

FILED

IN UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

2008 MAY 12 P 4:17

CLERK US DISTRICT COURT
ALEXANDRIA, VIRGINIA

FEDERAL TRADE COMMISSION,)
)
 and)
)
 COMMONWEALTH OF VIRGINIA)
 ex. rel. ROBERT F. MCDONNELL,)
 ATTORNEY GENERAL,)
)
 Plaintiffs,)
 v.)
)
 INOVA HEALTH SYSTEM FOUNDATION,)
)
 and)
)
 PRINCE WILLIAM HEALTH SYSTEM,)
)
 Defendants.)

Civil Action No. 1:08CV460-CMH/JFA
[Public Record Version]

COMPLAINT FOR PRELIMINARY INJUNCTION

Plaintiff, the Federal Trade Commission (“FTC” or “Commission”), by its designated attorneys, petitions the Court, pursuant to Section 13(b) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 53(b), and Plaintiff Commonwealth of Virginia (“Commonwealth”), at the relation of its Attorney General, Robert F. McDonnell, and pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26, petitions the Court for a preliminary injunction restraining and enjoining defendants Inova Health System Foundation (“Inova”), including their domestic and foreign agents, divisions, parents, subsidiaries, affiliates, partnerships, or joint ventures, from acquiring through a merger or otherwise any stock, assets, or other interest, either directly or indirectly, of or from defendant Prince William Health System (“PWHS”), or its domestic and foreign agents, divisions, subsidiaries, affiliates, partnerships, or joint ventures; thereby

maintaining the status quo during the pendency of an administrative proceeding before the Commission adjudicating defendant Inova's proposed merger with PWHHS that has been commenced by the Commission pursuant to Sections 7 and 11 of the Clayton Act, 15 U.S.C. §§ 18 and 21.

Unless prevented, the combination of these two financially sound, high-quality hospitals will reduce competition and result in significantly higher prices and reduced non-price competition for hospital services and amenities provided to health care consumers. These consumers include health insurance plans, employers, unions, and ultimately the citizens of Northern Virginia, many of whom will not be able to afford these higher prices and will be forced to reduce or even drop their health insurance coverage. Indeed, the defendants do not dispute that health care prices will increase as a result of the merger. It is also indisputable that higher healthcare costs will result in fewer residents of Northern Virginia receiving medical care, including hospital services, and, thus, those not able to purchase medical care likely will suffer adverse health effects. The Commission and Commonwealth further allege:

I.

JURISDICTION AND VENUE

1. Jurisdiction is based upon Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), and Section 16 of the Clayton Act, 15 U.S.C. § 26, and upon 28 U.S.C. §§ 1331, 1337 and 1345. Defendants reside and transact business within this district pursuant to 28 U.S.C. § 1391 (b) and (c). This is a civil action arising under Acts of Congress protecting trade and commerce against restraints and monopolies, and is brought by an agency of the United States and by a sovereign state authorized by an Act of Congress to bring this action. Venue is proper under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), under 28 U.S.C. § 1391(b) and (c), and under Section 12 of

the Clayton Act, 15 U.S.C. § 22.

2. Defendants are engaged in commerce or in activities affecting commerce, as “commerce” is defined in Section 1 of the Clayton Act, 15 U.S.C. § 12.

II.

THE PARTIES

3. The Commission is an administrative agency of the United States Government established, organized, and existing pursuant to the FTC Act, 15 U.S.C. § 41 *et seq.*, with its principal offices at 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. The Commission is vested with authority and responsibility for enforcing, *inter alia*, Section 7 of the Clayton Act.

4. The Commonwealth is a sovereign state of the United States. This action is brought by and through its Attorney General, who is the chief law enforcement officer of the Commonwealth, with the authority to bring this action on behalf of his State, its general economy and the citizens residing in the Commonwealth, pursuant to Section 9.15 of the Virginia Antitrust Act, Va. Code Ann. § 59.1-9.15, and Section 16 of the Clayton Act, 15 U.S.C. § 26. The Office of the Attorney General of Virginia has its principal offices at 900 East Main Street, Richmond, Virginia 23219.

5. Defendant Inova, a non-profit corporation, is the largest hospital system in Northern Virginia with its office and principal place of business located at 8110 Gatehouse Road, Falls Church, Virginia 22042. Inova operates five general acute care inpatient hospitals and provides other health services, including emergency and urgent care centers, home care, nursing homes, wellness classes, and mental health and blood donor services. Inova has grown primarily through acquiring its competitors, including Loudoun Hospital in 2005 and Alexandria Hospital in 1997. The Inova hospitals combined have 1,892 licensed beds in Northern Virginia.

For 2006, Inova had a total net operating revenue of \$1.8 billion and operating income of \$132 million. The five hospitals that Inova operates throughout Northern Virginia are listed below.

Inova Health System Hospitals

<u>Inova Hospital</u>	<u>Location</u>	<u>Licensed Beds</u>
Inova Fairfax Hospital	Falls Church, VA	884
Inova Alexandria Hospital	Alexandria, VA	334
Inova Fair Oaks Hospital	Fairfax, VA	182
Inova Loudoun Hospital	Leesburg, VA	255
Inova Mt. Vernon Hospital	Alexandria, VA	237

6. Defendant PWHs is a non-profit corporation with its headquarters and principal place of business at 8700 Sudley Road, Manassas, VA 20110. PWHs operates a single general acute care inpatient hospital with 180 licensed beds located in Manassas, Virginia, and provides other health services. In 2006, PWHs had a total net operating revenue of \$170.5 million and operating income of \$5.2 million. PWHs' primary service area includes western Prince William County, and the cities of Manassas and Manassas Park.

III.

SECTION 13(b) OF THE FTC ACT

7. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), provides in pertinent part:

(b) Whenever the Commission has reason to believe –

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon

has become final, would be in the interest of the public –

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond

IV.

SECTION 16 OF THE CLAYTON ACT

8. Section 16 of the Clayton Act, 15 U.S.C. § 26, provides in pertinent part:

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings. . . .

The Commonwealth of Virginia is a “person” within the meaning of Section 16 of the Clayton Act.

V.

THE PROPOSED ACQUISITION AND THE PLAINTIFFS' RESPONSE

9. Pursuant to an agreement dated August 1, 2006, Inova intends to acquire PWHS and integrate PWHS into the Inova system (“the Merger”).

10. On May 6, 2008, the Commission authorized the commencement of this action under Section 13(b) of the FTC Act to seek a preliminary injunction barring the Merger until resolution of the administrative proceeding that was commenced by the Commission on May 9, 2008, pursuant to Section 11(b) of the Clayton Act, 15 U.S.C. § 21(b). The legality of the Merger under Section 7 of the Clayton Act, and the appropriate remedy, in the event liability is

found, will be determined by the Commission through an administrative proceeding and will be subject to judicial review. On May 9, 2008, the Attorney General of Virginia authorized the Commonwealth to join this action for preliminary injunction, pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26. Section 9.15 of the Virginia Antitrust Act, Va. Code Ann. § 59.1-9.15, also authorizes the Commonwealth to join this action.

11. Defendants have advised the Commission and the Commonwealth that, in the absence of a court order to the contrary, they will consummate the Merger after 11:59 pm on August 4, 2008.

12. In authorizing the commencement of this action, the Commission and the Commonwealth determined that a preliminary injunction is in the public interest and that they have reason to believe that the Merger would violate Section 7 of the Clayton Act because the Merger may substantially lessen competition in the relevant markets alleged in this Complaint.

VI.

COMPETITION BETWEEN INOVA AND PWHS BENEFITS CONSUMERS

13. Like many general acute care inpatient hospitals, the Inova hospitals and PWHS sell acute care inpatient hospital services to a variety of commercial health plans. These health insurance plans reduce health care costs by encouraging hospitals to compete vigorously on price and non-price terms. They do so by contracting with hospitals in an area and providing financial incentives to encourage their enrollees to use the hospitals with which they contract.

14. Hospitals compete for inclusion in health insurers' plan networks by offering preferential prices for the services that they provide to the plan's enrollees. Hospitals that do not offer competitive pricing risk exclusion from a health plan's network, especially if there are substitutes for the excluded hospital.

15. Competition among hospitals for inclusion in those networks has lowered, and will continue to lower or constrain, the cost of health care services, ultimately lowering the costs to consumers and taxpayers, while continuing to make high-quality health care available.

16. Hospitals also compete for patients on the basis of quality, customer service, location, price, and cost-effectiveness.

17. The primary health insurers in Northern Virginia are: Aetna, Inc.; Anthem Plans of Virginia; CIGNA; CareFirst, Inc.; Kaiser Foundation Health Plan; and United Healthcare.

18. These health insurers compete by developing and selling health plans on the basis of the breadth and quality of their networks, as well as on the premiums they offer and their benefits structure. Employers or group purchasers and their individual and family members purchase access to a health plan network that will provide them with a menu of physician and hospital options if diagnosis or treatment is required. Health insurers, therefore, generally try to offer a network health plan with a broad range of attractive and convenient physician and hospital services.

19. Competition between Inova and PWHS currently constrains the rates that the merging parties, particularly PWHS, are able to negotiate with health plans. When hospitals compete for patients, health plans can threaten explicitly or implicitly during negotiations to exclude a hospital and substitute a competing hospital in its place. This threat of substitutability increases health plans' bargaining leverage during negotiations with hospitals. Health plans in Northern Virginia currently have the option of contracting with Inova and not contracting with PWHS. This threat forces PWHS to offer competitive rates, which helps keep health care costs affordable to employers in the area.

20. The two Inova hospitals closest to PWHS (Inova Fair Oaks and Fairfax Hospitals)

and PWHS spur each other to improve quality, services and amenities at each other's facilities. [**Redacted**] at PWHS and Inova Fair Oaks provide a striking example of this non-price competition. When PWHS opened [**Redacted**] from Inova Fair Oaks, Inova Fair Oaks [**Redacted**]. Similarly, PWHS decided to [**Redacted**] Inova Fair Oaks and Fairfax.

21. Because of their quality, convenience, and location, Inova Fair Oaks and Fairfax are PWHS' closest competitors. In 2006, over 87 percent of all residents in PWHS' primary service area (the region comprising 75 percent of PWHS' discharges in the relevant product market) who were hospitalized were admitted to PWHS or an Inova hospital. Hospitals other than Inova Fair Oaks and Fairfax – specifically Fauquier and Potomac Hospitals – have only small shares in PWHS' primary service area. Health plans also view Inova as the next best substitute for PWHS in setting up their networks. As a result, PWHS views Inova Fair Oaks and Fairfax as its primary competitors.

22. As a large hospital system with five geographically dispersed hospitals, Inova has a broader view of competition. Nevertheless, Inova views PWHS [**Redacted**].

VII.

THE RELEVANT MARKET IS GENERAL, ACUTE CARE INPATIENT HOSPITAL SERVICES IN NORTHERN VIRGINIA

23. The relevant product market in which to analyze the Merger is general, acute care inpatient hospital services sold to private payors, including commercial health plans. General acute care inpatient hospital services are a broad cluster of basic medical and surgical diagnostic and treatment services that include an overnight stay in the hospital by the patient. General acute care inpatient hospital services exclude: (a) services at hospitals that serve solely children, military personnel and veterans; (b) services at outpatient facilities that provide same-day service

only; (c) sophisticated services known in the industry as “tertiary” services such as open heart surgery and transplants; and (d) psychiatric, substance abuse, and rehabilitation services.

24. Patients who require acute care inpatient hospital services must be admitted to a general acute care inpatient hospital by a physician with admitting privileges at that hospital.

25. The relevant geographic market in which to analyze the Merger is an area no larger than Northern Virginia or the Commonwealth of Virginia’s Health Planning Region II (“HPR II”) and Fauquier County, and broad enough to include both Inova and PWHS. HPR II is a geographic region designated by the Commonwealth of Virginia as a healthcare planning region for Certificate of Public Need purposes and as such represents Virginia’s view that the area is a distinct healthcare area for purposes of determining healthcare needs and licensing facilities. HPR II includes the counties of Arlington, Fairfax, Loudoun, and Prince William, as well as the independent cities of Alexandria, Fairfax, Falls Church, Manassas, and Manassas Park.

26. Hospitals and systems outside of the relevant geographic market do not compete with defendants for the provision of general, acute care inpatient services in the relevant geographic market. Few patients who live within the geographic market travel outside its borders to seek these general acute care inpatient services in, for example, Maryland or Washington, D.C. hospitals. In 2006, for the hospitals located in Northern Virginia, approximately 90 percent of their patients came from Northern Virginia. Of the patients who reside in Northern Virginia, approximately 90 percent go to hospitals in Northern Virginia.

27. The explanation for these patterns is simple. Patients prefer to be admitted to a high quality general acute care hospital close to where they live. Therefore, patients perceive only conveniently located hospitals that provide quality care to be acceptable for general, acute

care inpatient hospital services.

VIII.

CONCENTRATION

28. There are a limited number of suppliers of general, acute care inpatient hospital services in the relevant geographic market. In addition to the Inova hospitals and PWHS, there are only four other suppliers of general, acute care inpatient hospital services in the geographic market: Fauquier Hospital (86 licensed beds) in Warrenton, VA; Reston Hospital Center (187 beds) in Reston, VA; Virginia Hospital Center (334 beds) in Arlington, VA; and Potomac Hospital (153 beds) in Woodbridge, VA. Although treated herein as if it were an independent competitor, Potomac Hospital claims it is an “Affiliate of Inova Health System” based on an affiliation and loan agreement between Inova and Potomac Hospital and a right of first refusal for Inova to purchase Potomac.

29. As a result of the Merger, there would be only five firms left in the relevant market. As seen below, Inova would control over 73 percent of the licensed hospital beds in Northern Virginia.

<u>Hospitals in Northern Virginia</u>	<u>Licensed Beds</u>	<u>Share (%)</u>
1. Prince William Hospital (Manassas)	170	6.0
2. Inova Fair Oaks Hospital (Fairfax)	182	6.4
Inova Fairfax Hospital (Falls Church)	884	31.3
Inova Loudoun Hospital (Leesburg)	255	9.0
Inova Mount Vernon Hospital (Alexandria)	237	8.4
Inova Alexandria Hospital (Alexandria)	<u>334</u>	<u>11.8</u>
Inova Total:	1,892	67.0
3. Potomac Hospital (Woodbridge)	153	5.4
4. Fauquier Hospital (Warrenton)	86	3.0
5. Reston Hospital Center (HCA) (Reston)	187	6.6
6. Virginia Hospital Center (Arlington)	334	11.8

30. The U.S. Department of Justice and the Federal Trade Commission have issued *Horizontal Merger Guidelines* (“*Merger Guidelines*”) that provide the analytical framework used by the U.S. antitrust enforcement agencies in assessing the effects of proposed mergers. Under the *Merger Guidelines*, market concentration is measured with the Herfindahl-Hirschman Index (“HHI”). Markets in which the post-merger HHI is above 1800 are highly-concentrated, and mergers that produce an increase in the HHI (the “delta”) of more than 100 are presumed likely to create or enhance market power or facilitate its exercise and are presumed to be unlawful.

31. A little more than ten years ago, Inova owned three hospitals and faced eight independent competitors. It then started acquiring its competitors including Alexandria Hospital in 1997 and Loudoun Hospital Center in 2005. With the Merger, Inova would acquire yet another competitor and control 73 percent of the general, acute care inpatient hospital services in Northern Virginia, leaving just four independent competitors. The Merger would increase the HHI (measured by beds) in the market for general, acute care inpatient hospital services in Northern Virginia from 4754 to 5562, an increase of 808. Measured by privately-insured

discharges, the Merger would increase the HHI in the relevant product and geographic markets from 4810 to 5784, with an increase of 974. Measured by inpatient revenue from commercial payors, the Merger would increase the HHI in the relevant product and geographic markets from 5635 to 6174, with an increase of 539. Under all of these measures, the HHI in the relevant product and geographic market and its increase from the merger are well above the level at which the Merger is presumptively unlawful under the *Merger Guidelines*.

**Shares of Estimated Inpatient Revenue
From Commercial Payors in Northern Virginia, 2006**

	Inpatient Revenue	Pre-Merger		Post-Merger	
		Share of Revenue	HHI	Share of Revenue	HHI
Inova Health System	\$601,455,520	74.0%	5,481	77.7%	6,033
Prince William Hospital	\$29,584,030	3.6%	13		
Fauquier Hospital	\$22,023,952	2.7%	7	2.7%	7
Northern Virginia Community Hospital	\$1,534,024	0.2%	0	0.2%	0
Potomac Hospital	\$34,225,648	4.2%	18	4.2%	18
Reston Hospital Center	\$61,105,764	7.5%	57	7.5%	57
Virginia Hospital Center	\$62,478,488	7.7%	59	7.7%	59
Total	\$812,407,426	100.0%	5,635	100.0%	6,174
Delta HHI					539

Source: 2006 VHI Hospital Detail Report

IX.

THE MERGER WOULD ELIMINATE BOTH PRICE AND NON-PRICE COMPETITION

32. As described in Paragraphs 19 through 22 above, Inova and PWHS are currently close competitors for the provision of general, acute care inpatient services in the relevant geographic market. Because one of the key factors influencing bargaining leverage for a health plan is the availability of independent substitutes for the negotiating hospital, a merger of close

substitutes eliminates this competitive discipline. After the Merger, health plans will no longer have the threat of excluding PWHS because it will be part of the Inova system, which is currently PWHS' closest substitute. Without this competitive discipline, Inova, negotiating the rates of PWHS, will force health plans to pay higher prices for services from PWHS.

33. Without PWHS as an independent alternative hospital for health insurers' plans, Inova also will gain additional bargaining leverage in its negotiations with health insurers. This increased leverage for both PWHS and Inova will lead to higher prices and higher health care costs for employers, health plan enrollees, and consumers in the relevant geographic market

34. In addition, Inova currently [**Redacted**]. After Inova acquired Alexandria Hospital and Loudoun Hospital Center, [**Redacted**] Inova plans to do the same with PWHS, [**Redacted**].

35. Many health plans expect the Merger will result [**Redacted**] reflecting the loss in competition caused by the merger. Indeed, defendants do not dispute that PWHS' [**Redacted**] as a result of the Merger, and one health plan is in the process of [**Redacted**].

36. Higher hospital prices to health insurers' plans lead directly to higher health care costs to the plans' members. While higher prices will harm all consumers, the increases will have the most significant impact on small employers and their employees. Several small employers in Northern Virginia have stated that providing health insurance is a significant financial burden and fear that a price increase postmerger may prevent them from offering health insurance to their employees in the future. Other small employers who aspire to offer their employees health insurance believe that if health care costs increase, they will be precluded from that alternative. As a result, the employees will suffer the consequences from less healthcare insurance and foregoing the care they can no longer afford.

37. PWHS acknowledges that [**Redacted**] with Inova because it would mean that the two hospital groups [**Redacted**] as they have in the past. With the Merger, Inova would [**Redacted**].

X.

ENTRY IS DIFFICULT

38. It is unlikely that entry into the market would remedy, in a timely manner, the anticompetitive effects of the Merger. A new hospital, or expansion of an existing hospital, sufficient to defeat a price increase or other anticompetitive effect would likely take three years or longer. In addition to planning and construction lead times, such projects would require state regulatory approval which can take a significant amount of time. Competitors like Inova can and do oppose such approvals in administrative and judicial proceedings, substantially prolonging the approval process.

XI.

THE MERGER WILL NOT RESULT IN EFFICIENCIES

39. The Merger is not necessary to permit the parties to achieve substantial efficiencies. Currently, the quality of PWHS' services is comparable to, and at times superior to, the quality of Inova's services, as measured by numerous objective quality criteria. Accordingly, Inova is unlikely to improve PWHS' quality of service or to help generate other efficiencies sufficient to offset the Merger's anticompetitive effects.

40. PWHS is a financially sound institution with the capacity to fund capital investments and quality improvements on its own or with another merger partner. Indeed, PWHS is currently successfully engaged in capital investment and quality improvement projects.

XII.

LIKELIHOOD OF SUCCESS ON THE MERITS AND NEED FOR RELIEF

41. The Merger between Inova and PWHS is an acquisition of “all or any part of the assets” of PWHS, within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18.

42. The Commission and the Commonwealth are likely ultimately to succeed in demonstrating, in administrative proceedings to adjudicate the legality of the proposed Merger, that the proposed Merger would violate Section 7 of the Clayton Act. Based on the nature of competition and high market concentration (and high entry barriers), there is a presumption of anticompetitive effects; but here, it is undisputed that prices for hospital services will increase.

43. The Commission and the Commonwealth are ultimately likely to succeed in demonstrating, *inter alia*, that:

- a. The relevant product market in which the competitive effects of the proposed merger may be assessed is general acute care inpatient services;
- b. The relevant geographic market to assess the competitive effects of the proposed merger is no larger than Northern Virginia or Health Planning Region II and Fauquier County, and includes both Inova and PWHS;
- c. Defendants are two of only a handful of competitors in the supply of general acute care inpatient hospital services in the relevant geographic market and are each other’s closest competitors;
- d. Defendants compete with each other on price and non-price dimensions in providing general, acute care inpatient hospital services;

e. Defendants compete with each other on price and non-price dimensions in providing general, acute care inpatient hospital services in Northern Virginia, as defined in Paragraph 23 above.

f. The effect of the proposed Merger, if consummated, may be substantially to lessen competition in the relevant markets by, among other things:

(i) The Merger would eliminate price competition in the market for general, acute care inpatient hospital services in the relevant geographic market; and

(ii) The Merger would eliminate non-price competition in the market for general, acute care inpatient hospital services in the relevant geographic market.

g. Substantial and effective entry into the relevant markets is difficult.

44. The reestablishment of Inova and PWHs as independent viable competitive entities if they were to merge would be difficult, and it likely would be difficult, if not impossible, to restore the businesses as they originally existed. Furthermore, it is likely that substantial interim harm to competition would occur even if suitable divestiture remedies could be devised.

45. For the reasons stated above, the granting of the injunctive relief sought is in the public interest.

WHEREFORE, the Plaintiffs request that the Court:

1. Temporarily and preliminarily enjoin defendants Inova and PWHs, and all affiliates of defendants, from taking any further steps to consummate, directly or indirectly, their

proposed Merger, or any other acquisition of stock, assets, or other interest, either directly or indirectly;

2. Retain jurisdiction and maintain the status quo pending resolution of the administrative proceeding before the Commission that has already commenced; and

3. Award such other and further relief as the Court may determine to be proper and just, including costs.

Dated: May 12, 2008

Jeffrey Schmidt
Director, Bureau of Competition

David P. Wales
Deputy Director, Bureau of Competition

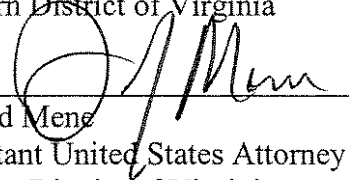
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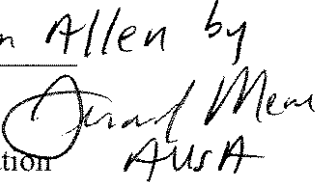
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 12 day of May, 2008, I filed the foregoing with the clerk of the court.

I FURTHER CERTIFY that on such date I served the foregoing on the following counsel via electronic mail:

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