



evidence upon which Defendant relies are approximately two years out of date and do not necessarily reflect current market shares.

**Defendants' Statement of Uncontroverted Material Fact No. 2**

Plaintiffs state that [Tyco's] market share has dropped from roughly [REDACTED] to less than [REDACTED] from 2001 to 2007.

**Plaintiffs' Response to No. 2**

Plaintiffs acknowledge that estimates of Defendant's market share appear in Table 1 of the opening expert report of Prof. Einer Elhauge. Plaintiffs note that these figures represent market share in dollars, not units. Plaintiffs further note that Defendants fail to include numerous qualifiers contained in Prof. Elhauge's report, including the fact that these estimates of market share are conservative, and that numerous Tyco documents estimate these figures to be higher. *See* Expert Report of Professor Einer Elhauge Report ("Elhauge Report," D.E. 133) at ¶ 88, n. 163, n. 164 (attached as Ex. 3 to the Declaration of Elena Chan in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment ("Chan Decl.")).

Plaintiffs further note that if Tyco's market share has been declining, this fact is not material. At issue in this case is Tyco's market power, and declining market share is not relevant to an assessment of market power. *See* Reply Expert Report Professor Einer Elhauge ("Elhauge Reply Report," D.E. 135) at ¶ 34 (attached as Ex. 4 to Chan Decl.). Rather, the appropriate question in this case is whether Tyco's share and power over price has been higher during the class period than it would have been in the but-for world, not whether it is higher now than it was in the past. *Id.*

**Defendants' Statement of Uncontroverted Material Fact No. 3**

BD and Stericycle state that [REDACTED]  
[REDACTED]

**Plaintiffs' Response to No. 3**

Plaintiffs dispute this purportedly uncontroverted material fact based on the following evidence.

Regarding BD, the testimony cited by Defendants facially contradicts this purportedly uncontroverted fact. At no point [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED] *See* Transcript of the Deposition of James Shaw ("Shaw Tr.") at 77:10-22; Word Index (attached as Ex. 9 to Chan Decl.). [REDACTED]

[REDACTED]  
[REDACTED]. *Id.* at 129-131 (Shaw Tr. 128:9-131:15). Furthermore, Exhibit 7 to the Deposition of James Shaw, [REDACTED]

[REDACTED]  
[REDACTED]  
[REDACTED] (attached as Ex. 10 to Chan Decl.).

Regarding Stericycle, [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] Kogler Tr. at 169:22-170:1 [REDACTED]

[REDACTED]

[REDACTED] ) (attached as Ex. 11 to Chan Decl.) [REDACTED]

[REDACTED]

[REDACTED]. Id. at 44:24-45:15. [REDACTED]

[REDACTED]

[REDACTED] (Kogler Tr. 194:5-15).

[REDACTED]

[REDACTED]

[REDACTED] Id. at 154:17-154:22. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Id. at 163:10-163:18.

**Defendants' Statement of Uncontroverted Material Fact No. 4**

In 1997, BD [REDACTED]

[REDACTED]

**Plaintiffs' Response to No. 4**

Plaintiffs acknowledge [REDACTED]

[REDACTED], but dispute the remainder of this purportedly uncontroverted fact for the following reasons.

First, the class period in this case begins on October 4, 2001, rendering an observation roughly

four years earlier in 1997 immaterial. Second, this purportedly uncontroverted fact would be

immaterial even during the class period because the relevant question is not [REDACTED]  
[REDACTED], but rather whether [REDACTED]  
[REDACTED]. Third, based on extensive analysis  
of documentary and testimonial evidence, as well as marketwide sales, Professor Elhauge has  
repeatedly demonstrated that [REDACTED]  
[REDACTED]. See Elhauge Report (Ex. 3) at  
¶¶17, 31-41, 142, Table 4, ¶¶165-199, Tables 6, 7, and Table 8; see also Elhauge Reply Report  
(Ex. 4) at ¶¶5, 11-12, 41-46.

#### **Defendants' Statement of Uncontroverted Material Fact No. 5**

BD [REDACTED]  
[REDACTED]

#### **Plaintiffs' Response to No. 5**

Plaintiffs admit this fact to the extent it refers to the year 1997, but dispute the remainder  
of this purportedly uncontroverted fact for the following reasons. First, the class period in this  
case begins on October 4, 2001, rendering an observation roughly four years earlier in 1997  
immaterial. Second, this purportedly uncontroverted fact would be immaterial even during the  
class period because the relevant question is not [REDACTED]  
[REDACTED], but rather whether [REDACTED]  
[REDACTED]. See Elhauge Reply Report (Ex. 4) at ¶¶130-131. Third,  
Professor Elhauge has repeatedly testified that [REDACTED]  
[REDACTED]. See Elhauge Report  
(Ex. 3) at ¶¶17, 31-41, 142, Table 4, ¶¶165-199, Tables 6, 7, and Table 8; see also Elhauge  
Reply Report (Ex. 4) at ¶¶5, 11-12, 41-46.

**Defendants' Statement of Uncontroverted Material Fact No. 6**

BD [REDACTED] since 1996, and between 1996 and 2007. [REDACTED]

**Plaintiffs' Response to No. 6**

Plaintiffs admit that BD [REDACTED] from 1996-2007, but note that the data upon which Tyco relies are in many cases only estimates. Plaintiffs dispute the remainder of this purportedly uncontroverted fact for the following reasons. First, the class period in this case begins on October 4, 2001, rendering observations from 1996 through 2000 immaterial. Second, this purportedly uncontroverted fact would be immaterial even during the class period because the relevant question is not whether [REDACTED], but rather whether [REDACTED]. See Elhauge Reply Report (Ex. 4) at ¶¶130-131. Third, Professor Elhauge has repeatedly testified that [REDACTED]. See Elhauge Report (Ex. 3) at ¶¶17, 31-41, 142, Table 4, ¶¶165-199, Tables 6, 7, and Table 8; see also Elhauge Reply Report (Ex. 4) at ¶¶5, 11-12, 41-46.

**Defendants' Statement of Uncontroverted Material Fact No. 7**

BD states [REDACTED]

**Plaintiffs' Response to No. 7**

Plaintiffs dispute this purportedly uncontroverted fact. The statement is duplicative of purportedly uncontroverted fact No. 3 and is disputed for the reasons explicated there.

**Defendants' Statement of Uncontroverted Material Fact No. 8**

BD states [REDACTED]

**Plaintiffs' Response to No. 8**

Plaintiffs dispute this purportedly uncontroverted fact based on the following evidence.

[REDACTED]

[REDACTED] Exhibit 8 to Shaw Depo. at BDSHARPS 00111606 (attached as Ex. 12 to Chan Decl.). Additionally, [REDACTED]

[REDACTED] Exhibit 9 to Shaw Depo. at BDSHARPS00213359 (attached as Ex. 13 to Chan Decl.). Finally, [REDACTED]

[REDACTED]

[REDACTED]. See Shaw Tr. (Ex. 9) at 98:1-13.

**Defendants' Statement of Uncontroverted Material Fact No. 9**

Stericycle acquired Biosystems, a regional reusable sharps container company, in 2003,

[REDACTED]

**Plaintiffs' Response to No. 9**

Plaintiffs admit that Stericycle acquired Biosystems in January of 2003, but dispute the remainder of this purportedly uncontroverted material fact on the basis that it erroneously suggests that [REDACTED]

[REDACTED]. For

example, [REDACTED]

[REDACTED]

[REDACTED] See Kogler Tr. (Ex. 11) at 22:24-

23:3; 143:16-24. In addition, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Id. at 60:7-17.

**Defendants' Statement of Uncontroverted Material Fact No. 10**

In 2004, Stericycle added [REDACTED] new accounts to Biosystems' base of business, representing a [REDACTED] growth in the business since Stericycle acquired Biosystems.

**Plaintiffs' Response to No. 10**

Plaintiffs admit that from acquisition in January 2003 through the end of 2004, Stericycle added [REDACTED] new accounts to Biosystem's base of business, and that this represented a roughly [REDACTED] increase in the number of accounts during that time, but dispute the remainder of this purportedly uncontroverted fact to the extent it suggests that this growth occurred in one calendar year and implies a [REDACTED] growth in revenue and/or volume for Stericycle. In the testimony cited by Tyco [REDACTED]

[REDACTED]

[REDACTED]

Kogler Tr. (Ex. 11) at 81:11-12.

**Defendants' Statement of Uncontroverted Material Fact No. 11**

In 2005, Stericycle added more than [REDACTED] new accounts, effectively [REDACTED]  
[REDACTED]

**Plaintiffs' Response to No. 11**

Plaintiffs admit that Stericycle added more than [REDACTED] new accounts in 2005, but dispute the remainder of this purportedly uncontroverted fact to the extent it suggests [REDACTED]. The testimony cited by Tyco [REDACTED]

**Defendants' Statement of Uncontroverted Material Fact No. 12**

In 2006, three years after the acquisition, Stericycle [REDACTED]

**Plaintiffs' Response to No. 12**

Plaintiffs dispute this purportedly uncontroverted fact to the extent it suggests [REDACTED]

[REDACTED]. The testimony cited by Tyco [REDACTED]

**Defendants' Statement of Uncontroverted Material Fact No. 13**

Stericycle [REDACTED]

**Plaintiffs' Response to No. 13**

Plaintiffs dispute this purportedly uncontroverted material fact based on the following evidence. Stericycle acquired Biosystems in January of 2003, well after the beginning of the class period on October 4, 2001. *See* Kogler Tr. (Ex. 11) at 22:24-23:3. Prior to the acquisition,

[REDACTED]. *See id.* at 35:3-36:2. [REDACTED]

[REDACTED]. See id.  
at 44:24-45:15 [REDACTED]

[REDACTED]. See id. at 194:5-15. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Id. at 169:22-170:1. [REDACTED]

[REDACTED]. See id. at 162:15-162:23.

On the other hand, multiple exhibits to the Kogler Deposition [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Ex. 15 to Kogler Depo. at STER079271 (attached as Ex. 14 to Chan Decl.).

Similarly, Stericycle recognized [REDACTED]

[REDACTED]

[REDACTED] Ex. 16 to Kogler Depo. at STER079286

(attached as Ex. 15 to Chan Decl.).

[REDACTED]

[REDACTED]

[REDACTED]. See Ex. 17 to Kogler

Depo. at STER 079252 (attached as Ex. 16 to Chan Decl.). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].” Ex. 20 to Kogler Depo. at STER194270  
(attached as Ex. 17 to Chan Decl.). [REDACTED]. *See*  
Kogler Tr. (Ex. 11) at 167:24-168:3; 187:18-191:1.

Another exhibit establishes that [REDACTED]  
[REDACTED]  
[REDACTED]. *See* Ex. 18 to Kogler Depo. at  
STER000523 (attached as Ex. 18 to Chan Decl.). [REDACTED]  
[REDACTED]. *See* Kogler Tr. (Ex. 11) at 162:15-162:23.

Yet another exhibit [REDACTED]  
[REDACTED].  
*See* Ex. 22 to Kogler Depo. at STER095546 (attached as Ex. 19 to Chan Decl.). [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] Kogler Tr. (Ex. 11) at 165:23-166:4.

**Defendants’ Statement of Uncontroverted Material Fact No. 14**

Stericycle [REDACTED]

**Plaintiffs’ Response to No. 14**

Plaintiffs dispute this purportedly uncontroverted material fact. The statement is duplicative of purportedly uncontroverted facts 3 and 13, and is disputed for the reasons explicated there.

**Defendants' Statement of Uncontroverted Material Fact No. 15**

Stericycle [REDACTED]

**Plaintiffs' Response to No. 15**

Plaintiffs dispute this purportedly uncontroverted material fact. The statement is duplicative of purportedly uncontroverted facts 3, 13, and 14, and is disputed for the reasons explicated there.

**Defendants' Statement of Uncontroverted Material Fact No. 16**

When Daniels entered the U.S. market [REDACTED]

**Plaintiffs' Response to No. 16**

Plaintiffs admit that [REDACTED], but dispute the remainder of this purportedly uncontroverted material fact based on the following evidence. In the testimony cited by Tyco, [REDACTED]

[REDACTED]. Skinner Tr. at 83:3-84:1 (attached as Ex. 20 to Chan Decl.).

**Defendants' Statement of Uncontroverted Material Fact No. 17**

[REDACTED]

**Plaintiffs' Response to No. 17**

Plaintiffs dispute this purportedly uncontroverted fact because it mischaracterizes the relevant testimony. The [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] Shaw Tr. (Ex. 9) at 50:20-51:8. [REDACTED]  
[REDACTED] Finally, [REDACTED]  
[REDACTED] Id. at 53:7-8.

**Defendants' Statement of Uncontroverted Material Fact No. 18**

Daniels [REDACTED]  
[REDACTED]  
[REDACTED]

**Plaintiffs' Response to No. 18**

Plaintiffs dispute this purportedly uncontroverted material fact because it is not time specific, relies on improper testimony that is itself mischaracterized and does not support the factual contention. Tyco has cited testimony from [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] Kogler Tr. (Ex. 11) at 106:13-14.

**Defendants' Statement of Uncontroverted Material Fact No. 19**

Daniels [REDACTED]

**Plaintiffs' Response to No. 19**

Plaintiffs admit that Daniels' [REDACTED]

[REDACTED]

[REDACTED] Skinner Tr. (Ex. 20) at 96:18-20.

Plaintiffs, however, dispute this other basis for this purportedly uncontroverted material fact, as Tyco can not rely upon the self-serving statements of its own damages expert to establish an uncontroverted material fact. Even the appendix of this expert's report upon which Tyco purports to rely notes that [REDACTED] Guerin-Calvert Report at Appendix 10, n. \*\* (attached as Ex. H to the Declaration of James Donato in Support of Defendants' Motion for Summary Judgment ("Donato Decl.")).

**Defendants' Statement of Uncontroverted Material Fact No. 20**

Daniels [REDACTED]

**Plaintiffs' Response to No. 20**

Plaintiffs dispute this purportedly uncontroverted material fact to the extent it mischaracterizes the relevant testimony. In the first exhibit cited by Tyco, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *See*

DI\_02563444-475 at 457 (Ex. I to Donato Decl.).

**Defendants' Statement of Uncontroverted Material Fact No. 21**

Daniels' [REDACTED]

**Plaintiffs' Response to No. 21**

Plaintiffs dispute this purportedly uncontroverted material fact on the basis that the evidence upon which Defendant relies is mischaracterized and does not support the factual contention. The first document cited by Tyco in support of this purportedly uncontroverted fact

[REDACTED] *See* DI\_00030871 (Ex. J to Donato Decl.) at 875. The deposition testimony cited by Tyco establishes only that [REDACTED]

[REDACTED] Skinner Tr. (Ex. 20) at 104:23-105:3. Further, in its next exhibit, [REDACTED]

[REDACTED] *See* DI\_00358556 (Ex. K to Donato Decl.) at 556.

[REDACTED] *See* id. Similarly, in Tyco's next exhibit, [REDACTED]

[REDACTED] *See* DI\_00359519 (Ex. L to Donato Decl.) at 19-20. The next document does not appear to contain any evidence in support of the factual contention, nor does Tyco specifically cite any. *See* DI\_00358100 (Ex. M to Donato Decl.) at 00-02. Finally, the last exhibit cited by Tyco [REDACTED]

[REDACTED] *See* DI\_00360532 (Ex. N to Donato Decl.) at 32.

**Defendants' Statement of Uncontroverted Material Fact No. 22**

Daniels' [REDACTED]

**Plaintiffs' Response to No. 22**

Plaintiffs admit that [REDACTED]

[REDACTED]

[REDACTED]. Smiley Tr. at 62:10-64:13 (attached as Ex. 21 to Chan Decl.). But Plaintiffs dispute the remainder of this purportedly uncontroverted material fact on the basis that the evidence upon which Defendants rely is mischaracterized and does not support the factual contention. [REDACTED]

[REDACTED]

[REDACTED] Id. at 64:20-21, referring to DI\_00344149-150 at 150 (Ex. P to Donato Decl.). In response, [REDACTED]

[REDACTED] Smiley Tr. (Ex. 21) at 64:18-24.

Furthermore, [REDACTED]

[REDACTED]

**Defendants' Statement of Uncontroverted Material Fact No. 23**

Daniels [REDACTED]

[REDACTED]

**Plaintiffs' Response to No. 23**

Plaintiffs admit that [REDACTED],

but dispute the remainder of this purportedly uncontroverted fact to the extent it mischaracterizes the evidence and suggests that [REDACTED]. [REDACTED]

[REDACTED]

(Smiley Tr. (Ex. 21) at 81:8-17 and DI\_01142784 (Ex. Q to Donato Decl.)), [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Id. at 83:24-84-10. Furthermore, [REDACTED]

[REDACTED]

[REDACTED]. Id. at 109:9-15.

**Defendants' Statement of Uncontroverted Material Fact No. 24**

[REDACTED]

[REDACTED]

[REDACTED]

**Plaintiffs' Response to No. 24**

Plaintiffs admit that [REDACTED]

[REDACTED], but dispute the remainder of this purportedly uncontroverted material fact to the extent

it mischaracterizes the evidence and [REDACTED]

[REDACTED]. It is clear from the exhibits cited by Tyco that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**Defendants' Statement of Uncontroverted Material Fact No. 25**

[REDACTED]

[REDACTED]

**Plaintiffs' Response to No. 25**

Plaintiffs admit that Stericycle [REDACTED], but dispute the remainder of this purportedly uncontroverted material fact to the extent it mischaracterizes the evidence. The evidence cited by Tyco makes clear that Stericycle [REDACTED] [REDACTED] [REDACTED] [REDACTED] DI\_00218455-467 at 467 (Ex. BB to Donato Decl.).

**Defendants' Statement of Uncontroverted Material Fact No. 26**

[REDACTED]

**Plaintiffs' Response to No. 26**

Plaintiffs dispute this purportedly uncontroverted material fact on the basis that the evidence cited does not support the allegation that [REDACTED] [REDACTED]. See Kogler Tr. (Ex. 11) at 119:8-120:20 [REDACTED]. On the contrary, [REDACTED] [REDACTED] [REDACTED] Id. at 158:6-159:20.

**Defendants' Statement of Uncontroverted Material Fact No. 27**

Stericycle entered the sharps container market around the same time as Daniels and has achieved a [REDACTED] share of reusable sales, compared to [REDACTED] for Daniels.

**Plaintiffs' Response to No. 27**

Plaintiffs dispute this purportedly uncontroverted material fact based on the following evidence. Daniels entered the US sharps container market in 2003. DI02203646-672 at 659 (Ex.

C to Donato Decl.). At this time Biosystems [REDACTED]  
[REDACTED]. See Kogler Tr. (Ex. 11) at 35:3-36:12. [REDACTED]  
[REDACTED]  
[REDACTED]. See TYN0025125 (attached as Ex. 22 to  
Chan Decl.). Finally, the expert report upon which Tyco purports to rely makes no reference to  
the date of market entry of either Stericycle or Daniels.

### **Defendants' Statement of Uncontroverted Material Fact No. 28**

Hospitals and other healthcare facilities created GPOs to combine their purchasing power  
to negotiate better prices and discounts from medical suppliers.

### **Plaintiffs' Response to No. 28**

Plaintiffs dispute this purportedly uncontroverted material fact to the extent it  
mischaracterizes the evidence. For example, the testimony cited by Exhibit GG to the Donato  
Decl. does not pertain to the creation of GPOs. More properly described, and as explained by  
Professor Elhauge, GPOs are the “most efficient means of brokering sales of medical devices,”  
providing contracting economies of scale through reduced transactions costs and access to a  
broad purchaser base. Elhauge Report (Ex. 3) at ¶ 62. In addition, GPOs (e.g., Novation) provide  
benefits to their members in the form of ordering efficiencies by offering electronic order  
management and data connectivity services. See *id.* at ¶63. GPOs add value to the purchasing  
process by evaluating new products and services, assisting with dispute resolution and lobbying  
for standardization on e-commerce and bar coding. *Id.* Given the effectiveness of GPOs in  
brokering sales of medical devices, hospitals purchasing through GPOs typically receive prices  
that average 12.1% less than the prices received by hospitals that do not. See *id.* at ¶65.

**Defendants’ Statement of Uncontroverted Material Fact No. 29**

GPO membership is voluntary, and facilities can belong to multiple GPOs, change their GPO memberships, or purchase outside GPOs.

**Plaintiffs’ Response to No. 29**

Plaintiffs admit that GPO membership is nominally voluntary and that purchases can be made outside of GPO negotiated contracts, but dispute the remainder of this purportedly uncontroverted material fact on the basis that it is incomplete, misleading and immaterial. First, regarding the voluntary nature of GPO membership and as noted above, hospitals purchasing through GPOs typically receive prices that average 12.1% less than the prices received by hospitals that do not, making GPO membership often critically important to a hospital’s finances. *See* Elhauge Report at ¶65. Second, the nominally voluntary nature of GPO membership is immaterial because “buyers will voluntarily agree to anticompetitive exclusionary agreements, usually because their individual decisions impose externalities on each other or because they are intermediaries who pass the anticompetitive price increase on downstream.” Elhauge Reply Report at ¶15. Third, [REDACTED]  
[REDACTED]  
[REDACTED]. *See* Crowder Tr. at 63:22-64:2 (attached as Ex. 23 to Chan Decl.); *see also* Elhauge Report at ¶146 and nn. 309-322.

**Defendants’ Statement of Uncontroverted Material Fact No. 30**

GPOs choose manufacturers through a competitive bid process, after which contract positions are sometimes awarded to one company -- a sole-source contract -- and sometimes to two or more companies depending on what the GPO believes is in its members’ best interests.

**Plaintiffs’ Response to No. 30**

Plaintiffs dispute this purportedly uncontroverted material fact because it is contrary to voluminous evidence already in the record establishing [REDACTED]

[REDACTED]. See Elhauge Report at ¶123

[REDACTED] Tyco’s assertion of this fact as uncontroverted is particularly inappropriate and disingenuous, given that this Court has in fact already noted:

Factually, Elhauge disputes the existence of ex ante competition among rivals for GPOs services, highlighting that “the evidence shows that numerous GPOs awarded Tyco sole-source contracts for sharps containers without any formal bidding at all, or with only limited ex ante competition, while excluding some suppliers.” (Elhauge Expert Reply ¶ 44). He also points out side payments in the form of administrative fees paid to GPOs for sole-source contracts. (See Elhauge Expert Reply ¶¶ 10, 65). This fee structure, as well as the ability of a intermediary like a GPO to pass on the externality of higher prices to the purchasers, undermines defendant’s view of the robustness of the competition for GPO contracts. ... Moreover, there is a fact dispute as to whether there exists ex ante competition for GPO contracts and whether in practice GPO sole source requirements give GPOs incentives to stay with Tyco rather than open up robust competition with Tyco’s rivals. Class Certification Opinion of August 29, 2008 (D.E. 169, “August Op.” at 22-23)(emphasis added).

**Defendants’ Statement of Uncontroverted Material Fact No. 31**

GPOs have treated disposable and reusable containers as separate bid categories.

**Plaintiffs’ Response to No. 31**

Plaintiffs dispute this purportedly uncontroverted material fact on the basis that the testimony cited is mischaracterized and misleading. The [REDACTED]

[REDACTED]. See Restino Tr. at 63:16-64:1 (Ex. FF to Donato Decl.).

Plaintiffs further dispute this purportedly uncontroverted fact because the class period in this case begins on October 4, 2001, while the cited testimony relates to 2005, and Tyco’s own liability expert [REDACTED]. See Elhauge Reply Report (Ex. 4) at ¶51 (citing Expert Report of Prof. Janusz A. Ordover, Jan. 31, 2008 (“Ordover Report”) at ¶¶27, 30, 91, 99 (attached as Ex. 24 to Chan Decl.). Finally, Plaintiffs and Professor Elhauge have already cited extensive evidence establishing that [REDACTED]  
[REDACTED]  
[REDACTED]” Elhauge Reply Report (Ex. 4) at ¶53 (citing CON-NAT 0003464-CON-NAT 0003466, at 465 (attached as Ex. 25 to Chan Decl.), TYN0144741-TYN0144756, at 741 (attached as Ex. 26 to Chan Decl.), TYN0020687-TYN0020689 at 688 (attached as Ex. 27 to Chan Decl.).

**Defendants’ Statement of Uncontroverted Material Fact No. 32**

BD [REDACTED]  
[REDACTED]

**Plaintiffs’ Response to No. 32**

Plaintiffs admit tha [REDACTED]  
[REDACTED]

[REDACTED] but dispute the remainder of this purportedly uncontroverted material fact because it mischaracterizes the evidence. First, Broadlane is [REDACTED]  
[REDACTED]  
[REDACTED]. See Elhauge Report at ¶15. Second, the testimony upon which Defendants rely

mentions only three of the seven major national GPOs, rendering it an impossibility to demonstrate contracts with “most” of the largest GPOs through the cited evidence.

**Defendants’ Statement of Uncontroverted Material Fact No. 33**

GPO contracts are terminable at will on short notice, typically 90 days or less.

**Plaintiffs’ Response to No. 33**

Plaintiffs dispute this purportedly uncontroverted fact on the basis that this Court has already noted that “there is a fact dispute as to ...whether in practice GPO sole source requirements give GPOs incentives to stay with Tyco rather than open up robust competition with Tyco’s rivals.” August Op. at 23. Plaintiffs further dispute this purportedly uncontroverted fact on the basis that the cited evidence does not support the factual contention. The termination clause referred to by Defendants applies only [REDACTED]

[REDACTED]

[REDACTED] not 90 or less days claimed by the Defendant. *See* Ex. NN to Donato Decl. at 021.

Additionally, this purportedly uncontroverted fact is inaccurate because, as explained by Professor Elhauge, the [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].” Elhauge Report (Ex. 3) at ¶ 147. *See also* id. at ¶

147, n. 323 (*See* TYN0022590-TYN0022606 at 591 ([REDACTED])

[REDACTED] (attached as Ex. 28 to Chan Decl.); TYN0000986-

TYN0001088 at 1086 ([REDACTED])

[REDACTED] (attached as Ex. 29 to Chan Decl.); TYN0001089-

TYN0001209 at 1091, 1109 (attached as Ex. 30 to Chan Decl.) ( [REDACTED] ); TYN0002075-TYN0002104 (Ex. 1) at 094 ( [REDACTED] ); TYN0000807-TYN0000842 at 839 (attached as Ex. 31 to Chan Decl.) ( [REDACTED] ); TYN0001640-TYN0001692 at 677 (attached as Ex. QQ to Donato Decl.) ( [REDACTED] ); AMERINET1261-1327 at 305 (attached as Ex. 32 to Chan Decl.) ( [REDACTED] ); 2AMERINET0678-0691 at 680 (attached as Ex. 33 to Chan Decl.) ( [REDACTED] ).

Finally, Plaintiffs dispute this purportedly uncontroverted fact to the extent it mischaracterizes the evidence. As explained by Professor Elhauge, “[b]uyers are incentivized to stay in harmful exclusionary agreements, even if those agreements are terminable, because terminating would cause buyers to incur price penalties individually.” *See* Elhauge Report (Ex. 3) at ¶¶ 26(d) & 141. [REDACTED]. *Id.* at ¶¶ 125, 141. *See also id.* at ¶ 147 n. 324 [REDACTED].”) *See also id.* at ¶ 26(d) (externality problems incentivize buyers to stay in exclusionary contracts, even though they may be terminable, because terminating buyers will incur price penalties

individually, and any benefits attending even a minimal reduction in marketwide foreclosure will be shared with all other buyers.) Furthermore, the existence of a termination clause does not change the exclusionary effect of these GPO contracts for two reasons. First, “A GPO could only terminate if it was willing to terminate the entire contract, and thus suffer both lower administrative fees and higher product prices for its members.” Second, “[t]he same externality problem that gives GPOs perverse incentives to enter into harmful exclusionary agreements will give those GPOs incentives to stay in them even if they are terminable, because any benefits produced by reducing marketwide foreclosure would mostly be shared with other GPOs or with buyers. Thus, even if the exclusionary agreements were terminable, that would not alter the incentives of each GPO to comply with them despite the net anticompetitive harm they create for buyers. Thus, the terminability of these contracts does not alter the foreclosure or the anticompetitive effects such foreclosure inflicts on rival competitiveness and on marketwide prices.” Id. at ¶ 141.

**Defendants’ Statement of Uncontroverted Material Fact No. 34**

Having a GPO contract does not guarantee sales and the contracts do not require members to buy anything from contracted vendors but simply give them the option of buying products at pre-negotiated discounts.

**Plaintiffs’ Response to No. 34**

Plaintiffs dispute this purportedly uncontroverted material fact based on the following evidence. For example, with respect to Tyco’s sole source agreement with Healthtrust, [REDACTED]

[REDACTED]

[REDACTED]” Deposition of Michael Liscio at 194:25-195:4 (attached as Ex. 34 to the Chan Decl.); Ex. 5 to Liscio Depo. (attached as Ex. 35 to Chan Decl.).

Another deposition exhibit made clear [REDACTED]  
[REDACTED].” Ex. 20 to Shaw Depo. at BDSHARPS0002075  
(attached as Ex. 36 to Chan Decl.). Similarly, another exhibit [REDACTED]  
[REDACTED]  
Ex. 9 to Shaw Depo. at BDSHARPS 00213359 (Ex. 13). Another exhibit [REDACTED]  
[REDACTED] Ex. 10 to Romano Depo. at  
TYN0108345 (attached as Ex. 37 to Chan Decl.), and Transcript of the Deposition of Jeffrey  
Romano (“Romano Tr.”) at pp. 153:1-156:6 (attached as Ex. 38 to Chan Decl.). Conversely, Mr.  
Romano confirmed [REDACTED]  
[REDACTED]  
Romano Tr. at 125:15-17; Ex. 37 at TYN0108345.

Moreover, as to the statement that such contracts “simply give [members] the option of  
buying products at prenegotiated discounts,” Plaintiffs note that [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]. TYN0022590-606 (Ex. 28) at 595. Similarly, [REDACTED]  
[REDACTED]. TYN0001973-2002 at  
1993 (attached as Ex. RR to Donato Decl.). *See also* Elhauge Report (Ex. 3) at ¶¶ 146-147.

**Defendants’ Statement of Uncontroverted Material Fact No. 35**

[Tyco’s] contracts with Novation state that [REDACTED]  
[REDACTED]

**Plaintiffs' Response to No. 35**

Plaintiffs admit that the contracts cited by Tyco contain the quoted language, but note that [REDACTED]

[REDACTED]

[REDACTED]. Further, these contracts [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. NP/NOV000124 (Ex. UU to Donato Decl.) at 145 and 129.

**Defendants' Statement of Uncontroverted Material Fact No. 36**

GPO members routinely buy products outside of GPO contracts.

**Plaintiffs' Response to No. 36**

Plaintiffs dispute this purportedly uncontroverted material fact because the evidence cited does not support the factual contention. The evidence cited makes no mention of members routinely buying products outside of GPO contracts. Plaintiffs further dispute this purportedly uncontroverted fact on the basis that the statement is out of context and misleading. For example, Mr. Crowder testified at deposition that for those products available through GPO contracts, Natchitoches makes all such purchases utilizing GPOs, and purchases outside of GPOs only for those products not offered by GPOs. Crowder Tr. (Ex. 23) at 66:19-67:6. Additionally,

Defendants [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. See Restino Tr. at 19:4-20:16 (Ex. FF to Donato Decl.).

**Defendants' Statement of Uncontroverted Material Fact No. 37**

Approximately [redacted] of [Tyco's] sharps container sales are made outside of GPOs.

**Plaintiffs' Response to No. 37**

Plaintiffs dispute this purportedly uncontroverted material fact based on the following evidence. The paragraph of Prof. Elhauge's report cited by Tyco actually says: '[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted] Elhauge Report (Ex. 3) at ¶ 68.

**Defendants' Statement of Uncontroverted Material Fact No. 38**

Natchitoches purchases [Tyco] sharps containers because of the products' features and because the products are safe and effective.

**Plaintiffs' Response to No. 38**

Plaintiffs admit that Mr. Crowder agreed with Tyco's counsel that Tyco's sharps containers met a threshold level of being "safe and effective," but dispute the remainder of this purportedly uncontroverted material fact on the basis that it mischaracterizes the cited testimony and is otherwise immaterial. The testimony cited first by Tyco is incomplete, and states in full that, "We didn't evaluate it. We didn't run tests. I saw the design and liked the design and so we purchased it," and thus stands only for the proposition that Natchitoches deemed Tyco's products superficially satisfactory. Crowder Tr. (Ex. 23) at 21:7-9. The cited testimony is also not specific

to any time period. The testimony cited next by Tyco refers to an event “prior to 1999,” and is thus immaterial because it predates the class period by more than two years. *Id.* at 22:7-8.

**Defendants’ Statement of Uncontroverted Material Fact No. 39**

Natchitoches is not prevented from buying competitive sharps containers instead of [Tyco’s].

**Plaintiffs’ Response to No. 39**

Plaintiffs dispute this purportedly uncontroverted material fact on the basis that it mischaracterizes the evidence, is incomplete and misleading. Tyco’s statement ignores that

[REDACTED]

[REDACTED]

Elhauge Report (Ex. 3) at ¶¶18, 127-137. Further, [REDACTED]

[REDACTED].” Elhauge Report at ¶¶16, 121-

126. As such, economic factors either prevent or penalize such purchases. Thus, and as repeatedly explained by Professor Elhauge, Tyco’s “[i]nquiries into ‘coercion’ or ‘forcing’ are thus irrelevant, unless such inquiry is understood simply as shorthand for the proposition that Tyco structured buyers’ choices to cause them to accept an exclusionary scheme that harmed buyers as a group, in which case Tyco’s conduct would be ‘coercive.’” Elhauge Reply Report (Ex. 4) at ¶60. Furthermore, this Court has already taken note of the evidence gathered and analyzed by Plaintiffs on this front: “Tyco also penalized purchaser end users who failed to meet its market share purchase requirements.” *See* Memorandum and Order of January 29, 2008 (D.E. 130) at 13.

**Defendants' Statement of Uncontroverted Material Fact No. 40**

Natchitoches belongs to multiple GPOs and utilizes whichever contract gives it the best deal on sharps containers.

**Plaintiffs' Response to No. 40**

Plaintiffs dispute this purportedly uncontroverted material fact on the basis that it is false and misleading. Testifying on behalf of Natchitoches, Mr. Crowder repeatedly and explicitly rejected Tyco's suggestion that has made purchasing decisions based on differing GPO pricing. *See* Crowder Tr. (Ex. 23) at 33:22-34:2; 55:1-15; 61:13-20. The testimony cited by Tyco refers only to contracts offered by the single GPO MedAssets. *Id.* at 48:12-15. Moreover, as a result of its decision not to commit to excluding Tyco's rivals, and as explained above in response to Tyco's purportedly uncontroverted fact No. 39, [REDACTED]

**Defendants' Statement of Uncontroverted Material Fact No. 41**

Natchitoches believes that GPOs have helped it receive better pricing.

**Plaintiffs' Response to No. 41**

Plaintiffs dispute this purportedly uncontroverted material fact on the basis that it mischaracterizes the evidence, is incomplete and misleading. First, and as noted above, Natchitoches did not compare GPO pricing. *See* Crowder Tr. (Ex. 23) at 33:22-34:2; 55:1-15; 61:13-20. Second, in the testimony cited by Tyco, it is clear that Mr. Crowder was comparing pricing within the GPO distribution channel only to pricing outside this distribution channel, and certainly not to the but-for prices that would prevail in the absence of Tyco's anticompetitive conduct. *Id.* at 48:22-46:5. Third, as noted above and as explained by Professor Elhauge, while GPOs provide pricing better than is generally available outside the GPO context, Tyco's

anticompetitive conduct has the effect of raising all prices in the market. *See* Elhauge Report at ¶¶22-25, 32-35.

**Defendants' Statement of Uncontroverted Material Fact No. 42**

Natchitoches may purchase products outside of GPO contracts without penalties or threats.

**Plaintiffs' Response to No. 42**

Plaintiffs dispute this purportedly uncontroverted material fact on the basis that it mischaracterizes the evidence and is incomplete and immaterial. First, in the 14 lines immediately preceding the testimony cited by Tyco, Mr. Crowder states that Natchitoches purchases all products on contract through a GPO, and only purchases off contract for those items for which there is no GPO contract. *See* Crowder Tr. (Ex. 23) at 66:19-67:7. Second, the testimony cited by Tyco related only to Natchitoches's purchases of "housekeeping carts," not sharps containers. *Id.* at 67:7-69:10. Third, and as noted above, Tyco has already acted on its threat and imposed financial penalties on Natchitoches due to its refusal to commit to excluding Tyco's rivals. *See id.* at 70:17-20.

**Defendants' Statement of Uncontroverted Material Fact No. 43**

Natchitoches does not believe [Tyco's] sharps containers are priced too high and has never experienced any wrong or improper conduct by [Tyco].

**Plaintiffs' Response to No. 43**

Plaintiffs dispute this purportedly uncontroverted material fact to the extent it mischaracterizes the evidence. The evidence cited by Tyco establishes that Mr. Crowder had not formed any opinion at all about whether Tyco's prices were too high: "Q: ...did you, Mr. Crowder, ever form in your own mind an opinion, a thought, or a view, that Kendall's products

were priced too high? A: No.” Crowder Tr. (Ex. 23) at 98:12-16. Similarly: “Q: Do you have an opinion that the prices you are paying are too high ...? ... A: I have no opinion on that.” Id. at 139:1-8. Moreover, these statements are of course consistent with the fact that, although familiar with Plaintiffs’ Complaint, Mr. Crowder is not a lawyer or an economist, and has not independently evaluated what Tyco’s prices would have been but for its anticompetitive conduct.

**Defendants’ Statement of Uncontroverted Material Fact No. 44**

Plaintiffs’ liability expert has not shown that [Tyco’s] prices were below its costs.

**Plaintiffs’ Response to No. 44**

Admitted.

**Defendants’ Statement of Uncontroverted Material Fact No. 45**

Plaintiffs’ liability expert has not shown that [Tyco’s] rivals could not profitably compete for hospital business simply by lowering their prices.

**Plaintiffs’ Response to No. 45**

Plaintiffs dispute this purportedly uncontroverted material fact because it misstates the evidence, is incomplete and misleading. The cited testimony in fact describes the dispute, but Tyco has used an ellipsis to deliberately omit the section where Professor Elhauge refers to contrary evidence. “Q: I am asking you as either a separate check or any kind of additional analysis you undertook to quantify whether any rival was capable of inducing a customer to switch from Covidien to itself. And by “capable,” I mean still able to earn a profit on the sale. A: **Yeah. My answer is the same as before. There [were] some specific examples in the documents where they weren’t able to do so.** My analysis was more based on statistics of what they were actually able to do in the unburdened and burdened portions of the market, rather than using tests that compared prices to costs and try to adjust for quality or brand-name value and all

and try to engage in that kind of inquiry.” Transcript of the Deposition of Professor Einer Elhauge, dated March 11, 2008 (“Elhauge Tr.”) (Ex. VV to Donato Decl.) at 136:11-137:3 (emphasis added to reflect testimony omitted by Tyco).

Moreover, this purportedly uncontroverted fact is contradicted by reams of evidence already in the record establishing that Tyco’s exclusionary agreements have consistently prevented rivals from competing against Tyco based on price and quality. *See* Elhauge Report at ¶¶31-41 (discussing the effect on rivals’ sales of Tyco’s contracts); ¶123 ( [REDACTED] ); ¶¶131-132 and n. 268, ¶148 and n. 327 ( [REDACTED] ); ¶¶129, 150-152, 158 ( [REDACTED] ); and ¶¶170-178 ( [REDACTED] ).

**Defendants’ Statement of Uncontroverted Material Fact No. 46**

By their express terms, the accused hospital contracts allow customers to choose to commit to a greater share or volume of purchases from [Tyco] in exchange for discounts.

**Plaintiffs’ Response to No. 46**

Plaintiffs dispute this purportedly uncontroverted material fact based on the following evidence. The challenged buyer contracts did not merely make pricing conditional on purchase levels, but generally included affirmative buyer commitments to restrict purchases from Tyco’s rivals to a low share. *See* Elhauge Reply Report (Ex. 4) at ¶8. [REDACTED] [REDACTED]. *See* Elhauge Report (Ex. 3) at ¶146. *See also* Elhauge Reply Report (Ex. 4) at ¶¶66-68 for specific examples of [REDACTED] [REDACTED].

**Defendants' Statement of Uncontroverted Material Fact No. 47**

Hospitals have the option to walk away from the commitments if they find a better deal elsewhere and the only consequence is that their price may be adjusted to reflect their actual levels of purchases.

**Plaintiffs' Response to No. 47**

Plaintiffs dispute this purportedly uncontroverted material fact based on the following evidence. [REDACTED]

[REDACTED]

[REDACTED]

NP/Nov000010 at 012; 2(a) (Ex. NN to Donato Decl.). Further, as explained by Professor

Elhauge, [REDACTED]

[REDACTED]

[REDACTED] Elhauge Report (Ex. 3) at ¶148.

Moreover, the “buyer contracts were not terminable. The buyer contracts were lengthy, and lacked termination clauses. Even if the buyer contracts had been terminable, any termination would clearly have triggered at least the same pricing penalties that were used to induce buyers to agree.” *See* Elhauge Reply Report (Ex. 4) at ¶¶60-61. *None* of the GPO-brokered contracts that required buyer commitments had termination clauses. *See* Elhauge Reply Report (Ex. 4) at ¶74. Thus, [REDACTED]

[REDACTED]

[REDACTED]. *See* Elhauge Report (Ex. 3) at ¶147. In one instance, Tyco noted that

[REDACTED]

[REDACTED]

[REDACTED] TYN0185586 (attached as Ex. 40 to Chan Decl.).

And in another document, [REDACTED]

[REDACTED]. Elhauge Report (Ex. 3) at ¶132, citing referring to TYN0142478

(attached as Ex 41 to Chan Decl.). *See also* Elhauge Report (Ex. 3) at ¶157 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**Defendants' Statement of Uncontroverted Material Fact No. 48**

[Tyco's] sole-source contracts covered, at most, [REDACTED] of the relevant market.

**Plaintiffs' Response to No. 48**

Plaintiffs admit that Table 4 to Professor Elhauge's Reply Report contains figures ranging from [REDACTED] representing for each year the share of marketwide sharps container sales to buyers purchasing under Tyco's sole source contracts, but dispute the remainder of this purportedly uncontroverted material fact because it mischaracterizes the evidence or is otherwise immaterial. First, the figures cited by Tyco have been superseded by updated tables provided to Tyco on the day of Professor Elhauge's deposition, March 11, 2008. Plaintiffs note that the updated version of these figures ranges from [REDACTED] *See* Errata Corrections to Elhauge Report ("Elhauge Errata," D.E. 135, Attachment 1, attached as Ex.

47 to Chan Decl.) at Table 4. Second, Professor Elhaug has explained in great detail the uncontroverted fact that Tyco's contracts foreclosed between ██████████ of the market for GPO brokerage services for sales of sharps containers. *See* Elhaug Report (Ex. 3) at ¶¶23, 140. Professor Elhaug has also explained that, as the most efficient distribution channel, foreclosure of this brokerage market has exacerbated the effects of all of the other forms of anticompetitive conduct. *See* Elhaug Report (Ex. 3) at ¶¶21, 25. Finally, the figures in Table 4 are immaterial to the extent that they do not constitute the estimated "foreclosure share" as represented by Tyco. Professor Elhaug's estimates of the "foreclosure share" during the class period instead range from ██████████%. *See* Elhaug Errata (Ex. 47) at Table 8.

**Defendants' Statement of Uncontroverted Material Fact No. 49**

[Tyco's] market share discounts covered, at most, ██████████ of the relevant market.

**Plaintiffs' Response to No. 49**

Plaintiffs admit that Table 7 to Professor Elhaug's Reply Report contains figures ranging from ██████████, representing for each year the share of marketwide sharps container sales foreclosed by Tyco contracts that restricted buyer purchases, but dispute the remainder of this purportedly uncontroverted material fact because it mischaracterizes the evidence or is otherwise immaterial. First, Plaintiffs note that the updated version of these figures spans the same range from ██████████, though values in certain years have changed. *See* Elhaug Errata (Ex. 47) at Table 7. Second, Professor Elhaug has made clear that these figures represent a lower bound on the foreclosure share, not an upper bound: "A conservative lower-bound calculation reveals that Tyco's bundled and share-based with purchasers of sharps containers foreclosed at least ██████████% of the sharps container market from 2001 through 2007." Elhaug Report (Ex. 3) at ¶24. Finally, the figures in Table 7 are immaterial to the extent

that they do not constitute the total estimated “foreclosure share” as represented by Tyco. Professor Elhauge’s estimates of the “foreclosure share” during the class period instead range from [REDACTED] See Elhauge Errata (Ex. 47) at Table 8.

**Defendants’ Statement of Uncontroverted Material Fact No. 50**

[Tyco’s] bundling programs covered less than [REDACTED] of the relevant market.

**Plaintiffs’ Response to No. 50**

Plaintiffs dispute this purportedly uncontroverted material fact based on the following evidence. The portion of the Ordover report to which Tyco refers acknowledges that it does not consider any National Alternate Site Sales agreements and may be subject to revision. See Ordover Report (Ex. B to Donato Decl.) at ¶110. Moreover, the cited testimony of Professor Elhauge demonstrates that regardless of whether this fact is uncontroverted, it is not material in that bundling is considered as a form of anticompetitive conduct in conjunction with sole-source GPO contracting, sole-source end-user contracting, market-share purchase requirements and the other forms of anticompetitive conduct at issue, and the relevant and material inquiry is into the combined marketwide foreclosure of these practices (of which bundling was a substantial part) and not the foreclosing effect of any particular anticompetitive practice. See Elhauge Report at ¶¶1, 18-21, 24-27, 32-33, 49, 111, 129-137, 143, 146, 148, 150-153, 157, 160, 171.

**Defendants’ Statement of Uncontroverted Material Fact No. 51**

HealthTrust’s 2001 contract with [Tyco] did not contain market-share commitment requirements.

**Plaintiffs’ Response to No. 51**

Plaintiffs dispute this purportedly uncontroverted material fact based on the following evidence. As noted by Professor Elhauge, [REDACTED]

[REDACTED]

[REDACTED].” Elhauge Report (Ex. 3) at n. 369 (citing TYN0151088-090 (attached as Ex. 35 to Chan Decl.) at 088: “[REDACTED]

[REDACTED] *see also* Elhauge Reply Report (Ex. 4) at ¶66; *see also* Ex. 18 to DeLuca Depo. (TYN0150810-813, attached as Ex. 42 to Chan Decl.) [REDACTED]

[REDACTED]

[REDACTED].

**Defendants’ Statement of Uncontroverted Material Fact No. 52**

[Tyco’s] prices have gone down and its margins have been shrinking.

**Plaintiffs’ Response to No. 52**

Plaintiffs dispute this purportedly uncontroverted material fact based on the following evidence. Defendants improperly rely solely upon the self-serving statements of their own expert for this untrue proposition. In fact, the cited portion of Ordovery’s analysis of prices is limited to three GPOs and ten products. In analyzing the market as a whole, rather than this limited portion, Professor Elhauge has demonstrated that there has been almost no change in Tyco pricing during the period 2003-2006. *See* Elhauge Reply Report (Ex. 4) at ¶35.

Plaintiffs further note that if Tyco’s prices have been declining, this fact is not material. At issue in this case is Tyco’s market power, and declining prices are not relevant to an assessment of market power. *Id.* The appropriate question in this case is whether Tyco’s prices have been higher during the class period than they would have been in the but-for world, not whether they are higher now than they have been in the past. *Id.* All of the above analysis regarding pricing applies equally to the statement that Tyco’s margins have been shrinking. *See* Elhauge Reply Report (Ex. 4) at ¶¶ 35-37.

Plaintiffs also note that the “decline” in margins referenced by Tyco, if it exists at all, is at most ██████ for the period 2001-2006. Ordover’s claim of a ██████ decline in margins has been conclusively disproved by Professor Elhauge. Id.

### **Defendants’ Statement of Uncontroverted Material Fact No. 53**

Dr. Singer’s “but for” price model requires a precise measure of the amount of foreclosure allegedly suffered by [Tyco’s] rivals.

### **Plaintiffs’ Response to No. 53**

Plaintiffs dispute this purportedly uncontroverted material fact because it misstates the testimony, the relevant economics, and the law. Tyco has cited the Singer Expert Report and the Ashenfelter Draft Report in support of this purportedly uncontroverted fact, yet neither Dr. Singer nor Dr. Ashenfelter, each an expert economist, has anywhere stated that the NEIO model requires a “precise” measure of the amount of foreclosure. *See* Ex. YY and Ex. ZZ to Donato Decl. Tyco’s wholly unsupported inclusion of the word “precise” is particularly egregious here, as it forms the basis of Tyco’s challenge to Dr. Singer’s estimates, and also misstates the applicable law. In the First Circuit, so long as there is “a rational basis in the evidence,” damages need not be proved “with mathematical certainty.” *Wallace Motor Sales v. American Motors Sales*, 780 F.2d 1049, 1062 (1st Cir. 1985); *see also Jay Edwards, Inc. v. New England Toyota Distributor, Inc.*, 708 F.2d 814, 821 (1<sup>st</sup> Cir. 1983)(“where defendant’s wrongdoing created the risk of uncertainty, the defendant cannot complain about imprecision”). Furthermore, this purportedly uncontroverted fact is immaterial to the extent that Professor Elhauge did precisely measure the “foreclosure share,” as explained below.

### **Defendants' Statement of Uncontroverted Material Fact No. 54**

Dr. Singer did not precisely measure the amount of foreclosure allegedly suffered by [Tyco's] rivals.

### **Plaintiffs' Response to No. 54**

Plaintiffs dispute this purportedly uncontroverted material fact both because the term “amount of foreclosure” is itself imprecise, and also because the following evidence establishes otherwise. First, Professor Elhauge did precisely calculate the “foreclosure share,” or portion of the market foreclosed to rivals, in support of his opinion regarding anticompetitive impact, and as explained in response to the next purportedly undisputed fact. [REDACTED]

[REDACTED]. See Ashenfelter Draft at 25 (attached as Ex. 6 to Chan Decl.). Moreover, Dr. Singer testified that he did “perform an audit” of Professor Elhauge’s work in the testimony cited by Defendants. Defendants choose not to inform the Court of Dr. Singer’s response to the next question asked at his deposition: “Before my report was filed I wanted to understand exactly how the foreclosure shares were being calculated, so I met with Professor Elhauge’s staff and they took me through step by step what they did. I had some of those portions replicated by my own staff and I was able to confirm that everything in my mind was correct.” Singer Tr. (Ex. 8) at 49:2-10.

Second, Dr. Singer did, in fact, independently and precisely translate the “foreclosure share” into the but-for market share using the following system of equations:

$$[1] \text{ Actual Rival Penetration} = (\text{Rival Penetration in Foreclosed Segment}) * (\text{Foreclosure Share}) + (\text{Rival Penetration in Non-foreclosed Segment}) * (1-\text{Foreclosure Share})$$

$$[2] \text{ But-For Rival Penetration} = (\text{Rival Penetration in Non-Foreclosed Segment}) * (\text{Foreclosure Share}) + (\text{Penetration in Non-Foreclosed Segment}) * (1-\text{Foreclosure Share})$$

Subtracting equation [1] from [2] yields the product of the “gap” in rival penetration and the foreclosure share, where the “gap” is defined as Rival Penetration in Non-Foreclosed Segment less Rival Penetration in the Foreclosed Segment (a positive value).

$$[3] = [2] - [1] = \text{But-For Penetration} - \text{Actual Penetration} = (\text{Gap in Penetration}) * \text{Foreclosure Share}$$

Although Dr. Singer relied on Professor Elhauge for the *inputs* to this equation, the derivation of this system of equations and the calculation of the but-for penetration is entirely his own. *See* Singer Report (Ex. 6) at ¶58 & Table 11. Thus, Dr. Singer did in fact independently estimate but-for rival market share.

**Defendants’ Statement of Uncontroverted Material Fact No. 55**

Prof. Elhauge did not precisely measure the amount of foreclosure allegedly suffered by [Tyco’s] rivals.

**Plaintiffs’ Response to No. 55**

Plaintiffs dispute this purportedly uncontroverted material fact both because the term “amount of foreclosure” is itself imprecise, and also because the following evidence establishes otherwise. As noted above, Professor Elhauge did precisely calculate the “foreclosure share,” or portion of the market foreclosed to rivals, in support of his opinion regarding anticompetitive impact. Elhauge Report (Ex. 3) at ¶168 & Table 8, Exhibit 8. Again, the technical accuracy of these calculations is no longer in dispute, and the [REDACTED]

[REDACTED]

[REDACTED]” Ashenfelter Draft (Ex. 7) at 25-26.

Moreover, Professor Elhauge has repeatedly testified that his resulting estimates of impact are inherently conservative because “they (1) ignore the fact that substantial foreclosure can lower rival efficiency and competitiveness in *both* the burdened and unburdened portions of the market, and (2) treat as burdened any buyer with a commitment contract, even if it was

noncompliant,” in addition to several other conservative steps. Elhauge Daubert Declaration at ¶82 & n. 105 (attached as Ex. 5 to Chan Decl.); Elhauge Report (Ex. 3) at ¶180, n. 405, ¶187. Dr. Singer has also confirmed that rivals in the non-foreclosed segment of the market were also impaired in their abilities to compete due to a deprivation of economies of scale. *See* Singer Report (Ex. 6) at ¶¶56-60, 73.

**Defendants’ Statement of Uncontroverted Material Fact No. 56**

Prof. Elhauge concedes that his simultaneous comparisons may contain selection bias.

**Plaintiffs’ Response to No. 56**

Plaintiffs dispute this purportedly uncontroverted material fact based upon the following evidence. Professor Elhauge has repeatedly disproven Tyco’s assertions. For example, Professor Elhauge states that:

In Part II, I discuss Tyco’s claims about my statistical analysis of anticompetitive impact. I show that Tyco’s arguments on selection bias all hinge on the nonsensical assumption that Tyco gave lower prices to get exclusionary contracts that had no effect on buyer purchases, an assumption that conflicts both with the fundamental premise of antitrust economics that market participants behave as rational profit-maximizers and with all the documentary evidence in this case. I further show that Tyco’s selection bias argument is disproven by the longitudinal Novation study, the simultaneous GPO comparisons, and the regressions of buyers whose contract status changed over time.

\* \* \*

Tyco’s critique of my statistical analysis of anticompetitive impact is flawed in several ways. First, Tyco’s selection bias argument assumes that Tyco was economically irrational, contrary to all economic theory and the actual evidence in this case. Second, as Tyco acknowledges, its selection bias argument cannot explain

[REDACTED]

Third, Tyco’s selection bias argument also cannot explain the simultaneous comparisons showing

[REDACTED]

Fourth, Tyco’s selection bias argument also cannot

explain the regressions showing that [REDACTED] Tyco's claim that I reclassified buyers as unburdened by their exclusionary contracts when they bought from rivals is factually wrong, and ignores the fact that none of my conclusions would be materially altered even if I never reclassified buyers. Tyco's other critiques of these regressions are also misguided and irrelevant because they would not alter the results or my conclusions. Fifth, the alternative that Tyco advocates to avoid selection bias problems – differentiating buyers by “access” to exclusionary contracts – is inferior because: (a) actual contractual status is what produces the relevant effects, (b) all buyers had “access” because Tyco's general policy was to offer exclusionary contracts, and (c) using the “access” approach and Tyco's definition of “access” almost always shows an even larger anticompetitive impact.

\* \* \*

Consistent with the view that my comparisons reflect sound economics, the federal court in *Applied Medical Resources v. Ethicon* admitted me to testify as an economic expert using the same comparison methodology to assess GPO sole-source and buyer-commitment contracts that were nearly identical to those at issue here. Further, Tyco's own motion states that Michigan Economics Professor Jeffrey MacKie-Mason used my same comparison methodology in the *Masimo v. Tyco* case, and was admitted by the court in that case to testify as an economic expert.<sup>95</sup> Moreover, Professor Ordover himself used a similar comparison methodology in the initial jury trial in *Masimo*, and was admitted by the court in that case to testify as an economic expert. And Tyco was the party that presented Professor Ordover's comparisons in the *Masimo* case. This past practice belies the notion that my comparison methodology would never be used by an economist or is contrary to standard economics.

\* \* \*

Even if it were true that there was some selection bias in some of the comparisons that I ran, that would not mean that the comparisons overstate the anticompetitive impact of Tyco's challenged contracts. As I explained in my original report, my comparisons are conservative because they (1) ignore the fact that substantial foreclosure can lower rival efficiency and competitiveness in *both* the burdened and unburdened portions of the market, and (2) treat as burdened any buyer with a commitment contract, even if it was noncompliant.<sup>105</sup> Thus, even if there were some selection bias, whatever effect it had would be offset by these conservative features of the comparisons.

Elhauge Daubert Declaration (Ex. 5) at ¶¶3, 16-57, 77, 82 (internal citations omitted).

**Defendants' Statement of Uncontroverted Material Fact No. 57**

Dr. Singer's model relies on Prof. Elhauge's simultaneous comparisons to calculate damages.

**Plaintiffs' Response to No. 57**

Plaintiffs admit that Dr. Singer's model relies, in part, on the results of Professor Elhauge's simultaneous comparisons. Plaintiffs note, however, that Dr. Singer independently approved of Professor Elhauge's methods and verified the results before implementing them, along with several other inputs, into the damages model contained in Dr. Singer's expert report. *See* Singer Dep. at 49:2-10 (attached as Ex. 8 to Chan Decl.).

**Plaintiffs' Undisputed Material Facts That Belie Defendants' Statements 34-36, 48-50**

Plaintiffs contend that the following undisputed facts further undermine Tyco's purportedly uncontroverted material facts 34, 35, 36, 48, 49, and 50.

- a. The relevant product market in this case includes all disposable and reusable sharps containers. *See* Elhauge Report at Para 43; *see also* Ordover Report at Para 49; *see also* August Op. at 16 citing same.
- b. The relevant geographic market in this case is the United States. *Id.*
- c. Tyco has at all times in the class period maintained at least a [REDACTED] share of the relevant market. *See* Elhauge Report at Para 31; *see also* Ordover Report at Para 55.
- d. Tyco's sole-source contracts with GPOs prohibit those GPOs from brokering sales of sharps containers for Tyco's rivals. *See* Elhauge Report at Para 16, *see also* Ordover Report at Para 6.

Dated: August 28, 2009

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that these documents 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 August 28, 2009.

/s/ Elena K. Chan  
Elena K. Chan