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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91227868
Party	Plaintiff HEALTH NEW ENGLAND, INC.
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Submission	Motion to Suspend for Civil Action
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE  
TRADEMARK TRIAL AND APPEAL BOARD**

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HEALTH NEW ENGLAND, INC.	)	
	)	Opposition No. 91227868
Plaintiff-Opposer	)	Serial No.: 86/779,873
	)	Mark: TRINITY HEALTH NEW ENGLAND
v.	)	& DESIGN
	)	
TRINITY HEALTH CORPORATION	)	
	)	
Defendant-Applicant.	)	

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Commissioner for Trademarks  
P.O. Box 1451  
Alexandria, VA 22313-1451

**RESPONSE TO MOTION TO SUSPEND**

Trinity Health Corporation (“Trinity Corp.” and/or “Applicant”) has inappropriately represented to the United States District Court for the District of Massachusetts (the “Court”) that the United States Patent and Trademark Office (“USPTO”) found that the TRINITY HEALTH NEW ENGLAND MARK, as shown in U.S. Trademark Application No.: 86/779,873 (“the ‘873 Application”), is unlikely to cause consumer confusion with respect to Health New England, Inc. (“Health New England” and/or “Opposer”)’s HEALTH NEW ENGLAND marks, as shown in U.S. Trademark Registration No.: 1,426,061 (“the ‘061 Registration”) and U.S. Trademark Application No.: 86/771,842 (“the ‘842 Application”) (collectively the “HEALTH NEW ENGLAND marks”). A review of the relevant file history, however, shows that the HEALTH NEW ENGLAND marks were never discovered, recognized, or otherwise considered by the USPTO prior to the present Opposition

proceeding before this Board. Trinity Corp. now moves<sup>1</sup> to suspend the present Opposition proceeding in an attempt to prevent this Board from considering the likelihood of confusion between the marks at issue so that Trinity Corp. can continue to inappropriately represent to the Court that the USPTO has fully vetted the likelihood of confusion between the TRINITY HEALTH NEW ENGLAND and HEALTH NEW ENGLAND marks.

Accordingly, Health New England submits this Response in opposition to Trinity Corps.'s Motion to Suspend in View of Pending Civil Action.

## **I. STATEMENT OF CASE**

1. On January 20, 1987, Health New England's U.S. trademark application No.: 73/580,915 (filed on February 3, 1986 for the mark HEALTH NEW ENGLAND) matured into the '061 Registration.<sup>2</sup>
2. On September 29, 2015, Health New England filed the '842 Application designating an intent to use the HEALTH NEW ENGLAND mark in connection with home health care services, hospitals, medical and pharmaceutical consultation, medical services, nursing services, physician services and providing long-term care facilities, in international class 44.<sup>3</sup>
3. On October 6, 2015, Trinity Corp. filed the '873 Application for the mark TRINITY HEALTH NEW ENGLAND also in connection with home health care services, hospitals, medical and pharmaceutical consultation, medical services, nursing services, physician services and providing long-term care facilities, and also in international class 44.
4. On November 23, 2015, Health New England filed its Complaint against Trinity Corp. with the Court for, *inter alia*, infringement of the '061 Registration.<sup>4</sup>
5. The '873 Application did not publish for opposition until March 22, 2016, and did so without the '061

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<sup>1</sup> Dkt. # 4, Motion to Suspend in View of Pending Civil Action.

<sup>2</sup> See Ex. A to Dkt. # 1, Notice of Opposition.

<sup>3</sup> See Ex. B to Dkt. # 1, Notice of Opposition.

<sup>4</sup> See Ex. A to Dkt. # 4, Motion to Suspend in View of Pending Civil Action.

Registration or the '842 Application being discovered, recognized, or otherwise considered by the USPTO.<sup>5</sup>

6. On April 11, 2016, Trinity Corp. inappropriately represented to the Court that the USPTO did not find a likelihood of confusion between the TRINITY HEALTH NEW ENGLAND mark as shown in the '873 Application, and the HEALTH NEW ENGLAND marks. Specifically, Trinity represented to the Court that:

**...the PTO found Trinity's Application No. 86/779,873 for the mark TRINITY HEALTH NEW ENGLAND is not likely to be confused with any other marks, including any of [Health New England]'s federal application or registrations. The PTO did not cite any of Plaintiff's federal applications or registrations as likely to be confused with any Trinity trademarks and the PTO has approved the '873 Application...Trinity has not engaged in deceptive or unfair conduct as supported and confirmed by the PTO approval of Trinity's '873 Application...**<sup>6</sup>

7. Health New England subsequently filed the present opposition action on May 13, 2016.<sup>7</sup>

## **II. ARGUMENT IN SUPPORT OF OPPOSER'S RESPONSE TO APPLICANT'S MOTION TO SUSPEND**

### **A. Trinity Corp.'s Motion to Suspend the Present Opposition Should Be Denied Pursuant to the Unusual Circumstances Concerning the Publication of the '873 Application.**

It is well established that TTAB proceedings may be suspended pursuant to a pending civil action in an article III court.<sup>8</sup> The Board, however, may deny suspension of a proceeding where "unusual circumstances" exist.<sup>9</sup> Accordingly, Health New England respectfully submits that such unusual circumstances exist in the case at hand.

Specifically, Trinity Corp. is inappropriately representing to the Court that the USPTO fully vetted the likelihood of confusion between the TRINITY HEALTH NEW ENGLAND and HEALTH NEW ENGLAND

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<sup>5</sup> See *Infra*.

<sup>6</sup> Ex. A, Defendant, Trinity Health Corporation's Answer, Affirmative Defenses, and Counterclaims (hereinafter "Trinity Corp.'s Answer"), *Health New England, Inc. v. Trinity Health Corporation*, Civil Action No.: 3:15-cv-30206-MAP (the "Federal Action"), pages 10 and 11, "Eleventh Affirmative Defense" and "Thirteenth Affirmative Defense" (emphasis added).

<sup>7</sup> See Dkt. # 1, Notice of Opposition.

<sup>8</sup> See Trademark Rule 2.117(a) and TBMP § 510.02(a)

<sup>9</sup> See *id*.

marks, despite the fact that the Examiner of the ‘873 Application never considered or even discovered the HEATH NEW ENGLAND marks. A review of the relevant file history demonstrates that the Examiner of the ‘873 application failed to discover the ‘061 Registration or the ‘842 Application, despite the facts that: 1) all of the terms in both the ‘061 Registration and the ‘842 Application appear within the ‘873 Application; 2) both the ‘061 Registration and the ‘842 Application were filed before the ‘873 Application; and 3) the ‘842 and the ‘873 applications list the exact same classes.<sup>10</sup> In particular, the Examiner’s search history reveals that the Examiner spent fifteen minutes searching for phonetic equivalents of “TRINITY”, “HEALTH”, and “NEW”, but failed to search for phonetic equivalents to “HEALTH NEW ENGLAND”.<sup>11</sup> A search via the USPTO’s TESS website, however, reveals that simply searching for “HEALTH NEW ENGLAND” immediately retrieves both the ‘061 Registration and the ‘842 Application.<sup>12</sup>

Nevertheless, Trinity is now representing to the Court that:

**...the PTO found Trinity’s Application No. 86/779,873 for the mark TRINITY HEALTH NEW ENGLAND is not likely to be confused with any other marks, including any of [Health New England]’s federal applications or registrations. The PTO did not cite any of Plaintiff’s federal applications or registrations as likely to be confused with any Trinity trademarks and the PTO has approved the ‘873 Application...Trinity has not engaged in deceptive or unfair conduct as supported and confirmed by the PTO approval of Trinity’s ‘873 Application...**<sup>13</sup>

Based on the above quoted statements from Trinity Corp.’s Answer, it is patently obvious that Trinity, by implication, is inferring that the USPTO has fully vetted the likelihood of confusion between the TRINITY HEALTH NEW ENGLAND and HEALTH NEW ENGLAND marks and subsequently permitted the allowance of the TRINITY HEALTH NEW ENGLAND mark **in light of the HEALTH NEW ENGLAND marks.**

As stated in TMEP § 704.01, however, the Examiner’s initial determination to publish the ‘873 Application only means that the Examiner believed that the ‘873 Application was in condition for publication for opposition, *i.e.*, public inspection, and does not constitute registration/approval. As such, Health New England respectfully submits that it is improper for Trinity Corp. to portray publication of the ‘873 Application as a *confirmation* by the USPTO that the TRINITY HEALTH NEW ENGLAND mark is unlikely to cause

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<sup>10</sup> See Ex. B, XSearch Search Summary for U.S. Trademark Application 86/779873.

<sup>11</sup> See *id.*

<sup>12</sup> See Ex. C, TESS Search Results for “HEALTH NEW ENGLAND”, executed July 21, 2016.

<sup>13</sup> Ex. A, Trinity Corp.’s Answer, pages 10 and 11, “Eleventh Affirmative Defense” and “Thirteenth Affirmative Defense” (emphasis added).

consumer confusion with respect to the HEALTH NEW ENGLAND marks.

Moreover, and although not technically dispositive, many article III courts will give great weight to the expert opinions of the USPTO.<sup>14</sup> Accordingly, Health New England respectfully submits that a suspension of the present opposition incurs a significant risk that the Court will defer to the expertise of the USPTO under the false belief that the USPTO has already fully vetted the likelihood of confusion between the TRINITY HEALTH NEW ENGLAND and HEALTH NEW ENGLAND marks.

Therefore, Health New England respectfully submits that the failure of the Examiner to discover and consider the HEALTH NEW ENGLAND marks, as well as Trinity Corp.'s blatant attempt to misrepresent to the Court that the USPTO has fully vetted and failed to find a likelihood of confusion between the TRINITY HEALTH NEW ENGLAND and HEALTH NEW ENGLAND marks, constitute highly unusual circumstances.

Accordingly, the Board should deny Trinity's Corp.'s Motion to Suspend in View of Pending Civil Action.

**B. A Decision by This Board Concerning the Likelihood of Confusion Between the Marks at Issue Will Likely Be Adopted by The Court.**

Health New England respectfully submits that the pending Federal Action is still in its early stages. Thus, it is highly likely that this Board would render a final determination of opposition well before a final determination of the likelihood of confusion by the Court. Additionally, as stated above, article III courts often give great weight to the expert opinions of the USPTO. Moreover, the United States Supreme Court now even requires article III courts to afford the TTAB deference "so long as the other ordinary elements of issue preclusion are met [and] the usages adjudicated by the TTAB are materially the same as those before the district court..."<sup>15</sup>

Therefore, Health New England respectfully submits that there is a high probability that any final determination by this Board would be essentially adopted by the Court thus conserving judicial resources.

**III. CONCLUSION**

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<sup>14</sup> See, *Kemin Industries, Inc. v. Watkins Products, Inc.*, 183 U.S.P.Q. 779 \*2 (D. Min. 1974) (defendant's motion to stay granted pending trademark cancellation proceedings on the basis of the issue lying within TTAB's expertise and for judicial economy); see general *B&B Hardware, Inc. v. Hargis Indus.*, 135 S. Ct. 1293 (2015).

<sup>15</sup> *B&B Hardware, Inc.*, 135 S. Ct. 1293, 1310 (holding that article III courts generally must defer to the TTAB's decision concerning the likelihood of confusion between two marks).

WHEREFORE for the premises considered, Opposer Health New England, by counsel, respectfully requests that the Board deny Applicant Trinity Health Corp.'s Motion to Suspend the present proceedings.

Respectfully submitted,

/Nicholas J. Tuccillo/

Nicholas J. Tuccillo, Esq  
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**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing RESPONSE TO MOTION TO SUSPEND has been sent by electronic mail, to the address of Applicant:

Trinity Health Corporation  
20555 Victor Parkway  
Livonia, Michigan 48152

/Nicholas J. Tuccillo/

Nicholas J. Tuccillo

# EXHIBIT A

**UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS**

_____	)	
HEALTH NEW ENGLAND, INC.,	)	
	)	
Plaintiff,	)	Civil Action No.: 3:15-cv-30206-MAP
	)	
v.	)	
	)	
TRINITY HEALTH CORPORATION,	)	
	)	
Defendant.	)	
_____	)	

**DEFENDANT, TRINITY HEALTH CORPORATION's, ANSWER,  
AFFIRMATIVE DEFENSES, AND COUNTERCLAIMS**

Defendant, Trinity Health Corporation (“Defendant” or “Trinity”), by and through its undersigned counsel, answers the Complaint against it by Health New England (“Plaintiff” or “Health New England”) as follows. Defendant denies all allegations in Plaintiff’s Complaint not expressly admitted.

**JURISDICTION AND VENUE**

1. Defendant admits that the Court has subject matter jurisdiction over alleged trademark infringement for marks in use in commerce. Defendant denies the allegations in the second, third, and fourth sentences of Paragraph 1. Defendant further states that Trinity has not committed and is not committing intentional and tortious acts in Massachusetts, has not conducted business in Massachusetts related to unlawful activity, has not committed the tortious acts as alleged in the Complaint, and has not engaged in continuous and systemic activities under the trademarks as alleged. Defendant does not contest that this Court has personal jurisdiction or that venue is proper. Defendant is the parent company of the entities formerly known as Saint Francis Care, Inc. and

Sisters of Providence Health System, Inc. and, as alleged, Defendant is not a proper party to this lawsuit.

### **NATURE OF THE ACTION**

2. Defendant admits that the Complaint purports to set forth actions for (i) trademark infringement under the Lanham Act, 15 U.S.C. Sec. 1051, *et seq.*; (ii) unfair competition under the Lanham Act, 15 U.S.C. Sec. 1125 (a); (iii) false designation of origin under 15 U.S.C. Sec. 1125 (a); and (iv) statutory unfair competition under Mass. Gen. Laws, ch. 93A. Defendant denies that the Complaint includes a count for common law unfair competition.

### **THE PARTIES**

3. Defendant, Trinity, is without the knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 3 of the Complaint, and therefore denies same.

4. Trinity admits it is incorporated under the laws of the State of Indiana, with a principal place of business at 20555 Victor Parkway, Livonia, Michigan 48152. Defendant admits the allegations in the second sentence of paragraph 4 and admits that as of the time of the Complaint, Trinity operated approximately eighty-eight health care facilities in twenty-one states.

### **FACTUAL BACKGROUND**

5. Trinity is without the knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 5 of the Complaint, and therefore denies same.

6. Trinity is without the knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first and second sentences of Paragraph 6 of the Complaint, and therefore denies same. Trinity admits Plaintiff has attached a website page as Exhibit A to the Complaint and Trinity states that the website page speaks for itself.

7. Trinity is without the knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 7 of the Complaint, and therefore denies same.

8. Trinity is without the knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 8 of the Complaint, including the statement that “Plaintiff is the owner of several nationally recognized, federally registered trade and service marks, including” and therefore denies same. Trinity further states that this statement is open-ended and, thus, the referenced trade and service marks are unclear, vague and indefinite. Trinity admits a copy of Registration No. 1,426,061 is attached as Exhibit B to the Complaint and the quoted language appears to be an accurate reproduction and the exhibit speaks for itself. Trinity admits a copy of Registration No. 2,814,598 is attached as Exhibit C to the Complaint and the quoted language appears to be an accurate reproduction and the exhibit speaks for itself. Trinity admits a copy of Registration No. 3,958,299 is attached as Exhibit D to the Complaint and the quoted language appears to be an accurate reproduction and the exhibit speaks for itself.

9. Trinity denies the allegations in paragraph 9. Trinity further states that none of the registrations attached to the Complaint specifically recite “health care insurance” or “health care services.”

10. Trinity is without the knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 10 of the Complaint, including the statement that “Plaintiff has several other, related federal trademark registrations, and at least one pending...trademark application” and therefore denies same. Trinity further states that this statement is open-ended and thus the referenced trademarks are unclear, vague and indefinite. Trinity admits a copy of what purports to be intent to use Application Serial No. 86/771,842 is

attached as Exhibit E to the Complaint and the quoted language appears to be an accurate reproduction and the exhibit speaks for itself.

11. Trinity is without the knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 11 of the Complaint, and therefore denies same. Trinity further states that it is unclear, vague and indefinite as to which marks Plaintiff is referencing. To the extent Trinity understands the “Health New England” mark, Trinity further states it does not identify products or services, and does not distinguish products and services, including in the health care insurance and health care service fields.

12. Trinity is without the knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 12 of the Complaint, and therefore denies same. Trinity further states that it is unclear as to which marks Plaintiff is referencing.

13. Trinity admits it owns a website at [www.trinity-health.org](http://www.trinity-health.org). Trinity admits a website page from what appears to be [www.trinity-health.org](http://www.trinity-health.org) is attached at Exhibit F to the Complaint. To the extent Paragraph 13 attempts to characterize the contents of the website, Trinity denies such characterizations. The website page speaks for itself. Trinity denies the remaining allegations in Paragraph 13.

14. Trinity admits in the fall of 2015, it was considering combining its name “Trinity Health,” with the geographic designation “New England.” Trinity admits the article was published by a third party and references an “approved merger with Trinity Health” and “what’s tentatively being called ‘Trinity Health New England.’” To the extent Paragraph 14 attempts to characterize the third-party article, Trinity denies such characterizations. The article speaks for itself. Trinity denies the remaining allegations in Paragraph 14.

15. Trinity is without the knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 15 of the Complaint as to what is being reported, and therefore denies same. Trinity admits it appears an article published by a third party is attached as Exhibit H and the third-party article references “Trinity Health” and states “...both hospital systems will be part of Trinity Health New England, though that regional name is not official”. To the extent Paragraph 15 attempts to characterize the article, Trinity denies such characterizations. The article speaks for itself.

16. Trinity is without the knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 16 of the Complaint as to what “this” is, and therefore denies same. Trinity admits The Mercy Hospital, Inc. d/b/a Mercy Medical Center is in Springfield, Massachusetts and was a part of the Sisters of Providence Health System. Trinity admits it appears an article published by a third party is attached as Exhibit I and the third-party article references “Trinity Health,” *inter alia*. To the extent Paragraph 16 attempts to characterize the article, Trinity denies such characterizations. The article speaks for itself.

17. Trinity admits on October 6, 2015 Trinity filed an intent to use application for the

following mark:  that included a disclaimer of the exclusive right to use the descriptive term “Health” and the geographically descriptive term “New England” apart from the mark as shown. Trinity admits the application was assigned Application Serial No. 86/779,873 and that the description of services for which Trinity and/or a related company intends to use the mark recites: “Home health care services; Hospitals; Medical and pharmaceutical consultation; Medical services; Nursing services; Physician services; Providing long-term care

facilities,” in international class 44. To the extent Paragraph 17 attempts to characterize the application, Trinity denies such characterizations.

18. Trinity denies the allegations in Paragraph 18 including that there is use of the mark “Trinity Health New England” as defined by the Trademark Laws. To the extent Trinity understands “Health New England” and “HNE” marks, Trinity denies any confusingly similar use. The remaining allegations in Paragraph 18 constitute conclusions of law or legal argument to which no responsive pleading is necessary. To the extent a responsive pleading is necessary, Trinity denies the same.

19. Trinity admits it received a September 30, 2015 letter on Plaintiff’s behalf prior to filing intent to use Application No. 86/779,873 for the mark:  , and that such letter referenced Plaintiff’s company and attached a copy of U.S. Registration No. 1,426,061 for “HEALTH NEW ENGLAND” for the following services in international class 42: “operating a health maintenance organization which arranges health and medical care for its members through a network of selected hospitals and physicians.” The registration stated on its face “No claim is made to the exclusive right to use ‘NEW ENGLAND’ apart from the mark as shown.

20. The allegations in Paragraph 20 constitute conclusions of law or legal argument to which no responsive pleading is necessary. Trinity further states that it is unclear, vague and indefinite as to which mark Plaintiff is referencing. To the extent a responsive pleading is necessary, Trinity denies the same.

**COUNT ONE – TRADEMARK INFRINGEMENT (15 U.S.C. Sec. 1051)**

21. Trinity repeats and incorporates by reference its answers to Paragraphs 1-20 above.

22. The allegations in Paragraph 22 constitute conclusions of law or legal argument to which no responsive pleading is necessary. To the extent a responsive pleading is necessary, Trinity denies the same.

23. Trinity denies the allegations in Paragraph 23 of the Complaint.

24. The allegations in Paragraph 24 constitute conclusions of law or legal argument to which no responsive pleading is necessary. To the extent a responsive pleading is necessary, Trinity denies the same.

25. The allegations in Paragraph 25 constitute conclusions of law or legal argument to which no responsive pleading is necessary. To the extent a responsive pleading is necessary, Trinity denies the same.

### **COUNT TWO**

26. Trinity repeats and incorporates by reference its answers to Paragraphs 1-25 above.

27. The allegations in Paragraph 27 constitute conclusions of law or legal argument to which no responsive pleading is necessary. To the extent a responsive pleading is necessary, Trinity denies the same.

28. The allegations in Paragraph 28 constitute conclusions of law or legal argument to which no responsive pleading is necessary. To the extent a responsive pleading is necessary, Trinity denies the same.

29. The allegations in Paragraph 29 constitute conclusions of law or legal argument to which no responsive pleading is necessary. To the extent a responsive pleading is necessary, Trinity denies the same.

### **COUNT THREE**

30. Trinity repeats and incorporates by reference its answers to Paragraphs 1-29 above.

31. The allegations in Paragraph 31 constitute conclusions of law or legal argument to which no responsive pleading is necessary. To the extent a responsive pleading is necessary, Trinity denies the same.

32. The allegations in Paragraph 32 constitute conclusions of law or legal argument to which no responsive pleading is necessary. To the extent a responsive pleading is necessary, Trinity denies the same.

#### **COUNT FOUR**

Trinity notes that the Complaint does not include a fourth count.

#### **COUNT FIVE**

33. Trinity repeats and incorporates by reference its answers to Paragraphs 1-32 above.

34. The allegations in Paragraph 34 constitute conclusions of law or legal argument to which no responsive pleading is necessary. To the extent a responsive pleading is necessary, Trinity denies the same.

35. The allegations in Paragraph 35 constitute conclusions of law or legal argument to which no responsive pleading is necessary. To the extent a responsive pleading is necessary, Trinity denies the same.

36. The allegations in Paragraph 36 constitute conclusions of law or legal argument to which no responsive pleading is necessary. To the extent a responsive pleading is necessary, Trinity denies the same.

#### **PRAYER FOR RELIEF**

Trinity denies all allegations contained in the Prayer for Relief of the Complaint and denies Plaintiff's entitlement to the relief requested.

**AFFIRMATIVE DEFENSES**

**FIRST AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred in whole or in part for failure to state a claim upon which relief may be granted.

**SECOND AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred in whole or in part by the doctrines of laches, waiver and/or estoppel.

**THIRD AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred in whole or in part by the doctrine of unclean hands.

**FOURTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred in whole or in part because Plaintiff abandoned any rights it may have had in the wording HEALTH NEW ENGLAND because, among reasons, it has failed to police its alleged marks against third party uses of similar marks.

**FIFTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred in whole or in part because the wording HEALTH NEW ENGLAND is geographically descriptive and generic.

**SIXTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred in whole or in part because, as set forth herein, Plaintiff made false and fraudulent representations to the U.S. Patent and Trademark Office (PTO) in applications for registration of the HEALTH NEW ENGLAND mark.

**SEVENTH AFFIRMATIVE DEFENSE**

The Plaintiff is barred from recovery, in whole or in part, because of a failure to mitigate damages.

**EIGHTH AFFIRMATIVE DEFENSE**

The Plaintiff is barred from any recovery because the Complaint fails to name the proper party.

**NINTH AFFIRMATIVE DEFENSE**

Plaintiff is equitably estopped from objecting to Trinity's proposed use of  , and variations thereof because, among other things, Plaintiff has failed to police their alleged marks against similar third party marks including the terms HEALTH and/or NEW ENGLAND in the health care field, and Plaintiff has publicly disclaimed the exclusive right to use this wording at the PTO for its services.

**TENTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred in whole or in part by the doctrine of fair use.

**ELEVENTH AFFIRMATIVE DEFENSE**

Plaintiff's claims are barred in whole or in part because the PTO found Trinity's Application No. 86/779,873 for the mark  is not likely to be confused with any other marks, including any of Plaintiff's federal applications or registrations. The PTO did not cite any of Plaintiff's federal applications or registrations as likely to be confused with any Trinity trademarks and the PTO has approved the '873 Application.

**TWELFTH AFFIRMATIVE DEFENSE**

Plaintiff's claims under G.L. c. 93A are not ripe for adjudication because Trinity had not used the mark in question as of the time this action was commenced.

**THIRTEENTH AFFIRMATIVE DEFENSE**

Health New England has alleged violations of G.L. c. 93A that are essentially identical to its claims under the federal laws. With respect to the prospective future name, as alleged (although, not necessarily in the form contemplated or actually used by Trinity – which clearly separates the terms HEALTH and NEW), the word order in TRINITY HEALTH NEW ENGLAND follows a previously established naming convention that predates knowledge of Plaintiff’s use, that is, using the dominant, leading term TRINITY, followed by the generic term HEALTH, followed by the geographically descriptive term – in this instance, NEW ENGLAND. By way of illustration, Trinity uses the mark TRINITY HEALTH MICHIGAN and many third parties follow a similar pattern with HEALTH formative names. Trinity has not engaged in deceptive or unfair conduct, as supported and confirmed by the PTO approval of Trinity’s ‘873 Application, and Trinity has merely added a geographically descriptive term to let consumers know Trinity Health, the well-known and established company, will be in New England. This serves the public interest. For these reasons, Health New England cannot convert future lawful conduct in into a presently actionable state law claim, and any such state law claim and/or remedy or damages is or would be preempted by the Lanham Act.

**JURY DEMAND**

Trinity Health Corporation respectfully demands a trial by jury as to all issues so triable.

### **COUNTERCLAIMS**

Defendant/Counterclaim Plaintiff Trinity, for its counterclaims against Plaintiff/Counterclaim Defendant Health New England alleges as follows:

#### **The Parties**

1. Trinity Health Corporation is an Indiana corporation with a principal place of business in Livonia, Michigan.

2. Health New England, Inc. is a Massachusetts corporation with a principal place of business in Springfield, Massachusetts.

#### **Jurisdiction and Venue**

3. This Court has jurisdiction over the subject matter of these counterclaims pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331 and 1338.

4. Venue is proper in this district pursuant to 28 U.S.C. § 1391.

#### **Trademark Application No. 86/771,842 for “HEALTH NEW ENGLAND”**

5. On September 29, 2015, the day before sending a letter to counsel for Trinity requesting Trinity reconsider the proposed use of “Trinity Health New England,” Health New England filed Trademark Application No. 86/771,842 for “HEALTH NEW ENGLAND” (“the ‘842 Application”) claiming it had a bona fide intent to use the mark for all of the following services: “home health care services; hospitals; medical and pharmaceutical consultation; medical services; nursing services; physician services; providing long-term care facilities,” in class 44. Specifically, the ‘842 Application recited “The applicant has a bona fide intention, and is entitled, to use the mark in commerce on or in connection with the identified goods/services.” The application was signed by counsel, Nicholas J. Tuccillo, on behalf of Health New England and the Declaration signed by Mr. Tuccillo recited that the “signatory being warned that willful false

statements and the like are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001, and that such willful false statements and the like may jeopardize the validity of the application or any registration resulting therefrom, declares that all statements made of his/her own knowledge are true and all statements made on information and belief are believed to be true.” The ‘842 Application was the first time Health New England claimed in a trademark application it intended to provide all of the following services: “home health care services; hospitals; medical and pharmaceutical consultation; medical services; nursing services; physician services; providing long-term care facilities” (“the ‘842 Services”). On information and belief, providing the ‘842 Services requires separate state licensure and Health New England is not licensed to provide these services. Health New England has not listed itself as a health care provider of any kind in its provider directory for members on the website page at <http://healthnewengland.org/member>.

6. The ‘842 Application was the first time Health New England used in the ‘842 Services in the description of services for any of its trademark applications. Since filing the ‘842 Application, Plaintiff has filed at least three trademark applications with the PTO, and none of them recited any of the same services as the ‘842 Application.

7. The description of services for the ‘842 application is identical to the description of services in Trinity Registration No. 4,025,524 for TRINITY HEALTH (“the ‘524 Registration”). The ‘524 Registration is attached at Exhibit A.

8. At the time Health New England filed the ‘842 Application, Health New England, and its authorized signatory to the ‘842 Application, knew or should have known Health New England did not have a bona fide intent to use the mark for the ‘842 Services. At the time Health New England filed the ‘842 Application, on information and belief, Health New England, or its authorized signatory to the ‘842 Application, was aware of the description of services for the ‘524

Registration. This statement in the '842 Application was made by Nicolas Tuccillo on behalf of Health New England under penalty of perjury, and jeopardizing the validity of the '842 Application. The PTO relied on and accepted Health New England's claim that it has a bona fide intention, and is entitled, to use the HEALTH NEW ENGLAND mark in commerce on or in connection with the identified goods/services for the '842 Services. On information and belief, this false representation of fact was material to the PTO's acceptance of this statement, the PTO did not reject this statement, the PTO relied on this statement, and this statement is false because Health New England never did and does not intend to provide such services.

9. On information and belief, if and when Health New England addresses the other issues raised in the '842 Application by the PTO, the PTO will accept the statement that Health New England has a bona fide intention to use the HEALTH NEW ENGLAND mark in commerce for the '842 Services.

10. On information and belief, Health New England filed the '842 Application for the same services as Trinity so it could try to make the Plaintiff's services and Defendant's services seem similar prior to sending the September 30, 2015 letter to Trinity alleging a likelihood of confusion between the Health New England name and the intended use of "Trinity Health New England." A copy of the September 30, 2015 letter sent by Mr. Tuccillo on behalf of Health New England is attached at Exhibit B.

11. Health New England provides insurance and health maintenance services through a network of selected hospitals and physicians. Those using Health New England's services are members and such members are enrolled by employers. For members enrolled by employers, the members do not select the health maintenance organization or insurance company; employers sign up with Health New England on behalf of employees. Employers must complete an application

form from Health New England such as the form attached at Exhibit C ([http://healthnewengland.org/Portals/\\_default/Shared%20Documents/brokers/2015\\_Employer\\_Group\\_App\\_Fillable.pdf](http://healthnewengland.org/Portals/_default/Shared%20Documents/brokers/2015_Employer_Group_App_Fillable.pdf)) to sign up for Health New England's services and employers are the purchasers of such services.

12. Health New England offers a variety of insurance plans under the Health New England name, with different benefits and limitations such as managed care plans to high deductible health plans and everything in between. The Health New England HMO plans provide access to doctors and hospitals in the Health New England network and health care services are provided through its network of doctors and health care professionals in Western and Central Massachusetts, as well as parts of Connecticut and Vermont. A listing of the Health New England Service Area is available at <http://healthnewengland.org/service-area-map> and attached at Exhibit D. The service area is limited to five counties in Massachusetts. Certain regions in New York are listed as eligible for enrollment. New York is not in New England. According to the Health New England website, Health New England is not licensed in Connecticut, New York, New Hampshire and Vermont. Health New England cannot serve residents in Connecticut, New York, New Hampshire, or Vermont unless they are employed by a Massachusetts company. Health New England does not provide medical treatment to its members. Members using the Health New England services have to sign up to use services.

13. On information and belief, Plaintiff does not intend to use the mark for the '842 Services and the representation of Plaintiff's intent to use the mark for such services was false, material, and intended to deceive the PTO to secure approval of the application.

**Health New England’s Attempts to Register Marks Including  
the Geographically Descriptive Wording “HEALTH NEW ENGLAND”**

14. Health New England has a principal place of business in Springfield, Massachusetts. Springfield, Massachusetts is located in New England. *Inter alia*, Plaintiff operates a “health maintenance organization” and the term “Health” cannot be exclusively appropriated for services in the “health care field.” The PTO has determined that “Health New England” is descriptive for at least some of the services provided by Health New England, including in the following applications for registration at the PTO:

1) Registration No. 4,594,008 (“the ‘008 Registration”) for the following services: “medical insurance, namely, underwriting and administration,” in class 36 and “operating a health maintenance organization which addresses health and medical care for its members through a network of selected health care providers,” in class 44. On September 24, 2013, the attorney for Health New England entered the following statement that now appears on the face of the ‘008 Registration: “No claim is made to the exclusive right to use “HEALTH NEW ENGLAND” apart from the mark as shown.” A copy of the ‘008 Registration is attached at Exhibit E.

2) Registration No. 4,332,448 (“the ‘448 Registration”) for the following services: “medical insurance, namely, underwriting and administration, in class 36 and “Operating a health maintenance organization which addresses health and medical care for its members through a network of selected health care providers,” in class 44. On May 18, 2012, the attorney for Health New England entered the following statement that now appears on the face of the ‘448 Registration: “No claim is made to the exclusive right to use “HEALTH NEW ENGLAND” apart from the mark as shown.” A copy of the ‘448 Registration is attached at Exhibit F.

15. In a November 19, 2011 Office Action from the PTO for the application that matured into the ‘408 Registration, the Examining Attorney at the PTO stated that “Applicant must

disclaim the descriptive wording “HEALTH NEW ENGLAND” apart from the mark as shown because it merely describes an ingredient, quality, characteristic, function, feature, purpose or use of applicant’s services.” The Examining Attorney determined:

NEW ENGLAND is a geographic indicator for a portion of the northeastern United States which includes Massachusetts where applicant is located. See <http://www.vocabulary.com>. HEALTH refers to the state of wellness. Id. Applicant is located in New England and intends to use its mark in connection with health care services and health insurance underwriting. The terms, therefore, are descriptive in relation to the recited services.

16. The PTO has also found the wording “HEALTH NEW ENGLAND” in other applications/registrations owned by Health New England to be geographically descriptive including the mark of Registration No. 3,298,851 (“the ‘851 Registration”). For the application that matured into the ‘851 Registration, the PTO stated for the wording “HEALTH NEW ENGLAND,” the “wording is primarily geographically descriptive because the services are health care services that originate in New England.” In response, Health New England conceded the wording is descriptive by amending the application to seek registration based on a claim of acquired distinctiveness (in part) and agreed to disclaim the exclusive rights to the generic term “HEALTH.” On November 11, 2005, the attorney for Health New England entered the following statement that now appears on the face of the ‘851 Registration: “No claim is made to the exclusive right to use "health" apart from the mark as shown.” A copy of the ‘851 Registration is attached at Exhibit G.

17. On January 20, 2016, the PTO issued Office Actions for Application Nos. 86/824,185 and 86/824,038, owned by Health New England, stating “Applicant must disclaim the following unregistrable components of the mark: (1) the wording “HEALTH” because it merely describes an ingredient, quality, characteristic, function, feature, purpose, or use of applicant’s

services; and (2) the wording “NEW ENGLAND” because it is primarily geographically descriptive of the origin of applicant’s services.”

18. On January 27, 2016, the PTO refused registration for the mark “HEALTH NEW ENGLAND” of the ‘842 Application stating: “Registration is refused because the applied-for mark is primarily geographically descriptive of the origin of applicant’s services” further stating:

the inclusion of the highly descriptive word “HEALTH” does not diminish the descriptiveness of the mark. The inclusion the term “HEALTH” within the identification of services and the attached third party registrations shows that “HEALTH” is commonly used in connection with similar services to mean general health care services. The addition of generic or highly descriptive wording to a geographic word or term does not diminish that geographic word or term’s primary geographic significance.

19. The PTO initially refused registration of the HEALTH NEW ENGLAND mark of Registration No. 1,426,061 (“the ‘061 Registration”) stating “Registration is refused on the Principal Register because the mark, when applied to the services, is considered to be primarily geographically descriptive thereof.” Health New England then submitted a Response, characterizing its services as “prepaid medical” services and assuring the PTO that its registration would not preempt other descriptive uses. A copy of this Response is attached at Exhibit H. In reliance on these statements, in whole or in part, the PTO approved the application and the registration subsequently issued. In making these arguments, Heath New England misrepresented its services and the manner it is now trying to enforce its geographically descriptive marks, and such statements are false and were material to the issuance of the registration. On information and belief, Health New England and/or its counsel knew such statements were false, misrepresented the services and/or misrepresented the anticipated enforcement against descriptive uses and intended to deceive the PTO and obtain approval of the application.

20. Numerous entities use the terms Health and New England and variations thereof, without a license or any control by Health New England, to describe various health and medical services that are provided in New England and elsewhere. In publicly available PTO records, Health New England has recently disclaimed the exclusive rights to this wording for the services it currently provides. The common use and meaning of “Health New England” indicates this term is without trademark significance, is generic, and to the extent any rights might have been acquired, such rights have been abandoned by Health New England due to the pervasive use by third parties. Health New England has not filed any opposition against any trademark applications that include the words “health,” and “New England.” The wording “HEALTH NEW ENGLAND” is of such a nature, that it is not recognized as a single source of goods/services and Health New England does not have the exclusive right to use this wording for its services, no less the entire field of health care, and it is not the owner of the exclusive right to the wording “HEALTH NEW ENGLAND.” Other entities are using the wording “Health” and “New England” as a part of a tradename or trademark in the health care field. On information and belief, the primary significance of the wording “HEALTH NEW ENGLAND” to the public is not that of a source identifier and the term “HEALTH NEW ENGLAND,” as alleged to be used by Health New England, has not acquired secondary meaning for all services in the “health care field.”

21. For Trinity’s ‘873 Application for the design mark , the PTO accepted Trinity’s disclaimer of “HEALTH” and “NEW ENGLAND” as descriptive of the various health services Trinity intends to provide and approved the ‘873 Application. The PTO determined the mark of the ‘873 Application appears to be entitled to registration. The PTO also conducted a search for confusingly similar marks to that of the mark of the ‘873 Application and found that there were no confusingly similar marks during examination of the ‘873 Application,

and did not cite any of the Health New England's trademarks as a basis to refuse registration based on a likelihood of confusion. A copy of the search summary from the PTO is attached at Exhibit I.

22. The belated attempts by Health New England to try to expand its rights and enforce rights in geographically descriptive wording will harm Trinity and others. The belated attempts by Health New England to enforce rights in geographically descriptive wording beyond the services it provides will harm Trinity and others.

**Count I – Fraud/Lack of Bona Fide Intent to Use for the “HEALTH  
NEW ENGLAND” Mark of the ‘842 Application**

23. Trinity hereby repeats and realleges each and every allegation set forth in paragraphs 1 through 22 of this Counterclaim.

24. Health New England's false statements, and the lack of a bona fide intent to use the mark in commerce, as set forth in the '842 Application, indicate that the '842 Application should be declared void under 15 U.S.C. § 1051 (b).

**Count II – Plaintiff's Trademark Registration No. 1,426,061 Is Invalid and Should  
be Canceled Under 15 U.S.C. § 1119**

25. Trinity hereby repeats and realleges each and every allegation set forth in paragraphs 1 through 24 of this Counterclaim.

26. The geographically descriptive and generic nature of the wording HEALTH NEW ENGLAND is incapable of exclusive appropriation for the entire health care field. To the extent Health New England acquired any rights in the wording HEALTH NEW ENGLAND, such rights have been abandoned due to widespread third-party use in the health care and insurance fields.

27. The '061 Registration was obtained through false statements to the PTO, and Health New England's false statements to the PTO have damaged and injured Trinity, and if Health New England is permitted to maintain and/or enforce the '061 Registration, Trinity and/or third parties will be further damaged and injured.

28. The '061 Registration should be cancelled under 15 U.S.C. § 1119 due to fraud in connection with the '061 Registration, genericism and/or abandonment of the mark of the '061 Registration.

**Count III –Fraudulent Registration Under 15 U.S.C. § 1120**

29. Trinity hereby repeats and realleges each and every allegation set forth in paragraphs 1 through 28 of this Counterclaim.

30. Health New England's false statements have damaged and injured Trinity and if Health New England is permitted to maintain and/or enforce the '061 Registration, Trinity will be further damaged and injured. Pursuant to 15 U.S.C. § 1120, Trinity is entitled to damages resulting from Health New England's false statements to the PTO.

**PRAYER FOR RELIEF**

WHEREFORE, Trinity prays for the following relief:

1. Dismiss the Complaint in its entirety.
2. Enter judgment for Trinity on its counterclaims.
3. Enter an order for injunction against Plaintiff Health New England its agents, servants, affiliates, representatives, successors and assigns, from asserting any purported trademarks containing "HEALTH NEW ENGLAND" against Trinity, including the purported mark(s) displayed in Registration Nos. 1,426,061, 4,594,008 and 4,332,448, and any marks with

this wording in any of Plaintiff's pending applications including Application Nos. 86/824,185, 86/824,038, 86/771,842, 86/871,652, and 86/871,517.

4. That the following federal trademark registrations and pending trademark applications be cancelled, abandoned, voided and/or amended to include appropriate disclaimers of "HEALTH NEW ENGLAND":

- (a) Application Nos. 86/771,842, 86/824,185, and 86/824,038; and
- (b) Registration No. 1,426,061.

5. Pursuant to 15 U.S.C. § 1120, award Trinity all monetary damages it is entitled to as a result of Plaintiff's fraudulent registration of Registration No. 1,426,061, and the attempted enforcement of an invalid and unenforceable trademark, and award attorneys' fees, expenses and costs associated with this action.

6. That Trinity be awarded such other and further relief as the Court deems equitable, just, and proper.

**JURY DEMAND**

Trinity Health Corporation respectfully demands a trial by jury as to all issues so triable.

**WHEREFORE**, Defendant/Counterclaim Plaintiff, Trinity Health Corporation, demands judgment in its favor and against Plaintiff, dismissing the Complaint with prejudice, together with the costs of suit and such other relief as the Court deems equitable and just.

Respectfully Submitted for Defendant/  
Counterclaim Plaintiff  
**Trinity Health Corporation,**  
by Its Attorneys,

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\*Applications for Pro Hac Vice Admission to be filed.

Dated: April 11, 2016

**CERTIFICATE OF SERVICE**

Pursuant to Local Rules 5.2(b)(2) and 5.4 of the United States District Court for the District of Massachusetts, I, Holly M. Polglase, hereby certify that on April 11, 2016, a true copy of the above document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

*/s/ Holly M. Polglase*

\_\_\_\_\_

Holly M. Polglase

# EXHIBIT B

\*\*\* User:wolandria \*\*\*

#	Total Marks	Dead Marks	Live Viewed Docs	Live Viewed Images	Status/ Search Duration	Search
01	330	N/A	0	0	0:01	*tr{"iey"}n{"iey"}t{"iey"}*[bi,ti] not dead[ld]
02	18362	N/A	0	0	0:01	*h{v:2}lth*[bi,ti] not dead[ld]
03	56540	N/A	0	0	0:02	*new*[bi,ti] or *neu*[bi,ti] not dead[ld]
04	584	N/A	0	0	0:01	*{"iey"}n{"g"}l{v}nd*[bi,ti] not dead[ld]
05	712	N/A	0	0	0:01	"ne"[bi,ti] or "n e"[bi,ti] not dead[ld]
06	11	0	11	10	0:02	1 and (2 or 3 or 5) not dead[ld]
07	9279	N/A	0	0	0:03	050525 not dead[ld]
08	24	N/A	0	0	0:01	290305 and 290306 not dead[ld]
09	353	N/A	0	0	0:01	290305 or 290306 not dead[ld]
10	11	0	2	11	0:01	7 and 9 not dead[ld]
11	2039	N/A	0	0	0:02	241325 not dead[ld]
12	29	0	4	29	0:02	7 and 11 not dead[ld]
13	1099000	N/A	0	0	0:03	"044"[cc] not dead[ld]
14	1037	0	5	1037	0:01	11 and 13 not dead[ld]

Session started 2/7/2016 10:08:20 AM

Session finished 2/7/2016 10:23:22 AM

Total search duration 0 minutes 22 seconds

Session duration 15 minutes 2 seconds

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# EXHIBIT C



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Current Search: **S1: (HEALTH NEW ENGLAND)[COMB]** docs: 29 occ: 187

	Serial Number	Reg. Number	Word Mark	Check Status	Live/Dead
1	86779873		TRINITY HEALTH NEW ENGLAND	TSDR	LIVE
2	86871517		HEALTH NEW ENGLAND BE HEALTHY	TSDR	LIVE
3	86871652		HEALTH NEW ENGLAND BE HEALTHY	TSDR	LIVE
4	86791167		NEW ENGLAND HEALTH PHYSICS SOCIETY	TSDR	LIVE
5	86824185		HEALTH NEW ENGLAND WHERE YOU MATTER.	TSDR	LIVE
6	86824038		HEALTH NEW ENGLAND	TSDR	LIVE
7	86771842		HEALTH NEW ENGLAND	TSDR	LIVE
8	85948956	4594008	HNE HEALTH NEW ENGLAND HOW CAN WE HELP?	TSDR	LIVE
9	85378448	4332448	HNE HEALTH NEW ENGLAND	TSDR	LIVE
10	85652812	4344418	HEARING HEALTH PROFESSIONALS OF NEW ENGLAND	TSDR	LIVE
11	85556351		NEW ENGLAND HEALTH ADVISORY	TSDR	DEAD
12	78767736	3361115	NEW ENGLAND HEALTH IMAGING	TSDR	DEAD
13	78498302	3298851	HNE HEALTH NEW ENGLAND HOW CAN WE HELP?	TSDR	DEAD
14	78498264	3136905	HNE	TSDR	LIVE
15	77586210	3675570	NEW ENGLAND HEALTHCARE INSTITUTE	TSDR	DEAD
16	77649051	3958299	HNE BE HEALTHY	TSDR	LIVE
17	77819177	3789810	NEW ENGLAND HEALTHCARE ENGINEERS' SOCIETY · 1958 · DESIGN OPERATION MAINTENANCE	TSDR	LIVE
18	77503644		THE NEW ENGLAND HEALTH AND WELLNESS CHANNEL	TSDR	DEAD
19	77503640		THE NEW ENGLAND HEALTH CHANNEL	TSDR	DEAD
20	77053198	3394025	NEW ENGLAND HEALTHCARE ASSEMBLY	TSDR	DEAD

21	76449511	2814598	HNE	TSDR	LIVE
22	76554252		HEALTHY DIRECTIONS A PRODUCT OF HEALTH NEW ENGLAND	TSDR	DEAD
23	76418109		NEHI NEW ENGLAND HEALTHCARE INSTITUTE	TSDR	DEAD
24	76418107	2833394	NEW ENGLAND HEALTHCARE INSTITUTE	TSDR	DEAD
25	75261362	2158639	THE NEW ENGLAND SCHOOL OF WHOLE HEALTH EDUCATION	TSDR	DEAD
26	73581019	1426062	HEALTH NEW ENGLAND	TSDR	DEAD
27	73580915	1426061	HEALTH NEW ENGLAND	TSDR	LIVE
28	73607819		NEW ENGLAND HEALTH & RACQUET	TSDR	DEAD
29	73585660		NEW ENGLAND HEALTH RESOURCES	TSDR	DEAD

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