STATE OF NORTH CAROLINA

COUNTY OF WATAUGA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

FILE NO: 07-CVS-222

IN THE MATTER OF:

THE RUTH COOK BLUE LIVING TRUST, dated August 26, 1996, James M. Deal, Jr., Linda C. Dalton and Sarah C. Isaacs, Trustees,

Petitioners,

v.

Clifton N. Blue, Jr., Peter Blue Crane, Henry McCoy Blue, William F. Blue, Jr., Katherine M. Blue, William F. Blue, Mrs. Gary B. Peterson, Richard F. Blue, Jr., John Tyler Blue, Mrs. Gary B. Blue, Jana Blue, Robert G. Blue, William A. Crane,

Respondents.

RESPONDENTS' BRIEF IN SUPPORT OF THEIR FIRST MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO PETITIONERS' FIRST MOTION TO AMEND

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The Respondents other than Jana Blue (together "the Blue Family") submit this brief explaining why the Court must: (i) deny Petitioners' (the Trustees') Motion to Amend Petition; and (ii) grant the Blue Family's First Motion for Partial Summary Judgment. In the Verified Petition the Trustees filed to initiate this proceeding, each Trustee swore to the accuracy of all facts material to this dispute. Respondents then admitted these sworn facts in their Answer. Petitioners now seek to erase these sworn and admitted facts through their unverified Amended Petition. The Blue Family is entitled to orders: (i) declaring these sworn and admitted facts to be "without substantial controversy" under Rule 56, and thus to be the facts for purpose of further proceedings; and (ii) denying the Trustees' Motion to "amend" these facts into non-existence.

FACTS

1. Introduction

Organized by John Blue in 1892 and in continuous operation since, the Aberdeen & Rockfish Railroad Company ("the A&R") is a privately-held North Carolina corporation serving railway customers in the southeastern and northeastern parts of the State.[1] The Blue Family are those descendants of John Blue who currently own shares of common stock of the A&R. *Petition for Declaratory Relief ("Pet.") ¶ 8.*[2]

Ruth Cook Blue – "Pat" Blue to her family – was a Blue family member who passed away on May 7, 2005. *Pet. ¶¶ 4-6* (Ex. A). Petitioner James M. Deal, Jr. ("Deal") was Pat Blue's lawyer. *Deposition of James M. Deal, Jr. ("Deal Dep.") at 29-34.*[3] A North Carolina-licensed attorney since 1974, Deal concentrated his practice in estate and trust planning. *Id. at 9.*

[1] The A&R Web site, www.aberdeen-rockfish.com, presents the history as well as information about the current operations of the A&R.
[2] For ease of reference, a copy of the verified Petition is attached to this brief as its Exhibit A.
[3] The transcript of the Deal deposition is attached to this brief as its Exhibit B.

In 1996, Deal drafted and Pat Blue signed the legal document at the heart of this case: The Ruth Cook Blue Living Trust (the Trust). Deal drafted a restated Trust document in 2003. *The Ruth Cook Blue Living Trust (June 23, 2003)(Ex. C)*[4]*(authenticated at Deal Dep. 64).* Pat Blue had by that time outlived both her husband, John A. Blue, and her children. *Trust p. 2-1 (Article 2)(Ex. C).* As John A. Blue's spouse and then widow, Pat Blue became the owner of a substantial block of A&R shares.

The Trust specified that at Pat Blue's death, Deal, Sarah C. Isaacs (Pat Blue's sister), and Linda C. Dalton (Pat Blue's niece) were to become cotrustees. *Trust pp. 3-2 (para. 3.03(c)) & 7-1 – 7-2 (paras. 7.03 & 7.04)(Ex. C).* These three accepted their appointments, and have served together since May 2005 to "conduct … the administration of the estate." *Pet. ¶¶ 4-5 (Ex. A).*

2. Paragraph 8.01 of the Trust

Paragraph 8.01 of the Trust directs the disposition of Pat Blue's A&R shares. The Trustees must "offer [the A&R] stock for sale to the [Blue Family] at the value established by the accounting firm engaged by the [A&R] as of December 31 of the year preceding my death." (emphasis added) *Trust p. 8-1(Ex.C)*

3. The Trustees

The Trustees are a mature and accomplished group. Dalton has been a North Carolina-licensed real estate broker for more than 20 years, and is the owner and broker-in-charge of Miracle & Co., a commercial real estate firm based in Charlotte. *Deposition of Linda C. Dalton ("Dalton Dep.") at 79-80*[5].

As indicated above, Trustee Deal was Pat Blue's lawyer and the author of the Trust. Deal also serves as executor of Pat Blue's estate. *Federal Estate Tax Return signed by Deal as*

[4] The 2003 Trust document is attached to this brief as its Exhibit C.
[5] The transcript of the Dalton deposition is attached to this brief as its Exhibit D.

Executor (Ex. E) (authenticated at Deal Dep. 179-80). Deal wears another notable hat in this matter as well; he is legal counsel to the Trust and its Trustees, including for the preparation and filing of this legal action. *See, e.g., Dalton Dep. at 87* (Dalton confirms that Deal was "legal counsel to the [T]rust in preparing th[e] [P]etition.")(*Ex. D*)

Deal agreed that he "did provide certain legal services to the [T]rust" separate from his services as a Trustee. *Deal Dep. at 81-82 (Ex. B).* Deal's law firm billed the Trust for those legal services. *Id.* Deal could not remember even the approximate amount of these legal bills, but admitted the Trust had paid them in full. *Id. at 82-83.*

4. The dispute framed by the Verified Petition and by the Blue Family Answer

a. Deal's March 2007 letter to the Blue Family

On March 29, 2007, Deal wrote each member of the Blue Family – on his law firm letterhead - to offer "the opportunity to purchase [Pat Blue's] shares in" the A&R. *Ltr. from Deal to Blue Family (Mar. 29, 2007)(Ex. F) (authenticated at Deal Dep. 59-60).* Deal identifies "the report of the accountants [for the A&R] as of December 31, 2004 (the year before [Pat's] death)" as the source of the offer price.

Clarifying what "report" and what "accountants" he meant, Deal enclosed with his letter a report by the Syracuse, New York accounting firm Bowers & Company CPAs PLLC (Bowers). Entitled "Determination of the Fair Market Value Per Share" of the A&R as of December 31, 2004 (the Bowers Report), the report details Bowers' analysis and conclusions regarding the value of A&R shares. The Bowers Report is also at Exhibit F to this brief, in its original position as an attachment to Deal's letter.

In his letter, Deal identifies "[t]he purchase price for the shares [a]s $938.00 per share." The Court will search the Bowers Report in vain for any reference to a value of $938.00 per share for the A&R. Deal achieved the figure by borrowing some of the Bowers calculations

reflected in the "Valuation Summary" page of the Bowers Report. Critically, however, Deal omitted the $3,492,749 marketability discount Bowers had applied in calculating the "fair market value" of each A&R share.

b. The Bowers Report as well as the estate tax return value the A&R at $603.00 per share

Because Deal disregarded the discount factor Bowers had applied in valuing the A&R, the $938 price the Trustees demanded of the Blue Family was more than 150% of the fair market value of each A&R share. The Bowers Report "conclude[d] the fair market value per share of a minority, non-marketable interest in [the A&R], as a going concern, as of December 31, 2004, to be $603 per share." *Ex. F (quoting page 3 of the Bowers cover letter).*

There appears to be no debate between the Trustees and the Blue Family that $603 is a correct calculation of the fair market value of A&R shares as of December 31, 2004. Deal stipulated $603 as the value of each of Pat Blue's shares for purposes of her federal estate tax return. *Ex. E.* The federal tax return expressly provides that its submission is "[u]nder penalties of perjury" and that by signing it, Deal represented its entries to be "true [and] correct." *Id.*

c. Trustee Deal wrote the Petition both as legal counsel to the Trust and as a named party to the Petition

Deal – who rates his legal drafting skills as "far better than average."[6] - wrote the Petition himself, just as he had written the Trust. Deal prepared the Petition after each Trustee agreed that a dispute existed between the Trust and the Blue Family over the "value established by the accounting firm engaged by [the A&R]," and after Trustees Dalton and Isaacs had accepted Deal's recommendation that the Trustees initiate a lawsuit to resolve the dispute. Deal sent the Petition to Dalton and Isaacs in draft, and each of these cotrustees approved the text of the final Petition.

[6] *Deal Dep. at 27 (Ex. B).*

As the preceding history portrays, the only disputed issue at the time the Trustees filed their Petition was whether the "marketability discount" employed by Bowers was a proper factor in calculating the "value" of A&R shares for Trust purposes.

d. Each Trustee swore to the accuracy of the Petition

Each Trustee separately verified, under oath, that he or she "ha[d] read the … Petition and that the statements contained therein are true to his [or her] own knowledge." *Pet. at verifications (Ex. A).* Each verification contains a qualification that "as to those matters stated upon information and belief … [the affiant] believes them to be true." As Deal admitted, and as is obvious on the face of the Petition, none of its allegations are "stated upon information and belief." *Deal Dep. at 164-65 (Ex. B).* Thus, each Trustee represented under oath that the Petition was unqualifiedly "true."

e. The Petition seeks only an interpretation of the 2004 Valuation Summary

The Petition first alleges that "[t]he accounting firm engaged by [the A&R] prepared a report as of December 31st of the year preceding the death" of Pat Blue. *Pet. ¶ 13 (Ex. A).* The Petition then alleges that "[t]his report lists a preliminary value and also lists a discounted non-marketable value" for the A&R. *Id.* The Petition attaches, as its Exhibit B, the Valuation Summary page from the Bowers Report. Thus, the Petition is clear in stipulating that: (a) Bowers is "[t]he accounting firm engaged by [the A&R]"; and (b) considering the Trust requirement that the Blue Family pay a price representing the "value" as "established by" Bowers, the Bowers Report is the sole reference for "value."

Having alleged that the Bowers Report "lists" two values, the Trustees then allege that they are uncertain "which value should be utilized for the purpose of the sale of the stock." *Pet. ¶ 13 (Ex. A).* The Petition alleges the first of these "two values" to be a "discounted value." As

explained above, the "discounted value" is the $603 per share figure Deal had used in the estate tax return.

The Trustees then allege that the Valuation Summary also establishes "a non-discounted value." *Pet. at Ex. B (Ex. A).* The Petition does not expand on this allegation. Deal's March 2007 letter makes clear, however, that what the Trustees meant was the $938 per share figure that Deal, not Bowers, had sought to "establish."

In summary, each Trustee swore in the Petition that their dispute with the Blue Family turned on whether Paragraph 8.01 of the Trust calls for a "discounted" or "non-discounted" value for the A&R. Indeed, the Trustees are explicit that this legal dispute is their only point of difference with the Blue Family: their Petition closes with a prayer only for "a declaration determining which value should be utilized for the purpose of the sale of the stock." *Pet. ¶ 13 (Ex. A).*

f. The Blue Family's Answer admits that the only disputed issue regards the interpretation of the 2005 Valuation Summary

The Blue Family filed its Answer on May 7, 2007. The Answer admits all of the facts the Trustees allege. The Blue Family specifically admitted that: (a) 2004 was the year preceding the death of Pat Blue; (b) the accounting firm engaged by the A&R prepared a valuation report as of December 31, 2004; (c) Bowers, the author of the Valuation Summary attached to the Petition, was that accounting firm; (d) the Valuation Summary was drawn from the correct Bowers Report; and (e) the Valuation Summary establishes a value of $603/share for shares of the A&R. *Answer ¶ 13.*

The only allegation the Blue Family controverted was that the Bowers Report establishes two values. Rather, the Blue Family alleges, the Bowers Report by its plain terms establishes but a single value: $603 per share. The Petition and the Answer thus agree not only about the facts,

but also about the dispositive legal issues: what "value," for Paragraph 8.01 purposes, does the Bowers Report "establish?"

5. The Amended Petition seeks to abandon the Trustees' sworn and admitted testaments to the truth of numerous material facts

On June 1, 2007, the Trustees served their Motion to Amend Petition, along with their proposed Amended Petition (*Pet'rs Mot. To Am. Pet.)(June 1, 2007)(Ex. G).* Representing that the Petition "incorrectly states the Petitioners' position," the Motion and Amended Petition seek to controvert the following sworn and admitted facts:

- Bowers is "the accounting firm engaged by [the A&R]" for purposes of Paragraph 8.01 of the Trust. At paragraph 11 of their Amended Petition, the Trustees now seek to allege that they "do not have sufficient information to determine whether … Paragraph 8.01 … refers to Bowers";
- Once the Court has defined "value," the Bowers Report will be its resource to reduce "value" to a figure. The Trustees now seek to allege that if Bowers is "the accounting firm" whose figures are to control under Paragraph 8.01, the Court should nonetheless substitute figures from some other firm or firms because Bowers "improperly applied a … discount to the value of [the A&R] and … otherwise failed properly to value" the A&R.

ARGUMENT

1. The Blue Family is entitled to partial summary judgment

a. Summary of argument

Rule 56 permits the Court to enter an order specifying "what material facts exist without substantial controversy." N.C. R.Civ.Proc. 56. The Trustees now seek to controvert material facts they have sworn to be true and that the Blue Family has admitted are true. Thus, the need

for an order addressing what facts are "material" and "without substantial controversy" is apparent.

The Court should specify that the following material facts exist without substantial controversy:

- Bowers is " the accounting firm engaged by [the A&R]" for purposes of Paragraph 8.01 of the Trust;
- The Bowers Report is the reference from which "value," for Paragraph 8.01 purposes, must be established.

With such an order in place, the case may then proceed to address the dispute framed in the Petition, the Answer, and in Deal's March 2007 letter. Understanding that the Trustees may wish to pursue discovery within that framework, the Blue Family would agree that resolution of this ultimate question should abide later proceedings.

b. The Trustees may not contradict their sworn Petition

i. The Trustees are bound to their sworn statements

Leaving aside for the moment the significance of Deal's double or triple service as party, witness and counsel, each Trustee is bound, as a party and as a witness abundantly competent to testify, to his or her sworn statement. North Carolina courts have repeatedly confronted situations in which parties opposing summary judgment have sought to improve the record by reversing or "recasting" their sworn statements. *See, e.g., Allstate Insur. Co. v. Lahoud*, 167 N.C. App. 205, 211, 605 S.E.2d 180, 184 (2004) (condemning defendant's efforts to "recast …as accidental," by affidavit, acts earlier sworn to have been intentional). Our courts have consistently held opponents of summary judgment to their initial sworn statements.[7]

[7] The Trustees' verified Petition is an "affidavit" for Rule 56 purposes. *See, e.g., Alpiser v. Eagle Pontiac-GMC-Isuzu, Inc.*, 97 N.C. App. 610, 612, 389 S.E.2d 293, 294 (1990) (citation omitted).

In *Belcher v. Fleetwood Enters., Inc*., 162 N.C. App. 80, 85-86, 590 S.E.2d 15, 19 (2004), for example, a plaintiff admitted at deposition that he had "not suffered any damages" from the defendant's alleged wrongdoing. When defendant moved for summary judgment, plaintiff responded with an affidavit alleging that he had, in fact, been damaged, albeit in a way that appeared not to have been addressed specifically at deposition. *Id.* at 86, 590 S.E.2d at 19. Recognizing the deposition admission to betray a "'fatal weakness' in plaintiffs' claims," the Court of Appeals affirmed summary judgment on the basis that "a non-moving party cannot create an issue of fact to defeat summary judgment simply by filing an affidavit contradicting his prior sworn testimony." *Id.* (quoting *Wachovia Mortg. Co. v. Autry-Barker Spurrier Real Estate, Inc.*, 39 N.C. App. 1, 9, 249 S.E.2d 727, 732 (1978)).

ii. At least as to Deal, the factual allegations of the Petition also constitute judicial admissions

By attesting under oath that the "statements contained [in the Petition] are true" to his own knowledge, Deal judicially admitted the truth of the Petition. Deal was a veteran North Carolina lawyer, fluent in trust and estate matters. He rendered and was paid for his legal services to the Trust. He was the sole author of the Petition and was, from the perspective of his fellow Trustees, acting as legal counsel to the Trust in drafting and filing the Petition. There can be no doubt that his verification of the Petition was not only as a Trustee, but also as legal counsel to the Trust and as an officer of this Court.

Allegations in legal pleadings, even unverified, are judicial admissions, with "the same effect as a jury finding and [are] conclusive upon the parties and the trial judge." *Buie v. High Point Assoc. Ltd. P'ship*, 119 N.C. App. 155, 158, 458 S.E.2d 212, 215, *disc. review denied*, 341 N.C. 419, 461 S.E.2d 755 (1995). "Such an admission is not evidence, but rather removes the admitted fact from the field of evidence by formally conceding its existence." *Estrada v.*

Burnham, 316 N.C. App. 318, 325, 341 S.E.2d, 538, 543 (1986)(quoting 2 Brandis on North Carolina Evidence § 166 (2d rev. ed. 1982)). So sacrosanct is this principle that our courts will reject a pleader's efforts to contradict through affidavits its own pleading. *See, e.g., Universal Leaf Tobacco Co. v. Oldham*, 113 N.C. App. 490, 494, 439 S.E.2d 179, 181 (1994).

Against this backdrop, the Trustees cannot argue that they may contradict a verified pleading – its oath required by statute "to be taken … with the utmost solemnity"[8] – with an unverified motion and proposed unverified amended pleading. *Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 208, 213, 580 S.E.2d 732, 736 (2003)(an unverified pleading "cannot be relied upon as sworn testimony").

c. The Trustees have no basis on which to avoid summary judgment except by ignoring their sworn statements and the text of the Trust

i. The Trustees have repeatedly sworn, even since filing their Motion to Amend, that Bowers is "the accounting firm"

(a) Deal and Dalton each admitted in deposition that Bowers is "the accounting firm" for Paragraph 8.01 purposes

The Blue Family deposed Deal and Dalton after the Trustees had served their Motion to Amend questioning whether Bowers was "the accounting firm for [the A&R]." Remarkably, despite the pendency of the Motion to Amend, Deal and Dalton each admitted Bowers was "the accounting firm" whose determination of "value" is dispositive under Paragraph 8.01 of the Trust.

Asked whether, at the time she verified the Petition, she had understood the Bowers Report to be "the report of the accounting firm engaged by [the A&R] as 8.01 describes," Dalton admitted that both she and her fellow Trustees understood "that it was." *Dalton Dep. at 30 (Ex. D).* Asked then whether she "ha[d] any different understanding today" – that is, in the face of

[8] N.C. Gen. Stat. § 11-1.

the Motion to Amend the Trustees had by then filed – Dalton again admitted that the A&R had told the Trustees that Bowers was "[its] accounting firm," and that "I don't have any reason not to think that was their accounting firm." *Id.*

Deal was just as clear at his deposition that Bowers was "the accounting firm" for purposes of Paragraph 8.01 of the Trust. Reminded that he had clearly invoked Bowers as "the accounting firm" both in his March 29, 2007 letter to the Blue Family and in the Petition, Deal was adamant that Bowers was "the only firm constituting the accounting firm engaged by [the A&R]." *Deal Dep. at 131-32 (Ex. B).* Deal repeated the point in this later exchange:

> Q: What was the accounting firm engaged by [the A&R] as of December 31 of the year preceding Pat Blue's death?
>
> A: The firm, to best of my knowledge, was Bowers.

Id. at 204-205.

As to this material fact, then, the Trustees must stand by the Petition not simply because Deal admitted Bowers was the accounting firm in his March 2007 letter, and not simply because all three Trustees then swore Bowers was the accounting firm in their April 2007 Petition. The Trustees must also yield on this question because they have answered it, in plain terms and again under oath, even after filing with the Court documents representing that the question was open.

(b) Deal admitted that Paragraph 8.01 is unambiguous

At his deposition, the Trustees' counsel invited Deal to confess having introduced ambiguity in his drafting of Paragraph 8.01. Specifically, counsel pressed Deal to admit that "December 31" could modify either "value," "accounting firm," or both. Asked "what December 31 modifies," as used in Paragraph 8.01, Deal testified that "I guess as written it modifies the accounting firm engaged by [the A&R]." *Deal Dep. at 202 (Ex. B).* The Trustees' counsel then suggested that December 31 "does not set the valuation date for valuing the stock

for purposes of paragraph 8.01"; Deal testified in response that he could "certainly see where that could be the way the document is written." *Id. at 202-203.*

The distinction counsel here attempted to adduce from her client is between the following readings of Paragraph 8.01: (a) value is to be established by the accounting firm engaged by the A&R as of December 31, 2004, but the text is silent on the date as of which value is to be established; or (b) value is to be established by the accounting firm engaged by the A&R as of December 31, 2004, and value is to be established as the same date. The Court will observe that under either interpretation, "the accounting firm" is Bowers. The practical significance of the ambiguity exercise, then, appears be nil, as even the Trustees admit that the Bowers Report is the means by which Bowers expresses itself on "value."

Rallying to defend his draftsmanship of the Trust, Deal affirmed that no material ambiguity exists in Paragraph 8.01. Under any interpretation, "the accounting firm" is Bowers. *Deal Dep. at* 207 (Deal confirms that "the accounting firm wouldn't change" under either approach) (Ex. B). Taking "the accounting firm" to be Bowers, the "value established by" Bowers is as expressed in the Bowers Report. *Id.*

In summary, even in the face of their own Motion to Amend seeking to question whether Bowers is "the accounting firm engaged by [the A&R]," the Trustees have testified affirming their sworn admissions that Bowers is "the … firm" and the Bowers Report the source in which "value [is] established" for purposes of Paragraph 8.01.

(c) Paragraph 8.01 is unambiguous that once "the accounting firm for [the A&R]" has been identified, what "value" another firm might seek to establish is irrelevant

North Carolina law is clear that where the terms of a trust are set forth in clear, unequivocal and unambiguous language, judicial construction is unnecessary. *Rhoads v.*

Hughes, 239 N.C. 534, 535, 80 S.E.2d 259 (1954).[9] The Trustees and the Blue Family agree that Paragraph 8.01 of the Trust defines the Trustees' obligations to offer Pat Blue's A&R shares for sale to the Blue Family. *See, e.g. Deal Dep. at 59* (Deal testifies that "8.01 is the only thing that's relative [sic] to [the Blue Family's] opportunities [to purchase Pat Blue's shares of the A&R] ….")(*Ex. B*). Paragraph 8.01 in turn is crystal-clear that the arbiter of the "value" at which the Blue Family has the right to purchase Pat Blue's shares of the A&R is "the accounting firm engaged by [the A&R]." With no doubt that Bowers is "the accounting firm engaged by [the A&R]," there should be no room for debate whether the Bowers Report is the last word on "value" under Paragraph 8.01.

Notably, Deal admitted that Pat Blue was free to dispose of her shares in the A&R according to any procedure or formula she wished. *Deal Dep. at 106-107(Ex. B).* The Trust "could have said that the Blue Family can have my shares for nothing." *Id. at 106.* The Trust could have said the Blue Family could purchase Pat Blue's shares "for $1,000 or a million dollars a share." *Id. at 107.* As Deal bluntly summarized, "We could have said anything in the [T]rust." *Id. at 174.*

The Trustees appear bent on amending their Petition to displace this clear Trust language and to supplant what Pat Blue and Deal "said .. in the Trust." By seeking permission to question Bowers' competency and, the Blue Family assumes, to introduce valuation opinions from firms unrelated to the A&R, the Trustees seek to detach the "value" inquiry from the text of Paragraph 8.01. The effort implies a conviction that the Trustees' obligation is not to administer Paragraph 8.01 according to its terms, but rather to extract from the Blue Family the maximum amount any third party may be persuaded to support.

[9] *Rhoads* involved the interpretation of a will rather than a trust. By statute, "[t]he rules of construction that apply in this State to the interpretation of and disposition of property by will also apply as appropriate to the interpretation of the terms of a trust and the disposition of the trust property." N.C. Gen. Stat. § 36C-1-112.

The Trustees' effort has no purchase in the language of the Trust, in underlying North Carolina law, or in common sense. If Pat Blue was free to give her shares to the Blue Family "for nothing," confining this case to the debate the March 2007 Deal letter and the verified Petition define – that is, what "value" the Bowers Report establishes - offends no principle this Court is bound to respect. [10]

2. The Trustees' Motion to Amend must be denied

The Blue Family answered the Petition nearly a month before the Trustees moved to amend. The Trustees may thus amend only be by leave of court. N.C. R. Civ. Proc. 15(a). The Court must deny leave to amend because: (a) amendment would be futile; and (b) the motion for leave to amend was made in bad faith. *See, e.g. Chicopee, Inc. v. Sims Metal Works, Inc.*, 98 N.C. App. 423, 430, 391 S.E.2d 211, 215 (1990).

Anticipating that the Trustees will stress that Rule 15(a) directs leave to amend "[to] be freely given," the Blue Family reminds the Court of the qualification to this phrase: "when justice so requires." The Comment to Rule 15(a) emphasizes the need to enforce this qualification: "[W]hen, on a whole view of the matter, as is frequently the case, it is determined that justice does not require a particular amendment, or that, to the contrary, positive injustice to the opposing party would result, amendment has been denied." N.C. Gen. Stat. § 1A-1, Rule 15 (Comment – Section (a))(citations omitted).

[10] In this regard, the Court may further note that the original as well as the proposed Amended Petition alleges that the Trustees "represent the interests of the beneficiaries of the Trust who will receive the proceeds from the sale [to the Blue Family] of [the A&R] stock." *Pet. ¶ 9 (Ex. A); Proposed Am. Pet. ¶ 18 (Ex. G)*. The Trustees fail to note in either document that "the beneficiaries of the Trust" also include the Blue Family. N.C. Gen. Stat. § 36C-1-103(3) (defining a trust "beneficiary" as "a person who … [h]as a present or future beneficial interest in a trust, vested or contingent ….). Thus, the Trustees owe the same fiduciary obligations to the Blue Family as to those "who will receive the proceeds" from Blue Family purchases.

a. With the Blue Family entitled to summary judgment on the strength of the verified Petition, an unverified amendment would be futile

As explained above, the Blue Family is entitled to an order of partial summary judgment specifying the undisputed material facts in this matter. It would be futile to allow the Trustees to interpose an unverified pleading contradicting these facts. If the Petition were amended as the Trustees seek, the Blue Family would remain entitled to partial summary judgment on the strength of a record supplemented, considering its current state, only by an unverified pleading. The unverified pleading would do nothing to defeat the Blue Family's entitlement to partial summary judgment, Thus, the Petition would be expanded by amendment only to be pruned back to its original boundaries. *See Tew v. Brown*, 135 N.C. App. 763, 767, 522 S.E.2d 127, 130 (1999)(Court may award summary judgment "without first ruling on a party's motion to amend its pleadings … when the amended pleadings are unverified ….")(citations omitted).

b. The Trustees' bad faith requires denial of their amendment

In their April 2007 Petition, the Trustees professed to have no position on what "value" Paragraph 8.01 requires from the Blue Family. Their confusion, they alleged, regarded whether "value" should account for certain discount factors applied in the Bowers Report. While the Blue Family disagrees that the Bowers Report supports a value other than $603 per share, the Blue Family agrees – and in their Answer pleaded agreement – with the Trustees' allegations that Bowers is the accounting firm on which the Trustees must rely and the Bowers Report the dispositive statement on "value."

The Trustees' efforts to abandon these sworn and agreed statements reflects bad faith. "Bad faith means 'not based on honest disagreement or innocent mistake'." *Lovell v. Nationwide Mut. Insur. Co.*, 108 N.C. App. 416, 421, 424 S.E.2d 181, 185 (1993)(quoting *Dailey v. Integon*

Gen. Insur. Corp., 75 N.C. App. 387, 396, 331 S.E.2d 148, 155, *disc. rev. denied*, 314 N.C. 664, 336 S.E.2d 399 (1985)).

i. The Trustees have repeatedly admitted Bowers is "the accounting firm"

The preceding sections of this brief summarize the extent to which amended petition reflects bad faith, as so defined. The first sworn and admitted fact sought to be altered by amendment is that Bowers is "the accounting firm engaged by [the A&R]." Even in the face of the pending motion to amend, Deal and Dalton have both repeatedly testified that the original Petition correctly alleged that Bowers is, indeed, "the accounting firm."

Indeed, as described above, Deal rebuffed an effort by the Trustees' own counsel to open a door to challenge this fact on the basis that Paragraph 8.01 might refer to a firm "engaged by [the A&R]" on a date other than December 31, 2004. Why the Trustees persist in an effort to retreat from these admissions is mysterious, but "honest disagreement or innocent mistake" are not logically available explanations.

ii. The allegations regarding errors by Bowers cannot support amendment

a. The allegations repeat the central charge of the original Petition

The blanket charge that Bowers "failed properly to value" the A&R is either superfluous or another demonstration of bad faith. If the charge is an attack on the use of a "discount factor" in achieving the $603 per share figure, then the charge is the same one made in the verified Petition. The Blue Family assumes even the Trustees would admit that Rule 15 supplies no basis for amending the Petition to restate its original allegations.

b. If fresh, the allegations contradict the Trust text as well as the Trustees' sworn admissions

If the charge is genuinely new, however, then it contradicts the plain language of the Trust and the sworn testimony of each of Trustee. Once again, there is no dispute that Bowers is

"the accounting firm" to which the Trust commits the determination of "value." Whether or not Bowers made the determination in a manner the Trustees, or some third party, regard as "proper" is legally immaterial.

On this point in particular, the chronology of events leaves no doubt that "honest disagreement" and "innocent mistake" cannot explain the Trustees' about-face as to Bowers' *bona fides*. Written nearly two years after the Trustees assumed their roles, Deal's March 2007 letter is adamant that the Bowers Report defines the four corners of the "value" debate. The April 2007 verified Petition is to the same effect; indeed, its only attachments are Paragraph 8.01 of the Trust and the Valuation Summary from the Bowers Report.

Not until their receipt of the Blue Family's Answer with Counterpetition/Counterclaim seeking attorneys' fees and other relief from the Trustees did the Trustees opt to discredit Bowers. No "honest disagreement" or "innocent mistake" explains this effort. First, there was no "disagreement" between the Trustees and the Blue Family – both agreed Bowers was the accounting firm for the A&R, and that the Bowers Report was the ground on which any value dispute must play out. Nor could "mistake" have been at play – both sides agree that Paragraph 8.01 does not instruct the Trustees to use the Bowers Report "unless some third party opines that Bowers failed properly to value" the A&R.

Thus, the attempted amendment is in no way a response to an innocent oversight about what Paragraph 8.01 requires. It is instead an effort to interpolate into Paragraph 8.01 a concept that contradicts the plain language and meaning of its text. The Court must reject that effort, and require the Petitions to litigate the case they have defined under oath and that the Blue Family has endorsed through their pleadings admissions.

CONCLUSION

For the reasons stated above, the Court should enter orders: (a) denying the Trustees' Motion to Amend; and (b) specifying that facts sworn and admitted by the parties are "without substantial controversy."

This 2nd day of July, 2007.

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RULE 15.8 CERTIFICATION

Respondent's Brief in Support of Their First Motion for Partial Summary Judgment and In Opposition to Petitioners' First Motion to Amend contains 5,211 words, excluding the parts of the brief exempted by BCR 15.8, and therefore complies with the word-count limitations of BCR 15.8.

This the 2nd day of July, 2007.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **RESPONDENT'S BRIEF IN SUPPORT OF THEIR FIRST MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN OPPOSITION TO PETITIONERS' FIRST MOTION TO AMEND** with the Clerk of the Court using the CM/ECF system which will electronically notify (mmandeville@mayerbrownrowe.com) and that pursuant to the Court's June 11, 2007 Order that I will also electronically notify (mmandeville@mayerbrownrowe.com) and the law clerk of Judge Jolly (trip.coyne@aoc.nccourts.org) of this filing.

This 2nd day of July, 2007.

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