

**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' SUR-REPLY IN FURTHER OPPOSITION TO DEFENDANTS' MOTION
TO EXCLUDE THE EXPERT REPORT AND OPINIONS OF DR. HAL SINGER**

TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. ARGUMENT..... 1

A. The NEIO Model Is Properly Suited To Analyzing Antitrust Claims..... 2

B. Dr. Singer’s Implementation Of The NEIO Model Fits The Contours Of The Sharps Container Market And Has Been Reliably Applied..... 5

1. The Sharps Container Market Is Properly Modeled As Homogeneous..... 6

2. High Industry Concentration Is Associated With Higher Profit Margins.. 12

3. Key Aspects Of Dr. Singer’s Analyses Are Corroborated By Other Evidence In This Case.....15

III. CONCLUSION..... 16

TABLE OF AUTHORITIES

Cases	Pages
<i>Cambridge Plating Co. v. Napco Inc.</i> 85 F.3d 752 (1st Cir. 1996).....	2
<i>Concord Boat Corp. v. Brunswick Corp.</i> 207 F.3d 1039 (8th Cir. 2000).....	15
<i>Conwood Co. v. U.S. Tobacco Co.</i> 290 F.3d 768 (6th Cir. 2002), <i>cert denied</i> , 537 U.S. 1148 (2003).....	2
<i>Daubert v. Merrell Dow Pharms, Inc.</i> 509 U.S. 579 (1993).....	<i>passim</i>
<i>DeLoach v. Philip Morris Cos.</i> 206 F.R.D. 551 (M.D. N.C. 2002).....	11
<i>In Re Corrugated Container Antitrust Litig.</i> 80 F.R.D. 244 (S.D. Tex. 1978).....	11
<i>In re High Fructose Corn Syrup Antitrust Litig.</i> 295 F.3d 651 (7th Cir. 2002).....	10
<i>In re Pharm. Indus. Average Wholesale Price Litig.</i> 491 F.Supp.2d 20 (D. Mass. 2007).....	16
<i>In Re Polypropylene Carpet Antitrust Litig.</i> 93 F. Supp 2d 1348 (N.D. Ga. 2000).....	6
<i>Small v. GMC</i> 2006 WL 3332989 (D. Me. 2006).....	16
<i>Storage Tech. Corp. v. Custom Hardware Eng’g & Cnslt’g</i> 2006 WL 1766434 (D. Mass. 2006).....	2
<i>United States v. Barnette</i> 211 F.3d 803, 816 (4th Cir. 2000).....	10
<i>United States v. Monteiro</i> 407 F. Supp. 2d 351 (D. Mass. 2006).....	1, 5

TABLE OF AUTHORITIES (con.)

Other Authorities	Pages
<i>Fundamentals of Antitrust Law</i> Areeda and Hovenkamp, Vol. 1, 2003 Edition, Aspen Publishers.....	8
<i>Horizontal Merger Guidelines</i> U.S. Dep't of Justice & Fed. Trade Comm'n, (1992) (rev. ed. 1997).....	7, 8

I. INTRODUCTION

Aside from attempting to usurp the role of gatekeeper by repeating conclusory and unsupported assertions, Defendants (“Tyco”) have not offered this Court any basis for excluding the testimony of Plaintiffs’ damages expert Dr. Hal Singer. Dr. Singer’s analysis is clear, careful, and conservative at every step, relies on a well accepted methodology closely conforming to every facet of the sharps container industry, and generates results mirroring Tyco’s own assessment of its monopoly premium. In its attempt to prevent this case from proceeding to trial, Tyco has filed two briefs making only perfunctory reference to *Daubert v. Merrell Dow*¹ while abandoning (instead of adhering to) the reliability analysis called for therein. Tyco does not challenge Dr. Singer’s expert qualifications, but persists in diversionary tactics in order to cloud what need only be a straightforward review. Plaintiffs Natchitoches Parish Hospital Service District and Smith Drug (collectively “Plaintiffs”) therefore submit this sur-reply memorandum in further opposition to Tyco’s Motion to Exclude the Expert Report and Opinions of Dr. Hal Singer (“Opening Brief,” Doc. 179) and Tyco’s Reply Brief in Support of the Motion to Exclude the Expert Report and Opinions of Dr. Hal Singer (“Reply Brief,” Doc. 208).

II. ARGUMENT

Plaintiffs agree with Tyco’s recitation in its Opening Brief of the basic applicable standard that:

[B]efore allowing expert testimony to be heard, the Court must take great care to assure that (1) the putative witness is expertly qualified to opine on the relevant subject matter, (2) the reasoning and methodology underlying the proposed testimony is scientifically valid, and (3) the proposed testimony actually ‘fits’ the contours of the case and can be properly applied to the facts in issue.” Opening Brief at 2 (citing *Daubert*, 509 U.S. at 592-593 and *United States v. Monteiro*, 407 F. Supp. 2d 351 at 357-358 (D. Mass. 2006)).

¹ *Daubert v. Merrell Dow Pharms, Inc.*, 509 U.S. 579 (1993).

But after successive rounds of briefing, Tyco appears unable or unwilling to acknowledge the lower threshold required of expert testimony related to the amount of damages, particularly in the antitrust context. *See Storage Tech. Corp. v. Custom Hardware Eng'g & Cnslt'g*, 2006 WL 1766434 at *21 (D. Mass. 2006) (citing *Cambridge Plating Co. v. Napco Inc*, 85 F.3d 752, 771 (1st Cir. 1996) in noting that in “antitrust cases ... market uncertainties ‘usually deny us the sure knowledge of what plaintiff’s situation would have been in the absence of the defendant’s antitrust violation.’”); *see also Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768, 794-95 (6th Cir. 2002), *cert denied*, 537 U.S. 1148 (2003) (“The antitrust cases are legion which reiterate the proposition that, if the fact of damages is proven, the actual computation of damages may suffer from minor imperfections”) (internal citations omitted). Plaintiffs submit that had Tyco taken cognizance of the lower threshold for damages testimony and also restrained itself to the relevant *Daubert* inquiries (rather than protesting its innocence and seeking pretrial factual determinations in its favor), Tyco would have concluded that this motion to exclude Dr. Singer is frivolous, and not worth wasting this Court’s resources.

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

In response to Plaintiffs’ Memorandum in Opposition to Defendants’ Motion to Exclude the Expert Report and Opinions of Dr. Hal Singer (“Opposition Brief,” Doc. 192) related to the suitability of the NEIO model to analyzing antitrust claims, Tyco states that it “Never Claimed That The NEIO Model Was Categorically Unsuitable.” Reply Brief at 1. Presumably this means that Tyco agrees with Plaintiffs that the NEIO is not categorically unsuitable, yet Tyco nevertheless claims, on the same page no less, that the NEIO model is a “novel, untested methodology.” *Id.* Where Tyco is drawing the line is somewhat unclear, but its attempt to split

hairs with this argument completely fails to adhere to the criteria advocated by *Daubert* and its progeny.

As Plaintiffs pointed out in their Opposition Brief, testability, peer review, potential error rates, and acceptance in the relevant scientific community are among the main factors in determining the reliability of an expert's proffered methodology. Opposition Brief at 2; *see also Daubert* at 593-594. Tyco has conceded in its Opening Brief that the NEIO model was developed in 1989 by the preeminent antitrust economist Timothy Bresnahan for purposes of analyzing the relationship between the exact market variables at issue in this case, *i.e.*, demand elasticity, industry concentration, price-cost margins, and the extent to which manufacturers act competitively. Opening Brief at 4. Plaintiffs also provided voluminous citations to the works of various other experts in econometrics and industrial organization showing that the NEIO model has been tested and peer-reviewed repeatedly in the antitrust context, across all kinds of industries, and has emerged as the preeminent model for analyzing the relationship between these market variables. *See* Opposition Brief at 3, n. 1; *see also* Expert Report of Dr. Hal Singer ("Singer Report," Doc. 179) at ¶27. There should therefore be no serious dispute that the NEIO model is a reliable, tested and peer-reviewed methodology for measuring anticompetitive effects in virtually any industry.

As to whether the NEIO model is appropriate given Plaintiffs' theory of anticompetitive harm, Tyco strains to distinguish Dr. Singer's use of the model from its use in merger related inquiries. But Tyco's effort is meaningless because it ignores the fact that the inquiry under each analysis is precisely the same, *i.e.*, how a change in industry concentration translates into a change in price. *See* Reply Brief at 3. Just as the merger of two competing firms can result in higher prices due to the reduction in competitive pricing discipline, Plaintiffs' theory of harm

posits, in short, that Tyco's exclusionary conduct foreclosed its rivals from the sharps container market, thereby reducing their market share and attendant ability to discipline Tyco's pricing; and that in the absence of such competitive discipline, Tyco has been able to charge supracompetitive prices to all purchasers. *See* Expert Report of Prof. Einer Elhauge, Dec. 18, 2007 ("Elhauge Report," Doc. 133); *see also* Reply Expert Report of Prof. Einer Elhauge, Feb. 15, 2008 ("Elhauge Reply Report," Doc. 135); *see also* Singer Report at ¶23; *see also* Expert Reply Declaration of Dr. Hal Singer ("Singer Reply," Doc. 137) at ¶2. Thus the NEIO model is uniquely suited to both merger analysis and to Plaintiffs' case because, *inter alia*, it focuses on the relationship between industry concentration and prices. Similarly, Tyco's attempt to distinguish the NEIO model's ability to forecast this change in price from Plaintiffs' use of the model to estimate damages ignores the very obvious fact that change in price and damages in this case are one and the same. *See* Reply Brief at 3-4. The NEIO model therefore is uniquely suited to estimating damages in this case.

Tyco also harps upon the NEIO model's supposedly "very short litigation track record," but ignores the significance of those times where the NEIO model has been accepted in litigation to model antitrust damages in a differentiated product market.² More importantly, Tyco's argument fails to explain why *litigation use* should supplant all of the *Daubert* factors that the NEIO model satisfies, and instead become the *conditio sine qua non* for its introduction into evidence. Though the analytical framework under *Daubert* is undoubtedly "a flexible one," it is not one where Tyco simply gets to ignore Supreme Court precedent and choose its own self-serving metrics for reliability. *Daubert* at 594.

Returning to Dr. Singer's actual implementation of the NEIO model in this case, Dr. Singer has shown his work for every step, making it entirely testable. Indeed neither Tyco nor its

² *See* Opposition Brief at 3-4 and at 6, discussing litigations where the NEIO model has been employed.

expert Ms. Guerin-Calvert claims that Dr. Singer performed any of these steps incorrectly. Dr. Singer also illustrates the robust nature of his implementation of the NEIO model (*i.e.*, its lack of potential error) by performing multiple sensitivity analyses showing the effect of relaxing various of his assumptions. Singer Report at Appendix 2. These analyses establish definitively that Dr. Singer has been conservative at every turn. It should therefore be beyond dispute that Dr. Singer has reliably implemented this peer-reviewed and widely accepted model in a manner consistent with its accepted implementation in these other industries.

B. Dr. Singer’s Implementation Of The NEIO Model Fits The Contours Of The Sharps Container Market And Has Been Reliably Applied

There being no real dispute regarding either: (1) whether Dr. Singer is “expertly qualified to opine on the relevant subject matter,” or (2) whether “the reasoning and methodology underlying the [NEIO model] is scientifically valid,” the only remaining area of analysis relates to whether or not Dr. Singer’s implementation of the NEIO model “actually ‘fits’ the contours of the case and can be properly applied to the facts in issue.” Opening Brief at 2 (citing *Daubert* at 592-593 and *Monteiro* at 357-358). On this last analytical prong, Tyco offers two arguments for why the NEIO model as implemented by Dr. Singer can not be reliably applied to the sharps container market. The first argument is that the sharps containers market exhibits more product differentiation, or heterogeneity, than the NEIO model can accommodate, and that this heterogeneity renders Dr. Singer’s analysis unreliable. Reply Brief at 4-8. The second is the remarkable argument that in the sharps container market, higher industry concentration levels go hand-in-hand with *lower* prices, contrary to the relationship in the NEIO model between higher industry concentration levels and *higher* prices, and that this contradiction renders Dr. Singer’s analysis unreliable. *Id.* at 9-11. As to each of these arguments, Tyco’s motion necessarily asks this Court to disregard the *Daubert* standard that expert testimony is properly admitted where the

assumptions are reasonable, even if they are in dispute, and to instead make a factual determination contradicting this Court's prior rulings, contradicting previous admissions by Tyco's experts, and ignoring all the evidence marshaled by Plaintiffs and Dr. Singer supporting Plaintiffs' position. *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).

1. The Sharps Container Market Is Properly Modeled As Homogeneous

As noted above and in Plaintiffs' Opposition Brief, even if "Dr. Singer were merely assuming sufficient homogeneity in the sharps container market for the NEIO model (which he is not)," Tyco's criticisms of Dr. Singer's analysis in this regard "are misplaced in a *Daubert* motion" because such an assumption, if it were one, would be entirely reasonable. Opposition Brief at 4 (citing *In Re Polypropylene*). Though Tyco continues to misrepresent Dr. Singer's opinions and testimony,³ Dr. Singer has unwaveringly maintained his conclusion, after performing several analyses to this end, that "sharps containers are sufficiently homogeneous that the basic damage models used in my report are appropriate." Singer Report at 12; *see also* Opposition Brief at 4-5 (discussing the analyses performed by Dr. Singer). Tyco does not and can not deny that the homogeneous products version of the NEIO model employed by Dr. Singer has been applied – in published, positively peer-reviewed, academic articles – to industries exhibiting substantially more differentiation than that of perfect commodities. *See* Singer Reply at 21 (discussing the application of the homogeneous products version of the NEIO model to

³ For instance, Tyco claims in its Reply Brief that Dr. Singer has contradicted Plaintiffs' arguments by asserting that sharps containers are "homogeneous, commodity-like products." Reply Brief at 5. But this is no contradiction at all. Indeed, sharps containers are not perfect commodities, but "commodity-like" in that the degree of differentiation, or heterogeneity, is insignificant, and certainly within the scope of differentiation that can be accommodated by the NEIO model. *See* Opposition Brief at 5-8. Furthermore, the language itself comes from Tyco's own document, cited in the Singer Reply at 17, n. 59, that Tyco's customers [REDACTED]

industries such as roast coffee, tobacco, textiles, and cigarettes); *see also* Opposition Brief at 3 (noting the application to automobiles, rubber, textile, electrical machinery, tobacco, food processing, banks, coffee, aluminum, retail gasoline, soft drinks and long-distance telephone service).

Tyco's argument is also irreconcilable with the admission of its liability expert Prof. Ordover that the "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." Expert Report of Prof. Janusz A. Ordover, January 31, 2008 ("Ordover Report," Doc. 132, Ex. A) at 32, ¶49. As pointed out in Plaintiffs' Opposition Brief, it is absolutely the case that "[b]y definition this means low degrees of differentiation." Opposition Brief at 8 (citing the *Horizontal Merger Guidelines* employed the U.S. Department of Justice and Federal Trade Commission). Again, Dr. Singer is not claiming that sharps containers are perfectly homogeneous (*i.e.*, perfect commodities) but instead that the NEIO model can accommodate the low degree of differentiation within that well-defined market.

Tyco's response to the test employed by the federal antitrust agencies is a simple *ipse dixit* "Not so," followed by the wholly unsupported argument that "Prof. Ordover's discussion of the relevant market in no way resolves the heterogeneity issue in favor of the Plaintiffs." Reply Brief at 6-7. But Prof. Ordover did more than "discuss" the relevant market, he agreed with Prof. Elhauge on its product and geographic boundaries. Given that Prof. Ordover "served as Deputy Assistant Attorney General for Economics at the Antitrust Division of the United States Department of Justice" where, as "the chief economist for the Antitrust Division, [he] was responsible for formulating and implementing the economic aspects of antitrust policy and enforcement of the United States, including co-drafting the 1992 U.S. Department of Justice and

Federal Trade Commission Horizontal Merger Guidelines,” Tyco’s argument that Prof. Ordover’s admission should not be deemed to include what his own guidelines necessitate is untenable. Ordover Report at 1 (emphasis added).

Tyco instead supports this conclusory assertion with a remarkable pronouncement on economics, without providing any citation to any authority of any kind, that “[p]roducts that are part of the same relevant market can still reflect significant heterogeneity.” Reply Brief at 6-7. Not only does Tyco’s assertion contradict the *Horizontal Merger Guidelines* co-drafted by its own expert, it also directly contradicts the academic guidance of Professors Areeda and Hovenkamp in the *Fundamentals of Antitrust Law*:

5.02a. “Market” defined. To define a market is to identify those producers providing customers of a defendant firm (or firms) with alternative sources for the defendant’s product or service. A properly defined market excludes other potential suppliers (1) whose product is too different (product dimension) or too far away (geographic dimension) and (2) who are not likely to shift promptly to offer defendant’s customers a suitably proximate (in both product and geographic terms) alternative. ... Thus, a market is the arena within which significant substitution in consumption or production occurs. ... With less perfect substitution, a range of prices may appear, though changes in each are closely correlated. Areeda and Hovenkamp, *Fundamentals of Antitrust Law*, Vol. 1, 2003 Edition, Aspen Publishers at §5.02a (emphasis added).

Thus, by agreeing that the relevant market consists all sharps containers, Tyco has conceded that none of the products within it are so different that a change in its price would not be closely correlated with the price changes among others. This close correlation in price changes is all that the NEIO model requires, and is indeed what the data proves. *See* Singer Reply at ¶¶11-17.

Tyco’s efforts to demonstrate a degree of differentiation greater than that consistent with the definition of a relevant market are therefore not even properly before the Court. But a review of Ms. Guerin-Calvert’s supposedly “data-driven analysis” reveals that Tyco has no support for its argument at all. According to Tyco, Ms. Guerin-Calvert demonstrates the “significant

differentiation” in the sharps container market in her expert report by showing that “more expensive containers frequently outsell less expensive alternatives.” Opening Brief at 7 (citing Guerin-Calvert Report at ¶¶133-134 and Appendix 9, Tables 6 & 7). Yet Tyco does not mention that Ms. Guerin-Calvert’s analysis here seeks to draw a marketwide conclusion by looking at only one of five purchasing tiers within a single GPO contract, for only one fiscal quarter in one year during the class period, and is restricted to a small subset of products. Neither Tyco nor Ms. Guerin-Calvert offer any rationale for rejecting a marketwide approach in developing a marketwide conclusion, or why these particular products, in this particular quarter, under this particular tier of this particular GPO, are representative of the product market at large. The failure to recognize this leap, much less address it, renders the analysis meaningless and excludable in its own right. In addition, Tyco has inaccurately suggested that Plaintiffs and Dr. Singer have not previously disputed this analysis despite the fact that Dr. Singer devoted four pages of his Reply Report to demonstrating the statistically inappropriate and misleading nature of Ms. Guerin-Calvert’s analysis. Reply Brief at 5; Singer Reply at ¶¶51-57.

Tyco nevertheless places great emphasis on Ms. Guerin-Calvert’s comparison of the 19-gallon chemotherapy containers offered by Tyco and Becton Dickinson (“Becton”) in the first quarter of 2005 under the dual source Premier GPO contract. Reply Brief at 6-7. Again, even if this comparison were performed correctly (which it is not), neither Tyco nor Ms. Guerin-Calvert has explained how this single observation can be reliably extrapolated to the entire product market, overcoming all the countervailing marketwide evidence cited in Dr. Singer’s reports. *See* Singer Report at ¶¶17-19 and Table 1; *see also* Singer Reply at ¶¶29-32. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Thus, Ms. Guerin-Calvert's claim that Becton was able to sell more containers when it was on equal footing with Tyco on a dual source contract [REDACTED], is unremarkable. Moreover, this fact argues in favor of product homogeneity, not against it.

In her purportedly representative examples, Ms. Guerin-Calvert has proven adept at self-selecting small snippets of data, creating false comparisons, and ignoring contrary evidence in the process of drawing a marketwide conclusion. Such an outcome-oriented methodology is anathema to unbiased statistical and economic analysis, rendering her conclusion regarding product differentiation unreliable. Tyco can not rely on her opinion as a basis for excluding Dr. Singer's testimony, as even a legitimate dispute between experts would be 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).

In essence, Tyco's view is that product differentiation *ipso facto* renders a damage analysis of a conceded relevant market inherently unreliable. But the degree of product differentiation claimed by Tyco has never been a preclusive bar to calculating damages in a class wide antitrust context. For example, a nationwide class of antitrust plaintiffs overcame defendants' class certification objections that, *inter alia*, the many sizes and shapes and

numerous specialized features of corrugated containers made the class wide calculation of damages impossible. *In Re Corrugated Container Antitrust Litig.*, 80 F.R.D. 244 (S.D. Tex. 1978). Though this decision was made in the class certification context, the arguments were the same. As the court noted:

Generally corrugated containers are manufactured in many sizes and shapes, are frequently printed to the customer's specifications, and may have any of numerous special features such as waterproofing, ventilating holes, handholes, and so forth. There are some common stock items, but many corrugated containers are specially adapted for the purchaser. In spite of the fact that one purchaser's cardboard box may not be suitable for another purchaser's needs, when made to the same specifications the box of one manufacturer is virtually identical to that of another manufacturer. *In Re Corrugated Containers*, 80 F.R.D. at 246.

This case settled before trial and prior to a full presentation of plaintiffs' damages model, yet given the defendants' objections it nevertheless stands for the proposition that there is nothing inherently unreliable about calculating class wide damages in a market with some degree of product differentiation.⁴

The final point regarding Tyco's product differentiation complaint is that even if Tyco were correct that the sharps container market exhibits a greater degree of product differentiation than that anticipated by the NEIO model, there would be no effect on Dr. Singer's resulting damage figures because he has conservatively assumed that the conduct parameter in the NEIO model would remain unchanged in the but-for world. *See* Opposition Brief at 9-10. What Tyco's Reply Brief fails to appreciate is that, to whatever degree Tyco's current margins and power over price are attributable to product differentiation rather than exclusion of rivals, this same degree of power over price will persist in Plaintiffs' but-for world. *See* Reply Brief at 8. Given the strong showing of sufficient homogeneity in the sharps container market, Dr. Singer could have

⁴ Plaintiffs' Opposition Brief already discusses *DeLoach v. Philip Morris Cos.*, 206 F.R.D. 551 (M.D. N.C. 2002) at length for the proposition that the NEIO is well-suited for modeling damages in a market with mild degrees of differentiation. Notably, the defendants in *DeLoach* nowhere claimed that the NEIO model was novel or untested.

reliably offered the much greater damage total where the value for the conduct parameter is relaxed in the but-for world. *See* Singer Report at Appendix 2. But Dr. Singer has not done so, making Tyco's complaints in this regard wholly irrelevant.

2. High Industry Concentration Is Associated With Higher Profit Margins

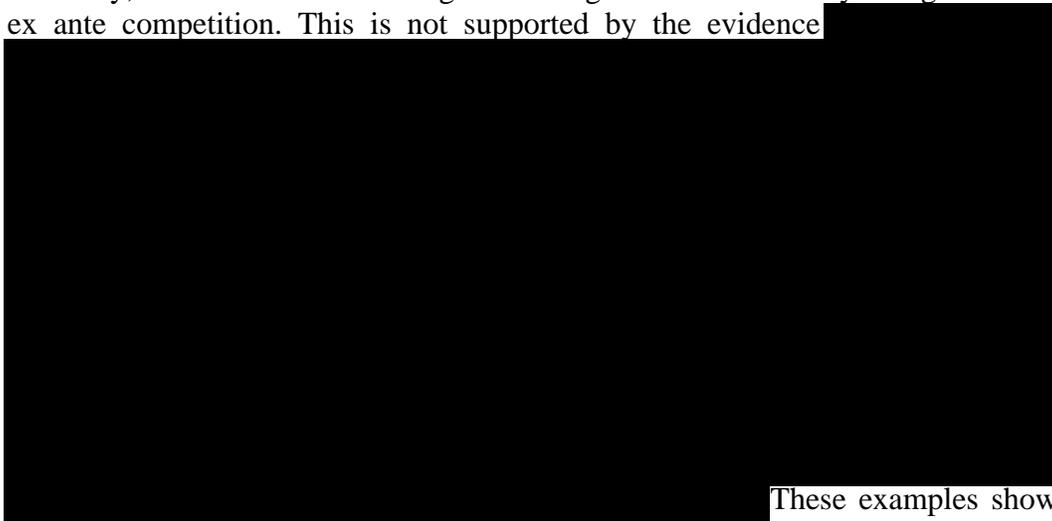
Tyco also claims that the NEIO model can not be reliably applied to the sharps container market because *ex ante* competition for GPO contracts contradicts a fundamental assumption in the NEIO model that higher industry concentration is correlated with higher price-cost margins. *See* Opening Brief at 8-9.⁵ Tyco claimed in its Opening Brief that "Higher Seller Concentrations And Lower Prices Go Hand-in-Hand" in the sharps container market – in effect that concentration and margins were negatively correlated. *Id.* at 8. Now, in response to the undisputed data discussed in Plaintiffs' Opposition Brief, Tyco no longer asserts the existence of this negative correlation, but instead makes the much weaker claim that "Plaintiffs Do Not Establish That Seller Concentrations and Sharps Container Margins Are [Positively] Correlated." Reply Brief at 9. Presumably then, Tyco no longer takes the position that the facts of this case establish such a negative correlation, but rather that Plaintiffs have not shown a sufficiently strong "fit" between the NEIO model and the sharps container industry with respect to this positive correlation between industry concentration and margins. But the arguments in Tyco's Reply Brief are just further attempts to distort the analysis and ignore the most salient facts.

Tyco acknowledges Plaintiffs' first response that the existence, extent, and effectiveness of *ex ante* competition for GPO contracts is a matter of great dispute between the parties, and that this Court took note of this dispute in its ruling on class certification. Opposition Brief at 10-

⁵ An underlying assumption in Tyco's argument is that *ex ante* competition is somehow synonymous with higher concentration, which is certainly not the case. Even assuming vigorous and unimpeded *ex ante* competition for GPO contracts, there are infinite combinations of dual and multi-source awards capable of producing the degrees of industry concentration predicted by Dr. Singer in the but-for world.

11; Reply Brief at 9. But Tyco nevertheless seeks to characterize this dispute as “irrelevant” to the *Daubert* inquiry because, in Tyco’s view, it is not a “reasonable” dispute. Reply Brief at 9. But Tyco has failed to grasp that this Court’s class certification ruling did more than recognize Plaintiffs’ disagreement with Tyco. First, Prof. Elhauge noted in his Reply Report that:

Factually, Professor Ordover’s argument hinges on there actually being effective *ex ante* competition. This is not supported by the evidence



These examples show that, contrary to Professor Ordover’s claims, vigorous *ex ante* competition for GPO contracts does not always occur. Not only were some competitors excluded from bidding, but Tyco’s exclusionary sole-source contracts – the only GPO contracts being challenged here – were frequently extended without any bidding occurring at all. Elhauge Reply Report at ¶44 (internal citations omitted).

Second, this Court held that this and other evidence “undermines defendant’s view of the robustness of the competition for GPO contracts,” and specifically that “there is a fact dispute as to whether there exists *ex ante* competition for GPO contracts.” Opposition Brief at 11 (citing August 29, 2008 Memorandum and Order, Doc. 169, at 22-23). On account of this language, Plaintiffs respectfully suggest that this Court has already determined that this dispute is a reasonable one. Since Tyco concedes in its Reply Brief that a reasonable dispute precludes exclusion under *Daubert*, there is therefore no basis for excluding Dr. Singer’s testimony. Reply Brief at 9 (“the proper question is whether Plaintiffs’ dispute is reasonable”).

Moreover, the marketwide data in this case, as Plaintiffs have repeatedly demonstrated, confirm the existence of a positive correlation between industry concentration and price-cost margins. Tyco acknowledges in its Reply Brief that Plaintiffs “claim that the ‘undisputed facts’ show that higher seller concentrations in the sharps container industry are associated with higher margins.” Reply Brief at 10 (citing Opposition Brief at 11). But Tyco then completely and inexplicably ignores the centerpiece of Dr. Singer’s proof of this positive correlation, *i.e.*, the correlation coefficient between these two variables. Prior to the filing of these *Daubert* motions, Dr. Singer demonstrated to Tyco and its experts that industry concentration and price-cost margin variables exhibit a correlation coefficient of 0.69 (on a scale from -1.0 to +1.0), indicating that industry concentration and price-cost margins are strongly positively correlated. *See* Singer Reply at 8-10. But in its Reply Brief, Tyco misrepresents Dr. Singer’s testimony by claiming that his proof of this positive correlation rests solely on a separate regression analysis he performed, which regression Dr. Singer in fact used only to confirm the results of the correlation coefficient analysis. *See* Reply Brief at 10; *see also* Singer Reply at 9. Tyco provides no explanation for omitting a discussion of the correlation coefficient.

In any event, the regression that Dr. Singer performed does confirm the existence of a positive correlation between industry concentration and price-cost margins with greater than 90% statistical confidence. Singer Reply at 9. Tyco’s response is to misstate the hypothesis (*e.g.*, “margins must fall in conjunction...”), base conclusions on a cherry-picked subset of data, overstate the required degree of statistical confidence (especially in relation to the burden of proof), and vaguely assert that incomplete data may invalidate Dr. Singer’s results. But as opposed to the litigation-driven statistical methods offered by Tyco (which have no support in the academic literature), Dr. Singer has offered two standard statistical analyses both confirming

the existence of this positive correlation between industry concentration and price-cost margins. Because the NEIO model requires nothing more, Tyco has failed to provide a basis for excluding Dr. Singer's testimony.

Tyco's third and final reply to Plaintiffs' opposition arguments regarding the NEIO model and the correlation between industry concentration and price-cost margins is a significantly narrowed down reference to *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir. 2000). Originally Tyco cited *Concord Boat* in a lengthy discussion analogizing that case to the present case, and requesting the exclusion of Dr. Singer's testimony based on the same grounds as were found dispositive there. Opening Brief at 10. After Plaintiffs responded with several arguments demonstrating the impropriety of a wholesale importation of *Concord Boat's* findings into the present case, Tyco now states only that it "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.'" Opposition Brief at 11-12; Reply Brief at 10 (citing *Concord Boat* at 1056). If so, then Plaintiffs accept this limited use of *Concord Boat*, and respectfully submit that this requirement of a fit between expert testimony and the facts has been met in this case.

3. Key Aspects Of Dr. Singer's Damage Analysis Are Corroborated By Other Evidence In This Case

Just as with its Opening Brief, Tyco's Reply Brief fails to comment on, much less dispute, the myriad ways in which Dr. Singer's implementation of the NEIO produces results that correspond closely to several facets of the sharps container market. Plaintiffs have already noted that Dr. Singer's industry elasticity results produce "overwhelmingly statistically significant results that are consistent each time with respect to the key characteristics of demand in the sharps container market," and that these results also confirm the "limited product differentiation in the sharps container market." Opposition Brief at 12-13 (citing Singer Report at

24-30 and Singer Reply at 20, n. 73). The same holds true for Dr. Singer's estimates of industry concentration, price-cost margins, and the conduct parameter, all of which show results consistent both with a monopolized market, and with Tyco's own assessment of its monopoly premium. Opposition Brief at 12-14.

Accordingly, Dr. Singer's implementation of the NEIO model fits remarkably well to the facts of the sharps container industry, far exceeding the threshold reliability requirement under *Daubert* and its progeny. Any legitimate dispute remaining can be addressed by Tyco with cross-examination at trial. *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, 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.").

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: December 9, 2008

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
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 South 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 December 9, 2008.

/s/ John Alden Meade

John Alden Meade