IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

NATCHITOCHES PARISH HOSPITAL SERVICE DISTRICT and J.M. SMITH CORP. d/b/a Smith Drug Co., on behalf of itself 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) Jury Trial Demanded

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

REDACTED VERSION

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Tyco's purported reply in support of its motion for summary judgment is another attempt to recast this case into a framework Tyco finds more amenable to defend than the case that Plaintiffs have actually pleaded and that the Court has found to present a genuine antitrust dispute suitable for class treatment. This Court has already painstakingly examined volumes of documents, testimony, data, opinions, and briefs, and written over 110 pages finding that Plaintiffs' theory is viable under the facts present.

Nevertheless, once again, Tyco pretends this is a below-cost pricing case. To the contrary, this Court has recognized the viability of Plaintiffs' claims of unlawful maintenance of monopoly power through exclusionary conduct under Sherman Act Section 2. Memorandum and Order of January 29, 2008 (D.E. 130) ("January Op.") at 23. This Court has also recognized the viability of Plaintiffs' claims of unreasonable restraint of trade in violation of Sherman Act Section 1. *Id.* at 24. Moreover, this Court has found Plaintiffs' evidence of class-wide injury reliable, accepted the expertise of Plaintiffs' expert Prof. Elhauge,[1] and recognized that Tyco's challenge to Dr. Singer's testimony is relegated to cross-examination at trial. *Id.*

I. This Court has recognized that this is a case of exclusionary conduct, not predatory pricing.

This Court has ruled that Plaintiffs' exclusive dealing theory of antitrust liability is viable as a matter of law: "The theories that support Plaintiffs' claim of antitrust injury are not 'novel.' One court reviewing nearly identical exclusive dealing arrangements imposed by Tyco concluded that plaintiff, a competitor, had a viable antitrust theory." Memorandum and Order of August 29, 2008 (D.E. 169) ("August Op.") at 12 (citing *Masimo v. Tyco Health Care Group, L.P.*, No. 02-4770, 2006 WL 1236666, at *6-10 (C.D. Cal. Mar. 22, 2006)).

[1] Memorandum and Order of September 21, 2009 (D.E. 289) ("*Daubert* Op.") at 12.

Contrary to Tyco's mischaracterization of Plaintiffs' claims, this case is about prices that are artificially too high, not predatory prices that are artificially too low:

> The cumulative effect of [Tyco's] practices has been to impair and foreclose competing manufacturers ... and to prevent those competitors from ... driving down the prices charged by both Tyco and its competitors in the Sharps Container market.
>
> Absent Tyco's anti-competitive conduct, Plaintiff and the other Class members would have paid less for the Sharps Containers that they purchased during the Class Period. Prices for these products would have been lower ... absent the exclusionary conduct.

Complaint ¶¶ 6, 7. Likewise, Prof. Elhauge opined, "I conclude that prices are higher and output lower than they would have been in the but-for world without Tyco's exclusionary contracts." Expert Report of Prof. Einer Elhauge (D.E. 166) ("Elhauge Report") ¶ 1.

Despite the reality of the nature of Plaintiffs' claims, Tyco continues to argue that the aspects of *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 277 (1st Cir. 1983), relating to aggressive price-cutting and other predatory pricing jurisprudence should control, claiming that this case "is fundamentally about Covidien's market share discounts." Defendants' Reply Memorandum in Support of Defendants' Motion for Summary Judgment (D.E. 283) ("Tyco Reply Br.") at 3-5. However, the authority cited by Tyco does not and should not apply to a case like this one, where Plaintiffs assert exclusive dealing claims and present evidence of ***foreclosure*** in the sharps container market resulting from Tyco's anticompetitive conduct. Tyco's continued insistence that inapplicable predatory-pricing law be applied to a case of exclusionary conduct leaves its motion without legal foundation.

Brooke Group v. Brown & Williamson Tobacco Corp., *United States v. AMR Corp.*, and *Nicsand, Inc. v. 3M Co.*, are all predatory pricing cases involving allegations that the defendants' low pricing adversely affected ***unforeclosed*** competitors. In *Brooke Group*, plaintiff Liggett, a

competitor of defendant Brown & Williamson in the generic cigarette market, claimed that Brown & Williamson's volume rebates caused its pricing on generic cigarettes to be so low that Liggett could not effectively compete. *Brooke Group*, 509 U.S. 209, 220-21 (1993). In *AMR*, plaintiffs alleged that defendant American Airlines, "in the face of low fare carrier competition, shifted from its traditional strategy and adopted competitive tools which combined price reductions and capacity increases, and that the cost of these tools was greater than the revenue obtained." *AMR*, 140 F. Supp. 2d 1141, 1193 (D. Kan. 2001). *Nicsand* involved a similarly excluded competitor plaintiff in the automotive sandpaper market who claimed that defendant 3M's pricing scheme resulted in prices that were too low. The *Nicsand* court deemed that plaintiffs waived the argument, first raised in *en banc* papers, that 3M's actions gave rise to a collective action problem (*i.e.*, a problem arising under a foreclosure theory, as asserted by Plaintiffs here), but correctly noted that aggrieved purchasers would have standing to sue 3M for treble damages if 3M chose to impose monopolistic prices. *Nicsand*, 507 F.3d 442, 456-457 (6th Cir. 2007).

In the few exclusionary conduct cases that Tyco does cite, the claims at issue there – contrary to the claims at issue here – were not supported by evidentiary proof of substantial foreclosure. In *Concord Boat*, the Eighth Circuit acknowledged that a potential competitor would have difficulty entering a market with significant barriers to entry to challenge a firm that is charging supracompetitive high prices, but found scant evidence that firms had difficulty entering the relevant market in that case (*i.e.*, there was no evidence of foreclosure). *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1059 (8th Cir. 2000). Here, Prof. Elhauge and Dr. Singer have painstakingly shown foreclosure levels and the damages resulting from the same. This Court has in fact already acknowledged Prof. Elhauge's use of "compelling, direct

evidence from Tyco's own documents and deposition testimony" to conclude that "Tyco had the ability to control prices and exclude rivals," and that "Tyco's exclusionary contracts with GPOs raised rival costs and increased barriers to entry in the sharps containers market."[2] This Court specifically found what Tyco continues to ignore, that "Elhauge's findings provide a sufficient showing of diminished rival competitiveness under First Circuit and general antitrust law."[3]

In *J.B.D.L. Corp. v. Wyeth-Ayers Labs*, the Ohio District Court observed that actual adverse effects on the market can be established when the contracts at issue substantially foreclose competition in the market, but did not reach the parties' dispute on the issue of specific foreclosure rates because the plaintiffs had "simply not established actual market foreclosure." No. 1:01-CV-704, 2005 WL 1396940 at *8, *11 (S.D. Ohio June 13, 2005). It is noteworthy that the court rejected the "somewhat simplistic argument" (identical to that urged here by Tyco) that the lack of predatory pricing mandates dismissal of Section 2 claims, and recognized that in the Sixth Circuit, Section 2 requires "a thorough analysis of each fact situation" in order to determine whether or not the monopolist's conduct is unreasonably anticompetitive and thus unlawful. *J.B.D.L.* at *12. Finally, the conduct challenged in *Virgin Atl. Airways v. British Airways* did not involve an exclusionary commitment in exchange for lower prices: "There is no allegation that British Airways' incentive arrangement partners agreed to do anything in exchange for the benefits British Airways awarded to high volume customers." 257 F. 3d 256, 263 (2d Cir. 2001).

Plaintiffs allege that Tyco's sharps container pricing during the entire class period – even its so-called "discounted" pricing – was supracompetitive. Plaintiffs simply do not challenge Tyco's discounts as predatory pricing. Plaintiffs challenge both (a) Tyco's contractual

[2] Aug. Op. at 17, 19.

[3] *Id*. at 26.

arrangements with GPOs and (b) other Tyco agreements with individual purchasers that contractually committed purchasers to buy sharps containers almost exclusively from Tyco, to the exclusion of other sharps container manufacturers, and financially penalized purchasers that did not comply with the Tyco-mandated purchase commitments.[4] These exclusionary contracts, even those allegedly "voluntarily" accepted and complied with, present a collective action issue because the costs of individual customers' decisions to agree are largely externalized onto the rest of the market, while the benefits of avoiding price penalties by agreeing to the exclusionary conditions go entirely to the individual buyer that agrees.[5] As this Court noted (and Tyco's expert admitted), this "naked exclusion" model is well-established in the antitrust literature. Aug. Op. at 19.

This exclusionary conduct also illustrates that Tyco's reliance on *Allied Orthopedic Appliances, Inc. v. Tyco Health Care Group L.P.* is misplaced. *See* Case No. 2:05-cv-06419-MRP-AJW, p. 12 (C.D. Cal. July 9, 2008). As Plaintiffs have previously pointed out: "[T]he *Allied* decision is irrelevant here because it focuses on a different methodology of a different expert designed to measure effects in a different market based on a different set of facts and theories."[6] Indeed, Tyco itself already conceded that the "Oximax strategy" claim -- central to

[4] Tyco uses internal ellipses to create the impression that, according to Plaintiffs' own expert, this case involves a challenge solely to Tyco's pricing and discounts: "[T]he *entire theory of harm in this case*…is that "[Covidien]'s conduct has *raised prices*…[Covidien's] *pricing thus reflects penalties*…" *See* Tyco Reply Br. at 3. But Professor Elhauge could not have been more clear that this case is about the market-wide effect of the "exclusionary conditions attached to those contracts." Reply Expert Report of Prof. Einer Elhauge ("Elhauge Reply," D.E. 163), at ¶43, 60, 62, 149. Moreover, with respect to the prices, Prof. Elhauge actually states that (1) the prices charged to buyers were *not* discounts, but rather inflated over but-for levels, and (2) price penalties even further above that level were inflicted on buyers or GPOs that refused to enter into or adhere to exclusionary contracts. Id. at ¶3.

[5] *See* Elhauge Expert Report ¶26(c).

[6] Plaintiffs' Second Supplemental Reply Memorandum in Support of Plaintiffs' Motion for Class Certification, D.E. 150, at 10 (itself citing Plaintiffs' Memorandum in Response to Defendants' Notice of Supplemental Authority, D.E. 129, at 2).

the *Allied* case -- involved "conduct unique to the pulse oximetry market and [is] inapplicable here."[7] And, as Tyco knows, this Court has already once rejected *Allied's* reasoning, and further, if Tyco was actually looking for a realistic analogue to Plaintiffs' claims in this case, the more obvious choice would be *Masimo* (in the same court as *Allied*) which involved the same conduct as alleged here, the same expert, and which resulted in a liability verdict for the plaintiff.[8]

In addition to acknowledging the viability of Plaintiffs' theories, this Court has found that Plaintiffs have made a sufficient showing of diminished rival competitiveness to infer injury to competition. Aug. Op. at 3, 26. Further, this Court has relied on Tyco's own documents for "particularly damning" direct evidence of price premiums, and found that Professor Elhauge, Plaintiffs' expert, demonstrated anti-competitive impact using three different reliable methodologies. *Daubert* Op. at 11.

Contrary to the opinion in *Allied*, but like the opinion in *Masimo*, this Court has already found that share requirements such as those imposed by Tyco can be anticompetitive, citing authority from a variety of sources:

> The *Antitrust Law* treatise … cites numerous cases for the proposition that "antitrust policy should not differentiate between the manufacturer of widgets that explicitly imposes exclusive dealing on its dealers and the manufacturer that gives such dealers a discount or rebate for dealing exclusively in the manufacturer's widgets." XI Hovenkamp, *Antitrust Law* ¶ 1807b at 128 & n.4 (emphasis added)…. [T]he antitrust literature, including recent academic articles authored by and cited by both parties' experts, also supports the theory that the share requirements at issue in this case can cause anticompetitive injury.

August Op. at 13 (additional citations omitted).

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[7] Tyco's Notice of Supplemental Authority (D.E. 128) at 2, n. 1.

[8] *See, Masimo v. Tyco Health Care Group, L.P.*, No. 02-4770, 2006 WL 1236666 at *15 (C.D. Cal. Mar. 22, 2006) ("The jury's Section 1, 2 and 3 liability verdict is sustained based on the anticompetitive effects of Market Share Discounts and Sole Source contracts.").

Further, Tyco's argument that its contracts were not exclusionary because they were terminable is unpersuasive. The Supreme Court has long held that terminable contracts can be exclusionary. In *FTC v. Brown Shoe*, 384 U.S. 316, 318-19 & n.2 (1966), the Court condemned an exclusionary agreement even though buyers could "voluntarily withdraw at any time." In *Standard Oil v. United States*, 337 U.S. 293, 296 (1949), the Court invalidated exclusive dealing agreements that were terminable on thirty days notice. In *Standard Fashion v. Magrane-Houston Co.*, 258 U.S. 346, 352 (1922), the Court invalidated exclusive dealing agreements that were terminable on three months' notice. Moreover, with respect to all the challenged contracts, Tyco has completely ignored Prof. Elhauge's analysis on this very point.[9] Tyco also failed to mention that none of the share-based buyer contracts contained any termination clause.[10]

Tyco also ignores relevant authority that foreclosing a distribution channel that provides significant efficiency is anticompetitive. *U.S. v. Microsoft Corp.*, 253 F.3d 34, 70-71 (D.C. Cir. 2001) (en banc); *LePage's v. 3M*, 324 F.3d 141, 159-60 & n.14 (3d Cir. 2003) (*en banc*), *Abbott Labs. v. Teva Pharms. USA, Inc.*, 432 F.Supp.2d 408 (D. Del. 2006). Here, Plaintiffs have alleged and come forward with evidence that Tyco impaired competition in part by substantially foreclosing the GPO distribution channel through sole-source agreements with individual GPOs, which agreements each completely barred the respective GPO from brokering sales of any rival company's products. *See also* Aug. Op. at 26. In this sense, the sole-source GPO contracts even satisfy Tyco's fictitious "truly 'exclusive'" standard.[11] Moreover, regarding whether rivals were

[9] Elhauge Reply at ¶¶60-62, 74.

[10] Id. at ¶74 (citing Elhauge Report at ¶157 & n. 323).

[11] *See*, Reply Memorandum In Support of Defendants' Motion for Summary Judgment (D.E. 283) ("Tyco Reply Memo") at 10 (repeatedly citing only its own brief in support of this proposition).

even allowed to compete fairly for placement on these GPO contracts, this Court has found fact issues suitable for resolution by the jury at trial on this very issue: "There is a fact dispute as to whether there exists ex ante competition for GPO contracts" (August Op. at 23); "There is a fact dispute as to whether . . . in practice GPO sole source requirements give GPO's incentives to stay with Tyco rather than open up robust competition with Tyco's rivals." (*Id.*)

II. The Court has found Plaintiffs' damages evidence admissible.

Tyco's arguments on damages are equally unavailing. Though Tyco continues to misrepresent the methods of Plaintiffs' experts, Tyco's basic complaint is that Dr. Singer's damage estimates are fatally speculative because they rely on an output of Prof. Elhauge's analysis that Tyco feels is unreliable or even somehow nonexistent.[12] Yet, this Court has denied Tyco's motion to exclude the testimony of Professor Elhauge, "[b]ecause Professor Elhauge demonstrated anti-competitive impact by using three different reliable methodologies, which provide a cross-check on each other." *Daubert* Op. at 12 (emphasis added). Included among these reliable methodologies are the simultaneous comparisons employed by Dr. Singer's model, showing the gap in Tyco's (and rivals') performance in the foreclosed and unforeclosed portions of the market. Even Professor Ashenfelter, the Court-appointed neutral econometric expert, "pinpointed no methodological flaws or technical errors in the econometric analysis that Professor Elhauge presented." *Daubert* Op. at 8. The Court also recognized that Professor Ashenfelter found that,"'[Elhauge's] analyses provide estimates of the impact of the challenged practices at the buyers that switched contract forms.'" *Daubert* Op. at 11, citing Report of Orley Ashenfelter Regarding the Motion to Exclude the Testimony of Professor Einer Elhauge (D.E.

[12] This output of Prof. Elhauge's simultaneous comparisons has often been referred to as the "gap in performance," which even Tyco's liability expert Prof. Ordover acknowledges exists. *See* Elhauge Report at ¶180 & n. 405; Elhauge Reply at ¶¶80-90 & nn. 195, 204 (citing Ordover Report at ¶120).

286) ("Ashenfelter Report") at 24. The Court also declined to resolve an issue raised by Tyco regarding "fixed effects linear regressions" compared to Plaintiffs' "simultaneous comparisons and other analyses." *Daubert* Op. at 12.

The Court at the same time disposed of Tyco's attempt to revive its challenge to Dr. Singer's opinion on damages:

> Professor Elhauge does not claim that his analyses measure the difference in prices paid by the class between the actual world and the 'but-for' world in which the practices did not exist. Dr. Singer uses the output of Professor Elhauge's econometric analyses to supply the market shares for his damage calculation which requires a measurement of Sharps containers market shares in the 'but for' world. ([Ashenfelter] Report at 4). While Defendants now challenge the use of the simultaneous comparison output as this [market share] measure in their comments on the [Ashenfelter] Report, they have withdrawn the motion to exclude testimony of Dr. Hal Singer (Docket No. 179), choosing to rely on cross-examination as their weapon of choice.

Daubert Op. at 11-12. Summary judgment cannot be based on withdrawn challenges to expert methodologies.

III. The *St. Francis* opinion is not pertinent authority in this case.

Tyco asks the Court to consider the recent decision in *St. Francis Medical Center v. C.R. Bard, Inc.* ("*St. Francis*")[13] in support of its Motion for Summary Judgment. *See* D.E. 293. As a preliminary matter, the *St. Francis* decision can be of no use in the present case because summary judgment there was granted due to a finding of no factual dispute prior to any *Daubert* hearings. As illustrate above and below, the present case has already completed the *Daubert* phase and this Court has identified issues of fact proper for jury consideration. Furthermore, this case from the Eastern District of Missouri is easily distinguishable and has no relevance to this matter.

[13] No. 07-CV-00031 (E.D. Mo. September 28, 2009), submitted by Tyco as supplemental authority in support of its Motion for Summary Judgment on October 1, 2009 (D.E. 293).

First, the plaintiffs in *St. Francis* were indirect purchasers that lacked standing to sue for treble damages. *St. Francis* at 59. The class in this case "contains only direct purchasers of Tyco's sharps containers in the relevant market during the proposed class period, and thus all class members have standing …." January Op. at 4 (citations omitted).

Second, the plaintiffs in *St. Francis* failed to present a plausible relevant market. Their market definition "improperly manipulate[d] the boundaries of the product market." *St. Francis* at 37. Here, "both experts agree that the relevant market includes all disposable and reusable sharps containers and that the relevant geographical market is the United States." August Op. at 16 (citing Elhauge Report ¶ 43: Ordover Expert Report ¶ 49).

Beyond the issues of standing and relevant market, the *St. Francis* plaintiffs did not prevail because, given their dramatically different facts, they could not establish antitrust injury. *St. Francis* at 59. In the instant case, Tyco's expert has conceded that the allegations of Plaintiffs herein can support a finding of anticompetitive impact. *See* McFadden Depo. at 102. In fact, Tyco's liability expert has conceded that the very contracts challenged here do have at least some such effect. Expert Reply Declaration of Prof. Janusz A. Ordover (D.E. 206) at ¶¶ 6, 15-16, 18. More importantly, this Court has expressly found that Plaintiffs have "demonstrated anti-competitive impact." *Daubert Op.* at 11. Thus, as Tyco has conceded the composition of the relevant market, and Plaintiffs have presented ample evidence of antitrust injury—both issues critical to the *St. Francis* decision—that opinion offers no relevant authority for the Court.

Other factors also distinguish *St. Francis*. For example, Tyco's influence on the GPO decision-making process for sharps containers—including whether rivals and suppliers are

invited to bid at all—is well-documented.[14] The *St. Francis* court found that the defendant had no "control over the question" of GPO contract awards (p. 6), and that there was "'fierce competition' for sole-source contracts." *St. Francis* at 17 (citation omitted).

Here, the Court has observed that the "Opportunity/Spectrum programs . . . penalized members who evaluated rival products." January Op. at 17. But in *St. Francis*, a clinician could request that a product "be evaluated regardless whether it is under a GPO contract." *St. Francis* at 11 (citation omitted).

In *St. Francis*, the Court found that Bard's rebate and discounting programs did not impede the purchase of competing products. Here, a number of consumers who wanted to switch from Tyco to another manufacturer were prevented from doing so due to financial penalties. The GPO contracts in this case ***did prevent*** hospitals from purchasing from another vendor, and it is misleading for Tyco to suggest otherwise.[15]

Tyco's argument that competitors in *St. Francis* were gaining ground on the purported monopolist in that case is irrelevant to this case. Plaintiffs here have "demonstrated ***hard proof of market power*** for the proposed Class Period." August Op. at 18 (emphasis added). Tyco's foreclosure share during the Class Period ranges from [redacted]% to [redacted]%. *See* Errata Corrections to Elhauge Report (D.E. 135) at Table 8.[16] Indeed, Tyco acknowledges that share-based

[14] "Elhauge has presented evidence that Tyco has successfully foreclosed a substantial part of the sharps containers market from rivals by getting individual purchasers to agree to purchase exclusively from Tyco." August Op. at p. 23. Thus, "there is a fact dispute as to whether there exists ex ante competition for GPO contracts and whether in practice GPO sole source requirements give GPOs incentives to stay with Tyco rather than open up robust competition with Tyco's rivals." Id. at p. 23.

[15] The contracts, on their face, "[redacted]." Elhauge Report at ¶¶ 18, 127-137. Further, Tyco's sole-source GPO contracts "[redacted]." Elhauge Report at ¶¶ 16, 121-126.

[16] In *St. Francis*, "Plaintiffs use Rochester as the touchstone of their argument that Bard has created barriers to entry. Their choice is unavailing." *St. Francis*, p. 48. Rochester's market entry costs were not prohibitive, and

commitment contracts *alone* foreclosed [redacted]% of the market. *See* Defendants' Memorandum in Support of Motion for Summary Judgment (D.E. 267) at 15. This foreclosure was no accident; while the *St. Francis* plaintiffs offered "no probative evidence of a specific intent to destroy competition," *St. Francis* at 47, the record in this case reveals "Tyco's audacious and explicit goal to drive out the competition," including "Tyco's explicit efforts to 'block[],' 'lock out,' and 'keep out' rivals." August Op. at 32 and 34 (citations omitted).

Tyco also relies heavily on a portion of the *St. Francis* opinion that addresses a claim not asserted here. *See* Defendants' Notice of New Authority (D.E. 293) at 3. The *St. Francis* court rejected the plaintiffs' reliance on Bard's pricing practices as evidence of anticompetitive conduct, but was addressing a predatory pricing claim – again, a claim which Plaintiffs in this case do not assert. *St. Francis* at 50-51. *See* Plaintiffs' Memorandum in Opposition to Defendants' Motion for Summary Judgment (D.E. 277) at 1.

Given the numerous critical differences between the facts and legal theories presented in this case and those presented in *St. Francis*, Plaintiffs respectfully submit that *St. Francis* is not relevant to the pending matter.

IV. CONCLUSION

Tyco has failed to demonstrate that it is entitled to summary judgment. To the contrary, this Court's prior rulings have established the viability of Plaintiffs' theory of antitrust liability, the admissibility of their expert testimony on antitrust injury, and the existence of material fact issues for trial. The Court should deny Tyco's motion in its entirety.

Bard's advantages were important to GPOs when awarding contracts. *St. Francis*, p. 49. In this case, Plaintiffs have repeatedly shown that all of Tyco's rivals were foreclosed because of Tyco's conduct. "Elhauge has presented evidence that Tyco has successfully foreclosed a substantial part of the sharps containers market from rivals . . . ." August Op. at 23 (emphasis added).

Dated: October 15, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that these documents filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non- registered participants on October 15, 2009.

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