

STATE OF NORTH DAKOTA
PUBLIC SERVICE COMMISSION

SCS Carbon Transport LLC
Midwest Carbon Express CO2 Pipeline Project
Siting Application

Case No: PU-22-391
OAH File No: 20230002

**INTERVENOR JOHN H. WARFORD, JR. AS TRUSTEE OF THE JOHN H.
WARFORD, JR. REVOCABLE TRUST’S OBJECTION TO APPLICATION OF
SCS CARBON TRANSPORT LLC TO PROTECT INFORMATION**

Intervenor John H. Warford, Jr. as Trustee of the John H. Warford, Jr. Revocable Trust (hereinafter “Warford”), by and through his attorneys, objects to and opposes the *Application of SCS Carbon Transport LLC to Protect Information* dated April 21, 2023 (“the *Application to Seal Dispersion Modeling*” or “*Application*”), through which Summit Carbon seeks to seal and keep secret from the parties and the public its dispersion modeling (a/k/a plume study or plume modeling) as allegedly protected by State and federal open records statutes, and other federal law applicable to “critical infrastructure”. In support of Warford’s opposition and objection to the *Application*, he provides the following:

CERTIFICATION OF GOOD-FAITH ATTEMPTS TO MEET & CONFER

Since receiving Summit Carbon’s correspondence to the PSC dated April 5, 2023 (docket #166) announcing its intentions to file the instant *Application*, Warford wrote two separate letters to Summit Carbon, dated April 6 and April 11, 2023 (attached as ***Exhibits 1 & 2***). Those letters objected to the *Application to Seal Dispersion Modeling*, including due to Summit Carbon’s knowing and voluntary waiver of any statutory protections for the plume study. Summit Carbon has insisted publicly – including before the PSC – that the plume study essentially proves siting the Carbon Dioxide pipeline near Bismarck and Burleigh County populations centers is safe. Summit Carbon responded by letter on April 10, 2023 (attached as Exhibit 3) but deflected, stating

instead that there must be some confusion. The letter concedes Summit Carbon is indeed attempting to use the PSC to keep the plume study from the public. Warford's letters offered to meet and confer with Summit Carbon about the objection as required by N.D.A.C. § 69-02-09-05. Summit Carbon ignored those requests and has not made any good-faith effort to meet and confer about its *Application* seeking to keep critical public safety information from the public.

OBJECTION TO APPLICATION

Summit Carbon's *Application* requests the PSC protect from public disclosure and keep secret certain security system plans, which it contends include the dispersion modeling requested by the PSC at the March 14, 2023 public hearing in Bismarck, ND. Warford opposes the *Application* as an impermissible infringement on his own rights as a party to these proceedings to full access to all of the evidence upon which the PSC will base its siting application decision, and as an infringement on the public's right to full and fair access to PSC proceedings, as well as the public's full access to the evidence submitted in these proceedings. The Commission should deny the request outright for the reasons discussed herein. Alternatively, if the Commission is not willing to outright deny the request, it should force Summit Carbon to redact material from its public filing that is actually protected from public disclosure under State or federal law, such as material that would evidence Summit Carbon's security system plans.

As indicated, the rights Summit Carbon seeks through its *Application* to eliminate include the parties' right to review and test the evidence on which the Commission will make its ultimate determination of Summit Carbon's siting application and other requested relief. Because the PSC requested Summit Carbon's plume study as part of the Commission's decision-making process in a public hearing, Summit Carbon should not be allowed to prevent the other parties to these proceedings from scrutinizing this key evidence and from cross-examining Summit Carbon's

witnesses on this evidence. Nor should the Commission allow Summit Carbon to continue to keep the public in the dark about its pipeline and what might happen in the event of a pipeline leak or in the event of a more catastrophic rupture near Bismarck. Warford and the general public have the right to know if Summit Carbon's plume study actually supports its contentions in these proceedings and the claims made in its public advertising campaign, which have insisted the pipeline and the proposed routing of the pipeline close to the City of Bismarck is entirely safe.

This concept of public notice and open access to public proceedings and information is enshrined in North Dakota's open records statutes, N.D.C.C. § 44-04-18, in the statutes applicable to the PSC's proceedings, N.D.C.C. § 49-01-07 (requiring the PSC's "proceedings shall be public upon the request of any person interested."), as well as in the PSC's procedural and evidentiary rules. N.D.A.C. § 69-02-04-01 (specifying advanced notice of hearings, including notice to parties and the general public); N.D.A.C. § 69-02-05-06 (allowing "[a]ll parties . . . to examine the entire book, paper, or document"); N.D.A.C. § 69-02-02-04 (requiring applications be filed with the PSC publicly); N.D.A.C. § 69-02-02-08 (requiring motions be filed publicly and "served on the other parties to the proceeding"); N.D.A.C. 69-02-05-11 (prohibiting ex-parte communications to the PSC and the public filing of all such communications).

There can be little doubt there is a presumptive right held by the public and the parties to see and to test all of the evidence that will be considered by the PSC in its siting determination. And what could be more critical to this determination than the plume study that allegedly will reveal what might occur if there is a leak or other pipeline failure in the high-pressure carbon dioxide pipeline that is proposed to be sited within two (2) miles of Bismarck's Extra-Territorial Area (ETA)? As indicated, if there are actual parts of the plume study that truly implicate Summit

Carbon's security system plans, those provisions in the plume study can be redacted as allowed for by the PSC's procedures. N.D.A.C. § 69-02-09-01(5).

Summit Carbon's initial argument for keeping its plume study secret relies on a North Dakota open records exemption statute, N.D.C.C. § 44-04-24. However, the open records exemption statute on its face does not have any application to the instant proceedings or to the relief requested in its *Application*. Section 44-04-24 states as follows:

1. A security system plan kept by a public entity, and records regarding disaster mitigation, preparation, response, vulnerability, or recovery, or for cybersecurity planning, mitigation, or threat, are exempt from the provisions of section 44-04-18 and section 6 of article XI of the Constitution of North Dakota.

2. As used in this section:

a. "Critical infrastructure" means public buildings, systems, including telecommunications centers and computers, power generation plants, dams, bridges, and similar key resources, and systems related to utility services, fuel supply, energy, hazardous liquid, natural gas, or coal, whether physical or virtual, so vital to the state that the incapacity or destruction of these systems would have a debilitating impact on security, state economic security, state public health or safety, or any combination of those matters.

b. "Security system plan" includes:

(1) Records, information, photographs, audio and visual presentations, schematic diagrams, surveys, recommendations, communications, or consultations relating directly to the physical or electronic security of a public facility, or any critical infrastructure, whether owned by or leased to the state or any of its political subdivisions, or any privately owned or leased critical infrastructure if the plan or a portion of the plan is in the possession of a public entity;

(2) Information relating to cybersecurity defenses, or threats, attacks, attempted attacks, and vulnerabilities of cyber system operations relating directly to the physical or electronic security of a public facility, or any critical infrastructure, whether owned by or leased to the state or any of its political subdivisions, or any privately owned or leased critical infrastructure if the information is in the possession of a public entity;

(3) Threat assessments;

(4) Vulnerability and capability assessments conducted by a public entity, or any private entity;

(5) Threat response plans; and

(6) Emergency evacuation plans.

3. This exemption applies to security system plans received by a public entity before, on, or after March 20, 2003.

4. Nothing in this section may be construed to limit disclosure required for necessary construction, renovation, or remodeling work on a public building. Disclosure under this subsection does not constitute public disclosure.

5. Records deemed exempt under this section and disclosed to another entity continue to be exempt in the possession of the receiving entity.

N.D.C.C. § 44-04-24 (emphasis added).

Assuming without agreeing Section 44-04-24 has any application to these proceedings (it does not), Summit Carbon would need to overcome at least a few hurdles to prove the North Dakota open records exemption statute applies to keep its plume study secret. The first hurdle is to prove a plume study is a “security system plan” as that term is used in the statute. The above statute makes clear the plume study would need to “relat[e] directly to the physical or electronic security” of the proposed carbon dioxide pipeline to be exempt from an open records request, but no showing has been made how the plume study would so relate. Other than making self-serving statements about protections for Emergency Response and Integrity Management plans, Summit Carbon’s *Application* has not made any attempt to prove that a plume study is or is even analogous to a “security system plan”. It simply asks the PSC to assume so, which is classic begging the question.

It also needs to be pointed out that Summit Carbon has not filed the requested plume study itself, which is the only document the PSC requested at the March 14th hearing. Rather, it apparently has filed the entire “Model Outputs and Risk Assessment”, of which Summit Carbon concedes its “dispersion modeling” is but one part. It would appear this is Summit Carbon’s attempt to protect public health material by intermixing it with security system planning material. No doubt, the two can be easily separated and/or the security material can simply be redacted. In

any event, it is not at all obvious how a plume study can be equated with security system planning. At a minimum, Summit Carbon should be forced to give a more robust explanation of its position.

In addition, and to create the appearance there is a bona fide security concern, Summit Carbon cites an old AP news article from 2017 about pipeline vandalism and threatened vandalism against the Dakota Access Pipeline in North Dakota, South Dakota and Iowa. It further cites another Los Angeles AP news story about a movie made by global warming, anti-oil activists entitled, “How to Blow Up a Pipeline”. Citing to news stories such as these does not raise actual security concerns for this carbon dioxide pipeline. Nor does it make a plume study into a “security system plan” by any stretch of the imagination. Again, the Commission should require Summit Carbon to demonstrate precisely how a plume study that is highly relevant to the safety aspects of siting a pipeline within 2 miles of Bismarck’s ETA is directly related to pipeline security. To date, no such showing has been made and the burden is clearly on Summit Carbon in this regard.

In addition, Summit Carbon puts the proverbial “cart before the horse” in relying on the North Dakota open records exemption statute to keep its plume study secret from the public. In this regard, the statute also clearly provides the security system plan sought to be protected must first be “in the possession of a public entity”. Summit Carbon’s use of the future tense when discussing its security system plan being filed at some future time with PHMSA belies its position that the open records exemption statute protects it. The Application makes clear the Model Outputs and Risk Assessment (allegedly including the plume study) is not in the possession of PHMSA. Summit Carbon’s *Application* states:

In connection with the preparation of the ERP and IMP, Summit is required to conduct dispersion modeling relating to a release of carbon dioxide from the Pipeline (the “Dispersion Model”). **Summit will submit the results of the Dispersion Model (the “Model Outputs”) and the risk assessment associated therewith (the “Risk Assessment”) to PHMSA** as part of that agency’s review of the adequacy and completeness of ERP, IMP and other programs that Summit is

required to develop. Given the sensitive nature of the Model Outputs and Risk Assessment, **Summit will request that PHSMA protect these materials** from public release under the Agency's regulations for submission of confidential information. See 49 C.F.R. §§ 190.343 and 7.29.

Application at 2 (emphasis added). Assuming a plume study could actually qualify as a security system plan under the statute, any protection that might be afforded to it requires that it first be submitted to PHSMA, which Summit Carbon concedes it has not done. North Dakota's open records exemption statute does not protect the plume study or provide a legal basis to seal it from the parties or the public as part of these proceedings.

Summit Carbon also argues that it will be seeking additional protections to keep its plume study secret under other certain federal regulations and pursuant to FOIA.¹ While those federal regulations and FOIA statutes might protect certain materials in certain contexts, it is clear that the PSC's request to be provided the Summit plume study made in a public hearing on March 14, 2023 is not one of those situations for which FOIA or the other federal regulations would apply. Indeed, neither the PSC nor any other party to this proceeding has to date made an open records or FOIA request for the plume study. Moreover, the federal regulations cited, 49 C.F.R. §§ 195.402(E) and 195.408, each reference a "procedural manual for operations, maintenance and emergencies" but those regulations do not discuss dispersion analysis or plume modeling in any way and moreover do not suggest that the manual itself is secret.

On the contrary, the cited federal regulations make it abundantly clear that the procedural manual must be located locally on site so that the operator can share it with and coordinate with

¹ One of the FOIA exemptions cited, 5 U.S.C. § 552(b)(4) provides an exemption for "trade secrets and commercial or financial information obtained from a person and privileged or confidential". The other FOIA exemption Summit Carbon argues would apply, 5 U.S.C. § 552(b)(7), provides an exemption for "records or information compiled for law enforcement purposes[.]" Summit Carbon has not explained how a plume study could be considered a trade secret or could be considered information compiled for law enforcement purposes.

local first responders to react appropriately in an emergency. 49 C.F.R. § 195.402 (stating, “The operator must immediately and directly notify the appropriate public safety answering point or other coordinating agency for the communities and jurisdiction(s) in which the pipeline is located after notification of potential rupture, as defined at § 195.2, has occurred to coordinate and share information to determine the location of the release[.]”); 49 C.F.R. § 195.408 (requiring each operator to have a communication system in place, including (“4) Providing communication with fire, police, and other appropriate public officials during emergency conditions, including a natural disaster.”). Even if the plume study at issue were considered part and parcel of the procedural manual discussed in those federal regulations – which Summit Carbon has not proven – those regulations indicate that local first responders need to be fully aware prior to construction of the pipeline of what would occur in the event of a leak or failure. If Summit Carbon’s claims can be taken at face value, “what would occur” is apparently explained very clearly in Summit Carbon’s plume study. These federal regulations do not provide a legal basis to seal the plume study requested by the Commission.

Another federal regulation cited by Summit Carbon, 49 C.F.R. § 195.452, is entitled, “Pipeline Integrity Management in High Consequence Areas”.² This particular regulation addresses the construction-related and later maintenance-related requirements of operators to

² The applicable federal regulation defines “high consequence area” in part as:

- (1) A commercially navigable waterway, which means a waterway where a substantial likelihood of commercial navigation exists;
- (2) A high population area, which means an urbanized area, as defined and delineated by the Census Bureau, that contains 50,000 or more people and has a population density of at least 1,000 people per square mile;
- (3) An other populated area, which means a place, as defined and delineated by the Census Bureau, that contains a concentrated population, such as an incorporated or unincorporated city, town, village, or other designated residential or commercial area;

49 C.F.R. § 195.450

assess the physical integrity of the pipeline and other special construction, constructability, engineering, pipeline materials, and inspection practices that must be in place in high consequence areas. Nothing in the cited regulation indicates plume modeling or studies, or dispersion analysis are part of the integrity management planning.

Other federal regulations cited by Summit Carbon to support its position here are equally unavailing. While it cites 49 C.F.R. §§ 1520.5(b)(5) and 1520.9 as regulations allegedly protecting “sensitive security information,” and “vulnerability assessments,” Summit Carbon nevertheless concedes the protections afforded by such regulation are not triggered until the Model Outputs and Risk Assessment have been “submitted to PHSMA”. Again, that apparently has not yet occurred. Therefore, any protections that would be afforded to Model Outputs and Risk Assessment (including the plume study) are not yet triggered.

While Summit Carbon has consistently argued otherwise, its planned carbon dioxide pipeline carries inherent risks and those risks are multiplied exponentially as the pipeline is sited close to population centers around Bismarck. To ensure the safety of the communities surrounding the pipeline, it is important that the parties to these proceedings, as well as the public and first responders, have access to the plume study. This will enable first responders and the political subdivisions that govern them to properly plan for and respond to any potential incidents, thereby minimizing as far as possible the risks to public safety. As but one example of a few public entities that need to be aware of the potential consequences of a carbon dioxide leak, there are three public schools in close proximity to the proposed Summit Carbon pipeline route near Bismarck. Those schools need to be fully aware of the consequences of any carbon dioxide leak so they can be properly prepared for an appropriate emergency response to such a leak, including to prepare for

prompt evacuation of young school children. Also, by disclosing the plume study Summit Carbon could demonstrate a commitment to transparency and accountability.

The public has a right to know about the potential risks associated with the proposed pipeline, and access to this information will facilitate informed decision-making and public dialogue. Disclosing the plume study would also allow independent experts to review the plume study in order to verify its accuracy or identify any potential flaws. This is essential to ensure that the model accurately predicts the behavior of the liquefied high-pressure carbon dioxide in the event of a leak or other incident. Public scrutiny will help to ensure that the data is scientifically sound and that proper safety measures are in place. Public trust in the proposed pipeline is also crucial for its successful implementation. By withholding important safety information, Summit Carbon risks undermining this trust and fostering suspicion among the public. Releasing the dispersion modeling information can potentially help to alleviate these concerns and demonstrate that the company is acting in good faith.


Lastly, it is conceded that Summit Carbon has raised critical infrastructure and national security concerns. It is no doubt of the utmost importance to protect sensitive pipeline security planning information that if released could be used maliciously by those who have demonstrated animus against pipelines and against the energy industry. Warford does not share the values of those people and organizations, and does not oppose this pipeline or any pipeline in principal. As indicated from the beginning of his intervention in these proceedings, he opposes this particular pipeline because Summit Carbon seeks to site it much too close to Bismarck and more populated areas in Burleigh County. If allowed to be sited as planned, this will have a decidedly negative impact on Bismarck's organic growth and development to the north and northeast, and more importantly, in the event of a rupture, the pipeline poses a grave risk to health and safety of the

public. Mere argument about national security concerns should not be used as a blanket justification for withholding the plume study from the parties and the public.

For all of these reasons, Warford respectfully requests the Commission deny the *Application to Seal Dispersion Modeling*.

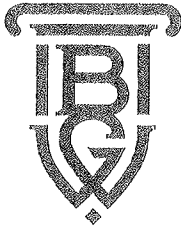
Dated this 15th day of May, 2023.

BAKKE GRINOLDS WIEDERHOLT

By: 

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as Trustee of the John H. Warford, Jr.
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**Bakke
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ATTORNEYS AT LAW

April 6, 2023

Via Email Only

Lawrence Bender
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**Re: SCS Carbon Transport LLC Midwest Carbon Express Project
Case No. PU-22-391**

Dear Mr. Bender,

We are in receipt of your April 5, 2023 letter to Mr. Steve Kahl of the Public Service Commission ("PSC") in which you advise "Summit intends to file an application to protect the Information from public disclosure pursuant to § 69-02-09-01 of the North Dakota Administrative Code ("NDAC")."

Please be advised, our client John H. Warford, Jr. as Trustee of the John H. Warford, Jr. Revocable Trust ("Warford") opposes and objects to the application in which Summit apparently seeks to keep secret from the public, public officials, and first responders its plume study that very likely shows the extreme danger of having this carbon dioxide pipeline sited so closely to the City of Bismarck and population centers in Burleigh County. You will recall that at the March 14, 2023 PSC hearing Summit advised the Commissioners that it would be willing to share a copy of its dispersion modeling (a/k/a plume study), and, there was considerable evidence put on by Summit at the same PSC hearing wherein it insisted the pipeline and any pipeline failure would not be unreasonably dangerous or hazardous to human life or health. In other words, Summit took great pains to minimize concerns about a pipeline leak or failure, and asked the PSC to believe there is essentially almost no risk based on the findings of its internal plume study. We fail to see how the dispersion modeling Summit hyped at the hearing could suddenly become essentially top secret. Based on Summit's actions at the hearing, to the extent any protections may have attached to the dispersion modeling, such protections have been knowingly waived.

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Exhibit 1

April 6, 2023
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Moreover, while your letter asks the PSC and the public to essentially take Summit's word for it that its dispersion modeling is "considered critical infrastructure under both state and federal law" Summit has to date made no such showing. Please provide the factual and legal basis for your contentions.

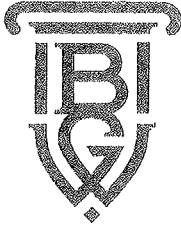
We have written this letter pursuant to the requirements of North Dakota Administrative Code § 69-02-09-05 requiring "the person [opposing the application] shall first attempt to informally dispose of the dispute with the party seeking to prevent disclosure." Please advise of your availability for a phone call to discuss our client's disagreement and objection to this most recent petition by Summit to conduct what should be public proceedings in secret.

I look forward to hearing from you.

Very Truly Yours,

/s/ Randall J. Bakke

Randall J. Bakke



**Bakke
Grinolds
Wiederholt**

ATTORNEYS AT LAW

April 11, 2023

Via Email Only

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**Re: SCS Carbon Transport LLC Midwest Carbon Express Project
Case No. PU-22-391**

Dear Mr. Bender,

This letter responds to your letter dated April 10, 2023, in which you state, “[T]here may be some confusion regarding what Summit is requesting of the Commission.” We do not believe there is any confusion in our client’s position opposing Summit’s request to conduct Public Service Commission (“PSC”) proceedings in secret.

Although you discuss PHMSA regulations, the fact is that the rules applicable to proceedings before the PSC require you to provide the public with a redacted version of the dispersion analysis. Your statement that “the filing of a redacted public version is not possible” is simply question begging. Summit has not made any showing why following the PSC’s rules in this situation is “not possible.” Indeed, Summit managed to file its *Application for Certificate of Corridor Compatibility and Route Permit and Waiver* in a redacted format that is available to the public. Nor have you cited any North Dakota law that would provide a legal basis for Summit to avoid filing the redacted dispersion analysis publicly as required. While it is our position the dispersion analysis can, should, and is required to be filed publicly in a redacted format, it is also our position it can and should be filed publicly in an un-redacted format for the reasons discussed in our prior letter. If the pipeline is truly safe to be so near Bismarck and its population centers as Summit argues, surely the dispersion analysis should be released to give the public the same level of assurance Summit insists it has on this issue.

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Exhibit 2

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Thank you for your consideration to the issues raised in this letter, and we stand by our request to have a telephone conference in order to comply with our client's obligation to meet and confer prior to filing a formal objection and requesting a hearing before the PSC. I have copied in other counsel on this email reply and our prior communication on this issue, as they may decide to weigh in on this issue.

Very Truly Yours,



Randall J. Bakke

RJB:sam

Bender.2

cc: Zach Pelham (via email only)
Brian Jorde (via email only)
Steve Leibel (via email only)
Kevin Pranis (via email only)



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April 10, 2023

VIA E-MAIL

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**RE: SCS Carbon Transport LLC
Midwest Carbon Express Project
Case No. PU-22-391**

Dear Mr. Bakke:

Thank you for your letter dated April 6, 2023 regarding the waiver request submitted by SCS Carbon Transport LLC ("Summit") to the North Dakota Public Service Commission ("Commission"). Upon review of your letter, I believe there may be some confusion regarding what Summit is requesting of the Commission.

As you are aware, Summit has agreed to file results of its dispersion modeling efforts (the "Dispersion Results") with the Commission under confidentiality. The process to maintain confidentiality of information submitted to the Commission is set forth in Chapter 69-02-09 of the North Dakota Administrative Code. Specifically, an application to protect information must be submitted to the Commission setting forth the information sought to be protected and the basis for that protection. In accordance therewith, Summit intends to submit an *UNREDACTED* copy of the Dispersion Results to the Commission for its review and analysis. The application to protect information will specifically request that the unredacted Dispersion Results be available for review only by the Commission, the Administrative Law Judge, legal counsel for the Commission and Commission siting analysts.

My April 6, 2023 letter to the Commission is a request for the Commission to waive the requirement that Summit provide a redacted public version of the Dispersion Results. For the reasons set forth in my letter, the filing of a redacted public version is not possible. Furthermore, as indicated at the public hearings in this matter, Summit is required to submit the Dispersion Results to the Pipeline and Hazardous Materials Safety Administration ("PHMSA") for its review and analysis. Summit is not required to provide PHMSA with a redacted version for public consumption and the Dispersion Results submitted to PHMSA are exempt from Freedom of Information Act (FOIA) requests. In this case, Summit is providing the Commission with the same, unredacted information for its review and analysis with a request that the Commission afford the same protection to the Dispersion Results that PHMSA does.

Exhibit 3

Mr. Randall J. Bakke
April 10, 2023
Page 2

I hope the foregoing clarifies what Summit is requesting of the Commission as it pertains to the Dispersion Results. Should you have any questions, please advise.

Sincerely,

/s/ Lawrence Bender
LAWRENCE BENDER

LB/tjg
78834677 v1