IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

NATCHITOCHES PARISH HOSPITAL SERVICE DISTRICT and JM SMITH CORPORATION d/b/a SMITH DRUG COMPANY on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

TYCO INTERNATIONAL, LTD.; TYCO INTERNATIONAL (US) INC.; TYCO HEALTHCARE GROUP LP; THE KENDALL HEALTHCARE PRODUCTS COMPANY,

Defendants.

Civil Action No. 05-12024 PBS

JURY TRIAL DEMANDED

STATEMENT OF MATERIAL FACTS IN SUPPORT OF TYCO INTERNATIONAL (US) INC., TYCO HEALTHCARE GROUP LP, AND THE KENDALL HEALTHCARE PRODUCTS COMPANY'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure and Local Rule 56.1, defendants Tyco International (US) Inc., Tyco Healthcare Group LP, and the Kendall Healthcare Products Company (collectively, "Covidien"), submit this Statement of Material Facts in support of their Motion for Summary Judgment.¹

Uncontroverted Material Facts

1. Daniels established U.S. operations in

2003 and has approximately a

share of the sharps container market.

Supporting Evidence

Elhauge Report (Ex. A) ¶ 89; Ordover
 Report (Ex. B) at Table 1; DI_02203646

(Ex. C) at 59.

¹ All cited documents and testimony are attached as exhibits to the Declaration of James Donato in Support of Defendants' Motion for Summary Judgment, filed herewith.

- 2. Plaintiffs state that Covidien's market share has dropped from roughly to less than from 2001 to 2007.
- 3. BD and Stericycle state that ______.
- 4. In 1997, BD
- 5. BD
- 6. BD since 1996, and between 1996 and 2007,

Supporting Evidence

- 2. Elhauge Report (Ex. A) at Table 1.
- 3. Shaw Depo. (Ex. D) at 77:5-13; Kogler Depo. (Ex. E) at 76:11-15, 88:3-15, 235:12-236:6.
- 4. Shaw Depo (Ex. D) at 19:22-25.
- 5. Shaw Depo. (Ex. D) at 14:23-15:20, 20:1-21.

6. Shaw Depo (Ex. D) at 21:1-16, 57:19-24;
Elhauge Report (Ex. A) at Table 1;
Ordover Report (Ex. B) at Table 1.

7. BD states

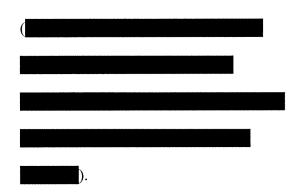
8. BD states

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

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

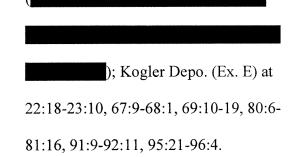
Supporting Evidence

7. Shaw Depo. (Ex. D) at 76:15-77-13



8. Shaw Depo. (Ex. D) at 28:25-29:8.

9. Ex. 3 to Kogler Depo. (Ex. F) at p. 4

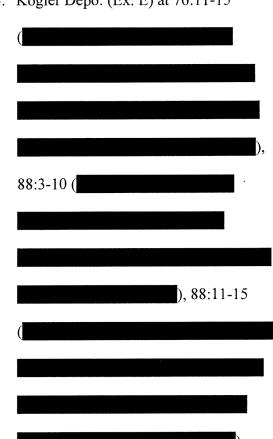


10. Kogler Depo. (Ex. E) at 80:6-81:16.

- 11. In 2005, Stericycle added more than new accounts, effectively
- 12. In 2006, three years after the acquisition, 12. Kogler Depo. (Ex. E) at 95:21-96:4. Stericycle
- 13. Stericycle

Supporting Evidence

- 11. Kogler Depo. (Ex. E) at 91:9-92:11.
- 13. Kogler Depo. (Ex. E) at 76:11-15



88:16-24 (

Supporting Evidence

14. Stericycle

14. Kogler Depo. (Ex. E) at 235:5-11

.

), 235:12-236:2

15. Stericycle

15. Kogler Depo. (Ex. E) at 236:3-6 (

16. When Daniels entered the U.S. market,

17.

.

18. Daniels

Supporting Evidence

17. Shaw Depo. (Ex. D) at 48:8-19, 49:9-

54:20 (

).

18. *See* Kogler Depo. (Ex. E) at 104:14-

106:17 (

.

20. Daniels

Supporting Evidence





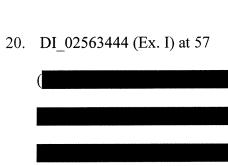
); Skinner Depo. (Ex. G) at

83:12-84:1 (



), 88:18-24.

19. Daniels 19. Skinner Depo. (Ex. G) at 96:14-25; Guerin-Calvert Report (Ex. H) at Appendix 10.



DI_00030871 (Ex. J) at 75 (

7.

Supporting Evidence

Skinner Depo. (Ex. G) at 83:12-25

- 21. Daniels'

21. DI 00030871 (Ex. J) at 75 (

); Skinner Depo.

(Ex. G) at 104:6-105:8 (

); DI 00358556 (Ex. K) at 56

); DI 00359519 (Ex. L) at 19-20;

DI 00358100 (Ex. M) at 00-02;

DI 00360532 (Ex. N) at 32.

22. Daniels'

Supporting Evidence

22. See, e.g., Smiley Depo. (Ex. O) at 62:10-

17, 63:4-66:7 (

), 66:8-23

), 73:15-25 (

· .

); Skinner

Depo. (Ex. __) at 106:13-20 (

); DI_00344149 (Ex. P) at 49-50

23. DI_01142784 (Ex. Q) at 84 (

23. Daniels

Supporting Evidence

|); Smiley Depo. (Ex. O) at |
|-------------------------------|
| 80:5-81:17 (|
| |
|), 82:25-83:23, 110:15-111:3 |
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|); DI_00243684 (Ex. R) at 84 |
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|); DI_00408305 (Ex. S) at 05 |
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|); DI_00239705 (Ex. T) at 05. |

Supporting Evidence

24.

24. DI_00342054 (Ex. U) at 54 (

DI_00344451 (Ex. V) at 51 (

DI 00342830 (Ex. W) at 30 (

);

DI_01577001 (Ex.X) at 01 (

); DI_03312145 (Ex.

Y) at 45 (

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Supporting Evidence



DI 03315788 (Ex. Z) at 88 (

); DI_00348373 (Ex.

AA) at 73-74 (

); Smiley

Depo. (Ex. O) at 67:6-23, 74:14-75:4, 77:23-79:9, 87:8-88:25.

25.

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25. DI_00218455 (Ex. BB) at 67 (

);

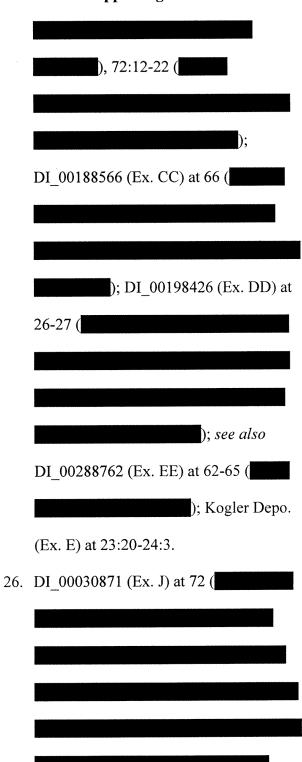
Skinner Depo. (Ex. G) at 101:13-23

); Smiley Depo.

(Ex. O) at 29:13-31:16 (

26.

Supporting Evidence



13.

Supporting Evidence

...."), id. at 75 (

- 27. Stericycle entered the sharps container market around the same time as Daniels and has achieved a share of reusable sales, compared to only for Daniels.
- 28. Hospitals and other healthcare facilities created GPOs to combine their purchasing power to negotiate better prices and discounts from medical suppliers.
- 29. GPO membership is voluntary, and facilities can belong to multiple GPOs, change their GPO memberships, or purchase outside GPOs.

27. Elhauge Report (Ex. A) ¶ 89.

- 28. Restino Depo. (Ex. FF) at 14:14-18, 14:24-15:12; Hargette Depo. (Ex. GG) at 29:2-21.
- 29. Crowder Depo. (Ex. HH) at 49:10-20 (Natchitoches belongs to three GPOs: MedAssets, Amerinet and Novation), 60:7-18 (Natchitoches has used Premier), 67:7-69:10 (Natchitoches purchases products from a company that is not on its GPO contracts rather than going with the brand that is on contract); Restino

Supporting Evidence

Depo. (Ex. FF) at 19:12-22 (); Hargette Depo. (Ex. GG) at 40:21-41:19 (); Dunehew Depo. (Ex. II) at 27:24-28:6 (), 88:24-89:3 (); Miriani Depo. (Ex. JJ) at 105:16-23 (); Walsh Depo. (Ex. KK) at 41:5-17 (

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.

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

Supporting Evidence

30. Restino Depo. (Ex. FF) at 16:8-17:21,
21:7-22:13; Hargette Depo. (Ex. GG) at
37:2-20; Florek Depo. (Ex. LL) at 13:1521; Webb Depo. (Ex. MM) at 26:18-25;
Walsh Depo. (Ex. KK) at 33:3-20

Supporting Evidence

); Miriani Depo. (Ex. JJ) at 115:19-116:25 (

- 32. BD
- 33. GPO contracts are terminable at will on short notice, typically 90 days or less.
- 32. Shaw Depo (Ex. D) at 65:2-24, 66:13-19, 91:25-92:11.
- 33. NP/NOV 000010 (Ex. NN) at 21 (
); P_000081 (Ex.
 OO) at 90 (
); HT02566 (Ex. PP)
 at 82 (
); TYN0001641 (Ex. QQ)
 at 63 (
); TYN0001975 (Ex. RR)
 at 79 (
); TYN0001439 (Ex. SS) at
 47 (
).

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 prenegotiated discounts.

Supporting Evidence

34.

| Shaw Depo. (Ex. D) at 63:3-63:15 |
|------------------------------------|
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|) . |
|), |
| Restino Depo. (Ex. FF) at 19:4-11 |
| |
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| |
|), 20:5-16; Hargette Depo. (Ex. |
| GG) at 39:16-40:6 (|
| |
| |
| <u> </u> |
| 53:11-54:1 (|
|); |
| Dunehew Depo. (Ex. II) at 28:7-11 |
| |
| •, |
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| |
|); Miriani Depo. (Ex. JJ) at 71:11 |
| 17 (|
| |

Supporting Evidence

); Walsh Depo. (Ex.

KK) at 41:5-17 (

); Ex. 3 to Miriani Depo. (Ex.

), Em. 3 to ivilitatin 2 opor (Em.

); TYN0001641 (Ex. QQ) at

42 (

); TYN0001975

(Ex. RR) at 79 (same); TYN0001439

(Ex. SS) at 43 (same).

TT) (

35. NP/NOV 000124 (Ex. UU) at 129; NP/NOV 000010 (Ex. NN) at 12.

35. Covidien's contracts with Novation state that

- 36. GPO members routinely buy products outside of GPO contracts.
- 36. Crowder Depo. (Ex. HH) at 67:7-69:10;
 Restino Depo. (Ex. FF) at 19:4-11, 20:5-16; Hargette Depo. (Ex. GG) at 39:16-40:6, 53:11-54:1; Dunehew Depo. (Ex. II) at 28:7-11, 71:14-72:1; Miriani Depo.

Supporting Evidence

(Ex. JJ) at 71:11-17, 72:9-25; Walsh Depo. (Ex. KK) at 41:5-17.

37. Elhauge Report (Ex. A) ¶ 68.

- 37. Approximately of Covidien's sharps container sales are made outside of
 - GPOs.
- 38. Natchitoches purchases Covidien sharps containers because of the products' features and because the products are safe and effective.

39. Natchitoches is not prevented from buying competitive sharps containers

instead of Covidien's.

38. Crowder Depo. (Ex. HH) at 20:25-21:9 ("I saw the design [of the Covidien product] and liked the design and so we purchased it."), 22:10-21 (Natchitoches switched from BD to Covidien around 1999 because "the [Covidien] design was better as far as preventing sharp sticks

than the BD"), 24:12-23 (the Covidien

container was safe and effective).

39. Crowder Depo. (Ex. HH) at 66:3-18 (Mr. Crowder was unaware of any contract that would prevent Natchitoches from switching from Covidien to BD), 81:20-82:2 ("I don't think that Natchitoches is prevented from buying from Daniels.").

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

- 41. Natchitoches believes that GPOs have helped it receive better pricing.
- 42. Natchitoches may purchase products outside of GPO contracts without penalties or threats.
- 43. Natchitoches does not believe Covidien's sharps containers are priced too high and has never experienced any wrong or improper conduct by Covidien.

Supporting Evidence

- 40. Crowder Depo. (Ex. HH) at 48:8-15

 ("MedAssets is our primary GPO and we purchase utilizing whatever contracts we have access to[,] to obtain the best pricing that we can."), 49:10-20

 (Natchitoches belongs to MedAssets,
 Amerinet and Novation), 60:7-61:12 ("If the Premier contract was better than one we were utilizing, then we would switch to the Premier contract. If it wasn't a better contract, then we would not.").
- 41. Crowder Depo. (Ex. HH) at 48:22-49:5

 (Through GPOs, "[w]e have been able to obtain better pricing on products and services that we purchase.").
- 42. Crowder Depo. (Ex. HH) at 67:7-69:10.
- 43. Crowder Depo. (Ex. HH) at 98:11-16, 100:7-16, 139:1-8.

44. Plaintiffs' liability expert has not shown that Covidien's prices were below its costs.

45. Plaintiffs' liability expert has not shown that Covidien's rivals could not profitably compete for hospital business simply by lowering their prices.

Supporting Evidence

- 44. Elhauge Depo. (Ex. VV) at 188:2-7 ("Q. Have you done any analysis that would suggest that at any time Covidien was offering discounts that were below cost?

 A. No. I haven't opined that the discounts were below costs or reached such a conclusion.").
- 45. Elhauge Depo. (Ex. VV) at 136:6-137:3

 (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.... 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

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

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.

Supporting Evidence

brand-name value and all and try to engage in that kind of inquiry.").

47. NP/Nov 000010 (Ex. NN) at 32 ();
TYN0001641 (Ex. QQ) at 49 (

TYN0001439 (Ex. SS) at 44 (

Supporting Evidence

); Hargette Depo (Ex. GG) at 203:19-204:5 (

- 48. Covidien's sole-source contracts

 covered, at most, of the relevant
- market.

 49. Covidien's market share discounts

 covered, at most, of the relevant
- 50. Covidien's bundling programs covered less than of the relevant market.

market.

- 48. Elhauge Reply Report (Ex. WW) at Table 4.
- 49. Elhauge Reply Report (Ex. WW) at Table 7.
- 50. Ordover Report (Ex. B) ¶ 110; see also
 Elhauge Depo. (Ex. VV) at 183:9-16 ("Q.
 Sitting here today, do you plan on giving
 an opinion to the jury as to the share of
 market covered by the bundle
 requirement provisions? A. No. For my
 purposes, it's irrelevant.... I'm not
 opining about it separately, standing
 alone.").
- 51. HealthTrust's 2001 contract with
- 51. Cooke Depo. (Ex. XX) at 77:12-17,

Covidien did not contain market-share commitment requirements.

- 52. Covidien's prices have gone down and its margins have been shrinking.
- 53. Dr. Singer's "but for" price model requires a precise measure of the amount of foreclosure allegedly suffered by Covidien's rivals.
- 54. Dr. Singer did not precisely measure the amount of foreclosure allegedly suffered by Covidien's rivals.

Supporting Evidence

- 52. Ordover Report (Ex. B) ¶¶ 19, 63-64.
- 53. Singer Expert Report (Ex. YY) ¶ 57;

 Ashenfelter draft report (Ex. ZZ) at 4.
- 54. Singer Depo. (Ex. AAA) at 48:4-24

 ("Q.... [Y]ou are not offering any
 testimony regarding whether the levels of
 alleged foreclosure predicted by

Supporting Evidence

Professor Elhauge are correct, are you? A. I am not offering an opinion on that. Q.... So you believe in your role as a damages expert that you should accept his foreclosure numbers and use those to determine the amount of damages that the class suffered? A. I believe it was appropriate here to do that, yes. Q. Did you do any independent analysis to determine if Professor Elhauge got the levels of rival foreclosure right? A. No independent -- I performed an audit of what he did but not what was done independently."), 63:1-22 ("I turn over that -- the role of estimating the magnitude of the foreclosure to Professor Elhauge. It is not my job to quibble or to offer a critique or an alternative estimation of foreclosure"), 64:13-21 ("I'm not asked to prove foreclosure, I am asked to convert that foreclosure, assuming that it occurred, assuming that

Supporting Evidence

it is real, into a but-for price."), 118:12119:4 ("I have not been asked, nor have I formed an independent opinion as to whether Professor Elhauge's calculation of the differential in rival penetration was the appropriate analysis. I just -- that's not something that I considered to be my task.").

- 55. Prof. Elhauge did not precisely measure the amount of foreclosure allegedly suffered by Covidien's rivals.
- 23:6-18 ("I'm opining on the fact of impact, not the precise amount of anticompetitive impact, which I gather is the subject of Dr. Singer's testimony as the damages expert."), 106:7-14 ("Q.... So you have not undertaken to calculate the precise amount of differential in the rival sales in any context in this case to affected versus unaffected buyers? A.

 No, I have done affected versus unaffected buyers, but what I haven't done, which is the relevant damages question, is quantify the difference

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

Supporting Evidence

between rival shares in the actual world and the but-for world").

56. 1/8/09 Daubert Hearing Tr. (Ex. BBB) at 90:14-91:12 ("[A]s I say in my initial report, ... there could be some selection bias where buyers who prefer [Covidien] products are more likely to commit than buyers who don't prefer [Covidien] products."), 91:16-92:19 ("I acknowledge[] that that gap ... for the commitment comparisons could to some extent reflect some selection bias.... [the gap] could be overstated"), 92:17-19 ("Q. [Y]ou agree that some portion of that gap is due to selection bias; is that right? A. Conceivably could be."); see also 1/9/09 Daubert Hearing Tr. (Ex. CCC) at 21:7-9 (regarding the presence of "some selection bias" in Prof. Elhauge's analysis, the Court observed that "It's actually not even that disputed. You haven't even really disputed that.").

Supporting Evidence

57. Dr. Singer's model relies on Prof.

Elhauge's simultaneous comparisons to calculate damages.

Dated: July 29, 2009

57. Singer Expert Report (Ex. YY) ¶ 57 &

Table 11 (incorporating the results of

Elhauge Exhibit 9).

Respectfully submitted,

/s/ James Donato

James Donato (SBN: 146140) SHEARMAN & STERLING 525 Market Street, 15th Floor San Francisco, CA 94105 Telephone: (415) 616-1143

e-Mail: james.donato@shearman.com

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John M. Griffin (BBO:549061) Marc A. Polk (BBO: 631765)

15 Hampshire Street Mansfield, MA 02048 Telephone: (508) 261-8480

e-Mail: john.griffin@covidien.com e-Mail: marc.polk@covidien.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 July 29, 2009.

| -/ | s/ | James '. | \mathcal{L} | onat | 0 | |
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