

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

NATCHITOCHEs PARISH HOSPITAL) SERVICE DISTRICT and J.M. SMITH) CORP. d/b/a SMITH DRUG COMPANY,) on behalf of themselves and all others) similarly situated,) Plaintiffs,) vs.) TYCO INTERNATIONAL, ltd.; and TYCO) INTERNATIONAL (U.S.), INC.; TYCO) HEALTHCARE GROUP, L.P. THE) KENDALL HEALTHCARE PRODUCTS) COMPANY,) Defendants.)	Civil Action No. 05-12024 EXPERT DECLARATION OF DR. HAL SINGER
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INTRODUCTION

1. I have been asked by counsel for Plaintiffs to re-estimate damages associated with alternative inputs produced by Professor Ordover in his expert reply declaration in support of the motion to exclude the report and opinions of Professor Elhauge.¹ In my expert report filed in December of 2007,² I estimated damages associated with the foreclosure caused by both Tyco's commitment contracts and Tyco's sole-source contracts with group purchasing organizations (GPOs). These estimates relied on inputs from Professor Elhauge. I subsequently updated my estimates to reflect revised inputs from Professor Elhauge in March of 2008.

1. *Expert Reply Declaration Of Prof. Jannsz A. Ordover In Support of Reply Brief In Support Of The Motion To Exclude The Expert Report and Opinions of Professor Einer Elhauge*, Nov. 26, 2008 [hereafter *Ordover Reply*].
2. Expert Report of Dr. Hal Singer, December 18, 2007 [hereafter *Singer Damages Report*].

2. As of March 2008, in my aggregate damages estimate, which encompasses two possible forms of foreclosure—Tyco’s commitment contracts with hospitals and Tyco’s sole-source contracts with GPOs—I estimated that, but for Tyco’s conduct, sharps container prices would have been between 17 percent and 29 percent less than extant prices during the Class Period, depending on the year in question. These pricing estimates yield an aggregate damages estimate of approximately \$184.7 million for the Class Period.

3. Professor Ordover has produced revised estimates of figures related to the inputs into my damages model, using what he terms a “modified access approach” to obtain his estimates.³ I have been asked to re-estimate damages so as to incorporate Professor Ordover’s modified access estimates. In contrast to Professor Elhauge’s approach, which treats only buyers who actually purchase under a challenged contract as being burdened by the challenged contract, Professor Ordover’s methodology treats any buyer who has “access” to a challenged contract — where “access” is defined as belonging to a GPO that had a sole-source contract or that offered exclusionary buyer contracts—as being burdened by the challenged contracts. This alters both the size of the burdened group and the gap in rival penetration between the burdened and unburdened groups.

4. By using Professor Ordover’s figures, I do not endorse Professor Ordover’s modified access approach. Indeed, I understand that Professor Elhauge disagrees fundamentally with this methodology. Rather, I have simply been asked to quantify the effect of Professor Ordover’s modified access estimates on my damages estimates.

5. My results indicate that classwide damages are *greater* when Professor Ordover’s modified access estimates are used. As shown in the Appendix, my aggregate damages estimate

3. *Ordover Reply*, Tables 2, 3, and 5.

indicates that—if one assumes hypothetically that Professor Ordover’s figures are the correct inputs to use—sharps container prices would have been between 17 percent and 32 percent less than extant prices during the Class Period, depending on the year in question. These pricing estimates yield an aggregate damages estimate of approximately \$185.2 million for the Class Period (compared to my original estimate of approximately \$184.7 million).

I. EXPLANATION OF ALTERNATE DAMAGES CALCULATION

6. As discussed in detail in my expert report, two key inputs into my damages model are the share of sales to buyers burdened by Tyco’s anticompetitive practices (“burdened share”) and the difference in rival penetration in the non-burdened segment of the market relative to the burdened segment.⁴ The figures that Professor Ordover has produced allow me to incorporate revised versions of these two inputs in accordance with his modified access estimates. The second input—the difference in rival penetration—is reported directly by Professor Ordover. The first input—the share of sales to burdened buyers—can be readily computed from the data underlying Professor Ordover’s modified access estimates.

7. When Professor Ordover’s modified access estimates are employed, the second input tends to decrease. On its own, this would imply a decrease in damages. However, Professor Ordover’s estimates also cause first input to increase, which implies an increase in damages when all other inputs are held constant. As it happens, the net effect of employing Professor Ordover’s alternative inputs is to increase damages.

4. *Singer Damages Report* ¶¶58-59. Note that the *Singer Damages Report* refers to these two inputs as (1) the “foreclosure share”; and (2) the difference in “rival penetration” between the non-foreclosed segment of the market and the foreclosed segment. However, when referring to Professor Ordover’s modified access estimates, I instead refer to these inputs as (1) the “burdened share”; and (2) the difference in rival penetration between the non-burdened and burdened segments. I use this terminology principally because I understand that Professor Ordover does not claim that his calculations under the “access” method are a calculation of the foreclosure share.

8. For example, as seen in Table 5 of Professor Ordoover's report, which focuses on the effects of either share-based commitment contracts or sole-source GPO contracts, Professor Ordoover estimates the difference in rival penetration between the burdened and unburdened segments (referred to by Professor Ordoover as the "Gap") at 32 percentage points in the year 2001.⁵ This implies that rivals' market share was 32 percentage points greater in the segment of the market unburdened by either share-based contracts or sole-source GPO contracts relative to the burdened segment. Thus, Professor Ordoover provides a direct estimate of the difference in rival penetration, which can be readily incorporated into my damages model.

9. Professor Ordoover's modified access estimates also allow for computation of the share of sales to burdened buyers—which constitutes the other key input into my damages model. To compute this input, I relied on files produced by Professor Ordoover (the "modified access files").⁶ The modified access files contain the data that form the basis for Professor Ordoover's modified access inputs. The modified access files allow for a straightforward computation of the share of sales to burdened buyers. For example, consider the case of either commitment contracts or sole-source contracts. Professor Ordoover's modified access files indicate, for each year, both the amount of sales to buyers burdened by either commitment contracts or sole-source contracts, and the amount of sales to unburdened buyers. The share of sales to burdened buyers can then be computed by dividing the first amount by the sum of the first and second amounts.

10. Given an estimate of the share of sales to burdened buyers and an estimate of the increase in rival market share in the unburdened segment relative to the burdened segment, I can

5. *Ordover Reply*, Table 5.

6. Professor Ordoover has produced various files which replicate the calculations displayed in the *Ordover Reply*. As indicated in the Appendix, I employed the file "Modified 2C & 2D.csv" to estimate the share of sales to burdened buyers.

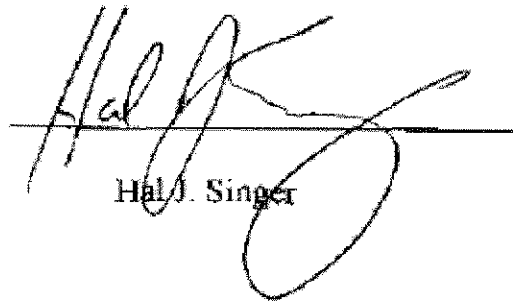
then compute the increase in rival market share that would occur in the but-for world under the hypothetical assumption that Professor Ordovery's inputs are correct. This increase in rival market share is simply the product of the share of sales to burdened buyers and the change in rival penetration. I can then proceed to compute class-wide damages, as explained in detail in my expert report.⁷

CONCLUSION

11. As indicated above, and as shown in the Appendix, classwide damages are *greater* when Professor Ordovery's modified access estimates are used. I conclude that class-wide damages estimates would increase if, as a hypothetical matter, Professor Ordovery's modified access methodology were actually adopted.

* * *

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.



Hal J. Singer

Executed on December 9, 2008.

7. *Singer Damages Report* ¶¶57-67.

APPENDIX 1

TABLE A1: ALTERNATE DAMAGE ESTIMATES: AGGREGATE DAMAGES DUE TO EITHER COMMITMENT CONTRACTS OR SOLE-SOURCE CONTRACTS⁸

	2001 (Oct-Dec)	2002	2003	2004	2005	2006	2007 (Jan-Nov)
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Total	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

⁸ As explained above, the first two rows in the table above were calculated based on data obtained from the *Ordover Report*. Data from the second row of the table above are taken directly from the *Ordover Report* at Table 5. In addition, the estimates in the first row were calculated based on Ordover's output file "Modified 2C & 2D.csv".