

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

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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. \*

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**PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION TO EXCLUDE  
TESTIMONY OF DEFENDANTS' EXPERT MARGARET GUERIN-CALVERT**

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## I. INTRODUCTION

Pursuant to rules 702 and 403 of the Federal Rules of Evidence, Plaintiffs Natchitoches Parish Hospital Service District and Smith Drug (collectively “Plaintiffs”) submit this memorandum in support of Plaintiffs’ Motion to Strike the Testimony of Defendants’ Expert Margaret Guerin-Calvert. In spite of her assignment to “assess damage claims alleged as a result of certain business practices by [Tyco],” Ms. Guerin-Calvert offers no affirmative opinion on what the damages to the plaintiff class could be should a jury find Tyco liable at trial for its anticompetitive conduct. As to her criticism of the damage analysis offered in the report of Plaintiffs’ Expert Dr. Hal Singer, her opinions are almost entirely – and improperly – directed at the issue of liability, or are simply throw-away econometric critiques evidencing a complete unfamiliarity and incongruity with the facts of the case. In the eighteen principal conclusions that she offers to this Court, Ms. Guerin-Calvert steadfastly refuses to recognize central tenets of economics and ignores the requirements for admissible expert testimony. Her opinions vacillate between being cumulative (with the testimony of Defendants’ liability expert Prof. Janusz Ordover), and being unreliable and/or irrelevant (in that there is no “fit” between the facts and her opinions). Ms. Guerin-Calvert’s last six conclusions contain the more serious reliability and relevance problems, but for ease of organization Plaintiffs have addressed these conclusions in the order she presented them. In all cases, however, Ms. Guerin-Calvert’s testimony does nothing to assist the trier of fact, and would instead be misleading and unfairly prejudicial if offered at trial. It should therefore be excluded in its entirety.<sup>1</sup>

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<sup>1</sup> Plaintiffs note that there are plenty of valid criticisms of Prof. Ordover’s methodology, many of which are set forth by Prof. Elhauge. However, Plaintiffs are aware of the standards of Daubert, and understand that such criticisms are to be reserved for cross-examination, and that a difference of opinion between qualified experts is to be resolved by the trier of fact.

## II. LAW AND ARGUMENT

### A. The Standard Governing a Motion to Exclude Expert Testimony

“Rule 702 of the Federal Rules of Evidence provides the backdrop for any consideration of expert testimony. That rule provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.”

*Seahorse Marine v. Puerto Rico Sun Oil*, 295 F.3d 68 (1st Cir. 2002)(citing F.R.E. 702).

The now familiar analytical framework for deciding a motion to exclude has recently been stated succinctly by this very court. “Rule 702 of the Federal Rules of Evidence assigns to the trial judge the responsibility for ensuring that an expert’s testimony as to scientific, technical, or other specialized knowledge ‘both rests on a reliable foundation and is relevant to the task at hand.’” *S.E.C. v. Goldsworthy*, 2008 WL 2943398 at \*1 (D. Mass. 2008)(quoting *Hochen v. Bobst Group, Inc.*, 290 F.3d 446, 452 (1st Cir.2002) (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993))). Thus, in addition to establishing an inquiry into the reliability of an expert opinion, *Daubert* and its progeny also inquire into whether “the evidence is relevant ... i.e., whether it ‘fits’ the case.” *Saia v. Sears Roebuck and Co.*, 47 F.Supp.2d 141,144 (D. Mass. 1999). *See also Sutura v. Perrier Group of America, Inc.*, 986 F.Supp. 655, 661 (D. Mass. 1997)(“expert testimony ... must ‘fit’ the facts of the case.”). “The ultimate purpose of this inquiry ‘is to determine whether the testimony of the expert would be helpful to the jury in resolving a fact in issue.’” *Goldsworthy* at \*1 (quoting *Cipollone v. Yale Indus. Prod., Inc.*, 202 F.3d 376, 380 (1st Cir. 2000)).

This focus on whether an expert opinion would be “helpful” shows how Rule 702 overlaps with the more general requirements of Federal Rule of Evidence 403. Thus even “[a]ssuming both relevance and reliability, the evidence still may be excluded ‘if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.’” *Saia* at 144 (citing Fed.R.Evid. 402)(emphasis added). *See also Goldsworthy* at \*2 (quoting *Daubert* at 595). Specifically with regard to duplicative expert reports, such cumulative testimony is properly excluded under Rule 403. *See In Re MTBE Products Liability Litigation*, 2008 WL 1971538 (S.D.N.Y 2008). In the end, of course, the “district court maintains considerable discretion in making this determination.” *Goldsworthy*, at \*1 (quoting *United States v. Garcia-Morales*, 382 F.3d 12, 18 (1st Cir.2004)).

## **B. Ms. Guerin-Calvert’s Cumulative Testimony Should Be Excluded**

Instead of offering something unique, the opinions proffered by Ms. Guerin-Calvert are almost entirely duplicative, and frequently verbatim repetitions, of the opinions proffered by Defendants’ liability expert in this matter, Prof. Janusz Ordover. While Plaintiffs certainly give no credence to Prof. Ordover’s opinions, allowing their repetition by another expert provides nothing of value to the trier of fact but does risk giving the jury the impression that Prof. Ordover’s opinions are to be afforded more weight than they deserve on their own.<sup>2</sup>

### **1. Prof. Ordover and Ms. Guerin-Calvert are assigned to the same task**

The striking similarities between these expert reports begins with their listed assignments. Prof. Ordover recites his assignment as:

I have been engaged by [Tyco] to assess, from an economic perspective, the antitrust allegations in the complaint filed on behalf of consumers who purchased

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<sup>2</sup> There are plenty of valid criticisms of Ordover’s methodology, but Plaintiffs understand when Daubert motions are appropriate.

sharps containers directly from [Tyco.] Specifically, I have been asked to evaluate, from an economic perspective, (a) whether [Tyco] has significant market power in the relevant market, (b) whether [Tyco's] challenged practices pertaining to Group Purchasing Organizations (GPO), IHN, and hospital contracts for relevant sharps container products have substantially foreclosed rival manufacturers and thereby led to harm to competition and consumers. I have also been asked to comment on the expert reports filed by Professor Einer Elhauge and Dr. Hal Singer on behalf of Plaintiffs.<sup>3</sup>

Prof. Ordover thus purports to affirmatively address liability issues, and also to rebut both of Plaintiffs' expert reports – Prof. Elhauge's expert report on liability and Dr. Hal Singer's expert report on damages. Ms. Guerin-Calvert describes her assignment in a remarkably similar fashion:

I have been asked by counsel of [Tyco] to assess damages claims [sic] alleged as a result of certain business practices by [Tyco] and to provide an independent expert assessment of the damages projections prepared by Plaintiffs' expert, Dr. Hal Singer. I have also been asked to analyze the conclusions that Prof. Elhauge has reached in his expert report, and in particular those upon which Dr. Singer relies in his damage analyses.<sup>4</sup>

Leaving aside for the moment that Ms. Guerin-Calvert seems to be confused about what an independent expert is, her description of her assignment makes clear that she will address the very same issues that Prof. Ordover does – the reports of both Prof. Elhauge and Dr. Singer. Even though Plaintiffs have provided separate expert reports as to the separate issues of liability and damages, Tyco has provided two expert reports each purporting to address both issues.<sup>5</sup> Although Ms. Guerin-Calvert has shown in her deposition that she understands the demarcation between liability and damages in her other engagements, neither she nor Tyco make any effort in this case to justify her duplication of Prof. Ordover's liability work.<sup>6</sup> Moreover, as discussed below in section II(C), her one potentially unique contribution to “assess damages claims alleged

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<sup>3</sup> Expert Report of Prof. Janusz A. Ordover, January 31, 2008 (“Ordover Report”) at 2-3.

<sup>4</sup> Expert Report of Margaret Guerin-Calvert, January 31, 2008 (“Guerin-Calvert Report”) at 2.

<sup>5</sup> Tyco has also offered another redundant and cumulative expert report from Mr. Thomas Hughes.

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as a result of certain business practices” – *i.e.*, provide a damages model – is a promise that she never keeps.

## **2. The first twelve of Ms. Guerin-Calvert’s conclusions are liability opinions already offered by Prof. Ordover.**

Ms. Guerin-Calvert begins her report by offering a summary of opinions listing eighteen conclusions. The first twelve of these conclusions are highly repetitious, and are therefore grouped together in the analysis below. More importantly, these conclusions correspond directly to points already made by Prof. Ordover, relating directly and solely to liability. These conclusions state in part that:

- **Conclusion One:** Tyco’s “contracting practices” did not lead to “artificially and anticompetitively inflated prices (‘overcharges’) for sharps containers during the class period.” Guerin-Calvert Report at ¶10.
  - Prof. Ordover states: “competition in the sharps container market has forced [Tyco] to offer competitive prices to hospitals and other health care purchasers.” Ordover Report at ¶38.
- **Conclusions Two and Three:** “GPOs ... aggregate the demands of numerous smaller buyers to improve their bargaining position and secure lower prices” and “negotiate with suppliers by organizing a competitive bidding process.” Guerin-Calvert Report at ¶¶11,12.
  - Prof. Ordover states: “[b]y pooling their purchasing power through GPOs, hospitals and other healthcare providers reduce transactions costs and benefit from discounted pricing offered by manufacturers.” Ordover Report at ¶44.
- **Conclusion Four:** “GPO contracting and bid process provides competitive discipline on prices charged by [Tyco].” Guerin-Calvert Report at ¶13.
  - Prof. Ordover states: “GPOs ... dangle[] the possibility of sole-source status in order to entice competing suppliers to offer greater discounts in exchange for the prospect of increased sales.” Ordover Report at ¶37.
  - Prof. Ordover also states: “A ban on the use of the challenged contracting mechanisms would lessen the substantial ex ante rivalry for contract placement which, at present, compels [Tyco] and other suppliers to tender offers of discounted prices in exchange for the expectation of higher sales.” Ordover Report at ¶75.
- **Conclusion Five:** “After the fact market share is not a reliable indicator of a supplier's ability to exercise market power, particularly where there has been competitive bidding for the contract.” Guerin-Calvert Report at ¶14.

- Prof. Ordoover states: “Prof. Elhauge does not account properly for the role of *ex ante* competition in generating competitive pressures on prices to consumers. Instead, Professor Elhauge’s analysis of the competitive situation in the sharps container market is focused almost exclusively on the *ex post* competition that follows after the placement of suppliers on GPO contracts.” Ordoover Report at ¶66.
- **Conclusion Six:** “GPOs compete with each other to offer low prices and obtain and retain members.” Guerin-Calvert Report at ¶15.
  - Ordoover states: “GPOs vigorously compete with one another for members, [so] a GPO must take into account its members’ preferences lest it loses membership to rival GPOs or induce the hospital to contract outside of the GPO.” Ordoover Report at ¶45.
- **Conclusion Seven:** “Entry and expansion prospects of competitors should be evaluated in terms of opportunities to bid, not merely by whether a company has won a specific contract or the number of companies on a given GPO contract.” Guerin-Calvert Report at ¶16.
  - Prof. Ordoover states: “Prof. Elhauge vastly understates the importance of *ex ante* competition for attaining low prices in this market” because “a rational firm, in bidding for placement on a GPO contract...will base its bid upon its projected incremental costs of serving the demand it expects to gain if it is successful in its efforts.” Ordoover Report at ¶44, ¶41.
- **Conclusion Eight:** “Prices offered under sole-source GPO contracts tend to be lower than under dual- or multi-source contracts.” Guerin-Calvert Report at ¶17.
  - Prof. Ordoover states: “Sole-source contracts tend to generate lower pricing relative to multi-source arrangements.” Ordoover Report at ¶45.
- **Conclusion Nine:** “GPOs regularly reevaluate their contract portfolio and incumbency provides no guarantee of future contract positioning.” Guerin-Calvert Report at ¶18.
  - Prof. Ordoover states: “GPOs solicit and evaluate competing bids,” and “if ... customers are paying supracompetitive prices, then they are ripe for picking by an entrant, even if the entrant's costs are not as low as that of the incumbent.” Ordoover Report at ¶43, ¶73.
- **Conclusion Ten:** “Competition for sales to GPO members continues to occur beyond the GPO contracting stage. This *ex post* competition continues to discipline prices of ‘on contract’ suppliers.” Guerin-Calvert Report at ¶19.
  - Prof. Ordoover states: “The evidence in this case shows that even when a supplier is the sole contracted vendor, it still faces *ex post* competition from suppliers who are not on contract. Thus, being placed on contract does not assure a particular volume of sales but plausibly increases the chances of making sales to the GPO members.” Ordoover Report at ¶44.

- **Conclusion Eleven:** “Contracting practices with GPOs do not limit the ability of [Tyco’s] competitors to compete.” Guerin-Calvert Report at ¶20.
  - Prof. Ordover states: “Professor Elhauge is wrong to conclude that [Tyco’s] challenged contracts foreclosed rival suppliers of sharps containers and thereby injured competition, and ultimately consumers.” Ordover Report at ¶77.
  
- **Conclusion Twelve:** “Examination of the evidence shows that, contrary to Plaintiffs’ experts’ untested projections, competitors achieved substantial growth and expansion, and were not artificially constrained.” Guerin-Calvert Report at ¶21.
  - Prof. Ordover states: [REDACTED]  
[REDACTED]  
[REDACTED] Id. at ¶59.

Listing fully all the redundancies between the two reports would take more than the space allotted for this brief. It should suffice as to these twelve conclusions in the Guerin-Calvert Report, however, that they contain nothing not already addressed in Prof. Ordover’s expert report. Such cumulative testimony is properly excluded by the district court. *See Laplace-Bayard v. Battle*, 295 F.3d 157, 163 (1st Cir. 2002) (affirming the district court’s exclusion of cumulative expert testimony).

The dichotomy between Tyco’s present arrangement that stresses duplication and Plaintiffs’ proper approach of defining the role of experts so that opinions are not cumulative is made even more clear upon consideration of Dr. Singer’s reply to Ms. Guerin-Calvert. He, too, understands the utility of the common division in expert work between liability and damages, stating early on in his reply that, “[a]s damages expert, I understand my role as *accepting* Plaintiffs’ theory of harm and projecting how that harm manifested itself in terms of higher prices.” Singer Reply at 4 (emphasis in original). Thus Dr. Singer correctly comments:

Ms. Guerin-Calvert appears unwilling to accept that role, and instead largely criticizes the Plaintiffs’ theory of harm. ... Ms. Guerin-Calvert does not get around to critiquing my damages model until the last section of the last heading of her report (Part VI.C.), and even there, she is not willing to concede that Defendant’s conduct could be the cause of the discrepancy in rival penetration

between the foreclosed and unforeclosed segments of the market. Singer Reply at 4-5.

Since both Prof. Elhauge and Prof. Ordover purport to opine on liability, the most rational course is to leave it at that, and prevent Ms. Guerin-Calvert from making “me too” liability arguments. Tellingly, neither Tyco nor its experts explain why the Court should have to tolerate, or the Plaintiffs have to bear the burden of, or the jury be required to ferret out a three-on-one fight (including Mr. Hughes) against Prof. Elhauge’s liability opinions. Having to do so at trial would be utterly unmanageable, confusing, unfair, and prejudicial. *See U.S. v. Shay*, 57 F.3d 126, 134 (1st Cir. 1995) (“Even if expert testimony is admissible pursuant to Rule 702, it may be disallowed pursuant to Fed.R.Evid. 403 if its prejudicial, misleading, wasteful, confusing, or cumulative nature substantially outweighs its probative value.”). Therefore, due to their obvious redundancy, Plaintiffs respectfully request that this Court exercise its discretion and judgment under Rules 702 and 403 by excluding the testimony contained in Ms. Guerin-Calvert’s first twelve conclusions related to liability (corresponding to paragraphs 45 through 68 in the body of her report).

**C. Conclusion Thirteen of Ms. Guerin-Calvert’s Report Is Irrelevant Testimony That Should Be Excluded**

Even where Ms. Guerin-Calvert finally begins to address the damage analysis proffered by Plaintiffs’ expert Dr. Singer, her criticisms evidence a complete unwillingness to accept the proper framework of analysis. As alluded to above, Ms. Guerin-Calvert never attempts to model potential damages under the assumption that a jury finds Tyco liable for its anticompetitive conduct. Instead, she principally complains in the thirteenth of her eighteen conclusions, that

[REDACTED]

[REDACTED]



[REDACTED]

Ms. Guerin-Calvert’s reluctance to answer a simple question highlights the peculiar role Tyco has chosen for her in this matter, but she eventually does answer affirmatively, conceding the point that the role of a damages expert is (supposed to be) to provide a damage figure based on a but-for world characterized by a given “set of assumptions,” i.e., the absence of a defendant’s challenged conduct. For whatever reason, Ms. Guerin-Calvert’s report in this matter never opines on what the but-for world would look like absent Tyco’s challenged conduct. Should the jury find Tyco not liable for this conduct, her critique of Dr. Singer would be moot. But should the jury instead find Tyco liable for this conduct, her testimony as to damages contributes nothing and would by definition be completely irrelevant and/or unreliable. As Dr. Singer points out, “Ms. Guerin-Calvert’s report amounts to an ‘all-or-nothing’ critique of [Plaintiffs’] damage estimates.” Singer Reply at ¶7. Such a failure to consider not just an alternate scenario, but the scenario where Tyco’s challenged conduct could have been the cause of the alleged harm, makes her report just the kind of unreliable testimony meriting exclusions. *See United States v. Diaz*, 300 F.3d 66, at 76 (1st Cir. 2002) (noting the importance under *Daubert* of experts “supporting their theories and refuting alternate theories”). Under any possible scenario, her testimony is totally irrelevant to the issue of damages in this case, and should be excluded.

## **D. Conclusions Fourteen Through Eighteen of Ms. Guerin-Calvert's Report Are Unreliable Testimony That Should Be Excluded**

The remaining potential utility of Ms. Guerin-Calvert's report could be as a direct criticism or rebuttal of Dr. Singer's analysis, but only where her critiques address Dr. Singer's econometric methods and applications, not his acceptance of Plaintiffs' theory of harm and Prof. Elhauge's proof thereof.<sup>9</sup> The last five of the eighteen conclusions in her Summary of Opinions would appear to be the candidates for such analysis; yet even in this last area, Ms. Guerin-Calvert proves herself to be of no use to the court or a jury, as she persists in making misguided and unreliable statements that have no grounding in the facts of the case.

### **1. Conclusion Fourteen: Industry concentration, higher prices, and the NEIO model**

In her fourteenth conclusion Ms. Guerin-Calvert's asserts that "Dr. Singer's application of the ... NEIO model is fundamentally dependent on the erroneous assumption that lower seller concentrations must lead to lower prices." Guerin-Calvert Report at p. 5, ¶23. Ms. Guerin-Calvert later amplifies this complaint, stating that "Dr. Singer assumes (based on the conclusions of Professor Elhauge)" what she deems is "the fundamental assumption that underpins Dr. Singer's usage of the NEIO model here" – "that higher industry concentration leads to higher prices." Guerin-Calvert Report at p. 12, ¶47. To support her criticism, Ms. Guerin-Calvert simply blusters that "the facts are to the contrary." Guerin-Calvert Report at p. 26, ¶82. *See Boucher v. U.S. Suzuki Motor Corp.*, 73 F.3d 18, 22 (2d Cir.1996) ("Admission of expert testimony based on speculative assumptions is an abuse of discretion.")

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<sup>9</sup> Had Plaintiffs employed just one expert to opine on both liability and damages, it would be difficult to imagine Ms. Guerin-Calvert's attack. Clearly, in that instance, Ms. Guerin-Calvert's objection would be ridiculous that the liability work would have to be re-run and independently verified had one person been engaged to do both functions. The attack is equally ridiculous here.

However, rather than just baldly asserting (without analysis) the existence of untold “facts to the contrary” as Ms. Guerin-Calvert does, Dr. Singer (in his initial report and again in his reply) actually uses the data to prove the point, statistically determining that: [REDACTED]

[REDACTED]

[REDACTED].”

Singer Reply at p. 8, ¶15. Thus in one fell swoop, Ms. Guerin-Calvert has offered redundant liability testimony while ignoring the uncontested data and related portions of Dr. Singer’s report. While the reader is simply left to wonder what “facts” Ms. Guerin-Calvert could be referring to, her basic misunderstanding of the NEIO model has become overtly clear.

Ultimately, because Ms. Guerin-Calvert’s criticism here has no factual basis on the record, it should be excluded.

## **2. Conclusion Fifteen: Market share shifts in the but-for world**

In her next criticism, Ms. Guerin-Calvert complains again about liability, stating that “Dr. Singer accepts without independent evaluation Plaintiffs’ liability expert’s characterization of the but-for world...” Guerin Calvert Report at p. 5, ¶24. Yet her overall point that Dr. Singer “overstates the shift in share that could realistically have occurred” is again lacking in any factual basis in the record. This is in keeping with her refusal to opine on what the but-for world would look like. In any event, Dr. Singer thoroughly refutes this charge in his reply report at pages 10-16 (¶¶18-28), but it suffices for present purposes to highlight the principal errors that render Ms. Guerin-Calvert’s opinion here so unreliable.

Ms. Guerin-Calvert insists on comparing actual-world figures to other actual-world figures, sometimes from a different time period, but never to the but-for world.<sup>10</sup> Such a fallacy by definition prevents a comparison between what the competitive outcomes are/would be – with

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<sup>10</sup> See Guerin-Calvert Report at ¶90 and ¶92; see also Singer Reply at pp. 10-11, ¶¶19-20, ¶27.

and without Tyco's anticompetitive conduct. Without explanation Ms. Guerin-Calvert commits this very basic error without acknowledging it. For instance, when addressing Dr. Singer's model showing a market share shift in the but-for world away from Tyco and to its rivals, Ms. Guerin-Calvert argues that Tyco's rivals did not have the capacity – in the actual world – to expand at the rate predicted by Dr. Singer. But such a criticism is illogical because it necessarily means that more successfully exclusionary conduct would result in lower damages. Ms. Guerin-Calvert is essentially suggesting that in a but-for world without Tyco's exclusionary conduct, its rivals would nevertheless continue to make production plans conforming to the actual world where Tyco's conduct has foreclosed them from a substantial portion of the market. This assertion defies both economics and common sense, which Ms. Guerin-Calvert neither recognizes nor addresses. Whether she is unaware, unwilling, or unable to explain herself, her criticism in this section is inherently unreliable, certainly unhelpful, and should be excluded.

**3. Conclusion Sixteen: Product differentiation/homogeneity/heterogeneity**

Ms. Guerin-Calvert's statement in her next criticism that Dr. Singer's "assumption that sharps containers are homogenous products is contradicted by the facts" is also ironic, both because the facts actually support Dr. Singer<sup>11</sup> and, more importantly, the degree of differentiation claimed by Ms. Guerin-Calvert<sup>12</sup> is in fact anticipated by the NEIO model. Guerin-Calvert Report at p. 5, ¶25 and p. 40, ¶124. In other words, when Ms. Guerin-Calvert states that "Dr. Singer's application of the NEIO erroneously assumes that the sharps containers at issue are undifferentiated," she is not only wrong, but it would not even matter if she was

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<sup>11</sup> [REDACTED]

right. In his reply, Dr. Singer provides a clear statistical proof to dispel Ms. Guerin-Calvert's confusion:

Ms. Guerin-Calvert's confusion stems from a basic misunderstanding of the implications of the NEIO model: "Given the type and size differences across products, the [NEIO] model cannot tenably assume that price differences would disappear in the but-for world." [citing Guerin-Calvert Report at ¶127] **But the NEIO model does *not* assume that the prices for all containers are the same in the but-for world.** As I explained in my class certification report, the NEIO model produces an average but-for price across all types of sharps containers, and therefore accommodates price variation across types of containers and even across customers for the same type of container.[] **Ms. Guerin-Calvert fails to acknowledge that the existence of an average does not imply the absence of a standard deviation.** Singer Reply at p. 17, ¶29 (italics in original; bold supplied).

In the same fashion, Ms. Guerin-Calvert uses the phantom issue of product heterogeneity to accuse Dr. Singer of overestimating damages by seizing upon a potential for bias in estimating the conduct parameter of the NEIO model. Guerin-Calvert Report at ¶139. The problem with this criticism is that it again ignores the manner in which Dr. Singer has properly used the NEIO to model damages. As Dr. Singer points out:

I stressed repeatedly in my expert report [that] in my damages model the conduct parameter is held fixed in the actual and but-for worlds. ... Therefore, even if one 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 p. 22, ¶35 (citing Singer Damages Report ¶32).

Yet Ms. Guerin-Calvert persists in her characterization of product heterogeneity as the nemesis of reliable damage calculations, further revealing her misunderstanding of the NEIO model. Ms. Guerin-Calvert states, once again incorrectly, that "Plaintiffs' expert is assuming that . . . the price of every one of [Tyco's] products would have similarly changed by the same percentage as industry average price changed." Guerin-Calvert Report at ¶142. In order to be helpful, Ms. Guerin-Calvert needs to put forward a disagreement with Dr. Singer about the appropriateness or precision of his methods. Ignorance of these methods clarifies nothing and

instead distracts the trier of fact from the relevant inquiry. As Dr. Singer is forced to explain yet again:

This proposition is simply not true. The mere fact that the model produces an average price for Tyco's sharps containers in the absence of the alleged foreclosure does not imply that the price of *every one of Tyco's products* falls by the same amount. Instead, the model allows for the prices of different Tyco products to decrease by different amounts—it merely imposes an average but-for price across all of Tyco's products. Singer Reply at pp. 22-23, ¶36.

Ms. Guerin-Calvert's demonstrated lack of understanding of the NEIO model, as evidenced by her inability to fashion a valid criticism of Dr. Singer's implementation of it, renders her opinion, again, completely unreliable. Allowing a person granted expert status to deny central tenets of statistics would confuse rather than clarify the issue. As the Supreme Court has observed, "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses." *Daubert*, 509 U.S. at 595. Because Ms. Guerin-Calvert's criticism here shows such a lack of understanding or familiarity with Dr. Singer's implementation of the NEIO model, it should be excluded.

#### **4. Conclusion Seventeen: Individualized factors affecting damages**

Apparently due to the timing of this Court's partial order with respect to class certification on January 29, 2008, and the deadline two days later for the submission of Tyco's expert reports related to the merits of the case, both Ms. Guerin-Calvert and Prof. Ordovery submitted expert reports with sections attacking the amenability of this action to class-wide resolution.<sup>13</sup> Ms. Guerin-Calvert simply parrots Prof. Ordovery, arguing that "Dr. Singer fails to account for relevant evidence that is individual to each purported class member, such as GPO

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<sup>13</sup> See Ordovery Report at 5-8, 81-86. See also Guerin-Calvert Report at 6, ¶26.

membership, geographic location, the time period during which the member made its purchases, or the product mix it bought.” Guerin-Calvert Report at p. 6, ¶26. These arguments have been mooted by this Court’s class-certification decision on August 29, 2008 (Docket #169) and should be excluded on that basis alone.

Moreover, even if not mooted, Ms. Guerin-Calvert’s arguments once again establish that she is completely unfamiliar with Dr. Singer’s methods. It would be one thing for Ms. Guerin-Calvert to disagree with Dr. Singer about the appropriateness or precision of his methods, but denying their existence constitutes a fundamental failure to offer an opinion that fits the facts of the case. *See Sutera*, 986 F.Supp. at 661. In his reply Dr. Singer illustrates how the model in his initial report already accounted for some of the criticisms levied by Ms. Guerin-Calvert:

Regarding the time period during which the member made its purchases, I provide separate damages estimates for each year in the Class Period, which accounts for changes in competitive factors over time. Regarding GPO membership, my calculation of but-for shares depends critically on the difference in rival penetration in the allegedly foreclosed and non-foreclosed segments of the market, which in turn depends critically on whether the buyer belonged to a GPO, and if so, under which GPO tier the buyer purchased a sharps container. Singer Reply at ¶41.

And how the other criticisms are simply irrelevant to an accurate calculation to begin with:

Ms. Guerin-Calvert observes that I do not account for product mix or geographic location of a particular buyer. But this observation does not affect my ability to estimate classwide damages or to allocate those damages to class members. Presumably Ms. Guerin-Calvert cites the geographic location of a buyer because she mistakenly believes that I have allocated in the but-for world particular Tyco customers to particular rival suppliers, some of which allegedly did not serve certain areas of the country during the early portion of the Class Period. Because my damages model does not perform such an allocation, her critique has no force. Similarly, any failure to account for the specific SKU number of a sharps container purchased by a class member does not affect my ability to estimate classwide damages or to allocate those damages to class members. Presumably, Ms. Guerin-Calvert cites the “product mix” of a buyer because she mistakenly believes that sharps containers are highly differentiated. Because the sharps container industry is properly modeled as a homogenous product, estimating the

but-for average market price for all sharps container is clearly sufficient to compute classwide damages. Singer Reply at ¶42 (internal citations omitted).

This failure to fit her criticisms to the model she deigns to criticize, combined with the irrelevance of her other objections, renders her testimony yet again confusing and unreliable, establishing another basis for its exclusion under Rules 702 and 403.

### **5. Conclusion Eighteen: Marketplace dynamics**

Ms. Guerin-Calvert's last criticism is a vague, throw-away, catch-all accusation that "Dr. Singer's errors led to a substantial mischaracterization of the marketplace and a failure to provide a sound economic basis for estimating damages;" and that the "resulting 'model' fails to account for the competitive dynamics of a marketplace or describe a plausible but-for world." Guerin-Calvert Report at p. 6, ¶27. This sweeping indictment corresponds to multiple disconnected accusations at the end of Ms. Guerin-Calvert Report that, like everything preceding it, has no semblance of a fit with either the facts of the case or the damages model that she is supposedly critiquing. Ms. Guerin-Calvert reproaches Dr. Singer repeatedly with obvious misrepresentations of the content of his report, often stating that he "assumes" something when he has in fact made a statistical deduction directly from the uncontested data produced by Tyco and other parties in this matter. Clearly Ms. Guerin-Calvert either does not understand Dr. Singer's methods or has preferred obfuscation over a scientific response.

For example, when Ms. Guerin-Calvert complains that "neither the elasticity of demand nor the nature of competition that Dr. Singer claims is embodied in the conduct parameter bears at all on his findings," Dr. Singer points out that these two parameters are "directly relevant to damage estimation" in that they confirm that the NEIO model has accurately captured the competitive dynamic of the marketplace. Guerin-Calvert Report at ¶147; Singer Reply at ¶45. Within this argument Ms. Guerin-Calvert states that Dr. Singer "assume[s] that the industry

elasticity remains constant between the actual and but-for worlds.” Guerin-Calvert Report at ¶151. This sudden interest in the but-for world notwithstanding, Ms. Guerin-Calvert has simply ignored the statistical methods employed by Dr. Singer to arrive at this conclusion. In his reply Dr. Singer cites to his original report wherein he concludes that “the estimated industry demand function indicates that a constant elasticity fits the data best” because “the degree of curvature of the industry demand function is such that the price elasticity remains constant as one moves along the demand curve.” Singer Reply at ¶47 (citing Singer Damages Report at ¶87). Ms. Guerin-Calvert does not explain why Dr. Singer’s analysis is wrong, she simply represents to the Court that the analysis doesn’t exist. Such misrepresentations are not based in accepted economic analysis and can present only problems and confusion if allowed at trial. They should therefore be excluded.

### **III. CONCLUSION**

In the testimony of Ms. Guerin-Calvert, Tyco has offered this Court a hodge-podge mix of duplication, irrelevance, and unreliability. Neither Tyco nor Ms. Guerin-Calvert has offered any rationale why this court should accept such duplicative testimony, and Ms. Guerin-Calvert herself makes no attempt to distinguish her opinions from that of her colleague. With respect to the only potentially unique aspect of her report – quantification of potential damages – Ms. Guerin-Calvert never follows through. Instead, the Guerin-Calvert report is devoid of any assessment of damages, casts a few stray aspersions on Dr. Singer’s methods, and proves only her lack of familiarity with Dr. Singer’s methods as well as her disregard for the facts of the case. In conclusion, Plaintiffs respectfully request that this honorable Court exclude the testimony of Ms. Guerin-Calvert in its entirety.

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Respectfully submitted,

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**/s/ John Alden Meade**

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