

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

|   |   |  |
|---|---|--|
| <b>NATCHITOCHEs PARISH HOSPITAL</b>       | : |  |
| <b>SERVICE DISTRICT and JM SMITH</b>      | : | <b>Civil Action No. 05-12024 (PBS)</b> |
| <b>CORPORATION d/b/a SMITH DRUG</b>       | : |  |
| <b>COMPANY, on behalf of themselves</b>   | : |  |
| <b>and all others similarly situated,</b> | : | <b>Jury Trial Demanded</b>             |
|   | : |  |
| <b>Plaintiffs,</b>                        | : |  |
|   | : |  |
| <b>v.</b>                                 | : |  |
|   | : |  |
| <b>TYCO INTERNATIONAL, LTD.; and</b>      | : |  |
| <b>TYCO INTERNATIONAL (U.S.), INC.;</b>   | : |  |
| <b>TYCO HEALTHCARE GROUP, L.P.</b>        | : |  |
| <b>THE KENDALL HEALTHCARE</b>             | : |  |
| <b>PRODUCTS COMPANY,</b>                  | : |  |
|   | : |  |
| <b>Defendants.</b>                        | : |  |
|   | : |  |
|   | : |  |

**DECLARATION OF JOHN ALDEN MEADE  
IN SUPPORT OF PLAINTIFFS' SUPPLEMENTAL BRIEF  
IN OPPOSITION TO DEFENDANTS' MOTION TO EXCLUDE THE  
EXPERT REPORT AND OPINIONS OF PROFESSOR EINER ELHAUGE**

I, John Alden Meade, declare as follows:

1. I am an associate with the law firm of Odom & Des Roches LLP, counsel for Plaintiffs in this action.
2. Attached as Exhibit A is a true and accurate copy of the transcript of the deposition of Dr. Daniel L. McFadden, dated December 12, 2008.

SIGNED UNDER PENALTIES OF PERJURY THIS 5<sup>th</sup> DAY OF January, 2009.

/s/ John Alden Meade  
John Alden Meade

**CERTIFICATE OF SERVICE**

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on January 5, 2009.

**/s/ John Alden Meade**  
John Alden Meade

1 IN THE UNITED STATES DISTRICT COURT  
2 FOR THE DISTRICT OF MASSACHUSETTS

3 \_\_\_\_\_  
4 NATCHITOCHEs PARISH HOSPITAL SERVICE)  
5 DISTRICT, On Behalf of Itself and )  
6 All Others Similarly Situated, )

7 Plaintiffs, ) CA No.

8 vs. ) 05-12024

9 TYCO INTERNATIONAL, LTD., AND TYCO ) (BPS)  
10 INTERNATIONAL (U.S.) INC., TYCO )  
11 HEALTHCARE GROUP, L.P., THE KENDALL )  
12 HEALTHCARE PRODUCTS COMPANY, )  
13 Defendants. )

14 \_\_\_\_\_)

15 VIDEOTAPED DEPOSITION of DANIEL L.  
16 McFADDEN, Ph.D., called as a witness by and on  
17 behalf of the Plaintiffs, pursuant to the  
18 applicable provisions of the Federal Rules of Civil  
19 Procedure, before P. Jodi Ohnemus, Notary Public,  
20 Certified Shorthand Reporter, Certified Realtime  
21 Reporter and Registered Merit Reporter, within and  
22 for the Commonwealth of Massachusetts, at the  
23 offices of Shapiro, Haber & Urmy, 53 State Street,  
24 Boston, Massachusetts, on Friday, 12 December,  
25 2008, commencing at 9:15 a.m.

|        |   |        |
|--------|---|--------|
| Page 2 | <p>1 APPEARANCES:</p> <p>2</p> <p>3 GARWIN, GERSTEIN &amp; FISHER, LLP</p> <p>4 BY: Brett H. Cebulash, Esq.</p> <p>5 -and-</p> <p>6 Archana Tamoshunas, Esq.</p> <p>7 1501 Broadway</p> <p>8 New York, NY 10036</p> <p>9 212 398-0055</p> <p>10 Bcebulash@garwingerstein.com</p> <p>11 Atamoshunas@garwingerstein.com</p> <p>12 For the Plaintiffs</p> <p>13</p> <p>14</p> <p>15 COOLEY, GODWARD, KRONISH, LLP</p> <p>16 Jeffrey Gutkin, Esq.</p> <p>17 101 California Street</p> <p>18 5th Floor</p> <p>19 San Francisco, CA 94111-5800</p> <p>20 415 693-2026</p> <p>21 Jgutkin@cooley.com</p> <p>22 For the Defendants</p> <p>23</p> <p>24 ALSO PRESENT:</p> <p>25 Ralph Scopa, Videographer</p> | Page 4 |
| Page 3 | <p>1 INDEX</p> <p>2</p> <p>3 EXAMINATION OF: PAGE</p> <p>4</p> <p>5 DANIEL McFADDEN, Ph.D.</p> <p>6</p> <p>7 (By Mr. Cebulash) 6</p> <p>8</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>  | Page 5 |
| Page 4 | <p>1 EXHIBITS</p> <p>2</p> <p>3 EXHIBIT DESCRIPTION PAGE</p> <p>4</p> <p>5 McFadden 1 Declaration of Daniel</p> <p>6 L. McFadden 22</p> <p>7 McFadden 2 Reply Declaration of</p> <p>8 Daniel L. McFadden 48</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>  | Page 5 |

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1 and being first duly sworn by the Notary  
 2 Public, was examined and testified as  
 3 follows to interrogatories  
 4 BY MR. CEBULASH:  
 5 Q. Good morning, Doctor McFadden. How are  
 6 you today?  
 7 A. Good morning.  
 8 Q. How are you doing today?  
 9 A. Fine. It's early in the morning for me,  
 10 but I'm waking up.  
 11 Q. Okay. Do you prefer to go by  
 12 Doctor McFadden or Professor McFadden? What is  
 13 your preference?  
 14 A. I answer to both.  
 15 Q. Okay. All right. I may use both,  
 16 depending on which I remember.  
 17 Have you ever been deposed before?  
 18 A. I have.  
 19 Q. Okay. And can you recall the instances in  
 20 which you were deposed?  
 21 A. There have been quite a number of times,  
 22 so I --  
 23 Q. More than -- more than 30?  
 24 A. No. I would say but probably 20.  
 25 Q. Have they all been cases where you were

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1 retained as an expert?  
 2 A. Yes.  
 3 Q. And what was -- what was -- what was the  
 4 last time that you were deposed?  
 5 A. The last case in which I was deposed was,  
 6 I believe, a case involving a -- a patent dispute.  
 7 And that would have, I believe, been in this  
 8 calendar year. I don't remember the date. I think  
 9 in the summer.  
 10 Q. Okay. And is that a matter that was -- do  
 11 you know the name of that -- that matter?  
 12 A. I -- I knew it as Every Penny Counts  
 13 versus the Bank of America, but I don't know if  
 14 that's the official title of the suit.  
 15 Q. And what were you retained to do in that  
 16 matter?  
 17 A. I was retained to review the economic  
 18 background -- particularly the behavioral economics  
 19 background -- for programs to encourage consumer  
 20 savings.  
 21 Q. And who retained you in that matter?  
 22 A. I was working for Bank of America.  
 23 Q. And do you know the status of that case?  
 24 A. That's due to go to trial next winter --  
 25 this winter.

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1 Q. Do you know if there was a Daubert motion  
 2 filed with regard to your testimony in that case?  
 3 A. I don't believe so, no.  
 4 Q. Have you done any due diligence to see if  
 5 there was a Daubert motion filed in that case?  
 6 A. I'm sorry?  
 7 Q. Have you done anything -- done any  
 8 investigation -- to determine whether there was a  
 9 Daubert motion filed with regard to your testimony  
 10 in that matter?  
 11 A. No, I just followed the instructions of  
 12 the attorneys as to when they want me to appear for  
 13 what.  
 14 Q. Okay. So the last -- the last -- the last  
 15 time you appeared was for your deposition.  
 16 A. That's correct.  
 17 Q. And -- and that's the last thing that  
 18 you've done in that case?  
 19 A. That's correct.  
 20 Q. Okay. And you -- when were you retained  
 21 in -- in this matter?  
 22 A. Mid September of this year.  
 23 Q. And who retained you?  
 24 A. I -- I don't know the specific firms. I  
 25 -- I know it's on behalf of Covidien.

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1 Q. And were you retained -- have you been  
 2 retained by Covidien in any other matters, other  
 3 than this one?  
 4 A. Well, a month earlier in the -- in the  
 5 Daniels matter.  
 6 Q. So that would be mid August you were  
 7 retained in the Daniels matter?  
 8 A. That's correct.  
 9 Q. And what was your assignment in the  
 10 Daniels matter?  
 11 A. It was to look at Professor Elhauge's  
 12 expert report and provide a comment on his  
 13 econometric and statistical demonstrations.  
 14 Q. And were you deposed in the Daniels  
 15 matter?  
 16 A. No.  
 17 Q. And how many -- how many reports or  
 18 declarations did you file in the Daniels matter?  
 19 A. I filed a -- a declaration.  
 20 Q. A single declaration?  
 21 A. Yes.  
 22 Q. And do you know when that was prepared?  
 23 A. Well, it was prepared between mid August  
 24 and -- and early October. My recollection is it  
 25 was filed in mid October.

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1 Q. Okay. And how did your assignment differ  
 2 in Daniels in comparison to your assignment in this  
 3 case?  
 4 MR. GUTKIN: I'll just object and remind  
 5 you that there is a privilege as to your  
 6 communications with anyone at my law firm, and you  
 7 shouldn't disclose any of those communications,  
 8 although I imagine you can answer this question  
 9 without getting into too much of that.  
 10 A. The instructions were the same, as -- as  
 11 far as I understood them.  
 12 Q. Okay. So your -- how would you describe  
 13 your assignment in -- in this case?  
 14 A. To read Professor Elhauge's report and  
 15 comment on his econometric and statistical methods.  
 16 Q. Did you read any other -- anything else in  
 17 the record in this case, other than Professor  
 18 Elhauge's reports?  
 19 A. You'll have to sharpen the question by --  
 20 by asking for various periods of time.  
 21 Q. Okay. When did you prepare your initial  
 22 report?  
 23 A. In this case?  
 24 Q. Yes.  
 25 A. I would say early -- early in November or

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1 through -- from -- from when I got the assignment  
 2 in mid September until early November. I don't  
 3 remember a specific date of filing. There was  
 4 considerable overlap between the Daniels case and  
 5 this case.  
 6 Q. Okay. Okay. Between the time that you  
 7 received the assignment and when you completed your  
 8 initial report in this case, what materials did you  
 9 review?  
 10 A. Well, I was primarily reviewing --  
 11 reviewing Professor Elhauge's report. I believe I  
 12 was provided with some of the briefing in this  
 13 case, so I had them. I --  
 14 Q. Okay. And what -- what --  
 15 A. I don't recall reading them.  
 16 Q. Okay. Do you recall what briefing you  
 17 were provided?  
 18 A. No.  
 19 Q. Okay. And you're clear that that briefing  
 20 was prior to completing your initial report; is  
 21 that correct?  
 22 A. No, I'm not absolutely clear on that.  
 23 Q. Do you know the subject matter of the  
 24 briefing?  
 25 A. At -- at some point, I -- I saw briefings

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1 related to the -- the Daubert --  
 2 Q. Okay.  
 3 A. -- issue. But without going back, I  
 4 cannot recall the dates when I saw them.  
 5 Q. Did you review any of the depositions in  
 6 this case?  
 7 A. Not in that time frame. No.  
 8 Q. Okay. And have you, since filing your  
 9 initial report, reviewed depositions in this case?  
 10 A. I -- I recently reviewed parts of  
 11 Professor Elhauge's deposition. I don't recall, as  
 12 I sit here, what the date of that deposition was.  
 13 Q. Okay. Putting aside the date of that  
 14 deposition, when did you review Professor Elhauge's  
 15 deposition?  
 16 A. I don't recall that I -- my recollection  
 17 is, I did not review it before submitting my  
 18 initial declaration. I don't recall if -- whether  
 19 I looked at it before submitting a reply.  
 20 Q. Did you request to review Professor  
 21 Elhauge's deposition?  
 22 A. Did I request it?  
 23 Q. Yes.  
 24 A. No, I was not aware that it was available,  
 25 I think, until it was actually delivered to me.

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1 Q. Did you select the parts to review?  
 2 A. No, I had -- my -- my staff flagged the  
 3 parts that were relevant to his econometric and  
 4 statistical analysis.  
 5 Q. And did you review Professor Elhauge's  
 6 deposition prior to submitting your reply  
 7 declaration in this case?  
 8 MR. GUTKIN: Object as asked and answered.  
 9 A. You're now -- you're asking about the  
 10 deposition?  
 11 Q. I'm asking if you reviewed Professor  
 12 Elhauge's deposition prior to filing your reply  
 13 declaration in this case.  
 14 A. I don't recall doing so. I may have  
 15 received it prior. I don't recall that I reviewed  
 16 it in that time frame.  
 17 Q. So you reviewed it after?  
 18 A. Well, I did look at it, the -- the  
 19 selections that I was provided at -- at some point  
 20 in -- within the last month, yeah, I'd say -- or  
 21 six weeks, you know.  
 22 Q. And you just -- you don't know whether or  
 23 not you reviewed the transcript prior to the reply;  
 24 is that correct?  
 25 MR. GUTKIN: Objection as to form.

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1 A. I -- I don't recall the specific dates. I  
 2 would -- I -- my reply was based on Professor  
 3 Elhauge's report and on his reply.  
 4 Q. So you reviewed Professor Elhauge's  
 5 opposition prior to preparing your reply  
 6 declaration, correct?  
 7 A. His -- his -- his reply to my declaration  
 8 was available to me, yes. I did review that.  
 9 Q. Okay. And did you go back at that point  
 10 and review his merits report and his reply merits  
 11 report at that time as well?  
 12 A. I'm not sure about the terminology here.  
 13 I have -- I had one -- one Elhauge report that was  
 14 given to me in mid September. You call it a merits  
 15 report. I don't -- I don't know which report this  
 16 -- it was.  
 17 Q. Okay. So you were -- you were -- you were  
 18 provided with one Elhauge report that may have been  
 19 roughly four inches thick?  
 20 A. It was a -- a large report, yes.  
 21 Q. Okay. Do you recall reviewing Professor  
 22 Elhauge's reply report?  
 23 MR. GUTKIN: Object.  
 24 Q. Not the -- not the reply declaration, not  
 25 the declaration that -- that -- where he replied to

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1 your declaration. I'm speaking of the reply report  
 2 now. It was prepared in February of 2008.  
 3 A. I do -- I have not seen that report.  
 4 Q. Okay. Have you reviewed any of Professor  
 5 Elhauge's academic writings?  
 6 A. No.  
 7 Q. Have you reviewed any of the deposition of  
 8 Tyco's witnesses in this case?  
 9 A. No.  
 10 Q. Have you spoken with any of Tyco's  
 11 employees?  
 12 A. No.  
 13 Q. Have you spoken with Professor Ordober  
 14 with regard to this case?  
 15 A. No.  
 16 Q. Did you ask to see any of the deposition  
 17 transcripts with regard to Tyco's employees in this  
 18 case?  
 19 A. I did not.  
 20 Q. Was there a reason that you were not  
 21 interested in reviewing the testimonial record in  
 22 this matter?  
 23 MR. GUTKIN: Object to form. Misstates  
 24 the testimony.  
 25 A. Yes. I was retained and asked

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1 specifically to look at Professor Elhauge's  
 2 scientific methodology and whether it met  
 3 acceptable scientific standards.  
 4 That was a limited brief, and that's what  
 5 I concentrated on. And that is the sole matter on  
 6 which I have offered opinions in this case.  
 7 I was not retrained -- not retained as an  
 8 antitrust expert, and I have offered no opinions on  
 9 the -- the antitrust matters in this case.  
 10 Q. Okay. Did you -- did you review any of  
 11 the -- the documents that were referenced in  
 12 Professor Elhauge's initial report?  
 13 A. Do you -- are you -- are you asking me  
 14 specifically about his citations of -- of various  
 15 fact witnesses' depositions and that -- those types  
 16 of questions?  
 17 Q. Depositions or the actual documents --  
 18 record documents -- from Tyco's files and other  
 19 entities' files that he cites to as support for his  
 20 propositions in his initial merits report. Any of  
 21 those materials.  
 22 A. Well, I would distinguish between the  
 23 backup materials that he provided for his report  
 24 that are relevant to his graphical and statistical  
 25 analysis, and his citations of -- of material from

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1 fact -- fact witnesses and -- and non --  
 2 nonstatistical materials.  
 3 I did not -- I -- I was concentrating  
 4 solely on his -- his statistical analysis and  
 5 associated graphical analysis. So I certainly have  
 6 looked at his backup materials for that.  
 7 But beyond that, no, I have not looked at  
 8 the other materials that would be, perhaps, germane  
 9 to the broader antitrust issues -- the substantive  
 10 antitrust issues in the case.  
 11 Q. Okay. In your -- in your initial  
 12 declaration, you cite to a -- a matter. I think  
 13 its -- its nickname is the Rocky Flats matter. Do  
 14 you recall your work -- your work in the Rocky  
 15 Flats matter?  
 16 A. I do.  
 17 Q. Can you describe what your -- what your  
 18 role was in that -- in that case.  
 19 A. Yes. In that case, there was a defendant  
 20 expert who -- first of all, the case is about  
 21 property damage, loss in property values from  
 22 environmental events and reports. And there were  
 23 two econometric studies done of the impact of these  
 24 environmental events on property values: One by a  
 25 plaintiff's expert, one by a defendant's expert.

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1 And I was asked to critique both and -- and comment  
 2 on the soundness of each study, and I -- I did so.  
 3 Q. And what did you conclude with regard to  
 4 the soundness of plaintiffs' expert study?  
 5 A. It was a -- a rather badly-flawed  
 6 analysis, from an econometric point of view.  
 7 Q. And what did you conclude with regard to  
 8 defendants' expert study?  
 9 A. It was -- it was -- I concluded that it  
 10 was done in an appropriate manner.  
 11 Q. Okay. And can you recall who the two  
 12 experts were? First the plaintiffs', and then the  
 13 defendants'.  
 14 A. Yes, the -- the plaintiffs' expert was a  
 15 Doctor Radke; and defendants' expert was Doctor  
 16 Wise.  
 17 Q. Doctor Wise?  
 18 A. Wise.  
 19 Q. W-i-s-e?  
 20 A. Yes.  
 21 Q. Okay. And did you ever learn of the  
 22 outcome of the Rocky Flats matter?  
 23 A. Yes, I understand that the plaintiffs  
 24 prevailed in that case.  
 25 Q. And do you understand the amount of the

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1 judgment?  
 2 A. No, I don't know that number.  
 3 Q. Do you know if it was in the many hundreds  
 4 of millions of dollars?  
 5 A. I don't -- I have not read the judgment.  
 6 I don't know what --  
 7 Q. Okay.  
 8 A. -- its nature is.  
 9 Q. In the Rocky Flats, who -- who retained  
 10 you to critique both experts?  
 11 A. Well, I -- actually, I don't know the --  
 12 the answer to that question. It was -- Department  
 13 of Energy was the defendant at some point. And I  
 14 believe that they were probably the entity that  
 15 retained me, but I can't be -- I don't -- I'm not  
 16 sure.  
 17 Q. Okay. Did you have opportunity to review  
 18 Professor Ordover's reports in this matter?  
 19 A. I have done so recently.  
 20 Q. Okay. Did you have opportunity to  
 21 critique Professor Ordover's work in this matter?  
 22 MR. GUTKIN: Object to form.  
 23 A. Well, in terms of physical time, no, I  
 24 didn't. I was provided his reports, I think, on  
 25 the day before yesterday.

Page 20

1 Q. Okay.  
 2 A. So I looked at them on the plane coming  
 3 here.  
 4 Q. And can you identify which of Professor  
 5 Ordover's reports you were provided and looked at.  
 6 A. There -- there was a -- I cannot give you  
 7 dates. There was a report, and then there was a  
 8 reply to Professor Elhauge. And that reply was, I  
 9 think, in November of this year.  
 10 Q. Okay. Maybe if you can't recall the --  
 11 either the dates or the -- or the titles, perhaps  
 12 if you could do it by size, because --  
 13 A. Well, I can -- I can also open my computer  
 14 where I have copies of this and -- and read it off  
 15 specifically, if you wish.  
 16 MR. CEBULASH: Is that okay?  
 17 MR. GUTKIN: Yeah, I mean, as long as --  
 18 MR. CEBULASH: I want --  
 19 MR. GUTKIN: -- it's limited to an inquiry  
 20 as to what exactly he reviewed.  
 21 MR. CEBULASH: Yeah, I want to know which  
 22 documents -- which reports those were --  
 23 THE WITNESS: Sure.  
 24 MR. CEBULASH: -- what I'm trying to  
 25 determine.

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1 THE WITNESS: (Reviews computer.)  
 2 A. Okay. The first report is an expert  
 3 report of Professor Ordover, dated January 31st,  
 4 2008.  
 5 Q. Okay.  
 6 A. (Witness reviews screen.) And the second  
 7 is an expert reply declaration of Professor  
 8 Ordover, dated November 26, 2008.  
 9 Q. Okay. Thank you.  
 10 A. Should I keep this open? Are you going to  
 11 have more questions like this?  
 12 MR. GUTKIN: Why don't you close it and  
 13 see if they need --  
 14 MR. CEBULASH: Yeah.  
 15 Q. Did you -- did you request copies of  
 16 Professor Ordover's January 31st report and/or his  
 17 reply of November 26th?  
 18 A. At -- I had a meeting with -- meeting with  
 19 counsel, and -- and -- and that came out of a  
 20 discussion with counsel. I --  
 21 Q. Did you review the -- in -- turning back  
 22 to the Rocky Flats matter, did you review the  
 23 Court's opinion with regard to your testimony in  
 24 that matter?  
 25 A. I did not.



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1 Q. Did you -- do you -- did you ever know  
 2 what the Court said about your critiques in that  
 3 matter?  
 4 A. I've never looked.  
 5 Q. Did you testify at trial?  
 6 A. I did.  
 7 Q. And your -- your retention in that matter  
 8 was over a period of nearly a decade; is that  
 9 correct?  
 10 A. It was a very drawn-out thing. I don't  
 11 recall the specific dates, but somewhere from the  
 12 mid '90s to about a year or two ago that it was  
 13 finally resolved.  
 14 (McFadden I, Declaration of Daniel  
 15 L. McFadden.)  
 16 Q. Doctor McFadden, I've asked the court  
 17 reporter to mark as Exhibit I a document entitled,  
 18 "Declaration of Daniel L. McFadden in Support of  
 19 Motion to Exclude the Expert Report and Opinions of  
 20 Professor Einer Elhauge."  
 21 Is this the first report that you prepared  
 22 in this matter?  
 23 A. Yes.  
 24 Q. Were your conclusions the same in the  
 25 Daniels case as they are in this matter?

Page 23

1 MR. GUTKIN: Object to form.  
 2 A. Well, it's a broad -- broad question, but  
 3 it -- the -- the core analysis of Professor Elhauge  
 4 was -- was the same in both cases, and the -- my  
 5 critique was correspondingly very similar.  
 6 I -- to parse it more than that, we'd have  
 7 to go to the details.  
 8 Q. Okay. Well, can you -- can you recall any  
 9 instances where your opinions diverged between the  
 10 -- your Daniels work and your work in this case?  
 11 MR. GUTKIN: Object to form.  
 12 A. Not specifically.  
 13 Q. Do you know the status of the Daniels  
 14 matter?  
 15 A. I understand that case has settled.  
 16 Q. Do you know any of the terms of the  
 17 settlement?  
 18 A. No, I do not.  
 19 Q. Did you ever ask?  
 20 A. I'm sorry?  
 21 Q. Did you ask for the terms in the  
 22 settlement? Were you curious?  
 23 A. I -- I did ask whether that was -- it was  
 24 public, and I was told that the fact that there was  
 25 a settlement was public, but that the terms were

Page 24

1 not.  
 2 Q. Okay. Could you turn to Page -- well -- I  
 3 don't know if there's page numbers on here. Let's  
 4 see. Let's go to -- I guess go by paragraph on  
 5 this -- on your report.  
 6 Could you turn to Paragraphs 8 and 9,  
 7 please.  
 8 Do you see in -- in Paragraphs 8 and 9 you  
 9 use the term -- when you're referring to Professor  
 10 Elhauge's analysis -- that you find the analysis to  
 11 be of "no probative value"? Do you see that?  
 12 A. I see that, yes.  
 13 Q. Okay. What -- what are you referring to  
 14 when you -- when you -- when you use the term, "no  
 15 probative value"?  
 16 A. What the term means to me is that it's not  
 17 useful to the finder of fact in this case.  
 18 Q. Okay. And is that a -- is that a term of  
 19 art in econometrics?  
 20 A. I would say no. It's a borrowed term from  
 21 legal -- legal terminology.  
 22 Q. It's not taken from Perry Mason, is it?  
 23 A. I don't recall hearing it on Perry Mason.  
 24 Q. Do you recall where you did hear it?  
 25 A. Over -- over many years, lawyers --

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1 lawyers use the term, and I've -- I've adopted,  
 2 because it does have a fairly precise meaning,  
 3 although I'm not in here intending to suggest a  
 4 specific legal meaning in terms of my opinion.  
 5 Q. Okay. And -- and is that a -- is that a  
 6 term you've used in your academic writings?  
 7 A. No.  
 8 Q. Is there a different approach that you  
 9 employ in preparing this declaration, vis-a-vis a  
 10 peer-reviewed academic undertaking that you might  
 11 engage in?  
 12 A. I would say no substantial difference.  
 13 Q. Okay. Is there a -- some insubstantial  
 14 differences?  
 15 A. Well, I would say in preparing --  
 16 preparing a report like this, I'm -- I'm relying on  
 17 staff. Whereas, in most cases, when I'm doing an  
 18 academic review, I may rely on one research  
 19 assistant, but not on -- not on a larger staff.  
 20 Q. Okay. And typically is the research  
 21 assistant, would that be one of your students --  
 22 A. For academic.  
 23 Q. -- for academic?  
 24 A. Yes.  
 25 Q. Okay. And would it typically be a

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1 graduate student that you'd be working with?  
 2 A. Yes.  
 3 Q. And would it typically be a candidate for  
 4 a Ph.D.?  
 5 A. Yes.  
 6 Q. Okay. And typically, what would be your  
 7 level of interaction with a graduate student that  
 8 was helping you prepare an academic study? Would  
 9 it be daily interaction?  
 10 A. Oh, I don't think -- I think the -- the  
 11 nature of the interaction would depend on the --  
 12 the task. The way I would do an academic review --  
 13 and actually, in this -- similarly, the way I would  
 14 do a review for litigation purposes -- would be to  
 15 set out a plan of analysis, assign specific tasks,  
 16 and then the -- the frequency of interaction would  
 17 depend on how -- how big the task is, whether --  
 18 whether issues arise along the way as to how this  
 19 would be executed.  
 20 Q. And did you -- did you set out a plan of  
 21 analysis for your initial report in this case?  
 22 A. I did.  
 23 Q. Okay. And could you describe the items in  
 24 the plan of analysis for me.  
 25 A. I would say that the -- I read Professor

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1 Elhaug's report, and I -- I noted what I saw as  
 2 potential problems. And I then thought about those  
 3 and analyzed those myself. And I also asked staff  
 4 to go to the backup materials, and first of all,  
 5 replicate and determine what Professor Elhaug  
 6 actually did, and then performed subsequent  
 7 analysis to clarify for me what was going on with  
 8 these data and with his analysis.  
 9 Q. And what was the -- the -- the time period  
 10 between setting up your plan of analysis and the  
 11 completion of the analysis?  
 12 A. Well, this is somewhat complicated by the  
 13 fact that the analysis in the Daniels case and the  
 14 analysis in this case were going on somewhat in  
 15 parallel, with substantial overlap. But the plan  
 16 of analysis for the Daniels case was set in late  
 17 August/early September, and the staff work on the  
 18 backup began in that -- in that period.  
 19 And I'd say in this case, after I was  
 20 retained in -- in mid September, we began both  
 21 those tasks. Immediate -- immediately a plan of  
 22 analysis was set out, based on my reading of  
 23 Professor Elhaug's report as soon as it became  
 24 available. And more or less simultaneously, the  
 25 staff went to work on acquiring and understanding

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1 his backup materials.  
 2 Q. Do you recall, sitting here today,  
 3 differences in your plan of analysis between the  
 4 Daniels matter and this matter?  
 5 A. No, I don't recall any specific  
 6 differences.  
 7 Q. Were there any differences?  
 8 A. I'd have to go back and read the two  
 9 reports side by side to -- to answer that question  
 10 definitively. But I don't recall any major  
 11 differences between Professor Elhaug's analysis  
 12 and claims in the two cases. Obviously, the focus  
 13 in the Daniels case was more on the impact on  
 14 Daniels. But I think in terms of the analysis that  
 15 Professor Elhaug carried out, it was -- he was  
 16 relying on a similar statistical analysis in both  
 17 cases. I'd say the issue of the Novation analysis  
 18 was much more prominent in the -- in this case than  
 19 it was in the Daniels case.  
 20 I'd -- in fact, without checking, I don't  
 21 even recall if that was part of the Daniels case.  
 22 I believe it was, but I'd have to check.  
 23 Q. Okay. You indicated that your  
 24 understanding is that in the Daniels case the  
 25 analysis was the impact on Daniels. What's your

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1 understanding of the analysis of the impact in this  
 2 case?  
 3 MR. GUTKIN: Object to form.  
 4 A. Well, I understand this is a -- a class  
 5 action case in which the Plaintiffs are hospitals.  
 6 So the -- the issue in this case is the impact on  
 7 the -- on those hospitals, those Plaintiffs.  
 8 Q. And how would you describe that impact?  
 9 MR. GUTKIN: Object to form.  
 10 A. Well, I -- I don't think I can easily  
 11 characterize it. It's -- it -- that's -- that's  
 12 the characterization of the -- of the -- of the  
 13 Plaintiffs' case, and I don't have that in front of  
 14 me. I can't reproduce it from memory.  
 15 Q. Do you have -- I mean, you prepared two  
 16 reports in this matter. Do you have any idea --  
 17 A. Well --  
 18 Q. -- which --  
 19 MR. GUTKIN: Object to form.  
 20 A. As a -- as a broad matter, the Plaintiffs  
 21 are claiming that Covidien engaged in  
 22 anticompetitive practices which harmed the  
 23 Plaintiffs.  
 24 Q. Okay. Can you provide any more -- more  
 25 detail --

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1 A. Well, I --  
 2 Q. -- on that?  
 3 A. -- think Professor Elhauge's theory is  
 4 that rivals were foreclosed from portions of this  
 5 market. And his theory, from there, would -- would  
 6 make some -- some connection to the impact it had  
 7 on the -- on the Plaintiffs, although I cannot  
 8 easily characterize that.  
 9 Q. Is it because you -- you don't understand  
 10 it, or you did not review it?  
 11 MR. GUTKIN: Object to form.  
 12 A. Well, that's a broad question. And so  
 13 it's hard for me to answer specifically. But I --  
 14 I read it. I think I understand what his claims  
 15 are. I don't understand the logic -- the economic  
 16 logic of those claims.  
 17 Q. Okay. I -- I'd like to -- you -- you  
 18 indicate that you don't understand the economic  
 19 logic of those claims. What don't -- what are the  
 20 claims, and what don't you understand about the  
 21 economic logic of those claims?  
 22 A. At various -- at various times, Professor  
 23 Elhauge says that prices were elevated by Covidien  
 24 practices. At other times, he says that prices  
 25 were reduced by Covidien practices. It seems to me

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1 that in -- in his argument, that foreclosure --  
 2 that foreclosure occurred and -- and injured the  
 3 Plaintiffs, he must have in mind some mechanism by  
 4 which rivals were impeded from entering this  
 5 business and that had some long -- long-term effect  
 6 on the Plaintiffs. That has the flavor of  
 7 something like a predatory pricing claim.  
 8 But I would say that the -- these matters  
 9 are not matters that enter -- enter my opinion. My  
 10 opinion is -- is based on what he did in terms of  
 11 his statistical analysis and whether the -- the  
 12 question that he posed and tried to answer  
 13 statistically is helpful to the resolution of this  
 14 case. That's -- that's the -- those are the areas  
 15 in which I have offered a -- an opinion.  
 16 Q. Well, when you say, "helpful to the  
 17 resolution of this case," what are you -- what are  
 18 you referring to?  
 19 A. The question -- the question is if -- is,  
 20 if the fact finder in this case has whatever other  
 21 facts are available in the case, does -- does the  
 22 statistical analysis of Professor Elhauge sharpen  
 23 any conclusions that can be drawn? And I think the  
 24 answer is it does not.  
 25 It's -- it's misleading, and it's

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1 inadequately precise to be useful.  
 2 Q. Have you ever worked with Professor  
 3 Ordover before?  
 4 A. I have not worked with him, no. I can't  
 5 say that there are any cases I've been involved  
 6 with in the past in which he may have also been  
 7 involved. But not -- not in any direct way, no.  
 8 Q. Has he ever been associated with The  
 9 Brattle Group?  
 10 A. Professor Ordover?  
 11 Q. Yes.  
 12 A. Not to my knowledge, but I don't know  
 13 everything that The Brattle Group does.  
 14 Q. How -- what's -- how long have you been  
 15 associated with The Brattle Group?  
 16 A. Since 2001, I believe.  
 17 Q. Is -- is -- did you have any critiques of  
 18 Professor Ordover's methods when you reviewed --  
 19 reviewed his reports yesterday?  
 20 MR. GUTKIN: Object to form.  
 21 A. I did not read them to do that or with the  
 22 -- take the time to do that, so I'm not in a  
 23 position to critique him at this -- at this point.  
 24 Q. Well, what was your purpose of reading  
 25 Professor Ordover's --

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1 A. Primarily to understand his critique on  
 2 selectivity and clarify its relation to my  
 3 critiques, which involve selectivity.  
 4 Q. Are you familiar with a Dr. Orley  
 5 Ashenfelter?  
 6 A. I am.  
 7 Q. Have you ever worked with Doctor  
 8 Ashenfelter?  
 9 A. I have not worked with him. I was the  
 10 arbitrator for the tobacco settlement and Professor  
 11 Ashenfelter was one of the testifying experts from  
 12 -- from whom I took testimony.  
 13 Q. Did you review any of the contracts in  
 14 this case?  
 15 A. I did not.  
 16 Q. Did you review the -- Professor Ordover's  
 17 class certification reports in this matter?  
 18 A. No, I did not.  
 19 Q. Did you review the class certification  
 20 opinions in this matter?  
 21 A. No, I did not.  
 22 MR. GUTKIN: Object to form.  
 23 Q. Are you aware that the class was certified  
 24 in this -- in this matter?  
 25 A. Existentially, I'm aware of it, yes.

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1 Q. How does one become existentially aware  
 2 that a class is certified?  
 3 A. Otherwise, I would be in San Francisco.  
 4 Q. I'm not going to argue with you on that,  
 5 but -- have you ever been involved in a class  
 6 action other than this one and the Rocky Flats  
 7 matter?  
 8 A. You mean as a -- as an expert?  
 9 Q. I guess the tobacco you were -- that was a  
 10 class action as well?  
 11 A. No, that was the -- that was the --  
 12 Q. The states?  
 13 A. -- the settlement -- the settlement, and  
 14 it was the terms of the settlement that called for  
 15 an arbitrator to determine the amounts that would  
 16 be transferred from the tobacco companies to the  
 17 states each year. So that was a -- a legal  
 18 proceeding, but not -- not a -- you know, outside  
 19 the regular court system.  
 20 But come back to your question: Yes, I  
 21 have been involved in other class action cases.  
 22 Q. Can you recall those matters?  
 23 A. I was involved, at various points, with  
 24 several other property value -- environmental  
 25 damage property evaluation cases. And in the

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1 1980s, I worked on asbestos and DES. Those were  
 2 class actions. They were market share liability  
 3 cases, and -- and those cases I was primarily --  
 4 not -- adjudicating is the wrong word -- providing  
 5 information that allowed the -- the defendants to  
 6 sort out what their respective liabilities would  
 7 be.  
 8 Q. So you were -- you aided them in  
 9 allocating their responsibility; is that --  
 10 A. That's correct.  
 11 Q. Okay. Have you ever opined on behalf of a  
 12 class?  
 13 A. I hesitate, because I cannot always recall  
 14 who -- who the plaintiffs in -- in various cases  
 15 were, but I -- I believe not.  
 16 Q. Okay. Do you ever recall reviewing  
 17 Professor Ordovery's list of the top 20 selling Tyco  
 18 sharps containers?  
 19 A. No, I -- I don't recall reviewing a  
 20 document by that name. I -- I recall getting that  
 21 information from Professor Elhauge's backup  
 22 documents, but that's not -- that's a different  
 23 source.  
 24 Q. Do you -- do you know the relative portion  
 25 of sales that Tyco's top 10 selling sharps

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1 containers are relative to Tyco's entire sales of  
 2 sharps containers? Do you know the percentage?  
 3 A. I don't recall the number.  
 4 Q. Would it surprise you if it was  
 5 approximately 40 percent of their sales were the  
 6 top 10 selling sharps containers?  
 7 A. That would not surprise me.  
 8 Q. Did you ever become aware -- other than  
 9 just now -- as to the amount of sales that are  
 10 accounted for by Tyco's top 10 selling items?  
 11 A. I'm -- I'm aware of the -- some of the  
 12 details, but not -- I'd say not -- not the bottom  
 13 line.  
 14 I've looked at Tyco's sales by SKU and  
 15 that -- very large datasets. I didn't -- I don't  
 16 recall --  
 17 Q. Tyco --  
 18 A. -- calculating shares by -- for -- for  
 19 different products.  
 20 Q. Okay. And you didn't -- you didn't  
 21 calculate share from the top 10 products, did you?  
 22 A. I don't recall doing that, no.  
 23 Q. Would you have asked your -- instructed  
 24 your staff to make that determination as to what  
 25 percentage of Tyco's sales are accounted for by

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1 their top 10 selling products?  
 2 A. I don't recall asking them to do that, no.  
 3 Q. Do you -- do you know how many SKUs -- you  
 4 said you did an analysis on SKUs. Do you know how  
 5 many SKUs Tyco has with regard to their sharps  
 6 containers?  
 7 A. There are a lot, but I don't recall the  
 8 specific number.  
 9 Q. In the hundreds?  
 10 A. I think more than the hundreds, but I  
 11 don't recall.  
 12 Q. Do you recall doing -- instructing your  
 13 staff or conducting yourself a study of Tyco's  
 14 economies of scale?  
 15 A. Oh, I definitely instructed my staff to  
 16 work on this, and I -- I did this myself in the  
 17 sense of instructing them as to what -- what to do.  
 18 Q. Did you instruct them to lop off 40  
 19 percent of Tyco's sales in conducting that study?  
 20 MR. GUTKIN: Object to form.  
 21 A. No. In fact, I -- what I did was  
 22 specifically instruct them to look -- look at  
 23 Professor Elhauge's regressions on returns to scale  
 24 and ask whether those -- those regressions were  
 25 consistent with -- or not -- with findings in

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1 economies of scale, as -- in my original  
 2 declaration I pointed out that there is a very  
 3 severe flaw in Professor Elhaug's argument that he  
 4 -- he takes different types of containers of  
 5 different sizes and different production costs and  
 6 -- and mixes them all together in an  
 7 apples-and-oranges comparison.  
 8 That -- that confounds any true economic  
 9 economies of scale with -- with problems of  
 10 mismatch -- mismatches, miscomparisons between  
 11 products.  
 12 So I instructed my staff to run some  
 13 models which try to clear up that confounding and  
 14 -- and isolate economies-of-scale effects.  
 15 One of the things that I instructed them  
 16 to do as part of this was to -- was to look at  
 17 whether -- whether economies of scale were present  
 18 in smaller-run products that were absent in -- in  
 19 longer-run products. And in that connection, I  
 20 instructed them to set up the program in such a way  
 21 that they could include or exclude high-volume  
 22 products. They -- they did so.  
 23 I believe my backup materials for the  
 24 original declaration include that program. And if  
 25 that's -- and what we did was we ran that program

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1 with and without lopping off high-volume products  
 2 as part of the -- as part of the analysis of -- of,  
 3 essentially, to understand what was going on with  
 4 these -- with these data.  
 5 Q. Did your staff come to you and say, Doctor  
 6 McFadden, we've -- we've done the regressions for  
 7 economies of scale, and we've excluded 40 percent  
 8 of Tyco sales -- Tyco sales in running those  
 9 regressions?  
 10 MR. GUTKIN: Object to form.  
 11 A. No, they came to me and said, We -- We've  
 12 -- in effect -- followed your instructions to run  
 13 the regressions with and without the top 10. And  
 14 it -- it gives results that, in -- in one case,  
 15 show economies of scale, and in the other case,  
 16 show no economies of scale, and the -- and the  
 17 patterns are such that they're exactly the opposite  
 18 of what -- what you'd expect.  
 19 That is, the top 10 should have exhausted  
 20 economies of scale. But what happens is, when they  
 21 are included, you show economies of scale. When  
 22 they're excluded, you do not show economies of  
 23 scale. My -- my conclusion from that is that  
 24 there's something going on in these data that's not  
 25 economic economies of scale. Something else is

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1 going on with these data. And these -- this --  
 2 this type of analysis simply does not give a -- a  
 3 clear and definitive statistical answer on the  
 4 question of whether they're economies of scale.  
 5 Q. Did you have your staff check to see how  
 6 many of Tyco's SKUs were discontinued after the  
 7 analysis was run?  
 8 A. Could you -- could you elaborate on -- on  
 9 -- on your question.  
 10 Q. Well, isn't it possible that low selling  
 11 SKUs are discontinued by Tyco? Why would you  
 12 include those in your analysis?  
 13 MR. GUTKIN: Object to form.  
 14 A. Well, I -- I'm having trouble getting the  
 15 basis for your question. Are you -- are you giving  
 16 me the proposition that a -- an analysis over all  
 17 SKUs included products that were discontinued  
 18 somewhere along the way?  
 19 Q. I'm asking you, your staff excluded 40  
 20 percent of Tyco sales in running this analysis.  
 21 I'm asking if, correspondingly, they looked to see  
 22 which of the SKUs were discontinued and perhaps  
 23 removed those from the analysis as well?  
 24 A. Well, I object to your characterization  
 25 that it's simply false. We -- we ran the analysis

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1 on all products, and on all products except the top  
 2 10. We ran both analyses.  
 3 And as I've indicated, the analysis using  
 4 all products showed economies of scale at a -- at a  
 5 convention level of significance. The analysis  
 6 dropping the top 10 did not show economies of scale  
 7 at a standard level of significance.  
 8 If there are, in fact, economies of scale  
 9 which are exhausted at some point, then those --  
 10 those results are inconsistent. And my conclusion  
 11 is, there is no consistent statistical evidence for  
 12 economies of scale.  
 13 Your -- your characterization that we  
 14 excluded 40 percent of the -- the data is -- is  
 15 simply incorrect. That's -- that's false.  
 16 Q. And where did you disclose the fact that  
 17 you excluded the top 10 products in the regression  
 18 that you reported in your report? Where is that  
 19 disclosure?  
 20 A. It's -- it's not in the report. The only  
 21 thing that I say in the report is I did not find  
 22 consistent statistical evidence for economies of  
 23 scale.  
 24 Let me add that this was a critique of  
 25 Professor Elhaug's claims; that there were

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1 statistical flaws in his analysis, most importantly  
 2 statistical flaw of running regression across  
 3 different products and treating that as evidence on  
 4 economies of scale. That's simply economic  
 5 nonsense.  
 6 Q. Okay.  
 7 A. I have no opinion myself as to whether  
 8 there are or are not economies of scale. The issue  
 9 here is whether the statistical analysis that he  
 10 did was sound, not -- not the question of fact.  
 11 Q. So you've -- you've reached no conclusion  
 12 on the question of fact; is that correct?  
 13 A. Yeah. The only conclusion that I've  
 14 reached is that the -- is statistical evidence that  
 15 Professor Elhauge presents and that my own analysis  
 16 finds is that these data don't show a consistent  
 17 statistical result, one way or the other.  
 18 Q. Did you review Professor Ordovery's work or  
 19 his conclusions on economies of scale?  
 20 A. I did not.  
 21 Q. If Professor Ordovery concluded that there  
 22 were economies of scale, would that make your  
 23 critique merely academic?  
 24 MR. GUTKIN: Object to form.  
 25 A. No, because if -- if you are doing a

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1 scientific experiment on econometric analysis and  
 2 putting it forward as -- as evidence in a case,  
 3 then that -- that should be done properly. And if  
 4 it's done improperly, then it's not academic. It's  
 5 a -- a disadvantage to the fact-finder in the case  
 6 to have flawed results presented.  
 7 Q. And that's a disadvantage that Professor  
 8 Ordovery is handicapped in overcoming; is that -- is  
 9 that your testimony?  
 10 MR. GUTKIN: Object to the form. Vague.  
 11 A. That's certainly not my testimony. In  
 12 fact, I'm having trouble with your -- with your  
 13 leap there.  
 14 I have not studied Professor Ordovery's  
 15 analysis of returns to scale. I have studied  
 16 Professor Elhauge's statistical analysis of returns  
 17 to scale, and my opinions are based on Professor  
 18 Elhauge's analysis.  
 19 Q. Is it -- is it true that -- that your --  
 20 your backup, even with this exclusion of the top 10  
 21 selling items, does show significance at the 90  
 22 percent level; is that correct?  
 23 A. The conclusion I reach from my -- my  
 24 analysis of Professor Elhauge's database on this  
 25 was that you get contradictory statistical

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1 conclusions. One is that if you include the top  
 2 10, you get a -- what appears to be significant  
 3 returns to scale. If you exclude the top 10, you  
 4 -- you do -- you get insignificant returns.  
 5 I don't recall the -- whether it was  
 6 significant. The 90 percent level, my recollection  
 7 -- I think my statement was that it was not  
 8 significant at the conventional level; that is, the  
 9 -- the commonly-used 95 percent level. I don't  
 10 think I said 95 percent in my declaration.  
 11 Q. Well, it was -- you -- earlier we  
 12 discussed the term "no probative value." Is -- is  
 13 conventional statistical level a -- a term that the  
 14 court should or would be familiar with, in your --  
 15 in your mind?  
 16 MR. GUTKIN: Object to form.  
 17 A. You have two parts of your question: One  
 18 -- one is -- regards probative value, and -- and my  
 19 critique in which I conclude that Professor  
 20 Elhauge's analysis of returns to scale has no  
 21 probative value is -- is based on his combining  
 22 different products into a single regression and  
 23 claiming that tells you something about the  
 24 economics of returns to scale. And as I -- as I've  
 25 indicated, that's an apples-to-oranges comparison,

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1 which is -- is economic nonsense. That simply  
 2 cannot tell you anything about returns to scale.  
 3 So that's my -- that's the foundation for  
 4 my statement about the probative value.  
 5 Now, on the questions of what significance  
 6 levels are appropriate, I've -- I have not offered  
 7 an opinion in my declaration on what significant  
 8 levels -- significance levels the Court should use.  
 9 Q. And what was the -- what was the phrase  
 10 you used, common significant --  
 11 A. Conventional significance level.  
 12 Q. And --  
 13 A. That's -- that's 95 percent, and that's --  
 14 that's commonly used in academic work. It's --  
 15 it's a useful benchmark for determining something  
 16 about a -- a statistical analysis.  
 17 Q. Did you run your regression excluding the  
 18 top 20 products?  
 19 A. I did not.  
 20 Q. Did you run it excluding the top 30  
 21 products?  
 22 A. I ran two regressions: One with all the  
 23 products, and second with the top 10 excluded.  
 24 Q. Did you do it -- run it with the top nine  
 25 excluded?

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1 MR. GUTKIN: Object. Asked and answered.  
 2 A. I just answered. I ran two, and one was  
 3 with all products, and the second was with the 10  
 4 -- the 10 largest volume products excluded.  
 5 Q. Could you -- could you find the disclosure  
 6 in your initial report with regard to the exclusion  
 7 of the 10 largest volume products from your  
 8 regression.  
 9 MR. GUTKIN: Objection. Asked and  
 10 answered.  
 11 A. As I said earlier, the statement in my  
 12 declaration is that I found no consistent  
 13 statistical evidence for returns to scale. The --  
 14 the -- my backup materials included the program  
 15 which, when run with and without the -- the limit  
 16 variable, gives the two regressions on which I base  
 17 that conclusion.  
 18 Q. And did you recognize that Professor  
 19 Elhauge was able to figure out that you excluded  
 20 the top 10 products, even though it was not  
 21 disclosed in your report?  
 22 MR. GUTKIN: Objection as to form.  
 23 A. Would you restate the question.  
 24 Q. Did you -- I'm asking you, are you aware  
 25 that, notwithstanding the fact that you did not

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1 disclose that you excluded the 10 largest products  
 2 from your analysis in the text of your report, that  
 3 Professor Elhauge, in his initial Daubert  
 4 declaration, was able to determine that you had, in  
 5 fact, excluded the top 10 products from your  
 6 analysis?  
 7 MR. GUTKIN: Same objection.  
 8 A. I ran regressions with and without the top  
 9 10 in. It was in -- in my backup documents  
 10 provided with -- with the declaration. Professor  
 11 Elhauge's claim that I did not run those  
 12 regressions is -- is false. That's -- that's false  
 13 testimony on his part.  
 14 Q. Okay. Did you -- did you include that --  
 15 that statement -- that Professor Elhauge has  
 16 included false testimony -- in your -- your reply  
 17 to Professor Elhauge?  
 18 A. I believe so. I'd have to go and look. I  
 19 -- I -- let me bring up that document.  
 20 Q. I'll -- I'll introduce that document so --  
 21 MR. CEBULASH: I think that would be --  
 22 MR. GUTKIN: Okay. At some point we  
 23 should start looking for a break.  
 24 MR. CEBULASH: Okay. We'll go with this  
 25 question and finish up this area, and then we can

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1 go for a break.  
 2 MR. GUTKIN: That's fine. Thank you.  
 3 (McFadden 2, Reply Declaration of  
 4 Daniel L. McFadden.)  
 5 Q. Professor McFadden, I asked the court  
 6 reporter to mark as Exhibit 2 a document entitled,  
 7 "Reply Declaration of Daniel L. McFadden in Support  
 8 of Reply Brief in Support of the Motion to Exclude  
 9 the Expert Report and Opinions of Professor Einer  
 10 Elhauge."  
 11 This is the report you prepared upon  
 12 receiving or respond to Professor Elhauge's initial  
 13 declaration?  
 14 A. That's correct.  
 15 Q. And I believe you addressed this in  
 16 Paragraph 22. That may be where you're -- where  
 17 you're looking.  
 18 A. That's correct.  
 19 Q. And I'm looking for the term "false  
 20 testimony" or --  
 21 A. (Witness reviews document.) Well, perhaps  
 22 I should go back to Professor Elhauge's claim,  
 23 which is in --  
 24 Q. Well --  
 25 A. -- Paragraph -- his Paragraphs 83 to 91.

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1 He said -- he -- he makes the statement in his  
 2 reply that I did not run these regressions. That  
 3 -- that is a false claim.  
 4 Q. So you -- you ran these regressions, but  
 5 what your testimony is here today is that you,  
 6 indeed, ran these regressions, but you -- isn't it  
 7 true that you did not report in the text the  
 8 results of those regressions?  
 9 A. I did not include the regression output  
 10 within the report. What I included in the report  
 11 was a summary which said that I found no consistent  
 12 evidence for -- statistical evidence -- for  
 13 economies of scale, which is -- that is my opinion;  
 14 that there -- there -- the statistical analysis  
 15 here correcting the very serious apple-to-oranges  
 16 flaw of Professor Elhauge does not show a  
 17 consistent pattern, one way or the other.  
 18 Q. And notwithstanding the fact that there  
 19 was no textural description of this, Professor  
 20 Elhauge was able to take your backup and determine  
 21 that there were regressions run, and that the  
 22 significance level of those regressions were not  
 23 disclosed in your report, correct?  
 24 MR. GUTKIN: Object to form.  
 25 A. I think the program to do these

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1 calculations in my backup was -- was descriptive  
 2 and -- and the fact that Professor Elhauge was able  
 3 to use that suggests they were descriptive enough  
 4 for him to carry out -- carry out that calculation.  
 5 It would appear, from his reply, that he  
 6 -- he either misunderstood what I did in terms of  
 7 running the regression with and without the top ten  
 8 sellers, or he -- he deliberately chose to  
 9 misinterpret it.  
 10 In -- in any case, my -- my position is  
 11 that -- on these matters -- I think perfectly  
 12 clear: I ran the -- I ran the two -- two  
 13 regressions. They were -- they were in my -- the  
 14 program for that was in my backup. And they  
 15 support the claim that I made in my declaration.  
 16 And Professor Elhauge's reply claiming that I did  
 17 not run these regressions is false.  
 18 Q. Okay. I'm -- I'm still looking for the --  
 19 where in the report that -- that you describe that  
 20 false testimony.  
 21 A. Paragraph 22 -- (witness reviews document)  
 22 -- first of all, refers to Professor Elhauge's  
 23 characterization of my results and then goes on to  
 24 explain what I actually did and -- and why I  
 25 reached the conclusion that I did; that there's no

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1 consistent statistical evidence for returns to  
 2 scale.  
 3 Q. Okay. And you -- you indicate that your  
 4 -- the language in your declaration that there is  
 5 no consistent statistical evidence for returns to  
 6 scale was deliberate?  
 7 A. Yes.  
 8 Q. And was it deliberate not to disclose that  
 9 you excluded the top 10 products in reaching the  
 10 conclusion that there's no consistent statistical  
 11 evidence for returns to scale?  
 12 MR. GUTKIN: Object to form. Misstates  
 13 the report and testimony.  
 14 A. I -- I considered the declaration correct  
 15 as -- as written. It -- it provides a summary of  
 16 my findings -- a correct summary, in my opinion.  
 17 My backup materials provided the backup necessary  
 18 to determine the basis for this opinion. Since  
 19 Professor Elhauge has challenged that in this  
 20 reply, I spell it out.  
 21 Q. Have you reviewed Professor Elhauge's  
 22 sur-reply?  
 23 A. I have.  
 24 Q. Okay. And do you recall the conclusions  
 25 that he draws in there with regard to this matter?

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1 A. I'd have to go back and reread it.  
 2 MR. CEBULASH: Okay. Why don't we -- why  
 3 don't we take a break now.  
 4 VIDEO OPERATOR: Time is 10:38. This is  
 5 the end of Cassette 1. We are off the record.  
 6 (Recess was taken.)  
 7 VIDEO OPERATOR: The time is 10:48. This  
 8 is the beginning of Cassette No. 2 in the  
 9 deposition of Dr. Daniel McFadden. We are on the  
 10 record.  
 11 Q. Do you see -- do you see the -- could you  
 12 turn to Exhibit 2, Doctor McFadden. That's the --  
 13 your reply declaration.  
 14 Could you go to Paragraph 1, please. Do  
 15 you -- do you see where you describe in Paragraph 1  
 16 that you reviewed Professor Elhauge's amended  
 17 analysis?  
 18 A. Yes.  
 19 Q. What -- what were you referring to when  
 20 you characterized that as "Professor Elhauge's  
 21 amended analysis"?  
 22 A. In his reply, Professor Elhauge runs a  
 23 series of additional regressions, particularly with  
 24 respect to share calculations.  
 25 Q. And were those in response to analysis

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1 that either you or Professor Ordovery conducted in  
 2 your initial declarations?  
 3 A. I can't speak about the connection to  
 4 Professor Ordovery, but certainly a number of them  
 5 were in response to my declaration.  
 6 Q. So why did you refer to them as "amended"?  
 7 Why did you use that term, as opposed to  
 8 "responsive"?  
 9 A. What's the difference?  
 10 Q. To you, are "amended" and "responsive" the  
 11 same?  
 12 A. I'm sorry?  
 13 Q. In your mind, "amended" and "responsive"  
 14 have the same connotation?  
 15 A. "Amended" means changed. I think you're  
 16 -- you're fishing for some legal distinction here,  
 17 which I did not make in my reply.  
 18 Q. Okay. So this could have just as easily  
 19 been "responsive analysis."  
 20 A. Well, I -- we could argue about whether  
 21 his -- his new analysis is, in fact, responsive. I  
 22 -- I, in fact, would -- would object to that. But  
 23 that's a different -- separate issue.  
 24 Q. Okay. So you -- your -- your preferred  
 25 term would be "new analysis"? Is that what you're



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1 testifying to today?  
 2 A. My -- my preferred term would be the term  
 3 I used in my reply.  
 4 Q. Okay.  
 5 A. It's "amended analysis."  
 6 Q. And can you recall what the analysis was  
 7 that you referred to as the "amended analysis"?  
 8 A. I'd have to go back to his declaration to  
 9 give you every instance. A substantial part of it  
 10 had to do with share calculations for restricted  
 11 and unrestricted contracts.  
 12 Q. And was that an area in you -- which you  
 13 opined in your initial declaration?  
 14 A. I opined in my initial declaration that  
 15 Professor Elhauge was making a serious statistical  
 16 error by excluding observations with zero rival  
 17 share from his analysis of the share impact of  
 18 restriction by his definition. And I, in my  
 19 original declaration, presented some alternative  
 20 analyses purely for the purposes of illustrating  
 21 that results were sensitive to the inclusion or  
 22 exclusion of a very large proportion of the total  
 23 available data -- over 90 percent. And his reply  
 24 amended analysis takes some of the -- of those  
 25 alternative regressions that I ran and does further

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1 analysis with them, including bringing in a good  
 2 deal of new data, which had previously not been in  
 3 the roll-up -- rolled-up data that he used for his  
 4 statistical analysis.  
 5 Q. And that -- that new data that you're  
 6 referring to that was not in the rolled-up data for  
 7 the statistical analysis, that data that includes  
 8 instances where Tyco has zero share and rivals have  
 9 100 percent share; is that correct?  
 10 A. That's correct.  
 11 Q. And you excluded that -- those -- that  
 12 data from your analysis; isn't that correct?  
 13 A. In my original declaration, I used  
 14 Professor Elhauge's dataset that he used for his  
 15 own regressions. I did not go back through his  
 16 many lines of code to prepare his analysis dataset  
 17 from the -- from the raw data.  
 18 So at that point, I was critiquing the  
 19 regression that Professor Elhauge ran on the data  
 20 which he had for that analysis. He's -- has now --  
 21 now disclosed that, in the background, he had  
 22 already omitted a great deal of other data. And my  
 23 position on that is that it would, in fact -- now  
 24 -- now that that's been disclosed, my position is  
 25 that, indeed, if those -- those data should be

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1 considered as part of the statistical analysis.  
 2 Q. So you -- you added in data, correct, in  
 3 doing your analysis?  
 4 A. In my original declaration, I used the  
 5 data that Professor Elhauge used. In my reply  
 6 declaration, I used the augmented data that  
 7 Professor Elhauge used.  
 8 Q. Didn't you add back in the data with  
 9 regard to instances where Tyco had a hundred  
 10 percent share; isn't that correct, in your original  
 11 analysis?  
 12 A. Well, let's -- let's be clear on terms.  
 13 Professor Elhauge's original dataset included  
 14 observations in which Tyco had a hundred percent  
 15 share. And then, through the arithmetic  
 16 calculations in his regression, he excluded all the  
 17 observations where Tyco had a hundred percent share  
 18 in -- in all the relevant regressions over 90  
 19 percent of the data.  
 20 Now, what did I do in the original  
 21 declaration? What I did in the original  
 22 declaration was -- was do some alternative  
 23 regressions in which -- in which you -- you could  
 24 see what the impact would be of excluding or --  
 25 including or excluding the observations with --

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1 with a hundred percent Tyco share.  
 2 And my conclusion in that declaration was  
 3 that the results were quite sensitive to the  
 4 treatment of those hundred-percent-Tyco-share  
 5 observations. I noted in the original  
 6 declaration -- and I will reemphasize here -- that  
 7 I -- I did not propose the alternative models as a  
 8 -- as a better model or a correct model for this  
 9 analysis. In fact, I specifically said that it's  
 10 -- it's not a correct model for this analysis.  
 11 It was simply to illustrate that what  
 12 Professor Elhauge had done was create a -- a severe  
 13 statistical problem for himself, which he had not  
 14 addressed.  
 15 Q. Is that typical of your academic work as  
 16 well, where you'll just offer a criticism and not  
 17 provide a solution?  
 18 MR. GUTKIN: Object to form.  
 19 A. I -- I often provide solutions. I would  
 20 have certainly -- had I been retained by the  
 21 Plaintiffs in this case -- have counseled Professor  
 22 Elhauge to do his analysis very differently than he  
 23 did it.  
 24 I have provided, in my declaration and my  
 25 reply, the suggestions as to where he should go

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1 look in the econometrics literature to try to do  
 2 this right. He has not done that.  
 3 Q. Were you aware that there were  
 4 corresponding instances in the data where there  
 5 were situations with -- where rivals had a hundred  
 6 percent share?  
 7 A. At the time I wrote my original  
 8 declaration, I was not aware of that.  
 9 Q. Okay. And how did you become aware of  
 10 that fact?  
 11 A. I became aware of that when I read  
 12 Professor Elhaug's reply, in which he -- he now  
 13 introduced all these observations. And then, upon  
 14 further investigation, I found that he had, in his  
 15 original analysis, done something which was  
 16 econometrically another very bad thing to do, which  
 17 was that he had taken tens of -- tens of thousands  
 18 of observations, by his own characterization, with  
 19 a hundred percent rival shares and collapsed them  
 20 into a single observation.  
 21 And that was, from an econometric point of  
 22 view, that's -- that's absolutely inappropriate.  
 23 Q. So in the -- in the backup there was one  
 24 instance where the hundred -- all these  
 25 observations were collapsed, correct?

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1 A. In his original regressions?  
 2 Q. Yes.  
 3 A. In each month, there was a single  
 4 observation which represented all the tens of  
 5 thousands of observations where rivals had a  
 6 hundred percent share.  
 7 Q. And your staff was not competent enough to  
 8 determine that that data was there, correct?  
 9 MR. GUTKIN: Object to form.  
 10 A. In -- in my -- in preparation for my  
 11 original declaration --  
 12 Q. Uh-huh.  
 13 A. -- I worked with the dataset that  
 14 Professor Elhaug used for his own regressions.  
 15 That dataset was not documented as to how this was  
 16 rolled up. His background programs for this are  
 17 opaque. And if we're characterizing competence, I  
 18 would say that Professor Elhaug's backup materials  
 19 were not competently documented.  
 20 Q. Did you request all the data in the case  
 21 at the time in order that you could run your own  
 22 tests?  
 23 A. Over the period of preparation of my  
 24 declaration and my reply, there were repeated  
 25 requests for completing the data from -- for -- to

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1 -- that went to Professor Elhaug.  
 2 Q. I'm -- I'm asking a different question:  
 3 You're an expert obtained -- retained by Tyco.  
 4 Isn't it true that you have full access to all the  
 5 data that was produced in this matter as being  
 6 retained by Tyco?  
 7 A. I was retained by Tyco to look at the  
 8 scientific methodology and econometric analysis  
 9 carried out by Professor Elhaug. And my opinions  
 10 are based on the questions he posed, the analysis  
 11 he did, and the interpretation of -- of his  
 12 results.  
 13 They are not an analysis of the facts of  
 14 this case. I was not retained to begin an  
 15 affirmative liability or damage analysis, and I  
 16 have not done so.  
 17 Q. Could you turn to Table I of your reply  
 18 declaration.  
 19 MR. GUTKIN: What paragraph comes right  
 20 before or right after that?  
 21 MR. CEBULASH: It's between 17 and 18.  
 22 Q. This -- this table shows various estimates  
 23 of foreclosure from Professor Elhaug's  
 24 regressions; is that -- is that correct?  
 25 A. Yes.

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1 Q. And what did you or your staff do in  
 2 preparing this table?  
 3 A. Well, this table was -- was recalculated  
 4 by us from Professor Elhaug's backup data, with  
 5 the footnote describing how we did the linear model  
 6 calculations.  
 7 Q. Okay. So you -- you undertook to do the  
 8 linear, as well as the linear fixed effects  
 9 regressions in Professor Elhaug -- you're just  
 10 reporting his results for the log regressions?  
 11 A. These calculations are based on using  
 12 Professor Elhaug's regressions and our calculation  
 13 of the -- of the percentage.  
 14 Q. Okay. And in -- and in every instance, it  
 15 shows that there was impact, correct?  
 16 MR. GUTKIN: Object to form.  
 17 A. Well, first of all, as I've said in my  
 18 declaration, none of these models -- the log model  
 19 of Professor Elhaug originally, which I critiqued  
 20 for omitting data and not making any statistical  
 21 adjustment for it, the linear model, which I've  
 22 suggested was introduced solely to determine  
 23 whether these things had a substantial impact on  
 24 the statistical results, and they show that it  
 25 does -- none of these are a correct model. None of

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| <p style="text-align: right;">Page 62</p> <p>1 them are statistically sound. None of them take<br/> 2 account of price effects, which, in my view, are<br/> 3 absolutely critical if you're trying to distinguish<br/> 4 between the effects of legitimate price differences<br/> 5 and other -- other conduct or actions which are --<br/> 6 are allegedly anticompetitive.<br/> 7 So here we have a -- a concatenation of<br/> 8 what I view as deep errors. So that I -- I, in my<br/> 9 -- in my view, these numbers simply are not useful<br/> 10 to the Court as they stand.<br/> 11 Q. Are you familiar at all with Tyco's<br/> 12 corporate history?<br/> 13 A. No.<br/> 14 Q. Are you familiar with any allegations with<br/> 15 regard to Tyco as to channel stuffing?<br/> 16 A. I'm sorry, as to --<br/> 17 Q. Channel, channel stuffing. Have you ever<br/> 18 heard that term before, "channel stuffing"?<br/> 19 MR. GUTKIN: Object to form.<br/> 20 A. I have not.<br/> 21 Q. Are you aware that -- have you ever<br/> 22 understood the term that some companies, in order<br/> 23 to make their quarterly numbers, will try to get<br/> 24 inventory into the pipeline? Have you ever heard a<br/> 25 description of -- of anything like that?</p> | <p style="text-align: right;">Page 64</p> <p>1 A. No.<br/> 2 Q. Have you reviewed the GPOs' practices with<br/> 3 regard to their fees?<br/> 4 A. No.<br/> 5 Q. Did you -- did you happen, in reviewing<br/> 6 Professor Ordoover's work, to notice Professor<br/> 7 Ordoover's definition of the relevant market in this<br/> 8 case?<br/> 9 A. I slid over that section, so I --<br/> 10 Q. So the answer to that would be no?<br/> 11 A. I don't have an opinion on it.<br/> 12 Q. You don't have an opinion on it, or you're<br/> 13 not aware of it?<br/> 14 A. I'm sorry?<br/> 15 Q. When you say, "slid over it," does that<br/> 16 mean you didn't review it?<br/> 17 A. I -- I skimmed that -- I did -- I did read<br/> 18 it, but I skimmed it.<br/> 19 Q. Can you -- can you turn to Table 1 in your<br/> 20 -- your initial declaration, please. That would<br/> 21 fall between -- just after Paragraph 16.<br/> 22 And in -- in this table, this is -- is<br/> 23 designed to show that -- that there are price<br/> 24 differences between restricted and unrestricted<br/> 25 sales; is that correct?</p>   |
| <p style="text-align: right;">Page 63</p> <p>1 MR. GUTKIN: Object to form.<br/> 2 A. As -- as a general matter, yes.<br/> 3 Q. You never heard that -- that practice<br/> 4 described as channel stuffing?<br/> 5 A. Not -- I don't know that particular term.<br/> 6 Q. But you are -- you are familiar with a --<br/> 7 a practice whereby a manufacturer, let's say, will,<br/> 8 in order to make their quarterly numbers, seek to<br/> 9 push product out at or around the end of a quarter.<br/> 10 A. I have no knowledge whatever of Tyco's<br/> 11 practices. If you're asking me, as a general<br/> 12 economic matter am I aware that firms will -- will<br/> 13 time things to make their books look good, yes, I'm<br/> 14 -- I'm aware of that.<br/> 15 Q. Okay. And you're familiar with the --<br/> 16 that the United States has financial reporting<br/> 17 requirements on a quarterly basis.<br/> 18 MR. GUTKIN: Object to form.<br/> 19 A. For SEC --<br/> 20 Q. Yes.<br/> 21 A. -- requirements? Yes.<br/> 22 Q. And are you familiar that there's also a<br/> 23 requirement for -- to report on an annual basis?<br/> 24 A. Yes.<br/> 25 Q. Have you studied the practices of GPOs?</p>  | <p style="text-align: right;">Page 65</p> <p>1 A. That's correct. The second panel in this<br/> 2 table is a -- averages of prices for very specific<br/> 3 products using the restricted -- Professor<br/> 4 Elhauge's restricted definition.<br/> 5 Q. Okay. And had you selected these four<br/> 6 items?<br/> 7 A. Did I select the four items?<br/> 8 Q. Yes.<br/> 9 A. I asked the staff to pick typical large<br/> 10 selling items over a wide range.<br/> 11 Q. So these are -- I mean, I'm just trying to<br/> 12 get at why -- why these particular four items were<br/> 13 selected and what the rationale was for selecting<br/> 14 these four. Are they -- are these among the top<br/> 15 ten sellers?<br/> 16 A. These were not -- this was not a random<br/> 17 sample, and I would -- I simply asked the staff to<br/> 18 pick out a -- a range of illustrative products. I<br/> 19 think they are among the larger sellers, but I<br/> 20 would have to go back and check to see if they're<br/> 21 among the -- among the very largest.<br/> 22 Q. Does it -- does the analysis in any way<br/> 23 hinge upon the items that were selected?<br/> 24 A. No, I don't think there was any intention<br/> 25 to select items where price differences were</p> |

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| <p style="text-align: right;">Page 66</p> <p>1 particularly large or particularly small, and --<br/>                 2 and the purpose of this is simply to illustrate<br/>                 3 that there were price differences.<br/>                 4 Q. Did your staff run any tests to make sure<br/>                 5 that they hadn't skewed the analysis by selecting<br/>                 6 four items that are odd or unusual?<br/>                 7 MR. GUTKIN: Object to form.<br/>                 8 A. I did not ask them to do that, so I don't<br/>                 9 believe they did.<br/>                 10 Q. Well, would it be econometrically sound<br/>                 11 not to make sure that these are, in fact,<br/>                 12 representative?<br/>                 13 A. Oh, I think if this were going to be used<br/>                 14 for econometric analysis, then one would want to be<br/>                 15 careful to do that. For -- for purposes of<br/>                 16 illustration, I think they serve that purpose.<br/>                 17 Q. Okay. And the principle you're<br/>                 18 illustrating here is that restricted prices are, on<br/>                 19 average, lower than unrestricted prices; is that<br/>                 20 correct?<br/>                 21 A. I need to now go back to the context of<br/>                 22 this table --<br/>                 23 Q. Okay.<br/>                 24 A. -- and remind myself. (Witness reviews<br/>                 25 document.) Thank you. The background for this was</p>  | <p style="text-align: right;">Page 68</p> <p>1 certainly. As an economist, I would expect buyers<br/>                 2 to respond to prices.<br/>                 3 Q. So that that -- your -- your statement is<br/>                 4 buyers respond to prices. That's the conclusion<br/>                 5 that you draw from this, correct?<br/>                 6 A. Well, that's not a conclusion from this.<br/>                 7 That's a -- that's a conclusion I draw from long<br/>                 8 experience as an economist.<br/>                 9 Q. And do you think that your statement that<br/>                 10 buyers respond to prices contradicts with Professor<br/>                 11 Ordover's analysis with regard to this market, that<br/>                 12 he also believes that buyers respond to prices?<br/>                 13 MR. GUTKIN: Object to form.<br/>                 14 A. You'll have to give me a specific Ordover<br/>                 15 reference here. As I've mentioned, I -- I reviewed<br/>                 16 Professor Ordover on the plane yesterday. But to<br/>                 17 answer a question like that, I need to know<br/>                 18 specifically what he's -- what he's claiming.<br/>                 19 Q. Okay. This -- your -- your -- in Table<br/>                 20 1, why did you organize the price data that you've<br/>                 21 reflected here according to restricted and<br/>                 22 unrestricted parameters?<br/>                 23 A. The reason is that -- that Professor<br/>                 24 Elhauge's share analysis is look -- is -- is based<br/>                 25 on looking at shares under restricted versus</p> |
| <p style="text-align: right;">Page 67</p> <p>1 -- this was -- table was intended to illustrate the<br/>                 2 point that there were price differentials between<br/>                 3 restricted and unrestricted. And this is in the<br/>                 4 context of an economic statement that, in deciding<br/>                 5 what products to buy, a -- a buyer --<br/>                 6 economically-sensible buyer -- will look at the --<br/>                 7 look at the relative prices of products and look<br/>                 8 for the least expensive way to satisfy his needs.<br/>                 9 And so to the extent that these price<br/>                 10 differentials are -- reflect ordinary competition,<br/>                 11 they -- they may be one of the explanations for<br/>                 12 share differences. And it's economically improper<br/>                 13 and econometrically improper to run a regression in<br/>                 14 which contract form is the only explanatory<br/>                 15 variable and attribute the coefficient on the<br/>                 16 effect of that variable entirely to contract<br/>                 17 effects, when, in truth, some of the share<br/>                 18 variations that one sees are due -- may -- may be<br/>                 19 due to -- or almost certainly are due to buyer<br/>                 20 response to relative prices.<br/>                 21 Q. So you -- in that answer, you -- you said<br/>                 22 that they may be due to that, and then you amended<br/>                 23 your response and said, "almost certainly are due<br/>                 24 to --" that, correct?<br/>                 25 A. I did -- I did restate it as almost</p> | <p style="text-align: right;">Page 69</p> <p>1 unrestricted contracts, by using his definition of<br/>                 2 restricted.<br/>                 3 The context for Paragraph 16 is that<br/>                 4 buyers are almost certainly responding to price,<br/>                 5 and there are price differences for Covidien<br/>                 6 between restricted and unrestricted contracts. So<br/>                 7 that's part of the -- part of what's causing shares<br/>                 8 to move around. And that's not being accounted for<br/>                 9 in the regression. And that's -- that's a poor --<br/>                 10 poor econometric procedure -- biased econometric<br/>                 11 procedure to not take that into account.<br/>                 12 Q. Who sets Tyco's prices for their sharps<br/>                 13 containers with regard to restricted and<br/>                 14 unrestricted? Is that Professor Elhauge who sets<br/>                 15 those prices?<br/>                 16 MR. GUTKIN: Object to form.<br/>                 17 A. These data, although they're taken from<br/>                 18 Professor Elhauge's backup, are -- I believe come<br/>                 19 from Tyco sales records. So they would be Tyco<br/>                 20 data.<br/>                 21 Q. So Tyco sets these prices and has -- sets<br/>                 22 the price differential between the restricted and<br/>                 23 unrestricted prices, correct?<br/>                 24 MR. GUTKIN: Object to form.<br/>                 25 A. As an economist, I would say that the --</p>   |

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| <p style="text-align: right;">Page 70</p> <p>1 the -- the prices for products like this will be<br/> 2 determined in the -- in the market by competition<br/> 3 among rivals. So that the answer is,<br/> 4 administratively, no doubt someone at Tyco is<br/> 5 signing off on -- on contracts to provide products<br/> 6 at various prices, and presumably doing so within a<br/> 7 market environment in which they have to take<br/> 8 account of the consequences of their pricing<br/> 9 relative to that of rivals.<br/> 10 Q. So subject to consequences in the market,<br/> 11 Tyco's free to set whatever price they want for<br/> 12 their products, correct?<br/> 13 MR. GUTKIN: Object to form.<br/> 14 A. Well, first of all, I -- I have not<br/> 15 studied Tyco pricing procedures, and -- and any<br/> 16 statements I make about this are based on the --<br/> 17 the general economic observation that firms --<br/> 18 firms are typically free to set -- set whatever<br/> 19 prices they wish, and the market -- and the market<br/> 20 will determine the consequences of that, and the --<br/> 21 the constraints of the market may well constrain<br/> 22 their -- their pricing behavior.<br/> 23 Beyond that, I have no specific<br/> 24 information about Tyco pricing.<br/> 25 Q. Did you ever review their requests --</p> | <p style="text-align: right;">Page 72</p> <p>1 Q. (Nods.)<br/> 2 A. I would say that it is -- is potentially a<br/> 3 confounding effect in the -- in the sense that some<br/> 4 -- some price-setting behavior will be -- be in<br/> 5 response to the circumstances in which a firm is<br/> 6 placed, and it -- also other -- other<br/> 7 circumstances.<br/> 8 I simply have not studied Tyco's<br/> 9 circumstances in terms of their costs, for example,<br/> 10 in terms of the costs of fulfilling a sole-source<br/> 11 versus a multiple-source contract. For example, I<br/> 12 have not studied those issues.<br/> 13 But the -- the fundamental economic<br/> 14 proposition, in my opinion, applies here, which is<br/> 15 that buyers respond to prices, so that some of --<br/> 16 some of the share effects that you see here are<br/> 17 almost certainly due to increases in Tyco prices.<br/> 18 Let me -- let me modify that. What I<br/> 19 expect buyers to respond to are relative prices.<br/> 20 Unfortunately, Professor Elhauge has not collected<br/> 21 and made available prices for rival products. So<br/> 22 it would be the question of what happens to<br/> 23 relevant prices after 2005 that would be, from an<br/> 24 economist's point of view, the most relevant data.<br/> 25 Q. When you say, "after 2005," when you're</p>  |
| <p style="text-align: right;">Page 71</p> <p>1 their response to Broadlane's request for proposal<br/> 2 in the 2005/2006 time period? Did you -- did you<br/> 3 review that?<br/> 4 A. I did not.<br/> 5 Q. Did you review any statements of Tyco's VP<br/> 6 for group purchasing, Armin Cline, with regard to<br/> 7 their strategy with regard to the Broadlane<br/> 8 contract?<br/> 9 A. I did not.<br/> 10 Q. Did you review Tyco's RFPs for the 2005<br/> 11 Novation contract?<br/> 12 A. I did not.<br/> 13 Q. You indicate in your report, don't you,<br/> 14 that Tyco raised prices on their top 10 selling<br/> 15 items to Novation after Novation went multisource;<br/> 16 is that correct?<br/> 17 A. That's -- that's -- I do indicate that.<br/> 18 That's -- that's my understanding, based on staff<br/> 19 calculations, and I understand that Professor<br/> 20 Ordover had similar calculations.<br/> 21 Q. And in your mind, the fact that Tyco<br/> 22 raised prices on their top 10 selling items after<br/> 23 Novation went multisource is a confounding effect,<br/> 24 in your mind?<br/> 25 A. Confounding?</p>  | <p style="text-align: right;">Page 73</p> <p>1 talking about relative prices now, your discussion<br/> 2 is with regard to Novation, is that -- is that what<br/> 3 my understanding is, or is that just generally that<br/> 4 there's some change in economic principles that<br/> 5 occurred in 2005?<br/> 6 A. Oh, I was responding to your question<br/> 7 about Novation, and the -- and the proposition<br/> 8 would be both general and specific to -- to<br/> 9 Novation that I would expect buyers to respond to<br/> 10 relative prices, and in particular, in the -- in<br/> 11 the Novation analysis that Professor Elhauge does,<br/> 12 omitting the effect of relative prices and<br/> 13 attributing all share changes to the contract has<br/> 14 the potential to confound; and in fact, I would say<br/> 15 is likely to confound the effect of -- of the<br/> 16 contract terms directly and the -- and the effect<br/> 17 of price changes, some of which may be linked to<br/> 18 the Covidien behave -- conduct and contract terms,<br/> 19 and some of which may be linked to other things,<br/> 20 such as costs and the -- and the simple economics<br/> 21 of -- of pricing for and bidding for contracts of<br/> 22 various types.<br/> 23 Q. Do you think -- do you think Tyco is<br/> 24 cognizant of these general economic principles that<br/> 25 buyers respond to price?</p> |

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1 MR. GUTKIN: Object. Calls for  
 2 speculation.  
 3 A. I would say that -- that if they are not,  
 4 they are going to lose share to their rivals.  
 5 Q. Did you -- did you seek to ask anybody in  
 6 the Tyco sharps container department as to whether  
 7 they understand this general economic principle,  
 8 that buyers respond to price?  
 9 A. Remember, I am offering opinions and a --  
 10 and an analysis of Professor Elhauge's statistical  
 11 and econometric analysis. I am not offering  
 12 opinions on Tyco practices. And so the -- the  
 13 answer to your specific question is, no, I have not  
 14 looked for that. It was not relevant to the  
 15 specific task that I was asked to do in this case.  
 16 Q. Well, Tyco -- Tyco sets their pricing,  
 17 don't they?  
 18 MR. GUTKIN: Objection. Asked and  
 19 answered.  
 20 A. What does that have to do with Professor  
 21 Elhauge's statistical methodology?  
 22 Q. It has to do with conclusions that you're  
 23 drawing that these effects can be explained by  
 24 differences in relative price, and those relative  
 25 prices are prices that are set by Tyco, correct?

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1 A. No, my -- my opinion is based on a general  
 2 economic principle, which is, that buyers respond  
 3 to relative prices, and that a statistical analysis  
 4 which omits relative prices has a substantial risk  
 5 of confounding the effect of the variables that are  
 6 included in the regression -- namely, whether  
 7 contracts are restricted or not, and the effects of  
 8 the variables excluded from the -- the regression  
 9 -- namely -- namely, relative prices.  
 10 Q. What if those prices are directly linked  
 11 to contract terms?  
 12 MR. GUTKIN: Object to form.  
 13 A. If those prices are directly linked to  
 14 contract terms, then one needs to do a careful  
 15 but-for analysis of what the prices would -- would  
 16 be in the presence or in the absence of any conduct  
 17 that's alleged to be anticompetitive.  
 18 Q. When -- when you say a "but-for analysis,"  
 19 would you suggest going back to the first time that  
 20 some company offered sharps containers? Is that  
 21 what you're suggesting in order to arrive at that?  
 22 A. No, I'm certainly not suggesting that.  
 23 What I'm suggesting is that one -- one should be  
 24 taking into account the response of buyers to  
 25 relative prices, and one should be -- and -- and

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1 that can be done in an econometric analysis.  
 2 Q. Is Professor Ordover competent to  
 3 undertake that econometric analysis in order to  
 4 show what the response is and in order to debunk  
 5 Professor Elhauge? Is he competent to do that?  
 6 MR. GUTKIN: Object to form.  
 7 A. Professor Ordover is a -- is a good  
 8 general economist, a well-known general economist.  
 9 And beyond that, I have not read in detail about  
 10 any econometric analysis he's done, and I cannot  
 11 comment further.  
 12 Q. Do you know how Tyco sets their pricing  
 13 between a sole-source contract and a dual- or  
 14 multisource contract? Have you looked at -- looked  
 15 at that?  
 16 A. Are you asking me about the -- about the  
 17 -- the empirical pattern or the mechanics of how  
 18 the bidding is done? What -- what are you asking  
 19 me about?  
 20 Q. Well, let's think about -- let's start,  
 21 'cause you mentioned the term "relative pricing."  
 22 Let's talk about relative pricing between the three  
 23 types of contracts.  
 24 Have you endeavored to make a  
 25 determination as to how Tyco fulfills its -- to the

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1 extent there is a request for a proposal from a GPO  
 2 -- how Tyco undertakes to set its pricing levels  
 3 for the three types of contracting situations?  
 4 A. No, I have not.  
 5 Q. So you -- you have no idea what the -- the  
 6 way Tyco sets the relative pricing for the three  
 7 contracts; is that correct?  
 8 MR. GUTKIN: I'll object. The use of  
 9 "relative pricing," I think, differs from the way  
 10 Doctor McFadden was using it.  
 11 Q. Well --  
 12 A. I -- I know -- I know from looking at  
 13 examples, such as the -- in Table 1 in my  
 14 declaration, that there are -- there are price  
 15 differences between sole source and multisource  
 16 contracts. Here it -- the distinction is  
 17 restricted and unrestricted, but that's closely  
 18 related.  
 19 And I -- I'm aware, as a -- as a general  
 20 matter, and just as a matter of general economics,  
 21 that companies will typically price low or offer a  
 22 discount when they have the opportunity to get  
 23 additional business, tie up -- tie up a buyer for  
 24 some contract period. There's -- there's nothing  
 25 that I have learned about Tyco which would suggest

1 to me that they -- they don't -- they don't compete  
2 the way most firms do for sole-source contracts.  
3 However, I have not studied that issue in -- I have  
4 not studied the facts on the ground, and I am not  
5 offering an opinion in this case as -- as -- as to  
6 what was -- what Tyco's actual pricing practices  
7 were.

8 Q. Was your work in Rocky Flats as narrowly  
9 circumscribed as your work here?

10 MR. GUTKIN: Object to form.  
11 "Circumscribed," was that the word?

12 Q. Do you understand what that means -- or  
13 circumscribed?

14 A. A very -- a very different situation. In  
15 the -- in the Rocky Flats case I did my -- I -- I  
16 was involved with the -- with the facts of the  
17 case, so not -- I not only critiqued other experts,  
18 but I ran my -- I ran my own analysis.

19 Q. And you appeared -- appeared at trial in  
20 this case, too, correct?

21 A. I did.

22 Q. Didn't -- you had mentioned that as a --  
23 as a possible reason that -- that -- that -- or  
24 suggested a possible reason that Tyco raised its  
25 prices on its top 10 products once Novation went

1 MR. GUTKIN: Object to form.

2 Q. -- as a purely --

3 A. Well --

4 Q. -- academic pattern?

5 A. No, I think as -- as -- as a -- a  
6 practical matter -- it's not an academic matter.

7 As a practical matter, there has -- has been no  
8 data, as far as I'm aware, introduced in this case  
9 on rivals' prices. Certainly, it's something I've  
10 asked for, and I was told that it was not -- not in  
11 any of Professor Elhauge's databases; that he has  
12 not collected it.

13 It's -- I cannot answer the legal question  
14 as to whether Covidien had asked for these data,  
15 whether they -- they were refused. I don't -- I  
16 don't know the answers to these questions.

17 Q. Have you ever opined on the concept of  
18 procompetitive justifications for an alleged  
19 anticompetitive practice?

20 A. Well, I'm not -- I -- I wouldn't  
21 characterize myself as opining in -- in those  
22 terms, but I have certainly been involved in  
23 rule-of-reason cases where there -- there is an  
24 issue of -- of balance between potentially  
25 procompetitive and anticompetitive effects. And

1 multisource is that perhaps Tyco's cost structure  
2 might have changed with regard to those top 10  
3 products; is that -- is that your testimony?

4 A. No, what I -- I believe what I -- what I  
5 said was that cost is -- costs are -- may have been  
6 one of the elements in Tyco price changes. To do a  
7 careful study of this market, one would need to  
8 have, also, the prices of rivals, and the -- not  
9 only the relative prices between Tyco and rivals,  
10 but the relative prices between different contract  
11 types for both Tyco and rivals. And in some sense,  
12 they're -- there are six prices relevant here for  
13 any given product.

14 Q. And --

15 A. At least six, because there are more than  
16 one -- there's more than one rival.

17 Q. It's true that Professor Ordover didn't  
18 undertake such an analysis; isn't that correct?

19 MR. GUTKIN: Object to form.

20 A. I have not -- I have not read Professor  
21 Ordover's statistical analysis here, and I -- and I  
22 don't know it.

23 Q. Well, this -- this -- this -- if, in fact,  
24 this was a -- a -- a proper analysis, certainly  
25 Tyco's expert in this case could run it, correct --

1 certainly, in issues like predatory pricing, that's  
2 the -- the critical issue in the balance, because  
3 predatory pricing tends to help buyers in the short  
4 run. And the question is, is that balanced by  
5 higher prices in the long run? And that,  
6 obviously, goes to the question of balance.

7 Q. Now, when you -- you've -- you've  
8 mentioned predatory pricing now at least twice.  
9 When you -- when you're discussing predatory  
10 pricing, you're referring to instances where a  
11 manufacturer will price below cost? Is that what  
12 you're referring to?

13 A. Well, I'm -- I'm aware of the legal  
14 standard -- the -- the old Areeta Turner standard  
15 for what's recognized legally as predation. I  
16 would, as an academic matter, put predation in a  
17 more -- in a more general context. That is, in the  
18 -- in the end, it's the question of what -- what a  
19 particular pricing conduct of firms has to do for  
20 consumer welfare over -- over the short and long  
21 run.

22 Q. So you -- so if I -- to interpret that  
23 answer, you're saying that predatory pricing could  
24 be above cost, depending on what the effects are in  
25 the long term.

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| <p style="text-align: right;">Page 82</p> <p>1 MR. GUTKIN: Object to form.<br/> 2 A. I would -- okay. What I would -- what I<br/> 3 would say is that the whole issue of what<br/> 4 constitutes -- what constitutes predatory pricing<br/> 5 legally is -- I think does not coexist very<br/> 6 comfortably now with the economic analysis of<br/> 7 competition among rivals in a -- in a dynamic<br/> 8 market. And there -- there the answer is there is<br/> 9 not such a simple picture of what's -- if I may use<br/> 10 -- now in a nonlegal way -- what's predatory and<br/> 11 what's not predatory is not such a simple analysis.<br/> 12 And in fact, I don't think it's even a settled<br/> 13 issue in economics.<br/> 14 So that's a long-winded answer which says<br/> 15 that I don't really know the answer, and I don't<br/> 16 think economics, at this point, knows the answer.<br/> 17 Q. And is -- does that -- does that reflect a<br/> 18 -- the -- the more or the less-defined nature of<br/> 19 that question, the economics, does that reflect a<br/> 20 shift in economics over the past number of years,<br/> 21 whenever -- whenever that may have occurred?<br/> 22 A. I would say it does, yes, beginning in the<br/> 23 -- in the 1980s there began to be a serious<br/> 24 analysis of the dynamics of -- of competition --<br/> 25 entry, exit, and these issues, and that involves</p> | <p style="text-align: right;">Page 84</p> <p>1 A. Yes.<br/> 2 Q. Have you ever been retained as a expert in<br/> 3 a case where exclusive dealing was among the<br/> 4 allegations?<br/> 5 A. I have.<br/> 6 Q. Okay. And what -- what cases -- case or<br/> 7 cases -- would that be?<br/> 8 A. Okay. In the -- in the late 1970s, I was<br/> 9 involved as a plaintiffs' expert for Murphy Tug in<br/> 10 a case that involved concerted refusals to deal and<br/> 11 exclusive dealing. And in the more recent decades,<br/> 12 I was involved as a plaintiffs' expert for<br/> 13 Netscape, and again, for Sun Microsystems in their<br/> 14 suits against Microsoft, and again, the issue was<br/> 15 exclusive dealing.<br/> 16 Q. And in Murphy Tug it was a -- it was a<br/> 17 business-on-business case, or was it a<br/> 18 business-on-union case?<br/> 19 A. No, it was a business-on-business case.<br/> 20 Q. Okay. And then, obviously -- the<br/> 21 Netscape/Sun versus Microsoft, that was also -- it<br/> 22 was not a class action. It was<br/> 23 business-on-business case?<br/> 24 A. That's correct.<br/> 25 Q. And do you recall the types of contracting</p> |
| <p style="text-align: right;">Page 83</p> <p>1 repeated games of imperfect information, and that's<br/> 2 a -- that's a -- that's a modern topic in economic<br/> 3 theory. And I think the -- the take-aways from<br/> 4 that theory for the legal profession are still not<br/> 5 -- are not -- are not yet low-hanging fruit. Let's<br/> 6 put it that way.<br/> 7 Q. And are there some -- some names that you<br/> 8 would attach to the -- the -- the more modern, I<br/> 9 guess is a way to say it, the more modern approach<br/> 10 to predatory pricing in economics?<br/> 11 A. Well, I -- first of all, let me say that<br/> 12 -- I will give you names. The issue here is the<br/> 13 dynamics of markets, not so much specifically<br/> 14 focused on predatory pricing. That's just --<br/> 15 Q. Okay.<br/> 16 A. Pricing is just one element of how firms<br/> 17 compete dynamically. Ariel Pakes at Harvard has<br/> 18 been one of the leaders on this subject. Jean<br/> 19 Tirole at Toulouse is another. Robert Hall at<br/> 20 Stamford has made some substantial contributions to<br/> 21 the subject.<br/> 22 Q. You -- well, you've mentioned predatory<br/> 23 pricing. You have not mentioned exclusive dealing<br/> 24 at all. Are you familiar with the concept of<br/> 25 exclusive dealing?</p>  | <p style="text-align: right;">Page 85</p> <p>1 practices that Microsoft engaged in vis-a-vis<br/> 2 Netscape/Sun?<br/> 3 A. Well, yes. It -- it would offer favorable<br/> 4 terms to internet providers if they agreed to<br/> 5 provide only -- only Microsoft products. And they<br/> 6 famously offered Internet Explorer for free, and in<br/> 7 -- in dealing with original equipment, companies<br/> 8 would offer them more favorable terms if they would<br/> 9 avoid putting any other products on the -- on the<br/> 10 desktop.<br/> 11 Q. Would -- among the more favorable terms --<br/> 12 be pricing terms?<br/> 13 A. The -- the price of the operating system,<br/> 14 yes.<br/> 15 Q. It would be lower if they agreed not to<br/> 16 put competing internet browsers on, correct?<br/> 17 A. That's correct.<br/> 18 Q. Do you know if that case went to trial?<br/> 19 A. Which case?<br/> 20 Q. The Sun, the Netscape --<br/> 21 A. Netscape --<br/> 22 MR. GUTKIN: Object.<br/> 23 A. -- and the Sun cases both settled.<br/> 24 Q. Okay.<br/> 25 MR. GUTKIN: I just want to clarify: Is</p>   |



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1 it two separate cases, the Netscape versus  
 2 Microsoft and the Sun versus Microsoft?  
 3 THE WITNESS: Two separate cases.  
 4 Q. And they both settled before trial?  
 5 A. Correct.  
 6 Q. Do you know the -- were the terms of the  
 7 settlements public?  
 8 A. They were.  
 9 Q. And do you know the terms of those  
 10 settlements?  
 11 A. In each case, a shade under \$1 billion.  
 12 Q. In favor of -- in favor of Netscape and  
 13 Sun, correct?  
 14 A. Netscape and Sun both received --  
 15 Q. They both received a billion dollars?  
 16 A. -- received -- received settlements,  
 17 that's correct.  
 18 Q. Okay.  
 19 MR. GUTKIN: I don't know if we're coming  
 20 towards another break point. I think we've been  
 21 going for over an hour. But it's up -- whatever  
 22 you think.  
 23 MR. CEBULASH: Just let me -- are you  
 24 okay?  
 25 THE WITNESS: Well, I'm approaching a

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1 bathroom break.  
 2 MR. CEBULASH: Okay. Well, why don't we  
 3 -- why don't we -- why don't we do that now.  
 4 THE WITNESS: Thanks.  
 5 VIDEO OPERATOR: Off the record. 11:54.  
 6 (Recess was taken.)  
 7 (Whereupon the deposition recessed  
 8 at 11:54 a.m.)  
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1 AFTERNOON SESSION (1:01 PM.)  
 2 VIDEO OPERATOR: On the record. 1:01.  
 3 Q. Did you review the -- the declaration that  
 4 Professor Elhauge filed on December 9th -- his  
 5 sur-reply declaration?  
 6 A. I did.  
 7 Q. Earlier we discussed the -- the concept of  
 8 channel stuffing. Do you recall that?  
 9 A. Yes.  
 10 Q. Is there a way to -- to smooth out the  
 11 effects of quarterly or monthly variation in sales?  
 12 A. I would say that the -- the preferred --  
 13 well, the answer is, yes, there is. And probably  
 14 the preferred method, if the problem is coming from  
 15 -- from -- from when -- when sales are -- are  
 16 booked would be to try to get some explicit  
 17 information on when accounting practices changed  
 18 and use what econometricians call "dummy variables"  
 19 to account for the specific impact of those  
 20 particular time periods.  
 21 Q. Do you recall Professor Elhauge, in either  
 22 reports that you reviewed, discussing the use of  
 23 dummy variables?  
 24 A. I don't recall his using the name "dummy  
 25 variable." He may have done, but his -- his

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1 restriction indicator is an example of a dummy  
 2 variable.  
 3 Q. His -- you said his "restriction  
 4 indicator"?  
 5 A. His restriction indicator.  
 6 Q. Okay. And using dummy variables is an  
 7 accepted econometric method?  
 8 MR. GUTKIN: Object to form.  
 9 Q. Generally?  
 10 A. You're asking -- you're asking a broad  
 11 question. The answer is that it's the accepted  
 12 method where it's appropriate.  
 13 Q. Okay.  
 14 A. And -- and the issue is, when is it  
 15 appropriate?  
 16 Q. In -- in your -- in your reply declaration  
 17 you indicated that -- that there was a violation of  
 18 the Gauss Markov theorem, correct?  
 19 A. That's correct.  
 20 Q. And you reviewed Professor Elhauge's  
 21 sur-reply, correct?  
 22 A. I have.  
 23 Q. Okay. And did you review his rebuttal to  
 24 your assertion that the Gauss -- your assertion  
 25 that his approach was violative of the Gauss Markov

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| <p style="text-align: right;">Page 90</p> <p>1 theorem?<br/>                 2 A. I did, and I can comment at some length.<br/>                 3 Q. Okay. Have you ever used a moving average<br/>                 4 regression in any of the expert reports that you've<br/>                 5 prepared?<br/>                 6 A. Let me not restrict it to expert reports.<br/>                 7 You could ask, generally, have I used moving<br/>                 8 average regressions? And the answer is, yes, I've<br/>                 9 used a variety of techniques for dealing with --<br/>                 10 dynamic models change over time. The use of<br/>                 11 various techniques for removing serial<br/>                 12 correlation -- which is another econometric term of<br/>                 13 art -- which is correlation between adjacent<br/>                 14 observations.<br/>                 15 Q. Can you describe some instances where<br/>                 16 you've used moving averages.<br/>                 17 A. I don't think we're -- just sitting here,<br/>                 18 I can cite specific papers. I can just tell you<br/>                 19 that various time series techniques are in my bag<br/>                 20 of tools, and I have used them frequently.<br/>                 21 Q. To the extent you used one in -- do you<br/>                 22 recall any -- ever being criticized for any of your<br/>                 23 use of moving averages, in either your -- any of<br/>                 24 your litigation work or your academic work?<br/>                 25 A. No, I -- I don't recall that.</p>                                 | <p style="text-align: right;">Page 92</p> <p>1 statistical results.<br/>                 2 Q. And what tests did you do here in order to<br/>                 3 determine endogeneity?<br/>                 4 A. Endogeneity?<br/>                 5 Q. Uh-huh.<br/>                 6 A. I -- I pointed it out as a potential<br/>                 7 problem in the -- Professor Elhauge's construction<br/>                 8 of his restriction variable. I also point it out<br/>                 9 -- pointed it out in the context of his returns to<br/>                 10 scale regressions as -- as a potential problem.<br/>                 11 I -- I did not conduct any statistical<br/>                 12 tests myself for whether -- whether that problem<br/>                 13 was present and -- and a serious one.<br/>                 14 Q. Okay. There's also the term -- and I'm<br/>                 15 not sure that you used this -- but there's the<br/>                 16 concept of exogenous. What would that -- what<br/>                 17 would that mean?<br/>                 18 A. And that's the other side of the coin from<br/>                 19 endogenous.<br/>                 20 Q. Okay.<br/>                 21 A. And a variable is exogenous if it is -- if<br/>                 22 it is not correlated with the statistical noise in<br/>                 23 a regression.<br/>                 24 Q. Can you turn to Paragraph 8 of your reply<br/>                 25 declaration, please.</p>   |
| <p style="text-align: right;">Page 91</p> <p>1 Q. Ever have a student challenge you in class<br/>                 2 for employing moving averages?<br/>                 3 A. No.<br/>                 4 Q. You -- you -- in your -- in your reply<br/>                 5 report you use the term "endogenous." How would<br/>                 6 you -- how would you describe that, or how would<br/>                 7 you define that term?<br/>                 8 A. Endogenous refers to the -- in the context<br/>                 9 in which it's used -- refers to the use of a<br/>                 10 right-hand side variable, an explanatory variable<br/>                 11 in a regression that is related in some way to the<br/>                 12 random noise in the regression.<br/>                 13 That it's a -- a way in which that might<br/>                 14 typically come about, and in fact, a way in which<br/>                 15 it does come about in Professor Elhauge's work is<br/>                 16 when a right-hand side variable, such as the<br/>                 17 restricted contract variable, is constructing --<br/>                 18 constructed using information on the -- on the<br/>                 19 outcome variable.<br/>                 20 That's -- that's a -- that's a methodology<br/>                 21 which has -- puts great risk at introducing<br/>                 22 endogenating. Endogenating itself -- if that's an<br/>                 23 adequate description -- is -- causes problems with<br/>                 24 statistical analysis. You can no longer use<br/>                 25 ordinary least squares and get -- and get sensible</p> | <p style="text-align: right;">Page 93</p> <p>1 Is -- are you -- is -- in Paragraph 8<br/>                 2 you're constructing a hypothetical, correct?<br/>                 3 A. That's correct.<br/>                 4 Q. Okay. And you -- you use -- you -- you<br/>                 5 employ the term "band" in there. What -- what are<br/>                 6 the parameters on your use of the word "band"?<br/>                 7 A. The purpose of this hypothetical is to<br/>                 8 make -- make the -- the logical point that one<br/>                 9 could have a -- a market in which sole source or<br/>                 10 dual-source contracting could arise as the result<br/>                 11 of perfectly competitive circumstances and would,<br/>                 12 as a result, produce a situation in which<br/>                 13 sole-source contracts would, on average, carry<br/>                 14 lower prices and have a larger share of the market<br/>                 15 than multisource contracts for any particular<br/>                 16 supplier.<br/>                 17 So that's -- that's the purpose of this<br/>                 18 logical point. Band you're -- simply means -- it<br/>                 19 would simply mean, for the purposes of the example,<br/>                 20 that a -- a buyer might say, I'll take the low bid<br/>                 21 and anybody that's within, say, 10 percent of the<br/>                 22 low bid. And if there's only one, they get a sole<br/>                 23 source. If there's more than one, they get a dual<br/>                 24 or multiple source. That would be -- that would be<br/>                 25 -- just a -- as a -- for the logical example, one</p> |

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| <p style="text-align: right;">Page 94</p> <p>1 way in which a -- a buyer's choice between sole<br/> 2 source and dual source, multiple source contracts<br/> 3 might -- might come about.<br/> 4 The -- the purpose of the example, as --<br/> 5 perhaps I said this already, but let me say it<br/> 6 again: The purpose of the example is to show that<br/> 7 the -- the pattern in which sellers, under<br/> 8 sole-source contract, would -- would have lower --<br/> 9 lower prices on average and higher shares on<br/> 10 average is a pattern that could -- could arise<br/> 11 naturally in an absolutely benign competitive<br/> 12 environment, and it would be perfectly<br/> 13 procompetitive to see that result.<br/> 14 And the reason I put this example in here<br/> 15 and emphasize this point is that, in my opinion --<br/> 16 my economic opinion -- it's quite important, I<br/> 17 think, Professor -- for Professor Elhauge to<br/> 18 distinguish -- distinguish what he views as<br/> 19 anticompetitive conduct by Covidien in this case<br/> 20 from practices that are -- that are purely<br/> 21 procompetitive.<br/> 22 And I think that he's -- he paints too<br/> 23 broad a brush when he simply says that sole-source<br/> 24 contracts, in and of themselves, are -- are<br/> 25 anticompetitive.</p>  | <p style="text-align: right;">Page 96</p> <p>1 and -- and other places where you -- you see<br/> 2 sole-source contracting with a -- with a particular<br/> 3 supplier by -- by buyers in a situation where --<br/> 4 where the -- you know, the buyers are willing and<br/> 5 that's what they want, and it's -- it, in fact,<br/> 6 encourages good prices for buyers.<br/> 7 So that's -- that's -- I -- is a<br/> 8 long-winded answer, but to me this is a very<br/> 9 important point. And it's -- I think it's -- to<br/> 10 me, it's the most fundamental criticism I have of<br/> 11 Professor Elhauge's analysis, which is that I feel<br/> 12 that he does not answer the right question. The<br/> 13 right question should be, did -- did Covidien<br/> 14 engage in conduct which -- which distinguishes it<br/> 15 from a pure -- a workably competitive firm? Were<br/> 16 there specific actions, specific things that it did<br/> 17 which caused it to give results different or more<br/> 18 extreme, perhaps, than -- than you would see with<br/> 19 buyer-driven sole and multiple-source contracting<br/> 20 at the buyer's discretion?<br/> 21 Q. Your -- your example doesn't -- doesn't<br/> 22 indicate any -- or your hypothetical doesn't have<br/> 23 any disclosure with regard to relative market<br/> 24 shares of the participants, does it?<br/> 25 A. Well, I -- the example I stated which, of</p> |
| <p style="text-align: right;">Page 95</p> <p>1 I think the -- the line between<br/> 2 procompetitive and anticompetitive behavior, a<br/> 3 reasonable balance in a rule-of-reason case has --<br/> 4 has got to -- has got to recognize that, in a<br/> 5 perfectly competitive situation, sole-source<br/> 6 contracting could be perfectly procompetitive.<br/> 7 Q. You said, "perfectly competitive." Is<br/> 8 there -- is there, like, a -- is there a theorem --<br/> 9 Bertrand theorem -- is there some kind of theorem<br/> 10 for a perfectly competitive environment? Is there<br/> 11 some term of art with that? Cornot, maybe?<br/> 12 A. I -- I tried to use in my report the words<br/> 13 "workably competitive," which I think is the -- is<br/> 14 more of the -- the notion of rough-and-ready<br/> 15 competition that, perhaps, is recognized in legal<br/> 16 circles.<br/> 17 I don't mean "perfectly competitive" in<br/> 18 the sense of -- in this context I didn't mean that<br/> 19 it had to be a textbook case of atomistic suppliers<br/> 20 and -- and all of that. The -- the proposition<br/> 21 here that I'm trying to make is that there needs to<br/> 22 be some bright line, some baseline of conduct which<br/> 23 -- which is acceptable, under -- under the<br/> 24 antitrust statutes, and which is -- is not going to<br/> 25 exclude contractors bidding for remodeling projects</p> | <p style="text-align: right;">Page 97</p> <p>1 course, is just a simple logical example, assumes<br/> 2 that a sole-source contractor would have all of the<br/> 3 market. A dual-source contractor, each would have<br/> 4 50 percent of the market. In -- in multiple-source<br/> 5 contracting, the rivals would share -- share the<br/> 6 market equally.<br/> 7 But the -- that -- that's a -- that's a<br/> 8 simplification for the purposes of the example.<br/> 9 Q. So --<br/> 10 A. And -- and one could vary those. The<br/> 11 logical point would still be the same. Namely,<br/> 12 that under -- under workably competitive<br/> 13 buyer-requested contracting, one can have -- one<br/> 14 would -- would expect to see a pattern in which<br/> 15 sole-source contractors would charge less and get<br/> 16 more of the business.<br/> 17 Q. Okay. Now, I was asking the question,<br/> 18 what you're indicating to me is that they're -- in<br/> 19 your hypothetical, you're talking about a market<br/> 20 that has -- is entirely predicated upon one<br/> 21 contract, correct? Because I asked you about<br/> 22 relative market shares, and you gave me the answer<br/> 23 that, in a sole-source -- with a sole-source<br/> 24 contract, it would be dominated by a perfect<br/> 25 monopoly; that there would be a hundred percent</p>   |

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1 share. And what you just said is that, in a  
 2 hundred-percent-share model, your expectation is  
 3 that prices would be lower. And I think that  
 4 violates basic economic principles.  
 5 A. Oh, it certainly does not.  
 6 MR. GUTKIN: Object. I'll object to form.  
 7 And I'm not even sure if there's a question pending  
 8 after that.  
 9 A. Okay. It -- it absolutely doesn't violate  
 10 any economic principles. The -- the point here is  
 11 that, before a contract is signed -- for whatever  
 12 duration it -- it applies -- in this logical  
 13 example, there is -- there is competition among --  
 14 among all -- all of the rivals. Now -- so that the  
 15 -- if someone gets a sole-source contract within  
 16 the context of this example, they do so because  
 17 they are the low bidder, the sole low bidder within  
 18 a -- within a certain band.  
 19 So the fact that they are then the sole  
 20 supplier over the duration of that contract doesn't  
 21 -- doesn't make them a monopolist in any economic  
 22 sense. It's true that they -- they got the  
 23 business over the -- over the period of this  
 24 contract, but they got it through competition.  
 25 Q. Okay. And -- and again, this is not based

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1 -- your -- your hypothetical is not based on the  
 2 GPOs and their practices, even though you include  
 3 GPOs in your hypothetical. These are just general  
 4 economic principles, correct?  
 5 A. The answer is it's correct. These are --  
 6 these are general economic principles, and they are  
 7 -- with the -- the point of showing that the -- the  
 8 pattern of sole-source, dual-source, multisource  
 9 contracting and the patterns of share variations  
 10 and price variations between those contract forms  
 11 is something that -- that can arise out of a -- out  
 12 of workable competition, driven by buyers'  
 13 preferences, with no anticompetitive conduct of any  
 14 sort involved.  
 15 Now, in -- in terms of actual GPO  
 16 practices and -- and application of this example to  
 17 -- to this case, I would say I have not studied  
 18 actual GPO practices. And it seems to me that it's  
 19 -- it's the nub of -- nub of the Plaintiffs' case  
 20 is they need to -- they need to demonstrate that  
 21 Covidien was doing something different than this.  
 22 [REDACTED]  
 23 [REDACTED]  
 24 [REDACTED]  
 25 [REDACTED]

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1 hypothetical?  
 2 MR. GUTKIN: Object to form.  
 3 A. Okay. Let me -- let me get the -- let me  
 4 get the text. "They" being Covidien --  
 5 Q. Tyco.  
 6 A. Tyco.  
 7 [REDACTED]  
 8 [REDACTED]  
 9 [REDACTED]  
 10 [REDACTED]  
 11 [REDACTED]  
 12 [REDACTED]  
 13 [REDACTED]  
 14 [REDACTED]  
 15 [REDACTED]  
 16 [REDACTED]  
 17 [REDACTED]  
 18 [REDACTED]  
 19 [REDACTED]  
 20 [REDACTED]  
 21 [REDACTED]  
 22 [REDACTED]  
 23 [REDACTED]  
 24 [REDACTED]  
 25 [REDACTED]

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1 [REDACTED]  
 2 [REDACTED]  
 3 [REDACTED]  
 4 Q. You -- the -- you also talk about a band.  
 5 And the band that you describe here is a -- is a  
 6 pricing band, correct?  
 7 A. For -- in -- in the -- in the -- in this  
 8 example, this is not actually a critical part of  
 9 the example, but the -- the idea would be that --  
 10 that sellers would be -- would respond to an RFP  
 11 from buyers with -- with -- with bids. And at  
 12 least one contracting mechanism that a buyer might  
 13 use is to -- is to say, We will -- we will take  
 14 bids. If we get multiple bids that are very, very  
 15 close to the lowest bid, we'll -- all those people  
 16 can sell. But if you're above that -- above that  
 17 range, you don't get -- you don't get to join the  
 18 -- the contract.  
 19 I -- that is -- for the purpose of the  
 20 example, the kind of contracting process that would  
 21 -- that corresponds to this example.  
 22 Q. And -- and if that occurred here -- that  
 23 everyone priced within this narrow band -- and the  
 24 GPOs still awarded Tyco a sole-source contract,  
 25 would that do violence to your hypothetical?

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1 MR. GUTKIN: Object to form.  
 2 A. Oh, I think the answer is the hypothetical  
 3 is -- is, in fact, quite specific on how -- what it  
 4 -- what this willing buyer would do in the -- in  
 5 the example in terms of seeing all these comparable  
 6 bids. Namely, for the purpose of the example, he  
 7 says -- says it would share the market equally  
 8 among the people who are winning or within the  
 9 margin-of-error bidders.  
 10 Q. Does --  
 11 A. Now, you know, beyond the example, does --  
 12 you've asked me the question, what would -- what  
 13 would happen -- what -- what are the implications  
 14 of Tyco getting a sole-source contract in a  
 15 situation where other bidders are essentially  
 16 giving the same bid? I think that would -- one  
 17 would want to look carefully at the circumstances.  
 18 Is that -- if that's a willing choice of the buyer,  
 19 you know, the question would be, where is the harm?  
 20 If it's the result of specific anticompetitive  
 21 practices by Covidien, then it seems Plaintiffs  
 22 would have an argument.  
 23 Q. Does your example -- I just have a couple  
 24 more questions. Does your example assume that the  
 25 pricing of the bidders remains constant, depend --

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1 and doesn't change, depending on what contract is  
 2 awarded?  
 3 A. That's correct. In this example, the --  
 4 this is the contract -- a simple example, logical  
 5 example where the -- the determination of the  
 6 contract form is -- is the result of a firm  
 7 submitting a single bid. And again, the purpose of  
 8 the example is to show that the kinds of patterns  
 9 that Professor Elhauge sees in his graphs and  
 10 regressions are -- can -- could be the result of a  
 11 workable competition. So that they are not -- they  
 12 are not discriminating between conduct that's  
 13 workably competitive and conduct, as he alleges  
 14 that Covidien engaged in, that's -- that's  
 15 anticompetitive.  
 16 So that's the purpose of the example.  
 17 Q. Okay.  
 18 A. Now, I under -- I understand that the --  
 19 to the extent that I know much about the actual  
 20 bidding process -- and I don't know the details of  
 21 it -- my understanding is that the sellers  
 22 typically -- that the GPOs ask for bids for  
 23 contracts of different types, and they get  
 24 different bids for the contracts of different  
 25 types.

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1 Q. And those -- those bids are submitted by  
 2 the manufacturers who determine their own pricing.  
 3 A. That's my understanding.  
 4 MR. CEBULASH: Okay. It's just about  
 5 1:30, and I think I'm done at this point. So  
 6 hopefully, you can make your plane.  
 7 THE WITNESS: Thank you.  
 8 MR. CEBULASH: Okay. Thank you.  
 9 VIDEO OPERATOR: The time is 1:29. This  
 10 deposition is concluded. This is the end of  
 11 Cassette 2. We are off the record.  
 12 (Whereupon the deposition ended at  
 13 1:29 p.m.)  
 14  
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1 DEPONENT'S ERRATA SHEET  
 2 AND SIGNATURE INSTRUCTIONS  
 3  
 4  
 5 The original of the Errata Sheet has  
 6 been delivered to Jeffrey Gutkin, Esq.  
 7 When the Errata Sheet has been  
 8 completed by the deponent and signed, a copy  
 9 thereof should be delivered to each party of record  
 10 and the ORIGINAL delivered to Brett Cebulash, Esq.  
 11 to whom the original deposition transcript was  
 12 delivered.  
 13  
 14  
 15 INSTRUCTIONS TO DEPONENT  
 16  
 17 After reading this volume of your  
 18 deposition, indicate any corrections or changes to  
 19 your testimony and the reasons therefor on the  
 20 Errata Sheet supplied to you and sign it. DO NOT  
 21 make marks or notations on the transcript volume  
 22 itself.  
 23  
 24 REPLACE THIS PAGE OF THE TRANSCRIPT WITH THE  
 25 COMPLETED AND SIGNED ERRATA SHEET WHEN RECEIVED.

1 Commonwealth of Massachusetts  
 2 Middlesex, ss.  
 3  
 4  
 5 I, P. Jodi Ohnemus, Notary Public  
 6 in and for the Commonwealth of Massachusetts,  
 7 do hereby certify that there came before me  
 8 on the 12th day of December, 2008, the deponent  
 9 herein, who was duly sworn by me; that the ensuing  
 10 examination upon oath of the said deponent was  
 11 reported stenographically by me and transcribed  
 12 into typewriting under my direction and control;  
 13 and that the within transcript is a true record of  
 14 the questions asked and answers given at said  
 15 deposition.

16 I FURTHER CERTIFY that I am neither  
 17 attorney nor counsel for, nor related to or  
 18 employed by any of the parties to the action  
 19 in which this deposition is taken; and, further,  
 20 that I am not a relative or employee of any  
 21 attorney or financially interested in the outcome  
 22 of the action.

23 IN WITNESS WHEREOF I have hereunto set my  
 24 hand and affixed my seal of office this  
 25 13th day of December, 2008, at Waltham.

\_\_\_\_\_  
 19  
 20 P. Jodi Ohnemus, RPR, RMR, CRR  
 21 Notary Public,  
 22 Commonwealth  
 23 of Massachusetts  
 24 My Commission Expires  
 25 3/23/2014

1 ATTACH TO DEPOSITION OF: DANIEL L. McFADDEN, Ph.D.  
 2 CASE: NATCHITOCHE PARISH HOSPITAL VS. TYCO

3 ERRATA SHEET

4 INSTRUCTIONS: After reading the transcript of your  
 5 deposition, note any change or correction to your  
 6 testimony and the reason therefor on this sheet.  
 7 DO NOT make any marks or notations on the  
 8 transcript; volume itself. Sign and date this  
 9 errata sheet (before a Notary Public, if required)  
 10 Refer to Page 105 of the transcript for errata  
 11 sheet distribution instructions.

12 PAGE LINE  
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 25 CHANGE: \_\_\_\_\_

1 I have read the foregoing transcript of  
 2 my deposition and except for any corrections or  
 3 changes noted above, I hereby subscribe to the  
 4 transcript as an accurate record of the statements  
 5 made by me.

6 DANIEL L. McFADDEN, Ph.D.

7 Subscribed and sworn to before me  
 8 this \_\_\_\_\_ day of \_\_\_\_\_, 2008.

9 Notary Public  
 10 My Commission Expires: