

STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH

**RECEIVED**

NOV 28 2012

IN DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT

CIVIL NO. 08-2011-CV-01887

**PUBLIC SERVICE COMMISSION**

Smith Contracting Inc.,  
  
Plaintiff,  
  
vs.  
  
North Dakota Public Service Commission  
Abandoned Mine Lands Division,  
  
Defendant.

**DEFENDANT'S REPLY BRIEF IN  
SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT AND IN  
OPPOSITION TO PLAINTIFF'S  
CROSS-MOTION FOR SUMMARY  
JUDGMENT**

\*\*\*

\*\*\*

\*\*\*

**I. INTRODUCTION**

The PSC has moved for summary judgment on Smith Contracting's claims. Smith Contracting has responded, requesting summary judgment in its favor. The PSC hereby replies to Smith Contracting's motion, and requests summary judgment be granted in the PSC's favor.

**II. APPLICABLE LAW AND ARGUMENT**

Smith Contracting's argument relies upon an unsupportable interpretation of, and attempts to rewrite, the contract. It remains undisputed that Smith Contracting agreed to perform this project for the price bid, agreed it had familiarized itself with the site conditions, and agreed to complete the project in 2010. When Smith Contracting wholly failed to meet its contractual obligations, it attempted to dramatically increase the cost and time to perform under the contract. When Smith Contracting's change order was denied, it left the project in mid-September 2010. Smith Contracting's surety then accepted the PSC's claim and hired a contractor to complete the project.

In addition, without so much as presenting a claim to the PSC or completing the dispute process in the contract, Smith Contracting waited almost a year after walking off the project and well after the surety bond accepted the PSC's claim, and initiated suit on various grounds that had never been presented before. As a result, not only does Smith Contracting's attempt to rewrite the contract require summary judgment, but the Court does not even have subject matter jurisdiction over Smith's claims.

The PSC incorporates the arguments made in its initial brief. Smith Contracting makes several arguments in its brief attempting to rewrite the contract. However, its assertions regarding the contract's interpretation are not reasonable, are inconsistent with the contract as a whole, and inconsistent with the undisputed evidence. This case boils down to the parties' contract and Smith Contracting's allegations are not supported by the contract or the evidence. The PSC requests its summary judgment motion be granted and Smith Contracting's motion be denied.

**A. Smith Contracting's Argument Regarding the Contract Period is a Clear Misreading of the Contract**

Smith Contracting attempts to establish some ambiguity in the contract language regarding the time to perform this contract. There are two provisions in the contract at issue, the first is the contract period and the second is the performance period. Smith's argument attempts to blend them together and ignore its representatives' testimony. There was never any confusion about the time to perform this contract and the contract documents are unambiguous. The *Information for Bidders* provides, "All work must be completed as specified during the 2010 construction season." *Information for Bidders* at p. 2, ¶ 2 (*Armstrong Aff.* at Ex. 3). It also indicated the time of performance would begin within ten days of issuance of the notice to

proceed and the “project performance period will be 150 consecutive calendar days. Time of performance shall be approximately from May 17, 2010 to October 13, 2010.” Id. at p. 14, ¶ 17. The scope of work provision further provided, “The contractor shall be capable of completing this project within one hundred fifty (150) consecutive calendar days between approximately May 17, 2010 and October 13, 2010.” Id. at p. 27, § 200, ¶ 3. There can be no dispute that the contract language unambiguously required the project be completed during the 2010 construction season.

Smith Contracting’s attempt to create an ambiguity based on the contract period also ignores Smith Contracting’s own testimony and the schedules it submitted. Lee Barron, Smith Contracting’s project manager who prepared the bid, testified as follows:

Q. What was your understanding of how long the actual construction of the project was supposed to take?

A. It was supposed to end in – it was supposed to go through some date in 2011.

Q. That was the contract period; correct?

A. Yeah.

Q. Was there part of that that talked about how long the actual work by Smith Contracting was supposed to take?

A. I don’t remember.

Q. Do you recall being aware that the work was supposed to take place over 150 consecutive days?

A. That might well be.

Q. You were aware of that, weren’t you?

A. Yeah.

Q. You weren’t expecting to work on the project through July of 2011, were you?

A. No.

Q. And that goes for even at the time you submitted the bid; is that true?

A. That's true. I know that we had conversations that we would be done this year – or that year, you know, by the deadline.

Q. You were bidding it as a 2010 project?

A. Right.

Q. And it was your intent to complete it in 2010?

A. Correct.

Q. You would agree with me it was not complete in 2010, would you not?

A. Yes.

*Barron Depo.* at 43:25-45:7 (*Armstrong Aff.*, Ex. A) (emphasis added). In addition, the correspondence and schedules submitted by Smith Contracting were for a 150-day completion of the project in 2010. See, e.g., *Armstrong Aff.* Ex. 5 (letter from Smith Contracting indicating 129 calendar days to complete the project from May 24 to September 30, 2010, with attached schedule).

Smith Contracting's desperate attempt to create an ambiguity of a contract term all parties understood from the beginning of the contract is telling. There was never any ambiguity that the work was to be completed during the 2010 construction season with a 150-day performance period. Smith's claims based on an alleged ambiguity of the contract time period must be dismissed because they are based on an unreasonable interpretation of the contract and are contrary to the parties' intent.

**B. Smith Contracting's Argument Regarding the PSC's Acceptance of Its Bid Ignores the Contract and the Applicable Public Bidding Law**

Smith Contracting apparently asserts the PSC should have rejected its bid. This argument

attempts to view the bidding process with 20/20 hindsight rather than what actually occurred. Prior to submitting its bid, Smith Contracting did not request any additional information from the PSC. *Barron Depo.* at 18. David Smith never asked any questions at the pre-bid meeting. *David Smith Depo.* at 13:17-18. By submitting its bid, Smith Contracting affirmed that it had carefully examined the site and project documents, and was “satisfied as to the conditions to be encountered in performing the work and as to the requirements of all contract documents.” *Standard Specifications* at § 103.5 (*Armstrong Aff.* Ex. 1).

After the bids were opened, Smith Contracting was the low bidder. The *Information for Bidders* provided, consistent with North Dakota’s public bidding laws, that the contract award would be made to the lowest responsible bidder with the lowest priced bid responsive to the specifications and all other requirements. Ex. 3, p. 11, cl. 2. As a result of the difference between Smith’s bid and the next lowest bidder, two PSC staff members contacted Smith Contracting. Again, Smith Contracting did not indicate its bid was based on its alleged, but unreasonable, assumption that the entire 1,850,000 cubic yards consisted of loose, flowable material. Rather, Smith Contracting assured the PSC it could perform as bid.

David Smith’s testimony belies Smith Contracting’s assertion the PSC should have rejected its bid. Smith testified:

Q. How did you become aware that Smith Contracting was the lowest bidder?

A. I guess Lee told me we were.

Q. And did Lee relay to you the conversations he had with the Public Service Commission about being about \$500,000 lower than the next bidder?

A. Yes.

Q. What did you and Lee discuss about that?

A. Went back through the bid, and I made him look at all the distances that we thought we had to move the material, and they all added up to our performance on other jobs. I mean, we've been a million dollars low on projects. You know, in five, six million, we'll be a million low sometimes. Sometimes were a million high. It's all in how you look at the job and what you feel you can do, I guess, plus what we feel we can do it for.

*David Smith Depo.* at 27:11-28:2 (*Armstrong Aff.* at Ex. B) (emphasis added). David Smith's testimony reflects the hypocrisy in Smith's argument that the PSC should have rejected its bid. Bids can vary greatly from contractor to contractor on a project. Smith's argument is essentially that the PSC erred by not recognizing Smith submitted an irresponsible bid.

Further, if Smith's bid was based on the entirely unreasonable assumption all the material was "loose" and "flowable", it should have indicated that in its bid response. The contract documents are clear that any additional terms must be in writing. The contract documents did not indicate the material was "loose" and "flowable", but also did not prevent Smith from conditioning its bid on the material on site being loose and flowable. See Information for Bidders at 5, Bidder's Instruction 1 (additional terms and conditions submitted with a bid response are of no effect unless accepted in writing by the Purchasing Agency). If that was truly Smith's understanding, it should have written such information on its bid for the PSC's acceptance or rejection.

The *Information for Bidders* also allowed contractors to request clarification in writing. Id. at 7, ¶ 15. This was to allow the PSC to issue any amendments to the contract documents in sufficient time for the bid opening. Id. It is clearly worded that "[v]erbal communications from whatever source are of no effect." Id. Smith's argument attempts to shift its responsibility to submit an accurate bid to the PSC into one where it is the PSC's responsibility to micromanage Smith Contracting's bid. Such a position entirely ignores the contract language, is unfair to the

other bidders on this project, contrary to the purpose behind public bidding laws, and would materially change the contract. When a bid on a public project is submitted and accepted with no qualifiers, a public body cannot then later just ignore the procedures and pay a contractor more than the bids of every other contractor who bid. Allowing this procedure would make the public bidding laws meaningless.

**C. Smith Contracting's Assertion that Boring Logs were Required Entirely Misinterprets the Contract**

Smith Contracting relies heavily on its inaccurate assertion that the PSC was required by the contract to take boring logs of the materials on site. The PSC did not conduct boring logs for this project, and the contract did include such a requirement. Smith Contracting relies on a partial quote of Section 103.5 of the *Standard Specifications* for its assertion that boring logs were required. In full, § 103.5 provides:

**103.5 Examination of Plans, Specifications, Special Provision, and Site of Work.** The bidder is expected to examine carefully the site of the proposed work, the bid form, plans, specifications, special provisions, and contract forms before submitting a bid. The submission of a bid shall be considered prima facie evidence that the bidder has made such examination and is satisfied as to the conditions to be encountered in performing the work and as to the requirements of all contract documents.

Boring logs and other records of subsurface investigations may be available for inspection by bidders. It is understood that such information was obtained and is intended for design and estimating purposes only. It is made available to bidders that they may have access to identical subsurface information available to the engineer, and is not intended as a substitute for personal investigation, interpretations and judgment of the bidders.

*Standard Specifications* at p. 6, §103.5 (*Armstrong Aff.* Ex. 1) (underline added). Smith Contracting's argument that this clause mandates the PSC to conduct boring logs is not reasonable. There is no ambiguity with this clause. The clause specifically indicates it is the bidder's responsibility to evaluate the materials at the site and what methods it will use to

accomplish the project objectives.

The clause further states that boring logs “may” be available, but if they are it is for design purposes only and is not a guarantee of the site conditions or a substitute for the bidder’s own investigation. Smith Contracting’s attempt to interpret the clause as mandating boring logs ignores the entire language of the clause and the rules for contract interpretation. Smith Contracting’s case, as indicated in its brief, is contingent on this inaccurate interpretation of the contract language.

Further, Smith Contracting’s argument is inconsistent. It argues on one hand that David Smith attended the pre-bid conference to decide what type of material was on site and how hard it would be to move, but that the PSC had a responsibility to identify the soil material. *Smith Contracting Brief* at 8. While Smith Contracting indicates Smith relied on the material being “unconsolidated dirt” for purposes of its bid, Smith Contracting never indicated such an unreasonable reliance to the PSC in its bid or otherwise until it was well into the project. When Smith submitted its bid, it did nothing to indicate its bid was supposedly based on the entire project being unconsolidated, silty loam.

The most telling evidence to evaluate Smith Contracting’s specious, after-the-fact contention is Lee Barron’s note from July 22, 2010 (approximately two months into the project). After Smith fell drastically behind on the project, it began trying to find a way to excuse its poor performance. On July 22, 2010, Lee Barron’s notes indicate “Find USDA Soils Map. If not mapped clayey then we may have been misled.” *Armstrong Aff.* Ex. 18 (emphasis added). Barron’s subsequent correspondence to the PSC on August 4, 2010, indicated the NRCS soil survey showed “soils in this area are generally clay loams with inclusions of clays and other similar soils.” *Id.* at Ex. 10. In other words, although Barron was attempting to find some

argument that Smith Contracting had been misled, his research (which could have easily been done prior to submitting the bid) did not support his attempt. This is precisely why Smith Contracting is left with arguing a perverse interpretation of the contract language to assert boring logs were required.

Smith Contracting next asserts it is entitled to summary judgment on liability for differing site conditions. As indicated in the PSC's initial brief, the site conditions were precisely as defined in the contract documents. Smith Contracting asserts the differing site conditions were subsurface saturated clay which was totally unanticipated. However, Smith did not check the NRCS soil surveys until somewhere between July 25 and August 4, 2010. There is no reasonable explanation for Smith thinking the materials on site would not be clay, and certainly nothing in writing as required by the contract documents. Smith Contracting's allegation of differing site conditions ignores its own investigation, the publicly available information for the project site, and most importantly, the contract documents requiring Smith Contracting to familiarize itself with the site conditions before submitting its bid.

**D. Smith Contracting's Argument Regarding Delayed Mobilization/ Unanticipated Work Conditions Ignores the Contract**

Smith Contracting next argues the PSC breached the contract by initiating the start date when highway load restrictions were in place. Smith cannot, and does not, point to any provisions of the contract to support its argument. The contract does not state anything about waiting until road restrictions are lifted to begin the project. Smith likewise does not support its contention that it could not mobilize equipment with citations to the record. Road restrictions do not make it impossible to bring equipment to the site.

Smith appears to be arguing that issuing the notice to proceed in accordance with the

contract somehow violates an implied covenant of fair dealing. Smith relies on Eickhoff v. Grafton for the proposition that there is an implied covenant of good faith and fair dealing in the contract. Eickhoff does not support what Smith Contracting claims. Smith Contracting's reliance on Eickhoff stems from language in that opinion regarding a contract provision giving the engineer authority to define the intent and meaning of the specifications and make his decision final to pay for pit runs of gravel. 123 N.W.2d at 583-84. The contract evaluated in Eickhoff made any decisions by the engineer final. Id. The Eickhoff court was addressing whether the engineer's decision was in the nature of construing the contract or interpreting it. Id. at 584. The court simply noted, in such a situation where the contract makes the engineer's decision final, it can be conclusive if there is no proof of fraud or gross mistake that would necessarily imply bad faith. Id. It is a desperate reading of Eickhoff that would interpret it to create an implied covenant for the contract in this case with respect to mobilization, particularly considering the contract language at issue in Eickhoff is not at issue in this litigation. Smith's claim for breach of implied covenants is not supported by the law or the contract in this case and should be dismissed.

Smith Contracting's reliance upon Stark County v. State, 160 N.W.2d 10 (N.D. 1968) and Little v. Burleigh County, 82 N.W.2d 603 (N.D. 1957) is also misplaced. These cases are markedly different than the present case. At most, and as marginally relevant to this case, these cases discuss instances where the state can be sued. They do not create any causes of action that do not otherwise exist. For instance, the Stark County court recognized the legislature has enacted laws allowing the state to be sued in contract and procedures for accomplishing such a suit. As discussed in the PSC's initial brief, Smith Contracting did not comply with those laws. Unlike here, Stark County and Buleigh County did not involve express contracts. As a result,

those cases are inapplicable and do not support Smith Contracting's claim.

Smith Contracting's argument about this issue is notable in only one important respect—it does not identify a contract provision the PSC allegedly breached. Therefore, its argument should be disregarded because it has no basis in the contract or claims in this litigation.

**E. Smith Contracting's Argument Regarding the Disputes Process Fails.**

Smith Contracting contests the disputes process that occurred following the denial of its change order request. Smith describes generally what occurred with respect to the dispute, ending with the PSC denying Smith's change order after an August 20, 2010, meeting with the PSC, Smith, and its bonding company. Smith then completely ignores the remaining language and steps necessary for it to complete the dispute process, including that it would continue performing under the contract. See Contract No. AM-588-10 at p. 3 (*Armstrong Aff.* Ex. 35) ("Continued performance by the Contractor during disputes is assured" and "Pending final decision of a dispute, the Contractor shall proceed diligently with the performance of the contract and in accordance with the decision of the Commission"). Even under Smith's argument, it did not follow the contractual procedures by continuing performance or proceeding with the disputes process past the denial of the change order.

Instead, Smith Contracting left the job site in mid-September 2010, ending any chance the project could be completed as required by the contract. Even though the contract required the work to be completed in 2010 and required Smith to continue working through the disputes process, Smith simply left the project. It is impossible to conclude the PSC breached this provision when Smith did nothing after the change order was denied and walked off the project. Smith Contracting's claim in this regard is unsupported by the contract and is indicative that this entire case must be dismissed for Smith's failure to exhaust its contractual remedies.

Smith Contracting then claims the PSC somehow breached the contract by failing to continue to negotiate with Smith Contracting after the change order was denied. Smith Contracting relies heavily on a phone call between Lee Barron and James Deutsch on September 13, 2010, where Lee Barron indicated Smith Contracting was “open to negotiation.” What Smith Contracting completely ignores is its abandonment of the project a mere two days later, removing all its equipment and workers from the site. The contract clearly provided the project would be completed in 2010. Yet, in mid-September 2010 (with at least a month-and-a-half of construction season remaining) Smith Contracting left the project site. Moreover, while Smith contends the project could have been finished in 2011, it never requested this from the PSC and instead left the project. *Barron Depo.* at 137:21-138:4 (testifying he did not believe Smith Contracting ever requested to complete the project in 2011). The PSC cannot be considered to have breached the contract by declaring Smith in default under these circumstances.

**F. Smith Contracting Failed to Follow Statutory Notice Provisions**

Smith Contracting asserts its change order request complies with the notice provisions necessary to sue the State, and that the PSC’s argument concerning the notice provision is not supported by any provision of the contract. Smith Contracting treats the notice requirement as a mere formality even though it is necessary to establish subject matter jurisdiction in this action. According to Smith Contracting, it must only vaguely assert it wants more money. The notice requirements were not followed by Smith Contracting and are necessary in order for subject matter jurisdiction to exist for Smith’s claims.

During construction, Smith Contracting requested a change order. Requesting a change order is not the same as presenting a claim against the PSC. When the change order was denied, Smith Contracting walked off the project. Subsequently, the PSC submitted a claim to Smith’s

bonding company, the bonding company accepted the claim, and the PSC entered into a tender agreement with the bonding company for completion of the project. Almost one year later, when the project was nearly completed by the completion contractor, Smith Contracting brought suit. The North Dakota Supreme Court has held that proceeding through an administrative appeal is insufficient to satisfy the legal notice requirements to present a contract claim. Messiha v. State, 1998 ND 149, ¶ 18, 583 N.W.2d 385. If proceeding through an entire administrative process is insufficient to satisfy the notice requirement, the minimal efforts by Smith Contracting are also insufficient. Smith Contracting's claims must be dismissed because it has failed to establish subject matter jurisdiction exists over its claims.

Smith Contracting further asserts the PSC's argument is not supported by the contract and the PSC's arguments must be deemed to have been waived. First, the contract explicitly provides it will be governed by North Dakota law. *Contract No. AM-588-10* at p. 4 (*Armstrong Aff. Ex. 35*) ("This contract is governed by and construed in accordance with the laws of the State of North Dakota"). In order to bring a contract claim against a state agency, it is settled North Dakota law that a party must follow the notice requirements in order for the court to have subject matter jurisdiction. Further, subject matter jurisdiction cannot be waived by the parties. Trottier v. Bird, 2001 ND 177, ¶ 6, 636 N.W.2d 157 ("Subject-matter jurisdiction is derived from the constitution and laws, and cannot be conferred by agreement, consent or waiver.") The PSC's argument is entirely supported by the contract and the law. Accordingly, Smith Contracting's claims must be dismissed because the Court does not have subject matter jurisdiction due to Smith Contracting's failure to comply with statutory notice requirements.

### **G. Smith Contracting's Tort Claims Must be Dismissed**

Smith Contracting argues its tort claims are not subject to notice requirements. Smith Contracting must follow the statutory notice requirements to sue a state agency. It has not. Regardless, Smith Contracting's tort claims should be dismissed because the parties' relationship arises solely from a contract. Pioneer Fuels, Inc. v. MDU, 474 N.W.2d 706, 710 (N.D. 1991) ("A breach of contract even if intentional, malicious, or in bad faith, is not enough to convert a contract action into a tort action. If the alleged obligation to do or not to do something that was breached could not have existed but for a manifested intent of the parties to a contract, then contract law should be the *only* theory upon which liability would be imposed.") (emphasis in original) (internal citations and quotations omitted). Failure of a plaintiff to show an independent duty on which a tort claim is based entitles a defendant to dismissal of the tort claim as a matter of law. Id. This case involves a contractual relationship between Smith Contracting and the PSC. The only damages alleged are based on contract theories. There is no relationship between the parties arising outside the contract. Accordingly, Smith Contracting could not have any tort claims against the PSC even if it had complied with the statutory notice requirements.

Smith cites and relies upon Eickhof v. Grafton, 123 N.W.2d 580 (N.D. 1963) as apparently supporting its ability to assert tort claims in this case. It is unclear what guidance Smith claims Eickhof provides because that case deals with different contract terms, different allegations, is outdated, and is not similar to the parties' claims in this case. Smith Contracting's interpretation of Eickhoff is also contrary to Pioneer Fuels. Smith Contracting appears to argue Eickhoff allows it to assert tort claims against the PSC. However, Eickhoff does not support Smith's argument. Smith Contracting's tort claims must be dismissed.

**H. Smith Contracting's Unconscionability Argument is Not Supported by the Law or the Facts**

Smith Contracting asserts the contract is unconscionable without identifying which clause or clauses it claims are unconscionable. *Smith Brief* at 42-45. It bases this argument on an assertion the contract is an adhesion contract. Smith's argument is misplaced. Even if this was an adhesion contract, merely because a contract is an adhesion contract does not make it unconscionable. However, this is not an adhesion contract.

Prospective contractors were able to make their own decision whether to bid on the project. Smith Contracting was certainly not required to bid on the project. Further, it's argument ignores this is a publicly bid project. In other words, the contract must be in the same form for all bidders. Then, all potential bidders have the opportunity to decide whether to bid and for what amount on the same contract documents. See N.D.C.C. § 54-44.4-05(1) ("purchasing contracts must be awarded through a competitive bidding process to the lowest responsible bidder considering conformity with specifications, terms of delivery, and quality and serviceability . . ."). Smith's argument that this is an adhesion contract and unconscionable are not supported by either the law or the facts of this case, ignores that eight other contractors submitted bids, and ignores the contract was ultimately completed under the identical contract terms. See *Markwed Excavating, Inc. v. City of Mandan*, 2010 ND 220, ¶ 24, 791 N.W.2d 22 (concluding a publicly bid contract was not unconscionable and the contractor "is bound by the plain and unambiguous language").

**I. Smith Contracting's Claim of the Implied Warranty of Accuracy is Misplaced**

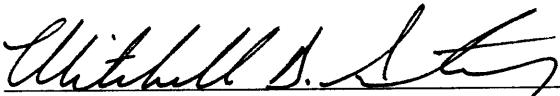
Smith argues the plans and specifications were inaccurate and discusses case law from Michigan and the U.S. Supreme Court. What Smith ignores and does not set forth is how the

plans and specifications were supposedly inaccurate. As indicated in the PSC's initial brief, the contract documents reflect the material on site consisted of spoil piles and that is precisely what was on site. The contract did not require the PSC to conduct boring logs and identify precisely what type of material was present. Further, the contract did not prevent Smith from conducting any evaluation it desired if it thought the information was necessary for its bid. Smith makes no effort to explain why it was the only contractor whose bid was based on allegedly inaccurate information. Smith has not identified what it claims is inaccurate in the project documents with competent, admissible evidence.

### III. CONCLUSION

For the foregoing reasons and for the reasons explained in the PSC's initial brief, the PSC respectfully requests the Court grant its motion for summary judgment and deny Smith Contracting's cross-motion for summary judgment.

Dated this 27<sup>th</sup> day of November, 2012.

By   
\_\_\_\_\_  
Mitchell D. Armstrong (ND Bar ID: 05892)  
Special Assistant Attorney General  
Sandra L. Voller (ND Bar ID: 06771)  
122 East Broadway Avenue  
P.O. Box 460  
Bismarck, ND 58502-0460  
(701) 258-0630

Attorneys for Defendant, North Dakota  
Public Service Commission Abandoned Mine  
Lands Division

STATE OF NORTH DAKOTA  
COUNTY OF BURLEIGH

IN DISTRICT COURT  
SOUTH CENTRAL JUDICIAL DISTRICT  
CIVIL NO. 08-2011-CV-01887

Smith Contracting Inc., )  
)  
Plaintiff, )  
)  
vs. )  
)  
North Dakota Public Service Commission )  
Abandoned Mine Lands Division, )  
)  
Defendants. )

**AFFIDAVIT OF SERVICE**

\*\*\*

\*\*\*

\*\*\*

STATE OF NORTH DAKOTA )  
)ss  
COUNTY OF BURLEIGH )

Tiffany Heim, being first duly sworn, deposes and states that she is over the age of eighteen years and not a party to the above-entitled matter. That on November 27, 2012, she filed the following document:

- 1. **Defendant's Reply Brief in Support of Motion for Summary Judgment and in Opposition to Plaintiff's Cross-Motion for Summary Judgment**

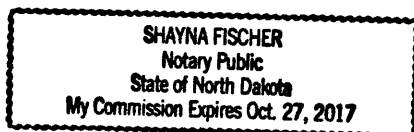
electronically with the Clerk of Court through the Odyssey File and Serve system and served as follows:

Ronald G. Schmidt  
Attorney at Law  
P.O. Box 860  
Rapid City, SD 57709-0860

VIA U.S. MAIL

*Tiffany Heim*  
\_\_\_\_\_  
Tiffany Heim

Subscribed and sworn to before me this 27<sup>th</sup> day of November, 2012.



*Shayna Fischer*  
\_\_\_\_\_  
Notary Public  
Burleigh County, North Dakota