

Uncontroverted Material Facts

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

Supporting Evidence

2. Elhauge Report (Ex. A) at Table 1.
3. Shaw Depo. (Ex. D) at 77:5-13; Kogler Depo. (Ex. E) at 76:11-15, 88:3-15, 235:12-236:6.
4. Shaw Depo (Ex. D) at 19:22-25.
5. Shaw Depo. (Ex. D) at 14:23-15:20, 20:1-21.
6. Shaw Depo (Ex. D) at 21:1-16, 57:19-24; Elhauge Report (Ex. A) at Table 1; Ordover Report (Ex. B) at Table 1.

Uncontroverted Material Facts

- 7. BD states [REDACTED]
[REDACTED].

- 8. BD states [REDACTED]
[REDACTED]
[REDACTED].

- 9. Stericycle acquired Biosystems, a regional reusable sharps container company, in 2003, and [REDACTED]
[REDACTED].

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

Supporting Evidence

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

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

- 9. Ex. 3 to Kogler Depo. (Ex. F) at p. 4
([REDACTED]
[REDACTED]
[REDACTED]); Kogler Depo. (Ex. E) at 22:18-23:10, 67:9-68:1, 69:10-19, 80:6-81:16, 91:9-92:11, 95:21-96:4.

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

Uncontroverted Material Facts

11. In 2005, Stericycle added more than [REDACTED] new accounts, effectively [REDACTED].

12. In 2006, three years after the acquisition, Stericycle [REDACTED].

13. Stericycle [REDACTED].

Supporting Evidence

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

12. Kogler Depo. (Ex. E) at 95:21-96:4.

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

([REDACTED] [REDACTED] [REDACTED] [REDACTED]),

88:3-10 ([REDACTED] [REDACTED] [REDACTED] [REDACTED]), 88:11-15

([REDACTED] [REDACTED] [REDACTED] [REDACTED]),

88:16-24 ([REDACTED] [REDACTED] [REDACTED]).

Uncontroverted Material Facts

14. Stericycle [REDACTED]
[REDACTED]
[REDACTED].

15. Stericycle [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

16. When Daniels entered the U.S. market, [REDACTED]
[REDACTED]
[REDACTED].

Supporting Evidence

14. Kogler Depo. (Ex. E) at 235:5-11
([REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]), 235:12-236:2
([REDACTED]
[REDACTED]
[REDACTED]).

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

16. Skinner Depo. (Ex.G) at 83:3-84:1
([REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]), 88:18-24 ([REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]).

Uncontroverted Material Facts

Supporting Evidence

19. Daniels [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

20. Daniels [REDACTED]
[REDACTED].

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]); Skinner Depo. (Ex. G) at
83:12-84:1 ([REDACTED])
[REDACTED]
[REDACTED]
[REDACTED]), 88:18-24.

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

20. DI_02563444 (Ex. I) at 57
([REDACTED])
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]);
DI_00030871 (Ex. J) at 75 ([REDACTED])
[REDACTED]

Uncontroverted Material Facts

21. Daniels' [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Supporting Evidence

[REDACTED];

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

([REDACTED]

[REDACTED]

[REDACTED]).

21. DI_00030871 (Ex. J) at 75 ([REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]); Skinner Depo.

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

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]); DI_00358556 (Ex. K) at 56

([REDACTED]

[REDACTED]

[REDACTED]); DI_00359519 (Ex. L) at 19-20;

DI_00358100 (Ex. M) at 00-02;

DI_00360532 (Ex. N) at 32.

Uncontroverted Material Facts

22. Daniels' [REDACTED]
[REDACTED].

23. Daniels [REDACTED]

Supporting Evidence

22. *See, e.g.*, Smiley Depo. (Ex. O) at 62:10-17, 63:4-66:7 ([REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]), 66:8-23
([REDACTED]
[REDACTED]
[REDACTED]), 73:15-25 ([REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]); Skinner
Depo. (Ex. __) at 106:13-20 ([REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]); DI_00344149 (Ex. P) at 49-50
([REDACTED]
[REDACTED]
[REDACTED]).

23. DI_01142784 (Ex. Q) at 84 ([REDACTED])

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[REDACTED]
[REDACTED]

Supporting Evidence

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

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24. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].

Supporting Evidence

24. DI_00342054 (Ex. U) at 54 ([REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]);
DI_00344451 (Ex. V) at 51 ([REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]);
DI_00342830 (Ex. W) at 30 ([REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]);
DI_01577001 (Ex.X) at 01 ([REDACTED]
[REDACTED]
[REDACTED]); DI_03312145 (Ex.
Y) at 45 ([REDACTED]
[REDACTED]

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Supporting Evidence

25. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] d.

[REDACTED]);
DI_03315788 (Ex. Z) at 88 ([REDACTED]
[REDACTED]
[REDACTED]); DI_00348373 (Ex.
AA) at 73-74 ([REDACTED]
[REDACTED]
[REDACTED]); Smiley
Depo. (Ex. O) at 67:6-23, 74:14-75:4,
77:23-79:9, 87:8-88:25.

25. DI_00218455 (Ex. BB) at 67 ([REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]);
Skinner Depo. (Ex. G) at 101:13-23
([REDACTED]
[REDACTED]
[REDACTED]); Smiley Depo.
(Ex. O) at 29:13-31:16 ([REDACTED]
[REDACTED]
[REDACTED]

Uncontroverted Material Facts

Supporting Evidence

26. [REDACTED]
[REDACTED]
[REDACTED].

[REDACTED]
[REDACTED]), 72:12-22 ([REDACTED]
[REDACTED]
[REDACTED]);
DI_00188566 (Ex. CC) at 66 ([REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]); DI_00198426 (Ex. DD) at
26-27 ([REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]); *see also*
DI_00288762 (Ex. EE) at 62-65 ([REDACTED]
[REDACTED]); Kogler Depo.
(Ex. E) at 23:20-24:3.

26. DI_00030871 (Ex. J) at 72 ([REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

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Supporting Evidence

27. Stericycle entered the sharps container market around the same time as Daniels and has achieved a [REDACTED] share of reusable sales, compared to only [REDACTED] for Daniels.

28. Hospitals and other healthcare facilities created GPOs to combine their purchasing power to negotiate better prices and discounts from medical suppliers.

29. GPO membership is voluntary, and facilities can belong to multiple GPOs, change their GPO memberships, or purchase outside GPOs.

[REDACTED]
[REDACTED]
....”), *id.* at 75 ([REDACTED]
[REDACTED]
[REDACTED]).

27. Elhauge Report (Ex. A) ¶ 89.

28. Restino Depo. (Ex. FF) at 14:14-18, 14:24-15:12; Hargette Depo. (Ex. GG) at 29:2-21.

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

Uncontroverted Material Facts

Supporting Evidence

Depo. (Ex. FF) at 19:12-22 ([REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; Hargette Depo. (Ex.

GG) at 40:21-41:19 ([REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; Dunchew

Depo. (Ex. II) at 27:24-28:6 ([REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]), 88:24-89:3 ([REDACTED]

[REDACTED]

[REDACTED]; Miriani Depo. (Ex. JJ)

at 105:16-23 ([REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]; Walsh Depo. (Ex. KK) at

41:5-17 ([REDACTED]

[REDACTED]

Uncontroverted Material Facts

Supporting Evidence

32. BD [REDACTED]
[REDACTED]
[REDACTED].
33. GPO contracts are terminable at will on short notice, typically 90 days or less.

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

32. Shaw Depo (Ex. D) at 65:2-24, 66:13-19, 91:25-92:11.
33. NP/NOV 000010 (Ex. NN) at 21 ([REDACTED])
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]; P_000081 (Ex. OO) at 90 ([REDACTED]); HT02566 (Ex. PP) at 82 ([REDACTED]); TYN0001641 (Ex. QQ) at 63 ([REDACTED]); TYN0001975 (Ex. RR) at 79 ([REDACTED]); TYN0001439 (Ex. SS) at 47 ([REDACTED]).

Uncontroverted Material Facts

34. Having a GPO contract does not guarantee sales and the contracts do not require members to buy anything from contracted vendors but simply give them the option of buying products at pre-negotiated discounts.

Supporting Evidence

34. Shaw Depo. (Ex. D) at 63:3-63:15

([REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]);

Restino Depo. (Ex. FF) at 19:4-11

([REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]), 20:5-16; Hargette Depo. (Ex.

GG) at 39:16-40:6 ([REDACTED]

[REDACTED]
[REDACTED]),

53:11-54:1 ([REDACTED]
[REDACTED]);

Dunehew Depo. (Ex. II) at 28:7-11

([REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]); Miriani Depo. (Ex. JJ) at 71:11-

17 ([REDACTED]
[REDACTED]

Uncontroverted Material Facts

Supporting Evidence

35. Covidien's contracts with Novation state

that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

36. GPO members routinely buy products outside of GPO contracts.

[REDACTED]

[REDACTED]; Walsh Depo. (Ex.

KK) at 41:5-17 ([REDACTED])

[REDACTED]

[REDACTED]; Ex. 3 to Miriani Depo. (Ex.

TT) ([REDACTED])

[REDACTED]

[REDACTED]; TYN0001641 (Ex. QQ) at

42 ([REDACTED])

[REDACTED]; TYN0001975

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

(Ex. SS) at 43 (same).

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

NP/NOV 000010 (Ex. NN) at 12.

36. Crowder Depo. (Ex. HH) at 67:7-69:10;

Restino Depo. (Ex. FF) at 19:4-11, 20:5-

16; Hargette Depo. (Ex. GG) at 39:16-

40:6, 53:11-54:1; Dunehew Depo. (Ex.

II) at 28:7-11, 71:14-72:1; Miriani Depo.

Uncontroverted Material Facts

Supporting Evidence

- (Ex. JJ) at 71:11-17, 72:9-25; Walsh Depo. (Ex. KK) at 41:5-17.
37. Approximately █████ of Covidien's sharps container sales are made outside of GPOs.
37. Elhaug Report (Ex. A) ¶ 68.
38. Natchitoches purchases Covidien sharps containers because of the products' features and because the products are safe and effective.
38. Crowder Depo. (Ex. HH) at 20:25-21:9 ("I saw the design [of the Covidien product] and liked the design and so we purchased it."), 22:10-21 (Natchitoches switched from BD to Covidien around 1999 because "the [Covidien] design was better as far as preventing sharp sticks than the BD"), 24:12-23 (the Covidien container was safe and effective).
39. Natchitoches is not prevented from buying competitive sharps containers instead of Covidien's.
39. Crowder Depo. (Ex. HH) at 66:3-18 (Mr. Crowder was unaware of any contract that would prevent Natchitoches from switching from Covidien to BD), 81:20-82:2 ("I don't think that Natchitoches is prevented from buying from Daniels.").

Uncontroverted Material Facts

40. Natchitoches belongs to multiple GPOs and utilizes whichever contract gives it the best deal on sharps containers.
41. Natchitoches believes that GPOs have helped it receive better pricing.
42. Natchitoches may purchase products outside of GPO contracts without penalties or threats.
43. Natchitoches does not believe Covidien's sharps containers are priced too high and has never experienced any wrong or improper conduct by Covidien.

Supporting Evidence

40. Crowder Depo. (Ex. HH) at 48:8-15 (“MedAssets is our primary GPO and we purchase utilizing whatever contracts we have access to[,] to obtain the best pricing that we can.”), 49:10-20 (Natchitoches belongs to MedAssets, Amerinet and Novation), 60:7-61:12 (“If the Premier contract was better than one we were utilizing, then we would switch to the Premier contract. If it wasn’t a better contract, then we would not.”).
41. Crowder Depo. (Ex. HH) at 48:22-49:5 (Through GPOs, “[w]e have been able to obtain better pricing on products and services that we purchase.”).
42. Crowder Depo. (Ex. HH) at 67:7-69:10.
43. Crowder Depo. (Ex. HH) at 98:11-16, 100:7-16, 139:1-8.

Uncontroverted Material Facts

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

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

Supporting Evidence

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

A. No. I haven't opined that the discounts were below costs or reached such a conclusion.").

45. Elhauge Depo. (Ex. VV) at 136:6-137:3 (Q.... I am asking you as either a separate check or any kind of additional analysis you undertook to quantify whether any rival was capable of inducing a customer to switch from Covidien to itself. And by "capable," I mean still able to earn a profit on the sale. A.... My analysis was more based on statistics of what they were actually able to do in the unburdened and burdened portions of the market, rather than using tests that compared prices to costs and try to adjust for quality or

Uncontroverted Material Facts

Supporting Evidence

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

47. Hospitals have the option to walk away from the commitments if they find a better deal elsewhere and the only consequence is that their price may be adjusted to reflect their actual levels of purchases.

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

46. TYN0001641 (Ex. QQ) at 77-78 ([REDACTED]); NP/Nov 000010 (Ex. NN) at 32-33 ([REDACTED]); P_000081 (Ex. OO) at 106-07 ([REDACTED]).

47. NP/Nov 000010 (Ex. NN) at 32 ([REDACTED]); TYN0001641 (Ex. QQ) at 49 ([REDACTED]); TYN0001439 (Ex. SS) at 44 ([REDACTED]).

Uncontroverted Material Facts

Supporting Evidence

- 48. Covidien’s sole-source contracts covered, at most, [REDACTED] of the relevant market.
- 49. Covidien’s market share discounts covered, at most, [REDACTED] of the relevant market.
- 50. Covidien’s bundling programs covered less than [REDACTED] of the relevant market.

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

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

51. HealthTrust’s 2001 contract with

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Supporting Evidence

Covidien did not contain market-share commitment requirements.

79:21-80:3, 80:16-81:1 ([REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]), 87:12-88:3 [REDACTED]
[REDACTED]
[REDACTED]), 94:22-95:1; HT02566
(Ex. PP) at 89 ([REDACTED]
[REDACTED]
[REDACTED]); *see also* Elhaug Reply Report
(Ex. WW) ¶ 66.

52. Covidien’s prices have gone down and its margins have been shrinking.

52. Ordover Report (Ex. B) ¶¶ 19, 63-64.

53. Dr. Singer’s “but for” price model requires a precise measure of the amount of foreclosure allegedly suffered by Covidien’s rivals.

53. Singer Expert Report (Ex. YY) ¶ 57; Ashenfelter draft report (Ex. ZZ) at 4.

54. Dr. Singer did not precisely measure the amount of foreclosure allegedly suffered by Covidien’s rivals.

54. Singer Depo. (Ex. AAA) at 48:4-24 (“Q... [Y]ou are not offering any testimony regarding whether the levels of alleged foreclosure predicted by

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Supporting Evidence

Professor Elhauge are correct, are you?

A. I am not offering an opinion on that.

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

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55. Prof. Elhauge did not precisely measure the amount of foreclosure allegedly suffered by Covidien's rivals.

Supporting Evidence

it is real, into a but-for price.”), 118:12-119:4 (“I have not been asked, nor have I formed an independent opinion as to whether Professor Elhauge’s calculation of the differential in rival penetration was the appropriate analysis. I just -- that’s not something that I considered to be my task.”).

55. 1/8/09 *Daubert* Hearing Tr. (Ex. BBB) at 23:6-18 (“I’m opining on the fact of impact, not the precise amount of anticompetitive impact, which I gather is the subject of Dr. Singer’s testimony as the damages expert.”), 106:7-14 (“Q.... So you have not undertaken to calculate the precise amount of differential in the rival sales in any context in this case to affected versus unaffected buyers? A. No, I have done affected versus unaffected buyers, but what I haven’t done, which is the relevant damages question, is quantify the difference

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

Supporting Evidence

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

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

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57. Dr. Singer's model relies on Prof. Elhauge's simultaneous comparisons to calculate damages.

Dated: July 29, 2009

Supporting Evidence

57. Singer Expert Report (Ex. YY) ¶ 57 & Table 11 (incorporating the results of Elhauge Exhibit 9).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and copies will be sent to those indicated as non-registered participants on July 29, 2009.

/s/ *James Donato*