

TABLE OF CONTENTS

	PAGE
I. INTRODUCTION	1
II. ARGUMENT	2
A. Plaintiffs' allegation of "redundancy" is factually wrong and no basis for exclusion	2
B. Ms. Guerin-Calvert was not obliged to concede that damages must follow from Plaintiffs' claims or to calculate a positive value for those damages	7
C. Plaintiffs' remaining claims are unfounded and amount to no more than a dispute as to which expert is right.....	10
1. Dr. Singer's analysis purportedly demonstrating an actual world correlation between seller concentrations and margins is plainly flawed.....	11
2. Ms. Guerin-Calvert was right to criticize Dr. Singer for estimating Covidien's rivals' capacity to expand without reference to the facts of the case	13
3. Sharps containers are heterogeneous, as Ms. Guerin-Calvert's un rebutted analysis demonstrates	15
4. Plaintiffs' other criticisms are not well taken	17
5. Plaintiffs' belief that their expert is right and Covidien's expert is wrong is no basis for exclusion.....	19
III. CONCLUSION.....	20

TABLE OF AUTHORITIES

	PAGE
CASES	
<i>1st Source Bank v. First Resource Federal Credit Union</i> 167 F.R.D. 61 (N.D. Ind. 1996).....	8
<i>CDA of America Inc. v. Midland Life Ins. Co.</i> No. 01-CV-837, 2006 WL 5349266 (S.D. Ohio Mar. 27, 2006).....	8
<i>Doyle v. Graske</i> No. 7:05CV21, 2008 WL 824275 (D. Neb. Mar. 20, 2008).....	7
<i>Feliciano-Hill v. Principi</i> 439 F.3d 18 (1st Cir. 2006).....	19
<i>Francois v. Colonial Freight Sys., Inc.</i> No. 3:06-cv-434-WHB-LRA, 2008 WL 80399 (S.D. Miss. Jan. 4, 2008).....	7
<i>Goya de P.R., Inc. v. Rowland Coffee Roasters</i> No. 01-1119 (DRD), 2004 WL 5459246 (D.P.R. Oct. 22, 2004).....	19
<i>KW Plastics v. United States Can Co.</i> 199 F.R.D. 687 (M.D. Ala. 2000).....	4, 8
<i>LaPlace-Bayard v. Batlle</i> 295 F.3d 157 (1st Cir. 2002).....	6
<i>Loeffel Steel Prods., Inc. v. Delta Brands, Inc.</i> 372 F. Supp. 2d 1104 (N.D. Ill. 2005).....	7
<i>Oglesby v. Gen. Motors Corp.</i> 190 F.3d 244 (4th Cir. 1999).....	3
<i>Olson v. Ford Motor Co.</i> 411 F. Supp. 2d 1149 (D.N.D. 2006).....	6
<i>Phillips v. Bradshaw</i> No. 5:03 CV 875, 2006 WL 2855077 (N.D. Ohio Sept. 29, 2006).....	6
<i>Price v. Wolford</i> No. CIV-07-1076-M, 2008 WL 2570952 (W.D. Okla. June 24, 2008).....	6
<i>Ruiz-Troche v. Pepsi Cola of Puerto Rico Bottling Co.</i> 161 F. 3d 77 (1st Cir. 1998).....	19
<i>Storage Tech. Corp. v. Custom Hardware Eng'g & Consulting, Ltd.</i> No. 02-12102-RWZ, 2006 WL 1766434 (D. Mass. June 28, 2006).....	19
<i>United States v. Diaz</i> 300 F.3d 66 (1st Cir. 2002).....	8
<i>United States v. Kayne</i> 90 F.3d 7 (1st Cir. 1996).....	19
<i>United States v. Monteiro</i> 407 F. Supp. 2d 351 (D. Mass. 2006).....	19
<i>Vadala v. Teledyne Indus.</i> 44 F.3d 36 (1st Cir. 1995).....	3

I. INTRODUCTION

Plaintiffs' motion to exclude the testimony of Covidien's expert Margaret Guerin-Calvert (the "Motion") is a patchwork of legally unsupported challenges and factually inaccurate criticisms.¹ The Motion reduces to three misdirected claims: (1) Ms. Guerin-Calvert cannot address topics Dr. Ordover also addresses, even when those topics are directly relevant to her analysis of Dr. Singer's damages claims; (2) Ms. Guerin-Calvert cannot testify unless she provides a model showing that class members were damaged by the challenged conduct; and (3) Dr. Singer is right and Ms. Guerin-Calvert is wrong on several miscellaneous points. None of these claims provide any basis for excluding Ms. Guerin-Calvert's testimony and opinions.

Plaintiffs' primary grievance is that certain of Ms. Guerin-Calvert's foundational analyses overlap, to some extent, with the opinions of Dr. Ordover and therefore Ms. Guerin-Calvert is impermissibly opining on "liability" issues. However, Plaintiffs cite no authority even remotely suggesting that a defendant's damages expert is required to uncritically accept all the opinions of a plaintiff's liability expert. Ms. Guerin-Calvert's analyses of the sharps container market and the opinions of Professor Elhauge are *directly relevant* to her evaluation of Plaintiffs' damages claims. Dr. Singer relies heavily on Professor Elhauge's calculation of the degree to which the challenged conduct "foreclosed" Covidien's rivals from making sales. Indeed, Professor Elhauge's foreclosure number is one of only a few inputs in the NEIO model that Dr. Singer used to estimate damages. Consequently, if this number is flawed or overstated, so too is Dr. Singer's damages model. Although Dr. Singer may have opted to import Professor Elhauge's estimates without any independent analysis of their validity, his choice by no means makes the legitimacy of those figures off limits for Ms. Guerin-Calvert's scrutiny. In fact, her

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

analyses of the larger market make her opinions *more* grounded in the facts of this case and *less* subject to challenge than those of Dr. Singer. In contrast, Dr. Singer has essentially ignored the facts at hand and done little more than plug the numerical findings of Professor Elhauge into a mathematical formula invented by another economist.

Similarly, there is no basis for excluding Ms. Guerin-Calvert's opinions because she does not offer a competing damages model. Contrary to Plaintiffs' claims, the law does not oblige Ms. Guerin-Calvert to concede the existence of damages from the challenged conduct, nor to compute how much those damages are. She is free to focus her testimony on criticisms of Dr. Singer's and Professor Elhauge's deficient analyses. But, in fact, Ms. Guerin-Calvert does substantially more than that. She offers independent testimony that the challenged conduct resulted in lower prices for sharps containers and that the evidence does not support the existence of overcharges. These opinions are perfectly consistent with her proper role in this action and applicable law.

Finally, Plaintiffs' numerous ancillary claims that Ms. Guerin-Calvert opinions are "wrong" are factually inaccurate or attacks on proverbial straw men. Plaintiffs will be free to cross-examine Ms. Guerin-Calvert on these points at trial, but none of these claims provides any basis to exclude her testimony under either Federal Rule of Evidence 403 or 702.

Accordingly, Plaintiffs' motion to exclude Ms. Guerin-Calvert's testimony should be denied in its entirety.

II. ARGUMENT

A. Plaintiffs' allegation of "redundancy" is factually wrong and no basis for exclusion.

Plaintiffs' main argument for exclusion is that Ms. Guerin-Calvert duplicates some of Dr. Ordovery's work by evaluating the conclusions of Professor Elhauge and Plaintiffs'

theory of liability. (Motion at 3-8.) Plaintiffs apparently believe Ms. Guerin-Calvert was required to treat Professor Elhauge's findings as gospel before undertaking any evaluation of the damages owed to the class.² Plaintiffs nowhere claim that Professor Elhauge's work is irrelevant to the existence or quantum of damages -- to the contrary, Plaintiffs' damages claims are entirely dependent on it. Instead, Plaintiffs assert that, because Dr. Ordover also disputes Professor Elhauge's findings, Ms. Guerin-Calvert must not challenge them. The fact that Ms. Guerin-Calvert and Dr. Ordover concur on numerous foundational points is immaterial, however, because each of Ms. Guerin-Calvert's conclusions is directly relevant to her evaluation of damages. Plaintiffs appear to believe that Ms. Guerin-Calvert must affirmatively refrain from analyzing the soundness of the inputs into Dr. Singer's damages model because it may overlap with some aspects of Dr. Ordover's testimony. Plaintiffs' position defies logic and the law, and, if accepted, would prevent Ms. Guerin-Calvert from opining on several topics that critically impact Dr. Singer's estimation of damages.

As a quote from Ms. Guerin-Calvert's report that Plaintiffs cite makes clear, she "particular[ly]" analyzed those of Professor Elhauge's conclusions "upon which Dr. Singer relies in his damages analyses." (Motion at 4, quoting Guerin-Calvert Report ¶ 2.)³ For Dr. Singer's testimony to be admissible for presentation to the jury, the assumptions underlying it must be reasonable and supported by the facts. *See, e.g., Vadala v. Teledyne Indus.*, 44 F.3d 36, 39 (1st Cir. 1995) (court must ensure that expert testimony "rests on a reliable foundation"); *Oglesby v. Gen. Motors Corp.*, 190 F.3d 244, 251 (4th Cir. 1999) (proposed expert witness's unsupported suppositions deprived his testimony of probative value). Dr. Singer's damages estimate depends

² As with many of their claims, Plaintiffs cite *no legal support whatsoever* for this claim.

³ Ms. Guerin-Calvert's 1/31/08 report will be referred to as the "Guerin-Calvert Report." Dr. Singer's 12/18/07 and 2/15/08 reports will be referred to as the "Singer Report" and "Singer Reply Report" respectively. All these reports were filed with the Court on 4/11/08.

on Professor Elhauge's testimony in several crucial respects, yet Dr. Singer has undertaken almost no independent evaluation of the validity of Professor Elhauge's findings. The fact that Dr. Singer was apparently content to absolve himself of any responsibility for the accuracy of critical inputs to his damages model does not in any way limit or prevent Ms. Guerin-Calvert from engaging in a full analysis. Regardless of what Dr. Singer chose to do, Ms. Guerin-Calvert is entitled to consider whether the assumptions that Dr. Singer relies on are accurate and reliable.

The decision in *KW Plastics v. United States Can Co.* is instructive on this point. 199 F.R.D. 687 (M.D. Ala. 2000). In *KW Plastics*, the plaintiff argued that the defendant's rebuttal damages expert should not be allowed to dispute whether the record supported key assumptions made by the plaintiff's expert. *Id.* at 691. In rejecting that claim, the court wrote:

[The defendant's expert] intends to criticize the report because it is not tied to any "real world" events. In other words, [the defendant's expert] is prepared to testify that, while [the plaintiff's expert's] report implicitly assumes (or erroneously fails to consider) facts X, Y, and Z, [the plaintiff's expert's] analysis is seriously flawed if the jury does not accept X, Y, and Z as true. This is a *well-accepted* way to criticize damages estimates.

Id. at 692 (emphasis added). The court also held that accepting the plaintiff's position "would emasculate [the defendant's expert's] testimony and effectively insulate [the plaintiff's expert] from challenge on the grounds that his estimate is not related to the facts of the case." *Id.* at 693.

Here too, Ms. Guerin-Calvert is entitled to challenge and attempt to verify the central assumptions underpinning Dr. Singer's work. For example, the degree of rival foreclosure caused by the challenged practices, which Professor Elhauge calculates, is an indispensable input to Dr. Singer's NEIO model. (Singer Report ¶¶ 57-58, Table 11; Guerin-Calvert Report ¶ 76.) If the foreclosure estimate is inaccurate, so are Dr. Singer's damages calculations. If that estimate

is unusable (because the methodology underlying it is faulty and unreliable),⁴ Dr. Singer's NEIO calculations will not provide a reliable estimate of damages.

Despite the importance of Professor Elhauge's foreclosure estimates, Dr. Singer admitted that he did not double-check the manner in which they were conducted. (Singer Depo. at 48:4-50:10, 116:19-120:5.) That is, he never validated this critical input using his own economic training and analysis. (*Id.*) By contrast, Ms. Guerin-Calvert's report analyzes the bases for the alleged level of foreclosure. She concludes that Professor Elhauge's conclusions are flawed and that competitive realities of the industry substantially undermine his findings. (*See, e.g.*, Guerin-Calvert Report ¶¶ 47-61, 65-68, 76 n.86, 100-102.) Her analysis is absolutely appropriate, because it bears directly on the soundness of Dr. Singer's damages model.

Ms. Guerin-Calvert's evaluation of certain aspects of Plaintiffs' liability claims is also relevant to her analysis of whether the NEIO model is well suited to analyzing the sharp container market. The choice of the NEIO model was entirely Dr. Singer's. (Singer Depo. at 47:4-14.)⁵ He selected a version of the NEIO model that presupposes that higher seller concentrations must lead to higher prices. (Guerin-Calvert Report ¶ 23, 47.) Ms. Guerin-Calvert, therefore, had to evaluate whether that predicate assumption, and others, were reasonable and supported as part of her task of determining whether the NEIO model was a good "fit" to the facts of this case. Her opinion that the verifiable presence of *ex ante* competition for GPO contract placement makes the NEIO model Dr. Singer proposes unsuitable here is a perfectly appropriate criticism of Plaintiffs' damages claims. (*Id.* ¶¶ 47-61, 80-85.) While Dr. Singer opted to defer entirely to Professor Elhauge's understanding of the market, Ms. Guerin-

⁴ As Covidien's 10/17/08 motion to exclude Professor Elhauge's testimony has already shown, that calculation is hopelessly infected with selection bias and totally unreliable for additional reasons.

⁵ "Singer Depo." refers to the 4/4/08 Deposition of Dr. Hal Singer, excerpts of which are attached as Exhibit A to the concurrently filed declaration of Kyle Wong.

Calvert plainly cannot be precluded from questioning the suitability of the damages model that Dr. Singer chose to use. Her analyses of the market, whether or not they partially coincide with Dr. Ordovery's, are inextricably linked to her opinions on damages.

Plaintiffs devote a substantial portion of their motion to listing those of Ms. Guerin-Calvert's conclusions that are similar to those reached by Dr. Ordovery. But this semi-theatrical exercise ignores the unmistakable fact that every one of the listed conclusions is directly related to whether: (1) class member prices were inflated, which is the central question a damages expert must assess (*see* conclusions 1, 2, 3, 4, 5, 6, 8) or (2) the posited level of foreclosure, which Dr. Singer heavily relies upon, is plausible (*see* conclusions 7, 9, 10, 11, 12). Testimony is not legally "cumulative" and subject to exclusion merely because two experts agree on various facts that are relevant to each of their distinct analyses.⁶ Ms. Guerin-Calvert's opinions that touch on liability are the building blocks of her assessment of Plaintiffs' damages claims, and she cannot be prevented from offering them. The formal line between liability and damages that Plaintiffs seek to draw is illusory and meaningless in this context.

Finally, even if there were to be overlap between Dr. Ordovery's and Ms. Guerin-Calvert's trial testimony, this Court is perfectly capable of dealing with that contingency during the trial.⁷

⁶ *Phillips v. Bradshaw*, No. 5:03 CV 875, 2006 WL 2855077, at *44 (N.D. Ohio Sept. 29, 2006) (two experts' testimony using "some of the same photographs" of plaintiffs' injuries not cumulative because each provided "independent and different testimony"); *Price v. Wolford*, No. CIV-07-1076-M, 2008 WL 2570952, at *1 (W.D. Okla. June 24, 2008) (denying exclusion of two experts as cumulative where the experts were "specialists in the same field... and will be testifying regarding the same issues"); *cf. Olson v. Ford Motor Co.*, 411 F. Supp. 2d 1149, 1157 (D.N.D. 2006) (denying a motion to exclude experts on both Rule 702 and 403 grounds, noting that "[c]umulative evidence is not bad per se; it is the 'needless presentation' that is to be avoided").

⁷ The sole legal authority Plaintiffs cite for the proposition that Ms. Guerin-Calvert's testimony should be preemptively excluded as cumulative is distinguishable. In *LaPlace-Bayard v. Battle*, the court relied primarily on the fact that the plaintiffs had disclosed the second, allegedly cumulative expert "barely a week before trial" and did not provide her report until "a mere three days before trial." 295 F.3d 157, 161-62 (1st Cir. 2002). In its discussion of whether the testimony was cumulative, the court began by noting the failure of the plaintiffs' pre-trial

Plaintiffs will have the opportunity to object and, the Court will be in a far better position to assess whether any testimony is unnecessarily cumulative once Covidien's experts take the stand. Numerous courts have rejected attempts to preemptively exclude testimony on the basis that it may be cumulative and, instead, have deferred such rulings until the actual evidence put before the jury could be evaluated. *See, e.g., Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, 372 F. Supp. 2d 1104, 1122 (N.D. Ill. 2005) (denying a motion to exclude expert testimony and ruling that "the claim of evidentiary overlap is, at bottom, a question of whether [the expert's] testimony would be needlessly cumulative under Rule 403, rather than a basis for exclusion under Rule 702. . . . But these are more trial arguments than the stuff of pretrial motions to bar expert testimony"); *Francois v. Colonial Freight Sys., Inc.*, No. 3:06-cv-434-WHB-LRA, 2008 WL 80399, at *6 (S.D. Miss. Jan. 4, 2008) (denying motion to limit expert testimony as "prejudicially redundant" with that of another expert, and deferring a ruling until trial).⁸

B. Ms. Guerin-Calvert was not obliged to concede that damages must follow from Plaintiffs' claims or to calculate a positive value for those damages.

Plaintiffs argue, without a shred of legal authority, that Ms. Guerin-Calvert was required to assume liability and generate her own affirmative damages model, and that her failure to do so shows that she is not fulfilling the obligations of a damages expert. (Motion at 8-10.) This claim is bizarre. There is no support in the law for the view that Ms. Guerin-Calvert must perform her own modeling and proffer a positive damages figure in order to contest Dr. Singer's theoretical approach, empirical analyses, and conclusions. Additionally, Ms. Guerin-Calvert affirmatively opined that challenged conduct resulted in lower prices for sharps

disclosures to preserve the right to offer the second expert's testimony. *Id.* at 163. Additionally, the plaintiff's claim in *LaPlace*, that it needed two liability experts to offer different theories of medical malpractice, is wholly dissimilar to Covidien's use of a liability and a damages expert here.

⁸ *See also Doyle v. Graske*, No. 7:05CV21, 2008 WL 824275, at *1 (D. Neb. Mar. 20, 2008).

containers and that the evidence and analyses presented do not support the conclusion that the challenged practices damaged class members.

Conspicuously absent from Plaintiffs' motion is any authority holding that a defense expert must "attempt[] to model potential damages" or "issue[] an actual damages number corresponding to a certain set of assumptions." (Motion at 8-9.) Indeed, the law is exactly the opposite. In *1st Source Bank v. First Resource Federal Credit Union*, for example, the plaintiff sought to exclude the testimony of the defendant's expert, claiming that "the purpose of his testimony is not to suggest alternative [damage] amounts" but instead to criticize the plaintiff's expert's calculations. 167 F.R.D. 61, 65 (N.D. Ind. 1996). The court held that "as a rebuttal expert witness, [the defendant's expert] may criticize [the plaintiff's] damages theories without offering alternatives." *Id.* Other courts have reached the same conclusion. *See, e.g., CDA of America Inc. v. Midland Life Ins. Co.*, No. 01-CV-837, 2006 WL 5349266, at *6 (S.D. Ohio Mar. 27, 2006) ("Defendants' rebuttal witness ... need not suggest alternative theories of damages, but, instead, is entitled to merely criticize [plaintiff's] damages calculations."); *KW Plastics*, 199 F.R.D. at 692 (an expert "can testify as to the flaws that he believes are inherent in [the opposing party's] damages report").⁹ These holdings reflect the straightforward principle that *Plaintiffs* have the sole burden to prove alleged damages. For Covidien to prevail at trial, Ms. Guerin-Calvert need not persuade the jury that the true amount of damages is zero dollars or any other amount. She need only show that Dr. Singer's calculations do not reliably establish

⁹ Plaintiffs' reliance on *United States v. Diaz*, 300 F.3d 66 (1st Cir. 2002) is far off base. (Motion at 10.) Plaintiffs misquote the case as noting the importance of "refuting alternate theories." (*Id.*) In fact, the court noted that the experts were "refuting alternate explanations." *Diaz*, 300 F.3d at 76. The statement referred to experts who testified that a basement fire was caused by arson and ruled out alternate causes of the fire. *Id.* The decision had nothing to do with providing an alternate damages model and, indeed, nothing to do with any question before this Court.

damages by a preponderance of the evidence. She expressed and supported that opinion repeatedly throughout her Report.

Moreover, Ms. Guerin-Calvert did more than simply criticize Dr. Singer's work. She affirmatively opined that an economic analysis did not support a finding of damages from the challenged conduct. Plaintiffs' strange claim that she "never opines on what the but-for world would look like absent [Covidien's] challenged conduct" (Motion at 10), is flatly disproved by her numerous affirmative statements that the challenged practices led to lower prices for sharps containers. To cite a few examples, Ms. Guerin-Calvert opined:

- "[Evaluation of] the impact of GPOs and GPO contracting on competition and prices in the sharps container industry ... showed that contracting practices such as sole-source contracts and share-of-purchase requirements result in *lower*, not higher, prices for sharps containers." (Guerin-Calvert Report ¶ 50 (emphasis original).)
- "The GPO contracting and bid process provides competitive discipline on prices charged by Covidien and price/service benefits for consumers." (*Id.* ¶ 13.)
- "Prices offered under sole-source GPO contracts tend to be lower than under dual- or multi-source contracts." (*Id.* ¶ 17.)
- "[C]ompetition among suppliers for the GPO position is a crucial competitive dynamic that results in lower, not higher prices." (*Id.* ¶ 22.)
- "From the customers' point of view, having their GPO enter into a sole-source contract with one vendor will often be preferable because prices offered under sole-source contracts tend to be lower than dual- or multi-source contracts." (*Id.* ¶ 63 (citing actual examples).)
- "In addition, given a sole- or dual-source contract, members typically obtain better prices by buying a greater share of their purchases from a supplier with a GPO contract." (*Id.* ¶ 64 (citing actual examples).)
- "An economic analysis of the evidence does not support the allegations that [the challenged] contracting practices led to artificially and anticompetitively inflated prices ("overcharges") for sharps containers during the class period." (*Id.* ¶ 10.)

Ms. Guerin-Calvert reached these conclusions based on her economic analysis of the evidence, a review of the contracting practices, a review of the economic literature, and multiple empirical

assessments of actual pricing. Thus, although she was not required to, Ms. Guerin-Calvert has offered an independent, affirmative damages opinion.

In their motion, Plaintiffs seem to insist that Ms. Guerin-Calvert's opinions are only admissible if she concludes that Plaintiffs' theory of liability actually led to some amount of damages. (*See, e.g.*, Motion at 9 (admitting that Ms. Guerin-Calvert argues there are no damages, but claiming that Dr. Singer's estimates must stand because "Ms. Guerin-Calvert provides no alternative damage estimate.")) This, of course, is incorrect. Ms. Guerin-Calvert was perfectly entitled to conclude, as she did, that, assuming a jury finds that the challenged practices were anticompetitive and wrongful, Plaintiffs have failed to prove damages and failed to demonstrate that a but-for world without the challenged practices would have benefited all class members with lower prices.

Additionally, Plaintiffs' reliance on Ms. Guerin-Calvert's computation of an alternative damages figure in another matter is clearly misplaced. (*See* Motion at 9-10.) The details of Ms. Guerin-Calvert's testimony in a totally unrelated litigation are irrelevant to the appropriate approach to examining damages here. Also, as the quoted deposition excerpt makes clear, Plaintiffs' claim that Ms. Guerin-Calvert "conced[ed] the point that the role of a damages expert is (supposed to be) to provide a damage figure based on a but-for world characterized by a given 'set of assumptions,'" is pure fantasy. (Motion at 9-10.) She testified to no such thing.

C. Plaintiffs' remaining claims are unfounded and amount to no more than a dispute as to which expert is right.

Finally, Plaintiffs offer a sparsely supported litany of other criticisms, which, in addition to being factually inaccurate, amount to nothing more than disputes about whose expert is right, which is not a basis for excluding expert testimony.

1. Dr. Singer’s analysis purportedly demonstrating an actual world correlation between seller concentrations and margins is plainly flawed.

As Ms. Guerin-Calvert’s Report explains, Dr. Singer’s NEIO model starts from the premise that as levels of seller concentration in a market fall, so too will profit margins. (Guerin-Calvert Report ¶ 47.) Ms. Guerin-Calvert’s Report explains why this assumption is wrong in this case. (*See, e.g., id.* ¶¶ 51-61, 80-85.) Plaintiffs argue that Ms. Guerin-Calvert’s opinion that higher seller concentrations and lower profit margins can coexist in the sharps container industry is disproved by the “uncontested data and related portions of Dr. Singer’s report,” showing that “actual world” seller concentrations and margins are correlated. (Motion at 11-12.) Plaintiffs’ Motion refers to the analysis in Dr. Singer’s Reply Report allegedly showing that as the sharps container market became less concentrated over time, industry margins have also fallen. (Singer Reply Report ¶¶ 15-17.) Plaintiffs’ reliance on this analysis is unavailing in several respects.

In her report, Ms. Guerin-Calvert explains in detail how *ex ante* competition for GPO contract positions can lead to both increased seller concentrations and lower prices. (Guerin-Calvert Report ¶¶ 80-85.) In performing this analysis, she relied on, among other things, well-known economic literature (*id.* ¶¶ 49, 83), the actual history of GPO bidding and contracting in this market (*id.* ¶¶ 51-59, 83), the deposition testimony of GPO employees (*id.* ¶¶ 60-61), and the testimony of Covidien’s rivals (*id.* ¶ 81).

Dr. Singer’s “uncontested” demonstration of the link between seller concentrations and margins appeared for the first time in his Reply Report.¹⁰ Consequently, under the Court’s order regarding the preparation of expert reports, Ms. Guerin-Calvert has had no opportunity to

¹⁰ Although the numbers underlying Table 1 in Dr. Singer’s Reply Report also appeared in his opening Report, Dr. Singer never suggested, in any way, that these numbers demonstrated an actual world correlation between seller concentration and margins until his Reply Report.

address it. To the extent that Dr. Singer’s new analysis is even timely, Ms. Guerin-Calvert will demonstrate at trial that it is flawed on its face. For example, the year-over-year changes in seller concentration and margins shown in Table 1 of Dr. Singer’s Reply Report show that his hypothesis that margins must fall as seller concentration falls is *flatly wrong* in four out of the six years for which he has data.

Elapsed Period	Change in Seller Concentration	Change in Margins
2001-2002	+38	No change
2002-2003	-222	+.01
2003-2004	-349	+.01
2006-2007	-181	+.03

It is Dr. Singer’s assumption that fails to fit the facts of this case, not Ms. Guerin-Calvert’s critique.

In his Reply Report, Dr. Singer introduced a new “univariate regression” to confirm that some degree of correlation between seller concentrations and margins exists over the entire observed period. (Singer Reply Report ¶ 16.) Again, assuming it is timely, this regression does nothing to demonstrate that Ms. Guerin-Calvert’s opinions are unreliable or do not fit the facts of the case for at least two reasons. As an initial matter, as the accompanying Declaration of Ms. Guerin-Calvert explains, Dr. Singer’s regression did not produce statistically significant results at the hallmark 95% confidence level. (11/14/08 Reply Declaration of Margaret E. Guerin-Calvert (“Guerin-Calvert Decl.”) ¶ 3.)

Additionally, Dr. Singer’s regression is based on a very small number of data points and there are problems with the few data points he does use. (*Id.*) First, he claims to have “Industry Price-Cost Margin” data for the years 2001 to 2007. (Singer Reply Report, Table 1.) In fact, the

data only come from Covidien and Becton Dickinson, and exclude all other industry participants. (Guerin-Calvert Decl. ¶ 3 n.7; Singer Report ¶ 33.) Second, the Covidien data ends in May 2007 and the Becton Dickinson data ends in October 2006. (Guerin-Calvert Decl. ¶ 3 n.7) Dr. Singer never explains how five months of data from Covidien alone can legitimately substitute for “industry” data for all of 2007. Dropping the 2007 data point because of this defect reduces the statistical significance of Dr. Singer’s regression below the bare minimum 90% confidence threshold. (*Id.* ¶ 3.)¹¹

In short, Ms. Guerin-Calvert’s opinion that relatively higher seller concentrations and lower prices can go hand-in-hand in the sharps container industry was well founded in the evidence, and Dr. Singer’s attempt at a statistical rebuttal is, at best, unpersuasive.

2. Ms. Guerin-Calvert was right to criticize Dr. Singer for estimating Covidien’s rivals’ capacity to expand without reference to the facts of the case.

Plaintiffs next argue that Ms. Guerin-Calvert improperly criticized Dr. Singer for failing to assess Covidien’s rivals’ capacity to absorb the massive amount of business that Covidien allegedly would have lost in the but-for world. In particular, Plaintiffs argue, “Ms. Guerin-Calvert insists on comparing actual-world figures to other actual-world figures, sometimes from a different time period, but never to the but-for world.” (Motion at 12.) But, once again, it is Dr. Singer’s analysis that is flawed and does not fit the facts.

Dr. Singer conducted no “sanity check” to determine whether the enormous share shift that he claims would have occurred in the but-for world is plausible. Indeed, Dr. Singer seems oblivious to the facts on this score. His model predicts that by 2007 Becton Dickinson would have had more than twice the market share of Covidien, (Guerin-Calvert Report ¶ 91 & ¶ 78, Table 5), and that the reusable suppliers would have grown by leaps and bounds. (Singer Report,

¹¹ Ms Guerin-Calvert’s declaration describes additional problems with Dr. Singer’s regression.

Tables 10 & 12.) But Dr. Singer never analyzed whether such growth was realistic. Ms. Guerin-Calvert's Report details, for several pages, the serious performance problems that the second-largest reusable competitor, Daniels, encountered. (*Id.* ¶¶ 103-113.) She also relied upon the testimony of the largest reusable and disposable competitors, Stericycle and Becton Dickinson, that they were able to successfully compete and that they were not foreclosed from making sales. (*Id.* ¶¶ 90-93.) Ms. Guerin-Calvert also cited testimony establishing that Stericycle's predecessor's lack of national expansion before 2004 had nothing to do with Covidien. (Guerin-Calvert Report ¶ 92 n.102, ¶119 n.177.) Dr. Singer's unsupported claim that these entities would have surged ahead but for the challenged conduct flies in the face of the facts, including the sworn testimony of Covidien's rivals' own employees.

Although Plaintiffs chide Ms. Guerin-Calvert for not having theories that "fit" the facts of this case, they simultaneously argue that she should have followed Dr. Singer's lead and ignored the "actual world" facts regarding Covidien's competitors when estimating their market share in the but-for world. (Motion at 12-13.) This argument is frivolous. Dr. Singer justifies his wholesale disregard for the facts by arguing that, but-for the challenged conduct, Covidien's rivals would have had greater capacity and motivation to expand. (Singer Reply Report ¶ 27.) But this guesswork assumption is inconsistent with the testimony of the business people running these organizations and, in any case, is entirely based on Dr. Singer's speculation. Importantly, Dr. Singer has not undertaken a considered analysis of the strengths and weaknesses of Covidien's rivals in constructing his but-for world. He has simply divided Covidien's posited market share losses pro-rata among the rivals and declared by fiat that the rivals would have been perfectly able to absorb it. (Singer Report ¶ 60; Guerin-Calvert Report ¶ 78.)¹²

¹² In the Appendix of his Report, Dr. Singer did an alternative allocation of market share to Covidien's rivals. In it, he redistributed the shares to rivals in a manner that disproportionately

For these reasons, Plaintiffs' claim that performing *no analysis* on this topic is clearly superior to Ms. Guerin-Calvert's analysis strains credulity.

3. Sharps containers are heterogeneous, as Ms. Guerin-Calvert's unrebutted analysis demonstrates.

Plaintiffs' attempt to exclude Ms. Guerin-Calvert's opinion that sharps containers are heterogeneous is "ironic" indeed. (Motion at 13-15.) As Covidien argued in its motion to exclude the testimony of Dr. Singer, only one expert in this matter has conducted an objective, data-driven analysis of whether sharps containers are homogeneous, and that expert is Ms. Guerin-Calvert. (10/17/08 Motion To Exclude Testimony of Dr. Singer at 6-8.) As Ms. Guerin-Calvert showed, accounting for allegedly favorable GPO positioning, container type and container size, the sales data demonstrate that more expensive sharps containers frequently outsell less expensive ones. (Guerin-Calvert Report ¶¶ 132-35.) This is true at times for more expensive Covidien products and for more expensive Becton Dickinson products. (*Id.*) Dr. Singer's Reply Report did not even attempt to confront this evidence.¹³ In light of this, Plaintiffs' claim that Ms. Guerin-Calvert's opinion is the unsupported one is not credible.

Plaintiffs make a number of other arguments related to product heterogeneity, all of which mischaracterize the facts or Ms. Guerin-Calvert's Report. First, Plaintiffs appear to claim that Ms. Guerin-Calvert was "wrong" when she said that Dr. Singer contends that sharps containers are undifferentiated. (Motion at 13.) Dr. Singer unequivocally stated, both in his Reply Report and in deposition that sharps containers are "homogeneous, commodity-like products." (Singer Reply Report ¶¶ 3, 42; Singer Depo. at 148:17-20.) Plaintiffs next claim the

allocated share to the smaller rivals. (Singer Report ¶¶ 77-78.) This allocation is even more disconnected from the actual world capacities of Covidien's competitors than his original analysis.

¹³ Plaintiffs' reliance on two documents referring to sharps containers as commodities (Motion at n.11; Singer Reply Report ¶ 30), is hardly a powerful retort to the statistical evidence that Ms. Guerin-Calvert has assembled.

NEIO model accommodates product differentiation in various ways. But this claim is inconsistent with Dr. Singer's admission that he used the "homogeneous product version" of the NEIO model and not the version designed to model heterogeneous-product markets. (Singer Reply Report ¶¶ 3, 39; Singer Depo. at 148:21-150:11.) Dr. Singer has never denied that other versions of the model are needed for significantly differentiated products. (Singer Reply Report ¶ 39 & n.88.) He only denies that sharps containers are differentiated.

Plaintiffs then argue that Ms. Guerin-Calvert has misunderstood the NEIO model by criticizing Dr. Singer for assuming that the price of every one of Covidien's products would have changed by the same amount as the industry average. (Motion at 14-15.) In truth, Plaintiffs have misunderstood the nature of Ms. Guerin-Calvert's criticism. Ms. Guerin-Calvert's point is two-fold: (1) Dr. Singer assumes, without support, that Covidien's margins (and prices) would have fallen by the same amount as the industry-wide drop in margins posited by the NEIO model and (2) Dr. Singer assumes, without support, that every customer, buying every different mix of Covidien products would have been overcharged, even though the only figure he calculated is how much the average price of all products *across the entire industry* would have fallen. (See, e.g., Guerin-Calvert Report ¶¶ 124, 135, 141-42.) Since Dr. Singer only looks at averages, he has no basis to opine whether the price of any particular product (or group of products) would have remained the same or even increased in the but-for world. Ms. Guerin-Calvert was not claiming that every product price would be predicted to change by the same amount. She was rightly noting that the model provides no basis to determine how much the price of any individual product, or even any individual supplier, would have changed. To do so would require a more sophisticated model. (Guerin-Calvert Report at ¶ 143.)

This, in fact, is one of the principal reasons why product differentiation renders Dr. Singer's use of NEIO unreliable. Because of differentiation, it is entirely possible that, even if industry-wide prices fell, some Covidien customers may not have been damaged at all. As Ms. Guerin-Calvert's Report notes, product prices and sales volumes will change depending on the demand each product faces. (Guerin-Calvert Report ¶ 141.) Because Dr. Singer ignores, rather than analyzes, the differentiation in the market, he cannot even say whether Covidien's prices and margins would have fallen substantially less than the industry-wide average.

As Covidien argued in its motion to exclude Dr. Singer's testimony, the only economic evidence regarding whether sharps containers are differentiated in the record is the evidence proffered by Ms. Guerin-Calvert showing that sharps containers are significantly heterogeneous. Her amply supported opinion on this topic cannot be excluded.

4. Plaintiffs' other criticisms are not well taken.

Plaintiffs level several other miscellaneous attacks on Ms. Guerin-Calvert's testimony that are without merit. Plaintiffs claim that, because the class has now been certified, Ms. Guerin-Calvert's view that the NEIO model does not account for differences among class members is irrelevant. (Motion at 15-16.) Not so. As discussed above, Dr. Singer's analysis only models the *industry-wide* forecasted change in margins/prices. His method of calculating damages contains no mechanism to account for differences in the way Covidien's products' prices change versus other industry participants. (Guerin-Calvert Report ¶ 142.) Therefore, even if his aggregate damages analysis were credited by the jury, it would still include the unsupported assumption that Covidien's prices would have fallen by the same amount as the average prices for the industry in the but-for world.

Additionally, Covidien disagrees with Dr. Singer's claim that his failure to do any analyses of the individual characteristics of class members "does not affect [his] ability to ...

allocate [] damages to class members.” (Motion at 16 (quoting Singer Reply Report ¶ 42).) How will Dr. Singer determine the amount of the overcharge to a customer who bought only (or predominantly) chemotherapy containers, which several of Covidien’s rivals did not offer? How will he allocate damages to a customer in a geographic area that some of Covidien’s rivals did not service? Will the forecasted overcharge percentage for a large hospital system with an individually negotiated contract be the same as that for a veterinarian’s office that bought at list price and would have done so in the but-for world? None of these questions can be answered by the NEIO model.

Plaintiffs also claim that Ms Guerin-Calvert’s observation that the elasticity of demand does not bear on Dr. Singer’s findings is inaccurate. (Motion at 17.) For support, Plaintiffs point out that Dr. Singer uses the “conduct parameter” (the derivation of which requires the elasticity) to analyze the competitive dynamics of the market. (*Id.*) But Ms. Guerin-Calvert’s Report already explicitly acknowledges Dr. Singer’s use of elasticity for that narrow purpose. (Guerin-Calvert Report ¶ 146.) Her point was that neither the value of the elasticity of demand nor the value of the conduct parameter affect *the amount* of damages Dr. Singer projects in his report. (*Id.* ¶¶ 145-47.) Dr. Singer has never disputed that Ms. Guerin-Calvert was correct on this point. (*See* Singer Reply Report ¶¶ 45-48.)¹⁴

What’s more, Ms. Guerin-Calvert’s Report already provides several responses to Plaintiffs’ claim that the conduct parameter and elasticity “confirm that the NEIO model has accurately captured the competitive dynamic of the marketplace.” (Motion at 17.) First, Ms. Guerin-Calvert points out that Dr. Singer’s finding that demand is elastic and negative is inconsistent with the realities of the sharps container market and the needs of customers for

¹⁴ In his Reply Report, Dr. Singer only pointed out that the demand *function* influenced his thinking on whether to change the elasticity of demand between the actual and but-for worlds and that he altered the conduct parameter in a second calculation appearing only in his appendix.

sharps disposal. (Guerin-Calvert Report ¶ 146.) Second, as Ms. Guerin-Calvert's Report explains, the author of the NEIO model equilibrium has cautioned that one of the pitfalls of failing to account for product heterogeneity is that the model can produce a conduct parameter that would "result in the attribution of market power to noncompetitive conduct when in fact the source of the market power is differentiated products." (*Id.* ¶ 139.)¹⁵

Thus, there is no valid basis to exclude any of this testimony.

5. Plaintiffs' belief that their expert is right and Covidien's expert is wrong is no basis for exclusion.

While it is clear from the discussion above that Plaintiffs' criticisms are meritless, Covidien also notes that much of the latter half of Plaintiffs' brief amounts to little more than a claim that Dr. Singer is right and Ms. Guerin-Calvert is wrong. As the First Circuit has made clear "[t]he mere fact that two experts disagree is not grounds for excluding one's testimony." *Feliciano-Hill v. Principi*, 439 F.3d 18, 25 (1st Cir. 2006); *United States v. Kayne*, 90 F.3d 7, 11-12 (1st Cir. 1996) ("[E]xperts often disagree[] among themselves. This is not unusual. These matters are properly the subject of searching cross examination."). District courts in the First Circuit consistently follow this precedent. *See, e.g., Storage Tech. Corp. v. Custom Hardware Eng'g & Consulting, Ltd.*, No. 02-12102-RWZ, 2006 WL 1766434, at *21 (D. Mass. June 28, 2006); *Goya de P.R., Inc. v. Rowland Coffee Roasters*, No. 01-1119 (DRD), 2004 WL 5459246, at *6 (D.P.R. Oct. 22, 2004); *see also United States v. Monteiro*, 407 F. Supp. 2d 351, 358 (D. Mass. 2006) (Saris, J.) (citing *Ruiz-Troche v. Pepsi Cola of Puerto Rico Bottling Co.*, 161 F. 3d 77, 81 (1st Cir. 1998)).

¹⁵ For all the reasons explained above, as well as the reasons set forth in Covidien's motion to exclude Dr. Singer's testimony, Ms. Guerin-Calvert's overall assessment that Dr. Singer's various errors "led to a substantial mischaracterization of the marketplace" was also well supported in her Report and by the record evidence.

In sharp contrast to Covidien's motion to exclude Professor Elhauge, Plaintiffs never question Ms. Guerin-Calvert's expertise (or training and education) as an economist. (10/17/08 Motion to Exclude Elhauge at 4-8.) Plaintiffs also never identify verifiable methodological errors that render critical portions of Ms. Guerin-Calvert's testimony biased and unreliable. (*Id.* at 8-17.) Unlike Covidien's motion to exclude the testimony of Dr. Singer, Plaintiffs have not shown that Ms. Guerin-Calvert simply ignored a major rebuttal to one of the key premises of her analyses. (10/17/08 Motion to Exclude Dr. Singer at 6-8.) (discussing Dr. Singer's failure to respond to Ms. Guerin-Calvert's analysis regarding product prices and heterogeneity.)

Plaintiffs have instead combined two legally unsustainable arguments (regarding allegedly "cumulative" testimony and Ms. Guerin-Calvert's failure to produce her own damages model) with a series of claims that Dr. Singer is right about various topics on which Plaintiffs do not dispute that Ms. Guerin-Calvert is a qualified expert. Plaintiffs will have every opportunity to cross-examine Ms. Guerin-Calvert on the latter set of points at trial, but they have no legitimate basis for excluding her testimony.

III. CONCLUSION

For all the above reasons, Covidien respectfully submits that Plaintiffs have no basis in law or fact for the exclusion of any portion of Ms. Guerin-Calvert's testimony.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and copies will be sent to those indicated as non-registered participants on November 14, 2008

/s/ James Donato
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