UNITED STATES DISTRICT COURT
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 (U.S.), INC.; TYCO HEALTHCARE GROUP, L.P.; and THE KENDALL HEALTHCARE PRODUCTS COMPANY, Defendants.	)	Civil Action No. 05-12024 (PBS) Leave to file granted on: February 16, 2010

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR ENTRY OF AN ORDER GRANTING FINAL APPROVAL OF SETTLEMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Federal Cases

Other Authorities

I. INTRODUCTION

Natchitoches Parish Hospital Service District ("NPH"), JM Smith Corporation d/b/a Smith Drug Company ("Smith Drug"), and the Class[1] (together "Plaintiffs" or "the Class") respectfully submit this Memorandum of Law in Support of Plaintiffs' Motion for Entry of an Order Granting Final Approval of Settlement.

After over four years of protracted hard-fought litigation, including thirteen days of trial by jury, Plaintiffs and Defendants Tyco International, Ltd., Tyco International (U.S.), Inc., Covidien, Inc. (formerly known as Tyco HealthCare Group, L.P.), and the Kendall Healthcare Products Company ("Tyco") have entered into a proposed settlement (the "Settlement") providing for the payment of $32.5 million in cash, plus interest (the "Settlement Fund"), to the Class. This Settlement provides an excellent result for the Class. As shown herein, and supported by the Affidavit of Class Counsel Andrew W. Kelly (the "Kelly Aff.") filed contemporaneously herewith, the proposed Settlement[2] is in all respects fair, reasonable, and adequate, and should be granted final approval.

The Settlement was entered after engaging in a contentious arm's-length negotiation process spanning many months involving experienced and highly-skilled antitrust counsel. The parties were also assisted in this process by Prof. Eric Green, one of the most respected mediators in the country. Despite his capable assistance, it was not until two days before closing arguments were scheduled that the two sides reached a satisfactory resolution.

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[1] The Class includes all persons or entities in the United States who purchased sharps containers directly from Covidien or any of its predecessor entities, including but not limited to Tyco Healthcare and the Kendall Healthcare Products Company. Excluded from the Class are Defendants and their officers, directors, management, employees, subsidiaries, or affiliates, and the following entities that opted out of the Class: Har-Kel, Inc., VWR Inc., and Saint Vincent's Health Center. *See* Order Preliminarily Approving Direct Purchaser Class' Proposed Settlement, Authorizing Notice to the Class and Setting Final Settlement Schedule, D.E. 396.

[2] The Settlement Agreement is attached to the Kelly Aff. as Exhibit A.

Confirming the fairness and reasonableness of this Settlement is the favorable reaction of this sophisticated class, which includes multi-billion dollar members of the Fortune 500 and some of the largest hospital networks in the country. These sophisticated entities have now been twice informed of their rights during the course of this litigation. In the first instance upon class certification, only three entities out of 6,315 opted out of the class. After receiving the Court-approved Notice of Proposed Settlement of Class Action, Plaintiffs' Counsel's Request for an Award of Attorneys' Fees and Reimbursement of Expenses and Hearing Regarding Settlement ("Notice of Proposed Settlement," D.E. 395-2, mailed January 29, 2010) describing the precise terms of the Settlement, none of the current class members has objected to the Settlement through the date of this filing, February 23, 2010. The deadline for objecting is March 1, 2010.[3] NPH and Smith Drug have also tendered affidavits explicitly supporting approval of the Settlement.[4] This motion for final approval is supported by Tyco.

II. SUMMARY OF THE CASE

This antitrust class action litigation was brought by direct purchasers of sharps containers from Tyco. Among other things, Plaintiffs claimed that Tyco violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, by allegedly entering into: (a) exclusionary agreements with purchasers of sharps containers, which required customers to purchase sharps containers almost exclusively from Tyco, as well as (b) exclusive dealing arrangements with Group Purchasing Organizations ("GPOs") under which GPOs agreed not to broker sharps container sales by Tyco's competitors. Plaintiffs allege that these antitrust violations substantially foreclosed

[3] Should an objection be filed between the date of this filing and March 1, 2010, Class Counsel will immediately inform the Court.

[4] The NPH and Smith Drug affidavits are attached to the Kelly Aff. as Exhibits B and C.

competition in the nationwide market for sharps containers, thereby forcing members of the Class to pay artificially inflated prices (*i.e.*, overcharge damages) for sharps containers.

Tyco denies Plaintiffs' allegations and maintains, among other things, that: (1) its market-share discounts are lawful and did not cause substantial market foreclosure; (2) its bundled programs are not unreasonable restraints of trade or competition; (3) it does not have monopoly power or market power in the sharps containers market; (4) its conduct did not cause antitrust injury; and (5) to the extent Tyco charged higher prices while maintaining more than a 50% market share from 2001-2007, it was because Tyco sold a superior product and service as compared to its competitors.

Through the proposed Settlement, this action is being resolved as to all Defendants, together with their present and former parents, predecessors, subsidiaries, divisions, affiliates, stockholders, officers, directors, employees, agents and any of their legal representatives. Prior to agreeing (subject to the Court's approval) to settle its claims against Defendants, Plaintiffs, on behalf of the Class:

- Engaged in substantial fact discovery, which included, *inter alia*, the inspection of over 4 million pages of documents;

- Took 18 depositions of Defendants' current and former employees, in locations ranging from Boston to San Diego and points between;

- Served 12 third-party document subpoenas, with accompanying negotiations for production of documents and sales data;

- Took 12 third-party depositions, including depositions of the largest national GPOs (Novation, Premier, Consorta, HealthTrust, Amerinet, Broadlane, and MedAssets) and several of Tyco's competitors (Becton Dickinson, Daniels, and Stericycle/Biosystems);

- Engaged in substantial work with experts, which included, *inter alia*, consultation with economic experts for liability and damages purposes (*i.e.*, Prof. Einer Elhauge and Dr. Hal Singer), and deposed Tyco's economic experts (Dr. Janusz Ordover and Ms. Margaret Guerin-Calvert). Plaintiffs also deposed Tyco's

industry expert, Mr. Thomas Hughes, and succeeded in partially excluding his expert opinions pursuant to a *Daubert* challenge;

- Fought off Defendants' *Daubert* challenges to Prof. Elhauge and Dr. Singer, which included Defendants' retention of Nobel-prize winning economist Dr. Daniel McFadden. Plaintiffs responded to Dr. McFadden's *Daubert* declarations, and also deposed Dr. McFadden;

- Successfully certified the Class, a process which took multiple expert reports, multiple rounds of briefing (14 briefs were submitted on issues relating to class certification), and resulted in close to 100 pages of written judicial opinions in an area of the law where the First Circuit was creating new standards contemporaneously with this Court's attempts to implement them, particularly with regard to proof of common impact;

- Prepared to try and actually tried the case to a jury for 13 days; and

- Engaged in a mediation process over a period of many months.

The Settlement provides for an immediate cash payment of $32.5 million to the Class in exchange for a release of all claims that the Plaintiffs have asserted or could have asserted in the Class Action relating to the purchase of sharps containers.[5] The amount of the Settlement, coupled with the diligence and effort through which the Settlement was achieved, weighs strongly in favor of its approval.

The amount of this Settlement is also quite substantial given the multiple risks of delayed, reduced or potentially zero recovery had the case proceeded to a jury verdict and subsequent appellate review. As noted above, Tyco offered multiple defenses to each of Plaintiffs' claims, was confident of putting its case to the jury, and had a pending motion for judgment as a matter of law before the Court (Tyco's "JMOL," D.E. 376). Tyco had also preserved several issues for appellate review, including those addressed in this Court's class certification, *Daubert*, summary judgment, and motions *in limine* rulings. Plaintiffs developed

[5] The release, as set forth in Paragraphs 10 and 12 of the Settlement Agreement (Kelly Aff. Ex. A), specifically excludes all claims arising in the ordinary course of business between Class members and the "Released Parties" concerning product liability, breach of contract (except breach of contract based in whole or in part of any conduct challenged by any plaintiff in this Class Action), breach of warranty or personal injury.

significant evidence and legal argument to rebut these defenses, but had Tyco ultimately been successful on any of these issues (whether before the jury, the trial court, or upon appellate review), the Class would have faced a high risk of obtaining little to no recovery only after significant additional delay.

Finally, the positive reaction of the Class to the Settlement also strongly favors granting final approval. As noted above, not a single objection has been lodged to the Settlement or any of its terms, nor have any objections been lodged regarding counsel for Plaintiffs' ("Class Counsel's") request for attorneys' fees, reimbursement of expenses and an incentive award for the two named plaintiffs ("Class Representatives").

For the foregoing reasons, and as detailed further below, Class Counsel respectfully request that the Settlement be approved as fair, reasonable, adequate, and in the best interests of the Class.

III. THE FORM AND MANNER FOR DISSEMINATION OF NOTICE

The Court preliminarily approved the proposed Settlement on January 19, 2010. Copies of the Notice of Proposed Settlement were disseminated *via* First-class U.S. mail to Class members identified from Defendants' transaction records.[6] Pursuant thereto, all entities identified as possible Class members were advised by certified mail of their rights under the Settlement, including the right to object to any terms of the Settlement, the award of attorneys' fees and costs, or to the proposed incentive award to the Class Representatives. Additionally, Class members were advised that they may appear at the March 10, 2010 fairness hearing. *See*

[6] Pursuant to this Court's electronic order dated May 7, 2009, Class members previously received a "Notice of Pendency of Class Action" (D.E. 259-2) advising them of the opportunity to request exclusion from the Class. Only three class members out of 6,315 opted out of the Class.

Affidavit of the Claims Administrator, Berdon Claims Administration LLC, by Michael Rosenbaum, attached to the Kelly Aff. as Exhibit D.

IV. LAW AND ARGUMENT

A. Settlements Of Antitrust Class Actions Are Encouraged

It is well-settled that courts favor and encourage settlements of lawsuits. *Williams v. First National Bank*, 216 U.S. 582, 595 (1910); *United States v. Cannons Engineering Corp.*, 899 F.2d 79, 84 (1st Cir. 1990); *Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982); *In re First Commodity Corp. of Boston Customer Accounts Litig.*, 119 F.R.D. 301, 313 (D. Mass. 1987) (citing *Weinberger*). Courts particularly encourage settlements in complex litigation because settlements promote the interest of judicial economy, and litigants should be encouraged to determine their respective rights among themselves. *In re General Motors Corp. Pick-Up Truck Fuel Tank Product Liab. Litig.*, 55 F.3d 768, 784 (3rd Cir. 1995) ("[t]he law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation"); *Cotton v. Hinton*, 559 F.2d 1326, 1330-1331 (5th Cir. 1977) (citing *United States v. Allegheny-Ludlum Indus. Inc.*, 517 F.2d 826 (5th Cir. 1975)); *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976). In evaluating settlements such as the one at issue here, courts have recognized that complex litigation is "notoriously difficult and unpredictable." *Granada Investments, Inc. v. DWG Corp.*, 962 F.2d 1203, 1205 (6th Cir. 1992) (quoting *Maher v. Zapata Corp.*, 714 F.2d 436, 455 (5th Cir. 1983)). "Absent evidence of fraud or collusion, such settlements are not to be trifled with." *Granada*, 962 F.2d at 1205.

Moreover, there is a strong public interest in private antitrust litigation generally. *See, e.g., Pillsbury Co. v. Conboy*, 459 U.S. 248, 262-63 (1983); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 331 (1979); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 266 (1972); *Minnesota Mining &*

Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318-19 (1965). This Settlement serves the public interest in that it provides a significant monetary award to the Class for the overcharges they have incurred. The instant Settlement may also help to curb similar anti-competitive behavior by others in the marketplace. *See Minnesota Mining*, 381 U.S. at 318 ("Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws"). This is particularly true in the healthcare industry, where the potential harm to society caused by efforts to prevent or delay entry of less expensive and/or innovative products is well-known, and which has been documented by the Senate Antitrust Subcommittee. *See, e.g.*, Testimony of Mr. Mark Leahey, Executive Director, Medical Devices Manufacturers Association, before the United States Senate, Judiciary Committee, Antitrust Subcommittee, March 15, 2006.[7]

B. The Proposed Settlement Should Be Approved As Fair, Reasonable, and Adequate

1. Standards for Court Approval of a Settlement

Federal Rule of Civil Procedure 23(e) provides, in part:

> If the proposal would bind class members, the court may approve it only after a hearing and on finding that it is fair, reasonable, and adequate.

Fed. R. Civ. P. 23(e)(2). As stated most recently by the First Circuit, "a district court can approve a class action settlement only if it is fair, adequate and reasonable, or (in shorthand) reasonable. If the parties negotiated at arm's-length and conducted sufficient discovery, the district court must presume the settlement is reasonable. The district court enjoys considerable range in approving or disapproving a class settlement, given the generality of the standard and the need to balance a settlement's benefits and costs." *In re Pharm. Industry Avg. Wholesale Price ("AWP") Litig.*, 588 F.3d 24, 32-33 (1st Cir. 2009) (citing *City P'ship Co. v. Atl. Acquisition Ltd. P'ship*,

[7] Available at http://judiciary.senate.gov/hearings/testimony.cfm?id=1808&wit_id=5164

100 F.3d 1041, 1043 (1st Cir. 1996) and *Nat'l Ass'n of Chain Drug Stores v. New England Carpenters Benefits Fund*, 582 F.3d 30, 44-45 (1st Cir. 2009)). In addition, the "fairness determination is not based on a single inflexible litmus test but, instead, reflects the court's studied review of a wide variety of factors bearing on the central question of whether the settlement is reasonable in light of the uncertainty of litigation." *New England Carpenters Benefits Fund v. First DataBank, Inc.*, 602 F.Supp.2d 277, 280 (D. Mass. 2009) (citing *Bussie v. Allmerica Fin. Corp.*, 50 F.Supp.2d 59, 72 (D.Mass. 1999)). Finally, there is a "principle of preference" in the First Circuit whereby the district court's discretion is subject to "the clear policy in favor of encouraging settlements." *Durrett v. Hous. Auth. of City of Providence*, 896 F.2d 600, 604 (1st Cir. 1990).

As demonstrated herein and in the supporting papers submitted herewith, the proposed Settlement is entitled to a presumption of fairness since it was reached after arduous litigation, including thirteen days of trial, and was negotiated at arm's-length over a period of months by counsel experienced in similar class action antitrust litigation and with the assistance of a very experienced mediator. *See, In re AWP Litig.*, 588 F.3d at 32-33.

2. Evaluation of the Settlement under Applicable Standards

In determining whether a settlement of a class action is fair, reasonable, and adequate under Fed. R. Civ. P. Rule 23(e), courts in the First Circuit have relied on more than one list of factors, though the lists are "fundamentally similar." *First DataBank, Inc.*, 602 F.Supp.2d at 281. The most exhaustive of these lists comes from the Second Circuit, and is sometimes referred to as the "*Grinnell*" factors. *Id.* (citing *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974)). Courts in this Circuit have recognized that a shorter (though still fundamentally similar)

list may be more appropriate given the facts and posture of a certain case. *Id.* at 280-281. For the sake of completeness, Plaintiffs herein address all factors articulated in *Grinnell*, which are:

(a) the complexity, expense, and likely duration of the litigation;

(b) the reaction of the class to the settlement;

(c) the stage of the proceedings and the amount of discovery completed;

(d) the risks of establishing liability;

(e) the risks of establishing damages;

(f) the risks of maintaining the class action through the trial;

(g) the ability of the defendants to withstand a greater judgment;

(h) the range of reasonableness of the settlement fund in light of the best possible recovery;

(i) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.

See, Id.

a. The complexity, expense, and likely duration of the litigation

This case has already proven itself to be highly complex, expensive and indeed lengthy since its filing on October 4, 2005. This case settled only after more than four years of vigorous litigation by Plaintiffs and Tyco. During this process the parties both responded and contributed to the changing legal landscape in the areas of class certification, *Daubert* challenges, and in the underlying substantive law and economics related to exclusive dealing claims. Plaintiffs and Tyco filed more than 40 briefs, participated in 10 hearings and conferences, and this Court wrote four major opinions totaling more than 120 pages before the case was ready for trial. As detailed in the Kelly Aff., Class Counsel have worked more than 47,000 hours and incurred expenses of

more than $4.1 million. *See generally*, Kelly Affidavit at 67-71. It was only after repeated mediation attempts and thirteen days of trial that the parties were able to agree on a settlement.

At the time of settlement, only two trial days remained, inclusive of the time reserved for closing arguments. The likely duration of the trial from that point forward to a jury verdict was therefore in the range of just several days. The parties and the Court had not yet settled on final jury instructions or a verdict form, and Plaintiffs had yet to file their opposition to Tyco's JMOL. But whatever the ultimate disposition of Tyco's JMOL (whether granted in its entirety, granted in part, or denied in its entirety), the parties and this Court recognized that an appeal to the First Circuit was very likely, especially in the event of a jury verdict in Plaintiffs' favor. *See* Transcript of Jury Trial, Day 11 (January 4, 2010) at 142 (The Court: "I think that whatever happens here is likely to go up on appeal, certainly if there's anything against Tyco"). Therefore, even assuming a favorable outcome both as to the JMOL and the jury verdict, Plaintiffs faced a lengthy appellate review process regarding nearly all of the contentious issues resolved by this Court, especially those related to class certification, *Daubert*, and the legal standards applicable to the challenged conduct.

Given the novelty and importance of some of the issues, particularly those related to exclusive dealing standards, it is likely that either or both parties would have eventually filed writs of certiorari to the United States Supreme Court. Thus, even though the case was nearing completion of the jury trial phase, the subsequent review prior to ultimate resolution likely would have taken several more years. In lieu of this extended appellate review process, the proposed Settlement provides an immediate recovery of $32.5 million for the Class.

b. The reaction of the class to the settlement

The overwhelmingly positive response of the Class to the proposed Settlement also strongly supports approval. So far, not a single Class member – out of over 6,000 – has filed an objection to any aspect of the Settlement. "Such acceptance of the Settlement on the part of the Class is convincing evidence of the proposed Settlement's fairness and adequacy." *In re Remeron Direct Purchaser Antitrust Litig.*, 2005 WL 3008808 at *6 (D.N.J., Nov. 9, 2005) (citing *Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 118-19 (3rd Cir. 1990) ("only" 29 objections in 281 member class "strongly favors settlement")); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 318 (3rd Cir. 1998), *cert. denied*, 525 U.S. 1114 (1999) (affirming conclusion that class reaction was favorable where 19,000 policyholders out of 8 million opted out and 300 objected).

Furthermore, where, as here, the Class is composed largely of sophisticated business entities with substantial stakes in the case who can be expected to oppose any settlement they find unreasonable, the absence of objections indicates the adequacy of the Settlement.[8] *See, In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 254 (D. Del. 2002), *aff'd*, 391 F.3d 516 (3rd Cir. 2004) ("the court finds the low number of objections from [third party payors] particularly significant, because these are sophisticated businesses with, in some case, large potential claims, and they could be expected to object to a settlement they perceived as unfair or inadequate"); *In re M.D.C. Holdings Sec. Litig.*, 1990 WL 454747, *10 (S.D. Cal., Aug. 30, 1990) (lack of objections "is significant since the class includes sophisticated financial institutions . . . who have counsel available to advise and represent them and submit objections to either the settlement or the fees and expenses"). The absence of objections, and affirmative support, from

[8] The Class here is largely comprised of wholesalers, hospitals, and hospital groups, all of which are sophisticated businesses and consumers of legal services.

this sophisticated Class is particularly significant because numerous Class members have also been members of classes in several other antitrust actions in the healthcare industry, and are therefore well-situated to evaluate a proposed settlement in an antitrust case. *See Remeron*, 2005 WL 3008808, * 6, citing *In re Relafen Antitrust Litig*., 231 F.R.D. 52 (D. Mass. 2004).

c. The stage of the proceedings and the amount of discovery completed

Given the stage at which the Settlement was finalized, this factor strongly supports final approval. As noted above and in the Kelly Aff., Plaintiffs reviewed millions of pages of documents produced by Tyco; deposed eighteen current and former Tyco employees, twelve third parties; and conducted substantial work with experts to analyze hundreds of contracts and millions of sales transactions at issue in this case. Also, this Court oversaw thirteen days of jury trial during which the most relevant of this evidence was presented to the Court and jury for consideration. Meanwhile, mediation that had formally begun several months prior to the *Daubert* decision (D.E. 289, Sept. 21, 2009) continued to occur in the background of trial. At the time of Settlement, only two trial days remained and Tyco had just filed its JMOL. As a result, Plaintiffs and Tyco were intimately familiar with the strengths and weaknesses of the case from both perspectives, and in a manner that included not only the entirety of discovery, but also how successfully each side had presented its case to the Court and the jury, as well as a deeper familiarity with potential issues for appellate review. *See Bonett v. Educ. Debt Serv., Inc*., 2003 WL 21658267, *6 (E.D. Pa., May 9, 2003) ("the parties certainly [had] a clear view of the strengths and weaknesses of their cases"), quoting *In re Warner Comm. Sec. Litig.*, 618 F.Supp. 735, 745 (S.D.N.Y. 1985). Class Counsel plainly had a strong basis to negotiate this Settlement. *See Warfarin*, 212 F.R.D. at 255 (finding this factor supported final approval of the settlement since class counsel "pursued this litigation for over three years," "engaged in substantial

discovery and coordinated these efforts with other plaintiffs' counsel," "voluminous documents were reviewed and numerous depositions taken and motions filed," and "an expert was engaged in at least one of the state actions, and experts were consulted by both consumers and [third party payors] in conjunction with settlement negotiations"); *In re Lucent Tech., Inc. Sec. Litig.*, 307 F.Supp.2d 633, 638 (D.N.J. 2004) (noting positively that class counsel had "hired experts to assist them in evaluating the merits of their claims and the risks of litigation").

d. The risks of establishing liability

As federal courts have long recognized, "antitrust cases, by their nature, are highly complex." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 122 (2d Cir. 2005). In particular, the "antitrust class action is arguably the most complex action to prosecute. The legal and factual issues involved are always numerous and uncertain in outcome." *In re Automotive Refinishing Paint Antitrust Litig.*, 617 F.Supp.2d 336, 341 (E.D. Pa. 2007) (citing *In re Linerboard Antitrust Litig.*, 296 F.Supp.2d 568 (E.D. Pa. 2003)); *In re Motorsports Merchandise Antitrust Litig.*, 112 F.Supp.2d 1329 (N.D.Ga. 2000); and *In re Shopping Carts Antitrust Litig.*, MDL No. 451, 1983 WL 1950 (S.D.N.Y. Nov. 18, 1983).

Through its oversight of this litigation over more than four years from inception through thirteen days of trial, this Court has become intimately familiar with Plaintiffs' claims and the evidence put forth by both Plaintiffs and Tyco. Plaintiffs were seeking to establish liability under both Sections 1 and 2 of the Sherman Act, for each of the two forms of challenged conduct (*i.e.*, commitment-based purchaser contracts and sole-source GPO contracts) in isolation and in concert with one another, for each year of the damage period from 2001 through 2007. Establishing liability under either Section 1 or 2 would have sufficed (*i.e.*, full recovery did not require establishing liability under both statutes), but a review of the standards for each shows

that Plaintiffs faced substantial risk in carrying their burden of proof. *See, e.g.*, Joint Proposed Jury Instructions, Exhibit G to Corrected Joint Pretrial Memorandum, D.E. 322-10.[9]

Not unexpectedly, Plaintiffs and Tyco did not agree on all the details of these standards, and this Court had proposed jury instructions to resolve such differences. At the time of Settlement, however, the scheduled charge conference to finalize the jury instructions had not yet occurred. Even so, the mere length of the Court's proposed jury instructions dealing with the specific elements of Plaintiffs' claims shows that Plaintiffs' faced a substantial risk in proving the elements of their claims. Fifteen pages of instructions were dedicated to Plaintiffs' claims under Section 1, thirteen pages to Plaintiffs' claims Section 2, and eighteen more pages applicable to causation and damages as applicable to both. Plaintiffs bore the burden of proof by a preponderance of the evidence as to each claim element. Failing to prove even one could prove fatal to a recovery of any size.

Plaintiffs remain confident in their legal characterizations of the contracts at issue, and also in the evidence put into the record during trial to support these claims. Further, even though Tyco filed its JMOL on January 6, 2010, more than two weeks after Plaintiffs rested their case, Plaintiffs were preparing to file an opposition to Tyco's filing. Nevertheless, had the case been put to the jury, Tyco's JMOL highlights both the difficulty of Plaintiffs' task as well as the evidence that Tyco adduced in its defense.

With respect to the share-based commitment contracts imposed on buyers, Tyco argued in its JMOL that Plaintiffs had "failed to establish that [Tyco's] single-product share discounts violated the antitrust laws." Tyco JMOL at 1. Tyco argued that these contracts were not actually exclusive dealing arrangements, but instead above-cost discounts with no affirmative commitments that were thus incapable of supporting antitrust liability. *Id.* at 1-2. Additionally,

[9] Disputed instructions are noted as "[DISPUTED]."

Tyco argued that evidence from trial testimony established that there were no "plus factors" such as to make these contracts eligible for consideration as anticompetitive exclusive dealing arrangements. *Id.* at 4-6. Tyco further argued that, even if the commitment contracts were properly considered exclusive dealing arrangements, Plaintiffs had not shown that they harmed competition. *Id.* Tyco believed that the evidence had shown just the opposite – that Tyco's rivals, and competition generally, was thriving throughout the class period. *Id.* at 7. Tyco also argued that these contracts had pro-competitive benefits outweighing any potential exclusionary effects. *Id.* at 9. Finally, Tyco argued that without the foreclosure levels associated with these contracts, Plaintiffs would be unable to establish an actionable level of market-wide foreclosure from GPO sole-source contracts alone. *Id.* at 10.

Regarding their GPO sole-source contracts, Tyco argued that Plaintiffs had "failed to show that [they] … violated the antitrust laws." *Id.* at 11. According to Tyco, Plaintiffs had "failed to show that that these contracts required *anyone* to purchase *any* sharps containers from [Tyco], much less all of a purchaser's requirements." *Id.* (emphasis in original). And as with the share-based commitment contracts, Tyco cited evidence from trial that – according to Tyco – proved that these contracts could not and did not impair competition at all, much less at the "substantial" level required to support antitrust liability. *Id.* at 12-16. Again, Tyco believed it had put forward evidence establishing that the pro-competitive benefits of these contracts outweighed any potential anti-competitive effects. *Id.* at 16.

Finally, with respect to Tyco's bundled discounts, Tyco again argued and cited to evidence it believed established that these contracts could not and did not produce anti-competitive effects, but had instead produced only pro-competitive benefits for purchasers of sharps containers. *Id.* at 20-24.

Although Class Counsel developed strong legal arguments and evidence to rebut these defenses, there was significant risk that this case could be lost any number of ways during trial and after, including: (a) the risk of the jury finding that none of Tyco's conduct was anticompetitive under the rule of reason; (b) the risk of the jury finding that Tyco did not have monopoly or market power; (c) the risk of the jury finding that none of Tyco's conduct constituted improper maintenance of monopoly power; (d) the risk of the jury finding that Tyco did not cause the Class to suffer antitrust injury; (e) the risk of the jury finding that Plaintiffs' damages estimates were too speculative, or that damages were nominal; (f) the risk that this Court would not allow some or all issues to go to the jury for deliberation and decision; and (g) the risk that, even if Plaintiffs obtained a favorable jury verdict on all of these elements of liability and damages, that the verdict would be overturned by post-trial motions or on appeal. This appellate risk included, but was not limited to, the risk that the Court of Appeals (or the United States Supreme Court) would be persuaded to overturn a jury verdict in Plaintiffs' favor by applying the recent decision in *Allied Orthopedic Appliances, Inc. v. Tyco Healthcare Group LP*, --- F.3d ---, 2010 WL 22693 (9th Cir., Jan. 6, 2010), instead of applying what Plaintiffs contend is the more closely analogous (and immediately prior) decision in *Masimo Corp. v. Tyco Healthcare Group LP*, 2009 WL 3451725 (9th Cir., Oct. 8, 2009).

In summarizing this *Grinnell* factor, Plaintiffs faced substantial risks in opposing Tyco's JMOL, obtaining a favorable jury verdict, and maintaining such a finding through appellate review. In light of the Settlements' immediate $32.5 million recovery for the Class, this factor weighs strongly in favor of final approval.

e. The risks of establishing damages

Establishing damages in an antitrust class action is a complex task, combining the particularities of the industry at issue with high level econometrics, all in the context of legal standards governing the predominance requirement under Fed. R. Civ. P. Rule 23(b)(3). *See, In re New Motor Vehicles Canadian Export Litig.("New Motor Vehicles")*, 522 F.3d 6 at 33-39 (1st Cir. 2008) (discussing the use of an econometric model to develop common proof of antitrust injury in the context of purchases of new motor vehicles imported across the Canadian border). Further, federal courts have long noted that in "antitrust cases … market uncertainties 'usually deny us the sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation.'" *Storage Tech. Corp. v. Custom Hardware Eng'g & Cnslt'g*, 2006 WL 1766434 at *21 (D. Mass. 2006) (citing *Cambridge Plating Co. v. Napco Inc*, 85 F.3d 752, 771 (1st Cir. 1996)).

Thus in this case, developing and employing a damages model that could be expressed as one equation, yet still account for all 6,312 direct purchasers in the Class over a six year damages period, *and* be conveyed convincingly to a jury, was a significant challenge faced by Plaintiffs. Plaintiffs' damages expert, Dr. Hal Singer, filed two declarations in the class certification context explaining (1) how the New Empirical Industrial Organization ("NEIO") model was well suited to the characteristics of the sharps container industry; (2) how the NEIO model could be applied uniformly across all direct purchasers over the entire class period; and (3) how the necessary data would be gathered and used to yield an estimate of the overcharge damages. *See* Expert Declaration of Dr. Hal Singer, D.E. 121, and Reply Declaration of Dr. Hal Singer, D.E. 87. Subsequently, Dr. Singer filed two expert reports carefully detailing his implementation of the NEIO model and responding to the criticisms of Tyco's damages expert, Margaret Guerin-

Calvert. *See* Expert Report of Dr. Hal Singer, D.E. 136, and Expert Reply Declaration of Dr. Hal Singer, D.E. 137. In all, Dr. Singer's four damages reports totaled 136 pages, and were filed over a period of approximately 14 months.

Tyco evidently did not believe that Plaintiffs had made even a threshold showing of a reliable damages estimate, filing a *Daubert* motion to exclude Dr. Singer's expert report and opinions in this matter. *See* Motion for Order to Exclude Testimony of Dr. Hal Singer (Tyco's "Motion to Exclude Dr. Singer," D.E. 179). Tyco argued that the NEIO model is too novel for use in antitrust litigation and that the model's assumptions made it unfit for use in the sharps container industry. Tyco's Motion to Exclude Dr. Singer at 1. In particular, Tyco argued that the NEIO model (1) could not account for the degree of product differentiation in the sharps container market, and (2) incorrectly assumed that high industry concentration (*i.e.*, high market shares) were associated with higher prices (*i.e.*, higher profit margins) in the sharps container market. *Id.* at 1, 6-10.

Plaintiffs responded forcefully in two briefs opposing Tyco's motion, and also filed a *Daubert* motion to exclude the expert report and opinions of Ms. Guerin-Calvert. D.E. 184, D.E. 185. In the lead up to a two-day hearing on the *Daubert* issues surrounding Prof. Elhauge's testimony, Plaintiffs and Tyco agreed to withdraw their *Daubert* motions as to the damages experts, but preserving such criticisms for cross examination at trial. *See*, Joint Motion to Withdraw Motion for Order to Exclude Testimony of Dr. Hal Singer and Motion to Exclude Testimony of Margaret Guerin-Calvert ("Joint Motion to Withdraw *Daubert* Challenges," D.E. 227).

Tyco, however, maintained its position regarding Dr. Singer's expert opinion, claiming in its summary judgment papers, its motion *in limine* No. 11, and again in its JMOL that Plaintiffs

had not offered a viable damages methodology, but rather only "speculation" and "guesswork." Tyco's JMOL at 29; *see also* Tyco's MSJ at 18-20; Memorandum of Law in Support of Tyco's Motions *in Limine* Nos. 1-11 (D.E. 318, "Tyco's MIL Memo") at 47. In addition to repeating the above criticisms, Tyco also claimed that Dr. Singer had inappropriately relied on an output from Prof. Elhauge's analysis to estimate the degree of anti-competitive impact. *Id.* This Court requested a separate brief from both parties addressing this last issue, due just five days before trial, and held a separate hearing in the afternoon after the eighth trial day in order to hear from both Dr. Singer and Ms. Guerin-Calvert. *See* Electronic Clerk's Notes dated Dec. 16, 2009. Ultimately this Court allowed Plaintiffs to proceed with Dr. Singer's original estimates and methodologies, and Tyco responded at trial by cross-examining Dr. Singer, as expected, on all of the above issues. Plaintiffs remain confident in Dr. Singer's testimony to the jury, but given the complexities of the analysis there was nevertheless a risk of not obtaining the support and endorsement of the jury or appellate courts.

f. The risks of maintaining the class action through the trial

As previously noted, class certification in the case required nearly two years of litigation, including 14 briefs, three hearings, and two major opinions totaling nearly 100 pages in an area of law where the First Circuit was creating new standards contemporaneously with this Court's attempt to implement them, particularly with regard to proof of common impact. *See, New Motor Vehicles*, 522 F.3d 24-30 (discussing the differing approaches among the various federal appellate circuits to analyzing injury and the predominance requirement under Fed. R. Civ. P. Rule 23(b)(3) en route to adopting a new standard for the First Circuit). Plaintiffs believe the Court correctly decided the issues, though Tyco disagreed and sought interlocutory review at the First Circuit pursuant to Fed. R. Civ. P. Rule 23(f). The First Circuit declined to grant Tyco's

petition for review, though Tyco's objections were preserved. Indeed, the First Circuit noted as much in its denial of Tyco's 23(f) petition:

> We express no view on the merits of the class certification order or the underlying merits of the antitrust claims. This order is without prejudice to any party's appellate rights going forward, including, but not limited to, end-of-case review.

Natchitoches Parish Hospital Service District, et al v. Tyco International, et al., No. 08-8058, (1st Cir., Order dated Dec. 5, 2008 (entered as D.E. 212)). In the event of a jury verdict in Plaintiffs' favor, and given the vigor of Tyco's arguments against class certification, Plaintiffs reasonably anticipated another round of intense briefing and argument at the appellate level related to the certification of the class in this case.

Plaintiffs disagree with Tyco's characterizations of the class certification arguments, but nevertheless Tyco's introduction to its 23(f) petition provides a good summary of what Plaintiffs would have faced and needed to overcome at the appellate level in order to maintain class through ultimate resolution of this case:

> Based upon nothing more than a naked presumption of antitrust injury and ignoring fundamental class conflicts, the district court certified a vast national class of thousands of buyers of [Tyco]'s medical sharps disposal containers. The Court failed to follow binding precedent from this Circuit on Rule 23 predominance, and its decision contradicts recent dispositive Eleventh Circuit law on adequacy. The Order also stands in direct conflict with a decision by the Central District of California that declined to certify a class under virtually identical factual and legal circumstances. This Court should now resolve these conflicts and settle several important issues of class action law in this Circuit.[10]

[10] Defendants-Petitioners Tyco's Petition for Review under Fed. R. Civ. P. 23(f) in the United States Court of Appeals for the First Circuit, No. 08-8058, dated Sept. 15, 2008 at 1.

Plaintiffs opposed and responded to the arguments made in Tyco's petition,[11] and certainly remain confident in the legal and factual underpinnings of this Court's class certification orders, but there nevertheless remained a risk of reversal upon appellate review.

g. The ability of the defendants to withstand a greater judgment

The Class does not contend that Defendants could not withstand a judgment larger than the Settlement. But, given that other *Grinnell* factors so strongly support approval of the Settlement, this factor does not play a material role here. *See, e.g., Remeron,* 2005 WL 3008808, *9 ("many settlements have been approved where a settling defendant has had the ability to pay greater amounts"); *Warfarin,* 391 F.3d at 538.

h. The range of reasonableness of the settlement fund in light of the best possible recovery

In analyzing this *Grinnell* factor, the District Court of Massachusetts has noted:

> A fine-tuned equation by which to determine the reasonableness of the size of a settlement fund does not exist. In any case, there is a range of reasonableness with respect to a settlement. Moreover, a high degree of precision cannot be expected in valuing a litigation, especially regarding the estimation of the probability of particular outcomes.

In re Relafen, 231 F.R.D. at 73 (citing *Newman v. Stein,* 464 F.2d 689, 693 (2d Cir. 1972) and *Reynolds v. Beneficial Nat'l Bank,* 288 F.3d 277, 285 (7th Cir. 2002)). In another instance, the District Court of Massachusetts also stated that "the evaluating court must ... guard against demanding too large a settlement based on its view of the merits of the litigation; after all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution." *In re Lupron Mktg and Sales Practices Litig.*, 228 F.R.D. 75 at 98 (D. Mass. 2005).

Thus, both the *Relafen* and the *Lupron* Courts' conclusion as to the proper analytical framework for this *Grinnell* factor was that the "present value of the damages plaintiffs would

[11] *See* Plaintiffs-Respondents' Answer in Opposition to Defendants-Petitioners Tyco's Petition for Review under Fed. R. Civ. P. 23(f) in the United States Court of Appeals for the First Circuit, No. 08-8058, dated Sept. 24, 2008.

likely recover if successful, appropriately discounted for the risk of not prevailing, should be compared with the amount of the proposed settlement." *In re Relafen*, 231 F.R.D. at 74; *In re Lupron*, 228 F.R.D. at 97 (both citing *In re General Motors Corp.*, 55 F.3d at 806). In making this analysis, the potential for treble damages need not be taken into account. *See, In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 210 (D.Me. 2003) ("courts generally do not consider either recovery of treble damages or recovery of attorneys fees in assessing the settlement"); *see also, Sylvester v. CIGNA Corp.*, 369 F.Supp.2d 34 at 51, n. 51 (D.Me. 2005) (declining to consider Plaintiffs' request for interest, punitive and treble damages in analyzing fairness and reasonableness of proposed settlement); *see also Grinnell*, 495 F.2d at 458-459; *Warfarin*, 212 F.R.D. at 257-258; *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 376 (D.D.C. 2002); *In re Ampicillin Antitrust Litig.*, 82 F.R.D. 652, 654 (D.D.C. 1979).

Through the expert work and testimony of Plaintiffs' damages expert Dr. Hal Singer, Plaintiffs' submitted a highly detailed damage analysis that estimated damages on a yearly basis from the beginning of the class period in October 2001 through November 2007. Dr. Singer also calculated damages separately for both forms of challenged conduct independently (sole-source and commitment/share-based contracts) and in concert with one another. Dr. Singer estimated those damages for the entire period associated with (a) the challenged sole-source contracts to be $109,254,079, and (2) the challenged commitment contracts to be $175,521,979. Had this Court denied Tyco's JMOL in its entirety, Dr. Singer's corresponding estimate provided for $184,655,078 in damages from the combined effect of both forms of challenged conduct for the entire period. The Settlement of $32.5 million thus represents approximately 17.6% of the best possible recovery.

Even when compared to this high end damages estimate, this 17.6% recovery is well within the range of acceptable settlement recoveries meriting final approval. *See, In re Linerboard Antitrust Litig.,* 2004 WL 1221350 (E.D. Pa., June 2, 2004) (collecting cases in which courts have approved settlements of 5.35% to 28% of estimated single damages in complex antitrust actions); *Stop & Shop Supermarket Co. v. SmithKline Beecham Corp.*, 2005 WL 1213926 (E.D. Pa. May 19, 2005) (recovery of 11.4% of estimated single damages "compares favorably with the settlements reached in other complex class action lawsuits."); *In re Remeron End-Payor Antitrust Litig.*, 2005 WL 2230314, *24 (D.N.J. Sept. 13, 2005) ("an antitrust class action settlement may be approved even if the settlement amounts to a small percentage of the single damages sought, if the settlement is reasonable relative to other factors"); *see also, In re Warfarin*, 391 F.3d at 538; *In re Remeron*, 2005 WL 3008808 at *9.

By comparison, settlements granted final approval in the securities context frequently range between 1.6% and 14% of the available damages. *See, In re Cendant Corp. Litig.*, 264 F.3d 201, 241-242, n. 22 (3rd Cir. 2001) (citing Denise Martin *et al.*, National Economic Research Association, Inc., *Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions* 10-11 (1996) (securities settlements range from 9%-14% of claimed damages); *In re Prudential Sec., Inc. L.P. Litig.*, MDL No. 1005, 1995 WL 798907 (S.D.N.Y. Nov. 20, 1995) (approving settlement of between 1.6% and 5% of claimed damages); *In re Crazy Eddie Sec. Litig.*, 824 F.Supp. 320 (E.D.N.Y. 1993) (settlement of between 6% and 10% of damages); *In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 57 (S.D.N.Y. 1993) (7.5%).

The $32.5 million cash payment called for in the Settlement Agreement is well within the range of acceptable settlements granted final approval.

i. The range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation

Tyco offered the expert testimony of Margaret Guerin-Calvert on the issue of damages, but did not provide a competing damage figure to Dr. Singer's estimates, preferring instead to maintain that Plaintiffs had not offered a reliable means of making such an estimate. Most basically, then, Tyco's position was that damages were zero. As this Court is aware, both Plaintiffs and Tyco moved under *Daubert* to strike the testimony and opinions of each other's damages expert, but these motions were mutually withdrawn, and the challenges they contained were reserved for cross-examination at trial. Joint Motion to Withdraw *Daubert* Challenges, D.E. 227. Yet Tyco persisted, both in its Motion for Summary Judgment, its motions *in limine*, and again in its JMOL, that Plaintiffs had not offered a reliable basis for estimating damages. *See* Tyco's MSJ at 18-20; Tyco's MIL Memo at 47; and Tyco's JMOL at 29-30. In response, this Court solicited additional briefing on damages and held a mid-trial hearing where both Dr. Singer and Ms. Guerin-Calvert took the stand under oath to explain their respective positions. *See* Transcript of Hearing held on December 16, 2009 (D.E. 368, "Damages Hearing"). At the conclusion of the hearing, this Court allowed Plaintiffs to proceed by presenting Dr. Singer's original damages estimates to the jury, but made clear that it found the "fixed-effects" approach identified by the independent expert Prof. Ashenfelter to be the most reliable:

> The problem I have is, I don't know what this jury is going to do. And I think that Professor Ashenfelter, who I have a lot of trust in, seemed to think that there was a debate about it; but at least he could say, one, the most reliable of the approaches was the fixed effects. That is the one which is at least almost irrefutable, irrefutable if you get to liability. So that's why I want to make sure they have choices.

Transcript of Damages Hearing at 67-68. Plaintiffs did not present the damages figures corresponding to "fixed effects" to the jury during Plaintiffs' case-in-chief, and it is unclear

whether the issue would have been addressed had Tyco chosen to put Ms. Guerin-Calvert on the stand prior to the close of trial. Nevertheless, the damage figure corresponding to the fixed effects approach was estimated by Plaintiffs to be approximately $89 million, and estimated by Tyco to be approximately $65 million.[12] Thus, the Settlement equates to 36.5% of the Ashenfelter derived damages figure as calculated by Plaintiffs, and 50% as calculated by Tyco.

In addition, these "choices" of damages ranging from $65 million to $184 million corresponded to the combined effect of both forms of conduct (*i.e.*, share-based commitment contracts and sole-source GPO contracts), and encompass damages across the whole damages period (*i.e.*, October 2001 through November 2007). Yet the Court had expressed some reservations about those damages corresponding only to commitment contracts, and had required Plaintiffs to oppose an as-yet-unfiled JMOL on that point.[13] Thus it was entirely conceivable that the jury would have either (i) not had the option to grant a verdict for damages associated with commitment contracts outside the context of sole-source GPOs, or (ii) returned a verdict in Tyco's favor as to these damages. Given that GPO sole-source only damages were $109,254,079, the Settlement equates to 29.7% of those single damages.[14]

Finally, this Court also indicated that certain testimony may lead the jury to believe that the anticompetitive effects had ceased by end of the 2005.[15] Furthermore, Tyco consistently maintained through trial that the reusable sharps container competitors most affected by Tyco's

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[12] Defendants' Motion to Strike Portions of Dr. Singer's December 2, 2009 Declaration that Concern His New, Unauthorized Damages Analysis, D.E. 344, at 5, n. 4.

[13] *See, e.g.*, Transcript of Jury Trial Day 11 at 8-13; 136-143.

[14] Incorporating the Ashenfelter fixed-effects approach to GPO sole-source only damages yields a damages estimate of approximately $52.8 million as calculated by Plaintiffs, and $38.6 million as calculated by Tyco. Under this scenario, the Settlement equates to 61.5% of single damages as calculated by Plaintiffs, and 84.2% as calculated by Tyco.

[15] *See, e.g.*, Transcript of Jury Trial Day 1 at 95:22-25 ("The Court: Is there [a] damage [figure] that [the jury] would say, yeah, there was a problem but only until the sole-source stopped being so dominant?") and 96:24-97:3 ("The Court: I'm not trying to win or lose, I'm simply saying it was a question I had as a potential fact finder. Is there a way [the jury is] going to come back and say, yes, there was a violation, but it ended in 2005, [so] how do we think in terms of damages.")

exclusionary conduct were not in a position to compete effectively against Tyco until 2003 at the earliest. One advantage of Dr. Singer's yearly damage estimates is that it would have provided the jury with a means to award damages corresponding to these different beginning and end points. Had the jury given credence to Tyco's arguments and found damages only in the period from 2003 through 2005, Dr. Singer's damages figures provided estimates of $96,801,981 for commitment contracts, $67,565,866 for sole-source contracts, and $103,285,955 for the combined effect. Under these scenarios the Settlement represents 33.6%, 48.1%, and 31.5%, respectively, of single damages.[16] All of these ranges are more than acceptable in the context of high risk antitrust class action cases such as this one.

* * * * * *

In light of (1) the complexity, expense and likely duration of this case absent the Settlement; (2) the overwhelming approval of the Settlement by the Class; (3) the fact that Settlement occurred after discovery and near completion of the jury trial; (4) the significant risks in establishing and maintaining liability and damages that would have been encountered absent the Settlement; and (5) the fact that the Settlement constitutes a recovery in the range of 17.6% to 136.2% of single overcharge damages (depending on the scenario), it is clear that this Settlement is well suited for final approval.

V. THE COURT SHOULD APPROVE THE PLAN OF ADMINISTRATION

By order dated January 26, 2010 (D.E. 396), the Court preliminarily approved the Notice of Proposed Settlement of Class Action, Plaintiffs' Counsel's Motion for Attorney Fees and

[16] Incorporating the Ashenfelter fixed-effects approach to these damages scenarios yields estimates of approximately $46.8 million for commitment contracts, $32.7 million for sole-source contracts, and $50 million for the combined effect, as calculated by Plaintiffs. Under these scenarios the Settlement equates to 69.4%, 99.4%, and 65.1% of single damages, as calculated by Plaintiffs. If Defendants' implementation of Ashenfelter's fixed-effects approach is used, damages under these scenarios are approximately $34.2 million for commitment contracts, $23.8 million for sole-source contracts, and $36.5 million for the combined effects. Under these scenarios, the Settlement equates to 95%, 136.2%, and 89.1% of single damages as calculated by Tyco.

Hearing Regarding Settlement (D.E. 395-2). This notice, at pages 14-20, contains the Direct Purchaser Proof of Claim and Release Form ("Claim Form"), which details the manner in which the Class proposes to allocate the Settlement Fund, net of Court-approved attorneys' fees, expenses, and incentive awards (the "Net Settlement Fund"), in proportion to the overcharge damages incurred by each Class member due to Defendants' alleged anticompetitive conduct. Such a method of allocating the Net Settlement Fund is inherently reasonable. *See Remeron,* 2005 WL 3008808, *11 (finding plan to allocate settlement funds in proportion to the overcharge incurred by each class member to be "inherently reasonable"); *Lucent Tech.*, 307 F.Supp.2d at 649 ("A plan of allocation that reimburses class members based on the type and extent of their injuries is generally reasonable"); *In re Corel Corp., Inc. Sec. Litig.*, 293 F.Supp.2d 484, 493 (E.D. Pa. 2003) (same).

The Claim Form provides a fair and reasonable method of determining each Class members' proportionate share of overcharge damages based on each Class member's purchases of Tyco's sharps containers during the time period at issue. Very similar plans have been approved and employed successfully in multiple direct purchaser class cases, including: *Remeron*, 2005 WL 3008808, *11; *In re Cardizem CD Antitrust Litig.*, Master File No. 99-MD-1278 (E.D. Mich.); *In re Buspirone Antitrust Litig.*, No. 01-cv-7951 (S.D.N.Y.); and *In re Relafen Antitrust Litig.*, Master File No. 01-12239 (D. Mass.). The use of similar plans in similar cases supports the approval of the proposed plan of allocation here. *See, e.g., Nichols v. SmithKline Beecham Corp.*, 2005 WL 950616, *18 (E.D. Pa., Apr. 22, 2005) (noting with approval similarity of allocation plan to plans used in similar cases). Significantly, the Claims Administrator here has substantial experience administering settlement funds created through

similar actions, using similar allocation plans, and involving many of the same class members, without serious problems or dispute.

In particular, the Claim Form (1) provides a introductory summary of the disposition of this class action and the purpose of the form; (2) provides general instructions on how to receive proceeds from the Net Settlement Fund; (3) provides specific instructions on how to properly complete and submit the Claim Form; (4) provides a description of the proportionate share of the Net Settlement Fund that the Class member will be entitled to receive; (5) advises of the use and availability of the Class member's qualifying purchases as calculated by Plaintiffs' economic experts; (6) describes the process for contesting the accuracy of such calculations; (7) describes alternative methods for establishing the Class member's qualifying purchases; and (8) explains the effect of the Release. *See generally*, Claim Form. The Claim Form also includes the deadlines for completing each of the tasks related to distributing each Class member's *pro rata* share of the Net Settlement Fund. *Id.*

Accordingly, Plaintiffs respectfully submit that the proposed plan of administration is fair and reasonable, and should be approved.

VI. CONCLUSION

For the reasons detailed above, and in other supporting documents including the Kelly Aff. and the exhibits thereto, the Class and Class Counsel respectfully request that the Court grant final approval to the Settlement pursuant to Fed. R. Civ. P. 23(e).

Dated: February 23, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document(s) 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 February 23, 2010.

/s/ John Alden Meade
John Alden Meade