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7 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
8

9 JOSEPH A. PAKOOTAS, an
individual and enrolled member of the
10 Confederated Tribes of the Colville
Reservation; DONALD R. MICHEL,
11 an individual and enrolled member of
the Confederated Tribes of the Colville
12 Reservation; and the
CONFEDERATED TRIBES OF THE
13 COLVILLE RESERVATION,

14 Plaintiffs,

15 and

16 STATE OF WASHINGTON,

17 Plaintiff-Intervenor

18 v.

19 TECK COMINCO METALS, LTD., a
Canadian corporation,
20

Defendant.
21

NO. CV-04-0256-LRS

PLAINTIFFS' SECOND AMENDED
COMPLAINT

22 I. INTRODUCTION

23 1.1 In this action, Joseph A. Pakootas and Donald R. Michel invoke the
24 Comprehensive Environmental Response, Compensation, and Liability Act
25 ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, citizens suit provision, 42 U.S.C.
26 § 9659(a)(1), to enforce and seek penalties for noncompliance with the Unilateral

PLAINTIFFS' SECOND AMENDED
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1 Administrative Order for Remedial Investigation/Feasibility Study ("UAO") issued
2 to Teck Cominco Metals, Ltd. ("Teck Cominco"), Docket No. CERCLA 10-2004-
3 0018, on December 11, 2003, by the United States Environmental Protection
4 Agency ("EPA") pursuant to its authority under 42 U.S.C. § 9606(a).

5 1.2 The Confederated Tribes of the Colville Reservation ("Tribes"), under
6 CERCLA § 9607(a)(4) have joined the action to recover from Teck Cominco the
7 costs of remedial or removal actions, natural resource damage assessment costs,
8 and natural resource damages that the Tribes have incurred and will continue to
9 incur at the Upper Columbia River and Lake Roosevelt where hazardous
10 substances have come to be located (hereinafter, the "Upper Columbia River
11 Basin Site").

12 II. PARTIES

13 2.1 Joseph A. Pakootas ("Pakootas") is an enrolled member of the Tribes
14 and a resident of Inchelium, Washington, located within the exterior boundaries of
15 the Colville Reservation.

16 2.2 Donald R. Michel ("Michel") is an enrolled member of the Tribes and
17 a resident of Inchelium, Washington, located within the exterior boundaries of the
18 Colville Reservation.

19 2.3 The State of Washington (the "State") is a sovereign state of the
20 United States through which the Columbia River flows, including that portion of
21 the river known as Lake Roosevelt. The State has an inherent interest in the health
22 and welfare of its citizens and the natural resources within the State, including the
23 Columbia River and its associated fish and wildlife. Pursuant to 42 U.S.C.
24 § 9607(f) and 40 C.F.R. § 300.605, the Washington State Department of Ecology
25 ("Ecology") serves as a Natural Resource Damage Trustee for the State of
26

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1 Washington. In that capacity, Ecology has the authority to assert natural resource
2 damage claims on behalf of the State.

3 2.4 The Tribes are a sovereign Indian Tribe whose government is
4 recognized by the United States. The Colville Reservation borders the Upper
5 Columbia River and Lake Roosevelt on its western and southern boundaries. A
6 portion of the Upper Columbia River Basin Site is located within the Colville
7 Reservation. The Tribes have an inherent interest in the health of both Tribal
8 members and non-members who either reside on or do business within the exterior
9 boundaries of the Reservation ("Reservation Population"), and the environmental
10 quality of the Reservation's reserved natural resources and those resources within
11 areas of the Columbia River subject to the Tribes' management and control and
12 areas within the former reservation boundaries in which the Tribes have reserved
13 rights and entitlement ("Reservation Environment"), of which the resources in and
14 about the Upper Columbia River and Lake Roosevelt are of paramount
15 importance. Pursuant to 42 U.S.C. § 9607(f) and 40 C.F.R. § 300.610, the Tribal
16 Chairman serves as a Natural Resource Damage Trustee for the Tribes. In that
17 capacity, the Tribal Chairman has the authority to assert natural resource damage
18 claims on behalf of the Tribes.

19 2.5 Teck Comino is a Canadian corporation registered as an extra
20 provincial company under the laws of British Columbia. Teck Cominco owns and
21 operates the world's largest integrated lead-zinc smelting and refining complex in
22 Trail, British Columbia, Canada ("Cominco Smelter"), located approximately 10
23 river miles north of the United States-Canada border ("Border").

24 III. JURISDICTION AND VENUE

25 3.1 This Court has jurisdiction of this citizens suit brought to enforce an
26 order which has become effective pursuant to CERCLA, to order such action as

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1 may be necessary to correct the violation of the order, and to impose civil
2 penalties. 42 U.S.C. § 9659(c).

3 3.2 Pursuant to 42 U.S.C. § 9659(d)(1), Pakootas and Michel provided
4 notice of the alleged violations of the UAO and their intent to sue to Teck
5 Cominco, the Administrator of EPA, the United States Attorney General, the
6 Attorney General of the State of Washington, and the Regional Administrator of
7 EPA Region 10.

8 3.3 More than sixty (60) days have passed since notice was provided, and
9 Teck Cominco has violated the UAO by refusing to comply with its provisions. To
10 date, EPA has not taken action under CERCLA to enforce the UAO, and has
11 neither commenced nor is diligently prosecuting a court action to redress this
12 violation.

13 3.4 Pursuant to 42 U.S.C. §9613(b), this Court has jurisdiction over the
14 Tribes' claims for cost recovery, costs of assessing natural resource damages, and
15 natural resource damages.

16 3.5 Pursuant to 28 U.S.C. § 2201(a) and 28 U.S.C. § 1331, this Court has
17 jurisdiction over the Tribes' claims for declaratory relief.

18 3.6 42 U.S.C. §§ 9659(b)(1), § 9613(b), and 28 U.S.C. § 1391(b)(2)
19 provide for venue in this Court.

20 **IV. FACTUAL ALLEGATIONS**

21 **A. Teck Cominco Disposed of Slag and Liquid Waste Containing
22 Hazardous Substances at the Columbia River Basin Site.**

23 4.1 From approximately 1906 to mid-1995, Teck Cominco generated and
24 discharged into the Columbia River certain hazardous substances in slag, as a solid
25 form, and in liquid waste, including, but not limited to, arsenic, cadmium, copper,
26 mercury, lead, and zinc. Prior to mid-1995, the Cominco Smelter discharged up to

1 145,000 tons of slag each year into the Columbia River. The slag and liquid waste
2 generated and discharged by Teck Cominco into the Columbia River is carried
3 downstream resulting in disposal in the waters of the United States.

4 4.2 Over time a significant volume of Teck Cominco's slag, liquid waste ,
5 and the hazardous substances contained therein have come to be located in, and
6 cause continuing impacts to, the surface water and ground water, sediments, and
7 biological resources which comprise the Upper Columbia River and Lake
8 Roosevelt.

9 4.3 Technical evidence, including distinct time frame dated chemical and
10 physical analyses of the characteristics of the slag obtained in core samples, shows
11 with scientific certainty that the predominant source of slag at the Upper Columbia
12 River Basin Site originates from the Cominco Smelter. Evidence shows that the
13 physical and chemical decay of slag, the settling of metals associated with liquid
14 waste, and the subsequent release of elements including, but not limited to, arsenic,
15 cadmium, copper, zinc, and lead, is an ongoing process in the buried slag and
16 sediment of the Upper Columbia River and Lake Roosevelt.

17 **B. Teck Cominco Slag Is Toxic to Humans and to Aquatic Life.**

18 4.4 The contaminants that have come to be located at the Upper Columbia
19 River Basin Site are toxic to humans and to aquatic life. As stated in the UAO:

20 4.4.1 Humans are exposed to slag and contaminated sediment by
21 direct contact with slag on the beaches of the Upper Columbia River and Lake
22 Roosevelt, contact with contaminated sediment during low draw down periods,
23 inhalation of airborne particles, dermal contact, and ingestion. In addition,
24 humans are exposed from ingestion of water from the Upper Columbia River or
25 Lake Roosevelt and through consumption of fish, aquatic resources, native plants,
26 and agricultural crops.

1 4.4.2 Environmental effects of slag include both chemical (increased
2 metal loads, potential bioaccumulation, toxicity problems in biota) and physical
3 (scouring of plants and animals in substrates, severe erosion of fish gills,
4 smothering of habitat) components.

5 **C. Teck Cominco Slag and Liquid Effluent Have Damaged and Continue
6 to Damage Pakootas and Michel.**

7 4.5 Pakootas and Michel live within the exterior boundaries of the
8 Colville Reservation. The Colville Reservation is diverse with natural resources
9 including the Upper Columbia River and Lake Roosevelt, standing timber, streams,
10 lakes, minerals, native plants, fish, and wildlife.

11 4.6 Pakootas and Michel fish and recreate in the Columbia River and
12 Lake Roosevelt. Pakootas and Michel walk along the beaches and camp on the
13 shores of the Columbia River and Lake Roosevelt. These activities, of central
14 importance to Pakootas' and Michel's subsistence, culture, and spiritual well-being,
15 expose Pakootas and Michel to the hazardous contaminants discharged by Teck
16 Cominco into the Columbia River.

17 4.7 Pakootas and Michel, as members of the Tribes, have expressly
18 reserved hunting, fishing, and gathering rights and entitlements to the Columbia
19 River that are impaired by the adverse impacts resulting from the hazardous
20 substances disposed of by Teck Cominco that have come to be located at the Upper
21 Columbia River Basin Site.

22 **D. EPA Issued Teck Cominco a UAO Concerning the Preparation and
23 Performance of a RI/FS at the Upper Columbia River Site.**

24 4.8 On December 11, 2003, EPA issued Teck Cominco the UAO.

25 4.9 EPA is aware that Teck Cominco has violated CERCLA by failing to
26 fulfill its obligation to comply with the UAO. In particular, EPA is aware, *inter
alia*, that Teck Cominco has violated 42 U.S.C. § 9606(a) as follows:

1 4.9.1 Teck Cominco has failed to comply with the terms and
2 conditions of the December 11, 2003 UAO. Teck Cominco's failure to comply
3 with the UAO constitutes a violation of a condition, requirement, or order which
4 has become effective under CERCLA.

5 4.9.2 Teck Cominco has failed to provide EPA with notice of its
6 intent to comply with the terms of the UAO within ten days of the effective date of
7 the UAO, in violation of § VII of the UAO. To the contrary, Teck Cominco
8 unequivocally indicated its intent not to comply with the terms of the UAO by its
9 letter dated January 12, 2004 from G. Leonard Manuel to Michael F. Gearheard.
10 Teck Cominco's conduct constitutes a violation of a condition, requirement or
11 order which has become effective under CERCLA.

12 4.9.3 Teck Cominco has failed to perform the Remedial
13 Investigation/Feasibility Study and submit deliverables as provided in the UAO
14 Statement of Work, Attachment 1 to the UAO, in violation of § IX(4) of the UAO.
15 Teck Cominco's conduct constitutes a violation of a condition, requirement, or
16 order which has become effective under CERCLA.

17 4.10 EPA has failed to enforce the UAO. Enforcement of the UAO
18 pursuant to CERCLA is necessary to protect the health and welfare of Pakootas
19 and Michel and the quality of the Reservation Environment from the adverse
20 impacts resulting from the hazardous substances disposed of by Teck Cominco that
21 have come to be located at the Upper Columbia River Basin Site. Teck Cominco's
22 failure to comply with the UAO adversely affects Pakootas and Michel.

23 4.11 Pursuant to 42 U.S.C. § 9659(d)(1), Pakootas and Michel provided
24 notice of the alleged violations and of their intent to sue to Teck Cominco, the
25 Administrator of EPA, the United States Attorney General, the Attorney General of
26 the State of Washington, and the Regional Administrator of Region 10 EPA.

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1 4.12 More than sixty days passed since notice was served, and the
2 violations complained of in the notice continued. Teck Cominco has violated the
3 UAO. EPA has not commenced and diligently prosecuted a court action to redress
4 this violation.

5 4.13 Approximately two years after commencement of this suit and 892
6 days after issuance of the UAO, Teck Cominco entered into an agreement with
7 EPA in which it and its subsidiary company, Teck Cominco American,
8 Incorporated, promised to perform Remedial Investigation/Feasibility Study work
9 patterned after the requirements of the UAO, conforming to EPA's CERCLA based
10 guidance and "consistent with the National Contingency Plan, 40 CFR, part 300."

11 **E. The Tribes Have Incurred and Will Continue to Incur Costs in**
12 **Response to Releases of Hazardous Substances at the Upper Columbia**
River Basin Site.

13 4.14 The Tribes have incurred costs in response to releases of hazardous
14 substances into the environment at the Upper Columbia River Basin Site. These
15 costs include costs of investigating the nature and extent of contamination from
16 the hazardous substances from the Cominco Smelter, including arsenic, cadmium,
17 copper, mercury, lead, and zinc, and costs of overseeing investigative activities
18 performed by others.

19 4.15 The Tribes will incur additional costs in the future in response to
20 releases of hazardous substances from the Cominco Smelter into the environment
21 at the Upper Columbia River Basin Site.

22 **F. The Tribes Have Incurred Natural Resources Damages.**

23 4.16 The release of hazardous substances from the Upper Columbia River
24 Basin Site have resulted in, and continue to result in injury to, destruction of, and
25 loss of natural resources at the Upper Columbia River Basin Site, for which the
26

1 Tribes are a Natural Resources Damages Trustee, as defined in 42 U.S.C
2 § 9607(a)(4)(c) and (f).

3 **G. The Tribes Have Incurred and Will Continue to Incur Costs Assessing**
4 **Natural Resource Damages.**

5 4.17. The Tribes have incurred costs assessing damages for injury to,
6 destruction of, or loss of natural resources belonging to, managed by, controlled
7 by, or appertaining to the Tribes or held in trust for the Tribes caused by the
8 release of hazardous substances into the environment at the Upper Columbia River
9 Basin Site.

10 4.18 The Tribes will continue to incur in the future costs assessing
11 damages for injury to, destruction of, or loss of natural resources belonging to,
12 managed by, controlled by, or appertaining to the Tribes or held in trust for the
13 Tribes caused by the release of hazardous substances into the environment at the
14 Upper Columbia River Basin Site.

15 **H. CERCLA Grants the Tribes the Right to Seek Cost Recovery and**
16 **Natural Resource Damages.**

17 4.19. Pursuant to 42 U.S.C. § 9607(a)(4), CERCLA grants the Tribes the
18 right to recover all costs of removal or remedial action incurred by an Indian Tribe
19 that are not inconsistent with the national contingency plan.

20 4.20. Pursuant to 42 U.S.C. §§ 9607(a)(4) and 9607(f), CERCLA also
21 grants the Tribes the right to recover damages for injury to, destruction of, or loss
22 of natural resources belonging to, managed by, controlled by, or appertaining to an
23 Indian Tribe or held in trust for an Indian Tribe caused by a release of hazardous
24 substances at a hazardous waste site. The Tribes' right to such damages includes a
25 right to the reasonable costs of assessing such injury, destruction, or loss resulting
26 from such a release.

V. TECK COMINCO IS LIABLE FOR PENALTIES FOR NON-COMPLIANCE WITH CERCLA

5.1 Pakootas and Michel reallege and incorporate by reference paragraphs 1.1 through 4.20 as though fully set forth herein.

5.2 The Upper Columbia River Basin Site is a "facility" as that term is defined in 42 U.S.C. § 9601(9).

5.3 Teck Cominco's discharges into the Columbia River resulted in disposal into the Upper Columbia River Basin Site of contaminants including arsenic, cadmium, copper, mercury, lead, and zinc, which are "hazardous substances" as that term is defined in 42 U.S.C. § 9601(14).

5.4 A "release or threatened release," as that term is defined in 42 U.S.C. § 9601(22), of those hazardous substances into the environment has occurred at the Upper Columbia River Basin Site.

5.5 Teck Cominco is a "person" as that term is defined under 42 U.S.C. § 9601(21) and is liable under 42 U.S.C. § 9607(a).

5.6 Teck Cominco has violated CERCLA by failing to comply with the UAO for a period of 892 days.

5.7 Based on its failure to comply with the UAO, Teck Cominco is liable for penalties as provided in 42 U.S.C. § 9659(c) and 42 U.S.C. § 9606(b)(1).

VI. DECLARATORY RELIEF REGARDING COST RECOVERY UNDER CERCLA

6.1 The Tribes reallege and incorporate by reference paragraphs 1.1 through 5.7 as though fully set forth herein.

6.2 Teck Cominco is liable under 42 U.S.C. § 9607(a) for all costs of remedial and removal actions incurred by the Tribes.

6.3 An actual controversy within the jurisdiction of this Court exists between the Tribes and Teck Cominco. Pursuant to 28 U.S.C. § 2201(a) and 42

1 U.S.C. § 9613(g)(2)(B), the Tribes are entitled to a declaratory judgment that Teck
2 Cominco is strictly, jointly, and severally liable under CERCLA for all remedial
3 and removal action costs that the Tribes have incurred and will incur in the future
4 responding to releases of hazardous substances into the environment at the Upper
5 Columbia River Basin Site.

6 **VII. COST RECOVERY UNDER CERCLA**

7 7.1 The Tribes reallege and incorporate by reference paragraphs 1.1
8 through 6.3 as though fully set forth herein.

9 7.2 The releases or threatened releases into the environment at the Upper
10 Columbia River Basin Site have caused the Tribes to incur response costs that are
11 not inconsistent with the national contingency plan.

12 7.3 Pursuant to 42 U.S.C. §§ 9607(a) and 9613(g)(2), Teck Cominco is
13 strictly, jointly, and severally liable for all costs incurred by the Tribes of remedial
14 or removal actions and all future costs the Tribes will incur responding to releases
15 of hazardous substances into the environment at the Upper Columbia River Basin
16 Site.

17 **VIII. DECLARATORY RELIEF REGARDING THE REASONABLE**
18 **COSTS OF ASSESSING NATURAL RESOURCE DAMAGES UNDER**
19 **CERCLA**

20 8.1 The Tribes reallege and incorporate by reference paragraphs 1.1
21 through 7.3 as though fully set forth herein.

22 8.2 Teck Cominco is liable under 42 U.S.C § 9607(a) and (f) for all
23 reasonable costs of assessing damages to the Reservation Environment's natural
24 resources.

25 8.3 An actual controversy within the jurisdiction of this Court exists
26 between the Tribes and Teck Cominco.

1 8.4 Pursuant to 28 U.S.C. § 2201(a), the Tribes are entitled to a
2 declaratory judgment that Teck Cominco is strictly, jointly, and severally liable
3 under CERCLA for all reasonable costs of assessing damages for injury to,
4 destruction of, or loss of natural resources that the Tribes have incurred and will
5 incur in the future.

6 **IX. COSTS OF ASSESSING NATURAL RESOURCE DAMAGES UNDER
7 CERCLA**

8 9.1 The Tribes reallege and incorporate by reference paragraphs 1.1
9 through 8.4 as though fully set forth herein.

10 9.2 The Tribes have incurred reasonable costs and will continue to incur
11 costs assessing damages to the Reservation Environment's natural resources.

12 9.3 Pursuant to 42 U.S.C. §§ 9607(a) and 963(g)(2), Teck Cominco is
13 strictly, jointly and severally liable for all costs incurred by the Tribes, and all
14 costs that will be incurred in the future by the Tribes, assessing injury to,
15 destruction of, or loss of the natural resources of the Upper Columbia River Basin
16 Site for which the Tribes are a Natural Resource Damages Trustee, including loss
17 of use of such resources and costs of restoration, replacement, or acquisition of
18 equivalent resources.

19 **X. DECLARATORY RELIEF REGARDING NATURAL RESOURCE
20 DAMAGES UNDER CERCLA**

21 10.1 The Tribes reallege and incorporate by reference paragraphs 1.1
22 through 9.3 as though fully set forth herein.

23 10.2 Teck Cominco is liable under 42 U.S.C. § 9607(a) and (f) for all
24 damages to the Reservation Environment's natural resources.

25 10.3 The releases or threatened releases into the environment at the Upper
26 Columbia River and Lake Roosevelt have caused and continue to cause injury to,
destruction of, and loss of natural resources at the Upper Columbia River Basin

1 Site for which the Tribes is a Natural Resource Damages Trustee within the
2 meaning of 42 U.S.C. § 9607(a)(4)(C).

3 10.4 An actual controversy within the jurisdiction of this Court exists
4 between the Tribes and Teck Cominco.

5 10.5 Pursuant to 28 U.S.C. § 2201(a) and 42 U.S.C. § 9613(g)(2)(B), the
6 Tribes are entitled to a declaratory judgment that Teck Cominco is strictly, jointly,
7 and severally liable under CERCLA for all damages for injury to, destruction of, or
8 loss of natural resources that the Tribes have incurred and will incur in the future.

9 **XI. NATURAL RESOURCE DAMAGES UNDER CERCLA**

10 11.1 The Tribes reallege and incorporate by reference paragraphs 1.1
11 through 10.4 as though fully set forth herein.

12 11.2 Pursuant to 42 U.S.C. § 9607(a)(4)(C), Teck Cominco is strictly,
13 jointly and severally liable for damages for injury to, destruction of, or loss of
14 natural resources at the Upper Columbia River Basin Site for which the Tribes are
15 a Natural Resource Damages Trustee, including loss of use of such resources and
16 costs of restoration, replacement, or acquisition of equivalent resources.

17 **XII. PRAYER FOR RELIEF:**

18 THEREFORE, having alleged the foregoing facts and causes of action
19 against Teck Cominco, the following relief is requested:

20 **A. Pakootas and Michel Request:**

21 1. Judgment against Teck Cominco for civil penalties to the maximum
22 extent permitted by CERCLA for each day during which it failed to comply with
23 the UAO.

24 2. Judgment against Teck Cominco for costs of litigation, including
25 attorneys' fees, incurred in bringing this suit pursuant to 42 U.S.C. § 9659(f).

26 3. Such other and further relief as equity and justice require.

1 **B. The Tribes Request:**

2 1. A declaration that Teck Cominco is strictly, jointly, and severally
3 liable under CERCLA for all costs of remedial or removal actions incurred by the
4 Tribes as a result of responding to releases of hazardous substances into the
5 environment at the Upper Columbia River and Lake Roosevelt.

6 2. A declaration that Teck Cominco is strictly, jointly, and severally
7 liable under CERCLA for all costs of assessing injury to, destruction of, or loss of
8 natural resources incurred by the Tribes resulting from the release of hazardous
9 substances into the environment at the Upper Columbia River and Lake Roosevelt.

10 3. A declaration that Teck Cominco is strictly, jointly, and severally
11 liable under CERCLA for damages for injury to, destruction of, or loss of natural
12 resources incurred or that will be incurred by the Tribes resulting from the release
13 of hazardous substances into the environment at the Upper Columbia River and
14 Lake Roosevelt.

15 4. Judgment against Teck Cominco for all removal or remedial action
16 costs incurred by the Tribes as a result of responding to releases of hazardous
17 substances into the environment at the Upper Columbia River and Lake Roosevelt,
18 in an amount to be proven at trial and including interest as provided in 42 U.S.C.
19 § 9607(a).

20 5. Judgment against Teck Cominco for all costs of assessing injury to,
21 destruction of, or loss of natural resources incurred by the Tribes resulting from the
22 release of hazardous substances into the environment at the Upper Columbia River
23 and Lake Roosevelt, in an amount to be proven at trial and including interest as
24 provided in 42 U.S.C. § 9607(a).

25 6. Judgment against Teck Cominco for damages based on, destruction
26 of, or loss of natural resources incurred by the Tribes resulting from the release of

1 hazardous substances into the environment at the Upper Columbia River and Lake
2 Roosevelt, in an amount to be proven at trial and including interest as provided in
3 42 U.S.C. § 9607(a).

4 7. Such other and further relief as equity and justice require.

5 DATED: May 16, 2008, 2008.

6 SHORT CRESSMAN & BURGESS PLLC

7
8 By: /s/ Paul J. Dayton

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16 Donald R. Michel, and the Confederated
17 Tribes of the Colville Reservation

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CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2008 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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