IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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

**TYCO INTERNATIONAL (US) INC., TYCO HEALTHCARE GROUP LP, AND THE KENDALL HEALTHCARE PRODUCTS COMPANY'S REPLY BRIEF IN SUPPORT OF THE MOTION TO EXCLUDE THE EXPERT REPORT AND OPINIONS OF PROFESSOR EINER ELHAUGE**

**[REDACTED VERSION]**

## TABLE OF CONTENTS

**Page**


I. INTRODUCTION ..... 1

II. ARGUMENT ..... 1

A. Plaintiffs' Claims Regarding Prof. Elhauge's Qualifications Entirely Miss The Point ..... 1

B. Prof. Elhauge Cannot Disprove That Rampant Selection Bias Vitiates His Simultaneous Comparisons ..... 5

1. Plaintiffs again admit the selection bias in Prof. Elhauge's simultaneous comparisons regarding share-of-purchase contracts ..... 6

2. Selection bias also undeniably infects the simultaneous comparisons regarding sole-source GPO contracts ..... 7

C. Prof. Elhauge's Simultaneous Comparisons are Inferior to A Properly Conducted "Access" Analysis and His Supposed Implementation of An "Access" Approach is Plainly Flawed ..... 9

1. An access approach would have largely avoided the selection bias inherent in Prof. Elhauge's simultaneous comparisons. ..... 10

2. Plaintiffs' purported access results are invalidated by inadequate data and obvious implementation errors ..... 12

D. Plaintiffs Also Fail to Rehabilitate Prof. Elhauge's Flawed Regressions. ..... 15

1. Prof. Elhauge's regressions are also infected with selection bias ..... 15

2. Prof. Elhauge admits that his logarithmic regression dumps the bulk of the relevant data. ..... 17

E. Covidien's Competitors' Sales At Novation During and After Covidien's Sole-Source Contract Do Not Support Prof. Elhauge's Conclusions ..... 18

F. Covidien's Economic Rationality Does Not Remotely Prove That Prof. Elhauge's Calculations Are Correct ..... 19

III. CONCLUSION ..... 20

## TABLE OF AUTHORITIES

**Cases** **Pages**

*Allgood v. General Motors Corp.*
No. 102CV1077DFHT AB, 2006 WL 2669337
(S.D. Ind. Sept. 18, 2006) ..... 7

*Ankuda v. R.N. Fish & Son, Inc.*
535 F. Supp. 2d 170 (D. Me. 2008) ..... 3

*Daubert v. Merrell Dow Pharm., Inc.*
43 F.3d 1311 (9th Cir. 1995) ..... 2

*Mitchell v. Gencorp Inc.*
165 F.3d 778 (10th Cir. 1999) ..... 3

*Moore v. Ashland Chem., Inc.*
151 F.3d 269 (5th Cir. 1998) ..... 2

*Shreve v. Sears, Roebuck & Co.*
166 F. Supp. 2d 378 (D. Md. 2001) ..... 2

*Sutera v. The Perrier Group of Am. Inc.*
986 F. Supp. 655 (D. Mass. 1997) ..... 2

*The Pinal Creek Group v. Newmont Mining Corp.*
352 F. Supp. 2d 1037 (D. Ariz. 2005) ..... 4

*Thomas J. Kline, Inc. v. Lorillard, Inc.*
878 F.2d 791 (4th Cir. 1989) ..... 4

*Tokio Marine & Fire Ins. Co., Ltd. v. Grove Mfg. Co.*
958 F.2d 1169 (1st Cir. 1992) ..... 2, 4

*Watkins v. Telsmith, Inc.*
121 F.3d 984 (5th Cir. 1997) ..... 2

## I. INTRODUCTION

As Covidien demonstrated in its opening brief and accompanying declarations, Professor Einer Elhauge's opinions and methods cannot separate the effects of perfectly legitimate competitive activity from allegedly anti-competitive conduct.[1] Prof. Elhauge also lacks even minimal training and qualification in statistics and econometrics, yet he proffers analyses that require expertise in both these areas. These fundamental defects make his proposed testimony not only substantively useless to the trier of fact, but highly misleading and prejudicial.

Plaintiffs respond to these fatal deficiencies by seeking to bury them under a mountain of evasive explanations, misleading (and sometimes false) clarifications, and inflammatory attacks on two distinguished economists, Dr. Ordover and Dr. McFadden. Nothing in Prof. Elhauge's new 72-page declaration or Plaintiffs' opposition brief even remotely cures the pervasive selection bias in Prof. Elhauge's analyses, corrects the defects in his improper regressions, or demonstrates that he has the expertise to present the opinions in his report to a jury. Thus, under the familiar *Daubert* standards, Prof. Elhauge's opinions are inadmissible and this Court should exclude his testimony.

## II. ARGUMENT

### A. Plaintiffs' Claims Regarding Prof. Elhauge's Qualifications Entirely Miss The Point

Plaintiffs have the burden to show that Prof. Elhauge has the necessary expertise to perform and testify about the sophisticated economic and data analyses that are the linchpin of Plaintiffs' case. Their exclusive reliance on Prof. Elhauge's legal background and alleged

---

[1] "Plaintiffs" are Natchitoches Parish Hospital Service District and JM Smith Corp. d/b/a Smith Drug Co.; "Covidien" means Tyco International (US) Inc., Covidien (formerly Tyco Healthcare Group LP), and The Kendall Healthcare Products Company.

knowledge of "antitrust economics" utterly fails to meet that challenge. Plaintiffs' insistence that Prof. Elhauge need only be qualified in the general area of antitrust economics to offer the economic and statistical analyses contained in his report is wrong. (*See* Plaintiffs' 11/14/08 Opposition to Defendants' Motion to Exclude Elhauge Report ("Opposition" or "Opp'n") at 3-4.) Plaintiffs cite no authority for the claim that his putative knowledge of antitrust economics and his law degree qualify him to perform complex statistical comparisons and regressions. To the contrary, the law squarely rejects Plaintiffs' argument.

Controlling authority dictates that an expert cannot pass muster simply by showing expertise in a related field or an understanding of common principles. *See, e.g., Tokio Marine & Fire Ins. Co., Ltd. v. Grove Mfg. Co.*, 958 F.2d 1169, 1174-75 (1st Cir. 1992) ("professional witness" with license in civil engineering and experience investigating over 60 crane accidents not qualified because he "conceded that he was not an expert in crane maintenance nor in crane operation").[2] As courts have consistently held, "[t]he fact that a proposed witness is an expert in one area, does not *ipso facto* qualify him to testify as an expert in all related areas." *Shreve v. Sears, Roebuck & Co.*, 166 F. Supp. 2d 378, 391 (D. Md. 2001). Prof. Elhauge's endorsement of his own work (which Plaintiffs cite as alleged proof of qualification)[3] is, of course, also legally meaningless. *See, e.g., Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1316 (9th Cir. 1995) ("the expert's bald assurance of validity is not enough.").[4]

---

[2] *See also Watkins v. Telsmith, Inc.*, 121 F.3d 984, 987-88 (5th Cir. 1997) (civil engineer with practical experience in common engineering principles cannot testify regarding mechanical engineering issues); *Sutera v. The Perrier Group of Am. Inc.*, 986 F. Supp. 655, 667 (D. Mass. 1997) (Saris, J.) (excluding oncologist and hematologist from opining as to leukemia's causes, where the expert had considerable experience in diagnosis and treatment of leukemia, but inadequate expertise in epidemiology, toxicology, biostatistics or risk-assessment).

[3] Citing to Prof. Elhauge's own declaration, Plaintiffs claim "Prof. Elhauge has properly applied economics (and some econometrics) to analyze the evidence in this case." (*Id.* at 4 (citing 11/14/08 Declaration of Prof. Elhauge ("Elhauge Decl.") ¶¶ 99-100).)

[4] *See also Moore v. Ashland Chem., Inc.*, 151 F.3d 269, 276 (5th Cir. 1998) (Expert admission "requires some

The closer Prof. Elhauge's background is examined, the clearer it is that he has no business presenting the statistical analyses that are the centerpiece of his opinions here. Plaintiffs admit that Prof. Elhauge's analyses apply "some econometrics," yet Prof. Elhauge already testified that he is "not [] an econometrician." (Opp'n at 4; 10/17/08 Defendants' Motion to Exclude Expert Report and Opinions of Elhauge ("Motion") at 5 (Docket No. 176).) Plaintiffs try to recover by saying that Prof. Elhauge only meant to concede that he is not a scholar who *develops* methodology in econometrics. (Opp'n at 3-4.) But developing methodology is precisely what Prof. Elhauge purports to do here. Among other things, he chose the types of regressions to run, selected the variables, picked the data to analyze (and discard), and decided how to populate his test groups. Additionally, even if Prof. Elhauge's work could be described as merely "applying" econometrics, Plaintiffs do not, in any way, establish that he has the training or experience needed to reliably perform that task either.

Instead of showing that Prof. Elhauge is qualified to perform statistical comparisons and regressions, Plaintiffs revert to baseless assurances that Prof. Elhauge's prior legal experience and scholarship somehow qualify him as an expert. (Opp'n at 5-6.) The issue of whether Prof. Elhauge is a legal scholar is simply irrelevant to the admissibility of the economic opinions he intends to deliver to the jury. *See, e.g., Ankuda v. R.N. Fish & Son, Inc.*, 535 F. Supp. 2d 170, 174 (D. Me. 2008) ("[I]f the expert witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts.") (citation omitted).

---

objective, independent validation of the expert's methodology. The expert's assurances that he has utilized generally accepted scientific methodology is insufficient."); *Mitchell v. Gencorp Inc.*, 165 F.3d 778, 781 (10th Cir. 1999) (same).

Prof. Elhauge's previous litigation experience is equally irrelevant to this inquiry. Under governing First Circuit law, the fact that Prof. Elhauge has been qualified in other antitrust cases does not mean he has earned a free pass here. *Tokio Marine*, 958 F.2d at 1175 n.3 ("The fact that a person spends substantially all of her time consulting with attorneys and testifying in trials is not a disqualification, but it is not an automatic qualification guaranteeing admission of expert testimony."); *see also Thomas J. Kline, Inc. v. Lorillard, Inc.*, 878 F.2d 791, 800 (4th Cir. 1989). More importantly, none of the courts that previously allowed Prof. Elhauge to testify ruled that he was competent to perform statistical comparisons or regressions, and, according to Prof. Elhauge, he has presented this type of analysis in only one trial.[5]

Plaintiffs' massive effort to impeach Covidien's descriptions of Prof. Elhauge's treatment by other courts is disingenuous. (Opp'n at 7.) Several courts have remonstrated Prof. Elhauge for including improper legal instruction in his trial testimony and expert materials. To remove any doubt and rebut Plaintiffs' allegations, Covidien provides additional detail below:

- In the *Pinal Creek* case, Prof. Elhauge sought to testify that the defendant could be found legally liable under his interpretation of Supreme Court precedent and antitrust law. *See The Pinal Creek Group v. Newmont Mining Corp.*, 352 F. Supp. 2d 1037, 1046 (D. Ariz. 2005). Recognizing that "expert testimony by lawyers, law professors, and others concerning legal issues is improper," the court concluded that Prof. Elhauge's opinion on the relevant law "invades the province of the trial court and is inadmissible." *Id.* at 1043, 1046. Consequently, the court ruled that Prof. Elhauge "is precluded from offering his opinion regarding the law that governs this case and federal anti-trust law." *Id* at 1046.

- In the *Masimo* case, the plaintiff attempted to proffer Prof. Elhauge to explain the

---

[5] Prof. Elhauge claims that he presented similar statistical work in the *Applied Medical* trial. (Elhauge Decl. ¶ 77.) But, from what the public records show, it appears that the defendant in *Applied* never moved to exclude Prof. Elhauge's testimony on these matters, and thus the court never considered, much less ruled upon, whether Prof. Elhauge was qualified to present such analysis. Likewise, Covidien did not move to exclude Prof. MacKie-Mason's testimony on these grounds in the *Masimo* case, and thus the court never deemed this methodology admissible, as Prof. Elhauge implies. (*Id.*) To the contrary, as Covidien detailed in its opening brief, the *Masimo* court, after a two-day bench trial to determine which experts' model was scientifically proper, rejected the methodology advanced by Prof. MacKie-Mason (and Prof. Elhauge here) and adopted, *in toto*, Dr. Ordover's approach. (Motion at 14-15). Covidien has pending motions to exclude Prof. Elhauge's similar data work in the *Rochester Medical* and *Daniels* litigations before Judge Folsom in the Eastern District of Texas.

significance of the original jury's verdict on liability to a new jury empanelled to determine damages. During the pre-trial hearing, when Covidien protested that Prof. Elhauge was "being offered to explain to the jury the significance and meaning of the jury's verdict from the last trial," the court responded, "Yes, I know that." (Ex. A at 46:11-15.)[6] Counsel pointed out that "to have a Harvard law school professor lecture to the jury on the legal meaning of a verdict is improper" and invaded the province of the court. (*Id.* at 46:20-47:6). The court agreed with Covidien's counsel that the "notion of having Mr. Elhauge explain the impact of the first jury's verdict...[is] just totally inappropriate," and ruled that "he can't do that." (*Id.* at 56:12-17.)

- In the *Applied Medical* case, defendant Johnson & Johnson moved to exclude Prof. Elhauge's testimony that it could be presumed "that a firm would always maximize profits by raising the standalone price [of a component of a bundled sales package] above the independent monopoly price unless constrained not to do so." (Ex. B at 23.) The court agreed that this presumption "was developed for this litigation and finds no support in the peer-reviewed literature." (*Id.* at 24.) Moreover, the court agreed that "Elhauge's presumption amounts to an impermissible opinion on the law ... [i]t is not the role of an expert to rewrite the law...[t]his ground is entirely sufficient to exclude Elhauge's opinion...." (*Id.* at 24-25.) Despite this admonishment, Prof. Elhauge repeatedly instructed the jury on legal matters during his testimony. During a recess, counsel for the defendant remarked that "[a]s the Court will recall, we filed a motion in-limine directed at Professor Elhauge's report before trial saying that it looked like he was coming to testify about the law and not about economics...[t]hree times this morning he did that." (Ex. C at 62:22-63:4) The court agreed that Prof. Elhauge's testimony "did sound awfully a lot like some of the jury instructions we have been discussing" and agreed to issue a corrective statement advising the jury to follow the court's instructions rather than the experts'. (*Id.* at 63:12-14, 64:3-19.)

In sum, Plaintiffs completely fail to show that Prof. Elhauge has the knowledge, skill, experience or training needed to present his economic opinions and conclusions to the jury.

### B. Prof. Elhauge Cannot Disprove That Rampant Selection Bias Vitiates His Simultaneous Comparisons

As shown in Covidien's opening brief, pervasive selection bias renders Prof. Elhauge's methods invalid and useless to addressing the economic issues presented in this case. Ironically, the magnitude of Plaintiffs' selection bias problem is clearest in the very analyses that Dr. Singer relies upon to estimate damages -- the simultaneous comparisons. In fact, for three of

---

[6] All references to an exhibit ("Ex.") refer to the lettered exhibits attached to the concurrently filed Declaration of Jeffrey M. Gutkin.

Prof. Elhauge's four simultaneous comparisons, Plaintiffs do not even deny that selection bias exists.[7] As shown below and in Covidien's Motion, selection bias is ubiquitous in Prof. Elhauge's work and renders his opinions unreliable and inadmissible.

### 1. Plaintiffs again admit the selection bias in Prof. Elhauge's simultaneous comparisons regarding share-of-purchase contracts.

Significantly, Plaintiffs do not dispute that selection bias is manifest in several parts of Prof. Elhauge's work. Prof. Elhauge performs four principal simultaneous comparisons: (1) customers who bought under GPO share discounts vs. those who did not; (2) customers who bought under sole-source GPO contracts vs. those who did not; (3) customers who bought under both share discounts *and* sole source contracts vs. those who bought under neither; and (4) customers who bought under share discounts *or* sole-source contracts vs. those who bought under neither. Even Plaintiffs do not deny that share discount comparisons suffer from selection bias. As the first sentence of this section of the Opposition makes clear, Plaintiffs deny selection bias only in the *sole-source contract* simultaneous comparison. (Opp'n at 9 ("Selection bias cannot explain the simultaneous comparison showing that buyers purchase much less from rivals when their GPO *has a sole source contract* with Tyco.") (emphasis added).)[8] Comparisons (1), (2), and (4) above are critical inputs for Dr. Singer's damages model, yet two of those three analyses incorporate the admitted selection bias in the share discount comparison. (Ex. D.) Thus, even if Plaintiffs are right on every point they actually dispute (which is not at all the

---

[7] Dr. Singer's damages estimate lives or dies on the reliability of Prof. Elhauge's simultaneous comparisons. Dr. Singer's exhibits show that the results of three simultaneous comparisons are imported *directly* into Dr. Singer's model. (Ex. D (compare Elhauge Revised Exhibits 9, 10, 12 with Singer Revised Tables R1, R2, and R3 ("Change in Rival Penetration" Row)).) If those numbers are unreliable, so are *all* of Plaintiffs' estimates of damages.

[8] Plaintiffs have not denied the presence of selection bias in the share-of-purchase comparisons because it is undeniable. Comparing a group of customers who elected to commit to buying a large percentage of their sharps containers from Covidien to a group containing many customers who declined to commit and opted to buy predominantly or entirely from a competitor is flawed as a matter of basic research design. Buyers with preferences for Covidien self-select into the "burdened" group and buyers preferring rivals self-select as "unburdened."

case), two of Dr. Singer's three overall damages calculations cannot go to the jury. *See, e.g.*, *Allgood v. General Motors Corp.*, No. 102CV1077DFHT AB, 2006 WL 2669337, at *9-11 (S.D. Ind. Sept. 18, 2006) (expert's "methodology...was not sufficiently reliable to satisfy the demands of *Daubert* and Rule 702 due to selection bias and therefore cannot be admitted".)

**2. Selection bias also undeniably infects the simultaneous comparisons regarding sole-source GPO contracts.**

Plaintiffs' scattered attempts to show that the sole-source GPO simultaneous comparisons are free of selection bias are factually unsustainable. Plaintiffs first glibly assert that, because customers do not choose a GPO based on what type of sharps containers they prefer, buyers in sole-source Covidien GPOs must have the same preferences as those not in such GPOs. (Opp'n at 9.) But, as Covidien's Motion pointed out, hospitals are put into the burdened group based on what contracts they *buy through*, not what GPO (or GPOs) they *belong to*. (Motion at 11.) Thus, there is no reason to believe buyers' preferences in the burdened and unburdened groups are the same.

Plaintiffs and Prof. Elhauge next say that classifying customers only if they actually chose to buy sharps containers using their GPO contract is the right approach. (Opp'n at 10.) But this statement merely highlights Prof. Elhauge's stubborn refusal to follow basic research design principles. He says that "because the relevant issue is the impact of sole-source contracts that foreclosed GPO brokerage service, it is appropriate to include only buyers that actually utilize a GPO's brokerage services as being burdened by the foreclosure." (Elhauge Decl. ¶ 35.) This defies logic, because if the burdened group includes only those who bought under a sole-source Covidien contract, it necessarily *excludes* every customer whose preferences for a rival's product caused them to buy 100% from a rival. Thus, the very data that disproves Prof. Elhauge's theory is flushed from his analysis, guaranteeing the result he wants. All customers

with the strongest revealed preferences for competitors are purged from the burdened group, artificially and unjustifiably inflating Covidien's share and the alleged damages.[9]

Plaintiffs also say, as they have falsely said many times in the past, that Covidien is wrong in claiming that Prof. Elhauge "reassigns a buyer to the unburdened group if it stops purchasing through a sole-source GPO contract." (Opp'n at 10.) But Covidien is 100% right on this point. Indeed, Plaintiffs admit, later in the same paragraph, that Prof. Elhauge "assigns a buyer to the unburdened group if it did not purchase any containers at all through any sole-source GPO." (*Id.*) Prof. Elhauge also admits, "I concluded that a buyer was not in the burdened group only if it did not buy any sharps containers through a restricted GPO *at all.* Purchasing even a single container from Tyco through a sole-source GPO contract was enough to *continue* assigning a buyer to the burdened group." (Elhauge Decl. ¶ 36 (emphasis added).) Although Plaintiffs and Prof. Elhauge are parsing their words extremely carefully, they cannot mask the undeniable fact that if a customer switches *all* sales to a rival, Prof. Elhauge does not "continue" to treat the customer as burdened. That is *precisely* what Covidien stated in its Motion. (Motion at 13 ("whenever a 'burdened' hospital demonstrates that the challenged contracts do not prevent it from switching entirely to a rival, Prof. Elhauge purges that buyer from the burdened category.").)[10] Reassignment does occur, as the actual examples in Dr. Ordover's concurrently filed Reply Declaration prove. (Ordover Rep. Decl. ¶¶ 30-35.) Plaintiffs' continued insistence

---

[9] Prof. Elhauge also makes the odd argument that these buyers are appropriately purged from the burdened group because they suffer an independent harm by, in some cases, being forced to go outside of a GPO to buy from a rival. (Elhauge Decl. ¶ 35.) This is a non sequitur. The question in the simultaneous comparisons is how many customers the challenged contracts diverted from rivals. If the rivals obtained the sales, whether some buyers bought outside of a GPO is irrelevant. Prof. Elhauge's notion that losing the GPO brokerage services would have raised rivals' costs is reminiscent of the "Raising Rivals Costs" damages model that Dr. Singer considered, but ultimately abandoned for lack of data. (12/18/07 Expert Report of Dr. Hal Singer ("Singer") ¶ 74 (Docket No. 136).)

[10] Prof. Elhauge's rejoinder that customers who continued to purchase small amounts of sharps containers from Covidien would remain in the burdened group (which Covidien already acknowledged) ameliorates his mistake very little, given his own admission that "most buyers" standardize on one supplier. (Elhauge Decl. ¶ 8.)

that it does not, despite their expert's admission, is a naked attempt to hide the flaws in Prof. Elhauge's work from this Court.

Plaintiffs also attempt to disprove selection bias in the sole-source GPO simultaneous comparisons by pointing out one trivial correction to Covidien's understanding of Prof. Elhauge's method. They state that if a member of a Covidien sole-source GPO purchased entirely from a rival, *but not through a GPO contract*, Prof. Elhauge dropped them from the analysis rather than putting them in the unburdened group. (Opp'n at 10.) This clarification does not, in any way, eliminate selection bias. First, if a customer in a sole-source Covidien GPO opted to purchase entirely from a rival *through a different GPO*, they were placed in the unburdened group, thereby inflating the rivals' share in that group through self-selection and inflating damages. (Ordover Rep. Decl. ¶ 35 (listing examples).) Second, even though a customer in a sole-source Covidien GPO that opted to purchase entirely from a rival without a GPO contract was not placed in the unburdened group, it was still improperly dropped from the burdened group, thereby inflating Covidien's share in the burdened group by self-selection and, again, inflating damages. (*Id.* ¶ 32 & n.35 (listing examples).) Thus, nothing in Plaintiffs' or Prof. Elhauge's reply submissions in any way cures or disproves the selection bias riddling the sole-source GPO simultaneous comparisons.

Without reliable simultaneous comparisons, *all* of Dr. Singer's damages calculations lack a vital input and cannot be performed. Therefore, Prof. Elhauge's inability to test and quantify alleged rival foreclosure in a scientifically reliable manner is fatal to Plaintiffs' case.

### C. Prof. Elhauge's Simultaneous Comparisons are Inferior to A Properly Conducted "Access" Analysis and His Supposed Implementation of An "Access" Approach is Plainly Flawed

To illustrate the patent errors in Prof. Elhauge' work, Covidien's Motion demonstrated that a method based on comparing the purchasing of buyers with access to the

challenged practices to those without access would substantially reduce selection bias. Plaintiffs first claim that an access approach is wrong-headed,[11] but then argue that it produces results even more favorable to their case. Plaintiffs are flatly wrong on both counts. A properly-conducted access analysis would avoid the selection biases that pervade Prof. Elhauge's work. Additionally, Plaintiffs' attempted access analysis is rife with error and does not even analyze the relevant data that a legitimate access analysis requires.

### 1. An access approach would have largely avoided the selection bias inherent in Prof. Elhauge's simultaneous comparisons.

Plaintiffs assert that the access approach "makes no sense." (Opp'n at 10.) The Opposition quotes a lengthy passage from Prof. Elhauge's declaration arguing that comparing customers who actually utilized the challenged contracts with those who did not was correct, because the issue he is investigating is whether *utilizing* the challenged contracts caused customers to purchase less from rivals. (Opp'n at 10-11; Elhauge Decl. ¶¶ 59-60.) This reasoning is faulty, as a simple and highly analogous hypothetical makes clear.

Suppose Covidien offered a coupon for sharps containers and engaged a researcher to test whether the coupon caused it to gain sales. Prof. Elhauge would have the researcher compare what percentage of sales Covidien achieved among those who used the coupon (the "Coupon User Group") to what percentage it achieved among those who did not (the "Coupon Non-User Group"). In the Coupon User Group, Prof. Elhauge would have (1) all the customers who would have bought from Covidien with or without the coupon, but naturally used the coupon to get lower prices and (2) all the customers who bought from Covidien only *because of* the coupon. In the Coupon Non-User Group would be (1) all the customers who were committed to buying from

---

[11] Prof. Elhauge expressly disclaims any reliance on an access method, so his extensive commentary on it is largely irrelevant to the *Daubert* issue before this Court.

competitors no matter what coupon they received, (2) all customers who preferred competitors and did not consider the coupon sufficiently enticing, (3) customers who preferred Covidien, but chose not to use the coupon, and (4) customers who never received the coupon.

Now assume that the coupon was relatively widely available in the market (as the challenged practices are here). Given that assumption, nearly all customers with strong preferences for Covidien would be in the Coupon User Group (*i.e.*, few customers who prefer Covidien would irrationally forego the coupon's discount). Likewise, the Coupon Non-User Group would be dominated by customers who preferred Covidien's competitors (*i.e.*, there would be comparatively few customers who never received the coupon). In this way, customers that preferred Covidien would self-select into the Coupon User Group and those that preferred rivals would be in the Coupon Non-User Group. In other words, comparing the level of Covidien sales between those two groups would be totally uninformative, even if the "gap" between the two groups was enormous. The research question posed -- how many customers bought from Covidien *because of* the coupon -- could not be answered using this method.

By contrast, a researcher using a properly-designed access approach would find two sets of buyers with equivalent sharps container preferences, where only one set received the coupon. She would then test Covidien's sales to buyers in the set that had access to the coupon, whether they used it or not, with those that did not have access. That method would allow an analysis of the impact of the coupon without selection bias.[12] As this hypothetical makes clear, comparing

---

[12] Note too that if the researcher wanted to measure the effect of the coupon independent of the price drop associated with it, she would have to compare Covidien's performance among those that received the coupon with its performance among other customers being offered the same price discounts that did not receive the coupon. Here, even Prof. Elhauge must admit that if Covidien wins sales from rivals because of lower prices, that is a pro-competitive outcome. Therefore, he must measure the affect of the challenged practices themselves (sole-source GPOs and commitment contracts) separate and apart from the lower prices that accompany them. As Dr. McFadden and Dr. Ordover point out, none of his analyses control for price in this manner.

customers who utilize the challenged contracts with those who do not is valueless.[13]

Prof. Elhauge criticizes the access approach by claiming that if a hypothetical monopolist offered the challenged practice to the entire market, the access approach could not analyze the effect of the practice. (Elhauge Decl. ¶ 61.) Prof. Elhauge also claims that the entire market effectively had access to Covidien's exclusionary practices here. (*Id.* ¶ 63.) This is an odd criticism. An analysis based on the utilization of the challenged contracts is invalidated by selection bias. If, as Prof. Elhauge asserts, using an access approach to remove selection bias is impossible in this market, then selection bias is an *incurable problem* with his proposed approach. This, of course, does not prove that it was impossible to measure the effect of the challenged contracts. It simply proves that a different analysis than the one Prof. Elhauge devised was required. The fact that he apparently does not believe it is possible to fix the defects in his chosen method does not justify ignoring those defects.[14]

### 2. Plaintiffs' purported access results are invalidated by inadequate data and obvious implementation errors.

After arguing that an access approach is inferior and fully standing behind his original comparison regime, Prof. Elhauge claims that conducting an access-based analysis produces even more Plaintiff-favorable results than his original work. (Opp'n at 11.)

As an initial and dispositive matter, Prof. Elhauge cannot simply walk away from the

---

[13] Prof. Elhauge's declaration analogizes his utilization approach to testing the effect of cigarettes on smokers, rather than on those with access to cigarettes. (Elhauge Decl. ¶ 62.) This analogy is strikingly misleading. It blurs the issue of what the relevant treatment being tested in the experiment is. In the case of smoking, the effect of smoking is what is being tested. Here, Prof. Elhauge should test the effect of belonging to a GPO with the challenged contracts. Instead, he effectively tests if choosing to buy from Covidien causes buying from Covidien.

[14] In its Motion, Covidien also set forth a hypothetical in which a GPO contract was assumed to have absolutely no effect on purchasing, and showed that Prof. Elhauge's flawed method would find that 100% of the difference between the rivals' sales in the burdened and unburdened portions of the market was caused by the contract. (Motion at 11-12.) Plaintiffs and Prof. Elhauge offer no meaningful rebuttal to that hypothetical.

only approach to quantifying foreclosure set forth in his Report and the only approach Plaintiffs' damages expert ever considered. Covidien's showing that the simultaneous comparisons are hopelessly polluted with selection bias does not entitle Prof. Elhauge to a "do over." For Plaintiffs to switch to an access-based approach at this stage would necessitate new expert reports, new rebuttals and new depositions. This, of course, cannot happen. *Daubert* motions nearly always follow the close of expert discovery. The fact that a *Daubert* challenge can bring unsolvable problems in an expert's methodology to light does not justify sending that expert back to the drawing board.

Even if Prof. Elhauge's foray into access-based analyses was not a purely academic exercise that the jury will never hear, it would have to be stricken as unreliable because of the manner in which he implemented it. As a starting point, Prof. Elhauge uses entirely the wrong data to conduct his access analysis. A reliable access analysis requires complete GPO member rosters for all the GPOs offering the challenged contracts. In place of this, Prof. Elhauge uses the poor proxy of actual purchasing records and manual matching of customers.[15] This leads to several types of errors and re-infuses selection bias into the results.

For example, if a buyer is a member of Healthtrust (a sole-source Covidien GPO) and Broadlane (a sole-source Becton Dickinson ("Becton") GPO), and buys exclusively from Becton for the entire class period, Prof. Elhauge would never know that the buyer is a Healthtrust member and would misclassify the buyer as unburdened, thereby inflating damages. The same would be true for a buyer who is a member of a Covidien GPO offering share discounts that buys

[15] Manual matching refers to the fact that when Prof. Elhauge observes a given customer purchasing from a competitor, he has to manually search the data to determine whether he has any purchase records that that customer is a member of one of Covidien's GPOs with the challenged practices. If there is no match, Prof. Elhauge treats the customer as unburdened. Relying on complete and accurate GPO member rosters would largely avoid this problem.

for the entire class period directly from Stericycle without a GPO contract. Prof. Elhauge's flawed access implementation would misclassify the buyer as unburdened. His use of purchasing records, instead of membership rosters likewise causes him to miss changes in GPO affiliation that do not change sharps container purchasing. For example, a multi-source GPO member buying from Becton, who later joins a sole-source Covidien GPO, but continues buying from Becton, should be reassigned to the burdened group under a proper access analysis. Prof. Elhauge would, of course, be unable to do this, because he would be unaware of the GPO change.[16] As explained in Dr. Ordover's Reply Declaration, inadequate hospital identifying information causes Prof. Elhauge to misclassify multiple buyers as unburdened who should have been in the burdened group. (Ordover Rep. Decl. ¶¶ 57-61.) This reintroduces selection bias into Prof. Elhauge's access analysis, because the misclassified customers are predominantly those buying from competitors who should have been classified as burdened. (*Id.* ¶¶ 56-62.)

Prof. Elhauge's attempt at an access analysis also heightens the importance of another error that was also present in his original analysis. In the simultaneous comparison between buyers: (1) with either a share contract or a sole-source Covidien GPO contract and (2) buyers with neither contract, a substantial percent of the unburdened group is comprised of members of Broadlane, which had a sole-source contract with Becton for part of the relevant period. (Ordover Rep. Decl. at n.66.) To use these buyers as a control group is equivalent to assuming that the same proportion of the but-for world market would have been in a sole-source contracts with Becton Dickinson. But this is plainly a false assumption that inflates damages, because the

[16] Prof. Elhauge may also infer changes in GPO status where none occur. For example, if a hospital was a member of a multi-source GPO *and* Healthtrust from 2000 through 2008, it should always, under an access approach, be in the burdened group. However, if the hospital buys from Becton through the multi-source GPO until 2006, then starts buying from Covidien in 2007, Prof. Elhauge's access implementation assumes the hospital only joined the sole-source GPO in 2007 and only then assigns that hospital to the burdened group.

but-for world is posited to have no sole-source GPO contracts and Prof. Elhauge has taken the position that Becton's sole-source contract at Broadlane lessened Covidien's sales to Broadlane members. (12/18/07 Expert Report of Prof. Elhauge ("Elhauge") ¶¶ 184-85 (Docket No. 133).)

Prof. Elhauge's access implementation also contains a mistake that violates Prof. Elhauge's own rules for how the burdened and unburdened groups should be populated. In his share-of-purchase comparison, when customers bought exclusively from a competitor through a multi-source GPO that also included Covidien, the customers were mistakenly classified as unburdened, even when that GPO offered Covidien share discounts. (Ordover Rep. Decl. ¶¶ 66-69.) This mistake, standing alone, explains Prof. Elhauge's finding that his access analysis shows a larger gap from share discounts than his original analysis. (*Id.* ¶ 73.)

For these reasons, and numerous others described in Dr. Ordover's Reply Declaration (*id.* ¶¶ 54-74), Prof. Elhauge's implementation errors invalidate Plaintiffs' claim that an access approach would have been even more favorable to them than Prof. Elhauge's original analysis.

### D. Plaintiffs Also Fail to Rehabilitate Prof. Elhauge's Flawed Regressions

In terms of Plaintiffs' burden of proof, Prof. Elhauge's regression analyses are unimportant in comparison to his simultaneous comparisons. Dr. Singer's damages estimates do not, in any way, incorporate the results of these analyses. Even if it were relevant, Plaintiffs' defense of the validity of Prof. Elhauge's regressions is also entirely unavailing.

#### 1. Prof. Elhauge's regressions are also infected with selection bias.

For all the reasons that selection bias distorts the simultaneous comparisons, it is equally present in Prof. Elhauge's regressions on "all buyers." Just as Plaintiffs did not deny that the simultaneous comparisons for share discounts have selection bias, they also do not deny that the regressions on all buyers suffer from it. Instead, Plaintiffs repeat their flawed claim that the "selection bias cannot explain the regressions [regarding] buyers *whose contract status*

*changed*." (Opp'n at 12 (emphasis added); Elhauge Decl. ¶ 40.) Thus, Plaintiffs and their expert effectively concede the presence of selection bias in four of Prof. Elhauge's eight regressions.

Plaintiffs only remaining contention is that the four regressions that focus only on buyers whose contract status has switched (the "Switcher Regressions") are free of selection bias. The heart of Plaintiffs' argument is that the Switcher Regressions only analyze the purchasing of buyers whose GPOs lifted the exclusionary shackles that previously controlled those buyers' behavior. According to Plaintiffs, it would be "particularly ridiculous" for Covidien to assert that buyers happened to change their preferences at the same time that GPOs decided to change which contracts were available to those buyers. (Opp'n at 12.) But Covidien never made such an assertion. Instead, what Covidien has demonstrated, and what Dr. Ordover's Reply Declaration demonstrates again with specific examples, is that *the Switcher Regressions are not limited to buyers whose GPOs changed their offerings*. (Ordover Rep. Decl. ¶ 43-53.) Just like the simultaneous comparisons, a buyer is treated as having "switched" from an exclusionary to a non-exclusionary contract either when his GPO stops offering an allegedly exclusionary contract or when the buyer itself opts to entirely stop buying under an allegedly exclusionary contract.

For example, if a customer was buying from Covidien under a sole-source GPO and then voluntarily switched entirely to buying from Becton under a multi-source GPO, he would be treated as a switcher even though his sole-source GPO stayed sole-source with Covidien. (Ordover Rep. Decl. ¶¶ 51-53 (listing examples).) Likewise, a customer buying from Covidien under a share discount who then switched entirely to a competitor and ceased all buying under the share discount would also be treated as a "switcher." (*Id.* ¶ 47-48 (listing examples).) Thus, Plaintiffs' repeated claim that the Switcher Regressions isolate and analyze only the changes in purchasing that follow a GPO's decision to end the various challenged contracts is manifestly

fallacious. The Switcher Regressions analyze purchasing after both GPO-imposed *and buyer-imposed* switches and are thus, like the rest of Prof. Elhauge's work, distorted by selection bias.

### 2. Prof. Elhauge admits that his logarithmic regression dumps the bulk of the relevant data.

Regarding Prof. Elhauge's original use of logarithmic regressions, neither Plaintiffs nor Prof. Elhauge deny that his original regressions ignored over 90% of the relevant data. Instead, Prof. Elhauge offers unpersuasive rationalizations for his logarithmic regression, which Dr. McFadden's concurrently filed Reply Declaration concludes cannot justify dropping the huge amounts of data that Prof. Elhauge dropped. (McFadden Rep. Decl. ¶¶ 10-12.)

Additionally, Plaintiffs and Prof. Elhauge point out that, in re-running Prof. Elhauge's regressions in linear form, Dr. McFadden inadvertently excluded observations where rivals had 100% of the sales. (Opp'n at 13-14.) This critique is a sideshow. Dr. McFadden's Declaration expressly and repeatedly stated that he did not consider a linear regression to be a valid test of the impact of the challenged contracts for numerous reasons, including Prof. Elhauge's failure to control for price. (McFadden Decl. ¶¶ 26-27.) Dr. McFadden only ran a linear regression to illustrate the affect of reincorporating the excluded data. (McFadden Rep. Decl. ¶¶10-12.) That criticism is still entirely valid. As Dr. McFadden's Reply Declaration makes clear, with all the new data, a linear regression still produces far different, and less plaintiff-favorable, results than Prof. Elhauge's original logarithmic analysis. (*Id.* ¶¶ 13, 17 & Table 1)[17]

---

[17] This is true irrespective of whether one accepts Dr. McFadden's view that a fixed effects model is appropriate or Prof. Elhauge's view that it is not. (McFadden Rep. Decl. ¶ 17.) Even without fixed effects, the level of impact on rivals' sales shown in five of Prof. Elhauge's eight linear regressions falls by 40% or more compared to his original logarithmic calculations. (*Id.*¶ 13, Table 1.) With fixed effects, the results in all eight linear regressions fall dramatically as compared to his original results. (*Id.* at Table 1.)

### E. Covidien's Competitors' Sales At Novation During and After Covidien's Sole-Source Contract Do Not Support Prof. Elhauge's Conclusions

Another merely corroborative analysis that does not affect Dr. Singer's damages calculations is Prof. Elhauge's "longitudinal comparison" of the purchasing of Novation customers over time. Covidien's Motion showed that this comparison was flawed because Prof. Elhauge ignores the unmistakable fact that rivals' share at Novation began to grow substantially before the contract changed and because analyzing the sales data across several time periods showed no statistically significant increase in rivals' growth rates after the contract change. Plaintiffs offer several unpersuasive responses.

First, Plaintiffs assert that Dr. McFadden "claim[ed] to have run regressions that were not actually done" and that when the regressions are run "the way he actually proposed to do them" they support Prof. Elhauge's conclusions. (Opp'n at 2, 8-9.) This argument stretches the bounds of good-faith advocacy. Dr. McFadden ran four regressions, on four different time periods, which all showed no statistically significant change. (McFadden Rep. Decl. ¶¶ 18 & backup data.) Scrutiny of Plaintiffs' criticism reveals that they only claim that Dr. McFadden should have run a regression on the precise time period Prof. Elhauge prefers, which was *not* a time period Dr. McFadden claimed to analyze. (McFadden Decl. ¶ 21; Elhauge Decl. ¶ 28.)

Additionally, Prof. Elhauge's justification for the time period he chooses is unsound. In particular, Prof. Elhauge claimed that problems with Becton's data between January 2003 and September 2003 justified not starting his regression analysis until October 2003. But Prof. Elhauge nowhere explains why he disregards all the sales data from October 2001 through December 2002, which Dr. McFadden analyzed. Plainly a transient data problem, at most, justifies excluding the problematic period itself, not throwing out all the preceding data.

Even accepting Prof. Elhauge's preferred date range would not make this analysis useful. First, the regression still fails to control for price and the unremarkable fact that when Covidien offered buyers less attractive prices, its rivals' sales increased. (1/31/08 Expert Report of Ordover ("Ordover") ¶ 121 (Docket No. 132) ([redacted].) Additionally, even Prof. Elhauge's hand-picked date range does not produce a robust result, as it is not statistically significant at the 95% confidence level (*i.e.*, there is more than a 5% probability that the difference in growth rates results from pure chance and not the contract change).[18] (Elhauge Decl. ¶ 28 (acknowledging the result is "statistically significant at a 90% confidence level").)

What's more, Prof. Elhauge offers no explanation as to why Covidien's rivals began making major inroads at Novation in September 2004, well before the sole-source contract expired in August 2005. (Ordover Rep. Decl. ¶ 25-26.) Analyzing the time period from when that surge in rival growth began through October 2006 also shows that the end of the sole-source contract caused no statistically-significant change in the rivals' growth rates. (*Id.* ¶ 26.)

### F. Covidien's Economic Rationality Does Not Remotely Prove That Prof. Elhauge's Calculations Are Correct

Plaintiffs also argue that Prof. Elhauge's simultaneous comparisons must be right because, if the challenged practices had "no impact on purchasing behavior in the market," it would have been economically irrational for Covidien to offer them. (Opp'n at 8.) But Covidien never claimed that the challenged practices had *no* impact on purchasing. Quite to the contrary, Dr. Ordover expressly acknowledged that the reason that Covidien offers these discounts is because of the expectation that they may lead to increased sales. (Ordover ¶¶ 93-97.) Similarly,

---

[18] As Dr. McFadden's Reply Declaration explains, Prof. Elhauge's use of moving averages to increase his level of statistical significance is misguided. (McFadden Rep. Decl. ¶ 19.)

Ms. Guerin-Calvert expressly argues that GPO contracting can lead to both lower prices *and* relatively higher seller concentrations among those suppliers who successfully compete for strong GPO positioning. (1/31/08 Expert Report of Margaret E. Guerin-Calvert ("Guerin-Calvert") ¶¶ 80-85 (Docket No. 132).)

Plaintiffs may be misconstruing Covidien's contention that the challenged practices led to no "foreclosure," in the legally relevant sense of anti-competitively excluding rivals from the market. To the extent that the challenged practices increased Covidien's (and reduced rivals') sales, that is attributable to the expected and pro-competitive reality that a supplier offering better prices and products will deprive its rivals of sales in a properly functioning market. That is the essence of competition that the antitrust laws are designed to protect.

What Covidien and its experts also repeatedly demonstrate is that Prof. Elhauge's attempts to *quantify* the impact the challenged practices had on Covidien's sales are totally unreliable. Because of selection bias and many other problems, Prof. Elhauge computes an amount of foreclosure based on patently flawed methodologies that grossly overstates the impact the challenged contracts could have had. The amount of foreclosure Prof. Elhauge estimates translates directly into the amount of damages Dr. Singer calculates. Therefore, the lack of reliability in the foreclosure estimates renders both experts' conclusions unfit for the jury.

## III. CONCLUSION

For these reasons, the Court should exclude Prof. Elhauge's opinions under *Daubert*.

Dated: November 26, 2008

Respectfully submitted,

James Donato

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

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

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

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

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

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

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and copies will be sent to those indicated as non-registered participants on November 26, 2008.

/s/ *James Donato*
James Donato

1113489 v1/SF