

STATE OF NORTH CAROLINA
COUNTY OF DURHAM

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
File No. 7 CVS 6365

SEAN HAUGH, ET AL.,
Plaintiffs,

v.

COUNTY OF DURHAM, ET AL.,
Defendants.

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BRIEF IN SUPPORT OF
MOTIONS TO DISMISS
AND
MOTION TO DISQUALIFY

The Defendants, Michael M. Ruffin, Ellen W. Reckhow, Michael D. Page, Lewis A. Cheek, Phillip R. Cousin, Jr., Becky M. Heron, and County of Durham, have moved to dismiss the complaint of the Plaintiffs pursuant to Rules 12(b)(1), (2), and (6) and Rule 17(a) of the North Carolina Rules of Civil Procedure, and pursuant to N.C. Gen. Stat. § 1-57 on the grounds that the Court lacks subject matter jurisdiction due to the lack of standing of the Plaintiffs to bring this action, lacks personal jurisdiction as to the individual county commissioners due to legislative immunity, lacks subject matter jurisdiction due to the Political Question Doctrine, that the Plaintiffs are not taxpayers in the County of Durham, that the individual county commissioners and the County Manager are not the real parties in interest, that the Plaintiffs are not the real parties in interest, and that the Plaintiffs have failed to state a claim under existing North Carolina jurisprudence. Further, the Defendant, County of Durham, has filed a Motion to Disqualify the counsel for the Plaintiffs for the violation of Rule 3.6 of the North Carolina Rules of Professional Conduct.

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STATEMENT OF THE NATURE OF THE CASE AND FACTS¹

Plaintiffs filed this declaratory judgment action to challenge the constitutionality of certain economic incentives awarded to Defendant, Nitronex Corporation, by the County of Durham. The Plaintiffs further seek injunctive relief.

Plaintiff, Sean Haugh, is a resident of Durham County. (Comp. ¶ 3). However, Mr. Haugh does not pay property taxes to Durham County. (Aff. of Simpson). Plaintiff, Russell Capps, is a resident of Wake County. (Comp. ¶ 4). He also does not pay taxes to Durham County. (Aff. of Simpson).

The Defendant, County of Durham, is a political subdivision of the State of North Carolina. (Comp. ¶ 5). The Defendants, Ellen W. Reckhow, Michael D. Page, Lewis A. Cheek, Phillip R. Cousin, Jr., and Becky M. Heron, comprise the Board of Commissioners which is the governing body for the County of Durham. Each of these Defendants is sued only in his or her official capacity. (Comp. ¶ 6). Michael M. Ruffin is the County Manager for the County of Durham and is sued only in his official capacity. (Comp. ¶ 7).

On March 12, 2007, the Durham County Board of Commissioners approved entering into an agreement with Nitronex providing \$100,000 from the Durham County Economic Development Investment Fund. (Comp. ¶ 18). The agreement was authorized in part by N. C. Gen. Stat. § 158-7.1. (Comp. Ex. C). The relocation of the facility to Durham County would

¹While these Defendants dispute the facts in the Complaint, the facts as stated in the Complaint are taken as true for purposes of these motions, except as to facts which are contradicted by the affidavits filed by these Defendants. The affidavits are filed only for purposes of the Motions to Dismiss and Disqualify pursuant to Rules 12(b)(1) and (2) and Rule 17(a) of the North Carolina Rules of Civil Procedure, and pursuant to N.C. Gen. Stat. § 1-57, and Rule 3.5 of the North Carolina Rules of Professional Conduct. *See, Data General v. County of Durham*, 143 N.C. App. 97, 101-102, 545 S.E.2d 243, 246-247 (2001).

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produce tax revenues equal to or greater to the value of the incentives. (Comp. Ex. C). Additionally, the relocation of the company to Durham County will increase the population, increase taxable property, and increase business prospects in the County of Durham, as well as, result in a substantial number of jobs in the County that pay at or above the median average wage in the County. (Comp. Ex. C). On March 22, 2007, Nitronex announced its intention to relocate its corporate and manufacturing operations to Durham County. (Comp. ¶ 19). Prior to the announcement, Durham County was in competition with California. The location of Nitronex in Durham County would generate an additional 210 employees with industry average of \$250,000 of revenue per employee. (Aff. of Titus). Eligible enterprises are not guaranteed Economic Development Investment Funds, but such appropriations are made in the discretion of the Durham County Board of Commissioners. (Comp. ¶ 24). All enterprises receiving a grant from Durham County must enter into a performance agreement with Durham County. (Comp. ¶ 25).

ISSUES

- I. Do the Plaintiffs have standing to bring this action?**
- II. Are the Plaintiffs the real parties in interest?**
- III. Does the Court lack subject matter jurisdiction due to the political question doctrine?**
- IV. Does the Court lack personal jurisdiction over the individual county commissioners due to legislative immunity?**
- V. Are the individual county commissioners real parties in interest?**
- VI. Does the complaint fail to state a claim against the County Manager as he is named in the caption, but there are no allegations concerning him in the body of the Complaint?**
- VII. Does the complaint fail to state a claim under existing North Carolina**

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jurisprudence?

VIII. Should Counsel for the Plaintiffs be disqualified for violation of Rule 3.6 of the North Carolina Rules of Professional Conduct?

ARGUMENT

I. The Plaintiffs do not have standing to bring this action.

Neither of the Plaintiffs pay property taxes in Durham County and therefore neither has standing to bring this action. "Standing refers to whether a party has a sufficient stake in an otherwise justiciable controversy such that he or she may properly seek adjudication of the matter." *American Woodland Industries, Inc. v. Tolson*, 155 N.C. App. 624, 626, 574 S.E.2d 55, 57 (2002), *disc. rev. denied*, 357 N.C. 61, 579 S.E.2d 283 (2003). The Plaintiffs have the burden of establishing that standing exists, and further, "[s]tanding is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction". *Id.*

It is "well settled" in North Carolina that taxpayers may bring suit to enjoin the making of unauthorized appropriations of tax dollars. *Goldston v. State*, 361 N.C. 26, 32, 637 S.E.2d 876, 880 (2006). However, plaintiffs may not bring such an action unless it can be shown by the plaintiffs that the action sought to be enjoined "will cause them to suffer personal, direct and irreparable injury". *Fox v. Board of Commissioners of County of Durham*, 244 N.C. 497, 500, 94 S.E.2d 482, 485 (1956). In this action, neither of the Plaintiffs are taxpayers of Durham County. While Plaintiff, Haugh, alleges he pays sales tax, this does not confer standing since the amount of sales tax paid is set by statute and not based on the amount of funds expended by the County, and further, sales taxes are paid by everyone who buys goods in North Carolina, including nonresidents. Essentially, sales taxes are paid by all members of the public, and even if they are

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expended illegally, it would not cause personal and direct injury.

The Supreme Court in *Nicholson v. State Education Assistance Authority*, 275 N.C. 439, 168 S.E.2d 401 (1969) was faced with a similar issue in which a taxpayer challenged the issuance of bonds by an authority. However, the bonds were not secured by the taxing power of the State. The Court there stated:

It is necessarily true that the plaintiff, as taxpayer, can suffer no injury from the issuance of the bonds of which he complains and has no interest therein, except his general interest as a member of the public in good government pursuant to the Constitution. . .

Thus, the plaintiff has not alleged facts showing, and the stipulated facts do not show, that any contemplated or threatened use of funds or other activity of the defendants will, if accomplished, result in any injury to the plaintiff, as a taxpayer or as a shareholder of any corporation. Consequently, the constitutional questions which he has sought to raise in this action are not before us and we express no opinion with reference thereto.

Id., S.E.2d at 410.

In the case at bar, the Plaintiffs can suffer no injury as neither are taxpayers of the County of Durham. Therefore, their only interest is a "general interest as a member of the public in good government". This does not give either of the Plaintiffs standing to bring this action, and it should therefore properly be dismissed.

II. The Plaintiffs are not the real parties in interest.

In order to bring an action, N.C. Gen. Stat. § 1-57 requires the plaintiff to be the real party in interest. The concept of real party in interest is closely related to standing. In fact, a party has standing to bring an action when it is the real party in interest. *Beachcomber Properties, L.L.C. v. Station One, Inc.*, 169 N.C. App. 820, 823-824, 611 S.E.2d 191, 193 (2005). However, to be the real party in interest, the party must have "by substantive law ... the legal right to enforce the

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claim in question". *Id.*, N.C. App. at 824, S.E.2d at 193-194. Again, the Plaintiffs in this case do not have the legal right by substantive law to enforce their claim. They are not taxpayers in Durham County, and therefore, they are not the real parties in interest in this action.

III. The Court lacks subject matter jurisdiction due to the political question doctrine.

The political question doctrine is "based on the distribution of powers among the branches of government, and it is as a function of the separation of powers that political questions are not determinable by the judiciary." 16 C.J.S. Constitutional Law § 309. The doctrine has been adopted by the North Carolina courts, and its premise has been explained as follows:

The political question doctrine controls, essentially, when a question becomes "not justiciable ... because of the separation of powers provided by the Constitution." *Powell v. McCormack*, 395 U.S. 486, 517, 89 S.Ct. 1944, 1961, 23 L.Ed.2d 491, 514 (1969). "The ... doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. The Judiciary is particularly ill-suited to make such decisions ..." *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230, 106 S.Ct. 2860, 2866, 92 L.Ed.2d 166, 178 (1986). "It is well established that the ... courts will not adjudicate political questions." *Powell*, 395 U.S. at 518, 89 S.Ct. at 1962, 23 L.Ed.2d at 515.

Bacon v. Lee, 353 N.C. 696, 717, 549 S.E.2d 840, 854, *cert. denied*, 533 U.S. 975, 122 S.Ct. 22, 150 L.Ed.2d 804 (2001).

Without specifically citing the political question doctrine, the Court of Appeals recently applied it in the context of a challenge to an economic incentive in *Blinson v. State*, _____ N.C. App. _____, 651 S.E.2d 268, 271 (2007). The Court there stated:

Whether these incentives are lawful under the North Carolina Constitution was settled by *Maready [v. City of Winston-Salem]*, 342 N.C. 708, 467 S.E.2d 615

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(1996)) and this Court's subsequent decision in *Peacock v. Shinn*, 139 N.C. App. 487, 533 S.E.2d 842, *appeal dismissed and disc. review denied*, 353 N.C. 267, 546 S.E.2d 110 (2000). . . Once the Supreme Court held in *Maready* that economic incentives to recruit business to North Carolina involve a proper public purpose, it became the role of the General Assembly and the Executive Branch – and not the courts – to determine whether such incentives are sound public policy.

It should be noted that the same advocacy group is again challenging the constitutionality of the economic incentives as it did in *Blinson*. Just as in *Blinson*, the issue of constitutionality has been settled by the Supreme Court and Court of Appeals. The issue of constitutionality is firmly established, and the issue of whether or not to award economic incentives in any particular case belongs to another branch of government, and not to the courts. It should be noted that the Plaintiffs have not challenged the County's compliance with N.C. Gen. Stat. § 158-7.1. As such, the Court lacks subject matter jurisdiction under the political question doctrine.

IV. The Court lacks personal jurisdiction over the individual county commissioners due to legislative immunity.

The individual County Commissioners enjoy absolute legislative immunity, and the Court lacks jurisdiction over them. County commissioners enjoy absolute legislative immunity for all actions "in the sphere of legitimate legislative activity." *Northfield Development Co., Inc. v. City of Burlington*, 136 N.C. App. 272, 281, 523 S.E.2d 743, 749, *aff'd*, 352 N.C. 671, 535 S.E.2d 32 (2000). This immunity extends beyond simply not being liable for damages, but instead "enables legislators to be free, not only from 'the consequences of litigations's results', but also from the burden of defending themselves". *Burnick v. McLean*, 76 F.3d 611 (4th Cir. 1996), *quoting*, *Dombrowski v. Eastland*, 387 U.S. 82, 85, 87 S.Ct. 1425, 1427, 18 L.Ed.2d 577 (1967).

It should also be noted that the determination of funding priorities is legislative in nature. *Berkley v. Common Council of City of Charleston*, 63 F.3d 295, 302 (4th Cir. 1995). In

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determining to fund incentives, the County Commissioners have engaged in a "quintessential legislative function". *Id.* The absolute legislative immunity enjoyed by the commissioners precludes jurisdiction over them, and they should properly be dismissed from this action.

V. The individual county commissioners are not real parties in interest.

Pursuant to N.C. Gen. Stat. § 1-57 and N.C. Gen. Stat. § 1A-1, Rule 17(a) every claim is required to be prosecuted in the name of the real party in interest. This requirement has also been held to apply to defendants. *Bridges v. Oates*, 67 N.C. App. 459, 463, 605 S.E.2d 685, 688 (2004). In the case of an action against a county, the real party in interest is the county itself, and the action may not be brought against its board of commissioners. This issue has been addressed by the Court of Appeals in *Piland v. Hertford County Board of Commissioners*, 141 N.C. App. 293, 295, 539 S.E.2d 669, 671 (2000) as follows:

N.C. Gen.Stat. § 153A-11 states in relevant part that "[t]he inhabitants of each county are a body politic and corporate.... Under that name they ... may sue and be sued..." N.C. Gen.Stat. § 153A-11 (1991). In *Fountain v. Board of Comm'rs of Pitt County*, 171 N.C. 113, 87 S.E. 990 (1916), our Supreme Court considered Revisal 1905, § 1310 of the North Carolina General Statutes, a predecessor to the above-quoted language from N.C. Gen.Stat. § 153A-11, stating:

Prior to the amendment by Revisal, § 1310, a suit, for a claim due by a county was required to be brought against its board of commissioners, as Code, § 704, provided that a county should "sue and be sued in the name of the board of commissioners," while Revisal, § 1310, provides that a county must "sue and be sued in the name of the county."

Id. at 114, 87 S.E. at 991-92. Thereafter, in *Johnson v. Marrow*, 228 N.C. 58, 44 S.E.2d 468 (1947), our Supreme Court stated that "[w]here a county is the real party in interest, it must sue and be sued in its name." *Id.* at 59, 44 S.E.2d at 470 (citing *Lenoir County v. Crabtree*, 158 N.C. 357, 74 S.E. 105 (1912); *Fountain*, 171 N.C. 113, 87 S.E. 990).

Undoubtedly, the real party in interest in this case is Hertford County

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Thus, a county may not be sued by naming its board of commissioners, but the suit must be brought in the name of the county. In the present case, both the county commissioners and the county are named as defendants. The action may be brought against the county, but it may not be brought against the individual county commissioners in order to sue the county.

VI. The complaint fails to state a claim against the County Manager as he is named in the caption, but there are no allegations concerning him in the body of the Complaint.

The Complaint in this case lists Michael M. Ruffin, Durham County Manager in his official capacity, as a defendant in this action. The Complaint further states in paragraph 7 that he is the county manager for the County of Durham and is sued in his official capacity. The Complaint does not otherwise state why he is being sued. Additionally, the Complaint does not allege that he engaged in any conduct or took any action in relation to the causes of action listed in the Complaint.

In *Alamance County v. N.C. Dept. Of Human Resources*, 58 N.C. App. 748, 749, 294 S.E.2d 377, 378 (1982), the Court of Appeals set forth the requirements to state a valid cause of action against a defendant as follows:

A mere assertion of a grievance is insufficient to state a claim upon which relief can be granted. Some degree of factual particularity is required. The statement of a claim for relief must "satisfy the requirements of the substantive law which give rise to the pleadings." *Sutton v. Duke*, 277 N.C. 94, 105, 176 S.E.2d 161, 167 (1970).

In the case at bar, the Complaint not only fails to state facts against this Defendant which give rise to the alleged causes of action, the Complaint fails to state even a grievance against Michael M. Ruffin. As such, the Complaint fails to state a claim upon which relief can be granted as to this Defendant, and as such, should properly be dismissed.

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VII. The complaint fails to state a claim under existing North Carolina jurisprudence.

The contract entered into between Defendants, County of Durham and Nitronex Corporation, was entered into pursuant to N.C. Gen. Stat. § 158-7.1. This is the statute under which incentives are paid by local government, and which been repeatedly held to be constitutional by the courts in *Maready v. City of Winston-Salem*, 342 N.C. 708, 467 S.E.2d 615 (1996), *Peacock v. Shinn*, 139 N.C. App. 487, 533 S.E.2d 842, *appeal dismissed and disc. review denied*, 353 N.C. 267, 546 S.E.2d 110 (2000), and *Blinson v. State*, _____ N.C. App. _____, 651 S.E.2d 268 (2007). And, as stated in *Blinson*, "We are not free to revisit the reasoning or holdings of those opinions." *Id.* at 271.

However, beyond the repeated holdings that economic incentives are constitutional, the Plaintiffs fail to allege in their Complaint that the County of Durham did not act in accordance with N.C. Gen. Stat. § 158-7.1. In fact, all their causes on action are based on the alleged unconstitutionality of the economic incentives. The failure to allege a violation of the statute is fatal to the Complaint. This matter was specifically addressed by the Supreme Court in *Nicholson v. State Education Assistance Authority*, 275 N.C. 439, 452, 168 S.E.2d 401, 409 (1969) as follows:

It being alleged that the appropriation of funds from the "general tax revenues" of the State was for use by the Authority "in the performance of its lawful functions" and the Authority having been established by statute, not attacked by the plaintiff which statutes purport to confer upon it authority to perform certain functions, the appropriation, as such, is not subject to attack by the plaintiff in this action.

The Court then refused to hear the plaintiff's arguments concerning his constitutional attacks on the appropriations by the defendant. This is exactly the same situation before the Court in this

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case. There has been no allegation that the County did not act pursuant to statute, and the validity of the statute is not attacked by the Plaintiffs. The Plaintiffs may not therefore attack the constitutionality of the appropriations of the County to Nitronex Corporation when the appropriations were made pursuant to a statute, the validity of which is not questioned.

VIII. Counsel for the Plaintiffs should be disqualified for violation of Rule 3.6 of the North Carolina Rules of Professional Conduct.

Rule 3.6 of the North Carolina Rules of Professional Conduct states that:

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

At or immediately prior to the filing of this lawsuit, counsel for the Plaintiffs made out of court statements regarding the facts involved in the case as well as pejorative opinions regarding the actions taken by these Defendants. In particular, counsel stated that: "Here we have a case where the government is giving money to a company for doing something it committed to doing five years before it got a subsidy. With this handout, Durham is giving away \$100,000 and getting nothing in return. The public deserves better." (Aff. of Ruffin, Ex. A). As shown by the Affidavit of Carolyn Titus, the purported statement of fact that "the government is giving money to a company for doing something it committed to doing five years before it got a subsidy" is in fact false.

The United States Supreme Court in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 111 S.Ct. 2720, 15 L.Ed.2d 888 (1991) upheld the constitutionality of the "substantial likelihood of material prejudice" test in regards to extrajudicial statements. In reaching this conclusion, the

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Court first recognized that the courts have the ability to regulate the conduct of attorneys licensed to practice. *Id.* at 1066. The North Carolina Appellate Courts have likewise upheld the disqualification of attorneys for violation of the Rules of Professional Conduct. While counsel has not found where an attorney has specifically been disqualified under Rule 3.6, the disqualification under other rules has been recognized. See, *Ferguson v. DDP Pharmacy, Inc.*, 174 N.C. App. 532, 621 S.E.2d 323 (2005) (Rule 1.9); *Oliver v. Bynum*, 63 N.C. App. 166, 592 S.E.2d 707, *disc. review denied*, 358 N.C. 545, 599 S.E.2d 405 (2004) (Rules 1.7 and 1.9); *Love v. Tyson*, 119 N.C. App. 739, 460 S.E.2d 204, *disc. review denied*, 341 N.C. 650, 462 S.E.2d 512 (1995) (Rule 5.1).

Following the recognition of the ability to regulate the conduct of attorneys, the Court in *Gentile* further noted the State's argument quoting the Supreme Court decision in *Bridges v. California*, 314 U.S. 252, 271, 62 S.Ct. 190, 197, 86 L.Ed. 192 (1941) where the Court stated that:

The very word "trial" connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper.

The Court further addressed the issue of the duty of the attorneys not to engage in public debate of their cases. There the Court quoting from *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976) stated:

As noted by Justice Brennan in his concurring opinion in *Nebraska Press*, which was joined by Justices Stewart and MARSHALL, "[a]s officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice." *Id.* at 601, n. 27, 96 S.Ct., at n. 27. Because through discovery and client communications, their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers' statements are

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likely to be received as especially authoritative.

Id. at 1074, 111 S.Ct. at 2744-45. This is just such a situation where the fiduciary responsibility of the attorney was breached by the making of statements to the press which the attorney either knew to be false, or should have known to be false. The making of statements and giving of pejorative opinions such as was done in this case is just the type of expression which is forbidden by the Rules of Professional Conduct. Further, it should be noted that although no jury trial was demanded by the Plaintiffs, answers have not been filed by any of the Defendants except the County. Thus, whether or not there will be a jury trial is unknown at this point, and it should be assumed that there will be a jury trial until such time as it is waived.

The State Bar in 98 Formal Ethics Opinion 4 also listed one of the factors in deciding whether an extrajudicial statement in a civil trial is unethical is "whether the attorney intended a trial by media". It is submitted to the Court that just such a trial by media was intended. Counsel baited the County by making false and slanderous accusations. The County certainly has the staff to respond to any such allegations which could have led to news story after news story concerning economic incentives. It is submitted that the North Carolina Institute for Constitutional Law, which continues to file constitutional challenges to economic incentives even after adverse rulings by the appellate courts, desires just such publicity.

CONCLUSION

For the reasons stated above, the Defendants, Michael M. Ruffin, Ellen W. Reckhow, Michael D. Page, Lewis A. Cheek, Phillip R. Cousin, Jr., Becky M. Heron, and County of Durham request that this matter be dismissed, and additionally, that the North Carolina Institute for Constitutional Law and its attorney Jeanette K. Doran be disqualified for their violation of

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Rule 3.6 of the North Carolina Rules of Professional Conduct.

This the 14th day of April, 2008.



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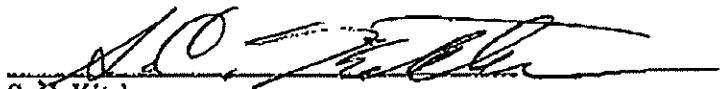
CERTIFICATE OF SERVICE

This is to certify that I have this date served a copy of the foregoing Motion to Dismiss on the following persons, by depositing a copy hereof in a postpaid wrapper in a post office or official depository under the exclusive care and custody of the United States Post Office properly addressed as listed below or by hand delivering a copy hereof, and by facsimile as indicated below:

Jeanette K. Doran (facsimile)
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Raleigh, NC 27603

Lee M. Whitman (facsimile)
Sarah M. Johnson
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Raleigh, NC 27607

This the 10th day of April, 2008.


S. C. Kitchen
Durham County Attorney