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I. INTRODUCTION

Plaintiffs' reply brief supporting their motion to exclude the testimony of Margaret Guerin-Calvert recycles the same unfounded claims of their Motion and largely ignores the arguments and authorities in Covidien's Opposition.¹ Plaintiffs' Reply merely confirms that their Motion to exclude Ms. Guerin-Calvert's testimony is without legal or factual support.

Covidien's Opposition fully and systematically explained why Plaintiffs' attempt to exclude Ms. Guerin-Calvert should be entirely rejected. Covidien addresses Plaintiffs' major arguments (none of which are well taken) again below.

II. ARGUMENT

A. **The challenged "liability" opinions are the foundations of Ms. Guerin-Calvert's damages analysis.**

Plaintiffs again argue that the first twelve opinions in Ms. Guerin-Calvert's introductory summary must be excluded because they overlap with Dr. Ordover's findings.² (Reply at 4-6.) As Covidien already explained, Ms. Guerin-Calvert's opinions that address supposed "liability" issues are the building blocks of her criticisms of Dr. Singer's damages analysis. Ms. Guerin-Calvert evaluated the overall market and the challenged practices so that she could develop informed opinions regarding critical damages issues such as: (1) whether Dr. Singer's NEIO model is applicable here, (2) whether the numerical inputs that Dr. Singer uncritically imported into his NEIO model are reliable, and (3) whether Dr. Singer's assumptions

¹ "Plaintiffs" are Natchitoches Parish Hospital Service District and JM Smith Corp. d/b/a Smith Drug Co.; "Covidien" refers to Tyco International (US) Inc., Covidien (formerly Tyco Healthcare Group LP), and The Kendall Healthcare Products Company. "Motion" refers to Plaintiffs' 10/17/08 Motion to Exclude Guerin-Calvert Testimony (Docket No. 186); "Opp'n" or "Opposition" refers to Covidien's 11/14/08 Opposition to Plaintiffs' Motion to Exclude Guerin-Calvert Testimony (Docket No. 193); "Reply" refers to Plaintiffs' 11/26/08 Reply Memorandum in Further Support of Motion to Exclude Guerin-Calvert Testimony (Docket No. 204).

² Plaintiffs' focus on Ms. Guerin-Calvert's summary is self-serving. It is unsurprising that some of Ms. Guerin-Calvert's high-level conclusions, as opposed to her actual analyses, are similar to those of Dr. Ordover.

about the hypothesized but-for world are consistent with the evidence. Ms. Guerin-Calvert was not obligated to unthinkingly accept every claim about the market Prof. Elhauge made (as Dr. Singer did), nor was she required to entirely defer to Dr. Ordoover for her understanding of how this market works. On the contrary, Ms. Guerin-Calvert had to perform her own independent assessment of the market before she could formulate reasoned opinions about Plaintiffs' damages claims. Indeed, Ms. Guerin-Calvert's diligent investigation of *all* the relevant facts is the basis for her disagreement with the implausible conclusions that pervade Dr. Singer's findings.

Covidien's Opposition showed that *every one* of Ms. Guerin-Calvert's first twelve opinions relates to either: (1) whether class member prices were inflated or (2) whether the posited level of rival foreclosure, upon which Dr. Singer's entire analysis fundamentally rests, is reliable. (Opp'n at 6.) Plaintiffs do not dispute that all the challenged opinions relate to these two topics, but attempt to argue that these are "liability" issues fully covered by Dr. Ordoover as to which Ms. Guerin-Calvert must remain silent. (Reply at 5.) This is not accurate.

First, as to prices, not only is the question of whether class member prices were inflated a damages issue on its face, but Prof. Elhauge explicitly disavowed any role in calculating "but-for prices" and deferred that responsibility entirely to Dr. Singer. As Prof. Elhauge testified:

Q. Do you plan on offering any opinion as to what the actual but-for price should look like?

A. No. I take that to be the task of Dr. Singer.

Q. So you're not in any way calculating the but-for competitive price, correct?

A. That's right. I take that to be his task and not mine.

(March 11, 2008 Deposition of Einer Elhauge at 144:1-9 (attached as Ex. A to Declaration of Archana Tamoshunas (Docket No. 197-3)).) Thus, Ms. Guerin-Calvert's consideration of all the

evidence relevant to whether prices in the but-for world would have been lower was not only permissible, but vital to her evaluation of Plaintiffs' claim for damages and Dr. Singer's report.

Regarding Ms. Guerin-Calvert's evaluation of whether the rival foreclosure estimates that Dr. Singer relies upon are accurate, Plaintiffs ignore the legal authority cited in Covidien's Opposition holding that challenging the factual assumptions of a damages expert "is a *well-accepted* way to criticize damages calculations." *KW Plastics v. United States Can Co.*, 199 F.R.D. 687, 692 (M.D. Ala. 2000) (emphasis added); *see also Vadala v. Teledyne Indus., Inc.*, 44 F.3d 36, 39 (1st Cir. 1995) (court must ensure that expert testimony "rests on a reliable foundation"). The law could hardly be otherwise. If Ms. Guerin-Calvert were not entitled to test the assumptions underlying (and the inputs fed into) Dr. Singer's model, she would be relegated to doing little more than confirming that his arithmetic was correctly performed. As the court in *KW Plastics* held, this "would emasculate [a defendant's expert's] testimony and effectively insulate [a plaintiff's expert] from challenge on the grounds that his estimate is not related to the facts of the case." 199 F.R.D. at 693. Plaintiffs' distorted vision for the narrowly confined role of a damages expert is simply unsupported by the law.

Moreover, as Covidien's Opposition established, and Plaintiffs do not dispute, Dr. Singer did virtually nothing to confirm the accuracy of Prof. Elhauge's foreclosure calculations. (Opp'n at 5.) Ms. Guerin-Calvert, not Dr. Ordover, will testify as to the effect that Prof. Elhauge's many mistakes have on Dr. Singer's damages calculations and why those errors invalidate Dr. Singer's findings. Indeed, Prof. Ordover's report does not even address how Prof. Elhauge's results are incorporated into Dr. Singer's model. Therefore, not only is Ms. Guerin-Calvert's testimony not cumulative, but preventing her from testifying regarding these issues would eliminate *all*

testimony regarding how the flaws in Prof. Elhauge’s simultaneous comparisons render Dr. Singer’s damages estimates unreliable. Clearly this result would severely prejudice Covidien.

Finally, Plaintiffs claim that the Court has “no reason to wait” until trial to determine whether Ms. Guerin-Calvert’s and Dr. Ordover’s testimony is actually cumulative. (Reply at 5-6.)³ Ms. Guerin-Calvert’s trial testimony will, as her report already makes clear, focus on Plaintiffs’ damages claims. Her report properly includes her opinions *and* the bases for those opinions. The inclusion of her overall market analysis and her evaluation of the challenged practices in her report was necessary for the sake of completeness and to head off any claim that her opinions are not grounded in the facts. This does not suggest, however, that Ms. Guerin-Calvert will read her report verbatim from the stand and present every foundational aspect of her thinking to the jury.

This Court should defer ruling as to whether the experts’ testimony is needlessly cumulative, because each expert’s testimony will be geared toward addressing different issues. The fact that both experts had to diligently analyze the overall market in order to understand those issues does not mean that their actual trial testimony will be redundant.

³ Plaintiffs’ reliance on the decisions in *Thorndike* and *Soyring* is ironic. (Reply at 6 & n.7.) In each of those cases, the challenged testimony was excluded in part because of the expert’s failure to perform his own independent analysis and the expert’s excessive reliance on the testimony of other experts. *Thorndike v. DaimlerChrysler Corp.*, 266 F. Supp. 2d 172, 185 (D. Me. 2003) (challenged expert’s opinion was “virtually silent with respect to how it is that any of these particular opinions are derived from an independent application of his strain of expertise”); *Soyring v. Fehr*, No. 05-1900(PJS/RLE), 2006 WL 5159192, at *4 (D. Minn. July 5, 2006) (challenged expert conducted no psychological tests and only “summarize[d] the clinical observations, and opinions, of [the plaintiff’s] treating health care professionals, through repeated references to their testing and evaluations”). Yet this is precisely what Plaintiffs are claiming Ms. Guerin-Calvert should have done here. According to Plaintiffs, she should have deferred to Dr. Ordover as to all the “liability” issues that undergird her testimony rather than performing her own analysis and reaching her own conclusions on those topics. Thus, these authorities make clear that Ms. Guerin-Calvert’s testimony would have been subject to a more plausible challenge if she had *not* analyzed the market for herself.

B. Covidien is not “missing the point” by showing that Plaintiffs’ principal arguments have no legal support.

The central theme of Plaintiffs’ briefs is that Ms. Guerin-Calvert should have opined as to what the damages would be assuming that every opinion offered by Prof. Elhauge is entirely accurate. As Plaintiffs acknowledge (Reply at 7), Covidien’s Opposition argued that Plaintiffs had no legal support for this claim. (Opp’n at 1 (“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”), 3 n.2.) Plaintiffs try to mask their continuing inability to find any supportive legal authority with the incredible claim that Covidien is “missing the point yet again.” (Reply at 7-8 (citing to no legal authority).)

It is not beside the point that Plaintiffs cannot cite a single legal authority supporting their view of what the proper scope of a damages expert’s testimony must be. *That is the point.* Ms. Guerin-Calvert was entitled to base her opinions as to whether Plaintiffs have reliably shown damages on her analyses of *all* the facts. Plaintiffs cannot artificially constrain her opinions to an assumption that Prof. Elhauge is absolutely right on all fronts and in every detail.⁴ This is particularly true in this case, where, as Covidien’s *Daubert* briefs have shown, Prof. Elhauge has undertaken work that directly bears on the amount of damages, and Dr. Singer does little more than plug Prof. Elhauge’s numbers into a mathematical formula. As Covidien explained, the bright line Plaintiffs have drawn between testimony related to liability and that related to damages is arbitrary and illusory. (Opp’n at 6.) Because Prof. Elhauge’s opinions are directly relevant to the amount of damages Dr. Singer projects, Ms. Guerin-Calvert was required to analyze and comment on Prof. Elhauge’s proposed testimony.

⁴ Because Dr. Singer inputs the precise numerical results of Prof. Elhauge’s simultaneous comparisons into his model, any inaccuracy in those numbers also causes inaccuracy in his damages estimate.

Covidien's Opposition also showed that Plaintiffs' demand for an alternative damages model was contrary to the law. (Opp'n at 7-10.) In particular, Covidien showed that several authorities hold that a damages expert may limit her testimony to only a showing that a plaintiff's approach is not reliable. *See, e.g., 1st Source Bank v. First Res. Fed. Credit Union*, 167 F.R.D. 61, 65 (N.D. Ind. 1996); *CDA of America Inc. v. Midland Life Ins. Co.*, No. 01-CV-837, 2006 WL 5349266, at *6 (S.D. Ohio Mar. 27, 2006). Plaintiffs now protest that they "nowhere suggested that Ms. Guerin-Calvert should provide a model showing [that class members were damaged]." (Reply at 2-3.) Not so. Plaintiffs' Motion expressly criticized Ms. Guerin-Calvert for not following the approach she took in another action in which she "issued an actual damages number corresponding to a certain set of assumptions." (Motion at 9.) Plaintiffs' Motion also specifically faulted Ms. Guerin-Calvert for "never attempt[ing] to model potential damages." (*Id.* at 8.) Plaintiffs' effort to distance themselves from their earlier misguided accusation is not credible.

In sum, Plaintiffs' pronouncements as to what Ms. Guerin-Calvert must and must not do are utterly without legal support and cannot be accepted by this Court.

C. Ms. Guerin-Calvert rightly criticizes Plaintiffs' failure to establish that the fundamental assumption of Dr. Singer's NEIO model is applicable here.

Plaintiffs next argue that because antitrust law is designed to prevent monopolization and various merger guidelines warn against high seller concentrations, the NEIO model's assumption that higher seller concentrations must always lead to higher prices is essentially beyond dispute. (Reply at 8-10.) This claim is indefensible.

Plaintiffs' position is tantamount to the view that no expert testimony or market analysis whatsoever is required here, because basic antitrust law dictates that a group buying organization, like a GPO, *always* injures its members and causes them to pay higher prices. This

flies in the face of reason and Plaintiffs' stated view that GPOs are good for consumers and should remain active in the but-for world. (Elhauge ¶ 17.)⁵ According to Plaintiffs' Reply, to the extent that GPOs have any tendency to increase sales to the suppliers with whom they negotiate deals, GPOs would always be inflating prices, even if the contracts were limited to universally-accepted volume discounts. In fact, even in a market with no GPOs, Plaintiffs' absurd oversimplification would force one to conclude that every time a supplier offers a discount that allows it to capture greater sales, it actually *raises* prices in the market. Plaintiffs' argument should be rejected out of hand because, undeniably, whether higher seller concentrations cause higher prices depends on the particular facts at hand.

Plaintiffs next repeat the claim that Ms. Guerin-Calvert "provides zero support" for her view that prices and seller concentrations may not be correlated here. (Reply at 9.) Given this passage from Covidien's Opposition, Plaintiffs repetition of this false accusation is unjustifiable:

In her report, Ms. Guerin-Calvert explains in detail how *ex ante* competition for GPO contract positions can lead to both increased seller concentrations and lower prices. (Guerin-Calvert Report ¶¶ 80-85.) In performing this analysis, she relied on, among other things, well-known economic literature (*id.* ¶¶ 49, 83), the actual history of GPO bidding and contracting in this market (*id.* ¶¶ 51-59, 83), the deposition testimony of GPO employees (*id.* ¶¶ 60-61), and the testimony of Covidien's rivals (*id.* ¶ 81).

(Opp'n at 11.)

Next, Plaintiffs misleadingly criticize Ms. Guerin-Calvert's supposedly "belated new analyses" responding to Dr. Singer's claim that actual world seller concentrations and margins are correlated. (Reply at 10.) As Covidien already explained, Ms. Guerin-Calvert was responding to various analyses Dr. Singer presented for the first time in his reply report. (Opp'n

⁵ "Elhauge" refers to the 12/18/07 Expert Report of Einer R. Elhauge, filed on 4/11/08 (Docket No. 133); "Guerin-Calvert" refers to the 1/31/08 Expert Report of Margaret E. Guerin-Calvert, filed on 4/11/08 (Docket No. 132-3).

at 11-12.) Because the parties agreed that no expert sur-replies reports would be filed, it was impossible for Ms. Guerin-Calvert to address these analyses before now. The true timeliness problem here is that Dr. Singer's analyses, which he could have included in his opening report, were untimely. In any event, Plaintiffs' substantive rebuttals of Ms. Guerin-Calvert's work are unavailing.

Plaintiffs first claim that Covidien "grossly misrepresent[ed]" the data in the table on the twelfth page of the Opposition by cherry-picking the data that contradicts Dr. Singer. (Reply at 10-11.) Plaintiffs, however, totally ignore the sentence immediately preceding the table, which states that Dr. Singer is wrong "in four out of the six years for which he has data." (Opp'n at 12.) Because of this clear acknowledgement that two of the six years supported Dr. Singer, there was nothing remotely misleading about presenting the four contrary years in the table.

Plaintiffs also argue that Ms. Guerin-Calvert's criticisms of Dr. Singer's analyses are unimportant because "the main point is that Ms. Guerin-Calvert has no statistical support whatsoever for her claim of a negative correlation." (Reply at 12.) This claim again ignores the specific evidence referenced above that Ms. Guerin-Calvert relies upon. (Opp'n at 11.) It also improperly inverts the burdens of proof in this case, by absolving Plaintiffs of their burden to show that the NEIO model is applicable here and demanding that Ms. Guerin-Calvert affirmatively establish a negative correlation between concentrations and margins.

Plaintiffs also claim that it is unproblematic that the regression results are not significant at the 95% level, in part, because Dr. McFadden has used that threshold of significance in his prior work. (Reply at 11.) As Dr. McFadden's Reply Declaration explained, however, he did so in particular circumstances that are not relevant here. (11/26/08 Reply Declaration of Dr. Daniel McFadden (Docket No. 207) ¶ 18 n.16 ("I believe the 95 percent significance level to be

appropriate in this case.”).) Moreover, Plaintiffs offer no response at all to Covidien’s point that the 2007 data for “industry” price-cost margins are actually data from only Covidien covering less than half the year. (Opp’n at 12-13.) Had Dr. Singer discarded that data point as incomplete, his analysis would not even have been significant at the 90% level. (*Id.*)

D. Ms. Guerin-Calvert correctly criticized Dr. Singer for ignoring the facts regarding the realistic expansion capacities of Covidien’s rivals.

Plaintiffs’ Reply repeats (without adding anything new) the claim that Ms. Guerin-Calvert should have followed Dr. Singer’s lead and assumed that Covidien’s rivals would have had the capacity to absorb the massive market share shifts posited in the but-for world. (Reply at 12-13.) This criticism was rebutted in Covidien’s Opposition. (Opp’n at 13-15.) Dr. Singer has simply taken it for granted that rivals could have expanded to service the huge number of Covidien customers who would allegedly have shifted their business in the but-for world. Ms. Guerin-Calvert thoroughly analyzed the evidence regarding rivals’ capacities to expand. (Guerin-Calvert ¶¶ 80-122.) But, rather than providing a counter-analysis of those facts, Dr. Singer and Plaintiffs respond that the actual facts are irrelevant and Dr. Singer’s wholesale reliance on assumption is superior. (Reply at 13.)

Plaintiffs claim that Ms. Guerin-Calvert “admits of no allowance whatsoever that these rivals’ behavior and decisions would be different in the but-for world without” the challenged conduct. (*Id.*) This is not accurate. Ms. Guerin-Calvert said that the huge levels of expansion that Dr. Singer posits were implausible and that Dr. Singer erred by never even considering Covidien’s competitors’ expansion capacities. She did not claim that the rivals would have no greater ability to expand than they had in the actual world, but rather that Dr. Singer’s assumptions were unsupported and unrealistic.

E. Covidien has repeatedly demonstrated that sharps containers are heterogeneous.

The Court is by now quite familiar with the parties' competing views of sharps container heterogeneity, and Covidien will not repeat those arguments again here. However, two points in the Reply require a brief response. First, Plaintiffs say again that even if there were significant differentiation, that would not affect the amount of estimated damages. (Reply at 14.) As Covidien has repeatedly explained, differentiation could, for example, cause Covidien's prices to fall far less than the industry-average price drop that the NEIO model produces. (Opp'n at 16-17; Covidien's 11/26/08 Reply Brief in Support of Motion to Exclude Dr. Singer (Docket No. 208) ("Singer Reply Brief") at 7-8.)) Thus, despite Dr. Singer's assurances to the contrary, sharps container differentiation absolutely can affect the amount of damages.⁶

Second, Plaintiffs again make the specious claim that Covidien's allegedly anticompetitive exclusion of rivals must explain why more expensive sharps containers frequently outsell less expensive ones. (Reply at 14.) As Covidien explained in its reply brief in support of the motion to exclude Dr. Singer, this claim reveals either Plaintiffs' failure to actually read Ms. Guerin-Calvert's report or their willingness to offer patently meritless arguments. (Singer Reply Brief at 6.) Ms. Guerin-Calvert's analyses controlled for GPO positioning *and* showed instances where more expensive Becton Dickinson products far outsold less expensive Covidien products. (*Id.*) The challenged conduct cannot explain these patterns of sharps container purchasing, but significant differentiation can and does.

⁶ Covidien did not concede anything to the contrary by observing that the *conduct parameter* does not affect the amount of damages. Changes in the conduct parameter would not be the only manifestation of overlooked differentiation in Dr. Singer's analyses.

III. CONCLUSION

Plaintiffs' Motion to exclude the testimony of Margaret Guerin-Calvert is without factual merit or legal support. Their Reply does nothing to cure those fatal defects. The Court should deny the Motion in its entirety.

Dated: December 9, 2008

Respectfully submitted,

James Donato

James Donato (SBN: 146140)
COOLEY GODWARD KRONISH LLP
101 California Street, 5th Floor
San Francisco, CA 94111
Telephone: (415) 693-2000
e-Mail: jdonato@cooley.com

COOLEY GODWARD KRONISH LLP
Donald K. Stern (BBO: 479420)
The Prudential Tower
800 Boylston Street, 46th Floor
Boston, MA 02199
Telephone: (617) 937-2300
e-Mail: dstern@cooley.com

TYCO HEALTHCARE GROUP LP
John M. Griffin (BBO:549061)
Marc A. Polk (BBO: 631765)
15 Hampshire Street
Mansfield, MA 02048
Telephone: (508) 261-8480
e-Mail: john.griffin@tycohealthcare.com
e-Mail: marc.polk@tycohealthcare.com

COOLEY GODWARD KRONISH LLP
Linda Callison (SBN: 167785)
Margaret Branick-Abilla (SBN: 223600)
Five Palo Alto Square
3000 El Camino Real
Palo Alto, CA 94306
Telephone: (650) 843-5000
e-Mail: lcallison@cooley.com
e-Mail: mbranickabilla@cooley.com

GIBSON DUNN & CRUTCHER LLP
Christopher D. Dusseault (SBN: 177557)
333 South Grand Ave.
Los Angeles, CA 90071-3197
Telephone: (213) 229-7000
e-Mail: CDusseault@gibsondunn.com

Attorneys for Defendants
TYCO INTERNATIONAL (US) INC.;
TYCO HEALTHCARE GROUP LP;
THE KENDALL HEALTHCARE
PRODUCTS COMPANY

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and copies will be sent to those indicated as non-registered participants on December 9, 2008.

/s/ _____ *James Donato*