IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

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

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

REDACTED VERSION

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I. INTRODUCTION

Tyco's Motion for Summary Judgment is meritless. Plaintiffs challenge exclusionary agreements based on a theory of harm this Court has already held viable and supported by compelling direct evidence. Tyco relies on law attacking a predatory pricing theory that is neither expressly nor implicitly asserted by Plaintiffs. All of Tyco's arguments regarding below-cost pricing are therefore inapposite, and have no bearing on this case.

Tyco's critique of Plaintiffs' expert analysis is also meritless. Plaintiffs' experts have carefully crafted calculations of foreclosure levels, differences in rival penetration, but-for market shares, and the damages resulting from Tyco's foreclosure of the market that would withstand any *Daubert* challenge. Moreover, Tyco's arguments here have already been made in exactly that context: a *Daubert* motion challenging Dr. Singer that Tyco later withdrew, specifically stipulating that such challenges were to be "reserved for cross-examination at trial" (D.E. 227). Tyco's efforts to re-urge this *Daubert* challenge should be denied on grounds of waiver, judicial estoppel, and the lack of merit of the underlying arguments.

II. FACTS

The Court has demonstrated great familiarity with the facts of this case in two lengthy class certification opinions (D.E. 130; 169). Facts relevant to the issues at bar will be described throughout only to the extent they give context to the arguments. As to the Statement of Uncontroverted Material Facts (D.E. 268) submitted by Tyco in conjunction with its motion, Plaintiffs have submitted contemporaneously with this brief in opposition a responsive Rule 56.1 Statement, disputing many of these purportedly uncontroverted facts.

III. LAW AND ARGUMENT

A. Standards of Law Regarding Motions for Summary Judgment

Pursuant to Rule 56(c), summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits, show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." As interpreted by the First Circuit, this Court must "view the facts in the light most favorable to the non-moving party, drawing all reasonable inferences in that party's favor." *Barbour v. Dynamics Research*, 63 F.3d 32, 36 (1st Cir. 1995).

B. Law of Exclusive Dealing and Application to Tyco's Conduct

1. Barry Wright

Tyco's primary legal argument is that the "First Circuit has flatly rejected the claim that above-cost discounts like the ones Plaintiffs challenge here can violate the antitrust laws ," with citation to the First Circuit's opinion in *Barry Wright v. ITT Grinnell*, 724 F.2d 227 (1st Cir. 1983). Defendants' Memorandum in Support of Motion for Summary Judgment (D.E. 267) ("MSJ") at 8. This statement is simply untrue. The First Circuit and numerous other courts have upheld challenges similar to that brought by Plaintiffs (in some cases against Tyco), and the law, including the law of this case, is clear that Plaintiffs' theory of harm is viable.

First, Plaintiffs do not challenge above-cost discounts. Plaintiffs do not challenge *any* discounts. Plaintiffs challenge exclusive dealing arrangements under which leading national GPOs agreed that they would not broker *any* container sales by Tyco rivals. Plaintiffs also challenge exclusionary agreements entered into by Tyco with individual purchasers, primarily hospitals, sometimes brokered by GPOs and sometimes not, under which hospitals contractually committed to buy containers almost exclusively from Tyco. Therefore Tyco's argument that *Barry Wright* supports the *per se* legality of "discounts like the one Plaintiffs challenge here ," is

based on a false predicate. Tyco's entire line of argument based on above-cost discounting should be rejected on this basis alone.

Second, with the Plaintiffs' actual allegations in mind, the First Circuit has not "flatly rejected" challenges to exclusionary contracts and exclusive dealing arrangements. The *Barry Wright* case plainly says so. In *Barry Wright*, the plaintiffs challenged "three specific aspects" of the defendant's conduct separately: "[1] its offer of special discounts …[2] its insistence on a long-term large-volume contract, and [3] its inclusion of the special non-cancellation clauses." 724 F.2d at 230. Thus while Tyco misleadingly cites portions of the opinion addressing discounts, Tyco fails to note not only that Plaintiffs are not challenging discounts, but that exclusionary agreements can be challenged *separately* from any such discounts.

After concluding that the discounts could not be challenged because they were above cost, *id.* at 231-236, *Barry Wright* then went on to assess whether the contractual terms were exclusionary. *Id.* at 237-239. Nowhere in the latter discussion did the court ever suggest that a cost-based test should apply to an exclusionary contract. *Id.* Rather it rejected the claim of an exclusionary contract on entirely different grounds, mainly that the challenged agreement was a volume-based contract, not a requirements contract, and had legitimate justifications. *Id. Barry Wright* thus affirmatively supports the position that exclusionary contract claims do not have to meet a cost-based test. Had the court thought otherwise, it would have ended all analysis with the conclusion that the discounts were above cost. Other cases likewise condemn exclusionary agreements requiring buyers to buy all or a high share from a defendant, even though the discounts used to induce those agreements were not proved to be below cost.[1]

[1] See *FTC v. Brown Shoe*, 384 U.S. 316, 318 (1966*); Standard Fashion v. Magrane-Houston*, 258 U.S. 346, 351-53 (1922); *LePage's v. 3M*, 324 F.3d 141(3d Cir. 2003) (en banc); *U.S. v. Microsoft*, 253 F.3d 34, 68 (D.C. Cir. 2001) (en banc).

As for *Barry Wright*'s actual analysis of the claimed exclusionary contract, it strongly supports plaintiffs here. The court emphasized there that the challenged agreement was a volume-based contract, not a requirements contract: "Grinnell did not promise to buy all its requirements from Pacific; it entered into a contract for a fixed dollar amount. There is "an important difference between a 'requirements' contract and a contract which calls for the purchase of a definite quantity over a period of time which the buyer estimates to be sufficient to meet his requirements.'"[2] As the First Circuit explained, a "true requirements contract flatly eliminates the buyer from the market for its duration; a fixed quantity contract leaves open the possibility that the buyer's needs will exceed his contractual commitment; he is free to purchase from others *any excess amount that he may want*." *Id.* at 237 (emphasis added).

The First Circuit's distinction is fatal to Tyco's reliance on *Barry Wright.* Plaintiffs here do not challenge fixed quantity or volume-based contracts; they challenge exclusionary agreements that require GPOs to broker *only* Tyco sales and require hospitals to buy almost *exclusively* from Tyco. The undisputed evidence is that the sole-source contracts with GPOs prohibit the GPO from brokering sales of any other vendor's sharps containers.[3] As this Court has described it "under these [sole-source] contracts, made between Tyco and the GPO itself, the GPO agreed to broker only sharps containers from Tyco … to its members."[4] Tyco's exclusionary contracts with hospitals, under which hospitals commit to buy a very high

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[2] *Id.* at 237, citing *Tampa Electric Co. v. Nashville Coal Co.*, 276 F.2d 766, 771 (6th Cir. 1960) *rev'd on other grounds* 365 U.S. 320 (1961).

[3] Declaration of Janusz A. Ordover in Support of Motion to Exclude Expert Testimony of Professor Einer Elhauge (D.E. 178), ¶ 1, n.2.

[4] Class Certification Opinion of January 29, 2008 (D.E. 130) (hereinafter "Jan. Op. at ___") at 15. For an example of a sole-source GPO contract, see Greg Goodall Dep. Exh. 11 (TYN0002075-2104) (attached as Ex. 1 to the Declaration of Elena Chan in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment ("Chan Decl.") (2005 contract between Tyco and Premier).

percentage of their containers from Tyco, clearly do not leave the purchaser "free to purchase from others any excess amount they want." As this Court has observed, "Unlike volume-based purchase requirements, which are based on the amount purchased by an end user regardless of the amount purchased from rivals, market share purchase requirements are based on the amount end users purchase from Tyco *to the exclusion* of Tyco's rivals." Jan. Op. at 13 (emphasis in original). The undisputed evidence is that under Tyco's challenged contracts, hospitals committed to buy an extraordinarily high percentage of their sharps containers, usually 90% or above, exclusively from Tyco.[5] As the contract does *not* leave the purchaser free to purchase from others "any excess amount that they may want ," it *is* a requirements contract rather than a volume-based contract.

Nor did *Barry Wright* hold that above-cost volume-based contracts were *per se* legal. Instead, it emphasized the additional element that the contracts there had legitimate procompetitive justifications. See 724 F.2d at 237. Here, there is clearly a genuine dispute about whether any procompetitive justifications exist at all, and the offered justifications bear little relation to the actual agreements or evidence. Ironically, Tyco mainly claims volume-based efficiencies that could (if valid) justify volume-based contracts, but could not justify the exclusive or share-based contracts actually challenged here.[6]

[5] See TYN0340589 (attached as Ex. 2 to Chan Decl.), and other documents cited in the Expert Report of Einer Elhauge ("Elhauge Report," D.E. 133, attached as Ex. 3 to Chan Decl.) ¶¶ 143-158 for examples of such contracts. Tyco misleadingly argues that the hospital contracts could not be foreclosing because the named plaintiff testified it was free to buy from whom it wanted. MSJ at 1, 13. But the reason the named plaintiff gave this testimony was because it declined to enter into a commitment contract, for which Tyco punished it with penalty prices. See, Elhauge Daubert Declaration (attached as Ex. 5 to Chan Decl.) ¶ 104. This testimony thus provides no support for Tyco's claim that hospitals who did agree to commitments were not foreclosed.

[6] Elhauge Report ¶¶ 207-213; Reply Expert Report of Einer Elhauge ("Elhauge Reply Report," D.E.135, attached as Ex. 4 to Chan Decl.) ¶¶137-150.

In short, the First Circuit denied relief in *Barry Wright* based on the separate legal determinations that (a) the above-cost discounts were not illegal, and (b) the alleged exclusionary contracts were volume-based and justified. In this case, (a) Plaintiffs are not challenging any discounts, and (b) the challenged contracts are not volume-based but rather are requirements contracts that require brokering only Tyco containers or buying close to 100% from Tyco *and* lack any procompetitive justification. Thus, Tyco's reliance on *Barry Wright* as to "above-cost discounting" and the balance of what it refers to as the "pricing jurisprudence" (MSJ at 10) is not applicable: Plaintiffs do not challenge Tyco's prices as "too low" (MSJ at 6, fn. 4), and this "pricing jurisprudence" has no relevance to this case.

The *Barry Wright* case actually supports Plaintiffs' theory of harm, and further shows that the present motion is without merit. As the court plainly stated: "*The antitrust problem that courts have found lurking in requirements contracts grows out of their tendency to "foreclose" other sellers from the marketplace." Id.* at 236 (emphasis added). This statement alone suffices to defeat Tyco's motion for summary judgment as to Plaintiffs' theory of harm. The court continued, "[i]n determining the 'probable effect of the contract on the relevant area of effective competition' we are to take into account both the extent of the foreclosure and the buyer's and seller's business justifications for the arrangement." *Id.* at 236-237 *quoting Tampa Electric Co., supra*, 365 U.S. 320 at 329, 333-34. Here, Plaintiffs have quantified the foreclosure resulting from Tyco's conduct. Tyco has argued a procompetitive efficiency: that price competition is driven by "ex ante" competition for placement on the GPO contract in the first instance. Though Tyco claims the existence of such competition is "uncontroverted,"[7] this claim is belied by this Court's prior finding that "there is a *fact dispute* as to whether there exists ex ante competition

[7] See Tyco Statement of Fact No. 30, as well as Plaintiffs' response to same.

for GPO contracts." Class Certification Opinion of August 29, 2008 (D.E. 169) (hereinafter "August Op.") at 23 (emphasis added). *See also* Elhauge Reply Report ¶¶ 44-46. This is more than sufficient to defeat summary judgment.[8]

The *Barry Wright* decision is not the First Circuit's only foray into the area of exclusive dealing and marketwide foreclosure. In *Stop & Shop Supermarket v. Blue Cross*, the First Circuit stated that the legality of exclusive dealing agreements that were obtained by giving discounts turned not on whether the discounted price was below cost, but rather on whether "the anti-competitive consequences of an exclusive contract outweigh the benefits." 373 F.3d 57, 65-66 (1st Cir. 2004). To establish anticompetitive harm, the Court stated that the "first step would be to show the extent of foreclosure" and that "foreclosure levels are unlikely to be of concern where they are less than 30 or 40 percent." *Id.* at 66, 68. Defendants have conceded this point. MSJ at 14. Ignoring Professor Elhauge's work in this case, Defendants then argue that Plaintiffs cannot demonstrate marketwide foreclosure sufficient to raise antitrust concerns. This argument flies in the face of Tyco's own brief, which acknowledges that the share-based commitment contracts *alone* foreclosed [redacted] of the market (MSJ at 15), putting the levels determined in this case directly within the ambit of the 30-40% suggested by *Stop & Shop*. Moreover, at least one federal court has held that "Stop & Shop does not find a bright line, but merely observes that foreclosure of less than 30-40% is *unlikely* to be of concern."[9] More egregious yet, Tyco ignores

[8] Furthermore, ex ante competition does not actually provide valid efficiency justifications for exclusionary agreements, the defendants never offered any evidence that ex ante efficiencies actually exist here, the theoretical ex ante efficiencies they cite would support volume-based contracts rather than exclusive and share-based contracts, their efficiency claim conflicts with the actual pattern of contract terms and profit margins, and the alleged efficiencies could have been equally (indeed more effectively) advanced through less restrictive alternatives like volume-based contracts. See Elhauge Reply Report ¶¶ 41-43, 138-143.

[9] *Applied Medical Resources v. Ethicon, Inc.*, 2006 U.S. Dist. LEXIS 12845 at *11, n.5 (C.D. Cal. Feb 2, 2006)(emphasis added). Many courts outside the First Circuit apply a 20% standard. *Twin City Sportservice v. Charles O. Finley & Co.*, 676 F.2d 1291, 1298 (9th Cir.), *cert denied* 459 U.S. 1009 (1982)(24% foreclosure unlawful); *Luria Bros & Co. v. FTC*, 389 F.2d 847 (3d Cir.), *cert denied* 393 U.S. 475 (1968) (foreclosures of 21%

that the relevant foreclosure percentages in this case are those analyzing the aggregated effects of *all* of Tyco's anticompetitive conduct. Professor Elhauge has analyzed these effects, and found [redacted] foreclosure of the sharps container market, more than any court has required for a finding of anticompetitive harm. See August Op. at 21, citing Elhauge Reply Report at Table 8. Tyco further ignores Professor Elhauge's testimony that these foreclosure percentages were conservative *lower-bound* estimates of the true foreclosure shares because his calculations were based on several conservative assumptions. See Elhauge Report at ¶¶ 24, 88, 139, 159, 162-63. Finally, Tyco ignores the fact that Professor Elhauge defined a relevant market in GPO brokerage services, which they do not deny in the instant motion, and that the sole-source GPO contracts foreclosed [redacted] of that market depending on the year. See Elhauge Report at ¶¶ 12, 23, 62-69, 138-140.

2. Tyco's remaining arguments on liability

Tyco cursorily argues that the exclusive dealing and resulting foreclosure that occurred in this case should be ignored in light of the "facts" that the contracts at issue are purportedly short-term and terminable (MSJ at 15), that alternate distribution channels to GPOs exist (MSJ at 16), and that competition is flourishing (MSJ at 17).

The hospital commitment contracts were not terminable at all. See Elhauge Report ¶ 147, Elhauge Reply Report ¶ 74, Elhauge Daubert Decl. ¶¶ 8, 11. Nor were the GPO sole-source contracts terminable at will, as Tyco contends, but rather could be terminated only upon payment of a significant penalty. Elhauge Report at ¶ 141, Elhauge Daubert Declaration at ¶ 12. Based upon these penalties, this Court has previously noted that terminability is a disputed issue of fact, making summary judgment inappropriate: "there is a *fact dispute* as to whether … in practice

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and 34% unlawful); XI HOVENKAMP, ANTITRUST LAW ¶1821, at 167, 182 (2d ed. 2005) (20% foreclosure presumptively anticompetitive).

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 (emphasis added). Exclusionary contracts are not deemed terminable under antitrust law if exercising a termination right requires suffering a financial penalty. See *U.S. Healthcare v. Healthsource*, 986 F.2d 589, 596 (1st Cir. 1993); 11 Herbert Hovenkamp, Antitrust Law 88, 117 (1998). Further, many other cases reject a terminability test altogether.[10]

Tyco's arguments that alternate distribution channels to GPOs exist are equally unavailing. To begin with, this argument could only be relevant to the claim that a substantial share of the GPO brokerage services market was foreclosed. It would not be relevant to the claim that a substantial share of the sharps container market was foreclosed. Further, the cases Tyco misleadingly cites for its arguments are cases that analyzed the existence of alternate distribution channels because they were relevant to defining the foreclosed market.[11] For example, *Stop and Shop* held that in a foreclosure case the relevant market should be based on alternatives available to foreclosed *rivals* rather than to buyers. 373 F.3d at 67.[12] These cases support Plaintiffs here because Professor Elhauge has defined a relevant market of GPO brokerage services based on evidence that alternatives were not reasonably interchangeable and defined that market based on the alternatives available to Tyco's rivals (see Elhauge Report ¶¶ 12, 23, 62-69).

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[10] *FTC v. Brown Shoe*, 384 U.S. 316, 318-19 & n.2 (1966) (exclusionary agreement condemned even though buyers could "voluntarily withdraw at any time"); *Standard Oil v. United States*, 337 U.S. 293, 296 (1949) (invalidating exclusive dealing agreements that were terminable upon thirty days notice); *Standard Fashion v. Magrane-Houston Co.*, 258 U.S. 346, 352 (1922) (same on three months notice); *United States v. Dentsply, Inc.*, 399 F.3d 181, 193 (3d Cir. 2005); *LePage's*, 324 F.3d at 157 n.11.

[11] The parties' experts have stipulated that "sharps containers" are a relevant product market and the United States is the relevant geographic market. August Op. at 16, citing Elhauge and Ordover reports.

[12] Likewise, *Omega* (MSJ at 14) concluded that foreclosure of a particular group of distributors was not relevant because the plaintiff's own expert testified that direct sales without the benefit of those distributors were in the same market. 127 F.3d at 1163.

Tyco further ignores voluminous caselaw holding that, if the distribution channel that is foreclosed provides significant efficiency advantages over other channels, foreclosing that channel is anticompetitive. For example, the D.C. Circuit sustained a district court holding that Microsoft violated Sherman Act § 2 because "Microsoft's agreements, including the non-exclusive ones, severely restricted Netscape's access to those distribution channels leading most efficiently to the acquisition of browser usage share" even though a substantial marketwide foreclosure share was not calculated. *U.S. v. Microsoft Corp.*, 253 F.3d 34, 70-71 (D.C. Cir. 2001) (en banc) *cert. denied*, 534 U.S. 952 (2001); see also *LePage's*, *supra*, at 159-160 & n.14. Here, there is no doubt that GPOs are the most efficient means of distribution --- that fact is the entire *raison d'etre* of the GPO. By foreclosing such channels through agreements that barred GPOs from brokering other vendors' products, Tyco has impaired competition.

Tyco also presses the arguments that it did not have market power, and that competition is flourishing, because its market share has declined over time. If declining market share indicates no market power, no monopolist could *ever* act anticompetitively to slow down the ability of rivals to gain market share on the merits: under Tyco's theory, if a competitor gained any sales, the monopolist's market share would diminish, meaning it never held market power in the first instance, as demonstrated by its diminishing market share. Such a suggestion is absurd. It is also contrary to copious authority.[13]

In making these arguments, Tyco again ignores this Court's prior opinions: "With respect to the ability to exclude rivals and control prices, Elhauge cites compelling, direct evidence from

[13] *American Tobacco*, 328 U.S. at 795 (monopolization found despite decline in share from 90.7% to 68%); *Reazin v. Blue Cross*, 899 F.2d 951, 970 (10th Cir.) (upholding finding of monopoly power despite decline in market share), cert. denied 497 U.S. 1005 (1990). Tyco's arguments that prices and profit margins have fallen over time would fail to disprove market or monopoly power for similar reasons, and also falter because the actual evidence is to the contrary. See Elhauge Reply Report ¶¶ 34-36.

Tyco's own documents and deposition testimony." August Op. at 17. Of course, the Court ultimately held that Plaintiffs have "demonstrated hard proof of market power for the proposed Class Period." Id. at 18.[14]

3. Law of the case

The second sentence of Tyco's motion characterizes Plaintiffs' case as based on a "novel allegation." MSJ at 1. This Court has repeatedly held that Plaintiffs' theory is viable, demonstrable through standard antitrust methodology, supported by compelling direct evidence, and in no way "novel":

- "Courts have recognized Section 1 claims based upon similar conduct," January Op. at 24;
- "Courts have recognized Section 2 liability claims based upon exclusionary conduct similar to the allegations in this Complaint;" Id. at 23,
- "Unlike in *New Motor Vehicles*, the methodology for evaluating whether Plaintiff has established a prima facie exclusive dealing case is not "novel,'" August Op. at 11;
- "This [not novel] approach is the one Elhauge takes in his report. Tyco's expert Ordover grudgingly concedes that Elhauge takes this approach ," Id. at 12;
- "The theories that support the Plaintiffs' claim of antitrust injury are not 'novel.' One court reviewing nearly identical exclusive dealing arrangements imposed *by Tyco* concluded that the plaintiff, a competitor, had a viable antitrust theory ," Id. (emphasis added);
- "The Antitrust Law treatise also cites numerous cases for the proposition that 'antitrust policy should not differentiate between the manufacturer of widgets that explicitly imposes exclusive dealing on its dealers and *the manufacturer that gives such dealers a discount or rebate for dealing exclusively in the manufacturer's widgets,'"* Id. at 13 (emphasis in original);

[14] Tyco also claims that its market shares are too low to establish monopoly power. MSJ at 17. Here, Tyco's market share was [redacted]. Elhauge Report ¶ 68. Generally, any market share over 50% will provide prima facie proof of monopoly power. *Domed Stadium Hotel v. Holiday Inns*, 732 F.2d 480, 489 (5th Cir. 1984); *Associated Radio Serv. Co. v. Page Airways*, 624 F.2d 1342, 1352 & n.18 (5th Cir. 1980). Plaintiffs can also show monopoly power in other ways if share is below 50%. *Broadway Delivery v. UPS*, 651 F.2d 122, 126-130 (2d Cir. 1981)(Newman, J.); *Yoder Bros. v. Cal-Fla Plant Corp.*, 537 F.2d 1347, 1367 n.19 (5th Cir. 1976).

- "The antitrust literature, including recent academic articles authored and cited by both parties' experts, also supports the theory that the share requirements at issue in this case can cause anticompetitive injury ," Id;

- "[B]ased on a full record, the Court concludes after a searching enquiry that plaintiffs have posited a viable theory demonstrating class-wide impact based on standard antitrust methodology and direct evidence ," Id.at 34.

This Court has told Tyco in *eight* separate instances that this is not a pricing case, it is a case involving exclusive dealing and exclusionary agreements, one with a viable and well-established theory of harm, and one with compelling direct evidence in the form of documents and deposition testimony. Tyco's arguments regarding the nature of Plaintiff's theory of harm are contrary to the record in this case and should be rejected.

C. Plaintiffs Can and Have Proved Antitrust Damages

Tyco also claims that the "alleged damages in this case are completely speculative." MSJ at 2. This argument is also meritless. The liability and damages models employed by Plaintiffs' experts in this case are state of the art, far surpassing the level of rigor and sophistication found acceptable in similar antitrust cases, as shown below. The significant merits of Plaintiffs' position aside, Tyco is barred from grounding its motion on this argument. Tyco has already filed, fully briefed, and literally on the eve of the hearing *withdrawn* a *Daubert* challenge to Dr. Singer's expert testimony, pursuant to a mutual agreement filed with and adopted as its own ruling by this Court. Tyco has waived its pre-trial objections to the reliability of Dr. Singer's damages model, and is estopped from re-arguing them now.

1. Tyco has expressly waived any challenge to Plaintiffs' damages analysis until trial

In a joint submission, filed on January 7, 2009, the parties agreed to withdraw their *Daubert* motions against each other's damages experts, and Tyco explicitly stated that the

"parties have reached a compromise in which these two [*Daubert*] motions will be withdrawn and *the challenges they contain will be reserved for cross-examination at trial."* (D.E. 227)(emphasis added). This Court granted the joint request contained in the motion. *See* Electronic Orders dated August 11, 2009.

Tyco's summary judgment arguments regarding damages are unquestionably within the realm of a *Daubert* challenge. In its current brief, Tyco describes Dr. Singer's damage estimates as "speculative" no fewer than eight times. Whether expert testimony is speculative is a central inquiry under *Daubert*, as it goes directly to reliability. "The testimony of an expert … must be based on valid principles and methods that are reliably applied to the facts in issue and which will assist the trier of fact. Hence, expert testimony must be something more than 'speculative belief or unsupported speculation.'" *Haemonetics Corp. v. Baxter Healthcare*, 593 F.Supp.2d 303, 305 (D. Mass. 2009)(citing *Daubert*, 509 U.S. at 590, 592-593, and Fed.R.Evid. 702). Though Tyco has avoided using any variation on the word "reliable" in its current brief, a *Daubert* challenge to "speculative" estimates is no less a *Daubert* challenge than one to "unreliable" estimates. Regardless of Tyco's choice of terminology, the argument it now seeks to raise is one properly brought pursuant to *Daubert*. Tyco has withdrawn this challenge to Dr. Singer, instead reserving its rights to cross-examination at trial.

A review of Tyco's arguments contained in the withdrawn motions makes clear that Tyco was aware of the operation of Dr. Singer's methods, challenged the reliability of Dr. Singer's estimates, and now attempts to unilaterally withdraw from the parties' agreement and disregard this Court's order by re-raising these arguments prior to trial. For example, in its opening brief to exclude Dr. Singer's testimony, Tyco argued, "Dr. Singer used Prof. Elhauge's estimates of the alleged foreclosure of [Tyco]'s rivals resulting from the challenged conduct," in developing a

damage model that Tyco claims should be excluded because it is "unreliable and inappropriate for presentation to the jury."[15] Although Tyco withdrew this challenge, it now claims that "Plaintiffs' damages calculations and claims depend entirely on quantifying the alleged effect of the challenged contracts on Covidien's rivals," and that neither expert "calculated that essential input" -- rendering "Plaintiffs' damages claims fatally speculative and improper for submission to the jury." MSJ at 2.

Tyco's *Daubert* briefing further argues that "Dr. Singer relies heavily on Professor Elhauge's calculation of the degree to which the challenged conduct 'foreclosed' [Tyco]'s rivals from making sales. … 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."[16] Tyco repeated this argument in its next brief, claiming that "Dr. Singer did virtually nothing to confirm the accuracy of Prof. Elhauge's foreclosure calculations. … Ms. Guerin-Calvert … will testify as to the effect that Prof. Elhauge's many mistakes have on Dr. Singer's damages calculations and why those errors invalidate Dr. Singer's findings."[17] And again, Tyco argues in its current brief that "Dr. Singer's model rests on a vital input he uncritically accepted from Prof. Elhauge's calculations." MSJ at 20. However, as Tyco has previously acknowledged, and as is consistent with the court order to reserve such arguments for the jury, the parties "will be free to cross-examine [the opposing expert] on these points at trial, but none of these claims provides any basis to exclude [the] testimony under either Federal Rule

[15] Memorandum in Support of Motion to Exclude Expert Testimony of Dr. Hal Singer at 5, 10 ("Opening Singer Brief at __") (D.E. 179).

[16] Memorandum in Opposition to Motion to Exclude Expert Testimony of Margaret Guerin-Calvert at 1-2 ("Guerin-Calvert Opp at __") (D.E. 193).

[17] Sur-Reply Memorandum in Opposition to Motion to Exclude Expert Testimony of Margaret Guerin-Calvert at 3 ("Guerin-Calvert Sur-Reply at __") (D.E. 215).

of Evidence 403 or 702."[18] The nearly perfect parallels between Tyco's arguments then and now establish conclusively that these arguments have been waived until cross-examination at trial.

A close analogue exists in *De Puy Inc. v. Biomedical Engineering Trust*, 216 F.Supp.2d 358 (D.N.J. 2001), the defendant medical device manufacturer filed a post-trial motion seeking to re-raise a *Daubert* challenge to plaintiffs' expert testimony on damages. The court refused to consider the argument, finding that the defendant had waived such a challenge when it expressly withdrew its *Daubert* challenge as part of the pre-trial order, preferring instead to have the reliability issue decided at trial. Just so here, where Tyco has explicitly withdrawn its *Daubert* challenge in favor of having the issue considered by the jury during cross examination *at trial*, the issue has been waived until then.

2. Tyco is judicially estopped from raising this argument

For over one hundred years, the Supreme Court has recognized that "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) quoting *Davis v. Wakelee*, 156 U.S. 680, 689 (1895). As the Supreme Court explained, three factors generally inform a court's decision to invoke the doctrine of judicial estoppel: the party's former position must be clearly inconsistent with its present position, the party should have succeeded in having the court adopt the original position, and the party now seeking to assert an inconsistent position must be doing so to the prejudice of the opposing party. *New Hampshire*, 532 U.S. at 750-751.

[18] Guerin-Calvert Opp. at 2.

Here, Tyco has taken inconsistent positions: that its challenges to Dr. Singer are reserved for cross-examination at trial, and that its challenges to Dr. Singer are grounds for summary judgment. Tyco has succeeded in asserting its former position: this Court has ordered that the *Daubert* motions against each damage expert are withdrawn, giving Tyco the benefit of retaining their damages expert. Finally, Tyco now seeks to have it both ways, to the prejudice of Plaintiffs: the *Daubert* challenge to Tyco's expert is withdrawn, but Tyco seeks to re-assert the withdrawn *Daubert* challenge to Dr. Singer in the guise of a motion for summary judgment. On this basis, Tyco should be judicially estopped from raising this argument.

3. Dr. Singer's damage estimates far exceed the threshold for presentation to the jury

In any event, a review of Dr. Singer's testimony and the parties' *Daubert* disputes shows that Dr. Singer's methods have already been established as reliable and beyond anything approaching speculation. Unfortunately, Plaintiffs must again point out that, "after successive rounds of briefing, Tyco appears unable or unwilling to acknowledge the lower threshold required of expert testimony related to the amount of damages, particularly in the antitrust context."[19] In defending its own expert on damages, however, Tyco did accurately note that, "[a]s the First Circuit has made clear '[t]he mere fact that two experts disagree is not grounds for excluding one's testimony.'"[20] Thus, as noted by Plaintiffs, "Tyco can not rely on [Guerin-

[19] Id. at 2 (citing *Storage Tech. Corp. v. Custom Hardware Eng'g & Cnslt'g*, No. 02-12102-RWZ, 2006 WL 1766434 at *21 (D. Mass. June 28, 2006); *Cambridge Plating Co. v. Napco Inc*, 85 F.3d 752, 771 (1st Cir. 1996); and *Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768, 794-95 (6th Cir. 2002), *cert denied*, 537 U.S. 1148 (2003)).

[20] Guerin-Calvert Opp. at 19, citing *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); *Storage Tech.*, 2006 WL 1766434 at *21; *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)).

Calvert's] opinion as a basis for excluding Dr. Singer's testimony, as even a legitimate dispute between experts would be a matter for the jury to decide."[21]

In this context, Plaintiffs repeatedly demonstrated the reliability of Dr. Singer's testimony, as follows:

> Dr. Singer's implementation of the NEIO produces results that correspond closely to several facets of the sharps container market. Plaintiffs have already noted that Dr. Singer's industry elasticity results produce 'overwhelmingly statistically significant results that are consistent each time with respect to the key characteristics of demand in the sharps container market,' and that these results also confirm the 'limited product differentiation in the sharps container market.' The same holds true for Dr. Singer's estimates of industry concentration, price-cost margins, and the conduct parameter, all of which show results consistent both with a monopolized market, and with Tyco's own assessment of its monopoly premium. Accordingly, Dr. Singer's implementation of the NEIO model fits remarkably well to the facts of the sharps container industry, far exceeding the threshold reliability requirement under *Daubert* and its progeny. Any legitimate dispute remaining can be addressed by Tyco with cross-examination at trial.[22]

And in particular with regard to the model inputs:

> Dr. Singer also illustrates the robust nature of his implementation of the NEIO model (*i.e.*, its lack of potential error) by performing multiple sensitivity analyses showing the effect of relaxing various of his assumptions. These analyses establish definitively that Dr. Singer has been conservative at every turn. It should therefore be beyond dispute that Dr. Singer has reliably implemented this peer-reviewed and widely accepted model in a manner consistent with its accepted implementation in these other industries.[23]

In the First Circuit, the standard is clear: so long as there is "a rational basis in the evidence," damages need not be proved "with mathematical certainty." *Wallace Motor Sales v.*

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[21] Plaintiffs' Sur-Reply in Opposition to Motion to Exclude Expert Testimony of Dr. Hal Singer (D.E. 214)("Singer Sur-Reply") at 10, citing *United States v. Barnette*, 211 F.3d 803, 816 (4th Cir. 2000); and *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651 (7th Cir. 2002).

[22] Singer Sur-Reply at 15-16 (citing Ps Opposition Brief at 12-13 (citing Singer Report at 24-30 and Singer Reply at 20, n. 73); *See In re Pharm. Indus. Average Wholesale Price Litig.*, 491 F.Supp.2d 20, 85 (D. Mass. 2007) ("The party offering the expert testimony need not prove the testimony is correct, but rather that it rests upon good grounds, based on what is known." (internal citations omitted). *See also, Small v. GMC*, No. 05-131, 2006 WL 3332989 at *12 (D. Me. Nov. 15, 2006) ("In any event, to the extent the defendants believe the [expert] opinion rests on shaky factual underpinnings, cross-examination, rather than outright exclusion, is the appropriate remedy.").)

[23] Singer Sur-Reply at 5, citing Singer Report (attached as Ex. 6 to Chan Decl.) at Appendix 2.

American Motors Sales, 780 F.2d 1049, 1062 (1st Cir. 1985).[24] The First Circuit went on to provide a list of three factors that are nowhere to be found in Tyco's brief:

> [W]hether the plaintiff explained the assumptions on which the … projections were based; whether the defendant had an opportunity to expose inconsistencies, inadequacies or inaccuracies in the plaintiff's testimony either by cross-examination or summation; and whether the defendant could have presented evidence of its own to indicate what the outer limits of the plaintiff's damages might have been. *Id.* (internal citations omitted).

Tyco's chief complaint is that neither Professor Elhauge nor Dr. Singer has calculated the "amount of foreclosure," and that this makes Dr. Singer's damage estimates entirely speculative. First, Professor Elhauge did precisely calculate the "foreclosure share," or portion of the market foreclosed to rivals in each year of the class period, in support of his opinion regarding anticompetitive impact, and has repeatedly explained how his calculations conservatively underestimated the impact of Tyco's anticompetitive conduct.[25] The technical accuracy of Professor Elhauge's work is no longer in dispute.[26] Moreover, Dr. Singer testified that he did "perform an audit" of Professor Elhauge's work in the testimony cited by Defendants. Defendants selectively quote from Dr. Singer's deposition, and studiously ignore the following testimony:

> 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 Dep. at 49:2-10 (attached as Ex. 8 to Chan Decl.).

Second, Dr. Singer did, in fact, independently and precisely translate the "foreclosure share" into the but-for market share using a system of equations fully expounded in Plaintiffs'

[24] *See also Jay Edwards, Inc. v. New England Toyota Distributor, Inc.*, 708 F.2d 814, 821 (1st Cir. 1983)("where defendant's wrongdoing created the risk of uncertainty, the defendant cannot complain about imprecision").

[25] See, Plaintiffs' Rule 56.1 responsive Statement of Fact No. 55.

[26] See, Draft Report of Independent Expert Dr. Orley Ashenfelter at 25 (attached as Ex. 7 to Chan Decl.).

Rule 56.1 responsive Statement of Fact No. 54. Although Dr. Singer relied on Professor Elhauge's work,[27] which he independently audited, 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 ¶ 58 & Table 11. Thus, Dr. Singer did in fact independently estimate but-for rival market share.

Finally, Dr. Singer's report itself notes his evaluation and approval of Professor Elhauge's foreclosure share calculations:

> These damage estimates are conservative for at least four reasons. First, spillover between the non-foreclosed and the foreclosed portions of the market is assumed to be zero. Thus, any increase in rivals' market share in the but-for world is restricted to the foreclosed segment. …. Finally, I assume that there is no interaction between the two types of foreclosure. In other words, I assume that foreclosure through share-based commitments does not reinforce, and is not reinforced by, foreclosure in the GPO brokerage market." Singer Report at ¶ 73.[28]

In short, Dr. Singer (a) performed an independent audit to satisfy himself that the foreclosure shares were calculated accurately, (b) personally calculated the but-for market shares purportedly at issue, and (c) gave verbal and written sworn testimony that the damage estimates are conservative due to certain assumptions Professor Elhauge used in his analysis. The First

[27] "…it is in the nature of expert opinion testimony to rely on the relevant expert opinions of others." *Brennan v. Casco Bay Island Transit Dist.*, No. 07-138-P-H, 2009 WL 1307875 at *9 (D.Me. May 11, 2009). Further "[t]his cannot be a reason to exclude the expert testimony …." *Id.* Such reliance is well-known and approved in this Circuit. *Ferrara & DiMercurio v. St. Paul Mercury Ins. Co.*, 240 F.3d 1, 9 (1st Cir. 2001).

[28] The second and third reasons the damages estimates are conservative are explained in Dr. Singer's report, but they are not related to his analysis and evaluation of Professor Elhauge's calculations, and are thus not described here. Nor is Dr. Singer's analysis at all in conflict with Professor Elhauge's analysis of selection bias because Professor Elhauge testified that (1) the evidence on buyer preferences for GPOs and sharps containers indicated selection effects were likely insignificant, (2) the Novation/Healthtrust studies established a lower bound on impact that was similar in magnitude to his comparison gap calculations, and (3) other factors suggested the comparison gaps underestimated effects. See Elhauge Report at ¶¶ 187, 198, Elhauge Daubert Decl. at ¶¶ 34, 82; Plaintiff's Comments on Draft Ashenfelter Report at 5-11 (attached as Ex. 44 to Chan Decl.); Daubert Day 1 Transcript 50, 57-60, 70-73(attached as Ex. 45 to Chan Decl.); Daubert Day 2 Transcript 9, 17-18 (attached as Ex. 46 to Chan Decl.); Elhauge Daubert Testimony Slides 9-11, 14 (attached as Ex. 47 to Chan Decl.). This testimony all supports a conclusion that those comparison gaps were a reasonable approximation of the amount of any impact, especially given the lower standards of proof applicable to damages. Thus, far from playing a game of "hot potato ," the opinions of Professor Elhauge and Dr. Singer provide both "belt and suspenders" support for the damages calculations.

Circuit has routinely upheld damage awards based on far less rigorous expert analysis than what Plaintiffs have proferred here.[29]

IV. CONCLUSION

For the reasons set forth above, Tyco's motion for summary judgment should be denied in its entirety.

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Respectfully submitted,

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[29] See, *Thermo Electron v. Schiavone Const.*, 958 F.2d 1158 (1st Cir. 1992)(upholding a $1.85 million verdict against the defendant given "paucity of evidence in the record [and] legal rules that permit calculations based on rough and ready comparisons"); *Computer Systems Engineering, v. Quantel*, 740 F.2d 59 (1st Cir. 1984)(upholding an award in excess of $1.2 million for lost profits, despite absence of plaintiff's prior earnings history); *Marcoux v. Shell Oil Products*, 524 F.3d 33 (1st Cir. 2006).

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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.

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