

STATE OF NORTH CAROLINA
COUNTY OF LEE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
CIVIL ACTION NO: 08-CVS-692

THE PANTRY, INC.,

Plaintiff,

v.

CITGO PETROLEUM CORPORATION,

Defendant.

PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO MOTION TO DISMISS

Plaintiff The Pantry, Inc. ("The Pantry") submits this brief in opposition to the Motion to Dismiss filed by Defendant CITGO Petroleum Corporation ("CITGO").

I. INTRODUCTION

As alleged in the complaint, The Pantry entered into a contract with CITGO under which CITGO is to supply, and The Pantry to purchase, tens of millions of gallons of gasoline monthly. (Ex. A to CITGO Brief, at 2.) At several of its terminals, CITGO has unilaterally ceased supplying The Pantry with conventional or "clear" gasoline under the contract, and has chosen instead to substitute E10—a mix of 90% clear gasoline and 10% ethanol. (Complaint, ¶14.) The Pantry's competitors, however, are still able to purchase clear gasoline from their suppliers. (Complaint, ¶17.) CITGO's decision to supply only E10, combined with its effort to exclude E10 from the supply agreement's price protection provision, has put The Pantry at a significant competitive disadvantage. (Complaint, ¶20.)

CITGO concedes that its supply of E10 is governed by the gasoline supply contract (CITGO Br. at 1-2), as it must—otherwise CITGO would be in breach of its obligation to supply the Pantry with gasoline. CITGO further concedes that E10 is governed by the contract's "market related pricing provision" that governs "[T]he Base Price for gasoline." (CITGO Br. at

5.) The “market related pricing provision” provides that the “Base Price” is to be the average of the two lowest prices posted on OPIS “for the applicable grade of motor fuel.” (Ex. A. to CITGO Br., at 11.) Grade refers to the octane level: regular, mid-grade, or premium. (Complaint, ¶8.) The application of the Base Price provision is therefore straightforward and simple: the price is the average of the two lowest prices for motor fuel of the grade in question. Both conventional gas and E10 are motor fuel under the contract, and both are therefore to be considered in setting the price. CITGO concedes that it has failed to take the price of conventional gasoline into account in applying the market pricing provision. (CITGO Br. at 3.)

CITGO nevertheless has moved to dismiss this action under Rule 12(b)(6), arguing that, although the contract states that the price is to be based on the average of the two lowest of “the prices for the applicable grade of motor fuel,” it ought to be read instead as if it referred to the prices for the applicable grade of “*the particular type of motor fuel being supplied.*” (CITGO Br. at 5; emphasis added.) Obviously, if the parties had intended so to limit the definition of Base Price, they easily could have by using the language now suggested by CITGO in its brief. They did not, and CITGO cannot now have the Court read its desired limitation into the contract after the fact. “The courts will not rewrite a contract for the benefit of one party.” *Oklahoma Oncology & Hematology P.C. v. US Oncology, Inc.*, 160 P.3d 936, 947 (Okla. 2007).¹ Indeed, because The Pantry competes against retailers who purchase conventional gasoline, the purpose of the market related pricing provision would be defeated if the plain meaning of the provision is not given force.

Because CITGO’s proposed interpretation is flatly contradicted by the words of the contract, the Court should reject CITGO’s contention, establish as the law of the case that the plain meaning of the contract applies in The Pantry’s favor, and deny CITGO’s motion. At a

¹ As CITGO noted, Oklahoma law governs the contract at issue.

minimum, the contract does not unambiguously favor CITGO's reading, and the complaint is more than sufficient to state a claim for breach of contract and declaratory relief.

II. ARGUMENT

a. The Applicable Legal Standard

“The only purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the pleading against which it is directed.” *White v. White*, 252 S.E.2d 698, 702 (N.C. 1979). When deciding a motion to dismiss a plaintiff's complaint, the essential question before the court is “whether the facts alleged in the complaint, when viewed in the light most favorable to the plaintiff[], give rise to a claim for relief on any theory.” *Regions Bank v. Reg'l Prop. Dev. Corp.*, 2008 NCBC 8 ¶ 40 (2008). In deciding a motion to dismiss, a court must construe the complaint liberally, *Block v. County of Person*, 540 S.E.2d 415, 419 (N.C. App. 2000), and treat the allegations contained in the complaint as true. *Oberlin Capital, L.P. v. Slavin*, 554 S.E.2d 840, 844 (N.C. App. 2001).

CITGO's motion contends that The Pantry has failed to state a claim for breach of contract. Stating such a claim is not difficult in North Carolina:

The elements of a claim for breach of contract are (1) existence of a valid contract and (2) breach of the terms of [the] contract. This Court has held that where the complaint alleges each of these elements, it is error to dismiss a breach of contract claim under N.C. Gen.Stat. § 1A-1, Rule 12(b)(6).

McLamb v. T.P. Inc., 619 S.E.2d 577, 580 (N.C. App. 2005) (internal quotation and citation omitted). Although the Court can consider the contract's terms in ruling on CITGO's motion to dismiss, *Slavin*, 554 S.E.2d at 847, it should deny CITGO's motion unless it can only find that the contract's language is plain and unambiguous and that CITGO did not breach it. *Praxair, Inc. v. Airgas, Inc.*, 1999 NCBC 9 ¶ 7 (1999). For the reasons given below, CITGO cannot show

“beyond a doubt” that the Pantry can prove no set of facts to support its claims. *Regions Bank*, 2008 NCBC 8 at ¶ 41. Accordingly, this Court should deny CITGO’s motion.

b. Contract Construction

As described above, this case turns on the Market Related Pricing provision of the contract between The Pantry and CITGO. The relevant portion of that provision reads as follows:

4. MARKET RELATED PRICING: The purchase price for the applicable motor fuel that the Company ratably purchases from CITGO during the term of this Addendum shall be equal to (i) the Base Price set forth herein, plus (ii) an Adder Fee plus applicable taxes, if any.

- (i) The Base Price for gasoline shall equal the average of the two lowest net OPIS rack prices for the applicable grade of motor fuel at the applicable Terminal as of the date of lifting.

(Ex. A to CITGO Brief, at 11.)

The Market Related Pricing provision appears in a February 11, 2003 Addendum (the “Addendum”) to the original August 2000 Distributor Franchise Agreement between CITGO and The Pantry (the “DFA”). The two documents are therefore to be considered together. 15 Okla. St. § 158 (“Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together.”) The DFA calls for CITGO to supply The Pantry with a specified quantity of “gasoline or diesel fuel.” (Ex. A to CITGO Brief at 5, ¶2). The Addendum refers to the diesel fuel to be provided under the contract as “low sulfur diesel” or “LSD.” (Ex. A to CITGO Brief, at 10-11.) The contract makes no reference to E10. CITGO, on its own, made the decision to satisfy its obligation to supply The Pantry with gasoline by supplying E10 instead of clear gasoline at certain terminals. (Complaint, ¶14.) Having conceded by its actions that E10 is a substitute for clear gasoline under the contract, CITGO further concedes that E10 is “gasoline” for purposes of the setting the Base Price under

the Market Related Pricing provision. (CITGO Br. at 5.) Under that provision, the price of E10 is to be equal to “the average of the two lowest net OPIS rack prices for *the applicable grade of motor fuel* at the applicable Terminal as of the date of lifting.” (Emphasis added.) E10 and clear gasoline are both motor fuel, which CITGO does not contest. The only remaining question, therefore, is the meaning of “the applicable grade.”

i. “Grade” Refers to Octane Level.

As alleged in the Complaint, grade refers to the octane level: regular (87 octane), mid-grade (89 octane), or premium (93 octane). (Complaint, ¶8.) Immediately following the Market Related Pricing Provision, in paragraph 4(ii), is a table for the calculation of “Adder Fees.” The “Branded Gasoline” column in that table contains three sub-columns: “RUL” (for Regular Unleaded) “MID” (for Mid-Grade) and “PREM” (for Premium). In the same row, under Unbranded Gasoline, the phrase “all grades” appears, indicating that the three sub-categories are indeed grades. (Ex. A. to CITGO Br., at 11.) The meaning of grade is confirmed by the DFA, which sets forth the ratios of “Unleaded Regular,” “Mid-Grade Unleaded,” and “Premium Unleaded” that CITGO is to supply and The Pantry to purchase under the agreement, and then immediately afterwards states that

Franchisee shall have the right to request a variation of the ratio of *gasoline grades set forth above* by making a written request to CITGO. Timely requests to modify the gasoline grade ratio shall be honored by CITGO to the best of its ability.

(Ex. A to CITGO Brief, at 5-6; emphasis added).

CITGO does not explicitly deny that “grade,” as used in the agreement between CITGO and The Pantry, refers to a fuel’s octane level. It does cite an obscure 2001 EPA staff white paper from 2001 that suggests that grade might refer to the type of motor fuel. (CITGO Br. at 3, n.3.) CITGO’s reference to the bureaucratic study is inappropriate, both as a matter of contract

interpretation, and of the law governing motions made under Rule 12(b)(6). The pertinent question facing the Court is the meaning of the word “grade” *to the parties to the agreement*. *May v. Mid-Century, Ins. Co.*, 151 P.3d 132, 140 (Okla. 2006) (“The primary goal of contract interpretation is to determine and give effect to the intention of the parties at the time the contract was made.”). The use of “grade” to refer to the three octane levels elsewhere in the agreement provides the best indication of the parties’ intent in using the word. *Barnes v. S. E. Townley*, 448 P.2d 468, 471 (Okla. 1968) (“Words used in one sense in one part of a contract are deemed to have been used in the same sense in another part of the same instrument, where the context does not indicate otherwise.”); *Cities Serv. Oil Co. v. Geologist Co., Inc.*, 254 P.2d 775, 783 (Okla. 1953) (same); *see also Duncan Oil Properties, Inc. v. Vastar Resources, Inc.*, 16 P.3d 465, 467-68 (Okla. Civ. App. 2000) (using the phrase “other parties,” as found in one paragraph of contract, to interpret same phrase in later paragraph of contract).

Furthermore, CITGO’s motion is made under Rule 12(b)(6), which forbids the consideration of matters such as the EPA study that are outside the pleadings and the contract. *Covenant Equip. Corp. v. Forklift Pro, Inc.*, 2008 NCBC 10 ¶ 37 (2008), *citing Fowler v. Williamson*, 251 S.E.2d 889, 890-91 (N.C. App. 1979). It also constitutes extrinsic evidence, which the Court is not to consider if the contract is, as CITGO contends, unambiguous. *Pitco Production Co. v. Chaparral Energy, Inc.*, 63 P.3d 541, 545-46 (Okla. 2003) (“If a contract is complete in itself, and when viewed as a totality, is unambiguous, its language is the only legitimate evidence of what the parties intended. That intention cannot be divined from extrinsic evidence but must be gathered from a four-corners’ examination of the instrument.”)² However,

² If the Court were to deem the contract ambiguous, so as to permit consideration of extrinsic evidence of the type CITGO offers, then dismissal under Rule 12(b)(6) would be improper, because “construction of the contract becomes a mixed question of law and fact and should be submitted to a jury under proper instructions.” *Stephenson v. Oneok Resources Co.*, 99 P.3d 717, 721 (Ok. Civ. App. Div. 3, 2004).

if the Court is to consider the use of the term in a government study, it should also consider the way CITGO itself uses the term. CITGO's website contains numerous references to the "grade" of motor fuel, all of which refer to its octane level. For example, the page entitled "CITGO Gasoline" states that "CITGO provides three different octane *grades* of gasoline." (Ex. A attached hereto; emphasis added.) The "Frequently Asked Questions" page says the same thing. (Ex. B attached hereto.) CITGO's website confirms the meaning of grade provided by the contract itself: it refers to the three octane levels of motor fuel. Accordingly, the Base Price for E10 is to be the average of the two lowest prices for "motor fuel" of the same octane level. Clear gasoline and E10 are both "motor fuel," and therefore, both considered in setting the price.

CITGO's argument to the contrary turns on two assertions: first, that E10 and clear gasoline are "*different* motor fuels" for purposes of the contract (CITGO Br. at 6), and second, that the phrase "applicable grade of motor fuel" should refer to "the particular type of motor fuel purchased." (CITGO Br. at 5.) As discussed below, both assertions are wrong.

ii. E10 and Clear Gasoline Are Not "Different Motor Fuels" for Purposes of the Contract.

The contract requires CITGO to supply, and The Pantry to purchase, a minimum volume of "gallons per Contract Year of Motor Fuels ('Motor Fuels' being defined as all grades of gasoline, branded and unbranded, and diesel.)" (Ex. A. to CITGO Brief, at 26.) The contract says nothing about the supply of E10 or any other ethanol blend and provides no textual basis for excluding E10 from the terms "gasoline" and "motor fuel" that are subject to price protection. The complaint alleges that E10 "is a type of gasoline," which allegation is to be taken as true for purposes of CITGO's 12(b)(6) motion. (Complaint, ¶18); *Slavin*, 554 S.E.2d at 844. CITGO has consistently treated E10 as gasoline, pursuant to the contract, for every purpose except the Base Price provision. First, CITGO and The Pantry executed a rider that allowed The Pantry to create

E10 on its own, with the proviso that The Pantry’s “ethanol/gasoline mixture shall meet CITGO’s specifications for the applicable grade of gasoline.” (Ex. C attached hereto.) CITGO therefore conceded, in the rider, that an ethanol blend could meet the specifications for an “applicable grade of gasoline.” The rider modifies, and is therefore part of, the agreement, and constitutes intrinsic evidence of the meaning of the term. 15 Okla. St. § 158. Second, CITGO ceased supplying clear gasoline at certain terminals, substituting E10, without seeking any modification of the contract. For purposes of CITGO’s supply obligations, and The Pantry’s purchase obligations, under the Contract, CITGO therefore treats E10 as a form of gasoline, interchangeable with and a substitute for clear gasoline. If E10 were a different type of motor fuel than gasoline or diesel, it would not comply with the contract’s requirement that CITGO supply “all grades of gasoline, branded and unbranded, and diesel.” (Ex. A. to CITGO Brief, at 26.) Thus, CITGO’s contention that E10 “is not, in and of itself, gasoline,” (CITGO Br. at 8), whatever its merits as a matter of chemical analysis in the abstract, is belied by the terms of the contract itself.

CITGO again refers to extrinsic evidence on this point: federal and state regulations that make a distinction between clear gasoline and ethanol. (CITGO Br. at 7-8.) As with CITGO’s citation of the EPA study, such references are not only improper, because the Rule 12(b)(6) motion is to be determined on the pleadings, *Covenant Equip.*, 2008 NCBC 10 ¶ 37, they are also irrelevant. The question is what the *parties* intended by the term gasoline *in the contract*. 15 Okla. St. § 152 (“A contract must be so interpreted as to give effect to the mutual intention of the parties, as it existed at the time of contracting, so far as the same is ascertainable and lawful.”); 15 Okla. St. § 155 (“When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible, subject, however, to the other provisions of this

article.”) As shown above, within the four corners of the contract itself, it is apparent that CITGO intended E10 to be considered a form of gasoline. *Principle Films, inc. v. Wichita Mountains Easter Sunrise Service Assn., Inc.*, 288 P.2d 734, 739 (Okla. 1955) (“Where the parties to a contract have given it a practical construction by their conduct, as by acts in partial performance, such construction is entitled to great, if not controlling weight, in determining its proper interpretation.”)

Nor would considering E10 to be a form of gasoline be an unusual meaning. If the Court considers CITGO’s citations to materials outside the pleading, materials that have nothing to do with the parties’ intent, it should give greater weight to the use of the term by the parties themselves. Specifically, the information on CITGO’s website confirms that E10 is simply a form of gasoline. CITGO’s Material Safety Data Sheet for “CITGO Gasolines, All Grades” lists as “Synonyms” not only “Unleaded Gasolines,” but also “Conventional Unleaded Gasoline with Ethanol; Unleaded Gasoline with Ethanol.” (Ex. D attached hereto.) CITGO’s “Consumer Frequently Asked Questions” page states that “CITGO gasoline may contain ethanol.” (Ex. E attached hereto.) CITGO’s website reflects that in the marketplace, E10 and clear gasoline are entirely interchangeable. Clear gasoline comes through a pipeline. E10 is created by adding ethanol to clear gasoline, similar to other additives such as detergents that oil companies use to try to differentiate their motor fuels. But adding something like ethanol does not change the fundamental function of the product. It is still a motor fuel, sold by octane rating, that consumers buy to run their gasoline-powered vehicles. If CITGO’s interpretation were correct, it could remove any of its products from the price protection provision simply by putting in additives.

E10 therefore differs from the government-mandated RFG and Low-RVP fuels described in footnote 6 of CITGO’s brief (should the Court consider that extrinsic evidence). Because

those fuels are federally mandated, they must be sold by The Pantry's competitors as well. The government does not mandate the sale of E10 in any location, and The Pantry therefore must compete against retailers who purchase clear gasoline as well as E10.

In summary, as with the definition of grade, the Court could conclude that the contract unambiguously treats E10 and gasoline as substitutes. But if the Court finds the contract to be ambiguous, such that extrinsic evidence is to be considered, then there is more than sufficient evidence to reject CITGO's motion.

iii. The Base Price Provision Does Not Limit the Type of Motor Fuel to which Comparison Is To Be Made for Pricing Purposes.

Even if clear gasoline and E10 were different types of fuel for purposes of the contract — which is demonstrably not the case, as described in the preceding section—the definition of Base Price in the Market Related Pricing Provision in the Contract refers simply to “the average of the two lowest net OPIS rack prices for the applicable grade of motor fuel.” The language of the contract therefore calls for a comparison to motor fuel of the same grade for purposes of the market related pricing provision, not the same grade and the same type. The contract would therefore still require that the price of any particular grade of E10 be set by reference to the price of the equivalent grade of both E10 and clear gasoline.

CITGO would have the Court change the language in the Base Price definition further to limit the prices to be averaged to the two lowest net OPIS rack prices for the applicable grade of motor fuel of “*the particular type of motor fuel purchased.*” (CITGO Br. at 5;emphasis added.) Notably, CITGO cites no support for its approach. Indeed, CITGO's argument is expressly forbidden by the applicable law, which provides that the Court may not add terms to the parties' agreement. *See Livesay v. Shoreline, LLC.*, 31 P.3d 1067, 1071 (Okla Civ. App. Div. 3 2001) (The court “cannot read into contracts words or terms it does not contain The law will not

make a better contract than the parties themselves have seen fit to enter into, or alter it for the benefit of one party to the detriment of another.”); *Anderson v. Pickering*, 541 P.2d 1361, 1365-66 (Okla. Ct. App. 1975) (The Court “cannot read into this binding statement a restriction which is not there”); *Paul Hardeman, Inc. v. United State Fidelity & Guaranty Co.*, 486 P.2d 726, 730-31 (Okla. 1971) (same). If the parties had intended to include such a restriction, they easily could have done so.

CITGO attempts to justify its effort to add words to the key contractual provision by referring to the introductory sentence of Paragraph 4, the Market Related Pricing provision. (CITGO Br. at 6-7.) That sentence says, “The purchase price for the *applicable motor fuel* that the Company ratably purchases from CITGO during the term of this Addendum shall be equal to (i) the Base Price set forth herein, plus (ii) an Adder Fee plus applicable taxes if any.” (Emphasis added.) According to CITGO, the phrase “applicable motor fuel” from the preface is to be “[r]ead together” with the phrase “applicable grade of motor fuel,” so that the preface somehow modifies the Base Price provision in Paragraph 4(i), with the result that only the OPIS listings for the “applicable motor fuel,” meaning “the same type of motor fuel,” are to be considered. *Id.* But CITGO’s argument not only runs afoul of the applicable law, it does violence to the words of the contract itself. The phrase “applicable motor fuel” in the preface to Paragraph 4 does not refer to the same thing as the phrase “applicable grade of motor fuel” in the Base Price Provision. The two therefore cannot be “read together.”

The phrase “applicable motor fuel that the Company ratably purchases” in the preface identifies the fuel to which the Base Price provision applies in the first place—gasoline purchased at the specific terminals listed in paragraph 3 (which CITGO redacted from the version of the contract it attached as Exhibit A, at 10-11), as opposed to gasoline purchased at

other terminals, to which this pricing provision does not apply.³ By contrast, in the definition of Base Price in Paragraph 4(i), the actual price protection provision, the phrase “applicable grade of motor fuel at the applicable Terminal as of the date of lifting” describes *not* the fuel that The Pantry is purchasing, but rather the fuel sold by *all* suppliers at the Terminal, on which the price protection is to be based. The phrase in 4(i) explicitly identifies only the *grade* of motor fuel—regular, mid-grade or premium—and states the average of the two lowest rack prices for that grade are to be compared to the price CITGO charges for the same grade. Thus, the fuel to which comparison can be made for the pricing provision is limited only by the grade.⁴ Therefore, the two phrases contain different words, refer to different things for different reasons, and cannot be conflated.

iv. The History and Purpose of the Base Price Provision Confirms Its Plain Meaning.

CITGO tries to be preemptive concerning the intent of the parties, but it has the history and purpose of the market-related pricing provision simply wrong. CITGO asserts that The Pantry already negotiated a price for E10 based on the lowest prices for E10 offered by any seller in a given area.” (CITGO Br. at 8.) There is no basis for this assertion in the complaint or contract, and it therefore must be rejected on the motion to dismiss. The contract does not even *mention* E10. To the contrary, as the complaint recites and the contract shows, The Pantry negotiated a price protection provision based on the price of “motor fuel” generally. (Complaint, ¶6; Ex. A to CITGO Brief, at 10.) That provision was added in order to “secure a price to The Pantry that would allow The Pantry to sell motor fuel at prices competitive with other retailers in

³ CITGO’s argument that The Pantry’s reading of the contract renders the reference to “applicable motor fuel” in the preface “superfluous” (CITGO Br. at 6) is therefore in error.

⁴ For example, if a clothing retailer negotiated with a mill for the purchase of cotton socks, in ankle-, calf-, and knee-lengths, with the price to equal the average of the two lowest prices for the “applicable length of sock”, and the mill unilaterally began to supply socks that were 90% cotton and 10% nylon under the contract, it could not thereby escape from the requirement that the price be compared to socks of the same length—whether 90% or 100% cotton.

its markets.” (Complaint, ¶¶ 6-7; Ex. A to CITGO Brief, at 15.) Those other retailers are able to purchase clear gasoline and then “splash blend” to create their own E10, claiming the ethanol tax credit for themselves. (Complaint, ¶17.) Although CITGO has passed the ethanol tax credit through to purchasers such as The Pantry, it did so as it raised the price of E10 above that of clear gasoline. (Complaint, ¶15.) Thus, if CITGO succeeds in its attempt to exempt E10 from the Market Related Pricing provision, it effectively will have claimed the tax credit for itself. In contrast, to be able to sell motor fuel at prices competitive with those sellers, The Pantry must be able to obtain motor fuel of the applicable grade at the same price, and also to “splash blend” when clear gasoline is available.

CITGO further refers to The Pantry’s “seeking to have the lowest posted prices for *clear* gasoline apply to its purchases of *E10*” (CITGO Br. at 9; emphasis in original), as if The Pantry were choosing to purchase E10. It was CITGO, and CITGO alone, that made the decision to shut off The Pantry’s supply of conventional gasoline and to substitute E10 in its place. (Complaint, ¶14.) Indeed, CITGO now has adopted the ironic position that the price of conventional gasoline—the dominant product when the parties agreed to the price protection provision—is irrelevant for purposes of calculating the price under that provision. If CITGO wishes to supply E10 instead of conventional gasoline under the contract, that is CITGO’s choice—but it cannot thereby evade the plain meaning and purpose of the market related pricing provision requiring it to match the average of the two lowest prices for motor fuel of the same grade.

III. CONCLUSION

CITGO decided, on its own initiative, to substitute E10 as gasoline under its supply contract with The Pantry. Although the contract treats E10 as a form of gasoline, and CITGO concedes that the Market Related Pricing provision applies to E10, CITGO now asks the Court to change the contract and exempt E10 from the pricing provision. The contract provides no basis for doing so. The Court should reject CITGO's request, rule that the plain meaning of the contract applies in The Pantry's favor or is at a minimum ambiguous, and deny CITGO's motion.

This the 8th day of September, 2008.

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RULE 15.8 CERTIFICATION

I certify that this brief complies with BCR 15.8.

This the 8th day of September, 2008.

s/D. Blaine Sanders
D. Blaine Sanders

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed this pleading with the North Carolina Business Court today which will electronically notify the following counsel of record and served the following counsel by hand delivery or by regular U.S. mail, postage-prepaid (as indicated below) and addressed as follows, all in accordance with the North Carolina Rules of Civil Procedure and the Rules of the North Carolina Business Court:

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This the 8th day of September, 2008.

s/D. Blaine Sanders
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