

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

## **I. INTRODUCTION**

Plaintiffs Natchitoches Parish Hospital Service District and Smith Drug (collectively “Plaintiffs”) submit this reply memorandum in further support of Plaintiffs’ Motion to Exclude the Testimony of Defendants’ Expert Margaret Guerin-Calvert (“Motion to Exclude,” Doc. 185), and in response to Defendants’ (“Tyco’s”) memorandum in opposition (“Tyco Opp. Memo,” Doc. 193). In its opposition, Tyco largely confirms that more than half of Ms. Guerin-Calvert’s proffered testimony is cumulative and irrelevant liability testimony, and declines to defend Ms. Guerin-Calvert’s failure to ground her opinions in accepted economic theory and the facts of the case – most notably with regard to her novel and contrarian hypothesis that greater monopolization of the sharps container industry by Tyco leads to more competitive prices.<sup>1</sup> Taken as a whole, Ms. Guerin-Calvert’s expert report, her recent declaration, and Tyco’s opposition are revealed as an effort only to obscure, and not elucidate the issues to be tried in this case. Tyco’s attempt to preserve this tactic and prevent its exclusion by seeking refuge in a “jury issue” is unavailing, as Ms. Guerin-Calvert has foregone her opportunity to satisfy the minimum requirements for admissible expert testimony. On the basis of these arguments and those made in Plaintiffs’ Memorandum in Support of Motion to Exclude the Testimony of Defendants’ Expert Margaret Guerin-Calvert (“Plaintiffs’ Memorandum,” Doc. 186), her testimony should be excluded in its entirety.

## **II. ARGUMENT**

### **A. Tyco’s Misrepresentations of Plaintiffs’ Motion to Exclude**

In order to present the issues most clearly to this Court, Plaintiffs’ Memorandum precisely tracked the structure offered in the Expert Report of Margaret Guerin-Calvert (“Guerin-

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<sup>1</sup> Taken to its logical conclusion, Ms. Guerin-Calvert’s unsupported theory means that the lowest prices would be available only when Tyco gained control of one hundred percent of the market.

Calvert Report,” Doc. 160). In the section entitled “Summary of Opinions,” Ms. Guerin-Calvert states that she has “reached the following conclusions.” Guerin-Calvert Report at 3. Plaintiffs’ Memorandum addresses each of these eighteen conclusions one by one, in order, demonstrating that every single one of them should be excluded, and therefore that Ms. Guerin-Calvert’s report should be excluded in its entirety. But rather than responding to each of Plaintiffs’ clear and discrete arguments as they are, Tyco continues its obfuscation.

Perhaps the clearest example of Tyco’s intention to confuse rather than clarify is in its introduction, wherein Tyco claims that Plaintiffs’ “Motion reduces to three misdirected claims.” Tyco Opp. Memo at 1. Tyco then offers three completely false summaries of Plaintiffs’ arguments, first:

(1) Ms. Guerin-Calvert cannot address topics Dr. Ordover also addresses, even when those topics are directly relevant to her analysis of Dr. Singer’s damages claims. Tyco Opp. Memo at 1.

This argument is nowhere to be found in Plaintiffs’ Memorandum. Indeed, the argument totally misses the point. Plaintiffs’ argument in this regard is rather that Ms. Guerin-Calvert has not offered any unique conclusions, but only rewordings of conclusions already reached by Prof. Ordover. Hence the structure of Plaintiffs’ memorandum as to Ms. Guerin-Calvert’s first twelve conclusions: Each of these conclusions is placed next to one of Prof. Ordover’s conclusions so that the redundancy is laid bare.

Tyco’s second false summary of Plaintiffs’ argument is that:

(2) Ms. Guerin-Calvert cannot testify unless she provides a model showing that class members were damaged by the challenged conduct. Tyco Opp. Memo. at 1 (emphasis added).

Here Tyco once again reveals its disregard for the difference between liability and damages. Whether “class members were damaged” is distinctly a liability question, and one for

which Prof. Elhauge and Prof. Ordover have each offered an opinion. Plaintiffs have nowhere suggested that Ms. Guerin-Calvert should provide a model showing such a thing, but have instead pointed out that Ms. Guerin-Calvert's criticisms of Dr. Singer conversely assume no liability, and are thus totally irrelevant should a jury find Tyco liable for its exclusionary conduct. This refusal to assume liability *arguendo* as a logical point of departure is what led Dr. Singer to comment in his reply that his report and Ms. Guerin-Calvert's are like "two ships passing each other in the night." Expert Reply Declaration of Dr. Hal Singer ("Singer Reply," Doc. 137) at 34, ¶58.

Tyco's third false summary of Plaintiffs' argument is that:

(3) Dr. Singer is right and Ms. Guerin-Calvert is wrong on several miscellaneous points. Tyco Opp. Memo at 1.

Here Tyco is incorrectly suggesting that Plaintiffs are asking this Court to decide issues of legitimate dispute between two qualified experts. That is simply not the case. Plaintiffs are requesting the exclusion of Ms. Guerin-Calvert's testimony on the issues of (a) the supposedly inverse relationship between industry concentration and price-cost margins, (b) market share shifts to Tyco's rivals in the but-for world, (c) product differentiation, (d) individualized factors affecting damages, and (e) marketplace dynamics because Ms. Guerin-Calvert steadfastly refuses to engage in such a legitimate dispute.<sup>2</sup> Since the only non-duplicative use for Ms. Guerin-Calvert's testimony would be her opinion on damages assuming liability, her refusal to ever accept Plaintiffs' theory of harm as to liability renders these conclusions unreliable and they should be excluded.

In an oblique recognition of her misguided choice to obfuscate rather than opine on potential damages, Ms. Guerin-Calvert purports to grant herself an entirely improper reservation

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<sup>2</sup> These five issues correspond to Ms. Guerin-Calvert's fourteenth through eighteenth conclusions (Guerin-Calvert Report at 5-6, ¶¶23-27), which are addressed in Plaintiffs' Memorandum at 11-18.

of rights in her recently filed reply declaration. Ms. Guerin-Calvert states, “I reserve the right to discuss any and all aspects of Dr. Singer’s reports in any future testimony that I give.” Reply Declaration of Ms. Guerin-Calvert (“Guerin-Calvert Reply,” Doc. 194) at 2, n. 1. Nothing permits an expert to engage in such disclosure by ambush. Therefore in moving for the exclusion of Ms. Guerin-Calvert’s testimony, Plaintiffs are not only asking this Court to rectify and/or prevent at trial Tyco’s attempts to distort the proper frame of analysis for the issue of damages, but also to prevent Ms. Guerin-Calvert from belatedly offering a new damage analysis in the event Tyco is found liable for its exclusionary conduct.

**B. Tyco Has Not and Can Not Rebut Plaintiffs’ Properly Framed Objections to Ms. Guerin-Calvert’s Testimony**

Just as with its motion to exclude the testimony of Plaintiffs’ damages expert Dr. Singer, Tyco seeks to avoid the central issues of this motion by attempting to divert the Court’s attention. To be clear, this *Daubert* motion relates to the Expert Report of Ms. Guerin-Calvert, not to Dr. Singer’s report, not to Prof. Elhauge’s, nor to Prof. Ordovery’s. Ms. Guerin-Calvert’s report must stand on its own in order to be admitted into evidence. Plaintiffs directly addressed all eighteen of Ms. Guerin-Calvert’s conclusions, and Tyco has not taken up the defense. A review of Tyco’s specific responses reveals that Plaintiffs’ charges remain unanswered.

**1. Ms. Guerin-Calvert’s First Twelve Conclusions**

Plaintiffs illustrated the considerable overlap between the assignments of Ms. Guerin-Calvert and Prof. Ordovery, which was the first clear indication that she would be offering largely duplicative testimony.<sup>3</sup> In its opposition, Tyco does not even address this fact. Plaintiffs also placed each of Ms. Guerin-Calvert’s first twelve conclusions next to the corresponding opinions

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<sup>3</sup> See Plaintiffs’ Memorandum at 3-4.

of Prof. Ordovery, yet Tyco has made no effort to distinguish between them.<sup>4</sup> Tyco's defense of Ms. Guerin-Calvert is instead to diminish the significance of her conclusions, referring to them as "foundational" or simply "topics," and claiming the overlap is only "partial." Tyco Opp. Memo at 1, 3. But these juxtapositions are not merely of "foundational points" or background "topics," but of Ms. Guerin-Calvert's self-styled conclusions. Id. They don't just "partially coincide" with each other, but are in fact the same opinion, with slightly different verbiage. Id. at 6.

Tyco disparages Plaintiffs' clear presentation by calling it "semi-theatrical," and then accuses Plaintiffs of "ignor[ing] the unmistakable fact that every one of the listed conclusions is directly related to whether: (1) class member prices were inflated ... or (2) the posited level of foreclosure, which Dr. Singer heavily relies upon, is plausible." Id. But again, whether prices were inflated and whether the level of foreclosure is plausible are liability questions, whereas the amount of such inflation resulting from such foreclosure is the damages question. Plaintiffs are not ignoring the liability questions, but instead pointing out that the dispute is already addressed by the reports of Prof. Elhauge and Prof. Ordovery. Therefore the reason for the co-presentation of Ms. Guerin-Calvert's and Prof. Ordovery's opinions is to demonstrate that Ms. Guerin-Calvert is simply offering duplicative conclusions. Thus Tyco's argument that expert testimony is not "subject to exclusion merely because two experts agree on various facts that are relevant to each of their distinct analyses" totally misses the point. Id. Ms. Guerin-Calvert's testimony here is subject to exclusion because they are redundant liability conclusions, offering nothing unique to the trier of fact.

Tyco attempts to rescue Ms. Guerin-Calvert's duplicative testimony from exclusion by arguing that the issue should be deferred for resolution at trial. But the cases Tyco cites for this

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<sup>4</sup> Id. at 5-8.

proposition do not support the argument. For instance, in *Loeffel Steel*, the court stated that because every instance of cumulative expert testimony had been challenged, the decision on which one to exclude could be made at trial.<sup>5</sup> In this case, however, Plaintiffs have not challenged the first instance of the duplicative testimony, *i.e.*, Prof. Ordover's report, but rather only that of his copycats Ms. Guerin-Calvert and Mr. Hughes. Thus the choice of whom to keep in is already clear. Similarly, the *Francois* case cited by Tyco provides no support for their argument because there was no showing in that case that the expert reports were duplicative. The *Francois* court stated that the testimony, if later shown to be cumulative, would be stricken at trial.<sup>6</sup> In this case Plaintiffs have already shown that Ms. Guerin-Calvert's first twelve conclusions are entirely repetitious of Prof. Ordover's liability opinions. Where it is obvious from the reports that two (or more) experts' testimony will be duplicative of each other, there is no reason to wait until the midst of trial to cure the obvious prejudice. Many courts have done so before trial. *See, e.g., Thorndike v. DaimlerChrysler*, 266 F. Supp.2d 172, 185 (D. Me. 2003) (excluding expert testimony that was "unnecessarily duplicative" and where proponent had "fail[ed] utterly to explain where methodology is involved here as opposed to simply the parroting of other experts' conclusions").<sup>7</sup>

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<sup>5</sup> *Loeffel Steel Prod., Inc. v. Delta Brands, Inc.*, 372 F. Supp.2d 1104, 1122 (N. D. Ill. 2005).

<sup>6</sup> *Francois v. Colonial Freight Systems, Inc.*, No. 06-434, 2008 U.S. Dist. LEXIS 648, \*17-18 (S.D. Miss. Jan. 4, 2008).

<sup>7</sup> *See also Rios v. City of San Jose*, No. 06-7036, 2008 U.S. Dist. LEXIS 84923, \*5 (N.D. Cal. Oct. 9, 2008) (court specifically precluding expert "from rendering duplicative opinion testimony from defendants' other medical experts"); *Soyring v. Fehr*, No. 05-1900, 2006 U.S. Dist. LEXIS 97169, \*14-15 (D. Minn. Jul. 5, 2006) (finding that Dr. Ascano's opinion "is a conclusory reiteration of those expressed by the Plaintiff's other expert witnesses" and struck it as being impermissibly duplicative); *Phillips v. General Motors Corp.*, No. 99-3423, 2000 U.S. Dist. LEXIS 13642, \*9 (E.D. La. Sept. 11, 2000) (excluding duplicative expert testimony of its own accord); *In re Taxable Municipality Bond Securities Litig.*, MDL-863, 1994 U.S. Dist. LEXIS 15937, \*7, \*9 (E.D. La. 1994) (excluding duplicative portions of expert reports). *See also Cabana v. Forcier*, 200 F.R.D. 9, (D. Mass. 2001) (denying motion to modify scheduling order to add another expert where "there is no indication that [the new expert's] testimony would not be duplicative of the testimony of plaintiffs' two other experts").

## 2. Ms. Guerin-Calvert's Thirteenth Conclusion

As demonstrated in Plaintiffs' Memorandum, Ms. Guerin-Calvert does not offer an opinion actually critiquing Dr. Singer's methods until her thirteenth conclusion, which purports to criticize Plaintiffs' but-for world.<sup>8</sup> But this conclusion is false because Ms. Guerin-Calvert has fabricated a quotation from Dr. Singer's report in support of her only specific complaint that Dr. Singer "assumes that any and all GPO contracts and contract terms are 'imposed' on customers." Guerin-Calvert Report at 4, ¶22.<sup>9</sup> Dr. Singer never states that anything is "imposed" on customers, and indeed his implementation of the NEIO model assumes no such thing. *See* Singer Reply at 5, n. 14. Plaintiffs' Memorandum advises Tyco of this misrepresentation for a second time, yet neither Tyco nor Ms. Guerin-Calvert has done anything about it, choosing instead to ignore the charge altogether.<sup>10</sup>

Similarly, Ms. Guerin-Calvert accuses Dr. Singer of "fail[ing] to recognize that competition among suppliers for the GPO position is a crucial competitive dynamic that results in lower, not higher, prices," – in effect assuming that the hotly disputed liability issues regarding the existence, extent, and effects of *ex ante* competition have been already decided in Tyco's favor. Guerin-Calvert Report at 5, ¶22. This Court has already taken note of extensive evidence that "undermines defendants' view of the robustness of the competition for GPO contracts." Memorandum and Order, August 29, 2008 ("Aug. Order") at 22-23. Yet Ms. Guerin-Calvert has nevertheless assumed the opposite, that Prof. Ordovery's view is correct.

Thus Tyco is missing the point yet again when it complains that "Plaintiffs cite no authority even remotely suggesting that a defendant's damages expert is required to uncritically accept all the opinions of a plaintiff's liability expert." Tyco Opp. Memo at 1. Given that the sole

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<sup>8</sup> *See* Plaintiffs' Memorandum at 8-10.

<sup>9</sup> *See also* Plaintiffs' Memorandum at 9.

<sup>10</sup> *See* Tyco Opp. Memo and Guerin-Calvert Reply.

utility of Ms. Guerin-Calvert's testimony rests in the circumstance where Tyco is found liable for its exclusionary conduct (as damages are zero by definition without such a finding), her reliance on or agreement with Prof. Ordovery's liability conclusions as the basis for her criticisms of Dr. Singer renders her testimony irreconcilable with a finding of Tyco's liability. Instead of opining on what the but-world would look like absent Tyco's challenged conduct,<sup>11</sup> a role she has performed without equivocation in other cases,<sup>12</sup> Ms. Guerin-Calvert simply insists that Dr. Singer's methods are unreliable because Tyco's conduct is procompetitive. Ms. Guerin-Calvert's conclusion thirteen is therefore simply an assumption that Prof. Ordovery's liability opinions are true, making the testimony therein either entirely cumulative or totally meaningless. It should therefore be excluded.

### **3. Ms. Guerin-Calvert's Fourteenth Conclusion**

Contrary to all economic sense and the undisputed evidence in this case, Ms. Guerin-Calvert opines that the NEIO model is unsuitable for modeling competitive effects in the sharps container industry because it presupposes a positive correlation between industry concentration and price-cost margins. Guerin-Calvert Report at 5, 25-27. While it is true the industry concentration can be a necessary but not always sufficient condition for anticompetitive outcomes, it is indisputably the default assumption, and indeed the economic *raison d'être* of the Sherman and Clayton Acts, that increased industry concentration, as measured by the

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<sup>11</sup> Note that Tyco recognizes this deficiency, briefly claiming otherwise that "Ms. Guerin-Calvert conclude[d] ... that, assuming a jury finds that the challenged practices were anticompetitive and wrongful, Plaintiffs have failed to prove damages and failed to demonstrate that a but-for world without the challenged practices would have benefited all class members with lower prices." Tyco Opp. Memo at 10. Tyco does not and can not provide any citation to the Guerin-Calvert Report for this argument because it is not there.

<sup>12</sup> Plaintiffs illustrated Ms. Guerin-Calvert's familiarity in another case with the damages expert role she seems unable to comprehend here. *See* Plaintiffs' Memorandum at 9-10. Tyco can not simply dismiss the significance of the quoted deposition testimony as "pure fantasy," because the language speaks for itself, and highlights the awkwardness of Ms. Guerin-Calvert's present role in this litigation.

Herfindahl-Hirschman Index (“HHI”), leads to decreased competition and higher prices.<sup>13</sup> For this reason, the *Horizontal Merger Guidelines* that the Department of Justice and Federal Trade Commission employ state clearly that “concentration is a useful indicator of the likely potential competitive effect of a merger,” with a post-merger HHI in excess of 1,800 viewed as “likely to create or enhance market power or to facilitate its exercise.”<sup>14</sup> Throughout the class period, the HHI in the sharps container market was never less than 3,700 – nearly 2,000 points above what the antitrust agencies consider the threshold for anticompetitive effects owing to a change in concentration. *See* Singer Reply, Table 1. The *Horizontal Merger Guidelines* do provide merger proponents an opportunity to prove the existence of offsetting merger-related efficiencies, just as the rule of reason under Section 2 of the Sherman Act provides a defendant an opportunity to prove offsetting procompetitive justifications for its anticompetitive conduct; but the burden of proof rests squarely on those parties.<sup>15</sup>

In this case Plaintiffs have clearly articulated the linkage between increased concentration, decreased competition, and higher prices in the sharps container industry. Specifically, Plaintiffs’ theory of harm states that Tyco is able to leverage its market power to enter into exclusive dealing contracts with GPOs, which foreclose rival container makers from accessing hospitals.<sup>16</sup> It is this foreclosure that drives the increased concentration in the industry, which weakens pricing competition and reduces consumer welfare. Plaintiffs have already noted that “Ms. Guerin-Calvert simply blusters that ‘the facts are to the contrary,’” noting specifically that Ms. Guerin-Calvert provides zero support for her remarkable contradiction of standard

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<sup>13</sup> William H. Landes & Richard Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937 (1981) (demonstrating that, all things being equal, an increase in market concentration will lead to an increase in price).

<sup>14</sup> Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines*, revised Apr. 1997 (“*Merger Guidelines*”) at 16.

<sup>15</sup> *Merger Guidelines* at 30. *See also Addamax Corp. v. Open Software Foundation, Inc.*, 888 F.Supp. 274, 279 (D. Mass. 1995) (noting defendants’ burden to prove offsetting procompetitive justifications under the rule of reason).

<sup>16</sup> Expert Report of Professor Einer Elhauge, December 18, 2007 (“Elhauge Report”) at ¶1.

antitrust economics. Plaintiffs' Memorandum at 11 (quoting Guerin-Calvert Report at 26, ¶82.) Ms. Guerin-Calvert instead only hypothesizes that "prices are not necessarily positively correlated with concentration," supposedly due to *ex ante* competition. Guerin-Calvert Report at 26, ¶82. In his reply, Dr. Singer demonstrates that the "correlation between concentration and price-cost margins is indeed positive, as the NEIO model predicts, and not zero or negative, as Ms. Guerin-Calvert claims." Singer Reply at 8, ¶15.

It is beyond dispute that the correlation coefficient is the proper statistic for purposes of evaluating the suitability of the NEIO model to the sharps container industry, that Dr. Singer has calculated it properly, and that it confirms the existence of a positive correlation between industry concentration and price-cost margins. Moreover, because Tyco and Ms. Guerin-Calvert are hypothesizing an exception to the accepted default relationship, it is incumbent upon them to affirmatively demonstrate how this novel and contrarian hypothesis is supported by the data – in effect to show that the correlation coefficient is negative, which neither Tyco nor Ms. Guerin-Calvert has done. Instead, Tyco and Ms. Guerin-Calvert completely avoid the issue and submit new analyses for the first time in their opposition papers that only purport to criticize Dr. Singer's work.<sup>17</sup> Not only are these new analyses corrupt and misleading, they do not even attempt (and therefore completely fail) to establish that Ms. Guerin-Calvert's fourteenth conclusion regarding a negative correlation between industry concentration and price-cost margins fits the facts of the case. Ms. Guerin-Calvert's testimony in this regard should therefore be excluded.

Plaintiffs are compelled to briefly address Tyco's belated new analyses. In its opposition brief, Tyco presents a table displaying the year-over-year change in seller concentrations alongside the year-over-year change in margins, for the period 2001 through 2007. Tyco Opp.

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<sup>17</sup> See Data table in Tyco Opp. Memo at 12; see also Guerin-Calvert Reply.

Memo at 12. This data table grossly misrepresents the data in this case because it eliminates all data points that disprove the point that Tyco is trying to make. Such cherry picking of data is anathema to unbiased statistical methods, and argues even more strongly for the exclusion of Ms. Guerin-Calvert's testimony on this issue. This data table is simply a component of the calculations that go into calculating the entire correlation coefficient, which properly includes all data points, and measures the co-movement of each value from its average. Tyco has not and cannot dispute that this correlation coefficient is 0.69 (on a scale from -1.0 to +1.0), indicating that industry concentration and price-cost margins are strongly positively correlated.

Tyco's next complaint is that Dr. Singer's regression results are only significant at the 90% confidence level, and not the "hallmark 95% confidence level." Tyco Opp. Memo at 12. *See also* Guerin-Calvert Reply at 3. This criticism is particularly disingenuous because Tyco and Ms. Guerin-Calvert are fully aware that (1) the academic literature on the NEIO model presupposes only the ordinary condition of a positive correlation between industry concentration and price-cost margins, and does not require a regression of price-cost margins on industry concentration, much less one of a particular degree of statistical significance,<sup>18</sup> and (2) 90% statistical significance is a commonly accepted regression result that even Tyco's own expert Dr. McFadden repeatedly relies on in his own work.<sup>19</sup> Dr. Singer offered this regression in his reply merely as further confirmation that Ms. Guerin-Calvert's novel, contrarian, and unsupported hypothesis was overwhelmingly contradicted by the data in this case.

Tyco also complains, again relying on the Guerin-Calvert Reply, that "Dr. Singer's regression is based on a very small number of data points." Tyco Opp. Memo at 12; Guerin-

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<sup>18</sup> *See* Plaintiffs' Memorandum in Opposition to Defendants' Motion to Exclude the Expert Report and Opinions of Dr. Hal Singer ("Plaintiffs Opposition to Tyco's Motion to Exclude Dr. Singer," Doc. 192) at notes 1-3 (citing numerous academic articles on the proper implementation of the NEIO model).

<sup>19</sup> *See* McFadden, *Contingent Valuation and Social Choice*, 76 AM J. OF AGRICULTURAL ECON. 689, 697, n.10, 698, 701, 702 (1994).

Calvert Reply at 3-4. Leaving aside the fact that Dr. McFadden uses the exact same sample size in his declaration,<sup>20</sup> this argument not only presupposes again the necessity of a regression in the first place, it actually highlights the very reason why the correlation coefficient is the more appropriate measure of the relationship between industry concentration and price-cost margins. This reason is that small sample sizes are much less likely to generate statistically significant regression results, even where a relationship does exist between the variables.<sup>21</sup> Thus while it certainly imparts additional confidence in Dr. Singer's conclusions that both the correlation coefficient and the regression confirm this positive correlation, the main point is that Ms. Guerin-Calvert has no statistical support whatsoever for her claim of a negative correlation.

In addition, Ms. Guerin-Calvert refuses to acknowledge any sort of deadline for satisfying her obligation to demonstrate a fit between her opinion and the facts of the case, claiming that she "may offer additional opinions when [her] analysis is complete," even though Dr. Singer's expert reports were submitted over nine months ago (in December 2007 and February 2008) Guerin-Calvert Reply at 4. The time has come and gone for Ms. Guerin-Calvert to do so. Tyco's new defense and Ms. Guerin-Calvert's reply have therefore done nothing to illustrate a fit between her opinions and the facts of the case, and have rather only heightened the cause for the exclusion of her testimony on this issue.

#### **4. Ms. Guerin-Calvert's Fifteenth Conclusion**

As noted in Plaintiffs' Memorandum, Ms. Guerin-Calvert only puts forward one critical analysis of Dr. Singer's reliance on Elhauge that had the potential of being consistent with

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<sup>20</sup> See Declaration of Prof. Einer Elhauge ("Elhauge Declaration") at 51, ¶89 and n. 115 (discussing Dr. McFadden's "Paragraph 32.do" program).

<sup>21</sup> See, e.g., Jeffrey M. Wooldridge, *Introductory Econometrics: A Modern Approach* 95-96 (South-Western Cengage Learning 4th ed. 2009) (showing that the variance of an estimated regression coefficient is inversely related to the variation in the independent variables, which "increases without bound as the sample size gets larger and larger." Thus, the larger the sample size, ceteris paribus, the more precisely the regression coefficients are estimated.)

Plaintiffs' theory of harm: the ability of Tyco's rivals to sufficiently expand their operations so as to absorb the market share shifts attributed to them in the but-for world. *See* Plaintiffs' Memorandum at 11. Ms. Guerin-Calvert opines that Plaintiffs have overstated the amount of share shift possible in the but-for world, but she inexplicably relies solely on the production capacities of Tyco's rivals in the actual world as the indicator for their capacities in the but-for world. *Id.* at 12; *see also* Singer Reply at 13-16, ¶¶26-28 (referring to Guerin-Calvert Report at 5, ¶¶24 and 27-30, ¶¶86-95). She admits of no allowance whatsoever that these rivals' behavior and decisions would be different in the but-for world without Tyco's exclusionary conduct. This is a fundamental comparison error that once again assumes away Plaintiffs' theory of harm, and suggests, contrary to all economic sense, that in a competitive marketplace unburdened by Tyco's exclusionary conduct, rivals would nevertheless refuse to increase capacity and decline to pursue additional sales. *Id.* at 13.

In its defense of Ms. Guerin-Calvert, Tyco casts its own set of aspersions at Dr. Singer's analysis, but this diversionary tactic can not conceal Ms. Guerin-Calvert's steadfast refusal to concede, even hypothetically, that Tyco's conduct before and during the class period could have prevented rival expansion.<sup>22</sup> Tyco Opp. Memo at 14-15. If Plaintiffs can prove at trial that Tyco's exclusionary conduct has impaired the ability of rivals to win sales and expand production, then quite obviously the current state of rival capacity is not a reflection of what the competitive but-for world would look like. The entire framework of Ms. Guerin-Calvert's testimony in this regard is therefore inapposite to the relevant inquiry in the event Tyco is found liable for its exclusionary conduct. It should therefore be excluded.

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<sup>22</sup> Again, the reliability of Ms. Guerin-Calvert's testimony can not be established by the supposed unreliability of Dr. Singer's report. Dr. Singer is already the subject of one of Tyco's *Daubert* motions, wherein the reliability of his opinions will be established on their own.

## 5. Ms. Guerin Calvert's Sixteenth Conclusion

Tyco's defense of Ms. Guerin-Calvert on the issue of product differentiation continues to misrepresent the record and once again totally misses the point. Tyco repeatedly argues its innocence and refuses to respond to the dispositive point on this issue that Ms. Guerin-Calvert is not only wrong, "it would not even matter if she was right." Plaintiffs' Memorandum at 14 (emphasis added).<sup>23</sup> The issue of product differentiation is dealt with thoroughly in Plaintiffs' Opposition to Tyco's Motion to Exclude Dr. Singer, but in the context of this motion to exclude Ms. Guerin-Calvert's testimony, the point is that her opinion is beside the point and meaningless. In its opposition, Tyco never establishes a link in Dr. Singer's implementation of the NEIO model between product differentiation and the potential for a biased estimate of classwide damages. This is because there is none, a fact which Tyco concedes later in its opposition.<sup>24</sup> While Tyco and Ms. Guerin-Calvert curiously rely on Tyco's success in excluding its rivals as evidence of product differentiation,<sup>25</sup> Ms. Guerin-Calvert's testimony on this issue remains an irrelevant sideshow. It should therefore be excluded.

## 6. Ms. Guerin Calvert's Seventeenth and Eighteenth Conclusions

Ms. Guerin-Calvert's final two conclusions regarding individualized factors and marketplace dynamics represent her final attempts to overly complicate and confuse the issue of damages. As demonstrated in Plaintiffs' Memorandum, Ms. Guerin-Calvert's opinions are varyingly moot, already accounted for, irrelevant, inconsistent with Prof. Ordovery's concession

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<sup>23</sup> Not only is the homogeneous products version of the NEIO model able to accommodate significantly more differentiation than that in the sharps container industry, the only effect of too much differentiation on the results of the NEIO model is a potentially inflated value for the conduct parameter. This potential bias would be relevant to an inference of market power, *i.e.*, liability, but not to Dr. Singer's damage total because Dr. Singer holds this value constant between the actual and but-for worlds. *See* Plaintiffs' Opposition to Tyco's Motion to Exclude Dr. Singer at 4-10.

<sup>24</sup> *See* Tyco Opp. Memo at 18 (Ms. Guerin-Calvert's "point was that neither the value of the elasticity of demand nor the value of the conduct parameter affect *the amount* of damages Dr. Singer projects in his report.")

<sup>25</sup> *See* Tyco Opp. Memo at 15 ("the sales data demonstrate that more expensive sharps containers frequently outsell less expensive ones," citing Guerin-Calvert Report ¶¶ 132-35.)

on the relevant market, or based on false pretenses. *See* Plaintiffs' Memorandum at 15-18.

Tyco's opposition does nothing to cure these defects, but instead simply repeats Ms. Guerin-Calvert's claims. Therefore for the reasons already urged, Ms. Guerin-Calvert's testimony on these issues should be excluded.

### **C. Ms. Guerin-Calvert's Report Is An Impermissible Duplicate Liability Opinion**

Tyco's memorandum in opposition to Plaintiffs' Motion to Exclude suffers from the same defects as the testimony it seeks to defend. The main point of Ms. Guerin-Calvert's report, according to both Tyco and Ms. Guerin-Calvert, is that "the challenged conduct resulted in lower prices for sharps containers and that the evidence does not support the existence of overcharges." Tyco Opp. Memo at 2. This is indisputably a liability opinion, which implausibly posits that monopolization of the GPO brokerage services market and the exclusion of rival suppliers is actually better for competition and prices. Under this theory, we are simply supposed to accept that the sharps container market is better off monopolized by exclusionary conduct, without competition on the merits, and that Tyco (not any of its rivals) should be the monopolist to provide these "benefits" to purchasers. This theory is a radical departure from accepted economic theory, for which neither Tyco nor Ms. Guerin-Calvert provide any justification or rationale, much less one based on the facts of this case. In any event, Tyco can not be permitted to have two experts address the exact same liability questions, nor can Tyco wait until trial to develop an alternative damage analysis not infected by a refusal to accept Plaintiffs' theory of harm. Ms. Guerin-Calvert's essential failing in this regard infuses the entirety of her report, making it unreliable and inherently confusing to a jury. It should therefore be excluded.

### III. CONCLUSION

For the reasons stated above, and the reasons stated in Plaintiffs' Memorandum, Plaintiffs respectfully request that that Court grant Plaintiffs' Motion to Exclude the Testimony of Defendants' Expert Margaret Guerin-Calvert.

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Respectfully submitted,

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**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 November 26, 2008.

**/s/ John Alden Meade**

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