THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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

TYCO INTERNATIONAL (US) INC., TYCO HEALTHCARE GROUP LP, AND THE KENDALL HEALTHCARE PRODUCTS COMPANY'S OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE THE EXPERT DECLARATION OF DANIEL L. MCFADDEN PURSUANT TO RULE 37(C) FOR FAILURE TO TIMELY DISCLOSE AND FOR REASONABLE EXPENSES AND ATTORNEYS' FEES

I. INTRODUCTION

Plaintiffs' effort to suppress the declaration of Dr. McFadden is wholly misdirected. In a concise 33-paragraph declaration, Dr. McFadden dispositively demonstrates that the empirical approach, statistical analysis, and interpretation of results proffered by Plaintiffs' liability expert, Professor Einer Elhauge, are "of no probative value in determining the impact of the alleged anti-competitive practices on the market." Declaration of Daniel L. McFadden in Support of Motion to Exclude the Expert Report and Opinions of Professor Einer Elhauge ¶ 8. Specifically, Dr. McFadden shows that Prof. Elhauge's work suffers from fundamental errors that invalidate his conclusions and render them useless to prove the allegation that the challenged contract practices had an exclusionary impact. Dr. McFadden's declaration and analysis reach to the core reasons why this Court should exclude Prof. Elhauge's opinions and testimony under the *Daubert* standard.

Plaintiffs' response to Dr. McFadden's critique of their expert is to implore this Court to ignore it. Plaintiffs cite no legal support whatsoever for this extreme request. To the contrary, Federal Rule of Civil Procedure 26(a)(2) -- the specific rule applicable to expert witness disclosure -- applies only to experts that a party "may use at trial." Fed. R. Civ. P. 26(a)(2)(A). This Court's Local Rule 26.4 applies the same "at trial" standard. Plaintiffs rely exclusively on two cases excluding declarations proffered for the first time in response to a summary judgment motion that are completely inapposite and offer no guidance whatsoever -- let alone authority -- for excluding critically important expert declarations in the *Daubert* context. Plaintiffs also simply ignore persuasive case law from the Third Circuit and other courts expressly allowing for "new" expert witnesses acting, as here, in support of a *Daubert* motion.

As if these factors were not enough to doom Plaintiffs' motion, they have utterly failed to show any kind of harm or prejudice from the timing of Dr. McFadden's declaration. Plaintiffs received the declaration on October 17, 2008 -- almost three months before the *Daubert* hearing set for January 8-9, 2009. Plaintiffs have fully analyzed and briefed their response to Dr. McFadden's conclusions. Indeed, a substantial portion of Plaintiffs' brief in opposition to Covidien's motion to exclude Prof. Elhauge, filed on November 14, 2008, consists of their answer to Dr. McFadden. A major part of Prof. Elhauge's voluminous 72-page declaration (and accompanying electronic backup) in opposition to Covidien's motion is devoted to disputing Dr. McFadden's analysis. Significantly, Plaintiffs never sought to depose Dr. McFadden and waited for almost three weeks after getting his declaration before deciding to bring this motion. Plaintiffs cannot begin to show that they have been prejudiced in any way.

If any prejudice is to be found here, it is in Plaintiffs' effort to keep Dr. McFadden's analysis out of the Court's *Daubert* inquiry. The statistical and econometric issues Dr. McFadden addresses are quintessential topics requiring expert witness assistance and are crucial to the proper resolution of the motion to exclude Prof. Elhauge. They are being offered not for trial but for Covidien's *Daubert* motion. For all of these reasons, this Court should deny Plaintiffs' motion to strike and request for fees.

II. ARGUMENT

A. Plaintiffs' Motion Has No Basis In The Applicable Rules Of Procedure.

As an initial and dispositive matter, governing procedural rules rebut Plaintiffs' argument. Rule 26 of the Federal Rules of Civil Procedure, which governs expert witness disclosure obligations, expressly states that a party need disclose only expert witnesses that it "may use at trial." Fed. R. Civ. P. 26(a)(2)(A); *see also UAW v. G.M. Corp.*, 235 F.R.D. 383,

388 (E.D. Mich. 2006) ("Rule 26 is a *trial*-oriented" activity) (emphasis in original). Nothing in the rule mandates disclosure of expert witnesses who will testify in a pre-trial *Daubert* hearing.[1]

The Court's Local Rules provide for the same trial-based disclosure obligation. Local Rule 26.4 provides that the parties shall make "disclosure[s] regarding experts required by Fed. R. Civ. P. 26(a)(2) … at least 90 days before the final pretrial conference" or as otherwise determined. L.R. 26.4(a). As with Rule 26, nothing in the Local Rule requires a party to disclose the identity of other experts beyond those designated for use at trial. Consequently, Plaintiffs have no basis to strike Dr. McFadden's declaration under the express rules governing expert disclosure. On this basis alone, their motion should be denied.

B. Plaintiffs Cite No Case Authority Supporting The Request To Strike.

Plaintiffs' two case citations -- *Lohnes v. Level 3 Communications, Inc.*, 272 F.3d 49 (1st Cir. 2001), and *Trost v. Trek Bicycle Corp.*, 162 F.3d 1004 (8th Cir. 1998) -- are completely off-point and provide no basis for striking Dr. McFadden's declaration. Neither of these cases involve a *Daubert* motion but address instead the vastly different context of summary judgment. *See Lohnes*, 272 F.3d at 59; *Trost*, 162 F.3d at 1007. In addition, both of these opinions were responses to the introduction of completely new expert witness materials virtually on the eve of trial and midway through pending summary judgment proceedings. In *Lohnes*, the plaintiff offered a new expert affidavit along with his summary judgment opposition less than three weeks before the final pre-trial conference. 272 F.3d at 59. In *Trost*, the plaintiff also

[1] Tellingly, Plaintiffs simply omit any reference to Rule 26(a)(2) and refer only to Rule 37. This tactic is misdirected. Rule 37 is only a remedial provision; it does not impose specific disclosure obligations as in Rule 26 and does not provide a basis for precluding testimony independent of Rule 26. Rule 37(c)(1)'s mention of motions is expressly in the context of trial-witness disclosures under Rule 26(a). Because Rule 37 provides no basis to strike Dr. McFadden's declaration, Plaintiffs' request for expenses and fees should be denied as well. Monetary sanctions are additionally inappropriate because the submission of Dr. McFadden's declaration was harmless to Plaintiffs, as shown below. *See* Fed R. Civ. P. 37(c)(1).

offered a new expert affidavit along with his summary judgment response a mere two months before the scheduled trial date. 162 F.3d at 1007-08. Both cases turned on the courts' assessment of prejudice from the introduction of expert material at a critical stage of summary judgment and immediately before trial. *Lohnes*, 272 F.3d at 60-61; *Trost*, 162 F.3d at 1008-09. In addition, the expert testimony at issue in each case would have been essential to the sponsoring party's ability to carry its burden of proof on its substantive claims *at trial*, thus triggering the application of Rule 26. *Lohnes*, 272 F.3d at 59, 61 (plaintiff could not survive summary judgment without expert affidavit); *Trost*, 162 F.3d at 1009 (same). Neither of these distinguishing characteristics is present in this case or implicated in Plaintiffs' motion to strike here.

C. Other Courts Have Rejected Motions To Strike In Similar Daubert Circumstances.

As if these considerations were not enough to deny Plaintiffs' motion, the Third Circuit and other courts have rejected similar efforts to exclude expert testimony offered solely for purposes of *Daubert* motions. In *In re Paoli Railroad Yard PCB Litigation*, the plaintiffs brought suit seeking damages resulting from exposure to chemicals allegedly released into the groundwater from a railroad yard owned by the defendants. 35 F.3d 717, 738 (3d Cir. 1994). The district court issued an order requiring defendants to identify all trial expert witnesses by a certain date in conjunction with the provisions of Rule 26. *Id.* After the expiration of the disclosure date, the defendants submitted affidavits from previously undisclosed experts in conjunction with motions to exclude the testimony of plaintiffs' experts. *Id.* Plaintiffs moved to strike the testimony of those "new" experts, but the court allowed them to testify. *Id.* at 739. The Third Circuit upheld the district court's admission of the testimony, finding that the cut-off

for identification of experts applied only to experts who would testify at trial, not those who would testify at the hearing on the motions to exclude. *Id*.

Other courts have reached the same conclusion. In *Nightlight Systems, Inc. v. Nitelites Franchise Systems, Inc.*, the defendants moved to exclude the testimony of an expert who was not identified during the disclosure period. No. 1:04-CV-2112-CAP, 2007 WL 4563875 at *8 (N.D. Ga. May 11, 2007). The court cited the limitation of Rule 26(a)(2) to experts who may be used "at trial" and held that the expert could testify in *Daubert* proceedings. *Id*. at *9. The court also underscored its obligation "to engage in a rigorous inquiry to determine whether [the defendants' expert] is qualified" and found that admission of testimony from plaintiff's expert, even though he was disclosed after the close of expert discovery, would aid in that inquiry. *Id*.; *see also Lyman v. St. Jude Med. S.C., Inc.*, -- F. Supp. 2d --, --, 2008 WL 2224352 at *4, n.3 (E.D. Wisc. 2008) (allowing use of "new" expert affidavit in *Daubert* proceedings). These decisions mandate denial of Plaintiffs' motion here.

D. Plaintiffs Cannot Show Any Harm.

As a final defect in their argument, Plaintiffs have not shown, and indeed cannot show, that they have been harmed in any way by the timing of Dr. McFadden's declaration. Covidien submitted Dr. McFadden's declaration along with its opening brief on the motion to exclude Prof. Elhauge on October 17, 2008 -- four weeks before the opposition to that motion was due and almost twelve weeks before the scheduled hearing. The declaration sets out in specific detail Dr. McFadden's critique of Prof. Elhauge's flawed methodology and the scope of Dr. McFadden's opinions and proposed testimony. Plaintiffs waited 19 days after receiving Dr. McFadden's declaration to file the instant motion, apparently unconcerned with any alleged "prejudice" during the intervening time. Moreover, Plaintiffs had ample time and opportunity to

request a deposition of Dr. McFadden before filing their opposition to the *Daubert* motion. They chose not to do so.

Significantly, Plaintiffs have already fully analyzed and briefed their response to Dr. McFadden's declaration. A substantial portion of Prof. Elhauge's 72-page declaration in opposition to the motion to exclude him is devoted to answering Dr. McFadden's criticisms.[2] A major part of Plaintiffs' opposition brief is directed to attacking Dr. McFadden.[3] Plaintiffs have had a full and fair opportunity to respond to Dr. McFadden's analysis.

III. CONCLUSION

For the foregoing reasons, Covidien respectfully requests that the Court deny Plaintiffs' Motion to Strike the Expert Declaration of Daniel L. McFadden and for Reasonable Expenses and Reasonable Attorneys' Fees.

Dated: November 20, 2008

Respectfully submitted,

/s/ James Donato

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

[2] Covidien submitted a similar declaration from Dr. McFadden criticizing Prof. Elhauge's econometric modeling in the sharps container competitor case venued in the Eastern District of Texas on September 17, 2008, more than a month before Dr. McFadden's declaration in this case. Prof. Elhauge wrote a detailed response to Dr. McFadden in that case, too. The substantive issues raised by Dr. McFadden are hardly new to Prof. Elhauge.

[3] Plaintiffs use the instant motion to take pot-shots at Dr. McFadden's qualifications as an expert. Plaintiffs' Memorandum at 6, n.5. They allege that the District of Colorado criticized Dr. McFadden in *Cook v. Rockwell Int'l*, No. Civ.A 90-CV-00181-J, 2006 WL 3533049 at *36-*38 (D. Colo. Dec. 7, 2006). Not so. The court there neither leveled significant criticism nor outright rejected Dr. McFadden's opinion; instead it stated his report and rebuttal testimony could be used at trial to "test [the opposing expert's] explanation and assumptions" about the case. *Id*. at *38. And, they cite to *Shannon v. Crowley*, 538 F. Supp. 476 (N.D. Cal. 1981), without explaining how the case suggests that Dr. McFadden is unqualified to appear here. Neither case is a basis for striking Dr. McFadden's declaration or testimony.

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

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

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

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

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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and copies will be sent to those indicated as non-registered participants on November 20, 2008.

/s/ *James Donato*

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