

STATE OF NORTH CAROLINA
LEE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
08 CVS 00692

THE PANTRY, INC.,

Plaintiff,

vs.

CITGO PETROLEUM CORP.,

Defendant.

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REPLY MEMORANDUM OF LAW
IN SUPPORT OF MOTION
TO DISMISS PURSUANT TO
RULE 12(b)(6)

The central issue before the Court is simple and straightforward:

Does the “market related pricing” formula in the Contract contemplate that CITGO sell E10 motor fuel to Pantry at a price based on the OPIS-reported market prices for E10? Or does it require, as Pantry suggests, that CITGO sell E10 to Pantry at a price based on the OPIS-reported market prices for clear gasoline, even though OPIS treats E10 and clear gasoline as different products by reporting separate market prices for each?

Merely stating these questions provides the answer: Where the two products—E10 and clear gasoline—are recognized *in the market*, by OPIS, as different products with different “posted” prices, the only reasonable interpretation of the DFA’s “market related pricing” provision is that the *market related* price for E10 should be determined using the prevailing market prices for E10 and not the prevailing market prices for some other, separately listed motor fuel.

Pantry’s entire case rests on the fact that different types of motor fuel, such as E10 and clear gasoline, come in three different octane grades and that one subpart of the Contract’s pricing provision refers to “applicable grade of motor fuel.” CITGO does not dispute that octane grade is relevant. But octane grade is not the *only* relevant factor. The DFA’s pricing provision sets forth *two* threshold steps: first, determine the “applicable motor fuel” being purchased by Pantry (¶ 4), and second, determine the octane grade (¶ 4(i)). While Pantry would prefer to read the first step out of the pricing provision and ignore the type of motor fuel

altogether, the law does not allow it. In the end, Pantry's proffered interpretation cannot be reconciled with the plain language of the Contract, and its Complaint should be dismissed as a matter of law.

* * * *

The parties agree that Paragraph 4 of the Contract governs the price CITGO charges Pantry for the E10 that Pantry purchases from CITGO. (Opp. at 4). Pantry also acknowledges, as it must, that Paragraph 4 begins by stating that the pricing formula laid out therein will determine "[t]he purchase price for the *applicable motor fuel* that the Company ratably purchases from CITGO." (*Id.* at 4, 11). Yet Pantry misguidedly asserts that CITGO should calculate the price for E10 using the lowest market prices for *any* motor fuel, instead of the lowest market prices for the *applicable* motor fuel being purchased, E10. This assertion is contrary to the plain and unambiguous language of the Contract, and for that reason, Pantry's Complaint should be dismissed.

Pantry's position disregards that Paragraph 4 is written in terms of the "applicable motor fuel" (here, E10). Pantry dismisses Paragraph 4 as merely an "introductory sentence" or "preface," and then argues that because Paragraph 4(i) later refers to "applicable grade of motor fuel" the two terms are different and cannot be read together. (Opp. at 11). From this argument, it would follow that in any contract where different terms are used, one must be disregarded. This is contrary to the basic rules of contract interpretation. *See Pierce Couch Hendrickson Baysinger & Green v. Freede*, 936 P.2d 906, 911-12 (Okla. 1997) ("A contract must be considered as a whole so as to give effect to all it [sic] provisions without narrowly concentrating upon some clause or language taken out of context.") (internal quotes and citation omitted). In

fact, the *only* logical way to determine the price of fuel sold to Pantry is to read the two terms together.

Paragraph 4 requires two steps to determine which OPIS prices to use in the Contract formula: first, which motor fuel is being purchased (clear gasoline, Reformulated gasoline, E10, or any number of other types of fuel); and second, which octane grade of that particular type of fuel is being purchased.¹ Once these determinations are made, Pantry gets the benefit of the two lowest prices for the particular motor fuel and grade it has purchased. Thus, if Pantry purchases “premium” (93 octane) E10, CITGO’s price is based on the two lowest net OPIS rack prices for premium E10, not, as Pantry suggests, the two lowest net OPIS rack prices for premium E10 *or* any other type of premium motor fuel. CITGO is not, as Pantry contends, “exclud[ing] E10 from the supply agreement’s price protection provision.” (Opp. at 1). To the contrary, Pantry is receiving the full benefit of that provision. CITGO sells E10 to Pantry at a market determined price under Paragraph 4, based on the two lowest posted E10 prices available in the market. (Cmplt. ¶ 16).²

By asking this Court to ignore the term “applicable motor fuel” in Paragraph 4 and to insert the word “any” in Paragraph 4(i) – so that it would read: “the two lowest net OPIS rack

¹ As previously described (Br. at 3), OPIS lists separate market prices for each octane grade of E10 and each octane grade of clear gasoline—there are separate prices for regular E10, mid-grade E10, premium E10, regular clear, mid-grade clear and premium clear.

² Likewise, Pantry’s suggestion that CITGO’s construction of the DFA would allow CITGO to “remove” a product from the Contract’s pricing provision merely by adding an additive (Opp. at 9) is a red herring. To the extent that ethanol is considered an “additive,” there is no dispute that the end-product consisting of 90% gasoline and 10% ethanol is a unique product known as “E10,” and that market prices for E10 are tracked and reported separately by OPIS. Thus, because CITGO’s price for E10 is based on the two lowest OPIS prices in the market (Cmplt. ¶ 16), it is clear that E10 is neither “excluded” nor “removed” from the market pricing provisions of the Contract.

prices for the applicable grade of [any] motor fuel” – it is Pantry, not CITGO, who is seeking to alter the plain meaning of the Contract. CITGO’s straightforward reading is based on the four corners of the DFA. The words “applicable motor fuel” referenced in Paragraph 4 mean something—that the price charged Pantry is to be based on the lowest market prices for the particular product that Pantry purchased. Pantry cannot plead around the plain language of the DFA by alleging that the parties’ true intent was somehow different than that reflected in the unambiguous words used to document their agreement. *Covenant Equip. Corp. v. Forklift Pro, Inc.*, 2008 WL 1945973, at *8, No. 07 CVS 21932 (N.C.B.C. May 1, 2008) (holding that, on a motion to dismiss, the court can reject legal conclusions regarding a contract alleged in the complaint if they are contradicted by the contract itself).³

Pantry also complains throughout its brief that it is at a competitive disadvantage because some of its competitors are able to purchase clear gasoline and “splash blend” their own E10. (Opp. at 1, 2, 7-8, 10, 13). First, this is not relevant to the issue presented here, which is how the E10 CITGO sells to Pantry is to be priced under the Contract. The Complaint on its face does not seek the right to splash blend; it seeks a more favorable price for E10 under the Contract. Second, although the Contract as originally drafted did not specifically reference “E10” or “splash blending,” the parties negotiated a Rider to that agreement which did specifically set forth the parties’ agreement with respect to Pantry’s splash blending of ethanol. In the Rider, dated October 26, 2007 (attached to Pantry’s Opp. as Exhibit C), CITGO and Pantry agreed that Pantry could splash blend ethanol with conventional gasoline *and* that CITGO could withdraw

³ Pantry’s characterization of Paragraph 4 as distinguishing between the fuel Pantry purchased at terminals covered by the DFA from fuel purchased at other terminals is baseless. As Pantry even acknowledges (Opp. at 11), Paragraph 3 specifically sets forth the scope of the Contract by listing the terminals covered by the DFA. It would be redundant for the pricing term to then restate that it only applies to the terminals to which Paragraph 3 already states the DFA applies.

its consent to such splash blending “at any time.” (Opp. Ex. C at ¶ h). These are the terms Pantry negotiated and agreed to with respect to splash blending ethanol. Pantry has not and cannot allege that CITGO has breached this agreement.⁴

Pantry’s response to CITGO’s motion to dismiss attacks various other strawmen, none of which undermine CITGO’s position. For example:

- Pantry complains that CITGO has raised its prices for E10. (Opp. at 13).
Because the price charged to Pantry is based on the two lowest OPIS-posted prices for E10, CITGO’s rack price is irrelevant unless CITGO was one of the two lowest prices posted by OPIS. The Complaint makes no such allegation.
- Pantry also protests that the DFA does not mention E10 by name. (Opp. at 4, 12).
In fact, the DFA does not mention *any* specific gasoline by name, nor need it because, pursuant to the Contract, the price for each gasoline product is determined by reference to the lowest OPIS postings for that product.
- Pantry’s attempt to distinguish RFG and Low-RVP fuels on the basis that they are mandatory (and thus Pantry’s competitors must also sell them) is inapposite. (Opp. at 9-10). The DFA’s language does not distinguish among fuels based on which are mandated by law or are sold by Pantry’s competitors. Pantry agreed to pay the price based on the OPIS postings for the “applicable motor fuel” and

⁴ Pantry’s claim that the Rider’s reference to the “applicable grade of gasoline” means that ethanol blends could meet the specifications for an “applicable grade of gasoline” (Opp. at 8) is a truism and is beside the point. Of course, ethanol blends can meet specifications for particular octane grades of gasoline, such as regular or premium. The Rider merely required that when Pantry made a particular octane grade of E10, it had to meet the specifications for that octane grade. This has nothing to do with how pre-blended E10 sold to Pantry would be priced.

“applicable grade of motor fuel.” This same mechanism applies to RFG, Low-RVP, clear gasoline, E10, or any other motor fuel.

- Finally, Pantry’s protestations regarding “extrinsic” evidence in CITGO’s motion are both incorrect and immaterial. (Opp. at 5-6, 8-10). CITGO referenced an EPA white paper as a government source for the undisputed and readily verifiable fact that there are many types of motor fuels sold throughout the United States. (Br. at 3 n.3). This Court can take judicial notice of this fact, which, in any event, is not essential to resolution of this motion. *See West v. G. D. Reddick, Inc.*, 302 N.C. 201, 203, 274 S.E.2d 221, 223 (1981) (“[A] judge or a court may take judicial notice of a fact which is either so notoriously true as not to be the subject of reasonable dispute or is capable of demonstration by readily accessible sources of indisputable accuracy.”).⁵

Pantry does not contest the key, dispositive point: CITGO is selling E10 to Pantry based *on the two lowest posted prices* for E10 offered by *any seller in a given market*. Pantry’s attempt to obtain a better price than it negotiated in the Contract should not be countenanced. As a matter of law, CITGO’s pricing of E10 based on posted OPIS prices for E10 is entirely consistent with, and not in breach of, its written agreement with Pantry, and Pantry has no grounds for maintaining its causes of action.

⁵ Similarly, the statutes and regulations cited by CITGO (Br. at 7-8) are law, not extrinsic facts, and also subject to judicial notice. *See Hinkle v. Hartsell*, 131 N.C. App. 833, 836, 509 S.E.2d 455, 457 (1998) (“It is clear that judicial notice must be taken of the public laws of this State, of the United States, and of any other state or territory of the United States, as well as of any foreign country.”); *Southern Ry. Co. v. O’Boyle Tank Lines, Inc.*, 70 N.C. App. 1, 8, 318 S.E.2d 872, 877 (1984) (“A court must take judicial notice of important administrative regulations having the force of law.”). Nor are they essential to resolution of this motion. In any event, if the Court denies CITGO’s motion to dismiss, CITGO reserves the right to introduce parol evidence to support its reading of the Contract and the intent of the parties.

CONCLUSION

For the foregoing reasons and those set forth in its Memorandum of Law in Support of its Motion to Dismiss, CITGO respectfully requests that this Court grant its motion to dismiss for failure to state a claim on which relief can be granted.

Respectfully submitted, this 22nd day of September 2008,

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RULE 15.8 CERTIFICATION

The undersigned certifies that this brief complies with the length requirements of Rule 15.8 of the General Rules of Practice and Procedure for the North Carolina Business Court.

This the 22nd day of September, 2008.

/s/ Jennifer K. Van Zant

Jennifer K. Van Zant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing **Reply Memorandum of Law in Support of Motion to Dismiss Pursuant to Rule 12(b)(6)** was served on the following by filing the foregoing through Electronic Filing, which, pursuant to Rule 6.5 of the General Rules of Practice and Procedure for the North Carolina Business Court, caused notice of the foregoing to be served by email addressed as follows:

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