IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

NATCHITOCHES PARISH HOSPITAL SERVICE DISTRICT and JM SMITH CORPORATION d/b/a SMITH DRUG COMPANY on behalf of themselves and all others similarly situated, Plaintiffs, v. TYCO INTERNATIONAL, LTD.; TYCO INTERNATIONAL (US) INC.; TYCO HEALTHCARE GROUP LP; THE KENDALL HEALTHCARE PRODUCTS COMPANY, Defendants.	§	Civil Action No. 05-12024 PBS

TYCO INTERNATIONAL (US) INC., TYCO HEALTHCARE GROUP LP, AND THE KENDALL HEALTHCARE PRODUCTS COMPANY'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR JUDGMENT AS A MATTER OF LAW

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COVIDIEN IS ENTITLED TO JUDGMENT AS A MATTER OF LAW[1]

Plaintiffs claim that Defendants (collectively, "Covidien") violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, by engaging in improper exclusive dealing. Plaintiffs seek more than $184 million in damages for the following Covidien practices:

1. Single-product share discount programs. Deals with hospitals that provided single-product discounts if the hospital bought a certain percentage of its sharps container needs from Covidien.[2]

2. Sole-source GPO contracts. Contracts with particular GPOs that provided that the GPO would contract with only Covidien for sharps containers.

3. Bundled discounts. Deals that provided discounts or rebates if a purchaser maintained a certain level of purchases in several product categories.

Plaintiffs have failed to present sufficient evidence to support antitrust liability based on any of the foregoing practices.

I. PLAINTIFFS FAILED TO PRESENT SUFFICIENT EVIDENCE THAT THE CHALLENGED COVIDIEN PRACTICES VIOLATED THE ANTITRUST LAWS

A. Plaintiffs Failed to Establish that Covidien's Single-Product Share Discounts Violated the Antitrust Laws

Covidien's single-product share discounts represent, in terms of quantity of sharps containers sold, the bulk of the conduct Plaintiffs challenge in this case. Under such programs, hospitals that purchased certain percentages of their sharps container needs from Covidien received a discounted price. For the reasons set forth below, Covidien's single-product share discounts do not violate the antitrust laws.[3]

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[1] Fed. R. Civ. P. 50(a)(1); *Zimmerman v. Direct Fed. Credit Union*, 262 F.3d 70, 75 (1st Cir. 2001).

[2] Notably, as discussed in more detail below, if Covidien's share discounts are found lawful, the entire case should be dismissed because foreclosure levels for the remaining challenged conduct are legally insufficient to violate the antitrust laws. *See infra*, Section I.B.

[3] On Day 11 of trial, the Court asked the parties whether share contracts should be evaluated separately depending on whether they were part of a sole-source contract or not. Day 11 Tr. at 8:19-10:5. Covidien believes that, both as a

1. Covidien's Share Discounts Did Not Restrain Competition and Were Not Anticompetitive

a. The Discounts Were Above Cost and Not Exclusive Deals

Covidien's share discounts did not restrain trade and were not anticompetitive for several reasons. *First*, Plaintiffs failed to prove that those discounts were below Covidien's costs. As Covidien has explained previously, above-cost discounts do not violate the antitrust laws.[4]

Second, Covidien's share discounts were not exclusive deals. While exclusive deals can vary in form, they share one characteristic: they must *require* a purchaser to buy all of its requirements from the defendant. *See, e.g., Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 2335-37 (1983) (rejecting foreclosure claim where contract did not require customer to buy "all its requirements" from defendant, and customer had "legal power to buy small . . . and then . . . larger" amounts from competitors); *Paddock Publ'ns, Inc. v. Chi. Tribune Co.*, 103 F.3d 42, 46 (7th Cir. 1996) ("An exclusive dealing contract obliges a firm to obtain its inputs from a single source."). Here, Covidien's single-product share discounts did not require anyone to purchase any sharps containers from Covidien, much less all of their requirements.[5]

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legal and practical matter, the answer is no. *First*, if share discounts alone (*i.e.*, separate from sole-source) are legal, the fact that the same share discount is offered as part of a sole-source contract could not render it illegal. To the extent Plaintiffs' refrain that one must consider the "layers" of contracts has any merit, it could mean only that the combined effects (if any) of different types of anticompetitive contracts can be considered together when evaluating whether the practices constitute restraints of trade or anticompetitive effects. In other words, to consider different "layers" in an antitrust analysis, each "layer" must be itself anticompetitive. A lawful practice does not become unlawful by "layering" it on top of an unlawful practice. *Second*, as a practical matter, a finding that share discounts could be unlawful only if they were mixed with a sole-source contracts would have no impact on the foreclosure analysis. As explained below (*see supra*, Section I.B), Plaintiffs' estimates of foreclosure due to sole-source contracts never exceed 30% in any year. A holding that sole-source and only share contracts that were part of a sole-source can go to the jury would not change that foreclosure number at all, because foreclosure counts each "foreclosed" customer only once, even if they are subject to different types of challenge conduct. *Id.* (explaining this in greater detail). Plaintiffs can only reach greater-than-30% foreclosure by adding foreclosure levels for share discounts outside of sole-source contracts to foreclosure levels for sole-source contracts. *Id.*

[4] Dkt. No. 267 at 7-11; Dkt. No. 283 at 2-10; Dkt. No. 318 at 33, 45-46. Covidien hereby incorporates by reference the argument and case law cited in those papers.

[5] Day 4, Valego Direct 92:6-14; Day 8, Blazejewski Direct 13:4-16:17; Day 12, Cline Direct 77:7-13, 79:5-19,

Moreover, the undisputed evidence is that hospitals were free to walk away from the share discounts at will and purchase from Covidien competitors instead. Just as in other cases that have held share discounts lawful, "the only direct consequence for a hospital that fails to meet its compliance level is potentially being charged the price that reflects its actual tier level of purchases."[6] *Allied Orthopedic*, No. 05-cv-06419 at 7. The evidence shows that a hospital does not have to repay previously earned discounts[7] and cannot be sued for breach of contract[8]. Indeed, the evidence shows that numerous hospitals that signed up for share discounts with Covidien in fact routinely switched to other suppliers without consequence.[9]

Numerous courts have found that share discounts such as those offered by Covidien do not constitute exclusive deals and do not violate the antitrust laws. In *Concord Boat*, for example, the Eighth Circuit reversed a jury verdict and held that share discount programs at issue

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86:11-14.

[6] Day 6, Frazzette Direct 85:4 -85:25 (DTX-1441), 91:1-91:11; Day 6, Frazzette Redirect 124:12-124:20; Day 8, Blazejewski Direct 13:4-16:17; Day 12, Cline Direct 86:18-88:19 (share contracts do not contain purchase requirements, no consequence to hospitals that did not meet planned compliance levels identified at outset).

[7] Day 4, Valego Direct 89:22-91:5 (hospitals were never asked to repay discounts or rebates if they did not meet commitment requirements); Day 8, Blazejewski Direct 13:4-16:17 (hospitals would not have to repay any discounts or face any other repercussions other than a higher price going forward for failure to meet tier requirement).

[8] Day 12, Cline Direct 87:8-88:9 (no customer has ever been sued for not purchasing enough after signing a letter of commitment, and Tyco does not view letters of commitment or other designation forms as contracts that can be the subject of a breach of contract lawsuit); Day 11, Liscio Direct 88:4-89:5 (no Tyco customer was ever threatened with a lawsuit or sued for breach of contract if it failed to meet purchasing commitments); *see also* 3 Areeda & Hovenkamp, Antitrust Law, 2008 Supp. ¶ 749b at 149 ("[T]he typical discount contract is usually conditional: if you want to obtain a 20% discount, then you must purchase all (or a specified percentage) of your goods from the contracting seller. The penalty for not taking the specified percentage is not a breach of contract suit . . . Rather, it is simply the loss of the discount.").

[9] Day 7, Blazejewski Direct 112:1-113:20 (P-381) (Despite share contract, HCA switched to Sureway in 2003); Day 11, Liscio Direct 90:8-93:3 (Despite share contract, Moses Cone converted to a competitor in 2006); Forthcoming Ordover Testimony (Memorial Hospital South Bend, Moses Cone, Reid Hospital, Buffalo General Hospital, Baptist St. Anthony, Holy Redeemer Hospital, Mary Washington Hospital, Rex-U of North Carolina, St. Josephy Mercy Oakland, Middlesex Hospital, and others bought from competitors despite Covidien share contracts); Day 11, Liscio Direct 81:25-84:9 (P-238) (listing over 100 accounts that had switched to competitors); Day 12, Cline Direct 88:20-89:14 (letters of commitment and other designation forms have no term and the purchaser can stop purchasing in order to switch to a competitor at any time).

could not be deemed "in any way exclusive" where prices were above cost and rivals could "lure customers away by offering superior discounts." 207 F.3d at 1059; *see also St. Francis,* 2009 WL 3088814 at *18 (share discounts not anticompetitive where no "hospital was required to purchase [the supplier's] urological products"); *Allied Orthopedic,* No. 05-cv-06419 at 7 ("market-share agreements do not create an unreasonable restraint on competition" because, *inter alia,* "[p]articipation in the market-share program is voluntary and can be ended at any time, and hospitals are thus free to switch to more competitively priced [alternatives]").

b. Plaintiffs Rely on an Invalid Theory of Exclusivity

Plaintiffs (via Professor Elhauge) argue that the loss of *future* discounts constitutes a "pricing penalty" that effectively requires hospitals to purchase from Covidien. There is no support in the case law for this theory of exclusivity. Moreover, Areeda & Hovenkamp have squarely rejected it, explaining that "the loss of the discount is not a penalty at all if a rival is willing to match the discounted price." 3 Areeda & Hovenkamp, Antitrust Law, 2008 Supp. ¶ 749b at 149.[10] Here, the evidence is that rivals were willing to match Covidien's prices.[11]

c. There Are No Anticompetitive 'Plus Factors' That Would Render the Share Discounts Exclusionary

This Court held in its summary judgment opinion that, "[u]nder the emerging caselaw, Defendants have the better argument that, without more, above-cost market-share discounts

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[10] Indeed, Areeda & Hovenkamp have criticized the theories of Professor Elhauge as being unworkable and likely to chill pro-competitive behavior if implemented. 3 Areeda & Hovenkamp, Antitrust Law, 2008 Supp. ¶ 749b at 145-46 ("The economic modeling showing that certain discounts can be anticompetitive tends to be highly complex, often making unrealistic assumptions. The result can be proposed legal standards that make impossible informational demands on courts. For example, one proposal [by Professor Elhauge] that has proven popular with plaintiffs' lawyers would require the fact finder to determine whether the bundled discount – even if it increased output – was greater than necessary to enable the discounter to achieve economies of scale . . . A federal court could never apply such theories, particularly in a jury trial, without creating the 'intolerable risk' that the Supreme Court feared in *Brooke Group*, of chilling pro-competitive behavior.").

[11] Day 10, Shaw Dep. 27:24-28:13, 28:25-29:02 (sometimes Kendall's pricing was lower than BD's, and sometimes BD's pricing was lower than Kendall's. Pricing is competitive in the sharps container market); *see also supra*, n.9.

cannot constitute improper exclusionary dealing that violates the Sherman Act." Dkt. No. 331 at 11-12. The Court further noted, citing allegations made by Plaintiffs, two possible examples of something "more" that could potentially render the share discounts exclusionary: (1) "contractual and practical obstacles prevent[ed] hospitals from terminating the contracts"; and (2) "Covidien policed and bullied its customers to ensure satisfaction of their ex ante purchasing commitments." *Id*. at 12-13. The evidence presented at trial, however, conclusively establishes that both of these allegations were false.

First, there were no "obstacles" to "terminating the contracts" because they did not require hospitals to do anything.[12] Instead, the "contracts" merely set forth the discounts purchasers would receive if they chose to purchase from Covidien. Areeda & Hovenkamp have explained that, for this reason, share discount contracts are "contract[s] of 'zero' duration." 3 Areeda & Hovenkamp, Antitrust Law, 2008 Supp. ¶ 749b at 149. The evidence in this case confirms this: hospitals that entered into such Covidien deals routinely switched to competitors.[13]

Second, the evidence establishes that there were no enforceable "ex ante purchasing commitments,"[14] nor did Covidien "police" or "bully" its customers[15].

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[12] Day 8, Blazejewski Direct 15:15-17. The Court also cited as a potential "obstacle" Plaintiffs' allegation that "the contracts imposed affirmative purchase obligations at the outset." Dkt. No. 331 at 12 (emphasis in original). While it is true that a hospital typically identified its anticipated compliance level when signing up for a share discount program, this fact could not render the contracts exclusionary given that the only consequence of a hospitals' failure to meet this compliance level was "being charged the price that reflects its actual tier level of purchases" (*Allied Orthopedic*, No. 05-cv-06419 at 7), *i.e.*, the loss of future discounts.

[13] *See supra*, n.9.

[14] *See supra*, n.6.

[15] Day 12, Cline Direct 89:16-91:13 (Tyco never had any kind of monitoring program to conduct inspections or audits to check on compliance commitments under share contracts, and as a result, some hospitals received top-tier discounts without actually meeting the requirements); Day 3, Romano Dep. 277:22-277:24; 278:06-278:07 (Covidien never threatened a customer and never told a customer that it could not buy products offered by a competitor); Day 8, Blazejewski Direct 11:18-16:17 (There are no reporting requirements for hospitals who have agreed to committed pricing tiers. Sales representatives passively check up on the hospitals using Tyco's own sales

Thus, the evidence at trial has proven that the two potential exclusionary 'plus factors' identified by the Court cannot render Covidien's share discounts exclusionary. Nor have Plaintiffs presented evidence of any other such 'plus factors.'[16]

* * *

In sum, because Covidien's single-product share discounts did not require purchasers to buy anything, were effectively terminable at will (*i.e.*, were "contract[s] of 'zero' duration"), the only consequence of not meeting identified compliance levels was the loss of future discounts, and competitors were free and able to offer similar discounts, they were not anticompetitive.

2. Covidien's Share Discounts Did Not Foreclose/Harm Competition or Amount to Substantial Foreclosure

Even if Covidien's share discounts were exclusive deals, Plaintiffs' claims would still fail because they did not prove that those deals harmed competition. *First*, the terms of the deals – *e.g.*, no purchase requirements, "zero duration" – establish they could not harm competition.[17] *See, e.g., Omega*, 127 F.3d at 1163 ("the short duration and easy terminability of these agreements negate substantially their potential to foreclose competition"). *Second*, there is no evidence that purchasers were foreclosed from purchasing from rivals – indeed, the evidence

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data, and if the numbers do not appear to be where they should, the sales representative could even elect to keep the hospital's pricing set at the committed tier level. This was done because of extensive competition in the marketplace and a worry that raising prices would result in that hospital converting entirely to a competitor.); Day 4, Valego Cross 47:21-24 (customers do what is in their best interests, including if a Tyco product is not doing what the customer needs it to do, either economically or from a features-and-benefits standpoint). Even if the evidence had showed otherwise, it would be irrelevant: if the terms of a contract are not exclusionary, the fact that those terms are enforced – or compliance therewith monitored – cannot render the contract exclusionary. Nor could unobjectionable contracts be transformed into exclusionary ones based on "monitoring" or "threats" where, as here, the only consequence for "non-compliance" is the loss of future discounts. *See supra*, n.6.

16 Indeed, just like in *Bard*, here "[t]here is no testimony by any hospital purchasing employee that he or she elected not to purchase a superior product in quality or price because of [Defendant's] . . . discount program." *St. Francis*, 2009 WL 3088814, at *20.

17 *See supra*, Section I.A.1.

shows exactly the opposite.[18] *Third*, two of Covidien's largest competitors (BD and Stericycle) testified they were not foreclosed and were, in fact, competing vigorously – and successfully – with Covidien.[19] That testimony is confirmed by evidence that competitors' market shares have been increasing at the expense of Covidien's.[20] *See, e.g.*, *Omega*, 127 F.3d at 1164 (no foreclosure where competitor experienced "actual entry and expansion" and market share grew from "6% to 8%"). *Fourth*, Covidien's competitors offered similar share discounts and were willing and able to match or beat Covidien's discounts.[21]

Even if Plaintiffs had established that Covidien's share discounts foreclosed its rivals from a portion of the market, Plaintiffs have failed to show that the foreclosure was "substantial." In attempting to prove the level of foreclosure, Plaintiffs rely exclusively on Professor Elhauge, their expert, who estimates that foreclosure due to share discounts is 30-39% depending on the year.[22] Even if those numbers were sufficient to show a violation of the

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[18] *See supra*, n.9; *see infra*, Section II.

[19] Day 10, Shaw (BD) Dep. 26:05-29:13 (Competition thrives in the sharps container market. Hospitals do not always make their choice on pricing, but if a competitor was overinflating its prices, BD would win business from them.); *id.* at 43:24-44:23 (Reusables have not been shut out of the market; reusables have been gaining market share at the expense of disposable competitors); *id.* at 19:22-23:25; 30:02-30:10 (BD has grown and competes successfully in sharps container market.); Forthcoming Ordover Testimony (market data shows Stericycle has grown substantially over the class period); Forthcoming Kogler Testimony at 38:11-14 (BioSystems has been a profitable investment for Stericycle since its acquisition); *id.* at 88:11-89:02 (BioSystems has achieved economies of scale and is being operated on a profitable basis); *id.* at 91:09-92:14; 96:01-04 (in its first two years after entering the national sharps containers market in late 2003, BioSystems had more than doubled its base of business and by the end of 2006 had more than tripled its base of business); *id.* at 234:22-236:06 (Stericycle never felt "locked out" of the sharps container business by Tyco.); Day 8, Blazejewski Direct 11:18-16:17 (because of extensive competition in the marketplace, raising prices would result in hospitals converting entirely to a competitor).

[20] Forthcoming Ordover Testimony.

[21] Day 11, Shaw Dep. 68:11-70:20 (BD uses the "commitment tier" system in its sharps container contracts, and such contracts are "very standard" and "created by essentially all of the GPOs"); *see supra* n.11.

[22] Day 9, Elhauge Direct 49:10-17. This includes all share contracts related to multi-, dual-, and sole- source GPO contracts. The portion of sales through share discount contracts outside of sole source GPOs was 15-27% depending on the year. Forthcoming Ordover Testimony.

antitrust laws,[23] the method of their determination is too unreliable to satisfy Plaintiffs' burden here. For the reasons set forth in Covidien's *Daubert* brief, which Covidien hereby incorporates by reference, econometric analyses such as those relied on by Professor Elhauge are too speculative and unreliable to prove that *any* foreclosure resulted from Covidien's share discounts, much less to prove the extent of that foreclosure. Dkt. No. 176 at 8-20; Dkt. No. 205 at 5-20. In particular, Professor Elhauge's analyses, which compared the buying practices of hospitals "burdened" by the challenged deals with the practices of those that were not, are tainted by selection bias. Dkt. No. 176 at 9-15; Dkt. No. 205 at 5-9. Plaintiffs argue this failure was not unreasonable because sharps containers are basically commodity goods. But no reasonable jury could reach that conclusion in light of the evidence at trial, which shows that, in fact, purchasers have preferences for different sharps containers for non-price reasons (*e.g.*, increased safety, different design features, brand preference, value-added programs and services).[24]

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[23] Some courts have suggested higher thresholds are required. *See, e.g., United States v. Microsoft Corp.*, 253 F.3d 34, 70 (D.C. Cir. 2001) (~40% or 50% usually required to establish substantial foreclosure).

[24] Day 4, Valego Direct 73:9-73:17; 99:1-22 (Hospitals based their purchasing decisions on a number of factors, including the features and benefits of the specific product and the breadth of the product line); *id.* at 93:12 – 93:22 (Customers choose Tyco's sharps containers because of the breadth of products, flexible value offerings, affordability, features and benefits, and premium containers, as well as value-added benefits); Day 2, Romano Dep. 32:02-33:04 (P-443) (In 70% of cases, hospitals base their purchases upon the clinically superior product); *id.* at 38:04-38:18 (P-443) (Free sharp safety analyses and consulting services were a mechanism of giving customers value to prevent them from converting); Day 11, Liscio Direct 40:7-8, 49:18-50:10, 73:15-24 (while price can be a factor in a hospital's decision, no supplier sells solely on price, and Tyco's focus is always on features, benefits, and value-added services that the particular customer might want or need); Day 5, Walsh Dep. 69:11-79:15 (Consorta decided to extend its 2003 sole-source contract with Tyco only after a review of its sharps containers, comparing both value and clinical acceptability, resulted in a preference of Tyco over BD); Day 3, Restino Dep. 16:08-17:21, 23:21-24:14 (Novation awards sole-source, dual-source, and multi-source contracts based on a combination of factors, including nonfinancial (clinical, quality, and service) and financial factors); Day 5, Walsh Dep. 33:05-34:11 (Consorta awards sole-source contracts only when they present the best value to its members based on quality, depth and breadth of product offering, high level of service, and other factors); Day 8, Florek Dep. 19:17-21:16 (At HPG, sole-source contracts are awarded only if the proposal meets all of four financial and non-financial factors); Day 12, Crowder Cross 16:18-17:14 (Natchitoches Parish Hospital's director of materials management made the decision to switch to Kendall sharps containers because Kendall's design was safer than BD's, and in fact made the decision regardless of price and would have switched to Kendall even if the BD containers were cheaper).

In sum, Plaintiffs have not proven that Covidien's share discounts harmed or foreclosed competition, nor that any such foreclosure was "substantial."

3. The Pro-Competitive Benefits of Covidien's Share Discounts Far Outweigh Any Harm to Competition

Not only did Plaintiffs fail to show that Covidien's share discount programs were anticompetitive, they failed to negate the programs' substantial pro-competitive benefits to consumers. Share discounts aid Covidien in selling its product. The "share" component of these deals allows hospitals of varying sizes the opportunity to receive the discounts.[25] Share discounts also lower costs for hospitals by allowing standardization throughout a hospital.[26] Share discounts further promote price competition. Hospitals have received significant saving pursuant to Covidien's share discounts.[27] Given the small, if any, amount of foreclosure caused by Covidien's share discount programs, the programs' pro-competitive benefits doom Plaintiffs' claims. *See Barry Wright*, 724 F.3d at 237-38 (rejecting claim despite 50% foreclosure where the contracts, *inter alia*, provided pro-competitive benefits to sophisticated buyers).

B. Given Plaintiffs' Foreclosure Estimates, A Finding that Covidien's Share Discounts Were Lawful Ends the Case

Before addressing the other challenged contracts, it is important to note the role that Covidien's share discounts play in the foreclosure calculation in this case. Specifically, Plaintiffs cannot establish an actionable level of market foreclosure in the absence of the share discounts. In other words, if the Court finds, as it should, that Covidien's share discounts were lawful and

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[25] Day 12, Crowder Cross 20:9-15; Day 12, Cline Direct 64:8-65:22.

[26] Day 5, Walsh Dep. 39:3-24.

[27] Forthcoming Ordover Testimony (hospitals received $25 million in savings over the class period).

cannot go to the jury, Plaintiffs' estimates of the amount of the market foreclosed by the other contracts at issue fall below the level required to establish an antitrust violation.

While there is some dispute in the case law about the levels of foreclosure necessary to state an antitrust claim (and Covidien reserves its right to argue that 40-50% or more is required), the Court need not resolve that dispute here because: (a) there is widespread agreement that foreclosure of 30% or below is insufficient;[28] and (b) Plaintiffs cannot reach 30% foreclosure if the share discounts are removed from the case.

Professor Elhauge, on behalf of Plaintiffs, provides separate foreclosure estimates for: (i) share contracts and (ii) sole-source GPO contracts. His sole-source foreclosure estimates never exceed 28% in any single year, and average 22% over the class period.[29] Without the share discounts, Plaintiffs' foreclosure estimates never reach 30% in any year of the class period.[30] [31]

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[28] *See, e.g., Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 46-47 (1984) (O'Connor, J., concurring) (30% not actionable because "[p]lainly . . . the arrangement forecloses only a small fraction of the [relevant] markets"); *B & H Medical, L.L.C. v. ABP Admin., Inc.*, 526 F.3d 257, 266 (6th Cir. 2008) ("Courts routinely observe that foreclosure levels are unlikely to be of concern where they are less than 30 or 40 percent.") (internal quotation and citation omitted); *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I.*, 373 F.3d 57, 68 (1st Cir. 2004) ("For exclusive dealing, foreclosure levels are unlikely to be of concern where they are less than 30 or 40 percent."); *Natchitoches Parish Hosp. Serv. Dist. v. Tyco Int'l., Ltd.*, 2009 WL 2914313, *12 (D. Mass. 2009) (same).

[29] Day 9, Elhauge Cross 103:23-104:20. Professor Elhauge testified that one cannot simply "add" the separate share and sole-source foreclosure estimates together to reach this "total." Day 9, Elhauge Direct 58:13-59:10. Instead, adjustments must be made to ensure that hospitals subject to both share discounts and sole-source contracts are not impermissibly "double counted." *Id*. As an illustration: if the foreclosure for share discounts was 10% in a particular year, and the sole-source foreclosure level was 5%, the "total" combined foreclosure for both practices would not be 15%. Instead, it would be some lesser number that accounted for the fact that some hospitals were subject to both practices.

[30] Notably, this remains the case even if the Court found that share discounts could be problematic if offered under a sole-source GPO contract. This is because of the adjustments made to prevent "double counting" when determining foreclosure. *See supra*, n.29. For example, a foreclosure level of 13% merely means that some challenged practice (*e.g.*, sole-source contracting) has prevented 13% of the market from purchasing from competitors. If the same customers who comprise that 13% of the market are also subject to a second challenged practice (for example, share discounts) that was only problematic when mixed with the first, the "foreclosure" estimate does not change (*i.e.*, it remains 13%), because the number of purchasers subject to a potentially anticompetitive practice has not changed.

[31] Plaintiffs and Professor Elhauge chose not to provide separate foreclosure estimates for bundled discounts. Defendants' own analysis indicates that these numbers would be extremely small, and would overlap almost entirely

Accordingly, if the Court finds the share contracts cannot go to the jury (as it should for the reasons presented above), it can and should dismiss the entire case based solely on the legal inadequacy of the remaining foreclosure levels.[32]

C. Plaintiffs Failed to Show that Covidien's Sole-Source GPO Contracts Violated the Antitrust Laws

The final practice challenged by Plaintiffs consists of Covidien's sole-source GPO contracts. No reasonable jury could find for Plaintiffs on this claim, either under traditional Sherman Act standards or under Plaintiffs' alternative theory that foreclosure of an efficient distribution channel violates the antitrust laws.

1. Covidien's Sole-Source GPO Contracts Were Not Unreasonable Restraints of Trade or Anticompetitive

Covidien's sole-source GPO contracts are not exclusive deals and thus cannot constitute unreasonable restraints of trade or anticompetitive conduct. *See supra*, Section I.A.1.a (citing cases holding that an "exclusive deal" is one that *requires* a purchaser to buy all of its requirements from the defendant). Plaintiffs have failed to show that these contracts required *anyone* to purchase *any* sharps containers from Covidien, much less of all of a purchaser's requirements. In fact, the opposite is true: no member of a GPO that has a sole-source contract with Covidien is required to purchase even a single sharps container from Covidien.[33]

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with sole-source GPO foreclosure levels. In other words, virtually all hospitals that received bundled discounts were also subject to a sole-source GPO contract and thus are already counted by Professor Elhauge's foreclosure estimates. As a result, even if bundled discount foreclosure levels are added to sole-source levels (while properly ensuring no "double counting"), that combined foreclosure would still never reach 30% in any year of the class period. Forthcoming Ordover Testimony.

[32] There are numerous other reasons, addressed below, for finding against Plaintiffs on their non-share discount claims. But in light of Plaintiffs' foreclosure estimates, the Court need not consider those other reasons if it dismisses the share discounts from the case.

[33] DTX-1414 at 2 ("Novation's award of this Agreement to Supplier will not constitute a commitment by any person to purchase any of the products."); Day 3, Restino Dep. 19:4-11, 20:5-8 (Novation's member hospitals "[a]bsolutely [do] not" have to buy products from Novation's sole-source contracts.); Day 4, Valego Direct 91:6-93:11 (Sole-source GPO agreements are never used to "force" a customer to buy Covidien's products); Day 5,

2. Covidien's Sole-Source GPO Contracts Did Not Harm/Foreclose Competition or Substantially Foreclose Competition

Even if Covidien's sole-source GPO contracts were exclusive deals, they do not foreclose competition for several reasons. *First*, the process by which GPOs select sole-source manufacturers is highly competitive. GPO contracts, including sole-cource contracts, are awarded following a competitive, public bid process.[34] That process is open to any manufacturer who wishes to participate.[35] Bids are evaluated by various committees, including committees comprised of nurses from the GPOs' member hospitals.[36] Further, sole-source contract extensions are only awarded after a full consideration of competitive options.[37] Over the last ten

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Walsh Dep. 20:05-21:02 (Consorta's members are free to choose what sharps container contracts they utilize); Day 6, Frazzette Direct 75:6-76:17 (Sole-source contracts are *not* a "silver bullet" for suppliers); Day 8, Florek Depo 30:24-31:21 (HPG members are not obligated to purchase sharps containers through HPG's sole-source contract with Tyco); Day 10, Cook Depo 77:12-86:19 (DTX-1344) (HPG's contracts with Tyco did not prevent members from switching suppliers. HPG members could switch to reusables, and in fact many did so without penalty).

[34] Day 3, Restino Dep. 21:7-22:13 (Novation follows a public competitive bid process to award new contracts. Process is open to all suppliers and members assist in the development and writing of nonfinancial criteria in developing bid specifications and structure. Members also assist in scoring responses from various suppliers and in making award recommendations.); *id.* at 21:16-22 (Novation has many member hospitals that have state or other requirements to adhere to and purchase from contracts that were subject to competitive bids.); *id.* at 30:15-31:4, DTX-1414 (Novation's 2000 sole-source contract with Kendall was awarded following a public bid process and after evaluating bids submitted by five suppliers.); Day 5, Walsh Dep. 19:7-21, 36:8-12, 43:6-50:4 (Consorta's bid process for sole-source contracts is competitive and follows a public process which considers bids from multiple suppliers for a particular product); Day 6, Frazzette Direct 73:13-75:5; Day 8, Florek Depo 13:15-18:22 (Contracts between HPG and suppliers are awarded following a competitive bid process and extensive evaluation of both the financial and non-financial factors of each proposal by committees composed of HPG shareholder employees).

[35] Day 3, Restino Dep. 21:7-15; Day 5 Walsh Dep. 43:10-20; Day 6, Frazzette Cross 33:23-34:02.

[36] Day 3, Restino Dep. 22:01-23:20; Day 5 Walsh Dep. 44:01-14.

[37] Day 5, Walsh Dep. 69:11-79:15; DTX-1503; DTX-1128; DTX-1123 (Consorta decided to extend its 2003 sole-source contract with Tyco for an additional two-years, but only after the committee reviewed the value and clinical acceptability of BD as a competitive option. BD was given a chance to present its sharps container product to Consorta, and in the end, the contracts and programs committee voted to extend Tyco's contract by a 12-1 vote.); Day 6, Frazzette Direct 80:13-82:19 (DTX-1415) (For a sole-source contract to be extended, there is still a review of the competitiveness of Tyco's products and pricing. If everything checks out, then the contract can be renewed. The GPO's nursing committee still reviews the product under sole-source contract to make sure that it is still the preferable product with the best quality, safety, and pricing, and only then does it extend the GPO contract.).

years, this competitive bid process has resulted in both Covidien and its competitors being awarded various GPO contracts.[38]

Second, the evidence shows that hospitals' decisions are not dictated by GPOs, nor are hospitals locked in to a particular GPO. Rather, GPOs are created by and for the benefit of the hospitals, and the hospitals control GPOs' decisions.[39] There is also intense competition among GPOs to recruit members.[40] Moreover, GPO members are free to switch GPOs[41] or belong to

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[38] Day 3, Restino Dep. 71:01-75:02, 76:02-82:15, 85:02-86:16 (BioSystems and BD awarded contracts by Novation in 2005, as well as Daniels in 2006); Day 5, Walsh Dep. 20:21-21:02 (Daniels awarded a sole-source contract by Consorta in 2006); Day 8, Skinner Dep. 59:21-64:15 (in the first few years since entering the U.S. sharps container market, Daniels has been able to secure national contracts with Consorta, Premier, and Novation. It has also secured a smaller contract with Broadlane); Forthcoming Kogler Testimony at 115:01-19, 116:12-117:10 (Stericycle awarded contracts by Broadlane in 2004 and MedAssets in 2005). Plaintiffs have attempted to make much of a small handful of documents from 2003 (most of which are various versions of monthly reports that appear to have been cut-and-pasted each month) that refer to a "gentlemen's agreement" with Novation. This evidence does not undermine the fair, free, and competitive nature of the GPO bid process. As an initial matter, Plaintiffs' intimation that this evidence shows an underhanded deal to extend Covidien's contract with Novation is without merit and unsupported by the evidence. Indeed the evidence shows the extension to which Plaintiffs refer occurred years before the dates of these documents as part of the Spectrum program. Day 12, Cline Direct 70:8-72:9. Moreover, even if the evidence did tend to show some untoward activity (which it does not), it would relate only to a single extension of a single contract with a single GPO – it does not in any way undermine the mountain of evidence concerning the public, competitive nature of the bid process GPOs use to award contracts.

[39] Day 2, Marley Direct 37:7-11, 59:5-60:6 (GPOs are trusted by hospitals to get them the best price.); *id.* at 56:19-57:1 (It is the charter of the GPOs to try to negotiate the best pricing they can for their members.); Day 3, Restino Dep. 13:2-16:07, 89:21-90:4 (Novation was created by hospitals, its members are hospitals, and no supplier owns any interest in Novation. Novation's contracts are always entered into in the best interests of its members. Novation would never into a contract that it thought had excessively high or noncompetitive prices.); Day 3, Restino Dep. 30:4-10, DTX-1414 (Novation seeks the input of its members before structuring its bids); Day 4, Smith Dep. 77:23-78:6, DTX-1320 (GPOs do not control the hospitals. Hospitals make their decisions independently.); Day 5, Walsh Dep. 21:21-30:8 (Consorta is owned and run by hospitals. Consorta's purpose is to help its member and shareholder hospitals reduce their costs by negotiating contracts with manufacturers. Consorta would not enter into any agreement unless it was deemed to be of good value to members, and would never enter into an agreement that it thought had excessive/non-competitive prices.); Day 4, DeLuca Dep. 17:19-110:3, P-309 (GPOs do not have a substantial influence on the decisions of their members. GPOs try to get good contracts with manufacturers and make recommendations, but it is then up to the hospitals to either participate or try to find a better deal.); Day 8, Florek Depo 8:09-13:14 (All actions that HPG takes are in the best interests of the hospitals and the patients).

[40] Day 3, Restino Dep. 20:18-21:06 (competition among GPOs for members is "very aggressive"); Day 5, Walsh Depo 30:09-33:02 (GPOs compete with each other and have differing approaches in terms of the kind of contract provisions that they think their hospital members want); Day 8, Florek Depo 25:05-27:10 (same).

[41] Day 2, Marley Cross 57:2-24 (GPO membership is voluntary and hospitals can join any GPO they want); Day 3, Restino Dep. 19:13-20:04 (if hospitals do not agree with Novation's contracting philosophies, they are free to join numerous other GPOs); Day 5, Walsh Dep. 30:09-33:02 (if a hospital or hospital system does not like how a GPO does things, it can freely leave and, if it wants, go to another competing GPO); Day 8, Florek Dep. 25:05-27:10

multiple GPOs[42]. *See St. Francis*, 2009 WL 3088814, at *2 ("hospitals can often belong to more than one GPO and often switch from one GPO to another"). Indeed, lead Plaintiff Natchitoches has been a member of multiple GPOs throughout the entire class period and was free to pick and choose amongst the different GPO contracts to obtain the best prices for the products it wanted.[43] Consequently, hospitals are free to switch to a GPO without a sole-source contract or buy outside of GPO contracts altogether.

Third, Covidien's sole-source contracts simply do not exclude competitors from seeking and obtaining business from GPO members. The evidence has shown that members of GPOs with sole-source contracts can and do purchase off-contract, that competitors actively solicit their business, and that sole-source contracts do not prevent hospitals from buying whichever sharps containers they want.[44] Indeed, there are many examples on the record of hospitals that bought

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(hospitals are free to leave HPG and join other GPOs if they think that HPG is not acting in their best interests).

[42] *See* Day 2, Marley Cross 57:2-57:7 (GPO membership is voluntary and hospitals can join any GPO they want); Day 3, Restino Dep. 19:13-20:4 (If hospitals do not disagree with Novation's contracting philosophies, they are free to join numerous other GPOs.).

[43] Day 12, Crowder Cross 20:3-8; Day 2, Marley Cross 57:8-24 (Natchitoches is a member of multiple GPOs in order to give it greater choice in the marketplace, and it can purchase sharps containers through any one of these GPOs).

[44] Day 5, Walsh Depo 82:18-83:14 (DTX-1090) (Despite Consorta's contract with Tyco, BD was able to win sharps container business from Consorta member Trinity Health in 2002); *id*. at 20:5-21:2. 41:5- 43:5 (Consorta members are never penalized in any way if they decide not to use a particular Consorta contract. Consorta members are not kicked out of Consorta or penalized if they choose to buy products off-contract); Day 7, Blazejewski Cross 60:2-61:6 (P-413) (Despite being awarded a sole-source contract with Premier in 2005, Tyco did not grow its sales at all with Premier members); Day 7, Blazejewski Direct 146:24-148:24, 7:17 – 10:9 (P-413) (GPO contracts had very little effect on customers' decisions. While they might consider the GPO agreement as part of their overall decision, the overall decision reflected the customer's needs. This included such factors as the breadth of the product portfolio, pricing, programs, and others); Day 5, Walsh Dep. 80:12-82:4, DTX-1064 (Despite Consorta's decision to extend its 2003 sole-source contract with Tyco, the one shareholder who disagreed with the decision was still able to go to BD to enter into its own contract for sharps containers.); Day 5, Walsh Dep. 82:18-83:14, DTX-1090 (Despite Consorta's contract with Tyco, BD was able to win sharps container business from Consorta member Trinity Health in 2002.); Day 5, Walsh Dep. 99:1-107:21, DTX-1137 (Despite commitment language in Covidien contracts with Consorta hospitals like Trinity Health freely switched suppliers.); Day 4, Smith Dep. 43:25-46:2, P-381 (Covidien's sole-source contract with HPG did not prevent it from offering a reusable alternative).

from Covidien competitors despite having access to a Covidien sole-source contract through their GPO.[45]

Fourth, Covidien's sole-source GPO contracts are terminable at will and on short notice without penalty.[46] Courts have recognized that even true "exclusive dealing" contracts do not violate the antitrust laws when they can be terminated on short notice. *See, e.g.*, *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 596 (1st Cir. 1993) (termination with 30 days notice a de minimis restraint); *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 394-95 (7th Cir. 1984) (exclusive dealing arrangements terminable in less than a year are presumptively lawful).

Even if Plaintiffs had established that Covidien's sole-source GPO contracts foreclosed its rivals from a portion of the market, Plaintiffs have failed to show that the foreclosure was "substantial." Covidien's sales through its sole-source GPO contracts constituted an average of

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[45] Day 4, Valego Direct 91:6-93:11 (most hospitals in the Manhattan area have used reusables for the last 20 years, despite having been part of GPOs with sole-source contracts for disposable sharps containers); Day 5, Walsh Dep. 80:12-82:04 (despite Consorta's decision to extend its 2003 sole-source contract with Tyco, the one shareholder who had disagreed with the decision had still been able to use BD for its sharps containers); Day 5, Walsh Depo 82:18-83:14 (despite Consorta's contract with Tyco, BD was able to win sharps container business from Consorta member Trinity Health in 2002); Day 7, Blazejewski Cross 60:2-61:6 (despite being awarded a sole-source contract with Premier in 2005, Tyco did not grow its sales at all with Premier members); Day 11, Liscio Direct 81:25-84:9 (P-238) (listing over 100 accounts that had switched to competitors during the 18 months prior to April 2005); Forthcoming Ordover Testimony (identifying numerous hospitals that bought from a competitor despite being a member of a GPO with a sole-source contract with Covidien).

[46] DTX-1502 at § 11.3 ("Consorta or Seller may terminate this Agreement for any reason or no reason upon ninety (90) days written notice."); DTX-1490 at ¶ 3(b) ("Novation may terminate this Agreement at any time for any reason whatsoever by delivering not less than ninety (90) days' prior written notice."); DTX-1446 at § 13.3 (Premier Agreement providing: "Either party may terminate this Agreement at any time without cause or penalty upon providing the other party with ninety (90) days' advance written notice."); DTX-1486 at § 16 ("Vendor and HPG shall both have the right to terminate this Agreement in its entirety ... without cause by providing at least sixty (60) days' prior notice."); *see also* Day 3, Restino Dep. 36:8-37:2, P-101 (Novation had a right to cancel its sole-source contract with Covidien.); Day 5, Walsh Dep. 33:21-36:7, 68:24-69:10, DTX-1503 (All Consorta sole-source contracts include a 90-day without-cause termination clause.); Day 5, Walsh Dep. 54:5-56:1, DTX-1564 (Consorta would have exercised cancellation right if it felt that Tyco's pricing, product depth/breadth, or charges to members were not competitive.); *see also* Day 6, Frazzette Direct 76:8-17, 76:23-80:12 (DTX-1415) (A GPO could easily cancel just the contract for one product rather than all products from a particular supplier, thereby leaving all of the other contracts in place and having no impact on those other contracts).

22% of market-wide sharps container sales over the class period (and never, in any single year, exceeded 28%).[47] Such percentages are legally insufficient. *See supra*, Section I.B.

Moreover, even these insufficient estimates are grossly exaggerated because they assume that every Covidien sole-source contract will be found anticompetitive. Even *Masimo Corp. v. Tyco Health Care Group, L.P.*, 2006 U.S. Dist. LEXIS 29977 (C.D. Cal. Mar. 22, 2006), which (wrongly) affirmed a jury verdict based on challenges to sole-source contracts, found that jury award could not be sustained with respect to the Novation sole-source contract due to the fact that it included "an explicit term . . . provid[ing] that no member hospital was required to buy anything from Tyco." That same term is in the Novation sole-source contract at issue in this case.[48] Novation is one of the larger GPOs, and thus accounts for a substantial portion of Plaintiffs sole-source foreclosure estimates.[49]

3. The Pro-Competitive Benefits of Covidien's Sole-Source GPO Contracts Far Outweigh Any Harm to Competition

Any anticompetitive effect of sole-source GPO contracts is outweighed by their substantial pro-competitive benefits. GPOs are "cooperatives of purchasers of health care goods who pool their purchasing power to negotiate lower prices and other favorable terms from manufacturers." ABA Section on Antitrust Law, Antitrust Law Developments, at 1428 (6th ed. 2007). GPO sole-source contracts are common among GPOs, and are awarded when such

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[47] Day 9, Elhauge Cross 103:23-104:20. Only if the share contracts remain in this case can Plaintiffs reach potentially sufficient foreclosure numbers. *See supra*, Section I.B.

[48] DTX-1414 at 2 ("Novation's award of this Agreement to Supplier will not constitute a commitment by any person to purchase any of the products.").

[49] And Plaintiffs have no way of identifying foreclosure numbers if the Novation, or any other, sole-source contract is excluded from the total.

contracts are in the best interests of GPO members based on both nonfinancial and financial factors.[50] Sole-source GPO contracts have in fact resulted in lower prices for customers.[51]

4. The Antitrust Laws Require Only that Alternative Distribution Channels Exist – Not That Competitors Have Access to the Most Efficient Channel

Plaintiffs' alternative theory of liability – that Covidien's sole-source contracts foreclosed the most efficient distribution channel in the sharps container market – fails as a matter of law. As long as there are alternatives, the antitrust laws do not require that competitors be given access to the most efficient distribution channel. *See, e.g.*, *Omega*, 127 F.3d at 1163 (holding that as long as rivals "are free to sell directly, to develop alternative distributors, or to compete for the services of the existing distributors", the "[a]ntitrust laws require no more").[52] Competitors here

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[50] Day 3, Restino Dep. 18:17-19:3 (Novation has sole-source contracts with "many" companies besides Covidien.); Day 5, Walsh Dep. 36:13-37:19 (Consorta has sole-source contracts with approximately half of its portfolio, or about 400 contracts for different products.); Day 3, Restino Dep. 16:8-17:21, 23:21-24:14 (Novation awards contracts based on a combination of factors, including nonfinancial (clinical, quality, and service)); Day 5, Walsh Dep. 33:5-34:11 (Consorta awards sole-source contracts only when they present the best value to its members based on quality, depth and breadth of product offering, high level of service, and other factors.); Day 5, Walsh Dep. 64:23-66:24, DTX-1503 (Consorta's 2003 contract award to Tyco because Tyco bid was the best based on financial and non-financial factors, including tier pricing which was competitive.); Day 5, Walsh Dep. 87:9-98:23, DTX-1124, DTX-1127 (When Consorta members began expressing interest in reusable sharps containers, Consorta issued RFPs for reusables to Tyco, Daniels, and BioSystems and made an award to Daniels.); Day 9, Elhauge Cross 99:18-102:14 (Sole-source contracting is common in the healthcare industry, and sole-source contracts are not inherently anticompetitive); Day 8, Blazejewski Redirect 53:9-54:6 (The fact that a supplier with a sole-source contract with a GPO might have greater market share among that GPO's members can be explained by the fact that those members are the same nurses and doctors who, collectively, already expressed a preference for that supplier by awarding it a sole-source contract.); Day 8, Florek Dep. 19:17-21:16 (DTX-1345) (At HPG, sole-source contracts are awarded only if the proposal provides extraordinary economic value.); Day 10, Cook Depo 53:04-61:09 (At HPG, different committees make the decision to award a contract to a supplier, with the best interests of members in mind.).

[51] Day 3, Restino Dep. 33:2-33:9 (Prices for sole-source contracts are typically lower than for dual-source, and this is common across all contracts and all suppliers.); Day 3, Restino Dep. 36:2-13, DTX-1415 (Covidien was contractually obligated to keep its prices, quality, value, and technology of all products market competitive during the term of the agreement. Novation could enforce the terms of its contract if Covidien failed to meet them.); Day 6, Frazzette Direct 76:18-22 (Sole-source GPO contracts resulted in prices that were typically less than the prices for dual- or multi-source contracts); Day 9, Elhauge Direct 52:23-53:5, 54:5-13 (prices under a dual- or multi-source contract were typically 9 to 12 percent higher than a sole-source contract); Forthcoming Ordover Testimony.

[52] *See also Omega*, 127 F.3d at 1162 ("exclusive dealing arrangements imposed on distributors rather than end-users are generally less cause for anticompetitive concern."); *Roy B. Taylor Sales, Inc. v. Hollymatic Corp.*, 28 F.3d 1379, 1383 (5th Cir. 1994) ("Alternative distributors did not have to be robust to compete; they merely had to exist."); *Stop & Shop*, 373 F.3d at 67 (relevant market is all potential customers, not just those in a more efficient network); *Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1572-73 (11th Cir. 1991); *CDC Techs., Inc. v.*

have won numerous sales outside of GPO contracts; indeed, they routinely win sales from members of GPOs who had a sole-source contract with a rival.[53] *See Omega*, 127 F.3d at 1162 ("The record contains undisputed evidence that direct sales to end-users are an alternative channel of distribution in this market."). The record thus establishes that GPO contracts are not the only avenue for selling sharps containers and, accordingly, the "[a]ntitrust laws require no more." *Id*. at 1163; *see also* Herbert Hovenkamp, Federal Antitrust Policy § 10.8 at 391 (1994) (foreclosure of even "a large percentage of one mode of distribution will have little anticompetitive effect if another mode is available").

5. Even if Legally Viable, the Facts Here Do Not Support a 'Most Efficient Distribution Channel' Theory of Liability

A few cases, on which Plaintiffs rely, have suggested a narrow exception to the general rule articulated in *Omega* (and other decisions): that foreclosure of a distribution channel can violate the antitrust laws despite the availability of alternative channels, where those alternatives

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IDEXX Labs, Inc., 186 F.3d 74, 81 (2d Cir. 1999); *Ticketmaster Corp. v. Tickets.com, Inc.*, 2003 WL 21397701, at *5 (C.D. Cal. Mar. 7, 2003) (even though defendant "had already contracted with the most desirable retail venues . . . [plaintiff] has found alternatives sufficient to solve the problem"); *Louisa Coca-Cola Bottling Co. v. Pepsi-Cola Metro. Bottling Co.*, 94 F. Supp. 2d 804, 816 (E.D. Ky. 1999).

[53] Day 3, Restino Dep. 251:7-20 (Novation hospitals could and did buy from Daniels or BD even during the time period of the 2000–2005 sole-source contract.); Day 5, Walsh Dep. 82:18-83:14, DTX-1090 (Despite Consorta's contract with Tyco, BD was able to win sharps container business from Consorta member Trinity Health in 2002.); Day 4, DeLuca Dep. 192:5-9 (Covidien has many N&S accounts that are under GPO contract with someone else.); Day 4, Valego Direct 91:6-93:11; Day 7, Blazejewski Direct 112:1-113:20 (P-381) (Despite HCA's membership in HPG, which had a sole-source contract with Tyco, in 2003, HCA switched to Sureway reusable containers); Day 11, Shaw Dep. at 63:20-64:1] (BD, Covidien's largest competitor, has always been able to compete for sales even when it lacks a GPO contract.); Day 5, Walsh Depo 82:18-83:14 (DTX-1090) (Despite Consorta's contract with Tyco, BD was able to win sharps container business from Consorta member Trinity Health in 2002); Day 4, DeLuca Depo 192:05-192:09 (Tyco has many N&S accounts that are under GPO contract with someone else); Day 8, Blazejewski Direct 10:10-11:17 (Even when Broadlane had a sole-source contract with BD for sharps containers, Tyco continued to compete for the business of Broadlane members and in fact held about a third of the available potential sales within Broadlane members, even without a GPO agreement); Day 2, Romano Dep. 156:12 – 156:16 (P-366) (Tyco had lots of business in accounts that were under sole-source with a competitor); Day 3, Romano Dep. 284:14-17 (Reusables competitors were a serious threat despite, to Romano's knowledge, not being on any GPO contracts); Forthcoming Ordover Testmiony (Daniels and Stericycle achieved 20% of sales at HPG member hospitals when Tyco had a sole-source contract with HPG); Day 12, Cline Direct 48:14-24 (Tyco has not faced additional burdens or lower profits by selling outside GPO contracts, and selling outside a GPO contract is not less efficient or more difficult).

are so inadequate that a competitor would have no chance of competing successfully using them. *See United States v. Microsoft*, 253 F.3d at 70 ("[N]o other distribution channel for browsing software even approaches the efficiency of [the foreclosed channels]."); *LePage's*, 324 F.3d at 160 (finding anticompetitive harm where the distribution channel foreclosed was "necessary to permit [competitors] to compete profitably"); *United States v. Dentsply*, 399 F.3d at 193 (rejecting lower court finding that an alternative distribution channel was "viable" because "we are convinced that it is 'viable' only in the sense that it is 'possible,' not that it is practical or feasible in the market as it exists and functions").

Even if these cases were good law on this point (which Covidien disputes), the exception they articulate could not apply here for at least three reasons. *First*, it is undisputed that a substantial amount of sharps containers are sold outside of GPO contracts. Indeed, during the class period, 78% of market-wide sales were made outside of Covidien's sole-source contracts and 40% of sales occurred outside of any (*i.e.*, sole-, dual-, or multi- source) GPO contract.[54] This data, as well as the other evidence of competitors gaining business outside of GPO contracts[55], establishes that non-GPO distribution methods are real (not just technical or theoretical) alternatives.

Second, market data proves that Covidien's sole-source contracts did not in fact foreclose access to GPOs. Those few cases that have found antitrust problems arising out of foreclosure of a distribution channel involved total or near-total domination of that channel. *See Microsoft*, 253 F.3d at 70-71 ("Microsoft has exclusive deals with fourteen of the top fifteen access providers in

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[54] Forthcoming Ordover Testimony.

[55] *See supra*, n.53; *see also* Day 12, Cline Direct 48:14-24 (Tyco has not faced additional burdens or lower profits by selling outside GPO contracts, and selling outside a GPO contract is not a less efficient or more difficult).

North America[, which] account for a large majority of all Internet access subscriptions in this part of the world.") (internal citations omitted); *LePage's*, 324 F.3d at 160; *Dentsply*, 399 F.3d at 190, 196. At all times during the class period here, however, Covidien's competitors had sharps container contracts with at least four of the seven major GPOs.[56] A *Microsoft*-like finding of distribution channel foreclosure simply could not be sustained in light of this fact.

Third, Covidien cannot be found to have foreclosed a distribution channel *because GPOs are not in fact distributors of sharps containers*. Instead, GPOs are merely purchasing intermediaries that negotiate contracts for medical supplies on behalf of their member hospitals. The cases on which Plaintiffs rely all involved foreclosure of a true *distribution* channel and there is no basis for extending their rationale to a purchasing intermediary. *See Microsoft*, 253 F.3d at 70; *LePage's*, 324 F.3d at 160; *Dentsply*, 399 F.3d at 193.

D. Plaintiffs Failed to Show that Covidien's Bundled Discounts Violated the Antitrust Laws

While Plaintiffs do not allege an independent claim based on "bundling" in this case, they have referenced certain Covidien bundled deals to support their claim of harm due to the share discounts and sole-source contracts.[57] These allegations concern standardized discount programs offered by Covidien or certain GPOs (*i.e.*, Novation's "Spectrum Opportunity Program,"[58] the

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56 Forthcoming Ordover Testimony.

57 Day 9, Elhauge Cross 109:21-110:5.

58 The Novation Spectrum Opportunity Program ("Spectrum") was a voluntary purchasing program created by Novation for its member hospitals in April 2001. DTX-1439; P-199. A participating hospital could earn rebates on a variety of medical products by committing to meet market-share thresholds for each participating product. *Id.* When a Novation member signed-up to participate in the Spectrum program, it was immediately allowed to earn the quarterly rebate on the assumption it would meet its commitment levels. Early in the Spectrum program – from April 2001 to March 2003 – the terms of the program provided that a member might repay rebates it had received if the member did not meet its share commitments. P-672; Restino Dep. at 109:25-111:4. Although several Spectrum participants left the program, no participant was ever required to repay a rebate. Day 4, Valego Direct 90:23-91:5 (not a single instance where a hospital was ever asked to repay a prior rebate or threatened with forced repayment if it switched to a competitor); Day 6, Frazzette Direct 86:1-87:23 (Tyco never asked a customer to repay past rebates

"Tyco Value Program,"[59] and MedAssets' "Select" program[60]) and a small number of individually negotiated deals with hospitals. Significantly, all of these bundle programs never exceeded 10% of market wide sales in any year of the class period; and the bulk of those sales were accounted for by a single program, Spectrum.[61] Plaintiffs have failed to show these "bundled" deals were anticompetitive or foreclosed a substantial portion of the container market.

1. Plaintiffs Have Not Presented Sufficient Evidence to Permit the Jury to Make Factual Findings Concerning These Programs

Other than Spectrum, Plaintiffs have presented virtually no evidence concerning these programs. What little evidence is in the record consists primarily of one-off emails introduced for another purpose that happen to mention one of the programs' names. Neither of Plaintiffs' experts conducted a separate analysis of foreclosure levels, anticompetitive impact, or damages for any of these programs.[62] Indeed, Professor Elhauge testified that bundling was not an independent source of harm in the market.[63] Thus, as a threshold matter, Plaintiffs have not

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because it left Spectrum or any other contract); Day 12, Cline Direct 105:13-107:5. In 2003, this repayment provision was eliminated. Day 3, Restino Dep. 51:16-52:12, 110:14-110:19. From 2001-2003, Spectrum contained language indicating that participants could not entertain proposals from non-participant manufacturers. That clause was removed in 2003 and there is no evidence it was ever enforced. *Id.* at 50:14-51:04; Day 12, Cline Direct 105:13-107:5. The Spectrum program ended in March 2005. DTX-1439; P-199.

[59] The Tyco Value Program ("TVP") was a voluntary rebate program designed for Novation members after the Spectrum program ended. P-353; P-354. The TVP provided discounts on a number of different Covidien products across a range of product categories (including sharps containers). If a hospital did not meet the requirements of the program, the only impact was they would not earn the rebates on a going forward basis. *See infra*, n.66.

[60] The MedAssets "Select" program was a voluntary program created by MedAssets for the benefit and at the request of its members in 2000. P-95. Participants committed to purchase a certain percentage of their requirements from a number of suppliers. In return, the member was offered quarterly rebates on a variety of medical products. Both Covidien and BD sharps containers were included. As a result, a participant in the Select program never had to buy any sharps containers from Covidien to earn a rebate. No participant was ever required to repay rebates.

[61] Forthcoming Ordover Testimony.

[62] Day 9, Elhauge Cross 109:21-24 ("Q. Now, sir, you have not separately calculated the scope of the sharps container market affected or covered by Tyco's bundled rebates, right? A. I have not, no.").

[63] Day 9, Elhauge Cross 109:25-110:5 ("Q. In fact, sir, you are not opining to this jury in this case that bundling standing alone is an independent source of harm in the market, right? A. That's right. I just view it as a particularly

submitted sufficient proof for the jury to make any factual findings of legal relevance – much less find that the elements of an antitrust claim are met – with respect to these programs.

2. The Bundled Discount Programs Were Not Unreasonable Restraints of Trade or Anticompetitive

Covidien's bundled discount programs did not constitute unreasonable restraints of trade or anticompetitive conduct for several reasons. *First*, Plaintiffs failed to show that they were below a relevant measure of Covidien's costs. *See, e.g.*, *Cascade Health*, 515 F.3d at 903; Herbert J. Hovenkamp, *Discounts and Exclusions, U. Iowa Legal Studies Research Paper No. 05-18*, 16 (Aug. 2005); *see also supra*, Section I.A.1.a.

Second, like Covidien's share discounts, its bundled programs did not constitute exclusive dealing because they did not require customers to purchase Covidien's goods. Plaintiffs did not present any witness testimony that the bundled programs prevented hospitals from purchasing products from other suppliers. Moreover, such programs were voluntary and hospitals could "opt out" of them at any time.[64] In fact, the evidence shows that a number of hospitals who signed these deals purchased from competitors.[65]

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ratcheted up penalty for not agreeing to commitment, but not separate and standing alone as a separate theory.").

[64] Day 4, Valego Direct 82:25-83:23, P-172 (Even though Cleveland Clinic was on a committed bundled discount program, it converted to reusables.); Day 2, Romano Dep. 224:20-225:21 (Spectrum was completely voluntary. It was not a financial "penalty" for being non-compliant. It was a financial "opportunity" for being compliant.); Day 3, Restino Dep. 47:13-48:15, P-104/DTX-1441 (Members who did not want to participate in Spectrum could still get the regular sharps container discounts under the Novation sole-source program.); Day 3, Restino Dep. 51:8-15, P-104/DTX-1441 (Hospitals could terminate their participation in Spectrum at any time.); Day 3, Restino Dep. 281:20-282:3 (At least 1200 to 1300 of Novation's 1800 members chose not to participate in Spectrum.); Day 6, Frazzette Direct 85:4-85:25 (DTX-1441), Day 6, Frazzette Redirect 124:12-124:20 (Spectrum was a completely voluntary program. Novation members did not have to participate in the first instance, and could cease participation (or begin buying certain products from a different supplier) at any time with no consequence other than the loss of a quarterly rebate); Day 12, Cline Direct 81:19-24 (all GPO contracts have termination clauses).

[65] Day 11, Shaw Dep. 83:12-19 (Spectrum program did not keep customers from converting to BD "at all," and BD converted a number of Spectrum participants from Tyco's sharps containers); Day 3, Romano Dep. 278:09-279:04, 279:06-18 (Swedish Covenant moved to reusables despite having signed up for the Spectrum program).

Third, with the exception of the 2001-2003 Spectrum program, the only possible consequence of failure to comply with bundled programs was the loss of future discounts or rebates.[66] The 2001-2003 Spectrum program is the *only* bundled program that provided for the repayment of previously received rebates from hospitals that failed to meet their commitment levels. But while Novation could theoretically have insisted on repayment, the evidence shows that it never did.[67]

Fourth, the bundled programs were not anticompetitive because Covidien's competitors could (and did) offer competing "bundles."[68] *See St. Francis*, 2009 WL 3088814, at *20 (bundled discount and rebate programs were not anticompetitive where at least some of the other competitors could offer similar bundles). Covidien's largest competitor in the sharps container market is BD, which had a market share of at least 19-25% during the relevant period.[69] BD (not Covidien) is the largest supplier of needles and syringes (with a 70% market share), and thus could (and did) offer its own bundled discounts on sharps containers and needles and syringes to compete with Covidien's offerings.[70] Similarly, suppliers of reusable sharps containers are able

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[66] Day 4, Valego Direct 89:22-91:5; Day 6, Frazzette Direct 85:4 – 85:25; Day 6, Frazzette Redirect 124:12-124:20; *see also supra*, n.64.

[67] DeLuca Dep. 232:8-23, P-199 ("Repayment of past rebates" clause was discontinued after 2003 and no hospital was ever required to repay past rebates.); Day 4, Valego Direct 90:23-91:5 (Valego is not aware of a single instance where a hospital was ever asked to repay a prior rebate or threatened with repayment if they switched to a competitor.); Day 8, Blazejewski Direct 18:23-19:13 (No hospital has ever had to actually pay back a rebate under any program, including Spectrum); Day 4, Valego Direct 90:23-91:5 (same); Day 6, Frazzette Direct 86:1-87:23 (same); Day 12, Cline Direct 105:13-107:5 (same).

[68] Day 9, Elhauge Cross 104:23-105:14 ("Bundling" is common in the United States economy generally, and it is not inherently anticompetitive or bad).

[69] Day 10, Shaw Dep. 19:22 – 23:25, 30:02-30:10; Day 9, Elhauge Direct 30:2-19; Forthcoming Ordover Testimony.

[70] Day 3, Romano Dep. 274:3-275:10 (BD offered similar package or cross-sale discounts to Covidiens, and in fact, Covidien got the idea of offering package/cross-sale discounts from BD.); Day 7, Blazejewski Direct 153:4-23, Day 8, Blazejewski Direct 6:4-11 (BD offered similar cross-sale discounts to its customers across a wide range of

to offer their own unique cross-sale: a bundle of sharps containers and waste-hauling services.[71] Indeed, the 30(b)(6) witness from Covidien's top "reusable" competitor – Stericycle – testified extensively about the success of Stericycle's bundling efforts.[72]

3. Covidien's Bundled Rebate Programs Did Not Substantially Foreclose Competition

Moreover, Plaintiffs did not establish that Covidien's bundled deals foreclosed a substantial portion of the relevant market. Covidien's bundling programs covered a small portion of the market – at no time greater than 10% (the vast majority of which was Spectrum).[73] That level is insufficient to state a claim under the antitrust laws.[74] *See also supra*, Section I.B.

II. Plaintiffs Failed to Show that Covidien Had Monopoly or Market Power in the Sharps Container Market

To prevail on its Sherman Act claims, Plaintiffs were required to first prove Covidien had market power (§ 1) and monopoly power (§ 2) in the U.S. sharps container market. *See, e.g., E.*

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products, including N&S, blood collection, IV catheters, and sharps containers).

[71] Day 7, Blazejewski Direct 128:2-129:4, 153:24-154:18, Day 8, Blazejewski Direct 6:12-7:13 (Stericycle, which had a market-leading position in the medical waste hauling market, was offering a bundled or cross-selling type of service with its reusable sharps containers combined with medical waste hauling services); Day 8, Blazejewski Redirect 51:25-52:23 (Despite plaintiffs' claim that there was only one price for Stericycle's/BioSystem's reusable sharps containers combined with the hauling of those containers (which would allegedly distinguish this "package" from the cross-selling programs of disposable suppliers like Tyco and BD), the reusable sharps container "package" was actually frequently cross-sold with the broader overall service of medical waste hauling, thus making it more similar to typical cross-selling programs); Day 3, Romano Dep. 274:3-275:10 (Stericycle offer "bundles" of waste hauling services combined with sharps containers.); Day 2, Romano Dep. 37:4-9 (Both Daniels and Stericycle were offering a product package combined with waste hauling service.); Forthcoming Kogler Testimony at 25:21-26:18.

[72] Forthcoming Kogler Testimony at 25:21-26:5, 82:2-17, 236:3-6.

[73] Forthcoming Ordover Testimony. *see also* Day 3, Restino Dep. 50:14-51:4, P-104/DTX-1441 (Spectrum was a tiny piece of the market.); Day 3, Restino Dep. 280:7-281:15 (Out of approximately 1800 total Novation members, only 500 to 600 chose to participate in Spectrum. The other 1,200 to 1,300 did not participate.).

[74] Nor could the foreclosure numbers for these bundled discounts be "added" to foreclosure numbers for other practices, because the hospitals that participated in these bundles were virtually all also participants in Covidien sole-source contracts. *See supra*, n.29, n.30 (explaining that merging foreclosure levels for different practices requires adjustments to ensure there is no "double counting" of a particular customer). Indeed, Novation's Spectrum program ran during the same time period that Covidien had a sole-source contract with Novation, and thus the Spectrum market wide sales (which account for the vast majority of sales of all of these bundled programs) are already fully subsumed by Plaintiffs' sole-source foreclosure estimate.

Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n, Inc., 357 F.3d 1, 5 (1st Cir. 2004); *Wojcieszek v. New Eng. Tel. & Tel. Co.*, 977 F. Supp. 527, 533 (D. Mass. 1997). In other words, Plaintiffs were required to prove that Covidien had the power to "control prices or exclude competitors." *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711, 726 (8th Cir. 1986) (defining "monopoly power"); *see also Graphic Products Distributors, Inc. v. ITEK Corp.*, 717 F.2d 1560, 1570 (11th Cir. 1983) (providing similar formulation for "market power").

The facts established at trial prove that Covidien did not have the power to control prices or exclude competition. *First*, the evidence shows that Covidien faced substantial competition in the marketplace during the relevant time period.[75] In particular, two large rivals, BD and Stericycle, successfully competed against Covidien[76] and another competitor, Daniels Sharpsmart, entered the market and expanded during the class period[77]. *Second*, Covidien's

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[75] Day 4, Valego Direct 71:21-73:5 (competition in the sharps container market was the most intense of any market that witness has ever been in); Day 8, Blazejewski Direct 19:14-20:7 (Every sale was a fight, regardless of any GPO contract that the customer might have access to); Day 10, Shaw (BD) Dep. 26:05-29:13; 43:24-44:23 (Competition thrives in the sharps container market); Day 4, DeLuca Dep. 96:05-96:09 (Tyco sales reps worried about losing business"every day"); Day 10, Shaw Dep. 26:05-29:13 (if a competitor in the sharps container market were charging overinflated prices, BD would win business from it); Day 11, Liscio Direct 54:24-55:12 (sharps container sales is a "very competitive" business, and there is nothing wrong with going to "war" with competitors).

[76] Day 10, Shaw (BD) Dep. 19:22-23:25; 30:02-30:10 (BD has steadily increased its market share every year since investing heavily in sharps containers in 1997, has achieved economies of scale in the market.); Day 4, Valego Direct 72:4-72:19 (BD and Stericycle were big players, and in some facilities, BD was the better competitor even when Covidien had a sole-source contract with the facility's GPO.); Day 4, DeLuca Dep. 96:5-9 (When DeLuca was a regional manager, sales reps came to him "every day" to tell him that they were in danger of losing business to BD because of price.); Day 8, Blazejewski Direct 16:18-18:22 (P-399) (Tyco lost a significant amount of sales when Kaiser converted to BD); Day 3, Restino Dep. 71:1-75:2 (DTX-1412) (Stericycle/BioSystems awarded a Novation contract.); Day 3, Restino Dep. 76:2-82:15 (DTX-1433) (Kendall and BD were awarded a dual-source Novation contract in 2005); Forthcoming Ordover Testimony (Stericycle's revenues increased 800% over class period.).

[77] Day 3, Restino Dep. 85:2-86:16 (DTX-1435) (Daniels was awarded a Novation contract in October 2006.); Day 4, Valego Direct 72:2-5 (Covidien faced stiff competition from Daniels); Day 5, Walsh Dep. 252:1-252:20 (Daniels converted Consorta members even while Consorta was on a sole-source contract with Tyco.); *id.* at 20:21-21:2 (Daniels was awarded a sole-source contract with Consorta in 2006.); Day 8 Skinner Dep. 59:21-64:15 (In the first few years of entering the U.S. sharps container market, Daniels has been able to secure national contracts with Consorta, Premier, and Novation. It has also secured a smaller contract with Broadlane); *id* at 45:22-60:03 (DTX-1171, DTX-1256, DTX-1274) (Internal Daniels emails in 2004 reported that Daniels was making substantial progress, that it was gaining business at the expense of other reusables competitors, and that conversions were "underway across the country"). There is some evidence on the record that arguably suggests Daniels had a slow

market share has been declining over the entire class period (to the benefit of competitors who gained share).[78] *Third*, Covidien's prices have remained stagnant despite rising costs,[79] unlike Becton Dickinson, whose prices have risen as costs have increased[80]. These facts would not exist if Covidien had market or monopoly power.[81] The absence of such power is fatal to Plaintiffs' entire case.[82] [83]

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start in the U.S. market. Even if this "slow start" were due to Covidien, that fact would not suffice to prove that Covidien had the power to exclude competitors, especially in light of all of the evidence of flourishing competition. Moreover, the evidence is that any such "slow start" was due to a variety of problems having nothing to do with Covidien. Day 8 Skinner Dep. 77:09-80:11 (DTX-1251) (Stericycle inhibited Daniels' attempts to expand nationally); *id.* at 103:14-106:20 (DTX-1148) (Daniels had ongoing problems with its waste hauler partners, including poor salesmanship and low-caliber employees); Forthcoming Smiley Testimony at 57:11-60:22, 67:06-23 (Daniels' had problems with sharps containers delivered to hospitals with blood stains, debris, and pungent smells); *id.* at 63:10-66:23 (Daniels had problems with getting sharps containers delivered promptly to hospitals).

78 Forthcoming Ordover Testimony; Day 9, Elhauge Direct 30:2-30:16; *see also Winter Hill Frozen Foods & Servs., Inc. v. Haagen-Dazs Co.*, 691 F. Supp. 539, 547 (D. Mass. 1988) ("the competitor's declining market share is evidence that such [a] competitor lacks [market] power").

79 Forthcoming Ordover Testimony.

80 Forthcoming Ordover Testimony.

81 Nor could Plaintiffs claim that Covidien's market share (~50-65% according to Plaintiffs) proves market/monopoly power, given case law establishing that market share alone is not sufficient. *See Rebel Oil, Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1439 (9th Cir. 1995); *L.A. Land Co., v. Brunswick Corp.*, 6 F.3d 1422, 1425 (9th Cir. 1993); *see also Exxon Corp. v. Berwick Bay Real Estate Partners*, 748 F.2d 937, 940 (5th Cir. 1984) (per curiam) ("monopolization is rarely found when the defendant's share . . . is below 70%"); *Colo. Interstate Gas Co. v. Natural Gas Pipeline Co. of Am.*, 885 F.2d 683, 694 n.18 (10th Cir. 1989) (same). In addition, Plaintiffs have not shown significant barriers to entry. *See Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1439 (9th Cir. 1995) ("To justify a finding that a defendant has the power to control prices, entry barriers must be significant.").

82 Plaintiffs' § 2 claim additionally fails because the evidence shows that Covidien obtained and maintained its market position through legitimate and competitive means unrelated to the challenged contracts; for example, due to "superior product, business acumen, [and] historical accident" (*Concord Boat*, 207 F.3d at 1060). Day 3, Smith Dep. 10:5-18 (Covidien's Sage and Devon lines are differentiated by features and benefits, and both lines are the results of acquisitions by Covidien. Covidien makes sales to hospitals based on strong customer relationships and high quality products.); Day 9, Elhauge Cross-Exam. 121:2-16 (Tyco's market share is attributable, at least in part, to its purchase of Sage); Day 10, Shaw (BD) Dep. 16:16-19:21 (Sage made a fast early entry into the U.S. sharps container market, which leads to a natural business advantage as a competitor); Day 3, Romano Dep. 271:12-21 (Covidien became a market leader because it was the best at product development, moving the product, understanding the needs of the customer, and meeting them.); *id.* at 277:11-21 (Covidien had success in its sales of sharps containers due to training in sales skills, good products, tools, and support.).

83 Even if the Covidien contracts at issue were anticompetitive, they could not give rise to antitrust liability because Plaintiffs bear at least equal responsibility for those contracts (because the contracts were entered into with GPOs, agents of the Plaintiffs, or directly with the Plaintiffs themselves). *See, e.g., CVD, Inc. v. Raytheon Co.*, 769 F.2d

III. PLAINTIFFS FAILED TO PRESENT SUFFICIENT EVIDENCE OF INJURY

It is well settled that "individual injury (also known as antitrust impact) is an element of [an antitrust] cause of action; to prevail on the merits, every class member must prove at least some antitrust impact resulting from the alleged violation." *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311 (3rd Cir. 2008); *see also Sullivan v. NFL*, 34 F.3d 1091, 1103 (1st Cir. 1994) ("An antitrust plaintiff must prove that he or she suffered damages from an antitrust violation."); *New Motor Vehicles*, 522 F.3d at 28 (antitrust plaintiff has a "duty to prove *each* [class member] was harmed by the defendants' practice") (emphasis added). Plaintiffs' antitrust claims fail because they have not proven that any and all class members suffered injury as a result of Covidien's actions.

Plaintiffs argue that Covidien's anticompetitive practices injured consumers in the sharps container market by depressing its rivals' output and producing higher prices for sharps containers than would otherwise have prevailed. The evidence is totally insufficient to support that claim.[84] As explained earlier, Plaintiffs presented no testimony from purchasers that they were injured in any way by the practices at issue. Indeed, the sole purchaser testimony in the record supports the opposite conclusion. Stephen Crowder, Natchitoches' Purchasing Director, testified (as Natchitoches' Rule 30(b)(6) witness on purchasing) that Natchitoches was not locked into Covidien, but instead purchased Covidien sharps containers because they were a

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842, 856 (1st Cir. 1985) ("Several courts have held that a plaintiff's complete, voluntary, and substantially equal participation in an allegedly illegal scheme precludes recovery for antitrust violations."); *Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n*, 830 F.2d 716, 724 (7th Cir. 1987) (holding "that the jury acted reasonably, upon consideration of the record as a whole, in concluding that General Leaseways bore substantially equal responsibility for the anticompetitive restrictions"); *THI-Haw., Inc. v. First Commerce Fin. Corp.*, 627 F.2d 991 (9th Cir. 1980).

[84] Plaintiffs have also failed to produce sufficient evidence to demonstrate that every Covidien buyer would have paid less for its sharps containers absent Covidien's contracting practices. Plaintiffs' experts merely calculated the *average* price they claim would have existed in a world without the alleged antitrust violations. As explained in Covidien's damages brief, there is no basis for the assumption that all consumers would have paid lower prices in a but-for world. Dkt. No. 336 at 3-5. Indeed, the opposite assumption is more likely. *Id.* at 4-5.

better, safer product than alternatives.[85] *See St. Francis*, 2009 WL 3088814, at *25 (in finding that plaintiffs failed to show that defendant's rebate programs caused injury, court stressed testimony by plaintiff hospital's marketing manager that "although Tyco has lower prices, he purchases from [Defendant] Bard because the hospital physicians prefer its products"). Moreover, Plaintiffs have failed to show that Covidien's practices harmed competition in the market by depressing rivals' ability to compete; again, the evidence is to the contrary.[86]

Instead of actual evidence, Plaintiffs rely primarily on expert testimony to prove injury. "When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict." *E.g.*, *Brooke Group*, 509 U.S. at 242; *accord Price v. GM Corp.*, 931 F.2d 162, 165 (1st Cir.1991). For the reasons set forth in Covidien's *Daubert* and damages briefs, Plaintiffs' experts failed to calculate a reliable measure of impact. Dkt. No. 176 at 8-20; Dkt. No. 205 at 5-20; Dkt. No. 336 at 5-12. Thus, Plaintiffs' "evidence" of injury is too speculative and unreliable to support antitrust liability as a matter of law. *See St. Francis*, 2009 WL 3088814, at *25 (granting summary judgment where "there is no showing that rebate programs caused St. Francis or any other plaintiff injury").[87] [88]

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[85] Day 12, Crowder Cross 16:22-18:7, 20:3-15.

[86] *See supra*, Section II.

[87] The certification of the class in this case can be challenged for these same reasons, and Covidien hereby preserves its objection thereto. *See, e.g., Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1176 (9th Cir. 2007); *Bell Atl. Corp. v. AT&T Corp.*, 339 F.3d 294, 302 (5th Cir. 2003); *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 160 (1982).

[88] At trial, Plaintiffs put on evidence of an assortment of purported "bad" acts, including alleged spying on competitors, the procurement of allegedly false scientific studies, and the dissemination of purportedly false advertising. Even if any of these acts could violate the antitrust laws, the evidence is too weak to support a finding that Covidien actually committed them. What is more, Plaintiff made no attempt to establish the existence or extent of any harm or damages that resulted from any of these acts. These were merely a legally irrelevant smokescreen presented by Plaintiffs to attempt to illegitimately taint the jury against Covidien. *See, e.g., Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224-25 (1993) ("Even an act of pure malice by one business

IV. PLAINTIFFS' DAMAGES ESTIMATE IS LEGALLY INSUFFICIENT TO SUPPORT A JURY VERDICT

Finally, Plaintiffs have failed to prove damages by any non-speculative estimation. In order to recover damages, an antitrust plaintiff must present "a just and reasonable estimate" of damages that is not based on "speculation or guesswork." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946); *Coastal Fuels* , 79 F.3d at 200; *Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors*, 850 F.2d 803, 816 (1st Cir. 1988).

Plaintiffs' estimate of antitrust damages falls woefully short of this standard. Plaintiffs' damages claim is based on their view that Covidien's customers paid higher prices for sharps containers than they would have but for the challenged contracts. But Plaintiffs' sole "evidence" of damages consists of the entirely speculative and unsupported theory of its expert, Dr. Singer. As explained in Covidien's Damages Brief (Dkt. No. 336), all of which Covidien hereby incorporates by reference, Dr. Singer's damages estimate is too unreliable and speculative to support a damages verdict for several reasons, including: (1) the positive relationship between seller concentration and price on which Dr. Singer's damages model is premised simply does not describe the sharps container market given ex ante competition for GPO contracts; and (2) Dr. Singer's model relies on the speculative and unreasonable estimates of the difference in rivals' foreclosure estimated by Professor Elhauge (*see supra*, Section I.A.2)[89].

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competitor against another does not, without more, state a claim under the federal antitrust laws [because] those laws do not create a federal law of unfair competition."); *R.W. Int'l Corp. v. Welch Food, Inc.*, 13 F.3d 478, 487 (1st Cir. 1994) ("Heavy-handed competitive tactics alone do not constitute an antitrust violation. . . . "); *Ball Mem'l Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1339 (7th Cir. 1986) ("Vigorous competitors intend to harm rivals, to do all the business if they can. To penalize this intent is to penalize competition."); *see also* Dkt. No. 318 at 18-21 (explaining irrelevance of such documents). Plaintiffs similarly relied on evidence purporting to show Covidien's "bad" anticompetitive intent, including documents indicating an intent to hurt rivals. Such evidence is insufficient to support antitrust liability. *See Barry Wright*, 724 F.2d at 232 ("'[I]ntent to harm' [rivals] without more offers too vague a standard in a world where executives may think no further than 'Let's get more business,'").

89 Those estimates (and thus Dr. Singer's model) assume that the challenged contracts were the sole reason Covidien had a higher share in the "burdened" segment of the market. In other words, Dr. Singer assumes that

Dr. Singer's damages analysis is also unreliable because it cannot distinguish between harm due to different types of contracts at issue. Dr. Singer only calculates damages for two broad categories of contracts: (1) all of Covidien's sole-source contracts; and (2) all other contracts in this case (*e.g.*, single-product share discounts, Spectrum, bundled rebates). In other words, even assuming his analysis is otherwise reliable, Dr. Singer's model – by his own admission at trial[90] – can only provide a reliable estimate of damages if (a) all sole source contracts are found unlawful or (b) all other contracts in this case are found unlawful. If some of the contracts that fall into either category are found lawful, Dr. Singer's damages model can no longer provide a damages estimate on which the jury could base a sustainable award.[91]

In sum, because Plaintiffs have failed to present legally sufficient evidence to supports its claim of damages, Covidien is entitled to judgment on that claim as a matter of law.

CONCLUSION

For the reasons set forth above, Covidien respectfully requests that judgment as a matter of law be entered in its favor on all of Plaintiffs' claims.

Dated: January 5, 2010

Respectfully submitted,

/s/ *James Donato*
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product features, brand loyalty, service levels, etc had absolutely no role in giving Covidien a higher percentage of the market among those hospitals subject to the Covidien contracts. The flaws with this assumption present an even greater issue with respect to Dr. Singer's analysis, given that he uses the estimates to quantify damages, whereas Professor Elhauge used them as merely evidence of the direction of impact. Forthcoming Guerin-Calvert Testimony.

[90] Day 10, Singer Cross 72:17-73:11 (Singer's damages assume liability as to (i) all sole source or (ii) all share contracts, as Professor Elhauge defined those categories.); *id*. at 73:19-74:1 ("Professor Elhague had had a way of classifying a hospital as being burdened or not burdened under these commitment contracts . . . And I assumed that those assumptions correspond with the liability or finding of liability. If it turns out there's no liability there, that he's classified people incorrectly, then I guess my damages model would be irrelevant.").

[91] Nor does Dr. Singer calculate damages for bundled discounts or any other alleged conduct Plaintiffs have raised.

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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 January 5, 2010.