression” that appeared for the first time in Dr. Singer’s reply report, which allegedly shows that, as seller concentration has fallen over the last several years, so have margins. Covidien already provided a thorough rebuttal to this unconvincing and unreliable analysis in its Opposition to Plaintiffs’ Motion to Exclude Ms. Guerin-Calvert. (See Covidien’s 11/14/08 Opposition to Plaintiffs’ Motion to Exclude Guerin-Calvert at 11-13 (Docket No. 193).) To briefly summarize: (1) Dr. Singer’s hypothesis that margins must fall in conjunction with drops in seller concentration is false in four of the six years for which he has data, (2) Dr. Singer’s regression does not produce a robust result and is not statistically significant at the standard 95% level, and (3) Dr. Singer’s analysis is based on incomplete data that may entirely invalidate his results. (*Id.*) Thus, there is no reliable evidence, in the undisputed facts or elsewhere, that concentrations and margins are correlated in this market.

Finally, Plaintiffs argue that Covidien’s citation to the Eighth Circuit’s ruling in *Concord Boat Corp. v. Brunswick Corp.* was somehow inappropriate. (Opp’n at 11.) Covidien cited *Concord Boat* for the proposition that an expert’s model is unreliable if it is “not grounded in the economic reality of the [relevant] market.” 207 F.3d 1039, 1056 (8th Cir. 2000). In particular, Covidien argued that “Dr. Singer’s selection of a generic academic formula that does not accommodate the realities of competition in a GPO market renders his testimony unreliable and inappropriate for presentation to the jury.” (Motion at 10.)

Plaintiffs first respond by stating that Covidien “failed to inform this Court” that Dr. Singer does not assume that the Cournot model of competition governs this market. (Opp’n at 11.) This rejoinder is confusing, given that Covidien’s Motion never states or in any way implies

that Dr. Singer assumed the Cournot model. Plaintiffs next assert that Covidien fails to grasp that the focus of a *Daubert* motion must be on the expert's methods, not his results. (*Id.* at 12.) This criticism is inapposite, as the entire relevant section of Covidien's brief is devoted to showing that *the model* Dr. Singer chose is unsuited to estimating damages in this case. Indeed, no part of Covidien's *Daubert* motion is based on disputing the actual damages estimates that the model outputs. Instead, the Motion is entirely about Dr. Singer's selection of his NEIO model and the assumptions that underlie it.

Thus, none of Plaintiffs' criticisms undermine Covidien's showing that *ex ante* competition renders the fundamental assumptions of Dr. Singer's NEIO model inapplicable and its results unreliable for modeling damages in this action. As his NEIO model is the basis for the only damages estimate Plaintiffs have, without it, Dr. Singer's testimony can be of no value to the jury.

III. CONCLUSION

For these reasons, Dr. Singer's testimony should be excluded in its entirety.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and copies will be sent to those indicated as non-registered participants on November 26, 2008.

/s/ James Donato

James Donato