

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN**

UNITED STATES OF AMERICA and
STATE OF MICHIGAN,

Plaintiffs,

v.

HILLSDALE COMMUNITY HEALTH
CENTER,
W.A. FOOTE MEMORIAL HOSPITAL,
D/B/A ALLEGIANCE HEALTH,
COMMUNITY HEALTH CENTER OF
BRANCH COUNTY, and
PROMEDICA HEALTH SYSTEM, INC.,

Defendants.

Case No.: 5:15-cv-12311-JEL-DRG
Judge Judith E. Levy
Magistrate Judge David R. Grand

**[PROPOSED] PROTECTIVE ORDER GOVERNING CONFIDENTIAL
AND HIGHLY CONFIDENTIAL INFORMATION**

In the interests of (i) promoting an efficient and prompt resolution of this Action; (ii) facilitating discovery by the Parties litigating this Action; and (iii) protecting confidential information from improper disclosure or use, and pursuant to Fed. R. Civ. P. 26(c)(1)(G), the Court ORDERS as follows:

A. Definitions

1. As used in this Order:

(a) “Action” means the above-captioned action pending in this Court,

including any related discovery, pretrial, post-trial, or appellate proceedings.

(b) “Allegiance” means W.A. Foote Memorial Hospital, d/b/a Allegiance Health, its divisions, subsidiaries, affiliates, partnerships and joint ventures, and all directors, officers, employees, agents, and representatives of the foregoing.

(c) “Confidential Information” means any trade secret or other confidential research, development, or commercial information, as such terms are used in Fed. R. Civ. P. 26(c)(1)(G), or any document, transcript, or other material containing such information that has not been published or otherwise made publicly available.

(d) “Disclosed” means shown, divulged, revealed, produced, described, transmitted, or otherwise communicated, in whole or in part.

(e) “Document” means any document or electronically stored information, as the term is used in Fed. R. Civ. P. 34(a).

(f) “Highly Confidential Information” means any Confidential Information which the Protected Person reasonably believes to be so competitively sensitive that it is entitled to extraordinary protections.

(g) “Investigations” means the pre-Complaint inquiry into the matters at issue in this Action by the Department of Justice and/or the State of Michigan.

(h) “Investigation Materials” means non-privileged documents,

testimony, or other materials relating to the Investigations that (i) any non-party provided to any Party, either voluntarily or under compulsory process; (ii) any Party provided to any non-party during the Investigations; and/or (iii) Allegiance provided to either Plaintiff during the Investigations.

(i) “Outside Counsel of Record” means the firm(s) of attorneys representing Allegiance in this proceeding.

(j) “Party” means any Plaintiff or Allegiance. “Parties” means collectively the Plaintiffs and Allegiance.

(k) “Person” means any natural person, corporate entity, partnership, association, joint venture, governmental entity, or trust.

(l) “Plaintiffs” means the United States of America and the State of Michigan, the Antitrust Division of the Department of Justice, the Michigan Attorney General’s Office, and all employees, agents, and representatives of the Antitrust Division of the Department of Justice and the Michigan Attorney General’s Office.

(m) “Protected Person” means any person (including a Party) that has provided Investigation Materials or that provides documents, testimony, or other materials in this Action voluntarily or in response to a discovery request or subpoena.

B. Designation of Confidential or Highly Confidential Information

2. Within five days after the Court's entry of this Order, each Plaintiff shall send by email, facsimile, or overnight delivery a copy of this Order to each non-party Protected Person (or, if represented by counsel, the non-party Protected Person's counsel) that provided Investigation Materials to that Plaintiff.

3. A Protected Person may designate as Confidential Information or Highly Confidential Information any Investigation Materials or any documents, transcripts of testimony, or other material that it provides to any Party during this Action, to the extent such information constitutes Confidential Information, as defined in subparagraph 1(c) of this Order, or Highly Confidential Information, as defined in subparagraph 1(f). Such designations constitute a representation to the Court that such Protected Person (and counsel, if any) in good faith believes that the information so designated constitutes Confidential Information or Highly Confidential Information.

4. Investigation Materials provided to a Party during the Investigations, or any documents or transcripts of testimony provided to a Party during the Investigations that was previously designated "confidential" shall be treated as Confidential Information and need not be re-designated as Confidential pursuant to this section. If the Protected Person wants to change the designation of any Investigation Materials provided to a Party during the Investigations that the

Protected Person previously designated as “confidential,” the Protected Person must follow the procedures in this section for designating Confidential or Highly Confidential Information.

5. The following procedures govern the process for Protected Persons to designate Investigation Materials produced prior to the Court’s entry of this Order as Confidential or Highly Confidential Information:

(a) Testimony. All transcripts of depositions taken by Plaintiffs during the Investigation or during this Action prior to entry of this Order will be treated as Confidential Information in their entirety for 21 days after entry of this Order. At any time during the 21-day period, each Protected Person may designate as Confidential Information or Highly Confidential Information any portion of the transcript, by page and line, and any accompanying exhibits produced by the Protected Person. To be effective, such designations must be provided in writing, by overnight mail or email, to Plaintiffs’ counsel. Within three days following the 21-day period, Plaintiffs shall transmit to Allegiance all deposition confidentiality designations received from non-Parties.

(b) Documents. All documents produced by Protected Persons to Plaintiffs during the Investigation will be treated as Confidential Information in their entirety for 21 days after entry of this Order. At any time during the 21-day period, any Protected Person may designate as Confidential Information or Highly

Confidential Information any document or portion of a document produced to Plaintiffs by providing Plaintiffs with document production page numbers or other means of easily identifying the designated documents. To be effective, such designations must be provided in writing, by overnight mail or email, to Plaintiffs' counsel. Within three days following the 21-day period, Plaintiffs shall transmit to Allegiance all confidentiality designations received from non-Parties.

6. The following procedures govern the process for Protected Persons to designate as Confidential or Highly Confidential any information that they disclosed in this Action after this Order is entered, including but not limited to information in response to requests under Fed. R. Civ. P. 30, 31, 33, 36 and 45, and documents disclosed in response to Fed. R. Civ. P. 33(d), 34(b)(2) and (c), or 45:

(a) Testimony. All transcripts of depositions taken in this Action after entry of this Order will be treated as Highly Confidential Information in their entirety for 21 days after the date when a complete and final copy of the transcript has been made available to the deponent (or the deponent's counsel, if applicable). Within five business days of receipt of the final transcript, the Party who noticed the deposition shall provide the final transcript to the deponent. Within 21 days following receipt of the final transcript, the deponent may designate as Confidential or Highly Confidential Information any portion of the deposition transcript, by page(s) and line(s), and any deposition exhibits provided by the deponent or the

deponent's employer. To be effective, such designations must be provided in writing, by overnight mail or email, to Plaintiffs' and Allegiance's counsel. Any portion of the transcript or exhibits not so designated pursuant to this subparagraph 6(a) shall not be treated as Confidential or Highly Confidential Information, despite any prior designation of confidentiality.

When a Party is entitled under this Order to question a deponent about a document or information that has been designated by a different Protected Person as Confidential or Highly Confidential, the Party that asked such questions shall designate as Confidential or Highly Confidential Information the portion of the transcript relating to such Confidential or Highly Confidential document or information.

(b) Documents. A Protected Person who designates as Confidential Information any document that they produced in this Action must stamp or otherwise mark each page containing Confidential Information with the designation "CONFIDENTIAL" in a manner that will not interfere with legibility or audibility. If the entire document is not Confidential Information, the Protected Person shall stamp or label only those pages that contain Confidential Information. Likewise, a Protected Person who designates as Highly Confidential information any document that they produced in this Action must stamp or otherwise mark each page containing Highly Confidential Information with the designation "HIGHLY

CONFIDENTIAL” in a manner that will not interfere with legibility or audibility.

If the entire document is not Highly Confidential Information, the Protected Person shall stamp or label only those pages that contain Highly Confidential Information.

(c) Electronic Documents and Data. Where a Protected Person produces electronic files and documents in native electronic format, such electronic files and documents shall be designated by the Protected Person for protection under this Order by appending to the file names or designators information indicating whether the file contains Confidential or Highly Confidential Information, or by any other reasonable method for appropriately designating such information produced in electronic format, including by making such designations in reasonably accessible metadata associated with the files. Where Confidential Information is produced in electronic format on a disk or other medium that contains exclusively Confidential Information, the “CONFIDENTIAL” designation may be placed on the disk or other medium. Likewise, where Highly Confidential Information is produced in electronic format on a disk or other medium that contains exclusively Highly Confidential Information, the “HIGHLY CONFIDENTIAL” designation may be placed on the disk or other medium. When electronic files or documents in native form are printed for use at deposition, in a court proceeding, or for provision in printed form to any person described in paragraph 12 or 13, the Party printing the electronic files or documents shall affix a

legend to the printed document saying “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL” and include the production number and designation associated with the native file.

(d) Whenever discovery is sought from a non-party in this Action, a copy of this Order shall accompany the discovery request or subpoena. Non-parties may designate materials as Confidential or Highly Confidential pursuant to the procedures in this paragraph.

7. If a Protected Person inadvertently produces material subject to the attorney-client privilege, work-product protection, or any other applicable privilege or protection, the applicable privilege and/or protection shall not be waived if a request for return of such inadvertently produced material is made promptly after the producing Protected Person learns of its inadvertent production. Upon such prompt notice, the Parties will comply with Federal Rule of Civil Procedure 26(b)(5)(B) and any other applicable rules or orders.

8. In the event of a disclosure of any Confidential or Highly Confidential Information to any Person(s) not authorized to receive such disclosure under this Order, the Party responsible for having made such disclosure shall promptly notify the Protected Person whose material has been disclosed and provide to such Protected Person all known relevant information concerning the nature and circumstances of the disclosure. The disclosing Party shall also promptly take all

reasonable measures to retrieve the improperly disclosed material and to ensure that no further or greater unauthorized disclosure and/or use thereof is made.

Unauthorized or inadvertent disclosure shall not change the confidential status of any disclosed material or waive the right to maintain the disclosed material as containing Confidential or Highly Confidential Information.

9. Any production of documents or testimony not designated as Confidential or Highly Confidential Information will not be deemed a waiver of any future claim of confidentiality concerning such information if it is later designated as Confidential or Highly Confidential Information. If at any time prior to the trial of this Action, a Protected Person realizes that it should have designated as Confidential or Highly Confidential any Investigation Materials or any documents, testimony, or other materials that Person previously produced during discovery in this Action, it may so designate such documents, testimony, or other materials by notifying the Parties in writing. No prior disclosure of newly designated Confidential or Highly Confidential Information shall violate this Order and the Parties have no obligations regarding such prior disclosures, if any.

10. If a Party receives a confidentiality waiver to allow a deponent that is not related to the waiving Party to be questioned on information that would otherwise be Confidential or Highly Confidential Information, that waiver (including identifying the specific Confidential or Highly Confidential Information

to which it pertains) must be disclosed to counsel for all other Parties as soon as practicable, but no later than two business days prior to the deposition of the witness in question, unless good cause for a later disclosure is shown.

C. Challenges to Confidential or Highly Confidential Designation

11. Any Party, based on the good faith belief that specific information designated as Confidential or Highly Confidential Information does not constitute Confidential or Highly Confidential Information, may notify the Protected Person (and all Parties) in writing of disagreement with the designation. Such challenge shall identify with particularity the document(s) or information that the objecting Party contends should be designated differently, and shall separately state the grounds for each objection with particularity. All materials objected to shall continue to be treated as Confidential or Highly Confidential Information pending resolution of the dispute. The objecting Party shall confer with the Protected Person (as well as any other interested Party) within five business days of making its objection, or such other time as the Parties may agree to in a good faith effort to resolve the dispute. The Protected Person shall thereafter have 14 days to move the Court for an order upholding the designation. The burden of proving that the designation is proper shall be upon the person seeking to uphold the designation. If the Protected Person fails to move the Court in accordance with this paragraph, or if the Court finds the designation of Confidential Information or Highly Confidential

Information to have been inappropriate, the challenged designation shall be considered rescinded. The Parties thereafter shall not be required to treat the information as Confidential or Highly Confidential Information under this Order.

The Parties' entry into this Order shall not preclude or prejudice either the Protected Person or the objecting Party from arguing for or against any designation, establish any presumption that a particular designation is valid, or alter the burden of proof that would otherwise apply in a dispute over discovery or disclosure of information.

D. Disclosure of Confidential or Highly Confidential Information

12. Confidential Information may be disclosed only to the following persons:

(a) the Court and all persons assisting the Court in this Action, including law clerks, court reporters, and stenographic or clerical personnel;

(b) counsel for the Plaintiffs in this Action and their paralegals and other professional personnel (including support and IT staff), and agents or independent contractors retained by the Plaintiffs to assist in this Action whose functions require access to the information;

(c) Outside Counsel of Record for Allegiance, including any attorneys, paralegals, and other professional personnel (including support and IT staff) that such outside counsel assigns to this Action whose functions require access to the information;

(d) outside vendors or service providers (such as copy-service providers and document-management consultants) retained by a Party to assist that Party in this Action provided that they shall first execute an Agreement Concerning Confidentiality in the form of Appendix A attached hereto;

(e) any mediator or arbitrator that the Parties engage in this Action or that this Court appoints;

(f) persons who are authors, addressees, and recipients of the document, to the extent they have previously had lawful access to the document disclosed or to be disclosed; or persons for whom counsel for Plaintiffs or Allegiance believes in good faith previously received or had access to the document, unless the person indicates that he or she did not have access to the document;

(g) any person retained by a Party to serve as a testifying or consulting expert in this Action, including employees of the firm with which the expert or consultant is associated or independent contractors who assist the expert's work in this Action, provided that they shall first execute an Agreement Concerning Confidentiality in the form of Appendix A attached hereto; and

(h) outside trial consultants (including, but not limited to, graphics consultants) provided that they shall first execute an Agreement Concerning Confidentiality in the form of Appendix A attached hereto; and

(i) one in-house attorney for Allegiance, not involved in business decisions, whose name shall be disclosed to the U.S. Department of Justice and the State of Michigan at least 5 business days prior to the effective date of such designation and who shall be agreed on by the parties or, in the absence of agreement, ordered by the Court, provided that the in-house attorney shall first execute an Agreement Concerning Confidentiality in the form of Appendix A attached hereto. If Allegiance seeks to change the one in-house attorney that may receive access to Confidential Information, the Defendant must provide notice to Plaintiffs at least 10 business days prior to the effective date of such change.

13. Highly Confidential Information may be disclosed only to the persons set forth in Section D.12(a)-(h) above.

14. Counsel for the Party making the disclosure must retain the original of the Agreement Concerning Confidentiality in the form of Appendix A attached hereto for a period of at least one year following the final resolution of this Action.

15. Each individual described in paragraphs 12 and 13 of this Order to whom information designated as Confidential Information or Highly Confidential Information is disclosed must not disclose that Confidential Information or Highly Confidential Information to any other individual, except as provided in this Order.

16. Recipients of Confidential or Highly Confidential Information under this Order may use such material solely for the prosecution and defense of this

Action and not for any business, commercial, or competitive purpose or in any other litigation proceeding. Nothing contained in this Order, however, will affect or restrict the rights of any Party with respect to its own documents or information produced in this Action. Further, nothing contained in this Order prevents Plaintiffs, subject to taking appropriate steps to preserve the confidentiality of such information, from disclosing or using such information designated as Confidential or Highly Confidential (i) in the course of any other legal proceeding in which the U.S. Department of Justice or the State of Michigan is a party; (ii) for the purpose of securing compliance with a Final Judgment in this Action; or (iii) for law enforcement purposes.

17. Nothing in this Order:

(a) limits a Protected Person's use or disclosure of its own information designated as Confidential or Highly Confidential Information;

(b) prevents disclosure of Confidential or Highly Confidential Information with the consent of the Protected Person that designated the material as Confidential or Highly Confidential;

(c) prevents disclosure by a Party of Confidential or Highly Confidential Information (i) that is or has become publicly known through no fault of that Party; (ii) lawfully acquired by or known to that Party independent of receipt in discovery in this Action; (iii) previously produced, disclosed and/or provided to

that Party without an obligation of confidentiality and not by inadvertence or mistake; or (iv) pursuant to an order of a Court or as may be required by law; or

(d) prevents Plaintiffs' retention or use or disclosure of Investigation Materials outside the context of the litigation to the extent permitted by applicable law or regulation governing such pre-complaint discovery including the Hart-Scott-Rodino Act, 15 U.S.C. § 18a and the Antitrust Civil Process Act, 15 U.S.C. §§ 1311-14, or for law enforcement purposes, or as required by law, court order, or regulation.

E. Use of Information Designated Confidential or Highly Confidential in This Action

18. If any documents, testimony, or other materials designated under this Order as Confidential or Highly Confidential Information are included in any pleading, motion, exhibit, or other paper to be filed with the Court, the Party seeking to file must follow the procedures set forth in E.D. Mich. LR 5.3. A request for the Court to allow filing under seal shall include the proposed redactions. If this Court grants leave to file the document under seal, the filing Party shall file with the Clerk of this Court a redacted version of the filing. Nothing in this Order shall restrict the Parties or any interested member of the public from challenging the filing of any Confidential or Highly Confidential Information under seal.

19. Disclosure at trial of documents and testimony designated as Confidential Information or Highly Confidential Information is governed as

follows:

(a) Absent a ruling by the Court to the contrary, documents or deposition testimony designated as Confidential or Highly Confidential Information by a Party or non-party that appear on an exhibit list or in deposition designations that are admitted into evidence at trial will be disclosed on the public record, and any examination relating to such information will likewise be disclosed on the public record, after compliance with the following process:

- i. Within seven days after the Parties file pretrial exhibit lists and within seven days after the Parties file deposition designations, each Party shall ensure that each non-party receives a written notice of any exhibits or designated deposition testimony listed by that Party that the non-party designated as Confidential or Highly Confidential Information, including the document-production page numbers and/or page and line numbers of deposition testimony. The Party will inform the non-party that, absent objection, that Confidential or Highly Confidential Information may be disclosed on the public record.
- ii. If a Party or non-party objects to potential public disclosure of all or part of the information identified in the

written notice, within seven days of the date on which it received the notice, the Party or non-party shall identify to the notifying Party the information designated as Confidential or Highly Confidential Information for which it seeks protection from public disclosure. The Party or non-party objecting to public disclosure and the notifying Party shall attempt to resolve their differences by, for example, redacting irrelevant Confidential or Highly Confidential Information. If no resolution is reached and the Party or non-party continues to object to potential public disclosure of the information at trial, the Party or non-party must, within fourteen days after receipt of written notice, file a motion for additional protection.

(b) Absent a ruling by the Court to the contrary, documents or deposition testimony designated as Confidential or Highly Confidential Information by a Party or non-party that do not appear on an exhibit list or in deposition designations that are admitted into evidence at trial will be disclosed on the public record, and any examination relating to such information will likewise be disclosed on the public record, after compliance with the following process:

i. A Party must alert the Court before doing so that it intends

to use Confidential or Highly Confidential Information of a Party or non-party and that that Party or non-party is not on notice.

- ii. At that time, the Court will determine whether to seal the courtroom while such Confidential or Highly Confidential Information is being discussed.
- iii. Within one day after the Party uses that Confidential or Highly Confidential Information, that Party shall ensure that a non-party that designated the material receives a written notice of same. The Party will inform the non-party that, absent objection, that Confidential or Highly Confidential Information will be disclosed on the public record.
- iv. If the Party or non-party continues to object to public disclosure of the information at trial, the Party or non-party must, within seven days after receipt of written notice, file a motion for additional protection.

F. Procedures Upon Termination of This Action

20. The obligations imposed by this Order survive the termination of this Action unless the Court, which shall retain jurisdiction to resolve any disputes

arising out of this Order, orders otherwise. Within 90 days after the expiration of the time for appeal of an order, judgment, or decree terminating this litigation, all persons having received information designated as Confidential Information or Highly Confidential Information must either make a good faith effort to return such material and all copies thereof to the Protected Person (or the person's counsel if represented by counsel) that produced it, or destroy or delete all such Confidential or Highly Confidential Information and certify that fact in writing to the Party or Protected Person. Counsel for Plaintiffs and Allegiance will be entitled to retain court papers, deposition and trial transcripts, exhibits, and work product, provided that the Parties and their counsel do not disclose the portions of court papers, deposition and trial transcripts, exhibits, or work product containing information designated as Confidential or Highly Confidential Information to any person except pursuant to court order or agreement with the Protected Person that produced the Confidential or Highly Confidential Information or as otherwise permitted herein. Counsel for Plaintiffs will also be entitled to retain information designated as Confidential or Highly Confidential (i) for conducting any other legal proceeding in which the U.S. Department of Justice or the State of Michigan is a party; (ii) for the purpose of securing compliance with a Final Judgment in this Action; or (iii) for law enforcement purposes. All Confidential or Highly Confidential Information returned to the Parties or their counsel by the Court likewise must be disposed of in

accordance with this paragraph. Nothing in this Paragraph, however, restricts the rights of the Parties under paragraphs 16 and 17 of this Order.

G. Right to Seek Modification

21. Nothing in this Order limits any person, including members of the public, Party, or Protected Person, from seeking further or additional protections of any of its materials or modification of this Order upon motion duly made pursuant to the Rules of this Court, including, without limitation, an order that certain material not be produced at all or is not admissible evidence in this Action or any other proceeding.

H. The Privacy Act

22. This Order constitutes a court order within the meaning of the Privacy Act, 5 U.S.C. § 552a(b)(11).

I. Protected Health Information

23. Confidential Information (as defined in subparagraph 1(c)) expressly includes Protected Health Information (“PHI”), as that term is defined by the Health Insurance Portability and Accountability Act (“HIPAA”), 45 C.F.R. Parts 160 and 164.

24. Confidential Information or Highly Confidential Information that includes PHI produced by any Protected Person to Plaintiffs or Allegiance may be produced by delivery of an encrypted mass storage device, such as a hard drive,

DVD, floppy disk, “jump” drive, or thumb drive. Confidential Information also expressly includes any decryption keys, passwords, or the like used by any Person to secure or encrypt Confidential Information that includes PHI. Confidential Information also expressly includes the individual electronic records or files contained in encrypted mass storage media used to produce PHI. Confidential Information also expressly includes any records or files containing PHI that are unencrypted and thereby reduced, transferred, saved, or re-encrypted in any other medium by any Person. (Examples of such records or files may include, by way of description and not limitation, paper copies or printouts, facsimiles, unencrypted files, or other mass storage devices upon which such Confidential Information may be stored or located.)

25. Any Person in possession of Confidential Information shall treat that Confidential Information in accordance with the terms of this Order for the entire period of time such Person remains in possession or maintains such Confidential Information, regardless of whether or not that period extends beyond the time period specified in Section F.

26. The procedures for the protection of Confidential Information as set forth herein provide sufficient protection such that this Order meets the requirements for a “qualified protective order” under HIPAA, 45 CFR 164.512(e)(1)(v).

J. Persons Bound by This Order

27. This Order shall be binding on the Parties to this Action, their attorneys, and their successors, personal representatives, administrators, assigns, parents, subsidiaries, divisions, affiliates, employees, agents, retained consultants and experts, and any persons or organizations over which they have direct control.

SO ORDERED:

Dated: October ____, 2015

BY THE COURT:

Hon. Judith E. Levy
U.S. District Judge

APPENDIX A

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN**

UNITED STATES OF AMERICA and
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HILLSDALE COMMUNITY HEALTH
CENTER,
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Case No.: 5:15-cv-12311-JEL-DRG
Judge Judith E. Levy
Magistrate Judge David R. Grand

AGREEMENT CONCERNING CONFIDENTIALITY

I, _____, am employed as _____
_____ by _____. I hereby
certify that:

1. I have read the Protective Order Governing Confidential and
Highly Confidential Information (“Protective Order”) entered in the
above-captioned action, and understand its terms.

2. I agree to be bound by the terms of the Protective Order and agree to
use information designated as Confidential or Highly Information provided to me
only for the purpose of this litigation.

3. I understand that my failure to abide by the terms of the Protective Order entered in the above-captioned action will subject me, without limitation, to civil and criminal penalties for contempt of Court.

4. I submit to the jurisdiction of the United States District Court for the Eastern District of Michigan solely for the purpose of enforcing the terms of the Protective Order entered in the above-captioned action and freely and knowingly waive any right I may otherwise have to object to the jurisdiction of said Court.

5. I make this certificate this__day of_____, 201__ .

(SIGNATURE)