IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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

Plaintiffs Natchitoches Parish Hospital and Smith Drug Co.'s Comments to Draft Report of Independent Expert Professor Orley Ashenfelter

Having reviewed the "Report of Orley Ashenfelter" ("the Report") in the above-captioned matter, and having been directed by the Court to give any comments that might help to prepare a final version of the Report to Professor Ashenfelter no later than July 15, 2009, Plaintiffs respectfully submit the following.

Introduction

Plaintiffs concur with Professor Ashenfelter's ultimate conclusions that:

(1) Professor Elhauge made no "technical errors in his analysis." Report at 25

(2) "there is nothing in the econometric analysis by itself that compels any particular estimate to be chosen" among the various methodologies used by Professor Elhauge. Id. at 26.

(3) "The final decision about the credibility of [Professor Elhauge's] estimates depends on the ultimate fact finders determination of what is most appropriate based on the totality of the evidence available." Id.

(4) Nothing in Professor Elhauge's credentials makes him unqualified to perform this analysis. Id. at 1.

(5) Professor Elhauge's econometric analysis is but one of four independent grounds for his conclusion that the challenged conduct had an anticompetitive impact, any one of which could logically support a fact-finder's determination to that effect. Id at 3-4

In short, Plaintiffs agree with Professor Ashenfelter's conclusions that Professor Elhauge has correctly applied accepted econometric techniques to the issue at hand in such a manner that the ultimate finder of fact could accept his conclusions and hold Tyco liable for its conduct, does not lack the qualifications to do so, and that in any event his conclusions could be independently

based on non-econometric grounds. These conclusions confirm there is no basis for excluding Professor Elhauge's testimony. However, Plaintiffs also believe that some portions of the Report mistakenly assess the legal framework within which these economic issues must be analyzed or overlook important evidence, and thus ask that the final version of the Report be modified in accord with these comments.

Impact v. Damages

The Report correctly notes that Professor Elhauge is opining on the "fact of impact", not the amount of impact, which is the subject of Dr. Singer's testimony. Id. at 4. However, the Report then indicates that it will nonetheless assess whether Professor Elhauge's econometric studies reliably measure the *amount* of injury because his studies are used as an input in Dr. Singer's damages calculation. Id. Following through on this indication, much of the Report's subsequent analysis of Professor Elhauge's econometric studies focuses not on whether they validly support his conclusion regarding the *fact* of impact, but rather whether they validly can be used to estimate the *amount* of impact. *See infra*. With great respect, this is legally improper. No one has challenged Professor Elhauge's calculations of the gap in rival shares between burdened and unburdened groups. The simple fact is that two different experts use these calculations for two different purposes. Professor Elhauge uses them, in combination with a host of other econometric and non-econometric evidence, to demonstrate the fact of impact. Dr. Singer uses them, in combination with a host of other evidence, to demonstrate the amount of impact. In extended briefing associated with a motion that Tyco ultimately withdrew, Plaintiffs demonstrated that Dr. Singer did properly use some of these calculations to estimate the *amount* of damages. More importantly, however, Dr. Singer's use of the studies and calculations is not

the correct framework for assessing Professor Elhauge's analysis regarding the *fact* of impact. It is legally critical to maintain the distinction between opinions regarding the fact and amount of impact for at least three reasons: (1) the law expressly adopts a lesser burden for proving the amount of injury,[1] (2) there is no challenge to Dr. Singer's damages methodology (the Defendants having withdrawn their *Daubert* challenge to Dr. Singer); and (3) the pending motion is to exclude Professor Elhauge, whose analysis cannot properly be impugned by another expert's use of his studies.

Portions of the Report should thus be modified to avoid framing the issue as an assessment of whether Professor Elhauge's empirical studies validly estimate the amount of injury. For example, the Report describes two "key assumptions" which it states are necessary for the validity of Professor Elhauge's simultaneous comparisons, and follows through by repeatedly applying those assumptions when assessing Professor Elhauge's analysis. Report at 6-7, 19-21. However, the Report also acknowledges that these two key assumptions could be "relaxed" in "an analysis that is only intended to determine ***whether*** the challenged contracts lower market shares for Covidien's competitors and not the ***extent*** of that depression". Report at 7 (all emphasis added). But in fact Professor Elhauge's opinion *is* only directed at whether there

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[1] Voluminous caselaw holds that laxer empirical standards apply when estimating the amount of injury based on the legal policy ground that "[I]t does not 'come with very good grace' for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted". *J. Truett Payne Co. v. Chrysler Motor Corp.*, 451 US 557, 565 (1981)(quoting *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 US 100, 123-124 (1969). See also *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 US 555, 562 (1931), *Bigelow v. RKO Radio Pictures*, 327 US 265 (1946); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 US 359, 379 (1927). Under this line of authority, the Supreme Court has approved rough approximation methodologies for estimating the amount of injury, including assuming the similarity of prices or profits in two time periods, market shares in two nations, or profits by two firms, without requiring the sort of rigorous controls the draft Report suggests in this case. *Zenith*, 395 U.S. at 124–25; *Bigelow*, 327 U.S. at 259–65; *Kodak*, 273 U.S. at 379; *Story Parchment*, 282 U.S. at 562–66.

is any market share impact, and is ***not*** offered to calculate the extent of the depression. Thus, although Professor Elhauge in fact did provide evidence to support both of these assumptions (as shown below), the Report should be modified so that the final version does not demand the satisfaction of two assumptions that the Report itself acknowledges are not necessary for Professor Elhauge's determination regarding the fact of injury.

Likewise, many portions of the draft Report frame the issue as being about (1) whether Professor Elhauge's analysis accurately measures the *degree* to which injury resulted from the challenged agreements rather than from other causes, *id* at 19-20, or (2) whether the various tests Professor Elhauge ran lead to different conclusions regarding the amount of injury. See *id.* at 18, 26-27 The final version of the Report should be modified to frame these issues as (1) whether Professor Elhauge's analysis provides a reliable basis for assessing the fact (not degree) of injury and (2) whether Professor Elhauge's multiple tests provide valid cross-checks for his conclusion on the fact of injury, rather than whether his tests differ from each other in a way that might bear on estimating the amount of injury.

Simultaneous Comparisons

The draft Report states that Professor Elhauge "does not study" or "does not address" whether the burdened and unburdened groups assessed in his simultaneous comparisons might differ in ways that would explain the gap in rival shares at these two groups even absent the exclusionary agreements. Report at 6, 20. Plaintiffs respectfully submit that these statements are mistaken for the reasons that follow. To some extent, these mistaken statements might reflect the fact that the Report did not consider any of Professor Elhauge's non-econometric analysis. *See* Id.at 1. The non-econometric portions of Professor Elhauge's analysis show that he

did provide valid grounds to believe the two groups were unlikely to be significantly different from each other. Specifically:

(1) For the GPO sole-source comparisons, Professor Elhauge noted that, due to the large variety and volume of medical products brokered through GPOs, and the relatively tiny percentage of GPO-brokered products that sharps containers represent, it is extremely unlikely that any buyer selected their GPO based on the provisions of the sharps container contract. Thus, in the presumed absence of any members who selected their GPO based on the sharps container contract provisions, one can infer that there is no significant difference in buyer preferences in the burdened and unburdened groups that would infect the analysis. See Elhauge Report at ¶ 198, Elhauge Dec at ¶ 34.[2]

(2) For the buyer commitment comparisons, Professor Elhauge observed that "as the Judge pointed out yesterday, in fact these are buckets, and the documentary evidence is consistent with that, that Tyco itself acknowledged buyers just view these as commodities. So it's very unlikely that there's these strong buyer preferences that lead to strong selection effect." *Daubert* Day 2 Tr. at 19. The Tyco internal documents to which

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[2] For ease of reference, Elhauge Report refers to the Opening Merits Report of Einer Elhauge submitted on 12/18/07; Elhauge Reply Report refers to the Merits Reply Report of Einer Elhauge dated 2/15/08; Elhauge Dec refers to the Declaration of Einer Elhauge submitted in opposition to Tyco's *Daubert* motion dated 11/14/08; Elhauge Sur-Reply Dec refers to the Sur-Reply Declaration of Einer Elhauge submitted in opposition to Tyco's *Daubert* motion dated 12/9/08; Elhauge Testimony Slides refers to the demonstrative slides Professor Elhauge used in conjunction with his testimony at the *Daubert* hearing, *Daubert* Day 1 Tr. refers to the transcript of the *Daubert* hearing held on 1/8/09; *Daubert* Day 2 Tr. refers to the transcript of the *Daubert* hearing held on 1/9/09; McFadden Reply Dec refers to the Reply Declaration of Dr. McFadden submitted on 11/26/08 in support of Defendant's Motion to Exclude Testimony of Prof. Einer Elhauge.

Professor Elhauge referred in his testimony found that customers "view our service as a commodity such as lawn service, office cleaning."[3]

Although non-econometric in nature, Professor Elhauge's observations do provide valid support for the assumptions that the burdened and unburdened groups were not significantly different in ways that might undermine his comparison studies. They would thus provide a valid basis for what the Report calls the "key assumptions" even if the issue were the amount of impact, rather than the fact of impact.

Further, because Professor Elhauge's studies focused on determining the fact of injury, not the amount, he did expressly study and address the issue of whether selection bias might explain the *entire* gap revealed by his comparison studies by: (1) looking both at non-econometric evidence on the fact of impact (the existence of which the Report expressly acknowledges) and (2) confirming the fact of impact with other econometric studies (the longitudinal and switching regressions) that the Report acknowledges are less vulnerable to any potential selection bias concerns. To the extent the Report characterizes Professor Elhauge's analysis of the potential for selection bias as "reactive" to suggestions from the defendants. Report at 18, Plaintiffs note that it was Professor Elhauge himself who in his opening report first raised the issue of whether "selection bias" might undermine his conclusion that the simultaneous comparisons demonstrated the fact of anti-competitive impact. See Elhauge Report at ¶194. He then explained how the other non-econometric and econometric evidence not only did not undermine his conclusion on the fact of impact, but verified it. See Elhauge Report at ¶¶ 195-199. Although Professor Elhauge does also respond to defendants' arguments that he should have used different models or assumptions, and shows that anticompetitive impact would exist

[3] Sharps Exchange Meeting, May 13, 2002, TYN0024639 at 24645. *See also Id.* at 24658 ("The customer sees sharps containers as a commodity purchase ").

even under those alternative models or assumptions. it is a normal part of rigorous empirical analysis to respond to such suggestions in order to demonstrate the robustness of empirical conclusions under varying models or assumptions.

Even if the relevant issue were the amount, rather than fact, of injury. Professor Elhauge's analysis also showed that using the access approach that Tyco and its experts recommended to address selection bias concerns (and that the Report states would "ameliorate" those concerns. Report at 20) would actually produce a larger anticompetitive impact. See Elhauge Sur-Reply Dec. ¶¶ 30-31. Although Professor Elhauge does not accept the defendant's access approach, for reasons the Report seems to find persuasive, see Report at 21, the fact that the access approach produces an even larger impact does support the conclusion that Professor Elhauge's comparisons are not being driven by selection bias.

Further. if the issue were the amount. rather than fact, of impact, the Report should take into account that Professor Elhauge pointed out that any tendency of the comparisons to overestimate the amount of impact because of selection bias would tend to be offset by the fact that the comparisons *under*estimate the amount of impact by failing to account for the fact that marketwide foreclosure impairs rival efficiency (and thus lowers rival shares) in both the burdened and *un*burdened portions of the market. See Elhauge Report at ¶187. The final version of the Report should also take into account that Professor Elhauge's comparisons were conservative in various other ways that the current draft does not mention. See Elhauge Dec ¶82 & n 105.

In addition, the Report now repeats Professor Ordover's objection to "the fact" that Professor Elhauge has reassigned buyers based on their contract status, as if it were a real fact. Report at 13. 16. The Report should note that Professor Elhauge has demonstrated that: (a)

buyers were not reassigned in the manner in which Ordover claimed, and (b) if one never reassigned buyers, the effects would remain similar and in some cases would be exacerbated. See Elhauge Dec at ¶¶ 36-37, 44-46, 65 & n.89, Elhauge Reply Report at ¶ 90; Elhauge Sur-Reply Dec at ¶ 20.

The Longitudinal Studies at Novation and Health Trust

The Report correctly observes that the group of buyers before and after the Novation change is likely to be the same so that the Novation study is unlikely to be infected by selection bias. Report at 21-22. However, the Report also suggests that, hypothetically, Novation may have changed its contract status because of an improvement in the product quality of Tyco's rivals. Id at 15, 22. The Report should note that Professor Elhauge specifically considered this possibility, establishing that it was inconsistent with other statistical evidence showing that the rival share at Novation increased much faster than the rival share outside Novation, a pattern that cannot be explained by an improvement in rival quality, which would affect rival shares equally everywhere, but instead is consistent with the Novation contract change having a separate impact. See Elhauge Decl. at ¶ 33.

On the regressions comparing the rival growth rates before and after the Novation contract change, the Report correctly concludes that there is no basis for excluding Professor Elhauge's regression showing a significant difference using a valid time period. See Report at 22. However the Report also states that Professor Elhauge found a significant effect "only if he uses two particular endpoints," whereas Professor McFadden's analysis proved no statistically significant effect using several other time periods. See Id. at 15-16, 22. Although this may have appeared to be the case from the McFadden declaration, this was disproven at the hearing.

Professor McFadden testified that he used two time periods, one from October 2003-May 2007 and the other from October 2001-October 2006. See McFadden Reply Dec ¶18. On his 2003-07 regression, Professor McFadden admitted at the hearing that it included "a six- to eight-month period [in which] there was no Becton Dickinson data" and that including a period without data from the largest rival "was an error on [his] part". *Daubert* Day 1 Tr. at 206. Thus, he conceded that one of his two regressions was invalid. On McFadden's 2001-2006 regression, Professor Elhauge pointed out at the hearing that it actually showed "a 0.95 percent difference in the growth rate at 92.5 percent level of confidence". *Daubert* Day 1 Tr. at 61. Professor McFadden did not dispute this fact in his testimony, but rather ignored it by implicitly requiring a 95% confidence level. However, a 90% confidence level is often used in statistics, including in Professor McFadden's own academic work. See McFadden, *Contingent Valuation and Social Choice*, 76 AM J. OF AGRICULTURAL ECON. 689, 697, n.10, 698, 701, 702 (1994). Finally, Professor Elhauge also testified at the hearing that, if one used Tyco's recommended approach, which included 2001-2002 data but not the bad data from Jan-Oct 2003, a similar 0.92% difference in growth rate could be shown at a 97.2% confidence level. *Daubert* Day 1 Tr. 61; Elhauge Testimony Slide 9. Thus, the final version of the Report should be modified to reflect the fact that, by the end of the hearing, it had been proven that Professor Elhauge showed a statistically significant change in growth rates using three different time periods, including the ones put forth by Tyco and Professor McFadden, whereas Professor McFadden offered no valid time period that disproved a statistically significant difference at the 90% confidence level. In the end, Professor McFadden's conclusion rested entirely on his implicit assertion that the court should demand 95% confidence rather that 90% confidence, an assertion that is not only inconsistent with his own prior academic work, but reflects a policy judgment about the proper

burden of proof that conflicts with standard law requiring plaintiffs to prove their case only by a preponderance of evidence, which is with more than 50% confidence.

The Report also states that defense expert McFadden presented visual evidence that the share shift at Novation began to occur before the contract change, and thus "there may have been a pre-existing trend in rivals' market share at Novation prior to the contract change that continued unaffected after the change". Report at 22. The last paragraph proves that, even if this trend did exist, three different regressions prove that the rate of growth was significantly higher after the sole source contract ended in August 2005. Further, the Report should note that Professor Elhauge showed that the pre-August 2005 visual trend was in fact caused by the end of a different exclusionary contract at Novation. *Daubert* Day 1 Tr.at 57-58, Elhauge Testimony Slide 11. The increase in overall rival shares at Novation began in January 2004. However, Professor Elhauge showed that this increase was all attributable to an increase in the share for *reusable* rivals at Novation, while the share for *disposable* rival Becton Dickinson did not increase from January 2004 to August 2005. As Professor Elhauge further explained, in January 2004 Novation announced an exception to its exclusionary Spectrum program, thus permitting members to purchase reusables for the first time without incurring the drastic penalties the program previously called for. This explains why there was no increase in Becton's share from January 2004 to August 2005 --- Becton does not market a reusable product and thus was unaffected by the January 2004 change. However, Becton's share does increase in August 2005 once the sole-source GPO contract ends, because this change did affect it. With this additional evidence in mind, it becomes clear that the 2004-2005 trend was caused by a change in one exclusionary contract that permitted reusables to be purchased by Spectrum members, while the

2005 market share shift accelerated this trend dramatically by ending the sole -source contract that barred Novation from brokering sales of any rival containers.

The Report also expresses an interest in checking the representativeness of the Novation study with data about the contract change at another GPO, specifically mentioning the GPO Consorta. Report at 22-23. Professor Elhauge did not present data on his analysis of Consorta because the relevant change at that GPO affected only one small rival for which there was data. Daniels. See Elhauge Report at ¶ 189 However, the Report should note that Professor Elhauge did present evidence that the Novation study was confirmed by a similar study at another GPO. showing that when HealthTrust switched from having buyer commitments to not having them, the rival share within HealthTrust rose by 20-25%. *Daubert* Day 1 Tr. 70-71; *Daubert* Day 2 Tr. 18, Elhauge Testimony Slide 14.

Causation Standards

The Report notes and repeats in various places the challenges which have been made throughout this litigation to Professor Elhauge's conclusions. Professor Elhauge has responded to all of these challenges, despite the fact that many of them offered little more than baseless speculation. For example, the Report cites to "one problem that the Defendants have raised: the possibility that buyers would choose Covidien anyway because of a preference for Covidien's products". Report at 20 & n 46, citing Ordover testimony. While this "possibility", and other selection bias arguments, have already been discussed and dismissed, it is worth noting that such a possibility is legally irrelevant. When defendants enter into agreements that restrain buyer choice, antitrust law provides that they cannot disprove causation by arguing that buyers would

have made the same choice anyway. [4] Moreover, even if it could be shown as a ***fact*** that some or even most of the effect on rival shares was the result of perfectly legal competition on the merits, such a showing would not defeat proof of causation. As the Supreme Court has consistently held, antitrust plaintiffs must show only that the violation was a "material cause" or "materially contributed" to the injury; there is no requirement that plaintiff show the violation to be the only or even main cause of the injury. [5] Further, proving material causation requires proving only a "reasonable probability" that defendants' antitrust violation contributed to plaintiffs' injury.[6]

Controlled Experiments

Finally, one portion of the Report seems to reflect an apparent miscommunication. In this portion, Professor Ashenfelter states that he asked each expert how they would do a "study absent constraints on data and analytical methods," and that it wasn't clear that Professors Elhauge or Ordover had thought carefully about this. Report at 5-6. Although one can see in retrospect the source of the confusion on this issue, the actual question asked how to design a controlled study without adding the crucial specification that he was assuming the absence of any constraints on data and analytical methods. *See Daubert* Day 2 Tr. at pp. 13, 44. In answering the question, it was reasonable for Professor Elhauge not to assume the absence of such

[4] *United Shoe v. United States*, 258 U.S. 451, 462 (1922); X Areeda, Elhauge & Hovenkamp, Antitrust Law ¶ 1753c (2d ed. 2004)(collecting cases).

[5] *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 & n 9 (1969), *Continental Ore v. Union Carbide*, 370 US 690, 702 (1962); IIA Areeda, Hovenkamp, Blair, & Durrance, Antitrust Law 338a, at 97 (3d ed. 2007) ("It is therefore enough that the antitrust violation contributes significantly to the plaintiffs injury even if other factors amounted in the aggregate to a more substantial cause.").

[6] *Catlin v. Washington Energy Co.*, 791 F.2d 1343, 1347 (9th Cir. 1986), *Advanced HealthCare Servs., Inc. v. Radford Community Hosp.*, 910 F.2d 139, 149 (4th Cir. 1990)

constraints, as the practical issue at stake was how best to perform an analysis given the real constraints. His answers clearly indicate that he understood what a controlled experiment was and pointed out the actual evidence that came closest to it given the actual data. Professor Elhauge stated: "in response to Professor Ashenfelter's question, I think [the Novation and HealthTrust longitudinal studies] actually provide the closest to a controlled experiment we have. It's before and after rather than at the same time, so it's not a perfect controlled experiment. but *they're as close as we can have in a world where, you know, we don't have the luxury of having a world without the Tyco antitrust violation*. You know, what we want is the but-for world and run an alternative universe to compare them, and that would be perfect, but I think this is as close as we can get." *Daubert* Day 2 Tr. at 18 (emphasis added). "Well, you know, actually I think the Novation [and] Healthtrust ones come about as close as you can." *Daubert* Day 2 Tr at 44. These answers made clear that Professor Elhauge was assuming the existence of the data constraints that Professor Ashenfelter apparently meant to relax, and so provide no evidence that Professor Elhauge did not think carefully about that issue, but rather simply indicate that he had thought carefully about the constraints posed by the actual data.

Conclusion

Although Plaintiffs respectfully ask that certain portions of the Report be modified to reflect the correct legal framework or the existence of overlooked evidence, this should not obscure the fact that the Report offers no basis on which to exclude Professor Elhauge's testimony. Further, Plaintiffs concur with the ultimate conclusions contained in the Report, specifically that:

(1) Professor Elhauge has made no technical errors in his application of econometrics;

(2) econometrics provides no basis to exclude any of Professor Elhauge's testimony;

(3) the credibility of Professor Elhauge's conclusions is a question of fact for the ultimate trier of fact;

(4) even if the econometric analysis were not considered, Professor Elhauge has posited three other forms of analysis proving anticompetitive impact, and the exclusion of any one of these independent approaches would not implicate the reliability of any other;

(5) based on the level of expertise demonstrated in this case, an analysis of Professor Elhauge's credentials is neither necessary nor useful.

Plaintiffs also note that the Report's conclusions on (2) and (3) are consistent with the conclusions of other federal courts that have approved the same simultaneous comparison approach that Professor Elhauge used here, see Elhauge Dec ¶¶ 77-81, and that the Report's conclusions on point (5) are consistent with the conclusions of other federal courts finding Professor Elhauge qualified to testify as an expert in antitrust economics. *Id* ¶94.

Plaintiffs respectfully submit the foregoing comments to Professor Orley Ashenfelter and to the Hon. Patricia B. Saris in accord with the order of the Court.

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